

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

INCOME TAX APPEAL NO.1315 OF 2015
WITH
INCOME TAX APPEAL NO.1313 OF 2015

The Commissioner of Income Tax-1,
Mumbai, R.No.330, Aayakar Bhavan,
M.K. Road, Mumbai-400 020.

.... Appellant

- Versus -

M/s Dedicated Healthcare Services
(TPA) India Pvt. Ltd., Kambata
Building, 3rd Floor, East Wing,
42, Maharishi Karve Road,
Mumbai – 400 020

.... Respondent

Mr. Prakash C. Chhotaray for the Appellant.
Mr. F.V. Irani i/by Mr. Atul K. Jasani for the Respondent.

**CORAM: S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.**

DATE : SEPTEMBER 17, 2018

ORAL ORDER (Per Shri S.C. DHARMADHIKARI, J.):

1. By these appeals, the Revenue has proposed common questions and stated to be substantial questions of law.

2. These questions are set out at pages 14 and 15 of the paper-book in Income Tax Appeal No.1315 of 2015.
3. These questions and the additional question stated to be of law are common to both these appeals.
4. It would be convenient to take the facts from Income Tax Appeal No.1315 of 2015. Therein the Revenue challenges the order passed on 10-12-2014 by the Income Tax Appellate Tribunal, Mumbai for the Assessment Year 2008-09. The Tribunal has dismissed the Revenue's appeal.
5. This Court's jurisdiction under Section 260A of the Income Tax Act, 1961 ("the I.T. Act" for short) is invoked in the following facts and circumstances.
6. The assessee before this Court is a Private Limited Company. It is carrying on business as a Third Party Administrator ("TPA" for short). The assessee is holding a licence from the Insurance Regulatory and Development Authority ("IRDA" for short). The Revenue claims that the assessee is

appointed by various insurance companies to disburse amounts under what is styled as Medclaim Insurance Policy. The insurance companies issue these policies which are serviced by TPAs like the assessee. The Revenue's case is that these TPAs act as facilitators and charge a fee. They provide services, *inter alia*, like hospitalisation, cashless access, billing and call centre services. All claims payable by the insurance companies for these services are routed through the TPA. The amounts are paid from an account styled as Claim Float Account ("CFA" for short) provided by the insurance companies. Under the cashless scheme, the amounts received from the insurance companies are disbursed directly to the recognized hospitals/clinics towards payments to various individuals receiving medical treatment. In the case of reimbursement, the payments are made by the TPA to the insured.

7. In para 3.2 of the memo of this appeal the Revenue says that, the arrangement is that the initial amount is paid by the insurance company to the assessee. This amount is deposited in the FA (Float Account). The payment for insurance claim is

made from this account. Once the FA is utilised by the assessee, it presents the detailed information on disbursement to the insurance company and which is verified by the insurance company. Thereupon, the assessee is reimbursed the sums/amounts disbursed. This is a continuous process and throughout the assessment year. As stated above, the receipts and disbursements are routed through the bank account of the assessee for which the assessee passes certain book entries. It is stated that on receipt of the amount, the bank account is debited and the account of the insurance company is credited. On payment of claims to the hospitals/insured, the account of the insurance company is debited and the bank account is credited. It is in these circumstances that the Revenue alleges that the assessee prepares the Profit and Loss Account by taking only the service charges received as receipt, and administrative and operating charges as expenses. The claims receivable from the insurance companies and payable to hospitals are not routed through the Profit and Loss Account and are directly taken to the Balance Sheet and are reflected as assets and liabilities in

the Balance Sheet.

8. In the instant case, the assessee filed a return of income on 28-9-2008 declaring total income of Rs.68,85,850/-. The return was processed under Section 143(1) of the I.T. Act. Later, a survey under Section 133A of the I.T. Act was conducted by the TDS Wing of the Department on 17-9-2009. It was noticed that the assessee had made payments to various hospitals during the year totalling to Rs.11,89,18,600/-, without deducting tax at source. It was claimed that this was required under Section 194J of the I.T. Act and that invited a disallowance under Section 40(a)(ia) of the I.T. Act. The Assessing Officer, therefore, had reason to believe that income had escaped assessment and he issued notice under Section 148 of the I.T. Act on 31-3-2011. He proceeded to make the assessment. He rejected the contentions of the respondent/assessee and in so doing placed reliance on the Board's Circular No.8 of 2009, dated 24.11.2009, holding that TPAs are required to deduct tax at source under Section 194J from all such payments made to hospitals, etc..

9. The Assessing Officer placed reliance on a Judgment and Order of this Court, dated 3-5-2010, in assessee's Civil Writ Petition No.404 of 2010 **{(2010) 324 ITR 345 (Bom)}**. That *inter alia*, according to the Revenue, upheld this circular.

10. Such an order of the Assessing Officer, which according to the Revenue is fairly detailed, was passed on 29-12-2011. Aggrieved by such an order, the assessee brought an appeal before the Commissioner of Income Tax (Appeals) ("First Appellate Authority" for short). This appeal was allowed by the First Appellate Authority on 8-8-2012. Aggrieved thereby, the Revenue filed an appeal before the Income Tax Appellate Tribunal ("ITAT" for short). The ITAT relied upon its order in the case of **Paramount Health Services (TPA) Private Limited vs. Income Tax Officer** (Income Tax Appeal No.2188/Mum/2013) and dismissed the Revenue's appeal. Hence, the instant appeal.

11. The facts are identical insofar as the other appeal is concerned.

12. Mr. Chhotaray, learned Advocate appearing in support of these appeals for the Revenue, would submit that the above questions squarely arise from the impugned order of the Tribunal. They are substantial questions of law. By placing heavy reliance upon the Judgment of the Division Bench of this Court, delivered in the assessee's Civil Writ Petition, it is argued by Mr. Chhotaray that payments to the hospitals are made by the TPA. The issue stands concluded by the order of the Division Bench as also the Central Board of Direct Taxes' Circular No.8 of 2009, dated 24.11.2009, holding that the TPAs are liable to deduct tax at source. In the present case, relying upon Section 40(a)(ia), it is urged by Mr. Chhotaray that the assessee's stand is peculiar. It flies in the face of the Revenue's circular as also the order of the Division Bench. It is argued by Mr. Chhotaray that the substantial questions of law ought to be considered in the backdrop of the above materials. The Assessing Officer was right in his conclusion and his detailed order should not have been disturbed by the First Appellate Authority. More so, when he held that the books are not maintained by the assessee

according to the accounting standards. The assessee is an independent concern and not an appendage of the insurance companies. Once the books of accounts are rejected, then, the Assessing Officer derives the authority and powers to recast the Profit and Loss Account, ignoring the receipts from the insurance companies as revenue receipts and payments to the hospitals as revenue expenditure. That is how the disallowance was made under Section 40(a)(ia) of the I.T. Act. The First Appellate Authority did not consider the issue from all angles and simply upheld the assessee's stand. The Tribunal also committed the same mistakes. It is in these circumstances that it is urged by Mr. Chhotaray that these appeals deserve to be admitted. Mr. Chhotaray has placed very heavy reliance on the Division Bench Judgment in the case of the assessee, the Revenue's circular and the principles of statutory interpretation as are found in the renowned work of Maxwell, namely, Maxwell on The Interpretation of Statutes. Mr. Chhotaray would highlight the Mischief Rule. He would submit that once the Parliament has stepped in to cure the mischief and remove the

defect, then, full effect has to be given to the provision as brought in. It is in these circumstances, he places reliance on some other decisions, including that of the Hon'ble Supreme Court of India and the Delhi High Court. Thus he has placed heavy reliance on the following decisions:-

1. **Dedicated Health Care Services TPA (India) Pvt. Ltd. and Others v. Assistant Commissioner of Income-Tax and Others**, reported in [2010] 324 ITR 345 (Bom),
2. **Medi Assist India TPA P. Ltd. v. Deputy Commissioner of Income-Tax (TDS) and Others**, reported in [2010] 324 ITR 356 (Karnataka),
3. **Vipul Medcorp TPA Pvt. Ltd. & Ors. v. Central Board of Direct Taxes & Anr.**, reported in 183 [2011] Delhi Law Times 580 (DB),
4. **Tuticorin Alkali Chemicals And Fertilizers Ltd. v. Commissioner of Income-Tax**, reported in [1997] 227 ITR SC 172,
5. **New Jehangir Vakil Mills Co. Ltd. v. Commissioner of Income Tax, Bombay North, Kutch and Saurashtra**, reported in [1963] 49 ITR SC 137,
6. **Krishak Bharati Co-operative Ltd. v. Deputy Commissioner of Income-Tax**, reported in [2013] 350 ITR 24 (Delhi),

7. **Distributors (Baroda) P. Ltd. v. Union of India and Others**, reported in [1985] 155 ITR SC 120, and
 8. Judgment of the Hon'ble Supreme Court dated 24-11-2017, passed in Civil Appeal No.19763 of 2017 [arising out of SLP (C) No.29816 of 2011] **{Commissioner of Income Tax II v. M/s. Modipon Ltd.}** with connected Appeals.
13. On the other hand, Mr. Irani, appearing for the assessee, would submit that the Tribunal has upheld the order of the First Appellate Authority. These are concurrent findings of fact. These are not vitiated by any perversity or error of law apparent on the face of the record. Mr. Irani brought to our notice the fact that the only issue is, whether the disallowance by the Assessing Officer has to be deleted. In that regard, it is found that the income of the assessee is by way of fees from insurance companies. The services that are rendered by the TPAs are referred and in the case of **Assistant Commissioner of Income Tax v. Health India TPA Services P. Ltd.** {Income Tax Appeal No.6475/Mum/2012}, the Tribunal took a view which it followed in the case of **Paramount Health Services** (supra).

Once the issue was identical to these two matters, then, the Tribunal's view in the impugned order, following the same, cannot be termed as perverse or vitiated by any error of law. The Tribunal has consistently held that payment made by the assessee is only to replenish the amount in the Floating Account and, therefore, no disallowance can be made when the assessee has not claimed any such expenditure in the Profit and Loss Account.

14. It has been brought to our notice that a Division Bench of this Court in **Income Tax Appeal No.1797 of 2013 (Commissioner of Income Tax-2, Mumbai v. Health India TPA Services Pvt. Ltd.)** has already dealt with a similar question proposed by the Revenue and by a detailed Judgment, dated 30-11-2015, dismissed the Revenue's appeal. The concurrent findings, therefore, have a confirmation from this Court as well. Consequently, the present appeals deserve to be dismissed.

15. For properly appreciating the rival contentions, we

must refer to the Judgment of this Court in the case of **Health India TPA Services Pvt. Ltd.** (ITA-1797/2013) (supra). There the Revenue proposed an identical question. The business of the respondent/assessee therein is identical to that of the assessee before us. They facilitated the insured person to avail the services of the hospital without payment in cash, popularly called cashless services. This is ensured by the assessee as it 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 payments are merely routed through such assessees, they do not deduct any tax at source under Chapter XVII-B of the I.T. Act nor does it debit the payment to its Profit and Loss Account. This is how the Revenue/Department decided to proceed against such TPAs. The orders passed by the Assessment Officer in their cases were similarly challenged before the First Appellate Authority and he allowed the appeals of the TPAs. The Revenue

carried the matter to the Tribunal and this Court found that the order of the First Appellate Authority, on similar issue for Assessment Year 2007-08, in the case of the assessee in Income Tax Appeal No.1797 of 2013, is identical to the earlier order in the case of that very assessee. No appeal was preferred against that order by the Revenue. The Deputy Commissioner of Income Tax was called upon to file an affidavit as to why this selective approach of the Revenue has been adopted. The affidavit in reply filed on behalf of the Revenue in that case made a curious reading. The Deputy Commissioner of Income Tax, on oath, stated that no appeal was preferred for the Assessment Year 2007-08 in the case of that assessee because 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 the P&L Account. It was noted that even though the assessee was bound to deduct TDS on the payments made to hospitals on behalf of the insurance company, the same was not an expenditure debited to the P&L Account. Therefore, the decision of the First Appellate Authority deleting

the disallowance was held to be correct and no further appeal before the Tribunal was preferred.

16. In the case of the assessee involved in Income Tax Appeal No.1797 of 2013, same contentions had been raised on behalf of the Revenue. This Court made a detailed reference to those contentions, legal provisions and came to the conclusion that, from plain reading of Section 40(a)(ia) it is evident that failure to deduct the tax at source in the absence of the same having been claimed as expenditure while determining the income, would not attract disallowance. The consequence of failure to deduct the tax is found in Section 201 of the I.T. Act and it does not in any way permit the addition of an amount, which has not been subjected to deduction of tax at source. Thus, according to the Division Bench, the pre-condition for application of Section 40(a)(ia) is claiming of the amount sought to be disallowed as an expenditure/deduction to determine the taxable income of the assessee. There the Revenue did not challenge the concurrent finding that the amount which is sought to be added to the assessee's income has

not been considered to arrive at its income. The stand is contrary to the provisions of Section 40(a)(ia) of the I.T. Act. More so, when the Revenue accepted the stand of similar assesseees for prior Assessment Year 2007-08. The appeal was dismissed by the Division Bench holding that the Revenue has not been able to show that any substantial question of law arises therefrom.

17. This view of the Division Bench has been followed in the case of the other assessee, **M/s. Paramount Health Services TPA Pvt. Ltd. {Income Tax Appeal No.248 of 2015}**, decided on 31-7-2017 by a Division Bench of this Court following the order in the case of Health India TPA Services Pvt. Ltd. (supra). On 13-1-2017, another appeal raising similar question being **Income Tax Appeal No.1367 of 2014 {Commissioner of Income Tax-2 v. Health India TPA Services P. Ltd.}** was dismissed by this Court.

18. Mr. Chhotaray would still argue that these orders do not bind the Revenue. It is argued by him that the Division

Bench order of this Court in the case of this very assessee, who is before us in the appeals, concludes the issue against the assessee.

19. There the issue which fell for determination related to construction of the provisions of Section 194J of the I.T. Act. The petitioners before that Court, who are registered as TPAs in terms of the IRDA Regulations, entered into Agreements, described as service level agreements, with insurance companies. The insurance companies issued health insurance policies which are serviced by the TPAs who acted as facilitators. Under the Agreement, the TPA is obliged to perform various services for policy holders. A specimen of the service level agreement, relied upon before the Division Bench, contained recital to the effect that the TPA is engaged in making available health and support services and that the insurer and the TPA have agreed that the latter shall provide to customers of the insurer health care services for a fee. Thus the TPAs agreed to provide services to customers of the insurance companies for a fee. This Court referred to the varied services to which we have

already made a reference, the CFA and then held that, while making payments to hospitals the TPAs are required to deduct tax at source under the provisions of Section 194J, is the issue. The Division Bench referred to the affidavit in-reply filed on behalf of the Revenue and then the rival contentions. The Division Bench reproduced Section 194J and came to the conclusion that payments made by TPAs to hospitals cannot be treated as fees for professional services, was the essential argument. The argument was that, Section 194J had at that time and even now been employing the words heavily relied upon by the assessee, namely, 'any person', not being an individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of, *inter alia*, fees for professional or technical services, is obliged 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 equivalent to 10% of such sum as income-tax on income comprised therein. The term 'person' thus would include an artificial person was the

argument. This Court dealt with that argument in great detail and came to the following conclusions:-

“11. 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 emphasised 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. In fact as noted earlier, while defining the character of the payer Parliament specifically excluded an individual and a Hindu Undivided Family from the purview of the expression of the person who is liable to deduct tax at source and a portion of the payment which is made to the payee. Hence, there are three circumstances, while construing the provisions of section 194J, that would weigh in determining the interpretation of the provision. Firstly, in defining the character of the person who is to make the payment and whose obligation it is to deduct tax at source, Parliament has excluded from the ambit of the expression "any person" an individual and a Hindu Undivided Family. Secondly, in defining the character of the payee under the substantive part of section 194J Parliament has used the wider expression "resident". Thirdly, in terms of explanation (a), the words "services rendered by a person in the course of carrying on" have to

be given a meaning. These words include service rendered which is incidental to the carrying out of a profession which is listed therein. The consequence of the submission which has been urged on behalf of the petitioners would now have to be tested. Following the submission to its logical conclusion, when a doctor runs a nursing home, section 194J would apply in respect of payments made by any person who is not an individual or a Hindu Undivided Family for professional services. However, section 194J would, as a consequence of that submission, have no application where a corporate body runs the hospital. As a matter of interpretation, there is no reason to postulate that Parliament would have intended such a result. There can be no gain saying the fact that a hospital provides medical services. As a matter of fact, a hospital provides an umbrella of services and for making those services available engages the services of doctors and qualified medical professionals. The fact that the services are institutionalized at a hospital which provides medical services should make no difference to the applicability of the provision of of Section 194J. The services which are provided continue to be services rendered in the course of carrying on the medical profession. These are medical services institutionally provided by the hospital, in the course of the carrying on of the medical profession.

12. Now undoubtedly a hospital by itself, being an artificial entity, or a corporate enterprise which conducts the hospital is not a medical professional. In *Dr. Devendra M. Surti v. State of Gujarat*, AIR 1969 SC 63 (at paragraph 7 page 67) the Supreme Court held that "a professional activity must be an activity carried on by an individual by his personal skill and intelligence". The Supreme Court in that case was construing the provisions of section 2(4) of the Bombay Shops and Establishments Act, 1948 which defined the expression "commercial establishment". In that case, a doctor who was running a dispensary was convicted for an offence under section 52(e) read with section 62 of the Act and of the Rules. The Supreme Court while allowing the appeal against the

order of conviction held that the case of the appellant did not fall within the purview of the Act, more specifically section 2(4). The Gujarat High Court similarly had occasion to follow this principle in its decision in *CIT v. Dr. K.K. Shah* [1982] 135 ITR 146 (Guj) while holding that where both spouses were doctors, lawyers or architects, and form a partnership for the purpose of carrying on a professional activity, their income would not be liable to be clubbed together under section 64(1) (i). The Gujarat High Court held that for this purpose, if the spouses were to carry on the activity of a nursing home as part of their professional activity for treating their own patients, the income from the nursing home could be treated as their professional income which was not liable therefore to be clubbed. However, if a business activity was carried on by the firm such as the running of a drug store, such income would partake of a business activity and would hence be liable to be clubbed. While applying the principle enunciated in *Dr. Shah's* case, it is necessary to note that the Explanation to section 194J provides a definition of the expression "professional services" only for the purposes of the section. Parliament must be attributed to be cognizant of the fact that the pursuit of a profession is, as noted by the Supreme Court, an activity carried on by an individual through the application of personal skill and intelligence. Despite this, when it imposed an obligation under section 194J to deduct tax, Parliament imposed that obligation on any person (not being an individual or a Hindu Undivided Family) who is responsible for paying to a resident any sum by way of fees for professional services and the expression "professional services" has been defined to mean services rendered by a person in the course of carrying on inter alia the medical profession. Where the provision of medical services takes place within the institutional framework of a hospital, services are rendered as part of an umbrella of services provided by the hospital which engages qualified medical professionals who practise the medical profession. These are services rendered in the course of the carrying on of the medical profession. Hence, it is not possible to accept the

submission that TPAs, when they make payments to hospitals are not liable to deduct tax at source under the provisions of section 194J. Section 197(1) of the Act provides that where in the case of any income of any person or sum payable to any person income tax is required to be deducted at the time of credit or, as the case may be, at the time of payment at the rates in force under the provisions inter alia of section 194J and the Assessing Officer is satisfied that the total income of the recipient justifies a deduction of income tax at lower rates or no deduction of income tax, the Assessing Officer shall on application made by the assessee in this behalf give to him such certificate as may be appropriate. Where a certificate to that effect is given, then under sub section (2) the person responsible for paying the income tax shall so long as the certificate remains valid deduct income tax at the rates specified in the certificate or deduct no tax, as the case may be. It would be open to any hospital, if it is so advised, to make an application under the provisions of section 197 for the deduction of tax at a lower rate or, as the case may be, for no deduction of tax as for instance when the hospital itself is exempted under the provisions of section 10(23C) of the Act. Such applications, as the affidavit in reply discloses, have already been made.

13. The petitioners have also called into question the validity of a circular issued by the Central Board of Direct Taxes, being Circular No.8 of 2009 dated November 24, 2009 {(2009) 319 ITR (St.) 22}. Paragraphs 3, 3.1 and 4 of the circular are to the following effect:

“3. The services rendered by hospitals to various patients are primarily medical services and, therefore, provisions of section 194J are applicable on payments made by TPAs to hospitals 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 cases of TPAs and insurance companies, the Board has decided that no proceedings under section 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."

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 impossible 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.”

20. A perusal of the conclusions reached by this Court, *inter alia*, with reference to the legal provisions and the Revenue's circular is clear. The Court came to the conclusion that the services are termed as professional or technical services. The fees for such services, therefore, have been received by the parties like the TPAs. They argued that when they make payments to hospitals, they are not liable to deduct tax at source under the provisions of Section 194J. It is that argument which was considered and rejected. Thus, the Judgment and the Revenue's circular cannot be of any assistance for deciding the issue raised in the present appeals. That is simply because the Revenue in this case says that when providing services the TPA empanels various hospitals and empanels them for the purpose of providing cashless facility to the policy holders (insured) on behalf of the insurance companies. It enters into separate agreements with the hospitals for providing cashless services to

the insured on behalf of the insurance companies. The TPA issues a health-card to the policy holder along with detailed information on the services offered for each insurance company. The TPA opens a separate bank account called FA (Floating Account) for the purpose of effecting monetary transactions and smooth flow of funds from the insurance companies to the policy holders. An initial amount is deposited for claim disbursement in this FA. The hospital raises the bill which is given to the TPA and thereupon the payment is made by the TPA to the hospital. In the case of cashless facility, the payment is made to the hospital and when there is a reimbursement case, the payment is made to the insured. The payments are made from this FA. It is very clear that when the information is forwarded by the TPA, the insurance company checks the details and wherever there is a case of reimbursement, that is made to the TPA. The TPA gets service charges from the insurance company for the entire process based on the terms and conditions. The argument, therefore, is that the TPA is taking over a part of the insurance company's work. The TPA thus

works as an insurance company except for issuance of the policy. The TPA's decision with regard to the bill and payment in respect thereof is thus final. After taking the policy from the insurance company, the insured is not in touch with the insurance company and that is how the TPA's role is very crucial. For these reasons, the TPA is liable to deduct tax at source.

21. The Tribunal found that with this argument being raised, still the questions, as proposed, cannot be answered in favour of the Revenue. The Tribunal found that the assessee is only facilitating the payment by the insurer to the insured for availing the medical facilities. The assessee is not rendering any professional services to the insurer or the insured and is only collecting the amount from the insurer and passing it on to various hospitals who were providing medical services to the insured. This is greatly distinct from the issue raised before the Division Bench and discussed and deliberated upon by it in terms of the Revenue's circular. The Tribunal found that for the transactions as are brought before it and equally before us now, there is no claim of expenses by the assessee and which was

disallowed. The issue would have been different if the amounts were paid and in terms of Section 194J. That is how the Karnataka High Court's Judgment was relied upon but distinguished.

22. To our mind, therefore, we cannot deviate or depart from the view taken by the Division Bench of this Court in Health India TPA Services (*supra*). Mr. Chhotaray, therefore, is not right in relying upon certain other decisions to which we will make a reference. Mr. Chhotaray would submit that the questions raised in these appeals have not been discussed earlier by the Division Bench. Here the issues arise because the Assessing Officer has rejected the books of account. According to Mr. Chhotaray, it is a settled position of law that when the provisions such as Section 145 of the I.T. Act have been invoked and the books of account were rightly rejected, then, the receipts from the insurance companies and their disbursement had to be routed through the Profit and Loss Account. Neither the First Appellate Authority nor the Tribunal dealt with this issue. Hence the Division Bench of this Court had no occasion to

deal with this position highlighted by him. He would, therefore, submit that the issue before us is slightly different. He also brought to our notice that on merits as well the Assessing Officer exhaustively dealt with the legal provision before he rejected the books of account. The Assessing Officer's findings are fairly detailed. He held that, revenue accrues to the company based on the contract entered with the insurance company in respect of policies entrusted to the company for rendering the TPA services. The assessee has made specific disclosure that the revenue is linked to the total value of the contract entered with the insurance company. He also referred to the notes on accounts. He discussed the basic principles governing the recognition of revenue and expenditure, and also the accounting standards. Mr. Chhotaray would submit that receipts from insurance companies, their disbursement to hospitals and service charges are part of an integrated process of the business of the assessee. There should have been an integrated account containing all the transactions. However, the assessee splits the transactions into two parts and the main issue of receipt from

the insurance company and their disbursement to the hospitals are routed through the separate float account by-passing the Profit and Loss Account. As a result, the Profit and Loss Account is limited to its service charges. In the process major transactions escape scrutiny of the Revenue. This is how the legal provision, namely, Section 40(a)(ia) is by-passed. It is in these circumstances, he would argue that we must entertain these appeals.

23. We are unable to accept this contention for more than one reason. The Revenue's circular, which was heavily relied upon, refers to amounts not to be allowed as deduction while computing income under the head "profit and gains of business or profession" if tax not deducted at source. It is in these circumstances and referring to the legal provisions, as amended, to augment compliance with TDS provisions in the case of residents and curb bogus payments to them that the circular discussed in detail the matter and cautions that no deduction will be allowed in the computation of income where tax is not deducted from payments of interest, commission or

brokerage, fees for professional or technical services and payments to a contractor, etc.. It is evident from the Judgment of the Hon'ble Supreme Court, relied upon by Mr. Chhotaray in great detail to highlight the principles of accountancy and that they do not override the provisions of Tax Statutes, that it was made in the backdrop of the peculiar question. The assessee **Tuticorin Alkali Chemicals And Fertilizers Limited** (supra), *inter alia*, manufactured heavy chemicals. The trial production commenced on 30-6-1982. The company, for the purpose of setting up of the factory, took term loans from various banks and financial institutions. That part of the borrowed funds which was not immediately required by the company was kept invested in short-term deposits in banks. These investments were permitted specifically. The company deposited certain sums with the Tamil Nadu Electricity Board. It also gave interest bearing loans to its employees to purchase vehicles. Upto a certain assessment year, interest earned by the company from the various loans given and also from the bank deposits was shown as income and was taxed accordingly. For the accounting

year involved before the Supreme Court, the same was disclosed as “income from other sources”. There was also a loss declared. After setting off the interest income against business loss, the company claimed the benefit of carry forward of net loss. It corrected its mistake by filing a revised return and claimed that according to the accepted accounting practice, interest and finance charges along with other pre-production expenses will have to be capitalised, and that, therefore, the interest income should go to reduce the pre-production expenses, which would ultimately be capitalised. That is how the peculiar facts in relation to that company were highlighted but the Income Tax Officer rejected the claim of the assessee that interest income was not exigible to tax. This view was upheld by the Commissioner and equally the Tribunal. It is in these circumstances and peculiar to that case that the Hon'ble Supreme Court made the observation heavily relied upon. We are mindful of this. But these legal principles, salutary as they are, would have to be applied depending upon the facts and circumstances in each case. In the instant case, we have not

found any such occasion and to hold that the legal provisions would have to be applied as they stand and we cannot take assistance of the principles of accountancy to override these provisions. Hence, this decision is of no assistance.

24. Equally, the Judgment in the case of **New Jehangir Vakil Mills Co. Limited** (supra) is distinguished. There, the Hon'ble Supreme Court referred to the principles which again are salutary and binding. There is no question of a principle like *res judicata* applying to Taxing Statutes. The decision given by an Income Tax Officer for one assessment year cannot affect or bind his decision for another year. Thus, the doctrine of *res judicata* or *estoppel* by record does not apply to such decisions. However, in equal measure and force the Hon'ble Supreme Court has held that, there is something like a rule of consistency and if, on identical facts and circumstances the Revenue has taken a view of the matter, then, in the following assessment years, on identical facts and circumstances it cannot be permitted to take an altogether different view. The principle of *estoppel* or *res judicata* is not applied nor is there a question of

law which permits a deviation from the rule of consistency. We can understand then a departure from the rule of consistency. In the circumstances, we do not think that we are applying the principle of *res judicata* or *estoppel*. We have also not found any occasion to apply the Judgment of the Hon'ble Supreme Court which is to be found in the Five Judge Bench Judgment {**Distributors (Baroda) P. Ltd.** (supra)}. The question there was, when the legal provision demanded a view to be taken differently from that was being consistently adopted by the Courts, the Supreme Court held that though reluctant to overturn a decision given by a Bench of the Court, whenever it is essential that there should be continuity and consistency in judicial decisions, the law should be definite and certain, but there is another principle and that is equally important that law should be settled correctly. If public interest demands and in peculiar circumstances that the previous decision be reviewed and reconsidered, then, nothing prevents the Court from such revisiting and review.

25. In the latest Judgment which is also relied upon by

Mr. Chhotaray and in the case of **M/s. Modipon Limited** (supra), the Hon'ble Supreme Court found that there was a consistent practice adopted by the assessee and which was accepted by the Revenue from the Assessment Year 1984-85 upto Assessment Year 1998-99 except for four assessment years under consideration, in Court. There, the argument of the Revenue was considered and equally that of the assessee but the Supreme Court found from the same that the challenge is entertainable because there is a substantial question of law or issue impacting public interest or the same has the potential of recurring in future. Then, the rule of consistency or practice and particularly of accounting adopted by the assessee and its acceptance by the Revenue possess no bar. It requires no reiteration that legal provisions would take precedence over all such practices and therefore when it comes to a pure legal question and demanding interpretation in larger public interest, the Courts would have to keep out the rule of consistency. Such is not the situation in the present case.

26. As a result of the above discussion, we do not find

that the Revenue can be permitted to raise the same questions as have been earlier dealt with in the Division Bench Judgments and Orders of this Court. In the circumstances, merely because these orders do not contain elaborate or detail reasons that we had to undertake this exercise. However, this necessarily does not lead to any different conclusion for, on facts we have not found the situation to be any different. In the circumstances, both these appeals do not raise any substantial question of law. They are dismissed but without any order as to costs.

(B.P. COLABAWALLA, J.)

(S.C. DHARMADHIKARI, J.)

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