

आयकर अपीलीय अधीकरण, न्यायपीठ – “C” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH: KOLKATA
(समक्षश्री ए.टी. वर्की, न्यायिक सदस्य एवं डॉ. ए.एल. सैनी, लेखासदस्य)
[Before Shri A. T. Varkey, JM & Dr. A.L. Saini, AM]

I.T.A. No. 2149/Kol/2017
Assessment Year: 2014-15

Deputy Commissioner of Income-tax, Central Circle-1(3), Kolkata	Vs.	M/s. EMC Limited
Appellant		Respondent

For the Appellant	Shri Vijay Shankar, CIT, DR
For the Respondent	Shri S. M. Surana, Advocate

Date of Hearing	17.02.2020
Date of Pronouncement	27.05.2020

ORDER

Per Shri A.T. Varkey, JM:

This is an appeal preferred by the revenue is against the order of Ld. CIT(A)-20, Kolkata dated 25.07.2017 for AY 2014-15.

2. The revenue has raised as many as twelve grounds of appeal but the only three effective grounds are (i) and (ii) which are against the action of Ld. CIT(A) in deleting the addition of the retention money of Rs.142.53 cr., under normal computation of income and u/s. 115JB of the Income Tax Act, 1961 (hereinafter referred to as the “Act”) and (iii) is against the action of Ld. CIT(A) in deleting the disallowance made by AO u/s. 14A read with rule 8D of the Income Tax Rules, 1962 (hereinafter referred to as the “Rules”) of Rs.51.59 lacs. Regarding this ground, it has been brought to our notice that the assessee has not earned any exempt income, therefore, the Ld. CIT(A) taking note of this fact has relied on the Tribunal’s decision in REI Agro Ltd. 144 ITD 141 has given relief to the assessee which order has been confirmed by the Hon’ble Calcutta High Court in GA No. 3022 of 2013. We note that the Hon’ble Delhi High court in Cheminvest Ltd. Vs. CIT (2015) 378 ITR 33 wherein it has been held that where no exempt income was earned by the assessee, no disallowance could be made under section 14A of the Act. Taking note of the Hon’ble jurisdictional High court as well as Hon’ble Delhi High Court decision, we find no infirmity in the order of the Ld. CIT(A) which warrants any interference from our part and, therefore, we dismiss this ground of appeal of the revenue.

3. Coming to the action of the Ld. CIT(A) in deleting the addition of Rs.142.53 cr. the retention money which was added by the AO under the normal computation of income, the AO noted that the assessee had filed its original return of income on 29.11.2014 showing total income of Rs.194,46,16,540/-. Later the assessee's case was selected for scrutiny and notices u/s. 143(2) of the Act dated 31.08.2015 was served upon the assessee. The AO noted that the assessee thereafter assessee had filed revised income tax return on 17.03.2016 revising its income to Rs.49,98,06,980/-. The AO taking note of this fact asked the assessee to explain as to why it has claimed such a deduction. The assessee explained that when the original return was filed on 29.11.2014 it was on the basis of profit as per the P&L Account without considering the deduction made by parties (customers) on account of retention money. However, the assessee on a proper application of the legal and factual position realised that company's real income was much less than the revenue booked in the account and hence, revised return was filed on 17.03.2016 claiming deduction of the retention money debited by the parties during the year amounting to Rs.142,53,74,710/-. It was also brought to the notice of the AO that as per the contract between the parties, certain percentage of the bills raised could be retained by the contractee party as retention money which would be payable only after successful completion of the entire contract and after it being certified by the party and after fulfilment of certain pre-determined conditions mentioned in the contract. However, as per the accounting practise followed by the assessee though a part of the bill amount was retained by the contractee party and would be paid afterwards on fulfilment of certain conditions, the entire revenue was booked in the books of account as and when bills were raised and hence, the entire amount was reflected in the revenue from the operations in the P&L Account. It was brought to the notice of the AO that profit before tax as per P& L Account for the year ended on 31.03.2014 is Rs.204,38,30,030/- and the said profit was arrived after taking into account entire bills raised on parties for contract work including the retention money. It was explained further that thereafter, sales was credited and party was debited with the entire bill amount and on that basis assessee had filed the original return on 29.11.2014 without considering the deduction made by the parties on account of the retention money and had shown total income of Rs.194,46,16,540/-. And when the assessee realised that its real income was much less than the revenue booked in the account it filed a revised return on 17.03.2016 claiming deduction of the retention money which was deducted by the parties to the tune of

Rs.142.53 cr. and thus in the revised return income to the tune of Rs.49.98 cr. was shown. This explanation of the assessee was not accepted by the AO.

4. In support of its action, the assessee cited the decision of the Hon'ble Calcutta High Court in the case of CIT Vs. Simplex Concrete Piles (India) dated 05.12.1988 for the AY 1965-66 which was not followed by the AO on the reason that in that case the assessment year under consideration was AY 1965-66 and at the time there was no provision of section 194C of the Act for deduction of tax at source and after citing the provisions of sec. 194C of the Act and stressing the aspect of credit of sum in the account of the payee by the payer, the AO distinguished the case of Simplex Concrete Piles (India) and also noted that the Hon'ble Calcutta High court has relied on the decision of the Hon'ble Supreme Court in the case of Seth PushalalMansinghka P. Ltd. Vs. CIT (1967) 66 ITR 159 wherein the meaning of the word 'accrue' was considered by the Hon'ble Apex court and according to AO, the decision rendered in Simplex Concrete Piles (India) (Supra) was the outcome of the interpretation given by the Hon'ble Apex court in the case of Seth PushalalMansinghka P. Ltd. (supra) in respect of the word 'accrue'. Thereafter, the AO distinguished the case laws relied on by the assessee of the Hon'ble supreme court in the case of ShoorjiVallabhadas Vs. CIT as well as the Hon'ble Calcutta High court in Simplex concrete Piles (India) (supra) and held that in the case of the assessee the retention money has been deemed to accrue to the assessee once TDS has been deducted and once the credit of TDS has been claimed by the assessee it may be safely deduced that upon such transaction, income has resulted and is clearly identified and quantified. According to AO, any deductions for demurrage and damages that has not yet been determined or accrued may be deducted to the profit and loss account as and when such items may be quantified and determined. Therefore, in view of the provision of section 194C of the Act, the AO treated the income on account of retention money as deemed to be the income of the assessee for the AY 2014-15 and hence, the deduction amounting to Rs.142,53,74,710/- claimed by the assessee on account of deduction for retention money was disallowed and added back to the income of the assessee. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who was pleased to grant relief to the assessee. However, directed that the TDS claimed by the assessee relatable to such retention money needs to be disallowed in the assessment year 2014-15 and it may be allowed in the year in which the

assessee declares retention money as its income. With this observation, the Ld. CIT(A) gave relief to the assessee. Against the action of the Ld. CIT(A), the revenue is before us.

5. Assailing the decision of the Ld. CIT(A), the Ld. CIT, DR drew our attention to the fact that the Ld. CIT(A) has heavily relied on the decision of the Hon'ble Calcutta High Court in the case of Simplex Concrete Piles (India) (supra), which according to him is distinguishable since that was the case which was decided for AY 1965-66 and the provisions of section 194C regarding tax to be deducted at source was not present in the statute. The Ld. CIT, DR drew our attention to the provisions of section 194C of the Act which reads as under:

"194C. (1) Any person responsible for paying any sum to any resident (hereafter in this section referred to as the contractor) for carrying out any work (including supply of labour for carrying out any work) in pursuance of a contract between the contractor and a specified person shall, at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to-

(i) one per cent where the payment is being made or credit is being given to an individual or a Hindu undivided family:

(ii) two per cent where the payment is being made or credit is being given to a person other than an individual or a Hindu undivided family,

of such sum as income-tax on income comprised therein.

(2) Where any sum referred to in sub-section (1) is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly."

6. Thereafter the Id. CIT, DR contended that the provisions of section 194C apply at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by Issue of a cheque or draft or by any other mode, whichever is earlier. Moreover it is also clearly mandated that where any sum referred to in sub-section (1) is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly. Thus deeming provision of Section 194C clearly states that once TDS has been deducted in accordance with provisions of Section 194C, such Income is deemed to accrue to the payee. (emphasis given by Id. CIT, DR). According to him, since tax has already been deducted for the retention money during the period under consideration, the

corresponding income on account of retention money is deemed to be the income of the assessee for the same period. Moreover, Ld. DR pointed out that the assessee has claimed the credit of such tax deducted at source for retention money in his Return of Income for the AY 2014-15, and in view of the above, the assessee has to compulsorily include income on account of retention money for which tax credit has already been claimed by the assessee. According to Ld. CIT, DR, the Hon'ble Calcutta High court's decision was based on the decision of the Hon'ble Apex Court in the case of Seth PushalalMansinghka P. Ltd. (supra) wherein the Hon'ble Supreme Court observed that the word 'accrue' and 'arise' do not mean actual receipt of the profits or gains. Both these words are used in contradistinction to the word 'receive' and indicate a right to receive. If the assessee acquires a right to receive the income, the income can be said to accrue to him, though it may be received later, on its being ascertained. Therefore, the Ld. CIT, DR contended that the Hon'ble High court placed reliance on the word 'accrue' and not on the word 'credit'. According to Ld. CIT, DR, when expenditure has been determined by the payee the liability to deduct tax at source arises. According to him, in accordance with the provisions of section 194C, once TDS has been deducted, the corresponding sum of retention money for which such TDS has been deducted is deemed to be the income of the assessee and hence, income has accrued to the assessee. According to the Ld. DR, deduction of tax at source by any person clearly determines that such expenditure has been booked by and the person has clearly identified such expenditure and acknowledged the same by deducting tax at source. According to him, in the case of the assessee, such income on account of retention money has accrued when such tax at source has been deducted by the payee. Though the Ld. CIT, DR acknowledged that such (retention money) payments be actually released later (not in this assessment year), the accrual may be safely said to have taken place when the tax has been deducted at source on account of retention money. Thus, according to Ld. DR, the assessee has clearly acquired a right to receive the income and, therefore, the income can be said to have accrued to him though it may be received later on its being actually paid. Thus, according to Ld. CIT, DR, the income (retention money) has accrued to the assessee. Moreover, according to Ld. CIT, DR, the assessee has regularly adopted the mercantile system of accounting and the right of the assessee on the income arose on the date on which tax has been deducted at source by the deductor in accordance with the provision of section 194C of the Act. According to Ld. CIT, DR, the issue in this case has not been considered in the case of Simplex Concrete

Piles (India) (Supra) which was relied upon by the assessee was not examined by the Hon'ble Calcutta High court in the light of the provisions of section 194C of the Act and the fact that whether accrual of income arises once tax has been deducted at source and also further that if the credit of tax deducted at source has been claimed by the assessee in his return of income, then whether the income has to be correspondingly taken into account by the assessee. Therefore, according to the Ld. CIT, DR, as per the provision of section 194C and section 198 of the Act, the AO has rightly made the disallowance of Rs.142,53,74,710/- as income of the assessee which has been erroneously deleted by the AO which should be reversed and the AO's order should be upheld.

7. Per contra, the Ld. AR for the assessee contended that assessee is in the business of supply, erection and commissioning of Electricity transmission towers, lines, power sub-stations etc. Such works are done under a duly executed contract with the principals. During the assessment year in question, the assessee continued the construction job for Power Grid Corporation of India Limited, Transmission Corporation of Andhra Pradesh Ltd, West Bengal State Electricity Distribution Corporation Ltd and Maharashtra State Electricity Transmission Co. Ltd. The assessee raised bills on the parties on progressive completion of particular project and credited the gross billed amount in its books of accounts which was reflected in the audited balance sheet under the head 'Revenue' from operations. The assessee maintained books of accounts on mercantile basis and the revenue was recognized on the basis of progressive partial completion of particular project and the bills were raised accordingly and were also accounted for in the same manner. The contracts, in such erection and commissioning of power plants included the clauses that the contractee's shall retain specified percentage (%) of the billed amount till successful completion of the entire project. The Ld. AR drew our attention to the copy of contracts which was filed before the AO and Ld. CIT(A). A perusal of the copy of one such contract with Power Grid Corporation of India Ltd. and the relevant clause was brought to our notice which reads as under:

"D Final Payment: The balance 10%, of the erection price component(excluding price component for survey) shall be paid after successful commissioning of the transmission line and issuance of taking over certificate.)"

According to such duly executed contracts entered into between the parties, the contractee's retained specified percentage of the billed amount as retention money. These

parties retained a sum of Rs. 142,53,74,710/- as retention money on the bills raised during the year. According to him, the details of the amount retained by parties were duly filed before the AO and a copy of which is enclosed in the PB. The Ld. AR contends that all other contracts with the remaining parties have similar clause and the assessee was, therefore, neither entitled to nor could have claimed the retention money as income accrued till the entire project was commissioned. It was pointed out by the Ld AR that the projects were not completed during the year but completed after financial year 2015-16. And as stated earlier, according to Ld AR, the assessee credited the amount of gross bills in the books of accounts which included the retention money and reflected as revenue from operations. As a result of the said treatment in the books of accounts, it was explained by Ld AR that the revenue from operations went up by the retention amount and consequently the book profit and the normal total income. According to Ld. AR, the assessee realizing the mistake that retention money cannot be treated as income accrued till the project was completed and as such did not accrue during the assessment year in question, claimed the same before the AO by filing the revised return that the said amount of retention money should be excluded from the revenue receipts and accordingly the amount should be excluded from the book profits and the total income. According to Ld. AR, the details of the retention money were filed and are not disputed by the AO. It was also clarified to the AO that retention money was to be included in the respective years when the project will be completed. It was also pointed out that a part of the said retention money was taken as income in assessment year 2015-16 to 2017-18 when a particular project was completed and have duly been included in the return of income during assessment year 2015-16 to 2017-18. The remaining amount of retention money shall also be included in the income for the year when the particular projects shall be completed.

8. According to Ld. AR, the facts stated above are not disputed by the AO. According to him, the AO duly examined the submissions made by the assessee however rejected the claim of the assessee on the ground that the assessee duly credited the amount of gross bills in its books of accounts, thereby included the retention money in the accounts as also in the profit and loss account and in the original return of income filed by the appellant. The AO also found that the assessee claimed TDS which was deducted on the gross bills. As per the AO when the assessee has claimed the TDS including the TDS on retention money during

the year, the retention money has to be included as income accrued during the assessment year in question which action, according to Id. AR, is erroneous.

9. The Ld. AR further submitted that though the assessee entered amount of gross bills of the job done including retention money in the books of account and consequently in the revenue from operations but the same was not in accordance with law. In the course of assessment proceedings it was duly claimed before the AO that retention money included in the gross receipts did not accrue during the year, could not be included as receipts for the year but accrues only in accordance with the contract when the appellant shall be entitled to claim the same as accrued. The assessee also filed revised return for the same as stated above. The assessee also explained the issue vide letter dated 28.12.2016. According to Id AR, though it is not an undisputed fact that the assessee was following mercantile system of accounting, only the income which is accrued during the year can be taxable. The Ld AR submitted that the making of the entry in the books of accounts is not decisive in determining the nature of income. According to Id. AR, the issue is no longer res-integra. Reference in this connection was invited to the following judgements:

In the case of MCM Services Pvt Ltd., (ITA No. 3485/K/2011 at para 7.3 it was observed by Tribunal (Del) as under:-

" In our view for a receipt to accrue as income an accounting entry cannot be only decisive factor. If the same is not accrued it cannot be held as income only because of such entry. The retention money is contingent upon the completion and post warranty certificate from the engineer in-charge of NTPC. Neither the work was completed nor the defect liability period was over. It is also fact that subsequently dispute arose between the appellant and ITD and matter is pending before arbitrator. Thus, the fate of such retention money is hanging in balance and it did not accrue as income of the appellant."

10. The Ld. AR cited the decision in Godhra Electricity Co. Ltd. v. CIT [1997]225 ITR 7461 wherein the Hon'ble Supreme Court reiterated the concept of 'real income', emphasizing that even under the mercantile system, a mere claim by the assessee is not sufficient to make income accrue on the basis of 'hypothetical income' - the income must actually become due. In the said case the Hon'ble Supreme Court inter alia examined the cash system and mercantile system of accounting in the context of 'hypothetical income'. Considering the facts before it, the Court said that although the assessee company was following the mercantile system of accounting and had made entries in the books regarding enhanced charges for the supply of electricity made to its consumers, no real income had accrued to the assessee-company in respect of those enhanced charges in view of the

representative suits filed by the consumers which were decreed by the court and ultimately, after various proceedings which took place, the assessee- company had not been able to realize the enhanced charges. Since no real income having accrued, it was held that the amount due on enhancement was not assessable to Income Tax.

11. In a subsequent decision rendered in CIT v. Bokaro Steel Ltd. [1999] 236 ITR 315, the Hon'ble Supreme Court, following its earlier decision in Godhra Electricity Co. Ltd.'s case (supra) affirmed the decision of the Patna High Court wherein it was held that the entry in the books of account shown as income from Hindustan Steel Ltd. for the 8 locomotives supplied by the assessee-company to them could not be brought to tax as income since this entry reflected 'hypothetical income' and only the real income could be brought to tax.

12. In CIT v. Modi Rubber Ltd. [1998] 230 ITR 817, following the decisions of the Supreme Court in Godhra Electricity Co. Ltd.'s. case (supra) and Shoorji Vallabhdas &Co's. case (supra), held that a mere unilateral act of the assessee debiting the books of account, the liability for payment whereof was not accepted or agreed to by the debtor, did not amount to income accrued to the assessee.

13. In the case of MCM Services Pvt. Ltd., (ITA No. 3485/K/2011 at para 7.8 and 7.12 it was observed by the Delhi Tribunal as under:-

"7.8. Reading all the decisions cited above and in view of facts and circumstances of the case, the amount of retention money cannot be held to be accrued and brought to tax as income of the assessee. It is trite law that an accounting entry cannot create taxability of a receipt which depends on contingencies and cannot be treated as accrued income."

"7.12. Apropos the denial of claim on the ground that such claim was made in the revised return, we have no difficulty in overruling such objection of CIT(A). Firstly, it is settled law that income is not taxable only on the basis of entry or absence thereof in the books of accounts. What is essential for charging section 5 is that income should have accrued to the appellant. This is made clear by Hon'ble Supreme Court in ShoorjiVallabhdas case (supra). Secondly, the CIT(A) wrongly considered eligibility of filing revised return only in case of 'mistake apparent on record' as envisaged in sec. 154 of the Act. The person is entitled to file revised return when he discovers any omission or any wrong statement therein. Offering income which, which can be validly revised u/ s. 139(5) of the Act."

14. In the case of Kedarnath Jute Mfg Co. Ltd., reported in 82 ITR the Hon'ble Supreme Court held that passing or not passing of the entry in the books of accounts is not determinative of considering the accrual of any income or expenditure.

15. In the light of the aforesaid case laws, the Ld. AR submitted that the first contention of the AO that the assessee was maintaining mercantile system of accounting and the income was duly included in the books of accounts cannot stand in the way of the assessee in allowing its claim. Further, according to Ld. AR, even if the assessee has included the income in the return, assessment has to be made on the income taxable as per law. Reference in this connection was invited to the CBDT's Circular No issued in June, 1955. [The circular is reproduced at page 532 of volume I of Chaturvedi and Pithisaria's Income-tax Law, second edition], and the circular is as follow:

"Officers of the department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the officers should take the initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the department, for it would inspire confidence in him. that he may be sure of getting a square deal from the department. Although, therefore, the responsibility for claiming refunds and reliefs rests with the assessee on whom it is imposed by law, officers should -

(a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other;

(b) freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs. "(Circular No. 14 (XL-35) of 1955 dated 11-4-1955)."

16. It was pointed out by the Ld. AR that this circular has been followed in a number of cases, one such case is Chokshi Metal Refinery vs Commissioner of Income- Tax, reported in 107 ITR 63 Guj.

17. According to Ld. AR, the issue with regard to the taxability of the retention money on similar facts came up for consideration before the ITAT Kolkata Bench in the case of McNally Bharat Limited in ITA No. 100/Kol/2011 vide order dated 1.3.2017 for Assessment Year: 2006-07, 2007-08 and 2008-09 which order was in favour of the assessee wherein it was held even if the assessee has included the retention money in its receipt in the books of accounts still the same has to be excluded while computing the total income both under normal provisions as well as while computing the income u/s.115JB. The issue raised before the ITAT was as under.-

"5. That on the facts and in the circumstances of the case Ld. CIT(Appeals) has erred in directing to exclude retention money of Rs. 28,87,72,022/- in computing total income under normal provision as well as in computing Book Profit u/s. 115JB."

The ITAT held as under.-

Para "38. We have given a very careful consideration to the rival submissions. As far as the question with regard to excluding the retention money while computing the total income under the normal provisions of the Act is concerned, it is not disputed by the revenue that the sum in question is in the nature of retention money. In such circumstances, we are of the view that the retention money cannot be regarded as income of the assessee. The issue is no longer *res Integra* and has been concluded by the Hon'ble Calcutta High Court in case of *CIT Vs. Simplex Concrete (piles) India Pvt Ltd.* [179 ITR 8]. In the aforesaid decision the Hon'ble Calcutta High Court on identical facts held that having regard to the terms and conditions of the contract, it could not be held that either 10 per cent or 5 per cent., as the case may be, being retention money, became legally due to the assessee on the completion of the work. Only after the assessee fulfilled the obligations under the contract, the retention money would be released and the assessee would acquire the right to receive such retention money. Therefore, on the date when the bills were submitted, having regard to the nature of the contract, no enforceable liability accrued or arose and, accordingly, it could not be said that the assessee had any right to receive the entire amount on the completion of the work or on the submission of bills. The assessee had no right to claim any part of the retention money till the verification of satisfactory execution of the contract. Therefore, the Tribunal was right in holding that the retention money in respect of the jobs completed by the assessee during the relevant previous year should not be taken into account in computing the profits of the assessee for the assessment year in question. In view of the aforesaid decision of the Hon'ble Calcutta High Court rendered on identical facts as that of the Assessee's case, we are of the view that there is no merit in one part of Gr.No.5 raised by the Revenue viz., that retention money has to be considered as income for computing total income under the normal provisions of the Act and accordingly the same is dismissed.

Para "43. The admitted factual and legal position in the present case is that retention money is not in the nature of income till such time the contractual obligations are fully performed to the satisfaction of the customer by the Assessee. Therefore, the retention money cannot be regarded as income even for the purpose of book profits u/s.115JB of the Act though credited in the profit and loss account and have to be excluded for arriving at the book profits u/s.115JB of the Act. We hold accordingly and confirm the order of the CIT(A) in this regard."

18. Apart from the above, the following judgments were cited by the Ld. AR:

a) Hon'ble Calcutta High Court in the case of Commissioner Of Income-Tax vs Simplex Concrete Piles (India) (179 ITR 8 Cal) :-

The question of law has been referred to the court was:

"Whether, on the facts and in the circumstances of the case and in view of the fact that the assessee follows the mercantile system of accounting, the Tribunal was right in holding that the retention money in respect of the jobs completed by the assessee during the relevant previous year should not be taken into account in computing the profits and gains of the assessee's business for the assessment year 1965-66 ?"

The Hon'ble High Court held that

"12. The payment of retention money is deferred and is contingent on the satisfactory completion of the work and removal of defects and payment of damages, if any. Till then, there is no admission of liability and no right to receive any part of the retention money accrues to the assessee. Accordingly, the Tribunal was right in directing the Income-tax Officer to examine the question of retention money from this angle and make adjustments regarding the same, if necessary.

b) Similar view is taken by the Hon'ble Gujrat High Court in Anup engineering Ltd. (247 ITR 457), holding as under:

"Looking to the facts of the present case and in the light of the law laid down by the Supreme Court in the cases referred to hereinabove, it was very clear that unless and until a debt is created in favour of the assessee, which is due by somebody, it cannot be said that the assessee has acquired a right to receive the income or that the income has accrued to him. A debt must have come into existence and the assessee must have acquired a right to receive the payment. In the instant case, the assessee did not get any right to receive the sum of Rs. 4 lakhs which could have been retained by 'G' in pursuance of clause No. 14 of the contract. One has to look at the contract and not at the entries made in the books of account. If, upon construction of the contract, one came to a conclusion that the assessee could not have received Rs. 4lakhs from 'G', by no stretch of imagination it could be said that the said amount had accrued by way of income to the assessee in the previous year in question. As the plant was not up to the satisfaction of 'G', 'G' had a right to retain Rs. 4lakhs. It was not in dispute that during the previous year in question, the dispute as to quality of the plant had arisen and the assessee had also felt that the quality of the plant was not up to the mark and, therefore, believing that 'G' might ultimately retain Rs. 3 lakhs or under the warranty clause the assessee might have to pay Rs. 3 lakhs, the assessee made a provision for Rs. 3 lakhs by deducting the said amount from the sales account. In fact, in the previous year in question, the assessee had no vested right to receive Rs. 4 lakhs and, therefore, it could not be said that income to that extent had accrued to the assessee. The above conclusion would be tested in a different manner too. Whether 'G' was liable to pay Rs. 4 lakhs to the assessee in spite of the fact that quality of the plant was admittedly not up to the mark? Did the assessee get a vested right to get the said amount? The answer to these questions would be in negative and, therefore, it could not be said that income had accrued to the assessee," The Hon'bleGujrat High Court Followed the Judgement in the case of CIT v. Simplex Concrete Piles (India) (P.) Ltd. [1989] 179 ITR 8 (Cal.)."

c) Hon'ble Bombay High Court judgment in the case of CIT v. Associated Cables P. Ltd. (286 ITR 596) which has inter alia held that;

"The question of law sought to be raised in this appeal is as to whether the retention money could be considered to be the income of the assessee in the year in which the amount was retained. The Income-tax Appellate Tribunal has referred to a judgment of the Tribunal in Associated Cables P. Ltd. v. Deputy CIT [1994] 206 ITR (AT) 48 (Bom.). Mr.Sathe appearing for the 'respondent has, however, drawn our attention to two judgments, viz., of the Calcutta High Court and the Madras High Court. The Calcutta High Court judgment is reported in CIT v. Simplex Concrete Piles (India) P. Ltd. 1989 179 ITR 8. A Division Bench of the Calcutta High Court in that matter has held that the payment of retention money in the case of contract is deferred and is contingent on satisfactory completion of contract work. The right to receive the retention money is accrued only after the obligations under the contract are fulfilled and, therefore, it would not amount to an income of the assessee in the year in which the amount is retained. The other judgment relied upon is in the case of CIT v. Ignifluid Boilers-(I). Ltd. reported in [2006] 283 ITR 295 (Mad.). In that judgment also, a Division Bench of the Madras High Court has held that the amount retained does not accrue to the assessee and, therefore, the assessee would not be liable.

In view of what is stated above, there is no reason to entertain the appeal. The appeal is dismissed".

19. According to Id. AR, the other contention taken by the AO while rejecting the claim was that the assessee himself has claimed the deduction of the TDS on the retention money during the year and therefore retention money was to be included in the total income of the assessee during the year under consideration. The Ld. AR submitted that the AO was not correct in not reducing the retention money while computing the total income in the aforesaid ground also. According to him, there is no dispute in view of what have been stated above that retention money did not accrue as income during the year and simply because the TDS was claimed by the assessee cannot be the basis to treat the same as income. The Ld. AR drew our attention to sec. 199 which is as under:

Credit for tax deducted.

“199. (1) Any deduction made in accordance with the foregoing provisions of this Chapter and paid to the Central Government shall be treated as a payment of tax on behalf of the person from whose income the deduction was made, or of the owner of the security, or of the depositor or of the owner of property or of the unit-holder, or of the shareholder, as the case may be.

(2) Any sum referred to in sub-section (1A) of section 192 and paid to the Central Government shall be treated as the tax paid on behalf of the person in respect of whose income such payment of tax has been made.

(3) The Board may, for the purposes of giving credit in respect of tax deducted or tax paid in terms of the provisions of this Chapter, make such rules as may be necessary, including the rules for the purposes of giving credit to a person other than those referred to in sub-section (1) and sub-section (2) and also the assessment year for which such credit may be given.”

20. Therefore, according to Id. AR, credit has to be allowed to the person from whose income tax has been deducted. The Ld. AR, however, acknowledged that there is also no dispute that credit can be allowed only in the year in which the income is made taxable. Therefore the AO was wrong that since the assessee has claimed TDS, income was taxable during the year. According to Id. AR, the issue is just opposite. According to him, since the income did not accrue during the year, the income shall be taxable in the year in which it will accrue and credit shall be allowed in the year in which such income is accrued and taxed. Therefore, according to him it is clear from the above provision that credit should be allowed in the year in which the income relating to the TDS shall be taken into account. Therefore, the AO could have disallowed the credit for the TDS relating to retention money during the year and such TDS was allowable in assessment years when such retention money is accrued and taxed.

21. According to Id. AR, similar issue came up for consideration before Income Tax Appellate Tribunal – Delhi wherein in the case of MCM Services Pvt. Ltd., New Delhi the assessee recognised the entire gross bills in the books of accounts but claimed that retention money did not accrue to the assessee as income and claimed the same to be reduced from the income. The AO allowed the claim but the CIT(A) enhanced the income by making addition of Retention Money claimed as not accrued by assessee. The assessee filed appeal before the ITAT and the Ld. DR took the same argument that since TDS was deducted on the retention money therefore the retention money accrued during the year itself. The Tribunal dealt with the said argument as under: -

6.4. Ld. CIT(DR) vehemently argues that there is no contingency involved in the accrual of retention money. Accrual and receipt are two deferent terms. Merely because there are certain conditions for receipt of money accrual of income cannot be postponed. It depends on assessee's right to receive the same. In this case assessee entered into a regular type of construction contract; terms of agreement are similar to routine contract agreements where security deposit is retained by the contractor for some time after completion of the contract. TDS has also been deducted on the entire amount which indicates that retention money accrued as income to the assessee.

The relevant para of the order of ITAT are reproduced hereunder:

7.2. Under the scheme of the Act, what is taxable is the income that has accrued in favor of the assessee, i.e. real income and not notional. This view is amplified in the decision of Hon'ble Supreme court in case of Godhra Electricity Co. Ltd. 225 ITR 746.

7.3. In our view for a receipt to accrue as income an accounting entry cannot be only decisive factor. If the same is not accrued it cannot be held as income only because of such entry. The retention money is contingent upon the completion and post warranty certificate from the engineer in-charge of NTPC. Neither the work was completed nor the defect liability period was over. It is also fact that subsequently dispute arose between the appellant and ITD and matter is pending before arbitrator. Thus the fate of such retention money is hanging in balance and it did not accrue as income of the appellant.

The aforesaid judgements also negate the contention of the AO with regard to the entry in the books of accounts. In all the judgments it has been held that in mercantile system of accounting the entry in the books of accounts is not decisive but it is the accrual of income which is decisive.

It may be submitted that even the CBDT was conscious of the issue and has introduced Income Computation and Disclosure Standards ('ICDS') with an intention to bridge the gap between the accounting treatment and taxation treatment as also to provide much needed clarity and consistency in computing taxable income. CBDT has issued few clarifications on ICDS in form of FAQs vide its Circular dated 23 March 2017. The clarification comes into effect from assessment year 2017-18 wherein they have made Clarification on recognition of retention money. It has been provided that as per the generally accepted accounting practices, retention money is not required to be recorded in the books of account unless the same accrues i.e. the stipulated conditions of the contract are so accomplished. The Board took note of the various judicial precedents while deciding on the taxability of the retention money. The CBDT has now clarified that retention money, being part of contract revenue, shall be recognized as revenue subject to reasonable certainty of its ultimate collection as

contained in Para 9 of ICDS III. This accounting standard is applicable from assessment year 2017-18.

22. In the light of the aforesaid case laws and submissions made, the Ld. AR prayed that the order of Ld. CIT(A) to reduce the retention money while computing the total income under normal provisions as well as u/s. 115JB of the Act while computing the books profits may be confirmed.

23. Having heard both the parties and after perusal of records, we note that the assessee had filed its original return of income on 29.11.2014 showing total income of Rs.194,46,16,540/-. Thereafter the assessee's case was selected for scrutiny and notices u/s. 143(2) of the Act dated 31.08.2015 was served upon the assessee. The AO noted that the assessee thereafter had filed revised income tax return on 17.03.2016 revising its income to Rs.49,98,06,980/-. The assessee explained that when the original return was filed on 29.11.2014 it was on the basis of profit as per the P&L Account without considering the deduction made by parties (customers) on account of retention money. However, the assessee on proper application of the legal and factual position realised that company's real income is much less than the revenue booked in the account and hence, revised return was filed on 17.03.2016 claiming deduction of the retention money debited by the parties during the year amounting to Rs.142,53,74,710/-. It was also brought to the notice of the AO that as per the contract between the parties certain percentage of the bills raised as per agreement can be retained by the contractee party as retention money which would be payable only after successful completion of the entire contract after it being certified by the party and after fulfilment of certain pre-determined conditions mentioned in the contract. Thus, it was explained to the AO that as per the accounting practise followed by the party though a part of the bill amount was retained by the contractee party and would be paid afterwards on agreed conditions, the assessee in its books of account has booked the entire revenue as and when the bills were actually raised and hence, the entire amount was reflected in the revenue from the operations in the P&L Account. It was brought to the notice of the AO that due to the said practice profit before tax as per P&L Account for the year ended on 31.03.2014 is Rs.204,38,30,030/- and the said profit was arrived after taking into account entire bills raised on parties for contract work including the retention money. It was explained further that thereafter, sales was credited and the party was debited with the entire bill amount and on that basis assessee had filed the

original return on 29.11.2014 without considering the actual deduction made by the parties on account of the retention money and had shown total income of Rs.194,46,16,540/-. And when the assessee realised that its real income was much less than the revenue booked in the account it filed a revised return on 17.03.2016 claiming deduction of the retention money which was deducted by the parties to the tune of Rs.142.53 cr. and thus in the revised return income to the tune of Rs.49.98 cr. was shown. This explanation of the assessee was not accepted by the AO and he disallowed the deduction claimed by the assessee in respect of retention money to the tune of Rs.142,53,74,710/- and was added back to the income of the assessee. On appeal, the Ld. CIT(A) was pleased to allow the claim of the assessee and directed the AO to exclude the retention money from the total income. However, the Ld. CIT(A) also directed that TDS claimed by the assessee relating to such retention money should be disallowed in this assessment year and added that it may be allowed in the year in which the assessee declares the retention money as its income. Aggrieved by the aforesaid action of the Ld. CIT(A) the revenue has preferred the appeal. We note that the assessee is in the business of supplying erection and commissioning of electricity transmission towers, line powers, sub-station etc. the assessee continued the construction job for M/s. Power Grid Corporation of India Ltd., M/s. Transmission Corporation of Andhra Pradesh Ltd., M/s. West Bengal State Electricity Distribution Corporation Ltd., M/s. Maharashtra Electricity Transmission Co. Ltd. The assessee had raised bills on the parties on progressive completion of particular project and credited the gross bill amount in its books of account which was reflected in the audited Balance Sheet under the head "Revenue from operations." The assessee maintained books of account on mercantile basis and the revenue was recognized on the basis of progressive partial completion of particular project and the bills were raised accordingly. As per the contract between the parties there were clauses in the contract that the contractee shall retain specified percentage of the billed amount till successful completion of the entire project. The Id. AR drew our attention to the contract with M/s. Power Grid Corporation of India Ltd. wherein it is stipulated that the balance 10% of the erection process component (excluding processed component) for survey shall be paid after successful commissioning of the transmission line and issuance of taking over certificate. So, the final payment would be given as per the contract after the successful commissioning of the transmission line and issuance of taking over certificate by the Power Grid meaning the retention money would be given only after successful commissioning and after issuance of

the taking over certificate. According to the assessee, as per such duly executed contract entered into between the parties, the contractee had retained specified percentage of the bills amount as retention money and in this assessment year these parties have retained a sum of Rs.142,53,74,710/- as retention money on the bills raised during the year. In the light of the said fact, according to assessee, it was neither entitled nor it could have claimed the retention money as income accrued till the entire project was commissioned. And since the projects were not completed during the year under consideration, the retention money has not accrued as income of the assessee and, therefore, assessee claimed deduction of the same. It was also brought to our notice that retention money would be included in the respective years when the project will be completed and it was also brought to our notice that a part of the said retention money retained by the parties were disbursed to the assessee in the succeeding assessment years, and which were duly offered as income in the assessment years 2015-16 to 2017-18 when particular projects got completed and have duly been included in the return of income during the respective assessment years from AYs 2015-16 to 2017-18 and consequently there is no revenue loss at all. However, we note that the AO has rejected the claim of the assessee on the ground that the assessee had credited the amount of gross bill in its books of account which included the retention money in the accounts as also in the P&L Account and reflected the same in the original return of income filed by the assessee. The AO also noted that the assessee claimed TDS which was deducted on the gross bill and the assessee had claimed credit for TDS including the TDS of retention money during the year. Therefore, according to AO, the retention money has to be included as income accrued in this assessment year. We note that the Ld. CIT(A) has taken care of the TDS issue and the assessee has not preferred to challenge the action of Ld. CIT(A) which crystallizes. Therefore, the direction of the Ld. CIT(A) to the AO to disallow the TDS credit claimed in respect of the retention money not shown as income by the assessee in the revised return and to allow it in the year in which the assessee declares retention money as its income takes care of the TDS credit even if erroneously claimed by the assessee in respect of the retention money. We note from the relevant clauses of the contract that the contractees had the right to withhold certain percentage of the consideration till the conclusion of the project and only after certification of concluded projects the retained portion of the amounts are disbursed finally which may be in the succeeding assessment years and is contingent upon the terms and conditions of the contract. We also note that the AO has not disputed the amount which has

been retained by the contractees. In such a scenario, merely because the assessee had booked the income in this year without actual receipt of it, cannot be chargeable to tax as per the Act. The reasons given by the AO to disallow the claim of the assessee cannot be sustained and was rightly repelled by the Ld. CIT(A) whose view to accept the claim of assessee is based on the accepted judicial precedents laid down by the Hon'ble jurisdictional High Court in CIT Vs. Simplex Concrete Piles (supra); Hon'ble Gujarat High Court in Anup Engineering Ltd. (supra); Hon'ble Bombay High court in CIT Vs. Associated Cables P. Ltd. (supra) and Hon'ble Madras High Court in CIT Vs. Ignifluid Boilers (I) Ltd. (2006) 283 ITR 295 (Mad). We hold that in the factual circumstances especially as per the terms of contract between the assessee and the contractee, the retention money retained by the contractee is deferred payment and is contingent upon satisfactory completion of contract work. We hold that the right to receive the retention money is accrued only after the obligations under the contract are fulfilled and the assessee had no vested right to receive the same in this assessment year, therefore, it would not amount to an income of the assessee in the year in which it is retained. Therefore, we do not find any infirmity in the order of the Ld. CIT(A) and so, we confirm it and dismiss the appeal of the Revenue.

24. Before parting, it is noted that the order is being pronounced after the ninety (90) days of hearing. However, taking note of the extraordinary situation in the light of the COVID-19 pandemic and lockdown, the period of lockdown days need to be excluded. For coming to such a conclusion, we rely upon the decision of the Co-ordinate Bench of the Mumbai Tribunal in the case of DCIT vs. JSW Limited in ITA No. 6264/Mum/2018 & 6103/Mum/2018, Assessment Year 2013-14, order dt. 14th May, 2020. In the light of the above discussion, the appeal of revenue is dismissed.

25. In the result, both the appeal of revenue is dismissed

Order is pronounced in the open court on 27th May, 2020.

Sd/-
(A. L. Saini)
Accountant Member

Sd/-
(A. T. Varkey)
Judicial Member

Dated: 27th May, 2020

Copy of the order forwarded to:

1. Appellant – DCIT, Central circle-1(3), Kolkata.
2. Respondent – M/s. EMC Limited, 8th floor, Wing B, Constantia Office complex, 11, Dr. U. N. Brahmachari Street, Kolkata-700 017,
3. CIT(A)-20, Kolkata. (sent through e-mail)
4. CIT, Kolkata.
5. DR, Kolkata Benches, Kolkata. (sent through e-mail)

True Copy,

By order,

Assistant Registrar
ITAT, Kolkata Benches