CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

Service Tax Appeal No. 51888 of 2015

(Arising out of Order–in-Original No. 39/Commissioner/2014-05 dated 23.01.2015 passed by Commissioner, Central Excise and Service Tax, New Delhi)

M/s Honda Cars India Ltd. **...Appellant**
(formerly M/s Honda Siel Cars India Ltd.).
Sector-40/41, Surajpur Kasna Road,
Greater Noida Industrial Area,
District Gautam Budh Nagar, (UP)-201306

Versus

The Commissioner, Central Excise and Service Tax,
LTU New Delhi. **...Respondent**

APPEARANCE:

Shri B.L. Narasimhan, Advocate for the Appellant
Shri Vivek Pandey, Authorized Representative for the Department

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.ANJANI KUMAR, MEMBER (TECHNICAL)

DATE OF HEARING: 08.12.2020
DATE OF DECISION: 22.12.2020

FINAL ORDER No. 51650/2020

JUSTICE DILIP GUPTA

M/s Honda Cars India Ltd.[1] has sought the quashing of the order dated January 23, 2015 passed by the Commissioner of Central Excise and Service Tax, New Delhi [2], by which the demand of service tax has been confirmed with penalty and interest, after invoking the

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1. **the appellant**
2. **the Commissioner**

extended period of limitation contemplated under the proviso to section 73(1) of the Finance Act 1994 [3].

2. The appellant, a manufacturer of motor vehicles in India, entered into a 'Technical Collaboration Agreement' dated April 1, 2010 [4] with Honda Motor Co. Limited Japan [5] for receiving technical and proprietary information for manufacturing new models of cars. Subsequently, the parties entered into a 'Model Agreement' dated May 31, 2011 [6] for the launch of a new model of 'Honda Civic' in India. This Model Agreement provided that the model fee and royalty fee would be determined as per the Technical Agreement.

3. The appellant claims that on account of unviability of high-end petrol cars due to increase in diesel cars, it decided not to launch the new model of Honda Civic car in India. For this reason, the Model Agreement was terminated on March 30, 2012 by a "Model Termination Agreement"[7]. In terms of clause 3 of this Termination Agreement, the appellant paid an amount of Japanese Yen [8] 130,000,000/- to Honda Japan to compensate all costs, expenses and non-cancellable commitments incurred by Honda Japan till then. This amount, according to the appellant, was paid to compensate for the following:

i. Research and development already undertaken by Honda Japan;

ii. Cost of Manpower assigned to the project;

iii. Overseas business trip expenses;

iv. Domestic business trip expenses; and

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3. the Finance Act
4. the Technical Agreement
5. Honda Japan
6. the Model Agreement
7. the Termination Agreement
8. JPY

v the Administrative costs incurred

4. According to the Department, the appellant received services from Honda Japan for the 'New Honda Civic Project' and the payments made by the appellant to Honda Japan were in the nature of consideration for these services. For this reason, a show cause notice was issued to the appellant on October 29, 2013 alleging that the amount paid by the appellant to Honda Japan was susceptible to service tax on a reverse charge basis under the category of 'consulting engineer' services defined under section 65(31), which is taxable under section 65(105)(g) of the Finance Act. The show cause notice mentions:

> "2. The audit of the records of the Noticee, was conducted by the officers of the DG Audit (CERA) for the period 2011-12. (RUD I). During scrutiny of Model fee expenses ledger of the Noticee for the year 2011-12, it was noticed that the Noticee had entered into a "Model Agreement" dated 31st May, 2011 (RUD II) with M/s Honda Motor Co. Ltd., Japan for payment of model fee in respect of new model of Honda Civic Car (211C). As per agreement the Noticee was required to pay first installment (50%) within 60 days for launching a new model 211C services fee charges for 211C" and accordingly charged/booked JPY 130,000,000 (Rs. 7,98,78,500/- including TDS of Rs. 79,87,850/- on 31.03.2012 as per the terms and conditions of the Model Termination Agreement dated 30th March, 2012 entered into by the Noticee with M/s. Honda Motor Co. Ltd. Japan. (RUD III)"

5. After referring to the clauses of the Termination Agreement, the show cause notice further mentions:

> "4. Accordingly, M/s Honda Motor Co. Ltd. raised invoice No. 912030492 dated 31/03/2012 (RUD IV) on the Noticee for payment of JPY 130,000,000 towards "Support Service Fee for 2HC". The Noticee paid M/s Honda Motor Co., Ltd. Japan "Support Service Fee for 2HC" amounting to JPY 130,000,000 (Rs. 7,98,78,500/- including TDS of Rs. 79,87,850/-) according to the Model Termination Agreement dated 30th March, 2012, and the same was in consideration of new model projects (reimbursement of all costs, expenses and non-cancellation commitment charges) and therefore was taxable. However they had not discharged appropriate service tax on this amount.
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> 6. From the definition of "Consulting Engineer Service" and relevant provisions of the Act and Rules made thereunder and the provisions of the Model Termination Agreement dated 30th March, 2012 between M/s Honda Siel Cars India Ltd and M/s. Honda Motor Co. Ltd Japan, it is apparent that the transaction involving payment of JPY 130,000,000 (Rs. 7,98,78,500/- including TDS of Rs. 79,87,850/-) by the Noticee to M/s Honda Motor Co. Ltd Japan in terms of the Model Termination Agreement cited above, is a taxable transaction and the Noticee is liable to pay Service Tax as recipient of service under Section 66A of the Act read with Rule 2 (1) (d)(iv) of the Rules. (as it existed during the period covered by audit)."

6. The appellant filed a reply dated July 7, 2014 to the aforesaid show cause notice contending that the appellant had not received any service from Honda Japan and, therefore, no service tax was payable on the termination fee paid to Honda Japan. After making reference to the Technical Agreement, the Model Agreement and the Termination Agreement, the appellant stated as follows:

> "A.9 A combined reading of the Model Agreement and the TCA shows that the Noticee was to receive technical information and know-how with respect to the full model changes for the CIVIC model in the form of drawings, specifications, engineering standards etc. (as mentioned in Article 1 of TCA).
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> A.10 **The noticee decided to terminate the decision to launch the full model change of HONDA CIVIC model even before its completion of Design Drawing etc by Honda Japan. So the services** which otherwise would have availed in the form of Consultancy engineers, Intellectual property Rights for the purpose of execution/ implementation of those Design drawings to the Noticee in India **have not even started.**
>
> A.11 It is submitted that the decision to launch the full model change of CIVIC was withdrawn in March 2012 an accordingly a MTA was entered into between the Noticee and Honda Japan on 30-03-2012.
>
> A.12 **The MTA was entered into even before any information/advice/drawing etc. could be supplied to the Noticee by Honda Japan. Accordingly, the Noticee did not receive any service from Honda Japan with regard to launching of FMC of CIVIC model.**
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> A.13 Further, the definition of consulting engineer service provides that the service is in the nature of advice, consultancy or technical assistance in any manner. **In the present case, no advice, consultancy or technical assistance with respect to launching of FMC of CIVIC model has been provided by Honda Japan to the Noticee. Hence, Honda Japan has not rendered any consulting engineer service to the Noticee."**

(emphasis supplied)

7. The appellant also pointed out in the reply that in any case the payment made to Honda Japan was only in the nature of compensation for the expenses incurred by Honda Japan and was, therefore, not leviable to service tax.

8. The Commissioner has, by the impugned order, confirmed the demand of service tax with penalty and interest for the reason that Honda Japan had rendered advice or technical assistance to the appellant. The observations are as follows:

> "4.5 On careful reading of the relevant portion of the agreement as above, show that the notice had taken a licence from M/s Honda Japan for Technical Information which means the notice shall obtain drawing, specification, engineering standard etc for manufacturing of Honda Automobile & there are nothing but Technical Assistance requiring to use the same for manufacturing of Automobiles. In the instance agreement, it also shows that the technical information shall specification, drawing, Engineering, standard etc. except Intellectual Property Right.
>
> 4.6 It is now relevant to discuss the text of the definition of "consulting Engineer" has been defined under section 65(31) of the Finance Act 1994.
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> > Section 65(31) "consulting Engineering" means any professionally qualified engineer, or any body corporate or any other firm who, either directly or indirectly, renders any advice, consultancy or technical assistance in any manner to any person in one or more disciplines of engineering.
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> 4.7 On plain reading of the definition as above, it shows that following ingredients are required to qualify for a person to be consulting Engineering
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> > (i) Consulting Engineering should be either qualified engineering or any body corporate or any firm
> >
> > (ii) Consulting Engineering should render advice, consultancy or technical assistance to any person.
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> **4.8 In the instant case M/s Honda Japan from whom the noticee had received the service, is a body corporate and M/s Honda Japan had rendered advice or technical assistance to the notice as discussed hereinabove para.**
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> 4.9 Therefore, and in view of my observation recorded in preceding para, I fail to find any legal force in noticee's argument that the services which they have received, is consulting engineering Service Tax. **I therefore, hold that**

> **the department has correcting classified the Service received by the noticee, under "Consulting Engineering Service,**
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> 4.10 **Next issue before me to decide as to whether the service tax amount to Rs 82,27,486/- to be recovered under section 73(1) of the Finance Act 1994.** In this regard, the noticee placed an argument that the provision of service received by them before the introduction of the taxable service of consulting engineer In furtherance of this plea, they placed reliance on the judgment of Hon'ble Tribunal in Hindustan Colar Ltd. Vs CCE already STR 845 (Tr. Mumbai). **This aspect has already been addressed to. by me here afore that the noticee had been receiving the provision of service after Model Agreement was made with them and it is also clearly established that the officials of M/s Honda Japan started visited the premises of the noticee for rendering the services.** In light of the available facts and evidence, I fail to find any legal force in the argument/plea of the noticee. I also fail to find any logic or reason, generating this plea to allow the noticee to entertain any relief that the noticee have not received any service."
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> **(emphasis supplied)**

9. Shri B.L. Narasimhan, learned counsel appearing for the appellant made the following submissions:

(i) The present dispute is whether the amount paid under the Termination Agreement would be subject to service tax. However, the impugned order has referred to the clauses of the Technical Agreement and the Model Agreement to arrive at a conclusion that the appellant imported technical information from Honda Japan. Reliance placed by the impugned order on the Model Agreement and the Technical Agreement for confirming the demand is not sustainable;

(ii) The Model Agreement and the Technical Agreement clearly stipulate that the appellant would receive technical information from Honda Japan for manufacturing the new Honda Civil model in India.

However, before this activity was undertaken, the appellant decided not to launch the said vehicle. Once the agreement for receipt of services was itself terminated, any amount paid towards reimbursement of costs would only be in the nature of a cancellation fee. In this regard, reliance has been placed on the following decisions to contend that there is no element of service rendered in case of cancellation of an agreement and so cancellation charges would not be susceptible to service tax.

(a) **Ford India Private Limited vs. Commissioner, LTU, Chennai [9].**

(b) **Lemon Tree Hotel vs. Commissioner, GST, Central Excise & Custom [10];**

(iii) When the benefits of the work undertaken by Honda Japan towards preliminary research or development for the appellant were not passed on to the appellant, no tax liability can accrue on reverse charge basis. This is specifically evident from the show cause notice itself. The show cause notice issued to the appellant discusses the clauses under the Technical Agreement which stipulate provision of technical information. The notice also discusses the taxing provisions for 'consulting

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9. 2018 (1) TMI 1219-Cestat Chennai

10. 2019 (7) TMI 767-Cestat New Delhi

engineer' service. Thereafter, the notice directly alleges that the appellant is liable to pay service tax on the amount paid under the Termination Agreement, without identifying or specifying any 'consulting engineer' service which was actually rendered by Honda Japan to the appellant;

(iv) The amount received was in the nature of reimbursement of expenses, which is not subject to service tax;

(v) No demand can be made under the category of 'consulting engineer' services; and

(vi) In the absence of any mala fide on the part of the appellant, the extended period of limitation could not have been invoked and so the demand is not imposable.

10. Shri Vivek Pandey learned Authorized Representative of the Department made the following submissions:

(i) Neither the agreements nor the invoice use the term 'reimbursement';

(ii) Compensation is different from reimbursement. Compensation is "for such service", while reimbursement may be not;

(iii) Technical Information is not Intellectual Property Right and is classifiable under 'consulting engineer' service;

(iv) Article 4.1 of the Technical Agreement provides that the licensor shall furnish technical information to the licensee on a

continuous basis, which means that technical information has to be extended without any break. Hence, the contention of the appellant that nothing was shared between 2010-12 is wrong;

(v) The Termination Agreement provides in clause 3 that the licensee agrees to compensate the licensor for the amount **towards** the commencement of the volume production. The word **towards** means "in the direction of" and, therefore, compensation is directed towards the commencement of volume production;

(vi) The Termination Agreement cannot undo technical information already provided and shared between 2010 to 2012;

(vii) Paragraph 4 of the Termination Agreement shows that all stages of the Agreement have been achieved except the commencement of volume production. Thus, the Agreement was terminated at the last stage; and

(viii) It is not a legal requirement for a show cause notice to contain all factual details. The classification, valuation and charge should be correct.

11. The submissions advanced by the learned counsel for the appellant and the learned authorized representative of the Department have been considered.

12. In order to appreciate the contentions advanced on behalf of the parties, it would be necessary to examine the three Agreements.

13. It is seen that the appellant, which manufactures motor vehicles in India, entered into a Technical Agreement with Honda Japan and the relevant portions of the Technical Agreement are reproduced below:

TECHNICAL AGREEMENT:

"WHEREAS, LICENSOR is engaged, in, inter alia, the business of the research and development, manufacture and sale of automobiles and their parts and through experience accumulated in such business, has acquired and possesses certain intellectual property rights, manufacturing information and know-how, quality standards and marketing methods relating to such products;

WHEREAS, LICENSEE is desirous of obtaining and receiving a license and technical information from LICENSOR for the manufacture and sale of certain automobiles, and LICENSOR is willing to give such license and information; and

WHEREAS, Exhibits I & II attached hereto, form an integral part of this Agreement,

NOW, THEREFORE, LICENSOR and LICENSEE hereby agree as follows:

Article 1. DEFINITIONS

Unless otherwise clearly required by the context, the following capitalized terms as used in this Agreement, whether used in the singular or plural, shall have the respective meanings as defined below:

1. The tem "Products" shall mean the specific models and types of Honda-branded automobiles, being currently manufactured by the LICENSEE, hereinafter called the "Existing Models", and such additional models and types, which may, from time to time, be decided, as agreed upon by the parties hereto, in writing, in a "Model Agreement and shall cover;

   (a) Full Model Changes (FMCs) being variants of the "Existing Models", involving major changes, including but not limited to, the appearance, design, specifications or process of manufacture

of the automobiles, and agreed between the parties to be an FMC.

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6. The term "Technical Information" shall mean the certain secret know-how and technical information (except for the Intellectual Proper Rights), whether in writing or not, including but not limited to (i) drawings, specifications, materials lists, direction maps (explanatory drawings) and test reports which directly relates to the Products or the Licensed Parts themselves and (ii) engineering standards and quality standards of LICENSOR commonly relates to the Honda-branded automobiles or the parts thereof, both of which is indispensable for the manufacture of the Products or the Licensed Parts and which LICENSOR owns at the time of execution of this Agreement or may own from time to time during the term of this Agreement or under which LICENSOR is entitled to grant a license to LICENSEE;

7. The term "Effective Date" hereof shall mean the first day of April, 2010; and

8. The term "Commercial Production" shall mean the first completed sale of the Products or the Export Parts by LICENSEE after the trial production phase is over.

Article 2. GRANT OF LICENSE

2.1 Subject to the terms and conditions herein contained, LICENSOR hereby grants to LICENSEE an indivisible, non-transferable and exclusive right and license, without the right to grant sub-license, to manufacture, use and sell the Products within the Territory, using the Intellectual Property Rights and the Technical Information.

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Article 4. FURNISHING OF TECHNICAL INFORMATION

4.1 During the term of this Agreement, LICENSOR shall furnish LICENSEE on a continuous basis with the Technical Information required by LICENSEE, bases on mutual consultation between LICENSOR and LICENSEE, by disclosing it in documentary form, and/or otherwise.

Article 13. CONSIDERATION

13.1 Mode of Payment
13.1.1 Model Fee

In consideration of the furnishing of the Technical Information under Article 4 hereof, LICENSEE shall pay to LICENSOR, a lump sum fee, hereinafter referred to as "Model Fee" as hereunder:

a) For each New or FMC Model

The amount of Model fee payable for each New or FMC model of the Products, as detailed under Exhibit I, by LICENSEE to LICENSOR shall be Eight Hundred Million Japanese Yen (JPY 800,000,000). This fee shall be payable in two (2) equal installments as detailed below:

i) The first installment of Four Hundred Million Japanese Yen (JPY 400,000,000) shall be payable within sixty (60) days after the signing

of Model Agreement by LICENSOR and LICENSEE; and

ii) The second and final installment of Four Hundred Million Japanese Yen (JPY 400,000,000) shall be payable within sixty (60) days after commencement of Commercial Production of the specific New or FMC model of the Products.

13.1.2 ROYALTY

In consideration of the right and license granted to LICENSEE under Article 2 hereof for the Products and the Export Parts, LICENSEE shall pay to LICENSOR a Royalty on all Products and Export Parts, while this Agreement is effective.

The rate of royalty for the Products payable by LICENSEE to LICENSOR shall be as under:

(a) On Domestic Sales: Five Percent (5%) net remittable to LICENSOR, after deduction from the Gross rate, the applicable withholding taxes, which shall be additionally borne and deposited by LICENSEE on behalf of LICENSOR
(b) On Export Sales: Five Percent (5%) net remittable to LICENSOR, after deduction from the Gross rate, the applicable withholding taxes, which shall be additionally borne and deposited by LICENSEE on behalf of LICENSOR

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The royalty shall be payable during the term of this Agreement for each Existing Model and the Export Part therefore, and from the date of commencement of Commercial Production for each New, FMC and for MMC Model and the Export Parts therefor."

14. The parties decided to launch a Full Model Change of the existing Civic car and, therefore, a Model Agreement was entered into between the parties on April 1, 2010. The relevant clauses of the Model Agreement are reproduced below:

MODEL AGREEMENT

"WHEREAS, LICENSOR and LICENSEE entered into a Technical Collaboration Agreement dated April 1, 2010 (hereinafter referred to as the "License Agreement"); and

WHEREAS, LICENSOR and LICENSEE have recently reached an accord of their opinions to launch FMC of the existing CIVIC in accordance with the provision of Article 1.1 (a) of the License Agreement.

NOW, THEREFORE, in accordance with the provisions of Articles 1.1 and 13.1.1(a), LICENSOR and LICENSEE hereby agree as follows:

1. The FMC of the existing CIVIC model, covered under this Model Agreement shall be known as 12 Honda CIVIC code named as "2HC" in accordance with the provisions of Article 1.1(a) of the License Agreement.

2. The amount of the Model Fee payable for 12 Honda CIVIC (2HC) shall be in accordance with provisions of Article 13.1.1(a) of the License Agreement.

3. The amount of the Royalty payable for 12 Honda CIVIC (2HC) shall be in accordance with provisions of Article 13.1.2 of the License Agreement.

4. Unless otherwise especially set forth herein, all the capitalized terms used herein shall have the same meaning defined in the License Agreement."

15. However, the appellant thought that the upper segment petrol cars would not suit the Indian market as Indian market was tilting towards diesel cars, and so it made a request to Honda Japan for termination of the Model Agreement, whereafter the Termination Agreement was executed. The relevant clauses of the Termination Agreement dated March 30, 2012 are reproduced below:

MODEL TERMINATION AGREEMENT

"WHEREAS, LICENSOR and LICENSEE entered into a Technical Collaboration Agreement dated on the 1st day of April, 2010 (hereinafter referred to as the "TCA") and pursuant to the said TCA the Licensor and Licensee entered into the Model Agreement dated the 31st day of May, 2011 concerning the 2012 YM Civic (hereinafter referred to as the "Products") as an addendum to the TCA (hereinafter referred to as the "Model Agreement";

WHEREAS, after execution of the Model Agreement by the parties hereto, LICENSEE has been having difficulty with the fast-changing environment for the Products, as Indian car market is rapidly getting dieselized because of large difference between the Petrol and Diesel fuel prices. Consequently, the upper segment Petrol cars are getting uncompetitive. This has sharply eroded the demand for the LICENSEE's existing Civic models; and

WHEREAS, in consideration for the above situation, LICENSEE requested LICENSOR to terminate the Model Agreement without the commencement by LICENSEE of the volume production of the Products and LICENSOR accepts as an exceptional case such LICENSEE's request if LICENSEE compensates all costs, expenses and non-cancelable commitments incurred by LICENSOR for the work towards the commencement of volume production of the Products by LICENSEE up to the date of cancellation of the Model Agreement,

NOW, THEREFORE, LICENSOR and LICENSEE hereby agree as follows:

1. LICENSOR and LICENSEE agree to terminate the Model Agreement as of the 30th day of March,2012.
2. LICENSOR and LICENSEE agree and confirm that the invoices, if any, covering the model fee for the Products issued by LICENSOR become null and void.
3. LICENSEE agrees to compensate the LICENSOR for following amount to agreed to by the LICENSOR towards all costs, expenses and non-cancelable commitments incurred by LICENSOR for the work towards the Commencement of the volume production of the Products by LICENSEE up to the date of cancellation of the Model Agreement:

   One Hundred Thirty Million Japanese YEN (JPY 130,000,000)."

16. To give effect to the clauses of the Termination Agreement, an invoice dated March 31, 2012 was issued by Honda Japan and the English Translation of the details contained in the annexure to the invoice are as follows:

English Translation

(Currency-Japanese Yen)

At the time of evaluation	1037,22,637	(A)
Japan Support Cost	22514,314	(B+C)
India share in Total Cost	126,236,951	
Management fee 3%	3787,108	
Affordability	130,024,059	
Round off	130,000,000	

17. The chart at pages 143 and 144 of the Appeal Memo also gives details of the breakup of the aforesaid amount. It indicates that the amount was paid to Honda Japan to compensate for research and development already undertaken by Honda Japan, cost of manpower assigned to the project, overseas business trip expenses, domestic business trip expenses and the administrative costs incurred.

18. The contention for learned counsel for the appellant is that no services were received by the appellant from Honda Japan and, therefore, no service tax could have been levied. In this connection it has been submitted that the appellant and Honda Japan had entered

into a Model Agreement pursuant to the Technical Agreement, under which the appellant was to receive technical information pertaining to the launch of the new model of Honda CIVIC car, but this Model Agreement dated May 31, 2011 was subsequently terminated by Termination Agreement dated March 30, 2012 as the introduction of a new Model was considered not to be economically feasible by the appellant. The Termination Agreement specifically provides that though the production of new Honda Civic Car would not take place, the appellant would have to compensate all costs, expenses and non-cancellable commitments incurred by Honda Japan for the work towards the commencement of the volume production of the new model and this amount, as noticed above, was also specified to be JPY 130,000,000.

19. According to the Department the respondent is liable pay service tax on a reverse charge basis on the amount paid to Honda Japan under the Technical Agreement under the category of "consulting engineer" service.

20. The dispute in the present appeal is, therefore, whether the amount paid by the appellant to Honda Japan can be subjected to service tax.

21. To appreciate the issue it would be pertinent to refer to the relevant clauses of the Technical Agreement, the Model Agreement and the Termination Agreement.

22. A perusal of the clauses of the Technical Agreement would indicate that Honda Japan was in the business of research and development; manufacture and sale of auto-mobiles; and possessed

manufacturing information and know-how. The appellant desired to obtain a license and technical information from Honda Japan for the manufacture and sale of certain automobiles. Accordingly, Honda Japan expressed its willingness to give such a license and provide the technical information. "Technical Information" has been defined to mean certain secret know-how and technical information, including drawings, specifications, material list, direction map and test reports which directly relate to the product. In consideration of the furnishing of the technical information, the appellant had to pay Honda Japan a fee called "Model Fee". The Model Fee payable for each New or Full Model Change of the product was JPY 800,000,000 payable in two equal installments. In consideration of the rights and license granted to the appellant, a royalty on all the projects was also required to be paid.

23. After the aforesaid Technical Agreement was executed between the parties, an accord was also reached to launch a Full Model Change of the existing CIVIC car model and, therefore, a Model Agreement was entered into between the parties on April 1, 2010. The amount of Model Fee was to be in accordance with Article 13.1.1(a) of the Technical Agreement and the amount of royalty payable was to be in accordance with Article 13.1.2 of the Technical Agreement.

24. The appellant, however, after the execution of the Model Agreement noticed that it was having difficulty with the fast-changing environment for the Products since the Indian car market was rapidly switching to diesel cars. Thus, the upper segment petrol

cars were getting uncompetitive. For the said reason, the appellant requested Honda Japan to terminate the Model Agreement before the commencement of the volume production of the Product by the appellant. Honda Japan, as an exceptional case, accepted the said request of the appellant, if the appellant would compensate all costs, expenses and non-cancellable commitments incurred by Honda Japan for the work towards the commencement of volume production by the appellant up to the date of cancellation of the Model Agreement. Both the appellant and Honda Japan agreed to terminate the Model Agreement as of March 30, 2012. An amount of JPY 130,000,000 was specified for compensating Honda Japan towards all costs, expenses and non-cancellable commitments incurred by Honda Japan for the work towards the commencement of the volume production of the product by the appellant.

25. It would also be pertinent to refer to the charges leveled against the appellant in the show cause notice. The show cause notice mentions that as per the Agreement, the appellant was required to pay the first installment within sixty days after the signing of the Model Agreement for launching of the new model car and, accordingly, an invoice dated March 31, 2012 for payment of JPY 130,000,000/- was raised as per the terms and conditions of the Termination Agreement dated March 30, 2012. The notice further mention that this amount was "in consideration of new model projects" (reimbursement of all costs, expenses and non-cancellation commitment changes) and, therefore, was taxable, but the appellant did not pay appropriate service tax on this amount.

26. The appellant filed a reply to the show cause notice clearly pointing out that the decision to launch the Full Model Change of Honda Civic model was terminated before any information/advice/ drawing could be supplied to the appellant by Honda Japan and, therefore, the appellant had not received any service from Honda Japan with regard to the launching of the Full Model Change of the new Civic Car. Thus, as advice, consultancy or technical assistance was not provided by Honda Japan to the appellant, there is no question of rendering any "consulting engineer" service to the appellant.

27. The charge leveled against the appellant, in the show cause notice, that JPY 130,000,000/- was paid towards the first installment mentioned in the Technical Agreement/ Model Agreement amounting to JPY 400,000,000/- is factually incorrect. As noticed above, JPY 130,000,000/- was paid by the appellant to Honda Japan in terms of the Termination Agreement to compensate Honda Japan towards the cost, expenses and non-cancellable commitment incurred by Honda Japan towards the commencement of the volume production of the Product by the appellant upto the date of cancellation of the model agreement. This amount was definitely not towards the first installment and even the figures do not match. The invoice also does not make mention that payment was towards first installment. Learned counsel for the appellant, on instructions from the appellant, has also made a categorical statement that the first installment of JPY 400,000,000/- was not paid by the appellant and JPY 130,000,000/- was paid towards the invoice raised by Honda Japan for compensating it for the work undertaken towards all cost,

expenses and non-cancellable commitments. What is also important to notice is that the show cause notice does not even indicate what technical assistance was actually provided by Honda Japan to the appellant so as to make out a case that Honda Japan had provided "consulting engineer" service to the appellant. It was necessary for the Department to have made specific averments on this aspect in the show cause notice.

28. It also needs to be noticed that the specific reply filed by the appellant that the Termination Agreement was executed even before any information/advice/drawing could be supplied to the appellant by Honda Japan, has not been considered by the Commissioner (Appeals) in the impugned order. The Commissioner (Appeals) was required to examine whether any information/advice/drawing was actually provided to the appellant by Honda Japan so as to make this service taxable under the category of "consulting engineer" service.

29. The Commissioner (Appeals) has, on the other hand, merely referred to various clauses of the Technical Agreement and the Model Agreement to arrive at a conclusion that the appellant imported technical information from Honda Japan. It is seen that the entire transaction concerns only the Termination Agreement and the payment that has been made by the appellant to Honda Japan is also in terms of the Termination Agreement. The provision of the Technical Agreement or the Model Agreement could not have been taken into consideration for arriving at a conclusion that Honda Japan had rendered 'consulting engineer' service to the appellant, as a

result of which the appellant was required to pay service tax on a reverse charge basis.

30. The contention of the learned authorized representative of the Department is that between the execution of the Model Agreement and the Termination Agreement, some technical information must have been furnished on a regular basis by Honda Japan and, therefore, the Termination Agreement cannot undo the technical information already provided by Honda Japan. In this connection the learned Authorized Representative of the Department has also made reference to the amount to JPY 400,000,000/- that was required to be paid in terms to the Model Agreement/ Termination Agreement towards the first installment.

31. This submission of the learned authorized representatives of the Department cannot be accepted. As discussed above, JPY 400,000,000, was not paid towards the first installment contemplated under the Agreement. JPY 130,000,000/- was paid by the appellant to Honda Japan against the invoice dated March 31, 2012 that was raised by Honda Japan in terms of the Termination Agreement dated March 30, 2012. The Department has assumed that some technical information must have been provided by Honda Japan to the appellant between May 31, 2011 (when the Model Agreement was executed) and March 30, 2012 (when the Termination Agreement was executed). This assumption is not based on facts and even the show cause notice does not identify or specify any such technical assistance which may have been rendered by Honda Japan to the appellant during this period. The show cause notice only refers

to various clauses of the Technical Agreement and the taxing provisions and then alleges that the appellant is liable to pay service tax on the amount paid under the Termination Agreement, without identifying or specifying what particular 'consulting engineer' service was rendered by Honda Japan to the appellant. The appellant has stated that the amount of JPY 130,000,000/- was paid to compensate for the work undertaken by Honda Japan towards the commencement of volume production of the new Honda CIVIC Model and details have also been provided, which details clearly indicate that the amount was paid to compensate Honda Japan for the research and allied work it had performed at its end and not towards supply of any technical information to the appellant. In the absence of any evidence to the contrary, the Commissioner (Appeals) could not have concluded that the aforesaid amount was paid by the appellant to Honda Japan for rendering any taxable service.

32. It is, therefore, not possible to accept the contention of the learned authorized representative of the Department that in terms of Article 4.1 of the Technical Agreement, Honda Japan was required to furnish technical information to the appellant on a continuous basis or that the amount was paid for the commencement of the production.

33. It has also been submitted by the leaned counsel for the appellant that the amount paid by the appellant to Honda Japan is actually in the nature of a cancellation fee and, therefore, neither any service was rendered by Honda Japan to the appellant nor any amount was paid for any service. The contention is that the amount

was paid by the appellant only to restitute Honda Japan for the cost incurred, once the Model Agreement to provide the service was terminated.

34. This submissions of learned counsel for the appellant also deserves to be accepted. In view of the specific provisions of the Termination Agreement, it is clear that no service, much less 'consulting engineer' service, was provided to the appellant. The appellant, therefore, could not have been subjected to service tax on a reverse charge basis.

35. In **Ford India,** a Division Bench of the Tribunal, held that no identifiable service can be attributed for payments made if the agreement is terminated, since the consideration is to make good the loss. The observations are as follows:

> "7. Regarding the tax liability on the consideration received due to termination of the arrangement, we note that no identifiable service can be attributed for such consideration. It is rather a termination of arrangement which itself the original authority held as a service. We note that by terminating the arrangement, the appellants are adversely put to certain business loss. The consideration has been paid for such loss. No identifiable service could be attributed for such payment during the material time."

36. In **Lemon Tree,** the Tribunal again held that the amount retained after cancellation cannot be subjected to service tax. The observations are as follows:

> "5. Admittedly, the customers pay an amount to the appellant in order to avail the hotel accommodation services, and not for agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and chargeable on full value and not on abated value. The amount retained by the appellant is for, as they have kept their services available for the accommodation, and if in any case, the customers could not avail the same, thus, under the terms of the contract, they are entitled to retain the whole amount or part of it.

> Accordingly, I hold that the retention amount (on cancellation made) by the appellant does not undergo a change after receipt. Accordingly, I hold that no service tax is attracted under the provisions of Section 66 E(e) of the Finance Act. Accordingly, this ground is allowed in favour of the appellant."

37. In view of the aforesaid discussion, it has to be held that the amount paid by the appellant to Honda Japan was not towards any consideration for a taxable service. It is, therefore, not possible to sustain the demand confirmed by the Commissioner (Appeals).

38. It would, therefore, not be necessary to examine the other contentions raised by the learned counsel for the appellant to assail the order passed by the Commissioner (Appeals).

39. Thus, for all the reasons stated above, the order dated January 23, 2015 passed by the Commissioner (Appeals) is set aside and the appeal is allowed.

(Order Pronounced on **December 22, 2020**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.ANJANI KUMAR)
MEMBER (TECHNICAL)

JB