INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A": NEW DELHI
BEFORE SHRI S.V.MEHROTRA, ACCOUNTANT MEMBER
AND
SHRI A. T. VARKEY, JUDICIAL MEMBER

ITA No. 4718/Del/2013
(Assessment Year: 2009-10)

DCIT Circle-49(1), New Delhi	Vs.	Artemis Medicare Service Ltd., 414/1, 4th Floor, DDA Commercial Complex, District Centre, Janakpuri, New Delhi PAN:AAFCA0130M
(Appellant)		**(Respondent)**

C.O. No.33/Del/2014
In ITA No. 4718/Del/2013
(Assessment Year: 2009-10)

Artemis Medicare Service Ltd., 414/1, 4th Floor, DDA Commercial Complex, District Centre, Janakpuri, New Delhi PAN:AAFCA0130M	Vs.	DCIT Circle-49(1), New Delhi
(Appellant)		**(Respondent)**

Appellant by	:	Dr. Shalini Verma, DR Shri Nanak Chand, Inspector
Respondent by	:	Shri Ajay Vohra, Sr. Adv & Ms. Bhavita, Adv

Date of Hearing	24.02.2015
Date of pronouncement	15.05.2015

O R D E R

PER A. T. VARKEY, JUDICIAL MEMBER

This is an appeal preferred by the revenue and the CO filed by the assessee against the order dated 20.05.2013 of the ld CIT(A), XXX, New Delhi for the Assessment Year 2010-11.

2. Brief facts of the case are that the assessee is a hospital by the name of M/s Artemis Medicare Services Pvt. Ltd. And it's case was picked up by ACIT (TDS), for

verification in respect to deduction of tax in compliance to chapter XVIIB of the Income Tax Act 1961(herein after the Act). In response to the notice issued by AO, the assessee submitted that the assessee, Artemis Medicare Services Ltd was formerly known as Artemis Medicare Services Pvt. Ltd and is engaged in the business of managing and operating of multi specialty hospital; and commenced its commercial operations by setting up the Artemis Health Institute, Gurgaon on 16.07.2007. It was submitted that the hospital has two broad categories of doctors namely (1) employee doctors and (2) medical consultants engaged as independent professionals. Further it was submitted by the assessee that the TDS returns for the various financial years as per the provisions of Chapter XVII-B have been filed indicating deduction of tax at source u/s 192 of the Act in respect of employees including employee doctors; as well as deduction u/s 194J of the Act in respect of medical consultants treating them as independent professionals.

3. The assessee hospital has submitted before the AO, (ACIT (TDS), New Delhi), the details of consultancy fees paid to consultants aggregating to Rs.29,48,82,714/- in the financial year 2009-10. The assessee hospital further categorized the doctors under five categories of consultants on the basis of financial arrangement of payment. The requisite details of payments of consultancy fees have been filed by the assessee before the AO, along with copies of the consultancy agreements for various categories of consultants in support of the contention of the assessee that consultants are independent agents and are rendering professional services to the hospital. Detailed breakup of payments for each category of consultants for the financial year was stated as under:

Sl. No.	Classification of Consultants	F.Y.2009-10 {Rs.}
1	Visiting Consultants (Doctors)	24,576,144
2	Doctors at Revenue Share Only	42,21,348
3	Doctors on Revenue Share with Minimum Guarantee	14,85,48,444
4	Senior Doctors on Minimum Guarantee Consultancy	6,50,62,933
5.	Junior Doctors on Minimum Guarantee Consultancy Fees	5,24,73,845
	TOTAL	2,948,82,714

4. According to the assessee, TDS has been deducted on the aforesaid payments u/s 194J of the Act. Further, the assessee brought to the knowledge of the AO that there are 18 doctors in F.Y 2009-10 who are employees of the appellant hospital working under the control and supervision of the hospital authorities and in their cases TDS has been duly deducted u/s 192 of the Act. During the course of proceedings u/s 201/201 (1A) before the AO, the assessee submitted that consultants are independent agents and are rendering professional services to the hospital and they are entitled to carry out their own private practice as consultants. The assessee further contended that there is no such stipulation in the consultancy agreements with the hospital that these consultants by virtue of the agreements between the assessee and them from where it can be inferred that these consultant doctors are whole time devoted to the work of the hospital. According to the assessee the consultants, while rendering professional services to the hospital, are not subject to supervision and control of the hospital as to diagnosis, line of treatment and in patient health care to be adopted by them and there is no "looking over the shoulder" by the hospital authorities in the matter of rendering of professional services by the consultants at the hospital. The assessee further argued that since the consultants have unfettered discretion in the matter of "method and manner" of carrying out their professional work, these Independent professionals have been rightly treated by the assessee hospital as independent agents and not employees.

5. We find that the AO accepted the stand of the assessee with regard to the first two categories of consultants as independent professionals however the AO was not impressed by the submission of the assessee, in respect to other three categories i.e. 3,4 and 5 (Supra) from the chart.

6. So the AO upheld the action of the assessee hospital to deduct TDS of the following consultant doctors u/s 194J of the Act.

(A) Visiting consultants: Professional fees paid Rs 2,45,76,144/-

(B) Doctors at revenue share only Professional fees paid Rs.42,21,348/-

7. With regard to the remaining three categories of consultants, the AO rejected the claim of the assessee and treated them as salaried employees as

under. The category and consultancy fees for the financial year 2009-10 of in these categories of consultants are as under:-

SL No.	Classification of consultants	FY2009-10 (Rs)
1.	Doctors on Revenue Share with Minimum Guarantee Consultancy Fees	14,85,48,444/-
2.	Senior Doctors on Minimum Guarantee Consultancy Fees	6,50,62,933/-
3.	Junior Doctors on Minimum Guarantee Consultancy Fees	5,24,73,845/-
	Total	26,60,85,223/-

8. The AO has referred to in Para 5 of his order the basic four factors namely masters right of selection, payment of remuneration, right to control the method of work, right to suspend or dismiss for deciding the issue whether consultants are employees of the hospital. The AO has recorded his findings in para 6.3 as under:

> *"The discussion in the above Para clearly and categorically reflects that there exists a clear employer-employee relationship between the assessee and the doctors receiving remuneration/salary in respect of services rendered by them under an express or implied contract of employment. Reliance is placed here on the jurisdictional High Court in the case of C.S Mathur vs CBDT(1998) 99 Taxman142 Delhi where it was held that the expression employer-employee covers cases of consultants and technicians also. The assessee's exercise of drawing distinction in agreements for part time/ full time employees or any such category may suggest only irrelevant categories so long as it stands the test of employer-employee relationship as has been concluded from the documents furnished by the assessee. Whatever name be given to the contract between the consultant doctors and the hospital there exists a clear master-servant relationships the contract is clearly "of service",*

9. The AO treated the payments to the aforesaid three categories of consultants aggregating to Rs.26,60,85,223/- as salary and thus held the assessee to be deemed to be in default u/s 201/201 (1A) of the Act to the tune of Rs.4,41,89,980/- on account of non deduction tax at source before disbursement and interest accrued on it for default. Subsequently we find that the AO vide order of rectification u/s 154 of the Act dated 18.7.2012 has accepted the application for rectification filed by the assessee claiming that doctors have filed their income tax returns and offered to tax consultancy fees paid to them, claimed credit for TDS deducted and deposited balance tax payable by them if any. In support a certificate of the Chartered accountant dated 5.6.2012 has also

been furnished before the AO. The AO accepted the contention of the assessee that in cases where doctors have filed their income tax returns and offered to tax consultancy fees paid to them, and deposited the balance tax payable by them, if any, no default u/s 201/201 (1A)would be deemed to have been committed by the assessee. However the tax and interest levied vide the initial order has been reduced by the AO only in cases of consultants whose names were included in the certificate of the Chartered Accountant. The AO has allowed the benefit on the basis of the proviso to section 201(1) and 201(1A) inserted by the Finance Act 2012. The newly Inserted proviso contains the requirement for furnishing a chartered accountant's certificate. The total demand of tax and interest has thus been reduced to Rs1,90,90,371/-.

10. Aggrieved by the said order of the AO, the assessee preferred an appeal before the ld CIT(A) who was pleased to partly allow the appeal.

11. Against the said order of the ld CIT(A), the Revenue has filed the appeal and the assessee has filed the cross-objection.

12. We have heard Sr. Advocate Shri Ajay Vohra on behalf of the assessee and ld DR, Dr. Salini Verma on behalf of the revenue and perused of the records and case laws cited before us. The assessee is a hospital and has doctors working in it by virtue of employment as well as certain agreement entered between the assessee and the doctors. In respect to doctors on employment with the assessee hospital, there is no quarrel and we are concerned only with the consultant doctors whom the assessee has categorised into five different categories as stated below.

Sl. No.	Classification of Consultants
1	Visiting Consultants (Doctors)
2	Doctors at Revenue Share Only
3	Doctors on Revenue Share with Minimum Guarantee
4	Senior Doctors on Minimum Guarantee Consultancy Fees
5.	Junior Doctors on Minimum Guarantee Consultancy Fees

13. We note that AO had no issue with the first and second category of Doctors stated above and has accepted the view of the assessee. However AO disagreed with the assessee's contention in respect of third, fourth and fifth

category doctors stated above. Here we would like to again mention that the assessee hospital had doctors on its employment role that is who were paid salary with benefits like PF etc, and TDS on salary has been deducted as per section 192 of the Act by the assessee and remitted as per law and there is no dispute. On appeal before the ld CIT(A), he was pleased to accept the contention of the assessee hospital in respect to 3rd and 4th category of Doctors and allowed the appeal in respect to them. However he dismissed the ground of appeal of the assessee in respect of the 5th category of doctors. So in nutshell, the revenue is in appeal against finding of the ld CIT(A) in the impugned order in respect of 3rd and 4th category of Doctors (Supra) and the assessee in its cross-objection against the impugned order in respect to the ld CIT(A) impugned finding in respect category '5' doctors (Supra)

14. Apropos ground No.3 and 4 of the Revenue which we will deal first, i.e. in respect to the question whether payment made by the assessee to the doctors is covered u/s 194J of the Act in respect of 3rd and 4th category of Doctors (Doctors on Revenue share with Minimum Guarantee and Senior Doctors on minimum Guarantee consultancy fees) instead of section 192 being TDS on salary as per the AO.

15. The AO treated the medical consultants of the assessee hospital categorised as 3rd and 4th category of Doctors above in the chart as salaried employees under section 192 for the purposes of tax deduction at source as against independent professionals treated by the assessee for the purpose of tax deduction at source u/s 194J of the Act.

16. Learned Departmental Representative Smt. Dr. Shalini Verma submitted that the assessee is a private ltd company engaging the services of doctors in its hospital and treated them as consultants for the purpose of TDS under s. 194J of the Act. According to the learned Departmental Representative as per the agreement between the assessee and the doctors they have to work for the hospital exclusively as a full-time employee consultant. They are also prohibited from being engaged in similar services either directly or indirectly to any other hospital or any person. The initial agreement was for a period of three years subject to renewal after mutual discussion. Referring to the order passed by the

AO under s. 201(1) of the Act the learned Departmental Representative submitted that the doctors were appointed by the assessee and paid a fixed remuneration. Therefore, the payment made to the said category of Doctors ought to have been treated as salary for the purpose of TDS under s. 192 of the Act. The learned Departmental Representative pointed out that the assessee was expected to deduct tax under s. 192 of the Act and not under s. 194J of the Act. The learned Departmental Representative further pointed out that a perusal of the agreements will reveal that there is an employer and employee relationship between the assessee and the consultant doctors in the aforesaid 3rd and 4th category of doctors. Dr Shalini the ld DR further pointed out that the assessee collected the entire fees and cost from the clients directly and the entire management of the hospital is with the assessee hospital. And according to her, as per the agreement the doctors are required to be present in the hospital as and when required by the assessee. Therefore according to the learned Departmental Representative, the assessee was required to deduct tax under s. 192 and not under s. 194J of the Act and contended that the ld CIT(A) erred in accepting the version of the assessee and therefore the impugned order need to be reversed.

17. On the other hand. Shri Ajay Vohra, ld Sr. counsel for the assessee submitted that the assessee is a company which is running hospitals and multi speciality health care facilities and for which engaging the services of professional doctors for rendering their services to the patients is required. According to the ld Sr. counsel these are agreements for rendering professional services for three years which is extendable with mutual consent. According to him, there is no element of employer and employee relationship in the said agreements. Referring to the order under section 201(1) of the Act, the ld Sr. counsel for the assessee pointed out that the professional doctors engaged by the assessee were not bound by the rules and regulations for the employee doctors, if any, framed by the assessee. According to him the consultant doctors have to maintain professional ethics in accordance with the rules framed by Medical Council of India. Moreover, it was pointed out by the Sr. Counsel that the doctors are not employees for the purpose of provident fund and other statutory benefits conferred upon the employees. According to him a perusal of the agreement will

reveal that there are no fixed hours of working for the said doctors. The doctors enjoys their freedom to select their own period of working in the manner in which they like. Therefore, according to him there was no control or direction by the assessee to the consultant doctors.

18. According to the Shri Ajay Vohra the agreements will reveal that the consultants are working as a team and the professional fees received as a team is distributed among the team members as well as the hospital on the basis of specified proportional shares. Such arrangement is in essence an association of independent professionals sharing receipts from professional fees. Such an arrangement cannot, by any stretch of imagination, be construed as master and servant relationship between the hospital and the members of the team. This is again the most telling manifestation of intention of the hospital authorities as well as the consultants to constitute relationship of principal to principal and not master and servant.

19. According to the ld Sr. counsel the remuneration paid to the consultants by the hospital has been debited in the books as fees for professional services from year to year .The consultants have also accounted for the fees as income from profession. The consultants have consistently and regularly disclosed consultation fees in their income tax returns from year to year and paid tax accordingly. This indicates concurrence of intention and motive of both the parties to the agreement which is also reflected in their conduct and actions to form the relationship on principal to principal basis. Reliance is placed on the decisions in the case of CIT v Bhojraj Hari Chand 14 ITR 277 (Lahore); Sri Nilkantha Narayan Singh v CIT 20 ITR 8 (Patna); Income tax officer v Calcutta Medical Research 107 Taxman250 (Cal) and Or Shanti Sarup Jain v First Income Tax Officer 21 ITO 494 (Born).

20. In view of the above, according to the ld Sr. counsel there was no employer and employee relationship. Therefore, the doctors referred to the 3rd and 4th category have to be treated as consultant for professional services rendered. Accordingly, s. 194J would be applicable and not s. 192 of the Act. Thus the payment made by the assessee, according to the ld Sr. counsel is for contract for service in the nature of professional charges and therefore, it cannot be treated as salary for the purpose of deduction of tax at source and the error

committed by the AO has been rightly corrected by the ld CIT(A) and therefore we need not interfere with the well reasoned order of the ld CIT(A).

21. We have considered rival submissions of either side and perused the material on record and case laws cited before us. The assessee company is running hospitals and for that is engaging the services of doctors for providing treatment to the patients. The question before us is whether the payment made to the doctors described and categorized on 3rd and 4th consultant doctors by the assessee hospital is salary or else is it only the professional charges so as to attract the provisions of s. 194J of the Act. The contention of the assessee is that the payment made by it to the said consultant doctors is only professional charges and, therefore, tax has to be deducted under s. 194J of the Act. However, the Revenue contends that the payment made by the assessee was salary and therefore, tax has to be deducted under s. 192 of the Act. We find that the ld CIT(A) after examining the terms of the agreement between the assessee and the doctors found that there was no employer and employee relationship and what was paid by the assessee to the doctors is for the professional services rendered. Before we advert further let us look at the law laid down by the Apex Court in respect to the question, as to how to determine whether the relationship between parties are of the nature of employers and employee; and let us examine as to who qualifies to be called employees; and principles of employer-employee relationship how established; and thereafter we can proceed to adjudicate the issue before us.

22. The Hon'ble Supreme Court in the case of Workmen of Nilgiri Cooperative Marketing Society Ltd Vs. State of Tamil Nadu, 2004) 3 SCC 514 has laid down as follows:-

> ***" 32. Determination of relationship:- Determination of the vexed questions as to whether a contract is a contract of service or contract for service and whether the employees concerned are employees of the contractors has never been an easy task. No decision of this Court has laid down any hard-and-fast rule nor is it possible to do so. The question in each case has to be answered having regard to the fact involved therein. No single test - be it control test, be it organisation or any other test - has been held to be the determinative factor for determining the jural relationship of employer and employee.***
>
> ***33. There are cases arising on the borderline between what is clearly an employer-employee relation and what is clearly an independent entrepreneurial dealing.***
>
> ***34. This Court beginning from Shivnandan Sharma v. Punjab National Bank Ltd.) and Dharang adhra Chemical Works Ltd. v. State of Saurashtra - observed that supervision and***

control test is the prima facie test for determining the relationship of employment. The nature or extent of control required to establish such relationship would vary from business to business and, thus, cannot be given a precise definition. The nature of business for the said purpose is also a relevant factor. Instances are galore there where having regard to conflict in decisions in relation to similarset of facts, Parliament has to intervene as, for example, in the case of workers rolling bidis.

35. In a given case it may not be possible to infer that a relationship of employer and employee has come into being only because some persons had been more or less continuously working in a particular premises inasmuch as even in relation thereto the actual nature of work done by them coupled with other circumstances would have a role to play.

36. In V.P. Gopala Rao v. Public Prosecutor; A.P3 this Court said that it isa question of fact in each case whether the relationship of master and servant exists between the management and the workmen and there is no abstract a priori test of the work control required for establishing the control of service. A brief resume of the development of law on this point was necessary only for the purpose of showing that it would not be prudent to search for a formula in the nature of a single test for determining the vexed question.

37. The control test and the organisation test, therefore, are not the only factors which can be said to be decisive. With a view to elicit the answer, the court is required to consider several factors which would have a bearing on the result: (a) who is the appointing authority; (b) who is the paymaster; (c)who can dismiss; (d) how long alternative service lasts; (e) the extent of control and supervision; (j) the nature of the job e.g. whether it is professional or skilled work; (g) nature of establishment; (h) the right to reject.

38. With a view to find out reasonable solution in a problematic case of this nature, what is needed is an integrated approach meaning thereby integration of the relevant tests where for it may be necessary to examine as to whether the workman concerned was fully integrated into the employer's concern meaning thereby independent of the concern although attached therewith to some extent.

39. I.T. Smith and J.C. Wood in Industrial Law, 3rd Edn., at pp. 8-10 stated:

> *"In spite of the obvious importance of the distinction between an employee and an independent contractor, the tests to be applied are vague and may, in a borderline case, be difficult to apply. Historically, the solution lay ill applying the 'control' test i.e. could the employer control not just what the person was to do, but also the manner of his doing it - if so, that person was his employee. In the context in which it mainly arose in the nineteenth century, of domestic, agricultural and manual workers, this test had much to commend it, but with the increased sophistication of industrial processes and the greater numbers of professional and skilled people being in salaried employment, it soon became obvious that the test was insufficient (for example in the case of a doctor, architect, skilled engineer, pilot etc.) and so, despite certain attempts to modernise it, it is now accepted that in itself control is no longer the sole test, though it does remain a factor and perhaps, in some cases, a decisive one. In the search for a substitute test, ideas have been put forward of an 'integration' test i.e. whether the person was fully integrated into the employer's concern, or remained apart from and independent of it. Once again, this is not now viewed as a sufficient test in itself, but rather as a potential factor (which may be useful in allowing a court to take a wider and more realistic view). The modern approach a has been to abandon the search for a single test, and instead to take a multiple or 'pragmatic' approach, weighing upon all the factors for and against a contract of employment and determining on which side the scales eventually settle. Factors which are usually of importance are as follows - the power to select and dismiss, the direct payment of some form of remuneration, deduction of PAYE and national insurance contributions, the organisation of the workplace, the supply of tools and materials (though there can still be a labour*

only sub-contract) and the economic realities (in particular who bears the risk of loss and has the chance of profit and whether the employee could be said to be 'in business on his own account'). A further development in the recent case-law (particularly concerning atypical employments) has been the idea of 'mutuality of obligations' as a possible factor i.e. whether the course of dealings between the parties demonstrates sufficient such mutuality for there to be an overall employment relationship."

(See also Ram Singh v. Union Territory, Chandigarh) (2004) 1SCC 126: 2004 SCC (L&S) 14: IT (2003) 8 SC 345

40. In Mersey Docks and Harbour Board v. Coggins & Griffiths (Liverpool) Ltd. 1947 AC 1: (1946) 2 All ER 345: 115 LJKB 465: 175 LT 270

Lord Porter pointed out: (All ER p. 351 F)

"Many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed, have all to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject-matter under discussion but amongst the many tests suggested I think that the most satisfactory, by which to ascertain who is the employer at any particular time is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged,"

41. If the provisions of the contract as a whole are inconsistent with its being a contract of service, it will be some other kiqd of contract and the person doing the work will not be a servant. [See Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance] (1968) 2 WLR 775: (1968) 1 ALL ER 433: (1968) 2 QB 497

42. The decisions of this Court lead to one conclusion that law in this behalf is not static. In Punjab National Bank v. Ghulam Dastagirl Krishna Iyer, J. (1978) 2 SCC 358: 1978 SCC (L&S) 353: (1978) 1 LLU 312, observed (at SCC p. 359., para 3): "To crystallise criteria conclusively is baffling but broad indications may be available from decisions."

43. After taking note of the ratio laid by the Hon'ble Supreme Court hereinbefore, the question before us poses intricate question having regard to the facts and circumstances of the case in hand. So in our endeavour to find out an answer, let us at the first instance look at the terms of agreement between the assessee and the said category doctors (i.e. consultant doctors on revenue share with minimum guarantee fees) as noted by the ld CIT(A).

(i) ***DOCTORS ON REVENUE SHARE WITH MINIMUMGUARANTEE CONSULTANCY FEES***

Sample agreement in this category entered with Dr. Deepak Sarin dated July 16, 2007 and subsequent addendum dated May 31, 2009 are placed at pages 96 to 101 (PB) Clause 4 deals with the financial terms and provides the minimum guarantee of Rs.2,00,000/- per month plus consultant share as per the revenue model being 50% doctors' share and 50% hospital's share and retainership reduces from the second year and consultancy revenue share increases.

(ii) SENIOR DOCTORS ON Revenue share with MINIMUM GUARANTEE CONSULTANCY FEES

An agreement with Dr. Rakesh R. Sapra in this category has been placed at pages 102 to 106 PB. Clause 4 deals with the financial terms and provides for minimum guarantee of Rs.5,00,000/- per month plus 50% consultant share. This agreement is also on similar lines as in the case of above categories and from the second year, the retainership decreases consultancy share increase. It agreement is also similar to that of the above said category of doctors.

23. The issue before us is whether the aforesaid two categories of consultant doctors are employees or they are independent professional consultants has to be decided mainly on the basis of the agreement between the parties. Therefore, we cannot say that merely because the assessee hospital engaged the services of professional doctors it has always to be treated as employee for the purpose of deduction of tax at source. The relationship between the assessee and the employee would depend upon the terms of contract between them. In Max Muller Bhawan 268 ITR 31, the AAR after relying on the decision of the Hon'ble Supreme Court in the case of Shivnandan Sharma Vs. Punjab National Bank AIR 1955 SC 404 and in the case of Ram Prasad vs. CIT 1972 CTR (SC) 97 : (1972) 86 ITR 122 (SC) has held as follows:-

"it is obvious that certain employee acts under direct control and supervision of the master. However, an agent or a professional exercises his discretion in carrying out the work and is not under the direct control or supervision of the employer though he is bound by the terms of employment from time to time."

24. Bearing in mind, the aforesaid laid down tests and principles by the Hon'ble Supreme Court and the Hon'ble AAR, we have to examine whether the impugned order of the ld CIT(A) is valid or not.

25. The ld CIT(A) on analysis of the consultancy agreements has held as follows:-

" 23. Analysis of the consultancy Agreements -

The facts and material placed on record as well as the case laws on the issue cited by the AO and the Authorized Representative of the appellant have been carefully considered by me. Before adverting to the legal principles governing jural relationship - master and servant as well as principal and independent contractor, it would be useful to analyse the consultancy agreements concerning the engagement of the consultants by the appellant hospital. It needs to be noted here that for deciding the issue whether the agreements in question establish relationship of employer-employee or principal to principal basis the underlying intention and motive of the parties to the agreement, as reflected in the terms and conditions contained in the agreement, are to be considered in totality. Mere

reference to the financial terms of payment will not be decisive of the issue in hand. The AO has apparently gone by the division of consultants in five categories made by the appellant and the first two categories of consultants namely visiting consultants and consultants appointed on revenue sharing basis have been accepted by her as independent professionals covered under section 194J whereas the remaining three categories of consultants namely consultants with revenue sharing subject to minimum guarantee, senior doctors with minimum guarantee and junior doctors with minimum guarantee are treated by her as employees without analysis of the clauses of the respective agreements.

24. On going through the compilations of consultancy agreements entered in to by the appellant, available on record, I find that there are broadly three different formats of agreements adopted by the appellant hospital for engagement of consultants The first format is for the visiting consultants who are engaged on revenue sharing basis and have been rightly treated by the AO as independent professionals. The second format of consultancy agreements has been adopted for engagement of consultants falling in the following three categories- (i) revenue sharing consultants (ii) revenue sharing with minimum guarantee (iii) senior doctors with minimum guarantee. It is rather intriguing that the AO has accepted revenue sharing consultants as independent professionals and with regard to the remaining two categories the AO has rejected the claim of the appellant and treated them as employees ignoring the crucial and decisive fact that the format of the three categories are similar, and various clauses are identical and the only difference is basis of payment. During the course of hearing of appeal before me, the Ld. AR of the appellant furnished a chart showing the comparison of various clauses forming part of agreement entered into between the appellant company and all the five categories of medical consultants, which forms part of this order as Annexure 'A'. The AR also urged that it could be observed from the said comparative chart that majority of the clauses forming part of contracts in all the five categories of consultants are similar and that the AO erred in coming to the conclusion that the consultants falling in the last three categories are employees, only for the reason that the consultants in these categories are getting minimum guarantee fee.

I have examined the various clauses forming part of the agreements with all the 5 categories of the medical consultants and am inclined to agree with the contention of the AR of the appellant that the clauses in these agreements are identically worded except in the fifth category of Junior Doctors with Minimum Guarantee. I am therefore inclined to concur with the arguments of the AR that since the agreements in the first 2 categories of consultants (i.e. visiting Consultants & Doctors at Revenue Share only) have been accepted by the ACIT as establishing the relationship of principal and independent consultants, similar agreements with identical terms and conditions in the case of next 2 categories of consultants (i.e. Doctors on revenue share with Minimum Guarantee & Senior Doctors on Minimum Guarantee Fee) should also be accepted, on principle of consistency, as being covered u/s 194J. No discrimination should be made by the revenue by treating the professionals in the 3rd & 4th category of Doctors on revenue share with Minimum Guarantee & Senior Doctors on Minimum Guarantee Fee as employees of the hospital. I, therefore hold that the 3rd & 4th categories of doctors i.e. Doctors on revenue share with Minimum Guarantee & Senior) Doctors on Minimum Guarantee Fee as independent consultants covered u/s 194 J of the IT Act."

24. The aforesaid finding and conclusion of the ld CIT(A) has been assailed before us by the revenue. So now let us examine the present case in the light of

the case law and discussion made by the Hon'ble AAR and the Hon'ble Supreme Court precedent cited and reproduced above. We find that both the AO as well as the ld CIT(A) extracted the relevant clauses of the agreement entered into by the assessee and the doctors. One of the points which were highlighted by the AO is that the doctor has to work for the assessee and cannot do any private practice. We cannot agree to this because of the simple fact that there is no prohibition for the said consultant doctors to do private practise and the only restriction is that the assessee hospital should be taken in to confidence before doing it. We find that in Para 15 of the AO's order itself he has taken note of the fact that the assessee hospital has granted permission to few doctors who desired to practise privately. And further we should point out that there is no prohibition in law to engage the services of a professional exclusively for a particular hospital. Merely because the doctors were exclusively engaged for three years, it does not mean that they are employees of the assessee hospital. As pointed out by the Sr. Counsel, the other factors such as PF, job assignments, working hours, direction and supervision are all the relevant factors which need to be considered to see the existence of employer and employee relationship. In the case before us, it is not in dispute that the consultant doctors in question are not in the roll of PF payments etc.

25. Admittedly, the working hours were flexible and determined mutually by the assessee and the doctor. The consultant doctors are free to come at their convenience and treat the patients. The agreement does not provide for any supervision or control over the doctor. The doctors at their own discretion treat the patients by making use of the infrastructural facilities and manpower available in the hospital. The doctors are governed by the rules and regulations of their regulatory body in their professional activity (MCA) and the assessee being a hospital they expected the doctors to conduct themselves as per its policy while discharging their profession. This expectation of the assessee is nothing but for maintaining discipline by the said consultant doctors by abiding to the code of conduct of assessee hospital, cannot be considered to be exercising control and supervision over the doctors in their independent professional activity. We find that clause dealing with indemnity insurance payable by the consultant in case of any liabilities for any act of medical malpractice arising under Consumer

Protection Act clearly takes the assessee hospital out of any vicarious liability which again goes on to show that there is no master-servant relation between them. We find that consultants are not governed by the service rules and leave rules which are applicable to employees. Therefore, it is obvious that the, doctors are not considered to be employed by the assessee and they are rightly considered only as consultant professionals.

27. So, in our opinion, the agreement between the assessee and the doctors is one for providing professional services, and there is no element of employer and employee relationship existing. Therefore, in our opinion, tax has to be deducted under s. 194J of the Act as fee for professional services and not as salary.

28. Hence we find force in the contention of the ld Sr. counsel for assessee that the agreement with the 3rd and 4th category cannot be termed as that of an employer employee contract and so ld CIT(A) rightly held so after analysing the said agreements. The ld Sr. Counsel has placed before us order of the Hon'ble Bombay High court wherein the Hon'ble High Court held in a similar case where facts are similar and having considered the case law heavily relied upon by the AO in his order i.e. the judgement of the Hon'ble Supreme Court in Indian Medical Association Vs. V.P. Shantra AIR 1996 SC, 550, the Hon'ble Bombay High Court held in the case of CIT (TDS) Vs. Grant Medical Foundation (Ruby Hall Clinic), Income Tax Appeal No.140 of 2013 as follows:

> ***" 32. In the case of Indian Medical Association Vs. V.P.Shantha and Ors reported in AIR .1996 Supreme Court, 550 what was adjudicated' by the Court is why doctors and medical professionals were brought within the purview of the Consumer Protection Act, 1986 and in relation to the services rendered by them. The argument was that the Consumer Protection Act defines the term "service" in Section 2 (1)(o) of the Consumer Protection Act, 1986. A doctor patient relationship is of mutual trust and confidence. A doctor cannot be said to be a servant of the patient. Neither the patient can be termed as his master. This peculiar relationship would, therefore, enable the association to contend that the parliament never intended to bring such professionals and doctors who work for the welfare and well being of the patients by treating them as servants of anybody.***
>
> ***33) In fact, the constitutional validity of the Act and in the backdrop of this peculiar provision was the issue before the Hon'ble Supreme Court.***
>
> ***34) Going by the peculiar definition and the consequences which would follow if acts of negligence and attributable to doctors and medical professionals are not brought within the purview of the Act that the Hon'ble Supreme Court upheld its validity and negatived the challenge. In doing that the Hon'ble Supreme Court referred to the well settled tests which could enable a Court to distinguish between a contract of service (a master servant relationship) and contract for service being services***

rendered as a professional. In that context, paragraphs 41 and 42 of the decision read as under:

> ***"41. Shri Salve has urged that the relationship between a medical practitioner and the patient is of trust and confidence and, therefore, it isin the nature of a contract of personal service and the service rendered by the medical practitioner to the patient is not 'service' under Section 2(1)(o) of the Act. This contention of Shri Salve ignores the well recognised distinction between a 'contract of service' and a 'contract for services'. [See: Halsbury's Laws of England, 4th Edn., Vol. 16, para 501; Dharangadhara Chemical Works Ltd v. State of Saurashtra, 1957 SCR 152 at p. 157]. A 'contract for services' implies a contract whereby one party undertakes to render services e.g. professional or technical services, to or for another in the performance of which he is not subject to detailed direction and control but exercises professional or technical skill and uses his own knowledge and discretion. [See : Oxford Companion to Law, P. 1134]. A 'contract of service' implies relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance. [See : Stroud's Judicial Dictionary, 5th Edn., P. 540; Simmons v. Heath Laundry Co. (1910) 1 K.B. 543; and Dharangadhara Chemical Works (supra) at p.159]. We entertain no doubt that Parliamentary draftsman was aware of this well accepted distinction between "contract of service" and "contract for services" and has deliberately chosen the expression 'contract of service' instead of the expression 'contract for services', in the exclusionary part of the definition of 'service' in Section 2(1)(0). The reason being that an employer cannot be regarded as a consumer in respect of the services rendered by his employee in pursuance of a contract of employment. By affixing the adjective 'personal' to the word "service" the nature of the contracts which are excluded is not altered. The said adjective only emphasizes that what is sought to be excluded is personal service only. The expression "contract of personal service" in the exclusionary part of Section 2(1)(o) must, therefore, be construed as excluding the services rendered by an employee to his employer under the contract of personal service from the ambit of the expression "service".***
>
> ***42. It IS no doubt true that the relationship between a medical practitioner and a patient carries within it certain degree of mutual confidence and trust and, therefore, the services rendered by the medical practitioner can be regarded as services of personal nature but since there is no relationship of master and servant between the doctor and the patient the contract between the medical practitioner and his patient cannot be treated as a contract of personal service but is a contract-for services and the service rendered by the medical practitioner to his patient under such a contract is not covered by the exclusionary part of the definition of service contained in Section 2(1)(o) of the Act."***
>
> ***35. We are mindful of the fact that these observations must be treated as confined to the interpretation of the provisions of a distinct legislation. That legislation was perceived and noted as taking care of the interest of consumers and of varied categories. It is in relation to bringing services and of all categories rendered by professionals for a fee that the Hon'ble Supreme Court negatived the challenge.***

30. Further the Hon'ble Bombay High court held in respect to the doctors who had a fixed remuneration and variable payment (in the case in hand consultant doctors on revenue share with minimum guarantee fee-identical) the Hon'ble High Court held as under:-

" 36) However, we are in agreement with. Mr Bajpai that 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 theassessee. 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.

37) 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, Or Zirpe and Dr Phadke, 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 outpatients and Indoor patients does not mean that a employer-employee relationship can be culled out or inferred. We do not see how Mr Gupta can fault such conclusions by relying upon decisions which have been rendered in cases of doctors having a fixed pay and tenure. In that case, before us, there is no dispute. Even the assessee accepts the position that they are the employees of the assessee trust.

38) 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. We also agree with the Tribunal because in the Commissioner's order in relation to these two doctors the findings are' little curious. The commissioner referred to the tests in paragraph 9 of the order at running page 62 and at internal page 14 in paragraph 10 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 Dr. Zirpe and Dr Phadke 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 (see paragraph 14). 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 Dr Phadke 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 Ruby Hall 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 Ruby Hall 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 ready-made 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. We do not see how there was any express bar from working at any other hospital and 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. We have also perused these contracts and copies of which are annexed to the paper book being part of the order of the Assessing Officer. We find that the communications which have been relied upon, namely, 25th November, 2008 and 14thMay, 2009 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 by us minutely .and carefully. We do not find that arty stipulations regarding working hours, academic leave or attachments would reveal that these doctors are employees of the assessee. In fact, Dr Zirpe 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 Dr Uday Phadke, we do not find any such stipulation. 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. An attractive or better term to attract talented young professionals and 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 findings, particularly pointed out by us hereinabove.

39) 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. We are not in agreement with Mr Gupta that the Tribunal's order is 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. We do not find even in the case of Dr Sumit Basu the Commissioner or the Tribunal committed any error. Merely because of his stature he was ensured and guaranteed a fixed monthly payment. That would not make him an employee of the hospital. This cannot be seen as a standalone 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 be laid down. Nowadays, 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, we do not think that the Tribunal committed any error of law apparent on the face of the record in confirming' the findings rendered by the first Appellate Authority. The findings of fact from paragraph 16 onwards in the Commissioner's order

on ground no.2 and from paragraph 20 onwards on groundno.3 do not suffer from any serious legal infirmity. The appreciation and appraisal of the factual materials is not such as would enable us to interfere in our limited jurisdiction. Our further appellate jurisdiction is limited.

40) As a result of the above discussion, we need not advert to the entire case law in the field. Suffice it to note 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 we are of the opinion that the questions of law termed as substantial and framed as above would have to be answered against, the Revenue and in favour of the Assessee.

41) Consequently, the appeal fails and is, dismissed with no order as to costs.

42) The only argument that is seriously canvassed by Mr Gupta is that confirmation of the findings rendered by the Tribunal would mean concurrence with its conc1usion that professionals can never be appointed as employees or there can never be master servant relationship. This is apprehended by the Revenue because several eminent professionals are rendering full time services as medical officers, medical practitioners and teachers at Civil and Government hospitals. They are alsopart of hospitals, privately managed or managed in public private partnership (PPP). Our findings or the Tribunal's order being upheld does not mean that we have laid down any absolute rule or principle of general application. 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. All such and other courses in law are always open. With this additional clarification, we dismiss this appeal."

31. After going though the aforesaid judgement of Bombay High Court and the reasons given by the ld CIT(A) after analysing the terms of the agreement between the assessee and the doctors i.e. 3rd and 4th category consultant doctors, we concur with the view of the ld CIT(A) that there is no employer employee relation between the said consultant Doctors and the assessee, and so the payment made to them does not attract section 192 of the Act and the assessee has rightly deducted tax u/s 194J of the Act. We do not find any infirmity in the impugned order and so the said appeals of the revenue is dismissed.

32. Coming to Ground Nos.1and 2 of the revenue is concerned we find that the revenue is aggrieved by the decision of the AO in reducing the demand while adjudicating an application filed by the assessee hospital u/s 154 of the Act, and the impugned direction of the ld CIT(A) to the AO, wherein he directed him to verify the tax details of the assessee, since AO (TDS) was handicapped and does not have access to verify the payment from ITD system. In this respect, we find that the ld CIT(A) has noted this aspect in para 15 of his order as follows:-

" 15. The AO treated the payments to the aforesaid three categories of consultants aggregating to Rs. 26,60,85,223 as salary and held the appellant to be deemed to be

in default u/s 201/201 (1A) to the tune of Rs.4,41,89,980 on account of tax and interest. Subsequently the AO vide order of rectification dated 18.7.2012 has accepted the application for rectification filed by the appellant claiming that doctors have filed their income tax returns and offered to tax consultancy fees paid to them, claimed credit for TDS deducted and deposited balance tax payable by them if any. In support a certificate of the Chartered accountant dated 5.6.2012 has also been furnished to the AO. The AO accepted the contention of the appellant that in cases where doctors have filed their income tax returns and offered to tax consultancy fees paid to them, claimed credit for TDS paid and deposited the balance tax payable by them, if any, no default u/s 201/201 (1A) would be deemed to have been committed by the assessee. However the tax and interest levied vide the impugned order has been reduced by the AO only in cases of consultants whose names are included in the certificate of the Chartered Accountant. It appears the AO has allowed the benefit on the basis of the proviso to section 201(1) and 201(1A) inserted by the Finance Act 2012. The newly Inserted proviso contains the requirement for furnishing a chartered accountant's certificate. AO passed the rectification order dated 18.7.2012 after the present appeal has been filed in April 2012 before me. The total demand of tax and interest has thus been reduced to Rs.1,90,90,371/-. A copy of the said rectification order passed by the AO has been filed before me."

33. Further we find from the records that the ld CIT(A) exercising his powers which are co-extensive to that of the AO wrote to the Director of Income Tax System II and III for Verification of deductees tax return details for the F.Y. 2009-10. And copy of the letter dated 18.02.2013 issued by the ld CIT(A) to DIT system (Page 223 PB) is reproduced below:-

F.NO.CIT(A)-XXX/12-131/913/213 *Date: 18 February, 2013*

To,
The Director of Income Tax (S) –II & III
Vaishali, Uttar Pradesh

Subject: - Verification of deductees tax return details for the F.Y. 2009-10 in the case of Artemis Medicare Services limited. (TANDELA16048E)

Dear Sir.

I have referred the case to member of CBDT on 16.11.2012 after consulting the matter with you. The appellant had won the case from Punjab and Haryana High Court on a petition filed by the appellant where TDS demand was raised by AO. of CIT (TDS) Delhi as well as AO. ACIT (TDS) Gurgaon for the F.Y. 2009-10 & 2010-11. The Hon'ble High Court had directed that the AO, CIT(TDS) Delhi will have jurisdiction .over the case for the F. Y. 2009-1 0 only and A O. ACIT (TDS) Gurgaon jurisdiction for the .FY 2010-11.1 am sending the authorize representative and General Manager of Taxation Shri KP. Sharma and Controller Finance Shri Vivek Anand for discussion with you and to obtaining the date of filing of income tax return of deductee Doctors as per list attached in this case so that interest can be quantified from the date of default to the date of filing of return of the deductees respectively. If the deductee have filed their income tax return, the deductors need not pay tax u/s 201(1) for the F.Y. 2009-10 which jurisdiction lies with me now as per Punjab and Haryana High Court direction. Therefore, I need your co-operation in this regard so that the tax demand can be quantified scientifically on the basis of information in our server.

Yours faithfully,

(Durga Charan Das)
Commissioner of Income Tax
(Appeal)-XXX. New Delhi

Copy to :1) Commissioner of Income Tax (TDS) Gurgaon.
2) Artemis Medicare Services Limited, Deihi
3) Commissioner of Income Tax (TD.S) - I & II. Delhi

34. Pursuant to the aforesaid letter of DDIT(System) forwarded a report and details as asked by the ld CIT(A) above and as vide letter dated 17.04.2013 (PB 230) has forwarded the said report thus obtained from DDIT (system) which have been sent to AO, for rectification, so, we find that there is no substance in the ground raised by the revenue and there is nothing wrong in the said action of the ld CIT(A). So we dismiss the aforesaid grounds of the revenue.

35. In the result appeal preferred by the revenue is dismissed.

36. Coming to the CO filed by the assessee, in respect of the impugned order in which it was held by the ld CIT(A)that 5th category doctors categorized under the heading 'Junior Doctors' on minimum guarantee consultancy fees" are employees and therefore TDS ought to have been deducted u/s 192 of the Act, mainly due to absence of indemnity bond and that they are subject to leave rules /conduct rules. On this ground of the assessee, the ld CIT(A), held as follows:-

> "Under the 5thcategory of consultants i.e. Junior Doctors with Minimum Guarantee, who are normally junior level of doctors, the format of the *agreement adopted by the parties is different in the content and language used. The financial terms of payment involved minimum assured sum. The aggregate consultation fees paid in this category is as under:*
>
> *Financial Year 2009-10* *Rs. 5,24,73,845/-*
>
> *The various terms and conditions adopted in the consultancy agreements with junior doctors are structured differently and agreements in such class/category are placed on record by the appellant. A bare reading of the various clauseswould indicate that the consultants in this category have been engaged asemployees. The clauses are structured in a different manner as compared with the earlier cases described above, however the sum and substance emerging from a composite reading of the agreement is that this is an agreement for engagement of consultant as an employee of the appellant hospital and not as independent professional.*
>
> *The agreements under this class provide that the doctor would be subject to leave rules of the hospital. No such clause relating to leave has been included in any of the consultation agreements which have been discussed herein before. Normally, leave rules are applicable to employees of the hospital and not to the independent consultants. On behalf of the appellant it has been argued that this clause by itself contained in agreements with junior doctors, who are on the lowest rung of their professional career with limited experience and expertise, would not clinch the issue against the appellant for invoking section 192 for the purposes of TDS. According to the appellant this clause by itself cannot be read in*

isolation for adjudicating the issue whether the doctor has been engaged as an employee or as an independent professional. It is further contended that thevarious characteristic features of the agreement in question namely short duration of engagement, non provision of any perquisites or benefits like provident fund, gratuity or bonus etc. and specific duties assigned to the doctor are indicative of the agreement being of the nature of engagement of independent professional and not an employee.

On careful perusal of the agreements with junior doctors with minimumguarantee and taking a composite view, I am inclined to uphold the conclusion of the ACIT on this class of junior doctors engaged by the appellant hospital as employees covered u/s 192 of the IT Act. The clauserelating to leave rules is not an isolated stipulation in the agreement. The junior doctors are subject to conduct rules framed by the hospital for its employees. The telling feature which eloquently demonstrate the intention of the parties to establish employer-employee relationship is the conspicuous absence of indemnity insurance clause and also the clause relating to denial of employeremployee relationship. Such clauses are included in the other consultancy agreements but have consciously been omitted from the agreements with junior doctors. The basic essence of such agreements is employer employee relationship. I, therefore, hold the 5th category of doctors i.e. junior doctors with minimum guarantee as employees covered u/s 192 of the IT Act.

37. Against the said finding and conclusion of the ld CIT(A) in respect to the 5th category consultant doctors the assessee hospital is before us.

38. According to the ld Sr, counsel, Shri Ajay Vohra the very procedure adopted for engagement of consultants is indicative of engagement of independent professionals and not recruitment of salaried employees. It is the Artemis hospital which has "sought the services of the consultant" and not the other way round when a candidate seeks employment by filing application for recruitment. Further it was submitted by the ld sr. counsel that there is no relationship of master and servant and these are contracts for specific services to be rendered by the consultants as independent professionals without any control by the hospital regarding the diagnosis or the line of treatment or in patient health care to be adopted by the consultant.

39. The ld Sr counsel submitted that there are no provisions in the agreements regarding fixed hours of work or the time schedule governing the services to be rendered by the consultant. Flexible timings are fixed as per the convenience and availability of the consultant after discussion with the hospital management. According to him, there is no requirement that the consultant should perform a particular number of operations or he should attend a particular number of

patients in the consulting room and the hospital has not reserved any right to regulate the work of doctors in any particular manner. The ld Sr. counsel pointed out that no perquisites or allowances like dearness allowance, provident fund or gratuity etc which are the normal incidents of employment are provided by the hospital to the consultant.

40. According to the ld Sr. counsel the agreements entered in to with the consultants by the hospital are of short duration. The duration of the agreements is for 12 months. So according to Sr. counsel, the basic object and purpose of the hospital is to engage consultants as independent professionals and not as employees of the hospital. Such temporary engagements cannot be held as salaried employment. He highlighted that the agreement does not envisage engagement on full time basis. The doctor consultants are not restrained from private practice or from running their own clinics. The relationship envisaged in the agreement is principal to principal. There is no outright ban on the consultants to take up consultancy with other hospitals. Of course the consultants have not been permitted to work in a rival hospital in Gurgaon so as to avoid conflict of interest. He further submitted that the consultants are allowed to bring their own equipments and instruments for their consultation services. In surgical operations, consultant surgeons may charge the hospital for use of their own equipment .This is the normal practice followed and accepted by the hospital.

41. According to the ld Sr. counsel the remuneration paid to the consultants by the hospital has been debited in the books as fees for professional services from year to year .The consultants have also accounted for the fees as income from profession. The consultants have consistently and regularly disclosed consultation fees in their income tax returns from year to year and paid tax accordingly. This indicates concurrence of intention and motive of both the parties to the agreement which is also reflected in their conduct and actions to form the relationship on principal to principal basis. Reliance is placed on the decisions in the case of CIT v Bhojraj Hari Chand 14 ITR 277 (Lahore); Sri Nilkantha Narayan Singh v CIT 20 ITR 8 (Patna); Income tax officer v Calcutta Medical Research 107 Taxman250 (Cal) and Or Shanti Sarup Jain v First Income Tax Officer 21 ITO 494 (Born). The ld Sr. counsel pointed out that the income tax department has accepted this position consistently in the cases of the consultants as well as the appellant hospital in the past from year to year and any departure from this

accepted position would be contrary to well accepted postulates of finality and consistency in tax jurisprudence. And so the ld Sr. counsel contended that there is a long standing practice in the hospital industry to engage medical consultants on temporary basis as independent professionals and the consultation agreements of Artemis with consultants is in conformity with the said practice and the ld CIT(A) erred in not allowing its appeal and so prayed that the impugned order be set-aside.

42. The ld DR, Dr. Shalini Verma reiterated the observation of the ld CIT(A) and the AO and does not want us to interfere in the order.

43. We have heard both the parties and perused the records and we take note that at Page 15, 16 and 17 of ld CIT(A)order, he observed that apart from engagement of consultants as independent professionals, the hospital has appointed doctors on salary basis also. There are 18 such employee doctors in F.Y.2009-10. The terms and conditions of such employment with one Dr. Amin Ahmed dated 28th May 2009 (Page 112 to 117), have been examined along with the agreement annexed at (Page 107-110) of Paper Book of Dr. Khallong who falls in the fifth category consultant doctors who are on monthly retainership of Rs.38,800/- reveals that the said 5th category doctors engagement is that of a temporary period (i.e. 12 months) which is renewable whereas for employee doctors retirement age of 58 years is there in clause g at Page 113 of Paper Book.

44. Distinguishing features between the employee doctors and the 5th category doctors need to be noted. As per the agreement with employee doctors it is evident that apart from the basic salary, the doctors are entitled to flexible benefits as well as performance bonus on the basis of achievement of rated performance. Benefits of leave, provident fund and gratuity as per the rules of the company are also allowed to such employees. In the case of consultancy agreements no such benefits or perquisites are provided to the consultants. The doctor employees would be on probation of six months from the date of joining. After the probation, the appointment letter envisaged continued service with the hospital till retirement at the age of 58 years. Whereas in the consultancy agreement the period of engagement is one year and there is no element of permanency. Another important feature which needs to be noted is that the management has the authority to transfer the doctor employee, as it may

consider necessary, to any place in India. We find that there is no such provision for transfer and posting in the case of a consultant. If the consultant is to be shifted to another hospital outside NCR, it has to be with the mutual consent of the parties. In the case of doctor employees, it is a whole time employment and the doctor is required to devote himself exclusively for the hospital of the company and shall in all respects obey and conform to the regulations of the company. On the other hand we find that the consultation agreement does not envisage whole time engagement of the consultant. So we can infer that specific time schedule for attending to the patients at the hospital premises by the consultant are to be arrived at after mutual consultation and mutual convenience. We take note that the employee doctor may be assigned any work in any department unit of the company. He is devoted to attend to the business of the company and jobs as assigned by the management. In the case of the consultants no such command and control can be seen from a reading of the agreement. We also take note of difference in the procedure of appointment of the employee doctors, to appoint them first they apply for it and there are there are various formalites to be fulfilled by the doctor employee before appointment as indicated in the terms of the an employment like medical check up, submission of requisite document like educational qualifications, salary statement from the previous employer etc. These are normal features of an employment agreement. However, no such requirement or compliance by consultants is included in the consultation agreement. The employee doctor is under the control and supervision of management and has to abide by the rules of the company as well as orders issued by the company from time to time. No such omnibus stipulation is included in the consultation agreement. The only requirement to be followed by the consultants is to abide by the code of the medical ethics, the underlying rationale being compliance by the consultants with the behavioural norms fixed by Medical Council as well as compliance by assessee hospital with the accreditations requirements of National Accreditation Board for Hospital and Healthcare Providers. Statutory compliance clause in the employment agreement provides that the employee would comply with the statutory requirements fastened on the company in his area of operation. We find that no such omnibus clause has been included in the consultation agreement with the independent professionals. We find that employment benefits, legislations

like Bonus Act, Gratuity Act, Provident Fund Act etc are applicable to employees and a specific clause has been included in employment agreements with doctor employees that the employee doctor would be entitled to more beneficial of the benefit either conferred in the agreement or similar benefit conferred under the statute. However since such employment legislations are not applicable to consultants of assessee hospital, we find that no such clause is included in consultation agreements. Further we find that agreements with doctor employees specifically ensure compliance by the employee with the statutory requirement with section 314 of the Companies Act. The said clause is absent in the case of consultation agreements because consultants are not treated as employees of assessee hospital and, hence section 314 of the companies Act is not applicable and so we find no corresponding clause regarding the consultant not being related to director of assessee has been found included. We keep in mind the aforesaid distinguishing features between the employment agreements and consultation agreements by assessee hospital with independent professional doctors.

47. Further an analysis of the agreement annexed at Page 107 to 110 PB of Dr. Khallung, title of which reads that it is a "consultancy agreement" and we find that as per clause 1, the consultancy was on a temporary basis i.e. for a period of 12 months. It appears that it was renewable from time to time. The retainer fee is Rs.38,500/- per month. The question whether the said agreement between the assessee with that of these Doctors can be termed as that of an employer with that of an employee; or that of principal to principal thereby treating the said doctors as professional, would depend mainly upon the nature of the consultancy, which was in this case is essentially temporary and the nature of relationship can be inferred from clause 4 of the agreement wherein it is stated that TDS will be deducted towards the professional charges and they will be paid the retainership fee for acting as a temporary consultant.

48. We would like to reproduce clause 4 at Page 107 of Paper Book reads

> *"4. For the above serves rendered, you will be paid a consolidated retainership fee for Rs.38,500/- (Rupees Thirty Eight Thousand and Five Hundred and Five Hundred only) per month subject to deductions as per income tax act & rules, towards professional charges.*

49. From a reading of the said clause it is agreed by the assessee that the Doctor/ Consultant Medical Officer shall be paid a consolidated retainership fee for the service he rendered and income tax deduction as per laws towards professional charges will be deducted. So the relation between the said doctors and the assessee is recognized as that of professional and not employee. And it is retainer fee and not salary which is paid to the employee. The ld CIT(A) erred in not noticing this fact and got swayed by the word salary propping up in one of the clause which states only of a security deposit which cannot in any manner alter the nature of payment agreed between the parties as stated in clause 4 (supra).

50. Clause 6 of the agreement entails the consultant doctor to practise outside with prior permission which is another important factor to indicate that they cannot be called employee doctors.We note that the consultant is not entitled to participate in any welfare benefit plans dispersed to employee doctors. And as per clause 19 the junior consultant/ Medical Officer on retainership has been offered co-ownership for any technology, technique, process, methodology developed by him during the course of engagement with the Hospital, which clause is conspicuous by its absence in term of employer with salaried doctor.

52. Another important fact which is noticed is that there is no transfer of these consultants whereas there is provision for transfer anywhere in India the employee doctors and in the absence of him non-joining at the place of posting it may cost his job. A junior consultant can relinquish his contract by giving one month notice to assessee, likewise the assessee too can terminate the contract by giving one month notice to the said class of doctors or in lieu of payment of one month pay, then notice is not required whereas an employee can be fired at will which is one of the distinguishing feature among others of an employer-employee/ master-servant relationship. We find that ld CIT(A) erred in giving undue weightage to absence of indemnity bond etc in their agreement, to term these doctor as employee, which aspect need to be understood and appreciated on the fact that these are Junior Consultants who will not be handling high risk matters, which will be handled by the super specialist doctors for whom indemnity bonds are already there as stated before and so merely because clause for indemnity bond is absent cannot be termed as a feature of employer-employee relationship. We

should take a pragmatic view about the non inclusion of indemnity bond in the agreement between assessee and the junior consultant/ medical officer. It is common knowledge that getting admission in a medical college and its study are very competitive and the best of the best in the country passes out with flying colours; and thereafter also getting PG and super specialisation etc are uphill task and very few seats are there in medical colleges. So when a doctor who accepts to discharge professional services to the assessee for a retainership of Rs.38,800/- per month is loaded with indemnity bond for which substantial amount need to be paid of insurance amount then we wonder who will accept such terms and conditions. We cannot lose sight of these realties ; And merely because leave has been stated to be governed by the leave rules of the hospital it cannot be termed that consultant Doctor becomes an employee doctor, whose retainer fee in any case is very less and cannot be given the freedom as given to other category to take any number of leaves during the period of contract because in the other class of consultants i.e. the consultant doctors belonging to 1st, 2nd 3rd and 4th category their remuneration is linked to revenue sharing also, so if they come less to the assessee hospital their revenue share will be less, so there is no such restriction on leave etc for that class of consultants. But that cannot be the case of these junior consultants, who have been engaged on a retainer fee and so the reasonable restriction of the assessee hospital in respect to availability of leave cannot be taken and read in isolation to call them as employee doctors. The said clause says that these doctors cannot absent themselves at will and cannot be absent for long. It is only a control on the number of days these doctors can avail leave, nothing more can be read beyond that. It would be a fallacy to say that because there is no indemnity bond or that because leave rules are applicable to these junior doctors/ medical officers they fall under the category of employee Doctors, when considering the reason as stated above.

54. The material fact is that there is no covenant in the agreement which expressly or impliedly confer on the assessee hospital control and supervision over the professional work done by the doctor. In the instant case, the doctors have been engaged as independent professionals on temporary basis for professional medical services and not as salaried servants or doctors of the hospital. Consultancy agreement as stated above do not envisage that the doctors have

exchanged their medical profession for service under the command and exclusive control of the assessee/ hospital and have taken up full time employment on permanent basis with the assessee hospital. Rather we note that the agreements are entered by the consultant doctors as incidental to exercise of their profession. We find force in the contention of ld Sr counsel that the normal indicia of employment namely personal perquisites or benefits like free residential accommodation, pensions, provident fund contributions, gratuity and allowances like leave travel assistance, house rent and insurance etc. are conspicuous by their absence in the consultancy agreements for the obvious reason that doctors are rendering professional services to the assessee hospital in the field of their specialization and expertise as independent professionals and not as salaried employees.

56. In CIT v Govindaswaminathan 233 ITR 264 (Mad) it has been held by the Madras High Court that retainer fee received by the Advocate General is professional receipt .The High Court observed:

> *"The assessee had not, at any point of his professional career, exchanged his profession for service and he continues to be a professional person. He received the salary in his capacity as a professional person and it was properly assessed by the Income-tax Officer under the head "Profession".*

57. We find force in the contention of the ld Sr. counsel the remuneration paid to the consultants by the hospital has been debited in the books as fees for professional services from year to year .The consultants have also accounted for the fees as income from profession. The consultants have consistently and regularly disclosed consultation fees in their income tax returns from year to year and paid tax accordingly. This indicates concurrence of intention and motive of both the parties to the agreement which is also reflected in their conduct and actions to form the relationship on principal to principal basis. Reliance is placed on the decisions in the case of CIT v Bhojraj Hari Chand 14 ITR 277 (Lahore); Sri Nilkantha Narayan Singh v CIT 20 ITR 8 (Patna); Income tax officer v Calcutta Medical Research 107 Taxman250 (Cal) and Or Shanti Sarup Jain v First Income Tax Officer 21 ITO 494 (Bomm). And we take note of the fact that in earlier years the department has accepted the claim of the assessee and has not disturbed the TDS collected by the assessee hospital in respect to these classes of

consultants too. No changes in facts or circumstances were pointed out by the ld. DR in the instant assessment year. So as per the Hon'ble Supreme Court's order in Radha Swami Satsang 193 ITR 32 (SC) and of the Hon'ble Delhi High Court reported in 279 ITR 86 (Del.) on the principle of consistency too no deviation was warranted.

58. In order to arrive at this conclusion we take reliance on the Hon'ble High Court of Bombay in the case of Grant Medical Foundation (Ruby Hall Clinic) (supra), where in the Lordships in similar case, in identical facts where the issue in hand before us was assailed by the revenue which has been reproduced above, leaves no doubt in our mind, to hold that these consultant doctors (5th category consultant) also are independent professionals and the assessee hospital rightly treated them so, and has rightly deducted tax at source u/s 194J of the Act. Therefore we are inclined to allow the appeal of the assessee hospital and set aside the impugned order of the ld CIT(A).

59. In the result the appeal of the revenue is dismissed and the appeal of the assessee is allowed.

Order pronounced in the open court on 15.05.2015.

-Sd/-	**-Sd/-**
(S.V.MEHROTRA)	**(A. T. VARKEY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated:15/05/2015

A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi