* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **WRIT PETITION (CIVIL) NO. 121 OF 2010**

Reserved on: 2nd September, 2011.

% **Date of Decision**: 30th September, 2011.

VIPUL MEDCORP TPA PVT. LTD. & ORS. .... Petitioners

Through Mr. S. Ganesh & Mr. Yasobant Das, Sr. Advocates with Mr. Amol Sinha & Mr. Anshum Jain, Advocates.

VERSUS

CENTRAL BOARD OF DIRECT TAXES & ANR.

.....Respondents

Through Mr. Kamal Sawhney, Sr. Standing Counsel & Mr. Amit Shrivastava, Advocate for the respondent No. 1.
Mr. Dipak K. Nag, Ms. Rashmi Rea Sinha & Ms. Dobopawa Roy, Advocates for the respondent No. 2-IRDA.

CORAM:
HON'BLE MR. JUSTICE DIPAK MISRA, THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

SANJIV KHANNA, J.:

The five petitioners claim that they are Third Party Administrators (TPA, for short) and perform functions by acting as facilitators of the insurance companies, which provide cashless facilities to the mediclaim policy holders. The petitioner companies

have been licensed by the respondent No. 2, Insurance Regulatory and Development Authority, to provide the said support insurance services. The petitioners state that they reimburse and make payments to the hospitals for the expenses incurred on the medical treatment of the policy holders of the insurance company. They discharge the liability of the insurance company under the contract of insurance entered into between the insurance company and the policy holder.

2. The petitioners have challenged circular No. 8/2009 issued by the Central Board of Direct Taxes, respondent No. 1 herein on the ground that the circular requires deduction of tax at source (TDS) under Section 194J of the Income Tax Act, 1961 (the Act, for short) when the TPAs make payment to the hospitals to settle/pay the dues of the policy holders on behalf of the insurance company.

3. The challenge to the circular is on four grounds. Firstly, Section 194J is not applicable to payments made to hospitals as the said payments are not covered by the expression "professional services" as defined in Explanation (a) to Section 194J of the Act. Secondly, TPAs like the petitioners do not avail of any professional services or make payment for any professional services. TPAs are not patients.

Therefore, Section 194J does not apply to payments made by the TPAs to the hospitals. Thirdly, payments made by the TPAs, like the petitioners are in discharge of the liability of the insurance company under the contract of insurance. These are not covered under Section 194J of the Act. Lastly, it is submitted that a policy holder may not be required to deduct TDS under Section 194J of the Act but, as per the circular, the TPA would be liable to deduct TDS under Section 194J when it makes payment. Further, as per the circular, TDS is required to be deducted in case the TPA makes payment to the hospital but is not required to be deducted TDS in case payment is made by the TPA or the insurance company to the policy holder. It is submitted that the interpretation placed by the respondent No. 1 under Section 194J is contrary to public interest and, therefore, the circular should be quashed.

4. Section 194J of the Act reads as under:-

> **194-J. Fees for professional or technical services**.—(1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of—
>
> (*a*) fees for professional services, or
>
> (*b*) fees for technical services, [or]
>
> (*c*) royalty, or

(*d*) any sum referred to in clause (*v-a*) of Section 28,

shall, at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to ten per cent of such sum as income tax on income comprised therein:

Provided that no deduction shall be made under this section—

(*A*) from any sums as aforesaid credited or paid before the 1st day of July, 1995; or

(*B*) where the amount of such sum or, as the case may be, the aggregate of the amounts of such sums credited or paid or likely to be credited or paid during the financial year by the aforesaid person to the account of, or to, the payee, does not exceed—

(*i*) thirty thousand rupees, in the case of fees for professional services referred to in clause (*a*), or

(*ii*) thirty thousand rupees, in the case of fees for technical services referred to in clause (*b*), or

(*iii*) thirty thousand rupees, in the case of royalty referred to in clause (*c*), or

(*iv*) twenty thousand rupees, in the case of sum referred to in clause (*d*):

Provided further that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (*a*) or clause (*b*) of Section 44-AB during the financial year immediately preceding the financial year in which such sum by

way of fees for professional services or technical services is credited or paid, shall be liable to deduct income tax under this section:

Provided also *that no individual or a Hindu undivided family referred to in the second proviso shall be liable to deduct income tax on the sum by way of fees for professional services in case such sum is credited or paid exclusively for personal purposes of such individual or any member of Hindu undivided family.*

(2) [* * *]

(3) [* * *]

Explanation.—For the purposes of this section,—

(*a*) "professional services" mean services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board for the purposes of Section 44-AA or of this section;

(*b*) "fees for technical services" shall have the same meaning as in *Explanation* 2 to clause (*vii*) of sub-section (1) of Section 9;

(*ba*) "royalty" shall have the same meaning as in Explanation 2 to clause (*vi*) of sub-section (1) of Section 9;

(*c*) where any sum referred to in sub-section (1) is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such sum, such crediting shall be deemed to be credit of such sum to the account of the payee and the provisions of this section shall apply accordingly.

5. Circular No. 8/2009 dated 24th November, 2009 reads as under:-

> "**Applicability of provisions under Section 194J of the Income Tax Act, 61 in the case of transactions by the Third Party Administrators (TPAs) with Hospitals etc.**
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> Circular No. 8/2009 dated 24-11-2009
>
> A number of representations have been received from various stakeholders regarding applicability of provisions under Section 194J of the Income Tax Act, 61 on payments made by Third Party Administrators (TPAs) to hospitals on behalf of insurance companies for settling medical/insurance claims etc with the hospitals.
>
> 2. The matter was examined by the Board. As per provisions of section 194J (1) "Any person' not being an individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of –
> (a) fees for professional services, or
> (b) fees for technical services, [or] 1
> (c) royalty, or
> (d) any sum referred to in clause (va) of Section 28,]
>
> Shall, at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to ten per cent of such sum as income-tax on income comprised therein…..". Further as per Explanation (a) to 194J "professional services" means services rendered

by a person in the course of carrying on legal, medical, engineering or architectural profession etc…'

3. The services rendered by hospitals to various patients are primarily medical services and, therefore, provisions of 194J are applicable on payments made by TPAs to hospitals " 1 etc. Further for invoking provisions of 194J, there is no stipulation that the professional services have to be necessarily rendered to the person who makes payment to hospital. Therefore TPAs who are making payment on behalf of insurance companies to hospitals for settlement of medical/insurance claims etc under various schemes including Cashless schemes are liable to deduct tax at source under Section 194J on all such payments to hospitals etc.

3.1. In view of above, all such past transactions between TPAs and hospitals fall within provisions of Section 194J and consequence of failure to deduct tax or after deducting tax failure to pay on all such transactions would make the deductor (TPAs) deemed to be an assessee in default in respect of such tax and also liable for charging of interest under Section 201 (1A) and penalty under Section 271C.

4. Considering the facts and circumstances of the class of cases of TPAs and insurance companies, the Board has decided that no proceedings u/s 201 may be initiated after the expiry of six years from the end of financial year in which such payment have been made without deducting tax at source etc by the TPAs. The Board is also of the view that tax demand arising out of Section 201(1) in situations arising above, may not be enforced if the deductor (TPA) satisfies the officer in charge of TDS that the relevant taxes have been paid by

> the deductee assessee (hospitals etc.). A certificate from the auditor of the deductee assessee stating that the tax and interest due from deductee assessee has been paid for the assessment year concerned would be sufficient compliance for the above purpose. However, this will not alter the liability to charge interest under Section 201(1A) of the Income Tax Act till payment of taxes by the deductee assessee or liability for penalty under Section 271C of the Income Tax Act as the case may be.
>
> 5. The contents of the circular may be brought to the notice of officers and officials working under you for strict compliance."

6. For the sake of convenience, we are first examining the last three contentions of the petitioners. We do not find any merit in the said contentions. Section 194J of the Act applies when a person (including an individual or Hindu Undivided Family covered by the proviso) is responsible for paying to a resident any sum by way of fee for "professional services" or technical services or royalty or sum referred in Section 28(va). The term "professional services" has been defined in Explanation (a) to mean services rendered by a person in the course of carrying on medical profession etc. On reading of Section 194J and for finding out and determining whether the payment made is or is not towards "fee for professional services", the nature and character of the payment but not the manner in which the

payment is accounted for by the payer is relevant. Nature and character of the payment in the hands of the payee, i.e. the recipient, is relevant and determines whether TDS has to be deducted. TDS is a method of collection of tax and the sum so deducted is deemed to be tax paid by the payee. The TDS deducted is treated as income received and credit is given in tax payable by the payee. Deduction is only a mode of recovery. (See Sections 198 and 199 of the Act). Payments made by the insurance company or the TPAs may be a business expenditure as per accounts/books maintained by them but TDS has to be deducted under Section 194J if the payment is made to a resident towards "fee for professional services". The fact that a third person and not the payer has availed of the professional services is immaterial. Section 194J does not state that the payer must have availed and taken benefit of the professional services. The payer may be making payment on behalf of a third person but would be liable to deduct TDS under Section 194J if Explanation (a) applies. Sub- section (1) to Section 194J uses the expression "any person… who is responsible for paying…". The expression "person responsible for paying" has been defined in Section 204 of the Act. The said section stipulates that for section 194J, the expression "person responsible

for paying" means the payer himself or if the payer is a company, the company itself including the principal officer thereof.

7. This brings us to the first contention whether the circular is ultra vires and contrary to Section 194J of the Act as the circular requires deduction of TDS when payment is made to a corporate hospital, but the corporate being an artificial person, the hospital is not rendering "professional services".

8. The said contention requires interpretation of the expression "professional services" as defined in Explanation (a) to Section 194J. If we delete and abstract words which are not necessary for the purpose of deciding the present question, the Explanation (a) would read as "professional services means services rendered by a person in course of carrying on medical profession". The term "person" has been defined in Section 2(31) to include an individual, Hindu Undivided Family, company, firm, association of persons or body of individuals, whether incorporated or not, local authority and every artificial person not included in the other expressions. The term "person" is indeed very broad and wide. We agree with the Revenue that for the purpose of Explanation (a) to Section 194J, the recipient can be any "person" as defined in Section 2(13) of the Act. The

recipient need not be restricted to an individual who carries on medical profession or other professions mentioned in the Explanation. It is not the intention of the Parliament to restrict or curtail the scope of Explanation (a) to only payments received by or made to individuals, firms, association of persons etc. and not to corporate bodies. On this aspect, we may refer to the decision of Bombay High Court in ***Dedicated Health Care Services TPA (India) Private Limited and Ors. versus Assistant Commissioner of Income Tax and Others,*** [2010] 324 ITR 345 (Bom) wherein it has been held as under:-

> " The submission which has been urged on behalf of the petitioners is that the medical profession or, for that matter, any other profession that is adverted to in clause (a) of the Explanation can only be carried on by an individual. Consequently, it has been urged that a hospital cannot be regarded as carrying on the medical profession and hence, payments made by TPAs to a hospital cannot be treated as fees for professional services. Now it needs to be emphasized that while defining the expression "professional services" Parliament has not defined the expression to mean services rendered by an individual who carries on the legal, medical, engineering or architectural profession or any of the other professions listed in the clause. If Parliament intended to restrict the ambit of Explanation (a) only to fees received by an individual in the discharge of his or her duties as a professional, it was open to Parliament to use words that would be indicative of that position. ……."

9. In the light of the aforesaid discussion, there can be no doubt that in case payment is made to a recipient for rendering services in course of carrying on medical profession or other professions as stipulated, deduction of tax at source has to be made and it is immaterial whether the recipient is an individual, firm or an artificial person.

10. It cannot also be doubted that TDS has to be deducted for all services rendered by a person in the course of carrying on medical profession. Incidental or ancillary services which are connected with carrying on medical profession are included in the term "professional services" for the purpose of Section 194J. The words "services… in the course of carrying on medical profession" in Explanation (a) are used with the intention to include incidental, ancillary, adjunct or allied services connected with and relatable to medical services. As the term "professional services" has been specifically defined for the purpose of Section 194J, full effect to the said provision has to be given.

11. In view of the aforesaid reasoning and to this extent we do not find any error or transgression by the impugned circular to Section 194J of the Act. The circular stipulates that when a payment is made

by TPA on behalf of the insurance company to the hospital for settlement of professional fees under the various claims including cashless claim, it would be liable to deduct TDS under Section 194J of the Act on all such payments.

12. The contention raised by the petitioners, however, is that the respondent No. 1 is insisting on deduction of TDS under Section 194J in view of the impugned circular even when payment is made to the recipient and in the hands of the recipient the said payment/receipt is business income and not professional income. It is submitted that there are corporate/trust/society hospitals who are providing medical services but they are not carrying on medical profession and income and payments received are not professional income or receipts but business income or receipts. Under the Medical Council Act, 1956, a corporate body cannot carry on medical profession. It carries on "business" and, therefore, the payments made to the said corporate hospitals cannot be regarded as payment towards professional services.

13. Section 14 of the Act enumerates different heads of income. Head D classifies one of the heads as "profit or gains of business or profession". The word "business" has been defined in Section 2(13)

and the word "profession" has been defined in Section 2(36) of the Act but both definitions are inclusive.

14. In ***G. K. Choski and company Vs. Commissioner of Income Tax, Gujarat*** (2008) 1 SCC 246, the difference between the terms "business" and "profession" was noticed and elaborated as under:-

> " **21.** Part D consists of Sections 28 to 43 of the Act which deal with profits and gains of business or profession. Though the phrase has been used in certain sections as "business or profession", but nowhere has the phrase been used as the "business and profession". In fact, wherever the legislature intended that the benefit of a particular provision should be for both business or profession, it has used the words "business or profession" and wherever it intended to restrict the benefit to either business or profession, then the legislature has used the word either "business" or "profession", meaning thereby that it intended to extend the benefit to either "business" or "profession" i.e. the one would not include the other.
>
> **22.** We agree with the submission made by the counsel for the appellant that in view of the settled law, if two interpretations are possible, then the one in favour of the assessee should be adopted. But, we are of the view that in the present case two interpretations are not possible as the word "business" occurring in Clause (*iv*) of Section 32(1), by no stretch of imagination, can be said to include "profession" as well. If the expression "business" is interpreted as including within its scope "profession", it would not mean that the lacuna

> has been made good by giving a wider interpretation to the word business. There is nothing in Section 32(1)(*iv*) which envisages the scope of word "business" to include in it "profession" as well. If the expression "business" is interpreted to include within its scope "profession" as well, it would be doing violence to the provisions of the Act. Such interpretation would amount to first creating an imaginative lacuna and then filling it up, which is not permissible in law. The contention of the counsel for the appellant that Section 32(1)(*iv*) should be given purposive interpretation to include "profession", has thus to be rejected."

15. The difference between "profession" and "business" is well recognized. (See ***Devendra M. Surti versus State of Gujarat*** AIR 1969 SC 63, ***Barendra Prasad Ray versus Income Tax Officer*** [1981] 129 ITR 295 (SC), ***K. Thomas Varghese (Dr.) versus Commissioner of Income Tax*** [1986] 161 ITR 21 (Ker.), ***Commissioner of Income Tax versus Bhagwan Broker Agency*** [1995] 212 ITR 133 (Raj), ***Commissioner of Income Tax versus Lallubhai Nagardas & Sons.*** [1993] 204 ITR 93 (Bom) and ***Commissioner of Income Tax versus Upasana Hospital*** [1997] 225 ITR 845 (Ker.)).

16. At the same time, it has been held that the word "business" is of a wider import than the word "profession". All professions can be classified, if required, as business but all businesses are not professions. The word "business" is a wider term. Section 2(b) of the

Indian Partnership Act, 1932 defines business as including every trade, occupation and profession.

17. The term "profession" as traditionally understood involves the idea of an occupation requiring either purely intellectual skills or if any manual skill is involved such as in painting, sculpture or surgery, a skill controlled by the operator's intellectual skill as distinguished from an occupation which substantially involves production or sale or arrangement for the production and sale of commodities (See ***Patridge vs. Mallandine*** (1886) 18 QBD 276)). The word "profession" as is currently known is wider than the old definition of learned professions such as the church, medicine and law. As per the definition clause section 2(36) of the Act, profession includes vocation.

18. According to Black's Law Dictionary, 6th Edition, profession means:-

> "A vocation or occupation requiring special, usually advanced education, knowledge, skill; e.g. law or medical professions. Also refers to whole body of such profession.
>
> The labour and skill involved in a profession is predominantly mental or intellectual, rather than physical or manual.

> The term originally contemplates only theology, law and medicine, but as applications of science and learning are extended to other departments of affaires, other vocations also receive the name, which implies professed attainments in special knowledge as distinguished from mere skill."

19. The question, therefore, is what is covered by the expression "professional services" under Explanation (a) and requires deduction of TDS under Section 194J. What is the legislative intent behind the definition in Explanation (a) to Section 194J of the Act? As noticed above, Section 2(36) defines the term "profession" and Section 14 also refers to profits and gains of business or profession. The term used in Section 194J, however, is "professional services" and Explanation (a) defines the said term for the said Section exclusively. The word "services" in the expression "professional services" is significant and has to be given due weightage. The primary purpose and objective of the definition clause is to define the services included and regarded as professional services and not the person who renders the said services. Section 194J under sub-section 1 applies when payment is made to a resident towards any sum by way of fee for professional services. The object of the definition clause Explanation

(a) is not to identify the 'resident', or the recipient, who receives or is paid fee for professional services but to define the services.

20. Explanation (a) can be divided into two parts. The first part begins with the word "services" and ends with the word "person", i.e., "services rendered by a person". As already interpreted above, the word "person" includes an artificial person. The second part begins with the word "in the course of carrying on" and then stipulates the services on which TDS is to be deducted. The second part of Explanation (a) qualifies and refers to the specified services on which TDS is to be deducted. The services covered by Explanation (a) are medical, legal, engineering, architectural or profession of accountancy, technical consultancy, interior decoration or advertisement or such other profession as notified by the Board for the purposes of Section 44AA.

21. The words "in the course of carrying on" do not mean that the person who renders service and is paid, must be a professional. These words signify that services rendered and paid for in the course of carrying on medical profession or other professions as stipulated, are covered and require deduction of TDS under Section 194J. As held in paragraph 10 above, the words "in the course of carrying on" are used

with the intention to include incidental, ancillary, adjunct or allied services connected with or relatable to medical services. Thus, the sweep and scope of the Explanation is not restricted only to payments made to medical or other professionals, but services rendered in the course of carrying on the stipulated profession. A corporate hospital, therefore, does not carry on profession of medicine. It is not a professional and does not earn professional income but it can be paid fee for services in the course of carrying on professional services. It is not necessary that the person who renders service and is receiving the payment/fee should himself or herself carry on the medical profession or other professions. Explanation (a) does not stipulate that the services must be rendered by the person concerned himself and not with the help, assistance, employment and engagements of others. What is covered and falls within the ambit of professional services are all services rendered in the course of medical profession or other professions. A corporate hospital offers services in the course of carrying on medical profession by the doctors who are associated with the hospital as consultants or as employees. The said doctors are professionals and income earned by them is professional income but Section 194J is attracted, not only when professional fee is

paid for services rendered by the recipient but income/fee received by the recipient is towards services rendered in the course of carrying on medical profession. Thus payments/fee for the services specified should be to a person who is a resident and Section 194J is not confined to payments to the person who is a professional.

22. We do not think it appropriate to interpret the Explanation (a) in a manner that the person, to whom payment is made, should himself/herself be a professional Doctor. The aforesaid interpretation will be highly restrictive, and would ignore the reality and the factum that the services in the field of medicine are not confined and rendered by individuals but in most cases rendered in hospitals which may be corporate or juristic entities. Professional activity is undertaken in the hospitals. Medical procedures require equipment, operation theatre and other facilities which are available in hospitals and nursing homes. The payments are made to the said hospital and not personally by the payer to the individual doctors or professionals.

23. Thus, we do not find any merit in the first contentions of the petitioners. Bombay High Court in ***Dedicated Health Care Services TPA (India) Pvt. Ltd.*** (supra) and a learned Single Judge of Karnataka High Court in ***Medi Assist India TPA P. Ltd. vs. Deputy Commissioner***

of Income-Tax (TDS) & Ors., [2010] 324 ITR 356 (Kar.), have taken a similar view.

24. In ***Dedicated Health Care Services***' case (supra), after referring to Section 119 of the Act, following observations have been made:-

> "14. Section 119 of the Act provides that the Board may, from time to time issue such orders, instructions and directions to other income-tax authorities as it may deem fit for the proper administration of the Act and that such authorities and all other persons employed in the execution of the Act shall observe and follow such orders, instructions and directions of the Board. The proviso to sub-section (1) however stipulates that no such orders, instructions or directions shall be issued (a) so as to require any income-tax authority to make a particular assessment or to dispose of a particular case in a particular manner; or (b) so as to interfere with the discretion of the Commissioner (Appeals) in the exercise of his appellate functions. The Board has by the circular taken the view that payments which are made by TPAs to hospitals fall within the purview of section 194J. No exception can be taken to the circular to that extent, consistent with the interpretation placed on the provisions of section 194J in the course of this judgment. However, the grievance of the petitioners is that the circular proceeds to postulate that a liability to pay a penalty under section 271C will be attracted for a failure to make a deduction under section 194J. Section 273B of the Act provides that notwithstanding anything contained in the provisions inter alia of section 271C no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the provision if he proves that there was a reasonable cause for the failure. The vice in the circular that has been issued by the Central Board of

> Direct Taxes lies in the determination which has been made by the Board that a failure to deduct tax on payments made by TPAs to hospitals under section 194J will necessarily attract a penalty under section 271C. Besides interfering with the quasi-judicial discretion of the Assessing Officer or, as the case may be, the appellate authority the direction which has been issued by the Board would foreclose the defence which is open to the assessee under section 273B. By foreclosing a recourse to the defence statutorily available to the assessee under section 273B, the Board has by issuing such a direction acted in violation of the restraints imposed upon it by the provisions of sub-section (1) of section 119. To that extent, therefore the circular that was issued by the Board would have to be set aside and is accordingly set aside. We also clarify that in making assessments or, as the case may be, in passing orders on appeals filed under the Act, the Assessing Officers and the Commissioner (Appeals) shall do so independently and shall not regard the exercise of their quasi-judicial powers as being foreclosed by the issuance of the circular."

25. We respectfully agree with the aforesaid ratio recorded by the Bombay High Court. To this extent, as held above by the Bombay High Court, the impugned circular is liable to be set aside and is accordingly set aside. Further, on the said aspects the Assessing Officer and the appellate authorities shall independently apply their minds in exercise of their quasi judicial powers without being tied down by the circular.

26. Writ petition is accordingly disposed of. It is held that Section 194J applies to the payments made by the petitioners to juristic or corporate entities that are "provide" "professional services". However, the impugned circular No. 8 of 2009 dated 24th November, 2009 is partly set aside to the extent indicated above. There will be no order as to costs.

(SANJIV KHANNA)
JUDGE

(DIPAK MISRA)
CHIEF JUSTICE

SEPTEMBER 30th, 2011
VKR