CIT Vs Uniword Telecom Ltd.

Court: Delhi High Court

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.