UNITED STATES TAX COURT
WASHINGTON, DC 20217

THE COCA-COLA COMPANY AND SUBSIDIARIES,	)	**SR**
Petitioner(s),	)	
v.	)	Docket No. 31183-15.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

ORDER

This case is calendared for trial at a Special Session of the Court beginning on March 5, 2018, in Washington, D.C. In a timely notice of deficiency the Internal Revenue Service (IRS or respondent) made transfer-pricing adjustments under I.R.C. § 482 that produced aggregate deficiencies in excess of $3.3 billion for petitioner's 2007-2009 taxable years. On August 28, 2017, respondent filed a Motion for Partial Summary Judgment. In this motion respondent asks the Court to render judgment as a matter of law that a closing agreement executed by the parties in 1996 has no conceivable relevance to any issue before the Court. We shall deny the motion.

The facts stated herein are derived from the parties' pleadings and motion papers, including the attached declarations and exhibits. The facts are stated solely for the purpose of ruling on respondent's Motion for Partial Summary Judgment and not as findings of fact in this case. See Tax Court Rule 1(b); Fed. R. Civ. P. 52(a); Cook v. Commissioner, 115 T.C. 15, 16 (2000), aff'd, 269 F.3d 854 (7th Cir. 2001). Petitioner had its principal place of business in Georgia when it petitioned this Court.

Following an examination of petitioner's 1987-1989 Federal income tax returns the parties executed a closing agreement that covered petitioner's tax years up to and including 1995. In that closing agreement the parties agreed to a methodology (the "10-50-50 method") for calculating product royalties payable by petitioner's foreign affiliates (generally referred to as "supply points"). Under this method the supply point would retain 10% of gross revenues as a routine return, and the residual operating income (after certain adjustments) would be split 50%-50% between the supply point and petitioner.

The closing agreement provided penalty protection for petitioner both during the term of the agreement and for tax years after 1995. For tax years after 1995 the closing agreement provided that, if petitioner continued to calculate royalties payable by its supply points in accordance with (1) the 10-50-50 method specified in the closing agreement or (2) another method to which the parties subsequently agreed, petitioner would be deemed to have met the "reasonable cause and good faith" exception to the penalties in I.R.C. §§ 6662(e)(3)(D) and 6664(c). This penalty protection applied to transactions between petitioner and all current and future supply points.

Although the closing agreement expired on December 31, 1995, petitioner continued to use the 10-50-50 method to compute product royalties payable by its supply points for 1996 through 2009. The IRS examined petitioner's tax returns for all of these years. For 1996-2006, the IRS accepted petitioner's application of the 10-50-50 method and (with one exception) made no I.R.C. § 482 adjustments to the product royalties paid by petitioner's supply points. However, during the examination of petitioner's returns for 2007-2009, the IRS determined that the transfer prices petitioner calculated using the 10-50-50 method were not arm's-length.

Petitioner does not contend that the 1996 closing agreement prevented the IRS from making the $3.3 billion transfer-pricing adjustment at issue. And respondent will be free to argue, at trial and in his post-trial briefs, that the 1996 closing agreement should be accorded no probative value in determining whether the IRS abused its discretion in adjusting petitioner's income under I.R.C. § 482. But even if that argument is accepted, it does not mean that the closing agreement has no possible relevance to any issue that may arise in this case.

The execution of the 1996 closing agreement is an historical fact. It provides the obvious starting point for any narrative of the events leading up to the 2007-2009 audit. Indeed, the 10-50-50 method prescribed by the closing agreement is the method that petitioner used when computing its taxable income for the years at issue. That alone gives the closing agreement "relevance."

The IRS did not assert penalties in the notice of deficiency. But respondent can seek leave to amend its answer at any time. See Tax Court Rule 41(a). In the unlikely event that respondent seeks leave to amend his answer to assert penalties under I.R.C. §§ 6662(e)(3)(D) and 6664(c), the penalty protection provision in the 1996 closing agreement would have obvious relevance.

The existence of the 1996 closing agreement may have relevance for other purposes of which the Court (six months before trial) is currently unaware. But there is at least one example of the closing agreement's relevance of which we are aware. That arises in connection with the Mexico foreign tax credit issue.

For 2007-2009 petitioner claimed foreign tax credits (FTCs) for Mexican income taxes paid by its Mexican branch. In the notice of deficiency the IRS disallowed approximately $254 million of these FTCs on the ground that the Mexican taxes were not "compulsory" levies. See sec. 1.901-2(a)(2)(i), Income Tax Regs. ("A foreign levy is a tax if it requires a compulsory payment pursuant to the authority of a foreign country to levy taxes."). The apparent theory for this disallowance was that the Mexican branch underpaid royalties to petitioner (according to the transfer-pricing adjustment determined in the notice of deficiency) and hence overpaid its Mexican corporate income tax. To the extent of that alleged overpayment, respondent contends that the Mexican tax payment was not "compulsory."

On June 20, 2017, petitioner moved for partial summary judgment on the Mexico foreign tax credit issue, contending that the Mexican tax payment was in fact "compulsory." In support of that contention petitioner alleges that this tax was paid consistently with Resolutions (unilateral advance pricing agreements) executed by petitioner's Mexican branch and Mexico's federal taxing authority (the Servicio de Administración Tributaria or SAT). Petitioner alleges that SAT in these Resolutions effectively adopted the 10-50-50 method embodied in the 1996 closing agreement, finding it to be "an application of the residual profit split method that resulted in arm's-length charges under Mexican transfer-pricing principles." At the very least, the 1996 closing agreement is "relevant" to the Mexico foreign tax credit issue because it helps explain the basis on which the Mexican branch paid income tax to the Government of Mexico. That fact alone "might affect the outcome of the [Mexico foreign tax credit issue] under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The motion currently before the Court is odd. Respondent has not filed a motion in limine seeking to exclude from evidence on relevance grounds a document captioned "1996 closing agreement." Rather, respondent has filed a Motion for Partial Summary Judgment seeking a ruling that an historical fact, as a matter of law, can have no conceivable relevance to any issue before the Court. We doubt that this is a proper subject for summary judgment because respondent does not seek summary adjudication in its favor on one or more "legal issues in controversy." Tax Court Rule 121(a); see Louzon v. Ford Motor Co., I718 F.3d 556, 561 (6th Cir. 2013) (noting that a summary judgment motion, in contrast to a motion in limine, is a mechanism used "to resolve non-evidentiary matters prior to trial"). It would be imprudent for a court to grant a summary judgment motion of this sort six months before hearing any evidence at trial. But we shall deny the motion on its merits in any event.

In consideration of the foregoing, it is

ORDERED that respondent's Motion for Partial Summary Judgment, filed August 28, 2017, is denied.

(Signed) Albert G. Lauber
Judge

Dated: Washington, D.C.
September 7, 2017