THE INCOME TAX APPELLATE TRIBUNAL
"G" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Ramlal Negi (JM)

I.T.A. No. 7338/Mum/2017 (Assessment Year 2009-10)

DCIT-3(3)(2) Room No. 609 Aayakar Bhavan M.K. Road Mumbai-400 020.	Vs.	M/s. Standard Industries Ltd. 59, 1st Floor, The Arcade World Trade Centre Cuffe Parade, Colaba Mumbai-400 005.
(Appellant)		(Respondent)

I.T.A. No. 7262/Mum/2017 (Assessment Year 2009-10)

M/s. Standard Industries Ltd. 59, 1st Floor, The Arcade World Trade Centre Cuffe Parade, Colaba Mumbai-400 005.	Vs.	DCIT-3(3)(2) Room No. 609 Aayakar Bhavan M.K. Road Mumbai-400 020.
(Appellant)		(Respondent)

PAN : AABCS8888C

Assessee by	Shri K.K. Ved & Ms. Urvi Mehta
Department by	Shri Bharti Singh
Date of Hearing	18.12.2019
Date of Pronouncement	02.03.2020

O R D E R

Per Shamim Yahya (AM) :-

These are cross appeals by the assessee and the Revenue directed against the order of learned CIT(A) dated 13.9.2017 and pertain to A.Y. 2009-10.

2. Grounds of appeal raised by the Revenue read as under :-

> 1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the disallowance of Rs. 23,00,125/- on account of bad debts without appreciating the fact that the assessee had not produced any details and/or documentary evidences in respect of names and addresses of the debtors to prove the assessment year when these amounts were offered to tax as income so as to consider them written off in the books of accounts.

2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of Rs. 3,09,68,0287- on sale of Transfer Development Rights (TDR) of Rs. 3,09,68,0287- as long term capital gains by applying the ratio laid down by the Hon'ble Bombay High Court's decision in the case of Sambhaji Nagar Co-op. Hsg. Society Ltd. (No. 1356 of 2012 dated 11.12.2014) without appreciating the fact that the facts of the present case are different from the facts of the case of Sambhaji Nagar Co-op. Hsg. Society.

3. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in deleting the addition of Rs. 3,09,68,0287- on sale of Transfer Development Rights (TDR) of Rs. 3,09,68,028/- as long term capital gains without considering the decision of the Hon'ble Supreme Court in the case of A.K. Krishnamurthy vs. CIT 43 Taxman 30(SC) quoted by the AO in the assessment order.

3. Grounds of appeal raised by the assessee read as under :-

"The Appellant objects to the order dated 13 September 2017 (received on 3 November 2017) passed by the learned Commissioner of Income- tax (Appeals)- 8 CIT(A), Mumbai under section 250 of the Income-tax Act, 1961 ('the Act') on the following grounds:-

1. The Id. Assessing Officer (AO)/CIT(A) has erred in not allowing an amount of Rs 34,38,099 as advances/deposits written off without appreciating the fact that the same is allowable under section 37 and section 28/29 of the Act constituting revenue loss as the advances/deposits were given against the trade transactions executed during the course of carrying on business;

2. The Id AO/CIT(A) has erred in not allowing deduction of Rs 1,77,69,915 in relation to expenditure incurred on fixing iron barricades while computing capital gains in accordance with the provisions of section 48 of the Act without appreciating the fact that the said expense is incurred wholly and exclusively in relation to assignment of leasehold rights of plot of land;

3. The Appellant craves leave to add, alter, amend, substitute and/or modify in any manner whatsoever modify all or 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.

Assessee's appeal :

4. Apropos disallowance of bad debts and advances written off.

5. The assessee company is engaged in the business of manufacturing and sales of textile fabrics, garments and chemicals. During the course of assessment the Assessing Officer observed that from the details of the assessee it was noted that the assessee has claimed bad debts of Rs. 65,00,616/-. Details of the same were as under :-

Sr. No.	Particulars	Amount (in Rs.)	Remarks
	Bad debts w/off		
1.	Debit balance of debtors written off as irrecoverable	23,00,125	Due to the dispute arising subsequent to sale for the amount charged towards freight, transportation, delay in delivering the goods, rates charged etc. the parties did not pay the outstanding amount. The said amount was outstanding since financial year 1999-200O. Therefore, the said amount was written off as bad and irrecoverable in the financial statements.
	Total bad debts w/off (A)	23,00,125	
	Advances w/of		
1.	Debit balances of sundry creditors	17,38,369	Advances given for materials and services written off as the work was not completed. The said amount is outstanding since financial year 1999-2000.
2.	Advances given to retrenched workmen	7,62,392	Advances given to workmen w/off as irrecoverable
3.	Excess advance tax paid	16,99,730	Amount w/off after completion of assessment
	Total Advances w/off (B)	42,00,491	
	Total amount w/off (A) and (B) above	65,00,615	

6. The Assessing Officer asked the assessee to furnish names and address of the debtors, efforts taken to recover the debts, when it was treated as income and other details in respect of write off of bad debts. In response the assessee submitted that the bad debts are on account of write off of disputed receivables not finally received and advances written off. Apart from this the assessee did not furnish any evidences to show that the amount was treated as income in any of the previous years. The assessee further submitted that they are not required to show that the debts have become bad. Thereafter the

Assessing Officer referred to the provisions of writing off of debts and made disallowance of Rs. 23,00,125/-.

7. In respect of advances written off the Assessing Officer noted that whether the advances were made in the due course of business has not been properly evidenced. That whether advances were for purchase of any revenue item or capital item has not been furnished. That whether the advances are actually written off in the books of accounts has not been furnished. That the names and addresses of the parties have not been furnished. Hence, the Assessing Officer made disallowance amounting to Rs. 34,38,099/-.

8. Against the above order the assessee appealed before learned CIT(A). learned CIT(A) noted that the said issue had come for A.Y. 2006-07 in assessee's own case. Following the same he held that the disallowance of bad debts written off amounting to Rs. 23,00,125/- was deleted and disallowance of Rs. 34,38,099/- was upheld.

9. Against this order the assessee and the Revenue are in cross appeals before us.

10. We have heard both the counsel and perused the records. We find that this Tribunal in assessee's own case for A.Y. 2006-07 set aside the issue of disallowance on account of write off of advances as under :-

> "7. We have heard the rival submissions and perused the material on record. We find that the assessee failed to file before the AO (i) the evidence to show that the advances were made in due course of business, (ii) whether the advances were for purchase of any revenue item or capital item, (iii) names and address of the parties and (iv) whether the advances are actually written off in the books of accounts.
>
> 7.1. In CIT vs. Calcutta Agency Ltd. (1951) I9 ITR 191 (SC), it was held that the burden of proving the necessary fact in order to entitle the assessee the claim exemption was on the assessee. In Nund and Samont Co. (P) Ltd. vs. CIT (1970) 78 ITR 268 (SC), it is held that it is for the tax payer to establish by evidence that the particular amount is deductible.

> 8. In view of the above, we set aside the order of the Ld. CIT(A) on the above issue and restore the same to the file of the AO to make an assessment afresh as per the provisions of the Act after giving a reasonable opportunity of being heard to the assessee. The assessee is directed to file the relevant details before the AO."

11. We find that the facts are identical, following the same. We remit this issue to the file of the Assessing Officer with similar direction.

12. As regards the issue of bad debts written off is concerned, we find that the issue is settled by Hon'ble Apex Course in the case of TRF Ltd. Vs. CIT (323 ITR 397). It was held in the said case that writing off of advances in the aforesaid account is sufficient compliance for provisions of the Act. However, in the present case, it was noted that the assessee has not furnished names of the debtors to the Assessing Officer, hence we remit this issue also to the file of the Assessing Officer if details of bad debts actually written off in the books are available the same is to be allowed as per ratios emanating out of the order of Hon'ble Supreme Court as above.

13. Apropos the issue of disallowance of deduction of Rs. 1,77,69,915/-.

This issue relates to disallowance of Rs. 1,77,69,915/- in relation to expenditure incurred on fixing barricades while computing capital gains. Brief facts of the issue are as under :-

The Assessing Officer asked to establish that the impugned expenditure related to improvement of land. The assessee submitted that the barricades were necessary to bifurcate the plot of land being assigned and facilitate handing over possession of the same for effecting the transfer of leasehold rights. At para 7.3 the Assessing Officer observed, "The contention of the assesses in this regard is not tenable as it is not necessary for the assesses to make such arrangement for sale of plot of land, which is an expenditure incurred in connection with the earmarking the unsold lot i.e., the remaining plot. Hence there is no necessity for the assessee to incur such expenditure in connection with transfer of such property, which is nothing but to protect its

remaining land from encroachments, etc. further, there is no mention in the sale agreement in respect of barricading the plot which is sold to M/s. Loma IT Park Developers Private Limited."

14. Upon assessee's appeal learned CIT(A) was not convinced. He upheld the action of the Assessing Officer by holding as under :-

> "Firstly, the said para refers to "fences" and not to iron and steel "barricades". The only inference that can be reasonably drawn from the said clause of the agreement is that the purchaser shall acquire everything that exists on the impugned piece or parcel of land bearing part of plot number 4/1 referred to. It is not stipulated anywhere that expenditure of fixing barricades of iron and steel is a prerequisite for the sale effected by the appellant. Therefore, in my opinion, it is not intrinsically linked or "wholly and exclusively in connection with" the sale.
>
> Secondly, by no stretch of imagination, erection of the barricade can be considered as resulting in any improvement in the plot of land. Every plot of land is demarcated in land records of the concerned authorities and there is no improvement if the boundaries are marked with bollards, paint, fence or any other marking. During appellate proceedings, the appellant failed to explain or establish how the said barricade added to the quality of land in question or cause to improvement of any kind. In view of the categorical finding of fact by the Assessing Officer, I do not find any reason to disagree with his conclusions. Accordingly this ground of appeal is dismissed."

15. Against this order the assessee is in appeal before us.

16. We have heard both the counsel and perused the records. Upon careful consideration we find that no issue has been raised by the authorities below on the genuineness of the expenditure. It is also not disputed that the assessee has incurred expenditure for creating fences. The reservation of the Assessing Officer is that in his opinion it was not necessary to incur the expenditure for barricade as the same was earmarking the unsold remaining plot. Here we find that the Assessing Officer has totally erred in concluding that there was no necessity for the assessee to incur such expenditure in connection with transfer of such property. The Assessing Officer is writing that this expenditure in nothing but to protect the remaining land from encroachments, etc. Here we fail to understand as to how identification and demarcation of land to be sold and land remaining unsold can be held to be not necessary and the same can

be attributed only to remaining plot. Further learned CIT(A) has also held that he cannot imagine as to how erection of the barricades can be considered as resulting in any improvement in the plot of land. He further held that every plot of land is demarcated in land records of the concerned authorities. This observation of learned CIT(A) is totally in contradiction of the Assessing Officer's observation who writes that this expenditure in nothing but to protect the remaining land from encroachments, etc. Hence, in our considered opinion both the authorities are making contradictory remarks only based upon their surmises. Learned CIT(A) has further erred in observing as to how barricades can improve the quality of land and cause to improvement of any kind. Here we find that as submitted by the assessee the barricades were necessary to earmark land to be sold. That lands are demarcated by barricades is well known phenomena. In the present situation everybody wants his land to be demarcated by identified barricades. People do not generally sit idle and go by demarcation of land in revenue records. It is naive to assume that people rest upon demarcation of land in land records without making barricades of their own for the various purposes of protection of land, ease in selling it and saving from encroachment etc. In this view of the matter in our considered opinion the authorities below have totally erred in this regard and impugned expenditure is allowable. Hence, we set aside the orders of the authorities below and decide the issue in favour of the assessee.

Revenue's appeal

17. Ground No. 1 has already been dealt with above while adjudicating assessee's appeal as above.

18. Apropos ground relating to deletion of addition of Rs. 3,09,68,028/- on sale of Transferable Development Rights (TDR). On this issue the Assessing Officer observed that the assessee is in receipt of Rs. 3,09,68,028/- on sale of TDR. The Assessing Officer noted that despite receiving income the assessee has not offered the same to tax by making following observation :-

"During the financial year ended 31 March 2009, the company has sold Transferable Development Rights ('TDR') for a consideration of Rs.3,09,68,028/-. It is submitted that the said TDRs are related to the land sold by the company during the earlier financial years. The entire cost of the land was considered in computing capital gains in the year in which the land was transferred. Accordingly, there was no cost attributable to the TDRs (related to the land) acquired subsequently as per the Development Rules and sold during the aforesaid financial year.

In light of the above facts, the tax position in the return is based on the contention that as the cost cannot be determined, the computation mechanism fails and it is not possible to compute capital gains. Consequently, there will be no tax liability in connection therewith.

Reliance in this regard is placed on the following decision wherein the judicial authorities have upheld the view that on sale of TDR is not taxable as the computation mechanism fails.

- Jethala D. Mehta vs. DCIT (2005) 2 SOT 422
- JTO vs. Lotia Co. Op. Hsg. Soc. Ltd. (2008) 12 DTR (Mum.) Tub.
- New Shailaja CHS vs. JTO JTA No.512/M/2007, Bench B, dtd.02-12-08 (Mum.)
- Maheshwar Prakash Co.Op. Hsg. Soc. Ltd. vs. ITO (2009) 121 TTJ Mumbai 641

Further, while calculating the Minimum Alternate Tax (MAT), on book profit, the company has considered profit on sale of TDR as not taxable. Reliance in this connection is placed on the decision in case of Frigsales (India) 4 SOT 376 wherein Hon'ble Mumbai Tribunal has upheld the view that capital gains which is exempt as per the provisions of Income-tax Act, is not in the nature of income and it cannot be taxed under the provisions of section 115JA of the Act. Applying the same analogy, under the facts of the case, the profit on sale of TDR has been excluded from Book Profits for computing MAT. "

19. From the above the Assessing Officer observed that it is the contention of the assessee that receipt on sale of TDR is on surrender of land in earlier years and the capital gain on such transfer of land has already been offered by the assessee in the year in which transfer took place. He rejected the assessee's contention that since the cost of such TDR is nil, there is no capital gain. He noted that the assessee is having the ownership of the plot and on sale of such plot the assessee received the sale consideration as well as other benefit in the form of TDR on such plot of land, which is just like a receipt of bonus shares in respect of shares held. After show-cause notice in this regard the Assessing Officer reproduced the submission of the assessee. However, he rejected the same by observing as under :-

"8.3 The submission of the assessee in this regard has been considered, however, the same is not acceptable. Prima facie the TDR if received against surrendered of a portion of land, the cost of land surrendered will be cost of the TDR. Therefore, TDR surrendered will be subject to either short term capital gain or Long Term Capital Gains depending upon the holding period of the land. If the land is held for less than 3 years then it will attract short term capital gains tax and it is held for more than 3 years then it will attract Long Term Capital Gains Tax. The case is to be interpreted as falling within the definition of Capital Asset and relying on the decision of the of the Bombay High Court in CIT, Bombay City I vs. Tata Services Ltd. Wherein provisions of Section 2(14), (47) 45 were interpreted. It was held U/s. 2(14) of the Income Tax Act a capital asset means property of any kind held by an assessee, whether or not connected with his business or profession. The word property used in S.2(14) of the Act is a word of the ^widest amplitude and the definition of Capital asset.

8.4 In view of the above, the receipt on sale of TDR shall be taxed as Long Term Capital Gain as the underlying land was held for more than three years. As the cost of land has already been claimed by the assessee while computing the capital gain on transfer of such land, the cost of TDR will be taken as Nil, as in the case of bonus shares. Therefore, the contention of the assessee that the computation of capital gain fails u/s.48 as there is nil cost for TDR is not correct. Further, the case laws relied upon by the assessee is different from the facts of the assessee. In this regard reliance is placed on the Hon'ble Supreme Court decision in the case of A.K. Krishnamurthy vs. CIT 43 Taxman 30 (SC), wherein it was held as under:

> [1989] 43 TAXMAN 30 (SC) SUPREME COURT OF INDIA A.R. Krishnamurthy v. Commissioner of Income-tax
>
> N.R.S. PATHAK, CJ. M.N. VENKATACHALIAHANDKVLDIPSINGH, JJ. CIVIL APPEAL NO. 2717 OF 1985 FEBRUARY 10,1989
>
> Section 45, read with section 48, of the Income-tax Act, 1961 - Capital gains -chargeable as - Assessee granted a mining lease of its land for ten years to an allied concern and lessee had to pay a salami in addition to royalty - Whether there was a transfer of capital asset resulting in assessable capital gains - Held, yes - Whether value of leasehold rights in cost of acquisition of land was determinate and, therefore, computation provisions were applicable - Held, yes

8.5 In view of the above, the sale proceeds on transfer of TDR is taxable under section 48 of the Act as long term capital gain, by considering the cost of acquisition as Nil. Accordingly, the capital gain is computed as under:

Total sale consideration	Rs.3,09,68,028
Less: Cost of acquisition	Rs. Nil
Long term capital gain	Rs.3,09,68,028

8.6 Thus, an addition of Rs.3,09,68,028/- is made to the total income of the assessee on account of long term capital gain. Further, the TDR is the

> benefit on sale of business property, the profit derived on sale of such right is also liable to tax under the company Act. Therefore, the long term capital gain of Rs.3,09,68,028/- is also added to the book profit."

20. Against the above order the assessee is in appeal before learned CIT(A). Learned CIT(A) by a laconic order held that the issue is covered by Hon'ble the decision of Hon'ble Bombay High Court in the case of CIT Vs. Sabhaji Nagar Cooperative Housing Society Ltd. (IT Appeal No. 1356of 2012 vide order dated 11.12.2014) (370 ITR 325), wherein it was held that where assessee had not incurred any cost to acquire TDR, transfer of the same to developer for consideration for construction of floor space index would not be eligible to capital gains. Learned CIT(A) found facts to be similar without giving further details, he held that the case law relied upon by learned CIT(A) are distinguishable with the instant case.

21. Against this the order the Revenue is in appeal before us.

22. We have heard both the counsel and perused the records. Learned Counsel of the assessee relied upon the order of learned CIT(A). He reiterated that there was no cost to acquire TDR and in this view of the matter no long term capital gain can be attributable to the assessee. Learned Counsel further relied upon the following case laws :

- Jethala D. Mehta vs. DCIT (2005) 2 SOT 422
- Maheshwar Prakash-2 Co-op. Hsg. Society Ltd. Vs. ITO (24 SOT 366)
- ACIT Vs. Dilip R. Shrinagarpure (ITA No. 6103/Mum/2017 vide order dt. 26.6.2019)
- Late Shri Lauriano Mendonca Vs. ACIT (ITA No. 3000/Mum/2011 vide order dt. 4.8.2017)
- CIT Vs. Sambhaji Nagar Co-op. Hsg. Society Ltd. (54 taxmann.com 77)

23. Learned Departmental Representative on the other hand submitted that the case law relied upon by learned Counsel of the assessee are not applicable on the facts of the case. In this regard learned Departmental Representative submitted that the assessee in its following submission before the ITAT itself agrees that there was cost of TDR as under :-

> "5 Accordingly, as per the terms of the aforesaid provisions of the DCR (refer point no.2 of the submissions) the assessee had to surrender 27% of vacant plot area to MHADA for public housing/mill workers housing, in order to be able to sell the land to the said Dost/ Corporation.
>
> 6 Subsequently, during the financial year 2008-09, i.e. on 3 June 2008, as a result of surrender of vacant land (sewree unit) measuring to 1247 sq.mtr to MHADA (which portion was not sold to the said Dost/ Corporation because of the restriction) the assessee received TDK for 1659.63 sq.mtr in accordance with the Regulation 58 of OCR (a copy of the relevant regulations enclosed at Annexure. "

24. Upon careful consideration, we note that learned CIT(A) has passed a very laconic order. He has not at all referred to the facts of the case. He has simply held that the issue is covered by the decision of Hon'ble Bombay High Court in the case of CIT Vs. Sambhaji Nagar Co-op. Hsg. Society Ltd. (supra). On the other hand learned Departmental Representative has pointed out that the said decision is not at all applicable on the facts of the present case. We note that in the said decision of Hon'ble High Court, the assessee is a cooperative housing society. With promulgation of development control rules (DCR) it acquired right of putting up additional construction through transferable development rights (TDR). Instead of utilizing this right itself, the assessee decided to transfer the same to a developer for construction of new building. This right created by the DCR was held to be not giving rise to any capital gains. We note that on the other hand the facts of the present case are that it was in lieu of surrender of 27% of vacant plot to MHADA that the assessee received TDR. Hence, facts of the present case are totally different and the cost is very much evident therein as the assessee had to surrender part of the plot owned by it. Furthermore other decisions referred by learned Counsel of the assessee are also in the same background. Distinguishing feature of the present case is that the assessee had to surrender 27% of the vacant plot and in lieu thereof subsequently it got TDR. Hence, in our considered opinion learned CIT(A)'s order is non-speaking and laconic cannot be sustained. We deem it appropriate to remit this issue to the file of the learned CIT(A). Learned CIT(A) is directed to

consider the issue afresh after taking into account actual facts arising in this case and thereafter decide as per law. The assessee is at liberty to make further submission before learned CIT(A) in support of its case.

25. In the result, these appeals are partly allowed for statistical purposes.

Order has been pronounced in the Court on 02.03.2020.

Sd/-	Sd/-
(RAMLAL NEGI)	(SHAMIM YAHYA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 02/03/2020

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)

PS ITAT, Mumbai