INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI

BEFORE

DR. BRR KUMAR, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 241/Del/2023
Asstt. Year: 2012-13

DCIT, Central Circle-74(1), New Delhi.	Vs.	Fortis Hospital Ltd. Tower-A, Unitech Business Park, Block-F South City-1, Section-41, Gurgaon, Haryana 122 001 PAN AABCF3718N
(Appellant)		(Respondent)

Assessee by:	Shri R.M. Mehta, CA
Department by:	Shri Vivek Kumar Upadhyay, Sr. DR
Date of Hearing:	29.08.2023
Date of pronouncement:	06.11.2023

<u>O R D E R</u>

<u>PER ASTHA CHANDRA, JM</u>

The appeal filed by the Revenue is directed against the order dated 31.10.2022 of the Ld. Commissioner of Income Tax (Appeals), NFAC, Delhi **("CIT(A)")** pertaining to Assessment Year **("AY")** 2012-13.

2. The Revenue has taken the following grounds of appeal:-

"1. That on the facts and in the circumstances of the case, the Ld. CTT(A) has erred in holding that appellant cannot be treated as an "assessee in default" in so far as the question of deducting tax at source in respect of doctors engaged as retainers and consultants was concerned. And that the provisions of the section 194J of the IT Act were applicable and not those of section 192 of the IT Act.

> *2. That on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in giving relief to the assessee without appreciating the facts that the terms and clauses of agreements entered into by the deductor company and retainer doctors/consultant doctors categorically affirm that there existed an evident employee-employer relationship between the deductor company and retainer doctors/consultant doctors and hence payment made to consultant doctors and retainer doctors should fall under the head "Salary" and the assessee hospital/ company was liable to deduct TDS at the rate applicable in the case of salary."*

3. Briefly stated, the assessee is a hospital, leading integrated healthcare delivery service provider in India. The healthcare verticals of the company primarily comprise hospitals, diagnostics and day care specialty facilities. The company operates from its headquarters office situated at Sector-41, Gurugram, Haryana and has many of its hospitals in different regions across the country. In the case of the assessee TDS survey under section 133A(2A) of the Income Tax Act, 1961 **(the "Act")** was conducted at the premises of M/s. Fortis Group on 23.01.2018 for verification of compliance of TDS provision under section 201(1)/201(1A) of the Act. During the course of survey proceedings, statement of Shri N.L. Gandhi, Sr. Taxation Officer was recorded in which he stated that doctors are mainly employed at different hospital units under various arrangements i.e. on roll, retainership and consultant basis and tax at source is deducted under section 192B for on roll doctors and 194J for retainer and consultant doctors for all such payments made to them. It seems that agreements of the doctors were called for and perused and it was the view of the Revenue that clauses in the agreement with retainer-doctors and consultant-doctors indicated that there was employer-employee relation between both the parties. The assessee was show caused why retainer-doctors and consultant-doctors be not treated as employees of the hospital. The assessee company made submission dated 01.03.2019 which was not considered satisfactory for the reason that consultant-doctors/ retainer-doctors formed the core of the assessee's

business and their expertise are used to run the company and not just for support to the company.

3.1 Accordingly, the Ld. Assessing Officer **("AO")** held that the payment to the consultant-doctors and retainer-doctors fall under the head "salary" and the assessee was liable to deduct TDS from the payment to consultant-doctors and retainer-doctors as well along with the on-roll doctors at the rate applicable in the case of salary. On this basis short deduction of TDS was computed in FY 2011-12 relevant to AY 2012-13 as under:-

NAME	PAN	AMOUNT	u/s 194J	u/s 192B	Difference
Dr. Tripat Chaudhary	AAEPC7216L	15699542	1569954	4561863	2991908
Vikram Walia	AALPW6932E	14907899	1490790	4324370	2833580
Dr. Raghuram Mallaiah	ACLPM6319H	13247204	1324720	3826161	2501441
Dr. Loveleena Nadir	AAAPN2648D	8232606	823261	2321782	1498521
Dr. Vimal Grover	AA1PG4465B	7344866	734487	2055460	1320973
Dr. Manjit Kochhar	AAAPK416512	6188064	618806	1708419	1089613
Dr. Sharad Shrivastava	AAMPS2551E	5644904	5644-90	1545471	980981
Dr. Meenakshi Ahuja	AAEPA1431D	5574165	557417	1524250	966833
Dr. M Bhutani	AAAPB3044M	4572047	457205	1223614	766409
Dr. Raj Gupta	AAEPG9258N	2647231	264723	64-6169	381446
Dr. Lena Gupta	AAEPG9259P	2611814	261181	635544	374363 ...
Dr Neena Singh	AAZPK1454F	2174988	217499	504496	286998
Dr Ruchira Prasad	AJRPP9882D	2074544	207454	474363	266909.
Dr, Sonu Agarwal	AADPA0520L	2029735	202974	460921	257947
Dr. fasbir Chandna	AADPC9225A	1800018	180002	392005	212004
Dr. Alka Juneja	ADKPJ8227D	1684270	168427	357281	188854

Dr. Veenu Kanshal	ABYPK2118E	1684270	160427	357281	188854
Dr. Seema Thakur	ACUPT9600M	1600000	160000	332000	172000
Dr. Amit Bali	AGVPB1381N	1365783	136578	261735	125157
Dr. Anita Sharma	ABKPS4578A	1315342	131534	246603	115068
Dr. Deepak Sikhriwal	BFFPS4143K	1307197	130720	244159	113439
Dr. Kumkum Vatsa	AAHPV0593J	1299810	129981	241943	111962
Dr. Raj Bokaria	AAIPB9286H	1275023	127502	234507	107005
Dr. Ashu Sawhney	ABBPS1629K	1252792	125279	227838	102558
Dr. Kamal Buckshee	AAFPB6154P	1154756	115476	198427	82951
Dr. Anil Malik	AGVPB1381N	1376746	137675	265024	127349
Total		***110065616***	***11006561***	***29171684***	***18165123***

3.2 Since there was liability of Rs. 2,91,71,684/- under section 192B of the Act and the assessee had deducted tax at source of Rs. 1,10,06,561/-, the assessee company was held to be an 'assessee in default' for failure to deduct tax at source of Rs. 1,81,65,123/- vide order dated 28.03.2019 passed by the Ld. ACIT Circle 74(1), New Delhi under section 201(1)/ 201(1A) of the Act.

4. Aggrieved thereby, the assessee filed appeal before the Ld. CIT(A). During appellate proceedings, the assessee submitted a table depicting that in the case of the assessee itself the predecessor CIT(A) decided the appeals for AY 2016-17 and 2017-18 in favour of the assessee. It was pointed out that Revenue's appeal there against have been dismissed by the ITAT. Challenging the order (supra) of the Ld. AO, the assessee made the following submissions:-

"1. The question of TDS in respect of institutions providing healthcare services and where doctors are appointed on salaried basis and on rotainership was at one time a contentious issue between the institutions and the department but not anymore as there is an unanimity of views expressed by Hon'ble High Courts and various Benches of the ITAT across the country that doctors a attract section 192 but section 1943 for purposes of TDS on payments made to them. All these judgements have been deliberately not adverted to by the AO.

2. It is settled law that issues which have attained finality should not be raked up by examining the same set of facts in a different way. The facts examined by the AO are not different to those that existed in the past years when no such action was taken even after a TDS survey carried out on 19.01.2015. Reliance is placed on CIT vs M/s Escorts Ltd. (2011) 338 ITR 435 (Del.).

3. The AO has passed the order impugned which is to of raising a demand which is to say the least factually and legally incorrect, and aimed at reflecting a huge only for the purpose demand for statistical purposes.

4. The AO in passing the orders impugned has overlooked relevant provisions of the Act which if considered would have avoided the present litigation. These are:

Section 191

This provides for a direct payment of tax by the deductee and in the eventuality of such payment being made, there is an abatement of liability on the part of the deductor, so that no interest can be levied for non-deduction of tax (pl. see CIT vs Adidas India Marketing P. Ltd. (2007) 288 ITR 379 (Del.). Tax paid directly by the assessee cannot be recovered again from the deductor as there is no provision for refund of tax wrongly deducted and deposited. As a result of the explanation inserted by the Finance Act, 2008 w.e.f. 01.06.2003 the liability to deduct tax gets abated the moment there is a direct payment.

Section 201

The Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverages (P) Ltd. vs CIT (2007) 293 ITR 226 (SC) took the view that no demand u/s 201 could be enforced once the deductor had satisfied the AO that the deductee had paid the taxes. The other judgements are Children's Education Society vs DCIT (TDS) (2009) 319 ITR 409 (Kar), TRO vs Bharat Hotels Ltd. (2009) 318 ITR (At) 244 (Bang:), Nai Rajdhani Path Pramandal vs CIT (2016) 384 ITR 328 (Pat) and Ghaziabad Development Authority vs Union of India (2017) 395 ITR 597 (All.)

> *The proviso to section 201 inserted by the Finance Act, 2012 w... 01.07.2012 recognizes the aforesaid legal position and deems the deductor not to be an assessee in default in cases where the deducte has funished his return of income, taking into account such sum for computing the income and has paid the taxes due on the income returned. The liability in such cases is restricted to Interest u/a 201(1A),*

In the light of the aforesaid legal position, one may refer to the order impugned in the present appeal. The AO has interpreted the two types of agreements ie one for salaried doctors and the other for doctors appointed on retainership basis as identical giving rise to employer employee relationship missing out the differences which have been noted over and again by the various Benches of the ITAT and the Hon'ble High courts. To mention a few:

1) *In the case of employee doctors, it is a whole time employment not restricted to a fixed term whereas a retainer doctor has a fixed term*

2) *The employee doctors draw a salary plus various other benefits whereas the retainer doctor is entitled to a consolidated retainership fee only*

3) *The employee doctors cannot take up any other employment whereas the retainer doctors although not to engage in employment with other hospitals can undertake private practice.*

4) *There is a retirement age for the employee doctors and payment to them is termed as salary, whereas the payment to the retainer doctors is treated as professional fee and they have no retirement age*

To advert at this stage to certain other clauses that exist in some contracts with retainers which lead the AO to treat the contract as one creating an employer-employee relationship and hence attracting Section 192.

A clause prohibits the retainer doctor from engaging himself with another institution carrying on the same business but not barring private practice. Another clause imposes certain conditions about time, supervision and the interest of the patients. A third clause may be the requirement to participate in academic activities conducted by the institution and a further clause may require the retainer doctor to develop original concepts, ideas, plans, designs etc. but as per the contract, these creations shall be treated as the sole and exclusive property of the institution. There has been an unanimity in the views

expressed by Courts and various Benches of the ITAT that such clauses do not create an employer-employee relationship

Another aspect to which one would refer is the distinction between a "contract for service" and a "Contract of service" the former implying a contract whereby one party undertakes to render service to another in the performance of which he is not subject to detailed directions and control but 1 exercises professional skill using his own knowledge and discretion and the latter implying relationship of master and servant with an obligation to obey orders in the work to be performed. Here again there is unanimity in the view expressed in various reported decisions that the former does not create a master servant relationship.

In view of the numerous judgements relied upon including those in the cases of appellant itself and group institutions, it is apparent that the issue of TDS is no longer res integra. Your goodself may be pleased to quash the order passed by the AO.

Prayed accordingly,"

5. The Ld. CIT(A), following the decision of his predecessor in assessee's own case on identical issue quashed the impugned order of the Ld. AO.

6. Dissatisfied, the Revenue is in appeal before the Tribunal and both the grounds relate thereto.

7. We have heard the Ld. Representative of the parties, considered their submissions and perused the records. It is not in dispute that the issue involved in the present appeal before us is no longer res-integra. It is submitted by the Ld. AR that in the case of the assesee company TDS survey was carried out on 19.01.2015 also. Identical facts were examined in past years as well and the judicial consensus is that the provisions of section 194J apply to the retainer-doctors and not those of section 192B of the Act after noting differences between the two types of agreements i.e. salaried doctors and doctors appointed on retainership basis. Certain clauses in contract with retainers which gave the erroneous impression to the Ld. AO of creating an employer-employee relationship has been explained by the assessee that they do not create such a relationship. The explanation of the assessee has unanimously been accepted by various

judicial pronouncements. The co-ordinate bench of Delhi Tribunal in its decision rendered on 27.06.2022 in assessee's own case in ITA No. 5322/Del/2019 for AY 2017-18 and in ITA No. 5323/Del/2019 for AY 2016-17 held in para 7 thereof as under:-

> *"7. Having gone through the provisions of section 192, Section 194J, Section 201 of the Income tax Act 1961, facts of the instant case and the judicial pronouncements on the issue involved, we are inclined to hold that the provisions of section 194J of the Act are applicable to the assessee and not those of section 192 of the Income tax Act 1961 therefore, the appellant cannot be treated as an "assessee in default" in so far as the question of deducting tax at source in respect of doctors engaged as retainers and consultants was concerned,"*

8. For the reasons set out above and following the decisions (supra) of the co-ordinate Bench of Delhi Tribunal, we do not find any substance in the appeal of the Revenue which we hereby reject.

9. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 6th November, 2023.

sd/-	sd/-
(DR. BRR KUMAR)	**(ASTHA CHANDRA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 06/11/2023
Veena

Copy forwarded to -
1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

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