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(2007) 02 BOM CK 0101

Bombay High Court

Case No: Writ Petition No. 7459 of 2006

Coca Cola India (P) Ltd.		APPELLANT
	Vs	
Income Tax Appellate Tribunal and Others		RESPONDENT

Date of Decision: Feb. 12, 2007

Acts Referred:

- Income Tax Act, 1961 - Section 143(3), 254, 254(1)

Citation: (2007) 208 CTR 269 : (2007) 290 ITR 464

Hon'ble Judges: S. Radhakrishnan, J; J.P. Devadhar, J

Bench: Division Bench

Advocate: S.E. Dastur, R. Murlidhar, Arun Siwach and Ameya Gokhale, instructed by Amarchand Mangaldas and S.A. Shioff and Co, for the Appellant; A.M. Kotangale, for the Respondent

Final Decision: Allowed

Judgement

J.P. Devadhar, J.
Rule. Rule made returnable forthwith. By consent of the parties, the writ petition is taken up for final hearing.

2. Two orders passed by the Income Tax Appellate Tribunal (Tribunal'' for short) are challenged in this petition. Firstly, the petitioner challenges the order of the Tribunal dt. 5th Oct., 2005 insofar it pertains to remanding the issues relating to the disallowance of service charges and marketing expenses to the AO without considering the specific grounds raised in the appeal. Secondly, the petitioner challenges the order of the Tribunal dt. 7th July, 2006 in rejecting the miscellaneous application filed by the petitioner by stating that the decision to restore the matter to the AO for de novo consideration was a conscious decision. The assessment year involved herein is asst. yr. 1997-98.

3. The petitioner is a 100 per cent subsidiary of Coca Cola South Asia India Holding, Hongkong, which in turn is a subsidiary of Coca Cola Asia Holding, Singapore and the ultimate holding company of the petitioner is The Coca Cola Company U.S.A. (TCCC'' for short). TCCC is the registered owner in India of the trade marks such as Coca Cola, Coke, Fanta and Sprite. The petitioner had entered into an agreement with TCCC on 1st June, 1993 pursuant to which an ordinary gratuitous non-exclusive license was granted to the petitioner and accordingly the petitioner has been manufacturing and selling non-alcoholic beverage bases also known as ''concentrates'' and beverages made out of such concentrates.

4. The business activity of the petitioner comprises of blending, bottling and distribution of non-alcoholic beverages. Instead of setting up its own factory, the petitioner has entered into arrangement with bottlers, fillers, wooden crate manufacturers, etc. so that the ''concentrate'' sold by the petitioner are used in the manufacture of non-alcoholic beverages under their strict supervision and marketed throughout the country. The petitioner had also entered into a service agreement with Coca Cola India Inc., U.S.A. (''CCI Inc.'' for short) which has its branch office at Delhi. ''CGI Inc.'' is a subsidiary of Coca Cola Holdings India Inc. (USA) which in turn is the subsidiary of TCCC. As per the service agreement, the petitioner was liable to pay for the services rendered by CCI Inc. Apart from incurring service charges, the petitioner incurred huge marketing expenses to boost sales of the non-alcoholic beverages which ultimately boosts the sale of ''concentrates''.

5. In its return of income for the asst. yr. 1997-98, the assessee had claimed deduction of service charges amounting to Rs. 46,35,12,031 and marketing expenses amounting to Rs. 73,79,03,469.

6. By an assessment order dt. 31st March, 2000 passed u/s 143(3) of the IT Act, 1961, the AO inter alia disallowed service charges amounting to Rs. 10,80,04,482 on the ground that the said expenses related to earlier years. Out of the sum of Rs. 10,80,04,482 a sum of Rs. 3,37,06,017 under invoice No. 0004 dt. 9th Dec., 1996 related to the period from 1st Jan., 1996 to 31st March, 1996 and the balance amount of Rs. 7,42,98,465 being l/4th of the invoice No. 0006 dt. 7th Jan., 2007 (1997) related to the period from 1st Jan., 1996 to 31st Dec., 1996. Thus, out of the service charges amounting to Rs. 46,35,12,031 claimed as business expenditure, the AO allowed Rs. 35,55,07,549 as business expenditure and the balance amount of Rs. 10,80,04,482 was disallowed as being prior period expenditure, as more particularly set out hereinbelow:

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Invoice No. 0004 dt. 9.12.2006 for the period from 1.1.1996 to  : 3,37,06,0
31.03.1996
Invoice No. 0006 dt. 7.01.1997 for the period from 1.1.1996 to
31.12.1996
(1/4th of the invoice amount of Rs. 29,71,93,862)               : 7,42,98,4
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7. As regards the deduction of marketing expenses of Rs. 73,79,03,469 claimed as deduction, the AO by his order dt. 31st March, 2000, disallowed a sum of Rs. 17,99,74,343 inter alia on the ground that there were differences in the amounts allegedly claimed to have been paid by the petitioner to various parties and the amount confirmed to have been received by those parties. The above disallowance included claims which were not confirmed by some of the parties by sending their reply to the AO. The above disallowance included disallowance of expenses incurred in the earlier years and ad hoc disallowance of Rs. 2,00,00,000. Thus, out of the sum of Rs. 73,79,03,469 claimed as marketing expenses, the AO allowed Rs. 55,79,29,126 and disallowed Rs. 17,99,74,343, the particulars of which are as follows:

(i) Difference (11 parties)	2,12,04,099	
(ii) No reply (14 parties)	3,90,28,917	
(iii) Earlier years (7 parties)	9,97,41,327	
		15,99,74,343
(iv) Ad hoc		2,00,00,000
		17,99,74,343

8. The petitioner filed an appeal before the Commissioner of Income Tax (Appeals) (''CIT(A)'' for short] inter alia challenging the disallowance of service charges and marketing expenses made by the AO. After making detailed enquiries the CIT(A) by his order dt. 14th Aug., 2003 held that the following factors were relevant for determining the allowability of service charges incurred by the petitioner and the nature of service charges rendered by CCI Inc. to the petitioner:

(i) CCI Inc. has been rendering services not only to the appellant company but also to other group companies and entities in India insofar asst. yrs. 1997-98 and 1998-99 are concerned.

(ii) CCI Inc. is looking after the Indian operation of TCCC and ''India'' in the scheme of things of TCCC includes Maldives.

(iii) The very genesis of the CCI Inc. evidenced from the papers submitted to RBI was to provide technical and managerial assistance to the appellant company as well as to take care of the brand image of TCCC in India.

(iv) The services rendered by CCI Inc. to the bottlers licensed by TCCC could be classified into services which are for the purposes of the appellant company and the services which are for the purposes of the business of the bottlers/ TCCC. While the services to the bottlers for purchase of concentrate, etc. and activities relating to market research, etc. could be classified as services for the purposes of the business

of the company as it directly helps the appellant in planning its production as evidenced by minutes of S&OP (sales and operation meetings) submitted before me and also in manufacture resource planning styled as MRP-II Project by the appellant, the services rendered in quality upgradation of the bottlers, etc. are for the purpose of the bottlers as well TCCC brand image. This aspect gets further provided by the recent episode of toxic residue in the soft drinks wherein the bottling companies were directly involved and therefore the cases have been filed before different Courts by the bottling unit M/s Hindustan Coca Cola Beverages Ltd. and not by the appellant. Merely because the bottlers are customers of the appellant, running their business or getting involved in their quality of product is not for the purpose of business of the appellant company but for purpose of the business of TCCC or the bottler. CCI Inc. provided such services to bottlers and rightly so as per the correspondence and approval from RBI, but these services do not have direct nexus with the business operations of the appellant. The decision of Hon''ble Supreme Court in the case of Travancore Titanium Products Ltd. Vs. Commissioner of Income Tax, Kerala, and The Indian Aluminium Co. Ltd. Vs. The Commissioner of Income Tax , West Bengal, Calcutta, provide relevant legal authority in this regard in the facts and circumstances of the nature of services rendered by CCI Inc. to the appellant and other entities in India.

(v) There are expenses embedded in the service charges claimed by the appellant and embedded in the reimbursed cost of the appellant to CCI Inc. which are not allowable in nature as per IT law. These include foreign travel expenses of wives of employees for their pleasure trips, capital expenditure on purchase of software, etc.

(vi) There are expenses on various services directly provided to the appellant for supply of bases and concentrates of the beverages and various other aspects which have been discussed in detail in the appellate order for asst. yr. 1998-99.

Accordingly, the CIT(A) held that since the services rendered by CCI Inc. benefited not only the petitioner but also benefited other group companies, disallowance has to be made to that extent and since the disallowance made by the AO was less than 25 per cent of the total service charges claimed, the CIT(A) upheld the disallowance made by the AO.

9. As regards the disallowance of the marketing expenses of Rs. 17,99,74,343 made by the AO, the CIT(A) partially allowed the appeal and held that the disallowance shall be restricted to Rs. 10,00,00,000 computed as below:

(i) Difference		
(ii) No reply	31,19,919	
(iii) Earlier years	4,11,61,718	

		4,42,81,637
(iv) Ad hoc as in the assessment order		2,00,00,000

(v) Capital expenditure on films/TV and brand building (balance figure)	3,37,18,863
	10,00,00,000

10. Being aggrieved by the aforesaid order passed by CIT(A), the petitioner filed an appeal before the Tribunal. No appeal was filed by the Revenue in respect of the service charges allowed by the AO and confirmed by CIT(A). In the appeal, the petitioner specifically raised the following legal issues relating to disallowance of service charges:

(i) Whether there was anything on record to show that CCI Inc. was rendering services to ''group concerns'' especially when the petitioner had clearly stated that there were no group concerns in India in the asst. yr. 1997-98 ?

(ii) Whether taking care of the brand image of TCCC in India was for the business purpose of the petitioner in the light of the undisputed fact that (a) TCCC was the owner of the brands; (b) the petitioner was the licensee of such brands on a gratuitous basis; (c) the petitioner''s business prospects depended directly on the said ''brand image'' ?

(iii) Whether rendering services to the petitioner''s bottlers was in the business interest of the petitioner in the light of the undisputed fact that (a) the services were in the nature of quality control to ensure that there is no under-filling or over-filling of the bottles; (b) the petitioner''s business interests were directly dependent on production by the bottlers; (c) the petitioner was recovering the full cost of such services from the bottlers in the form of increased sales price of concentrate ?

(iv) Whether expenses embedded in the service charges such as foreign travel expenses of wives, etc. are allowable as per IT law ?

11. As regards the disallowance of the marketing expenses is concerned, it is pertinent to note that both the petitioner as well as the Revenue had filed appeals against the order of CIT(A). According to the petitioner, the CIT(A) erred in making disallowance of marketing expenses amounting to Rs. 10,00,00,000. According to the Revenue, the CIT(A) ought to have made disallowance of marketing expenses at Rs. 13,03,94,446 as computed below:

(i) Difference	94,35,775	
(ii) No reply	95,64,184	
(iii) Earlier years	5,76,75,624	
		7,66,75,583
(iv) Ad hoc as in the assessment order		2,00,00,000
(v) Capital expenditure on films/TV and brand building		

(balance figure)	3,37,18,863
	13,03,94,446

12. Thus, the specific issues raised in the appeal filed by the petitioner as well as the Revenue were, whether the CIT(A) was justified in making disallowance of marketing expenses and if so, whether:

(a) The prior period expenditure ought to be Rs. 4,11,61,718 as determined by the CIT(A) or should it be Rs. 5,76,75,624 as calculated by the Department (i.e. a difference of Rs. 1,65,13,906);

(b) Whether disallowance of Rs. 31,19,919 made by the CIT(A) on account of ''differences/no reply'' was justified when the payments were made by account payee cheques and constituted a small fraction of the total expenditure of Rs. 73,79,03,469 ?

(c) If so, whether disallowance on account of ''differences/no reply'' made by CIT(A) at Rs. 31,19,919 as determined by the (sic) is correct or should it be at Rs. 1,89,99,955 (Rs. 94,35,775 plus Rs. 95,64,184) as calculated by the Department (i.e., a difference of Rs. 1,58,80,036);

(d) Whether there is any scope for ad hocism in a quasi-judicial proceeding so as to justify the ad hoc disallowance of Rs. 2 crores ?

(e) Whether disallowance of expenditure on films/TV and brand building made on the ground that the same are capital expenditure is justifiable ?

13. By the impugned order dt. 5th Oct., 2005, the Tribunal, without considering the specific grounds raised in the appeal relating to disallowance of service charges and marketing expenses confirmed by the CIT(A), restored the matter to the AO for de novo consideration. The Tribunal held that whole of the expenses amounting to Rs. 73,79,03,469 claimed as marketing expenses and whole of the expenses of Rs. 46,35,12,031 claimed as service charges are to be segregated first year-wise and then the expenses pertaining or relating to the year in question are to be examined in detail to determine and ascertain whether all the expenses relating to the year under consideration have actually been paid out and expended wholly and exclusively for the purpose of business.

14. The petitioner, thereupon filed a miscellaneous application stating therein that the Tribunal ought not to have remanded the case to the file of AO for redetermination without deciding the issues specifically raised in the appeal. The Tribunal by its order dt. 7th July, 2006 held that its decision to restore the matter to the AO was a conscious decision taken based on the totality of the facts and circumstances of the case. The Tribunal further held that though the AO is required to consider as to whether the entire claim of service charges and marketing

expenses were incurred in the assessment year in question, the quantification of inadmissible expenses which may ultimately be found to be not having been incurred for the purpose of assessee''s business shall be restricted to Rs. 10,80,04,482 of the service charges and Rs. 17,99,74,343 of the marketing expenses. Challenging the aforesaid orders passed by the Tribunal, the present petition is filed.

15. Mr. Dastur, learned senior advocate appearing on behalf of the petitioner submitted that the Tribunal seriously erred in restoring the matter to the file of AO for de novo consideration of the entire claim of service charges and marketing expenses, instead of adjudicating upon the issues specifically raised in the appeal.

16. Relying upon the decisions in the case of Raja Vikramaditya Singh (decd.) (through Lrs. Rani Indira Kumar i and Others) Vs. Commissioner of Income Tax, , Saurashtra Packaging Pvt. Ltd. Vs. Commissioner of Income Tax, , Rajesh Babubhai Damania Vs. Commissioner of Income Tax, , Rameshchandra M. Luthra Vs. Assistant Commissioner of Income Tax, . Omar Salay Mohamed Sait Vs. Commissioner of Income Tax, Madras, , Mr. Dastur submitted that if all the basic facts required for the disposal of an appeal are on record, then the Tribunal must decide the issues raised in the appeal instead of remanding the matter back to the lower authorities. In the present case, the Tribunal has not even considered the specific issues raised in the appeal. Relying upon the decision of the apex Court in the case of The Commissioner of Income Tax, Bombay Vs. Chandulal Keshavlal and Co., Petlad, , Mr. Dastur submitted that even if the payments made by the petitioner for its business enures some benefit to a third party, the petitioner is entitled to claim deduction of such expenses and in any event, without deciding that issue the Tribunal ought not to have remanded the case for de novo consideration.

17. Mr. Dastur further submitted that the impugned order passed by the Tribunal has caused grave prejudice to the petitioner because relying upon the decision of the Tribunal dt. 5th Oct., 2005, the AO has passed an assessment order on 31st March, 2006 for asst. yr. 2003-04, disallowing 100 per cent of the marketing expenditure and 100 per cent of the service charges. Moreover, even in the present case in the light of the impugned orders passed by the Tribunal, the AO has called upon the petitioner to produce every voucher relating to the entire service charges amounting to Rs. 46,35,12,031 and marketing expenses amounting to Rs. 73,79,03,469 incurred by the petitioner during asst. yr. 1997-98. Mr. Dastur submitted that the scope of the enquiry in an appeal filed before the Tribunal is restricted to the specific issues raised in the appeal and it is not open to the Tribunal to pass an order which goes beyond the scope of the appeal. Accordingly, Mr. Dastur submitted that the impugned orders passed by the Tribunal be quashed and set aside and the case be remitted to the Tribunal with a direction to dispose of the appeal on merits on the basis of the material on record.

18. Mr. Kotangale, learned Counsel appearing on behalf of the Revenue, on the other hand, submitted that in the present case, from the assessment order dt. 31st March, 2000 it is clear that the petitioner had not given the basis or breakup of the working of the expenses claimed by them. In these circumstances, the Tribunal was justified in remanding the matter to the AO for de novo consideration. Mr. Kotangale submitted that by the remand order no prejudice is caused to the petitioner, because, as per the order of the Tribunal dt. 7th July, 2006, the disallowance on remand is restricted to the disallowance made by the AO in the original assessment order and it would be open to the petitioner to establish before the AO that the amounts claimed by them have been actually spent wholly and exclusively for the purpose of business.

19. Relying upon a Full Bench judgment of this Court in the case of Ahmedabad Electricity Co. Ltd. And Godavari Sugar Mills Ltd. Vs. Commissioner of Income Tax, , Mr. Kotangale submitted that the basic purpose of an appeal in an Income Tax matter is to ascertain the correct tax liability of the assessee and for that purpose the Tribunal u/s 254 of the IT Act has wide powers to consider the entire proceedings and pass such orders thereon as it thinks fit. In the present case, in the absence of any material facts or break-up of the expenses given by the petitioner, the Tribunal was justified in remanding the matter to the AO for de novo consideration. While disposing of the miscellaneous application, the Tribunal has clarified that the disallowance on remand shall not exceed the disallowance made in the original assessment. Accordingly, Mr. Kotangale submitted that no interference is called for in a writ jurisdiction and the petition is liable to be dismissed.

20. Having considered the rival submissions, we are of the opinion that in the facts of the present case, the arguments advanced on behalf of the petitioner deserve acceptance.

21. In the present case, there were two issues before the Tribunal. One relating to the disallowance of service charges and another relating to disallowance of marketing expenses. The CIT(A) had upheld disallowance of service charges amounting to Rs. 10,80,04,482 out of the total claim of Rs. 46,35,12,031 inter alia, on the ground that the services rendered benefited the group companies, services were rendered to take care of the brand image of TCCC in India, services were rendered to the bottlers and that the service charges included foreign travel expenses of wives which were not allowable. In the appeal, the petitioner had specifically pleaded there were no group concerns in India in asst. yr. 1997-98 and, therefore, disallowance could not be made on that ground. It was pleaded that being a licensee of the brands owned by TCGC, the petitioner''s business prospects depended directly on the brand image of TCCC, and therefore, disallowance could not be made on that ground. It was pleaded that rendering services to the bottlers was necessary so that the branded goods are bottled and marketed as per the standards prescribed and that the services rendered to the bottlers ultimately boost

the sale of the ''concentrates'' and, therefore, the said expenses incurred for the business of the petitioner ought to have been allowed. It was pleaded that even the foreign travel expenses of the wives were incurred in the course of business and, therefore, allowable.

22. Similarly, in respect of disallowance of marketing expenses of Rs. 10,00,00,000 confirmed by the CIT(A), the petitioner claims that before the Tribunal they were agreeable for confirmation of the disallowances made by CIT(A) i.e., prior period expenses at Rs. 4,11,61,718 and disallowance of Rs. 31,19,317 on account of ''differences/no reply''. Therefore, the issue to be decided by the Tribunal was whether the disallowance of prior period expenditure should have been Rs. 5,76,75,624 as claimed by the Revenue [instead of disallowance of Rs. 4,11,61,718 confirmed by the CIT(A)] and whether the disallowance on account of differences/no reply should have been Rs. 1,89,99,955 as claimed by the Revenue [instead of disallowance of Rs. 31,19,919 confirmed by the CIT(A)]. The Tribunal was required to decide as to whether the said differences/no reply cases deserved to be allowed as the payments were made by account payee cheques and constituted a small fraction of the total expenditure of Rs. 73,79,03,469. The Tribunal was required to decide whether the CIT(A) was justified in making the disallowance of marketing expenses amounting to Rs. 2 crores on ad hoc basis and whether disallowance of the expenditure incurred on production of short duration advertisement film, etc. and brand building (as) capital expenditure was in accordance with law.

23. However, in the impugned order dt. 5th Oct., 2005, the Tribunal has not dealt with any of the above specific issues raised in the appeal and restored the issue to the file of the AO (see para 51) with a direction to the AO, first to ascertain and determine the actual amount of service charges which pertain to the year in question and then to adjudicate the question of allowability thereof as per law. The Tribunal directed the petitioner to furnish necessary documents, details, particulars, information, books and other evidence in support of their entire claim of service charges. Similarly, in respect of disallowance of marketing expenses, the Tribunal restored the matter to the file of AO by holding that the whole of the expenses claimed amounting to Rs. 73,79,03,469 are to be segregated first year-wise and then the expenses pertaining or relating to the year in question are to be examined in detail to determine and ascertain whether all the expenses related to the year under consideration have actually been paid out and expended wholly and exclusively for the assessee''s business. Thus, the Tribunal on remand, directed the AO to investigate the entire claim of service charges and marketing expenses even though the appeal was restricted to the partial disallowance of service charges and partial disallowance of marketing expenses confirmed by CIT(A). When this anomaly was brought to the notice of the Tribunal by filing a miscellaneous application, the Tribunal disposed of the said miscellaneous application by stating that it had taken a conscious decision and clarified that on remand, the AO shall restrict the disallowance to the amounts disallowed in the original assessment.

24. Section 254(1) of the IT Act, 1961, requires the Tribunal to give both the parties to the appeal an opportunity of being heard and pass such orders on the appeals filed before it as it thinks fit. The expression "pass such orders thereon as it thinks fit" in Section 254(1)(is) though wide enough to include the power of remand, such power can be exercised only if it is necessary to decide the issues which are subject-matter of the appeal. In the present case, none of the issues specifically raised in the appeal have been considered by the Tribunal before remanding the matter to the file of AO.

25. By the impugned order, the Tribunal has directed the AO to reconsider the entire claim of service charges and marketing expenses by first segregating the prior period expenses and thereafter determine the actual amount pertaining to the year under appeal and adjudicate as to whether the expenses incurred in the year in question have been incurred wholly and exclusively for the purpose of business. It is pertinent to note that in para 50 of its order, the Tribunal has given a categorical finding to the effect that out of the disallowance of service charges of Rs. 10,80,04,482 confirmed by CIT(A), service charges amounting to Rs. 3,37,06,617 were incurred in the earlier year and that amount is not allowable in the year in question. Having quantified the claims which relate to earlier years, the Tribunal was not justified in remanding the matter to AO to redetermine the service charges which are relatable to earlier years.

26. Similarly, whether service charges and marketing expenses were incurred wholly and exclusively for the purposes of business was not an issue raised in the appeal. The specific grounds raised in the appeal against the order of CIT(A) were, whether the services rendered benefited group companies, whether the expenses were incurred to take care of TCCC brand image, whether rendering service to the bottlers could be a ground for making disallowance, whether disallowance of foreign travel expenses of the wives was justified, whether disallowance of marketing expenses ought to have been enhanced as claimed by the Revenue, whether disallowance could be made on ad hoc basis and whether expenditure on films/TV and brand building were capital expenditure. The Tribunal ought to have adjudicated upon these issues and to decide any of these specific issues if it was found necessary, the Tribunal could have remanded the matter for reconsideration of those issues. As the Tribunal has not considered the specific issues raised in the appeal, it is difficult to sustain the remand order passed by the Tribunal.

27. Strong reliance was placed by Mr. Kotangale, learned Counsel appearing on behalf of the Revenue on the Full Bench decision of this High Court in the case of Ahmedabad Electricity Co. Ltd. (supra). In our opinion, that decision has no bearing on the facts of the present case because in that case what is held is that the Tribunal has jurisdiction to permit additional grounds to be raised before it even though the same may not arise from the order of the AAC so long as the said grounds are in respect of the subject-matter of the entire tax proceedings. In the present case,

even the Revenue has not filed any appeal or cross-objection in respect of service charges and marketing expenses allowed by the AO and confirmed by CIT(A). In these circumstances, the order passed by the Tribunal without considering the issues raised in the appeal and in remanding the case to the file of AO for reconsideration of the entire claim relating to service charges and marketing expenses cannot be sustained.

28. For all the aforesaid reasons, we set aside the impugned order passed by the Tribunal dt. 5th Oct., 2005 as well as the order passed on a miscellaneous application dt. 7th July, 2006 insofar as it pertains to the claim relating to service charges and marketing expenses and remit the case to the Tribunal for disposal of the appeal in accordance with law.

29. Accordingly, the writ petition succeeds. Rule is made absolute in terms of prayer Clause (a) with no order as to costs.