IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 7TH DAY OF OCTOBER, 2021

PRESENT

THE HON'BLE MRS.JUSTICE S.SUJATHA

AND

THE HON'BLE MR. JUSTICE RAVI V. HOSMANI

I.T.A.No.676/2016

BETWEEN :

M/s HOSMAT HOSPITAL PRIVATE LTD.,
REP. BY ITS CHAIRMAN AND
MANAGING DIRECTOR,
Dr. THOMAS A. CHANDY
NO.45, MAGRATH ROAD,
BANGALORE-560 025. ...APPELLANT

(BY SRI S.ANNAMALAI, ADV. A/W SRI M.LAVA, ADV.)

AND :

THE ASSISTANT COMMISSIONER OF
INCOME TAX (TDS), CIRCLE -18(1),
4TH FLOOR, HMT BHAVAN,
59, BELLARY ROAD,
BANGALORE-560 032. ...RESPONDENT

(BY SRI K.V.ARAVIND, ADV.)

THIS INCOME TAX APPEAL IS FILED UNDER SECTION 260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 11.08.2016 PASSED IN ITA NOS.572, 575 & 576/BANG/2014, FOR THE ASSESSMENT YEAR 2011-2012, 2012-2013 & 2013-2014. (ANNEXURE-A). PRAYING TO 1. TO FORMULATE THE SUBSTANTIAL QUESTION OF LAW AS STATED ABOVE AND ANSWER THE SAME IN FAVOUR OF THE APPELLANT. 2. TO ALLOW THE APPEAL AND SET ASIDE THE

FINDINGS TO THE EXTENT AGAINST THE APPELLANT IN THE ORDER PASSED BY THE ITAT, BENGALURU 'C' BENCH, IN ITA NOS. 572, 575 & 576/BANG/2014 DATED11/08/2016 FOR THE ASSESSMENT YEAR 2011-2012, 2012-2013 & 2013-2014. (ANNEXURE-A).

THIS APPEAL COMING ON FOR HEARING, THIS DAY, ***S. SUJATHA, J.***, DELIVERED THE FOLLOWING:

J U D G M E N T

This appeal is filed by the assessee under Section 260A of the Income Tax Act, 1961 ('Act' for short) assailing the order dated 11.08.2016 passed in ITA Nos.572, 575 and 576/Bang/2014 by the Income Tax Appellate Tribunal, Bangalore "C" Bench ('Tribunal' for short), relating to the assessment years 2011-12, 2012-13 and 2013-14.

2. The assessee is a company engaged in the activity of running and maintaining a hospital. Pursuant to the survey conducted on the premises of the assessee - company, certain appointment letters of the consultant doctors were collected. Based on which, the Assessing Officer issued the show-cause notices stating that TDS has been made on various payments

made to consultant doctors under Section 194J of the Act instead of making it under Section 192 of the Act and thereby the assessee was called on to show-cause as to why order under Sections 201 and 201(1A) of the Act should not be passed for the assessment years under consideration. The assessee filed reply to the said show-cause notices along with the agreement entered by the assessee with 'in-house consultants' and appointment letter issued to salaried doctors. Rejecting the reply, the Assessing Officer passed the order under Sections 201 and 201(1A) of the Act concluding that the 'consultant doctors' of M/s. Hosmat – assessee are employees of the company and payment made to them is 'salary', not 'fees for professional services', thereby held the assessee as 'assessee in default' and raised the demand of tax and interest as under:-

"Assessment Year 2011-12 : RS.4,55,98,910/-

Assessment Year 2012-13 : Rs.3,87,31,670/-

Assessment Year 2013-14 : Rs.3,21,80,820/-."

3. Being aggrieved, the assessee preferred appeals before the Commissioner of Income Tax (Appeals) who confirmed the order of the Assessing Officer in respect of 'in-house consultant doctors' and had given the relief in respect of 'visiting doctors' vide order dated 14.02.2014. Aggrieved by the same, the assessee preferred appeals before the Tribunal. The Tribunal dismissed the appeals. Hence, the present appeals are preferred by the assessee under Section 260A of the Act raising the following substantial questions of law which were admitted for consideration by this Court.

1. *Whether the Tribunal was justified in law in holding that the payments to in-house consultant doctors are subject to tax deduction at source under Section 192 of the Act and consequently passed a perverse order on the facts and circumstances of the case?*
2. *Whether the Tribunal was justified in law in not holding that the department cannot take different stand in TDS provisions and*

assessment proceedings of the consultant doctors on the facts and circumstances of the case?

3. *Whether the Tribunal was not justified in law in holding that the appellant is not liable to pay interest under Section 201(1A) of the Act on the facts and circumstances of the case?*
4. *Whether the order passed under Sections 201(1) and 201(1A) of the Act is in accordance with law on the facts and circumstances of the case?*
5. *Whether the deduction granted by the authorities on account of recipient having offered the income is in accordance with scheme of the Act and various decisions in this regard on the facts and circumstances of the case?*

4. Learned counsel for the assessee submitted that the difference between the employee and 'consultant doctors' as per the agreement is *ex-facie* apparent. The assessee – hospital has employed doctors under 3 categories 1) salaried doctors, 2) in-house consultants 3) visiting consultants. There was no dispute with respect to the category of salary for

doctors. Though the Assessing Officer held that 'in-house consultants' and 'visiting consultants' under one head, treating them also as 'salaried doctors', Commissioner of Income Tax (Appeals) has given the relief in respect of 'visiting doctors', without appreciating the fundamental difference between the 'in-house consultant doctors' and the 'salaried doctors' the Tribunal has proceeded to reject the appeal filed by the assessee. It was argued that the 'in-house consultant doctors' though are getting fixed professional/technical fees per month, but the incentive was as per the company policy which varies from consultant doctor to doctor and month to month. The difference between the employee/salaried doctors and consultant doctors as per the agreement is pointed out as under:

Sl No.	Employee	Consultant
1.	Remuneration : Salary fixed on monthly basis.	Professional/technical fees per month and incentives as per the company policy.
2.	Timings: 7.30 a.m. to end of clinic	7.30 a.m. to 5.30 p.m.

3.	Probation for a period of one year from the date of appointment.	Agreed to work for minimum period 5 years.
4.	Minimum Service requirements: No minimum service requirement.	Minimum 5 years of service
5.	Control: Work under the direction and to the satisfaction the Medical Director, the HOD and Vice- President.	NIL
6.	Clauses for Registration: 2 months notice should be served.	2 calendar months notice to be served. If not served for 5 years from date of joining cannot serve for a period of 2 years in Bangalore District.
7.	Outside engagements. Cannot engage in any other work	Can engage in outside engagements with permission of HOSMAT.
8.	Rules and Regulations: As per hospital requirements applicable to employee.	As per hospital requirements applicable to consultants.
9.	Confidentiality clause: Confidentiality regarding information about hospital	As per hospital requirements.
10.	NIL	Conditions: Nothing in this agreement shall be interpreted as meaning that the Associate Consultant-Orthopaedic Surgeon is an employee of HOSMAT, and therefore shall not be entitled to any pension, gratuity, any bonus or other fringe benefits from HOSMAT.
11.	NIL	Undertakes and agrees to take out adequate professional indemnity insurance cover with an insurance company of good repute to cover its

		professional liability and agrees to produce at HOSMAT's Management request a copy of the insurance policy for inspection by HOSMAT.

5. It was argued that Section 192 of the Act is not applicable in respect of 'in-house consultant doctors'. On the contrary, the professional charges paid for services of the 'in-house consultant' are covered under Section 194J of the Act. The appellant is not an 'assessee in default' and consequently the tax could be collected invoking the provisions under Section 201 (1) and 201(1A) of the Act. Placing reliance on the Co-ordinate bench decision of this Court in the case of ***Commissioner of Income-tax vs. Manipal Health Systems (P.) Ltd.,*** reported in ***(2015) 375 ITR 509 (Karnataka)***, it was argued that the 'in-house consultant doctors' cannot be construed as 'salaried doctors'. Reliance is also placed on the following judgments.

1. *CIT vs. Apollo Hospitals International Ltd., reported in (2014) 44 taxmann.com 368 (Gujarat);*
2. *CIT vs. Yashoda Super Speciality Hospital reported in (2014) 49 taxmann.com 570 (AP);*
3. *CIT vs. Ivy Health Life Sciences (P.) Ltd., reported in (2016) 380 ITR 22 (P & H);*
4. *CIT vs. Grant Medical Foundation reported in (2015) 375 ITR 49 (Bombay);*
5. *CIT vs. Asian Heart Institute and Research Centre (P.) Ltd., reported in (2019) 104 taxmann.com 212 (Bombay);*
6. *Escorts Heart Institute & Research Centre Ltd., vs. DCIT reported in (2017) 87 taxmann.com 184 (Rajasthan);*
7. *Commissioner of Income tax vs. Eli Lilly and Co. (India) (P.) Ltd., reported in (2009) 178 Taxman 505 (SC);*
8. *CIT vs. Teleradiology Solutions (P.) Ltd., reported in (2016) 67 taxmann.com 364 (Karnataka).*

6. Learned counsel further argued that the 'in-house consultant doctors' have filed their return of income declaring the payment towards professional services and the same has been assessed as the

professional income in the hands of the said 'in-house consultant doctors'. That being so, a different stand cannot be taken in respect of employer - assessee treating the income as 'salaried income' and the assessee as 'an assessee in default'. Learned counsel for the assessee has placed before us the details of the incentive paid for elective surgeries to one 'in-house consultant doctor' - Somanna to demonstrate that the remuneration is not fixed and it depends on the incentives which has a direct nexus to the number of surgeries/emergency cases/extended time after duty hours/admission/investigation etc.,

7. Learned counsel for the Revenue argued that the broad test enunciated by the Co-ordinate bench of this Court in ***Manipal Health Systems (P.) Ltd.,*** supra, would indicate the parameters to be applied for deciding the relationship of employer and employee. The Tribunal has rightly applied the principles laid down by the Co-

ordinate bench of this Court in dismissing the appeal filed by the assessee considering the conditions of appointment of the 'in-house consultant doctors' as per the agreements entered into between the assessee and such other 'in-house consultant doctors'. As per the agreements, the payment made to the 'in-house consultant doctors' cannot be construed as payment towards the professional services, as the same fulfills the characteristics of a salary. Learned counsel submitted that the material now placed on record before this Court deserves to be examined by the Assessing Officer and no conclusion would be possible *sans* examining the case in that angle of variance in incentive depending on various circumstances/factors, decided by the company – assessee.

8. We have carefully considered the rival submissions and perused the material on record.

9. In ***Manipal Health Systems (P.) Ltd.***, (where one of us Hon'ble SSJ was a member) supra, the Co-ordinate bench of this Court has held thus:

> *"13. To decide the relationship of employer and employee we have to examine whether the contract entered into between the parties is a 'contract for service' or a 'contract of service'. There are multi-factor tests to decide this question. Independence test, control test, intention test are some of the tests normally adopted to distinguish between 'contract for service' and 'contract of service'. Finally, it depends on the provisions of the contract. Intention also plays a role in deciding the factor of contract. The intention of the parties can also determine or alter, a contract from its original shape and status if both parties have mutual agreement. In the instant case, the terms of contract ipso facto proves that the contract between the assessee-Company and the doctors is of 'contract for service' not a 'contract of service'. The remuneration paid to the doctors depends on the treatment to the patients. If the number of patients is more, remuneration would be on a higher side or if no patients, no remuneration. The income of the doctors varies,*

depending on the patients and their treatment. All these factors establish that there is no relationship of employer and employee between the assessee- Company and the doctors.

14. One such agreement referred to by the Tribunal i.e., para-7 of the agreement dated 12.09.2007 entered into between the Assessee Company and Dr.Isaac Mathew speaks in unequivocal terms that "This agreement is executed on a principal to principal basis notwithstanding the fact that the company may extend to the consultant certain benefits that are available to the employees. The consultant shall not be deemed to be an employee of the company".

15. 'Consultancy charges' in the ordinary sense means providing of expert knowledge to a third party for a fee. It is a service provided by a professional advisor. These consultant Doctors are rendering professional services as and when they are called upon to attend the patients. Profession implies any vocation carried by an individual or a group of individuals requiring predominantly intellectual skill, depending on individual characteristic of person(s) pursuing with the vocation, requiring specialized and

advance education or expertise. Consultancy charges are paid to the Doctors towards rendering their professional skill and expertise which are purely in the nature of professional charges. Assesssee Company has no control over the Doctors engaged by them with regard to treatment of patients.

xxxxxxx

17. It is also pertinent to note that the doctors have filed their return of income for the relevant assessment years showing the income received from the assesseee-Company as professional income and the same is said to have been accepted by the department."

This Court has held that the multi-factor tests would be available to examine whether the contract entered into between the parties is a 'contract for service' or 'contract of service'. Finally, it depends on the provisions of the contract; intention also plays a role in deciding the factor of contract. Considering the contract between the assessee - company therein and the doctors, it was found that the income of the doctors

varies, depending on the patients and their treatment. Thus, held, there was no relationship of employer and employee between the assessee - company and the doctors.

10. In ***Ivy Health Life Sciences (P.) Ltd.,*** supra, the terms of the agreement on the basis of which the Assessing Officer issued show-cause notice therein reads thus:

> *"(i) The second party shall be associated exclusively with M/s IVY Hospital as full-time consultant and shall not associate himself with any other hospital.*
>
> *(ii) the second party shall paid professional charges for services rendered by him in IVY Hospital as under with a minimum guarantee of Rs.....per month subject to TDS deductions as per Act, the minimum guarantee amount shall be paid to the second party for a period of 12 months from the date of joining. The same shall be revised at the end of 12 months.*
>
> *(a) 70% of the OPD charges.*
>
> *(b) Visiting charges in ward/private room as mutually settled between the two parties.*
>
> *(c) 15% of the investigation done of IVY Hospital.*
>
> *(iii) the second party shall not do practice at any other place and would be associated exclusively with IVY Hospital. The second party*

shall not operate or admit patient in any other hospital except at IVY Hospital.

In our opinion, the Assessing Officer was not right in concluding on the combined reading of the above stipulations that the income of the doctors was salary. It nowhere suggests that there exists relationship of employer-employee between the assessee and the said doctors, rather it is a pointer to the contrary."

11. In ***Teleradiology Solutions (P.) Ltd.,*** supra, yet another Co-ordinate Bench of this Court considering the complete exhaustive chart prepared by the Commissioner of Income Tax (Appeals) not differed by the Tribunal, held that the amount paid to the doctors was not in nature of "salary" and liable for deduction of tax at source as required under Section 194J as "professional fees" even when the assessee therein engaged the doctors as consultants and as per the agreements, the said consultants shall be governed by the rules and regulations of service, conduct rules, discipline etc., Sl.No.16 of the said chart would read thus:

> *"16. Other aspects such as fixed amount of payment every month, performance based incentive, leave facility, working hours, selection of doctors through interviews, availability of doctors through a pre-determined time schedule etc are only measures to ensure that there would be no interruption in provision of medical services to patients, hospitals etc."*

12. In the case of ***Eli Lilly & Co. (India) (P.) Ltd.,*** supra, the Hon'ble Apex Court has enunciated the legal principles on the scope and effect of Sections 201(1) and 201(1A) of the Act as under:

> *"34. A perusal of Section 201(1) and Section 201(1A) shows that both these provisions are without prejudice to each other. It means that the provisions of both the sub-sections are to be considered independently without affecting the rights mentioned in either of the sub-sections. Further, interest under Section 201(1A) is compensatory measure for withholding the tax which ought to have gone to the exchequer. The levy of interest is mandatory and the absence of liability for tax will not dilute the default. The liability of deducting tax at source is in the nature of a vicarious liability, which pre-supposes existence of primary liability. The said liability is a vicarious liability and the principal liability is of the person who is taxable. A bare reading of Section 201(1) shows that interest under Section 201(1A) read with Section 201(1) can only be levied when a person is declared as an assessee-in-default. For computation of interest under Section 201(1A), there are three elements. One is the quantum on which interest has to be levied.*

> *Second is the rate at which interest has to be charged. Third is the period for which interest has to be charged. The rate of interest is provided in the 1961 Act. The quantum on which interest has to be paid is indicated by Section 201 (1A) itself. Sub-section (1A) specifies "on the amount of such tax" which is mentioned in sub-section (1) wherein, it is the amount of tax in respect of which the assessee has been declared in default. The object underlying Section 201(1) is to recover the tax. In the case of short deduction, the object is to recover the shortfall. As far as the period of default is concerned, the period starts from the date of deductibility till the date of actual payment of tax. Therefore, the levy of interest has to be restricted for the above stated period only. It may be clarified that the date of payment by the concerned employee can be treated as the date of actual payment."*

13. In the light of these judgments and the assessment said to have been done in the hands of the 'in-house consultant doctors' treating their income as professional income received from this assessee, the matter requires re–consideration by the Assessing Officer, more particularly in view of the incentive policy adopted by the company as canvassed before this Court by referring to the document now placed on record

before this Court inasmuch as 'in-house consultant doctors'.

14. For the reasons aforesaid, we set aside the order of the Tribunal as well as the Authorities concerned insofar as treating the appellant as 'assessee in default' with respect to the 'in-house consultant doctors' and restore the matter to the Assessing Officer to re-consider the matter in the light of the incentive policy and the return of income filed by the 'in-house consultant doctors' vis-à-vis the judgments cited at the bar referred to above.

15. Hence, we pass the following

ORDER

i) Appeal is allowed in part.

ii) The orders of the Assessing Officer, CIT (Appeals) and the Tribunal insofar as treating the appellant as "assessee in

default" with respect to the 'in-house consultant doctors' are set aside.

iii) It is made clear that whatever the benefits extended to the assessee in all other aspects, remain undisturbed.

iv) The matter is restored to the file of the Assessing Officer to re-consider the matter in the light of the observations made hereinabove and the Assessing Officer shall take expedite decision in accordance with law after providing an opportunity of hearing to the assessee.

v) Assessee is at liberty to produce additional evidence, if any, in support of its contentions.

Sd/-
JUDGE

Sd/-
JUDGE

PMR