IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'L' BENCH, MUMBAI
[Coram: Pramod Kumar AM and Pawan Singh JM]

I.T.A. No. 3833/Mum/2011
Assessment years: 2002-03

Siemens Nixdorf Informationssysteme GmbH ***……Appellant***
(formerly Siemens Nixdorf Informationssysteme AG)
C/o. Deloitte Haskins & Sells,
264-265, Vaswani Chambers,
Dr. Annie Besant Road, Worli,
Mumbai – 400 030
[PAN: AAGCS 6490 J]

Vs.

Dy. Director of Income Tax (Int'l Taxation) 2(1), Mumbai. ***……Respondent***

Appearances by:
Nitesh Joshi *for the appellant*
Jasbir Chauhan *for the respondent*

Date of concluding the hearing : January 6, 2016
Date of pronouncing the order : March 31st, 2016

O R D E R

Per Pramod Kumar, AM:

1. By way of this appeal, the assessee appellant has challenged correctness of the order dated 14th March, 2011 passed by the learned CIT(A) in the matter of assessment under section of 143(3) of the Income Tax Act, 1961 for the assessment year 2002-03.

2. Grievances raised by the assessee, as set out in the memorandum of appeal, are reproduced below:

> *"1. The learned Commissioner (Appeals) erred in confirming the disallowance of short term capital loss of Rs.34,68,84,550 claimed by the appellant.*

2. The learned Commissioner (Appeals) erred in holding that the loan of Euro 9 million due from Siemens Nixdorf Information Systems Limited was not a capital asset.

3. The learned Commissioner (Appeals) erred in holding that the transfer of loan will not result in short term capital loss.

4. The learned Commissioner (Appeals) ought to have appreciated that the loan was a capital asset and that the assignment thereof had resulted into short term capital loss.

5. The learned Commissioner (Appeals) erred in stating that the short term capital loss has been claimed by the appellant company without any logic or reasonable basis.

Observations in the order

6. The learned Commissioner (Appeals) erred in making the following factually incorrect observations:

> *(a) "Accordingly, an agreement dated 28.03.2002 was signed between the appellant company and M/s Siemens AG wherein the latter company accepted the assignment of loan for total consideration of Euro 0.731 million, although the loan amount was Euro 9 million." (Page 4, Para 2.2) (Erroneous observation highlighted in Italics)*

(b) "Further the Assessing Officer has discussed the definition of transfer at page 13 of his order." (Page 7, Para 2.3) (Erroneous observation highlighted in Italics)

Grounds not decided

7. The learned Commissioner (Appeals) erred in not deciding the following grounds in the appeal:

"4. The learned Deputy Director erred in holding that to the extent of diminution in value, there was no debt which could have been transferred.

5. The learned Deputy Director erred in holding that the transaction was a cloak or device to reduce the tax liability."

3. Notwithstanding the above elaborate grounds of appeal, in our considered view, the short issue that we are required to adjudicate in this appeal is whether or not the learned CIT(A) was justified in upholding the disallowance of short term capital loss of Rs.34,68,84,550 claimed by the

assessee. When we put this proposition to the parties, learned representatives fairly agreed to the proposition put to them.

4. To adjudicate on this appeal, only a few material facts need to be taken note of. The assessee before us is a non-resident company and it has a wholly owned subsidiary in India by the name of Siemens Nixdorf Information Systems Limited (SNISL, in short). The assessee had loaned an amount of Euros 90,00,000 to the SNISL, vide agreement dated 21st September 2000. SNISL, as is the stand of the assessee, ran into serious financial troubles and there was a proposal to wind up this company. It was in this backdrop, and based on the valuation by Infrastructure Leasing & Finance Limited, the assessee sold this debt to Siemens AG for a consideration of Euros 7,31,000. The assessee claimed a short term capital loss on this transaction of sale of book debt. However, the Assessing Officer declined the deduction on the basis of the reasoning that (a) the loan of Euro 90,00,000 to SNISL, i.e. assessee's right to recover Euro 90,00,000 from SNISL, was not a capital asset under section 2(14); (b) that the assignment of this debt, or the right to recover the money from SNISL, was not a transfer under section 2(47); (c) even going by the valuation report, what is recoverable is only Euro 7,31,000 and what is not recoverable cannot be transferred either; and (d) it is a sham transaction only with the tax motives since the advance to the SNISL was in the capital field and a capital loss is not allowed as deduction. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. Learned CIT(A) confirmed the action of the Assessing Officer on the basis of the following reasoning:

> *"2.6 I have carefully gone through the order of the Assessing Officer and also the submissions as made by the Authorized Representative of the appellant company. I find no merit in the argument of the Authorized Representative of the appellant company that amount of loan given by SNISL, Germany to SNISL, India constitute a capital asset. On the contrary, the Assessing Officer has rightly held that such loan can only be current asset and diminution in value of debt does not result in short term capital loss. The finding of the Assessing Officer is correct and the same is upheld. The appellant company had not filed any return of income in India and for the first time, return of income for the Assessment year 2002-03 has been filed claiming only short term capital loss of Rs.34,68,84,558/- because of assignment of loan. The appellant company has not been able to show that it had P.E. in India and it had earned any business income in India. The return of income has also been filed*

which does not show that in which country Germany or India its business income is taxable. The short term capital loss has been claimed by the appellant company without any logic or reasonable basis, therefore, the Assessing Officer was correct in rejecting the claim of the appellant company. I do not find any infirmity in the order of the Assessing Officer and therefore, his order is confirmed on this issue and this ground of appeal is dismissed."

"3.3 I have carefully gone through the order of the Assessing Officer and also the submissions as made by the Authorized Representative of the appellant company and I find that the word assignment has not been used in the Section 2(47) of the Income-tax Act. However, 'transfer' includes sale, exchange or relinquishment of the asset or the extinguishment of any rights therein. In the present case, assignment of loan by the appellant company to M/s. Siemens AG does constitute a 'transfer' but it does not help the appellant company because it is not a transfer of capital asset. When loan itself is not a capital asset, the transfer thereof will not result in short term capital loss."

"4.3 I have carefully considered the facts, submission and finding of the Assessing Officer. I agree with the Assessing Officer that the loan of Euro 9 million was assigned by the appellant company for Euro 0.731 million to M/s. Siemens AG, there was a diminution in the value of loan because SNISL, India incurred heavy losses and could not repay the loan to the appellant company. Consequently, M/s. Siemens AG could recover higher or lower amount, out of the loan amount given to M/s. SNISL, India although it had purchased this loan of Euro 9 million for a sum of Euro 7,31,000 only from the appellant company. It could have been a business decision for M/s. Siemens AG to have purchased this loan from the appellant company at a such low value but the recovery of the loan is not definite and ascertainable because what amount will finally paid by the SNISL, India to M/s. Siemens AG is not determinate. On the other hand, the appellant company has recovered only Euro 7,31,000 against the Euro 9 million loan given to SNISL, India and it had right to assign its debt to anybody as it deemed fit to cut further losses."

5. The assessee is not satisfied with the stand so taken by the learned CIT(A) as well, and is in further appeal before us.

6. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

7. The first thing, which is in fact fundamental to the dispute before us, is whether or not an advance given by the assessee is a capital asset. Section 2(14) defines the 'capital asset' as "**property of any kind held by an assessee, whether or not connected with his business or profession**" except as specifically excluded in the said section. So far as business assets are concerned,

the exclusion is only for "**(i) any stock- in- trade, consumable stores or raw materials held for the purposes of his business or profession**", and it is not, nor can it be, anybody's case is that an advance is covered by the exclusion clause. The question, therefore, arises as to what are the connotations of the expression "property". Hon'ble Bombay High Court, in the case of CWT Vs Vidur V Patel [(1995) 215 ITR 30 (Bom)] had an occasion to consider this question in the context of wealth tax, and this is what Their Lordships had to say:

> **……..So far as the meaning of "property" is concerned, it is well-settled that it is a term of widest import and subject to any limitation which the context may require, it signifies every possible interest which a person can hold or enjoy. As observed by the Supreme Court in Commissioner, Hindu Religious Endowments vs. Shri Lakshmirudra Tirtha Swami of Sri Shirur Mutt (1954) SCR 1005, there is no reason why this word should not be given a liberal or wide connotation and should not be extended to those well-recognised types of interests which have the insignia or characteristic of property right.**
>
> *[Emphasis, by underlining, supplied by us]*

8. It was based on this analysis that Their Lordships held that even a deposit under the Compulsory Deposit Scheme Act, 1963, is also a property. When such are the views of Hon'ble jurisdictional High Court, there is no reason for us to exclude an advance from the scope of 'capital asset'. An advance given by the assessee is a property in the sense it is an interest which a person can hold and enjoy, and since it is a property and it is not covered by the exclusion clauses set out in Section 2(14), it is required to be treated as a 'capital asset'. Learned counsel's reliance on the decision of Hon'ble Gujarat High Court's judgment, in the case of CIT Vs Minor Bababhai alias Lavkumar Kanti Lal [(1981) 128 ITR 1 (Guj)], we find that the loss suffered by the assessee, on account of settlement of his dues as unsecured creditor @ 45% of the amount, was allowed as a short term capital loss. Unless the amount due is treated as a capital asset, there was obviously no question of the short term capital loss. As a matter of fact, it was not even the case of the revenue, and rightly so- in our opinion, that the debt was not a capital asset. As regards learned CIT(A)'s observation to the effect that "a loan is a current asset and not a capital asset", we may only point out

that the concept of 'current asset' is alien to the law on taxation of capital gains, or, for that purpose, to the law on taxation of income. The expression 'capital asset' is a defined expression under section 2(14) and, even though it may be more appropriate to describe an advance, a debt or a recoverable amount as a 'current asset' from an accountant's perspective or from any other perspective, as long as such an advance, debt or recoverable amount satisfies the requirements of Section 2(14), it will have to be treated as a 'capital asset' for the purposes of computation of capital gains. As regards the CIT(A)'s observations that the assessee did not have a PE in India, that the assessee was not carrying out any business in India and that the assessee was not required to file a return of income in India, we are unable to see any relevance or basis of these observations. The capital asset in this case is the money recoverable from an Indian entity which is thus essentially required to be treated as in India, and, as is the mandate of Section 9(1)(i) any income, *inter alia*, "through the capital asset situated in India" is deemed to accrue or arise in India. As a corollary to this taxability of income, the loss through the capital asset situated in India is also required to be taken into account. The authorities below were, in determining whether or not the amount recoverable from an Indian entity was a capital asset under section (14), swayed by the considerations which were not germane in this context. In view of these discussions, in our considered view, the advance, debt or recoverable amount, in whichever way one describes it, was a capital asset under section 2(14).

9. The next thing that we need to decide is whether or not there was a transfer under section 2(47) or not. Section 2 (47)(i) provides that "transfer, in relation to a capital asset, includes (i) the sale, exchange or relinquishment of the asset". There is no dispute that the rights to recover the money from the Indian entity, which is what the capital asset is in this case, was sold to Siemens for a consideration of Euro 7,31,000. All these rights, under the arrangements with Siemens, belonged thereafter only to Siemens Limited. The sale of trade debts, or even loans, is a part of day to day trade and commerce. Learned CIT(A) has not even raised on any issues on this aspect of the matter; all that he has to say in this regard is that since an advance given by the assessee did not

give rise to any capital asset, the transfer of the advance, or the right to recover the advance so given, did not result in any transfer of capital asset. As we have held it to be in the nature of capital asset, the objection raised by the CIT(A) ceases to be relevant anyway.

10. We have noted that the right to recover the money from the Indian entity, in the light of the financial difficulties that the Indian entity was traversing through, was valued at Euro 7,31,000. There is no dispute about bonafides of this valuation. As for the vague allegations about the tax evasion motive, nothing cogent has been brought on record at all. The authorities below were in error in fighting shy of the tax corollaries of a legally valid commercial transaction, without bringing on record any material to disprove its bonafides or to show that it's a sham transaction, just because of their apprehensions about tax motives of the transaction. Just because a transaction results in a tax benefit, unless it is a sham transaction, it cannot be ignored. The fact remains that the recoverable from the Indian entity is transferred by the assessee and that it was transferred for an amount lesser than the cost at which it is acquired. There is also no dispute that if the capital loss is to be allowed, the loss has to be short term capital loss. In these circumstances, in our considered view, there is no justification in declining the short term capital loss claimed by the assessee.

11. In view of the above discussions, as also bearing in mind entirety of the case, we uphold the grievance of the assessee, and direct the Assessing Officer to allow the short term capital loss, subject to normal verifications, as claimed by the assessee.

12. In the result, the appeal is allowed. Pronounced in the open court today on 31st day of March, 2016.

Sd/-	***Sd/-***
Pawan Singh	**Pramod Kumar**
(Judicial Member)	(Accountant Member)

Dated: 31st day of March, 2016.

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*Commissioner*	*(4)*	*CIT(A)*
	(5)	*Departmental Representative*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai