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CHARTERED ACCOUNTANTS

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PROFESSIONAL SERVICES Vs. TECHNICAL SERVICES

U/S 194J OF INCOME TAX ACT, 1961

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This analysis has assumed great importance due to amendment of section 194J by the Finance Act, 2020 with effect from 1st April, 2020. In nutshell, after the amendment, the TDS rate on fees for “professional services” is 10% and in respect of “fees for technical services” (**not being a professional services**) has been reduced to 2%. Now the moot question is that in which situation this concessional rate will be applicable.

As per Explanation to Section 194J of the Income Tax Act, 1961:

“Professional services” means 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 44AA or of this section;

(Other profession as notified u/s 44AA are as Authorized Representative, Film Artist, Company Secretary and Information Technology). It may be noted that no profession has been notified separately for the purpose of section 194J.

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

As per this clause, "fees for technical services" means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head "Salaries".

Now at first glance it seems overlapping because there is mention of technical consultancy in the definition of “professional services” and “fees for technical services” is defined separately also. But if we closely see, we come to a conclusion that “technical services” if provided in the **course of profession** will partake the nature of “professional services”. Whereas if technical services are not provided in the course of profession, then they will be rendered in the course of business and will be treated as “technical services” and hence eligible for beneficial TDS rate of 2%.

Given the plethora of legal cases in respect what is included in managerial, technical or consultancy services as per definition of “fees for technical services”, and long standing debate on this issue, the same has not been discussed here in detail. The critical aspect here is that, where technical consultancy is provided in the course of profession, then it will assume the nature of “professional services” and hence TDS at rate of 10% should be applicable. However, where “technical services” are not provided in the course of profession, then lower TDS rate of 2% should be available as per the recent amendment.

There may also be an intent behind levying higher TDS rate in the case of professional services, as there are higher margins in the case of a “profession”. In profession, one earns with the power of mind, whereas in business there has to be much more overheads and infrastructure involved. Therefore lower margins entailing lower TDS rate in case services are provided in the course of business. Percentage of profit in relation to turnover in business is much less than profession. Income Tax Act recognizes this fact as the rate of presumptive income for business under section 44AD (6%/8% of turnover) is much less than for the profession under section 44ADA (50% of turnover).

It will be interesting to note that though specific professions have been specified in section 194J but word “profession” is nowhere specifically defined in the Income Tax Act. Though under section 2(36) it is stated that “profession includes vocation” but is not of much use as this definition (more of clarification) is to enlarge the scope of profession to informal sector as well but does not discuss the meaning of profession.



There is important distinction made in the provisions of Income Tax with respect to “business” and “profession”. As can be seen in respect of Tax Audit provisions where section 44AB specify separate turnover limits for “business” and separate for “profession”.

As per the Tax Audit Guidance Note issued by The Institute of Chartered Accountants of India (ICAI),

Quote “The term **“business”** is defined in section 2(13) of the Act, as under: *“Business” includes any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacture. The word ‘business’ is one of wide import and it means activity carried on continuously and systematically by a person by the application of his labour or skill with a view to earning an income. The expression “business” does not necessarily mean trade or manufacture only - Barendra Prasad Ray v ITO [1981] 129 ITR 295 (SC).*

Section 2(36) of the Act defines profession to include vocation. Profession is a word of wide import and includes “vocation” which is only a way of living. – Additional CIT v. Ram Kripal Tripathi [1980] 125 ITR 408 (All).

*Whether a particular activity can be classified as ‘business’ or ‘profession’ will depend on the facts and circumstances of each case. **The expression “profession” involves the idea of an occupation requiring purely intellectual skill or manual skill controlled by the intellectual skill of the operator, as distinguished from an operation which is substantially the production or sale or arrangement for the production or sale of commodities. - CIT Vs. Manmohan Das (Deceased) [1966] 59 ITR 699 (SC), CIT v. Ram Kripal Tripathi [1980] 125 ITR 408 (All).***



The following activities have been held to be business:

- (i) Advertising agent
- (ii) Clearing, forwarding and shipping agents - CIT v. Jeevanlal Lalloobhai & Co. [1994] 206 ITR 548 (Bom).
- (iii) Couriers
- (iv) Insurance agent
- (v) Nursing home
- (vi) Stock and share broking and dealing in shares and securities - CIT v. Lallubhai Nagardas & Sons [1993] 204 ITR 93 (Bom).
- (vii) Travel agent.” **Unquote**

Further it may be noted that all the professional institutes or statutory Acts, may it be Chartered Accountant Institute, Company Secretary Institute, Insolvency Act, Advocate Act, Architectural Institutes, Indian Medical Association etc., none of them allow registration of a corporate entity as a professional. Any company is incorporated to do business and not to do profession. Though pursuing a profession may not be through a formal Institute but If we closely see the wordings how the “profession” is to be understood, then it can be concluded that profession can be carried on by natural persons only and therefore services provided by a corporate entity or a society or Trust or any other similar corporate structure of artificial juridical person cannot qualify as services provided in the course of a profession.

To quote wordings from the Tax Audit Guidance note once again, ***The expression "profession" involves the idea of an occupation requiring purely intellectual skill or manual skill controlled by the intellectual skill of the operator.*** We have to mark the words, **“Skill of the operator”**. Accordingly the services provided by such entities will not qualify to be called “professional services” within the meaning of section 194J. Therefore it can be safely concluded that “professional services” cannot be provided by Corporate, Trust, Society, Trust, Artificial Juridical person and similar organizations. In contrast, the Individual, partnership firms including LLP can definitely provide professional services because they in their capacity can pursue a profession.



Conclusion:

The following conclusions can be made as per discussion above

- (1) When “technical services” are provided in the course of a specified profession as detailed under section 194J by any Individual, partnership, LLP , then since they will also be categorized as “professional services”, they will not qualify for the benefit of lower rate of TDS since the wordings are “fees for technical services (not being professional services)**
- (2) Fees for Technical services (not being professional services) will be eligible for lower rate of TDS i.e.2%**
- (3) A corporate entity or a society or trust or similar artificial juridical entity when charges “fees for technical services”, then it cannot be covered as professional services under any circumstances because a company etc. cannot provide these services in the course of a profession and will be eligible for lower rate of TDS i.e.2%**

However it is desirable that CBDT Comes out with a circular clarifying the scope for extending the benefit of lower rate of TDS specified u/s 194J to “fees for technical services” to quell any doubts in the mind of a tax payer.

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