

# Consultant versus Employee: An Agreement of Difference

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**Abstract:** The primary objective of this paper is to expose certain grey areas while drafting consultant appointment agreement. These fine lines of difference can play a crucial role in impacting various employment law upon an employee. Hence an attempt is made to distinguish various small intricacies which can be small at macro level but at micro level it is a big game.

**Keywords:** Consultant, Employee, Laws, Jurisdiction, Employment Rights.

In India there is a risk of misclassification when it comes to Consultant. Often it can happen that employees and consultants are treated in one and in a same manner. When two different job roles are treated in the similar manner, risk of misclassification arises. However, Supreme court has laid down that it is the extent of control over the person that determines whether he is an employee or engaged as a contractor. It is the level of supervision and control by the concerned entity on the concerned employee or group of employees of class of employees that distinguishes an independent contractor with an employee. This was held in *Dhrangadhara Chemical Works v State of Saurashtra* (1954 AIR 264).

## Distinguishing Factor between Contractor and Employee

Supreme Court in *Lakshminarayan Ram Gopal & Sons Ltd. V Government of Hyderabad* had enunciated distinguishing factor between an employee and an independent contractor:

- An employer can tell the employee what to do and how to do it.
- A contractor can be given instructions but not how they can be carried out.
- An employee is under comprehensive control than a contractor.  
(1954 25 ITR 449 (SC).)

Following factors can be considered while finding out the differences as held by Supreme Court in *Ram Singh v Union Territory of Chandigarh*:

- Extent or level or degree of control over the worker.
- How much a worker is integrated with employer's business?
- Power to appoint and dismiss.
- Whether the responsibility to pay remuneration and payment towards social security contribution exists?
- Responsibility to organise work and supply equipment.
- Nature of obligations between parties.
- Terms of contract between parties.

## Impact when deemed to be an Employee

When a consultant is deemed to be an employee, it will have impact on both the consultant and the Company in

consideration. For consultants following impacts will take place:

- A consultant can deduct all business related expenses from their gross income. However, employees can offset certain specified deductions like House Rent Allowances, contributions to provident fund, medical insurance premium, etc.
- Income earned by Consultants falls under "Income from business and professions" whereas income earned by employees comes under "Income from Salary".

(The government has introduced an alternative taxation regime for employees in lower tax bands (through the Finance Act 2020). However, employees opting to use this regime can only do so if they forego all the deductions available to employees under the standard regime.). For the Company following impact shall take place:

- The TDS (tax deducted at source) for employees will be upto 30% depending upon their salary level as opposed to 10% which is in case of Consultants exclusive of surcharge and cess in both the cases.
- If the income tax authorities are of the opinion that consultant is actually an employee, they may initiate proceedings under Section 201 of the Income Tax Act, 1961 for short deduction of taxes.

This may involve:

- The levy of simple interest at the rate of 1% per month for the period during which the tax was not deducted.
- Recovery proceedings against the company or the re-categorised consultant.
- Imposition of a penalty (up to 200%) for default on the company (however, if a good faith reason is established for the short deduction of TDS, it should be possible to avoid a penalty). The tax authorities can re-open these issues up to seven years after the fact.<sup>1</sup>

## Pointers while Drafting Consultant Appointment Agreement

We can take following steps to mitigate the above risk of misclassification of a labour whether as consultant or as an employee. Let us find out what are the steps that can be taken in this regard.

- A statement in the agreement that consultant is an independent service provider and there doesn't exist any employer and employee relationship.

<sup>1</sup>[https://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research\\_Papers/Consultancy\\_agreements\\_\\_short\\_form\\_\\_Q\\_A\\_India.pdf](https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Consultancy_agreements__short_form__Q_A_India.pdf)

- A clause stating that consultant is an independent service provider and is entitled to a fee for service so provided.
- There must be a statement that the consultant has a freedom to provide service to other clients.

#### **Doctrine of Vicarious Liability**

The doctrine of vicarious liability is recognised in Indian court, however it is mostly used in employer employee relationship and does not extent to independent contractor relationship. Hence the company unless mentions indemnity clause the consultant is not liable for any loss or damage during the term of engagement.

#### **Duration of Service**

It is ideally advised that the consultant are not engaged for a period extending 24 months as it can be to misclassification risk

#### **Service Clause**

Following clauses can be included in a consultancy agreement with regard to consultant duty.

- The consultant agrees to perform to certain service assigned by the company. All services must be performed at consistent, expected level and specified level directed by the company from time to time.
- The consultant shall comply with all rules, procedures, and policies of the company during the period of engagement.
- The consultant will not showcase themselves as an employee or agent of the company nor the consultant will enter into any contract agreement or such other arrangements that binds the company or create any liability or obligation on the company

There are no provisions that impose any specific duties on consultant under any law.

#### **Anti-Bribery and Corruption Clause**

The consultant will have to comply with Prevention of Corruption Act 1988 (POCA). POCA does not apply to any corruption and bribery instances occurring outside the Indian jurisdiction. Hence, it is important to include in the agreement US Foreign Corrupt Practices Act 1977 and UK Bribery Act 2010 both of which has extraterritorial jurisdiction.

#### **Restrictive Covenants**

It is a common practice to include certain Restrictive Covenants which typically includes clause providing for non-solicitation of employee, clients and customer. The period of non-solicitation clause can apply both during the term of engagement and post engagement period for a reasonable period which can be three to six months.

#### **Termination Clause**

Normally in consultancy agreement contracting parties can agree to circumstances in which without notice termination can occur these may include

- Breach of terms of agreement.
- Following behaviour displayed by company or consultant :
  - Fraud;
  - Negligence;
  - Misrepresentation;
  - Dishonesty;
  - Or misconduct.

No particular procedure defined in law.

#### **Discrimination Clause**

With regard to private establishment following anti-discrimination law exist;

- The Equal Remuneration Act 1976 (ERA).
- The Rights of Persons with Disabilities Act, 2016 (RPDA).
- The Transgender Persons (Protection of Rights) Act 2016 (TPA).
- The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 (POSH).

In the above ERA applies to the situation where employer-employee relationship exist. However, The TPA & RPDA are much broader and does not cover only an employee respectively. Hence consultants are covered under this ambit. Again POSH includes consultants or independent contractors in the workplace.

#### **Confidentiality Clause**

Consultants may have access to confidential information of the company in the course of rendering their service which is disclosed by the consultants. Even after termination of the consultancy agreement might cause substantial damage or loss to the company. Hence the company can legally bind the consultant by inserting confidentiality clause in the consultant agreement even after termination of the consulting agreement. The benefit will be misclassification risk can be avoided.

#### **Execution Formalities**

The agreement must be signed by both the parties "on consensus". The signature can be original or digital or electronic. The agreement must be stamped under the local stamp duty law to be admissible as evidence in an Indian Court. Stamping can be achieved by purchasing the stamp paper, franking the agreement or obtaining e stamp on line. The agreement does not need to be register with any authority with India.

#### **Notice Period Formalities**

There is no mandatory notice period or payment made to the consultant on termination of the consulting agreement. The agreement between the consultant and the firm is final and binding.

### CONSULTANT AGREEMENT

This Consultant Agreement (hereinafter “**Agreement**”) is hereby entered into as of this the [.] day of [.] 201[.] (“**Effective Date**”)

#### **BY AND BETWEEN**

[.], a private limited company incorporated under the Companies Act, 1956/2013 having its office at [.] (the “**Client**” which term shall include parent and subsidiary companies and permitted assigns);

#### **AND**

Mr. [.] son of Mr. [.] currently resides at [.] (the “**Consultant**”, which term shall include successors and permitted assigns).

The Company and Consultant are hereinafter collectively referred to as the “**Parties**” and individually referred to as the “**Party**”.

**WHEREAS**, the Client is in the business of [.]

**WHEREAS**, the Consultant is [.]

**WHEREAS**, the Client desires to engage the Consultant to provide certain services in the area of Consultant’s expertise and the Consultant is willing to provide such services to the Company;

**NOW, THEREFORE**, in consideration of the mutual covenants and agreements set forth below, it is hereby covenanted and agreed by the Company and the Consultant as follows:

#### **1. SERVICES/PROJECT.**

Subject to the terms and conditions set forth herein, Client hereby engages the Consultant to perform, and Consultant agrees to perform, professional services in relation to [.] (“**Work**”) as described more in detail in Annexure A.

#### **2. DELIVERABLES.**

Upon completion, Consultant shall submit the completed Project in the format reasonably acceptable to Client. Subject to the terms set forth herein, including section 3 below, the manner and method of producing the Work is monitored by the Client and the Consultant shall carry on such Work as long as they comply with Client requirements, which shall be described in Annexure A or may be communicated in writing to Consultant (e-mail is acceptable). Consultant is obliged to only deliver the Work and the Client is not entitled to demand Consultant's engagement in another project unless or until Client and Consultant enter into a separate agreement to cover such project on mutually agreed-upon terms.

#### **3. OBLIGATIONS AND WARRANTIES OF CONSULTANT.**

- a) Upon submitting the Project to the Client, Consultant represents and warrants that the Project (or any part of it):
- is plagiarism-free and original (is not owned by any third party fully or partially and does not contain any previously produced text, “copy-pasting”);
  - complies with all requirements provided by the Client (formatting style is considered a requirement) in Annexure A;
  - has not been obtained by unlawful means;
- b) The Consultant acknowledges and agrees that if they fail to adequately complete the Work by the agreed due date, the Client has the sole right to cancel this Agreement; provided that Client must pay Consultant a reasonable prorated amount of the Fees proportionate to that portion of the Project completed to date. If the Consultant fails to meet the Work deadline, they must contact the Client to request deadline extension at least 24 hours prior to the due date. Extension may be granted at the Client’s sole discretion.
- c) The Project must conform to general standards as determined by the Client. Consultant acknowledges and represents that if the Project fails to conform to the general standards, the Client has the sole right to request immediate revision of the Work, deny payment, and/or cancel this Agreement. If the Work is deemed inappropriate by the Client at the time of submission either for content or other reasons, the Client has the sole right to request immediate revision of Work, deny payment, and/or refuse to use any portion of the Work related to the business of Client or otherwise.
- d) The Consultant shall also be responsible for the following specific obligations:
- (i)
  - (ii)
  - (iii)
  - (iv)

#### **4. COMPENSATION.**

- a) The Consultant shall be compensated for the Services with an amount of Rs. [.]/- (Rupees [.]), and no other fee or expenses shall be paid to the Consultant, unless the Client has approved such fee or expenses in writing.
- b) The completeness of the Services and work product shall be determined by the Client in its sole discretion, and the Consultant agrees to make all revisions, additions, deletions or alterations as requested by the Client.
- c) The Compensation shall be charged monthly.
- d) The Consultant shall be solely responsible for any and all taxes, social security contributions or payments, disability insurance, unemployment taxes, and other payroll type taxes or other legal requirements applicable to such compensation or to the Consultant.
- e) The Consultant hereby indemnifies and holds the Client harmless from any claims, penalties, losses, costs, liabilities, injuries or damages suffered by the Client arising out of the Consultant's failure with respect to its obligations under this clause.

#### **5. MATERIALS.**

The Client agrees to furnish the Consultant with all necessary materials needed to complete the Work described herein. Such materials may include, but are not limited to, podcast [.] on what the Client's objectives are, and other materials.

#### **6. OWNERSHIP AND ASSIGNMENT**

- a) **Ownership:**
  - i) The Parties agree that the Client shall have complete and sole ownership over the work product or Services performed by the Consultant under this Agreement.
  - ii) The Consultant shall promptly disclose in writing to the Client all works, products, discoveries, developments, designs, innovations, improvements, inventions, and data (whether or not at a commercial stage, or registrable under any intellectual property laws) which are authored, made, reduced to practice or learned by the Consultant (either alone or jointly with others) during the period that Consultant provides the Services to the Client, as a result of performing the Services including any concepts, ideas, suggestions and approaches related thereto or contained therein.
  - iii) All materials, including without limitation any ideas, concepts or notes including all alterations thereof, which are developed in the process of performing the Services, or relate to the Services and Confidential Information (defined below) or any of the above are the property of Client, and shall be returned by Consultant to the Client promptly at the Client's request together with any copies thereof.
- b) **Assignment:**
  - i) The Consultant hereby assigns and agrees to assign to the Client, without royalty or any other consideration except as expressly set forth herein, all worldwide right, title and interest that the Consultant may have or acquire in and to the Client, its successors, assignees, or nominees, the Receiving Party's right, title and interest, if any, in any patents, trade secrets, trademarks, copyrights, or other intellectual property rights or proprietary information embodied in or relating to Consultant's work under this Agreement.
  - ii) At the Client's request, the Consultant hereby agrees to cooperate with the Client and do all such actions and execute any documents necessary to give effect to the provisions of this section.

#### **7. RELATIONSHIP OF THE PARTIES**

- a) The Consultant and Consultant Personnel, if any, shall, at all times, remain independent contractors and nothing in this Agreement shall be construed to create the relationship of employer and employee, principal and agent, partnership or joint venture, or any other fiduciary relationship.
- b) The Consultant may not act as agent for, or on behalf of, the Client, or to represent the Client, or bind the Client in any manner.
- c) Neither the Consultant, nor any of the Consultant Personnel, shall be entitled to any benefits accorded to any employees of the Client or other benefits generally granted to employees including but not limited to insurance, vacation, retirement benefits and sick pay.

#### **8. CONFIDENTIALITY**

##### **a) Confidential Information:**

- i) The Client owns and may develop, compile and own certain proprietary techniques, trade secrets, and confidential information, which are very valuable to the Client (collectively, "**Confidential Information**"). The Client may disclose Client Information to Consultant during the Consultant's performance of the Services.
- ii) Confidential Information is any information relating to the Client that is not accessible by the general public and includes not only information disclosed by Client, but also information developed or learned by Consultant during Consultant's performance of the Services. Client Information is to be broadly defined and includes all information, which has or could have commercial value or other utility in the business that the Client is or may be engaged in and the unauthorized disclosure of which could be detrimental to the interests of Client, whether or not such information is identified by Client.
- iii) Confidential Information includes, but is not limited to, details of customers and business contacts, developments, designs, inventions, software, techniques, know-how, data, marketing, sales or other business information, scripts, costs and resources, tools used; and all derivatives or improvements to any of the above.

##### **b) Non- disclosure and Protection:**

The Consultant agrees that at all times during or subsequent to the performance of the Services, the Consultant will keep confidential and not disclose or cause to be disclosed, publish, disseminate or otherwise make available or use Confidential Information, except for the Consultant's own use during the Term of this Agreement and only to the extent necessary to perform the Services. The Consultant shall not remove or cause to be removed tangible embodiments of, or electronic files containing, Confidential Information from the Client, without prior written approval of the Client.

#### **9. TERM AND TERMINATION**

a) **Term:** This Agreement shall take effect immediately from the Effective Date and continue to remain in full force and effect for a period of 3 (three) months and the Parties have the option of renewing the same (hereinafter, the "Term"), unless terminated earlier in accordance with this Agreement.

b) **Termination:** Either Party may terminate this Agreement for cause by providing the other Party written notice if the other Party: (i) is in material breach of this Agreement and has failed to cure such breach within five (5) days after its receipt of written notice of such breach provided by the non-breaching Party; (ii) engages in any unlawful business practice related to that Party's performance under the Agreement; or (iii) files a petition for bankruptcy, becomes insolvent, acknowledges its insolvency in any manner, makes an assignment for the benefit of its creditors, or has a receiver, trustee or similar party appointed for its property. The Parties shall give a notice of 1 (one) month prior to termination.

#### **10. INDEMNIFICATION.**

Client agrees to hold Consultant harmless for any such damages that may arise from Consultant's work product. In no event shall Consultant be liable for any direct, indirect, punitive, incidental, special consequential damages whatsoever arising out of or connected with the use or misuse of her work product. Consultant assumes no responsibility for any special, incidental, indirect, or consequential damages of any kind, or any damages whatsoever (including without limitation, those resulting from her work product or from: (a) user or Client reliance on the materials or documents produced (b) costs of replacement writings, training, or documents (c) loss of use, data, or profits (d) delays or business interruptions, (e) and any theory of liability, arising out of or in connection with the use or performance of Consultant's work whether or not Consultant has been advised of the possibility of such damages.

#### **11. LIABILITY.**

Except with respect to the parties' indemnification obligations, neither party shall be liable to the other for any special, indirect, incidental, punitive, or consequential damages arising from or related to this agreement, including bodily injury, death, loss of revenue, or profits or other benefits, and claims by any third party, even if the parties have been advised of the possibility of such damages. The foregoing limitation applies to all causes of action in the aggregate, including without limitation to breach of contract, breach of warranty, negligence, strict liability, and other torts.

#### **12. MISCELLANEOUS.**

**a) Entire Agreement:** This Agreement, and any annexures, duplicates, or copies, constitutes the entire agreement between the Parties with respect to the subject matter of this Agreement, and supersedes all prior negotiations, agreements, representations, and understandings of any kind, whether written or oral, between the Parties, preceding the date of this Agreement.

**b) Amendments and Assignment:** This Agreement may be amended only by written agreement duly executed by an authorized representative of each party (email is acceptable). This Agreement shall not be assigned by either party without the express, written consent of the other party

**c) Severability:** If any provision or provisions of this Agreement shall be held unenforceable for any reason, then such provision shall be modified to reflect the parties' intention. All remaining provisions of this Agreement shall remain in full force and effect for the duration of this Agreement.

**d) No Waiver:** A failure or delay in exercising any right, power or privilege in respect of this Agreement will not be presumed to operate as a waiver, and a single or partial exercise of any right, power or privilege will not be presumed to preclude any subsequent or further exercise, of that right, power or privilege or the exercise of any other right, power or privilege.

**e) Dispute Resolution, Governing Law and Jurisdiction:** i) The Parties agree to first mediate any disputes or claims between them in good faith and resolve the disputes amicably and share the cost of mediation equally. In the event that mediation fails, any claim arising out of or relating to this Agreement shall be settled by Arbitration in accordance with the Indian Arbitration and Conciliation Act, 1996. All hearings will be held in [.] and shall be conducted in English. The parties shall each appoint an arbitrator who shall then appoint a sole arbitrator to preside over the Arbitration proceedings. ii) This Agreement shall be governed by and construed in accordance with the laws of India. The adjudication of any dispute will be the exclusive jurisdiction of the courts of [.]

**f) Time:** The Contactor agrees that time is of the essence in this Agreement.

**g) Notice:** Any notice, demand, or request with respect to this Agreement shall be in writing and shall be effective only if it is delivered by personal service, by air courier or emailed to the address set forth above. Such communications shall be effective when the addressee receives them.

**h) Headings:** The numbering and captions of the various sections are solely for convenience and reference only and shall not affect the scope, meaning, intent or interpretation of the provisions of this Agreement, nor shall such headings otherwise be given any legal effect.

The Parties have read and understood all the terms herein and are voluntarily, free of any coercion, signing this Agreement on the date stated in the introductory clause.

\_\_\_\_\_  
(Client)  
Name:  
Designation:

\_\_\_\_\_  
(Consultant)  
Name:

**ANNEXURE - A**  
**Details of Services**

**1. Services to be provided by Consultant:**

<to be added>

Additional Services may be added by parties by mutual agreement in writing.

**2. Work product to be delivered by Consultant** (Check boxes as applicable, and set forth details as desired in space provided):

- Oral recommendations/reports
- Written reports
  - Daily
  - Weekly
  - Monthly
  - Upon Completion
  - Other:
- Notes, Drafts, Working Papers, etc.

**3. Schedule for Completion of Work:**

S.No.	Task to be completed	Deadline (Date)