

**IN THE INCOME TAX APPELLATE TRIBUNAL,
AHMEDABAD BENCH 'A', AHMEDABAD**

[Coram: Justice P P Bhatt, President, and Pramod Kumar, Vice President]

ITA No. 344/Ahd/2016
Assessment year: - 2012-13

United Oil Distributors (Gujarat) Pvt Ltd**Appellant**
17, Safe Ware House,
B/h Ekta Hotel, Sarkhej,
Ahmedabad-380051
[PAN : AAACU 5072 D]

Vs

Dy. Commissioner of Income-tax**Respondent**
Circle 4 (1)(2), Ahmedabad

Appearances by

Aseem L Thakkar, for the appellant
GC Daxini, for the respondent

Date of concluding the hearing : 01.04.2019
Date of pronouncement : 25.06.2019

O R D E R

Per Pramod Kumar, Vice President:

1. By way of this appeal, the assessee appellant has challenged the correctness of the order dated 14th December 2015 passed by the by the Id. CIT(A)-8, Ahmedabad in the matter of assessment under section 143(3) of the Income-tax Act, 1961, for the assessment year 2012-13.

2. Grievance of the assessee, in substance, is as follows:-

“The Assessing Officer as well as First Appellate Authority has erred in law and on facts in making disallowances & partly confirming respectively the claim of cost of improvement amounting to Rs.31,50,580/-, and cost of transfer amounting to Rs.2,25,000/-. The same deserves to be deleted.”

3. To adjudicate on this appeal, only a few material facts need to be taken note of. During the relevant previous year, the assessee had earned capital gains. When these capital gains came up for scrutiny before the Assessing Officer, the Assessing Officer disallowed cost of improvement of Rs.31,50,580/- and cost of transfer of

Rs.5,50,000/-. As for denial of cost of improvement deduction, the reasoning adopted by the Assessing Officer was as follows:-

"During the course of assessment proceedings, details regarding cost of acquisition and cost of improvement were called for. Assessee in its submission filed on 01.01.2015 submitted that total cost of improvement incurred on the said land is Rs.31,50,580/- and whole of the cost has been borne by assessee only. The co-seller i.e. Sanjay Kumar Manubhai Bharwad, has not shared the cost of improvement as per submission of the assessee. AR of the Assessee was asked to justify this discrepancy along with supporting documents vide notice dated 26.12.2024. The assessee submitted its reply vide letter dated 01.01.2025. For a ready reference the relevant para of the reply of the assessee is reproduced below:-

"The claim of expenses incurred towards land filling Rs. 31,50,580/- the assessee through would like to submit the same is allowable under the Act on the following grounds:-

The land purchase was a bare portion with uneven surface not worthy of carrying out any construction work on the same. The assessee through one contractor namely M/s. Shaym Enterprise had incurred the expenses for each filling on this land and to make it able for carrying out any construction activity on it. Later on after earth filling work activity the assessee has constructed on the same. Then is neither doubt not any evidence that the assessee has not earned out the earth filling work on this land.

In support of the claim of the genuineness of the expense apart from the above factual information the assessee is attached the following information:

- 1. Copy of the confirmation of assessee's ledger from the books of M/s. shyam Enterprise.*
- 2. Copy of the bill by M/s. Shyam Enterprise.*
- 3. Copy of mutual understanding documents entered with the co owner fixing the liability on the assessee to bear the total cost of earth filling work.*

So, it becomes clear from the above evidences that the earth filling work was carried out by M/s. Shyam Enterprise, However the payment for the same was not made because there was dispute on the quality of work and ultimately the same will be made in current year as the assessee & M/s Shyam Enterprise have sorted out their difference the same will be made in current year. Considering the above factual position the assessee kindly, request your good self to allow the genuine expenses of 31,50,580/- incurred towards the earth filling working."

4.2 The submission of the assessee has been perused but is not acceptable. It is pertinent to mention here that assessee has claimed expenses in the nature of land filling work carried out on the land sold during the year but no payment has been made to M/s. Shyam Enterprise for the work performed. A notice u/s 133(6) of the Act, dated 23.12.2024 was issued to M/s Shyam Enterprises for providing details of work carried out and payments received from the assessee. No reply was filed on the date fixed neither any request for adjournment was filed. In this regard the assessee was asked to produce the proprietor of M/s Shyam Enterprise, who has supposedly carried out the improvement work on the land mainly land filling work. In its reply dated 01.01.2025 assessee remains silent on producing the proprietor of M/s Shyam Enterprise for verification. It is pertinent to mention here that no payment has been made by the assessee to M/s Shyam Enterprise against the work done. Therefore it is clear that no earth filling work has been carried out on the abovementioned land. The above claim of cost of improvement is only a bogus claim to reduce the tax liability arising out of capital gain.

4.3 Without prejudice to above, it is pertinent to mention here that sale consideration as well as cost of acquisition has been equally shared by assessee & other co-seller. Therefore, the cost of improvement expenses of Rs.31,50,580/- has to be shared equally between the assessee & the other party. The assessee could not prove or justify for claiming 100% of the cost of improvement as expenses from its share of sales consideration. The assessee's reliance on the written understanding entered into with other co-seller Shri Sanjay Kumar Manubhai Bharwad for completely taking the burden of cost of improvement does not justify the claim by assessee, as assessee has received only part of the sale consideration. Also it is pertinent to mention here that the other co-seller Shri Sanjay Kumar Manubhai Bharwad has not filed return of income for A.Y.2012-13. It is pertinent to mention here that the onus is on the assessee to prove the genuineness of any expense or deduction claimed by it in the return of income.

In view of the above the cost of improvement i.e Rs. 31,50,580/- is hereby disallowed and added to the total income of the assessee to be taxed on short term capital gain. Penalty proceedings u/s. 271(1)(c) of the Act is initiated separately for furnishing inaccurate particulars of income.

(Disallowance of Rs. 31,50,580/-)"

4. Similarly, with regard to denial of deduction for cost of transfer, the stand of the Assessing Officer was as follows:-

"5. The assessee has also claimed Rs. 5,50,000/- and Rs. 1,12,500/- as cost of transfer and the cost of acquisition respectively. Amount of Rs.5,50,000/- has been paid to Ramilaben B. Chauhan on 22.09.2009. The assessee has submitted that above payment has been made in consequence to the agreement dated 05.09.2009 for getting no objection from above

person along with her family members. However there is no mention of above payment or any other payment to be made by assessee to above person. In view of the above the assessee was asked vide notice dated 26.12.2014 to show cause why the above payment should not be disallowed. Assessee filed its reply vide letter dated 01 01.2015, the relevant para of which is reproduced below:-

"The assessee has paid this amount for title clearance on this land i.e. they have objection on this land. And for that the assessee has produced the agreement which was registered in Register office Sanand, Moreover the assessee has paid this amount by way of cheque and the copy of ledger with Certificate from the bank is already submitted to your honour in the hearing. Thus there is dear the amount is paid for objection against the land which we have purchase. And if we not dear the objection till time we have not received the NOC from the register and the assessee not sale this land to any one.

Thus it is necessary to clear their objection against land for selling of land or holding the title in the same of purchaser, "Which is wholly and exclusively for transfer of sue assets." Hence it is allowed as cost of transfer or cost of improvement u/s. 48 of the Act.

The submission of the assessee has been perused but not acceptable. The assessee has merely relied on that it has made payment by cheque and that payment was necessary to get NOC from registrar. In this connection the relevant provision of section 48 of the Act is reproduced below:

"48. The income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely :—

- (i) expenditure incurred wholly and exclusively in connection with such transfer
- (ii) the cost of acquisition of the asset and the cost of any improvement thereto"

It is dear from above that only expenditure incurred wholly and exclusively in connection with the transfer is to be allowed as deduction. It is pertinent to mention here that the agreement on which assessee has relied on for allowing the expenditure, does not mention the payment to be made by assessee. The payment made to Ramilaben Chauhan by cheque does not prove the nexus with the land being transferred. The assessee has failed to prove that payment has been made wholly and exclusively in connection with the transfer of land.

In view of the above the deduction of Rs. 5,50,000/- claimed by assessee as cost of transfer is hereby disallowed and added to the total income of the assessee to be taxed on short term capital gain. Penalty proceedings u/s. 271(1)(c) of the Act is initiated separately for furnishing inaccurate particulars of income.

(Disallowance of Rs. 5,50,000/-)"

5. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without much success. The CIT(A) did allow cost of transfer to the extent of 50% thereof (i.e. Rs.2,25,000/-) by observing as follows:-

"5.2 Ground No.3 is against the disallowance of cost of transfer amounting to Rs.5,50,000/-. The assessing officer has observed that the appellant has paid Rs. 5,50,000/- to Ramilaben B Chauhan on 22/09/2009, The said payment was made by the appellant in consequences to the agreement dated 05/09/2009 for getting no objection from her along with her family members.

The AO disallowed the claim of appellant by stating that there was no mention of the payment details to be made to Ramilaben B. Chauhan in the said agreement. In this regard the AR has stated in his submission that the said payment was made to her for getting no objection certificate from her because the said payment was necessary as the appellant was not in a position to sale said land without getting the consent from all the concerned stakeholders.

He further stated that payment was made by the appellant through cheque and copy of ledger along with certificate from the bank was already submitted before the Ld. AO. During the appeal proceedings also a certificate was submitted from Bank of India , S.G. Highway Branch, certifying that the appellant company (Account No. 204020100000015) has issued cheque No. 735995 in favour of Ramilaben B. Chauhan for amount of Rs.5,50,000/- which has been cleared on 22/09/2009. In view of this proof of payment to Ramilaben the claim of the appellant for the cost of transfer is allowable and the AO is directed to allow the same while computing the capital gain. Considering above factual and legal position, the disallowance of Rs.5,50,000/- being cost of transfer deserves to be deleted. Accordingly, this ground f appeal is allowed. However, the assessee being the co-seller, only Rs.2,25,000/- will be allowed as cost of transfer."

6. As for the claim of deduction of Rs.31,50,580/-, being cost of improvement, learned CIT(A) rejected the claim of the assessee and observed as follows:-

"5.1 Ground No.2 is against the disallowance of Rs.31,50,580/- being cost of improvement. Despite enough opportunities given by the AO, the payment made for improvement could not be explained by the assessee. During the appellate proceedings the AR in his submission from point 1.1 to 1.6 as

quoted above, accepted that no payment is made by the assessee to M/s. Shyam Enterprises for the so called work of land filling. He claimed that the copy of confirmation of assessed ledger from the books of M/s. Shyam Enterprise and copy of the bill by M/s. Shyam Enterprise was not considered by the AO. Now, at the time of appeal proceedings also he filed the photo copy of confirmation which is not acceptable as no payment is made and the confirmation is not even signed by the assessee.

The party to whom the payments for land filling is claimed to be given, could not be produced nor the party responded to the notice u/s. 133(6). Even at the time of appeal proceedings the appellant could not submit any proof or evidence for the work done for the improvement and the payment made for the same. The AR himself stated that even till date the payment has not been made. The appellant is not entitled to get claim of cost of improvement which is never paid. Moreover, no proof of work done for the improvement is given. The AO has rightly rejected this claim as the assessee has himself accepted that no payment is made nor he could prove the work done. In view of these details the addition made by the AO is confirmed and this ground of appeal is dismissed.”

7. The assessee is not satisfied and is in further appeal before us.
8. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.
9. When this appeal was taken up for hearing, our attention was invited to the application dated 25th March 2019 seeking admission of additional evidence before us. This application states as follows:-

“Sub: Request for the admission of additional evidences u/r 29 of the I.T. Rules, 1963 for A.Y.2012-13-reg.

Ref: ITA No.344/A/2016 - Bench "A", Ahmedabad.

Sir,

In connection with the above the above it is submitted as under:

1. The assessee company has filed an appeal for A.Y.2012-13 before the Hon. Tribunal against the order passed by the Ld. Comm. Of Income Tax (Appeals)-S, Ahmedabad. The appeal is filed on 11.02.2016 and bearing no.ITA No.344/A/2016 and fixed before Bench "A", Ahmedabad.
2. One of the additions which have come to be made and which is the subject matter of dispute is the disallowance of cost of improvement of Rs.31,50,580/- being the payments made to M/s Shyam Enterprises for the land development charges paid. The assessee company had during

the course of assessment proceedings furnished the following documents in support of the claim of deduction made:

- i. Copy of confirmation from the books of M/s Shyam Enterprises,
 - ii. Copy of bills of M/s Shyam Enterprises,
 - iii. Copy of mutual understanding entered into with the co-owner fixing the liability on the assessee company to bear the total cost of earth filling work.
3. The AO dismissed the contentions of the assessee company and disregarded the evidences furnished and made the additions on the ground that:
- i. Notice u/s 133(6) of the Act was issued to M/s Shyam Enterprises which remained uncomplied,
 - ii. No payment had been made to M/s Shyam Enterprises for the work done,
 - iii. The assessee company had borne 100% of the land filling charges though was having 50% share in the land.
4. The assessee company had during the course of assessment/appellate proceedings clearly stated that on account of disputes with regards the quality of land filling work done the payments had not been made. However, bills/confirmation etc. had been furnished. The notice u/s 133(6) of the Act had been issued to M/s Shyam Enterprises and the AO has stated that no compliance has been made.
5. On inquiry with Shyam Enterprises with regards the alleged non compliance we have been informed that he had made due compliance with the AO at the time of assessment proceedings. The copy of the correspondence by Shyam Enterprises with ITO Ward 4(1)(2), Ahmedabad is placed on record for your Honours perusal by way of additional evidence.
6. During the course of assessment/appellate proceedings it was also submitted that on account of disputes the payments had not been made in the year under appeal. However, the payments had come to be made in the subsequent years when the issue came to be resolved in the subsequent years. In fact, the assessee company leased out its premises on rental basis to SNK Infraspace Pvt. Ltd., wherein Vijaykumar Dholakia, prop, of Shyam Enterprises was a director. Against the rent receivable by the assessee company, the bills raised by M/s. Shyam Enterprise towards land development expenses came to be adjusted. All these events took place subsequent to the expiry of the relevant year under appeal and therefore, the assessee company was not in a position to furnish the details at the time of assessment proceedings. Therefore, additional evidences in the form of rent

agreement, letter for settlement of rent dues from SNK Infraspace Pvt. Ltd. etc have been filed by way of additional evidences. Furthermore, the copies of the audited accounts of M/s Shyam Enterprises are placed on record by which it can be observed that he has disclosed the aforesaid amount by way of income.

7. *With regards the land development expenses it was explained that the land in question was jointly owned with one Sanjay Bharwad and the land development expenses were to be exclusively borne by the assessee company. The assessee company had also furnished the copy of MOU with Sanjay Bharwad with respect to the aforesaid arrangement. The AO has on the ground that the co-seller Shri Sanjay Bharwad had not filed return of income for A.Y.2012-13 rejected the contentions of the assessee company. The copy of the assessment order passed u/s 144 read with section 147 of the Act for A.Y.2012-13 of Sanjay Bharwad, other land owner is placed on record by way of additional evidence. The perusal of the order would reveal that no deduction in respect of land development expenses have been granted in the case of Sanjay Manubhai Bharwad while completing the assessment. This only demonstrates the fact that the entire expenses have been borne by the assessee company. Since the copy of the assessment order was not available at that relevant point of time and came to be passed subsequent to the decision of the appeal the same has been placed by way of additional evidence.*
8. *It is hereby submitted that the additional evidences which have been filed under Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 on account of the fact that the assessee company due to the circumstances beyond their control was not in a position to place those evidences before the concerned Authorities at that relevant point of time. The admission of such evidences would only enable to appreciate the controversy in the correct perspective and further the cause of substantial justice.*

In view of the above it is requested that the additional evidences filed under Rule 29 of the Income Tax (Appellate Tribunal), Rules 1963 be kindly admitted."

10. Having perused the aforesaid petition, and having heard rival contentions on admission of additional evidence, we are inclined to admit the additional evidence. As we hold so, we have noticed that these additional evidences have crucial bearing on the decision about correctness of the findings of the authorities below, and it is important that these evidences be examined on merits. Learned Departmental Representative, however, vehemently argues that if at all the additional evidences are to be admitted, these evidences should be sent back to the Assessing Officer for examination as he must be afforded reasonable opportunity to examine the same. To this extent, we agree with the learned Departmental Representative. As the

matter is being remitted to the file of the Assessing Officer for fresh adjudication on admissibility of deduction of Rs.31,50,580/- towards cost of improvement, we also consider it appropriate to remit the issue about deductibility of remaining cost of transfer of Rs.2,25,000/- to the Assessing Officer. In view of these discussions, as also bearing in mind entirety of the case, we deem it fit and proper to remit the matter to the file of the Assessing Officer, in terms of our observations above, for fresh adjudication on merits in accordance with the law, by way of a speaking order and after giving a fresh and reasonable opportunity of hearing to the assessee. Ordered, accordingly.

11. In the result, the appeal is allowed for statistical purposes. Pronounced in the open court today on the 25th day of June, 2019.

Sd/-

Justice P P Bhatt
(President)

Ahmedabad, dated the 25th day of June, 2019

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Copies to: (1) The appellant (2) The respondent
(3) CIT (4) CIT(A)
(5) DR (6) Guard File

By order etc

True Copy

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad