



TRANSFER PRICING ALERT

N. A. SHAH **BULLETIN**

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EXECUTIVE SUMMARY

Two enterprises cannot be treated as an Associated Enterprise unless the parameters laid down in both Section i.e 92A(1) and 92A(2) of the Income-tax Act are fulfilled.

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Page Industries Ltd V Deputy Commissioner of Income Tax (Bangalore ITAT)

ITA No. 163/Bang/2015

Facts:

- i. Page Industries Ltd ("the assessee" or "Page India") is a company incorporated under the provisions of the Companies Act, 1956 and engaged in the business of manufacture and sale of ready-made garments.
- ii. The assessee is a licensee of the brand name "Jockey" for the exclusive and marketing of Jockey readymade garments under license agreement with Jockey International Inc, USA ("Jockey Inc"). The assessee owned the entire manufacturing facility, capital investment, employees and there was no participation of Jockey Inc in the capital and management of the assessee.
- iii. In consideration for granting the right to use brand name, the assessee paid consideration in the form of royalty at 5% of the sales to Jockey Inc amounting to Rs. 16,78,29,024. The assessee also reported the said transaction in Form 3CEB for the year under consideration.
- iv. During the assessment proceedings, Transfer Pricing Officer ("the TPO") disallowed the entire royalty payment. Further, TPO also treated expenditure incurred by the assessee on advertisement, marketing and product promotion as an international transaction and attempted to determine arm's length price ("ALP") by applying Bright Line Test method. Accordingly, the TPO proposed a total adjustment of Rs. 20.20 crores.
- v. Aggrieved, the assessee raised objections before the DRP. DRP rejected the objection raised by the assessee on this issue and confirmed the order of the TPO.
- vi. Aggrieved, the assessee has preferred an appeal before the Hon'ble Bangalore ITAT.

Issue:

- a. In the absence of participation by Jockey Inc in the management/ control/ capital of the assessee, whether the relationship between the assessee and Jockey Inc can be treated as that of an Associated Enterprise ("AE") as per Section 92A(1) and 92A(2) of the Act?

Held:

- i. The ITAT held that in order to constitute relationship of an AE, the parameter laid down in both the sub-section (1) and (2) of Section 92A of the Act should be fulfilled.
- ii. The ITAT relied on explanation of Memorandum of Finance Bill 2002 which clarified that participation of one enterprise in the management/ control/ capital of other enterprise shall not make them AE unless the criteria specified in sub-section (2) of Section 92A of the Act are fulfilled.
- iii. The ITAT relied on the Supreme Court rulings of **State of Tamil Nadu v. M.K. Kandaswami [(1975) 36 STC 191, 198 (SC)]** and **Calcutta Jute Manufacturing Co v. CTO [(1997) 106 STC 433, 439 (SC)]** and observed that while interpreting a provision in a taxing statute, the construction should preserve the purpose of the provision. If more than one construction is possible, that which preserves its workability and efficacy is to be preferred to the one which would render it otiose or sterile.
- iv. Considering the above, ITAT held that even if the taxpayer and Jockey Inc may be related as per Section 92A(2)(g) of the Act, but till the time the parameters laid down in sub-section (1) are not fulfilled, they cannot be construed as an AE and therefore the provisions of Chapter X of the Act have no application.

Accordingly, the ITAT held that the transfer pricing adjustment made by the TPO is not valid in law.

Our Comments:

- i. The above views pronounced by Bangalore ITAT is in contradiction with the ruling of Mumbai ITAT in case of ***Kaybee Private Ltd (ITA No 3749/ Mum/ 2014)***. In the said ruling, Mumbai ITAT had held that two enterprises would be treated as an AE if the conditions of Section 92A(1) of the Act are independently satisfied irrespective of the deeming fiction set out under Section 92A(2) of the Act.

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