IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

PRESENT:

The Hon'ble Justice Soumitra Pal.
And
The Hon'ble Justice Mir Dara Sheko.

ITA No. 628 of 2004

M/s. Innovestment Impex Ltd.
Versus
Commissioner of Income Tax, Kolkata-1

For the Appellant	:	Mr. J.P. Khaitan, Senior Advocate, Mr. Sanjoy Bhowmick, Advocate, Mr. C.S. Das, Advocate.
For the Respondent	:	Mr. Siddhartha Bhattacharyya, Advocate.
Heard on	:	02.07.15, 03.07.15, 06.07.15
Judgment on	:	11th September, 2015

Soumitra Pal, J.:-

This appeal, preferred by the assessee against the order dated 23rd April, 2004 passed by the Income Tax Appellate Tribunal 'C' Bench Kolkata for the assessment year 1998-99, was admitted on the following substantial questions of law:-

"a) Whether on a true and proper construction of the agreements dated March 29, 1997 and March 31, 1997 and related documents, the Tribunal was justified in law in holding that (i) there was no outright/absolute transfer of the technical know-how developed by the appellant without any cost of acquisition for the consideration of Rs.59 lakhs; (ii) the consideration of Rs.59 lakhs was not only for the transfer of the self-developed technical know-how, (iii) there was no such transfer in association with disposal of the appellant's business/capital asset; (iv) such technical know-how was not a capital asset; (v) the said sum was revenue receipt and not a capital receipt outside the purview of taxation; and its purported findings in that behalf are without and/or in excess of jurisdiction, arbitrary, unreasonable and perverse?

(b) Whether the Tribunal was justified in law in holding that transfer of the capital asset took place not during the previous year relevant to the assessment year 1997-98 but during the previous year relevant to the assessment year 1998-99 or that the sum of Rs.59 lakhs was chargeable to capital gains tax in the assessment year 1998-99 in view of the amended provisions of section 55 of the Income Tax Act, 1961 and its purported findings in that behalf are arbitrary, unreasonable and perverse?"

The facts in brief are as follows:-

The appellant, the assessee was engaged in the manufacture of closure systems required for plastic bottles at Silvassa. The moulds required for the manufacture of the said goods were imported. In the course of carrying on the said business over a period of 13 years, the appellant developed its own fool proof system and got the manufacturing process relating thereto registered in India and thus acquired patent rights for manufacture of the closures. The appellant in the course of its said business developed its own designs, know-how, etc. in respect of the manufacturing process and used such self-developed technical know-how along with patent rights for the purpose of carrying on its business.

With the object of going out of the said business, during the financial year ended 31st March, 1997 the appellant sold its plant and machinery including the imported moulds to SPBP Tea (India) Ltd. (hereinafter referred to as "SPBP"), a sister concern, and the self-developed technical know-how to M/s. Truepack Pvt. Ltd. (hereinafter referred to as "Truepack"). Truepack purchased the said plant and machinery and moulds from SPBP along with certain other plant and machinery belonging to SPBP.

For the sale of the self-developed technical know-how, comprising drawings, designs, manuals, process know-how, etc. the appellant entered into an agreement dated March 29, 1997 ('first agreement' for short) with Truepack. The consideration for the said transfer was agreed at Rs.59 lakhs out of which a sum of Rs.15 lakhs was to be paid upon handing over of the drawings and related technical information. The balance sum of Rs.44 lakhs was payable after the installation and commissioning of the plant and machinery purchased by Truepack from SPBP and trial production. It was agreed between the appellant and Truepack that the plant and machinery so purchased required renovation so as to achieve the stipulated production which could be carried out at a cost of Rs.28 lakhs. In the event the cost of renovation exceeded the sum of Rs.28

lakhs, such excess was to be funded by the appellant and treated as a loan by the appellant to Truepack carrying interest @18% per annum repayable within a period of three years. The first agreement further provided that on request the appellant would depute a technical person for providing supervision, guidance and assistance in areas pertaining to manufacture and also to guide, assist and train the staff of Truepack for a separate consideration including the expenses for travel, lodging and boarding of such person.

On March 31, 1997 another agreement (for short 'subsequent agreement') was entered into between the appellant and Truepack in terms of which the appellant agreed not to compete in the manufacture and/or sale and/or trading of the goods or similar products for a period of four years for a consideration of Rs.10,000/-.

The appellant on March 31, 1997 made over the self-developed technical know-how comprising drawings, designs, manuals, process know-how, technical information and guidelines, etc. to Truepack and became entitled to a sum of Rs.15 lakhs out of the agreed consideration of Rs.59 lakhs. It appears upon request by Truepack, the appellant agreed to a short postponement in the payment of the said sum of Rs.15 lakhs. Subsequently Truepack paid the sum of Rs.15 lakhs in May, 1997 along with interest @18% p.a. for the delay in payment. The balance sum of Rs.44 lakhs was subsequently paid by Truepack after the trial production along with interest for the delay in payment.

The case of the appellant is as the appellant had not incurred any cost in respect of the technical know-how self-developed by it in the course of its business and such self-developed technical know-how was its capital asset, the sum of Rs.59 lakhs receivable by upon transfer thereof during the previous year relevant to the assessment year 1997-98 was not chargeable to any capital gains tax. Upon receipt of the said sum of Rs.59 lakhs during the previous year ended March 31, 1998 relevant to the assessment year 1998-99, the said sum was included under the head Reserves and Surplus in its balance sheet as a capital receipt.

The sale of the plant and machinery including imported moulds to SPBP was duly reflected in the accounts of the appellant for the previous year ending on March 31, 1997 and the loss arising upon such sale was duly claimed in the computation of income for the assessment year 1997-98 of the appellant.

It appears that Truepack deducted income tax at source amounting to Rs.2,95,000/- from the sum of Rs.59 lakhs paid to the appellant for purchase of its self-developed technical Know-how. The appellant claimed credit for the said amount of tax deducted at source in its return for the assessment year 1998-99. The return for the assessment year 1998-99 was dealt with by the Assessing Officer under section 143(1)(a) of the Act accepting the returned loss. However, subsequently the Assessing Officer initiated proceedings under section 147 for the said assessment year. It appears from the reassessment order that the reassessment proceedings were initiated because the appellant had claimed credit for the tax deducted at source of Rs.2,95,000/- but had not shown the receipt of Rs.59 lakhs as part of its income. In the reassessment proceedings the appellant contended that there was no cost of acquisition in respect of the self-developed technical know-how which was transferred during the previous year relevant to the assessment year 1997-98 and that there was no liability for any capital gains tax. Though the Assessing Officer accepted there was no cost of acquisition, he treated the sum of Rs. 59 lakhs as chargeable to capital gain tax.

Being aggrieved, the appellant preferred appeal before the Commissioner of Income Tax (Appeals). The CIT(A) however, dismissed the appeal holding as that the transfer took place during the previous year relevant to the assessment year 1998-99, the amount was chargeable to capital gains tax in the said assessment year having regard to the amended provisions of section 55. It is to be noted that the appellant had filed an application for rectification before the CIT (A) since the appellate order suffered from several mistakes apparent on the face of the record, which has not yet been dealt with by the Commissioner of Income Tax (Appeals).

Being aggrieved, the appellant preferred further appeal before the Income Tax Appellate Tribunal. However, the Tribunal by order dated 23rd April, 2004 upheld the order of the CIT (A) and dismissed the appeal, holding that the sum of Rs.59 lakhs received by the appellant was a revenue receipt. The Tribunal held that even if there was a transfer of any capital asset, such transfer took place finally during the previous year ended 31st March, 1998 relevant to the assessment year 1998-99 and the appellant was liable for capital gains tax in view of the amendment made in section 55 of the Act with effect from the assessment year 1998-99.

Mr. J.P. Khaitan, learned senior advocate appearing for the appellant submitted that the real issue is whether there was transfer of technical know-how by the appellant to Truepack which took place on 31st March, 1997. Referring to the first and subsequent agreement between the appellant and Truepack for transfer of technical know-how and the non-competitive agreement respectively and the letter dated 31st March, 1997 written by Truepack to the appellant confirming receipt of technical Know-how, it was submitted that the crucial question is when the transfer of know-how took place. Since it is evident from the letter dated 31st March, 1997 that Truepack had confirmed having received such know-how it is clear that transfer had taken place on 31st March, 1997, that is in the assessment year 1997-98, which was duly reflected in the profit and loss account as the value of the plant and machinery was shown as nil. The finding of the Tribunal that the agreement has to be read as a whole and transfer had finally taken place in the financial year relevant to the assessment year 1998-99 was not on proper appreciation of the first agreement as clauses 1, 3 and 8 thereof have to be read together and not with Clause 2 dealing with the running of the factory and Clause 9 with regard to cost of renovation not related to the transfer of technology. Submission was the Tribunal proceeded on an erroneous construction of the agreements between the appellant and Truepack and other related documents in holding that the consideration of Rs.59 lakhs was payable not only for the transfer of technical Know-how but also for other services. The Tribunal failed to consider that section 55 of the Act had no manner of application for the assessment year 1997-98.

Submission was the Tribunal failed to consider that the question of taxability or otherwise of the sum of Rs.59 lakhs could not be postponed to the year in which installation, etc. of the plant and machinery was completed by Truepack having regard to the well settled legal position that taxability or otherwise was required to be considered in the year in which the transfer took place and could not be postponed to the year of payment of the consideration for such transfer. The Tribunal failed to consider that transfer of the technical know-how having taken place during the previous year relevant to the assessment year 1997-98, the question of taxability or otherwise thereof arose only in the said assessment year. The Tribunal failed to consider that the fact that the balance sum of Rs.44 lakhs was payable by Truepack upon installation and commissioning the plant and machinery and after trial production was entirely irrelevant for the purpose of deciding when the transfer of the technical know-how took place. Moreover the Tribunal exceeded its jurisdiction in holding that the sum of Rs.59 lakhs was a revenue receipt or that the technical know-how was not a capital asset, as no such case was made out either before the Assessing Officer or the CIT(A). The Tribunal failed to consider that the self-developed technical know-how was undoubtedly appellant's capital asset and was not stock-in-trade and the amount received upon transfer thereof constituted a capital receipt.

Though the Tribunal in its order held that the appellant did not provide details regarding the nature of the own designs and how it was developed, however, the Tribunal failed to consider that the appellant was never required by the adjudicating authorities below to furnish details of the nature of the self-developed designs, know-how, mechanism, secret process, and it was accepted that the appellant had in fact developed such know-how in course of its business and the same was transferred by the appellant for valuable consideration. Submission was the Tribunal failed to consider that Truepack would not have paid a sum of Rs.59 lakhs without receiving the value thereof and there could be no manner of doubt that the appellant had in fact developed its own technical know-how, which for acquiring Truepack agreed to pay Rs.59 lakhs. Since there was no of acquisition, capital gains cannot be computed. Referring to the assessment order submission was though the Assessing Officer in his order had imposed a minimum capital gains tax at 20 per cent, the revenue did not make out a case that it was a business receipt, a finding confirmed by the CIT(A). However the Tribunal held it was a revenue receipt which was neither the case of the assessee nor of the revenue. Mr. Khaitan has relied on some judgments which will be dealt appropriately.

Mr. Bhattacharya, learned advocate for the revenue submitted since the appellant was under an obligation to provide services which was a part of the transfer of technology, there was no absolute transfer on 31st March, 1997. Since agreement stipulates part payment is to be made on transfer of know-how and provision was made for renovation of plant and machinery, it was not a single transaction rather a package. Moreover the non compete agreement, the subsequent agreement, gave the appellant to manufacture and sell similar products after four years. Since it was not a complete transfer and it was not a capital receipt, the provisions contained in the amended section 55 comes into operation.

In order to appreciate the issue it is necessary to set out the relevant portions of the first agreement between the appellant and M/s Truepack Pvt Ltd, which are as under:-

"Whereas the Transferor is possessed of and sufficiently entitled to and conversant with the technical know-how, drawings, designs, manuals, process know-how, data, information and other details for the manufacture of Tampsafe Dropper Bottles herein after called "Dropper Bottles" by virtue of its expertise and knowledge and is in a position to render such technical know-how, advice and provide guidelines, information, assistance and services for the day to day operation of plant, machinery and equipment and maintenance of necessary plant and equipment and for manufacture and production of Tampsafe Dropper Bottles: hereinafter as follows:-

1) *The TRANSFEROR shall render, supply, furnish and provide said technical know-how, advice, guidance and shall provide information, assistance and services for day to day operation production and manufacture of Tampsafe Dropper Bottles.*
2) *The TRANSFEROR shall on request of the TRANSFEREE depute a technical person for providing supervision, guidance and assistance in the areas pertaining to manufacture of Tampsafe Dropper Bottles and also to guide, assist train designated staff of the TRANSFEREE in running/operating and maintaining the machines and associated facilities and for optimisation of methods of operation as required for manufacturing the Dropper Bottles. It is*

agreed that the expenses for travel lodging and boarding as also remuneration on per day basis of such person as may be agreed upon shall be borne by Transferee.

3) *The TRANSFEROR shall provide all the relevant information, date, documents, drawings, design, manuals pertaining to technical know-how for the product and manufacture of Tampsafe Dropper Bottles and shall provide its expert advice on all aspects so as to enable the Transferee to have the sufficient information to run the operation of manufacturing Dropper Bottles.*

4) *The TRANSFEROR shall not divulge, convey or inform at all times during and after cessasion of this agreement of any information relating to such technical know-how, trade secrets, date, methods processes, equipment, drawings etc. pertaining to the manufacture of Tampsafe Dropper Bottles.*

5) *…………………*

6) *That the convenants herein contained shall bind TRANSFEROR and/or its sister concerns and associated companies and it is expressly agreed that TRANSFEROR shall not directly or indirectly, by itself or its servants or agents or associates do any such act, deed, thing or matter which may have effect of violating the terms and conditions of this agreement. The intent being that neither TRANSFEROR nor any of its servants, agents or associated companies, or others directly or indirectly violate any of the terms of conditions of this agreement or commit any breach thereof in any manner whatsoever or otherwise adversely affect the rights of TRANSFEREE.*

7) *…………………………*

8) In consideration of the receipt of technical know-how information the TRANSFEREE shall pay to the Transferor fees or consideration of Rs.59,00,000/- (Rupees Fifty Nine Lacs only) to the TRANSFEROR towards the technical know-how information, advise and guidance from the TRANSFEROR within a period of one month from the date of this agreement.

The said amount shall be paid as follows:

a) Rs.15,00,000/- to be paid at the time when the transferor hands over to the transferee necessary drawings & related technical infomation

(b) Rs.44,00,000/- being the balance amount payable when the said machines are installed & Commissioned at the transferee place of manufacturing and after trial production.

9) The Transferor represents and assures that the said Plant & Machinery, equipment requires renovation so as to achieve minimum production of 3 million numbers of the said product per month of acceptable quality and such area of renovation shall be conveyed to the Transferee and the Transferor has further represented that such renovation can be completed at a total cost of Rs.28,00,000/- (Rupees Twenty eight lacs only). It is agreed by and between the parties hereto that such renovation work shall be inclusive of dismantling, transportation, installation and commissioning cost and shall be carried out by the parties hereto in consultation with each other and it is agreed that any expenses in excess of the aforesaid cost to achieve production of 3 million bottles per month of acceptable quality will be funded by the Transferor and shall be treated as loan by *the Transferor to the Transferee. The said amount of loan shall carry the interest at the rate of 18% per annum and shall be repayable within a period of 3 years".*

In this regard it is also appropriate to refer to the relevant clauses of the subsequent Agreement between the appellant and M/s Truepack Pvt Ltd. which are as under:-

"WHEREAS the TRANSFEREE has agreed to purchase the plant, machinery and equipment for the manufacture of Dropper Bottles as per separate Asset Acquisition Agreement arrived at and executed by and between the SPBP Tea (India) Ltd. of the one part and the TRANSFEREE herein of the other part.

AND WHEREAS the TRANSFEROR has agreed to provide technical know how to the Transferee for the consideration and on the terms & conditions agreed to by and between the parties hereto as recorded in a separate agreement

AND WHEREAS the Transferor has agreed not to compete in the manufacture and/or sale of the said products and the Transferor has agreed to the said arrangement for the consideration and on the terms and conditions agreed to by and between the parties hereto as hereinafter appearing;

NOW, THEREFORE, THIS AGREEMENT WITNESSETH AND IT IS HEREBY AGREED AND RECORDED AS FOLLOWS:

1) *The TRANSFEROR agrees not to compete in the manufacture and/or sale and/or trading of the said Dropper Bottles and/or similar products within*

the territory of India for a period of four years from the date of this agreement."

Admittedly by the first agreement the appellant had agreed for the transfer of the technical know-how to Truepack and was under an obligation not to divulge the know-how for all times to come. The consideration for transfer was agreed at Rs.59 lakhs out of which Rs.15 lakhs was to be paid on handing over of the drawings and Rs.44 lakhs was payable after installation of the plant and machinery purchased by Truepack and on commencement of trial production. Accordingly, the technical know-how, drawings, design, manuals, process Know-how, information and details for the manufacture of bottles were handed over by the appellant which by letter dated 31st March, 1997 Truepack had confirmed. The appellant submitted that it had not incurred any cost with regard to the technical know-how developed by it and as there was transfer of the said know-how during the previous year relevant to the assessment year 1997-98, there are no liability of capital gains tax. Hence, the sum of Rs.59 lakhs receivable on transfer thereof during the previous year relevant to the assessment year 1997-98 was not chargeable to capital gains tax. As already noted, however, the Assessing Officer and the CIT (A) declined the prayer of the appellant. In appeal the Tribunal referring to the Clauses in the agreements negatived the contention of the assessee by holding, inter alia, as follows:

"15. For the reasons aforementioned, we are of the opinion that the receipt of Rs.59 lakhs received by the assessee for imparting, providing, furnishing,

rendering and supplying the benefit of technical know-how, advices, guidelines, information, assistance and services for day-to-day operation of plant and machinery and equipments and for manufacturing and producing Dropper Bottles and that too not in association with the disposal of any capital asset or business of the assessee-company are liable to be taxed as revenue receipt. Even otherwise, it is also clear that there had been no absolute parting by the assessee with his so-called self generated technical know-how to the transferee. The assessee-company has also failed to provide and furnish details, particulars and nature of alleged fool-proof mechanism of manufacturing plastic bottles and has also failed to describe and specify those designs and know-how that were developed by it. The assessee has also not been able to specify and describe the secret process of manufacturing plastic bottles that were claimed to have been developed by it. The technical knowledge acquired in the course of carrying on business activities, which is overgrowing and everchanging, cannot be held in the nature of a capital asset. The assessee has not been able to establish and prove that alleged technical know-how was in the nature of a capital asset and it was transferred absolutely once for all. It is also not the assessee's case that the assessee's right to manufacture, produce or process the plastic bottles was transferred. The facts of the case as discussed above clearly show that there was no transfer of assessee's right to manufacture, produce or process the plastic bottles in any way or manner. Since there was no absolute transfer of any capital asset in the nature of alleged technical know-how, the decision in the case of CIT vs. B.C. Srinivasa Shetty (1981) 128 ITR 294 (SC) does not apply to the present case.

16. Even assuming that there was a transfer of assessee's right to manufacture, produce or process plastic bottles by way of imparting, rendering, providing, supplying and furnishing alleged self-generated technical know-how, advice, guidance and services, the consideration received by the assessee is exigible to tax inasmuch as the alleged transfer had finally taken place in the financial year 1997-98 relevant to the assessment year 1998-99 as would be established and evident from the nature of services or guidance or advices rendered by the assessee to the transferee in the terms of clause (1), (2), (3), (8) and (9) of the Agreement dated 29-3-1997. The imparting, rendering, furnishing, providing and supplying the services, advices, guidelines, knowledge etc. has been completed in the financial year 1997-98 as such transfer did or could not made on or before March 31, 1997. Mere supplying alleged drawings, designs manuals, process know-how, data, information and other details without anything more on 31-3-1997 is not enough and sufficient to complete the transfer unless and until the services or advices referred to in clause (1), (2), (3), (8) and (9) of the Agreement dated 29-3-97 are completely and fully rendered provided and/or furnished. The rendering, supplying, furnishing and providing technical know-how, advices, guidance, services were for day to day operation, production and manufacture of Tampsafe Dropper Bottles and also for renovation and installation of machineries so as to achieve minimum production of 3 million numbers of the said product per month of acceptable quality. The transfer of such services has or could not be completed by 31-3-1997. In the present case, transfer of knowledge and services as referred to in the Agreement dated 29-3-1997 has taken place and completed in *the financial year 1997-98 when such knowledge, services, guidance, advices etc. were in reality and in fact imparted or rendered or furnished by the assessee to the transferee for the day to day operation, production and manufacture of said bottles and for renovation and installation of machineries etc. so as to achieve minimum production of 3 million numbers of the said bottles of acceptable quality. To decide this question, the agreement in question has to be read as a whole. So read, it is clear that the transfer had taken place in the financial year 1997-98. In this connection, we may refer to the balance-sheet of the transferee company. It can be seen from the statement of account for the financial year 1997-98 that process of installing plant and machinery has been completed in the financial year 1997-98 and the transferee company started its production of plastic bottles and sets in the financial year 1997-98. This position has been given by the assessee-company in its written submission filed before us. In this view of the matter, even otherwise the assessee is not entitled to exemption from capital gain in view of the amendment made in section 55 of the Act effective from assessment year 1998-99".*

As the Tribunal, relying on the agreements had denied the claim of the appellant, the agreements require examination.

The crucial question which requires consideration is whether the first agreement is a composite agreement or taking the said agreement as a whole, whether the clauses in it are severable. It is to be noted in order to derive the meaning of any particular expression, the agreement has to be read as a whole to find out the true meaning of its Clauses. While interpreting an agreement Court should not confine itself to emphasising on a particular expression. The words and sentences in each clause of the agreement should be so interpreted so as to bring them in harmony with other provisions of the agreement. Where there are more than one agreement to the transaction and were executed during the same period, they have the same effect and have to be read together as if there was one agreement.

In the light of what has been held hereinabove, let the first and the subsequent agreement be examined.

In order to delve into the issues, Clauses of the first agreement, particularly Clauses 1,2,3,4,8 and 9 thereof, have to be scrutinized closely. To understand the actual effect of the first agreement, such through consideration is necessary. So far as Clause 1 is concerned we find that not only the appellant was to *"render, supply, furnish and provide said technical Know-how, advice, guidance"* to Truepack but was also under an obligation to *"provide information, assistance and services for day to day operation, production and manufacture"* of bottles. Thus this Clause, a composite provision, provided not only for transfer of technology for manufacture of bottles but also to provide assistance for running the factory on a daily basis. In this connection it is worth mentioning that Clause 3 is near similar to Clause 1 as the appellant was not only to provide *"all the relevant information, data, documents, drawings, design, manuals pertaining to technical know-how for the product and manufacture"* of bottles but was also to *"provide its expert advice on all aspects so as to enable the transferee to have the sufficient information to run the operations of manufacturing"* the bottles. Then under Clause 2 appellant was to depute a technical person on the request of Truepack to train the staff to run the factory and maintain the machines and to optimize the methods of operation required for manufacture of bottles which was essential *"for day to day operation"* under Clause 1. In this context it is not material that the appellant had undertaken to bear the expenses for food and lodging of such technical person. Again Clause 9 assumes significance as it is evident that the appellant had represented that the plant and machinery required renovation so as to achieve maximum production. The extent of the said renovation required was to be conveyed to Truepack, the transferee, and renovation was to be completed at a total cost of Rs.28,00,000/- which included dismantling, transportation, installation and commissioning in consultation with each other. Significantly under Clause 8(b) the balance amount of Rs. 44,00,000/- lakhs for transfer of know-how was payable on installation and commissioning of the plant and trial production. Therefore, Clause 4 of the first agreement regarding transfer of technology at a cost of Rs.59 lakhs cannot be read in isolation and has to be read as a whole as correctly interpreted by the Tribunal. From an analysis of the Clauses of the first agreement we find that mere parting by the appellant of the technical know-how to Truepack was not the sole object with which the said agreement was entered into but was also to assist the transferee in renovation, in installing and in commissioning the plant. It is clear from the language of the Clauses of the first agreement that the sale of know-how and the renovation, installation and commissioning of the plant were interlinked. Significantly it is to be noted that the transferee company had started its production in the financial year 1997-98, that is in the assessment year 1998-99, and the services to be provided under the first agreement were from renovation to commissioning of the factory. Looking from another angle we find that under the first agreement the appellant not only agreed to part with the technical know-how at a consideration but was also to assist Truepack in installing, in commissioning and in day to day operation. In view of the discussion on the first agreement, no discussion is required on the subsequent agreement, the non-competition agreement, which refers to first agreement. Since Court has to look at the nature and substance of the transaction in the background of the agreement and as in the case in hand under the first agreement the appellant had transferred the know-how and had agreed to provide other services from renovation and installation of machinery till the commissioning of the plant as evident of the first agreement, on facts the judgments of the Supreme Court in CIT vs. B.C. Srinivasa Setty (SC): 128 ITR 294, CIT vs. D.P. Sandu Bros. Chembur P. Ltd (SC) : 273 ITR 1 and the judgment of the Bombay High Court in CIT vs. Ralliwolf Ltd: 143 ITR 720 are not applicable. Since payment of balance consideration of Rs.44,00,000/- is linked with the installation and commissioning of machines at the transferee place and after trial production and as it appears that the installation had taken place in the assessment year 1998-99, the principles of law laid down in paragraph 8 of the judgment in Ajay Guliya v. Assistant Commissioner of Income-tax, New Delhi: 209 Taxman 295(Delhi) are not applicable.

Therefore, the question no. (a) is answered in the affirmative, against the Assessee and in favour of the Revenue. The question no. (b) is also answered in the affirmative, against the Assessee and in favour of the Revenue.

Hence, the appeal is dismissed.

(Soumitra Pal, J.)

I agree.

(Mir Dara Sheko, J.)