

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 1797 OF 2013

Commissioner of Income Tax-2,
Mumbai

.. Appellant

v/s.

Health India TPA Services Pvt. Ltd.

..Respondent

Mr. Suresh Kumar for the appellant

Mr. P. J. Pardiwalla, Sr. Counsel a/w Sameer Dalal for the
respondent

**CORAM : M.S. SANKLECHA &
M.S. SONAK, J.J.**

DATED : 30th NOVEMBER, 2015.

P.C.

1. This appeal under Section 260-A of the Income Tax Act, 1961 (the Act), assails the order dated 22nd February, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order dated 22nd February, 2013 relates to Assessment Year 2008-09.

2. The appellant Revenue has urged following question of law for our consideration.

(i) Whether on the facts and circumstances of the case, the Tribunal was correct in law, in deleting the disallowance made under Section 40(a)(ia) of the Act ?

3. The Respondent Assessee is a Third Party Administrator (TPA) in respect of the mediclaim Insurance. The business of the Respondent Assessee *inter alia* involves facilitating an insured person to avail the services of the hospital without payment in cash popularly called cashless services. This is ensured by the Respondent Assessee as a TPA guarantees payment to the hospitals extending cashless facility to the insured on behalf of the Insurance company. The medical expenses incurred and claimed by the hospitals for rendering services to the Insured, are collected by the Respondent Assessee from the Insurance company and paid over to the hospitals. As the above payments are merely routed through them, the Respondent Assessee does not deduct any tax at source under Chapter XVII B of the Act nor does it debit the payment to its profit and loss account. In view of the failure of the Respondent Assessee to deduct the tax under Chapter XVII B of

the Act, the Assessing Officer by its order dated 9th December, 2010 held that the entire amount which was paid over to the hospitals would be disallowed under Section 40(a)(ia) of the Act. Consequently, an amount of Rs.4.58 crores was added to the Respondent Assessee's income being the amount disallowed under Section 40(a) (ia) of the Act.

4. In appeal, the Commissioner of Income Tax (Appeals) by an order dated 1st July, 2011 held that the question of disallowance of expenditure under Section 40(a)(ia) of the Act, would not arise in the present facts as no such allowance being expenditure in its profit and loss account was claimed. This was a consequence of a finding of fact that neither Rs.4.58 crores or any part thereof had been debited to its profit and loss account. Thus the appeal of the Respondent Assessee was allowed.

5. Being aggrieved the Revenue carried the issue in an appeal to the Tribunal. By the impugned order, the Tribunal recorded a finding of fact viz. that the Respondent Assessee had not claimed any expenditure in respect of the payments made by it to the

hospitals on receiving the same from the Insurance company. It acted as a mere conduit to carry the amounts for the Insurance company to the concerned Hospital. These amounts were not reflected in its profit and loss account. In the above view, the Tribunal dismissed the Revenue's appeal.

6. We noticed that the impugned order *inter alia* records the fact that in Assessment Year 2007-08, the order of the Commissioner of Income Tax (Appeals) on issue an identical to the present one had held in fact of the Respondent Assessee and the same had been accepted by the Revenue as to appeal therefrom was filed. In view of the above, one Mr. Aastha Madhur, Deputy Commissioner of Income Tax filed an affidavit seeking to explain why the order of the Commissioner of Income Tax (Appeals) for the Assessment Year 2007-08 had been accepted by stating as follows :-

“4. On perusal of the relevant records, it is seen that for A.Y. 2007-08, no appeal was preferred against the CIT(A)'s order as it was observed that the payment made by the TPA to the hospitals on behalf of the Insurance company is not an expenditure of the assessee and the same was not debited in P&L account. It was noted that even though the assessee company was bound to deduct

TDS on payments made to hospitals on behalf of the insurance company, the same was not an expenditure debited to P/L account. Therefore, the decision of the CIT(A), of deleting the disallowance u/s 40(a)(ia), was held to be correct and no further appeal before the ITAT was preferred.”

7. Mr. Suresh Kumar, the learned Counsel appearing for the Revenue submits that in cases where TDS has not been deducted under Chapter XVII B of the Act, *ipso facto* the entire amount which has not suffered TDS, would be added to the income of the assessee as a consequence of disallowance of deduction under Section 40(a) (ia) of the Act. Thus, the order of the Assessing Officer adding the amount of Rs.4.58 crores, cannot be found fault with as the TDS on the aforesaid amount has admittedly not been deducted by the Respondent Assessee. So far the affidavit dated 6th October, 2015 is concerned, Mr. Suresh Kumar, learned Counsel for the Revenue states that there was a responsibility on the Respondent Assessee to deduct tax under Chapter XVII B of the Act and this not being done, the amount paid without deduction of such tax is liable to be included to the petitioner's income.

8. We have considered the grievance of the Revenue. We note

that both the order i.e. of the Commissioner of Income Tax (Appeals) as well as the impugned order of the Tribunal have recorded a finding of fact that the Respondent Assessee has not claimed any expenditure while computing its income chargeable to tax. As a consequence, there can be no occasion to disallow such expenditure under Section 40(a)(ia) of the Act. It is clear from plain reading of Section 40(a)(ia) of the Act that the failure to deduct the TDS in the absence of the same having been claimed as an expenditure while determining the income, would not attract disallowance. The consequence of failure to deduct the tax is found in Section 201 of the Act and it does not in any way permit the addition of an amount, which has not subjected tax deduction at source. The *Sine qua non* for the application of Section 40(a)(ia) of the Act to apply is claiming of the amount sought to be disallowed as an expenditure / deduction to determine the taxable income of the assessee. In the present case, the Revenue is not challenging the concurrent finding of the fact that the amount of Rs.4.58 crores, which is being sought to be added to the Respondent's income has not been considered i.e. deducted to arrive at its income. Thus in such a case, the stand of

Revenue contrary to the clear provisions of section 40(a)(ia) of the Act is unsustainable.

9. We further find that for Assessment Year 2007-08 in an identical fact situation as existing in the subject assessment year, the Revenue has accepted the decision of the Commissioner of Income Tax (Appeal), which is the same as taken in the impugned order of the Tribunal. The affidavit of Mr. Aastha Madhur does not justify the reason why a different view is being taken for the Assessment Year 2008-09.

10. For the aforesaid reasons viz. the concurrent findings of fact clear, self evident provision of law and the affidavit dated 6th October, 2015 of Mr. Aastha Madhur, the question as proposed does not give rise to any substantial question of law. Accordingly, appeal dismissed. No order as to costs.

(M.S. SONAK, J.)

(M.S. SANKLECHA, J.)