

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

Before Shri Sanjay Arora, Accountant Member and
Shri Manomohan Das, Judicial Member

ITA No. 98/Coch/2021
(Assessment Year: 2016-17)

Aster DM Healthcare Ltd.
IX/475L, Kuttisahib Road
(Aster Medicity Hospital)
Cheranallore, Kochi 682027
[PAN:AACCD7912K]
(Appellant)

Dy. CIT,
Corporate Circle-1(1)
vs. Central Revenue Building
I.S. Press Road
Kochi 682018
(Respondent)

Assessee by: Shri R. Krishnan, CA
Revenue by: Shri Sanjit Kumar Das, CIT-DR

Date of Hearing: 14.09.2023
Date of Pronouncement: 12.12.2023

ORDER

Per Sanjay Arora, AM

This is an Appeal by the Assessee directed against the revision of it's assessment under section 143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) dated 30.12.2018 for assessment year (AY) 2016-17, vide order u/s. 263 dated 09.03.2021 by the Principal Commissioner of Income Tax, Kochi (Pr. CIT).

2. The appeal, filed on 03/8/2021, i.e., with a delay of 81 days, is however deemed to be in time in view of the decision by the Hon'ble Apex Court in Suo Motu WP No. 03/2020, dated 10/01/2022. The hearing was accordingly proceeded with.

3.1 At the outset, it was submitted by Shri Krishnan, the learned counsel for the assessee, that though the appeal raises as many as 18 issues, *qua* which the revisionary authority has set aside the assessment for fresh adjudication after proper enquiry by the assessing authority, he would, in view of the consequent order since passed by the Assessing Officer (AO), limit his arguments to only three such areas,

on which additions to the returned income came to be made. The attempt would be, he added, to show that proper enquiry and verification had been made by the AO in the first instance and, being satisfied, did not cause any adjustment to the returned income in assessment. In the alternative, i.e., in case of absence or lack of enquiry, no prejudice to the Revenue stands caused.

3.2 The first issue is the expenditure on ESOP shares in respect of which the assessee, a company running hospitals and medical care institutions, had claimed Rs. 2.44 cr. for the relevant year, further allotting 23.61 cr. shares to a Trust under ESOP. Taking us through the assessee's reply dated 23/12/2018 (PB pg. 16), it was shown that the details were duly sought. ESOP shares, he would continue, it is well-settled, is a method of rewarding an employee for his services and commitment to the company and, accordingly, an admissible business expenditure, so that no disallowance was made by the AO. The second issue is in respect of unbilled revenue, reflected as a current asset in the assessee's Balance Sheet at Rs. 4.32 cr. As explained in the revisionary proceedings, the same, a regular feature of the assessee's operations, is toward unbilled services, so reflected from year after year. While services continue to be delivered on a daily basis, the bills are raised on the patients only on their discharge from the Hospital. As expenditure in relation to the services incurred is being claimed on mercantile basis, the corresponding services are valued and booked as unpaid revenue at each year-end, which gets reversed in the following year, making fresh provision at its end. The ledger accounts were also produced before the Pr. CIT. The third issue is in respect of claim u/s. 35AD on weighted deduction basis at Rs. 151.51 cr. The assessee admits to non-inquiry during the assessment proceedings, even as the details were duly sought and provided in rectification proceedings vide letter dated 18/2/2020 (copy on record).

4. We have heard the parties, and perused the material on record. We may begin by delineating the law in the matter. Absence or lack of enquiry, i.e., where warranted,

would render an order as erroneous and prejudicial to the interests of the Revenue. The law is well-settled, case law of which is legion, including by the Hon'ble Apex Court and the Hon'ble jurisdictional High Court, as in *Malabar Industrial Co. Ltd. v. CIT* [2000] 243 ITR 83 (SC) and *Raja & Co. v. CIT* [2011] 335 ITR 381 (Ker). The same in fact stands co-opted on the statute per *Explanation 2(a)* to s. 263(1) w.e.f. 01.06.2015. At the same time, there must be, as explained in *CIT v. Gabriel India Ltd.* [1993] 203 ITR 108 (Bom), circumstances which would make the enquiry prudent, and not *de hors* the same; that being an objective fact which must be satisfied on the basis of the material on record. This in fact is captured by the words: 'which should have been made' occurring in *Explanation 2(a)* supra with reference to any inquiry or verification by the AO. The legal framework having been thus clarified, we proceed to analyse each of the issues raised by the Id. Pr. CIT, as follows.

5. Issue #1: To begin with, the AO, whose enquiry has not been placed on record by the assessee, as it appears from the assessee's reply, has no more than sought the basic details, even as pointed out by the Id. Pr. CIT. The same, it may be noted, entails exercise of option/s by the employee; the vesting date/s; and, finally, allotment of shares by the assessee-employer to him. The law deems it as a perquisite in the hands of the employee on the allotment of shares thereto (s. 17(2)(vi)). At which point of time, therefore, the expenditure can be said to have been incurred by the assessee is one such issue that would arise for consideration. Further, as discussed in detail by this Tribunal in *V-Guard Industries Ltd. v. Pr. CIT* (in ITA No. 63/Coch/2022, dated 20/3/2023), even as income by way of salary arises to an employee on being allotted shares at a rate below their fair market value (FMV), there is no corresponding expenditure incurred by the employer for being claimed as a business expense. The company is only capitalizing on the value of its shares at the expense of the body on its shareholders, the value of whose shares, representing the unitized net worth of the company, decreases to that extent. Reference in this context is drawn to paras 4.9 & 4.10 of the said order, in public domain. We

accordingly find no merit in assessee's challenge to the injunction for a proper enquiry in the matter and its set aside to the AO for the purpose. We, accordingly, confirm the impugned order *qua* this issue.

6. Issue # 2: In our opinion, the same clearly falls under the second category of cases, i.e., where no prejudice stands in any case caused to the Revenue. The reason is simple. This is as the name suggests, it is, firstly, revenue in nature. The same is reflected in accounts as a current asset, with the corresponding credit shown to be to the revenue account. Not so reading the provision would result in the words "should have been made" in *Explanation 2(a)* to section 263(1) losing their significance. The assessee succeeds.

7. Issue #3: The scope of inquiry or verification u/s.154 being severely limited, furnishing of details thereat would be of little consequence insofar as the revision on account of lack or absence of inquiry in the matter in assessment is concerned. The invocation of s. 263 under the circumstances is valid, warranting no interference.

8. In the result, the assessee's appeal is partly allowed.

*Order pronounced on December 12, 2023 under Rule 34 of The Income Tax
(Appellate Tribunal) Rules, 1963.*

Sd/-
(Manomohan Das)
Judicial Member

Sd/-
(Sanjay Arora)
Accountant Member

Cochin, Dated: December 12, 2023

n.p.

Copy to:

1. The Appellant
2. The Respondent
3. The Pr. CIT concerned
4. The CIT-DR, ITAT, Cochin
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By Order

Assistant Registrar
ITAT, Cochin