

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'B', NEW DELHI**

**BEFORE SH. AMIT SHUKLA, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER**

ITA No.2179/Del/2006
Assessment Year: 2001-02

Coca-Cola India Inc., Enkay Towers, Udyog Vihar, Phase-V, Gurgaon	Vs.	DCIT, Gurgaon Circle, Gurgaon
PAN :AAACC2638K		
(Appellant)		(Respondent)

Appellant by	Sh. Ajay Vohra, Adv. & Sh. Gaurav Jain, Adv.
Respondent by	Sh. G.K. Dhall, CIT(DR)

Date of hearing	30.05.2018
Date of pronouncement	27.06.2018

ORDER

PER O.P. KANT, A.M.:

While disposing the Miscellaneous Application No. 652/Del/2009 filed by the assessee, this appeal has been recalled by the Tribunal vide order dated 30/09/2009, for a limited purpose of adjudicating ground number 2.2 to 2.6 of the appeal . The said grounds of appeal raised in ITA No. 2179/Del/2006 are reproduced as under:

2.2 The CIT(A) failed to appreciate that the only adjustments made to income computed protectively is for items discussed in paras 18,19,20 of the assessment order which does not include any addition of notional income at 5% of marketing expenditure. The CIT (A) therefore grossly erred in upholding this addition of the notional income to the protective part of assessment order.

2.3 The CIT (A) erred in wrongly presuming that Marketing expenditure in question, which was incurred by service receiving parties, to be a reimbursement in the hands of the appellant.

2.4 Without prejudice, the CIT(A) erred in upholding addition of notional sums to the income computed, purely based on presumptions and contrary to express written understanding.

2.5 Without prejudice, the CIT(A) erred in holding that appellant should have charged 5% mark-up on the above direct expenditure of the service receiving entities failing to appreciate that the appellant company can only charge 5% of cost like salary of employees etc., incurred by the appellant itself in rendering these services.

2.6 Without prejudice, the CIT(A) erred in failing to appreciate that the appellants have already billed the respective service receiving entities for expenses incurred by appellant company in rendering any services in connection with the respective entities marketing activities together with the agreed mark-up, which income has been offered to tax.

2. In the above ground Nos.2.2 to 2.6 of the appeal, the only issue of addition of Rs.10,56,00,755/- sustained by the Ld. CIT(A) towards markup 5% on marketing expenditure, is involved.

2.1 Facts of the case have already been narrated in details in the order of the Tribunal, dated 09/10/2009 and hence, we are not repeating those facts again here.

2.2 The facts qua the issue in dispute are that the assessee i.e. Coca-Cola India Inc, USA (CCI), a foreign company, having branch office in India, entered into three separate agreements with Coca-Cola India Private Limited (CC IPL), Hindustan Coca-Cola Beverages Private Limited (HCCBPL), and the Hindustan

Coca-Cola Marketing Company Private Limited (HCCMCPL), for providing marketing support and other services. In view of the service agreements, the assessee managed entire advertising and marketing work of these companies through its employees. The advertisement and marketing work, *inter alia*, included following:

- (a) Development of creative advertisement campaign, media planning, media buying, development of marketing strategy and other ancillary activities related to selling products
- (b) Selection of spots on advertising media such as radio, TV, newspapers and booking of spots on such media, engaging of celebrities,
- (c) Development of regional sales promotion and local campaign, development of marketing strategy and other ancillary activities related to selling of the products and development of the brands.

2.3 Thus, the cost of the advertising and marketing consist of the cost of the employees of the assessee company for supervision of the work and the cost paid to other agencies like media agencies, celebrities etc. The cost of employees and related expenses have been debited by the assessee in its books of accounts whereas the expenses paid directly to media agencies, celebrities etc have been paid from the bank accounts of the three companies. These bank accounts, issue of cheques , montoting of work etc., were managed by the employees of the assessee company.

2.4 The assessee raised invoices on those three companies for reimbursement of the employee and other related costs incurred

by the assessee along with a markup 5% on such cost, and accordingly shown income in its books of accounts.

2.5 However, according to the Assessing Officer, the assessee was required to charge markup of 5% on the entire cost of advertisement and marketing, including the cost incurred directly from the bank account of those 3 companies. Accordingly, he held that the assessee is exclusively responsible for marketing strategies, advertise and publicity and sales promotion. He observed that the CCIL claimed marketing expenses of Rs.127,69,54,968/-, HCCBPL claimed advertisement publicity in sales promotion expenses of Rs.77,88,63,238/- and HCCMCPL claimed advertisement publicity in sales promotion expenses of Rs.5,61,96,933/-. Accordingly, he worked out 5% of the expenses incurred on marketing by these three companies expenses (Rs.6,38,47,748/- for CCIL, Rs.3,89,43,161/- for HCCBPL and Rs. 28,09,846/- for HCCMCPL) aggregating to Rs.10,56,00,755/-

2.6 On further appeal, the Ld. CIT(A) upheld the addition. The submission of the assessee and finding of the Ld. CIT(A) on the issue in dispute are reproduced as under:

“15.5 Against the above, the assessee submitted the following:-

(1) As per the agreements the appellant receives a reimbursement of actual cost incurred by it in providing the agreed services plus a mark up of 5% of such costs incurred by it. In other words, the service receiving companies like CCIPL etc. reimburse the appellant for the actual costs incurred by the appellant company plus a mark up of 5%.

(2) By no stretch of imagination can appellant be entitled to a mark up on the direct and actual marketing expenses incurred by the service receiving companies.

(3) Further, the cost of such services, if any, provided by the appellant to facilitate incurring of the said marketing expenditure directly by the service receivers, are already included in the service charges with agreed mark up, which have already been offered to tax.

(4) Adhoc addition has been made on presumption.

(5) Expenses are directly incurred by service receiving companies. The assessee only does the following jobs:-

"... for co-ordinating with marketing agencies engaging celebrities entering into agreement with celebrities, marketing agencies, media etc. making payment for the above from the bank accounts of service receiving companies viz., making the vouchers, checking that services are received, complying with TDS and other formalities etc."

When the assessee incurs expenditure in the form of salary of staff, overheads, depreciation etc., the same are recovered from the service receiving entities in the form of service charges and offered to tax in the returned income.

(6) the payment of the marketing expenditure incurred by CCIPL has been made by them either directly or by using the assessee company's services for preparation of cheques, accounting and processing of payments, auditing etc., however, again these payments were made directly from CCIPL's own bank accounts. In case of the other service receiving companies the marketing and sales promotion expenses were also directly incurred by them without even the support of any services from the assessee's end.

(7) The Assessing Officer has not disputed that these expenses were the direct expenditure incurred by these companies (i.e.CCIPL, HCCMPL & HCCBPL).

15.6 I have very carefully considered the facts and submissions made. The three separate agreements have been perused. To explain this issue, it is necessary to point out the relevant parts of the agreement between the CCI Limited and the assessee company.

The fifth Para(Page 1) of the agreement states:-

".....Whereas, CCI has expertise and know-how in the field of manufacture, sale and marketing of beverages, syrups and foodstuffs in general and the Products in particular and in providing services in connection therewith; and is authorized to:

- a) *develop and promote the export activities amongst others of CCIL*
- b) *co-ordinate activities of the licensed bottlers in India with CCIL.*
- c) *Render support sendees to CCIL in terms of the Reserve Bank of India approval letters dated October 21st 1994, 11th January 1995 and 12th February 1995 (hereinafter 'RBI approvals '). ”....*

15.7 *It is, thus, acknowledged, the assessee company has the expertise in the field of marketing of beverages, syrups and foodstuffs etc. and in providing services in connection therewith.*

15.8 *In this regard, the assessee company is to provide:-*

** “....Advise, monitor and co-ordinate the activities of Bottlers in the Country with CCIL and provide....*

**Assistance and guidance to Bottlers and CCIL, on advertising and promotion....*

**.....Actively look for the keep CCIL informed of potential business opportunities and the general market situation in the Country as far as is relevant for its products and its scope of activities, and advise them on applicable laws and regulations.....”*

2.7 Before us, the Ld. counsel of the assessee filed a paper book containing pages 1 to 76 and referred relevant pages of the service agreements between the assessee and those three companies and the exhibits enclosed with those agreements. The Ld. counsel submitted that according to the relevant clauses of the service agreements those companies were required to pay a fee on the basis of the actual cost incurred by the assessee under expenses listed in the Exhibit-A in providing such services plus a markup of the 5% on such actual cost. The Ld. counsel referred to the Exhibit -A in case of service agreement with CCIL, which is available on page-52 of the paper book, which comprises of expenses on salary and allowances (including contribution to

provident another funds), moving and relocation, service charges for use of the assets, staff welfare expenses. He also referred to relevant clauses and Exhibit-A available in paper book in case of the other two companies. In view of the submissions, the Ld. counsel argued that actual cost for the purpose of markup of 5% was limited only to the cost as per Exhibit-A and not the cost incurred directly by those companies on advertising and marketing and sales promotion.

2.8 On the other hand, the Ld. DR relied on the order of the lower authorities and submitted that so-called tasks of booking of spots in media or engaging of celebrities etc have been carried out by the employees of the assessee company and execution of these works have also been supervised by the employee of the assessee. He submitted that not only bank accounts but accounting work of these three companies, in respect of advertisement and marketing was managed by the employees of the assessee company. Thus, according to him, the assessee claimed to be expert of marketing in the field of cold drinks and other beverages and it managed the entire marketing portfolio of the three companies and therefore the actual cost incurred towards advertisement and marketing for the purpose of markup 5% , include the entire cost on advertising and marketing and sales promotion debited in the profit and loss account of these three companies.

2.9 We have heard the rival submissions and perused the relevant material on record. The relevant parts of the service agreement between the assessee and the three companies reproduced in the order of the Ld. CIT(A), have already been extracted above. As far as the issue of providing marketing

support by the assessee company to these three companies is concerned, all the three service agreements are similarly worded. The clause 3, 4 and 6 of the service agreement between the assessee and CCIL is reproduced as under again for clarification of the issue in dispute:

“3. Provide Marketing Support to CCIL including development of creative, development of the advertising campaign, media planning, medical buying, development of market strategy and other ancillary activities related to selling of the Products.

4. Provide Accounting Assistance including guidance and support on Budgeting, development and implementation of Management Information Systems (MIS) for financial analysis, Planning, Costing and Monitoring of the transaction with the bottlers and export transactions.

6. In consideration of the services provided by CCI, CCIL shall reimburse the out of the pocket expenses incurred in rendering the Services on the production of supporting. In addition, CCIL shall pay to CCI a fee on the basis of actual costs incurred by CCI under Expense heads lists in Exhibit A, in providing such services plus a mark up to 5% on such actual costs.”

2.10 Thus, according to the service agreement, the assessee was required to render certain services of marketing support and in consideration of the services; the CCIL was required to reimburse out-of-pocket expenses incurred in rendering the said services on production of supporting. In addition to the out-of-pocket expenses, the CCIL was also required to pay a markup of 5% on the basis of the actual cost incurred by the assessee under expenses heads listed in Exhibit-A. Following expenses are listed in Exhibit-A, a copy of which is available on page 52 of the paper book:

1. *Salaries and disallowances (including contribution to Provident and other funds)*
2. *Moving and Relocation*
3. *Service Charges for use of assets*
4. *Staff Welfare Expenses.*

2.11 Thus, according to the service agreement, the CCIL was required to pay 5% markup on the actual cost incurred by the assessee under the expenses head listed in the Exhibit-A. The contention of the Revenue is that all the expenses even paid directly to the media or the celebrities etc by the CCIL (and other two companies) should be included in the actual cost for the purpose of markup 5%. In our opinion the finding of the Ld. CIT(A) on the issue in dispute is not correct. When the agreement between the assessee and the CCIL (also other two companies) has clearly specified that markup will be charged on the actual cost of the expenses mentioned in the Exhibit-A, the Revenue cannot direct the assessee to charge 5% markup on the entire expenditure on marketing and advertisement incurred by the CCIL and other 2 companies. The parties to the agreement are bound by the terms and conditions mentioned therein and the Revenue cannot interpret the said agreement in its own way to include the other costs. Even otherwise, if the 5% markup on other cost is considered as income in the hands of the assessee, then the same would have to be allowed as expenditure in the hand of those 3 companies and thus entire exercise would be revenue neutral exercise. the Ld. CIT(A) has placed reliance on the letter dated 12/01/1995 and 21/02/1995 addressed by the

assessee to the RBI, to support that the services rendered by the assessee includes development of creative, media buying and MIS and thus the assessee has rendered the entire services of marketing to the 3 companies. In our opinion, there is no dispute as far as rendering of services are concerned. But the service agreement has specified 5% markup only on the actual cost related to the salaries and allowances of employees, their moving and relocation expenses, staff welfare, service charges for the use of the assets. In view of the above, in our opinion, the Ld. CIT(A) is not justified in sustaining the addition made by the Ld. Assessing Officer, and thus accordingly, we reverse the finding of the Ld. CIT(A) on the issue in dispute and delete the addition of Rs.10,56,00,755/-.

3. Accordingly, the relevant grounds of the appeal are allowed.

4. In the result, appeal recalled for the limited purpose of ground Nos. 2.2 to 2.6, is allowed.

Decision is pronounced in the open court on 27th June, 2018.

Sd/-

(AMIT SHUKLA)
JUDICIAL MEMBER

Dated: 27th June, 2018.

RK/-(D.T.D.)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Sd/-

(O.P. KANT)
ACCOUNTANT MEMBER