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'Fortis' was liable to deduct TDS under sec. 194J on sum paid to doctors engaged on retainership basis

Summary – The Chandigarh ITAT in a recent case of Fortis Healthcare Ltd., (the Assessee) held that Payments made by assessee-hospital to retainer doctors, would be subject to TDS under section 194J and not under section 192

Facts

- The assessee-company was running a hospital. It had deducted tax at source in respect of payments made to doctors appointed on retainership basis under section 194J by treating the payments as professional charges.
- The Assessing Officer held that there was employer-employee relationship between assessee and doctors and tax was to be deducted at source under section 192.
- On appeal, the Commissioner (Appeals) analysing the agreement between retainer doctors and hospital, held that there did not exist any employer and employee relationship and, thus, invocation of section 192 was not justified.
- On revenue's appeal:

Held

- The Assessing Officer has raised seven objections based on which he has held that these doctors are being made payment of salary. The first objection raised by the Assessing Officer is with regard to the clause of agreement that the retainer doctors shall be associated exclusively with the assessee as full time consultant and shall not associate himself with any other hospital.
- The explanation of the assessee in this regard has all along been that there is no bar on retainer consultants undertaking any professional assignment or to have independent practice and the only bar is to join any other similar company. Even the Commissioner (Appeals) has considered this argument of the assessee in a very positive perspective in the sense that these doctors are not barred from having their own practice and barring them to join any other similar organization is just to avoid shifting of patients to other places, also this bar itself does not create employer and employee relationship between the assessee and the retainer doctors.
- At point No. (ii), the Assessing Officer stated that the retainer doctors are bound to work from time to time in accordance with the requirements of the hospital and patients and in the best interest of the management. From the perusal of this condition, it cannot be inferred that by imposing such a condition the relationship between the doctors and the assessee becomes that of employer and employee. This is a common clause, provided in such agreements in order to protect the interest of the assessee-hospital and to provide service to the patients as per the work culture in the hospital.

- The point raised by the Assessing Officer at No. (iii) is with regard to the fact that the retainers are duty bound to participate in all academic activities, such as CMEs, conferences, seminars, publications of articles undertaken by the hospital and as advised by the hospital management from time to time. From this contention also, it cannot be inferred that the relationship is that of the employer and employee.
- At point No. (iv), the Assessing Officer referred to the submission of the assessee that the retainers are engaged only for short duration, whereas it is seen that the retainership is offered for a period ranging from 4 years to 2 years. In this regard, it is seen that the retainership agreements are renewable agreements and can be renewed on agreement by both the parties. There is nothing wrong in this kind of arrangement since if the assessee-hospital finds the services of the doctors to be appropriate, the agreement can be renewed. Just because the association between the assessee and the doctors is a long term association, it cannot be said that the relationship between the assessee and the doctors is that of employer and employees.
- The point No. (vi) raised by the Assessing Officer is with regard to the condition that the retainers may develop or create either individually or jointly with company any original concepts, ideas, plans, designs, presentations, data base, floppies, products, *etc.*, but as per the clauses of the agreement these creations shall be treated as sole and exclusive property of the company and the retainers shall not claim to have any legal title or interest in any such creations at any point of time. Even on perusal of this clause it cannot be inferred that the payments made by the assessee to these doctors are in the nature of salary. Once the person is hired for some specific purpose in order to provide quality services to the patients and to protect the interest of the assessee-hospital, this kind of condition imposed is very common.
- Some of the objections taken by the Assessing Officer are on basic and general conditions laid down in the retainership agreement which do not in any way infer that the payment is salary in nature. The Commissioner (Appeals) has very appropriately dealt with these objections of the Assessing Officer in his order and given a finding that by these types of conditions, it does not make the retainer doctors employees of the assessee.
- Further since all these recipient doctors' receipts have been taxed as professional receipts in the hands of doctors and not as income from salary, in a way, the department has accepted the position that these doctors are not employees of the hospital.
- Different types of agreements are made both for doctors engaged on retainership and those who are regular employees. There are a number of differences between various clauses in both types of agreements. To the employed doctors, there are conditions as with regard to revision of salary in the form of increment and also there is a condition as to the retirement age being 58 years. However, in case of retainer doctors, there is no clause as to the increment or retirement. Probation period of six months has also been laid down for salaried doctors, while there is no such condition in case of retainer doctors. No retirement benefits in the form of gratuity, PF, *etc*. were given to the retainer doctors, while said clauses are there in the agreement with the salaried doctors. Another

interesting clause with regard to posting and transfer also appears in the case of salaried doctors, whereby the assessee-company may determine to transfer the doctors at the sole discretion of the management to any department, section, location, associate, sister concern or subsidiary at any place in India or abroad, whether existing today or which may come up in future, while in the case of retainer doctors, it has been very specifically mentioned as to in which department the services of these doctors are required. From the analysis of these facts, it is quite clear that there is a lot of difference between clauses of agreement with the retainer doctors and that of the salaried doctors.

- To decide the issue whether TDS has to be deducted as per section 192 or 194J, the basic requirement is to interpret the relationship between the assessee and the doctors. Further, a distinction is also to be drawn between the 'contract for service' and 'contract of service'. The contract 'for service' implies a contract, whereby one party undertakes to render the service, for example professional or technical services, to or for another in the performance of which he is not subject to detailed directions and control but exercises professional or technical skill and uses his own knowledge and discretion. A 'contract of service' implies relationship of master and servant and involves an obligation to obey orders in the work to be performed and also as to its mode and manner of performance. From the perusal of the agreements with the doctors, no relationship of master and servant was seen between the assessee and the doctors on retainership basis. It is also seen from these agreements that the doctors who are on the pay roll of the assessee are debarred from taking up any other work for remuneration part time or otherwise or work in advisory capacity or on interest directly or indirectly in any other trade or business during the employment with the assessee without permission of the assessee, while the doctors on retainership basis are only debarred from not getting in similar or any capacity for any other company engaged in a business similar to that of the assessee. The difference between this clause in two types of agreements itself goes to prove that doctors who are engaged on retainership basis are not the servants of the assessee since they are allowed to do whatever they want except joining the similar business while other doctors who are on the pay roll of the assessee are debarred from doing any other activity apart from that of the assessee.
- From the perusal of all the facts and material it appears that no relationship of master and servant exists between the assessee and the retainer doctors.
- The intention of the Legislature to frame different provisions in the form of sections 192 and 194J is that the persons who receive salary are liable to be deducted tax at source under section 192 while those who receive payment for professional services, the TDS has to be deducted under section 194J. The Commissioner (Appeals), while discussing in detail the agreements between different types of doctors engaged by the assessee and placing reliance on the other material on record only, has given his finding. In view of the above, the order of the Commissioner (Appeals) is to be upheld.