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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL No.140 of 2013

The Commissioner of Income Tax (TDS),Pune } **Appellant**

Vs

Grant Medical Foundation (RUBY Hall Clinic) }**Respondent.**

Mr Vimal Gupta, Senior Counsel a/with Mr Shyam Walve i/by Ms Padma Divakar for the Appellant.

Mr Shashank Bajpai a/with Mr Rajesh H. Mirchandani for the Respondent.

CORAM : S.C. DHARMADHIKARI &
SUNIL P. DESHMUKH, JJ.
DATE :22nd JANUARY, 2015.

ORAL JUDGMENT (PER S.C. DHARMADHIKARI, J)

1) This appeal under section 260A of the Income Tax Act, 1961 (for short "the IT Act") is directed against the order of the Income-tax Appellate Tribunal Pune Bench "A", Pune (hereinafter referred to as "the Tribunal") dated 20th

April, 2012. The assessment year is 2008-09.

2) The Tribunal had before it the Appeal, bearing ITA No.884/PN/2010 which was filed by the respondent assessee and ITA No.985/PN/2010 which was by the Revenue. The assessee's appeal was restricted to the confirmation by the Income Tax Commissioner Appeals Pune of deduction of tax under section 201 (1) amounting to Rs.80,81,586/- and consequent interest thereon under section 201 (1A) amounting to Rs.16,73,630/- in respect of doctors drawing fixed plus variable pay with written contract treating them as employees of the hospital. The second ground raised by the assessee was whether the Commissioner erred in partially confirming short deduction of tax (TDS) under section 201 (1) amounting to Rs.1,14,897/- and consequent interest of Rs.23489/- thereon under section 201 (1A) in respect of the laboratory fees paid. The impugned order proceeds to partly allow the assessee's appeal and release the assessee from paying the interest in terms of the direction of the Commissioner, the

Revenue's appeal has been dismissed.

3) The revenue had raised three grounds and namely that the Commissioner erred in coming to the conclusion that the payments made by the assessee hospital to the category of doctors drawing only variable pay with written agreements were not in the nature of salary and hence not liable for deduction of tax under section 192 of the IT Act. The second ground of challenge was that the Commissioner should not have arrived at a conclusion that the payments made by the assessee hospital to the category of doctors drawing only variable pay without written agreements and these were treated as not in the nature of salary, hence not liable for deduction of tax under section 192 of the IT Act. The last ground was that the payment made by the Hospital towards annual maintenance contract on plant and machinery were not in the nature of fees for rendering technical services and, therefore, the tax deductible at source on these payments were covered under section 194C and not under Section 194J of the IT Act.

4) In this appeal, we are only concerned with the set of doctors who are drawing a variable pay with written agreements or without written agreements.

5) We are of the view that the appeal arising out of the findings and conclusions of the Tribunal raises a substantial question of law. The appeal is, therefore, admitted on the following two substantial questions of law:

> "(a) Whether on the facts and in the circumstances of the case and in law, the Tribunal is justified in setting aside the order passed against the assessee under section 201 and 201 (1A) of the Income-tax Act?
>
> (b) Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct in holding that there existed no relationship of employer and employee between the assessee and Consultant doctors employed in the hospital?"

6) With the consent of the learned counsel appearing for both sides, we dispose of this appeal finally by the present order.

7) The brief facts necessary for answering the substantial questions of law are that the respondent

assessee is a public charitable trust. It is administering and managing a hospital in the city of Pune known as Ruby Hall Clinic. The assessee made deduction of tax at source under section 194J of the I.T.Act at 10% on the remuneration paid to the doctors employed in the hospital drawing only variable pay with written contract, doctors drawing only variable pay without written contract and doctors drawing fixed plus variable pay with written contract by treating the same as fee for professional services. The assessing officer passed an order on 29th June, 2009 on scrutiny and verification of the contracts, the terms and conditions thereof that the payments to these doctors were in the nature of salary, the tax should have been deducted under section 192 of the IT Act. The Assessing Officer, therefore, held that the Assessee is in default for short deduction of tax on this count and liability for short deduction along with interest under section 201 (1A) of the IT Act was worked out at Rs.5,82,65,575/-.

8) Being aggrieved and dissatisfied with this order

the assessee preferred an appeal before the Commissioner of the Income-tax (Appeals)/ First Appellate Authority. The Commissioner passed an order on 15th March, 2010 partly allowing the appeal of the assessee. The Commissioner held that in respect of doctors employed in the hospital drawing only variable pay with the written contract, it cannot be said that they were employees of the hospital and the remuneration received by them was of the nature of salary. In respect of doctors drawing only variable pay without written contract, the Commissioner held that in the absence of attributes of an employee doctors of this description were not employees of the hospital. In respect of doctors drawing fixed plus variable pay with written contract, the Commissioner held that the doctors under this category satisfied ten out of the fourteen criteria that has been applied by the courts to determine whether a person was an employee of another.

9) It is in these circumstances that the cross appeals were preferred before the Tribunal and the Tribunal

by the impugned order allowed the assessee's appeal partly and dismissed that of the Revenue.

10) It is aggrieved by such an order that this appeal is filed.

11) Mr Vimal Gupta, learned Senior Counsel appearing on behalf of the Revenue in support of this appeal would submit that the entire foundation on which the Tribunal proceeded is erroneous in law. Inviting our attention to Sections 16 and 17 of the I.T. Act together with Section 192 thereof, Mr Gupta would submit that the term "salary" has been defined in the I.T. Act in inclusive manner. That term does not necessarily postulate existence of an employer employee or master servant relationship. That also includes fees and which have been paid for services namely professional. In that regard he invites our attention to Section 17 (1) (iv) of the I.T.Act. He, therefore, submits that the basis on which the Tribunal proceeded and equally the Commissioner is erroneous in law. The obligation to deduct the tax at source arises not only in terms of such a relationship but otherwise as well. In that regard, Mr

Gupta sought to draw difference between the services which are performed and rendered by Judges of the Hon'ble Supreme Court and the High Courts. Even they are paid salaries and in terms of the constitutional provisions and under the parliamentary Statute the payments made to the Judges were held to be taxable under the head “salary”. In that regard, reliance is placed upon the judgment of the Hon'ble Supreme Court in the case of **Justice Devki Nandan Agarwal Vs. Union of India and Anr** reported in **237 ITR 872**.

12) Mr Gupta complained that the Tribunal has not discussed any of these facts or issues in detail. The Tribunal has merely relied upon some co-ordinate Bench decisions. However, the parity or similarity in facts and circumstances emerging from the record of both appeals in which decisions have been rendered by the co-ordinate Bench and the present appeal has not been established. The Tribunal lost sight of the fact that in a recent judgment rendered by the Jaipur Bench of the Income Tax Tribunal in the case of

Escorts Heart Institute & Research Centre Ltd v. Deputy Commissioner of Income-tax (TDS), Jaipur reported in [2014] 147 ITD 41/42 taxmann.com 200 (Jaipur – Trib) on a difference of opinion between the Members, the Tribunal considers all the orders and earlier views rendered by it. That decision also refers to some decisions of other High Courts. In these circumstances, Mr Gupta would submit that the Assessing officer was right in the conclusion that he reached. The A.O. has categorized the doctors and has found that the assessee went to the extent of urging that there is no employer-employee relationship when doctors were paid fixed remuneration. The assessee then accepted the mistake and agreed to make good the short deduction.

13) In relation to the doctors drawing fixed plus variable pay with written contract the assessing officer referred to the contracts and the terms and conditions of two doctors, one working as Director of Neuro Trauma Unit. The terms and conditions reveal that this doctor was required to spend fixed amount of time in the hospital. He

was to perform teaching duties and guide post graduate students and observers for training. He was also to be at the premises for the fixed hours. The Assessing Officer, therefore, concluded that the working hours of the consultants are fixed. They are remunerated on monthly basis. There is a clause in the agreement which binds them and regarding prescribed number of private patients to be admitted. There is a clause about applicability of hospital rules. There is a clause prohibiting an outer limit on medical facilities. The clause of confidentiality, rendering the decision of the Hospital management in case of any dispute final and reviewing of performance periodically would reveal that this category of doctors receive salary and therefore, would be governed by the provisions of Section 192 of the IT Act.

14) In the third category of doctors as well the Assessing Officer found from the explanation given by the Controller of Accounts of the Assessee in writing that Dr Sumit Basu who was appointed as a Consultant Radiation

Oncologist, was bound by a term namely minimum income of Rs.10000/- per month in the form of professional fee / referral fee inclusive of OPD and IPD visits and consultation. The Assessing Officer concluded that he is a full time employee of the hospital. The Assessee exercised strict control over the doctors and hence in relation to them as well the Assessee is in default.

15) With regard to the last category of doctors the questions posed to the assessee were not answered satisfactorily. In these circumstances, though the assertion was that there was no employer-employee relationship that could not be proved by the assessee.

16) The Commissioner and the Tribunal does not discuss all these aspects but merely follow some co-ordinate Bench decisions. In these circumstances, if this Court is not inclined to allow the Revenue's appeal in its entirety, it should be allowed by directing a remand of the case to the Tribunal for a fresh decision in terms of the above facts and law.

17) Mr Bajpai, learned counsel appearing on behalf of the assessee would submit that there is no merit in any of the contentions of Shri Gupta. He submits that the findings of fact which are rendered concurrently by the Commissioner and the Tribunal cannot be termed as perverse. They are consistent with the factual materials placed on record. The findings of fact cannot be interfered with unless they are so vitiated or found to be palpably erroneous and on the face of the record. In other words, the findings of fact would bind this Court. They would have to be demonstrated to be perverse or vitiated by any error of law apparent on the face of the record. Such is not the situation inasmuch as the Commissioner and the Tribunal referred to all categories of doctors and professionals. If a reputed hospital in the city of Pune invites certain professionals for their expertise, experience and skill in the profession and requests them to be associated with the hospital, then, their engagement cannot be seen as a master servant or employer-employee relationship. The

Tribunal has found that the categories of doctors dealt with are not the employees of the hospital. Such doctors are free to carry on their private practice either in the hospital premises or elsewhere. There is no prohibition or bar when they being associated with the other hospitals. There is also no restriction on the nature of the work that they perform and carry out in the hospital. The hospital does not in that sense exercise a disciplinary control. The hospital executes a contract with them and which is capable of being terminated by either parties. The contractual stipulations, therefore, have to be read as a whole and together to arrive at a conclusion as to whether it denotes a master servant or employer-employee relationship. Precisely that has been done in the given facts by the Tribunal and the Commissioner. Both have referred to the relevant and germane tests and the decisions in the field. They have also adverted to the rival contentions. They have found that the fixed pay doctors can easily fit into the relation so envisaged by the legal provisions. It is erroneous to assume

that the test of a master servant or employer-employee relationship cannot be invoked and applied. The moment the Assessing Officer called upon the assessee to deduct the sums from the amounts payable to the categories of doctors who were working either on a written contract or without but drawing a fixed and/or only variable pay indicates that he had in mind nothing but employer-employee or master and servant relationship. That test has not been satisfied as held by the Tribunal. In the circumstances, any decisions on which reliance is placed by the Revenue are of no assistance. They are rendered in the cases of those doctors to whom a fixed amount was paid per month. They were also entitled to several other facilities which an employee would be receiving and entitled to. For all these reasons, he submits that the appeal be dismissed.

18) Then reliance is placed by Mr Bajpai on the decisions which have been rendered by the High Court of Gujarat in the case of **Commissioner of Income-tax Vs. Apollo Hospitals International Ltd.** He also relies upon

several decisions and rendered by Tribunals. They are inter alia, **Assistant Commissioner of Income-tax Vs Usha Mullapudi Cardiac Centre** reported in **[2014] 33 ITR (T) 72** (Hyderabad-Trib) and **Deputy Commissioner of Income-tax Vs. Yasoda Super Speciality Hospital** reported in **(2011) 44 SOT 87** (ITAT Hyderabad) and a decision which has also been rendered by the High Court and in the case of the **CIT vs. Yashoda Super Specialty Hospital** (2014) **365 ITR 356** (AP).

19) For the principle that the law makes a distinction between a contract of service and contract for service, reliance is placed by the counsel on Indian **Medical Association Vs. V.P. Shanta** reported in **AIR 1996 SC 550.**

20) With the assistance of the counsel appearing for the parties, we have perused the appeal paper book together and all the orders which are part thereof. The Income-tax Officer (TDS) 1 Pune had before him the issue, namely, the verification of certain discrepancies in deduction of tax at source under various provisions of the IT Act. He issued a

show cause notice on 29th December, 2008 in response to which Shri Sohrab Mehta, Controller of Accounts, appeared before him from time to time, filed replies and raised various contentions. The Assessing Officer referred to Section 192 and Section 17 of the IT Act and then the judgment of the High Court of Punjab and Haryana in the case of **CIT Vs. Dr (Mrs) Usha Verma (2002) 120 Taxman, 738** and a decision of the Hon'ble Supreme Court in the case of **Gestetner Duplicators Pvt Ltd Vs CIT (117 ITR 1)** and firstly concluded that the doctors drawing fixed remuneration are nothing but employees and they cannot be but held to be servants or employees only. Therefore, the short deduction and which has been admitted in their case must be made good. We are not concerned with this category of doctors as the conceded position records.

21) We are concerned herewith doctors drawing fixed plus variable pay with written contract. They are categorized at paragraph 3B(2). In relation to them the Assessing Officer concluded that the Trust is exercising

strict control over these doctors' timings, do or don'ts, number of private patients to be admitted, teaching the post graduate students etc., which reveals the degree of supervision. That is held to be absolute. If there is control only then the work of these doctors can be reviewed. Therefore, this contract was determined by the Assessing Officer as one of service. The existence of employer-employee relationship was held to be proved. Therefore, the assessee should have deducted tax at source from payments to them at the rate applicable.

22) In arriving at this conclusion, he relied on the letters dated 25th November, 2008 and 14th May, 2009, wherein the assessee accepted that payments to doctors drawing fixed plus variable remuneration are in the nature of salary.

23) In relation to the doctors drawing only variable pay with written contract categorized as 3B (3) the terms and conditions of the contract with two doctors, Dr Sumit Basu and Dr Manoj Durairaj, have been referred. The

Assessing Officer concluded that Dr Sumit Basu is a full time employee of the hospital. The hospital exercises control over him and various clauses and the terms in the contract have been referred to. It was concluded that there is no difference between the doctors drawing fixed plus variable remuneration and doctors drawing variable pay only. In this category as well, the findings are rendered by the Assessing Officer against the assessee treating it to be in default.

24) In relation to the fourth and last category of doctors drawing variable pay without written contract the questions in the questionnaire that have been referred and the answers thereto imply a admission stated to have been given by Mr Pervez Grant, Managing Trustee of the assessee. From this control and supervision was inferred. Even if there is no written contract, the Assessing Officer concluded that the relationship is that of employer and employee and the assessee is in default.

25) It is aggrieved by such findings that the assessee approached the Commissioner and the First Appellate Authority had before it all the grounds. They have been extensively referred together with submissions and findings of the A.O. The First Appellate Authority carefully considered the facts, the detailed order of the Assessing Officer, the oral and written arguments and then referred to the relevant tests including emerging from a famous decision of the Hon'ble Supreme Court in the case of **Dhrangadhra Chemicals Works Ltd Vs. State of Saurashtra** reported in **AIR 1957 264.**

26) The First Appellate Authority from paragraph 9 onwards dealt with category of doctors and summarized by the Assessing Officer. From paragraph 13 the First Appellate Authority dealt with the doctors drawing fixed plus variable pay with written contracts and concluded that out of the fourteen tests, the answers which have been given by the assessee and based on the records, would reveal that two doctors whose contracts were scrutinized and verified by

the assessing officer were not entitled to provident fund or any terminal benefit. Both were free to carry on their private practice outside the hospital and both the 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. However, despite the above position, the first appellate authority concluded that they shared a lot of attributes of employees, their appointments were in response to their applications, both were receiving a fixed remuneration, fixed hours of work and which were regular and substantial, application of leave rules, period of the contract and one of the doctor being expressly barred from working with any other hospital. In the circumstances, he agreed with the assessing officer as regards this category of doctors.

27) With regard to doctors drawing only variable pay with written contract their cases were dealt with from paragraph 16 and the first appellate authority concluded that the Assessing Officer is not right in holding that these

categories of doctors and whose cases were noted by the A.O. are employees of the hospital nor were they receiving a remuneration which could be termed as salary.

28) With regard to the last category of doctors drawing only variable pay without any written contract, the first appellate authority agreed with the assessee and concluded that even they are not employees of the hospital.

29) However, there was a finding against the assessee on the point of interest and deduction of tax from annual maintenance contract, TDS on laboratory fee paid.

30) The Tribunal had before it the appeal of the assessee and the Revenue and it noted the rival contentions after referring to the facts from paragraphs 4 to 8. After noting the rival contentions and the relevant case law, the Tribunal concluded that the common legal sense reveals that the expression "professional fee" means payment of service rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or profession of accountancy or technical nature. If there is no

employer-employee relationship, as none of the doctors are entitled to regular benefits but discharging only professional services, the Tribunal relied upon its co-ordinate Bench decision and nothing contrary being brought to its notice, concluded that the ratio therein would squarely apply. The Tribunal termed the categories of doctors with the contracts but drawing fixed remuneration and variable pay or drawing only variable pay as visiting doctors. They are treated on par with independent professionals rendering medical services. In these circumstances, the Tribunal did not uphold the findings of the Commissioner and in relation to the set of doctors who were drawing fixed remuneration plus variable pay and confirmed his findings in category of doctors with variable pay with written contracts and without written contracts.

31) In the recent decision which has been delivered by the Hon'ble Supreme Court in **Employees State Insurance Corporation cum Medical Officers Association Vs. Employees State Insurance Corporation and Anr, AIR**

2014 Supreme Court, 1259, in the context of question whether medical doctors discharging functions of medical officers treating patients in Employees Insurance Corporation dispensary /hospital are workmen within the meaning of Section 2 (s) of the Industrial Disputes Act, 1947, the Court held as under:

> *"We are of the view that a medical professional treating patients and diagnosing diseases cannot be held to be a "workmen" within the meaning of Section 2(s) of the ID Act. Doctors' profession is a noble profession and is mainly dedicated to serve the society, which demands professionalism and accountability. Distinction between occupation and profession is of paramount importance. An occupation is a principal activity related to job, work or calling that earns regular wages for a person and a profession, on the other hand, requires extensive training, study and mastery of the subject, whether it is teaching students, providing legal advice or treating patients or diagnosing diseases. Persons performing such functions cannot be seen as a workman within the meaning of Section 2(s) of the ID Act. We are of the view that the principle laid down by this Court in A. Sundarambal's case (supra) and in Muir Mills's case (supra) squarely applies to such professionals. That being the factual and legal position, we find no reasons to interfere with the judgment of the High Court. The SLP lacks merit and is dismissed accordingly."*

This decision is relevant only for the purpose of noting as to how doctors' role is perceived and it is considered as a noble profession mainly dedicated to serve the society which demands professionalism and accountability. A distinction between occupation and profession and which is of paramount importance has been noted.

32) In the case of **Indian Medical Association Vs. V.P. Shantha and Ors** reported in **AIR 1996 Supreme Court, 550** what was adjudicated by the Court is why doctors and medical professionals were brought within the purview of the Consumer Protection Act, 1986 and in relation to the services rendered by them. The argument was that the Consumer Protection Act defines the term "service" in Section 2 (1) (o) of the Consumer Protection Act, 1986. A doctor patient relationship is of mutual trust and confidence. A doctor cannot be said to be a servant of the patient. Neither the patient can be termed as his master. This peculiar relationship would, therefore, enable the association to contend that the parliament never intended

to bring such professionals and doctors who work for the welfare and well being of the patients by treating them as servants of anybody.

33) In fact, the constitutional validity of the Act and in the backdrop of this peculiar provision was the issue before the Hon'ble Supreme Court.

34) Going by the peculiar definition and the consequences which would follow if acts of negligence and attributable to doctors and medical professionals are not brought within the purview of the Act that the Hon'ble Supreme Court upheld its validity and negatived the challenge. In doing that the Hon'ble Supreme Court referred to the well settled tests which could enable a Court to distinguish between a contract of service (a master servant relationship) and contract for service being services rendered as a professional. In that context, paragraphs 41 and 42 of the decision read as under :

> *"41. Shri Salve has urged that the relationship between a medical practitioner and the patient is of trust and confidence and, therefore, it is*

in the nature of a contract of personal service and the service rendered by the medical practitioner to the patient is not `service' under Section 2(1)(o) of the Act. This contention of Shri Salve ignores the well recognised distinction between a `contract of service' and a `contract for services'. [See : Halsbury's Laws of England, 4th Edn., Vol. 16, para 501; Dharangadhara Chemical Works Ltd v. State of Saurashtra, 1957 SCR 152 at p. 157]. 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 he is not subject to detailed direction and control but exercises professional or technical skill and uses his own knowledge and discretion. [See : Oxford Companion to Law, P. 1134]. 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. [See : Stroud's Judicial Dictionary, 5th Edn., P. 540; Simmons v. Heath Laundry Co. (1910) 1 K.B. 543; and Dharangadhara Chemical Works (supra) at p. 159]. We entertain no doubt that Parliamentary draftsman was aware of this well accepted distinction between "contract of service" and "contract for services" and has deliberately chosen the expression `contract of service' instead of the expression `contract for services', in the exclusionary part of the definition of `service' in Section 2(1)(o). The reason being that an employer cannot be

regarded as a consumer in respect of the services rendered by his employee in pursuance of a contract of employment. By affixing the adjective `personal' to the word "service" the nature of the contracts which are excluded is not altered. The said adjective only emphasizes that what is sought to be excluded is personal service only. The expression "contract of personal service" in the exclusionary part of Section 2(1)(o) must, therefore, be construed as excluding the services rendered by an employee to his employer under the contract of personal service from the ambit of the expression "service".

42.It is no doubt true that the relationship between a medical practitioner and a patient carries within it certain degree of mutual confidence and trust and, therefore, the services rendered by the medical practitioner can be regarded as services of personal nature but since there is no relationship of master and servant between the doctor and the patient the contract between the medical practitioner and his patient cannot be treated as a contract of personal service but is a contract for services and the service rendered by the medical practitioner to his patient under such a contract is not covered by the exclusionary part of the definition of `service' contained in Section 2(1)(o) of the Act."

35) We are mindful of the fact that these observations must be treated as confined to the interpretation of the provisions of a distinct legislation. That legislation was perceived and noted as taking care of the interest of consumers and of varied categories. It is in relation to bringing services and of all categories rendered by professionals for a fee that the Hon'ble Supreme Court negatived the challenge.

36) However, we are in agreement with Mr Bajpai that the foundation or basis on which the Revenue and the Assessing Officer proceeded was whether the categories of doctors and which were before the Assessing Officer could be seen and termed as an employee or servant of the assessee. About the category of doctors and who draw fixed pay without any other benefit but like an ordinary employee entitled to medical and provident fund or retiremental benefits, there is no dispute.

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, retiremental 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 employer-employee 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, lever, 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 ready-made 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.

39) In relation to other doctors where the remuneration was variable and there was a written contract or no written contract the Commissioner and the Tribunal did not commit any error at all. Both have referred extensively to the materials on record. We are not in agreement with Mr Gupta that the Tribunal's order is in any way incomplete or sketchy or cryptic. The settled principles

and rendered in co-ordinate Bench decisions have been referred only to emphasize the tests which have been evolved from time to time. It is only in the light of such tests and their applicability to individual cases that matters of this nature must be decided. This approach of the Tribunal did not require it to render elaborate or lengthy findings and when it agreed with the Commissioner. We do not find even in the case of Dr Sumit Basu the Commissioner or the Tribunal committed any error. Merely because of his stature he was ensured and guaranteed a fixed monthly payment. That would not make him an employee of the hospital. This cannot be seen as a stand alone term. There are other terms and conditions based on which the entire relationship of a consultant or professional and visiting the assessee's hospital had been determined. Once again, no general rule can be laid down. Nowadays, Private Medical Care has become imperative. Public Hospitals cannot cater to the increasing population. Hence, Private Hospitals are established and continue to be formed

and set up day by day. The quality of care, service, attention, on account of the financial capacity, therein has forced people of ordinary means also to visit them. Since specialists are in demand because of the life style diseases that consultants and doctors prefer these hospitals. Sometimes they hop from one medical centre or clinic to another throughout the day. Retaining them for fixed days and specified hours requires offering them friendly terms and conditions. In such circumstances, we do not think that the Tribunal committed any error of law apparent on the face of the record in confirming the findings rendered by the first Appellate Authority. The findings of fact from paragraph 16 onwards in the Commissioner's order on ground no.2 and from paragraph 20 onwards on ground no.3 do not suffer from any serious legal infirmity. The appreciation and appraisal of the factual materials is not such as would enable us to interfere in our limited jurisdiction. Our further appellate jurisdiction is limited.

40) As a result of the above discussion, we need not

advert to the entire case law in the field. Suffice it to note that the Revenue relied on the judgments which were rendered in cases where the terms and conditions denoting employee and employer relationship included a fixed pay or monthly remuneration only. For all these reasons we are of the opinion that the questions of law termed as substantial and framed as above would have to be answered against the Revenue and in favour of the Assessee.

41) Consequently, the appeal fails and is dismissed with no order as to costs.

42) The only argument that is seriously canvassed by Mr Gupta is that confirmation of the findings rendered by the Tribunal would mean concurrence with its conclusion that professionals can never be appointed as employees or there can never be master servant relationship. This is apprehended by the Revenue because several eminent professionals are rendering full time services as medical officers, medical practitioners and teachers at Civil and Government hospitals. They are also

part of hospitals, privately managed or managed in public private partnership (PPP). Our findings or the Tribunal's order being upheld does not mean that we have laid down any absolute rule or principle of general application. In such cases, depending upon the attending facts and circumstances, the terms and conditions of the engagement, a finding can be arrived at that there is a master servant or an employer-employee relationship. It can be arrived at in cases where it is found by the Income-Tax Authorities that though there is not a regular process of recruitment and appointment but the contract would indicate that the doctor/professional was appointed as an employee and on regular basis. All such and other courses in law are always open. With this additional clarification, we dismiss this appeal.

(SUNIL P. DESHMUKH, J.) **(S.C. DHARMADHIKARI,J)**