

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO.2062 OF 2013

The Commissioner of
Income Tax, Mumbai

.. Appellant.

Vs.

M/s.Jaslok Hospital and
Research Centre

.. Respondent.

Mr. P.C. Chhotaray for the Appellant.

Mr. Nitesh Joshi along with Mr.Rajesh Poojary i/b M/s.Mint &
Conferors for the Respondents.

**CORAM : S.C. DHARMADHIKARI AND
A.K. MENON, JJ.**

DATED : 20TH APRIL, 2015.

P.C. :

1. This appeal by the revenue challenges the order passed by the Income Tax Appellate Tribunal dated 30th January, 2013. The assessment year is 2006-07.

2. Mr.Chhotaray, appearing on behalf of the revenue submits that there are substantial questions of law which have been proposed at Page 14 of the paperbook.

3. In relation to question (a) Mr.Chhotaray has

submitted that section 194H of the Income Tax Act, 1961 was squarely applicable. As far as that section is concerned, it obliges a person making payment which could be termed as commission or brokerage to deduct tax at source at 5% from the income that would be derived by such payment. Mr.Chhotaray submits that the payment in the present case squarely finds place in the explanation (i) which is for the purpose of this section. Mr.Chhotaray submits that deduction at 2% by the respondent assessee is short deduction and such deficit or short fall in the same would make it a assessee in default, therefore, the obligation to pay interest as well follows.

4. Mr.Chhotaray submits that the agreement with two persons and in relation to procurement of the drugs and contemplating payment of drug handling charges denotes that section 194H is attracted and applicable. In the assessment year in question the assessee had debited a sum of Rs.40,66,638/- under the head "Operating other administrative charges" pertaining to "Drug Handling Charges". Such payments were explained by pointing out that the payment has been made to two parties Mrs. Poonam C. Malani and Mrs.Beena Mirchandani. The agreement dated 22nd April, 2004 was executed and it was valid for three years. These two parties were paid those charges and tax at source was deducted under section 194C treating the same

as contract charges. Mr.Chhotaray submits that in the light of the agreement and stipulation noted by the assessing officer therein section 194H was attracted. Mr.Chhotaray submits that two ladies were to procure drugs for the hospital from the licensed manufacturers or other reputed reliable and authorised agents. The fresh stock had to be brought at the drug store. This was not a case of administration and management of the drug store, pure and simple but all payments of acquiring the drugs and medicines from the manufacturers or agents were made by the assessee hospital. It is in these circumstances that the commission or brokerage contemplated by the explanation and section 194H as a whole is attracted. The assessee could not have got away by making deduction under section 194C of the Income Tax Act, 1961. Mr.Chhotaray submits that alternate argument was not at all open. Mr.Chhotaray relied upon the judgment of the Hon'ble Supreme Court in the case of Federation of Andhra Pradesh Chambers of Commerce and Industry and Others Vs. State of Andhra Pradesh and Others 247 ITR Page 36.

5. On the other hand Mr.Joshi submits that argument of Mr.Chhotaray overlooks the agreement between the hospital and two ladies. That agreement must be read in its entirety and as a whole. One clause or any part of any such clause cannot be picked up and read out of context to mean that it is an

arrangement of procuring drugs for the drugs store in the hospital. There is no principal and agent relationship in this case. This is not any payment within the meaning of section 194H. The agreement read as a whole would indicate that the hospital has a Pharmacy or drug store of its own. It was finding it difficult to manage it and by own staff. The 'Assessee' decided to manage it with the help of these two ladies. The ladies were to ensure availability of the drugs and medicines for the patients visiting hospital and getting treated in the hospital. It was their obligation and duty. To enable them to procure drugs and supply them to the drug store that the payment was made to the manufacturers. This is not procurement for the hospital through these ladies and as understood by the revenue. In such circumstances the provision was not attracted. In any event the alternative argument of Mr.Joshi relying on the case of Hindustan Coca Cola Beverage P. Ltd. Vs. Commissioner of Income Tax (2007) 293 ITR 226, is that whatever money has been paid in the shape of drugs handling charges is disclosed as income by these two ladies in their returns of income, therefore, there is no question of any tax being evaded. In any event, the concurrent findings do not raise any substantial question of law in relation to this question.

6. We have carefully perused the legal provision.

Section 194H is contemplating deduction of tax at source for payment to a resident, on or after 1st day of June 2001 of any income by way of commission (not being insurance commission referred to in section 194D) or brokerage. The words are defined in the explanation and in a inclusive manner and that inter alia indicates any service in the course of buying or selling of goods. In the present case, the assessee has explained both before the Commissioner and the Tribunal that Mrs. Poonam Malani and Mrs. Beena Mirchandani were in-charge of the drug store of the assessee. The assessee pointed out that they were brought in for administration and management of the drug store under the agreement. The Commissioner as also the Tribunal have noted the relevant clauses, reproduced them and construed the agreement as a whole. They have read the clauses of the same together and harmoniously. Upon such reading of the agreement, we find that neither the Commissioner nor the Tribunal committed any error of law apparent on the face of record or perversity. The agreement reiterated that there is no principal and agent relationship. It is an independent management and administration job handed over to these ladies. To facilitate the administration and management by them and of the drug store that the hospital agreed with them that the payment would be made to the manufacturers or recognised and reputed agents of the manufacturers in procuring the drugs and medicines for drug

store. That would ensure that genuine drugs reach the drug store. That would also ensure regularity of supply. That would also ensure that the drugs of reputed manufacturers and procured by lawful means alone are available at the drug store. It is in these circumstances while not reading this particular arrangement torn from the context or in isolation that both the fact finding authorities hold that no commission or brokerage has been paid and therefore section 194H is not attracted.

7. We do not agree with Mr.Chhotaray that something more and which is not there in the statute or statutory provision concerned has been read therein. It is not a case where the revenue intended to tax something which is clearly within the statute. This is a case where the construction of a statutory provision by the fact finding authorities in backdrop of peculiar facts and circumstances enables them to conclude that the same is not applicable. This is perfectly legitimate exercise and permissible while dealing with a taxing statute. Therefore, the judgment of the Hon'ble Supreme Court and the principle laid down therein cannot be invoked and applied. The appeal to this extent has no merit and must be dismissed.

8. However, we have heard both sides and extensively on two other provisions, namely, section 194J and 194-I on payment

under head "Doctors fees". What has been relied upon for the payment to doctors for instrument hire charges by Mr.Chhotaray is section 194-I of the Income Tax Act, 1961. He submitted that the assessee has paid hire charges to the doctors who bring in their own instruments to check and operate upon the patients. On such payments, the tax at source has not been deducted. When the explanation was sought, the assessee pointed out that this is nothing but reimbursement by the trust of the amounts collected from the patients and for use of equipment belonging to them while operating upon the patients in the hospital premises. This was therefore not a case falling within section 194-I as it then stood and prior to 13th July, 2006. Mr.Chhotaray would submit that irrespective of whatever clarification has been brought in this provision, it was always applicable. It takes into account something which is named as a rent. It means any payment and under whatever name called under whatever arrangement for use of (separately or together) inter alia any equipment, therefore, this provision was attracted.

9. Mr.Joshi appearing on behalf of the assessee rightly submitted that the term "rent" as defined in the explanation has been worded widely and broadly but from 13th July, 2006. Prior to its substitution clause (i) of explanation was worded narrowly and restrictively and it does not mention any equipment and use

thereof and payment in relation thereto as a rent. In such circumstances for atleast assessment year 2005-06 this question will not arise.

10. Having noted the rival contentions and findings of the Commissioner and the Tribunal we find substance in the submission of Mr.Joshi. Clause (i) of the explanation prior to substitution and after its substitution reads as under :

“(i) 'rent' means any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of any land or any building (including factory building), together with furniture, fittings and the land appurtenant thereto, whether or not such building is owned by the payee.”

11. A bare perusal thereof would denote as to how the Legislature and Parliament has brought in under whatever arrangement and for use of land, building etc. including equipment whether or not any or all of them are owned by the payee and termed them as rent. Prior thereto the pertinent exclusion with regard to equipment would enable both the Commissioner and the Tribunal to hold that this provisions is not attracted atleast to the cases which are arising prior to 13th July,

2006. To that extent we do not find any perversity or error of law apparent on the face of record in the impugned order.

12. However, Mr.Joshi's arguments in relation to subsequent assessment years and as accepted by the Commissioner and the Tribunal to some extent raise a substantial question of law. Similarly, the rival contentions on application of section 194-I and also 194J would also raise substantial questions of law. The appeal, therefore, is admitted on the following substantial question of law :

“(1) Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was justified in confirming the order of the CIT (A) in holding that the assessee was not an assessee in default u/s.201(1) in respect of the amount of tax which has not been deducted from provisions created in respect of “Doctors” fees payable ?”

13. Mr.Joshi waives service on behalf of the respondents.

14. The Registrar (Judicial) / Registrar, High Court, Original Side, Bombay to ensure that the original record in relation to this Appeal is summoned from the Tribunal and offered for inspection of the parties.

This paper book is treated sufficient for the purpose of admission of this Appeal. However, the Registry must further ensure preparation of complete paper book in accordance with the Rules. The Registry in the first instance must send intimation of admission of this Appeal enclosing therewith a copy of this order so as to enable the Tribunal to act accordingly.

(A.K. MENON,J.)

(S.C. DHARMADHIKARI,J.)