IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1807 OF 2013

The Commissioner of Income Tax-10 ...Appellant
Vs.
SGS India Pvt. Ltd. ...Respondent

....

Mr.Tejveer Singh, for Appellant-Revenue.

Mr.Paras Savla with Ms.Keerthiga Sharma, for the Respondent.

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CORAM : M.S. SANKLECHA &
G.S. KULKARNI, JJ.

DATED : 18 November 2015

P.C.:

1. This appeal by the Revenue filed under Section 260A of the Income Tax Act, 1961 (the Act), challenges the order date 30 January 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The matter relates to the Assessment Year 2002-03.

2. The appellant – Revenue urges the following question of law for our consideration:-

"(1) Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in deleting the addition made by Transfer Pricing Officer of Rs.1,59,88,100/- on account of fees for technical services ?”

3. The respondent-assessee is a wholly owned 100% Indian subsidiary of Generale De Survillance (SGS) (parent company). The parent company is based in Geneva, Switzerland. The respondent-assessee is engaged in India in providing certification with regard to various agricultural, mineral, petroleum, consumer goods and other services.

4. For the aforesaid purpose of its business, the respondent – assessee uses the trade mark of its parent company and it pays Royalty for the same ranging between 2.5 % to 4% of the Revenue generated. For the purpose of transfer pricing, respondent – assessee contended that 3% of the revenue generated should be considered as reasonable Royalty for use of trade mark provided by its parent company. This 3% according to the respondent would be the appropriate bench-mark while considering the Arms Length Price (ALP) in respect of its transactions with its Associated

Enterprise i.e. parent company. In support the respondent placed reliance upon the approval granted by Foreign Investment Promotion Board (FIPB) dated 25 September 2000. However, the Transfer Pricing Officer (TPO) did not accept the same and placed reliance upon the Press Note No.9 (2000 series) issued by the Ministry of Commerce and Industries, Government of India, wherein the royalty is allowed at 1% on domestic sale and 2% on export for the use of trademark/brand name of a foreign collaborator. In the circumstances, the TPO lowered the bench mark to less than 3% for purposes of computing the ALP. In terms of the above order of the TPO, the Assessing Officer passed a final assessment order dated 24 March 2005.

5. In appeal the Commissioner of Income Tax (Appeals), by order dated 20 January 2006 sustained the order dated 24 March 2005 passed by the Assessing Officer.

6. On further appeal, the Tribunal on consideration of all the facts concluded that the Royalty between the range of 5% to 8% if taken, could not be faulted as it was covered by FIPB instructions.

Besides, the Tribunal records the fact that Transfer Pricing study identified the uncontrolled transaction of royalty at 10%, whereas the respondent-assessee makes only a payment at 3% to its Associated Enterprises. Thus, the Tribunal accepted the contention of the respondent that bench marking at 3% to arrive at ALP of payment made to parent company as Royalty for use of Trade Mark.

7. The Revenue before us contends that Press Note No.9 (2000 series) issued by Ministry of Commerce, Government of India in clause III thereof provides as under:-

> "III. Payment of royalty upto 2% for exports and 1% for domestic sales is allowed under automatic route on use of trademarks and brand name of the foreign collaborator without technology transfer."

Thus, it is submitted that the bench marking of royalty payable by the respondent to its parent company has to be lower than 3% for the purposes of arriving at the ALP.

8. As against the above, the respondent-assessee pointed out that the Press Note No.9 (2000 series) being relied upon by the Revenue, even if applied would indicate that in case of wholly

owned subsidiaries such as respondent, a Royalty payment is allowed for user of brand name upto 8% on export and 5% on domestic sales. In support reliance is placed on Clause (IV) of the Press Note which reads thus:-

> "IV. Payment of royalty upto 8% on exports and 5% on domestic sales by wholly owned subsidiaries to offshore parent companies is allowed under the automatic route without any restriction on the duration of royalty payments."

9. It is an undisputed position before us that the respondent - assessee is a wholly owned subsidiary of its parent company which is registered in Switzerland. The respondent pays to its parent company Royalty for use of its Trademark/brand name. Therefore, admittedly the present case is covered by Clause IV and not Clause III of the Press Note 9(2000 series). The aforesaid clause IV of the Press Note 9 (2000 series) allows payment of Royalty upto 8% on export sales by wholly owned subsidiaries to its offshore parent companies.

10. On the last occasion that is on 23 September 2015

Mr.Tejveer Singh, learned Counsel for the Revenue sought time to take instructions on whether Clause IV as reproduced hereinabove is applicable in the case of respondent-assessee. Today Mr.Tejveer Singh, on instructions, states that the respondent-assessee is covered by clause IV of the Press Note 9 (2000 series) dated 8 September 2000. Therefore, the bench marking of the Royalty paid at 3% by the respondent to arrive at the ALP is much below the Royalty for trade mark / brand name which is allowed to be paid by wholly owned subsidiary to its offshore parent company.

11. In view of the above, the grievance of the Revenue that the Tribunal ought to have lowered the bench marking on application of Clause III of the Press Note 9 (2000 series) dated 8 September 2000 does not survive. Accordingly, question as proposed does not give rise to any substantial question of law. Thus not entertained.

12. The appeal is dismissed. No order as to costs.

[G.S. KULKARNI, J] **[M.S. SANKLECHA, J.]**