

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H", MUMBAI
BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No. 389/Mum/2022 (A.Y. 2011-12)

Kamal Jafferli Wadhwanja,
504/A Green park, Usha Darshan CHSL,
Sjantivan Mhada, Off Link Road,
Andheri (West), Mumbai-400093.

PAN: AAHPW5049G

..... Appellant

Vs.

ITO, Ward-2(2)(4),
Room No. 716, 7th Floor,
Smt. K.G. Mittal Ayurvedic Hospital Building,
Charni, Road, Mumbai-400002.

..... Respondent

Appellant by	:	None
Respondent by	:	Sh. Tejinder Pal Singh, Sr. DR
Date of hearing	:	14/07/2022
Date of pronouncement	:	26/09/2022

ORDER

PER GAGAN GOYAL, A.M:

This appeal by the assessee is directed against the order of National Faceless Appeal Centre, Delhi [hereinafter referred to as ('NFAC')] dated 27.12.20221 under section 250 of the Income Tax Act, 1961 (hereinafter referred

to as 'the Act') for the Assessment Year (AY) 2011-12. The assessee has raised the following grounds of appeal:

"1. On facts and circumstances of the case and in law, the AO as well as CIT(A) are erroneous in holding that the TDS is deductible at 10% instead of 2% on the common area maintenance (CAM) service without appreciating the law settled on the issue in favour of appellant.

2. On the facts and circumstances of the case and in law, the Ld. CIT(A), erred in treating the appellant in default u/s 201(1) and charging interest u/s 201(1A) of Income Tax Act.

3. On the facts and circumstances of the case and in law, the Apex Court judgment of Hindustan Coca Cola Beverages Ltd (293-ITR-26) applicable or not.

4. On the facts and circumstances of the case and in law, the Ld. CIT (A), further erred in not accepting the various case laws including the judgment of ITAT, New Delhi Bench.

5. The appellant pray that the Order of the Ld. CIT(A) on the above grounds be set aside in toto.

6. The appellant craves leave to amend or alter any ground or add a new ground."

2. Brief facts of the case are that the assessee was a tenant of R. City Mall, Ghatkopar of R. Mall Developers Pvt. Ltd in the FY 2010-11, relevant to A.Y 2011-12, this appeal of assessee is with reference to sec 201 and 201(1A) of the Act. There was a survey conducted on Run wall group and it is found that assessee is one of the tenants in the premises of Run wall group. During the course of survey, it was noticed that the assessee had paid Rs. 12, 98,373/-. The notice to assessee was issued on 12-Mar-2018 u/s 201(1)/201(1A) asking for copies of lease and licence agreement for F.Y 2010-11 along with the copies of the ledger accounts of the expenses on which provisions of TDS is attracted, acknowledgement of TDS return and TDS challan for the concerned F.Y. the case was fixed for hearing on

28-03-2018. Here it is pertinent to mention that case was getting time barred on 31-03-2018 and time given to assessee was insufficient to reply and to substantiate his matter. As the matter pertains to F.Y 2010-11 and proceedings were initiated on 26-03-2018 only.

3. There is a time lag of almost 7 years and notice was issued at fag end, so it can't be treated as proper opportunity being provided to the assessee. Assessee asked for adjournment for 10 days vide its letter dated 28-03-2018. We have gone through the letter of the assessee seeking adjournment vide reproduced in para 3 of the assessment order. Assessee's request for adjournment looks to be very genuine as the matter pertains to period FY 2010-11 and locating such old records need some time, being F.Y ending assessee must be busy in finalisation of accounts, filing of GST returns and other accounting and compliance related issues. So it can be reasonably held that the finding of the A.O vide para 3.2 of the assessment order that "the assessee is not ready to co-operate", is baseless and rather it confirms violation of natural justice and a very harsh burden is being imposed by the A.O on the assessee. These are the factual findings other than the merits of the case. These factual findings are in the nature of an adverse comment on A.O and his conduct towards assessee and this bench expects a reasonable cognizance may be taken by the department.

4. We have gone through the order of the A.O and Ld. CIT (A)-14, Mumbai and following facts on the merits of the case emerged as under:

a. As per A.O during the F.Y 2010-11 assessee paid an amount of Rs. 12,98,373/- towards AC maintenance, housekeeping and security etc to the mall owner by deducting TDS @ 2% u/s 194C, whereas Ld. CIT(A) given a finding of facts that the

assessee paid Rs. 1,57,208/- towards the same. So the figures as taken by A.O in his assessment order vis-a vis figures taken by Ld. CIT(A) in his appeal order vide pg no-3 are not matching.

b. There is no breakup given by AO of the total amount amounting to Rs. 12,98,373/- which comes to Rs 1,08,198/- pm whereas as per the order Ld. CIT(A) this amount is Rs 13101/- pm. Both the amounts are not matching.

c. Ld. CIT(A) given 3 figures towards licence repayable amounting to Rs. 36,247/-, again Rs. 36,247/- towards amenity charges and Rs. 13,101/- towards common area maintenance. The total of this figure comes to Rs. 85,595/-pm. and p.a total comes Rs. 10, 27,140/-. This figure nowhere matches with the figure of AO order amounting to Rs. 12, 98,373/-. Further Ld. CIT (A) himself confirmed in his order vide pg-2 para-1 that assessee has deducted TDS u/s 194(I) @ of 10% on licence fee and amenity charges. As per him only of on amount of common area maintenance amounting to Rs. 1, 57,208/- assessee deducted TDS @ 2% u/s 194C.

d. it clearly demonstrates a total chaos in the order of A.O and Ld. CIT(A) as discussed supra even if it is assumed that assessee was liable u/s 194(I) on Rs. 1,57,208/-, his liability will be Rs 15,720/- u/s 201 and almost the similar amount of around Rs. 12,000/- u/s 201(1A). These are our observation not withstanding our further decision on the merits of the case.

It is abundantly clear that sec 194I is applicable only in case of rent may be on plant and machinery (@ the rate of 2%) and for the use any land or building or land appurtenant to a building. In this case assessee is paying a rent/lease charges for the office premises which includes AC etc. and charges for the same already

included in the rent. But the extra assessee is paying is for AC maintenance (not AC rent) housekeeping, security and common area maintenance charges. These payments nowhere related to sec 194I maybe the same has been fixed on a Lum sum basis pm. For these charges the relation of assessee is not of lessor and lessee but of contractor and service taker, which falls in the category of as defined in sec 194C.

6. In view of the findings returned, we direct the A.O to delete the demands raised u/s 201(1) and 201(1A), after due verification as per Para 4(c) and 4(d) above. In these terms appeal of the assessee is allowed.

Order pronounced in the open court on 26th day of September 2022.

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER

Mumbai, दिनांक / Dated: 26/09/2022

SK, Sr.PS

Copy of the Order forwarded to:

1. अपीलार्थी / The Appellant ,
2. प्रतिवादी / The Respondent.
3. आयकर आयुक्त (अ) / The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि. , मुंबई / DR, ITAT, Mumbai
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BY ORDER,

(Dy. /Asstt. Registrar)
ITAT, Mumbai