Coca-cola Export Corporation Vs S.C. Tewari, ITO, Central Circle-I, New Delhi and another

Civil Writ Petition No. 309 of 1979 with C.W. No''s. 308 and 377 of 1979 and 1566 and 1568 of 1982

Court: Delhi High Court

Date of Decision: Dec. 18, 1984

Citation: (1986) 52 CTR 5 : (1986) 158 ITR 439 : (1986) 24 TAXMAN 641

Hon'ble Judges: S.B. Wad, J; Rajinder Sachar, J

Bench: Division Bench

Judgement

Sachar, J.
All these petitions were heard together and they will be disposed of by this order as they raise the same point excepting for an

extra point in C.W. No. 308 of 1979 which we shall discuss separately.

2. These petitions have arisen out of notices issued u/s 148 of the Income Tax Act.

C.W. No. 308 of 1979 deals with a notice issued for reassessment for the year 1970-71 and for the deduction allowed for the provision for

gratuity to be paid to the employees.

C.W. No. 377 of 1979 is directed against an ex parte assessment made for the year 1970-71.

C.W. No. 1566 of 1982 and C. W. No. 1568 of 1982 challenge the notices for reassessment issued for the assessment years 1967-68, 1968-69

and 1969-70.

3. Petitioner No. 1, Coca Cola Export Corporation, is a company incorporated in the United States of America and having its branch office in

New Delhi. The petitioner is a wholly owned subsidiary of the Coca Cola company which is also incorporated in the USA (referred to as ""the

home office""). The Indian branch of the petitioner company has been declared as a company u/s 2(17)(iv) of the Income Tax Act, 1961, by the

Central Board of Direct Taxes and is being assessed as a non-resident company in India since its establishment in 1958. The petitioner/assessed

being non-resident, its assessment under the Indian Income Tax Act is restricted to its activities in India. The petitioner manufactures coca cola

concentrate and supplies it to the bottler. The ingredients of this concentrate is imported by the assessed from its London office. Since the

company''s activities are spread over various parts of the world, its affairs are managed by the head office at New York as well as the area office

at Beirut. For administrative convenience, the whole area of the operation of the petitioner has been divided into four zones and fourteen areas.

The home office, zone office and area office render common service to the branches under them.

4. Thus, for the import of ingredients of concentrate as well as for various services rendered by the assessed''s office, particular payments have to

be made and adjusted in order to arrive at a proper financial position as well as the profit and loss derived as a result of activities in India. The

assessed, Therefore, when it imports concentrate from London office credits the said account from time to time. Similarly, the expenses incurred at

the head office as well as the area office which are allocated towards the share of the petitioner company are credited to the area office. For

arriving at the profit and loss, the payments made to the London office are to be deducted. All the expenses incurred by the home office are in

dollars and the liability of each branch is pro rated also in dollars. As the branches, like the petitioner, export their products and services are

required to be rendered by the district and regional offices, the branches selling concentrate do not have any separate or other arrangements to

render services to the purchaser of products. The commission and expenses incurred by them for rendering services to different branches are also

distributed among the various branches pro rata. The method of accounting which was followed by the petitioners since 1958 up to date in regard

to its liability in dollars for payment of the price in dollars for various ingredients supplied to it by the home office and the London office and in

regard to the pro rated home expenses and services charges are as follows :

When any liability for payment in dollars accrues in regard to prorated home expense or service charges, the liability is translated into Indian rupees

at the then prevailing rate of exchange and debited in Indian rupees in account books of the Indian branch. The Indian branch also maintains

accounts in regard to these liabilities in dollars as the liabilities have to be discharged in dollars. The Indian branch further followed the practice of

retranslating its outstanding liabilities in dollars at the end of each accounting year in rupees at the then prevailing rate of exchange. If there was

increase in the liability in terms of Indian rupees on such retranslation at the end of the year, the excess amount in terms of Indian rupees was

debited to the profit and loss account and is claimed as deduction as loss in exchange. If, on the other hand, on such retranslation of outstanding

dollar liability, there is decrease in liability in terms of Indian rupees at the end of the year, the outstanding liabilities of the Indian branch in terms of

Indian rupees so saved was credited to the profit and loss account and was treated and offered for taxation as profit on exchange. Similar is the

position on the actual purchase by remission and the excess or decrease being credited and debited to the profit and loss account and offered for

assessment. The Indian branch followed the same system of accounting in regard to the payments to be received by it in dollars from home office

for the supplies made by it to the home office or for products exported by it from abroad.

5. This method of accounting was being followed right up to 1959-60 assessment year. The Income Tax Officer accepted this system. He

specifically accepted as valid pro rated home office expenses and pro rated service charges for the year and only disallowed a small portion of 5%

and 3%, respectively, from the above-said two expenses. This position uniformly continued right up to the assessment years from 1966-67 to

1973-74.

6. In 1967-68, devaluation of the rupee vis-a-vis dollar took place in June, 1966. Because of the adjustment earlier having been made in terms of

the then foreign exchange rate, the petitioner-assessed retranslated the liability in terms of the foreign exchange subsequent to June, 1966 (this was

done because the closing period of the accounting year is December for the petitioner-assessed). Thus, on this account, for the year 1967-68 an

amount of Rs. 13,38,850 was claimed as a deduction as loss on account of devaluation comprising of the additional charges to the New York

office and for supply of concentrate to the London office. The company''s practice being to maintain the account both in terms of US dollars as

well as rupees, the company had in February, 1966, credited to London 37,500 dollars being the price of the goods purchased. In terms of

retranslation into rupees, this worked out to Rs. 1,79,287.82. On June 5, a sum of Rs. 32,633.60 had been remitted to London and the account

was debited with a corresponding value of Rs. 1,56,001.89. When the devaluation took place, the company recalculated the liabilities with the

result that 37,507 dollars when converted into original exchange rate came to Rs. 1,79,287.82, the then value of liability, in terms of devalued

rupee came to Rs. 28,413.94, a difference of Rs. 1,04,856.12. This was treated as a loss on exchange due to change in the rate of exchange.

Simultaneously, as 32,635.60 dollars had been sent earlier and which at the old rate was equal to Rs. 1,56,001.89, was retranslated at Rs.

2,47,239.39 as per the new rate of exchange. Thus, a difference of Rs. 91,237.50 was shown as profit on exchange in the assessed''s books. This

was the basis also on which the loss of exchange for the credit on the job to the London office and area office had been worked out. The Income

Tax Officer disallowed the loss on exchange due to devaluation for both the head office expense as well as the service charges. Thus, it disallowed

this loss on exchange to the extent of Rs. 13,38,850. The assessed, however, succeeded in appeal before the Appellate Assistant Commissioner

as per order dated September 11, 1970. He allowed the entire expense of Rs. 13,38,850 and held that though the monthly statements of sales and

purchases were being exchanged between the company and the foreign offices, the accounts were closed only at the end of the year, and,

Therefore, liability had naturally to be worked out for the whole of the year. The Commissioner filed an appeal before the Tribunal but it was

dismissed as per order dated February 18, 1974. It held that though the head office and the branch are not two separate entities, but still, in order

to work out the profits, payments made to the head office for services and other expenses had to be deducted. The reasoning of the Tribunal was

that the branch would have to pay to the Reserve Bank excess amount of rupees to purchase the same amount of dollars on account of devaluation

and the increase was in respect of the trading liability of the Indian business whose profits are charged to Income Tax and that this loss was real

and, Therefore, allowed by the Appellate Assistant Commissioner and the Tribunal affirmed the order of the Appellate Assistant Commissioner

deducting the sum of Rs. 13,38,850 from the assessment year 1967-68. The Commissioner of Income Tax thereafter filed a reference u/s 256(1)

of the Income Tax Act for referring the question whether the Tribunal had rightly upheld the deduction of loss on account of Rs. 13,38,850 to the

High Court but the same was declined. The Commissioner thereafter made an application u/s 256(2) to the High Court but the said application

was dismissed by its order dated February 27, 1979. The Revenue did not appeal against the said order to the Supreme Court.

7. For 1968-69, the assessed offered a sum of Rs. 10,051.37 as profit on account of exchange and claimed a loss of Rs. 94,200.41 as loss arising

on remission of dollars. The Income Tax Officer allowed both the expenses.

8. For 1969-70, there were no fluctuations in the rate of exchange and neither profit nor loss on exchange and retranslation was claimed. Though

there was an actual conversion profit of Rs. 4,715 and a loss on exchange of Rs. 1,07,762 on actual purchases and remission of dollars, the

Income Tax Officer assessed the profit and allowed the deduction.

9. Similarly for 1970-71, there were no fluctuations in the rate of exchange and, Therefore, no profit or loss on exchange was claimed. However,

loss on actual purchase and remission of dollars was claimed and allowed. The same was the position for the year 1971-72.

10. For the year 1972-73, there was a profit on exchange due to retranslation of dollars into rupees as per the rate of exchange. An amount of Rs.

4.50 lakhs was accepted by the Income Tax Officer as profit on this account.

11. For the year 1973-74, the petitioner showed a profit of over Rs. 7 lakhs and a loss on exchange of about Rs. 22 lakhs on retranslation of

dollars at the rate of exchange particularly at the end of the accounting year. The Income Tax Officer asked for some Explanation and the

petitioner explained the way it had been worked out. Ultimately, the Income Tax Officer allowed the loss for the period 1973-74 as it found that

for the year 1974-75, the profit on exchange of retranslation would be Rs. 18 lakhs. We are not concerned with the assessment orders for the

subsequent period from 1974-75 onwards, as appeals have been filed by the assessed and are pending. It is in this background in which

reassessment notices were issued in the present petition (C.W. No. 309 of 1979) on January 5, 1979, u/s 148 of the Income Tax Act for

reopening the assessment for the assessment years under 1971-72 to 1973-74 u/s 147(a) of the Act. The reasons recorded by him u/s 148(2) of

the Act are broadly to the following effect :

That during the course of the assessment proceedings, it was noticed that the assessed followed a method of revising its books of account

maintained in Indian currency with every change in the rates of exchange pertaining to its liabilities and assets in foreign currency. It was stated that

while adjustments to the amounts already debited/credited as a receipt or expenditure on mercantile basis at the time of actual clearance of the

accounts are understandable, the peculiar method of accounting followed by the assessed resulted in working out artificial profits and losses.

12. That once the revenue account is so debited or credited on accrual basis, subsequent adjustments thereto can be made only when the income

or expenditure accounted for on accrual basis is actually received or paid. Thus profit and loss worked out by the assessed on account of changes

in the rate of exchange, in so far as they are not linked with the actual receipts or payments during the year, shall have to be excluded from the

computation of assessable income or losses.

13. Another objection was that the remittances made by the assessed are subject to strict control by the Govt. Rules and Regulations in that behalf.

While in actual practice, the assessed is entitled only to such remittances which are approved by the Government and as such in the computation of

assessable income, only such remittances which are approved by the Government would be allowed as deduction, by following the method of

working out profits and losses on every fluctuation in the rate of exchange on the foreign exchange liabilities as per books, the assessed has claimed

deduction even in respect of such liabilities which the assessed may not be permitted to remit.

14. Reliance was placed on Commissioner of Income Tax, Bombay City-I Vs. Mehboob Productions Pvt. Ltd., and Sutlej Cotton Mills Ltd. Vs.

Commissioner of Income Tax, that in computing or working out the net profit of a business, a loss suffered by fluctuation in foreign exchange rates

cannot be deducted, as fluctuation must be held to be capital in nature. Reference was also made to para. 26 of the Report of the Controller and

Auditor General of India for the year 1976-77 - Union Government (Civil) Revenue Receipts, Volume II, Direct Taxes - which argued that since

losses were not actually incurred and the relevant sterling accounts had not been settled through actual remittances, the notional losses did not

constitute admissible deductions. Further, the assessed''s income was also said to have escaped on account of the assessed having claimed

deduction for home office expenses and service charges over and above the ceiling limits prescribed by the Department of Economic Affairs,

Government of India, under the Foreign Exchange Regulation Act. The Government of India, vide its letter dated May 4, 1973, directed that

remittance facilities to the assessed-company during the year 1969 to the end of March, 1972, on all counts will be allowed at 80% of the total

export earnings brought in by it during these years and that from April, 1972 onwards, vide letter dated November 6, 1974, the Government also

laid down that with effect from January 1, 1969, the remittance of service charges by the Indian Branch of the Coca Cola Export Corporation will

be subject to an independent ceiling of 10% of the export earnings. It was mentioned that the assessed had claimed expenses of the home office

and service charges which are far in excess of the ceiling permitted by the letter of the Department of Economic Affairs and the excess, Therefore,

to the extent of Rs. 44,31,425, has escaped assessment on account of over-deduction of the head office expenses and service charges.

15. Similarly for 1972-73, the reason was the same and it was claimed that the head office and service expenses ceiling in terms of the letter could

only be up to Rs. 58 lakhs. It will be seen that the main reason for reassessment is that once the debit and credit items have been retranslated in

rupees at one point of time during the course of the year, they should not be retranslated at the end of the year, but only at the time when actual

remission of dollars is done. What is suggested is that liability should be allowed to continue to be shown at the figure when goods/services were

received. But, according to the petitioner, this ignores that profit and loss cannot be worked out unless the accounts are worked out at the end of

year because it is only profits of the year (after adjusting all liabilities) that can be offered for taxation. Further, that even if statements of accounts

were exchanged monthly between the petitioner and its home office, it could not make any difference because the liability could only be worked

out in respect of share of expenses for the whole year, and that necessarily requires retranslation in terms of dollars at the end of the year.

16. A perusal of the reasons given by the Income Tax Officer for reopening the assessment would show that it is really seeking to reopen the point,

namely, losses on exchange, which was the subject-matter of the assessment proceedings for the year 1967-68 and which was decided against the

Revenue right up to the Tribunal and even reference was refused by the High Court. It will be recalled that in that year also the assessed had

claimed loss on exchange by the retranslation in terms of dollars which, though disallowed by the Income Tax Officer, was allowed on appeal by

the Appellate Assistant Commissioner and upheld by the High Court. I am not saying that the Income Tax authorities are necessarily debarred

from taking a different view in the subsequent years because it is well settled that each assessment year is a separate unit and there is no res

judicata or estoppel before the Income Tax authorities for the subsequent years. It is not necessary to define up to and to what extent it is open to

the authorities concerned to take a different view in the subsequent assessment years because it was not even disputed that they are not debarred

per se from taking a different view even if the circumstance and material brought to their notice subsequently point to a conclusion otherwise. But

these principles may well be applicable if the assessments were being made for the first time. The infirmity in the action of the respondent springs

from the fact that the respondent seeks to reopen these assessments which have already been concluded and that can only be permitted if the

condition precedent exists. It is the petitioner''s case that those conditions do not exist. It is well settled that the Income Tax Officer can only issue

a notice u/s 148 if the pre-requisite conditions of section 147(a) are available and the court is not precluded from examining whether the

jurisdictional facts which confer jurisdiction do exist. [See Mrigendra Shum Sher Jung Bahadurrana Vs. The Income Tax Officer and Others,

decided on September 12, 1979]. Now, one of the essential pre-conditions is that the income chargeable to tax should have escaped assessment

and as such escapement has been occasioned by the omission or failure on the part of the assessed to disclose fully and truly all material facts

necessary for his assessment for that year. It will be seen that in the earlier years right from 1960 onwards, profit on exchange and loss on

exchange in the relevant assessment returns were being regularly assessed or claimed. Up to 1973-74, it had thus offered for tax profit on

exchange to the tune of Rs. 13,37,381.55 and claimed deduction on account of loss on exchange to the extent of Rs. 43,35,097.95. The Income

Tax Officer had taxed the amounts of the profit on exchange, but had, however, refused deduction of loss on exchange. This assessment for 1967-

68 by the Income Tax Officer was not accepted and the assessed went up in appeal and deduction on loss on exchange was allowed by the

Appellate Assistant Commissioner. The Revenue took up the matter before Tribunal and the High Court, but failed. For the subsequent years, the

Income Tax Officer continued to allow this loss on exchange apparently because for the earlier years it had been allowed. It is thus clear that the

Income Tax Officer was fully aware of the particular system of accounting followed by the petitioner. This accounting procedure shows that profit

on exchange and loss on exchange was shown by the petitioner-assessed year after year in Income Tax returns. From the record, it is quite clear

that at no point of time, the fact that the loss on exchange was being claimed on account of retranslation of the outstanding liability in dollars at the

end of the year was kept away from the notice of the Income Tax Officer who made the assessment. As a matter of fact, the assessment orders

clearly show that all these details were within the knowledge of the Income Tax Officer. Now, reasons for the belief of the Income Tax Officer that

the income has escaped assessment must extend not only to the escapement of income to assessment but also to the escapement being occasioned

by an omission or failure on the part of the assessed by not producing fully and truly all relevant material. It is not even suggested that information

as to how loss on exchange was claimed as deduction was withheld. The duty of the assessed no doubt, and it may even be insisted upon strictly,

is to supply all the primary facts when the assessments are being made. The only justification for reopening the assessment on this point seems to

flow from the opinion mentioned in the reasons that unless loss is occasioned by actual remission, nothing is claimable by converting and

retranslating the losses in dollars, at the end of the year. But this was the precise reason for disallowing the loss in 1967-68, but which was

reversed in appeal and decided against the Revenue. But all that this comes to is that the Income Tax Officer wishes to take a different view of the

matter from that taken earlier. Now whatever may be the position about the jurisdiction of the Income Tax Officer to take a different view of the

matter on the same point for the subsequent years, because of the inapplicability of principle of estoppel in tax matters, different considerations

apply about the jurisdiction when reopening old assessments. It is well settled that escapement of income from assessment either due to a particular

view of law or facts taken by the Income Tax Officer or due to a mistake other-wise on the part of the Income Tax Officer is not an escapement

relevant to section 147(a) as such escapement is not on account of the omission or failure of the assessed to discharge his obligation u/s 147(a).

Nowhere in the reasons given by the Income Tax Officer is there any suggestion of any overt or covert act in concealing or keeping back the fact,

on the basis of which loss on exchange was being claimed. That this information was being supplied by the assessed and even discussed by the

Income Tax Officer and formed part of assessment order for all these years and was an important part of 1967-68 assessment order and

subsequent appellate proceedings cannot be denied. In this background, it is not permissible now for the Income Tax Officer to invoke the

provisions of section 148 read with section 147(a) to order reassessment on the items of expenses on account of loss on the fluctuation in the rate

of exchange. I am repeating that I am not saying anything as to what view is to be taken on this aspect for the subsequent years of assessment. I

am saying so because we were given to understand by the counsel for the Revenue, Mr. Wazir Singh, that for the subsequent year 1974-75, the

Income Tax Officer had disallowed this loss on exchange fluctuation and that the assessed had filed appeals which were pending. That is why I do

not wish to say anything on the merits of this particular item either way, that is whether the view taken earlier is the correct one or the contrary,

which is now being urged, is the sounder one. I do not wish to say anything on the merits because I do not wish to say about matters pending in

appeal. I may notice that the counsel for the petitioner, though conceding that there may not be estoppel or res judicata in Income Tax

proceedings, yet maintained that there was no fresh material so as to entitle the Income Tax Officer even for the subsequent assessment years to

take a view different from the one taken earlier. Counsel for the respondent however, maintains that each assessment year must be taken to be an

independent transaction in Income Tax proceedings and, Therefore, there is no bar for the Income Tax authorities to take a different view on the

same material either on the question of fact or question of law for the subsequent years and the principles of estoppel or res judicata are inapposite

in Income Tax proceedings. I need not dilate on these rival contentions so far as the subsequent assessment years are concerned, because we are

not dealing with them.

17. Now, it will be seen that the notice for reassessment gives two reasons for reopening the assessment. One reason is that in the opinion of the

Income Tax Officer, the loss on exchange which had been deducted and which had been allowed by the earlier assessment orders was wrongly

allowed and it needs to be reopened. I have already shown above that this very point was discussed threadbare at the time when the assessments

were finalised and it was after a full discussion that the Income Tax Officer allowed this deduction. In that situation, it is impermissible to say that

escapement of income on this count has occurred because of any omission on the part of the assessed to disclose fully and truly all material facts

necessary for the assessment for that year. In that view of the matter, it will have to be held that the notice issued by the Income Tax Officer for

reassessment u/s 148 read with section 147(a), in so far as it seeks to reopen the question of deduction having been allowed on loss on exchange

due to exchange rate fluctuation is concerned, the same is without jurisdiction and it is not open to the Income Tax Officer to start reassessment

proceedings with regard to this item.

18. I may also notice that the reassessment notices also mention another reason for reopening the assessment. That aspect is that in terms of the

Govt. of India''s letters dated May 4, 1973, and November 6, 1974, laying down the ceiling on remittances on account of home office expenses

and service charges expenses, excess deductions on these counts have been permitted than allowed by this ceiling and, Therefore, the said

excesses have thus escaped assessment on account of over-deduction of head office expenses and service charges. I shall be dealing with the

second aspect a little later in the judgment and indicating that, in my view, these extra-ordinary proceedings are not a proper forum to challenge this

part of the notice. The result will be that the notice issued u/s 148 will be deemed to have been set aside only in so far as it seeks to reopen the

deduction allowed on account of loss on exchange is concerned. The result will be that there will be no restraint on the Income Tax Officer in these

proceedings on this aspect of the notice issued u/s 148 of the Act. Of course, it will be open to the assessed to raise any objections that he is

advised before the Income Tax authorities, as permitted by law.

19. I may also note that for the year 1972-73, the reasons given and the claim of escapement of the income are based on the ground of ceiling limit

having been crossed by the assessed. In that view, there would be no reason even to partly quash so far as the notice for reassessment for the year

1972-73 is concerned. Of course, in so far as the years 1971-72 and 1973-74 are concerned, they will be partly quashed in so far as it seeks to

reopen the item of deductions so far as loss of exchange is concerned.

20. Notices u/s 148 have also been issued for the years 1967-68, 1968-69 and 1969-70 and which are the subject-matter of Writ Petitions Nos.

1566-68 of 1982 respectively. The reasons for reopening the assessments are the same as have already been discussed while dealing with notices

issued for the years 1971-72, 1972-73 and 1973-74. For the reasons mentioned already, these notices of reassessment will also be partly

quashed but only in so far as they seek to reopen the question of deductions on account of loss of exchange but no direction will be issued with

regard to the other ground, viz., on account of ceiling on remissions having been laid by the Government of India. I may clarify that while upholding

the notice in so far as it seeks to make an enquiry whether over-deduction has been allowed in so far as it exceeded the ceiling limit fixed by the

letters of May 4, 1973, and November 6, 1974, the Income Tax Officer is not permitted to reopen the question as to the pro-rated expenses

allowed on account of the home office expenses and service charges on any ground other than that of alleged ceiling limits said to have been fixed.

I am saying this because I wish to make it clear that under this notice, the Income Tax Officer cannot seek to question the details of expenses and

the pro-rata portion already accepted by him. This is because the Income Tax authorities have been accepting the figure of expense claimed by the

assessed on account of pro-rata expenses for the home office and service charges, excepting for disallowing 5% and 3% of these charges,

respectively. The 1970-71 assessment order shows that this matter was considered again by the Income Tax Officer and he noted that the

disallowance in respect of home office and area office attributable to Indian branch to the assessed company be restricted to 5% and 3%

respectively. Thus, after accepting the details of pro rata expenses on these two counts, only a disallowance of 5% and 3% was made.

Reassessment proceedings cannot now 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 the Indian branch. That aspect is no longer open for reassessment. But, of course, it is certainly

open to the Income Tax Officer to examine whether expenses on these two counts have exceeded the ceiling permitted by the Reserve Bank of

India and as to what is its effect. If in pursuance of this examination, the expenses already allowed have exceeded, and in law that is not permissible

in the opinion of the Income Tax Officer, it will no doubt be open to the Income Tax Officer to scale down these expenses on these two heads

from the amount that has already been allowed. But then, in that case, the decision will not be on the merits of allowance of the expenses in

general, but on a totally different aspect and only on the sole ground of a legal bar having been placed in terms of the letters dated May 4, 1973,

and November 6, 1974. I have mentioned this caution and limitation because by permitting reopening to be done in terms of the letters of May 4,

1973, and November 6, 1974, I am quite clear that this is no permission to broaden in an unlimited manner the enquiry so as to embrace it on

merits on other grounds. Now, I shall deal with that part of the reason for reopening the assessment given u/s 148, namely, that the income has

escaped on account of the assessed having claimed deduction for head office expenses and service charges over and above the ceiling limits

prescribed by the Department of Economic Affairs, Government of India, under the Foreign Exchange Regulation Act. Reference, in this

connection, is made to the Department of Economic Affairs" letters dated May 4, 1973, and November 6, 1974. Section 9 of the Foreign

Exchange Regulation Act, 1973 (corresponding to section 5 of the Foreign Exchange Regulation Act, 1947), provides that save as may be

provided in and in accordance with any general or special exemption from the provisions of this sub-section which may be granted conditionally or

unconditionally by the Reserve Bank, no person in, or resident in, India (a) make payment to or for the credit of any person resident outside India.

This section, Therefore, places an embargo for making any payment except as laid down by the Reserve Bank of India. It was apparently in

pursuance of this that a letter was written by the Government of India dated a May 4, 1973, to the petitioners informing them that in pursuance of

their application made to the Reserve Bank of India for permission to remit abroad profits, head office expenses, etc., for the year ended

December, 1969 and onwards, the Government has reviewed the remittance facilities on different counts afforded to the Corporation and have

decided, subject to the acceptance in writing by the Corporation, that the continuance of remittance facilities to the Corporation will be subject to

the conditions mentioned therein. The condition was that from 1969 to the end of March, 1972, the remittance facilities will be at 80% of total

export earnings brought in during these years. And from April, 1972, the remittance facilities will be allowed at 80% of the export earnings

consisting of company"s own item of production. As regards service charges, the amount payable to overseas branches will be subject to an

independent ceiling which will be communicated separately. Consequently, another letter dated November 6, 1974, followed, laying down that

with effect from January, 1969, the remittance of service charges by the Indian branches to the overseas branches will be subject to an

independent ceiling of 10% of the export earnings from exports of concentrates to the territories of the said overseas branches of the corporation.

These remittances will be within the overall ceiling of 80% of export earnings applicable to the remittances as mentioned in the Ministry"s letter

dated May 4, 1973.

21. The reason, Therefore, for reopening the assessment is stated to be that as the deductions have been claimed on these two counts, namely,

home office expenses and service charges in excess of the ceiling limits, the said excess has thus escaped assessment. Mr. Desai, counsel for the

petitioner, however, argued that the assessments for the years 1971-72 and 1972-73 were completed before May 4, 1973, and the petitioner

cannot be faulted to produce a letter which was not even in existence and the conclusion that the assessed has failed to disclose all material facts

necessary for the assessment of income cannot be reasonably arrived at. The argument of the counsel for the Revenue, however, is that even

earlier to these letters, there was a ceiling placed on the remittances which could be made and it was, Therefore, the duty of the assessed to have

brought to the notice of the Revenue the actual fact that an application seeking permission of the Govt. of India to remit the amount abroad was

pending decision. It was argued that had this fact been brought to the notice of the Revenue, the Income Tax Officer would have made enquiries to

find out about the ceiling and would not have completed the assessments till he obtained the requisite information. It is also urged that, in any case,

the assessed was in the know of the fact that he had applied for permission and the Govt. of India was to fix a ceiling for remittances, and it was

thus the duty of the assessed to bring it to the notice of the Income Tax Officer. It is argued that the assessed does not discharge his duty to

disclose fully and truly material facts necessary for the assessment of the relevant years by merely producing the books of account or other

evidence. He has to bring to the notice of the Income Tax Officer particular items in the books of account or portions of the documents which are

relevant. Reference is made to Kantamani Venkata Narayana and Sons Vs. First Additional Income Tax Officer, Rajahmundry, . In that context, it

is urged that it was the duty of an assessed to at least point out as to how much amount has been permitted in the previous years and as to the fact

that the application of the assessed for the year 1969 onwards was pending before the Government of India. This was undoubtedly not done and if

in that context the Income Tax Officer has chosen to issue a notice u/s 148, it cannot be said that his action is totally without jurisdiction as to call

for interference in the extraordinary proceedings under article 226. Mr. Desai has also sought to argue that taking these letters as it is, they did not

amount to any permanent restrictions on the amount that can be remitted and in any case have no relevance for the purpose of deduction of

expenditure under the Income Tax Act. The argument was that for the purpose of deduction of Income Tax and for the purpose of profit and loss

account, whatever expenses have been allowed to be properly debited to the home office and service charges expense on accountancy principle is

final and must be allowed as expenditure in business, notwithstanding that there may be a ceiling placed by the Reserve Bank of India on the

remittances that could be made by the assessed. Mr. Wazir Singh, however, argued that the fact that the ceiling on remission has been placed

amounts to statutory ceiling placed on the expense which could be claimed on account of the home office expenses and service charges and any

deduction of expense in excess of that would involve contravention of of a law like the Foreign Exchange Regulation Act making such excess an

impermissible deduction. It is argued that every expense is not deductible under the Income Tax Act. An expenditure is not deductible unless it is a

commercial loss in trade and penalty imposed for breach of the law during the course of trade cannot be described as such. If a sum is paid by an

assessed conducting his business in a manner contrary to law and he renders himself liable to pay penalty, this cannot be said to be business

expenditure and cannot be claimed as deductible expenditure as infraction of law is not a normal incident of business : Haji Aziz and Haji Aziz and

Abdul Shakoor Bros. Vs. The Commissioner of Income Tax, Bombay City II, . The argument is that if under the Reserve Bank direction, no

amount can be remitted on account of expense of these two items like home office and service charges than is permitted under letters May 4, 1973

and November 6, 1974, any expense in excess of this ceiling is an unauthorised expense in law and cannot be claimed as appropriate deductions

while calculating the profit and loss account of the assessed.

22. Mr. Desai wanted to urge that the ceiling by the letters of May 4, 1973, and November 6, 1974, could not be taken to be permanent and

there was a possibility that in subsequent years the Government may allow more remittances. To this, of course, the counsel for the Revenue

countered that if in any year these ceilings were relaxed for those assessment years, it may be open to the assessed to claim deduction of that

expense in the relevant year but it cannot at this stage anticipate and imagine a relaxation and claim on that basis more than what is permitted in

terms of these two letters.

23. I have given above these arguments but I do not intend to give any finding on these. The reason is that these raise matters of dispute on which

full material is not available on record. From a reference to the assessment orders, it is quite clear that the question of any ceiling having been

placed in terms of the letters of May 4, 1973, and November 6, 1974, was not examined at any time by the Income Tax Officer when completing

the assessments. It cannot, Therefore, be said that by seeking to reopen the said assessment orders on this point, the Income Tax Officer is in any

way seeking to make fresh assessment because he has had a change of opinion or is wanting to review his earlier decisions. The fact is that as this

matter was not examined by the Income Tax Officer, he cannot be faulted on the ground that he is now seeking to reopen the proceedings because

he has had a change of opinion. There can obviously be no change of opinion unless some opinion had been expressed in the assessment order

and, as is clear, not even a reference was made to these letters and the question of expressing any opinion and the effect of these letters was

obviously not considered when originally orders of assessment were made. I, however, do not feel any necessity to discuss this matter any further

because in my view this is a case in which the Income Tax Officer cannot be pre-empted at the threshold from making any enquiry into the matter.

Too many questions of fact and details need be looked into in order to arrive at a correct conclusion. Whether, on these facts, a notice should have

been issued or not will depend on the examination of a spate of facts which cannot be examined satisfactorily in the writ proceedings. It is to be

remembered that the High Court is only concerned in deciding whether the conditions which invested the Income Tax Officer with power to

reopen the assessment did exist; it is not within the province of the High Court to record a final decision about the failure to disclose fully and truly

all material facts bearing on the assessment and consequent escapement of income from assessment and tax (See Kantamani Venkata Narayana

and Sons Vs. First Additional Income Tax Officer, Rajahmundry,). I am not saying nor am I called upon to determine finally whether, in the

circumstances of the case, a notice u/s 147(a) was issued on sufficient material. It is open to the assessed to satisfy the authorities concerned that

the notice was not validly issued and, Therefore, no reassessment should be done. But that must be the decision of the Income Tax authorities and

not of this court in these proceedings. It is also to be remembered that it is open to the Income Tax authorities to decide whether the notice u/s 148

was valid or invalid.

24. I may also note that any order passed in pursuance of the notice issued u/s 148 can also be appealed against and a further appeal and

reference under the Act (are available); a perfectly good alternative remedy is thus available under the statute where all these questions can be

examined in detail. Then there is a further important aspect that from the assessment year 1974-75 onwards the Income Tax Officer, acting on the

basis of these two letters of May 4, 1973, and November 6, 1974, allowed deduction of expenses on these two counts only up to their ceiling

mentioned therein. The assessed has, of course, not accepted this and has gone up in appeal. All these appeals are still pending disposal. Thus, the

matter as to the exact scope and ambit of these two letters is awaiting decision at the appellate stage before the Income Tax authorities. In that

view, it cannot be doubted that to give expression to any opinion as to the scope of these two letters would seriously prejudice either the assessed

or the Revenue. I do not see any special reason more so when one is handicapped by the absence of all the relevant material to express any view

as to the exact scope of these two letters, namely, whether any expense beyond the amount of ceiling is not a permissible deduction as is

contended by the Revenue or whether the ceiling of remission in these letters has no relevance for claiming expense under the Income Tax Act as is

urged by the assesseds. In that view, I feel that on this aspect, it is not possible to quash the notice issued u/s 148 of the Act. Thus, the writ petition

is so far as it seeks to quash and pre-empty the enquiry being made by the Income Tax Officer on the basis of these two letters of May 4, 1973,

and November 6, 1974, will be dismissed and it will be open to the Income Tax Officer to make enquiry as to whether the deductions which have

been allowed and which is in excess of the limit fixed by these two letters are legal or not. I have already indicated above the parameters of this

enquiry and I do not think it is necessary to reiterate them. As a result, subject to the limitation mentioned above, the writ petition will be partly

allowed only on the ground that the Income Tax Officer is restrained from reopening in so far as the question of deduction on account of loss on

exchange due to exchange rate fluctuation is concerned; but it will fail in so far as it seeks to prevent the Income Tax Officer from making enquiry

into the claim for deductions of expenses on account of home office expenses and service charges which are stated to be in excess of the ceiling

laid down by the letters of May 4, 1973, and November 6, 1974.

25. This relates to the assessment year 1970-71. Return of income was filed on June 30, 1970. Subsequently, a revised return of income was filed

on account of the fact that the assessed deducted a sum of Rs. 90,760 on account of gratuity in the revised return of income. The petitioner had

also claimed as usual in the past expenses on account of home office expenses and area office expenses as in the previous years. The same were

allowed subject to a disallowance in respect of these expenses to the extent of 5% and 3% respectively. The Income Tax assessment order was

made on March 21, 1972.

26. On March 23, 1974, the Income Tax Officer issued a notice u/s 147 of the Act on the ground that some income has escaped assessment. The

reasons for the plea that the income has escaped assessment have also been supplied. In the reasons, it is stated that deduction on account of

provision for gratuity payable amounting to Rs. 90,760 has been allowed as deduction but as the amount has not been paid to the employees nor

has it become payable during the previous year, the income chargeable to tax has escaped assessment. This was the reason for starting

proceedings u/s 147(a) and issuing of notice u/s 148.

27. The petitioner in pursuance of this notice replied to the same and to some other queries which were raised. Thereafter, after a period of about

2-1/2 years, the petitioner was again asked by the Inspecting Assistant Commissioner to supply certain information. The petitioner claims to have

appeared before the Inspecting Assistant Commissioner on March 19, 1977, but it appears that in fact an ex parte order of assessment was made

on the same date, i.e., on March 19, 1977. The petitioner applied for setting aside the order and the same was set aside by the order of the

Inspecting Assistant Commissioner on March 28, 1977. Thereafter, the petitioner received a notice under sections 142(1) and 143(2) from the

first respondent dated February 3, 1979, asking for certain information. The petitioner at this stage came to this court in Civil Writ Petition No.

308 of 1979 by which he has purported to challenge the notice issued u/s 148 dated March 25, 1974, the plea being that the notice was issued

without jurisdiction and consequently also challenging the notice under sections 142(1) and 143(2) issued on February 3, 1979, because if the

notice u/s 148 reopening the assessment is not valid, then there would obviously be no jurisdiction to issue notice under sections 142(1) and

143(2) of the Act. This petition was filed on March 8, 1979. The main reason being that as notice issued u/s 148 was void, any further

proceedings in pursuance of notice issued on February 3, 1979, under sections 142(1) and 143(2) are also without any authority of law. It would,

however, appear that on March 8, 1979, the respondent had passed an assessment order for the assessment year 1970-71 u/s 144 read with

section 147 of the Act. It had also started proceedings against the petitioner for initiating penalty under sections 271(1)(b) and (c) and 273 of the

said Act. A reference to the order of March 8, 1979, shows that a number of expenses have been disallowed which had been allowed in the

earlier order of March 21, 1972, when the original assessment was made. By the said order of 8-3-79 the assessed''s claim for deduction of Rs.

96,760 which had been allowed in the previous assessment order has been rejected on the ground that sections 36 and 37 did not permit an

expenditure on account of gratuity unless the same has been paid during the previous year and unless it was out of an approved gratuity fund. As

the order was not acceptable, challenge has been made by the Civil Writ Petition No. 377 of 1979. In this writ petition, apart from the common

challenge to the disallowance of the home and area office expenses as in the connected writ petition, an additional point for reopening of the

deduction given on account of gratuity has been raised.

28. In the reply filed, an objection is, however, taken to the maintainability of the petition by stating that the petitioner has already filed an appeal

before the Commissioner of Income Tax (Appeals). The said appeal is stated to have been held against the reopening of the assessment as well as

the order passed after reassessment on March 8, 1979. It would be seen that these above two writ petitions were filed in 1979. The notice u/s

148 was issued on March 25, 1974. Apparently, the petitioner co-operated with the department in pursuance of the notice though it raised

objections to the reopening but it did supply the information which was being asked for. It was only when a notice u/s 142(1) was issued on

February 3, 1979, that the petitioner filed Civil Writ petition No. 308 of 1979 challenging the said notice along with notices issued u/s 148 on

March 25, 1974. The counsel for the petitioner, however, sought to urge that as the notice u/s 148 for reassessment was without jurisdiction, the

consequential order passed on March 8, 1979 (subject-matter of CWP No. 377 of 1979) automatically must fail. But this argument ignores that

notice u/s 148 issued in 1974 is being challenged in 1979. Whatever infirmity there may or may not have been in the impugned notice, I do not feel

inclined to examine its legality when challenge was made to it after a period of five years, and more so when in the meanwhile a fresh assessment

order has been passed, and the petitioner has already availed of the remedy of appeal. Thus, the petitioner will be in a position to raise all

objections in those proceedings. I am more inclined to this because disallowance of gratuity (subject-matter of notice u/s 148 of the Act) is a small

amount of Rs. 90,760 of disallowance which has been declined in the fresh assessment order of March 8, 1979. Thus, in the assessment order of

March 8, 1979, the overwhelming amount of disallowance (of about Rs. 40 lakhs) by the Income Tax Officer is on the ground that expenses on

account of home office expenses and service charges cannot exceed the ceiling laid down in the Government of India letters of May 4, 1973, and

November 6, 1974. I have already, in connected Civil Writ Petition No. 308 of 1979, held that no infirmity can attach to the issue of notice u/s

148 of the Act in so far as the Income Tax Officer wants to examine this matter. On that view, it would not be possible to give any relief to the

petitioner on this count. The other items of disallowance in the order of March 8, 1979, is a small amount on account of profit and loss on

exchange due to the fluctuation in rate (i.e., Rs. 7,867 and Rs. 67,788 respectively). On the facts and circumstances, I, Therefore, feel that it is not

possible or correct to say anything on merits on any of these items of disallowances, because they form part of appeal proceedings filed by the

petitioner, and must necessarily be allowed to be decided by the appropriate authorities concerned as provided under the provisions of the Income

Tax Act, 1961. As a result, both the writ petitions will be dismissed but with no order as to costs.

29. The writ petitions are disposed of as above.