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

BEFORE SHRI O. P. KANT, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

I.T.A. No. 889/DEL/2020 (A.Y 2011-12)

(THROUGH VIDEO CONFERENCING)

Kapoor Watch Company Pvt. Ltd. G-7, South Extension, Part-1, New Delhi AAACK3885A **(APPELLANT)**	Vs	ACIT Circle-75(1) New Delhi **(RESPONDENT)**

Appellant by	**Sh. Gautam Jain, Adv & Sh. Lalit Mohan, CA**
Respondent by	**Sh. Sohail Malik, Sr. DR**

Date of Hearing	**23.12.2020**
Date of Pronouncement	**05.01.2021**

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the order dated 16/1/2020 passed by CIT(A)-38, Delhi for Assessment Year 2011-12.

2. The grounds of appeal are as under:-

"1. That order dated 30.3.2018 u/s 201(1)/201(1 A) of the Act for the financial year 2010-11 was barred by limitation and therefore deserved to be quashed as such.

1.1 That the learned Commissioner of Income Tax (Appeals) has failed to appreciate that since order u/s 201(1)/ 201(1 A) of the Act was beyond the period of six years from the end of financial year in which the payment was

made or credit was given by the appellant company in view of the provisions contained in section 201(3) of the Act, therefore order made was barred by limitation.

2. That the learned Commissioner of Income Tax (Appeals) otherwise too erred both in law and facts in upholding the order concluding that the appellant company be 'assessee-in-default for a sum of Rs. 1,68,499/- u/s 201(1) of the Act and Rs. 1,43,963/- u/s 201 (1 A) of the Act.

2.1 That finding that "common area maintenance 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 the common area maintenance charges paid by the appellant are part of rent liable for TDS u/s 1941 and accordingly other decision relied upon by the AR are distinguishable on facts" is factually and legally misconceived, and untenable.

2.1 That the learned Commissioner of Income Tax(Appeals) has erred both in law and on facts in upholding the conclusion that appellant was obliged to deduct TDS u/s 1941 of the Act as asainst u/s 194C of the Act on the common area maintenance charges paid by the appellant company.

2.2. That in any case and, even other-wise, the Commissioner of Income Tax (Appeals) has overlooked the judgment of the Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverages Ltd. vs. CIT reported in 293 ITR 26 wherein it was held that once the deductee has paid the taxes due, then there is no justification for imposing any liability under section 201(1) of the Act.

3. That in any case and, even other-wise, the Commissioner of Income Tax (Appeals) has overlooked the judgment of the Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverages Ltd. vs. CIT reported in 293 ITR 26 wherein it was held that once the deductee has paid the taxes due, then there is no justification for imposing any liability under section 201(1) of the Act."

3. The assessee company M/s Kapoor Watch Company Pvt. Ltd. is in the business of selling and marketing in the retail market of luxury watches of

international brands. A Survey Action u/s 133A(2A) of the I. T. Act, 1961, was conducted in the case of Ambience Group by ACIT(TDS) - 73(1), Delhi on 12/02/2018 with the purpose to verify compliance by the assessee company to the provisions of Chapter XVII B of the Income Tax Act,1961. During the course of Survey Action, it was found that the Ambience group operates two malls, namely Ambience, Gurgaon and Ambience Mall, Vasant Kunj. The malls have various units/shops that have been either sold or are rented. It was observed by the Assessing Officer that the group i.e. mall owners have recovered/collected expenses in the form of CAM (Common Area Maintenance) Charges. It is seen that the deductors/tenants have been deducting TDS at 2% being considering the same to be covered under the provisions of Section 194C. Since these collections/payments are directly relatable to and being part of the rental activity and also mentioned in the same contractual agreement should have been covered by the provisions of Section 1941 calling for TDS at 10% as against deduction of TDS at 2% being made by the deductors/tenants, thereby prima facie being assessee in default. On the basis of the information received from Circle 73(1), New Delhi a notice was served for Section 201 proceedings for FY 2010-11 on 06/03/2018 asking for details the assessee company. In response to this notice, Authorized Representative of the company appeared on 15/03/2018 filed Balance sheet, P& L account and Tax Audit Report alongwith annexure, section wise details of TDS deducted and deposited and also submitted the copy of Provisional receipt of all TDS return. The Assessing Officer observed that the payments in the nature of common area maintenance (CAM) which is essentially part of rental activity are covered u/s 194-I & thus calculated the short deductions at Rs. 1,68,499/- and treated the assessee in default within the meaning of Section 201(1) of the Income Tax Act for failing to appropriately deduct tax as required by the provisions of the Act. The Assessing Officer also imposed interest for short deduction of TDS at 1% for every month on the amount of such tax from the date on which such tax was deducted to the date on which such tax is actually paid. Thus, the total TDS liabilities u/s 201 (1)/201(1A) was computed at Rs. 3,14, 078/-.

4. Being aggrieved by the assessment order u/s 201(1)/201(1A), the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee.

5. As regards to Ground No. 2, 2.1 and 3 relating to issue that the assessee company should have deducted TDS u/s 194-I of the Act as against u/s 194C of the Act on the Common Area Maintenance Charges (CAM) paid by the assessee company. The Ld. AR submitted that undisputed facts are that there is tri-parte agreement between assessee company (tenant), owner and, operation/maintenance services providers agency. It is also undisputed fact that assessee company has paid rent to owner after deduction of TDS u/s 194-I of the Act and, to operation/maintenance services providers directly after deduction of TDS u/s 194C of the Act. The only dispute that arises by revenue that assessee company should deduct TDS on payment made directly to operation/maintenance services providers u/s 194I 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. The Ld. AR submitted that CIT (A) while sustaining the order of the Assessing Officer has relied upon 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, the Ld. AR submitted that the issue under consideration is distinguishable from the facts before the Hon'ble High Court. The Ld. AR submitted that issue under consideration is of deduction of TDS that too for maintenance charges paid directly by assessee tenant to maintenance services provider agency and, it is not the case of revenue that income should be added in the hands of landlord/ operation/maintenance services providers agency under the head "Income from house property". The Ld. AR further submitted that obligation to deduct TDS arises u/s 194-I of the Act only if nature of payment in hands of payee is rent. In the instant case payment is

in the nature of maintenance charges undisputedly in hands of payee and once it is the factual position then both legally and logically section applicable is 194C of the Act. The allegation of revenue is based on edifice that sum paid by the payer is rent in hands of landlord who is neither payee nor payer and thus ex-facie the basis is misconceived. The Ld. AR submitted that it is evident from the plain reading of Section 190 that notwithstanding that the regular assessment in respect of any income is to be made in a later assessment year, the tax on such income shall be payable by deduction or collection at source or by advance payment or by payment under sub-section (1A) of section 192 of the Act, as the case may be, in accordance with the provisions of this Chapter. Thus, the Ld. AR submitted that TDS is a part of tax on income of payee/recipient. Therefore, the Ld. AR submitted that whether TDS deductible or not and, if deductible under which Section TDS has to be deducted depend on nature receipt of payee/recipient from whose payment TDS to be deducted. The Ld. AR relied upon the following decisions:

i) **GE India Technology Centre (P) Ltd. vs. CIT 327 ITR 456 (SC)**

ii) **Vijay Ship Breaking Corpn. & Ors. Vs. CIT 314 ITR 309 (SC)**

The Ld. AR further submitted that nature of payment in hands of payer is not deciding/relevant factor for deciding nature of receipt in hands of recipient. In this regard reliance is placed on judgment of the Hon'ble Apex Court in case of Empire Jute Co. Ltd. vs. CIT 124 ITR 1 by the Ld. AR.

6. The Ld. DR relied upon the order u/s 201(1)/201(1A) and order of the CIT(A).

7. 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.

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

Order pronounced in the Open Court on this 5TH day of January, 2021

-Sd/-	**-Sd/-**
(O. P. KANT)	**(SUCHITRA KAMBLE)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 5th /01/2021
*R. Naheed **

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

ASSISTANT REGISTRAR
ITAT NEW DELHI