IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : B : NEW DELHI

BEFORE SHRI C.M. GARG, JUDICIAL MEMBER
AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

ITA No.1676/Del/2020
Assessment Year: 2012-13

HV Global Pvt. Ltd., O-17A, Jangpura Extension, New Delhi.	Vs.	ITO, Ward-74(2), New Delhi.

PAN: AAACH7298C

(Appellant)		(Respondent)
Assessee by	:	Shri Manoj Kumar, CA
Revenue by	:	Shri Kumar Pranav, Sr. DR
Date of Hearing	:	23.11.2022
Date of Pronouncement	:	.11.2022

ORDER

PER C.M. GARG, JM:

This appeal filed by the assessee is directed against the order dated 14.08.2020 of the CIT(A)-38, Delhi, relating to Assessment Year 2012-13.

2. The grounds of appeal raised by the assessee read as under:-

"1 That the honorable CIT(A)-XXXVIII has erred in law and on facts in sustaining the addition of Rs. 197503.00 comprising of TDS liability of Rs. 104244/- and Interest liability of Rs.93299/- on assessed TDS liability on illegal and untenable grounds. Hence, the addition as such may be deleted.

2 That the honorable CIT(A)-XXXVIII has erred in law and on facts in sustaining the addition as notice issued under section

201(1)/201(1A) is time barred and hence any assessment in pursuance of that is illegal and may be vacated.

3 That the honorable CIT(A)-XXXVIII has erred in law and on facts in sustaining the addition as no scn was issued by the Ld AO stating that why the assessee should not be held to be assessee in default u/s 201(1) and interest u/s 201(1A) should be levied upon him. Hence, the addition is illegal and may be deleted.

4 That the honorable CIT (A)-XXXVIII has erred in law and on facts in sustaining the addition of Rs. 197503.00 as the order under section 201(1) and 201(IA) is illegal for want of notice with specific charge and hence, the order may be quashed.

5 That the honorable CIT(A)-XXXVIII has erred in law and on facts in sustaining the addition of Rs. 197503.00 without verifying from the deductee whether It has included the same in his income or not. Hence, the addition as such may be deleted.

6 That the honorable CIT(A)-XXXVIII has erred in law and on facts in sustaining the addition of Rs. 104244.00 on illegal and untenable grounds. Hence, the addition as such may be deleted.

7 That the honorable CIT(A)-XXXVIII has erred in law and on facts in sustaining the addition of interest of Rs. 93,299.00 on illegal and untenable grounds. Hence, the addition as such may be deleted.

8 That the honorable CIT(A)-XXXVIII has erred in law and on facts in sustaining the addition of Rs. 197503.00 as it has not been brought on record whether the payee was liable to pay tax or not. Hence, the addition as such may be deleted.

9 That the appellant craves plea for addition, modification, substitution or deletion of any grounds of appeal on or before the date of hearing. Further, all the above grounds of appeal are independent of each other and without prejudice to each other."

3. The ld. Assessee's Representative (ld. AR) submitted copy of agreement for taking possession of rented premises dated 20.04.2010 and submitted that the agreement clearly shows that there was a separate clause of 'payment of rent' in para 3 and the payment of common area maintenance charges. Therefore, these payments cannot be mixed for attracting the provisions of TDS. The ld. AR also submitted that as per the certificate issued by the TDS Officer dated 25.02.2011 u/s 190(1) of the Act, the TDS charges are applicable @ 0.5% instead of 10% and the assessee has deducted TDS @ 2% which is sufficient to comply with the provisions of the Act. Therefore, no further disallowance or addition can be made in this regard. The ld. AR also submitted that the issue is squarely covered in favour of the assessee by the various judgements of the Hon'ble High Court of Delhi and the coordinate Benches of the Tribunal including the order of the ITAT, Delhi 'D' Bench in the case of *Kapoor Watch Company Pvt. Ltd., vide order dated 05.01.2021 in ITA No.889/Del/2020, for AY 2011-12* and, therefore, the grounds of appeal may kindly be allowed. He has also placed reliance on the decision of the ITAT Delhi, 'SMC' Bench dated 1st July, 2022 in the case of *Nijhawan Travel Service (P) Ltd. vs. ACIT in ITA No.1417/Del/2020 for AY 2012-13*.

4. On careful consideration of the rival contentions, we are of the considered view that identical issue was placed before the ITAT Delhi 'SMC' Bench in the case of *Nijhawan Travel Service (P) Ltd. (supra)* and the coordinate Bench of the

Tribunal by order dated 01.07.2022 in ITA No.1417/Del/2020, for AY 2012-13, held as follows:-

> *"5. On careful consideration of the above submissions, first of all from the copies of the agreements placed by the assessee at serial nos. 13 to 17, pages 24 to 138, it is clearly gathered that CAM chares have been paid to different parties by executing agreements which do not form part of rent payment. It has not been disputed by the authorities below, nor by the learned Sr. DR before us, that the assessee has deducted TDS u/s 194C of the Act on the payment of CAM charges to the respective third parties who provided services to maintain common area.*
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> *6. Now I advert to the proposition rendered by ITAT Delhi Bench "B" in the case of Connaught Plaza Restaurants P. Ltd. Vs. DCIT(supra), where in paras 11 to 13, the coordinate Bench of the Tribunal, by referring earlier judgment of the ITAT Delhi Bench in the case of Kapoor Watch Company Pvt. Ltd. (supra), held as under:*
>
> *"11. We shall now advert to the claim of the assessee that both the lower authorities had erred in law and the facts of the case in concluding that the CAM charges paid by the assessee to Ambience Group (supra) were liable for deduction of tax at source @10%, i.e., u/s 194-1 and not @2%, i.e., U/S.194C of the Act, as claimed by the assessee. Succinctly stated, the assessee company which is engaged, inter alia, in the business of running of fast food restaurants in North and East India under the brand name "McDonalds", had taken shop/spaces/units in commercial areas/malls on lease from various parties by way of lease agreements. Apart from the rent, the assessee-company had also paid CAM charges, i.e., charges which are fundamentally for availing common area maintenance services, which may either be provided by the landlord or any other agency. In so far the CAM charges that were paid by the assessee to the same party to whom rent was being paid pursuant to the lease agreements, or to an appointed or related party with whom the lease agreement had been entered into, the AO was of view that the assessee was obligated to deduct tax at source @10%, i.e., 194-1 of the Act. Backed by his aforesaid conviction the A.O had held the assessee as an assessee-in-default u/s.201(1) of the Act, for short deduction of tax at source @2%, i.e. U/S.194C instead of @10% u/s 194-1 of the Act.*

12. Issue involved qua the aforesaid controversy lies in a narrow compass, i.e., as to whether the CAM charges paid by the assessee were liable for deduction of tax at source u/s. 194-1, i.e., @10% or u/s 194C, i.e, @2%. Before adverting any further it would be relevant to cull out the provisions of Section 194-1 of the Act, which reads as under:

"194-1.Rent.

Any person, not being an individual or a Hindu undivided family, whO' is responsible for paying to a resident any income by way of rent, shall, at the time of credit of such income to the account of the payee or at the time ofpayment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rate of- (a) two per cent for the use of any machinery or plant or equipment; and (b) ten per cent for the use of any land or building (including factory building) or land appurtenant to a building (including factory building) or furniture or fittings:

Provided that no deduction shall be made under this section where the amount of such income or, as the case may be, the aggregate of the amounts of such income 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 one hundred and eighty thousand rupees:

……. ……. .

Explanation.-For the purposes of this section,- (i) "rent" means any payment, by whatever name called, under any lease, sublease, tenancy or any other agreement or arrangement for the use of (either separately or together) any, -

(a) land; or (b) building (including factory building); or (c) land appurtenant to a building (including factory building); or (d) machinery; or (e)plant; or (f) equipment; or (g) furniture; or (h) fittings,

whether or not any or all of the above are owned by the payee; ……. ……." (emphasis supplied)

On a perusal of the definition of the terminology "rent" as had been provided in the aforesaid statutory provision, viz. Sec. 194-1 of the Act, we find that the same includes payment for the use of land,

building, land appurtenant to a building, machinery, plant, equipment, furniture or fittings. In sum and substance, only the payments for use of premises/equipment is covered by Section 194-1 of the Act. In our considered view, as the CAM charges are completely independent and separate from rental payments, and are fundamentally for availing common area maintenance services which may be provided by the landlord or any other agency, therefore, the same cannot be brought within the scope and gamut of the definition of terminology "rent". On the other hand, we are of the considered view, that as the CAM charges are in the nature of a contractual payment made to a person for carrying out the work in lieu of a contract, therefore, the same would clearly fall within the meaning of "work" as defined in Section 194C of the Act. In our considered view, as the CAM charges are not paid for use of land/building but are paid for carrying out the work for maintenance of the common area/facilities that are available along with the lease premises, therefore, the same could not be characterized and/or brought within the meaning of "rent" as defined in Section 194-1 of the Act.

13. In the backdrop of our aforesaid deliberations, we concur with the claim of the Id. AR that as the payments towards CAM charges are in the nature of contractual payments that are made for availing certain services/facilities, and not for use of any premises/equipment, therefore, the same would be subjected to deduction of tax at source u/s.194C of the Act. Our aforesaid view is supported by the order of the ITAT, Delhi in the case of Kapoor Watch Company P. Ltd. vs. ACIT in ITA No.889/Del/2020. In the aforesaid case, the genesis of the controversy as in the case of the assessee before us were certain proceedings conducted by the Department in the case of Ambience Group (supra) to verify the compliance of the provisions of Chapter XVII-B of the Act. On the basis of the facts that had emerged in the course of the proceedings, it was gathered by the Department that the owners of the malls in addition to the rent had been collecting CAM charges from the lessees on which TDS was deducted @2% i.e u/s.194C of the Act. Observing, that payment of CAM charges were essentially a part of the rent, the AO treated the assessee as an assessee-in-default for short deduction of tax at source u/ss. 201(1)/201(1A) of the Act. On appeal, it was observed by the Tribunal that the CAM charges paid by the assessee did not form part of the actual rent that was paid to the owner by the assessee company. As the facts involved in the case of the assessee before us remains the same as were therein involved in the aforesaid case, therefore, in the backdrop of our aforesaid deliberations, and respectfully following

the aforesaid order of the Tribunal, we herein conclude, that as claimed by the assessee, and rightly so, the CAM charges paid by it were liable for deduction of tax at source @2%, i.e., u/s.194C of the Act. We, thus, in terms of our aforesaid observations set-aside the order of the CIT(A) who had approved the order passed by the AO treating the assessee company as an assessee-in-default u/s.201(1) of the Act. The Grounds of appeal no.4 to 4.5 are allowed in terms of our aforesaid observations."

7. In view of the foregoing discussion and factual position noted by us, which has not been controverted by the learned DR, I am in agreement with the claim of the learned AR that the payment towards CAM charges are in the nature of contractual payment which are made for availing services/ facilities and not for the use of any premises/ equipment, therefore, same would be subject to deduction of tax at source u/s 194C of the Act and not u/s 194I of the Act. This view has also been taken by the Tribunal in the case of Kapoor Watch Company Pvt. Ltd. (supra). As the facts involved in the present case of assessee before us are quite identical and similar to the facts of the case involved in the cases of Connaught Plaza Restaurants P. Ltd. (supra); and Kapoor Watch Company Pvt. Ltd. (supra), therefore, respectfully following the same, I conclude that as claimed by the assessee the TDS on CAM charges paid by it is liable for deduction of tax at source @ 2% u/s 194C of the Act. I, thus, in terms of my above noted observation, set aside the order of the AO as well as that of learned CIT(A) treating the assessee company as an assessee in default u/s 201(1) of the Act.

8. In the result, the appeal of the assessee is allowed."

5. In the present case also the AO in the assessment order observed that the payments received by Ambience group are split into two companies of same group on single contract one for rent and the other for maintenance charges. However, the AO noted that this arrangement has been made to avoid the higher deduction of TDS rate applicable to which we do not agree as when the receiver of rent and receiver of maintenance charges are different and distinct and the

character of the payment is also different and distinct, then, the payments towards maintenance charges has to be made after TDS @ 2% u/s 194C of the Act and not @ 10% u/s 194I of the Act. From the material available on record, it is clearly discernible that the assessee company has paid rent to the owner after deduction u/s 194 of the Act @ 10% and the payment for operation/maintenance was made directly to the service provider company after deduction of tax u/s 194C of the Act. Therefore, we are inclined to hold that in the present case the common area maintenance charges was not forming part of the actual rent paid to the owner by the assessee company. Payments of rent and common area maintenance charges have been made to distinct entities/companies, therefore, the authorities below were not right in creating the impugned liability payable by the assessee firm under the provisions of sub-sections (1) and (1A) of section 201 of the Act. Therefore, respectfully following the order of the coordinate Bench of the Tribunal in the case of *Nijhawan Travel Service (P) Ltd. (supra)*, the grievance/grounds of the assessee are allowed and the AO is directed to delete the impugned liability u/s 201(1) and 201(1A) of the Act.

6. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 06.12.2022.

Sd/-	Sd/-
(PRADIP KUMAR KEDIA) ACCOUNTANT MEMBER	(C.M. GARG) JUDICIAL MEMBER

Dated: 06th December, 2022.

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Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi