

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES “B” : HYDERABAD
(THROUGH VIDEO CONFERENCE)**

**BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

ITA No.	A.Y.	Appellant	Respondent
866/Hyd/16	2010-11	Kiran Infertility Central Private Limited, Hyderabad [PAN: AABCK6053F]	Income Tax Officer, Ward-2(1), Hyderabad
867/Hyd/16	2011-12		
868/Hyd/16	2012-13		
1673/Hyd/17	2013-14		Deputy Commissioner of Income Tax, Circle-2(1), Hyderabad

For Assessee : Smt. S.Sandhya and
Shri S.Rama Rao, AR

For Revenue : Shri Rohit Mujumdar, DR

Date of Hearing : 18 & 19-02-2021

Date of Pronouncement : 08-04-2021

ORDER

PER S.S.GODARA, J.M. :

These four assessee's appeals for AYs.2010-11 to 2013-14 arise against the CIT(A)-Kurnool & Hyderabad's separate orders dated 11-04-2016 in former three and dt.30-06-2017 in last case passed in case Nos.0153, 0152, 0150 / CIT(A),Knl / 2015-16 & 0085 / 2016-17 involving proceedings u/s.148/147 r.w.s.143(3) [for AYs.2010-11 to 2012-13] and

u/s.143(3) in AY.2013-14 of the Income Tax Act, 1961 [in short, 'the Act']; respectively.

Heard both the parties. Case files perused.

2. The assessee's first and foremost substantive ground challenges validity of re-opening in its former three appeals ITA No.866 to 868/Hyd/2016; has not been pressed during the course of hearing. The same stands rejected as not pressed.

3. We next notice that the assessee's identical latter substantive grievance in former three AYs.2010-11 to 2012-13 and sole substantive issue in AY.2013-14 challenges correctness of both the lower authorities' action invoking Section 194C r.w.s.40(a)(ia) disallowance of Rs.71,23,300/- paid to Shri Sesha Sai (acting on behalf of M/s.Amma Welfare Society) in the nature of surrogacy in AY.2010-11 & similar surrogacy payments to the very party along with one Shri T.Ramana Rao (latter payee never appeared) of Rs.3,35,52,500/- in AY. 2011-12, Rs.89,02,746/- in AY.2012-13 and Rs.70,50,000/- in AY.2013-14; respectively along with Section 40(a)(i) r.w.s.195 disallowance of Rs.1,10,478/-, Rs.43,61,158/- and Rs.83,16,089/- (in latter three assessment years) representing payments made to foreign egg donors; respectively.

4. We first of all advert to the impugned Section 40(a)(ia) r.w.s.194C and 194J issue of surrogacy payments in case of Shri S.Sesha Sai since the other recipient has never appeared to support the impugned claims till date. The CIT(A)'s identical lower appellate discussion affirming the Assessing Officer's

action disallowing assessee's summary of payments made to surrogate mothers reads as under:

"5.3 Ground No.3 to 5: These grounds relate to the assessment made by the AO holding that the income returned attracts the provision of section 194 J and as no tax was deducted on such payments, the disallowance was made u/s.40(a)(ia). The AO has brought out the various issues involved in a lucid manner in the assessment order.

During the Course of appellate proceedings, the appellant filed his written submissions. As per page 30 of the annexure filed along with the written submissions, the appellant enclosed a proforma (sample) copy of the surrogacy agreement wherein it is stated to be a bipartite agreement consisting of :

(i) Genetic father and mother - intended parents (who make use of the surrogate technology).

(ii) Treating physician of the Kiran Infertility Centre (appellant).

In the definition section 1.3 - Physician Samit Sekhar IVF and Surrogacy Programme Director, Kiran Infertility Centre Pvt. ltd., are stated as sole representing Kiran Infertility Centre Pvt. Ltd. In the miscellaneous section of the said agreement vide para 18.2, it is stated that the terms and conditions of this agreement shall extend to include to the benefit of and be binding upon the parties hereto and their respective permitted successors and assignees.

I have also perused the written submissions containing the detailed explanation made by the appellant in response to the show cause letter issued by the AO. I am unable to concur with the view of the appellant. Once the payment to the surrogate mother or to the egg donor is that of the appellant, then the responsibility of deducting the amount of TDS required to be done u/s.194J / 194C in accordance with the agreement also vests in the hands of the appellant.

The appellant cannot take a plea that it is only a conduit through which the genetic parent makes the payment either to the surrogate mother of the egg donor. I also do not agree with the proposition by the appellant that the surrogate mother is not rendering any services to the appellant hospital. The AO has elaborately brought out the facts in the assessment order vide para 7 of the order which needs to be reproduced:

"7. The issue involved in the assessment is whether the payments made towards surrogacy services attract tax deduction provisions u/s.194J / 194C of the Act.

From the foregoing, it is discernible that Mr.Sesha Sai, the supplier of surrogate mothers has been the consultant in true sense to the assessee in finding out and supplying suitable and willing surrogate mothers, who are eligible for rendering surrogacy services as per the guidelines of Indian Council for Medical Research (ICMR) for effectively carrying out the treatment of infertility by the Infertility Centre [The assessee]. The assessee having set a package price for the treatment of infertility, is responsible to provide for all requirements necessary for completing the treatment. It is also an admitted fact that the assessee 'pays for the sendee of surrogate mothers through the consultant. Therefore, the action of supplying surrogate mothers fits into the definition of 'Fee for Technical Services' as set out in Explanation.2 to section.9(1)(vii) thereby attracting provisions of sec.194J which is reproduced below:

"Fees for technical services' means any consideration [including any lump sum consideration] for the rendering of any managerial, technical or

consultancy services [including the provision of services of technical or other personnel] but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head 'salaries','

As per the above definition of "fees for technical services" I the provision of services of 'other personnel' squarely covers the provision of services of surrogate mothers/women and as long as this service does not fall within the exclusions provided in the definition, the payment made towards supply of surrogate mothers is "fees for technical services". It is not material whether the surrogate mother has rendered the service of giving her egg or carrying pregnancy."

It is not necessary that the surrogate mother should be a professional as contended by the assessee. It is sufficient if the consultant/the supplier of surrogate mothers provides the services of the surrogate mothers to the Hospital for carrying on its profession. The contention of the assessee that the amount paid to surrogate mother is towards expenses and it does not partake the character of income, is misleading and away from the truth. In fact, as per the statements given by the assessee and the consultant, it is evident that all the medical expenses and maintenance expenses of the surrogate mothers are borne by the assessee and the consultant. Therefore, the amount, paid to the surrogate mothers at Rs.2 lakh for single pregnancy and Rs.2.25 lakh for carrying pregnancy of twins, is income in the hands of the surrogate mothers.

Besides, the contention of the assessee, that the payments made to the surrogate mothers through the consultant are not

governed by the provisions of sec.194C of the IT Act, is not correct. It is very clear from the agreement entered into by the consultant and the assessee that the consultant is under obligation to supply the surrogate mothers to the assessee as and when the assessee(Hospital) requires the services of the surrogate mother either for donation of egg or for carrying pregnancy for a price. Since, supply of surrogate mothers for a price took place as per the agreement between the assessee and the consultant, the payments made for surrogacy services attract provisions of sec.194C. The contention of the assessee that supply of surrogate mothers does not fit into the phrase given U/s 194C ie. "including supply of labour for any work" does not hold good. It is only extension of the section and inclusive in nature but does not restrict the scope of sec.194C to cover the contracts or agreements entered into for supply of any manpower for the purpose of providing any service."

From the above factual matrix as narrated by the AO, it is clearly established that the consultant has been supplying the surrogate mothers (egg donors) to the appellant. Without the setup as it existed by way of a Fertility Centre, the donor or the intended parents could not be benefited merely by a mutual agreement. They need the services of the IVF Centre to culminate the process and procedure and therefore, the intended parents have made payment to the IVF centre Which in turn has made payments 10 the surrogate mother.

The appellant's reliance on the case laws cited have no bearing on the facts of this case and therefore, I decline to interfere with the order of the AO, who has clearly brought out the failure on the part of the appellant in deducting the TDS.

This being the case, the appellant was obligated to deduct the tax and pay the balance to the surrogate mother as part of the surrogacy services rendered by such surrogate mothers. Failure to do so as per the provisions of sec.40(a)(ia) of Act leads to the disallowance and accordingly, I uphold the action of the AO. The grounds raised by the appellant are dismissed".

5. Next come the basic relevant facts. The assessee/a company runs infertility clinic(s). It had admittedly claimed an amount of Rs.71,23,300/- to Mr.Sai as surrogacy charges without deducting TDS thereupon to Shri Sesha Sai, herein above. The Assessing Officer's assessment order dt.12-03-2014 suggests that he sought to treat the same as payments made

u/s.194J of the Act in the nature of fee for technical services as well as contractual payments u/s.194C of the Act, requiring mandatory TDS deduction going by chapter-XVII of the Act.

6. The assessee filed a common detailed reply dt.18-12-2013 to the said show cause notice as follows:

Sir,

Sub:- Income-Tax Assessment - Assessment Year 2009-10 to 2013-14 - Kiran Infertility Centre Pvt.Ltd., Hyderabad.PAN-AABCK6053F - Regarding.

Kind reference is invited to the notice is/ s 148 of the I.T. Act requiring the assessee to file the return of income for the Assessment Year 2009-10 to 2012-13 with a view to reassess the income of the assessee company.

In this regard, the assessee humbly submits that the returns of income for the above assessment years were already filed as detailed below:

Sl. No.	Assessment year	Date of filing of the original return of income	Date of filing of the revised return of income	Income admitted (Rs.)	Tax paid including advance tax and TDS
1.	2009-10	01-10-2009	05-10-2009	17,16,308	5,62,050
2.	2010-11	26-09-2010	--	35,46,610	11,07,946
3.	2011-12	27-09-2011	07-03-2013	72,27,106	25,61,800
4.	2012-13	29-09-2012	05-03-2013	1,39,55,115	47,33,344

The above mentioned returns of income may please be treated as the return of income filed in response to notice u/s 148 of the I.T. Act.

The assessee humbly submits that the Assessing Officer conducted survey u/s 133A of the IT. Act on 22-10-2013 at the premises of the company. A statement was recorded by the Assessing Officer at the time of survey. From the statement, it can be ascertained that the Assessing Officer entertained a doubt that the assessee should have deducted tax at source in respect of the payments made to the egg donors from abroad and that the provisions of Sec.195 of the IT Act are applicable to such payments. The Assessing Officer also seems to have entertained a view that the payments made to the surrogate mothers and egg donors in India also is to be subject to deduction of tax at Source which was not done. Perhaps the Assessing Officer is of the view that TDS was not made in respect of some expenditure and, therefore, as' per. the provisions of Sec 40(a)(ia) such amounts are not

allowable. Therefore, the Assessing Officer proposed to initiate proceedings u/s 147 of the IT Act. The assessee also submits that the Income-Tax 'Officer (International taxation)-I, Hyderabad issued a notice to the assessee company requiring it to show cause as to why the provisions of Sec.195 have no application to the payments made to the surrogate mothers or to the egg donors. The assessee company furnished a reply to the Income-Tax Officer (International Taxation), a copy of which is submitted for perusal.

In this regard the assessee humbly submits that no such deduction of tax need be made for the following reasons:

a) The assessee is a company carrying on the activity of maintaining fertility center, diagnostic centre and pathological laboratory for the purpose.

b) The assessee submits that the patients i.e. mother and father who are desirous of conceiving children but are not capable of doing so, approach the assessee hospital. They are known as "genetic parents".

c) They would be examined for the reasons for infertility. In most of the cases, the infertility in the couple/patient may be due to physiological disorder, hormonal or chromosomal disorders.

d) Once the reasons for infertility are identified and if such defect prevents the female partner from utilizing her own eggs or carrying pregnancy to term the genetic parents choose a woman for donating eggs/ovum and a surrogate mother to carry the pregnancy to term.

e) A payment is to be made by the genetic parents for getting eggs/ovum from the woman who maybe a relative in some cases or maybe anonymous and also to the surrogate mother to carry the pregnancy to term.

f) The egg so obtained after ovarian stimulation is fused with the sperm of the genetic father and the resultant embryo is transferred in the womb of the genetic mother. In such an event, there is no requirement of a surrogate mother. However, in many cases of infertility it is found that the woman is not capable of carrying a pregnancy in her womb to term which maybe because of several disorders and therefore needs a surrogate mother to preserve the pregnancy.

g) The genetic parents choose the surrogate mother to carry the pregnancy on behalf of the genetic mother. They choose the surrogate mother through organization such as AMMA WOMEN'S WELFARE SOCIETY or from others. Always it is the choice of the genetic parents to choose the surrogate mother and is not the choice of the hospital.

h) All the connected parties i.e. the genetic parents, surrogate mother and the hospital (fertility centre) discuss about the issue after the surrogate mother is chosen by the genetic parents. At that stage the genetic parents, the hospital and the surrogate mother enter into a tripartite agreement, a copy of which is submitted.

i) The fertility centre conducts the pathological and other tests in order to decide the possibility of transferring the embryo in the womb of surrogate mother. If she is found medically fit, the process commences as per the terms of the agreement.

j) In the said agreement, the total amount is paid by genetic parents which includes hospital fee for treatment, the amount to be incurred towards surrogate mother for preserving/ carrying the pregnancy for a period of 9 months, for her wellbeing and reasonable expenses to her is decided. The agreement specified that payments are to be made to surrogate mother towards her reasonable expenses. Such payments are to be made by genetic parents.

k) The amount so arrived at is first paid in advance in installments to the hospital by the genetic parents with a request that the reasonable expenses be spent for medical treatment and for maintenance of health of surrogate mother and for her wellbeing.

l) The payments made to the surrogate mother are paid by the hospital only on behalf of the genetic parents to their nominee Amma Women Welfare Society and others in India.

m) The payments for foreign egg donors on behalf of genetic parents are to be paid by assessee company to the nominees celeste Coetzee in south Africa and Alexis Thomas in USA both of whom are foreign nationals.

n) The amount so paid to the surrogate mother is towards the expenditure incurred on maintenance of the health and general wellbeing of the surrogate mother for a period of 10 to 18 months, cost of medicines to sustain the pregnancy for the period of 9 months and towards her general maintenance.

o) Having spent the amount for pregnancy on their behalf, it is in the best interest of the genetic parents to see that the surrogate mother is following all NECESSARY REMEDIES TO MAINTAIN A HEALTHY PREGNANCY AND NOT INDULGING IN any acts which may be detrimental to the health of their unborn child and to make sure that there is no breach of agreement on behalf of the surrogate mother. Therefore, the genetic parents chose certain organization or persons

to monitor and care for the surrogate mother in all respects-- both physical, medical and social.

p) Only when all i.e. genetic parents, surrogate mother; the organization and the hospital acts in discipline and according to plan, the programme would be successful.

q) On completion of the period of pregnancy and when the surrogate mother delivers a child in the hospital, such child would be handed over to the parents after recording the assurance from the genetic parents that the child would be brought up by them as their own child. Where the genetic parents are foreign nationals, they would also furnish assurance to the appropriate authority of the Government of India before taking the child to their country.

It can be seen from the said letter filed before ITO of International taxation that the payments made to the surrogate mothers and payments made to egg donors do not require deduction of tax at Source as they were made on behalf of the genetic parents and not as an expenditure of the assessee and that the payments are towards expenditure to be incurred by the surrogate mother, supply of eggs and the activity carried on by the surrogate mother, supply of eggs would not attract any deduction of tax at Source under Chapter XVII of the IT. Act.

Therefore, the provisions of Chapter XVII or Sec.40(a)(ia) of the IT. Act would not apply to the payments made to the surrogate mothers and payments for supply of eggs.

It is also submitted that the payment for the supply of eggs is for the human reproductive cell/genetic material. It is the payment for the material and, therefore, no deduction of tax at Source need be made.

In view of the above, the assessee humbly submits that the presumption of the Assessing Officer that there is any escapement of income on this ground is not justified”.

7. The Assessing Officer thereafter considered the assessee's directors as well as Shri Sai's statements to conclude that the impugned surrogacy payments attracted Section 194J as well as 194C of the Act as follows:

“4. However from the above submissions as well as from the statements of Sri.Sesha Sai (the consultant and supplier of surrogate mothers) and the Director of the company Sri.Samit Sekhar [the relevant questions and answers of these statements are given in

subsequent pages], the operations or the functioning of the hospital can be broadly summarized as under:

a) The assessee is engaged in the treatment of infertility by employing various methods like IVF Treatment, Surrogacy service and other related services. One of the methods is providing surrogacy services where in when a couple approach the assessee for infertility treatment the assessee ascertains the suitability of genetic parents for carrying pregnancy and when the genetic parent is found to be unsuitable for carrying pregnancy or to produce egg, the assessee provides the service of surrogacy wherein as per the requirement the egg is obtained from the egg donor and fused with the sperm and the embryo is introduced into the womb of another women haired for carrying the pregnancy to its full term on behalf of the intended genetic parent. On delivery of the baby the genetic parents take over the baby as their own and the surrogate mother will not have any right over the baby. In order to provide this method of service the assessee charges the patients/genetic parents a lump sum amount. It is the responsibility of the assessee to provide for all the related services to ensure that the genetic parents beget their baby.

b) For the purpose of effectively doing its business, the assessee enters in to an agreement/contract with the supplier of surrogate mothers / egg donors and in the instant case the supplier has been Sri. T.Sesha Sai. The contents of agreement/contract dated 09.05.2012 proposed by supplier of surrogate mothers is produced below:

"To
Dr. Samit Sekhar,
Executive Director,
Kiran Infertility Centre,
Hyderabad.
India,

Dear Sir,

Sub: Proposal of arranging surrogate mother & egg donor's

Amma Women welfare society Reg.NGO.No.806/2012 Represented by its vice President T.Seshasai aged about 50 years is and NGO working for the upliftment of poor and destitute women in the state of Andhra Pradesh.

We provide food housing and rehabilitation for women who have been neglected by their families we work towards reconciliation and helping them learn vocational trades arid become self reliant.

I have learnt about you esteemed institute online and some of the women at Our NGO have come forward to provide this very noble service to help childless couples by becoming surrogate mothers and Egg donors because they understand the plight of childless couples in the Indian society.

AMMA will arrange for Surrogate mothers and egg donors for Kiran Infertility Centre and on the basis of the decided remuneration which will be 4 lakhs for a single pregnancy and 4,50,000 for carrying twins.

In the mentioned amounts Amma will arrange for food accommodation, clothing, travel and any other non medical expenditure for the surrogate mothers and egg donors including their compensations.

All medical procedures and treatments and medical / surgical care will be the responsibility of the Kiran Infertility Centre.

AMMA is also in the process of applying with ICMR for registration as an ART bank.

Thanking you,

*For Amma Women Welfare Society,
Sd/-
(T. Sessa Sai)
Vice-President”.*

The agreement/contract dated 10.05.2012 accepting the above said proposal is identical in all its content except for an additional para which is given below:

"All the payments will be made to T.Sessa Sai on behalf of Amma Women Welfare Society who will then release payments to egg donors and surrogate mothers as per terms and conditions discuss with commissioning parents and surrogate mothers."

From the contents of the above proposal and acceptance it is seen that it is basically a contract between the supplier of surrogate mothers and the assessee (M/s.Kiran Infertility Centre Pvt Ltd) and contains the amount to be paid for each surrogate mother and the duties and responsibilities of both the parties. It is very important to mention here that the NGO Amma Women Welfare Society came into existence only on 08.05.2012 and hence a written agreement was entered into. During the relevant year there was no NGO but the consultant/supplier was supplying surrogate mothers on similar terms.

5. For the purpose of assessment, It is also necessary to verify/examine the answers given in the sworn statements given by the director Sri.Samith Sekhar and Sri.T Sesha Sai (the consultant and supplier of surrogate mothers). The relevant questions and answers are produced below:

Dr. Samit Sekhar:

Q.5. [sworn statement dt. 22.10.13] Do you incur any expenditure for marketing your services abroad?

Ans. We pay Egg Donors compensation through resident freelancer in South Africa Ms.Celeste Coetzee. She is paid about 10,000 to 15,000 SAF Rands as Donor compensation and also for additional expenses such as flights, visa and medical tests for the egg donor.

There are certain other expenses for conferences, advertisements etc as business promotion expenditure

These expenses of egg donors are shown as marketing expenses for outward remittance because the bank does not have provision for egg donor expenses and as suggested by bank

Q.6. [sworn statement dt.22.10.13] please give the details of Fee charged for various services provided by the company?

Ans. Rs.75,000 to Rs.2,00,000 for IVF package [per cycle] from Fin. Year 2011-12 US\$32,000 for comprehensive surrogacy package with Indian donor from Fin.Year 2011-12, it was about US\$20,000 to 25,000 before F.Y.2011-12.

Q.7. Please explain the process of treatment given to the patients.

Ans. IVF : on registration and consultation of the patients, detailed history is taken followed by investigation if required to reach a diagnosis. Based on the diagnosis, a particular type of treatment is suggested which may be IUI / IVF / ICSI / Surrogacy Majority of patients requiring treatment of IUI / IVF / ICSI. do not require prolonged admission / stay in the hospital. Surrogate mothers may require to stay in the hospital from 12 week pregnancy to till the delivery, Which differs from case to case. However the genetic parents and the donors in majority cases may not require any hospitalization but they are required to visit the hospital for dally monitoring. As a part of package, any complication related to the surrogacy is the responsibility of the hospital. As far as IVF treatments are concerned, our monitoring extends up to 12 weeks of pregnancy.

Q.11. Please explain the procedure followed for identifying the surrogate mothers?

Ans. Amma Women Welfare Society, an NGO has panelled voluntary women for surrogacy and on requirement basis, and whenever there is a requirement the clinic informs the NGO/ABT bank. Then the screening of the surrogate mother is carried out for her suitability. Intended Surrogate mother is introduced to the genetic couple upon her request. Once the mother meets the criteria, she is subjected to Embryo transfer and then she is taken care of by the Society and clinic.

Q. 20. Are the genetic parents from abroad aware as to what amount is paid to the surrogate mother particularly when they agree to pay the package amount?

Ans. The details are communicated in person during consultation or phone conversation.

Q.2. [sworn statement dated 23.10.2013] Please explain why the amounts of Rs.4,00,000/- or 4,50,000/- per surrogate mother is paid to Sri.Thuraga Sesha Sai, a medical practitioner. Whether there is any authorization from surrogate mothers to pay their compensation through Sri.Sesha Sai.

Ans. Sesha sai is the Vice President of the Amma Women Welfare Society and upon consent from commissioning parent, and surrogate mother who authorize Mr.Sesha sai of Amma women welfare society to enter into agreement with the necessary parties, the payments are released on their behalf to take care of surrogate mother compensation, food, shelter, clothing, travel and all other non medical expenditure for the surrogate mothers during their complete medical process/ivf/icsi/pregnancy/deliver/caesarean section and post birth for 6 months if any nonmedical expenditure is needed. This is done with consent and authorisation of all parties involved. The clinic never makes any payment or enters into any financial agreement with the surrogate mother directly.

Q.7. When it is the responsibility of Amma Women Welfare Society as to the payment of compensation to the surrogate mother and her well being, why you are collecting the charges on their behalf from the commissioning parents? The charges could well be paid to the society directly. Please explain?

Ans Surrogacy is a complex medical procedure and because of several logistical issue involved in the process and in accordance of an understanding with all parties involved, the money is collected and released to Mr.Sesha sai by cheque for disbursal to the surrogate mother in a timely and orderly manner.

Q.8. By your own admission, it is clear that you are receiving payment for all the service involved in the complex medical procedure

and even the compensation to the surrogate mothers is released by you in an orderly manner suggesting that you own up responsibility for ensuring successful completion of the complex surrogacy medical procedure. Please say Yes or No.

Ans. This answer needs a detailed explanation because of the complexity involved and cannot be answered in YES/NO.

Q.9. Do you state that Mr.Sesha Sai has been providing the human resources independently for the success of the your practice?

Ans. Amma women's welfare society provides for surrogate mothers and egg donors to our clinic upon request from Commissioning parents to us and he also takes care of logistical requirement such as food, travel, stay etc for surrogate mothers and egg donors.

Q.10. When the NGO has been providing the Human Resources, why the compensation to surrogate mothers is being paid into the personal account of Mr.Sesha sai but not into the account of the NGO ?

Ans. According to Mr. Sesha sai his Ngo is involved in several welfare activities for the betterment of poor women and to streamline the timely payments for benefit of surrogate mothers the payments for them is made into his account upon authorisation from his NGO.

Sri.T .Sesha Sai :

Q.4 [Sworn statement dt.23.10.2013] please give details of payments received from M/s Kiran Infertility Centre Pvt Ltd. for each surrogate mother arranged by you?

Ans. I am getting Rs.4 lakh for every surrogate mother for single pregnancy and Rs.4.5 lakh for twin pregnancy for M/s Kiran infertility Centre pvt ltd and also I enter into an agreement on behalf of our NGO with Mis Kiran Infertility Centre Pvt Ltd .for the surrogacy service and a copy of which also will be provided to you tomorrow. Out of the amount received I pay Rs.2 lakh to every surrogate mother in instalments from conception to delivery of surrogate mother. In addition to that I have to provide food, shelter and travelling expenses for surrogate mothers for nearly 12 to 18 months.

Q.7. Why the amounts towards compensation to the surrogate mothers is deposited into your personal account but not into the NGO account?

Ans. The NGO M/s. Amma Women Welfare Society was established only on 08.05.2012 but I have been providing surrogate mothers to M/s Kiran Infertility Centre Pvt Ltd since 2008 and the practice of depositing in my personal account is continued.

Q.8. Why M/s Kiran Infertility Centre has been paying you the compensation/amounts payable to the surrogate mothers?

Ans. Since M/s Kiran Infertility Centre does not have time for searching willing surrogate mothers it uses my service. As and when a request is received from M/s Kiran Infertility Centre for surrogate mothers, I search for the willing women through various contacts and supply them to M/s Kiran Infertility Centre. I take the risk of controlling and monitoring the surrogate mothers till one month after the delivery. As most of the surrogate mothers do not have any bank accounts and they are required to be kept under strict discipline, the money payable to them is being paid to me and I am also paid by M/s Kiran Infertility Centre towards maintenance expenses of the surrogate mothers.

Q.9. Have you ever met any Commissioning/Genetic Parent from abroad in connection with the surrogacy service? Did you ever enter into agreement with the Commissioning/Genetic parent from abroad in connection with the surrogacy service?

Ans. No. I have never met any Commissioning/Genetic Parent from abroad in connection with the surrogacy service. I have not entered into any agreement with the Commissioning/Genetic Parent from abroad in connection with the surrogacy service.

Q.10. Have any surrogate mother gave you any consent for accepting or receiving money on their behalf from M/s Kiran Infertility Centre?

Ans. No surrogate mother gave any such consent. In fact I take an undertaking from the surrogate mothers specifying that only Rs.2,00,000 will be paid as compensation for the surrogacy service in instalments and that they will not go away till one month after the delivery.

Q.11. When you pay only Rs.2 lakh to the surrogate mother, what do you do with the remaining Rs.2 lakh or 2.25 lakh?

Ans. I have to pay Rs.50,000 to 60,000 to the middlemen and I have to meet the expenditure towards salary to the Care Taker J.Vijaya Lakshmi, Cooks, Drivers etc.

Q.12. Do any commissioning/genetic parent ever questioned you about the well being of the surrogate mother or they ever made you responsible for the well being of the surrogate mothers?

Ans. As I said earlier, there is no contact with the Commissioning/Genetic parent. But mostly Dr.Samit Sekhar of M/s Kiran Infertility Centre monitors the entire process. I am answerable only to Dr.Samit Sekhar of M/s Kiran Infertility Centre, Hyderabad.

Q.3. [Sworn statement dt.30.10.2013] How many surrogate mothers are under your care and how and on what basis you maintain the surrogate mothers?

Ans. As on date about 20 surrogate mothers are under my care in the above said address and about 35 surrogate mothers are in the M/s Kiran Infertility Centre Pvt Ltd. As and when I receive the requirement from the M/s Kiran Infertility Centre Pvt Ltd, I contact the known people who have information about the willing women for surrogacy and after paying some amount ranging from Rs.10,000 to Rs.15,000 to the family members of the women, she is brought to my address and look after her all needs till her suitability is established. If the woman is found not suitable, she is sent back after paying necessary expenses. However, on suitability of a woman for surrogacy, all her expenditure is borne by me till one to three months after delivery. All the expenditure relating to the maintenance of surrogate mothers and expenses on non-suitable women is met by me out of the amounts received on account of only suitable surrogate mothers. However when there is a failure after pregnancy, depending upon the stage of pregnancy, I am paid RS.50,000 to Rs.2,00,000 towards expenses.

Q.9. Who supervises your maintenance work as to the well being of the surrogate mothers housed in the hospitals?

Ans. The Doctors of M/s Kiran Infertility Centre Pvt Ltd oversee the well being of the surrogate mothers and according to their instructions, the Diet is provided to the surrogate mothers but the expenditure is met by me.

Q.10. Please provide the Permanent Account Numbers of all the surrogate mothers who were provided by you during 2010 to till date.

Ans. Obtaining PAN in respect of some surrogate mothers has started in 2012. I will provide the details at the earliest.]

6. An analysis of the submissions of the assessee and the statements given by the assessee, Sri.T.Sesha Sai and the surrogate mothers reveals that

[a] the tripartite agreement as alleged by the assessee is entered into without the knowledge of the Surrogate Mother. It is also evident from the statements of the Surrogate mothers and the consultant Sri.T.Sesha Sai that they are not aware of the genetic parents for whom they are carrying the pregnancy or rendering the service as the case may be.

Therefore, it is the assessee who takes all the responsibility and coordinates all the activities for the success of the treatment.

[b] Sri T.Sesha Sai as per the agreement with the assessee, is required to supply willing surrogate mother to the assessee hospital for which service he is paid. Mr.T.Sesha Sai is having network in all the districts and through various contacts obtains information about poor women who are in need of money and these women are made to get convinced about the remuneration they get for providing the Surrogacy service or the Egg as the case may be. For this purpose, he pays to middlemen. Mr.T.Sesha Sai always maintains 8. group of willing women and he employed a caretaker to take care of their maintenance. As and when he gets a requisition from the assessee, he readily provides willing woman of the prescribed age group for the surrogacy service.

7. The issue involved in the assessment is whether the payments made towards surrogacy services attract tax deduction provisions u/. U/s 194J/194C of the IT Act.

From the foregoing, it is discernible that Mr.Sesha Sai, the supplier of surrogate mothers has been the consultant in true sense to the assessee in finding out and supplying suitable and willing surrogate mothers, who are eligible for rendering surrogacy services as per the guidelines of Indian Council for Medical Research (ICMR) for effectively carrying out the treatment of infertility by the Infertility Centre [The assessee]. The assessee having set a package price for the treatment of infertility, is responsible to provide for all requirements necessary for completing the treatment. It is also an admitted fact that the assessee pays for the service of surrogate mothers through the consultant. Therefore, the action of supplying surrogate mothers fits into the definition of 'Fee for Technical Services' as set out in Explanation.2 to section. 9(1)(vii) thereby attracting provisions of sec.194J which is reproduced below:

'Fees for technical services means any consideration[including any lump sum consideration] for the rendering of any managerial, technical or consultancy services [including the provision of services of technical or other personnel] but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head 'salaries'."

As per the above definition of "fees for technical services", the provision of services of 'other personnel' squarely covers the provision of services of surrogate mothers/women and as long as this service does not fall within the exclusions provided in the definition,. the payment made towards supply of surrogate mothers is "fees for technical services". It is not material whether the surrogate mother has rendered the service of getting her egg or carrying pregnancy.

It is not necessary that the surrogate mother should be a professional as contended by the assessee. It is sufficient if the consultant/the supplier of surrogate mothers provides the services of the surrogate mothers to the Hospital for carrying on its profession. The contention of the assessee that the amount paid to surrogate mother is towards expenses and it does not partake the character of income, is misleading and away from the truth. In fact, as per the statements given by the assessee and the consultant, it is evident that all the medical expenses and maintenance expenses of the surrogate mothers are borne by the assessee and the consultant. Therefore, the amount, paid to the surrogate mothers at Rs.2 lakh for single pregnancy and Rs.2.25 lakh for carrying pregnancy of twins, is income in the hands of the surrogate mothers.

Besides, the contention of the assessee, that the payments made to the surrogate mothers through the consultant are not governed by the provisions of sec.194C of the IT Act, is not correct. It is very clear from the agreement entered into by the consultant and the assessee that the consultant is under obligation to supply the surrogate mothers to the assessee as and when the assessee[Hospital] requires the services of the surrogate mother either for donation of egg or for carrying pregnancy for a price. Since, supply of surrogate mothers for a price took place as per the agreement between the assessee and the consultant, the payments made for surrogacy services attract provisions of sec 194C. The contention of the assessee that supply of surrogate mothers does not fit into the phrase given u/s.194C ie. "including supply of labour for any work" does not hold good. It is only extension of the section and inclusive in nature but does not restrict the scope of sec 194C to cover the contracts or agreements entered into for supply of any manpower for the purpose of providing any service.

(The assessee in fact has two consultants namely Sri.T.sesha Sai and sri,T.v.Ramana Rao who are engaged for supply of surrogate mothers. The assessee vide letter submitted on 28.02.2014 stated that Sri,T.V .Ramana Rao has been suffering from Chronic Multiple diseases and is not available in Hyderabad. Since the where abouts of T.V. Raman a Rao were not furnished, he could not be examined.)"

7.1. The Assessing Officer proceeded with very reasoning to disallow the assessee's surrogacy payments in issue. The CIT(A) has upheld the impugned disallowance as per his lower appellate discussion extracted in the preceding paragraphs.

8. We have heard rival submissions. The assessee's assessment year-wise paper book of 75 pages in AY.2010-11 *inter alia* compiling its income tax return, statement of total income, forms-3CA and 3CD, audit report, financial statements, ITO's letter dt.26-11-2013, its reply dt.19-12-2014, sample surrogacy agreement, Amma Welfare Society's letter dt.09-05-2012 Section 131 summons dt.11-11-2013, Section 148 notice dt.01-11-2013, its reply dt.18-12-2013 (*supra*), request letter to ITO, letter submitting information to ITO with all enclosures, details of impounded documents etc., Dr.Sekhar's sworn statement dt.12-11-2013, CIT, Hyderabad's order dt.04-11-2013 u/s.133A(3), details of payment made to surrogate mothers from 01-04-2009 to 31-03-2015, expenditure on surrogate mothers, outstanding admin expenses, ledger copies for AY.2013-14; other current liabilities, other expenses, ledger copies for AY.2014-15 etc., pertaining to alleged surrogate mothers; respectively along with similar details in assessment years in issue, stand perused. Coupled with this, we have also gone through assessee's and Revenue's detailed written submissions reiterating their respective stands against and in support of the impugned identical disallowance along with former's note on the historical/mythological perspective of surrogacy also been considered.

9. Learned authorised representative vehemently contended during the course of hearing that both the lower authorities have erred in law and on facts in holding the impugned surrogacy payments as contractual as well as fee for technical

services requiring TDS deduction u/s.194C and 194J of the Act; respectively. He submitted that assessee/infertility clinic is neither a party to the corresponding agreement executed between the genetic parents and surrogate mother(s) nor has it availed any technical services from either of them so as to deduct TDS in issue.

Learned counsel next referred to assessee's sample agreement (pgs.31 to 34) AY.2010-11's paper book that this taxpayer is not in any way liable for the corresponding obligations between the generic parents and surrogate mothers and therefore, it neither enjoys any right nor any liability flowing therefore.

10. Mr.Rama Rao thereafter took pains to make us go through all the relevant clauses in the sample agreement. And that the purpose of entering into the said kind of agreement is that it is the desire of mainly the overseas genetic parents wishing to have a child by way of In Vitro Fertilization 'IVF' by engaging an Indian surrogate mother so as to carry and deliver their biological child. And that the said overseas genetic parents themselves arrange surrogate mothers on their own. She is then brought to the clinic for the entire 'IVF' process followed by duly monitored gestation cycle of a human pregnancy involving normal time span of 36 weeks in average, finally culminating in delivery of the surrogate child.

11. Learned counsel further argued that this entire 'IVF' process leaves very much a limited role so far as assessee's responsibility is concerned wherein it has to monitor the same involving surrogate pregnancy coupled with the necessary

tests for monitoring the foetus care right from 1st to 36th weeks. Learned counsel reiterated that the assessee is not liable at all to any of the parties involved i.e., genetic parents or surrogate mothers. Coming to the impugned payments made to surrogate mothers, the assessee highlighted the fact that it had duly engaged services of an 'NGO' for supplying the surrogate mothers.

12. The Revenue has strongly supported the impugned disallowance made in the course of assessment and affirmed in the CIT(A)'s order.

13. It emerges from a perusal of Pg.35 in AY.2010-11 paper book that the NGO herein M/s.Amma Welfare Society; through its VP/payee Shri Sessa Sai; had offered to arrange for surrogate mothers and egg donors for the assessee. This NGO claimed itself to be engaged in upliftment of poor and destitute women. It further made it clear that it would be charging remuneration of Rs.4 lakhs for single pregnancy and Rs.4.50 lakhs in case of twins wherein the assessee would be responsible for all medical procedures & treatments along with medical/surgical care as well. Learned counsel contended before us that both the lower authorities have not appreciated the correct law whilst fastening the TDS liability of this taxpayer without pin-pointing the taxability of the surrogate mothers forming a conditions precedent so as to attract Section 194C.

14. Mr.Rama Rao repeated all the preceding facts once again and stated that the impugned payments also do not involve any fee for technical services u/s.194J Explanation(b) making

it clear that the legislative expression 'fee for technical services' carries the same meaning as u/s.9(1)(vii) Explanation-2 of the Act to be taken as any consideration; including lumpsum, for rendering of any managerial, technical or consultancy services (including the provisions of services or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income and so on.

15. Learned counsel's last argument is that the impugned TDS mechanism applies only in case the corresponding income is assessable in the payee's hands under any heads defined in Section 14 of the Act. And that the surrogate mothers herein do not perform any business or professional services thereby deriving taxable income. His further case is that providing surrogacy services does not amount to commercial use of a female womb in any manner and therefore, the impugned payments are otherwise exempt from taxation as well as per Hindustan Coca Cola Beverages Pvt. Ltd Vs. CIT 293 ITR 226 (SC) and GE India Technology Centre P. Ltd. Vs. CIT [327 ITR 456] (SC) that liability of TDS deduction is applicable only when the corresponding income is taxable in the recipient's hands.

16. Mr.Rama Rao's concluding remarks next touched upon the issue of Section 40(a)(i) r.w.s.195 disallowance of foreign egg donors' payments made through the payee based in South Africa in latter three assessment years (supra) since he has not performed any services in India. He accordingly contended that the impugned disallowance made under both u/s.40(a)(i) as

well as u/s.40(a)(ia) of the Act are liable to be deleted in above terms.

17. Mr.Mujumdar has strongly supported the impugned twin disallowance(s) on the other hand. He has filed a detailed not to the effect that learned lower authorities have rightly invoked Section 194C r.w.s.194J r.w.s.40(a)(ia) and 40(a)(i) disallowance r.w.s.195 in issue.

18. We have given our thoughtful consideration to the preceding rival contentions. There is hardly any dispute by now that we are dealing with a very much an un-touched issue as to whether payments made to surrogate mothers attract chapter-XVII of the Act requiring TDS deduction. We therefore deem it appropriate first of all to have clarity from the entire procedure of surrogacy in succeeding paras.

There is no dispute between the parties that this surrogacy process involves genetic parents i.e. a male and a female; where in eggs collected from IVF are fertilized with the latter's sperm and then placed in the womb of the surrogate mother which in turn is carried till delivery of the fetus. And that such genetic parents could be a solo female or a male only as well. Apart from the fact that the digital platform throws enough light on surrogacy right from ancient times coming to the rescue of issueless couples as per the learned counsel's written submissions discussing the mythological side, the first successful instance of artificial insemination of a woman through surrogacy reported only in the year 1884. After a long time span of almost a century thereafter saw the first case of a completed 'IVF' transfer. This was followed by the first legal

surrogacy agreement brokered in USA which in turn was used to establish an infertility centre. The year 1978 saw the first baby born through IVF transfer.

19. We continue to notice that next decade of 1980s to 1989 witnessed the famous surrogate child's custody dispute 'Baby M case' in the year 1986 wherein the New Jersey Supreme Court (USA) rejected the corresponding surrogacy agreement as an illegal one. It was during all these developments only that the year 1985 witnessed the first successful gestational surrogacy and the same practice procedure has been continuing as on date to help issueless couples or those female(s) or male(s) who wish to have a surrogate child.

20. Coming to India, it was in the year 2002 that the surrogacy was legalised on commercial lines and continued upto year 2015 when the Government of India prohibited its commercial practice. We are informed that the legislature has also approved the Surrogacy (Regulation) Bill, 2020 as well.

21. We further note from valuable assistance coming from both the parties that the issue of surrogacy has not only been confined to mere procedures and regulatory mechanisms. Hon'ble apex court in Baby Manji Yamada Vs. Union of India Writ Petition (Civil) No.369/08, dt.29-09-2008 also dealt with a case of a surrogate child's production/custody who had overseas genetic parents and an Indian surrogate mother.

22. We now proceed to deal with the impugned issue of TDS deduction on surrogacy payments before us keeping in mind the above conceptional backdrop. The assessee's case admittedly is that it is no a party to any agreement or a contract at all so as to be eligible to Section 194C of the Act. We see no reason to accept the instant argument. We make it clear that pgs.31 to 34 of the paper book contains the assessee's sample surrogacy agreement in this regard. The introductory portion thereof duly contains the clause that the same is 'by and among' the genetic parents, surrogate mothers and the assessee in other words. Not only this, 'material breach' clause 17.2 therein also suggests that it is the infertility centre/physician only 'who shall reimburse intended parents for all sums expended plus interest at the maximum allowable rate'. All this sufficiently negates the assessee's stand that it is neither a party to the surrogacy agreement nor any right or liability flows thereof on its role as an infertility clinic.

23. We further notice with the Revenue's able assistance and from a perusal of the case file at pg.35 that the NGO (supra) herein has proposed the assessee to arrange for surrogate mothers in lieu of the decided remuneration of Rs.4 lakhs for single and Rs.4.5 lakhs in case of twins' pregnancies; respectively. This NGO further claimed itself as working for rehabilitation for poor & destitute woman after they were neglected by their families facing poverty and other adverse circumstances. The assessee is fair enough in not disputing the fact that it had duly agreed to the said proposal only alongwith its undertaking to pay for the material breach of

contract to the genetic parents on account of the surrogate mothers' default.

24. Mr.Mujumdam next took us to Mr.Sesha Sai statement(s) dt.23-10-2013 and 30-10-2013 that although he had been receiving the corresponding amount from the assessee/infertility centre since 2008 through banking channels but he had not maintained any proper account for the corresponding expenditure incurred on surrogate mothers. This payee further admitted in question Nos.4 to 10 *inter alia* that he had entered into an agreement with assessee and also that no surrogate mother had given him any consent for accepting and receiving money on their behalf from the infertility centre. Apart from the fact that we are only dealing with income tax litigation, all this arrangement adopted between the assessee and its payee Shri Sesha Sai {acting for the NGO (allegedly looking after poor and destitute women)} speaks volumes about the mechanism adopted; more particularly from the latter's side, not only exploiting the poor surrogate mothers but also proving clear cut cheating of the female wombs. We make it clear that this payee had also failed to throw any light on payments made to surrogate mothers whose services had been utilized by the assessee/infertility centre for the purpose of surrogate pregnancy on behalf of the genetic parents. We therefore exercise our inherent jurisdiction vested u/s.254 of the Act as well to observe these parties have done nothing else but exploited the poor and destitute surrogate mothers without even paying the adequate compensation. Rather the payee 'NGO' and its office bearer(s) have *prima facie* swindled the entire money. This conclusion

flows from the entire surrogacy procedure adopted by the assessee with the so called NGO and its authorised person as it is evident from the perusal of the case file in the light of human probabilities after removing all blinkers as held in *Sumati Dayal Vs. CIT* (1995) [214 ITR 801] (SC) and *CIT Vs. Durga Prasad More* (1971) [82 ITR 540] (SC). We thus conclude that so far as the application of 194C r.w.s. 40(a)(ia) is concerned, the assessee's all other arguments regarding taxability of the surrogate mothers also deserve to be rejected since its payee himself had admitted that it had not maintained any accounts of the payments made to the surrogate mothers. We thus uphold the learned lower authorities' action invoking Section 194C r.w.s. 40(a)(ia) disallowance of Rs.71,23,300/-, Rs.3,35,52,200/-, Rs.89,02,746/-, Rs.70,50,000/- assessment year-wise; respectively in case of Mr.Sai and the other payee (supra). The same stands confirmed.

25. Next comes yet another equally important aspect as to whether all these payments attract Section 194J so as to hold that the payee concerned had rendered any technical service in arranging poor and destitute women as surrogate mothers. We do not find any technical service element involved in all this surrogacy process involving the recipient or the surrogate mothers attracting the clinching statutory expression(s) of managerial, professional and technical services u/s.194J r.w.s.9(i)(vii) Explanation (supra). We thus reverse both the lower authorities' action invoking Section 194J in facts of the instant case(s). It is therefore concluded that our instant latter adjudication has no bearing on final outcome of the impugned

40(a)(ia) disallowance as the same already stands confirmed u/s.194C of the Act.

Assessee's first appeal ITA No.866/Hyd/2016 raising this sole issue fails therefore.

26. Next comes the latter issue of Section 40(a)(i) r.w.s.195 disallowance in AYs.2011-12 to 2013-14 involving varying sums of money. It is not in dispute that the South Africa based payee Ms.Celeste Coetzee has not performed any services in India herself even if egg donation activity taken as a technical services. What all she has done is to arrange overseas egg donor's not on salary or contractual assignment but on free lancer basis only. There is further no indication before us that assessee's egg donor payments per head exceed the threshold limit u/s.194J(1) 1st proviso as well. All this makes it sufficiently clear these payments are not taxable in India so as to be held liable for TDS deduction going by M/s.GE India Technology Centre P. Ltd. Vs. CIT (2010) [327 ITR 456] (SC); CIT Vs. Faizan Shoes Pvt. Ltd. [367 ITR 155] (Mad); & DCIT Vs. Welspun Corporation Ltd., (2017) [55 (Trib) 405] (Ahmedabad). We thus hold that the impugned 40(a)(i) disallowance in case of the overseas payees deserves to be deleted for this reason alone. The assessee's instant substantive ground in AYs.2011-12 & 2013-14 succeeds therefore. These three latter appeals ITA Nos.867, 868/Hyd/2016 and ITA No.1673/Hyd/2017 are partly accepted in above terms.

27. Before parting, we deem it appropriate to observe in light of the above narrated facts of the poor and destitute women's womb's exploitation evident herein in most heinous manner

that the learned CIT-DR shall forward a copy of our instant detailed discussion to the Secretary, Ministry of Woman and Child Welfare, Government of India, New Delhi and the corresponding department in the State of Telangana so that such practices are altogether curbed. Whilst directing so, we quote hon'ble Bombay high court's full Bench's decision Ahmedabad Electricity Co., Ltd. Vs. CIT (1993) 199 ITR 351 (Bom) that Section 254 involving the statutory expression 'may pass such orders 'as it thinks fit' confers widest possible jurisdiction on the tribunal. We exercise the same and order accordingly.

28. To sum-up, assessee's first appeal ITA No.866/Hyd/2016 is dismissed and whereas the remaining three appeals ITA Nos.867/Hyd/2016, 868/Hyd/2016 and 1673/Hyd/2017 are partly allowed in above terms. A copy of this common order be placed in the respective case files.

Order pronounced in the open court on 8th April, 2021

Sd/-
(LAXMI PRASAD SAHU)
ACCOUNTANT MEMBER

Hyderabad,
Dated: 08-04-2021

TNMM

Sd/-
(S.S.GODARA)
JUDICIAL MEMBER

Copy to :

1.Kiran Infertility Centre Private Ltd., C/o. Sri S.Rama Rao, Advocate, Flat No.102, Shriya's Elegance, 3-6-643, Street No. 9, Himayat Nagar, Hyderabad.

2.The Deputy Commissioner of Income Tax, Circle-2(1), Hyderabad.

3.The Income Tax Officer, Ward-2(1), Hyderabad.

4.CIT(Appeals)-Kurnool.

5.CIT(Appeals)-2, Hyderabad.

6.Pr.CIT-II, Hyderabad.

7.D.R. ITAT, Hyderabad.

8.Guard File.