आयकर अपीलीय अधिकरण "ए" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI

श्री संजय अरोड़ा, लेखा सदस्य **एवं** डॉ. एस.टी.एम. पवलन, न्यायिक सदस्य

BEFORE SHRI SANJAY ARORA, AM AND DR. S. T. M. PAVALAN, JM

आयकर अपील सं./I.T.A. No.638/Mum/2012

(**निर्धारण वर्ष** / Assessment Year: 2008-09)

ITO 4(3)(3), R. No.637, 6th floor, Aayakar Bhavan, Mumbai-400 020	**बनाम**/ Vs.	LKP Securities Ltd. 203, Embassy Centre, Nariman Point, Mumbai-400 021
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACL 0963 A		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

&

आयकर अपील सं./I.T.A. No.1093/Mum/2012

(**निर्धारण वर्ष** / Assessment Year: 2008-09)

LKP Securities Ltd. 203, Embassy Centre, Nariman Point, Mumbai-400 021	**बनाम**/ Vs.	ITO 4(3)(3), R. No.637, 6th floor, Aayakar Bhavan, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACL 0963 A		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

राजस्व ओर से / **Revenue by**	:	Shri Manoj Kumar
निर्धारिती की ओर से/**Assessee by**	:	Shri Subhash S. Shetty

सुनवाई की तारीख / **Date of Hearing**	:	18.02.2013
घोषणा की तारीख / **Date of Pronouncement**	:	17.05.2013

आदेश / O R D E R

Per Sanjay Arora, A. M.:

These are a set of cross appeals by the Assessee and the Revenue arising out of the Order by the Commissioner of Income Tax (Appeals)-9, Mumbai ('CIT(A)' for short) dated 11.11.2011, partly allowing the assessee's appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year (A.Y.) 2008-09 vide order dated 24.12.2010.

Revenue's Appeal (in I.T.A. No.638/Mum/2012)

2. We shall take up the Revenue's appeal, being senior, first. Vide its first ground, the Revenue assails the deletion of the disallowance u/s.37 in the sum of Rs.2,87,505/- on account of fines and penalties. While the Assessing Officer (A.O.) disallowed the same in view of the *Explanation* to section 37(1), the assessee found favour with the ld. CIT(A) on the basis that the fines and penalties levied to the assessee were by National Stock Exchange (NSE) for various procedural defaults, viz., trading beyond exposure limit, late submission of margin certificates, delay in making delivery of shares, etc. There was as such no infraction of law, as to attract the *Explanation* to section 37, but only of the procedural guidelines and regulations by NSE, which cannot be equated with statutory rules or law. NSE is not a statutory body as SEBI. Rather, even in the context of the penalties levied in relation to SEBI regulations, the same cannot be treated as penalty so as to suffer disallowance u/s.37.

3. We have heard the parties, and perused the material on record. Any infraction of law cannot be considered as an incident of business and, accordingly, even apart from *Explanation* to section 37(1), would not merit allowance there-under. This is trite law, as clarified by the apex court as far back as in the case of *Haji Aziz and Abdul Shakoor Bros. vs. CIT* [1961] 41 ITR 350 (SC), and which law has been reiterated by it time and again, again, even prior to the insertion of *Explanation* to section 37(1) by Finance (No.2) Act, 1998 w.r.e.f. 01.04.1962. So, however, in the instant case, the Revenue has not

specified any specific violation of any provision of law, so that we are unable to understand the basis of its case. Clearly, the various defaults or deficiencies, which stand to be regulated by NSE in terms of its bye-laws, cannot be regarded as an infraction of law, so as to attract disallowance. We, therefore, see no reason for inference with the impugned order on this ground.

4. The Revenue's second ground concerns the disallowance u/s.2(24)(x) r.w.s. 36(1)(va) of the Act on account of employee's contribution to the Employees Provident Fund (EPF) and Employees State Insurance Corporation (ESIC) in the sum of Rs.35,70,973/- and Rs.46,229/- respectively. The A.O. made the disallowance on the basis that the payments were made beyond the due date, being 15th of the following month in respect of contributions to the Provident Fund, and 21st of the following month in the case of payments to ESIC. Further, the grace period of 5 days for payment of PF contribution was only with respect to non-charge of penal interest and other penalties under the relevant Act. The same would not by itself extend the due date, with reference to which date only the allowability of the sum required to be paid by the assessee in respect of the employee's contribution is to be reckoned. Reliance was placed by him on the decisions in the case of *CIT vs. South India Corporation Ltd.* [2000] 242 ITR 114 (Ker.) and *CIT vs. Sree Kamakhya Tea Co. (P.) Ltd.* [1993] 199 ITR 714 (Cal.).

The ld. CIT (A), in appeal, ruled in favour of the assessee in view of the decision by the apex court in the case of *CIT vs. Alom Extrusions Ltd.* [2009] 319 ITR 306 (SC), as well as in the case of *CIT vs. AIMIL Ltd.* [2010] 188 Taxmann 265 (Del.) [321 ITR 508]. Aggrieved, the Revenue is in appeal.

5.1 Before us, the ld. DR, placing a copy of the order by the Tribunal in the case of *Dy. CIT vs. Bengal Chemicals & Pharmaceuticals Ltd. vs.* (in ITA No.1680/Kol/2010 dated 07.01.2011, reported at [2011] 10 taxmann.com26(Kol.)] would submit that the tribunal, after considering the decision by the apex court in the case of *Alom Extrusions Ltd.* (supra), as well as in the case of *CIT vs. Sabari Enterprises* [2008] 298 ITR 141

(Kar.) and *Allied Motors (P.) Ltd. vs. CIT* [1997] 224 ITR 677 (SC), has clarified that the payment under reference is not governed by section 43B of the Act. As such, the amendments to the said section would have no bearing on the deductibility of the sums covered by section 36(1)(va) of the Act. To the same effect, in fact, is the decision by the Hon'ble Jurisdictional High Court in the case of *CIT vs. Pamwi Tissues Ltd.* [2008] 215 CTR 150 (Bom.), with the hon'ble court clarifying that the dismissal of the Special Leave Petition (SPL) in the case of *CIT v. Vinay Cement Ltd.* [2007] 213 CTR (SC) 268 (SC) cannot be said to be a law decided, so that the same would not have any bearing on its said decision. As such, accordingly, the employee's contribution to EPF/ESIC, if not paid by the due date, was not allowable.

5.2 The ld. AR, on the other hand, would place reliance on the decision in the case of *AIMIL Ltd.*(supra), stating that the hon'ble court, after considering the decisions by the apex court in the case of *Vinay Cement Ltd.* (supra), has clarified that the amendment to section 43B by Finance Act, 2003 (w.e.f. 01.04.2004) would apply to the employer's as well as the employee's contribution to the various welfare funds. It has been clearly held that the decision by the hon'ble jurisdictional High Court in the case of *Pamwi Tissues Ltd.* (supra) is no longer good law after the decision by the apex court in the case of *Vinay Cement Ltd.* (supra). In fact, there should be no scope for any doubt after the decision by it in the case of *Alom Extrusions Ltd.* (supra). As such, any payment made by the employer, either in respect of the employee's or the employer's contribution, by the due date of filing of the return, would qualify for being allowed as a deduction for the relevant year. In the instant case, as would be evident from the chart of the payments listed at para 9 of the assessment order, the same were during the relevant year itself, with the exception of one, i.e., for the month of March, 2008, in April, 2008, i.e., well before the due date of filing the return of income. The entire disallowance stands, thus, rightly deleted by the ld. CIT(A).

6. We have heard the parties, and perused the material on record.

6.1 The issue under reference is the allowability or otherwise in law of the sums paid by the assessee-employer by way of employee's contribution to the Provident and the Employees State Insurance Corporation (ESIC) Funds where the said payment is made beyond the due date as defined under the relevant statutes, though before the due date of the filing of the return of income for the relevant year.

6.2 The disallowance having been deleted by the ld.CIT(A) with reference to section 43B, on which also the assessee basis its case, it would, therefore, be firstly required to be seen if the deduction *qua* the said payment is regulated by the said section, i.e., s.43B. This becomes also relevant as the decisions by the apex court in the case of *Vinay Cement Ltd*. (supra) and *Alom Extrusions Ltd*. (supra) relied upon by the assessee concern section 43B only, i.e., in respect of the retrospectivity or otherwise of the amendment thereto by Finance Act, 2003, w.e.f. 01.04.2004 (by way of omission of the second *proviso* as well as reference to clauses (a) and (c) to (f) in the first *proviso* to the section), holding in favour of the same being curative and, thus, retrospective.

Section 43B as it is stood prior to the said amendment reads as under:

"Certain deductions to be only on actual payment.

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

(a) any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, under any law for the time being in force, or]

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

(c) …….

(d) …….

(e) …….

(f) …….

shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed

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

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

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

Vide amendment by Finance Act, 2003 w.e.f. 01.04.2004, the second *proviso* stands omitted, as also reference to clauses (a) and (c) to (f) in the first *proviso*. Section 43B is a *non obstante* clause providing for an overarching and additional qualification, so that it would operate without exception. As such, it would apply to any sum covered thereby, irrespective of the section or the provision governing the deduction in its respect. As per its terms, the sums specified in clause (a) to (f) would, where otherwise allowable, yet have to satisfy the test or condition of payment for the same to qualify for deduction. The deduction, in the event of non-payment, would stand deferred to the year of actual payment. An exception, by way of first *proviso* to the section, is drawn to sums specified in clauses (a), (c) to (f), so that the payment would not stand to be disallowed if it is made by the due date of filing the return of income for the relevant year. For the payments covered by clause (b), the time limit prescribed, however, is the due date as defined under *Explanation* to section 36(1)(va), i.e., the time period allowed per the relevant Act.

6.3 Having gone through the anatomy of the section, we are now in a position to answer our first question, i.e., if the payment of the employee's contribution is covered u/s. 43B(b). *In our clear view, it is not*. This is for the reason that section 43B covers only

the sums payable by way of contribution by the assessee as an employer, i.e., the employer's contribution, *inter alia*, the PF and ESI funds. Under the said Acts (i.e., Provident fund Act and the Employees State Insurance Act), the employer is to deduct a prescribed percentage of the employee's remuneration, as the employee's contribution to the said fund/s. He is further obliged to make a matching contribution, and pay the entire sum to the credit of the employee's account with the relevant fund by the due date under the relevant Act. Both the contributions are to be paid simultaneously, vide separate challans though, the due date for which is the same. The employer's contribution is deductible u/s. 37(1) of the Act, being only a part of the employee cost or of his employment. The employee's contribution, on the other hand, is to be deducted from the salary/wages due to the employee, i.e., for which the assessee is contractually obliged as an employer, so that no separate expenditure stands incurred in its respect and, consequently, there is no question of the same being claimed or allowed as an expense. So however, section 2(24) of the Act, the provision which defines 'income' under the Act, i.e., inclusively, vide sub-clause (x) thereof, deems the sum so retained by the employer toward the employee's contribution (for onward payment) as the employer's income; the said section reading as under:

"**Definitions**.

2. *In this Act, unless the context otherwise requires,—*

(24) "income" includes-

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

[emphasis, ours]

Section 36(1)(va) of the Act correspondingly provides for deduction *qua* these sums where paid to the credit of the employee's account in the relevant fund by the due date. 'Due date' is defined per *Explanation* thereto as a date by which the employer is required to credit the employee's contribution to the employee's account in the relevant fund

under any Act, or any Rule, order, notification, etc., issued there-under; the relevant provision reading as under:-

"Other deductions.

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

(i) …

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

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

[emphasis, ours]

As would be apparent from a bare reading of the provision, the deduction is subject to the actual payment and, further, by the 'due date'. It is, therefore, abundantly clear that while deductibility of the employer's contribution (to the relevant fund) is governed by section 37(1), that of the employee's contribution, which is deemed as income u/s.2(24)(x), is by section 36(1)(va). It is only the former that is covered by section 43B, per clause (b) thereof. This is manifest from the clear language of the provisions, viz., ss. 2(24)(x), 36(1)(va) and 43B(b). Further, as the due date for both the payments, or the credit in its respect thereof to the employee's account, is the same, section 43B(b), in deviation of the norm of the actual payment during the relevant year, or modified/amended norm of payment by the due date of filing of the return of income for the relevant year, provides for the same basis for deduction thereof under the Act., i.e., the payment by the due date. This, thus, also explains the rationale in providing for a separate payment prescription for sums specified u/s. 43B(b), i.e., as against the uniform prescription for those falling under the other clauses of section 43B.

Continuing further, as afore-noted, section 43B provides for an additional qualification of payment (by the date specified there-under), failing which the deduction

would stand to be allowed only in the year of actual payment. That is, it subjects the deduction to the additional condition of payment. The sum under reference, however, must be otherwise allowable, i.e., under a particular provision, i.e., but for the factum of payment, the additional condition provided by the section. Now when section 36(1)(va) itself provides for the condition of actual payment, section 43B would even otherwise be rendered of no consequence. That is, even if we were to overlook the clear language of section 2(24)(x) r.w.s. 36(1)(va) (on one hand) and section 43B(b) (on the other), so that they clearly concern separate and distinct sums, and consider, for the sake of the argument, section 43B(b) as applicable to section 36(1)(va) payments, it would be rendered otiose. This is as the sum under reference has to be 'otherwise allowable', i.e., under the relevant provision. The payment by the due date u/s. 36(1)(va) having not been made, the same is not allowable thereunder, so that there is no scope for application or invocation of section 43B. On the other hand, if the payment has been made, section 43B again becomes of no functional relevance. This aspect stands also explained by the tribunal in the case of *Bengal Chemicals & Pharmaceuticals Ltd*. (supra), following its earlier order in ITA No.1255/Kol./2010 dated 19.11.2010, also reproducing therefrom at para 5 of its order. Reference in this context is also drawn to, *inter alia*, para 8 of the said order, citing the reasons why in its view section 43B does not apply to the payment of the employee's contribution. In fact, even as noted by the tribunal its order in ITA No.1255/Kol./2010 (supra), this aspect stands also clarified by the Special Bench of the tribunal in the case of *Jt. CIT v. ITC Ltd*. [2008[112 ITD 57 (Kol.)(SB), holding that section 43B does not apply to payment of the employee's contribution. Rather, as would be clear, section 43B, even assuming applicability, would become relevant only if it provides for payment terms most stringent than that provided by section 36(1)(va). This is as it is only in that case that the prescription of 'otherwise allowable' would stand met, so as to consider the satisfaction or otherwise of the additional, more stringent condition *qua* payment. Quite on the contrary, we have been found the payment terms for sums specified u/s. 43B(b) to be at par with that provided u/s.36(1)(va), and which in fact gets relaxed by amendment by Finance Act, 2003 (w.e.f. 01.04.2004) to the due date of the

filing of the return (for the relevant year), i.e., as in the case of payments falling under the other clauses of section 43B. *The deduction of the employee's contribution, which is deemed as the employer's income u/s.2(24)(x),and which is subject to deduction u/s.36(1)(va) is, thus, without doubt not governed by section 43B*.

6.4 The decisions by the apex court in the case of *Vinay Cement Ltd*. (supra) and *Alom Extrusions Ltd*. (supra) are admittedly with reference to section 43B and, further, *qua* the scope of the amendments thereto. The deductibility of the employee's contribution is not regulated by section 43B. Further, even if so considered, the said section would not come into play as the sum under reference has first to be 'otherwise allowable', satisfying the test of the relevant provision under which it is deductible, before the deduction could be subject to the additional rigor of section 43B. It is, therefore, difficult to see as to how these decisions would have any bearing on the issue of the deductibility of the employee's contribution to the employee welfare funds, which is governed solely by section 2(24)(x) r.w.s. 36(1)(va) and, as such, independent of and *de hors* section 43B of the Act. Consequently, the amendment/s to this section would be of no consequence. This aspect stands also explained by the jurisdictional high court in the case of *Pamwi Tissues Ltd*. (supra) as well. The same, we are conscious, stands reversed by the apex court vide its decision in the case of *Alom Extrusions Ltd.* (supra). However, the reversal is on the issue that stands decided and was the subject matter of the decision by the apex court, i.e., the retrospectivity or otherwise of the amendment to s. 43B by way of omission of the second *proviso* and the deletion in the first *proviso* thereto by Finance Act, 2003 w.e.f. 01/4/2004. The decision in the case of *Pamwi Tissues Ltd*. (supra), in fact, endorses the decision in the case of *CIT v. Godaveri (Mannar) Sahakari Sakhar Kharkhana Ltd*. [2008[298 ITR 149 (Bom.), wherein issues other than those relating to the said amendment to s. 43B were also referred to. These questions remain unanswered or unaddressed by the decision in the case of *Alom Extrusions Ltd*. (supra). In fact, a mere reference to the question referred to the hon'ble apex court, which stands set out by it at the beginning of its decision and, therefore, it sets out to and, accordingly, answers,

would dispel any doubt in the matter, even as we have also carefully perused the judgment. A decision, it is trite, is an authority for what it actually decides (refer: *CIT v. Sun Engineering Works (P.) Ltd*. [1992] 198 ITR 297 (SC); *Blue Star Ltd. v. CIT* [1996] 217 ITR 514 (Bom.)). Further, as explained by the apex court in the case of *CIT v. Murlidhar Bhagwan Dass* [1964] 52 ITR 335 (SC), a 'finding' can only be that which is necessary for the disposal of the appeal for the relevant year, or to put in a broader context, to answer the question that is referred to and, accordingly, answered by the court. There is no finding by the hon'ble apex court that the employee's contribution, deduction of which is subject to s. 36(1)(va), is further subject to s. 43B. Nor, for that matter, a finding that s. 43B would apply even where the sum under reference is not, even as stated by the tribunal in the case of *Bengal Chemicals & Pharmaceuticals Ltd*. (supra), allowable under the relevant provision, i.e., is not *otherwise allowable*. These aspects, even as sought to be emphasized with reference to the question posed and answered by the apex court, did not arise for consideration by the hon'ble court. Rather, we have labored to explain the unfeasibility and the inoperability of s. 43B even if, ignoring the clear identification of the separate sums referred to in ss. 36(1)(va) and 43B, per the clear language of the said provisions, where it is sought to be applied to the sums covered u/s. 36(1)(va). The tribunal in the case of *Bengal Chemicals & Pharmaceuticals Ltd*. (supra), as well as per its earlier decision in ITA No. 1255/Kol./2010, has also considered the decision by the apex court in the case of *Alom Extrusions Ltd*. (supra), finding it as not germane to the specific issue under reference, i.e., the deductibility of the employee's contribution, being not covered by sec. 43B(b) of the Act.

Coming, next, to the decision in the case of *CIT v. AIMIL Ltd*. (supra). We have gone through the said decision, which stands again considered by the tribunal in the case of *Bengal Chemicals & Pharmaceuticals Ltd*. (supra). No doubt, the said decision covers payment of employee's contribution to EPF and ESI funds. However, as a perusal of the decision would show, the entire deliberation therein, as well as the subject matter of the decision, is *qua* s. 43B, including the amendments thereto. In fact, the hon'ble court moved on the premise that the employee's contribution is subject to clause (b) of s. 43B

and, accordingly, the interpretation of the section, as well as the nature of the amendments thereto, engaged its mind. Specific reference in this context may be drawn to para 11 of the judgment, whereat the hon'ble court, after delineating the provisions of ss. 2(24)(x) and 36(1)(va), goes on to state that, however, s. 43B(b) stipulates that such deduction would be permissible on actual payment. We have already noted that s. 36(1)(va) itself prescribes the condition of payment for deduction and, besides, equal if not more rigorous than that provided by s. 43B. The decision by the tribunal, which stands approved by the hon'ble court in the case of *AIMIL Ltd*. (supra), stands rendered without considering the decision by the special bench of the tribunal in the case of *ITC Ltd*. (supra), besides being also inconsistent with the decision by the hon'ble jurisdictional high court in *Godaveri (Mannar) Sahakari Sakhar Kharkhana Ltd*. (supra) insofar as the latter relates to the inapplicability of s. 43B to payments specified u/s. 36(1)(va). *Finally, the absence of the relevant findings in the case of* Alom Extrusions Ltd. *(supra), also attend the decision in the case of* AIMIL Ltd. (supra). We are therefore with respect not persuaded to follow the decision in the case of *AIMIL Ltd*. (supra); rather consider it as not applicable/germane and, on the contrary, are inclined to follow the decision by the special bench in *ITC Ltd*. (supra) as well as in the case of *Bengal Chemicals & Pharmaceuticals Ltd*. (supra), both of which are consistent with the decisions by the hon'ble jurisdictional high court on the material aspect. In doing so, we also derive support from the decision by the hon'ble jurisdictional high court in the case of *CIT v. Thane Electricity Supply Ltd*. [1994] 206 ITR 727 (Bom.).

6.5 The deductibility of the impugned payments has thus to be seen only with reference to s. 36(1)(va), which has not witnessed any material changes since its insertion on the statute by Finance Act, 1987 w.e.f. 01/4/1988. As such, deduction would be exigible where the payment is made by the due date, i.e., under the relevant Act. In this regard we observe that the AO has not allowed the 'grace period' of five days in case of payments under the Provident Fund Act. This is as the 'due date' is defined under the said Act, which could not be superseded by any circular or notification. Secondly, the

extension is only for the limited purpose of non-levy of any penal interest or penalty, and does not operate to alter or redefine or extend the due date, which stands clearly defined, and is constant/fixed. We have given our careful consideration to the matter. In our view, the payment/s made within the grace period as allowed by virtue of any circular, order, etc. would be eligible for deduction u/s. 36(1)(va). The language of the provision accords primacy to not only the relevant Act, but also to any circular, order, notification, etc. issued thereunder. Two, a 'due date', for all practical purposes, as also by definition, is the date by which the relevant action (payment in the instant case) could be performed so as to be considered as eligible, and without inviting any penal consequences. As such, the benefit of the 'grace period' could not be disallowed, and which would rather bring the two enactments in harmony. In so deciding, we also derive support from the decision by the hon'ble jurisdictional high court in the case of *Godaveri (Mannar) Sahakari Sakhar Kharkhana Ltd*. (supra) inasmuch as the hon'ble court has clearly held in favor of allowing the benefit of the grace period afore-said. The AO is accordingly directed to allow deduction u/s. 36(1)(va) where any payment is made within the grace period. We decide accordingly, and the Revenue gets part relief.

7. The third and the final ground of the Revenue's appeal is in respect of deletion of disallowance on the write off bad debt/s amounting to Rs.33,93,886/- by the ld. CIT(A). The basis of the A.O.'s decision was that though no doubt the amount under reference has been written off by the assessee in its accounts, the provisions of section 36(1)(vii) could apply only to the brokerage amount arising to it on the purchase or sale of the shares on behalf of the clients inasmuch as the assessee company was a broker. The brokerage ranges between 0.05% to 2% of the transaction value and, therefore, the assessee's claim for bad debt could not extend to the entire amount due from its client/s, but only to the amount of brokerage income embedded therein. The ld. CIT(A), however, allowed relief to the assessee in view of the decision by the Special Bench of the tribunal in the case of *Dy. CIT vs. Shreyas S. Morakhia* [2010] 5 ITR (Trib) 1 (Mum.) (SB).

8. We have heard the parties, and perused the material on record. The decision by the Special Bench of the tribunal in the case of *Shreyas S. Morakhia* (supra) has since been upheld by the Hon'ble jurisdictional High Court in the case of *CIT vs. Shreyas S. Morakhia* [2012] 342 ITR 285 (Bom.), even as brought to our notice by ld. AR during hearing. The hon'ble court has clarified that both the components, i.e., the value of the shares transacted as well as the brokerage thereon, arise from the very same transaction and, thus, constitute a part of the debt arising therefrom. The requirement of section 36(2)(i), the non compliance of which forms the basis of the Revenue's case, has been clarified as being fulfilled. In view thereof, the Revenue's ground deserves to be dismissed. We decide accordingly.

Assessee's Appeal (I.T.A. No.1093/Mum/2012)

9. The first and the second grounds of the assessee's appeal are in respect of disallowance u/s.40(a)(ia) (aggregating to Rs.44,89,619/-) in respect of amounts paid toward lease line charges and VSAT charges inasmuch as the assessee had failed to deduct the tax thereon, which was considered as liable there-for u/s.194J of the Act. The ld. CIT(A), after a detailed discussion, was of the view that the said charges, as also the transaction charges paid by the brokers to Stock Exchange, are only fees for technical services liable for tax deduction at source u/s.194J and, consequently, in case of non-deduction, qualify for disallowance u/s.40(a)(ia) of the Act. The allowance in its respect would fall due on the payment of the tax deductible. Aggrieved, the assessee is in appeal.

10. The ld. AR during hearing placed on record copy of the decision by the hon'ble jurisdictional high court in the case of *ITO vs. Angel Capital & Debit Market Ltd.* (in ITA No.475 of 2011 dated 28.07.2011). The hon'ble court has clarified that the said charges being paid by the assessee-brokers to the stock exchange were merely reimbursement of charges paid/payable by the Stock Exchange to the Department of Telecommunication (DOT). The same had no element of income and, consequently, the

question of deduction of tax on such payment did not arise. The ld. DR could not rebut these averments by the ld. AR.

11. We have heard the parties, and perused the material on record. The decision by the hon'ble high court is squarely on the point. The hon'ble high court observes that the tribunal returning a finding as to the relevant charges being only a reimbursement of the relevant expenses, there is no case for deduction of any tax at source. Further, in fact, on an enquiry by the Bench with reference to the decision by the hon'ble high court in the case of *CIT v. Kotak Securities Ltd.* [2012] 340 ITR 333 (Bom), also dealing with tax deductibility on various payments to the Stock Exchange, it was clarified by the ld. AR that the 'BOLT' system being adopted by the Bombay Stock Exchange (BSE) entailed payments by the brokers on three counts, i.e., lease rent charges, VSAT and transaction charges. The decision by the hon'ble high court in the case of *Kotak Securities Ltd.* (supra), confirming the deductibility of TDS u/s.194J, is in respect of transaction charges only. We have clarified this fact on going through the decision. As it would appear to us, the Stock Exchange is billed for the total charges on these counts (i.e., including lease line and VSAT charges) by the Department of Telecommunication (DOT), which in turn allocates the same to its different constituents (which would be on some definite/utilization basis), without including any charge of its own. The payment to the Stock Exchange is thus, only in the nature of reimbursement. Even as, therefore, it may result in a TDS liability in the hands of the Stock Exchange (inasmuch as what it pays to the DOT is only the latter's income), in-so-far as the individual brokers are concerned, who make the payments to the Stock Exchange, no tax is deductible inasmuch as the same is only a reimbursement of the charges as levied by DOT. Accordingly, no ground for disallowance survives, and the assessee succeeds in respect of the relevant grounds.

12. The third ground of the assessee's appeal is in respect of disallowance made u/s.14A r/w rule 8D of the Income Tax Rules, 1962 ('the 'Rules' hereinafter) in the sum of Rs.7,45,563/-, having been since confirmed by the first appellate authority. The basis

of the disallowance as well as its confirmation, is that the said provisions are mandatory for the current year. No argument, much less material, has been brought by the assessee on record to controvert the Revenue's clear stand inasmuch as the assessee has maintained average investments at Rs.351.51 lakhs (in shares and mutual funds) as well as incurred interest expenditure at Rs.173.01 lakhs for the current year. In the absence of any information with regard to the utilization of the borrowed funds, the general pool of funds hypothesis, which underlies the rule of appropriation of expenditure on the basis of the proportionate financing of all assets, which defines the rationale of rule 8D, would prevail. The Revenue has relied in substantiating its case on the decisions in the case of *Dhapa & Sons vs. CIT* [2011] 54 DTR 345 (Cal.) and *CIT vs. Smt. Leena Ramachandran* [2010] 45 DTR 372 (Ker.), besides by the Special Bench of the tribunal in the case of *Daga Capital Management* [2008] 26 SOT 603 (Mum), since upheld by the Hon'ble Jurisdictional High Court in the case of *Godrej & Boyce Mfg. Co. Ltd. v. Dy. CIT* [2010] 328 ITR 81 (Bom.). We, therefore, find no infirmity in the impugned orders and, accordingly, confirm the impugned disallowance.

13. The fourth and the fifth grounds of the assessee's appeal are in respect of non allowance of the set off in respect of:

a) brought forward long term capital loss (from A.Y. 2003-04) on sale of quoted equity shares (non STT) at Rs.41,36,974/- (Gr. 4) and;
b) long term capital loss on sale of quoted equity shares (STT) for the current year at Rs.36,69,436/- (Gr. 5);

against long term capital gain on sale of unquoted equity shares (non STT) arising for the current year. The respective cases of both the parties in respect thereof being the same, the same were argued together, and are therefore being taken up for adjudication together, even as by the first appellate authority vide para 9 (page 24) of his order. The basis of the Revenue's disagreement with the assessee is firstly, that the 'long term capital gain' is since, i.e., by Finance (No.2) Act, 2004 (w.e.f. 01.10.2004), not part of the total income, being exempt u/s. 10(38) of the Act. Secondly, there is nothing on record to

show that there was brought forward loss for A.Y. 2003-04, as being claimed by the assessee. Neither was the same claimed per its computation of income, nor finds mention in the relevant assessment order passed u/s.143(3) of the Act. The assessment was in fact contested up to the level of the tribunal, even where there was no reference to any loss being carried forward. The assessment has accordingly attained finality and, as such, the assessee's claim for brought forward loss has no basis in law.

14. We have heard the parties, and perused the material on record. At the outset, it may be relevant to state that the said Finance Act, vide Chapter VII thereof, levies tax called Security Transaction Tax (STT) on long term capital assets, being equity shares in a company or a units in an equity oriented fund. That is, the equity share transactions which are subject to STT would not be subject to tax under Act. As such, we are unable to see as to what infirmity in law attends the Revenue's case in denying the claim of loss on transactions in equity shares subject to STT (at Rs.36.69 lakhs), against the taxable capital gains for the current year (non STT); it relying and drawing support from the decision by the apex court in the case of *CIT vs. Harprasad & Co. P. Ltd.* [1975] 99 ITR 118 (SC). The income (and loss, which is only negative income) falling under Chapter III of the Act and, thus, exempt from the levy of the tax, would not form part of the computation of the income under Chapter IV of the Act. *That in fact is a fundamental premise; the basis of sec. 14A of the Act*. The Revenue's case in this regard is unexceptional, and we confirm the same. With regard to the other limb of the matter, the assessee has again failed to bring anything on record to rebut the clear findings by the ld. CIT(A) that its assessment for A.Y. 2003-04 has attained finality, with there being not mention of any loss which requires to be carry forward, so that the findings by the Revenue remain uncontroverted. It may be clarified that the carry forward of the losses is subject to certain conditions, viz. filing of the return in time, its assessment, etc. which in the instant case is u/s.143(3) bearing a definite finding in the matter. This gives a vested right to the assessee. Accordingly, we find no basis in the assessee's case in this regard as well.

15. In the result, both the Revenue's and the assessee's appeals are partly allowed.

परिणामतः निर्धारिती / राजस्व की अपीलें आंशिक स्वीकृत की जाती है ।

Order pronounced in the open court on 17th May, 2013
आदेश की घोषणा खुले न्यायालय में दिनांकः को की गई ।

Sd/-	Sd/-
(Dr. S. T. M. PAVALAN)	(SANJAY ARORA)
न्यायिक सदस्य / JUDICIAL MEMBER	लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांकDated : 17.05.2013

व.नि.स./Roshani , Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**

आयकर अपीलीय अधीकरण, न्यायपीठ – "सी", कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "C", KOLKATA

(समक्ष)Before **श्रीमती दिवा सिंह,** न्यायीक सदस्या, **एवं/and**
Smt. Diva Singh, Judicial Member.
सी.डी.राव, लेखा सदस्य
C.D. Rao, Accountant Member

आयकर अपील संख्या / ITA No.1680/Kol/2010
निर्धारण वर्ष/Assessment Year : **2005-06**

(अपीलार्थी/APPELLANT)		(प्रत्यर्थी/RESPONDENT)
DCIT, Circle-12, Kolkata	Versus	M/s. Bengal Chemicals & Pharmaceuticals Ltd. (PAN: AABCB 5107F)

अपीलार्थी की ओर से/ For the Appellant: Shri A.K.Pramanick
प्रत्यर्थी की ओर से/For the Respondent: Shri V.N.Purohit

आदेश/ORDER

(**सी.डी.राव**) लेखा सदस्य
Per Shri C.D.Rao, A.M.

This appeal is preferred by the Revenue against the order of the C.I.T.(A)-XXXII, Kolkata dated 20.05.2010 for the assessment year 2005-06.

2. In this appeal, the only issue raised by the Revenue is relating to deletion of employees contribution to P.F. and E.S.I under section 43B taking it t be employer's contribution.

3. At the time of hearing before us, the Ld. D.R. relied on the orders of the ITAT, Kolkata "B"Bench in ITA No.1255/Kol/2010 wherein this Tribunal considered all the cases on this issue and concluded that the assessee is not entitled to deduction u /s 36(1)(va) of the employees' contribution to provident fund which was paid after the due date as specified in Explanation to Section 36(1)(va) of the Act as section 43B cannot be pressed into service because section 43B comes into play only when a deduction is otherwise allowable under the Income Tax Act .

4. On the other hand, the Ld. Counsel, appearing on behalf of the Assessee, has submitted that the Hon'ble Supreme Court in the case of CIT-Vs- Alom Extrusions Ltd. reported in 319 ITR 306 has considered this issue and affirmed the decision in the case of CIT-Vs- Sabari Enterprise reported in 213 CTR 269 (Kar) and valued the ratio laid down in Allied Motors Pvt. Ltd. reported in 224 ITR 677. Therefore, he requested to uphold the action of the Ld. CIT(A).

5. After hearing the rival submissions and on careful perusal of the materials available on record, we are unable to accept the contention of the Ld. Counsel for the Assessee that the order of the Hon'ble Supreme Court in the case of Alom Extrusions is not on the issue of employees' contribution. On the other hand, it is on the employer's contribution and relating to the second proviso to section 43B and the amendment of the first proviso to section 43B of the Act by the Finance Act, 2003 whereas in assessee's case the undisputed fact is that the additions made by the AO are under the provisions of section 36(1)(va). Since this issue has been decided by this Tribunal in ITA No.1255/Kol/2010 exhaustively, we find no reason to deviate from the view taken by us in ITA No.1255/Kol/10 on 19.11.2010. The relevant particulars of the above order are as under:

> "5. During the course of hearing, the learned D.R. submitted that section 36(1)(va) read with section 2(24)(x) of the Act provides that due date of payment of employees' contribution to provident fund and if it is not paid within due date , the same cannot be allowed as deduction if it is paid belatedly. Learned D.R. submitted that Special Bench, ITAT in the case of ITC Ltd. (supra) has held that the provisions of section 43B of the Act will not apply in respect of payment of employees' contribution to provident fund. Learned D.R. further submitted that the decision of the Hon'ble Apex Court in the case of Vinay Cement Ltd. (supra) deals with the provisions of section 43B of the Act and in respect of employees' contribution to provident fund, the provisions of section 43B does not apply. He further submitted that the decision of the Hon'ble Delhi High Court in the case of AIMIL Ltd.(supra) has also been decided by following the decision of Vinay Cement Ltd.(supra). He further

submitted that the only issue decided on those appeals were whether amount paid on account of P.F. after due date are allowable in view of section 43B read with section 36(1)(va) of the Act. He further submitted that it is nowhere decided as to whether belated payment of employees' contribution to provident fund paid is allowable if it is paid after due date but before due date of filing of return.

6. On the other hand, learned A.R. supported the order of the learned C.I.T(A) and also placed reliance on the aforesaid decisions as relied before the learned C.I.T(A). Besides above, the learned A.R also referred the decision of the Hon'ble Delhi High Court in the case of CIT vs P.M.Electronics Ltd. AIT 2008 – 397 – H.C.

7. We have heard the learned representatives of the parties and have considered the orders of the authorities below. We have also considered the cases cited by the learned representatives of the parties in support of their submissions. We observe that there is no dispute to the fact that assessee had paid employees' contribution to provident fund after the due date. We observe that the above issue as to whether the employees' contribution to provident fund is also subject to the provisions of section 43B of the Act or not. In this respect we consider it necessary to state the relevant provisions of section 36(1)(va) and relevant clauses of section 43B of the Act which are as under :

"36(1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein , in computing the income referred to in section 28 -
(i) .....
(ia) .....
(ib) .....
(iia) .....
(iii) .....
(iiia) .....
(va) any sum received by the assessee from any of his employees to which the provisions of sub-clause (x) of clause (24) of section 2 apply, if such sum is credited by the assessee to the employee's account in the relevant fund or funds on or before the due date.

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

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

8. From the above it emerges that the term "due date" as appearing in section 36(1)(va) read with Explanation specifies the due date as the date by which the assessee is required as an employer to credit an employee's contribution under the employees a/c to the relevant fund. As regards the term "due date" as appearing in section 36(1)(va), the Explanation to section 36(1)(va) specifies the "due date" as the "date by which the assessee is required as an employer to credit an employee's contribution to the employee's account in the relevant fund under any Act, rule, order or notification issued there-under or under any standing order, award, contract of service or otherwise." The term "due date" as specified in the Explanation to section 36(1)(va) does not refer to the due date fixed for filing the return of income u/s 139(1). Hence the "due date" as fixed for filing the return of income u/s 139(1) cannot be read into the Explanation to section 36(1)(va). The "due date" for crediting any sum received by the assessee

from his employees as contributions towards any provident fund or superannuation fund or any fund for the welfare of the employees by the employer-assessee to the employee's account in the relevant fund or funds must be the one specified in the Explanation to section 36(1)(va) and not the "due date" for filing the return of income under section 139(1). In the case before us there is no dispute that the assessee company has neither credited the impugned contribution received by it from its employees to the employees' account in the relevant fund nor it has done so on or before the due date specified in the Explanation to section 36(1)(va) and hence we are of the considered view that the claim of the assessee for deduction cannot succeed. Further section 43B, we are of the considered view, does not apply in respect of the employees contribution for the following reasons :

(i) Section 43B opens with a non obstante clause which means that it controls the operation of other provisions of the Income-tax Act in that section 43B will have overriding effect notwithstanding other provisions under which a deduction may otherwise be allowable.

(ii) The opening words of section 43B make it clear that the said section would have overriding effect and apply only when a deduction is otherwise allowable under the Income-tax Act. In other words, the very applicability of the non-obstante clause would come into play only when a deduction is otherwise allowable under the Income-tax Act. Thus section 43B cannot be pressed into service to allow a deduction which is otherwise not allowable under the Income-tax Act including section 36(1)/(va) thereof. In order to avail the beneflt of section 43B upon actual payment, the assessee must show that the deduction claimed by it u/s 43B is otherwise allowable under the provisions of the Income-tax Act including section 36(1)/(va) thereof.

(iii) Section 43B bars deduction, which is otherwise allowable under the Income-tax Act, of any sum referred to in clauses (a) to (f) unless it is actually paid. Thus the factum of actual payment of any sum referred to in clauses (a) to (f) is relevant only when the deduction is otherwise allowable under the Income-tax Act. There are several provisions in the Income-tax Act, which set out the conditions for the allowability of deductions of those very sums which are referred to in section 43B. Those provisions would be rendered otiose if a view was to be taken that deductions of the aforesaid sums would be allowed as and when they are actually paid irrespective of the fact that they are not otherwise allowable under the Income-tax Act. The plain and unambiguous language used in section 43B makes it absolutely clear that the allowability of deduction of any sum referred to in clauses (a) to (f) upon actual payment is restricted to

those deductions only, which are otherwise allowable under the Income-tax Act. Thus the factum of actual payment by itself is not sufficient to successfully claim a deduction u/s 43B, which is otherwise not allowable under the Income-tax Act. In other words, all those deductions, which are otherwise not allowable under the Income-tax Act, cannot be allowed even on actual payment u/s 43B.

(iv) The proviso to section 43B carves out an exception and allows deduction in respect of any sum referred to in clauses (a) to (f) which is actually paid by the assessee on or before the due date for furnishing the return of income u/s 139(1) in respect of the previous year in which the liability to pay such sum was incurred. However, the proviso applies only to those matters which are specifically referred to in section 43B to which it has been added. Proviso to section 43B cannot therefore be made applicable to those deductions which are otherwise not allowable under the Income-tax Act."

9. From the above we are of the view that a claim/deduction which is otherwise not allowable u /s 36(1)(va) or for that matter any other provision of the Income Tax Act can neither be considered nor is allowed u/s 43B. The opening words of section 43B ,namely "notwithstanding anything contained in any other provision of this Act a deduction otherwise allowable under this Act ……..." make it amply clear that section 43B comes into play only when deduction is otherwise allowable under the Income Tax Act . The purpose of section 43B is i) to bar the deduction of the sums referred to therein unless they are actually paid and ii) not to allow deduction which is otherwise not allowable under the Income Tax Act. Therefore, section 43B cannot be pressed into service in a case like the one before us where deduction is not otherwise allowable u /s 36(1)(va). Moreover, section 43B is a general provision which merely bars deduction of specified sums unless they are actually paid and whereas provisions of section 36(1)(va) specifically deal with deduction in respect of payment of employees contribution to the Provident Fund. Therefore, the provisions of section 36(1)(va), being special provisions enacted to deal with specific matter would, in our view, prevail over the general provisions of section 43B on the principle that a general clause does not explain to those things that have been previously provided for specifically.

10. We have gone through the decisions (cited supra) in which it is held that employees' contribution to provident fund would be eligible for deduction if it is paid before due date prescribed u /s 139(1) for filing the return of income. However, we do not find any such observation in the said cases (cited supra) that deduction u /s 43B would have to be allowed even if the deductions in respect of which payments have been made in terms of section 43B are otherwise not allowable under the Income Tax Act. In fact it has not even the question raised in those decisions as to whether deduction which is not otherwise allowable under the Income Tax Act, could at all be allowed on payment basis u /s 43B. It is well-settled principle that a judgment must be read as a whole and the observations in the judgment have to be construed in the light of the question raised before the Court. It is the judicial principle found upon reading the judgment as a whole in the light of the question raised before the Court which forms precedent and not particular words or phrases.

11. In view of the above we hold that the assessee is not entitled to deduction u /s 36(1)(va) of the employees' contribution to provident fund which was paid after the due date as specified in Explanation to Section 36(1)(va) of the Act as section 43B cannot be pressed into service because section 43B comes into play only when a deduction is otherwise allowable under the Income Tax Act. Hence, we confirm the action of the AO by reversing order of the learned C.I.T(A) and accordingly allow ground no. 1 taken by the department."

5.1 Respectfully following the same, we set aside the orders of the Ld. CIT(A) and restore that of the AO.

6 In the result, the Revenue's appeal is allowed.

यह आदेश न्यायालय में सुनाया गया है

THIS ORDER PRONOUNCED IN THE OPEN COURT ON 7th January, 2011.

Sd/-	Sd/-
दिवा सिंह, न्यायीक सदस्या,	**सी.डी.राव,** लेखा सदस्य
Diva Singh, Judicial Member.	C.D. Rao, Accountant Member

(तारीख) Date:07.01.2011
MST(Sr.P.S.)

आदेश की प्रतिलिपि अग्रेषितः-

Copy of the order forwarded to:

1. M/s. Bengal Chemicals & Pharmaceuticals Ltd., 6, Ganesh Chandra Avenue, Kolkata – 700 013.
2. DCIT, Circle-12, Kolkata
3. The CIT,
4. The CIT(A),
5. DR, Kolkata Benches, Kolkata

सत्यापित प्रति/True Copy,

आदेशानुसार/ By order,

Deputy /Asst. Registrar**,** ITAT, Kolkata Benches