Ashtvinayaka Construction, Navi ... vs Jcit Cir 22(3), Mumbai on 9 October, 2017

, " ", IN THE INCOME TAX APPELLATE TRIBUNAL BENCH "F" MUMBAI BEFORE SHRI D.T.GARASIA, JM AND SHRI RAJESH KUMAR, AM I.T.A. No.3821/Mum/2015 (/ Assessment Year: 2011-12) Dy.Commissioner of Income Tax M/s Ashtavinayaka

-28(1), Construction Room No.306, 3rd floor, / Plot No.478, Vashi Railway Station Complex, Vs. TTC Industrial Area, Vashi, MIDC Rabale, Navi Mumbai-400703 Navi Mumbai-400701 I.T.A. No.3883/Mum/2015 (/ Assessment Year: 2011-12) M/s Ashtavinayaka Construction JtCommissioner of Income Plot No.478, Tax -22(3), Mumbai / TTC Industrial Area, MIDC Rabale, Vs. Navi Mumbai-400701 ./ PAN : AADFA1724G (/Appellant) : (/ Respondent) / Assessee by : Shri Bhadresh Doshi / Revenue by : Shri T A Khan /Da te o f He a r in g : 5.9.2017 a te of Pr o no u nc e me nt : 09.10.2017 I.T.A. No.3821/Mum/2015 and 3883/M/2015 ¡ / O R D E R PER RAJESH KUMAR, A. M:

The captioned are cross-appeals by the assessee and revenue pertaining to assessment year 2011-12 directed against the order of ld Commissioner of Income Tax-(A)-26 dated 23.3.2015 passed u/s 143(3) of the Income Tax Act (hereinafter called the Act).

2. First we shall take up the appeal bearing no.3883/Mum/2015 by the assessee wherein following grounds have been taken:

"1. The Ld. CIT(A) has erred in confirming the action of A.O of adding Rs.39,88,535/- on account of alleged bogus purchases. The said addition of Rs.39,88,535/- may please be deleted.

2. The Ld. CIT(A) has erred in restricting the claim of the appellant of retention money only to the extent of Rs. 4,76,62,505/-. Thus, the CIT(A) has thereby confirmed the action of A.O of denial of retention money to the extent of Rs.2,12,22,495/-. The said claim of retention money of Rs.2,12,22,495/- may please be allowed.

3. The Ld. CIT(A) has erred in confirming the action of A.O of disallowing interest to the tune of Rs. 16,86,094/- u/s 40(a)(ia).

4. The Ld. CIT(A) has erred in restricting the claim of the appellant of TDS on VAT only to the extent of Rs. 28,66,922/-. Thus, the CIT(A) has thereby confirmed the action of A.O of denial of claim of TDS on VAT to the extent of Rs. 39,87,561/-. The said claim of Rs. 39,87,561/- may please be allowed."

3. Facts of the case in brief are that the assessee is engaged in the business of civil contractorship and has filed return of income on 30.9.2011 declaring total income of Rs.5,02,78,345/- which was processed under I.T.A. No.3821/Mum/2015 and 3883/M/2015 section 143(1) of the Act. The case was selected for scrutiny and the statutory notices were issued u/s 143(2) and 142(1) of the Act. The AO during the course of assessment proceedings called for various informations/details from the assessee and the assessee filed the written submissions finally culminating into the assessment being framed by the AO by making various additions vide order dated 31.12.2013 passed u/s 143(3) assessing the total income of Rs.12,52,72,720/- by making additions as have been enumerated in para 13 of the assessment order. Now, we will deal with the appeal ground wise.

4. The issue raised in the grounds of appeal no.1 is against the confirmation of the addition of Rs.39,88,535/- by the ld.CIT(A) as made by the AO on account of bogus purchases. During the course of assessment proceedings, the AO found that the assessee has purchased material from three parties viz (a) EMCO Industries,(b) Mercury Enterprises and (c) Viraj Trading Co. which were declared as hawala operators in the list declared by the Sales Tax Department, Government of Maharashtra. Accordingly, the AO issued notice dated 19.12.2013 and 23.12.2013 to the assessee to prove the genuineness. The assessee made purchases from these parties to the tune of Rs.39,88,535/- comprising of Rs.6,19,313/-, Rs.3,88,800/- and Rs.29,80,422/- from (a) EMCO Industries,(b) Mercury Enterprises and (c) Viraj Trading Co. respectively. The assessee submitted before the AO that I.T.A. No.3821/Mum/2015 and 3883/M/2015 the payment to first two parties i.e. (a) EMCO Industries and (b) Mercury Enterprises were not made as the material supplied by these parties were not as per the specifications as ordered and therefore the payment were withheld and were disputed. The purchases from M/s Viraj Trading Co were made by cheques and the bank statement evidencing the payment was filed before the AO. The assessee also filed consumption statement before the AO showing that the material actually received from the suppliers and was consumed at the work site of the assessee. However, the AO was not satisfied with the submissions of the assessee on the ground that the assessee failed to prove the genuineness of the purchases from these parties and also the Income Tax Inspector deputed to verify the purchases on the addresses supplied by the assessee reported that none of the parties was existed on the addresses furnished by the assessee. Finally the entire addition was made to the income of the assessee. In the appellate proceedings, the ld. CIT(A) confirmed the addition by observing and holding as under :

"5.5 In view of the above, inference of preponderance of probabilities can be drawn from the materials on records. The appellant has attempted to inflate U1e purchases artificially by obtaining the accommodation bills from the hawala parties. Therefore, I agree with the view taken by the AO that the appellant cannot be allowed a deduction of the purchases amounting to Rs.39,88,535/-. Section 69C for making the additions by treating them as unexplained expenditure. The provisions of section 69C can be made applicable only if there is an expenditure which has been incurred by the assessee the I.T.A. No.3821/Mum/2015 and 3883/M/2015 source of which is doubtful. Here, the incurrence of the expenditure in the form of purchases itself is doubtful and therefore provisions of section 69C are not applicable. Hence, I direct the AO to disallow the purchases from the said three parties amounting o Rs.39,88,535/- as bogus u/s 37(1) of the Act."

5. After hearing both the parties, and on perusal of materials placed before us, we observe that the assessee is undoubtedly beneficiary of bogus purchase bills issued by these three parties as mentioned hereinabove to the tune of Rs.39,88,535/-. In respect of first two parties viz. (a) EMCO Industries and (b) Mercury Enterprises, the payments were withheld due to defective materials which were duly entered into by the assessee in the stock register and also consumed in the construction at the various sites, whereas in respect of the third party viz Viraj Trading Co., the material was received and shown in the stock register and consumed. The payment was made through banking channel. The AO doubted the entire purchases and added the same to the income of the assessee which was upheld by the ld. CIT(A) by observing that the provisions of section 69C of the Act treating the purchases as unexplained expenditure was rightly applied. In the case of bogus purchases, the practice followed by the beneficiaries are that the bills are prepared from the hawala dealers while purchases the goods from the grey market thereby making the saving of non-payment of VAT and other incidental charges. We are not in agreement with the conclusion drawn by the ld.CIT(A) specifically when the assessee has filed the statement of receipt I.T.A. No.3821/Mum/2015 and 3883/M/2015 of materials and consumption thereof at the various sites and hence at the most a reasonable disallowance to cover the leakages of revenue and various types of savings made by the assessee by purchasing goods from the grey market could be made. In the similar cases, the Co-ordinate Benches of the Tribunal have taken a consistent view of directing addition ranging from 5% to 12.5% depending upon the facts of the case. In the present case, we are of the view that it would be fair and reasonable to make the addition towards gross profit at the rate of 12.5% of the said purchases. Accordingly, we set aside the order of CIT(A) on this issue and direct the AO to make addition at 12.5% of the bogus purchases. Ground no.1 is partly allowed.

6. Grounds of appeal no.2 pertains to part confirmation of addition in respect of retention money to the extent of Rs.2,12,22,495/- by the Ld. CIT(A) out of addition of Rs.6,88,85,000/- made by the AO and thus not deleting the entire addition.

7. Facts in brief are that the assessee is engaged in the business of civil contractor ship on turnkey/EPC basis relating power stations. In the business of the assessee, it is contractual as per the terms of the contract that certain % is retained as retention money out of contract bill towards satisfactory performance guarantee. During the year while filing the return of income, the assessee reduced such retention money of Rs. 6,88,85,000/- from the income in the "statement of computation of income" nevertheless the same was I.T.A. No.3821/Mum/2015 and 3883/M/2015 shown as revenue in the profit and loss account The details of the said retention money is incorporated in the assessment order at page 4. The assessee was asked by the AO to justify the claim of deduction of retention money which was replied by the assessee as under :

> "We are into business of Power Transmission, requiring laying down cables In remote areas Since we ore into business wherein execution of contract is the main activity deduction of Retention Money IS unavoidable. The deduction becomes applicable even in cases where goods are supplied, as the quality of these goods has to be of required grade for satisfactory completion of the contract.

> The Sales are recorded at the Invoice value which is the requirement of Accounting Standard 9 and or Accounting Standard 7 as applicable. It is also necessary that these bills ore submitted In agreed format to be approved from the customers. Therefore all the sales are recorded at Gross Value i.e. Including Retention Money. When the agreed amount of Retention Money is deducted, it is known to both the parties that the sum so deducted will be repaid on satisfactory completion of the contract. In other words it means that if the contract is not satisfactorily completed, the Retention Money will not be paid. The satisfactory completion DJ work not only depends on the work already done but also upon the work to be done in future. Thus taxing Retention Money would mean not adhering to the Mercantile System as envisaged in Income Tax.
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> The following are cases wherein Retention Money is allowed as deduction:
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> ClT v. Simplex Concrete Piles {India} Pvt.Ltd. 179 ITR 8) (Cal.) ClT v. Chanchani Bros (Contractors) Pvt. Ltd. 161 ITR 418 (Patna) Janatha Contract Co. v. CIT (105 ITR 627)(Kerala) ClT v. Gajapathy Naidu (53 ITR 114) Supreme Court."

The AO, after considering the contentions of the assessee, rejected the same by citing various reasons as has been enumerated in para 11.3 of the I.T.A. No.3821/Mum/2015 and 3883/M/2015 assessment order and finally added Rs. 6,88,85,000/- to the total income of the assessee. In the appellate proceedings, the ld.CIT(A) partly allowed the claim of the assessee to the tune of Rs. 4,76,62,505/- while sustaining to the extent of 2,12,22,495/- by observing and holding as under :

> "6.10 From these details submitted by the appellant, it has been observed not in all cases the retention money pertaining to the sales booked during the year under consideration has been claimed. In many cases, the retention money pertaining to the sales which were booked in the prior years have been claimed in the year under consideration. If the corresponding revenue has been offered to tax not in this year but in the earlier years then how can the retention money pertaining to the same can be claimed as a deduction in this year. Further, the appellant has included deductions on account of various other reasons also under the name of retention money. What are the reasons for such various other deductions and whether such deductions can be considered for lowering the income or not have not been explained by the appellant at all.
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> 6.11 Therefore, from the tabular statement furnished by the appellant along with the detailed enclosures for each of the transactions under consideration, have been extracted in the CIT(A)'s order at pages 17 ,18 and 19 for the sake of brevity we are not reproducing below:

8. The ld. AR vehemently submitted that the order passed by the ld.CIT(A) in confirming the addition of Rs. 2,12,22,495/- is completely wrong and against the facts on records. The assessee is engaged into the business of execution of contracts on Turnkey/EPC basis related to power stations.

It has entered into various contracts with several parties mainly government agencies. Retention of certain percentage of interim contract bill till the time of satisfactory completion of the contract or as subsequent performance I.T.A. No.3821/Mum/2015 and 3883/M/2015 guarantee for agreed period is a routine feature in case of such contracts with government agencies which as the per terms of the contracts. Retention Money which is withheld by the customers has been reduced from the taxable income in the statement of income while filing the return of income though booked as revenue/income in the P&L A/c. The ld. AR submitted that the amount of retention money cannot be said to have accrued to the assessee in the AY 2011-12 for the reasons that the assessee has not obtained unconditional right to receive the money and there is no certainty as to its realization. The said retention money is not receivable unless the contractee is satisfied with the work of the assessee and the contract is successfully completed or operated satisfactorily for agreed period . Thus, there is an uncertainty as to collectability of the retention money. Also, the assessee has no right to claim the amount from the contractee until the project is completed as per the terms of the contract. In light of the above, the retention amount has never accrued to the assessee in AY 2011-12. It should be taxed in the year of receipt or the year when the assessee gets a right to receive it. In defense of his arguments the ld AR relied on the some decisions namely:

- ¢ E.D. Sassoon & Co. Ltd. vs. CIT 26 ITR 27
- ¢ CIT vs. Gujarat Apollo Industries Ltd.
- ¢ Amarshiv Construction (P.) Ltd. vs. DCIT

DIT (International Taxation) vs. Ballast Nedam International ¢ CIT vs. P & C Constructions (P.) Ltd.

- ¢ CIT vs. Associated Cables Ltd.

- ¢ CIT vs. East Coast Constructions & Ind. Ltd.
- ¢ CIT vs. Ignifluid Boilers (I) Ltd.
- ¢ CIT vs. Simplex Concrete Piles India (P.) Ltd.

The ld. AR submitted that in the appellant's case, the right to receive the retention money did not arise during the year under consideration. This fact can be substantiated from the agreements and the payment advices in respect of all parties. For instance, one of the major parties which have awarded contract to the appellant is Power Holding Co. of Nigeria. The appellant has claimed retention money amounting to Rs.3,99,35,186 with respect to this party which amounted 10% of the total invoices raised during the year under consideration. The agreement executed with this party clearly mentions the payment terms whereby 10% of the contract consideration is not receivable immediately but at a future date and after commissioning of the project. The relevant terms are reproduced below:

"6.3.3 Five percent (5%) of the contract price shall be paid after the commissioning of

the works and the issuance of the initial taking over certificate.

6.3.4 Five percent (5%) of the contract price shall be paid after the completion of the works and warranty period and issuance of the final completion certificate"

The ld. AR submitted that Further, the same agreements also provide for the corresponding warranty period which is 12 months from the date of the initial take-over by the Employer i.e. Power Holding Co. of Nigeria. During the year under consideration, the assessee has merely shipped the required goods to I.T.A. No.3821/Mum/2015 and 3883/M/2015 Nigeria and question of completion of the relevant project does not arise at all. Similar is the case with respect to other contracts where some portion of the contract has been retained by the customers on account of similar terms contained in agreements with them. With respect to the portion of retention money which is held to be not deductible by the CIT (A) it is submitted that the fact that right to receive that amount has not accrued to the assessee has not been disputed. The only reason for not allowing deduction is that the corresponding bills were booked in the earlier years and not during the years under consideration. It is humbly submitted that in many cases, the appellant comes to know about retention money being deducted at the time when the payment is released by the customers. Majority of the customers of the appellant are government agencies. They do not share even accurate details about retention money well in time. Further, in many cases, certain portion of the agreed consideration is retained over and above agreed proportion of retention as per the agreement. The assessee does not have control over it. Therefore, the appellant was forced to book amounts withheld as retention money during the year under consideration. The appellant should be allowed to reduce its taxable income by whole of the retention money irrespective of whether the corresponding invoice was booked in the year under consideration or earlier years.

I.T.A. No.3821/Mum/2015 and 3883/M/2015

9. The ld.DR relied on the order of the AO. The ld. DR submitted that even if the money is retained by the contractee under the terms of contract till satisfactory completion of contract and subsequent performance for a certain number of years would not be taken to means that the assessee is not conferred with the right to receive the money. The ld. DR contended that when the contract is completed and work is executed the bills are raised on the contractee, the assessee becomes entitled to receive amount irrespective of the fact whether the same is results into performance or not in terms of contract terms and conditions of money retained by the contractee. The ld. DR submitted that the money retained by the contractee represents the income earned by the assessee but retained as performance till the satisfactory completion of contract. Therefore, the same has rightly been assessed and brought to the tax by the AO. The ld. DR while taking us through the balance sheet and pointed out that the amount receivable under the head deposits retention money was only Rs.2,19,00,293/- which is subsequently retained and claimed as nor received in the financial year 2010- 11 out of the said bill for the FY 2010-11 meaning thereby the remaining retention money is possibly shown under the head sundry deposits. It is computed in the submission of total income and deduction has been claimed of Rs.6,88,85,000/- at the time of filing of return of income when the amounts of assessee were already finalized. The ld. DR also stated that such I.T.A. No.3821/Mum/2015 and 3883/M/2015 type of deduction were not claimed in the past by the

assessee and according to the mercantile system of accounting the sales and purchases have to be accounted for and receipts brought to tax whether or not actually received.

10. The ld. DR showed various agreements of contracts entered into by the assessee and submitted that even if the contract agreement provided for deduction of 5-10 % of the work done by the assessee even then accordingly to the mercantile system of accounting the schedule of material to be determined the time of accrual of income. Finally, the ld. DR prayed before the bench that the order of AO should be restored as the revenue has challenged the appeal against the relief allowed by the CIT(A) to the tune of Rs.4,76,62,505/-.

11. We have carefully considered the rival submissions and perused the material including the impugned orders and case law relied upon by both the parties. We note that the assessee is a contractor executing the contractual work relating to power station on turnkey basis. After perusal of the various agreements with the contractor, we observe that the said agreement provided for retention/deduction of 5 to 10% of money of the amount of the contract bill towards satisfactory completion of contract as performance guarantee which would be received after certain number of years when the project is successfully operated. Thus, money retained by the customers is in fact the amount withheld for certain number of years depending upon the I.T.A. No.3821/Mum/2015 and 3883/M/2015 successful completion of contract or successfully running of the work executed for certain number of years. According to the ld.AR, the assessee has no right to receive the money till the time the contract is satisfactory completed and executed depending upon the terms of the contract. Therefore the said money retained should not be taken as accrued to the assessee in the AY 2011-12 and the same will be offered to tax as and when it received after fulfillment of the contract of the terms. Whereas the revenue on the other hand primarily harp on the mercantile system of accounting when once billing is done and the same has to be offered to tax irrespective of fact whether the same is received or not . In other words according to the revenue the schedule of payment or accounts determines the point of taxability of the income and it is to be on the basis of mercantile system of accounting otherwise taxing the retention money in the years of receipt of money would change the system of accounting from mercantile to cash system. The issue before us that the money retain is taxable in the year in which it is retained or in which year it was received. £ In the case of E. D. Sassoon And Company Ltd vs The Commissioner Of Income Tax 26 ITR 27 (SC), it has been held that the assessee can be said to acquire the right to receive the income which cannot be said to have accrued as under:

> "Income may accrue to an assessee without the actual receipt of the same. If the assessee acquires a right to receive the income, the I.T.A. No.3821/Mum/2015 and 3883/M/2015 income can be said to have accrued to him though it may be received later on its being ascertained. The basic conception is that he must have acquired a right to receive the income. There must be a debt owed to him by somebody. There must be as is otherwise expressed debitum in praesenti, solvendum in futuro. Unless and until there is created in favour of the assessee a debt due by somebody it cannot be said that he has acquired a right to receive the income or that income has accrued to him."

£ In the case of CIT V/s Gujarat Apollo Industries Ltd it has been held by the Hon'bleHIGH COURT OF GUJARAT:

> "5. Insofar as the first question is concerned, a perusal of the order passed by the Commissioner (Appeals) shows that after analyzing the terms of payments of purchase orders in respect of various parties, has given categorical finding that the retention of 10% money of total sales was due to specific terms and conditions for final payment mentioned in the customer purchase order. It was further held that the assessee - company had been following this system of accounting for the last several years and was accepted by the department. The Commissioner (Appeals) further examined as to whether the assessee had made any deviation from the usual practice followed by it in the earlier years with an intention to evade tax and found that there was no such change during the year under appeal and whatever retention money had not been shown in that year and realized in the subsequent year had been shown as sale proceeds in that year and offered for tax. It is in these circumstances that the Commissioner (Appeals) was of the view that there was no need to disturb the method of accounting followed by the assessee - company and also found no discrepancy in terms and conditions of purchase orders. The Tribunal has concurred with the findings recorded by the Commissioner (Appeals).
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> £ In the case of Amarshiv Construction (P.) Ltd. V/s DCIT, the Hon'ble Gujarat High Court held as under :
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> "29. Reliance placed by the Tribunal to the Accounting Standards for percentage completion method was misplaced. The assessee did not follow the percentage completion method and the accounting treatment I.T.A. No.3821/Mum/2015 and 3883/M/2015 to be accorded in such case therefore was not at issue. The assessee claiming entire expenditure and not excluding expenditure relatable to the withheld security deposit also would not be fatal to the interest of the assessee. The expenditure in toto was incurred. The question only was what would be the total amount that the assessee would receive for carrying out such construction. Ninety per cent of the amount was payable or already paid over. Ten per cent of the running account bills was adjustable towards the claims of the SSNNL and recoveries arising out of defects; if any. Release of such amount or part thereof would decide the ultimate profit margin of the assessee upon execution of the contract. The expenditure incurred by the assessee could not be proportionately divided into that covering the assessee's ninety per cent of the bill amount and relatable to the rest ten per cent.
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> 30. Under the circumstances, we find that the Tribunal committed an error in allowing the Revenue's appeals. The question is answered in favour of the assessee. The judgment to the extent above in each of the respective appeals is reversed. Resultantly, the judgment of the CIT (A) is reinstated. As a result, consequential directions of the CIT (A) will also stand reinstated. We reproduce such directions,

again here :

> "However, the Assessing Officer is directed to tax the said retention money in the assessment year relevant to the 'previous year' in which retention money becomes payable to the appellant as per the terms of the contracts ie., after the defect liability is over and after the Engineer- in-Charge certifies that no liability attaches to the appellant."

Appeals are allowed to the above extent."

£ In the case of Director of Income-tax (International Taxation) v.Ballast Nedam International the Hon'ble Gujarat High Court held that :

> "6. Having heard learned counsel for the Revenue and having perused the documents on record, we find that the issue under consideration is squarely covered by the decision of this Court in the case of Anup Engineering Ltd. v. CIT [2001] 247 ITR 457/114 Taxman 584 (Guj.).
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> 7. In the said case the agreement that the assessee entered into for execution of a contract for supply and erection of plant specified that full amount would not be paid if the plant was defective. The assessee had debited the sum of Rs. 3 lakhs by crediting the same to the warranty account as some dispute had arisen with respect to the execution of the contract. In such background, the Court considered I.T.A. No.3821/Mum/2015 and 3883/M/2015 whether such amount represented assessee's accrued income. In this context, it was held and observed as under:
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> "For the purpose of ascertaining whether income had, in fact, accrued, one has to also see whether there is a real income. It has been also observed by the Hon'ble Supreme Court in CIT v. Bokaro Steel Ltd. 236 ITR 315, that no matter by adopting what method the assessee maintains his accounts, it may be either the cash system where entries are made on the basis of actual receipts and actual outgoings or disbursements, or it may be the mercantile system where entries are made on accrual basis, that is to say, accrual of the right to receive payment and the accrual of the liability to disburse or pay. However, in both cases, unless there is real income, there cannot be any income tax. In the instant case also, there is no real income so far as Rs. 3 lacs are concerned because no debt has been created in favour of the assessee by virtue of clause No. 14 of the contract and as the assessee did not get any right to receive the said amount during the previous year in question, it cannot be said that income in respect of the amount in question had been accrued to the assessee during the previous year in question.
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> Looking to the facts of the present case and in the light of the law laid down by the Hon'ble Supreme Court in the cases referred to hereinabove, it is very clear that unless and until a debt is created in favour of the assessee, which is due by somebody,

it cannot be said that the assessee has acquired a right to receive the income or that the income has accrued to him. A debt must have come into existence and the assessee must have acquired a right to receive the payment. In the instant case, the assessee did not get any right to receive a sum of Rs. 4 lacs which could have been retained by Godrej in pursuance of clause No. 14 of the contract. One has to look at the contract and not at the entries made in the books of account. If, upon construction of the contract, one comes to a conclusion that the assessee could not have received Rs. 4 lacs from Godrej, by no stretch of imagination it can be said that the said amount had accrued by way of income to the assessee in the previous year in question. As the plant was not up to the satisfaction of Godrej, Godrej had a right to retain Rs. 4 lacs. It is not in dispute that during the previous year in question the dispute as to quality of the plant had arisen and the assessee had also felt that quality of the plant was not up to the mark and, therefore, believing that Godrej might ultimately retain Rs. 3 lacs or under the warranty I.T.A. No.3821/Mum/2015 and 3883/M/2015 clause the assessee might have to pay Rs. 3 lacs, the assessee made a provision for Rs. 3 lacs by deducting the said amount from the sales account. In fact, in the previous year in question, the assessee had no vested right to receive Rs. 4 lacs and therefore it cannot be said that income to that extent had accrued to the assessee. We can test the above conclusion in a different manner too. Whether Godrej was liable to pay Rs. 4 lacs to the assessee in spite of the fact that quality of the plant was admittedly not up to the mark? Did the assessee get a vested right to get the said amount? Answer to these questions would be in negative and, therefore, as observed hereinabove, it cannot be said that income had accrued to the assessee.

A similar question had arisen in case of CIT v. Simplex Concrete Piles (India) Pvt. Ltd. 179 ITR 8 (Cal.). Having regard to the facts and circumstances of the case, it was held in that case that, when there is a clause with regard to retention money, the assessee gets no right to claim any part of the retention money till the verification of satisfactory execution of the contract is concluded and, therefore, if there is no immediate right to receive the retention money, the said amount cannot be said to have accrued to the assessee. Even in the instant case, so far as retention money is concerned, the assessee had not to receive the same and therefore it cannot be said that the amount of Rs.

3 lacs had accrued to the assessee."

8. In the result, this Tax Appeal is dismissed."

12. We note that the assessee has claimed the retention money of Rs.3,99,35,186/- from power company of Nigeria being 10% of the total invoice amount during the year under consideration which was taken as retained as per clause 6.3.3 and 6.3.4 of the contract and during the year the assessee has merely transported the required goods to Nigeria and therefore there cannot be any question of completion of project at all during the year. We also find merit in the contention of the assessee that right to receive has not been disputed by the revenue but the ld CIT(A) rejected the

claim/deduction to the tune of Rs. 2,12,22,495/- for the reasons that the I.T.A. No.3821/Mum/2015 and 3883/M/2015 corresponding bills were booked in the earlier years and not in the present year. Moreover, in the case of the assessee, most of the customers are government agencies where the exacts details of retention money are not even available with the assessee. The revenue has not disputed that the assessee has not offered the retention money as and when received. In view of the above facts and circumstances of the case and ratio laid down in the aforementioned case law, we find merit in the contention of the assessee that the assessee has not received money retained by the contractees and also that some retention could not be accounted due to non availability of details and information with the assessee. It is only when these details were available with the assessee the necessary entries were made in the books of accounts. Therefore, we are of he considered view that though the mercantile system of accounting provides for accounting and taxing of income on accrual basis but in the instant case the assessee has no control over the retention money deducted by the contractees. Therefore, the assessee should be allowed deduction in the year of retention or in that year in which it comes to know about the said deductions nevertheless it is pertinent to say that retention has to be taxed as and when received by the assessee. Accordingly, we are not agreement with the conclusion of CIT(A) that the deduction of retention money which pertained to earlier years is not I.T.A. No.3821/Mum/2015 and 3883/M/2015 allowable and accordingly direct the AO to allow claim of retention money of Rs.2,12,22,495/-. Accordingly, this ground of assessee is allowed.

13. The issue raised in ground no.3 is against the confirmation of disallowance of interest to the tune of Rs. 16,86,094/- u/s 40(a)(ia) of the Act.

14. We have heard the rival contention and perused the material placed before us. In our opinion the disallowance u/s 40(a)(ia) of the Act on account of interest can be made only if the payee has not offered the receipts in his return of income. We, therefore, feel that the issue has to be sent back to the file of the AO to verify the same in terms of second proviso to section 40(a)(ia) of the Act and accordingly the AO is directed to decide the same as per facts and law after giving reasonable hearing to the assessee. This ground is allowed for statistical purposes.

15. Ground of appeal no.4 is against the part confirmation of on account TDS on VAT to the extent of Rs. 39,87,561/- by CIT(A) as against Rs. 68,54,483/- added by the AO.

16. The facts in brief are that the assessee suo motto added back TDS on VAT to the income to the tune of Rs.68,54,483/-. The assessee raised the issue before the AO during the assessment proceedings but AO rejected the same on the ground that the claim is not made by way of revised return of I.T.A. No.3821/Mum/2015 and 3883/M/2015 income. In the appellate proceedings the ld. CIT(A), after verifying the claim of the assessee in the computation of income , found it to be correct. However, the ld. CIT(A) after calling for the details of these expenditures from the assessee observed that out of Rs.68,54,483/-, a sum of Rs. 39,87,561/- pertained to earlier years and therefore the deduction to that extent should not be allowed in the current year and thus allowed Rs.28,66,922/- relating to the current year only. Now the assessee is in appeal before us against the rejection of claim of the assessee to the tune of Rs.39,87,561/-. The ld. AR submitted before us that the said addition/disallowance was suo motu made by the assessee at the time of filing of the return of income on the wrong belief that it related to TDS under the Income Tax Act, whereas the same

related to TDS on VAT Act and therefore represented the indirect expenses under contract qua payment of VAT and cannot be disallowed.

17. On the other hand, the ld. DR objected to the arguments of the ld.AR. The DR submitted before us that the assessee has suo motto disallowed the TDS on VAT while filing the return of income. The ld DR further stated that the claim of assessee of TDS on VAT rightly rejected by the AO as it was not made by way of revised return of income. The ld DR submitted that the ld CIT(A) has erred in allowing even a part of the said amount and prayed that the order of AO be restored.

I.T.A. No.3821/Mum/2015 and 3883/M/2015

18. We have heard the rival submissions and perused the material placed before us. The undisputed facts are that the assessee is a works contractor and it is a statutory requirement under the VAT Rules to deduct TDS on the said contract for the work carried out under the Sales Tax Act. The assessee claimed expenditure during the assessment proceedings qua TDS on VAT deducted by the contractees and not by way of revised return and therefore the said claim was not admitted by the AO. The ld CIT(A) allowed Rs.28,66,922/- while denying the claim to the tune of Rs.39,87,561/- on the ground that the same did not pertain to the year under consideration. We find merit in the contention of the ld.AR that the amount retained during the year under consideration is not recoverable from the customers. The customers normally intimate the assessee about the TDS on VAT vide certificate as per VAT rules but in many cases the contractors come to know when the payments are received from the customers after reducing the amount of TDS. Thus, the short recovery of bill amount due to deduction of TDS under VAT Act is accounted for in the books of account as and when it comes to the notice of the assessee and accordingly claimed as expenditure. Even otherwise the deduction of such type of taxes is available upon its payment as per the provisions of section 43B of the Act. If we consider the claim from another angle that the said claim crystallized during the year as the assessee came to know about the said deduction only during the year I.T.A. No.3821/Mum/2015 and 3883/M/2015 under consideration as the customer failed to issue any deduction certificate and as a result was not claimed by the assessee in those years. In our considered view the assessee should be allowed the claim in the year in which it first comes to know about the said deductions. In view of these facts , we are inclined to direct the AO to allow Rs 39,87,561/- as admissible deduction while assessing the income. The ground raised by the assessee is allowed.

19. Resultantly, the appeal of the assessee is partly allowed for statistical purposes as indicated above.

20. Ground No. 1 & 2 are arising out of the same issue as have been decided by us in ground No. 2 & 4 in assessee's appeal ITA No. 3883/Mum2015 .Since we have decided these grounds in favour of the assessee, ourdecision taken therein would, mutatis mutandis, apply to these grounds as well. Resultantly, the grounds of appeal no 1 & 2 of the revenue stands dismissed.

21. The issue in ground no 3 is against allowing deduction of Rs. 1,02,404/- by CIT(A) as disallowed by the AO towards the late payment of employees contribution to PF.

22. The brief facts are that the employees contribution to provident fund for the quarter 1st Jan to 31st March 2011 was paid on 25th April,2011 and was I.T.A. No.3821/Mum/2015 and 3883/M/2015 disallowed by the AO on the ground that it was not paid within the time as stipulated under the respective ACT.

23. The ld CIT(A) appeal deleted the additions by following the decision of the Jurisdictional High Court in the case of Ghatge Patil Transport Ltd wherein it has been held that if the payment is made on or before the due date of filing the return of income u/s 139(1) of the Act the deduction has to be allowed.

24. Having considered the rival contentions and after perusing the records placed before us , we find that there is no infirmity or mistake in the order of CIT(A) and therefore we are inclined to uphold the same on this issue. The ground raised by the revenue is dismissed.

25. In the result, appeal of the assessee is partly allowed for statistical purposes and that of revenue stands dismissed.

Order pronounced in the open court on 9th Oct, 2017.

Sd	sd
(D.T.GARASIA)	(RAJESH KUMAR)
Judicial Member	Accountant Member

Mumbai; Dated :. 9.10.2017

Sr.PS:SRL:

¡ □ ¥ /Copy of the Order forwarded to :

1. / The Appellant
2. / The Respondent
3. ( ) / The CIT(A)
4. / CIT - concerned
5. ƒ ¥ , , / DR, ITAT, Mumbai
6. ¥ § / Guard File ¡ / BY ORDER, True copy ¤ / ' “

(Dy./Asstt. Registrar) , / ITAT, Mumbai