$~88

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Judgment delivered on: 16.01.2025***

\+ ITA 388/2019

THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -3 .....Appellant

Through: Mr. Indruj Singh Rai, SSC with Mr. Sanjeev Menon, Mr. Rahul Singh, JSCs, Mr. Anmol Jagga & Mr. Gaurav Kumar, Advs.

versus

STANDARD CHARTERED GRINDLAYS LTD .....Respondent

Through: Ms. Shashi M. Kapila, Mr. Pravesh Sharma & Mr. Sushil Kumar, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

J U D G M E N T

YASHWANT VARMA, J. (Oral)

1. This appeal is directed against the order of the **Income Tax Appellate Tribunal**[1] dated 30 November 2017 and came to be admitted on 15 April 2019 on the following question of law:-

> "i) Whether the ITAT erred in allowing the deduction claimed by the assessee in respect of the expenses incurred on soliciting and mobilization of foreign currency deposits from Non-Resident Indians on the assessee's Indian business in the backdrop of Section 44C of the Income Tax Act, 1961?

[1] Tribunal

ii) Whether the Ld. ITAT erred in allowing the amount of Rs. 9.81 crores as expenditure on account of contribution to approved pension funds ignoring the provisions of Section36(l)(iv) and 40A(9) of the Act read with Rule 87 of the Income Tax Rules, 1962?"

2. Insofar as Question (i) is concerned and pertains to NRI expenses, learned counsels for parties are *ad idem* that the said issue would have to be answered in favour of the respondent /assessee in light of the order passed by us in **Director of Income Tax vs. ANZ Grindlays Bank**[2] and where we had while dealing with this question held as follows:-

> "3. Insofar, as the aspect of expenses incurred in garnering FCNR deposits is concerned, we note that the Tribunal has while dealing with this aspect held as follows: -
>
> > 7.2 During the hearing the Ld. CIT (DR) stated that the CIT (Appeals) had erred in holding that the expenses incurred at places like Singapore, Hong-Kong etc could not be treated as a part of head office expenses and that the same were to be allowed after obtaining the exact details from assessee despite the fact that such expenses were not even debited in the accounts of Indian Branch. In any case the AO had separately allowed a deduction at 5% under Sec. 44C on account of Head Office expenses and therefore no separate deduction was allowable for expenses incurred outside India.
> >
> > 7.3 <u>The assessee's counsel explained that the Indian branches of the assessee bank had opened off-shore NRI counters outside India to obtain foreign currency deposits/funds from Non-Resident Indians (NRIs). The country was passing through a balance of payments crises and urgently needed foreign exchange into the country the RBI had issued circulars giving foreign currency deposits of NRI's a favourable rate of interest as against LIBOR rates of interest. Such expenses were incurred recently for marketing the Resurgent Bonds after the nuclear explosion in India to obtain the necessary foreign exchange. For that, counters were opened outside India for soliciting and mobilizing foreign currency deposits from NRI's and for advertising and explaining the RBI Circulars, the tenure of NRI Deposits/ Interest Rates etc. This entire business was managed and</u>

[2] ITA 563/2007 decided on 19 September 2024

controlled from India in accordance with RBI guidelines and was totally and entirely India -centric. Therefore, it was claimed that such expenses were legitimately allowable in the computation of Indian business income. These foreign currency deposits were then deployed in India at the various retail branches of the Bank across the country. The bank's deposit base in foreign currency deposits increased and this furthered its capacity to lend in foreign currency to borrowers within India. The interest income earned there from was offered for tax within India. Regarding the point that this expenditure was in the nature 'head office expenses', it was submitted that 'Head Office expenses' as defined in section 44C referred to 'executive and general administration expenditure. Special expenses for soliciting foreign currency deposits from NRI customers were not in the nature of "executive and administrative" expenses as contemplated under sec.44C of the Income Tax Act, 1961. It was further submitted that even if these expenses were treated as head office expenses, they were still fully allowable. The courts of law have held that no part of head office expenses which were exclusively India - centric were disallowable in law. For this Reliance was placed on the judgement of the Calcutta High Court in Rupenjuli Tea Company v. CIT [186 ITR 301] and Mumbai High Court in the case of CIT vs Abu Dhabi Commercial bank reported in 262 ITR 55 where the court have categorically held that 'head office' expenses which are incurred exclusively and ONLY for the Indian business were fully deductible for determining the Indian business profits. No parts of such expenses were disallowable. Reliance was also placed on the decision of the Special Bench of the ITAT in the case of Inspecting Assistant Commissioner vs. Goodricke Group Ltd. reported in 12 ITD 1 (Calcutta). It was further submitted that the learned AO had relied upon the judgment of the Calcutta High Court in the case of UCO Bank Vs. CIT (200 ITR 68) for making this disallowance. That judgement had subsequently been reversed by the Supreme Court in 240 ITR 355(SC), Reliance was placed on Article 7 of the Indo-Australian Double Taxation Avoidance Treaty under which the Business Profits of Permanent Establishment (PE) in India were to be computed. Under Article 7 of the aforesaid Treaty the profits of a PE carrying on business in India were to be computed as if it were a distinct and separate enterprise. Therefore, these expenses which directly and exclusively related to the business in India, should be rightfully allowed as a deduction in the computation of the Indian "Business Income", since the profits of the Permanent Establishment

> were offered for tax in India.
>
> 7.4 We have carefully considered the rival submissions: The funds mobilized abroad were brought to India in foreign currency account and kept in India for the Indian business of the assessee bank. The benefits reaped by the India branch or Permanent Establishment in India have been accounted for as Indian income. We, therefore, see no reason as to why the deduction of expenditure should not be allowed. These expenses incurred for procurement of business cannot be understood as Head Office expenses and the learned Assessing Officer, therefore, erred in treating them as head Office expenses within the meaning of section 44C of the Act. We, therefore, direct the learned Assessing Officer to allow the assessee deduction of actual expenditure basis and for that purpose if necessary the learned Assessing Officer may withdraw corresponding deduction allowed, if any under the provisions of section 44C."
>
> 4. As has been noted by the Tribunal, the expenses were incurred for the purposes of inviting NRIs' to open deposits in the Indian branches of the respondent assessee. The aforesaid initiative was predicated upon the circular of the RBI itself which is dated 16 October 1991. Since this was expenditure which was incurred solely for the purpose of the business of the respondent assessee in India, we find no merits in the challenge which stands mounted to the order of the Tribunal in this respect."

3. That leaves us to examine the issue which is raised in Question (ii). The disputes centres around the extent of contributions which were made by the respondent/assessee to a recognised superannuation fund and whether those could be said to have breached the limits prescribed by Section 36(1)(iv) and thus not liable to be allowed as deductions bearing in mind the provisions made in Section 40A(10).

4. The Tribunal has found that during the **Assessment Year**[3] in question, the respondent/assessee had made a contribution of INR 9.81 Crores and in respect of which deductions were claimed as a

---

[3] AY

whole. The **Assessing Officer**[4], however, disallowed that claim and took the position that the amount in excess of the limit as specified in Rule 87 of the **Income Tax Rules, 1962**[5] would be disallowable in light of Section 36(1)(iv) read along with 40A(9) of the Act.

5. The Tribunal has taken the view that the issue would be liable to be answered in favour of the assessee bearing in mind the decision of the Supreme Court in **Commissioner of Income Tax vs. Sirpur Paper Mills**[6].

6. Mr. Menon, learned counsel who appears in support of the appeal, has taken us through the relevant statutory provisions contained in the Act as well as the Rules to submit that the limitations as introduced by virtue of Rule 87, and which pegs the contribution at not exceeding 27% of the salary of an employee for each year, would clearly apply and thus the entire contribution as made by the respondent/assessee could not have been claimed as a deductible expense. According to Mr. Menon, this would be the position which would obtain even on a conjoint reading of Section 36(1)(iv) along with sub-sections (9) and (10) of Section 40A.

7. Having heard the submissions addressed on behalf of respective sides and on going through the judgment of the Supreme Court in *Sirpur Paper Mills*, we are disinclined to accept the position as canvassed for our consideration by Mr. Menon for reasons which follow.

8. *Sirpur Paper Mills* was dealing with a case where the assessee had made a contribution of INR 2,70,911/- and the deduction in that

---

[4] AO
[5] Rules
[6] (1999) 3 SCC 596

case being restricted by the Income Tax Officer to the extent of 80% of the aggregate contribution as spread over a period of five years. The Supreme Court while rendering judgment also had an occasion to notice the Notification issued by the **Central Board of Direct Taxes**[7] dated 21 October 1965 which stood extracted in para 7 of its judgment and is reproduced hereinbelow:

> "**7.** In exercise of the powers conferred by Section 36(1)(*iv*), the Board issued a notification dated 21-10-1965 which was relied upon by the assessing authority. It reads thus:
>
> "Contributions to Approved Superannuation Fund
>
> *Conditions specified under clause (iv) of sub-section (1) for the purposes of deduction of certain contributions*.—In exercise of the powers conferred by clause (*iv*) of sub-section (1) of Section 36 of the Income Tax Act, 1961 (43 of 1961), the Central Board of Direct Taxes hereby specified the following conditions for the deduction of contributions, not being annual contributions of fixed amounts or annual contributions fixed on some definite basis by reference to the income chargeable under the head 'Salaries' or to the contributions or to the number of members of the fund namely:
>
> *1*. The total amount of contribution that shall be taken into account for the purposes of this notification shall not exceed twenty-five per cent of the employee's salary for each year of his past service with the employer as reduced by the employer's contribution, if any, to any provident fund (whether recognised or not) in respect of that employee for each such year.
>
> *2*. Subject to condition *1*, eighty per cent of the amount actually paid by the employer by way of contribution during any previous year shall be the deductible allowance.
>
> *3*. One-fifth of such deductible allowance shall be allowed in the assessment year relating to the previous year in which the amount was actually paid and the balance of the deductible allowance shall be allowed in equal instalments for each of the four immediately succeeding assessment years.""

9. After taking into consideration, the statutory position which

---

[7] CBDT

emerged from a reading of Section 36, the Supreme Court pertinently observed as follows:-

> "**9.** Section 36(1)(*iv*) states that the deductions provided in the clauses thereof "shall be allowed" when computing income under Section 28. Clause (*iv*) lists as so deductible any sum paid by the assessee as an employer by way of contribution towards a recognised provident fund or an approved superannuation fund, subject to limits that may be prescribed for the purposes of recognition of these funds and subject also to such conditions as the Board might think fit to specify in cases where the contributions are not in the nature of annual contributions of fixed amounts or annual contributions fixed on some definite basis by reference to the income chargeable under the head "Salaries" or to the contributions or to the number of members of the fund.
>
> **10.** The contributions in the instant case were not payments for recognition or approval and, therefore, outside the limits that could be prescribed under clause (*iv*) in that behalf.
>
> **11.** It is arguable that the contributions made here are annual contributions of fixed amounts but, for the purposes of these appeals, we will proceed on the basis that they are not and that the Board was, therefore, entitled to make conditions that would apply. Even so, the question is whether the conditions which were laid down in the said notification fall outside the power of the Board in this behalf.
>
> **12.** For this purpose, the said notification must be analysed. The first condition is that the total amount of the contribution shall not exceed 25% of the employees' salary and there is no dispute that this is a condition which the Board was empowered to impose, having regard to the provisions in this behalf in Rule 88.
>
> **13.** The second condition is that only 80% of the amount actually paid by the employer can be allowed as a deduction. This really falls into two parts; one is the requirement that the amount must be actually paid and the other is that the deduction shall only be of 80%. Taking the second part first, we see no justification for it. The section states that the deduction shall be wholly allowed. It permits the Board to specify conditions but conditions cannot have the effect of curtailing the scope of the deduction granted by the section. The amplitude of the deduction permitted by the section cannot be cut down under the guise of imposing a "condition". In fact, this is not a condition but an impermissible attempt to rewrite

> the section. As to the first part, in the cases before us, the payment had in fact been made and we do not need to dilate; but we should point out that Section 36(1)(*iv*) itself speaks of "any sum paid"."

10. As is manifest from the above, the Supreme Court found that Section 36(1)(iv) used two prescriptive conditions insofar as contributions that could be made by an employer and represented in the shape of the phrases "*any sum paid*" and "*shall be allowed*".

11. As we read Paragraph 10 extracted above, it becomes evident that it was found that the prescription of limits to the extent of contribution that could be treated as deductible was hinged to the power of the to CBDT impose such conditions for the purposes of recognition or approval of a provident fund or superannuation fund. These were thus recognised by the Supreme Court to be qualificatory conditions for the purposes of recognition as distinguishable from the extent of contribution that may be made in a particular year.

12. This position clearly merits acceptance when we read Section 36(1)(iv) alongside Section 40A(9) and (10). Section 40A(9) too speaks of deductions being allowed in connection with the "*setting up*" or "*formation of*" or "*as contribution to any fund*" by an assessee in terms contemplated under Section 36(1)(iv). The disqualification which is then introduced by sub-section (10) of Section 40A too is coupled to the limits that may be prescribed in the provisions specified therein including Section 36(1)(iv).

13. The phraseology employed in Section 36(1)(iv) and when it speaks of "*subject to such conditions as the Board made deem fit to specify in cases*" is to be read along and in juxtaposition with the expression "*for the purpose of recognising the provident fund or*

approving the superannuation fund" and which stands mirrored and replicated in Rule 88 which again speaks of the initial contribution.

14. Insofar as Rule 87 is concerned, that clearly seems restricted in its application to the ordinary annual contribution that may be made by an employer to a fund and prescribes an outer limit with respect to the employers' contribution insofar as that particular employee is concerned.

15. We find that a similar view stands expressed by the Calcutta High Court which in **Principal Commissioner of Income Tax vs. Exide Industries Ltd.**[8] has held as follows:-

> "**3.** The issue involved in this appeal pertains to the disallowance of a sum of Rs. 9,14,70,000/- being contribution to the approved pension fund. The deduction scheme of the respondent/assessee was rejected by the Assessing Officer and the ground that the allowability of deduction towards contribution to superannuation fund is governed by section 36(1)(*iv*) of the Act read with rules 87 and 88 of the Income-tax Rules, 1962 ('the Rule') which deal with normal and annual contribution. Aggrieved by the same, the assessee preferred appeal before the Commissioner of Income-tax (Appeals) -I, Kolkata CIT (A) contending that under rule 87 of the said Rules normal and annual contribution by the employer shall not exceed 27% of the salary of the employee for each year as reduced by the employer's contribution to the provident fund in respect of the same employee for the year. In terms of rule 88, the limit is 25% of the employee's salary of each year up to 21-9-1997 and 27% of the employee's salary for each year after 21-9-1997. The assessee contended that rules 87 and 88 refer to initial contribution and regular contribution and the lump sum contribution made by the assessee is neither ordinary contribution nor initial contribution and the limits prescribed in rule 87 and rule 88 shall not apply to such lump sum contribution. The CIT (A) did not aggrieve with the assessee and by order dated 28-3-2007 dismissed the appeal. Aggrieved by the same the assessee had preferred appeal before the learned Tribunal. The Tribunal by the impugned order aggrieved by the contention raised by the assessee and after taking note of the decision of the Co-ordinate Bench of the Tribunal in the case of *Asstt. CIT* v. *Glaxo Smithkline*

[8] ITA No. 95 of 2018 decided on 22 September 2022

Pharmaceuticals [IT Appeal No. 6444 (Mum.) of 2007, dated 28-1-2011] allowed the assessee's appeal.

4. We have carefully considered the submissions of either side and perused the materials on record. Section 36 of the Act deals with other deductions. Sub-section (1) of section 36 states that deduction provided for in the clause enumerated thereunder shall be allowed in respect of matters dealt with therein in computing the income referred to section 28. Clause (*iv*) is under section 36(1) would be relevant for our case which is quoted hereinbelow:

> *"Other deductions.*
> 36. (1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28-
> xxxx xxxx xxxx
> (*iv*) any sum paid by the assessee as an employer by way of contribution towards a recognised provident fund or an approved superannuation fund, subject to such limits as may be prescribed for the purpose of recognising the provident fund or approving the superannuation fund, as the case may be; and subject to such conditions as the Board may think fit to specify in cases where the contributions are not in the nature of annual contributions of fixed amounts or annual contributions fixed on some definite basis by reference to the income chargeable under the head "Salaries" or to the contributions or to the number of members of the fund;"

5. In Part-B of the Fourth Schedule to the Income-tax Act, the subject dealt with is approved superannuation fund. In Clause-(*iii*) thereunder, the conditions for approval have been given and Clause-(*iv*) deals with provisions relating to Rules. In terms of the said power, the Board may make rules for limiting the ordinary annual contribution and any other contribution to an approved superannuation funds by an employee. In exercise of such power rules have been framed which are found in Part-XIII of the Income-tax Rules, 1962 and rules 87 and 88 thereto would be relevant for our case.

> "87. *Ordinary annual contributions.*—The ordinary annual contribution by the employer to a fund in respect of any particular employee shall not exceed [twenty-seven] per cent of his salary for each year as reduced by the employer's contribution, if any, to any provident fund (whether recognised or not) in respect of the same employee for that year.

88. *Initial contributions.*—Subject to any condition which the Board may think fit to specify under clause (*iv*) of sub-section (1) of section 36, the amount to be allowed as a deduction on account of an initial contribution which an employer may make in respect of the past services of an employee admitted to the benefits of a fund shall not exceed twenty-five per cent of the employee's salary for each year [up to the employee's salary for each year] of his past service with the employer as reduced by the employer's contribution, if any, to any provident fund (whether recognised or not) in respect of that employee for each such year."

6. In terms of the above rules, what is required to be seen is whether there is any ceiling fixed in respect of the contribution which have been made by the respondent/assessee and whether it was towards an ordinary annual contribution or whether it was towards an initial contribution. The factual position is not in dispute which have been noted not only by the learned Tribunal but also by the CIT(A). In terms of the above rules, a contribution to an approved superannuation fund is deductible as long as the quantum of the contribution does not exceed the prescribed limit. As noticed from the rules, the limitations have been prescribed only for the initial contribution and ordinary annual contribution to the funds. Thus, the consequence that would follow is that any other contribution made other than initial contribution or an ordinary annual contribution, would not be covered under the rules and no ceiling has been fixed with regard to the amount of such contribution. This has not been disputed by the revenue that the amount paid by the respondent/assessee in excess of 27% of the salaries of the employees are neither towards ordinary annual contribution nor towards initial contribution and the payment was necessitated due to short-fall discovered in the course of actuarial valuation of the funds which is in exceptional circumstances and has been made to ensure that the superannuation funds will be able to discharge its obligation to the employees. The learned Tribunal bearing the above principle in mind and also taking note of the decision of the co-ordinate bench of the Tribunal in *Glaxo Smithkline Pharmaceuticals* case (*supra*) allowed the assessee's appeal. The revenue had challenged the order passed by the learned tribunal in the case of *Glaxo Smithkline Pharmaceuticals* (*supra*) before the High Court of Judicature at Bombay *CIT* v. *Glaxo Smithkline Pharmacenticals* IT Appeal No. 2232 of 2011 which was dismissed by judgment dated 6th March, 2013.

7. However, we are conscious of the fact that the Hon'ble Division Bench while dismissing the appeal had made an observation that

> even if the expenditure as claimed is not allowable under section 36(1)(*iv*) of the Act, the same is allowable under section 37 of the Act. However, on this aspect there are other decisions of the Hon'ble Supreme Court which have decided otherwise. Therefore, we do not wish to trade into the said territory. We are satisfied that the amount which was remitted by the respondent/assessee is neither towards an initial contribution nor towards an ordinary annual contribution and, therefore, the ceiling fixed under the rules will not apply to such a contribution. That apart, this contribution had to be made considering the peculiar circumstances and it was a one-time payment, therefore we are of the view that the learned Tribunal rightly allowed the appeal filed by the assessee. That apart the decision in the case of *Glaxo Smithkline Pharmaceuticals* (*supra*) has been affirmed by the High Court of Judicature at Bombay.
>
> **8.** For the above reasons, we find there are no ground to interfere with the order passed by the learned Tribunal. Accordingly, the appeal filed by the revenue (ITA/95/2018) is dismissed and the substantial question of law is answered against the revenue."

16. We find that the factual position which had fallen for notice of the Calcutta High Court in *Exide Industries* and which lead it to draw a distinction between an initial or qualificatory contribution as distinguished from a contribution made in a particular year in discharge of employer obligations. It thus held that the limits that the Board could prescribe would only apply to an initial or an ordinary annual contribution. Any contribution made additionally in discharge of an overarching obligation would thus not be rendered as a disallowable expense. We find ourselves in agreement with the view expressed in *Exide Industries*.

17. In the facts of the present case, the Tribunal has noted the stand of the appellant leading up to the making of the contribution in the following words:-

> "55. The assessee in the year under consideration has claimed the deduction of Rs. 9.81 crores on account of contribution of approved pension fund in its books of accounts. However the

assessee made the disallowance of the same in its computation of income in view of the specific limits laid down under Rule 87 of Income Tax Rule read with section 36 (1) (iv) 40A(9) of the Act.

56. However the assessee before the Ld. CIT(A) vide letter dated29.7.1999 submitted that the deduction of Rs. 9.81 crores was claimed before the AO during assessment proceedings. However the AO failed to take any cognizance of the request made by the assessee. The assessee before the Ld. CIT(A) further submitted that the issue is covered in favour of assessee by the judgment of Apex Court in the case of Sa soon J David and Co. Pvt. Ltd. Vs. CIT reported in 118 ITR 261. However the Ld. CIT(A)disregarded the contention of the assessee and confirm the order of AO by observing as under :-

> *"13.4 I have considered the submissions made by the appellant bank. It is seen that section 36(1)(!v) specifically deals with the tax deductibility of contributions made to approve pension funds. Section 40A(9) explicitly places an embargo on the deductibility of any payment made over and above the limits laid down in Rule* 87 *of the Income Tax Rules. In view of the explicit statutory provisions restricting deductibility of contributions made to approve pension fund in excess of the limits laid down the claim of the appellant made vide letter dated29.7.1999 is not allowable. Hence the addition made on this count as Item* **'t'** *of the addition to total income ofRs.9,81,00,000.//-is sustained the appeals appeal is dismissed on this ground. "*

Being aggrieved by the order of Ld. CIT(A) assessee is in second appeal before us.

57. The Id. AR for the assessee before us submitted that the additional contribution was necessitated and driven entirely by business necessity to make immediate pay-outs of pension to employees who opted for the VRS Scheme due to early retirement. As the retirement of the employees under VRS was pre-poned, the pension fund did not have sufficient or the necessary funds to meet the costs of all the retiring employee(s) opting for the VRS scheme. He further stated that in order to make the payments of pension in accordance with the duly approved VRS Scheme additional funding was required to be made in the pension fund. It is submitted that this additional contribution is allowable as a deduction in accordance with the judgment of the Hon'ble Supreme Court it) *CIT VS. Sirpur Paper Mills* reported in 237 ITR 41 (SC) where the Hon'ble Supreme Court held that restricting condition laid down by CBDT Circulars cannot curtail scope of deduction granted by the statute under the Income Tax Act. The head notes

read as follows:-

> *"Section 36(1)(1v) of the Income-tax AC0 19611 states that the deductions provided in the clauses thereof* "shall be allowed" *when computing income under section* 28. *Clause (iv) lists as so deductible any sum paid by the assessee as an employer by way of contribution towards a recognized provident fund or an approved superannuation fund subject to limits that may be prescribed forthe purposes of recognition of these funds and subject also to such conditions as the Board might think to specify in case where the contributions are not in the nature of annual contributions of fixed amounts or annual contributions fixed on some definite basis by reference to the income chargeable under the head* ***"Salaries"****or to the contributions or to the number of members of the fund. In exercise of the powers conferred by section 36(11)(iv) the Central Board of Direct Taxes issued a notification dated October 21/ 1965. The notification has set forth certain conditions. The first condition is that the total amount of the contribution shall not exceed 25 per cent of the employees' salary and there is no dispute that this is a condition which the Board was empowered to impose, having regard to the provision in this behalf in rule 88 of the Income-tax Rules,1962. The second condition is that only 80 per cent of the amount actually paid by the employer can requirement that the amount must be actually paid and the other is that the deduction shall only be of 80 per cent. Taking the second part first there is no justification for it. The section states that the deduction shall be wholly allowed. It permits the Board to specify conditions but these conditions cannot have the effect of curtailing the scope of the deduction granted by the section. The amplitude of the deduction permitted by the section cannot be cut down under the guise of imposing a* ***'condition'.*** *In fact, this is not a condition but an impermissible attempt to rewrite the section. The last condition imposed by the said notification is that the deduction shall be spread out equally over a period of five years commencing with the assessment year relating to the previous year in which the amount was paid. This too is no* ***'condition'*** *but a provision super-added to the section which does not contemplate any such distribution of the deduction. Under the section the deduction is available in the Assessment year relating to the previous year in which the payment was made and it must be so granted. The second and third conditions aforesaid are not valid."*

Thus on the above reasoning the deduction is allowable in its

entirety. It has been held by the Hon'ble Supreme Court in the case of *Indian Molasses Col (P) Ltd. Vs. CIT(1959)* 37 ITR 66 (SC) that expenditure whichis deductible for income-tax purposes is one which is towards the liability actually existing at the time. Ld. AR further cited the case of Hon'ble Supreme Court in the case of *CIT VS. Gemini Cashew Sales Corpon. (1967)*65 ITR 643 (SC) where the Hon'ble Supreme Court again held that:

> *"the present value on commercial valuation of money to become due in future, under a definite obligation will be a permissible outgoing or deduction in computing the taxable profits of a trader."*

Applying the law laid down by the above Hon'ble courts to the facts of our case it may please be seen that in the present case the liability to pay pension is certain and definite.

58. On the other hand Ld. DR submitted that the assessee can claim the deduction on account of approved pension fund within the limit as specified u/s 36(1)(iv) of the Act. Ld. DR further submitted that the claim was made by the assessee through a separate letter and no such claim was made in the Income Tax return. Ld. DR in support of his claim relied on the judgment of Hon'ble Apex Court in the case of *Goetz India Ltd Vs. CIT* reported in 284 ITR 323(SC). The Id. DR vehemently supported the order of authorities below.

59. We have heard the rival contentions and perused the material available on record. In the instant case the issue relates to the confirmation of the addition made by the assessee to approved pension fund for Rs. 9.81 crores. The assessee in its computation of income has disallowed the claim of Rs. 9.81 crores but claimed the deduction of the said amount before the Ld. CIT(A). However the Ld. CIT(A) rejected the claim of the assessee on the ground that the impugned amount is in excess of the limit as specified in Rule 87 read with section 36 (l)(iv) and section40A(9) of the Act.

59.1 Now the issue before us arises so as to whether the deduction for Rs.9.81 crores is eligible on account of payment to approve the pension fund in the given facts and circumstances. In this regard, we note that the principles laid down by the Hon'ble Apex Court in the case of *Goetz India Ltd.* (supra) does not restrict the power of the Tribunal to entertain the fresh claim of the assessee. Thus, we reject the argument of the Id. DR. We further note that the impugned issued is directly covered in favour of assessee by the judgment of Hon'ble Apex Court in the case of *CIT Vs. Sirpur Paper Mills* reported in 237 ITR 41 wherein it held as under:

> *"Section 36(1)(lv) states that the deductions provided in the clauses thereof' shall be allowed' when computing income under section 28. Clause (Iv) provides for*

deduction of any sum paid by' the assessee as an employer by way of contribution towards a recognised provident fund or an approved superannuation fund, subject to limits that may be prescribed for the purposes of recognition of these funds and subject also to such conditions as the Board .might think fit to specify in cases where the contributions are not in the nature of annual contributions of fixed amounts or annual contributions fixed on some definite basis by reference to the income chargeable under the head 'Salaries' or to the contributions or to the number of members of the fund.

The contributions in the instant case were not payments for recognition or approval and, therefore, outside the limits that could be prescribed under clause(Iv) in that behalf.

It was arguable that the contributions made here were annual contributions of fixed amounts but, for the purposes of these appeals one would proceed on the basis that they were not and that the Board was, therefore, entitled to' make conditions that would apply. Even so, the question was whether- the conditions which are laid down in the said notification fall outside the power of the Board in this behalf.

For 'this purpose the said notification must be analysed. The first condition is that the total amount, of the contribution shall not exceed 25 per cent of the employees salary and there. is no dispute that this is a condition which the Board is empowered to impose having regard to the provisions in this behalf in rule 88.

The second condition is that only 80 percent of the amount actually paid by the employer can be allowed as a deduction. This really falls into two parts; one is the requirement that the amount 'must be actually paid and the other is that the deduction shall 'only be of 80 percent. Taking the second part first, there is no justification for it. The section states that the deduction shall be wholly allowed. It permits the Board to specify conditions but cannot have the effect of curtailing the scope of the deduction granted by the section. The amplitude of the deduction permitted by the section cannot be. cut down under the guise of imposing a 'condition', In fac0 this is not a condition but an impermissible attempt to rewrite the section. As to the second part, section 36(1)(iv) Itself speaks of 'any sum paid'.

The last condition imposed by the said notification is that the deduction shall be spread out equally over a period of five years commencing with the assessment year relating

> *to the previous year in which the amount was paid. This too is no 'condition' but a provision super-added, to the section which does not contemplate any such distribution of the deduction. Under the section the deduction is available in the assessment year relating to the previous year in which the payment was made and it must be so granted.*
>
> *The appeal was, therefore, to be dismissed."*

Respectfully following the principles laid down by the judgment of Hon'ble Apex Court in the case of *Sirpur Paper Mills (supra)* we reverse the order of Authorities Below and allow the ground of appeal raised by the assessee. Accordingly, AO is directed.

60. In the result, assessee's appeal partly allowed for statistical purpose."

18. Accordingly and for all the aforesaid reasons, we find no justification to interfere with the view as expressed by the Tribunal.

19. The questions as framed are answered in the negative and in favour of the assessee. The appeal consequently fails and shall stand dismissed.

YASHWANT VARMA, J.

HARISH VAIDYANATHAN SHANKAR, J.

JANUARY 16, 2025/v