

Bellsonica Auto Components India Pvt. ... vs Dcit, Gurgaon on 27 July, 2018

In the Income-Tax Appellate Tribunal,
Delhi Bench 'E', New Delhi

Before : Shri Amit Shukla, Judicial Member And
Shri L.P. Sahu, Accountant Member

ITA No. 2210/Del/2016
Assessment Year: 2011-12

Bellsonica Auto Components India Pvt. Ltd., Plot No. 1, Phase-3A, Sector-8, IMT Menesar, Gurgaon. PAN- AACCB9442Q (Appellant)	vs. DCIT, Circle 1(1), Gurgaon. (Respondent)
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ITA No. 2329/Del/2016
Assessment Year: 2011-12

ACIT, Circle 1(1), Gurgaon. (Appellant)	vs. Bellsonica Auto Components India Pvt. Ltd., Plot No. 1, Phase-3A, Sector-8, IMT Menesar, Gurgaon. (Respondent)
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Assessee by	Sh. S.Vasudevan, Advocate
Revenue by	Sh. Sujit Kumar, Sr. DR

Date of Hearing	05.07.2018
Date of Pronouncement	27.07.2018

ORDER

Per L.P. Sahu, A.M.:

These two cross appeals by the assessee and the Revenue are directed against the order of Id. CIT(A), Gurgaon dated 16.02.2016 for the assessment year 2011-12. Both the parties have raised following grounds in their respective appeals :

Grounds raised by assessee :

" 1. That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) erred on facts and in law in confirming the disallowance of reimbursement amounting to Rs.8,92,572/- under the provisions of Section 40(a)(i) of the Income Tax. Act, 1961.

2. That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) erred on facts and in law in dismissing the contention of the Appellant that the Appellant was not liable to deduct tax under Section 195 of the Income Tax. Act, 1961, from the

payment made to M/s. Bellsonica Corporation Japan towards reimbursement of expenses as the same was not an income chargeable to tax in India.

2.1 That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) erred on facts and in law in observing in complete disregard of the supporting details and written submissions that the Appellant has failed both in the assessment proceedings as well as in the appellate proceedings to demonstrate the nature of reimbursements.

2.2 That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) erred on facts and in law in not appreciating that, similar claim of reimbursement of expenses of the Appellant has been allowed by the department in the previous assessment year i.e. Assessment Year 2010-

11.

3. That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) erred on facts and in law in not deleting the disallowance of expenditure the Appellant towards expenditure on account of royalty.

3.1. That on the facts and in the circumstances of the case, the Ld. CIT (Appeals) has erred on facts and in law in treating 25% of the expenditure towards Royalty incurred by the Appellant as capital expenditure.

Ground raised by the Revenue:

"1. Considering the facts and circumstances of the case, the Ld. CIT(A) erred in treating 75% of the expenses on royalty payment for technical "know how" as revenue expenditure without any basis for such percentage, whereas the total expenditure was capital in nature being incurred on technical "know how" as defined in Explanation-4 to section 32(1) of the Income Tax Act, 1961."

2. The brief facts are that the assessee filed return of income on 23.09.2011 declaring loss of Rs.1,62,75,800/-. The case was selected for scrutiny and statutory notices were issued to the assessee. In the assessment proceedings, the Assessing Officer observed that the assessee has paid technical fee of Rs.8,92,572/-, on which no TDS was deducted. The assessee was asked to furnish the details of payments made and reason for non- deduction of tax at source. The assessee submitted detailed written submissions. The Assessing Officer was not satisfied with the reply of assessee and disallowed a sum of Rs.8,92,572/- u/s. 40(a)(ia) of the Act and added the same to the income of the assessee.

3. The Assessing Officer further observed that the assessee has paid royalty of Rs.2,36,63,834/- to Bellsonica Corpn., Japan and it has been claimed as revenue expenditure. As per the license agreement, Bellsonica Corpn. Will supply technical knowhow and knowledge of dies, quality control and testing and he will also provide production methodology of the assessee in lieu of which royalty has been paid as per agreement placed on record. It was also submitted that Bellsonica Corpn.

Japan has given license information, technical knowhow of YC-5, design information, process, design of machines, dies, fixer for YP-8 and also provided blue prints of products. The Assessing Officer treated the royalty payment as fee for technical knowhow and as per Rule-5, technical knowhow is an intangible capital asset. Therefore, he allowed 25% depreciation on payment of Rs.2,36,63,834/- and after deducting depreciation, the rest amount was treated as capital in nature. Therefore, the balance amount of royalty paid of Rs.1,92,26,865/- was capitalized by the Assessing Officer and added to the income of the assessee. In appeal before the Id. CIT(A), who after considering the submissions of the assessee sustained the addition made u/s. 40(a)(ia) and in respect of payment of royalty, the Id.CIT(A) treated 25% of total payment as capital in nature and the balance 75% was treated as revenue expenditure after relying on case laws. Aggrieved by the order of the Id. CIT(A), the assessee as well as the Revenue have come up in appeal before the ITAT.

4. The learned AR reiterated the submissions made before the Id. CIT(A) and submitted that these payments made by the assessee are in nature of reimbursement, therefore, the TDS provision is not applicable on it. He has also referred to the agreement clause 3.05 and submitted that all payments have been made according to the agreement.

5. On the other hand, the Id. DR relied on the orders of the lower authorities and submitted that the assessee had not demonstrated the exact nature of payments made to its group company or payments made to the employees of Bellsonica Corpn. Japan. Therefore, the Id. CIT(A) has rightly dismissed the appeal of the assessee on this issue.

6. We have heard the submissions of both the parties and have gone through the entire material available on record. The assessee had not produced exact nature of payment made before the Assessing Officer as well as the Id. CIT(A) and during the course of arguments, he was agreed to indicate the nature of payments made to its group company. Therefore, this matter deserves to be remitted back to the file of Assessing Officer to decide the issue afresh. The Assessing Officer is directed to examine whether the TDS provisions are applicable or not with reference to the nature of payments made by the assessee to Bellsonica Corporation, Japan or to their employees. The assessee is also directed to produce cogent evidences in support of its claim. Reasonable opportunity shall be given to the assessee.

7. Further, in respect of payment of royalty of Rs.2,36,63,834/-, the AO has treated it as capital in nature as per Rule 5. The Id. AR reiterated the submissions made before the Id. CIT(A) and submitted that the payments have been made as per agreement with Bellsonica Corpn. Japan on 01.10.2006. It is submitted that the payment of royalty made by the assessee does not suggest any benefit of enduring nature to the assessee, as the payment has been made for the license given by the foreign company as per license agreement and after termination of license, the assessee is not authorized either to use the technical knowhow gathered from the said company nor can transfer the same to anyone. Reliance is placed on the decision of Hon'ble Delhi High Court in the case of CIT vs. Hero Honda Motors Ltd., 55 taxmann.com 230 (Del). He has also relied on the decision of Chandigarh Bench of Tribunal in DSM Sinochem Pharmaceuticals India (P) Ltd. DCIT, 82 taxmann.com 316 and of Delhi Tribunal in ACIT vs. Denso India, 89 taxmann.com 139. It is therefore, submitted that the Id. CIT(A) has wrongly held 25% of the payment as capital in nature.

8. On the other hand, the Id. DR relying on the order of the Assessing Officer submitted that the assessee had made agreement in the year 2006 and continuously getting benefit of the license till date. Therefore, it is capital in nature as the assessee is getting enduring benefit there from. The Id. CIT(A) has also wrongly decided the issue partly in favour of the assessee.

9. After hearing both the sides and perusing the entire materials available on record, we find that what we have to decide here is whether the payment made for technical knowhow was capital in nature or revenue. The ownership of the technical knowhow remained with the foreign company. The assessee has made license agreement with the foreign company as on 01.10.2006, which is continuously in force till date. The terms of agreement read as under :

" ARTICLE 2 LICENSE AND BELLSONIC'S OWNERSHIP 2.01: Scope of License

(a) Bellsonica agrees to provide, during the term of this Agreement, technical collaboration and license necessary to the manufacture, testing and quality control of Products, in accordance with the terms and conditions in this Agreement.

(b) Bellsonica hereby grants to Licensee during the term of this Agreement, in strict accordance with the terms and subjects to the conditions set forth, the non-

exclusive right to use the Licensed Information for the manufacture, testing and quality control of Products within the Territory.

2.02 Bellsonica's Ownership Licensee recognizes and acknowledges Bellsonica's ownership and validity of the Licensed Information and shall not raise or cause to be raised and question concerning or any objection to the ownership or validity of Licensed Information. Licensee shall not apply or cause to be applied for any letters industrial properties as to any of the Bellsonica's invention or register or cause to be registered any copyright or design which are identical or similar to or imitations or derivations of Licensed Information, in any part of the world without Bellsonica's written consent, either during the term of this Agreement or after its termination.

2.03: Use of License - Discovery of Infringement Licensee shall not, at any time, do any act which may in any way impair the right of Bellsonica in the Licensed Information. If any infringement of the Licensed Information or any industrial properties and know-how included in the Licensed Information comes to Licensee's attention, Licensee shall notify Bellsonica thereof immediately so as to enable Bellsonica to take whatever steps it believes advisable or necessary to protect its interest.

2.04 Disclaimer of Warranty

(a) Bellsonica declares that as of the date of this Agreement no third party has raised any industrial property and know-how claims against Bellsonica with regard to Products, which might have a material adverse effect on the manufacture, use or sale of Products by or for Licensee, manufactured strictly in conformity with the Licensed Information under this Agreement.

(b) Bellsonica further declares that in case such claim is raised during the term of this Agreement, which cannot be settled with the relevant third party, and such industrial properties and know-how claims have a material adverse effect on the manufacture, use or sale of Products manufactured strictly in conformity with the Licensed Information, it will make efforts to a reasonable extent to make available to Licensee a technical solution which will not violate the relevant industrial property and know-how.

(c) Bellsonica agrees to cooperate with Licensee in the legal defense of any law suits alleging infringement by Licensee of other's industrial property and know-how in respect of Products manufactured by Licensee in conformity with the Licensed Information, by furnishing to Licensee such information and evidence as are available to Bellsonica and are material to the proper defense of such law suits. The further obligations or responsibilities, if any, to be assumed by Bellsonica in any such law suits shall be decided by mutual agreement between Bellsonica and Licensee if and when such a need arises.

(d) Bellsonica gives no other warranty express or implied, as to description, quality, merchantability, fitness for a particular purpose, performance, productiveness, or any other matter, of any Products, Licensed Information, or any other matter of thing that may be provided by Bellsonica to Licensee at any time under this Agreement or any related agreement, unless the same is in written and signed by Bellsonica. Bellsonica will use its best efforts to verify the accuracy of the Licensed Information furnished it to Licensee, but shall not be liable to Licensee for damages arising out of, or resulting from, any of the Licensed Information made available hereunder or thereof by Licensee.

(e) Bellsonica further disclaims any responsibility whatsoever with respect to any representations or warranties, whether express or implied, which Licensee may make with respect to Products manufactured and/or sold by Licensee and, in any event, Licensee agrees to hold and save harmless Bellsonica from any claims, demands or actions which may result from any representations or warranties of Licensee.

Notwithstanding the foregoing, any warranty which Licensee proposes to give with respect to Products it manufactures sells shall be notified to Bellsonica in advance.

(f) Licensee shall take all actions necessary to indemnify and keep harmless Bellsonica from any product liability claims in connection with Products manufactured and sold by Licensee hereunder including procuring and maintaining, in the name and for the benefit of Bellsonica, without any liability or cost to Bellsonica, policies of insurance in such form, of such type and with such insures as are reasonably satisfactory to Bellsonica.

2.05 Infringement of Third Party's Rights Upon receipt of notice by Bellsonica and/or Licensee of any intended claim for industrial property and know-how infringements or if any action for industrial property and know-how infringements is instituted against Licensee and / or Bellsonica by any third party or parties, the parties hereto shall consult each other regarding the resolution of such matter. If any law suit is brought against Bellsonica alleging infringement of any industrial

property and know-how owned by others by any act of Licensee or by the import, manufacture, use and / or sale of Products in the Territory or any other country, Licensee shall cooperate with Bellsonica to enable Bellsonica to make proper defense against law suit.

ARTICLE 3: PROVISIONS RELATING TO LICENSING TECHNICAL ASSISTANCE 3.01 Supply of Licensed Information

(a) Bellsonica agrees to make available to Licensee Licensed Information which Bellsonica has the right and capacity, and is free, to disclose and/or grant license to Licensee as contemplated by this Agreement and which is utilized by Bellsonica in its plants where Products are manufactured. Notwithstanding the foregoing provision in the Article 3.01, Bellsonica shall make available to Licensee such Licensed information as, when properly used by Licensee, will be sufficient and complete for the manufacturing, testing and quality control of Products as contemplated by this Agreement.

(b) Bellsonica shall supply to Licensee all documentation in Japanese language. The language of documentation, however, shall be in English when Licensee has been so requested. Bellsonica shall further render reasonable assistance to Licensee in converting Japanese technical standards in the Documentation whatever required to Indian standards to enable them to be used by Licensee in India.

3.2 Improvement by Licensee If, at any time during the term of this Agreement, Licensee discovers or acquires any improvement with respect to Products, it shall give to Bellsonica full information, instructions, know-how and particulars as to the mode of working and using the same. Such improvement shall be treated as Licensed Information for the purpose of this Agreement. If such information contains improvements of significant commercial value for Bellsonica, Bellsonica will pay reasonable compensation to Licensee for the use thereof. The amount of such compensation will be mutually agreed upon.

3.03 Observance of Standards and Specifications

(a) In order to establish a Licensee production standard of quality comparable to the standards of Bellsonica, Licensee shall use its best efforts to provide and maintain adequate manufacturing and testing facilities, with the assistance and cooperation of Bellsonica in accordance with this Agreement. Bellsonica may also, in consultation with Licensee, examine and test materials used for Products for the purpose of enabling Licensee to reach the required standards of quality.

(b) In order to protect and maintain the quality of Products manufactured by Licensee pursuant to this Agreement, Licensee shall manufacture Products in strict accordance with the drawings, designs, specifications, bills of materials, know-how and instructions made available by Bellsonica for the purpose and in conformity with such methods and quality standards as may be described by Bellsonica. No change or modification which will affect the safety or performance of Products nor any other material change or modification of the drawing designs, specifications, bill of materials, know-how and models of products shall be made by Licensee, without securing the written approval of Bellsonica thereto.

3.04 Bellsonica in-Plant Training Bellsonica agrees, during the term of this Agreement, upon receipt of written request from Licensee to make available to Licensee Bellsonica's plant facilities, as designated by Bellsonica, for the purpose of in-plant observation and training of personnel of Licensee. As between Bellsonica and Licensee all costs and expenses relating to the in-plant observation and training of personnel of Licensee under this Article 3.04 (including but not limited to round-trip air fare between Indian and Japan, travel and transportation cost within Japan to and from the place where the relevant Bellsonica's plant is located, accommodation and daily expense and salaries and daily allowance paid to such personnel of Licensee in accordance with Licensee's company policy and rules) shall be borne by Licensee. Licensee shall not be required to pay any amount to Bellsonica for such in-plant observation and training. The number of persons and the period of training and stay shall be decided by mutual consultation and agreement by Bellsonica and Licensee, on a case by case basis.

3.05 Despatch of Bellsonica's Personnel

(a) Bellsonica agrees, during the term of this Agreement, upon written request from Licensee, to dispatch its personnel to the factories of Licensee to provide technical advice and guidance in the use of the Licensed Information for the manufacture, testing and quality control of Products or the same for start-up manufacturing of new model component. The number of personnel to be dispatched, their period of stay at the factory and/or factories of Licensee, the date of departure and all other terms and conditions not set forth hereunder in this Article 3.05 shall be, mutually agreed upon between Bellsonica and Licensee, on a case by case basis and subject to approval by the Government of India.

(b) Licensee shall bear, or upon the receipt of Bellsonica's statement reimburse to Bellsonica, the following expense and fees for each Bellsonica's despatched personnel:

(1) round-trip air fare between Japan and India, in business class for official general manager and above positions whereas in economy class for all others.

(2) twenty five thousand Japanese yen (¥ 25,000.-) per person for the inland transportation expense within Japan (3) travel and transportation expenses (including business class air fare and driver's expenses if applicable) within India, and (4) daily technical advisory fee for despatched personnel in the amount of forty thousand (40,000.-) for managers or greater while twenty thousand (20,000) for all other, both in Japanese yen and uniformity applied which rate is subject to increase upon mutual agreement between the parties hereto.

Licensee shall, in addition, provide at its own expense to Bellsonica's despatched personnel accommodation suitable to their respective status. Licensee shall bear all taxes and charges imposed by the Government of India or any authority therein or thereof having power to tax, upon any payments to be made by Licensee pursuant to or under this Article 3.05 (b), provided however that Licensee may make payment of daily technical advisory fee to Bellsonica net of taxes, on an understanding that Licensee shall furnish such documents, details, and information in regard to the

deduction of tax on daily technical advisory fee which may be required by Bellsonica. All other expenses incurred in connection with making such payments including expenses of currency conversion shall be borne by Licensee and no deduction shall be made by Licensee from such payment.

(c) In the event Bellsonica's personnel are despatched, as provided in the preceding Article 3.05(a), Licensee shall take, or cause to be taken, any and all reasonable steps to protect and ensure the safety of each Bellsonica's despatched personnel's life and properties. Bellsonica reserves the right, after consulting Licensee, to instruct and or ali of its despatched personnel to return to Japan or such other place as it may designate, when a situation exists which may be dangerous to the lives and properties of such despatched personnel.

3.06: Consideration

(a) Based upon fundamental agreement on Articles 2.01(a) and (b) between the parties, Licensee agrees to pay Bellsonica the running royalty at the rate of 2 (two) per cent of Licensee's sale which is the value against net sale after deducting all payable duties and taxes, in consideration of; providing and assistance of Licensed Information as specified in Article 3.01(a) and (b) and, assistance with regard to Articles 3 04 and 3.08, furthermore all other technical assistance and cooperation led by productivity increase or production improvement, and/or providing commercial information all of which Licensee is so desired as to Licensee's development, manufacturing and sale of Products.

(b) Aforementioned royalty payment is valid as equals to the life of this agreement and such rate of royalty is subject to increase upon mutual agreement between the parties hereto. Such royalty payment shall be made by Licensee within 30 (thirty) days upon closing Licensee's accounting book at every six (6) months within each fiscal year and by means of wire transfer to Bellsonica Licensee further agrees to submit Bellsonica such statement of account for royalty along with profit and loss statement in equivalent period as an evidencing document.

(c) All royalty payment by Licensee shall be done in Japanese Yen. Licensee may make payment of royalty to Bellsonica net of taxes, on an understanding that Licensee shall furnish such documents, details and information in regard to the deduction of tax on daily technical advisory fee which may be required by Bellsonica. All other expenses incurred in connection with making such payments including expenses of currency conversion shall be borne by Licensee and no deduction shall be made by Licensee from such payment.

(d) Notwithstanding of the provisions in Article 3.06 (a) and (b) royalty payment by Licensee may forbear, subject to Licensee's prior written notice and consent to the same by Bellsonica, further provided that the Licensee's gross profit is so long as and substantially negative for the first 3 (three) fiscal years from Licensee's incorporation. In such event of forbearance, royalty payment thereby shall only begin at the closing of Licensee's fourth fiscal year and further.

3.07: Delayed or non-payment In the event Licensee fails to make any payment specified in this Agreement to Bellsonica when due and payable for any reason whatsoever, subject to obtaining

requisite approval of the Government of India/Reserve Bank of India, an interest of ten percent (10%) per annum on such unpaid amount shall accrue and be due and payable by Licensee to Bellsonica until such unpaid amount is fully paid, notwithstanding whether or not this Agreement has been terminated in accordance with the provisions contained in this Agreement. The foregoing provision shall not be construed to release Licensee from its obligation to compensate for any damage which Bellsonica may suffer due to Licensee's failure as referred to above.

3.08 Assistance by Bellsonica's Representatives Bellsonica may, with the consent of Licensee, which consent shall not unreasonably withheld, examine the manufacturing facilities of Licensee pertaining to Products manufactured by Licensee in manufacturing Products in conformity with the drawings, specifications and designs furnished by Bellsonica to Licensee.

3.09: Confidentiality All licensed information supplied to and acquired by Licensee hereunder, shall be supplied and acquired in confidence for the use of Licensee under this Agreement and Licensee shall keep confidential and shall not disclose the same to any other party at any time during the subsistence of this Agreement, or after its termination, except where necessary to its employees, suppliers and subcontractors for the purpose solely related to the manufacture and sale of Products, and Licensee shall enter into an agreement with each of such suppliers and subcontractors under which supplier or subcontractors undertake to keep confidential, and not to use for any purpose other than the supply to Licensee of materials of products, any Licensed information disclosed to it by Licensee pursuant to this Article 3.09 and shall take such other steps as may be reasonably required to cause its employees, suppliers and subcontractors to safeguard the confidentiality of such information.

Both parties shall not, and shall require their officers, directors and employees not to, at any time, directly or indirectly, during the life of this Agreement or after its termination, divulge to any person, firm or corporation any information furnished by either party which may, in any way, be prejudicial to the best interest of the other party hereto.

3.10: Special Work by Bellsonica In the event Licensee requests Bellsonica to render any advice or assistance relating to Product or any manufacturing and operating preparations including, but not limited to, machineries, facilities and tooling or alike which requires special or unusual work or analysis and is not covered by this Agreement and in the event Bellsonica agrees to render such advice and assistance, Licensee agrees to pay Bellsonica a reasonable fee to be mutually agreed upon therefore. This fee shall be paid in Japanese Yen.

ARTICLE 4: PURCHASE OF PRODUCTION MACHINERY 4.01: Purchase of Production Machinery With regard to the production machinery to be purchased by Licensee for the manufacture of Products by Licensee, Bellsonica shall render advice and assistance to Licensee in the selection and purchase production machinery, at the request of Licensee.

ARTICLE 5: OTHER OBLIGATION OF LICENSEE 5.01: Not to manufacture similar products During the term of this Agreement or any extension thereof, Licensee shall not, except with the prior written consent of Bellsonica, either directly or indirectly enter into any other License agreement or

supply with any other manufacturer or seller of four- wheelers, two-wheelers or stamping and welding manufacturer under which Licensee would directly or indirectly manufacture, assemble or sell any part which is similar to any of Products.

5.02: Best Efforts With respect to Products to be manufactured by Licensee hereunder, Licensee shall do everything necessary in order to achieve and maintain quality standards comparable to those maintained by Bellsonica in Japan in connection with products of the same category as Products produced by Bellsonica so as to maintain the reputation of Suzuki Motor Corporation (hereinafter called "SMC") and Maruti in Territory and countries where four-wheelers or two-wheelers in which Products are incorporated are to be exported.

ARTICLE 6: DURATION AND TERMINATION 6.01: Term This agreement, unless terminated earlier as provided for in this Agreement, shall continue to be in force and effect for a period of 10 (ten) years from the Effective Date, and shall be automatically extended for successive period(s) of five (5) years unless either party hereto terminates this Agreement by a written notice given to the other party not less than 6 (six) months before the expiration of the then current period.

6.02: Governmental Approvals

(a) In the event any validation, approval, filing or registration with respect to this Agreement or for making or maintaining the obligations of the parties under this Agreement valid, binding and enforceable (including those Licensee for the remittance by Licensee to Bellsonica of any fees, royalties, expense or any other money provided for in this Agreement as contemplated herein) shall be required by the Government of India or Japan initially upon execution of this Agreement or at any time during the term of this Agreement, each party agrees to take immediately whatever steps as may be required in this respect with its own Government, and any charges incurred or to be incurred by such party in such connection shall be for the account of such party.

(b) It is also agreed that unless and until all such validations, approvals and/or registrations which may be required and are capable of being obtained initially upon execution of this Agreement, under the laws of Japan or India, as the case may be, have been received from the Government of Japan and India, respectively, which responsibility Bellsonica and Licensee respectively assume, no party shall be under any obligation to undertake performance of any of its obligations contained herein.

(c) Bellsonica shall obtain or complete, if required, such approvals, validations, registrations and filings in Japan with respect to this Agreement as set forth in paragraph (b) above by the end of October, 2006, and Licensee shall obtain or complete such approvals, validations, registrations and filings in India with respect to this Agreement as set forth in paragraph (b) above by the end of October 2006. Upon failure of either party to obtain or complete such approvals, validation, registrations and filings within the specific period stated herein from or with their respective Governments or regulatory authorities therein, each party shall have the right and option to declare this Agreement null and void and of no effect.

(d) In the event that either party hereto fails or delays to obtain any such validation, approval or registration referred to in paragraph (a) above of this Article 6.02 as may be required during the term of this Agreement and as is capable of obtaining the payment of any fees, expense or any other money provided for in this Agreement due and payable by Licensee to Bellsonica shall be made immediately after obtaining such validation, approval or registration together with the interest thereon accrued in accordance with Article 3.07 hereof.

(e) Each party also assumes the obligation, at its own expense, of complying with all laws, requirements and regulations of its Government affecting or relating to this Agreement.

6.03: Effective Date This agreement shall become effective as of the date on which all such approvals, validations, registrations and filings as set forth in paragraph (b) of Article 6.02 above have been obtained and made with such terms and conditions as are satisfactory to Bellsonica and Licensee, and such date shall be the "Effective Date" of this Agreement. Notwithstanding any provision contained in this Agreement, should any Licensed Information be supplied by Bellsonica, at its sole discretion and judgment, to Licensee prior to the Effective Date, Licensee shall immediately become subject to, and obliged to comply with, the provision in Article 2.02, 2.03 and 3.09 as if this Agreement shall have become effective pursuant to this Article 6.03.

6.04: Termination for Breach of this Agreement

(a) Notwithstanding anything to the contrary set forth in this Agreement and in addition to and without prejudice to the right to terminate this Agreement provided elsewhere herein, either party hereto may, upon its election and in addition to any other legal remedies that it may have, terminate this Agreement by giving a written notice of termination to the other party, in any of the following events:

(i) any of the payments covenanted herein to be paid to Bellsonica shall be in arrear and unpaid for a period of 90 (ninety) days after the same shall have become payable;
or

(ii) the other party hereto shall make a default in the performance or observance of any of the material obligations or covenants contained in this Agreement and on its part to be performed or observed and (except where such default is not capable of remedy) shall not remedy such default within 90 (ninety) days after its receipt of any written notice requiring such remedy given to it by the party terminating this Agreement; or

(iii) the other party hereto shall stop payment (within the meaning of any applicable bankruptcy law) or become insolvent or unable to pay its debt when due;

or

(iv) any proceeding shall have been initiated against the other party hereto under any applicable bankruptcy reorganization or insolvency law and such proceeding shall not have been discharged or stayed within a period of 90 (ninety) days; or

(v) the other party hereto shall institute or consent to any proceeding in respect of itself under any applicable bankruptcy, reorganization or insolvency law or shall make assignment for the benefit of, or into any composition with, its creditors.

(b) Notwithstanding anything to the contrary herein and in addition to and without prejudice to the right to terminate this Agreement provided elsewhere herein, either party hereto may, upon its election and in addition to any other legal remedies that it may have, terminate this agreement by giving a written notice of termination to the other party, in case Licensee shall at any time abandon, or cease to pursue, its plan to manufacture and sell products within the Territory as contemplated by this Agreement.

(c) Upon such notice of termination being given in accordance with paragraph (a) or (b) of this Article 6.04, this Agreement shall, except as otherwise provided herein, forthwith cease and terminate automatically as of the date of such notice of termination and the non-defaulting party shall have no further obligation to the other party under this Agreement, except as otherwise provided herein, but without prejudice to the rights and remedies of the non-defaulting party to receive or sue for and recover any payments, fees or interests payable under this Agreement, or to make claim for damages sustained by the non-defaulting party as a result of such default or seek any remedy with respect to any breach of any of the covenants or agreements contained herein.

6.05: Effect of Termination

(a) Upon any expiration, termination or cancellation of this Agreement, for any reason whatsoever, Licensee shall continue to be obliged to comply with the terms and provisions of this agreement with respect to the sale or other disposal of any or all of products remaining in its possession and the obligation set forth in Article 2.02, 2.03, 3.09 and 6.05 of this Agreement shall survive any such expiration, termination or cancellation and shall continue in effect perpetually.

(b) No compensation or indemnity shall be payable or given by any party to the other party to this Agreement due to expiration, termination or cancellation of this Agreement or upon refusal by Bellsonica or Licensee to agree to an extension of this Agreement or to enter into a new agreement, and neither party shall be entitled to, and each party does not hereby waive, any right to claim from the other party to this Agreement which it may otherwise have due to any goodwill, or otherwise, created during the term of this Agreement or any extension thereof.

ARTICLE 7. GENERAL 7.01: Arbitration Any and all claims, disputes, controversies or differences between the parties arising out of or in relation to or in connection with this Agreement, or with a breach thereof, which cannot be satisfactorily settled by correspondence or mutual conference between the parties hereto, shall be determined by arbitration in accordance with the then prevailing commercial Arbitration Rules of the Japan Commercial Arbitration Association upon

written request of either party hereto. The arbitration tribunal shall consist of one arbitrator appointed in accordance with such Rules. The arbitration shall be held in Tokyo, Japan in accordance with the Rules and also in accordance with the Japanese laws in respect of the procedures on which the Rules are silent, and may be held, if the Tribunal considers it appropriate, in an informal and summary manner to shorten the total time of the arbitration proceedings on the basis that it shall not be necessary to observe or carry out the usual formalities or procedures, including the delivery of pleadings, the making of discovery or the observance of the strict rules of evidence. The decision of such arbitrator shall be final and binding upon the parties hereto and judgment thereon may be entered in any court having jurisdiction thereon or application may be made to such court for judicial acceptance of the award and/or order of enforcement, as the case may be.

7.02 No waiver The failure with or without intent of either party hereto to insist upon performance by the other party of any term or provision of this Agreement in strict conformity with the literal requirements hereof shall not be treated or deemed to construct a modification of any term or provision hereof, nor shall such failure or election be deemed to constitute a waiver of the right of such party at any time whatsoever thereafter to insist upon performance by the other party strictly in accordance with any term or provision hereof.

7.03: Serviceability If any term or provision of this Agreement is hereafter determined to be illegal by any court with competent jurisdiction, the remainder of this Agreement shall not be affected thereby and shall continue in force notwithstanding the illegal provision or provisions herein contained.

7.04: Relationship of Parties Notwithstanding any of the provision of this Agreement, the relationship between the parties hereto, during the term of this Agreement, is and shall be that of independent contractors. Neither party shall at any time enter into or incur on behalf of the other party any commitment, expense or liability whatsoever, and all obligations, expenses and liabilities in connection with or relating to the manufacture, use and sale of products shall be made, paid and undertaken exclusively by Licensee for their own accounts as independent contractor and not as agent or representative of Bellsonica.

7.05: Not Assignable This Agreement, either in whole or in part or any of the rights and obligations hereunder, shall not be transferred or assignable, directly or indirectly, by either party, except Bellsonica may transfer or assign this Agreement to any successor by amalgamation, merger or consolidation or to any person, firm or corporation to which, at the same time, substantially all of the property, business and assets of Bellsonica are sold. Licensee shall not sublicense or sublet any of its rights under this Agreement. The obligations set forth articles 2.02, 2.03, 3.09 and 6.05 shall survive any transfer, assignment or other disposal of this Agreement and shall continue in effect perpetually on the parties as originally named in such provisions.

7.06: Governing Law This Agreement shall be governed by and constructed in accordance with the laws of India.

7.07: Notice Any written notice required by any provision of this Agreement or which either party hereto shall deem necessary or desirable shall be given by delivery in person or by registered airmail, postage prepaid, in each case addressed as follows (or to such other address or person as may have been designated by written notice as herein provided):

If to Bellsonica Corporation, 630-18 Yamaguchi, Kosai City, Shizuoka Pref.
431-0443, Japan Attention: President/CEO If to Licensee:

Bellsonica Auto Component India Private Limited, Plot No, 1, Phase 3A, IMT Manesar, Distt. Gurgaon - 122 051, Haryana India Attention: Managing Director Any written notice given pursuant to this Article 7.07 will be deemed to have been served and be effective when delivered in person at the address herein specified for the addressee or, in the case of airmail, when 20 (ten) days shall have passed after the same shall have been placed in mail.

7.08: Force Maieure No party to this Agreement shall be liable or responsible in any manner whatsoever to the other party for losses or damages due to failure or delay to perform or fulfill any provisions of this Agreement when such failure or delay is due to fires, floods, earthquakes, strikes, act of God, legal acts of public authorities, or delays and default caused by public carriers, or for any other acts or causes whatsoever, whether similar or dissimilar, which cannot be reasonably be forecasted or provided against, provided, however, that the party so affected shall promptly give a written notice to the other party setting forth the reason or cause for such delay or non-performance and shall use its best efforts to avoid or remove such reason or cause and shall continue performance hereunder with the utmost dispatch whenever such reason or cause is removed.

However, in the event the reason or cause for such delay and non-performance is not eliminated for a period of 90 (ninety) days, the other party may, at its option, without any liability whatsoever, forthwith terminate this Agreement by a written notice given to the party so affected.

7.09 Suspension or Termination Due to Act of Japanese or Indian Government Notwithstanding any provision contained herein which may be construed to the contrary, in the event that any act, regulations, directives, decrees or laws of the Government of Japan or of India, their departments, agencies or court should determine any material term or provision of this agreement to be illegal or make impossible or prohibit, restrain, modify or limit any material act or obligation of Bellsonica or Licensee under this agreement, either party to this Agreement shall have the right, at its option, to suspend or terminate this Agreement or to make, after consultation with the other party, such modifications thereto as may be necessary.

7.10: Titles The titles or headings used at the commencement of various Articles, Sections or paragraphs of this Agreement are for the purpose of ease of reference only, and in no event shall the substance of any paragraph or the intent of the parties be interpreted or controlled by any such titles or headings.

7.11: Counterpart Originals This Agreement is being executed in duplicate and each copy shall be deemed as original and shall be retained by each party hereto. The two original copies, however, shall constitute one and the same Agreement.

7.12 Entire Agreement The terms and conditions herein contained constitute the entire agreement between the parties hereto in connection with the subject matter of this Agreement and shall supersede all previous negotiations, communications, agreements or arrangements, either oral or written, between the parties hereto pertaining to the subject matter of this Agreement, and no agreement or understanding varying or extending the terms and conditions of this Agreement shall be binding upon any party hereto unless it is made in writing, signed by a duly authorized officer or representative of the parties hereto and, if so required, approved by the Government of Japan and Indian respectively."

10. After going through the terms of agreement dated 01.10.2006, we find that when the agreement is terminated, the ownership of technical knowhow will not remain with the assessee company. In the decision relied on by the assessee, the royalty payment in the similar facts and circumstances, has been decided to be a revenue in nature. The observation of ITAT Delhi Bench in the case of Moser Baer (supra) read as under :

"9.4. We have perused submissions advanced by both sides in the light of records placed before us.

9.5. The issue before us is regarding treatment of payment made to various parties with whom assessee entered into a know-how agreement. Assessee during year made payments to various parties which were treated as revenue expenses. Assessee contends that expenditure incurred on acquisition of right to know-how/technical information would not satisfy test of enduring benefit. Assessee placed reliance upon decision le Supreme Court in the case of CITv. Ciba India Ltd. [1968] 69 ITR 692.

9.6. Whereas Department contends that right acquired by assessee enabled assessee in trading results in practical and commercial sense and therefore satisfies test for enduring benefits.

9.7. Certain facts as observed by Ld.CIT (A) are that know-how are owned by owners and assessee was granted right to use for period of time till agreement continues to exist. And that upon termination, assessee has to discontinue manufacturing activities and sale of products where the use of such know-how is applicable.

9.8. Further Ld.AO observed that assessee has been using know-how since 2003. Ld.TPO observed that agreements entered into by assessee with these parties have been renewed from time to time automatically and assessee is allowed to sell products manufactured with the help of such know-how worldwide. Further agreement with M/s HP grants assessee an exclusive sub-license to reproduce, use and display the HP trade marks in the territory assigned to assessee and assessee is

free as per terms of agreement to contract out the manufacturing of HP branded products to HP approved 3rd parties and to appoint distributors for sale or distribution of HP branded products within the territory.

9.9. From the clauses referred to by Ld.AO in his order, it appears that, assessee acquired merely right to draw upon technical knowledge of foreign companies for a limited purpose of carrying on its business, and that foreign companies did not part with any of their assets absolutely for ever or for a limited period of time, that they continued to have the right to use their knowledge and, even after agreements had run their course, their rights in this behalf was not lost, that assessee had not, therefore, acquired any asset or advantage of an enduring nature for benefit of its business and that payments were, therefore, revenue in nature and were deductible."

Similarly, Hon'ble Delhi High Court in the case of Hero Honda Motors(supra) after considering the terms of agreement, has also held as under :

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

of-date models. Technical upgradation and state-of-the-art know-how is injected every year in the automobile industry. Failure to keep up and upgrade would result in product rejection and fall in sales. Persistent upgradation and cutting edge technology is mandate and business requirement in the competitive market of two/three wheelers."

11. The facts of the assessee's case are similar to these decisions. The Id. CIT(A) has relied on Supreme Court Decision in the case of Southern Switchgear Ltd. vs. CIT, 232 ITR 359 is not applicable in the present case because in that case agreement was made for a period of five years and it was expressly stipulated that after expiry of agreement, the method, production, procedure etc. would remain with the Indian assessee, whereas no such stipulation is made in the agreements made in the case before us so as to observe any benefit of enduring nature with the assessee. In the present case, the assessee has acquired only right to use of technical knowledge of the foreign company. Thus, respectfully following the decision of Hon'ble Delhi High Court and of the coordinate bench of Tribunal, we are of the considered opinion that the royalty paid by the assessee in the peculiar facts and circumstances of the present case, was in the nature of revenue expenditure incurred by the assessee. Therefore, we set aside the orders of the authorities below on this issue and decide it in favour of the assessee. Accordingly, ground No. 3 of assessee is allowed and ground No. 1 of the Revenue is dismissed.

12. In the result, the appeal of the assessee is partly allowed for statistical purposes and that of the Revenue is dismissed.

Order pronounced in the open court on 27th July, 2018.

Sd/-
(Amit Shukla)
Judicial member

Sd/-
(L.P. Sahu)
Accountant Member

Dated: 27th July, 2018

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Copy of order forwarded to:

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|---------------------------------|--------------------|
| (1) The appellant | (2) The respondent |
| (3) Commissioner | (4) CIT(A) |
| (5) Departmental Representative | (6) Guard File |

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Assistant Registr
Income Tax Appellate Tribun
Delhi Benches, New Del