IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH `B' NEW DELHI

BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER
AND
SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER

I.T.A.No.3454/Del/2013
Assessment Year : 2007-08

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Assessment Year : 2007-08

DCIT,	vs	Consulting Engineering Services (India) Pvt. Ltd.,
Circle-49(1),		5th Floor, Manjusha Buidling,
New Delhi.		57, Nehru Place, New Delhi.
		(PAN: DELCO6077B)
(Appellant)		(Respondent)

Appellant by: Smt. Parwinder Kaur, Sr. DR
Respondent by : Dr. Rakesh Gupta, Adv., Sh. Somil Agarwal, Adv.

O R D E R

PER CHANDRAMOHAN GARG, J.M.

These appeals have been filed by the revenue against the consolidated order of CIT(A)-XXX, New Delhi dated 5.3.2013 in Appeal No. 1782/2011-12 for FY 2007-08 and 2008-09 pertaining to AY 2007-08. The revenue has raised similarly worded grounds in both the appeals which read as under:-

"1. The Ld. CIT(A) erred on facts and in law in holding that the taxes have been correctly deducted u/s 194J of the LT. Act, even though there was employer- employee relationship between payer and payee of the sum liable for deduction at source.

2. The Ld. CIT (A) erred on facts and in law in holding that the liability of the deductor u/s 201(1) of the LT. Act cease after 4 years."

2. We have heard argument of both the sides and carefully perused the relevant material placed on record. Ld. DR elaborating the functional profile of the assessee company submitted that the assessee is engaged in providing technical and professional consultancy for engineering project. Ld. DR further submitted that on 21.1.2011, a survey was carried out by the department for verification of compliance of TDS provisions wherein it was observed that the assessee had a large number of employees who were termed as consultants and tax on their remuneration was deducted u/s 194J instead of section 192 of the Act. The AO after detailed discussion with the assessee's representative re-characterised the consultant arrangement into employer-employee relationship and held that the assessee is an assessee in default u/s 201(1)/201(1A) for deducting tax u/s 194J and not u/s 192 of the Act. Finally, the AO raised a demand of Rs.2,05,94,240 u/s 201(1)/201(1A) for both the financial years namely FY 2007-08 and 2008-09, being the difference in tax deductible u/s 192 and 194J on payments made to consultants. The assessee carried the matter to the CIT(A) challenging the re-characterisation of the arrangement between the company and consultants as employer-employee in place of consultant arrangement between the assessee entity and the said consultants. The CIT(A) granted relief for the assessee and directed the AO to delete the impugned

demand for both the FYs. Now, the aggrieved revenue is before this Tribunal in these appeals with the similarly worded grounds as reproduced hereinabove.

3. Ld. DR supported the action of the AO and submitted that the relationship between the company and these consultants of the assessee company was more of an employer employee and therefore, the remuneration paid to them was chargeable to tax under the head of salaries and the said payments thus are subject to deduction of tax as per provisions of section 192 of the Act and not as per provisions of section 194J of the Act. Ld. DR submitted that the CIT(A) granted relief for the assessee on incorrect premise and without any justified reasoning, therefore, the impugned order may be set aside by restoring that of the AO.

4. Replying to the above, ld. Counsel of the assessee strenuously supported the impugned order of the first appellate authority and submitted that there was no relation of employer and employee between the consultant and the assessee company and therefore, the assessee company rightly deducted TDS u/s 194J of the Act which was also on the higher side in comparison to deduction u/s 192 of the Act. Ld. Counsel further took us through charts filed along with appeal showing analysis from return of income filed by the consultants on sample basis of 9 consultants out of 25 consultants for FY 2007-08 and the same analysis of 11 consultants out of 40 consultants for FY 2008-09 and submitted that the assessee deducted TDS u/s 194J of the Act on the higher side and if the

deduction as proposed by the AO was deducted u/s 192 of the Act, then also the amount of TDS deducted by the assessee u/s 194J of the Act was higher than the TDS deductible u/s 192 of the Act at the average applicable rates. Ld. Counsel vehemently contended that it was not possible for the assessee company to engage on a continuous full time basis such highly qualified and experienced professionals at their pre or post superannuation age because there would be high employment cost, service of such technocrats not being required continually on a full time basis and the technocrats themselves being averse to work on full time basis with one company, therefore, the assessee company had to engage and tap the experience and knowledge of such technocrats as consultants on part time and temporary basis. Ld. Counsel further placed reliance on the decision of **Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverage (P) Ltd. Vs CIT (2007) 293 ITR 226(SC)** and submitted that where the payee has already paid taxes due on the payments received by it from the assessee, then recovery of tax cannot be made once again for the tax deductor. Ld. Counsel also placed reliance on the decision of ITAT Chandigarh 'A' Bench in the case of DCIT(TDS) Chandigarh vs Ivy Health Life Sciences (P) Ltd. and submitted that where the assessee hospital under an agreement was availing services of doctors who fixed their own OPD hours and there was no control of hospital by way of direction to doctors on treatment of patients, it could be said that doctors were working in their professional capacity and there was no employer and employee relationship between hospital and professional

doctors and therefore, TDS was to be deducted u/s 194J of the Act and not u/s 192 of the Act.

5. On careful consideration of above submissions and from bare reading of the impugned order, we note that the CIT(A) granted relief with following observations and conclusion:-

> *"I have perused the assessment order, written submissions of the AR and discussed the matter with them very carefully. From the list of age of consultants, it is observed that all the consultant are above 60 years of age. It appears that they take up this assignment after their retirement from Govt/PSU/Private Sector Job. We are in F.Y. 2007-08 & 2008-09. Applying the case of Hindustan Coca Cola Beverages (P) Ltd., 293 ITR 226 (Se), it will be found that over all taxes have been paid by deductees in their personal income returns, but they do not want to disclose their income. The ARs replied that they cannot force old consultants to disclose their income/ITRs, but they need the services of consultants anyhow the AO(TDS) can ask for PAN of such deductees and verify their return status from ITD application. Hence the liability of deductor u/s 201 (1) ceases after 4 years of end of F. Y. 2007-08 and 2008-09. As per the average rate of TDS to total till disbursement analysis, it again appears that the deductor company had deducted more TDS than suggested by AO (TDS) treating all consultants as employees. The A.O. (TDS) calculates tax rate @30% without giving effect of slabs and different tax rates for different slabs and does not give 80C deductions.*
>
> *The role of AO is to guard the revenue by enforcing the tax compliance and also to ensure that any tax leakage does not arise. They should look ahead and not look back. They should not encourage the avoidable and unnecessary litigation by raising the unsustainable demands like that of the present case. Considering the overall situation, it will be seen that the appellant deductor had deducted more tax (TDS) than is required as per AO (TDS) if proper tax rates and deductions under chapter VIA are given."*

6. On careful consideration of above submissions and observations of the CIT(A), at the very outset, we note that the main grievance of the department is that the relationship of assessee company and the consultants/technocrats was of employer and employee and, therefore, the TDS was to be deducted u/s 192 of the Act and not u/s 194J of the Act as deducted by the assessee company. We may further point out that ld. DR could not demolish the analysis submitted by the assessee from the return of income filed by the consultants on sample basis for both the FYs which clearly shows that the amount of TDS deducted by the assessee company u/s 194J of the Act is on the higher side in comparison to TDS deductible u/s 192 of the Act at average rates. We further observe that as per details of consultants/technocrats submitted by the assessee before the authorities below, it is vivid that the age of all consultants/technocrats is more than 60 years and in a number of cases, the age is 70 and 80 plus which clearly shows that these persons are highly experienced and knowledgeable technocrats who are rendering their service to the assessee company as a specialist technocrat and not as an employee. Although from the order of the AO we note that the AO dismissed submissions and contentions of the assessee and re-characterised the transaction between the assessee company and the said consultants/technocrats as employer or employee relationship but this re-characterisation cannot be held as justified under the facts and circumstances of the present case. We further note that the amount of TDS deducted by the assessee company u/s 194J of the Act shows that the assessee was cautious

about the provisions of the TDS and he deducted higher amount under the said provision in comparison to the expectation of the AO wherein the AO alleged that the assessee company should have deducted TDS from these payments u/s 192 of the Act. At the same time, we further note that from the analysis submitted by the assessee, it is also clear that the payee consultants/technocrats have already paid taxes on the income, then even if there was a short deduction of tax at source, further recovery of tax cannot be made once again from the tax deductor.

7. Now, we proceed to consider the ratio relied by the CIT(A) while granting relief for the assessee in the case of Hindustan Coca Cola Beverage (P) Ltd. vs CIT (supra) wherein their lordships speaking for the apex court on this issue held as under:-

> *"7. The Tribunal upon rehearing the appeal held that though the appellant-assessee was rightly held to be an "assessee in default", there could be no recovery of the tax alleged to be in default once again from the appellant considering that Pradeep Oil Corporation had already paid taxes on the amount received from the appellant. It is required to note that the Department conceded before the Tribunal that the recovery could not once again be made from the tax deductor where the payee included the income on which tax was alleged to have been short deducted in its taxable income and paid taxes thereon. There is no dispute whatsoever that Pradeep Oil Corporation had already paid the taxes due on its income received from the appellant and had received refund from the tax Department. The Tribunal came to the right conclusion that the tax once again could not be recovered from the appellant (deductor-assessee) since the tax has already been paid by the recipient of income."*

8. The High Court interfered with the order passed by the Tribunal on the ground that the order dated July 12,2002, of the Income-tax Appellate Tribunal has attained its finality since the appeal filed against the same by the appellant was dismissed by the High Court on May 21, 2004 ; the point based on ground No.7 was not taken up in the appeal preferred by the appellant in the High Court. The High Court further held that the Income-tax Appellate Tribunal's order dated July 12, 2002, got itself merged into the order passed by it on May 21,2004, dismissing the appeal of the appellant herein. The High Court came to the conclusion that the Tribunal could not have reopened the matter for any further hearing.

9. We have already noticed that the order passed by the Tribunal to reopen the matter for further hearing as regards ground No.7 has attained its finality. In the circumstances, the High Court could not have interfered with the final order passed by the Income-tax Appellate Tribunal.

10. Be that as it may, Circular No. 275/201/95-IT(B) dated January 29, 1997, issued by the Central Board of Direct Taxes, in our considered opinion, should put an end to the controversy. The circular declares "no demand visualized under section 201(1) of the Income- tax Act should be enforced after the tax deductor has satisfied the officer-in-charge of TDS, that taxes due have been paid by the deductee-assessee. However, this will not alter the liability to charge interest under section 201(1A) of the Act till the date of payment of taxes by the deductee-assessee or the liability for penalty under section 271C of the Income-tax Act".

11. In the instant case, the appellant had paid the interest under section 201(1A) of the Act and there is no dispute that the tax due had been paid by the deductee-assessee (M/s. Pradeep Oil Corporation). It is not disputed before us that the circular is applicable to the facts situation on hand."

8. When we consider the ratio laid down by ITAT Chandigarh in the case of DCIT(TDS), Chandigarh vs Ivy Health Life Sciences (P) Ltd. (supra), we note that the coordinate Bench of this Tribunal in the case of payment of consultants by a hospital held as under:-

"4. Lakshminarayan Ram Gopal and Son Ltd. v.Government of Hyderabad|1954| 25 ITR 449-(SC) The distinction between a servant and an agent is thus indicated in Powell's Law of Agency, at page " (a) Generally a master can tell his servant what to do and how-to do it.

(b) Generally a principal cannot tell his agent how to carry out his instructions.

(c) A servant is under more complete control than an agent, "and also at page 20 :-

" (a) Generally, a servant is a person who not only receives instructions from his master but is subject to his master's right to control the manner in which he carries out those instructions. An agent receives his principal's instructions but is generally free to carryout those instructions according to his own discretion.

(b) Generally, a servant, qua servant, has no authority to make contracts on behalf of his master. Generally, the purpose of employing an agent is to authorize him to make contracts on behalf of his principal.

(c) Generally, an agent is paid b)' commission upon effecting the result which he has been instructed by his principal to achieve. Gene-rally, a servant is paid by wages or salary. "

The statement of the law contained in Halsbury's Laws of Eng-land-Hailsham Edition-Vol. 22, page 1 13, Para. I 92 may be referred to in this connection:-

" The difference between the relations of master and servant and of principal and agent may be said to be this : a principal has the right to direct what work the agent has to do : but a master has (he further right to direct how the work is to be done. "

The position is further clarified in Halsbury's Laws of England-Hailsham Edition-Vol. 1, at page 193. Art. 345, where the positions of an agent, a servant and independent contractor are thus distinguished:-

" An agent is to be distinguished on the one hand from a servant and on the other from an independent contractor. A servant acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given him in the course of his work ; an independent contractor, on the other hand, is entirely independent of any control or interference and merely undertakes to produce a specified result, employing his own means to produce that result. An agent, though bound to

exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal. An agent as such is not a servant, but a servant is generally for some purposes his master's implied agent, the extent of the agency depending upon the duties or position of the servant. "

5. We have heard the rival submissions, facts of the case and the relevant records. The brief facts of the case are that the appellant company is running a hospital, known as Ivy Hospital at Mohali. The Department conducted a TDS inspection u/s 133A of the Act, at the business premises of the assessee appellant on 28.09.2011. During the course of such inspection and assessment proceedings u/s 201(1)/201(1A) of the Act, it was noticed by the ACIT (TDS) that the hospital is running different OPDs, apart from indoor patients' treatment. The procedure of treating patients in OPD is that when a patient comes for the treatment in Hospital's OPD, he deposits a consultation fee for the particular Medical Department in which he wants to consult, at the cash; counter of the hospital and he is given a receipt for it and then he consults the Doctor to whom he wants to consult. The concerned Doctor prescribes the treatment on the hospital's letter pad. If the patient is to be admitted in the hospital for indoor treatment, then he is admitted under his treatment. The working days and hours of the doctors working in OPD of the hospital, are fixed and as per the contract between these doctors and the hospital they are not allowed to do their own practice or work with another hospital during the period for which they are engaged attended the hospital on call. However, during the course of TDS inspection, it was noticed that the assessee deductor was deducting the tax at source of the both types of doctors u/s 194J as professional charges, whereas the payments made to doctors who are regularly attached with hospital, are required to be treated as salary and tax is also required to be deducted u/s 192 of the Act. The AO was of the view that payments made to doctors were regularly attached with the hospital, were required to be treated as salary and taxes were required to be deducted u/s 192 of the Act. Consequently, AO issued a show cause notice to treat the 'Person Responsible' (hereinafter referred to as 'PR') as assessee in default u/s 201(1) of the Act for short deduction of tax at source from the payments made to the consultant doctors and charged interest u/s 201(1A) of the Act. On appreciation of

the written submissions filed by the appellant before the AO, it was concluded by him that there existed employer-employee relationship in the hospital. Consequently, the AO concluded the issue as "During the financial year 2008-09, the assessee had deducted tax of Rs.11,67,399.40 u/s 194J of the Act, whereas the tax of Rs.27,98,169.69 u/s 192 of the Act, was required to be conducted. Therefore, the assessee is liable to pay a difference of Rs.16,30,770/- as tax of Rs.7,40,121/- u/s 201(1A) of the Act. As per calculation enclosed as Annexure-1 to this order. Accordingly, total payable tax demand comes to Rs.23,70,891/- for the assessment year 2009-10."

6. Similarly, for the assessment year 2010-11, the AO worked out the total payable tax demand at Rs.75,60,672/- (difference net tax deducted at Rs.62,50,560/- and interest of Rs.12,50,112/- u/s 201(1A) of the Act.

7. Ld CI T(Appeals), on appreciation of the factual matrix of the Act and case laws cited by the appellant, adjudicated the issue in favour of the assessee appellant, as per following finding :

"5. I have considered the submission filed by the Ld. Counsels. I have also gone through the MOUs between the appellant company and professional doctors. The various clauses of the MOUs need to be examined in the light of the criteria laid down by the Courts to determine whether the doctors attached to the appellant hospital are employees of the hospital. The test which is uniformly applied in order to determine whether a particular relationship amounts to employer-employee relationship is the existence of a right of control in respect of the manner in which work is to be done by the person employed. The nature and extent of control which is requisite to establish the relationship of employee and employer varies from business to business."

8. A bare perusal of the case law, relied upon by the appellant and submissions made in the synopsis reveals that there does not exist employer-employee relationship between the assessee appellant and the persons providing professional services. On consideration of the agreement in its entirety vis- à-vis the case law relied upon by the assessee appellant, it is evident that it is not a case of employer-employee relationship between the assessee appellant and the doctors. Therefore, having regard to the detailed analysis and findings of the CIT(Appeals) on the issue in question, it cannot be said that findings of the ld

CIT(Appeals) suffer from any infirmity. In view of this, findings of the CI T(Appeals) are upheld."

9. When we consider the facts and circumstances of the present case, we are inclined to hold that the AO re-characterised the relation between the assessee company and the consultant/technocrat and relation of employer and employee but we are unable to see any basis or allegation supporting this re-characterisation and action of the AO to treat the payments by the assessee company to these consultants/technocrats as salary instead of remuneration/consultation fee and expecting the assessee to deduct TDS u/s 192 of the Act instead of remuneration/consultation fee and expecting the assesse to deduct TDS u/s 192 of the Act instead of 194J of the Act. Per contra, from the explanation, details and evidence submitted by the assessee, we are satisfied that the payments made by the assessee company was not salary and the same was remuneration/consultation fee paid to the highly experienced technocrats/consultants which could not be engaged on full time basis as regular employees due to high remuneration and temporary requirement of the assessee company. We cannot ignore this fact that all technocrats and consultants are more than 60 years of age and are in post retirement/superannuation life cycle and we cannot expect them to work as regular employees unless there is an exceptional case. We may further note that the AO has not demolished this contention of the assessee that the said consultant/technocrat had filed their income tax return with the department which were also submitted before the AO

and they have paid tax thereon, therefore, respectfully following the ratio laid down by the Hon'ble Supreme Court in the case of Hindustan Coca Cola (supra), there was no need of expecting the assessee deductee to again pay the tax on the said payment on account of short deduction of TDS, specially when the TDS deducted by the assessee company u/s 194J of the Act was on the higher side as deductible u/s 192 of the Act.

10. In view of above, we are unable to see any infirmity, perversity or any other valid reason to interfere with the order of the CIT(A).

11. In the result, the appeals are of the revenue are dismissed.

Order pronounced in the open court on 5.8.2015.

Sd/- Sd/-

(N.K. SAINI) (CHANDRAMOHAN GARG)
ACCOUNTANT MEMBER JUDICIAL MEMBER

DT. 5th AUGUST 2015
'GS'

Copy forwarded to:-

1. Appellant
2. Respondent
3. C.I.T.(A)
4. C.I.T. 5. DR

By Order

Asstt.Registrar