
(1978) 07 CAL CK 0058

In the Calcutta High Court

Case No : Income-tax Reference No. 452 of 1974

Agarwal Hardware Works (P.) Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 18-07-1978

Acts Referred:

Income Tax Act, 1961 — Section 256(1)

Citation : (1979) 1 CompLJ 51 : (1980) 121 ITR 510

Hon'ble Judges : Sudhindra Mohan Guha, J;S.C. Deb, J

Bench : Division Bench

Advocate : R.N. Bajoria and Sanjay Bhattacharyya, for the Appellant;Ajit Sengupta and P. Mazumdar, for the Respondent

Judgement

Deb, J.—This reference u/s 256(1) of the I.T. Act, 1961, arises out of the assessment proceedings for the assessment year 1968-69.

2. The assessee is a private limited company. It carries on business of manufacture and sale, inter alia, of mild steel rods and bars used in reinforced concrete constructions or structures.

3. The assessee and M/s. Tor-Isteg Steel Corporation of Luxembourg (hereinafter referred to as "the foreign company") entered into an agreement dated February 15, 1967, In this agreement, the assessee has been described as the "licensee" and the foreign company as "Tor-Isteg".

4. It reads, inter alia, as follows :

" Article 1

Tor-Isteg grants to the licensee a full licence to use the following patents registered in Luxembourg relating to high tensile steel wires and/ or bars known as " Ribbed Tor-steel" for reinforced concrete constructions :

Article 2

During the period of this agreement:

(a) Tor-Isteg and the licensee shall make available to each other all information in their respective possession relating to the working of and improvements to each of the patents.

(b) Should the licensee or any of his employees, or any one else acting under any sub-licence granted by him with the written consent of Tor-Isteg make any improvement or addition to or discovery in respect of any of the patents, then the licensee will make a complete disclosure thereof, immediately that fact which comes to the notice of the licensee, to Tor-Isteg who will enjoy the full benefit thereof without any consideration therefore and utilise the improvement in any manner deemed fit by Tor-Isteg.

Article 3

(1) Tor-Isteg shall supply and disclose all technical, engineering and manufacturing information, including specifications, drawings, etc. (which may be in its possession) to the licensee as may be reasonably required by the licensee in order to use the patents to the best advantage.

(2) Tor-Isteg to this end will make available to the licensee the services of one or more European experts to assist in the production stage (rolling twisting, etc.).

(3) Tor-Isteg shall at its own cost do everything necessary to keep each of the patents in force and to obtain such extensions thereof from time to time as it can legally obtain.

Article 5

The licensee will use his best endeavours to exploit the patents to the maximum advantage. In this connection :

(d) the licensee shall fully endeavour to its utmost to promote the utilisation of ribbed tor-steel.

Article 6

(a) In consideration of the rights granted and technical assistance offered to the licensee in terms of this agreement the licensee shall pay Tor-Isteg a royalty and technical fee calculated as follows on an annual basis of production:--

1. Rupees nine per ton for the first 50,000 tons of ribbed tor-steel under the terms of this agreement.

2. Rupees seven per ton for quantities over 50,000 tons.

Article 8

(a) This agreement shall...continue for as long as any of the patents or any renewals thereof remain in force, and/or the licensee uses the trade mark RIBBED TOR-STEEL or any other registered trade mark of Tor-Isteg.

(b) Tor-Isteg shall have the right to terminate this agreement if from 1st January, 1968, the licensee has not produced at least 5,000 tons of ribbed tor-steel during any calendar year except for reasons beyond their control.

Article 9

This agreement shall automatically be terminated if any of the parties commits a breach of its obligations under this agreement and shall not have remedied that breach within one month after receipt of notice from the other party requiring it to remedy that breach.

Article 10

All steel produced under the terms of this agreement shall be sold under the trade mark "RIBBED TOR-STEEL". Tor-Isteg covenants that the licensee shall be entitled to use the said trade mark.

Article 11

If the patents cease to be in force in the Union of India, the licensee will continue the use of the registered trade mark mentioned in Article 10 and obtain the same services from Tor-Isteg mentioned in Article 3 against payment of a fee of 50% of those mentioned in Article 6, the repatriable amount mentioned therein being reduced accordingly by 50%.

Article 13

Tor-Isteg reserves the right to grant licence for the production of ribbed tor-steel in the Union of India to one or more prospective firms other than the licensee if and when Tor-Isteg considers it necessary in the interest of better utilisation of its patents."

5. In the relevant previous year the assessee paid Rs. 18,825 to the foreign company under Article 6(a) of the agreement. The ITO has disallowed the assessee's claim, namely, that this expenditure is allowable as a revenue expenditure. The AAC has allowed the claim but the Tribunal has rejected it.

6. I will now state the relevant facts found by the Tribunal. The foreign company has granted similar licences to five other Indian parties. "Ribbed tor-steel" is a new variety of twisted mild steel rod used in reinforced concrete constructions or structures. The assessee has not installed any new machinery for the purposes of manufacturing "ribbed tor-steel". It has manufactured those goods with the help of its existing machinery. And that this agreement was entered into by the assessee with a view to manufacture this new variety of goods.

7. In view of its aforesaid findings, the Tribunal held that the assessee has acquired an asset or an advantage of an enduring nature in the sense that it enabled the assessee to start a new line of business and, therefore, the aforesaid payment was not a revenue but a capital expenditure and was not an admissible deduction.

8. The assessee then made an application u/s 256(1) of the Act by formulating four questions. The Tribunal disallowed question No. 1 and after consolidating the remaining questions referred the same to this court in the following terms :

"Whether, on the facts and in the circumstances of the case and on a proper construction of the agreement between the assessee-company and Tor-Isteg Steel Corporation, the Tribunal is justified in holding that the sum of Rs. 18,825 paid by the assessee-company to the said foreign company by way of royalty and technical fee in terms of article 6(a) of the agreement is not revenue expenditure but capital expenditure and is, therefore, not an admissible deduction? "

9. As, in our opinion, the question should be answered in the negative, I would like to dispose of the cases cited at the Bar for convenience before dealing with the arguments of Mr. Ajit Sengupta, learned counsel for the revenue.

10. The case of Paterson Engineering Ltd. v. Duff [1943] 25 TC 43 deals with the express prohibitions under the Income Tax Act, 1918, of England and the case of British Borneo Petroleum Syndicate Ltd. v. Cropper [1968] 45 TC 201 ; [1969] 73 ITR 125 deals with a royalty agreement which was appropriated as a capital asset. These cases, therefore, do not assist the revenue.

11. It is unnecessary for us to discuss the cases of (1937) 5 ITR 511 , Handley Page v. Butterworth [1935] 19 TC 328, EVANS MEDICAL SUPPLIES LTD. Vs. MORIARTY (INSPECTOR OF TAXES)., Jeffrey v. Rolls-Royce Ltd. [1962] 40 TC 443 ; [1965] 56 ITR 580, Musker v. English Electric Co. Ltd. [1964] 41 TC 556 and Wolf Electric Tools Ltd. v. Wilson [1968] 45 TC 326, as these cases are on receipts and not on expenditure and the Supreme Court has considered some of these cases in Commissioner of Income Tax, Bombay Vs. Ciba of India Ltd., , and at page 700 of the report says thus :

"The nature of a receipt as capital or revenue is not always determinative of the nature of the outgoing in the hands of the person who pays it."

12. Similarly, no useful purpose will be served in discussing the guidelines stated in Atherton v. British Insulated and Helsby Cables Ltd. [1925] 10 TC 155 of the report and in John Smith and Son v. Moore (H.M. Inspector of Taxes) [1921] 12 TC 266 of the report, as the Supreme Court has already discussed them in Assam Bengal Cement Co. Ltd. Vs. The Commissioner of Income Tax, West Bengal, .

13. The cases of Commissioner of Income Tax (Central) Vs. Assam Oil Company Ltd., , INLAND REVENUE COMMISSIONERS Vs. BRITISH SALMSON AERO ENGINES, LTD., , Pingle Industries Ltd., Secunderabad Vs. Commissioner of Income Tax, Hyderabad, , K.T.M.T.M. Abdul Kayoom and Another Vs. Commissioner of Income Tax, and R.B. Seth Moolchand Suganchand Vs. The Commissioner of Income Tax, Delhi, were decided on the terms of the respective leases and the agreement which are totally different from the terms of the agreement before us.

14. Therefore, the aforesaid cases have no application to the facts and circumstances of the case before us and, apart from it, in *Gotan Lime Syndicate Vs. Commissioner of Income Tax, Rajasthan and Delhi*, the Supreme Court said that each case has to be decided on its own facts and on the legal principles applicable to it. Further, at page 727 of the report, the Supreme Court also says thus:

"It is not the law that, in every case, if an enduring advantage is obtained, the expenditure for securing it must be treated as capital expenditure."

15. A Division Bench of this court has followed the above extract in *Commissioner of Income Tax (Central) Vs. Hindusthan General Electrical Corporation Ltd.*. In this case, the assessee was a manufacturer of electrical motors. It entered into a collaboration agreement for the purpose of manufacturing electrical motors of "Simplex design" which the assessee was not hitherto manufacturing. Therefore, it was a new variety of goods of an allied nature which the assessee manufactured under that collaboration agreement. And by following the *Commissioner of Income Tax, Bombay Vs. Ciba of India Ltd.*, it was held that the assessee did not acquire any asset or any enduring benefit for its business and that the amount paid by the assessee for technical information, etc., was a revenue expenditure.

16. It may now be noted here that the ITO in rejecting the claim of the assessee has followed the *Mysore Kirloskar Ltd. Vs. Commissioner of Income Tax, Mysore*, which was decided before the *Commissioner of Income Tax, Bombay Vs. Ciba of India Ltd.*, was decided by the Supreme Court. Whereas the AAC in allowing the claim of the assessee has followed the *Commissioner of Income Tax, Bombay Vs. Ciba of India Ltd.*, and the *Commissioner of Income Tax (Central) Vs. Hindusthan General Electrical Corporation Ltd.*, according to the Tribunal, the facts of this case and the facts of *Hylam Ltd. Vs. Commissioner of Income Tax*, are the same. Therefore, by following the *Hylam* case, the Tribunal has disallowed the assessee's claim.

17. The Madras High Court in *Commissioner of Income Tax Vs. Lucas-T.V.S. Limited (No. 1)*, and in *Additional Commissioner of Income Tax and Another Vs. Southern Structurals Ltd.*, by following the *Commissioner of Income Tax, Bombay Vs. Ciba of India Ltd.*, has held that the respective assesseees did not acquire any asset or enduring benefit for their business and the amounts paid by them under the agreements were revenue expenditure.

18. In *Commissioner of Income Tax Vs. I.A.E.C. (Pumps) Ltd.*, the Madras High Court distinguished the case of *Mysore Kirloskar Ltd. Vs. Commissioner of Income Tax, Mysore*, and, by following the *Commissioner of Income Tax, Bombay Vs. Ciba of India Ltd.*, held that the assessee acquired a mere licence to use the patents, designs and the technical knowledge under the collaboration agreement and the entire amount paid by the assessee as licence fee was allowable as a revenue expenditure.

19. In Mysore Kirloskar Ltd. Vs. Commissioner of Income Tax, Mysore, it was held that the initial and lump sum payment under the first limb of Clause 12(i) of the collaboration agreement for supply of technical know-how for manufacturing two types of new machines was a capital expenditure. As the agreement did not provide for the return of the technical know-how, it was held that the assessee was entitled to use the technical knowledge even after the termination of that agreement and that the said "knowledge was acquired for manufacturing new types of machines, i.e., to bring into existence new business".

20. The terms of that agreement are not fully set out in the judgment. It is not a case on sale or assignment of or any licence to use any registered patent, design or trade mark. It relates to use of technical know-how for 15 years, provided the terms of that agreement were carried out by the assessee. Further, the amount payable under the first limb of Clause 12(i) of that agreement was an initial, predetermined and lump sum amount and that the said expenditure was to be made "not only once and for all" but was also not related to the annual turnover of the assessee's business.

21. Therefore, the Mysore Kirloskar Ltd. Vs. Commissioner of Income Tax, Mysore, was decided on different facts. But we will again come back to it as it was followed by the Andhra Pradesh High Court in Hylam Ltd. Vs. Commissioner of Income Tax, , in which the assessee was a manufacturer of copper laminates. Under the first collaboration agreement the English company granted to the assessee a non-assignable licence to use its registered patents to manufacture an allied product, namely, copper-clad laminates. Under that agreement royalty payable by the assessee to the English company was based on a certain percentage of the annual turnover of the assessee subject to a ceiling of ₹ 5,000. The second agreement relates to supply of technical knowledge for manufacturing those goods for which the consultancy fee payable by the assessee was based on a certain percentage of the net annual sales of the products during the term of that agreement which did not provide for the return of the technical information, etc., after its termination. It was held that the amounts paid as royalty and consultancy fee were capital expenditure.

22. Several grounds were given for the aforesaid conclusion. The first ground proceeds on the basis that the assessee had acquired the business in patents of the English company in India and that the English company had parted away with its capital assets, namely, the patents and the technical knowledge, for ever in favour of the assessee and that the assessee had acquired those assets or enduring benefit for its new business. In other words, the first ground is based on an outright transfer of the business including the patents and the technical know-how by the English company in favour of the assessee.

23. But with due respect we are unable to agree with it. By reading the terms of the agreements set out in that judgment it appears to us that the English company did not transfer the said business to the assessee and that the English company granted a mere licence to the assessee to use the patents and the

technical knowledge for manufacturing those goods. Further, both the amounts payable under the agreements were solely related to the annual turnover of the assessee and were not predetermined amounts and were not even related to any capital value of any asset.

24. Furthermore, the case of Commissioner of Income Tax, Bombay City I Vs. Devidas Vithaldas and Co., , which was followed in Hylam Ltd. Vs. Commissioner of Income Tax, has been reversed by the Supreme Court and its judgment is reported in Devidas Vithaldas and Co. Vs. Commissioner of Income Tax , Bombay, 25. The second ground in Hylam Ltd. Vs. Commissioner of Income Tax, is based on the fact that the second agreement did not provide for the return of the technical information, etc., after the termination of that agreement and, therefore, it was held that the assessee-company was entitled to use the technical know-how after the end of the period of the agreement. But with due respect we are unable to agree with it for the reasons stated later on.

26. Then, by following the Mysore Kirloskar Ltd. Vs. Commissioner of Income Tax, Mysore, it was held that the special knowledge relating to the patented processes was not in respect of any product which Hylam company was manufacturing, "but it related to a new product" and "although allied in nature to the products that were being manufactured" by Hylam company, it was an "acquisition of an advantage or an asset for the extension" of its business. The Commissioner of Income Tax, Bombay Vs. Ciba of India Ltd., was distinguished on several grounds and one of them was that the technical know-how in Ciba case was with regard to the same products which Ciba of India was already manufacturing, whereas in Hylam Ltd. Vs. Commissioner of Income Tax, , "the special knowledge relates to a new product which" Hylam company "was not hitherto manufacturing ".

27. But in Acc-Vickers Babcock Ltd. Vs. Commissioner of Income Tax, Bombay City II, of the report, the Bombay High Court did not agree with the aforesaid distinction and rightly pointed out that the technical know-how also extended to new products which Ciba of India was to manufacture after the agreement came into operation.

28. In Commissioner of Income Tax, Bombay Vs. Ciba of India Ltd., , after construing the agreement, the Supreme Court held that the Swiss company has neither assigned its rights under the patents or trade marks to the assessee nor has made any attempt to part with the technical knowledge absolutely in favour of the assessee.

29. The Supreme Court also held that the assessee was a mere licensee, for a limited period, of the Swiss company with the right to use the patents and trade marks of that company and that under the agreement the assessee acquired a mere right to receive the technical information, etc., for the purpose of carrying on its business as a manufacturer and dealer of pharmaceutical products for a limited period and that the Swiss company did not part with any assets of its

business by making the technical knowledge available to the assessee.

30. The Supreme Court further held that even for the period of the agreement the assessee was not entitled exclusively to use the patents and trade marks of the Swiss company and that although the licence was for a period of five years, it was liable to be terminated in certain eventualities even before the expiry of the period.

31. The Supreme Court also held that the object of that agreement was to obtain the benefit of the technical assistance for running the business of the assessee and that the licence granted to the assessee was subject to the rights actually granted or which might be granted after the date of the agreement to other persons by the Swiss company. It was also held that the assessee was expressly prohibited from divulging confidential information to third parties without the consent of the Swiss company.

32. In view of the aforesaid facts emerging from the said agreement and that the stipulated payment was recurrent and dependent upon the sale and that too only for the period of the agreement, the Supreme Court held that the assessee did not acquire any asset or an enduring benefit for its business and that the amount paid by the assessee under that agreement to the Swiss company was a revenue expenditure.

33. It may now be noted here that Ciba of India was incorporated on December 13, 1947, as a subsidiary company of the Swiss company. On December 17, 1947, the agreement was entered into between Ciba of India and the Swiss company and thereafter on January 1, 1948, the pharmaceutical section of the Swiss company was taken over by Ciba of India and then it went into production.

34. Therefore, those products, as rightly pointed out by their Lordships of the Bombay High Court, were new products so far as Ciba of India was concerned and yet the Supreme Court did not even think it fit to take that factor into account for determining the said issue. Similarly, in Commissioner of Income Tax (Central) Vs. Hindusthan General Electrical Corporation Ltd., , although the product was a new product, the Division Bench of this court did not find it necessary to take it into consideration for deciding the same question. Therefore, a new product of an allied nature cannot be regarded as a decisive factor.

35. In Commissioner of Income Tax Vs. Associated Electrical Industries (India) Private Ltd., , the assessee was a manufacturer of electrical motors. It entered into a collaboration agreement. No new machinery was installed by the assessee for the purpose of manufacturing the electrical motors for which the design was obtained and the manufacture was done with the help of the existing machinery. New types of electrical motors were manufactured and, therefore, Hylam Ltd. Vs. Commissioner of Income Tax, was cited. But without saying anything on that case it was held by a Division Bench of this court that the amount paid by the assessee to the foreign collaborator under that agreement was a revenue expenditure with a finding that those motors were mere improvements over the

earlier motors manufactured by the assessee.

36. In our opinion, the question as to whether an assessee is carrying on the same business or has started a new line of business by adding a new product of an allied nature is a mixed question of law and fact. In *Setabgunj Sugar Mills Ltd. Vs. The Commissioner of Income Tax, Central, Calcutta*, of the report, the Supreme Court says :

"The question whether, on the application of the settled tests, different ventures carried on by an individual or a company form the same business is a mixed question of law and fact."

37. The Supreme Court has also laid down certain guidelines to determine that question not only in the aforesaid case but also in the causes of *Commissioner of Income Tax, Madras Vs. Prithvi Insurance Co. Ltd.*, , *Produce Exchange Corporation Ltd. Vs. Commissioner of Income Tax (Central), Calcutta*, and *The Standard Refinery and Distillery Ltd. Vs. Commissioner of Income Tax, Calcutta*, . Those guidelines or tests are too well known to be restated here. And yet they were overlooked in *Mysore Kirloskar Ltd. Vs. Commissioner of Income Tax, Mysore*, and in *Hylam Ltd. Vs. Commissioner of Income Tax*, .

38. An assessee may carry on a number of different ventures but merely on that ground it cannot be said that he is carrying on different businesses. Similarly, a mere inclusion of a new type of goods of an allied nature in his existing business cannot automatically lead to a conclusion that he has started a new line of business or has extended his existing business. Take the case of a shopkeeper : he sells khadi dhoties, then he sells khadi sarees too. On this fact alone it cannot even be suggested that he has either started a new line of business or has extended his business.

39. Further, the collaboration agreements of this nature are normally, if not universally, entered into with a view to manufacture goods. The quality of the goods produced by the use of technical know-how must always be different from the quality of the goods produced earlier without the aid of the technical know-how. In view of the qualitative changes in the goods, both the products cannot be the same and in that sense the goods produced with the aid of the technical know-how must be a new product.

40. A simple illustration will make the position clear. The Waterman fountain pens manufactured before the second world war are not the same fountain pens manufactured nowadays by that company. Their quality has completely changed and in that sense they are new products. And yet on no commercial principle can it be said that the Waterman company by manufacturing new fountain pens by utilising the scientific developments and the technical knowledge has either extended its business or has started a new line of business.

41. It is beyond dispute that no one is permitted to use the patents or designs without the licence of their owner. Generally speaking, the technical know-how

for the use of the patents or designs is like a manual or a guidebook to manufacture the goods in accordance with the patented inventions or the designs. The goods produced earlier must be different from the goods produced subsequently by the use of the patents, designs and the technical know-how. It must be a new product but merely on that ground it cannot even be urged that a new line of business has been started or an existing business has been extended.

42. The matter has to be approached on commercial principles and the guidelines laid down by the Supreme Court in the aforesaid cases which are based on the classical saying of Mr. Justice Rowlatt in *Scales v. George Thompson & Company Ltd.* [1927] 13 TC 83 of the report, which is too well known to be cited here.

43. For all the foregoing reasons and with due respect we are not in agreement with the second ground in *Mysore Kirloskar Ltd. Vs. Commissioner of Income Tax, Mysore*, and the corresponding ground in *Hylam Ltd. Vs. Commissioner of Income Tax*, .

44. As already stated, it has been held by the Tribunal that the facts in *Hylam* case and the instant case are same because *Hylam* company was already manufacturing copper laminates and started manufacturing copper-clad laminates which was an allied product and the assessee before us was already manufacturing twisted mild steel rods used in reinforced concrete constructions or structures and the "ribbed tor-steel" is a twisted mild steel rod used in reinforced concrete constructions or structures. In other words, the finding of the Tribunal is that "ribbed tor-steel" is an allied product and that the assessee has manufactured this allied product with the help of its existing machinery. Therefore, merely because it is a new variety of goods, it cannot be said that the assessee has started a new line of business. And this disposes of one of the main arguments of Mr. Sengupta.

45. In *Fenner Woodroffe and Co. Ltd. Vs. Commissioner of Income Tax*, , the Madras High Court has followed the *Mysore Kirloskar Ltd. Vs. Commissioner of Income Tax, Mysore*, and the *Hylam Ltd. Vs. Commissioner of Income Tax*, . No patent or trade mark was involved in this case. It was a case of supply of technical know-how and the agreement did not provide for return of such knowledge after its termination. It was held that the assessee was entitled to use the technical knowledge forever and has, therefore, acquired an asset or enduring benefit for its business and that the remuneration paid by the assessee was a capital expenditure.

46. Now, in *Commissioner of Income Tax Vs. Indian Oxygen Ltd.*, , the collaboration agreement did not provide for the return of any information, processes, etc., after the termination of the agreement. By citing the *Fenner Woodroffe and Co. Ltd. Vs. Commissioner of Income Tax*, , it was argued that the assessee was entitled to use the technical know-how after the termination of that agreement and has, therefore, acquired an enduring benefit for its business and accordingly the amount paid by the assessee for technical know-how was a

capital expenditure. But, speaking for this court, I rejected those arguments.

47. It may be noted here that there is a typing mistake in my said judgment which should be read as "Clause 10(c)" in place of "Clause 10(b)" of the agreement in the Fenner Woodroffe and Co. Ltd. Vs. Commissioner of Income Tax, which was distinguished as then advised. Mr. Sengupta submits that we should not differ from this case including the Mysore Kirloskar Ltd. Vs. Commissioner of Income Tax, Mysore, and the Hylam Ltd. Vs. Commissioner of Income Tax, . But we are not impressed by his argument for the reasons already given in rejecting the arguments in the Commissioner of Income Tax Vs. Indian Oxygen Ltd., and also for the reasons given later on.

48. Almost every commercial transaction is entered into for the mutual benefit of both the parties. And yet each case has to be decided on its own facts and the legal principles involved in it. Further, the aim and object of the expenditure would determine its character, namely, whether it is a capital or a revenue expenditure as said by the Supreme Court in the case of Assam Bengal Cement Co. Ltd. Vs. The Commissioner of Income Tax, West Bengal, .

49. The matter has to be looked at from the commercial point of view and the agreement before us has to be read as a whole in order to see whether by incurring the expenditure under Article 6(a) of the agreement the assessee has acquired a mere licence to use the patents, technical knowledge and the trade mark for the purpose of producing profits in the conduct of its business or whether the assessee has acquired an asset or an advantage for the enduring benefit of its business. If it falls within the first category, the payment must be regarded as a revenue expenditure ; if, on the other hand, it falls within the last category, the (expenditure may be regarded as a capital outlay in the absence of any special circumstances.

50. The CBDT has also taken the same view in Circular No. 21 of 1969 dated July, 1969--See [1969] 73 ITR 19, after the Commissioner of Income Tax, Bombay Vs. Ciba of India Ltd., was decided by the Supreme Court. It may also be noted here that the aforesaid circular does not even say anything about any new variety of an allied product manufactured under any collaboration agreement and that the Tribunal has overlooked this circular in the same way it was overlooked in the Hylam Ltd. Vs. Commissioner of Income Tax, and in the Fenner Woodroffe and Co. Ltd. Vs. Commissioner of Income Tax, .

51. Now, Mr. Sengupta argues that Rs. 18,825 paid by the assessee to the foreign company under Article 6(a) of the agreement is a capital receipt in the hands of the foreign company and, therefore, this expenditure is not a revenue expenditure in the hands of the assessee and accordingly the source or manner of this payment is of little consequence.

52. In view of the first sentence of Article 12 and the provisions of Articles 2(b), 5(d), 8(a) and 11 of the agreement which is for an indefinite period and does not provide for the return of the technical knowledge after the termination of the

agreement, he argues that the assessee is entitled to use the patents, trade marks and the technical knowledge for an indefinite period and has thereby brought into existence these assets or advantages for the enduring benefit of its trade by incurring this expenditure and has also become the owner of these assets and, therefore, this amount paid by the assessee to the foreign company under Article 6(a) of the agreement is a capital expenditure.

53. Mr. Sengupta further argues that the exploitation of the patents and the technical knowledge cannot help the assessee in running its business carried on by it before entering into this agreement and, therefore, the expenditure incurred by the assessee under this article has not been incurred for running its business or working it with a view to produce profits but has been incurred with a view to acquire a right to produce and sell these goods and, therefore, it should be held that this expenditure is not a revenue expenditure.

54. But we are not impressed by his arguments. The nature of this receipt in the hands of the foreign company is not a relevant consideration. That apart, this amount cannot be regarded as a capital receipt in its hands for the reasons stated in the next paragraph. Further, the amount payable under Article 6(a) is not an initial or a lump sum or a predetermined amount and it is not to be paid "once and for all". Therefore, its source or mode of payment cannot be ignored by us.

55. To us it appears that the patents, the technical knowledge for the use of these patents and the trade mark are the trading assets of the foreign company. The foreign company has not sold or assigned these assets to or in favour of the assessee. It has not parted away with these assets for ever in favour of the assessee. The foreign company has not wound up its business in India. It has kept these assets for using them as its stock-in-trade under Article 13 of the agreement and has also granted similar licences to five other Indian parties. Therefore, this amount cannot be regarded as a capital receipt in the hands of the foreign company.

56. The assessee has not acquired any capital asset under this agreement. The foreign company has granted a mere licence to the assessee to use the patents and the trade mark under Articles 1 and 10 of the agreement. The technical information, etc., to be supplied to the assessee under Article 3 of the agreement is like a manual or a guidebook for using these patents. The assessee has acquired a mere non-exclusive licence to use these assets belonging to the foreign company during the period of the agreement. Further, the agreement does not provide that the assessee shall be entitled to use the patents, technical knowledge and the trade mark after the termination of the agreement and, therefore, the assessee has no right to use them after the termination of the agreement.

57. The assessee has no power to grant sub-licence without the consent of the foreign company under Article 2(b) of the agreement. The foreign company has

retained its proprietary rights and the interests in these assets and, therefore, without its consent the assessee cannot divulge the secrets of the technical knowledge to others.

58. The benefit of any improvement or additional discovery relating to the patents shall be enjoyed by the foreign company under Article 2(b) of the agreement without making any payment and the foreign company will be entitled to use them in any manner it may deem fit. Under Article 4 the foreign company is to do everything to keep the patents in force and to obtain extensions thereof at its own cost. These two articles read together along with the other relevant articles conclusively show that the assessee has not become the owner of the patents or the technical knowledge and, as already stated, the technical knowledge here is like a manual or a guidebook for using the patents.

59. The agreement not being for any fixed period can be terminated by either party at any time by giving a reasonable notice to the other party. Further, Article 9 provides for an automatic termination of the agreement. Moreover, Article 8(b) overrides Article 8(a) of the agreement, because under Article 8(b) the foreign company is entitled to terminate the agreement if the assessee does not produce at least 5,000 tons of these goods during any calendar year except for the reasons beyond its control. In view of this right of the foreign company under Article 8(b) it cannot be said that the assessee has become the owner of these assets, because, as already stated, the assessee has no right to use them after the termination of this agreement.

60. The assessee is not to pay anything for the patents after they cease to be in force in India as stated in Article 11 of the agreement. And if thereafter the assessee uses the trade mark and obtains the technical services and assistance mentioned in Sub-articles (2), (3), (4) and (5) of Article 3, it has to pay 50% of the fees mentioned in Article 6(a) as stated in Article 11 of the agreement which clearly shows that the payment under Article 6(a) is related solely to the use of the patents, the trade mark and the technical knowledge, services and assistance to be received by the assessee from the foreign company.

61. Article 11 also shows that for the use of the patents, technical knowledge and the trade mark as a licensee the assessee is to make an annual recurring payment on the basis of the annual production of these goods. Further, the opening sentence of Article 12 makes it abundantly clear that the agreement relates only to the production and sale of these goods under the patents in India.

62. The foreign company is the owner of the patents, the technical know-how and the trade mark and these assets are its trading assets. The assessee is merely entitled to use them in terms of the agreement as a licensee of the foreign company and that too not exclusively even during the period of the agreement. And the moment the agreement will stand terminated the assessee will not be entitled to use them any further.

63. Under no circumstances the assessee can return the technical knowledge

acquired by it to the foreign company, for, it is elementary that any knowledge once acquired can never be returned although the printed materials from which such knowledge is acquired may be returned. But this technical knowledge, as already stated, cannot be used by the assessee after the termination of the agreement, because under the agreement the assessee has not acquired any right to use them after its termination.

64. Further, to hold that the assessee is entitled to use the technical know-how after the termination of the agreement is to make a new contract between them by taking away this asset from its owner, namely, the foreign company, which is wholly unwarranted by law. Moreover, if the agreement is killed by its breach or termination, the right to use the technical knowledge is also extinguished.

65. And it may now be noted here that all the foregoing principles were overlooked in Mysore Kirloskar Ltd. Vs. Commissioner of Income Tax, Mysore, , in Hylam Ltd. Vs. Commissioner of Income Tax, and in Fenner Woodroffe and Co. Ltd. Vs. Commissioner of Income Tax, . And these are only some of the reasons for overruling the argument of Mr. Sengupta that we should follow these decisions.

66. Now, the agreement before us is for an indefinite period. The licence granted to the assessee to use the patents, technical knowledge and the trade mark is also for an indefinite period and it is terminable at any time. Where an advantage or benefit is terminable at any time at the volition of either party, it can never be regarded as an enduring advantage or benefit in the way a capital asset endures.

67. Further, Article 6(a) does not provide for payment of any lump sum amount. The expenditure under this article is not to be made "once and for all". It is also not an initial or a predetermined amount. This article does not also provide for payment of any maximum or minimum amount. If more is produced, more is payable. If less is produced, less is payable. And if nothing is produced, nothing is payable.

68. In other words, the amount payable under this article is not only an indefinite amount but is also of a recurring nature and is solely related to and based on the annual production of the goods. It is not at all related to any fixed or capital sum or the capital value of any asset. This article, in our opinion, excludes the very idea of a capital outlay. Therefore, the expenditure under this article, cannot be regarded as a capital expenditure under any circumstances.

69. The question now is whether this expenditure can be regarded as revenue expenditure. Article 6(a) is the only article which provides for payment and that too only of two sums, namely, (i) royalty, and (ii) technical fee. By the payment of royalty the assessee, as already stated, has not acquired any capital asset nor has brought into existence any enduring benefit or advantage for its business. And it has paid the technical fee in consideration of the technical assistance and services received by it from the foreign company.

70. Further, by reading the agreement as a whole we are of opinion that the aim and object of this expenditure is not to bring into existence any asset or enduring advantage or benefit for the assessee's business but to produce profits in the conduct of its business. The assessee has acquired a mere non-exclusive licence to use these assets belonging to the foreign company and that too is terminable at any moment on a reasonable notice by either party or by the foreign company in terms of the article already mentioned.

71. Moreover, an expenditure incurred for acquiring a mere benefit is not a capital expenditure. And on no commercial or legal principle it can be said that by the payment of this amount the assessee has acquired or brought into existence an asset or an enduring advantage or benefit for its business. The assessee has incurred this expenditure wholly and exclusively for the purposes of its business, namely, to produce profits in the conduct of its business and this expenditure, not being of a capital nature, must be regarded as a revenue expenditure.

72. We, accordingly, answer the question in the negative and in favour of the assessee.

73. Having regard to the facts and circumstances of the case and the valuable assistance rendered at the Bar, we do not propose to make any order as to costs.

Sudhindra Mohan Guha, J.

74. I agree.