

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "H": NEW DELHI
BEFORE SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No. 1730/Del/2021
(Assessment Year: 2013-14)

Paramount Restaurants Pvt. Ltd, T-308, Level-3, Ambience Mall, Nelson Mandela Road, Vasant Kunj, Delhi-110070 (Appellant)	Vs.	CIT(A), Circle-19(1), Delhi (Respondent)
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PAN: AAFCP2633N

Assessee by :	None
Revenue by:	Sh. Yogesh Nayyar, Sr. DR

Date of Hearing	09/03/2023
Date of pronouncement	13/03/2023

O R D E R

PER ANUBHAV SHARMA, J. M.:

1. The present appeal has been preferred by the Assessee against the order dated 29.08.2021 of Ld. CIT(A), National Faceless Appeal Centre (NFAC) (hereinafter referred as Ld. First Appellate Authority) arising out of an appeal before it against the assessment order dated 23.03.2020 passed u/s 201(1A) of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by the AO, (hereinafter referred as the Ld. AO).

2. The assessee has raised the following grounds of appeal:-

- "1. *On the facts and in the circumstances of the case the learned Assessing Officer has erred in law in treating the Common Maintenance Charges as part of rent.*
2. *The appellant had correctly deducted tax at source at 2 percent on these payments and interference by the learned*

Assessing Officer for treating it as part of rent and deduction of TDS at 10% is uncalled for, unjustified and deserves to be deleted.

3. *The learned Assessing Officer has wrongly charged interest u/s 201(1A) of the Income Tax Act."*
3. Heard and perused the record.
4. None appeared on behalf of the assessee and the record shows that in spite of notice of listing of appeal, none has appeared and the assessee is not available at the address.
5. The Id DR supported the findings of the Tax Authorities below. It was submitted that the Id CIT(A) has taken into account the fact that there was no separate agreement between the assessee, the landlord and service provider for common maintenance. It was submitted that copies of invoices submitted indicate that, charges were being paid to associate company of the landlord and the Id DR also pointed out that the invoices show that high proportion of common maintenance charges were paid in a manner to bifurcate rental.
6. Giving thoughtful consideration to the matter on record, the bench is of considered opinion that primarily the dispute is with regard to applicability of section 194 Explanations and whether the assessee had rightly deducted tax @10% on rent and @2% on the common maintenance charges. The Id Tax Authorities below have primarily considered the provisions of explanation (i) of section 194 of the Act to conclude that any payment made to the landlord, other than under the head rent, falls into the category of rent and relied the judgment of Hon'ble Punjab and Haryana High court in the case of Sunil Kumar Gupta Vs. ACIT (2016) 389 ITR 38/73.
7. Now admittedly in the case in hand there was no separate agreement between the assessee tenant, the landlord and the service provider for common maintenance, M/s. Ambience Facilities Management Pvt. Ltd which is owned by Ambience Group to which

the rent was paid. The coordinate bench, on which one of us, the judicial member, was in quorum, in ITA No. 1738/Del/2020 in case of **M/s. Johnson Watch Company Pvt. Ltd. Vs. ACIT**, vide order dated 9/11/22, has taken into account similar circumstances including the judgment of **Sunil Kumar Gupta vs. ACIT (supra)** and observed as below:-

"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 Id . 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. In the light of the aforesaid discussion, the bench is of considered opinion that Ld. Tax Authorities below have fallen in error in holding that the assessee was required to pay TDS @10% towards the common area maintenance charges. Consequently the grounds raised by the assessee are allowed.

9. In the result, **the appeal is allowed.**

Order pronounced in the open court on 13/03/2023.

-Sd/-
(N. K. BILLAIYA)
ACCOUNTANT MEMBER

-Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER

Dated: 13/03/2023
A K Kaeot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi