

INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "E": NEW DELHI  
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER  
AND  
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 415/Del/2015  
(Assessment Year: 2010-11)

|                                  |     |                                                                                                                   |
|----------------------------------|-----|-------------------------------------------------------------------------------------------------------------------|
| ITO,<br>Ward-16(3),<br>New Delhi | Vs. | Media Satellite & Telecom<br>Ltd,<br>1201, B-89, Hemkunt<br>Chamber, Nehru Place, New<br>Delhi<br>PAN: AAACM0721D |
| (Appellant)                      |     | (Respondent)                                                                                                      |

|                       |            |
|-----------------------|------------|
| Revenue by :          | None       |
| Assessee by:          | None       |
| Date of Hearing       | 02/05/2018 |
| Date of pronouncement | 10/07/2018 |

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by ITO, Ward-16(3), New Delhi against the order of the Id CIT(A)-IX, New Delhi dated 24.10.2014 for the Assessment Year 2010-11, where, the solitary ground was raised against the deletion of disallowance of Rs. 6056122/- on account of 'rebate and discount' given to related parties.
2. The revenue has raised the following grounds of appeal:-
  - "1. *Whether on the facts and circumstances of the case and in law, the Id CIT(A) has erred in deleting disallowance of Rs. 6056122/- made by the AO by entirely relying on the submission of the assessee although the assessee failed to justify the 'rebate & discount' given to its related party as the onus was on the assessee to justify the above expenditure which the assessee failed to discharge.*
  2. *That the order the Id CIT(A) is erroneous and is not tenable on fact and in law."*
3. The brief facts of the case is that the assessee is a company engaged in trading of electronic goods. The assessee filed its return of income on

26.07.2011 declaring income of Rs. 1826720/-. The assessment u/s 143(3) of the Act was passed on 30.03.2013 determining total income of Rs. 8104609/-. The Id AO disallowed Rs. 6056122/- u/s 40A(2)(b) and Rs. 225770/- u/s 14A of the Act. The assessee preferred an appeal before the Id CIT(A), the Id CIT(A) deleted the addition of Rs. 6056122/-. The disallowance u/s 14A was confirmed. Therefore, the revenue is in appeal before us against the order of the Id CIT(A), where disallowance of Rs. 6056122/- was deleted.

4. At the time of hearing none appeared on behalf of the assessee as well as on behalf of the revenue and therefore, the issue is decided on merits of the case as per the information available on record.
5. The issue involved is that the assessee is purchasing goods from a related party and also selling goods partly to related party. During the course of the assessment proceeding the Id AO noted that the assessee has debited Rs. 6056122/- on account of rebate and discount. On verification of the details submitted by the assessee, he noted that the total discount was given to M/s. MVL Telecom Ltd which is a related party. He further noted that the discount was given @3.75% on sale of games of Rs. 14.24 crores and VCD of Rs. 1.09 crores. The assessee submitted that sale of TV games is only to one party i.e. Media Industries Ltd and there are no other customers. Therefore, it was claimed that comparison between prices cannot be drawn. The assessee submitted that it is with the Merchant Trend which is normal in wholesale trade. It was further stated that receiver of the discount is also paying tax @30% and therefore, there is no tax evasion. It was further stated that the discount is given out of commercial expediency and is allowable as a deduction. The Id AO rejected the contention of the assessee and held that when the sale and purchase is with related parties and beside incurring the selling expenditure the assessee has also given discount and thus incurring the loss on sale of games. He held that it cannot be considered that both are paying same rate of tax. Therefore, he disallowed Rs. 6056122/- paid to

MVL Telecom Ltd by way of discount applying the provisions of section 40A(2)(b) of the Act. The assessee aggrieved with the order of the Id CIT(A) preferred an appeal before the Id CIT(A) who decide the whole issue vide para No. 7 of his order as under:-

*7. Ground of Appeal No. 4 is regarding disallowance of Rs.60,56,122/- u/s 40A(2)(b) of the Act for excessive discount.*

*7.1 The AO observed that, there is decline in sales of the appellant during the relevant year. The AO also found that, the appellant has given discount to one of the related concern to the tune of Rs.60,56,122/- without proper business need. The appellant did not receive any discount on purchase from a related company but provided discount on sale to another related company incurring loss in the books of account. In view of this, considering the fact that both purchase and sale are made to the parties related as mentioned in the assessment order, the AO disallowed the amount u/s 40A(2)(b).*

*7.2 Before CIT(A), the appellant submitted that*

*"The Id. AO has again made an addition for Rs.60,56,122/- as made during last year (A. Y 2009-10) in respect of discount allowed by the appellants as per past practice.*

*On similar facts of the case, on similar trade pattern followed by the appellant in the past years, your Honor had accepted the contentions of the appellant and similar discount of Rs.1,07,87,411/- allowed during AY 2009-10 by the appellant to the same customer Media Industries Limited now called MVL Telecom was held allowable in appeal no. 139/11-12 vide order dated 21.01.2014 of CIT Appeals IX New Delhi. Copy of the said order is enclosed. This situation has been accepted by the IT Dept, and no appeal has been filed against the relief so allowed for addition made u/s 40A(2)(b) of the Act. Therefore the similar disallowance of Rs.60,56,122/- made u/s 40A(2)(b) be allowed. Without prejudice to the above claim in respect of consistency to be maintained by the Income tax department, the disallowance of Rs. 60,56,122/- is not sustainable also on account of following alternative grounds:*

*Elements of Commercial expediency in achieving the large turnover and earning a taxable profit has been ignored. In this regard, it shall be apt to consider following case law:-*

*So far as the legitimate business needs of the assessee or the benefit derived by or accruing to the assessee from goods, services or facilities etc, are concerned these are not to be judged from the point of view of a revenue officer but from*

*the view point of businessman. [Voltamp Transformers Pvt. Ltd. Vs. CIT (1981) 129 ITR 105 (Guj)]*

*Provisions of Sec. 40A(2)(b) of the Act have not been complied with to the extent of quantifying the element of unreasonable and excessive nature of expense if any claimed by the appellant in the opinion of the AO.*

*The 100% disallowance of rebate and discount has been made on the sole consideration that it was allowed to an associated concern, whereas the value and volume of sales made to the associated concern from whom the total bread and butter was earned, has been ignored.*

*Payment cannot be disallowed u/s 40A(2) merely because it is made to a related person: merely because a payment is made to a related person it cannot be understood as being non genuine or that is excessive or unreasonable. In the absence of such finding in this regard, the payment could not be disallowed. [Shree Construction & Investment Co. Vs. Asst. CIT (2003) 262 ITR 73(Guj)]*

*In support of the above contentions we also rely upon the following judgments:*

*CIT Vs. Surendra Buildtech Pvt. Ltd. (2011) 47 SOT 212/12 Taxman.com 178 (Delhi) Asst. CIT Vs. Budha Lai & Co. (2011) 47 SOT 27 (URO)/10 Taxmann.com 52 (AHD) DCIT Vs. Ravi Ceramics ITA No. 2959 (AHD) of 2009 AY 2006-07 ITAT Ahmadabad Bench C order dated 11.05.2012.*

*Without prejudice to the above contentions the Ld. AO has further erred in calculating the economics of sales made to MVL Telecoms Ltd. for games only. He has conveniently ignored a large volume of sales made to the same party for VCD's. For commercial reasons, during the year looking at the overall turnover with the same customer, it was decided to allow discount on one item when the appellant were making profit on the other item - VCD sales, which compensated the loss of revenue. On an overall basis there was no loss in total sale of goods to MVL Telecom Ltd. during the year. As such there is no reason to cherry pick a solitary item without taking into account the total sales of games and VCD's during the year.*

*This is a tax neutral disallowance. Both companies, the payer and the recipient are both taxpaying companies. Copy of income assessed for A.Y 2010-11 of MVL Telecom Ltd. (Formerly Media Industries Ltd.) is enclosed. It will be observed that the assessed income of the said company is Rs. 99,22,696/-. Since both companies are being taxed at the same flat rate of 30.9%. It is not a case of transfer of income from a profit making company to a loss making company in a scheme of tax avoidance. Therefore there is no hidden benefit*

*availed by the appellant in giving discount against sales, which was allowed on principals of commercial expediency. In this connection we also relied on following case laws in our support:*

*CIT Vs. Siya Ram Garg FIUF (2011) 49DTR 126 (Copy enclosed)*

*Triveni Silks Mills Vs. ITO Ludhiana ITA No. 791 CFID/2011 AY 2006-07 Order dated 22.09.2011(Copy enclosed)*

*Without prejudice to the above submissions the same income cannot be taxed twice once in the hand of the appellant as discount disallowed and again in the hands of the payee as discount received. It is not disputed by the A.O. that the payee has taken credit of the discount and increased its income to the same extent. It is thus submitted that if or any reason the addition is sustained, a direction be also issued to the AO of the payee company to exclude the same from its income. "*

**7.3** *This issue has been discussed in detail in appellant's own case for in appeal No. 139/11-12. It is discussed as below:-*

*"It is seen that, the appellant has already explained with the documentary evidence that how much it would have cost to the assessee if same services were to be availed either by employing whole time employees on its role or obtaining the services of the independent consultants on these areas. The company could not give better justification than this. However, the AO has proceeded on altogether different reasoning and even not attempted to specify by taking an independent view of the matter and has rather disallowed the amount.*

*There is no doubt as to the judicial proposition as to whether the payment is excessive or reasonable is a question of fact. However, the fact of excessive or reasonable is required to be established is only by knowing as to what would be reasonable amount for the services obtained. The assessee explained as to how the payment made was reasonable and justified. It was for the AO to dispute the claim on some cogent evidence and material which has not been done by him. Hence, the judicial decisions cited by AO does not support AO's findings. The judgments mentioned by the AO in his order simply suggest the principles which are laid down by Section 40A(2)(a)/(b) of the Act.*

*As per the provisions of Section 40A(2)(a) some justification on the basis of comparables and bench marking is required to*

*prove the existence and quantify the unreasonableness of the expenses to be considered for disallowances. The AO did not ascertained Fair Market Value (F.M.V.) of the services and other connotations to establish that appellant has paid unreasonable amount and quantum of payment does not commensurate with the services rendered. Since the level of discount given is same to all dealers, the FMV is not violated. The intention behind the provision of Section 40A(2)(a) is to prevent the intentional reduction in tax liability by certain assessee's by diverting business profits to close relatives and concerns in the form of excessive payments for goods and services received. The facts and circumstances of the case does not indicate any such tax evasion plan. Both the companies are the tax - paying entities at the same rate of tax. So long as the arrangement is genuine and bona fide and the intention is not to evade taxes, it cannot be disregarded for the purpose of determining the taxability of the respective entity.*

*At this juncture, reliance may be placed on the decision of Hon'ble High Court in the case of CIT Vs. M/s Gautam Motor (2010) 194 Taxman 21 (Delhi) also 334 ITR 326 (Del). Wherein it is held that,*

*"There is no case made out by the Department that any tax avoidance has been attempted by these arrangements. We, therefore, see no justification to hold the additions made by the Ld. AO and sustained by the CIT(A), the same is directed to be deleted and this ground of appellant is allowed. "*

*In the case of Glaxo Smithkline Asia Pvt. Ltd. (SLP Civil No. 18121/2007), the Hon'ble Supreme Court has held that in the case of related party transactions the authorities must examine whether there is any loss of revenue. And, if exercise is revenue neutral, than the matter may be decided accordingly. So long as the arrangement is genuine and payments have actually been made and there is no tax evasion planning involved, when both the entities are paying tax at the maximum marginal rate, there cannot be any justification in disallowing any amount on estimated basis. Such revenue neutral addition made by AO unnecessarily increases avoidable academic exercise. In the case CIT Vs. M/s Excel Industries Ltd. (itatonline.org) in appeal no. 125 of 2013 vide order dated 08.10.2013 the Hon'ble Supreme Court held that the AO is required to be pragmatic and not pedantic. The Apex Court also observed that Revenue cannot be allowed to flip-flop on the issue and if ought let the matter raised rather than spend the tax payers money in pursuing litigation for the sake of it. In the similar facts and*

*circumstances of the case, the Apex Court observed that, "It is not as if the Revenue has been deprived of any tax. We are told that the rate of tax remained the same in the present A. Y. as well as in the subsequent A. Y. Therefore, the dispute raised by the Revenue is entirely academic or at best may have a minor tax effect. There was, therefore, no need for the Revenue to continue with this litigation when it was quite clear that not only was it fruitless (on merits) but also that it may not have added anything much to the public coffers."*

*Respectfully following the judicial pronouncements discussed above and also because the nature of transaction is genuine and in the absence of any revenue loss, the disallowances made by AO is deleted. This ground of appeal is allowed".*

*The facts and circumstances of the case remaining same, the addition made is deleted and ground of appeal is allowed."*

6. The Id CIT(A) has decided the issue by following his own decision in its own case for Assessment Year 2009-10. Furthermore, the Id AO could not show that the expenditure incurred by the assessee is excessive or unreasonable providing market comparative price with respect to the fair market value of the goods. The Id AO could not show that without offering the discount the goods are saleable and are not in accordance with the legitimate needs of the business of the assessee. In absence of these the Id AO could not have applied the provisions of section 40A(2)(b) of the Act. In view of this we do not find any infirmity in the order of the Id CIT(A) in deleting the above disallowance.
7. In the result the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 10/07/2018.

-Sd/-

(AMIT SHUKLA)  
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER

Dated: 10/07/2018  
A K Keot

Copy forwarded to

1. Applicant

2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi