

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'I-1' NEW DELHI**

**BEFORE SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

I.T.A .No. 1080/DEL/2016 (A.Y 2011-12)

Readers Digest Book and Home Entertainment India (P) Ltd. C-227, Paryavaran Complex New Delhi AADCR0848P (APPELLANT)	Vs	DCIT Circle 21(1) New Delhi (RESPONDENT)
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I.T.A .No. 1621/DEL/2016 (A.Y 2011-12)

DCIT Circle 21(1) New Delhi (APPELLANT)	Vs	Readers Digest Book and Home Entertainment India (P) Ltd. C-227, Paryavaran Complex New Delhi AADCR0848P (RESPONDENT)
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Appellant by	Sh. Percy Pardiwala, Sr. Adv
Respondent by	Sh. A. Sreenivasa Rao, Sr. DR

Date of Hearing	16.10.2018
Date of Pronouncement	20.12.2018

ORDER

PER SUCHITRA KAMBLE, JM

These two appeals are filed by the assessee and the Revenue against the Assessment Order dated 29/01/2006 passed u/s 143(3)/144C/92CA (4) of the Income Tax Act, for Assessment Year 2011-12.

2. The grounds of appeal are as under:- **I.T.A .No. 1080/DEL/2016**

“Based on the facts and in the circumstances of the case and in law, the Appellant respectfully craves leave to prefer an appeal against the order passed by the Deputy Commissioner of Income-tax - 21(1) [‘AO’], under section 143(3) r.w.s 144C(13) of the Income-tax Act, 1961 (‘Act’) (‘Assessment order’), in pursuance of the directions issued by Dispute Resolution Panel - 2, New Delhi (‘Hon’ble DRP’), on the following grounds. Each of the below grounds of appeal is without prejudice to and independent of one another. The Learned AO/DRP have erred in law and facts:

1. *in making a reference of the Appellant’s case to the Learned TPO, which is not in accordance with Section 92CA, and then making a transfer pricing adjustment of Rs 15,92,54,270 to the total income of the Appellant for AY 2011-12;*

2. *in making a transfer pricing adjustment of Rs 15,92,54,270 under Section 92C(4) of the Act to the total income of the Appellant on the premise that there exists an international transaction under Section 92B of the Act between the Appellant and its Associated Enterprise (‘AE’) on account of alleged Advertisement, Marketing and Promotion (‘AMP’) expenses incurred by the Appellant;*

3. *in failing to appreciate that there are no machinery provisions under the Act to determine AMP as international transaction;*

4. *in holding that the alleged AMP expenses is an international transaction without bringing anything on record to prove that there is an understanding/ arrangement/ or an action in concert between the Appellant and the AE for the promotion of brand/ trademark name owned by the AE;*

5. *in failing to appreciate that the existence of AMP being an international transaction has to be proven dehors of bright line test (‘BLT’) which has not*

been otherwise substantiated;

6. in failing to understand that the components of the Appellant's advertising and sales promotion and postage expenses are different from what is ordinarily understood as Advertisement, Marketing and Promotion ('AMP') expenses and therefore the same cannot in any circumstances be alleged to lead to creation of marketing intangible for the AE;

7. in considering expenses incurred in "connection with sales" as AMP expenditure incurred toward brand promotion;

8. in considering postage expenses amounting to Rs. 4,07,65,295 as part of the alleged AMP expenditure, which is absurd since postage expenses cannot contribute to brand building;

9. in disregarding the expert opinion of Mr Ranjan Kapur, which gives credence to the fact that selling and distribution expenditure incurred by the Appellant has not lead to brand creation/ promotion;

10. in not appreciating that the concept of marketing intangible is not applicable to the Appellant's case;

11. in failing to understand that the alleged AMP expenses were incurred by the Appellant wholly and exclusively on its own account and for its own business and any benefit to the AE can only be incidental;

12. in characterizing the Appellant as a limited risk distributor from an entrepreneurial entity

13. in treating Appellant's own selling and distribution expenses as having been incurred for and on behalf of its AE and accordingly holding that the Appellant should have recovered the same from the AE;

14. in arbitrarily holding that the alleged AMP expenses incurred by the Appellant constitutes a separate international transaction with its AE under

Section 92B(1) of the Act and subjecting the same to transfer pricing provisions;

15. *Without prejudice to above, in failing to appreciate that a bundled approach should be adopted for determining the arm's length price of its alleged AMP expenses since the same is intrinsically linked to the distribution function.*

16. *in failing to appreciate that 'bright line method' suffers from various fallacies and deficiencies; and is not a prescribed method under the Indian TP regulations*

17. *in making an adjustment on account of the alleged AMP expenses incurred by the Appellant although in the very same order, it has been held that the profits earned by the Appellant in its distribution activity, which was computed after taking into account these alleged AMP expenses, meets the arm's length test; without prejudice to the above, erred in not determining the 'excessive' alleged AMP spend and marking the transfer pricing on the entire alleged AMP spend incurred by the Appellant;*

18. *in concluding that the alleged AMP expenses lead to brand building without appreciating the Appellant's facts and in particular the nature of expenses incurred;*

19. *in erroneously using an incorrect cost base for the purpose of making the adjustment in respect of alleged AMP expenditure;*

20. *in erroneously not giving effect to the directions of the Hon'ble DRP that has allowed this objection raised by the Appellant in the DRP directions in the favour of the Appellant.*

21. *In failing to consider the fact that where the alleged AMP expenses are considered to be a separate international transactions, the same ought to*

be reduced from the total expenses for computation of the Appellant's margin from its distribution business, in which case, the substantially high margins would show an absurd result;

22. *in arbitrarily levying a mark-up of 25.88% by using gross profit to cost of goods sold of comparables (identified by the learned TPO) on the alleged AMP expenses incurred without providing any reasonable basis for arriving at the same;*

23. *in not appreciating that the comparables selected by the learned TPO to benchmark the alleged international transaction are not comparable;*

24. *in granting short credit of taxes deducted at source of Rs. 5,867 while computing the tax liability for the year;*

25. *in levying interest of Rs 8,02,908 under Section 234A of the Act without appreciating that the Appellant has filed its return of income before the due date;*

26. *in levying interest of Rs 2,32,84,332 under Section 234B of the Act;*

27. *in not appreciating that the entire addition has been made due to transfer pricing adjustment and hence, could not have been envisaged, while paying advance tax;*

28. *in levying interest of Rs. 28,22,518 under Section 234D of the Act;*

29. *in initiating penalty proceedings u/s 271 (1)(c) of the Act."*

I.T.A .No. 1621/DEL/2016

"1. Whether under the facts and circumstances of the case and in law the Hon'ble DRP was correct in holding that PLR cannot be the basis for

computing markup on AMP expenses without appreciating the Revenue's case wherein the PLR of bank has been used as an uncontrolled comparable to benchmark the opportunity cost of money involved and locked up in AMP expense?

2. Whether on the facts and in the circumstances of the case and in law, the Hon'ble DRP-2 was justified in stating that routine selling and distribution expenses would not form part of AMP expenses (disregarding the fact that these expenses contribute to creation of marketing intangible) even while the same is a factor for comparability analysis as different entities account for such expenditure under different heads?.

3. The assessee Company's main business is to sale high quality information and education books and music and video products of the Reader's Digest Brand. Return declaring NIL income and claiming carry forward losses at Rs.19,72,993/- was filed on 15/11/2011. The case was selected for security. The audited balance sheet, profit and loss account and supported annexure were filed by the assessee before the Assessing Officer. In response, to notices u/s 143(2)/142(1) followed by the questionnaire, Chartered Accountant/Authorized Representative of the assessee company attended the proceedings from time to time and furnished requisite details. Reference to the Transfer Pricing Officer was made to determine Arms Length Price u/s 92CA(3) of the Income Tax Act after obtaining prior approval of the Commissioner of Income Tax-V, New Delhi. The Transfer Pricing Officer passed order u/s 92CA (3) of the Income Tax Act, on 30/1/2015, after considering the objections filed before him. The Transfer Pricing Officer made an addition of Rs.16,62,47,629/- in light of detailed discussions made in the order passed u/s 92CA (3) of the Income Tax Act, 1961 dated 30/1/2015. The upward adjustment Arms Length Price of international transactions was made at Rs. 16,62,47,629/- and accordingly an addition of this amount was propose to be

made to the income of the assessee. Thereafter, draft order proposing the said addition was passed on 26/3/2015 and duly served upon the assessee.

4. The assessee filed objections before DRP. The DRP while its directions dated 23/12/2015 directed the TPO to re-compute the ALP of International Transactions. The TPO carried out the directions of DRP by holding as under:-

" 4. In view of the above directions, the alleged AMP spend/incurred by the assessee after exclusion of billing material, personalization, list rentals and promotions and bad debts is tabulated as under:

S No.	Particulars	As per TP order	As per DRP Directions
1	Billing Materials	11,17,612	Excluded
2	Promotion freight	32,68,074	32,68,074
3	personalization	79,85,056	Excluded
4	List rentals and other promotions	31,53,009	Excluded
5	Premiums	2,43,81,740	2,43,81,740
6	Sweeptakes Judging	33,40,985	33,40,985
7	Paper and printing of brochures	5,47,56,672	5,47,56,672
8	Bad debts	1,83,79,127	Excluded
9	Postage	4,07,65,295	4,07,65,295
	TOTAL	15,71,47,570	12,65,12,766

Accordingly, the following expenses should be considered part of AMP:

Particulars	Amount (in INR)	Amount (in INR)
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	<i>F.Y 2010-11 as per TP Order</i>	<i>F.Y 2010-11 considered as AMP on the directions of DRP</i>
<i>Advertisement</i>	<i>15,71,47,571</i>	<i>12,65,12,766</i>

5. For the purpose of determination of the markup on the AMP cost, it is directed by the Panel that the CP ratio of the comparables should be considered. The average GP/ Cogs ratio of the comparables is shown as below:

<i>S. No.</i>	<i>Name</i>	<i>GP/COGS</i>
<i>1</i>	<i>Crossword Bookstores Ltd.</i>	<i>38.03%</i>
<i>2</i>	<i>India Book Distributors (Bombay) Ltd.</i>	<i>13.72%</i>
<i>Average</i>		<i>25.88%</i>

8. The adjustment on account of AMP, as per the directions of the Hon'ble DRP is therefore calculated as below:-

<i>Excess AMP(A)</i>	<i>12,65,12,766</i>
<i>Mark up (B) @ 25.88%</i>	<i>3,27,41,504</i>
<i>AMP adjustment (C=A=B)</i>	<i>15,92,54,270</i>

3.6 Accordingly, in this case, the AMP adjustment required to be carried out comes to Rs. 15,92,54,270/- after the directions of the DRP as against Rs.16,62,47,629/- proposed in the order passed u/s. 92CA(3) of the Income Tax Act, 1961.

Consequent upon the directions of DRP-II, the TPO-3(2)(2), has recomputed the ALP at Rs. 15,92,54,270/-, and communicated to this office vide letter F.No. TPO-3(2)(2)/DRP Effect/2015-16/198 dt. 13.01.2016. therefore, the adjustment on account of ALP of international transactions entered into by the assessee is being made at Rs. 15,92,54,270/-.For the reasons mentioned above, as the assessee has furnished inaccurate particulars of its income, penalty proceedings under

section 271(l)(c) of the Income Tax Act are initiated against the assessee for which notice under section 274 of the Act is being issued separately.”

5. The Ld. AR submitted that the assessee is disputing the very existence of international transaction of alleged AMP expenses. The Ld. AR submitted that there is no mechanical provision under the Act to determine AMP as International Transactions. The TPO/DRP did not bring anything on record to prove that there is an understanding/arrangement / or an action between the assessee Company and the A.E for the promotion of brand/trademark name owned by A.E. The Ld. AR relied upon the decision of the Delhi Tribunal in case of Sony Mobile Communications (India) (P.) Ltd. vs. Addl. CIT (2018) 96 taxmann.com 312 as well as the decision of the Hon'ble Delhi High Court in case of Maruti Suzuki India Ltd. vs. CIT (2016) 282 CTR 1 (Del.). The Ld. AR further submitted that the existence of AMP being an international transaction has to be proved dehors of Bright Line Method which has not been otherwise substantiated by the TPO/A.O. The Ld. AR relied upon the decision of the Delhi Tribunal in case of Cengage Learning India Pvt. Ltd. vs. ACIT (ITA No. 19/Del/2016 A.Y. 2011-12 order dated 13.02.2018) as well as the decision of the Hon'ble Delhi High Court in case of PR. CIT vs. Mary Kay Cosmetic Pvt. Ltd. (ITA 1010/2018 order dated 18.09.2018). The Ld. AR further submitted that the TPO/DRP failed to understand that the components of the assessee's Advertising and Sales promotion and postal expenses are different from what is ordinarily understood as an advertisement, marketing and promotion (AMP) expenses. And, therefore, the same cannot in any circumstances be alleged to lead to creation of market intelligence for the A.E. The TPO/DRP has not brought on record anything to the contrary, while considering expenses incurred in connection with sales as AMP expenditure incurred towards brand promotion. The TPO/DRP failed to consider that postage expenses to Rs.4,07,65,295/- are not the part of AMP expenditure as it is an absurd proposition since postage expenses cannot contribute to brand building. In fact, the TPO/DRP ignored the expert opinion of Mr. Ranjan Kapoor which

gives credence to the fact that selling and distribution expenditure incurred by the assessee Company has not led to brand creation/promotion. The TPO/DRP did not appreciate that the concept of marketing intangible is not applicable to the assessee's case. The Ld. AR further submitted that the TPO/DRP failed to understand that the alleged AMP expenses is not an international transaction and these expenses incurred by the assessee Company wholly and exclusively on its own account and for its own business and any benefit to A.E is only incidentally. The Ld. AR further submitted that the assessee is an entrepreneur entity and cannot be categorized as a limited risk distributor. The Ld. AR further submitted that the TPO was incorrect in treating the assessee's own selling and distribution expenses as having been incurred for on behalf of it's A.E and accordingly holding that the assessee should have recovered the same from the A.E, is contrary from the records. The Ld. AR further submitted that the TPO/DRP arbitrarily held that the alleged AMP expenses incurred by the assessee in a separate international transaction with it's A.E u/s 92B (1) of the Act and subjected the same to the transfer pricing provisions. Without prejudice to these submissions the Ld. AR further submitted that the TPO/AO above that failed to appreciate that the warranted approach should be adopted for determining the Arms Length Price of its alleged AMP Expenses since the same is not linked to the distribution function. The Ld. AR further submitted that the TPO failed to appreciate that Bright Line Method suffers from various short comings and is not prescribed method under the TP Regulations in making an adjustment on account of the alleged AMP Expenses incurred by the assessee Company. Although in the very same order, it was held that the profits earned by the assessee company in its distribution activity which was computed after taking into account, these alleged AMP expenses meets the Arms Length test. Without prejudice to these submissions, the Ld. AR further submitted that the TPO erred in not determining the excessive alleged AMP expenses and the marketing transfer pricing on the entire alleged AMP Expenditure incurred by the assessee Company. The Ld. AR further submitted that the TPO while concluding that

the alleged AMP expenditure were for brand building without appreciating the nature of expenses incurred by the assessee. The Ld. AR further submitted that the TPO used an incorrect cost based for the purpose of making the adjustment in respect of alleged AMP expenditure. The Ld. AR further submitted that the Assessing Officer has not given effect to the directions of the DRP that has allowed the objections raised by the assessee in favour of the assessee. The TPO failed to consider the fact that where the alleged AMP expenditure incurred the same ought to be reduced from the total expenses for computation of the assessee company's margin from its distribution business in which case substantially high margins would show and an easier results. The TPO arbitrarily levied a markup of 25.88% of comparables (identified by the TPO on the alleged AMP Expenses incurred without providing any basis for arriving at the same. The TPO did not appreciate that the comparables selected by the Assessee to bench mark the alleged international transitions are not comparables. The Ld. AR also relied upon the decisions of M/s SENNHEISR Electronics India Ltd. ACIT being ITA No. 7574/Del/2017 A.Y. 2013-14 order dated 19/9/2018 Delhi Tribunal. The Ld. AR also relied upon the assessee's own case for Assessment Years 2008-09, 2009-10 & 2010-11 being ITA Nos. 655/Del/2015, 1160 & 1161/Del/2014 order dated 14/10/2016 wherein the said issue has been remanded back.

6. The Ld. DR relied upon the order of the TPO/ DRP. The Ld. DR further submitted that the decisions cited by the Ld. AR are not applicable in the present case.

7. We have heard both the parties and perused the material available on record. The components of the assessee's Advertising and Sales promotion and postal expenses are different from what is ordinarily understood as an advertisement, marketing and promotion (AMP) expenses. The components of these expenses are that of billing material, personalization, promotion freight, list rentals and other promotions, premiums, sweepstakes judging, paper and

printing of brochures and also postage. Therefore, the same cannot in any circumstances lead to creation of AMP expenses for the A.E. Thus, these expenses cannot in any circumstances be categorized for creation of making intangible for the AE. These expenses were incurred by the assessee wholly and exclusively on account of its own business and any benefit to the AE was only incidental. From the records, it can be seen that the assessee is incurring its own selling and distribution expenses. There was no advertisement in media nor the products are available in the shop. It is made available only through order placed. There exist a distinction between product promotion and brand promotion. The mechanism used by the assessee company is altogether different for its product promotion. From the records, it can be seen that there is only a mail order marketing use as promotion for products sales. The Ld. AR has aptly relied on the various decisions regarding involvement of AMP expenses but in the present case, the facts are altogether different as here the method for using product sales and promotion are totally different. The assessee company's products are not available in market as such in general. Therefore, the TPO/DRP ignored these basic differences while holding that these expenses are international transaction itself. Besides that both the revenue authorities failed to bring on record as to how the said activity of the assessee company is having an element of international transaction itself. These factors were not at all verified by the revenue authorities. The issue of Bright Line Test method is now settled by the judicial precedence in case of the decision of the Hon'ble Delhi High Court in case of PR. CIT vs. Mary Kay Cosmetic Pvt. Ltd. Thus, this also should be looked into by the AO/TPO. Therefore, it will be appropriate to remand back this entire issue to the file of the AO/TPO for fresh adjudication as also done in the earlier Assessment years i.e. 2008-09 to 2010-11. Needless to say that the assessee be given opportunity of hearing by following principles of natural justice. Thus, Ground No. 1 to 23 are partly allowed for statistical purpose. As regards to Ground No. 24, the same also needs to be verified and hence is remanded back to the file of the AO. As regards to Ground Nos. 24 to 29 are consequential in nature hence the

same are not adjudicated at this juncture. As regards to Revenue's appeal the same is also partly allowed as per the findings given in the assessee's appeal hereinabove.

8. In result, appeals of the assessee and Revenue are partly allowed for statistical purpose.

Order pronounced in the Open Court on 20th December, 2018.

Sd/-

(N. K. BILLAIYA)
ACCOUNTANT MEMBER

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated: 20/12/2018
*R. Naheed **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	16 .10.2018
Date on which the typed draft is placed before the dictating Member	22 .10.2018
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	20.12.2018
Date on which the final order is uploaded on the website of ITAT	20.12.2018
Date on which the file goes to the Bench Clerk	20.12.2018
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	