IN THE INCOME TAX APPELLATE TRIBUNAL
CHANDIGARH BENCH 'A' CHANDIGARH

BEFORE Ms.SUSHMA CHOWLA, JUDICIAL MEMBER
AND SHRI MEHAR SINGH, ACCOUNTANT MEMBER

ITA No. 731& 732/CHD/2012
A.Y. 2009-10 & 2010-11

DCIT (TDS), Chandigarh.	V	Ivy Health Life Sciences P.Ltd., H.No. 499, Sector 71, Mohali. PAN: AABCI-4594F
(Appellant)		(Respondent)

Appellant by : Shri Ashok Khanna
Respondent : S/Shri S.C.Vasudeva &
Sachin Vasudeva

Date of Hearing : 01.10.2012
Date of Pronouncement : 16.10.2012

ORDER

PER MEHAR SINGH, AM

The captioned two appeals, filed by the Revenue are directed against the order dated 30.04.2012 passed by the ld. CIT(A) u/s 250(6) of the Income-tax Act,1961 (in short 'the Act') for the financial year 2008-09 and 2009-10. As the grounds of appeal and the issues involved, in both the appeals are identical, the same are disposed of by way of single consolidated order for the sake of convenience.

2. As the grounds of appeal, raised in both these appeals are similar, the grounds of appeal as raised in ITA No. 731/Chd/2012 are reproduced hereunder as illustrative case:

i) The Ld. CIT(A), Chandigarh has erred in law in deleting the addition made by the AO on the ground that the AO was not right in concluding that there existed an

employer-employee relationship between the Hospital and the professional doctors and in treating the PR as assessee in default u/s 201(1) of the Act for short deduction of tax at source by taking the. amounts to be u/s 192 and not u/s 194J and in charging interest u/s 201(1A) of the Act, on the following grounds:-

i) The Ld. CIT(A), Chandigarh has relied upon the following case laws given by the Counsel of the assessee: -

a) DCIT vs. Yashoda Super Speciality Hospital (2010) 133 TTJ 17 (IIYD), ITAT Hyderabad Bench, 'B'

b) CIT vs. Deep Nursing Home & Children Hospital (2008) 169 Taxman 189 (Punj. & Liar)

c) ITO vs. Calcutta Medical Research Institute (200) 75 ITD 484 (Cal) in the ITAT Calcutta Bench 'E'

d) ITO vs. Apollo Hospitals International Ltd. ITA No.3363/Ahd/2008 - A.Y. 2007-08.

ii) The facts of the case laws cited by the assessee are different from the present case, as the doctors engaged in the above Hospitals were part-time consultants whereas the Doctors in the present case were full time consultants engaged by the Hospital and as per the agreements signed between the Hospital and the doctors the Doctors were exclusively meant to work for the assessee hospital and were not permitted to do their own private practice or with any other organization.

iii) The Ld. CIT(A), Chandigarh has also not appreciated the remand report submitted by the AO during the course of hearing before him in which it was established by the AO that the facts of the cases (case laws) quoted by the assessee were totally different from the case in hand, and from the terms and conditions of the written agreements between the Hospital and the doctors it stands proved that the Hospital Authorities had full control over the doctors as their working hours & working days were fixed by the employer and they were also supposed to do the other works related to the hospital activities as and when required. From this it is clear that there existed an employer-employee relationship between the hospital and doctors.

iv) That the appellant craves the leave to add, modify, amend or delete any grounds of appeal before it is finally disposed off."

3. Ld. 'DR', in the course of present appellate proceedings before the Bench stressed that the doctors are exclusively working for the hospital and there is a contract for providing of service by such doctors for a number of years. He, referred to page No.15 of the Paper Book. He was of the opinion that there

exists a relationship of employer-employee and, hence, the order passed by the AO be upheld.

4. Ld. 'AR', on the other hand, vehemently contended that perusal of the relevant agreement(s) clearly reveals that there does not exist employer-employee relationship. The doctors are just providing professional services and he, supported order passed by the CIT(Appeals). However, the ld. 'AR' filed brief synopsis for both assessment years, which is reproduced as under :

"Brief Synopsis
(on behalf of the Assessee)

Issues

1. *Whether the Assessee Company was required to deduct the tax under section 192 of the Act and not under section 194J of the Act from the payments made to the Doctors, who worked with the hospital as consultants and shared the fee received from patients.*

2. *Whether there existed any employer and employee relationship between hospital and the professional Doctors.*

3. *Whether assessee company can be declared as an assessee in default and therefore differential tax (between TDS worked out on the basis of section 192 of the Act and TDS deducted from payments made to the doctors u/s 194J of the Act) could be recovered from it along with interest under section 201 (1 A) of the Act.*

Facts

Assessee Company is running hospital under the name "Ivy Hospital" at Mohali. survey under section 133A of the Act was carried out by TDS units of the department, The assessee company engaged certain professional Doctors to provide full time services to the patients as per contract for service entered with them. The professional Doctors shared Ices received from the patients, their remuneration was not fixed and they were free to render service to the patients as they considered appropriate in terms of time or duration. The assessee company deducted tax under section 194J from the payments made to them treating the payments as professional fees. The learned Assessing Officer however, interred that there existed an employer and employee relationship between the assessee company and Doctors and held that tax ought to have been deducted under section 192 of the Act and not under section 194J of the Act. He accordingly, created a demand for differential tax and also charged interest under section 201 (1A) of the Act. His reasoning in brief was as under (Refer Page 9 of Assessment Order):-

a) The Doctors were exclusively associated with the assessee hospital.

b) The timing of attendance for Doctors was fixed from 10:30 a.m. to 1:00 p.m.from Monday to Friday.

c) The Doctors were to participate as per directions of hospital in Peripheral OPDs, Promotional camps. Lectures and Continued Medication Education (CMLs) as per the policy of the Ivy Hospital.

d) There was a minimum amount of remuneration fixed for the Doctors.

e) The hospital authorities have full control over other hospital activities except those relating to the treatment of patients.

f) From the above conditions it is clear that there existed an employer and employee relationship between the hospital and Doctors.

Order of the CIT (A)

The Learned CIT (A) allowed the appeal of the assessee for the following reasons:-(Refer Page 6 to 8 of the CIT (A) order)

1) Analysis of various agreements with the Doctors revealed following aspects:-

i. A number of doctors run e contributed to the cost of equipments installed in their departments.

ii. Most of the doctors tire available on call outside OPD hours.

iii. Doctors are given free hand to treat patients,

iv. In most of the MOUs, a condition of exclusivity is absent,

v. Doctors have agreed to share the discount offered to patients.

2) The Doctors enjoy complete professional freedom, they define working protocol, have free hand in treatment of patients and there is no control of the hospital by way of any direction to the Doctors on the treatment of patients.

3) Doctors fix their own OPD hours and are available on call in case of emergency. They are working in their professional capacity and not as employees.

4) Mere fixing hours for availability of the Doctors and not permitting them to work with other organization does not create employer-employee relationship. There is a condition in some of the agreements whereby hospital is restricted to appoint or hire alternative doctors/consultants, which condition is not found in cases where there is employer-employee relationship.

5) The Doctors are not entitled to LTC, concession in medical treatment of relatives, PF, leave encashment and retirement benefits like gratuity. The professional doctors are required to follow some defined procedure to maintain uniformity in action and some administrative discipline but this does not mean they are employees of the hospital.

6) *Assessing officer has mentioned that doctors were entitled to annual increment and there is a minimum guaranteed amount but in most of the cases there is no clause of annual increment. Moreover where minimum guarantee amount is prescribed the doctors have received over and above the minimum amount.*

7) *The entire receipt, whether minimum guarantee amount or more is taxed by the department in the hands of the Doctors as professional fee and not income from salary.*

8) *The Doctors are entitled to share profit and loss of departments or share fees received from patients.*

9) *Learned C1T(A) relied on following judgments:- (Refer Page 8-9 of the CIT(A) order)*

   i. *DC1T vs. Yashoda Super Specialty Hospital (2010) 133 TTJ 17 (Hyd)*

   ii. *C1T vs. Deep Nursing Home & Children Hospital (2008) 169 Taxman 189 (Punj & Har)*

   iii. *ITO vs. Calcutta Medical Research Institute (200) 75 ITD 484 (Cal)*

   iv. *ITO vs. Apollo Hospitals International Ltd. 1TA No. 3363/Ahd/2008; Asstt. Year 2007-08.*

Issue raised by the department

The department has challenged the order of the Learned C1T(A) primarily for the following reasons:-

   i. *The Doctors were exclusively meant to work for the assessee hospital. They were not permitted to do their own private practice or work with any other organization.*

   ii. *The hospital authorities had full control over the Doctors as their working hours and working days were fixed by the employer.*

   iii. *They were also supposed to do other work related to hospital activities.*

   iv. *Therefore there existed an employer-employee relationship.*

Our Submissions in support of order of Ld. CIT(A) are as under:-

1) *For an employer-employee relationship to exist following ingredients must be satisfied :-*

   i. *A servant does the work for the master and not for himself.*

   ii. *The servant acts according to the liking of the master and is subject to the master's control and supervision.*

iii. The servant is restricted in delegating the work to another.

iv. The master provides tools and equipments to the employee to work with.

v. A master not only tells his servant what to do but also tells how to do it.

vi. A master has the superior choice for control and direction of the servant. The servant represents master's will in ultimate result of the work and also in the details.

vii. The indicia of contract of the service are:-

a) Master's power of selection of the servant

b) The payment of wages or other remunerations

c) Master's right to control the method of doing the work

d) Master's right of suspension or dismissal of the employee

e) It is the master's right to terminate the employment, to take disciplinary action, to describe the conditions of the service and the nature of the duties performed by the employee.

f) Master's right to issue directions to the employee about the manner and method of the work and

g) It is his right to determine the source from which wages or salary is paid.

2) The Doctors have entered into "Contract for Service" and not "Contract of Service". The "contract for service" implies a contract whereby one party undertakes to render services to. or for another in the performance, for which he is not subject to detailed direction and control but exercises professional or technical skill and uses his own knowledge on the subject. On the other hand "contract of service" implies relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance.

3) Various agreements with the doctors would reveal that:

a) Doctors are not subject to control about mode and manner of performance of professional duties.

b) A doctor may work part time with a hospital or devote his entire time for a particular hospital. This requirement does not make him an employee of the hospital if he is not subject to such other conditions applicable to employees which have been detailed above.

c) They have free hand to treat the patients. The Company did not have any control over their professional judgement or performance. They have no service conditions like employees. The doctors were required to register themselves with the State Medical Council for working as consultant in the hospital.

d) The total remuneration payable to doctors was not a fixed amount. It varied

with the number of patients treated by him/her.

e) They are sharing fees as well as discounts allowed to the patients.

f) The source of payments to Doctors is not at the discretion of the hospital but it is fixed as per agreement, being the share out of the revenue received from patients and in some cases share of profits from the share in respect of unit/department being looked after by the doctor.

g) In some cases doctors provided equipment and or shared investment in a particular unit under their charge (Refer agreement with Dr. Raka Kaushal, Dr. Avinash Srivastava. Dr. Jalin Sarin and Dr. Vinod Kumar)

4) The receipt from the hospital has been assessed as under the head "Income from Business and Profession" in the hands of the Doctors and not as "income from salary.

5) A note explaining employer-employee relationship and the judgments in support of the principals laid down thereon is enclosed as Annexure A.

6) The consultation agreement (being the Memorandum of Understanding of Doctors or agreement with the Doctors) was for a temporary period and it did not provide for continuity of service. The relationship was that of a customer and independent contractor acting as temporary consultant. The other work required to be performed by the doctors \\as only in connection with promotion of the nature of their work. This aspect also does not bring them in the category of an employee. The consultant is not entitled to participate in any welfare benefit plan and programme maintained by the hospital for other employees.

7) The Doctors were never under employment of the hospital and therefore any consultation fees received could not lake character of salary.

8) Mere holding of an office does not create a relationship of employer-employee. In the present case relationship between Doctors and the hospital is essentially that of a professional consultant and a client.

*9) Where Doctors have filed the return of income, declared the receipts from the hospital under the head "income from business and profession" and assessments * having been completed, no further tax can be recovered from the hospital as it is not possible to adjust the differential lax against any tax demand of the Doctors whose assessments are final. Once receipt from hospital is offered for tax and assessed, the deductor has no further liability.*

10) For explaining employer-employee relationship we rely on the following authorities:-

i. C1T vs. Laxmipathi Singania (1973) 92 ITR 598 (Allahabad)

ii. Pvarelal Adisherlal vs. CIT (1996) 40 ITR 17

iii. CIT v Manmohan Das 59 11'R 699 (SC)

iv. Laxmi Narain Rangpal 25 ITR 449 (SC) Advance Law Luxcon A gist of the aforesaid judgements is enclosed as Annexure 'A'

1I) For the proposition that once assessments of deductee are completed, tax cannot be recovered from the deductor and he cannot be declared the assessee in default, we rely on the following authorities:-

i. *CIT vs. New Indian Assurance Co. Ltd. (1983) 140 ITR 818 (MP)*

ii. *CIT vs. Indraprasta Medical Corpn. Ltd. (2009) 33 SOT 261 (Del)*

iii. *Jagran Prakashan Ltd. vs. DCIT TDS (2012) 345 ITR 288 (Allahabad)*

iv. *Vodafone SR Ltd.\DCIT TDS (201 1) 135 TTJ 365 Mum*

12) For the proposition that once the tax due had been paid by the deductee the tax could not be recovered once again from the assessee (deductor) we rely on: Hindustan Coca Cola Beverage P. Ltd. v. CIT [2007] 293 ITR 0226 (SC)

13) For the proposition that the liability of deducting tax at source is in the nature of a vicarious liability, which presupposes existence of primary liability. Interest nder section 201(1 A) read with section 201(1) can only be levied when a person is declared an assessee-in-default we rely on: CIT vs. Eli Lily & Co India Pvt. Ltd. (2009) 312 1TR 225 (SC).

14) For the proposition that where no employer-employee relationship existed. TDS is required to be deducted under section 194J, we rely on the following authorities:

i. *DC1T vs. Yashoda Super Specialty Hospital (2010) 133 TTJ 17 (Hyd),*

ii. *CIT vs. Deep Nursing Home & Children Hospital (2008) 169 Taxman 189(Punj &Har)*

iii) *1TO vs. Calcutta Medical Research Institute (200) 15 ITD 484 (Cal)*

iv) *ITO vs. Apollo Hospitals International Ltd. ITA No. 3363/Ahd/2008; Asstt. Year 2007-08.*

15)The decision of 1TAT Hyderabad Bench in the case of Deputy Commissioner of Income-tax, Circle-15(2), Hyderabad v.Wockhardt Hospitals Ltd. [2012] 24 taxmann.com 190 (Hyd.), in which employer-employee relationship was inferred ,will not be applicable in the present case because in that case:

i. *Appointment order issued to the doctors showed that a fixed monthly amount was paid by the assessee as remuneration.*

ii. *The monthly payment was not related to the number of patients treated by them or the amount charged to the assessee.*

iii. *The doctors were governed by the service rules of the assessee. Their leave entitlement was also in accordance with the assessee's rules. The doctors were under probation period.*

iv) *That assessee had discretion to terminate the appointment.*

v. *It was specifically mentioned in the appointment order that it was a*

contract for employment and the doctors are liable for retirement on attaining the age of 58 years.

vi. *During the period of employment, either side will be able to terminate the employment by giving two months' notice in writing or by payment of two months' salary in lieu of such notice to each other.*

vii. *The real intention of the parties, apparent from the appointment letter issued to the doctors was to have an employer and employee relationship between them and it was not a case of appointment of consultants.*

Annexure 'A'

A contract for service and a contract of service

In the case of a contract for service, the master can order or require only what is to be done, while in the case of contract of service he can not only order or require what is to be done but also how itself it shall be done [see, Dharangadhra Chemicals Works Ltd. Vs. State of Saurashtra, AIR l^c)57 SC 264. 267; Collins Vs. Hertfordshire County Council, (1947) KB 598,615).

There is a well-recognised distinction between a 'contract of service' and a 'contract for services'. A 'contract for services' implies a contract whereby one party undertakes to render services, e.g., professional or technical services, to or for another in the performance of which lie is not subject to detailed direction and control but exercise professional or technical skill and uses his own knowledge and discretion. A 'contract of service' implies relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance [Indian Medical Association Vs. V.P. Shantha, (1995) 6 SCC 651, 673 = (1996) 86 Comp Cas 806, 829 (SC)].

Case Laws

Commissioner of Income-tax v. Lakshmipati Singhania\1973| 92 ITR 598-(AlI)

Ordinarily, in the case of a master and servant, the servant works under the control of the master. The master can tell the servant what to do and how to do. Generally, a servant is not only a person who receives instructions from his master, but is also subject to the master's right to control the manner in which he carries out those instructions.

Piyare La! Adishnar Lai v.Commissioner of Income-tax\1960| 40 ***ITR*** *11-(SC)*

It was pointed out in Cassidy v. Ministry of Health (1) that in the case of contract of service " a man is employed as part of the business, and his work is done as an integral part of the business whereas under a contract for services the contractor is not integrated into the business but is only accessory to it ". In certain cases it has been laid down that the indicia of a contract of service are (a) of the master's power of selection of the servant; (b) the payment of wages or other remunerations ; (c) the master's right to control the method of doing the work ; and (ci) the master's right of suspension or dismissal.

CIT Vs. Manmohan Das, (1966) 59 ITR 699, 703 (SC)|

The fact that a person may hold an office and that he should receive a remuneration by virtue of that office does not necessarily bring about a relationship of master and servant between him and the person who pays him the remuneration or the relationship of an employer and an employee, it all depends upon the contract under which the individual who receives the remuneration is employed. In employment, there are certain basic concepts:-

i) A servant does the work for the master and not for himself;

ii) *The servant acts according to the liking of the master and is subject to the master's control and supervision.*

iii) *The servant works for remuneration which may be paid in a lump sum or on commission basis, or partly in one and partly in the other irrespective of profits in the work;*

iv) *The servant is restricted in delegating the work to another; and The person for whom the work is done provides the tool and equipment.*

4. *Lakshminarayan Ram Gopal and Son Ltd. v.Government of Hyderabad\1954\ 25 ITR 449-(SC)*

The distinction between a servant and an agent is thus indicated in Powell's Law of Agency, at page 16

" (a) Generally a master can tell his servant what to do and how-to do it.

(b) Generally a principal cannot tell his agent how to carry out his instructions.

(c) A servant is under more complete control than an agent, "and also at page 20 :-

" (a) Generally, a servant is a person who not only receives instructions from his master but is subject to his master's right to control the manner in which he carries out those instructions. An agent receives his principal's instructions but is generally free to carryout those instructions according to his own discretion.

(b) Generally, a servant, qua servant, has no authority to make contracts on behalf of his master. Generally, the purpose of employing an agent is to authorize him to make contracts on behalf of his principal.

(c) Generally, an agent is paid b)' commission upon effecting the result which he has been instructed by his principal to achieve. Gene-rally, a servant is paid by wages or salary. "

The statement of the law contained in Halsbury's Laws of Eng-land-Hailsham Edition-Vol. 22, page 1 13, Para. I 92 may be referred to in this connection:-

" The difference between the relations of master and servant and of principal and agent may be said to be this : a principal has the right to direct what work the agent has to do : but a master has (he further right to direct how the work is to be done. "

The position is further clarified in Halsbury's Laws of England-Hailsham Edition-Vol. 1, at page 193. Art. 345, where the positions of an agent, a servant and independent contractor are thus distinguished:-

"An agent is to be distinguished on the one hand from a servant and on the other from an independent contractor. A servant acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given him in the course of his work ; an independent contractor, on the other hand, is entirely independent of any control or interference and merely undertakes to produce a specified result, employing his own means to produce that result. An agent, though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal. An agent as such is not a servant, but a servant is generally for some purposes his master's implied agent, the extent of the agency depending upon the duties or position of the servant. "

5. We have heard the rival submissions, facts of the case and the relevant records. The brief facts of the case are that the appellant company is running a hospital, known as Ivy Hospital at Mohali. The Department conducted a TDS inspection u/s 133A of the Act, at the business premises of the assessee

appellant on 28.09.2011. During the course of such inspection and assessment proceedings u/s 201(1)/201(1A) of the Act, it was noticed by the ACIT (TDS) that the hospital is running different OPDs, apart from indoor patients' treatment. The procedure of treating patients in OPD is that when a patient comes for the treatment in Hospital's OPD, he deposits a consultation fee for the particular Medical Department in which he wants to consult, at the cash; counter of the hospital and he is given a receipt for it and then he consults the Doctor to whom he wants to consult. The concerned Doctor prescribes the treatment on the hospital's letter pad. If the patient is to be admitted in the hospital for indoor treatment, then he is admitted under his treatment. The working days and hours of the doctors working in OPD of the hospital, are fixed and as per the contract between these doctors and the hospital they are not allowed to do their own practice or work with another hospital during the period for which they are engaged attended the hospital on call. However, during the course of TDS inspection, it was noticed that the assessee deductor was deducting the tax at source of the both types of doctors u/s 194J as professional charges, whereas the payments made to doctors who are regularly attached with hospital, are required to be treated as salary and tax is also required to be deducted u/s 192 of the Act. The AO was of the view that payments made to doctors were regularly attached with the hospital, were required to be treated as salary and taxes were required to be deducted u/s 192 of the Act. Consequently, AO issued a show cause notice to treat the 'Person Responsible' (hereinafter

referred to as 'PR') as assessee in default u/s 201(1) of the Act for short deduction of tax at source from the payments made to the consultant doctors and charged interest u/s 201(1A) of the Act. On appreciation of the written submissions filed by the appellant before the AO, it was concluded by him that there existed employer-employee relationship in the hospital. Consequently, the AO concluded the issue as "*During the financial year 2008-09, the assessee had deducted tax of Rs.11,67,399.40 u/s 194J of the Act, whereas the tax of Rs.27,98,169.69 u/s 192 of the Act, was required to be conducted. Therefore, the assessee is liable to pay a difference of Rs.16,30,770/- as tax of Rs.7,40,121/- u/s 201(1A) of the Act. As per calculation enclosed as Annexure-1 to this order. Accordingly, total payable tax demand comes to Rs.23,70,891/- for the assessment year 2009-10.*"

6. Similarly, for the assessment year 2010-11, the AO worked out the total payable tax demand at Rs.75,60,672/- (difference net tax deducted at Rs.62,50,560/- and interest of Rs.12,50,112/- u/s 201(1A) of the Act.

7. Ld CIT(Appeals), on appreciation of the factual matrix of the Act and case laws cited by the appellant, adjudicated the issue in favour of the assessee appellant, as per following finding :

> *"5. I have considered the submission filed by the Ld. Counsels. I have also gone through the MOUs between the appellant company and professional doctors. The various clauses of the MOUs need to be examined in the light of the criteria laid down by the Courts to determine whether the doctors attached to the appellant hospital are employees of the hospital. The test which is uniformly applied in order to determine whether a particular relationship amounts to employer-employee relationship is the existence of a right of control in respect of the manner in which work is to be done*

by the person employed. The nature and extent of control which is requisite to establish the relationship of employee and employer varies from business to business."

8. A bare perusal of the case law, relied upon by the appellant and submissions made in the synopsis reveals that there does not exist employer-employee relationship between the assessee appellant and the persons providing professional services. On consideration of the agreement in its entirety vis-à-vis the case law relied upon by the assessee appellant, it is evident that it is not a case of employer-employee relationship between the assessee appellant and the doctors. Therefore, having regard to the detailed analysis and findings of the CIT(Appeals) on the issue in question, it cannot be said that findings of the ld CIT(Appeals) suffer from any infirmity. In view of this, findings of the CIT(Appeals) are upheld.

9. In the result, appeal of the revenue is dismissed.

10. The above findings are applicable in both the appeals of the revenue (ITA No. 731 & 732/Chd/2012). Accordingly, both the appeals of the revenue are dismissed.

Order pronounced in the Open Court on 16th Oct.,2012.

Sd/- Sd/-

(SUSHMA CHOWLA)
JUDICIAL MEMBER

(MEHAR SINGH)
ACCOUNTANT MEMBER

Dated: 16th Oct.,2012.
'Poonam'
Copy to:

The Appellant, The Respondent, The CIT(A), The CIT,DR

Assistant Registrar, ITAT
Chandigarh