

आयकर अपीलीय अधिकरण, न्यायपीठ – “A” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA
 (समक्ष) श्री ए. टी. वर्की, न्यायीक सदस्य एवं डॉ. अर्जुन लाल सैनी, लेखा सदस्य)
 [Before Shri A. T. Varkey, JM & Dr. A. L. Saini, AM]

I.T.A. No. 1052/Kol/2017
Assessment Year: 2012-13

M/s. Titagarh Industries Ltd. (formerly M/s. Bhatpara Papers Ltd.) (PAN: AACCB7323G)	Vs.	Deputy Commissioner of Income-tax, Circle-4(1), Kolkata.
Appellant		Respondent

Date of Hearing	11.06.2018
Date of Pronouncement	04.07.2018
For the Appellant	Shri S. Jhajharia, FCA & Shri Sujoy Sen, AR
For the Respondent	Shri G. Hangshing, CIT

ORDER

Per Shri A.T.Varkey, JM

This is an appeal preferred by the assessee against the revision order of the Ld. Pr. CIT-2, Kolkata dated 14.03.2017 passed u/s. 263 of the Income-tax Act, 1961 (hereinafter referred to as the “Act”).

2. In this appeal the appellant has assailed the decision of invoking jurisdiction by the Pr. CIT u/s 263 of the Act and thereafter directing the AO to disallow the short term capital loss of Rs.9,65,11,775/- and instead assess short term capital gain of Rs.27,41,15,579/-. In the course of hearing the assessee also filed additional grounds objecting to the validity of the impugned order on the ground that the notice was issued in the name of M/s. Bhatpara Paper Mills Ltd, a non-existing entity.

3. Briefly stated the facts of the case are that for the AY 2012-13, return u/s 139 was filed declaring loss of Rs.10,33,31,991/- inter alia including short term capital loss of Rs.9,65,11,775/-. During the relevant year the assessee had sold its scrap paper manufacturing plant including Capital Work-in-Progress ('Capital WIP') at Kakinara, West Bengal for consideration of Rs.27,50,00,000/- to M/s Ajmera Steels Pvt Ltd. (M/s. ASPL) vide agreement dated 16.09.2011. The computation of capital gain as returned by the appellant was as under:

<u>Particulars</u>	<u>Amount (in Rs.)</u>
Sale Consideration	27,50,00,000/-
Less: Cost of Capital WIP	37,06,27,354/-
WDV of the Plant & Machinery	<u>5,38,761/-</u>
	9,61,66,115/-
Less : Net Selling Expenses (13,45,660 – 10,00,000)	<u>3,45,660/-</u>
Short Term Capital Loss	9,65,11,775/-

4. The assessment u/s 143(3) was completed on 16.01.2016 wherein short term capital loss of Rs.9,65,11,755/- was assessed. The Ld. Pr. CIT thereafter initiated proceedings u/s 263 vide SCN dated 04.08.2016. In the Pr. CIT's opinion the assessment was completed by the AO without examining the issues concerning computation of capital gains on sale of assessee's paper manufacturing plant. In his opinion, in terms of Section 50(2), Capital WIP did not form part of block of assets and for that reason did not qualify to be called Capital Asset. In his opinion the cost of Capital WIP could not be taken into account in arriving at short term capital gain chargeable u/s 50 of the Act. In his opinion the subject matter of sale to M/s. ASPL was only scrap paper machinery at Kakinara and therefore in Pr. CIT's opinion Short Term Capital Gains (STCG) should have been assessed as follows:

<u>Particulars</u>	<u>Amount (in Rs.)</u>
Sale Consideration	27,50,00,000/-
Less: WDV of the Plant & Machinery	<u>5,38,761/-</u>
	27,44,61,239/-
Less : Selling Expenses	<u>13,45,660/-</u>
	27,31,15,579/-
Add: Interest received from purchaser	<u>10,00,000/-</u>
Short Term Capital Gain	27,41,15,579/-

5. Accordingly in the impugned order dated 14.03.2017, the Ld. Pr. CIT held that the AO's order u/s 143(3) was erroneous in so far as it was prejudicial to the interests of the Revenue and directed AO to compute the short term capital gain of Rs.27,41,15,579/-. Being aggrieved by this order, the appellant is in appeal before us.

6. At the time of hearing the Ld. AR of the appellant assailed the Ld. Pr. CIT's order on various grounds. He submitted that while passing the impugned order, the Ld. Pr. CIT completely brushed aside the contentions put forth before him by the assessee and also ignored the material facts which were available on the records and thereby came to incorrect conclusion that the assessee did not incur any loss but rather made gain of Rs.27,41,15,579/-. The Ld. AR first drew our attention to the annual financial statements for the year ended 31st March 2013. It was pointed out that sale consideration of Rs.27,50,00,000/- received from M/s Ajmera Steels Pvt. Ltd. (M/s. ASPL) was adjusted both from the block of Plant & Machinery and Capital WIP in the Fixed Asset Schedule at Note No. 7 of the accounts and that the net loss of Rs.12,65,47,945/- after adjusting the book WDV of Plant & Machinery (P&M) and Capital WIP of Rs.3,04,49,393/- & Rs.37,06,27,354/- respectively was debited under the head 'Other Expenses' – Note No. 19, as a separate line item in the Profit & Loss Account. We therefore note that the sale of fixed assets and Capital WIP during the year was duly reflected on the face of the annual financial statements of the appellant-company for the year ended 31st March 2012.

7. Drawing attention to the AO's notice u/s 142(1) dated 24.02.2014, the Ld. AR pointed out that in response to such notice, the assessee had furnished details of online auction of its plant & machinery of Kakinara factory. He further pointed out that by the notice dated 03.11.2014, the AO specifically requisitioned not only the details for loss incurred on sale of fixed assets and Capital WIP but also sought reasons for incurring such loss. In response, the assessee had furnished detailed reply along with requisite documents, copy whereof was placed at Pages 69 to 71 of the paper book. The Ld. AR therefore submitted that the question of assessability of loss on sale of plant & machinery and Capital WIP was examined by the AO and only after conducting necessary enquiry, the loss as returned by the appellant was accepted by the AO and therefore it was wholly inappropriate for the Ld. Pr. CIT to allege in the show cause notice (SCN) that no enquiry in respect of this issue was carried out prior to completion of assessment. The Ld. AR also pointed out that the Ld. Pr. CIT's presumption that the entire consideration received from M/s ASPL was only for purchase of plant & machinery and no part of such consideration was relatable to sale of Capital WIP was factually wrong. Drawing attention to the agreement dated 16.09.2011 with M/s. ASPL, the Ld. AR pointed out that the subject matter of agreement was described as follows:

“ Sub: Agreement for sale of paper manufacturing plant and machinery including capital work in progress at our paper mill at Kakinara, West Bengal,” (emphasis supplied by us)

8. The Ld. AR accordingly claimed that the contemporaneous documents, i.e. the assessee's agreement with M/s. ASPL and also the entries in the audited financial statements clearly showed that the Plant & Machinery along with Capital WIP at assessee's Kakinara factory was sold to M/s. ASPL for a consolidated price of Rs.27,50,00,000/- and such sale was conducted by way of e-auction.

9. The Ld. AR further drew our attention to the Balance Sheet of the appellant and pointed out that the original cost of the Fixed Assets & Capital Work-in-Progress was Rs.4,12,55,831/- & Rs.37,06,27,354/- respectively. The book value of the Fixed Assets, after deducting Depreciation as on 01.04.2011 was Rs.3,04,49,393/-. For income-tax purposes,

since the Fixed Assets were eligible for accelerated rate of depreciation by way of a statutory allowance, its WDV as on 01.04.2011 was Rs.5,38,761/- and the Capital WIP stood at its original cost of Rs.37,06,27,354/-. Referring to these figures the Ld. AR submitted that no prudent person would pay a sum of Rs.27,50,00,000/- for plant & machinery whose original cost at the time of acquisition was Rs.4,12,55,831/- which after depreciation, use, wear & tear etc. was reflected at a useful value of Rs.3,04,49,393/- in the books of accounts and its written down value for tax purposes stood eroded to Rs.5,38,761/- . These facts further supported the appellant's case that the Capital WIP indeed formed part of the aggregate Fixed Assets sold to M/s. Ajmera Steels Pvt Ltd. The Ld. AR thus submitted that the factual premise on which the Ld. Pr. CIT proceeded with the SCN and passed the revisionary order was erroneous and flawed; accordingly the impugned order so passed was bad in law from its inception.

10. As regards the Ld. Pr. CIT's allegation that since Capital WIP cannot form part of the "block of the asset" for the purposes of Section 50(2) and therefore its cost of acquisition is to be ignored, according to Ld. AR, is devoid of any merit. The Ld. AR contended that Section 50 of the Act contains computational provisions for assessment of gain realized on sale of depreciable asset and does not contain the definition of 'Capital Asset'. Drawing attention to Section 2(14) of the Act, the Ld. AR claimed that the expression 'capital asset' includes within its ambit and scope property of every kind, whether moveable or immovable, real or corporeal and only excludes agricultural land, stock-in-trade, personal effects and specified gold bonds. He therefore claimed the Capital WIP was indeed a 'capital asset' and which in the assessee's case amounted to Rs.37,06,27,354/- incurred in relation to Capital WIP.

11. The Ld. AR alternatively submitted that even if the Capital WIP was not considered along with the WDV block for the purposes of Section 50(2) and the consideration was allocated on proportionate basis amongst the two, even then the net result would be the same. He illustrated the same, which is as follows:

Particulars	Plant & Mach.	Capital WIP	Total
Sale Consideration (apportioned)	3,39,172	27,46,00,827	
Less : WDV/Original Cost	5,38,761	37,06,27,534	
Short Term Capital Loss	1,39,588	9,60,26,527	9,61,66,115
Less: Net Selling Expenses			3,45,660
Aggregate Capital Loss			9,65,11,775

12. In view of the above, the Ld. AR submitted that seen from any angle, the computation of short-term capital loss of Rs.9,65,11,775/- as determined by the appellant was as per law. Even otherwise and for the reasons discussed in the foregoing, the Ld. AR contended that the computation of computation of short term capital loss at Rs.9,65,11,775/- was made by the AO by adopting a possible legal view and the view so adopted was not an impossible view and hence even in such a scenario, the Ld. Pr. CIT's exercise of jurisdiction u/s 263 and the consequent order was bad in law, liable to be set aside.

13. On the other hand, the Ld. DR appearing on behalf of the Revenue submitted that the AO in this case had given only a standard questionnaire which is normally given as a preliminary exercise for collecting information from the assessee during the course of assessment proceedings. The replies and information given by the assessee to this questionnaire was simply collected by the AO and placed on record without making any further enquiry or application of mind. Hence, it cannot be said that the AO had examined the issue. The Ld. DR reiterated the Ld. Pr. CIT's contention and finding and he vehemently relied on the order passed by the Ld. Pr. CIT passed u/s. 263 of the Act and did not want us to interfere with the impugned order.

14. After having heard the rival submissions and having gone through the records, first of all let us take the guidance of judicial precedents which illuminates the invocation of revisional jurisdiction by Ld. Pr. CIT u/s. 263 of the Act. The assessee company has challenged in the first place, the very usurpation of jurisdiction by Ld. Principal CIT to

invoke his revisional powers enjoyed u/s 263 of the Act. Therefore, first we have to see whether the requisite jurisdiction necessary to assume revisional jurisdiction is there existing before the Pr. CIT to exercise his power. For that, we have to examine as to whether in the first place the order of the Assessing Officer found fault by the Principal CIT is erroneous as well as prejudicial to the interest of the Revenue. For that, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in *Malabar Industries Ltd. vs. CIT* [2000] 243 ITR 83(SC) wherein their Lordship have held that *twin* conditions needs to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer must be erroneous and so far as prejudicial to the interest of the Revenue. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed on incorrect assumption of fact; or (ii) incorrect application of law; or (iii) Assessing Officer's order is in violation of the principle of natural justice; or (iv) if the order is passed by the Assessing Officer without application of mind; (v) if the AO has not investigated the issue before him; then the order passed by the Assessing Officer can be termed as erroneous order. Coming next to the second limb, which is required to be examined as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue. When this aspect is examined one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of *Malabar Industries* (supra) held that this phrase i.e. "*prejudicial to the interest of the revenue*" has to be read in conjunction with an *erroneous order* passed by the Assessing Officer. Their Lordship held that it has to be remembered that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue **"unless the view taken by the Assessing Officer is unsustainable in law"**. Taking note of the aforesaid dictum of law laid down by the Hon'ble Apex Court, let us examine whether the Assessing Officer passed order u/s 143(3) dated 16.02.2015 is erroneous as well as

prejudicial to the interest of the revenue. We find in the first place that the impugned proceedings u/s. 263 of the Act were initiated by the Ld. Pr. CIT on the following two assumption of facts namely, (a) that the sale price of Rs.27,50,00,000/- realized by the assessee only pertained to sale of scrap plant and machinery and (b) before conclusion of the assessment, no enquiry whatsoever in respect of loss assessed under the head "Capital Gain" was conducted by the AO. On perusal of the material on record and the Ld. AR's submission, we however, find that both these assumptions were factually unfounded and contrary to the material facts gathered by the AO in the course of assessment. As taken note earlier under the provision of sec. 263 of the Act, the Ld. Pr. CIT is given power to revise any order passed by the AO if he finds that the order passed by the AO is erroneous in so far as it is prejudicial to the interest of the Revenue. The well settled principal for exercising this revisional jurisdiction is that the Ld. Pr. CIT has to demonstrate with sufficient material that the AO's order was erroneous and as a consequence of finding of the erroneous order, some tangible prejudice is caused to the revenue. Both these conditions are required to be fulfilled cumulatively and not alternatively. It is also judiciously held that in coming to such a finding, the Ld. Pr. CIT need not confine himself to the material and information gathered by the AO at the time of assessment, but the Ld. Pr. CIT is permitted to take into account any material or information which may come to his attention till the passing of the order u/s. 263 of the Act and he need not confine only to the documents and information available with the AO at the time of framing of original assessment. However, it is necessary that the information and documents on the basis of which the Ld. Pr. CIT comes to conclusion that the assessment order was erroneous and prejudicial must have a tangible nexus or connection with Ld. Pr. CIT's ultimate finding that the AO's order was erroneous and which caused prejudice to the revenue. However, if it is found as a matter of fact that the Ld. Pr. CIT has proceeded to record his finding on assumption of certain facts which are not borne out or supported by the actual facts, then the assumption of jurisdiction and consequent exercise of power u/s. 263 can be said to be vitiated resulting in infirmity in the order passed u/s. 263 of the Act. Viewed from this angle, it is necessary to examine as to whether the Ld. Pr. CIT validly exercised his revisional jurisdiction in the present case.

15. As demonstrated by the Id. AR, with reference to documents on record, the fixed assets along with capital WIP at the appellant/assessee's Kakinara factory were sold during the relevant year through the process of e-auction to M/s. ASPL for a composite consideration of Rs.27,50,00,000/-. According to Ld. Pr. CIT the deemed short term capital gain was wrongly assessed because in his opinion, the expression "Block of Assets" did not include in its ambit "Capital WIP" because no depreciation thereon was allowed. We further find that in the impugned order u/s. 263 of the Act while recording his final conclusion that the entire sale consideration was required to be netted off only against the WDV of the plant and machinery, the Ld. Pr. CIT proceeded on the footing that entire such sale consideration was paid by the purchaser only for purchase of plant and machinery. In recording such a finding there was an implied assertion that either the appellant/assessee did not sell the Capital WIP to M/s. ASPL or alternatively the capital WIP was sold or transferred to the successful bidder without allocating any consideration. We, however, find that both these assumption and inferences on which the Ld. Pr. CIT proceeded were factually without any basis and therefore, has no legs to stand and so wrong. In this context, we say that no prudent person properly instructed in law or facts would have drawn such inference which makes the impugned order perverse. We note that both in the course of original assessment by AO and in the course of 263 proceeding before Ld. Pr. CIT the appellant/assessee had furnished copy of the agreement for sale dated 16.09.2011 between the appellant/assessee and M/s ASPL. The subject clause of the said agreement categorically stated that the subject matter of agreement was sale of paper manufacturing plant and machinery including capital WIP. We further note that the sale consideration of Rs.27,50,00,000/- offered by the purchaser was a composite and consolidated price paid both for the plant and machinery as well as for Capital WIP. In the circumstances, it is quite incomprehensible as to on what basis the Ld. Pr. CIT concluded that the price was paid by the purchaser only for the purchase of plant and machinery and that no part of the consideration was attributable to sale of Capital WIP though it was very much integral part of the sale transaction. The Ld. Pr. CIT's conclusion that the sale price received by the appellant/assessee pertained only to sale of plant and machinery was, therefore, recorded

without having due regard to the transactional documents. We also note that in the audited financial statements of the appellant/assessee, the assessee had made appropriate disclosure which established that the assessee had sold both the plant and machinery and Capital WIP for a composite consideration of Rs.27,50,00,000/- and the resultant loss of Rs.12,65,47,945/- was declared in the P&L Account. We, therefore, find that the assessee had in fact made proper disclosure of the aforesaid facts in the audited accounts as well as in the transactional documents which proved that the assessee had in fact sold both plant & machinery and Capital WIP for a composite consideration of Rs. 27,50,00,000/-. In the aforesaid facts and circumstances, we hold that the finding of the Ld. Pr CIT that consideration received by the appellant/assessee pertained to only sale of plant & machinery and no evidence in support of sale of Capital WIP was furnished is factually incorrect and, therefore, unsustainable.

16. The second premise on which the Ld. Pr. CIT justified the invocation of sec. 263 was his assumption that the AO had assessed the loss under the head "Short Term Capital Gain" on sale of plant & machinery and Capital WIP without carrying out any examination of facts. From the material on record we find that in response to notice u/s. 143(2) of the Act, the appellant/assessee had furnished the details of plant and machinery sold through e-auction vide its letter dated 22.07.2014. Thereafter, the AO vide his questionnaire issued u/s. 142(1) of the Act dated 03.11.2014 had required the appellant/assessee to provide the particulars of sale of fixed assets and capital WIP and the details of the loss incurred there from. In response to such a questionnaire, the appellant/assessee had furnished the relevant particulars vide its letter dated 07.11.2014. The assessee had submitted documents supporting the sale of plant & machinery and capital WIP and also furnished the reasons for the loss incurred. In the explanation, the appellant/assessee had also provided the working of the loss computed under the head 'Short Term Capital Gain'. After examination of the assessee's explanation and documents furnished, the order u/s. 143(3) of the Act was passed by the AO on 16.01.2015 in which the loss reported by the assessee under the head "Capital Gains" was assessed and this carry forward was also permitted by the AO u/s. 74 of the Act.

The foregoing facts, therefore, put beyond any doubt that prior to completion of assessment, the AO had indeed conducted examination of the relevant facts culminating in assessment of short term capital loss incurred on sale of plant & machinery and Capital WIP. We, therefore, find that both the premise on which the Ld. Pr. CIT assumed jurisdiction u/s. 263 of the Act were factually untenable and, therefore, the proceedings based on assumption of wrong or incorrect facts was unsustainable in law. It is no doubt true that an authority authorized under the Act can invoke a jurisdiction prescribed in law, such as reopening under sections 147 or to correct an apparent error on the face of record under sec. 154 or revisional jurisdiction u/s. 263 of the Act if he entertain a bonafide belief at the stage of initiation of proceeding and it may not be necessary for such an authority to demonstrate that the belief entertained by the authority is absolutely right. However, if the belief entertained by the authority or the premise adopted for initiating proceeding is based on incorrect understanding of facts or legal provisions, then in such case, assumption of jurisdiction is fragile in the eyes of law. It may be kept in mind that howsoever bonafide the belief an authority may entertain that, if such honest belief is based on an erroneous interpretation of the relevant statutory provisions or incorrect assumption of facts, the assessee should not be required to face the rigours of reassessment or revision merely because the authority entertains an honest belief. In order to justify the revision or reassessment proceedings, the honest belief of the authority should be based upon the material on record and should, in fact, give rise to the belief that prejudice has been caused to the revenue as a consequence of passing of an erroneous order by the AO. Since the facts of the instant case demonstrate beyond doubt that the price of Rs.27,50,00,000/- received by the assessee was in respect of plant & machinery as well as Capital WIP, the Ld. Pr. CIT's finding that such price was paid only in respect of plant & machinery was based on no material and, therefore, the finding recorded by the Ld. Pr. CIT on incorrect understanding of the facts is unsustainable in law. Similarly, the Ld. Pr. CIT's finding in show cause notice as well as impugned order that the loss on sale of fixed assets was determined by AO without conducting any enquiry is also even factually wrong. Therefore, Ld. Pr. CIT's order

which is based on incorrect understanding of the material facts as discussed above is unsustainable and needs to be set aside on this score alone.

17. On the facts set out in the foregoing thereof, let us discuss a case law. We find that the assessee's case is supported by the decision of the Hon'ble jurisdictional High Court in the case of CIT Vs. J. L. Morrison Pvt. Ltd. 366 ITR 593. In this case also the assessment was framed u/s. 143(3) of the Act, which was held by the Ld. CIT to be erroneous and prejudicial to the interest of the Revenue. In the show cause notice, the CIT had set out five specific heads of expenses in respect of which the CIT considered the AO's order was erroneous because deduction allowed by the AO without calling for requisite information, without adequate enquiry. On appeal, the coordinate bench of this Tribunal, however, found that in the notice issued u/s. 142(1) of the Act the AO had required the assessee to furnish the details of various expenses, inter alia, including the items specified in the show cause notice. The Tribunal, therefore, held that in respect of the issue set out in the show cause notice the AO had indeed conducted enquiry and by requiring the assessee to furnish the details and after examining the relevant details and explanation the AO had taken one of the plausible view and, therefore, the Ld. CIT was not justified in invoking revisional jurisdiction u/s. 263 of the Act. On appeal u/s. 260A of the Act, the Hon'ble Calcutta High Court upheld the Tribunal's order observing as follows:

“There is evidence to show that the AO had required the assessee to answer 17 questions and to file documents in regard thereto. It is difficult to proceed on the basis that the 17 questions raised by him did not require application of mind. Without application of mind the question raised by him in the annexure to notice u/s. 14 and 11 could not have been formulated. The fact that all requisite papers were summoned and thereafter the matter was heard from time to time coupled with the fact that the view taken by him is not shown by the revenue to be erroneous and was also considered by the Tribunal as also by us to be a possible view, strengthens the presumption under clause (c) of section 114 of Indian Evidence Act. A prima facie evidence on the basis of the aforesaid presumption, is thus converted into a conclusive proof of the fact that order was passed by the AO after application of mind.”

18. Applying the ratio laid down in the judgment of the Hon'ble Calcutta High Court, we note that notice u/s. 142(1) of the Act dated 03.11.2014, the AO had raised specific question requiring the assessee to furnish details of machinery and capital WIP sold and the reasons for low sale consideration. From the material placed before him and only after examination

of the document furnished the AO passed the assessment on 16.01.2015. On these facts, therefore, we are unable to accept the Ld. Pr. CIT's allegation in the show cause notice that the AO has passed the order without obtaining any information from the assessee on the issue.

19. As far as the question whether cost of capital WIP is required to be computed for computing capital gains, we hold that the Ld. Pr. CIT's reference to section 50(2) of the Act was irrelevant. It should be kept in mind that section 50(2) of the Act only lays down the manner of computation of capital gain on sale of depreciable assets. It does not define the term "Capital Asset". One may say that capital WIP is not a depreciable asset unless put to use, but it is indeed a 'capital asset' and hence, any gain/loss arising on this transaction is taxable by way of capital gain/loss. Section 2(14) of the Act which defines the term "Capital Asset" is an inclusive definition which means it is not exhaustive and, therefore, it includes within this ambit "Property of every kind". Section 2(14) brings within its sweep, assets and properties of every kind be it moveable or immovable, real or corporeal, personal or institutionalized. Section 2(14) of the Act only carves out four exceptions viz., (i) agricultural land in India, (ii) personal effects, (iii) stock in trade and (iv) gold bonds. Save & except these specific exemptions granted by the Legislature every other asset owned and or held by the assessee falls within the scope of capital asset and it is wholly immaterial, whether or not such asset is used for assessee's business purposes or not. It is undoubted fact that in the assessee's financial statements the asset in the form of Capital WIP was appearing and undoubtedly the appellant had incurred cost of Rs.37,06,27,354/- for acquiring the same. Undoubtedly, WIP for the appellant had incurred cost of Rs.37,06,27,354/- was a valuable 'property' and hence, in the nature of a 'capital asset'. Our view also find support from the decision of this Tribunal in the case of JCIT Vs. Graphite India Ltd. 89 ITD 415 wherein capital WIP was held to be a capital asset and all the cost of expenses incurred in relation thereof was held to be its cost of acquisition. The relevant findings of this Tribunal are as follows:

"From the details of expenditure, we find that the expenditure has been mainly incurred for acquisition of leasehold rights of, even though till date of transfer, the assessee did not physically get

land transferred in its name, and was incurred for Geological expenses, mining plant expenses, prospecting expenses, registration expenses, licence fee, etc. The details of expenses also included expenditure of purchase of vehicles, furniture, advances to suppliers, Mining Plan expenses, etc. All these expenses were incurred by the assessee towards implementation of its Cement Plant Project at Rajasthan and was also treated by the assessee as capital work-in-progress and accordingly shown in the Balance-sheet which were presented to the shareholders of the Company. In the relevant assessment year, the assessee has not claimed any of such expenditure as a revenue expenditure in the income-tax return filed with the Department. The assessee also incurred cost for preparing the Mining Plan for getting approval from Indian Bureau of Mines

12. the definition of capital assets as provided in [Section 2\(14\)](#) is an inclusive one, which brings within its ambit property of any kind held by the assessee, except what has been expressly excluded by Clauses (i) to (iv) thereunder, thus the expression 'capital asset' has a wide connotation. The term 'property' though has no statutory meaning but is of widest import and subject to any limitation which the context may require, it signifies every possible interest which a person can acquire, hold or enjoy. According to Stroud's judicial dictionary of the words and phrases (6th edition) 'property' is a comprehensive term indicative of every possible interest which a party can have. In view of the wide meaning of the expression 'capital asset' in [Section 2\(14\)](#) and 'property' is understood in its ordinary side connotation, there is no hesitation in holding that the bundle of rights/permissions, tangible and intangible assets acquired by the assessee in respect of the Cement Plant to be set up in Rajasthan was a capital asset. There is also no much substance in the contention of the ld. counsel for the assessee that conceptually there is no cost of acquisition which could be attributable to the various rights/licences, etc. acquired by the assessee. It is equally difficult to accept that the date of acquisition of various rights/privileges/licences/tangible or intangible assets is not known. The dates and cost components constituting various rights, privileges proposed to be transferred to GKW vide agreement dated 30.8.1995, are definitely known and all these costs have been properly recorded in the books of accounts and capitalised as capital work-in-progress. The question of determination of cost of acquisition is primarily a question of fact which has been determined by the A.O. in the course of assessment under [Section 143\(3\)](#). After verifying the details of various expenses incurred by the assessee, he has reached to the conclusion that the cost of acquisition as recorded in the books of accounts for various rights, privileges, etc. was Rs. 44.88 lakhs.”

In our considered view, therefore, and on the facts of the case, since the assessee had sold the plant and machinery along with the capital WIP, the cost incurred on capital WIP was required to be considered and reduced as and by way of “cost of acquisition” arriving at the taxable amount of capital gain/loss. On this count also we reject the Ld. Pr. CIT’s allegation in the show cause notice that the cost of acquisition of capital WIP could not be considered for computing the short term capital loss.

20. We further note that in the impugned order the only reason given by the Ld. Pr. CIT for not accepting the cost of acquisition of Capital WIP was required to be reduced from the sale consideration for arriving at the taxable capital gain/loss was that no evidence was furnished to show that the consideration was also received towards the capital WIP and not the plant and machinery alone. The relevant finding and direction of the Ld. Pr. CIT were as under:

“Arguments of the assessee have been carefully considered. But the same is not acceptable. No evidence has been furnished in support of the claim that the price received was mainly for the work in progress and not towards the plant and machinery. I therefore hold that the assessment order passed by AO is erroneous and prejudicial to the interest of revenue. The same is set aside u/s. 263 with the direction to include short term capital gain of Rs.27,41,15,579/-. The AO is also directed to disallow carried forward of short term capital loss of rs.9,65,11,775/-.”

In this regard, we, however, find that the terms of the agreement dated 16.09.2011 between the appellant and M/s. ASPL sufficiently to establish that the appellant/assessee had in fact sold the plant and machinery along with the capital WIP as can be seen from the subject agreement. This contemporaneous piece of evidence clearly goes on to show that the sale consideration of Rs.27.50 cr. was paid for purchasing the plant and machinery and the capital WIP lying at the appellant/assessee's Kakinara factory. We also find sufficient merit in the Ld. AR's submission that no prudent business man would spend Rs.27.50 cr. to purchase fixed assets whose useful value as per the provisions of the Companies Act, 1956 was Rs.3,04,49,393/- and the WDV for tax purpose was only Rs.5,38,761/-. In fact we note that the original cost of the fixed assets at the time of purchase by the appellant/assessee was Rs.4,12,55,831/-. In the circumstances, by no stretch of imagination one can argue that any blind person would pay a consideration of almost seven times of the actual cost at which the machinery was originally acquired but at the relevant time of sale have been used, old, depreciated and worn out scrap item. Indeed therefore, we concur with the assertion of assessee that the capital WIP was sold along with the plant and machinery which were lying idle in the appellant/assessee's factory whose business was under suspension. Accordingly, both the appellant/assessee as well as the AO was right on the facts and in law in taking into account the cost of acquisition of capital WIP for computing the overall loss accruing on

sale of fixed assets including capital WIP. For the reasons set out in the foregoing we are therefore, unable to agree with the Ld. Pr. CIT's finding in the impugned order that no evidence was furnished before him satisfying the claim raised by the assessee is not tenable and, therefore, we find that the jurisdiction invoked for exercising his revision jurisdiction is not tenable in the eyes of law and, therefore, we have no hesitation in quashing the impugned order passed by the Ld. Pr. CIT. Therefore, the ground of appeal of assessee is allowed.

21. In the result, appeal of assessee is allowed.

Order is pronounced in the open court on 04.07.2018

Sd/-

(Dr.A. L. Saini)
Accountant Member

Sd/-

(Aby. T. Varkey)
Judicial Member

Dated : 4th July, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – M/s. Titagarh Industries Ltd. (formerly M/s. Bhatpara Papers Ltd.)756, Anandapur, E.M. Bypass, Kolkata-700 107.
- 2 Respondent – DCIT, Circle-4(1), Kolkata
3. Pr. CIT-2, Kolkata.
4. DR, ITAT, Kolkata. (sent through e-mail)

/True Copy,

By order,

Sr. Pvt. Secretary