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

BEFORE SHRI AMARJIT SINGH, JM AND SHRI S. RIFAUR RAHMAN, AM

आयकर अपील सं/ I.T.A. No.1402/Mum/2019
(**निर्धारण वर्ष** / Assessment Year: 2009-10)

ACIT (TDS)-2(2) Room No.717, K. G. Mittal Ayurvedic Hospital Bldg, Charni Road, West , Mumbai-400002.	**बनाम**/ Vs.	Sodexo SVC India Pvt. Ltd. Nesco Complex, Indabrator Building, W.E. Highway, Goregaon (E), Mumbai-400051.

CO. No.108/Mum/2021
(Arising out of ITA. No.1402/Mum/2019)
(**निर्धारण वर्ष** / Assessment Year: 2009-10)

Sodexo SVC India Pvt. Ltd. Nesco Complex, Indabrator Building, W.E. Highway, Goregaon (E), Mumbai-400051.	**बनाम**/ Vs.	ACIT (TDS)-2(2) Room No.717, K. G. Mittal Ayurvedic Hospital Bldg, Charni Road, West , Mumbai-400002.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AALCS9822Q		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Revenue by:	Shri Jasbir Chouhan
Assessee by:	Shri Gautam Thakkar & Shri Yazdi P. Jijina

सुनवाई की तारीख / Date of Hearing: 07/02/2022
घोषणा की तारीख /Date of Pronouncement: 06/04/2022

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The Revenue as well as assessee have filed the above mentioned appeal as well as cross-objection against the order dated 28.12.2018 passed

by the Commissioner of Income Tax (Appeals)-60, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2009-10.

ITA. NO.1402/Mum/2019

2. The revenue has filed the present appeal against the order dated 28.12.2018 passed by the Commissioner of Income Tax (Appeals)-60 Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2009-10

3. The revenue has raised the following grounds: -

> *"1. Whether on the facts and in the circumstances of the case and in law, the CIT(A) was justified in holding that the order passed u/s 201(1)/201(1A) was time barred.*
>
> *2. Whether on the on the facts and in the circumstances of the case and in law, the CIT(A) was justified in applying the old provision of 201(3)(i), prior to the amendment made by Finance (No.2) Act of 2014 effective from 1st October, 2014, without appreciating that this is a machinery/procedural provision and the law existing as on the date when the impugned order was passed i.e. 21st March, 2016, along could be made applicable."*

4. The brief facts of the case are that a survey u/s 133A(2A) was conducted in the case of M/s. Sodexo SVC India Pvt. Ltd, on 21.01.2016 for the purpose of verification of compliance of the provisions of the Chapter XVII B of the I. T. Act, 1961. Sodexo was engaged in the business of issuing Meal/Gift Voucher/Smart cards to its Clients/Customers who wish to make benefit in kind for their employees. The employees used these vouchers/smart cards at different affiliates of the Sodexo across the India.

Affiliates are different business entities such as Restaurants, Eating Places, Caterers, Super Markets and other establishments who have made agreements with M/s. Sodexo SVC India Pvt. Ltd., for accepting the vouchers/cards of the company as payments for goods or services provided by them. During the course of survey action, the books of account of the M/s. Sodexo and modus operandi of the business activity carried out by it was examined in depth. It is seen that the Sodexo enters into agreement with its clients/Customers for issuance of vouchers/cards for which it charges in addition to face value, certain amount as service charges and delivery charges. The entire amount paid by clients/customers was deposited in escrow account of M/s Sodexo kept with RBI as per the guidelines of payment and settlement systems act 2007 and revised consolidated guidelines 2014. The clients distribute such voucher/cards to their employees. Sodexo was having large number of affiliates across India such as Restaurants, Eating Places, Caterers, Supermarkets etc. Sodexo enters into agreement with all such affiliates. These affiliates provide goods or services to the users who are employees of its customers, on presentation of voucher/cards issued by it to its customers. Sodexo after deducting certain amounts as service charges and applicable taxes makes payment to such affiliates as per the terms and conditions of agreement made with them.

5. During the course of survey, Sodexo was requested to furnish details of payments made by it to affiliates from F.Y - 2008-09 to till date. The said details have been provided by it during the course of survey/post survey proceedings. It was seen that M s Sodexo had not mentioned quantum of receipt from client & payments made in their P & L account

attached with Audit report. No quantification statement by auditor has been made in the notes to Audit regarding why he opt to exclude receipts from client's customers and payments made to affiliates in his P & L account and Audit report. This especially was not giving true picture of the accounts of the assessee to the tax authorities and thereby presenting distorted picture of its entire scale of operations. It is seen that Sodexo is deducting TDS on certain payments made to one category of Affiliates ie. Caterers. However, no TDS was being deducted on payments made to other Affiliates i.e. Restaurants, Supermarkets & Food establishments specifically. The show cause notice was issued and after the reply of the assessee, it was observed that the assessee did not deduct the tax at source to the tune of Rs.17,07,25,056/- u/s 194C and failed to deposit the Government Account u/s 201(1) and interest of Rs.15,45,06,175/- u/s 201(1A), hence, the demand was raised and the notice was issued u/s 156 of the Act. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who allowed the claim of the assessee, therefore, the revenues has filed the present appeal before us.

6. We have heard the argument advanced by the Ld. Representative of the parties and perused the record. At the very outset, the Ld. Representative of the revenue has argued that the CIT(A) has wrongly hold that the appeal is time barred, therefore, the finding of the CIT(A) is not justifiable. However, on the other hand, the Ld. Representative of the assessee has argued that the issue is duly covered by the decision of the Hon'ble ITAT in the assessee's own case bearing ITA. No.980/Mum/2018 for the A.Y.2012-13 dated 28.03.2018. The copy of the order dated 28.03.2018 is on the file in which the relevant finding has been given by the

Hon'ble ITAT in the assessee's own case (supra) and para no. 5 to 11 which is hereby reproduced as under: -

> *"5. The learned Sr. Counsel, Shri J.D. Mistry, appearing for the assessee reiterated the submissions made before the first appellate authority. Drawing our attention to the pre–amended provision of sub– section (3) of section 201, he submitted that in case of the assessee statements in terms of section 200 having been filed, the order under section 201 has to be passed before expiry of two years from the end of relevant financial year wherein the statements were filed. He submitted, the Departmental Authorities have not disputed the fact that the assessee has filed its quarterly statement of TDS within the time prescribed under section 200 of the Act. Therefore, the assessee will be covered by clause (i) of section (3) of section 201 as it existed prior to its amendment by Finance Act, 2014. Learned Sr. Counsel submitted, by virtue of amendment to sub–section (3) of section 201 by Finance Act, 2014, the earlier provisions as contained under sub– section (3) was substituted by a new provision as per which the limitation period was extended in all cases to before expiry of seven years from the end of financial year wherein payments were made. However, he submitted, the amended sub–section (3) of section 201 of the Act was made effective from 1st October 2014. The learned Sr. Counsel submitted, by the time the amendment to sub–section (3) of section 201 was effected by Finance Act, 2014, the limitation period as per the pre–amended provisions has already expired in case of the assessee. Therefore, the Assessing Officer could not have assumed jurisdiction for issuing a notice under section 201(1) and 201(1A). The learned Sr. Counsel submitted, the impugned order of the Assessing Officer passed under section 201(1) and 201(1A) being*

barred by limitation has to be declared as null and void. In support of his contentions, the learned Sr. Counsel relied upon the following decisions: –

i) Tata Teleservice v/s Union of India and Anr., [2016] 385 ITR 497 (Guj.);

ii) Troikaa Pharmaceuticals Ltd. v/s Union of India, [2016] SCC Online (Guj.) 4788;

iii) CIT v/s Vatika Township Pvt. Ltd., [2014] 367 ITR 466 (SC);

iv) Reliance Jute and Industries Ltd. v/s CIT, [1980] 1 SCC 139;

v) CIT v/s Shah Sadiq & Sons, [1987] 3 SCC 516 (SC).

6. Learned Departmental Representative strongly relied upon the observations of the first appellate authority.

7. We have heard rival submissions and perused materials available on record in the light of the decisions cited. So far as the factual aspect of the issue is concerned, there is no dispute that in terms of section 200(3), the assessee has filed statements of TDS before the Department within the prescribed time. In fact, in the submissions made by the assessee as reproduced in Para–5.2 of the impugned order of the learned Commissioner (Appeals), the fact of filing of TDS statements by the assessee has been clearly brought out. Therefore, we have to proceed on the basis that in assessee's case, the statements of TDS have been filed. Keeping the aforesaid factual position in view it is necessary to examine the relevant statutory provisions. Section 201 which lays down the consequences of failure to deduct tax at source or having deducted not remitted to the Government account, in

its original form, did not provide any time limit for passing the order under sub–section (1) of section 201. Looking at the dispute arising out of proceedings being taken up and completed after lapse of substantial time in the absence of a time limit, the legislature through Finance Act, 2009, introduced sub– section (3) to section 201 providing limitation period of two years for passing the order under section 201(1) from the end of the financial year in which statement of TDS is filed by the deductor and in a case where no statement is filed the limitation was extended to before expiry of four years from the end of financial year in which the payment was made or credit given. The aforesaid amendment was made effective from 1st April 2010. Subsequently, by Finance Act, 2012, sub–section (3) of section 201 was again amended with retrospective effect from 1st April 2010. The aforesaid amended provision reads as under:–

"(3) No order shall be made under sub–section (1) deeming a person to be an assessee in default for failure to deduct the whole or any part of the tax from a person resident in India, at any time after the expiry of –

(i) two years from the end of the financial year in which the statement is filed in a case where the statement referred to in section 200 has been filed;

(ii) six years from the end of the financial year in which payment is made or credit is given, in any other case: Provided that such order for a financial year commencing on or before the 1st day of April 2007 may be passed at any time on or before the 31st day of March 2011."

8. As could be seen from a reading of the aforesaid provision, the only change which was effected from the earlier provision was the limitation period of four years in case of a deductor not filing TDS statement was extended to six years from four years. Whereas, in case of a person / deductor filing TDS statement, the limitation period of two years remained unchanged. The aforesaid sub–section (3) of section 201 was again amended by Finance Act, 2014, w.e.f. 1st October 2014 by substituting the earlier provision with the following:–

"(3) No order shall be made under sub–section (1) deeming a person to be an assessee in default for failure to deduct the whole or any part of the tax from a person resident in India, at any time after the expiry of seven years from the end of the financial year in which payment is made or credit is given."

9. Thus, as could be seen from the aforesaid amended provision a uniform limitation period of seven years from the end of relevant financial year wherein payments made or credit given was made applicable. The issue before us is, whether the un–amended sub–section (3) which existed before introduction of amended sub–section (3) by Finance Act, 2014, will apply to assessee's case or not. It is the case of the assessee that, since, clause (i) of sub–section (3) of section 201 is applicable to the assessee and the limitation period of two years has expired by the time the provision was amended by Finance Act, 2014, the extended period of limitation of seven years as per the amended provision will not apply. Whereas, it is the case of the Department that the amended sub–section (3) brought into the statute by Finance Act, 2014, will apply retrospectively, hence, the impugned

order passed by the Assessing Officer within the period of seven years is valid. It is a fact on record that by the time the amended provisions of sub–section (3) was introduced by Finance Act, 2014, the limitation period of two years as per clause (i) of sub– section (3) of section 201 (the un–amended provision) has already expired. The learned Commissioner (Appeals) has applied the amended provision of sub–section (3) of section 201 by referring to the objects for making such amendment and on the reasoning that the said provision being a machinery provision will apply retrospectively. However, on a careful perusal of the objects for introduction of the amended provision of sub–section (3), we do not find any material to hold that the legislature intended to bring such amendment with retrospective effect. If the legislature intended to apply the amended provision of sub–section (3) retrospectively it would definitely have provided such retrospective effect expressing in clear terms while making such amendment. This view gets support from the fact that while amending sub–section (3) of section 201 by Finance Act, 2012, by extending the period of limitation under sub–clause (ii) to six years, the legislature has given it retrospective effect from 1st April 2010. Since, no such retrospective effect was given by the legislature while amending sub–section (3) by Finance Act, 2014, it has to be construed that the legislature intended the amendment made to sub–section (3) to take effect from 1st October 2014, only and not prior to that. The Hon'ble Supreme Court in Vatika Township Pvt. Ltd. (supra) while examining the principle concerning retrospectivity of an amendment brought to the statutory provisions has observed that unless a contrary intention appears, a legislation is presumed not to be intended to have retrospective operation. The idea behind the rule is that a current law

should govern current activities. Law passed today cannot apply to the events of the past. The Hon'ble Court observed, legislations which modified accrued rights or which impose obligations or imposes new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect. It was observed, if a provision is not for the benefit of a community, but, imposes some burden or liability the presumption would be it will apply prospectively. The rule against retrospective operation is a fundamental rule of law that no statute shall be construed to have retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. Similar view has been expressed in the case of Reliance Jute and Industries Ltd. (supra) as well as Shah Sadiq & Sons (supra). In case of Tata Teleservices (supra), which is directly on the issue of retrospective application of the amended sub–section (3) of section 201, the Hon'ble Gujarat High Court, after extensively dealing on the issue of retrospective applicability of the provisions and applying the principles laid down by the Hon'ble Supreme Court in a number of cases, held as under:–

"15.00. Considering the law laid down by the Hon'ble Supreme Court in the aforesaid decisions, to the facts of the case on hand and more particularly considering the fact that while amending section 201 by Finance Act, 2014, it has been specifically mentioned that the same shall be applicable w.e.f. 1/10/2014 and even considering the fact that proceedings for F.Y. 2007-08 and 2008-09 had become time barred and/or for the aforesaid financial years, limitation under section 201(3)(i) of the Act had already expired on 31/3/2011 and 31/3/2012, respectively, much prior to the amendment in section 201 as amended

by Finance Act, 2014 and therefore, as such a right has been accrued in favour of the assessee and considering the fact that wherever legislature wanted to give retrospective effect so specifically provided while amending section 201(3) (ii) of the Act as was amended by Finance Act, 2012 with retrospective effect from 1/4/2010, it is to be held that section 201(3), as amended by Finance Act No.2 of 2014 shall not be applicable retrospectively and therefore, no order under section 201(i) of the Act can be passed for which limitation had already expired prior to amended section 201(3) as amended by Finance Act No.2 of 2014. Under the circumstances, the impugned notices / summonses cannot be sustained and the same deserve to be quashed and set aside and writ of prohibition, as prayed for, deserves to be granted." 10. Following the aforesaid decision of the Hon'ble Gujarat High Court in Troykaa Pharmaceuticals Ltd. (supra) again expressed the same view.

"7. Examining the facts of the present case in the light of the principles enunciated in the above decision, the present case relates to financial year 2008-2009. The petitioner had filed statements as required under section 200 of the Act. The limitation for initiating proceedings under section 201(1) of the Act would, therefore, be governed by section 201(3)(i) of the Act as it stood at the relevant time which provided for a period of limitation of two years from the end of the financial year in which statement was filed in a case where the statement referred to in section 200 has been filed. The limitation for initiating action under section 201(1) of the Act, therefore, elapsed on 31st March, 2012 whereas the amendment in section 201 of the Act as amended by Finance Act No. 2 of 2014 came into force with effect from 28th May, 2012. The impugned notice, therefore, is clearly

barred by limitation and, therefore, cannot be sustained. For the detailed reasons recorded in the judgment and order dated 5th February, 2016 rendered in the case of Tata Teleservices v. Union of India (supra), this petition also deserves to be allowed."

11. No contrary decision has been brought to our notice by the learned Departmental Representative. Therefore, considering the principle laid down by the Hon'ble Supreme Court in the decisions as well as the ratio laid down by the Hon'ble Gujarat High Court in the decisions referred to above which are directly on the issue, we hold that the order passed under section 201(1) and 201(1A) having been passed after expiry of two years from the financial year wherein the TDS statements were filed by the assessee under section 200 of the Act, is barred by limitation, hence, has to be declared as null and void."

7. Since the issue has duly been covered by the Hon'ble ITAT in the assessee's own case bearing ITA. No.980/Mum/2018 for the A.Y.2012-13 dated 28.03.2018, therefore, the finding of the CIT(A) is quite correct which is not liable to be interfered with at his appellate stage. Accordingly, we decide this issue in favour of the assessee against the revenue.

In the result, appeal filed by the revenue is hereby dismissed.

C.O.108/Mum/2021

8. The assessee has filed the cross-objection against the order dated 28.12.2018 passed by the Commissioner of Income Tax (Appeals)-60 Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2009-10.

9. The assessee has raised the following cross-objection: -

"1. The Learned Commissioner of Income-Tax (Appeals) erred in upholding the Order passed under section 201(1)/201(1A) of Income-Tax Act, 1961 (the "Act") holding the Respondent liable to deduct tax under section 194C of the Act in respect of transactions undertaken between the Respondent and its Affiliates.

2. The Learned Commissioner of Income-Tax (Appeals) ought to have appreciated that 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 Respondent to deduct tax at source.

3. The Learned Commissioner of income-Tax (Appeals) erred in holding that the Respondent had failed to deduct tax at source under Section 194C of the Act, even though:

a. The Affiliates are not acting as agents of the Respondent and are not providing services or supplying goods pursuant to a contract with the Respondent;

b. The Affiliates are not carrying out any "work" for the Respondent;

c. The Respondent does not pay any "consideration" to the Affiliates;

d. There is no contract to carry out any work between the Respondent and its Affiliates; and

e. The Affiliates are not acting as "Contractors/ Sub-contractors" for the Respondent.

4. The Learned Commissioner of Income-Tax (Appeals) has erred in ignoring the observations contained in the Order passed by the Hon'ble Supreme Court in the Respondent's own case and

Guidelines/Master Directions issued by the Reserve Bank of India, governing the Respondent's business operations.

5. All the aforesaid Cross Objections are taken without prejudice to one another.

6. The Respondent craves leave to add, amend, alter or delete and/or modify the above Cross Objections before or during the course of hearing."

10. Since the appeal of the revenue bearing ITA. No.1402/Mum/2019 has been ordered to be dismissed being covered by the decision of the Hon'ble ITAT in the assessee's own case bearing ITA. Nos. 932 to 935/Mum/2019 dated 15.12.2021, and the CIT(A) has decided the matter of controversy on the basis of the decision of the Hon'ble ITAT(supra) therefore there is no need to decide these issues being it only would be academic in nature.

11. In the result, the appeal filed by the revenue is hereby dismissed and the cross-objection of the assessee is hereby dismissed.

Order pronounced in the open court on 06/04/2022.

Sd/-	Sd/-
(S. RIFAUR RAHMAN)	**(AMARJIT SINGH)**
लेखा सदस्य / **ACCOUNTANT MEMBER**	**न्यायिक सदस्य/JUDICIAL MEMBER**

मुंबई Mumbai दिनांक Dated : 06/04/2022.
Vijay Pal Singh (Sr.PS)

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**