(1979) 02 BOM CK 0051

Bombay High Court

Case No: Income-tax Reference No. 159 of 1970

Commissioner of Income Tax, Bombay City-I		APPELLANT
	Vs	
Tata Engineering and Locomotive Co. Pvt. Ltd.		RESPONDENT

Date of Decision: Feb. 14, 1979

Acts Referred:

- Income Tax Act, 1961 - Section 37(1)

Citation: (1979) 13 CTR 209 : (1980) 123 ITR 538 : (1979) 2 TAXMAN 149

Hon'ble Judges: M.N. Chandurkar, J; Desai, J

Bench: Division Bench

Advocate: R.J. Joshi and S.G. Shah, for the Appellant; R.J. Kolah and D. Vyas, for the Respondent

Judgement

Chandurkar, J.

This reference raises a question relating to the nature of payments made by the assessee-company to two foreign companies in accordance with two agreements dated October 3, 1955, and April 11, 1956. The assessee-company, M/s. Tata Locomotive and Engineering Co. Ltd. (hereinafter referred to as "Telco") had entered into an agreement with M/s. Daimler Benz, according to which, the assessee was to establish a factory for the manufacture in India of Daimler Benz trucks and other automotive products upon the terms and conditions mentioned in the agreement. The assessee-company was already manufacturing locomotives and under the agreement, M/s. Daimler Benz was to render certain services to Telco. It is not necessary to refer extensively to the terms and conditions with regard to the services and assistance which were agreed to be rendered by M/s. Daimler Benz. The summary thereof as given in the affidavit filed by the director-in-charge of Telco before the ITO the correctness of which is not disputed on behalf of the revenue, is as follows :

"(a) Technical advice, information and assistance as may be reasonably required by Telco concerning the layout of additional factory buildings, etc., and selection and arrangement of plant, equipment, etc., for setting up the automotive division at Tatanagar.

(b) Grant to Telco on an exclusive basis for India the manufacturing rights, together with patents, patent rights, secret and other processes relating to the manufacture of automotive products.

(c) Supply of drawing and designs and full technical information required for the manufacture of automotive products.

(d) Communicate all technical information relating to improvements and developments in the manufacturing process.

(e) Supply of all jigs, tools and fixtures required by Telco (or at the option of Telco, drawing or designs of such jigs, tools and fixtures) for the manufacture of automotive products.

(f) Supply of Telco from tome to tome such parts and components as are required to be incorporated in the manufacture of automotive products.

(g) Use of the name and trade marks of Daimler Benz during the currency of the agreement.

(h) Until such time as suitably qualified and trained Indian technical personnel is available, Daimler Benz shall put at the disposal of Telco to the extent they are able to do so, technical personnel required for the operation of the automotive division.

(i) Provide training facilities for training of Indian personnel in their German plants and establishments."

2. In consideration of these services the payments to be made to M/s. Daimler Benz were as follows :

(a) During the period of the first five years of commercial production of Daimler Benz trucks and during the first five years of commercial production of each of the other automotive products of Daimler Benz subsequently manufactured in Telco works in terms of the agreement a royalty on :

1% of the Indian net sales proceeds calculated on an ex works basis (excluding tyres, batteries and other items not included in the export price of the entire vehicle c.k.d., f.o. b. continental north sea port unpacked) where the Telco manufacturing proportion does not exceed 50%; and

1 1/2% of the Indian net sales calculated on an ex works basis (excluding tyres, batteries and other items not included in the export price of the entire vehicle c.k.d., f.o.b. continental north sea port unpacked) when the Telco manufacturing proportion exceeds 50%; and

(b) sum equal to 7 1/2% of the annual net profits of the automotive division of Telco as certified by Telco''s auditors."

3. It may, however, be mentioned that apart from above terms, the agreement also provided that the Telco could use the name and trade mark of M/s. Mercedes Benz in such form, design or manner as may be mutually agreed upon. It is also provided under the agreement that M/s. Daimler Benz were to take ordinary shares worth Rs. 80 lakhs and this share holding could not be disposed of by them within 10 years of the agreement. The period of the agreement was for 15 years commencing from April 1, 1954, but any of the parties could terminate the agreement by six months'' notice in case of a serious breach of its terms and conditions. In what circumstances the breach was to be treated as serious was also specified. It was also specifically provided that after March 31, 1969, on which date the agreement was to come to an end, the Telco was entitled to continue its manufacture, but that they should cease to use the trade name of Tata_Mercedes Benz. Since the learned counsel for the revenue has based some argument on this particular clause, we reproduce it as followed :

"36. On the expiry or termination of this agreement for any cause Telco shall have the right to continue in the filed of automotive manufacture with the benefit of all technical information and experience acquired by it in terms of this agreement, but shall not be entitled to use any trade mark or name licensed to it as provided for clause 24(d)."

4. The assessee had also entered into another agreement with a Belgian company by name Societe Anonyme Business Emile Henricot (hereinafter referred to as "M/s. Henricot") as the Telco desired to secure competent technical advice, information and assistance in Europe to bring the Telco steel foundry when completed into full and efficient operation as early as possible and to design and manufacture therein on an economical and efficient basis the maximum possible tonnage of sound steel castings of all sizes, shapes and specifications, including particularly heavy and complicated casting for the steam locomotives building industry. M/s. Henricot has long and varied experience in the design, manufacture and sale of steel castings and was able and willing to provide the technical advice, information and assistance required by Telco and this was to be done under the terms and conditions provided in the agreement. The nature of the services and assistance which M/s. Henricot could be called upon to render are briefly as follows :

(a) Grant and communicate to Telco on an exclusive basis for India technical knowledge, information, advice, services and facilities as may be required for bringing the Telco Steel Foundry into full effective and efficient operation and fit for manufacturing steel casting of all sizes, shape and specifications, and for developing, manufacturing and selling on the most efficient and economical basis the maximum possible tonnage of steel casting made in all such designs, sizes and qualities as are in demand.

(b) Provide complete and detailed drawings, designs, date, information and advice to the best of Henricot''s own practice, experience and knowledge of the most efficient methods and process relating to, (i) organisation control and supervision of all operations in the Telco Steel Foundry for the design, manufacture and sale of steel castings, (ii) specifications of sand and raw materials and their treatment, and (iii) most modern and efficient production methods and processes.

(c) Methods of estimating production costs and preparing quotations.

(d) Utilisation of scrap and waste products.

(e) Provide facilities for training in Henricot''s Belgian plant and establishments of such Indian employees of Telco as may be deputed by Telco for such training.

(f) Communicate all technical information regarding improvements and development relating to the design and manufacture of steel castings.

(g) To start the operation of the Telco Steel Foundry and to bring it into effective commissioner. Put at the disposal of Telco fully qualified and experienced personnel of Henricot for such periods as may be considered necessary.

(h) To supply Telco on terms and conditions to be settled by mutual agreement the maximum possible tonnage of steel castings for Telco''s own requirements."

5. The payments to be made in consideration of the services to be rendered by M/s. Henricot as provided in the agreement dated April 11, 1956, were as follows :

"(a) A sum of two million, five hundred thousand (2,500,000) Belgian Francs in each of the first five years of the agreement to be payable in four equal quarterly instalments, the first such instalment to be paid on the 1st day of September, one thousand nine hundred and fifty-five and thereafter :

(b) a sum of five million, one hundred and sixty-six thousand six hundred and sixty-six (5,166,666) Belgian Francs in each of the three years, following the first five years of the agreement to be payable in four equal quarterly instalments, the first such instalment to be paid on the 1st day of September, one thousand nine hundred and sixty."

6. In the assessment year 1959-60, the payments made by Telco to M/s. Daimler Benz and M/s. Henricot were as follows :

1. Ratio in share of profits paid to M/s. Daimler Benz Rs. 29,59,608.

2. Technical fees to M/s. Henricot Rs. 2,99,158.

7. The agreement with M/s. Henricot provided for facilities for training in Henricot''s Belgian plant and establishments of such Indian employees of Telco as may be deputed by Telco for such training. The total number of trainees was not to exceed 30 and the duration of the training of anyone trainee was not to exceed two years.

The training of Telco''s Indian personnel by M/s. Henricot was to cover the entire field of designing, producting, finishing, machining and selling steel castings, including drawing, estimating, production, planning, selection, treatment of sand, raw materials, pattern making, fore making, melting, puring, gating, risoring, laboratory control machining, casting methods, etc. The salaries and expenses of Telco''s Indian personnel sent for training at the factories of M/s. Henricot had to be borne by Telco. The sum spent on training expenses in the assessment year in question was Rs. 1,69,926.

8. In assessment proceedings for the assessment year 1959-60, Telco claimed this expenditure as revenue expenditure. Before the ITO concerned a detailed statement about the nature of services rendered by the foreign companies was made by Mr. Moolgaonkar, who was the director-in-charge of the Telco. The ITO, however, declined to treat the above expenditure as revenue expenditure and treated it as capital expenditure.

9. In the appeal filed by the assessee, however, the AAC treated the above expenditure as revenue expenditure. He, therefore, deleted the addition made by the ITO with regard to Rs. 29,59,608 and Rs. 2,99,158, being the payments made to M/s. Daimler Benz and M/s. Henricot respectively. He also held that the training expenses claimed by the assessee were allowable.

10. The ITO then filed an appeal against the order of the AAc before the Income Tax Appellate Tribunal. The Tribunal considered the terms of the agreement with M/s. Daimler Benz and M/s. Henricot and found that all that the assessee got by the agreement with M/s. Daimler Benz was technical assistance and knowledge in regard to truck manufacture and the right to use its trade name for a period of 15 years. The Tribunal took the view that at best in the circumstances, "this will amount to user of technical knowledge and information given by them for which they had to pay". With regard to the user of the trade name the Tribunal took the view that it was not an acquisition of any proprietary right in regard to the trade name, but it was the permission given to the assessee to utilise the name for a particular period. According to the Tribunal, it was really a case of fees being paid for the user of the technical know-how as well as the trade name. In respect of the payments made to M/s. Henricot, the Tribunal found that no capital asset as such had been acquired from M/s. Henricot and that under the agreement with M/s. Henricot the assessee had acquired merely the right to trade for the purpose of carrying on its business upon the technical knowledge of M/s. Henricot in regard to the foundry business. This according to the Tribunal, could not be said to be acquisition of any capital asset, but that it was mere user of it. Therefore, according to the Tribunal, the moneys paid to M/s. Henricot, was also revenue expenses. With regard to the amount spent in training Telco personnel with M/s. Henricot, the Tribunal took the view that the expenditure was incurred not for acquiring or bringing into existence an asset or capital of enduring nature to the business but was made for running the

business with a view to produce more products and with a view to run the business more efficiently so as to produce higher profits. Thus, the expenditure incurred in respect of all the three items referred to above was held allowable as revenue expenditure. Out of this order of the Tribunal, the following question has been referred at the instance of the revenue :

"Whether, on the facts and in the circumstances of the case, the expenditure in question has been rightly allowed as revenue expenditure ?"

11. Mr. Joshi appearing on behalf of the revenue has contended that the payments made to M/s. Daimler Benz and M/s. Henricot, if properly understood in the light of the terms of the relevant agreements, would be clearly in the nature of capital expenditure and our attention was particularly invited to certain terms of the agreement with M/s. Daimler Benz and the preamble thereof. It is contended that the agreement of M/s. Daimler Benz showed that Telco had to establish the manufacture in India of Daimler Benz motor trucks and that an automotive division was agreed to be set up at the Telco works at Tatanager. Thus, according to Mr. Joshi, the payments made must be related to the initial setting up of the business of manufacturing of Daimler Benz Motor trucks, since the advice to be given by M/s. Daimler Benz and the technical assistance was in respect of setting up such business. Reliance was also placed on clause (3) of the agreement, which has referred to the fact that along with drawings and designs and full technical information to be made available by M/s. Daimler Benz "Daimler Benz will grant to Telco on an exclusive basis for India the manufacturing rights together with patents, patent rights, secret and other processes relating to manufacturing programmes for the time being in force under this agreement."

12. Reference was then made to the provisions of cls. (17) and (18) which provide for the manner of payment. Clauses (17) refers to payment of royalty and prescribes the rate of royalty. Clauses (18) provides that apart from the royalty provided under clause (17), Telco shall pay to M/s. Daimler Benz a certain percentage of the annual net profits of the automotive division of Telco as certified by Telco''s auditors. It was contended relying on this clause that in view of the specific provision relating to royalty the expenditure incurred by Telco was clearly of capital nature. Stress was further laid on the provision relating to the duration of the agreement and the provision thereof in clause 34 of the agreement. Under that clause, it was provided that the agreement shall operate for an initial period of fifteen years commencing from April 1, 1954, and ending with March 31, 1969. Sub-clause (2) of clause 34, however, provided that any of the parties may terminate the agreement by giving six months'' previous notice in writing in case of a serious breach of its terms and conditions by the other party or parties to the agreement. Under what circumstances a serious breach of the agreement thereof deemed to have been committed were also specified, but a reference to that part of the clause is not material to the disposal of the reference. Another clause on which particular reliance

was placed was clause 36, which provided that on expiry or termination of the agreement for any case Telco shall have the right to continue in the field of automotive manufacture with the benefit of all the technical information and experience acquired by it in terms of this agreement, but shall not be entitled to use any trade mark or name licensed to it as provided for in clause 24(d).

13. Relying on the stipulated period of 15 years and the provisions enabling Telco to continue the use of technical information and experience acquired by it under the agreement even after the agreement has been terminated, it was contended that since the benefit of the technical know-how made available by M/s. Daimler Benz could be utilised by Telco even after the period of agreement was over, and since know-how and technical knowledge could be drawn upon for a long period of 15 years, Telco must be deemed to have acquired a capital asset, i.e., technical know-how, and, therefore, the expenditure incurred in the form of payments made to M/s. Daimler Benz. Similar argument was advanced in respect of agreement with M/s. Henricot, though the period of agreement with M/s. Henricot was nine years. The argument in substance in respect of both the agreements remains the same, viz., acquiring technical know-how amounted to acquisition of capital asset or in any case benefit of enduring character and, therefore, the payments made under the agreement were in the nature of capital expenditure.

14. The crucial question that will have to be determined on the material in this case having regard not to the terms of the two agreements but also to the statement of Mr. Moolgaonkar made before the ITO and the affidavit filed before the ITON, as to whether the expenditure incurred to the company by way of payments to M/s. Daimler Benz and M/s. Henricot were so related to the carrying on or the conduct of the business of the assessee that they should be regarded as integral part of the profit earning process or whether the assessee had really acquired any capital asset or benefit of a permanent character. At the outset it must be pointed out that merely because payment provided for under the agreement is referred to as royalty, that nomenclature will not be conclusive of the question as to whether a capital asset was acquired or not. It cannot be said that in every case payment of royalty results in acquisition of capital asset. Whether payments made in the nature of royalty as provided for under a particular agreement should be treated as revenue expenditure or capital expenditure will depend upon the nature of the return which is got in lieu of that payment. We must, therefore, first direct our attention to the question as to what was the nature of the know-how and the technical information made available by the two companies to Telco. This is not a case where Telco was setting up its business for the first time. It was already carrying on manufacture of locomotives and as such it was already in manufacturing business. Mr. Moolgaonkar had filed before the ITO affidavits explaining the nature of the services rendered by the two companies and these affidavits are annexed to the statement of the case as annexs."C" and "C-1". The affidavit in respect of services rendered by M/s. Daimler Benz is annex."C" and the affidavit in respect of services rendered by M/s. Henricot

is annex."C-1".

15. In respect of both these companies it is stated by Mr. Moolgaonkar that no patent or patent rights or licences have been transferred or assigned to Telco by either M/s. Henricot or M/s. Daimler Benz. With regard to the services rendered by M/s. Daimler Benz, it is stated in the affidavit that M/s. Daimler Benz have not given any technical advice, information or assistance to Telco concerning the layout of the factory and buildings, extensions, etc., for the automotive division and the entire work of designing and erection of the various factory buildings, etc., and the lay out of the automotive division were carried out by Telco''s own personnel. It is then stated that the plant and machinery required for the automotive division were and are supplied to Telco by M/s. Daimler Benz on f.o.b. basis, as between principal and principal, i.e., buyer and seller, and those assets are separately paid for, and no part of the consideration payable under the agreement is attributable to this service. It is further stated that jigs, tools and fixtures as well as parts and components required by Telco for the manufacture of automotive products were and are supplied to Telco by M/s. Daimler Benz on f.o.b. basis as between principal and principal, i.e., buyer and seller, and these goods are separately paid for. No part of the consideration payable under the agreement is attributable to to this service. Mr. Moolgaonkar further states, "M/s. Daimler Benz have not transferred or assigned or imparted any technical know-how or secret or other processes to Telco. The manufacturing techniques and processes used by Telco are normally those adopted by automobile or engineering concerns of repute and there is, therefore, no special know-how or secret or other processes involved in the processes used by Telco." It is further stated :

"Drawing and designs and technical information supplied to Telco are also those that could normally be supplied by any automobile or engineering concern of repute, and technical personnel put at the disposal of Telco are employed by Telco under contract of service for specific period and remunerated by Telco for their services as full-time employees of Telco."

16. The ITO has questioned Mr. Moolgaonkar in detail further about the nature of the services rendered by M/s. Daimler Benz, and particularly question No. 9 was directed to find out what were the services for which payments were made to M/s. Daimler Benz. We have already referred to the statements of Mr. Moolgaonkar in the affidavit, where he has positively stated that the payments made to M/s. Daimler Benz were not in respect of any advice regarding the layout of the factory buildings or for purchase of plant and machinery from M/s. Daimler Benz. These services were grouped in group "A" and group "B" in note No. 1 which is a part of the statement. Group "A" refers to services which were to be performed but not performed by M/s. Daimler Benz. Group "B" refers to services for which full payment has been made separately by Telco. Then under group "C" the following services have been stated :

"Groups :

Services falling neither in group A nor group B

(i) Selection and arrangement of plant and equipment for setting up the auto division at Tatanagar.

(ii) Grant to Telco on an exclusive basis in India, the manufacturing rights.

(iii) Supply of drawings and designs and full technical information required for manufacture of auto products.

(iv) Communication of all facts relating to improvements. Development in the manufacturing process.

(v) Use of the name and trade marks of Daimler Benz, during the currency of the agreement.

(vi) Provision of training facilities."

17. In reply to a question by the ITO, Mr. Moolgaonkar has positively stated that the payments made to M/s. Daimler Benz particularly related to use of the name and trade marks of M/s. Daimler Benz during the currency of the agreement and provision of training facilities. He further made a statement before the ITO, the correctness of which has not been disputed before us, that the main reason for entering into collaboration agreement was to secure training facilities and the right to use a well known trade name. He further stated that no proprietary right is claimed by Telco in the drawings, designs and technical data and processes and that the drawing is merely a shop language of what needs to be done for production of the concerned part and that it was for technical guidance. He positively told ITO that he considered the training as one of fundamental importance.

18. With regard to the agreement with M/s. Henricot Mr. Moolgaonkar stated "by and large, we were furnished with all technical information and training facilities necessary to enable us to operate the foundry." The reason for a long term agreement with M/s. Henricot was given by Mr. Moolgaonkar to the ITO as follows :

"At that time there were no mechanised steel foundries in India. We had necessarily to obtain assistance from abroad. Further the institutions do not teach the special techniques for production of large castings. We tried to obtain technical assistance from the U.K. but ultimately we entered into an arrangement with Henricot."

19. From the statement of Mr. Moolgaonkar, it appears that Telco tried to take assistance from General Steel Castings, a company in U.S.A. but "due to devaluation, etc.", they could not proceed further as the costs became prohibitive.

20. We are in this case not called upon to construe in abstract the recitals in an agreement of foreign collaboration, but we have positive evidence in this case with regard to the services availed of by Telco. It is in the light of the statements made in the affidavit and before the ITO that we have to correctly ascertain the nature of the

benefit which was derived by Telco as a result of the agreements in question. If the statements made by Mr. Moolgaonkar are considered in their proper perspective, it is obvious that, according to him, the payments made to M/s. Daimler Benz were in essence for permission to use name and trade mark of M/s. Daimler Benz during the currency of the agreements and making provision for training facilities. When Telco started producing trucks and they entered into agreement with M/s. Daimler Benz they obtained a licence to use the name of M/s. Daimler Benz for the trucks which were manufactured by Telco. The substantial benefit under the agreement with M/s. Daimler Benz was that M/s. Daimler Benz permitted their trade mark to be used during the currency of the agreement and facilities were given for training personnel belonging to Telco. Obtaining information relating to the technical know-how and having well trained personnel necessary for the manufacture of trucks was essential if trucks of good quality had to be produced and no company would allow its name to be lent to a product of another company, unless it is satisfied that the product which is sold under the name of such company, was of the required quality. Telco would also be interested in producing trucks of good quality which could be sold by the trade name of M/s. Daimler Benz and it, therefore, appears to us that Mr. Moolgaonkar was right when he stated before the ITO that the payment made under the agreement with M/s. Daimler Benz in effect was payment made for the use of the use of the name and trade mark of M/s. Daimler Benz and making provision for training facilities. The period of the agreement was to run out after 15 years. Telco was, however, not going to stop manufacturing after that and if production of quality trucks was to continue, Telco was bound to see that its own personnel were properly trained with the know-how and possessed all the technical information necessary for the manufacture of a quality product. If the transaction embodied in the agreement is looked at commercially it looks to us as nothing more than obtaining the services of a consultancy so far as the supply of know-how is concerned, and in the nature of a licence to use the trade name so far as permission to use the trade name of M/s. Daimler Benz was concerned. The payment was not, therefore, for acquisition of any capital asset. Though the production of trucks was to be continued by Telco even after the expiry of agreement, the use of the trade mark of M/s. Daimler Benz could not be used by Telco as the licence to use the name had come to an end. So far as the payments made under the agreement were concerned, they were to be made partly in the nature of royalty and partly in the nature of share in the profit but they were only intended to secure the use of the trade name and acquire necessary know-how. Technical know-how can in no sense of the term be called a tangible asset. Mr. Moolgaonkar has clearly stated that in this case no patent rights were granted. It is not as if know-how in a technical production remains stagnant and remains the same. In the present day conditions of technological and scientific development, all technical know-how changes from time to time and with it the production methods also change. In our view, acquiring technical know-how and technical advice for the time being, cannot in these days of technological and scientific development and consequent change in production techniques, be treated as a capital asset.

21. Same would be true even in respect of the agreement, with M/s. Henricot. Strictly speaking so far as the payment made to M/s. Henricot is concerned, it would stand on a much better footing as a revenue expenditure than in the case of M/s. Daimler Benz. There was no question of M/s. Henricot allowing the assessee to use the company''s own trade name. Mr. Moolgaonkar has clearly stated that all that they got was special technique for production of large castings, which information could not be available from U.K. and arrangements with U.S.A. could not be made because of devaluation.

22. Mere length of the period of the agreement is not of much consequence, if the nature of the advice made available is such that it cannot be called a capital asset. The agreement itself could have been terminated by any party before the expiry of the term on any of the grounds stated in the agreement. There is no doubt nothing in the agreement which disables Telco from using the technique which it had mastered after getting the know-how from either M/s. Daimler Benz or M/s. Henricot. It is not possible for us to accept the argument that merely because a company, which has entered into a contract with regard to know-how, is entitled to use that know-how even after the agreement has expired, the benefit must be said to be of an enduring character. Agreement of foreign collaboration, where foreign know-how is availed of in lieu of payment, is in our view, in substance, a transaction of acquiring the necessary technical information with regard to technique of production. Instead of employing persons having knowledge of those techniques and utilising their knowledge, what is done is that technical know-how is acquired under a collaboration agreement. The fact that the same information is continuously used whether in the same form or in improved form will, therefore, not be relevant in deciding whether technical know-how obtained under such an agreement is a capital asset. Technical know-how made available by a party to such an agreement does not stand on the same footing as protected rights under a registered patent. There is no property right in a know-how which can be transferred just as it is, in a limited sense, in a patent. In any case a party making the know-how available can hardly make any attempt to retrieve all the information supplied after the other party to the agreement has fully equipped itself and made itself familiar with the technical information and know-how supplied. The fact that the production can still be continued after the expiry of the agreement is, therefore, in our view, wholly immaterial for deciding whether such know-how can be treated as a capital asset.

23. In our view, the present case will be governed by the law laid down by the Supreme Court in the case of Commissioner of Income Tax, Bombay Vs. Ciba of India Ltd., In that case, the Supreme Court held that the assessee acquired under the agreement merely the right to draw, for the purpose of carrying on its business as a manufacturer and dealer of pharmaceutical products, upon the technical

knowledge of the Swiss company for a limited period, and by making that technical knowledge available the Swiss company did not part with any asset of its business, nor did the assessee acquire any asset or advantage of an enduring nature for the benefit of its business. Construing the agreement in that case, it was found by the Supreme Court that the following facts which emerged from the agreement clearly showed that the secret processes were not sold by the Swiss company to the assessee; (a) the licence was for a period of five years, liable to be terminated in certain eventualities even before the expiry of the period; (b) the object of the agreement was to obtain the benefit of the technical assistance for running the business; (c) the licence was granted to the assessee subject to rights actually granted or which may be granted after the date of the agreement to other persons; (d) the assessee was expressly prohibited from divulging confidential information to third parties without the consent of the Swiss company; (e) there was no transfer of the fruits of research once for all; the Swiss company which was continuously carrying on research had agreed to make it available to the assessee; and (f) the stipulated payment was recurrent dependent upon the sales, and only for the period of the agreement. Except for circumstances mentioned in (c) and (e) all the circumstances referred to by the Supreme Court are also present in the instant case before us. Applying the ratio of the decision in Commissioner of Income Tax, Bombay Vs. Ciba of India Ltd., in our view, it is apparent that the assessee-company had not acquired any asset or advantage of enduring nature for the benefit of its business.

24. We may incidentally point out that we have considered in detail the decision in Commissioner of Income Tax, Bombay Vs. Ciba of India Ltd., in Antifriction Bearings Corporation Ltd. v. [1978] 114 ITR 335 and we have held in that case that since in the payment for taking advantage of know-how from a foreign firm, there is no transfer or acquisition of an asset, it must follow that any expenditure incurred, in connection with an exploratory mission or a visit intended to finalise the collaboration agreement, in the form of travelling expenses, will also have to be treated as revenue expenditure.

25. We may refer to the decision of the Calcutta High Court in Commissioner of Income Tax (Central) Vs. Hindusthan General Electrical Corporation Ltd., , where the Calcutta High Court has taken the view that there is no property right in "know-how" that can be transferred, even in the limited sense that there is a legally protected property interest in a secret process. It was pointed out in that case that special knowledge or skill can indeed ripen into a form of property in the fields of commerce and industry, as in copyright, trademarks and designs and patents and where such property is parted with for money, what is received can be, but will not necessarily be, a receipt on capital account. It was also pointed out in that case that royalties, usually are periodical payments for continuous enjoyment of certain benefits under a contract, but in every case payment of royalty is not a capital expenditure. It was held in that case that the payments were intimately linked up

with the manufacturing activities of the assessee and not with the capital values of the assets that the assessee would acquire. They could not, strictly speaking, be said to be the purchase price of the assets. That was a case of foreign principals imparting their know-how and it was held that though the assessee''s foreign principals would be imparting their "know-how" to the assessee for a reward, that is nothing more than a teacher selling his knowledge or skill to his pupil and the assessee''s foreign principals were merely supplying technical information to enable the assessee to carry on business in terms of the agreement.

26. Mr. Joshi has, however, relied on a decision of the Madras High Court in Additional Commissioner of Income Tax and Another Vs. Southern Structurals Ltd., . The assessee in that case had entered into an agreement with a British company not only for the foreign company''s participation in the equity capital of the assessee-company but also for getting technical assistance which took the shape of the foreign company giving the assessee-company all inventions and designs relating to railway wagons, whether patented or not, owned by the British company. The British company was required to give full technical information in relation to the design and manufacture of any existing type of railway wagon which may be of assistance to the assessee. The parties were under mutual obligations to communicate important matters in the design or manufacture of any particular type of wagon and also for the purpose of training the employees of the assessee-company in the works of the foreign company. Clause 4 of the agreement provided that after the expiration of the agreement the assessee would be free from any further obligation to pay any amount to the foreign company while the assessee-company would have the continued use free of charges of all information made available by the foreign company during the period of the validity of the agreement. The Madras High Court on these facts held that the assessee had acquired an enduring benefit under the agreement and to that extent the amount paid was clearly capital in nature. The reason, according to the Madras High Court, was that though under clause 2 of the agreement there was a certain amount of limitation on the assessee not being in a position to assign the benefits it obtained under the agreement, that would not take the case out of the ratio of the decision in Fenner Woodroffe and Co. Ltd. Vs. Commissioner of Income Tax,

27. Now, in the case of Fenner Woodroffe & Co. Ltd., there was an agreement with the foreign company to make available the technical date relating to the manufacture of leather belting and also to permit the use of such technical date for the purpose of manufacture of the products. Certain amounts were paid to the foreign company in pursuance of this agreement and these payments were claimed as deductions for the respective assessment years. The High Court held in that case that there was no limitation in the agreement as to its insurability and the assessee could use the technical data with it as if it were their own asset, and, therefore, the amounts paid are not admissible as business expenditure. While referring to the decision in Commissioner of Income Tax, Bombay Vs. Ciba of India Ltd., , the High

Court pointed out that on the termination of the agreement Ciba Pharma in that case was required to return to Ciba Basle all copies of information, scientific data or materials sent to it, and on this stipulation the Madras High Court observed that the use of the knowledge or practical experience which Ciba Pharma got by knowing the technical know-how thus limited only for the purpose of conduct of the business during the period of five years provided for in the agreement. From this stipulation, the Madras High Court seems to have drawn an inference that there was a prohibition against the use of know-how after the period of the agreement, an inference which does not appear to be justified on the terms of the agreement in the case of Ciba of India Ltd. The Madras High Court in Fenner Woodroffe and Co. Ltd. Vs. Commissioner of Income Tax, observed with reference to the agreement in that case that though the agreement is stated to be in force for a period of ten years there was no prohibition of the use of the technical data by the assessee after the period of ten years nor was there any clause requiring the assessee to return the technical date as in Commissioner of Income Tax, Bombay Vs. Ciba of India Ltd., implying that the benefit under the agreement is to be enjoyed only during the period of the agreement. The decision in Fenner Woodroffe and Co. Ltd. Vs. Commissioner of Income Tax, , therefore, seems to have turned mainly on the consideration that there was no bar against use of the technical know-how beyond the period of agreement and that was why that court was persuaded to hold that the assessee had acquired an asset or an advantage of enduring benefit to his trade. With great respect to the learned judges who decided that case, it is not possible for us to follow the view taken in that decision.

28. As already pointed out by us from the mere fact that the assessee is entitled to us the know-how even after the expiry of the period of the agreement, it cannot be held that the assessee had acquired a benefit of an enduring character because the know-how does not remain stagnant. We have also pointed out that in essence the agreements in question were for acquiring technical knowledge regarding methods of production and in addition in case of M/s. Daimler Benz the payment was for the use of the trade name. The decision in the case of Additional Commissioner of Income Tax and Another Vs. Southern Structurals Ltd., merely followed the decision in Fenner Woodroffe and Co. Ltd. Vs. Commissioner of Income Tax, . Since we are inclined to dissent from the view taken in that case, it is not possible to hold on the strength of the authority in that case that the expenditure in question in respect of any of the agreements in question must be treated as capital expenditure.

29. So far as the expenditure incurred on training of the employees of Telco is concerned, it is obvious that that expenditure was incurred with a view to give training to persons so as to achieve maximum and efficient production. The expenditure incurred on such training was undoubtedly closely related to the profit earning process, and, therefore, in our view, that would always be allowable as revenue expenditure. In this view of the matter, the question referred to us must be answered in the affirmative and in favour of the assessee.

30. The assessee to get the costs of this reference from the revenue.