

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'SMC', NEW DELHI**

**BEFORE SH. R.K PANDA, ACCOUNTANT MEMBER**

ITA No.2331/Del/2018  
Assessment Year: 2013-14

M/s. Oberoi Glass House 1589, Madarsa Road, Kashmere Gate, Delhi-110006 PAN No.AAAFO6397A	Vs	ACIT Circle – 35 (1) New Delhi
<b>(APPELLANT)</b>		<b>(RESPONDENT)</b>

Appellant by	Sh. Satish Aggarwal, CA
Respondent by	Sh. Amit Jain, Sr. DR

Date of hearing:	11/03/2019
Date of Pronouncement:	29/03/2019

**ORDER**

**PER R.K. PANDA, AM:**

1. This appeal filed by the assessee is directed against the order dated 28.11.2017 of the CIT(A)-12, New Delhi relating to A. Y. 2013-14.
2. The revised grounds raised by the assessee are as under :-  
“1. That the order of the Learned CITI (Appeals)-12, New Delhi is arbitrary, biased and bad in law and in facts and circumstances of the case in so far as it confirms the order of the Assessing Officer.

2. *That the Learned Commissioner of Income Tax (A) has grossly erred in confirming the 40a (a) (ia) of the Act, were not applicable in the facts and circumstances of the case.*

3. *That the Learned Commissioner of Income Tax (A) has grossly erred in confirming the addition of Rs.16,93,861/- being the notional interest on interest free loan given to M/s. Oberoi Enterprises.”*

3. The ground No. 1 being general in nature is dismissed.

4. So far as ground No.2 is concerned the same relates to addition confirmed by the CIT(A) on account of non deduction of tax under provisions of section 40 (a) (ia) from certain payments.

5. The first issue raised by the assessee in the grounds of appeal relates to the order of the CIT(A) in confirming the disallowance of business expenditure of Rs.4,05,832/- made by the Assessing Officer.

6. The facts of the case, in brief, are that the assessee firm is engaged in the business of trading in Auto Mobile glass and accessories. It filed its return of income on 19.12.2013 declaring total income of Rs.21,76,930/-. The Assessing Officer during the course of assessment proceedings observed that the assessee has made payment of Rs.6,61,732/- to different parties on which TDS has not been deducted. From the details furnished by the assessee he observed that an amount of Rs.4,05,832/- has been paid to Hotel Radisson on which no tax has been deducted. It was argued before the Assessing Officer that no tax is required to be deducted from the amount paid to Hotel Radisson for dinner hosted by the assessee for existing and prospective customers of

the assessee who were in the same or related trade. However, the Assessing Officer was not satisfied with the arguments advanced by the assessee and made addition of the same for non deduction of tax.

7. In appeal the Ld. CIT(A) upheld the action of the Assessing officer. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal.

8. The Ld. Counsel for the assessee at the outset referred to CBDT circular No.715 dated 08.08.1995 and drew the attention of the bench to the query No.11 and answer there to which read as under :-

*“Question : Whether a contract for catering would include serving food in a restaurant/ sale of eatables ?*

*Ans. TDS is not required to be made when payment is made for serving food in a restaurant in the normal course of running of the restaurant / café.”*

9. He accordingly submitted that in view of the CBDT circular No.715 which is binding on the department no tax is deductible from the payments made to hotel Radisson for catering expenses.

10. The Ld. DR on the other hand heavily relied on the order of the CIT(A).

11. I have considered the rival arguments made by both the sides and perused the orders of the authorities below. It is an admitted fact that the Assessing Officer disallowed an amount of Rs.4,05,832/- paid to Hotel Radisson being the dinner hosted by the assessee for customers on account of non deduction of tax. I find the Ld. CIT(A) upheld the action of the Assessing Officer on the ground that the supply of food alongwith catering services rendered by the hotel is covered in the “work contract” and the

assessee was under legal obligation to deduct tax from the same. I find the issue is covered in favour of the assessee by CBDT circular No.715 dated 08.08.1995 where it has been categorically held that TDS is not required to be made when payment is made for serving food in the restaurant in the normal course of running of the restaurant / cafe. Since the circular is binding on the department, therefore, I find no justification on the part of the CIT (A) in upholding the action of the Assessing Officer. I, therefore, set aside the order of the CIT(A) on this issue and direct the Assessing Officer to delete the addition.

13. The second issue relates to order of the CIT(A) in confirming the addition of Rs.28,000/- out of Rs.6,29,628/- made by the Assessing Officer out of miscellaneous expenses.

14. The facts of the case, in brief, are that an amount of Rs.28,000/- was paid to two persons @ 14000 each for facilitating to get the rented premises at two locations and for complying related formalities. It was submitted before the Assessing Officer that these payments were not in the nature of commission / brokerage and were also not in the nature of contract payment. However, the Assessing Officer was not satisfied with the arguments advanced by the assessee and made the addition which has been confirmed by the CIT(A).

15. The Ld. Counsel for the assessee could not controvert the factual finding given by the CIT(A) that when the services of the brokers are taken for some rented premises, the payments to them will be called brokerage only and therefore, TDS should have been deducted since the payment exceeds to Rs.2500/- to each person. I, therefore, uphold the order of the CIT(A) on this issue and addition so sustained is confirmed.

16. The next issue relates to the order of the CIT(A) in confirming the addition of Rs.2,27,900/- on account of non deduction of tax from rent by observing as under :-

*8.9 Rs.2,27,900/- were paid as rent to M/s. Najumuddin Taiyebally & Others. The Appellant states that the payment was made to more than one person. But in this regard no evidence has been filed. Moreover, I find that in the rental agreement there is the signature of only one person against lessor. In the lease agreement also, the term used is 'lessor' which indicates 'singular' instead of 'plural'. The Appellant has not given the details of bank statement to prove that the payments were made to different persons. The amount during the year exceeded Rs.1,80,000/-. Therefore, the Assessee was under obligation to make the TDS. Hence, the Assessing Officer was justified in making the disallowance."*

17. The Ld. Counsel for the assessee submitted that given an opportunity the assessee is in a position to produce the bank account and substantiate that the payments have been made to different persons and the amount does not exceed Rs.1,80,000/- per year per person for which no tax is deductible. In view of the above submission of the Ld. Counsel for the assessee this issue is restored to the file of the Assessing Officer with a direction to grant one final opportunity to the assessee to substantiate its case. The Assessing Officer shall decide the issue as per fact and law after giving due opportunity of being heard to the assessee. I hold and direct accordingly.

18. Similarly the issue with respect to payment of Rs.250/- claimed to be rent for the business premises is also restored to

the file of the Assessing Officer with similar directions as in the preceding paragraph.

19. The next issue relates to the order of the CIT(A) in confirming the addition of Rs.2,42,110/- wherein the Ld. CIT(A) held as under :-

*“8.11 The Appellant has stated that no tax was deducted on Rs.2,42,110/- paid to M/s. VK Garg & Associates, Chartered Accountants. The Appellant has failed to justify the reason for making no deduction. I am not convinced with the argument of the Appellant that disallowance cannot be made in the cases of short deduction. Short deduction cannot be defined because a person can make the deduction of Rs.1./- leaving the balance amount, payable to the deductee. Such cases will also fall in the category of short deduction. In this way the purpose of the provisions of the TDS will get defeated. Therefore, I hold that Assessing Officer has rightly disallowed the amount.”*

20. The Ld. Counsel for the assessee filed the following chart :-

“2. Details of Short deduction of TDS

Total PAYMENT to M/s. VK Garg & Associates	549950.00
during the year 2012-13	
TDS Required to be deducted on the above	10.00% 54995.00
TDS Actually deducted by M/s. Oberoi	
Glass House	<u>30784.00</u>
TDS short deduction	<u>24211.00</u>
Amount on which TDS short deducted	242110.00

(Disallowance)”

21. The Ld. Counsel for the assessee at the outset submitted that he has no objection if the issue is restored to the file of the Assessing officer with a direction to give one final opportunity to the assessee to substantiate with evidence to his satisfaction regarding income offered by the payees on such income who are reputed consultancy firms. I, therefore, deem it proper to restore this issue to the file of the Assessing Officer with a direction to give one final opportunity to the assessee to substantiate with evidence to his satisfaction that the payees have declared such income in their respective return of income and paid tax thereon. The Assessing Officer shall decide the issue as per fact and law after giving due opportunity of being heard to the assessee.

22. So far as the ground No.3 is concerned the same relates to the order of the CIT(A) in confirming the addition of Rs.15,93,861/- being notional interest on interest free loan given to M/s. Oberoi Enterprises.

23. After hearing both the sides. I find the Assessing Officer had made addition of Rs.15,93,861/- being interest @ 12% on 1,32,82,8641/- being interest on interest free loan given to M/s. Oberoi Enterprises. In appeal the Ld. CIT (A) confirmed the addition on the ground that the assessee could not substantiate with evidence that the payment was made for purchase of goods. Since the assessee has claimed interest on account of borrowed funds from the banks and unsecured loans and has given interest free advances to sister concerns, therefore, he held that the action of the Assessing Officer in disallowing notional income is justified.

23. The Ld. Counsel for the assessee relying on the decision of Hon'ble Bombay High court in the case of CIT Vs. Chanda Bhoj and Jassa Boy (2012) 49 SOT 448 (Mum) submitted that under identical circumstances the Hon'ble High Court has upheld the order of the Tribunal deleting the addition on account of notional interest.

24. It is the submission of the Ld. DR that assessee has not fulfilled the condition laid down by the Hon'ble Supreme Court in the case of S. A. Buildtech Vs. CIT.

25. I find that the facts are not borne out clearly from the submissions made by the assessee. It is not a case of the assessee that it has sufficient capital and free reserves at the beginning of the year so as to advance such huge loan. The assessee has also not substantiated with evidence that advances given to M/s. Oberoi Enterprises are against purchases. Considering the totality of the facts of the case and considering the fact that the Ld. CIT(A) while rejecting the claim of the assessee on this issue has observed that the assessee has failed to prove its averment made before the Assessing Officer or before him, therefore, I deem it proper to restore this issue to the file of the Assessing Officer with direction to give one more opportunity to the assessee to substantiate with evidence to his satisfaction that these are business advances and / or that the capital of the partners is more than the interest free advances given to the sister concerns. The Assessing Officer shall decide the issue as per fact and law after giving due opportunity of being heard to the assessee. I hold and direct accordingly.

26. The grounds raised by the assessee are partly allowed for statistical purposes.

Order pronounced in the open court on 29.03.2019.

**Sd/-**  
**(R.K PANDA)**  
**ACCOUNTANT MEMBER**

*\*Neha\**

Date:- 25.03.2019

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT NEW DELHI

Date of dictation	25.03.2019
Date on which the typed draft is placed before the dictating Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	29.03.2019
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	