

**IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT),
"B" BENCH, MUMBAI**

**BEFORE SHRI S.S. GODARA, JUDICIAL MEMBER
&
SHRI M.BALAGANESH, ACCOUNTANT MEMBER
ITA No. 3709/Mum/2019
(Assessment Year :2012-13)**

DCIT(TDS)-2(3) Room No.718, K.G.Mittal Ayurvedic hospital bldg. Room No.718 Charni Road Mumbai-400 002 -	Vs.	National Health Education Society 87, Veer Savarkar Road, Mahim,Mumbai-400 016
PAN/GIR No.AAATN0093Q		
(Appellant)	..	(Respondent)

Assessee by	Ms. Rutuja N. Pawar, AR
Revenue by	Ms. Kavita P. Kaushik, Sr.DR
Date of Hearing	14/10/2020
Date of Pronouncement	14/10/2020

आदेश / O R D E R

PER S.S.GODARA (J.M):

This Revenue's appeal for A.Y.2012-13 arises from Mumbai's order of Commissioner of Income Tax (Appeals)-60, in case No.CIT(A)-60/IT-10102/ACIT(TDS)-(2)2/2014-15 dated 18/03/2019, in proceedings u/s.201(1) r.w.s.(1A) of the Income Tax Act, 1961 [hereinafter referred to as Act].

Heard both the parties.

2. The Revenue's sole substantive grievance pleaded in the instant appeal seeks to challenge correctness of the CIT(A)'s action

reversing the assessment findings treating the assessee to be an assessee in default for not having deducted TDS on payments made to Hospital Based Consultants (HBCs). We find from a perusal of the case file that the Assessing Officer's corresponding order dated 28/03/2014 held that an employer-employee relationship existed between the assessee and its hospital based consultants and therefore, the payments made to the latter were in the nature of salary requiring TDS deduction u/s 192 of the Act failure of which at the former's part had made it as the assessee in default.

3. We notice that the CIT(A) findings under challenge place reliance on hon'ble jurisdictional high court's decision declining Revenue's arguments on the same issue as under:-

Ground No.1 & 2:-

1. *The Assistant Commissioner of Income-tax (TDS)-2(2) ("AO") on the facts and in the circumstances of the case and in alw, erred in holding that based on the letter appointment of Hospital Based Consultants (HBCs), 'employer-employee' relationship exists between the appellant & the HBC's and thereby further holding that TDS should have been deducted u/s. 192 & not u/s. 194J.*
2. *Without prejudice to the merits of the above, the AO has also erred in holding the appellant as assessee in default in terms of Sec. 201(1) & 201(1A) by working out short deduction u/s. 201(1) at Rs. 16,42,66,732/- and interest on short deduction u/s. 201(1A) at Rs. 1,97,12,0087/- aggregating to Rs. 18,39,78,740/- holding that appellant should have deducted tax u/s. 192 instead of 194J.*

Appellant Submission:-

*During the course of appellate proceedings, **written submissions** were filed along with Paper Book, the relevant part of which is summarized as under:- The appeal is against the order of AO to treat the amounts **paid to the consulting Doctors** as salaries thereby attracting the provisions of section 192 of the Income Tax Act 1961 as against our contention that these payment are the consulting doctors' share as per the agreements, in the fees collected from the visiting patients. The appellant has deducted tax at source on these payments @ 10% as tax payable on professional fees under the provisions of Section 194 J of the Income Tax Act.*

*This issue was raised by AO during the last 8 assessment years namely **AY 2004-05 to 2011-12**. In all these assessment years, the decisions of CIT (A) and ITAT are in our favour. Both CIT(A) and ITAT have upheld our contention that the professional **fees** paid to the Hospital Based Consultants (HBCs) fall under the ambit of Section 194 J of the Income Tax Act 1962 and hence the assessee has correctly deducted the TDS and paid the same. Since there is no demand for the short deduction of TDS, there cannot be any demand for the payment of interest under section 201 (1)/201(1 A) of the Act.*

*As suggested by you, we are enclosing the copies of ITAT orders and AO orders nullifying the demand based on ITAT orders for the 8 AYs namely AY 2004-05 to **2011-12** which are self-explanatory. We would like to summarize our contention based on the contracts for the engagement with HBCs for the professional services as under:-*

- 1. The professional fees generated from the patients bills are shared between the Hospital and the HBCs in a predetermined ratio based on the contract of engagement.*
- 2. Unlike employees, HBCs do not have Sick leave, Privilege Leave*
- 3. HBCs do not have the fixed timings of work.*
- 4. HBCs are not entitled for PF, ESIC and gratuity*
- 5. Hospital does not provide any insurance cover to HBCs. For Physicians the Insurance Cover is Rs.15 lacs and for surgeons it is Rs 25 lacs and the HBCs have to pay the insurance premium themselves and Hospital does not pay the premium.*
- 6. Certain % of professional fees is earmarked for attending medical conferences, academic work*
- 7. Some HBCs are allowed to work at other attachments as well.*

It will be thus clear that these are the contracts for service and not of service. Secondly a comparative chart showing terms and conditions of the engagement/appointment of HBCs and other employees was submitted by the AR's of the appellant on 08.03.2017 the same is referred below:-

No	Particulars	House Based Consultants	Other Employees
1.	Basis	Letter of engagement of service	Appointment letter
2.	Payment Structure	HBCs are generally on the basis of sharing fees but in some cases there is certain fixed amount also. In few cases, there is only fixed amount.	No such structure. Only fixed amount. Some employees will have variable DA.
3.	Break-up of the amount received	No such break-up	Break-up into basic, DA, HRA and other allowances
4.	Administrative control of the Hospital	No	Yes

5.	<i>Regulation of time for the services in the hospital</i>	<i>Timings and days are mentioned for the convenience of the patients. HBCs are free to come at any time to treat the patients</i>	<i>Fixed time and days of work.</i>
6.	<i>Gratuity, PF, EPF, ESIC, Bonus, Ex-gratia, LTA, Festival Advance</i>	<i>No such Benefits</i>	<i>All such benefits as per the applicable provisions of Gratuity, PF, ESIC Acts.</i>
7.	<i>Attendance</i>	<i>No muster, punching of identity card</i>	<i>Punching of identity card for all except Sr. Managers and above.</i>
8.	<i>Overtime</i>	<i>No</i>	<i>Applicable to certain categories</i>
9.	<i>Leave</i>	<i>30 days p.a.</i>	<i>Sick leave, privilege leave and casual leave</i>
10	<i>Applicability of general rules and regulations</i>	<i>Rules pertaining to code of conduct and ethics are applicable</i>	<i>Rules and regulations of the hospital are applicable.</i>
11.	<i>Prohibition from taking any other assignments</i>	<i>Senior HBCs are allowed to take up other assignments</i>	<i>Prohibition to take up other job</i>
12.	<i>Indemnity insurance taken by self</i>	<i>HBCs are required to take indemnity insurance policy and pay the premium on their own.</i>	<i>No such policy is required to be taken</i>
13.	<i>Return of income</i>	<i>HBCs are showing the income from the hospital under the head "Income from Profession"</i>	<i>Employees show the income under the head "Income from salary"</i>
14.	<i>Relationship</i>	<i>No relationship of Employee and Employer</i>	<i>Employer and Employee relationship exists.</i>
15.	<i>Nature of service</i>	<i>Contract for professional service</i>	<i>Contract of service</i>

*Note: These facts are the same as in earlier years.
From the chart above stated it is clearly seen that there is immense difference between regular employees and HBCs working in the Hospital. The HBCs are professional working at the Hospital.*

Furthermore, a Paper Book filed on 16.02.2017 comprising of orders of Assessing Officer and Hon'ble ITAT for Assessment years 2004-05 to 2011-12 wherein the ITAT has decided the issue of HBCs in the favour of the appellant. For example, the relevant paragraph for A.Y. 2009-10 is stated as under-

"7.a. Analysis of the above referred two judgment lead to the conclusion that to decide the issue of 192/194J controversy following factors should be considered

- i) Administrative control
- ii) Regulation o the time for service in the hospital
- iii) Eligibility for gratuity and cover under the provident fund scheme
- iv) Benefit of causal leave and sick leave
- v) Applicability of general service rules framed by the hospital

Besides, prohibition from taking any other assignment does both justify the inference that the payment to them id salary. One of the other important factor is filing of return by HBCs and showing the sum received by them from the hospitals it has to be seen whether they are showing the receipt from the hospital under the head salary or under the head professional income. In addition to it one of the important factors is insurance taken by the HBCs. If they are not covered by the insurance provided by the hospital and they take the indemnity insurance for themselves, it indicates that they might not be the employee of the organization. Broadly, these are the some of the basic Parameters.

8. We have compared the engagement letters issued by the HH to the HBCs and the other doctors. In the first category TDS was made as per the provisions of section 194J of the Act, whereas in the second category tax was deducted u/s. 192 of the Act We find that the HBCs were not allowed to any kind of leave, whereas the other doctors were eligible for paid leave 2.5 day per month. The junior doctors were offered "Salary" in the letters of engagement, but the HBCS were given offer to 'share professional fees' at a fix rate. In their letters word salary was not used at all. Besides, the HBCs were informed that in their cases it was mandatory for them to take indemnity Insurance to adequately cover any medico legal problem. For physicians the insurance cover to be taken was Rs. 15 Lakhs and for the surgeons it was Rs. 25 Lakhs. In case of junior doctors such was not stipulated. There was no provision for gratuity or PF in their case. (Pgs. 150 to 184 of the PB). In short, there are certain clauses in the appointment/offer letter that deal with HBCs rights in the fields of Clinic, admitting and operating, Sharing of professional fees, earmarking of % of fees for attending medical conferences/academic work and allowing them o continue attachment The AO or the FAA had not discussed these items. After considering the important parameters/guiding principles mentioned as paragraph 7.a. and the terms of agreements entered in to between the assessee and the HBCs- especially the term so sharing professional fees as well as the judgments delivered by the **Hon'ble Gujarat and AP High Courts (supra)**, we are of the opinion that payment made by the assessee to the HBCs was covered by the provisions of section 194 J of the Act and not by section 192 of the Act. Ground no. 1 is decided in favor of the assessee."

Similarly in all other orders which are enclosed in the Paper Book that relate to the ground of HBCs are decided by the Hon'ble ITAT in the favour of appellant.

The assessee has now submitted vide letter dated 23rd February, 2019, the decision of the Hon'ble Bombay High Court, dated 22.02.2019, nullifying the demand for the last 6 years, i.e. from A.Y. 2006-07 to A.Y. 2011-12. Following are the relevant excerpts from the order of the Hon'ble Bombay High Court, pertaining to the assessee's contention:

" Question (a)

"Whether on the facts and in the circumstances of the case and in law, the ITAT was correct in not treating the Hospital Based Consultants (HBCs) as employees and therefore provisions of Section 192 is not applicable?"

"As far as Question (a) is concerned, we find considerable force in the argument canvassed by Mr. Tiwari that the same is squarely covered by a Division Bench decision of this Court. We find that a Division Bench of this Court in the case of Commissioner of Income-tax (TDS Pune) (ITXA No.140 of 2013) (supra) and to which one of us was a party (S. C. Dharmadhikari, J), was considering whether the Tribunal was correct in holding that there exists no relationship of employer and employee between the assessee - Grant Medical Foundation (Ruby Hall Clinic) and the Consultant doctors employed in the hospital. After perusing the law on the subject, this Court answered the aforesaid question in favour of the assessee and against the revenue. We find that as far as Question (a) is concerned, the same has been answered against the revenue and in favour of the assessee as per the judgment delivered by this Court in the case of Commissioner of Income-tax (TDS Pune) (ITXA No.140 of 2013) (supra). In fact, when judgment was brought to the notice of Mr. Suresh Kumar, he fairly conceded that Question (a) would be covered by this decision. This being the case, in our opinion, (a) does not give rise to any substantial question of law.""

Decision:

1 have gone through the assessment order, the grounds of appeal and the appellant's submission on the grounds of appeal. There are all together 7 grounds but the main ground is with regard to the treatment given by the AO to hospital based consultant (HBCs). The assessing officer has treated the relationship between the assessee and the hospital based consultant Doctors is purely that of employer and employee¹ and remuneration paid to them in terms of the said relationship is 'salary' which attracted the provision of section 192 of the IT Act 1961, against which the assessee is in appeal.

The appellant submitted the copies of the Hon'ble ITAT orders for Assessment years 2004-05 to 2011-12 in his own case wherein the ITAT has decided the issue of HBCs in the favour of the appellant. Further, the appellant submitted vide letter dated 23rd February, 2019, the decision of the Hon'ble Bombay High Court, dated 22.02.2019, nullifying the demand for the last 6 years, i.e. from A.Y. 2006-07 to A.Y. 2011-12. Since the Jurisdictional High Court has given an order in his favour in his own case for the previous years, respectfully following that order, the decision of the AO is annulled and the appeal is decided in the favour of appellant. In sum, the appeal is **allowed**.

4. There is no distinctions on facts or law pointed out at the Revenue's behest during the course of hearing. We thus adopt judicial consistency in the given facts and circumstances to affirm the CIT(A) action under challenge deleting the section 201(1) r.w.s. 1(A) TDS demand in issue.
5. This Revenue's appeal is dismissed.

Order pronounced in the open court on this 14/10 /2020

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER
Mumbai; Dated 14/10/2020
Thirumalesh, *sr.ps*

Sd/-
(S.S.GODARA)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai