Supreme Court of India
The Coca-Cola Export Corporation ... vs Income Tax Officer & Anr on 30 March, 1998
Author: D Wadhwa.
Bench: Sujata V. Manohar, D.P. Wadhwa

PETITIONER:
THE COCA-COLA EXPORT CORPORATION ETC.

Vs.

RESPONDENT:
INCOME TAX OFFICER & ANR.

DATE OF JUDGMENT: 30/03/1998

BENCH:
SUJATA V. MANOHAR, D.P. WADHWA

ACT:

HEADNOTE:

JUDGMENT:

THE 30TH DAY OF MARCH, 1998 Present :

Hon'ble Mrs. Justice Sujata V. Manohar Hon'ble Mr. Justice D.P. Wadhwa H.N. Salve, Sr. Adv., S.Ganesh, Adv., Mrs.A.K. Verma, Advs. for M/s. JBD & Co., Advs. with him for the appellant T.L.V. Iyer, Sr.Adv., T.C. Sharma, Ms. Neelam Sharma and B.K. Prasad, Advs. with him for the Respondents.

J U D G M E N T The following Judgment of the Court was delivered :

WITH CIVIL APPEAL NOS. 4075-76/85 AND 1089-91/85 D.P. Wadhwa. J.

These appeals are from the judgment dated December 18, 1984 of Division Bench of the Delhi High Court Dismissing writ petitions of the appellant for various assessment years. In these writ petitions, the appellant had challenged notices issued under Section 148 of the Income Tax Act, 1961 (for short, the `Act'). Civil Appeal 4074/85 pertains to assessment year 1969-70 and CAs 4075/85 and 4076/85 to assessment year 1967-68 and 1968-69 respectively. Civil Appeal 1089/85 pertains to 2 assessment years - 1971-72, 1972-73 and 1973-74. For the assessment year 1970-71, there are two appeals and these are CAs 1091/95 and 1091/85. While for each assessment year there was separate

writ petition in the High Court, for assessment year 1970-71, there were two. Reason for two writ petitions for the assessment year 1970- 71 was that while the first writ assessment year 1970-71 was that while the first writ petition challenged the notice under Section 148 of the Act, second was filed as by that time the Income Tax Officer had completed the assessment and, thus, there was a challenge to the assessment itself.

The appellant is a wholly owned subsidiary of the Coca- Cola Company which is a company incorporated under the laws of the United States of America having its headquarters at Atlanta, Georgia. U.S.A. The appellant has its main office at New York referred to as the "home office". The appellant had a branch office at New Delhi which had been declared as a company under Section 2(17) (iv) of the Act by the Central Board of Direct Taxes. It is being assessed to income-tax as a non-resident company in India since it was established in the year 1958. The Coca-cola Company, the holding company, manufactures certain basic ingredients like `7X' for the manufacture of Coca-cola concentrate and other beverage bases in its factories in U.S.A. and in London. These basic ingredients are sold by the holding company exclusively to the appellant for further manufacture of Coca-cola concentrate and beverage bases for its branches numbering 23 spread in various countries including that in India.

For the administrative convenience the whole area of operation of the appelland had been divided into four zones and 14 areas with district and regional offices. Different branches of the appellant including the Indian branch Export their products to different countries and for that necessary services which are required are rendered by the district and regional offices. The branch offices have no staff or any other arrangement to render services to the purchasers of their products. These district and regional offices have no income of their own and the expenses they incur are termed as services charges and are borne by different branches of the appellant. There are thus Home Office expenses and the service charges by the zonal and area offices and also the district and regional offices. These are, as per report of the auditor, are distributed pro-rata basis on different branches on the basis of their exports and are met by the branches in US Dollars. The Indian branch primarily maintains accounts in respect of its liability for payment of pro-rated Home Office expenses and service charges in US Dollars as the liability is to be discharged in US Dollars only. At the same time the Indian branch also maintains accounts in respect of these liabilities in rupees as the accounts of the business carried on by its are generally in rupees. It is stated that this practice of pro-rating Home Office expenses and service charges is followed by multinational companies having branches in different countries and is an international accepted practice.

The Income-tax Officer accepted the system followed by the Indian branch for pro-rating the Home Office expenses and services charges for the assessment years 1959-60 to 1966-67. For the assessment year 1967-68 the Income-tax Officer re-examined afresh the claim of the Indian branch for deduction of pro-rated Home Office expenses and service charges. The Income-tax Officer considered the details of the miscellaneous expenses which according to him were likely to include expenses disallowable under the Act and after going through the details furnished by the Indian branch, the Income Tax Officer disallowed 5 per cent out of the pro-rated service charges in that year. Felt aggrieved by the disallowance of the deductions so made, the appellant preferred an appeal before the Appellate Assistant Commissioner. The appeal was, however, dismissed. Similar

was the position of disallowance of 5 per cent out of the pro-rated service charge in the assessments for the assessment years 1968-69 to 1973-74. The question regarding the deduction of the pro-rated service charges was again examined afresh and in detail by the Income-tax Officer in the assessment year 1970-71 and he also disallowed 5 per cent and 3 per cent respectively out of Home Office expenses and service charges as on the preceding years.

On January 5, 1979, the Income-tax Officer issued separate notices under Section 148 of the Act to the appellant for reopening the assessment for the assessment years 1971-72, 1972-73 and 1973-74 under Section 147(a) of the Act. After recording discussions for reopening assessments the Income-tax Officer said he had "reasons to believe that on account of the assessee's failure or omission to disclose fully and truly all material facts necessary for its assessment for the year, its income chargeable to tax has escaped assessment". For the assessment years 1971-72 and 1973-74 two grounds were mentioned for re-opening the assessments for these years while fore the assessment year 1972-73 only second of these two grounds was mentioned. The grounds were:

1. In a mercantile system of accounting, it is open to credit or debit the revenue account as and when income or expenditure accrues irrespective of the fact as to whether such income or expenditure is actually received/paid during the accounting period. But once the revenue account is so debited or credited accrual basis subsequent adjustments thereto can be made only when the income or expenditure accounted for accrual basis is actually received or paid. To make adjustment in respect of income or expenditure frequently with every fluctuation the rate of exchange is to press the mercantile principle too far and to work out purely accounting profits or losses. In the regular assessment notional loss on exchange resulted from re-translation of the outstanding dollar liability into Indian rupees at the end of the year at the then prevailing rate of exchange has been wrongly allowed. Only the actual loss suffered or remittance of foreign currency should be allowed.

2. In the regular assessment the Income-tax Officer wrongly allowed excess deduction of pro-rated Home Office expenses and service charges. The deduction which was permissible could only be allowed to the extent mentioned in letters dated May 4, 1973 and November 6, 1974 of the Government of India, Department of Economic Affairs to the assessee.

For the assessment year 1972-73 only ground (2) above was mentioned for re-opening the assessment being the excess allowance of deduction of Home Office expenses and service charges. The ground had not been recorded as foreign exchange loss but had been claimed or allowed in that year.

For the assessment years 1976-68 to 1969-70 re- assessment proceedings were also initiated under Section 147(a) of the Act and notices all dated February 24, 1982 were issued to the assessee. The reasons recorded by the Income Tax Officer for these years were identical in terms relating to the allowance of foreign exchange loss recorded by the appellant on re-translation of the outstanding dollar liability at the end of the relevant accounting year at the then prevailing rate of exchange.

The second ground relating to the deduction of Home Officer expenses and service charges was not mentioned for these three years obviously because the letters of the Government of India (Ministry

of Company Affairs) referred to above, related to the period on and after January 1, 1969. As a matter of fact the loss on exchange of rate claimed by the appellant and allowed by the Income-tax Officer in the regular assessment for the assessment years 1966-67 to 1969-70 was suffered due to actual purchase and remittance of US Dollars in that year. There was no fluctuation in exchange rates through out the year 1968 (previous year for the assessment year 1969-70) no loss on exchange due to exchange of re-translation of dollar liability at the end of year had been claimed in that year.

On June 6, 1933 devaluation of rupee vis-a-vis US dollar took place. Because of the adjustment earlier having been made in terms of the then foreign exchange rates the appellant re-translated the liability in terms of the foreign exchange subsequent to 1966 onwards. This was done because the closing year of the account of the appellant was December.

For the assessment year 1970-71 the two writ petitions filed by the appellant were dismissed by the High Court on the ground of laches as notice issued under Section 148 of the Act was being challenged in the year 1979. The High Court also noticed that the re-assessment had been made and the appellant had already availed the remedy of appeal under the Act. Mr. Salve, learned counsel for the appellant, submitted that the appeals were pending before the Income Tax Appellate Tribunal for the assessment years 1977071 and that he would not press the present appeals, i.e., Civil Appeal Nos. 1970-71 and he would like to withdraw the same leaving all the questions open for the Appellate Tribunal to decide. We nee not, therefore, go into the merit of the dispute in these two appeals and, as prayed, would dismiss the same as withdrawn.

The High Court quashed the notices under Section 148 of the Act for all the six years (assessment years 1967-68 to 1969-70 and 1971-72 to 1973-74) so far as they were based on the first ground, viz., wrongly deduction of foreign exchange loss. The High Court was of the view that the Income-tax Officer sought to re-open the assessment on this point which was already concluded and held that condition precedent that re-assessments under Section 147(a) of the Act were satisfied. The High Court noticed that on this first ground record would show that the Income-tax Officer in re-opening the assessment was in fact really seeking to re-open the issue which was the subject matter of assessment proceeding for the assessment year 191967-68, which was decided against the Revenue right upto the stage of the Appellate Tribunal and that even, reference under Section 256(2) of the Act was refused by the High Court. The Revenue did not take up the matter further to the Supreme Court. In the Assessment year 1967-68 the appellant had claimed losses on exchange by re-translation in terms of US Dollars which though disallowed by the Income-tax Officer were allowed by the Income Tax Appellate Tribunal. Further proceedings taken by the Revenue by way of appeal and reference were decided against the Revenue. The assessments, which therefore stood concluded on the same facts and law on the subject, would not be re-opened as no condition existed requisite for re- opening the concluded assessment. After the assessment for the assessment year 1967-68 became final the Income-tax Officer continued to allow the loss on exchange for subsequent years. The High Court said that it was obvious that the Income-tax Officer was fully aware of the particular system of accounting being followed by the appellant. It is not necessary to refer to other reasons given by the High Court in questioning the notices issued under Section 148 on the first ground as we find that against this part of the judgment of the High Court had come up to this Court in special leave petition, which was dismissed. What, however, is surprising that in spite of the fact

that first ground was the only ground given by the Income-tax Officer for re-opening the assessment for the assessment years 1967-68 to 1969-70 and the High Court had quashed the notices under Section 148 of the Act yet the writ petitions pertaining to these three years were dismissed. In spite of the fact having been brought to the notice of the High Court in the review petitions filed by the appellant by force the appellant had filed the appeals in respect of these three assessment years as well.

At this stage it is appropriate to set out the two letters dated May 4, 1973 and that dated November 6, 1974 of the Department of Economic Affairs as under :

> " New Delhi: 4.5.1973 M/s. Coca-cola Export Corporation, 14-A, Nizamuddin West, New Delhi-13.
>
> Gentlemen:
>
> Please refer to your various letters addressed to Government and to the applications made to the Reserve Bank of India for permission to remit abroad profits, Head Office expenses etc, pending for the year ended December, 1969 and onwards.
>
> 2. Government have reviewed the remittance facilities on different Counts afforded to your Corporation in the past and have decided, subject to your acceptance in writing, that the continuance of remittance facilities to your Corporation will now be subject to the following conditions:-
>
> a) Remittance facilities during the year 1969 to the end of March, 72, on all counts (imports, profits, Head Office Expenses, Service Charges to Overseas branches etc.) to the Indian Branch of Coca-cola Export Corporation will be allowed at 80% of total export earnings brought in by it during these years.
>
> b) From April 72 onwards, the remittance facilities on all counts as stated in para (a) above will be allowed to the extent of 80% of the exports consisting of company's own items of production.
>
> c) Imports as mentioned above of ingredients will include imports not only against Actual Users Licences but also import replenishments and C.G. licences.
>
> d) The remittance facilities will be calculated on cash basis. For the calculation of remittances each year, the accounting of value of exports will be on cash basis instead of accrual basis.
>
> e) If at the end of a calender year the company is left with any unused remittance eligibility calculated as in (a) and (b) above, it will be added to the Company's eligibility in respect of the next year.

3. As regards service charges, the amount payable to your overseas Branches in relation to your exports of concentrates to their territories shall be subject to an independent ceiling which will be communicated to you separately.

4. Please acknowledge receipt and let us have your confirmation as asked for above.

Yours faithfully, Sd/- Raj K. Nigam Director (Investment)" "New Delhi, the 6th Nov., 1974 The Coca-cola Export Corporation, 14, Nizamudding West, New Delhi-110013.

Sub: Your remittances on account of profits, Head Office expenses, service charges etc. Gentlemen, Please refer to this Ministry's letter of even No. dated 4th May, 1973 on the above subject. In para 3 of that letter it was mentioned that the remittance of service charges by you to your other overseas branches in relation to your export of concentrates to their territories will be subject to an independent ceiling. I am directed to inform you that this matter has since been considered by Government and it has been decided that the remittance of these service charges will be allowed on the following terms and conditions:-

(i) With effect from 1.1.1969, the remittance of service charges by the Indian branch of the Coca-cola Export Corporation to the other overseas branches of the Corporation will be subject to an independent ceiling of 10% of the Export earnings from exports of concentrates to the territories of the said other overseas branches of the Corporation. These remittances will be within the overall ceiling of 80% of export earnings applicable to the remittance of the Indian branch on all counts (as referred to in this Ministry's letter dated 4.5.1973).

(ii) In determining the export value, the amount to be adjusted for replenishment and cash assistance will be in accordance with the general policy followed in respect of other exports.

(iii) While claiming remittances on account of service charges, the Indian branch of the Coca-cola Export Corporation should furnish satisfactory proof to the effect that the service cost attributed to the Indian branch has been arrived at on the basis of an equitable distribution of the total cost between the Indian branch and all other entities concerned i.e. the branch importing the concentrate and other supplying office (s) if any.

The remittance facility allowed to your company on all counts is subject to review from time to time.

Kindly acknowledged receipt of this letter.

Yours faithfully, Sd/- (D.N. Bhargava) Under Secretary to the Govt. of India."

The second ground for reopening the assessments for the assessment years 1971-72, 1972-73 and 1973-74 are these two letters dated May 4, 1973 and November 6, 1974 of the Department of Economic Affairs in the Ministry of Finance, Government of India, allegedly laying down the ceiling on remittances on account of Home Office expenses and service charges expenses when in the assessment orders excess deductions on these two counts had been permitted than allowed by these two letters. It is thus the claim of the revenue that to that extent the income has escaped assessment on account of over deduction of head office expenses and service charges. If we see these two letters there appears to be hardly a ground for Income-tax Officer to reopen the assessment. Pare 2 of the letter dated May 4, 1973 states in clear terms that the Government had reviewed the remittance facilities on different accounts afforded to the appellant in the past and had decided, subject to acceptance in writing of the appellant that the continuance of remittance facilities to the appellant would now be the subject to the conditions set out in the para. In sub-para

(d) of para 2 of this letter it is mentioned that remittance facilities would be calculated on cash basis and that for the calculation of remittances each year, the accounting of value of exports would be on cash basis instead of accrual basis. Para 3 of the letter refers to service charges and it is stated that the amount payable by the appellant to its overseas branches in relation to its export of concentrates to their territories shall be subject to an independent ceiling which would be communicated to the appellant separately. By the letter dated November 6, 1974 papa 3 of the earlier letter dated May 4, 1973 is explained and Government decision as to how remittances of the service charges would be allowed was communicated to the appellant.

It may be noticed that assessments for the assessment years 1971-72, 1972-73 and 1973-74 were respectively completed on January 23, 1973, March 12, 1973 and September, 8, 1973 while the notices under Section 148 of the Act were issued on January 5, 1979. It is difficult to appreciate how a Government decision of a later date originating from a different department exercising powers under separate law could be used to reopen already completed assessments on the ground that it is "in consequence of information in his Income-tax Officer) possession".

Bar is imposed by the two letters on the amount of remittances to be made above. This bar in any case is under the provision of the Foreign Exchange Regulation Act, 1947 (since repealed and re-enacted as the Foreign Exchange Regulation Act, 1973 with effect from January 1, 1974). Section 9 of the 1973 with effect from January 1, 1947 Act) provides that save as may be provided in and in accordance with any general or special exemption from the provision of this sub-section (i) of Section 9 which may be granted conditionally or unconditionally by the Reserve Bank, no person in or resident in India can make payment to or for the credit of any person resident outside Inside. This section places an embargo for making any payment of or for the credit of any person residing outside India except as may be permitted by the Reserve Bank. High Court has noticed that it was apparent that in pursuance of this that letter was written by the Government of India dated May 4, 1973 to the appellant informing it that in pursuance to its application made to the Reserve Bank of India for permission to remit abroad profits. Head Office expenses etc. pending for the year ended December, 1969 and onwards the Government has reviewed the remittance facilities on different counts afforded to the appellant and have decided, subject to acceptance in writing by the appellant, that the continuance of remittance facilities to the appellant would be subject to the conditions

mentioned in that letter. The letter permitted remittances within overall ceiling of 80 per cent of export earnings., This reason, therefore, has been stated for reopening the assessment on the ground that deduction had been claimed on these two counts namely, Home Office expenses and service charges, in excess of the ceiling limits and the said excess had thus escaped assessment. High Court was of the opinion that reassessment could not be resorted to for the purpose of reopening the details of those expenses on the ground that they were in fact not spent or were not properly attributable to Indian branch and said that aspect was no longer open for assessment. At the same time the High Court held that it was certainly open to the Income-tax Officer to examine whether a expenses on these two counts had exceeded the ceiling permitted by the Reserve Bank of India and as to what would be its effect. It said that if in pursuance of this examination the expenses already allowed had exceeded and in law that was not permissible in the opinion of the Income-tax Officer, it would no doubt be open to him to scale down these expenses on these two heads from the amount that had already been allowed. The Court observed: "but then in that case the decision would not be on the merits of allowance of the expenses in general, but on totally different aspect and only on the sole ground of a legal bar having been placed in terms of these two letters":. High Court sounded a caution in the matter and imposed limitation saying that because permitting reopening to be done in terms of the two letters was not to broaden in unlimited manner the enquiry so as to embrace it on merits on other grounds. High Court did not want to record its final decision about the failure to disclose fully and truly all material facts bearing on the assessments and consequent escapement of income from assessment and tax. It said that perfectly good alternative remedy was thus available under the statute where all the questions raised by the appellant could be examined in detail. High Court also said that the matter as to exact scope and ambit of these two letters were awaiting decision at the appellate stage before the income-tax authorities and that in view of the matter it did not think fit to give expression to any opinion as to the scope of these two letters as that would seriously prejudice either the appellant or the revenue. High Court, therefore, held that the writ petitions in so far as these sought to quash and pre-empt the enquiry being made by the Income-tax Officer on the basis of the two letters would be dismissed and it would be open to the Income-tax Officer to make enquiry whether the deductions which had been allowed and which were in excess of the limit fixed by these two letters were legal or not.

Mr. Salve, learned counsel for the appellant, submitted that the High Court has wrongly addressed itself to the issue involved in the writ petitions on the question of interpreting effect the to the two letters. He said that it was not correct for the High Court to leave the decision to the Income-tax Officer and that there was failure on the part of the High Court to exercise its jurisdiction which it manifestly did possess. Mr. Salve also referred to a few decision of this Court as to when the Income-tax Officer can assume jurisdiction under Section 147 of the Act. We. however, think that it is not necessary for us to refer to any of those decisions as law is well settled on the subject starting from Calcutta Discount Co. Ltd. vs. Income-tax Officer, Companies Distt-I. Calcutta, and anr. [(1961) 41 ITR 191]. In the present case what we find is that though proceeding for each assessment initiated by the Income-tax officer was under Section 147(a) of the Act but the High Court considered the same to be one under Section 147(a) of the Act without further examining the question if notices under Section 148 of the Act on that ground will be within the period of limitation. Again, we do not think that we need to delve into this field as we find the High Court erred in not exercising its jurisdiction when the facts were all there and law clear on the subject.

Having examined the matter thereadbare after entertaining the writ petitions in exercise of its jurisdiction under Article 226 of the Constitution and after granting full relief for the assessment years 1967-68 to 1969-70 and partly for the assessment years 1971-72 to 1973-74 the High Court was not justified in staying its hands and leaving the matter with the Income-tax Officer to decide the question of effect of the two letters. The High Court was to examine if the Income-tax Officer possessed jurisdiction to correctly invoke the provisions of Section 147 of the Act in that were these two letters provided material for him to initiate the re-assessment proceedings and did these constitute information to give him a reason to believe that income chargeable to tax had escaped assessment. We have seen above that these two letters have been issued under the provision of Foreign Exchange Regulation Act and deal with remittance of foreign exchange outside India. Any contravention of these letters would entail prosecution under Section 56 of 1973 Act and under Section 23 of 1947 Act. Foreign Exchange Regulation Act contains stringent provision for conservation of the foreign exchange resources of the country and the proper utilisation thereof in the interests of the economic development of the country and for that purpose regulation of certain payments, dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange, etc. Reference in this connection be made to the Preamble of the 1973 Act or even to 1947 Act. The embargo so placed by these two letters on the ground of foreign remittance to be made abroad by the appellant has nothing to do with the amount of disallowances under the Income-tax Act. As already seen above the letter dated November 6, 1974 allows remittances within the overall ceiling of 80 per cent of export earnings applicable to the remittances of the India branch of the appellant on all counts. The assessments for the years 1971-1972 to 1973-74 were already complete before the issuance of this letter. If any remittance of foreign exchange having been made in excess of prescribed limit from January 1, 1969 that will be for the Reserve Bank or the Central Government to take action or to grant permission as may be provided under the Foreign Exchange Regulation Act, 1973. That, however, cannot be a ground for the Income-tax Officer to assume jurisdiction to start reassessment proceedings either under Section 147(a) or 147(b) of the Act on the ground that will so in consequence to information" in this possession in the shape of these two letters. Whatever amount be payable in respect of Home office expenses or service charges by the Indian branch to its principal office abroad as allowed by the Income-tax authorities under the Income-tax Act, remittance can only be permitted under the provisions of the Foreign exchange Regulation Act by the Reserve Bank of India. Both Acts -- Income Tax Act and Foreign Exchange Regulation Act -- operate in different fields.

We may also notice that when notices under Section 148 of the Act were issued, these did not specify whether action was being contemplated under clause (a) or clause (b) of Section 147 of the Act. Notice merely said that "there was reasons to believe that the income of the assessee in respect of which it was assessable/chargeable to tax for the assessment years in question had escaped assessment" within the meaning of Section 147 of the Act. In view of the decision of this court in Kantamani Venkata Narayana and Sons vs. First Additional Income-Tax Officer [(1967) 63 ITR 638] it is neither necessary nor imperative that a notice under Section 147 of the Act must specify under which of the two clauses (a) or (b) it has been issued.

In this view of the matter the two letters were wholly irrelevant and could not be treated as an information to the Income-tax Officer to initiate re-assessment proceeding. We are, therefore, of the

opinion that there was inherent lack of jurisdiction in the Income-tax Office to issue notices under Section 148 of the Act on the basis of any income of the appellant escaping assessment either under clause (a) or clause (b) of Section 147 of the Act. All the notices under Section 148 of the Act are quashed.

Impugned judgment dated 18th December, 1984 of the High Court of Delhi is set aside and the appeals are allowed with costs.