आयकर अपीलीय अधिकरण "जी" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"G" BENCH, MUMBAI

BEFORE JUSTICE SHRI P. P. BHATT, PRESIDENT AND SHRI MANOJ KUMAR AGGARWAL, AM
(Hearing through Video Conferencing Mode)

आयकरअपील सं./ I.T.A. No.7297/Mum/2019
(**निर्धारण वर्ष** / Assessment Year: 2011-12)

DCIT(OSD)(TDS)-2(2) 706, Smt. K.G.M. Ayurvedic Hospital Bdg. Charni Road (West) Mumbai-400 002	**बनाम**/ Vs.	**Sir Hurkisondas Nurrotumdas Hospital & Research Centre** H.N. Hospital, Prarthana Samaj Raja Rammohan Roy Road Girgaon, Mumbai-400 004
PAN / TAN :: AABTS-7800-D / MUMS-48115-C		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

Assessee by	:	Shri Nimesh Vora-Ld. AR
Revenue by	:	Shri T.S. Khalsa-Ld.Sr. DR

सुनवाई की तारीख/ **Date of Hearing**	:	29/06/2021
घोषणा की तारीख / **Date of Pronouncement**	:	12/07/2021

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by revenue for Assessment Year (AY) 2011-12 contest the order of Ld. Commissioner of Income-Tax (Appeals)-60, Mumbai {CIT(A)} dated 26/09/2019 on following grounds of appeal: -

> 1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in not treating the Hospital Based Consultants (HBCs) as employees and therefore holding that provisions of Section 192 of the Income Tax Act, 1961 were not applicable?
> 2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in holding that payment made to employees of M/s. Sir Hurkisondas Nurrotumdas Hospital & Research Centre who had worked with the respondent for rendering various services to be treated as reimbursement and not

as payment towards professionals fee requiring TDS to be deducted u/s 194J of the Act?

3. "Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in holding that TDS on payments made to employees of M/s. Sir Hurkisondas Nurrotumdas Hospital & Research Centre, TDS was required to be deducted u/s 194J and not u/s 192 of the Act without appreciating the fact that payment made to the employees on monthly basis were essentially in nature of salaries?"

As evident, the revenue is aggrieved by findings of Ld. CIT(A) that the payment made by assessee hospital to certain consultant doctors would require deduction of tax at source u/s 194J as applicable to professional payments and not u/s 192 as applicable to salaried employees.

2. The undisputed position that emerges is that Ld. CIT(A) has primarily followed the order of Tribunal in assessee's own case for AY 2008-09, ITA No.2681/Mum/2015 order dated 26/08/2016 while rendering his adjudication. Nothing has been shown to us that the aforesaid order has ever been reversed by any higher judicial authority. No factual distinction could be point out before us. In the said background, our adjudication to the subject matter of appeal would be as given in succeeding paragraphs.

3.1 The material facts are that an order was passed by Ld. TDS Officer (AO) u/s 201(1) / 201(1A) on 22/03/2013 wherein it transpired that the assessee hospital paid aggregate amount of Rs.11.17 Crores to full time doctors / consultants (referred to as consultant doctors) as professional fee after deduction of applicable tax at source in terms of requirements of Sec.194J. This was on the premise that there was no employer-employee relationship between the assessee and full-time consultant doctors. The consultant doctors were given retainership-fee for the performance of duties assigned to them. Their terms of arrangement would not indicate that they were employed by the assessee hospital. It

was explained that the assessee hospital engages various medical professional comprising different specialists for providing medical treatment to the patients by using the infrastructural facilities set up by the hospital. Some of these professionals were full-time employees whereas some specialist doctors were engaged as consultants to whom possessional fees was paid. The hospital would charge their patients under various heads like room charges, operation theater charges, medicine and doctors fees. The doctors' fees so collected would be paid to the consultant doctors after deduction of tax at source (TDS) u/s 194J. There was no specific timing and attendance records maintained by the hospital with respect to consultant doctors. The doctors would not come to the hospital it there was no patients related to their specialty / admitted under them. Therse professionals would not work exclusively for the assessee hospital rather they render similar services directly or indirectly to other entities as well as at their private clinic since there were no such restriction mentioned in the letter issued to them.

3.2 However, the AO based on survey findings u/s.133A conducted on assessee on 30/10/2010 opined that services of the doctors were utilized only for the purpose of patients coming to the assessee hospital. These doctors were expected to serve the patients on all days at the hospital. The doctors were expected to work as per the rules and regulation of the hospital and were barred from working in any other hospital or conduct private practice. The same would be possible only if there was employer-employee relationship. Therefore, the assessee was liable to deduct tax u/s 192 as applicable to Salary Payments. Since there was short-deduction of tax, the assessee was treated as assessee-in-default. Finally, the shortfall was computed at Rs.83.80 Lacs, as detailed in para-

3.4 of the order. The interest u/s 201(1A) on shortfall was computed at Rs.29.33 Lacs and aggregate demand of Rs.113.14 Lacs was raised against the assessee.

4.1 During appellate proceedings, the assessee reiterated that wherever doctors were employed on full time basis, tax was deducted u/s 192 whereas where doctors were not employed by the assessee, tax was deducted u/s 194J as applicable to professional payments. The attention was drawn to the fact that consultant doctors were visiting doctors and their terms of appointment were different from employee doctors. To support the same, the attention was drawn to the statement showing monthly fees paid to visiting doctors wherein it could be noted that fee paid to each doctor was different in each month. This was so because fees payable to them was linked to services rendered and patients attended to by them during the relevant period. The basis of payment was patients attended to by them during the month. The consultant doctors were not entitled to any fix remuneration. In case of weaker / indigent patients, the visiting doctor would get no fee or less fee depending upon the fee collected from such patients. It was also reiterated that the hospital charged their patients under various heads like room charges, operation theatre charges, medicines, doctors' fee etc. In case of visiting doctors, fees collected from patients was paid to them after retaining hospitals' share in the fee. There was no specific timing and attendance record maintained by hospital with respect to such doctors. Further, the consultant doctors would not be eligible for any leave, provident fund, gratuity, bonus etc. and were not subject to admission or retirement from services. They were not entitled to several benefits as allowed to regular employees such as medical

reimbursement. Insurance, leave encashment etc. Thus, there was no employer-employee relationship and therefore, tax was rightfully deducted u/s 194J.

4.2 Reliance was placed on the decision of Hon'ble Supreme Court in the case of **Laxmi Narayan Ram Gopal & Son Ltd. Vs. Govt. of Hyderabad (25 ITR 449 SC)** and also on **Ram Prashad Vs. CIT {1972; 86 ITR 122 SC}** wherein it was held that the distinguishing factors would be control and supervision. As per contractual terms of assessee with these consultant doctors, there was no control on the doctors as to how work assigned to them was to be carried out. They were working as independent professionals and also there was no supervision by way of instructions to tell the doctors what to do and how to do their work.

4.3 Another submission was that Tribunal in assessee's own case for AY 2008-09 vide ITA No.2681/Mum/2015 order dated 26/08/2016 allowed similar issue in assessee's favor relying mainly on the decision of Hon'ble Bombay High Court in **CIT Vs. Grant Medical Foundation (ITA No.140 of 2013 dated 22/01/2015).**

4.4 The Ld. CIT(A), in the light of assessee's submissions, concurred that the issue stood covered in assessee's favor by the decision of Tribunal in AY 2008-09 wherein it was held that the doctors were independent professionals and were discharging only professional services. There was no employer-employee relationship between the assessee and consultant doctors. The ratio of decision of Mumbai Tribunal in the case of **Jaslok Hospital & Research Centre (ITA No. 4043/Mum/2015)** taking the same view, was also noted.

4.5 Finally, it was concluded that the assessee was not liable to deduct tax u/s 192 of the Act and it was not to be treated as assessee-in-default. Aggrieved, the revenue is in further appeal before us.

Our findings and Adjudications

5. Going by the factual matrix as enumerated in the preceding paragraphs, it could be noted that the terms of arrangement with consultant Doctors was different from employee-doctors. The consultant doctors were paid based on the services rendered by them and on the basis of doctors' fees collected by the hospital from the patients. The same is evident from the fact that the payment made to these doctors vary significantly in each month. This was so because fees payable to them was linked to services rendered and patients attended to by them during the relevant period. Further, the consultant doctors were not entitled to any fix remuneration. It is also a fact that there was no specific timing and attendance record maintained by hospital with respect to such doctors and this category of doctors was not be eligible for any leave, provident fund, gratuity, bonus etc. and were not subject to admission or retirement from services. They were not entitled to several benefits as allowed to regular employees such as medical reimbursement. Insurance, leave encashment etc. All these facts and features would bolster assessee's claim that there was no employer-employee relationship between the assessee and consultant doctors. Therefore, the tax was rightfully deducted u/s 194J. Pertinently, the coordinate bench of this Tribunal has also decided this issue in assessee's favor for AY 2008-09 which has already been taken note of in the impugned order. No distinction in facts could be brought on record. Therefore, we find no reason to interfere in the impugned order.

6. The appeal stands dismissed.

Order pronounced on 12th July, 2021.

Sd/-	**Sd/-**
(Justice P.P. Bhatt)	**(Manoj Kumar Aggarwal)**
President	**Accountant Member**

मुंबई Mumbai; दिनांक Dated : 12/07/2021
Sr.PS, Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / **ITAT, Mumbai.**