**In the Income-Tax Appellate Tribunal,**
**Agra Bench, Agra**

**Before : Shri Laliet Kumar, Judicial Member And**
**Dr. Mitha Lal Meena, Accountant Member**

**ITA No.41 & 42/Agr/2021**
**Assessment Year Ay 2018-19 and A.Y. 2019-20**

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| M/s MAHADEV COLD STORAGE.<br>29, Prayag Sarover Colony, Aligarh.<br>**PAN : AAOFM4144K**<br>**(Appellant)** | V.S. | Jurisdictional Assessing Officer, Circle-4(1)(2), Aligarh.<br>**(Respondent)** |

**And**

**ITA No. 20&21/Agr/2021**
**(Assessment Year 2018-19&2019-20)**

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| Vinod Thanwerdas Sainani,FlatNo.4,Bldg UI, AWHO, Phase-2 Tucker Enclave Near Gondhale Nagar Hadapsar,Pune<br>PAN: ADHPS2512D<br>**(Appellant)** | vs. | Jurisdictional Assessing Officer<br>Ward-1(1)(5), Agra<br>**(Respondent)** |

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| **Appellant by** | **CA Sh Sanjeev Gupta ,in ITA no. 41&42/21**<br>**Sh. Hemant Jain C.A. in ITA no 20&21/21** |
| **Respondent by** | Mazhar Akram, Sr. DR |

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| **Date of Hearing** | 14.06.2021 |
| **Date of Pronouncement** | 14.06.2021 |

## ORDER

**Per Bench .**

These four appeals are filed by the assessee, feeling aggrieved by the order passed by the Commissioner of Income Tax (Appeals) National Faceless Appeal Centre Delhi on the following grounds

**ITA no 41/2021**

1. That the appellant denies its liability to be assessed at total income of Rs.

   13,22.156/- as against returned income of Rs. 10,67,861/- and accordingly denies its liability to pay tax, cess and interest demand here on.

   2. That having regard to the facts and circumstances of the case, Ld. C1T(A) has erred in law and on facts in confirming the action of Ld. AO in making adjustments u/s 143(1)(a) of the Income Tax Act, 1961 by disallowing the contribution received from employees towards ESI and EPF amounting to Rs. 2,54,295/- with complete disregards to the Decision of Jurisdictional Honorable Allahabad High Court in the case of Sagan Foundry (P) Ltd. Vs CIT ( 97CCH 0160 and 145 DTR 0265) as the payments have been made before due date specified u/s 139(1) and assuch are fully allowable.

**ITA no 42/2021**

That the appellant denies its liability to be assessed at total income of Rs.9.45,640/- as against returned income of Rs. 8,18,607/- and accordingly denies its liability to pay tax, cess and interest demand thereon.

2. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in making adjustments u/s 143(1)(a) of the Income Tax Act, 1961 by disallowing the contribution received from employees towards ESI and EPF amounting to Rs. 1,27,032/- with complete disregards to the Decision of Jurisdictional Honorable Allahabad High Court in the case of Sagun Foundry (P) Ltd. Vs CIT ( 97CCH 0160 and 145 DTR 0265)as the payments have been made before due date specified u/s 139(1) andas such are fully allowable..2. That while rejecting the assessee's submissions and charging the tax under the Head 'long term capital gain', the authorities below have not considered the facts and the explanation offered before them. After taking into consideration the above, no capital gain arises on the compulsory acquisition of the above land, the capital gain charged on the compulsory acquisition of this land is not called for, the addition made on this score is liable to be deleted.

3. That the appellate order dated 28.12.2018 is bad in law.

**ITA NO 20/21**

That the Ld. Assessing Officer (CPC) made an addition of Rs.15,97,250/- on processing u/s. 143(1) on account of late deposit of employee contribution towards ESIC/EPF on account of late deposit of employee contribution towards ESIC/EPF. In view of the provisions of section 2(24)(x) read with section 36(I)(va) & section 43B of the Income Tax Act,1961, being late deposit of employees contribution towards ESIC/EPF which has been duly deposited on or before the due date of filing of return of income as per the provisions under section 139(I) of The Income Tax Act 1961, employee contribution towards ESI and PF paid after due date of respective statue but before the filling of Income Tax return due date as per section 139 (1) are allowable expenses and cannot be disallowed under section 36 (l)(va). But the Ld. Assessing Officer (CPC) without appreciating the legal position and facts of the case made the above mentioned addition and the assessee preferred an appeal before the Hon'ble CIT (A)-1, Agra against said order. And then order has been passed by **CIT(A), National Faceless Appeal Centre, Delhi.** The Hon'ble CIT (A) NFAC also confirmed theabove said addition of Rs.15,97,250/- and

passed the order against the Assessee, on 27/0$^{2}$/$_{2}$021. Copy of order is enclosed

**ITA NO 21/21**

That the Ld. Assessing Officer (CPC) made an addition of Rs.17,76,883/- on processing u/s. 143(1) on account of late deposit of employee contribution towards ESIC/EPF on account of late deposit of employee contribution towards ESIC/EPF. In view of the provisions of section 2(24)(x) read with section 36(I)(va) & section 43B of the Income Tax Act,1961, being late deposit of employees contribution towards ESIC/EPF which has been duly deposited on or before the due date of filing of return of income as per the provisions under section 139(I) of The Income Tax Act 1961, employee contribution towards ESI and PF paid after due date of respective statue but before the filling of Income Tax return due date as per section 139 (1) are allowable expenses and cannot be disallowed under section 36 (1)(va). But the Ld. Assessing Officer (CPC) without appreciating the legal position and facts of the case made the above mentioned addition and the assessee preferred an appeal before the Hon'ble CIT (A)-1, Agra against said order. And then order has been passed by **CIT(A), National Faceless Appeal Centre, Delhi.** The Hon'ble CIT (A) NFAC also confirmed theabove said addition of Rs.17,76,883/- and

passed the order against the Assessee, on 27/02/2021. Copy of order is enclosed

**We are reproducing herein the facts of ITA 41/2021, as facts of all the appeals are identical .**

**Brief Facts in AY 2018-19 in ITA no 41/2021**

1. Commissioner of Income Tax (Appeals) National Faceless Appeal Centre Delhi in order dated 31/3/2021 in held as under:

" The present appeal has been preferred against the intimation passed by the9 CPC, Bangalore, u/s.143(1) of the I.T. Act, 1961 for the assessment year 2018-1. The appellant e-filed the appeal vide acknowledgement No.190423N761041019Delhi. on 04/10/2019 in view of Circular No.20/2016 dtd.26/05/2016 of CBDT, New Delhi

2.2. Date of final hearing was fixed by this office on 26.03.2021 and the Notice u/s 250 of the Act was issued where in assessee was asked to submit written submission on registered email id or on E-Filing Portal. The appellant has uploaded written submission along with copy of the Judgments on E-Filing Portal on 03.03.2021. The

case is adjudicated based upon relevant information on record. There is no request for any adjournment. The relevant portion of the statement of facts and reply is under:-

"The Assessee, is engaged in the business of storage of potatoes in Cold storage and filed its return of Inctim ,for AY 2018-19;on 30-09-2018,declaring a net taxable income of Rs1167861/- having the income from Profit and Gains from Business and Profession however the, assessing officer DCIT while processing the return of Income has disallowed the expenditure, of Employees contribution to ESI and PF not credited to Employees account on or before the due date (Section 36(1) (va) being Rs. 254295 and having tax impact of Rs. 81807 (refund cancelled for Rs.60720 and net demand Rs. 21087) and hence this appeal."

"Further we would like to draw your attention regarding the allowability of Employees Contribution towards ESI and PF which have been deposited after due date but before the due date of filing of Income Tax Return, the same has been allowed u/s 43B of theIncome Tax Act by the Worthy CIT(Appeals), Agra in the case of Mrs.Rekha Agarwalin Appeal No. 497679031100619/2019-20/Aligarh for AY 2017-18 dated 23.09.2020which relied on the Judgment of Allahabad H C Sagun Foundry Private Limited and held in the case of Sagun Foundry (P) Ltd. vs CIT {2017) 78 Taxmann 47, even employee contribution, actually paid by the

employer into the relevant fund before the due date u/s 139(1) for filing of return of income for the relevant assessment year, is allowable as adeduction in the relevant year. Accordingly, the adjustment of Rs. 99788/-is deleted subject to verification by the AO that the sum of Rs. 99788/- has been actually paid by the assessee into the relevant fund before the due date u/s 139(1) for filing of return of income for the relevant assessment year"

Copy of the Judgment is attached as annexure.

Hence, in view of above, the issue is aptly clear that payments for labour welfare dues like PF and ESI if paid before the due date of filing of income tax return u/s 139(1) will be allowable deduction is fully covered by section 438 and as such the disallowance of Rs. 254295/- made by the Ld A.O. is bad-in-law and may kindly be deleted."

Decision

3.1 ……..

3.2 …….

3.3 On the other hand, it was argued by the Appellant that Employee's contribution towards Provident Fund and ESI has been deposited within the time limit prescribed u/s 139(1) of the Act and

accordingly contended that the same is allowed as deduction in view of provisions of section 43B of the Act.

**On carefully consideration of observation of Assessing Officer and contention of Appellant, I observe that entire issue is covered against Appellant by decision of Hon'ble Gujarat High Court in case of State Road Transport Corporation (366 ITR 170) wherein it is held as under:**

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

With due respect to case laws relied by the appellant and as more than one high court decision involved, it is felt that the final verdict is evolving on this issue. Considering the above decision of Hon'ble High Court In the -case of State Road Transport Corporation( 366 ITR 170) addition of Rs. 2,54,295/- made by Assessing Officer is upheld. The **groundno.2 of appeal is dismissed. The ground no.1 &3 are routine and subsidiary in nature hence dismissed."**

2. The Ld.AR for the assessee had submitted that the order passed by the CIT(A) was contrary to the law laid down by the Jurisdictional High Court and therefore the order passed by the CIT(A) is required to be set aside and the appeal of the assessee is required to be allowed. He had submitted that national faceless appeal centre, had not considered the binding decision of the High Court and have passed the order. He had also submitted that in all cases EPF/ESI contributions were paid by the assessee before last date of filling return of income. He had also submitted thatin similarfacts, the NFAC had allowed the appeal of Mr Rajbir,PAN no AVPPS5601P in its order dated 9/3/2021, in ITBP/NFAC/S250/2020-21/1031333008(1).

3. Per contra DR for the revenue had vehemently relied upon the order passed by the assessing officer as well as by the CIT (A). It was submitted that the CIT(A) had noted down jurisdictional High Court decision however he had relied upon the decision of the Gujrat High Court, as the issue has not been finally concluded by the apex court. Therefore he had supported the order passed by the lower authority.

4. In the rebuttal the Ld.AR for the assessee, had submitted that the tax effect in the present case is well below the limit prescribed for filing the appeal before the High Court or before the Supreme

Court. It was submitted that the reliance on the Non-jurisdictional High Court judgement had resulted into burdening the litigant unnecessarily, as no appeal can be filed before the High Court against the order of the tribunal, in case the appeal of the assessee is allowed. The net result would be the same. It was submitted that the doctrine of precedent requires this tribunal to follow the decision of the jurisdictional High Court. He had also drawn our attention to the newly inserted provision of the faceless assessment and faceless appeal.

5. We have considered the rival contention of the parties and perused the material available on record, including the judgments cited at bar during the course of hearing by both the parties. From the reading of the impugned order it is abundantly clear that the NFAC, had relied upon the decision of Gujarat High Court in the matter of State Road Transport Corporation (366 ITR 170), for the purposes of dismissing the appeal of the assessee and have ignored binding decision of the Jurisdictional High Court in the matter of Sagun Foundry (P) Ltd. vs CIT {2017) 78 Taxmann 47. In our view the approach of the NFAC , is not correct and is against the scheme of the notification issued by the Board for creating the centralised NFAC and also against the settled principle of precedent. As NFAC, is the new concept

produced by virtue of the notification dated 25 September 2020, therefore we deem it appropriate to deal the issue in some detail.

6. It will be useful to state some background development in the field of Faceless appellate adjudication by the revenue .The Hon'ble Prime Minister on August 13, 2020 launched the platform for Honouring the Honest which included a Scheme for Faceless Appeals *inter alia* which has been notified by the Central Board for Direct taxes (**CBDT**) vide ***Notifications dated September 25, 2020 bearing No. 76 of 2020and No. 77 of 2020***. The Finance Act, 2020 ***(2020) 428 ITR 1 (St )***vide amendment in section 250(6C) of the Income-tax Act, 1961 (**Act**) expanded the scope of e-assessment to include e-appeals.

7. Lot of articles and research papers were published by various erudite tax practitioners and academician highlighting the various features of notification dated 25/9/2020 . Wehave gone through the notification and some of the article including article written by **Dr. K. Shivaram, Senior Advocate, and Mr. Shashi Bekal, Advocate ,( posted on itatonline.org on 27.3.2021) .**

8. The Finance Bill, 2020***(2020) 420 ITR 145/ 221 (St)*** vide proposed amendments under section 274 and 250 of the Act sought to expand the scope of e-assessment by introducing provisions pertaining to e-penalty and e-appeals, respectively.According to the Memorandum to the Finance Bill, 2020,***(2020) 420 ITR 249 (St)*** The filing of appeals before Commissioner (Appeals) has already been enabled in an electronic mode. However, the first appeal process under the Commissioner (Appeals), which is one of the major

functions/ processes that is not yet in full electronic mode. A taxpayer can file appeal through his registered account on the e-filing portal. However, the process that follows filing of appeal is neither electronic nor faceless. In order to ensure that the reforms initiated by the Department to eliminate human interface from the system reach the next level, it is imperative that an e-appeal scheme be launched on the lines of e-assessment scheme.Accordingly, it was proposed to insert sub-section (6A) in section 250 of the Act to provide for the following:

- Empowering Central Government to notify an e-appeal scheme for disposal of appeal so as to **impart greater efficiency, transparency and accountability.**
- Eliminating the interface between the Commissioner (Appeals) and the appellant in the course of appellate proceedings to the extent technologically feasible.
- Optimizing utilization of the resources through economies of scale and functional specialisation.
- Introducing an appellate system with dynamic jurisdiction in which appeal shall be disposed of by one or more Commissioner (Appeals).

9. Section 250 of the Act provides as under :

**Procedure in appeal.**

**250.** [90] (1) The [91][***] [92][Commissioner (Appeals)] shall fix a day and place for the hearing of the appeal, and shall give notice of the same to the appellant and to the [93][Assessing] Officer against whose order the appeal is preferred.

(2) The following shall have the right to be heard at the hearing of the appeal—

(*a*) the appellant, either in person or by an authorised representative;

(*b*) the [93][Assessing] Officer, either in person or by a representative.

(3) The [91][***] [92][Commissioner (Appeals)] shall have the power to adjourn the hearing of the appeal from time to time.

(4) The [91][***] [92][Commissioner (Appeals)] [94]may, before disposing of any appeal, make such further inquiry as he thinks fit, or may direct the [93][Assessing] Officer to make further inquiry and report the result of the same to the [91][***] [92][Commissioner (Appeals)].

(5) The [91][***] [92][Commissioner (Appeals)] may, at the hearing of an appeal, allow the appellant to go into any ground of appeal not specified in the grounds of appeal, if the [91][***] [92][Commissioner (Appeals)] is satisfied that the omission of that ground from the form of appeal was not wilful or unreasonable.

(6) The order of the [95][***] [96][Commissioner (Appeals)] disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reason for the decision.

[97][(6A) In every appeal, the Commissioner (Appeals), where it is possible, may hear and decide such appeal within a period of one year from the end of the financial year in which such appeal is filed before him under sub-section (1) of section 246A.]

[98][(6B) The Central Government may make a scheme[98a], by notification in the Official Gazette, for the purposes of disposal of appeal by Commissioner (Appeals), so as to impart greater efficiency, transparency and accountability by—

(*a*) eliminating the interface between the Commissioner (Appeals) and the appellant in the course of appellate proceedings to the extent technologically feasible;

(*b*) optimising utilisation of the resources through economies of scale and functional specialisation;

(*c*) introducing an appellate system with dynamic jurisdiction in which appeal shall be disposed of by one or more Commissioner (Appeals).

(6C) The Central Government may, for the purposes of giving effect to the scheme made under sub-section (6B), by notification in the Official Gazette, direct that any of the provisions of this Act relating to jurisdiction and procedure for disposal of appeals by Commissioner (Appeals) shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in the notification:

**Provided** that no direction shall be issued after the 31st day of March, 2022.

(6D) Every notification issued under sub-section (6B) and sub-section (6C) shall, as soon as may be after the notification is issued, be laid before each House of Parliament.]

(7) On the disposal of the appeal, the [99][***] [1][Commissioner (Appeals)] shall communicate the order passed by him to the assessee and to the [2][[3][Principal Chief Commissioner or] Chief Commissioner or [3][Principal Commissioner or] Commissioner].

10. The centre while exercising its power under section 6B had introduced Faceless Appeal Scheme and made it effective from September 25, 2020. By The CBDT vide Notification bearing No. 76 & 77 of 2020.Some of the relevant clauses of this are reproduced hereinfor the purposes of completeness and record :

In exercise of the powers conferred by sub-section (6C) of section 250 of the Income-tax Act, 1961 (43 of 1961), for the purposes of giving effect to the Faceless Appeal Scheme, 2020 made under sub-section (6B) of section 250 of the Act, the Central Government hereby makes the following directions, namely:—

**1.** The provisions of clause (16A) of section 2, section 120, section 129, section 131, section 133, section 134, section 136 and Chapter XX of the Act shall apply to the procedure in appeal in accordance with the said Scheme subject to the following exceptions, modifications and adaptations, namely:—

"A. (1) The appeal, as referred to in paragraph 3 of the said Scheme, shall be disposed of under the said Scheme as per the following procedure, namely:—

……

……..

…….

(xvii) where the appeal unit intends to enhance an assessment or a penalty or reduce the amount of refund,—

(a) the appeal unit shall prepare a show-cause notice containing the reasons for such enhancement or reduction, as the case may be, and send such notice to the National Faceless Appeal Centre.

(b) the National Faceless Appeal Centre shall serve the notice, as referred to in sub-clause (a), upon the appellant.

(c) the appellant shall, within the date and time specified in the notice or such extended date and time as may be allowed on the basis of application made in this behalf, file his response to the National Faceless Appeal Centre.

(d) where a response is filed by the appellant, the National Faceless Appeal Centre shall send such response to the appeal unit, or where no such response is filed, inform the appeal unit;

(xviii) The appeal unit shall, after taking into account all the relevant material available on the record, including the response filed, if any, by the appellant or any other person, as the case may be, or report furnished by the 1[National Faceless Assessment Centre] or the Assessing Officer, as the case may be, and after considering any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised in the appeal, —

(a) prepare in writing, a draft order in accordance with the provisions of section 251 of the Act; and

(b) send such order to the National Faceless Appeal Centre along with the details of the penalty proceedings, if any, to be initiated therein;

(xix) the National Faceless Appeal Centre shall upon receipt of the draft order, as referred to in sub-clause (a) of clause (xviii), —

(a) where the aggregate amount of tax, penalty, interest or fee, including surcharge and cess, payable in respect of issues disputed in appeal, is more than a specified amount, as referred to in clause (x) of paragraph 13 of the said Scheme, send the draft order to an appeal unit, other than the appeal unit which prepared such order, in any one Regional Faceless Appeal Centre through an automated allocation system, for conducting review of such order.

(b) in any other case, examine the draft order in accordance with the risk management strategy specified by the Board, including by way of an automated examination tool, whereupon it may decide to —

i. finalise the appeal as per the draft order; or

ii. send the draft order to an appeal unit, other than the unit which prepared such order, in any one Regional Faceless Appeal Centre through an automated allocation system, for conducting review of such order;

(xx) the appeal unit shall review the draft order, referred to it by the National Faceless Appeal Centre, whereupon it may decide to,—

(a) concur with the draft order and intimate the National Faceless Appeal Centre about such concurrence; or

(b) suggest such variation, as it may deem fit, to the draft order and send its suggestions to the National Faceless Appeal Centre;

(xxi) the National Faceless Appeal Centre shall, upon receiving concurrence of the appeal unit, finalise the appeal as per the draft order;

(xxii) the National Faceless Appeal Centre shall, upon receiving suggestion for variation from the appeal unit,assign the appeal to an appeal unit, other than the appeal unit which prepared or reviewed the draft order, in any one Regional Faceless Appeal Centre through an automated allocation system;

(xxiii) the appeal unit, to whom appeal is assigned under clause (xxii), shall, after considering the suggestions for variation,—

(a) where such suggestions intend to enhance an assessment or a penalty or reduce the amount of refund, follow the procedure laid down in clause (xvii) and prepare a revised draft order as per the procedure laid down in clause (xviii); or

(b) in any other case, prepare a revised draft order as per procedure laid down in clause (xviii);

and send such order to the National Faceless Appeal Centre along with the details of the penalty proceedings, if any, to be initiated therein;

(xxiv) the National Faceless Appeal Centre shall after finalising the appeal as per item (i) of sub-clause (b) of clause (xix) or clause (xxi) or upon receipt of revised draft order as per clause (xxiii),pass the appeal order and,—

(a) communicate such order to the appellant;

(b) communicate such order to the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner as per sub-section (7) of section 250 of the Act;

(c) communicate such order to the 1[National Faceless Assessment Centre] or the Assessing Officer, as the case may be, for such action as may be required under the Act;

(d) where initiation of penalty has been recommended in the order, serve a notice on the appellant calling upon him to show cause as to why penalty should not be imposed upon him under the relevant provisions of the Act;

**C.** (1) An appeal against an order passed by the National Faceless Appeal Centre under the said Scheme shall lie before the Income-tax Appellate Tribunal having jurisdiction over the jurisdictional Assessing Officer.

(2) Subject to the provisions of paragraph (3) of the said Scheme, where any order passed by the National Faceless Appeal Centre or Commissioner (Appeals) is set-aside and remanded back to the National Faceless Appeal Centre or Commissioner (Appeals) by the Income-tax Appellate Tribunal or High Court or Supreme Court, the National Faceless Appeal Centre shall pass the order in accordance with the provisions of the said Scheme.".

11. From the reading of the notification issued by the Board, it is abundantly clear that, before passing Final appellate order in appeal,it passes through various stages of scrutiny . Firstly a draft order is proposed by AU, than it is sent to review unit ( subject to tax effect) and if review unit suggest some suggestion/s than it is assigned to another AU for concurrence or modification and thereafter final appellate order is passed by NFAC(XXii,XXiii and XXiv of notification ) .Thus enough safeguards were provided by the notification with a view to achieve its objects of impart consistency , efficiency, transparency and accountability.

12. As provided by the notification, order passed by NFAC, subject to challenge before the income tax tribunal having the jurisdiction over the jurisdictional Assessing Officer.

13. In the case on hand, the assessing officer is situated within the jurisdiction of Income Tax Appellate Tribunal, Agra,(falling within the jurisdiction of Allahabad High Court).

14. The jurisdiction of the Income Tax Appellate Tribunal, Agra, have not been disputed the revenue before us. The Short question which requires the consideration by the tribunal is whether the impugned order is sustainable in the eyes of law, When First appellate authority noted down in the impugned order that there is jurisdictional High Court decision in the case of Sagun Foundry (P) Ltd. vs CIT {2017) 78 Taxmann 47, in favour of the assessee , however after noting the binding decision , NFAC chooses to dismiss the appeal of the assesse by following the non jurisdictional decision in the matter of **State Road Transport Corporation (366 ITR 170).**

15. Though it needs no decision that the decision of the jurisdictional High Court shall be binding on the authorities /tribunal / courts situated in the territorial jurisdiction of the High Court. However even if there are conflicting decision of Jurisdictional high Court and non

jurisdictional high court than also the Jurisdictional High Court decision shall be binding on the quasi-judicial authorities/ courts/ Tribunal situated within the state. However for the purposes of clarity and completeness were we Reiterating herein theabove concept in some details .

16. National Judicial academy had published one article on 14 September 2018 written by Hon'ble Justice ( Retd)B.S. Chauhan of SC , the relevant extract of the said article are as under :

**"महाजनोयेनगतःसपन्थाः**

The text of Mahabharata says 'that path is the right path which has been followed by virtuous men.' The concept of precedent is based on this theory. The edifice of the common law is made up of judicial decisions. The doctrine of precedents grew in England in absence of codified laws. The rule of law requires not over turning precedents too often. Aristotle said "the habit of lightly changing the laws is an evil".

…

Precedents: A source of "law" under the Constitution of India

Article 141 of the Constitution lays down that the “law declared” by the Supreme Court is binding upon all the courts with the territory of India. The “law declared” has to be construed as a principle of law that emanates from a judgment, or an interpretation of a law or judgment by the Supreme Court, upon which, the case is decided. Hence, it flows from the above that the “law declared” is the principle culled out on the reading of a judgment as a whole in the light of the questions raised,upon which the case is decided. (See: Fida Hussain v. Moradabad Development Authority (2011) 12 SCC 615; Ambica Quarry Works v. State of Gujarat (1987) 1 SCC 213; and CIT v. Sun Engg. Works (P) Ltd. (1992) 4 SCC 363).

……..

…….

The High Courts are Court of record under Article 215 of the Constitution. By virtue of the provisions of Article 227, the High Courts have power of superintendence over all Courts and tribunals in their respective jurisdiction. Thus, it is implied that all Courts and Tribunals in the respective State will be bound by the decisions of the High Court.(See: East India Commercial Co. Ltd. v. Collector of Customs, AIR 1962 SC 1893; Prakash Chandra Pathak v. State of Uttar Pradesh, AIR 1960 SC 195; and Raval & Co. v. K G Ram Chandran, AIR 1974 SC 818).

The full form of the principle is “Stare decisis et non quieta movere”, which means “stand by decisions and do not move that which is quite”.

There are vertical and horizontal stare decisis. Thehorizontal one is a rule of prudence, and may be diluted by factors e.g. manifest error, distinction on facts, etc. (vide Keshav Mills Co. Ltd. v. C.I.T. AIR 1965 SC 1636). The vertical principle require only compliance, being a rule of law. It's breach would cause judicial indiscipline and impropriety. (See: Nutan Kumar v. IInd Additional District Judge AIR 2002 SC 3456).

Judgments of the courts are not computer outputs ensuring consistency and absolute precision but they are product of human thoughts based on the given set of facts and interpretation of the applicable law. If the doctrine of precedentis not applied, there may be confusion in the administration of law and respect for law would irretrievably suffer.

It is necessary to create a predictable and a non-chaotic condition. The cardinal principle of uniformity is basic principle of jurisprudence that promotes equity, equality, judicial integrity and fairness. Predictability is a powerful tool in the modern law literature.

- Precedents form foundation of administration of justice (Tribhovandas P. Thakker v. Rattilal Motilal Patel, AIR 1968 SC 372).

- Precedents keep the law predictable. (Surinder Singh v. Hardial Singh, AIR 1985 SC 89)

Follow it to mark Path of Justice (Union of India v. Amrit Lal

Manchanda, AIR 2004 SC 1625).

A decision made by a higher court is binding and the lower court cannot over turn it. The court not to overturn its own precedent unless there is a strong reason to do so.

In Union of India v. Raghubir Singh, AIR 1989 SC 1933, the Supreme Court held that the binding precedent is necessary to be followed in order to maintain consistency in judicial decision and enable an organic development of the law. It also provides an assurance to an individual as to the consequence of transactions forming part of his daily affairs.

In Mamleshwar Prasad v. Kanahaiya Lal, AIR 1975 SC 907, the Supreme Court held as under:—

"Certainty of the law, consistency of rulings and comity of Courts – all flowering from the same principle - converge to the conclusion that a decision once rendered must later bind like cases. We do not intend to detract from the rule that, in exceptional instances where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of binding precedents. It should be a glaring case, an obtrusive omission."

The benefit of this doctrine is to provide certainty, stability, predictability and uniformity. It increases the probability of judges arriving a correct decision, on the assumption that collective wisdom is always better than that of an individual. It also preserve the institutional legitimacy and "adjudicative integrity". It is flexible in nature, as there are ways to avoid precedents. It provides equality in treatment and thus prevents bias, prejudice and arbitrariness and avoids inconsistent / divergent decisions. It prevents uncertainty and ambiguity in law

[Union of India v. Raghubir Singh, (1989) 2 SCC 754; and Justice R V Raveendran : "Precedents – Boon or Bane", (2015) 8 SCC 1 (J)].

The courts have to nurture, strengthen, perpetuate and proliferate certainty of law and not deracinate its clarity (Vide: State of U.P. v. Ajay Kumar Sharma, (2016) 15 SCC 289)....."

17. From the above said article it is clear that the decision of the High Court are binding on the courts/ tribunal situated within the territorial jurisdiction of the High Court.

18. Binding nature of jurisdictional High Court decision on the tribunal working under it umbrella , traces its origin Article 227 of the Constitution, which provides the supervision and control of all the tribunal/ auction other authority situated within the jurisdiction of the High Court.The Hon'ble Supreme Court in East India Commercial Co. Ltd. v. Collector of Customs AIR 1962 SC 1893 observes -

***" We therefore, hold that the law declared by the highest court in the state is binding on authorities or Tribunals under its superintendence and they cannot ignore it."***

19. The Apex Court reiterated the aforestated position once again in **Baradakanta Mishra v. Bhimsen Dixit AIR 1972 SC 2466** where it stated that it would be anomalous to suggest that a Tribunal over which a High Court has superintendence can ignore the law declared by it and if a Tribunal can do so, all the subordinate courts can equally do so, for there is no specific provision as in respect of Supreme Court, making the law declared by the High Court binding on subordinate Courts. The court further observed that it is implicit in the power of supervision conferred on a superior Tribunal that all the Tribunals subject to its supervision should confirm to the law laid down by it.

20. Jurisdictional High Court of Allahabad High Court in K. N. Agarwal v. CIT [1991] 189 ITR 769 laid emphasis of following the Juriditional high Court in the Following manner and held as under -

*"Indeed, the orders of the Tribunal and the High Court are binding upon the Assessing officer and since he acts in a quasi judicial capacity, the discipline of such functioning demands that he should follow the decision of the Tribunal or the High Court, as the case may be. He cannot ignore merely on the ground that the Tribunal's order is the subject matter of revision in the High Court or the High Court's decision is under appeal before the Supreme Court. Permitting him to take such a view would introduce judicial indiscipline, which is not called for even in such cases. It would lead to a chaotic situation".*

*21.* Similarly A.P. High Court in State of A.P. v. CTO (1988) 169 ITR 564, held as under :-

*" If any authority or the Tribunal refuses to follow any decision of the High Court on the above grounds, it would be clearly guilty of committing contempt of the High Court and is liable to be proceeded against."*

22. The Supreme Court in the case of Union of India v. Kamlakshi Finance Corpn. Ltd. AIR 1992 SC 711; deliberately emphasized on the following

"It cannot be too vehemently emphasized that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should

be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not 'acceptable' to the Department—in itself an objectionable phrase—and is the subject-matter of an appeal canfurnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assesseesand chaos in administration of tax laws."

23. The Hon'ble Calcutta High Court in Voest Alpine Ind. GmbH v. ITO &Ors. (246 ITR 745, 749 Cal.) held that it is well settled principle of law that the junior incumbent is supposed to obey and carry out the order and / or observations 'made by the superior authority, be it judicial forum or a quasi-judicial forum or even in any administration field.

24. In CIT v. Ralson Industries Ltd. (288 ITR 322 SC) the Hon'ble Supreme Court observed that when an order is passed by a higher authority, the lower authority is bound thereby keeping in view the principles of judicial discipline.

25. Recently Hon'ble Bombay High Court Sungard Solutions (I) (P.) Ltd.*[2019] 105 taxmann.com 67 (Bombay) had held as under

> ***13.*** *The submission on behalf of the Revenue that the seat of the Assessing Officer alone would decide the jurisdiction of the High Court on the basis of Section 127 of the Act, is misplaced. This for the reasons that the bare reading of the provisions show that the Court to which appeal would lie is not governed by the seat of the Assessing Officer. It for this reason that, the Income Tax Appellate Tribunal (ITAT) Rules specifically provides in Rule 4(i) thereof, the Bench which shall hear the appeals, filed before it in terms of Section 253 of the Act, shall be decided by the President of the Tribunal. Therefore, which bench/seat of the Tribunal will hear the appeals is not decided by the seat of the Assessing Officer as provided in Section 127 of the Act, as it does not apply in case of the Tribunal as it is not an Income Tax Authority under the Act. It is the President of the Tribunal in exercise of his powers under Rule 4(1) of the ITAT Rules, issued a standing order No.63/97 dated 2.7.2013 as amended, inter alia, providing the jurisdiction of the bench dependent upon the areas from where the impugned orders have originated. In the above standing order, Note 4 specifically states that the jurisdiction of a bench will not be determined by the place of business or residence of the assessee but by the location of the office of the Assessing Officer. If the seat of the Assessing Officer were in terms of Section 127 of the Act, to govern/control the jurisdiction of the Authorities other than those listed in Section 116 of the Act, then a specific provision in terms of Note 4 in the standing order issued by the President of the Tribunal was not called for/required. Thus in terms, the above standing order where an assessment proceedings have been transferred from one place to another under Section 127 of the Act, then the bench of the Tribunal before which appeals would lie, may shift with the seat of the Assessing Officer before the filing/hearing of the appeal. Moreover, it is important to note that, the Bombay High Court Rules while providing for appeals from the Tribunal does not specifically exclude its jurisdiction in case of orders passed by the Tribunal at Mumbai or provide for*

*the court entertaining appeals dependent upon the seat of the Assessing Officer at the time of filing the appeal. In fact, the inter se, distribution of Appeals between the different benches of this court is on the basis from where an appeal originated. Therefore, the Appellate Court from which an appeal would lie from the order of the Tribunal would necessarily be the High Court exercising jurisdiction over the places where the Tribunal which passed the order, is situated.*

***14.*** *The above plain reading of the provisions is also supported by jurisdictional/constitutional principles. The Tribunal which passes orders is bound by the orders passed by the jurisdictional High Court where the Tribunal is situated. In the above view, in the present facts, the Tribunal which passed the impugned order is situated in Bangalore. Therefore, the Tribunal would be bound by the orders passed by the Karnataka High Court at Bangalore. However, it is likely that there could be divergence of opinion between two High Courts on a particular issue, one view by the Court where the Tribunal is situated i.e. Bangalore and the other view by the Court where the Assessing Officer is now situated i.e. Pune, leading to an incongruous situation. On what paramaters would the High Court to which an appeal is filed on the basis of where the seat of the transferee Assessing Officer is situated by virtue of Section 127 of the Act would apply to the order of the Tribunal passed at seat of the transferor Assessing Officer in this case by the Bangalore Bench of the Tribunal. Thus, the Parliament keeping in view the fact that, all Authorities/Tribunals functioning within a particular State are bound by the view of the High Court of that State. This has been so provided in terms of Section 260A read with 269 of the Act. It is, therefore, for the above reason that the orders passed by the Tribunal are subject to an appeal before the High Court under which it exercises jurisdiction. If the submission of the Revenue is to be accepted, then we would have a peculiar situation where the powers under Articles 226 and 227 of the Constitution, would be exercised by the Court which exercises jurisdiction over the seat of the Tribunal which is passing the order while for the purposes of appeal under the Act, the Court which would entertain the appeal would be a Court different from the Court which would exercise jurisdiction under Articles 226 and 227 of the Constitution. It is to be noted that, for relief under Article 226 of the Constitution, no*

*part of the case of action would have arisen in Mumbai giving rise to the jurisdiction of this Court. Thus, harmonious reading of the various provisions of law would require that the appeal from the order of the Tribunal is to be filed to the Court which exercises jurisdiction over the seat of the Tribunal.*

***15.** In this case, the Karnataka High Court exercises jurisdiction over the Banglore bench of the Tribunal which has passed the impugned order dated 30th July, 2015. However, it may be pointed that Explanation to Section 127 of the Act states that once a direction has been issued therein in respect of the case i.e. Section 127 of the Act, then all Assessment proceedings under the Act in respect of any year which may be pending on the date of such order or which have been completed on or before such date would stand transferred to the transferee assessing Officer. The words "all proceedings under this Act" would not cover appeals under the Act before the High Court as it would run counter to Section 260A and 269 of the Act which provides specifically for the High Court which would have jurisdiction over the orders of the Tribunal. Thus, the words "all proceedings under this Act" have to be harmoniously read with the other provisions of the Act and have to be restricted only to the proceedings under the Act before the authorities listed in Section 116 of the Act. Any other interpretation would render Section 269 of the Act otois. In fact, the Andhra Pradesh High Court in case of CIT v. Parke Davis (India) Ltd. [1999] 106 Taxman 16/239 ITR 820 has dealt with this very submission in the context of a Reference application and inter alia after examining the explanation to Section 127 held as under: —*

*"The words 'All proceedings under the Act in respect of any year' occurring in the Explanation cannot be understood in vacuum and cannot be stretched to cover reference applications already filed or decided by the date of transfer under Section 127."*

*The situation would not be different while dealing with the appeal under Section 260A of the Act. We are in respectful agreement with the decision of the Andhra Pradesh in the case of Parke Davis (I) Ltd. (supra). Therefore, in our view, Section 127 of the Act and explanation thereto only apply to the authorities listed under Section 116 of the Act and*

*exercising jurisdiction under the Act. It can have no application to the High Court constituted under the Constitution.*

***16.*** *We shall now examine the various decisions cited at the bar and its applicability to the present facts. The decision in the case of Sahara India Financial Corpn. Ltd. (supra) relied by the Revenue proceeded on the explanation to Section 127(4) of the Act to hold that where the assessment proceedings were transferred from Lucknow to Delhi, it would only be the Delhi High Court which could entertain an appeal from the order of the Tribunal after the date of transfer of assessment proceedings under Section 127 of the Act.*

*We respectfully note that the aforesaid decision of the Delhi High Court has not considered the provisions of Section 260A and 269 of the Act. In our view, the applicability of the provisions of Section 127 of the Act is only restricted to the authorities listed under Section 116 of the Act and will not govern the jurisdiction of the High Court. The jurisdiction of the High Court would be decided on application of Sections 260A and 269 of the Act.*

***Similarly, the decision of the Delhi High Court in the case of AAR Bee Industries (supra) relied upon by the Revenue noticed the different view taken by Punjab & Haryana High Court in Motorola India Ltd. (supra). However, it held itself bound by the decision of its co-ordinate bench in the case of Sahara India Financial Services (supra) to hold that Section 127 of the Act will govern/decide the Court which will exercise jurisdiction in respect of appeals from the order of the Tribunal.***

*We respectfully disagree with the above view of the Delhi High Court. In our view, Section 127 of the Act can only govern/control the jurisdiction of the Income Tax Authorities as defined in Section 116 of the Act. Therefore, the appeals from the order of the Tribunal to the High Court would be governed by section 260-A and 269 of the Act.*

***17.*** *We note that Punjab & Haryana High Court in Motorola India Ltd. (supra) has examined the identical issue and on examination of Section 127 of the Act, it held as under:—*

*"14. A conjoint reading of the aforementioned provisions makes it evident that the Director General or Chief CIT or CIT is empowered to transfer any case from one or more AOs subordinate to him to any other AO. It also deals with the procedure when the case is transferred from one AO subordinate to a Director General or Chief CIT or CIT to an AO who is not subordinate to the same Director General, Chief CIT or CIT The aforementioned situation and the definition of expression 'case' in relation to jurisdiction of an AO is quite understandable but it has got nothing to do with the territorial jurisdiction of the Tribunal or High Courts merely because Section 127 of the Act dealing with transfer has been incorporated in the same chapter. Therefore, the argument raised is completely devoid of substance and we have no hesitation to reject the same."*

***18.*** *On interpretation of Section 127 of the Act, it held that it has nothing to do with the territorial jurisdiction of the High Court as it only deals with the transfer of assessee's case from one Assessing Officer to another Assessing Officer. Similarly, the Calcutta High Court J.L Morrioson (I) Ltd. (supra) has on application of section 260-A and 269 of the Act held that the High Court where the Tribunal is seated will be the appropriate High Court for purpose of appeal under Section 260A of the Act Both these orders deal with the issue which arise in this appeal i.e which Court would have jurisdiction to entertain the appeal from the order of the Tribunal passed in Banglore whether the Bombay High Court or Karnataka High Court. In similar situation, both the Courts have held that it would be the Court which exercises jurisdiction over the seat of the Tribunal which passed the order which would have jurisdiction.*

26. On the basis of above discussions we are of opinion, though, centralized NFAC, had been created by the notification by the Central Board Of Direct Taxes however it should be ensured ,that whenever any appellate order is passed by NFAC as per notification either by of draft order, or by way of review the draft order or Final Appellate Order, than Decision of

jurisdictional High Court, having the jurisdiction over the assessing officer should be followed and applied by the NFAC. Merely because there is some conflicting decision of a non-Jurisdictional High Court, the relief should not be refused to the assessee. As per the **Notification** Clause C (supra ) an appeal against an order passed by the National Faceless Appeal Centre under the said Scheme shall lie before the Income-tax Appellate Tribunal having jurisdiction over the jurisdictional Assessing Officer. As per Section 260 A of the Income Tax Act, the appeal against the ITAT, order shall lie to **The** High Court and the High court had been defined under section 269 High Court" means—

(i) In relation to any State, the High Court for that State .

27. Thus appeal against the tribunal ( Agra in present case )shall lie to the Hon'ble Allahabad High Court and therefore the decision rendered by Hon'ble High court is not only binding on the Tribunal but also on NFAC, ( though sitting in Delhi ) which is deciding the lis pertaining to Agra ITAT Jurisdiction (AllahabadHC Jurisdiction).

28. The purpose of setting up of the centralized NFAC, is to ensure efficiency, transparency and accountability. We have noted down the various stages of finalization of the final appellate order, however as pointed out by us, despite the binding decision of the jurisdictional High Court and tribunal, the

centralizedNFAC have chooses to contemptuously ignore the binding precedent of Jurisdictional High Court and have applied the non-jurisdictional High Court decision to deprive the assessee from the benefit of the judicial High Court decision.

29. Predictability and transparencies are important hall mark of matured Justice delivery system .The assessee ( litigant ) are expected to arrange their affairs of doing the business , profession or trade on the basis of the applicable Income Tax Act, applicable Rules thereof and binding precedent of the High Court of the state in which, assessee is situated and of Hon'ble SC .

On the basis of the applicable judgement and law, the assessee are drawing their profit and loss account and based on P&L account assessee are filing the return of income. The dream of the Hon'ble Prime Minister of "Honoring theHonest " would only be accomplished if, the revenue treat the assessee Honorably and apply the applicable laws of the High court in right earnest .If the revenue continue to harass the litigants , by passing orders in impugned manner than it would result in callouses waste of time , energy, trust and resource of tax payer. The honoring the honest will remain a slogan and will not areality. Time has come when serious introspection is required by the

Board about the functioning its NFAC. The frivolous litigation and orders should be nip into the bud. The real issues should be raised and decided by the lower authorities without fear or favor, however the issues which are settled by the High court/s should not be raised again and again, especially when the tax effect is very less and no appeal shall lie to High Court/Supreme court as per Board circular .

We may point out in the present case beside AllahabadHigh court, there are many High court decision including Rajasthan high court in the matter of Rajasthan State Ganganagar Sugar Mills Ltd.* against which SLP had been dismissed by Supreme court reported in [2020] 114 taxmann.com 573 (SC) yet NFAC for the sake of passing the order passing the unsustainable order .This is resulting in chocking the legal system which cannot be countenanced and we strongly disapprove this practice .

30. On facts and law , the decision in the matter if **Sagun (supra)** is elaborate and detailed decision , Allahabad high court had even considered and distinguished the decision of high court of Gujrat in the matter of Gujarat State Road Transport Corpn (supra) relied upon by revenue, in the following manner :-

"14. So far as Section 43B is concerned, we find that it was inserted w.e.f. 01.04.1984 to allow deductions provided

payments are actually made before filing of return as per due date under Section 139(1) of Act 1961. 'Income' defined under Section 2(24) of Act, 1961, includes 'profits and gains'. Under Section 2(24)(x), any sum received by Assessee from his employees as contribution to any provident fund/superannuation fund or any fund set up under Employees State Insurance Act, 1948, or any other fund for welfare of such employees, constitute 'income'. In respect to such contributions deduction was allowed under Section 36(1)(va) when contributions received by employer is deposited within time prescribed, under relevant labour welfare statute. Prior to 01.04.1984, every Assessee (employer) was entitled to deduction on mercantile system of accounting as a business expenditure by making provision in his books of account in that regard and this situation continued upto 01.04.1984. An Assessee (employer), if maintaining books on accrual system of accounting, even after collecting contribution from his employee, and even without remitting the amount to Regional Provident Fund Commissioner, he i.e. Assessee (employer) would have claimed deduction as 'business expense', by merely making a provision to that effect in his books of account. A similar discrepancy was noticed in the context of sales tax where Assessee collected the same and other indirect taxes, from their respective customers, and claimed deduction only by making provisions in their books, without actually remitting the amount to Exchequer. To curb this practice, Section 43B was inserted w.e.f. 01.04.1984 whereby mercantile system of accounting with regard to tax, duty and contributions to welfare funds stood discontinued. Now it became necessary for Assessee (employer) to account for the aforestated items, not on mercantile basis, but on cash basis. W.e.f. 01.04.1988, Section 43B was again amended and a Proviso was inserted. It provided, inter alia, in

the context of any sum payable by Assessee (employer) by way of tax, duty, cess or fee, if such an Assessee (employer) pays such tax, duty, cess or fee even after closing of accounting year but before date of filing of Return under Section 139(1) of Act, 1961, assessee would be entitled to deduction under Section 43B on actual payment basis and such deduction would be admissible for the accounting year. This proviso, however, was not made applicable to contributions made by Assessee (Employer) to labour welfare funds. By Finance Act, 1988, w.e.f. 01.04.1988, Second Proviso came to be inserted. Second Proviso was further amended by Finance Act, 1989 w.e.f. 01.04.1989.

15. From the above provisions, now Assessee (employer) become entitled to deduction only if contribution stand credited on or before due date, given in Labour Welfare Statutes. However, Second Proviso again created certain difficulties. In many of the Companies, Financial Year ended on 31st March, did not coincide with accounting period of Labour Welfare Statutes. In many cases, time to make contribution of funds ended after due date of filing of Returns. On the representation of Industries, again Parliament, vide Finance Act, 2003, w.e.f. 01.04.2004, made amendment by deleting Second Proviso and amending First Proviso.

16. Learned counsel for Assessee argued that the issue in question is covered by Supreme Court judgment in CIT v. Alom Extrusions Ltd. [2009] 319 ITR 306/185 Taxman 416, but both learned counsels appearing for rival parties admitted that even after the aforesaid judgment, various High Courts have taken divergent views on the question, whether Section 43B can be read alongwith Section 36(1)(va) or both have independent, distinct and separate field of operation. In this back drop, we find it appropriate, first, to examine judgments of various High Courts

which have been rendered after considering Supreme Court judgment in Alom Extrusions Ltd. (supra) and thereafter would examine the entire aspect in totality.

17. We find that with respect to employees contribution to Provident Fund, as to whether disallowable or not with reference to Section 36(1)(va) read with Section 43B, a similar question came up for consideration before Gujarat High Court in CIT v. Gujarat State Road Transport Corpn. [2014] 366 ITR 170/223 Taxman 398/41 taxmann.com 100. Therein Assessee collected Rs. 51,06,02,712/- from its employees towards provident fund contribution but deposited Rs. 21,16,61,582/- with provident fund trust. Thus there was a short fall of Rs. 24,89,41,130/-. This amount of short fall was treated by Assessing Officer as income of Assessee vide Section 2(24)(x) read with Section 36(1)(va) of Act 1961. Assessing Officer also added Rs. 1,93,55,580/- being the amount of short fall towards employers contributory provident fund and disallowed the same under Section 43B of Act 1961. He also disallowed the said amount of Rs. 1,93,55,580/- from expenses claimed by Assessee for the A.Y. in question i.e. 2005-06 as per provisions under Section 43B. Dissatisfied with assessment order, Assessee preferred appeal before CIT(A) who vide order dated 25.06.2009 partly allowed the same and deleted disallowance of Rs. 24,89,41,130/- (short fall in employees contribution to provident fund) and Rs. 1,93,55,580/- (short fall in employers contribution to provident fund) observing that employees contribution/employers contribution was deposited before filing Return under Section 139(1) of Act 1961 for the relevant period. Revenue, in its turn, preferred appeal before Tribunal. Relying on judgment in Alom Extrusions Ltd. (supra), Tribunal dismissed appeal and confirmed order passed by CIT(A). That is how matter came before High Court in appeal. Court

considered following question, posed in para 7.01, reads as under:—
"Short question which is posed for consideration of this court is with respect to the disallowance of the amount being the employees' contribution to the PF account/ESI contribution which admittedly which the concerned assessee did not deposit with the PF Department/ESI Department within due date under the PF Act and/or the ESI Act."

18. Gujrat High Court referred to Section 2(24)(x) and found that any sum received by Assessee (employer) from his employees as contributions to any provident fund or superannuation fund or any fund set up under Act, 1948, or any other fund for welfare of such employees, constitute income. However, Section 36 of Act 1961 provides for deduction in computing income referred to in Section 28. The relevant provision of Section 36 applicable to the case before Gujarat High Court was Section 36(1)(va) with which we are also concerned. It entitles an Assessee for deduction in computing income referred to in Section 28 with respect to any sum received by Assessee (employer) from his employee to which Section 2(24)(x) apply, if such sum is credited by Assessee to employees accounts in the relevant fund before due date i.e. date prescribed in the relevant statute applicable to the concerned fund. Court also noticed that Section 43B is in respect to certain deductions and applies only on actual payment. It held that amendment was made by deletion of Second Proviso of Section 43B only, but no corresponding amendment was made under Section 36(1)(va). It said:
"It is required to be noted that as such there is no amendment in Section 36(1)(va) and even the Explanation to Section 36(1) (va) is not deleted and is still on the statute and is required to be

complied with. Merely because with respect to the employer's contribution the second proviso to Section 43B which provided that even with respect to the employer's contribution (Section 43B(b)), the Assessee was required to credit the amount in the relevant fund under the PF Act or any other fund for the welfare of the employees on or before the due date under the relevant Act, is deleted, it cannot be said that Section 36(1)(va) has been deleted and/or amended."

19. That is how Gujrat High Court held that Section 43B would not be attracted in a case where dispute relates to employees contribution only. Section 43B would be confined only to employers contribution. It further said:
"Therefore, with respect to the employees contribution received by the assessee if the assessee has not credited the said sum to the employees' account in the relevant fund or funds on or before the due date mentioned in the Explanation to Section 36(1)(va), the assessee shall not be entitled to deductions of such amount in computing the income referred to in Section 28 of the Act."

20. Gujrat High Court distinguished judgment of Alom Extrusions Ltd. (supra) on the ground that therein actual dispute relates to employers' contribution and whether amendment in Section 43B by Finance Act, 2003 would operate retrospective or not, Supreme Court had no occasion to consider deduction with reference to Section 36(1)(va). For the same reason Gujrat High Court dissented with the judgments of Rajasthan High Court in CIT v. Udaipur Dugdh Utpadak Sahakari Sangh Ltd. [2014] 366 ITR 163/[2013] 217 Taxman 64 (Mag.)/35 taxmann.com 616, Punjab & Haryana High Court in CIT v. Hemla Embroidery Mills (P.) Ltd. [2014] 366 ITR 167/[2013] 217 Taxman 207/37

taxmann.com 160, Himachal Pradesh High Court in CIT v. Nipso Ployfabriks Ltd. [2013] 350 ITR 327/213 Taxman 376/30 taxmann.com 90 and Karnataka High Court in CIT v. Sabri Enterprises [2008] 298 ITR 141.

21. Karnataka High Court had an occasion to consider, whether it should dissent with the view taken in the earlier judgments and follow the view taken by Gujrat High Court in Gujarat State Road Transport Corpn. (supra) and this occasion came in Essae Teraoka (P.) Ltd. v. Dy. CIT [2014] 366 ITR 408/222 Taxman 170/43 taxmann.com 33 (Kar.). Dispute relates to A.Y. 2008-09. Assessee filed Return on 26.09.2008. Return was processed under Section 143(1) and thereafter on scrutiny, notice under Section 143(2) was issued. Assessing Officer completed assessment by order dated 24.12.2010 under Section 143(3) disallowing Rs. 12,51,737/- under Section 36(1)(va) and also disallowing Rs. 1,04,621/- under Section 14A read with Rule 8D. In appeal, CIT (A) reversed findings of Assessing Officer but on appeal preferred by Revenue, Tribunal restored Assessing Officer's order and that is how matter came to Karnataka High Court. The question up for consideration was, "whether Tribunal was justified in affirming finding of Assessing Officer and denying Assessee's claim of deduction of employees contribution to PF/ESI alleging that the payment was not made by appellant in accordance with the provisions of Section 36(1)(va) of Act 1961." The Assessee's counsel relied on earlier judgment of Karnataka High Court in CIT v. Spectrum Consultants (P.) Ltd. [2014] 49 taxmann.com 29/227 Taxman 164 (Mag.) while counsel for Revenue attempted to pursue to take a different view following decision of Gujrat High Court. The Division Bench judgment delivered by Hon'ble Dilip B. Bhosale, (as his lordship then was)

held, if the contribution of employees fund is deposited within due date the Assessee is straightaway entitled for deduction under Section 36(1)(va). However Section 43B provides for certain deductions allowable only on actual payment. It gives an extension to the employer to make payment of contribution to provident fund or any other fund, till due date applicable for furnishing of Return under Section 139(1) of Act 1961, in respect of previous year in which liability to pay such sum was incurred, and evidence of such payment is furnished by Assessee along with such Return. Court then said:
"In short, this provision states, notwithstanding anything contained in any other provision contained in this Act, a deduction otherwise allowable in this Act in respect of any sum payable by the assessee as an employer by way of contribution to any fund such as provident fund shall be allowed if it is paid on or before the due date as contemplated under Section 139(1) of the Income-Tax Act. This provision has nothing to do with the consequences, provided for under the PF Act/PF Scheme/ESI Act, for not depositing the "contribution" on or before the due dates therein." (Emphasis added)

22. It also said that the word "contribution" used in clause (b) of Section 43B of Act 1961 means the contribution of employer and employee, both, and that being so, if contribution is deposited on or before due date for furnishing Return of income under sub-section (1) of Section 139 of Act 1961, employer is entitled for deduction.

23. Though in a short judgment, but Punjab & Haryana High Court in Hemla Embroidery Mills (P.) Ltd. (supra) not only followed Alom Extrusions Ltd. (supra) but also its own earlier

judgment in CIT v. Rai Agro Industries Ltd. [2011] 334 ITR 122/[2012] 20 taxmann.com 194/207 Taxman 10 (Mag.), to hold that Section 43B shall apply to both 'contributions' i.e. employers' and employees'.

24. Kerala High Court in recent judgment in CIT v. Merchem Ltd. [2015] 378 ITR 443/235 Taxman 291/61 taxmann.com 119, has followed the decision of Gujarat High Court in Gujarat State Road Transport Corporation (supra) and dissented with the otherwise judgments of Rajasthan High Court in CIT v. State Bank of Bikaner and Jaipur [2014] 363 ITR 70/43 taxmann.com 411/225 Taxman 6 (Mag.), Karnataka High Court in Spectrum Consultants India (P.) Ltd. (supra) and Bombay High Court in CIT v. Ghatge Patil Transports Ltd. [2014] 368 ITR 749/[2015] 228 Taxman 340/53 taxmann.com 141.

25. Before following a particular view when there is divergence in views of different High Courts, we find it appropriate to examine Supreme Court judgment in Alom Extrusions Ltd. (supra) to find out whether it can be confined only in respect to employers' contribution or is applicable to both 'contributions', whether by employer or employee.

26. The question, whether benefit under Section 43B, as a result of amendment of Finance Act, 2003, is retrospective or not, came to be considered in Alom Extrusions Ltd. (supra). Court considered the intent, purpose and object in the historical back drop of insertion of Section 43B and its progress by way of various amendments. Referring Section 2(24)(x) it said, income is defined under Section 2(24) which includes profits and gains. Further in clause (x) of Section 2(24) any sum received by Assessee from employees as 'contributions' to any provident

fund/superannuation fund or any fund set up under Act 1948, or any other fund for welfare of such employees constitute 'income'. This is the reason why every Assessee/Employer was entitled to deduction even prior to April, 1, 1984, keeping books on mercantile system of accounting, as a business expenditure, by making provision in his books of account in that regard. Assessee was capable of keeping money with him and just by mentioning in accounts, was able to claim deduction as business expenses. Section 43B was inserted to check this practice and it resulted in discontinuing mercantile system of accounting with regard to tax, contributions etc. With induction of Section 43B an Assessee could claim deduction on actual payment basis. By Finance Act, 1988 Parliament inserted first proviso w.e.f. 01.04.1988 which inter alia provides that any sum payable by Assessee by way of tax, duty, cess or fee, if payment is made after closing of accounting year but before date of filing of Return under Section 139(1), Assessee would be entitled to deduction on actual payment basis. This proviso did not include within its ambit, contributions under labour welfare statutes. By Finance Act, 1988, Second Proviso thus Second proviso was further amended by Finance Act, 1989 w.e.f. 01.04.1989.

31. Court held that Assessee/employer thus would be entitled to deduction only if contribution stands credited on or before due date given in the Act 1952 or Act 1948. Second proviso created difficulties, inasmuch as under Act, 1981, due date was after the date of filing of returns and thus industries made representations to the Ministry of Finance. Court, looking to the history of amendments held, it is evident that Section 43B, when enacted in 1984, commences with a non obstante clause. The underlying object being to disallow deductions claimed merely by making a

book entry based on the mercantile system of accounting. At the same time, Section 43B made it mandatory for the Department to grant deduction in computing income under Section 28 in the year in which tax, duty, cess etc. is actually paid. Parliament took cognizance of the fact that accounting year of a company did not always tally with the due dates under Provident Fund Act, Municipal Corporation Act (Octroi) and other Tax laws. Therefore, by way of First Proviso, an incentive/relaxation was sought to be given in respect of tax, duty, cess or fee by explicitly stating that if such tax duty cess or fee is paid before the date of filing of the return under Act 1961, Assessee would than be entitled to deduction. This relaxation/incentive was restricted only to tax, duty, cess and fee. It did not apply to contributions to labour welfare funds. The reason appears to be that the employer should not sit on the collected contributions and deprive workmen of the rightful benefits under social welfare legislations by delaying payment of contributions to the welfare funds. But when implementation problems were pointed out for different due dates, uniformity was brought about in first proviso by Finance Act, 2003. Hence, amendment made by Finance Act 2003 in Section 43B is retrospective, being curative in nature and apply from 01.04.1988. In the result when contribution had been paid, prior to filing of return under Section 139(1), Assessee/employer would be entitled for deduction and since deletion of Second Proviso and amendment of First Proviso is curative and apply retrospectively w.e.f. 01.04.1988.

28. From the aforesaid judgment, we find that irrespective of the fact that deduction in respect of sum payable by employer contribution was involved, but Court did not restrict observations, findings and declaration of law to that context but looking to the

objective and purpose of insertion of Section 43B applied it to both the contributions. It also observed clearly that Section 43B is with a non-obstante clause and therefore over ride even if, anything otherwise is contained in Section 36 or any provision of Act 1961.

29. Therefore, we are clearly of the view that law laid down by High Courts of Karnataka, Rajasthan, Punjab & Haryana, Delhi, Bombay and Himachal Pradesh have rightly applied Section 43B in respect to both contributions i.e. employer and employee. Otherwise view taken by Gujrat High Court and followed by Kerala High Court, with great respect, we find expedient to dissent therewith."

32. Further we may rely on the coordinate Bench decision in the matter of **R K P Company [2016] 71 taxmann.com 257** (Raipur - Trib.), which had succinctly laid down concept of Binding precedentin case of various conflicting high court decision as under :

> ***"7.*** *As for Hon'ble Kerala High Court's decision in the case of Thomas George Muthoot (supra), undoubtedly, outside the jurisdiction of Hon'ble Kerala High Court and outside the jurisdiction of Hon'ble Delhi High Court- which has decided the issue in favour of the assessee, there are conflicting decisions on the issue of restrospectivity of second proviso to Section 40(a)(ia). It is thus evident that views of these two High Courts are in direct conflict with each other. Clearly, therefore, there is no meeting ground between these two judgments. The difficulty arises as to which of the Hon'ble non jurisdictional High Court is to be followed by us in the present situation. It will be wholly inappropriate for us to choose views of one of the High Courts based on our perceptions about reasonableness of the respective viewpoints, as such an exercise will de facto amount to sitting in judgment over the views of the High Courts something diametrically opposed to the very basic principles of hierarchical judicial system. We have to, with our highest respect of both the Hon'ble High Courts, adopt an objective criterion for deciding as to*

*which of the Hon'ble High Court should be followed by us. We find guidance from the judgment of Hon'ble Supreme Court in the matter of CIT v. Vegetable Products Ltd. [1972] 88 ITR 192. Hon'ble Supreme Court has laid down a principle that "if two reasonable constructions of a taxing provisions are possible, that construction which favours the assessee must be adopted". This principle has been consistently followed by the various authorities as also by the Hon'ble Supreme Court itself. In another Supreme Court judgment, Petron Engg. Construction (P) Ltd. v. CBDT [1989] 175 ITR 523/[1988] 41 Taxman 294, it has been reiterated that the above principle of law is well established and there is no doubt about that. Hon'ble Supreme Court had, however, some occasions to deviate from this general principle of interpretation of taxing statute which can be construed as exceptions to this general rule. It has been held that the rule of resolving ambiguities in favour of tax- payer does not apply to deductions, exemptions and exceptions which are allowable only when plainly authorised. This exception, laid down in Littman v. Barron 1952(2) AIR 393 and followed by apex Court in Mangalore Chemicals & Fertilizers Ltd. v. Dy. CCT (1992) Suppl. (1) SCC 21 and Novopan India Ltd. v. CCE & C 1994 (73) ELT 769 (SC), has been summed up in the words of Lord Lohen, "in case of ambiguity, a taxing statute should be construed in favour of a tax-payer does not apply to a provision giving tax-payer relief in certain cases from a section clearly imposing liability". This exception, in the present case, has no application. The rule of resolving ambiguity in favour of the assessee does not also apply where the interpretation in favour of assessee will have to treat the provisions unconstitutional, as held in the matter of State of M.P. v. Dadabhoy's New Chirmiry Ponri Hill Colliery Co. Ltd. AIR 1972 SC 614. Therefore, what follows is that in the peculiar circumstances of the case and looking to the nature of the provisions with which we are presently concerned, the view expressed by the Hon'ble Delhi High Court in the case of Ansal Landmark Township (P.) Ltd. (supra), which is in favour of assessee, is required to be followed by us. Revenue does not, therefore, derive any advantage from Hon'ble Kerala High Court's decision in the case of Thomas George Muthoot (supra).”*

33. Further the Apex Court deprecated this practice of not following the settled legal proposition and unsettling the legal issues in Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd., AIR 1997 SC 2477, observing as under:—

"When a position, in law, is well settled as a result of judicial pronouncement of the Court, it would amount to judicial impropriety to say the least, for the subordinate Courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate Courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops."

34. Similar view has been reiterated in State of Punjab v. Satnam Kaur, (2005) 13 SCC 617 while dealing with a similar issue, the Supreme Court in Tribhovandas Purshottamdas Thakkar v. Ratilal Motilal Patel, AIR 1968 SC 372, observed as under:—

"Precedents which enunciate rules of law form the foundation of administration of justice under our system. It has been held time and again that a single Judge of a High Court is ordinarily bound to accept as correct judgments ofCourts of co-ordinate jurisdiction and of Division Benches and of the Full Benches of his Court and of the Supreme Court. The reason for the rule which makes a precedent binding lies in the desire to secure uniformity and certainty in the law."

35. In Sundarjas Kanyalal Bhathija v. The Collector, Thane, Maharashtra, AIR 1990 SC 261, the Supreme Court held as under:—

"One must remember that pursuit of the law, however glamorous it is, has its own limitation on the Bench. In a multi judge Court, the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority."

Therefore,respectfully following the decision of Hon'ble SC Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd., AIR 1997 SC 2477, Sundarjas Kanyalal Bhathija v. The Collector, Thane, Maharashtra, AIR 1990 SC 261 and Tribhovandas Purshottamdas Thakkar v. Ratilal Motilal Patel, AIR 1968 SC 372We deprecate this practice of NFAC in following the decision of Gujrat High court a against the binding decision of Allahabad High .This practice is in contradiction of the objects for which the Notification was issued by the Board at the initiative the Hon'ble Prime Minister, for creating centralized NFAC. The purpose of the scheme is to bring consistency ,transparency, efficiency, accountability and predictability.

36. Having categorically held the allowability of claim under section 43B, by Jurisdictional HC, it is not expected from the revenue to apply inapplicable and not binding decision in the present case . It would be apostle to refer the decision in the the matter of Dnyandeo Sabaji Naik ans ANR Vs Mrs. Pradnya

Prakash Khadekar and ORS in Special Leave Petition (C) Nos. 25331-33 OF 2015 wherein Hon,ble Supreme court had held

"14. Courts across the legal system – this Court not being an exception – are choked with litigation. Frivolous and groundless filings constitute a serious menace to the administration of justice. They consume time and clog the Productive resources which should be deployed in the handling of genuine causes are dissipated in attending to cases filed only to benefit from delay, by prolonging dead issues and pursuing worthless causes. No litigant can have a vested interest in delay. Unfortunately, as the present case exemplifies, the process of dispensing justice is misused by the unscrupulous to the detriment of the legitimate. The present case is an illustration of how a simple issue has occupied the time of the courts and of how successive applications have been filed to prolong the inevitable. The person in whose favour the balance of justice lies has in the process been left in the lurch by repeated attempts to revive a stale issue. This tendency can be curbed only if courts across the system adopt an institutional approach which penalizes such behavior. Liberal access to justice does not mean access to chaos and indiscipline. A strong message must be conveyed that courts of justice will not be allowed to be disrupted by litigative strategies designed to profit from the delays of the law. Unless remedial action is taken by all courts here and now our society will breed a legal culture based on evasion instead of abidance. It is the duty of every court to firmly deal with such situations. The imposition of exemplary costs is a necessary instrument which has to be deployed to weed out, as well as to prevent the filing of frivolous cases. It is only then that the courts can set apart time to resolve genuine causes and answer the concerns of those who are in need of justice. Imposition of real time costs is also necessary to ensure that access to courts is available to citizens with genuine grievances. Otherwise, the doors would be shut to legitimate causes simply by the weight of undeserving cases which flood the system. Such a situation cannot be allowed to come to pass. Hence it is not merely a matter of discretion but a duty and obligation cast upon all courts to ensure that the legal system is not exploited by those who use the forms of the law to defeat or delay justice. We commend all courts to deal with frivolous filings in the same manner".

37. We fail to understand despite the order under the Notification is required to screened at three stages scrutiny by AU , yet no Appellate Unit , had Objected to following of non binding decision of the non-jurisdictional High Court ,especially when binding Jurisdictional High Court Judgment on the subject was available . In our view this as a serious issue which requires immediate redressal by the Board, as it is resulting in filling of unnecessary litigation by the assessee.There is yet to another reason to deprecate the practice of the revenue, as the NFAC, in the case of Rajbir(supra) had granted the similar relief wide order dated 9th March 2021, thereby breaching the principle of consistency . This is a wakeup call. A good intentioned and well thought notification issued by the Board for NFAC, is not yielding the desired result on account of incorrect application of law.As notified by the board in the notification it would be using the artificial intelligence and data analytic for the smooth functioning of NFAC, in our view this should be used in all aspects. Further we expect the Board to take appropriate remedial measures at the earliest forrecalling such kind of orders, by issuing comprehensive guidelines for NFAC and give relief to the honest assessee .

38. In the light of the above said discussion,Judgments of SC and HCs,We hold that NFAC, is bound by the binding decision of

the Jurisdictional Allahabad High Court, as the assessing officer is situated, within the territorial and subjective jurisdiction of High court . Hence, we allow the appeal of the assessee by respectfully following the decision of jurisdictional High Court in the matter of Sagun Foundry (P) Ltd. vs CIT {2017) 78 Taxmann 47.

39. In the result all the four appeals of the assessees are allowed.

Sd/- Sd/-

**(Dr. Mitha Lal Meena)** **(Laliet Kumar)**
**Accountant Member** **Judicial member**

Dated: 14/06/2021
*Copy of order forwarded to:*
*(1) The appellant* *(2) The respondent*
*(3) Commissioner* *(4) CIT(A)*
*(5) Departmental Representative* *(6) Guard File*

*By order*

*Sr. Private Secretary*
*Income Tax Appellate Tribunal*
*Agra Bench, Agra*