

General Capital And Holding Company ... vs The Income Tax Officer, Ward-2(1)(1), ... on 12 February, 2018

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "D" BENCH AHMEDABAD

BEFORE, SHRI S. S. GODARA, JUDICIAL MEMBER
AND SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

ITA No. 538/Ahd/2016
(Assessment Year: 2012- 13)

General Capital and Holding
Company Pvt. Ltd.,
E/9, Bhaskar Apartment, Mirambica
School Road, Naranpura, Ahmedabad - 380013

Appellant

Vs.

Income Tax Officer,
Ward 2(1)(1), Navjivan Trust Bldg., Ahmedabad

Respondent

PAN: AADCG1059M

/By Assessee : Shri Sunil Talati, A.R.
/By Revenue : Shri V. K. Singh, Sr. D.R.

/Date of Hearing : 17.01.2018
/Date of
Pronouncement : 12.02.2018

ORDER

PER S. S. GODARA, JUDICIAL MEMBER

This assessee's appeal for assessment year 2012-13 arises against the CIT(A)-2, Ahmedabad's order dated 08.02.2016, in case no. CIT(A)- 2/521/Wd.2(1)(1)/14-15, affirming Assessing Officer's action disallowing its Section 80G deduction claim of Rs.11,11,111/-, sundry balance written off amounting to Rs.1,00,00,000/- as well as partly confirming Section 36(1)(iii) A.Y. 2012-13 -2- interest disallowance of Rs.10,22,586/- to the extent of Rs.2,22,586/-; respectively, in proceedings u/s. 143(3) of the Income Tax Act, 1961; in short "the Act".

2. We come to the first issue of Section 80G disallowance of Rs.11,11,111/-. There is no dispute that the payee herein is "Shankersingh Vaghela Bapu Charitable Trust" enjoys a valid registration u/s.80G of the Act since 18.07.2008. The CIT, Gandhinagar's approval order dated 18.07.2008 to

this effect forms page 3 of the paper book. Relevant bank statement at page no.1 of the paper book reveals that the assessee/payer had actually paid the sum in question to the above payee on 14.08.2008. The payee trust thereafter issued its donation acceptance receipt on 14.08.2011 (page 2) acknowledging cheque no. 208216 qua the relevant amount. The assessee had been showing the above sum as a credit entry in payee's ledger account throughout the intervening period. It chose to write off the same as a donation in the relevant previous year (page 5) after taking it as opening balance on 01.04.2011. The Assessing Officer first of all observed in para 3.1.1 of the assessment order dated 05.02.2015 that the assessee had placed on record payee's registration only without its acceptance receipt. He then concluded that assessee's books stated the amount in question as opening balance which meant that the same was not paid during the relevant previous year as per Section 80G(1) & (2) of the Act. All this reasoning lead to the impugned disallowance being made in assessee's hands.

3. The CIT(A) upholds Assessing Officer's action disallowing the above 80G claim as follows:

"2.4. Decision:

I have carefully considered the facts of the case, the assessment order and the written submission of the appellant. The AO has made the disallowance of claim of donation amounting of Rs.11,11,111/- paid to Shankarsinh Vaghela Bapu Charitable Trust for the reason that the appellant has filed the copy of the approval granted by the CIT u/s. 80G of the IT Act to the said trust but no receipt for payment of donation has been filed before him. The AO also observed that as per the provisions of section 80G(1) and (2) it clearly provides that the deduction u/s. 80G is allowable only in respect of any sum paid during the year under consideration.

A.Y. 2012-13 -3- 2.5. On the other side, the appellant claimed that initially in the year 2008 the appellant has extended the loan to the aforesaid trust with the object to help the trust. However subsequently in the year under consideration the appellant claimed to have donated the above loan to the trust on 14.08.2011. It also submitted copy of receipt issued by the said trust in respect of the donation made alongwith approval obtained u/s. 80G of IT Act.

2.6. Having considered the facts and submissions it is noticed that the appellant has given the loan of Rs.11,11,111/- to the aforesaid trust on 14.08.2008 and the same was converted in the year under consideration on 14.08.2011 into the donation. Thus in the year under consideration in fact, the transaction was the conversion of the loan into the donation which in accordance with the provisions of 80G of IT Act is not the deductible expenditure. The condition for the deduction u/s.

80G is that the donation should be paid in the year under consideration which is not the case of the appellant. As per the appellant, it was the loan given to the trust on 14.08.2008, Even it was not in the nature of the payment as donation in the year 2008. It was the after thought of the appellant to convert the said loan into the donation. Thus the condition does not get fulfilled. Moreover as per

the explanation (5) to section 80G of IT Act it has been provided that no deduction shall be allowed under the section in respect of any donation unless such donation is of sum of money. Here in the instant case, the donation was stated to be in the form of book entry only by converting the loan into donation. Thus there was no such donation of any money involved in the year under consideration. In other words, the appellant have waived the right to recover the lendings to the trust in the year under consideration, and this right to waive the right cannot be said to be the donation given by the appellant.

2.7. Further in the appellate proceeding the appellant has submitted copy of the receipt dated 14.08.2011 in respect of the donation issued by the trust which has not been produced before the AO in the assessment proceedings. Thus the receipt was an additional evidence filed first time before this office for consideration without making any written request for admission of the additional evidence under rule 46A of IT Act. Hence, in absence of the procedure followed by the appellant in this regard and without knowing the good and sufficient reasons for not producing this evidence in the assessment proceedings the additional evidence submitted is not accepted and hence the same is rejected.

2.8. In view of the aforesaid discussion, the disallowance of the deduction made by the AO is found correct and justified and hence the same is confirmed."

4. Heard rival contentions. Relevant records perused. Learned Authorized Representative and learned Departmental Representative strongly reiterate assessee's and Revenue's respective stands against and in support of the impugned disallowance. Both parties agree that the relevant basic conditions to be satisfied in a Section 80G deduction claim are that it must pertain to an actual sum of money than in kind, it is to be paid to a recognized specified institution through banking A.Y. 2012-13 -4- channel followed by a necessary payment receipt issued from the donee's end. Learned Departmental Representative submits that the assessee has actually paid the amount in question way back in financial year 2008-09. It thereafter treated the said amount as loans and advances till the relevant previous year wherein it chose to write off the above amount in dispute as a donation. The donee trust has also issued corresponding receipt in relevant previous year only on 14.08.2011.

5. Learned Departmental Representative's case accordingly is that the CIT(A)'s order extracted hereinabove has not admitted the above donation receipt since not accompanying the relevant Rule 46A additional evidence application as per Income Tax Rules. We do not find it as convincing argument on Revenue's part. The fact remains that the assessee admittedly filed the above donation receipt as a proof of payment alongwith registration certificate during lower appellate proceedings. It pleaded therein that the assessing authority had not granted it sufficient time to produce the same on record. The CIT(A)'s above extracted finding nowhere specifically rebut relevancy or genuineness thereof as he has proceeded to adopt a hypertechnical approach by simply brushing aside both the necessary documents without even a proper factual verification. We conclude that learned CIT(A) has preferred technical over substantive justice in order to reject assessee's donation claim without even examining the issue as to whether the Assessing Officer had afforded sufficient opportunity to the assessee or not. We therefore take the above document(s) pertaining to the assessee's payee trust as part of records in this backdrop of facts.

6. Coming to merits, we find that this is not the Revenue's case that the donation trust is not an approved institution or it has not issued the corresponding acceptance receipt. There is further no quarrel on basic facts inter alia the assessee having actually transferred the money to donee trust through banking channel only on 14.08.2008. Its books recognized the said amount on asset side till the relevant previous year wherein it decided to forgo its loan right by way of donating the amount in question to the donee in lieu of the corresponding acceptance receipt.

A.Y. 2012-13 -5- We are of the opinion that both the lower authorities have erred in law as well as on facts in this peculiar circumstances to interpret the relevant statutory provision Section 80G of the Act in an unsustainable manner which tantamounts to denying the necessary relief in both assessment years i.e. the year of actual payment as well as that of getting the necessary donation receipt. In our considered opinion, the purpose of using the crucial expression "in relevant previous year" in statute is to ensure actual payment on or before the relevant previous year rather than altogether rejecting a case alike the instant facts only. We therefore accept assessee's first substantive ground to delete the impugned Section 80G disallowance of Rs.11,11,111/- under challenge.

7. The assessee's next substantive ground seeks to reverse both the lower authorities' action in disallowing its claim of sundry balances write off amounting to Rs.1,00,00,000/- in case of M/s. Bhagyam Industries Pvt. Ltd. and M/s. Dolphin Metal (India) Ltd. involving sums of Rs.60lacs and Rs.40lacs; respectively. Its further alternative plea is that the above sundry balances be considered as allowable either u/s.36(1)(vii) as bad debts or u/s.37 of the Act. We notice in this backdrop that the CIT(A)'s detailed discussion takes into account the relevant finding in assessment as well as assessee's submissions as under:

"3. The second ground of appeal is as under:-

"The learned assessing officer has erred in law and on facts in making disallowance of Rs.1,00,00,000/- being sundry balance written off. In this regard your appellant would like to state that the Ld. AO has not appreciated the explanations / submissions made during the course of assessment proceedings. Yours appellant states that amount of Rs.1,00,00,000/- being advance were made in ordinary course of business and thus appellant prays before our honor to kindly delete the disallowance of Rs.1,00,00,000/- being sundry balance written off. Without prejudice to above, your appellant would like to pay before your honour that sundry balance v/ritten off amounting to Rs.1,00,00,000/- should either be allowed u/s. 37 or 36(1) (vii) of the Act."

3.1 Assessing Officer's findings:-

The relevant extracts from the assessment order are reproduced here under.-

A.Y. 2012-13 -6- "3.2. In respect of the balance amount of Rs. 1,00,00,000/- under the head sundry balances written off, it was stated by the assessee in its written

submissions dated 03.12.2014, 13.01.2015 and 27.01.2015 that the same pertained to advances given to Bhagyam Industries P. Ltd. Rs.60,00,000/- in June 2009 and Dolphin Metal (India) Ltd. Rs.40,00,000/- in April 2010 and no money could be recovered since giving of such advances and hence, the amounts were written off as non-

recoverable, Assessee has further contended that the advances were given in Course of company's business of lending money and also filed copy of the Memorandum of Association as well as the loan agreements with the concerned parties alongwith copy of cheque issued by Dolphin Metal (India) Ltd. obtained as an indemnity against future losses. In its' letter dtd. 27.01. 2015, it was stated by assessee that giving loans and advances was principal object of the company's business. It was further contended that the advance made to Bhagyam Industries Pvt Ltd & Dolphin Metal (I) Ltd. were in ordinary Course of assessee company's business and that the advance were made through Manish Shah director of Gyscoal Alloys Ltd. (an associate company in which directors of assessee company are also directors) who was expected to pursue the repayment in case of default or delay, however, Shri Manish Shah expired on 21.08.2014 after suffering from cancer and hence, the company could not pursue the recovery. In respect of Dolphin Metal (I) Ltd since there were no assets left with the company after paying secured debtors of bank on sale of assets and hence, there was no alternative but to write off the amount as non-recoverable. In respect of Bhagyam Industries, the where about could not be located and hence, the amount was written off as non-recoverable and since the advances Were entirely genuine, the same were required to be allowed as written off against company's business income.

3.2.1. The replies and contentions of the assessee company are considered and not found to be acceptable on account of following:

(i) It is seen that assessee company has failed to prove that the amounts claimed to have been advanced by it to the two parties namely Dolphin Metal (I) Ltd. & Bhagyam Industries had actually been advanced by assessee company and the amounts were in the nature of loans and advances made in ordinary course of assessee company's business.

(ii) It is pertinent to mention here that it is an admitted fact that where-about of the loanee namely M/s. Bhagyam Industries or Bhagyam Industries P. Ltd. are not traceable anywhere in any. database of sales tax department or the MCA site. Further, assessee company's loan agreement shows that no individual is identified as signatory to the same & it appears that not even cheque was obtained from the said party as a security indemnity.

(iii) It is seen that there was default in respect of both these advances as soon as the loans were claimed to have been granted to theses parties since assessee Company never received any money including interest income from these parties, which shows that the amounts even if paid by assessee company to these parties, were not in the nature of loans and advances made in ordinary course of assessee's business of

financing. It is also evident that there was no due diligence carried out by the assessee company, prior to granting of loan and advances to three parties, nor any security A.Y. 2012-13 -7-

/undertaking/pledge of any assets was made by assessee against the loans and advances granted to these parties. In fact, in absence of traceability of one of the parties Bhagyam Industries on any database shows that the amounts even if advanced were not in ordinary course of Assessee Company's business.

(iv) On perusal of the loan agreements entered into with the loanee by Assessee Company, it is seen that the same are very cursory and neither notarized nor registered documents. Further, even the stamp paper used for agreement with Bhagyam Industries is dated 09.07.2009 whereas the loan agreement is pre-dated to 06.06.2009.

(v) Assessee company never deposited the cheque obtained from Dolphin Metal (I) Ltd. nor any legal proceedings initiated against the both the loanee parties despite having failed to recover even single rupee out of the money paid. In fact, during the course of assessment proceedings in the case of Gopal Iron & Steels Co. (Gujarat) Ltd for the Assessment year relevant to previous year 2011-12 i.e. in subsequent to the year in which assessee claimed to have advanced the funds & became irrecoverable, it is seen that the said Dolphin Metal India Ltd had paid huge amounts of Rs. 90,38,062/- as rolling charges from April 2011 to March 2012 which proves that the debt could not have become bad at the time when assessee wrote off the amount claiming the same as irrecoverable. Hence, the claim in respect of the said party is found to be non-genuine.

3.2.3 In light of the above, it is factually evident that the amounts claimed as sundry balances written off on account of non-recoverable loans and advance made to Dolphin Metal (Industries) Ltd & Bhagyam Industries P Ltd were not made in ordinary course of assessee company's business & hence, not allowable as deduction.

3.2.4 Notwithstanding the above, it is also pertinent to mention that assessee company's non-recoverable loans & advances were in the nature of capital loss & hence, are not allowable as deduction against the assessee company's revenue receipts & income taxable for the year under consideration. In this regard, reliance is placed on the following decisions:

(i) In the case of Vijaykumar Mills Ltd Vs CIT(Mad.) 247 ITR 176, it was held that if advance was not made for the purpose of the business, the same was not allowable as a deduction on its write off.

(ii) In the case of Datamatics Financial Services Ltd. Vs. DCIT 2011- TIOL-

124 ITAT Mumbai, It was held that even if assessee advanced loans in the shape of ICDs and offered interest income on such deposits as business income & Memorandum of Association permitted assessee company to do business of financing of loans, the same were basically investments made by assessee out of surplus funds. Hence such deposits written off cannot be allowed as bad debt.

(iii) In the case of A.V. Thomas & Co. Ltd. Vs. CIT(SC) 48 ITR 67, the disallowance in respect of claim for deduction on account of write off of outstanding debt was upheld on the ground that debt is an outstanding which if A.Y. 2012-13 -8- recovered would have swelled the profits and it is not money handed over to someone which that person has failed to return & hence, claim for write off in respect of such debt is not an allowable expenses.

(iv) In the case of Indian Aluminium Co. Ltd. Vs. CIT (SC) 79 ITR. 514 it was held that a business debt should spring from the carrying on of a business and should be incidental to it and cannot be just any loss sustained by the assessee even if has some connection with its business.

3.2.5 The facts of assessee's case are squarely identical to the facts of the above cited decisions. Assessee company has failed the prove that the amounts were advanced in its regular course of business. Since, it failed the prove ever existence of a person/party to whom the amount was claimed to loans advanced and in respect of another through loan agreement produce, genuineness of the said agreement neither notarized nor registered, absence of any collateral securities, non-initiated any recovery proceedings against the said parties are circumstances loading to the conclusion that the amounts claimed for written off were not allowable as deduction against assessee's total income for the year under consideration. In light of the above, the claim of assessee company for sundry balances written off on account of money advanced to Dolphin Metal (I) Ltd. Rs. 40,00,000,- and Bhagyam Industries P. Ltd. Rs. 60,00,000/- are held to be not allowable as business deductions against the income from other sources. The entire claim of Rs. 1,00,00,000/- is hereby rejected and the amount is hereby added to the assessee's total income."

3.2. Appellant's submission:-

The relevant extracts from the submission of the appellant are reproduced here under:-

2) "The Second ground of appeal is with regard to disallowance of Rs.

1,00,00,000/- made by A.O. in respect of sundry balances written off during this year. It is submitted that the Appellant had advanced money of Rs. 60,00,000/- to Bhagyam Industries P. Ltd in June ,2009 and Rs. 40,00,000/- to Dolphin Metal (India) Ltd. in April, 2010 as advances in normal course of business. The copies of ledger account of both the parties from AY 2010-11 to AY 2012-13 along with bank statement highlighting entries of advances given are enclosed herewith on Page No. 4 to 9. Further the above advances given to both the parties were in the ordinary course of business to earn interest income, as the Appellant is engaged in money lending business, which can also be verified from the copy of Memorandum which is enclosed on Page No. 10 to 15. The Ld. A.O. has stated various objections on Page 4, Para 3.2.1 , which are not at all correct or relevant as under:

- The A.O. has stated in Point (i) Para, 3.2.1 on Page 4, that the assessee has failed to prove that the advances were actually made to these parties. In this regard ,the Appellant has to state that advances to both the parties were given in the ordinary course of business and through proper A.Y. 2012-13 -9- banking channel, which can

be verified from the copy bank statement enclosed on Page No 5 and 7 to 9.

- The A.O. has further stated in Point (ii) in Para 3.2.1 that the assessee company's loan agreement shows that no individual is identified as signatory to the same & it appears that not even cheque was obtained from the said party as a security or indemnity. In this regard, we have to state that the copies of loan agreement made with both the parties i.e. Bhagyam Industries and Dolphin Metal (India) Ltd are enclosed on Page No. 16 to 19 & 21 to 24, from which it can be seen that the signatory authorities in both the cases are easily identifiable. Further merely the appellant did not obtain the cheque from the above parties can never be a ground to disallow genuine business loss. The practice to obtain security would differ from assessee to assessee and as per company's business policy and there can not be any stipulation to such business loans & advances. Further please refer clause 33 of Part B of Memorandum of Association, wherein it is clearly mentioned that the appellant can lend the money without security upon such terms and in such manner as may be thought proper from time to time. Thus stand taken by the A.O. is totally incorrect.
- The Ld. A.O. has observed in Point (v) in Para 3.2.1. that the debt / advances could not become bad in respect of party namely Dolphin Metal (I) Ltd at the time when the assessee wrote off the amount claiming the same as irrecoverable. In this regard, the Appellant has to state that merely on the basis of the observation made in case of third party, the A.O. couldn't jump to conclusion that the claim of the assessee is found to be non-genuine. The Appellant has tried hard for the recovery of loans given to both the parties and finally the same had been written off in the year under consideration. The A.O. has wrongly taken shelter of the third party who succeeded in recovery of its dues from the Dolphin Metal (I) Ltd. likewise we have to state that the other party namely Associated Tradecom has filed a suit against Dolphin Metal (I) Ltd for its recovery of dues for the similar year under consideration. The evidences regarding suits filed by Associated Tradecom are also enclosed herewith as per Page No. 25 to 40, which proved beyond the doubt that the party Dolphin Metal (I) Ltd is a defaulter and claim of the Appellant is genuine and legal one.

The Ld. A.O. has relied on various decisions as cited on 6, Para 3.2.4, which are not at all applicable in assessee's case, as the above loans given to both the parties in normal course of business, which is clearly justifiable from the above submission as well as evidences enclosed herewith. In view of this, the entire claimed of Rs. 1,00,00,000/- written as bad debt may please be considered as genuine business loss and be allowed accordingly."

3.3. The appellant had also made the further written submission vide its letter dated 01/02/2016 and the same have also been considered.

3.4. Decision:

I have carefully considered the facts of the case, the assessment order and the written submission of the appellant. The AO has made the disallowance of A.Y. 2012-13 - 10 -

claim of balance written off of Rs.1,00,00,000/- in respect of loans granted by the appellant to two different parties Bhagyam Industries Pvt Ltd. at Rs.60,00,000/- in the month of June 2009 and Dolphin Metal India Ltd. at Rs.40,00,000/- in April 2010. Since the money could not be recovered since granting the loans to both the parties and hence in the year under consideration these loans were written off as non recoverable. The AO has discussed various reasons for non acceptance of the submission of the appellant in para 3.2.1 to 3.2.5 of the assessment order.

3.5. The appellant has claimed that these loans were granted to the aforesaid parties in the ordinary course of business and therefore the same are allowable u/s. 37 or section 36()(vii) of IT Act. It was also argued that the appellant was engaged in money lending business. For support, it submitted copy of memorandum of association of the appellant. These advances were made through proper banking channel which was verifiable from the bank statement. The detailed submission given by the appellant has been reproduced in the preceding para of this order.

3.6. Having considered the facts and submissions, the appellant's claim that the appellant was in the business of money lending is not verifiable from the copy of the memorandum of association submitted. The relevant clauses of the main object upon which the appellant placed reliance are reproduced as under:

"A.3. To carry on the business of an investment company and to invest in and hold and otherwise deal in shares, stocks, debentures, debenture-stocks, bound obligations and securities issued or guaranteed by any company constituted or private industrial enterprises carrying on business in India or elsewhere and shares debentures, debenture- stocks, bonds securities issued guaranteed by any government state , dominion sovereign public body or authority, supreme, municipal local or otherwise whether in India or elsewhere and to provide merchant banking services by acting as manager to the public issue or brokerage, loan syndication, guarantee and also to act as registrar to the issue, investment schemes of the companies, bodies corporate and also to carry on the business of project financing, shares and securities, financing and to act as shares and stock brokers at any place in India in consultation with the rules and regulations of various stock exchanges in India in accordance with the guidelines framed by the securities and exchange board of India (SEBI) from time to time.

B.2 To form, constitute, float lend money to assist and control similar associations or undertakings whatsoever.

B-15 To act as distributors, dealers, exporters, importers, agents and to undertake and carry on anywhere in India or abroad any or all the trades and business of ginner, packers, balers, spinners, weaver, processors and manufacturers of all types of yam, fibres, fabrics, cotton, wool, silk, flax, hemp, jute, cellulose and non cellulose products, nylon, polyester whether textile, netted or looped and also fibrous or textile

substances altering, adding, bleaching, blending, carbonizing, calendaring, converting, colouring, curing, creeping, dyeing, doubling, dipping, dewatering, developing, enlarging, extracting, fishing, improving, knitting, knocking,, manipulating, mercerizing, making, printing, preparing, reconditioning, refining, sizing, sourcing, sanforizing, treating, twisting, thinning, texturising, watering, washing, working, utilizing.

A.Y. 2012-13 - 11 -

B.33 To lend, invest or otherwise employ or deal with money belonging to or entrusted to the company in securities and shares or other movable or immovable property or without security upon such term and In such manner as may be thought from time to time, to very such transactions and investments in such manner as the Directors may think subject to the provision of the Companies Act, 1956.

B-38 To carry on business as consignors, consignees and agents and to buy, sell, import, resell, exchange, manufacture otherwise deal in all kinds and classes of cotton, wollen, rayon, silk, art silk, nylon, jute, synthetic, others natural man - made staple fibres, fabrics, yarn, thread and materials made therefrom and other synthetic fabrics, materials and garments.

B-46 To carry on all kinds of agency business and as buying and selling agents of all articles, things, commodities and products."

3.7. Thus from the above clauses of the main object nowhere it could be said that the lendings given to the aforesaid two parties were made in the ordinary course of its business. Even as per the copy of loan agreement submitted the aforesaid loans were temporary in nature. Thus the contention of the appellant in this regard is not found to be acceptable. Further these loans were granted by the appellant in the preceding years and upon such loans no interest income has been received by the appellant till the year under consideration. Thus the requirement of the provisions of section 36(2) is not getting fulfilled as the interest income pertaining to the aforesaid loans have not been shown as income in the preceding years or in the year under consideration in the books of accounts. Thus in absence of fulfillment of the condition u/s. 36(2) of IT Act the deduction of the bad debt could not be allowed. The appellant's claim u/s. 37(1) of IT Act is also found not correct for the reason that the appellant has not established that the lendings given to these parties were in respect of business of the appellant carried out. As has been discussed in the preceding para that these loans were in no way connected with the object clause of the memorandum of association. The appellant has also unable to submit any details and evidences to prove that M/s.Bhagyam Industries Pvt Ltd. was not traceable from any source of information. Even in the loan agreements the signatories as witnesses are also not identifiable as their names and complete addresses are not mentioned therein. Even no cheques from Bhagyam Industries Pvt Ltd. have been taken from the said party as a security as indemnity. For the sake of argument even if it is assumed that the appellant has granted the advances in the ordinary course of business of financing, in that case the interest income could have been derived since granting loan to Bhagaym Industries in June 2009 and Dolphin Metals India

Ltd. in June 2010. But by not deriving any interest income from these parties the appellant's contention of the business of finance and lendings in the ordinary course of business is not established. Even as per Clause B

- 15, the lendings on the terms to be decided between the appellant and the customers or other companies dealing with the appellant granted in respect of the guarantee and the performance of any contract could be regarded as business in ordinary course as per the Memorandum of Association. However, in the appellant's case neither any terms and condition of lendings have been brought on record, nor it has been proved that those two parties were customers or having any A.Y. 2012-13 - 12 -

dealing with the appellant company. Therefore, these lendings could not be said to be covered in the ordinary course of business.

3.8. The AO also observed that the loan agreement with Bhagaym Industries was dated 09.07.2009 (correctly 27.07.2009) while the agreement was shown to be executed on 6.6.2009. In other words when the non judicial stamp of Rs.100/- had been purchased only on 27.07.2009 then how could this agreement be executed on 06.06.2009, it means this agreement has been backdated. Therefore the authenticity of the said agreement was in doubt. It has also been noticed that the appellant company never deposited the cheque obtained from Dolphin Metal India Ltd. nor any legal proceedings were initiated against both the parties despite being failed to recover even a single rupee out of the money paid to them. On the contrary the AO observed that Dolphin Metal has repaid the rolling charges to another party viz. Gopal Iron and Steel Company Gujarat Ltd. which has proved that the debt could not become bad at the time when appellant wrote off the amount claiming the same as irrecoverable as the claim in respect of the said party was found not genuine. The appellant has relied upon various decisions /judgments in his favour, but the same are not found relevant because the appellant is found not to be granted the loans and advances to the aforesaid two parties in its ordinary course of business as discussed in the preceding paras. Even, the appellant has not even proved that these advances were made to its business associates. For example in the case of Patnaik & Co. Ltd., the Hon'ble Court has decided the issue in view of the old provisions of section 28(i) & has allowed the revenue loss on the issue totally different from the facts of the appellant. Likewise in the case of DCIT Vs. Hindustan Mi Swaco Ltd., the issue involved was in respect of claim of bad debt u/s. 36(1)(vii) of the I. T. Act r.w. 36(2) (i) of I. T. Act which has already been discussed in the appellant's case in the preceding paras of this order.

3.9. The AO has also relied upon various judgments in support of the contention that the non recoverable loans from the said parties were not the deductible expenditures against the income of the year under consideration.

3.10. In view of the aforesaid discussion, the claim of the written off as bad debt of the lendings granted to both the parties is not allowable under the provisions of IT Act and the AO has rightly disallowed these claims of deductions. Thus, disallowance made by the AO is confirmed."

8. We deem it appropriate first of all to deal with relevant documents on record. Paper book pages 6 to 50 comprise of assessee's memorandum including its money lending activity clause, copy of ledger accounts pertaining to both entities M/s. Bhagyam Industries Pvt. Ltd. and M/s. Dolphin Metal (India) Ltd. right from assessment year 2010-11 up to the impugned assessment year alongwith necessary bank statements highlighting the advances in question to have been actually given through banking channel, corresponding loan agreements, evidence indicating civil suit filed by one M/s. Associated Tradecon against the said latter entity as well as A.Y. 2012-13 - 13 -

initiating Section 138 cheque dishonour criminal proceedings, latter company's incorporation as per CIN allotted under Companies Act and its blank cheque(s) given as collateral security; respectively.

9. We now proceed to examine the instant issue in light of relevant factual backdrop as emanating from preceding paragraphs. There does not appear to be much dispute about the basic fact on record. The assessee had actually advanced the two sums in question of Rs.60lacs and Rs.40lacs to M/s. Bhagyam Industries Pvt. Ltd. and M/s. Dolphin Metal (India) Ltd. The corresponding loan agreements demonstrate that the parties in question had agreed for interest @ 13 to 14% per annum on reducing balance method. The Assessing Officer and CIT(A) are first of all of the view that the assessee has failed in proving itself to be an entity engaged in money lending business. We find that hon'ble Kerla High Court in (2014) 45 taxmann.com 118 (Kerla) Peninsular Plantations Ltd. vs. ACIT holds that such a specific money lending clause is not necessary as it is very much possible for a company to lend money to another entity even in absence of a money lending clause. Their lordships are of the view that the test in such a case would be as to whether the transaction in question has taken place in ordinary course of business or not. The assessee's above referred evidence sufficiently indicates that it had proposed to charge interest on the advances in question given through banking channel. We conclude that the money in question advanced as per its above object clause or for that even in absence of object clause amounted to a transaction in its ordinary course of business only. Both the lower authorities corresponding finding by this effect accordingly stand reversed.

10. Next come rival contentions qua genuineness of assessee's money lending agreement(s). The Revenue's case is that former loan agreement is stated to be executed on 06.06.2009 whereas the relevant document is dated 27.07.2009. It thus pleads that the Assessing Officer as well as CIT(A) have rightly questioned genuineness of the said loan agreement. We see no substance in the instant argument. It is noticed that the amount in question comprises of three money A.Y. 2012-13 - 14 -

transfers vide cheques / banking channel entries dated 08.06.2009, 10.06.2009 and 11.06.2009 involving sums of Rs.50lacs and Rs.10lacs each followed by a receipt of Rs.10lacs; respectively leaving behind net sum of Rs.60lacs. These transactions read with loan agreement dated 06.06.2009 in question make it clear that both the parties had first entered into agreement and thereafter the same was attested on 27.07.2009. The above loan agreement is very much a genuine document read together with all the abovestated surroundings facts and circumstances. The mere fact that the name of authorized person acting on behalf of the M/s. Bhagyam Industries Pvt. Ltd. is not specified does not in our opinion form the sole reason to disbelieve all the said facts and circumstances indicating the assessee to have actually paid the amount in question through banking

channel by way of a loan agreement. The payee concerned did not return the said amount for almost three years. We quote hon'ble apex court's landmark judgment in Chainrup Sampatram v. CIT (1953) 24 ITR 481 (SC) settling the law that anticipated losses can be booked at first sign of probability. We thus observe that non recovery of the amount in question for a continuous time period of three years formed a sufficient reason for the assessee to write off the corresponding amount of Rs.60lacs pertaining to the said former entity M/s. Bhagyam Industries (supra).

11. It further transpires that assessee's case qua write off regarding latter entity M/s. Dolphin Metal (India) Ltd. is much stronger than that of former one accepted hereinabove. Case records suggest that the said entity had been facing both the civil as well as Section 138 prosecution proceedings for having not discharged its liability in case of M/s. Associated Tradecom. Page 48 of the paper book reveals that this latter entity had held already its Annual General Meeting way back on 29.09.2009. Its authorized signatory details/duly incorporated in the corresponding loan agreement in page 34 para 9. It had also submitted collateral security in the nature of blank cheques. Mr. Singh at this stage vehemently submits that these blank cheques do not form a valid collateral security. We do not see any substance in the instant plea since the issue before us is that of sundry balances write off than that of validity of the said negotiable instruments. We refer to our preceding A.Y. 2012-13 - 15 -

detailed discussion to once again conclude that all these facts and circumstances constituted sufficient reason for the assessee to write off the impugned sum pertaining to M/s. Dolphin Metal (India) Ltd. amounting to Rs.40lacs as well as the gross sum of Rs.1,00,000/-.

12. Learned Departmental Representative's next vehement contention is that such cases of sundry balances write off involve cash deposit instances followed by loans disbursed through cheques later on claimed as sundry balances write off. Mr. Talati has filed before us assessee's bank statement with due certification that it has never deposited any cash sum since incorporation till date. Revenue's above instant argument is therefore rejected.

13. Next line of argument between learned representatives is qua the learned CIT(A)'s findings treating the impugned write off as a capital loss and not revenue in nature so as to be deposited against income of the impugned assessment year. We find that a co-ordinate bench in Late Shri Jhamu Sughand vs. ITO ITA Nos. 7803 & 7804/Mum/2011 decided on 29.08.2012 has decided the very issue against the Revenue in holding that advances given in the nature of working capital not recovered amount to business loss wherein registration under money lending law is not necessary. Learned co-ordinate bench's detailed discussion qua this effect read as under:

"6. We have considered the rival submissions as well as the relevant material on record. As it is evident from the earlier assessment orders as well as from the order of this Tribunal for the AY 2004-05 that the assessee was in the business of distribution, production and finance of films production. The advance / loans were given in the ordinary course of the business and not as investment in capital field. It is evident from the record and particularly from the assessment orders of the earlier years that the assessee used to give advances in connection with the business activity of the assessee. Therefore, when the business of the assessee was closed and after his death

there was no chance of recovery of debts as given in the ordinary course of the business then it cannot be said that the decision taken by the legal heirs of the assessee is not an honest decision. It is pertinent to note that even if it is considered that the advances were given for film production but the same is in the nature of working capital of the assessee and when the business was closed and there is no scope for revival then this is loss of working capital and not in the capital filed as such. Even otherwise when the legal representatives of the assessee A.Y. 2012-13 - 16 -

have written off the balances as appearing on the asset side of the balance sheet as well as the advance and loan appearing in the liability side of the balance sheet simultaneously then accepting one of the Act of writing back and not accepting the write off unrecoverable amount is contrary to the Rule of consistency or uniform principle on the part of the AO. The AO should have adopted the same principle while dealing with the identical nature of write off and write back amounts by the assessee as both are representing the advance given and advances received in the ordinary course of the business and it is very well possible that the advances given by the assessee were out of advances received by the assessee. Thus if the write off unrecoverable amounts are treated in capital filed then the write back amount which is corresponding to the write off amount should have also been treated as capital in nature and cannot be taxed as income of the assessee. There is no dispute that the loans taken by the assessee was for business and advances given were also in the course of business. Therefore the same were nothing but representing the same nature of transaction in trading field though opposite to each other. The Hon'ble Madras High Court in case of CIT vs. Crescent Films (P.) Ltd. (supra) while dealing with an identical issue has observed at page no.72 as under:

In any business, credit is an indispensable part and advances of a temporary nature with or without interest is a common incidence of business. It is not necessary that every business should register itself under the Money Lenders Act and make any claim in relation to any advance made by it only in the capacity of a person carrying on money lending business. It is also not possible to agree with the submission that any money spent to salvage the capital would automatically result in impressing the money so spent with the character of capital expenditure. If the nature of the expenditure or the nature of the transaction is such as to be regarded as one in the revenue field, it cannot be treated as capital, merely because such expenditure was incurred for the purpose of salvaging the capital. In this case, the sum of ` 7,50,000 paid by the distributor would have been lost to the assessee, had the picture not been completed as the money paid him for acquiring distribution rights and without the picture, there was no likelihood of the assessee realising his investment. In order to ensure that the picture was completed, the assessee had agreed to lend money and that lending was a separate transaction and was not part of the distribution arrangement. The money so lent having been found to have become irrecoverable by reason of the picture failing at the box office and the producer being unable to repay

his debts, the money so lost to the assessee was rightly held by the Commissioner and the Tribunal to be a trading loss. Learned counsel for the Revenue, however, contended that the decision of this court in the case of CIT v. Coimbatore Pictures (P.) Ltd. [1973] 90 ITR 452 should govern this case. The fact that the assessee therein was also a distributor even as the assessee here is a distributor, does not imply that that decision, without anything more, will be applicable to this case as well.

A decision is to be regarded as a precedent for its ratio decidendi and not for the facts in relation to which such ratio was laid down. The ratio of that case as we read it is that before a deduction can be claimed on the ground of business loss, the loss should have been incurred in the course of business, and it should be in the nature of revenue loss. We are in entire agreement with that proposition. On the facts of this case, the loss to the A.Y. 2012-13 - 17 -

assessee being a revenue loss which had been incurred in the course of business, the assessee was entitled to deduct the same under section 37 of the said Act. We answer the question referred to us in favour of the assessee and against the Revenue."

7. It has been held by the Hon'ble High court that it is not necessary that every business should register itself under the Money Lenders Act. In any business, credit is indispensable part of advance of temporary nature with or without interest is common in business. Thus, the Hon'ble High Court has held that the money lent during the business of acquiring, distribution rights in the picture found to become unrecoverable by the reason of picture failing at box office and purchaser being unable to repay his debts, the money so lost by the assessee has rightly held to be a trading loss. In the instant case it cannot be a case of bad debts but it is certainly a trading loss as advances given in the course of business and loss to the assessee in view of the facts and circumstances when the business of the assessee is closed and further he has already died. This view is also fortified by the decision of Hon'ble Madras High Court in the case of Devi Films P. Ltd. vs. CIT. Hence, we do not find any substance or merit in the contention of Ld. DR that the decision of writing off was taken by the LR of the assessee after the conclusion of the financial year because the decision for write back was taken by LR of the assessee only after conclusion of the financial year. The AO while exercising his quasi judicial authority cannot apply different principles and standards while dealing with the similar nature of transactions.

8. Having regard to the facts and circumstances of the case, we are of the considered view that both the writing off as well as written back amounts should be accepted but at the same time when there is no business the loss returned by the assessee shall be ignored and the income should be treated as 'nil'. Hence, we allow the claim of write off but the loss returned by the assessee is disallowed and income is to be treated as 'nil'."

We therefore take into account our preceding detailed adjudication in view of the relevant facts and case law inter alia conclude that the assessee has advanced he sum in question of Rs.60lacs and Rs.40lacs to M/s. Bhagyam Industries Pvt. Ltd. and M/s. Dolphin Metal (India) Ltd. totaling to Rs.1crore through banking channel in its ordinary course of business in lieu of charging interest and non recovery thereof for almost three years formed sufficient reason to write them off as sundry

balances as revenue loss to be adjusted against its income of the impugned assessment year. The assessee's second substantive ground is accordingly accepted.

14. Learned counsel representing assessee invites our attention to assessee's third substantive ground challenging Section 36(1) (iii) interest disallowance of A.Y. 2012-13 - 18 -

Rs.2,22,586/- out of Rs.10,22,586/- made in the course of assessment. He states very fairly that the assessee does not wish to press for this third substantive ground. We therefore decline the instant last substantive ground as not pressed.

15. This assessee's appeal is partly allowed.

[Pronounced in the open Court on this the 12th day of February, 2018.] Sd/- Sd/-

(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER
Ahmedabad: Dated 12/02/2018

(S. S. GODARA)
JUDICIAL MEMBER

True Copy

S.K.SINHA

/ Copy of Order Forwarded to:-

1. / Revenue
2. / Assessee
3. ! / Concerned CIT
4. ! - / CIT (A)
5.) , - , , /
DR, ITAT, Ahmedabad
6. i3 ¢ £ / Guard file.

By order

/ /
,