

आयकर अपीलिय अधिकरण, मुंबई "एफ़" खंडपीठ में
Income-tax Appellate Tribunal -"F" Bench Mumbai
सर्वश्री राजेन्द्र, लेखा सदस्य एवं सी. एन. प्रसाद, न्यायिक सदस्य
Before S/Sh.Rajendra, Accountant Member and C. N. Prasad, Judicial Member
आयकर अपील सं./I.T.A./3193 & 3194/Mum/2015,
(निर्धारण वर्ष /Assessment Year: 2006-07 & 2007-08)

Dr. Batra's Positive Health Clinic Pvt.Ltd. 307/308, Arcadia, 3rd Floor, Nariman Point, Mumbai-400 021. PAN:AABCD 3857 G	Vs.	ITO-(TDS)(OSD), Range-1(3) 8th Floor, Room No.811, Smt. K.G. Mittal Ayurvedic Hospital Building, Charni Road (W)Mumbai-400 002.
(अपीलार्थी /Appellant)		(प्रत्यर्थी / Respondent)

राजस्व की ओर से / **Revenue by:** Smt. Pooja Swaroop
अपीलार्थी की ओर से / **Assessee by:** S/ Shri Vijay Mehta & Govind Jhaveri
सुनवाई की तारीख / **Date of Hearing:** 04/08/2017
घोषणा की तारीख / **Date of Pronouncement:** 20/10/2017

लेखा सदस्य, राजेन्द्र के अनुसार/ PER Rajendra A.M.-

Challenging the orders dtd. 02/03/2015 of the CIT (A)-59, Mumbai the assessee has filed appeals for the above mentioned two Assessment Years (AY.s). As the issues raised in both the appeals are common, so, we are adjudicating them together for the sake of convenience. Effective ground of appeal is treating the Assessee In Default (A-I-D) u/s. 201(1) and 201 (1A) of the Act.

ITA/3193/Mum/2015, AY.2006-07:

2. On verification of profit and loss account of the assessee, the AO observed that assessee had debited expenses on account of professional fees paid to permanent doctors at Rs.6.32 crore. During the course of survey, carried out at the business premises of the assessee, it was noticed that more than 300 doctors, who were termed as permanent doctors of the company, were working in their branches, that the doctor had been employed in the company vide individual agreement, that the doctors were not allowed to attend even their relatives unless they were registered as patient with the company, that if those doctors could not complete the tenure were indulged in the activities is mentioned in the article 15 (b) and 15 (c) of the agreement they had to pay company Rs.4.00 lakhs as liquidated damages on demand, that the doctors were paid fixed sum every month, that the assessee had deducted tax at source at the rate of 5.61% treating the doctors as professional instead of the employees who were liable for tax directed at source at normal rates is applicable for salary. The AO referred to various provisions of the agreement and after analysing the same held that the relationship between the assessee-company and the doctors was purely that of employer and employee, that the professional fees paid to them in terms of the said relationship was salary which attracted the

provisions of section 192 of the Act. Finally, he treated the assessee as assessee in default within the meaning of section 201(1) and 201(1A) of the Act. He raised the demand of Rs.47.47 lakhs for the year under consideration.

3. Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA) and made elaborate submissions before him after considering submission of the assessee and the order of the AO, he held that permanent doctors were paid monthly remuneration/retainership, that they were entitled to leave and were in service for long duration and were in control of the hospital, that the permanent doctors duty hours were specified by the schedule drawn by the hospital, that the doctors were barred to take any other employment, that such arrangements gave rise to employer-employee relationship, that the assessee had argued that it was not extending facilities like PF, gratuity, bonus reimbursement of travel expenses and hence the contract was not employment, that such benefits were categorised as perquisite under the Act, that the payments were individual components and were governed by separate statute making the employees to fulfill statutory conditions, that there were many types of employment's without the above benefits to the employees such as temporary employees, that gratuity was payable to employees in the government only after completing a minimum period, that lack of gratuity payment would not take back the character of contract as employee, that the organisation control and the terms and conditions of job assigned to the doctors proved that there was relation of employer-employee between the assessee and the doctors, that the assessee had argued that doctors were free to decide the line of treatment, that the said argument was no way conclusive of the fact that there was no employer employee relationship. She further held that the cases relied upon by the assessee were distinguishable on facts. Finally, the FAA held that AO was justified in holding that tax was deductible under the provisions of section 192 of the Act.

With regard to the alternate argument raised by the assessee about payment of taxes by the doctors, in light of the judgment of Hindustan Coca-Cola Beverages Private Ltd (293 ITR 226), the FAA held that assessee should produce the necessary evidence before the AO to substantiate its claim. Accordingly the AO was directed to examine the necessary evidence to recompute/delete the demand raised under section 201 (1). It was further held that interest levied under section 201 (1A) would remain till the date of filing of returns by the deductee.

4. During the course of hearing before us, the Authorised Representative (AR) stated that the doctors were not the employees of the assessee, that they were governed by the independent agreements, that there was no relationship of employer employee between the assessee and

the doctors, that the agreements entered into by the assessee and the doctors was contract for service, that the provisions of section 194J of the Act were applicable, that the assessee had no control over the doctors for making diagnosis of the illness as well as the treatment of the patients, that the doctors engaged by the assessee were independent professionals and would work under the contract for service and not contract of service, that in subsequent AY.s or quarters the AO had not treated the assessee as A-I-D. He relied upon the cases of Grant Medical Foundation (Ruby Hall Clinic) of the Hon'ble Bombay High Court (375 ITR 49), Yashoda Super Speciality Hospital (365 ITR 356) and Sir Hurkisondas Nurrotumdas Hospital and Research Centre (ITA/2681/Mum/ 2015-AY.2008-09, dated 26/ 8/2016).

The DR supported the order of the FAA and contended that the tenure and the pay of the doctors was fixed, that they were receiving salary from the assessee, that the Hon'ble High Court, in the case of Grant Medical Foundation-Ruby Hall Clinic (supra) had held that where it was found by the income-tax authorities that though there was not a regular process of recruitment and appointment the contract would indicate that the doctor/professional was appointed as an employee on a regular basis, that the perusal of the contract agreement between the assessee and one of the doctors (*SN.1 of paper book no.1*) revealed that the doctor could not have an independent practice along with working with the assessee nor could he/she could take multiple employments at other clinics not only during the tenure with it but till one year after the tenure has terminated, that the doctors were engaged on fixed tenure by it, that the doctors were engaged on fixed pay by it, that the doctors were entitled to certain incentives and benefits by the assessee, that the doctors were totally bound by the working hours as specified by it, that the doctors were totally bound by the employment with it only and had no discretion or independence with respect to the patients, that the AO had, during the assessment proceedings, perused the contract agreements made by the assessee with the doctors and thereafter had listed out all the aforementioned observations, that express written word in any contract agreement would not belie the essence of the employer-employee relationship which was starkly apparent in the contract agreements submitted by the assessee before all the authorities, that as per the guidelines laid down in the judgment of the Grant Medical Foundation-Ruby Hall Clinic (supra), the case of the assessee would fall squarely in case no. (i) i.e. case of doctors with fixed pay and tenure and that there was no dispute in that regard, that the amount paid to the doctors constituted salaries, that the doctors were not free to carry on their private practice at their own clinic or outside hospitals or beyond the hospital timings, that they could not treat their private

patients from the hospitals premises, that they were employees and not independent professionals.

In his rejoinder, the AR stated that till the AY.2005-06 the doctors working under the assessee as employees, that the company being a corporate entity was not entitled to treat the patients, that accordingly certain modifications were made in the agreements. Referring to page 3 of the paper book, he stated that the doctors were paid fixed remuneration as well as variables, that clause 5 of the agreement clearly showed that there was no intention of the assessee to employ any doctor, that the AO was not authorised to re-write a private agreement, that the whole exercise did not result in bringing additional income to tax. He referred to the returns of income filed by the doctors and stated that in their income and expenditure account they had not shown salary income, that they were never assessed as salaried employees by the department, that except for the AY.s 2006-07 and 2007-08 no adverse order i.e. order u/s.201 was passed in case of the assessee.

5. We have heard the rival submissions and perused the material before us. We find that the basic issue to be decided is as to under which section the assessee should have deducted source i.e. u/s.192 or u/s.194J of the Act. The FAA has confirmed the order of the AO holding that payment was in the nature of salary, though in the last paragraph of her order, she directed the assessee to produce the evidence regarding payment of taxes by the doctors.

We find that the issue of payment of remuneration to the doctors and rate of tax for deducting tax has been deliberated upon extensively in a series of cases by the Tribunal and various Hon'ble High Courts. There is unanimity on the principle that relationship between the employer and the employees would depend upon the terms of agreement of employment. We would like to reproduce the relevant portion of the order of the Tribunal in the case of Sir Hurkisondas Nurrotumdas Hospital and Research Centre (supra), wherein the judgment of Grant Medical Foundation (Ruby Hall Clinic) of the Hon'ble Bombay High Court (supra) dealing with the issue has been quoted extensively and same reads as under:

"The present appeal is filed by the assessee against the order of CIT (A)-21, Mumbai dated 126.02.2015 for Assessment Year (AY) 2008-2009 raising the following Grounds of appeal:

1. The order passed by the CIT(A) is illegal, bad in law, ultra vires and contrary to the provisions of law and facts of the case and without appreciating the facts of the case in their proper perspective.

2. a) The learned CIT (A) erred in confirming the action of the Assessing Officer (AO) that the appellant has failed to comply with the provisions of section 192 by deducting TDS U/S 194J on payment made to full time consultants causing short deduction of tax at source of Rs.91,829/-.

b) The appellant submits that on the facts and circumstances of the case the TDS was rightly deducted U/S 194J of the Income Tax Act.

3. The learned CIT(A) failed to appreciate that in raising tax demand U/S 201(1) in respect of tax deductible where the respective deductee have paid due amount of taxes. The appellant submits that when the deductee pays the taxes due to the Government, no tax demand U/S 201 (1) can be raised on the tax deductor.

2. The brief facts of the case are that a survey u/s 133A of the I.T. Act, 1961 was conducted in case of assessee on 30.09.2010. On verification of books of accounts and furnishing information during the course of survey and subsequent proceedings, it was revealed that the assessee-company failed to make TDS as per provisions of Chapter XVII B of the Act. During the course of survey and post survey proceedings, the assessee was asked to explain as to why the payments should not be treated as salary and paid to the doctors on which tax is deductible u/s 192 of the Act. The assessee submitted its reply that the doctor engaged by the assessee are rendering services to the Hospital as provided u/s 194J of the Act. There is no employee-employer relationship; the doctors/consultants are retainer-ship of fees for the performance of duties assigned to them. The term letter of engagements issued to them does not indicate that these consultants are employees of the Hospital and section 192 of the Act is not attracted. The contention of the assessee was not accepted by the AO and the assessee was held in default for non-deduction of tax on the payment of full time consultation u/s 192 of the Act. Aggrieved by the order of AO, the assessee filed an appeal before the CIT(A) but without any success. Further, aggrieved by the order of CIT(A), the present appeal is filed before us.

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4. We have considered the rival contentions of the parties and perused the material available on record. The AO while passing the order, observed that the assessee's Hospital engaged in visiting doctors, full time consulting doctors and residential medical officers (RMOs) and tax is being deducted at source u/s 192 of the Incometax Act to RMOs and u/s 194J on the payments to visiting doctors but the tax is deducted u/s 194J in respect of full time consultation. The AO examined the condition of the engagement of the doctors and concluded that the condition of daily attendance into devote his expertise (only to the Hospital) can only be dictated 3 with their employee-employer relationship and whole of the doctors are employee of the assessee-company and TDS has to be deducted u/s 192 of the Act. Ld. CIT(A) during the appellate proceeding, observed that the AO rightly hold that payments made to 23 doctors totalling to Rs. 38,79,074/- as remuneration/salary and not fees for profession, service or technical services. Ld. CIT(A) further observed that doctors are regular employee of the assessee and are bound by service conditions, hence, there is employee-employer relationship. Ld. CIT(A) concluded that with a view to camouflage facts, the assessee played with the words that these doctors are consultant and are given retainer-ship of the performance of duties assigned to them, infact they are employee on regular basis and there is a term and condition imposed by the employer and doctors are on the pay-role and the employee of the Hospital.

5. We have seen that neither the AO nor the CIT(A) tried to classified the term and condition of engagement of doctors vis-a-vis the employee-employer relationship. The AO and the CIT(A) has not bring on record, if the doctors are subject to the payment of Provident Fund or other retirement benefit, the AO has applied his own notion for arriving at the conclusion that there is employee-employer relationship and concluded that their existing relationship of employee-employer. The Hon'ble jurisdictional High Court in a recent decision in CIT vs. Grant Medical Foundation in ITA No. 140/2013 dated 22.01.2015 held as under:

“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 negated 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 negated 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 retirement 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, 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 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 standalone 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.

6. Now coming to the facts of the present case, neither the AO nor the ld CIT (A) gave their finding that any of the condition contained in the contract of the Doctors mandate that there was employee-employer relationship between the assessee and them, which specifically may brings the doctors in the category of employee. We respectfully following the decision of jurisdictional High Court in case of Grant Medical Foundation (supra) held that Doctors have no relationship of employee employer with the assessee's Hospital. The doctors are in fact independent professional who may be receiving fixed remuneration despite fixed hours of works which may substantially regulating their application for leave and other discipline.

With these observations, we hold that the doctors are discharging only professional services and the assessee is not liable to deduct tax u/s 192 of the Act. Thus, the appeal of assessee is allowed."

6. We find that facts of the case under consideration are similar to the facts of the above referred case relied upon by the assessee. Nothing has been brought on record to prove that there was master servant or employer employee relationship between the assessee and the doctors. The doctors are performing duties independently as professionals. Working hour restriction cannot make them employees of the assessee. Agreements entered in to between the doctors and the assessee clearly reveal that doctors were not employees of the assessee. In addition to salary they were entitled for variables. Therefore, in our opinion the FAA was not justified in upholding the order of the AO to treat the assessee as A-I-D. It was brought to our notice that the doctors had filed their returns of income and had not shown the remuneration received, by them, from the assessee under the head salary. Besides, we find that in subsequent years, the AO has accepted the claim of the assessee wherein it had deducted tax at source u/s. 194J of the Act. The assessee was not treated as A-I-D subsequently. Nothing is available on record to prove that the facts of the case under consideration were different from the facts of latter years. Therefore, in our opinion, there was no justification for passing order u/s. 201 of the Act for the year under consideration.

Considering the above and the facts and circumstances of the case, we decide effective ground of appeal in favour of the assessee.

ITA/3194/Mum/2015, AY.2007-08 :

7. Following our order for the earlier year, we allow the effective ground of appeal, filed by the assessee for this year also.

As a result, appeals filed by the assessee for both the AY.s stand allowed.

फलतः निर्धारिती द्वारा दोनों नि.व.के लिए दाखिल की गई अपीलें मंजूर की जाती हैं.

Order pronounced in the open court on 20th October, 2017.

आदेश की घोषणा खुले न्यायालय में दिनांक 20 अक्टूबर, 2017 को की गई।

Sd/-

Sd/-

(सी. एन. प्रसाद / C.N.Prasad)

(राजेन्द्र / Rajendra)

न्यायिक सदस्य / JUDICIAL MEMBER

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक/Dated : 20.10.2017.

Jv.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR "A " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ, आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.