आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'के', मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL "K", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM
&
SHRI AMIT SHUKLA, JM

आयकर अपील सं./**ITA No.376/Mum/2012**

(**निर्धारण वर्ष /** Assessment Year :2007-2008)

Sara Lee TTK Ltd. (Formerly known as Sara Lee Household and Body Care India Ltd., now amalgamated into Godrej Consumer Products Ltd.), Kalyaniwalla & Mistry, Army & Navy Building, 148, Mahatma Gandhi Road, Fort, Mumbai400001	Vs.	DCIT Range-10(2), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AAACT 1921 C**		
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

निर्धारिती **की ओर से** /Assessee by : Shri F.V.Irani, Ms.Sonali Godbole

राजस्व **की ओर से** /Revenue by :Shri N.K.Chand, Shri Peeyush Sonkar

सुनवाई की तारीख **/ Date of Hearing : 27/06/2016**

घोषणा की तारीख**/Date of Pronouncement 24/08/2016**

आदेश / O R D E R

***PER R.C.SHARMA (A.M)*:**

This appeal is preferred by the assessee against the order of the Ld. CIT(A)-15, Mumbai dated 9-11-2011 pertaining to assessment year 2007-08, in the matter of order passed u/s.143(3) of I.T.Act.

2. The assessee-company is engaged in the business of manufacture and sale of shore care, household care and personal care products. It had entered into a license agreement with Buttress B.V. Netherlands in 1995 for the use of knowhow, formulae and trademarks for the manufacture, packing, sale and distribution of Brylcreme, according to which royalty

@5% on the net sales of Brylcreme is to be paid by the appellant. This agreement was approved by the Reserve Bank of India (RBI) on 5.6.1995. When the original agreement expired on 05.6.2002, the assessee approached the department of Industrial Policy and Promotion (DIPP) under the Ministry of Commerce & Industry for extension of their approval for a period of 5 years from 06.06.2002 to 05.6.2007.It approved it with certain terms and conditions on 28.7.2003. Thereafter, the assessee entered into a Trademark License Agreement with Buttress B.V. Netherlands dt. 17.12.2003 w.e.f. 01.7.2012 and then sought an amendment from the DIPP, which gave the foreign technical collaboration approval on 23.4.2004 with certain terms and conditions. Taking cognizance of it, the RBI also gave its approval for the payment of royalty @5% on 26.5.2004. Before the TPO, the appellant has taken the rate of royalty approved by the DIPP and its consequent approval by the RBI as a benchmark and had contended that its transaction relating to the payment of royalty is at arm's length. However, the TPO relying on the press note 9(2000 series) dt 08.9.2000, restricted the royalty payment to 1% of domestic sale towards the use of trademark without transfer of technology. On an appeal to the CIT(A)-15, Mumbai, the Ld. CIT(A) noticed that the assessee has not carried out any bench mark analysis for the payment of royalty towards the use of trademark with similar business segment as that of the assessee and it has also not analysed. In view of that the Ld. CIT(A) required the appellant to give comparable license agreements. From the copies of agreement furnished by the assessee,

the Ld. CIT(A) noted that facts such as trademark, commodity classification, class, items, territory etc. has been "blackened out". Further, those agreements were not pertaining to any company operating in India and paying royalty for the use of trademark to its AE outside India. For the lack of clarity of those agreements and for the reasons that they do not pertain to India, the Ld. CIT(A) observed that the documents submitted by the assessee is of no use for deciding the issue on hand. On examining the copy of the Trademark License Agreement between the assessee and its AE and the approval letter of the DIPP, the CIT(A), inter alia, found that the licensor has specifically allowed licensee to use trade mark for manufacturing, packing, sale a d distribution of these products in the territory and the DIPP a approval is for the purpose of manufacturing / packing, sale and distribution of these products in the territory and the DIPP and the royalty rate approved @5% is for internal sales as well as export sales subject to taxes. The ld. CIT(A), held that although the DIPP approved the royalty rate for the purposes of manufacturing/collaboration, the assessee paid royalty for the use of the brand brylcreme only. Further, he held that the assessee has not independently bench marked its international transaction relating to the payment of royalty by taking any independent comparable. On the assessee's plea that the approval given to it by the DIPP / RBI should be taken as the benchmark, he held that the rate of royalty approved by DIPP is towards collaboration/ manufacturing/technical knowhow agreement towards which the RBI permitted royalty @ 5% of net sales on domestic sales and 8% on net

sales on export sales under automatic route and hence those approvals cannot be considered as a benchmark towards royalty for the use of trademark/brand. In the facts and circumstances, the Ld. CIT(A) considered that the prevailing rate of royalty for use of brand or trade mark would be the rate prescribed by the RBI in their press note No 9(2000 series) dt 08.9.2000 and accordingly upheld the action of the AO/ TPO.

3. Against that order, the assessee preferred this appeal with the following grounds of appeal:

> *1) The learned Commissioner of Income Tax (Appeals) erred in confirming the order of the Assessing Officer and Transfer Pricing Officer holding that the royalty payable to the Associated Enterprise was to be restricted to 1 % of the qualifying Net Sales as against the rate of 50/0 of the qualifying et Sales as computed by the appellant.*
>
> *2) Without prejudice to the above grounds, the appellant submits that the Transfer Pricing adjustment is excessive and ought to be deleted or reduced substantially. "*

4. Based on certain clauses of the agreement dated 17.12.2003 and the approval of the RBI, the Learned AR appearing on behalf of the appellant has contended that the agreement is a mere extension of the original agreement of 1995 and hence the royalty payment cannot be regarded as being restricted to the use of Trademark alone. He contended that Press Note 9 (2000) series relied upon by the TPO and the Ld.CIT(A), in no way supports the TPOls/ Ld.CIT(A)'s restriction on rate of payment of royalty to 1% as the Para III of the Press Note, relied upon by TPO/Ld.CIT(A) relates to royalty payments made exclusively for use of trademarks and brand names without technology transfer.

However, in the present case, since there is a technology transfer, it is clear that the restriction in Para III has no application. The Ld. AR further submitted there is an error in the computation of the disallowance.

5. With respect to objection of revenue that there has been no benchmarking done by the assessee company. it was submitted by ld. AR that the assessee company has obtained specific approval from RBI permitting payment of royalty @5% and hence the Department and assessee have both relied on Government Approval for benchmarking.

With regard to the objection taken by TPO in respect of the New Agreement is not an extension of the Original Agreement, it was contended by ld. AR that the New Agreement is a mere extension of the original agreement which is clear from the intention of the parties and the permission granted by Ministry of Commerce & Industry, Department of Industrial Policy and promotion and the Reserve Bank of India, taking the extension of the original agreement on record.

6. With regard to objection of revenue authorities to the effect that the new agreement is not for transfer of technical knowhow but only for trademark license, ld. AR submitted that the new agreement is for transfer of technical knowhow and not merely for use of trademark, as it is a mere extension of the original agreement.

7. With regard to objection that the Government approval is not relevant for transfer pricing purpose, the contention of ld. AR was that the TPO/CIT(A) have themselves benchmarked the transaction with Press

Note 9 (2000), whereas the assessee company has obtained specific permission from the RBI.

8. Ld. AR also invited our attention to the new agreement dated 17.12.2003, executed between the Appellant Company Buttress B.V. is a mere extension of the original agreement of 1995. Our attention was also invited to the Recital of the New Agreement dated 17.12.2003. Our attention was also invited to the permission granted by Ministry of Commerce & Industry, Department of Industrial Policy and Promotion, dated July 28, 2003. It was the contention of ld. AR that the collaboration agreement was for manufacturing and not confined to use of trademark. It was submitted that the new agreement is for transfer of technical knowhow and not merely for use of trademark which is evident from the new agreement dated 17.12.2003.

9. With regard to revenue's contention that the RBI approval/FIBP approval was not determinative of ELP, it was contended that the TPO and CIT(A) have themselves benchmarked the transaction with Press Note 9 (2000) series. The Press Note prescribes rate of royalty for payments made under automatic route. The assessee company has a specific permission from RBI for payment of royalty. The specific permission overrides the general permission. Reliance was placed by ld. DR on the following judicial pronouncements :-

i) M/s Thyssenkrupp Industries India Pvt. Ltd. Vs. ADCIT,
ii) DCIT Vs. Owens Corning Industries (India) Pvt. Ltd.;
iii) Kinetic Honda Motor Ltd. Vs. JCIT;
iv) Akzo Nobel Chemicals (India) Ltd. Vs. DCIT.

10. The Ld. CIT DR relying on the Ld.CIT(A) order, the title and certain clauses of the new agreement has contended that the payment is towards the use of trademarks / brand only. Relying on the decision of the Hon'ble Delhi High Court in the case of Nestle India Ltd, the Hon'ble P & H High court decision reported in 177 Taxmann 103 , the Hon'ble ITAT Del decision in 37 SOT 358 Del in Perot systems TSI (India) Ltd etc, the DR contended that the RBI's approval is in connection with foreign exchange and it would look into the matter from that angle only. Their approval for the purpose of remittance/ outflow of foreign exchange, does not ipso facto, partake the character of ALP, which has to be determined as per TP regulations. In this case, the AO/ TPO/Ld.CIT(A) have considered the issues in accordance with the law and hence pleaded that the order of the Ld.CIT(A) is to be upheld.

11. Ld. DR invited our attention to Schedule A of the agreement which stipulates that it is for the use of trademark “BRYLCREEM”. As per ld. DR Clause 3, 4 and 5 are for the protection of Trademark as the licensor wants to secure it’s reputation and to ensure that the products meet the specification and quality desired by the Licensor. The contention of ld. DR was that the reliance on RBI approval is also misplaced as that approval is for collaboration only. There is not a single evidence on record to prove that there is any know how transfer under TRADEMARK LICENCE AGREEMENT'. As per ld. DR the knowhow must have been subject matter of License agreement of 1995. The same must have been

completed as no technology transfer agreement is forever. Ld. DR seeks reliance on the decision in the following cases:

1. SKOL Brewaries Ltd., (29 taxmann.com 111) (Mumbai)
2. Perot System TSI (India) Ltd., 37 SOT 358 (Del)
3. Tata Autocomp Systems Ltd., (21 taxmann.com 48)dt. 30/04/2012 (Mumbai ITAT)
4. Tata Autocomp Systems Ltd.,ITA No. 1320 of 2012dt. 3/2/2015 (Bombay High Court)
5. Tata Autocomp Systems Ltd., ITA No. 774 & 1508/M/2014 dt. 18/11/2015.

12. We have considered the rival submissions and perused the relevant finding given in the impugned orders. We had also deliberated on the judicial pronouncements referred by lower authorities in their respective orders as well as cited by ld. AR and DR during the course of hearing before us, in the context of factual matrix of the case. From the record we found that the assessee did not bench mark the royalty payment separately. On enquiry by TPO, it has relied on RBI approval given in 1995 and also on the fact that the assessee earned a gross profit of 41.6%. TPO applied Press Note 9(2000 series) and restricted it to 1% on the plea that the payment was for use of trademark without transfer of technology. The assessee has not separately benchmarked the Royalty transaction at the time submission of Form 3CEB or at the time of preparation of Transfer Pricing Report. It is settled proposition of law that it is the onus of the assessee to prove that the transactions were taken at arm's length. Royalty is a separate international transaction, for this purpose, reliance can be placed on the decision of Punjab & Haryana High Court in the case of Knorr-Bremse India (P) Ltd., ITA No.182 of 2013. The RBI approval/FIPB approval is not determinative of ALP and

cannot be considered to be a valid CUP. Automatic route under which FIPB approvals or RBI approvals are granted have been devised for the "ease of doing business". These approvals emanate from other legislation or policy and are not in relation to determination of Arm's Length Price. The purpose of the RBI approval/FIPB approval is entirely different and cannot be equated with the arm's length principle. The approvals of rates given by the DIPP and the RBI are for different purposes, like for promotion of industries, management of foreign exchange etc. and it varies in accordance with the business practices prevalent at different times which are clear from the RBI approvals themselves. Going by the relevant TP provisions as enshrined under the Act and relevant Rules, it is mandatory that the appellant has to independently benchmark its international transaction with independent comparables so as to arrive at arm's length price, which has not been made in this case. The comparability analysis is the substratum of determining the ALP, which has not been done by assessee at any stage. At the very same time we found that the revenue authorities have not properly appreciated the relevant clauses of the trademark licence agreement, precisely the clauses which were highlighted by ld. AR during the course of hearing before us. Therefore, in the interest of justice and fair play, this case should be restored back to the file of AO, ho shall require the assessee to bench mark its international transaction of 'royalty' with independent comparables following suitable methods prescribed under the Act and on

its compliance, the AO after giving adequate opportunity to the assessee shall decide this issue in accordance with the TP regulations.

13. In the result, appeal of assessee is allowed for statistical purposes.

Order pronounced in the open court on this 24/08/ 2016.

Sd/-	**Sd/-**
(AMIT SHUKLA)	**(R.C.SHARMA)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक Dated 24/08/2016

प्र.कु.मि/pkm, नि.स/ PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार
(Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai