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IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'I-1' NEW DELHI

BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
&
SHRI O.P. KANT, ACCOUNTANT MEMBER

ITA No. 6282/Del/2015
Assessment Year: 2005-06

Hero Motocorp Ltd. 34, Community Centre, Basant Lok, Vasant Vihar, New Delhi. PAN No. AAACH0812J	vs	Addl. CIT Range-12, New Delhi.

&

ITA No. 6302/Del/2015
Assessment Year: 2005-06

DCIT Circle 11(1) New Delhi.	vs	Hero Honda Motors Ltd. 34, Community Centre, Basant Lok, Vasant Vihar, New Delhi. PAN No. AAACH0812J

Assessee by	**Shri Gaurav Jain, Adv. Ms. Monisha Sharma, Adv.**
Revenue by	**Shri Surenderpal, CIT DR**

Date of Hearing	**15.01.2021**
Date of Pronouncement	**13.01.2021**

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ORDER

PER SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER:

These are cross appeals filed by the Assessee and the Revenue against the order of the Ld. Commissioner of Income Tax (Appeals)-44, New Delhi {CIT (A)} vide order dated 28.08.2015 for Assessment Year 2005-06. ITA 6282/Del/2015 is the appeal filed by the assessee whereas ITA 6302/Del/2015 is the appeal of the Department.

2.0 The respective grounds raised by the parties are as under:

2.1 ITA No. 6282/Del/2015 (Assessee appeal):

"1. That the CIT (A) erred on facts and in law in sustaining the disallowance of administrative expenses made by the assessing officer to the extent of Rs. 3,26,03,500 invoking the provisions of section 14A of the Income Tax Act, 1961 ('the Act) alleging the same to have been incurred for earning exempt dividend income.

1.1 That the CIT (A) erred on facts and in law in affirming the action of the assessing officer in computing disallowance of administrative expenses, by allocating 0.5% of the total investments made by the appellant during the relevant previous year, on the assumption that certain administrative expenses must have been incurred to earn the exempt income without appreciating that only expenses having proximate nexus with the earning of exempt income could have been disallowed under section 14A of the Act.

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1.2 That the CIT (A) erred on facts and in law in not deleting the disallowance of interest expenditure of Rs. 78,55,100 made by the assessing officer under section 14A of the Act.

1.3 That the CIT (A) erred on facts and in law in directing the assessing officer to disallow interest expenditure incurred on borrowed funds utilized for making investment in shares/ mutual funds on the basis of bank statement under section 14A, without appreciating that the appellant had mixed pool of funds wherein surplus funds were sufficient for making investments in shares/ mutual funds.

2. That the CIT (A) erred on facts and in law in sustaining the disallowance of deduction of Rs. 2,30,53,828/- claimed by the appellant under section 80IA of the Act in respect of captive power generating unit situated at Gurgaon.

2.1 That the CIT (A) erred on facts and in law in affirming the action of the assessing officer in computing income of the power generating unit by considering the rate of Rs. 3.99 per unit, at which power was supplied by Haryana State Electricity Board ("HSEB"), as the 'market price' of the power, as against rate of Rs. 6.30 per unit (cost of generation of power at Rs. 5.48 per unit + mark-up of 15%) adopted by the appellant.

2.2 That the CIT (A) erred on facts and in law in not appreciating that the price at which electricity was supplied by HSEB was not reflective of 'market price' since electricity supply was not adequately available from HSEB at Gurgaon as per the appellant's requirement and other manufacturers in the vicinity were procuring power from the prime supplier, viz., Maruti at a higher price.

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3. That the CIT (A) erred on facts and in law in not deleting the disallowance of additional depreciation of Rs. 14.93 crores claimed by the appellant under section 32(1)(iia) of the Act with respect to plant and machinery acquired during the year.

3.1 That the CIT (A) erred on facts and in law in holding that new plant and machinery must directly result in increase in installed capacity of the manufacturing plant for the purposes of claiming additional depreciation thereon under section 32(1)(iia) of the Act, without appreciating that no such condition existed in the said section for entitling additional depreciation.

4. That the CIT (A) erred on facts and in law in sustaining disallowance of portfolio management expenditure of Rs. 27,68,039 on the ground that the same related to investment activity of the appellant.

4.1 That the CIT (A) erred on facts and in law in not allowing the alternate claim of the appellant for deduction of portfolio management charges against income under the head 'capital gains' on the ground that the said expenditure was relatable to earning of exempt income.

5. That the CIT (A) erred on facts and in law in sustaining disallowance of professional fee of Rs. 14.74 paid to Prof. Tarun Khanna, a non-resident, for rendering consultancy services for scenario planning exercises of the appellant, under section 40(a)(i) for alleged failure on the part of appellant in not deducting tax at source therefrom.

5.1 That the CIT (A) erred on facts and in law in holding that the skills/ experience utilized by the consultant for rendering

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services would amount to 'make available' within the meaning of Article 12(4) of the India-USA DTAA.

6. That the CIT (A) erred on facts and in law in upholding the action of the assessing officer / TPO in making addition to the extent of Rs.6,57,195/- on account of alleged difference in arm's length price of international transaction of import of components, spare parts etc., applying CUP method instead of TNMM applied by the appellant as the most appropriate method.

6.1 That the CIT (A) erred on facts and in law in not holding that having regard to nature and class of the international transactions of purchase of spare parts and components, TNMM was correctly applied as the most appropriate method, as per section 92C of the Act.

6.2 That the CIT (A) erred on facts and in law in holding that for determining the arm's length Price of international transaction of purchase of spare parts and components, CUP method would be the most appropriate method.

6.3 That the CIT (A) erred on facts and in law in not appreciating that since operating profit margin of the appellant was within an acceptable range vis-a-vis unrelated parties, no further adjustment of arm's length price of any other international transaction, including the impugned import of components, was warranted.

6.4 That the CIT (A) erred on facts and in law in sustaining the order of the TPO / assessing officer in applying CUP method in respect of international transaction of import of components from the AE by comparing incomparable transactions, viz., price of the

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international transaction with prices of purchase of similar components from the domestic vendors.

6.5 That the CIT (A) erred on facts and in law in not appreciating that the TPO in the succeeding assessment year(s) had accepted that price for import of components in the facts of the appellant's case cannot be compared with price for procurement of similar components from the domestic vendors."

2.2 <u>ITA 6302/Del/2015 (Department's Appeal:</u>

"1. Whether on the facts & that circumstances of the case, Ld. CIT (A) erred in deleting the addition of Rs. 1250773885 on account of disallowance of royalty and technical guidance fee?

2. Whether on the facts & that circumstances of the case, Ld. CIT (A) erred in deleting the addition of Rs. 198530762 on account of disallowance of model fee?

3. Whether on the facts & that circumstances of the case, Ld. CIT (A) erred in deleting the addition of Rs. 86926848 on account of disallowance of export commission due to non deduction of TDS?

4. Whether on the facts & that circumstances of the case, Ld. CIT (A) erred in deleting the addition of Rs. 51800000 on account of disallowance of warranty provisions?"

3.0.0 Arguing for the appeal filed by the assessee, the Ld. Authorised Representative (AR) submitted that ground nos. 1 to 1.3 are relating to disallowance under Section 14A of the Income Tax Act, 1961 ('the Act') read with Rule 8D of the Income Tax Rules,

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1962 ('the Rules') amounting to Rs.3,26,03,500/- It was submitted by the learned AR that in the return of income, the assessee had shown to have earned exempt dividend income of Rs.14,41,51,497/- from investments held in shares and mutual funds, as under:

Particulars	Amount (in crores)
Dividend on shares of Hero Honda Finlease Ltd.	1.49
Dividend on other shares	1.14
Dividend from investment in Mutual funds	11.78
Total	14.41

3.0.1 It was further submitted that the assessing officer computed disallowance of Rs. 4,04,58,600/- by applying Rule 8D of in the following manner:

- Expenditure directly relating to exempt income Nil
- Interest expenditure apportioned in the ratio of average investments to average total assets 78,55,100
- 0.5% of average investments 3,26,03,500

Total disallowance 4,04,58,600

3.0.2 It was submitted by the Ld. AR that the Ld. CIT (A) confirmed the disallowance made by the assessing officer under section 14A of the Act to the extent of Rs.3,26,03,500/- being 0.5% of the total investments on the assumption that certain

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administrative expenses must have been incurred to earn exempt income. It was pointed out that further, the Ld. CIT (A) remanded the disallowance to the extent of Rs. 78,55,100/- on account of interest expenditure to the assessing officer who, vide set aside order dated 31.03.2017, deleted the disallowance made under section 14A of the Act to the extent of Rs.78,55,100/-.

3.0.3 The Ld. AR submitted that the disallowance of Rs. 3,26,03,500/- which was sustained by the Ld. CIT (A) deserves to be deleted at the threshold itself since disallowance under section 14A of the Act cannot be made by applying the provisions of Rule 8D since the provisions of said Rule are prospective in nature and are, thus, applicable from assessment year 2008-09 onwards and were not applicable during the relevant assessment year 2005-06. The Ld. Counsel relied on the following decisions:

- CIT v. Essar Teleholdings Ltd: 401 ITR 445 (SC)
- Maxxop Investment Ltd. v. CIT: 402 ITR 640 (SC)

3.0.4 The Ld. AR for the assessee further submitted that the assessing officer made an *ad hoc* disallowance of 0.5% of the average

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investment by applying Rule 8D automatically, without pointing out any specific expenditure having being incurred by the assessee to earn dividend income. It was submitted that the assessing officer, thus, failed to record any satisfaction in the assessment order regarding correctness of the claim of the assessee that no expenditure was incurred for earning exempt income. The Ld. AR for the assessee relied on the following decisions wherein the Hon'ble Courts have repeatedly held that the assessing officer is bound to record satisfaction *qua* incurrence of the expenditure for earning exempt income before making disallowance under section 14A of the Act even in case where the assessee claims that no expenditure has been incurred:

- Godrej & Boyce Manufacturing Company Ltd. VS. DCIT: 394 ITR 449(SC)
- H.T. Media Limited v. PCIT: 399 ITR 576 (Del)
- Eicher Motors Ltd. vs. CIT: 398 ITR 51(Del)

3.0.5 It was further submitted that the onus is on the revenue to establish that the administrative expenses are incurred for the purpose of earning exempt income and *ad hoc* disallowance of administrative expenses cannot be made under section 14A of the

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Act. For the aforesaid argument, the Ld. AR relied on the following decisions:

- Maxxop Investment Ltd. v. CIT: 402 ITR 640 (SC)
- DLF Ltd. vs. CIT: 27 SOT 22 (Del. ITAT) – Affirmed by Delhi High Court (350 ITR 555)
- Impulse (India) (P.) Ltd. vs. ACIT: 22 SOT 368 (Del. ITAT)
- Minda Investments Ltd. vs. DCIT: 48 SOT 169 (Del. ITAT)
- PukhrajChunilalBafna vs. DCIT: 65 SOT 187 (Mum. ITAT)
- DCIT vs. Smita Conductors Ltd.: 16 SOT 251 (Mum. ITAT)
- DCIT vs. Jammu and Kashmir Bank Ltd: 152 TTJ 522 (Amr. ITAT)
- CIT v. Catholic Syrian Bank Ltd.:237 CTR 164/207 Taxman 2 (Kar.)

3.0.6 The Ld. AR submitted that in the present case, no expenditure was incurred to earn exempt income. The expenses debited in the profit and loss account pertained to main business activity of manufacturing two wheelers and were unrelated to earning of dividend income. Further, it was submitted that the revenue earned from manufacturing activity during the relevant previous year was Rs. 8,596.81 crores as against dividend income of Rs. 14.41 crores being 0.16% of total revenue. It was also pointed

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out that out of the total income of Rs. 14.41 crores, a sum of Rs. 12.24 crores was earned from the following two investments that were quite old, requiring no administrative/management effort or any other cost in earning the same:

Income from UTI's Unit 64	Rs. 10.75 crores
Dividend from Hero Honda Finlease Ltd.	Rs. 1.49 crores
	Rs. 12.24 crores

3.0.7 It was further submitted that even for the balance dividend of Rs. 2.17 crores earned from investment in mutual funds and investment in shares, these treasury activities were looked after by two staff members of the finance department, out of total strength of 70 employees. It was submitted that the treasury function carried out by these two persons comprised of four activities, i.e., funds mobilization (borrowing), working capital management, financial risk management and funds deployment (investments). Investment is only one of the functions performed by them. The Ld. AR submitted that the aforesaid investments did not involve any expenditure on account of administrative or other managerial expenses and that any portion of such expenses, if at all,

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is to be attributed to making or handling of such investment, would be minuscule or insignificant, which has not been pointed by the assessing officer.

3.0.8 Without prejudice to the above, the Ld. AR submitted that disallowance, if any, has to be restricted to the proportionate amount of salary paid to the said employees. It was pointed out that the assessee had *suo motu*, out of abundant caution, started disallowing proportionate salary of employees in the subsequent assessment year, i.e., AY 2006-07 and onwards, which was affirmed by the Tribunal in order dated 24.10.2016 for the assessment year 2010-11 and 2011-12 and order dated 31.05.2018 for the assessment year 2006-07.

4.0 The learned DR, on the other hand placed reliance on the case of Maxopp Investment Ltd. (supra), and submitted that this issue should be set aside to the file of the Assessing Officer.

5.0 We have heard both the parties and have perused the material available on record. In the present year, the Assessing Officer has made disallowance under section 14A by invoking provisions of Rule 8D of the Income Tax Rules, 1962. Since Rule 8D

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is not retrospective, the same is not applicable in the present assessment year and accordingly, we hold that the assessing order erred in invoking the provisions of Rule 8D of the Rules. We find that the assessee had been consistently following a method of disallowance in the succeeding years commencing from AY 2006-07 onwards. The said method has been accepted by the Tribunal in AY 2010-11, 2011-12 and 2006-07 (set aside proceedings) in the absence of any dissatisfaction by the AO qua inaccuracy of the same. We have also upheld the said method in the appeal for AY 2015-16, in the absence of any dissatisfaction by the AO. We accordingly restore the matter back to the file of the AO to compute disallowance on the same basis in the year under consideration after taking requisite details from the assessee and giving opportunity of hearing by following the principle of natural justice. The ground is allowed for statistical purposes.

6.0.0 With respect to Ground No. 2 to 2.2, the Ld. AR submitted that the same related to disallowance of deduction of Rs. 2,30,53,828/- claimed under section 80IA of the Act in respect of captive power generating unit situated at Gurgaon. At the time of

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hearing before us, it was submitted by the learned counsel that in view of the power supply constraints in the area of Gurgaon, Haryana, the assessee had set up power plant in order to meet the requirement of power of its manufacturing unit at Gurgaon. The assessee claimed deduction of Rs. 2,30,53,826/- under section 80IA of the Act in respect of the power generated at the aforesaid unit and captively consumed by the assessee. The deduction claimed was duly supported by Chartered Accountant's Report. It was submitted that for the purposes of computing deduction under section 80IA, the assessee adopted transfer price of power, captively consumed, at the cost of generation of power per unit with mark-up of 15%. The cost of generation of power was adopted at Rs.5.48, which was based on cost certified in the cost audit report. Accordingly, the assessee adopted the rate of transfer of power @ Rs. 6.30 per unit (Rs.5.48 + 15% of Rs.5.48). It was submitted that the assessing officer, in the assessment order, relying on the assessment order for the assessment years 2003-04 and 2004-05 held that the inter-unit transfer price of power from the power plant should have been at the price at which HSEB is supplying, i.e. Rs.3.99 per unit. Since the

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cost of generation was more than the market value taken by the assessing officer, there was no profit from the generation of power as per the Assessing Officer eligible for deduction under section 80 IA of the Act. It was further submitted by the Ld. AR that the Ld. CIT (A), relying on the order passed by the Tribunal in the assessment year 2006-07, upheld the disallowance made by the assessing officer.

6.0.1 The Ld. AR for the assessee submitted that the Tribunal, in the assessee's own case for the assessment years 2010-11 and 2011-12, after duly taking into consideration the material facts/evidences placed on record, decided the issue in favour of the assessee, holding that for the purpose of determination of 'market price' of power under section 80IA(4) read with 80IA(8) of the Act, where multiple options of price of a product are available, then the price which is most favorable to the assessee needs to be adopted. The Tribunal, while distinguishing the decision of Delhi bench of the Tribunal in the earlier years, also held that price of power charged by State Electricity Board is not reflective of market price for computing deduction under section 80IA(4) of the Act. It was

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submitted that the decision of the Tribunal in assessment year 2006-07 was distinguished by the Tribunal on the basis of rectification order dated 06.09.2013 passed by the Tribunal in MA No 1/Del/2013, while deciding the issue in favour the assessee in assessment years 2010-11 and 2011-12. The Ld. AR pointed out that following the order for the assessment years 2010-11 and 2011-12, the Tribunal deleted the disallowance made by the assessing officer in assessment years 2009-10 and 2004-05.

7.0 The Ld. DR relied on the order of the AO.

8.0.0 We have gone through the records. Though by order dated 23.11.2012 passed by the Tribunal for assessment year 2006-07, the Tribunal had decided the issue against the assessee, subsequently, the said order was rectified by the Tribunal vide order dated 6.9.2013. In the order for Assessment Years 2010-11 and 2011-12, the Tribunal after considering the aforesaid, held as under:

> *"124. We find that the expression market value 'inter-unit transfer has been defined under Explanation to section 80IA of the Act as follows:*
>
> > *"Explanation.—For the purposes of this sub-section, ―market value‖, in relation to any goods or services, means— (i) the price that such goods or services would ordinarily fetch in the open*

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market; or (ii) the arm's length price as defined in clause (ii) of section 92F, where the transfer of such goods or services is a specified domestic transaction referred to in section 92BA."

The aforesaid definition endorses the meaning of market price' explained by the Courts in several decisions, i.e., the price that such goods or services would ordinarily fetch in the open market. In the present case, we note that there are two prices available at which buyers are paying price for procurement of power, i.e., the rate at which power is supplied by HSEB and the rate at which power is supplied by the private entity, i.e., Maruti Udyog Ltd. The issue, thus, arises is what should be the market price of power? The market rate (or "going rate") for goods or services is the usual price charged for them in a free market. If demand goes up, manufacturers and laborers will tend to respond by increasing the price they require, thus setting a higher market rate. Had power been provided by HSEB in abundant quantity to meet the needs of consumers, especially manufacturing entities, there was no occasion for any other player to supply the power at higher rates. In such a situation, the free market conditions would have forced a private player to supply the power at the same rate at which power is supplied by HSEB or at a lower rate. But since the actual facts are reverse inasmuch as HSEB is not able to meet the power requirement of the consumers, private entities are forced to generate power for self-consumption, as in the case of appellant, or supply in the market like Maruti Udyog at a higher price. The consumers in the free market conditions are, therefore, willing to

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pay higher price to meet their power consumption needs. In such a situation, under an arm‗s length condition, if the appellant, too, like Maruti was to supply power to third party located in its vicinity, the appellant could have also charged price higher than that charged by HSEB. The aforesaid discussion leads to the conclusion that the price charged by HSEB, at best under the facts and circumstances of the case and looking to the power situation at Haryana, cannot be said to be ‗market price‗ within the meaning of Explanation to section 80IA(8) of the Act. We find that the Tribunal in appellant‗s own case for assessment year 2006-07 dismissed the aforesaid claim on a mistaken belief that the rate at which power was supplied by Maruti was not a proper benchmark, since Maruti was supplying power to its associated enterprises. The aforesaid mistake was also rectified by the Tribunal pursuant to miscellaneous application filed by the appellant whereby the words ―associated enterprises‖ were replaced with ‗ancillary units‗. Considering that the original decision was taken on a mistaken belief, it was not a correct decision and, thus, cannot be followed. In the given facts, where different rates for supply of power are available, we agree with the decision of Jaipur bench of Tribunal in the case of Sri Cement Ltd. (supra), wherein while applying the decision of Supreme Court in the case of Vegetable Products Ltd.: 88 ITR 192 it was held as under :-

> *"12. On perusal of the above, it could be clearly seen that the statute provides that the assessee must adopt 'market value' as the transfer price. In the open market, where a basket of 'market*

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values' [say like, independent third party transactions, grid price (average annual landed cost at which grid has sold power to the assessee), power exchange price for the relevant period etc.] are available, the law does not put any restriction on the assessee as to which 'market value' it has to adopt, it is purely assessee's discretion. So long as the assessee has adopted a 'market value' as the transfer price that is sufficient compliance of law. AO can adopt a different value only where the value adopted by assessee does not correspond to the 'market value'. Even if assessee's cement unit has purchased power also from the grid or that assessee's power unit has also partly sold its power to grid or third parties that by itself, does not compel the assessee or permit the Revenue to adopt only the 'grid price' or the price at which the eligible unit has partly sold its power to grid or third parties, as the 'market value' for captive consumption of power to compute the profits of the eligible unit. Any such attempt is clearly beyond the explicit provisions of s. 80-IA(8) of the Act. Underlying principles forming the basis of our findings given hereinbefore in this order are also supported by the decision of Special Bench of Hon'ble Bangalore Tribunal in Aztec Software & Technology Services Ltd. v. Asstt. CIT [2007] 107 ITD 141/15 SOT 49/162 Taxman 119 (Bang.) (SB) as well as Mumbai Tribunal decision in the case of Asstt. CIT v. Maersk Global Service Center (India)(P.) Ltd. [2011] 133 ITD 543/16 taxmann.com 47 (Mum.) wherein while interpreting the transfer pricing provisions, the Courts have held that it is the assessee who is the best judge to know the transactions undertaken and thus finding out the comparable cases from the vast database available in the public domain. Once the assessee has adopted the same, the AO has to examine whether the same is market price or not. AO has the power to adopt the market price only when the price adopted by the assessee does not correspond to market value. In the present case, we find that the assessee has

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adopted a rate at which actual transactions have been undertaken by unrelated entities. The volumes of transaction as relied upon are also substantial and hence it cannot be said that the assessee has handpicked some transactions, which are beneficial to it. The Departmental Representative submitted that since the assessee has itself drawn power from the grid, the grid rate represents the 'best market value' and hence the same should only be adopted. We are not agreeable to the above contention of the Department. No doubt the grid rate is market value but there is no concept of 'best' market value in law. If by using the said adjective, Revenue seeks to infer that grid rate is the only market value in the present context, such inference is also clearly not tenable Further, in case there are options the option favorable to the assessee is to be adopted. This is a well-settled principle of law laid down by Courts time and again including Supreme Court in the case of Vegetable Products Ltd. (supra) and other High Courts as pointed out by the Authorised Representative. 13. In the light of the aforesaid, we hold that:

(a) the value adopted by the assessee be it value as per independent third party trading transactions or as per power exchange (IEX etc.) or any other independent transaction (for the relevant period and which has taken place in the relevant area where the eligible unit is located) constitute 'market value' in terms of Explanation to s. 80-IA(8);

(b) the value at which State grid has sold power to the cement unit of the assessee (average annual landed cost) also constitute 'market value' in terms of Explanation to s. 80-IA(8) but the value at which State grid or third party has purchased power from the power unit of the assessee, which represents its power which is sold when not required by the cement unit, does not constitute

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'market value' in terms of Explanation to s. 80-IA(8). It is the 'principle' and not the 'quantum' which is deciding factor;

(c) where a basket of 'market values' are available for the relevant period and relevant geographical area where the eligible unit is situated, the assessee has discretion to adopt any one of them as market value; and

(d) If the value adopted by the assessee is 'market value' as explained above, it is not permissible for Revenue to recompute the profits and gains of the eligible unit by substituting the said value (as adopted by the assessee) by any other 'market value'. 14. Accordingly, we delete the disallowance as made by the AO in order under s. 143(3) on account of deduction under s. 80-IA of the Act and hence the grounds 1 and 2 are accordingly decided in favour of the assessee."

In the present case also there are three rates,(i) rates at which power is purchased from state electricity board, (ii) the cost of production of the power by the legible unit of the assessee and mark up thereon (iii) the rates at which power is supplied by Independent party to its ancillary unit . Therefore there are multiple basket of the market rates. As held in above decision that where multiple options for the price of a product are available, then the option which is most favorable to assesse needs to be adopted for the purposes of determining inter-unit transfer price u/s 80 IA(8) of the Act. Further it is not the case of the revenue that the power cost incurred by the assessee is inflated or incorrect. In that view of the matter, in the present case, considering that three different prices for supply of power are available in the market, the method

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adopted by the appellant to compute inter-unit transfer price by imputing a reasonable mark-up on its cost of production, i.e., Rs.8.75, which was less than the rate of Rs. 9.84 charged by Maruti, was quite a reasonable for the purposes of computing deduction u/s 80IA(4) of the Act. Therefore we reverse the disallowance made by the Ld. assessing officer of deduction of Rs. 8 0 7.76 Lacs under section 80 IA, in relation to the generation of power .Accordingly, the ground No. 26 of appeal stands allowed."

8.0.1 We find that following the aforesaid order of the Tribunal, the Tribunal deleted the disallowance made by the assessing officer in assessment years 2009-10 and 2004-05. Respectfully following the same, we hold that the disallowance made by the Assessing Officer (AO) under 80IA of the Act in relation to the generation of power cannot be sustained. We, accordingly, allow this ground of appeal raised by the assessee.

9.0.0 Grounds of appeal nos. 3 to 3.1 pertain to disallowance of the claim of additional depreciation under section 32(1)(iia) of the Act made by the assessee. It was submitted by the Ld. AR that in terms of section 32(1)(iia), additional depreciation on new plant and machinery acquired and installed during the year is available,

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subject to condition of increase in installed capacity of the relevant industrial undertaking. It was submitted that the assessee claims to have increased its installed capacity during the year, thereby entitling it to additional depreciation under the aforesaid section, whereas the claim of the AO is that the relevant plant and machinery installed during the year did not enhance the production of the assessee and, therefore, the same had no nexus/co-relation with the increase in installed capacity. Ld. AR submitted that during the relevant previous year, the assessee invested Rs. 105.8 crores and Rs.79.57 crores in plant and machinery in Gurgaon and Daruhera units respectively. Due to the said investment, the installed capacity increased by 75% in Gurgaon plant (from 8,00,000 to 14,00,000 units) and by 43.75% in Dharuhera plant (from 8,00,000 units to 11,50,000 units) from 31.03.2002 to 31.03.2005. The Ld. AR submitted that in terms of section 32(1)(iia) of the Act, additional depreciation of Rs. 14.93 crores was claimed by the assessee in respect of plant and machinery installed in factory premises in the aforesaid plants but the assessing officer, disallowed the aforesaid claim of additional depreciation holding that there was

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no correlation between installed capacity and installation of machine by observing as under:

"As per assessee there has been increase in installed capacity as compared to last year of 12% and 15%_in respect of its two plants. The records of the assessee indicates the claimed increase in installed capacity as under:

Installed capacity plant wise
Ay 2005-06

As on	GGN	DHR	Total
31.03.2002	800000	800000	1600000
31.03.2005	1400000	1150000	2550000
Increase	75.00%	43.75%	59.38%
31.03.2004	1250000	1000000	2250000
Last year	12.00%	15.00%	13.33%

8.2 During the course of assessment proceedings various records of the assessee and breakup of production were called for and examined so as to verify the claim of the assessee that it is due to new machinery being added that there has been increased in installed capacity. The analyses of production details submitted by the assessee reveals the following position.

Addition of machinery	Upto October (in crores)	After October (in crores)
GGN	37.57	68.23
DHR	4.3	36.57

8.3 Now this addition to the plant and machinery is mapped on the actual production done by the assessee in the corresponding period to arrive at the conclusion as to whether really there has been increased in installed capacity by virtue of

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addition of plant and machinery or it is only a matter of demand and supply which governs the production of motor cycles with inherent capacity already been there.

Actual production (No.)	Upto October	After October	Difference
GGN	609354	719502	110148
DHR	625222	670952	45730

8.4 This table would reveal that in Dharuhera plant where the machinery has been added after October 2005 of Rs. 36.57 crores the increase in production is of only 45730 over a period of 151 days whereas in the first half of the year where the addition to machinery is very small almost similar quantity is been produced. This implies that addition of machinery had either no effect or very minimum effect on the production capacity. It appears that more production is linked to the demand and supply position rather than increase in the capacity. This fact gets further reinforced that the peak production in respect of both the plants of 123351 units in Gurgaon and 117000 units in Dharuhera had simultaneously taken place in the month of October 2004. This factor clearly establishes the fact that the machinery acquired by the assessee was more related to the change in the technology for producing a newer engine i.e. core 1 technology rather than addition to the installed capacity. Even in case of Gurgaon plant where an argument could be raised that there has been investment of Rs. 37.57 crores before October and that had resulted due to the increased production. However, that also doesn't appear to be a correct view because in the month of May, 2004 when there has not been large investment the production has been of 103535 units whereas in the month of June and August the production has been of 98273 and 92781 units respectively. Therefore, the correlation between installed capacity and installation of machine is not established and in any case if Dharuhera is an indicator the addition to plant and machinery has been almost neutral so far as installed capacity is concerned. The reason very clearly lies in the fact that the in assessment year 2004-05 i.e. the immediately preceding year there has been a huge

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addition in plant and machinery and even by assessee's admission there has been increased in capacity by almost 45% to 50% over that as on 31/03/2002. Apparently in this case since major increase in capacity took place in the immediately preceding year it appears that there remained a higher capacity of production inherent in the expansion made in the earlier year and the same got reflected due to demand and supply position in the current year. Therefore there has been no real increase in installed capacity due to acquisition in plant and machinery."

9.0.1 The Ld. AR submitted that the Ld. CIT (A) upheld the aforesaid action of the assessing officer, with the direction to the assessee to establish nexus of investment with increase in installed capacity of the assessee company as a whole by holding as under:

"The appellant has not demonstrated that investment in plant and machinery during the impugned assessment year has effect of increase in installed capacity and not as a part of expansion programme of installed capacity undertaken for the financial year ending on 31.03.2004. Therefore, I direct the AO to verify as to whether investment in plant and machinery during the impugned assessment year is at stand alone mode which has increased the installed capacity to Gurgaon and Daruhera plant. In case, this fact is proved that due to investment in plant and machinery during this year the capacity has increase irrespective of expansion plant

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undertaken during the immediate preceding year the additional depreciation is allowable."

9.0.2 The Ld. AR for the assessee invited attention to the provision of Section 32(1)(iia) of the Act, as amended by Finance (No.2) Act, 2004, w.e.f. 01.04.2005 and applicable for the year under consideration, which reads as under:

"32. In respect of depreciation of—

…………………………………….

(iia) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2002, by an assessee engaged in the business of manufacture or production of any article or thing, a further sum equal to fifteen per cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii) :

Provided that such further deduction of fifteen per cent shall be allowed to—

(A)a new industrial undertaking during any previous year in which such undertaking begins to manufacture or produce any article or thing on or after the 1st day of April, 2002; or

(B)any industrial undertaking existing before the 1st day of April, 2002, during any previous year in which it achieves the substantial expansion by way of increase in installed capacity by not less than ten per cent:

Provided further that no deduction shall be allowed in respect of—

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a) any machinery or plant which, before its installation by the assessee, was used either within or outside India by any other person; or

b) any machinery or plant installed in any office premises or any residential accommodation, including accommodation in the nature of a guest house; or

c) any office appliances or road transport vehicles; or

d) any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or other-wise) in computing the income chargeable under the head "Pro-fits and gains of business or profession" of any one previous year:

Provided also that no deduction shall be allowed under clause (A) or, as the case may be, clause (B), of the first proviso unless the assessee furnishes the details of machinery or plant and increase in the installed capacity of production in such form, as may be prescribed along with the return of income, and the report of an accountant, as defined in the Explanation below sub-section (2) of section 288 certifying that the deduction has been correctly claimed in accordance with the provisions of this clause.

Explanation.—For the purposes of this clause,—

XXX

(2) "installed capacity" means the capacity of production as existing on the 31st day of March, 2002"

9.0.3 It was argued by the Ld. AR that the language of the aforesaid section is plain and unambiguous and provides that additional depreciation of 15% shall be available on the cost of

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new plant & machinery acquired and installed after 31.03.2002, *inter alia* in case of a undertaking existing before 01.04.2002, during any previous year in which such undertaking achieves the substantial expansion by way of increase in installed capacity by not less than 10%. On the basis of the aforesaid language of the aforesaid section, it was argued that the same did not contain any condition of the nexus of plant and machinery with increase in installed capacity of the relevant industrial undertaking. If there was increase in installed capacity, additional depreciation was admissible on cost of new plant and machinery acquired and installed during the year.

9.0.4 The Ld. AR further invited our attention to section 32(1)(iia) as amended by the Finance Act, 2005, w.e.f. 01.04.2006, whereby the aforesaid condition of increase in installed capacity was removed and additional depreciation was available on any new plant and machinery acquired or installed after 31.03.2005 by an assessee engaged in the business of *inter alia* manufacture or production of any article or thing. It was argued that the intention of the legislature was to give incentive to

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investment in new plant and machinery *de hors* actual increase in production from such installation. It was argued that the intention of the amendment was not to discriminate incentives on investments made pre and post 31.03.2005, but to simplify and remove hardship in the provisions, in order to extend the benefit of additional depreciation on new investments in plant and machinery without any further condition.

9.0.5 It was further argued that, even otherwise the AO and the Ld. CIT (A) have erred in denying the aforesaid claim of deduction, since what they were comparing was the nexus of increase in production with installation of relevant plant and machinery, whereas the requirement of law was only increase in overall installed capacity of the relevant industrial undertaking.

9.0.6 The Ld. AR, thereafter, invited our attention to the details of the installed capacity at the relevant Gurgaon and Dharuhera plants, which was undisputed by the lower authorities to contend that the relevant plants satisfied the condition of increase in installed capacity of more than 10%, as per the table below:

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	Gurgaon Plant	Daruhera Plant	Total
Installed capacity as on 31.03.2002	8,00,000	8,00,000	16,00,000
Installed capacity as on 31.03.2004	12,50,000	10,00,000	22,50,000
Installed capacity as on 31.03.2005	14,00,000	11,50,000	25,50,000
%age increase in installed capacity on 31.3.2005 vis-à-vis 31.3.2002	75.00%	43.75%	59.38%
% age increase in installed capacity on 31.3.2005 vis-à-vis 31.3.2004	12%	15%	13.33%
% age increase of differential of installed capacity for year ending 31.3.2005 (i.e. 31.3.2005 – 31.3.2004) vis-à-vis 31.3.2002	18.75%	18.75%	18.75%

9.0.7 The Ld. AR submitted that the claim of the assessee was further supported by the report of Chartered Accountant in Form 3AA wherein the Auditors have certified the new investment made by the assessee in the plant and machinery and increase in the installed capacity. (Page No 124-198 of PB-Supplementary). It was submitted that in the notes to accounts forming part of audited annual accounts for the year ending 31.03.2005, the statutory auditors too have disclosed the details regarding the licensed, installed and actual production capacity for the relevant previous year and preceding previous year. (Page No. 25 of PB) as under:

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10. ADDITIONAL INFORMATION

a) Details of capacity and production :

Class of goods	Units	Licensed capacity*		Installed capacity**		Actual Production***	
		This year	Previous year	This year	Previous year	This year	Previous year
Motorised two wheelers upto 350CC engine capacity	Nos.	200000	200000	2550000	2250000	2625030	2064698

* The Company's products are exempt from licensing requirements under New Industrial Policy in terms of Notification no. S.O. 477 (E) dated 25th July, 1991.

** On triple shift basis, as certified by the management and relied on by the auditors being a technical matter.

***Includes 132 (Previous year 49) motorcycles produced and capitalised during the year.

9.0.8 It was argued that, since the assessee satisfied the relevant conditions for claim of additional depreciation under section 32(1)(iia), the disallowance made by the AO deserved to be deleted.

9.0.9 Reliance was also placed on the following decisions wherein it has been held that there is no requirement under section 32(1)(iia) of the Act to establish operational connectivity of the eligible plant and machinery with the article and thing manufactured by the assessee:

- CIT v. VTM Ltd: 319 ITR 336 (Mad)
- CIT v. Hindustan Newsprint Ltd.: 183 Taxman 257 (Ker)
- CIT v. Hi Tech Arai Ltd: 321 ITR 477 (Mad):
- CIT v. Texmo Precision castings: 321 ITR 481 (Mad)
- CIT vs. Diamines & Chemicals Ltd.: 271 CTR 98 (Guj)
- NRB Bearings Ltd. vs. DCIT: 133 ITD 306 (Mum ITAT)

10.0 On the other hand, the Ld. CIT (DR) refuted the contentions of the assessee's counsel. The Ld. CIT (DR) heavily relied upon the findings contained in the assessment order. It was argued

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that, there was ambiguity in the language of section 32(1)(iia) and that the presence of the condition of increase in installed capacity only amplified that the increase in such investment was concomitant of the eligible plant and machinery. It was further argued that, the assessee had erred in filing the present ground of appeal, since there was no grievance to the assessee from the order of CIT (A), in as much as the CIT (A) had only remitted the matter back to the AO for verification.

11.0 In the rejoinder the Ld. Counsel for the assessee only made an additional argument that the ground of appeal filed by the assessee was valid, since if the provisions of section 32(1)(iia) are to be understood in the right spirit, then there was no need for the verification directed to be carried out by the Ld. CIT (A).

12.0.0 We have heard both the parties and find substantial force in the contentions of the assessee company. We find that the language of section 32(1)(iia) reproduced supra, is plain and unambiguous. On a plain and literal reading of the said section, we find no condition requiring nexus of the relevant plant and machinery acquired and installed during the year with the increase

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in installed capacity of the relevant industrial undertakings during the year. As per our reading, the requirement of the section is that in case of an existing industrial undertaking, additional depreciation shall be available on new plant and machinery acquired and installed during the previous year, if such industrial undertaking achieves substantial expansion by way of increase in installed capacity by not less than 10%. Accordingly, if there is an increase in installed capacity of the relevant industrial undertaking, the new plant and machinery acquired and installed during such year shall be eligible for additional depreciation at the rate prescribed in that section. There is no further condition of drawing operational nexus of such plant and machinery with increase in installed capacity. We also find that the said condition, has even been removed in section 32(1)(iia) by the Finance Act, 2005, w.e.f. 01.04.2006, although said amendment is not applicable during the year under consideration, but re-enforces the intent of the legislature, that the same was not relevant even in the earlier year, warranting nexus of plant & machinery with increase in installed capacity. Nevertheless, there is no condition of the relevant plant and machinery resulting in the

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increase in production of the relevant industrial undertaking. What the AO and the Ld. CIT (A) have held in the impugned order(s), is drawing nexus of the installed plant and machinery with increase in production from such machinery, which is clearly not the requirement in law. In view of the same, we find that, the AO and the Ld. CIT (A) have travelled to an extraneous territory, while examining and disallowing the aforesaid claim of additional depreciation under section 32(1)(iia) of the Act. We also draw support for the aforesaid reasoning from the following decisions referred by the Ld. Counsel for the assessee:

- CIT v. VTM Ltd: 319 ITR 336 (Mad):

  "5. In the case on hand, the assessee is stated to have set up a wind mill at a cost of Rs. 5,85,60,000. It is true that the assessee is a company engaged in the business of manufacture of textile goods. As far as application of section 32(1)(iia) of the Act, is concerned, what is required to be satisfied in order to claim the additional depreciation is that the setting up of a new machinery or plant should have been acquired and installed after 31-3-2002 by an assessee, who was already engaged in the business of manufacture or production of any article or thing. The said provision does not state that the setting up of a new machinery or plant, which was acquired and installed up to (sic.

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after) 31-3-2002 should have any operational connectivity to the article or thing that was already being manufactured by the assessee. Therefore, the contention that the setting up of a wind mill has nothing to do with the power industry, namely, manufacture of oil seeds etc. is totally not germane to the specific provision contained in section 32(1)(iia) of the Act.

6. In such circumstances, we are not able to appreciate the contention of the learned standing counsel for the appellant on the ground that the order of the Commissioner of Income-tax (Appeals) as confirmed by the Tribunal should be interfered with. It cannot also be said that setting up of a windmill will not fall within the expression setting up of a new machinery or plant. We do not find any error in the conclusion of the Tribunal in confirming the order of the Commissioner of Income-tax (Appeals). We, therefore, do not find any question of law much less substantial question of law to entertain this appeal. The appeal fails and the same is dismissed. No costs."

- CIT v. Hindustan Newsprint Ltd.: 183 Taxman 257 (Ker):

"The above provision was later modified dispensing with the requirement of increase in installed capacity as a condition for eligibility for additional depreciation. In this case the contention of the revenue is that the installed capacity of the final product of the company viz., newsprint remains unaltered even after installation of the de-inking machinery in respect of which additional depreciation was claimed. However the assessee's

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case as is clear from the orders of the authorities below including the Income-tax Tribunal is that there is increase in installed capacity of pulp and pulp though an intermediary product also is marketable and hence assessee is entitled to additional depreciation under the above provision. Standing counsel for the revenue contended that installed capacity of an industry should always be understood with reference to the final product manufactured and sold by it. Even though there cannot be any doubt on this proposition there is nothing to indicate that the respondent-assessee cannot sell pulp as a product. The fact that pulp is an intermediary product and is generally consumed captively in the manufacture of newsprint does not mean that pulp is not a product that cannot be marketed by the respondent as and when they desire. There is no dispute that pulp is a marketable commodity. If there is reduction in the manufacture of final product on account of any reason, necessarily respondent will have to market the excess pulp produced. So much so we agree with the view of the Tribunal that pulp being a marketable commodity produced by the respondent, the increase in the installed capacity of the pulp plant on account of the installation of the de-inking machinery will entitle the respondent for the benefit of additional depreciation. The finding of the Tribunal that there has been increase in the installed capacity of the production of pulp in terms of the requirement of the provision in the statute is not disputed in the appeal filed by the revenue. On the other hand their contention is that the installed

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capacity should have reference to only final product that is newsprint. We are unable to uphold this contention of the revenue and we feel that the intermediary product viz., pulp produced by the company being a marketable commodity the increase in the installed capacity for claiming benefit of additional depreciation under the above provision can be in the production of intermediary viz., pulp. We therefore agree with the finding of the Tribunal and dismiss the department appeal."

- CIT v. Hi Tech Arai Ltd: 321 ITR 477 (Mad)
- CIT v. Texmo Precision castings: 321 ITR 481 (Mad)

12.0.1 The ratio emanating from the aforesaid decisions squarely supports the aforesaid interpretation of section 32(1)(iia) of the Act. As regards the condition of increase in installed capacity, we have seen the facts and there is no dispute by the AO/Ld. CIT (A) as well on the increase in installed capacity of assessee. The same is certified by auditors and also reported in notes to audited accounts reproduced supra. In view of the above, we delete the disallowance made by the AO and hence the ground of appeal is allowed.

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13.0.0 The Ld. AR submitted that Grounds of Appeal Nos. 4 – 4.1 relate to disallowance of portfolio management expenditure of Rs. 27,68,039/- claimed by the assessee as deduction against business income. It was submitted that during the relevant previous year, the assessee had incurred expenditure of Rs.27,68,039/- towards portfolio management fee and that the assessing officer had disallowed the same on the ground that the same related to the investment activity of the assessee and therefore not an allowable deduction against business income. It was further submitted that on further appeal, the disallowance was sustained by the Ld. CIT (A) by holding that the issue is decided against the assessee by the Tribunal in the assessment year 2008-09. It was submitted by the Ld. AR that before the Ld. CIT (A), the assessee had raised without prejudice and an alternate condition, that if the aforesaid expenditure was to be considered as having nexus with investment activity, the same may be directed to be allowed as deduction under section 48 against income from capital gains. It was submitted that the aforesaid alternate claim was denied by the Ld. CIT (A), holding

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that such fee had nexus with earning exempt income from investment activity and, therefore, was not allowable.

13.0.1 In support of the grounds of appeal, the Ld. Counsel repeated the arguments taken before the lower authorities that the aforesaid expenditure was incurred for proper administration and management of surplus funds arising in the course of business and, therefore, the said expenditure satisfies the test of commercial expediency and purpose of business contained in section 37(1) of the Act; and therefore the same ought to be allowed as business deduction.

13.0.2 Without prejudice to the above, it was further argued that if the said expenditure was not to be treated as "for the purpose of business", but having relation with investment activity, then this expenditure needs to be alternatively allowed against income arising from investment activity i.e. capital gains. In this connection, the Ld. AR also invited our attention to the decision of Delhi Bench of Tribunal in the assessee's own case for the assessment year 2008-09, wherein while the Tribunal rejected the first argument of allowance of the aforesaid expenditure as business deduction, but

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accepted the alternate claim of the said expenditure to be deductible against income under the head capital gains.

13.0.3 The Ld. Counsel further relied upon the decision of Pune Bench of Tribunal in the case of DCIT vs. KRA Holding & Trading (P.) Ltd.: 54 SOT 493 wherein portfolio management fee paid by the assessee was held to be allowable as deduction under Section 48 while computing capital gains arising from sale of shares. It was the plea of the Ld. AR that section 48 allows deduction of - (i) expenditure incurred wholly and exclusively in connection with transfer of capital asset or (ii) cost of acquisition of asset, which are reduced from the sale consideration at the time of computing capital gains under section 45 of the Act. It was argued that if the portfolio management expenditure is not to be considered as business expenditure, then the only nexus of such expenditure is either with purchase or sale of relevant instrument, which is clearly allowable deduction under either clause (i) or clause (ii) of section 48 of the Act.

13.0.4 As regards the finding of the Ld. CIT (A), that the said expenditure is related to earning of exempt income, the Ld. Counsel

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argued that the expenditure was incurred to make investment and earn capital appreciation there from, but not dividend income and, therefore, the said expenditure cannot be attributed to earing of exempt income.

13.0.5 Without prejudice, it was submitted that if at all disallowance is to be made for nexus with exempt income, then only proportionate expenditure in the ratio of dividend income to capital gains should be made.

14.0 The Ld. DR defended the findings in the assessment order. It was argued that when the assessee is claiming income from investments under the head capital gains and not business income, then such expenditure cannot be allowed as deduction against business income. The Ld. DR relied upon the order of Delhi Bench of Tribunal in the assessee's own case for the assessment year 2008-09 for the aforesaid proposition. As regards the alternate plea of the assessee regarding allowance of deduction under section 48, the Ld. DR contended that the aforesaid expenditure is to be considered as having relation with exempt income and for that reason should not be allowed as deduction.

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15.0.0 We have heard the arguments of both the parties. We find that the aforesaid issue has been decided against the assessee by the Tribunal in the assessee's own case for the assessment year 2008-09, wherein it has been held that the portfolio management expenditure is not allowable as business expenditure. The relevant observations of the Tribunal for that year are as under:

> *"197. On careful consideration of above submissions, we hold that on ground no. 51 and 51, the assessee vehemently contended that the gains realized from sale of such various instruments is income under the head of capital gains and the AO wrongly held that eh aforesaid income was taxable under the head of business income. At the same time while arguing for ground no.52, the assessee's submissions are that the expenditure incurred for the administration and management of funds in the course of business being towards cash management/optimum utilization of business funds should be considered as expenditure for the purpose of business and hence the same may be allowed as business deduction. Alternatively, ld. Counsel of the assessee has also submitted that without prejudice to the above contentions, if the Tribunal holds that the aforesaid PMS expenses and PMS fee are not allowable as business expenditure, then the AO may be directed to allow the same as deduction from income from capital gains.*

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198. Since while adjudicating ground no. 50 of the assessee, we have come to the conclusion that the income from sale of shares/mutual funds/PMS etc. is taxable as capital gains instead of business income, then expenses incurred towards portfolio management fee and entry load PMS fee in respect of investment made in shares/mutual funds are not allowable as business expenditure and the same deserve to be allowed as deduction from income from capital gains as per provisions of the Act. Thus, ground no. 52 of the assessee is allowed by accepting alternate submission of the assesse and AO is directed to allow the impugned expenditure incurred by the assessee towards portfolio management fee and entry load PMS fee from the income under the head of capital gains in accordance with relevant provisions of the Act. Finally, ground no. 52 of the assessee is allowed."

15.0.1 We respectfully agree with the aforesaid findings of the co-ordinate Bench of the Tribunal. We also find that if the expenditure is not allowed as business deduction, then the same ought to be allowed as deduction under either clause (i) or clause (ii) of section 48 of the Act while computing income arising from investments under the head capital gains. The Tribunal in the aforesaid order has also accepted the aforesaid alternate plea of the

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assessee. We, however, further find that the nexus of the aforesaid expenditure with earning of exempt dividend cannot be completely ruled out. Accordingly, we accept the alternate contention of the assessee and direct the assessing officer to disallow part of the aforesaid expenditure in the ratio of dividend income to capital gains under section 14A and the balance expenditure to be allowed as deduction under section 48 from income declared by the assessee under the head capital gains. Such expenditure can be further apportioned by the assessing officer in the ratio of short term or long term capital gain declared by the assessee.

15.0.2 As a result the aforesaid ground of appeal is partly allowed.

16.0.0 Grounds of Appeal Nos.5-5.1 are against the disallowance of professional fee of Rs.14.74 lacs paid to resident of USA for want of TDS or alternatively as capital expenditure. It was submitted by the Ld. AR that during the relevant assessment year, the assessee made a payment of Rs 14.74 lakhs to Shri Tarun Khanna, professor from Harvard University and a resident of USA, towards consultancy charges for the service rendered in the scenario

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planning exercise initiated by the assessee company. Scenario planning exercise was aimed at identifying the key variables impacting the two-wheeler industry and establishing the early warning signal. It was submitted that Shri Khanna, after studying the two wheeler industry, had given advice to the assessee company relating to future prospects. The aforesaid payment was, however, remitted without taking any tax at source in India. It was further submitted that in the assessment order, the AO invoked the provision of Section 40(a)(i) and made the disallowance on the ground that the assessee had failed to deduct tax at source from aforesaid payment, which was taxable in India as "fee for technical services" under Section 9(1)(vii) of the Act. Alternatively, the assessing officer held that the aforesaid expenditure resulted in enduring benefit to the assessee through the study conducted by the vendor and, therefore, the expenditure was a capital expenditure, which was not allowable as revenue deduction under Section 37(1) of the Act. The Ld. AR further submitted that on further appeal before the Ld. CIT (A), the assessee argued exemption from deduction of tax at source under Indo-USA DTAA wherein it was

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argued that the payment was not taxable in India, which overrode the provisions of the Act including Section 9(1)(vii). The Ld. CIT (A), however, did not agree to contentions of the assessee and upheld the disallowance. It was submitted that the Ld. CIT (A) did not allow the benefit of Treaty on the ground that there was no exemption available in as much as the vendor had "made available" advice to the assesee, which was not exempt under the relevant provision of Treaty. It was submitted that the Ld. CIT (A), however, did not give any finding on the alternate contention of the AO regarding the expenditure to be capital or revenue in nature.

16.0.1 In support of the grounds of appeal, the Ld. AR argued that it is now settled by the decision of the Hon'ble Supreme Court in the case of G.E. India Technology Centre (P) Ltd. vs. CIT: 327 ITR 456, that if the payment is not taxable in India as per the provisions of Treaty, then the payer-assessee is not liable to deduct tax at source under section 195 of the Act. It was argued that the aforesaid payment was not taxable in India as per Article 12 of Indo-USA DTAA which was applicable to income earned by non-resident in the nature of "fees for included services". The Ld. AR submitted

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that, as per the said definition, income is taxable in India only if the recipient "makes available" its technical knowledge, experience, skill, know-how to the resident payer which enables the latter to apply the technology contained therein. If the recipient only enjoy the services, but is unable to apply know-how behind the service, then the income would not satisfy the test of "make available". Reliance for the aforesaid meaning was placed on the following decisions:

- CIT vs. De Beers India Minerals (P) Ltd: 346 ITR 467 (Karnataka)
- DIT vs. Guy Carpenter & Co Ltd: 346 ITR 504 (Del-HC)
- Raymond Ltd v. DCIT: 86 ITD 791 (Mumbai)
- Ernst & Young India: 323 ITR 184 (AAR)
- ICICI Bank Ltd. v. DCIT: (2008) 20 SOT 453 (Mum)
- Bharti AXA: 326 ITR 477 (AAR)
- Worley Parsons Services Pty Ltd (AAR No. 750 of 2007)

16.0.2 It was argued that the assessee had engaged the services of Shri Tarun Khanna merely for providing services in the scenario planning exercise, wherein the latter was required to advise on the key variables of the two wheeler industry. In no case and no circumstances, did Shri Tarun Khanna reveal or provide the details of researches to the assessee, in order to enable the latter to carry

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out and undertake such services in future on its own accord without availing services from him. It was submitted that the role and services provided by Shri Tarun Khanna were on principal-to-principal basis and did not lead to any transfer of specialised knowledge/know-how. It was submitted that since the consultancy services provided by Shri Tarun Khanna did not involve making available of any technology or technical knowledge to the assessee, the same cannot be characterized as FTS, within the meaning of Article 12 (4) of the DTAA and, therefore, not chargeable to tax in India. It was argued that the payment was exempt from tax in India as per the Article 12 of Treaty and in the absence of any permanent establishment or place of business of the foreign national in India, the payment was completely exempt and not taxable in India.

16.0.3 As regards the alternate contention of the assessing officer, it was argued that the payment made by the assessee company to Shri Tarun Khanna was capital expenditure resulting in enduring benefit is also not correct, since the consultancy services of Shri Khanna did not result in acquisition of any asset/intangible right in the nature of a capital asset, or enduring benefit increasing

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the profit earning apparatus of the company. The services were rendered in connection with the existing business of the assessee company and, therefore, benefit, if any, derived, formed integral part of the existing business/apparatus and not for addition thereto. Thus, the fees paid by the assessee to Shri Tarun Khanna cannot be characterized as capital asset. Reliance was placed on the decision of the Hon'ble Delhi High Court in assessee's own case, reported at 372 ITR 481 wherein disallowance of royalty paid to foreign JV partner on the similar issue was deleted on the ground that payment of royalty does not result in enduring benefit in the capital field to be treated as capital expenditure. It was submitted that the disallowance of fee paid by the assessee to Shri Tarun Khanna on the alternate ground of being capital expenditure also deserves to be deleted.

17.0 The Ld. CIT (DR) heavily relied upon by the orders passed by the AO and the Ld. CIT (A).

18.0.0 We have heard the rival contentions. We agree with the contentions of the Ld. Counsel of the assessee that the impugned payment did not "make available" technical know-how/

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knowledge of the foreign national to the assessee in India. The foreign national had only made available its findings of the scenario planning exercises conducted by him as a professional, but did not make available his knowledge, which was used for conducting the aforesaid exercise.The legal position in this regard is no longer *res integra* and is settled by catena of decisions referred to by the Ld. Counsel of the assessee supra with regard to the meaning of expression "make available" used in the Treaty. Useful reference can be made to the decision of the Hon'ble Delhi High Court in the case of DIT vs Guy Carpenter & Co Ltd: 346 ITR 504 (Del) referred supra. Accordingly, the impugned payment made was not taxable in India. Accordingly, the assessee did not commit any error in not deducting tax at source while making the remittance and, therefore, the same did not warrant any disallowance under Section 40(a)(i) of the Act.

18.0.1 We also do not find in force in the alternate contention of the assessing officer to treat the said payment as capital expenditure. The assessee is a large sized company already existing in the business of manufacturing two wheelers since past several

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years. The impugned expenditure constitutes a miniscule part of the total expenses incurred by the assessee in the course of carrying on the said business. The aforesaid expenditure did not result in providing any benefit of enduring nature leave alone the benefit by way of accretion to the profit earning apertures or in the capital field. The said expenditure is part and parcel of the existing business, incurred to gain some insight of the future outlook of the two-wheeler industry and, therefore, the same formed integral part of the existing business, which cannot, in our view, be sought to be capital in nature.

18.0.2 Accordingly, the disallowance made by the AO on both the aforementioned accounts was wrong in law and is, therefore, deleted. The grounds of appeal 5-5.1 stand allowed.

19.0.0 As regards Ground No. 6 to 6.5, the same relate to Transfer Pricing adjustment of Rs.7,05,334/- on account of international transaction of import of components. During the accounting year, the assessee, *inter alia,* entered into the international transaction of import of components aggregating to Rs. 177.35 crores. In the Transfer Pricing Study, the assessee applied

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TNMM for the purpose of benchmarking. The TPO, however, made a transfer pricing adjustment of Rs.6,57,195/- applying CUP method by comparing the prices of import of two components, viz., sprocket timing and sprocket camp, from the associated enterprises with that of the prices of components sourced locally from domestic suppliers, after their indigenization. The Ld. CIT (A) upheld the transfer pricing adjustment holding that the associated enterprise charged excessively high price for the two components which cannot be attributed to geographical variation.

19.0.1 The Ld. AR submitted that the assessee imported only those components/spare parts from the associated enterprise where such products were not available in the domestic market (throughout the relevant previous year) or could not be supplied by the domestic vendors in desired quantity and quality. The price paid to the local vendor(s), cannot, in such circumstances, be regarded as benchmark to determine the arm's length price for products imported from the associated enterprise. It was submitted that it needs to be appreciated that the domestic vendor(s) had limited capacity to supply products/components, which fell short of the

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assessee's requirements. The associated enterprise, on the other hand, was in a position to cater to the assessee's complete requirement of such products/components. The price paid to the local vendor(s) for part supply (for want of domestic vendor(s) not being able to supply the complete quantity) could not be compared with the price paid to the associated enterprise for the balance quantity secured. It was also pointed out by the Ld. AR that the aforesaid issue is covered in favour of the assessee by the decision of the Tribunal in the assessment year 2006-07. It was submitted that the Tribunal had held that if the goods were not available indigenously, then naturally the rate of indigenous goods cannot be applied for determining the ALP and had restored back the matter back to assessing officer to re-adjudicate the issue in the light of the evidence to be submitted by the assessee that goods were not indigenously available and the adjustment is liable to be deleted. It was pointed out that similar directions were given by the Tribunal in the assessment years 2002-and 2003-04, while setting aside the matter to the AO/TPO.

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19.0.2 It was further pointed out that the TPO, while giving effect to the order of the Tribunal for assessment year 2006-07, had deleted the transfer pricing adjustment by holding as under:

> *"5. During the proceedings, it was gathered that the assessee made purchase of only Rs. 81 crores from its AE out of the total purchase of Rs. 5911 crores. The process of indigenization was steadily progressing and the assessee has subsequently stopped purchasing these components when such parts were available indigenously as per the desired quality in sufficient quantity.*
>
> *6. In view of the above, no adverse inference is drawn on the purchase of the raw material, spare parts and components of Rs. 81,10,78,331/- from its AE."*

19.0.3 The Ld. AR also relied on the order passed by the Tribunal in assessment year 2004-05, wherein the Tribunal after taking into consideration the orders for the earlier years and the approach adopted by the TPO, had deleted similar transfer pricing adjustment.

20.0 The Ld. CIT – DR supported the orders of the authorities below.

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21.0.0 We have gone through the records. Co-ordinate Bench of the Tribunal in assessment year 2004-05 has held as under:

> *"On a careful consideration of the matter, we find that out of the total purchases of Rs.20,46,58,682/- from the domestic market, the assessee imported from associated enterprises the components worth Rs.22,83,666/- which does not constitute any significant portion thereof. We, therefore, having regard to the directions given by the Tribunal for earlier years and the approach adopted by the ld. AO while deleting the addition on this score, hold that the transfer pricing adjustment to the tune of Rs.7,05,334/- made by the TPO cannot be sustained and accordingly while allowing the ground delete the same.*

21.0.1 In view of the latest order of the Tribunal wherein this issue has been dealt with in detail, which we respectfully follow, we hold this issue in favour of the assessee and hold that the transfer pricing adjustment to the tune of Rs.7,05,334/- made by the TPO cannot be sustained and accordingly while allowing the grounds delete the same.

22.0 In the result, the appeal of the assessee stands partly allowed.

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6302/Del/2015 (Departmental appeal):

23.0.0 We now take up the appeal filed by the Revenue. Ground no. 1 relates to disallowance of net expenditure of Rs. 12507.73 lacs on account of Royalty and Technical Guidance Fee by holding the same to be capital in nature after allowing depreciation @ 25%. The Ld. AR submitted that the assessee has been manufacturing two wheelers in India since 1985 on the basis of technology provided by M/s Honda Motors Co. Ltd., Japan ("Honda") and pursuant to the agreement dated 2.06.2004 paid Royalty and Technical guidance fee aggregating to Rs. 16676.98 lacs to Honda. The assessing officer held the same to be capital in nature and made net disallowance of Royalty and Technical Guidance fee of Rs.12507.73 lacs after allowing depreciation @ 25%. It was further submitted that on appeal, the Ld. CIT (A) deleted the same following the appellate orders for the earlier assessment years.

23.0.1 The Ld Counsel for the assessee brought to our notice that coordinate bench of this Tribunal decided the issue in favour of the assessee for the AYs 2000-01 to 2003-04, 2006-07 to 2008-09, 2010-11 and 2011-12 by holding that the annual payment

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of Royalty/technical guidance fee was allowable as revenue expenditure. Similar approach was adopted by the revenue for the AYs 2009-10, 2010-11, 2011-12, 2012-13 and 2013-14 also. The Learned AR submitted that the order of the Tribunal relating to the AY 2002-03 has been confirmed by the Hon'ble Delhi High Court in assessee's own case reported as CIT vs. Hero Honda, 372 ITR 481. It was further submitted that even subsequently by order dated 31.07.2019, the Tribunal decided the issue in favour of the assessee for the AY 2004-05.

24.0 The Ld. CIT DR relied on the assessment order.

25.0 We have perused the record. In view of the fact that the issue has been consistently decided in favour of the assessee for more than 13 years which also stands upheld by the Hon'ble jurisdictional High Court, the same approach has to be adopted in this case also and, therefore, respectfully following the consistent view taken by the Tribunal and approved by the Hon'ble High Court, we uphold the findings of the learned CIT (A). Accordingly, we dismiss the ground of appeal raised by the Revenue.

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26.0.0 Ground no. 2 relates to disallowance of net expenditure of Rs.19,85,30,762/- incurred on account of model fee by holding the same to be capital in nature after allowing depreciation @ 25%. It was submitted that the assessee has been manufacturing two wheelers in India since 1985 on the basis of technology provided by M/s Honda Motors Co. Ltd., Japan ("Honda") and pursuant to the agreement dated 2.06.2004 had paid Model fee of Rs. 26,47,07,683/- to Honda. The assessing officer held the same to be capital in nature and made a net disallowance of Rs.19,85,30,762/- after allowing depreciation @ 25%. It was further submitted that following the appellate orders for the earlier years, the Ld. CIT (A) had deleted the disallowance made by the assessing officer.

26.0.1 The Ld. Counsel for the assessee pointed out that in assessee's own case for the AY 1996-97, the Tribunal took the view that the model fee paid by the assessee to Honda is allowable u/s 37(1) of the Act as revenue expenditure on the ground that the payment was only for right to use the technology/know-how and there was no ownership of the intellectual property which remained

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to be with Honda. This view of the Tribunal was challenged by the revenue but the Hon'ble Delhi High Court declined to entertain the appeal. The decision of the Hon'ble High Court was accepted by the Department and has become final, as no SLP has been filed there against. The Ld. Counsel further pointed out that in the assessee's own case for A.Y.1996-97, the Tribunal was pleased to allow model fee paid to Honda under section 37(1) of the Act as revenue expenditure. The said decision is reported as Hero Honda Motors Ltd. v. JCIT: 95 TTJ 782 (Del). The Hon'ble Delhi High Court did not entertain the appeal filed by the department on the said issue. The decision of the High Court was accepted by the Department and has become final, as no SLP has been filed there against. It was further submitted that the Tribunal in the assessment years 1997-98 and 1999-2000 allowed similar expenditure on payment of model fee, following the decision of the Tribunal for assessment year 1996-97. The Revenue's appeal against the said orders has been dismissed by the High Court. It was also submitted that in assessment year 1999-2000, appeal filed by the Revenue against the order of the High Court has been dismissed by the Hon'ble Supreme Court. It was

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further submitted that the Tribunal in assessee's case for assessment year 2001-02, vide order dated 27.03.2009 in ITA No. 2067/Del/2006, allowed the payment of model fee following the same order for assessment year 1996-97 and that the same treatment has been given by ITAT in respect of AY 2006-07, AY 2007-08, AY 2008-09, 2010-11 and 2011-12. It was further submitted that the Hon'ble High Court has affirmed the order passed by the Tribunal in assessment year 2000-01 to 2002-03 in 372 ITR 481. The Ld. AR further submitted that the Tribunal deleted similar disallowance of payment of model fee in AYs 2012-13, 2013-14 and that vide recent order dated 31.07.2019, the Tribunal in assessment year 2004-05, dismissed the appeal of the revenue holding that the issue has been decided in favor of the assessee company in the earlier years by the Tribunal which has been upheld by the Hon'ble High Court and Supreme Court. It was further submitted that subsequently the same view was upheld by the Tribunal and the Hon'ble High Court affirmed the same and that the Hon'ble Supreme Court also declined to interfere with the same. The Ld. AR also submitted that vide order dated 23.4.2019 for the

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Assessment Year 2009-10, the Tribunal reaffirmed the said view. Ld.

27.0 The Ld. CIT-DR relied on the assessment order.

28.0.0 We have perused the record. It is, clear that for quite a long time there is consistency in the view taken by the Tribunal as upheld by the Hon'ble jurisdictional High Court and Hon'ble Apex court. Therefore, the issue is no longer *res integra* and is in favour of the assessee. We uphold the findings of the Ld. CIT (A). Accordingly, we dismiss the ground of appeal raised by the Revenue.

29.0.0 Ground no. 3 relates to disallowance of export commission of Rs. 8,69,26,848/- paid to Honda Motor Company Ltd. (Honda), Japan under Section 40(a)(i) on ground that the same constituted royalty/fee for technical services on which the assessee was obliged to deduct tax at source under section 195 of the Act. Alternatively, the AO disallowed the aforesaid amount on the following grounds:

(i) The export agreement was for the benefit of Honda and not the assessee company, therefore, the payment of export commission was held to be not allowable under Section 37(1)

(ii) The export agreement was in the nature of license acquired by the assessee for the purpose of making export to other countries where Honda had exclusive privilege to operate. The

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license was for a longer period of time and, therefore, it constitutes an intangible asset. Accordingly, the expenditure was held to be a capital expenditure.

29.0.1 On appeal, the Ld. CIT (A) deleted the disallowance made by the AO by relying on the orders passed by the Tribunal in assessee's own case for assessment years 2006-07 to 2008-09.

29.0.2 The Ld. Counsel for the assessee submitted that issue is squarely covered in favour of the assessee by the order passed by the Tribunal in assessee's own case in AY 2006-07 wherein the Tribunal had held that by way of export agreement, Honda had only permitted the assessee to export the specified goods to the specified countries and the that assessee did not acquire any asset/intangible right in the nature of a capital asset. Further, the Tribunal held that no managerial, technical or consultancy services had been provided which were taxable in India and, therefore, no TDS was liable to be deducted. The Ld. AR submitted that the aforesaid order of the Tribunal has been affirmed by the Hon'ble High Court vide order dated 08.05.2017, passed in ITA No. 923/2015. The Ld. Counsel also pointed out that the Tribunal

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following the aforesaid order for the assessment year 2006-07, decided the issue in favor of the assessee in the assessment year 2007-08.

30.0 The Ld. CIT DR relied on the order of the AO.

31.0.0 We have perused the record. We find that the issue is squarely covered in favour of the assessee by the order passed by the Tribunal in AY 2006-07 wherein the Tribunal has held as under:

> *"71. We have carefully considered the arguments of both the sides and perused the material placed before us. While considering the adjustment made by the TPO in respect of export agreement, we have discussed both these agreements. The technical know-how agreement was entered into between the assessee and HMCL in the year 1984 which was renewed in the year 1994 and then in 2004. Under the technical know-how agreement, the assessee was permitted to manufacture, assemble, sell and distribute the products within the territory which was defined as Republic of India. Thus, since 1984 to 2004, the assessee was not allowed to export any product. The export agreement was entered into with HMCL only on 21st June, 2004 by which HMCL gave its consent for export of the goods to the designated countries on the payment of export commission. Therefore, the contention of the Revenue that cumulative effect of the two agreements is to be considered*

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cannot be accepted. Both the agreements were entered into in different parts of time, one in the year 1984 and, the other in the year 2004 and both the agreements operate under different fields. By the first agreement, HMCL provided technical know-how for manufacture and sale of two wheelers within the territory of India. By the export agreement, HMCL permitted the assessee to export the designated goods to the designated countries outside India. Therefore, both the agreements are to be interpreted independently. On the perusal of the export agreement, we are unable to agree with the Revenue that the export agreement is in the nature of royalty or fees for technical services. We find that the Authority for Advance Ruling has considered the issue of TDS on the export commission in the case of Spahi Project P.Ltd. (supra). ………………………

……………………………………………………………………………………

73. Similarly, 'fee for technical services' has been defined by way of Explanation-2 after Section 9(1)(vii) of the Income-tax Act. From a plain reading of the above definitions of 'royalty' as well as 'fee for technical services', it would be evident that the payment of export commission would not fall in any of the above definitions. By way of technical agreement, the assessee received the technical know-how to manufacture, assemble, sell and distribute the two wheelers within the territory of India. The payment made in pursuance to such agreement was royalty and has been treated by the assessee itself as royalty. By way of second agreement i.e. export agreement, HMCL permitted the

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assessee to export the specified two wheelers to the specified countries. Therefore, by export agreement, the assessee has not been transferred or permitted to use any patent, invention, model, design or secret formula. Similarly, HMCL, by way of export agreement, has not rendered any managerial, technical or consultancy services. In view of the above, we hold that export commission was neither royalty nor fee for technical services and, therefore, the assessee was not required to deduct tax at source on the payment of export fee. Once the assessee was not required to deduct the tax at source, it cannot be said that the assessee failed to deduct tax at source so as to apply Section 40(a)(ia).

74. While considering the disallowance made by the TPO by way of transfer pricing adjustment, we have discussed at length and have arrived at the conclusion that the export agreement was for the benefit of the assessee and not detrimental to the assessee. Therefore, the finding of the Assessing Officer that the expenditure incurred by the assessee by way of export agreement was not incurred for the purpose of business of the assessee cannot be upheld. We hold that the export commission paid by the assessee was for the purpose of assessee's business.

75. The Assessing Officer has alternatively held the payment of export commission to be capital expenditure. After considering the arguments of both the sides and the facts of the case, we are unable to accept this view of the Assessing Officer. By way of

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export agreement, HMCL has only permitted the assessee to export the specified goods to the specified countries, that too, subject to running payment of the export commission. The assessee has not acquired any asset or even the intangible right in the nature of a capital asset. The Assessing Officer has disallowed the royalty payment paid by the assessee by way of technical know-how agreement holding the same to be capital expenditure. From paragraph No.7 to paragraph No.29, we have discussed at length and have come to the conclusion that the payment of running royalty cannot be said to be capital expenditure. While doing so, we have also relied upon several decisions of Hon'ble Jurisdictional High Courts at pages 17 to 24. For the sake of brevity, we are not reproducing the same again but, we reiterate that the ratio of those decisions in the cases of Lumax Industries Ltd. (supra), Shriram Pistons & Rings Ltd. (supra), Sharda Motor Industrial Ltd. (supra), J. K. Synthetics Ltd. (supra), Climate systems India Ltd. (supra) and Munjal Showa Ltd. (supra) would also be applicable so as to arrive at the conclusion that the payment of running export commission paid as a percentage of export amount every year cannot be said to be capital expenditure. In view of the above, we delete the disallowance of export commission made by way of transfer pricing adjustment and also by way of general provisions of the Income-tax Act."

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31.0.1 The aforesaid order passed by the Tribunal in AY 2006-07 has further been affirmed by the Hon'ble Delhi High Court in ITA No. 923/2015. Considering the aforesaid, we find that the order passed by the Ld. CIT (A) is correct in law. We accordingly uphold the order of the Ld. CIT (A) and dismiss the ground of appeal raised by the Revenue.

32.0.0 Ground no. 4 relates to disallowance of Rs.5,18,00,000/- being provision for warranty made in respect of sales made during the year. The Ld. AR submitted that during the year, the assessee had claimed the deduction of Rs.5.18 crores on account of provision for warranty on motorcycles sold by the assessee during the year and such deduction had been claimed on mercantile basis, on the basis weighted average cost of the actual claims received in the past years. It was further submitted that based on the order for AY 2004-05, the AO disallowed the aforesaid provision holding the same to be an unascertained liability. The Ld. Ar further submitted that on appeal, the Ld. CIT (A), vide the impugned order, deleted the same holding that the issue is squarely covered in favour of the assessee by order passed by the Tribunal in

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assessee's own case for various assessment years and that the appeal filed by the Revenue has not been admitted by the High Court.

32.0.1 The Ld. Counsel for the assessee submitted that the issue is squarely covered in favour of the assessee by the following orders passed in assessee's own case:

- The Tribunal in the assessee's own case for assessment year 2002-03 following the decision of the Hon'ble Supreme Court in the case of Rotork Controls India Ltd. vs. CIT reported in 314 ITR 62, deleted the similar disallowance of provision of warranty made in that year.
- Similar disallowance was also made by the assessing officer in assessment year 2003-04. On further appeal, the disallowance was deleted by the Ld. CIT (A) vide order dated 31.01.2011 and the department did not file an appeal challenging the aforesaid action of the Ld. CIT (A).
- The Tribunal, following the orders for the assessment years 1999-2000 (ITA No. 5511/Del/2003), 1996-97 (ITA No. 3093/Del/2000) and 1997-98 (ITA No. 4028/Del/2003), deleted similar disallowance in assessment year 2006-07. No question of law was framed by the Hon'ble Delhi High Court in relation to the appeal preferred by the Revenue against the order of the Hon'ble Tribunal for the assessment year 1996-97.

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- Further, the disallowance of provision made for warranty was also deleted by the Tribunal in AY 2004-05, 2007-08 and 2008-09.

33.0 The Ld. CIT -DR relied on the order of the AO.

34.0.0 We have perused the record. We find that the Tribunal, vide recent order dated 31.07.2019 passed in assessment year 2004-05, dismissed the appeal of the revenue holding as under:

> *"36. Even for the Asstt. Year 2002-03, while following the decision of the Hon'ble Apex Court in the case of Rotork Controls India Ltd. vs CIT, 314 ITR 62, the Tribunal deleted the addition and subsequently, similar addition was disallowed in respect of Asstt. Years 1999-2000, 1996-97, 1997-98, 2006-07, 2007-08 to 2009-10 by several orders of the Tribunal, which are to be found place in the paper book. On a reading of these orders, we are of the considered opinion that the issue is fairly settled and there is no need to reopen the same for taking fresh view. Learned CIT (A) deleted the addition by following the appellate orders and, therefore, we do not find any perversity in such finding. We uphold the order of ld. CIT (A)."*

34.0.1 In view of the aforesaid, we find that the issue has been decided in favor of the assessee company by order passed by

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the Tribunal in the earlier years and since appeal filed by the Revenue has not been admitted by the High Court, the issue has attained finality. We find that the order passed by the CIT (A) is correct in law. We accordingly uphold the order of the Ld. CIT (A) and dismiss the ground of appeal raised by the Revenue.

35.0 In the result, the appeal of the Revenue is dismissed.

36.0 In the final result, the appeal of the assessee is partly allowed whereas the appeal of the Department is dismissed.

Order pronounced on 13th April, 2021.

Sd/-	Sd/-
(O.P. KANT)	**(SUDHANSHU SRIVASTAVA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 13.04.2021
Dragon

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI