

# SHOULD EXCESSIVE MARKETING EXPENSES BE REMUNERATED? LESSONS FROM INDONESIA'S TAX COURT DECISIONS

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## *Abstract*

*This study examines the causes of remuneration disputes over excessive marketing expenditures that enhance marketing intangibles value and suggests solutions for fairly remunerating such excessive marketing activities. Based on existing literature, this study investigates the causes of disputes using four factors that affect the effectiveness of transfer pricing audits. This study employs a qualitative method using case studies of Indonesia's tax court decisions from 2020 to 2023. The primary and secondary data are collected through interviews and existing data support and validated further using triangulations. Findings reveal that the disputes are mainly caused by weak proof of the correction made by the tax authority. Applying*

*the arm's length principle became highly subjective due to the unclear transfer pricing regulations, inadequate assessment of the company's business complexity, and lack of comparable data. The tax authority should improve domestic regulations on transfer pricing and disclose taxpayers' nominative list of promotional expenses to implement appropriate corrections in this case. Empirically, this study has novelty by using the perspective of tax court's judges and is based on tax court decisions in Indonesia. Practically, this research is useful in examining the amount of arm's length remuneration for excessive marketing activities.*

*Penelitian ini meneliti penyebab dari sengketa remunerasi atas biaya pemasaran yang berlebihan yang dianggap meningkatkan nilai aset pemasaran tak berwujud dan menyarankan solusi untuk memberikan remunerasi yang adil atas aktivitas pemasaran yang berlebihan tersebut. Berdasarkan literatur yang ada, penelitian ini menyelidiki penyebab perselisihan dengan menggunakan empat faktor yang mempengaruhi efektivitas audit transfer pricing. Penelitian ini menggunakan metode kualitatif dengan menggunakan studi kasus putusan pengadilan pajak Indonesia dari tahun 2020 hingga 2023. Data primer dan sekunder dikumpulkan melalui wawancara dan data pendukung yang ada, dan divalidasi lebih lanjut dengan menggunakan triangulasi. Hasil penelitian mengungkapkan bahwa sengketa terutama disebabkan oleh lemahnya pembuktian atas koreksi yang dilakukan oleh otoritas pajak. Penerapan prinsip kewajaran dan kelaziman usaha menjadi sangat subyektif karena peraturan penetapan harga transfer yang tidak jelas, penilaian yang kurang memadai atas kompleksitas bisnis perusahaan, dan kurangnya data pembanding. Otoritas pajak harus memperbaiki peraturan domestik tentang transfer pricing dan mengungkapkan daftar nominatif biaya promosi wajib pajak untuk menerapkan koreksi yang tepat dalam kasus ini. Secara empiris, penelitian ini memiliki kebaruan dengan menggunakan perspektif hakim pengadilan pajak dan didasarkan pada putusan pengadilan pajak di Indonesia. Secara praktis, penelitian ini*

*bermanfaat dalam mengkaji besaran remunerasi yang wajar atas kegiatan pemasaran yang berlebihan.*

*Keywords: remuneration, marketing intangibles, excessive marketing, transfer pricing, arm's length principle.*

## Introduction

The business strategy of multinational companies that exploit the economic potential of intangibles is increasing compared to the past, which relied heavily on the presence of tangible goods.<sup>1</sup> One of the important intangibles is marketing intangibles, such as trademarks and trade names, created through marketing activities. Marketing intangibles can assist the commercial exploitation of a product or service and/or have essential promotional value to the product concerned.<sup>2</sup> In addition, to reach a broader market, the multinational company expanded its distribution network in various countries and carried out massive local marketing activities to attract consumers' attention. For example, multinational food and beverage companies reported substantial advertising and marketing expenses.<sup>3</sup> The Coca-Cola Company reported advertising expenses of USD 4.3 billion in 2022 (10% of net sales).<sup>4</sup> Meanwhile, Nestle reported marketing and administrative expenses of USD 18.2 billion in 2022 (18% of sales).<sup>5</sup> Marketing and innovation are essential in creating brand loyalty and expanding market share

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<sup>1</sup> Stephan Grüber, *Intangible Values in Financial Accounting and Reporting* (Wiesbaden: Springer Fachmedien Wiesbaden, 2015), <https://doi.org/10.1007/978-3-658-06550-8>.

<sup>2</sup> *United Nations Practical Manual on Transfer Pricing for Developing Countries 2021* (United Nations, 2021), <https://doi.org/10.18356/9789210001052>.

<sup>3</sup> OECD, "Working Party on Agricultural Policies and Markets - Case Study: The Contribution of the Processed Food Sector to the 'Triple Challenge'" (OECD, December 7, 2020).

<sup>4</sup> The Coca Cola Company, "Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934," 2022.

<sup>5</sup> Nestlé, "Consolidated Financial Statements of the Nestlé Group 2022," 2022.

in the highly competitive food and beverage industries.<sup>6</sup> This gives rise to the notion that local marketing activities carried out by distributors in various countries should be fairly remunerated for their role in developing brand loyalty that is legally owned by other affiliates.<sup>7</sup>

The development of multinational companies' business models that utilise the economic potential of intangibles has implications for the tax treatment of transfer pricing-related remunerations of intangibles.<sup>8</sup> The Organisation of Economic Co-operation and Development (OECD) pays great attention to the concept of transfer pricing analysis of intangibles by amending several guidelines in the OECD Transfer Pricing Guidelines of 2017. The changes emphasise the value creation of intangibles and the allocation of economic benefits from such value, among others related to marketing intangibles. Although a party in a business group is not the legal owner of intangibles, it can be deemed to contribute to the creation or enhancement of the value of intangibles based on the functions performed, assets used, and risks assumed by the party. Therefore, the party is entitled to appropriate remuneration for its Development, Enhancement, Maintenance, Protection, and Exploitation (DEMPE) or Development, Acquisition, Enhancement, Maintenance, Protection, and Exploitation (DAEMPE) activities in the form of higher distribution profits (due to lower product purchase prices), reduced royalty rates, and profit sharing related to the creation of marketing intangible value.<sup>9</sup> However, the OECD does not provide sufficient guidance in applying the DEMPE concept, which has caused many

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<sup>6</sup> OECD, "Working Party on Agricultural Policies and Markets - Case Study: The Contribution of the Processed Food Sector to the Triple Challenge"; The Coca Cola Company, "Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934."

<sup>7</sup> OECD *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022* (OECD, 2022), <https://doi.org/10.1787/0e655865-en>.

<sup>8</sup> Darussalam et al., *Transfer Pricing: Ide, Strategi, Dan Panduan Praktis Dalam Perspektif Pajak Internasional* (Jakarta: DDTIC, 2023).

<sup>9</sup> *United Nations Practical Manual on Transfer Pricing for Developing Countries 2021*; OECD *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022*.

differences of opinion and even controversy between the parties, namely taxpayers and tax authorities.<sup>10</sup>

Several international tax disputes have attracted worldwide attention regarding the remuneration of marketing activities related to creating local marketing intangible value. The United States and India have the most cases related to the utilisation or transfer of marketing intangibles between related parties.<sup>11</sup> Based on some of the tax dispute cases, there are differences in the method to determine whether the brand owner should compensate a marketing activity and how much the arm's length compensation should be. The DHL (2002) case in the United States introduced the 'bright-line test' concept by distinguishing between routine and non-routine expenses incurred in Advertising, Marketing, and Promotion (AMP) activities.<sup>12</sup> Meanwhile, the Maruti Suzuki (2010) case in India recognised the concept of a 'bright-line test' by considering the agreement's exclusivity underlying the utilisation or the license of marketing intangibles.<sup>13</sup>

Indonesia is dealing with numerous transfer pricing disputes, some related to compensation for marketing intangibles. These disputes are typically resolved in the Tax Court and/or Supreme Court. Based on the Tax Court decisions for the 2020 to 2023 period published on the Tax Court Secretariat website, this case involved several famous consumer goods brands successfully marketed in Indonesia.

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<sup>10</sup> Vasistha Parmessar, Isabel Verlinden, and Stefaan De Baets, "Grappling with DEMPEs in the Trenches: Trying to Give It the Meaning It Deserves," *Intertax* 47, no. Issue 12 (December 1, 2019): 1042–56, <https://doi.org/10.54648/TAXI2019107>.

<sup>11</sup> Gustavo Sanchez Gonzales, Armando Cabrera Nolasco, and Katia Huerdo, "The Growing Prominence of Marketing Intangibles in TP Regulations and Disputes in Latin America," 2022.

<sup>12</sup> Ninth Circuit United States Court of Appeals, "DHL Corporation and Subsidiaries v. Commissioner of Internal Revenue," *Nos. 99-71580, 00-70008, 99-71592 and 99-71675*, April 11, 2002.

<sup>13</sup> Marc M. Levey and Brian Arthur, "The High Court in India Relies on OECD Approach for Marketing Intangibles in the *Maruti Suzuki Case*," *Intertax* 38, no. Issue 12 (December 1, 2010): 672–80, <https://doi.org/10.54648/TAXI2010071>.

**Table 1.** Disputes Statistics of Remuneration of Marketing Intangibles in F&B Companies

Year	Granted in Full	Rejected	Partially Granted	Formally Rejected	Total
2020	6	1	0	0	7
2021	8	0	0	0	8
2022	4	0	0	1	5
2023	5	1	1	0	7
Total	23	2	1	1	27
Percentage	85.19%	7.41%	3.70%	3.70%	100%

Source: Processed from the Tax Court Secretariat Website<sup>14</sup>

In the 2020 to 2023 period, approximately 85% of Tax Court decisions related to the remuneration of marketing intangibles involved the food and beverage companies. After reviewing existing tax dispute cases in F&B companies as recapitulated in Table 1, we find that taxpayers won almost all cases. The Directorate General of Taxes (DGT) only won two cases, and one other was partially granted. The disputes occurred because the tax auditor found a huge marketing expense compared to the company's limited functions. The tax auditor believed that the company in Indonesia had contributed to increasing the value of marketing intangibles owned by its affiliates abroad.

A study suggests that various factors affect the effectiveness of transfer pricing audits, including the complexity of the company's ownership structure and transactions, the subjectivity of applying the arm's length principle, unclear transfer pricing regulation, and lack of comparable data.<sup>15</sup> Accordingly, a

<sup>14</sup> <https://setpp.kemenkeu.go.id/risalah/IndexPutusan>

<sup>15</sup> Favourate Yelesedzani Sebele-Mpofu, Eukeria Mashiri, and Patrick Korera, "Transfer Pricing Audit Challenges and Dispute Resolution Effectiveness in Developing Countries

previous study reveals that tax disputes related to the remuneration of marketing intangibles continue to occur in various countries, including Latin America.<sup>16</sup> Another study, using a case study approach in a company in Indonesia, reveals that excessive marketing expenses incurred by affiliate distributors, when compared to similar expenses incurred by comparable independent distributors, can create marketing intangibles.<sup>17</sup> With the same approach, another study shows that a company that incurs promotional expenses solely to maintain product existence and increase company sales cannot be considered involved in increasing brand awareness, so it is not entitled to compensation from the brand owner.<sup>18</sup> By using data processing techniques in the form of literature study, direct observation, and interviews with tax auditors, academics, taxpayers, and tax consultants, this study further reveals that the correction made by DGT related to remuneration for marketing activities in connection with the creation of marketing intangible value does not have a strong basis.<sup>19</sup>

To the best of our knowledge, very limited research has been conducted in Indonesia on treating remuneration for excessive marketing expenditures. Further, existing studies do not analyse the tax dispute resolution of remuneration for such marketing activities from the perspective of the Tax Court's judges. This study aims to fill these gaps by analysing tax disputes in the food and beverage industry based on case studies from Indonesia's Tax

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with Specific Focus on Zimbabwe," *Accounting, Economics, and Law: A Convivium* 0, no. 0 (October 8, 2021), <https://doi.org/10.1515/ael-2021-0026>.

<sup>16</sup> Gonzales, Nolasco, and Huezo, "The Growing Prominence of Marketing Intangibles in TP Regulations and Disputes in Latin America."

<sup>17</sup> Punia Mega Metlissa and Nanda Ayu Wijayanti, "Transfer Pricing Practises of Intensive Advertising, Marketing and Promotion Expense in Indonesia: Case Study in PT Z," in *E-Proceeding for Asian Conference on Business, Economics and Social Science (ACBESS) 2021* (Melaka : Universiti Teknologi MARA, 2021).

<sup>18</sup> I Wayan Wahyu Putra, "Analisis Pembebanan Biaya Promosi Sehubungan Dengan Pemasangan Logo Pihak Afiliasi Sebagai Marketing Intangible Pada Usaha Joint Venture (Studi Kasus Pada PT X Tahun Pajak 2016)" (2020).

<sup>19</sup> Lutfiah, "Analisis Sengketa Pajak Marketing Intangible Atas Biaya Pemasaran PT Samsung Electronics Indonesia Dan Upaya Penyelesaian Sengketa Marketing Intangible " (Universitas Indonesia, 2016).

Court decisions. The research questions in this study are as follows: 1) What are the causes of tax disputes about remuneration of marketing activities related to the creation of marketing intangibles? and 2) How is the appropriate remuneration treatment for marketing activities related to creating marketing intangibles? This study is expected to contribute to the settlement of similar disputes and the development of knowledge related to the transfer pricing of intangibles.

### **Research Methods**

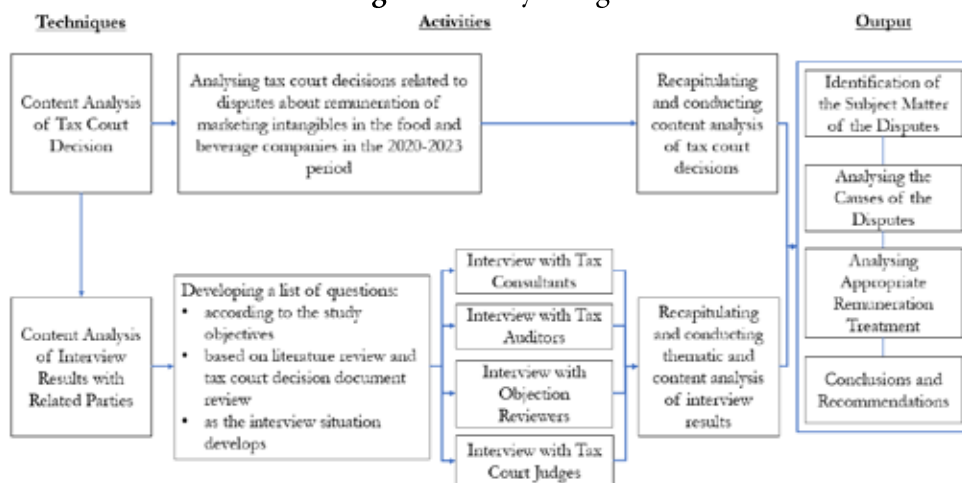
This study employs a qualitative approach using case studies. The case study is conducted on Indonesia's tax court decisions for the 2020 to 2023. The case study approach provides an in-depth understanding of the causes of tax disputes and finds solutions to prevent similar conflicts from recurring. The sample of court decision documents used are those involving the food and beverage companies because most of the related disputes involved companies in the food and beverage industry. Primary data is gathered through interviews with disputing parties, while secondary data is obtained from tax court decisions and literature documents. The primary and secondary data are validated using triangulation. The data analysis technique is content analysis of document reviews of tax court decisions, interview results, and literature reviews.

The analysis was conducted using the problem-diagnosis analysis stage. Content analysis of the document of tax court decisions and literature review were used to develop interview questions. This study included interviews with two tax consultants, one tax auditor, two objection reviewers, and two tax court judges regarding relevant tax disputes. The interviews took place for about one hour, on average. One tax court judge did not want to reveal his identity and did not want the interview to be recorded and was only willing to take notes, while the other interviewee consented to be recorded and reveal their identities. This study uses purposive sampling, setting specific criteria for interviewees. Furthermore, content analysis of tax court decision documents,



literature review, and interview results are combined to confirm the suitability of the results as a basis for analysing the causes of disputes and providing recommendations in the form of appropriate remuneration treatment practices for marketing activities. The overall study design is presented in figure 1 below.

Figure 1. Study Design



Source: Author's Analysis

## Discussion

### Causes of Tax Disputes Related to Remuneration of Excessive Marketing Expenses *The Complexity of the Company's Ownership Structures and Transactions*

Auditing a multinational company is difficult as it requires a thorough understanding of its business operations, how it generates profits, and which business functions are essential in generating revenue.<sup>20</sup> Therefore, one important step before conducting a comparability analysis is to understand the

<sup>20</sup> Thulani Shongwe, "Improving Transfer Pricing Audit Challenges in Africa Through Modern Legislation and Regulations," in *INTERNATIONAL TAX COOPERATION: Perspectives from the Global South*, ed. Manuel F. Montes, Danish, and Anna Bernardo (Geneva: South Centre, 2019), 87–114.

characteristics of transactions affected by special relationships to identify commercial and/or financial relationships between taxpayers and their affiliated parties.<sup>21</sup> This step determines the taxpayer's business characteristics that will be used in conducting the comparability analysis. Based on the review of the tax court decision's documents, the complexity of the company's ownership structure and transactions in this dispute is illustrated by the difference of opinion between the taxpayer and the tax authority regarding the characterisation of the taxpayer's business that can receive remuneration for its marketing activities and the substance of the marketing expenses incurred by the taxpayer. Taxpayers argue that companies that can receive remuneration for their marketing activities are only companies with distributor or marketer functions. Meanwhile, the tax authority emphasises the distribution function performed, not the company's characterisation. With such emphasis, the tax authority argues that a company characterised as a fully-fledged manufacturer may also perform distribution functions or act as a service provider (agent) that performs promotional/marketing activities to strengthen the brand (Development and Enhancement of Marketing Intangibles).

If examined based on the cases won by taxpayers and tax authorities, tax court judges agree that a company's business field or characteristics as a distributor can be presumed to be entitled to receive remuneration for its marketing activities. Almost all cases won by taxpayers involve taxpayers with characteristics of functions, assets, and risks as manufacturing companies, both fully-fledged manufacturers and licensed manufacturers. This is in line with the provisions in paragraphs 6.75 to 6.78 of the OECD Transfer Pricing Guidelines, which essentially outline that distributors who are not the legal owners of an intangible asset but carry out marketing activities to increase the

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<sup>21</sup> Menteri Keuangan Republik Indonesia, "Penerapan Prinsip Kewajaran Dan Kelaziman Usaha Dalam Transaksi Yang Dipengaruhi Hubungan Istimewa," Peraturan Menteri Keuangan Nomor 172 Tahun 2023 § (2023).

value of the intangible asset should be compensated in connection with the marketing activities carried out.<sup>22</sup>

The interviews with the parties involved in the dispute reveal a broader range of opinions. There is a common view between the taxpayers and tax authorities. The first tax consultant representing the taxpayer states that the business profile is not the main point in determining whether the marketing expenses are excessive and should be remunerated by the brand owner. It is the amount of marketing that matters, not the company itself.<sup>23</sup> The tax auditor also expresses that the main things that must be considered in this case are who owns the intangible property and the contract's content. During tax audits, tax auditors should first confirm that the taxpayer is not the legal owner of the marketed brand. Then, they examine the contract details to determine whether it involves extensive marketing activities that independent distributors would not normally do.<sup>24</sup>

Meanwhile, other tax consultants argue that it is common for distributor or marketer companies to receive remuneration for excessive marketing activities because they are less important and have lower profit margins than manufacturing companies. Manufacturers are in the business of selling their products, and distributors help them out by focusing on selling specific products. So, it makes perfect sense for manufacturers to consider marketing expenses as a normal part of their overall expenses, while distributors and marketers may be deemed to be entitled to receive remuneration from those who give them work.<sup>25</sup>

However, the objection reviewer's analysis, in this case, does not only emphasise the function of an enterprise but also considers the assets used and the risks assumed by the enterprise. Contract manufacturers and limited-risk

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<sup>22</sup> OECD *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* 2022.

<sup>23</sup> Yusuf Wangko Ngantung (Partner Danny Darussalam Tax Center), Interview, March 25, 2024.

<sup>24</sup> Ahmad Muzaini (Pemeriksa Pajak Madya Kantor Pelayanan Pajak Penanaman Modal Asing Empat), Interview, March 25, 2024.

<sup>25</sup> Arief Sholikhul Huda (Partner Taxford), Interview, April 22, 2024.

manufacturers hinge on the marketing activities of the affiliated company. On the other hand, fully-fledged manufacturers likely handle all aspects of the business, including marketing. Thus, a low-risk manufacturing company (contract manufacturer and limited-risk manufacturer) may be presumed to be entitled to receive remuneration for its marketing activities.<sup>26</sup>

As the arbiters of disputes, the Tax Court's judges look at the strength of each party's arguments. Arguments in court must be explained and proven with data and facts. There is no absolute right or wrong in these situations it all comes down to the strength of the presented arguments.<sup>27</sup> From the data on the Tax Court's decisions that have been announced for the period 2020 to 2023, we find that all judges agree that the characterisation of companies with fully-fledged manufacturer and licensed manufacturer functions should not receive any remuneration from their affiliates because their marketing and promotion activities are mainly related to the marketing risks they bear and not to perform intangibles' enhancement services. Meanwhile, most of the Directorate General of Taxes (DGT)'s corrections are made to companies with fully-fledged manufacturer and licensed manufacturer functions. Due to the minimal proof and construction of facts and data, the DGT correction is often not upheld by the Tax Court.

Apart from business characterisation, understanding business transactions conducted between taxpayers and their affiliated parties often causes disputes due to differences of opinion between taxpayers and tax authorities. The differences that often occur are related to the substance of marketing expenses that are considered to increase the value of marketing intangibles, so the brand owner should remunerate these expenses. The document review results show that the taxpayer argues that the marketing activities carried out are to increase sales and compete with similar products in the market, not to increase intangibles' value. The substance of marketing

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<sup>26</sup> Erlangga Lunggo Ajie Yudha (Penelaah Keberatan Kantor Wilayah Direktorat Jenderal Pajak Jakarta Khusus), Interview, March 18, 2024.

<sup>27</sup> Riztiar Arinta (Hakim Pengadilan Pajak), Interview, April 1, 2024.

expense is Product Awareness, not Brand Awareness. Meanwhile, the tax authority argues that the expenses related to the promotional/marketing activities are like strengthening the brand (enhancement of intangibles) and increasing the value of the intangibles owned by the affiliated company so that the taxpayer is entitled to obtain reimbursement/remuneration for these expenses from the brand owner.

In 11 of the 26 Tax Court decisions in the 2020 to 2023 period, the Tax Court judges consider that although the marketing activities carried out by the taxpayer are activities carried out for its benefit in selling the products it produced, directly or indirectly, the marketing activities can also strengthen the value of the intangibles attached to the taxpayer's products. These judges' assessments are also confirmed in an interview with one of the Tax Court judges. The Tax Court judge believes that it is very difficult to distinguish which promotional expenses increase sales and which promotional expenses increase brand value because increased sales and increased brand value are interrelated. A marketing activity can boost sales and increase brand awareness at the same time.<sup>28</sup>

Therefore, based on our review of Tax Court decision documents, the taxpayers win in all cases where the tax authority corrects the entire amount of promotional expenses incurred by the taxpayers. Any marketing strategy undertaken by a company can directly influence product sales and brand equity, so the evaluation of marketing performance can also be done in two separate ways, namely (1) short-term results and (2) changes in brand equity.<sup>29</sup> Meanwhile, the OECD does not distinguish the substance of marketing expenses that increase brand value but only emphasises excessive marketing activities to determine whether a promotional expense is entitled to be remunerated.<sup>30</sup> This is also in line with the statement of the tax consultant

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<sup>28</sup> Riztiar Arinta (Hakim Pengadilan Pajak).

<sup>29</sup> Philip Kotler and Kevin Lane Keller, *Marketing Management*, 14th ed. (Upper Saddle River, NJ: Prentice Hall, 2012).

<sup>30</sup> *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022*.

interviewee, who emphasised the existence of marketing activities that are considered excessive rather than distinguishing the substance of the purpose of promotional expenses carried out by the company. Also, looking at international court cases, judges have not considered the impact on brand value as a key factor in deciding tax benefits for marketing expenses.<sup>31</sup>

However, in some cases, the tax authority separates promotional expenses that are considered to increase sales and promotional expenses that can increase brand value. Corrections are made to the amount of promotional expenses that can increase brand value. This argument is based on the concept of the buying funnel:

**Figure 2.** The Buying Funnel



Source: Kotler et al., *Ending the War Between Sales and Marketing* (HBR, 2006)

Marketing activities aim to build brand preferences that will ultimately create sales, while sales activities aim to find customers, determine customer

<sup>31</sup> Tami Putri Pungkasan (Asisten Manajer Danny Darussalam Tax Center), Interview, March 25, 2024.

needs, negotiate contracts, and implement sales.<sup>32</sup> Promotional activities are carried out to increase product awareness but do not create marketing intangible value.<sup>33</sup> Furthermore, based on the result of an interview with a tax auditor, it is revealed that the way to distinguish the benefits of these promotional expenses is to look at the substance of the expenses. Selling expenses, such as discounts or rebates, directly boost sales. On the other hand, marketing expenses, such as mass media advertising, billboards, and sponsoring sports or music events, aim to increase brand awareness and typically involve larger amounts because these activities must be ongoing to ensure the brand stays at the forefront of customers' minds.<sup>34</sup>

However, arguments related to the substance of marketing expenses are difficult to prove. They are often based on assumptions that the Tax Court's judges do not consider when deciding disputes. The tax authority might rely on vague information and reach conclusions too quickly.<sup>35</sup> Most multinational companies' transactions are complex and do not have a clear audit trail, making it difficult for auditors to assess their fairness.<sup>36</sup> To be a strong argument and considered by the Tax Court's judges, an argument related to the substance of these promotional expenses must be supported by strong evidence, such as the taxpayer's marketing strategy contracts and documents, so that it can be proven that there is an increase in the value of intangibles. However, this is difficult to obtain due to the tax authority's lack of access to data held by the taxpayer's business group, as stated by the objection reviewer in the interview. Taxpayers argue that marketing expenses

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<sup>32</sup> Philip Kotler, Neil Rackham, and Suj Krishnaswamy, "Ending the War between Sales & Marketing," *Harvard Business Review* 84 (July 1, 2006): 68–78, 187.

<sup>33</sup> Putra, "Analisis Pembebanan Biaya Promosi Sehubungan Dengan Pemasangan Logo Pihak Afiliasi Sebagai Marketing Intangible Pada Usaha Joint Venture (Studi Kasus Pada PT X Tahun Pajak 2016)."

<sup>34</sup> Ahmad Muzaini (Pemeriksa Pajak Madya Kantor Pelayanan Pajak Penanaman Modal Asing Empat), Interview.

<sup>35</sup> Riztiar Arinta (Hakim Pengadilan Pajak), Interview.

<sup>36</sup> Sebele-Mpofu, Mashiri, and Korera, "Transfer Pricing Audit Challenges and Dispute Resolution Effectiveness in Developing Countries with Specific Focus on Zimbabwe."

should not be remunerated because they only increase sales, but proving this direct link is challenging due to confidentiality restrictions.<sup>37</sup> The tax authority often lacks a master file created by the parent company that established the marketing scheme, what is designated for Indonesia, what is for global operations, and the underlying basis.<sup>38</sup>

### The Subjectivity of Applying the Arm's Length Principle

Conflicts of interpretation can arise when applying the current international guidelines, especially when applying the arm's length principle and measuring value creation.<sup>39</sup> Transfer pricing is not an exact science, so its assessment requires information disclosure and experience. It is based on the judgment of each party from the tax authority and the taxpayer.<sup>40</sup> The element of subjectivity in calculating the arm's length price makes tax audits and tax dispute resolution ineffective.<sup>41</sup>

As in the case of remuneration of marketing expenses, tax auditors have different views in assessing the arm's length remuneration of marketing activities carried out by taxpayers. Based on our review of the Tax Court decisions, the main way that the tax authority often assesses the arm's length amount of marketing expenses is to look at the substance of the promotional expenses themselves, as explained in the previous subsection. In addition, the arm's length principle is assessed by considering the market share controlled by the taxpayer and the company's financial condition. These methods are

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<sup>37</sup> Erik Aulia Amri (Penelaah Keberatan Kantor Wilayah Direktorat Jenderal Pajak Jakarta Khusus, Interview, March 19, 2024.

<sup>38</sup> Erlangga Lunggo Ajie Yudha (Penelaah Keberatan Kantor Wilayah Direktorat Jenderal Pajak Jakarta Khusus), Interview.

<sup>39</sup> Tim Büttner and Matthias Thiemann, "Breaking Regime Stability? The Politicization of Expertise in the OECD/G20 Process on BEPS and the Potential Transformation of International Taxation," *Accounting, Economics and Law* 7, no. 1 (March 1, 2017), <https://doi.org/10.1515/ael-2016-0069>.

<sup>40</sup> *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022*; *United Nations Practical Manual on Transfer Pricing for Developing Countries 2021*.

<sup>41</sup> Sebele-Mpofu, Mashiri, and Korera, "Transfer Pricing Audit Challenges and Dispute Resolution Effectiveness in Developing Countries with Specific Focus on Zimbabwe."



considered weak by the Tax Court's judges because they do not prove that the promotional expenses impact the increase in intangible value.

All interviewees agreed that the arm's length of promotional expenses cannot be directly linked to the size of the market share controlled and/or the company's financial condition, although there may be some influence. Furthermore, they emphasise the importance of understanding the taxpayer's business process and business strategy, as well as the industry conditions in which the taxpayer is engaged, to apply an appropriate comparability analysis in assessing the arm's length of such promotional expenses.<sup>42</sup> Since transfer pricing is not an exact science, the tax authority and taxpayers must consider factors that will significantly impact profits from a business perspective.<sup>43</sup>

Concerning the application of the arm's length principle in this case, the bright-line test concept has been introduced in the United States and widely applied in resolving disputes related to marketing expenses in various countries. In the bright-line test concept, the portion of marketing expenses that exceed the line of routine marketing expenses incurred by an independent comparable company is considered a portion of non-routine marketing expenses that impact increasing the value of marketing intangibles.<sup>44</sup> This aligns with the opinion of the tax consultant and Tax Court judge in the interview, who stated that the tax authority should test the arm's length remuneration of marketing expenses using the transfer pricing principle.<sup>45</sup> The recommended approach is the bright-line test, which compares AMP (Advertising, Marketing, and Promotion) expenses to comparable companies'

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<sup>42</sup> Erik Aulia Amri (Penelaah Keberatan Kantor Wilayah Direktorat Jenderal Pajak Jakarta Khusus, Interview; Arief Sholikhul Huda (Partner Taxford), Interview; Anonym (Hakim Pengadilan Pajak), Interview, April 30, 2024.

<sup>43</sup> Arief Sholikhul Huda (Partner Taxford), Interview.

<sup>44</sup> Gonzales, Nolasco, and Huezco, "The Growing Prominence of Marketing Intangibles in TP Regulations and Disputes in Latin America."

<sup>45</sup> Yusuf Wangko Ngantung (Partner Danny Darussalam Tax Center), Interview; Anonym (Hakim Pengadilan Pajak), Interview.

expenses.<sup>46</sup> While nothing may perfectly align, adjustments are necessary, employing the transfer pricing approach.<sup>47</sup>

Aside from using the bright-line test to assess the arm's length of marketing expenses, the Tax Court judge's opinion in one of the decisions<sup>48</sup> mentions that independent companies' operating profits or royalty rates can be used to assess the arm's length of the potential benefits of these marketing activities. This is in line with the results of an interview with one of the Tax Court's judges, who states that assessing the arm's length of marketing expenses can also be done at the operating profit level. Operating profit inherently considers promotional expenses. Therefore, if such a test has been conducted at the operating profit level, such as through the transactional net margin method (TNMM), there is no longer a need to directly compare one's own marketing expenses with those of independent peer companies.<sup>49</sup> In addition, the smaller royalty rate on the utilisation of marketing intangibles when compared to other independent companies can be justified as a form of reimbursement for excessive marketing costs.<sup>50</sup> However, this justification must also be balanced with evidence of the purchase price of the product that remains at arm's length so that it can be believed that the element of the royalty difference is not included in the purchase price of the product.<sup>51</sup>

Our review of the Tax Court's decision and the interview with the Tax Court's judge, tax auditor, objection reviewer, and tax consultant are also in line with paragraph 6.78 of the OECD Transfer Pricing Guidelines, which explains that there are various forms of additional remuneration for marketing

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<sup>46</sup> Yusuf Wangko Ngantung (Partner Danny Darussalam Tax Center), Interview.

<sup>47</sup> Anonym (Hakim Pengadilan Pajak), Interview.

<sup>48</sup> Pengadilan Pajak, "PUT-008344.15/2019/PP/M.IA Tahun 2021" (Jakarta, March 1, 2021).

<sup>49</sup> Anonym (Hakim Pengadilan Pajak), Interview.

<sup>50</sup> Yusuf Wangko Ngantung (Partner Danny Darussalam Tax Center), Interview; Ahmad Muzaini (Pemeriksa Pajak Madya Kantor Pelayanan Pajak Penanaman Modal Asing Empat), Interview; Riztiar Arinta (Hakim Pengadilan Pajak), Interview.

<sup>51</sup> Erik Aulia Amri (Penelaah Keberatan Kantor Wilayah Direktorat Jenderal Pajak Jakarta Khusus), Interview.

expenses incurred by distributors that may take the form of higher distribution profits (due to a decrease in the purchase price of the product), a reduction in royalty rates, or a share of profits associated with an increase in the value of the marketing intangible.<sup>52</sup> If the taxpayer's profits or royalties are outside an arm's length range, it should be suspected that the taxpayer received or should have received remuneration from the brand owner.

### Unclear Transfer Pricing Regulations

The lack of clarity of regulations is the biggest challenge in conducting tax audits and resolving disputes effectively.<sup>53</sup> Based on our review of the Tax Court's decision documents for 2020 to 2023 related to this dispute, around 70% of the decisions reveal that taxpayers disputed the legal basis of tax regulations in Indonesia used by tax authorities in making corrections for excessive marketing activities. The taxpayers state that the tax authority's corrections have created legal uncertainty by using an irrelevant legal basis, conducted against transactions that do not occur, and are not based on sufficient competent evidence.

The type of correction in this dispute over remuneration for marketing activities is divided into two types. First, the tax authority's correction is to generate income outside the business. Based on the review of the Tax Court decision document, according to the taxpayer, the tax authority has no legal basis to change or create a transaction (deemed transaction) in this type of correction. Article 18 paragraph (3) of the Income Tax Law stipulates that the DGT is authorised to redetermine the amount of income and deduction and determine debt as capital to calculate the amount of Taxable Income for taxpayers who have a special relationship with other taxpayers under the arm's

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<sup>52</sup> OECD *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* 2022.

<sup>53</sup> A Beebeejaun, "The Efficiency of Transfer Pricing Rules as a Corrective Mechanism of Income Tax Avoidance," *Journal of Civil & Legal Sciences* 07, no. 01 (2018), <https://doi.org/10.4172/2169-0170.1000237>; Sebele-Mpofu, Mashiri, and Korera, "Transfer Pricing Audit Challenges and Dispute Resolution Effectiveness in Developing Countries with Specific Focus on Zimbabwe."

length principle that is not affected by the special relationship.<sup>54</sup> The taxpayer argues that the tax authority has violated its authority by making transfer pricing corrections to the performance of independent transactions. The interview with the tax consultant also confirms this. Article 18(3) of the Income Tax Law allows the DGT to adjust prices or profits based on the arm's length principle, but subsequent regulations often specify that the DGT is only empowered to amend transactions involving special relationships.<sup>55</sup>

The second type of correction is that the taxpayer's promotional expenses become undeductible, referring to Article 6 of the Income Tax Law. Article 6 stipulates that taxpayers' taxable income is determined based on gross income minus expenses to earn, collect, and maintain income.<sup>56</sup> Under the document review of the Tax Court decision, the taxpayer argues that marketing expenses are expenses to obtain, collect, and maintain income, so they should be recognised as expenses taxpayers can deduct. Based on the result of the interview with the tax consultant, the application of Article 6 of the Income Tax Law must be proven by transaction regarding whether promotional expenses are indeed incurred to obtain, collect, and maintain income. However, examining hundreds of independent transactions individually is a massive undertaking.<sup>57</sup>

Meanwhile, based on the interview results, there are different views between the tax auditor and the objection reviewers regarding the appropriate type of correction for this case of excessive marketing expenses. The tax auditor and one objection reviewer interviewed express the opinion that the correction of marketing expenses to be nondeductible is the most appropriate, while another objection reviewer interviewed expressed the opposite opinion that the correction shall result in the correction of income from outside the

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<sup>54</sup> Presiden Republik Indonesia, "Undang-Undang Nomor 7 Tahun 1983 Tentang Pajak Penghasilan Sebagaimana Telah Beberapa Kali Diubah Terakhir Dengan Undang-Undang Nomor 7 Tahun 2021 Tentang Harmonisasi Peraturan Perpajakan (UU PPh)" (n.d.).

<sup>55</sup> Yusuf Wangko Ngantung (Partner Danny Darussalam Tax Center), Interview.

<sup>56</sup> Presiden Republik Indonesia.

<sup>57</sup> Arief Sholikhul Huda (Partner Taxford), Interview.

business. The difference of opinion is caused by various reasons. The tax auditor states that the legal basis for the correction depends on the contents of the taxpayer's contract with the relevant affiliated party. If the contract states that the distributor does not bear the expenses related to the marketing function, then the marketing expenses incurred by the distributor should be nondeductible. However, if, in the contract, the marketer performs the marketing function so that it is entitled to receive a margin as a fee for its marketing services, the correction is applied by bringing up income from outside the business as remuneration for marketing activities.<sup>58</sup>

Meanwhile, one of the objection reviewers emphasises correcting expenses that became nondeductible more because he usually followed the principle of matching cost against revenue, the portion of expenses directly proportional to revenue.<sup>59</sup> However, another objection reviewer argues that correction using the legal basis of Article 6 and Article 9 of the Income Tax Law requires transaction-by-transaction substantiation, making it more difficult to carry out. The correction scheme for income from outside the business is easier because what is determined is the amount of reimbursement that should have been received for excessive marketing expenses.<sup>60</sup>

The different views among tax auditors and objection reviewers indicate that Indonesia's transfer pricing regulations do not regulate the appropriate remuneration treatment of these marketing activities. The absence of further implementing rules has led to the inappropriate determination of arm's length remuneration for such marketing activities.<sup>61</sup> Meanwhile, in deciding disputes, the Tax Court's judges interpret the application of Article

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<sup>58</sup> Ahmad Muzaini (Pemeriksa Pajak Madya Kantor Pelayanan Pajak Penanaman Modal Asing Empat), Interview.

<sup>59</sup> Erlangga Lunggo Ajie Yudha (Penelaah Keberatan Kantor Wilayah Direktorat Jenderal Pajak Jakarta Khusus), Interview.

<sup>60</sup> Erik Aulia Amri (Penelaah Keberatan Kantor Wilayah Direktorat Jenderal Pajak Jakarta Khusus), Interview.

<sup>61</sup> Rima Lourentia, "Analisis Nilai Wajar Atas Remunerasi Aktivitas Marketing Yang Dilakukan Oleh Pihak Afiliasi Yang Tidak Memiliki Marketing Intangible (Studi Kasus Di Direktorat Jenderal Pajak)" (Universitas Indonesia, 2013).

18 paragraph (3) of the Income Tax Law more comprehensively. The interpretation of Article 18 paragraph (3) should be viewed in the direction of whether an independent enterprise would be willing to incur excessive marketing expenses in similar circumstances. The company's income can vary, including reimbursement for marketing expenses incurred to enhance marketing intangible value.<sup>62</sup>

In addition, the provisions contained in the OECD Transfer Pricing Guidelines and the United Nations (UN) Practical Manual on Transfer Pricing can not necessarily be the legal basis for corrections made by tax authorities, as the Tax Court's judge stated in the interview. The guidelines are constantly evolving and include interpretations, and no positive law in Indonesia has said that the OECD Guidelines are part of Indonesia's regulations.<sup>63</sup> This is in line with the provisions of Articles 7 and Article 8 of Law Number 12/2011 as last amended by Law Number 13/2022 on the Formation of Legislation. In these provisions, it is stated that the types of laws and regulations in Indonesia consist of the 1945 Constitution of the Republic of Indonesia, Decree of the People's Consultative Assembly, Law / Government Regulation in Lieu of Law, Government Regulation, Presidential Regulation, Provincial Regional Regulation, Regency / Municipal Regional Regulation, including regulations stipulated by the People's Consultative Assembly, People's Representative Council, Regional Representative Council, Supreme Court, Constitutional Court, Supreme Audit Agency, Judicial Commission, Bank Indonesia, Ministers, agencies, institutions, or commissions of the same level established by Law or the Government by order of Law, Provincial People's Representative Council, Governor, Regency / Municipal Regional People's Representative Council, Regent / Mayor, Village Head or equivalent.<sup>64</sup>

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<sup>62</sup> Anonym (Hakim Pengadilan Pajak), Interview.

<sup>63</sup> Riztiar Arinta (Hakim Pengadilan Pajak), Interview.

<sup>64</sup> Presiden Republik Indonesia, "Pembentukan Peraturan Perundang-Undangan," UU Nomor 12 Tahun 2011 sttd UU Nomor 13 Tahun 2022 § (2011).

### Lack of Comparable Data

The lack of information related to comparable data causes uncertainty in determining the arm's length price of a related party transaction.<sup>65</sup> When comparable data information is unavailable, or very few, adjustments are made to the conditions to make it comparable to the tested related party transaction.<sup>66</sup> In these adjustments, both the taxpayer and the tax authority have discretionary subjectivity, which can lead to tax disputes.<sup>67</sup> In the dispute over remuneration for marketing activities, comparable data is difficult to find to prove the arm's length amount of marketing expenses incurred by the taxpayer. Only one out of 26 Tax Court decisions reviewed uses comparable data to prove excessive marketing expenses. The comparable data is taken from the financial statement data of listed companies. However, the comparable data is not comparable to the taxpayer being tested, and no adjustments were made, so the Tax Court judge did not consider it. As one of the tax consultants interviewed stated, the lack of local comparable data in Indonesia makes it difficult to apply the bright-line test as a tool to prove the existence of excessive marketing activities. Given their distinct geographical coverage, this requirement for local comparable data arises from the significant disparity in marketing expenses between markets such as Indonesia and Singapore. The local comparable data is actually included in the nominative list of promotional expenses in the corporate tax return, but the data is not public.<sup>68</sup>

The objection reviewer also expresses the difficulty of finding comparable data in his interview. Data on listed companies is comparable data that can be used because it is open, but the amount is very limited, making adjustments difficult. Due to the limited data available, sometimes the tax

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<sup>65</sup> Joel Cooper et al., "Transfer Pricing and Developing Economies A Handbook for Policy Makers and Practitioners Public Sector Governance," 2016.

<sup>66</sup> Sujata Jaffer, "Key Challenges Faced by Taxpayers on Preparation of Transfer Pricing Documentation," Nexia, August 2019.

<sup>67</sup> Sebele-Mpofu, Mashiri, and Korera, "Transfer Pricing Audit Challenges and Dispute Resolution Effectiveness in Developing Countries with Specific Focus on Zimbabwe."

<sup>68</sup> Yusuf Wangko Ngantung (Partner Danny Darussalam Tax Center), Interview.

authority uses secret comparable data to test whether there are excessive marketing expenses. However, such data cannot be used in disputes because the data is confidential.<sup>69</sup> Paragraph 3.36 of the OECD Transfer Pricing Guidelines states that using secret comparable data as a basis for correction by tax authorities creates unfair treatment for taxpayers.<sup>70</sup> Likewise, regulations in various countries do not encourage the use of secret comparable data in transfer pricing analysis.<sup>71</sup> This is in line with the statement of the Tax Court judge when interviewed that all comparable data must be open and accessible to all parties, including when taxpayers start making Transfer Pricing Documentation. Consequently, if, for instance, the tax authority suddenly adjusts using internal data, approximately 80% of it will become invalid.<sup>72</sup>

Finally, to overcome the difficulty of obtaining comparable data, the tax auditor's assessment method shifts to assessing at the operating profit level (use TNMM), where comparable data is quite widely available in external databases, as explained by the tax auditor in his interview.<sup>73</sup> Thus, assessing the arm's length amount of expenses is no longer done at the level of the costs (excessive marketing expenses) but at the level of operating profit between similar independent companies. The comparable data is obtained through the Orbis database and Oriana database or can also be obtained through Exchange of Information (EoI) with partner jurisdictions.<sup>74</sup>

### Appropriate Remuneration of Excessive Marketing Expenses

From our review of tax court decision documents and interviews with the parties involved in the disputes, we can conclude that the applicable tax

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<sup>69</sup> Erik Aulia Amri (Penelaah Keberatan Kantor Wilayah Direktorat Jenderal Pajak Jakarta Khusus, Interview).

<sup>70</sup> *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022*.

<sup>71</sup> Molly Moses, "Comparable Data Searches, TNMM Use Examined," 2010.

<sup>72</sup> Riztiar Arinta (Hakim Pengadilan Pajak), Interview.

<sup>73</sup> Ahmad Muzaini (Pemeriksa Pajak Madya Kantor Pelayanan Pajak Penanaman Modal Asing Empat), Interview.

<sup>74</sup> Ahmad Muzaini (Pemeriksa Pajak Madya Kantor Pelayanan Pajak Penanaman Modal Asing Empat).



regulations related to transfer pricing in Indonesia have not regulated the proper remuneration treatment of excessive marketing expenses, as explained in the previous subsection. The Tax Court judge reveals that the tax authority often relies on the individual tax auditor's judgment, which can lead to inconsistencies (variations) in how adjustments are made. The DGT, as the tax authority, actually has great authority to determine the arm's length principle in transfer pricing cases, so it should have the courage to make clearer regulations by taking into account the number of cases and the enforceability of the regulations.<sup>75</sup>

The opinion of the Tax Court judge is in line with the full authority granted by Article 18 paragraph (3) of the Income Tax Law to DGT to recalculate the amount of income and expenses for taxpayers with the special relationship under the arm's length principle. In this dispute over remuneration for excessive marketing activities, DGT should amend the provisions of Article 18 paragraph (3) of the Income Tax Law to be clearer to avoid similar disputes in the future. Article 9 of the OECD Model states that if there is a condition in the commercial and financial relationship between associated enterprises that is different from that between independent enterprises under the same conditions, then the profit resulting from the condition should be assessed for reasonableness.<sup>76</sup> It can be concluded that the OECD Model does not restrict the application of the arm's length principle to transactions that occur between related parties. The difference in conditions affects the profit that should be earned, so fair adjustments must be made.<sup>77</sup> When applying the arm's length principle, it is important to replicate what the

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<sup>75</sup> Riztiar Arinta (Hakim Pengadilan Pajak), Interview.

<sup>76</sup> OECD, "Model Tax Convention on Income and on Capital 2017 (Full Version)," 2019, <https://www.oecd-ilibrary.org/content/publication/g2g972ee-en>.

<sup>77</sup> OECD *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022*; Gregg D. Lemein, Mary C. Bennett, and Caroline Silberztein, "The OECD Discussion Draft on the Transfer of Intangibles (Revision of Chapter VI of the OECD Transfer Pricing Guidelines) &#150; Detailed Comments," *Intertax* 41, no. Issue 2 (February 1, 2013): 66–81, <https://doi.org/10.54648/TAXI2013008>.

parties agreed to under arm's length conditions and similar circumstances.<sup>78</sup> In order to correct this dispute over remuneration for marketing activities more robustly, the tax authority needs to amend its domestic regulations to include the phrase of such conditions in its authority to apply the arm's length principle.<sup>79</sup> However, as a consequence of the change, the DGT should also explain that it is done to prevent not only tax avoidance but also double taxation.<sup>80</sup>

Furthermore, to assess the arm's length of marketing expenses incurred by companies that utilise marketing intangibles they do not own, it is important to conduct a functional analysis, namely FAR (function, asset, risk) analysis.<sup>81</sup> In addition, before conducting a comparability analysis, it is also necessary to analyse the transaction conditions and industry related to the taxpayer's business activities, including identifying factors that affect business performance in the industry.<sup>82</sup> This is also confirmed in the interview with the objection reviewer and Tax Court's judge, who emphasised the importance of knowing the company's business strategy to conduct a FAR analysis. When the understanding of the taxpayer's financial data is accompanied by an understanding of the business strategies, business processes, key drivers, and business environment, the functional analysis conducted as the initial stage before conducting a comparability analysis also results in more accurate determinations.<sup>83</sup>

After the functional analysis, a comparability analysis is conducted to determine whether there are excessive marketing expenses. The methods that

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<sup>78</sup> Chantal Roberge, "Transfer Pricing in the Pharmaceutical Industry: The Remuneration of Marketing Intangibles," *International Transfer Pricing Journal* 20, no. 4 (June 14, 2013), <https://doi.org/10.59403/2m6rcgp>.

<sup>79</sup> Yusuf Wangko Ngantung (Partner Danny Darussalam Tax Center), Interview.

<sup>80</sup> Yusuf Wangko Ngantung (Partner Danny Darussalam Tax Center); OECD, "Model Tax Convention on Income and on Capital 2017 (Full Version)."

<sup>81</sup> *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022*.

<sup>82</sup> Menteri Keuangan Republik Indonesia, Penerapan Prinsip Kewajaran dan Kelaziman Usaha dalam Transaksi yang Dipengaruhi Hubungan Istimewa.

<sup>83</sup> Erik Aulia Amri (Penelaah Keberatan Kantor Wilayah Direktorat Jenderal Pajak Jakarta Khusus, Interview; Anonym (Hakim Pengadilan Pajak), Interview.

can be used vary, ranging from the bright-line test to the TNMM method at the operating profit level, as explained in the previous subsection. Distributors or marketers earn a higher operating profit than comparable companies, as a form of remuneration for the marketing costs they incur.<sup>84</sup> In other literature, the cost-plus and profit-split methods can also be used to determine remuneration for arm's length distributors. The cost-plus method can be used where service providers (agents) provide their services to trademark owners.<sup>85</sup> Meanwhile, the profit split method is the most reliable method when both parties are involved in developing and exploiting the same intangibles or when each party owns or uses different intangibles with different values.<sup>86</sup> The profit split method is the best transfer pricing method because it allocates profit based on the extent of each party's role. However, applying the profit split method has its own challenges because Indonesia does not have clear data to do it.<sup>87</sup>

Furthermore, applying the DEMPE concept in this case is also very difficult. The OECD does not provide additional guidance on identifying and applying the DEMPE function that is considered to create intangible asset value. This lack of guidance in the application of DEMPE may lead to differences of opinion, even controversy, between the parties, namely taxpayers and tax authorities.<sup>88</sup> The proof of the DEMPE concept has always been a long-standing debate.<sup>89</sup> It is also difficult to assess the portion of each activity

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<sup>84</sup> OECD *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022* (OECD, 2022), <https://doi.org/10.1787/0e655865-en>; Yusuf Wangko Ngantung (Partner Danny Darussalam Tax Center), Interview.

<sup>85</sup> F. Vincent, "Marketing Intangibles in Canada: Myth or Reality?," in *Report of Proceedings of Fifty-Seventh Tax Conference* (Canadian Tax Foundation, 2006); Yusuf Wangko Ngantung (Partner Danny Darussalam Tax Center), Interview.

<sup>86</sup> OECD Ctr. for Tax Policy and Admin., "Transactional Profit Methods: Discussion Draft for Public Comment," January 25, 2008.

<sup>87</sup> Erik Aulia Amri (Penelaah Keberatan Kantor Wilayah Direktorat Jenderal Pajak Jakarta Khusus, Interview.

<sup>88</sup> Parmessar, Verlinden, and De Baets, "Grappling with DEMPEs in the Trenches: Trying to Give It the Meaning It Deserves."

<sup>89</sup> Yusuf Wangko Ngantung (Partner Danny Darussalam Tax Center), Interview.

(% of Development, % of Enhancement, % of Maintenance, % of Protection, and % of Exploitation) if it is separated.<sup>90</sup>

Ultimately, the most likely method to assess whether a marketing expense is excessive is to conduct a bright-line test, cost-plus method, or test using the TNMM method at the operating profit level. However, assessing using the bright-line test also suffers from the lack of publicly accessible comparable data. In the interview, the tax consultant recommended the tax authority disclose the nominative list of promotional expenses submitted by the taxpayer in the tax return, which can be used as comparable data in the bright-line test.<sup>91</sup>

## Conclusion

In this study, the disputes over the remuneration of excessive marketing expenses are proven to be caused by four factors, namely the complexity of the company's ownership structures and transactions, the subjectivity of applying the arm's length principle, unclear transfer pricing regulations, and lack of comparable data. The disputes are mainly caused by weak evidence of the correction made by the tax authority. Applying the arm's length principle became highly subjective due to the unclear transfer pricing regulations, inadequate assessment of the company's business complexity, and lack of comparable data. Excessive marketing expenses can be remunerated in three forms, namely through higher distribution profits, reduced royalty rates, or profit-sharing related to enhanced marketing intangible value. The right form of remuneration is one that suits the company's business conditions and characteristics.

To develop stronger evidence in this dispute, the DGT needs to consider using the bright line test approach, cost plus method, or TNMM to assess the arm's length remuneration of marketing expenses. The DGT should

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<sup>90</sup> Erik Aulia Amri (Penelaah Keberatan Kantor Wilayah Direktorat Jenderal Pajak Jakarta Khusus, Interview.

<sup>91</sup> Yusuf Wangko Ngantung (Partner Danny Darussalam Tax Center), Interview.

also improve domestic regulations on transfer pricing and disclose taxpayers' nominative list of promotional expenses to implement appropriate corrections concerning remuneration for excessive marketing activities. This study provides empirical and practical contributions. Empirically, this study strengthens the previous study's conclusion that DGT corrections do not have a strong basis, and marketing expenses incurred by the company do not necessarily have an impact on increasing brand value.<sup>92</sup> In addition, this study has novelty by using the perspective of tax court's judges and is based on tax court decisions in Indonesia, compared to previous studies that only focus on research within the company. Practically, this research is useful in examining the amount of arm's length remuneration for excessive marketing activities, which can be useful for taxpayers, tax authorities, and Tax Court judges in dealing with similar cases. This study also has limitations because it only conducts research in one business sector, namely food and beverage companies. We encourage similar research to be conducted in other business fields. In addition, we invite future researchers to explore further the application of methods to determine arm's length remuneration for marketing expenses incurred by the company.

## References

- Beebejaun, A. "The Efficiency of Transfer Pricing Rules as a Corrective Mechanism of Income Tax Avoidance." *Journal of Civil & Legal Sciences* 07, no. 01 (2018). <https://doi.org/10.4172/2169-0170.1000237>.
- Büttner, Tim, and Matthias Thiemann. "Breaking Regime Stability? The Politicization of Expertise in the OECD/G20 Process on BEPS and the Potential Transformation of International Taxation." *Accounting*,

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<sup>92</sup> Lutfiah, "Analisis Sengketa Pajak Marketing Intangible Atas Biaya Pemasaran PT Samsung Electronics Indonesia Dan Upaya Penyelesaian Sengketa Marketing Intangible" (Jakarta, Universitas Indonesia, 2016); I Wayan Wahyu Putra, "Analisis Pembebanan Biaya Promosi Sehubungan Dengan Pemasangan Logo Pihak Afiliasi Sebagai Marketing Intangible Pada Usaha Joint Venture (Studi Kasus Pada PT X Tahun Pajak 2016)" (Depok, 2020).

- Economics and Law* 7, no. 1 (March 1, 2017).  
<https://doi.org/10.1515/acl-2016-0069>.
- Cooper, Joel, Randall Fox, Jan Loerprick, and Komal Mohindra. "Transfer Pricing and Developing Economies A Handbook for Policy Makers and Practitioners Public Sector Governance," 2016.
- Darussalam, Danny Septriadi, B. Bawono Kristiaji, and Atika Ritmelina M. *Transfer Pricing: Ide, Strategi, Dan Panduan Praktis Dalam Perspektif Pajak Internasional*. Jakarta: DDTC, 2023.
- Gonzales, Gustavo Sanchez, Armando Cabrera Nolasco, and Katia Huevo. "The Growing Prominence of Marketing Intangibles in TP Regulations and Disputes in Latin America," 2022.
- Grüber, Stephan. *Intangible Values in Financial Accounting and Reporting*. Wiesbaden: Springer Fachmedien Wiesbaden, 2015.  
<https://doi.org/10.1007/978-3-658-06550-8>.
- Jaffer, Sujata. "Key Challenges Faced by Taxpayers on Preparation of Transfer Pricing Documentation." Nexia, August 2019.
- Kotler, Philip, and Kevin Lane Keller. *Marketing Management*. Upper Saddle River, NJ: Prentice Hall, 2012.
- Kotler, Philip, Neil Rackham, and Suj Krishnaswamy. "Ending the War between Sales & Marketing." *Harvard Business Review* 84 (July 1, 2006): 68–78, 187.
- Lemein, Gregg D., Mary C. Bennett, and Caroline Silberztein. "The OECD Discussion Draft on the Transfer of Intangibles (Revision of Chapter VI of the OECD Transfer Pricing Guidelines) &#150; Detailed Comments." *Intertax* 41, no. Issue 2 (February 1, 2013): 66–81.  
<https://doi.org/10.54648/TAXI2013008>.

- Levey, Marc M., and Brian Arthur. "The High Court in India Relies on OECD Approach for Marketing Intangibles in the *Maruti Suzuki Case*." *Intertax* 38, no. Issue 12 (December 1, 2010): 672–80. <https://doi.org/10.54648/TAXI2010071>.
- Lourentia, Rima. "Analisis Nilai Wajar Atas Remunerasi Aktivitas Marketing Yang Dilakukan Oleh Pihak Afiliasi Yang Tidak Memiliki Marketing Intangible (Studi Kasus Di Direktorat Jenderal Pajak)." Universitas Indonesia, 2013.
- Lutfiah. "Analisis Sengketa Pajak Marketing Intangible Atas Biaya Pemasaran PT Samsung Electronics Indonesia Dan Upaya Penyelesaian Sengketa Marketing Intangible." Universitas Indonesia, 2016.
- Menteri Keuangan Republik Indonesia. Penerapan Prinsip Kewajaran dan Kelaziman Usaha dalam Transaksi yang Dipengaruhi Hubungan Istimewa, Peraturan Menteri Keuangan Nomor 172 Tahun 2023 § (2023).
- Metlissa, Punia Mega, and Nanda Ayu Wijayanti. "Transfer Pricing Practises of Intensive Advertising, Marketing and Promotion Expense in Indonesia: Case Study in PT Z." In *E-Proceeding for Asian Conference on Business, Economics and Social Science (ACBESS) 2021*. Melaka: Universiti Teknologi MARA, 2021.
- Moses, Molly. "Comparable Data Searches, TNMM Use Examined." Transfer Pricing Report, The Bureau of National Affairs, Inc. no. 287, 2010.
- Nestlé. "Consolidated Financial Statements of the Nestlé Group 2022," 2022.
- OECD. "Model Tax Convention on Income and on Capital 2017 (Full Version)," 2019. <https://www.oecd-ilibrary.org/content/publication/g2g972ee-en>.

- . “Working Party on Agricultural Policies and Markets - Case Study: The Contribution of the Processed Food Sector to the Triple Challenge.” OECD, December 7, 2020.
- OECD Ctr. for Tax Policy and Admin. “Transactional Profit Methods: Discussion Draft for Public Comment,” January 25, 2008.
- OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* 2022. OECD, 2022.  
<https://doi.org/10.1787/0e655865-en>.
- Parmessar, Vasistha, Isabel Verlinden, and Stefaan De Baets. “Grappling with DEMPEs in the Trenches: Trying to Give It the Meaning It Deserves.” *Intertax* 47, no. Issue 12 (December 1, 2019): 1042–56.  
<https://doi.org/10.54648/TAXI2019107>.
- Pengadilan Pajak. “PUT-008344.15/2019/PP/M.IA Tahun 2021.” Jakarta, March 1, 2021.
- Presiden Republik Indonesia. Pembentukan Peraturan Perundang-Undangan, UU Nomor 12 Tahun 2011 sttdt UU Nomor 13 Tahun 2022 § (2011).
- . Undang-Undang Nomor 7 Tahun 1983 Tentang Pajak Penghasilan sebagaimana telah beberapa kali diubah terakhir dengan Undang-Undang Nomor 7 Tahun 2021 tentang Harmonisasi Peraturan Perpajakan (UU PPh) (n.d.).
- Putra, I Wayan Wahyu. “Analisis Pembebanan Biaya Promosi Sehubungan Dengan Pemasangan Logo Pihak Afiliasi Sebagai Marketing Intangible Pada Usaha Joint Venture (Studi Kasus Pada PT X Tahun Pajak 2016).” 2020.
- Roberge, Chantal. “Transfer Pricing in the Pharmaceutical Industry: The Remuneration of Marketing Intangibles.” *International Transfer Pricing Journal* 20, no. 4 (June 14, 2013). <https://doi.org/10.59403/2m6rcgp>.



Sebele-Mpofu, Favourate Yelesedzani, Eukeria Mashiri, and Patrick Korera. "Transfer Pricing Audit Challenges and Dispute Resolution Effectiveness in Developing Countries with Specific Focus on Zimbabwe." *Accounting, Economics, and Law: A Convivium* 0, no. 0 (October 8, 2021). <https://doi.org/10.1515/ael-2021-0026>.

Shongwe, Thulani. "Improving Transfer Pricing Audit Challenges in Africa Through Modern Legislation and Regulations." In *INTERNATIONAL TAX COOPERATION: Perspectives from the Global South*, edited by Manuel F. Montes, Danish, and Anna Bernardo, 87–114. Geneva: South Centre, 2019.

The Coca Cola Company. "Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934," 2022.

*United Nations Practical Manual on Transfer Pricing for Developing Countries 2021*. United Nations, 2021. <https://doi.org/10.18356/9789210001052>.

United States Court of Appeals, Ninth Circuit. "DHL Corporation and Subsidiaries v. Commissioner of Internal Revenue." *Nos. 99-71580, 00-70008, 99-71592 and 99-71675*, April 11, 2002.

Vincent, F. "Marketing Intangibles in Canada: Myth or Reality?" In *Report of Proceedings of Fifty-Seventh Tax Conference*. Canadian Tax Foundation, 2006.