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IN THE INCOME TAX APPELLATE TRIBUNAL

(DELHI BENCH 'C' : NEW DELHI)

BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.1738/Del/2020
(Assessment Year : 2012-13)

M/s. Johnson Watch Company Pvt. Ltd. L-21, Connaught Place, New Delhi	Vs.	ACIT Circle 75(1), New Delhi
Appellant		Respondent
PAN: AABCJ9807G		

Assessee by	Sh. Anand Chaudhari, Adv.
Revenue by	Shri Anuj Garg, Sr. DR

Date of hearing:	02.11.2022
Date of Pronouncement:	09.11.2022

ORDER

Per Anubhav Sharma, JM :

The appeal has been filed by the assessee against order dated 25.08.2020 in appeal no. ITBA/APL/S/250/2020-21/1027795311(1) New Delhi in assessment year 2012-13 passed by Commissioner of Income Tax (Appeal)-38, New Delhi (hereinafter referred to as the First Appellate Authority or in short 'Ld. F.A.A.') in regard to the appeal before it arising out of assessment order dated 29/03/2019 u/s 201(1)/ 201(1A) of the Income Tax Act, 1961 passed by ACIT, (hereinafter referred to as the Assessing Officer or 'AO').

2. The facts of the case are that the assessee is a Private Limited Company and is engaged in the business of trading of watches. Verification u/s 201(1)/(1 A) of the Income Tax Act, 1961 was completed for the F.Y. 2011-12 relevant to A.Y. 2012-13. An order u/s 201 (1)/201 (I A) of the Income Tax Act, 1961 was passed on 29.03.2019 and demand of Rs. 31,303/- of interest on short deduction of TDS was worked out to be payable by the Company as per the said order. Assessee company has paid common area maintenance charges (CAM Charges) to M/s. DLF Utilities Ltd. for the retail store taken on lease in DLF Emporio Mall, Vasant Kunj, New Delhi and to M/s. Ambience Facilities Management Pvt. Ltd. for the retail stores taken on lease in Ambience Mall, Vasant Kunj and Gurgaon and has deducted TDS @ 2% on such CAM charges u/s I94C of the Income Tax Act, 1961. However, as per the Ld. Assessing Officer, TDS should have been deducted @ 10% u/s 1941 of the Income Tax Act, 1961 on the CAM charges paid by the appellant company considering the common area maintenance charges as part of the rental activity covered under section 1941 of the Income Tax Act, 1961 and treated the appellant company as assessee in default within the meaning of section 201(1) of the Income Tax Act, 1961 for short deduction of TDS on CAM Charges. The appellant company has submitted Form 26A along with certificates from Chartered accountants of M/s. DLF Utilities Ltd. and M/s. Ambience Facilities Management (P) Ltd. certifying the accountability of such CAM charges in the computation of total taxable income for the A.Y. 2012-13 and payment of tax thereon. However, interest u/s 201(1 A) of the Income Tax Act, 1961 was charged for short deduction of TDS on the CAM Charges and demand of Rs. 31,303/- was raised on account of short deduction of TDS on the appellant company for A.Y. 2012-13. The Ld.CIT(A) had sustained the same with following findings in para 4.2;

> **"*4.2 Ground of appeal No.2 (a.b.c.d.e.f and g) -*** *the Appellant has challenged the action of AO in treating CAM charges as part of rent liable for TDS u/s 1941. Undisputedly there is single lease agreement for payment of rent as well as CAM charges. The AR has submitted that payment of CAM charges is nothing but reimbursement of common area maintenance expenses incurred by*

the lessor on general maintenance, electric, water and security services etc. Further it has been claimed that, the common area is out side the area which is leased out to the assessee. These arguments are not acceptable because the common area and other services provided by the lessor are also enjoyed by the appellant along with the specified area. As per the same agreement, the appellant is required to pay lease rent as well as CAM charges. It is also noticed that there is no distinction between CAM charges and lease rent payments except, for raising separate invoices. The Explanation below section 1941 which defines "Rent" takes into its ambit any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or ***arrangement for the use of (either separately or together)*** *any (b) building or (c) land appurtenant, to a building (including factory building) or (h) fittings, whether or not any or all of the above are owned by the payee and hence it is clear that any payment even for use of any building and land appurtenant, there to including furniture/fittings is part of rent.* ***CBDT vide circular*** *No.* ***715*** *dated 08.08.1995 (Question No. 24) has also clarified that there is composite arrangement for use of premises and provision of manpower, such agreement in essence is for taking premises on rent and hence provisions of section 1941 are-applicable. This view also gets support, from the decision of Hon'ble* ***High*** *Court* ***in the*** *case of* ***Sunil*** *Kumar Gupta* ***Vs ACIT (2016)*** *389 ITR 38 (P & H), in which it is held that where the agreement provides that the owner of the premises shall pay for common facilities, then it is reasonable to presume that the same is factored into the rent payable by the lessee. However, if maintenance charges etc. are stipulated to be payable by the lessor, it must form part of rent for the purposes of computing income from house property. In the case before hand, the CAM charges are paid by the lessor and the appellant has no control on actual expenditure to be incurred by the lessor. In view of above mentioned factual and legal position, thus it is clear that the CAM charges paid by the appellant are part of rent liable for TDS u/s 1941 and accordingly other decisions and CBDT circulars relied upon by the AR are distinguishable on facts."*

3. The assessee has come in appeal before this Tribunal raising following grounds :-

"1. That the order of the learned CIT(A) is bad in law and on facts in confirming the order of AO in respect of following demands u/s 201(1A) of the Income Tax Act, 1961 :-

TDS demand	*DLF Utilities Ltd. (in Rs.)*	*Ambience Facilities Management Private Limited (in Rs.)*	*Total (in Rs.)*
Interest on short deduction of TDS	*15,814/-*	*15,489/-*	*31,303/-*

2. That the CIT(A) has erred by treating the common area maintenance charges (CAM) paid by the appellant lessee to the maintenance company as part of the rent and thus making lessee liable for deduction of tax at source u/s 1941 @ 10% and not u/s 194C @ 2% in respect of such payment.

3.That the learned CIT(A) has erred by observing that the lessor is paying the common area maintenance charges to the maintenance company and same are recovered by the lessor company from the lessee and thus such CAM charges are part of the rent and are liable for deduction of tax at source u/s 1941 @ 10% instead of deduction of tax at source u/s 194C ***@ 2%.***

4.That the learned CIT(A) erred by confirming the demand of Rs. 31,303/- in respect of interest on short deduction by applying section 1941 instead of section 194C.

5.That the appellant craves leave to add, modify, alter, substitute or delete any of the grounds of appeal on or before the date of hearing.

4. Heard and perused the record.

5. On behalf of the assessee, at the outset the application seeking leave for admission of the adjudication of additional legal grounds of appeal was not pressed and endorsement in that regard was made on the application itself. Further, Ld. Counsel relied judgement in ***Kapoor Watch Company Pvt. Ltd. vs. ACIT, ITA No. 889/Del/2020*** and contended that in identical facts, the Co-ordinate Bench has held that the Common Maintenance Charges are not part of the rent and TDS has to be made u/s 194C. It was submitted that this judgment of ***Kapoor Watch Company Pvt. Ltd. (supra)*** has been subsequently relied in another assessee's case, ***Connaught Plaza Restaurants P. Ltd. vs. DCIT, ITA No. 993 & 1984/Del/2020.***

5.1 On the other hand, Ld. DR submitted that facts of the two judgment cited are distinguishable and as assessee has paid common area maintenance charges

under one agreement under which rent is paid so provisions of Section 194-I of the Act are applicable and there is no infirmity in the findings of Tax Authorities.

6. All the grounds arising out of one issue are taken up together for disposal. Appreciating the matter on record and the submissions, it can be observed that both Ld. AO and Ld. CIT(A) have relied the definition of 'rent' in Explanation to Section 194-I of the Act and Ld. CIT(A) has also relied CBDT Circular no. 715 dated 08.08.1995. Primarily the conclusion of Ld. CIT(A) was based on the fact that there is a single lease agreement for payment of rent as well as CAM charges and because the CAM charges are paid by the lessor they are part of the rent liable for TDS u/s 194-I of the Act. It appears from the order of ld. CIT(A) that assessee claimed that as separate invoices were being raised under separate clauses of the lease agreement in respect of rent and CAM charges, the CAM charges were not part of the rent.

7. Now, when the definition of *'rent'* as Explanation of section 194-I is seen it is the 'payment' made for the *'use'* of certain immovable properties like land or building (including factory building) or land appurtenant to a building (including factory building) or movable properties like machinery or plant or equipment or furniture or fittings, is considered to be rent. Thus, what is important is the *'use'* of these immovable properties or those things appurtenant or fittings with the building that is essential to make a payment fall in definition of rent for purpose of Explanation to Section 194-I of the Act.

7.1 The common area maintenance for which the CAM charges are paid are not for the *'use'* of immovable or immovable properties included in the definition of rent above as the 'rent' becomes payable for getting exclusive interest of user of aforesaid properties. The word 'use' here would mean use exclusively by the lessee. The rent as such is consideration for contract of tenancy or lease, where lessee gets beneficial interest of user of demised property to the exclusion of others, including the Landlord/lessor. However, the

common areas have access to and can be used not only by co-tenants but the landlord/lessor too or even other visitors without any right of exclusion by the assessee. Any payment for it's maintenance cannot be said to be consideration for any beneficial interest to exclusion of others.

8. Merely because a single agreement is executed between lessor and lessee creating liability on lessee for both rent and CAM charges does not discard the distinguishing nature of the two payments. As for the Rent and Eviction Laws the two may have no difference but under 'the Act', they are different head of expenditures of the lessee. The 'rent' is on account of 'use' of the property given into a exclusive possession of the lessee for the running of business but the CAM charges are for maintenance of the common areas, used or not used by the lessee. There is no reason to distinguish between the nature of two payments made by the lessee to the lessor if lessor keeps rent to himself and the CAM charges are paid further by the lessor unless there is composite rent, inclusive of the CAM. Which is not the case, as admittedly they are paid under different clauses of the agreement and by separate invoices.

9. In **Sunil Kumar Gupta vs. ACIT (2016) 389 ITR 38 (P&H),** the judgment of Hon'ble Punjab and Haryana High Court, relied by Ld. AO, Hon'ble High Court was considering the question about computing the annual value of the property and in those circumstances observed that the maintenance charges must be included as part of the rent for the purpose of computing the annual value of the property and the wide ambit of the term rent in Section 22 and 23 of the Act was discussed. However, in the case before us as for the purpose of deduction of tax at source the term rent has to be understood in terms of explanation to Section 194-I of the Act which as discussed above makes a distinction between rent for the use of the property by the lessee and expenses of CAM.

10. The judgment relied by Ld. AR for the appellant in ***Kapoor Watch Company Pvt. Ltd. and Connaught Plaza Restaurants P. Ltd.(Supra)*** case also support the case of appellant wherein the Co ordinate bench observed;

> *"We have heard both the parties and perused the material available on record. Ground Nos. 1 and 1.1 are general in nature hence not adjudicated upon. As regards to Ground Nos. 2, 2.1, 2.2 and 3, it is pertinent to note that the assessee company has paid the rent to owner after deduction of TDS u/s 194-I of the Act and the payment for operation/maintenance was made directly to the services providers after deduction of TDS u/s 194C of the Act. There is a Tri-party Agreement which was on record before the Assessing Officer as well as before the CIT(A). These facts were never disputed by the Assessing Officer as well as the CIT(A). The only dispute that arises by revenue that assessee company should deduct TDS on payment made directly to operation/maintenance services providers u/s 194-I of the Act instead of Section 194C of the Act by relying on the judgment of the Hon'ble High Court of Punjab & Haryana in case of Sunil Kumar Gupta vs. ACIT 389 ITR 38 wherein the Hon'ble Court held that maintenance charges must form a part of the rent while calculating the annual value of property u/s 23(1) of the Act for the purpose of Section 22 of the Act. However, in the present assessee company's case, the common area maintenance charges was not forming the part of the actual rent paid to the owner by the assessee company. There is a separate agreement between the Owner, Tenant and service provider for common area maintenance which is distinguishing fact and thus, the decision of the Hon'ble Punjab and Harayana High Court will not be applicable in the present case. Therefore, the CIT(A) was not right in confirming the order of the Assessing Officer. Hence, appeal of the assessee is allowed.* There is no distinction of facts as attempted by Ld. DR.

10.1 In ITA No. 1115/Del/2020 : Asstt. Year: 2012-13 titled **Yum Restaurants India (P) Ltd, Vs. ACIT (TDS)**, Circle-78(1), New Delhi decided on 3/10/22 a Bench, on which one of us was also in quorum, has also dealt with the issue and observed;

> *"6. The undisputable fact in this case is that while the lease rentals are paid based on a fixed percentage on the net revenue, the CAM charges are based on the per sq . ft. area. The observation of the ld . CIT(A) is that the rent by any name , lease , sub-lease , tenancy or the reliance on the judgment wherein the services are intrapolated into the rent stand on a different pedestal. In the instant case , the determination of the rent or CAM are separate and the CAM arrangements are not essential and an integral part for use of the premises. While there are no expenses incurred against the rent except for general building maintenance and municipal charges , the CAM involves employment of separate staff and separate operations involved on day to day basis. Hence , we hold that the provisions for rent are governed by Section 194I and CAM charges by Section 194C of the Act. The AO is directed to re-compute the CAM charges, taking into consideration the two sections mentioned above."*

8. The ground raised are sustained. T**he appeal of assessee is allowed** and the impugned demands u/s 201(1)A of the Act are set aside.

Order pronounced in the open court on 09th November, 2022.

-Sd/-	**-Sd/-**
(ANIL CHATURVEDI)	**(ANUBHAV SHARMA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Date:09.11.2022
Binita, SR.P.S

Copy forwarded to:
1. Appellant