IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No. 120 of 2015

Date of Decision: 3.12.2015

Commissioner of Income Tax (TDS) Chandigarh
....Appellant.

Versus

DAV College, Sector-10, Chandigarh
...Respondent.

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: Mr. Denesh Goyal, Advocate for the appellant.

Mr. Maninder Arora, Advocate for the respondent.

AJAY KUMAR MITTAL, J.

1. This order shall dispose of a bunch of three appeals bearing ITA Nos. 120, 122 and 123 of 2015 as according to learned counsel for the parties, the identical questions of law and facts are involved therein. For brevity, the facts are being extracted from ITA No. 120 of 2015.

2. This appeal has been preferred by the revenue under Section 260A of the Income Tax Act, 1961 (in short "the Act") against the order dated 8.8.2014 (Annexure A-3) passed by the Income Tax Appellate Tribunal, Chandigarh Bench "B", Chandigarh (hereinafter referred to as "the Tribunal") in ITA No. 353/CHD/2014 for the assessment year 2010-11, claiming the following substantial questions of law:-

(i) Whether on the facts and circumstances of the case and in law, the Ld. ITAT was justified in holding that the relation with Guest Faculty (professional teaching staff) is equivalent in nature to an employer/employee relationship when there was no agreement/appointment or employer-employee relationship between the parties and that the Guest Faculties were merely professionals and therefore Section 194J of the Act was applicable?

(ii) Whether on the facts and in the circumstances of the case, the learned ITAT has erred in recognizing the payments made to Guest Faculty, who rendered professional services to the college, as per the provisions of Section 192 of the Income Tax Act, 1961 instead of Section 194J of the Income Tax Act, 1961?

(iii) Whether on the facts and in the circumstances of the case, the Ld. ITAT is right in law in holding that there existed an employer-employee relationship between the Guest Faculty teachers and the College and the assessee-college is not liable to make deduction of tax at source u/s 194J of the Income Tax Act, 1961?

(iv) Whether on the facts and in the circumstances of the case the findings recorded by the Ld. ITAT are perverse and contrary to the material available on record and not sustainable in the eyes of law?

3. A few facts necessary for adjudication of the instant appeal as narrated therein may be noticed. The assessee is a college, imparting education in various subjects and fields. Part of fields and subjects are financially aided by the Government and others are not aided by the Government. The services of teaching staff (guest faculty) for the self financing scheme courses is engaged on need basis. A survey under Section 133A of the Act was conducted on the premises of the assessee on 9.9.2011. During the course of inspection, it was found that the assessee had engaged the professional teaching staff (guest faculty) for rendering professional services for teaching self-financing and other professional courses run by the assessee. The payment to guest faculty was made on the basis of lectures delivered by the guest faculty and not the pay scales as in the case of regular employees. Since the payments made were exceeding ₹ 20,000/-, the assessee was required to deduct the tax at source as envisaged under Section 194J of the Act. Accordingly, a show cause notice dated 28.2.2012 was issued to the assessee treating it as person-in-default under Section 201(1)/201(1A) of the Act. The Assessing Officer vide order dated 24.12.2012 (Annexure A-1) passed under Section 201(1)/201(1A) of the Act created a demand of ₹ 8,96,763/- and also initiated penalty proceedings under Section 271C of the Act. Feeling aggrieved, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) [for brevity "the CIT(A)"] pleading that the tax at source was not required to be deducted under Section 194J of the Act on the payments made to the guest faculties because there existed a relationship of employer and employee and the

payment made to the guest faculty is a salary and also below the taxable limit. The CIT(A) vide a consolidated order dated 31.1.2014 (Annexure A-2) for the assessment years 2009-10, 2010-11 and 2011-12 allowed the appeals holding that the Assessing Officer was not right in treating the assessee in default under Section 201(1)/201(1A) of the Act for not deducting tax at source under Section 194J of the Act. Against the order, Annexure A-2, the revenue filed appeals before the Tribunal pleading that the CIT(A) without any finding held that there is relationship of employer and employee and the college had not availed the professional services of the guest faculties for teaching self-financing and other courses whereas the payments made were exceeding ₹ 20,000/- and deduction of tax at source was required to be made under Section 194J of the Act as the college engaged the professional services of the guest faculty. The Tribunal vide order dated 8.8.2014 (Annexure A-3) affirmed the order of the CIT(A) and dismissed the appeals. Hence, the present appeals by the revenue.

4. Learned counsel for the appellant-revenue submitted that whether the agreement between the respondent-assessee and the guest faculty lecturers engaged by the college-assessee 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 respondent-assessee and the guest faculty lecturers 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 respondent-assessee 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 impugned orders are 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 3, 2015
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(RAMENDRA JAIN)
JUDGE