

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

**INCOME TAX APPEAL NO.1294 OF 2016
ALONG WITH
INCOME TAX APPEAL NO.1355 OF 2016
ALONG WITH
INCOME TAX APPEAL NO.1423 OF 2016
ALONG WITH
INCOME TAX APPEAL NO.1318 OF 2016**

**Commissioner of Income Tax (TDS-1) : Appellant
versus
Asian Heart Institute and Research
Centre Pvt. Ltd. : Respondent**

Mr. Suresh Kumar for the Appellant.

**CORAM : AKIL KURESHI &
M.S.SANKLECHA, JJ.**

DATE : 05th MARCH 2019.

P.C.:

1 All these Appeals arise in common background, we may therefore record the facts from Income Tax Appeal No.1294 of 2016.

2 This Appeal is filed by Revenue to challenge the judgment of Income Tax Appellate Tribunal.

3 The following questions were pressed for our consideration :-

(i) Whether, on the facts and in the circumstances of

the case and in law, the Hon'ble ITAT was correct in holding that there does not exist employer-employee relationship between the Assessee and Full Time Consultant Doctors and the payments made to them by the assessee come in the prview of Sec.194J whereas as per the terms and conditions of the contract, there exist employer-employee relationship and such payments come within the purview of Sec.192 of the I.T. Act, 1961?

(ii) Whether, on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was correct in holding that payments made towards the annual maintenance contracts in respect of various hospital equipments come in the purview of Sec.194C whereas such maintenance charges are in the nature of technical fee within the meaning of Sec.194J of the I. T. Act, 1961?"

4 We notice that the Revenue has framed a few additional questions, however, those questions nothing but a limbs of above noted questions and therefore not separately considered.

5 The first question relates to the Revenue's contention that the Respondent-Assessee, a trust, running a hospital, had to deduct the tax at source under Section 192 of the Income Tax Act, 1961 (for short "the Act") while making payment to the doctors discharging their duties at the said hospital. The contention of the Revenue was that these services of the doctors have been engaged under a contract executed between the parties, and that the doctors are not employees of the hospital. Under the circumstances, according to the Assessee, section 192 of the Act was not applicable. The

payments to the doctors were in the nature of professional fee for which tax was deducted under section 194J at the time of payment.

6 The Assessing Officer did not accept such a contention, upon which the Assessee filed an Appeal. The Commissioner (Appeals) who also rejected the Appeal, upon which the issue reached the Tribunal in an Appeal filed by the Assessee. The Tribunal examined the terms of engagement of the doctors by the Assessee Trust and came to a conclusion that the issues were squarely covered in favour of the Assessee by virtue of the judgment of the Division Bench of this court in the case of *CIT v/s. Grant Medical Foundation* reported in *375 ITR 049*. Thereupon the Revenue has filed this Appeal.

7 In Grant Medical Foundation's case (Supra) this Court examined at length the issue as to when the engagement of the services of the doctors can be seen to be in the nature of employment. In this context, after referring to the terms of engagement of the doctors, this Court held and observed as under :-

- 37) In relation to other category of doctors there was a dispute. The Assessing Officer and the Commissioner concluded that though these categories of doctors had a fixed remuneration and variable pay but their terms and conditions of employment or service would be crucial and material. In relation to two doctors, namely, Dr Zirpe and Dr Phadke, the contracts were taken as sample and scrutinized minutely. Upon such a scrutiny the Tribunal noted that it cannot be said that these doctors were employees. If the first part of the Commissioner's

order indicates as to how these persons or doctors were not treated by the assessee as regular employees for want of benefits like provident fund, retirement benefit, etc., then, merely because they are required to spend certain fixed time at the hospital, treating fixed number of patients at the hospital, attend them as out patients and Indoor patients does not mean that a employer-employee relationship can be culled out or inferred. We do not see how Mr Gupta can fault such conclusions by relying upon decisions which have been rendered in cases of doctors having a fixed pay and tenure. In that case, before us, there is no dispute. Even the assessee accepts the position that they are the employees of the assessee trust.

- 38) However, in cases of other doctors the contract would have to be read as a whole. It would have to be read in the backdrop of the relationship and which was of engagement for certain purpose and time. The skill of the doctors and their expertise were the foundation on which an invitation was extended to them to become part of the assessee which is a public charitable trust and rendering medical service. If well known doctors and in specified fields are invited to join such hospitals for a fee or honorarium and there are certain terms drawn so as to understand the relationship, then, in every case such terms and the attendant circumstances would have to be seen and in their entirety before arriving at a conclusion that there exists a employeremployee relationship. The Tribunal found that the Commissioner was in error. We also agree with the Tribunal because in the Commissioner's order in relation to these two doctors the findings are little curious. The commissioner referred to the tests in paragraph 9 of the order at running page 62 and at internal page 14 in paragraph 10 the Commissioner concluded that doctors drawing fixed remuneration are full time employees. However, in relation to the second category of doctors drawing fixed plus variable pay with written contracts the terms and conditions of Dr Zirpe and Dr Phadke have been referred and the Tribunal concluded that neither of the doctors was entitled to provident fund or any terminal benefits. Both were free to carry on their private practice at their

own clinic or outside Hospitals but beyond the Hospital timings. Both doctors treated their private patients from the hospital premises. All of which could be seen as indicators that they were not employees but independent professionals (see paragraph 14). However, they were found to be sharing a overwhelming number of attributes of employees. In relation to that the contract seems to have been bifurcated or split up or read in bits and pieces by the Commissioner. The Leave Rules were held to be applicable in case of Dr Phadke and there were fixed timing and fixed remuneration. Now, it is inconceivable that merely because for a certain period of time or required number of hours the doctors have to be at Ruby Hall Clinic means they will not be entitled to visit any other hospital or attend patients at it necessarily. The anxiety appears is not to inconvenience the patients visiting and seeking treatment at the Ruby Hall Clinic. If specialized team of Doctors, Experts and Experienced in the field are part of the Assessee's Clinic, then, their availability at the clinic has to be ensured. Now, the trend is to provide all facilities under one roof so that patients are not compelled to go to several clinics or Hospitals. Hence, a diagnostic center with laboratories and clinics, consultation rooms, rooms with beds for indoor treatment, critical care, treatment for kidney, liver, heart, brain, stomach ailments are facilities available at clinics and hospitals. The management, therefore, insists that such facilities, which are very costly and expensive are utilized to the optimum and the investment of time, money and infrastructure is not wasted. Hence, fixed timings and required number of hours and such stipulations are incorporated in contracts so that they are of binding nature. The Doctor or Expert Medical Practitioner is then obliged to denote his time and energy to the clinic whole heartedly. If handsome remuneration, fee is prescribed in return of readymade facilities even for professionals, then, such insistence is not necessarily to treat highly qualified professionals as servants. It is a relationship of mutual trust and confidence for the larger interest of the patient being served efficiently. From this contract or any clause therein no such conclusion could have been arrived at. We do not see how there was any express bar from working at any other hospital and if the contracts would

have been properly and carefully scrutinized. Merely because their income from the hospital is substantial does not mean that ten out of the fourteen criteria evolved by the Commissioner have been satisfied. The Assessing Officer and the Commissioner, therefore, were in complete error. We have also perused these contracts and copies of which are annexed to the paper book being part of the order of the Assessing Officer. We find that the communications which have been relied upon, namely, 25th November, 2008 and 14th May, 2009 do not contain any admission by the assessee. All that the assessee admitted is the existence of a written contract and with the above terms. Those terms have also been perused by us minutely and carefully. We do not find that any stipulations regarding working hours, academic leave or attachments would reveal that these doctors are employees of the assessee. In fact, Dr Zirpe was appointed as a Junior Consultant on three years of contract. He was paid emoluments at fixed rates for the patients seen by him in the OPD. That he would not be permitted to engage himself in any hospital or nursing home on pay or emoluments cannot be seen as an isolated term or stipulation. In case of Dr Uday Phadke, we do not find any such stipulation. In these circumstances, the only agreement between the parties being that certain private patients or fixed or specified number seen by the consultant could be admitted to the assessee hospital. That would not denote a binding relationship or a master servant arrangement. A attractive or better term to attract talented young professionals and too in a competitive world would not mean tying down the person or restricting his potential to one set up only. The arrangement must be looked in its entirety and on the touch stone of settled principles. The Tribunal was right in reversing the findings of the Assessing Officer and the Commissioner. There was a clear perversity and contradiction in the findings, particularly pointed out by us hereinabove.”

8 Thus, the Court was influenced by certain factors which were presented on record such as engagement of the doctors for a fixed term under

a contract, the fact that the Trust had no liability to pay provident fund or pension or such other post retiral benefits. It was also noted that these doctors were free to carry on their private practice in their own clinics outside the said hospital beyond the hospital time.

9 In the present case, it has been recorded that the doctors were entitled to admit, investigate and provide treatment to the patients and that the doctors would be responsible for their clinical care. The doctors were responsible for supervising the sub-ordinate staff whereas the facilities of the hospital staff, paramedical and nursing staff would be provided by the hospital along with the necessary equipment to render services to the patients. 15% of the fee collected by the doctors would be deducted by the hospital as its share and the balance 85% would be paid to the doctors after deduction of tax at source. In case of fees not being paid by patients, the same would be the liability of the concerned doctors. It was on this basis the Tribunal had come to the conclusion that the relationship between the hospital and the doctors cannot be treated as one of the employer-employee relationship. It was noted that the earnings of the doctors would be dependent upon the patients that the doctors would attract.

10 We do not find that the Tribunal has committed any error. Significant features of the contractual relationship between the doctors and the

hospital in the present case were that the hospital would provide support service where a particular patient would be treated by a doctor. The sharing was in the proportion of 15% v/s. 85% between the hospital and the doctors. Contractual tenure of these doctors was for a period of one year which would be renewable depending on the performance of the doctor to be assessed by the Medical Advisory Council of the hospital. These doctors are not entitled to benefits of leave encashment, gratuity, provident fund, superannuation benefits etc. which regular employees of the hospital are. These doctors would on their own obtain indemnity insurance. These are clear indications that the relationship was not one of employer-employee. The Tribunal has correctly applied the decision of this Court in the case of Grant Medical Foundation's case (supra) wherein the Court has laid down the propositions and principles to be applied while testing such a bilateral relationship between the hospital and the doctors.

11 The second question pertains to the revenue's contention that the Respondent - Assessee while making payment to a contractor providing maintenance and support services ought to have deducted tax at source under Section 194J of the Act instead of Section 194C under which the Assessee had made such deductions.

12 We notice that the CIT (Appeals) and the Tribunal have

concurrently held that the contractor was meant to carry out maintenance and the repair work and therefore his services could not have been categorized as providing technical services. We do not find any error in such finding. No question of law arises. All the Income Tax Appeals are dismissed.

[M.S.SANKLECHA,J.]

[AKIL KURESHI, J]