**INCOME TAX APPELLATE TRIBUNAL**
**DELHI BENCH "B": NEW DELHI**

**(THROUGH VIDEO CONFERENCING)**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER**
**AND**
**SHRI AMIT SHUKLA, JUDICIAL MEMBER**

ITA Nos. 1502,1504,443,1503,3663,3667,3664/Del/2019
A.Ys: 2012-13, 2015-16, 2013-14, 2014-15, 2010-11,2009-10, 2011-12

| ACIT<br>Circle-9(1)<br>Room No. 178,<br>1ST Floor,<br>C.R. Building,<br>New Delhi-110 002 | Vs. | FCC Clutch India P Ltd.<br>(Successor of M/s. FCC Rico Ltd.), Plot No. 5, Sector-3.<br>IMT, Manesar,<br>Gurgaon – 122050<br>PAN AAACF4739N |
|---|---|---|
| **(Appellant)** | | **(Respondent)** |

| Department by: | Ms. Nidhi Srivastava, CIT(DR)<br>Shri Mahesh Thakur, Sr. DR |
|---|---|
| Assessee by : | Shri K.M. Gupta, Advocate<br>Ms. Shruti Khimta, Advocate<br>Ms. Saloni Shital, AR |
| Date of Hearing | 22/07/2021 |
| Date of pronouncement | 30/07/2021 |

**O R D E R**

***PER AMIT SHUKLA, J.M.:***

The aforesaid appeals have been filed by the Department against separate impugned orders of different dates passed by Ld. CIT (Appeals)3. New Delhi for the quantum of assessment passed u/s 143(3) for the assessment years 2009-10, 2010-11, 2011-12, 2012-13, 2013-14, 2014-15 and 2015-16. The common ground raised in all the

appeals is that, Ld. CIT (A) has erred in deleting the disallowance made by the AO by treating the 'royalty' expenditure holding that these expenses were revenue in nature, whereas AO has treated it as capital in nature. Consequently the royalty disallowed in all the years are as under:-

| **Asstt. year** | **Amount** |
|---|---|
| 2009-10 | Rs. 7,67,40,014/- |
| 2010-11 | Rs. 9,31,03,660/- |
| 2011-12 | Rs. 13,91,35,242/- |
| 2012-13 | Rs. 16,90,72,648/- |
| 2013-14 | Rs. 19,40,11,412/- |
| 2014-15 | Rs. 2,37,68,129/- |
| 2015-16 | Rs. 20,49,31,705/- |

2. Since identical issue is involved in all the appeals arising out of similar set of facts, therefore, same were heard together and are being disposed of by way of this consolidated order.

3. Brief facts are that the assessee company is engaged in the business of manufacturing and selling of clutch assemblies for two wheelers and four wheelers and supplying to original equipment manufacturers since 1997. During the course of assessment proceedings, AO noted that the assessee has entered into a license agreement dated 01.04.1999 with F.C.C. Co. Ltd., Japan ('FCC Japan'). After the expiry of the first agreement it had entered into another license agreement dated 01.10.2007 with FCC Japan so as to ensure continuity in manufacture, development, production and sale. Vide this agreement, the assessee was granted non-exclusive and non-transferable right and license to use the

Industrial Property Rights ('IPRs') and technical information in order to manufacture and sell the products and parts in India. Copy of the said agreements has been placed before us at pages 32 to 61 of the Paper book I. The assessee, in consideration of the right to use the IPRs and the technical information provided by FCC Japan, agreed to pay royalty as per the terms of the agreement at the rate of 5% on the difference between the net sales price actually charged by the assessee and gross sales price actually charged by FCC Japan to the assessee (i.e. on the 5% of the value addition made by the assessee).

4. In the assessment order for the assessment year 2009-10, AO required the assessee to show cause as to why royalty paid should not be treated as capital expenditure. In response, the assessee had given a detailed explanation along with the copy of agreement and also justifying that payment of royalty @ 5% for consideration of use of know-how in technical assistance is for non-exclusive and non-transferable right to use IPR and technical information in order to manufacture and sell the products and parts in India. Hence, it was claimed that it was revenue expenditure. However, Ld. AO held that royalty claimed by the assessee is capital in nature after relying upon the judgment of Hon'ble Supreme Court in the case of **Southern Switchgear Ltd vs CIT ([1998] 232 ITR 359 (SC).**

5. It is pertinent to note that exactly similar basis for disallowances were made in the earlier assessment years starting from Assessment year 2005-06. The appeal for A.Y. 2005-06 was allowed in the first appeal in favour of the assessee holding that it is revenue expenditure after detail analysis and reasoning. However, in assessment year 2005-06, the assessment was made u/s 147 and the validity of the same was challenged before the Tribunal, the Tribunal had quashed the reopening without adjudicating on merits. In the years which are

appealed before us, Ld. CIT (A) had deleted the addition on account of royalty and held it to the revenue expenditure after following the order of Ld. CIT (A) for assessment year 2005-06. The relevant observation of the Ld. CIT (A) reads as under :-

> *"4.3 I have considered the facts of the case and the submission made by the AR. It is contended that the appellant has entered into a technical collaboration agreement with FCC,. Japan on yearly basis that provides limited right to the appellant to use the Technical Information on a non-exclusive and non-transferable basis. The ownership of the technical information and IPRs remained with the Licensor i.e. FCC Japan. It is further submitted that the appellant has not acquired any tangible or intangible assets by paying royalty. The appellant has relied upon various case laws which are quoted in the submission above. The AR has further submitted that the disallowance on similar ground made by the AO has been allowed in favour of the appellant by the Ld. CIT(A) in AY 2005-06 vide order dated 14.05.2013. After going through this order of the CIT (A), I find that this issue has already been decided in favour of the appellant, in which the Ld. CIT(A) has held as under:*
>
> *'The facts of the appellant's case are identical with the facts of the above stated judicial pronouncements; therefore, the ratio of the said judgments is squarely applicable to the appellant's case. Hence, the royalty paid for using non-exclusive, non-transferable technical knowhow from FCC, Japan and Foreign Personal Deputation expenses for dissemination of technical knowhow in the production process is in the nature of recurring expenditure and same is held to be as revenue expenditure. Hence, the decision of the Assessing Officer of treating said expenditure as*

*capital expenditure and allowing depreciation at the rate of 25% on the same is deleted and the entire expenditure on royalty and Foreign Personal Deputation is treated as revenue expenditure. "*
*4.3.1 A perusal of the said appellate order for AY 2005-06 shows that !he Ld. CIT(A) has duly considered the judgment of Hon'ble Supreme Court in the case of Southern Switchgear Ltd vs. CIT 232 1TR 359 relied upon by the,. AO while deciding the issue. The Ld. CIT(A) has relied upon the judgment or— Hon'ble Delhi High Court in the case of CIT vs. JK Synthetics Ltd. [2009] 309 ITR 371 and CIT vs. Shri Ram Pistons & Rings Ltd. 220 CTR 404 (Delhi) along with other judgments and has allowed the issue in favour of the appellant. Since there is no change in facts to take a different view, in order to maintain judicial consistency and following the doctrine of judicial discipline, the addition made by the AO is deleted and the grounds of appeal are allowed."*

6. Before us the Ld. DR had filed his written submissions. For the sake of ready reference, same is being reproduced hereunder :

*"In the above case appeal has been filed before the Hon'ble ITAT by the Revenue against the orders of the CIT(A) for the above years in which the royalty payment was disallowed by the AO on the ground that the same constituted capital expenditure on account of enduring benefit to the assessee arising from the License Agreement.*

*2. The CIT(A) in their orders for different years have relied upon the decision of the CIT(A) for A.Y 2005-06 wherein the CIT(A) deleted the addition by holding that judgement of the Apex Court in the case of Southern Switchgears Ltd was not applicable in the given case. As per CIT(A), in the case of Southern Switchgears, the technical knowledge acquired by the appellant was enduring in*

*nature and benefit of the same was available to the said company for its manufacturing and industrial process even after termination of the agreement. In the case of the appellant, agreement was valid for 10 years and was not of enduring nature since it was granted right to use technical information and knowhow for manufacturing and sale of clutch and its parts in the specified territory on payment of recurring fee till the tenure of the agreement. The CIT(A) thus relied on the grounds of royalty payment being non-exclusive in nature and the right to use the Industrial Property Rights and Technical Information only for the period the agreement was in force and not after the termination of the agreement.*

*3. In view of the above and the submission made by the AR of the assessee during the proceedings before the Hon'ble Bench following submission is made for consideration of the Hon'ble Bench in light of the facts and circumstances of the case.*

*3.1 The assessee came into existence as an outcome of the Joint Venture Agreement (JV) dated 10-12-2006 made between FCC Co. Ltd. (a corporation organized and existing under the laws of Japan) and Rico Auto Industries Ltd. (a corporation organized and existing under the laws of India). The object of creating the JV was to manufacture clutch for automobiles and other parts and provide high quality products at competitive prices in India. This was to be achieved by utilizing the technical expertise, know-how and experience of the FCC Co. Ltd in the field of clutch assemblies and other parts.*

*3.2 In order to execute the same, an agreement was to be signed between the new company i.e., assessee and FCC Co. Ltd. The same is reflected in Article 15 of the JV Agreement which*

*forms part of the paper book filed by the AR. Both the signatories to the JV were to have equal shareholding in the assessee and the said percentage of shareholding was to be always maintained untill otherwise mutually agreed. Even in the event of any public issue or issue of scares to any financial institutions and the like the percentage of holding in the total issued capital of the assess was to be proportionately changed so that both the parties have equal shares in the issued capital remaining after such issue of shares.*

*3.3 Thus form the above, it is evident that both companies having equal share in the assessee had created the same to reap benefits from the technical know-how and expertise of FCC Co. Ltd in the field of clutch manufacturing. In pursuance of the JV agreement, a License Agreement dated 01-4-1999 was executed between the assessee (Licensee) and FCC Co. Ltd. (Licensor). The said agreement was subsequently followed by another agreement dated 01-10-2007 between the parties, the terms and conditions of which were similar to the previous agreement.*

*3.4 With regard to the ground taken by CIT(A) that the rights and license to use the 'Industrial Property Rights' and Technical Information' granted to the assessee was non-exclusive and non-transferable, it is submitted that the Ld. CIT(A) has not fully appreciated the facts of the case and has not taken a holistic view of the issue before arriving at the conclusion that the rights granted were non-exclusive and non-transferable. CIT(A) has relied more upon what is apparent but not real.*

*3.5 In the given case, licensor (FCC Co. Ltd.) has 50% stake in the assessee going by the shareholding of 50%. Article 1 of the JV Agreement clearly states that the purpose for setting up the new*

*company was profit making by utilizing the technical know-how of the licensor. Since, the Licensor has 50% stake in the assessee only logical inference that can be drawn is that the licensors interest lay in assessee earning maximum profits out if its business activities. This profit is inextricably linked to the 'Technical Information and 'Industrial Property Rights' provided by the licensor to the assessee basis their License agreement. This technical advantage available to the assessee is the key factor which gives the products of the assesse an edge over the other products. In this background, the license even though as per the License Agreement is non-exclusive in nature thereby implying that the licensor has the right to share it with other parties also but considering the peculiar situation, the financial interests at stake of the parties to the agreement and the close nexus of the licensor with the profits of the assessee, it is not difficult to assume that the licensor would prefer to have the technical information and know-how with assesse only rather than sharing it with other parties as this would adversely affect the business interests of the assesses which in turn would also mean the financial interest of the licensor on account of being 50% stakeholder in the assessee. In view of the above facts, it can be said that the rights granted to the assesse by the agreement are infact exclusive in nature. This can also be seen from the fact that the license agreement executed in FY 1999-2000 was in operation till FY 2014-15 which happens to be one of the years of appeal, the information about existence of business in subsequent years is not known from the available records. Even till FY 2014-15 would mean that the assessee has exclusive right of use of technical know-how for a period of 15 years which goes beyond the period of 10 years mentioned in the order of CIT(A). Hence, the right*

*enjoyed by the assessee has been an exclusive right for 15 years even though the license agreement stated that the same was non-exclusive in nature. Thus, it can be stated that the term non-exclusive in the license agreement is a misnomer when examined in the context of the facts existing. To this extent, the Ld. CIT(A) was not correct in holding that since the right available to assessee was non-exclusive in nature hence the royalty payment was allowable expenditure.*

*3.6 Another ground for deletion by CIT(A) was that the benefit was not enduring in nature as the same was available only during the duration of the agreement and not after its termination. This argument is also not valid considering the facts of the case. As per para 2 of the termination clause in the license agreement. In the event of termination, licensee shall promptly return to the licensor all documents and other tangible proper:, supplied by the licensor in connection with the agreement and shall keep confidential ali technical information received from the licensor and shall cease using and shall remove all marks used on the products such as trade names and trademarks owned by the licensor and/or designated trademarks and shall refrain from using the above said marks for the business of the licensee.*

*3.7 In this regard, it is submitted that assessee was incorporated for the sole purpose of manufacturing clutch and other parts of vehicles using the technology transferred by FCC Co. Ltd. (licensor with 50% stake in the assessee). It is not a case of assesse being an independent entity which was in existence prior to the execution of the license agreement and carrying similar business. The very existence of assessee is based on the agreement with the licensor and in case of termination of the agreement, assessee will*

*be deprived of the technical know-how and Industrial property rights on which its business activities are based. In such a scenario, business of the assessee would come to a closure with respect to manufacture of clutch and other parts and no manufacturing activity will be carried out. Thus, the argument that the benefits accruing to the assessee from the license agreement will not be available after the termination of the agreement itself is a fallacy as in such a condition even the assesse will cease to exist. Hence, to arrive at the conclusion that the agreement is only for a limited period and not enduring in nature is not true rather on the basis of the above discussion it can be said that the benefit is available to the assessee as long as it is in existence and the benefit is therefore enduring in nature.*

*3.8 The assessee has been availing the benefits of the license agreement for the 15 years since it was executed and will continue to do sb till the date of termination of the said agreement thus rendering the benefit to be enduring in nature. The condition of the benefits not being available post termination of the agreement does not hold any relevance in the given case as the very existence of the assesse is concurrent with the license agreement.*

*3.9 The grounds of the license agreement being non-exclusive, non-transferrable and the benefits of the agreement not being available post termination would have been relevant had the assesse been an independent entity without the licensor having any kind of interest/stake in the assessee. Since, in the given case licensor has 50% stake holding in the assessee along with other party to the JV, hence these arguments do not hold any substance. Had the assesse been in the business of manufacture*

*of clutch and other parts prior to the license agreement then in such a case it would have been relevant whether the rights granted by the agreement were exclusive, non-transferreable and would continue post termination of the agreement.*

*4. Reliance is placed on the order of the Hon'ble Supreme Court in the case of Honda Siel Cars India Ltd. V. CIT, Ghaziabad dated 09-06-2017 (395 ITR 713). The facts of the case are similar to the assesese. In the said case also the assesse i.e Honda Siel Cars India Ltd. Was newly created on the basis of the JV agreement. The assesse was granted indivisible and non-transferable right to manufacture in India. The appellant had during the currency of the agreement only the right to access the technical know¬how/technology. The agreement was for a period of 10 years and on the expiry of the agreement the appellant was duty bound to return all copies of the drawings, designs etc made available. For providing the aforesaid facilities a lump sum fee of 30.5 million US dollar was to be paid, besides appellant was liable to pay royalty of 4% on internal and exports. The appellant claimed the lump sum fee to be revenue expenditure which was held by the Apex court to be capital in nature. The Hon'ble court held that the lump sum payment was to be paid for the right in the license as well as for furnishing technical information, intellectual property rights which the appellant was entitled to exploit as a licensee without getting any rights in the same.*

*4.1 The Hon'ble Supreme Court also discussed the decision rendered by it in CIT V Ciba India Ltd. as well as Alembic Chemical Works Co. Ltd before arriving at the conclusion that the said payment was capital in nature. It was stated in the order that if the technical know-how obtained under the agreement for*

*which technical fee/ royalty is paid is for a limited period and only right to use the technical know-how is there during the agreement with no right of acquisition, coupled with the fact that the said technical know¬how is utilized for improvising the existing business, the expenditure would be treated as revenue expenditure. This case thus gives an indication that if such a technical know-how is for the purpose of setting up a new business, the position may be different.*

*4.2 The Court further held that the conclusion drawn by the High Court that expenditure incurred was capital in nature appears to be unblemished. Admittedly there was no existing business and thus question of improvising the technical knowledge by borrowing the technical know-how of HMCL, Japan did not arise. The assessee was not in existence at all and it was the result of the joint venture of HMCL, Japan and M/s HSCIL, India. The very purpose of agreement between the two companies was to set up a JV compan y :h the aim and objective to establish a unit for manufacture of automobiles and parts thereof*

*5. The case is also covered by another decision of the Hon'ble Supreme court in CIT v Southern Switchgears Ltd. (148ITR 272) wherein the Court disallowed one fourth of the royalty paid on the ground that the same was for acquisition of an exclusive privilege of manufacturing and selling the products. In the case before the Hon'ble Bench also the benefit available to the aseessee is exclusive in nature based on the discussion held in the earlier paras. In the case of Jonas Woodhead v CIT ( 224 ITR 342) the Hon'ble Supreme Court held Tribunal having considered the different clauses of the agreement and having come to the conclusion that under the agreement with the foreign firm what*

*was set up by the assessee was a new business and the foreign firm had not only furnished information and the technical know-how but rendered valuable services in setting up of the factory and even after the expiry of the agreement there was no embargo on the assessee to continue to manufacture the product in question, it was difficult to hold that the entire payment made was a revenue expenditure merely because the payment was required to be made on a certain percentage of the gross turnover of the products as royalty. In the facts and circumstances of the case, High Court was fully justified in answering the reference in favour of the revenue and against the assessee.*

*6. In view of the above, it is submitted that the Ld. CIT(A) was not correct in holding the royalty payment as revenue in nature on the grounds that the rights arising to the assessee from the License Agreement were non-exclusive, non-transferrable and not available post termination of the said agreement."*

*7.* On the other hand Ld. Counsel had also filed his written synopsis and it was submitted that this issue now stands squarely covered qua the judgment of Hon'ble Delhi High Court in the case of; **Climate Systems India Ltd. v. CIT [2009] 319 ITR 113 ; *CIT v.* Sharda Motor Industrial Ltd. [2009] 319 ITR 109** wherein the Hon'ble Jurisdictional High Court had also distinguished the decision of the Hon'ble Supreme Court in the case of Southern Switchgear Ltd vs CIT (supra). Again in the case of **CIT vs. Hero Honda Motors Ltd [2015] 55 taxmann.com 230 (Delhi),** Hon'ble Delhi High Court has duly considered the case of Southern Switchgear Ltd. and held that payment of royalty is revenue expenditure.

8. We have heard the rival submissions and also perused the relevant finding given in the impugned orders and material referred to before us. The only issue before us is, whether the royalty payment to FCC Co. Ltd., Japan where assessee was granted non-exclusive and non-transferable right and license to use IPR, technical know-how and technical information in order to manufacture and sell products and parts in India is revenue expenditure of capital. The relevant clauses of licence agreement have been reproduced in detail in the appellate order. However, relevant article 2 and 12 are reproduced hereunder:-

*Article 2- License*

1. *The Licensor hereby grants and Licensee a* ***non-exclusive and non-transferable right and license to use*** *the Industrial Property Rights and Technical Information in order to manufacture and sell the Products and Parts in the Territory in accordance with the provisions of this Agreement.*
2. *In the event the Licensee wishes to subcontract to manufacture all or any part of the Products to a third party, the Licensee shall inform the Licensor in advance.*

*Article 12- Consideration*

*In consideration of the right to manufacture and sell the products under the Industrial Property Rights and the Technical Information provided by the Licensor pursuant to this Agreement, the Licensee shall pay to the Licensor the following royalties: Five percent (5%) of the difference between the net sales price actually charged by the Licensee to purchasers of the products sold by the Licensee and the gross sales price actually charged by the Licensor to the Licensee for the Parts sold by the Licensor. However when calculating the above royalties, any taxes imposed and cost of any imported components of any nature and standard bought out components in regard to the sales of the Products shall be excluded. The computation of royalty shall be as per the guidelines laid down by the RBI and Government of India, through any of its agencies.*

9. The royalty paid by the assessee is recurring in nature which has been paying royalty over the years to FCC Col Ltd., Japan. The computation of royalty paid from Asstt. Year 2009-10 to Asstt. Year 2015-16, that is, for the years under consideration are as under:-

| Assessment Year | Amount of Net ales (Amount in Rs.) | Value addition (Amount of sale in Rs.) | Royalty Paid (Amount of Royalty in Rs.) | Remarks |
|---|---|---|---|---|
| AY 2009-10 | 352,77,55,798 | 204,64,01,177 | 10,23,20,059 | The Assessing Officer disallowed 75% of the total royalty expenditure amounting to Rs.7,67,40,014 treating the same as capital expenditure. |
| AY 2010-11 | 463,12,94,127 | 248,27,64,231 | 12,41,38,212 | The Assessing Officer disallowed 75% of the total royalty expenditure amounting to Rs.9,31,03,660 treating the same as capital expenditure. |
| AY 2011-12 | 624,70,30,950 | 371,02,73,127 | 18,55,13,656 | The Assessing Officer disallowed 75% of the total royalty expenditure amounting to Rs.13,91,35,242 treating the same as capital expenditure. |
| AY 2012-13 | 748,58,13,313 | 450,86,03,939 | 22,54,30,197 | The Assessing Officer disallowed 75% of the total royalty expenditure amounting to Rs.16,90,72,648 treating the same as capital expenditure. |
| AY 2013-14 | 834,98,99,248 | 517,36,37,653 | 25,86,81,883 | The Assessing Officer disallowed 75% of the total royalty expenditure amounting to Rs.19,40,11,412 treating the same as capital expenditure. |
| AY 2014-15 | 920,56,09,612 | 633,75,50,108 | 31,68,77,505 | The Assessing Officer disallowed 75% of the total royalty expenditure amounting to Rs.23,76,58,129 treating the same as capital expenditure. |
| AY 2015-16 | 779,39,46,935 | 5,464,845,477 | 27,32,42,274 | The Assessing Officer disallowed 75% of the total royalty expenditure amounting to Rs.20,49,31,705 treating the same as capital expenditure. |

10. One very important aspect which needs to be considered in the cases of payment of royalty is, whether any right has been given which is for use of technology or it has been given for acquiring the knowhow or transfer of technology; whether any exclusive right has accrued to the licensee or it is purely for use of technology for production and sale. In case where it is purely for use of technology without giving any exclusive right to acquire the knowhow or transfer of technology then it is revenue expenditure. In this case the right has been given as non-exclusive and non transferable right to the assessee. Hon'ble Delhi High Court in the case of **Climate Systems India Ltd. v. CIT** (supra) held that royalty paid by the assessee to the foreign collaborator at specified percentage of its domestic and export sales for using the technology and availing of technical services provided by the licensee under the technical collaboration agreement is allowable as revenue expenditure. Similar view was taken in the case of **CIT v. Sharda Motor Industrial Ltd**. In this decision, Hon'ble High Court has also considered the judgment of Southern Switchgears Ltd. and held that the proposition laid down in the said judgment and the principle will not apply where the payment of royalty made is for use of technology and is non transferable and non-exclusive then it is a revenue expenditure. Again this principle has been reiterated in the case of CIT vs. Hero Honda Motors Ltd. (supra).

11. The judgment of Southern Switchgears Ltd. as referred by the Ld. AO is purely distinguishable on facts of the present case on the following grounds :-

- The collaboration agreement in that case was for providing of technical knowhow for ***setting up of a factory*** and operation thereof, whereas in the present case ***only limited right to use the technical know-how for the***

***manufacturing and selling the products and parts during the term of the agreement has been granted to the assessee.***

- The technical knowledge secured under the agreement ***was available even after the termination of the agreement,*** whereas in the present case the ***assessee was obliged to discontinue the use and return the know-how.***
- There was conferment of ***exclusive right*** to manufacture and sell the articles whereas in the present case ***the assessee has only been granted non-exclusive, nontransferable and royalty bearing use of IPRs and technical information for limited use to manufacture, assemble, sell and distribute the licensed products and parts.***

Thus reliance placed by the AO and the judgment of Hon'ble Supreme Court is not correct.

12. Ld. DR submitted that there was a JV Agreement dated 10.12.2006 between FCC Co., Limited Japan and RICO AUTO Industries Limited with the object of clutch for automobiles and other parts. This was to be achieved by utilizing the technical expertise, know-how and experience of the FCC Company Ltd. The FCC Co. Ltd. Japan had equal shareholding in the assessee company. Therefore, both companies having equal shareholding in the assessee company was created to reap benefits from the technical know-how and expertise of FCC Com. Japan. Thus, the purpose of FCC Co. Ltd. for setting up of the new company was profit making therefore such profit is linked to the technical information and IPR provided by the licensor

to the assessee basis their license agreement. Though License Agreement uses the word non exclusive but in fact the substance of it looking to the financial interests and peculiar situation at stake of the parties to the agreement there is a close nexus with the licensor with the profits of the assessee and therefore royalty payment on the facts of the case needs to be held as capital in nature. Thus, there was an exclusive right the same was treated as non-exclusive in the licence Agreement. He has also referred to para 2 of the termination clause of license agreement wherein in the event of termination licensee shall promptly return to the licensor all the documents and other tangible property supplied by the licensor in connection with the agreement and shall keep confidential all technical information received from the licensor and shall cease using and shall remove all marks used on the products. The relevant termination clause has already been incorporated in the written submissions of Ld. DR. Thus, he had submitted that very existence of assessee is based on the agreement with the licensor and in case of termination of the agreement assessee will be deprived with the technical knowhow and IPR on which its business activities are based.

13. On perusal of the entire submissions and the contention put forth by the Ld. DR, no way can be inferred that the license agreement gave any exclusive right to the licensee or any technical know-how is being transferred or it will lead to creation of any capital asset in the hands of the licensee giving enduring benefit either during the term of license or in the year of termination of license agreement. FCC Co. Japan even having 50% stake holding with the assessee company will not lead to an inference that there is exclusive or transferrable technical know-how which is being acquired by the assessee company. It is purely for use of technology for manufacturing of clutch assembly for two wheelers and four wheelers and the royalty paid based on sale

percentage thereon cannot be a capital expenditure. Either having 50% control or 100% control that will not change the colour of nature of expenditure, because the royalty payment is for manufacturing or sale of manufactured products using the technical information and know-how. Precisely on these facts and circumstances the jurisdictional High Court in series of judgments have held that such a nature of payment of royalty is always a revenue expenditure. Accordingly, we hold that in the facts and circumstances of the case the payment of royalty as revenue expenditure and is allowable. Thus all the appeals of the revenue are dismissed.

14. In the result, all the appeals of revenue are dismissed.

Order pronounced in the open court on 30/07/2021.

| sd/- | sd/- |
| --- | --- |
| **(R.K. PANDA)** | **(AMIT SHUKLA)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

Dated: 30 /07/2021

***Veena***

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi