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

BEFORE SHRI PRAMOD KUMAR, ACCOUNTANT MEMBER,
AND SHRI S. S. GODARA, JUDICIAL MEMBER.

ITA Nos. 953 & 1314/Ahd/2016
(Assessment Year : 2010-2011)

Ambalal Sarabhai Enterprises Ltd.,
Wadi Wadi, Baroda 390023 Appellant

Vs.

Dy. Commissioner of Income-tax,
Circle 1(1)(1), Vadodara Respondent/Cross appellant

PAN: AABCA6893K

आवेदक की ओर से/By Assessee	: Shri S. N. Soparkar & Shri Parin Shah, A.R.
राजस्व की ओर से/By Revenue	: Shri Sanjay Agarwal, CIT. DR.
सुनवाई की तारीख/Date of Hearing	: 12.09.2017
घोषणा की तारीख/Date of Pronouncement	: 13.09.2017

ORDER

PER S. S. GODARA, JUDICIAL MEMBER

The assessee and Revenue have instituted the instant cross appeals for assessment year 2010-11 against the CIT(A)-1, Vadodara's order dated 29.02.2016, in case no. CAB-1/59/14-15, in proceedings u/s143(3) of the Income Tax Act, 1961, in short 'the Act'.

2. We come to rival pleadings. The assessee raises four substantive grounds in its appeal inter alia averring that the CIT(A) has erred in law as well as on facts in disallowing Rs.1,20,097/- @ 5% of total expenditure claim of Rs.29,46,561/-, in rejecting approved government valuer's report adopting fair market value of the capital asset sold as on 01.04.1981 thereby restricting the said valuation from Rs.2200/- per sq.mtr. to Rs.550/- per sq.mtr. in lower appellate proceedings as well as in not allowing its claim of having paid retention money/refund amount of Rs.2,33,98,605/- back to the vendee in question as expenditure u/s.48 of the Act, in upholding disallowance of salary and wages pertaining to employees of Packart Press Unit and in holding that section 14A disallowance of Rs.49,03,488/- is to be added for the purpose of computing books profits; respectively.

3. The Revenue's grievance also appears to have been pleaded in equal number of grounds. It challenges correctness of the lower appellate order inter alia deleting disallowances/addition of expenses aggregating to Rs.6,84,716/-, capital expenses of Rs.4,91,318/- relating to replacement or major renovation work, in directing the assessing authority to adopt FMV of assessee's capital asset as on 01.04.1981 to be @ Rs.550/- per sq.mtr. instead of Rs.250/- and in deleting Section 14A r.w. Rule 8D disallowance of Rs.49,03,488/-; as made in assessment order dated 28.03.2013.

A combined perusal of the above pleadings makes it clear that some of the issues raised in the instant cross appeals are common. We therefore proceed to decide such corresponding grounds together in succeeding paragraphs.

4. Mr. Soparkar states at the outset in assessee's appeal ITA No.953/Ahd/2016 that it no more wishes to press for its first substantive

ground seeking to delete disallowance of Rs.1,20,097/- @ 5% of the total other expenses (supra). The Revenue's corresponding substantive ground also raises the very issue since seeking to revive the entire disallowance sum of Rs.8,04,813/- including telephone and vehicle expenses of Rs.6,84,716/-. The CIT(A) admittedly has followed his predecessor's order in assessment year 1998-99 in restricting the impugned disallowance to that @5%. The Revenue fails to indicate any distinction on facts in the two assessment years. We therefore uphold the CIT(A)'s order. Both parties fail in their first substantive ground.

5. The assessee's second substantive ground and Revenue's third substantive ground raise first component of fair market value issue as on 01.04.1981 qua the impugned capital asset sold in the relevant previous year.

6. There is no dispute between the parties that the assessee sold a part of its factory land admeasuring 7600sq.mtr. or 81800 sq.ft. situated at Wadiwadi, Baroda as comprised in City Survey No. 385/part, RS No.54/B. It executed a registered conveyance deed on 12.04.2009 for Rs.33,53,80,000/-. Its registered valuer adopted cost of acquisition as on 01.04.1981 @ 2250 per sq.mtr. for 7600mtrs. The Assessing Officer observed in assessment order that the very issue had arisen between the parties in proceeding assessment year(s) as well wherein he had adopted cost of acquisition to be Rs.250/- per sq. mtr. for the purpose of computing consequential capital gains. He therefore recomputed assessee's capital gains. The CIT(A) grants part relief to assessee in enhancing the said cost of acquisition from Rs.250/- per sq.mtr. to Rs.550/- per sq.mtr. as on 01.04.1981. This leaves both the parties aggrieved to the extant indicated hereinabove.

7. We have heard both sides. Relevant findings perused. There is hardly any quarrel that both the lower authorities have made it clear in their respective orders that the very issue had arisen in preceding assessment years (supra). Mr. Soparkar at this stage refers to this tribunal's order in assessment year 2008-09 and 2009-10 pertaining to assessee's appeal itself has decided on 11.04.2016 adopting the said cost of acquisition as on 01.04.1981 has to be Rs.980/- per sq.mtr. Both parties fail to indicate any distinguishing facts in the impugned assessment year. We therefore direct the Assessing Officer to adopt cost of acquisition on assessee's capital asset as on 01.04.1981 @ Rs.980/- per sq.mtr. to be followed by re-computation of capital gains. The assessee partly succeeds in its grievance whereas Revenue's corresponding substantive ground is declined.

8. Next component in assessee's instant substantive ground pleads that both the lower authorities have erred in disallowing its refund money of Rs.2,33,98,605/- paid back to its vendee on 4/4/09 i.e. within two days from both sale deed and MOU as expenditure u/s.48 (i) &(ii) of the Act. Its case is that it had to pay the sum in question back to the vendee as per terms of an MOU between them dated 02.04.2009. The assessee pleaded before Assessing Officer that the said MOU's conditions stipulated payment of the impugned sum in case the land in question would not be converted from industrial to commercial use within a period of 180 days from the date of conveyance deed executed on 02.04.2009. The assessee therefore claimed to have paid the sum in question back to the purchaser. It then adopted the balance sale price of Rs.31,19,81,395/- for the purpose of computing consequential capital gains. It further raised an alternative claim of expenditure qua the impugned sum in case its earlier plea of reduced sale price was not accepted.

9. The Assessing Officer rejected the assessee's above claim in assessment order dated 28.03.2013. He observed that sale price of Rs.33,53,80,000/- was expressly stated in the registered sale deed. The reduced sale price plea to the above effect was therefore hold as not allowable. The Assessing Officer further observed that no such conversion obligation was there to be discharged on assessee's part. He quoted Section 48 of the Act to the effect that the impugned amount was not incurred wholly and exclusively in connection with the conveyance deed in question.

10. The CIT(A) affirms Assessing Officer's findings as under:

"4.4.2. I have considered the AO's observations, appellant's submissions, the agreement of sale dated 28.07.2008, the register deed for conveyance of the land dated 02.04.2009 and the MOU referred to by the appellant dated 02.04.2009. A perusal of the agreement to sale shows that this said land was subject matter of the company petition No. 161 and 184 of 2007 before the Company Lew Board, Principal Bench, New Delhi. Considering the needs of the company, the Company Law Board passed an order on 26,03.2008 ordering the appellant to constitute the land sale committee for formulating the tender procedure and invite offer for parties for sale of said land. Accordingly, the sale committee of 5 persons was formed to float the tender and vide tender dated 16.05.2008, the purchaser of the land quoted price of Rs.33,53,80,000/-. The appellant company agreed to sell the land at this price to the purchaser after obtaining the approval of the Hon'ble Board for this purpose. Subsequently the agreement to sale dated 28.7.2008 was signed. Clause No. 9 of the agreement of sale states as follows:

> *"The said land has been agreed to be sold for the zone for which it is classified as at present. Ay proposed change use by the purchaser from "Industrial" to "Commercial" or any other shall be liability and responsibility, of the purchaser, and any permission for the sale to be obtained from the appropriate authorities shall be obtained by the purchaser only, and all cause, charges and expenses in connection there with shall be borne and paid by the Purchaser."*

Thus, the agreement to sale clearly states that for the change of the land from Industrial to Commercial, entire liability was on the purchaser and the appellant was not at all concerned with the same.

4.4.2.1. Further to this, the deed of conveyance was executed on 02.04.2009. The deed clearly mentions that this being executed for the sale consideration of Rs.33,53,80,000/-. Clause B of the sale deed also states that the

representations made under the said agreement to sale dated 28.07.2008 are valid& true and correct and are deemed to be repeated herein. Thus, the condition incorporated in the agreement to sale that any change for the land use has to be made by the purchaser on its own cost has been incorporated in the conveyance deed for sale also. The conveyance deed also states the sale consideration is Rs.33,53,80,000/-. The deed of sale nowhere mentions that a part of such sale consideration will be refunded by the appellant under any condition. Thus, the sale consideration in this case is Rs.33,53,80,000/- on which capital gain is required to be computed. The deed of conveyance also shows that the entire consideration has been paid by the vendee to the vendor and the vendor has also acknowledge full receipts and realization of the same in the manner as narrated on Page No. 7 & 8 of the deed of conveyance. Thus, the entire amount had been received by the appellant on the date of execution of sale deed itself.

4.4.2.2. Now, the appellant has claimed that another MOU was executed on 02.04.2009 as per which the appellant company agreed to refund back certain part of the sale consideration. This MOU states that the purchasers can make application for a revised NA and if it is not obtained, immediately an amount of Rs. 129992.25 shall be refunded back by the appellant to be computed per day for the delay in obtaining revised NA permission. If the revised NA permission is delayed beyond 180 days, the entire retention amount of Rs. 2,33,98,605/- would be refunded back. But, again the MOD also states that the entire responsibility to obtain revised permission or application or otherwise shall be on the vendee. Thus, this MOU is in direct contravention to the agreement to sale entered on 28.07.2008 which has been fully incorporated in the deed of conveyance made on 02.04.2009. As per these legally executed documents, the appellant: was not at all required to make any effort for revised land use of the land and the entire responsibility was on the purchaser. Thus, by entering into this MOU, the appellant has taken over the liability of the purchaser voluntarily. Such action of the appellant is not at all related with the sale of land and it has not been incurred in relation to the transfer of the' land to the purchaser. Such payment made by the appellant is gratuitous in nature and is in the nature of application of its income. This is also on account of the fact that the MOU states that the appellant company shall pay to and deposit with the Vendee an amount of Rs. 2,33,98,605 in Trust. Since the MOU has been signed after the land has been conveyed to the purchaser, hence this amount is not on account of diversion of income at source. The income of the appellant accrued as per the narration made in the agreement to sale and deed of conveyance. Such income is liable for income tax and any .payment made by the appellant after receipt of the income and that too voluntarily and as a gratuitous act cannot be allowed as a deduction in computation of income of the appellant. The appellant was under no obligation to refund such amount to the purchaser as the sale consideration had been fixed by the approval of the company law board and the purchaser had also agreed to such sale consideration as per the agreement to sale executed on 28.07.2008 itself, The purchaser had also paid such amount before the execution of the deed of conveyance and the deed of conveyance did not have any such condition for sale.

4.4.2.3. The sale consideration accruing to the appellant is being computed on the basis of the deed of conveyance and any payment made by the appellant for liability of some other person is not deductible in computation of its income. For this reliance is placed upon the decision in the ***case of 226 ITR 680(Mad), Kumudam Printers Pvt. Ltd.,*** *in which Hon'ble Madras High Court has held as follows:*

> *"the liability to pay Rs. 1.75 lakhs was not that of the assessee-company and the assessee-company did not have anything to do with the said liability of the vendor. The payment of the amount by the assessee-company was only a* ***voluntary and gratuitous payment of the liability of a third party,*** *viz., the vendor in this case. Further, in view of the assessee-company having become the, owner of the property on the registration of the sale deed, its title was complete and perfect. In such circumstances, the question of treating the payment of the liability of a third party as an expenditure of the assessee-company, much less for the purpose of its business, could not arise. The amount was not deductible as business expense."*

4.4.2.4. Hence, it is held that the AO has rightly considered the sale consideration mentioned in the deed of conveyance for the purposes of computation of capital gain in this case. Besides the payment made by the appellant to the purchaser subsequent to the registration of the land is not deductible as an expense as the same has not been incurred for the purposes of transfer of land, since the same has been paid as a gratuitous payment for liability of another party and is not a payment made for the purposes of transfer of this land. Hence this contention of the appellant is rejected."

11. We have heard both the parties reiterating their respective pleadings against and in support of CIT(A) above extracted detailed findings inter alia discussing it alongwith necessary backdrop of facts that the assessee's land sold formed subject matter of a lis before the Company Law Board, the said "Board" ordered it to formulate a tender process after constituting a sale committee of five persons under the chairmanship of hon'ble Mr. Justice B. J. Diwan (retired) and four other members, this committee invited sale tenders, the vendee herein offered purchase price of Rs.33,53,80,000/-, the sale committee placed the same before the above "Board" who granted necessary approval in its order dated 27.05.2008 in assessee's application; respectively. It emerges from assessee's registered agreement to sale dated 28.07.2008 at page 102 containing clause 9 that the

vendee had agreed to purchase the land in the same zone i.e. industrial than commercial on as it is basis. The said vendee further undertook to bear all liabilities/responsibilities of costs and expenses etc. for the purpose getting approval relating to abovestated conversion. Page 106 reveals that the assessee had already received advance payment of Rs.19,15,38,000/- by the date of agreement to sale forming more than half of the total sale price. It admittedly executed conveyance deed thereafter on 02.04.2009 without even an iota of mention therein about its MOU of the same date wherein it agreed to pay the amount in question of Rs.2,33,98,605/- in the nature of retention money in case revised permission of conversion of the asset in question from industrial to commercial did not come within 180 days. We therefore see no merit in its contention raised that it had to part with the impugned sum as an obligation in the nature of retention money.

12. Mr. Soparkar refers to assessee's MOU page nos. 90 to 93 followed by impugned payment made to the vendee in question. He states that the above conveyance deed was very much a conditional one to be finalized only after conversion of the industrial land to commercial one. We find that there was no such impediment in registered agreement as well as in registered sale deed. The said registered documents carrying presumption of truth demonstrate just the opposite wherein it was vendee's liability/responsibility to bear for such a conversion. Mr. Soparkar then states that the said conversion did not come making it obligatory for the assessee to part with the impugned refund amount after the agreement in question. We again see no reason to accept this contention since the assessee's claim of having made the payment within two days does not inspire confidence in view of the abovestated overwhelming material going against the instant MOU's terms. Mr. Soparkar quotes various case laws i.e. Godhra Electricity Co. Ltd. vs. CIT (1997) 225 ITR 746 (SC), CIT vs.

Axel Co. Ltd. (2013) 358 ITR 95 propounding real income's accrual theory. We however observe that the said case law does not apply to facts of the instant case wherein the assessee has not been able to prove that the impugned expenditure to be falling under Section 48 (i) & (ii) of the Act for the purpose of computing consequential capital gains. Mr. Soparkar then relies upon further case laws CIT vs. Hooghly Mills Co. Ltd. (2004) 266 ITR 257 (Calcutta) quoting Kumudan Printers (P) Ltd. vs. CIT (1997) 226 ITR 680 (Mad.) in upholding tribunal's decision allowing gratuity liability of the said assessee. We however notice that in taking over agreement therein of the undertaking specifically included gratuity liability as against facts of the instant case wherein the assessee appellant has failed to prove that its MOU dated 2.04.2009 is in tune with registered documents (supra). We therefore see no justification in interfering with well thought CIT(A)'s conclusion upholding Assessing Officer's action.

13. Both the learned representatives thereafter made their respective arguments qua registration aspect of the abovestated MOU u/s.17(1) r.w.s. 49 of the Indian Registration Act. We however find that this aspect pertaining to the instant issue is rendered academic in view of our findings in preceding paragraphs. We accordingly uphold the CIT(A)'s action affirming impugned disallowance. The assessee's instant second substantive ground is therefore partly accepted in above terms.

14. The assessee's third substantive ground raises the issue of disallowance of salary and wages of Packart Press Unit amounting to Rs.28,78,876/-. Mr. Soparkar refers to abovestated co-ordinate bench order in preceding assessment year (supra) setting aside the very issue back to the Assessing Officer. Both parties are ad idem that there is no distinction on facts involved in the two assessment years. We therefore follow the very

course of action herein as well in remitting the issue back to the Assessing Officer for decision afresh as per law after affording adequate opportunity of hearing to assessee. This substantive ground is treated as accepted for statistical purposes.

15. The assessee's as well as Revenue's fourth substantive ground raise issue to correctness of Section 14A disallowance of Rs.49,03,488/- made by the Assessing Officer followed by consequential addition in book profits u/s.115JB of the Act. The CIT(A) deletes the impugned disallowance on the ground that the assessee has not derived any exempt income in the impugned assessment year. He follows hon'ble jurisdictional high court's decision in CIT vs. Corrtech Energy Pvt. Ltd.'s case in Tax Appeal No. 239 of 2014. The same factual position continues herein as well wherein the Revenue fails to quote any judicial precedent overruling the above legal proposition. We therefore see no reason to interfere in CIT(A)'s conclusion deleting the impugned addition. The Revenue's fourth substantive ground is therefore declined whereas assessee's substantive ground is dismissed as rendered infructuous being consequential in nature. Latter's appeal ITA No. 953/Ahd/2016 is therefore partly accepted.

16. The Revenue's second substantive ground assails the correctness of CIT(A)'s order allowing expenditure of Rs.4,91,318/- to be revenue in nature thereby reversing Assessing Officer's action in adopting above items of replacement / major renovation work as capital expenditure. It appears that the assessee had incurred the impugned expenditure on various heads like barricading of main gate side with material and labour work, scooter parking shed opposite main gate, waterproofing of civil work of boiler house. We afforded ample opportunity to learned Departmental Representative for indicating in the case file to the effect that above

renovation and repairs have in any way created new assets. The Revenue fails to pinpoint any such material on record. We therefore follow hon'ble jurisdictional high court's decision in Manoj B. Mansukhani case in Tax Appeal no. 941/2010 to uphold the CIT(A)'s order treating the impugned repair expense as revenue in nature. The Revenue's appeal ITA No. 1314/Ahd/2016 raising all four substantive grounds therefore fails.

17. We refer to our above discussion in partly allowing the assessee's appeal ITA No. 953/Ahd/2016. The Revenue's appeal ITA No. 1314/Ahd/2016 is dismissed.

[Pronounced in the open Court on this the 13th day of September, 2017.]

Sd/-	Sd/-
(PRAMOD KUMAR)	(S. S. GODARA)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Ahmedabad: Dated 13/09/2017

True Copy

S.K.SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।