IN THE INCOME TAX APPELLATE TRIBUNAL
CIRCUIT 'SMC' BENCH, VARANASI

BEFORE SHRI.VIJAY PAL RAO, JUDICIAL MEMBER

ITA No.19/VNS/2022
Assessment Year: 2018-19

M/s Samara Carpets Pvt. Ltd., Ahimanpur, Khamaria, Bhadohi-221306, U.P. PAN-AAKCS3987K	v.	The Dy. Commissioner of Income Tax, CPC, Bangalore
(Appellant)		(Respondent)

Appellant by:	Sh. A.K. Pandey, Advocate
Respondent by:	Sh. A.K. Singh, Sr. DR
Date of hearing:	23.08.2022
Date of pronouncement:	24.08.2022

O R D E R

VIJAY PAL RAO, J.M.

This appeal by the assessee is directed against the order dated 22.04.2022 of CIT(A) (National Faceless Appeal Centre, Delhi) for the assessment year 2018-19. The assessee has raised the following ground:-

> *"1. Because on the facts and in circumstances of the case the Ld. CIT(A) has erred while passing the order u/s 250 of the I.T. Act, 1961.*
> *2. Because on the facts and in circumstances of the case the ld. CIT(A) has erred in making disallowance of Rs. 5,73,947/- on account of ESI/EPF not deposited on or before due date u/s 36(1)(va) of the Income Tax Act, 1961.*
> *3. Because the appellant craves leave to add to, alter, amend and / or to modify the grounds taken herein.*
> *4. Because on the facts and circumstances of the case the order passed by the Ld. Assessing Officer is bad in law, invalid arbitrary in nature without giving proper opportunity of being heard, unreasonable and against the principle of natural justice."*

2. The solitary issue arises from this appeal of the assessee is regarding disallowance made on account of employees' contribution to ESI and EPF not deposited before the due date prescribed under the respective acts but was paid

before the due date of filing of return of income under section 139(1) of the Income Tax Act.

3. The learned AR of the assessee has submitted that as per the details of the payments made towards the employees' contribution on account of ESI and EPF, it is clear that the payments were made before the due date of filing of return of income under section 139(1) of the Act. He has referred to the details of the payments at page 4 and 5 of the Audit Report and submitted that once all the payments were made before the due date of filing of the return of income under section 139(1) of the Act then the amended provisions of section 36(1)(va) of the Income Tax Act as well as 43B is not applicable for the year under consideration. In view of the various decisions of this Tribunal, he has relied upon the decision of the Tribunal in the case of of ***M/s Utkarsh Small Finance Bank Limited vs. National E-assessment Centre, Delhi*** in ITA No. 29/VNS/2021.

4. On the other hand, the learned DR has submitted that the amendments made by Finance Act, 2021 in Section 36(1)(va) and 43B are retrospective in nature as it is merely clarificatory in nature. The ld. Sr. DR submitted that the statute is very clear as Section 36(1)(va) clearly mandates that employees share of PF/ESI collected by employer from the salary of employees is to be deposited with the relevant fund maintained for PF/ESI to the credit of employees before the due date prescribed under the relevant statute governing PF/ESI , and the extended period of time of due date prescribed u/s 139(1) for filing of return of income is not available as is enshrined in Section 43B to employee share of contribution to PF/ESI, as in the opinion of ld. Sr. DR the language of statute is very clear and unambiguous and hence so far as employee share of contribution towards PF/ESI is concerned , the deduction while computing income chargeable to tax can only be allowed provided the same is deposited to the credit of employee with the relevant fund maintained for PF/ESI within the due date

prescribed for depositing the same under relevant statute governing PF/ESI. The ld. Sr. DR submitted that it is only because of interpretation by the Constitutional Courts of the provisions of Section 36(1)(va) that the tax-payers were granted relief by the appellate authorities. It was submitted by ld. Sr. DR that now in any case with the retrospective amendment made by Parliament to Section 36(1)(va) and 43B of the 1961 Act wherein Explanation 2 and 5 respectively were added to aforesaid sections, the matter is set to rest and the authorities below have rightly decided the issue against the assessee, and prayers were made to uphold the additions as were made by authorities below. The ld. SR DR , thus , supported the appellate orders passed by ld. CIT(A), and submitted that the appellate order passed by ld. CIT(A) be upheld. The ld. Sr. DR fairly submitted that the Division Bench of tribunal at Allahabad (of which both of us were part of the DB who pronounced the order) has already taken a view on this matter in favour of tax-payer in this issue, but prayers were made that the contentions raised by ld. Sr. DR in earlier matters through oral as written submissions, be also taken into account and read in this appeal, as the issue is similar and recurring in nature.

5. I have considered the rival submissions as well as relevant material on record. The Assessing Officer has made disallowance under section 36(1)(va) on account of the employees' contribution towards ESI/EPF not deposited within the due date as prescribed under the respective Acts. The CIT(A) has confirmed the action of the Assessing Officer by holding that the amendment brought to the provisions of section 36(1)(va) and section 43B are in the nature of clarification and applicable with retrospective effect . This issue of the amendment brought by Finance Act, 2021 to the provisions of section 36(1)(va) and section 43B has been considered by this Tribunal in a series of decisions including the decision dated 7.7.2022 in the case of ***M/s Utkarsh Small Finance Bank Limited vs. National E-assessment Centre, Delhi*** (supra) and held in para 5 as under:-

"5. We have considered rival contentions and perused the material on record including cited case laws. The only effective issue in this appeal is regarding delayed deposit of employee share of PF/ESI collected by employer from salaries of employees to the tune of Rs. 51,28,996/- which was not deposited before the due date prescribed under the statute governing PF/ESI and claimed by Revenue to be hit by provision of Section 36(1)(va) read with Section 2(24)(x) of the 1961 Act. There is a recent amendment by Finance Act, 2021 in Section 36(1)(va) and 43B of the 1961 Act. Similar issue was dealt with Division Bench of Allahabad tribunal in which both of us were part of Division Bench who pronounced the order, in the case of Commercial Auto Sales Private Limited for ay: 2018-19 in ITA No. 13/Alld/2021 vide orders dated 16.12.2021, wherein the Allahabad-tribunal decided this issue in favour of the tax-payer after considering the amendments made by Finance Act, 2021 in Section 36(1)(va) and 43B, by holding as under:

> *"5. We have considered rival contentions and perused the material on record including cited case laws. The only effective issue in this appeal is regarding delayed deposit of employee share of PF/ESI collected by employer from salaries of employees to the tune of Rs. 13,14,725/- which was not deposited before the due date prescribed under the statute governing PF/ESI and hence hit by provision of Section 36(1)(va) read with Section 2(24)(x) of the 1961 Act. There is a recent amendment by Finance Act , 2021 in Section 36(1)(va) and 43B of the 1961 Act. Similar issue was dealt with Division Bench of Allahabad tribunal in which both of us was part of Division Bench who pronounced the order, in the case of JCIT(OSD) , Allahabad v. Bharat Pumps and Compressors Limited, Allahabad, in ITA no. 147 and 148 /Alld/2016 for ay: 2005-06, vide orders dated 12.08.2021, wherein the tribunal considered the amendment made by Finance Act, 2021 in Section 36(1)(va) and 43B , and decided this issue in favour of the tax-payer , by holding as under:*
>
> > *10. We have considered rival contentions and perused the material on record. We have observed that the issue before us is regarding allowability of employees contribution of Rs. 1,82,98,490/- towards PF received by assessee from its employees , but which was deposited by assessee to the credit of employees with PF trust late beyond the time provided under the relevant PF Act , but albeit the same was admittedly deposited within the due date prescribed for filing of return of income u/s 139(1) of the 1961 Act. This issue was subject matter of different interpretation by different High Courts. The Hon'ble Gujarat High Court and Hon'ble Kerala High Court has decided this issue against the tax-payer and in favour of Revenue, while Hon'ble Allahabad High Court, Hon'ble Bombay High Court, Hon'ble Karnataka High Court , Hon'ble Rajasthan High Court, Hon'ble Himachal Pradesh High Court , Hon'ble Madras High Court have decided the issue in favour of assessee and against Revenue. It is pertinent to reproduce hereunder the decision of ITAT, Chennai in the case of DCIT v. Repco Home Finance Private Limited reported in (2020) 117 taxmann.com 233(in which one of us being Accountant Member was part of DB which pronounced the order) , wherein the tribunal discussed the relevant law in details and then decided the issue in favour of tax-payer by following the jurisdictional Madras High Court decision , by holding as under:*
> >
> > > ***"10.** The next effective issue, which is agitated by Revenue before tribunal , is with respect of disallowance of Rs. 6,31,788/- made under Section 36(1)(va) read with section 2(24)(x) by A.O being employee contribution to P.F. which is deposited by assessee to the credit of employee with Relevant fund beyond the time stipulated under the relevant P.F. Act , but admittedly the said amount stood deposited*

before the due date prescribed for filing of return of income u/s 139(1) of the 1961 Act , against which the assessee filed 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 Rs. 6,31,788/- being employee's contribution towards PF to the credit of employee with relevant fund within due date as was prescribed under the statute governing Provident Fund , as is required under Section 36(1)(va) read with Explanation 1 and Section 2(24)(x) of the 1961 Act, which led AO to disallow the said amount by invoking Explanation 1 to Section 36(1)(va) of the 1961 Act but the said amount admittedly stood deposited by assessee to the credit of employee with relevant fund before the time prescribed for filing of return of income u/s 139(1) of the 1961 Act. Aggrieved by an assessment framed by AO u/s 143(3) of the Act, the assessee filed first appeal with learned CIT(A) who was pleased to delete the addition to the income to the tune of Rs. 6,31,788/- made by AO on account of delayed remission of employee's contribution towards EPF to the credit of employee with relevant fund beyond the time prescribed under relevant PF statute but admittedly the said amount stood deposited by assessee to the credit of employee with relevant fund before the due date prescribed for filing of return of income u/s 139(1) of the 1961 Act , by relying on following judicial decision(s) as stipulated hereunder:-

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

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

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

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

"Definitions.
2. In this Act, unless the context otherwise requires,—
** ** **
(24) "income " includes—
** ** **
(x) any sum received by the assessee from his employees as contributions to any provident fund or superannuation fund or any fund set up under the provisions of the Employees' State Insurance Act, 1948 (34 of 1948), or any other fund for the welfare of such employees ;] "

"Other deductions.
36. (1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28—
[(va) any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date.
Explanation.—For the purposes of this clause, "due date" means the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued thereunder or under any standing order, award, contract of service or otherwise;] "

"Certain deductions to be only on actual payment.
43B. Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of—
** ** **
(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees,
** ** **
shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting

regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him:

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

10.3.2 *It is by virtue of Finance Act, 1987 w.e.f. 01.04.1988 , the provisions of Section 36(1)(va) read with Section 2(24)(x) of the 1961 Act were inserted, which considered employee contribution towards PF/ESI and other employees welfare funds received by employer as income of the assessee by virtue of Section 2(24)(x) of the 1961 Act and deduction thereof the employee contribution shall be allowed by virtue of Section 36(1)(va) of the 1961 Act provided the said amount stood deposited by employer to the credit of employee with relevant fund on or before the due date as prescribed under relevant statute governing PF/ESI and other employees welfare funds. The Provision of Section 43B of the 1961 Act were also amended by Finance Act, 1987 w.e.f. 1.4.1988 and as it stood at that time is reproduced hereunder:*

"Certain deductions to be only on actual payment.

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

*(a)** ** ***

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

*[(c)** ** ***

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

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

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

** ** **

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

superannuation fund or gratuity fund or any other fund for welfare of employees.

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

"[Certain deductions to be only on actual payment.
43B. Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of—
** ** **
(b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of employees, [or]
** ** **
shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him :
Provided that nothing contained in this section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return.
** ** **

***10.3.4** It is pertinent at this stage to reproduce the decision of Hon'ble Supreme Court in the case of Alom Extrusions Limited (supra) wherein the amendments made by Finance Act, 2003 w.e.f. 01.04.2004 were held to be curative in nature and applicable retrospectively effective from 01.04.1988, which decision of Hon'ble Supreme Court is reproduced hereunder:*
"6. The lead matter in this batch of civil appeals is CIT v. Alom Extrusions Ltd. [Civil Appeal arising out of S.L.P. (C) No. 23851 of 2007].
Prior to the amendment of section 43B of the Act, vide Finance Act, 2003, the two provisos to section 43B of the Act read as under :
"Provided that nothing contained in this section shall apply in relation to any sum referred to in clause (a) or clause (c) or clause (d) or clause (e) or clause (f), which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return :
Provided further that no deduction shall, in respect of any sum referred to in clause (b) , be allowed unless such sum has actually been paid in cash or by issue of a cheque or draft or by any other mode on or before the due date as defined in the Explanation below clause (va) of sub-section (1) of section 36, and where such payment has been made otherwise than in cash, the sum has been realized within fifteen days from the due date. "

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

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

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

"Income" has been defined under section 2(24) of the Act to include profits and gains. Under section 2(24)(x), any sum received by the assessee from his employees as contributions to provident fund/superannuation fund or any fund set up under Employees' State Insurance Act, 1948, or any other fund for welfare of such employees constituted income. This is the reason why every assessee(s) [employer(s)] was entitled to deduction even prior to 1-4-1984, on Mercantile System of Accounting as a business expenditure by making provision in his Books of Account in that regard. In other words, if an assessee(s)-employer(s) is maintaining his books on Accrual System of Accounting, even after collecting the contribution from his employee(s) and even without remitting the amount to the Regional Provident Fund Commissioner [R.P.F.C.], the assessee(s) would be entitled to deduction as business expense by merely making a provision to that effect in his Books of Account. The same situation arose prior to 1st April, 1984, in the context of 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 subsection (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return." [Emphasis supplied]

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

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

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

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

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

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

(b) Whether the deletion of the 2nd proviso to section 43B by way of amendment by the Finance Act, 2003 is 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 18-82008 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 taxpayer and judicial discipline demands that we follow the judgment of Hon'ble Jurisdictional High Court viz. in the case of CIT v. M/s. Industrial Security and Intelligence India Pvt. Ltd. (supra), which judgment is binding on us. At this stage we would like to refer to order in writ petition passed by Single Judge of Hon'ble Madras High Court in the case of Unifac Management Services (India) Private Limited v. DCIT in WP no. 5264 of 2020, WMP No. 6461 of 2018, vide order dated 23.10.2018 (reported in (2018) 409 ITR 225(Mad.), wherein Single Judge of Hon'ble Madras High*

Court decided this issue in favour of Revenue. However, subsequently, the said decision of Single Judge of Hon'ble Madras High Court was challenged by the tax-payer before the Division Bench of Hon'ble Madras High Court by filing writ appeal no. 2854 of 2018 and CMP No. 23727 of 2018 and the Division Bench of Hon'ble Madras High Court was pleased to grant permission to the tax-payer to withdraw the original writ petition namely WP No. 5264 of 2018 as well writ appeal no. 2854 of 2018, vide orders dated 09.01.2019. The Revenue has referred before us during the course of hearing , decision of Hon'ble Madras High Court in the case of Orchid Pharma (supra) , wherein the Hon'ble Madras High Court had noted that the assessee did not appear before tribunal and also it is an order passed by Hon'ble Madras High Court ex- parte in the absence of the tax-payer, wherein no notice was issued to the tax-payer as proceedings were pending against the tax-payer before National Company Law Tribunal as the tax-payer was in liquidation. The Hon'ble Madras High Court observed in the case of Orchid Pharma (supra) that tribunal has decided the issue in favour of tax-payer by relying on decision of Hon'ble Madras High Court in the case of Industrial Security and Intelligence Private Limited (supra). The Revenue brought to the notice of the Hon'ble Madras High Court , decision(s) of Hon'ble Kerala High Court in the case of CIT v. Merchem Limited reported in (2015) 378 ITR 443(Ker.) and also decision in the case of Popular Vehicles and Services Private Limited v. CIT reported in (2018) 96 taxmann.com 13(Ker.), wherein this issue is decided by Hon'ble Kerala High Court in favour of Revenue and with this background, Hon'ble Madras High Court remanded the matter back to the file of learned CIT(A) for fresh adjudication of the issue , after considering entire law in statute and decisions of Courts post the decision of Hon'ble Delhi High Court in the case of Aimil Limited (supra). We have observed that Hon'ble Supreme Court in the case of Alom Extrusion (cited supra) while adjudicating on applicability of amended provision of Section 43B of the 1961 Act by virtue of deletion of second proviso and amendment of first proviso by Finance Act, 2003 which was applicable wef 01.04.2004 , held the said amendments to be curative in nature and to apply retrospective wef 01.04.1988. The Hon'ble Supreme Court also referred to larger bench decision in the case of Allied Motors Private Limited (1997) 224 ITR 677(SC) to hold amendment made by Finance Act, 2003 to be retrospective . While holding the same to be retrospective, the Hon'ble Supreme Court referred to its decision in the case of CIT v. J.H. Gotla reported in (1985) 156 ITR 323(SC) wherein it held that if strict interpretation leads to absurd results which are not intended by the object of the legislation, and if other construction is possible , then that construction should be preferred to the strict legal construction. The Hon'ble Supreme Court observed that though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to literal construction. We have observed that Hon'ble Bombay High Court in the case of CIT v. GhatgePatil 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 GhatgePatil Transport (supra) is reproduced hereunder:

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

10.3.9 *The Hon'ble Bombay High Court has consistently held this issue in favour of the tax-payer in its other decisions also such as Geekay Security Services Private Limited v. DCIT reported in (2019) 101 taxmann.com 192(Bom.), CIT v. Hindustan Organics Chemicals Limited (2014) 366 ITR 1(Bom.). The Hon'ble Delhi High Court in AIMIL Limited (supra) held that if employees contribution is not deposited by the due date prescribed under the relevant Acts and is deposited late, the employer not only pays interest on delayed payments but can incur penalties also , for which specific provisions are made in the Provident Fund Act as well as the ESI Act. It further held that the statutes governing PF/ESI permits the employer to make the deposit with some delays , subject to the aforesaid consequences. Insofar as the 1961 Act is concerned, the assessee can get the benefit if the actual payment made is before the return of income is filed, as per the principle laid down by the Supreme Court in Vinay Cement Ltd.'s case(supra). However, Hon'ble Delhi High Court has now decided this issue in favour of Revenue in the case of CIT v. Bharat Hotels Limited reported in (2019) 410 ITR 417(Del.) , while impliedly reversing the stand taken in its earlier decision in the case of Aimil Limited (supra). However, the decision in the case of Aimil Limited (supra) was not brought to the notice of Hon'ble Judges of Delhi High Court while adjudicating in the case of Bharat Hotels (supra). The Hon'ble Punjab and Haryana High Court has decided this issue in favour of the tax-payer in the case of CIT v. Rai Agro Industries Limited reported in (2011) 334 ITR 122 (Punj & Har.);CIT v. Hemla Embroidery Mills Private Limited reported in (2014) 366 ITR 167(Punj. &Har.). Hon'ble Rajasthan High Court in the case(s) of CIT v. State Bank of Bikaner and Jaipur reported in (2014) 43 taxmann.com 411(Raj.) and in CIT v. Jaipur Vidyut Vitran Nigam Limited reported in (2014) 49 taxmann.com 540(Raj) has decided this issue in favour of the tax-payer. Similarly, Hon'ble Karnataka High Court and Hon'ble Himachal Pradesh High Court has decided this issue in favour of the tax-payer. However, Hon'ble Gujarat High Court has decided this issue in favour of Revenue in CIT v. Gujarat State Road Transport Corporation reported in (2014) 366 ITR 170(Guj.) ; Checkmate Facility & Electronic Solutions (P.) Ltd. v. Dy. CIT [Tax Appeal No. 1256 of 2018, dated 15-10-2018 and PCIT v. Suzlon Energy Limited reported in (2020) 115 taxmann.com 340(Guj). Thus, Hon'ble Gujarat High Court held that to get deduction towards employees contribution towards PF/ESI and other welfare funds, the employer ought to have deposited the said amount to the credit of employees with the relevant Funds on or before the due date specified in PF/ESI Act or other welfare funds , keeping in view provisions of Section 36(1)(va) read with Explanation 1 and Section 2(24)(x) of the 1961 Act. Similarly, Hon'ble Kerala High Court has also decided this issue in favour of Revenue in the case of CIT v. Merchem Limited reported in (2015) 378 ITR 443(Ker. HC) and also in Popular Vehicles and Services Private Limited v. CIT (2018) 406 ITR 150 (Ker.HC). While deciding the appeal in the case of Merchem Limited (supra)*

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

"7. We will first notice the provisions.

"S.2(24) "income " includes —

** ** **

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

"S.36. Other deductions

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

** ** **

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

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

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

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

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

** ** **

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

8. Looking at the provisions we are definite that the Act treats employer's and employee's contribution distinctly. Sub-clause (v) of Section 36(1) speaks of a gratuity fund, wherein the employee does not contribute at all. Section 36(1)(va) speaks of the employee's contribution to a welfare fund for the benefit of employees alone, by virtue of the specific reference to Section 2 (24). Section 2 (24) includes as income, any contribution received by the employer

from the employee for the purpose of remittance to a fund created for the welfare of the employees; including inter alia a provident fund and that under the ESI Act. When the same is remitted on the due date as prescribed in the statute or order creating such fund, then it is eligible for deduction under Section 36. Section 43B(b) refers to "a sum payable by the assessee as an employer", to an employees welfare fund which is the employer's contribution.

9. We have carefully gone through the decisions of the Hon'ble Supreme Court as also of the Division Bench. The primary question to be considered is whether there should be a reconsideration of Merchem Ltd.'s case (supra). Alom Extrusions Ltd.'s case (supra)and Merchem Ltd.'s case (supra) applied in two different fields; the former with reference to Section 43B(b), being employer's contribution and the latter dealing with employee's contribution as covered by Section 36(1)(va). We would first deal with Alom Extrusions Ltd.'s case (supra)which has dilated upon the history of the legislation and the reason for the various amendments brought in. We first notice that the question which arose for consideration in Alom Extrusions Ltd. 's case (supra)was as to "whether omission (deletion) of the second proviso to section 43B of the Income-tax Act, 1961, by the Finance Act, 2003, operated with effect from April 1, 2004, or whether it operated retrospectively with effect from April 1, 1988" (sic para 4). The Hon'ble Supreme Court noticed that prior to Finance Act, 2003, the second proviso to Section 43B restricted the deduction in respect of any sum payable by an employer by way of contribution to provident fund/superannuation fund or any other fund for the welfare of employees, unless it stood paid within the specified due date.

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

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

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

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

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

14. We are of the opinion that the question with respect to employee's contribution is regulated by clause (x) of Section 2(24) and sub-clause (va) of Section 36(1) and would not be affected by Section 43B. Section 43B though a non-obstante clause, makes deductions to be allowable only on actual payment; when such deductions are otherwise allowable. Primarily it is to be noticed that it is a restrictive clause, the amendments to which or the deletion

of a proviso in which cannot lead to it being converted as an enabling provision permitting deduction even when there was no deduction permissible by the other provisions of the Act. The non- obstante clause has no effect insofar as the employee's contribution which is specifically covered by sub-clause (va) of Section 36(1). By virtue of the Explanation below 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 relevant . Admittedly, in the instant case the aforesaid sum of Rs. 6,31,788/- being employee contribution towards PF was not deposited by assessee to the credit of employees with PF Funds within due date prescribed under statute governing PF which at threshold was hit by provisions of Section 36(1)(va) read with Explanation 1 and Section 2(24)(x) of the 1961 Act and deduction is not allowable going by strict and literal interpretation of provisions of the statute. Thus, once the deduction is found to be not allowable otherwise under the 1961 Act being hit by infringement of Section 36(1)(va) of the 1961 Act on account of employees share of PF contribution being deposited to the credit of employee with relevant fund by assessee-employer beyond the time stipulated as due date under PF Act , there is no question of entering into provisions of Section 43B of the 1961 Act which deals with allowing deduction on payment basis provided the deduction is otherwise allowable under the provisions of the 1961 Act. Section 36(1)(va) of the 1961 Act is a provision which entitles taxpayer to claim deduction from the income and hence the provision is to be strictly construed and the onus is on the assessee to prove that it fulfills all the conditions as stipulated under Section 36(1)(va) read with Explanation before claiming deduction from its income. The decision of Constitution Bench of Hon'ble Supreme Court in the case of Commissioner of Customs (Imports) v. Dilip Kumar & Co. reported in (2018) 9 SCC 1 is relevant. The recent decision of Hon'ble Supreme Court in the case of Ramnath& Co. v. CIT reported in (2020) 116 taxmann.com 885(SC) is relevant (refer para 17 to 20) , which is reproduced hereunder:

Dilip Kumar & Co.

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

came to be stated that any ambiguity in a tax provision/notification must be interpreted in favour of the assessee who is claiming benefit thereunder.[14]

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

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

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

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

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

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

"17. when two views of a notification are possible, it should be construed in favour of the subject as notification is part of a fiscal enactment."
This observation may appear to support the view that ambiguity in a notification for exemption must be interpreted to benefit the subject/assessee. A

careful reading of the entire para, as extracted hereinabove would, however, suggest that an exception to the general rule of tax has to be construed strictly against those who invoke for their benefit. This was explained in a subsequent decision in Wood Papers Ltd. case. In para 6, it was observed as follows: (SCC p. 262)

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

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

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

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

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

"50. We will now consider another Constitution Bench decision in CCE v. Hari Chand Shri Gopal (hereinafter referred as "Hari Chand case", for brevity). We need not refer to the facts of the case which gave rise to the questions for consideration before the Constitutional Bench. K.S. Radhakrishnan, J., who wrote the unanimous opinion for the Constitution Bench, framed the question viz. whether manufacturer of a specified final product falling under the Schedule to the Central Excise Tariff Act, 1985 is eligible to get the benefit of exemption of remission of excise duty on specified intermediate goods as per the Central Government Notification dated 11-8-1994, if captively consumed for the manufacture of final product on the ground that the records kept by it at the recipient end would indicate its "intended use" and "substantial compliance" with procedure set out in Chapter 10 of the Central Excise Rules, 1994, for consideration? The Constitution Bench answering the said question concluded that a manufacturer qualified to seek exemption was required to comply with the preconditions for claiming exemption and therefore is not

exempt or absolved from following the statutory requirements as contained in the Rules. The Constitution Bench then considered and reiterated the settled principles qua the test of construction of exemption clause, the mandatory requirements to be complied with and the distinction between the eligibility criteria with reference to the conditions which need to be strictly complied with and the conditions which need to be substantially complied with. The Constitution Bench followed the ratio in Hansraj Gordhandas case, to reiterate the law on the aspect of interpretation of exemption clause in para 29 as follows: (Hari Chand case, SCC p. 247)"29. The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption.

** ** **"

(emphasis in bold supplied)

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

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

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

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

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

(emphasis in bold supplied)

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

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

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

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

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

***10.3.11** Thus, keeping in view strict and literal interpretation of provisions of Section 36(1)(va) of the 1961 Act read with Explanation 1 and Section 2(24)(x) of the 1961 Act , the assessee will not be entitled for deduction as the employee contribution towards PF received by assessee was deposited late beyond the time stipulated under the relevant statute governing PF. But, it is equally true that the Constitutional Courts viz. Hon'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 instil certainty among tax-payers, thus, Respectfully following the decision of Hon'ble Madras High Court in the case of Industrial Security and Intelligence (supra) , we allow the claim of the assessee for deduction of Rs. 6,31,788/- towards employees contribution to PF which was deposited late beyond due date as prescribed under relevant statute governing PF , but the same stood deposited to the credit of employees with relevant fund before the due date for filing of return of income as prescribed u/s 139(1) of the 1961 Act. The Revenue fails on this issue for the reasons cited above. We order accordingly."

The Hon'ble jurisdictional High Court in the case of Sagun Foundry Private Limited v. CIT, Kanpur in ITA No. 87 of 2006, vide judgment dated 21.12.2016 has decided this issue in favour of the tax-payer, by holding that Section 43B is applicable to both employer and employee contribution and thus in case employee contribution towards PF received by employer is deposited to the credit of employees with the PF trust prior to due date of filing of return of income u/s 139(1), the tax-employer shall be entitled for deduction u/s 36(1)(va) read with Section 2(24)(x) and 43B of the 1961 Act. The Hon'ble Jurisdictional High Court has in para 29 has taken a view that the law laid down by Hon'ble High Court of Karnataka , Hon'ble High Court of Rajasthan, Hon'ble High Court of Punjab and Haryana , Hon'ble High Court of Delhi, Hon'ble High Court of Bombay and Hon'ble High Court of Himachal Pradesh have rightly applied Section 43B in respect of both contributions i.e. employers and employees . The Hon'ble Jurisdictional High Court has with great respect dissented with the view taken by Hon'ble Gujarat High Court and Hon'ble High Court of Kerala, which view on the issue was decided by Hon'ble Gujarat High Court and Hon'ble High Court of Kerala in favour of Revenue. It will be relevant to refer at this stage to the Constitution Bench decision of Hon'ble Supreme Court in the case of Commissioner of Customs (Imports) v. Dilip Kumar & Co. reported in (2018) 9 SCC 1 , in which Constitution Bench of Hon'ble Supreme Court has held that Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification. When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the Revenue. The recent decision of Hon'ble Supreme Court in the case of Ramnath& Co. v. CIT reported in (2020) 116 taxmann.com 885(SC) is also relevant (refer para 17 to 20), which are reproduced hereunder:

"Dilip Kumar & Co.

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

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

Court noted the enunciations in Wood Paper Ltd. with total approval as could be noticed in the following:-

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

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

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

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

(emphasis supplied)

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

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

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

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

question of giving the clause a liberal construction and hold that production of goods by respondent mentioned in the notification were entitled to benefit."

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

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

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

shown, if there is failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption.

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

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

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

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

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

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

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

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

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

given by the Government to incite or encourage or support any particular activity16.

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

Thus, keeping in view strict and literal interpretation of provisions of Section 36(1)(va) of the 1961 Act read with Explanation 1 and Section 2(24)(x) of the 1961 Act , the assessee will not be entitled for deduction as the employee contribution towards PF received by assessee was deposited late beyond the time stipulated under the relevant statute governing PF. But, it is equally true that the Constitutional Courts viz. Hon'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. The Hon'ble jurisdictional High Court in the case of Sagun Foundry Private Limited v. CIT, Kanpur in ITA No. 87 of 2006, vide judgment dated 21.12.2016 has decided this issue in favour of the tax-payer, by holding that Section 43B is applicable to both employer and employee contribution and thus in case employee contribution towards PF received by

employer is deposited to the credit of employees with the PF trust prior to due date of filing of return of income u/s 139(1), the tax-employer shall be entitled for deduction u/s 36(1)(va) read with Section 2(24)(x) and 43B of the 1961 Act. The Hon'ble Jurisdictional High Court has in para 29 has taken a view that the law laid down by Hon'ble High Court of Karnataka , Hon'ble High Court of Rajasthan, Hon'ble High Court of Punjab and Haryana , Hon'ble High Court of Delhi, Hon'ble High Court of Bombay and Hon'ble High Court of Himachal Pradesh have rightly applied Section 43B in respect of both contributions i.e. employers and employees . The Hon'ble Jurisdictional High Court has with great respect dissented with the view taken by Hon'ble Gujarat High Court and Hon'ble High Court of Kerala, which view on the issue was decided by Hon'ble Gujarat High Court and Hon'ble High Court of Kerala in favour of Revenue. Thus, the applicable provision as is contained in Section 36(1)(va) is read down by most of the Constitutional Courts including our Jurisdictional High Court (barring Hon'ble Gujarat High Court and Hon'ble Kerala High Court) to make it workable as otherwise the tax-payer will lose the deduction for ever if the employee contribution is not deposited within due date as prescribed under relevant statute , although the said contribution stood deposited by employer belatedly before the due date for filing of return of income u/s 139(1) of the 1961 Act and the amount will stood brought to tax as income keeping in view provisions of Section 2(24)(x) of the 1961 Act so far employee share of contribution towards PF ,ESI and other employees welfare funds is concerned. No doubt it is well cherished objective that there should not be an unjust enrichment of the employer of the amount which it collects from its employees towards employees share of PF , ESI and other employees welfare funds and in the ideal situation , the said amounts ought to have been deposited by employer which it collected from its employees, to the credit of employee with relevant funds within time stipulated as due date by respective statute governing PF/ESI etc. but at the same time if the employer does not deposit the contribution towards PF/ESI etc. within due date as prescribed under relevant statute governing PF/ESI etc., the employers are visited with Interest for delayed deposit of PF/ESI as well Penalties for late deposit beyond the time stipulated under the relevant statute governing PF/ESI and other employees welfare funds. Reference is drawn to Section 7Q and 14 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.
There is an recent amendment to Section 36(1)(va) by Finance Act, 2021, wherein Explanation 2 was inserted, which reads as under:

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

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

> *"43B*****
> ******
> *Explanation5- For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply and shall be deemed never to have been applied to a sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 applied."*

Although, on perusal of the above amendment by Finance Act, 2021 , it transpires that the said explanation was inserted by way of removal of doubt to clarify the law as existed on the statute so far as employee contribution received by employer from employee which is to be deposited to the credit of employee with PF fund on or before the due date as provided in statute governing PF, to enable the employer to claim deduction u/s 36(1)(va) of the 1961 Act read with Section 2(24)(x) of the Act, and no deduction shall be allowed by virtue of Section 43B in case of delayed deposit beyond the time stipulated for deposit under relevant statute governing PF by virtue of being hit by Section u/s 36(1)(va) of the Act as it is stated in the explanation that provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the 'due date' under this clause , although the said amounts were deposited before the due date as prescribed for filing of return of income u/s 139(1) of the 1961 Act. The above amendment from the plain reading of the Section indicates that it ought to have retrospective effect , but on perusal of Memorandum to Finance Bill 2021, it transpires that the lawmakers have consciously made it applicable from ay: 2021-22 and subsequent assessment years. It is also recognised in the said Memorandum that some courts have applied the provision of section 43B on employee contribution as well and have decided this issue in favour of taxpayer. The said explanation was inserted to rationalise the provisions of Section 36(1)(va) and 43B of the 1961 Act and it is stated in Memorandum to Finance Bill, 2021 that the said explanation is inserted to provide certainty. It is specifically stated in Memorandum to Finance Bill, 2021 that these amendments to Section 36(1)(va) and 43B shall take effect from 01st April , 2021 and will accordingly apply to assessment year 2021-22 and subsequent assessment years. It is also to be noted that several of the tax-payers (except in the State of Gujarat and Kerala , and such other States where Hon'ble jurisdictional High Court has decided this issue in favour of Revenue) situated in the States where Hon'ble Jurisdictional High Court has decided this issue in favour of tax-payers, have already been allowed the deduction towards employee contribution received by employer which was deposited late by employer beyond the time stipulated u/s 36(1)(va) , but before the due date as prescribed for filing of return of income u/s 139(1) of the 1961 Act , and there cannot be a class different now at this stage where the deduction is to be denied on the ground of strict interpretation of the provisions of Section 36(1)(va), unless the amendment made by Finance Act, 2021 is made specifically applicable retrospectively from the date of insertion of the provision or any other specified earlier date in the Finance Act, rather on the other hand , the Memorandum to Finance Bill, 2021 has specifically made this amendment applicable from 01.04.2021 and specified that the same shall be made applicable from assessment year 2021-22 and subsequent assessment years. We are presently concerned with ay: 2005-06. The relevant clause to Memorandum to Finance Bill , 2021 is reproduced hereunder:

"Rationalisation of various Provisions

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

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

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

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

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

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

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

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

(i) CIT v. Merchem Ltd, [2015] 378 ITR 443(Ker)

(ii) CIT v. Gujarat State Road Transport Corporation [2014] 366 ITR 170 (Guj.)

(iii) CIT v. South India Corporation Ltd. [2000] 242 ITR 114 (Ker)

(iv) CIT v. GTN Textiles Ltd. [2004] 269 ITR 282 (Ker)

(v) CIT v. Jairam & Sons [2004] 269 ITR 285 (Ker)

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

***4.** This assessee's appeal is allowed."*

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

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

Respectfully following the aforesaid decision in the case of Bharat Pumps and Compressors Limited(supra) , in which both of us were part of the Division Bench who pronounced the order, we hold that in the instant appeal for ay: 2018-19 if the employee share of PF/ESI is deposited by employer to the credit of employee with the relevant fund maintained for PF/ESI before the due date of filing of return of income u/s 139(1) of the 1961 Act, then the assessee shall be entitled for deduction u/s 36(1)(va) of the 1961 Act. The assessee's counsel has filed tax-audit report in which detail/ bifurcations of employee share of PF/ESI along with date of payment is mentioned, but challans are not filed. The said tax-audit report is placed on record in file. Thus for limited purposes , we are directing AO to verify the challans evidencing deposit of aforesaid employee share of PF/ESI and that it was deposited before the due date prescribed for filing of return of income u/s 139(1), before allowing claim of deduction u/s 36(1)(va) of the 1961 Act. The assessee is directed to file before AO complete details/bifurcation of employees share of PF/ESI , to the tune of Rs. 13,14,725/- which was added to income of the assessee u/s 36(1)(va) read with Section 2(24)(x) along with relevant paid challans, for verification. We order accordingly."

This Division Bench (of which both of us are part of the Division Bench) also decided this issue in favour of the tax-payer after considering the amendment made by Finance Act, 2021 by holding that if the employee share of contribution towards PF/ESI is deposited by employer-taxpayer with the relevant fund governing PF/ESI to the credit of employee before the due date for filing of return of income prescribed u/s139(1) for the relevant assessment year, the employer-taxpayer shall be entitled for deduction in the previous year relevant to ay to which such employee contribution to PF/ESI pertains, in the case of Commercial Auto Sales Private Limited for ay:2019-20 in ITA no. 15/Alld/2021 , vide orders dated 20.01.2022 in which both of us were part of the Division Bench who pronounced the order. It is also pertinent to mention that Division Bench of Allahabad-tribunal in the case of M/s Bharat Pumps and Compressors Limited in ITA no. 147/Alld/2016 for ay:2005-06 , vide orders dated 12.08.2021 (in which both of us were the part of the DB who pronounced the order), also decided this issue in favour of the tax-payer after considering the amendment made by Finance Act, 2021, by holding that if the employee share of contribution towards PF/ESI is deposited by employer-taxpayer with the relevant fund governing PF/ESI to the credit of employee before the due date for filing of return of income prescribed u/s139(1) for the relevant assessment year, the employer-taxpayer shall be entitled for deduction in the previous year relevant to ay to which such employee contribution to PF/ESI pertains.

It is also pertinent to mention that Division Bench of Allahabad-tribunal in the case of M/s SBW Udyog Limited , Allahabad v. DCIT(CPC), Bengaluru in ITA no. 19/Alld/2021 for ay:2018-19 , vide appellate order dated 02.06.2022 (in which both of us were the part of the DB who pronounced the order), also decided this issue in favour of the tax-payer after considering the amendment made by Finance Act, 2021, by holding that if the employee share of contribution towards PF/ESI is deposited by employer-taxpayer with the relevant fund governing PF/ESI to the credit of employee before the due date for filing of return of income prescribed

u/s139(1) for the relevant assessment year, the employer-taxpayer shall be entitled for deduction in the previous year relevant to ay to which such employee contribution to PF/ESI pertains.In the all the above case, the tribunal held the amendment made by Finance Act, 2021 to be prospective and applicable from ay: 2021-22 and subsequent assessment years .

It is also observed that several Benches of tribunal across India have consistently taken a similar view in favour of the tax-payer, even after considering amendment made by Finance Act, 2021 to Section 36(1)(va) and 43B of the 1961 Act, and few of the decisions of tribunal all decided in favour of tax-payer on this issue, are cited below:

a) Delhi-tribunal order in the case of Flying Fabrication v. DCIT , CPC, Bengaluru , in ITA no. 1049/Del/2021 for ay: 2018-19 and 1407/Del/2021 for ay:2019-20, vide common order dated 17.11.2021
b) Delhi-tribunal order in the case of Adama Solution Private Limited v. ADIT,CPC, Bengaluru, SMC Bench in ITA no. 1800/Del/2020 , vide orders dated 13.10.2021
c) Delhi-tribunal order in the case of Insta Exhibitions Private Limited v. Addl. CIT , in ITA No. 6941/Del/2017, vide orders dated 03.08.2021
d) Delhi-tribunal decision in the case of Aroon Facilitation Management Services Private Limited , SMC Bench in ITA no. 1824/Del/2020, vide order dated 13.10.2021
e) Jaipur-tribunal decision in the case of Bhivaram Pannalal Kumawat v. DCIT in ITA no. 76/JP/2021, order dated 12.10.2021
f) Hyderabad-tribunal decision in the case of Value Momentum Software Services Private Limited v. DCIT, in ITA no. 2197/Hyd/2017, order dated 19.05.2021
g) Hyderabad-tribunal decision in the case of Vijay Electricals Limited v. DCIT, in ITA no. 1533 & 1534/Hyd/2017, order dated 27.05.2021
h) Hyderabad-tribunal SMC decision in the case of Salzgitter Hydraulics Private Limited v. ITO, reported in (2021) 128 taxmann.com 192(hyd.-trib.SMC)
i) Jaipur-tribunal decision in the case of Dhabryia Plywood Limited v. ADIT, CPC, reported in (2021) 133 taxmann. com 135(Jp-trib.)
j) Bangalore-tribunal decision in the case of Shakuntala Agarbathi Company v. The DCIT, in ITA no. 385/ Bang/2021, vide orders dated 21.10.2021
k) Hyderabad-tribunal in the case of NCC Limited v. ACIT in ITA no. 595 & 596/Hyd/2020, vide common order dated 27.09.2021
l) Delhi-tribunal decision in the case of Indian Geotechnical Services v. ACIT, in ITA No. 622/Del/2018, vide order dated 27.08.2021(in which one of us, being Hon'ble Judicial Member was part of Division Bench which pronounced this order)
m) Bangalore-tribunal decision in the case of Jana Urban Services for Transformation Private Limited v. DCIT, in ITA No. 307/Bang/2021, order dated 11.10.2021
n) Amritsar-tribunal decision in the case of Vinko Auto Industries Limited v. DCIT, CPC, in ITA no. 63 & 64/Asr./2021, vide order dated 08.11.2021

o) Bangalore-tribunal decision in the case of Infobell Interactive Solutions v. DCIT, in ITA No. 411/Bang/2021, order dated 03.11.2021
p) Jodhpur-tribunal decision in the case of Mohan Ram Chaudhary v. ITO, in ITA no. 51,54& 55/Jodh./2021, vide order dated 28.09.2021
q) Bangalore-tribunal decision in the case of Gopalakrishna Aswini Kumar v. ADIT, reported in (2022) 134 taxmann.com 18(Bang.-trib.)
r) Chennai-tribunal decision in the case of Adyar Ananda Bhavan Sweets India Private Limited, reported in (2022) 134 taxmann.com 56 (chennai-trib.).

In all the above tribunal-decisions, it is consistently held that amendment made by Finance Act, 2021 in Section 36(1)(va) and 43B are prospective in nature and shall be applicable from ay:2021-22 and subsequent assessment years, and consequently shall not have any retrospective effect . We are presently seized with ay: 2018-19, which is also assessment year prior to ay:2021-22. While adjudicating the appeal in Commercial Auto Sales Private Limited(supra) for ay:2018-19, the Division Bench of Allahabad-tribunal (both of us were part of the Division Bench which pronounced the order) have already adjudicated this issue in favour of the assesse, which was an appeal in ITA No. 13/All/2021, vide orders dated 16.12.2021, by following the Hon'ble Jurisdictional High Court judgment in the case of **Sagun Foundry Private Limited v. CIT**, in ITA No. 87 of 2006, vide judgment dated 17.08.2016, as the said decision holds the field , as it was also held that the amendment by Finance Act, 2021 in Section 36(1)(va) and 43B is prospective and is applicable to ay: 2021-22 and subsequent assessment years. There is no contrary decision of Hon'ble Allahabad High Court or of Hon'ble Apex Court is brought to our notice by Revenue. Since, the facts in the present appeal are similar to the facts in the case of Commercial Auto Sales Private Limited(supra), which was decided by us in favour of the tax-payer on this issue , vide orders dated 16.12.2021 , thus keeping in view of principles of consistency, we decide this appeal in favour of the assessee .

Admittedly, in this case, the assessee has deposited employee share of PF/ESI late beyond the time stipulated under the relevant statute governing PF/ESI, but the same was claimed by assessee to be deposited prior to the due date prescribed for filing of return of income u/s 139(1). The main contention of Revenue is that the PF/ESI Act arebenevolent statute(s) with the social benefits for employees to build retirement corpus for the salaried employees. The contribution to fund is made both by employer and employee. The contention of the Revenue is that the employer deduct employee contribution from his/her salary and holds the same in fiduciary capacity, and thus the employer is under bounden duty to deposit to the credit of employee with the fund maintained for said purposes within prescribed period of fifteen days as is provided under the relevant statute governing PF/ESI. Thus, it is stated by Revenue that is the reason why Section 2(24)(x) stipulates that firstly said employee contribution shall be deemed as income of the assesse, and then deduction is to be allowed u/s 36(1)(va) provided the same is deposited within time provided under the relevant statute governing PF/ESI. It is claimed so far as employer contribution is concerned, different consideration shall apply as the same is

provided by employer out of its own funds and hence extended period shall be available as is provided u/s 43B so far as employer contribution is concerned. On the first blush, the arguments of Revenue seems quite attractive , but as we look deeper , the argument does not hold ground keeping in view the view held by Hon'ble Jurisdictional High Court in the case of **Sagun Foundry(supra)**and also keeping in view the provisions of Special Statute governing PF/ESI which itself provided for stringent provisions in the case of delay /default in deposit of PF/ESI by employer with relevant fund to the credit of employee. So far as contention of the Revenue that PF/ESI Act is benevolent statute for the social benefit of the salaried employees to build corpus for their retirement/old age is concerned, there is no quarrel on the same. If we look into the relevant Statute governing PF/ESI, the statute itself provide for the stringent provisions in case if the contribution to the fund is delayed, by way of providing for interest for delayed payments, damages/penalties in case payments are delayed and also providing for punishment/prosecution for failure to comply with the provisions of these special statute governing PF/ESI. Reference is drawn Section 7Q , 14, 14A, 14AA, 14AB, 14AC, 14Band 14C of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. Stringent provisions also found place in ESI Act.Thus , to say that these are benevolent statute and thus the provision u/s 36(1)(va) read with Section 2(24)(x) is to be strictly construed even under the 1961 Act , wherein for a single day delay in deposit of employee share of PF/ESI by employer to the credit of employee with relevant fund, beyond the time provided under these special statute for deposit of PF/ESI which is fifteen days from the end of the month to which such contribution pertain in case of PF , the same is to be held chargeable to tax and denying the deduction u/s 36(1)(va) forever does not hold meritin the teeth of binding decision of Hon'ble jurisdictional High Court in the case of **Sagun Foundries (supra)**.The Revenue is not able to place on record any contrary decision of Hon'ble Apex court and/or Hon'ble Allahabad High Court. No doubt, 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 even before amendment by Finance Act, 2021 , the assessee will not be entitled for deduction as the employee contribution towards PF/ESI received by assessee was deposited late beyond the timeprovided for deposit of said contribution as is stipulated/provided under the relevant statute governing PF/ESI. But, it is equally true that the Constitutional Courts viz. Hon'ble High Courts and Hon'ble Supreme Court in India have powers to read down the provisions of the 1961 Act to make it workable and to avoid absurdity. This issue was subject matter of different interpretation by different High Courts . The Hon'ble Gujarat High Court and Hon'ble Kerala High Court has decided this issue against the tax-payer and in favour of Revenue, while Hon'ble Allahabad High Court, Hon'ble Bombay High Court, Hon'ble Karnataka High Court , Hon'ble Rajasthan High Court, Hon'ble Himachal Pradesh High Court , Hon'ble Madras High Court have decided the issue in favour of assessee and against Revenue. 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 jurisdictional High Court in the case of Sagun Foundry Private Limited v. CIT, Kanpur in ITA No. 87 of 2006, vide judgment dated 21.12.2016 has decided this issue in favour of the tax-payer, by holding that Section 43B is applicable to both employer and employee contribution and thus in case employee contribution towards PF received by employer is deposited to the credit of employees with the PF trust prior to due date of filing of return of income u/s 139(1), the employer shall be entitled for deduction u/s 36(1)(va) read with Section 2(24)(x) and 43B of the 1961 Act. The Hon'ble Jurisdictional High Court while deciding Sagun Foundry(Supra) has discussed the decision of Hon'ble Supreme Court in para 25 to 28 and then adjudicated this issue in favour of the tax-payer. The Hon'ble Jurisdictional High Court has in para 29 has taken a view that the law laid down by Hon'ble High Court of Karnataka , Hon'ble High Court of Rajasthan, Hon'ble High Court of Punjab and Haryana , Hon'ble High Court of Delhi, Hon'ble High Court of Bombay and Hon'ble High Court of Himachal Pradesh have rightly applied Section 43B in respect of both contributions i.e. employers and employees . The Hon'ble Jurisdictional High Court has with great respect dissented with the view taken by Hon'ble Gujarat High Court and Hon'ble High Court of Kerala, which view on the issue was decided by Hon'ble Gujarat High Court and Hon'ble High Court of Kerala in favour of Revenue. Thus, the applicable provision as is contained in Section 36(1)(va) is read down by most of the Constitutional Courts including our Jurisdictional High Court (barring Hon'ble Gujarat High Court and Hon'ble Kerala High Court) to make it workable as otherwise the tax-payer will lose the deduction forever 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 for relevant ay 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. Revenue has also cited decisions of Courts taking a contrary view in favour of Revenue, but no decision of Hon'ble Jurisdictional High Court or of Hon'ble Apex Court is cited by Revenue, taking a view in favour of Revenue. 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, apart from facing punishment/prosecution . Reference is drawn to Section 7Q, 14 14A, 14AA, 14AB, 14AC, 14Band 14C of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 . Stringent provisions also found place in ESI Act. There is an recent amendment to Section 36(1)(va) by Finance Act, 2021, wherein Explanation 2 was inserted, which reads as under:

> " 36(1)(va)****
> ****
>
> Explanation 2-For the removal of doubts, it is hereby clarified that the provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the 'due date' under this clause;"
>
> Correspondingly, there was an amendment to Section 43B of the 1961 Act by Finance Act, 2021, wherein Explanation 5 was inserted , which reads as under:
>
> "43B****
> ****
>
> Explanation 5- For the removal of doubts, it is hereby clarified that the provisions of this section shall not apply and shall be deemed never to have been applied to a sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 applied."

Although, on perusal of the above amendment by Finance Act, 2021, it transpires that the said Explanations were inserted in Section 36(1)(va) and 43B by way of removal of doubt to clarify the law as existed on the statute so far as employee contribution received by employer from employee which is to be deposited to the credit of employee with PF/ESI fund on or before the due date as provided in statute governing PF/ESI, to enable the employer to claim deduction u/s 36(1)(va) of the 1961 Act read with Section 2(24)(x) of the Act, and no deduction shall be allowed by virtue of Section 36(1)(va) as Section 43B has no applicability in case of employee contribution to PF/ESI , in case of delayed deposit beyond the time stipulated for deposit under relevant statute governing PF by virtue of being hit by Section u/s 36(1)(va) of the Act as it is stated in the Explanations that provisions of section 43B shall not apply and shall be deemed never to have been applied for the purposes of determining the 'due date' under this

clause so far as employee contribution to PF/ESI, although the said amounts were deposited before the due date as prescribed for filing of return of income u/s 139(1) of the 1961 Act. The above amendments from the plain reading of the Section indicates that it ought to have retrospective effect , **but on perusal of Memorandum to Finance Bill 2021, it transpires that the lawmakers have consciously made the amendments made to be applicable from ay: 2021-22 and subsequent assessment years.**

The relevant clause to Memorandum to Finance Bill, 2021 is reproduced hereunder:

> "Rationalisation of various Provisions
>
> Payment by employer of employee contribution to a fund on or before due date
>
> Clause (24) of section 2 of the Act provides an inclusive definition of the income. Sub-clause (x) to the said clause provide that income to include any sum received by the assessee from his employees as contribution to any provident fund or superannuation fund or any fund set up under the provisions of ESI Act or any other fund for the welfare of such employees.
>
> Section 36 of the Act pertains to the other deductions. Sub-section (1) of the said section provides for various deductions allowed while computing the income under the head "Profits and gains of business or profession'.
>
> Clause (va) of the said sub-section provides for deduction of any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date. Explanation to the said clause provides that, for the purposes of this clause, "due date" to mean the date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued there-under or under any standing order, award, contract of service or otherwise.
>
> Section 43B specifies the list of deductions that are admissible under the Act only upon their actual payment. Employer's contribution is covered in clause (b) of section 43B. According to it, if any sum towards employer's contribution to any provident fund or superannuation fund or gratuity fund or any other fund for the welfare of the employees is actually paid by the assessee on or before the due date for furnishing the return of the income under sub-section (1) of section 139, assessee would be entitled to deduction under section 43B and such deduction would be admissible for the accounting year. This provision does not cover

employee contribution referred to in clause (va) of sub-section (1) of section 36 of the Act.

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

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

(iii) 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

(iv) 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]"

(Emphasis supplied by us)

The said explanation was inserted to rationalise the provisions of Section 36(1)(va) and 43B of the 1961 Act and it is stated in Memorandum to Finance Bill, 2021 that the said explanation is inserted to provide certainty.**But,It is specifically stated in Memorandum to Finance Bill, 2021 that these amendments to Section 36(1)(va) and 43B shall take effect from 01st April , 2021 and will accordingly apply to assessment year 2021-22 and subsequent assessment years.** It is also **recognised in the said Memorandum thatsome courts** have applied the provision of section 43B on employee contribution as well and have decided this issue in favour of taxpayer. Thus, the Parliament was fully aware that some courts have interpreted the provisions of Section 36(1)(va) by allowing the

extended period as provided u/s 43B , in favour of the tax-payer, but still the Parliament chose to make the amendments to Section 36(1)(va) and 43B to be applied w.e.f .01.04.2021 and made applicable to assessment year 2021-22 and subsequent assessment years . This clearly shows intention of Parliament to accept the interpretation provided by Constitutional Courts in reading down provision of Section 36(1)(va) wherein extended period allowed u/s 43B was applied even to employee contribution to PF/ESI, until assessment year 2020-21 and the Parliament chose to apply the said amendments w.e.f. 01st April , 2021 and made applicable effective from assessment year 2021-22 and subsequent assessment years. Thus, it is clear that the Parliament chose not to litigate this issue prior to assessment year 2021-22 and to close all disputes on this issue , prior to assessment year 2021-22 , and made these stringent provisions applicable to employee contribution to PF/ESI effective from assessment year 2021-22 and subsequent assessment years. There is a cherished objective behind this not raising the dispute(s) on this issue prior to assessment year 2021-22 and accepting the position as laid down by Constitutional Courts up-till 2020-21, which is on consonance with the Policy of Government of India to reduce litigations and to increase efficiency. Reference is drawn to recent statement given by Hon'ble Union Minister of Law and Justice in Lok Sabha on 17.12.2021, which clearly indicates that Government of India wants to minimise disputes and to maximise efficiency. This statement refers that formulation of National Litigation Policy which is under consideration of Government of India with the objective of laying down guidelines for preventing, controlling and reducing litigation , keeping in view the policy and plans of Government of India, in a cohesive and organised manner. This statement also refers to several steps taken by CBDT by issuing instructions and bringing in several measures, for reducing litigation and the resultant burdens of Courts. This also refers to measures taken by CBDT in enhancing monetary limits for filing appeal by Department before ITAT/Hon'ble High Courts and Hon'ble Apex Court, as under:

"National Litigation Policy

Posted On: 17 DEC 2021 2:53PM by PIB Delhi

With the objective to lay down guidelines for preventing, controlling and reducing litigation, keeping in view the policy & plans of the Government, in a cohesive and organized manner, Litigation Policy is under consideration.

Ministries and Departments like the Railways and Department of Revenue, involved in a high number of litigations have been taking several measures for reducing the number of Court cases. Ministry of Railways have issued instructions for effective monitoring of Court cases at all levels. Zonal Railways and Production Units have been asked to take effective steps to reduce the number of cases in which the Government is a party and reduce the burden of courts, expedite finalization of all the cases in all courts at the earliest and to cut down the expenditure in contesting court cases. For achieving this, emphasis has been laid on effective monitoring of cases by having regular meetings with empanelled advocates, for briefing and necessary directions to be given at the highest

level, besides ensuring timely submission of replies, Counter replies and necessary documents to the advocates.

The Central Board of Direct Taxes (CBDT) and the Central Board of Indirect Taxes and Customs (CBIC) under the Department of Revenue, have issued a slew of instructions and brought in several measures, for reducing litigations and the resultant burden on Courts. While the CBDT has issued circulars directing the field Officers that pending appeals before Income Tax Appellate Tribunals/High Courts/Supreme Court with tax effect below the specified limits may be withdrawn/not pressed, and in the process facilitating a better and concerted focus on high demand litigations. CBDT has also clarified to the field officers that appeals should not be filed merely because the tax effect in a particular case exceeds the prescribed monetary limits and the filing of an appeal should be decided strictly on the merits of the case.

Similarly, the field formations under the CBIC have been instructed to withdraw appeals pending in High Courts/Customs Excise and Service Tax Appellate Tribunal, where the Supreme Court has decided on identical matter. Besides, CBIC has also instructed its field formations not to contest further in appeal where the issue has been lost in two stages of appeals. It has been decided, however, that in cases where it is felt that the issue is fit for further appeal, then on proper justification and approval of the Zonal Chief Commissioner, an appeal can be filed for the third time. Also, the field formation have been instructed to forward only those SLP proposals where in the issue involves substantial question of law or gross perversity or illegality in the appreciation of evidence.

In this direction, both the CBDT and the CBIC have also enhanced the threshold monetary limit for filing appeals, the details of which are as follows:

CBDT:

For filing appeals	**Monetary limit**
Before Income Tax Appellate Tribunal	**Rs. 50 lakhs**
Before High Court	**Rs.1 Crore**
Before Supreme Court	**Rs.2 Crore**

CBIC:

Monetary limits for filing appeals in cases relating to Central Excise and Service Tax			**Monetary limits for filing appeals in cases relating to Customs**		
Before	Before High	Before	Before CESTAT	Before High	Before

CESTAT	Court	Supreme Court		Court	Supreme Court
Rs.50 lakhs	Rs.1 Crore	Rs.2 Crore	Rs. 5 lakhs	Rs.10 lakhs	Rs.25 lakhs

For the purpose of monitoring of litigation of Union of India, a web-platform namely, Legal Information Management & Briefing System (LIMBS) was created in the year 2016. LIMBS Ver.2 has been launched in the year 2019 to overcome the then existing technological gaps in the application. The vision of LIMBS Ver.2 is '***to be a single platform for Litigation of GoI along with establishment of a synchronized regime for monitoring of Litigation***' across all Ministries / Departments of Government of India. Presently, there are **7.78 lacs** cases (including archive cases) including **5.78 lacs** live/pending cases entered by **57** Ministries/Departments. It has a single database of **15881 officials/users** and more than **20000 advocates.** All the High Courts, except High Court of Delhi, have been integrated with LIMBS Ver.2 to facilitate monitoring of cases pending in these High Courts. In addition, the linkage of database with the Hon'ble Supreme Court is envisaged as part of LIMBS implementation. Law Secretary, vide DO letter dated 20.11.2020, followed by reminders dated 16.03.2021 and 09.07.2021 has taken up the case for grant permission for data of various Tribunals and with LIMBS Ver.2 through API with the Chairperson/President of the Tribunals and Secretaries of the respective Ministries/Departments. At present, Central Administrative Tribunal, The Telecom Dispute Settlement & Appellate Tribunal and Appellate Tribunal for Electricity have provided API linkage to their database with LIMBS Ver.2. Further, the fast track integration of database of cases of Railway Claims Tribunal, Income Tax Appellate Tribunal, National Green Tribunal, National Company Law Tribunal and National Company Law Appellate Tribunal with LIMBS is envisioned.

The alternative mechanism for the resolution of Inter-Ministerial/Departmental disputes also provide for an institutionalized mechanism for resolution of such disputes, namely, Administrative Mechanism for Resolution of Disputes (AMRD). This was framed by the Department of Legal Affairs and circulated *vide* O.M. dated 31.03.2020. This mechanism, applicable to disputes other than taxation disputes, will reduce litigations in courts and resolve the cases outside the court system, where both parties are Govt. Department or where one party is Govt. Department and other is its instrumentalities, (CPSEs/Boards/ Authorities, etc.).

To resolve the commercial disputes between Central Public Sector Enterprises *inter-se* and Central Public Sector Enterprises and Government Departments/ Organizations in place of the earlier 'Permanent Machinery of Arbitration', a new scheme, namely, "Administrative Mechanism for Resolution of CPSE Disputes (AMRCD)" evolved by Department of Public Enterprises has been brought into effect w.e.f. 22.05.2018.

The Commercial Courts Act, 2015 was amended in 2018 to inter-alia provide for Pre-Institution Mediation and Settlement (PIMS) mechanism. Under this mechanism a party which does not contemplate any urgent interim relief in a subject-matter of commercial dispute of specified value of Rs.3 lakh and above has to first exhaust the remedy of PIMS

to be conducted by the authorities constituted under the Legal Services Authorities Act, 1987, before approaching the Court.

Further for facilitating quick disposal of disputes outside the court systems by way of alternate dispute redressal mechanism of mediation, the Mediation Bill, 2021 is being introduced in the Parliament *inter-alia* providing for pre-litigation mediation by the parties.

This information was given by Shri Kiren Rijiju, Union Minister of Law & Justice in Lok Sabha today.

****"

Moreover, it is stated in the Memorandum that is to provide certainty and it is made applicable effective from assessment year 2021-22 and subsequent assessment years. There is no reason for us to hold these amendments retrospective. Reference is also drawn to the decision of Hon'ble Supreme Court in the case of CIT v. Vatika Township Private Limited , reported in (2014) 49 taxmann.com 249(SC), wherein Hon'ble Apex Court held that proviso appended to Section 113 of the 1961 Act by Finance Act, 2002 is prospective .It is also to be noted that several of the tax-payers (except in the State of Gujarat and Kerala , and such other States where Hon'ble jurisdictional High Court has decided this issue in favour of Revenue) situated in the States where Hon'ble Jurisdictional High Court has decided this issue in favour of tax-payers, have already been allowed the deduction towards employee contribution received by employer which was deposited late by employer beyond the time stipulated u/s 36(1)(va) , but before the due date as prescribed for filing of return of income u/s 139(1) of the 1961 Act , and there cannot be a class different now at this stage where the deduction is to be denied on the ground of strict interpretation of the provisions of Section 36(1)(va) , unless the amendment made by Finance Act, 2021 is made specifically applicable retrospectively from the date of insertion of the provision or any other specified earlier date in the Finance Act, rather on the other hand , the Memorandum to Finance Bill, 2021 has specifically made this amendment applicable from 01.04.2021 and specified that the same shall be made applicable from assessment year 2021-22 and subsequent assessment years. Thus, the Parliament was fully aware that Some courts have decided this issue in favour of tax-payers by reading down the existing provisions of Section 36(1)(va) read with Section 2(24)(x) by applying provisions of Section 43B of the 1961 Act , but still the Parliament has made amendments to Section 36(1)(va) and 43B and made it applicable from ay: 2021-22 and subsequent assessment years, which we have already discussed in this order earlier that it was with an object to end dispute and litigation with respect to this issue for assessment years prior to assessment year 2021-22. We are presently concerned with ay: 2018-19. It is also claimed that there is a CBDT circular No. 22/2015 dated 17.12.2015 which has clarified that Section 43B has applicability so far as employer contribution to PF/ESI is concerned and such extended period as provided u/s 43B has no applicability so far as employee contribution is concerned. It is well settled that CBDT circulars are binding on income-tax authorities . Once the Constitutional Courts including Hon'ble Jurisdictional High Court

have read down the provision as is contained in Section 36(1)(va) read with Section 2(24)(x) of the 1961 Act and then decided this issue in favour of tax-payer by holding that extended period as provided under Section 43B shall be applicable even to employee contribution towards PF/ESI , there is no reasons for us to take a different view by following aforesaid CBDT circular . The ld. Sr. DR has also stated that Hon'ble Supreme Court while deciding Alom Extrusion(supra) was seized of issue concerning employer contribution to PF/ESI and was not seized of the issue concerning with employee contribution to PF/ESI, but it is also equally true that our Hon'ble Jurisdictional High Court in the case of Sagun Foundry(supra) has considered Alom Extrusion(supra) in para 25 to 28 of the judgment, and then decided this issue that Section 43B has applicability to both employer and employee contribution to PF/ESI. We have also noted that several of benches of tribunal has already considered the amendments made by Finance Act, 2021 in Section 36(1)(va) and 43B of the 1961 Act, and then decided the issue in favour of the tax-payer , by holding that the amendments made by Finance Act , 2021 is prospective in nature which shall be applicable from ay: 2021-22 and subsequent assessment years and shall not have retrospective effect . Reference is drawn to following decision of the Benches of tribunal, as under:

a) Delhi-tribunal order in the case of Flying Fabrication v. DCIT , CPC, Bengaluru , in ITA no. 1049/Del/2021 for ay: 2018-19 and 1407/Del/2021 for ay:2019-20, vide common order dated 17.11.2021
b) Delhi-tribunal order in the case of Adama Solution Private Limited v. ADIT,CPC, Bengaluru, SMC Bench in ITA no. 1800/Del/2020 , vide orders dated 13.10.2021
c) Delhi-tribunal order in the case of Insta Exhibitions Private Limited v. Addl. CIT , in ITA No. 6941/Del/2017, vide orders dated 03.08.2021
d) Delhi-tribunal decision in the case of Aroon Facilitation Management Services Private Limited , SMC Bench in ITA no. 1824/Del/2020, vide order dated 13.10.2021
e) Jaipur-tribunal decision in the case of Bhivaram Pannalal Kumawat v. DCIT in ITA no. 76/JP/2021, order dated 12.10.2021
f) Hyderabad-tribunal decision in the case of Value Momentum Software Services Private Limited v. DCIT, in ITA no. 2197/Hyd/2017, order dated 19.05.2021
g) Hyderabad-tribunal decision in the case of Vijay Electricals Limited v. DCIT, in ITA no. 1533 & 1534/Hyd/2017, order dated 27.05.2021
h) Hyderabad-tribunal SMC decision in the case of Salzgitter Hydraulics Private Limited v. ITO, reported in (2021) 128 taxmann.com 192(hyd.-trib.SMC)
i) Jaipur-tribunal decision in the case of Dhabryia Plywood Limited v. ADIT, CPC, reported in (2021) 133 taxmann. com 135(Jp-trib.)
j) Bangalore-tribunal decision in the case of Shakuntala Agarbathi Company v. The DCIT, in ITA no. 385/ Bang/2021, vide orders dated 21.10.2021
k) Hyderabad-tribunal in the case of NCC Limited v. ACIT in ITA no. 595 & 596/Hyd/2020, vide common order dated 27.09.2021

l) Delhi-tribunal decision in the case of Indian Geotechnical Services v. ACIT, in ITA No. 622/Del/2018, vide order dated 27.08.2021(in which one of us, being Hon'ble Judicial Member was part of Division Bench which pronounced this order)
m) Bangalore-tribunal decision in the case of Jana Urban Services for Transformation Private Limited v. DCIT, in ITA No. 307/Bang/2021, order dated 11.10.2021
n) Amritsar-tribunal decision in the case of Vinko Auto Industries Limited v. DCIT, CPC, in ITA no. 63 & 64/Asr./2021, vide order dated 08.11.2021
o) Bangalore-tribunal decision in the case of Infobell Interactive Solutions v. DCIT, in ITA No. 411/Bang/2021, order dated 03.11.2021
p) Jodhpur-tribunal decision in the case of Mohan Ram Chaudhary v. ITO, in ITA no. 51,54 & 55/Jodh./2021, vide order dated 28.09.2021
q) Bangalore-tribunal decision in the case of Gopalakrishna Aswini Kumar v. ADIT, reported in (2022) 134 taxmann.com 18(Bang.-trib.)
r) Chennai-tribunal decision in the case of Adyar Ananda Bhavan Sweets India Private Limited, reported in (2022) 134 taxmann.com 56 (chennai-trib.)

We have also observed that Hon'ble Jurisdictional High Court in the case of Sagun Foundry Private Limited (supra) has held that deduction is to be allowed for belated payment of employee contribution to PF/ESI which is deposited beyond the due date stipulated under the relevant statutes governing PF/ESI, but the same stood deposited before the due date for filing of return of income as is prescribed u/s 139(1) of the 1961 Act. It is also to be noted that while deciding this issue in Sagun Foundry (supra) in favour of the tax-payer, the Hon'ble Allahabad has duly discussed Hon'ble Supreme Court decision in Alom Extrusion (supra) in para 25-28 , and then decided this issue in favour of the tax-payer. We at tribunal being inferior judicial body to Hon'ble Allahabad High Court , are bound by decision of Hon'ble jurisdictional High Court in the case of Sagun Foundry (supra) as a cardinal principles of judicial discipline and to instil certainty among tax-payers. We also hold that the amendments made by Finance Act, 2021 in Section 36(1)(va) and 43B are prospective in nature and shall be applicable from ay: 2021-22 and subsequent assessment years and shall not have retrospective effect. Thus, Respectfully following the aforesaid decision of Allahabad-tribunal in the case of Commercial Auto Sales Private Limited for ay:2018-19 in ITA no. 13/Alld/2021 , vide orders dated 16.12.2021and also in the case of Commercial Auto Sales Private Limited for ay:2019-20 in ITA no. 15/Alld/2021 , vide orders dated 20.01.2022 in which both of us were part of the Division Bench who pronounced the order and also in the case of SBW Udyog Limited for ay:2018-19 in ITA no. 19/Alld/2021 , vide order dated 02.06.2022 in which both of us were part of the Division Bench who pronounced the order, we hold that in the instant appeal for ay:

2018-19, if the employee share of PF/ESI is deposited by employer to the credit of employee with the relevant fund maintained for PF/ESI before the due date of filing of return of income u/s 139(1) of the 1961 Act, then the assessee shall be entitled for deduction u/s 36(1)(va) of the 1961 Act. The assessee's counsel has filed tax-audit report in which detail/ bifurcations of employee share of PF/ESI along with date of payment is mentioned but challans for deposit of PF/ESI are not filed. The said tax-audit report is placed on record in file. Thus for limited purposes , we are directing AO to verify the challans evidencing deposit of aforesaid employee share of PF/ESI and that it was deposited before the due date prescribed for filing of return of income u/s 139(1), before allowing claim of deduction u/s 36(1)(va) of the 1961 Act. The assessee is directed to file before AO complete details/bifurcation of employees share of PF/ESI , to the tune of Rs. 51,28,996/- which was added to income of the assessee u/s 36(1)(va) read with Section 2(24)(x) along with relevant paid challans, for verification. While passing the above order, we also note that several Division Benches of ITAT across Country have now passed appellate orders , even after considering the amendments made to Section 36(1)(va) and 43B of the 1961 Act by Finance Act, 2021, holding that if the employee share of PF/ESI is deposited by employer to the credit of employee with the relevant fund maintained for PF/ESI before the due date of filing of return of income u/s 139(1) of the 1961 Act, then the tax-payer shall be entitled for deduction u/s 36(1)(va) of the 1961 Act . The assessee succeeds in this appeal. We order accordingly."

6. From the details of the payment, it is clear that all the payments were made before the due date of filing of return under section 139(1) of the Income Tax Act. Therefore, the addition made by the Assessing Officer and confirmed by the CIT(A) on this account is deleted.

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

Order pronounced in the open court on 24.08.2022 at Varanasi U.P.

Sd/-
[VIJAY PAL RAO]
JUDICIAL MEMBER

DATED: 24/08/2022
Varanasi
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Copy forwarded to:
1. Appellant- M/s Samara Carpets Pvt. Ltd.
2. Respondent-The DCIT, CPC, Bangalore
3. CIT(A),Varanasi
4. CIT
5. DR

By order
Sr. P.S.