Sum paid to consultant-doctor without any stipulation of working hours or leave would attract sec. 194J TDS

Summary – The High Court of Bombay in a recent case of Grant Medical Foundation., (the Assessee) held that w here from contracts, no stipulations regarding working hours, academic leave or attachments had been found which would reveal that consultant doctors were employees of assessee, Tribunal was right in holding that there existed no relationship of employer and employee between assessee and consultant doctors and accordingly, TDS under section 194J would be applicable on doctors remuneration and not under section 192

Facts

- The assessee was a public charitable trust administering and managing a hospital. It made deduction of tax at source under section 194J on the remuneration paid to the doctors employed in the hospital drawing only variable pay with written contract, doctors drawing only variable pay without written contract and doctors drawing fixed plus variable pay with written contract by treating the same as fee for professional services.
- The Assessing Officer observed that the doctors were also paid certain fixed remuneration, hence, held that payments to these doctors were in the nature of salary, thus, TDS under section 192 was applicable. The Assessing Officer, therefore, held that the assessee was in default under section 201 for short deduction of tax.
- On appeal, the Commissioner(Appeals) partly allowed the appeal of the assessee and held that doctors drawing only variable pay with written agreements were not in nature of salary and, hence, not liable for deduction of tax under section 192.
- On cross appeals, the tribunal ruled in favour of the assessee and dismissed appeal of the revenue. The tribunal held that there existed no relationship of employer and employee between the assessee and consultant doctors employed in the hospital and thereby set aside the order passed against the assessee under sections 201 and 201(1A).
- On appeal to High Court:

Held

- The foundation or basis on which the revenue and the Assessing Officer proceeded was whether the categories of doctors and which were before the Assessing Officer could be seen and termed as an employee or servant of the assessee. About the category of doctors and who draw fixed pay without any other benefit but like an ordinary employee entitled to medical and provident fund or retiremental benefits, there is no dispute.
- In relation to other category of doctors there was a dispute. The Assessing Officer and the Commissioner concluded that though these categories of doctors had a fixed remuneration and variable pay but their terms and conditions of employment or service would be crucial and material.

In relation to two doctors, namely, Z and P, the contracts were taken as sample and scrutinized minutely. Upon such a scrutiny the Tribunal noted that it cannot be said that these doctors were employees. If the first part of the Commissioner's order indicates as to how these persons or doctors were not treated by the assessee as regular employees for want of benefits like provident fund, retiremental benefit, etc., then, merely because they are required to spend certain fixed time at the hospital, treating fixed number of patients at the hospital, attend them as out patients and Indoor patients does not mean that a employer-employee relationship can be culled out or inferred. Such conclusions could not be faulted by relying upon decisions which had been rendered in cases of doctors having a fixed pay and tenure**.** In that case, there is no dispute. Even the assessee accepts the position that they are the employees of the assessee trust,

- However, in cases of other doctors the contract would have to be read as a whole. It would have to be read in the backdrop of the relationship and which was of engagement for certain purpose and time. The skill of the doctors and their expertise were the foundation on which an invitation was extended to them to become part of the assessee which is a public charitable trust and rendering medical service. If well known doctors and in specified fields are invited to join such hospitals for a fee or honorarium and there are certain terms drawn so as to understand the relationship, then, in every case such terms and the attendant circumstances would have to be seen and in their entirety before arriving at a conclusion that there exists a employer-employee relationship. The Tribunal found that the Commissioner was in error. The Tribunal's order is agreeable because in the Commissioner's order in relation to these two doctors the findings are little curious. The Commissioner concluded that doctors drawing fixed remuneration are full time employees. However, in relation to the second category of doctors drawing fixed plus variable pay with written contracts the terms and conditions of Z and P have been referred and the Tribunal concluded that neither of the doctors was entitled to provident fund or any terminal benefits. Both were free to carry on their private practice at their own clinic or outside Hospitals but beyond the Hospital timings. Both doctors treated their private patients from the hospital premises. All of which could be seen as indicators that they were not employees but independent professionals. However, they were found to be sharing a overwhelming number of attributes of employees. In relation to that the contract seems to have been bifurcated or split up or read in bits and pieces by the Commissioner. The Leave Rules were held to be applicable in case of P and there were fixed timing and fixed remuneration. Now, it is inconceivable that merely because for a certain period of time or required number of hours the doctors have to be at the clinic means they will not be entitled to visit any other hospital or attend patients at it necessarily. The anxiety appears is not to inconvenience the patients visiting and seeking treatment at the clinic. If specialized team of doctors, experts and experienced in the field are part of the assessee's clinic, then, their availability at the clinic has to be ensured. Now, the trend is to provide all facilities under one roof so that patients are not compelled to go to several clinics or hospitals. Hence, a diagnostic center with laboratories and clinics, consultation rooms, rooms with beds for indoor treatment, critical care, treatment for kidney, lever,

heart, brain, stomach ailments are facilities available at clinics and hospitals. The management, therefore, insists that such facilities, which are very costly and expensive are utilized to the optimum and the investment of time, money and infrastructure is not wasted. Hence, fixed timings and required number of hours and such stipulations are incorporated in contracts so that they are of binding nature. The doctor or expert medical practitioner is then obliged to denote his time and energy to the clinic whole heartedly. If handsome remuneration, fee is prescribed in return of readymade facilities even for professionals, then, such insistence is not necessarily to treat highly qualified professionals as servants. It is a relationship of mutual trust and confidence for the larger interest of the patient being served efficiently. From this contract or any clause therein no such conclusion could have been arrived at. There was no express bar from working at any other hospital, if the contracts would have been properly and carefully scrutinized. Merely because their income from the hospital is substantial does not mean that ten out of the fourteen criteria evolved by the Commissioner have been satisfied. The Assessing Officer and the Commissioner, therefore, were in complete error. On perusal of these contracts it was found that the communications which have been relied upon, namely, do not contain any admission by the assessee. All that the assessee admitted is the existence of a written contract and with the above terms. Those terms have also been perused minutely and carefully. No stipulations regarding working hours academic leave or attachments have been found which would reveal that these doctors are employees of the assessee. In fact, Z was appointed as a junior consultant on three years of contract. He was paid emoluments at fixed rates for the patients seen by him in the OPD. That he would not be permitted to engage himself in any hospital or nursing home on pay or emoluments cannot be seen as an isolated term or stipulation. In case of P, no such stipulation has been found. In these circumstances, the only agreement between the parties being that certain private patients or fixed or specified number seen by the consultant could be admitted to the assessee hospital. That would not denote a binding relationship or a master servant arrangement. A attractive or better term to attract talented young professionals that too in a competitive world would not mean tying down the person or restricting his potential to one set up only. The arrangement must be looked in its entirety and on the touch stone of settled principles. The Tribunal was right in reversing the findings of the Assessing Officer and the Commissioner. There was a clear perversity and contradiction in the finding.

- In relation to other doctors where the remuneration was variable and there was a written contract or no written contract the Commissioner and the Tribunal did not commit any error at all. Both have referred extensively to the materials on record. The Tribunal's order is not in any way incomplete or sketchy or cryptic. The settled principles and rendered in co-ordinate bench decisions have been referred only to emphasize the tests which have been evolved from time to time. It is only in the light of such tests and their applicability to individual cases that matters of this nature must be decided. This approach of the Tribunal did not require it to render elaborate or lengthy findings and when it agreed with the Commissioner. Further merely because in case a doctor was ensured and guaranteed a fixed monthly payment would not make him an employee of the hospital. This cannot

be seen as a stand alone term. There are other terms and conditions based on which the entire relationship of a consultant or professional and visiting the assessee's hospital had been determined. Once again, no general rule can be laid down. Now a days, private medical care has become imperative. Public hospitals cannot cater to the increasing population. Hence, private hospitals are established and continue to be formed and set up day by day. The quality of care, service, attention, on account of the financial capacity, therein has forced people of ordinary means also to visit them. Since specialists are in demand because of the life style diseases that consultants and doctors prefer these hospitals. Sometimes they hop from one medical centre or clinic to another throughout the day. Retaining them for fixed days and specified hours requires offering them friendly terms and conditions. In such circumstances, the Tribunal did not commit any error of law apparent on the face of the record in confirming the findings rendered by the first appellate authority.

- Further, it is to be noted that the revenue relied on the judgments which were rendered in cases where the terms and conditions denoting employee and employer relationship included a fixed pay or monthly remuneration only. For all these reasons Tribunal was justified in setting aside the order passed against the assessee under sections 201 and 201 (1A) and holding that there existed no relationship of employer and employee between the assessee and consultant doctors employed in the hospital.
- However, the findings of the instant court or the Tribunal's order being upheld does not mean that any absolute rule or principle of general application has been laid down. In such cases, depending upon the attending facts and circumstances, the terms and conditions of the engagement, a finding can be arrived at that there is a master servant or an employer-employee relationship. It can be arrived at in cases where it is found by the Income-tax Authorities that though there is not a regular process of recruitment and appointment but the contract would indicate that the doctor/professional was appointed as an employee and on regular basis. Accordingly, the appeal is dismissed.