1. At the outset, it is submitted that proposed adjustment, on account of disallowance of deduction claimed u/s 36(1)(va) of the act, to the total income of assessee vide impugned intimation dated 21.02.2020 issued u/s 143(1) of the act is bad in law being the said adjustment is ultra vires to the provisions of section 143(1) of the act. In this regard, our detailed reply is as under:
   1.1. As per the provisions of section 143(1) of the act, a return of income filed u/s 139 or u/s 142(1) of the act shall be processed in prescribed manner and certain adjustments, as prescribed under clause (a) of section 143(1) of the act, can be made to the total income declared in return of income. The prescribed adjustments allowed to be made u/s 143(1) of the act are as under:
      i. any arithmetical error in the return;
      ii. an incorrect claim, if such incorrect claim is apparent from any information in the return;
      iii. disallowance of loss claimed, if return of the previous year for which set off of loss is claimed was furnished beyond the due date specified under sub-section (1) of section 139;
      iv. disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return;
      v. disallowance of deduction claimed under sections 10AA, 80-IA, 80-IAB, 80-IB, 80-IC, 80-ID or section 80-IE, if the return is furnished beyond the due date specified under sub-section (1) of section 139; or
      vi. addition of income appearing in Form 26AS or Form 16A or Form 16 which has not been included in computing the total income in the return:
   1.2. On legal analysis of the aforesaid provisions of the act, it can be inferred that no adjustment to the total income declared in the return of income can be made on the basis of information provided by the tax auditor in the tax audit report except where such information relates to expenses claimed in the return of income. It is a well-established legal premise that clause (a) of the section 143(1) of the act prescribes exhaustive list of adjustments that can be made to the total income of assessee as declared by him in his return of income. Detailed literal interpretation of the aforesaid provision of the act, clearly indicates that instant case of assessee, more or less, falls under sub-clause (iv) which relates to "***disallowance of expenditure indicated in the audit***

report but not taken into account in computing the total income in the return". Herein the said sub-clause, law makers had clearly mentioned that disallowance can be made only in respect of expenditures which are indicated in the tax audit report and the same are not considered by the assessee in his return of income. As such, it is clearly evident that nowhere in the provisions of section 143(1) of the act, law makers have prescribed that adjustments to the total income of assessee can be made in respect of information furnished in tax audit report relating to deductions claimed during the year which are not in relation to expenses claimed during the year in the return of income.

1.3. In the instant case of assessee, it is noteworthy that the sum received from employees as their share of contribution towards provident fund and/or ESI fund is a deemed income of the assessee u/s 2(24)(x) of the act and a deduction is allowable u/s 36(1)(va) of the act on deposit of said sum to the credit of relevant authorities within stipulated due date. It is pertinent to note that neither in section 36 nor in tax audit report the impugned deductions have been referred as expenditure. In respect of the amounts referred to as expenditure in the act such as amounts prescribed u/s 35 of the act, there are specific clauses in the tax audit report where reporting regarding such expenses are to be made by the tax auditor. For instance, for the period under consideration, reporting in respect of expenses incurred for scientific research etc., was to be made under clause 19 of the tax audit report specifically. As such, it can be concluded beyond any doubt that the impugned deduction claimed by the assessee u/s 36(1)(va) of the act in the return of income cannot be disallowed through adjustment u/s 143(1) of the act as the same is not allowed. Thus, the impugned intimation u/s 143(1) of the act, is void-ab-initio being the adjustment made therein is ultra vires to the provisions of the act and deserves to be quashed.

2. Further, it is submitted that disallowing the sum of Rs. 21,96,707/-, being received from employees as a contribution to provident fund and/or to a fund setup under ESI Act merely on account that assessee did not deposited the amount within due date mentioned under section 36(1)(va) of the act without appreciating the fact that assessee had duly deposited the amount of employee contribution to provident fund and ESI fund before due date of filing the Return of Income Tax for AY 2019-20 i.e. 30.10.2019 is bad in law. In this regards, assessee's detailed submission is as under:

2.1. As per the provisions of section 2(24(x) r.w.s. 36(1)(va) of the act, it can be inferred beyond doubt that in case any sum is received by assessee employer from his employees on account of contribution towards provident fund or ESI fund etc. by way of deduction or otherwise, the same amount shall become the income of assessee u/s 2(24)(x) of the act and deduction of same amount shall be allowed when the same is deposited to the credit of relevant authorities. Relevant extract of aforesaid provisions of the act is reproduced hereunder for your kind perusal:

Section 2(24)(x)

(24) "income" includes—

…………………………………………………………………………

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

Section 36(1)(va)

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

…………………………………………………………………………

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

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

2.2. It is pertinent to note that from the provisions of section 36(1)(va) of the act alongwith explanation to this clause, it is clearly evident that the employer assessee is required to deposit the employee's

contribution of provident fund and/or ESI fund by the date by which the assessee is required as an employer to credit the contribution to the employees account in the relevant fund under any Act/Rule or order or notification issued thereunder or under any standing order, award, contract of service or otherwise. In respect of determining the due date of deposit of employer's share of contribution to provident fund and/or ESI fund, the act had separate provisions namely section 43B(b) of the act wherein it has been clearly stated that the any sum payable by assessee as an employer by way of contribution to any provident fund and/or ESI fund, shall be allowed as deduction only against the income for the financial year in which the same is actually paid. However, deduction of said amount will be allowed to the assessee employer against the income for the previous year in which aforesaid liability was incurred subject to the condition that the said amount has been paid to the credit of relevant authorities on or before the due date of filing of income tax return as prescribed u/s 139(1) of the act. Relevant extract of aforesaid provisions of the act is reproduced hereunder for your kind perusal:

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

evidence of such payment is furnished by the assessee along with such return.

2.3. On perusal of aforesaid provisions of the act, it can be clearly inferred that the employee's contribution towards provident fund and/or ESI fund shall be deemed to be income of assessee employer u/s 2(24(x) of the act and thereby deduction u/s 36(1)(va) r.w.s. 43B(b) of the act shall be allowed upon actual payment of such statutory dues either within the due dates as may be prescribed under such acts or even being payment made after the expiry of such due dates but before the due date of filing of income tax return for the period under consideration being the said statutory dues are actually paid within the time period stipulated u/s 43B(b) of the act and the provisions of section 36(1)(va) of the act clearly states that the due date for deposit of impugned employee's contribution is same as the employer assessee is required to deposit employer's own share of contribution towards such funds in accordance with provisions of section 43B(b) of the act.

2.4. In addition to aforesaid legal analysis of the provisions of the act, it is pertinent to note that the legal intent of the lawmaker in respect of aforesaid provisions of the act is to curb the mala-fide practices of certain employer assessee's who sit upon the funds of employees and use such funds for their own purpose whereas such employees are deprived from the social benefits available to them from such labour welfare acts and funds setup thereunder. This clearly implies that the basic scheme of the aforesaid provisions of the act is that deduction in respect of impugned employee's share of contribution will be available to assessee employer only when the same is actually paid to the credit of relevant funds/ authorities. But, it is nowhere intended by the lawmakers to deprive the employer assessee of such deduction even if the delay in payment of impugned statutory dues were due to reasonable cause and the same have been compensated to such funds by payment of interest and penalty as may be prescribed under the said acts upon delay in payment of impugned statutory dues. As such, it can be inferred beyond doubt that the deduction u/s 36(1)(va) of the act on account of sum received from employees as employee's contribution to provident fund and/or ESI fund, shall be available to the assessee employer

in the financial year in which such liability is incurred even if the impugned sum have been deposited after the due dates as prescribed under said labour welfare acts but before the due date of filing of income tax return for said period u/s 139(1) of the act.

2.5. The aforesaid contention of assessee have duly been upheld by Hon'ble Jurisdictional High Court in the case of **CIT vs. AIMIL Ltd. *[2010] 321 ITR 508 (Del.)***, wherein it was held as under:

"It is clear from the above that as soon as employees' contribution towards provident fund or ESI is received by the assessee-employer by way of deduction or otherwise from the salary/wages of the employees, it will be treated as 'income' at the hands of the assessee. It clearly follows therefrom that if the assessee does not deposit this contribution with provident fund/ ESI authorities, it will be taxed as income in the hands of the assessee. However, on making deposit with the concerned authorities, the assessee becomes entitled to deduction under the provisions of section 36(1)(va). Section 43B (b), however, stipulates that such deduction would be permissible only on actual payment. This is the scheme of the Act for making an assessee entitled to get deduction from income insofar as employees' contribution is concerned.

*If the employees' contribution is not deposited by the due date prescribed under the relevant Acts and is deposited late, the employer not only pays interest on delayed payment but can incur penalties also, for which specific provisions are made in the Provident Fund Act as well as in the ESI Act. Therefore, the Act permits the employer to make the deposit with some delay, subject to the aforesaid consequences. Insofar as the Income-tax Act is concerned, the assessee can get the benefit if the actual payment is made before the return is filed, as per the principle laid down by the Supreme Court in **CIT v. Vinay Cement Ltd. [2007] 213 CTR (SC) 268**.*

Therefore, the Tribunal was correct, in law, in deleting the addition made by the Assessing Officer under section 36(1)(va) relating to employees' contribution towards provident fund and ESI."

(Copy of Judgement is enclosed for your kind perusal on page no. ……………)

In the instant case of assessee, employer assessee had duly deposited the impugned sum of employee's contribution to provident fund and/or ESI fund with relevant authorities on or before the due date of filing of income tax return prescribed u/s 139(1) of the act. As such, in light of the afore discussed landmark judicial pronouncement, the said proposed disallowance deserves to be dropped.

2.6. Further, assessee place further reliance on following judicial pronouncements:

a. In case of **Pr. CIT vs. Rajasthan State Beverages Corporation Ltd.** ***[2017] 84 Taxmann.com 185 (SC)***, Hon'ble Apex Court dismissed the appeal and upheld the decision of Hon'ble Rajasthan High Court wherein it was stated as under:

"This court in the aforesaid case has also allowed the claim of the assessee, in so far as payment of PF & ESI etc. is concerned, on the finding of fact that the amounts in question were deposited on or before the due date of furnishing of the return of income and taking in consideration judgment of this Court in ***CIT v. State Bank of Bikaner & Jaipur [2014] 363 ITR 70 /43 taxmann.com 411/225 Taxman 6 (Mag.) (Raj.)*** *and* ***CIT v. Jaipur Vidhut Vitaran Nigam Ltd. [2014] 363 ITR 307/ 49 taxmann.com 540/ [2015] 228 Taxman 214 (Mag.) (Raj.)*** *and accordingly both the questions are covered by the aforesaid judgment and against the revenue.*

7. In the light of the judgment in assessee's own case, the first two questions being covered against the revenue, no more remains substantial question of law which can be considered by this court and so far as question of bad debt is concerned, essentially it is based on a finding of fact and no substantial question of law can be said to emerge out of the order of the Tribunal."

(Copy of Judgement is enclosed for your kind perusal on page no. ……………)

b. In case of **CIT vs. State Bank of Bikaner & Jaipur** ***[2014] 363 ITR 70 (Raj.)***, Hon'ble High Court of Rajasthan allowed the assessee's claim and stated as under:

"the explanation appended to Section 36(1)(va) of the Act further envisage that the amount actually paid by the assessee

on or before the due date admissible at the time of submitting return of the income under Section 139 of the Act in respect of the previous year can be claimed by the assessee for deduction out of their gross total income. It is also clear that Sec.43B starts with a notwithstanding clause & would thus override Sec.36(1)(va) and if read in isolation Sec. 43B would become obsolete. Accordingly, contention of counsel for the revenue is not tenable for the reason aforesaid that deductions out of the gross income for payment of tax at the time of submission of return under Section 139 is permissible only if the statutory liability of payment of PF or other contribution referred to in Clause (b) are paid within the due date under the respective enactments by the assessee's and not under the due date of filing of return.

22. We have already observed that till this provision was brought in as the due amounts on one pretext or the other were not being deposited by the assessees though substantial benefits had been obtained by them in the shape of the amount having been claimed as a deduction but the said amounts were not deposited. It is pertinent to note that the respective Act such as PF etc. also provides that the amounts can be paid later on subject to payment of interest and other consequences and to get benefit under the Income Tax Act, an assessee ought to have actually deposited the entire amount as also to adduce evidence regarding such deposit on or before the return of income under sub-section (1) of Section 139 of the IT Act.

23. Thus, we are of the view that where the PF and/or EPF, CPF, GPF etc., if paid after the due date under respective Act but before filing of the return of income under Section 139(1), cannot be disallowed under Section 43B or under Section 36(1)(va) of the IT Act."

(Copy of Judgement is enclosed for your kind perusal on page no. ……………)

In light of aforementioned judicial pronouncements, it is submitted that there persisted no default on the part of the assessee in depositing the statutory liability in respect of employee's contribution to Provident Fund and ESI, as the same were duly deposited prior to date of filing of income tax return for the period under consideration. The issue involved in the captioned case had been thoroughly discussed at various judicial forums including Hon'ble Apex

Court as well as various High Courts and at each and every forum, it is concluded that the due date envisaged in explanation to section 36(1)(va) of the act shall be read with due date mentioned in section 43B of the act and the due date of filing of Income Tax Return prescribed u/s 139(1) of the act shall be considered as due date for allowing deductions u/s 43B as well as 36(1)(va) of the act. As such, the impugned proposed disallowance by your goodself is bad in law. Thus, it is most humbly requested that your goodself may kindly drop the impugned proposed adjustment of Rs. 21,96,707/- being the assessee had duly paid the impugned sum within the prescribed time limits.