IN THE INCOME TAX APPELLATE TRIBUNAL
" D " BENCH, AHMEDABAD

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER And
MS. MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./ITA No.967/Ahd/2018

(□नधार□ण वष□/Assessment Year : 2013-14)

Sterling Addlife India Pvt.Ltd. Sterling Hospital Buildings Off Gurukul Road Memnagar Ahmedabad-380 052	**बनाम**/ Vs.	The Pr.CIT-4 Ahmedabad
□थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AADCA 0897 M		
(अपीलाथ□/**Appellant**)	..	(□□यथ□ / **Respondent**)

अपीलाथ□ ओर से/ **Appellant by** :	Shri Dinal Shah & A.C.Shah, Ars
□□यथ□ क□ ओर से/**Respondent by**:	Shri Mahesh Shah, CIT-DR

सुनवाई क□ तार□ख/ **Date of Hearing**	28/01/2019
घोषणा क□ तार□ख /**Date of Pronouncement**	27/03/2019

आदेश / O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the assessee against the order of the Commissioner of Income Taxï 4, Ahmedabad [CIT in short] dated 28/03/2018 relevant to Assessment Year (AY) 2013-14.

2. The assessee has raised the following grounds of appeal:-

1. The learned Principal CIT has erred in holding that the order passed under Section 143(3) dated 29-02-2016 is erroneous and prejudicial to the interest of revenue under Section 263

inasmuch as the assessment order passed under Section 143(3) dated 29-02-2016 is not erroneous in so far as it is not prejudicial to the interest of the revenue.

2. *The learned Principal CIT has erred in holding that the order passed under Section 143(3) dated 29-02-2016 is erroneous and prejudicial to the interest of revenue under Section 263 on the ground that the AO has not made detailed inquiry in as much as the AO has made the detailed inquiry at the time of assessment proceedings.*

3. The common issue raised by the assessee in the ground no. 1 and 2 is that the Ld. Ld.CIT erred in holding that the order passed by the AO u/s 143(3) dated 29-02-2016 as erroneous in so far prejudicial to the interest of Revenue under section 263 of the Act.

4. Briefly stated facts are that the assessee is a private limited company and deriving income from hospital-medical services. The AO framed assessment u/s 143(3) of the Act dated 29-02-2016 after making an addition of Rs. 7,86,579/- on account of disallowance u/s 14A of the Act. Subsequently, the Ld. CIT on scrutiny of assessment order observed that the AO allowed deduction of Rs. 3,95,64,875/-on account of premium expenses for conversion of agriculture land to non-agriculture land. As such the assessee had sold land dated 07-08-2012 during the year under consideration for Rs. 26 crores to V square developers by Sale agreement dated 07-08-2012 and handed over the possession to the buyer on the same date. The assessee also declared the LTCG in its income tax return for Rs. 25,34,52,209/- only. However, the assessee paid such premium charges on 16-12-2015 for a change of use of land, i.e., from agriculture

to nonagricultural land which was granted by collector Surat vide letter dated 07-12-2015 after transfer of land and filing of return of income by the assessee.

4.1. The assessee company during the assessment proceeding before the AO filed revised working of capital gain claiming a further deduction of Rs. 3,95,64,875/- on account of premium paid to Surat Municipal Corporation which was borne by the assessee as per clause 11 of the said agreement.

4.2. However, the claimed was made through an unsigned letter dated 05-01-2016 before the AO. The AO admitted the claim of the assessee though the assessee did not file the revised return of income.

4.3. The ld. CIT accordingly noted that the AO allowed the deduction of the amount stated above without making any inquiry in this regard. The AO also did not examine the claim of expenses on transfer, Capital Gain declared in the return of income, neither copy of sale deed nor the purchased deed were called for examination. The copy of agreement by which land was transferred was also not available on record. In the absence of agreement the ld. CIT opined that the AO did not examine the claim of assessee regarding capital gain.

4.4. Further as per Para 34 of notes to the financial statement for the year ended 31-03-2013, the assessee declared a profit on the sale of land

of Rs, 13,64,86,728/-, however in the return such profit was declared at Rs. 25,34,52,709/-.

4.5. Considering the above, the ld. CIT was of the view that the AO while passing order u/s 143(3) of the Act had not considered the above discrepancies and failed to make proper inquiries in this regard before allowing the premium expenses. Thus order passed by the AO appeared to be erroneous and prejudicial to the interest of the revenue.

4.6. On a question by the CIT assessee submitted that the assessee paid Rs. 3,95,64,875/- to Surat Municipal Corporation under the obligation as per clause 11 of agreement to sale. As per this clause, the assessee is responsible for premium if any payable for converting the land from agricultural to Non-Agricultural approvals. Hence such expenses have been incurred directly in connection with the transfer of land.

4.7. However, the CIT after considering the submission of the assessee held that the AO failed to make proper inquiry regarding the claim of expenditure of premium payment against the income offered for the year under consideration u/s 45 of the Act. Hence the order of the AO is erroneous in so far prejudicial to the interest of the Revenue.

4.8. As such the documents, i.e., an agreement to sale, letter of possession, a premium paid receipt filed during the proceeding under

section 263 of the Act needs to be verified for the deciding the allowability of premium paid.

4.9. In view of the above the ld. CIT set aside the order passed by the AO with the direction to make a fresh assessment after proper inquiry and verification about the expenses as discussed above.

5. Being aggrieved by the order of ld. CIT, the assessee is in appeal before us. The ld. AR before us submitted as under:

"1. The case of the assessee company was selected for scrutiny assessment under Section 143(2) of the Act, Notice under Section 143(2) dated 04-09-2014 was issued and served upon the assessee.

2. During the A.Y. 2013-2014, the assessee company had transferred land situated at Surat to V. Squre Developers by agreement to sale dated 7th August, 2012 for Rs. 26.00 Crore. The assessee has received Rs. 26.00 Crore as full consideration.

2.1. The possession of the land was also given by separate possession letter dated 7th August, 2012. The final Sale Deed was pending in that year.

2.2. Since, the agreement to sale and the possession of the land was given to the buyer, the company treated the same as transfer by virtue of provisions of Section 2(47)(v) of the Income Tax Act. Accordingly, the capital gain was offered for taxation m the income tax return for A.Y. 2013-2014. The necessary disclosure was also made into the notes to the accounts at Sr. No. 34.

2.3.As per Clause No. 11 of Agreement to Sale, the seller i.e. the appellate company was responsible for premium, if any, payable for NA approvals. Accordingly, the seller i.e. the appellate company was required to pay premium of Rs. 3,95,64,875 to Surat Municipal Corporation in respect of this land. Clause No. 11 of the agreement to sale is reproduced for your ready reference:

> *"11. The land comprised in this Agreement are old tenure land and no premium is payable to the State Government under any law for the time being in force. The seller is responsible for any demand of premium with respect to classification of land and indemnify the Buyer in case of demand arises, if the same arise during the course ofN.A. approvals."*

2.4. This amount of Rs. 3,95,64,875 was an obligation on a seller to transfer this land, Therefore, this expenditure is incurred in connection with transfer of a land and hence, the revised capital gain working was furnished to the assessing officer.

2.5 The appellant company vide letter dated 05-01-2016 has furnished the details alongwith the revised computation of income. Following details were furnished to Assessing Officer during the course of assessment proceedings:

1. Agreement to Sales
2. Letter of Possession
3. Premium paid receipt of Rs. 3,95,64,875

2.6 The Assessing Officer has examined the documents and in Para No. 6 of the Order has specifically stated that the claim of premium paid in relation to sale of land was verified by him and therefore same was allowed. The AO passed an assessment order under Section 143(3) assessing normal income at Rs. NIL and book profit at Rs. 11.06 Crore.

3. Notice under Section 263 was issued in relation to additional claim of premium of Rs. 3.95 Crores during the course of assessment proceedings on following grounds:

3.1 The AO has allowed the claim without examining necessary documentary evidences in relation to such claim.

3.2 The AO has not examined the taxability of capital gain for MAT provision and also not called for the reconciliation between the amount of capital gain as per return and as per the financial statements.

3.3 Further, it is stated that the assessing officer could not allow the claim without revising the return of income.

3.4 In view of above observation, the notice is issued on the ground that the assessment order is erroneous and to that extent, it is prejudicial to the interest of revenue.

4. The appellant company has filed reply dated 22-02-2018 in response to notice under Section 263. However, the Pr. CIT - 4 has passed an order on 28-03-2018 by Setting aside the order and directing the AO to make fresh assessment after making proper enquiries and verification about the expenses.

Ground No. 1: The assessment order passed under Section 143(3) dated 29-02-2016 is not erroneous in so far as it is not prejudicial to the interest of the revenue:

5. The letter dated 5th January, 2016 filed with the AO (unsigned through oversight as per assessment record) is not material as same is acknowledged by the tax department as per stamp affixed on the letter and also same has been considered specifically by the AO while passing the Assessment Order and therefore same can not be ignored.

The assessing officer has referred this letter in the assessment order in para 6 and has also stated that he has verified this claim and then allowed. Hence the question of non-verification does not arise.

6. The copy of the final sale deed was executed on 31st May, 2016 and therefore same was not submitted at the time of assessment. The sale deed was executed only for the completion of formalities of revenue records as for tax purpose the transaction was already treated as transferred based on agreement to sale, possession letter and the consideration received for the relevant assessment year.

7. The capital gain in financial statement is the difference between the sale consideration and the cost of acquisition as per books and the expenditure incurred. This fact is stated in Note No. 34 of financial statement.

Whereas computation of capital gain for income tax purpose is in accordance with the provision of Section 45 and Section 48. Thus the amount of capital gain would always be different between the two.

The amount of profit credited to Profit and Loss Statement was also verified by AO for the purpose of calculation of book profit under Section 115JB and the certificate from Chartered Accountant in Form No. 29B determining the book profit is also available in record.

And therefore, based on the above observation, the conclusion drawn by the Pr. CIT-4 that the assessment order is erroneous and prejudicial to interest of revenue is not correct.

8. The Income return was under the MAT provision under Section 115JB and the income is also assessed under the MAT provision. The additional claim of Rs. 3.95 Crore has resulted in additional carry forward loss but the income has not been assessed less than returned income. Therefore, the assessee company was

not required to file the revised return since there is no prejudicial to the interest of the revenue. The Pr. CIT-4 has relied on the Apex Court decision in case of Goetze (India) Ltd. V/s. CIT 284 ITR 323 (SC) and CBDT Circular No. 549 dated 31-10-1989. But as income assessed is not less than the income returned, the reference to Circular of CBDT No. 549 dated 31-10-1989 is not applicable. The income returned was Rs. 10.98 Crore and income assessed was Rs. 11.06 Crore under the MAT provision and thus assessee company was not required to revised the return for the additional claim and as the assessee is not liable to file revised return of income, the reliance on SC Judgment and CBDT Circular is misplaced.

9. In any case as per the law laid down by the Gujarat High Court in case of Mitesh Impex Pvt. Ltd. [2014] 46 taxmann.com 30 (Gujarat), the assesse can raise any additional claim at any appellate stage of the proceeding without filling the revised return. Hence the argument of the learned CIT is not correct.

Ground No. 2: The AO has made the detailed inquiry at the tune of assessment proceedings.

10. The appellant company has furnished all the necessary documents for the claim of expenditure incurred on account of premium paid vide letter dated 05-01-2016. The AO has examined all the documents and in Para No. 6 of the order has specifically stated that the claim of premium paid in relation to sale of land was verified by him and therefore same was allowed.

11. And therefore the observation made by the Pr. CIT - 4 in Para No. 7 [Page No. 8 of the Order under Section 263] that the AO has not examined the claim with documentary evidences is factually not correct. Therefore, the assessment order is not erroneous and prejudicial to the interest of revenue. Further learned CIT has not pointed out any specific deficiency as to what is not verified in the order and it is a general observation.

12. The AO has made proper inquiry and thereafter the capital gain is worked out. The capital gain is properly worked out since the premium is paid to the government as per Clause No. 11 of agreement to sale. So far as the payment is concerned, the AO has examined the payment properly and satisfied about the same and therefore he has allowed the deduction. The premium is paid as per Clause No. 11 of agreement to sale. The sale deed is only a formality to complete the transfer of land. Therefore, there is no need for any further inquiry.

13. Explanation 2 to Sec. 263 was inserted w.e.f. 1st June, 2015 and therefore the explanation is not applicable for the assessment year under appeal.

Further, the Ahmedabad Tribunal in the case of Torrent Pharrnaceuticals Ltd. 173 ITD 130 has laid down the principals in para 9 to 9.3 about the applicability of new explanation. It is held that in adequacy of inquiry cannot be taken as a recourse under this explanation.

There is a distinction between lack of inquiry and inadequate inquiry. It is only in case of lack of inquiry, CIT is empowered to exercise his revisional powers u/s. 263. Please refer para 5.4 and 5.5 of Delhi IT AT decision in the case of Sansspareils Greenlands Pvt. Ltd. v/s. CIT 99 Taxman.com 222. The Hon'ble Tribunal has followed Bombay High Court Judgment in the case of Gabrial India Ltd. which is relied upon Supreme Court Judgment in the case of Parashuram Pottery Works Co. Ltd. 106ITR1.

14. In any case, SC in the case of Malabar Industrial Co. Ltd. V/s. CIT 243 ITR 83 held "when an ITO adopted one of the course permissible in law and it has resulted in loss of revenue or where two views are possible and ITO has taken one view which CIT does not agree, it cannot be treated as erroneous order prejudicial to the interest of revenue unless the view taken by the ITO is unsustainable in law ".

15. The appellant further relies on the following decisions.

1. CIT v/s. Reliance Communication Ltd. (Mumbai High Court) (76 Taxmann.com 226) (Relevant Para 10)

2. CIT v/s. Arvind Jwellers (Gujarat High Court) (259 ITR 502) (Relevant Para 6)

3. Ravi K. Modi v/s. ITO 151 Taxmann 11 (Ahmedabad ITAT) (Relevant Para of page 7 of the order)

4. Sansspareils Greenlands Pvt. Ltd. v/s. CIT 99 Taxman.com 222 (Delhi ITAT) (Relevant Para 5. To 5.9)

5. CIT v/s. Gabrial India Ltd. 203 ITR 108 (Bombay-High Court)

6. CIT v/s. Sunbeam Auto Ltd. (Delhi High Court) 332 ITR 167 (inadequate inquiry can not empowered CIT with revisional powers)

7. Netafim Irrigation India Pvt. Ltd. V/s. Pr. CIT-2, Baroda, ITA No. 864/Ahd/2016.

16. The copy of the final sale deed dated 31st May, 2016 translated in English is attached.

17. The copy of order u/s. 143(3) r.w.s. 263 dated 20-09-2018 is also attached. From the same your honor may please refer para 3 and 4.5 that the notice is issued only for the purpose of premium paid of Rs. 3.95 crore and not for any other issues."

"In furtherance of our gist of submission dated 28.01.2019, we further beg to state as under:

1. Explanation 2 to Section 263 was inserted with effect from 1st June 2015 which is prospective in nature and hence such explanation is not applicable to Appellant's present appeal for AY 2013-14. This is so held by Hon'ble Mumbai ITAT in case of Metacaps Engineering and Mahendra Construction Co(J,V.) V/s. CIT 86 taxmann.com 128 (Mumbai ITAT) [Please refer para 17 of the order].

2. Hon'ble Supreme Court, in the case of Reliance Jute and Industries Limited V/s. CIT [1979] 120 ITR 921, has laid down that the law as on 1st April of relevant assessment year will be applicable for that assessment year.

3. In the present case, law as on 1st April 2013 would be applicable for AY 2013-14. Explanation 2 to section 263 was inserted with effect from 1st June 2015 and hence such explanation is not applicable for assessment year under consideration."

6. On the contrary, the ld. DR submitted that the assessee made the additional claim by the letter dated 5th January 2016 which was not signed by the assessee. Accordingly, there cannot be made any reference to such a letter.

6.1. Further, the AO framed the assessment under section 143(3) of the Act without referring to the sale deed which was crucial before allowing the deduction of the premium paid for the conversion of use of land.

6.2. The learned DR also claimed that explanation 2 section 263 of the Act was applicable in the instant case. The learned DR vehemently supported the order passed by the learned CIT under section 263 of the Act.

7. We have heard the rival contentions and perused the materials available on records. In the instant case, the order of the AO passed under section 143(3) of the Act has been held erroneous insofar prejudicial to the interest of the Revenue by the Ld.CIT under section 263 of the Act. The reasons for holding the order of the AO as erroneous insofar prejudicial to the interest of Revenue are as detailed under:

1. The assessee claimed the land conversion charges amounting to Rs. 3,95,64,875/- by way of unsigned letter dated 05-01-2016.

2. The assessee claimed the deduction of premium charges without filing the revised return of income.

3. The AO did not verify the expenses on the transfer of the land amounting to Rs. 50,85,272.00.

4. The capital gain income declared in return and subsequently in the revised return was not verified by the AO.

5. The AO did not verify the sale deed/sale agreement/purchased the/possession of the land to the buyer.

6. The copy of the sale agreement was not available in the assessment record.

7. The AO did not call for the sale deed/purchased deed for verification.

8. At the time of the hearing, the original assessment records were produced for verification before us. On perusal of the same, it is an admitted fact that the assessee did not sign the letter dated 5-1-2016. However, we are of the view that the said letter was supported by documentary evidence. Therefore in the given facts and circumstances, we presume that the act of non-signing the letter by the assessee is a procedural lapse. It is because the relief was not given by the AO merely on the basis of the letter. As such the deduction was allowed by the AO after verification of the necessary documents such as receipt of payment towards the land conversion charges issued by the Government of Gujarat. Furthermore, there was a clause in the sale agreement by which the assessee was liable to incur such expenses. Therefore we deem it appropriate not to hold the order of the AO as erroneous insofar prejudicial to the interest of revenue merely on the basis of non-signing of the letter written by the assessee in these peculiar facts & circumstances.

8.1. The assessee claimed the deduction against the long-term capital gain income for the expenses amounting to Rs. 3,95,64,875/-incurred by it in pursuance to the agreement to sale dated 7th August 2012. Admittedly the assessee was liable for such expenses as per the impugned agreement. However such expenses were not claimed as a deduction in the original return of income filed by the assessee due to the fact that such expenses were not incurred till the date of filing of income

tax return. At this juncture, we find important to refer the clause 11 of the agreement which reads as under:

> *"11. The land comprised in this Agreement are old tenure land and no premium is payable to the State Government under any law for the time being in force. The seller is responsible for any demand of premium with respect to classification of land and indemnify the Buyer in case of demand arises, if the same arise during the course ofN.A. approvals."*

8.2. However, the assessee claimed the deduction of such expenses during the assessment proceedings by way of filing the revised computation of income. Admittedly such deduction was claimed in the revised computation of income without filing the revised return of income.

8.3. The question arises whether the assessee can claim the deduction for the impugned expenses by way of filing the revised computation of income and without filing the revised return of income. The Hon'ble Supreme Court has settled the impugned issue in the case of Goetze (India) Ltd. Vs. CIT reported in 284 ITR 323 wherein it was held as under:

> *"The decision in question is that the power of the Tribunal under section 254 of the Income-tax Act, 1961, is to entertain for the first time a point of law provided the fact on the basis of which the issue of law can be raised before the Tribunal. The decision does not in any way relate to the power of the Assessing Officer to entertain a claim for deduction otherwise than by filing a revised return. In the circumstances of the case, we dismiss the civil appeal. However, we make it clear that the issue in this case is limited to the power of the assessing authority and does not impinge on the power of the Income-tax Appellate Tribunal under section 254 of the Income-tax Act, 1961. There shall be no order as to costs."*

8.4. From the above, it is clear that the AO cannot entertain any claim of the assessee until and unless the assessee makes such claim in the revised return of income.

8.5. Thus, it is apparent from the order of the AO that he admitted the fresh claim made by the assessee without revising the return of income which is contrary to the judgment of Hon'ble Apex Court in the case of Goetz India (Supra).

8.6. However, we further note that before holding the order of the AO as erroneous insofar prejudicial to the interest of revenue there are 2 conditions which need to be fulfilled simultaneously. Firstly the order of the AO should be erroneous, and simultaneously it should be prejudicial to the interest of revenue. Regarding this, we note that the learned CIT has not brought anything on record which is causing prejudice to the Revenue by allowing the claim of the assessee. As such there was no observation of the learned CIT suggesting that the assessee is not entitled to the deduction of such land conversion charges. Therefore we are of the view that there is no prejudice to the Revenue on account of the claim made by the assessee without filing the revised return of income. Therefore we are reluctant to agree with the finding of the ld. CIT.

8.7. Regarding the expenses on the transfer of property for Rs. 50,85,272.00, we note that the learned AR has not brought anything on record suggesting that the AO verified the impugned expenses during the

assessment proceedings. Therefore, we do not find any reason to interfere in the finding of learned CIT.

8.8. On perusal of the unsigned letter dated 5 January 2016, we note that the assessee has filed the copy of the agreement to sale, letter of possession and the premium payment receipt. Thus it can be concluded that the AO has verified and applied his mind on such documents during assessment proceedings. Therefore, we are reluctant to hold that the order passed by the AO is erroneous insofar prejudicial to the interest of revenue.

8.9. Regarding the purchase deed, we note that the assessee has claimed the indexed cost of acquisition of the land for Rs. 14,62,019 which is not very significant against the capital gain income. It is also important to note that the assessee against such land has declared huge capital gain income amounting to Rs. 25,34,52,709.00. Thus, considering the amount involved in the cost of acquisition of the land, we deem it appropriate not to hold the order of the AO as erroneous insofar prejudicial to the interest of revenue on this count.

8.10. Admittedly, the sale deed dated 31st May 2016 was not available before the AO at the time of assessment under section 143(3) of the Act. However, we note that the assessee offered the capital gain income by the agreement to sale which fulfills the criteria of section 2(47) clause (v) of the Act read with section 53A of the transfer of Property Act. Thus there remains no ambiguity that there was a transfer of the property which is

subject to the provisions of capital gain. Thus in such a case, the reference to the actual sale deed is not relevant. As such the transaction for the transfer of the property was established from the agreement to sale which is sufficient enough to attract the provisions of section 45 of the Act. We further note that once the agreement to sale has been admitted for working out the capital gain income, then this agreement should be accepted as a whole. As such the agreement to sell cannot be accepted in part meaning thereby the Department is accepting the sale value for the transfer of the property on the basis of the agreement to sell. Therefore the same agreement of sale also speaks about the cost to be incurred by the assessee on the conversion of land status from agriculture to non-agriculture. Thus we need to place our reliance on the document of agreement to sell as a whole. Accordingly, we are of the view the reference to the sale deed which has taken place subsequently is not material enough to conclude that the order passed by the AO is erroneous insofar prejudicial to the interest of revenue.

8.11. After considering the facts in totality, we are of the view the order of the AO cannot be held erroneous on account of the reasons as discussed above except the non-verification of the expenses incurred by the assessee on the transfer of land amounting to ₹50,85,272.00. Accordingly, we hold that the order of the AO is erroneous insofar prejudicial to the interest of revenue to the extent of non-verification of the expenses incurred by the assessee on the transfer of the land. Hence, the ground of appeal of the assessee is partly allowed.

9. In the result, the appeal of the assessee is partly allowed.

This Order pronounced in Open Court on 27/03/2019

-Sd	-Sd-
(MS.MADHUMITA ROY)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad; Dated 27/03/2019

ट□सी.नायर, व.□म.स./T.C. NAIR, Sr. PS

आदेश क□ □□त□ल□प अ□ेषित/Copy of the Order forwarded to :

1. अपीलाथ□ / The Appellant
2. □□यथ□ / The Respondent.
3. संबं□धत आयकर आयु□त / Concerned CIT
4. आयकर आयु□त(अपील) / The CIT-4, Ahmedabad
5. □वभागीय □□त□नि□ध, आयकर अपील□य अ□धकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गाड□फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपील□य अ□धकरण, अहमदाबाद / ITAT, Ahmedabad