**inspecting Assistant Vs. Rollatainers Ltd.**

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**SooperKanoon Citation** : sooperkanoon.com/62941

**Court** : Income Tax Appellate Tribunal ITAT Delhi

**Decided On :** Jul-23-1987

**Reported in** : (1987)23ITD440(Delhi)

**Judge** : P Mehta, F Rustagi

**Appellant** : inspecting Assistant

**Respondent** : Rollatainers Ltd.

**Judgement** :

1. The appeal of the revenue for the assessment year 1976-77 and the CO. of the assessee relating thereto are conveniently taken up together and disposed of by a common order.

2. First we will take up the appeal of the revenue and state the relevant facts. The assessee is a limited company whose accounting year, relevant to the assessment year 1976-77 under consideration ended on 30th June, 1975. The ITO in the assessment order has not correctly indicated the nature of assessee's business. The assessee's learned counsel Shri O.P. Vaish pointed out that the assessee is packaging machinery manufacturer and not making cartons. It entered into an agreement dated 28th March, 1973 with Christonssons Muskinor and Patontor AD, Bromma, Sweden (hereinafter referred to as 'CMP') which was engaged in Sweden in the manufacture of packaging machinery for in its own specialization system of packaging used for packing of a variety of consumer products. Relevant clauses of the agreement are reproduced below : 1. Licensee shall develop in the

Territory the manufacture of the machinery according to a phased programme decided by CMP and Licensee with due regard to availability of Machine shop capacity and consumer demand.

The drawings and specifications contemplated for each phase of the programme are those which are now used by CMP for its own manufacture and they are specified in Exhibit 1 hereto.

2. Licensee shall during the continuance of this agreement purchase from CMP at current prices all materials component and spare parts of the products which Licensee is unable to manufacture and which are in the manufacturing programme and described above provided that such current prices shall not in any case be higher than the prices charged by CMP for such materials, component and spare parts supplied by CMP to buyers elsewhere than in the Territory and provided that such materials, component and spare parts as CMP may furnish or cause to be furnished to Licensee therein shall be used by Licensee solely for the manufacture and assembly into completed units of the products. Licensee shall bear all costs of freight, insurance and other charges and expenses for the transfer of such materials, component and spare parts from CMP to Licensee.

3. In lieu of the technical services rendered to the Licensee, CMP shall be paid a royalty of 4% (Four per cent) subject to Indian taxes, of the net ex-factory sale price of the machines minus the landed cost of the imported and or independently bought out components, irrespective of the sources of procurement, including ocean freight, insurance, customs duties etc. limited to an annual production of Rs. 48 lakhs (Rupees forty-eight lakhs).

4. In addition to the royalty mentioned above CMP shall be paid a lump sum of Rs. 2 lakhs (Rupees two lakhs only) subject to the applicable taxes, for technical know-how/drawings etc.

5. CMP hereby grants to Licensee the exclusive right to manufacture the Machinery throughout the Territory and CMP shall not sell or lease any machine to any person in the Territory or to any person outside the Territory, knowing that such person intends to import the machine into the Territory. The payment of

royalty at the rate mentioned above in para 3 will be restricted to a total production of Rs. 48 lakhs per annum and 25% in excess thereof. In case of production in excess of this quantum, the prior approval of Govt.

will have to be obtained regarding the terms of payment of royalty in respect of this extra production.

14. Licensee agrees that it will not during the term of this agreement manufacture purchase, sell or use any other machines which might be deemed competitive with the machinery. Licensee agrees that it will not during the term of this agreement and at all times after its termination, not to divulge or disclose any of the affairs, prices, drawings, designs or technical information of CMP (except by way of legitimate information to customers for the purpose of leasing or serving the Machinery during the life of this agreement), nor to use or attempt to use any such confidential information or trade secret of which Licensee shall have been possessed during the life of this agreement, unless such use is permitted in accordance with this agreement nor to act in any manner which may injure or cause loss to CMP, but Licensee shall in all matters act loyally and faithfully to CMP and support and defend its interests.

Licensee shall take every reasonable measure in order to ensure that no person shall have access to any drawings, specifications or manufacturing descriptions except such person who necessarily must have such access in order to perform their obligations towards Licensee concerning the manufacturing in accordance with this agreement and that no such person shall have access to any more of such material than is necessary for such performance and Licensee shall take every precaution adequate or necessary in order to have such person safeguard the confidential nature of such material.** ** ** 17. Should Licensee become involved in receivership, bankruptcy or insolvency proceedings, this agreement may be terminated at once by CMP. Each party may terminate this agreement at any time upon sixty days written notice to the other party in case of substantial breach of this agreement by such other party, provided, however, that if such is remedied or made good within such sixty days period, the agreement shall not be terminated pursuant to such notice.

18. Upon termination of this agreement, irrespective of any cause Licensee shall send immediately to CMP all drawings, models and designs, as well as all pertinent technical material, which Licensee has received from CMP or otherwise obtained as part of the rights which Licensee has enjoyed under this agreement.

19. It is the Licensee's intention to take up the manufacture of these machines as soon as approval of the Indian Government to the terms of this agreement has been received. The duration of this agreement shall be for a period of five years from the date of commencement of production provided production is not delayed beyond 3 years of the signing of agreement.

20. The import of prototype capital goods, machines, raw materials components would be allowed by the Government of India as per import policy prevailing from time to time.

3. The assessee at the assessment stage claimed development rebate and depreciation on the amount of Rs. 2 lakhs paid for technical know-how drawings. The ITO allowed depreciation, but refused the claim for development rebate. The assessee filed an appeal before the CIT (Appeals) in regard to ITO's action in refusing development rebate, but in the course of pendency of the appeal it was advised that the entire amount of Rs. 2 lakhs was allowable as revenue expenditure.

Consequently it raised an additional ground of appeal before the CIT (Appeals) by its letter dated 12-10-1982. The additional ground of appeal is noted in para 6 of the order of CIT (Appeals). The CIT (Appeals) admitted the additional ground and accepted the contention of the assessee to treat the expenditure of Rs. 2 lakhs as revenue expenditure. The Revenue has come in appeal to the Tribunal urging the following single ground : On the facts and in the circumstances of the case the learned Commissioner of Income-tax (Appeals) erred in directing to allow claim of the assessee in respect of payment of Rs. 2 lakhs made to foreign collaborator, (sic) 4. Shri D.K. Sharma, the learned departmental representative, first sought to raise a contention that the Commissioner (Appeals) was not right in admitting the additional ground as the aspect about expenditure being revenue expenditure was not dealt with by the ITO. He relied on the Supreme Court decision in Addl. CIT v.

Gurjargravures (P.) Ltd. (1978) 111 ITR 1.

5. We have quoted the single ground of appeal of the Revenue above. The contention of the Revenue objecting to the admission of additional ground should fail for the pre Hminary reason that the ground authorised by the Commissioner does not seek to challenge the issue of admission of additional ground. The ground merely is directed to the merits of the issue decided by the CIT (Appeals). Alternatively the assessee's counsel Shri O.P. Vaish rightly submitted that the additional ground did not require any fresh investigation into facts, the facts being already on record and his reliance on the Supreme Court authority in CIT v. Mahalakshmi Textile Mills Ltd. (1967) 66 ITR 710 and Andhra Pradesh High Court decision in CIT v. Gangappa Cables Ltd. (1979) 116 ITR 778 is well placed. We reject this approach of the Revenue and deal with the issue on merits.

6. The submissions of both the sides on merits have been heard at length. In brief the stand of the Revenue was that CIT (Appeals) had not passed a speaking order and did not apply his mind to the facts of the case and that he had ignored the word 'etc.' used in Clause '4' of the agreement. It was further submitted that facts of the cases relied upon by the CIT (Appeals) namely CIT v. Tata Engg. and Locomotive Co.

(P.) Ltd. (1980) 123 ITR 538 (Bom.) and Praga Tools Ltd. v. CIT (1980) 123 ITR 773 (AP)(FB) were distinguishable, as those were cases of royalty payment and not of any lump sum payment and that royalty payment had already been allowed to the assessee by the ITO. Another vehement argument urged was that expenditure on drawings and patterns acquired from a foreign collaborator had been held to be a capital expenditure by the Gujarat High Court in CIT v. Elecon Engg. Co. Ltd. [1974] 96 ITR 672 and that decision of the High Court has been confirmed by the Supreme Court in CIT v. Elecon Engg. Co. Ltd. (1987) 166 ITR 66. On the basis of these decisions it was contended that expenditure on drawings and technical know-how incurred by the assessee was in the nature of capital expenditure and the CIT (Appeals) was wrong in treating it to be revenue expenditure. Finally it was submitted that the Delhi High Court decisions in Shriram Refrigeration Industries Ltd. v. CIT (1981) 127 ITR 746 and Triveni Engg.

Works Ltd. v. CIT (1982) 136 ITR 340 were delivered prior to the Supreme Court decision in Elecon Engg. Co. Ltd.'s case (supra) and the earlier decision of the Supreme Court followed in that case namely Scientific Engg. House (P.) Ltd. v. CIT (1986) 157 ITR 86.

7. Shri O.P. Vaish, the learned counsel for the assessee, submitted that in the assessee's case machinery to be manufactured under the agreement was stock in trade and it was a case of manufacturing another item of machinery for packaging in collaboration with a foreign manufacturer. It was further pointed out that the agreement with the foreign party CMP, was for a limited period of five years as per Clause 19 and that as per Clause 18, upon termination of the agreement, the assessee had to return immediately to CMP all drawings, models and designs as well as all pertinent technical material which it had received from CMP or otherwise obtained as part of the rights which the assessee had enjoyed under the agreement. It was contended that on the basis of these clauses of the agreement, this was a case of merely making use of information obtained on payment for profit earning process and not a case of bringing into existence a capital asset and therefore the expenditure of Rs. two lakhs was in the nature of revenue expenditure. It was further explained that knowledge obtained from the Swedish party was applied for manufacture of machines and this was a case of assistance received towards the profit earning process. It was submitted that the case fell under the ratio of the Supreme Court decision in CIT v. Ciba of India Ltd. (1968) 69 ITR 692, which has been followed by our High Court in several cases. He cited and relied upon at least four cases of the Delhi High Court, namely Shriram Refrigeration Industries Ltd.'s case (supra), Triveni Engg. Works Ltd.'s case (supra), Addl. CITv. Shama Engine Valves Ltd. (1982) 138 ITR 216 and CIT v. Bhai Sunder Dass and Sons (P.) Ltd. (1986) 158 ITR 195. It was submitted that it was clear from reading of these authorities that in the event of use of technical know-how and drawings and other things of that nature, the expenditure incurred would be in the nature of revenue expenditure. It was also submitted that similar view has been taken by other High Courts in several other cases.

Referring to the Supreme Court decision in the case of Elecon Engg. Co.

Ltd. (supra), it was pointed out that there were two distinguishing features in comparison with the assessee's case. Firstly, as can be seen from the Gujarat High Court judgment, in Elecon Engg. Co. Ltd.'s case (supra) at page 677 that during the course of hearing of the appeals, the assessee did not seriously press the contention that expenditure in question was revenue expenditure and it merely contended that expenditure was of a capital nature for acquiring a capital asset on which the assessee was entitled to depreciation allowance Under Section 32 of the Income-tax Act. Secondly it was a case of an agreement for a period of five years and upon termination of that agreement as per Clause 18, all drawings, models, designs, pertinent technical material etc. had to be returned to CMP and was not to be he property of the assessee. It was submitted that the Supreme Court in the case of Elecon Engg. Co. Ltd. (supra) had followed its earlier decision in the case of Scientific Engg. House (P.) Ltd. (supra). Shri Vaish then referred to the facts of that case and pointed out that the Supreme Court after examining the various clauses of the agreement at page 95 of 157 ITR had clearly held that expenditure under consideration was incurred by the assessee by way of purchase price of the drawings, designs, charts, plans, processing data and other literatuie etc. comprising in 'documentation service' specified in Clause 3 and the expenditure, therefore, was undoubtedly of a capital nature, as a result whereof a capital asset of technical know how in the shape of drawings, designs, charts, plans, processing data and other literature etc. was acquired by the assessee. Shri Vaish submitted that in the case of the assessee the technical know-how, drawings and all pertinent technical material etc. had not been purchased outright and as such material had to be returned to the CMP and, therefore, it was a case of use merely, falling in the ratio of the Delhi High Court decisions cited and relied upon by him.

8. After weighing the rival submissions and perusing the clauses of the agreement and particularly the authorities of the Supreme Court and the Delhi High Court cited by the assessee, we find that submissions of the assessee's learned counsel Shri O.P. Vaish are well founded. In the first judgment in the case of Shriram Refrigeration Industries Ltd. (supra), the Delhi High Court has laid down the principles which have been followed in the subsequent cases. We will quote the head note at pages 747-748 to highlight those principles : (i) That the payment of

Rs. 2,39,084 Uuder Article. VI(a) was in the nature of revenue expenditure. The whole object of the agreement was only to obtain the benefit of technical assistance for running the business, a restricted licence for the limited use of the patent rights of Westinghouse and the use was restricted to the assessee alone and for the duration of the agreement of such technical information as may be supplied by Westinghouse. In the light of these features of the agreement it could be appropriately said that Westinghouse did not part with technical knowledge absolutely in favour of the assessee and that Westinghouse had not 'sold' their secret processes to the assessee. The period of the agreement was not of much significance. If the nature of the agreement itself was such that it could not be said that the assessee had absolutely acquired any knowledge or asset, it was difficult to see how even a payment made by way of a lump sum to obtain the agreement or to persuade Westinghouse to enter into the agreement could itself have a different character. Further, since the payments were made to have access to the knowledge and information that was necessary to carry on and run the business from day to day, it was not of much significance whether the agreement was entered into at the time of the commencement of a business or in the course of a business which was already being carried on.

(ii) That in view of the Tribunal's finding that the expenditure could be considered in the assessment year 1966-67, the entire sum of Rs. 2,39,084 was allowable as a deduction in the assessment year 1966-67.

If the collaboration agreement results in the absolute transfer of technical knowledge to the assessee, the assessee could be said to have acquired an asset of enduring advantage but where the payment is made only for obtaining access to information which does not become its own, the payments cannot be elevated to the status of payments of a capital nature.

9. In our view applying the above principles the expenditure of Rs. two lakhs is revenue expenditure and the conclusion of CIT (Appeals) is to be upheld. It is unnecessary to send the matter back to the CIT (Appeals) to meet the contention of the Revenue that he has written a non-speaking order and ignored the word 'etc' in Clause 4 of the agreement. The word 'etc' in that clause is to be read in the

manner as explained fully in Clause 18, i.e., it will cover technical know-how/drawings, models and designs as well as all pertinent technical material which the assessee received from CMP or otherwise obtained as part of the rights enjoyed under the agreement. We also find force in the submission made on behalf of the assessee that the facts of the two Supreme Court cases Elecon Engg. Co. Ltd. (supra) and Scientific Engg. House (P.) Ltd. (supra) were different, as those cases were cases of purchase of technical know-how, drawings etc. we will prefer to go by the principles laid down by our own High Court to interpret agreements of foreign collaboration on the point of supplying of technical know-how, drawings etc. It is also correctly contended that in both the judgments of the Supreme Court the issue was not debated from the angle of revenue expenditure.

10. As a result of above discussion we uphold the conclusion of CIT (Appeals) to treat the expenditure of Rs. two lakhs to be revenue expenditure and dismiss the appeal of the revenue.

11. The cross-objection of the assessee, as filed, merely seeks to support the decision of CIT (Appeals) and does not seek any fresh relief. The cross-objection is, therefore, redundant. Shri Vaish wanted to modify the cross-objection by filing a modified cross-objection at the time of hearing which sought to agitate a different issue namely CIT (Appeals) had erred in not holding that if the expenditure was held to be of capital nature, the assessee was entitled to development rebate also in respect of the expenditure in addition to be depreciation allowed by the ITO herself.

12. In our opinion this amounts to raising a new cross-objection, which cannot be permitted to be raised for the first time after the expiry of prescribed limitation period. This modified cross-objection is, therefore, not entertained. The cross-objection of the assessee is dismissed, being infructuous.