Nike India Pvt Ltd [IT(TP)A No 202/Bang/2021]

In this case the Bangalore ITAT deleted transfer pricing adjustment with respect to AMP expenses for AY 2015-16. Nike India P Ltd ("the assessee") is engaged in distributing footwear, sports apparel and equipment in India through its distribution network and franchise partners.

The assessee incurred AMP expenses during the relevant previous year, but did not treat the same as 'international transaction' on the basis that there was no arrangement or agreement in writing or otherwise with the AEs. The TPO however held that an agreement between assessee and its Netherlands AE titled "Intellectual Property License and Exclusive Distribution" contained a clause referencing the fact that the assessee incurs significant marketing expenses which directly impacts its operating margin. Also referring to OECD commentaries (specifically pertaining to participation in Development, Enhancement, Maintenance, Protection and Exploitation "DEMPE functions"), TPO concluded that there was an agreement to incur AMP expenses and therefore incurring such expense was an international transaction. The ITAT noted that assessee incurred AMP expenses during the relevant previous year, but did not treat the same as 'international transaction' on the basis that there was no arrangement or agreement in writing or otherwise with the AEs. ITAT took note of the fact that consistently the ITAT has not treated the AMP expenses as international transaction for earlier AYs 2013-14 and 2007-08, 2010-11, 2011-12, 2012-13 & 2014-15. ITAT further referred to Delhi HC rulings in Maruti Suzuki India and Whirlpool and noted that in appeal against Maruti Suzuki decision, SC left open the question whether AMP expenses give rise to international transaction. It was observed that the substance of the said decisions is that "there should be existence of an agreement to incur AMP expense between the assessee and the foreign AE either expressed or there must be circumstances indicating compulsion to incur AMP expenses". The ITAT concluded that the agreement referred to by the TPO can be no basis to conclude existence of any such understanding between assessee and AE, in as much as it does not in any way indicate a mandate from the AE for assessee to incur such expenses.

- **Supreme Court dismisses Tax Department's SLP against Karnataka High Court decision which had held Section 92A(1) and 92A(2) should be read together - Page Industries Ltd [TS-718-SC-2021-TP]**

Karnataka High Court upholding Hon'ble Tribunal's order in case of the Assessee, had confirmed as under:

- Memorandum of Finance Bill, 2002 states that sub- Section (2) of Section 92A was amended with effect from 01.04.2002 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.
- Thus, two enterprises cannot be treated as an Associated Enterprise unless both the parameters laid down in Section 92A of the Act are fulfilled.
- In case the provisions of sub-Sections (1) and (2) are read independently, one of the provisions would be rendered otiose which is impermissible in law in view of the well settled rule of statutory limitation.
- In the above context, Hon'ble High Court had confirmed that even of the Assessee and Jockey International Inc. satisfy Section 92A(2)(g) of the Act but till the time their relationship will not satisfy the conditions laid down in Section 92A(1) of the Act, they cannot be construed as AEs. Therefore provisions of Chapter X of the Act have no application.

SC dismisses Revenue's SLP against the above Hon'ble High Court order stating that "We are not inclined to interfere with the impugned order".

- **Section 144C applicable for orders issued after the specified date of 01.10.2009, follows Zuari Cement ruling over contrary smaller bench decision in case of Vedanta Ltd - Lanxess India Private Ltd. [TS-450-ITAT-2022(Mum)-TP]**

Facts:

The Assessee raised an additional ground challenging the final assessment order for AY 2009-10 as void ab initio, because provisions of Section 144C are applicable only from AY 2010-11 and onwards.

In view of the non-applicability of Section 144C, the assessment was to be completed within the limitation provided for scrutiny cases under Section 143(3) of the Act, whereas the assessment has been completed after the said limitation provided under Section 153 of the Act. The Assessee relied on Hon'ble Madras High Court decision in case of Vedanta Ltd. vs. ACIT (writ Petition No. 1729 of 2011) wherein it was held that provisions of Section 144C have been held to be applicable from AY 2010-11.

Hon'ble Tribunal's Ruling:

- Hon'ble Tribunal held final assessment order (dt. 26.02.2014) passed under Section 143(3) r.w.s 144C(13) for AY 2009-10 to be within limitation.
- Hon'ble Tribunal notes that Division Bench of Andhra Pradesh High Court, in Zuari Cement Ltd (Writ Petition no. 5557 of 2012), held that amendment relating to Section 144C of the Act would take effect from 01.10.2009. Hon'ble High Court observed that memorandum explaining the Finance Bill which preceded the Finance (No.2) Act, 2009 clearly indicated that the amendments relating to Section 144C of the Act would take effect from 01.10.2009.
- Noted that the circular No.5/2010 issued by the CBDT stating that Section 144C(1) of the Act would apply only from the assessment year 2010 subsequent years and not for the assessment year 2008-09 is contrary to the express language in Section 144C(1) of the Act.;
- Regarding Single Judge of Madras HC, in M/s Vedanta Ltd (supra), noted that there was no decision of the jurisdictional High Court on the issue, and that judicial discipline demands that the decision of the higher forum (larger bench) be followed.

- **Does provisions of Section 144C(13) of the Act extend the time limit prescribed in Section 153 of the Act? High Court Admits substantial question of law - Acer India Pvt Ltd [TS-1272-HC-2020(KAR)-TP]**

The Assessee before the Hon'ble Tribunal (in Acer India Pvt Ltd [TS-416-ITAT-2019(Bang)-TP]) contented that provisions of Section 144C(13) of the Act do not extend the time limit for passing the final assessment order as prescribed in Section 153 of the Act. Accordingly, the final assessment order for Ay 2012-13 dated 16 January 2017 passed beyond time limit prescribed in Section 153 of the Act should be quashed.

The Hon'ble Tribunal rejected the Assessee' contention and held that the provisions of Section 144C override Section 153 and the Act. Further noted that the provisions of Section 144C(13) of the Act gives extension of a further period of one month from the end of the month in which DRP's direction was received.

Assessee preferred an Appeal before Hon'ble High Court. The Hon'ble High Court admitted the following substantial questions of law:

"Whether on the facts and in the circumstances of the case, the Tribunal is right in holding that final assessment order dated 16.01.2017 is within limitation?"