

IN THE INCOME TAX APPELLATE TRIBUNAL
ALLAHABAD BENCH, ALLAHABAD

(THROUGH VIRTUAL COURT),

**BEFORE SHRI.VIJAY PAL RAO, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

ITA Nos. 147 & 148/ALLD/2016
Assessment Years: 2005-06 & 2007-08

JCIT (OSD), Circle-2 Aayakar Bhawan, 38, M.G. Marg, Allahabad,U.P.	v.	Bharat Pumps & Compressors Ltd. Naini, Allahabad, U.P.
		PAN: AAACB9309A
(Appellant)		(Respondent)

Revenue by:	Shri Shantanu Dhamija, CIT (DR)
Assessee by:	Ms. Tanu Singhal, C.A.
Date of hearing:	14.07.2021
Date of pronouncement:	12.08.2021

ORDER

PER Bench:

These two appeals, filed by Revenue, bearing ITA Nos. 147 & 148/Alld/2016 for assessment year's(ay's) : 2005-06 and 2007-08 respectively are directed against two separate appellate orders, dated 22.01.2016 & 23.02.2016 respectively in two separate appeal no(s). 130/ACIT/R-II/Alld/09-10 and 153/ACIT/R-II/Alld/13-14 , for ay: 2005-06 and 2007-08 respectively , passed by learned Commissioner of Income-tax (Appeals), Allahabad , U.P. (hereinafter called " the CIT(A) ") . The appellate proceedings had arisen before ld. CIT(A) from two separate assessment orders dated 31.12.2009 and 25.03.2013 for ay: 2005-06 and 2007-08 respectively , passed u/s. 143(1)/148 of the Income Tax Act, 1961 (hereinafter called "the Act") and 148 of the 1961 Act for ay: 2005-06 and 2007-08

respectively, by learned Assessing Officer(hereinafter called “ the AO”) . We have heard both the appeals through video conferencing mode through Virtual Court. We will deal with both the appeals separately in this common order. First, we shall deal with Revenue’s appeal in ITA no. 147/Alld/2016 for ay:2005-06.

ITA No. 147/Alld/2016-Assessment Year 2005-06

2. The grounds of appeals raised by Revenue in memo of appeal filed with Income Tax Appellate Tribunal, Allahabad(hereinafter called “ the tribunal”) in ITA No. 147/Alld/2016 for ay : 2005-06, reads as under :-

- “ 1. That the ld. CIT(A) has erred on facts & in the circumstances of the case in holding that the sums of Rs. 96,26,000/- and Rs. 29,02,000/- lacs paid to the BPCL Employees Provident fund Trust to make good the deficit of interest earnings and interest expenses of the said PF trust for the F.Y.2004-05 & 2003-04 were business expenditure for the assessee and , therefore, deletion of the said both additions is unjustified on facts and in law.*
- 2. That the ld. CIT(A) has erred on facts & in the circumstances of the case in deleting the disallowance of the employees’ contributions to VPF amounting to Rs. 2,32,95,170/- (comprised of Rs. 1,82,98,490/- deposited after the due dates under Explanation to section 36(1)(va) but before end of the relevant previous year and Rs. 49,96,680/- (Rs.25,05,265 + 24,91,415) deposited on 10.01.2006 i.e. , after the due date of filing return u/s 139(1) as the same were not deposited to the credit of the employees’ PF a/cs within the due dates of 15 days from the close of the month as required under Explanation to section 36(1)(va) read with Paragraph 36(1) of the Employees’ Provident Fund Scheme, 1952 and ; therefore , the relief allowed by him on this issue is unjustified on facts and in law.*
- 3. That the appellant craves leave to add, amend or alter the ground of appeal at the time of hearing.”*

3. The brief facts of the case are that the assessee is a Pubic Sector Undertaking(PSU) and is in the business of manufacturing of Pumps, Compressors and Gas cylinders. The return of income filed by the assessee for the impugned assessment year 2005-06 was processed by Revenue u/s 143(1) of the 1961 Act. The case of the assessee was reopened by Revenue u/s 147 r.w. Section 148 of the Act and statutory notices were issued by Revenue from

time to time during the course of reassessment proceedings . The Revenue also furnished to the assessee reasons recorded for reopening of the concluded assessment . The assessee was asked to furnish return of income in response to notice u/s 148 of the 1961 Act , and the assessee in reply thereof submitted before the AO that return of income originally filed by assessee with Revenue u/s 139(1) of the 1961 Act be treated as return of income filed in pursuance to notice issued by AO u/s 148 of the 1961 Act. These facts/issues are not in dispute as there is no legal dispute raised by assessee challenging reopening of the concluded assessment by Revenue as it is not brought to our notice that Cross Appeal/Cross Objections(CO) are filed by assessee before the tribunal challenging legality and validity of reopening of the concluded assessment by Revenue by invoking provisions of Section 147/148 of the 1961 Act, and the issues involved in this appeal filed by Revenue are argued before the Division Bench on merits of the issue's by both the rival parties .

3.2 During the course of re-assessment proceedings, the Assessing Officer observed that the assessee namely M/s Bharat Pumps & Compressors Limited(hereinafter called "BPCL") has claimed deduction of Rs.96,26,000/- on account of shortfall of PF Trust Earning (Interest) as per schedule 9.4 of the P & L Account of the assessee for the impugned assessment year under consideration. The AO was of the view that since liability for payment of interest was of the PF Trust fund and not of the assessee company, hence these expenses are not allowable to the assessee company as deduction from income from business , and hence consequently should be disallowed by adding to income of the assessee and brought to income-tax. Further, the Assessing Officer also observed that the assessee has claimed deduction of Rs.29,02,000/- made on account of shortfall of PF Trust Earning (Interest) which are part of prior period expenses vide schedule 10.1 of the Profit and Loss Account and

these expenses are not allowable as deduction from business income and the same ought to be disallowed and added to the income of the assessee and brought to income-tax. The assessee during the course of reassessment proceedings was asked by AO to explain the same. The assessee submitted before the AO during the course of reassessment proceedings that as per the BPCL Employees Provident Trust Annual Accounts for the financial year 2004-05 and 2003-04 , the said trust had incurred loss amounting to Rs.96.26 lacs and Rs.29.02 lacs respectively after crediting interest in the Employees Accounts as per statutory requirements. The assessee further submitted the as per BPCL Employees Provident Rules 25(v) page 14 of the Employees PF Rules, if there is any shortfall/deficiency between interest earning of the trust and interest distributed by the trust to its members as per statutory requirements such shortfall/deficiency shall be made good by the assessee company. It was submitted by assessee before AO during the course of reassessment proceedings that the PF Trust is for the employees of the company and in case of any shortfall/deficiency in earning of the PF Trust, the said deficiency shall be recouped by the assessee company to avoid any ultimate loss to member employees. The assessee , thus , explained that accordingly the expenditure was debited to interest account and prior period expense account respectively. The AO was not satisfied with the reply of the assessee as the AO was of the view that even if the assessee was obligated to make good the losses suffered/deficiencies /shortfall in PF Trust, the same cannot be allowed as business expenditure and allowed to be debited to P&L account , as it did not relate to the regular business activities of the assessee company, vide reassessment order dated 31.12.2009 passed by the AO .

4. Being aggrieved by reassessment order dated 31.12.2009 passed by AO, the assessee carried the matter further by filing an appeal before Id. CIT(A). It was

submitted by assessee before Id. CIT(A) that as per BPCL Employees Provident Fund Trust's annual accounts for the financial year 2004-05 and 2003-04, the Trust had incurred loss amounting to Rs. 96.26 lacs and Rs. 29.02 lacs respectively after crediting interest in the employees account as per the rates prescribed by notification of Central Government. It was submitted by assessee before Id. CIT(A) that as per Note no. 8 of the Notes to Accounts (Schedule 11.1) of the Audited Financial Statement, the assessee has provided for shortfall of Rs.29,02,000/- for financial year 2003-04 as assessed in the audited accounts of the PF Trust (Date of audit report 25.09.2005) over and above liability already provided on estimated basis during the financial year 2003-04. It was submitted by assessee before Id. CIT(A) that shortfall of Rs. 96.02 lacs for financial year 2004-05 was provided on estimated basis as the audit of the PF Trust was not completed before the closing of the annual accounts of the assessee company. It was submitted by assessee before Id. CIT(A) that as per Rule 25(v) page 14 of the BPCL Employees PF Rules, if there is any shortfall/deficiency between the interest earning of the trust and interest distributed by the trust to its members as per the Central Government notification, such shortfall/deficiency shall be made good by the company. It was submitted that PF trust is for the employees of the assessee company and in case of any shortfall / deficiency in earning of the PF trust, the same shall be recouped by the assessee company to avoid any ultimate loss to member employees, which was acceptable to the assessee company and hence consequently shortfall was debited to Profit and Loss Account and claimed as business expenditure against income of the assessee. Thus, it was claimed that the aforesaid shortfall/deficiency between interest earned by trust and the interest distributed by the trust to its member as per rate notified by Central Government is business expenses of assessee and is allowable as deduction while computing income chargeable to tax. It was also submitted by assessee

company before Id. CIT(A) that the BPCL Employees Provident Fund Trust is for employees of the company, set up under the P.F. Act, a statutory law, and the Trust is well recognized by the Income Tax Department vide letter No.21(1)/71 dated 15.03.1971 of Additional Commissioner of Income Tax, Lucknow. It was submitted by assessee before Id. CIT(A) that the expenditure arising as per the provisions/byelaws of the approved trust is very much business related expenditure and as such the same should be allowed as business expenditure of the assessee. The Id. CIT(A) was pleased to allow assessee's appeal on this issue by holding as under, vide appellate order dated 22.1.2016:-

"As has been pointed by the Ld. A.R. of the assessee, I find that the BPCL Employee Provident Fund Rule, 25 (v) mandates that if there was any shortfall/deficiency between the interest earning of the Trust and interest distributed by the Trust to its members as per the Central Govt. notification, such shortfall/deficiency shall be made good by the company. The impugned expenses have been incurred by the appellant company to meet such shortfall. These expenses are wholly and exclusively for the purposes of its business and are neither personal nor capital in nature. These are also not illegal payments. Accordingly, additions so made (Rs. 96,26,000+Rs. 29,02,000) are hereby deleted."

5. Now it was the turn of Revenue to be aggrieved by the decision of Id. CIT(A) allowing assessee's appeal on this issue and the Revenue has filed this appeal with tribunal. The appeal was heard by the Division Bench of the tribunal through video conferencing mode in Virtual Court, wherein both the rival parties vehemently supported their stand and detailed arguments are made out by both the rival parties. The Id. CIT-DR opened arguments before the Division Bench and submitted that the business deductions were claimed by assessee from income towards the shortfall in PF Trust earnings to the tune of Rs. 96,26,000/- for the impugned assessment year under consideration. The attention was drawn by Id. CIT-DR to Rule 25(v) of BPCL Employees Provident Fund Rules (page 14 of Rules/ page 43 of

paper book). It was submitted by Id. CIT-DR that the AO did not allowed the said deduction as the same were not incurred for business purposes. Our attention was drawn by Id. CIT-DR to the assessment order and appellate order passed by Id. CIT(A). It was submitted that Id. CIT(A) allowed the said deduction u/s 37(1) of the 1961 Act. It was submitted that this amount is part of employers contribution and the amount is to be paid within due date. Our attention was drawn by Id. CIT-DR to provisions of Section 36(1)(iv),36(1)(va) and 43B of the 1961 Act. It was submitted that specific provision of the 1961 Act viz. Section 36(1)(iv) and 36(1)(va) deals with the contribution to PF and hence general provision namely Section 37(1) will not be applicable because once specific provision of the 1961 Act has applicability, it will lead to ouster of applicability of general provision of the Act. The Id. CIT-DR submitted that the assessee is also claiming deduction towards shortfall in PF Trust earnings of the earlier years and the same cannot be allowed as deduction as the same are prior period expenses which cannot be set off against income of the current year under consideration. It was also submitted by Id. CIT-DR that merely provision for expenses are made in books of accounts and no payments are made, hence the same cannot also be allowed because the assessee has not made any payments for these expenses.

5.2 The Id. Counsel for the assessee on her part vehemently submitted in rebuttal that the amounts are paid towards contribution to PF Trust. Our attention was drawn by Id. Counsel for the assessee to Rule 25(v) of BPCL Employees PF Trust(page 43/paper book) and it was submitted that if the trust does not earn interest income as per rate of interest applicable to PF as notified by Central Government , then deficiency is to be borne by the employer BPCL. Reference was drawn by Id. Counsel for the assessee to provisions of Section 43B and 36(1)(iv) of the 1961 Act. Reliance was also placed by Id. Counsel for the assessee to the decision of Hon'ble Supreme Court in the case of CIT v. Sirpur Paper Mills Limited (1999) 103

Taxmann 352(SC) and CBDT notification SO 3422 dated 21.10.1965. The Id. Counsel for the assessee also relied upon the following case laws:

1. Hon'ble Supreme Court judgment in the case of CIT v. Alom Extrusions Limited (2009) 319 ITR 306(SC)
2. Hon'ble Allahabad High Court judgment in the case of Sagun Foundry Private Limited v. CIT, Kanpur in ITA No. 87 of 2006, judgment dated 21.12.2016
3. Hon'ble Allahabad High Court judgment in the case of CIT v. Manoj Kumar Singh in ITA no. 480 of 2008 , judgment dated 12.03.2012
4. Delhi ITAT decision in the case of DCIT v. M/s Leaseforces Staffing India , in ITA No. 6266 & 6267/Del/2014 , order dated 06.11.2017, (2017) ITAT Delhi
5. Hon'ble Karnataka High Court judgment in the case of Essae Teraoka Private Limited v. DCIT in ITA No. 480/2013 , judgment dated 04.02.2014

Reliance was placed by Id. Counsel for the assessee on the provisions of Section 43B of the 1961 Act. It was submitted that payments were made before the due date of filing of the return of income u/s 139(1) and hence the same be allowed. Our attention was drawn to Annual Audited Accounts filed by the assessee and reference was drawn to page 36 of Annual report/Note No. 8 to submit that the liability was discharged by the assessee and hence the same be allowed.

5.3 The Id. CIT-DR submitted in rejoinder that these payments are over and above the liability reflected in the Balance Sheet and hence Section 43B has no applicability. Our attention was drawn by Id. CIT-DR to Annual Report at page 36/Note No. 8 and it was submitted that it was an unascertained liability. It was submitted that it was an old liability and hence the same can not be allowed in this year. It was submitted that it is not clear when the accrual of liability occurred . It

was submitted that it is not known when the PF accounts were finalized, and also it was submitted that when the claim was received by PF trust is also not known.

5.4 The Id. Counsel for the assessee rebutted the contentions made by Id. CIT-DR in rejoinder by submitting that the audited accounts of PF Trust for financial year 2003-04 are available and the said accounts were finalized/audited on 25.09.2005, and hence the amounts were claimed in the year under consideration as the accounts for the financial year 2004-05 of the assessee company were finalized on 25.10.2005.

6. We have considered rival contentions and perused the material on record including case laws cited before us. We have observed that the assessee is a PSU and is in the business of manufacturing of Pumps, compressors and gas cylinders. We have observed that the assessee has made contribution towards shortfall in the interest earning of BPCL Employees PF Trust vis-à-vis interest computed based on rate notified by Central Government for PF, for two years viz. previous years relevant to ay's: 2004-05 and 2005-06. It is brought to our notice that the said PF trust is recognized by Income-tax department. As per Rule 25(v) of the said BPCL Employees Provident Fund Rules(paper book page 29 to 64) which is placed on record in file by Id counsel for the assessee, the employees are entitled for interest on PF at the rates notified by Central Government and any shortfall in the earnings of the PF trust shall be made good by assessee by contributing the shortfall additionally apart from its normal employer contribution towards PF. The said rule is reproduced hereunder :

"25. CREDITING THE INTEREST TO THE MEMBERS A/C:

(i) Interest shall be credited to the account of each member of such rate as may be determined by the Board of Trustees.

*(ii) to (iv)****

(v) In determining the rate of interest the Board of Trustees shall satisfy itself that there is no overdrawal on the Revenue account and result of debit thereto of the interest credited to the Accounts of the members. The interest payable to a member for any year shall not, how-ever, be lower than what would have otherwise accounted to him at the rate declared by the Central Govt. for that year under the Employees Provident Fund Scheme 1952. Deficiencies , if any , shall be made good by the Company.

*(vi)*** “*

As per notes to accounts as appended in Annual Report, the assessee has claimed to have duly discharged the said shortfall out of non plan loan provided by Government of India. The said note is reproduced hereunder:

“8. During the year, Company has discharged the liability towards the shortfall in BPCL Employees PF Trust’s earning as per bye-laws of Trust for the year 2003-04 amounting to Rs. 29.02 lacs (as assessed which is over and above estimated liability provided for during the year 2003-04 (previous year provided for Rs. 160.00 lacs) and Rs. 96.26 lacs for the year 2004-05 based on estimate made. These liabilities have been discharged out of non-plan loan provided by the GOI.”

Thus, as could be seen , the assessee has claimed business expenses during the year under consideration , firstly on account of shortfall of interest earned by PF trust vis-à-vis rates of interest notified by Central Government for PF , amounting to Rs. 29,02,000/- for ay: 2004-05 and secondly an amount of Rs. 96,26,000/- towards shortfall on account of interest earned by PF trust vis-à-vis rates of interest notified by Central Government for PF , for the year under consideration ay: 2005-06. The assessee has claimed that shortfall of interest earned by PF trust for the ay: 2004-05 was made in this year as the accounts of PF trust was audited on 25.09.2005 and hence it came to know about this liability after audit of the PF trust and hence the shortfall on interest is accounted for in this year. So far as the impugned ay: 2005-06 is concerned, the assessee has claimed that on estimated basis, the liability for

shortfall in interest earned on PF trust is accounted for in this year. It is observed that the AO has disallowed the same on the grounds that these are not regular business expenses, while Id. CIT(A) has allowed the same as business expenses u/s 37(1) of the 1961 Act. In our considered view , the applicability of provision of Section 36(1)(iv) read with Schedule IV of the Income-tax Act,1961, Section 43B of the 1961 Act, and Rule 75 and 88 of the Income-tax Rules, 1962 and other relevant applicable provisions/rules/notifications/judicial precedence's etc. dealing with employer contribution to PF and the quantum allowable has not been looked into by both the authorities below . In our considered view these provisions/rules prima facie have bearing on the resolution of the dispute between both the rival parties and it is only after detailed arguments and bringing relevant evidences on record which may requires inquiry into facts, the dispute between both the rival parties can be resolved both as to allowability as well on quantum allowable. In our considered view in the fitness of matter, fairness to both the parties and in the interest of justice , the issue need to be restored to the file of the AO for fresh adjudication on merit in accordance with law. While remanding matter back to the file of the AO, we clarify that all the contentions are kept open and we have not commented on merits of the issue. Needless to say that the AO shall provide proper and adequate opportunity of being heard to assessee in accordance with principles of natural justice in accordance with law. The AO shall admit all the relevant details/evidences/ submissions furnished by assessee in its defense in set aside proceedings before the AO , which will be decided by AO on merits in accordance with law. The AO is directed to pass reasoned and speaking order. This ground of appeal number 1 in memo of appeal filed by Revenue is allowed for statistical purposes. We order accordingly

7. The second issue which has arisen in the Revenue's appeal for ay:2005-06 concerns itself with the relief granted by Id. CIT(A) with respect to disallowance of

Employee's Contribution to Provident Fund received by assessee . The Assessing Officer made disallowance of Rs. 232,95,170/- on the ground that the said amount received by assessee from employees towards employees contribution of PF was not deposited by assessee to the credit of employees with the Provident Fund trust before the due date as prescribed under the P.F Act as stipulated under Section 36(1)(va) of the Act. The assessee submitted before AO that amount of Rs.1,82,98,490/- was deposited on various dates which were all prior to the date of filing of return of income u/s 139(1) of the 1961 Act , while an amount of Rs.25,05,265/- + 24,91,415/- , aggregating to Rs.49,96,680/- were not deposited at all before the due date of filing of return of income u/s 139(1) of the 1961 Act and hence the assessee conceded that an amount of Rs. 49,96,680/- is to be disallowed as the said sum of employee contribution received by it towards PF was not at all deposited even prior to the due date of filing of return of income u/s 139(1) . The AO disallowed the entire amount of Rs. 2,32,95,170/- by invoking provisions of Section 36(1)(va) read with Section 2(24)(x) of the 1961 Act, vide reassessment order dated 31.12.2009.

8. Aggrieved by re-assessment framed by the AO , the assessee filed first appeal before learned CIT(A) and submitted as under:-

"The Ld. A.R. for the appellant has submitted as under-
"As per clause (1) of Paragraph 38 of Employee's Provident Fund Scheme, 1952, Employee's contribution deducted is to be deposited together with employer's contribution within 15 days of the close of the month.
Following the apex court judgment in the case of CIT vs. M/s Alom Extrusions Limited (2009) 319 ITR 306 (SC) and judgment of Allahabad High Court in the case of CIT vs. Manoj Kumar Singh (2012), it is clear that after withdrawal of Second Proviso to Sec. 43B of the Act by Finance Act, 2003 w.e.f. 01.04.2004, the contribution to Provident fund/ VPF is allowable for deduction if it is deposited on or before the due date of furnishing of return of income u/s 139(1) of the Act.
We submit that in our case, contribution amounting to Rs. 49,96,680/- out of total contribution of Rs. 232,95,170/- has been deposited on 10.01.2006 after the due date of furnishing of return of income i.e.

30.10.2005. Hence only Rs. 49,96,680/- is to be disallowed instead of entire amount of Rs. 232,95,170/- as mentioned by the A.O.

This is to inform you that as per Sec 16(1) (b) of the Employee's Provident Funds & Miscellaneous Provident Act, 1952, "This Act shall not apply to any other establishment belonging to or under control of the Central Government or a State Government and whose employees are entitled to benefit of contributory provident fund or old age pension in accordance with any scheme or rule framed by the Central Government or the State Government governing such benefits."

BPCL is a 100% Central Government owned PSU so the question of disallowance under the Provident Fund Act does not arise in our case."

8.2 The learned CIT(A) was pleased to allow the appeal of the assessee by holding as under:-

" This issue is no more res-integra in view of the decision of the Hon'ble Allahabad High Court in the case of CIT,Bareilly vs. Manoj Kumar Singh (ITA No. 480 of 2008), decided on 12.03.2012. Respectfully following the same, the impugned addition is hereby deleted."

9 Aggrieved by relief granted by learned CIT(A) vide appellate order dated 22.01.2016 , the Revenue is in appeal before the tribunal being aggrieved by the relief granted by ld. CIT(A) . It is pertinent to reproduce grounds of appeal no 3 raised by assessee in memo of appeal filed by assessee before learned CIT(A) from Form No. 35 dated 29.01.2020 filed along with appeal filed with tribunal, which is reproduced as hereunder:-

"3. Because the learned ACIT erred in disallowing Rs. 2,32,95,170/-. This pertains to employees contribution to PF deposited late by the co. In this connection, it is stated that total contribution received by the co. from employees in F.Y. 2004-05 is Rs.4,43,42,193/-. Out of this, Rs. 2505256/- and Rs. 2491415/- totaling to Rs. 4996680/- were not deposited before filing of return (this has been deposited on 10.01.2006) and this amount of Rs. 4996680 can only be disallowed instead of Rs. 23295170/- as mentioned in the assessment order."

Thus, as could be seen from grounds of appeal raised by assessee before ld. CIT(A), out of total disallowance of Rs.2,32,95,170/- as was made by AO , the assessee has itself conceded that Rs.49,96,680/- has to be disallowed because the same were not

deposited at all before filing of return of income u/s 139(1). Thus, the issue which survives for our consideration is with respect to disallowance of Rs.1,82,98,490/- made by AO on account of employees contribution received by the assessee from its employees towards PF contribution , which was admittedly deposited late beyond the time prescribed under the PF Act as stipulated u/s 36(1)(va) of the 1961 Act, but was deposited by assessee within due date prescribed for filing of return of income u/s 139(1) of the 1961 Act , and against which relief was granted by ld. CIT(A) vide its decision as reproduced above by following the decision of Hon'ble Allahabad High Court in the case of CIT v. Manoj Kumar Singh (ITA no. 480 of 2008), decided on 12.03.2012.

9.2 The ld. CIT-DR opened argument before the Division Bench and submitted that this issue of allowability of employee contribution towards PF received by employer and which is deposited beyond the due date prescribed under PF Act abut before the due date prescribed for filing return of income u/s 139(1), is decided by jurisdictional High Court against the Revenue in the case of Mr. Manoj Kumar Singh(supra). The ld. Counsel for the assessee submitted before the Bench that so far as employee share of PF Contribution received by employer which is deposited before the due date of filing the return of income u/s 139(1) is to be allowed as deduction , as was decided by Hon'ble Allahabad High Court in favour of assessee and against the revenue, in the case of Mr. Manoj Kumar Singh(supra). Reliance was also placed by ld. Counsel for the assessee on provisions of Section 43B of the 1961 Act. The ld. Counsel for the assessee fairly submitted before the Bench that out of total amount of Rs.2,32,95,170/- disallowed by AO towards employee share of PF received by assessee , the assessee has itself conceded and accepted that Rs.49,96,680/- has to be disallowed because the same was not deposited at all before filing of return of income u/s 139(1). Thus, the ld counsel for the assessee reiterated that the only issue which is before the tribunal and for which relief was

granted by Id. CIT(A) is with respect to disallowance of Rs.1,82,98,490/- made by AO on account of employees contribution received by the assessee from its employees towards PF , which was deposited by assessee to the credit of employees with Employees PF trust late beyond the time prescribed under the PF Act , but was deposited by assessee within due date prescribed for filing of return of income u/s 139(1) of the 1961 Act and it was submitted that Id. CIT(A) rightly granted relief to the assessee . The Id. Counsel for the assessee relied upon the following case laws:

1. Hon'ble Supreme Court judgment in the case of CIT v. Alom Extrusions Limited (2009) 319 ITR 306(SC)
2. Hon'ble Allahabad High Court judgment in the case of Sagun Foundry Private Limited v. CIT, Kanpur in ITA No. 87 of 2006, judgment dated 21.12.2016
3. Hon'ble Allahabad High Court judgment in the case of CIT v. Manoj Kumar Singh in ITA no. 480 of 2008 , judgment dated 12.03.2012
4. Delhi ITAT decision in the case of DCIT v. M/s Leaseforces Staffing India , in ITA No. 6266 & 6267/Del/2014 , order dated 06.11.2017, (2017) ITAT Delhi
5. Hon'ble Karnataka High Court judgment in the case of Essae Teraoka Private Limited v. DCIT in ITA No. 480/2013 , judgment dated 04.02.2014

Our attentions was also drawn by Id. counsel for the assessee to amendment made by Finance Act, 2021 to provisions of Section 36(1)(va) of the 1961 Act and it was submitted that the said amendment is prospective from ay:2021-22 and subsequent assessment years.

10. We have considered rival contentions and perused the material on record. We have observed that the issue before us is regarding allowability of employees contribution of Rs. 1,82,98,490/- towards PF received by assessee from its

employees , but which was deposited by assessee to the credit of employees with PF trust late beyond the time provided under the relevant PF Act , but albeit the same was admittedly deposited within the due date prescribed for filing of return of income u/s 139(1) of the 1961 Act. This issue was subject matter of different interpretation by different High Courts . The Hon'ble Gujarat High Court and Hon'ble Kerala High Court has decided this issue against the tax-payer and in favour of Revenue, while Hon'ble Allahabad High Court, Hon'ble Bombay High Court, Hon'ble Karnataka High Court , Hon'ble Rajasthan High Court, Hon'ble Himachal Pradesh High Court , Hon'ble Madras High Court have decided the issue in favour of assessee and against Revenue. It is pertinent to reproduce hereunder the decision of ITAT, Chennai in the case of DCIT v. Repco Home Finance Private Limited reported in (2020) 117 taxmann.com 233(in which one of us being Accountant Member was part of DB which pronounced the order) , wherein the tribunal discussed the relevant law in details and then decided the issue in favour of tax-payer by following the jurisdictional Madras High Court decision , by holding as under:

“10. The next effective issue, which is agitated by Revenue before tribunal , is with respect of disallowance of Rs. 6,31,788/- made under Section 36(1)(va) read with section 2(24)(x) by A.O being employee contribution to P.F. which is deposited by assessee to the credit of employee with Relevant fund beyond the time stipulated under the relevant P.F.Act , but admittedly the said amount stood deposited before the due date prescribed for filing of return of income u/s 139(1) of the 1961 Act , against which the assessee filed first appeal with learned CIT(A) who was pleased to allowed deduction u/s 36(1)(va) read with Section 2(24)(x) of the 1961 Act, which issue is raised by the Revenue in Ground Nos.4.1. to 4.5 in memo of appeal filed with the tribunal. Admittedly , the assessee has not deposited a sum of Rs. 6,31,788/- being employee's contribution towards PF to the credit of employee with relevant fund within due date as was prescribed under the statute governing Provident Fund , as is required under Section 36(1)(va) read with Explanation 1 and Section 2(24)(x) of the 1961 Act, which led AO to disallow the said amount by invoking Explanation 1 to Section 36(1)(va) of the 1961 Act but the said amount admittedly stood deposited by assessee to the credit of employee with relevant fund before the time prescribed for filing of return of income u/s 139(1) of the 1961 Act.

Aggrieved by an assessment framed by AO u/s 143(3) of the Act, the assessee filed first appeal with learned CIT(A) who was pleased to delete the addition to the income to the tune of Rs. 6,31,788/- made by AO on account of delayed remission of employee's contribution towards EPF to the credit of employee with relevant fund beyond the time prescribed under relevant PF statute but admittedly the said amount stood deposited by assessee to the credit of employee with relevant fund before the due date prescribed for filing of return of income u/s 139(1) of the 1961 Act , by relying on following judicial decision(s) as stipulated hereunder:-

1. *CIT v. Alom Extrusions Ltd., in 319 ITR 306(SC)*
2. *CIT v. Industrial Security and Intelligence India Pvt. Ltd., (Mad) Tax Case Appeal Nos.585 and 586 of 2015 and M.P No.1 of 2015 , dated 24.07.2015*
3. *ACIT v. M/s.Easun Products of India (P) Ltd., in I.T.A. No. No.182/Mds./2016 , vide order of Chennai Tribunal dated 19.05.2016, for ay: 2012-13.*

10.2 *Aggrieved by an appellate order dated 30.08.2017 passed by learned CIT(A), the Revenue has now filed an appeal before the tribunal agitating against the decision of learned CIT(A) granting relief to assessee despite specific provision as is contained in Section 36(1)(va) read with Explanation 1 of the 1961 Act that deduction towards employees contribution to PF can be allowed only when the employer remits the said employee contribution to the credit of employee with relevant fund on or before the due date specified in statute governing PF, which admittedly was not complied by the assessee . Before us, the Ld. D.R. submitted that Section 36(1)(va) read with Explanation 1 of the 1961 Act clearly provides that employee contribution to Provident Fund amount should have been deposited before the due date as prescribed under the statute governing Provident Fund. By relying on the provisions of section 36(1)(va) of the Act so far as employees contribution is concerned, the learned DR relied upon the decision of Hon'ble Madras High Court in the case of The Principal C.I.T. v. M/s.Orchid Pharma Ltd., in Tax case appeal Nos.430 & 421 of 2019 & CMP No.13978 of 2019 for ay:2013-14 and 2014-15, judgment dated 08.07.2019 and prayers were made by Ld. D.R. to restore the matter back to the file of learned CIT(A) for fresh adjudication after considering aforesaid*

decision of Hon'ble Madras High Court in the case of Orchid Pharma (cited supra). The Ld. Counsel for the assessee on the other hand submitted that this issue is squarely covered in favour of assessee by decision of Hon'ble Madras High Court in the case of CIT v. M/s.Industrial Security and Intelligence India Pvt. Ltd., (Tax Case Appeal No. 585 and 586 of 2015 dated 24.07.2015, for ay: 2003-04 and 2004-05) and it is also submitted by learned counsel for the assessee that the Chennai Tribunal in I.T.A. No. No.3263/Chny/2018 for ay: 2013-14 in the case of the ACIT v. M/s.SPEL Semo conductor Ltd., vide order dated 23.07.2019 has decided this issue in favour of the assessee, to which one of us namely Hon'ble Judicial Member was part of Division Bench who pronounced the said order in ITA no. 3263/Chny/2018.

10.3 We have heard rival contentions through video conferencing and perused the material on record including cited case laws. We have observed that the assessee has deposited Employee's share of Provident Fund contribution amounting to Rs. 6,31,788/- to the credit of employees with respective PF fund beyond the due date prescribed under the relevant statute governing Provident Fund , but the same was admittedly deposited before the due date of filing of return of income as is prescribed u/s 139(1) of the 1961 Act . Before proceeding further, it will be profitable to reproduce the relevant provisions of the 1961 Act as were applicable for ay: 2013-14, which are reproduced hereunder:

"Definitions.

2. In this Act, unless the context otherwise requires,—

*	*	*
*	*	*

(24) "income " includes—

*	*	*
*	*	*

(x) any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948 (34 of 1948), or any other fund for the welfare of such employees ;] "

"Other deductions.

36. (1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28—

[(va) any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section

2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date.

Explanation.—For the purposes of this clause, "due date" means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise;] "

"Certain deductions to be only on actual payment.

43B. Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of—

*	*	*
*	*	*

(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees,

*	*	*
*	*	*

shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him:

[Provided that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return . "

10.3.2 *It is by virtue of Finance Act, 1987 w.e.f. 01.04.1988 , the provisions of Section 36(1)(va) read with Section 2(24)(x) of the 1961 Act were inserted, which considered employee contribution towards PF/ESI and other employees welfare funds received by employer as income of the assessee by virtue of Section 2(24)(x) of the 1961 Act and deduction thereof the employee contribution shall be allowed by virtue of Section 36(1)(va) of the 1961 Act provided the said amount stood deposited by employer to the credit of employee with relevant fund on or before the due date as prescribed under relevant statute governing PF/ESI and other employees welfare funds. The Provision of Section 43B of the 1961*

Act were also amended by Finance Act, 1987 w.e.f. 1.4.1988 and as it stood at that time is reproduced hereunder:

"Certain deductions to be only on actual payment.

43B. Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of—

(a)	*	*
**	*	*

(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, [or]

*[(c)*** **

shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him.

[Provided that nothing contained in this section shall apply in relation to any sum referred to in clause (a) [or clause (c)] which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return:

Provided further that no deduction shall, in respect of any sum referred to in clause (b), be allowed unless such sum has actually been paid during the previous year on or before the due date as defined in the Explanation below clause (va) of subsection (1) of section 36.]

*	*	*
*	*	*

Thus, Section 43B of the 1961 Act as it stood vide amendment made by Finance Act, 1987 w.e.f. 01.04.1988 , inter-alia, provided that notwithstanding anything contained in any other provision of the 1961 Act, a deduction which is otherwise allowable under the 1961 Act shall be allowed of any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees provided the said sum is actually paid during the previous year on or before the due date as defined in the Explanation below clause (va) of subsection (1) of section 36 viz. the date prescribed under the

relevant statute governing PF/ESI and other employee welfare funds for deposit of the contribution payable by assessee as an employer to an provident fund or superannuation fund or gratuity fund or any other fund for welfare of employees.

10.3.3. Then came the amendment by Finance Act, 2003 w.e.f 01.04.2004, wherein the second proviso to Section 43B stood deleted and first poviso to Section 43B was amended so that now even any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees provided the said sum is actually paid during the previous year on or before the due date as prescribed under Section 139(1) for filing of return of income shall be allowed. The amended Section 43B , as amended by Finance Act, 2003 wef 01.04.2004 , is reproduced hererunder:

"[Certain deductions to be only on actual payment.

43B. Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of—

*	*	*
*	*	*

(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, [or]

*	*	*
*	*	*

shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him :

Provided that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return.

*	*	*
*	*	*

10.3.4 It is pertinent at this stage to reproduce the decision of Hon'ble Supreme Court in the case of Alom Extrusions Limited (supra) wherein

the amendments made by Finance Act, 2003 w.e.f. 01.04.2004 were held to be curative in nature and applicable retrospectively effective from 01.04.1988, which decision of Hon'ble Supreme Court is reproduced hereunder:

"6. The lead matter in this batch of civil appeals is CIT v. Alom Extrusions Ltd. [Civil Appeal arising out of S.L.P. (C) No. 23851 of 2007].

Prior to the amendment of section 43B of the Act, vide Finance Act, 2003, the two provisos to section 43B of the Act read as under

:

"Provided that nothing contained in this section shall apply in relation to any sum referred to in clause (a) or clause (c) or clause (d) or clause (e) or clause (f), which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return :

Provided further that no deduction shall, in respect of any sum referred to in clause (b) , be allowed unless such sum has actually been paid in cash or by issue of a cheque or draft or by any other mode on or before the due date as defined in the Explanation below clause (va) of sub-section (1) of section 36, and where such payment has been made otherwise than in cash, the sum has been realized within fifteen days from the due date. "

7. By Finance Act, 2003, the second proviso to section 43B of the Act not only got deleted but the said Finance Act, 2003, also amended the first proviso with effect from assessment year 2004-05. We quote hereinbelow the first proviso to section 43B of the Act after its amendment by Finance Act, 2003, which reads as under:

"Provided that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under subsection (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return. "

To answer the above controversy, we need to understand the Scheme of the Income-tax Act, 1961, as it existed prior to 1st April, 1984, and as it stood after 1-4-1984.

"Income" has been defined under section 2(24) of the Act to include profits and gains. Under section 2(24)(x), any sum received by the assessee from his employees as contributions to provident fund/superannuation fund or any fund set up under Employees' State Insurance Act, 1948, or any other fund for welfare of such employees constituted income. This is the reason why every assessee(s) [employer(s)] was entitled to deduction even prior to 1-4-1984, on Mercantile System of Accounting as a business expenditure by making provision in his Books of Account in that regard. In other words, if an assessee(s)-employer(s) is maintaining his books on Accrual System of Accounting, even after collecting the contribution from his employee(s) and even without remitting the amount to the Regional Provident Fund Commissioner [R.P.F.C.], the assessee(s) would be entitled to deduction as business expense by merely making a provision to that effect in his Books of Account. The same situation arose prior to 1st April, 1984, in the context of assessee(s) collecting sales tax and other indirect taxes from their respective customers and claiming deduction only by making provision in their Books without actually remitting the amount to the exchequer. To curb this practice, section 43B was inserted with effect from 1-4-1984, by which the Mercantile System of Accounting with regard to tax, duty and contribution to welfare funds stood discontinued and, under section 43B, it became mandatory for the assessee(s) to account for the afore- stated items not on Mercantile basis but on cash basis. This situation continued between 1-4-1984 and 1-4-1988, when the Parliament amended section 43B and inserted first proviso to section 43B. By this first proviso, it was, inter alia, laid down, in the context of any sum payable by the assessee(s) by way of tax, duty, cess or fee, that if an assessee(s) pays such tax, duty, cess or fee even after the closing of the accounting year but before the date of filing of the Return of income under section 139(1) of the Act, the assessee(s) would be entitled to deduction under section 43B on actual payment basis and such deduction would be admissible for the accounting year. This proviso, however, did not apply to the contribution made by the assessee(s) to the labour welfare funds. To this effect, first proviso stood introduced with effect from 1-4-1988.

Vide Finance Act, 1988, the second proviso came to be inserted. It reads as follows:

"Provided further that no deduction shall, in respect of any sum referred to in clause (b) , be allowed unless such sum has actually been paid during the previous year on or before the due date as defined in the Explanation below clause (va) of sub-section (1) of section 36. "

At this stage, we also quote hereinbelow the Explanation below clause (va) of sub-section (1) of section 36:

"Explanation.—For the purposes of this clause, 'due date' means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise."

7. However, the second proviso stood further amended vide Finance Act, 1989, with effect from 1-4-1989, which reads as under:

"Provided further that no deduction shall, in respect of any sum referred to in clause (b), be allowed unless such sum has actually been paid in cash or by issue of a cheque or draft or by any other mode on or before the due date as defined in the Explanation below clause (va) of sub-section (1) of section 36, and where such payment has been made otherwise than in cash, the sum has been realised within fifteen days from the due date."

8. On reading the above provisions, it becomes clear that the assessee(s)-employer(s) would be entitled to deduction only if the contribution stands credited on or before the due date given in the Provident Fund Act. However, the second proviso once again created further difficulties. In many of the companies, financial year ended on 31st March, which did not coincide with the accounting period of R.P.F.C. For example, in many cases, the time to make contribution to R.P.F.C. ended after due date for filing of returns. Therefore, the industry once again made representation to the Ministry of Finance and, taking cognizance of this difficulty, the Parliament inserted one more amendment vide Finance Act, 2003, which, as stated above, came into force with effect from 1-4-2004. In other words, after 1-4-2004, two changes were made, namely, deletion of the second proviso and further amendment in the first proviso, quoted above. By the Finance Act, 2003, the amendment made in the first proviso equated in terms of the benefit of deduction of tax, duty, cess and fee on the one hand with contributions to Employees' Provident Fund, superannuation fund and other welfare funds on the other. However,

the Finance Act, 2003, bringing about this uniformity came into force with effect from 1-4-2004. Therefore, the argument of the assessee(s) is that the Finance Act, 2003, was curative in nature, it was not amendatory and, therefore, it applied retrospectively from 1-4-1988, whereas the argument of the Department was that Finance Act, 2003, was amendatory and it applied prospectively, particularly when the Parliament had expressly made the Finance Act, 2003, applicable only with effect from 1-4-2004. It was also argued on behalf of the Department that even between 1-4-1988 and 1-4-2004, Parliament had maintained a clear dichotomy between payment of tax, duty, cess or fee on one hand and payment of contributions to the welfare funds on the other. According to the Department, that dichotomy continued up to 1-4-2004, hence, looking to this aspect, the Parliament consciously kept that dichotomy alive up to 1-4-2004, by making Finance Act, 2003, come into force only with effect from 1-4-2004. Hence, according to the Department, Finance Act, 2003 should be read as amendatory and not as curative [retrospective] with effect from 1-4-1988.

9. We find no merit in these civil appeals filed by the Department for the following reasons: firstly, as stated above, section 43B [main section], which stood inserted by Finance Act, 1983, with effect from 1-4-1984, expressly commences with a non obstante clause, the underlying object being to disallow deductions claimed merely by making a Book entry based on Mercantile System of Accounting. At the same time, section 43B [main section] made it mandatory for the Department to grant deduction in computing the income under section 28 in the year in which tax, duty, cess, etc., is actually paid. However, Parliament took cognizance of the fact that accounting year of a company did not always tally with the due dates under the Provident Fund Act, Municipal Corporation Act [octroi] and other Tax laws. Therefore, by way of first proviso, an incentive/relaxation was sought to be given in respect of tax, duty, cess or fee by explicitly stating that if such tax, duty, cess or fee is paid before the date of filing of the Return under the Income-tax Act [due date], the assessee(s) then would be entitled to deduction. However, this relaxation/incentive was restricted only to tax, duty, cess and fee. It did not apply to contributions to labour welfare funds. The reason appears to be that the employer(s) should not sit on the collected contributions and deprive the workmen of the rightful benefits under Social Welfare legislations by delaying payment of contributions to the welfare funds. However, as stated above, the second proviso resulted in implementation problems, which have been mentioned hereinabove, and which resulted in the enactment of Finance Act, 2003, deleting the second proviso and bringing about uniformity in the first proviso by equating tax, duty, cess and fee with contributions to welfare funds.

Once this uniformity is brought about in the first proviso, then, in our view, the Finance Act, 2003, which is made applicable by the Parliament only with effect from 1-4-2004, would become curative in nature, hence, it would apply retrospectively with effect from 1-4-1988. Secondly, it may be noted that, in the case of Allied Motors (P.) Ltd. v. CIT [1997] 224 ITR 677(SC), the scheme of section 43B of the Act came to be examined. In that case, the question which arose for determination was, whether sales tax collected by the assessee and paid after the end of the relevant previous year but within the time allowed under the relevant Sales Tax law should be disallowed under section 43B of the Act while computing the business income of the previous year? That was a case which related to assessment year 1984-85. The relevant accounting period ended on 30-6-1983. The Income-tax Officer disallowed the deduction claimed by the assessee which was on account of sales tax collected by the assessee for the last quarter of the relevant accounting year. The deduction was disallowed under section 43B which, as stated above, was inserted with effect from 1-4-1984. It is also relevant to note that the first proviso which came into force with effect from 1-4-1988 was not on the statute book when the assessments were made in the case of Allied Motors (P.) Ltd. (supra). However, the assessee contended that even though the first proviso came to be inserted with effect from 1-4-1988, it was entitled to the benefit of that proviso because it operated retrospectively from 1-4-1984, when section 43B stood inserted. This is how the question of retrospectivity arose in Allied Motors (P.) Ltd.'s case (supra). This Court, in Allied Motors (P.) Ltd.'s case (supra) held that, when a proviso is inserted to remedy unintended consequences and to make the section workable, a proviso which supplies an obvious omission in the section and which proviso is required to be read into the section to give the section a reasonable interpretation, it could be read retrospective in operation, particularly to give effect to the section as a whole. Accordingly, this Court, in Allied Motors (P.) Ltd.'s case (supra), held that the first proviso was curative in nature, hence, retrospective in operation with effect from 1-4-1988. It is important to note once again that, by Finance Act, 2003, not only the second proviso is deleted but even the first proviso is sought to be amended by bringing about an uniformity in tax, duty, cess and fee on the one hand vis-a-vis contributions to welfare funds of employee(s) on the other. This is one more reason why we hold that the Finance Act, 2003, is retrospective in operation. Moreover, the judgment in Allied Motors (P.) Ltd.'s case (supra) is delivered by a Bench of three learned Judges, which is binding on us. Accordingly, we hold that Finance Act, 2003, will operate retrospectively with effect from 1-4-1988 [when the first proviso stood inserted]. Lastly, we may point out the hardship and the invidious

discrimination which would be caused to the assessee(s) if the contention of the Department is to be accepted that Finance Act, 2003, to the above extent, operated prospectively. Take an example - in the present case, the respondents have deposited the contributions with the R.P.F.C. after 31st March [end of accounting year] but before filing of the returns under the Income-tax Act and the date of payment falls after the due date under the Employees' Provident Fund Act, they will be denied deduction for all times. In view of the second proviso, which stood on the statute book at the relevant time, each of such assessee(s) would not be entitled to deduction under section 43B of the Act for all times. They would lose the benefit of deduction even in the year of account in which they pay the contributions to the welfare funds, whereas a defaulter, who fails to pay the contribution to the welfare fund right up to 1-4-2004, and who pays the contribution after 1-4-2004, would get the benefit of deduction under section 43B of the Act. In our view, therefore, Finance Act, 2003, to the extent indicated above, should be read as retrospective. It would, therefore, operate from 1-4-1988, when the first proviso was introduced. It is true that the Parliament has explicitly stated that Finance Act, 2003, will operate with effect from 1-4-2004. However, the matter before us involves the principle of construction to be placed on the provisions of Finance Act, 2003.

10. Before concluding, we extract hereinbelow the relevant observations of this Court in the case of CIT v. J.H. Gotla [1985] 156 ITR 323, which reads as under:

"...We should find out the intention from the language used by the Legislature and if strict literal construction leads to an absurd result, i.e., a result not intended to be subserved by the object of the legislation found in the manner indicated before, then if another construction is possible apart from strict literal construction, then that construction should be preferred to the strict literal construction. Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction...." (p. 339)

For the afore-stated reasons, we hold that Finance Act, 2003, to the extent indicated above, is curative in nature, hence, it is retrospective and it would operate with effect from 1-4-1988 [when the first proviso came to be inserted]. For the above reasons, we find no merit in this batch of civil appeals filed by the Department which are hereby dismissed with no order as to costs.

Civil Appeal No. 7755/2009 @ S.L.P. (C) No. 20581/2008 and Civil Appeal No. 7757/2009 @ S.L.P. (C) No. 18380/2009:

11. Leave granted.

12. In view of our judgment in the case of CIT v. Alom Extrusions Ltd. [Civil Appeal arising out of S.L.P. (C) No. 23851 of 2007], we set aside the impugned judgment and order of the Bombay High Court and allow these civil appeals filed by the assesseees with no order as to costs."

10.3.5 It is also pertinent to reproduce at this stage the decision of Hon'ble Delhi High Court in the case of Aimil Limited (supra) wherein Hon'ble Delhi High Court interpreted the decision of Hon'ble Supreme Court to be applicable to both employer and employees contribution and in case the said amounts were deposited by employer to the credit of employees with the respective funds before the due date as prescribed u/s 139(1) of the 1961 Act, the deduction from the income shall be allowed, by holding as under:

"4. In some other appeals preferred by the assesseees, the ITAT has taken contrary view and upheld the addition made by the Assessing Officers. Under these circumstances, all these appeals were admitted and heard on the following question of law : —

"Whether the ITAT was correct in law in deleting the addition relating to employees' contribution towards Provident Fund and ESI made by the Assessing Officer under section 36(1)(va) of the Income-tax Act, 1961 ?"

5. Section 36 of the Act deals with certain deductions which shall be allowed in respect of matters dealt with therein, in computing the income referred to in section 28 of the Act. Different types of deductions are provided therein in various clauses of section 36. Clause (iv) of sub-section (1) deals with deductions on account of contribution towards a recognized provident fund or an approved superannuation fund made by the assessee as an employer, subject to certain limits and also subject to certain conditions as the CBDT may think fit to specify. Clause (v) of sub-section (1) of section 36 enables the assessee to seek deduction in respect of sum paid by it as an employer by way of contribution towards an approved gratuity fund created by him for the exclusive benefit of his employees under an irrevocable trust. Then comes clause (va) which deals about employees' contribution in the provident fund and ESI and reads as under :—

"(va) any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause

(24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date.

Explanation - For the purposes of this clause, 'due date' means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract or service or otherwise. "

6. It would also be appropriate to take note of section 43B of the Act primarily for the reason that in Vinay Cement Ltd. 's case (supra) it was this provision which came up for discussion before the Supreme Court and also keeping in view the contention of learned counsel for the Revenue that this judgment would be of no avail to the assessee while discussing the matter under section 36(1)(va) of the Act. Section 43B stipulates that certain deductions are to be given only on actual payment. Clause (b) thereof talks about contribution by the assessee as employer to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees. Since we are concerned only with clause (b), we reproduce the same for clearer understanding :—

"43B. Certain deductions to be only on actual payment.— Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of—

*	*	*
*	*	*

(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, or,

*	*	*
*	*	*

shall be allowed irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him :

Provided that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the

return of income under subsection (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return." [Emphasis supplied]

7. During the period in question with which we are concerned, section 43B contained second proviso also, which stands omitted by the Finance Act, 2003 with effect from 1 - 4-2004. Since, this provision existed at the relevant time, it also needs to be reproduced : —

"Provided further that no deduction shall, in respect of any sum referred to in clause (b), be allowed unless such sum has actually been paid in cash or by issue of a cheque or draft or by any other mode on or before the due date as defined in the Explanation below clause (va) of sub-section (1) of section 36, and where such payment has been made otherwise than in cash, the sum has been realized within fifteen days from the due date."

8. As per the first proviso, if the payment is actually made on or before the due date applicable in his case for filing the return, it would be admissible as deduction. Thus, the 'due date' is the date on which return is to be filed. The case of the Revenue is that for employees' contribution, the 2nd proviso was specifically incorporated and in the present case, as we are concerned with non-deposit of the employees' contribution towards provident fund as well as ESI contribution by the employer, only 2nd proviso be looked into.

9. What is sought to be argued is that distinction is to be made while treating the case related to employers' contribution on the one hand and employees' contribution on the other hand. It was submitted that when employees' contribution is recovered from their salaries/wages, that is trust money in the hands of the assessee. For this reason, rigours of law are provided by treating it as income when the assessee receives the employees' contribution and enabling the assessee to claim deduction only on actual payment by due date specified under the provisions.

10. Ms. Prem Lata Bansal, learned counsel for the Revenue, thus, argued that the second proviso to section 43B, as it stood at the relevant time, clearly mentioned that deduction in respect of any sum referred to in clause (b) shall not be allowed unless such sum has actually been paid in cash or by issuance of cheque or draft or by any other mode on or before the due date, as defined in the Explanation below clause (va) of sub-section (1) of section 36. Thus, the assessee would earn the entitlement only if the actual payment is made before the due date specified in Explanation below clause (va) of sub-section

(1) of section 36 of the Act. As per the said Explanation, 'due date' means the date by which the assessee is required, as an employer, to credit the employees' contribution to the employees' account in the relevant fund under any Act, rules, order or notification issued thereunder or under any standing order award contract of service or otherwise.

11. Before we delve into this discussion, we may take note of some more provisions of the Act. Section 2(24) of the Act enumerates different components of income. It, inter alia, stipulates that income includes any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948 (34 of 1948), or any other fund for the welfare of such employees. It is clear from the above that as soon as employees' contribution towards provident fund or ESI is received by the assessee by way of deduction or otherwise from the salary/wages of the employees, it will be treated as 'income' at the hands of the assessee. It clearly follows therefrom that if the assessee does not deposit this contribution with provident fund/ESI authorities, it will be taxed as income at the hands of the assessee. However, on making deposit with the concerned authorities, the assessee becomes entitled to deduction under the provisions of section 36(1)(va) of the Act. Section 43B(b), however, stipulates that such deduction would be permissible only on actual payment. This is the scheme of the Act for making an assessee entitled to get deduction from income insofar as employees' contribution is concerned. It is in this backdrop we have to determine as to at what point of time this payment is to be actually made.

12. Since the ITAT while holding that the amount would qualify for deduction even if paid after the due dates prescribed under the Provident Fund/ESI Act but before the filing of the income-tax returns by placing reliance upon the Supreme Court judgment in Vinay Cement Ltd.'s case (supra). at this juncture we take note of the discussion of ITAT on this aspect: —

"11. We have carefully considered the rival submissions in the light of material placed before us. In the assessment order Id. Assessing Officer has categorically stated that what the amount due was for which month in respect of EPF, Family Pension, PF inspection charges and ESI deposits and what were the due dates for these deposits and on which date these deposits were made. The dates of deposits are mentioned between 23rd May, 2001 to 23rd April, 2002. The latest payment is made on 23rd April, 2002 and assessee being limited company had filed its return on 20th October, 2002 which is a date not beyond the due date of filing of the return. Thus, it is clear beyond doubt that all the payments

which have been disallowed were made much earlier to the due date of filing of the return. The disallowance is not made by the Assessing Officer on the ground that there is no proof of making such payment but disallowance is made only on the ground that these payments have been made beyond the due dates of making these payments under the respective statute. Thus, it was not an issue that the payments were not made by the assessee on the dates which have been stated to be the dates of deposits in the assessment order. If such is a factual aspect then according to latest position of law clarified by Hon'ble Supreme Court in the case of CIT v. Vinay Cement Ltd. that no disallowance could be made if the payments are made before the due date of filing the return of income. This issue came before Hon'ble Supreme Court in the case of CIT v. Vinay Cement Ltd. which was a special leave petition filed by the department against the High Court Order of 26th June, 2006 in ITA No. 2/05 and ITA No. 56/03 and ITA No. 80/03 of the High Court of Guwahati, Assam and it is order dated 7th March, 2007. A copy of the said order is placed on record. The observations of their Lordships on the issue are as under :—

'In the present case we are concerned with the law as it stood prior to the amendment of section 43B. In the circumstances the assessee was entitled to claim the benefit in section 43B for that period particularly in view of the fact that he has contributed to provident fund before filing of the return.

The special leave petition is dismissed."

13. It is clear from the above that in Vinay Cement Ltd.'s case (supra), the SLP preferred by the Revenue against the judgment of the Guwahati High Court was dismissed making the aforequoted observations. The reasons are given and, thus, it amounts to affirmation of the view taken by the High Court of Guwahati.

14. When we keep that proposition in mind and also take into consideration various judgments where Vinay Cement Ltd.'s case (supra) is applied and followed, it will not be possible to accept the contention of the Revenue.

15. In CIT v. Dharmendra Sharma [2008] 297ITR 320, this Court specifically dealt with this issue and relying upon the aforesaid judgment of the Guwahati High Court, as affirmed by the Supreme Court in Vinay Cement Ltd.'s case (supra), the appeal of the Revenue was dismissed. More detailed discussion is contained in another judgment of this Court in CIT v. P.M. Electronics Ltd. [2009] 177 Taxman 1 . Specific questions of law which were proposed by the Revenue in that case were as under : —

"(a
)

Whether
 amounts
 paid on
 account of
 PF/ESI after
 'due date'
 are
 allowable in
 view of
 section 43B,
 read with
 section
 36(1)(va) of
 the Act?

(b)

Whether the
 deletion of
 the 2nd
 proviso to
 section 43B
 by way of
 amendment
 by the
 Finance Act,
 2003 is
 retrospectiv
 e in nature"
 (p. 2)

16. These questions were answered by the Division Bench in the following manner : —

"7. Having heard the learned counsel for the revenue, as well as, the assessee, we are of the view that the view taken by the Tribunal deserves to be sustained as it is no longer res integra in view of the decision of the Supreme Court in the case of CIT v. Vinay Cement Ltd. 213 ITR 268 which has been followed by a Division Bench of this Court in the case of CIT v. Dharmendra Sharma [2008] 297 ITR 320.

8. Despite the aforesaid judgments, the learned counsel for the Tribunal has contended that in view of the judgment of the Division Bench of the Madras High Court in the case of CIT v. Synergy Financial Exchange Ltd. [2007] 288 ITR 366 and that of the Division Bench of the Bombay High Court in the case of CIT v. Pamwi Tissues Ltd. [2008] Taxindiaonline.com 104 (TIOL) the issue requires

consideration. According to us, in view of the dismissal of the Special Leave Petition in the case of Vinay Cement Ltd. (supra) by the Supreme Court by a speaking order, the submission of the learned counsel for the revenue has to be rejected at the very threshold. The reason for the same is as follows:—

9. The Gauhati High Court in the case of CIT v. George Williamson (Assam) Ltd. [2006] 284 ITR 619 dealt with the very same issue. In the said judgment the Division Bench of the Gauhati High Court noted a contrary view taken by the Kerala High Court in the case of CIT v. South India Corporation Ltd. [2000] 242 ITR 114. After noting the said judgment the fact that the amendments had been made to the provisions of section 43B of the Act by virtue of Finance Act, 2003 with effect from 1-4-2004 it agreed with the submission of the learned counsel for the assessee that by virtue of the omission of the second proviso and the omission of clauses (a), (c), (d), (e) and (f) without any saving clause would mean that the provisions were never in existence. For this purpose, in the said case the assessee had placed reliance on the judgment of a Constitution Bench of the Supreme Court in the case of Kolhapur Canesugar Works Ltd. v. Union of India [2000] 2 SCC 536 and Rayala Corporation (P.) Ltd. v. Director of Enforcement [1969] 2 SCC 412 and General Finance Co. v. Asstt. CIT [2002] 257 ITR 338 (SC). The said submissions found favour with the Division Bench of the Guwahati High Court and relying on earlier decisions of its own Court in CIT v. Assam Tribune [2002] 253 ITR 93 and CIT v. Bharat Bamboo & Timber Suppliers [1996] 219 ITR 212 the Division Bench dismissed the appeal of the revenue. It transpires that the aforesaid matter was taken up in appeal along with other matters including Vinay Cement Ltd.'s case (supra). The order in Vinay Cement Ltd.'s case (supra) was passed by the Supreme Court on 7-3-2007 wherein it observed as follows:- 'Delay condoned. In the present case we are concerned with the law as it stood prior to the amendment of section 43B. In the circumstances, the assessee was entitled to claim the benefit in section 43B for that period particularly in view of the fact that he has contributed to provident fund before filing of the return. Special leave petition is dismissed'.

10. In view of the above, it is quite evident that the special leave petition was dismissed by a speaking order and while doing so the Supreme Court had noticed the fact that the

matter in appeal before it pertain to a period prior to the amendment brought about in section 43B of the Act. The aforesaid position as regards the state of the law for a period prior to the amendment to section 43B has been noticed by a Division Bench of this Court in Dharmendra Sharma's case (supra). Applying the ratio of the decision of the Supreme Court in Vinay Cement Ltd. 's case (supra) a Division Bench of this Court dismissed the appeals of the revenue. In the passing we may also note that a Division Bench of the Madras High Court in the case of CIT v. Nexus Computer (P.) Ltd. by a judgment dated 18-8-2008 passed in Tax Case (A) No. 1192/2008 discussed the impact of both the dismissal of the special leave petition in the case of George Williamson (Assam) Ltd. (supra) and Vinay Cement Ltd.'s case (supra) as well as a contrary view of the Division Bench of its own Court in Synergy Financial Exchange's case (supra). The Division Bench of the Madras High Court has explained the effect of the dismissal of a special leave petition by a speaking order by relying upon the judgment of the Supreme Court in the case of Kunhayammed v. State of Kerala 119 STC 505 at page 526 in paragraph 40 and noted the following observations:—

'If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the Court, Tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the Court, Tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.'

11. Upon noting the observations of the Supreme Court in Kunhayammed's case (supra) the Division Bench of the Madras High Court in the case of Nexus Computer (P.) Ltd. (supra) came to the conclusion that the view taken by the Supreme Court in Vinay Cement Ltd. 's case (supra) would

bind the High Court as it was not declared by the Supreme Court under article 141 of the Constitution.

12. We are in respectful agreement with the reasoning of the Madras High Court in Nexus Computer (P.) Ltd.'s case (supra). Judicial discipline requires us to follow the view of the Supreme Court in Vinay Cement Ltd.'s case (supra) as also the view of the Division Bench of this Court in Dharmendra Sharma's case (supra).

13. In these circumstances, we respectfully disagree with the approach adopted by a Division Bench of the Bombay High Court in Pamwi Tissues Ltd.'s case (supra).

14. In these circumstances indicated above, we are of the opinion that no substantial question of law arises for our consideration in the present appeal. The appeal is, thus, dismissed." (p. 3)

It also becomes clear that deletion of the 2nd proviso is treated as retrospective in nature and would not apply at all. The case is to be governed with the application of the 1st proviso.

17. We may only add that if the employees' contribution is not deposited by the due date prescribed under the relevant Acts and is deposited late, the employer not only pays interest on delayed payment but can incur penalties also, for which specific provisions are made in the Provident Fund Act as well as the ESI Act. Therefore, the Act permits the employer to make the deposit with some delays, subject to the aforesaid consequences. Insofar as the Income-tax Act is concerned, the assessee can get the benefit if the actual payment is made before the return is filed, as per the principle laid down by the Supreme Court in Vinay Cement Ltd.'s case (supra).

18. We, thus, answer the question in favour of the assessee and against the Revenue. As a consequence, the appeals filed by the assessee stand allowed and those filed by the Revenue are dismissed.

No costs."

10.3.6 *We have also observed that Hon'ble Madras High Court in the case of CIT v. M/s.Industrial Security and Intelligence India Pvt. Ltd. (cited supra), has decided this issue in favour of the tax-payer and deduction towards employees contribution to PF/ESI was allowed provided the same is deposited to the credit of employees with respective PF/ESI funds before the due date prescribed u/s 139(1) of the 1961 Act, albeit the same was deposited after the due date as prescribed for*

payment under statute governing PF/ESI. The Hon'ble Madras High Court while adjudicating the aforesaid appeal in the case of Industrial Security (supra) in favour of tax-payer referred to the decision of Hon'ble Supreme Court in the case of CIT v. Alom Extrusions Limited reported in 319 ITR 306(SC) and decision of Hon'ble Delhi High Court in the case of CIT v. Aimil Limited reported in (2010) 321 ITR 508(Del.) , and Hon'ble Madras High Court held as under :

5. We find that the Tribunal has rightly relied on the decision of the Supreme Court in the case of CIT V. Alom Extrusion Ltd. reported in 319 ITR 306, whereby , the Supreme Court held that omission of second proviso to Section 43B and amendment to first proviso by Finance Act, 2003 are curative in nature and are effective retrospectively , i.e. , with effect from 1.4.1988 i.e. the date of insertion of first proviso . The Delhi High Court in the case of CIT V. Aimil Ltd. reported in 321 ITR 508 held that if the assessee had deposited employee's contribution towards Provident Fund and ESI after due date as prescribed under the relevant Act, but before the due date of filing of return under the Income Tax Act, no disallowance could be made in view of the provisions of Section 43B as amended by Finance Act, 2003.

6. In the present case, the assessee had remitted the employees contribution beyond the due date for payment, but within the due date for filing the return of income. Hence, following the above-said decision, we find no reason to differ with the findings of the Tribunal. Accordingly, we find no question of law much less any substantial question of law arises for consideration in these appeals. Accordingly, both the Tax Case(Appeals) stand dismissed. No Costs. Consequently, M. P. N. 1 of 2015 is also dismissed."

10.3.7 We have also observed that Co-ordinate Division Bench of Chennai Tribunal in ACIT v. SPEL Semiconductor Limited in I.T.A. No. 3263/Chny/2018 for ay:2013-14 has decided this issue in favour of the tax-payer as in that case the employee contribution of the Provident Fund was deposited by employer to the credit of employees with respective PF fund after the due date as prescribed in the applicable PF Act, but was deposited before the due date as prescribed for filing of return of income under Section 139(1) of the 1961 Act, by relying on decision of Hon'ble Madras High Court in the case of CIT v. Industrial Security & Intelligence India Private Limited (supra) . One of us namely Hon'ble Judicial member was part of the Division Bench who pronounced the order in the case of SPEL Semiconductor Limited (supra).

10.3.8 We have observed that most of the Hon'ble High Courts in India have taken a view on this issue of belated deposit of employee

contribution towards PF/ESI and other employees welfare funds beyond the date prescribed under statute governing PF/ESI and other employee welfare funds but deposited prior to due date for filing of return of income u/s 139(1) of the 1961 Act, in favour of the tax-payer, while we have also observed that Hon'ble Kerala High Court and Hon'ble Gujarat High Court has taken a view on this issue favorable to Revenue. Our Hon'ble Jurisdictional High Court has taken a view in favour of the taxpayer and judicial discipline demands that we follow the judgment of Hon'ble Jurisdictional High Court viz. in the case of CIT v. M/s. Industrial Security and Intelligence India Pvt. Ltd. (supra), which judgment is binding on us. At this stage we would like to refer to order in writ petition passed by Single Judge of Hon'ble Madras High Court in the case of Unifac Management Services (India) Private Limited v. DCIT in WP no. 5264 of 2020, WMP No. 6461 of 2018, vide order dated 23.10.2018 (reported in (2018) 409 ITR 225(Mad.), wherein Single Judge of Hon'ble Madras High Court decided this issue in favour of Revenue. However, subsequently, the said decision of Single Judge of Hon'ble Madras High Court was challenged by the tax-payer before the Division Bench of Hon'ble Madras High Court by filing writ appeal no. 2854 of 2018 and CMP No. 23727 of 2018 and the Division Bench of Hon'ble Madras High Court was pleased to grant permission to the tax-payer to withdraw the original writ petition namely WP No. 5264 of 2018 as well writ appeal no. 2854 of 2018, vide orders dated 09.01.2019. The Revenue has referred before us during the course of hearing, decision of Hon'ble Madras High Court in the case of Orchid Pharma (supra), wherein the Hon'ble Madras High Court had noted that the assessee did not appear before tribunal and also it is an order passed by Hon'ble Madras High Court ex- parte in the absence of the tax-payer, wherein no notice was issued to the tax-payer as proceedings were pending against the tax-payer before National Company Law Tribunal as the tax-payer was in liquidation. The Hon'ble Madras High Court observed in the case of Orchid Pharma (supra) that tribunal has decided the issue in favour of tax-payer by relying on decision of Hon'ble Madras High Court in the case of Industrial Security and Intelligence Private Limited (supra). The Revenue brought to the notice of the Hon'ble Madras High Court, decision(s) of Hon'ble Kerala High Court in the case of CIT v. Merchem Limited reported in (2015) 378 ITR 443(Ker.) and also decision in the case of Popular Vehicles and Services Private Limited v. CIT reported in (2018) 96 taxmann.com 13(Ker.), wherein this issue is decided by Hon'ble Kerala High Court in favour of Revenue and with this background, Hon'ble Madras High Court remanded the matter back to the file of learned CIT(A) for fresh adjudication of the issue, after considering entire law in statute and decisions of Courts post the decision of Hon'ble Delhi High Court in the case of Aimil Limited (supra). We have observed that Hon'ble Supreme Court in the

case of *Alom Extrusion* (cited supra) while adjudicating on applicability of amended provision of Section 43B of the 1961 Act by virtue of deletion of second proviso and amendment of first proviso by Finance Act, 2003 which was applicable wef 01.04.2004, held the said amendments to be curative in nature and to apply retrospective wef 01.04.1988. The Hon'ble Supreme Court also referred to larger bench decision in the case of *Allied Motors Private Limited* (1997) 224 ITR 677(SC) to hold amendment made by Finance Act, 2003 to be retrospective. While holding the same to be retrospective, the Hon'ble Supreme Court referred to its decision in the case of *CIT v. J.H. Gotla* reported in (1985) 156 ITR 323(SC) wherein it held that if strict interpretation leads to absurd results which are not intended by the object of the legislation, and if other construction is possible, then that construction should be preferred to the strict legal construction. The Hon'ble Supreme Court observed that though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to literal construction. We have observed that Hon'ble Bombay High Court in the case of *CIT v. Ghatge Patil Transports Limited* reported in (2014) 368 ITR 749(Bom.) held that decision of Hon'ble Supreme Court in the case of *Alom Extrusion* (cited supra) shall apply both to employees as well employers contribution to various employees welfare funds, and if the amount towards employee's contribution to employees welfare funds is deposited before the due date prescribed for filing of return of income u/s 139(1) of the 1961 Act, the assessee would be entitled for deduction. The aforesaid decision of Hon'ble Bombay High Court in the case of *Ghatge Patil Transport* (supra) is reproduced hereunder:

"15. In this manner, the amendment provided by Finance Act, 2003 put on par the benefit of deductions of tax, duty, cess and fee on the one hand with contributions to various Employees' Welfare Funds on the other. All this came up for consideration before the Hon'ble Supreme Court in the case of *Alom Extrusions Ltd.* (supra). The Tribunal in the case at hand relied upon the said judgment. There is no reason to fault the order passed by the Tribunal. We are of the view that the decision of the Supreme Court in *Alom Extrusions Ltd.* (supra) applies to employees' contribution as well as employers' contribution. Question Nos.2, 3 & 4 are accordingly answered in favour of the assessee and against the revenue."

10.3.9 The Hon'ble Bombay High Court has consistently held this issue in favour of the tax-payer in its other decisions also such as *Geekay Security Services Private Limited v. DCIT* reported in (2019) 101 taxmann.com 192(Bom.), *CIT v. Hindustan Organics Chemicals Limited* (2014) 366 ITR 1(Bom.). The Hon'ble Delhi High Court in *AIMIL Limited* (supra) held that if employees contribution is not

deposited by the due date prescribed under the relevant Acts and is deposited late, the employer not only pays interest on delayed payments but can incur penalties also , for which specific provisions are made in the Provident Fund Act as well as the ESI Act. It further held that the statutes governing PF/ESI permits the employer to make the deposit with some delays , subject to the aforesaid consequences. Insofar as the 1961 Act is concerned, the assessee can get the benefit if the actual payment made is before the return of income is filed , as per the principle laid down by the Supreme Court in *Vinay Cement Ltd.'s case*(supra). However, Hon'ble Delhi High Court has now decided this issue in favour of Revenue in the case of *CIT v. Bharat Hotels Limited* reported in (2019) 410 ITR 417(Del.) , while impliedly reversing the stand taken in its earlier decision in the case of *Aimil Limited* (supra). However, the decision in the case of *Aimil Limited* (supra) was not brought to the notice of Hon'ble Judges of Delhi High Court while adjudicating in the case of *Bharat Hotels* (supra). The Hon'ble Punjab and Haryana High Court has decided this issue in favour of the tax-payer in the case of *CIT v. Rai Agro Industries Limited* reported in (2011) 334 ITR 122 (Punj & Har.); *CIT v. Hemla Embroidery Mills Private Limited* reported in (2014) 366 ITR 167(Punj. & Har.). Hon'ble Rajasthan High Court in the case(s) of *CIT v. State Bank of Bikaner and Jaipur* reported in (2014) 43 taxmann.com 411(Raj.) and in *CIT v. Jaipur Vidyut Vitran Nigam Limited* reported in (2014) 49 taxmann.com 540(Raj) has decided this issue in favour of the tax-payer. Similarly, Hon'ble Karnataka High Court and Hon'ble Himachal Pradesh High Court has decided this issue in favour of the tax-payer. However, Hon'ble Gujarat High Court has decided this issue in favour of Revenue in *CIT v. Gujarat State Road Transport Corporation* reported in (2014) 366 ITR 170(Guj.) ; *Checkmate Facility & Electronic Solutions (P.) Ltd. v. Dy. CIT* [Tax Appeal No. 1256 of 2018, dated 15-10-2018 and *PCIT v. Suzlon Energy Limited* reported in (2020) 115 taxmann.com 340(Guj). Thus, Hon'ble Gujarat High Court held that to get deduction towards employees contribution towards PF/ESI and other welfare funds, the employer ought to have deposited the said amount to the credit of employees with the relevant Funds on or before the due date specified in PF/ESI Act or other welfare funds , keeping in view provisions of Section 36(1)(va) read with Explanation 1 and Section 2(24)(x) of the 1961 Act. Similarly, Hon'ble Kerala High Court has also decided this issue in favour of Revenue in the case of *CIT v. Merchem Limited* reported in (2015) 378 ITR 443(Ker. HC) and also in *Popular Vehicles and Services Private Limited v. CIT* (2018) 406 ITR 150 (Ker.HC). While deciding the appeal in the case of *Merchem Limited* (supra) in favour of Revenue on this issue, the Hon'ble Kerala High Court held that deduction on account of employees contribution towards PF/ESI can only be allowed if the said amount is deposited to the credit of employee with relevant funds within

the due date as prescribed under the statute governing PF/ESI keeping in view provisions of Section 36(1)(va) read with Explanation 1 and provisions of Section 2(24)(x) of the 1961 Act, thus applying strict interpretation and holding that otherwise Section 36(1)(va) read with Explanation 1 will become otiose which was not the intention of legislature. It further went on to hold that the issue before Hon'ble Supreme Court while adjudicating appeal in the case of Alom Extrusion (supra) was never with respect of employees contribution to PF/ESI and it was only in context of employers contribution to PF/ESI , wherein amendments brought in by Finance Act, 2003 were held to be retrospective by Hon'ble Supreme Court in the case of Alom Extrusion (supra). The decision of Hon'ble Kerala High Court in the case of Popular Vehicles (supra) is reproduced as hereunder:

"7. We will first notice the provisions.

"S.2(24) "income " includes —

*	*	*
*	*	*

(x) any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948 A(34 of 1948), or any other fund for the welfare of such employees".

"S.36. Other deductions

(1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in the section 28—

*	*	*
*	*	*

(v) any sum paid by the assessee as an employer by way of contribution towards an approved gratuity fund created by him for the exclusive benefit of his employees under an irrevocable trust;

(va) any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date.

Explanation.- for the purposes of this clause, "due date" means the date by which the assessee is required as an employer to credit an employee's contribution to the

employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise".

"S.43B. Certain deductions to be only on actual payment

Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of—

*	*	*
*	*	*

(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees".

8. Looking at the provisions we are definite that the Act treats employer's and employee's contribution distinctly. Sub-clause (v) of Section 36(1) speaks of a gratuity fund, wherein the employee does not contribute at all. Section 36(1)(va) speaks of the employee's contribution to a welfare fund for the benefit of employees alone, by virtue of the specific reference to Section 2 (24). Section 2 (24) includes as income, any contribution received by the employer from the employee for the purpose of remittance to a fund created for the welfare of the employees; including inter alia a provident fund and that under the ESI Act. When the same is remitted on the due date as prescribed in the statute or order creating such fund, then it is eligible for deduction under Section 36. Section 43B(b) refers to "a sum payable by the assessee as an employer", to an employees welfare fund which is the employer's contribution.

9. We have carefully gone through the decisions of the Hon'ble Supreme Court as also of the Division Bench. The primary question to be considered is whether there should be a reconsideration of Merchem Ltd.'s case (supra). Alom Extrusions Ltd.'s case (supra) and Merchem Ltd.'s case (supra) applied in two different fields; the former with reference to Section 43B(b), being employer's contribution and the latter dealing with employee's contribution as covered by Section 36(1)(va). We would first deal with Alom Extrusions Ltd.'s case (supra) which has dilated upon the history of the legislation and the reason for the various amendments brought in. We first notice that the question which arose for consideration in Alom Extrusions Ltd. 's case (supra) was as to "whether omission (deletion) of the second proviso to section

43B of the Income-tax Act, 1961, by the Finance Act, 2003, operated with effect from April 1, 2004, or whether it operated retrospectively with effect from April 1, 1988" (sic para 4). The Hon'ble Supreme Court noticed that prior to Finance Act, 2003, the second proviso to Section 43B restricted the deduction in respect of any sum payable by an employer by way of contribution to provident fund/superannuation fund or any other fund for the welfare of employees, unless it stood paid within the specified due date.

10. Here we have to notice that sub-clause (b) of Section 43B speaks of sum payable by the employer which is the 'employer's contribution', payable by the employer without deduction from the salary of the employee. Employees contribution though remitted to the fund by the employer, it is deducted from the employees salary, which deduction is statutorily enabled. Deduction from the salary of the employee, of course, is the liability of the employer and so is the remittance to the fund but it does not change the essential nature of the contribution; which is of the employee. A contribution deducted from the employee's salary and paid by the employer cannot, for a moment, be termed as the employer's contribution. There is a clear distinction insofar as the contributions payable under the EPF&MP Act as also the ESI Act. The employer's contribution has to be paid by the employer himself and there is possible no deduction from the salary of the employee, whereas with respect to the employee's contribution, it has to be deducted from the salary of the employee and paid to the relevant fund.

11. The Supreme Court in Alom Extrusions Ltd.'s case (supra) as was noticed, was specifically considering the issue with respect to the employer's contribution. The Hon'ble Supreme Court noticed that prior to 1983 even a book entry made with respect to an assessee following the mercantile system of accounting, making a provision for the payment of contributions towards EPF and ESI could be claimed as a deduction. By introduction of Section 43B in the Finance Act, 1983, the object was to "disallow deductions claimed merely by making a book entry based on the mercantile system of accounting" (sic - para 16). Section 43B made it mandatory for the department to grant deduction in computing the income under Section 28 in the year in which the tax, duty, cess, etc. were paid. However, the due dates under the various enactments, i.e.; the welfare and tax legislation would not have the due date before the date of filing of return as

provided in the Income Tax Act. On account of this the first proviso was introduced to grant a relief by way of deduction insofar as the tax, duties, cess or fee paid before the filing of the return under the IT Act though after the previous year; the liabilities having accrued in that previous year. This relaxation, however, was restricted to tax, duties, cess and fee and not applied to contributions to labour welfare funds. The reason also stated by the Hon'ble Supreme Court "to be that the employer(s) should not sit on the collected contributions and deprive the workmen of the rightful benefits under social welfare legislations by delaying payment of contributions to the welfare funds" (sic - para 16). It is this declaration by the Hon'ble Supreme Court which is relied on by the learned Counsel for the appellant to contend that the Hon'ble Supreme Court was considering the question of employee's contribution also. Otherwise, there would not have been a reference to an 'employer sitting on the collected contribution', is the compelling argument.

12. We have to understand this statement with reference to the question framed by the Hon'ble Supreme Court at the first instance in the opening paragraph of the judgment. We also have to notice that even otherwise the Explanation to sub-clause (va) of Section 36(1) took care of the employee's contributions; which was introduced by the Finance Act, 1987 with effect from 01.04.1988, from which date the statute recognised the distinction between employee's and employer's contribution. In this context we have to necessarily dwell upon the various amendments over the years and look at the sequence in which they were brought in. Only on introduction of Section 43B with effect from 01.04.1984, there was an insistence that there should be actual payment of amounts claimed as deductions, enumerated under the provision. Section 43B (b) spoke of sum payable by the employer by way of contribution to a welfare fund. At that point it could be understood that the sub-clause took in both employee's and employer's contribution. The legislature then took note of the circumstance that many claim the deduction on the ground of maintaining accounts on mercantile or accrual basis and fail to discharge the liability. Hence by Finance Act 1987, clause (x) under Section 2 (24) , sub-clause (va) of Section 36 (1) and the 2nd proviso to Section 43B were brought in. From that date the statute treats the employee's and employer's contribution differently.

13. Otherwise there was no requirement for bringing in a sub-clause under the definition clause of 'income' including the employee's contribution received by the employer and providing a deduction by sub-clause (va) and permitting the deduction only if that contribution is paid in accordance with the statute, which created the fund. The 2nd proviso to Section 43B then underwent a cosmetic change and later was deleted. There was also a new proviso added under Section 43B for permitting deduction on contributions paid before the returns are filed. This took in only the employer's contribution especially since Section 2(24) and sub-clause (va) were retained. The employee's contributions, as Merchem Ltd.'s case (*supra*) noticed, stands on a different footing, since it is collected from the employee as a deduction in their salary itself. This would in effect be income of the assessee, as has been specifically indicated in the definition of "income" under Section 2(24)(x), which provision was introduced w.e.f 01.04.1988 as per Finance Act, 1987.

14. We are of the opinion that the question with respect to employee's contribution is regulated by clause (x) of Section 2(24) and sub-clause (va) of Section 36(1) and would not be affected by Section 43B. Section 43B though a non-obstante clause, makes deductions to be allowable only on actual payment; when such deductions are otherwise allowable. Primarily it is to be noticed that it is a restrictive clause, the amendments to which or the deletion of a proviso in which cannot lead to it being converted as an enabling provision permitting deduction even when there was no deduction permissible by the other provisions of the Act. The non-obstante clause has no effect insofar as the employee's contribution which is specifically covered by sub-clause (va) of Section 36(1). By virtue of the Explanation below subclause (va), no deduction could be claimed if the contribution has not been paid, after collection from the employees by way of deduction from their salaries, within the due date under the EPF&MP Act. The deletion of a proviso under Section 43B cannot render otiose the Explanation under Section 36(1)(va).

15. Merchem Ltd.'s case (*supra*), we notice, dealt with the specific question of disallowance of employee's contribution when the same was not paid within the time provided under the statute under which the welfare fund was created and held so in paragraph 19:

'19. Therefore, income of the assessee includes any sum received by the assessee from his employee as

contribution to any Provident Fund or superannuation fund or funds set up under the provisions of the Employees' State Insurance Act, 1948 (34 of 1948) or any other fund for the welfare of such employees. According to us, on a reading of Sec. 36(1)(va) along with Sec. 2(24)(x), it is categoric and clear that the contribution received by the assessee from the employee alone was treated as income for the purpose of Sec. 36(1)(va) of the Act and therefore we are of the considered opinion that the assessee was entitled to get deduction for the sum received by the assessee from his employees towards contribution to the fund or funds so mentioned only if, the said amount was credited by the assessee on or before the due date to the employees account in the relevant fund as provided under Explanation 1 to Sec.36(1)(va) of the Act. According to us, so far as Sec. 43B(b) is concerned, it takes care of only the contribution payable by the employer/assessee to the respective fund. Therefore, in that circumstances, Sec. 36(1)(va) and Sec. 43B(b) operate in different fields i.e. the former takes care of employee's contribution and the latter employer's contribution. The assessee was entitled to get the benefit of deduction under Sec. 43B(b) as provided under the proviso thereto only with regard to the portion of the amount paid by the employer to the contributory fund. Such an understanding of Sec. 43B is further exemplified by the phraseology used in the proviso, which reads thus:

"Provided that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under Sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return. "

Further, in Explanation 1 to Sec. 43B also, the phraseology used persuade us to think that Sec. 43B can be applied to the contribution payable by the assessee as an employer, which reads thus:

"For the removal of doubts, it is hereby declared that where a deduction in respect of any sum referred to in

clause (a) or clause (b) of this section is allowed in computing the income referred to in section 28 of the previous year (being a previous year relevant to the assessment year commencing on the 1st day of April, 1983 or any earlier assessment year) in which the liability to pay such sum was incurred by the assessee, the assessee shall not be entitled to any deduction under this section in respect of such sum in computing the income of the previous year in which the sum is actually paid by him."

Therefore, according to us, since the Respondent has admittedly not paid the deduction so made within the due date as provided under Sec. 36(1)(va), the Respondent was not entitled to get deduction of the amounts deducted thereunder for and on behalf of the employees'.

16. The learned Judges had elaborately considered the decision in Alom Extrusions Ltd.'s case (supra) and has found the provisions having application in different fields. Section 43B(b) dealt with the employer's contribution and sub-clause (va) of Section 36(1) was concerned with the employees contribution as rightly held. We do not find ourselves persuaded to take a different view with respect to employee's contribution and we respectfully follow the decision of the Division Bench of this Court in Merchem Ltd. 's case (supra). We, hence, answer the substantial question of law raised with respect to reconsideration of Merchem Ltd.'s case (supra) in the negative, against the assessee and in favour of the Revenue.

17. The other question of law framed refer to the 'amounts payable', the reference obviously is to "any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other funds for the welfare of employees" as found in sub-clause (b) of Section 43B, which refers only to the employer's contribution and not the employee's contribution. Employee's contribution, as has been already held by us, is covered by clause (va) of Section 36(1) and the deduction is restricted by the Explanation below it. With respect to employer's contribution, the deduction is allowable only on actual payment, as per Section 43B restricted only by the proviso as is now available

in the Act, which requires payment before the filing of return. Any sum paid as employer's contribution, which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income, under sub-section (1) of Section 139, then the same would be enabled deduction. Hence, in the present case if the employer's contribution under the EPF or ESI for the financial year 2007-08 is paid after the said year but before the date of filing of the return for that year, then necessarily it would be allowable as a deduction in the assessment year, de hors the fact that it was paid in the subsequent year.

18. Sub-clause (va) of Section 36(1) takes care of the employee's contribution, which stands unaffected by Section 43B as the restriction available in Section 43B is already available under the Explanation to the said clause, with a qualification of the payment being before the due date, as stipulated by the statute or order creating the fund. We would also observe that, as the Hon'ble Supreme Court noticed, the legislature took a different approach with respect to the contributions deducted from the salary of the employees which had to be paid to the welfare fund within the due date; as provided under the statute which created the welfare fund. The contributions which are deducted at the time of payment of salary is received by the employer- Company and is treated as income under Section 2(24). On remittance of this contribution, within the due date, it is allowed as a deduction under Section 36. If it is not paid to the welfare fund within the due date provided under the relevant statute, it remains as an income in the books of accounts of the assessee/employer Company. The said contribution having not been paid to the applicable welfare fund within the due date provided, the assessee for all time is deprived of claiming such a remittance, made subsequently, as deduction from the income. This, as the Hon'ble Supreme Court noticed, is looking at the spirit behind the labour welfare legislation and the need for the employer to satisfy the remittance within the time provided under the statute creating the welfare fund. At least with respect to the employee's contributions, which the employer deducts from the salary of the employees, if it is not remitted into the fund within the due date, the employer not only

has defaulted the stipulation in the labour legislation but has received an income; albeit an illegal enrichment. Sub-section (v) is with respect to and confined to a gratuity fund and does not have any relevance here. We, hence, answer the other questions of law framed, also against the assessee and in favour of the Revenue.

We dismiss the appeal, leaving the parties to suffer their respective costs."

10.3.10 *Thus, it can be clearly seen that the Hon'ble High Courts in India have taken a different views so far as to allowability of employee contribution to PF/ESI and other welfare funds which is deposited to the credit of employee with revenant funds beyond the time stipulated under the relevant statute applicable to PF/ESI and other funds for welfare of employees, but deposited prior to due date of filing of return of income u/s 139(1) of the 1961 Act. If we apply strict interpretation as is normally applied as there is no equity in tax laws, we have observed that the employee contribution received by an employer is treated as income under the provisions of Section 2(24)(x) of the 1961 Act , while deduction is allowed u/s 36(1)(va) read with Explanation of the amount received by an employer from employees as their contribution which stood deposited by employer to the credit of employee with relevant fund on or before the due date as is prescribed under relevant statute governing PF/ESI and other employees welfare funds. The provisions of Section 43B of the 1961 Act has a heading that certain deductions to be allowed only on actual payment basis and it starts with a non obstante clause that 'notwithstanding anything contained in any other provisions of this Act, a deduction otherwise allowable under this Act in respect of...'. Thus, it stipulates that deduction shall be allowed only on actual payment basis in the year of payment of deduction which otherwise is allowable under the 1961 Act. Thus, if the deduction is not otherwise allowable under the 1961 Act owing to provision in statute, then recourse to Section 43B of the 1961 Act cannot be made at threshold. Section 43B of the 1961 Act creates further embargo on deductions which are otherwise allowable under the provision of the 1961 Act, but owing to Section 43B it can only be allowed only on actual payment basis and not otherwise . Then Section 43B of the 1961 Act , by a proviso stipulates that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income u/s 139(1) of the 1961 Act . So , what is important for entering into provisions of Section 43B of the 1961 Act is that the deduction ought to be firstly allowable under the provision of the 1961 Act before recourse to Section 43B of the 1961 Act can be taken. Provisions of Section 36(1)(va) allows deduction towards*

employees contribution to PF/ESI and other welfare funds of employees which is required to be deposited by employer to the credit of employee with relevant fund on or before the due date as is prescribed under the relevant statute applicable for PF/ESI and other welfare funds of employees , otherwise deduction u/s 36(1)(va) of the 1961 Act is not allowable and employee contribution towards PF/ESI and other employees welfare funds received by employer shall be deemed to be income of the assessee u/s 2(24)(x) of the 1961 Act. Thus, firstly to get deduction u/s 36(1)(va) of the 1961 Act of the employee contribution received by employers towards PF/ESI which constitute income in the hands of employer by virtue of Section 2(24)(x) of the 1961 Act, the employers is required to deposit the employees contribution to the credit of employees with relevant funds on or before the due date prescribed under the statute governing PF/ESI and other employees welfare funds. But once at threshold stage of Section 36(1)(va) read with Explanation 1 and Section 2(24)(x) of the 1961 Act , infringement took place viz. the employer fail to deposit the employee contribution towards PF/ESI and other employees welfare funds to the credit of employee with relevant fund before due date as prescribed under relevant statute governing PF/ESI and other employees welfare fund, then at threshold itself no deduction u/s 36(1)(va) read with Explanation 1 and Section 2(24)(x) of the 1961 Act can be allowed and consequently there cannot be any question of entering further into Section 43B of the 1961 Act as the deduction at threshold level of Section 36(1)(va) of the 1961 Act is itself not available. This are the literal and strict interpretation of provisions of Section 2(24)(x) read with Section 36(1)(va) of the 1961 Act . The deduction provisions are to be strictly construed and onus is on the assessee to prove that it is entitled for deduction/ exemption as it falls within four corners of the statute. There is no equity in tax laws and exemption/deduction provisions are to be strictly construed. The decision of Constitution Bench of Hon'ble Supreme Court in the case of Commissioner of Customs (Imports) v. Dilip Kumar & Co. reported in (2018) 9 SCC 1 and decision of Hon'ble Supreme Court in the case of Ramnath & Co. v. CIT reported in (2020) 116 taxmann.com 885(SC)(refer para 17 to 20) are relavant . Admittedly , in the instant case the aforesaid sum of Rs. 6,31,788/- being employee contribution towards PF was not deposited by assessee to the credit of employees with PF Funds within due date prescribed under statute governing PF which at threshold was hit by provisions of Section 36(1)(va) read with Explanation 1 and Section 2(24)(x) of the 1961 Act and deduction is not allowable going by strict and literal interpretation of provisions of the statute. Thus, once the deduction is found to be not allowable otherwise under the 1961 Act being hit by infringement of Section 36(1)(va) of the 1961 Act on account of employees share of PF contribution being deposited to the credit of employee with relevant fund by assessee-

employer beyond the time stipulated as due date under PF Act , there is no question of entering into provisions of Section 43B of the 1961 Act which deals with allowing deduction on payment basis provided the deduction is otherwise allowable under the provisions of the 1961 Act. Section 36(1)(va) of the 1961 Act is a provision which entitles taxpayer to claim deduction from the income and hence the provision is to be strictly construed and the onus is on the assessee to prove that it fulfills all the conditions as stipulated under Section 36(1)(va) read with Explanation before claiming deduction from its income. The decision of Constitution Bench of Hon'ble Supreme Court in the case of Commissioner of Customs (Imports) v. Dilip Kumar & Co. reported in (2018) 9 SCC 1 is relevant . The recent decision of Hon'ble Supreme Court in the case of Ramnath & Co. v. CIT reported in (2020) 116 taxmann.com 885(SC) is relevant (refer para 17 to 20) , which is reproduced hereunder:

Dilip Kumar & Co.

17. The core question referred for authoritative pronouncement to the Constitution Bench in the case of Dilip Kumar & Co. (supra) was as to what interpretative rule should be applied while interpreting a tax exemption provision/notification when there is an ambiguity as to its applicability with reference to the entitlement of the assessee or the rate of tax? The reference to the Constitution Bench was necessitated essentially for the reason that in a few decisions, one of them by a 3-Judge Bench of this Court in the case of Sun Export Corpn. v. Collector of Customs: [1997] 6 SCC 564, the proposition came to be stated that any ambiguity in a tax provision/notification must be interpreted in favour of the assessee who is claiming benefit thereunder.¹⁴

17.1. In Dilip Kumar & Co., the Constitution Bench of this Court examined several of the past decisions including that by another Constitution Bench in CCE v. Hari Chand Shri Gopal: [2011] 1 SCC 236 as also that by a Division Bench of this Court in the case of UOI v. Wood Papers Ltd.: [1990] 4 SCC 256 wherein, the principles were stated in clear terms that the question as to whether a subject falls in the notification or in the exemption clause has to be strictly construed; and once the ambiguity or doubt is resolved by interpreting the applicability of exemption clause strictly, the Court may construe the exemption clause liberally. This Court found that in Wood Papers Ltd. (supra), some of the observations in an earlier decision in the case of CCE v. Parle Exports (P) Ltd.: [1989] 1 SCC 345 were also explained with all clarity. This Court noted the enunciations in Wood Paper Ltd. with total approval as could be noticed in the following:-

"46. In the judgment of the two learned Judges in Union of India v. Wood Papers Ltd.: [1990] 4 SCC 256 (hereinafter referred to as "Wood Papers Ltd. case", for brevity), a distinction between stage of finding out the eligibility to seek exemption and stage of applying the nature of exemption was made. Relying on the decision in CCE v. Parle Exports (P) Ltd. : [1989] 1 SCC 345, it was held: (Wood Papers Ltd. case, SCC p. 262, para 6)

"6. ... Do not extend or widen the ambit at the stage of applicability. But once that hurdle is crossed, construe it liberally."

The reasoning for arriving at such conclusion is found in para 4 of Wood Papers Ltd. case, which reads: (SCC p. 260)

"4. ... Literally exemption is freedom from liability, tax or duty. Fiscally, it may assume varying shapes, specially, in a growing economy. For instance tax holiday to new units, concessional rate of tax to goods or persons for limited period or with the specific objective, etc. That is why its construction, unlike charging provision, has to be tested on different touchstone. In fact, an exemption provision is like an exception and on normal principle of construction or interpretation of statutes it is construed strictly either because of legislative intention or on economic justification of inequitable burden or progressive approach of fiscal provisions intended to augment State revenue. But once exception or exemption becomes applicable no rule or principle requires it to be construed strictly. Truly speaking liberal and strict construction of an exemption provision are to be invoked at different stages of interpreting it. When the question is whether a subject falls in the notification or in the exemption clause then it being in nature of exception is to be construed strictly and against the subject, but once ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction."

(emphasis supplied)

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58. *In the above passage, no doubt this Court observed that: (Parle Exports case, SCC p. 357, para 17)*

"17. when two views of a notification are possible, it should be construed in favour of the subject as notification is part of a fiscal enactment."

This observation may appear to support the view that ambiguity in a notification for exemption must be interpreted to benefit the subject/assessee. A careful reading of the entire para, as extracted hereinabove would, however, suggest that an exception to the general rule of tax has to be construed strictly against those who invoke for their benefit. This was explained in a subsequent decision in Wood Papers Ltd. case. In para 6, it was observed as follows: (SCC p. 262)

"6. ... In CCE v. Parle Exports (P) Ltd., this Court while accepting that exemption clause should be construed liberally applied rigorous test for determining if expensive items like Gold Spot base or Limca base or Thums Up base were covered in the expression food products and food preparations used in Item No. 68 of First Schedule of Central Excises and Salt Act and held 'that it should not be in consonance with spirit and the reason of law to give exemption for non-alcoholic beverage basis under the notification in question'. Rationale or ratio is same. Do not extend or widen the ambit at stage of applicability. But once that hurdle is crossed construe it liberally. Since the respondent did not fall in the first clause of the notification there was no question of giving the clause a liberal construction and hold that production of goods by respondent mentioned in the notification were entitled to benefit."

59. *The above decision, which is also a decision of a two- Judge Bench of this Court, for the first time took a view that liberal and strict construction of exemption provisions are to be invoked at different stages of interpreting it. The question whether a subject falls in the notification or in the exemption clause, has to be strictly construed. When once the ambiguity or doubt is resolved by interpreting the applicability of exemption clause strictly, the Court may construe the notification by giving full play bestowing wider and liberal construction. The ratio of Parle Exports case deduced as follows: (Wood Papers Ltd. case, SCC p. 262, para 6)*

"6. ... Do not extend or widen the ambit at stage of applicability. But once that hurdle is crossed, construe it liberally."

60. We do not find any strong and compelling reasons to differ, taking a contra view, from this. We respectfully record our concurrence to this view which has been subsequently, elaborated by the Constitution Bench in Hari Chand case "

(emphasis in bold supplied)

17.2. The Constitution Bench decision in Hari Chand Shri Gopal (supra) was also taken note of, inter alia, in the following:-

"50. We will now consider another Constitution Bench decision in CCE v. Hari Chand Shri Gopal (hereinafter referred as "Hari Chand case", for brevity). We need not refer to the facts of the case which gave rise to the questions for consideration before the Constitutional Bench. K.S. Radhakrishnan, J., who wrote the unanimous opinion for the Constitution Bench, framed the question viz. whether manufacturer of a specified final product falling under the Schedule to the Central Excise Tariff Act, 1985 is eligible to get the benefit of exemption of remission of excise duty on specified intermediate goods as per the Central Government Notification dated 11-8-1994, if captively consumed for the manufacture of final product on the ground that the records kept by it at the recipient end would indicate its "intended use" and "substantial compliance" with procedure set out in Chapter 10 of the Central Excise Rules, 1994, for consideration? The Constitution Bench answering the said question concluded that a manufacturer qualified to seek exemption was required to comply with the preconditions for claiming exemption and therefore is not exempt or absolved from following the statutory requirements as contained in the Rules. The Constitution Bench then considered and reiterated the settled principles qua the test of construction of exemption clause, the mandatory requirements to be complied with and the distinction between the eligibility criteria with reference to the conditions which need to be strictly complied with and the conditions which need to be substantially complied with. The Constitution Bench followed the ratio in Hansraj Gordhandas case, to reiterate the law on the aspect of interpretation of exemption clause in para 29 as follows: (Hari Chand case, SCC p. 247)"29. The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on

which the provision has been placed in the statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption.

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(emphasis in bold supplied)

17.3. In view of above and with reference to several other decisions, in Dilip Kumar & Co., the Constitution Bench summed up the principles as follows:-

"66. To sum up, we answer the reference holding as under:

66.1. Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

66.2. When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the Revenue.

66.3. The ratio in Sun Export case is not correct and all the decisions which took similar view as in Sun Export case stand overruled."

(emphasis in bold supplied)

17.4. Obviously, the generalised, rather sweeping, proposition stated in the case of Sun Export Corporation (supra) as also in other cases that in the matters of taxation, when two views are possible, the one favourable to assessee has to be preferred, stands specifically disapproved by the Constitution Bench in Dilip Kumar & Co. (supra). It has been laid down by the Constitution Bench in no uncertain terms that exemption notification has to be interpreted strictly; the burden of proving its applicability is on the assessee; and in case of any ambiguity, the benefit thereof cannot be claimed by the subject/assessee, rather it would be interpreted in favour of the revenue.

18. *It has been repeatedly emphasised on behalf of the appellant that Section 80-O of the Act is essentially an incentive provision and, therefore, needs to be interpreted and applied liberally. In this regard, we may observe that deductions, exemptions, rebates et cetera are the different species of incentives extended by the Act of 1961*

15. *In other words, incentive is a generic term and 'deduction' is one of its species; 'exemption' is another. Furthermore, Section 80-O is only one of the provisions in the Act of 1961 dealing with incentive; and even as regards the incentive for earning or saving foreign exchange, there are other provisions in the Act, including Section 80HHC, whereunder the appellant was indeed taking benefit before the assessment year 1993-94.*

19. *Without expanding unnecessarily on variegated provisions dealing with different incentives, suffice would be to notice that the proposition that incentive provisions must receive "liberal interpretation" or to say, leaning in favour of grant of relief to the assessee is not an approach countenanced by this Court. The law declared by the Constitution Bench in relation to exemption notification, proprio vigore, would apply to the interpretation and application of any akin proposition in the taxing statutes for exemption, deduction, rebate et al., which all are essentially the form of tax incentives given by the Government to incite or encourage or support any particular activity¹⁶.*

20. *The principles laid down by the Constitution Bench, when applied to incentive provisions like those for deduction, would also be that the burden lies on the assessee to prove its applicability to his case; and if there be any ambiguity in the deduction clause, the same is subject to strict interpretation with the result that the benefit of such ambiguity cannot be claimed by the assessee, rather it would be interpreted in favour of the revenue. In view of the Constitution Bench decision in Dilip Kumar & Co. (supra), the generalised observations in Baby Marine Exports (supra) with reference to a few other decisions, that a tax incentive provision must receive liberal interpretation, cannot be considered to be a sound statement of law; rather the applicable principles would be those enunciated in Wood Papers Ltd. (supra), which have been precisely approved by the Constitution Bench. Thus, at and until the stage of finding out eligibility to claim deduction, the ambit and scope of the provision for the purpose of its applicability cannot be expanded or widened and remains subject to strict interpretation but, once eligibility is decided in favour of the person claiming such deduction, it could be construed liberally in regard to other requirements, which may be formal or directory in nature.*

10.3.11 Thus, keeping in view strict and literal interpretation of provisions of Section 36(1)(va) of the 1961 Act read with Explanation 1 and Section 2(24)(x) of the 1961 Act, the assessee will not be entitled for deduction as the employee contribution towards PF received by assessee was deposited late beyond the time stipulated under the relevant statute governing PF. But, it is equally true that the Constitutional Courts viz. Hon'ble High Courts and Hon'ble Supreme Court in India have powers to read down the provisions of the 1961 Act to make it workable and to avoid absurdity. On perusal of the decision of Hon'ble Supreme Court in the case of *Alom Extrusion* (supra), it is observed that Hon'ble Supreme Court has elaborately discussed provisions of Section 36(1)(va), 2(24)(x) and amendments made by Finance Act, 2003 to Section 43B of the 1961 Act, which amendments to Section 43B of the 1961 Act were held to be retrospective in nature. The Hon'ble Supreme Court also referred in its decision in *Alom Extrusion* (supra) to its earlier decision in *CIT v. J.H. Gotla* [1985] 156 ITR 323(SC), para 10 that intention of the legislature is to be found out from the language used and if strict literal construction leads to an absurd result i.e. result not intended to be subserved by the object of the legislation found in the manner indicated before, then if another construction is possible apart from strict literal construction, then that construction should be preferred to the strict literal construction. Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction. The Hon'ble Delhi High Court and Hon'ble Bombay High Court after considering, analyzing and interpreting the decision in the case of *Alom Extrusion* (supra) has held that it will apply both to employers and employee contribution and if the same is deposited before the due date of filing of return of income u/s 139(1) of the 1961 Act, the deduction shall be allowed, even if the same is deposited beyond the time stipulated as due date as prescribed under the provisions of Statute governing PF/ESI Act. Thus, the applicable provision as is contained in Section 36(1)(va) is read down by most of the Constitutional Courts including our Jurisdictional High Court (barring Hon'ble Gujarat High Court and Hon'ble Kerala High Court) to make it workable as otherwise the tax-payer will lose the deduction for ever if the employee contribution is not deposited within due date as prescribed under relevant statute, although the said contribution stood deposited by employer belatedly before the due date for filing of return of income u/s 139(1) of the 1961 Act and the amount will stand brought to tax as income keeping in view provisions of Section 2(24)(x) of the 1961 Act so far employee share of contribution towards PF, ESI and other employees welfare funds is concerned. No doubt it is well cherished objective that there should not be an unjust enrichment of the employer of the amount which it collects from its employees towards employees share of PF, ESI

and other employees welfare funds and in the ideal situation , the said amounts ought to have been deposited by employer which it collected from its employees, to the credit of employee with relevant funds within time stipulated as due date by respective statute governing PF/ESI etc. but at the same time if the employer does not deposit the contribution towards PF/ESI etc within due date as prescribed under relevant statute governing PF/ESI etc, the employers are visited with Interest for delayed deposit of PF/ESI as well Penalties for late deposit beyond the time stipulated under the relevant statute governing PF/ESI and other employees welfare funds. Reference is drawn to Section 7Q and 14 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 . Similarly, Hon'ble Madras High Court in the case of Industrial Security and Intelligence India Private Limited (supra) after considering and interpreting the decision of Hon'ble Supreme Court in the case of Alom Extrusion (supra) and Hon'ble Delhi High Court in the case of Aimil Limited (supra) held that deduction is to be allowed for belated payment of employee contribution to PF/ESI which is deposited beyond the due date stipulated under the relevant statutes governing PF/ESI , but the same stood deposited before the due date for filing of return of income as is prescribed u/s 139(1) of the 1961 Act. We at tribunal being inferior judicial body to Hon'ble Madras High Court , are bound by decision of Hon'ble jurisdictional High Court in the case of Industrial Security (supra) as a cardinal principles of judicial discipline and to instill certainty among tax-payers, thus, Respectfully following the decision of Hon'ble Madras High Court in the case of Industrial Security and Intelligence (supra) , we allow the claim of the assessee for deduction of Rs. 6,31,788/- towards employees contribution to PF which was deposited late beyond due date as prescribed under relevant statute governing PF , but the same stood deposited to the credit of employees with relevant fund before the due date for filing of return of income as prescribed u/s 139(1) of the 1961 Act. The Revenue fails on this issue for the reasons cited above . We order accordingly.”

The Hon’ble jurisdictional High Court in the case of Sagun Foundry Private Limited v. CIT, Kanpur in ITA No. 87 of 2006, vide judgment dated 21.12.2016 has decided this issue in favour of the tax-payer, by holding that Section 43B is applicable to both employer and employee contribution and thus in case employee contribution towards PF received by employer is deposited to the credit of employees with the PF trust prior to due date of filing of return of income u/s 139(1), the tax-employer shall be entitled for deduction u/s 36(1)(va) read with Section 2(24)(x) and 43B of the 1961 Act. The Hon’ble Jurisdictional High Court has in para 29 has taken a view that the law laid down by Hon’ble High Court of Karnataka , Hon’ble High Court of

Rajasthan, Hon'ble High Court of Punjab and Haryana , Hon'ble High Court of Delhi, Hon'ble High Court of Bombay and Hon'ble High Court of Himachal Pradesh have rightly applied Section 43B in respect of both contributions i.e. employers and employees . The Hon'ble Jurisdictional High Court has with great respect dissented with the view taken by Hon'ble Gujarat High Court and Hon'ble High Court of Kerala, which view on the issue was decided by Hon'ble Gujarat High Court and Hon'ble High Court of Kerala in favour of Revenue. It will be relevant to refer at this stage to the Constitution Bench decision of Hon'ble Supreme Court in the case of Commissioner of Customs (Imports) v. Dilip Kumar & Co. reported in (2018) 9 SCC 1 , in which Constitution Bench of Hon'ble Supreme Court has held that Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification. When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the Revenue. The recent decision of Hon'ble Supreme Court in the case of Ramnath & Co. v. CIT reported in (2020) 116 taxmann.com 885(SC) is also relevant (refer para 17 to 20), which are reproduced hereunder:

“Dilip Kumar & Co.

*17. The core question referred for authoritative pronouncement to the Constitution Bench in the case of Dilip Kumar & Co. (supra) was as to what interpretative rule should be applied while interpreting a **tax exemption provision/notification** when there is an ambiguity as to its applicability with reference to the entitlement of the assessee or the rate of tax? The reference to the Constitution Bench was necessitated essentially for the reason that in a few decisions, one of them by a 3-Judge Bench of this Court in the case of Sun Export Corpn. v. Collector of Customs: [1997] 6 SCC 564, the proposition came to be stated that any ambiguity in a tax provision/notification must be interpreted in favour of the assessee who is claiming benefit thereunder.¹⁴*

17.1. In Dilip Kumar & Co., the Constitution Bench of this Court examined several of the past decisions including that by another Constitution Bench in CCE v. Hari Chand Shri

Gopal: [2011] 1 SCC 236 as also that by a Division Bench of this Court in the case of UOI v. Wood Papers Ltd.: [1990] 4 SCC 256 wherein, the principles were stated in clear terms that the question as to whether a subject falls in the notification or in the exemption clause has to be strictly construed; and once the ambiguity or doubt is resolved by interpreting the applicability of exemption clause strictly, the Court may construe the exemption clause liberally. This Court found that in Wood Papers Ltd. (supra), some of the observations in an earlier decision in the case of CCE v. Parle Exports (P) Ltd.: [1989] 1 SCC 345 were also explained with all clarity. This Court noted the enunciations in Wood Paper Ltd. with total approval as could be noticed in the following:-

"46. In the judgment of the two learned Judges in Union of India v. Wood Papers Ltd.: [1990] 4 SCC 256 (hereinafter referred to as "Wood Papers Ltd. case", for brevity), a distinction between stage of finding out the eligibility to seek exemption and stage of applying the nature of exemption was made. Relying on the decision in CCE v. Parle Exports (P) Ltd.: [1989] 1 SCC 345, it was held: (Wood Papers Ltd. case, SCC p. 262, para 6)

"6. ... Do not extend or widen the ambit at the stage of applicability. But once that hurdle is crossed, construe it liberally."

The reasoning for arriving at such conclusion is found in para 4 of Wood Papers Ltd. case, which reads: (SCC p. 260)

"4. ... Literally exemption is freedom from liability, tax or duty. Fiscally, it may assume varying shapes, specially, in a growing economy. For instance tax holiday to new units, concessional rate of tax to goods or persons for limited period or with the specific objective, etc. That is why its construction, unlike charging provision, has to be tested on different touchstone. In fact, an exemption provision is like an exception and on normal principle of construction or interpretation of statutes it is construed strictly either because of legislative intention or on economic justification of inequitable burden or progressive approach of fiscal provisions intended to augment State revenue. But once exception or exemption becomes applicable no rule or principle requires it to

be construed strictly. Truly speaking liberal and strict construction of an exemption provision are to be invoked at different stages of interpreting it. When the question is whether a subject falls in the notification or in the exemption clause then it being in nature of exception is to be construed strictly and against the subject, but once ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction."

(emphasis supplied)

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58. *In the above passage, no doubt this Court observed that: (Parle Exports case, SCC p. 357, para 17)*

"17. when two views of a notification are possible, it should be construed in favour of the subject as notification is part of a fiscal enactment."

This observation may appear to support the view that ambiguity in a notification for exemption must be interpreted to benefit the subject/assessee. A careful reading of the entire para, as extracted hereinabove would, however, suggest that an exception to the general rule of tax has to be construed strictly against those who invoke for their benefit. This was explained in a subsequent decision in Wood Papers Ltd. case. In para 6, it was observed as follows: (SCC p. 262)

"6. ... In CCE v. Parle Exports (P) Ltd., this Court while accepting that exemption clause should be construed liberally applied rigorous test for determining if expensive items like Gold Spot base or Limca base or Thums Up base were covered in the expression food products and food preparations used in Item No. 68 of First Schedule of Central Excises and Salt Act and held 'that it should not be in consonance with spirit and the reason of law to give exemption for non-alcoholic beverage basis under the notification in question'. Rationale or ratio is same. Do not extend or widen the ambit at stage of applicability. But once that hurdle is crossed construe it liberally. Since the

respondent did not fall in the first clause of the notification there was no question of giving the clause a liberal construction and hold that production of goods by respondent mentioned in the notification were entitled to benefit."

59. The above decision, which is also a decision of a two- Judge Bench of this Court, for the first time took a view that liberal and strict construction of exemption provisions are to be invoked at different stages of interpreting it. The question whether a subject falls in the notification or in the exemption clause, has to be strictly construed. When once the ambiguity or doubt is resolved by interpreting the applicability of exemption clause strictly, the Court may construe the notification by giving full play bestowing wider and liberal construction. The ratio of Parle Exports case deduced as follows: (Wood Papers Ltd. case, SCC p. 262, para 6)

"6. ... Do not extend or widen the ambit at stage of applicability. But once that hurdle is crossed, construe it liberally."

60. We do not find any strong and compelling reasons to differ, taking a contra view, from this. We respectfully record our concurrence to this view which has been subsequently, elaborated by the Constitution Bench in Hari Chand case "

(emphasis in bold supplied)

17.2. The Constitution Bench decision in Hari Chand Shri Gopal (supra) was also taken note of, inter alia, in the following:-

"50. We will now consider another Constitution Bench decision in CCE v. Hari Chand Shri Gopal (hereinafter referred as "Hari Chand case", for brevity). We need not refer to the facts of the case which gave rise to the questions for consideration before the Constitutional Bench. K.S. Radhakrishnan, J., who wrote the unanimous opinion for the Constitution Bench, framed the question viz. whether manufacturer of a specified final product falling under the Schedule to the Central Excise Tariff Act, 1985 is eligible to get the benefit of exemption of remission of excise duty on specified intermediate goods as per the Central Government Notification dated 11-8-

1994, if captively consumed for the manufacture of final product on the ground that the records kept by it at the recipient end would indicate its "intended use" and "substantial compliance" with procedure set out in Chapter 10 of the Central Excise Rules, 1994, for consideration? The Constitution Bench answering the said question concluded that a manufacturer qualified to seek exemption was required to comply with the preconditions for claiming exemption and therefore is not exempt or absolved from following the statutory requirements as contained in the Rules. The Constitution Bench then considered and reiterated the settled principles qua the test of construction of exemption clause, the mandatory requirements to be complied with and the distinction between the eligibility criteria with reference to the conditions which need to be strictly complied with and the conditions which need to be substantially complied with. The Constitution Bench followed the ratio in Hansraj Gordhandas case, to reiterate the law on the aspect of interpretation of exemption clause in para 29 as follows: (Hari Chand case, SCC p. 247)"29. The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption.

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*	*	*
		"

(emphasis in bold supplied)

17.3. In view of above and with reference to several other decisions, in Dilip Kumar & Co., the Constitution Bench summed up the principles as follows:-

"66. To sum up, we answer the reference holding as under:

66.1. Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

66.2. When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the Revenue.

66.3. The ratio in Sun Export case is not correct and all the decisions which took similar view as in Sun Export case stand overruled."

(emphasis in bold supplied)

17.4. Obviously, the generalised, rather sweeping, proposition stated in the case of Sun Export Corporation (supra) as also in other cases that in the matters of taxation, when two views are possible, the one favourable to assessee has to be preferred, stands specifically disapproved by the Constitution Bench in Dilip Kumar & Co. (supra). It has been laid down by the Constitution Bench in no uncertain terms that exemption notification has to be interpreted strictly; the burden of proving its applicability is on the assessee; and in case of any ambiguity, the benefit thereof cannot be claimed by the subject/assessee, rather it would be interpreted in favour of the revenue.

18. It has been repeatedly emphasised on behalf of the appellant that Section 80-O of the Act is essentially an incentive provision and, therefore, needs to be interpreted and applied liberally. In this regard, we may observe that deductions, exemptions, rebates et cetera are the different species of incentives extended by the Act of 1961

15. In other words, incentive is a generic term and 'deduction' is one of its species; 'exemption' is another. Furthermore, Section 80-O is only one of the provisions in the Act of 1961 dealing with incentive; and even as regards the incentive for earning or saving foreign exchange, there are other provisions in the Act, including Section 80HHC, whereunder the appellant was indeed taking benefit before the assessment year 1993-94.

19. Without expanding unnecessarily on variegated provisions dealing with different incentives, suffice would be to notice that the proposition that incentive provisions must receive "liberal interpretation" or to say, leaning in favour of grant of relief to the

assessee is not an approach countenanced by this Court. The law declared by the Constitution Bench in relation to exemption notification, proprio vigore, would apply to the interpretation and application of any akin proposition in the taxing statutes for exemption, deduction, rebate et al., which all are essentially the form of tax incentives given by the Government to incite or encourage or support any particular activity¹⁶.

20. The principles laid down by the Constitution Bench, when applied to incentive provisions like those for deduction, would also be that the burden lies on the assessee to prove its applicability to his case; and if there be any ambiguity in the deduction clause, the same is subject to strict interpretation with the result that the benefit of such ambiguity cannot be claimed by the assessee, rather it would be interpreted in favour of the revenue. In view of the Constitution Bench decision in Dilip Kumar & Co. (supra), the generalised observations in Baby Marine Exports (supra) with reference to a few other decisions, that a tax incentive provision must receive liberal interpretation, cannot be considered to be a sound statement of law; rather the applicable principles would be those enunciated in Wood Papers Ltd. (supra), which have been precisely approved by the Constitution Bench. Thus, at and until the stage of finding out eligibility to claim deduction, the ambit and scope of the provision for the purpose of its applicability cannot be expanded or widened and remains subject to strict interpretation but, once eligibility is decided in favour of the person claiming such deduction, it could be construed liberally in regard to other requirements, which may be formal or directory in nature.”

Thus, keeping in view strict and literal interpretation of provisions of Section 36(1)(va) of the 1961 Act read with Explanation 1 and Section 2(24)(x) of the 1961 Act, the assessee will not be entitled for deduction as the employee contribution towards PF received by assessee was deposited late beyond the time stipulated under the relevant statute governing PF. But, it is equally true that the Constitutional Courts viz. Hon'ble High Courts and Hon'ble Supreme Court in India have powers to read down the provisions of the 1961 Act to make it workable and to avoid absurdity. On perusal of the decision of Hon'ble Supreme Court in the case of Alom Extrusion (supra), it is observed that Hon'ble Supreme Court has elaborately discussed provisions of Section 36(1)(va), 2(24)(x) and amendments made by Finance Act, 2003 to Section 43B of the 1961 Act, which amendments to Section

43B of the 1961 Act were held to be retrospective in nature. The Hon'ble Supreme Court also referred in its decision in *Alom Extrusion (supra)* to its earlier decision in *CIT v. J.H. Gotla* [1985] 156 ITR 323(SC) , para 10 that intention of the legislature is to be found out from the language used and if strict literal construction leads to an absurd result i.e. result not intended to be subserved by the object of the legislation found in the manner indicated before, then if another construction is possible apart from strict literal construction, then that construction should be preferred to the strict literal construction. Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction. The Hon'ble Delhi High Court and Hon'ble Bombay High Court after considering, analyzing and interpreting the decision in the case of *Alom Extrusion (supra)* has held that it will apply both to employers and employee contribution and if the same is deposited before the due date of filing of return of income u/s 139(1) of the 1961 Act, the deduction shall be allowed , even if the same is deposited beyond the time stipulated as due date as prescribed under the provisions of Statute governing PF/ESI Act. The Hon'ble jurisdictional High Court in the case of *Sagun Foundry Private Limited v. CIT, Kanpur* in ITA No. 87 of 2006, vide judgment dated 21.12.2016 has decided this issue in favour of the tax-payer, by holding that Section 43B is applicable to both employer and employee contribution and thus in case employee contribution towards PF received by employer is deposited to the credit of employees with the PF trust prior to due date of filing of return of income u/s 139(1), the tax-employer shall be entitled for deduction u/s 36(1)(va) read with Section 2(24)(x) and 43B of the 1961 Act. The Hon'ble Jurisdictional High Court has in para 29 has taken a view that the law laid down by Hon'ble High Court of Karnataka , Hon'ble High Court of Rajasthan, Hon'ble High Court of Punjab and Haryana , Hon'ble High Court of Delhi, Hon'ble High Court of Bombay and Hon'ble High Court of Himachal Pradesh have rightly applied Section 43B in respect of both contributions i.e. employers and employees . The Hon'ble Jurisdictional High Court has with great respect dissented with the view taken by

Hon'ble Gujarat High Court and Hon'ble High Court of Kerala, which view on the issue was decided by Hon'ble Gujarat High Court and Hon'ble High Court of Kerala in favour of Revenue. Thus, the applicable provision as is contained in Section 36(1)(va) is read down by most of the Constitutional Courts including our Jurisdictional High Court (barring Hon'ble Gujarat High Court and Hon'ble Kerala High Court) to make it workable as otherwise the tax-payer will lose the deduction for ever if the employee contribution is not deposited within due date as prescribed under relevant statute , although the said contribution stood deposited by employer belatedly before the due date for filing of return of income u/s 139(1) of the 1961 Act and the amount will stood brought to tax as income keeping in view provisions of Section 2(24)(x) of the 1961 Act so far employee share of contribution towards PF ,ESI and other employees welfare funds is concerned. No doubt it is well cherished objective that there should not be an unjust enrichment of the employer of the amount which it collects from its employees towards employees share of PF , ESI and other employees welfare funds and in the ideal situation , the said amounts ought to have been deposited by employer which it collected from its employees, to the credit of employee with relevant funds within time stipulated as due date by respective statute governing PF/ESI etc. but at the same time if the employer does not deposit the contribution towards PF/ESI etc. within due date as prescribed under relevant statute governing PF/ESI etc., the employers are visited with Interest for delayed deposit of PF/ESI as well Penalties for late deposit beyond the time stipulated under the relevant statute governing PF/ESI and other employees welfare funds. Reference is drawn to Section 7Q and 14 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 .

There is an recent amendment to Section 36(1)(va) by Finance Act, 2021, wherein Explanation 2 was inserted, which reads as under:

“ 36(1)(va)*****

Explanation 2-For the removal of doubts , it is hereby clarified that the provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the ‘due date’ under this clause;”

Correspondingly, there was an amendment to Section 43B of the 1961 Act by Finance Act, 2021, wherein Explanation 5 was inserted , which reads as under:

“43B****

Explanation5- For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply and shall be deemed never to have been applied to a sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 applied.”

Although, on perusal of the above amendment by Finance Act, 2021 , it transpires that the said explanation was inserted by way of removal of doubt to clarify the law as existed on the statute so far as employee contribution received by employer from employee which is to be deposited to the credit of employee with PF fund on or before the due date as provided in statute governing PF, to enable the employer to claim deduction u/s 36(1)(va) of the 1961 Act read with Section 2(24)(x) of the Act, and no deduction shall be allowed by virtue of Section 43B in case of delayed deposit beyond the time stipulated for deposit under relevant statute governing PF by virtue of being hit by Section u/s 36(1)(va) of the Act as it is stated in the explanation that provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the ‘due date’ under this clause , although the said amounts were deposited before the due date as prescribed for filing of return of income u/s 139(1) of the 1961 Act. The above amendment from the plain reading of the Section indicates that it ought to have retrospective effect , but on perusal of Memorandum to Finance Bill 2021, it transpires that the lawmakers have consciously made it applicable from ay: 2021-22 and subsequent assessment years. It is also recognised in the said Memorandum that some courts have applied the provision of section 43B on employee contribution as well and have decided this

issue in favour of taxpayer. The said explanation was inserted to rationalise the provisions of Section 36(1)(va) and 43B of the 1961 Act and it is stated in Memorandum to Finance Bill, 2021 that the said explanation is inserted to provide certainty. It is specifically stated in Memorandum to Finance Bill, 2021 that these amendments to Section 36(1)(va) and 43B shall take effect from 01st April , 2021 and will accordingly apply to assessment year 2021-22 and subsequent assessment years. It is also to be noted that several of the tax-payers (except in the State of Gujarat and Kerala , and such other States where Hon'ble jurisdictional High Court has decided this issue in favour of Revenue) situated in the States where Hon'ble Jurisdictional High Court has decided this issue in favour of tax-payers, have already been allowed the deduction towards employee contribution received by employer which was deposited late by employer beyond the time stipulated u/s 36(1)(va) , but before the due date as prescribed for filing of return of income u/s 139(1) of the 1961 Act , and there cannot be a class different now at this stage where the deduction is to be denied on the ground of strict interpretation of the provisions of Section 36(1)(va) , unless the amendment made by Finance Act, 2021 is made specifically applicable retrospectively from the date of insertion of the provision or any other specified earlier date in the Finance Act, rather on the other hand , the Memorandum to Finance Bill, 2021 has specifically made this amendment applicable from 01.04.2021 and specified that the same shall be made applicable from assessment year 2021-22 and subsequent assessment years. We are presently concerned with ay: 2005-06. The relevant clause to Memorandum to Finance Bill , 2021 is reproduced hereunder:

“Rationalisation of various Provisions

Payment by employer of employee contribution to a fund on or before due date

Clause (24) of section 2 of the Act provides an inclusive definition of the income. Sub-clause (x) to the said clause provide that income to include any sum received by the assessee from his employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of ESI Act or any other fund for the welfare of such employees.

Section 36 of the Act pertains to the other deductions. Sub-section (1) of the said section provides for various deductions allowed while computing the income under the head "Profits and gains of business or profession".

Clause (va) of the said sub-section provides for deduction of any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date. Explanation to the said clause provides that, for the purposes of this clause, "due date" to mean the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued there-under or under any standing order, award, contract of service or otherwise.

Section 43B specifies the list of deductions that are admissible under the Act only upon their actual payment. Employer's contribution is covered in clause (b) of section 43B. According to it, if any sum towards employer's contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees is actually paid by the assessee on or before the due date for furnishing the return of the income under sub-section (1) of section 139, assessee would be entitled to deduction under section 43B and such deduction would be admissible for the accounting year. This provision does not cover employee contribution referred to in clause (va) of sub-section (1) of section 36 of the Act.

Though section 43B of the Act covers only employer's contribution and does not cover employee contribution, some courts have applied the provision of section 43B on employee contribution as well. There is a distinction between contribution and employee's contribution towards welfare fund. It may be noted that employee's contribution towards welfare funds is a mechanism to ensure the compliance by the employers of the labour welfare laws. Hence, it needs to be stressed that the employer's contribution towards welfare funds such as ESI and PF needs to be clearly distinguished from the employee's contribution towards welfare funds. Employee's contribution is employee own money and the employer deposits this contribution on behalf of the employee in fiduciary capacity. By late deposit of employee contribution, the employers get unjustly enriched by keeping the money belonging to the employees. Clause (va) of sub-section (1) of Section 36 of the Act was inserted to the Act vide Finance Act 1987 as a measure of penalizing employers who mis-utilize employee's contributions.

Accordingly, in order to provide certainty, it is proposed to –

- (i) amend clause (va) of sub-section (1) of section 36 of the Act by inserting another explanation to the said clause to clarify that the provision of section 43B does not apply and deemed to never have been applied for the purposes of determining the —due date|| under this clause; and*

- (ii) *amend section 43B of the Act by inserting Explanation 5 to the said section to clarify that the provisions of the said section do not apply and deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section 2 applies.*

These amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years. [Clauses 8 and 9]"

We have also noted that Hyderabad Bench(SMC Bench) of tribunal has decided this issue in favour of tax-payer in the case of Salzgitter Hydraulics Private Limited v. ITO reported in (2021) 128 taxmann.com 192(Hyd. Trib.) after considering the amendment made in Section 36(1)(va) and 43B by Finance Act, 2021, by holding as under:

"2. Coming to the sole substantive issue of ESI/PF disallowance of Rs. 1,09,343/- and Rs. 3,52,622/-, the assessee's and revenue's stand is that the same has been paid before the due date of filing sec. 139(1) return and after the due date prescribed in the corresponding statutes; respectively. I notice in this factual backdrop that the legislature has not only incorporated necessary amendments in Sections 36(va) as well as 43B vide Finance Act, 2021 to this effect but also the CBDT has issued Memorandum of Explanation that the same applies w.e.f. 1-4-2021 only. It is further not an issue that the forergoing legislative amendments have proposed employers contributions; disallowances u/s 43B as against employee u/s 36 (va) of the Act; respectively. However, keeping in mind the fact that the same has been clarified to be applicable only with prospective effect from 1-4-2021, I hold that the impugned disallowance is not sustainable in view of all these latest developments even if the Revenue's case is supported by the following case law.

- (i) CIT v. Merchem Ltd, [2015] 378 ITR 443(Ker)*
- (ii) CIT v. Gujarat State Road Transport Corporation [2014] 366 ITR 170 (Guj.)*
- (iii) CIT v. South India Corporation Ltd. [2000] 242 ITR 114 (Ker)*
- (iv) CIT v. GTN Textiles Ltd. [2004] 269 ITR 282 (Ker)*
- (v) CIT v. Jairam & Sons [2004] 269 ITR 285 (Ker)*

3. The impugned ESI/PF disallowance is directed to be deleted therefore.

4. This assessee's appeal is allowed."

We have observed that Hon'ble Jurisdictional High Court in the case of Sagun Foundry Private Limited (supra) has held that deduction is to be allowed for belated payment of employee contribution to PF/ESI which is deposited beyond the due date

stipulated under the relevant statutes governing PF/ESI , but the same stood deposited before the due date for filing of return of income as is prescribed u/s 139(1) of the 1961 Act. We at tribunal being inferior judicial body to Hon'ble Allahabad High Court , are bound by decision of Hon'ble jurisdictional High Court in the case of Sagun Foundry (supra) as a cardinal principles of judicial discipline and to instill certainty among tax-payers, thus, Respectfully following the decision of Hon'ble Allahabad High Court in the case of Sagun Foundry (supra) , we allow the claim of the assessee for deduction of Rs. 1,82,98,490/- towards employees contribution to PF which was deposited late beyond due date as prescribed under relevant statute governing PF , but the same stood deposited to the credit of employees with relevant fund before the due date for filing of return of income as prescribed u/s 139(1) of the 1961 Act. The assessee has , however, itself conceded that the assessee has not deposited Rs. 49,96,680/- received towards employee contribution to PF before the due date for filing of return of income u/s 139(1) of the 1961 Act and hence the said amount was rightly disallowed by authorities below. The Revenue fails on this issue for the reasons cited above . We order accordingly.

11. In the result, the appeal filed by Revenue in ITA no. 147/Alld/2016, for ay: 2005-06 stood partly allowed for statistical purposes. We order accordingly.

ITA no. 148/Alld/2016 for the Assessment Year: 2007-08

12. The grounds of appeals raised by Revenue in memo of appeal filed with the tribunal in ITA No. 148/Alld/2016 for ay : 2007-08, reads as under :-

"1. That the ld. CIT (A) has erred on facts and in law in deleting the addition of Rs. 1,47,36,408/- made by the A.O. on account of estimated undisclosed investment in fixed deposits corresponding to the admitted interest income of Rs. 9,65,908/-, as the source of investment made therein could not be reconciled & explained by the assessee.

2. That the ld. CIT (A) has erred on facts and in law in restricting the addition of Rs. 1,16,62,230/- [being the difference in contractual and professional fee receipts as per 26 AS vis-à-vis P&L a/c] to Rs. 11,61,000/- only.

3. That the appellant craves leave to add, amend or alter the grounds of appeal at the time of hearing. "

13. The first issue in Revenue's appeal for ay: 2007-08 concerns itself with deletion of addition by Id. CIT(A) of Rs. 1,47,36,408/- on account of undisclosed deposit/ investment by assessee . The AO observed that the assessee has credited interest income of Rs. 73,93,000/- in its P&L Account, while the assessee was able to submit evidences of interest bearing investments/deposit held to the tune of Rs. 1951.42 lacs corresponding to interest income of Rs. 64,27,092/- , while no evidences could be produced by assessee towards the interest bearing deposits/investment held corresponding to interest income of Rs. 9,65,908/- found credited in the Profit and Loss Account. The AO brought to tax income from undisclosed sources of investments/deposits to the tune of Rs. 1,47,36,408/- based on computation made of unexplained deposits/investment computed on yield @ 8% on the unexplained interest income of Rs. 9,65,908/- , and also taking into effect other differences in disclosed investment/deposits. The second addition to the income of the assessee as was made by AO was to the tune of Rs.1,16,62,230/- on account of difference in the income towards contractual receipts as covered u/s 194C and professional /technical fee covered u/s 194J, as disclosed in 26AS and such income as disclosed by assessee as its income in books of accounts of the assessee.

13.2 Aggrieved by the action of the AO in bringing to tax aforesaid income's in the hands of the assessee, the assessee filed first appeal before Id. CIT(A) agitating both the aforesaid issues.

13.3 So far as first issue is concerned concerning additions to the tune of Rs. 1,47,36,408/- made by AO towards unexplained sources of deposits/investments , the assessee made submissions before Id. CIT(A), which are reproduced as hereunder:-

“The Assessing Officer (AO) has added Rs. 1,47,36,408/- towards assessee income from undisclosed sources. In this connection. It is stated that during the F.Y 2006-07, total interest receipts was Rs. 73.93 lacs. Out of which, we have already provided evidences of interest receipt amounting to Rs. 64.27 lacs which includes interest received from Andhra bank for the financial year 2007-08 amounting to Rs. 2.08 lacs. Hence, net interest pertaining to the current year i.e. F.Y. 2006-08 amounts to Rs. 62.19 lacs, for which we have already provided evidences during the assessment proceedings. We have provided interest amounting to Rs. 0.90 lacs on interest bearing security deposits with UPSEB for which no evidence is being provided by UPSEB. Considering the above mentioned facts, summary of interest receipts during the year, supported by evidences, are as under:

Particulars	Amount (in lacs)
Interest receipt as per assessment under	64.27
Less: interest for F.Y. 2007-08 consider in assessment order	2.08
Sub Total	62.19
Add: Interest received from Canara Bank	10.49
Add: Interest received from Andhra Bank	0.35
Sub Total	73.03
Add: Provision of interest accrued on Electricity security Deposit	0.90
Total Interest Income	73.93

Further, not a single case of interest bearing deposit was mentioned by the Assessing Officer on which we have not credited our account with Interest. So all the additions made by the A.O are adhoc without any basis.

So, it is clear that the assessee has not concealed anything on this account and as such there is no undisclosed deposit as assessed on adhoc basis by the AO. So, the above additions wrongly made by the AO, may please be deleted.”

13.4. The Ld. CIT(A) was pleased to delete the aforesaid addition to the tune of Rs. 1,47,36,408/- made by AO towards income from undisclosed sources of investments/deposits , by holding as under:-

“Decisions.

*The assessee company has been able to reconcile the figures of interest income. In any case, the addition made by the A.O. was hypothetical, fantastic, unwarranted and unreasonable. **The addition so made is, therefore, deleted.***

13.5. On the second issue of additions being made owing to non reconciliation of income as stated in 26AS and the income as declared in the books of account. The assessee submitted before Id. CIT(A) as under:-

“The Ld. A.R. has submitted a reconciliation statement as under-

Particulars	Amount (Rs. In Lakhs)
Amount credited as per Form 26 AS of the department	286.29
Less: Duplicate entry in Form 26 AS of the department	74.93
Less: Income accounted for in the financial year i.e. 2005-06 (Details attached)	29.99
Total	181.37
Income from Job work shown in Audited P & L Account for Financial Year 2006-07	169.76
Difference to be Reconciled	11.61

13.6. The LD. CIT(A) was pleased to hold as under:

3.2 Decision :

The AO is directed to reconcile these figures. In any case, the assessee has failed to give any evidence with regard to difference of Rs. 11,61,000/- , The addition is confirmed to the extent of Rs. 11,61,000/- , for balance the AO would verify and reconcile the amounts.”

14. Now, aggrieved by the decision of Id. CIT(A) granting relief to the assessee, Revenue has filed this appeal before the tribunal agitating both the aforesaid issues. The Ld. CIT-DR opened argument before the Division Bench and submitted that Id. CIT(A) accepted the reconciliation of interest income without forwarding the same to Assessing Officer for AO's comments/remand report. Thus, Id. CIT-DR submitted that the addition as made by AO was deleted by Id. CIT(A) without calling for remand report/comments from AO. So far as second addition which was deleted by

ld. CIT(A), the ld. CIT-DR submitted that ld. CIT(A) has restored the matter to the file of Assessing Officer to reconcile the difference in Form No. 26AS and the amount credited in the P&L Account amounting to Rs.1,16,62,230/- and only addition to the tune of Rs. 11,61,000/- was confirmed by ld. CIT(A). The ld. Counsel for the assessee supported the appellate order passed by ld. CIT(A).

15. We have considered rival contentions and perused the material on record. We have observed that the Assessing Officer has made addition on account of income from undisclosed sources of deposits/ investments to the tune of Rs. 1,47,36,408/- based on yield @8% on unexplained interest income to the tune of Rs. 9,65,908/- against which no evidences of interest bearing investments/deposits could be produced by the assessee and also taking into effect other differences in disclosed investment/deposits. The assessee filed reconciliation statement before ld. CIT(A) to explain the difference which was accepted by ld CIT(A) and the additions to the tune of Rs. 1,47,36,408/- were deleted by ld. CIT(A), but, however, it is observed on perusal of the appellate order passed by ld CIT(A), that the ld. CIT(A) passed a cryptic unreasoned order accepting the contentions of the assessee without passing a reasoned/detailed /speaking order as to how the contentions of the assessee stood accepted . Secondly , it is also observed that ld. CIT(A) did not forwarded to AO additional evidences filed by the assessee to reconcile the issue of interest income for seeking AO's comments , as no remand report/comments were called by ld. CIT(A) from the Assessing Officer. Reference is drawn to sub-rule (3) of Rule 46A of the Income-tax Rules, 1962. Under these circumstances, we are of the considered view that the appellate order passed by ld. CIT(A) cannot be accepted and is hereby set aside. Thus, keeping in view the entire factual matrix of the case as well in the interest of justice and fairness to both the parties, in our considered view, the matter need to be set aside and restored to the file of Assessing Officer for fresh determination of the issue after considering the evidences/details/explanation

filed by assessee in its defense in the set aside proceedings . Needless to say that the AO shall provide proper and adequate opportunity of being heard to the assessee in set aside proceedings in accordance with principles of natural justice in accordance with law. The evidences/explanation/details furnished by assessee in its defense before AO during set aside proceedings shall be admitted by AO and shall be adjudicated on merits in accordance with law. The AO is directed to pass a reasoned and speaking order. We order accordingly.

16. With respect to second issue regarding addition to the tune of Rs. 1,16,62,230/- made by AO on account of difference in income as reflected in 26AS and income as declared in Profit and Loss Account, it is observed that ld. CIT(A) has confirmed the addition to the tune of Rs. 11,61,000/- which has attained finality as it was not shown before us by both the rival parties that the assessee has filed any appeal/CO challenging the addition of Rs. 11,61,000/- confirmed by ld. CIT(A), while for the rest of the addition as was made by AO, the ld. CIT(A) remitted the matter to the file of AO to reconcile the figures as submitted by assessee . First of all , the ld. CIT(A) did not have powers u/s 251 to set aside and restore the matter to the file of the AO , as he is required to pass an order in an appeal against an order of assessment either confirming, reducing, enhancing or annulling the assessment , but there are no powers vested with ld. CIT(A) to set aside or restore the matter to the file of AO. Reference is drawn to provisions of Section 251(1)(a) of the 1961 Act. Secondly, in case additional evidences are filed by the assessee, the ld. CIT(A) is required to forward additional evidences to AO for its comments/remand report. The ld. CIT(A) in the instant case did not call for any remand report/comments from AO and rather set aside the matter to AO for reconciliation/verification . Reference is drawn to sub-rule (3) of Rule 46A of the Income-tax Rules, 1962. Thus , keeping in view the entire factual matrix of the case and in the interest of justice and fairness to both the parties, we are inclined to restore this issue back to the file of Assessing

Officer for fresh determination of the issue after considering the evidences/details/explanation filed by assessee in its defense . Needless to say that the AO shall provide proper and adequate opportunity of being heard to the assessee in accordance with principles of natural justice in accordance with law. The evidences/explanation/details furnished by assessee in its defense before AO during set aside proceedings shall be admitted by AO and shall be adjudicated on merits in accordance with law. The AO is directed to pass speaking and reasoned order. We order accordingly.

17. In the result, appeal filed by Revenue for ay: 2007-08 is allowed for statistical purposes.

18. In the result, the appeal filed by Revenue for ay: 2005-06 is partly allowed for statistical purposes, while appeal filed by Revenue for ay: 2007-08 is allowed for statistical purposes.

Order pronounced in the open Court on 12/08/2021 through video conferencing.

Sd/-
[VIJAY PAL RAO]
JUDICIALMEMBER
DATED: 12/08/2021
Allahabad
Vijay Pal Singh (Sr. PS)

Sd/-
[RAMIT KOCHAR]
ACCOUNTANTMEMBER

Copy forwarded to:

1. Appellant – The JCIT(OSD), Circle-2, Aayakar Bhawan, 38, M G Road, Allahabad, U.P.
2. Respondent – Bharat Pumps and Compressors Limited, Naini , Allahabad
3. CIT(A) –Aayakar Bhawan, Allahabad
4. CIT, Allahabad
5. DR –CIT-DR, Allahabad

By order
Assistant Registrar