आयकर अपीलीय अधिकरण "ए" न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, CHENNAI

माननीय श्री वी. दुर्गा राव, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI V. DURGA RAO, JM AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

1. आयकरअपील सं./ **ITA No.789/Chny/2022**
(**निर्धारण वर्ष** / Assessment Year: 2019-20)

M/s.Electrical India New No.205, Old No.92/2, Lake View Road, West Mambalam, Chennai-600 033.	**बनाम**/ Vs.	**ADIT, CPC** Bengaluru.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AAAFE-2087-M**		
(□ पीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**	:	Shri I.Dinesh, Advocate
प्रत्यर्थीकीओरसे/**Respondent by**	:	Shri ARV Sreenivasan (Addl. CIT) – Ld. Sr. DR

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2. आयकरअपील सं./ **ITA No.813/Chny/2022**
(**निर्धारण वर्ष** / Assessment Year: 2020-21)

M/s. Batliboi Renewable Energy Solutions Private Ltd. No.28, Thiru-Vi-Ka Industrial Estate, Ekkaduthangal, Guindy, Chennai-600 032.	**बनाम**/ Vs.	**ADIT, CPC** Bengaluru.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AAACB-6055-H**		
(□ पीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**	:	Shri R. Kumar (Advocate) – Ld. AR
प्रत्यर्थीकीओरसे/**Respondent by**	:	Shri ARV Sreenivasan (Addl. CIT) – Ld. DR

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3. आयकरअपील सं./ **ITA No.788/Chny/2022**
(**निर्धारण वर्ष** / Assessment Year: 2019-20)

Mr. Abdul Hassan Risvi 27, 3rd floor, Chindhamani Building, Meeran Sahib Street, Mount Road, Chennai-600 002.	**बनाम**/ Vs.	**ADIT, CPC** Bengaluru.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AUDPR-2171-E**		
(□ पीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**	:	Shri D. Anand (Advocate) – Ld. AR
प्रत्यर्थीकीओरसे/**Respondent by**	:	Shri ARV Sreenivasan – (Addl. CIT) – Ld. DR

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4. .आयकर अपील सं./ **ITA No.756/Chny/2022**

(**निर्धारण वर्ष** / Assessment Year: 2018-19)

Late Dharmaraj Shankar Ganesh 10, 2nd Street, Ulaganathapuram, Ennore, Chennai-600 057.	**बनाम**/ Vs.	**DCIT, CPC** Bengaluru.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **CRSPS-0972-G**		
(□ पीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**	:	None
प्रत्यर्थीकीओरसे/**Respondent by**	:	Shri ARV Sreenivasan – (Addl. CIT) – Ld. DR

सुनवाईकीतारीख**/ Date of Hearing**	:	26-10-2022
घोषणाकीतारीख / **Date of Pronouncement**	:	04-11-2022

आदेश / O R D E R

Per Bench:

1. In the aforesaid appeals for various assessment years, the grievance of the assessee is common i.e., confirmation of disallowance of Employees' Contribution to PF / ESI in terms of Sec.43B r.w.s. 36(1)(va) as well as Sec.2(24)(x). Till now, this issue was being decided by us in assessee's favor, inter-alia, by relying upon the decision of Hon'ble High Court of Madras in **CIT v. Industrial Security & Intelligence India (P.) Ltd. (TCA No. 585 of 2015, dated 24-7-2015).** However, the position has materially been altered after recent decision of Hon'ble Supreme Court in bunch of appeals titled as **Checkmate Services P. Ltd. Vs CIT (Civil Appeal No.2833 of 2016 dated 12.10.2022).**

2. The registry has noted delay of 1 day in the appeal listed at serial no.4. Considering the period of delay, the delay is condoned and the appeal is admitted for adjudication on merits.

3. We find that now this issue has been decided by Hon'ble Supreme Court in favor of revenue in its recent decision in bunch of appeals titled as **Checkmate Services P. Ltd. vs. CIT (Civil Appeal No.2833 of 2016 dated 12.10.2022).** In this decision, it was noted by Hon'ble Court that there was divergent of opinion amongst various Hon'ble High Courts viz. High Courts of Bombay, Himachal Pradesh, Calcutta, Guwahati and Delhi favoring the interpretation beneficial to the assessee on one hand whereas High Courts of Kerala and Gujarat favoring interpretation in favour of the Revenue on the other hand. Taking note of legislative history, the matter has finally been put to rest by Hon'ble Court in revenue's favor as under: -

> 30. The factual narration reveals two diametrically opposed views in regard to the interpretation of Section 36(1)(va) on the one hand and proviso to Section 43(b) on the other. If one goes by the legislative history of these provisions, what is discernible is that Parliament's endeavour in introducing Section 43B [which opens with its non-obstante clause] was to primarily ensure that deductions otherwise permissible and hitherto claimed on mercantile basis, were expressly conditioned, in certain cases upon payment. In other words, a mere claim of expenditure in the books was insufficient to entitle deduction. The assessee had to, before the prescribed date, actually pay the amounts – be it towards tax liability, interest or other similar liability spelt out by the provision.
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> 31. Section 43B falls in Part-V of the IT Act. What is apparent is that the scheme of the Act is such that Sections 28 to 38 deal with different kinds of deductions, whereas Sections 40 to 43B spell out special provisions, laying out the mechanism for assessments and expressly prescribing conditions for disallowances. In terms of this scheme, Section 40 (which too starts with a non obstante clause overriding Sections 30-38), deals with what cannot be deducted in computing income under the head "Profits and Gains of Business and Profession". Likewise, Section 40A(2) opens with a non-obstante clause and spells out what expenses and payments are not deductible in certain circumstances. Section 41 elaborates conditions which apply with respect to certain deductions which are otherwise allowed in respect of loss, expenditure or trading liability etc. If we consider this scheme, Sections 40-43B, are concerned with and enact different conditions, that the tax adjudicator has to enforce, and the assessee has to comply with, to secure a valid deduction.

32. The scheme of the provisions relating to deductions, such as Sections 32- 37, on the other hand, deal primarily with business, commercial or professional expenditure, under various heads (including depreciation). Each of these deductions, has its contours, depending upon the expressions used, and the conditions that are to be met. It is therefore necessary to bear in mind that specific enumeration of deductions, dependent upon fulfilment of particular conditions, would qualify as allowable deductions: failure by the assessee to comply with those conditions, would render the claim vulnerable to rejection. In this scheme the deduction made by employers to approved provident fund schemes, is the subject matter of Section 36 (iv). It is noteworthy, that this provision was part of the original IT Act; it has largely remained unaltered. On the other hand, Section 36(1)(va) was specifically inserted by the Finance Act, 1987, w.e.f. 01-04-1988. Through the same amendment, by Section 3(b), Section 2(24) – which defines various kinds of "income" – inserted clause (x). This is a significant amendment, because Parliament intended that amounts not earned by the assessee, but received by it, - whether in the form of deductions, or otherwise, as receipts, were to be treated as income. The inclusion of a class of receipt, i.e., amounts received (or deducted from the employees) were to be part of the employer/assessee's income. Since these amounts were not receipts that belonged to the assessee, but were held by it, as trustees, as it were, Section 36(1)(va) was inserted specifically to ensure that if these receipts were deposited in the EPF/ESI accounts of the employees concerned, they could be treated as deductions. Section 36(1)(va) was hedged with the condition that the amounts/receipts had to be deposited by the employer, with the EPF/ESI, on or before the due date. The last expression "due date" was dealt with in the explanation as the date by which such amounts had to be credited by the employer, in the concerned enactments such as EPF/ESI Acts. Importantly, such a condition (i.e., depositing the amount on or before the due date) has not been enacted in relation to the employer's contribution (i.e., Section 36(1)(iv)).

33. The significance of this is that Parliament treated contributions under Section 36(1)(va) differently from those under Section 36(1)(iv). The latter (hereinafter, "employers' contribution") is described as "sum paid by the assessee as an employer by way of contribution towards a recognized provident fund". However, the phraseology of Section 36(1)(va) differs from Section 36(1)(iv). It enacts that "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." The essential character of an employees' contribution, i.e., that it is part of the employees' income, held in trust by the employer is underlined by the condition that it has to be deposited on or before the due date.

34. It is therefore, manifest that the definition of contribution in Section 2 (c) is used in entirely different senses, in the relevant deduction clauses. The differentiation is also evident from the fact that each of these contributions is separately dealt with in different clauses of Section 36 (1). All these establish that Parliament, while introducing Section 36(1)(va) along with Section 2(24)(x), was aware of the distinction between the two types of contributions. There was a statutory classification, under the IT Act, between the two.

35. It is instructive in this context to note that the Finance Act, 1987, introduced to Section 2(24), the definition clause (x), with effect from 1 April 1988; it also brought in Section 36(1)(va). The memorandum explaining these provisions, in the Finance Bill, 1987, presented to the Parliament, is extracted below:

"Measures of penalising employers mis-utilising contributions to the provident fund or any funds set up under the provisions of the Employees State Insurance Act, 1948, or any other fund for the welfare of employees –

> 12.1. The existing provisions provide for a deduction in respect of any payment by way of contribution to the provident fund or a superannuation fund or any other fund for welfare of employees in the year in which the liabilities are actually discharged (Section 43B). The effect of the amendment brought about by the Finance act, is that no deduction will be allowed in the assessment of the employer, unless such contribution is paid into the fund on or before the due date. "Due date" means the date by which an employer is required to credit the contribution to the employees account in the relevant fund or under the relevant provisions of any law or term of the contract of service or otherwise. (Explanation to Section 36 (1) of the Finance Act)
>
> 12.2. In addition, contribution of the employees to the various funds which are deducted by the employer from the salaries and wages of the employees will be taxed as income within brackets insertion of new [clause (x) in clause (24) of Section 2] of the employer, if such contribution is not credited by the employer in the account of the employee in the relevant fund by the due date. Where such income is not chargeable to tax under the head "profits and gains of business or profession" it will be assessed under the head "income from other sources."

36. Significantly, the same Finance Act, 1987 also introduced provisos to Section 43B, through amendment (clause 10 of the Finance Bill). The memorandum explaining the Bill, pertinently states, in relation to second proviso to Section 43B that:

> "…The second proviso seeks to provide that no deduction shall be allowed in regard to the sum referred to in clause (b) unless such sum has actually been paid during the previous year on or before the due date. The due date for the purposes of this proviso shall be the due date as under Explanation to clause (va) of sub-section (1) of Section 36."

37. It is evident that the intent of the lawmakers was clear that sums referred to in clause (b) of Section 43B, i.e., "sum payable as an employer, by way of contribution" refers to the contribution by the employer. The reference to "due date" in the second proviso to Section 43B was to have the same meaning as provided in the explanation to Section 36(1)(va). Parliament therefore, through this amendment, sought to provide for identity in treatment of the two kinds of payments: those made as contributions, by the employers, and those amounts credited by the employers, into the provident fund account of employees, received from the latter, as their contribution. Both these contributions had to necessarily be made on or before the due date.

38. This court had occasion to consider the object of introducing Section 43B, in Allied Motors. The court held, after setting out extracts of the Budget speech of the Finance Minister, for 1983-84, that:

> "Section 43B was, therefore, clearly aimed at curbing the activities of those tax-payers, who did not discharge their statutory liability of payment of excise duty, employer's contribution to provident fund, etc., for long periods of time but claimed deductions in that regard from their income on the ground that the liability to pay these amounts had been incurred by them in the relevant previous year. It was to stop this mischief that Section 43B was inserted."

39. Original Section 43B(b) enabled the assessee/employer to claim deduction towards contribution as an employer, “by way of contribution to any provident fund”. The second proviso was substituted by Finance Act, 1989 with effect from 01.04.1989 and read 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 to 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 same has been realised within 15 days from the due date."

40. The position in law remained unchanged for 14 years. The Central Government then constituted the Kelkar Committee, to suggest tax reforms. The report suggested amendments inter alia, to Section 43B. The relevant extract of the report is as follows:

> "In terms of the provisions of section 43B of the Income-tax Act, deduction for statutory payments relating to labour, taxes and State and public financial institutions are allowed as deductions, if they are paid during the financial year. However, under the provisions payment of taxes and interest to State and public financial institution are deemed to have been paid during the financial year even if they are paid by the due date of filing of return. Further if the liability is discharged in the subsequent year after the due date of filing of return, the payment is allowed as a deduction in the subsequent year. In the case of statutory payment relating to labour, the deduction for the payment is disallowed if such payment is made any time after the last date of payment of the about related liability. Trade and industry across the country represented that the delayed payment of statutory liability related to labour should be accorded the same treatment as delayed payment of taxes and interest, i.e. they should be allowed in the year of account.
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> Since the objective of the provision is to ensure that a tax-payer does not avail of any statutory liability without actually making a payment for the same, we are of the view that these objectives would be served if the deduction for the statutory liability relating to labour are allowed in the year of payment. The complete disallowance of such payments is too harsh a punishment for delayed payments. Therefore, we recommend that the deduction for delayed payment of statutory liability relating to labour should be allowed in the year of payment like delayed taxes and interest."

Based on the report, the Union introduced amendments to the IT Act, including an amendment to Section 43B; the memorandum explaining the provisions in the Finance Bill, 2003 in the matter of Section 43B. inter alia, reads thus:

> "The Bill also proposes to provide that in case of deduction of payments made by the assessee as an employer by way of contribution to any provident fund or superannuation fund or any other fund for the welfare of the employees shall be allowed in computing the income of the year in which such sum is actually paid. In case the same is paid before the due date of filing the return of income for the previous year, the allowance will be made in the year in which the liability was incurred. These amendments will take effect from 1st April, 2004 and will accordingly apply in relation to the assessment year 2004-05 and subsequent years.”

41. The Notes on Clauses inter alia, reads as follows:

> "It is also proposed to amend the first proviso to the said section so as to omit the references of clause (a), clause (c), clause (d), clause (e) and clause (f) which is consequential in nature.
>
> It is also proposed to omit the second proviso to the said section. These amendments will take effect from 1st April, 2004 and will, accordingly, apply in relation to the assessment year 2004-2005 and subsequent years."

42. The rationale for introduction of Section 43B was explained by this court in M.M. Aqua Technologies Ltd. vs. Commissioner of Income Tax, Delhi:

> "19. The object of Section 43B, as originally enacted, is to allow certain deductions only on actual payment. This is made clear by the non obstante Clause contained in the beginning of the provision, coupled with the deduction being allowed irrespective of the previous years in which the liability to pay such sum was incurred by the Assessee according to the method of accounting regularly employed by it. In short, a mercantile system of accounting cannot be looked at when a deduction is claimed under this Section, making it clear that incurring of liability cannot allow for a deduction, but only "actual payment", as contrasted with incurring of a liability, can allow for a deduction."

43. This condition, i.e., of payment of actual amount on or before the due date to enable deduction, continued for 14 years. By the amendment of 2003, the second proviso was deleted. This court interpreted the law, in the light of these developments, in Alom Extrusions. The court considered the effect of omission of the second proviso, and observed as follows:

> "10. "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 any provident fund/superannuation fund or any fund set up under the Employees' State Insurance Act, 1948, or any other fund for the welfare of such employees constituted income. This is the reason why every assessee(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 accounts 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 (RPFC), the assessee(s) would be entitled to deduction as business expense by merely making a provision to that effect in his books of accounts. The same situation arose prior to 1-4-1984, 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 43-B 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 43-B, it became mandatory for the assessee(s) to account for the aforestated items not on mercantile basis but on cash basis. This situation continued between 1-4-1984 and 1-4-1988, when Parliament amended Section 43-B and inserted the first proviso to Section 43-B.
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> 11. 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 43-B 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, the first proviso stood introduced with effect from 1-4-1988.

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15. 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 the 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 the Finance Act, 2003, was amendatory and it applied prospectively, particularly when Parliament had expressly made the Finance Act, 2003 applicable only with effect from 1-4-2004.

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18. However, as stated above, the second proviso resulted in implementation problems, which have been mentioned hereinabove, and which resulted in the enactment of the Finance Act, 2003, deleting 25 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 Parliament only with effect from 1-4-2004, would become curative in nature, hence, it would apply retrospectively with effect from 1-4-1988.

19. Secondly, it may be noted that, in Allied Motors (P) Ltd. v. CIT [(1997) 3 SCC 472 : (1997) 224 ITR 677] , the scheme of Section 43-B 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 43-B of the Act while computing the business income of the previous year? That was a case which related to Assessment Year 1984-1985. 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 43-B which, as stated above, was inserted with effect from 1-4-1984

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22. It is important to note once again that, by the Finance Act, 2003, not only is the second proviso deleted but even the first proviso is sought to be amended by bringing about a uniformity in tax, duty, cess and fee on the one hand vis-à-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. [(1997) 3 SCC 472 : (1997) 224 ITR 677] was delivered by a Bench of three learned Judges, which is binding on us. Accordingly, we hold that the Finance

> Act, 2003 will operate retrospectively with effect from 1-4-1988 (when the first proviso stood inserted).
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> 23. 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 the Finance Act, 2003, to the above extent, operated prospectively.
>
> Take an example, in the present case, the respondents have deposited the contributions with RPFC 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 43-B 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 43-B of the Act."

44. There is no doubt that in Alom Extrusions, this court did consider the impact of deletion of second proviso to Section 43B, which mandated that unless the amount of employers' contribution was deposited with the authorities, the deduction otherwise permissible in law, would not be available. This court was of the opinion that the omission was curative, and that as long as the employer deposited the dues, before filing the return of income tax, the deduction was available.

45. A reading of the judgment in Alom Extrusions, would reveal that this court, did not consider Sections 2(24)(x) and 36(1)(va). Furthermore, the separate provisions in Section 36(1) for employers' contribution and employees' contribution, too went unnoticed. The court observed inter alia, that:

> "15. …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 judgement in Allied Motors (P) Limited (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 1st April, 1988 [when the first proviso stood inserted]. Lastly, we may point out the hardship and the invidious discrimination which would be caused to the assessee(s) if the contention of the Department is to be accepted that Finance Act, 2003, 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 upto 1st April, 2004, and who pays the contribution after 1st April, 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 1st April, 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 1st April, 2004. However, the matter before us involves the principle of construction to be placed on the provisions of Finance Act, 2003".

46. A discussion on the Principles of interpretation of tax statutes is warranted. In Ajmera Housing Corporation & Ors. vs. Commissioner of Income17 this court held as follows:

> "27. It is trite law that a taxing statute is to be construed strictly. In a taxing Act one has to look merely at what is said in the relevant provision. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. There is no room for any intendment. There is no equity about a tax. (See: Cape Brandy Syndicate v. Inland Revenue Commissioners (1921) 1 KB 64 and Federation of A.P. Chambers of Commerce and Industry and Ors. v. State of A.P. and Ors.(2000) 6 SCC 550. In interpreting a taxing statute, the Court must look squarely at the words of the statute and interpret them. Considerations of hardship, injustice and equity are entirely out of place in interpreting a taxing statute. (Also see: Commissioner of Sales Tax, Uttar Pradesh v. The Modi Sugar Mills Ltd. 1961 (2) SCR 189.)"

47. Likewise, this court underlined the rule, regarding interpretation of taxing statutes, in Commissioner of Income Tax-III v Calcutta Knitwears, Ludhiana. 18 Recently, in Union of India & Ors. vs. Exide Industries Limited & Ors, this court examined, and repelled a challenge to the constitutionality of Section 43B, especially the provision requiring actual payment, in respect of leave encashment benefit of employees. The court observations in this regard are relevant:

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48. One of the rules of interpretation of a tax statute is that if a deduction or exemption is available on compliance with certain conditions, the conditions are to be strictly complied with. 20 This rule is in line with the general principle that taxing statutes are to be construed strictly, and that there is no room for equitable considerations. 49. That deductions are to be granted only when the conditions which govern them are strictly complied with. This has been laid down in State of Jharkhand v Ambay Cements 21 as follows:

> 23…. In our view, the provisions of exemption clause should be strictly construed and if the condition under which the exemption was granted stood changed on account of any subsequent event the exemption would not operate.
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> 24. In our view, an exception or an exempting provision in a taxing statute should be construed strictly and it is not open to the court to ignore the conditions prescribed in the industrial policy and the exemption notifications.
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> 25. In our view, the failure to comply with the requirements renders the writ petition filed by the respondent liable to be dismissed. While mandatory rule must be strictly observed, substantial compliance might suffice in the case of a directory rule.
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> 26. Whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said

requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed. Since the requirement, in the instant case, of obtaining prior permission is mandatory, therefore, non-compliance with the same must result in cancelling the concession made in favour of the grantee, the respondent herein." 20 See for e.g., Eagle Flask Industries Ltd. v. Commissioner of Central Excise, 2004 Supp (4) SCR 35. 21 State of Jharkhand v Ambay Cements, (2005) 1 SCC 368. 30 This was also reaffirmed in a number of judgments, such as Commissioner Income Tax v. Ace Multi Axes Systems Ltd.

50. The Constitution Bench, in Commissioner. of Customs v. Dilip Kumar & Co. 23 endorsed as following:

"24. In construing penal statutes and taxation statutes, the Court has to apply strict rule of interpretation. The penal statute which tends to deprive a person of right to life and liberty has to be given strict interpretation or else many innocents might become victims of discretionary decision-making. Insofar as taxation statutes are concerned, Article 265 of the Constitution ["265. Taxes not to be imposed save by authority of law.—No tax shall be levied or collected except by authority of law."] prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because the State cannot at their whims and fancies burden the citizens without authority of law. In other words, when the competent legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/interpreted to include those, which were not intended by the legislature.

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34. The passages extracted above, were quoted with approval by this Court in at least two decisions being CIT v. Kasturi & Sons Ltd. [CIT v. Kasturi & Sons Ltd., (1999) 3 SCC 346] and State of W.B. v. Kesoram Industries Ltd. [State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201] (hereinafter referred to as "Kesoram Industries case [State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201]", for brevity). In the later decision, a Bench of five Judges, after citing the above passage from Justice G.P. Singh's treatise, summed up the following principles applicable to the interpretation of a taxing statute:

'(i) In interpreting a taxing statute, equitable considerations are entirely out of place. A taxing statute cannot be interpreted on any presumption or assumption. A taxing statute has to be interpreted in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any deficiency;

(ii) Before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section; and

(iii) If the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject and there is nothing unjust in a taxpayer escaping if the letter of the law fails to catch him on account of the legislature's failure to express itself clearly.'"

51. The analysis of the various judgments cited on behalf of the assessee i.e., Commissioner of Income-Tax v. Aimil Ltd. 24; Commissioner of Income-Tax and another v. Sabari Enterprises25; Commissioner of Income Tax v. Pamwi Tissues Ltd. 26; Commissioner of Income-Tax, Udaipur v. Udaipur Dugdh Utpadak Sahakari Sandh Ltd. 27 and Nipso Polyfabriks (supra) would reveal that in all these cases, the High Courts principally relied upon omission of second proviso to Section 43B (b). No doubt, many of these decisions also dealt with Section 36(va) with its explanation. However, the primary consideration in all the judgments, cited by the assessee, was that they adopted the approach indicated in the ruling in Alom Extrusions. As noticed previously, Alom Extrutions did not consider the fact of the introduction of Section 2(24)(x) or in fact the other provisions of the Act.

52. When Parliament introduced Section 43B, what was on the statute book, was only employer's contribution (Section 34(1)(iv)). At that point in time, there was no question of employee's contribution being considered as part of the employer's earning. On the application of the original principles of law it could have been treated only as receipts not amounting to income. When Parliament introduced the amendments in 1988-89, inserting Section 36(1)(va) and simultaneously inserting the second proviso of Section 43B, its intention was not to treat the disparate nature of the amounts, similarly. As discussed previously, the memorandum introducing the Finance Bill clearly stated that the provisions – especially second proviso to Section 43B - was introduced to ensure timely payments were made by the employer to the concerned fund (EPF, ESI, etc.) and avoid the mischief of employers retaining amounts for long periods. That Parliament intended to retain the separate character of these two amounts, is evident from the use of different language. Section 2(24)(x) too, deems amount received from the employees (whether the amount is received from the employee or by way of deduction authorized by the statute) as income - it is the character of the amount that is important, i.e., not income earned. Thus, amounts retained by the employer from out of the employee's income by way of deduction etc. were treated as income in the hands of the employer. The significance of this provision is that on the one hand it brought into the fold of "income" amounts that were receipts or deductions from employees income; at the time, payment within the prescribed time – by way of contribution of the employees' share to their credit with the relevant fund isto be treated as deduction (Section 36(1)(va)). The other important feature is that this distinction between the employers' contribution (Section 36(1)(iv)) and employees' contribution required to be deposited by the employer (Section 36(1)(va)) was maintained - and continues to be maintained. On the other hand, Section 43B covers all deductions that are permissible as expenditures, or out-goings forming part of the assessees' liability. These include liabilities such as tax liability, cess duties etc. or interest liability having regard to the terms of the contract. Thus, timely payment of these alone entitle an assessee to the benefit of deduction from the total income. The essential objective of Section 43B is to ensure that if assessees are following the mercantile method of accounting, nevertheless, the deduction of such liabilities, based only on book entries, would not be given. To pass muster, actual payments were a necessary pre-condition for allowing the expenditure.

53. The distinction between an employer's contribution which is its primary liability under law – in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers' income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) - unless the conditions spelt by Explanation to

> Section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts – the employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer. This marked distinction has to be borne while interpreting the obligation of every assessee under Section 43B.
> 54. In the opinion of this Court, the reasoning in the impugned judgment that the non-obstante clause would not in any manner dilute or override the employer's obligation to deposit the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of Section 43B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assessees are given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such 34 interpretation were to be adopted, the non-obstante clause under Section 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction.
> 55. In the light of the above reasoning, this court is of the opinion that there is no infirmity in the approach of the impugned judgment. The decisions of the other High Courts, holding to the contrary, do not lay down the correct law. For these reasons, this court does not find any reason to interfere with the impugned judgment. The appeals are accordingly dismissed.

It has finally been held by Hon'ble Court that there is clear distinction between employer's contribution which is its primary liability under law [in terms of Section 36(1)(iv)] and its liability to deposit amounts received by it or deducted by it from its employees' [in terms of Sec. 36(1)(va)]. The former forms part of the employers' income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x)

and therefore, subjected to conditions spelt out by Explanation to Section 36(1)(va) i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two contributions – the employer's liability is to be paid out of its income whereas the second is deemed to be an income, by definition, since it is the deduction from the employees' income and held in trust by the employer. This marked distinction has to be borne while interpreting the obligation of every assessee under Section 43B. If the same is not deposited as per mandate of Sec.36(1)(va), the deduction of the same would not be available to the assessee. Thus, this issue stands in favor of revenue and we respectfully follow the same.

4. At the same time, we are of the considered opinion that this decision of Hon'ble Court would relate back to the date of consequential amendment brought in by legislatures in respective provisions of the act and it was to be presumed that the legal position was always like that i.e., both the contributions were to be treated differently since inception and the Employee's contribution was always subjected to rigors of Sec.36(1)(va). If the assessee complies with the same only then the deduction would be allowed to the assessee otherwise the same would continue to form the income of the assessee. The said decision, in our opinion, is to be given full consequential effect.

5. The Ld. Authorized representatives, for assessee, however, assails the adjustment so made in intimations issued by Centralized Processing Center (CPC) while processing the return of income u/s 143(1) which primarily flows from the reporting made by Tax Auditor in the Tax Audit Reports which the assessee is obligated to furnish along with return of

income. Based on defaults reported by Tax Auditor, the CPC has disallowed late payment by employees' contribution to PF / ESI and accordingly, processed the return of income. Aggrieved, the assessee is in further appeal before us.

Arguments Before us

6.1 In one of the arguments, it has been submitted that the scope of Sec.143(1) is very limited and narrow. The provisions of Sec.143(1)(a)(ii) enable revenue to make adjustment of incorrect claim which is apparent from any information in the return of income. The expression "an incorrect claim apparent from any information in the return", as defined in the explanation would mean a claim, on the basis of any entry, in the return – (i) of an item which is inconsistent with another entry of the same or some other item in such return; (ii) in respect of which information required to be furnished under this act to substantiate such entry has not been furnished; or (iii) in respect of a deduction, where such deduction exceeds specified statutory limit which may have been expressed as monetary amount of percentage or ratio of fraction. It has been submitted that the return of income does not contain any information relating to belated remittance of PF & ESI and therefore, this adjustment could not have been made by CPC while processing the return of income.

6.2 It has further been submitted that Sec. 143(1) restricts the Assessing Officer (CPC) to only deal with the claims that are apparent from any information in the return. The word 'apparent' means something which appears to be so ex-facie and is incapable of argument or debate. In other words, the debatable point of law or fact cannot be corrected by way of processing u/s 143(1). The issue of deduction of PF / ESI has

been subjected to debate and there exist divergent opinion of High Courts. The decision of Hon'ble Supreme Court has put a quietus to this issue only on 12.10.2022 whereas the returns has been processed by CPC much before that date on which the issue was a debatable issue and therefore, the same could not be disallowed u/s 143(1). To support the same, reliance has been placed on various case laws. On the basis of the same, it has been submitted that adjustment of deduction u/s 36(1)(va) is beyond the scope of Sec.143(1).

6.3 In yet another submissions, it has been submitted that whether such disallowance / addition u/s 36(1)(va) could be made while processing the return of income u/s 143(1) has not been answered by Hon'ble Supreme Court and the issue is still unaddressed.

6.4. Another argument is that disallowance of expenditure or increase in income indicated in the audit report but not taken into account in computing the total income in the return of income as provided under sub-clause (iv) of Sec.143(1)(a) has been inserted by Finance Act, 2021 w.e.f. 01.04.2021 by insertion of the expression 'or increase in income'. Therefore, only after this amendment the AO, CPC is vested with the jurisdiction to make adjustment on account of increase in income indicated in the audit report but not taken into account in computing the total income. Before that date, the adjustment on account of 'increase in income' was not in accordance with law.

6.5 It was also submitted that the Tax Audit report is not a certificate and therefore, the findings in the audit report are not conclusive, From AY 2020-21 onwards, the law entails the assessee to furnish audit report one month prior to the due date of filing of return of income u/s 139(1).

All the details in the audit report need not necessarily be accepted by the assessee while filing his return of income.

6.6 The Ld. Sr. DR, on the other hand, filed written arguments and submitted that the issue stood squarely covered in revenue's favor and the position of law was always like the one as expounded by Hon'ble Supreme Court. The Ld. Sr. DR submitted that the issue was never debatable considering the cited decision of Hon'ble Supreme Court. Reliance was placed on the decision of Hon'ble High Court of Madras in **Southern Industrial Corporation vs. CIT (258 ITR 481).** The Ld. Sr. DR further submitted that the law declared by the Hon'ble Supreme Court has effect not only from the date of decision but also from the date of incorporation of statutory provision [**R. Kuppusamy Mudaliar & Sons vs. Board of Revenue 45 STC 152 (Mad.)]**. Regarding the argument that the provision of Sec.143(1)(a)(iv) was amended only on 01.04.2021 to include the words "in income", the Ld. Sr. DR submitted that Sec.36 deals with deductions only. Therefore, even before the amendment, this adjustment was permissible. Finally, Ld. Sr. DR submitted that items of income are picked up from Sl. No.21(d);25;29A;29B etc. of Tax Audit Report Form 3CD while processing u/s 143(1) whereas the wrong claim of deduction u/s 36(1)(va) is picked up from Sl. No.20(b) of Form 3CD of the Tax Audit Report.

6.7 Having heard rival submissions and after due consideration of material before us, our adjudication would be as under.

Our findings and Adjudication

7. We find that the provisions of Section 2(24) enumerate different components of income. The income as defined therein 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 thus clear that as soon as the Employer receives any contribution from its employees towards provident fund or ESI by way of deduction or otherwise, then the same is treated as income of the assessee. If the assessee deposit the same as per the mandate of Sec. 36(1)(va), the deduction of the same is allowed to the assessee otherwise the right to claim the deduction is lost forever. In other words, the contribution is first treated as deemed income of the assessee and thereafter, the deduction of the same is allowed to the assessee if the conditions of Sec.36(1)(va) are met. The CPC, as is evident, has denied this deduction to the assessee since the assessee did not fulfil the mandate of Sec.36(1)(va). It could also be seen that this is not an increase in income but disallowance of expenditure, the adjustment of which is covered u/s 143(1)(a)(iv) which provide that the disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return could be made while processing the return of income. The amendment made w.e.f. 01.04.2021 by insertion of words ‘increase in income’ would have no impact on such disallowance since it is only a disallowance of expenditure and the revenue is very well entitled to make such an adjustment u/s 143(1)(a)(iv).

8. The impugned adjustment, in our opinion, would also fall u/s 143(1)(a)(ii) since it is an incorrect claim which is apparent from any information in the return. The adjustment made by CPC flows from reporting made by Tax Auditor in Tax Audit Report in Form 3CD. As per statutory mandate, the assessee is required by law to get its accounts

audited u/s 44AB if its turnover crosses threshold turnover. The purpose of the audit is to enable the revenue to make correct computation of assessee's income. A proper audit would, inter-alia, ensure that the claims for deduction are correctly made. The report is required to be furnished by the assessee along with return of income to enable revenue to make correct computation of income. The reporting made therein could certainly be available to CPC to make the adjustment of defaults reported therein since the same would be apparent from information contained in the return. As noted earlier, the contribution is first treated as income of the assessee and thereafter, the deduction of the same has to be claimed by the assessee. Therefore, the columns in the Profit & Loss Account in the return of income has to be filled in this manner only i.e., the contribution is to be first added to the income of the assessee and thereafter, the deduction of the same would be claimed by the assessee. In other words, the assessee would first add the same to its income and thereafter, it would claim deduction after crossing the hurdle of Sec.36(1)(va). Since the claim made by the assessee is inconsistent with the reporting made by Tax Auditor, it was an incorrect claim which CPC has rightly disallowed.

9. Another argument is that the debatable issues could not be subject matter of adjustment u/s 143(1). However, so far as the revenue is concerned, this issue is not debatable for the revenue. The revenue has always maintained a position that the claim is allowable to assessee only when the contribution is deposited as per the mandate of Sec.36(1)(va) otherwise not. Therefore, it is incorrect to say that the issue is debatable one. The Hon'ble Supreme Court has upheld the stand of the revenue.

10. The Hon'ble High Court of Madras in **Southern Industrial Corporation vs. CIT (258 ITR 481)** held that when a statutory provision is interpreted by the Apex Court in a manner different from the interpretation made in the earlier decisions by a smaller Bench, the order which does not conform to the law laid down by the larger Bench in the later decision which decision would constitute the law of the land and is to be regarded as the law as it always was, unless declared by the court itself to be prospective in operation, would clearly suffer from a mistake which would be apparent from the record. Therefore, in the present case, the law laid down by Hon'ble court is to be regarded as law of land and it was to be presumed that the law was always like that.

11. The case law of Hon'ble Supreme Court in **Kvaverner John Brown Engg. (India) P. Ltd. V/s ACIT (305 ITR 103),** as referred on behalf of assessee, deal with deduction u/s 80-O for which two interpretations were possible viz. the deduction could be computed at gross value or the same could be computed on net value. The same is not the case here. The action of revenue is in accordance with the law laid down by Hon'ble Supreme Court in the cited decision. In fact, Hon'ble High Court of Madras in **Tamilnadu Magnesite Ltd. vs DCIT (303 ITR 71)** held that where the amount was inadmissible in view of Sec.43B which overrides section 36(1) of the Act, the revenue was well within its power to make a prima facie adjustment in the computation of taxable total income while processing return of income under Section 143(1)(a) of the Act. The aforesaid decision supports our view.

12. The decision of Hon'ble High Court of Bombay in **Bajaj Auto Finance Ltd. vs. CIT (93 Taxmann.com 63)** as referred before us deals with case of debatable issue and hence distinguishable. The case law of

Chandigarh Tribunal in **Lanjani Co-operative Agri Service Society Ltd. vs DCIT (ITA No.332/Chd/2021 dated 30.08.2022)** relates with adjustment u/s 143(1)(a)(v) which is not the case here. The case law of Visakhapatnam Tribunal in **S.V.Engineering Constructions India (P.) Ltd. vs DCIT (ITA No.130/Viz/2021 dated 23.09.2021)** relies on another decision of Tribunal in **Andhra Trade Development Corp. Ltd. (ITA No.434/Viz/2019 dated 05.05.2021)** which deal with set-off of losses. In this decision, the bench also dealt with the merits of the case by following earlier view which has now been reversed by Hon'ble Supreme Court. The decision of Delhi Tribunal in **SVS Guarding Services Pvt. Ltd. vs ITO (ITA No.231/Del/2022 dated 24.05.2022)** held that the issue whether the amendment made by Finance Act, 2021 was retrospective or prospective was debatable and controversial and consequently, the adjustment was beyond the scope of Sec.143(1). Further the bench did not specifically examine the applicability of clauses (ii) and (iv) of Sec.143(1)(a) in that decision. The subsequent decision of the bench in **360 Realtors LLP vs. ADIT (ITA No.303/Del/2022 dated 26.09.2022)** is substantially on same lines. All these case laws have been rendered before the recent decision of Hon'ble Supreme Court which has settled the law since its inception. Therefore, all these case laws do not render any assistance to the case of the assessee.

13. In the above background, the captioned appeals are disposed-off as under: -

(i) ITA No.789/Chny/2022

The CPC processed the return of income and issued an intimation u/s 143(1) on 21.01.2021. The CPC denied deduction of Rs.28.45 Lacs for late payment of PF / ESI as indicated in the Tax Audit Report under the

head ‘disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return-143(1)(a)(iv). The Ld.CIT(A) confirmed the same on the ground that CPC was empowered to make such an adjustment as Auditor had indicated the default in the Tax Audit Report. But the assessee claimed it in the return of income against the Audit Report. The Ld. CIT(A) relied on the clarificatory amendment made by Finance Act, 2021 and confirmed the additions. Aggrieved, the assessee is in further appeal before us.

(ii) ITA No.813/Chny/2022

The CPC processed the return of income and made similar disallowance of Rs.2.88 Lacs in an intimation issued u/s 143(1) on 24.12.2021. The Ld. CIT(A) confirmed the same against which the assessee is in further appeal before us.

(iii) ITA No.788/Chny/2022

The CPC processed the return of income and made similar disallowance of Rs.21.40 Lacs in an intimation issued u/s 143(1) on 05.05.2020. The adjustment was made under the head ‘disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return- 143(1)(a)(iv). The Ld.CIT(A) confirmed the same against which the assessee is in further appeal before us.

(iv) ITA No.756/Chny/2022

The CPC processed the return of income and made similar disallowance of Rs.31.48 Lacs in an intimation issued u/s 143(1) on 19.01.2019. The adjustment was made under the head ‘disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return-143(1)(a)(iv). The Ld.CIT(A) confirmed the same against which the assessee is in further appeal before us.

14. Respectfully following the recent decision of Hon'ble Supreme Court in bunch of appeals titled as **Checkmate Services P. Ltd. Vs CIT (Civil Appeal No.2833 of 2016 dated 12.10.2022)** and considering our findings and adjudication in preceding paragraphs, the impugned disallowances stand confirmed. All the appeals stand dismissed.

15. All the appeals stands dismissed.

Order pronounced on 04th November, 2022.

Sd/-	**Sd/-**
(V. DURGA RAO)	**(MANOJ KUMAR AGGARWAL)**
न्यायिक सदस्य /JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

चेन्नई / Chennai; दिनांक / Dated : 04-11-2022
EDN/-

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

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