

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No. 242 of 2011 (O&M)

Date of Decision: 2.12.2015

Suresh Kumar Hooda

....Appellant.

Versus

The Commissioner of Income Tax, Rohtak and another

...Respondents.

1. Whether the Reporters of the local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

**CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MR. JUSTICE RAMENDRA JAIN.**

PRESENT: Ms. Radhika Suri, Senior Advocate with
Ms. Rajni Pal, Advocate for the appellant.

Mr. Inderpreet Singh, Advocate for the respondent.

AJAY KUMAR MITTAL, J.

1. Delay of 14 days in refiling the appeal is condoned.
2. This appeal has been preferred by the assessee under Section 260A of the Income Tax Act, 1961 (in short "the Act") against the order dated 30.9.2010 (Annexure A-9) passed by the Income Tax Appellate Tribunal, Delhi Bench "G", New Delhi (hereinafter referred to as "the Tribunal") in ITA No. 3897/Delhi/2009 for the assessment year 2006-07. The appeal was admitted by this Court vide order dated 24.7.2012 for determination of the following substantial question of law:-

Whether in the facts and circumstances of the case,

the Income Tax Appellate Tribunal has fallen in error in holding that the service of an independent contractor would be taxable as salary contrary to the contract of service dated 9th February, 2004 and 14th November, 2005?

3. The facts, in short, necessary for adjudication of the instant appeal as narrated therein may be noticed. The appellant was engaged as a contractor on contractual basis by South East Marine Engineering and Construction Ltd. vide letters dated 13.7.2005 (Annexure A-1) and dated 14.11.2005 (Annexure A-2). Vide letter dated 14.2.2006 (Annexure A-3), the appellant was again re-engaged by the said company. He was also engaged by Dolphin Offshore Enterprises vide letter dated 9.2.2004 (Annexure A-4) and the said contract was further extended vide letter dated 6.6.2004 (Annexure A-5). The TDS certificate, Annexure A-6, was issued to the appellant by the said company after deducting the tax at source under Section 194J of the Act. The appellant filed his return for the assessment year 2006-07 on 25.8.2006 declaring the income at ₹ 61,377/- which was revised at ₹ 83,467/-. The assessee disclosed receipts on account of his technical service from South East Asia Marine Engineering and Construction Ltd. and Dolphin Offshore Enterprise Ltd. as income from business or profession. The Assessing Officer vide assessment order dated 5.12.2008 (Annexure A-7) treated the said receipts as income from salary. Feeling aggrieved, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) [for brevity "the CIT(A)"]. The CIT(A) vide order dated 29.1.2009 (Annexure A-8) affirmed the order of the Assessing Officer holding that the said receipts were taxable under Section 17 of the Act as salary. Still dissatisfied, the

assessee filed an appeal before the Tribunal who vide order dated 30.9.2010 (Annexure A-9) upheld the order of the CIT(A) and dismissed the appeal. Hence, the present appeal by the assessee.

4. Learned counsel for the appellant-assessee submitted that whether the agreement between the assessee and South East Asia Marin Engineering and construction Ltd. (SEAMEC Ltd.) and M/s Dolphin Offshore Enterprise Ltd. (DOE Ltd.) was a 'contract for service' or a 'contract of service' would be a question of fact dependent upon appreciation of various factors enunciated by this Court in **The Commissioner of Income Tax (TDS), Chandigarh v. M/s Ivy Health Life Services Pvt. Ltd., Mohali, Punjab, ITA No. 142 of 2013** decided on 26.8.2015. It was urged that the Tribunal who is the final fact finding authority has not recorded any such clear finding of fact regarding 'contract of service' or 'contract for service' between the appellant-assessee and SEAMEC Ltd. and DOE Ltd. based on guiding principles enunciated in **M/s Ivy Health Life Services Pvt. Ltd.'s case (supra)**. It was, thus, contended that in such circumstances it would be just and appropriate that the matter is remitted back to the Tribunal to decide afresh keeping in view the principles of law laid down in **M/s Ivy Health Life Services Pvt. Ltd.'s case (supra)**.

5. On the other hand, learned counsel for the revenue supported the order passed by the Tribunal.

6. We have heard learned counsel for the parties and find force in the submissions of learned counsel for the appellant.

7. This Court in **M/s Ivy Health Life Services Pvt. Ltd., Mohali, Punjab's case (supra)** held that it was required to be seen whether the agreement between the assessee and the concerned

doctors was a 'contract for service' or a 'contract of service'. In case, it is 'contract for service', the income of the doctors would fall under the head 'income from business or profession' whereas under 'contract of service', it would partake the character of salary which is dependent upon master-servant relationship. It is always a vexed question to determine whether employer-employee relationship exists between the parties or not. There is no strait jacket formula prescribed under any statute or by any pronouncement on the basis of which it could be said that in a given eventuality, it would be characterized as employer-employee relationship. Such relationship depends upon several factors taken together. Even the Apex Court in **Workmen of Nilgiri Coop. Market Society Limited v. State of Tamil Nadu and others, 2004(2) RSJ 466 (SC)** observed that the question whether the relationship between the parties is one of the employer and employee is a pure question of fact. The control test and the organization test are not the only factors whereas several other factors viz. who is the appointing authority; who is pay master; who can dismiss; how long alternative service lasts; the extent of control and supervision; the nature of the job e.g. Whether it is professional or skilled work; nature of establishment and the right to reject, are also required to be scanned before arriving at the conclusion of the employer-employee relations. This Court had recorded as under:-

“9. To resolve the controversy raised in these appeals, necessarily, it will be required to be seen whether the agreement between the assessee and the concerned doctors was a 'contract for service' or a 'contract of service'. In case, it is 'contract for service', the income of the doctors would fall under the head

'income from business or profession' whereas under 'contract of service, it would partake the character of salary which is dependent upon master-servant relationship. It is always a vexed question to determine whether employer-employee relationship exists between the parties or not. There is no strait jacket formula prescribed under any statute or by any pronouncement on the basis of which it could be said that in a given eventuality, it would be characterized as employer-employee relationship. It is dependent upon several factors taken together which would result into such relationship. Besides the control/supervisory test and the organization test, the Apex Court in Workmen of Nilgiri Coop. Marketing Society Limited's case (supra), observed that the question whether the relationship between the parties is one of the employer and employee is a pure question of fact. It was also noticed that control test and the organization test are not the only factors whereas several other factors such as (a) who is the appointing authority; (b) who is pay master; (c) who can dismiss; (d) how long alternative service lasts; (e) the extent of control and supervision; (f) the nature of the job e.g. whether it is professional or skilled work; (g) nature of establishment; (h) the right to reject, are also required to be scanned before arriving at the conclusion of employer-employee relationship."

8. Accordingly, the order dated 30.9.2010 (Annexure A-9) is set aside and the matter is remanded to the Tribunal to decide the same afresh keeping in view the principles laid down by this Court in **M/s Ivy Health Life Sciences Pvt. Ltd., Mohali, Punjab's case (supra)** and after hearing the parties and by passing a speaking order in accordance with law. Needless to say anything observed hereinbefore shall not be taken to be expression of opinion on the merits of the controversy.

(AJAY KUMAR MITTAL)
JUDGE

December 2, 2015
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(RAMENDRA JAIN)
JUDGE