आयकर अपीलीय अधिकरण, कटक न्यायपीठ,कटक

IN THE INCOME TAX APPELLATE TRIBUNAL CUTTACK BENCH, CUTTACK

श्री चन्द्र मोहन गर्ग, न्यायिक सदस्य **एवं** श्री अरुण खोड़पिया, लेखा सदस्य के समक्ष ।

BEFORE SHRI CHANDRA MOHAN GARG, JM & SHRI ARUN KHODPIA, AM

आयकर अपील सं./ITA No.358/CTK/2017

(**निर्धारण वर्ष /** Assessment Year :2013-2014)

Rukmani Infra Projects Ltd., Plot No.251, District Centre, C.S.Pur, Bhubaneswar-16	Vs	ACIT, Circle-1(2), Bhubaneswar
PAN No. : **AAECR 1585 L**		

(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

निर्धारिती **की ओर से** /Assessee by	:	None
राजस्व **की ओर से** /Revenue by	:	Shri Manoj Kumar Goutam, CIT-DR

सुनवाई की तारीख **/ Date of Hearing**	:	08/03/2022
घोषणा की तारीख**/Date of Pronouncement**	:	30/03/2022

आदेश / O R D E R

Per Arun Khodpia, AM :

This appeal filed by the assessee has been directed against the order passed by the ld. CIT(A)-1, Bhubaneswar, dated 16.06.2017, for the assessment year 2013-2014.

2. Brief facts of the case extracted from the available records are that, the assessee, a company incorporated under the Companies Act, 1956, engaged in the business of erection, commissioning, technical and maintenance service to different power plants. The return of income for the AY 2013-14 was filed by the assessee on 01.10.2013 declaring a total income of Rs.1,65,91,030/-. The case of the assessee was selected under CASS. Notice u/s 143(2) and 143(1) were issued and served on the assessee. Assessment proceedings were completed by the AO and concluded with an addition of Rs.3,58,95,574/- under four different

grounds, thereby enhancing the taxable income of the assessee to Rs.5,24,86,600/- with an additional tax demand of Rs.1,60,51,630/-.

3. Aggrieved by the order of AO, the assessee challenged the additions made by the AO by filing an appeal with the first Appellate Authority i.e CIT(A)-1, Bhubaneswar. In process, the Ld CIT(A) had observed the matter and sum-up the same with a minor relief to the assessee vide his order dated 16.06.2017.

4. Dissatisfied with the decision of Ld CIT(A), the assessee preferred an appeal before the ITAT and has raised the following grounds:

1. *Learned Assessing officer has added share application money of M/s Mahabali Enclave Pvt. Ltd, without considering the ground reality and basic facts, even though all the transaction are genuine and from credit worthy parties and within the group, done through bank. Hence the addition is liable to quashed.*
2. *Learned Assessing officer has added delayed payment of statutory dues to the extent of Rs.1, 60, 35,364/- paid before filling of return, without considering the facts and circumstances of the assessee business. Hence the addition is liable to be quashed.*
3. *Learned Assessing officer has added Rs.40,22,979/- as expenditure in capital nature without considering the nature of business and the facts and circumstances. Hence the addition is liable to be quashed.*
4. *Learned Assessing officer has added an amount of Rs.6,13,011/- paid as donation and charity expenses without considering the ground reality of the fact which is customary. Hence the addition is liable to be quashed.*
5. *Learned Assessing officer has added an amount of Rs.21,64,220/- paid as interest on late deposit of TDS without considering the ground reality of the facts. The assessee has saved working capital which has more interest than the above. Hence the addition is liable to be quashed.*
6. *That the Appellant craves the leave of the Hon'ble Bench to add, alter, amend, modify, substitute, delete and/or rescind all or any of the grounds of appeal, submit written submissions, paper book and such other facts and figures before or at the time of final hearing of the case, if necessity so arises.*

5. This case was fixed for hearing several times before starting from 01.08.2018, initially, at few occasions adjournment was sought by the AR of the assessee, subsequently, the case was fixed for hearing on several dates but neither any one was appeared nor adjournment was sought on behalf of the assessee. Therefore, the bench proceeded to dispose of the case based on pleadings of the Ld CITDR and on the basis submission in form a paper book as well as the material facts available on record.

6. **Ground 1** - At the outset, on this ground relates to disallowance of receipt of Rs.1,30,60,000/- by the assessee company towards share capital by treating the same as Income u/s 68 of the Income Tax Act by Ld AO. Ld DR brought to our attention the relevant paras of order of AO and CIT(A), also furnished before the bench his written submission having details of Mahabali Enclave Private Limited containing a list of 34 companies registered on the same address identical to Mahabali Enclave Private Limited with a contention to prove that the finding of the CIT(A) is correct that "*M/s Mahabali Enclave Pvt Ltd is a penny-stock company not having genuine credit worthiness".*

6.1 On perusal of the order of AO as well as order of CIT(A), wherein after discussing the issue in detail, a common inference drawn by both the revenue authorities, extracted from order of the CIT(A) was as under: -

> *2.2 I have considered the facts of the case, the reasons given by the AO to make the addition u/s.68 and the written submission of the assessee. The assessee in its written submission has referred to the decisions in the cases of Lovely Exports (P) Ltd. and Stellar Investment Ltd. of the Hon'ble Apex Court and also certain other decisions of various High Courts which are mainly based on the above decisions of the Hon'ble Apex Court. Relying on these decisions, the assessee pleads that since the identity of the party, i.e. M/s. Mahabali Enclage (P) Ltd. has been established, there is*

no need to prove its creditworthiness and genuineness of the transaction. It may be mentioned here that by way of an amendment by the Finance Act, 2012, a new proviso, being proviso-1 has been inserted w.e.f. 1.4.2013 (AY 2013-14) to section 68 of the Act providing that in the case of a company not being a company in which the public are substantial interested, if there is a credit consisting of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless the following conditions are satisfied:

(a) The person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and

(b) Such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory

2.2.1 After insertion of the above proviso, from AY 2013-14, the assessee cannot take shelter under the decisions in the case of Lovely Exports and Stellar Investment Ltd.(supra), and has to furnish an explanation from the company from whom share application money is received about the nature and source of the credit entered in its name. Moreover, the AO has to be satisfied about the explanation furnished in respect of the nature and source of the credit. In the case of the assessee, no such explanation has been furnished by M/s. Mahabali Enclave (P) Ltd. The AO has pointed out that there was no cash balance in the bank account of M/s. Mahabali Enclave (P) Ltd. and substantial cash deposits were made just to enable issue of cheque in favour of the assessee-company. On the facts of the case M/s. Mahabali Enclave (P) Ltd. clearly appears to be a penny-stock company not having genuine creditworthiness. This company has been used as a conduit to channelize the undisclosed income of the assessee-company through the medium of share application money. In this view of the matter, the addition of Rs.1,30,60,000/- u/s.68 is confirmed.

6.2 In contradiction to the opinion of the authorities below, the assessee in its paper book on this ground has mentioned that the assessee has proved the identity and genuineness of the transaction and fulfilled its onus thereby proved that the additions are bad in law. To prove its contention the assessee has submitted copies of assessment order, pan card, bank statement of the company Mahabali Enclave Pvt Ltd., the investment company to whom the shares were allotted by the assessee

company. Assessee has further submitted following case laws to substantiate its contention:

i) CIT Vs Stellar investment Ltd 251 ITR 263 [SC]
ii) CIT Vs Lovely Exports (P) Ltd 216 CTR 195[SC]
iii) CIT, Meerut Vs M/s VAN Resorts & Hotels (P) Ltd. Allahabad HC
iii) CIT, Meerut Vs Nav Bharat Duples Ltd. Allahabad HC
iv) CIT Vs Oasis Hospitalities Pvt Ltd & UP Bone Mills India Ltd. Delhi HC
v) Vijay power generators Ltd & Director of Income Tax, Delhi HC

6.3 In conclusion to submission on this ground the assessee had stated on para 2 of page number 7 of its paper book, as under:

> *Moreover, assessee is not required to provide any material for creditworthiness of the investors and if they are bogus investors or their income is less than the amount invested then the remedy to the AO is to 'open the assessment of the respective investors and cannot add the credit in the as undisclosed income in any circumstances. In the present case also assessee has proved the identity of all the investors by copy of PAN card Xerox, Annual Report, and Bank statement of the party. Therefore, assessee has fulfilled its onus cast upon him to prove the identity of shareholders and genuineness. Therefore, it is prayed your honor to delete the addition made with regard to share application money based on the facts and laid down principles."*

6.4 We have considered the rival contentions, after going through the submissions and relevant material placed before us, it is revealed in the instant case that M/s Mahabali Enclave Private Limited, the investment company has duly transferred funds through proper banking channel to the assessee company for issuance of shares, current status of the investment company is also active, as submitted by Ld CITDR. The assessee has also submitted in its Paper Book, copies of bank account, Pan Card and Assessment Orders of the Investment Company. Hence, identity of the Investor Company is not doubtful. Regarding genuineness or credit worthiness of the investor company, no material evidences were fetched by the AO. Ld CIT(A) in para 2.2.1 of its order has mentioned on

the basis of observations of AO that *"The AO has pointed out that there was no cash balance in the bank account of M/s Mahabali Enclave (P) Ltd and substantial cash deposit were made just to enable issue of cheque in favour of the assessee company*", however, on perusal of the bank statement submitted at page number 12-13 of the paper book of the assessee, it is evident that all the deposits in the said account of M/s Mahabali Enclave (P) Ltd are through bank transfers and no cash was deposited during the entire period under assessment. It shows that AO has not scrutinized the matter appropriately and CIT(A) has made a incorrect opinion based on facts presented by the AO.

6.5 From the above discussion, we found that the findings of the revenue authorities are not justified and are irrational, they have deliberated the matter without due application of mind, identity of the investor had duly disclosed by the assessee and identified by the AO, all the transactions were through proper banking channel, no cash deposit was found as alleged by the AO, assessee has discharged its duty by providing all the relevant material required for the investigation. Therefore, application of section 68 of the income tax act in the instant case is not reasonable and uncalled-for.

6.6 In view of the above discussion, we found merit in contention of the assessee and, accordingly this ground of appeal of the assessee is decided in favour of the assessee.

7. **<u>Ground 2</u>** relates to disallowance of statutory dues of Rs. 1,60,35,365/- which were paid after the due date but before filing of the ITR u/s 139(10 of the Act. This disallowance consists of 3 items:

i)	Belated remittance of EPF contributions	1,26,76,279/-
ii)	Unpaid VAT	31,83,370/-
iii)	Unpaid professional tax	1,75,715/-

7.1 Item no ii) and iii) were not pressed by the assessee while the same were decided by CIT(A), hence the same disallowances, under the non-prosecution, are treated as accepted by the assessee and hence are decided in favour of the revenue by upholding the order of CIT(A) on this issue.

7.2 Regarding item i) late payment of EPF contribution for Rs. 1,26,76,279/-, CIT(A) has mentioned in his order that the EPF contribution consists of employee's contribution of Rs. 59,30,423/- and employer's contribution of Rs. 67,45,856/-.

7.3 For employer's contribution CIT(A) has told that *"so far as employer's contribution is concerned, there being no evidence to show that the same was paid before the due date of filing of the return, the disallowance u/s 43B is justified."* However, on perusal of the order of AO it is clearly evident from the table of payment (reproduced hereunder for ready reference) of EPF that all such payments are made along with employee's contribution before the due date for filing of income tax return. Therefore, employer's contribution of Rs.67,45,856/- admittedly paid before the date of filing of return is allowable u/s 43B of the Income Tax Act.

Table showing due date and actual date of payment of EPF by the assessee:

S No	Due Date	Actual Date	Amount (Rs.)
1	15/05/2012	02/06/2012	12,21,359
2	15/07/2012	17/09/2012	12,73,811
3	15/08/2012	13/12/2012	12,03,709
4	15/09/2012	30/09/2013	12,30,904
5	15/10/2012	30/09/2013	11,34,696
6	15/11/2012	23/09/2013	13,62,799
7	15/12/2012	23/09/2013	12,10,295
8	15/01/2013	23/09/2013	11,56,620
9	15/02/2013	23/09/2013	10,00,118
10	15/03/2013	23/09/2013	9,06,116
11	15/04/2013	30/09/2013	9.75,852
		T O T A L	126,76,279

7.4 So far as Employee's Contribution is concerned Ld CITDR has supplied copies of certain case laws, which revenue has relied upon are as under: -

i) Unifac Management Services (India)(P.) Ltd. Vs. DCIT, [2018] 100 taxmann.com 244 (Madras) :

Section 36(1)(va), read with sections 43B and 2(24)(x), of the Income-tax Act, 1961 - Employees contribution (General) - Whether sum received by assessee as an employer from employee is an income at hands of assessee, as per section 2(24)(x) and said sum would be entitled for deduction only when it is paid to concerned authority within due date as per section 36(1)(va) and certainly, sum payable by assessee as an employer by way of his contribution towards beneficial fund cannot be treated as an income at his hand but only as an expenditure allowable for deduction when such payment is made in accordance with section 43B(b) - Held, yes - Whether scope of section 43B and section 36(1)(va) are different and thus, there is no question of reading both provisions together to consider as to whether assessee-employer is entitled to deduction in respect of sum paid (employees contribution to PE, ESI) belatedly and therefore, for considering such question, application of section 36(1)(va), read with section 2(24)(x) alone is proper course and any other interpretation would only defeat object and scope of both provisions, viz., 43B and 36(1)(va) - Held, yes [Paras 18 to 27] [In favour of revenue]

Section 43B, read with section 36(1)(va), of the Income-tax Act, 1961 - Business disallowance - Certain deductions to be allowed on actual payment - Employers contribution (General) - Whether though an amendment has been introduced to section 43B, whereby actual date of payment is enough for considering deduction, if such date falls before date for filing return but in absence of any amendment made to section 36(1)(va), both

contributions, viz., 'employees' and 'employers' cannot be brought under same scope and ambit of section 43B to claim deduction - Held, yes - Whether Circular No. 22/2015 dated 17-12-2015, issued in consequence of amendment made to section 43B, to inform settled position that if assessee deposits contribution before due date for furnishing return, no disallowance can be made under section 43B, specifically excludes extension of such scope to employee's contribution governed by section 36(1)(va) - Held, yes [Para 19] [In favour of revenue]

ii) CIT Vs. Gujarat State Road Transport Corporation [2014] 41 taxmann.com 100 (Gujarat):

Section 43B, read with section 36(1)(va) of the Income-tax Act, 1961 - Business disallowance - Certain deductions to be allowed on actual payment (Employees contribution) - Whether where an employer has not credited sum received by it as employees' contribution to employees' account in relevant fund on or before due date as prescribed in Explanation to section 36(1)(va), assessee shall not be entitled to deduction of such amount though he deposits same before due date prescribed under section 43B i.e., prior to filing of return under section 139(1) - Held, yes - Assessee State transport corporation collected a sum being provident fund contribution from its employees - However, it had deposited lesser sum in provident fund account - Assessing Officer disallowed same under section 43B - However, Commissioner (Appeals) deleted disallowance on ground that employees contribution was deposited before filing return - Whether since assessee had not deposited said contribution in respective fund account on date as prescribed in Explanation to section 36(1)(va), disallowance made by Assessing Officer was just and proper - Held, yes [Para 8] [In favour of revenue]

iii) CIT Vs. Merchem Limited, (2015) 378 ITR 443 (Kerala), wherein the Hon'ble High Court held as under :-

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:

> *" x x x x x x x*
>
> *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.

*20. In view of the reliance placed by various High Courts in **'Alom Extrusions**' (supra), to arrive at a conclusion that the assessees therein were liable to pay both the employees as well as employer's contribution on or before filing of return under Sec.139(1) only, we thought that if **'Alom Extrusions**' (supra) is discussed in detail, the question raised in this case can be made clear. In paragraph 3 of the said judgment, the question considered was formulated as follows::*

> *"3. A short question which arises for determination in this batch of civil appeals is 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 1st April, 2004, or whether it operated retrospectively with effect from 1st April, 1988?".*

*21. Therefore, the question that was considered in **Alom Extrusions' case'** was whether omission of second proviso to Sec.43B of the Income Tax Act by the Finance Act, 2003, operated with effect from 1st April, 2004 or retrospectively with effect from 1st April, 1988. Therefore, the question raised in this appeal has nothing to do with the question considered in the said decision. It is true that Sec.2 (24)(x) as well as Sec.36(1)(va) were discussed in paragraphs 10 and 11 of the said judgment. But it was for the sole*

purpose of understanding the scheme of the Income Tax Act, 1961 as it existed prior to 1st April, 1984 and as it stood after 1st April, 1984. After discussing the aforesaid provisions and Sec.43B, the Apex Court held in paragraph 14 of the judgment as follows:

> *"14. 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 case, 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 w.e.f. 1st April, 2004. In other words, after 1st April, 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 w.e.f. 1st April, 2004.*
>
> *x x x x*
>
> *x x x x x x x x x x x"*

22. Therefore, on a reading of the afore-extracted portion of the judgment, it is clear that the Apex Court had considered only the question relating to the effect of the amendment so made and found that amendment was curative in nature and therefore that it operated retrospectively from 1st April, 1988.

23. Thereafter, in paragraph 15 of the judgment, it was held that the amendments were brought about under the Finance Act, 1983 for the purpose of ensuring that the relaxation/incentive was restricted only to tax, duty, cess and fee under Sec.43B in order to ensure that it did not apply to contributions to labour welfare funds. Further, it was held that the reason appears to be that the employers 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. It was also held that consequent to the implementation problems of the second proviso to Sec.43B resulted in 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 and therefore the Finance Act, 2003 which was made applicable by the Parliament only with effect from 1st April, 2004 would become curative in nature and hence it would apply retrospectively from April, 1988.

*24. So also, the learned counsel for the assessee contented that since Sec.43B commences with a non-obstante clause, Explanation 1 to Sec.36(1)(va) was excluded. But in **Alom Extrusions' case'** (supra), the Apex Court had held that the underlying object of the*

non-obstante clause was to disallow deductions claimed merely by making the book entry under mercantile system of accounting. Therefore, the contention of the learned counsel for the assessee that since Sec.43B commences with a non-obstante clause, Sec.36(1) (va) stood excluded, cannot be sustained. According to us, the findings of the Apex Court towards the latter part of paragraph 15 makes the intention and purpose behind the amendment brought about to Sec.43B clear and it reads thus:

> *"15. x x x x x x x*
> *x x x x x x x*
> *Accordingly, we hold that Finance Act, 2003, will operate retrospectively w.e.f. 1st April, 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 IT 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 Sec.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 1st April, 2004, and who pays the contribution after 1st April, 2004, would get the benefit of deduction under Sec.43B of the Act."*

*According to us, it is thus clear that the decision rendered by the Apex Court in '**Alom Extrusions'** (supra) did not consider the question involved in this case.*

*25. So also, in paragraph 16 of the judgment supra, the Apex Court had quoted with approval the judgment in **'Commissioner of Income Tax v. J.H. Gotla'** [(1985) 156 ITR 323 (SC)], which read thus:*

> *"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."*

26. Therefore, in our view, when Sec.43B as it stood prior to the amendment and Sec.36(1)(va) Explanation 1 thereto r/w Sec.2(24)(x) are considered together, it is clear that they operate in different fields. So far as the employee's contribution received is concerned, it should have been paid on or before the due date prescribed under the relevant statutes. Then again the learned

counsel contended that on a reading of Sec.43B(b), any sum "payable by the assessee as an employer" by way of contribution to any provident fund meant payment of both employees contribution and employer's contribution, by the employer and therefore the assessee was entitled to pay both contributions together on or before the filing of the return under Sec.139(1) of the Act. We are unable to accept the said contention advanced by the learned counsel. If such a contention is accepted, that would make Sec.36(1) (va) and the Explanation thereto otiose. According to us, there was no indication in Sec.43B as it stood prior to the amendment and thereafter also to deface Sec.36(1)(va) and the Explanation thereto from the Income Tax Act. Thus, it means that both provisions are operative and the contributions have to be paid in accordance with the mandate contained under Sec.36(1)(va) and Explanation thereto and under Sec. 43B, respectively.

*27. So far as the decisions cited by the learned counsel for the assessee referred to in paragraph 15 of this judgment were concerned, it is true that in the said judgments, the High Courts were considering the question of remittance of the contributions received from the employee as well as the employer and held that the contributions received from the employee were also liable to be paid to the respective statutory authorities under the PF and ESI Act on or before the filing of return under Sec.139(1) was alone sufficient to be eligible for deduction. For the reasons stated, we are unable to subscribe to the views expressed by the High Courts in the decisions cited supra by the learned counsel for the assessee. That apart, we are reminded of the judgment of the Hon'ble Apex Court in '**Padma Sundara Rao and Others v. State of T.N. and Others**' [(2002) 3 SCC 533] paragraph 9 which reads as follows:*

> *"It is also a settled proposition of law that Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in 'Harrington v. British Railways Board'. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."*

28. We are also conscious of the fact that if the intention of a particular provision of a statute can be gathered from the language used by the legislation, then we are bound to abide by the language used therein in order to ascertain the intention. We are also of the opinion that there was a clear logic behind Sec.36(1)(va) and Explanation thereto since the Legislature intended that the amount received towards contribution of the employee was money belonging to the employee and the assessee was not entitled to utilise the said fund and enrich himself. So also, both the provisions supra will co-exist harmoniously without disturbing each other. Therefore, the distinction drawn to credit the amount of the employer and the employee was with a clear objective and there is no illegality or other legal infirmity in classifying the contributions of employees and employer in the matter of crediting the same to the appropriate statutory authorities.

*29. In that view of the matter, we are of the considered opinion that the view taken by the Tribunal which affirmed the decision of the 1st Appellate Authority that the Respondent was entitled to get deduction of the contributions received from the employees if paid on or before the filing of the return under Sec. 139(1) was not correct. We are inclined to agree with the judgment of the Gujarat High Court in '**Gujarat State Road Transport Corporation**'s case (supra). We are also of the opinion that the judgments of the other High Courts referred to by the learned counsel for the Respondent do not lay down the law correctly.*

*30. Learned counsel for the Respondent has also contended that when two views are possible, one in favour of the assessee shall be adopted and our attention was drawn to the decisions in **'Commissioner of Income-Tax v. Podar Cement Pvt. Ltd. and Others**' [(1997) 226 ITR 625], '**Manish Maheshwari v. Asst. Commissioner of Income Tax and Another**' [(2007) 289 ITR 341 (SC)] and **Indore Construction P. Ltd. v. Commissioner of Income-Tax**' [(2007) 289 ITR 341] and canvassed for the said proposition. But since we are of the clear opinion that the assessee was entitled to get the deduction of the amounts as provided under Sec.36(1)(va) only if the amounts so received from the employee was paid within the due date as provided under the relevant statute, we do not think that this is a case to which such a principle is applicable.*

iv) Pr.CIT Vs. M/s Suzlon Energy Ltd., (2020) 423 ITR 608 (Guj), wherein the Hon'ble High Court has held as under :-

7. Thus, the dictum as laid in the aforesaid decision is that Section 38 of the Employees Provident Funds and Miscellaneous Provisions Act 1952 makes it obligatory for the employer before paying him his wages to deduct the employee's contribution along with the employer's own contribution as fixed by Government. The employer is further obliged to pay the same within fifteen days of the close of every month pay i.e. such contribution and administrative charges. The reference to fifteen days of the close of the month must be in relation to month during which the payment of wages is to be made and corresponding liability to deduct employee's contribution to the fund arises. This Court held that the expression "within fifteen days of the close of every month" therefore, must be interpreted as having reference to the close of the month, for which, the wages are required to be paid with corresponding duty to deduct employee's contribution and to deposit the same in the fund.

8 In such circumstances referred to above, the finding recorded by the Tribunal that if such wages are paid for the following month, the liability to deposit the employee's contribution to the fund gets differed by another month is not the correct statement of law.
9 In view of the aforesaid, this appeal succeeds and is hereby allowed. The impugned order passed by the Tribunal is hereby quashed and set aside.

v) CIT Vs. Bharat Hotels Ltd., (2019) 410 ITR 0417 (Delhi), wherein the Hon'ble High Court in paras 7 , 8 & 9, has held as under:-

7. The issue here concerns the interplay of Section 2(24)(x) of the Act read with Section 36(1)(va) of the Act alongside provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (especially Regulation 38 of the Employees' Provident Funds Scheme, 1952) and the provisions of the Employees' State Insurance Act, 1948. The AO had brought to tax amounts which were deducted by the employer/assessee from the salaries and wages payable to its employees, as part of their contributions. It is not in dispute that the employer's right to claim deductions under the main part of Section 43-B of the Act is not an issue. The question the AO had to then decide was whether the amounts deducted from the salaries of the employees which had to be deposited within the stipulated time (in terms of notification/circular dated 19.03.1964 which was modified on 24.10.1973), as far as the EPF contribution went and the period of three weeks as far as the ESI contributions went. The AO made a tabular analysis with respect to the contributions deducted and actually deposited. The cumulative effect of notifications under the Employees' Provident Funds Act, 1952 and the Employees State Insurance Act, 1948 was that in respect of the EPF Scheme contributions the deductions were to be deposited within 15 days of the succeeding wage period with a grace period of 5 days; for ESI contributions the deposit with the concerned statutory authority had to be made within three weeks of the succeeding wage month/period. The CIT in this case confirmed the additions - made by the AO based on the entire amounts that were disallowed. The ITAT however granted complete relief.

8. Having regard to the specific provisions of the Employees' Provident Funds Act and ESI Act as well as the concerned notifications which granted a grace period of 5 days (which appears to have been late withdrawn recently on 08.01.2016), we are of the opinion that the ITAT's decision in this case was not correct. The assessee undoubtedly was entitled to claim the benefit and properly treat such amounts as having been duly deposited, which were in fact deposited within the period prescribed (i.e. 15 + 5 days in the case of EPF and 21 days + any other grace period in terms of the extent notification). As far as the amounts constituting deductions from employees' salaries towards their contributions, which were made beyond such stipulated period, obviously the assessee was not entitled to claim the deduction from its returns.

9. In view of this discussion, the Revenue's appeal is partly allowed. The AO is directed to examine the contributions made with reference to the dates when they were actually made and grant relief to such of them which qualified for such relief in terms of the prevailing provisions and notifications. We also clarify that the assessee would be entitled to deduction in terms of Section 36(1)(va) of the Act.

vi) Vedvan Consultants Pvt. Ltd., ITA No.1312/Del/2020, order dated 26.08.2021, wherein the Tribunal has held as under :-

8. Section 43B specifies the list of deductions that are admissible under the Act only upon their actual payment. Employer 's contribution is covered in clause (b) of section 43B. According to it,

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

9. Section 36(1)(va) and section 43B(b) operate in different fields, i.e ., former takes care of employee's contribution and later the employer's contribution. Therefore , an assessee is entitled to get bene fit o f deduction under section 43B as provided under the proviso thereto only with regard to portion of amount paid by the employer to contributory fund. So far as the employee's contribution is concerned, the assessee is entitled to get deduction of amounts as provided under section 36(1)(va) only if amounts so received from the employee is credited in specified account within due date as provided under relevant statute (CIT v. Merchem Ltd. 61 taxmann.com 119).

10. The section 43B of the Act covers only employer's contribution and does not cover employees' contribution, sometimes they have been applied to the provision of section 43B on employees' contribution as well and allowed the deduction to employer even if the employees' contribution is deposited by the due date of filing Income Tax Return (ITR) as mentioned under section 139(1).

11. To provide clarity and certainty on non applicability o f section 43B on employees' contribution to specified funds, the Budget 2021 has proposed to amend the provisions of section 36(1)(va) and section 43B as under:

(a) amend section 36(1)(va) of the Act by inserting another explanation 2 to the said clause to clarify that the provision of section 43B does not apply and deemed to never have been applied for the purposes of determining the due date under this clause; and

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

12. The language o f newly proposed explanation 2 to section 36(1)(va) and explanation 5 to section 43B makes it clear that the amendment is retrospective.

13. The rational of the amendment was explained by the Memorandum to the Finance Bill, 2021 as below:

> *"There is a distinction between employer contribution and employee' s contribution towards welfare fund. It may be noted that employee's contribution towards welfare funds is a mechanism to ensure the compliance by the employer's of the labour welfare law s. Hence , it needs to be stressed that the*

> *employer' s contribution towards welfare funds such as ESI and PF needs to be clearly distinguished from the employee' s contribution towards welfare funds. Employee' s contribution is employee own money and the employer deposits this contribution on behalf of the employee in fiduciary capacity . By late deposit of employee contribution , the employers get un justly enriched by keeping the money be longing to the employees . Clause (va) of sub-section (1) of Section 36 o f the Act was in ser ted to the A ct vide Finance Act 1987 as a measures of penalizing employer s who mis-utilize employee' s contributions.*
>
> *14. From the above, it can be said that the law is now made clear that employees' contribution to specified fund will not be allowed as deduction if there is delay in deposits as per the due dates mentioned in the respective legislation.*

7.5 Based on the above case laws, the ld. DR further submitted on the following points to prove its contention :-

a) Amendment in Section 36 & 43B of the Act in the Finance Act, 2021 has no effective date to apply so the same will be effective retrospectively;

b) courts decision favouring the assessee are no longer valid/good in terms of new amendment brought in by the legislature in the Finance Act, 2021. This shows intent of the law; and

c) Section 43B of the Act applies to employers' contribution only and not on employees' contribution. Employees' contribution shall be governed by Section 36(i)(va) read with Section 2(x)(24) of the Act.

7.6 Further the ld. DR submitted that a clarificatory amendment was brought in by the Finance Act 2021 by adding explanation 2 in Section 36(1)(va) and explanation 5 to section 43B. The language of these explanations clearly suggest that the amendment is retrospective and intent of legislature was never to apply provisions of section 43B on provisions of Section 36(1)(va) prospectively. Ld. CIT DR placed vehement reliance on the order of ITAT Delhi Bench. Now section

36(1)(va) and section 43B after amendment by Finance Act, 2021 read as under:

> *"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 1].-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.]*
>
> *[Explanation 2.-For the removal of doubts} it is hereby clarified that the provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the "due date" under this clause;*
>
> *"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.*
>
> *Explanation5.-For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply and shall be deemed never to have been applied to a sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 applies,*

7.7 Therefore, the AO has correctly disallowed the amount being employees contribution to PF as the assessee failed to deposit the same within due dates specified in' the respective Acts by invoking provisions of section 36(1)(va) r.w.s. 2(24)(x) and provisions of section 43B are not applicable to the employees contribution to PF.

7.8 On the other hand, assessee's written submission on this ground available on records, recites as under:

> *To summarize the above,*
>
> *• Employees' contribution is an income in the hands of the employer-assessee as per section 2(24) (x)*
>
> *• The employer's contribution is allowable as expenditure if the payment is made on or before due date of filing his return of income u/s 139(1) and the proof thereof is attached along with the return of income.*
>
> *• Section 43B is a non-obstante provision, and*
>
> *• Section 43B also covers employee contribution (as the section just states "any sum payable by the assessee as an employer", deduction is available in par with employer contribution to such funds.*

Assessee also placed its reliance on some judgements:

i) M/s Essae Teraoka Pvt. Ltd. Vs. DCIT [2014 (3) TMI 386-Kar HC];

ii) CIT Vs. State Bank of Bikaner & Jaipur & Jaipur Vidyut Vitaran Nigam Ltd. [2014(5) TMI 222-Raj HC) dated Jan, 6, 2014; and

iii) CIT Vs. M/s Kichha Sugar Company ltd. [2013 (6) TMi 98-Uttarakhand HC.

7.9 To decide the above ground, it is prudent to refer to the amendment in Finance Bill 2021, the amendments are made in section 36 & 43B vide clause 8 & 9. In this regard attention is invited towards section 1(2)(a) of Finance Act, 2021 wherein it has specifically mentioned *"(2) Save as otherwise provided in this Act-. (a) section 2 to 88 shall come into force on the first day of April 2021*". Relating to the amendment by Finance Act

2021, Memorandum Explaining the Provisions of Finance Bill, 2021 says regarding amendment in section 43B and 36 that "*These amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years*. For the sake of clarity, we would like to reproduce the extracts of the memorandum Explaining the Provisions in Finance Bill, 2021, which read as under :-

> *"Though section 43B of the Act covers only employer's contribution and does not cover employee contribution, some courts have applied the provision of section 43Bon employee contribution as well. There is a distinction between employer contribution and employee's contribution towards welfare fund. It may be noted that employee's contribution towards welfare funds is a mechanism to ensure the compliance by the employers of the labour welfare laws. Hence, it needs to be stressed that the employer's contribution towards welfare funds such as ESI and PF needs to be clearly distinguished from the employee's contribution towards welfare funds. Employee's contribution is employee own money and the employer deposits this contribution on behalf of the employee in fiduciary capacity. By late deposit of employee contribution, the employers get unjustly enriched by keeping the money belonging to the employees. Clause (va) of sub-section (1) of Section 36 of the Act was inserted to the Act vide Finance Act 1987 as a measures of penalizing employers who mis-utilize employee's contributions.*
>
> *Accordingly, in order to provide certainty, it is proposed to –*
>
> *(i) amend clause (va) of sub-section (1) of section 36 of the Act by inserting another explanation to the said clause to clarify that the provision of section 43B does not apply and deemed to never have been applied for the purposes of determining the —due date‖ under this clause; and*
>
> *(ii) amend section 43B of the Act by inserting Explanation 5 to the said section to clarify that the provisions of the said section do not apply and deemed to never have been applied to a sum received by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section 2 applies.*
>
> *These amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years.*
>
> *[Clauses 8 and 9]*

7.10 After this amendment, several decisions by the coordinate benches of ITAT at various locations are pronounced on this issue, brief synopsis and finding on the issue are as under:

i) Jagmohan Singh Vs DCIT (ITAT Chandigarh), Appeal Number: ITA Nos. 185 & 193/Chd/2021, Date of Judgement/Order: 15/12/2021

HELD THAT:- It is not in dispute that employees' contribution to ESI and PF collected by the assessee from its employees had been deposited well before the due date of filing of return of income u/s 139 (1) of the Act. We find that the issue is squarely covered by the decisions of the Hon'ble Rajasthan High Court, Hon'ble Himachal Pradesh High Court as well as Hon'ble Punjab & Haryana High Court. We further note that though the ld. CIT(A) has not disputed the various decisions of Hon'ble High Courts including the decision of the jurisdictional Himachal Pradesh High Court but has referred to the amendment brought in by the Finance Act, 2021. It is a consistent position across various Benches of the Tribunal including Chandigarh Benches that the amendment which has been brought in by the Finance Act, 2021 shall apply w. e. f. assessment year 2021 – 22 and subsequent assessment years and the impugned assessment year being assessment year 2018- 19, the said amendment cannot be applied in the instant case. Therefore the addition made by way of adjustment while processing the return of income u/s 143 (1) of the Act, amounting to ₹ 11,99,710/- so made by the CPC towards the deposit of employees' contribution towards ESI and PF paid before the due date of filing of the return of income u/s 139 (1) of the Act, is hereby directed to be deleted. – Decided in favour of assessee.

ii) Stirred Creative Advertising Pvt. Ltd. Vs DCIT (ITAT Bangalore), Appeal Number : ITA No. 594 & 595/Bang/2021, Date of Judgement/Order : 12/12/2021

HELD THAT:- We find no merit in the argument of the ld.DR since the explanation as provided in Finance Act 2021 prescribes that the amendment in both sec.36(va) as well as 43B by inserting corresponding explanation that although impugned PF comes in the form of provision and the same is applicable from 1/4/2021 onwards only. In the present case we are concerned with the asst. year 2017-18 and the amended provision could not be applied retrospectively as it is only applicable w.e.f 1/4/2021. Being so no disallowance could be made by the AO in respect of PF/ESI paid within the due date of filing return of income. Though, it was beyond the date mentioned in the respective Act. This view of ours is supported by various judgment relied on by the ld.AR. Accordingly the appeal of the assessee is allowed.

iii) Adyar Ananda Bhavan Sweets India P Ltd Vs ACIT (ITAT Chennai), Appeal Number : ITA [2015 – 5/23 402 & 403/CHNY/2021, Date of Judgement/Order : 08/12/2021

HELD THAT:- There are series of decisions of various High Courts on this issue and even Hon'ble Jurisdictional High Court in the case of M/s. Industrial Security & Intelligence India P Ltd. [2015 - MADRAS HIGH COURT] held that the payment of employees contribution in regard to PF & ESI if made before the due date of filing of return of income u/s.139(1) of the Act, the same is allowable as deduction as per the provisions of Section 2(24)(x) r.w.s. 36(1)(va) r.w.s. 43B. As before insertion of Explanation 2 to Section 36(1)(va) of the Act, there is ambiguity regarding due date of payment of employees' contribution on account of provident fund and ESI, whether the due date is as per the respective acts or up to the due date of filing of return of income of the assessee. As noted by Hon'ble Supreme Court an amendment made to a taxing statute can be said to be intended to remove hardship only of the assessee and not of the Department. Imposing of a retrospective levy on the assessee would be caused undue hardship and for that reason Parliament specifically chose to make the proviso affective from a particular date. In the present case also, the amendment brought out by Finance Act, 2021 w.e.f. 01.04.2021 i.e. for and from assessment year 2021-22 of Explanation-2 to s. 36(1)(va) of the Act and not retrospectively. Thus, from the above, it is clear that the amendment brought in the statute i.e., by Finance Act, 2021, the provisions of Section 36(1)(va) r.w.s. 43B of the Act amended by inserting Explanation 2 is prospective and not retrospective. Hence, the amended provisions of Section 43B r.w.s. 36(1)(va) of the Act are not applicable for the assessment year 2018-19 but will apply from assessment year 2021-22 and subsequent assessment years. Hence, this issue of assessee's appeal is allowed

iv) Pachouli Wellness Clinic LLP Vs ITO (ITAT Delhi), Appeal Number : ITA No: 999/Del/2021, Date of Judgement/Order : 25/11/2021

HELD THAT:- As decided in PLANMAN HR (P) LTD., 48, COMMUNITY CENTRE, NARAINA INDUSTRIAL AREA, PHASE-I, NEW DELHI. [2021 – ITAT DELHI] Delayed payments of employee's contribution to Provident Fund/ESIC is allowable if it is deposited before the return is filed u/s 139(1). In view of the legal position on the issue and the order of the Hon'ble ITAT, Delhi in the appellant's own case [2017 – ITAT DELHI] the company is eligible for deduction made by the AO by invoking provisions of Section 36(1)(va) read with 2(24) (x) and 43B of the Act. The AO is, therefore, directed to delete the addition. – Decided in favour of assessee.

v) Star Facilities Management Limited VS ITO (ITAT Delhi), Appeal Number : ITA No. 1755/Del/2020, Date of Judgement/Order : 01/11/2021

HELD THAT:- Admittedly, the assessee, in the instant case, has deposited the employees' contribution to PF and ESI after the relevant date prescribed under the PF and ESI Act, but, before the due date of filing the return of income. In the case of PCIT vs. Pro Interactive Service (India) Pvt. Ltd. [2018 – DELHI HIGH COURT] has held that 'the legislative intent was/is to ensure that the amount paid is allowed as an expenditure only when payment is actually made. The Hon'ble High Court has further held that legislative intent and objective is not to treat belated payment of Employee's Provident Fund (EPD) and Employee's State Insurance Scheme (ESI) as deemed income of the employer under the Act. Tribunal in the case of CIT v. Dee Development Engineers Ltd. [2021 – ITAT DELHI] has decided the issue in favour of the assessee holding that no disallowance u/s. 36(1)(v) r.w.s. Section 2(24)(x) can be made if the employees' contribution to PF and ESI are deposited after the due date prescribed under the relevant Acts, but, paid before the due date of filing of return. Since the assessee, in the instant case has, admittedly, deposited the employees' contribution to PF and ESI before the due date of filing of the return of income, therefore we hold that no disallowance u/s. 36(1)(v) r.w.s. Section 2(24)(x) can be made in the instant case – Decided in favour of assessee.

vi) Lumino Industries Ltd. Vs. ACIT, ITA Nos.231&365/Kol/2021, order dated 17/11/2021;

17. Have heard both the parties. We note that the Finance Bill, 2021 has brought in an amendment which disallows the employees' contribution made in PF and ESI if not made within the due date as prescribed by the respective statutes (PF and ESI Act). So after the amendment has been inserted according to Shri Miraj D Shah takes effect from 1st April, 2021 i.e AY 2021-22 and subsequent assessment year and if the remittance of PF/ESI Employees' Contribution is not made within the time prescribed by the PF/ESI Act then the remittance cannot be allowed as a deduction which is prospective in operation. Whereas according to Ld. CIT(A), the amendment brought in is clarificatory in nature so, retrospective in operation. So we have to adjudicate this issue whether the amendment brought in by Finance Act, 2021 is prospective or retrospective in operation. We note that before this amendment has been inserted by Finance Bill, 2021, the Hon'ble Jurisdictional Calcutta High Court in the case of Shri Vijayshree Ltd. Ltd.(supra), M/s Philips Carbon Black Ltd.(supra), M/s Coal India Ltd.(supra), M/s Akzo Nobel India Ltd. (supra) has held that the payment of employees' contribution if made by an assessee before the due date of filing of return of income u/s 139(1) of the Act, is

allowable as a deduction. We note that by Finance Act, 2021, the provision of Section 36(1)(va) as well as Section 43B has been amended to this extend by inserting the Explanation 2 whereby it is clarified that the provision of Section 43B shall not apply and shall be deemed never to have been applied for the purpose of determining the due date under this clause. For ready reference, we reproduce the Explanation-2 to Section 36(1)(va) as under:

"Section 36(1)(va) Explanation-2 – For the removal of doubts, it is hereby clarified that the provisions of Section 43B shall not apply and shall be deemed never to have been applied for the purpose of determining the 'due date' under this clause'

18. We find that this amendment has been brought in the Act to provide certainty about the applicability of Section 43B in respect of belated payment of employees' contribution. In order to test whether the amendment brought in later is retrospective or not one has to apply the test as laid by the Hon'ble Supreme Court in the case of M/s Snowtex Investment Ltd. (supra) wherein the Hon'ble Supreme court took note of the law laid down on this issue by the Constitution Bench in M/s Vatika Township Ltd. and held that the intent of the Parliament/legislature need to be looked into for ascertaining whether the amendment should be retrospective or not. In Vatika Township Ltd. (supra) the Hon'ble Supreme Court held that the notes on clauses appended to the Finance Bill will throw light as to the legislative intent; because it has to be borne in mind that Parliament/legislature is aware of three concepts before an amendment is brought in, which can be discerned from reading of the "Notes on Clauses" to the Bill which are (i) prospective amendment with effect from a fixed date; (ii) retrospective amendment with effect from a fixed anterior date; and (iii) clarificatory amendments which are retrospective in nature. So when we adjudicate whether the view of Ld CIT(A) that the explanation 2 brought in by Finance Act, 2021 is retrospective, let us look at the "Notes on Clauses and the relevant clauses 8 & 9 of the Finance Bill, 2021 (supra) pertaining to the issue in hand which in clear and unambiguous terms spells out the intention of Parliament that the amendment shall take effect from 1st April, 2021 and therefore will accordingly apply to Assessment Year 2021-22 and subsequent years. So since the legislative intent is clear, the amendment brought in by Finance Act, 2021 on this issue as discussed is prospective and Ld. CIT(A) erred in holding otherwise. So till AY 2021-22, the Jurisdictional High Court's view in favor of assessee will hold good and is binding on us. As discussed the decision of the Hon'ble Delhi High Court in Bharat Hotels Ltd. (supra) which was in favor of revenue has not considered the decision of the Co-ordinate Division Bench decision in M/s Aimil Ltd.(supra) which is in favour of assessee. So we note that later decision of the Delhi/Hyderabad Tribunal have followed the decision favouring assessee in the light of the Hon'ble Supreme

Court decision in M/s Vegetable Products (supra). In the light of the aforesaid decision and relying on the ratio of the Hon'ble Supreme Court in the case of Vatika Township Pvt. Ltd. (supra) and M/s Snowtex Investment Ltd. (supra) and also taking note of the binding decision of the Hon'ble Jurisdictional Calcutta High Court on this issue before us in Shri Vijayshree Ltd. Ltd.(supra), M/s Philips Carbon Black Ltd.(supra), M/s Coal India Ltd.(supra), M/s Akzo Nobel India Ltd. (supra), we set aside the impugned order of Ld CIT(A) and direct the AO to allow the claim of deduction in respect of employees contribution shares towards ESI, PF, by the assessee before the due date of filing of return u/s 139(1) of the Act. Therefore the appeal of assessee succeeds and so, it is allowed in favor of assessee.

7.11 Few more orders by the coordinate benches of the ITAT having same finding on this issue are as under:-

i) Mavinahalli Shivananjappa Vijay Kumar Vs. DCIT, ITA Nos.596&597/Bang/2021, order dated 13/12/2021;
ii) Shri Prakash Pai Kochikar Vs. ADIT, ITA No.479/Bang/2021, order dated 09/12/2021;
iii) Eskay heat Transfers Pvt. Ltd. Vs. ADIT, ITA No.534/Bang/2021, order dated 07/12/2021;
iv) Anand Sweets and Savouries Vs. DCIT, ITA No.530/Bang/2021, order dated 06/12/2021;
v) Transzone Logistics (India) Pvt. Ltd. Vs. DCIT, ITA No.1740/Del/2020, order dated 29/10/2021;
vi) Jai Enterprises Vs. DCIT, ITA No.248/JP/2021, order dated 25/11/2021;
vii) Nayrathan Jewellers Pvt. Ltd. Vs. ADIT, ITA No.470/Bang/2021, order dated 23/11/2021;
viii) Abhimanyu Sharma Vs. ITO, ITA No.175/JP/2021, order dated 23/11/2021;
ix) Nikhil Mohine Vs. DCIT, ITA No.37&38/Jab/2021, order dated 18/11/2021;
x) DCIT Vs. Kesoram Industries Ltd., ITA No.1777/Kol/2019, order dated 28/10/2021;
xi) Suba Singh Vs. ITO, ITA No.85/ASR/2021, order dated 10/11/2021;
xii) Citi Centre Developers Vs. CPC, ITA No.126/Chd/2021, order dated 28/11/2021;
xiii) Pee Tee Turners Vs. ADCPC, ITA No.105/JP/2021, order dated 28/11/2021;
xiv) Amandeep Singh Khurana Vs. ITO, ITA No.1822/Del/2020, order dated 27/10/2021;
xv) Aroon Facilitation Management Services Pvt. Vs. DCIT, ITA No.1824/Del/2020, order dated 13/10/2021;
xvi) Worldwide Facility Management Services Pvt. Ltd.Vs. DCIT, ITA No.1823/Del/2020, order dated 13/10/2021;
xvii) Rukmini Polytubes Pvt. Ltd. Vs. DCIT, ITA No.1855/Del/2020, order dated 13/10/2021;
xviii) Adama Solution P. Ltd. Vs. ADIT, ITA No.1800/Del/2020, order dated 13/10/2021;

xix) Vansh Jain Vs. DCIT, ITA No.1853/Del/2020, order dated 13/10/2021;
xx) Express Roadway P. Ltd. Vs. ACIT, ITA No.5570/Del/2017, order dated 11/10/2021;
xxi) Ridhi Sidhi Mills (India) Pvt. Ltd. Vs. DCIT, ITA Nos.71&72/Jodh/2021, order dated 28/09/2021;
xxii) Chodavaram Vs. ADIT, ITA No.25&28/VIZ/2021, order dated 23/09/2021;
xxiii) S.V.Engineering Constructions India (P) Ltd. Vs. DCIT, ITA No.130/VIZ/2021, order dated 23/09/2021.

7.12 Moreover, it would be significant to refer to the SLP by the revenue filed before the Hon'ble Apex Court in the case of M/s Rajasthan State Beverages Corporation Ltd., reported on 84 Taxman.com 185 [04.07.2017] wherein the SLP of revenue arising out of the order passed by the Hon'ble Rajasthan High Court in the case of M/s Rajasthan State Beverages Corporation Ltd., in ITA No.150/2016, order dated 04.08.2016, is dismissed by the Hon'ble Apex Court. Held That : *Amount claimed on payment of PF and ESI having been deposited on or before due date of filing of returns, same could not be disallowed under section 43B or under section 36(1)(va); SLP dismissed.*

7.13 On perusal of the above judgments in favour of the assessee and other quoted by the Ld DR in contrast. Having two opposite opinions on the same issue, it is a moot question that which view should be appreciated. To reach on a judgment on the controversy under this ground in absence of a direct finding of the Apex Court after amendment in the provisions by Finance Bill 2021 or a judgment by the jurisdictional High Court, nonetheless having several judgments of non-jurisdictional High Courts and Benches of ITAT decided both against as well as in favour of the assessee, to decide the issue judiciously, this would be

appropriate and it is well settled law originated from case laws mentioned in ensuing paras that if two views are possible in interpreting the provisions of law in taxation, the one favourable to the assessee has to be preferred.

7.14 In Sun Export Corporation, Bombay vs Collector of Customs (1997) 6 SCC 564 it was observed that “even assuming that there are two views possible, it is well settled that one favourable to the assessee in matters of taxation has to be preferred.”.

7.14 In CIT vs. Gwalior Rayon Silk Mfg. Co. Ltd. (1992) 196 ITR 149 (SC) it has held that provisions for deduction, exemption and relief should be interpreted liberally, reasonably and in favour of the assessee.

7.15 In CIT vs. Vegetable Products Ltd., 88 ITR 192 (SC): “if two reasonable constructions of a taxing provisions are possible, that construction which favours the assessee must be adopted”.

7.16 The Hon’ble Supreme Court in the case of CIT Vs. Vatika Township Private Limited, (2014) 367 ITR 466 (SC) has held that the intention of the legislature regarding amendment in the Finance Act, was to make it prospective in nature, which cannot be treated as declaratory/statutory or curative in nature. The relevant observations of the Hon’ble Apex Court in this regard in para 38 are as under :-

> *“38. When we examine the insertion of proviso in Section 113 of the Act, keeping in view the aforesaid principles, our irresistible conclusion is that the intention of the legislature was to make it prospective in nature. This proviso cannot be treated as declaratory/statutory or curative in nature.”*

7.17 Keeping in sight of the above discussion, in the present case which is for the asst. year 2013-14, it is an undisputed fact that the Employees contribution for EPF was duly deposited by the Assessee Company before the due date of filing of return u/s 139(1) of The Income Tax Act. The year under consideration is also before the effective date (01.04.2021, AY 2021-22 onwards) of the amended provision by Finance Bill 2021. Accordingly, in view of various judgments in the favour of assessee, disallowance could not be made in respect of PF/ESI paid within the due date of filing return of income. Therefore, it is directed to delete the disallowance made for delayed remittance of employee's contribution to EPF for Rs. 59,30,423/-, consequently, the appeal of the assessee is allowed to this extent.

7.18 Thus, ground number 2 of the assessee is partly allowed.

Ground 3 – Disallowance of Capital Expenditure for Rs. 40,22,979/-

8. Submission of the Assessee on this ground vide page 9-10 of the paper book are:

> *Learned Assessing officer has disallowed a sum of Rs.40,22,979/- debited to the profit and loss account being 100% depreciation on temporary sheds constructed for labour hutment at site. This is purely allowable expenses. 100% depreciation of hutments and sheds for labour created at work sites are purely allowable in nature which the learned AO has erred in adding. Assssee's contractees have stringent conditions for labour safety dwelling place etc in the contract requisite itself.*
> *In this regard the assessee enclosed herewith the copies of work orders marked as annexure-I, where the contractee company stipulates space for construction of temporary sheds for its workmen."*
>
> *1. The houses are constructed near work site for providing accommodation for a temporary period to people who are working at the work site.*

2. The lands on which the labour hutments are situated are the property of the plant owner where the company had executed the work.

3. The work order against which the work was executed are awarded to the company for shorter period and also having condition of termination with 30 days notice.

In the case of Shalivahana Constructions Ltd vs. DCIT Circle 3(1), (2007) 12 SOT 406(Hyd.).This was an appeal of assessee against revision order passed by CIT who disallowed the depreciation allowance allowed by the A.O. on temporary erections. The ITAT was held that,

"It was no where mentioned that a temporary erection should not be made of cement or brick. Therefore the commissioner was wrong in talking the view that the order passed by the assessing officer suffered from an error and it was prejudicial to the interests of revenue."

Hydrabad Bench 'B' of the tribunal in case of Jt. CIT vs. Lanco Industries Ltd. (IT Appeal No.487 (Hyd.) of 2000 order dated 31.01.2005) it was clearly held that for temporary structures depreciation is allowable at 100%.

The assessee has shown the above in the fixed asset schedule under the head temporary shed and claims 100% depreciation on the same being eligible for the same. The assessing officer has added this on the ground that capital expenditure debited to profit and loss account. But the real fact is that it is a asset eligible for 100% depreciation which is shown properly in the Asset schedule of the company (Copy of asset schedule enclosed herewith) Marked as Annexure- J for your reference. Hence this addition is unjustified and illegal.

8.1 Ld DR on this ground has agitated and drawn our attention to para 6 of the AO's order and para 4 of the CIT(A)'s order wherein, it is observed by the AO that as per comments in column number 17(a) of the tax Audit report a sum of Rs. 40,22,979/- has been debited to profit & loss account being expenditure of capital nature is not allowable item under section 37 of the Income Tax Act, 1961.

8.2 Ld LCTDR had further augmented by taking us to the order of CIT(A) whereby it has come out that the assessee contends in the course

of appeal hearing that the amount of Rs.40,22,979/- represent expenses on construction of temporary hutments for the labour at the site and, therefore, the same is eligible for 100% depreciation. However, there is no evidence filed by the assessee in support of its contention. No details of the expenses have been furnished to show that the amount was spent on construction of temporary hutments. Moreover, there is no provision in law to allow depreciation at 100% on temporary hutments. Accordingly, the disallowance made by the AO is justified and hence upheld.

8.3 After considering the rival contention, it is clear that the assessee has failed to provide required information regarding construction of the temporary hutments, however, if it is proved that such structures were constructed on temporary basis and were used for the purpose of business of the assessee, a deduction of expenditure will be allowable, if the same is revenue in nature or depreciation would be allowed if the same is capital in nature. 100% disallowance without disputing the actual incurrence of the expenditure which is used for the purpose of the business of the assessee is unwarranted and bad in law. Therefore, this Ground of appeal is directed to restore back to files of AO to reassess the same in light of actual facts and according to the intent of the legislature.

8.4 Thus, ground No.3 of appeal is allowed for statistical purposes.

Ground 4 – Disallowance of Donation of Rs. 6,13,011/-

9. On this ground finding of CIT(A) is as under:-

> *5. Ground No.4 relates to disallowance of Rs.6,13,011/- on account of payment of donation. The AO has disallowed the entire claim on the ground that the assessee could not adduce any evidence to show that the expenditure was laid out solely for the purpose of its business. Of course, donation, as the nomenclature suggests, is*

> *gratuitous payment normally not having any business expediency. However, for smooth running of business, sometimes, the assessee has to pay subscription to the local puja committee etc. Unless the donation is given, the local people may be impediments in the way of business progress. In this view of the matter, I am of the opinion that 50% of the donation expenses may be considered to have been spent on account of business expediency and, therefore, allowable. With this view, I delete disallowance to the extent of Rs.3,6,506/- and confirm the balance.*

9.1 Ld DR has relied on orders of the revenue authorities.

9.2 The assessee in its paper book page 10 has submitted that the Assessing officer has disallowed a sum of Rs.6,13,011/- debited to Profit and loss account under the head donation expenses on the ground that the assessee could not adduce any reason that the above expenditure has been laid out solely for the purpose of business of the assessee Company. The amount is paid to different local puja committees towards subscription for puja. The assessee is a company engaged in execution of different project works at different places all over India where local co-operation is highly necessary for the uninterrupted execution. To get local harmony the above amounts are paid as customary from time to time. Hence the same was inevitable for running the business and may kindly be allowed as business expenses.

9.3 After careful perusal of the observation of Ld CIT(A) and submissions of the assessee it is concurred that the expense incurred are necessary and for commercial expediency of the business of the assessee. CIT(A) also approved the contention of assessee by allowing 50% of the expenditure treating the same spent on account of business expediency of the assessee. We, therefore of the view that expenditure on donation was incurred for the purpose of and essential for business of

the assessee shall be allowed as deductible expenditure. Accordingly, we decide the issue in favour of assessee. Thus, the ground No.4 is allowed.

Ground 5 – Interest on Late Deposit of TDS for Rs. 21,64,220/-

10. Ld DR, relied on the following case laws with respect to this ground:

> ***i) Commissioner Of Income-Tax vs Chennai Properties*** *239 ITR 435 . Relevant para 13 and 14 of the said order are as under:*
>
> *13. Learned counsel for the Revenue also referred to the decisions of the Bombay High Court in the case of Ferro Alloys Corporation Ltd. v. CIT [1992] 196 ITR 406 and the decision of the Calcutta High Court in the case of Martin and Harris Pvt. Ltd. v. CIT [1994] 73 Taxman 555. It was held in those cases that the interest paid under Section 201(1A) of the Act was not deductible as business expenditure under Section 37 of the Act.*
>
> *14. As already noticed the payment of interest takes colour from the nature of the levy with reference to which such interest is paid and the tax required to be but not paid in time, which rendered the assessee liable for payment of interest was in the nature of a direct tax and similar to the income-tax payable under the Income-tax Act. The interest paid under Section 201(1A) of the Act, therefore, would not assume the character of business expenditure and cannot be regarded as a compensatory payment as contended by learned counsel for the assessee.*
>
> *ii)* ***Bharat Commerce & Industries Ltd vs The Commissioner Of Income Tax*** *230 ITR 733*
>
> *Held that "We do not see any reason why any distinction can be made between such interest and interest paid under the Income Tax Act, 1961. Both payments do not have any nexus with the business of the assessee. They are statutory liabilities in respect of the obligations of the assessee which arise under the Income Tax Act and the Voluntary Disclosure of Income and Wealth Act, 1976 after the income of the assessee is determined and/or declared under the said Acts. They cannot be deducted before the determination of such income."*

10.1 Contrary to the contention of revenue, the assessee submitted on page 11 of its paper book that the assessing officer has added a sum of Rs.21,64,220/- as interest on late deposit of TDS. The assesse had used

the funds in the day-to-day business instead of taking financial loan from bank as the rate of interest is high at bank. Hence the assessee prays before you to consider the same as business expenses and allow deduction. The assessee has also placed the same argument before the CIT appeals; however, he had not appreciated the claim of assessee and has just added all the additions of AO without considering the assessee's view at all. Presently the company is under liquidation vide order of NCLT, therefore, the assessee requested restore this issue to CIT(A) for fresh consideration.

10.2 On perusal of the above citations by the Ld CITDR and submissions by the assessee, we are of the opinion that ratio decided by the above judgments squarely applies on this ground of appeal, we do not find any merit in the contention of the assessee and therefore, we upheld the order of CIT(A) and dismiss the ground No.5 of the assessee.

11. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 30/03/ 2022.

Sd/-	**Sd/-**
(C.M.GARG)	**(ARUN KHODPIA)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

कटक Cuttack; दिनांक Dated 30/03/2022

Prakash Kumar Mishra, Sr.P.S.

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

1. अपीलार्थी / The Appellant-
   Rukmani Infra Projects Ltd.,
   Plot No.251, District Centre,
   C.S.Pur, Bhubaneswar-16
2. प्रत्यर्थी / The Respondent-
   ACIT, Circle-1(2), Bhubaneswar
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **कटक** / DR, ITAT, Cuttack
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

(Assistant Registrar)

आयकर अपीलीय अधिकरण, कटक/ITAT, Cuttack