IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

BEFORE SRI MAHAVIR SINGH, JM AND SRI MANOJ KUMAR AGGARWAL, AM

ITA No. 5045/Mum/2013
(A.Y:2007-08)

ITA No. 5046/Mum/2013
(A.Y:2008-09)

ITA No. 5047/Mum/2013
(A.Y:2009-10)

ITA No. 5048/Mum/2013
(A.Y:2010-11)

ITA No. 430/Mum/2014
(A.Y:2011-12)

ITA No. 4427/Mum/2015
(A.Y:2012-13)

Income Tax Officer (OSD) (TDS) – 1(3) Mumbai **DY. CIT (TDS) 1(1), Mumbai**	Vs.	**Dr. Balabhai Nanavati Hospital** Nanavati Hospital Bldg., SV Road, Vile Parle(W), Mumbai-400 056 **PAN No.AAATD0094K**
Appellant	..	**Respondent**

Revenue by	..	Shri Purushottam Kumar, DR
Assessee by	..	Dr. K Shivaram, & Rahul K. Hakani, ARs

Date of hearing	..	**06-09-2017**
Date of pronouncement	..	**08-09-2017**

O R D E R

MHAVIR SINGH, JM:

These six appeals by the Assessee are arising out of the different orders of CIT(A)-14 Mumbai, in appeal Nos. CIT(A)-14/IT.994 to 996/ TDS Rg. 1/11-12 and CIT(A)-14/IT.1030 TDS Rg.1/11-12, CIT(A)-

14/DCIT(TDS)-1(1)/IT/2013-14, CIT(A)/Mumbai-59/IT-549/DCIT(TDS)-1(1)/13-14, dated 30-03-2013, 26-11-2013, 21-05-2015. The Assessment orders under section 201 & 201(1A) of the Income Tax Act, 1961 (hereinafter 'the Act') for A.Ys 2007-08 to 2010-11, 2011-12 & 2012-13 were passed vide different dates 22-03-2011, 30-03-2013, 24-03-2014.

2. The first common issue in all these four appeals of Revenue in ITA No. 5045,5046,5047 & 5048/Mum/2013, is as regards to the order of CIT(A) holding that the provisions of 194C are applicable, as against the order of AO applying provisions of section 194J of the Act on the maintenance of specialized machines in hospitals for skilled professionals/ technical engineers and thereby charging short deduction of TDS under section 201(1) of the Act and consequential interest under section 201(1A) of the Act. For this Revenue in all the four years have raised identical worded grounds and for the sake of clarity, we are reproducing the ground as raised in AY 2007-08 in ITA No. 5045/Mum/2013 and will decide the issue on the basis of available facts in this year. The relevant grounds read as under: -

> *"1. On the facts and circurnstances of the case and in law, the Id. CIT (A) erred by holding that provisions of sec. 194C are applicable and not the provisions of section 194J as held by the AO without appreciating the fact that the maintenance of specialized machines in hospitals call for skilled professional/technical engineers and cannot be held as single contractual charge and thereby erred in deleting the short deduction u/s. 201(l) and interest u/s. 201(1A).*
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> *2. On the facts and circumstances of the case and in law, the Id. CIT (A) erred by holding that the nature of services received by the assessee by*

paying maintenance charges for Hi-tech equipments in hospitals which requires professionals of highly qualified specialized technical competency and falls within the purview of section .194C and not u/s. 194J of the I.T. Act and thereby erred in deleting the short deduction u/s. 201(1) and interest u/s. 201(IA)."

3. Brief facts are that the assessee is a registered charitable trust with the charity Commissioner, Mumbai under the Bombay Public Trust Act, 1950. The trust is also registered u/s 12A as a charitable Organization with the DIT (E), Mumbai. A TDS Survey u/s 133A of the Act was carried out on the assessee's premises on 04-10-2010 and according to survey team there were discrepancies in relation to deduction of TDS. Thereby the assessee was issued show cause notice u/s 201 and 201(1A) of the Act. According to AO, the assessee has made payment to various vendors in respect of hospital equipments towards annual maintenance contracts and according to him, these payments were in the nature of fee for technical services falling u/s 194J of the Act and thereby TDS should have been deducted under this provision at the rate of 10% instead of TDS deducted by the assessee u/s 194C of the Act at the rate of 1%. According to AO, the assessee has made short deduction of TDS and he recomputed the short deduction in view of provisions of section 194J of the Act at Rs. 2,57,981/- and also charged interest u/s 201(1A) of the Act at Rs. 1,21,251/-. Aggrieved, assessee preferred the appeal before CIT(A), who deleted the charging of short deduction by observing in Para 4.6 to 4.8 as under: -

"4.6 I have considered the above submissions of the appellant as well as the facts of the case. I have also considered the observations of the AO as per the impugned orders passed by him. The details of

expenses under this head show that they are towards Annual Maintenance Contracts (AMC) of medical equipments/ machines etc. The AM are contracts for periodical inspection and routine maintenance work along-with sup of spare parts and in my view do not constitute 'fees for technical services. In my viwe such repairs are in the nature of normal repairs as mentioned in Q.29 of Circular No.7 dated 8.8.1995 issued by CBOT which is as under (on which the AO has also relk upon)

> *"Question 29: Whether a maintenance contract including supply of spare would be covered under Section 194C or 194J of the AC)?*

Answer: Routine, normal maintenance contracts which includes supply o spares will be covered tinder Section 194C. However, where technical services are rendered, the provision of Section 1 94J will apply in regard to the deduction at source."

4.7 The appellants claim is also supported by the decision of ITAT, Ahmedabad in the case of Gujarat State Electricity Corporation Ltd. vs. ITO, 3 SOT 468 (Ahd), wherein it was held that the payments made by the assessee company to Gujarat Electricity Board for entire operation and maintenance 6r'Power plant under a comprehensive contract could not be treated as payment 'fees for professional services as contemplated in section 194J but were covered by section 194C of the Act". Further, in another decision dated 30.09.2011 in ITA Nos. 3059 to 3061 & 3081/Ahd./2009 of Ahmedabad

Tribunal in the case of Nuclear Power Corporation Ltd, it has been held that repairs and annual maintenance of computers do not involve services of technical nature so as to be assessable as "fees for technical services" u/s 9(1)(vii) of the Act and hence the assessee was required to deduct TDS under Section 194C of the Act and not under Section 194J of the Act. The Hon'ble ITAT has in this regard followed the decision of Hon'ble Madras High Court in the case of Skycell Communications Ltd. 251 ITR 53 (where it was held that the installation and operation of sophisticated equipments with a view to earn income by allowing customers to avail of the benefit of the user of such equipment does not result in the provision of technical service to the customer for a fee). The decision in the case of Ultra Entertainment Solutions Ltd (supra) by the AO is not applicable to the issue at hand because in that case, the election was regarding the nature of payments made by the assessee to another person V who was engaged by the assessee is to carry out all operations connected with the selling of online lottery tickets on behalf of the assessee.

4.8 In view of above discussion therefore and respectfully following the above two decisions of Hon'ble Ahmedabad Tribunal. I hold that the expenditure on account of Annual Maintenance Contracts (AMC) of medical equipments/ machines etc. is not in the nature of professional or technical services as construed under the provisions of Section 194J of the Act and hence, provisions of

> *Section 194J of the Act are not applicable. The appellant has correctly deducted TDS under section 194C of the Act in respect of payments of Annual Maintenance Contracts (AMC) of medical equipments/ machines etc. Accordingly, the demands of tax under section 201(1) and of interest under section 201(1A) raised by the AO in respect of the assessment years under consideration are hereby deleted."*

Aggrieved, Revenue came in second appeal before Tribunal.

4. We have heard the rival contentions and gone through the facts and circumstances of the case. The facts are that the assessee hospital has been making annual maintenance contract in respect to equipments like X-ray Machines, HD dialysis machines, CT Scanner, Olympus Endoscopes, MRI Scanner, Axiomo arties FC and other medical equipments and it is making payments as per regular AMC's and at the time of payment it is deducting TDS as per the provisions of section 194C of the Act. The learned counsel for the assessee before us stated that in earlier years Revenue has never raised this issue and accepted the position of the assessee. He stated that the practice of AMC and TDS on such payments is established fact that the assessee is deducting TDS u/s 194C of the Act and this position is duly recognized by the Revenue for passed several years. After going through the AMC, filed by assessee in its paper book, we noticed that it is evident that AMC is necessary to keep medical equipments and other hospital equipments in good working condition and this process is normally carried out by skilled mechanics and not any qualified technician. We find that though these AMCs assessee is carry out routine normal maintenance which is covered by the provisions of section 195C and not as if technical services covered u/s 194J of the Act. This issue is covered by the decision of co-ordinate

Bench of Mumbai Tribunal in the case of DCIT (TDS)-1(1) vs. Asian Heart Institute & Research Centre Pvt. Ltd. in ITA No. 7051 & 7177/Mum/2012 for the AY 2008-09 and others following the decision of Ahmedabad bench decision in the case of Nuclear Power Corporation Ltd and holding that the annual maintenance charges are payment in the nature of contractual payments and will fall under section 194 C of the Act. The Tribunal considered this issue as under :-

> *"18. With respect to the payments made towards annual maintenance contract, we find that the CIT(A) upheld the stand of the assessee following the CBDT Circular No.715 dated 8/8/1995 as also the decision of the Ahmedabad Bench of the Tribunal in the case of Nuclear Power Corporation Ltd., ITA NO.3059 to 3061/Ahd/2009 dated 30/9/2011. The following discussion in the order of CIT(A) is worthy of notice:-*
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> > *"4.4 I have considered the above submissions of the appellant as well as the facts of the case. I have also considered the observations of the AO as per the impugned order passed by him. The details of expenses under this head show that they are towards Annual Maintenance Contracts (AMC) of medical equipments machines etc. The AMCs are contracts for periodical inspection and routine maintenance work along-with supply of spare parts and in my view do not constitute 'fees for technical services'. Also, in my view, the repairs of other gadgets such ACs etc are also in the nature of normal repairs as mentioned in Q.29 of Circular*

NO.715 dated 8.8.1995 issued by CBDT which is as under:

"Question 29: Whether a maintenance contract including supply of spares would be covered under Section 194C or 194J of the Act?

Answer: Routine) normal maintenance contracts which includes supply of spares will be covered under Section 194C. However) where technical services are rendered) the provision of Section 194J will apply in regard to tax deduction at source."

4.5 The appellant's claim is also supported by the decision of IT AT, Ahmedabad in the case of Gujarat State Electricity Corporation Ltd. vs. ITO, 3 SOT 468 (Ahd) wherein it was held that "the payments made by the assessee company to Gujarat Electricity Board for entire operation and maintenance of power plant under a comprehensive contract could not be treated as payment of fees for professional services as contemplated in section 194J but were covered by section 194C of the Act. Further, in the recent decision dated 30.09.2011 in ITA Nos. 3059 to 3061 & 3081/Ahd. 2009 of Ahmedabad Tribunal in the case of Nuclear Power Corporation Ltd., it has been held that repairs and annual maintenance of computers do not involve services of technical nature so as to be assessable as "fees for technical services"

u/s 9(1)(vii) of the Act and hence the assessee was required to deduct TDS under Section 194C of the Act and not under Section 194J of the Act. The Hon'b1e ITAT has in this regard followed the decision of Hon'b1e Madras High Court in the case of Skycell Communications Ltd, 251 ITR 53 (where it was held that the installation and operation of sophisticated equipments with a view to earn income by allowing customers to avail of the benefit of the user of such equipment does not result in the provision of technical service to the customer for a fee). The decision in the case of Ultra Entertainment Solutions Ltd. (supra) cited by the AO is not applicable to the issue at hand because in that case, the question was regarding the nature of payments made by the assessee to another person 'P' who was engaged by the assessee is to carry out all operations connected with the selling of online lottery tickets on behalf of the assessee.

4.6 In view of above discussion therefore and respectfully following the above two decisions of Hon'ble Ahmedabad Tribunal, I hold that the expenditure on account of Annual Maintenance Contracts (AMC) of medical equipments machines etc. is not in the nature of professional or technical services as construed under the provisions of Section 194J of the Act and hence, provisions of

> *Section 194J of the Act are not applicable. The appellant has correctly deducted TDS under section 194C of the Act in respect of payments on Annual Maintenance Contracts (AMC) of medical equipments machines etc. Accordingly, the demands of tax under section 201(1) and of interest under section 201(1A) raised by the AO in respect of the assessment years under consideration are hereby deleted."*
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> *19. We do not find any infirmity in the order of CIT (A) and therefore we hold that tax has been rightly deducted by assessee on the annual maintenance charges u/s 194C of the Act. Consequently, it is held that the assessee cannot be deemed to be an "assessee in default" within the meaning of section 201(1) of the Act. Consequently, no interest under section 201(1A) of the I.T. Act is leviable. Accordingly, the order of CIT(A) is affirmed on this point. "*

5. When a query was put to the learned Sr. DR, he could not point out any difference in the facts of the present case and that in the case of DCIT v Asian Heart Institute & Research Centre Pvt. Ltd (supra) despite the fact the sample copies of AMC's were filed by the assessee in its paper book.

6. In view of the above facts and circumstances, we are of the view that the expenditure on account of AMC of medical equipments etc., is not in the nature of fee for professional and technical services as construed u/s 194J of the Act and hence, not liable to deduct TDS u/s 194J of the Act. The assessee has deducted TDS u/s 194C of the Act in

regard to payments on AMC of medical equipments and machines etc. Accordingly, we find no infirmity in the order of CIT(A) on this issue and hence, the same is confirmed. This issue of revenue's appeal is dismissed. Consequently, appeals of Revenue in ITA Nos. 5046,5047,5048/Mum/2013 are dismissed being facts exactly identical on this issue.

7. The next issue in these four appeals of Revenue in ITA Nos. 5045,5046,5047,5048/Mum/2013, is as regards to the order of CIT(A) holding that the income from sale of Scraps being old equipment and machineries would not attract provisions of tax collection at sources under section 206C of the Act. For this Revenue has raised following ground No. 3 in ITA No. 5045/Mum/2013 for the AY 2007-08 : -

> *"3. In the facts and circumstances of the case and in law, the Id. CIT (A) erred by holding that income from sale of scraps being old equipment & machinery would not attract provisions of TCS as per section 206C of the Act."*

8. Briefly stated facts are that during the course of survey the AO observed that the assessee has shown income on sale of hospital equipments i.e. old equipments sold on the basis of buy back, wherein, according to AO the tax should have been collected u/s 206C of the Act being scrap sale. As the assessee failed to collect TCS the AO treated the assessee in default and charged TCS u/s 206C of the Act and held the assessee in default u/s 201 and consequently charged interest u/s 201(1A) of the Act. Aggrieved, assessee preferred the appeal before CIT(A) who allowed the claim of the assessee by observing in Para 5.5 as under: -

> *5.5 Since the appellant is a trust (i.e. AOP), it is not covered in the definition of 'seller' given above.*

> *Furthermore, the sale of old equipments/machinery has been made by the appellant, either to its own employees or else under a buyback arrangement to its venders against the purchase of new machinery. Hence such sale of old equipments cannot be categorized as 'scrap sale' as per above explanation. Therefore, the appellant's case does not fall within the purview of section 206C of the Act. Hence, in my view the action of the AO in holding the appellant to be in default for non-collection of tax at source is not justified. I hold accordingly and delete the demand of tax and interest raised by the AO under section 201(1)/201(1A) of the Act.*

Aggrieved, against the order of CIT(A), Revenue came in second appeal before Tribunal.

9. We have heard the rival contentions and gone through the facts and circumstances of the case. We find from the facts of the case that the assessee is neither engaged in manufacturing or processing or industrial activity nor generate scrap rather its activities relates to medical facilities to the public. The word 'scrap' itself in ordinary parlance presupposes manufacture, processing or industrial activity. In running a medical hospital question of generation of scrap is inconceivable. Therefore provisions of s.206C of the Act, 'Prima Facie' are not applicable to the assessee. We find that the AO held that the assessee is hit by the provisions of section 206C of the Act by noting following instances.

i. *Resale second hand and used equipment by the Hospital to their employees for their personal household consumption only.*

ii. Sale/ Exchange of second hand and used equipment to the seller, under buy back agreement with replacement of new hospital / office equipment.

From the above findings of the AO it can easily be presumed that the AO is merely harbouring wrong notion that what is sold out by the assessee is scrap having zero value and such items are not usable. But, assessee is neither a trader nor a manufacturer generating or dealing in resale of scrap generated as waste material or unusable. Secondly, the assessee has sold the product under buy back and useable items i.e. hospital equipments and machinery. In view of the above, we find no infirmity in the order of CIT(A) and hence, the same is affirmed. This appeal of Revenue is dismissed. Consequently, appeals of Revenue in ITA Nos. 5046,5047,5048/Mum/2013 are dismissed being facts exactly identical on this issue.

10. The next issue in these six appeals of Revenue is as regards to the order of CIT(A) holding that there is no relationship of employer and employee of the assessee appointing its consulting Doctors and subsequently, the payments are in the nature of Honorium does not fall under the purview of 192 of the Act and the assessee has rightly deducted TDS under section 194J of the Act. For this Revenue has raised following ground No.4 in ITA No. 5045/Mum/2013 for the AY 2007-08: -

> *"4. On the facts and circumstances of the case and in law, the Id. CIT (A) erred by holding that there was no relationship of employer - employee between the assessee and its appointed consultant doctors and consequently the payments of honorarium made by the assessee to its consultant doctors does not fall within the purview of section*

192 of the LT. Act without properly appreciating the factual and legal matrix of the case as clearly brought out by the A.O in order u/s. 201(1)1201(1.4) of the Income-tax Act, 1961 and thereby erred in deleting the short deduction u/s. 201(l) and interest u/s. 201(IA).”

11. Briefly stated facts are that the assessee is a charitable trust running hospital and research centre in Mumbai. The assessee is taking services from two types of doctors (1) Resident Doctors who are as employees of the assessee Trust on salary basis (2) full time consultant doctors or Honorary consultant doctors. There is no dispute on deduction of TDS under section 192 of the Act in respect of payment made to Resident doctors. The issue in dispute is that the payment to full time consultant or Honorary consultant doctors wherein the assessee is deducted TDS under section 194J of the Act as against the view of the Revenue that the TDS is to be deducted under section 192 of the Act. Accordingly the AO passed order under section 201(1) read with section 201(1A) of the Act in regard to full time consultant doctors, who are practically employees of the assessee and AO after going through the agreement of employee, noticed that the terms of appointment of these full time consultant doctors of the hospitals are to be treated as employees. The appointment letter issued by the assessee carry sufficient directions suggesting the manner in which the consultant doctor should carry out the work assigned to him. The letters make it clear that the assessee is exercising sufficient control over the consultants as a result of which employer employee relationship is very much manifested. According to AO, there exists employee and employer relationship between full time consultant appointed as doctors and the assessee. The AO also discussed the default on account of short deduction under section 201(1) of the Act and consequently interest under section 201(1A)

of the Act. Accordingly, the AO treated the assessee in default under section 201(1) and 201(1A) of the Act and aggrieved assessee preferred the appeal before CIT(A), who after considering the submissions of the assessee, deleted the action of the AO by holding that the tax is deductible under a provisions of section 194J of the Act in case of full time consultant doctors. The CIT(A) observed in Para 6.7 as under: -

> *6.7 The appellant has cited the decision of Chandigarh ITAT in the case of IVY Health Life Sciences (P) Ltd (supra), where the facts are almost identical to the case of the appellant, in that case also, the professional doctors were paid on the basis of fees received from the patients. Their remuneration was not fixed and they were also free to render services to the patients as they considered appropriate in terms of time or duration. Such professional doctors were also not entitled to PF, ESI, LTC and any other perquisites or retirement benefits. In these circumstances therefore, it was held by Hon'ble Chandigarh ITAT that there was no employer and employee relationship between the assessee and the professional doctors. Hence the assessee had rightly deducted tax at source under section 194J from the payments made to the professional doctors The facts in the case of the appellant are rather more liberal in terms of service conditions of the so-called honorary doctors as discussed above. Hence it is quite clear that there is no employer-employee or master servant relationship between the appellant and the 'honorary doctors'. Thus, it is evident that the AO was not justified in holding the appellant to be an assessee in default. I hold accordingly. The demands of tax*

and interest raised by the AO under section 201(1)/201(1A) of the Act are hereby deleted"

Aggrieved, Revenue is in second appeal before Tribunal.

12. Before us the learned Counsel for the assessee, argued that the assessee appointed certain doctors who draw their fees based upon the patients treated by them (physiotherapist etc.) and on other times based upon time spent on the duty which is normally an 8 hourly duty. As per the understanding of these independent professional doctors with the assessee hospital, it is agreed upon by them that they would receive their professional fees when the patients pay the same or on monthly basis. These independent doctors are not prohibited from practicing on their own. They are neither entitled to any retirement benefits, nor to any provident fund, gratuity, leave encashment etc. which are available to the employees of the assessee hospital. They are not on the payroll of the assessee hospital and also no other perquisites/benefits/ provisions as applicable to employees of the hospital are applicable to them. The assessee hospital in no ways is controlling the professional activity of these doctors and therefore due to the above stated facts, the payments are subjected to withholding tax u/s 194J of the Act, as there is no employer/employee relationship exists between the assessee and the Consultants/ doctors.

13. We find that the assessee had been following this practice consistently from the past and the same has been accepted by the department in the earlier years. There is no change in the said services/engagement of such doctors during the year. We find that in the present AY the AO while passing the order decided that such full-time doctors are employees of the assessee, but failed to appreciate that these independent professional doctors enjoy complete professional freedom, they define working protocol, have free hand in treatment of

patients and there is no control of the assessee hospital by way of any direction to the doctors on the treatment of patients These professional doctors are required to follow some defined procedure and some administrative discipline, akin to that of Honorary Consultant, to maintain uniformity in action. The assessee being a hospital, it is expected to maintain its image the reputation and image and this expectation of the hospital cannot be construed as exercising control and supervision over the doctors in their professional activities and thereby cannot lead to the conclusion that an employee-employer' relationship exists. We also find that the AO has merely compared the appointment letter in case of Honorary Consultants and independent professional doctors and brought out differences to hold that the independent professional doctors are employees. In doing so, he has overlooked the similarities in the two which essentially is necessary to draw the point that both are professionals. He chose to ignore assessee's submissions on the comparison between the assessee's employees entitled to provident fund, different categories of leave, gratuity, HRA, etc. benefits which the independent doctors were not entitled to.

14. Apart from the above, we are of the opinion that the real intention of the parties in the present case is appointment of consultants and not to create employer-employee relationship and accordingly TDS is liable to be deducted u/s 194J of the Act. Another aspect in this matter is that the fact that the TDS is liable to be deducted u/s. 194J of the Act on payment to the independent professional doctors, the AO has ignored the excess of TDS amount deducted u/s. 194J of the Act in certain cases, in comparison with the TDS liability determined u/s 192 of the Act, thereby raising a demand u/s 201(1). Further, these doctors have filed their return of income and declared the receipts from the assessee hospital and have paid taxes thereon. Accordingly, interest u/s. 201(1A) is not chargeable. The learned Counsel for the assessee also relied on the decision of

Hon'ble Bombay High Court in the case of CIT (TDS) vs Grant Medical Foundation (2015) 375 ITR 49 (Bom), wherein exactly identical facts held as under: -

> *"37. In relation to other category of doctors there was a dispute. The Assessing Officer and the Commissioner concluded that though these categories of doctors had a fixed remuneration and variable pay but their terms and conditions of employment or service would be crucial and material. In relation to two doctors, namely, Dr Zirpe and Dr Phadke, the contracts were taken as sample and scrutinized minutely. Upon such a scrutiny the Tribunal noted that it cannot be said that these doctors were employees. If the first part of the Commissioner's order indicates as to how these persons or doctors were not treated by the assessee as regular employees for want of benefits like provident fund, 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.*
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> *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. Now a days, 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."*

In view of the above judgment of Hon'ble Jurisdictional High Court and the facts of the case, we confirm the orders of CIT(A) in all the six years and this common issue of Revenue's appeal in all the six years is dismissed.

15. **In the result, all these six appeals of Revenue are dismissed.**

Order pronounced in the open court on 08-09-2017.

Sd/-	Sd/-
(MANOJ KUMAR AGGARWAL)	(MAHAVIR SINGH)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dated: 08-09-2017

Sudip Sarkar /Sr.PS

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,

Assistant Registrar
ITAT, MUMBAI