

आयकर अपीलीय अधिकरण न्यायपीठ रायपुर में।
IN THE INCOME TAX APPELLATE TRIBUNAL,
RAIPUR BENCH, RAIPUR

BEFORE SHRI RAVISH SOOD, JUDICIAL MEMBER
AND
SHRI ARUN KHODPIA, ACCOUNTANT MEMBER

आयकर अपील सं./ ITA No. 96/RPR/2021

निर्धारण वर्ष / Assessment Year : 2011-12

The Assistant Commissioner of Income Tax
(Central Circle)-1, Raipur (C.G.)

.....अपीलार्थी / Appellant

बनाम / V/s.

M/s. Chhattisgarh Steel & Power Limited
142, Sahid Smarak, G.E. Road,
Raipur (C.G.)
PAN: AACCC7479G

.....प्रत्यर्थी / Respondent

Assessee by : Ms. Puja Bajaj, CA
Revenue by : Shri Piyush Tripathi, Sr. DR

सुनवाई की तारीख / Date of Hearing : 05.06.2023

घोषणा की तारीख / Date of Pronouncement : 01.08.2023

आदेश / ORDER**PER RAVISH SOOD, JM:**

The present appeal filed by the revenue is directed against the order passed by the CIT(Appeals)-3, Bhopal, dated 17.08.2021, which in turn arises from the order passed by the A.O. u/s.143(3) of the Income-tax Act, 1961 (for short 'Act'), dated 28.03.2014 for A.Y. 2011-12. The revenue has assailed the impugned order on the following grounds of appeal before us:

“1. On the facts and in the circumstances of the case, the ld. CIT(A) erred in deleting the addition of Rs.1,02,18,074/- made by the Assessing Officer u/s 14A r.w.r. 8D of the Income Tax Act, 1961.

2. On the facts and in the circumstances of the case, the ld. CIT(A) erred in deleting the addition of Rs.1,24,448/- made by the Assessing Officer on account of ESIC payment made beyond due date.

3. On the facts and in the circumstances of the case, the ld. CIT(A) erred in deleting the addition of Rs.89,41,411/- made by the Assessing Officer on account of the fact that the loss of the assessee company was reduced by Rs.89,41,411/- by scrutiny proceedings u/s143(3) of the Income Tax Act, 1961 and that the effects of the same was not brought forward by the assessee company in its return of income for A.Y. 2011-12 which was filed before completion of assessment.”

2. As pointed out by the registry a delay of 8 days is involved in filing of the captioned appeals by the revenue. However, as clarified by the Dy. CIT, Central-1, Raipur vide his letter dated 16.11.2021 the impugned delay in filing of the appeal is covered by the order of the Hon'ble Supreme Court of India in Suo Moto Writ Petition (Civil) No.3 of 2020 dated 23.03.2020 which was thereafter modified vide further order(s) dated 08.03.2021,

27.04.2021, 23.09.2021 and 10.01.2022. We, thus, finding the appeals filed by the revenue within the prescribed period of limitation admit the same.

3. Succinctly stated, the assessee company which is engaged in the business of generation and transmission of power had e-filed its return of income for A.Y.2011-12 on 15.10.2010, declaring its total income at Rs.76,44,910/-. Case was thereafter selected for scrutiny assessment and notice u/s. 143(2) of the Act was issued to the assessee company.

4. The A.O vide his order passed u/s. 143(3) of the Act, dated 28.03.2014, determined the income of the assessee company at Rs.2,69,28,880/- after, inter alia, making following additions/disallowances:

Sr. No.	Particulars	Amount
1.	Addition towards PF & ESI contribution u/s. 2(24)(x) of the Act.	Rs. 1,24,484/-
2.	Disallowance u/s.14A r.w.r. 8D	Rs.1,02,18,074/-
3.	Addition on account of unabsorbed depreciation reduced to the extent for the last year A.Y.2010-11	Rs. 89,41,411/-

5. Aggrieved the assessee company carried the matter in appeal before the CIT(Appeals) who partly allowed the same in so far the aforesaid additions/disallowances were concerned.

6. The revenue being aggrieved with the order of the CIT(Appeals) has carried the matter in appeal before us.

7. We have heard the ld. authorized representatives of both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them to drive home their respective contentions. As multi-facet issues are involved in the present appeal, therefore, we shall deal with the same as under:

A). Re : Disallowance of Rs.1,02,18,074/- u/s.14A r.w.r. 8D

8. The Ld. Departmental Representative (for short 'DR') submitted that the CIT(Appeals) had erred in deleting the disallowance of Rs.1,02,18,074/- made by the A.O u/s.14A r.w.r.8D of the Income Tax Rules, 1963. It was submitted by the Ld. DR that the assessee company which had made an investment of Rs.19,26,07,755/- in exempt dividend income yielding unquoted shares of several companies, as per its balance sheet had raised secured loans from SBI and State Bank of Indore a/w interest bearing loans on which it had paid interest of Rs. 6,05,62,408/-, therefore, the A.O had rightly worked out a disallowance of Rs.1,02,18,074/- u/s.14A r.w Rule 8D of the Income-tax Rules, 1963.

9. Per Contra, it was the claim of the Ld. Authorized Representative (for short 'AR') that the assessee company had not earned any exempt income during the year under consideration and investment was made out of its own funds. Carrying her contention further, it was submitted by the Ld. AR that the CIT(Appeals) had specifically observed that the assessee company had during the year not earned any exempt income. It was submitted by the Ld. AR that in absence of any exempt income the provisions of Section 14A could not be triggered. The Ld. AR in support of her aforesaid contention had placed reliance on the decision of the ITAT, Raipur Bench in the case of Ind Synergy Ltd. Vs. DCIT, ITA No.312/RPR/2016 dated 30.03.2022. It was further submitted by the Ld. AR that as the assessee company had interest free funds by way of share capital of Rs.41 crore and reserves & surplus of Rs.15.74 crore aggregating to Rs.56.74 crore which were more than the investment made by it in exempt dividend income yielding shares, therefore, no disallowance of any part of interest expenditure was called for in its case. Ld. AR in support of her aforesaid contention that no disallowance u/s.14A can be made in respect of interest paid on borrowings if assessee's own funds and non-interest-bearing funds exceeds investments in tax free securities had relied on the following decisions:

- (i) South India Bank Ltd. Vs. CIT (2021) 438 ITR 1 (SC)
- (ii) HDFC Bank Vs. DCIT (2016) 383 ITR 529 (Bom.)

10. After having given a thoughtful consideration to the contentions advanced by the Ld. Authorized Representative of both the parties, we find substantial force in the claim of the Ld. AR that now when the assessee company had admittedly not received any exempt income during the year under consideration, therefore, no disallowance u/s.14A of the Act was called for in its hand. Our aforesaid view is fortified by the judgment of the **Hon'ble Supreme Court** in the case of **CIT Vs. Chettinad Logistics Pvt. Ltd. (2018) 257 Taxmann 2 (SC)** and also of the **Hon'ble High Court of Delhi** in the case of **Cheminvest Limited Vs. CIT, (2015) 378 ITR 33 (Delhi)**. Backed by the aforesaid judicial pronouncements, it was submitted by the Ld. AR that as per the settled position of law no disallowance u/s.14A in absence of any exempt income could have been made in the hands of the assessee company. In the backdrop of the facts involved in the case before us r/w. the aforesaid settled position of law we find substance in the claim of the Ld. AR that now when the assessee company had not received any exempt dividend income during the year under consideration, therefore, no disallowance u/s.14A of the Act was warranted in its case. We, thus, in terms of our aforesaid observations finding no infirmity in the view taken by the CIT(Appeals) uphold the same. Thus, the **Ground of Appeal No.1** raised by the revenue is dismissed in terms of our aforesaid observations.

B. Re : Disallowance of Rs.1,24,448/- on account of ESIC

11. The grievance of the revenue is that the CIT(Appeals) had erred in deleting the disallowance of Rs.1,24,448/- made by the A.O on account of the assessee's claim for deduction of delayed deposit of employee's share of contribution towards Labour Welfare Funds, viz. EPF amounting to Rs.1,24,448/-.

12. Admittedly, it is a matter of fact borne from record that the Hon'ble Apex Court in the case of Checkmate Services Pvt. Ltd. Vs. Commissioner of Income Tax-I, Civil Appeal No.2833 of 2016 dated 12.10.2022, while clarifying the position of law, had held that the delayed deposit of employee's share of contribution towards labour welfare funds, viz. Employee's Provident fund (EPF) and Employee's State Insurance (ESI) is liable to be disallowed as per the mandate of Section 36(1)(va) r.w.s 2(24)(x) of the Act.

13. Considering the law laid down by the Hon'ble Apex Court in the case of Checkmate Services P. Ltd. Vs. Commissioner of Income Tax-I (supra), we are of the considered view that the delayed deposit of employee's share of contribution towards EPF & ESI is liable to be disallowed as per the mandate of Section 36(1)(va) r.w.s. 2(24)(x) of the Act. The Hon'ble Apex Court had observed that the employee's share of contribution towards ESI & EPF deposited by the assessee beyond the due dates prescribed under

the said respective Acts would by virtue of Section 36(1)(va) r.w.s. 2(24)(x) of the Act constitute the income of the assessee. It was observed by the Hon'ble Apex Court as under:

“Analysis and Conclusions

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.

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.

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:16 "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) M.M. Aqua Technologies Ltd. vs. Commissioner of Income Tax, Delhi, 2021 SCC OnLine SC 575.

[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

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 assessee(s) collecting sales tax and other indirect taxes from their respective customers and claiming deduction only by making provision in their books without actually remitting the amount to the exchequer. To curb this practice, Section 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 aforesaid 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.

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.

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.

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 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

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).

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 a 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, 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,¹⁹ 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:

“20. Section 43B, however, is enacted to provide for deductions to be availed by the Assessee in lieu of liabilities accruing in previous year without making actual payment to discharge the same. It is not a provision to place any embargo upon the autonomy of the Assessee in adopting a particular method of accounting, nor deprives the Assessee of any lawful deduction. Instead, it merely operates as an additional condition for the availment of deduction qua the specified head.

Ajmera Housing Corporation & Ors. vs. Commissioner of Income, 2010 (8) SCC 739.

Commissioner of Income Tax-III v Calcutta Knitwears, Ludhiana 2014 (6) SCC 444.

Union of India & Ors. vs. Exide Industries Limited & Ors., 2020 (5) SCC 274.

21. Section 43B bears heading "certain deductions to be only on actual payment". It opens with a non-obstante clause. As per settled principles of interpretation, a non obstante Clause assumes an overriding character against any other provision of general application. It declares that within the sphere allotted to it by the Parliament, it shall not be controlled or overridden by any other provision unless specifically provided for. Out of the allowable deductions, the legislature consciously earmarked certain deductions from time to time and included them in the ambit of Section 43B so as to subject such deductions to conditionality of actual payment. Such conditionality may have the inevitable effect of being different from the theme of mercantile system of accounting on accrual of liability basis qua the specific head of deduction covered therein and not to other heads. But that is a matter for the legislature and its wisdom in doing so.

22. The existence of Section 43B traces back to 1983 when the legislature conceptualised the idea of such a provision in the 1961 Act. Initially, the provision included deductions in respect of sum payable by Assessee by way of tax or duty or any sum payable by the employer by way of contribution to any provident fund or superannuation fund. It is noteworthy that the legislature explained the inclusion of

these deductions by citing certain practices of evasion of statutory liabilities and other liabilities for the welfare of employees...”

23. With the passage of time, the legislature inserted more deductions to Section 43B including cess, bonus or commission payable by employer, interest on loans payable to financial institutions, scheduled banks etc., payment in lieu of leave encashment by the employer and repayment of dues to the railways. Thus understood, there is no oneness or uniformity in the nature of deductions included in Section 43B. It holds no merit to urge that this Section only provides for deductions concerning statutory liabilities. Section 43B is a mix bag and new and dissimilar entries have been inserted therein from time to time to cater to different fiscal scenarios, which are best determined by the government of the day. It is not unusual or abnormal for the legislature to create a new liability, exempt an existing liability, create a deduction or subject an existing deduction to override regulations or conditions.

24. The leave encashment scheme envisages the payment of a certain amount to the employees in lieu of their unused paid leaves in a year. The nature of this payment is beneficial and pro-employee. However, it is not in the form of a bounty and forms a part of the conditions of service of the employee. An employer seeking deduction from tax liability in advance, in the name of discharging the liability of leave encashment, without actually extending such payment to the employee as and when the time for payment arises may lead to abhorrent consequences. When time for such payment arises upon retirement (or otherwise) of the employee, an employer may simply refuse to pay. Consequently, the innocent employee will be entangled in litigation in the evening of his/her life for claiming a hard-earned right without any fault on his part. Concomitantly, it would entail in double benefit to the employer - advance deduction from tax liability without any burden of actual payment and refusal to pay as and when occasion arises. It is this mischief Clause (f) seeks to subjugate.”

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.

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.

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.

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.” See for e.g., *Eagle Flask Industries Ltd. v. Commissioner of Central Excise*, 2004 Supp (4) SCR 35.

State of Jharkhand v Ambay Cements, (2005) 1 SCC 368.

This was also reaffirmed in a number of judgments, such as *Commissioner of Income Tax v. Ace Multi Axes Systems Ltd.*²²

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.

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 Commissioner of Income Tax v. Ace Multi Axes Systems Ltd., 2018 (2) SCC 158 Commissioner. of Customs v. Dilip Kumar & Co, 2018 (9) SCC 1.

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 Dugdhd 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 Extrusions 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 Commissioner of Income-Tax Vs. Aimil Ltd., [2010] 321 ITR 508 (Delhi High Court).

Commissioner of Income-Tax and another Vs. Sabari Enterprises, [2008] 298 ITR 141 (Karnataka High Court).

Commissioner of Income Tax Vs. Pamwi Tissues Ltd., [2009] 313 ITR 137 (Bombay High Court).

Commissioner of Income-Tax, Udaipur v. Udaipur Dugdh Utpadak Sahakari Sandh Ltd., [2013] 35 taxmann.com 616 (Rajasthan High Court).

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 is to 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 assessee's 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 assessee is 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 latter 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 assessee is 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 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.”

As the issue involved in the present appeal is no more *res-integra* pursuant to the aforesaid judgment of the Hon'ble Apex Court in the case of Checkmate Services P. Ltd. Vs. Commissioner of Income Tax-I (supra), therefore, in terms of our aforesaid observations we respectfully follow the same and uphold the view taken by the AO and sustain the disallowance of the delayed deposit of employees share of contribution towards EPF of Rs.1,24,448/-. Thus, the **Ground of appeal No. 2** raised by the revenue is allowed in terms of our aforesaid observations.

**C. Re : Disallowance of Rs.89,41,411/- on unabsorbed depreciation/
business loss**

14. We shall now deal with the grievance of the revenue that the CIT(Appeals) had erred in deleting the addition of Rs.89,41,411/- made by the A.O.

15. As is discernible from the assessment order, it was observed by the A.O that an unabsorbed depreciation of the assessee company was adjusted by the A.O while framing regular assessment in its case for the immediately preceding year, viz. A.Y.2010-11. It was further observed by the A.O that the assessee company had failed to give effect to the adjustment of the aforesaid unabsorbed depreciation in its return of income for the year under consideration i.e AY 2011-12, for the reason that the same was filed during the pendency of the regular assessment for the aforementioned preceding year i.e. A.Y. 2010-11. Backed by the aforesaid facts the A.O made an addition of Rs.89,41,411/- to the returned income of the assessee.

16. Before the CIT(Appeals), it was the claim of the assessee company that failure on its part to give effect to the unabsorbed depreciation as against its assessed income for the preceding year ought to have been reduced from the amount of b/forward unabsorbed depreciation and business losses of the earlier year, and not by making an addition in the

hands of the assessee company as had been done by the A.O. Elaborating on his aforesaid contention, it was submitted by the assessee company that in case if the addition made by the A.O of Rs.89,41,411/- was sustained, then it would create double effect and it would effectively result to double deduction of the b/forward loss in the hands of the assessee company. The CIT(Appeals) after deliberating at length on the contentions advanced by the assessee found favour with the same and vacated the addition of Rs.89,41,411/-, observing as under:

“4.3.1. The appellant during the appellate proceedings also contended that this addition of Rs. 89,41,411/- has already been deleted by CIT(Appeals)-1, Raipur vide order dated 10.07.2020 for A.Y. 2010-11. I have carefully examined the case, submissions of the appellant put forth before me and order of CIT(Appeals)-1, Raipur passed on 10.07.2020 vide Appeal No. CIT(A)-1/RPR/A.No.163/13-14/20-21. The relevant portion of the order of CIT (Appeals)-1, Raipur is as under:-

"I have considered the grounds of appeal, gone through the submissions of the appellant, and seen the order of the AO. From the balance sheet of the year under consideration I observe that the appellant has declared sales at Rs. 94,13,28,810/- and other income at Rs.17,80,03,4 aggregating to Rs.94,31,08,844/-. Reserves and surplus for the year under consideration is 15,74,19,102. The break up of loans from State Bank of Indore, SBI, have been provided along with the interest. It is demonstrated that the appellant company has surplus own funds for investments other than interest bearing funds from banks. 4. In the schedule to the fixed assets at Schedule-E in the financial statement I notice that there are additions to fixed assets during the year to plant and machinery. Thus it is apparent that the loans taken by the appellant have been used for installation of plant and machinery, stock and work in Progress. Interest paid on loans is for business purposes, and the loans have been invested mainly in the fixed assets. It was demonstrated that the appellant company, had non-interest bearing funds as stated above at its disposal which was more than that of interest bearing funds. The Hon'ble Bombay High in in the case of CIT v HDFC Bank in ITA 330 of 2012 held that no disallowance u/s

14A can be made in respect of interest paid on borrowings if assessee's own funds and non-interest bearing funds exceeds investments in tax free securities. Moreover no exempt income has been claimed and no expenses on the said income has been claimed. Adverting to section 14A of the Act the provisions are entitled expenditure incurred in relation to income not includable in total income'. Sub-section 2 of 14A empowers the assessing officer to determine the amount of expenditure incurred in relation to such income which does not form part of the total income under this Act in accordance with Page 7 of 9 Chhattisgarh Steel and Power Limited, A Y.2010-11, Appeal No. 163/13-14 such method as may be prescribed, and sub-section 3 of section 14A of the Act enjoins that the provisions of sub-section 2 shall apply in relation to a case where an assessee claims that no expenditure has been incurred by him in relation to income which does not form part of the total income under this Act. From the above provisions it is clear that what is required to be disallowed is expenditure incurred in relation to income not includible in total income. Where there is no exempt income the disallowance of expenditure in relation to such income does not arise. The Act empowers the AO to determine expenditure even where cm assessee claims that no expenditure had been incurred by him, and not where no such income has been claimed by him. The disallowance of such expenditure is required to be made in relation to income not includible in total income. I observe from the balance sheet and P&L A/c that no such exempt income has been claimed by the appellant. The expenses debited are directly related to the business of the appellant and have been incurred for the purpose of tile business. The AO has himself. observed at the beginning of his order that the appellant produced the books of accounts which have been examined by him. The expenses are duly recorded in the books of accounts and therefore the contentions of the AO that the appellant has incurred huge interest expenses which have taken by the AO for disallowance is without any basis. 5. No material has been brought on record in the assessment for the disallowances made u/s. 14A r.w.r. 8D of the IT rules which are based on presumptions and surmises. In the case of CIT v. Chettinad Logistics (P) Ltd. SLP Diary No. 15631 of 2018 the Supreme Court has dismissed the SLP filed by the revenue against the order of Madras High Court after discussion on merits. Where the department filed SLP to appeal against the judgment of the Madras High Court in CIT v. Chettinad Logistics (P) Ltd. (2017) 248 Taxman 55 (Mad), whereby the High Court held that there was no dividend income in relevant assessment year, therefore, addition made by the AO relying on section 14A was completely contrary to provisions of that section as rule 8D only provides for a method to determine the amount of expenditure incurred in relation to the income, which does not form part of the total income of assessee the

Supreme Court dismissed the SLP on the ground of delay as well as on merits. Also in the case of PCIT v. Sintex Industries limited reported in 255 Taxman 171 the hon'ble Supreme Court dismissed the SLP against the decision of the Hon'ble Gujarat High Court in this case reported in 248 Taxman 449 where the hon'ble Gujarat High Court had held that where the assessee had its surplus fund against which investments was made, no question of making any disallowance of expenditure in respect of interest and administrative expenses u/s.14A of the Act arose, there was no question of any estimation of expenditure in respect of interest and administrative expenses u/r.8D. In view of the above facts and judicial pronouncements the disallowance u/s. 14A read with rule 8D is unsustainable hence deleted. This ground of appeal is allowed. 6. The second ground of appeal relates to addition of Rs.2,00,000/- last year disallowance once again in current year. It was observed by the AO as under: Assessee has filed assessment order for the AY 209-10 in which the AO TO-1(1) Raipur has added Rs.2,00,000/- reducing the claims losses by assessee. However its effect has not been brought forward as return was filed before completion of the assessment. Therefore the effect of addition is given in this order by adding Rs. 2,00,000/- to the returned loss. Page 9 7. In the result the appeal is allowed. (R. K. Singh) Commissioner of Income Tax (Appeals)-I Raipur, (C.G.) Chhattisgarh Steel and Power Limited, AY: 2010-11, Appeal No. 163/13-14 During the appeal proceedings the Ld. counsels appearing on behalf of the appellant made written submissions along with the case laws which are reproduced as under: In respect of the Second addition made by learned A.O. for addition in respect of A.Y. 2009-10 of Rs.2,00,000/-, is also not relevant because the effect of said addition is to be given in "brought forward depreciation and loss of earlier year" and it should not be made as an addition. Because if it is made as an addition, then it will create double effect of the same, as it will result in double reduction of the loss. Hence there is no need to add once again in current year proceedings. Hence this addition deserves to be deleted. Kindly delete the addition made by learned A.O. of Rs. 2,00,000/- and provide relief of Rs. 2,00,000/- (GROUND-2 OF APPEAL) Please favourably consider the written submission & oblige.

I have considered the grounds of appeal, gone through the submissions of the appellant and seen the order of the A.O. I am in agreement with the views of the appellant that what is required to be reduced is the brought forward loss of earlier by giving effect additions so made. By making an addition again of the same amount/item for the year under consideration is a double addition. Subject to the above. the addition is deleted and this ground of appeal is allowed

4.3.1. Keeping in view of above and to avoid the double taxation upon the appellant, the addition made by the AO amounting to Rs: 89,41,411/- is Deleted. Therefore, the appeal on this ground is Allowed.”

17. Controversy pertaining to the addition of Rs.89,41,411/- (supra), which thereafter was vacated by the CIT(Appeals) would require understanding the issue which though initially appeared to be simple but in fact is found to be contentious. It would be relevant to cull out the details of the unabsorbed depreciation/loss that finds its genesis in the return of income filed by the assessee for A.Y.2009-10 and was thereafter b/forward by the assessee company to the year under consideration i.e. A.Y.2011-12, as under:

Particulars	A.Y. 2009-10	A.Y. 2010-11	A.Y. 2011-12
Unabsorbed depreciation/loss as per return	Rs. 4,02,53,916/-	B/f figure from A.Y. 2009-10 was Rs. 4,02,53,916/-	B/f figure from A.Y. 2009-10 was Rs. 4,02,53,916/- was wholly set off against income of current year
Addition made by AO during the year	Rs. 2,00,000/-	Rs. 87,41,411/-	Rs. 89,41,411/-
Appeal filed by assessee	No	Yes	Yes
Relief allowed	Not applicable	Rs. 87,41,411/-	Rs. 89,41,411/-
Actual reduced carried forward loss should be	Rs. 4,00,53,916/-	Rs. 4,00,53,916/-	Rs. 4,00,53,916/- Reduction of loss to the extent of Rs. 2,00,000/- is correct since no appeal was filed by the assessee against this addition

Facts relevant for adjudicating the issue in hand are culled out as under:

- (i) the addition of Rs.2 lacs that was made by the A.O while framing assessment for A.Y.2009-10 was adjusted against the

unabsorbed depreciation/business loss of Rs.4,02,53,916/- (supra) claimed by the assessee in its return of income for A.Y.2009-10. Accordingly, the unabsorbed depreciation/business loss that was available with the assessee company on the basis of its assessment for A.Y 2009-10 as was available for being carried forward and adjusted in the succeeding years was reduced to an amount of Rs.4,00,53,916/-;

- (ii)** the assessee had e-filed its return of income for A.Y.2010-11 on 15.10.2010 declaring an income of Rs. Nil. Assessment of the assessee company for the A.Y.2010-11 was framed vide order u/s.143(3) dated 18.03.2013, wherein a disallowance u/s.14A r.w.r. 8D(2)(ii) of Rs.87,41,411/- was made by the A.O; **(iii)**. AS is discernible from the assessment order passed by the A.O u/s.143(3) dated 18.03.2013 for A.Y.2010-11 the unabsorbed depreciation/business loss available for being carried forward by the assessee company was reduced to an amount of Rs(-) 3,13,12,505/-, i.e. after making two fold adjustments out of loss of Rs. (-) 4,02,53,916/- (supra), viz. (a) adjustment of disallowance u/s.14A r.w.r. 8D made by the A.O vide order passed u/s.143(3) dated 18.03.2013 for A.Y.2010-11 : Rs.87,41,411/-; and (b) adjustment of ad-hoc disallowance out of

labour charges/wages made by the A.O while framing assessment in the case of the assessee company for A.Y.2009-10 : Rs.2,00,000/-. For the sake of clarity, the factual position as observed by the A.O in the body of his assessment order for AY 2010-11 is culled out as under:

Total loss carry forwarded as per return		Rs.(-)4,02,53,916/-
Add as discussed above		
Disallowance as per Section 14A r.w.r.8D	87,41,411/-	89,41,411/-
Last year's addition	2,00,000/-	
Total loss to be carry forwarded		Rs.(-)3,13,12,505/-

(iv). At this stage, we may herein observe that as the assessee company had not assailed the assessment framed in it's case for A.Y.2009-10 any further in appeal, therefore, the addition of Rs.2,00,000/- (supra) made by the A.O attained finality. On the contrary, the assessee had assailed the disallowance of Rs.87,41,411/- that was made by the A.O vide his order passed u/s.143(3) dated 18.03.2013 in its case for A.Y.2010-11 before the CIT(Appeals), which thereafter, was vacated by the latter vide his order passed in appeal No.163/13-14 dated 10.07.2020, Page 10-18 of APB.

18. Also, it would be relevant and pertinent to point out that as the assessee company had e-filed its return of income for A.Y.2011-12 on

21.01.2012 (wrongly mentioned by the A.O as 15.10.2010), on which date, the assessment proceedings for the preceding year, i.e A.Y.2010-11 were pending (as the same had been framed vide order passed by the A.O u/s.143(3) dated 18.03.2013), therefore, there was no occasion for the assessee company to have carried out necessary adjustments to the amount of the available b/forward unabsorbed depreciation/business loss pursuant to the addition of Rs. 87,41,411/- that was made by the A.O while framing assessment in its case for A.Y.2010-11 vide order passed u/s.143(3) of the Act, dated 18.03.2013. At the same time, we may herein observe that as the assessment in the case of the assessee for A.Y.2010-11, wherein an ad-hoc disallowance of Rs. 2,00,000/- was made in its hands vide his order passed u/s.143(3) dated 30.12.2011 (i.e prior to the filing of the return of income by the assessee company for the year under consideration, i.e AY 2011-12 on 21.01.2012) therefore, there was a clear failure on its part to make an adjustment to the said extent as against the loss that was carried forward to be set-off against the income of the subsequent years. Be that as it may, the disallowance u/s.14A r.w.r. 8D of Rs.87,41,411/- made by the A.O in A.Y.2010-11 had thereafter been vacated by the CIT(Appeals) vide his order passed in appeal No.163/13-14 dated 10.07.2020.

19. Considering the aforesaid facts in totality the unabsorbed depreciation/business loss that was available for being set-off in A.Y.2011-

12 worked out at Rs.4,00,53,916/- [Rs.4,02,53,916/- (supra) (-) Rs.2,00,000/- (supra)]. On the basis of the aforesaid facts, we are of the considered view that unabsorbed depreciation/business loss of Rs.4,00,53,916/- was available with the assessee company during the year under consideration i.e. A.Y.2011-12.

20. Apropos the claim of the Ld. AR that adjustment of the amount of unabsorbed depreciation/business loss ought not to have been made as an addition while framing assessment in its case for the year under consideration i.e. A.Y.2011-12, but called for a scaling down/reducing the amount of unabsorbed depreciation/business loss as was available with the assessee company as b/forward from the preceding years, we find substance in the same. Admittedly, as stated by the Ld. AR and ,rightly so, in case reduction in the amount of unabsorbed depreciation/business loss is projected as an addition in the hands of the assessee company for the year under consideration, then the same would be clearly a fallacious approach as it would lead to double addition. We, thus, in terms of our aforesaid observations vacate the addition of Rs. 89,41,411/- made by the A.O, but at the same time scale down the availability of b/forward unabsorbed depreciation/business loss with the assessee company during the year under consideration i.e AY 2011-12 to an amount of Rs.4,00,53,916/-(supra). Thus, the **Ground of appeal No.3** raised by the revenue is partly allowed in terms of our aforesaid observations.

21. In the result, appeal of the revenue is partly allowed in terms of our aforesaid observations.

Order pronounced in open court on 01st day of August, 2023.

Sd/-
ARUN KHODPIA
(ACCOUNTANT MEMBER)

Sd/-
RAVISH SOOD
(JUDICIAL MEMBER)

रायपुर/ RAIPUR ; दिनांक / Dated : 01st August, 2023
***SB

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-3, Bhopal (M.P)
4. The Pr. CIT (Central) Bhopal (M.P)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर बेंच,
रायपुर / DR, ITAT, Raipur Bench, Raipur.
6. गार्ड फाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, रायपुर / ITAT, Raipur.