IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI

BEFORE SHRI PAWAN SINGH (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 932/MUM/2019
Assessment Year: 2013-14
&
ITA No. 933/MUM/2019
Assessment Year: 2014-15
&
ITA No. 934/MUM/2019
Assessment Year: 2015-16
&
ITA No. 935/MUM/2019
Assessment Year: 2016-17

Sodexo SVC India Pvt. Ltd., 503 & 504, 5th floor, B Wing, Hiranandani Fulcrum, Sahar Road, Andheri East, Mumbai.	Vs.	Assistant/Deputy Commissioner of Income Tax (TDS)-2(2), 717, Smt. K.G. Mittal Ayurvedic Hospital Bldg., Charni Road (W), Mumbai.
PAN No. AALCS9822Q		
Appellant		**Respondent**

Assessee by : Mr. F.B. Andhyarujina,
Mr. Gautam Thacker,
Mr. Yazdi P. Jijina, &
Ms. K.R. Daviervala, ARs

Revenue by : Mr. B.B. Rajendra Prasad, CIT-DR

Last Date of Hearing : 12/07/2019
Date of pronouncement: 07/10/2019

ORDER

PER N.K. PRADHAN, AM

The captioned appeals filed by the assessee are directed against the order of the Commissioner of Income Tax (Appeals)-60, Mumbai [in short

CIT(A)] and arise out of order u/s 201(1)/201(1A) of the Income Tax Act, 1961 (in short 'the Act'). As common issues are involved, we are proceeding to dispose off these appeals through a consolidated order for the sake of convenience. Facts being identical, we begin with the A.Y. 2013-14.

2. The grounds of appeal filed by the appellant/assessee read as under:

1. The Ld. CIT(A) erred in holding the Appellant to be an assessee in default for failing to deduct tax at source under Section 194C of the Act though the provisions of Section 194C of the Act do not apply to the facts of the present case and as such there is no obligation on the Appellant to deduct tax at source on the reimbursements made by it to its Affiliates.
2. The Ld. CIT(A), erred in law, by departing from the well-established principle of consistency particularly where, no demands have been raised and/or adverse orders have been passed on account of non-deduction of tax in respect of reimbursements made to the Appellant's Affiliates under section 194C of the Act, since inception of the Appellant Company.
3. The Ld. CIT(A) has erred in ignoring the observations contained in the order passed by the Hon'ble Supreme Court in the Appellant's own case and the guidelines issued by the Reserve Bank of India, governing the Appellant's business operations.
4. The Ld. CIT(A) erred in holding the Appellant to be an assessee in default for failing to deduct tax at source under section 194C of the Act on the reimbursements made by the Appellant to its Affiliates, even though:
    a. The Affiliates are not acting as agents of the Appellant and are not providing any services or supplying any goods pursuant to a "contract" with the Appellant;
    b. The Affiliates are not carrying out any "work" for the Appellant;
    c. The Appellant does not pay any "consideration" to the Affiliates;
    d. Section 194C of the Act does not apply to transactions in the nature of "reimbursements";

e. There is no contract to carry out any work between the appellant and the affiliates; and
f. The affiliates are not acting as "Contractor/Sub-Contractor" for the Appellant.

3. The assessee has also filed an additional ground of appeal No. 7 which is as under :

> "On the facts and in the circumstances of the case, and in law, the appellant submits that the Ld. CIT(A) grossly erred in treating the appellant as an assessee in default u/s 201/201(1A) and charging interest when the appellant denied its liability to be taxed at all."

4. As the above additional ground of appeal No. 7 is closely linked with the original grounds of appeal, we admit it for adjudication.

5. Briefly stated, the facts of the case are that the appellant is a private limited company registered under the Companies Act, 1956. It is authorized by the Reserve Bank of India (RBI) u/s 7 of the Payment & Settlement System Act, 2007 (in short 'PSS Act') to carry on the business of operating a semi-closed prepaid payment system. The appellant has been carrying on the said business since the past several years.

The appellant issues printed (paper) meal vouchers to Companies or other establishments (Customers) having large number of employees on their rolls who purchase food items from the affiliates of the appellant (eating joints/restaurants/merchant establishment) by using meal vouchers as valid payment thereof. The affiliate (the designated restaurant/merchant establishment) accepts the vouchers tendered by the employees of the Customer for the purchase of food items as a valid mode of payment. The affiliates, after accepting the vouchers, present the same to the appellant. The appellant calls it a reimbursement of the face value of

such vouchers. It is the contention of the appellant that the vouchers issued act as an alternative mode of payment and allow the employees to purchase food items, without paying for the same in cash.

On 21.01.2016, a survey u/s 133A (2A) of the Act was conducted by the Department to verify the compliance by the appellant to the provisions of Chapter XVIIB of the Act. A statement of Mr. Pramul Saxena, Chief Financial Officer of the appellant was also recorded by the Assessing Officer (AO) u/s 131 of the Act. Subsequently, in response to a query raised by the AO *vide* show cause notice dated 22.02.2016 to explain why it should not be treated as an assessee in-default for failing to deduct tax at source u/s 194C of the Act on the reimbursement of vouchers to various affiliates during the year, the assessee filed a reply *vide* letter dated 08.03.2016 explaining why the provisions of section 194C of the Act are not applicable to reimbursements made by the appellant to various affiliates.

However, the AO was not convinced with the said reply of the assessee and observed that (i) the appellant has not mentioned quantum of receipts and payments made in its P&L account attached with the audit report, (ii) no qualification statement has been made by the auditor in the notes to audit on why he opted to exclude receipts from the clients/customers and payments made to affiliates in its P&L account and audit report, (iii) the appellant is making TDS on certain payments made to one category of affiliates i.e. Caterers ; however no TDS is being made on payments made to other affiliates i.e. Restaurants, Supermarkets and Food Establishments, (iv) RBI gives license to operators of pre-paid instruments only to protect the public interest and to regulate the issue of pre-paid payment instruments in the country ; this license does not give blanket sanction to the appellant not to follow any of the provisions of the Income

Tax Act applicable to it, (v) in the case of the appellant, the money for issuance of pre-paid instruments is received from clients/customers who are mainly big corporates/firms who pay the money from their account and obtain the prepaid instruments from the appellant and give these instruments to their employees for actual use; for this the corporates/firms are getting deduction of expenditure u/s 17 of the Act, without attracting any tax on the expenditure made ; the employees use the appellant's coupons at different affiliates which are in agreement/contract with the appellant and obtain food and other articles, (vi) the ultimate beneficiary in the appellant's coupons is the employee of a corporate who is not paying money for the services used or who is not the client of the appellant and he is a completely third party who never comes in touch with the appellant; whereas in credit card/debit card, consumer is on the roles of a particular bank or financial institution and he reimburses the amount used by him through pre-paid instrument issued by his principal ; thus the relation is of principle to principal, whereas in the case of the appellant the relation is principal to agent and entire transaction is operated through contracts/agreements with corporate/firms on one hand and contracts/agreements with affiliates on the other, (vii) the clients/customers who are corporates/firms, who enter into contract/agreement with the appellant, who buy vouchers from the appellant for use of their employees make TDS u/s 194C on the payments made by them to the appellant ; however, the appellant is not making TDS on payments made by it to its affiliates, though it has entered into similar type of contract with them also, (viii) the entire scheme is operational only because of contract between the appellant and its customers/clients on one side and the appellant and its affiliates on the other side and payments by corporates/firms to the appellant and payments made by the appellant to

affiliates are covered by section 194C of the Act and hence claim made by the appellant that payments made by it to affiliates namely Restaurants/Supermarkets are not liable to TDS u/s 194C is not acceptable, (ix) the agreement of the appellant is not with employees, but with corporate/firm to whom these employees belong to; further payment to the appellant is made by corporate/firm from its current account not by employees from their own account which the appellant has claimed to be reimbursing on behalf of the employees under the alternate and PSS Act, (x) the appellant is not simply reimbursing, it is doing much more, like collecting service charges from affiliates, binding them with contract agreement, processing of claim forms of affiliates etc. and providing service to employees who are not directly connected with it, (xi) affiliates render service to the employees of the appellant's customers pursuant to the contract agreement signed with the appellant and the appellant is making payments to these affiliates for the services provided by them after deducting its commission/other charges; the assessee has tried to convert the issue of payment being made under contractual agreement into "an agreement" for the purpose of escaping from its liability of making TDS on such payments; (xii) all the affiliates have to do specific work before claiming reimbursement from the appellant; after processing of reimbursement claim by affiliates, amount payable is determined by the appellant and it is final and affiliates should also pay service charges and delivery charges to the appellant, which clearly proves that it is more than reimbursement and affiliates are acting as agents to the appellant in serving clients/customers of the appellant through contract arrangement made which falls under 194C and making the appellant liable to make TDS on all payments made to affiliates, (xiii) the transaction between the appellant and affiliates cannot be held as contract for sale of goods since

rights of ownership or title are not coming to either the appellant or corporate/firm, instead ownership/title on food and other articles are getting transferred to employees of corporate with whom neither the appellant nor affiliates are having contract, (xiv) the decision in the case of *Sodexo SVC India Pvt .Ltd. v. State of Maharashtra* 2016 (331) ELT 23 (SC) relied on by the appellant is distinguishable as the said decision has been given in the context of whether "Sodexo Meal Vouchers" can be treated as goods for the purpose of levy of octroi or local body tax, (xv) only those establishments who have entered into a contractual agreement with the appellant are eligible to render such services as affiliates of the appellant and are thereby liable to get paid by the appellant ; since the payment is being made pursuant to a contractual agreement between the appellant and its affiliates, the appellant is liable to deduct tax at source on such payments being made to affiliates, (xvi) as per RBI terms and conditions "the issuer shall maintain the details of the persons to whom such instruments have been issued and make available to same on demand. The issuer shall also ensure that full details of the ultimate beneficiary are obtained for furnishing to the regulator or Government, as and when required"; but no such details are maintained nor entered into books of accounts of the appellant, thereby violating RBI Guidelines, (xvii) the operation of the appellant with customers and affiliates is similar to that of Third Party Administrators of health insurance policy.

With the above observations, the AO treated the appellant as defaulter within the meaning of section 201(1) and directed the appellant to pay tax of Rs.32,82,40,000/- being tax not deducted at source u/s 194C and not deposited in the Government account u/s 201(1) and interest of Rs.13,91,32,320/- u/s 201(1A) of the Act.

6. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). Having examined the facts of the case and the contentions of the appellant, the Ld. CIT(A) observed that (i) in this business model, payments are received by the appellant-company by issuing of Sodexo vouchers to customer companies; the appellant in turn makes payment to affiliate companies after verification by redeeming the vouchers and these kind of transactions can be described as 'cash management service charges' which broadly refers to an area of finance involving a full range of advance products and services to efficiently process receivables and payables, (ii) it is apparent that if a payment is made by a person to any payment systems company authorized by RBI under sub-section (2) of section 4 of the PSS Act for any of the mentioned services or activity therein, no deduction of tax under Chapter XVII of the said Act shall be made on the payment, thus the payment made by the customer to the appellant-company is not covered by the notification ; however, the reverse is not true , (iii) when the payment is made by the appellant to its affiliates, then the said Notification is not applicable and does not come to the rescue of the appellant from the purview of TDS provisions (iv) the appellant is making payment to three types of affiliates namely Caterers, Restaurants and Supermarket for services rendered to holders of its Sodexo coupons, the appellant has paid to the Caterers on which TDS has been made and paid by the company; the appellant was not able to clearly differentiate as to why on this amount TDS has been made by them while for the remaining affiliates, it has failed to make TDS, (v) after comparing the nature of work of the two parties namely, the Caterers to whom tax deduction has been made and the other affiliates, there is no distinction discernible in the nature of services performed by the two entities, (vi) the activities described to be carried out by the affiliates are not at all carried out for or on behalf of Sodexo ; if the

said activities are not carried out by the affiliates, then it would be prejudicial to their interest as they would be disentitled to the reimbursement of the vouchers, if at the time of presentation of the same, the affiliate has not exercised due care to ensure authenticity/validity of the same, (vii) the real nature of the transaction is not 'expenses' which are being 'reimbursed', but a financial product which is being 'encashed' and which actually represents the income of the affiliate, (viii) the payment of money from escrow account to the affiliates misclassified as reimbursement of expenses is not a natural corollary as contemplated by the appellant but is to be seem as a procedural obligation ; in fact maintaining an escrow account and the credits/debits from this account is a procedural obligation prescribed by a regulatory authority, (ix) the amount which is received by the affiliate is a trading receipt which includes not only the expenses/costs but also the profit earned by the affiliate in the process of sale, (x) carrying out of such activities does constitute "work" as contemplated u/s 194C of the Act, so as to unambiguously attract the provisions of that section, (xi) the present case is not a simple example of purchase and sale of goods, rather the transaction takes place pursuant to and in terms of the written commercial contract made between the two parties ; even the terms and conditions of contract between the two parties at para numbers 4, 5, 6 and 14 of the agreement indicate specified duties of the Restaurants beyond normal course of their business, (xii) this is not a case of reimbursement as in the case of reimbursement, the full amount of the bill is paid by the party making the reimbursement ; however, in the present case the vouchers are reimbursed after deducting service charges, (xiii) if the accounting aspects of the transaction is examined, in case of reimbursement of expenses the amount paid by Sodexo should be the expenses incurred by the affiliates, however, the actual transaction entry is

that the amount paid by Sodexo to the various affiliates has been shown as receivables or a trading receipt on the income side ; in case of reimbursement of expenses, generally one party bills the other party the said amount which he has incurred as expenses also in their books of account and will receive the payment as reimbursement.

Observing as above, the Ld. CIT(A) held that since the payment is being made in pursuant to a contractual agreement between Sodexo and affiliates, all the three ingredients of section 194C of the Act viz., any sum paid, a work contract and contract between two parties are categorically present and therefore Sodexo was liable to deduct tax at source on such payments being made by it to its affiliates. Thus he confirmed the order u/s 201(1)/201(1A) treating Sodexo as an assessee in default for failing to deduct tax at source u/s 194C of the Act.

7. Before us, the Ld. counsels for the appellant submit that as per the RBI Guidelines formed in this regard, the appellant is required to maintain an escrow account with a scheduled commercial bank which is exclusively used for the purpose of operating the payment system. The money collected against the issuance of vouchers is to be compulsorily deposited in the escrow account directly by the customers and the same can only be used to reimburse the vouchers presented for reimbursement by the affiliates. It is stated that the appellant is not making "payment" to the affiliate for "any work" or "supply of labour" and it is merely reimbursing to the affiliate, the value of the coupons that they have collected from their customers in lieu of cash, as an alternate mode/system of payment. Referring to the decision in *Sodexo SVC India Pvt .Ltd*. (supra), it is stated that the question therein was whether Sodexo was liable to pay octroi/local body tax on the vouchers when they were 'sold' to the customers and the

decision was that Sodexo is only a facilitator and a medium between the affiliates and the customers and is a service provider. It is explained that the goods belong to the affiliates which are sold by them to the customers' employees on the basis of vouchers given by the customers to its employees and it is the affiliates who are getting the money for those goods and not the appellant, who only gets service charges for the services rendered both to the customer as well as the affiliates. It is stated that the contract between the assessee and the affiliate is a part of the requirement of prepaid payment instruments under the PSS Act and it has no connection with any work or service by the affiliate.

Stating that the payments are in the nature of reimbursements, the Ld. counsels refer to para 8.3 of the Master Circular on "Policy Guidelines in Issuance and Operation of Prepaid Payment Instruments in India" dated 01.07.2015 issued by RBI and argue that the appellant is specifically allowed to make "reimbursement" to its affiliates out of an escrow account maintained by the appellant under the scheme as laid out by RBI in the said Circular. It is explained that reimbursement of the value of the vouchers does not part take the nature of income in the hands of the payee/recipient and, therefore, no tax is deductible at source in respect thereof. The Ld. counsels point out that the Hon'ble Supreme Court in the case referred above concluded that the appellant is not making any payment to the affiliates and the only role played by the appellant in the whole transaction is reimbursement of the face value of the meal vouchers. It is explained that even if it is regarded that payment is made by the appellant, the same is for the purchase of food by the employees of the customer and not for any work performed and the appellant is only acting as a facilitator who discharges the obligation of the employees arising from the employees

purchasing food items from the affiliates. Referring to clause 24 of the agreement between the appellant and its customers, it is argued that the payment is made for the purchase of food items from the affiliate and not for the performance of any work. Further, referring to the CBDT Circular No. 715 dated 08.08.1995, it is stated that serving of food items/sale of eatables was not subject to TDS u/s 194C.

Relying on the decision in the case of *Sodexo SVC India P. Ltd*. (supra), the Ld. counsels submit that (i) the said vouchers are an 'alternate mode' of payment, being 'pre-paid payment instruments' under the PSS Act, (ii) the role played by the appellant was to facilitate 'reimbursement' of the face value of the vouchers presented to it by the affiliates, (iii) when the vouchers are redeemed, the appellant reimburses to the affiliate the face value of the voucher, (iv) the appellant is only a facilitator and a medium between the affiliates and customers, it is only the affiliates who are getting the money for the goods/food and not the appellant, who only gets service charges for the services rendered, both to the customers as well as the affiliates, (vi) the amount received by the appellant from its customers is only used for reimbursement of the face value of the vouchers and this amount is never accounted for nor used as income in the hands of the appellant; the said amount received by the appellant from its customers does not form part of its profit and loss account, because the same is not a part of its income; however, the aforesaid transactions are disclosed in the balance sheet of the appellant, (vii) the payments on issue of vouchers received from the appellant's customers are deposited into an escrow account from which reimbursements are made to the appellant's affiliates as per the mechanism laid down and regulated by RBI and therefore, no question of TDS can arise on such reimbursements, (viii) the appellant

would act only as a co-ordinating agent between the customer and the affiliate and the reimbursement of vouchers by the appellant to the affiliates would act as a valid discharge of the customers' obligation to pay the affiliates directly.

Stating that section 194C of the Act is not applicable at all in the facts of the present case, the Ld. counsels submit that (i) the appellant does not make any payment to the affiliates, the payment made for the purpose of food items is made by employees of the customers and the appellant only 'reimburses' the face value of the vouchers to the affiliates, (ii) there is no contract for 'work' between Sodexo and the affiliates as contemplated u/s 194C of the Act ; the affiliates neither do any work for the appellant nor supply any labour to the appellant and (iii) there is no element of income comprised in the reimbursement as the income for the affiliate has accrued at the point of time when the sale of food has taken place.

Further stating that the real character of the transaction is the facility by the customers as employers to their employees, the Ld. counsels explain that the customer makes payment to the appellant for the purchase of the meal vouchers and the value of the meal vouchers is a perquisite in the hands of the employees and accordingly, a part of salary of the employee and TDS in respect thereof is deductible u/s 192 of the Act by the employer. Thus it is stated that the appellant does not make payments to the affiliates but it is the employees that make such payment to the affiliates for the purchase of food items through meal vouchers as an alternative to making cash payment.

Concluding that there is no element of income arising from the reimbursement of the face value of the vouchers made by the appellant to

the affiliates, the Ld. counsel rely on the decision in *Vijay Ship Breaking Corporation v. CIT* [2009] 314 ITR 309 (SC), *GE India Technology Centre P. Ltd. v. CIT* [2010] 327 ITR 456 (SC), *DIT (Int. Tax.) v. A.P. Moller Maersk A/S* [2017] 392 ITR 186 (SC), *CIT v. Industrial Engineering Projects P. Ltd.* [1993] 202 ITR 1014 (Del), *CIT v. DLF Commercial Projects Corporation* [2015] 379 ITR 538 (Del), *ADIT (IT) v. Wizcraft International Entertainment P. Ltd*. [2011] 8 ITR (Trib) 334 (Mum) .

Further reliance is placed by the Ld. counsels on the decision in *East India Hotels Ltd. v. CBDT* (2010) 320 ITR 526 (Bom), *All Gujarat Federation of Tax Consultants v. CBDT* (1995) 214 ITR 276 (Guj), *Associated Cement Co. Ltd. v. CIT* (1993) 201 ITR 435 (SC) and *Birla Cement Works v. CBDT* (2001) 248 ITR 216 (SC).

8. On the other hand the Ld. Departmental Representative (DR) submits that in the instant case, the presentation of coupons to Sodexo and encashment thereon, by no means represent reimbursement of expenses; only those establishments who have entered into a contractual agreement with Sodexo are eligible to become affiliates of Sodexo and thereby liable to be paid by Sodexo ensuring the subsistence of the contract. It is argued by him that since the payment is being made in pursuance to a contractual agreement between Sodexo and affiliates, all the three ingredients of section 194C viz. any sum paid, a contract work and contract between two parties are specifically present and therefore, Sodexo was liable to deduct tax at source on such payments being made by it to the affiliates.

In support of his contentions that Sodexo was liable to make TDS, the Ld. DR relies on the decision in *Associated Cement Co. Ltd.* (supra) and the CBDT Circular No. 681 dated 08.03.1994.

Thus the Ld. DR submits that the order of the CIT(A) which is elaborate and based on facts may be confirmed.

9. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

As mentioned earlier, on 21.01.2016, a survey u/s 133A (2A) of the Act was conducted by the Department to verify the compliance by the appellant to the provisions of Chapter XVIIB of the Act. A statement of Mr. Pramul Saxena, Chief Financial Officer of the appellant was also recorded by the AO u/s 131 of the Act. Because of the findings in the survey, the order in earlier years will have no binding effect in the current year. In *Instalment Supply (Pvt.) Ltd. v. UoI*, AIR 1976 SC 53, it is observed by the Hon'ble Supreme Court that in tax matters, there is no question of *res judicata* because each year's assessment is final only for that year and does not govern later years.

9.1 As mentioned hereinbefore, the contentious issue here is whether the payments made by the appellant to its affiliates are 'reimbursement' or not. The appellant claims it as reimbursements, whereas the revenue disputes it. Therefore, it would be pertinent to examine below the co-ordinates of 'reimbursements'.

In *Bovis Lend Lease (I) P. Ltd. v. ITO* 127 TTJ 25 (Bang-Trib), it is observed that the following parameters are essential for a payment to be regarded as reimbursement:

- The actual liability to pay should be of the person who reimburses the money to the original payer.

- The liability should be clearly determined, it should not be an approximate or varying amount.
- The liability should have crystallized. In other words, the reason given that payments that were never required but were made just avoid a potential problem may not qualify.
- There should be a clear ascertainable relationship between the paying and reimbursing parties. Therefore, reimbursement by an unconnected person may not qualify.
- The payment should first be made by somebody whose liability it never was and the repayment should then be made to that person to square off the account.
- Three parties should exist in a case of reimbursement-a payer, a payee and a reimburser (i.e. the person reimbursing the amount of the payer).

Further it is well settled that the basic ingredient is that there is no profit element in the amount reimbursed.

9.2 We may mention here some examples of documents to be considered in the context of transactions involving 'reimbursements', which are listed below.

- Written agreement between the parties.
- Invoices or debit notes raised by the parties.
- Agreement entered by lead company with third parties and invoices raised by the third parties towards reimbursable expenses incurred by the lead company.

9.3 Having examined the materials available on record, we find that the parameters as mentioned at para 9.1 hereinabove have not been examined

by the AO or the Ld. CIT(A). Further, it is observed that the documents which could lead to it have not been filed completely by the appellant before the AO or the Ld. CIT(A). Therefore, we set aside the order of the Ld. CIT(A) and restore the matter to the file of the AO of make a *de novo* order after giving reasonable opportunity of being heard to the appellant. We direct the appellant to file the relevant documents/evidence before the AO. As the matter has been restored to the file of the AO, we are not adverting to the case laws relied on by both the sides.

10. Facts being identical, our decision for the AY 2013-14 applies *mutatis mutandis* to AYs 2014-15, 2015-16 and 2016-17.

11. In the result, the appeals are allowed for statistical purposes.

Order pronounced in the open Court on 07/10/2019.

Sd/-	Sd/-
(PAWAN SINGH)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 07/10/2019
Rahul Sharma Sr.P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai