IN THE INCOME TAX APPELLATE TRIBUNAL, KOLKATA 'C' BENCH, KOLKATA

Before **Shri M.Balaganesh, Accountant Member** and
Shri S.S. Viswanethra Ravi, Judicial Member

I.T.A. No. 712/KOL/ 2013
Assessment Year: 2008-09

Exide Industries Limited,.....Appellant
59E, Chowringhee Road,
Kolkata-700 020
[PAN : AAACE 6641 E]

-Vs-

Deputy Commissioner of Income Tax,..... Respondent
Circle-I, Kolkata, AayakarBhawan,
P-7, Chowringhee Square, Kolkata-700 069

Appearances by:
Shri Anup Sinha, ACA, for the assessee
Shri G. Mallikarjuna, CIT, DR, for the Department

Date of hearing: 23-08-2016
Date of pronouncement: 19-10-2016

Shri. S.S.VISWANETHRA RAVI, JM:

This appeal by the Assessee against order dt:28-02-2013 passed by the Commissioner of Income Tax-(Appeals) for the assessment year 2008-2009

2. Ground no's 1(a) & (b) are similar to each other, involving disallowance of 1,51,03,956/- on account of provision made by the assessee for leave encashment made by the Assessing Officer by invoking the provision under section 43B(f) of the Act and confirmed by the CIT-(Appeals).

3. During the course of hearing before us, the Ld.AR submits that the issue squarely covered by the consolidated order of Coordinate Bench in Assessee's own case for A.Y 2003-04 & 2004-05 in ITA 189/Kol/2007 and ITA 1414/Kol/2007 respectively. The Ld. DR relied on the orders of CIT-A and AO.

4. Heard rival submissions and perused the material on record. We find that the consolidated order *supra* as placed on record by the Ld.AR, the Tribunal decided the issue therein is similar to the issue on hand covering the grounds as raised in no's 1(a) & (b) and the relevant portion of which is reproduced herein below:

> *25. The issue raised in Ground No. 8 relates to the disallowance of 1.51 crores made by the Assessing Officer and confirmed by the ld. CIT(Appeals) on account of provision made by the assessee for leave encashment.*
>
> *26. The assessee-Company during the year under consideration had made a provision of Rs.1.51 crores for leave encashment on the basis of an acturial valuation and the same was claimed as deduction by relying on the decision of the Hon'ble Calcutta High Court in assesese's own case reported in 292 ITR 470 and the decision of the Hon'ble Supreme Court in the case of Bharat Earth Movers reported in 245 ITR 428. The Assessing Officer, however, disallowed the claim of the assessee for provision of leave encashment relying on the Clause (f) inserted in Section 43B by the Finance Act, 2001 w.e.f. 1s t April, 2002. The ld. CIT(Appeals) confirmed the said disallowance. The assesese challenged the constitutional validity of Clause (f) inserted in Section 43B before the Hon'ble Calcutta High Court by way of a Writ Petition and although the same was initially dismissed by the Single Bench, it was admitted and ruled in favour of the assessee by the Division Bench of the Hon'ble Calcutta High Court by holding that the introduction of Clause (f) to Section 43B is ultra virus of the Act in the absence of disclosure of the objects and being inconsistent with the basic intent of Section 43B. Thereafter the Department filed the SLP against the decision of the Hon'ble Calcutta High Court and while admitting the same, the Hon'ble Supreme Court vide its judgment dated 08.09.2008 stayed the judgment of the Hon'ble Calcutta High Court until further orders.*
>
> *27. At the time of hearing before us, the ld. Counsel for the assessee has contended that even though the decision of the Hon'ble Calcutta High*

Court holding Clause (f) of Section 43D as ultra virus is stayed by the Hon'ble Supreme Court while admitting the SLP filed by the Revenue, the same has not been reversed and this Tribunal, therefore, is bound to follow the same being a binding precedent. He has also contended that the decision of the Hon'ble Calcutta High Court was stayed by the Hon'ble Apex Court vide its judgment dated 08.09.2008 until further orders and there being another Interim Order passed by the Hon'ble Supreme Court on 08.05.2009, the stay granted earlier stands automatically vacated. A copy of the said interim order dated 08.05.2009 is placed on record before us, the contents of which are extracted below:- "Pending hearing and final disposal of the Civil Appeal, Department is restrained from recovering penalty and interest which has accrued till date. It is made clear that as far as the outstanding interest demand as of date is concerned, it would be open to the Department to recover the amount in case Civil Appeal of the Department is allowed. We further make it clear that the assessee would during the pendency of this Civil Appeal, pay tax as if section 43B(f) is on the Statute Book but at the same time it would be entitled to make a claim in its returns".

28. We have carefully perused the Interim Order dated 8t h May, 2009 passed by the Hon'ble Supreme Court in the matter. It is observed that the Hon'ble Apex Court in the said order has made it clear that the assessee, during the pendency of the Civil Appeal, would pay tax as if Section 43B(f) is on the Statute Book, but at the same time, it would be entitled to make claim in its return. Keeping in view all these developments, the Coordinate Bench of this Tribunal in the case of Dy. CIT –vs.- BLA Industries Pvt. Ltd. (ITA No. 1434/KOL/2012 dated 16.01.2015) has restored the similar issue to the file of the Assessing Officer with a direction to await till the final decision of the Hon'ble Supreme Court on the issue and then to decide the issue accordingly. Following the said decision of the Coordinate Bench, we restore this issue to the file of the Assessing Officer with the similar direction. Ground No. 8 is accordingly treated as allowed for statistical purposes.

5. Taking into consideration the order *supra*, we remand the issue to the file of AO to decide the same in accordance with the Judgment of the Hon'ble Supreme Court that may be passed in Civil Appeal filed by the Revenue. Ground no's 1(a) & (b) are allowed for statistical purposes.

6. Regarding ground no's-2(a), (b) & (c) are similar questioning the disallowance of Rs.9,97,00,000/- made by the Assessing Officer and confirmed

by the CIT-Appeals on account of provision made by the assessee for warranty.

7. During the course of hearing before us, the Ld.AR submits that the issue squarely covered by the consolidated order dt:20-01-16 of Coordinate Bench in Assessee's own case for A.Y 2003-04 & 2004-05 in ITA 189/Kol/2007 and ITA 1414/Kol/2007 respectively. The Ld. DR relied on the orders of CIT-A and AO.

8. Heard rival submissions and perused the material on record. We find that the consolidated order *supra* as placed on record by the Ld.AR, the Tribunal decided the issue therein is similar to the issue on hand covering the grounds as raised in ground nos. 2(a) (b)&(c) and the relevant portion of which is reproduced herein below:

> *7.The issue raised in Ground No. 2 relates to the disallowance of Rs.17.65 crores made by the Assessing Officer and confirmed by the ld. CIT(Appeals) on account of provision made by the assessee for warranty.*
>
> *8. The Batteries manufactured and sold by the assessee through its Dealers carry certain guaranteed life and in case of any failure during such guaranteed period, the Batteries are replaced free of cost. Keeping in view the period of guarantee/warranty and based on the past experience, a provision for warranty of Rs.17.65 crores was made by the assessee for the year under consideration. It was claimed that the said provision was made as per the Accounting Standard AS-29 prescribed by the Institute of Chartered Accountants of India. The Assessing Officer, however, rejected this claim of the assessee-Company on the ground that a provision made for warranty being a notional and contingent liability was not allowable as per the mercantile system of accounting followed by the assessee. On appeal, the ld. CIT(Appeals) upheld the order of the Assessing Officer on this issue by observing that the provision for warranty being in the nature of an uncertain liability was rightly disallowed by the Assessing Officer.*
>
> *9. We have heard the arguments of both the sides and also perused the relevant material available on record. As rightly submitted by the ld. Counsel for the assessee, this issue is covered in principle in favour of the assessee by the decision of the Hon'ble Supreme Court in the case of Rotork Controls India (Pvt.) Limited –vs.- CIT reported in 314 ITR 62,*

wherein the Hon'ble Apex Court has held that the provision of warranty is allowable as deduction if the following conditions are satisfied:- (i) An Enterprise has a present obligation as a result of past events; (ii) It is probable that an out-flow of resources will be required to settle the obligation; (iii) A reliable estimate based on historical trend can be made on account of obligation on the basis of historical trend.

10. The ld. D.R. has not raised any contention to dispute the proposition propounded by the Hon'ble Supreme Court in the case of Rotork Controls India (Pvt.) Limited (supra) on this issue. He, however, has contended that the issue as to whether the assessee in the present case has satisfied the conditions laid down by the Hon'ble Supreme Court for allowing deduction on account of provision for warranty requires verification and since the same has not been done either by the Assessing Officer or by the ld. CIT(Appeals), the matter may be restored to the file of the Assessing Officer for the limited purpose of such verification. We find merit in this contention of the ld. D.R. and since the ld. Counsel for the assessee has also not raised any objection in this regard, we restore this issue to the file of the Assessing Officer with a direction to decide the same in the light of the decision of the Hon'ble Supreme Court in the case of Rotork Controls India (Pvt.) Limited. Ground No 2 is accordingly treated as allowed for statistical purposes.

9. In view of the observations and conditions laid down therein by the Hon'ble Supreme Court in the case of Rotork Controls India (Pvt.) Limited, we restore the issue to the file AO for verification of provision of warranty,thus, ground no's 2(a) (b) & (c) are allowed for statistical purposes.

10. Ground no's-3(a), (b),(c) & (d) raised questioning the disallowance of Rs.12,18,60,300/- made by the AO towards the expenditure incurred in earning the dividend income of Rs.63,18,822/-and applicability of Rule 8D.

11. Brief facts relating to the issue are that, the assessee earned dividend to an extent of Rs.63,18,822/- from mutual funds and shares and claimed as an exempt income and offered Rs.1,86,487/-as disallowance on its own being a proportionate expenses for earning said exempt income and the assessee attributed such disallowance to 20% of total man hours of Treasury

Department. The AO was of the opinion why interest and finance costs as found by him debited at Rs.38,17,24,153/- to P&L account should not be disallowed. The assessee explained that all the investments made from interest-free own funds and further submitted that it has net cash inflow from operations at Rs.180.45 crores, net proceeds from rights issue at Rs.114.45 crores, besides free reserves generated in the previous years are sufficient to make investments on its own. The assessee also furnished statement showing free reserve of Rs.253.98 crores as on 01-04-2007 were available for making investments. The assessee also filed estimated working of disallowance under section 14A for Rs.7,99,610/- through its letter dated 08-12-2011 and claimed that it had earned dividend of Rs.70.52 laks and Rs.45.11 laks from trade investments and non-trade investments respectively.

12. Considering the submissions above, the AO was of the opinion that the assessee could not provide one to one nexus in showing that the borrowed fund not been diverted to investments and by providing cumulative figures of balance sheet or the gross earnings of the year does not establish that borrowed fund has not been used for making investment. The AO further found that the assessee did not allocate that the administrative and miscellaneous charges and direct and indirect expenses properly and proceeded to apply Rule 8D(2)(ii) and (iii). Accordingly, the AO computed the expenditure of Rs.1,86,487/-, Rs.9,92,67,063/- and Rs. 2,24,06,750/- U/R 8D(2)(i),(ii) and (iii) respectively and disallowed an amount of Rs.12,18,60,300/-for the purpose of section 14A of the Act and added same to the total income of the Assessee.

13. In first appeal, the assesse submitted details of interest paid on term loans, working capital and fund mobilization expenses in a tabular form, wherein the assesse admits that Rs.16.05 crores where it could not be able to

specifically show that such sum utilized for business purpose out of Rs.38,17,24,153/- and in view of the order of Kolkata Tribunal urged to restrict the disallowance to Rs.6,16,37,232/-. The relevant portion of which is reproduced herein below:-

6.2 During the course of appeal, the appellant has made the following submissions:-

"…..In light of the above the assessee humbly submits the following:-

The details of Interest shown in the Annual Report and considered by the AO is Rs.38,17,24,153/- for the purpose of computing Rule 8D(ii).

Details	*Amount (Rs.)*	*Nature of interest*	*Page refer Extract of ledger*
Interest on Term Loans	*16,05,61,945*	*Against Long term loan from Citibank HSBC-utilization in earlier years and cannot be easily specified*	*Ledger pages 1-2*
Interest on Others (Working Capital Borrowings)	*22,03,66,763*	*Interest on the following:* *1. Buyers credit* *2. Packing credit and preshipment credit* *3. Bill Discounting* *4. Channel financing (materials)* *5.Interest on LC & material purchases.* *6.Gain/loss on Interest/loan* *7.Foreign currency and working capital demand loan-short term financing of expenses or shortage of recovery*	
Fund Mobilisation Expense	*7,95,405*	*Bank Charges for arranging short term financing*	
	38,17,24,153		

On a perusal of the above table and the ledger accounts of the interest your kindself would observe that Rs.16.05 crores are the only amounts which cannot be

specifically stated to be used for business purpose. The rest interest clearly shows that the amount of interest is arising from various borrowings which are linked to normal purchase and sale of goods and other routine services and expenses like salary, wages and other expenses, the revenue proceeds of which are directly linked to taxable income namely sales.

Therefore in view of the above and in light of the decision of the Hon'ble Kolkata Tribunal, we have computed the disallowance under Rule 8D to the following extent:-

Expenditure during relating to income which does not form a part of the total income	*Identified by assessee in tax audit report and duly approved by AO under Rule 8D(i)*	*1,86,487*
In case the assessee has incurred expenditure by way of interest during the previous year which is not directly attributable to any particular income	*Under Rule 8D(ii) the AO considered Rs.38.17 crores. Of which Rs.22.04 crores and Rs.0.07 crores can be identified to be directly linked with regular business needs and generating taxable income. Hence, Interest can be apportioned to: 16,05,61,945 x 429.21/ 1723.27*	*3,99,90,245*
Amount equal to ½ % of avg. investment	*½% x 429.21 under Rule 8D(iii)*	*2,14,60,500*
	TOTAL	*6,16,37,232*

Average of total value of investments, income from which does not or shall not form part of total income:-

	Rs. In crores	
	31.3.2007	*31.3.2008*
Total investments	*378.00*	*518.27*
Less: Investment in foreign companies whose dividends are taxable		
Chloride Batteries SE Asia Pte Ltd	*10.35*	*10.35*
Expex Batteries Ltd	*0.77*	*0.77*
Associated Battery Mfg (Ceylon)	*7.30*	*7.30*
CELL Motive Power Pty	*-*	*1.02*
Investments which would yield Tax free income	*359.58*	*498.83*

Average ===\{359.58 + 498.83\}/2=429.21

Our humble request your kindself would be to approve above in principle and restrict the disallowance to Rs.6.16 crores."

14. The CIT-A did not agree with the submissions of the Assessee, but however, taking into consideration of foreign investments to an extent of Rs.19.44 crores and Rs.18.44 crores as standing on 31-03-2008 and 31-03-2007 respectively and directed the AO to restrict the average value of investments to Rs.429.21 crores instead of Rs.448.135 crores as computed by the AO.

15. The Assessee before this Tribunal questioned the order of CIT-A. The Ld.AR submits that the disallowance may be restricted to disallowance as made by the Assessee before the CIT-A and referred para 4.4.1 at page 27 of written submission and argued that the assessee has surplus reserves at Rs.253.98 crores as on 1.4.2007 as compared to investment at Rs.140.26 crores during the year. The Ld. DR relied on the order of the AO.

16. Heard rival submissions and perused the material on record.During the course of assessment proceedings, the AO found the loans availed by the assessee of Rs.324.70 crores as on 31-03-2007 and Rs.349.81 crores as on 31-03-2008 from the balance sheet, according to him that there is a increase to an extent of Rs.25.11 crores. The AO further found that the assessee debited an amount of Rs.38,17,24,153/- from the profit and loss account towards payment of interest. It was also observed by the AO the investments made by the assessee in various companies increased to an extent of Rs.140.27 crores as compared to 31-03-2007. The AO disallowed the amount as computed by applying Rule 8D(2)(i),(ii) and (iii) of Rs.12,18,60,300/- only on the ground that the assessee could not provide one to one nexus in showing

that the borrowed fund not been diverted to investments. We find from the order of CIT-A, that the Assessee submitted details of interest shown in Annual Report by way of tabular form wherein the assesse admitted that it could not able to show an amount of Rs.16,05,61,945/- has one to one nexus with the business purpose and Assessee itself recomputed the disallowance U/Rule 8D(2)(i),(ii) and (iii) to an extent of Rs.6,16,37,232/- and urged therein to restrict the same to that extent.The case of the AO that the Assessee could not explain and produce anything during the course of assessment proceedings showing one to one nexus date wise investments and source of fund thereon and in view of the tabular forms as submitted by the Assessee and discussed by the CIT-A as the same were not in the file of AO and it is appropriate, in our view, to remand the issue to the file of AO for verification of details of payment of interest as shown in the annual report as discussed in para-6.2 of impugned order and to pass order by taking into consideration of the same. Accordingly, grounds and additional grounds raised therewith are allowed for statistical purposes.

17. Ground no-4 is about questioning the disallowance of Rs.1,36,32,019/- made by the Assessing Officer and confirmed by the CIT -A on account of payments made by the assessee to various vendors on account of software repairs and maintenance expenses.

18. During the course of hearing before us, the Ld.AR submits that the issue squarely covered by the consolidated order dt:20-01-16 of Coordinate Bench in Assessee's own case for A.Y 2003-04 & 2004-05 in ITA 189/Kol/2007 and ITA 1414/Kol/2007 respectively. The Ld. DR relied on the orders of CIT-A and AO.

19. Heard rival submissions and perused the material on record. We find that the consolidated order *supra* as placed on record by the Ld.AR, the Tribunal decided the issue therein is similar to the issue on hand covering the ground as raised in ground no-4 and the relevant portion of which is reproduced herein below:

> *21. Grounds Nos. 5(c) & 6 involve the issue relating to the disallowance of Rs.69.21 lakhs and Rs.2.05 crores made by the Assessing Officer and confirmed by the ld. CIT(Appeals) on account of payment made by the assessee to Sonata Information Technology and on account of ERP expenses respectively.*
>
> *22. During the year under consideration, the assessee had incurred expenditure of Rs.2.05 crores for upgradation of ERP. A sum of Rs.69.21 lakhs was also paid by the assessee to M/s. Sonata Information Technology for software and hardware support as well as consultancy services in connection with the implementation of the upgraded ERP. This entire expenditure incurred by the assessee for upgradation of ERP as well as implementation thereof was claimed as deduction being revenue in nature. The Assessing Officer as well as the ld. CIT(Appeals), however, treated the same as capital in nature on the ground that the same resulted in the enduring benefit to the assessee and accordingly allowed only depreciation thereon.*
>
> *23. We have heard the arguments of both the sides and also perused the relevant material available on record. It is not in dispute that the ERP package was originally purchased and installed by the assessee in the earlier years and the expenditure incurred thereon in the earlier years was finally treated as capital in nature. During the year under consideration, the said ERP package was upgraded by the assessee and the expenditure in question thus was incurred by the assessee on upgradation of ERP as well as implementation thereon. As rightly submitted by the ld. Counsel for the assessee, the expenses incurred on upgradation of ERP has already been held as revenue expenditure allowable as deduction in the various decisions rendered by the Hon'ble High Courts as well as the different Benches of this Tribunal. In one of such decisions rendered in the case of CIT –vs.- Amway India Enterprises, this issue has been elaborately dealt with by the Special Bench of this Tribunal and after discussing all the relevant aspects, it is held that expenditure incurred on upgradation of ERP module would be allowable as deduction being revenue in nature. At the time of hearing before us, the ld. D.R. has contended that the upgradation of ERP is nothing but replacement of ERP package as the earlier version of ERP becomes completely useless after upgradation. We are unable to agree with the contention of the ld. D.R. In our opinion, there is a difference between upgradation of ERP Software and purchase of ERP Software, inasmuch as the benefit of upgradation is only incremental, which is to the extent of additional features provided in the new version, while the same in the case of acquisition of new ERP package*

is full and completely new. Even this benefit is reflected in the price charge, inasmuch as the price charged for upgradation is only marginal equivalent to the incremental benefit available in the new version while it is full in case of acquisition of new ERP package. The upgradation of ERP, in our opinion, therefore, cannot be equated with replacement as contended by the ld. D.R. and the advantage being only incremental to the extent of the additional features in the new version, the same cannot be treated as the replacement of the entire ERP package so as to treat the expenditure incurred on upgradation as capital expenditure. Moreover, the use of any ERP package in the case of manufacturer like the assesese-Company is generally for coordinating and rationalizing its functions and business process in order to ensure that the business is carried on more efficiently and effectively and by applying the functional test, the expenditure incurred on ERP package, in our opinion, cannot be treated as capital expenditure as it does not result in creation of any new asset or advantage of enduring nature in the capital field. We, therefore, direct the Assessing Officer to allow the deduction claimed by the assessee on account of expenditure incurred on upgradation of ERP and implementation thereof treating the same as revenue in nature.

20. In the present issue, the assessee incurred expenditure of Rs.3,40,80,049/- for routine maintenance and for procuring license for SAP and M.S. Office. Accordingly the assessee paid to many vendors i.e SAP India, ERP, TATA Technologies, ONE APPS, Oracle, WIPRO,ETVL and M/s. Sonata Information Technology for software and consultancy services. The assessee claimed said expenditure as deduction by treating the same as revenue in nature. According to AO, as the new software installed improves the efficiency of the computers and it is a capital expenditure. The CIT-A confirmed the said finding. Taking into consideration, the finding of the coordinate Bench supra, we are of the view, the expenditure incurred towards for routine maintenance and for procuring license of software cannot be treated as capital in nature as it would not create a new asset and accordingly, we hold the assesse is entitled to claim such expenditure as revenue in nature. Thus, ground no-4 is allowed.

21. In the result, the appeal of the assessee is partly allowed as indicated above.

Order pronounced in the open Court on 19th October, 2016.

Sd/-	Sd/-
M.Balaganesh	**S.S. Viswanethra Ravi**
Accountant Member	**Judicial Member**

Dt: 19 -10-2016

Copies of the order forwarded to :

(1) Exide Industries Limited, 59E, Chowringhee Road, Kolkata-700 020

(2) Additional /Deputy Commissioner of Income Tax, Range-I, Kolkata, AayakarBhawan, P-7, Chowringhee Square, Kolkata-700 069

(3) Commissioner of Income-tax (Appeals)-I, Kolkata

(4) Commissioner of Income Tax, Kolkata
(5) The Departmental Representative
(6) Guard File
**PP/SPS By order

Assistant Registrar,
Income Tax Appellate Tribunal
Kolkata