

**IN THE INCOME TAX APPELLATE TRIBUNAL “G” BENCH, MUMBAI  
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAM LAL NEGI, JM**

आयकर अपील सं/ I.T.A. No.1886/Mum/2018  
(निर्धारण वर्ष / Assessment Year:2013-14)

Standard Industries Ltd. 59, The Arcade, 1 <sup>st</sup> Floor, World Trade Centre, Cuffe Parade Colaba, Mumbai- 400005.	<b>बनाम/</b> Vs.	PCIT-3 612, Aayakar Bhavan, M. K. Road, Mumbai-400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCS8888C		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Mr. K. K. Ved	
Revenue by:	Shri Ajay Kumar (DR)	

सुनवाई की तारीख / Date of Hearing: 17/12/2019  
घोषणा की तारीख /Date of Pronouncement: 20/02/2020

**आदेश / ORDER**

**PER SHAMIM YAHYA, AM:**

This appeal filed by the assessee is directed against the order of the Principal Commissioner of Income Tax-3, Mumbai [hereinafter referred to as the “PCIT”] dated 15/01/2018 and pertains to A.Y.2013-14.

2. The grounds of appeal are as under: -

“The Appellant objects to the order dated 15 January 2018 (received on 25 January 2018) passed by the learned Principal Commissioner of Income Tax -3 (referred to as CIT), Mumbai under section 263 of the Income-tax Act. 1961 ('the Act') on the following grounds:

I. Validity of order under section 263



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- 1.1 The Id. CH erred in setting aside the assessment order passed under section 143(3) by the Deputy Commissioner of Income-tax –3(3)(2)(referred as DCIT) dated 17 March 2016 under section 263 of the Act without appreciating the fact that the conditions precedent to passing an order under the said section were not satisfied;
  - 1.2 The Id. CIT erred in holding that the assessment order passed by DCIT is erroneous and prejudicial to the interests of the revenue:
  - 1.3 The Appellant submits that considering the facts and circumstances of its case. and the law prevailing on the subject. the assessment framed by the Id. DCIT was after consideration of facts and hence, setting aside of the same by the Id. CIT under section 263 of the Act is erroneous, in excess of jurisdiction and bad in law:
  - 1.4 The Appellant submits that the impugned order under section 263 of the Act by the CIT be struck down.
2. Without prejudice to the above,
- 2.1 The Id. CIT has erred in directing the DOT to consider disallowance of carry forward of long term capital loss aggregating to Rs.1,33,76,692 by treating it as an advance written off.
  - 2.2 The Id. CIT erred in holding that a right to acquire machinery is not in the nature of a capital asset. He erred in not appreciating the fact that the definition of 'transfer' includes relinquishment of right to a acquire a capital asset and therefore, the loss on right to acquire a capital asset in the appellant's case is eligible to carried forward as long term capital loss.
  - 2.3 Without prejudice to the above, the appellant submits that if the Id. CIT is of the view that the loss incurred is not a capital loss in nature then it should be allowed as a business expenditure under section 37:
3. The Appellant craves leave to add, alter, amend. substitute and / or modify in any manner whatsoever modify all or



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any of the foregoing grounds of appeal at or before the hearing of the appeal. Each of the grounds of appeal is without prejudice to the other.”

3. In this case the assessment u/s 143(3) of the I. T. Act, 1961 was completed on 17.03.2016 for A.Y.2013-14 by the Dy. CIT 3(3)(2), Mumbai assessing the total income/loss of the assessee at Rs.4,76,03,249/- and book loss at Rs.7,62,34,191/- as against current year's loss of Rs.6,21,88,565/- and book loss of Rs.7,62,34,191/- declared by the assessee company.

4. Thereafter Ld. CIT issued the notice to the assessee u/s 263 of the I.T. Act, 1961 dated 20.02.2017 the same read as under.:-

*“During the year under consideration, the assessee has claimed capital loss as Long Term Capital Loss and carried forward the same for set off against the gains in subsequent years. Allowance of said claim is found to be erroneous as the amount is a mere write off of balances and not a Long Term Capital Loss arising out of a sale of any rights or asset. Therefore, the assessment needs to be revised to deny the claim of assessee for Long Term Capital Loss of Rs.1,33,76,692/-*

*In view of the above, the assessment order passed u/s 143(3) by the DDT 3(3)(2), Mumbai dated 17/03/2016 appears to be erroneous and prejudicial to the interest of Revenue and it is evident that the Assessing Officer has committed the lapse of not applying his mind to the issues discussed above. I, therefore, propose to pass such order thereon as the circumstance of the case justify, including an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment under the provisions of sec 263.”*

5. In response to the same assessee submitted that the issue has duly been examined by the AO and after considering the submission filed and being fully aware of the fact of the long term capital loss of



Rs.1,33,76,692/- the same was allowed to be carried forward u/s 143(3) of the I. T. Act, 1961.

6. In this regard, the assessee placed reliance upon the several case laws for the proposition that when AO has enquired into the matter and applied his mind to the materials on record and then the view has been taken the same cannot be subject the matter of Ld. CIT invoking the provisions of Section 263 of the I. T. Act, 1961. However, Ld. CIT was not satisfied. He observed that the assessment records indicate that the AO has during the course of assessment proceeding only called for routine details and has not delved in detail or made necessary inquiries on the issue of Long Term Capital Loss and investigation on such issues which should have been made. He noted that as is evident from the records and the assessment order, there was no direct query made by the AO regarding the claim of Long Term Capital Loss. The AO accepted assessee's submission and did not make any further queries regarding the ownership, actual transfer, delivery/handing over possession etc of the said property. The Ld. CIT referred to the provisions of Section 263(1) of the Act, the definition of transfer of capital asset and the facts of the case. The Ld. CIT concluded as under.:-

*“5.1 The submissions of the assessee company challenging the validity of the proceedings initiated u/s 263 are duly considered but are found to be untenable. The assessee's contention that the order cannot be treated as erroneous as the AO has accepted the submissions made by the company and AO's order cannot be labeled as erroneous is not correct. This is because the assessment records indicate that the AO has during the course of assessment proceedings only called for routine details and has not delved in detail or made necessary inquiries on the issue of Long Term*



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*Capital Loss and investigation on such issues which should have been made. As is evident from the records and the assessment order, there was no direct query made by the AO regarding claim of Long Term Capital Loss. The AO accepted assessee's submission and did not make any further queries regarding the ownership, actual transfer, delivery/ handing over possession etc of the said property. Therefore, the undersigned, as Principal Commissioner-3, Mumbai, is within the powers accorded under the provisions under sec 263 as the said section 263 of the I. T. Act, 1963 includes the following:*

*263. (1) The (Principal Commissioner or] Commissioner may call for an examine the record of any proceeding under this Act, and if he considers that any order passed therein by the [Assessing] Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment.°*

*(Explanation 2.- For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interest of the revenue, if in the opinion of the Principal Commissioner or commissioner: -*

*(a) The order is passed without making inquiries or verification which should have been made;*

*(b) The order is passed allowing any relief without inquiring into the claim;*

*(c) The order has not boon made in accordance with any order, direction or instruction issued by Board under section 119: or*

*(d) The order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person]*



6. *It is pertinent to note that a "Capital Gain" or a "Capital Loss" arises on sale/transfer of a capital asset for a consideration. Definition of sale/transfer of asset as per sec 2(47) is as under*

*2(47) transfer in relation to capital asset includes —*

*(i) sale, exchange or relinquishment of the asset; or*

*(ii) the extinguishment of any rights therein; or*

*iii) the compulsory acquisition thereof under any law; or*

*(v) in a case where the asset is converted by the owner thereof into, or is treated by him as stock-in-trade of a business carried on by him, such conversion or treatment; or*

*iva) the maturity or redemption of a zero coupon bond; or*

*(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53k of the Transfer of Property Act, 1882.....*

*6.1 The facts of the case are as under:*

*The assessee is a company engaged in the manufacture and trading of textile goods, readymade garments, caustic soda, potash, chlorine, hydrochloric acids, and other organic and inorganic chemicals. On perusal of the assessment records, it is revealed that the assessee has debited Rs.1,33,76,692/- as sundry balances written off in the books of accounts being advance given to BHEL towards acquisition of a capital asset. This amount was added in computation of income by the assessee and subsequently claimed the same as Long Term Capital Loss to be carried forward. Without due inquiry and verification, the AO allowed the claim. This is erroneous in as much as it is prejudicial to the Revenue, as the Assessee has written off its balance advanced to a party which cannot be categorised as a Long Term Capital Loss. This is because, the amount written off is capital itself which was given as advance and loss has not arisen due to alienation of any capital asset. Reliance is placed on the decision of the ITAT, Mumbai in the case of M/s Tulip Star Hotels Ltd Vs Addl. CIT 114 ITD 202. Reliance is also placed on the decisions in the following cases*



i) *Grindwell Norton Ltd Vs. DOIT ITAT Mumbai —TM - 91 ITD 412*

H) *CIT Vs Chidambaramnatha Mudaliar Madras - 240 ITR 552*

*Wherein the concept of Long Term Capital Loss on account of alienation of asset and Loss of Capital is discussed. In the order of the Hon'ble High Court Madras, in the case of CIT Vs Chidambaramnatha Mudaliar Madras - 240 ITR 552, it was held as under:*

*The Tribunal was not correct in holding that the assessee had incurred long term capital loss when the assessee wrote off his unrealized deposit from a wound up company and that the assessee suffered a loss under the head Capital Gains' to enable him to carry forward the same to the subsequent years'*

*6.2 In the present case, it is clear that there was neither a capital asset in the possession of the Assessee nor any right in the capital asset with the assessee. An advance made for buying a machinery/equipment is neither acquisition of any right in a capital asset nor is it acquisition of any right in a capital asset. Such an advance is an advance for capital goods which is paid for supply of capital equipment. As per Accounting Standard 10, accounting of fixed assets permits such accounting only if an identifiable asset is created. In this case payment of an advance does not create an identifiable asset. Therefore, the amount of advance continues to be disclosed as advances for capital goods. It is such an advance that is written off by Assessee and therefore, it cannot be termed as capital asset as claimed by Assessee nor a right acquired for a capital asset. It, therefore, cannot be claimed under the provision of Capital Gains under the Income Tax Act, 1961, The Assessee had given an Advance for acquirement of the asset but the transaction was not completed so the assessee did not gain any right over such asset. What the assessee wrote off was sundry balance of advance only.*

*6.3 In view of the above, the assessee's contention that the company had entered into an agreement for purchase of machinery and also paid an amount to the other party (BHEL). whereby acquiring a right, though in a limited extent, over the property in question is completely incorrect in law. The claim is, therefore,*



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*against the provisions of law and not allowable to assessee. Therefore, the assessment order which did not disallow this claim is erroneous in as much as its prejudicial to the interests of revenue.*

*6.4 From the assessment records and the order u/s 143(3) dated 17/03/2016 for AY. 201314 passed by the AO, it is clear that the AO has not applied his mind or delved deep into the issue to verify the claim of Long Term Capital Loss made by the Assessee in the computation of income.*

*7. In view of the discussion above, it is held that the Assessing Officer did not make necessary inquiries and verification which should have been made and completed the assessment without disallowing the claim of Long Term Capital Loss, thus making the assessment order u/s 143(3) dated 17/03/2016 for AY. 2013-14 erroneous in so far as it is prejudicial to the interests of revenue. Accordingly, it is required to be set aside u/s 263 of the I. T. Act. Accordingly, I, Principal Commissioner of Income Tax — 3, Mumbai, in exercise of powers conferred upon me u/s 263 of the I. T. Act, 1961, set aside the assessment made u/s 143(3) dated 17/03/2016, for AY. 2013-14 to be made as per directions/observations in above paras after due inquiries and verification. The Assessing Officer is directed to grant sufficient opportunity to the assessee of being heard and examine and consider all the submissions as well as evidences, which the assessee may wish to produce before him, and thereafter decide this issue on merits and complete the assessment as per law.”*

7. Against the above order assessee is in appeal before the ITAT. We have heard both the counsel and perused the records. Learned Counsel of the assessee reiterated the submission that the AO has duly enquired the matter and after proper inquiry he has taken conscious decision in this regard. The counsel referred to the submission made to the AO dated 17.03.2016 for the following submission before the AO.:-

*“Note on allowability of provision written back*



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*1. During the financial year ended 31 March 2013, the Company has written back a provision of Rs.1,74,39,520/- in its books of accounts.*

*2. The said provision was suo moto disallowed in the Return of Income filed for the AY 200910, year in which the said provision was created. A copy of the said Computation of total income for AY 2009-10 is attached herewith (or your reference at Annexure 1.*

*3. Consequently, the provision written back in the profit and loss account for the year ended 31 March 2013, aggregating to Rs.3,74,39,5201-, should not be taxable under section 41 of the Act.*

*4. The Company has received it settlement amount from BHEL amounting to Rs.40,62,692/and the balance advance receivable from BHEL of Rs.1,33,76,692/- was written off in the books of accounts during the financial year 2012-13. This amount has been claimed as it capital loss since it was towards acquisition of it capital asset.”*

**8.** Referring to the above Ld. Counsel of the assessee stated that the matter has duly been explained to the AO and after acceptance of the same the AO has allowed the claim. Hence Ld. counsel of the assessee submitted that the Ld. CIT cannot invoke the provisions of Section 263 of the I. T. Act.

**9.** Per contra the Ld. Departmental representative relied upon the orders of the CIT. He referred to the provisions of Section 263 of the Act for the proportion that now Ld. CIT can invoke the jurisdiction u/s 263 of the I. T. Act if the order has been passed without making proper inquiry and verification. Furthermore Ld. DR submitted that the so called explanation as contained in paragraph-4 under a misleading heading cannot be said to be proper explanation. Furthermore Ld. DR submitted that even if is assumed that the AO has inquired the matter but if the view taken is not at



all possible one Ld. CIT is duly empowered to invoke the jurisdiction u/s 263 of the I. T. Act.

**10.** Upon careful consideration we find that in the present case assessee has written off advance given for purchase of machinery. This has been claimed as long-term capital loss to be carried forward.

**11.** In the assessment order there is no discussion whatsoever on this issue. The learned CIT has invoked his jurisdiction under section 263 of the I-T act. He has observed that assessing officer has not made any enquiry and the view that the writing off of an advance given for purchase of machinery can give rise to a claim of long term capital loss to be carried forward is erroneous.

**12.** The contention of the learned counsel of the assessee is that assessing officer has made the necessary enquiry and after being satisfied with the assessee's reply he has passed the assessment order. In this regard we note that no specific enquiry by the assessing officer on the subject has been brought to our notice. The learned counsel of the assessee only states the assessee submission as mentioned above before the assessing officer. The same may be reproduced hereunder even at the cost of repetition.

*“Note on allowability of provision written back*

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*2. The said provision was suo moto disallowed in the Return of Income filed for the AY 200910, year in which the said provision was created. A copy of the said Computation of total income for AY 2009-10 is attached herewith (or your reference at Annexure 1.*



*3. Consequently, the provision written back in the profit and loss account for the year ended 31 March 2013, aggregating to Rs.3,74,39,5201-, should not be taxable under section 41 of the Act.*

*4. The Company has received its settlement amount from BHEL amounting to Rs.40,62,692/and the balance advance receivable from BHEL of Rs.1,33,76,692/- was written off in the books of accounts during the financial year 2012-13. This amount has been claimed as its capital loss since it was towards acquisition of its capital asset.”*

**14.** In this regard the submission of the learned departmental representative is quite cogent that there was no enquiry by the assessing officer and this reply under a misleading head can by no stretch of imagination can be construed as proper enquiry by the assessing officer and application of mind. We find ourselves in full agreement with the above. Without any specific enquiry on the subject by the assessing officer, the assessee has tried to pass off the information about how the said long term capital loss to be carried forward arose under a misleading heading of “note on allowability of provision written back”. Admittedly the claim of long-term capital loss to be carried forward on account of writing off of advance given for machinery, is itself erroneous, and hence the allowance thereof cannot be legally sustained on the ground that the same is conscious application of mind by AO. Moreover passing off this information under the heading "note on allowability of provision of written back" is more in nature of misleading than providing proper information. This is because writing off of advances for machinery and claiming the same as long-term capital loss to be carried forward has nothing to do with "note on allowability of provision written back". Accordingly, in our considered



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opinion the submission that there is enquiry and application of mind by the assessing officer is not all sustainable. Hence Ld CIT is quite justified in invoking jurisdiction under section 263 of the income tax act, hence we uphold the order of Id CIT.

**15.** We note that this is appeal against an order of Ld CIT passed under section 263 of the I-T Act Hence we are confining ourselves to the order passed under section 263 of the I-T Act. The grounds raised by the assessee as, without prejudice, on the merits of the matter are premature and we need not adjudicate the same.

In the result, on this appeal filed by the assessee stands dismissed.

Order pronounced in the open court on 20/02/2020

**Sd/-**

**(RAM LAL NEGI)**

**न्यायिक सदस्य/JUDICIAL MEMBER**

**Sd/-**

**(SHAMIM YAHYA)**

**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक Dated :20/02/2020  
*Vijay Pal Singh/Sr. PS*



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**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार / (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**