Income Tax Officer vs Dr. Willmar Schwabe India (P) Ltd. on 3 March, 2005

Equivalent citations: (2005)95TTJ(DELHI)53

ORDER

P.M. Jagtap, A.M.

1. These four appeals preferred by the Revenue against a common order of learned CIT(A)-XXV, New Delhi, dt. 30th March, 2001, for financial years 1995-96 to 1998-99 involve some common issues and the same, therefore, are being disposed of by a single order along with cross-objections filed by the assessee for financial years 1996-97 to 1998-99.

2. The first issue which is raised by the Revenue in its appeal for financial year 1998-99 relates to the deduction of tax at source in respect of contract payments amounting to Rs. 39,17,581 made by the assessee for which provisions of Section 194C are held to be inapplicable by the learned CIT(A).

3. The assessee in the present case is a private limited company engaged in the business of manufacture and distribution of homeopathic and herbal medicines. It requires bottles, caps, labels and other packing material for packing of the medicines which is purchased from various suppliers as per assessee's own specification. Such specification of packing material required by it is given by the assessee to the suppliers and after the approval of the samples, regular supply orders are placed. The suppliers also print name/logo, etc. of the assessee wherever required. A survey operation under Section 133A of the Act was conducted on 2nd Feb., 2000, at the premises of the assessee during the course of which assessee was found to have procured printed packing material involving cartons, labels, inserts, rolls, corrugated boxes, p.p. caps, self-adhesive company stickers, leaflets and aluminium foils manufactured by different parties as per the purchase orders placed with them giving its specific requirement. According to the AO, the said procurement was in pursuance of material contracts entered into with the concerned suppliers and relying on the decision of Hon'ble Supreme Court in the case of Associated Cements Co. Ltd. v. CIT (1993) 201 ITR 435 (SC) and the subsequent Circular No. 681, dt. 8th March, 1994, issued by the CBDT, he held that tax @ 2 per cent was required to be deducted from the payments made to the said suppliers as per Section 194C. Since no such deduction was made by the assessee-company, he treated the assessee-company as in default for the same after quantifying the amount of such short deduction at Rs. 78,351 for financial year 1998-99. Interest under Section 201(1A) amounting to Rs. 22,505 was also charged from the assessee. The matter was carried before the learned CIT(A) and it was . submitted on behalf of the assessee-company before him that it had purchased printed packing material comprising of several items manufactured by different parties for an aggregate amount of Rs. 39,17,581 and the concerned suppliers had even paid sales-tax as well as excise duty thereon, wherever applicable. It was also submitted that the said suppliers were the regular manufacturers of such products and the ownership in the goods supplied by them to the assessee remained with them till they are delivered at the godown of the assessee. The assessee, therefore, contended that it was not a case of contract

but was a simple case of sale of goods. It was also pointed out by the assessee that even in the Circular No. 681, dt. 8th March, 1994, issued by the CBDT after the decision of the Hon'ble Supreme Court in the case of Associated Cements Co. Ltd v. CIT (supra), it has been specifically clarified by the Board in para No. 7 that the provisions of Section 194C will not cover contract for sale of goods. It was submitted that the AO had not correctly interpreted the said circular and the inference drawn by him relying on the same was not correct. Reliance was also placed by the assessee on the decision of Pune Bench of Tribunal in the case of Wadilal Dairy International Ltd. v. Asstt. CIT (2001) 70 TTJ (Pune) 77, wherein it was held, after considering the relevant Circulars Nos. 681 and 715 issued by the Board as well as number of cases decided by the various High Courts, that purchase of packing material by an assessee from various manufacturers in accordance with its specification did not involve any work contract and the provisions of Section 194C were not applicable. The submissions made on behalf of the assessee-company were found favour with the learned CIT(A) and accepting the same, he decided this issue in favour of the assessee for the following reasons given in para Nos. 10 and 11 of his impugned order:

> "I have considered the submissions of the Authorised Representative. The appellant has been purchasing various packing materials from several vendors as per its requirement. These packing materials are manufactured by these vendors as per the specification given by the assessee. The items purchased by the assessee are subject to payment of excise duty and sales-tax, wherever applicable. When the packing material is manufactured and ready, the same are delivered to the assessee, No raw material or any part is supplied by the assessee to the manufacturer, The goods are delivered in a readymade form by the vendors to the assessee. Purchase orders are placed by the assessee from these suppliers for supply of packing material based on its own specification. If the supplied packing material is not as per the specifications, the same are rejected.
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> The Board vide its Circular No. 681, dt. 8th March, 1994, has clarified that the provisions of Section 194C are not applicable with regard to contract for sale of goods. In the assessee's case, admittedly, there is no supply of material by the assessee to the vendor which has been converted into boxes, labels, etc., etc. and after being printed, has been supplied to the assessee. Thus, I am in agreement with the Authorised Representative that the transaction is a transaction of sale of goods and not a contract for work. The fact that sales-tax as well as excise duty is also paid further substantiates the above finding. The main purpose of buying the packing material is to obtain the goods for the purposes of packing and the fact that some printing, etc. was also required to be done by the supplier will not change the basic character of the transaction. Keeping in view the decision of the Tribunal in Wadilal's case (supra), as mentioned above, I am of the view that the action of the AO in holding that provisions of Section 194C are applicable to such transactions and determining a short deduction of tax and charging of interest thereon was not justified and the same is deleted."

4. The learned Departmental Representative submitted before us that the assessee-company was getting printed packing material from the concerned suppliers as per its specific requirements and the nature of such work being of material contract, the provisions of Section 194C were clearly applicable requiring the assessee to deduct tax at source @ 2 per cent on the payments made to the concerned suppliers. Relying on the decision of Hon'ble Supreme Court in the case of Associated Cement Co. v. CIT (supra) as well as the Circular Nos. 681 and 715 issued by the CBDT, he contended that the nature of contract between the suppliers and the company was absolutely the contracts for supply of materials duly printed as per the requirement of the assessee-company and the provisions of Section 194C were clearly applicable. He also relied on the decision of Hon'ble Madras High Court in the case of CIT v. Kumudam Publications (P) Ltd. (1991) 188 ITR 84 (Mad).

5. The learned counsel for the assessee, on the other hand, submitted that the assessee had purchased printed packing material comprising of several items manufactured by different parties during the year under consideration and it was a clear case of sale of material by the said parties to the assessee-company as per the Sale of Goods Act. He pointed out that the said suppliers had even paid sales-tax and excise duty on the material supplied to the assessee-company, wherever applicable, and, therefore, such supply made by them as regular manufacturers of the relevant products was a simple case of sale of goods and not works contract as held by the AO. He invited our attention to the Circular No: 681 issued by the CBDT on 8th March, 1994, and pointed out that the Board itself has clarified in paragraph No. 7 of the said circular that the provisions of Section 194C would not cover contract for sale of goods. He contended that the AO, however, did not properly interpret the said circular and his reliance on the said circular to draw an adverse inference against the assessee on the issue under consideration was clearly misplaced. He also contended that the decision of Pune Bench of Tribunal in the case of Wadilal Dairy International Ltd (supra) is squarely applicable to the facts of the present case since it was held therein that purchase of packing material by the assessee for its products from various manufacturers did not involve any works contract even if the same was manufactured according to the assessee's specifications and even some printing was also done on the said material by the manufacturers as per the specification of the assessee. He, therefore, strongly supported the impugned order of learned CIT(A) on this issue and urged that the same may be upheld.

6. We have considered the rival submissions and also perused the relevant material on record. It is observed that various packing materials were procured by the assessee-company during the year under consideration from several manufacturers who were regularly manufacturing such material. It is also observed that even though the said packing material was manufactured by the concerned suppliers as per the specifications given by the assessee-company and even some printing was also done as per the assessee's requirement, the required raw material for the purpose of manufacturing the said packing material was purchased by the concerned suppliers on their own, As submitted on behalf of the assessee-company before the authorities below as well as before us, the concerned manufacturers had even paid sales-tax as well as excise duty on the material supplied to the assessee-company, wherever applicable. Thus, the ownership in the said material was entirely with the concerned manufacturers till its supply to the assessee-company, and the contract between the assessee-company and these manufacturers was that for supply of material and not for carrying out any particular work as envisaged in Section 194C. It was a clear case, of sale of goods by the said

suppliers to the assessee-company and this was evident from the fact that sales-tax as well as excise duty was paid by the concerned suppliers on the packing material supplied to the assessee-company, wherever applicable. As rightly pointed out by the learned counsel for the assessee, the CBDT itself in Clause 7(b) of its Circular No. 681 issued on 8th March, 1994, has clarified that where the contractor undertakes to supply any article or thing fabricated according to the specifications, the property in such article or thing passes to the purchaser only after such article or thing is delivered and the contract thus being for sale of such article or thing, would be outside the purview of Section 194C.

7. In the case of CIT v. Kumudam Publications (P) Ltd (supra), relied, upon by the learned Departmental Representative, the facts involved were different inasmuch as the printing of magazine was done by the concerned party for the assessee by using the material supplied by the assessee-publisher as per the terms and conditions between them and it was, therefore, held by the Hon'ble Madras High Court that the same amounted to works contract within the meaning of Section 194C. In the present case, as already observed, the material required for manufacture of packing material was procured by the concerned manufacturers on their own and, therefore, the decision of Hon'ble Madras High Court in the case of Kumudam Publications (P) Ltd. (supra) relied upon by the learned Departmental Representative, has no application to the present case. On the other hand, the decision of Pune Bench of Tribunal in the case of Wadilal Dairy International Ltd. (supra) cited by the learned counsel for the assessee is directly applicable to the facts of the case wherein, in the similar facts and circumstances, it was held by the Tribunal that purchase of packing material by the assessee for its products from various manufacturers which was manufactured according to the assessee's specifications did not involve any work contract, even if some printing was also done on the said material by the manufacturers as per the requirement of the assessee, the provisions of Section 194C thus were not applicable. As such, considering all the facts and circumstances of the case and keeping in view the aforesaid decision of the Tribunal in the case of Wadilal Dairy International Ltd. (supra) as well as Circular No. 681, dt. 8th March, 1994, issued by the CBDT, we hold that the learned CIT(A) was right in holding that the provisions of Section 194C were not. applicable in respect of payments made by the assessee to the suppliers of packing material requiring any deduction of tax. In that view of the matter, we uphold his impugned order on this issue and dismiss ground No. 1 of the Revenue's appeal.

8. The second issue which is raised in ground No. 2 of the Revenue's appeal relates to the failure of the assessee to deduct tax at source from payments made to M/s Indochem Techno Consultants for financial years 1995-96 to 1998-99 which have been held to be outside the ambit of Section 194J by the learned CIT(A).

9. The assessee entered into an agreement with M/s Indochem Techno Consultants to provide consultancy in connection with manufacture of medicines. As per the terms and conditions of the agreement with the consultant, the assessee was required to pay a fixed amount of professional charges to the consultant and reimbursement of car maintenance expenses . based on actuals. The assessee-company in accordance with the agreement made payments as professional charges and also reimbursed the car maintenance expenses during the relevant years. The AO was of the view that the reimbursement of the expenses were also a part of the professional fee paid to the

consultant and the same was covered under Section 194J of the Act and the company was liable to deduct TDS @ 5 per cent on all the reimbursements and payments made to professionals. Reliance was placed by the AO on question No. 30 of Board's Circular No. 715, dt. 8th Aug., 1995, which is reproduced below :

> "Q. No. 30. Whether the deduction of tax at source under Sections 194C and 194J has to be made out of the gross amount of the bill including reimbursements or excluding reimbursement for actual expenses ?
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> Ans. Sections. 194C and 194J refer to any sum paid obviously, reimbursements cannot be deducted out of the bill amount for the purpose of tax deduction at source."

In view of the above clarification, the AO held that the company has failed to deduct tax on the reimbursements made to M/s Indochem Techno Consultants and was treated to be assessee in default in respect of the tax along with interest under Section 201(1A) of the Act amounting to Rs. 13,150 and Rs. 6,090 for financial years 1995-96 to 1998-99. Before the learned CIT(A), it was explained by the assessee that an agreement was entered into by a consultancy agreement with M/s Indochem Techno Consultants Ltd. and in terms of the said agreement, it was to pay consultancy fee and also to provide a car to the consultants for the purpose of carrying out their functions. Referring to the provisions of Section 194J, it was pointed out that it is only the fee for rendering the technical/professional services which would be liable for deduction of tax at source and not any other amount which is not in the nature of fee paid by the assessee. Reliance was placed on behalf of the assessee-company to the Board's Circular No. 714, dt. 3rd Aug., 1995, wherein it was clarified in paragraph No. 2 that deduction of tax at source under Section 194J @ 5 per cent of the sum as income-tax has to be only on the income comprised of such sum. It was submitted that the reliance by the AO on reply to question No. 30 as per Circular No. 715, dt. 8th Aug., 1995, was misplaced since the said clarification applies only if there is a composite bill which does not differentiate between the reimbursement and other sum. It was pointed out that in the case of the assessee, there was no composite bill but separate bills had been raised for fee for technical services and reimbursement of actual expenses. It was, therefore, contended on behalf of the assessee that there being no income included in the amount of reimbursement which was on the basis of actual expenses incurred by the consultant on petrol and maintenance of the car, the same cannot be subject to TDS as part of gross bill under Section 194J. Convinced by the submissions made on behalf of the assessee-company, the learned CIT(A) found no justification in the action of the AO in treating it as assessee in default for the short deduction of tax on this count and also in charging interest under Section 201(1A) by observing as under:

> "I have considered the submissions of the assessee. As per the terms of the agreement, the consultant was provided with a car by the assessee who was to bear the maintenance cost of the same. The consultant was submitting separate bills for his consultancy charges and separate bills for car maintenance and petrol expenses to the assessee. The payment for maintenance of the car expenses provided by the assessee is, therefore, reimbursement of the actual expenses incurred by the consultant and cannot be included by way of fee for the technical services rendered

> by him. I agree with the contention of the Authorised Representative that reimbursement of actual expenses cannot have an element of income as mentioned in the Circular No. 715, dt. 3rd Aug., 1995, issued by the CBDT. The answer to question No. 30 mentioned in Circular No. 715 is with regard to submission of gross amount of bills including reimbursement. This only clarifies that reimbursement cannot be deducted out of the bill amount for the purpose of tax deduction at source. However, when separate bills are to be given for the professional/technical fee and reimbursement of actual expenses, then, in my view, provisions of Section 194J will apply only to the bills for professional/technical fee and not the separate bill for reimbursement of actual expenses. The action of the learned AO in determining a short deduction of tax on the amounts reimbursed on actual basis to the consultants for the respective financial years and charging of interest under Section 201(1A) of the Act was, therefore, not justified and is deleted."

10. The learned Departmental Representative strongly relied on the order of the AO in support of the Revenue's case on this issue. He submitted that the reimbursement of expenses as per the consultancy agreement entered into by the assessee-company with M/s Indochem Techno Consultants Ltd. was also part of the professional fees paid to the said consultant and the same, therefore, was covered by Section 194J making it obligatory for the assessee-company to deduct tax at source @ 5 per cent from such reimbursement.

11. The learned counsel for the assessee, on the other hand, strongly supported the impugned order of learned CIT(A) on this issue. He submitted that as per the consultancy agreement entered into by the assessee-company with M/s Indochem Techno. Consultants Ltd., separate bills for expenses actually incurred by the said consultant were raised on the assessee and since no element of profit was involved in the said bills, reimbursement of the same was not covered under Section 194J. He also submitted that tax on its income for all the years under consideration having been already paid by M/s Indochem Techno Consultants Ltd., the assessee could not be held liable for short deduction of tax, if any, as rightly held by the learned CIT(A).

12. After considering the rival submissions and perusing the relevant material on record, we find no infirmity in the impugned order of learned CIT(A) on this issue. It is observed that as agreed by and between the assessee-company and M/s Indochem Techno Consultants Ltd., a vehicle was to be provided by the assessee-company to the said consultant for attending to its work and thus, the assessee-company was to bear the vehicle expenses actually incurred by the said party. Bills for such expenses incurred by the said consultant were separately raised by them on the assessee-company in addition to bills for fees payable on account of technical services and since the amount of bills so raised was towards the actual expenses incurred by them, there was no element of any profit involved in the said bills. It was thus a clear case of reimbursement of actual expenses incurred by the assessee and the same, therefore, was not of the nature of payment covered by Section 194J requiring the assessee to deduct tax at source therefrom. The CBDT Circular No. 715, dt. 8th Aug., 1995, relied upon by the AO in support of his case on this issue was applicable only in the cases where bills are raised for the gross amount inclusive of professional fees as well as reimbursement of actual expenses and the same, therefore, was not applicable to the facts of the present case, where

bills were raised separately by the consultants for reimbursement of actual expenses incurred by them. As such, considering all the facts of the case, we are of the view that the provisions of Section 194J were not applicable to the reimbursement of actual expenses and the assessee-company was not liable to deduct tax at source from such reimbursement. In that view of the matter, we uphold the impugned order of learned CIT(A) on this issue and dismiss the relevant grounds of the Revenue's appeal.

13. The next issue raised by the Revenue in its appeals as well as by the assessee in its cross-objections relates to the determination of value of perquisite provided by the assessee-company to its director by providing accommodation in the form of a hotel room in financial year 1998-99.

14. The managing director of the assessee-company during the period 18th Jan., 1999 to 31st March, 1999, stayed in a hotel before he was provided with a suitable accommodation by the company. An amount of Rs. 12,26,643 was the bill for the hotel which was paid by the company in respect of the expenditure incurred. The assessee-company, however, included a perquisite value only to the extent of Rs. 74,397 on account of accommodation so provided to the managing director, being 20 per cent of the salary during the period of stay in the hotel. The AO found that the total hotel bill of Rs. 12,26,643 was comprising of room rent of Rs. 8,79,427 and a balance of Rs. 3,47,216 towards laundry expenses, telephone calls, restaurant bills, pub bills, flower shop, etc. According to him, the said perquisite was to be considered as rent-free accommodation provided to an employee by the employer and as per Rule 3(iii) of the IT Rules r/w Circular No, 374, dt. 14th Dec, 1983, he worked out its value at Rs. 7,01,685 on account of room rent paid by the assessee-company. The balance amount paid by the company amounting to Rs. 3,47,216 on account of other expenses was also treated by him as a perquisite as per Section 17(2) of the Act. The amount of additional perquisite thus was determined by him at Rs. 9,74,504 and a tax @ 30 per cent amounting to Rs. 2,92,351 was held to be recoverable from the assessee-company being short deducted at source along with the interest of Rs. 54,623 under Section 201(1A). Before the learned CIT(A), it was submitted on behalf of the assessee-company that in terms of the employment agreement, it was to provide accommodation to the managing director and not being able to arrange a suitable accommodation immediately, he was temporarily lodged in a hotel for a short period of two-and-half months till it could arrange a suitable accommodation for him. It was thus contended that lodging the managing director in the hotel was a necessity in the absence of a suitable accommodation on his arrival and he was shifted out of the hotel immediately once suitable accommodation was arranged. It was also contended that providing temporary accommodation in the hotel was under compelling circumstances and, therefore, the payment of hotel bills could not be considered as a perquisite in the hands of the employee by any stretch of imagination. In support of this contention, reliance was placed by the assessee on the decision of Tribunal, C-Bench, Mumbai, in the case of First Addl. NO v. R.V. Graafeillan (1990) 38 TTJ (Mumbai) 578, It was also submitted that the assessee-company still worked out the perquisite value @ 20 per cent of salary of managing director on its own as a matter of abundant caution despite there being no specific rules for valuation of such perquisite. The learned CIT(A) found some merits in the submission made on behalf of the assessee on this issue and accepting the same partly, modified the order of the AO accordingly by observing as under :

> "I have considered the submissions of the assessee. The managing director was lodged in the hotel from 18th Jan., 1999 to 31st March, 1999. He was subsequently allotted residential accommodation w.e.f. 1st April, 1999. The total bill was of Rs. 12,26,643 consisting of room rent of Rs. 8,79,427 and balance of Rs. 3,47,216 towards other expenses like laundry expenses, telephone, restaurant bills, pub bills, etc. The assessee has on its own taken the perquisite value @ 20 per cent of the salary of the managing director during the period of his stay in the hotel. The computation of perquisite value by the AO at Rs. 10,48,901 was not justified considering that the accommodation was to be provided on a temporary basis in the absence of suitable accommodation. There is nothing on record that the employee had wanted that he be lodged only in the five star hotel. In fact, he had shifted on 1st April, 1999, when required accommodation was allotted to him. The computation of perquisite value @ 20 per cent of the salary made by the assessee is reasonable as far as the expenses incurred on account of room rent is concerned. However, the amount paid towards laundry, telephone, restaurant, flower shop, etc. amounting to Rs. 3,47,216 is also inclusive of some element of personal expenses of the employee. The AO has added the total amount as perquisite under Section 17(2) of the Act which appears to be excessive. In my view, 25 per cent of the balance payment of Rs. 3,47,216 can be reasonably estimated towards personal expenses and be added as perquisite of the employee. The amount of short deduction of tax and interest thereon under Sections 201(1) and 201(1A) may be suitably modified by the AO."

15. The learned Departmental Representative relied on the order of the AO in support of the Revenue's case on this issue and specifically invited our attention to pp. 4 and 5 of the AO's order to point out the reasons given by the AO in justification of his action on this issue.

16. The learned counsel for the assessee, on the other hand, submitted that arrangement of stay for its managing director was made by the assessee-company in a hotel for temporary period till he was provided with a suitable accommodation and since this facility provided to him was in the nature of residential accommodation provided by the assessee-company to him, its perquisite value @ 20 per cent of the salary of the managing director during the period of his stay in the hotel was determined as per Rule 3(iii) of the IT Rules r/w Circular No. 374, dt. 14th Dec, 1983. He submitted that the amount of actual expenses incurred by the assessee-company for providing such residential accommodation to the managing director thus was not relevant for the purpose of determining the perquisite value and the AO was not justified in treating such actual expenses incurred by the assessee-company as perquisite value. He also submitted that the estimate of salary income of the managing director, in any case, was made by the assessee-company relying on the relevant rules as well as aforesaid circular issued by CBDT and the same being an honest and bona fide estimate, the assessee-company could not be treated as in default for short deduction of tax at source, if any, under Section 201(1). In support of the assessee's case on this issue, he relied on the decision of Bombay Bench of Tribunal in the case of Addl. ITO v. R.V. Graafeillan (supra), wherein it was held that where employee was made to stay in a five star hotel till suitable accommodation could ' be provided by the employer as per terms of employment, entire hotel expenses would not form value of perquisites.

17. In support of the assessee's cross-objection on this issue, he invited our attention to the details of expenses incurred by the managing director in connection with his stay in the hotel placed at p. 24 of his paper book. He pointed out that the majority of the said expenses were incurred in addition to room rent and taxes thereon, on laundry, telephone and food, and since the same were incidental to the stay of the managing director in the hotel, the learned CIT(A) was not Justified in treating 25 per cent thereof as personal expenses of the managing director on estimated basis being perquisite provided by the assessee-company.

18. We have considered the rival submissions and also perused the relevant material on record. It is observed that as per the terms of employment, the assessee-company was to provide a residential accommodation to its managing director and since a suitable residential accommodation was not available on his arrival in India, he was put in a five star hotel temporarily till such accommodation could be arranged. Thus, the arrangement made by the assessee-company for stay of its managing director in a hotel was clearly a substitute for a residential accommodation which was to be provided by it to him as per the terms of employment and value of this perquisite being in the nature of residential accommodation was to be ascertained as provided in specific Rule 3(iii) of IT Rules r/w Circular No. 374, dt. 14th Dec, 1983. A similar view has also been expressed by the Bombay Bench of Tribunal in the case of R. V. Gmaafeillan (supra) cited by the learned counsel for the assessee involving similar facts and circumstances wherein it was held that where employee was made to stay in a five star hotel till suitable accommodation could be provided by the employer as per the terms of employment, entire hotel expenses would not form value of perquisites. Moreover, the perquisite value of the arrangement made for stay of its managing director in a hotel was determined by the assessee-company in accordance with Rule 3(iii) r/w Circular No. 374, issued by CBDT on 14th Dec, 1983, taking into consideration that the arrangement for stay in hotel was akin to providing a rent-free accommodation to the managing director and since such valuation made by the assessee was fair and honest and was also based on bona fide working made for the purpose of deduction of tax at source, the requirements under Section 192 were duly complied by the assessee-company as held by Delhi Bench of Tribunal in the case of Dy. CIT v. HCL Infosystems Ltd. decided vide its order dt. 24th June, 2004, in ITA Nos. 4521 to 4528/Del/2000. As such, considering all the facts of the case, we are of the view that the perquisite value of the stay arrangement made by the assessee-company for its managing director in a hotel determined by the AO on the basis of actual hotel bill paid by it was not correct and the learned GIT(A) was fully justified in not upholding the same. Even the expenses of Rs. 3,47,216 incurred during the stay of managing director in a hotel were mainly on account of expenditure tax, luxury tax, laundry expenses, telephone and food, and the same being incidental to the stay of the managing director in a hotel, we are of the view that the same could not be considered as a separate perquisite. In that view of the matter, we hold that the learned CIT(A) was not justified in adding 25 per cent of such expenditure as perquisite provided by the assessee-company to its managing director in order to work out his salary income for the purpose of deduction of tax at source. His impugned order on this issue is, therefore, suitably modified and the AO is directed to accept the value of perquisite taken by the assessee on this count for estimating the salary for the purpose of deduction of tax at source. The assessee thus cannot be held responsible for short deduction of tax, if any, on this count under Section 201(1).

19. The next issue which is raised in the Revenue's appeals as well as assessee's cross-objections for all the years under consideration relates to the valuation of perquisite in respect of expenditure incurred on payment of salary to drivers.

20. The salary of the drivers paid by some of its employees including the directors was reimbursed by the assessee-company. Since the said drivers were not on the payroll of the assessee-company but were employed by the concerned employees, the AO held that the reimbursement of the drivers, salary to the employees was a perquisite as per Section 17(2) of the Act. Before the learned CIT(A), it was submitted that the assessee-company having undertaken to provide car with a driver to the concerned employees, the value of perquisite on account of driver's salary ought to have been worked out as per Rule 3 and not on the basis of amount reimbursed to the employees as done by the AO. The learned CIT(A) noted that as per Rule 3(iii)(c)(iv) of IT Rules, if the employee owns a motor car but the actual running and maintenance charges (including remuneration of the chauffer) are met or reimbursed to him by the employer, the value of the perquisite to the employee has to be determined as an amount which can reasonably be attributed to the user of the car by the employee for his personal purposes. Accordingly, he held that 50 per cent of the amount reimbursed could reasonably be attributed towards the personal user of the employees in the case of the assessee and directed the AO to recompute the perquisite value in the hands of the employees accordingly.

21. The learned Departmental Representative relied on the order of the AO in support of the Revenue's case on this issue, whereas the learned counsel for the assessee submitted that the drivers were provided to the concerned employees by the assessee-company as per the terms of employment and the value of perquisites on account of drivers' salary was liable to be determined as per r, 3(iii)(c)(ii). He submitted that the said drivers were not directly employed by the assessee-company just to avoid various obligations under different labour laws and merely because the same were shown to be in employment of the concerned employees and their salary was reimbursed by the assessee-company, the valuation of perquisites on this count could not be done differently than as provided in the aforesaid rule.

22. After considering the rival submissions and perusing the relevant material on record, it is observed that it was not a case of providing of drivers by the assessee-company to its employees since the said drivers were not directly employed by the assessee-company. On the other hand, the said drivers were in the employment of concerned employees and only the salary paid to them by the concerned employees was reimbursed by the assessee-company. The valuation of perquisites on this count, therefore, was liable to be determined as per Rule 3(iii)(c)(iv) as rightly done by the learned CIT(A) and not as per Rule 3(iii)(c)(ii) as contended by the learned counsel for the assessee. Even the action of learned CIT(A) in attributing 50 per cent of the salary reimbursed by the assessee-company to its employees towards personal use was fair and reasonable in the facts and circumstances of the case, and there is nothing on record to justify any interference with the same. As such, considering all the facts of the case, we find no infirmity in the impugned order of learned CIT(A) on this issue and upholding the same, we dismiss the relevant grounds of the Revenue's appeal as well as that of assessee's cross-objections.

23. The next issue which is raised by the assessee-company in its cross-objection for financial year 1998-99 relates to the determination of value of perquisites in respect of maintenance and hire charges of AC as well as repairs and renewals towards the leased accommodation provided to the managing director.

24. The assessee-company had provided a rent-free furnished accommodation to its managing director, Mr. Wolf Gang Haslinger, which was taken on rent during the financial year 1998-99. The company incurred an expenditure of Rs. 1,89,300 towards maintenance and hire charges of the AC provided in the said residential accommodation. The assessee-company also incurred an additional expenditure of Rs. 25,28,410 towards repairs and renewals of the said accommodation. The AO added an amount of Rs. 1,89,300 as perquisite value as per Rule 3(iii)(b)(ii) of IT Rules and also added Rs. 2,52,841 as perquisite value being 10 per cent of Rs. 25,28,410 while computing the salary income of the managing director. Accordingly, he worked out short deduction of tax to the extent of Rs. 1,32,642 and held the assessee to be in default on this count under Section 201(1) along with interest of Rs. 32,828 payable thereon under Section 201(1A). Before the learned CIT(A), it was submitted on behalf of the assessee-company that the expenditure incurred on maintenance and hire charges of AC as well as on account of repairs and maintenance to the residential accommodation of the assessee could not be treated as perquisite liable to be included in the salary of the managing director. It was also submitted that the said residential accommodation was occupied by its director only for a period of five months, i.e., from July, 1998 to November, 1998, and the entire amount incurred on repairs and renewals having been recovered by the assessee-company from the subsequent occupant, there was no case to treat the same as perquisite to the extent of 10 per cent provided to its managing director. The learned CIT(A) found no merits in the contention raised on behalf of the assessee-company and considering that the expenditure in question incurred by the assessee on account of repairs and maintenance of residential accommodation as well as of AC provided therein had resulted in the direct benefit to its managing director, he held that the AO was right in adding the perquisite value of the same in the hands of the managing director. He, however, found the alternative contention raised on behalf of the assessee-company to be acceptable and considering that the residential accommodation was occupied by the managing director only for a period of five months, he directed the AO to consider the perquisite value proportionately for a period of five months only instead of the whole year. Still aggrieved, the assessee-company has raised this issue in its cross-objection.

25. After considering the rival submissions and perusing the relevant material on record, it is observed that rent-free accommodation was provided by the assessee-company to its managing director as per the terms of his employment and, therefore, valuation of this perquisite provided by the assessee-company was governed by Rule 3(a)(iii) of IT Rules. As provided in the said rule, if a rent-free accommodation provided by the employer to his employee is furnished, the value of rent-free residential accommodation shall be the aggregate of the fair rental value of the accommodation arrived at as if the accommodation was not furnished and the fair rent for the furniture (including equipments and appliances such as AC, etc.) calculated at 10 per cent per annum of the original cost of such furniture or if such furniture was hired from a third party, the actual hire charges payable therefor. In the present case, the AC provided in the accommodation of managing director was taken on hire by the assessee-company from a third party and, therefore,

actual hire charges paid/payable for the said AC was liable to be included in the value of perquisite provided to the managing director on account of rent-free accommodation as rightly done by the AO and confirmed by learned CIT(A). Similarly, furniture and other incidental items were provided in the accommodation given by the assessee-company to its managing director costing Rs. 25,28,410 and value of this perquisite was to be calculated at 10 per cent per annum of the original cost of such furniture as specifically provided in Rule 3(a)(iii), irrespective of whether the cost so incurred on account of furniture by the assessee-company was subsequently recovered by it from the subsequent occupant. Keeping in view these specific provisions contained in Rule 3(a)(iii), we hold that the valuation of perquisite on account of providing AC and other furniture in the rent-free accommodation of managing director to the extent sustained by the learned CIT(A) was in accordance with law, especially the relevant Rules framed thereunder and there being no infirmity in his impugned order on this issue, we find no justifiable reason to interfere with the same. The same is, therefore, upheld, dismissing ground No. 2 of the assessee's cross-objection for financial year 1998-99 being CO. No. 268/Del/2004.

26. The next issue which is raised by the Revenue in all its appeals relates to the levy of interest under Section 201(1A) for all the years under consideration.

27. After considering the rival submissions and perusing the relevant material on record, it is observed that the learned CIT(A) has directed the AO vide Ms impugned order to allow consequential relief to the assessee in respect of levy of interest under Section 201(1A) holding that charging of interest unders. 201(1A) is consequential inasmuch as it was to be charged on the amount of tax finally determined as deducted short by the assessee. Before us, the learned Departmental Representative, however, has relied on the decision of Hon'ble Delhi High Court in the case of CIT v. Prem Nath Motors (P) Ltd (2002) 253 ITR 705 (SC) to contend that absence of liability for tax does not dilute the default of the assessee in deducting tax at source and the assessee, therefore, was liable to pay interest under Section 201(1A) having not properly deducted tax at source as required by the relevant provisions. He has also relied on the decision of Hon'ble Bombay High Court in the case of Bennet Coleman & Co. Ltd v. Mrs. V.P. Damle, ITO (1986) 157 ITR 812 (Bom), wherein it was held that interest under Section 201(1A) being mandatory, it could not be waived on the basis that default in deduction of tax at source was not intentional. It is, however, observed that the facts involved in these two decisions cited by the learned Departmental Representative are different from the facts of the present case inasmuch as relief in terms of liability fixed on him under Section 201(1) has not been allowed in appeals either by the learned CIT(A) or even by us in the foregoing portion of this order on the basis that there was no liability to tax in the case of concerned payees or that tax on the relevant income was duly paid by the concerned payees or that the default in deduction of tax at source was unintentional. On the other hand, such relief has been allowed to the assessee on the ground that he was not required to deduct tax at source from the relevant payments and this being so, he could not be held liable to pay any interest under Section 201(1A) to the extent of relief allowed in quantum because there was no short deduction of tax to that extent as alleged. It is pertinent to note here that the purpose of levy of interest under Section 201(1A) is to claim compensation on the amount which ought to have been deducted and deposited but has not been done. The liability to pay interest on the amount not deducted or deducted but not paid is directly related to the failure of the assessee to deduct or remit such

amount and if there is no such case of non-deduction or non-payment, interest under Section 201(1A) cannot be levied. We, therefore, find no infirmity in the impugned order of learned CIT(A) on this issue and upholding the same, we direct the AO to allow consequential relief to the assessee in the matter of levy of interest under Section 201(1A) depending upon the quantum of short deduction of tax finally determined after giving effect to the appellate orders. Accordingly, we dismiss the relevant grounds raised by the Revenue relating to this issue.

28. In the result, all the appeals of the Revenue as well as cross-objections of the assessee being CO. Nos. 266 and 267/Del/2004 are dismissed, whereas the cross-objection of the assessee for financial year 1998-99 being CO. No. 268/Del/2004 is partly allowed.