

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'D' NEW DELHI**

**BEFORE SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER
&
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA No-883/Del/2017
(Assessment Year: 2013-14)**

M/s K.S Hotels Pvt. Ltd., B-25,
Connaught Place, New Delhi-
110001.
AAACK4557EI

vs

ITO
Ward-14 (1)
New Delhi

Revenue by Sh. Radha KatyalNarang, Sr DR
Assessee by Sh. Madhur Aggarwal, Adv

Date of Hearing 04.11.2020

Date of Pronouncement 05 .11.2020

ORDER

PER K. NARSIMHA CHARY, J.M.

Challenging the order dated 15/12/2016 passed by the learned Commissioner of Income Tax (Appeals)-5, Delhi (“Ld. CIT(A)”) in appeal number Del/CIT (A)-5/0358/2015-16 in the case of M/s KS Hotels Private Limited (“the assessee”) for the assessment year 2013-14, Revenue preferred this appeal on the following two grounds, without 1 being general in nature.

1. On the facts and in the circumstances of the case, Ld. CIT(A) has erred in law in treating the contractual receipts of goods under section 194 C by treating them as regular sale by suppliers.
2. On the facts and circumstances of the case, Ld. CIT(A) has added in law in deleting unverifiable miscellaneous expenses.

2. Brief facts of the case, as could be culled out from the record, are that the assessee is engaged in the business of running a restaurants by the name of Zen and Tao in Connaught place which sell primarily Chinese food, beverages and liquor and that the company outsourced the Chinese kitchen to another entity called Dewa enterprises. For the assessment year 2013-14, they filed the return of income on 28/9/2013, declaring an income of Rs. 40, 87, 223/-, but the assessment was complete under section 143(3) of the Income Tax Act, 1961 (“the Act”) at Rs. 3, 12, 43, 980/-by making addition of Rs. 70, 51, 973/- on account of section 40(a)(ia) of the Act and Rs. 1, 04, 788/-on account of ad hoc disallowance of certain miscellaneous expenses.

3. When the assessee preferred appeal, Ld. CIT(A) deleted both the additions and, therefore, the Revenue is an appeal before us challenging the deletion stating that there is error in the finding of the Ld. CIT(A) inasmuch as Ld. CIT(A) treated the payments not as contractual payments but as consideration for purchase of food and also in not sustaining the unverifiable miscellaneous expenses.

4. Insofar as the addition of Rs. 3, 12, 43, 980/-is concerned, learned Assessing Officer held that there was a contract between Dewa enterprises and the assessee for supply of Chinese food during the year under consideration and therefore, such payment was contractual payment falling within the definition of contractor under section 194C of the Act. Since the assessee did not effect the Tax Deduction at Source, such an expense is liable to be disallowed under section 40(a)(ia) of the Act. Assessee pleaded before the Ld. CIT(A) that the assessee is the owner of the premises and has agreement with M/s Dewa enterprises for supply of Chinese food and in accordance with the agreement, food was

supplied by charging VAT on the sale of food supplied, which in turn was sold to the customers of the assessee by charging VAT thereon by claiming the VAT input. On this ground, the assessee contended that the transaction between the two concerns is in the nature of purchase and sale inasmuch as the contract for supply of material/food is not a labour work contract as envisaged under section 194C of the Act.

5. Ld. CIT(A) considered the contentions of the assessee in the light of the submissions made on behalf of the assessee. Further, Ld. CIT(A) found that a similar question had arisen in the case of the assessee in the previous assessment years and after examining the contract with the Dewa enterprises, the bills issue and the VAT returns of the assessee and a seller of the goods in the light of the amended section of 194C of the Act, his predecessor reached a conclusion that the transaction between the assessee and the supplier was that of sale and purchase and the same does not fall within the ambit of section 194C of the Act. Ld. CIT(A), therefore, observed that since there is no change in the facts and circumstances of the case nor has the learned Assessing Officer brought anything on record to prove that the agreement fell within the expanded scope of work contract envisaged under section 194C of the Act, explanation (iv) thereto with effect from 1/10/2009, there is no scope to deviate from the view taken by his predecessors for the assessment years 2006-07 to 2012-13. Findings of the Id. CIT(A) were confirmed by Tribunal in ITA Nos 4466/Del/2015, ITA Nos 278/Del/2013, ITA Nos 2809/Del/2015 and ITA Nos 6858/Del/2015 for AY 2006-07, 2007-08, 2011-12 and 2012-13 respectively.

6. It is not the case of the Revenue that any change occurred either in

the facts or in law subsequent to the Ld. CIT(A), taking the consistent view for the assessment years 2006-07 to 2001-13. In the absence of any such change, Ld. CIT(A) is justified in finding it difficult to take a different view from the consistent one taken for the earlier assessment years. We do not find any illegality or irregularity in such course adopted by the Ld. CIT(A). We accordingly decline to interfere with the same and dismiss this ground of appeal.

7. Second ground relates to the addition of Rs. 1, 04, 788/-towards and had disallowance of 10% of the miscellaneous expenses. According to the learned Assessing Officer the assessee had debited miscellaneous expenses of Rs. 10, 47, 885/-in P&L account, but the larger part of it is not subject to verification due to lack of proper vouchers and, therefore, the disallowance of 1/10 of the expenses had to be made. Assessee argued before the Ld. CIT(A) that such disallowance was made without any basis of reason and that too without affording an opportunity to the assessee to explain their case on this aspect.

8. Ld. CIT(A) considered the contentions of the assessee and found that the learned Assessing Officer was not clear in his reasons for disallowance, but disallowed the expenses on ad hoc basis simply by perusing the ledger account wherein sufficient details were not available. According to the Ld. CIT(A) in case of learned Assessing Officer entertaining any doubt about the nature of some of the expenses, he could have called for the corresponding bills and made enquiries about the genuineness of the business expediency of incurring those expenses, but without pin-pointing that any of the cash payments were above the

limit specified in section 40A(3) of the Act or that any of the bills were ingenuineor for other than business purpose, the disallowance will be subjective in manner basing on surmises and conjectures. Ld. CIT(A) place reliance on the decisions of the Tribunal in the case of ACIT vs. Ganpati Enterprises Ltd (2013) 35 CCH 485 and Tripat Kaur vs. ACIT and held that they disallowance of expenditure on estimate basis without pointing out specific defects in the books and without providing an opportunity of explanation to the assessee cannot be sustained.

9. On a consideration of the contentions raised before us, we of the considered opinion that there is no perversity in the finding of the Ld. CIT(A) and he is right in observing that without pointing out any defect in the books of accounts of the assessee and without giving an opportunity to the assessee to explain their stand on this issue, the ad hoc disallowance cannot be sustained. Findings of the Ld. CIT(A) do not warrant any interference and have to be confirmed. We accordingly dismissed ground number two.

10. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on the 5th day of November, 2020.

Sd/-
(N. K. BILLAIYA)
ACCOUNTANT MEMBER
Dated:.05.11.2020

Sd/-
(K. NARSIMHA CHARY)
JUDICIAL MEMBER