IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : C : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.3730/Del/2015
Assessment Year: 2010-11

Cosmos Industries Ltd., C/o Garg R. Kumar & Associates, CAs, 7, Advocate Chambers, Raj Nagar District Centre, Above Dominos Pizza, Ghaziabad.	Vs.	DCIT, Circle-3(1), New Delhi.

PAN: AAACC6682R

(Appellant)		(Respondent)
Assessee by	:	Shri Akhilesh Kumar, Advocate
Revenue by	:	Shri Anil Katoch, Sr.DR
Date of Hearing	:	17.12.2018
Date of Pronouncement	:	31.12.2018

ORDER

PER R.K. PANDA, AM:

This appeal by the assessee is directed against the order dated 18th March, 2015 of the CIT(A)-14, New Delhi, relating to Assessment Year 2010-11.

2. The facts of the case, in brief, are that the assessee is a company and is engaged in the business of manufacturing and trading of sugar. It filed its return of income on 31st March, 2011 declaring total income of Rs.3,36,93,430/- and income u/s 115JB at Rs.4,01,70,500/-. This case was selected for scrutiny by issue of

statutory notices. During the course of assessment proceedings, the Assessing Officer observed from the P&L Account of the assessee that the assessee company has claimed a sum of Rs.71,69,290/- as loss on sale of investment. On being asked by the Assessing Officer to explain as to why the loss as claimed on sale of investment be not disallowed being capital in nature and added back to the taxable income, the assessee replied as under:-

> 1. "The assessee company has made investment in shares of two subsidiary companies which are engaged in the business of generation of power & in real estate respectively.
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> 2. The company's management decides to involve in these business through 'SPV' (special purpose vehicle). Thus two subsidiary companies were formed to implement such objects with the sole object of earning business profit thought such SPV.'
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> 3. The entire investment is such companies was made by the assessee company only as measure of commercial expediency to further is business objectives and were related to the business operations of the assessee company.
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> 4. The power planet run by one of the subsidiary company could not come into operation due to certain restrictions and non availability of permission from various Government Authorities of Government of Himachal Pradesh. In fact the total investment made by such subsidiary company represents application fees Rs. 200000/-, processing charges Rs. 800000/- and 50% of upfront fees of Rs. 850000/- with a stipulation that 50% of upfront fees will be paid after start of the project besides Rs. 1700000/- was given to government of Himachal Pradesh as security deposit. As the project could not be started hence neither any expense have any realizable value nor the security is refundable hence the project is under total loss. In these circumstances the company is bound to sell its investment at a price whatever available to get rid off total loss. Similarly in the other subsidiary company there is preliminary & pre operative expenses aggregating to Rs. 8.50 lakh approx and its asset includes a disputable advance of Rs. 15.13 lakhs besides other risks. Hence company also sold its shares at a loss.
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> 5. Hence such loss on sale of shares of subsidiary companies may kindly be accepted as business loss."

3. However, the Assessing Officer was not satisfied with the explanation given by the assessee. He observed that the assessee has shown the amount as investment in the balance sheet and, therefore, it is a capital asset within the meaning of section 2(14) of the IT Act. Therefore, the loss on investment is a capital loss. Since the assessee has held the asset for a period of more than 12 months, therefore, it is a long-term capital asset and the loss is a long-term capital loss. He noted that the provisions of section 37 provides that no capital expenditure is allowed in the computation of business income. He, therefore, disallowed the amount of Rs.61,69,290/- claimed by the assessee as loss on sale of investment.

4. Before the CIT(A) the assessee reiterated the same submissions as made before the Assessing Officer. Relying on various decisions, it was argued that the action of the Assessing Officer in treating the loss incurred on sale of shares of subsidiary company as long-term capital loss as against business loss treated by the assessee is unjustified and not as per law.

5. However, the ld.CIT(A) was not satisfied with the arguments advanced by the assessee and upheld the action of the Assessing Officer by observing as under:-

> 6. I have carefully considered the submissions made by the Ld.AR and have gone through the assessment order. It is noticed that the Assessing Officer has made a disallowance of Rs. 71.69.290/- on account of loss on sale of investments by holding that such loss is a long term capital loss and as such, is not eligible for setting off against the business income declared by the appellant. However, the Assessing Officer has specifically allowed carry forward of long term capital loss of Rs. 71,69,290/- as per the provisions of Income Tax Act, 1961. Thus, the genuineness and incurring of the loss by the appellant company has not been denied in the order of assessment; The dispute is to the nature and allowability of the loss so as to set off the same against the business income

declared by the appellant company. In regard to the same, it is not denied by the appellant that the shares held by the appellant in two subsidiary companies namely M/s. Cosmos Hydro Power Ltd. and M/s. Cosmos Hospitality and States Pvt. Ltd. had been shown as investment in the balance sheet. It has been stated that both these companies were subsidiaries of the appellant company under the Companies Act, 1956 since the appellant company held 97.5% shareholding of M/s. Cosmos Hydro Power Ltd. and 85% shareholding of M/s. Cosmos Hospitality and States Pvt. Ltd. It was submitted that both these investments in subsidiary companies were not made with an intention to realize any enhancement in value over a period of time and/or to earn dividend there from. It has been stated that such investments were with the business objectives to earn business profits through such special purpose vehicle. In support of the claim, the appellant has referred to the decision of Bombay Bench of Hon'ble ITAT in the case of DCIT vs. Coalgate Pamolive Pvt. Ltd. and it is therefore, submitted that mere disclosure requirement as investment in subsidiaries under Schedule VI of the Companies Act, 1956 should not be a ground to deny the eligibility of loss incurred on sale of investment. In case of Coalgate Pamolive Pvt. Ltd., the facts were that assessee claimed a loss on account of sale of shares held in Camolate Investment Pvt. Ltd. In the said case, it was contended that the assessee company had made investments in the fully owned subsidiary of the assessee company which was engaged in manufacturing activity exclusively for the assessee. On such facts, the I tribunal held that investment in subsidiary was only as a matter of commercial expediency to further its business objectives and were related to primary business operation of the assessee. In view thereof, Hon'ble Tribunal concluded that the head under which, investment in subsidiaries is shown does not and cannot negate the fact that such investments are made on the ground of commercial expediency. It was also held that head under which, dividend income has been assessed to tax does not affect the determination of the question whether shares are purchased on account of commercial expediency or not. It was concluded that so long as the shares are acquired on the grounds of business expediency, loss on sale of shares is treated as an admissible business deduction.

A reference was made to the judgment of the Hon'ble Supreme Court in the case of Patnayak and Company and where too, the assessee had subscribed to certain government security but incurred a loss on sale of that security. In that regard, it has been noted as under:-

"The stand of the assessee was *that the assessee had made the said investment with a view to promote its business interests and as subscription to the Government Loan was conducive to its business, the loss arose in the course of the business, and that, therefore, the assessee* was *entitled to a deduction of the loss claimed by it. A coordinate bench of this Tribunal upheld the claim made by the assessee. The Tribunal found that having regard to the sequence of events and the close proximity of the investment with the receipt of the Government orders, the conclusion was inescapable that the investment was made in order to further the sales of the assessee and boost its business. In the circumstances, the Tribunal held that the investment was made by way of commercial expediency for the purpose of carrying on the assessee's business and that, therefore, the loss suffered by the assessee on the sale of the investment must be regarded as a revenue loss. Upholding the stand of the Tribunal, Hon'ble Supreme Court held that the Tribunal was right in its view.*

It is thus clear that as long as investment is justified on the grounds of commercial expediency, the loss on sale of such investment is to be considered a business loss. The nature of business expediency could vary from case to case but what is important is that there must be an underlying motive to serve business interests of the assessee in making such investment. Let us now turn to the facts of the case before us. The company in which shares are subscribed is engaged only in the business of manufacturing the toothbrushes for the assessee company. Any investment in such a company is justified for pure commercial considerations, and, therefore, loss on sale of such shares is admissible as business losses. In the case of DCIT vs Gujarat Small Industries Corporation (84 TTJ 22), a coordinate bench of this Tribunal was dealing with a situation in which "from the facts on record, it is obvious that the Girnar Scooter Ltd. was *floated for the same purpose as a subsidiary and later on sold off when the loss started mounting" and on these facts the coordinate bench held that loss on sale of shares in subsidiary was business loss in nature. We are in considered agreement with the line of reasoning thus adopted by the coordinate bench. In view of these discussions, as also bearing in mind entirety of the case, we uphold the stand of the CIT(A) and decline to interfere in the matter. "*

5.1 In the above judgment, it is evident that Hon'ble Tribunal referred to decision of DCIT vs. Gujarat Small Industries Corporation 84 TTJ 22 where the Hon'ble Tribunal had approved the stand of the CIT(A) in following the judgments of the Apex Court in Brook Bond India Ltd. vs. CIT reported in 162 ITR 373 and Rajasthan High Court in the case of Rajasthan Financial Corporation vs. CIT reported in 65 ITR 117 wherein too it has been held that if the investments in shares and sale thereof are closely linked with the business of the assessee, the loss suffered would be trading loss. It was held in the above decisions as under:

"5. We have considered the rival contentions of the parties, perused records and gone through the orders of the lower authorities. Some admitted facts noticed by us are that as per the memorandum of association of the assessee-corporation, the main object of the company was *to promote the interest of SSI Units in Gujarat State. The main object of the corporation was to help industrial concerns in various ways and help industrial growth of the State. From the facts on record, it is obvious that the Girnar Scooter Ltd.* was *floated for the same purpose as a subsidiary and later on sold off when the loss started mounting. From this facts, we find some force that investment in shares of Girnar Scooter Ltd. by the assessee-company was in the nature of trade investment. On perusal of the order of the CIT(A), we find that the CIT(A) has correctly followed the judgment of Hon'ble Supreme Court in the case of Brooke Bond India Ltd. vs. CIT (1986) 57CTR (SC) 25 : (1986) 162 ITR 373 (SC). The learned CIT(A) has also followed the judgment of Hon'ble Rajasthan High Court in the case of Rajasthan Financial Corporation vs. CIT (1967) 65 ITR 112 (Raj), wherein it was held that if the investment in shares and sale thereof is closely linked with the business of the assessee, the loss suffered on account of such sale would be a trading loss. "*

6.2 In light of the above, first principle that emerges is that disclosure by the assessee by itself cannot be a ground to determine the nature of the asset held by the assessee and consequently the loss incurred on sale of such an asset.

This has also been stated by the Hon'ble Supreme Court in the case of CIT vs. Kedarnath Jute Mfg. Co. Ltd. 82 ITR 363 wherein it has been held as under:

"We are wholly unable to appreciate the suggestion that if an assessee under some misapprehension or mistake fails to make an entry in the books of account and although, under the law, a deduction must be allowed by the Income-tax Officer, the assessee will lose the right of claiming or will be debarred from being allowed that deduction. Whether the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view which the assessee might take of his rights nor can the existence or absence of entries in the books of account be decisive or conclusive in the matter. "

5.3 Similar view was also expressed in the case of Tuticorin Alkali Chemicals and Fertilizers Ltd.vs. CIT 227 ITR 172 whereby it has been held as under:

"It is true that this court has very often referred to accounting practice for ascertainment of profit made by a company or value of the assets of a company. But when the question is whether a receipt of money is taxable or not or whether certain deductions from that receipt are permissible in law or not, the question has to be decided according to the principles of law and not in accordance with accountancy practice. Accounting practice cannot override section 56 or any other provision of the Act. As was pointed out by Lord Russell in the case of B . S. C. Footwear Ltd. (1970) 77 ITR 857, 860 (CA), the income-tax law does not march step by step in the footprints of the accountancy profession. "

5.4. In view of the above binding precedents, it is evident that the disclosure by itself cannot be a ground to regard the nature of loss claimed as capital loss. However, what is necessary and essential for determination of loss is that investment must be made by the assessee for the purpose of business of the assessee. Thus, there has to be commercial expediency in incurring such expenditure. In the instant case, in my opinion, the aforesaid test has not been satisfied. It has not been established in what manner and on what basis these two companies were set up as a measure of commercial expediency. M/s. Cosmos Hydro Power Ltd. and M/s. Cosmos Hospitality and States Pvt. Ltd. were not in the nature of business carried on by the appellant. On the contrary, they were engaged in distinct line of business of generation of power and real estate respectively which are not in any way related to the existing business of manufacturing and trading of sugar. In view thereof, the claim of loss by the appellant on sale of such investment cannot be regarded as business loss. In arriving at the above conclusion, I am also supported by the judgment of the Hon'ble High Court of Karnataka in the case of United Breweries Ltd. vs. ACIT reported in 229 Taxman 113. In the said case, assessee carried on business activities and sale of power and regular. It established a subsidiary company namely UB Resort Ltd. with a view to extend the business of the assessee company which was to put up resorts at important tourist destinations. The Assessing Officer held that expenditure on investment of said company was not incurred wholly and exclusively for the purpose of business and therefore, disallowed the claim despite the fact that subsidiary company had become defunct under section 560 of the Companies Act, 1956. The CIT(A)

dismissed the appeal by holding that expenditure related to setting up of an altogether new business which was separate and distinct from existing business and therefore, loss was a capital loss and not business loss. The Tribunal also affirmed the conclusion of the authorities below. On further appeal, Hon'ble High Court also rejected the claim by holding as under:-

"therefore, when the assessee is in the business of manufacture and sale of beer and liquor, if they have lent money to a sister concern, may be a subsidiary, for the purpose of setting up a new line of business, it cannot be said that the money lent by them to the subsidiary company as an assistance could be characterized as an expenditure laid down and expanded wholly and exclusively for the purpose of business of the assessee. In fact, the material on record discloses that the subsidiary company was in existence from 1994 to 2001. The entire money is lent and spent only towards payment of salary and travelling expenses over a period of four to five years and no deductions were claimed in each year when such payments were made. On the contrary, for the first time the claim was put forth as bad debts. After writing off the same when they could not substantiate the said claim, then as an alternative, a claim was put forth under Section 37 of the Act. Though mere mentioning of a wrong provision would not deprive the assessee of the benefit of deductions or exemptions, in trying to find out the real nature of transaction, intention of the parties at an undisputed point of time, clearly go to show that this expenditure was not incurred wholly and exclusively for the purpose of business of the assessee. The said claim is only made after the claim was not accepted under Section 36(1)(vii) of the Act. If the argument of the assessee is to be accepted, whenever a holding company lends money to a subsidiary company, then the holding company would be entitled to the said benefit. That is not the intent of the law. Though there is no prohibition in law for starting subsidiary company, to get the benefit of Section 37, the money lent should be laid out and expended only for the purpose of business of the assessee. There should be a direct nexus between the assessee and the business for which the money is lent. If that connection is not there, merely because the money was *lent to a sister concern or to a subsidiary company would not enable the assessee to claim such deduction. The Assessing Officer and the appellate authorities on careful consideration of the material on record have recorded the finding of fact. In the circumstances, we do not see any justification to interfere with the said concurrent finding of fact recorded. "*

5.5. In view of the above, I agree with the conclusion of the Assessing Officer that the loss incurred on sale of shares is a capital loss and not a business loss as the same has no proximity much less close proximity to the business so as to regard the same to be either integral or essential part of carrying on the business or incidental to the business of the appellant. The Hon'ble Supreme Court in the case of A.V. Thomas & Company Ltd. vs. CIT 48 ITR 67 held that when the assessee is neither a banker nor a money lender, the advance made by assessee to a private company to purchase a share could not be said to be incidental to the trading activity of the assessee.

5.6 In view thereof, for the reasons aforesaid, the loss is held to be long term capital loss and as such, grounds raised by the appellant are rejected."

6. Aggrieved with such order of the CIT(A), the assessee has come in appeal before the Tribunal raising the following grounds:-

> "1. That The Commissioner of Income Tax (Appeals) was not justified in holding that loss incurred on sale of shares of subsidiary companies is to be treated as capital loss. As these investment made only as a measure of commercial expediency and to further its business objectives, hence should be treated as business loss.
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> 2. That CIT (Appeals) ignored the decision pronounced by various Courts wherein it was held that shares acquired on ground of commercial expediency, any loss on sale thereof is to be treated as admissible business loss, inspite of the fact that these shares were not converted into stock in trade and the fact that an asset shown as investment per se does not, and can not negate the fact that such investments are made on the ground of commercial expediency."

7. The ld. Counsel for the assessee strongly challenged the order of the CIT(A). Referring to para 5 of the order of the CIT(A), he submitted that he has accepted that genuineness of the incurring of the loss by the assessee company has not been denied by the Assessing Officer. He has also accepted the plea of the assessee of revenue loss by holding that the disclosure by itself (as investment) cannot be a ground to regard the nature of loss as capital loss by relying on the decision of Hon'ble Supreme Court in the case of *Kedarnath Jute Manufacturing Ltd., 82 ITR 363* and *Tuticorin Alkali Chemicals, 227 ITR 172 (SC).* However, he sustained the disallowance of loss on the basis that the test of commercial expediency was not satisfied.

8. The ld. counsel for the assessee submitted that the assessee has taken a decision of investment in subsidiary companies only as a measure of commercial expediency to do the business of power generation and hospitality/real estate by way of two special purpose vehicle with the sole object of earning profit, that too in furtherance of objects

of company which is related to business operations under separate entities. Referring to the main objects to be pursued by the company on incorporation and the objects ancillary or incidental to the attainment of main objects, the ld. counsel for the assessee drew the attention of the Bench to various clauses of the Memorandum of Association. Referring to the decision of the Hon'ble Punjab & Haryana High Court in the case of *Bright Enterprises Pvt. Ltd. vs. CIT, vide ITA No.224 of 2013, order dated 24.07.2015,* he submitted that when the holding company invests amounts for business of its subsidiary, it must be held for business expediency. The Hon'ble High Court, relying on the decision of Hon'ble Supreme Court in the case of *SA Builders (P) ltd. vs. CIT, 288 ITR 1 (SC),* has held that two companies may be in different lines of business, still it makes no difference. He drew our attention to paras 34 and 35 of the said order which read as under:-

> "34. We agree with the view taken by the Delhi High Court in CIT vs. Dalmia Cement (Bharat) Ltd. (2002) 254 ITR 377 that once it is established that there was nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the arm-chair of the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No businessman can be compelled to maximize its profit. The income tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own view point but that of a prudent businessman. As already stated above, we have to see the transfer of the borrowed funds to a sister concern from the point of view of commercial expediency and not from the point of view whether the amount was advanced for earning profits.
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> 35. We wish to make it clear that it is not our opinion that in every case interest on borrowed loan has to be allowed if the assessee advances it to a sister concern. It all depends on the facts and circumstances of the respective case. For instance, if the Directors of the sister concern utilize the amount advanced to it

> by the assessee for their personal benefit, obviously it cannot be said that such money was advanced as a measure of commercial expediency. However, money can be said to be advanced to a sister concern for commercial expediency in many other circumstances (which need not be enumerated here). However, where it is obvious that a holding company has a deep interest in its subsidiary, and hence if the holding company advances borrowed money to a subsidiary and the same is used by the subsidiary for some business purposes, the assessee would, in our opinion, ordinarily be entitled to deduction of interest on its borrowed loans."

9. Referring to the decision of the Mumbai Bench of the Tribunal in the case of DCIT vs. Colgate Palmolive India Ltd., ITA No.5485/Mum/2009, order dated 25th October, 2011, he submitted that the Tribunal in the said decision has allowed the loss of Rs.5.5 crore incurred upon sale of shares of Camelot as business loss. It was held that as long as investment is justified on the grounds of commercial expediency, the loss of sale of such investment is to be considered as business loss. It was further held that the nature of business expediency could vary from case to case, but, what is important is that there must be an underlying motive to serve business interests of the assessee in making such investment. He submitted that the above decision of the Tribunal has been upheld by the Hon'ble Bombay High Court reported in 370 ITR 728 and the SLP filed by the Revenue was dismissed by the Hon'ble Supreme Court vide SLP No.25987/2015 dated 21.12.2017. He also relied on the following decisions:-

(i) Apollo Tyres Ltd. vs. ACIT, ITA No.223/Cochin/2015, order dt.10.01.2017; &

(ii) DCIT vs. Gujarat Small Industries, 84 TTJ AHD 22.

10. The ld. DR, on the other hand, heavily relied on the order of the CIT(A). He submitted that there is no proximate relationship between the nature of business and

investment. The various decisions relied on by the ld. counsel for the assessee are distinguishable and not applicable to the facts of the present case.

11. The ld. counsel for the assessee, in his rejoinder submitted that the ld.CIT(A) has only denied the benefit on account of commercial expediency which is discernible from para 5.4 of the order of the CIT(A). The genuineness and incurring of the loss by the assessee company is not in doubt. The dispute is only regarding the nature and allowability of the loss so as to set off the same against the business income. He submitted that in the light of the various decisions cited earlier, the case of the assessee is squarely covered in its favour.

12. We have considered the rival arguments and perused the orders of the Assessing Officer and CIT(A). We have also considered the various decisions cited before us. We find the Assessing Officer disallowed the amount of Rs.71,69,290/- claimed by the assessee on account of loss on sale of investments by holding that such loss is a long-term capital loss and, therefore, is not eligible for setting off against the business income declared by the assessee. Treating the said loss as long-term capital loss, the Assessing Officer has allowed the carry forward of the same as per the provisions of the Income-tax Act. We find the ld.CIT(A) upheld the action of the Assessing Officer, the reasons of which have already been reproduced in the preceding paragraphs. It is the submission of the ld. counsel for the assessee that loss on sale of shares held as investment in subsidiary companies is a revenue loss. It is also his argument that when holding company invests amounts for business of its subsidiary, it

must be held for business expediency. We find merit in the arguments advanced by the ld. counsel for the assessee. We find the Hon'ble Punjab & Haryana High Court in the case of Bright Enterprises Pvt. Ltd. (supra), while deciding the issue of commercial expediency has observed as under:-

> 14. The appellant's case meets each of the tests stipulated by the Division Bench. In fact, it meets a higher test. When a holding company invests amounts for the purpose of the business of its subsidiary, it must of necessity be held to be an expense on account of commercial expediency. A financial benefit of any nature derived by the subsidiary on account of the amounts advanced to it by the holding company would not merely indirectly but directly benefit its holding company. In the case before us, the subsidiary had to be funded to a large extent for otherwise it would not have survived. If it had not survived and had gone into liquidation, the appellant would have suffered directly on account of an erosion of its entire investment in the subsidiary. In this case, the financial assistance was not only prudent but of utmost necessity for without it the subsidiary would have suffered grave financial prejudice.
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> 15. The Tribunal, therefore, erred in coming to the conclusion that the CIT (Appeals) had not considered the judgment of the Supreme Court in the correct perspective. With respect, we find that the Tribunal has not even analyzed the judgment of the Supreme Court in S.A. Builders Ltd. vs. Commissioner of Income-Tax (Appeals) and another (supra).
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> 16. As we noted earlier, the funds/reserves of the appellant were sufficient to cover the interest free advances made by it of Rs.10.29 crores to its sister company. We are entirely in agreement with the judgment of the Bombay High Court in Commissioner of Income Tax vs. Reliance Utilities & Power Ltd., (2009) 313 ITR 340, para-10, that if there are interest free funds available a presumption would arise that investment would be out of the interest free funds generated or available with the company if the interest free funds were sufficient to meet the investment.
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> 17. The Assessing Officer's view that the advance was not for business purposes as the appellant had no business dealings with the sister company is erroneous. Commercial expediency in advancing loans does not arise only on account of there being transactions directly between the holding company and the subsidiary company or between the group companies inter se. The two companies may even be in a different line of business. It would make no difference. It would still be commercially expedient for one group company to advance amounts to another group company, if, for instance, as a result thereof the former benefits. In the present case, as we have already demonstrated, there would be a direct benefit on

> account of the advance made by the appellant to its sister company if the same improves the financial health of the sister company and makes it a viable enterprise. We hasten to add that it is not necessary that the advance results in a positive tangible benefit. So long as the amount is advanced with that view in mind or with any other commercially expedient view in mind that is sufficient.

13. We find the Mumbai Bench of the Tribunal in the case of CIT vs. Colgate Palmolive (supra) has decided an identical issue where the loss incurred on sale of shares of the subsidiary company was disallowed as business loss. The CIT(A) allowed the claim of the assessee and on appeal by the Revenue, the Tribunal upheld the action of the Assessing Officer and dismissed the appeal filed by the Revenue by observing as under:-

> 7. We find that Camelot was set up to manufacture toothbrushes exclusively for the assessee company and that it had no other customer than the assessee. It was said to have been set up as a small scale industrial undertaking with a view to certain preferential treatment in the excise laws, but whatever it manufactured was bought by the assessee company alone. Camelot did incur the losses but the assessee company extended financial help to Camelot from time to time. This financial help was clearly in assessee's own business interests because, if the assessee company was not to do so, Camelot could not have continued to exist, and all these losses incurred by Camelot were essentially relatable to doing business with assessee alone, i.e. Camelot's only customer. The loans and advances so given by the assessee were therefore wholly incidental to its business and could not be treated in isolation of its legitimate business interests. When the grant of loan itself is justified on the ground of commercial expediency, it is only corollary thereto that even write off of such a loan is incidental to business. It is, therefore, not really correct to say that write off of the loans granted by the assessee to Camelot would have been an inadmissible business deduction and the entire transaction was devised to avoid legitimate tax liability. We see substance in the plea of the company that anyone buying a company would like to buy a company with minimum liabilities, it was considered appropriate to first pay off the dues by the company, even by raising the funds through fresh issue, and then sell the company. This explanation is in consonance with the ground business realities and we find no infirmity in the same. The advances given by the assessee were finally converted into equity, as the assessee company subscribed to the Camelot shares to enable Camelot to pay off its dues to the assessee company. On these facts, in our humble understanding, the assessee had invested in the Camelot, and extended financial

help to Camelot, purely for commercial expediency. The head under which investments in subsidiaries is shown is governed by the disclosure requirements under Schedule VI to the Companies Act, and, therefore, the fact that an asset is shown as 'investment' per se does not, and cannot, negate the fact that the such investments are made on the grounds of commercial expediency. Similarly, the head under which dividend income is assessed to tax does not also affect determination of question whether the shares are purchased on account of commercial expediency or not. It is only elementary that dividend income, whether the shares are held as investments or as any other asset, is always taxable under the head 'income from other sources'. Therefore, nothing really turns on Assessing Officer's emphasis on the fact that the Camelot shares were shown as investments in the balance sheet and that dividend income from these shares is taxable as income from other sources. We have also noted that as long as shares are acquired on the grounds of business expediency, any loss on sale thereof is also required to be treated as an admissible business deduction. Hon'ble Supreme Court's judgment in the case of Patnaik & Co (supra) deals with a situation in which the assessee had subscribed to certain Government security but incurred a loss on sale of that security. The stand of the assessee was that the assessee had made the said investment with a view to promote its business interests and as subscription to the Government Loan was conducive to its business, the loss arose in the course of the business, and that, therefore, the assessee was entitled to a deduction of the loss claimed by it. A coordinate bench of this Tribunal upheld the claim made by the assessee. The Tribunal found that having regard to the sequence of events and the close proximity of the investment with the receipt of the Government orders, the conclusion was inescapable that the investment was made in order to further the sales of the assessee and boost its business. In the circumstances, the Tribunal held that the investment was made by way of commercial expediency for the purpose of carrying on the assessee's business and that, therefore, the loss suffered by the assessee on the sale of the investment must be regarded as a revenue loss. Upholding the stand of the Tribunal, Hon'ble Supreme Court held that the Tribunal was right in its view. It is thus clear that as long as investment is justified on the grounds of commercial expediency, the loss on sale of such investment is to be considered a business loss. The nature of business expediency could vary from case to case but what is important is that there must be an underlying motive to serve business interests of the assessee in making such investment. Let us now turn to the facts of the case before us. The company in which shares are subscribed is engaged only in the business of manufacturing the toothbrushes for the assessee company. Any investment in such a company is justified for pure commercial considerations, and, therefore, loss on sale of such shares is admissible as business losses. In the case of DCIT Vs Gujarat Small Industries Corporation (84 TTJ 22), a coordinate bench of this Tribunal was dealing with a situation in which " from the facts on record, it is obvious that the Girnar Scooter Ltd. was floated for the same purpose as a subsidiary and later on sold off when the loss started mounting" and on these facts the coordinate bench held that loss on sale of shares in subsidiary was business loss in nature. We are in considered agreement with the line of

reasoning thus adopted by the coordinate bench. In view of these discussions, as also bearing in mind entirety of the case, we uphold the stand of the CIT(A) and decline to interfere in the matter.

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24. Having heard the rival contentions, we find that the issue is covered in favour of the assessee by the decision of ITAT Delhi (SB) in the case of ITO v. Ekta Promoters (P)Ltd., (2008) 113 ITD 719 (Delhi)(SB), wherein, it has been held that section 223D will have application only w.e.f. A.Y. 2004-05 and cannot be applied to A.Y. 2003-04. The assessment year under consideration in this case is 2003-04. We also find that Hon'ble Jurisdictional High Court in the case CIT v. M/s. Bajaj Hindustan Ltd in Income Tax Appeal No.198 of 2009 , held that the provisions of section 234D inserted w.e.f. 1.6.2003 have no retrospective effect. Respectfully following the decision in the case of Ekta Promoters (supra), and also in the case of Bajaj Hindustan Ltd (supra), we uphold the action of the CIT(A) and decline to interfere."

14. We find the decision of the Tribunal was upheld by the Hon'ble Bombay High Court reported in 370 ITR 728. The relevant observations of the Hon'ble High Court at para 9 of the order reads as under:-

"9. Upon a perusal of this material, we are unable to agree with Mr. Pinto that question 5.1 reproduced above is a substantial question of law. Given the peculiar facts and circumstances and the nature of the investment so also being for commercial expediency, the view taken by the Commissioner and the Tribunal concurrently cannot be termed as perverse. That view being imminently possible in the given facts and circumstances. It does not raise any substantial question of law."

15. We find the SLP filed by the Revenue has been dismissed by the Hon'ble Supreme Court. The various other decisions relied on by the ld. counsel for the assessee also support his case. Under these circumstances, we are of the considered opinion that the CIT(A) was not justified in holding that the loss incurred on sale of

shares of subsidiary companies is a capital loss and not a business loss. The grounds raised by the assessee are accordingly allowed.

16. In the result, the appeal filed by the assessee is allowed.

The decision was pronounced in the open court on 31.12.2018.

Sd/-	Sd/-
(SUCHITRA KAMBLE) JUDICIAL MEMBER	(R.K. PANDA) ACCOUNTANT MEMFBER

Dated: 31st December, 2018

dk

Copy forwarded to

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi