* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **INCOME TAX APPEAL NOS. 694/2011, 696/2011, 698/2011, 699/2011, 625/2012 & 633/2012**

Reserved on : 10th November, 2014
Date of decision: 3rd February, 2015

COMMISSIONER OF INCOME TAX-IV ..... Appellant

Through Mr. Rohit Madan, Mr. P. Roy Chaudhury & Mr. Ruchir Bhatia, Advocates.

versus

HERO HONDA MOTORS LIMITED .....Respondent

Through Mr. Ajay Vohra, Sr. Advocate with Ms. Kavita Jha & Mr. Vivek Bansal, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J.:

This common decision/judgment would dispose of the present set of appeals filed by the Revenue relating to Assessment Years 2000-01, 2001-02 and 2002-03. These appeals impugned the order dated 16th April, 2010 passed by the Income Tax Appellate Tribunal (Tribunal, for short). The substantial question of law required to be decided and admitted for hearing by order dated 20th April, 2012 reads as under:-

> "Whether the Income Tax Appellate Tribunal was right in holding that the payment made to Honda Motors Limited under the "know how" agreement dated 2.6.1995 is revenue expense and not partly or wholly capital expense?"

2. The respondent-assessee Hero Motocorp Limited, earlier known as Hero Honda Motors Limited, was a joint venture between the Hero Group

and Honda Motorcycle Company Limited, Japan (Honda, for short) f manufacture and sale of motorcycle using technology licenced by Honda. The respondent-assessee and Honda had entered into a technical collaboration contract dated 24th January, 1984, which was revised by second and third supplementary agreements. These agreements were valid for a period of ten years. The respondent-assessee and Honda thereupon entered into another agreement dated 2nd June, 1995 called 'licence and technical assistance agreement' and we are concerned in the present appeals with the payments made under the said agreement and the question raised is whether royalty paid under the said agreement to Honda is wholly or partly capital expenditure. Another contention raised by the Revenue is that the model fee, which was separately payable under the agreement dated 2nd June, 1995 was capital expenditure. The third contention raised by the Revenue relates to payment of technical guidance fee and whether the same was capital expenditure. The last two items arise for consideration in Assessment Year 2000-01, but these aspects have not been raised in the appeals preferred for the Assessment Years 2001-02 and 2002-03.

3. Before we critically examine the relevant clauses of the 'licence and technical assistance agreement' dated 2nd June, 1995, it would be punctilious to elucidate the difference between capital and revenue expenditure with reference to acquisition of technical information and know-how. A frequent and primary test adopted to differentiate between capital and revenue expenditure is the enduring nature test. When an assessee incurs expenditure which gives enduring benefit in the capital field, as distinct from expenditure of concurrent and reoccurring nature in revenue field, it is treated and regarded as capital expenditure. Albeit, said test is applied on the basis of commercial principles and not as a strait-

jacket formula. ***Empire Jute Company Limited versus CIT***, (1980) 1 ITR 1 (SC) exemplified that even if expenditure is incurred for obtaining an advantage of enduring benefit, the said test would break down when the nature of advantage considered in a commercial sense merely facilitates the assessee's trading operations or enables the management to conduct assessee's business more efficiently or more profitability, while leaving the fixed capital untouched. Such expenditure would be on revenue account, though the advantage may endure for an indefinite future. The test of enduring benefit is, therefore, not unconditional or conclusive test; it cannot be applied impetuously and mechanically without regard to the particular and realistic *terra firma*. The conclusion must be practical, common sensical and down to earth and not prosaic, academic and theoretical.

4. In the facts of the present case, we have to consider whether the expenditure incurred on acquisition or right to technical information and know-how would satisfy the enduring benefit test in the capital field, or the right acquired had enabled the assesse's trading and business apparatus, in practical and commercial sense.

5. Technical information and know-how are intangible and have unique characteristics as distinct from tangible assets. These are acquired by a person over a period of time or acquired from a third person, who may transfer ownership or grant a licence in the form of right to use i.e. grant limited rights, while retaining ownership rights. In the latter case technical information or know-how even when parted with, the proprietorship is retained by the original holder and in that sense what is granted to the user would be a mere right to use and not transfer of absolute or complete ownership.

6. The aforesaid aspect and its relevance in determining whether t expenditure was to acquire technical information and knowhow in capital or revenue field was elucidated by the Supreme Court in ***Commissioner of Income Tax, Bombay City I versus Ciba India Limited***, (1968) 69 ITR 692 (SC). This judgment pronounced on 15th December, 1967 is incessantly cited and applied to decide this question/issue. In the said case, the assessee company had procured know-how in the form of processes, formulae, scientific data, working, prescription and other intellectual property rights developed by a Swiss Company, to produce licensed preparations and to promote their sale in India. Inspite of the fact that the Swiss Company had granted to the Indian assessee "full and sole right and licence" in the territory of India under the patents listed in Schedule-I, to make use, exercise and vend the inventions referred to therein and to use the trade marks set out in Schedule-II in the territory of India, the Supreme Court held that what was conferred was a mere right to use. The Indian assessee, it was observed, was not entitled to exclusive rights to patents, trademarks etc. As per the agreement, proprietary information was not to be divulged to third parties without consent. The rights granted enabled access to the technical knowledge and experience with right to use patents and trademarks for a limited period. The Swiss Company did not part with any asset of its business, nor did the Indian assessee acquire any asset or advantage of enduring nature. The right empowered the Indian assessee to draw for the purpose of carrying on its business as a manufacturer and rely upon the technical knowledge of the Swiss Company. There was no attempt to part with technical knowledge absolutely in favour of the Indian assessee. It was not a case of transfer of intellectual rights once for all. Thus, the expenditure incurred was revenue in nature.

7. The aforesaid legal position finds resonance in subsequent decisio of the Supreme Court in ***CIT vs. British Indian Corp. Ltd.*** (1987) 165 ITR 51 (SC), ***CIT vs. Indian Oxygen Ltd.*** (1996) 218 ITR 337 (SC) and ***CIT vs. Wavin (India) Ltd.*** (1999) 236 ITR 314 (SC). These were not cases of outright sale of technical information and know-how and what was granted was non-exclusive or non-transferrable right to use. In ***Indian Oxygen*** (supra), the Indian company was not entitled to use the know-how after termination of agreement.

8. Absence of stipulation as to duration of time for use of know-how etc., and whether it would be determinative and crucial, when we answer whether it is a case of outright transfer or mere access or right to use, was considered by the Delhi High Court in ***Shriram Refrigeration Industries Ltd. vs. CIT*** (1981) 127 ITR 746 (Del). In the said case, the Indian assessee had been granted non-divisible, non-transferable and non-assignable licence in respect of technical knowledge and secret process for manufacture of sealed compressors, without right to sub-licence except with the consent of the grantor. The agreement, it was observed, contemplated that it would continue unless otherwise terminated at end of 10 years and at end of succeeding 5 year period. This period of 5/10 years was considered to be not unduly long as to warrant an inference that some lasting advantage was obtained. Significantly, the division bench held that once conclusion was reached on the difference in principle between a payment made for acquisition of assets and a payment made for only use of intellectual property rights, the period of use pales into insignificance. Payment made for use of an asset for however long a period, it will be only payment of revenue nature. Similarly, whether payment was lumpsum or periodical cannot by itself in the absence of other facts, help decide whether the agreement was for acquisition of a capital

asset or an enduring advantage. But the nature and character of the ass acquired, whether it is permanent or everlasting or merely enables an assessee to run its business more efficiently, is determinative. In the said case, technical knowledge was made available without absolute acquisition of any knowledge or asset and therefore payment, it was held, was revenue in nature.

9. In ***Triveni Engineering Works Ltd. vs. CIT*** (1982) 136 ITR 340 (Del), the Indian assessee was a public limited company manufacturing turbines and other machinery. It had made payments in connection with obtaining technical know-how, services for manufacture of turbines and sugar mill machinery for 10 years, which were partly treated as revenue expenditure in one year and partly carried forward for two years, and then written off in three years. Revenue contested the said claim on the ground that the expenditure was of capital nature. The High Court observed that the test to be applied was whether there was absolute sale of knowhow or the payment was for mere right to use. On elucidation of the relevant clauses of the agreement, the High Court observed that use of words like 'sold', 'absolute property' and 'deemed to be the property of' was made in the agreement, but on careful and closer scrutiny and reading the agreement as a whole, it emerged that the agreement was for a period of 10 years, but, it could be terminated "forthwith". The agreement was limited to India. Though the data, drawings, documents and dyes, etc. were to be treated as absolute property of the Indian assessee, yet the copyright continued and remained vested with the foreign party, meaning thereby that it was a case of grant of licence for use. The Indian assessee was to observe complete confidentiality with regard to the knowhow and could not assign the agreement, without written consent. Aforesaid clauses, manifested that the right was only a limited licence for use and not a case

of absolute transfer of property. Importantly, in this age of fa technological developments and scientific research, it was held that technical knowhow and information become obsolete and useless unless updated.

10. The aforesaid ratio and reasoning has been followed by the Delhi High Court in ***Addl. Commissioner of Income Tax vs. Shama Engine Valves Ltd.*** (1982) 138 ITR 216, In the said case the agreement was initially for 10 years, with right of automatic renewal and right to continue manufacture without payment on termination. The agreement had granted an exclusive right to manufacture in India and other specified countries. However, there was restriction in form of a confidentiality clause on communication or disclosure of information to third parties. It was observed that the information and knowhow granted was in respect of fast changing technological developments which become obsolete in a short span of time. The payment had direct nexus with carrying on or conduct of the business, and considered commercially, it would be an integral part of the profit making process. The court, therefore, held that the expenditure must be treated as revenue. Similar reasoning is to be found in the case of ***CIT vs. Bhai Sunder Dass & Sons P. Ltd.*** (1986) 158 ITR 195 (Del). Reference can also be made to the recent decision in ***CIT vs. Lumax Industries Ltd.*** (2008) 173 Taxman 390 (Del) wherein referring to a circular, it was observed that if a licence was acquired for use of technical knowhow for a limited period, the payment would not bring into existence an asset of enduring nature. In this decision, reference was made to the decision of the Supreme Court in ***Jonas Woodhead & Sons (India) Ltd. vs. CIT*** (1997) 224 ITR 342, wherein it has been held that answer to the question whether a particular payment was wholly or partly capital or revenue expenditure, would depend upon several factors like, whether the

assessee had obtained a completely new plant with completely new proce and technology; whether the expenditure was for acquiring technical knowhow for betterment of the product which were already being produced; is it a case of improvisation and part and parcel of the existing business or a new business; whether the assessee after expiry of a specified period was required to return plans and designs but could continue to manufacture the product in the factories which had been set up. Cumulative effect on a construction of various terms and conditions of the agreement must be considered. Similar reasoning can be found in ***Shriram Pistons & Rings Ltd. vs. CIT*** (2008) 171 Taxman 81 (Del) which made specific reference to the fact that when the intellectual property rights remain with the foreign party, it indicates that what was granted was a mere licence, as the assessee was obliged to observe complete confidentiality as to knowhow and could not have disclosed information or assigned the agreement without prior consent. In this case, there was no provision for returning the drawings or documents. The said factum, it was observed would not be relevant in the rapidly evolving world of science and technology. Decision in ***Scientific Engg. House (P) Ltd. vs. CIT*** (1986) 157 ITR 86 (SC) was distinguished, as in the said case the issue was whether the drawings and designs could be treated as "books" or "plant" under Section 43(3) of the Act and hence depreciable. Thus, ***Scientific Engg. House (P) Ltd*** (supra) dealt with the issue, whether depreciation should be allowed on intangible property like knowhow etc. The Supreme Court in ***Scientific Engg*** (supra) had not answered the question whether the expenditure was capital or revenue in nature.

11. A detailed discussion on the said aspect is to be found in the decision of this Court in ***CIT vs. J.K. Synthetics Ltd.*** (2009) 176 Taxman 355 (Del), wherein the principles to distinguish capital and revenue expenditure stand

set out in paragraph 38. We would only like to refer to clauses 5 and thereof, which reads as under:-

> "(v) expenditure incurred for grant of License which accords "access" to technical knowledge, as against, "absolute" transfer of technical knowledge and information would ordinarily be treated as revenue expenditure. In order to sift, in a manner of speaking, the grain from the chaff, one would have to closely look at the attendant circumstances, such as:-
>
> (a) the tenure of the Licence.
>
> (b) the right, if any, in the licensee to create further rights in favour of third parties,
>
> (c) the prohibition, if any, in parting with a confidential information received under the License to third parties without the consent of the licensor,
>
> (d) whether the Licence transfers the "fruits of research" of the licensor, "once for all",
>
> (e) whether on expiry of the Licence the licensee is required to return back the plans and designs obtained under the Licence to the licensor even though the licensee may continue to manufacture the product, in respect of, which "access" to knowledge was obtained during the subsistence of the Licence.
>
> (f) whether any secret or process of manufacture was sold by the licensor to the licensee. Expenditure on obtaining access to such secret process would ordinarily be construed as capital in nature;
>
> (vi) the fact that assessee could use the technical knowledge obtained during the tenure of the License for the purposes of its business after the Agreement has expired, and in that sense, resulting in an enduring advantage, has been categorically rejected by the courts. The Courts have held that this, by itself, cannot be decisive because knowledge by itself may last for a long period even though due to rapid change of technology and huge strides made in the field of science, the knowledge may with passage of time become obsolete"

The said decision makes reference to the decision of the Bombay High Court in ***Commissioner of Income Tax v. Tata Engineering & Locomotive Co Pvt Ltd*** (1980) 123 ITR 538 (Bom) where payment was made to the foreign collaborator in respect of design and technical information required for manufacture of automotive products. The reasoning adopted by Division Bench of the Bombay High Court was to the effect that technical knowhow made available under an agreement did not stand on the same footing as protected rights of a registered patent holder, as mere right to use in limited sense was granted. It was not material whether assessee could use the knowhow even after the end of the agreement on the ground that this aspect was wholly immaterial. (We express no opinion on other grounds/reasoning recorded in the said decision.)

12. Recently the Delhi High Court in ITA No. 1450/2010 titled ***CIT vs. Modi Revlon Pvt. Ltd.,*** decided on 29th August, 2012, observed that when royalty was paid for a limited purpose, i.e. for use of know-how, it would be revenue in nature as the entire benefit of know-how was meant for manufacture of products. It was not a matter where assessee had chosen to undertake the manufacture through a contractor. In the said case, the ownership of the brand, remained property of the foreign party and a licence to operate in a defined territory was granted. Expenditure was allowed under section 37(1) of the Act. This was inspite of the fact that the original licence was for indefinite period and the supplementary agreement did not indicate a *terminus quo*. It was, however, observed that the agreement could be terminated and upon such expiration or termination, the Indian assessee would have no right to exploit or use the know-how. There was no vesting of know-how or goodwill in the Indian assessee.

13. Learned counsel for the assessee has also referred to decisions ***CIT vs. Oblum Electrical Industries (P) Ltd.*** (1981) 127 ITR 409 (AP), ***CIT vs. Gujarat Carbon Ltd.*** (2002) 254 ITR 294(Guj), ***CIT vs. Jyoti Electric Motors Ltd.*** (2002) 255 ITR 345(Guj), ***S.R.P. Tools Ltd. vs. CIT*** (1999) 237 ITR 684 (Mad), ***CIT vs. Southern Pressings (P) Ltd.*** (2000) 242 ITR 67 (Mad) and ***CIT vs. B.N. Elias & Co. (P) Ltd.*** (1987) 168 ITR 190 (Cal). We need not specifically dilate any more on the said aspect in view of the position of law as expounded above. However, we would like to refer to the decision in ***CIT vs. Southern Switchgear Ltd.*** (1984) 148 ITR 272 (Mad) relied on by the revenue. In the said case, the assessee had entered into a collaboration agreement for providing of technical knowhow for setting up of a factory and operation thereof. The foreign company had agreed not to manufacture products in India or give right to a third person to do the same. Referring to the clauses of the agreement, the High Court held that technical knowledge so secured had resulted in an enduring advantage and benefit, as the same was available even after termination of the agreement since the factory and its operation would have continued. The duration of the agreement was 5 years but the method, production, procedure, etc. would remain with the Indian assessee and, therefore, an enduring benefit/advantage was acquired. There was also conferment of exclusive right to manufacture and sell the articles, which was an independent right secured and was of an enduring nature. Accordingly, 25% of the royalty paid was disallowed as capital expenditure. Noticeably, it was observed that the entire royalty was for acquisition of exclusive privilege to manufacture and sell the products and, therefore, it was partly capital and partly revenue in nature. The aforesaid decision was upheld by the Supreme Court by a short order observing that they were not persuaded to hold that the view of the High Court was erroneous vide ***Southern***

Switchgear Ltd. vs. Commission of Income Tax & Anr. (1998) 232 ITR 359. The decision in ***Southern Switchgear Ltd.*** (supra) was considered by the Delhi High Court in ***CIT vs. Sharda Motor Industrial Ltd.*** (2009) 319 ITR 109 (Del) and was distinguished on facts.

14. What is placed before us is the "licence and technical assistance agreement" dated 2nd June, 1995 for the territory of India. The term 'intellectual property right' stood defined to mean those patents, utility models, design patents and other intellectual property rights relating directly to the products or the licensed parts thereof or to manufacturing of the products and their licensed parts, but excluded trademarks, patents, utility models, design patents and intellectual property rights relating to the manufacturing facilities and the manufacture thereof. The term 'know-how' was defined as any or all secret, technical information except for intellectual property rights, whether in writing or not, including but not limited to drawings, standards, specifications, material list, process manuals and direction maps etc. directly related to products or licensed parts thereof, or necessary for manufacture of the same. The term 'technical information' was to mean 'know-how' and any technical information not included in 'know-how' which related to the product or licensed part or was necessary for manufacture of product or licensed parts which the Honda owned at the time of execution of the agreement or would own from time to time during the subsistence of the agreement. The term 'products' meant two-wheelers or three-wheelers as expressly specified under clauses (a) and (b), identified by licensor's development codes, *viz.* 198s, KCCA, etc. which had already been developed and was under manufacture under the earlier agreement. Under clause (c), it would include additional models or types of two/three wheelers pursuant to 'model change' as specified in the model agreement. The term 'new

models' was to mean new models developed by Honda at the request of t respondent assessee with new development code and subject to new model agreement. Similarly, the term 'model change' was defined as conduct through which a new model with new development code was made by a change in any part or entirety of the product, including but not limited to appearance, structure, characteristics or specifications and in each case was subject to a new model agreement. The agreement specifically recorded that the respondent assessee was already engaged in the business of manufacturing, assembling, selling and otherwise dealing with two/three wheelers and their parts as a joint venture. It referred to the earlier collaboration agreement dated 24th January, 1984 and the subsequent amendment thereto which conferred and had granted to the respondent assessee a right and licence to manufacture, assemble, sell, distribute, repair and service two/three wheelers.

15. The other terms of the agreement were:

(1) Rights and licenses granted by the licensor to the respondent assessee were exclusive, indivisible and non-transferrable, without the right to grant sub-licenses to manufacture, assemble, sell and distribute the product or parts thereof. The rights and duties under the agreement were not assignable or delegatable, directly or indirectly.

(2) The aforesaid license was for the term of the agreement, i.e. 10 years from the effective date of 21st June, 1994.

(3) The Agreement could be terminated by 60 days' notice to the defaulting party, if it failed to cure the same within the notice period. The agreement could also be terminated forthwith by a party, if the other party had transferred whole or an important part of business;

went into liquidation, bankruptcy or insolvency; merged with, or w directly or indirectly transferred to third party; or on significant change in shareholding ownership.

(4) Upon expiration of the term of the agreement, i.e. after 10 years, or termination due to default of performance of obligations, the respondent assessee could continue to manufacture, assemble, sell or deliver services but subject to due performance of their obligations, including payment of royalty.

(5) In the event of pre-mature termination, i.e. within 10 years, except due to default of performance of obligations, the respondent assessee was to promptly discontinue manufacturing activities, sale and other dispositions of the products and the parts, as well as the use of intellectual property right and technical information.

(6) Further in the event of expiration or termination, the respondent was to promptly return all documents and tangible properties in connection with the agreement including copies and translations and all information received under the secret and confidentiality clauses.

(7) Honda had right to access the respondent's factories and other facilities for inspections to check and confirm whether conditions/obligations imposed were being complied with.

(8) Knowhow, technical information and other non-public technical or business information was to remain solely and exclusively the property of Honda and was to be held in trust and in confidence for Honda by the respondent assessee. This information was not to be divulged, communicated or made known to third persons in any manner whatsoever, except as expressly provided. Respondent was to

take all necessary precautions to keep the said information secret a confidential and restrict its use strictly as per the first as well as the present agreement. The respondent assessee was to establish and maintain internal regulations and procedures for protection of secrecy. The information could be disclosed to employees, Directors or approved sub-contractors when it was reasonably necessary for the purpose of manufacture, assembly, repair and servicing, subject to obtaining a 'written promise' from the approved sub-contractors to treat all information as secret and confidential.

(9) The aforesaid rights and obligations were to persist even on expiration or termination of the agreement.

(10) The respondent assessee was not to use or cause or permit use by any third party, intellectual property right or technical information provided under the agreement.

(11) The respondent assessee was not to claim any title or property right whatsoever during the existence of the agreement. Upon termination as a result of default of the respondent assessee, no such right, title, property or interest whatsoever could be claimed.

(12) There were stipulations in case respondent assessee became aware or had knowledge of any infringement or illegal use of intellectual property right of Honda in India by a third party.

(13) The respondent was to submit monthly written report in the designated form to Honda regarding manufacture, sale and inventory and/or sale of parts or products. Honda was entitled to have access to books of accounts, financial statements and records, to the extent they relate to transactions as contemplated under the agreement.

(14) The respondent could not, without Honda's prior written consent, directly or indirectly or through its subsidiary, affiliate, distributor or agent or any other party, carry on or participate in the business of manufacturing, assembling, distributing or otherwise dealing in two/three wheelers of other parties.

(15) On the question of consideration payable, Article 25 of the Agreement provided for fees under two heads namely, (1) Model Fee; and, (2) Running Royalty.

a. 'Model fee' was payable on model change under the new model agreement. It was non-refundable and non-creditable against other payments. The agreement in addition stipulated the amount of model fee payable in respect of the product, "C-100" of US$ 10,00,000/- was payable in three equal instalments; i.e., (i) within first 60 days of the agreement being taken on record by the Government authorities in India; (ii) within 60 days of Honda delivering to the respondent the technical information necessary for manufacture and assembly; and, (iii) within 60 days after the parties confirmed in writing that the manufacture of the model had commenced on commercial basis, or 4 years after the agreement, whichever was earlier.

b. Royalty was running and periodical payment as specified in Exhibit 1 or the amounts calculated by multiplying the rate specified in Exhibit 1 with reference to the ex-factory/ex-warehouse sales price.

16. Reading the aforesaid terms and conditions and applying the tests expounded, it has to be held that the payments in question were for right to

use or rather for access to technical knowhow and information. T ownership and the intellectual property rights in the knowhow or technical information were never transferred or became an asset of the respondent assessee. The ownership rights were ardently and vigorously protected by Honda. The proprietorship in the intellectual property was not conveyed to the respondent assessee but only a limited and restricted right to use on strict and stringent terms were granted. The ownership in the intangible continued to remain the exclusive and sole property of Honda. The information, etc. were made available to the respondent assessee for day to day running and operation, i.e. to carry on business. In fact, the business was not exactly new. Manufacture and sales had already commenced under the agreement dated 24th January, 1984. After expiry of the first agreement, the second agreement dated 2nd June, 1995, ensured continuity in manufacture, development, production and sale. The period of agreement, 10 years in the present case, would be inconsequential for the agreement merely permitted and allowed use of technology subject to payment of royalty and compliances and the proprietorship and ownership right was never granted or transferred. The factum that after 10 years and after returning the tangible properties, the respondent assessee could still have continued to use technical knowhow and information would be a trivial and inconsequential factum as in the automobile industry, technology upgradation is constant and rapid. Gone are the days when one or two manufacturers enjoyed monopoly rights and there was a long and indeterminate wait and queue for purchase of out-of-date models. Technical upgradation and state-of-the-art know-how is injected every year in the automobile industry. Failure to keep up and upgrade would result in product rejection and fall in sales. Persistent upgradation and cutting edge

technology is mandate and business requirement in the competitive mark of two/three wheelers.

17. Model fee, subject matter of appeal pertaining to assessment year 2001-02 is merely Rs.4.09 lakhs and the said issue is not raised in other years. Royalty on the other hand is substantive and payment made in the assessment year 2001-02 was Rs.17.88 crores. The said royalty paid to Honda, if paid for right to use of technical knowhow and intellectual property right, would possibly be taxed in India in terms of the Double Taxation Avoidance Agreement between India and Japan. But the said payment might not be taxable in India if it is held that there was absolute and complete transfer of ownership in the intellectual property right by Honda to the Indian assessee in absence of a Permanent Establishment (See Articles 7 and 12 of the Double Taxation Avoidance Agreement between India and Japan).

18. In the appeal for the assessment year 2000-01, Revenue has also challenged the tax treatment of Rs.33.07 lakhs paid as technical guidance fee. Copy of the agreement on the basis of which the said fee was paid has not been placed on record by the appellant Revenue. In the absence of any document and even details as to the nature and character of the said fee, we cannot adjudicate and decide this issue in favour of the Revenue. The tax treatment given by the Tribunal is, therefore, not interfered.

19. The respondent assessee during the course of hearing had drawn our attention that the question whether model fee paid was revenue or capital in nature had arisen for the first time in the assessment year 1996-97. The Tribunal had held that the fee was revenue expenditure and, therefore, deductible under Section 37(1) of the Act in their decision reported as (2005) 95 TTJ Delhi 782, titled ***Hero Honda Motors Ltd versus Joint***

Commissioner of Income Tax, decided on 13th May, 2005. The Del High Court did not entertain and frame any question of law on the said aspect in the appeal of the Revenue on the said issue. Revenue had preferred a Special Leave Petition but the same was also dismissed. For the assessment years 1997-98 and 1999-2000, similar expenditure of model fee was allowed as revenue expenditure by the Tribunal. Appeals filed by the Revenue on the said issue were not entertained by the High Court. We would not like to decide the present appeal for this ground and reason, as the High Court orders do not set out and indicate any ground or reason. We do not comment or express an opinion on whether the High Court under Section 260A of the Act can at the time of hearing, frame any additional question of law.

20. We also reject the contention of the respondent/assessee with reference to the power of the Commissioner under Section 263 of the Act relating to assessment year 2001-02. In the impugned order the Tribunal on the said question held:-

> "Learned counsel has made clear case that in assessment year 2001-02, the 263 appeal before Hon'ble Delhi High Court was not pressed by the assessee and Hon'ble High Court passed the order to the effect that the issue will be open for consideration in other years. In our view, the view adopted by Assessing Officer allowing model fee and TGF expenses being a correct view, there was no error in passing original assessment order. Therefore, 263 action in assessment year 2002-03 is quashed. Since we have quashed the 263 order passed by CIT, subsequent proceedings i.e. AO's and CIT(A)'s consequential orders thereon are also quashed."

A reading of the aforesaid reasoning clearly elucidates that the Tribunal has held that payments made by respondent to Honda were revenue expenditure and not capital. On the said finding on merit, the Tribunal observed that there was no error in the order passed by the Assessing Officer. Power under Section 263 can be invoked by the Commissioner

only when the order passed by the Assessing Officer is erroneous and n otherwise. It is in these circumstances, that no specific question of law with reference to power under Section 263 of the Act, has been framed in the appeal relating to assessment year 2001-02.

21. In view of the aforesaid discussion, the substantial questions of law are answered in favour of the respondent assessee and against the appellant Revenue.

22. The appeals are accordingly disposed of. There will be no order as to costs.

(SANJIV KHANNA)
JUDGE

(V. KAMESWAR RAO)
JUDGE

FEBRUARY 3rd , 2015
VKR/kkb