IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 8TH DAY OF JANUARY 2021

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR. JUSTICE NATARAJ RANGASWAMY

I.T.A. NO.285 OF 2017

BETWEEN:

1. PR. COMMISSIONER OF INCOME TAX-5
BMTC COMPLEX, KORMANGALA
BANGALORE.

2. DEPUTY COMMISSIONER OF INCOME TAX
CIRCLE-5(1)(2), BANGALORE.

... APPELLANTS

(BY SRI. JEEVAN J. NEERALGI, ADV.,)

AND:

M/S. PAGE INDUSTRIES LTD
ABBAIAH REDDY INDUSTRIAL AREA
JOCKEY CAMPUS, NO.6/2 & 6/4
HONGASANDRA, BEGUR HOBLI
BANGALORE-560068
PAN: AABCP2K630D.

... RESPONDENT

(BY SRI. CHYTHANYA K.K. ADV.)

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THIS I.T.A. IS FILED UNDER SEC. 260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 24.06.2016 PASSED IN IT(TP)A NO.163/BANG/2015 FOR THE ASSESSMENT YEAR 2010-11 VIDE ANNEXURE-A, PRAYING TO:

(i) DECIDE THE FOREGOING QUESTION OF LAW AND/OR SUCH OTHER QUESTIONS OF LAW AS MAY BE FORMULATED BY THE HON'BLE COURT AS DEEMED FIT AND SET ASIDE THE

APPELLATE ORDER DATED:24.06.2016 PASSED BY THE ITAT, 'B' BENCH, BENGALURU, AS SOUGHT FOR, IN THE RESPONDENT-ASSESSEE'S CASE, IN APPEAL PROCEEDINGS IN IT(TP)A No.163/BANG/2015 FOR A.Y.2010-11 VIDE ANNEXURE-A, & GRANT SUCH OTHER RELIEF AS DEEMED FIT, IN THE INTEREST OF JUSTICE.

THIS ITA COMING ON FOR HEARING, THIS DAY, **ALOK ARADHE J.,** DELIVERED THE FOLLOWING:

JUDGMENT

This appeal under Section 260-A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act', for short) has been filed by the revenue. The subject matter of the appeal pertains to the Assessment Year 2010-11. The appeal was admitted by a Bench of this Court vide order dated 09.11.2018 on the following substantial question of law:

> *"Whether on the facts and in the circumstance of the case, the Tribunal is right in law in setting aside the disallowance made by appellate authority under Section 80JJA of the Act by relying on its earlier order in case of assessee itself when said earlier order has not reached finality and even when the appellate authority rightly rejected said claim as deduction cannot be given in respect of additional wages paid on employment of new workmen during the previous year 2009-10 (Rs.55,99,,873/-) & 2008-09 (Rs.18,09,043/-)*

as Form No.10DA certifies the amount if deduction at Rs.1,11,32,662/- for the Assessment Year 2010-11?"

3. Facts leading to filing of this appeal briefly stated are that the assessee is a company incorporated under the provisions of the Companies Act, 1956 and is engaged in the business of manufacture and sale of ready made garments. The assessee - company is a licensee of the brand name 'Jockey' for the exclusive and marketing of Jockey readymade garments under license agreement with Jockey International Inc. a company incorporated in United States of America which is the owner of brand Jockey. In order to collect the brand name, the assessee paid consideration in the form of royalty at the rate of 5% of the sales. The assessee filed return of income for the Assessment Year 2010-11 on 05.10.2005 and declared the total income of Rs.55,25,65,514/-. The Assessing Officer, by an order dated 03.02.2014, processed the return. Thereafter, the case of the assessee was taken up for scrutiny and notice under Section 143(2) of the Act was issued. The Assessing Officer, during the course of the proceedings, found that the

assessee - Company had returned the international transaction in Form 3CEB and paid royalty of Rs.6,78,29,024/- to JII. The assessee sought to justify the consideration paid to international transactions entered with JII to be at arm's length.

4. The Assessing Officer thereafter referred the matter to the Transfer Pricing Officer, who by an order dated 30.01.2014 *inter alia* computed the transfer pricing adjustment at Rs.20,20,07,861/- under Section 92CA(3) of the Act. The Transfer Pricing Officer treated the expenditure incurred on the advertisement and marketing and product promotion as an international transaction and determined the arms length price by applying bright line method. Pursuant to the order passed by the Transfer Pricing Officer, a draft assessment order was passed by the Assessing Officer, by which disallowance to the extent of adjustment on account of transfer pricing Rs.20,20,07,861/-, disallowance under Section 14A read with Rule 8D(2)(iii) to the extent of Rs.20,51,175/- and disallowance of Rs.74,08,964/- under the provisions of Section 80JJAA of the Act were proposed. The

assessee thereupon filed objections before the Dispute Resolution Panel contesting all the additions. The Dispute Resolution Panel, however rejected the objections preferred by the assessee. The assessee thereupon filed an appeal before the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal' for short). The Tribunal, by an order dated 24.06.2016, *inter alia* held that since the requirements laid down in Section 92A(1) has not been fulfilled, therefore, the provisions of Section 92A are not attracted to the fact situation of the case. To the aforesaid extent, the appeal preferred by the assessee was allowed. In the aforesaid factual background, the revenue has filed this appeal.

5. Learned counsel for the revenue submitted that the transactions entered into by the assessee have to be treated as an international transaction. In this connection, our attention has been invited to paragraph 3.1.3 and paragraph 3.1.4 of the order passed by the Transfer Pricing Officer. It was further submitted that the order passed by the Transfer Pricing Officer has been affirmed by the Dispute Resolution

Panel. However, the Tribunal has partly allowed the appeal preferred by the assessee merely on the ground that the assessee cannot be said to be an associated enterprise and therefore, the requirements of Section 92A(1) have not been complied with. Therefore, the provisions of Section 92A are not applicable to the transaction in question and therefore, the same cannot be treated to be an international transaction. It is further submitted that the provisions of Section 92A(1) and (2) have to be read independently and since the case of the assessee falls within the purview of Section 92A(2)(g) of the Act, therefore, the transaction in question has to be held as an international transaction and therefore, the Tribunal ought to have held that the provisions of Section 92A are applicable to the case of the assessee.

6. On the other hand, learned counsel for the assessee has invited our attention to the memorandum of the Finance Bill, 2002, in which clarification regarding provisions of transfer pricing has been mentioned. It is further submitted that the Tribunal has relied on the judgment of Ahmedabad Bench of the Tribunal, which had held that sub-Sections 1

and 2 of Section 92A have to be read together and the aforesaid order passed by the Tribunal has been upheld by Gujarat High Court in ***'PRL. COMMISSIONER OF INCOME TAX-CENTRAL Vs. VEER GEMS' (2017) 249 TAXMAN 264 (GUJ).*** Against the decision of Gujarat High Court, special leave petition was preferred by the revenue which was dismissed in ***'PRL. COMMISSIONER OF INCOME TAX-CENTRAL Vs. VEER GEMS' (2018) 256 TAXMAN 298 (SC).*** Therefore, both the provisions namely sub-Sections (1) and (2) have to be read together. It is also pointed out from the order passed by the Dispute Resolution Panel that the panel itself has recorded a finding that the Transfer Pricing Officer has gone into the provision of Section 92A(2) of the Act. It is further submitted that the provisions of sub-Sections (1) and (2) of Section 92A are interlinked and have been read together harmoniously and therefore, the substantial question of law framed in this appeal is required to be answered in favour of the assessee.

7. We have considered the submissions made on both sides and have perused the record. From perusal of the

Memorandum of Finance Bill, 2002, it is evident that sub-Section (2) of Section 92A was amended with effect from 01.04.2002 to clarify that mere fact of participation by one enterprise in the management or control or capital of the other enterprise, or the participation of one or more persons in the management or control or capital of both the enterprises shall not make them associated enterprises, unless the criteria specified in sub-Section (2) are fulfilled.

8. Before proceeding further, it is apposite to take note of relevant extract of sub-Sections (1) and (2) of Section 92A of the Act which reads as under:

> *92A (1) For the purposes of this section and sections 92, 92B, 92C, 92D, 92E and 92F, "associated enterprise", in relation to another enterprise, means an enterprise -*
>
> *(a) which participates, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise; or*
>
> *(b) in respect of which one or more persons who participate, directly or indirectly, or through one ore more intermediaries, in its management or control or capital, are the*

same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise.

(2) For the purposes of sub-section (1), two enterprises shall be deemed to be associated enterprises if, at any time during the previous year -

…….

(g) the manufacture or processing of goods or articles or business carried out by one enterprise is wholly dependent on the use of know-how, patents, copyrights, trade-marks, licences, franchises or any other business or commercial rights of similar nature, or any data, documentation, drawing or specification relating to any patent, invention, model, design, secret formula or process, of which the other enterprise is the owner or in respect of which the other enterprise has exclusive rights; or"

9. Thus, from perusal of the aforesaid provisions, it is evident that sub-Sections (1) and (2) of Section 92A of the Act are interlinked and have to be read together. In case the

provisions of sub-Sections (1) and (2) are read independently, we are afraid that one of the provisions would be rendered otiose which is impermissible in law in view of the well settled rule of statutory limitation. Therefore, the requirement contained in sub-Sections (1) and (2) of Section 92A of the Act has to be complied with. It is also pertinent to mention here that the finding recorded by the Tribunal that the assessee has not complied with the provisions of sub-Section (1) of Section 92A of the Act, has not been assailed by the revenue.

10. In view of preceding analysis, the substantial question of law is answered against the revenue and in favour of the assessee.

In the result, the appeal fails and is hereby dismissed.

Sd/-
JUDGE

Sd/-
JUDGE

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