आयकर अपीलीय अधिकरण,'सी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'C' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं डॉ दीपक पी. रिपोटे, लेखा सदस्य के समक्ष

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENTAND
Dr. DIPAK P. RIPOTE, ACCOUNTANT MEMBER

आयकर अपीलसं./**ITA No.: 353/CHNY/2022**

निर्धारण वर्ष/Assessment Year: 2014-15

M/s. Tamilnadu State Marketing Corporation Ltd., CMDA Tower, II, IV Floor, Gandhi Irwin Bridge Road, Egmore, Chennai – 600 008.	vs.	**The ACIT,** Corporate Circle 3(1), Chennai.
PAN: AAACT 2964P **(अपीलार्थी/Appellant)**		**(प्रत्यर्थी/Respondent)**

अपीलार्थी की ओरसे/Appellant by : Shri R.Vijayaraghavan, Advocate

प्रत्यर्थी की ओर से/Respondent by : Shri M. Rajan, CIT

सुनवाई की तारीख/Date of Hearing : 16.08.2022

घोषणा की तारीख/Date of Pronouncement : 14.11.2022

आदेश /O R D E R

PER MAHAVIR SINGH, VICE PRESIDENT:

This appeal by the assessee is arising out of the revision order passed u/s.263 of the Income Tax Act, 1961 (hereinafter the 'Act') by the Principal Commissioner of Income Tax (Appeals), Chennai-3 in Revision No.PCIT, Chennai-3/Revision-263/100000339483/2022 dated 31.03.2022. The assessment was framed by the ACIT,

Corporate Circle-3(1), Chennai for the assessment year 2014-15 u/s.143(3) of the Act vide order dated 30.12.2016.

2. The only issue in this appeal of assessee is as regards to the revision order passed by PCIT by holding the assessment framed as erroneous and prejudicial to the interest of Revenue on account of Value Added Tax paid by assessee and claimed as deduction u/s.37 r.w.s. 43B of the Act and allowed.

3. Brief facts are that the assessee is a State owned undertaking engaged in trading and retail vending in liquor. The original assessment was completed u/s.143(3) of the Act, after scrutinizing the accounts of the assessee by the AO vide order dated 30.12.2016. Subsequently, the PCIT, Chennai on perusal of records noted that the assessee has claimed VAT expenses of Rs.11,491.97 crores in the profit & loss account during the previous year 2013-14 relevant to this assessment year 2014-15 and this being unusual VAT expenditure needs to be examined. The PCIT examined the provisions of section 40 of the Act and noted that this provision specified the amounts which shall not be deducted in computing the income chargeable under the head "profits and gains of business or profession". According to PCIT, statutory duties like income-tax,

wealth tax, etc., are non-deductible expenditure and disputes have arisen in respect of some of State Government undertakings as to whether any sum paid by way of privilege fee, license fee, royalty etc., levied or charged by the state government exclusively on its undertaking are deductible or not. The PCIT also observed that in some cases, orders have been issued to the effect that surplus arising to such undertakings shall vest with the state government. The PCIT taking cognizance of the amended provisions of section 40(a)(iib) of the Act, observed as under:-

> "The amended provisions of section 40(a)(iib) provide that any amount paid by way of fee, charge, etc., which is levied exclusively on, or any amount appropriated, directly or indirectly, from a State Government undertaking, by the State Government, shall not be allowed as deduction for the purpose of computation of income of such undertakings under the head "Profits and Gains of business or profession". The change of VAT which is levied exclusively on the State Government undertaking by the State Government and therefore comes within the provisions of section 40(a)(iib) of the Income Tax Act, 1961."

She further held that in view of the above, the assessment framed by the AO u/s.143(3) of the Act dated 30.12.2016 for assessment year 2014-15 is erroneous so far as prejudicial to the interest of Revenue. Hence, a show-cause notice was issued accordingly so as to why the assessment order framed u/s.143(3) of the Act be not revised u/s.263 of the Act. The assessee filed various replies stating various submissions and arguments and also case laws.

3.1 The PCIT was not convinced and passed revision order u/s.263 of the Act, holding the assessment framed by the AO is erroneous so far as prejudicial to the interest of Revenue and directed the AO to reframe the assessment by observing in para 10 to 19 as under:-

> 10. The first issue to be considered is whether the VAT levied by the Government of Tamilnadu is in the nature of royalty, license fee, service fee, privilege fee, service charge or any other fee or charge, by whatever name called and the second issue to be considered is whether amended it is levied exclusively on TASMAC so as to attract the provisions of section 40(a)(iib).
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> 11. In the following paragraphs we have brought out how Fee, Charge is different from Tax :
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> 11.1 The Interpretation of the Department seems to be that the wordings "royalty, license fee, service fee, privilege fee, service charge or any other fee or charge, by whatever name called" are wide enough to include Sales Tax (i.e. VAT) also.
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> 11.2 In this context it is submitted that the VAT is levied by the State Government of Tamil Nadu by the power vested in it under the Entry No. 54, List I, Seventh Schedule, Constitution of India and the Petitioner pays the Stale Govenment VAT as per Section 3(5) of the TNVATAct, 2006 read with the rate mentioned in Second Schedule to the TNVAT Act, 2006 and claims it as an expenditure u/s.37 1961 in its Income Tax return which has been r.w.s.43B of the Income Tax Act, 1961 disallowed by the Assessing Officer for A Y 2017-18 u/s. 40(a)(ib) of the Income Tax Act, 1961.
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> 11.3 It is submitted that under the Constitution of India, the list of areas which fall within the exclusive power of States are given in the List II of the Seventh Schedule. State has the exclusive power to levy taxes on sale and purchase of intoxicating liquor (Entry 54). But the power to levy fees in respect of matters in the List is given under a different entry (Entry No 66). Thus, the State derives power to levy sales tax (VAT) on liquor under entry 54 and power to levy fees in connection with production, manufacture, transportation etc. is derived under entry no 69 of the List II of VII schedule

the Constitution of India. So, the power of State Government to levy tax on sale and purchase of Liquor and power to levy fees are two different powers and are derived from two different entries in the State List. Thus, fees levied by whatever name called under the power granted under Entry 69 cannot encompass tax levied by virtue of Entry 54.

11.4 Value Added Tax is imposed on the sales or purchases made by any Assessee. Value Added Tax does not confer any special or specific benefit to the Assessee who pays the Value Added Tax. Nor can the Payer of Value Added Tax. Nor can the payer of value added Tax demand any specific privileges from the State Government on account of payment of sales and surcharge.

11.5 It is submitted that for extending the meaning to expenditure other than those specified in the Section on the basis of the phrase "by any other name called", it would require the application of the legal principle of Ejusdem generis. Ejusdem Generis means "of the same kind" Therefore, there should be an underlying thread of common characteristic between the various types of charges specified in sec 40(a)(ib) and the expenditure sought to be roped into the ambit of the Section. The Section refers to various charges for completely different types of services. The only underlying thread of common characteristic amongst all fees/charges mentioned in the section is that all of the charges are payments for some benefits or rights conferred by the Government on the specific Assessee paying such charges.

11.6 It is submitted that the Explanatory explaining the impugned provision itself makes it clear that the intention is only to disallow royalty, license fee, service fee, privilege fee, service charge or any other fee or charge, by whatever name called, which is levied exclusively on state Government undertakings. If it had been the intention to include Sales Tax/VAT, then in the section, taxes would have mentioned first before Royalty etc. The section refers to only Fees which are levied for some privileges granted to specific assessee's. It will not cover Sales Tax (VAT) which is an exaction and cannot be considered as Fees, charges. Further in the Memo explaining the introduction of section deal only with privilege fees, License fees, Royalty – that disputed have arisen regarding their deductibility. It is also mentioned that orders have been issued to the effect that surplus arising to such undertakings shall vest with the Government. Deductibility of Sales Tax was never in dispute.

11.7 It is submitted that the definition of "fee/charge" is very clearly distinguished from "tax" in the following decisions:

i) COMMISSIONER, HINDU RELIGIOUS ENDOWMENTS, MADRAS vs. SRI LAKSHMINDRATHIRTHA SWAMIAR OF SRI SHIRUR MUTT 1954 AIR 282 ("Shirur Mutt" case),

ii) The Hingir-Rampur Coal Co.Ltd. Vs The State Of Orissa And Others 1961 SCR (2) 537,

iii) Har Shankar v. Deputy Excise and Taxation Commissioner AIR 1975 SC 1121,

iv) Om Parlkash Agarwal v Giri Raj Kishori & Others (164 ITR 376, 1986 AIR 726)

v) Srikakollu Subba Rao & Co. & Ors. vs. UOI & Ors. (1988) 173 ITR 708 (AP),

vi) CIT VS. M.L Agro Products Pvt. Ltd. (1992) 197 1TR 485 (AP),

vii) CIT Vs. Dineshkumar Gordhanlal (1997) 2261TR 826 (MP)

11.8 In the Shirur Mutt case (supra) the Hon'ble Apex Court pointed out:

"though levying of less is only a particular form of the exercise of taxing power of the Slate, Our Constitution has placed fees under a separate category for the purpose of Legislation and at the end of each one of three legislative lists, it has given a power to the particular Legislature to legislate on the imposition of fees in respect of every one of the item dealt with in the list itself.

Again, it has been observed in that decision:
"The essence of tax is compulsion, that is to say, it is imposed under statutory power without the taxpayer's consent and payment is enforced by law. The second characteristic of Tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the tax payer of the Tax. This is expressed by saying that the levy of tax is for the purpose of general revenue, which when collected forms part of public revenue of the State. As the object of a tax is not to confer any special benefit upon any particular individual, there is, it is said, no element of quid pro quo between the Taxpayer and the Public Authority. Another feature of taxation is that it is a part of the common burden, quantum of imposition upon taxpayer depends generally upon his capacity to pay".

Further it was pointed out-

"A fee is generally defined to be a charge for a special service rendered to the individuals by Some Government agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay".

Finally, it was pointed out-
"the distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of a common burden, while fee is a payment for special benefit or privilege. Public interest seems to be at the basis of all imposition, but in a fee it is some special benefit which the individual receives"

11.9 In the case of the The Hingir-Rampur Coal Co., Ltd. vs The State Of Orissa. And Others 1961 SCR (2) 537, the Hon'ble Apex Court held: "The distinction between tax and fee is, however, important and it is recognized by the Constitution. Several entries in the Three Lists empower the appropriate Legislature to levy Taxes; but apart from the power to levy taxes thus conferred each List specifically refers to the power to levy fees in respect of any of the matters mentioned in the said list.

11.10 The Constitution Bench of the Hon'ble Supreme Court in the case of Bar Shankar V. Deputy Excise and Taxation Commissioner AIR 1975 SC 1121, has expounded on the distinction between a tax' and fee and the characteristics of these two as also excise duty, in the following words:

"Since rights in regard to intoxicants belong to the State, it is open to the Government to part with those rights for a consideration. By Article 298 of the Constitution, the executive power of the State extends to the carrying on of any trade or business and to the, making of contracts for any purpose.

Again, it has been observed in that decision *"The distinction which the Constitution makes for legislative purposes between a 'tax' and a 'fee' and the characteristic of these two as also of excise duty' are well-known, tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not a payment for services rendered". (1) A fee is a charge for special services rendered to individuals by some government tat agency and such a charge has an element in it of a quid pro quo. (2).*

Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country (3). The amounts, charged to the licensees in the instant case are, evidently, neither nature of tax nor excise duty. But then, the License fee' which the State government charged to the licensees through the medium of auctions or the Fixed fee' which it charged to the vendors of foreign. liquor holding licenses in Forms L-3, L-4 and L-5 need bear no, quid pro quo to the services rendered to the licensees. The word 'fee' is not used in the Act or the Rules in the technical sense of the expression. By 'license fee' or 'fixed fee' is meant the price or consideration which the Government charges to the licensees for parting with its privileges and granting them to the licensees. As the State can carry on a trade or business, such a charge is the normal incident of a trading, or business or transaction. "

The Court then held "The argument that in Cooverjee's case 1954 SCR 873 (AIR 1954 SC 220) the impugned power having been exercised in respect of a centrally administrated area, the power was not fettered by legislative lists loses its relevance in the view we are taking. It is true that in that case it was permissible to the court to find, as in fact it did, that the fee imposed on the licenses was, "more in the nature of a tax than a license fee", As the authority which levied the fee had the power to exact a tax, the levy could be upheld as a lax, oven if it could not be justified as a fee in the constitutional sense of that term. But the 'License fee' or 'Fixed fee' in the instant case does not have to conform to the requirement that it must bear a reasonable relationship with the services rendered to the licensees. The amount charged to the licensees is not a fee properly so-called nor indeed a tax but is in the nature of the price of a privilege, which the purchaser has to pay in any trading or business transaction"

11.11 The Hon'ble Supreme Court in the case of Om Parkash Agarwal v Giri Raj Kishorl & Others (164 ITR 376, 1986 AIR 726) have noticed the difference between Tax and fee and has held that State Government cannot levy,/ tax under the guise of calling it a Fee

"The three principal characteristics of a tax noticed by Mukherjea J. in the above passage are:
(i) that it is imposed under statutory power without the taxpayer's consent and the payment is enforced by law; (ii) that it is an imposition made for public purposes without reference to any special benefit to be conferred on

the payer of the tax; and (iii) that it is a part of the common burden, the quantum of imposition upon the taxpayer depending generally upon the capacity of the taxpayer to pay. As regards fees, Mukherjea J. observed in the above decision thus (at p. 295 of AIR):

"Coming now to fees; a reel is generally defined to be a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the government in rendering the service, though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay. These are undoubtedly some of the general characteristics, but as there may be various kinds of fees, it is not possible to formulate a definition that would be applicable to all cases

……If, as we hold, a fee is regarded as a sort of rectum or consideration for services rendered, it is absolutely necessary that the levy of fees should on the face of the legislative provision, be correlated to the expenses incurred by government in rendering the services.

11.12 It is submitted that Sec 43B of the Income Tax, 1961, when it was introduced contained only the phrase "Tax and Duty", Courts in the context of disallowance ix] s 43B, have held that Fees cannot be considered as Tax and hence cannot be disallowed ix]s 43B. In the case of Dalmia Cement (Bharat) Ltd V CIT (357 ITR 419), the Hon'ble Delhi High Court in a very detailed Order, considering the jurisprudence on the subject, has held as under:

> *"27. But, in the present case, the cess and cess surcharge do not fall within the characteristics of a tax. As pointed out in Dewan Chand Builders and Contractors (supra), in the case of a cess there exists a reasonable nexus between the payer of a cess and the services rendered.*

It was further observed in Hingir Rampur Coal Co. Ltd. (supra) that if specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area and is a condition precedent for the said services or in return for them, cess is levied against the said area or the said class of persons or trade or business, the cess is distinguishable from a tax and is described as a fee. Furthermore, tax recovered by a public

authority invariably goes into the consolidated fund which is ultimately utilized for all public purposes whereas a cess levied by way of a fee is not intended to be and does not become a part of the consolidated fund. It is earmarked and set apart for the purpose of services for which it is levied.

While coming to this conclusion the Hon'ble Delhi High Court had considered and distinguished the case of India cements Ltd vs State of Tamil Nadu (188 ITR 690) and held as under

21. This takes us to the consideration of the issue as to whether cess is the same thing as a tax and that even though the word "cess" was not used in Section 43B(a) as it originally stood, it always included cess inasmuch as tax was covered in the said provision. We find ourselves in agreement with the submission made by Mr Mehta that the decision of the Supreme Court in India Cement Ltd. (supra) would not be of any help to the revenue inasmuch as the issue there was entirely different. The focus in that decision was not on whether a cess was a tax or not but whether levy of cess on royalty was within the competence of the State Legislature. We also feel that the considerations with regard to cess in that case were in the context of legislative competence of the State Legislature to levy the cess on royalty which, by virtue of an explanation to Section 115 of the Tamil Nadu Panchayats Act, 1958, were said to be included in the meaning of land revenue. In that case, it was not in dispute that the cess which the Madras Village Panchayat Act proposes to levy was nothing but an "additional tax" and originally it was levied only on land revenue, and that apparently land revenue would fall within the scope of Entry 49 of List II in Schedule VII to the Constitution. The Supreme Court however held that it could not be doubted that royalty which was a levy or tax on the extracted mineral was not a tax or levy on land alone and that if cess was charged on the royally, it could not be said to be a levy or tax on land and therefore, it could not be upheld a imposed in exercise of jurisdiction under Entry 49 List II by the State Legislature. The Court held that the legislature went beyond its jurisdiction under Entry 49 List H and therefore the levy was clearly without the authority of law

22. These observations whereby there is some indication that cess has been equated with tax have been sought to be relied upon by Mr Sabharwal. However, we reiterate that the Supreme Court was not

exactly concerned with the question of whether a cess was a tax or not, in all cases. It was generally concerned with the concept of cess as a part of taxation. We must also keep in mind that the Supreme Court was interpreting the Constitution as distinct from interpreting a provision of a statute.

And again «So, even if in a particular case, while interpreting the Constitution, the Supreme Court may have regarded cess to be generally a part of taxation, it does not mean that cess would be part of a tax when the said word i.e., "tax[1] is used in an Act such as the Income Tax Act which needs to be construed strictly. For this reason also, we feel that the Supreme Court decision in India Cement Ltd. (supra) would not be of any use to the revenue."

11.13 In CIT & MCDOWELL & Co Ltd 314 ITR 185 SC' the Hon'ble Apex Court held that the the Bottling fee payable by the assessee under the Rajasthan. Excise Act, 1950 and the rules framed thereunder receivable by the State for parting with its exclusive privilege to deal in potable liquor, is not in the nature of any sum payable by way of tax, duty, cess or fee and, therefore, is not subject to disallowance under s. 43B affirming the decision **of CIT vs.Udaipur Distillery Co. Ltd**. **(2004) 186 CTR** (Raj) 34.

11.14 It is submitted that, with respect to interpretation of taxing statute, the Constitution Bench of the Supreme Court in **Commissioner of Customs vs Dilip Kumar (Civil Appeal No.3327 Of 2007 dated 30thJuly 2018)** held as follows: «Article265 of the Constitution (265. Taxes not to be imposed save by authority of law No tax shall be levied or collected except by authority of law) prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because State cannot at their whims and fancies burden the citizens without authority of law. In other words, when competent Legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/ interpreted to include those, which were not intended by the Legislature.". In this context, trying to bring, in tax into fee or charge as S.40(a)(iib) reads is violative of Article 265 of the Constitution.

11.15 It is submitted that the very fact that Taxes are not mentioned in the main section, nor any reference has been made in the memo

Explaining the introduction of section would go to show that the Legislature never intended to disallow Taxes under sec 40(a)(iib) of the Act.

11.16 It is impossible to comprehend that when the Legislature proposes to disallow taxes that the State Government has levied under its exclusive domain, such tax is not specifically mentioned in the Section but allowed to be derived from the phrase "charges by whatever name called" 'particularly when the Apex Court has clearly laid down the distinction between Taxes and fees and have held that Taxes cannot be levied under the guise of fees.

11.17 Further, TASMAC cannot collect Privilege Fees /Vend fees separately from the Purchasers. Value Added Tax is collected' from the Customers. It is collected on behalf of the Government and passed on to the Government in totality. A trader can collect Value Added Tax as per the provisions of the Act- nothing more. The entire amount so collected is passed on to the Government. In this manner also, Value Added Tax, which is separately collected from the Purchaser, is different and distinct from the charges mentioned in S.40(a)(iib) which are borne by the TASMAC and cannot be collected from the Purchaser.

11.18 Recently, the Hon'ble Kerala High Court in the case of M/s.Kerala State Beverages((Manufacturing and Marketing) Corporation Ltd v ACIT in I.T.Appeal Nos 135, 146 & 313 of 2019 dated 30th April 2020, considering the ratio down in the decision's supra, held, inter alia, that:

> *22. On analyzing the rival contentions, we take note of the fact that the surcharge on sales tax was introduced only as an increase in the tax payable. Merely because the statute imposed a prohibition with respect to passing on such liability to others, the basic characteristics of the levy is not changed. As settled through various legal precedents, a 'tax' cannot by equated with a 'fee or charge'. When the provisions contained in Section 40(a)(iib) is clear in its terms that it will take in only 'fee or charges' enumerated therein or any 'fee or charge by whatever name called, it is clear that any levy of 'tax' is outside the ambit and scope of the said provision. In order to include surcharge on sales tax or turnover tax within the sweep of Section 40(a) iiib), it become necessary to read something into the provision. Therefore we are inclined to accept the view as contended by the*

appellant, that the disallowance of surcharge on sales tax and turnover tax cannot be sustained.
"the surcharge on sales tax and turnover tax is not a fee or charge' coming within the scope of Section 40(a)(iib)and is not an amount which can be disallowed under the said provision. Therefore the disallowance made in this regard is liable to be set aside. In the result the assessment completed against the appellants with respect to the assessment years 2014-2015, 2015-2016 are hereby set aside".

11.19 In view of the above it is submitted that VAT collected and paid by TASMAC under the provisions of the Tamilnadu Value Added Tax Act, 2006 is an allowable expenditure and cannot be disallowed under the amended provisions of section 40(a)(iib) of the Act.

12. Value Added Tax (VAT) Dot exclusive on TASMAC:

12.1 It is submitted that S.40(a)(iib) operates only on "royalty, license fee, service fee, privilege fee, service charge or any other fee or charge, by whatever name called, which is levied exclusively on... State Government Undertaking by State Government". In other words exclusivity of such fee, charge is a requirement.

12.2 It is submitted that Value Added Tax is an Indirect Tax collected from customers and remitted to Government on monthly basis after filing necessary monthly return as per the provisions of the Tamilnadu Value Added Tax Act, 2006 and rules framed there under, it is further submitted that Annual audited VAT return is also filed as per the provisions of the Tamilnadu Value Added Tax Act, 2006 and rules framed there under.

12.3 It is submitted that Value Added Tax (VAT) is imposed on the sales or purchases made by any Assessee. VAT does not confer any special or specific benefit to the Assessee who pays the VAT. Nor can the Payer of VAT demand any specific privileges from the State Government on account of payment of VAT and Surcharge.

12.4 It is submitted that VAT is transaction specific and anybody who transacts the transactions contemplated under the VAT Act has to pay the VAT. The Payer has no option and the payment is on the value of sales and not for services rendered nor privileges granted by the State Government. The Tax is on the sale price effected by the registered dealer.

12.5 The Tax is collected at the rates specified in the VAT Act and passed on to the State Government. The Assessee/TASMAC cannot collect at a rate higher than that specified in the Act and the entire amount so collected has to be passed on to the Government. It is not out of any surplus available to the Assessee/TASMAC. Therefore the VAT Tax collected cannot be considered as a surplus appropriated by the State Government.

12.6 In the case of intoxicating liquor, it is not only the Assessee/TASMAC but also other persons (Hotels & clubs) also manufacturers of IMPS and Beer within the state dealing with intoxicating liquor collect and pay VAT. VAT Act applies to all persons dealing in intoxicating liquor and all such' persons are required to collect and pay VAT as per the Act. Hence the VAT cannot be considered specifically on Assessee/TASMAC.

12.7 The Sales Tax (VAT)levied in the instant case as can be seen from the Second Schedule of Tamil Nadu VAT Act would show that the VAT is on all the Assesses satisfying the condition of a particular entry and is not exclusively on TASMAC and hence condition of exclusively levied u/S.40(a)(iib) would not be met.

13, Sec.40(a)(iib) cannot be applied as the Valued Tax payment is not an appropriation:

13.1 The next issue for consideration is whether Value Added Tax can be considered as appropriation by the State Government so as to bring it within the ambit of limb (B) of S.40(a)(iib)

13.2 Appropriation under accounting parlance means the allocation of the profits, after setting off the expenditure, among various Reserves and Dividend. Thus in the accounts of the company, the net profit for the year-after provision for tax, together with Credit Balance in the Profit and Loss account, is considered as Profit available for appropriation. This is appropriated towards Dividend, Redemption Reserves, Capital reserve, General reserve and balance is taken to the credit of the Profit and Loss account.

13.3 Under the accounting for Government Finance, no money can be withdrawn from the Government Fund to meet specified expenditure except under an appropriation made by Law approved by the

Parliament/Assembly. While Finance Act regulates the income, Appropriation Act authorizes incurring of expenditure. Thus, appropriation in Government accounts means the allocation of the income for various expenses of the Government.

13.4 Appropriation means allocating or taking away funds for a specific purpose. **In other words, it is an application of income. It will not cover Taxes on which is and always has been a deduction while arriving at the net profits.** Such deductible expenditure cannot be considered as an appropriation/ application of income. **Further it is a on profits and is based on the type of transaction and not a particular Assessee.**For example, the levy is on the different types of License holders, without reference to whom or how many persons, may have been granted that type of License. Individual holders of the license may vary, but the levy is constant for all such License holders. Such a common levy on sale of goods applicable to all sellers cannot be considered as an appropriation in the case of Assessee alone.

13.5 When Value Added Tax is considered and allowed as a charge (deduction) against Sales consideration in all other cases of sellers dealing in Indian Made foreign liquor, the same cannot be considered as an appropriation in the case of State Government Undertakings /TASMAC. **Character of Tax, which is applicable to all sellers as a deduction against sale consideration, does not change to one seller alone and become an appropriation.**

14. Thus, on the facts and circumstances as well as the settled legal principles, it is clear that the legislature did not propose to disallow Taxes levied by the State Government u/s 40(a)(iib). Neither the section, nor the Memo explaining the introduction of the section, nor the CBDT Circular explaining the section contains any whisper of tax. It is the Assessing Officer who has given his own interpretation to the wording fees or charges by whatever name called. This interpretation against the provisions ofconstitution and the decisions of the Apex Court is ultravires and traversing beyond his authority.

15. Thus, Value Added Tax payable by the TASMAC to the State Government is:

1. Neither in the nature of royalty, license fee, service fee, privilege fee, service charge nor any other fee or charge, by whatever name called

2. Nor is it levied exclusively on the Assessee
3. Nor can it be considered as appropriation by the State Government.

Therefore, the tax payments (VAT) would not attract the provisions of sec 40(a)(iib) and hence is allowable u] s 37 read with sec 43B as claimed by the assessee.

16. We further submit the following additional considerations for your good self to take on record:

Even under the CGST Act, 2017 as per the section 9 (i), exception is given "to the alcoholic liquor of human consumption. Hence the instant case (ie liquor) is falling under the ambit of TNVAT Act, 2006. It is pertinent to note that as per section 9(2), of the CGST Act, 2017 tax on supply of petroleum crude, HSD, Motor spirit (commonly known as petrol), natural gas, aviation turbine fuel shall be levied w.e.f such date as may be notified by the Government on recommendation of the GST Council. Hence, those items are taxed under TNVATAct, 2006. Therefore, the stand taken in our case is unjustified and unwarranted.

In line with S.40(a)(iib), TASMAC has disallowed the license fee paid to government under the provisions of Tamil Nadu Prohibition Act, 1937 and the rules framed there under while computing taxable income.

The Accounting Policy adopted by TASMAC is disclosed under "Significant Accounting Policies" in the Audited financial statements and it is clearly stated in the accounts that Sale is accounted inclusive of VAT. This is as per the Accounting Standards issued by the ICAI, AS 9-Revenue Recognition. Thus, correctly, the Sales (inclusive of VAT) is enumerated under "Revenue" and" the "VAT on IMPS and Beer" is enumerated under Expenses. These final accounts for the impugned period 2016-17 have been audited and certified by the Statutory auditors appointed by the C&AG and Supplementary Audit has been conducted by the C&AG for which they have issued a certificate agreeing with the accounts and have passed NIL comments.

Finally, in rebuttal to point no. 3 of your Show Cause Notice, we humbly submit that alcoholic liquors for human consumption is falling under the State list as per the Constitution of India. The enactment of TNVAT Act, 2006 was made as per the delegated powers to State Government. Hence,

the claim of VAT being arbitrary and abnormal goes against the very powers enshrined in the State as per the Constitution. We further humbly submit there is no criteria or basis brought out in the SCN to measure the reasonableness and normality. In brief it is not levied on TASMAC but on the consumers as per the powers granted by the Constitution of India to Government of Tamilnadu through the enactment of the TNVAT Act, 2006. TASMAC collects tax while selling liquor and pay to Government.

All the facts regarding VAT and payment of the same have been furnished before the Assessing Officer and that has not been doubted by your good self. The Assesses- themselves have disallowed License Fees. Considering the facts and the legal provision the Assessing Officer had allowed the claim of deduction of VAT. Therefore, it is not open to the Principal Commissioner of Income Tax to substitute his opinion/ doubt over the decision of the Assessing Officer.

Your good self have come to this conclusion that VAT should be disallowed u/S.40(a)(iib) without reference to and ignoring the definition of Tax as enshrined in the Constitution and as enumerated by Apex and numerous other High Court judgments. We have now brought on record the decisions of the Apex and other High Courts defining Tax and distinguishing it from Fees. Under the Constitution also Tax is different from Fees. Thus, in fact concluding that the word fees would include tax is erroneous. The decision of the AD that VAT expenses does not attract the provisions of sec 40(a)(iib) is NOT erroneous and provisions of sec 263 cannot be applied to interfere that conclusion of the AO in the Assessment order.

Therefore, the only issue to be decided by your good for interfering with the Assessment order u] s 263 is a purely legal one of whether sec 40(a)(iib) will be applicable to Payment of VAT. This purely legal issue is based on numerous decisions by the Apex Court and High Courts and has to be decided by your good self and the same cannot be set aside to the AD to sit on judgment of the decision of the Higher Forums particularly when the specific issue of applicability of provisions of sec 40(a)(iib) to VAT has been decided by the Hon'ble Kerala High Court.

It is also pointed out that the Assessing Officer in the course of Income Tax. Assessments cannot sit on judgment on the reasonableness of the VAT

charges. As long as the State has the statutory powers to levy VAT, the rates cannot be questioned by the Department on account of it being High.

Therefore, in view of all the above facts and circumstances including the clear decisions on this point by the Apex Court and other High Courts and particularly the recent by Kerala High Court on this very issue, the AO's Order cannot be held to be erroneous by the Principal Commissioner of Income Tax to invoke S.263 of the Income Tax Act,

In any case, when there are two opinions possible on an issue,(even though in this issue in our opinion, only one view is possible in view of the decisions of the Apex Court and Kerala High Court have In favour of the Assessee), **and the Assessing Officer has taken one possible view, the provisions of sec 263 will not apply** as held by the Hon 'hie Supreme Court & numerous High Courts :

Malabar Industrial Co Ltd v CIT	*243 ITR 83 SC*
CIT Vs Mepco Industries Ltd	*294 ITR 121 (Mad)*
CIT v Max India Ltd	*295 ITR 282 SC*

In the light of the above submissions we request your good self to kindly drop the revision proceedings initiated vide notice u/s.263 dated 18.03.2020 proposing to disallow VAT u/s. 40(a)(iib) of the Act and oblige.
If your good self require any further clarification, we shall be happy to provide the same. We would like to be given a personal hearing to explain our stand in the matter.

Further assessee has submitted the following details on 22.03.2022.

"This is bring to your kind attention that the assessment year for the Assessment year 2014-15, the department has been proposing to disallow under section 40(a)(iib) of the Income Tax Act, 1961, the value added tax (VAT) paid by the Tamilnadu State marketing Corporation Limited. (TASMAC). While TASMAC has been disputing the same issue, it was decided by the Hon'ble Kerla Highcourt in the case of M/s Kerla State Beverages Manufacturing & Marketing Corporation Ltd. that provision of section 40(a)(iib) will not apply to surcharge on sales tax and Turnover tax as they constitute tax and not fees.

The issue was taken up by the Revenue before the Hon'ble Supreme Court of India wherein the Hon'ble Supreme Court in the case of M/ s. Kerala State Beverages Manufacturing & Marketing Corporation Ltd vs ACIT Circle 1(1) in CA No 11 of 2022 dated 03.01. 2022 held that provisions of Sec.40(a)(iib) will not apply to taxes.

We are enclosing the said Orders of the Hon'ble Supreme Court of India. In the paragraph 14.1, 14.3 to paragraph 16 of the orders, it has been held that Section 40(a)(iib) will not apply to taxes in view of the basic constitutional distinction between fee and tax. Further, in the provisions of Section 40 distinction between fees and tax has been carefully spelt out and therefore, if the provisions of Sec.40(a)(iib) is interpreted to include tax, that will render meaningless as against the distinction between taxes and fees spelt out and maintained in Section 40. **In view of the categorical decision of the Hon'ble Supreme Court, the provisions of Section 40(a)(iib) will not apply to Value Added Tax paid by TASMAC to the Government of Tamilnadu under the provisions of the Tamllnadu Value Added Tax Act, 2006.**

We request you to complete the assessment proceedings in line with the ratio bf the decision of the Hon'ble Supreme Court in the case of M/s. Kerala State Beverages Manufacturing & Marketing Corporation Ltd vs ACIT, Circle 1(1) in CA No 11 of 2022 dated 03. 01. 2022, that is the Value Added Tax paid under the provisions of Tamilnadu Value Added Tax Act, 2006 is an allowable expenditure and hence the cannot he disallowed u/s. 40(a)(iib) of the Act."

Assessee made the following submissions on 25.03.2022

"This is the written submission dated 22.5.2020, in response to the Honourable Madras High Court Order for the Assessment Year 2014-15 in WP No.8829 of 2019 and WMP No.9394 of 2019. In that submission we had elaborately submitted that provisions of sec 40(a)(iib) would apply only to Fees and similar charges which are in the nature of quid pro quo for privileges parted with by the State Government but would not apply to Taxes which are in the nature of appropriation.

Subsequently, the Hon'ble Kerala High Court in the case of M/s. Kerala State Beverages Manufacturing & Marketing Corporation Lid. Vs CIT, Corporate Circle 1(1) in ITA No.135 of 2019 have held that provisions of

Section 40(a)(iib) will not apply to surcharge on sales-tax and Turnover tax as they constitute tax and not fees.
The issue was taken up by the Revenue before the Hon'ble Supremo Court of India wherein the Hon'ble Supreme Court in the case of M/s. Kerala State Beverages Manufacturing & Marketing Corporation Ltd vs ACIT Circle 1(1) in CA No 11 of 2022 dated 03.01.2022 held that provisions of Sec.40(a)(iib) will not apply to taxes.

We are enclosing the said Orders of the Hon'ble Supreme Court of India. In the paragraph 14.1, 14.3 to paragraph 16 of the orders, it has been held that Section 40(a)(iib) will not apply to taxes in view of the basic constitutional distinction between fee and tax. Further, in the provisions of Section 40 distinction between fees and tax has been carefully spelt out and therefore, if the provisions of Sec.40(a)(iib) is interpreted to include tax, that will render meaningless as against the distinction between taxes and fees spelt out and maintained in Section 40. **In view of the categorical decision of the Hon'ble Court, the provisions or Section 40(a)(iib) will not apply to Value Tax paid by TASMAC to the Government or Tamilnadu under the provisions of the Tamilnadu Value Added Tax Act,**

Further. Without prejudice to the above submissions, we would like to submit that, if there are two views possible on an issue and the view taken by the Assessing Officer is not unsustainable in law, the order of the Assessing Officer cannot be considered as erroneous. As one of the twin mandatory conditions for invoking jurisdiction under sec 263 fails, then the Principal Commissioner of Income Tax does not have jurisdiction to invoke provisions Section 263 of the Income Tax Act, 1961. Assessee relies on the following decisions:

Malabar Industrial Co Ltd v CIT	243 ITR 83
CITvMax India Ltd	295 ITR 28
CIT Vs Mepco Industries Ltd	294 ITR 12

In the circumstances it is prayed that the Principal Commissioner may be pleased to drop further proceedings under Section 263 of the Income Tax Act, 1961, for the Assessment Year 2014-15 in our case initiated by Show Cause Notice U/S. 263 of the Income Tax Act, 1961 dated 18.03.2019."

9. The submissions made by the Assessee company is carefully examined and verified with the records.

10. On examination of the P & L accounts of the Assessee Company for the Financial Years shows the following.

Sl. No.	Particulars	Amount for F.Y. 13-14 in Crores of Rupees	Amount for F.Y. 12-13 in Crores of Rupees
1	Revenue from Operations (Sales)	25,412.86	24,815.70
2	VAT on IMFS and BEER	11,491.97	4,372.91
3	Special Privilege Fee	Nil	4,291.43

11. From the above table, it is seen that the Tamil Nadu State Government has increased the VAT by 263% and reduced the Special Privilege Fee to Nil during the current year. It is interesting to note that with effect from 01.04.2014, clause (iib) was inserted by the Finance Act 2013 to the section 40(a) of the Income Tax Act which is as under-

"40. Notwithstanding anything to the contrary in sections 30 to [82][38], the following not be deducted in computing the income charge- able "Profits and gains of business or profession",—

(a) In the case of any assessee-

(iib) any amount—

(A) paid by way of royalty, licence fee, service fee, privilege fee, service charge or any other fee or charge, by whatever called, which is levied exclusively on; or

(B) which is appropriated, directly or indirectly, from,

a State Government undertaking by the State Government

Explanation.—For the purposes of sub-clause, a State Government undertaking includes—

(i) a corporation established by or under Act of the State Government;

(ii) a company in which more than fifty per of the equity capital is by the State Government;

(iii) a company in which more than fifty per cent of the equity share capital is held by the entity referred to in clause (i) or clause (ii) (whether singly or together);

(iv) a company or corporation in which the State Government has the right to appoint the majority of the directors or to control the management or policy directly or indirectly, including by virtue of its or rights of shareholders agreements or voting agreements or in other manner;
(v) an authority, a or an institution or a body constituted by or under Act of the State Government or owned or controlled by the State Government"

12. In the present case, the Assessee company is fully owned by the Tamilnadu State Government as its entire share capital of Rs.15,00,00,000/- is held by them.

13. In the accounts, the Special Privilege Fee which was Rs. 4,291.42 Crores which was levied upto 31.03.2013 was brought to Nil with effect from 01.04.2013 (next day) and the VAT on IMFS and Beer was increase by 263% simultaneously. These figures make it clear that these changes were introduced by the Tamil Nadu State Government to ostensibly to circumvent the legislation by the Parliament of India to show an artificial/inflated expenses in the books of accounts of the Assessee company which is fully owned by them, intentionally not to pay any income tax to the Government of India.

14. The intention of the Parliament in introducing this legislation is clearly stated in the Explanatory Memorandum for the Finance Act, 2013, which is reproduced hereunder-

Disallowance of certain fee, charge, etc. in the case of State Government Undertakings The existing provisions of section 40 specifies the amounts which shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession". The non-deductible expense under the said section also includes statutory dues like fringe benefit tax, income-tax, wealth-tax, etc. Disputes have arisen in respect of income-tax assessment of some State Government undertakings as to whether any sum paid by way of privilege fee, license fee, royalty, etc. levied or charged by the State Government exclusively on its undertakings are deductible or not for the purposes of computation of income of such undertakings,. In some cases, orders have been issued to the effect that surplus arising to such undertakings shall vest with the State Government. As a result it has been claimed that such income by way of surplus is not subject to tax. It is a settled law that: State Government undertakings are separate legal entities than the State and are liable to income-tax. In order to

protect the tax base of State Government undertakings vis-a-vis exclusive levy of fee, charge, etc. or appropriation of amount by the State Governments from its undertakings, it is proposed to amend section 40 of the Income-tax Act to provide that any amount paid by way of fee, charge, etc., which is levied exclusively on, or **any amount appropriated, directly or indirectly, from a State Government undertaking, by the Government, shall not be allowed as deduction for the purposes of computation of income of such undertakings under the head "Profits and gains of business or profession".** It is also proposed to define the expression "State Government Undertaking" for this purpose. This amendment will take effect from 1st April, 2014 and will, accordingly, apply in relation to the assessment year 2014-15 and subsequent assessment years. [Clause 7].

15. It is interesting to note that in page 30 of the annual report of the Assessee Company it is stated that

"Others Include refund due from Government towards vend fee, annual privilege fee, special privilege fee. The Commissioner (P&E), Department vide his letter No.P&E 9(1)/17936/2012 dated 13.11.2014 has confirmed as follows: Necessary proposals were sent to Government...for the refund of payment by the TASMAC in respect of vend fee, annual privilege fee and special privilege fee ... After obtaining the orders of the Government, the excess payments paid by the TASMAC will be refunded."

16. The above remarks by the Managing Director of the Assessee Company in their annual report makes it very clear that upto 13.11.2014, the company was paying vend fee, annual privilege fee and special privilege fee etc. to the State Government for most of the part of the Financial Year 2013-14. However, the Tamil Nadu State Government directed them to send the proposals for refund of these amounts, presumably to defeat the new legislation introduced by the Parliament of India for taxing the above amounts. It may be noted no such payments were debited in the P&L Accounts of the Assessee Company for the Financial Year 2013-14, though it was paid by them during the year.

17. From the above, it is clear that the Tamil Nadu State Government indirectly and deliberately increased the VAT and reduced the Special Privilege Fee just to defeat the above legislation made by the Government of India.

> 18. The Assessee quoted the judgement of the Supreme Court of India in the case of the Kerala State Beverages Corporation. That judgement is based on the Kerala Abkari Act and Kerala VAT legislation. Whether these legislations are identical with the similar laws of Tamil Nadu is to be examined. Also it is understood that a review petition is filed/being filed before the Hon'ble Supreme Court.
>
> 19. While completing the assessment, this issue was not examined properly examined by the Assessing Officer. Therefore, the assessment is erroneous as it is prejudicial to the interest of the revenue. In view of this, I hereby set aside the assessment to the file of the Assessing Officer to examine the issue in detail and complete the assessment after affording reasonable opportunity of being heard to the Assessee.

Aggrieved, assessee came in appeal before the Tribunal.

4. Before us, the ld.counsel for the assessee submitted the fact that the assessee is a Government of TamilNadu undertaking incorporated on 23.05.1983 under the Companies Act, 1956 and vested with the special privilege for wholesale distribution and retail sale of Indian Made Foreign Liquor and beer in the whole State of TamilNadu. He submitted that Section 17C(1A)(a) and Section 17C(1B)(b) of the TamilNadu Prohibition Act, 1937, the assessee have the exclusive privilege of supply by wholesale and retail of Indian Made Foreign Spirit (IMFS) for the whole State of TamilNadu. He further submitted that the assessee retails alcoholic liquor through retail vending shops across the state of Tamil Nadu and collects from its customers (buyers of liquor) the sale price of the

liquor bottle along with the Value Added Tax (VAT) as per Section 3(5) of the TamilNadu Value Added Tax Act, 2006 read with the Second Schedule to said Act. Accordingly, the assessee remits the VAT so collected to the State Government on or before 14th of succeeding month after filing necessary return as prescribed in the TamilNadu Value Added Tax Rules, 2007.

4.1 The ld.counsel explained that the VAT expenditure amounting to Rs.11,491.97 crores was claimed and allowed in the assessment order passed by the AO and now, the PCIT want to disallow the claim, in term of the amended provisions of section 40(a)(iib) of the Act. The ld.counsel submitted that the Hon'ble Finance Minister introduced Finance Bill 2013 in the Lok Sabha on 28th February, 2013, to give effect to the financial proposals of the Central Government for the financial year 2013-14. The Bill contained a proposal to amend section 40 of the Income Tax Act. The relevant clause in the Finance Bill reads as under:

> *"7. In section 40 of the Income-tax. Act, in clause (a), after sub-clause (to the following sub-clause shall be inserted with effect from the 1st day of April, 2014, namely:-*
>
> *(iib) any amount-*
> *A) paid by way of royalty, licence fee, service fee, privilege fee, service charge or any other fee or charge, by whatever name called, which is levied exclusively on; or*

(B) which is appropriated, directly or indirectly, from, a State Government undertaking by the State Government.

Explanation.-For the purposes of this sub-clause, a State Government undertaking includes-

(i) a corporation established by or under any Act of the State Government;
(ii) a company in which more than fifty per cent of the paid-up equity share capital is held by the State Government;

(iii) a company in which more than fifty per cent of the paid-up equity share capital is held by the entity referred to in clause (i) or clause (i) (whether singly or taken together)

(iv) a company or corporation in which the State Government has the right to appoint the majority of the directors or to control the management or policy decisions, directly or indirectly, including by virtue of its shareholding or management rights or shareholders agreements or voting agreements or in any other manner;

(v) an authority, a board or an institution or a body established or Constituted by or under any Act of the State Government or owned or controlled by the State Government;".

4.2 The ld.counsel stated that in the present case the revision proceedings have been initiated on the ground that "the amended provisions of section 40(a)(iib) provide that the amount paid by way of fee, charge, etc., which is levied exclusively on or any amount appropriated, directly or indirectly, from a State Government undertaking by the State Government, shall not be allowed as deduction for the purposes of computation of income of such undertakings under the head 'profits and gains of business or profession'. The charge of VAT, which is levied exclusively on the

assessee, the State Government undertaking by the State Government do not comes within the provisions of section 40(a)(iib) of the Act. In view of the above, the ld.counsel stated that the VAT levied by the Govt. of TamilNadu is not in the nature of royalty, license fee, service fee, privilege fee, service charge or any other fee or charge, by whatever name called. Hence, he argued that the revision order passed by PCIT is without any backing of law, as the assessee has rightly claimed deduction of Value Added Tax and this is not in the nature of royalty, license fee, service fee, privilege fee, service charge or any other fee or charge, by whatever name called. Hence, he asked the Bench to quash the revision order passed u/s.263 of the Act, by the PCIT as the issue is neither debatable nor any dispute on this issue is involved and entire jurisprudence is in favour of the assessee.

5. On the other hand, the ld.CIT-DR relied on the revision order passed by the PCIT.

6. We have heard rival contentions and gone through facts and circumstances of the case. We have gone through the revision order passed by PCIT and noted that the PCIT has interpreted the word royalty, license fee, privilege fee, service charge or any other

fee or charge by whatever name called, are wide enough to include sales tax i.e., VAT also. According to us, this interpretation is totally wrong because the VAT is levied by the State Government of TamilNadu by the power vested in it under the Entry No.54, List-II, Seventh Schedule, Constitution of India and the assessee pays the State Government VAT as per Section 3(5) of the TNVAT Act, 2006 read with the rate mentioned in Second Schedule to the TNVAT Act, 2006 and claims it as an expenditure u/s.37 r.w.s.43B of the Act, in its income-tax return, which has been disallowed by the Assessing Officer for AY 2017-18 u/s.40(a)(iib) of the Act. We have gone through the Constitution of India, and are of the view that the list of areas which fall within the exclusive power of States are given in the List II of the Seventh Schedule. State has the exclusive power to levy taxes on sale and purchase of intoxicating liquor (Entry 54). But the power to levy fees in respect of matters in the List is given under a different entry (Entry No 66). Thus, the State derives power to levy sales tax (VAT) on liquor under entry 54 and power to levy fees in connection with production, manufacture, transportation etc. is derived under Entry no 69 of the List II of VII schedule the Constitution of India. So, the power of State Government to levy tax on sale and purchase of liquor and power to levy fees are two different powers and are derived from two different entries in the

State list. Thus, fees levied by whatever name called under the power granted under Entry 69 cannot encompass tax levied by virtue of Entry 54.

6.1 We noted that the definition of fee charge is very clearly distinguished from tax by the Hon'ble High Court in the case of Har Shankar vs. Deputy Excise and Taxation Commissioner, AIR 1975 SC 1121 and has founded on the distinction between tax and fee and the characteristics of these two, as also excise duty and held as under:-

> "Since rights in regard to intoxicants belong to the State, it is open to the Government to part with those rights for a consideration. By Article 298 of the Constitution, the executive power of the State extends to the carrying on of any trade or business and to the, making of contracts for any purpose."
>
> *Again, it has been observed in that decision:* "The distinction which the Constitution makes for legislative purposes between a 'tax' and a 'fee' and the characteristic of these two as also of 'excise duty' are well-known. "A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not a payment for services rendered".(1) A fee is a charge for special services rendered to individuals by some government tat agency and such a charge has an element in it of a quid pro quo. (2). Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country (3). The amounts, charged to the licensees in the instant case are, evidently, neither nature of tax nor excise duty. But then, the 'Licence fee' which the State government charged to the licensees through the medium of auctions or the 'Fixed fee' which it charged to the vendors of foreign. liquor holding licences in Forms L-3, L-4 and L- 5 need bear no, quid pro quo to the services rendered to the licencees. The word 'fee' is not used in the Act or the Rules in the technical sense of the expression. By 'licence fee' or 'fixed fee' is meant the price or consideration which the Government charges to the licensees for parting

with its privileges and granting them to the licensees. As the State can carry on a trade or business, such a charge is the normal incident of a trading, or business transaction."

The Court then held : "The argument that in Cooverjee's case the impugned power having been exercised in respect of a centrally administrated area, the power was not fettered by legislative lists loses its relevance in the view we ,:are taking. It is true that in that case it was permissible to the court to find, as in fact it did, that the fee imposed on the licencees was, "more in the nature of a tax than a licence fee". As the authority which levied the fee had the power to exact a tax, the levy could be upheld as a tax, even if it could not be justified as a 'fee', in the constitution sense of that term. But the 'Licence fee' or 'Fixed fee' in the instant case does not have to conform to the requirement that it must bear a reasonable relationship with the services rendered to the licensees. The amount charged to the licensees is not a fee properly so-called nor indeed a tax but is in the nature of the price of a privilege, which the purchaser has to pay in any trading or business transaction."

6.2 Further, Hon'ble Supreme Court in the case of Om Prakash Agarwal vs. Giri Raj Kishori & Others, 164 ITR 376 have noticed the difference between tax and fee and has held that State Government cannot levy tax under the guise of fee. The Hon'ble Supreme Court held as under:-

"The three principal characteristics of a tax noticed by Mukherjea, J. in the above passage are:

(i) that it is imposed under statutory power without the tax-payer's consent and the payment is enforced by law;

(ii) that it is an imposition made for public purposes without reference to any special benefit to be conferred on the payer of the tax; and

(iii) that it is apart of the common burden, the quantum of imposition upon the tax-payer depending generally upon the capacity of the tax payer to pay. As regards fees Mukherjea, J. Observed in the above decision thus:

> "Coming now to fees, a "fee" is generally defined to be a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the government in rendering the service, though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay. These are undoubtedly some of the general characteristics, but as there may be various kinds of fees, it is not possible to formulate a definition that would be applicable to all cases.
>
> ……. If, as we hold, a fee is regarded as a sort of return or consideration for services rendered, it is absolutely necessary that the levy of fees should on the face of the legislative provision, be correlated to the expenses incurred by government in rendering the services."

6.3 Further, the Hon'ble Delhi High Court in the case of Dalmia Cement (Bharat) Ltd., vs. CIT, 357 ITR 419, while incorporating the provisions of section 43B of the Act, when it was introduced only the phrase 'Tax and Duty' was introduced and in this context, the Hon'ble Delhi High Court held that fee cannot be considered as tax and hence, cannot be disallowed while invoking the provisions of section 43B of the Act. The Hon'ble Delhi High Court considered this issue as under:-

> 27. But, in the present case, the cess and cess surcharge do not fall within the characteristics of a tax. As pointed out in Dewan Chand Builders and Contractors (supra), in the case of a cess there exists a reasonable nexus between the payer of a cess and the services rendered……
>
> It was further observed in Hingir Rampur Coal Co. Ltd. (supra) that if specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area and is a condition precedent for the said services or in return for them, cess is levied against the said area or the said class of persons or trade or business, the cess is distinguishable from a tax and is described as a fee. Furthermore, tax recovered by a public authority invariably goes into the consolidated fund which is ultimately

utilized for all public purposes whereas a cess levied by way of a fee is not intended to be and does not become a part of the consolidated fund. It is earmarked and set apart for the purpose of services for which it is levied.

While coming to this conclusion the Hon'ble Delhi High Court has considered and distinguished the case of India Cement Ltd. v. State of Tamil Nadu: 188 ITR 690 and held as under:-

21. This takes us to the consideration of the issue as to whether cess is the same thing as a tax and that even though the word "cess" was not used in Section 43B(a) as it originally stood, it always included cess inasmuch as tax was covered in the said provision. We find ourselves in agreement with the submission made by Mr Mehta that the decision of the Supreme Court in India Cement Ltd. (supra) would not be of any help to the revenue inasmuch as the issue there was entirely different. The focus in that decision was not on whether a cess was a tax or not but whether levy of cess on royalty was within the competence of the State Legislature. We also feel that the considerations with regard to cess in that case were in the context of legislative competence of the State Legislature to levy the cess on royalty which, by virtue of an explanation to Section 115 of the Tamil Nadu Panchayats Act, 1958, were said to be included in the meaning of land revenue. In that case, it was not in dispute that the cess which the Madras Village Panchayat Act proposes to levy was nothing but an "additional tax" and originally it was levied only on land revenue, and that apparently land revenue would fall within the scope of Entry 49 of List II in Schedule VII to the Constitution. The Supreme Court however held that it could not be doubted that royalty which was a levy or tax on the extracted mineral was not a tax or levy on land alone and that if cess was charged on the royalty, it could not be said to be a levy or tax on land and therefore, it could not be upheld as imposed in exercise of jurisdiction under Entry 49 List II by the State Legislature. The Court held that the legislature went beyond its jurisdiction under Entry 49 List II and therefore the levy was clearly without the authority of law.

22. These observations whereby there is some indication that cess has been equated with tax have been sought to be relied upon by Mr Sabharwal. However, we reiterate that the Supreme Court was not exactly concerned with the question of whether a cess was a tax or not, in all cases. It was generally concerned with the concept of cess as a part of taxation. We must

> also keep in mind that the Supreme Court was interpreting the Constitution as distinct from interpreting a provision of a statute.
> ……..
>
> 23. So, even if in a particular case, while interpreting the Constitution, the Supreme Court may have regarded cess to be generally a part of taxation, it does not mean that cess would be part of a tax when the said word i.e., 'tax' is used in an Act such as the Income Tax Act which needs to be construed strictly. For this reason also, we feel that the Supreme Court decision in India Cement Ltd. (supra) would not be of any use to the revenue.

6.4 The very fact that taxes are not mentioned in the main section, nor any reference has been made in the memo explaining the introduction of section would go to show that the legislature never intended to disallow taxes under sec 40(a)(iib) of the Act. It is impossible to comprehend that when the legislature proposes to disallow taxes that the State Government has levied under its exclusive domain, such tax is not specifically mentioned in the section but allowed to be derived from the phrase "charges by whatever name called" particularly when the Apex Court has clearly laid down the distinction between taxes and fees and have held that Taxes cannot be levied under the guise of fees. We noted that TASMAC cannot collect Privilege Fees/ Vend fees separately from the Purchasers. Value Added Tax is collected from the Customers. It is collected on behalf of the Government and passed on to the Government totality. A trader can collect Value Added Tax as per the provisions of the Act and nothing more. The entire amount so

collected is passed on to the Government. In this manner also, Value Added Tax, which is separately collected from the Purchaser, is different and distinct from the charges mentioned in S.40(a)(iib) of the Act, which are borne by the TASMAC and cannot be collected from the purchaser. As referred by ld.counsel, the recent decision of Hon'ble Kerala High Court in the case of Kerala State Beverages (Manufacturing and Marketing) Corporation Ltd., vs. ACIT, in I.T. Appeal Nos.135, 146 & 313 of 2019 dated 30.04.2020 considered an identical fact and legal situation, deleted the disallowance of surcharge on sales tax and turnover tax by observing as under:-

> 22. On analysing the rival contentions, we take note of the fact that the surcharge on sales tax was introduced only as an increase in the tax payable. Merely because the statute imposed a prohibition with respect to passing on such liability to others, the basic characteristics of the levy is not changed. As settled through various legal precedents, a 'tax' cannot by equated with a 'fee or charge'. When the provisions contained in Section 40 (a) (iib) is clear in its terms that it will take in only 'fee or charges' enumerated therein or any 'fee or charge by whatever name called, it is clear that any levy of 'tax' is outside the ambit and scope of the said provision. Inorder to include surcharge on sales tax or turnover tax within the sweep of Section 40 (a) (iib), it becomes necessary to read something into the provision. Therefore we are inclined to accept the view as contended by the appellant, that the disallowance of surcharge on sales tax and turnover tax cannot be sustained.
>
> the surcharge on sales tax and turnover tax is not a 'fee or charge' coming within the scope of Section 40 (a) (iib) and is not an amount which can be disallowed under the said provision. Therefore the disallowance made in this regard is liable to be set aside. In the result the assessment completed against the appellants with respect to the assessment years 2014-2015, 2015-2016 are hereby set aside.

In view of the above, we are of the view that VAT collected and paid by TASMAC under the provisions of TamilNadu Tax Act, 2006 is an allowable expenditure and cannot be disallowed under the amended provisions of section 40(a)(iib) of the Act.

6.5 According to us, the Value Added Tax is not exclusively on TASMAC, Value Added Tax is only the indirect tax collected from customers and remitted to Government on monthly basis after filing necessary monthly return as per the provisions of TamilNadu Value Added Tax Act, 2006 and rules framed thereunder. We find from records that the taxes collected at the rates specified in the VAT Act and passed on to the State Government. The assessee cannot collect at a rate higher than the specified in the act and the entire amount so collected has to be passed on to the Government and it is not out of any surplus available and therefore VAT collected cannot be considered as surplus appropriated by the State Government. We also noted that even the provision of section 40(a)(iib) of the Act cannot be applied as the value added tax payment is not an appropriation so as to bring the sum within the ambit of provisions of section 40 (a)(iib) of the Act. In sum up, we state that the Value Added Tax payable by the assessee to the State Government is

a. Neither in the nature of royalty, licence fee, service fee, privilege fee, service charge nor any other fee or charge, by whatever name called.
b. Nor is it levied exclusively on the Assessee.
c. Nor can it be considered as appropriation by the State Government.

According to us, the VAT payment would not attract the provisions of section 40(a)(iib) of the Act and hence, is allowable u/s.37 r.w.s.43B of the Act, as claimed by the assessee. Hence, we quash the revision order passed by PCIT and allow the claim of assessee.

7. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 14th November, 2022 at Chennai.

Sd/-	Sd/-
(डॉ दीपक पी. रिपोटे)	(महावीर सिंह)
(Dr. DIPAK P. RIPOTE)	**(MAHAVIR SINGH)**
लेखा सदस्य/ACCOUNTANT MEMBER	उपाध्यक्ष /VICE PRESIDENT

चेन्नई/Chennai,
दिनांक/Dated, the 14th November, 2022

RSR

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant	2. प्रत्यर्थी/Respondent	3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकरआयुक्त /CIT	5. विभागीय प्रतिनिधि/DR	6. गार्ड फाईल/GF.