

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**TAX APPEAL No. 827 of 2011****For Approval and Signature:****HONOURABLE MR.JUSTICE V. M. SAHAI
HONOURABLE MR.JUSTICE N.V. ANJARIA**

- =====
- 1 Whether Reporters of Local Papers may be allowed
to see the judgment ?
- 2 To be referred to the Reporter or not ?
- 3 Whether their Lordships wish to see the fair copy
of the judgment ?
- 4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?
- 5 Whether it is to be circulated to the civil judge
?
- =====

=====

COMMISSIONER OF INCOME TAX(TDS) - Appellant(s)
Versus
APOLLO HOSPITALS INTERNATIONAL LTD - Opponent(s)

=====

Appearance :

MRS MAUNA M BHATT for Appellant(s) : 1,
None for Opponent(s) : 1,

=====

CORAM : HONOURABLE MR.JUSTICE V. M. SAHAI**and****HONOURABLE MR.JUSTICE N.V. ANJARIA****Date : 05/07/2012****ORAL JUDGMENT**

(Per : HONOURABLE MR. JUSTICE N.V. ANJARIA)

1. The present appeal by the Revenue is directed against order dated 23.12.2010 passed by the Income Tax Appellate Tribunal, Ahmedabad Bench 'B' in Income Tax Appeal No. 3363 of 2008.

2. The appellant has raised the following question proposing it as a substantial question of law:-

"Whether the Appellate Tribunal is right in law and on facts in cancelling the order passed u/s.201(1) of Rs.24,17,674/- and interest charged u/s.201(1A) of Rs.1,03,880/- of the Income Tax Act?"

3. The facts involved in the appeal are that the premises of respondent assessee which is a hospital was subjected to a survey under section 133A of the Income Tax Act, 1961, ('the Act' for sake of brevity). The Assessing Officer found that in respect of 15 doctors who were rendering services at the assessee hospital, the tax under section 194J of the Act was being deducted by the assessee by treating the payments made to those doctors as professional fees. On the basis of the terms of agreement between the hospital and the doctors, the Assessing Officer held that there existed a relationship of employer and employee and payments made to the doctors were in the nature of 'fixed salary and guaranteed money to consultant/doctors', therefore, the provisions of section 192 of the Act would apply.

3.1 It was accordingly concluded by the Assessing Officer that in the financial year 2006-07 Rs.1,27,64,050/- was paid to those 15 doctors claiming the payment to be professional fees erroneously and in respect of that deduction of tax ought to have been made under the provisions of

section 192 of the Act. As a result, he passed order under section 201(1) and 201(1A) of the Act and raised demand of Rs.24,17,674/- and interest amount of Rs.1,03,380/- respectively.

3.2. Upon the appeal preferred by the assessee against the order of the Assessing Officer, the CIT(A) by his order dated 03.07.2008 held that the payments in question made to the doctors were professional fees covered under section 194J of the Act, to which the provisions of section 192 would not apply on the ground that the 15 doctors in question were professional consultants who could not be treated as employees of the hospital.

3.3. The Revenue approached the Appellate Tribunal by preferring an appeal which came to be dismissed, bringing the Revenue before this Court in the present appeal.

4. We heard learned Senior Standing Counsel Mr. M.R. Bhatt assisted by Mrs. Mauna Bhatt for the appellant. We had been through the facts and material on record and considered the impugned order.

5. From the facts on record it emerged that the assessee hospital had engaged 53 full-time resident-doctors who were the employees and in respect of payment to them the tax was being deducted at source under section 192 of the Act and was regularly paid. The professional tax and provident fund amounts were also deducted from their salaries. The 15 doctors in question against whom the Assessing Officer concluded that there was a shortfall of T.D.S. by virtue of non-compliance of section 192 were another set of doctors giving their services at the hospital. The facts on

record before the Tribunal further indicated that the employee-doctors were eligible for gratuity and were covered under the provident fund scheme, they were eligible for casual leaves and sick leaves and were governed by general service rules. As against that, the 15 consultant-doctors in question were not entitled to such service benefits and further they were required to take professional indemnity insurance on their own. It was on the basis of such relevant factual aspects the Appellate Commissioner took the view that payments made to them were professional fees for which the assessee had rightly deducted tax under section 194J of the Act.

5.1. In the impugned order, the Tribunal has elaborately considered the aspect whether the agreement between the assessee and 15 doctors was a contract of service or it was a contract for service. The Tribunal observed as under:

"6. ...Undisputed fact is that there are two types of Agreements. One of the covenant is stated to be in the nature of employer/employee agreement and the other is stated to be Fixed Salary & Guarantee Money to Consultants (in short FGCs) contract. Before us the terms & conditions of both the agreements were recited. Evidently there is a distinction. The distinction as pointed before us can be stream lined in short as under:

(a) In case of 'employee doctors' there is a list of allowances such as Basic, HRA, Trans. Allw. Edu. Allw. B&P Allw. Tel. Allw. Other Allw. On the other hand, in case of 'consultant doctors' there is a clause of lump-sum monthly payment. The consultant doctors, however, are not paid any such allowance.

(b) In the case of 'employee doctors' there is a clause of entitlement of leave prescribed for a specific period, however, there is no such condition mentioned in case of agreement with the 'consultant doctors'.

(c) An 'employee doctor' is entitled for Medical Benefit and Personal Accident Benefit provided by the assessee as per the policy of the hospital.

Contrary to this there is no such benefit granted to the 'Consultant Doctors'.

(d) There is a specific mention of General Service Rules & Regulation to govern the service matters, but in the agreement of FGCs they are not governed by such Rules and Regulations, rather they were confined within the terms of the agreement.

(e) For 'Employee Doctors' the employment is full-time employment and they are not entitled for any other full time employment or private practice. On the other hand consultant doctors are free to do any other job.

(f) In case of Consultant Doctors, there is a clause of fixed "Guarantee Money" per month, but alongwith this amount there is a clause of sharing of receipts with the hospital. This clause of agreement states that the arrangement is "fee for service" and the hospital is entitled to collect the amount to be shared between the two. However, there is no such clause for regularly employed doctors.

(g) The Consultant Doctors were required to take Professional Indemnity Insurance on their own.

(h) The Consultant Doctors were not employed by Service Rules and Regulations but they were expected to follow the Code of Conduct and Ethics of Doctors.

It was further observed:

"To determine whether an amount received by a person is in the nature of salary or not, it is necessary to examine over all circumstances and primarily the terms and conditions of the employment. We have already scrutinized the terms and conditions and thereupon made certain distinctions as listed hereinabove. On the basis of those distinctions, we hereby hold that the terms and conditions in respect of the impugned doctors who are under FGCs are not akin to the salaried employees. Their relationship with the hospital, thus, cannot be said to be an employer-employee relationship. For this reason the deduction of tax at source ought to have been made as per the provisions of Sec.194J of the Act."

6. Another important aspect was that the consultant doctors had filed

their individual returns of their income showing professional fees received from the assessee and on that they had paid tax. The assessing officer directed for payment of interest under section 201(1A) of the Act. On the issue of charging of interest the fact that those consultant doctors were independently assessed was of signifying relevance inasmuch as since they were paying tax, there was no loss to the Revenue. In such facts and circumstances, the Tribunal correctly concluded that charging interest was not justified.

6.1. As discussed above, the Tribunal took into account all the relevant aspects from the material on record to arrive at a conclusion that the consultant doctors were not getting salary, but the payment to them was in nature of professional fees. The contract with them by the assessee was one of contract 'for service' and 'not of service'. Therefore, tax was being rightly deducted at source under section 194J and section 192 of the Act had no application. The findings and conclusions of the Tribunal are proper. There is no error of appreciation. We are in agreement with the same. No substantial question of law arises for consideration.

7. Accordingly, this Tax Appeal is dismissed.

(V.M. SAHAI, J.)

(N.V. ANJARIA, J.)

(SN DEVU PPS)