आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
' A' BENCH : CHENNAI

श्री जॉर्ज माथन, न्यायिक सदस्य एवं
श्री रमित कोचर, लेखा सदस्य के समक्ष

BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

HEARD THROUGH VIDEO CONFERENCING

आयकर अपील सं./**ITA No.2885/Chny/2017**
निर्धारण वर्ष /**Assessment Year: 2013-14**

The Deputy Commissioner of Income Tax, Corporate Circle-5(1), Chennai-600034	**v.**	**M/s. Repco Home Finance Pvt. Ltd.,** 33, North Usman Road, T.Nagar, Chennai – 600 017. **[PAN: AAACR 0209 F]**
(अपीलार्थी/Appellant)		**(प्रत्यर्थी/Respondent)**

अपीलार्थी की ओर से/ Appellant by	:	Shri ARV Sreenivasan, JCIT
प्रत्यर्थी की ओर से /Respondent by	:	Shri M. Viswanathan, C.A
सुनवाई की तारीख/Date of Hearing	:	03-06-2020
घोषणा की तारीख /Date of Pronouncement	:	17-06-2020

आदेश / O R D E R

PER RAMIT KOCHAR, ACCOUNTANT MEMBER

This appeal filed by Revenue is directed against appellate Order dated 30.08.2017 passed by learned Commissioner of Income Tax (Appeals)-3, Chennai (hereinafter called "the CIT(A)",

in ITA No.51/2016-17/CIT(A)-3 , for assessment year (ay) 2013-14, the appellate proceedings before learned CIT(A) had arisen from assessment order dated 29.03.2016 passed by learned Assessing Officer (hereinafter called "the AO") u/s.143(3) of the Income-tax Act, 1961 (hereinafter called "the Act"). The appellate proceedings are conducted by Income-Tax Appellate Tribunal, Chennai Bench 'A', Chennai through Virtual Court.

2. The grounds of appeal raised by Revenue in memo of appeal filed with Income-Tax Appellate Tribunal, Chennai (hereinafter called "the Tribunal") read as under:-

> *"1. The order of the ld CIT(A) is contrary to law and facts and circumstances of the case.*
>
> *2.1 The ld CIT(A) erred in deleting the disallowance effected u/s. 14A r.w.r 8D made by the AO to the tune of Rs.4,02,500/-, holding that the disallowance cannot be made in the absence of exempt income earned during a year.*
>
> *2.2 The ld CIT(A) erred in deleting the disallowance made u/s. 14A r.w.r 8D, without appreciating the fact that the assessee had investments to the tune of Rs.8.05 crores, capable of earning exempt income, thereby attracting the provisions of Sec. 14A read with rule 8D.*
>
> *2.3 The CIT(A) ought to have appreciated that the Hon'ble Bombay High Court in the case of Godrej & Boyce has held that the provisions of sub sections (2) and (3) of Section 14A of the Income Tax Act 1961 are constitutionally valid and that the provisions of Rule 8D of the Income Tax Rules as inserted by the Income Tax (Fifth Amendment) Rules 2008 are not ultra vires the provisions of Section 14A, more particularly sub section (2) and do not offend Article 14 of the Constitution.*
>
> *2.4 The CIT(A) erred in placing reliance on the Hon'ble jurisdictional High Court's decision in the case of M/s.*

Redington (India) Ltd, since the decision was made in the context of provisions of Sec. 14A as it existed during the assessment year 2007-08. In the instant case the assessment year involved is 2013-14 for which the amended provisions of Sec. 14A r.w. Rule 8D is applicable.

2.5 The id CIT(A) ought to have noted that as per the decision of the Hon'ble Mumbai Bench of the Tribunal in the case of M/s. Daga Capital Management Private Limited (117 ITR 169), Rule 8D is applicable in all cases wherein even there is no exempt income is earned.

2.6 The ld CIT(A) failed to note that the Board, vide Circular No.5 of 2014, has clarified that the disallowance is applicable even in cases where no exempt income was earned during the year, but there is a possibility of earning the exempt income.

3.1 The ld CIT(A) erred in directing the AO to compute the deduction u/s 36(1)(viii) by including the loans classified as "Short term Loans & Advances" since they also relate to long term loans advanced for the purpose of housing, but classified as short term loans, as per the requirement of Schedule VI of the Companies Act.

3.2 The ld CIT(A) failed to appreciate that the loans given by the assessee company to the individuals are for different purposes and they cannot be grouped together under one roof as Long Term loans and included while computing the deduction u/s 36(1)(viii).

3.3 The Ld. CIT(A) ought to have appreciated that the loans are given against mortgage of properties for many purposes such as repairs and renovation of properties, purchase of plots etc., as per the wish of the borrowers which cannot be grouped under one head as "Long Term Loans" and accordingly the AO is justified in excluding such Short Term Loans from the purview of Sec.36(1) (viii) of the Act.

4.1 The id CIT(A) erred in deleting the disallowance u/s 36(1)(va) r.w.s 2(24)(x) made by the AO to the tune of Rs.6,31,788/- on employee's contribution towards PF, on account of belated remittance into Government Account, not conforming to the due dates as per relevant Acts.

4.2 The ld CIT(A) failed to note that as per the decision of the jurisdictional High Court in the case of CIT Vs Madras Radiators and Pressing Limited (2003) 129 Taxmann 709, the employees' contribution received by the employer

would be income in his hands and that would be allowed as permissible deduction under clause (va) of Sec.36(1) in computing the business income u/s 28, provided the assessee credits the same to the relevant fund as per the due dates specified.

4.3 The ld CIT(A) ought to have noted that as per the decision of the Hon'ble Gujarath High Court in the case of CIT II Vs Gujarath State Road Transport Corporation, as per the definition of 'income' as per Sec.2(24)(x), any sum received by the assessee from his employees as contribution to any PF or Superannuation Fund etc., as per the Relevant Acts, is to be treated as income and the employer-assessee is eligible to claim deduction of such amount as per Explanation to Sec.36(1)(v) only when the same is credited into the relevant fund within the due dates specified under those Acts.

4.4 The ld CIT(A) failed to note that in the case of M/s Gujarath State Road Transport Corporation, the Hon'ble Gujarath High Court has clearly discussed that the Hon'ble Apex Court in the case of Alom Extrusions Limited, never had the occasion to consider the deduction u/s 36(1)(va) with respect to employees' contribution and the only controversy before the Supreme Court was with respect to the amendment (deletion) of second proviso to Sec.43B operative w.e.f 1.4.2004 or whether it operates retrospectively w.e.f 1.4.1988 ?

4.5 The id CIT(A) failed to note that the Board itself has differentiated between employer's contribution and employees' contribution to funds, vide Board's Circular No. 22/2015 dated 17-12-2015, wherein it has been clarified that the Hon'ble Apex Court's decision in the case of CIT Vs Alom Extrusion Limited, has been accepted with regard to employer's contribution only and does not apply to the claim of deduction under employees' contribution.

3. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the learned CIT(A) may be set aside and that of the Assessing Officer restored."

3. The brief facts of the case are that the assessee is a Housing Finance Company which duly holds Registration Certificate granted by National Housing Bank.

4. The ground number 1 raised by Revenue in memo of appeal filed with tribunal is general in nature and does not require separate adjudication , hence , ground number 1 raised by Revenue in its memo of appeal filed with tribunal stand dismissed as being general in nature. We order accordingly.

5. The first effective issue agitated by Revenue before the Bench in its appeal filed with Tribunal vide ground number 2.1 to 2.6 is with respect to disallowance by AO of expenditure incurred in relation to earning of an exempt income by invoking provisions of Section 14A of the 1961 Act read with Rule 8D(2)(iii) of the Income-tax Rules, 1962, to the tune of ₹.4,02,500/- , which disallowance on first appeal filed by assessee with learned CIT(A) stood deleted by learned CIT(A) on the ground that the assessee has not received any exempt income during the year under consideration . Since no exempt income was received by assessee during the year under consideration, learned CIT(A) was pleased to delete entire disallowance of expenditure to the tune of ₹.4,02,500/- as was made by the A.O. , by following decisions of Hon'ble Jurisdictional High Court in the case of Redington (India) Ltd. v. Addl. CIT reported in (2017) 392 ITR 633(Madras), and of Co-ordinate Division Bench of the Chennai Tribunal in the case of ACIT v.

M.Baskaan in I.T.A. No. No.1717/Mds/2013 dated 31.07.2014 for ay: 2009-10.

5.2 Before the Bench during the course of hearing , Ld. D.R, at the outset, placed reliance on the assessment order passed by AO and drew our attention to the provisions of Section 14A of the 1961 Act, and submitted before the Bench that disallowance of expenditure incurred in relation to earning of exempt income as was made by AO while framing assessment, ought to have been upheld by learned CIT(A) as the assessee has made investment to the tune of ₹.8.05 crores in securities , which are capable of earning an exempt income albeit admittedly no exempt income was received by the assessee during the year under consideration . It is admitted by learned DR that no exempt income was received by the assessee during the year under consideration. The Ld. A.R on the other hand submitted that there was no exempt income earned by assessee during the year under consideration and hence, there is no question of disallowance of any expenditure being incurred in relation to earning of an exempt income by invoking provisions of Section 14A of the 1961 Act.

5.3 We have heard both the parties through video conferencing and perused the material available on record. It is an admitted position now between rival parties that the assessee has not earned/received any dividend income during the year under consideration and hence,

no exemption of income was sought to be claimed by assessee in the return of income filed by it with Revenue. We have also observed that although in the assessment order, the A.O. has stated that the assessee has earned dividend income of ₹.23,34,346/-, but the learned CIT(A) after perusal of the audited financial statement filed by assessee company, had observed that the A.O. has wrongly treated 'interest earned on deposits with the Bank' as 'dividend income' and a categorical finding is given by learned CIT(A) that the assessee did not received any exempt income during the year under consideration . This finding of learned CIT(A) that the assessee has not earned/received any exempt income during the year under consideration has not been challenged/rebutted by Revenue before the tribunal , neither in the grounds of appeal raised by Revenue before the tribunal nor by learned DR before the Bench during the course of hearing of this appeal. The Ld. D.R. infact admitted before us that no exempt income was earned/received by the assessee during the year under consideration. The assessee has also produced before us relevant portion of its Audited Financial Statement, on perusal of which we have observed that the assessee has earned 'interest on deposits with the bank' to the tune of ₹.23,34,346/-(placed at page No.4 of paper book/schedule being note 16 of the audited financial statements under the head 'Other Income' – interest on deposits with Bank-Rs.

23,34,346/-), which was infact considered by AO to be dividend income and later rectified by learned CIT(A). Thus, keeping in view of the factual position as is emanating from the records that the assessee has not received/earned any exempt income during the year under consideration, we are of considered view that no disallowance of expenditure being incurred in relation to earning of an exempt income by invoking provisions of Section 14A of the 1961 Act is warranted in this case. We have also observed that Hon'ble Jurisdictional High Court in the case of C.I.T, Chennai 1, Chennai v. M/s.Chettinad Logistics Pvt Ltd., in T.C.A No.24 of 2017 dated 13.03.2017 for ay: 2011-12, reported in (2017) 248 Taxman 55(Mad.) has held that no disallowance of expenditure u/s 14A of the 1961 Act is warranted when there is no exempt income received by tax-payer. We have also observed that Hon'ble Delhi High Court in the case of M/s.Cheminvest Ltd., v. C.I.T reported in (2015) 378 ITR 33 (Delhi), had held that no disallowance of expenditure is warranted by invoking provisions of section 14A of the Act when no exempt income is received by the tax-payer during the year under consideration . Thus , on this short reasoning alone that no disallowance of expenditure incurred can be made by invoking provisions of Section 14A of the 1961 Act whence the tax-payer has not received any exempt income during the year under consideration, we dismiss the grounds raised by Revenue w.r.t.

disallowances made u/s 14A of the 1961 Act and uphold decision of learned CIT(A) in deleting disallowance of expenditure. The Revenue fails on this issue. We order accordingly.

6. The second issue, which is agitated by Revenue before the tribunal vide Ground No. 3.1 to 3.3 raised in memo of appeal filed with tribunal, is with respect to disallowance of Rs. 8,78,08,404/- under Section 36(1)(viii) of the 1961 Act made by the A.O against which the assessee filed first appeal with learned CIT(A) who was pleased to grant partial relief to the assessee. The A.O. during the course of assessment proceedings conducted u/s 143(3) read with Section 143(2) of the 1961 Act observed that the assessee has claimed deduction u/s. 36(1)(viii) of the 1961 Act to the tune of ₹.23,12,14,754/-. The AO observed that provisions of Section 36(1)(viii) of the 1961 Act provides for deduction to the tune of 20% of the profits derived from eligible business , which as per explanation (b) to Section 36(1)(viii) of the 1961 Act , the eligible business is of providing long term finance for construction or purchase of houses in India for residential purposes . The AO observed that the assessee has claimed deduction to the tune of 20% of total business income instead of profits derived from providing long term finance for construction or purchase of houses in India for residential purposes. The A.O. observed that the assessee declared business income of

₹106,79,59,847/- which included a sum of ₹2,64,22,322/- being 'other operative income', which as per AO needs to be excluded from eligible profits since the same is not derived from the eligible transaction. The A.O. observed that the other operating incomes are not in the nature of income derived from providing long term finance for construction or purchase of houses in India for residential purposes and hence, these receipts cannot be included in total income for the purposes of computing deduction allowable to the assessee u/s 36(1)(viii) of the 1961 Act. The AO observed that these 'other operative income' can be attributed to the income of business of providing long term finance but it cannot be said that these are income derived from the business of providing long term finance. The AO relied upon following decisions to decide against the assessee to exclude 'other operative income' from the business income to compute deduction u/s 36(1)(viii) of the 1961 Act :

a) CIT v. Sterling Foods (1999) 237 ITR 579(SC) , and

b) Pandian Chemicals Limited v. CIT reported in (2003) 262 ITR 278(SC).

6.2 Thus, the A.O. observed that an amount of ₹2,64,22,322/- being 'other operative income' is to be firstly excluded from the business

income to compute deduction u/s. 36(1)(viii) of the Act. The A.O. further observed that as per the balance sheet, long term loans and advances outstanding as on 31.03.2013 were to the tune of 3,320.55 crores, while short term loans and advances outstanding were to the tune of ₹.229.49 crores, totaling to Rs. 3550.04 crores from which the assessee is receiving interest income. The A.O. further observed that out of the aforesaid amount of Rs. 3550.04 crores, only an amount of ₹.2833.25 crores were given as housing loans to individuals in India for purchase or construction of houses for residential purposes in India, which is an eligible transaction to claim deduction u/s. 36(1)(viii) of the 1961 Act. The A.O. observed from the submissions made by the assessee before the AO, as to details of various classes of home loans sanctioned by assessee that the assessee has sanctioned following loans:-

"i) Individual Home Loans: Loan provided for the purpose of construction and/or purchase of residential properties.

ii) Plot loans: Loans given for the purpose of purchase of a residential plot promoted by Housing board development authorities, Registered cooperative Societies and approved layouts constructing dwelling unit thereon.

iii) Repairs and renovation: This is one type of long tenure housing loan provided to needy people for the purpose of extension or reconstructing existing dwelling unit undertake major repairs.

iv) Home Equity Loans: These are loan against mortgage of immovable residential properties."

6.3 The A.O. further observed from the website of the assessee company that the assessee is giving loans for purchase or construction of commercial properties, plot loans for commercial properties and prosperity loans (loans against mortgage of immovable property for such purposes as may be desired by the borrower). The A.O. also observed so far as plot loans are concerned , there is no checking mechanism available with assessee to verify whether the borrower has constructed any residential house thereafter other than the letter of undertaking from the borrower. With respect to loans given for repairs and renovation of properties, the AO observed that the said loans were given for long term but it cannot be said that these loans were utilized for the purchase or construction of houses for residential purposes and the AO further observed that the name itself suggest that the said loans were for repairs and renovation and further the AO observed that it could not be ascertained whether the said loans were with respect to commercial or residential properties. The AO further observed that so far as prosperity loans are concerned, it cannot be said that these loans are for purposes of purchase/construction of residential houses and these loans are given against the mortgage of the property and the borrower may use the same for any purposes as

per their wish. Thus, the AO rejected the submissions made by assessee before the AO that all the loans were given for purchase/construction of residential house in India.

6.4 The A.O. also observed from annual report of the assessee for ay: 2013-14 that the assessee is providing a variety of home loan products for construction and/or purchase of residential and commercial properties including repairs and renovations. The AO observed that the assessee apart from offering home loans , the assessee is also offering loans against properties . The AO observed that home loans to individuals amounted to ₹.3,017 crores , while the loan against the property amounted to ₹.528 crores as per assessee's own segregation of loans. The AO also observed that management of the assessee at page number 51 of annual report has certified the exposure to the real estate sector with the breakup for residential and commercial mortgages .

6.5 The A.O. restricted and allowed deductions u/s. 36(1)(viii) of the Act to housing loans, thereby the A.O. allowed deduction to the tune of ₹.14,34,06,350/- to the assessee u/s 36(1)(viii) of the 1961 Act, as against deduction of ₹.23,12,14,754/- claimed by the assessee u/s 36(1)(viii) of the 1961 Act, which led to the disallowance of ₹.8,78,08,404/- of the deduction claimed by assessee u/s 36(1)(viii) of

the 1961 Act, vide assessment order dated 29.03.2016 passed by AO u/s 143(3) of the 1961 Act.

7. The assessee being aggrieved by an assessment framed by AO u/s 143(3) of the 1961 Act filed first appeal with learned CIT(A) and submitted before learned CIT(A) that the assessee is in business of providing finance for housing and holds certificate of registration granted by National Housing Bank(NHB). The assessee also submitted before learned CIT(A) that as per para-2(m) of the Housing Finance Companies NHB directions , the Housing Finance Company is defined as follows:

"housing finance company" means a company incorporated under the Companies Act, 1956 (1 of 1956) which primarily transacts or has as one of its principal objects, the transacting of the business of providing finance for housing, whether directly or indirectly;

The assessee submitted before learned CIT(A) that main object of the assessee company is providing of long term loans for purchase and constructions of houses, the entire amount of profits and gains from business has been reckoned for the purposes of arriving at deduction under section 36(i)(viii) of the 1961 Act. The assessee assailed assessment order passed by A.O. before learned CIT(A) during first appellate proceedings on following grounds:-

(a) The Assessing officer fail to appreciate that all the loans extended by the company are long term in nature and are extended only to individuals.

(b) Other operating income cannot be excluded from the profits of the business since the same includes income by way of interest on account of foreclosure of loans by the borrower.

(c) Plot loans—cannot be excluded for the purposes of claiming deduction under Section 36(1)(viii) since the loans are extended for the purposes of purchase of plots and later on for the purposes of construction. No construction can be completed without purchase of land and accordingly the same need to be reckoned for the purposes of claiming deduction under Section 36(1)(viii) of the income tax act. (Copy of sample loan sanction letter for plot loan is enclosed).

(d) Loans given for the purposes of repairs and renovation are akin to constructions and cannot be said to be as non housing. (A copy of sample loan sanction letter for repairs loan is enclosed).

(e) The learned assessing officer failed to appreciate that all the loans extended are long term in nature and the assessee has reflected short term advances in line with the requirements of schedule VI of the Companies Act which was revised during the year2012. The presentation of financial statements under the companies Act has undergone a change during 2011-12. Revised Schedule VI of the companies act was made applicable from the financial year 2011-12.

One of the key changes as per the Revised Schedule VI was that all the long term liabilities and assets, need to be

bifurcated into Long term and short term. All the borrowings/ liabilities due within one year should be disclosed under short term borrowings or current liabilities . Similarly all the loans and advances due within one year need to be disclosed under short term loans and advances. Copy of the relevant portion of the advisory issued under the Companies Act is enclosed.

(f) Further the learned assessing officer has notionally worked out the claim under Section 36(1)(viii) without calling for the income earned under the respective heads'

The assessee submitted before learned CIT(A), details of income earned under each of the activity :-

S.No.	Purpose of Loan	Operating Income In Rs.	Other Operating income In Rs.	Total Revenue from Operations In Rs.
A	Construction	189,33,11,359	1,04,61,169	190,37,72,528
B	Purchase	116,94,03,752	93,10,203	117,87,13,955
C	Prosperity loan against mortgage of housing properties	49,67,31,193	36,97,789	50,04,28,982
D	Commercial Loan	25,23,18,670	9,64,431	25,32,83,101
E	Plot Loan	19,35,14,433	19,09,930	19,54,24,363
F	Repairs Loan	2,54,18,073	78,800	2,54,96,876
	Total A + B + C + D + E + F	403,06,97,480	264,22,322	405,71,19,802

The assessee submitted that out of the above bifurcation of loans granted by assessee, income derived from loans granted A – construction, B- purchase, E-Plot loan and F –Repairs loan , should be considered for allowing deduction u/s. 36(1)(viii) of the Act, which

comes to ₹.18.82 crores. Thus, the assessee itself submitted before the learned CIT(A), that it is entitled for deduction to the tune of Rs. 18.82 crores u/s 36(1)(viii) of the 1961 Act as against deduction to the tune of Rs. 23.12 crores claimed by it in return of income filed with the Revenue. It is pertinent to mention that the AO allowed deduction to the tune of Rs. 14.34 crores to the assessee u/s 36(1)(viii) of the 1961 Act. Thus, the assessee itself submitted before learned CIT(A) that it is not entitled for deduction u/s 36(1)(viii) of the 1961 Act with respect to income derived from prosperity loans against mortgage of housing properties and also on profits derived from commercial loans. Thus, assessee itself voluntarily and admittedly forego before learned CIT(A) its original claim of deduction of ₹.23.12 crores u/s 36(1)(viii) of the 1961 Act claimed by it in return of income filed with Revenue and instead restricted the said claim of deduction u/s 36(1)(viii) to the tune of ₹.18.82 crores.

7.2 The learned CIT(A) after considering the contentions of the assessee held as under, vide appellate order dated 30.08.2017 :-

> *"4.6. I have considered written submissions of the Ld.AR and also oral arguments. I have also perused assessment order. The undisputable facts are that appellant company is carrying business of advancing loans for housing. AO, while examining the claim u/s.36(1)(viii), has noticed that appellant advanced housing loans to the tune of*

Rs.2833,25,22,221/- out of total loans advanced of Rs.3550,04,88,705/-. Further, AO has excluded other operating income of Rs.2,64,22,322/- from the profits of business amounting Rs.92,71,93,360/-. After all these adjustments, AO has allowed deduction u/s.36(1)(viii) to the tune of Rs. 14,34,06,350/- and disallowed an amount of Rs.8,78,08,404/-. So far, the facts narrated herein above indicate that disallowance is agreed even by the Ld.AR. However, Ld.AR is disputing the quantum of disallowance. As per the Ld.AR disallowance should be confined to only Rs.4,29,53,958/- but not Rs.8,78,08,404/-. I have considered facts relating to the loans advanced for housing by the appellant. I have also perused financials filed during the appellate proceedings. On perusal, I have found that AO has confined to housing loan to individuals under the head 'long term loans and advances' amounting to Rs.2833,25,22,221/- whereas Ld.AR has taken loans and advances for housing to the tune of Rs.3300,34,07,722/-. The difference of opinion arose with regard to short term loans and advance amounting to Rs.229,49,37,716/- as to whether said loans are part of housing loans or not. Ld.AR says that these are long term loans advanced for the purpose of housing but classified as short term loan as per the requirements of Schedule VI of Companies Act. It seems this argument has not been accepted by the AO. On perusal of financials and submissions made by the Ld.AR, I find there is a merit in the arguments of the Ld.AR. The schedule under short term loans and advances gives a details which are as under:

Short Term Loans & Advances (Secured & considered Good excepting Provision made for non performing Advances)		
-	31.03.2013 In Rs.	31.03.2012 In Rs.

Current Maturities of Housing Loan	183,29,26,110	144,61,67,768
Current Maturities of Mortgage / Other Loans	45,64,94,560	32,71,36,605
Other Loans & Advances (Unsecured, considered good unless otherwise stated)		
Advances recoverable in cash or in Kind	15,09,250	2,33,18,972
Loan to Employees	36,02,637	19,90,772
Travel Advance	4,05,159	2,41,495
Total	229,49,37,716	179,88,55,612

On perusal of above schedule, I have noticed that first two columns are in the nature of housing loans. Therefore, I find lot of merit in the arguments of the Ld.AR. In the circumstances, I direct the AO to include current maturities of housing loan and current maturities of mortgage loans for the purpose of allowing deduction u/s.36(1)(viii).

4.7. With regard to operate income taken by the AO amounting to Rs.92,71,93,360/-, AO is directed to verify as to whether operate income is only Rs.92,71,93,360/- or Rs.115,60,73,772/-. After verification, whichever the figure is found correct same may be taken for the purpose of allowing deduction u/s.36(1)(viii).

4.8. In view of the above discussion, AO is directed to re-compute deduction u/s.36(1)(viii) as per this order. The grounds taken by the appellant are partly allowed."

8. The Revenue being aggrieved by appellate order dated 30.08.2017 passed by learned CIT(A) has filed an appeal with tribunal and has raised Ground Nos.3.1 to 3.3 in memo of appeal filed with the tribunal. The assessee has not filed an appeal with tribunal and so far as assessee is concerned , the appellate order passed by learned CIT(A) has attained finality. Nothing contrary to that effect is brought to our notice by rival parties during the course of hearing before the Bench.

8.2 The Ld. D.R. at the outset submitted before the Bench through video conferring that deduction u/s 36(1)(viii) of the 1961 Act can only by allowed from profits derived from eligible business of providing long term finance for construction or purchase of houses in India for residential purposes. It was also submitted by learned DR that the assessee has classified loans under the head "short term loans and advances", which cannot be considered for claiming deduction u/s 36(1)(viii) of the 1961 Act . It was also submitted by learned DR before the Bench that mortgage loans are not eligible for claiming deduction u/s 36(1)(viii) of the 1961 Act and only housing loans are to be considered for computing deduction u/s 36(1)(viii) of the 1961 Act. It was also submitted by learned DR that Plot loans are also to be excluded while computing deduction u/s 36(1)(viii) of the 1961 Act. It was also submitted by learned DR that later on plot loans were converted into commercial loans as the plot owners have not

constructed residential house on said plots during the stipulated period and conditions stipulated u/s 36(1)(viii) are not fulfilled . It was submitted that onus is on the assessee to segregate and exclude such plots loans which were later converted into commercial loans owing to the fact that the owners of the plot did not constructed residential houses on the said plots within prescribed stipulated period. Thus, it was prayed by learned DR that plot loans are to be excluded while allowing deduction u/s 36(1)(viii) of the 1961 Act. It was also submitted that mortgage loans be also excluded while computing deduction u/s 36(1)(viii) of the 1961 Act as these loans were not granted for construction or purchase of residential house property . It was submitted that all the loans given for commercial purposes be excluded while allowing deduction u/s 36(1)(viii) of the 1961 Act . It was prayed by learned DR that onus is on the assessee to prove that it is eligible for deduction u/s 36(1)(viii) of the 1961 Act and prayers were made to set aside and restore this matter back to the file of the AO for re-adjudication of the issue.

8.3 The Ld. Counsel for the assessee submitted before the Bench that the assessee has already agreed before learned CIT(A) that mortgage loans and commercial loans are to be excluded while computing deduction u/s 36(1)(viii) of the 1961 Act, which was done voluntarily by the assessee of its own volition . It was also submitted by Ld. A.R.

that all the loans, which are granted by assessee, are long term loans ranging from 120 to 180 months. The assessee counsel also submitted before the Bench that the assessee has already excluded mortgage loans and commercial loans , while computing deduction under Section 36(1)(viii) of the 1961 Act.

9. We have heard rival submissions through video conferencing and perused the material available on record. We have observed that the assessee is a housing finance company holding registration certificate granted by National Housing Bank (NHB). It is an admitted position between both the rival parties that the assessee is an specified entity being Housing Finance Company mainly engaged in eligible business of providing long term finance for construction or purchase of houses in India for residential purposes and the assessee is admittedly entitled for deduction under Section 36(1)(viii) of the Act. The dispute between rival parties is with respect to quantum of deduction which the assessee is entitled for within the provisions of Section 36(1)(viii) of the 1961 Act , which dispute has mainly arisen with respect to some of the loans which were classified by assessee as 'Short Term Loans & Advances' in its audited financial statements as also certain categories of loans which assessee has granted which revenue is alleging that these loan products granted by assessee do not qualify to be housing loans granted for construction or purchase of houses in India for

residential purposes. Before we proceed further , it is pertinent to mention that the assessee is claiming deduction u/s 36(1)(viii) of the 1961 Act being 20% of the profits derived by assessee from eligible business computed under the head 'Profits and Gains of Business or Profession' and since this a deduction provision, it shall be strictly construed and onus is squarely on the assessee to prove that the deduction claimed falls within the parameters of Section 36(1)(viii) of the 1961 Act and the assessee is meeting all the requirements of the provisions of Section 36(1)(viii) of the 1961 Act and is eligible for said deduction . Any ambiguity in the provision is to be held in favour of Revenue. Reference is drawn to 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). It is profitable at this stage to refer to statutory Provision as are enshrined in Section 36(1)(viii) of the Act as it stood for relevant ay viz. ay: 2013-14 , is reproduced hereunder:-

"*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-

*(i) to (vii) ****

(viii) ***in respect of any special reserve created and maintained by a specified entity, an amount not exceeding twenty per cent of the profits derived from eligible business computed under the head "Profits and gains of business or profession" (before making any deduction under this clause) carried to such reserve account*** *:*

Provided that where the aggregate of the amounts carried to such reserve account from time to time exceeds twice the amount of the paid up share capital and of the general reserves of the specified entity, no allowance under this clause shall be made in respect of such excess.

Explanation.- in this clause,

*(a) "**specified entity"** means,-*

(i) a financial corporation specified in section 4A of the Companies Act, 1956 (1 of 1956) ;

(ii) a financial corporation which is a public sector company ;

(iii) a banking company ;

(iv) a co-operative bank other than a primary agricultural credit society or a primary co-operative agricultural and rural development bank ;

(v) a housing finance company *; and*

(vi) any other financial corporation including a public company ;

*(b) "**eligible business"** means,-*

(i) in respect of the specified entity referred to in sub-clause (i) or sub-clause (ii) or sub-clause (iii) or sub-clause (iv) of clause (a), the business of providing long-term finance for-

(A) industrial or agricultural development;

(B) or development of infrastructure facility in India; or

(C) development of housing in India;

(ii) in respect of the specified entity referred to in sub-clause (v) of clause (a), the business of providing long-term finance for the construction or purchase of houses in India for residential purposes ; *and*

(iii) in respect of the specified entity referred to in sub-clause (vi) of clause (a), the business of providing long-term finance for development of infrastructure facility in India ;

(c) "banking company" means a company to which the Banking Regulation Act, 1949 (10 of 1949) applies and includes any bank or banking institution referred to in section 51 of that Act ;

(d) "co-operative bank", "primary agricultural credit society" and "primary co-operative agricultural and rural development bank" shall have the meanings respectively assigned to them in the Explanation to sub-section (4) of section 80P ;

(e) "housing finance company" means a public company formed or registered in India with the main object of carrying on the business of providing long-term finance for construction or purchase of houses in India for residential purposes ;

(f) "public company" shall have the meaning assigned to it in section 3 of the Companies Act, 1956 (1 of 1956) ;

(g) "infrastructure facility" means-

(i) an infrastructure facility as defined in the Explanation to clause (i) of sub-section (4) of section 80-IA, or any other public facility of a similar nature as may be notified by the Board in this behalf in the Official Gazette and which fulfils the conditions as may be prescribed;

(ii) an undertaking referred to in clause (ii) or clause (iii) or clause (iv) or clause (vi) of sub-section (4) of section 80-IA ; and

(iii) an undertaking referred to in sub-section (10) of section 80-IB;

(h) "long-term finance" means any loan or advance where the terms under which moneys are loaned or advanced provide for repayment along with interest thereof during a period of not less than five years;"

Thus, as can be seen from the statutory provisions, undisputedly the assessee is an housing finance company which holds registration certificate from NHB. The assessee is engaged in providing housing loans to individual. It has several portfolios/house loan products which has been modulated by assessee to and offered to borrowers to suit their requirements. However, the deduction u/s 36(1)(viii) of the 1961 Act will only be available to the assessee to the tune of 20% of the profits derived from the business of providing long term finance (repayable for a period of not less than five years) for the construction or purchase of houses in India for residential purposes, computed

under the head 'Profits and Gains of Business or Profession' (before making any deduction u/s 36(1)(viii) of the 1961 Act) and for which the assessee is also required to create and maintain special reserves. Thus, in nut-shell the assessee has to meet fully all the requirements of Section 36(1)(viii) of the 1961 Act, which are to be strictly construed. The housing finance company is defined in Explanation- (e) to Section 36(1)(viii) of the 1961 Act, as a public company formed or registered in India with the main object of carrying on the business of providing long term finance for construction or purchase of houses in India for residential purposes. It can be seen that the deduction u/s 36(1)(viii) of the 1961 Act is to be allowed from the profit derived from eligible business computed under the head 'Profits and Gains of Business or Profession' . These are deduction provision and hence it is to be strictly construed and onus in on the assessee to prove its eligibility. Any ambiguity is to be decided in favour of Revenue. The decision of Hon'ble Supreme Court in the case of Dilip Kumar & Co.(Supra) and Ramnath and Company(supra) are relevant to that effect to support the said propositions of law. The word used in the statute is 'derived' from eligible business computed under the head 'Profits and Gains of Business or Profession' and not profits 'attributable' to the eligible business. The word 'derived' is narrower in its interpretation and it required direct and immediate nexus of

profits and the business of providing long term finance for construction or purchase of houses in India for residential purposes , than word 'attributable' to profits from business of providing long term finance for construction or purchase of houses in India for residential purposes which is wider in its import and which could include receipts other than the actual conduct of the business. The decision(s) of Hon'ble Supreme Court in the case of CIT v. Sterling Foods reported in (1999) 237 ITR 579(SC) ; Cambay Electric Supply Industrial Company Limited v. CIT reported in (1978) 113 ITR 84(SC), Pandian Chemicals Limited v. CIT reported in (2003) 262 ITR 278(SC) and Mrs. Bacha F. Guzdar v. CIT (1955) 27 ITR 1(SC) are relevant to support the aforesaid proposition of law. The provisions of Section 36(1)(viii) of the 1961 Act has also referred to Profits 'derived' and hence direct and immediate nexus of Profits and the business of providing long term finance for construction or purchase of house in India for residential purposes is to be seen. On this threshold, the decision of learned CIT(A) in allowing deduction with respect to mortgage and other loans is not correct and hence, we reverse the decision of learned CIT(A) in allowing deduction with respect to current maturities of mortgage/other loans, as these loans were not granted for construction or purchase of houses in India for residential purposes. We also hold that classification undertaken by assessee as to 'Short Term Loans and Advances' to include current

maturities is to meet the new reporting requirements as prescribed as per the Government Notification no. F.No.2/6/2008-C.L-V dated 30-3-2011, wherein Revised Schedule VI for the Balance Sheet and Profit and Loss Account to be prepared for the financial year commencing on or after April 1, 2011 which provided current maturities of long term debts falling due within next one year to be classified as 'short term loans and advances' and assessee has rightly classified current maturities of long term debt under the head 'Short Term Loans and Advances' in compliance of aforesaid Government notification , thus these loans were long term loan and only to meet requirement of Government/ MCA , these loans with current maturities upto one year were classified under the head 'Short Term Loans and Advances' . These new guidelines became effective from the financial year starting from 01.04.2011 and presently we are concerned with ay: 2013-14. There is no adverse material on record to hold that these loans were otherwise granted/sanctioned for a period of less than ficve years. The assessee has brought on record sanction letters and stated that loans were granted for a period of 120-180 months. The Revenue could not contradict the same before us. However, only an amount of Rs. 183.29 crores being current maturities of housing loan shall be included for the purposes of claiming deduction u/s 36(1)(viii) and profits derived thereof shall be included to compute deduction u/s 36(1)(viii) of the

1961 Act. Thus, the current maturities of mortgage/other loans which was allowed by learned CIT(A) shall not be included while computing deduction u/s 36(1)(viii) of the 1961 Act and to that effect the appellate order of learned CIT(A) stand reversed.

From the perusal of the details submitted by assessee before learned CIT(A) which is not contradicted by Revenue, it is observed that it has revenues from following portfolios of loans are as under:-

S.No.	Purpose of Loan	Operating Income Rs.	Other Operating income Rs.	Total Revenue from Operations Rs.
A	Construction	189,33,11,359	1,04,61,169	190,37,72,528
B	Purchase	116,94,03,752	93,10,203	117,87,13,955
C	Prosperity loan against mortgage of housing properties	49,67,31,193	36,97,789	50,04,28,982
D	Commercial Loan	25,23,18,670	9,64,431	25,32,83,101
E	Plot Loan	19,35,14,433	19,09,930	19,54,24,363
F	Repairs Loan	2,54,18,073	78,800	2,54,96,876
	Total A + B + C + D + E + F	403,06,97,480	264,22,322	405,71,19,802

The learned counsel for the assessee has claimed before us that the assessee has itself excluded prosperity loans and commercial loans and hence deduction u/s 36(1)(viii) as upheld by learned CIT(A) exclude profits derived from prosperity loans against mortgage of housing properties and commercial loans, and in our considered view the assessee is not entitled for claiming deduction u/s 36(1)(viii) of the 1961 Act with respect to profits derived from these prosperity loans

against mortgage of properties as proceeds of these loans can be utilized for any purposes and it was not for the purposes of construction or purchase of house in India for residential purposes. The stand of assessee to voluntarily disallow deduction u/s 36(1)(viii) is correct and further the assessee will not be entitled for deduction u/s 36(1)(viii) of the 1961 Act on profits derived from commercial loans as these loans were not granted for construction or purchase of residential house in India. Now , coming to Plot loans , the assessee is granting these plot loans for buying plots and undertaking is taken from the borrower that he/she will construct the residential house on the said plot of land within a period of three years . The NHB guidelines permit housing finance companies to lend for purchase of plot , vide directions No. NHB(ND)/DRS/Pol-No. 41/2011-12 dated 26.09.2011 , but so far as deduction u/s 36(1)(viii) is concerned , it is deduction provision and it is to be strictly construed and onus is on assessee to prove that it is entitled for claim of deduction. Permission of activity by NHB to is one thing , while grant of deduction under provision of the 1961 Act is altogether different. No doubt it is true that the house cannot be constructed without plot of land but deduction u/s 36(1)(viii) of the 1961 Act can only be allowed on profits derived from loans granted for a period of not less than five years for construction or purchase of house in India for residential purposes. It

is also brought to our notice by learned counsel for the assessee that in those cases, where the borrower fails to construct the plot of land for residential house within 3 years, the said loan is classified as commercial loan but it could not be brought on record by learned counsel for the assessee that the assessee had foregone deduction on all such plot loans which were later classified as commercial loans . In case the borrower constructs residential house on plot of land within three years by further borrowing for construction or by investing it own funds, then doctrine of relation back has to be applied and the assessee will be entitled for deduction u/s 36(1)(viii) of the 1961 Act but in case the borrower who had borrowed the funds from assessee to buy a plot of land either fails to construct residential house within three years or construct commercial property on such plot of land, no such deduction can be allowed to the assessee u/s 36(1)(viii) of the 1961 Act. The assessee is directed to produce complete details before the AO wrt to plot loans granted by it , deduction claimed u/s 36(1)(viii) on these plot loans and whether the borrower constructed residential house within three years from the date of purchase of plot or else these loans were classified by assessee as commercial loans. Thus, to this effect matter is remitted back to the file of AO for fresh determination of deduction u/s 36(1)(viii) on plot loans and the assessee is directed to produce complete details before the AO. The

AO after considering the submissions of the assessee in remad proceeding shall grant deduction in accordance with our above directions/orders. Similarly, with respect to loans granted for repairs and renovation , only deduction can be granted u/s 36(1)(viii) of the 1961 Act provided renovation has led to construction of additional floors /areas and no deduction u/s 36(1)(viii) of the 1961 Act can be granted for normal repairs and renovation. The onus is on the assessee to bring on record details of loans granted, construction of additional floor/area in the existing residential properties , fresh sanction plans issued by local municipal authorities etc. to substantiate that the loans were granted/utilised for the purposes of construction of additional floors etc to the borrowers. The matter is remitted back to AO and the assessee is directed to produce all details before the AO. The AO shall in remand proceedings after considering the submissions of the assessee shall grant deduction u/s 36(1)(viii) in accordance with our aforesaid directions/orders. It is also observed that the assessee is claiming 'other operating income' to the tune of ₹.2.64 crores which was included as part of profits for the purposes of computing deduction u/s 36(1)(viii) of the 1961 Act , the details as furnished by assessee before tribunal are as under:-

FY 12-13

GL Name	**Balance**

Admin Fees	1,22,72,626
Other Charges	61,63,645
Prepayment charges	27,79,854
Recovery in Bad Debts	14,40,957
Cersai Charges Received	12,57,894
Notice Period Salary	11,43,629
Other Income	8,41,955
Interest On Personal Loan	4,50,469
Interest On Car Loan	48,315
Interest On Conveyance Loan	11,564
Pemi On Personal Loan	11,297
Penal Interest On Personal Loan	117
Total	2,64,22,322

On consideration of the above, we observe that some of the incomes such as notice period salary, other income, interest on car/personal loan, interest on conveyance loans , PEMI on personal loans , penal interest on personal loans have no direct and immediate nexus with profits derived from loans granted for construction or purchase of house in India for residential purposes, while for other components of income, we are remitting the matter back to AO to decide the above in light of Hon'ble Supreme Court decisions in the case of Pandian Chemicals(supra), Sterling Foods(supra) , Cambay Electricity(supra) and Bacha F Guzdar(supra) and if it is found that there is direct and immediate nexus of the said income with grant of loans for construction or purchase of houses in India for residential purposes, the same shall be included for computing deduction u/s 36(1)(viii) of the 1961 Act. The onus is on the assessee to prove that it is eligible for

deduction u/s 36(1)(viii) of the 1961 Act and claim of the assessee for grant of deduction u/s 36(1)(viii) is to be strictly construed. etc.. We order accordingly.

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 files 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 ₹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 ₹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 Semoconductor 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 ₹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 sub-section (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 sub-section (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 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."*

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 assessees 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 assessees 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 assessees, 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 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." [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 ld. 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] 297 ITR 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 retrospective 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 assessees 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 bur 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 tax-payer 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 decising 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, ie; 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 sub-clause (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 tax-payer 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)

** ** **

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.

** ** **"

(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 activity[16].

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'be 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 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 . 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.

11. In the result, the appeal of Revenue in ITA no. 2885/Chny/2017 for ay: 2013-14 is partly allowed for statistical purposes, as indicated above.

Order pronounced in the open court through videoconferencing on 17th June, 2020, at Chennai.

Sd/-	Sd/-
(जॉर्ज माथन)	**(**रमित कोचर**)**
(GEORGE MATHAN)	**(RAMIT KOCHAR)**
न्यायिक सदस्य/JUDICIAL MEMBER	लेखा सदस्य **/Accountant Member**

चेन्नई/Chennai
दिनांक/Dated: 17th June, 2020.
K S Sundaram

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF