IN THE INCOME TAX APPELLATE TRIBUNAL
*KOLKATA BENCH "**C**" KOLKATA*

Before **Shri N.V.Vasudevan, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.643, 1139-1140/Kol/2016
Assessment Years:2007-08 to 2009-10

M/s Heritage Health TPA Pvt. Ltd. P & T Road, Jalpaimor, Siliguri-734005 [**PAN No.CALHO 1529 B**]	**V/s**.	Income Tax Officer, Ward-2(3), Siliguri
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

ITA No.1156-1158/Kol/2012
Assessment Years: 2007-08 to 2009-10

M/s Heritage Health TPA Pvt. Ltd. 3, Netaji Subhas Road, Kolkata-700 001 [**PAN No.AAACH 7666 J**]	**V/s**.	Dy. Commissioner of Income Tax, (TDS), Circle-57, Kolkata-71
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

ITA No. 1760-1762/Kol/2012
Assessment Years: 2007-08 to 2009-10

ACIT (TDS), Circle-57,10B, Middleton Row, Kolkata	**V/s**.	M/s Heritage Health TPA (P) Ltd., Nicco House, 5th Floor, Hare Street, Kolkata-700 001 [**PAN No.AAACH 7666 J**
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

आवेदक की ओर से/By Assessee	Shri Ravi Tulsiyan, FCA
राजस्व की ओर से/By Revenue	Shri M.K. Clanda, JCIT,SR-DR
सुनवाई की तारीख/Date of Hearing	10-11-2016
घोषणा की तारीख/Date of Pronouncement	09-12-2016

आदेश /O R D E R

PER Bench:-

Out of nine appeals – six by the assessee and three by Revenue are against the orders of Commissioner of Income Tax (Appeals)-24/ CIT(A)-1, Kolkata of dated 08.03.2016 & 12.07.2012. Assessments were framed by DCIT,Circle-57,(TDS), Kolkata u/s 254/251/201(1)/201(1A) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide their orders dated 21.03.2014 & 30.03.2011 for assessment years 2007-08 to 2009-10 respectively.

Shri Ravi Tulsiyan, Ld. Authorized Representative appeared on behalf of assessee and Shri M.K. Clanda, Ld. Departmental Representative appeared on behalf of Revenue.

2. At the threshold, it is noted that there is a delay of 54 days in filing the appeals by the Revenue in ITA No.1760-1762/Kol/2012. The Revenue has filed affidavit in this regard stating the reasons that the delay has occurred due to official scrutiny and arranging related papers for filing the appeal. Ld. AR for the assessee submitted that considering the delay he should not be having any objection to the Bench if condonation of the delay is considered. Thus, in our considered opinion, on the facts and circumstances of the case, the delay in these cases deserves to be condoned and proceeded to hear the appeals.

3. All the appeals are heard together and are being disposed of by way of consolidated order.

4. The Assessee is a Third Party Administrator (TPA). An insurance company appoints TPA to settle claims and pay to policy holders. The TPA acts as an agent performing claim settlement and disbursement functions. TPA has recognized and enlisted various hospitals and nursing homes. Policy holder can know about the same and select a hospital for hospitalization. TPA usually settle claims only in case of hospitalization. Expenses incurred prior to

hospitalization and after discharge from hospital have to be claimed from insurance company directly. Many times TPA do not pay full amount even to the hospital, and the policy holder is required to make a claim for reimbursement on insurance company. The insurance company can pay directly or through TPA depending on their understanding. TPA gets money from insurance company on account of claims settled and disbursed and some charges for their services which may be called commission or service charges. Insurance Regulatory & Development Authority of India (IRDA) has defined TPA's as "An insurance intermediary licensed by the Authority who, either directly or indirectly, solicits or effects coverage of, underwrites, charges premium from an insured, or adjusts or settle claims in connection with health insurance, except as an agent or broker or an insurer.

The plea of the TPA's are that when an insurance company pay to the policy holder any sum on account of medical expenses or motor car accidental repairs the insurance company pays to settle insurance claims. The payment may be made directly to the service provider like hospital or diagnosis centre in case of Mediclaim insurance or to Authorized Service station at vehicle repair shops in case of insurance of motor cars. The insurance company does not pay as professional fees to hospital or as payment under a works contract to the vehicle repair workshop. Therefore, insurance companies do not deduct tax under sections like section 194J or 194C while making payment to hospitals or workshops. The insurance companies are not required to deduct tax even when payment is made directly to the hospital or the workshop. Similarly TPA is an agent or outsourced service for receiving and settling claims within limitation of delegation in their favour and can make disbursement on behalf of insurance companies Therefore, what is applicable to insurance company is applicable to TPA When the principle that is the insurance company is not required to deduct tax while making direct payment to hospital or vehicle workshop or making payment to policy holder as reimbursement there is no question to ask TPA to deduct tax while making payment of hospital or workshop Therefore merely because insurer has

appointed TPA as an intermediary or an agent to perform some of its functions, different rules cannot be applied to TPA. TPA is therefore not liable to deduct tax from payments made to hospitals.

5. It is the further plea of the assessee/TPA that Hospital is an organized entity. It provides infrastructure and organizes various services required for treatment of patients. It cannot be said that a hospital is a doctor. Hospital may organize and arrange to provide services of different doctors as may be required by patients. In case of private hospitals, the choice of doctor is also made by patient and not by hospital. Hospital cannot also be called performing any work under a works contract. As in case of a hotel (rendering hospitality service) it cannot be said that they provide any service under works contract to guests, similarly it cannot be said that a hospital provide any service under works contract to patients. Therefore the TPAs are not making any payment for professional services when they make payments to hospitals and therefore there is no obligation on their part to deduct tax at source u/s.194J of the Act. The revenue however holds that the view that the payments made by the TPAs to various hospitals is fees for professional services rendered and therefore tax has to be deducted at source in terms of Sec.194J of the Act by the TPA while making payments to hospitals. Now coming to the present facts of the case are that as a TPA, the assessee is required to extend services to the holders of Mediclaim policies issued by the Insurance Companies namely National Insurance Co. Ltd, New India Assurance Co. Ltd., United India Insurance Co. Ltd., and Oriental Insurance Co. Ltd. Private Limited Company etc. The assessee's major role is to settle medical expenses of insured person under the Mediclaim insurance policy issued by the aforesaid insurance company. A survey was conducted u/s.133A dated 06.01.2009 in the office premises of assessee and it was found that the assessee failed to deduct TDS from payment of the bills raised by hospital. Accordingly, the AO treated the assessee as assessee in default for non-deduction of TDS u/s 194J of the Act and also in terms of Circular No.715/1995 dated 08.08.1995 issued by CBDT. The AO thus worked out the amount of TDS as under:-

FY	Amount paid under the cashless scheme	TDS deductible including EC	Interest thereon from 01.01.07	Total amount payable
06-07	12,10,00,000	1,24,63,000/-	63,56,130	18818130

The AO raised the demand of tax along with interest under section 201(1)/201(1A) respectively.

6. Aggrieved, assessee preferred an appeal before Ld. CIT(A) whereas assessee submitted that the provision of Sec. 194J are attracted to the professional services but in the instant case, assessee is merely acting as an agent between the insurance companies and hospitals in settling the claim of insurers (public). As such, the assessee is not rendering any professional service. The submission of the assessee can be summarized as under :-

a) The profits of a profession are mainly dependent upon personal qualification. The pursuit of a profession is an activity carried on by an individual through the application of personal kill and intelligence. Since a hospital is an artificial entity, it cannot carry on a profession.

b) Although the directors or employees of a company or the partners of a firm running the hospital can individually carry on profession, the company or firm itself cannot carry on a profession.

c) The activities undertaken with a profit motive by a hospital are related to business and not to profession.

d) Any kind of commercial activity telescoped to professional activity ought to be understood as a business.

e) Hospitals providing various medical services and having several doctors specialized in different fields for rendering professional services to patients essentially carry on business with the help of the professionals.

The assessee also filed before Ld. CIT(A) a statement showing break-up of about 100 invoices of hospitals settled by the appellant under the cash-less scheme. Referring to this statement, the assessee has pointed out that the

invoices of the hospitals settled by the appellant have several components viz. bed / room charges, OT charges, medicine / implant charges, pathology / diagnostic / x-ray charges doctors' fees, miscellaneous charges towards special attendants / meal etc. It is noticed that in many cases doctors' fees pertained to more than one doctor and in most of the cases there was no question of deduction of tax by the hospital as the professional fees of the doctors were less than the threshold limit prescribed in Sec. 194J for the purpose of deduction of TDS. The assessee has also referred to the provisions of section 204 of the IT Act which defines the words "***person responsible for paying***" used in Section 194J of the IT Act. As per section 204(iii), the person responsible for deducting TDS from fees for professional services in terms of section 194J is the payer himself or if the payer is a company, the company itself including the principal officer thereof. The assessee has pointed out that the professional fees payable to the doctors/ surgeon are actually paid by the hospital, who arranges their services and consequently in terms of section 204(iii) of the IT Act, it is the person responsible for deducting TDS from payments to the doctors. The assessee also argued that the hospital gets reimbursement of professional fees paid by it to the doctors from the insured patient or on his behalf from the TPA. Since the TPA is not the payer, it has no responsibility to deduct TDS from the professional Fees paid to the doctors. However, Ld. CIT(A) considering the facts and circumstances of the case gave partly relief to assessee by observing as under:-

> *"13. Decision*
>
> *I have perused the orders under section 201(1)/201(1A) of the IT Act passed by the AO and carefully considered the submissions of the AR, both oral and written. Keeping in view the facts and circumstances of the case, it appears to me that these appeals involve the following common questions of law and fact.*
>
> *(a) Whether the hospital to whom the appellant TPA made payments under Cash-less scheme was rendering professional service to the Insured patients or it was engaged in business activities.*

(b) Whether the amounts received by the hospital from the appellant TPA under the Cash-less scheme represented its business receipt or it was in the nature of fees for professional services

(c) Whether in terms of provision of Sec. 194J of the IT Act the appellant TPA committed any default for its failure to deduct TDS from the payments made by it to the hospital.

(d) Whether the appellant TPA was deemed to be an assessee in default within the meaning of Sec. 201(1) of the IT Act for its failure to deduct TDS from payments made by it to the hospital under the Cash-less scheme.

14. Before discussing the abovementioned questions of law, it would be relevant to refer to Sec. 194J of the IT Act in terms of which the appellant was required to deduct TDS as held by the AO. Sec. 194J (after excluding the portion not relevant for deciding these appeals provides that-

Any person not being an individual or HUF who is responsible for paying to a resident any sum by way of:-

(a) Fees for professional services or

(b) …. …. ….. …. …

(c) … … … … … …

(d) … … … … … … ..

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 10% of such sum as Income Ta on income comprised therein.
Provided that no deduction shall be made under this Section

(A) … … …

(B) Where the amount of such sum or as the case may be the aggregate of the amounts of such sum credited or paid or likely to be credited or paid during the Fin. Year by the aforesaid person to the account of or to the payee does not exceed rs.20,000 in the case of fees for professional services referred to in Clause(a).

In the explanation below Sec. 194J, it has been provided that for the purpose of this section "professional services:"means services rendered by a person in the course of carrying on legal, medical, engineering … .. or such other profession as is notified by the Board for the purposes of section 44AA or of this section. Rule 6F deals with books of account and other documents to be kept by persons carrying on certain professions.

15. On going through the provisions of section 194J of the IT Act, it is clear that in terms of this Section TDS is required to be deducted from

fees for professional services rendered in the course of carrying on medical profession. During the hospitalization of a patient, the hospital arranges for professional services of a physician/surgeon for examining the patient and prescribing medicines etc. for him. As submitted by the AR, the bills prepared by the hospital include not only the professional fees paid by it but also charges for various other services provided to the patient by the hospital e.g. room rent, meal charges, charges for diagnostic tests, medicines etc. the consolidated bill prepared by the hospital therefore represents its composite business receipts including fees paid to doctors as professional charges or professional fees.

The AR of the appellant has also drawn my attention to a decision of the Hon'ble Income Tax Appellate Tribunal A-Bench Hyderabad in the case of Arogya Sri Health Care Trust vs. Income Tax officer, Ward-14(2) (TDS) reported in 2012-TIOL-200-ITAT-HYD involving a similar issue which is under appeal. In this case the assessee has been a Trust formed by Government of Andhra Pradesh which acted as an independent nodal agency of Government of Andhra Pradesh to provide healthcare coverage under Arogya Sri-II Scheme. For the purpose of administering the said scheme, the Trust directly made payments to various hospitals/nursing homes as per the MOU it entered with such Hospitals/Nursing Homes. In this case the dispute was whether payments made by the said Trust to Hospitals/Nursing Homes for providing Health Care services were liable to deduction of TDS u/s. 194J. A copy of this Tribunal order dt. 16.03.2012 has been filed by the AR in my record. In this case the Hon'ble ITAT has held as follows:-

> '… it is only the element of fee for professional services comprised in each of the payment made by assessee trust to the hospitals which falls within the scope of S. 194J of the Act. As canvassed by the learned counsel for the assessee, elements of payment towards bed charges, medicines, follow up services, outpatient services, transportation charges, implants, expenditure incurred for conducting camps at village levels, do not strictly fall within the scope of '**fee for professional services**' which alone can be considered as falling within the scope of the provisions of S.194J of the Act.'

*16. Keeping in view the decision of the Hon'ble Tribunal referred to above, impugned order therefore hold that it is only the element of fees for professional services comprised in each of the payment made by the assessee company to the hospitals/institutions which falls within the scope of Sec. 194J of the Act. as canvassed by the learned counsel for the assessee, elements of payment towards room services medicines, OT charges, investigation and procedure, implants, other expenses, etc. do not strictly fall within this scope of "**Fee for Professional Services**"*

*which alone can be considered as falling within the scope of provisions of Sec. 194J of the Act. Accordingly, AO is directed to bifurcate the payments made by the assessee company to the hospitals/institutions into various elements as noted above and confine the demand raised in terms of sec. 201(1) of the Act only to payments which assumed the nature of "**Fees for Professional Services**" as noted above. The Assessing Officer shall examine each of payment made by assessee company in the case of "**Fees for Professional services**" and in case where "**Fees for Professional Services**" exceeds Rs.20,000/- then only TDS provisions u/s. 194J should be applied. Assessing Officer is accordingly directed to amend his order u/s. 201 of the IT Act. Therefore, this ground is partly allowed."*

Aggrieved by this order of Ld. CIT(A), both assessee and Revenue have come up in appeal before us in ITA Nos. 1156 to 1158/Kol/2012 (Assessee's appeals) and in ITA Nos. 1760 to 1762/Kol/2012 (Revenue's appeals) respectively. The grounds raised by assessee per its appeal reads as under:-

"1) a) That the Ld. CIT(A) erred in holding that the appellant-company was required to deduct tax at source us 194J on the element of fees for professional services comprised in the bill of Hospital / Nursing Home.

*b) That since admittedly, the Hospitals & Nursing Homes already deducted tax at source while making payments of Professionals Fees to the Doctors, the ape TP cannot be held by the Ld. CIT(A) as the "**person responsible for paying**" and deducting TDS within the meaning of section 204(iii) read with section 194J of the IT ct on its payments to the Hospital / Nursing Home.*

c) That the order of the Ld. CIT(A) on this issue should accordingly be reversed.

2) In view of Ground Nos. 1(a), (b) and (c) above since there was no liability on the part of the appellant to deduct tax at-source, the direction contained in Para 17 of the CIT(A)'s order is arbitrary and uncalled for.

3) That the order of the Ld. CIT(A) to this extent may accordingly be modified and your appellant be given such relief(s) as prayed for."

7. The grounds raised by Revenue per its appeal in **ITA No.1760/Kol/2012** reads as under:-

"1. That in the facts and circumstances of the case, whether the CIT(A) was correct in holding that the total payment made by the assessee-TPA to various hospitals/institutions be segregated into 'professional fees/professional charges' and other business receipts whereas in facts there is no segregation of such charges with the deductor assessee as admitted by him with supporting records.

2. That in the facts and circumstances of the case, the CIT(A) has erred in directing the AO to examine each payment made by the deductor assessee to the hospitals and apply the provision of section 194J only in cases where the payments exceeds Rs.20,000/-".

Solitary issue raised by assessee in all the grounds of appeal is that Ld. CIT(A) erred in holding that assessee was liable to deduct Tax Deducted at Source (TDS) u/s. 194J of the Act on the element of fees for professional services comprise in the bill of hospital / nursing home and issue raised by Revenue is that Ld. CIT(A) ought not to have directed segregation of payment made by assessee to hospitals towards professional fees and other payments and further held that assessee is liable to TDS only on the payment made as professional fees.

8. We find that the issue raised by the Assessee and Revenue has been settled by Hon'ble ITAT Hyderabad in the case of Arogya Sri Health Care Vs. Income Tax Officer reported in 51 SOT 0079, where the Hon'ble ITAT Hyderabad has held as under :

"22. As for the quantum of the demand raised by the assessing officer under S.201 of the Act, we find some force in the contention of the assessee that it is only the element of fee for professional services comprised in each of the payment made by assessee trust to the hospitals which falls within the scope of S.194J of the Act. As canvassed by the learned counsel for the assessee, elements of payment towards bed charges, medicines, follow up services, outpatient services, transportation charges, implants, expenditure incurred for conducting camps at village levels, do not strictly fall within the scope of ***'fee for professional services'*** *which alone can be considered as falling within the scope of the provisions of S.194J of the Act. In this view of the matter, we set aside the order of the CIT(A) on this aspect, and direct the assessing officer to bifurcate the payments made by the assessee trust to the hospitals into various elements as noted above,*

and confine the demand raised in terms of S.201(1) of the Act, only to the payments which assume the nature of fee for professional services, as noted above"

In view of above, we are in agreement with the order of ld. CIT(A) with regard to the liability of the TDS on the assessee for the element of fees for the professional services comprised in the bill of Hospital/ Nursing Home. Hence the appeals of assessee and that of Revenue's appeals are dismissed.

Now we take up Assessee's appeal in ITA No. 643-1139 & 1140/Kol/2016 for A.Y.07-08, 08-09 & 09-10.

9. The issue raised by the assessee in this appeal is that the AO has not given correct effect to the direction issued by the ld. CIT(A) by including investigation and investigation & procedure charges as fees for professional services.

10. At the outset we find that the ld. CIT(A) has passed ex-parte order on the ground that the assessee failed to appear on the dates of hearing. However we find that the grounds raised by the assessee are arising out of the appeal disposed of in terms of the directions given by the ld. CIT(A) in Appeal No. 78,79 & 80/CIT(A)-I/Cir-57/11-2 vide order dated 12.7.2012. At this juncture we find important to reproduce the direction of the ld. CIT(A) which reads as under :

*"It is only the element of fees for professional services comprised in each of the payment made by the assessee company to the hospitals/institutions which falls within the scope of Sec. 194J of the Act. as canvassed by the learned counsel for the assessee, elements of payment towards room services medicines, OT charges, investigation and procedure, implants, other expenses, etc. do not strictly fall within this scope of "**Fee for Professional Services**" which alone can be considered as falling within the scope of provisions of Sec. 194J of the Act. Accordingly, AO is directed to bifurcate the payments made by the assessee company to the hospitals/institutions into various elements as noted above and confine the demand raised in terms of sec. 201(1) of the Act only to payments which assumed the nature of "**Fees for Professional Services"** as noted above. The Assessing Officer shall*

*examine each of payment made by assessee company in the case of "**Fees for Professional services**" and in case where "**Fees for Professional Services**" exceeds Rs.20,000/- then only TDS provisions u/s. 194J should be applied. Assessing Officer is accordingly directed to amend his order u/s. 201 of the IT Act. Therefore, this ground is partly allowed."*

From the above, it is clear that the ld. CIT(A) has given direction to the AO for not including the investigation and investigation & procedure charges as professional fees for the purpose of TDS under 194J of the Act. However the AO has exceeded his jurisdiction by not following the direction of the ld. CIT(A) correctly and holding the investigation and investigation & procedure charges liable to TDS under section 194J of the Act. Therefore in our considered opinion the investigation and investigation & procedure charges are outside the purview of TDS provisions.

10.1 However the ld. AR before us filed the affidavit stating that the recipient hospitals have already discharged their obligations towards the tax liability by filing the returns of income. The ld. AR also submitted the list of the hospitals to which the payments were made during the assessment years 2007-08, 2008-09 & 2009-10 by the assessee. In this connection we find that the Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverages Pvt. Ltd. Vs. CIT reported in 293 ITR 226 has held that where the payee included its receipt in the books of accounts and pays the tax thereon then the payer cannot be treated as assessee in default for non deduction of TDS. The relevant extract of the order is produced below :

"It is required to note that the Department conceded before the Tribunal that the recovery could not once again be made from the tax deductor where the payee included the income on which tax was alleged to have been short deducted in its taxable income and paid taxes thereon. There is no dispute whatsoever that P Corpn. had already paid the taxes due on its income received from the appellant and had received refund from the Tax Department. The Tribunal came to the right conclusion that the tax once again could not be recovered from the appellant (deductor-assessee) since the tax has already been paid by the recipient of income. The order passed by the Tribunal to reopen the

matter for further hearing as regards ground No. 7 has attained its finality. In the circumstances, the High Court could not have interfered with the final order passed by the Tribunal. Be that as it may, the Circular No. 275/201/95-IT(B), dt. 29th Jan., 1997 issued by the CBDT should put an end to the controversy. In the circumstances, it is not necessary to go in detail as to whether the Tribunal could have at all reopened the appeal to rectify the error apparent on the face of the record.—CIT vs. Hindustan Coca Cola Beverages (P) Ltd. (2007) 207 CTR (Del) 119 set aside."

In view of above and in the interest of justice, we are inclined to restore the issue to the file of the AO for fresh adjudication as per law with the direction to verify whether the payee has included the payment in its books and paid the tax thereon by filing in its income tax return. Therefore we are inclined to restore this issue to the file of AO for fresh adjudication as per law in terms of the direction stated above. Hence, the grounds raised by assessee in all three appeals are allowed for statistical purpose.

11. We also find that the ld. CIT(A) has also passed the *ex-parte* order in the instant cases before us. But we have restored the issue to the AO to avoid multiple litigations. Hence, we are not inclined to adjudicate other grounds of appeal of the assessee.

12. In the result, appeals of assessee are allowed for statistical purpose.

13. **In combine result, assessee's appeals in ITA No. 643, 1139 & 1140/Kol/2016 are allowed for statistical purpose and that of remaining appeals of assessee and appeals of Revenue are dismissed.**

Order pronounced in the open court 09/12/2016

Sd/-	Sd/-
(न्यायिक सदस्य)	(लेखा सदस्य)
(N.V.Vasudevan)	(Waseem Ahmed)
(Judicial Member)	(Accountant Member)

Kolkata,
*Dkp, Sr.P.S
दिनांकः- 09/12/2016 **कोलकाता** ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-M/s Hritage Health TPA Pvt. Ltd. 3 Netaji Subhas Road, Kolkata-01
2. राजस्व/Revenue-ITO, Ward-2(3), Siliguri/DCIT, (TDS), Circle-57, Kolkata/ACIT (TDS), Cir-57, 10B, Middleton Row, Kolkata
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कोलकाता** / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।