(2014) 02 DEL CK 0073

Delhi High Court

Case No: ITA 269/2011, CM Appl. 14021/2012 (XOBJ)

CIT	APPELLANT
Vs	
Uniword Telecom Ltd.	RESPONDENT

Date of Decision: Feb. 25, 2014

Hon'ble Judges: S. Ravindra Bhat, J; R.V. Easwar, J

Bench: Division Bench

Advocate: Rohit Madan, Sr. Standing Counsel and Mr. Akash Vajpai, Advocate for the Appellant; Salil Kapoor, Mr. Vikas Jain, Mr. Sanat Kapoor and Mr. Ankit Gupta, Advocate for the Respondent

Judgement

S. Ravindra Bhat, J.
In this appeal of the Revenue, an order of the Income Tax Appellate Tribunal (ITAT) dated 29th January, 2010, in Appeal No.641/DL/2009 has been challenged. The Revenue urges the following questions of law, i.e.

a) Whether ITAT was justified in restricting the number of parties from whom bogus purchases were said to have been resorted to by the assessee?;

b) Did the Tribunal fall into error in directing disallowance to the extent of only 10% of purchases made from such vendors by the assessee?

2. The assessee has also filed a cross appeal and urges the following questions of law:

Did the ITAT err in law in not applying Section 40(a)(ia) to the circumstances of the case as that provision has been retrospectively amended by Finance Act, 2008 w.e.f. 01.04.2005?

3. The facts are that the assessee was engaged in designing, manufacturing, marketing and trading telecommunication equipments, public address system and flood matters. In its return for AY 2005-06, the assessee declared an income of Rs. 1,08,85,191/-; it was initially processed u/s 143(1) of the Act. During the year under

consideration, a search operation was conducted by the Central Excise Department in the manufacturing unit of the assessee. It was alleged that the assessee had claimed CENVAT credit for inputs, and that it was using bogus purchases bills from non-existent parties. The Central Excise Department identified 19 such fictitious vendors. On the strength of these allegations, the Income Tax Department also took up the assessee''s case for scrutiny and issued notice u/s 133(6) of the Act to 16 parties.

4. After considering the materials on record, the AO rejected the books of accounts and determined the net profit at 10% to the total sale of business at Rs. 16,40,91,000/- in addition to other income declaration by the assessee. A further addition was made to the tune of Rs. 18,34,490/- u/s 40(a) (ia) of the Act for non-deduction of tax at source.

5. The assessee preferred an appeal to the Commissioner (Appeals). The latter confirmed the rejection of the assessee''s books of accounts, addition of Rs. 1.64 crores and the addition of Rs. 18.34 lakhs. In the meanwhile after the search operations of the Central Excise Authorities, the assessee had approached the Settlement Commission under the Central Excise Act and disclosed an excise liability of Rs. 3.67 Crores. As against an initial demand of Rs. 7,73,62,600/- by the Excise Authorities pursuant to the search operations, the Commission finalized the assessment at Rs. 4,94,57,794/-. The order and the relevant materials pertaining to the Settlement Commission proceedings was allowed to be taken on record in the Appellate Commissioner''s proceedings as additional evidence. However, the order of the AO was confirmed despite these subsequent developments.

6. The ITAT noticed that the stock found in the premises during the search was also tallied on 04.12.2006 along with statutory records, i.e., the payment of excise duty, however no discrepancy was found in the stock. The Tribunal noticed that the show cause notice had alleged purchases from 19 non-existent or bogus vendors, and that the enquiries from transporters showed discrepancy in the numbers of the vehicles or that the bills were non-existent. It was also noticed that the AO in the Income Tax proceedings made enquiries in respect of purchases from 16 parties, of which 5 were common with parties mentioned by the Excise Authorities in the show cause notice. Taking further note of the Settlement Commission''s order fixing the assessee''s liability at Rs. 4.94 Crores, as well as the findings of that Commission to the effect that gate pass registers had been maintained from 2004 onward, and the statements of some of the suppliers, the ITAT held as follows:

8.8 In the light of the aforesaid discussion, we are of the view that the facts established before the Settlement Commission, which were considered by the ld. CIT (Appeals) and in regard to which the AO had also made enquiries from the assessee, will have to be taken into account for the purpose of computation of the income of the assessee. However, all allegations made in the show cause notice cannot be taken to be consideration as in the first place these were only allegations,

and in the second place many of them were proved to be wrong or not established before the Settlement Commission. In other words, the order of the Settlement Commission can be said to be the right basis for settling facts as no evidence was brought on record by either party to displace such findings.

7. The ITAT also took note of further aspects such as the complete stock tally made on 04.01.2006, which established that though some vendors were not in existence, yet the goods were actually used in the process of manufacturing of final products, and that the facts involved in addition to such purchases were drawn in cash sometimes directly and sometimes by the two concerns. The ITAT took note of the material facts and found that there was no evidence showing that monies flowed back to the assessee or its directors. The ITAT, therefore, further reasoned as follows:

9.1 On the basis of aforesaid facts, it cannot be said that the books of account contained material defects so as to lead to their rejection on account of incompleteness or unreliability. The only thing which can be said is that the purchase price of the goods from 10 vendors does not stand established on the basis of evidence produced by the assessee. In coming to this conclusion, we have taken into account the fact that there is no evidence of flow back of the money, production of unaccounted goods, diversion of goods purchased for some other purpose or clandestine removal of finished products.

9.4...However, there is no corroborative evidence to support the bills from 4 or 5 parties, made in this year. There are attendant circumstances such as withdrawals by the vendors in cash, non payment of excise duty them and absence of day to day stock registers. These facts do lead to a reasonable inference that the arrangement was to inflate purchase price. Looking to the fact that no direct evidence could be produced by the assessee to support the bills, it will be fair to restrict the disallowance to 10% of the purchase price, mentioned in the bills.

9.5 It was also the case of the ld. counsel that all the purchases were not made on revenue account and some of the expenditure was capitalized. In respect of the four vendors, from whom purchases were made amounting to Rs.303.68 crore, the purchases on capital account capitalized as fixed assets in the block of plant of machinery, was stated to be Rs.1,44,42,100/-. The balance purchases were in respect of raw material. The position in the case of Ashish Alloys & Castings (P) Ltd. is not known to us. In view thereof, the AO is directed to segregate the purchases from the aforesaid five parties made in this year in terms of capital expenditure and revenue expenditure. 10% of the revenue expenditure will be disallowed on account of non-verifiability of the purchase price and similarly 10% of the expenditure on capital account shall be reduced from the cost of purchase of plant and machinery for the purpose of computation of depreciation. The result of this discussion is that ground No.1 is partly allowed.

8. It is urged by the Revenue that satisfaction of the AO and as confirmed by the CIT(Appeals), all facts, i.e., claims of purchases from bogus vendors were based upon analysis and appreciation of all the materials on record. These findings also received corroboration because the vendors upon being summoned did not respond and present themselves in the assessment proceedings. Furthermore, the records of transportation of such material were of dubious nature. The assessee had relied on cash withdrawals to state that such expenditure had been incurred. Given the conspectus of these facts and circumstances, the disallowance of such expenditure and adding back was justified and should not have been interfered by the ITAT. It was urged by counsel for the Revenue that the materials before the Settlement Commission at best showed that 5 parties from whom the material was purchased were common with the list of suppliers available with Income Tax authorities. Furthermore, the AO had given valid reasons for rejection of books of accounts. In these circumstances, the ITAT could not have rejected the addition at 10% purchases from 4 parties only by relying on the findings of the Excise Commission.

9. The assessee urged that the impugned orders of the Tribunal made an in depth analysis of the Settlement Commission''s order as well as the materials available. The learned counsel pointed out that the statutory registers and gate passes clearly pointed to the assessee in fact having used the inputs. That some of the vendors did not participate in the assessment proceedings was one adverse factor, but could not have been the conclusive one to decide that all purchases were bogus. In these circumstances, argued counsel, ITAT order is sound and justified does not call for any interference.

10. The Court notices at the outset that of the enquiries conducted by the AO from 16 parties u/s 133(6), 8 parties had directly sent relevant information. The assessee had furnished information in respect of two parties on 24.12.2007 before completion of the assessment. The information in respect of the others was furnished on 26.12.2007. Apparently, as evident from para 3.2 of the impugned order, details and particulars in regard to 15 vendors, had been furnished during the course of assessment.

11. It is necessary to notice a few important facts at this stage. Firstly, the Central Excise Authority conducted a search proceeding on 02.01.2006 in the assessee''s premises. The stocks found in the premises were tallied with the statutory records maintained for purposes of payment of excise duty. Significantly, no discrepancy was found in the stock. The allegations made in the show cause notice issued by the Excise authorities was that 19 non-existent vendors are alleged to have supplied material, and that there was no corresponding gate pass entries. The bank of the vendors showed that the monies were withdrawn in cash and were routed from certain accounts. It is a matter of fact that during settlement proceedings, the assessee''s liability was limited to Rs. 4.94 crores in respect of the Excise demands.

The important findings of the Commission were that the stock tallied with what was utilized in respect of the final product thus belying the allegation of bogus purchases. In other words, the inputs claimed to have been received were actually utilised for the final product. So far as gate passes were concerned, the Commission held that the gate registers were maintained from 2004 onwards and absence of entries in that register ipso facto could not lead to the conclusion that no goods were received. The Commission also held that the only exception was M/s. Ashish Alloy Casting Pvt. Ltd., which in fact, stated that it was manufacturing FRP and Abrasives, and not the items mentioned in the returns. Most importantly, the assessee accepted the liability of Rs. 4,61,55,055/- due to non-payment of duty by some vendors.

12. The AO had concluded the assessment on the assumption that the assessee failed to produce the books of accounts and what was made available were only copies of computerized ledger accounts. The assessee had contended that books of accounts and other material had been seized by the Excise authorities. The Tribunal noted here that though the AO was aware of the search and seizure operations, he made no attempt to obtain the books of accounts from the Excise authorities. This could have been done even in the proceedings before the CIT (Appeals) when the remand report was filed. The failure of the Revenue, therefore, could not oblige the assessee''s disadvantage. This Court confirms the said finding of the ITAT.

13. So far as the Revenue''s complaint that the ITAT ought not to have substantially accepted the assessee''s contention is concerned, this Court is of the opinion that the findings recorded in Para 8.8 and Para 9, 9.1 to 9.5 in the impugned order in favour of the assessee are warranted. The findings of the Settlement Commission were based upon assessment of the materials before that authority; it was satisfied that the inputs had been used to a large measure. That the assessee was unable to pinpoint or ensure the presence of the vendors in the assessment proceedings could not have been sole ground for rejecting its entire books of accounts, particularly when there was relevant material suggesting that the inputs had, in fact, been utilised and paid for. The suspicion that the cash withdrawn by the vendors directly might have found its way back to the assessee could not have led to the rejection of the books of accounts and the drastic consequences, which the AO in this case had directed by way of disallowance. In these circumstances, this Court is of the opinion that the restricting the disallowance amounts, both in terms of the number of vendors and to 10%, is neither unreasonable nor without justification. The findings of the Tribunal in this regard are, therefore, upheld. The questions of law framed at the behest of the Revenue are answered against it.

14. As far as the question of disallowance of Rs. 18,34,490/- made by the AO u/s 40(a)(ia) is concerned, the Court notices that the ITAT in its order has made a chart disclosing the rate of TDS for various salts, which the assessee did not resort to. This resulted in addition of Rs. 18,34,490/-. The assessee''s contention was that the AO

could be directed to allow the deduction in the year when the tax was actually paid.

15. The assessee''s contention in its cross objection with respect to this finding is that the ITAT completely overlooked the fact that Section 40(a)(ia) had been amended by Finance Act, 2008 w.e.f. 01.04.2005. This aspect has not and cannot be disputed. Section 40 directs a disallowance in the computation of profits and gains from business or profession in the case of any assessee where inter alia any amounts payable as interest, commission, brokerage, rent, royalty, fees for professional services or amounts payable to contractor or sub-contractor, for carrying out any work on which tax is deductible at source under Chapter XVII-B and such tax had not been deducted, or, after deduction, -

a) As in a case where tax was deductible and was so deducted during the last month of the previous year on or before the due dates specified in Section 139(1) or

b) In other cases on or before the last day of the previous year.

The proviso to Section enabled these sums to be allowed as deduction in computation of the income of the previous year in which the tax had been paid. This provision, i.e., amendment made w.e.f. 01.04.2005 concededly was in force w.e.f. 01.04.2005 and was on the statute book till 11.03.2010. Clearly therefore, the assessee was not under obligation to deposit the TDS amount and could deduct addition of Section 40(ia) with its proviso as it existed then. This aspect appears to have been lost sight of the ITAT. The assessee''s contentions, therefore, are merited. Its cross objections are consequently allowed.

16. In view of the above foregoing reasons, the Revenue''s appeal fails and is hereby dismissed. The assessee''s cross objection is allowed; the sum of Rs. 18,34,490/- is directed to be given the benefit of deduction u/s 40(a); the disallowance directed by the AO and as upheld by the CIT (Appeals) are consequently set aside. The file is directed to be restored to the AO who shall give effect to the present order on the assessee''s cross objection.