आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
" B" BENCH, AHMEDABAD
(CONDUCTED THROUGH VIRTUAL COURT AT AHMEDABAD)

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No. 2970/AHD/2017**
निर्धारण वर्ष/Asstt. Year: 2014-2015

D.C.I.T., Circle-1(2), Vadodara.	Vs.	M/s Deloitee Haskins and Sells, 31-Nutan Bharat Society, Alkapuri, Baroda. **PAN: AADFD2337G**

(Applicant)		**(Respondent)**

Revenue by	:	Shri James Kurian, D.R.
Assessee by	:	Shri Parcy Padiwala, A.R.

सुनवाई की तारीख/**Date of Hearing : 26/03/2021**
घोषणा की तारीख /**Date of Pronouncement: 08/04/2021**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Revenue against the order of the Learned Commissioner of Income Tax(Appeals)-4, Vadodara, dated 14/09/2017 (in short "Ld. CIT(A)") arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2014-15..

2. The Revenue has raised the following grounds of appeal:

> *1. On the facts and circumstances of the case and in law, the Ld.CIT(A) erred in allowing the interest of Rs. 1,92,18,117/- by treating it as business expenditure ignoring the fact on record that the AO had disallowed interest of Rs. 1,92,18,117/- at the rate of 5.81% on interest free loan amounting to Rs.33,07,76,535/- given by the assessee as it agreed and also opening 85 closing balances of advances to DTTIPL were same at the figure of Rs. 68,51,33,061/-. The assessee had not submitted any evidences as to what it had gained from DTTIPL.*
>
> *2. On the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the disallowance made u/s 40(a)(ia) of the Act to the tune of Rs. 1,07,83,531/- without considering the fact that the assessee had not proved that the payments were not in nature of room rent but other payments not attracting provisions of TDS. Since the amounts of hotel rent charges hired and paid was on regular basis and hence provisions of TDS U/s 1941 was clearly applicable on it.*
>
> *3. The appellant craves leave to add to, amend or alter the above grounds as may be deemed necessary.*
> ***Relief claimed in appeal***
> *It is prayed that the order of the CIT (Appeals) be set aside and that of the Assessing Officer be restored.*

3. The first issue raised by the Revenue is that "Ld.CIT (A)" erred in deleting the addition made by the AO on account of interest free advances given by the assessee to its group concerns.

4. Briefly stated fact are that the assessee in the present case is a partnership firm and engaged in the activities of Chartered Accountancy. The AO during the assessment proceedings found that the assessee has incurred interest expenses amounting to Rs. 5,45,63,251/- comprising of interest on borrowing from the bank and on the capital of the partners. At the same time the assessee has extended interest free loans and advances to its group concerns amounting to Rs. 90,19,24,628/- only whereas the partner's capital funds stand at Rs. 57,11,48,093/- only. Accordingly, the AO was of the view that the assessee has diverted its interest bearing funds amounting to Rs.33,07,76,535/- (90,19,24,628 - 57,11,48,093). As per the AO the assessee on one hand is incurring interest expenses on the borrowed fund and on the other hand, it has provided interest free loans and advances to its group concerns. Accordingly the AO worked out proportionate amount of interest

attributable on Rs.33,07,76,535/- being interest free loans and advances over and above the partners capital amounting to Rs. 1,92,18,117/- and disallowed the same by adding to the total income of the assessee.

5. Aggrieved assessee preferred an appeal to the "Ld.CIT (A)" who deleted the addition made by the AO by observing that the interest free loans and advances were extended as a measure of commercial expediency.

6. The "Ld.CIT (A)" also found that there was no loss to the Revenue for not charging interest by the assessee from the group concerns as the assessee and other group concerns were paying the taxes at the maximum marginal rate.

7. Being aggrieved by the order of the "Ld. CIT (A)" the revenue is in appeal before us.

8. Both the Ld. DR and Ld. AR before us vehemently supported the order of the authorities below to the extent as favorable to them.

9. We have heard the rival contentions of both the parties and perused the relevant materials available on record. In the case on hand, the AO has made the proportionate disallowance of the interest expenses claimed by the assessee on account of interest free advances given by the assessee in the earlier year to its group companies. As per the AO, the assessee on one hand was charging interest expenses on the borrowed fund and on the other hand the assessee has advanced interest-free loans to its associated concern. Thus, the AO made the proportionate disallowance of the interest expenses amounting to Rs. 1,92,18,117/- only. However, the learned CIT (A) found that the assessee and group concerns are engaged in the similar line of activities and belongs to global professional network. The assessee was also availing the professional services from the group concerns to which the interest free advances were provided. Therefore, there was the

commercial expediency in advancing interest-free loan by the assessee to its group concern. The learned CIT (A) besides the above also found that the assessee and the group concerns are paying the taxes on the maximum marginal rate and therefore there would not have been any impact on the Government Exchequer even in a situation if the assessee charges interest on the interest-free advances given to the group concern. Accordingly, there was no loss to the revenue for not charging any interest by the assessee from the group concern on the interest-free advances given to them. Thus, the learned CIT (A) was pleased to delete the addition made by the AO.

9.1 The first controversy that arises for our adjudication whether the interest free advances were given by the assessee to its group concern as a measure of commercial expediency in the given facts and circumstances. The expression "commercial expediency" refers to those transactions/ expenditures which are not required to be incurred under any provisions of the law. But it refers to such expenditure, a prudent businessman incurs for the purpose of business. Such expenditures might not have been incurred under any legal obligation, but the same are allowable as a business expenditure if it was incurred on grounds of commercial expediency.

9.2 The "commercial expediency" depends upon the wisdom of the businessman and the Revenue has no role to play to decide as to what is "commercial expediency". The Revenue cannot occupy the position of the assessee and assume the role to decide whether a particular expenditure is required to be incurred, having regard to the facts and circumstances of the case. There cannot be any compulsion on the assessee to maximize his profit. The income-tax authorities should enter into the shoes of the assessee to see how a prudent businessman would act in the given facts and circumstances. It is because the Revenue does not seem to have understood the market conditions in which businesses are carried on. But at the same time, the Income-tax Department (Revenue), beyond doubt, is not precluded

from assuming powers against those who try to circumvent law through unacceptable and prohibited means.

9.3 Likewise, the provisions of section 37(1) of the Act does not curtail or prevent an assessee from incurring an expenditure which he feels and wants to incur for the purpose of business. Expenditure incurred may be direct or may even indirectly benefit the business in form of increased turnover, better profit, growth, etc. Various courts have held that as long as the expenditure incurred is "wholly and exclusively" for the purpose of business, the Assessing Officer cannot by applying of his own mind, disallow whole or a part of the expenditure. The Assessing Officer cannot question the reasonableness by putting himself in the arm-chair of the businessman and assume status or character of the assessee and that it is for the assessee to decide whether the expenses should be incurred in the course of his business or profession or not. Courts have also held that if the expenditure is incurred for the purposes of the business, incidental benefit to some other person would not take the expenditure outside the scope of Section 37(1) of the Act. Further, it is settled law that the commercial expediency of a businessman's decision to incur a particular expenditure cannot be tested on the touchstone of strict legal liability to incur such expenditure.

9.4 In the backdrop of the above stated discussion, we note that the assessee was availing the services from the group concerns including M/S DTTIPL as evident from the MOU dated 1 April 2011 which is placed on pages 166 to 168 of the paper book. The relevant clause of the MOU reads as under:

> *This memorandum of understanding (MOU) is made on this the first day of April 201 1 by and between;*
>
> *Deloitte Haskins & Sells, (Registration Number 117364W), firm of practicing Chartered Accountants, registered with the Institute of Chartered Accountants of India (1CA1), having its office at 31. Nutan Bharat Soceity, Near M.K. High School, Aikapuri,' Baroda - 390 007 (hereinafter referred to as DHS B) .;*
> *And*
> *Deloitte louche Tohmatsu India Private Limited, having its office at 12, Dr. Annie Besant Road, Worli, Mumbai -400 018 (hereinafter referred to as DTTIPL)*

Scope of Work

Whereas DTTIPL provides, among others, the following services to its clients
• Management Consultancy services
• Assistance in all matters relating to direct and indirect taxes
• Any other service that may be agreed upon as per the requirement of its clients

Whereas, DHS B has been appointed/engaged/retained by its clients to perform identical services and is desirous of utilizing the services of DTTIPL to fulfil its engagements with its clients. Both parties recognize that the employees of DITIPL are competent to ***fulfil*** *the engagement entered Into by DHS B, While the employees shall always remain on the rolls of DTTIPL, they shall be permitted to carry equivalent designations in DHS B while dealing with the client of DHSB.*

Consideration on manner of payment

The fee agreed by DHS B with the client in respect of any assignment shall include the payments to be made by DHS B to DTTIPL as sub-contractor. Such payment shall be arrived at on the basis of mutual discussion between DHS B and OTT1PL [Van? time to time, based upon the complexities involved in the engagement and the estimated time to be spent by the personnel of DTTIPL on the said assignment,

DHS B shall also reimburse, at actual, all out-of-pocket expenses incurred by DTTIPL in I he conduct of its services. DTTIPL shall also raise an invoice regularly and indicate separately the amount payable as share of fee and out-of-pocket expenses. Service Tax, as applicable, will be charged in the invoices. Payment shall be made within 30 days of the invoice being raised.

The above payments will be subject to withholding taxes in India, if any, DHS B will be responsible for collecting and remitting service tax on the entire fee realized from its clients on Us engagement/contracts (including the share of fee attributable to OTTIPL),
Obligations and Responsibilities

DHS B shall ensure that the employees of DTTIPL utilized for fulfilling its contracts have access to relevant information required for carrying out their services diligently.

DTTIPL shall ensure that the personnel assigned to perform their obligations and responsibilities under this MOU, shall have adequate knowledge, experience,, training ami expertise which shall be at least be equal to commercially reasonable standards applicable to such personnel for the purpose of providing-and performing the above services and that such employees shall perform the functions assigned to them in a manner acceptable to DHS B.

Both .parties shall ensure full and complete compliance with all laws and regulations in force at any given point of time, as well as the rules and regulations laid down by the ICAI.

Notwithstanding any thing contained herein but subject to any mutual understanding in this regard to the contrary, each of the parties herein shall be at liberty, in their own right to enter into any third party agreement required for providing services and additional services, if any, on a principal to principal basis. It is clearly understood by and between the parties hereto that no privity of contract shall arise between such third parties and the parties hereto by virtue of these presents and consequently no liability of any kind or on any account shall accrue to the parties hereto.

*If any function, responsibilities or tasks not specifically described or provided for in this MOU are required for the proper execution of this contract such functions, responsibilities or shall be **deemed** to be implied and shall be included within the scope of this MOU, as if the same were specifically set out in the MOU.*

*Disclosure **of Information***

Both DHS B and DTTIPL agree to hold all information relating to one another and to the client in confidence to and undertake not to disclose such information to any other person or organisation, without the written permission of the other party.

Validity
This MOU shall remain in force, unless terminated by any party as otherwise provided in this MOU, Termination of this MOU shall not relieve either party or any obligation which may have accrued prior to such termination.

Dispute Resolution

All disputed arising out of this MOU shall be referred to a sole arbitrator agreeable to all the parties engaged in the same. The seat of arbitration shall be Mumbai.
Any notices permitted or required to be given under this MOU shall be deemed given upon delivery, if delivered by hand or sent by facsimile followed by registered or certified mail, return receipt requested, to the parties at the address as mentioned in this agreement or other address if the same is notified to the respective parties.

9.5 In this connection we find that the group concern of the assessee namely DSSIPL and DTTIPL have rendered services to the assessee in the year under consideration as well as in the immediate preceding year. The debit notes/invoice issued by these parties are placed on pages 169 to 170 of the paper book on sample basis. Thus from the above, it is clear that the advances were extended by the assessee to the group concern as a measure of commercial expediency.

9.6 In addition to the above we also find that the assessee and its group concerns were paying the taxes at the maximum marginal rate as evident from the income tax acknowledgements of its group companies which are placed on pages 171 to 175 of the paper book. Accordingly we hold that there was no loss to the revenue for not charging interest on the amount extended by the assessee as interest-free loan to its group companies.

9.7 We also find that this tribunal in the group case of the assessee, involving identical facts and circumstances, bearing ITA No. 1983 & 1984/AHD/2017 in the

case of DCIT versus Deloittee Haskins & Sells vide order dated 1 October 2019 has decided the issue in favour of the assessee. The relevant extract reads as under:

> *5.1 The first issue for our consideration, which is common / in both the assessment years under consideration, is the dispute regarding proportionate disallowance of interest on advances to assessee's related concern DTTIPL. The assessing officer had disallowed the interest mainly on the ground that the assessee firm had used interest-bearing funds for the purpose of providing interest free advances. The AO has also observed that the assessee has not provided evidences which could prove that the transaction with DTTIPL were in the nature of a business transaction and further the commercial expediency was also not established with respect to interest free advances. The Ld. CIT (Appeals), while deleting the disallowance has noted that the assessee firm and DTTIPL are members of global network of professional firms carrying on similar profession and that the objective of the global network was to ensure cooperation amongst members and thereby enhance their respective capability to carry on professional practice. It has been noted by the Ld. first appellate authority that the assessee has demonstrated that subsequently DTTIPL has raised debit notes on the assessee for services rendered and, thus, it has been amply demonstrated that DTTIPL and has provided services of its resources against which the advances made by the assessee were adjusted. It has also been observed by the Ld. first appellate authority that there was commercial expediency in giving advance to DTTIPL as both the assessee firm and DTTIPL were in the same line of profession. The Ld. first appellate authority has reached a conclusion that there was a business relationship between the assessee and DTTIPL and, therefore, the advances given by the assessee firm could not be said to be not having any link with the assessee business and, therefore, proportionate disallowance of interest was not warranted. Further the Ld. first appellate authority has also noted that it cannot be said that the assessee does not have a continuous business relationship with DTTIPL. The Ld. CIT (Appeals), while deleting the disallowance, has also placed reliance on the ratio of judgement of the Hon'ble Apex Court in the case of SA Builders (supra) wherein the Hon'ble Apex Court had held that the expression 'commercial expediency' is an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose c business. In this case, the Hon'ble Apex Court went on to hold that once it is established that there is nexus between the expenditure and the purpose of business, the revenue cannot assume the role to decide as to how much is reasonable expenditure. Apart from this, the Ld. first appellate authority has also noted that the assessee firm had its own funds which were more than the amount of advances given to DTTIPL and, therefore, there was no occasion for the assessing officer to make disallowance on account of interest. While deleting the disallowance, it has also been noted by the Ld. First appellate authority that both the concerns pay tax at the same rates and, therefore, there was no loss of revenue. We are in full agreement with these observations and findings of the Ld. first appellate authority in this regard. In the proceedings before us, the Ld. senior departmental representative could not point out if there was any perversity in these factual findings recorded by the Ld. first appellate authority. Therefore, in our considered opinion, the disallowance with respect to interest in both the years under consideration has been rightly deleted by the Ld. first appellate authority and we find no reason to interfere on this issue. Accordingly, we dismiss the grounds relating to disallowance of interest in both the years under appeal.*

9.8 In view of the above and after considering the facts in totality, we do not find any infirmity in the order passed by the learned CIT (A). Accordingly we uphold the same. Hence the ground of appeal of the revenue is **dismissed.**

10. The second issue raised by the revenue is that the "Ld.CIT (A)" erred in deleting the addition made by the AO for Rs. 1,07,83,531/- on account of non-deduction of TDS u/s 194-I r.w.s. 40(a)(ia)of the Act as detailed under:

11. The assessee in the year under consideration has made payments to the Hotels either without deducting the TDS or deducted TDS at the rate lower than the rate prescribed under the Act. The details of payments to the hotels stand as under.

Sr.No.	*Name of the Hotel*	*Total Hotel Payment(Rs.)*	*Banquet Charges (A) (Rs.)*	*TDS @ 2% on Banquet Charges u/s.194C(Rs.)*	*Room/rental Charges (Rs.)*	*TDS u/s.194 I (Rs.)*
1.	*Moven Pick Hotel*	*15,10,815/-*	*-*	*NIL*	*15,10,815/-*	*NIL*
2.	*Vivanta Hotel*	*91,58,571/-*	*54,57,460/-*	*1,09,149/-*	*37,01,111/-*	*NIL*
3.	*ITC Grand*	*13,21,195/-*	*5,93,567/-*	*11,556/-*	*7,39,185/-*	*NIL*
	Total	***1,19,90,581/-***	***60,51,027/-***	***1,20,705/-***	***59,51,111/-***	

11.1 As per the AO the assessee was liable to deduct TDS u/s 194-I of the Act with respect to the Banquet charges at the rate of 10% whereas the assessee has deducted the TDS at the rate of 2% prescribed under section 194-C of the Act.

11.2 Likewise the assessee was liable for deduction of TDS with respect to the room rental charges paid amounting to Rs. 59,51,111/- in terms of the CBDT Circular bearing No.5/2002 dated 30/07/2002. However, the assessee has not deducted the TDS.

11.3 Accordingly, there was a shortfall in the amount of TDS deducted by the assessee. As such the assessee has deducted a sum of Rs. 1,20,705/- which is corresponding to the hotel charges of Rs.12,07,050/- only. Consequently the balance amount of hotel charges amounting to Rs. 1,07,83,531/- was without deduction of TDS. Accordingly the AO disallowed the same and added to the total income of the assessee.

12. Aggrieved assessee preferred an appeal before the "Ld.CIT (A)" who has deleted the addition made by the AO by observing as under:

> *6.3. I have considered the submissions of the learned Authorized Representative and the order of the Assessing Officer. It is gathered the facts that during the year appellant firm has made two types of payment i.e. Banquet Charges and Room Rent to three hotels as stated above. Out of the Banquet charges, the appellant has deducted 2% and from the payment of rent on room no tax was deducted. The A.O. has combined the both the payments and disallowed Rs.1,07,83,531/- out of the total payment of Rs.1,19,90,581/- after giving relief of Rs.12,07,050 (assumed 10 percent TDS of Rs.1,20,705/- deducted)] under section 40(a)(ia) for non-deduction.*
>
> *On going through the facts it is crystal clear that appellant firm already deducted the tax on banquet payment of Rs.60,51,027/-, therefore, payment of banquet charges should not be disallowed. I am inclined to accept this contention of the appellant, therefore, I direct the A.O. not to disallow the banquet charges of Rs.60,51,027/-.*
>
> *6.4. As far as room rent is concerned, the A.O. relied on question No. 20 of circular No. 715 dated 08-08-1995 which reads as under:*
>
> > *"Q No. 20: Whether payment "made to a hotel for rooms hired during the year would be of nature of rent?*
> > *Ans: Payment made by person other than individuals and HUF for hotel accommodation taken on regular basis will be in nature of rent subject to IDS under section 194-1"*
> > *The appellant firm also relied on the same question but further stated that vide circular No. 5/2002 dated 30-07-2002 it is clarified that what is "regular basis: The same is reproduced here under:*
> > *"2.....*
> > *The meaning of 'rent' in Section 194-1 is wide in its ambit and scope. For this reason, payment made to hotels for hotel accommodation, whether in the nature of lease or licence agreements are covered, so long as such accommodation has been taken on 'regular basis'. Where earmarked rooms are let out for a specified rate and specified period, they would be construed to 'be accommodation made available on 'regular basis'. Similar would be the case, where a room or set of rooms are not earmarked, but the hotel has a legal obligation to provide such types of rooms during the currency of the agreement."*
> > *"3. However, often, there are instances, where corporate employers, tour operators and travel agents enter into agreements with hotels with a view to merely fix the room tariffs of hotel rooms for their executives/guests/customers. Such agreements, usually entered into for lower tariff rates, are in the nature of rate-contract agreements. A rate-contract, therefore, may be said to be a contract for providing specified types of hotel rooms of pre-determined rates during an agreed period. Where an agreement is merely in the nature of a rate contract, it cannot be said to be accommodation 'taken on regular basis', as there is no obligation on the part of the hotel to provide a room or specified set of rooms.{The occupancy in such cases would be occasional or casual. In other words, a rate-contract is different for this reason from other agreements, where rooms are taken on regular basis. Consequently, the provisions of Section 194-I while applying to hotel*

accommodation taken on regular basis would not apply to rate-contract agreements."

As clarified in the above para where earmarked rooms are (et out for specified period and specified rate it would constitute as "regular basis" Even only rate contract would not cover under the purview of term "regular basis".

In the circular it is clarified that where earmarked rooms are let out for a specified rate and specified period, they would be construed to be accommodation made available on 'regular basis'. Similar would be the case, where a room or set of rooms are not earmarked, but the hotel has a legal obligation to provide such types of rooms during the currency of the agreement."

6.5. It is further clarified that where corporate employers, tour operators and travel agents enter into agreements with hotels with a view to merely fix the room tariffs of hotel rooms for their executives/guests/customers. Such agreements, usually entered into for lower tariff rates, are in the nature of rate-contract agreements. A rate-contract, therefore, may be said to be a contract for providing specified types of hotel rooms of pre-determined rates during an agreed period. Where an agreement is merely in the nature of a rate contract, it cannot be said to be accommodation 'taken on regular basis' as there is no obligation on the part of the hotel to provide a room or specified set of rooms. Consequently, the provisions of Section 194-1 while applying to hotel accommodation taken on regular basis would not apply to rate-contract agreements.

First the A.O. has not brought on record any evidence that there is agreement between the appellant firm and Hotel for providing room at specified rate and for specified period. From the copy of the bills submitted by the appellant, it is crystal clear that room was taken for some conferences or seminar which is on occasional basis. There may be only rate agreement for getting room at concessional rate, so in that case question No. 20 of circular No. 715 dated 08-08-1005 would not apply in view of subsequent clarification issued vide circular No. 05/2002 dated 30-07-2002. Hence, no tax was required to be deducted u/s. 1941 of the Act on the rent of room paid to three Hotels. In substantially similar case, the Hon'ble Mumbai ITAT in case of ***Red Chillies Entertainment Pvt. Ltd vs ACIT (IDS),*** *Mumbai 92/Mum/ 2015, on which the appellant relied, held that no tax was required to be deducted u/s. 1941 from room rent paid by the assessee to Hotel. In view of the above discussion, I direct the A.O. to delete the disallowance of Rs.1,07,83,531/- u/s.40(a)(ia) with respect to payment made to hotels.*

13. Being aggrieved by the order of the "Ld.CIT (A)", the Revenue is in appeal before us.

14. Both the Ld. DR and Ld. AR before us vehemently supported the order of the authorities below to the extent as favorable to them.

15. We have heard the rival contentions of both the parties and perused the materials available on record. From the preceding discussion, we note that the AO made the disallowance of the payment made by the assessee to the hotels on

account of non-deduction of TDS under section 194-I of the Act. As per the AO there were two types of payment made to the Hotel, firstly banquet charges amounting to ₹ 60,51,027/- and secondly, room rental charges amounting to ₹ 59,51,111/- only. The assessee has deducted TDS with respect to banquet charges at the rate of 2% under section 194C of the Act whereas the rate of TDS applicable to such payment is 10% under the provisions of section 194-I of the Act.

15.1 Likewise, the AO was of the view that the assessee is liable for the deduction of TDS under section 194-I of the Act with respect to the room rental charges amounting to ₹ 59,51,111/- but the assessee failed to do so. Accordingly the AO disallowed the same and added to the total income of the assessee.

15.2 Accordingly the AO was of the view that there was short deduction of the TDS amount. As such the amount of TDS deducted by the assessee of ₹ 1,20,705/- corresponds to the hotel charges of ₹ 12,07,050/- and accordingly the remaining amount of Rs. 1,07,83,531/-was disallowed on account of non-deduction of TDS.

15.3 However, the learned CIT (A) with respect to the banquet charges amounting to ₹ 60,51,027/- only held that the assessee has deducted the TDS at the rate of 2% and it is not the case of non-deduction of TDS. Therefore there cannot be any disallowance of such expenses on account of short-deduction of TDS.

15.4 Regarding the room rental charges paid by the assessee amounting to Rs. 59,51,111/-, the learned CIT (A) held that the provisions of section 194-I of the Act will be in operation with respect to the payment made to the Hotel for the accommodation taken on regular basis. However in the case on hand, the payment made by the assessee to the Hotel does not represent the payment on regular basis and therefore the same is outside the purview of the provisions of TDS as specified under section 194-I of the Act.

15.5 In the backdrop of the above stated discussion, the 1st question arises for our adjudication with respect to the banquet charges paid by the assessee amounting to ₹ 60,51,027/-, in this connection we note that the provisions of section 40(a)(ia) of the Act provides for the specified expenses will not be allowed as deduction if the assessee failed to deduct the TDS or after deducting taxes the assessee failed to deposit the same in account of revenue on or before the due date filling return of income as specified under section 139(1) of the Act. However the issue on hand is short deduction of taxes. The question arises for our adjudication whether the provision of section 40(a)(ia) can be imported in the case where tax has been deducted but same is deducted in wrong section or deducted less than the rate specified under the relevant section. In this regard we find pertinent to refer the judgment of Hon'ble Calcutta High Court in case of CIT vs. S.K. Tekriwal reported in [2014] 361 ITR 432 where the Hon'ble Court in similar circumstances dismissed the appeal of the revenue by observing as under:

> *Here in the present case before us, the assessee has deducted tax u/s. 194C(2) of the Act and not u/s. 194I of the Act and there is no allegation that this TDS is not deposited with the Government account. We are of the view that the provisions of section 40(a)(ia) of the Act has two limbs one is where, inter alia, assessee has to deduct tax and the second where after deducting tax, inter alia, the assessee has to pay into Government Account. There is nothing in the said section to treat, inter alia, the assessee as defaulter where there is a shortfall in deduction. With regard to the shortfall, it cannot be assumed that there is a default as the deduction is not as required by or under the Act, but the facts is that this expression, 'on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction has not been paid on or before the due date specified in sub-section 3 (1) of section 139'. This section 40(a)(ia) of the Act refers only to the duty to deduct tax and pay to government account. If there is any shortfall due to any difference of opinion as to the taxability of any item or the nature of payments falling under various TDS provisions, the assessee can be declared to be an assessee in default u/s. 201 of the Act and no disallowance can be made by invoking the provisions of section 40(a)(ia) of the Act.*

15.6 It also pertinent to note that subsequently the Hon'ble Kerala High court in case of CIT vs. PVS Memorial Hospital Ltd reported in [2016] 380 ITR 284 decided the issue in favour of Revenue by observing as under:

> *The expression 'tax deductible at source under Chapter XVII-B' occurring in the section 40(a)(ia) has to be understood as tax deductible at source under the appropriate provision of Chapter XVII-B. Therefore, as in this case, if tax was deductible under section 194J but was deducted under section 194C, such a deduction would not satisfy the requirements of section 40(a)(ia). The latter part of this section that such tax has not been deducted, again refers to the tax deducted under the appropriate provision of Chapter XVII-B. Thus, a*

cumulative reading of this provision shows that deduction under a wrong provision of law will not save an assessee from section 40(a)(ia). [Para 9]

15.7 Thus there are conflicting observations made by both the above non-jurisdictional Hon'ble high courts in similar fact and circumstances, also none of party i.e. either assessee or revenue brought before us any judgment of Hon'ble Jurisdictional High Court judgment on the issue on hand. Therefore in this situation where there is conflicting observation made by the non-jurisdictional High Courts, then the judgment favoring the assessee shall be adopted. In this connection we find support from the judgment of the Hon'ble Apex Court in case of CIT vs. Vegetable Products Ltd reported in 88 ITR 192, where the Hon'ble Apex Court have laid down that in case of conflicting view of the provision of the Act the view favoring to the assessee should be relied upon. The relevant finding of the Hon'ble Apex court reads as under:

The duty of the Court is to read the section, understand its language and give effect to the same. If the language is plain, the fact that the consequence of giving effect to it may lead to some absurd result is not a factor to be taken into account in interpreting a provision. It is for the legislature to step in and remove the absurdity. On the other hand, if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted. This is a well-accepted rule of construction recognised by this Court in several of its decisions.

15.8 Thus following the rule laid down by the Hon'ble Supreme in above case we decided the follow the judgment of Hon'ble Calcutta High Court in case of CIT vs. PVS Memorial Hospital Ltd (Supra). Accordingly we hold that the assessee in the case on hand has deducted the taxes and also deposited the same but as per the AO same is deducted in wrong section resulting in short deduction. However there the assessee cannot be held in default under section 40(a)(ia) of the Act.

Regarding the room rental charges paid by the assessee, we find important to refer to the CBDT Circular bearing number 05 of 2002 dated 30-07-2002 which reads as under:

Clarification regarding question No. 20

1. *Circular No. 715 dated 8-8-1995 has been issued by the Central Board of Direct Taxes to clarify various provisions relating to tax deduction at source under various provisions of the Income-tax Act. Question No. 20 of the aforesaid Circular related to applicability of the provisions of section 194-I of the Income-tax Act in respect of payments made to a hotel for rooms. The relevant question and answer is reproduced below :—*

". . . Q. No. 20 : Whether payments made to a hotel for rooms hired during the year would be of the nature of rent?

Ans. : Payments made by persons other than individuals and HUF for hotel accommodation taken on regular basis will be in the nature of rent subject to TDS under section 194-I." [Emphasis supplied]

In this context, doubts have been raised as to what constitutes "hotel accommodation taken on regular basis" for the purpose.

***2.** The Board have considered the matter. First, it needs to be emphasised that the provisions of section 194-I do not normally cover any payment for rent made by an individual or HUF except in cases where the total sales, gross receipts or turnover from business and profession carried on by the individual or HUF exceed the monetary limits specified under clause (a) or clause (b) of section 44AB. Where an employee or an individual representing a company (like a consultant, auditor, etc.) makes a payment for hotel accommodation directly to the hotel as and when he stays there, the question of tax deduction at source would not normally arise (except where he is covered under section 44AB as mentioned above) since it is the employee or such individual who makes the payment and the company merely reimburses the expenditure.*

Furthermore, for purposes of section 194-I, the meaning of 'rent' has also been considered. "'Rent' means any payment, by whatever name called, under any lease . . . or any other agreement or arrangement for the use of any land. . . ." [Emphasis supplied]. The meaning of 'rent' in section 194-I is wide in its ambit and scope. For this reason, payment made to hotels for hotel accommodation, whether in the nature of lease or licence agreements are covered, so long as such accommodation has been taken on 'regular basis'. Where earmarked rooms are let out for a specified rate and specified period, they would be construed to be accommodation made available on 'regular basis'. Similar would be the case, where a room or set of rooms are not earmarked, but the hotel has a legal obligation to provide such types of rooms during the currency of the agreement.

***3.** However, often, there are instances, where corporate employers, tour operators and travel agents enter into agreements with hotels with a view to merely fix the room tariffs of hotel rooms for their executives/guests/customers. Such agreements, usually entered into for lower tariff rates, are in the nature of rate-contract agreements. A rate-contract, therefore, may be said to be a contract for providing specified types of hotel rooms at pre-determined rates during an agreed period. Where an agreement is merely in the nature of a rate contract, it cannot be said to be accommodation 'taken on regular basis', as there is no obligation on the part of the hotel to provide a room or specified set of rooms. The occupancy in such cases would be occasional or casual. In other words, a rate-contract is different for this reason from other agreements, where rooms are taken on regular basis. Consequently, the provisions of section 194-I while applying to hotel accommodation taken on regular basis would not apply to rate contract agreements.*

15.9 From the above circular it is transpired that the provisions of TDS with respect to the room charges will be applicable where the hotel accommodation was taken on regular basis. The CBDT in its circular *(supra)* has clarified that where the rooms have been earmarked for a specified rate and for the specified period, then it shall be construed as accommodation available on regular basis. However in the case on hand there is nothing coming from the order of the AO suggesting that the rooms

have been earmarked by the assessee for a specified period and specified rate. Furthermore on perusal of the invoices issued by the Hotels, placed on pages 180 to 216 it is transpired that the rooms have been taken in connection with some conference. Therefore it cannot be said that the rooms were taken on regular basis as clarified by the CBDT circular. In holding so we draw support and guidance from the order of Bombay Tribunal in the case of Red Chillies Entertainment Private Ltd versus CIT in ITA No. 92/MUM/2015 wherein it was held as under:

> *32. We have gone though the orders passed by the lower authorities and facts brought before us on the basis of bills of hotels and other evidences. It is noted that nothing has been brought before us to show that assessee had entered into any prior contract with the hotels for any specific room or rooms for any specific rates or rooms for any specific period. The rooms were hired on as and when available basis at the regular tariff rates subject to the discounts as agreed at the time of booking of rooms. Under these circumstances, the assessee deserves to be given the benefit of the circular issued by the Board providing that under these circumstances, TDS will not be required to be made u/s 194I. Therefore, it is held that no TDS was required to be made in this case. As a result, these grounds are allowed and this appeal is partly allowed.*

15.10 In view of the above, we hold that there cannot be any disallowance on account of non-deduction of TDS under section 194-I of the Act. Hence we uphold the finding of the learned CIT (A). Thus the ground of appeal of the Revenue is dismissed

16. In the result, the appeal filed by the Revenue is **dismissed.**

Order pronounced in the Court on 08/04/2021 at Ahmedabad.

Sd/-	**Sd/-**
(RAJPAL YADAV)	**(WASEEM AHMED)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 08/04/2021
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