IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI I BENCH, NEW DELHI
[Coram: Pramod Kumar AM and C. M. Garg JM]

I.T.A. No.: 4790/Del/2010
Assessment year: 2004-05

Assistant Commissioner of Income Tax
Circle 12(1), New Delhi ***……Appellant***

Vs.

Harper Collins Publishers India Ltd ***……Respondent***
F 26,Connaught Circus, New Delhi 110 001
[PAN: AAACH0085R]

Appearances by:
Peeyush Jain, *for the appellant*
Salil Agarwal, R P Mall and Shailesh Gupta, *for the respondent*

Date of concluding the hearing : September 02, 2014
Date of pronouncing the order : October 13th, 2014

O R D E R

Per Pramod Kumar:

1. By way of this appeal, the appellant Assessing Officer has challenged correctness of learned Commissioner (Appeals)'s order dated 31st August, 2010, in the matter of assessment under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), for the assessment year 2004-05.

2. Ground no. 1 and 5 are general in nature and donot require any specific adjudication.

3, In ground no. 2, the Assessing Officer has raised the following gfrievance:

> **On the facts and circumstances of the case and in law, the learned CIT(A) has erred in deleting the addition of Rs 1,59,446 made by the AO on account of replacement of software as capital expenditure.**

4. So far as this issue is concerned, suffice to note that while the AO disallowed Rs 2,00,000 paid towards purchase of financial accounting software

and Rs 27,780 for upgrading the MS Office XP software, and another Rs 60,000 under the belief that this amount represents payment for software for which no bill is produced, on the ground that these software are new assets, he allowed depreciation in respect of the same. When the matter travelled in appeal before the CIT(A), she noted that there is no independent payment of Rs 60,000 – it is already included in the payment of Rs 2,00,000 and as such this disallowance was made because of wrong appreciation of facts. As regards the payments made for software, she noted that these payments were merely for upgradation of existing software used by the assessee, and, as such, the amounts so paid cannot be treated as payments for new assets. The disallowances were thus deleted. The AO is aggrieved of the relief so granted by the CIT(A) and is in appeal before us.

5. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of applicable legal position.

6. We find that it is an uncontroverted position that the impugned payments were made for the purpose of upgrading the software that the assessee was using and that no new asset came into existence. It is also well settled legal position that the expenses incurred on upgrading the software are to be treated as revenue expenditure. Learned Departmental Representative did not bring on record any material to dislodge the findings of the CIT(A) or seriously dispute the same. In view of these discussions, as also bearing in mind entirety of the case, we approve the conclusions arrived at by the CIT(A) and decline to interfere in the matter.

7. Ground No. 2 is dismissed.

8. In ground no. 3, the Assessing Officer has raised the following grievance:

> **On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the addition of Rs 60,000 made by the AO on account of software development charges paid to Partha Development Corporation**.

9. This ground is clearly ill conceived inasmuch as the amount of Rs 2,00,000 for financial accounting software was paid to Partha Development Corporation in two instalments – one of Rs 1,40,000 and the other of Rs 60,000. While the Assessing Officer took the entire amount of Rs 2,00,000 for disallowance, he also made a separate addition of Rs 60,000. This aspect of the matter has been highlighted in the CIT(A)'s order and no defects are pointed out in the said finding. In view of this uncontroverted factual finding, revenue's this ground of appeal is based on a simple misconception of facts. We need not deal with this matter in any more detail and dismiss the same as based on misconception of facts

10. Ground no. 3 is thus dismissed.

11. In ground no. 4, the Assessing Officer has raised the following grievance:

> **On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in deleting the addition of Rs 1,37,87,826 made by the AO on account of difference in arm's length price.**

12. So far as this grievance of the Assessing Officer is concerned, relevant material facts are like this. The assessee company is a joint venture between HarperCollins Publishers Ltd, UK, which holds 60% of its equity shares, and Living Media India Limited, which holds 40% of its equity shares. One of the major business activity that the assessee is engaged in is import of books primarily from its AEs and distribution of these imported books in India. During the relevant previous year, the assessee imported books from its AE for an aggregate amount of Rs 3,56,45,087, The assessee used Resale Price Method for benchmarking its international transactions so far as purchase of books is concerned. The claim of the assessee was that its purchase is at arm's length price because while its gross margin for the sale of books, other than imported books, is 33.82%, whereas its gross margin for sale of imported books is 38.08%. The TPO, however, rejected this stand on the ground that the comparison of profit earned on imported books with profit earned on other books is incorrect because the latter is an entirely uncomparable activity on the

facts of this case. It was pointed out that, apart from distributing books imported from the AEs, the assessee publishes Indian reprints of foreign books by paying royalty thereon, and that this activity cannot be compared with distribution of books. The very foundation of assessee' TP approach in applying RPM method, according to the TPO, was legally unsustainable inasmuch wrong comparable has been picked up. The TPO further noted that the assessee's submission that it has received 75.15% discount, on the UK cover price, from the AE whereas the assessee gives 30% discount, on its India cover price to the wholesale distributor. Using the wholesale distributor's margin as a valid comparable for the application of RPM, and treated the UK published price and Indian MRP as the same, the TPO recomputed the ALP on the following basis:

The figures given by the assessee

Sales	5,65,66,983
Less : cost of sales	3,50,27,598
Profit	2,15,39,385
Percentage of profit	38.08%

TPO's computation of wholesale distributor's margin

Cover price of the book (resale price to the distributor)	14,09,56,128
Cost of books to the distributor	5,65,66,983
Gross profit	8,43,89,145
Percentage of profit	59.86%

Computation of ALP of purchases by the TPO

Resale price of books	5,65,66,983
Normal GP	59.68%
Amount as per clause (ii) Of rule 10B(1)(b) (i.e. resale price as reduced by margins in comparable case)	2,27,05,986
Amount as per clause (ii) Of rule 10B(1)(b) (i.e. direct expenses incurred in Purchase etc)	8,48,725

Net amount which is treated as ALP of the purchases of books	2,18,57,261

13. On the basis of aforesaid calculation, the TPO concluded that as the stated value of imports of books is Rs 3,56,45,087, an arm's length adjustment is required to be made with respect to the difference amount i.e. Rs 1,37,87,826.

14. Aggrieved by the ALP adjustment so made by the TPO, assessee carried the matter in appeal before the CIT(A) who deleted the ALP by observing that the gross profit margin cannot be worked out by reducing the sale price from cover price. The Assessing Officer is aggrieved by the relief so given by the CIT(A) and is in appeal before us.

15. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

16. A plain look at the computations done by the TPO shows glaring inconsistencies. While the TPO has proceeded on the basis that the assessee has received 85.15% discount on published price of the books and allowed 30% discount on the same published price to the wholesale dealers, the figures reproduced above have a different story to share. Going by the business model as perceived by the TPO, which constitute foundation of the impugned ALP adjustment, for each purchase of Rs 24.85 (100-85.15) by the assessee, the sale price has to be Rs 70 (100-30). The profit margin thus works out to 45.15 which works out to margin of 64.50% of sales whereas the profit margin of the assessee on sale of these books is admittedly 38.08%. Clearly, therefore, there is a discrepancy in the perceptions of the TPO vis-à-vis actual facts of the case. This discrepancy, however, seems to be explained by the assessee's uncontroverted claim that, as submitted by the assessee before the AO vide chart attached to letter dated 13.12.2006- a copy of which is placed before us at the paper-book page 144, the UK cover price of the book and Indian cover price is not the same. While the discount allowed to the assessee is on the UK published price, the discount allowed to wholesale dealer is on Indian cover price. For example, UK cover price of the book 'The Age of Kali- Indian Travels

and Encounters' is stated to be UK £ 8.99 whereas Indian cover price for sale is stated to be UK £ 4.99 and the discount allowed to the distributor is on Indian cover price. There are variations in the discount rates also but that aspect, for the present purposes, is not really material. Similarly, in the case of 'Sleepover Club Ponies' the UK cover price is stated to be UK £ 3.99 whereas Indian cover price is stated to be UK £ 2.50. All these details were before the TPO, yet has proceeded to compute the hypothetical sale price of the books in the hands of the distributor on the basis that it will be equivalent to 402.414869% (i.e. 100/ 24.85 X 100) of the purchases in the hands of the assessee. This approach, including the presumption underlying therein, is clearly erroneous. The computation of profit margins of the wholesale distributor, as computed by the AO, are, therefore, are also incorrect. The TPO has not adopted the profit margin by the wholesale distributors on the basis of actual figures or the undisputed discount policies on cover prices but based on certain hypothesis which turns out to be based on misconception of facts and is, in any case, unsubstantiated by material on record.We are, therefore, of the view that the very foundation of impugned ALP adjustment is unsustainable in law. Our reasoning may have been different but our conclusion is the same as arrived at by the CIT(A).

17. When we pointed out glaring errors in the approach adopted by the TPO to the learned Departmental Representative, he pointed out that the manner in which RPM has been applied to the facts of the case is incorrect and even the TPO has not done the ALP determination properly. The manner in which transfer pricing study has understood RPM method is, according to the learned Departmental Representative, is patently erroneous though even the TPO has overlooked the fundamental errors in the approach. He suggested that the matter should be restored to the file of the AO/TPO so that the ALP can be properly computed.

18. We are, however, not inclined to accept this plea. The TP study may be erroneous but it is not open to us to enlarge the scope of issue before us. In the present case, the TPO has disputed only the margin of the wholesaler on the basis of certain calculations which turned out to be erroneous. He, however,

does not dispute the fact that the margins of the wholesale distributor can be compared with the margins of the assessee. It is a matter of record that the assessee's margin from this segment are over 38% whereas going by the business model adopted by the assessee, maximum permissible margin for the wholesale distributor is 30%. In these circumstances, and within the limitations that we have, there is no good reason to disturb the relief given by the CIT(A). It is not for us to supplement the work done at the assessment level or to step into the shoes of the AO and TPO for deciding what more could have been done in a particular case. We have also noted that right from 2004-05 to 2012-13 the ALP benchmarking on this basis has been accepted by the revenue and even though a reference was made to TPO in the assessment year 2010-11, the TPO did not disturb this ALP determination either.

19. In view of all these facts, and bearing in mind entirety of the case, we approve the conclusions arrived at by the CIT(A) on this issue as well and decline to interfere in this matter.

20. Ground No. 4 is thus dismissed.

21. In the result, the appeal is dismissed. Pronounced in the open court today on 13th day of October, 2014.

Sd/-	Sd/-
C M Garg	**Pramod Kumar**
(Judicial Member)	(Accountant Member)

New Delhi, 13th day of October 2014

Copies to: *(1)* *The assessee* *(2)* *The Assessing Officer*
(3) *CIT* *(4)* *CIT(A)*
(5) *Departmental Representative*
(6) *Guard File*

By order etc

Assistant Registrar
Income Tax Appellate Tribunal
Delhi benches, New Delhi