



Sodexo Food Solutions India Private Limited
Assessment Years-2002-03, 2003-04 & 2009-10

आयकर अपीलिय अधिकरण “ई” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“E” BENCH, MUMBAI

जोगिन्दर सिंह, न्यायिक सदस्य एवं
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।

BEFORE SHRI JOGINDER SINGH, JM AND
SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./I.T.A. Nos.304 & 305/Mum/2014
(निर्धारणवर्ष / Assessment Years: 2002-03 & 2003-04)

Sodexo Food Solutions India Private Limited (Formerly known as Radhakrishna Hospitality Services Private Limited) Gemstar Commercial Complex 1 st Floor, Ramchandra Lane Extn. Kanchpada, Malad(W) Mumbai-400 064	बनाम/ Vs.	Deputy Commissioner of Income Tax Range-8(3) 2 nd Floor, Aaykar Bhavan M.K.Road, Mumbai -400 020
स्थायी लेखासं./जी आइ आर सं./PAN/GIR No. AAACR-2547-Q		
(आपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

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आयकर अपील सं./I.T.A. No.7042/Mum/2012
(निर्धारणवर्ष / Assessment Year: 2009-10)

Sodexo Food Solutions India Private Limited (Formerly known as Radhakrishna Hospitality Services Private Limited) Gemstar Commercial Complex 1 st Floor, Ramchandra Lane Extn. Kanchpada, Malad(W) Mumbai-400 064	बनाम/ Vs.	Assistant Commissioner of Income Tax -8(3) Room No.217, 2 nd Floor Aaykar Bhavan, M.K.Road Mumbai -400 020
स्थायी लेखासं./जी आइ आर सं./PAN/GIR No. AAACR-2547-Q		
(आपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

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आयकर अपील सं./I.T.A. No.6864/Mum/2012
(निर्धारणवर्ष / Assessment Year: 2009-10)

Assistant Commissioner of Income Tax -8(3) Room No.217, 2 nd Floor Aaykar Bhavan, M.K.Road	बनाम/ Vs.	Sodexo Food Solutions India Private Limited (Formerly known as Radhakrishna Hospitality Services Private Limited) Gemstar Commercial Complex 1 st Floor, Ramchandra Lane Extn.
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Sodexo Food Solutions India Private Limited
Assessment Years-2002-03, 2003-04 & 2009-10

Mumbai -400 020		Kanchpada, Malad(W) Mumbai-400 064
स्थायी लेखासं./जीआइआरसं./PAN/GIR No. AAACR-2547-Q		
(□ पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	J.D.Mistry, Ld.AR
Revenue by	:	V.Justin, Ld. DR

सुनवाई की तारीख/ Date of Hearing	:	15/05/2018
घोषणा की तारीख / Date of Pronouncement	:	08/08/2018

आदेश / ORDER

Per Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeals by assessee as well as revenue for different Assessment Years [AY] contest separate order of Ld. First Appellate Authority. Since common issues are involved, the same are being disposed-off by way of this common order for the sake of convenience & brevity.

Assessee's Appeal for AY 2002-03 ITA No. 304/Mum/2014

2.1 The captioned appeal contest the order of Ld. Commissioner of Income Tax (Appeals)-18, Mumbai [CIT(A)], *Appeal No.CIT(A)-18/ITO-8(3)(1)/IT-140&141/2010-11 dated 05/11/2013 qua* confirmation of disallowance of certain *deferred revenue expenditure* of Rs.3.88 Lacs as claimed by the assessee. The assessment for impugned AY was framed by *Ld. Deputy Commissioner of Income Tax, Circle -8(3), Mumbai [AO] u/s 143(3) read with section 254 of the Income Tax Act, 1961* on 31/12/2010. The assessee is in second round of appeal before us since the matter in the first round was remitted back by the Tribunal to the file



Sodexo Food Solutions India Private Limited
Assessment Years-2002-03, 2003-04 & 2009-10

of Ld. AO for re-adjudication vide ITA No.1880/Mum/2008 dated 30/07/2009. The sole ground raised in the appeal reads as under: -

- 1.1 *On the facts and in the circumstances of the case and in law, the Learned Commissioner of Income-tax (Appeals) [hereinafter referred to as CIT(A)] erred in holding, on an ad-hoc basis that a sum of Rs.10,00,000/- out of the total amount spend by the appellant on repairs, renovation and re-furbishing the premises to make it suitable for the purposes of its business be treated as Revenue Expenditure and balance sum of Rs.3,88,000/- be treated as Capital Expenditure.*
- 1.2 *The learned CIT(A) and the learned Assessing Officer failed to appreciate the explanation/details furnished by the appellant in respect of deduction for above referred expenditure and the rule of law laid down by various High Courts in this behalf.*

The appellant prays that the disallowance made by treating the said expenditure as Capital Expenditure be deleted and the total income of the appellant be reduced accordingly.

2.2 To appreciate the facts, the findings & conclusion of the Tribunal in first round is extracted below for ready reference:-

8. In the P&L account filed along with its return of income, a sum of Rs.3,91,699/- was debited by the assessee company on account of deferred revenue expenditure. In the computation of total income, a deduction of Rs.15,66,797/- however, was claimed by it on account of deferred revenue expenditure. While justifying the claim for the said deduction, it was submitted on behalf of the assessee company before the A.O. that catering services were being provided by it to the clients through the space made available in the client's premises. It was submitted that in order to make the said space suitable for the purpose, expenditure was incurred on renovation and refurbishing of the area by way of changing the flooring, interiors, fittings etc. including construction of platforms and closets. It was contended that out of the expenditure so incurred, the amount spent on acquisition of requisite equipment's as well as movable furniture was duly capitalized whereas the expenditure incurred on renovation and refurbishing had been debited to deferred revenue expenditure account. It was contended that as assessee company was not the owner of the concerned premises and it had only a right to usage thereof for a specified period, the expenditure incurred on renovation and refurbishing was not treated as capital expenditure but treated as deferred revenue expenditure in the books of account. It was contended that in so far as the computation of total income was concerned, the same, however, was claimed as deduction entirely in the year under consideration being of revenue nature. It was also pointed out that as per the terms and conditions of the relevant agreement, all property embedded td earth and improvements and installations made therein was to become the property of the licensor and the assessee company was not even entitled for any compensation in respect thereof. Relying on various judicial pronouncements, the deferred revenue expenditure incurred on refurbishing and renovation of the space in the premises belonging to other parties was claimed to be revenue expenditure fully deductible while computing its business income by the assessee company.



Sodexo Food Solutions India Private Limited
Assessment Years-2002-03, 2003-04 & 2009-10

9. The A.O. did not accept the contentions raised on behalf of the assessee before him and rejecting the same, he proceeded to hold that the assessee company itself having treated the expenditure in question as deferred revenue expenditure, the same was allowable only to the extent of Rs. 3,91,699/- being the amount debited in the P&L account. The matter was carried before the Ld. CIT(A) who required the assessee company to explain as to why Explanation to section 32(1) should not be invoked to treat the expenditure in question incurred on renovation and refurbishing of the premises as capital expenditure. In reply, it was submitted on behalf of the assessee company before the Ld. CIT(A) that Explanation to Section 32(1) was not applicable to the expenditure in question incurred by it having regard to its very nature. It was also contended that the said Explanation has been introduced to give benefit of depreciation to the assessee taking premises on lease or rent and the same therefore could not be invoked to treat any expenditure of capital nature which was otherwise of revenue in nature. The Ld. CIT(A) did not find merit in the contention of the assessee. According to him, the expenditure in question incurred by the assessee company and treated by it as deferred revenue expenditure in the books of account was clearly covered by Explanation to section 32(1) and the same therefore was rightly treated by the A.O. as of capital nature. He, however, held that the said expenditure to the extent of Rs. 1,78,797/- being incurred by the assessee company for repairs of chairs and tables was liable to be treated as revenue expenditure as claimed by the assessee company. He therefore allowed the assessee's claim to that extent and disallowed the balance amount of Rs. 13,88,000/- treating the same as capital expenditure.

10. The learned counsel for the assessee, at the very outset, invited our attention to the details of expenditure in question placed at page No.20 to 23 of his paper book. He also invited our attention to the sample for lease placed at page No. 71 to 80 of his paper book to point out that the assessee company as lessee was not to make any structural addition or alteration to the demised premises. As further pointed by him, the assessee was also required to put fully, mechanized kitchen equipments as well as furniture in the dining space and also to invest in food counters and other related infrastructure in the dining space. He submitted that the investment so, made by the assessee company on items which could be taken away was duly capitalized by it in the books of account. The remaining amount, however, was claimed as revenue expenditure since no enduring benefit as a result of the same in the capital filed had accrued to the assessee company.

11. The Ld. D.R., on the other hand, submitted that at least one of the agreements entered into by the assessee company was for 9 years and keeping in view the said period of lease as well as the nature of expenditure in question incurred by the assessee company, Explanation to section 32(1)(i) was clearly applicable in its case. He contended that the authorities below therefore were fully justified in treating the expenditure in question as of capital nature by invoking the said Explanation. He also contended by referring to the relevant details of the expenditure furnished by the assessee that some of the items acquired by the assessee are of such a nature that they could be taken away after expiry of lease. He submitted that the said expenditure in any case had resulted in enduring benefit to the assessee and the same therefore was of capital nature as rightly treated by the Revenue Authorities.

12. In the rejoinder, the learned counsel for the assessee submitted that even though the period of lease was 9 years in one case as pointed by the Ld. D.R., the



Sodexo Food Solutions India Private Limited
Assessment Years-2002-03, 2003-04 & 2009-10

said lease as finally terminated within 3 years. He also submitted that the assessee only can judge as to whether any item of furniture could be removed or not. He further submitted that Explanation to section 32(1) does not make any expenditure to be of capital nature which Otherwise is of revenue nature.

13. We have considered the rival submissions and also perused the relevant material on record. It is observed that the expenditure in question incurred by the assessee mainly on renovation and refurnishing of the premises taken on lease was treated by the A.O. as capital expenditure relying entirely on the accounting treatment given by the assessee company to the said expenditure as, deferred, revenue expenditure., it is a well settled position that the accounting treatment is not conclusive to. decide the, nature of expenditure whether capital or revenue and the same has to be ascertained by examining the details of such expenditure and by applying the various guidelines laid down in several judicial pronouncements. In so far the reliance of the Ld. CIT(A) on Explanation 1 to section 32(1) while confirming the disallowance is concerned, we agree with the contention raised by the learned counsel for the assessee that any expenditure which is otherwise is of revenue nature cannot be treated as capital expenditure by applying the said Explanation and there is no such intention either explicit or even implicit in the provisions of the said Explanation inserted in the statute w.e.f. 01.04.89. The intention of the legislature to introduce the same is very clear that if any capital expenditure is incurred by the assessee for the purpose of business or profession on the building taken on lease, he shall be treated as deemed owner thereof in order to make him satisfy the condition of ownership for the purpose of claiming depreciation.

14. The First and foremost issue that is required to be decided thus is whether, the expenditure in question is basically of capital nature or revenue nature and the same has to be essentially decided irrespective of whether the assessee is the owner or tenant of the building. As already observed, the details of the referred expenditure for this purpose are required to be examined and the nature thereof is to be ascertained on such examination applying the settled legal principles on the issue. It appears that this exercise, however, has not been done either by the A.O. or by the Ld. CIT(A) specifically as is evident from their respective orders. We therefore deem it fair and proper and in the interest of justice to restore the matter to the file of the A.O. for deciding the same afresh by undertaking such exercise. It is observe that the A.O. shall afford proper and sufficient opportunity of being heard to the assessee in the matter. Ground No.3 of assessee's appeal is accordingly treated as allowed for statistical purposes.

2.3 As evident from quantum assessment order dated 31/12/2010 in the set aside proceedings, the expenditure of Rs.13.88 Lacs as claimed by the assessee as revenue expenditure has again been treated as capital expenditure against which depreciation @10% has been allowed to the assessee. Finally, a net addition of Rs.12,49,200/- has been made in the hands of the assessee. Aggrieved, the assessee contested the



same without any success before Ld. CIT(A) vide impugned order dated 05/11/2013 where Ld. CIT(A), after considering the factual matrix and remand report furnished by Ld. AO, has concluded the matter in the following manner:-

From the perusal of the remand report and submissions of the appellant, it is observed that the deferred revenue expenditure was incurred by the appellant on civil & structural works including fencing & grill work water-proofing, purchase of tiles, purchase of granite, ceiling, painting etc. The expenditure was also incurred on purchase of furniture & fitting, air-conditioners, gas-linings, electrical equipment, aluminium door partitions and other electrical items purchased. The first objection of the appellant is that it was a rented premises and it has not got any enduring benefit, therefore, the expenditure may be treated as of revenue nature. To deal with this objection of the AR, it is held that the question of ownership of the premises is not relevant but the nature of expenditure has to be seen. It is true that the whole expenditure is not of capital nature because the civil work & electrical repair etc. cannot be treated as capital expenditure. But the purchase of air-conditioner, furniture, fittings & electrical items etc. are definitely of capital expenditure. To strengthen this view reliance is placed on the decision of hon'ble Madras High Court in case of CIT Vs. Madura Coats 205 Taxman 357, wherein it was held that extensive repair/renovation carried out by the assessee on rented building being capital in nature could not be allowed u/s 37(1) of the I.T.Act. Similarly, hon'ble Mumbai Tribunal in case of Living Room Designers Vs. ITO 34 SOT 34 has held that the assessee has taken a shop on lease & license basis and incurred a total expenditure of Rs.12,51,352/- for renovation of shop and claimed it as revenue expenditure. However, the A.O. has treated it as capital expenditure. The order of the A.O. was confirmed by CIT(A) and the tribunal has upheld the order of the CIT(A). From the perusal of the details submitted before the A.O. and before me, it is observed that the whole expenditure is not of capital nature because, the repairs and maintenance like painting, polishing, water-proofing, electrical repairs etc. are of the nature of revenue expenditure but purchase of tiles, granite, aluminium doors, air-conditioners, furniture fitting, gas-line etc. are naturally are of the nature of capital expenditure. The purchase of air-conditioner, computers, furniture fittings, kitchen equipments cannot be held as the expenditure of revenue nature. Neither the assessee has separated these items nor the A.O. has done this exercise to bifurcate the items of revenue nature and expenditure nature, therefore, it is fair to estimate this expenditure on the basis of details filed keeping in view the details submitted it is held that Rs.10,00,000/- in A.Y. 2002-13 and Rs.3,00,000/- in A.Y.2003-04 is the expenditure of revenue nature which is to be allowed to the appellant. The balance amount is held as capital expenditure, therefore, the A.O. is directed to re-compute the depreciation allowed and allow the relief accordingly. Ground of appeal is partly allowed.

Aggrieved the assessee is in further appeal before us. It has been submitted before us that the revenue is not in further appeal against the relief provided by Ld. CIT(A).



2.4 The Ld. Senior Counsel, *Shri J.D.Mistry* drew our attention to the fact that assessee was engaged in providing *catering / canteen services* to various entities in the impugned AY and was operating from the premises / space provided by these entities and was not the owner of the premises. With the support of documents placed in the *paper-book*, it has been submitted that the impugned expenditure has been incurred to facilitate business operations. Reliance has been placed on several judicial pronouncements to support the submissions. Per *Contra*, Ld. Departmental Representative, *Shri V.Justin*, submitted that the stand of Ld. CIT(A) was fair on factual matrix since expenditure incurred by the assessee were composite in nature.

3.1 We have carefully heard the rival contentions and perused relevant material on record including cited case laws. The undisputed fact is that the assessee is not the owner of the premises for which such expenditure has been incurred by the assessee. Secondly, the genuineness of the expenditure has not been doubted by the revenue rather the dispute is related to the fact that whether the impugned expenditure was allowable to the assessee at one go as revenue expenditure or it was capital expenditure eligible for depreciation claim in the impugned AY. At the outset, it is noted that the entries in the books of accounts are not conclusive as to the true character of the expenditure and each claim has to be examined keeping in view the nature of expenditure and with reference to the statutory provisions. Further, there is no concept of *deferred revenue expenditure* under Income Tax Act. The expenditure is either capital expenditure which entitles the assessee to claim depreciation there-against or revenue expenditure allowable at



one go in the relevant year irrespective of the fact that the benefit therefrom could accrue to the assessee over a number of years. In the above backdrop, we proceed to dispose-off the appeals.

3.2 The material on record reveal that the impugned expenditure has been incurred by the assessee for its project / site situated at *Tidal park-Chennai, L&T Infocity-Hyderabad & Fortis Heart Institute-Mohali* the lease period of which ranges between 3 to 9 years. As evident from details of expenditure placed on *page numbers 99 to 101*, the expenditure primarily pertains to *construction of working slabs / counters for various purposes, teakwood partitions, stainless steel shutters, pipelines, purchase of tables, chairs, centrifugal blowers and fresh air inlets, duct fabrication, S.S.Hoods, POP ceilings, electrical works, water connections, paintings etc & various other items of similar nature*. A bare perusal of nature of impugned expenditure reveal that the same were essential to facilitate carrying out of catering / canteen services at the leased premises and formed part and parcel of assessee's trading operations and constitute an integral part of profit earning process of assessee's business. No new asset on capital account came into existence and there was no enlargement of profit making apparatus. Although the benefit of the stated expenditure may have been derived by the assessee for more than one year but as already noted, there is no concept of *deferred revenue expenditure* under the statute and therefore, once the expenditure is found to be revenue in nature, the same is allowable to the assessee in the year of incurrence thereof. Therefore, the action of Ld. first appellate authority in bifurcating the same in an *ad hoc* manner was not justified. Consequently, the impugned



expenditure shall be allowable to the assessee as revenue expenditure; the depreciation allowed against the same in the quantum assessment order shall stand reversed. The Ld. AO is directed to verify the fact that the deferred expenditure as claimed by the assessee in subsequent years has been disallowed in the computation of income for those years. The assessee is directed to provide requisite documentary evidences in this regard. The assessee's appeal stands allowed in terms of our above order.

Assessee's Appeal for AY 2003-04, ITA No. 305/Mum/2014

4. In the captioned appeal for AY 2003-04, the assessee is similarly aggrieved by disallowance of *deferred revenue expenditure* to the extent of Rs.69,91,986/-. In this year, the assessee has incurred expenditure for its site situated at *ITPL-Bangalore & Mumbai Central, IRCTC*, the lease period of which ranges between 3 to 9 years. The order of Ld. first appellate authority is common order for AY 2002-03 & 2003-04. The details of expenditure as placed on *page numbers 86 & 87* reveal that the nature of expenditure is similar as in earlier AY. The factual matrix being the same, taking the same stand, we concur with the stand of assessee in this regard and allow the claim of the assessee on similar lines. The Ld. AO is directed to allow the impugned expenditure as revenue expenditure; depreciation allowed against the same in the quantum assessment order shall stand reversed. The Ld. AO is directed to verify the fact that *deferred revenue expenditure* debited in the subsequent year has been disallowed in the computation of income for those years, the requisite documentary evidences of which shall be



provided by the assessee. The appeal stands allowed in terms of our above order.

Cross Appeals for AY 2009-10

5.1 The cross appeals for AY 2009-10 contest the order of Ld. Commissioner of Income Tax (Appeals)-18, Mumbai [CIT(A)], Appeal No.CIT(A)-18/ACIT-8(3)/IT-171/2011-12 dated 31/08/2012. The assessee has been assessed u/s 143(3) at Rs.617.17 Lacs after certain additions / disallowance as against returned income of Rs.426.13 Lacs *e-filed* by the assessee on 12/07/2010. The following additions / disallowances made in the quantum assessment order are the subject matter of cross appeals:-

No.	Nature of Additions	Amount (Rs.)	Remarks
1.	Disallowance u/s 14A read with Rule 8D	10,73,908/-	Partly Allowed by Ld. CIT(A)
2.	Disallowance u/s 37(1)	18,00,000/-	Dismissed by Ld. CIT(A)
3.	Advances Written-off	1,15,52,740/-	Allowed by Ld. CIT(A)
4.	Disallowance u/s 40(a)(ia)	30,27,131/-	Allowed by Ld. CIT(A)

The assessee is aggrieved by disallowance u/s 37(1) as confirmed by Ld. CIT(A) whereas the revenue is aggrieved by relief provided to the assessee. The assessee, by way of, additional ground of appeal, has contested the stand of Ld. CIT(A) in confirming partial disallowance u/s 14A on the premise that no exempt income has been earned by the assessee during the impugned AY and therefore the disallowance u/s 14A was not warranted.

5.2 The registry has noted that the appeal of the assessee is delayed by 17 days. The director of the assessee company by way of sworn affidavit dated 20/01/2014 has pleaded for condonation of delay.



Keeping in view the quantum of delay, we condone the same and proceed to hear the appeal on merits.

6.1 The brief facts leading to additions / disallowances are that during assessment proceedings, it was noted that the assessee had made investments in certain securities which called for disallowance u/s 14A. The Ld. AO opined that disallowance was called for in all situations irrespective of the *factum* of actual earning of exempt income. Accordingly, applying Rule 8D, Ld. AO computed aggregated disallowance of Rs.10.73 Lacs on account of interest expenditure and administrative expenses.

6.2 Upon perusal of *Tax Audit Report*, it was noted that the assessee incurred an expenditure of Rs.18 Lacs as penalty towards contravention of *Foreign Exchange Management Act, 1999* and therefore the same in the opinion of Ld. AO, being penal in nature, could not be allowed to the assessee in terms of explanation to Section 37(1).

6.3 Upon perusal of financial statements, it was noted that the assessee wrote-off advances of Rs.115.52 Lacs which were disallowed for want of proper justification / explanation thereof.

6.4 The last addition pertains to disallowance for want of compliance of *Tax Deduction at Source [TDS]* provisions. Upon perusal of *Tax Audit Report*, it was noted that there was a delay in payment of *TDS* on amount of Rs.9,35,581/- and therefore the same was not allowable to the assessee in terms of Section 40(a)(ia). Another addition of Rs.20,91,550/- was made u/s 40(a)(ia) for short deduction of *TDS* against *contractual / professional / rental payments* made by the assessee during impugned AY.



Sodexo Food Solutions India Private Limited
Assessment Years-2002-03, 2003-04 & 2009-10

7. Aggrieved, the assessee contested the same with partial success before Ld. CIT(A) vide impugned order dated 31/08/2012 where partial relief was granted by Ld. first appellate authority against disallowance made u/s 14A by directing the Ld. AO to pick up correct figures of interest expenditure. The disallowance u/s 37(1) read with explanation thereof was confirmed by Ld. CIT(A) whereas addition on account of advances written-off was deleted by placing reliance on certain judicial pronouncements. The disallowance made u/s 40(a)(ia) was deleted by making following observations:-

5.2. I have considered the submissions of the Ld. Counsel and it is noted that as far as the disallowance of Rs.9,35,581/- is concerned, the same is squarely covered by the decision of Hon'ble ITAT Mumbai in the case of Shri Piyush C. Mehta vs. ACIT (2012) 52 SOT 27 (AT). Since the related tax deducted at source has duly been paid by the appellant before the due date for filing the return of the income u/s 139(1) of the I.T. Act, no disallowance can be made u/s 40(a)(ia) of the I.T. Act. Hence, the disallowance made by the A.O. is hereby deleted.

Similarly, the disallowance u/s 40(a)(ia) of the I.T. Act is to be made for failure to deduct tax at source and not for short fall of deduction. The matter is squarely covered by the following decisions: -

- (a) Dy. CIT vs. Chandabhoy Jassobhoy (Mum)*
- (b) Dy. CIT vs. S.K. Tekriwal – (Kolkatta)*
- (c) Nitin M. Pancamiya vs. Addl. CIT – (2012) 73 DTR (Mum) (Trib) 202*

Hence, the disallowance/addition made by the A.O. of Rs.20,91,550/- for short fall is hereby deleted. Thus, this ground of appeal is allowed.

Aggrieved, the assessee as well as revenue is in cross appeal before us.

8. The Ld. Senior Counsel submitted that no exempt income has been earned by the assessee during the impugned AY and therefore, no disallowance u/s 14A is called for in the circumstances in terms of various judicial pronouncements on the issue. The disallowance made u/s 37(1) has been contested on factual matrix by drawing our attention to the fact that the penalty was in the nature of *compounding fees* which was paid to a *Government Agency* and hence, there was no illegality in the payment as such and therefore the deduction thereof was allowable



Sodexo Food Solutions India Private Limited
Assessment Years-2002-03, 2003-04 & 2009-10

to the assessee. Per *Contra*, Ld. Departmental Representative [DR] controverted the same and submitted that the payment was penal in nature which was for infraction of law and therefore, the same could not be allowed to the assessee in terms of explanation to Section 37(1). Regarding issues raised in revenue's appeal, it was submitted that the assessee failed to provide the requisite details / information before Ld. AO with respect to *advances written-off* and therefore, Ld. CIT(A) erred in providing relief to the assessee. Regarding short deduction of TDS u/s 40(a)(ia), reliance has been placed on the judgment of Hon'ble Kerala High Court rendered in *CIT Vs. PVS Memorial Hospital Ltd. [ITA No. 16 of 2014 dated 20/07/2015]*.

9. We have carefully heard the rival contentions and perused relevant material on record. So far as the disallowance u/s 14A is concerned, it is undisputed fact that the assessee has not earned any exempt dividend income during the impugned AY and the same is squarely covered by the following judicial pronouncements where it has been held that no disallowance u/s 14A is called for in case no income has been earned by the assessee during the year under question:-

No.	Case Law	Judicial Authority	Citation
1.	<i>CIT Vs. Holcim India P. Ltd.</i>	Hon'ble Delhi High Court	111 DTR 158
2.	<i>Cheminvest Ltd Vs CIT</i>	Hon'ble Delhi High Court	378 ITR 33
3.	<i>PCIT Vs IL&FS Energy Dev. Co. Ltd.</i>	Hon'ble Delhi High Court	84 Taxmann.com 186
4.	<i>PCIT Vs Empire Package Pvt. Ltd.</i>	Hon'ble Punjab & Haryana High Court	81 Taxmann.com 108
5.	<i>CIT Vs Lakhani Marketing Inc.</i>	Hon'ble Punjab & Haryana High Court	2015 4 ITR-OL 246
6.	<i>CIT Vs Hero Cycles Ltd</i>	Hon'ble Punjab & Haryana High Court	323 ITR 518
7.	<i>CIT Vs. Winsome Textiles Ind. Ltd.</i>	Hon'ble Punjab & Haryana High Court	319 ITR 204
8.	<i>CIT Vs Corrtch Energy Pvt Ltd</i>	Hon'ble Gujarat High Court	223 Taxmann.com 130

The revenue is unable to bring on record any contrary judgment to controvert the same. In view of the catena of judgment of higher judicial



authorities in favor of the assessee, respectfully following the same, we conclude that since no exempt income was earned by the assessee during the impugned AY, no disallowance u/s 14A was called for and therefore the same is deleted. Consequently, the additional ground raised by the assessee stands allowed which makes revenue's *ground number- 1 infructuous*. Now, we take up other grounds raised in revenue's appeal.

10. We find that addition on account of advances written-off has been made by Ld. AO for want of requisite information / documentary evidences. The main grievance of the revenue is that the assessee has failed to adduce proper explanation / justification to make this claim and Ld. CIT(A), without appreciating the factual matrix, erred in providing relief to the assessee. Upon perusal of documents placed in the *paper-book*, we find that the assessee had already filed the summary of these advances written-off to Ld. AO by way of letter dated 27/12/2011. The perusal of the same, *prima facie*, reveals that the assessee has written-off deposits as well as certain advances in the books of accounts. However, the justification / basis of the same or the circumstances under which these have been written-off is not clear from the record, In principle, while approving the submissions that the business losses written-off in ordinary course of business were allowable to assessee as business loss, we remit the matter back to the file of Ld. AO for re-adjudication thereof in the light of submissions made before us. The assessee, in turn, is directed to substantiate the same including demonstrating the justification / basis of writing-off the same in the



impugned AY. This ground of revenue's appeal stand allowed for statistical purposes.

11.1 So far as disallowance u/s 40(a)(ia) is concerned, we find that this disallowance has been made on two account i.e. late payment of TDS and short deduction of TDS. So far as the late payment of TDS is concerned, we find that the matter stood covered in assessee's favour by the judgment of Hon'ble Delhi High Court rendered in *CIT Vs. Naresh Kumar [362 ITR 256]*. It is evident from perusal of *Tax Audit Report* that although the TDS has been deposited by the assessee beyond due date but it is well before the due date of filing of return of income by the assessee. The facts of the issue are squarely covered by the ratio of cited decision of Hon'ble Delhi High Court where it has been held that the provisions of Section 40(a)(ia) were to be interpreted liberally and equitably keeping in mind the object and purpose behind the same so that the assessee do not suffer unintended and deleterious consequences and therefore the amendment to Section 40(a)(ia) as made by Finance Act, 2010 was retrospective in nature and therefore the amount of TDS which is deposited late but before due date of filing of return of income enables the assessee to claim the deduction of the expenditure in the concerned year itself. Respectfully following the same, we confirm the stand of Ld. CIT(A) in this regard.

11.2 So far as the disallowance on account of short deduction of TDS is concerned, we find that this Tribunal in *Dish TV India Ltd. Vs ACIT [86 Taxmann.com 177]*, after considering the conflicting decisions of various judicial authorities, concluded the matter in the following manner:-

15. We heard the rival submissions and gone through the orders of the tax authorities below. We noted that in both the cases the assessee was of the opinion that tax had to be deducted



Sodexo Food Solutions India Private Limited
Assessment Years-2002-03, 2003-04 & 2009-10

under section 194C @2% but the Revenue was of the view that tax has to be deducted under section 194J @10%. Therefore, the AO applied provisions of Section 40(a)(ia) and made the disallowance in respect of both the expenditures. Before us the learned D.R. relied on the decision of the Hon'ble Kerala High Court in the case of CIT v. P.V.S. Memorial Hospital Ltd. [2015] 60 taxmann.com 69/234 Taxman 46/[2016] 380 ITR 284 (Ker.) copy of which was placed before us in which it was held that deduction under a wrong provisions of the law will not save an assessee from section 40(a)(ia), i.e. where the tax was deductible under section 194J but was actually deducted under section 194C, such a deduction would not meet the requirements of section 40(a)(ia). We noted that prior to this decision the Hon'ble Calcutta High Court in the case of CIT v. S.K. Tekriwal [2014] 361 ITR 432/46 taxmann.com 444 (Cal.) vide order dated 3rd December, 2014 taken a view by which the Hon'ble High Court dismissed the appeal of the Revenue against the order of the Tribunal by holding that where tax was deducted by the assessee, though under a bona fide wrong impression under wrong provisions, the provisions of Section 40(a)(ia) could not be invoked and if there was any shortfall due to any difference of opinion as to the taxability of any item or the nature of payments falling under various tax deduction at source provisions, the assessee could be declared to be an assessee in default under section 201 but no disallowance could be made invoking the provisions of Section 40(a)(ia). The said decision of the Hon'ble Calcutta High Court has not been referred to before the Hon'ble Kerala High Court and the Kerala High Court, therefore, did not consider the decision of the Calcutta High Court. This Tribunal in the case of CIT v. Zuben J. Gandevia [IT Appeal No. 3357 (Mum.) of 2014] dated 1st February, 2016 had the occasion to consider the binding nature of both the decisions and ultimately under para 8 of its order held as under: —

"8. Before us the Ld. Counsel has pointed out that there is a divergent view also taken by the Hon'ble Kerala High Court in the case of P V M Memorial Hospital (supra). But such a decision may not have a persuasive value as it is quite a trite law that if there are two conflicting decisions of non- Hon'ble Jurisdictional High Courts, then the decision in favour of the assessee should be taken. We agree with such a contention raised by the assessee that, if there are two conflicting decisions and in absence of any Hon'ble Jurisdictional High Court, decision one favourable to the assessee should be preferred and this proposition has been long back settled by the Hon'ble Supreme Court in the case of Vegetable Products Ltd. (supra). Thus, we hold that, no disallowance under section 40(a)(ia) should be made on short deduction of tax under different or wrong provision of the section."

Similarly, Visakhapatnam Bench of this Tribunal in the case of P.S.R. Associate v. ACIT [IT Appeal No. 345 (Viz) of 2013, dated 6-1-2016] vide order dated 6th January, 2016 had also an occasion to consider both the decisions of Hon'ble Calcutta High Court as well as that of Hon'ble Kerala High Court on the same issue and ultimately under paras 10 & 11 of its order held as under: —

"10. The Departmental Representative relied upon the Hon'ble Kerala High Court judgment in the case of M/s. P.V.S. Memorial Hospital Ltd. (supra) and argued that the provisions of section 40(a)(ia) is applicable even for short deduction of TDS. The Hon'ble Kerala High Court has upheld the disallowance of expenditure under sec. 40(a)(ia) of the Act, for short deduction of TDS. With due respect to the Hon'ble Kerala High Court, we prefer to follow the judgment referred by the Authorized Representative of the assessee in the case of S.K. Tekriwal (supra), for the reason that when there are two reasonable constructions are possible on similar issue i.e. one in favour of the assessee and another in favour of the Revenue, the decision in favour of the assessee should be followed as held by the Hon'ble Supreme Court in the case of CIT v. Vegetable Products Ltd. [1973] 88 ITR 192.

11. Considering the facts and circumstances of the case and also applying the ratio of the Hon'ble Calcutta High Court judgment in the case of S.K. Tekriwal (supra), we are of the opinion that the CIT(A) rightly deleted the addition made under sec. 40(a)(ia) of the Act. In



Sodexo Food Solutions India Private Limited
Assessment Years-2002-03, 2003-04 & 2009-10

the present case on hand, the assessee has deducted TDS and deposited the same with the Central Govt. account as prescribed under the Act. The allegation of the A.O. is that the assessee failed to deduct TDS under appropriate provisions of the Act. Therefore, we are of the view that the provisions of sec. 40(a)(ia) of the Act is applicable, in case there is a failure on the part of the assessee to deduct TDS and remit the same to the government account. There is nothing in the said section to treat inter alia that the assessee is defaulter where there is shortfall in deduction of TDS. If there is any shortfall due to any difference of opinion as to the taxability of any item or the nature of payments falling under the various TDS provisions, the assessee can be declared to be an assessee in default under sec. 201 of the Act and no disallowance can be made by invoking the provisions of sec. 40(a)(ia) of the Act. Therefore, we do not find any error or infirmity in the CIT(A)'s order, hence, we inclined to uphold the order of the CIT(A) and reject the ground raised by the Revenue."

16. *No contrary decision of this Tribunal or of the Hon'ble Jurisdictional High Court or Hon'ble Supreme Court was placed before us. We, therefore, are bound to follow the decision of the Coordinate Bench. Therefore, we do not find any infirmity or illegality in the order of the CIT(A) in holding that provisions of Section 40(a)(ia) will not be applicable in the case of the assessee as there is nothing in the section to treat the assessee as defaulter where there is shortfall in deduction of TDS. We, therefore, affirm the CIT(A) and dismiss the grounds taken by the Revenue in both the appeals.*

Respectfully following the same, we confirm the stand of Ld. CIT(A). Accordingly, this ground of revenue's appeal stand dismissed. Finally, the revenue's appeal stand partly allowed for statistical purposes.

12.1 Now, we take up the remaining ground in assessee's appeal which is concerned with claim u/s 37(1) for Rs.18 Lacs. Facts as emanating from the records are that the assessee paid aforesaid sum of Rs.18 Lacs to *Reserve Bank of India [RBI]* as *compounding fees* under the provisions of *Foreign Exchange Management Act, 1999 [FEMA]*. The assessee obtained approval from *Foreign Investment Promotion Board [FIPB]* for *foreign direct investment [FDI]* to the extent of 50% of its share capital. The assessee was categorized as *operating company* for the purposes of *FIPB* and *FEMA*. Subsequently, the assessee made investment in shares of its wholly owned subsidiary companies and accordingly its category changed from *operating company* to *operating-cum-holding company*, which required prior approval of *FIPB*. However, the said approval was not obtained and the assessee applied for *post-*



facto approval of the same from *FIPB* which was granted subject to compounding of the same by *Reserve Bank of India [RBI]*. The aforesaid lapse, in the opinion of assessee, was merely procedural defect in nature and was in the nature of condonation subject to pecuniary payment and therefore, not hit by the explanation to Section 37(1). However, not convinced, Ld. AO disallowed the same which was confirmed by Ld. CIT(A) by observing as under:-

2.2. I have considered the submissions of Ld. Counsel and in this case it is seen the fees paid to RBI of Rs.18,00,000/- is to regularize procedural lapse under Foreign Exchange Management Act, 1999. The contravention admitted by the company for which compounding is approved by the RBI is contravention of the FEMA regulations issued in terms of paragraph 2(1) of Schedule 1 to Notification No. FEMA.20/2000-RB. The contravention has occurred since the appellant was established under specific approval of the FIPB unit and earlier approvals obtained by the appellant from FIPB have not authorized the applicant to undertake investment activities and make downstream investment without specific and prior approval of FIPB in terms of FDI policy. The appellant made an application to the FIPB unit seeking approval inter alia for classification of company as 'operating-cum-holding company' instead of prior approval as 'operating company'. The FIPB unit has conveyed post facto approval to the appellant to act as an operating-cum-holding company as advised that the approval shall be subject to compounding by the RBI.

It is noted that in the order of RBI that the contraventions in question relate to an amount of Rs.22,71,00,000/- and the duration of the contravention till February, 2009 is three years approximately. In terms of Section 13 of the FEMA, penalty is leviable upto thrice the sum involved in such contravention upon adjudication. However, taking into account of the relevant facts and the post-facto approval granted by the FIPB. The RBI has levied a penalty of Rs.18,00,000/- by taking a lenient view in the matter.

In view of the above discussions, the amount has been paid for contravention of the FEMA provisions, the compounding fees are paid for regularizing procedural lapse. It is not in the nature of an offense for infraction of law-and is against 'public' policy as prohibited by law-hence hit by Explanation to Section 37 and is therefore dismissed.

Hence this ground of appeal is dismissed.

Aggrieved, the assessee is in further appeal before us.

12.2 We have heard the submissions made by respective representatives before us, in this regard. The basic facts are not in dispute. The assessee has paid compounding fees of Rs.18 Lacs to *RBI*



Sodexo Food Solutions India Private Limited
Assessment Years-2002-03, 2003-04 & 2009-10

for getting *post-facto* approval, which otherwise was required to be obtained in earlier point of time. We have perused the relevant documents as placed before us, in this regard, in *paper-book page numbers 11 to 31*. It is evident that in terms of clause (e) and (h) of the *PRESS NOTE No. 9 (1999 Series), Dated 12/04/1999*, the assessee failed to notify the downstream investments of Rs.252.55 Lacs made by him in its subsidiaries namely *Skyline & Unisol* within 30 days of making those investments and also failed to bring those investments from abroad. The assessee got *post-facto* approval of the same from *FIPB unit* vide latter dated 03/02/2009 wherein the approval was granted, *inter-alia*, subject to compounding by *RBI*. Accordingly, the assessee filed an application to *RBI* for compounding of contravention under FEMA 1999 vide application dated 12/02/2009 as supported by the requisite Forms / documents. The compounding was done by *RBI* vide *FEC.CO.PCD.1512/15.02.67/2009-2010 dated 15/07/2010*, which is reproduced below:-

In the
RESERVE BANK OF INDIA
Foreign Exchange Department
11th Floor, Central Office Building
Shahid Bhagat Singh Road
Mumbai-400 001
Present

Dasarathi Mishra
Chief General Manager
Date: July 14, 2009
C.A.419/2009
In the matter of

Radhakrishna Hospitality Services Private Limited
6 & 7, Jyoti Wire House, Off. Veera Desai Road,
Andheri (West), Mumbai – 400 053
(Appellant)

In exercise of the powers under section 15(1) of Foreign Exchange Management Act, 1999 and the Regulations / Rules/Notifications/Orders made there under, I pass the following
Order



The applicant has filed a compounding application dated February 12, 2009 and addendums submitted thereafter for compounding of contravention of the provisions of the Foreign Exchange Management Act, 1999 (the FEMA) and the regulations issued there under. The contravention sought to be compounded was the failure to obtain the specific and prior approval of the Foreign Investment Promotion Board (FIPB) to change its status from "operating company" to "operating-cum-holding company" before making downstream investment in its step down subsidiary in contravention of paragraph 2(1) of Schedule 1 to Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 notified vide Notification No. FEMA. 20/2000-RB dated 3rd May 2000 and as amended from time to time (Notification No. FEMA.20/20000-RB, hereinafter).

2. The relevant facts of the case are as follows: The applicant is a private limited company incorporated under the Companies Act, 1956 on October 31, 1994. The applicant is engaged in the business of providing food and hospitality services, integrated facilities management and vending solutions. The applicant has submitted that they have made downstream investment as detailed below:

Month of investment	Investee company	Investment (in Rs.)
March 2001	Skyline Caterers Pvt.Ltd	100,000
February 2006	Unisol Infra Services Pvt.Ltd	25,155,000
	Total	25,255,000

The applicant had not obtained prior and specific approval from the FIPB unit, Department of Economic Affairs, Ministry of Finance, Government of India for undertaking operating cum holding company activities, as they did not have authorization to undertake investment activities in terms of the extant guidelines.

3. The applicant made an application on December 13, 2008 to the FIPB unit, Department of Economic Affairs, Ministry of Finance, Government of India seeking approval inter alia for the classification of Radhakrishna Hospitality Services Pvt. Ltd. As operating cum holding company. The FIPB unit in its approval vide letter No. FC. II/205(95)/55(95)-Amend dated February 3, 2009 has conveyed post facto approval to the applicant to act as an operating-cum-holding company and advised that the approval shall be subject to compounding by the Reserve Bank in respect of downstream investment made by the applicant.

4. The applicant was given an opportunity for personal hearing vide our letter No.FE.CO.PCD/33484/15.02.67/2008-09 dated June 19, 2009 for further submission in person and/or producing documents, if any, in support of the application. During the personal hearing on June 30, 2009 authorized representatives of the applicant Shri Olivio Tavares, Chief Financial Officer, Radhakrishna Hospitality Services Pvt Ltd. Huned Contractor, Thigna & Contractor, Mumbai and Anurag Kothari, Senior Associate, Trillegal, Mumbai represented the applicant. The representatives of the applicant submitted the details with regard to downstream investment and foreign equity participation in the applicant. They submitted the fair value of the shares as on the relevant dates. The representative of the applicant also submitted that after issue of Press Note 2 (2009 Series) Press Note 4 (2009 Series) by the Government of India, the applicant is not in breach of the FEMA, they requested that these issues may be considered for the disposal of the application. They submitted that the contravention of the FEMA was inadvertent and there was no malafide intention to contravene any provisions relating to foreign investment in India or the provisions of the FEMA. They requested to compound the contravention which had occurred inadvertently. The application for compounding is therefore, being considered on the basis of the averments made in the application as well as other documents and submissions made in this context by the applicant during the personal hearing and thereafter.



Sodexo Food Solutions India Private Limited
Assessment Years-2002-03, 2003-04 & 2009-10

5. I have given my careful consideration to the documents on record and submissions made by the applicant during the personal hearing. The contravention admitted by the company for which compounding is now sought for is contravention of the FEMA regulations issued in terms of paragraph 2(1) of Schedule 1 to Notification No FEMA.20/2000-RB. The contravention has occurred since the applicant was established under specific approval of the FIPB unit and earlier approvals obtained by the applicant from the FIPB have not authorized the applicant to undertake investment activities and make downstream investment without specific and prior approval of FIPB in terms of FDI policy, Press Note 9 (1999 series), Therefore the applicant has contravened provisions of Press Note 9 (1999 series) and thereby paragraph 2(1) of Schedule 1 to Notification No. FEMA.20/2000-RB.

6. The remaining issue is determination of the sum involved in the contravention given the facts and circumstances of the case. The applicant has made submission during the personal hearing and vide their letters dated May 14 and June 29, 2009 that the sum involved in the contravention may be considered on the basis of average value of shares. Further, the applicant has also submitted that the quantum relevant for the compounding of the contravention is the amount of downstream investment by the company in Skyline and Unisol i.e. Rs. 25,255,000/-. I have considered the submissions made by the applicant and the documents available on record. I find Rs.22,71,00,000/- (50,00,000 x 45.42) the fair value of total foreign equity participation in Radhakrishna Hospitality Services Pvt. Ltd. As on the date of last downstream investment i.e. on February 14,2006 is the sum involved in the contravention. The fair value of shares was arrived on the basis of audited balance sheet as on March 31, 2005.

7. The contraventions in question relate to an amount of Rs. 22,71,00,000/- and the duration of the contravention till February 2009 (the post facto approval of the FIPB) is three years approximately. In terms of Section 13 of the FEMA, any person contravening any provision of the Act shall be liable to a penalty up to thrice the sum involved in such contravention upon adjudication. However, taking into account the relevant facts, the post facto approval granted by the FIPB, issue to Press Note 2 (2009 Series) Press Note 4 (2009 Series) by the Government of India and circumstances of the case, I am persuaded to take a lenient view on the amount for which the contravention is to be compounded and I consider that an amount of Rs.18,00,000/- (Rupees eighteen lakh only) will meet the ends of justice.

8. Accordingly, I compound the admitted contravention namely, the contravention of paragraph 2(1) of Schedule 1 to Notification No. FEMA/20/2000-RB by the applicant on the facts discussed above in terms of the Foreign Exchange (Compounding Proceedings) Rules, 2000 on payment of an amount of Rs.18,00,000/- (Rupees eighteen lakh only) which shall be deposited by the applicant with the Reserve Bank Of India, Foreign Exchange Department, 11th Floor, Central Office Building, Fort, Mumbai-400 001 by a demand draft drawn in favour of the "Reserve Bank of India" and payable at Mumbai within a period of 15 days from the date of this order. In case of failure to deposit the compounded amount within the above mentioned period, Rule 10 of the Foreign Exchange (Compounding Proceedings) Rules, 2000 dated May 3, 2000 shall apply.

The application is disposed accordingly.

Dated this the 14th day of July 2009.



Sodexo Food Solutions India Private Limited
Assessment Years-2002-03, 2003-04 & 2009-10

Pursuant to the same, the assessee paid the compounding fees, which is evident from the document / certificate as placed on *page numbers 29 & 30* of the *paper book*.

12.3 The perusal of *RBI permission* reveal that the assessee could be saddled with huge penalty running in to crores, which has been compounding for Rs.18 Lacs. This fact leads us to conclude that the impugned amount was not penal in nature but it was more of *compensatory* in nature. At this juncture, we deem it fit to reproduce the *explanation* to Section 37(1) as inserted by Finance (No.2) Act, 1998 retrospectively with effect from 01/04/1962 and the same read as under:-

"*Explanation* — For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure."

According to the explanation, expenditure incurred for any purpose which is an offence or which is prohibited by law, is not entitled for deduction. The Ld. Senior Counsel has raised an alternative argument that the expenditure could not be disallowed since the payment is to a government agency and the same is not prohibited by any law. The same, in our opinion, do not hold much water since it is *purpose test*, which impugned expenditure has to pass before becoming eligible to be claimed as deduction. On the basis of preceding discussion, we have already reached a conclusion that the aforesaid payment by assessee was compensatory in nature and not penal one.

12.4 So far the judicial pronouncement is concerned, we find that the identical factual matrix is covered in assessee's favor by the judgment of *Pune Tribunal* rendered in *EON Hadapsar Infrastructure (P) Ltd. Vs.*



ACIT [71 taxmann.com 115] wherein the matter has been concluded in the following manner:-

9. We have heard the rival contentions and perused the record. The issue arising before us is in relation to the claim of expenditure of Rs. 45 lakhs. The assessee had applied to the Reserve Bank of India for raising ECB loans. In order to avail the aforesaid ECB loans from Reserve Bank of India, necessary documents/evidences as required under FEMA Act have to be provided to Reserve Bank of India, who in turn, approves the same by way of issuing LR number, consequent to which, the assessee is entitled to raise ECB loans in foreign currency. The assessee before us is a company which was promoted by Shri Vikas Shah and Smt. Swetha Shah. The assessee had raised ECB loans from M/s. Porto Limited, Porto Louis, Mauritius, which was wholly owned company of Shri Vikas Shah and Smt. Swetha Shah. The assessee entered into loan agreements and raised ECB loans after receiving the permission from Reserve Bank of India. The first loan agreement was dated 19.11.2004, against LR No. 2004846, dated 07.12.2004 was issued by the Reserve Bank of India for grant of loan of US \$ 8 lakhs. Further, second loan agreement was dated 09.12.2004, against Reserve Bank of India issued LR No. 2004865, dated 17.12.2004 and the assessee raised sum of US \$ 10 lakhs on different dates. Further, third loan agreement dated 17.06.2005, against LR number issued by Reserve Bank of India was 2005238, dated 09.06.2005 and the assessee raised US\$ 5 lakhs. Total loan raised by the assessee was US\$ 23 lakhs equivalent to Rs. 1,00,843 lakhs. The lender company i.e. M/s. Porto Limited, Porto Louis, Mauritius was wholly owned company of promoter directors of assessee company. The lender however, assigned all three ECB loans to person resident outside India vide agreement dated 31.01.2006. The Reserve Bank of India after taking note of the arrangement noted that the lender was not the recognized lender in terms of guidelines for ECB under the provisions of FEMA Act, 1999. In view thereof, Reserve Bank of India approved pre- payment of all three ECBs raised by the assessee. However, proceedings were initiated against the assessee for non-compliance with the Rules/Regulations/Directions under FEMA Act, 1999. Under the Reserve Bank of India guidelines, a Circular is issued by Reserve Bank of India on compounding of contraventions under FEMA Act, 1999. The said Master Circular on compounding of contraventions under FEMA Act, 1999 is placed at pages 7 to 11 of the Paper Book. Under clause 3.5, it recognizes three types of contraventions, which are as under:—

- "a. whether the contravention is technical and/or minor in nature and needs only an administrative cautionary advise;
- b. whether the contravention is serious in nature and warrants compounding of the contravention; and
- c. whether the contravention, prima facie, involves money-laundering, national and security concerns involving serious infringement of the regulatory framework."

10. The contravention as per sub-clauses (a) and (b) of clause 3.5 are to be referred to the Reserve Bank of India and the contravention, if any, under sub- clause (c) are to be decided by the Enforcement Directorate. As per clause 4, the scope and



*Sodexo Food Solutions India Private Limited
Assessment Years-2002-03, 2003-04 & 2009-10*

manner of compounding is provided and as per clause 4.3, the application for compounding is to be disposed of on merits after considering the records and submissions at the exclusive discretion of Competent Authority and discretion is given for passing compounding order and also for arriving at the quantum of sum, on payment of which, contravention shall be compounded. It is further provided under the said clause that the compounding could be on account of amount of gain of unfair advantage, wherever quantifiable, made as a result of the contravention and also the amount of loss caused to any authority/agency/exchequer as a result of contravention; and other conditions provided thereunder.

11. It is the case of assessee before us that the compounding in its case was on account of amount of loss caused to any authority/exchequer as a result of such contravention. The perusal of compounding order passed by the authority reflects that the authority had held the assessee to have contravened regulations 3 and 6 of Notification No. FEMA.3/2000-RB by availing external commercial borrowings amounting to Rs. 10.08 crores without prior approval of the Reserve Bank of India. The duration of contravention was 3 years 7 months approximately. In terms of section 131 of FEMA Act, 1999, where any person contravened any provisions of the Act shall be liable to penalty up to thrice the sum involved in such contravention. The Competent Authority noted that though in terms of section 131 of FEMA Act, the penalty could be up to Rs. 30,25,29,000/-, but however, after considering the matter and rationale behind the compounding provisions, submissions of assessee and entire facts and circumstances of the case, a lenient view was taken on the amount for which contravention was to be compounded and it was held that the payment of Rs. 45 lakhs would meet the ends of justice. The perusal of the said order passed by Competent Authority reflects that as against the contravention of provisions to the extent of Rs. 30.25 crores, after considering the totality of the facts and circumstances and various provisions of compounding, the assessee was asked to pay compounding fees of Rs. 45 lakhs. In other words, the compounding fees charged to the assessee was not in the form of any penalty for committing an offence but was compensatory amount charged to the assessee for failing to comply with provisions of FEMA Act. It may be clarified herein that the provisions of FEMA Act, 1999 itself provides a measure to be taken by the authorities by charging compounding fees in respect of contravention, if any. Such a compounding fees charged to the assessee being compensatory in nature as is evident from the fact that though the amount to be charged could be up to Rs. 30.25 crores, the assessee was asked to pay sum of Rs. 45 lakhs in order to meet the ends of justice, established the case of assessee that the same was not in the form of penalty. Where the amount paid by the assessee is compensatory payment and was not by way of any penalty levied under the provisions of FEMA, then such amount is to be allowed as deduction in the hands of assessee.

12. Now, coming to the stand of authorities below that such payment is covered by Explanation to section 37(1) of the Act. We find no merit in the said stand of CIT (A). The Explanation to section 37(1) of the Act was inserted in respect of any expenditure incurred for any purpose which was an offence or which was prohibited by law. The Circular of Reserve Bank of India itself provided that where the assessee had committed an irregularity while dealing in foreign earnings or expenditure outgoes, then such an action of applicant could be compounded as per



Sodexo Food Solutions India Private Limited
Assessment Years-2002-03, 2003-04 & 2009-10

Rules and Regulations provided in the said Circular. It is not a case where the assessee has been held to have committed an offence or the amount has been paid for purpose, which was prohibited in law, hence the provisions of Explanation to section 37(1) of the Act are not attracted. In view thereof, we hold that the assessee is entitled to the claim of deduction under section 37(1) of the Act.

13. Now, coming to the reliance placed upon by the learned Departmental Representative for the Revenue on the ratio laid down by Pune Bench of Tribunal in *Modi Builders (supra)*. It may be pointed out that the compounding fees paid in the said case was by a land developer to municipal corporation on account of deviation from original sanctioned plan. By paying the said compensation, the assessee therein had benefited by way of saving the additional cost of construction put up in violation of provisions of the Act and Byelaws. Further, as pointed out by us in the paras hereinabove, External Commercial Borrowings were availed by the assessee after taking due permission from Reserve Bank of India which is complicated procedure. No person can avail ECB loans without such permission. Only because of some technical default, the assessee was held to be in default and repay the ECBs and for this, the assessee was charged with compounding fees of Rs. 45 lakhs. Such charge cannot be equated with cases of deviation from Regulations of State Authorities and charges laid therein. We direct the Assessing Officer to allow the claim of assessee. The grounds of appeal raised by the assessee are thus, allowed.

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

The above decision has been rendered after distinguishing the decision rendered by the same Tribunal in *Modi Builders Vs. JCIT [60 taxmann.com 54]*, which has also been relied upon by the revenue before us.

12.5 Finally, keeping in view the overall factual matrix, we concur with the stand of assessee and delete the impugned additions of Rs.18 Lacs as confirmed by Ld. first appellate authority. This ground stand allowed for statistical purposes.

13. Resultantly, the assessee's appeal stand allowed in terms of our above order whereas the revenue's appeal stand partly allowed for statistical purposes.

Conclusion



Sodexo Food Solutions India Private Limited
Assessment Years-2002-03, 2003-04 & 2009-10

14. All the appeal stands disposed-off in the following manner:-

No.	Appeal Number	Appeal By	AY	Status
1.	ITA/304/Mum/2014	Assessee	2002-03	Allowed
2.	ITA/305/Mum/2014	Assessee	2003-04	Allowed
3.	ITA/7042/Mum/2012	Assessee	2009-10	Allowed
4.	ITA/6864/Mum/2012	Revenue	2009-10	Partly Allowed for statistical purposes

Order pronounced in the open court on 08th August, 2018

Sd/-

(Joginder Singh)

न्यायिक सदस्य / **Judicial Member**

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 08.08.2018
Sr.PS:-Thirumalesh

आदेश की प्रतिलिपि □ ग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai