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

Before Shri P.M. Jagtap, Accountant Member
and Shri S.S. Viswanethra Ravi, Judicial Member

I.T.A. No. 189/KOL/ 2007
Assessment Year: 2003-2004

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

-Vs.-
Additional Commissioner of Income Tax,.....Respondent
Range-I, Kolkata,
Aayakar Bhawan,
P-7, Chowringhee Square,
Kolkata-700 069

&

I.T.A. No. 1414/KOL/ 2007
Assessment Year: 2004-2005

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

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

Appearances by:
Shri Anup Sinha, Advocate and Shri Bishan Kr. Seal, ACA, for the assessee
Shri G. Mallikarjuna, CIT, for the Department

Date of concluding the hearing : December 11, 2015
Date of pronouncing the order : January 20, 2016

O R D E R

Per Shri P.M. Jagtap:-

These two appeals filed by the assessee against two separate orders of the ld. Commissioner of Income Tax (Appeals)-I, Kolkata for the

Assessment years 2003-04 and 2004-05 involve some common issues and the same, therefore, have been heard together and are being disposed of by a single consolidated order for the sake of convenience.

2. First we take up the appeal of the assessee for assessment year 2003-04, which is directed against the order of the ld. CIT(Appeals)-I, Kolkata dated 08.11.2006.

3. The issue involved in Ground No. 1 of this appeal relates to the disallowance of Rs.42,94,336/- made by the Assessing Officer and confirmed by the ld. CIT(Appeals) under section 40(a)(ia) on account of non-deduction of tax at source from the payment of royalty and consultancy fees made to a Japanese Entity.

4. The assessee in the present case is a Company, which is mainly engaged in the business of manufacture and sale of Batteries. The return of income for the year under consideration, i.e. A.Y. 2003-04 was filed by it originally on 28.11.2003 declaring total income of Rs.75,59,82,050/-. Thereafter the revised return was filed by the assessee on 30.10.2004 declaring total income of Rs.58,20,27,180/-. In the Tax Audit Report filed along with the return, a sum of Rs.42,94,336/- paid by the assessee to a Japanese Entity on account of royalty and consultancy fees was shown to be an item disallowable under section 40(a)(i) for non-deduction tax at source. In the computation of total income, no such disallowance under section 40(a)(ia) was offered by the assessee. In this regard, reliance was placed by the assesee on the non-discriminatory clause as contained in para 3 of Article 24 of the Indo-Japanese Tax Treaty. The stand of the assessee was that since no such disallowance on account of non-deduction of tax at source from the payment of similar nature made to the resident was liable to be made under the Income Tax Act, the disallowance under section 40(a)(ia) on account of non-deduction of tax

from the similar payment made to a non-resident could not be made as it would result in discrimination. This stand of the assessee was not found acceptable by the Assessing Officer. According to him, the limited purpose of tax treaty was to avoid double taxation only and it could not be relied upon for deciding as to whether any amount was disallowable or not. He accordingly invoked the provision of section 40(a)(i) and made a disallowance on account of royalty and consultancy fees paid by the assessee to a Japanese Entity.

5. On appeal, the ld. CIT(Appeals) confirmed the disallowance made by the Assessing Officer on this issue observing that the limited purpose of section 90(2) of the Act is to allow concession relating to tax rates only and, therefore, Article 24 of the relevant DTAA could not be invoked to dispute the applicability of the provision of section 40(a)(ia).

6. We have heard the arguments of both the sides and also perused the relevant material available on record. As agreed by the ld. Representatives of both the sides, this issue now stands squarely covered in favour of the assessee by various decisions of this Tribunal. In one of such decisions rendered by Delhi Bench of this Tribunal in the case of Millenium Infocom Technologies Limited –vs.- ACIT reported in 21 SOT 152, it was held that since royalty payments to residents could not be disallowed for non-deduction of taxes, similar payments made to non-residents could not be disallowed in the hands of the assessee under section 40(a)(i) as per Article 26(3) of the Indo-U.S. DTAA. Since the relevant provision of Article 26 of Indo-Japanese DTAA is analogous to the provision of Article 26 of Indo-US DTAA, we respectfully follow the decision of the Coordinate Bench of this Tribunal in the case of Millenium Infocom Technologies Limited (supra) and delete the disallowance made by the Assessing Officer and confirmed by the ld. CIT(Appeals) under section 40(a)(i). Ground No. 1 is accordingly allowed.

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.

11. The issue raised in Ground No. 3 relates to the assessee's claim for deduction of Rs.41.25 lakhs on account of arrears of electricity charges.

12. The assessee-company was regularly subjected to monthly fuel surcharge upon actual consumption and the same was provided and paid by it in the respective previous years based on the bills issued by CESC Limited. There was a revision of the charge by CESC Limited with retrospective effect from the year 2000-01 and accordingly arrears for the earlier years were recovered from the assessee. The arrears so

recovered to the extent of Rs.41,25,486/- were debited by the assessee to the profit & Loss account for the year under consideration. According to the Assessing Officer, the said amount was pertaining to the earlier years and the assessee, therefore, was not entitled to claim the same in the year under consideration.

13. On appeal, the ld. CIT(Appeals) found merit in the contention of the assessee raised on this issue that the arrears of electricity charges for the earlier years having been paid by the assessee in the year under consideration on the basis of Hon'ble High Court's order, the liability on this account, which was not a contractual liability, had crystallized in the year under consideration. He, however, found that the aspect as to whether the amount in question was paid by the assessee as per the order of the Hon'ble High Court required verification and accordingly a direction was given by him to the Assessing Officer to verify this aspect and allowed the claim of the assessee accordingly.

14. We have heard the arguments of both the sides on this issue and also perused the relevant material available on record. Although the ld. Counsel for the assessee has invited our attention to the relevant documentary evidence placed in the paper book to show that the bills for arrears having been raised by the CESC Limited as per the order of the Hon'ble High Court in the year under consideration, the liability on account of electricity charge arrears had arisen in that year, we find that the ld. CIT(Appeals) has already directed the Assessing Officer to verify this aspect from the relevant record after giving the assessee proper and sufficient opportunity of being heard and the assessee, therefore, is at liberty to produce all the relevant documents to establish its case on this aspect of the matter before the Assessing Officer. In our opinion, there is thus no infirmity in the impugned order of the ld. CIT(Appeals) on this

issue warranting any interference from our side and upholding the same, we dismiss Ground No. 3.

15. The issue raised in Ground No. 4 relates to the disallowance of Rs.1,31,37,993/- made by the Assessing Officer and confirmed by the ld. CIT(Appeals) on account of liquidated damages.

16. In the Profit & Loss Account filed along with the return of income, a sum of Rs.2,99,17,569/- was debited by the assessee on account of liquidated damages. During the course of assessment proceedings, it was explained by the assessee that the said amount represented deductions made by the customers for non-compliance with the delivery schedule, shortage due to transit loss, breakage due to transit damage, etc. It was submitted that there was a short recovery of the dues from customers to the extent of Rs.2.99 crores and the same representing liquidated damages was claimed as expenditure. In this regard, the Assessing Officer noted that there was a substantial increase of liquidated damages of 78% claimed by the assessee in the year under consideration as compared to the immediately preceding year while the corresponding increase in sales was only 11.5%. He, therefore, held that the liquidated damages claimed by the assessee were excessive and unreasonable and by allowing the increase in liquidated damages only to the extent of increase in sales, i.e. 11.5%, he disallowed the balance amount of liquidated damages of Rs.1.31 crores being excessive and unreasonable. On appeal, the ld. CIT(Appeals) confirmed the disallowance made by the Assessing Officer on this issue for the same reasons as given by the Assessing Officer.

17. The ld. Counsel for the assessee submitted that the claim of the assessee for liquidated damages was allowed by the Assessing Officer as well the ld. CIT(Appeals) in principle but the portion of the same was treated as excessive and unreasonable and disallowed on *ad hoc* basis,

which is against the principle laid down by the Hon'ble Supreme Court in the case of Dhakeshwari Cotton Mills Limited –vs.- CIT reported in 26 ITR 775. He also submitted that the liquidated damages is in the nature of normal business expenditure required to be incurred by any manufacturer like the assessee-company and the Assessing Officer himself allowed such expenditure in the earlier years as well as in the subsequent years. He contended that the total sales of the assessee for the year under consideration were Rs.194.39 crores and the liquidated damages claimed by the assessee at Rs.2.99 crores being only 1.27% of such sales, the same cannot be treated as excessive or unreasonable. He also contended that the liquidated damages are in the nature of bad debts and the same, therefore, are allowable alternatively under section 36(1)(vii) having written off by the assessee in the books of account as per the ratio laid down by the Hon'ble Supreme Court in the case of TRF Limited –vs.- CIT reported in 323 ITR 397.

18. The ld. D.R., on the other hand, submitted that no specific details or supporting evidence could be furnished by the assessee to substantiate its claim for liquidated damages. He contended that in the absence of such details and documents, the claim of the assessee for higher liquidated damages as compared to the immediately preceding year was not fully verifiable and such higher claim was only disallowed by the Assessing Officer treating the same as excessive or unreasonable. He contended that the mere fact that there was short a recovery of dues from the customers is not sufficient to establish that there was a case of liquidated damages recovered by the concerned customers. He also contended that the claim of the assessee for liquidated damages cannot be allowed alternatively as bad debts as sought by the ld. Counsel for the assessee as the requirements for allowing deduction on account of bad debts as contained in the relevant provisions are specific.

19. We have considered the rival submissions and also perused the relevant material available on record. It is observed that there was a short recovery of dues from the customers on account of non-compliance by the assessee with delivery schedule, shortages due to transit loss, breakage due to transit damages, etc. and the same was claimed by the assessee as liquidated damages. As rightly contended by the ld. Counsel for the assessee, neither the Assessing Officer nor the ld. CIT(Appeals) has disputed the claim of the assessee for liquidated damages in principle, but the same is partly disallowed by them on the ground that the increase in liquidated damages as claimed by the assessee in the year under consideration at 78% was substantially more than the corresponding increase in sales of 11.5%. Such increase over and above increase in sales was treated by them as excessive or unreasonable without giving any cogent or convincing reason. It is pertinent to note here that the claim of the assessee for liquidated damages was allowed in the earlier years as well as in the subsequent years by the Assessing Officer but not even these figures of the other years were taken into consideration by them to ascertain as to whether the increase in liquidated damages as claimed by the assessee in the year under consideration was excessive or unreasonable. No doubt, the specific details of all the liquidated damages claimed were not furnished by the assessee, as rightly contended by the ld. D.R., to substantiate its claim for deduction. However, the fact remains that there was under recovery of receivables by the assessee from the concerned customers and the party-wise details of under-recovery having been furnished by the assessee, we are of the view that there was no justification on the part of the authorities below to consider the claim of the assessee for liquidated damages as excessive or unreasonable without bringing any material on record in support. As rightly contended by the ld. Counsel for the assessee, the liquidated damages is a regular feature of any manufacturer like the assessee-Company and the Assessing Officer himself having

allowed the claim for liquidated damages not in the earlier years and subsequent years but even partly in the year under consideration, the disallowance made by him for the remaining part without there being anything to support and substantiate the same, in our opinion, is not sustainable. We, therefore, delete the disallowance made by the Assessing Officer and confirmed by the ld. CIT(Appeals) on this issue and allow Ground No. 4.

20. Ground Nos. 5(a) and 5(b) are not pressed by the ld. Counsel for the asseessee. The same are accordingly dismissed as not perssed.

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.

24. Ground No. 7 relating to the issue of Dealers incentive is not pressed by the ld. Counsel for the assessee at the time of hearing before us. The same is accordingly dismissed as not pressed.

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. 1st 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 8th 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.

29. Grounds No. 9, 10 & 11 raised by the assessee in this appeal are not pressed by the ld. Counsel for the assesee at the time of hearing before us. The same are accordingly dismissed as not pressed.

30. In the result, the appeal of the assessee for A.Y. 2003-04 being ITA No. 189/KOL/2007 is partly allowed.

31. Now we shall take up the appeal of the assessee for A.Y. 2004-05, which is directed against the order of the ld. Commissioner of Income Tax (Appeals)-I, Kolkata dated 28.03.2007.

32. The issue involved in Ground No. 1 of this appeal relating to the assessee's claim for deduction on account of provision made for leave encashment is similar to the one involved in Ground No. 8 of the assessee's appeal for A.Y. 2003-04, which has already been decided by us in the foregoing portion of this order. Following our conclusion drawn on the similar issue in A.Y. 2003-04, we restore this issue to the file of the

Assessing Officer for deciding the same afresh as per the same direction as given in A.Y. 2003-04.

33. As regards the issue involved in Ground No. 2 relating to the disallowance made under section 40(a)(ia) on account of payment made by the assesese to a Japanese party towards royalty and technical fees, it is observed that the issue is similar to the one involved in Ground No. 1 of the assessee's appeal for A.Y. 2003-04, which has been decided by us in the foregoing portion of this order. Following our conclusion drawn in A.Y. 2003-04, we delete the disallowance made by the Assessing Officer and confirmed by the ld. CIT(Appeals) on this issue and allow Ground No. 2 of the assessee's appeal for A.Y. 2004-05.

34. As regards Ground Nos. 3, 4 & 5 of the assessee's appeal for A.Y. 2004-05, it is observed that the issues involved therein relating to the disallowance made on account of assessee's claim for deduction of ERP upgradation and implementation expenses are similar to the issues involved in Ground No. 5(c) and Ground No. 6 of the assessee's appeal for A.Y. 2003-04, which have been decided by us in the foregoing portion of this order. Following our conclusion drawn in A.Y. 2003-04, we decide these issues in favour of the assessee and delete the disallowance made on account of ERP upgradation and implementation expenses. Grounds No. 3, 4 & 5 of the assessee's appeal for A.Y. 2004-05 are accordingly allowed.

35. The issue raised in Ground No. 6 relating to the disallowance made under section 14A has not been pressed by the ld. Counsel for the assessee at the time of hearing before us. The same is accordingly dismissed as not pressed.

36. In Ground No. 7(a), the assessee has challenged the action of the ld. CIT(Appeals) in upholding the order of the Assessing Officer reducing the technical know-how fees from the "profits of the business" for the purpose of computing deduction under section 80HHC.

37. While computing the deduction allowable to the assessee under section 80HHC, the technical know-how fees amounting to Rs.34,08,824/- was reduced by the Assessing Officer from the "profits of the business". For this conclusion, he relied on Explanation (baa) to Section 80HHC(4B) and held that the technical know-how fees received by the assessee being in the nature of brokerage, commission, interest, rent, etc., the same was required to be reduced to the extent of 90% from the profits of the business for the purpose of computing deduction under section 80HHC. On appeal, the ld. CIT(Appeals) upheld the action of the Assessing Officer on this issue by relying on his appellate order passed in assessee's own case for A.Y. 2003-04, whereby export incentive received under DEEC Scheme was excluded from the profits of the business for the purpose of computing deduction under section 80HHC.

38. The ld. Counsel for the assessee reiterated before us that the assessee-Company had entered into technology sharing agreement with its subsidiary at Srilanka and the amount in question was received by it from the said subsidiary for sharing technical knowledge in order to enable the said subsidiary to service the goods exported by the assessee-Company. He contended that there was thus a direct link with the export of goods made by the assessee-Company and the amount in question received as technical know-how fees. He also contended that the Explanation (baa) to Section 80HHC(4B) of the Act relied upon by the Assessing Officer is not applicable in the present context as the technical know-how fees received by the assessee is not in the nature of receipts covered by the said Explanation. In support of his contention on this

issue, the ld. Counsel for the assessee relied on the decisions of the Hon'ble Bombay High Court in the case of CIT –vs.- K.K. Doshi & Company reported in 245 ITR 849 and CIT –vs.- Kantilal Chhotelal reported in 246 ITR 429. The ld. D.R., on the other hand, relied on the orders of the authorities below in support of the Revenue's case on this issue.

39. We have considered the rival submissions and also perused the relevant material available on record. Going by the nature of the amount in question received by the assessee on account of technical know-how fees as explained by the ld. Counsel for the assessee, we are of the view that the same is different from the nature of receipts as covered by Explanation (baa) to Section 80HHC(4B) such as Duty Draw Back, sale of license, commission, brokerage, interest, rent, etc. and, therefore, the reliance of the authorities below on the said Explanation to exclude the said amount to the extent of 90% from the profits of the business for the purpose of computing deduction admissible to the assessee is clearly misplaced. On the other hand, the said amount having direct link with the export of the assessee as explained by the ld. Counsel for the assessee, we are of the view that the same cannot be excluded from the profits of the business for the purpose of computing deduction under section 80HHC as held, *inter alia,* by the Hon'ble Bombay High Court in the case of K.K. Doshi & Co. (supra) and Kantilal Chhotelal (supra). We, therefore, direct the Assessing Officer to include the amount of technical know-how fees in the profits of the business for the purpose of computing deduction under section 80HHC as claimed by the assessee. Ground No 7(a) of the assessee's appeal for A.Y. 2004-05 is accordingly allowed.

40. Grounds No. 7(b) and 7(c) are not pressed by the ld. Counsel for the assessee. The same are accordingly dismissed as not pressed.

41. The issue involved in Ground No. 8 in asessee's appeal for A.Y. 2004-05 relates to the disallowance made by the Assessing Officer and confirmed by the ld. CIT(Appeals) on account of assessee's claim for deduction towards additional contribution paid to Pension Fund amounting to Rs.914.70 lakhs.

42. After having noticed that there was a short fall in the accumulated funds for making payments of Pension to employees in future and keeping in view the falling interest rates on investment, additional contribution of Rs.9,14,07,000/- was made by the assessee on the basis of actuarial report in the year under consideration. According to the Assessing Officer, this additional contribution made by the assessee to Pension Fund was not allowable as deduction as the same was not specifically covered by the relevant provisions of section 36(1)(iv) read with Rules 87 & 88 of the Income Tax Rules, 1962. He, therefore, disallowed the same. On appeal, the ld. CIT(Appeals) confirmed the disallowance made by the Assessing Officer on this issue for the same reasons as given by the Assessing Officer.

43. We have heard the arguments of both the sides on this issue and also perused the relevant material available on record. It is observed that similar issue had come up for consideration before the Coordinate Bench of this Tribunal at Mumbai in the case of CIT –vs.- Glaxo Smithkline Pharmaceuticals (ITA No. 6444/MUM./2007 dated 28.01.2011), wherein as a result of falling interest rate, the LIC of India had revised actuarial rate of pension to be provided by them to the retiring members resulting in larger pay out from the fund and in order to make good the deficit, additional contribution was paid by the assessee amounting to Rs.476.06 lakhs based on an actuarial valuation. This additional contribution paid by the assessee to Pension Fund was held to be an allowable deduction by

the Tribunal for the following reasons given in Paragraphs No. 8 to 10 of its order:-

> *"8. We find that Section 36(1)(iv), which deals with the deductions on account of contribution to a recognised provident fund or an approved superannuation fund, provides as follows:*
>
> > *"36. Other deductions.-(l) 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-*
> >
> > *(i) to (iii).....*
> >
> > *(iv) any sum paid by the assessee as an employer by way of contribution towards a recognised provident fund or an approved superannuation fund, subject to such limits as may be prescribed for the purpose of recognising the provident fund or approving the superannuation fund, as the case may be; and subject to such conditions as the Board may think fit to specify in cases where the contributions are not in the nature of annual contributions of fixed amounts or annual contributions fixed on some definite basis by reference to the income chargeable under the head 'Salaries' or to the contributions or to the number of members of the fund;"*
>
> *9. We may now refer to the Fourth Schedule. Part B of the Schedule deals with the approved superannuation funds. Conditions relating to the grant of approval and the procedure therefor are set out in these, two Parts. Rule 11 of Part B provides, that in addition to any power conferred by Part B, the CBDT may make rules, inter alia, limiting the ordinary annual contribution and any other contributions to an approved superannuation fund by an employer. Rules 87 and 88 of the Income-tax Rules, 1962 ('the Rules'), are prescribed in pursuance of section 36(1)(iv). For convenient reference these rules are reproduced below:*
>
> > *"87. Ordinary annual contributions.-The ordinary annual contribution by the employer to a fund in respect of any particular employee shall not exceed twenty-five per cent of his salary for each year as reduced by the employer's contribution, if any, to any provident fund (whether recognised or not) in respect of the same employee for that year.*
> >
> > *88. Initial contributions.-Subject to any condition which the Board may think fit to specify under clause (iv) of sub-section*

> *(1) of section 36, the amount to be allowed as a deduction on account of an initial contribution which an employer may make in respect of the past services of an employee admitted to the benefits of a fund shall not exceed twenty-five per cent of the employee's salary for each year of his past service with the employer as reduced by the employer's contribution, if any, to any provident fund (whether recognised or not) in respect of that employee for each such year."*
>
> *10. What follows is that, in terms of the above provisions, a contribution to approved superannuation fund is deductible in principle as long as the quantum of the said contribution does not exceed the prescribed limits. The limits are, however, prescribed only for the initial contribution and ordinary annual contribution to the fund. As a corollary to these limits having been prescribed, amounts paid in excess of such limits, towards initial contribution and for ordinary annual contribution, are not allowed as deduction. That is the only limitation for quantum of deduction under section 36(1)(iv). However, it is not in dispute that the amounts paid in excess of the 27% of salaries of the employees, are neither towards the ordinary annual contribution nor towards the initial contribution. This payment has been necessitated due to shortfall discovered in the course of actuarial valuation of the fund, and is in the nature of a one time exceptional payment to ensure that the superannuation fund is able to discharge its obligation. Its neither an annual contribution, nor an ordinary contribution. Limitations placed under rule 87 relevant for 'ordinary annual contribution', as have been invoked in this case, cannot be pressed into service in such a case. In our considered view, the disallowance under section 36(1)(iv) read with Rule 87 do not come into play in the case of a payment to make good the shortfall, on the basis of actuarial valuation, in the superannuation fund. In this view of the matter, the very foundation of the impugned disallowance did not have legally sustainable basis; the amount was deductible, in principle. Under section 36(1)(iv) and the restriction on deductibility, as set out in the said section as also in Rule 87, did not apply in this case. The conclusions arrived at by the CIT(A), though for the reasons other than the reasons adopted by the CIT(A), are correct and do not call for any interference".*

44. It is manifest from the relevant portion of the order of the Tribunal passed in the case of Glaxo Smithkline Pharmaceuticals (supra) that a similar claim of the assessee for deduction on account of additional contribution paid to Pension Fund in the similar facts and circumstances has been allowed by the Tribunal after taking into consideration the relevant provisions of section 36(1)(iv) as well as the relevant Rules, i.e. Rules 87 & 88 of the Income Tax Rules, 1962. The ld. D.R., however, has

contended that the relevant aspect as to whether the payment made by the assessee is within the limits specified in the relevant Rule or not requires verification as this aspect had not been verified by the Assessing Officer. Accordingly, we decide this issue in favour of the assessee in principle by following the decision of the Coordinate Bench of this Tribunal in the case of Glaxo Smithkline Pharmaceuticals (supra) and restore the matter to the file of the Assessing Officer for the limited purpose of verifying as to whether the amount paid by the assessee to Pension Fund is within the limits specified in the relevant Rules. Subject to this direction, Ground No. 8 of the assessee's appeal for A.Y. 2004-05 is treated as allowed.

45. The issue raised in Ground No. 9 of the assessee's appeal for A.Y. 2004-05 relating to the disallowance made on account of provision for warranty is similar to the one involved in Ground no. 2 of the assessee's appeal for A.Y. 2003-04, which has been decided in the foregoing portion of this order. Following our conclusion drawn in A.Y. 2003-04 on similar issue, we decide this issue in principle in favour of the assessee with a direction to the Assessing Officer to allow the claim of the assessee for provision for warranty after verifying that the provision so made is reasonable and on scientific basis. Ground No. 9 of the assessee's appeal for A.Y. 2004-05 is accordingly treated as allowed.

46. In the result, the appeal of the assessee for A.Y. 2003-04 being ITA No. 1414/KOL/2007 is partly allowed.

47. To sum up, both the appeals filed the assessee are partly allowed as indicated above.

Order pronounced in the open Court on January 20, 2016.

Sd/-	**Sd/-**
(S.S. Viswanethra Ravi)	**(P.M. Jagtap)**
Judicial Member	**Accountant Member**

Kolkata, the 20th day of January, 2016

Copies to : (1) ***Exide Industries Limited,***
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Kolkata-700 069

(3) Commissioner of Income-tax (Appeals)-I, Kolkata
(4) Commissioner of Income Tax, Kolkata
(5) The Departmental Representative
(6) Guard File

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.