

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 9<sup>TH</sup> DAY OF JUNE 2020

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR. JUSTICE HEMANT CHANDANGOUDAR

**I.T.A. NO.134 OF 2011**

BETWEEN

1. THE COMMISSIONER OF INCOME TAX  
LTU  
JSS TOWERS  
BSK III STAGE  
BANGALORE
2. THE ASST. COMMISSIONER OF INCOME TAX  
CENTRAL CIRCLE-19  
NEW DELHI.

...APPELLANTS

(BY SRI K V ARAVIND, ADV.)

AND

M/S.ABB LTD  
(SUCCESSOR OF ABB INSTRUMENTATION LTD)  
KHANIJA BHAVAN, RACE COURSE ROAD  
II FLOOR, EAST WING  
BANGALORE-560017.

... RESPONDENT

(BY SRIV VINAY GIRI, ADV.)

THIS ITA IS FILED UNDER SEC.260-A OF I.T ACT, 1961 ARISING OUT OF ORDER DATED 26-11-2010 PASSED IN ITA NO.158/BANG/2010, FOR THE ASSESSMENT YEAR 2001-2002, PRAYING TO:

- I. FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN,
- II. ALLOW THE APPEAL AND SET ASIDE THE ORDERS PASSED BY THE ITAT, BANGALORE IN ITA NO.158/BANG/2010 DATED 26-11-2010 AND CONFIRM THE ORDER OF THE APPELLATE COMMISSIONER CONFIRMING THE ORDER PASSED BY THE ASSISTANT COMMISSIONER OF INCOME TAX, CENTRAL CIRCLE-19, NEW DELHI, IN THE INTEREST OF JUSTICE AND EQUITY.

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THIS ITA COMING ON FOR ADMISSION, THIS DAY, **ALOK ARADHE J.**, DELIVERED THE FOLLOWING:

### **JUDGMENT**

This appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act', for short) has been filed by the revenue. The subject matter of the appeal pertains to Assessment year 2001-02. The appeal was admitted on the following substantial questions of law:

- a) *Whether on the facts and in the circumstances of the case and law the finding of the Tribunal that the investment*

*made by the assessee in a sum of Rs.3,50,81,381/- in Gujarat Instruments Ltd., a sister concern for purchase of equity shares which into liquidation can be written off as bad debt despite the same is treated as a dead loss, is justified and whether it is contrary to law?*

*(b) Whether the finding recorded by the tribunal that investment made by the assessee to the tune of Rs.32,25,000/-, for diminution in the value of investment in Gujarat Instruments Ltd., is permissible under Section 46(2) of the Act as capital loss in view of decision in CIT VS. JAI KRISHNA, 231 ITR 108 is perverse?*

2. Facts leading to filing of this appeal briefly stated are that assessee is engaged in the business of manufacture of field instrumentation. The assessee filed the return declaring loss of Rs.7,40,96,877/- on 29.10.2001, which was processed under Section 143(1) of the Act on

22.03.2002. Thereafter, a notice under Section 143(2) of the Act as well as a questionnaire dated 26.12.2003 along with notices under Section 143(2) and 142(1) were issued. The assessing officer by an order dated 18.03.2004 inter alia held that the assessee is a promoter of M/s Gujarat Instruments Ltd., and is an associate Company. It was further held that the assessee had not furnished any details of investment / finance provided to M/s Gujarat Instruments Ltd., from time to time and has also not explained the circumstances, which led to liquidation of the said company and how the funds provided by the assessee were utilized. It was also held that no details have been furnished by the assessee of its business interest in M/s Gujarat Instruments Ltd., therefore, the loss suffered by the assessee to the tune of Rs.3,50,81,381/- has to be treated in the nature of capital loss. The assessing

officer also disallowed a sum of Rs.32,25,000/- i.e., the provision made for diminution in the value of investment in M/s Gujarat Instruments Ltd., on the ground that no particulars were furnished.

3. Being aggrieved, the assessee filed an appeal. The Commissioner of Income Tax (Appeals) by order dated 23.11.2009 upheld the disallowance in respect of writing off the debts. It was further held that investment made for equity shares of M/s Gujarat Instruments Ltd., cannot be written off as a revenue loss and the same is a dead loss and therefore, is not allowable. Being aggrieved, the revenue as well as the assessee preferred appeals. The tribunal vide order dated 26.10.2010 inter alia held that writing off bad debt as irrecoverable in the accounts of the assessee is sufficient in view of law laid down by Supreme Court in **'T.R.F LTD. VS.**

**CIT', 323 ITR 397** and the assessee was entitled to write off an amount of Rs.3,50,81,381/- as bad debt. It was also held that the aforesaid amount should be treated as capital loss under Section 46(2) of the Act in view of the decision in the case of '**CIT VS. JAI KRISHNA', 231 ITR 108 (GUJ)**. Being aggrieved, the revenue is in appeal before us.

4. Learned counsel for the revenue while inviting our attention to the order of assessment has pointed out that the assessing officer has not adhered to the manner of requirement of writing off the bad debt. It is also urged that tribunal has also failed to examine whether writing off of debt has taken place in the manner laid down by the Supreme Court and therefore, the matter should have been remitted to the assessing officer without recording a finding that assessee is entitled to avail

the benefit of capital loss. In support of aforesaid submissions, reliance has been placed on the decisions of the Supreme Court in '**T.R.F LTD. VS. COMMISSINER OF INCOME TAX**', 323 ITR 397 and '**VIJAYA BANK VS. COMMISSIONER OF INCOME TAX & ANR.**', 323 ITR 166. It is also submitted that any loss incurred in setting up of a business / company of a sister concern is a capital expenditure and therefore, the same has to be treated as capital loss. It is also pointed out that the assessee had failed to explain the commercial expediency. It is also urged that bad debt should occur during the course of business to claim benefit under Section 36 of the Act. It is also submitted that even though tribunal remanded the matter to the assessing officer, yet it erred in recording a finding that assessee is entitled to capital loss on the ground that the assessee had invested in equity

shares, even though, neither nature of investment was disclosed nor any particulars were furnished. It is further submitted that the tribunal should not have remitted the matter to the assessing officer by holding that assessee is entitled to avail of the benefit of capital loss.

5. Learned counsel for the assessee submitted that the burden to prove that the debt is a bad debt has been removed with effect from 01.04.1989. It is further submitted it is sufficient if the debt is be written off as bad debt in the accounts of the assessee. It is further submitted that the assessing officer's remand report was called for and after 01.04.1989, there was no need to establish the aspect of irrecoverability of debt after 01.04.1989. It is also pointed out that decision rendered in **T.R.F** supra was accepted by the

department and a Circular No.12/2016 dated 30.05.2016 was issued and it has been clarified that after 01.05.1989, for allowing deduction for amount of any bad debt or part thereof under Section 36(1)(vii) of the Act, it is not necessary for the assessee to establish that the debt in fact had become irrecoverable and it is enough even though if bad debt is written off as irrecoverable in the books of account of assessee. It is also submitted that the decision rendered by the Supreme Court in **T.R.F** supra was subsequently explained in **VIJAYA BANK** supra. While inviting the attention of this court to the order passed by Commissioner of Income Tax (Appeals), it is pointed out that assessee had advanced a sum of Rs.2,21,29,761/- as loan and advances and had further advanced a sum of Rs.1,29,51,620/- to sundry debtors. It was also pointed out that the assessing officer had

accepted that the investment made by the assessee in the sister concern is by way of equity shares and day to day business activity cannot be treated to be capital in nature as the appellant had made supplies to its sister concern. It is further submitted that an amount of Rs.2.2 Crores advanced by the assessee to its sister concern should have treated as business loss. In support of aforesaid submissions, reliance has been placed on decisions in the cases of **'BADRIDAS DAGA VS. CIT', (1958) 46 ITR 10 (SC)**, **' CIT VS. MYSORE SUGAR CO. LTD.', (1962) 46 ITR 649 (SC)**, **' S.A.BUILDERS LTD. VS. CIT', (2007) 158 TAXMAN 74 (SC)**, **' T.R.F. LTD. VS. CIT', (2010) 190 TAXMAN 391 (SC)**, **'HARSHAD J.CHOKSI VS. CIT', (2012) 25 TAXMANN.COM 567 (BOM.)**, **' CIT VS. JAYKRISHNA HARIVALLABHDAS (1998) 231 108 (GUJ.)**. It is also urged that the tribunal has

rightly treated the loss as capital loss by placing reliance in the case of **CIT VS. JAI KRISHNA** supra.

6. By way of rejoinder, learned counsel for the revenue submitted that manner of writing off the debt has not been examined by the assessing officer as well as Commissioner of Income Tax (Appeals) and the tribunal. It is also pointed out that decision in **T.R.F** supra on which reliance has been placed has been rendered subsequently and the Circular has been issued by the Central Board of Direct Taxes subsequent to the passing of the impugned order. It is also pointed out that business relations are not established and the fact that loss incurred by the assessee has been incurred during the course of business has also not been proved.

7. We have considered the submissions made on both the sides and have perused the record. Section 36(1) (vii) of the Act post 01.04.1999 is reproduced below for the facility of reference:

*36. Other deductions : (1) the deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in S.28-*

*(i) to (vi).....*

*(vii) subject to the provisions of sub-s,(2), the amount of any bad debt or part thereof which is written off as irrecoverable in the accounts of the assessee for the previous year.*

8. The Supreme Court taking note of the aforesaid provision held that after 01.04.1989 it is not necessary for the assessee to establish that the

debt in fact had become irrecoverable and it is enough if the bad debt is written off as irrecoverable in the accounts of assessee. On the basis of the aforesaid decision, the Central Board of Direct Taxes has issued Circular No.12/2016 dated 30.05.2016, by which it has been clarified that claim for any debt or part thereof in any previous year shall be admissible under Section 36(1)(vii) of the Act if it is written off as irrecoverable in the books of account of the assessee for that previous year and it fulfills the condition stipulated in Section 36(2) of the Act. Undoubtedly, the judgment rendered by the Supreme Court and the Circular have been issued subsequent to the orders passed in the instant case. However, the fact remains that the Supreme Court has interpreted the provision of law, which was incorporated by the Legislature with effect from 01.04.1989, therefore, such an interpretation would

relate back to the date when such a provision came into existence.

9. In the backdrop of aforesaid well settled legal position, facts of the case in hand may be examined. From perusal of the order dated 18.03.2004 passed by the assessing officer, it is evident that assessing officer has not examined the fact whether or not the assessee has entered an amount of Rs.35,081,381/- as written off as bad debt. In the appeal, the remand report was called for by the Commissioner of Income Tax (Appeals) and the assessing officer has submitted the following report, which is reproduced in para 25.3 of the order passed by the Commissioner of Income Tax (Appeals):

*"Ground No.12 & 13:- This ground relates to the disallowance of RS.3,50,81,381/- on account of written*

*off due from M/s Gujarat Instruments Ltd. And Rs.32,25.000/- on account of diminution in value of investment in M/s Gujarat Instruments Ltd. In its submission filed before your honor, assessee has submitted that "The appellant had made certain investments by acquiring the equity shares of a company known as Gujarat Instruments Ltd.." The appellant was due a sum of Rs.1,29,51,620/- towards unpaid price for instrument supplied by the appellee to the company. The appellant had from time to time made "advances to this company to enable" it to meet certain expenditure incurred by it on its day to day business activities. During the year the appellant wrote off an amount of Rs.3,50,81,381/- representing the advances and dues from the said company as well as made a provision for diminution in value of its investments in the said company in a sum of Rs.32,25,000/-. "Assessee further*

*submitted that "in any event the sum of Rs.1,29,51,620/- being bad debts on account of supply made can never be regarded as on capital account." Perusal of the above submission reveals that the assessee had given advances to M/s Gujarat Instruments Ltd. To meet certain expenditure incurred by it on its day to day business activities, which have certainly a capital nature. With regard to claim of bad debts of RS.1,29,51,620/-, it is seen that the assessee has failed to substantiate its claim that is on account of supply made and fulfilled the conditions laid down in Section 36(1)(vii) for allowing as bad debts. Assessee has not made any fresh submission on addition of Rs.32,25,000/-, In view of the above facts and circumstances, I am of the opinion that the assessing officer has rightly disallowed Rs.3,50,81,381/- on account of written off due from M/s Gujarat Instruments Ltd. And Rs.32,25,000/- on account of diminution in value of*

*investment in M/s Gujarat Instruments Ltd*

11. Thus, from the order passed by the Commissioner of Income Tax (Appeals) also it is evident that he has not recorded a specific finding that the assessee had written off the debt in the books of account. However, the tribunal in para 15 (vii) has held as under:

*(vii) The assessee had taken a view that the loans, advances and sundry debtors amounting to Rs.3.50 Crores due from its associate company -GIL- which had gone in liquidation and there was no trace of recovering the same, the management took a view to write off the said sum in its ledger of accounts during he previous year relevant to the Assessment year under dispute where the ruling of the Hon'ble Apex Court in the case of T.R.F. Ltd. Vs.*

*CIT reported in (2010) 323 ITR 397 (SC) comes to its rescue. The Hon'ble judiciary had, in its wisdom, ruled that 'in order to obtain a deduction in relation to bad debts, it is not necessary for the assessee to establish that the debt, in fact, has become irrecoverable; it is enough, if the bad debt is written off as irrecoverable in the accounts of the assessee.' The assessee had precisely in its books of account written off as irrecoverable.*

12. Thus, from perusal of aforesaid paragraph also it is evident that the tribunal also has not recorded a specific finding by assigning reasons that in the books of account the debts have been written off. Only in a single sentence, it is stated that the assessee had in its books of account written off its debt as irrecoverable.

14. The issue with regard to loss of shares in a company, which went under liquidation was considered by Gujarat High Court in **CIT VS. JAI KRISHNA** supra and it was held that a person who gets nothing on account of liquidation of a company and suffers loss, his loss has to be treated as capital loss by virtue of Section 46(2) of the Act. The tribunal has followed the aforesaid decision and has held that the assessee is entitled to benefit under Section 46(2) of the Act in respect of an amount of Rs.32,25,000/- for diminution of value of investment made in Gujarat Instruments Ltd. We concur with the view taken by Gujarat High court.

13. In view of preceding analysis, the impugned order passed by the Income Tax Appellate Tribunal is modified and the finding that the assessee is entitled to the benefit of capital loss is

set aside. The matter is remitted to the assessing officer who shall decide the same in the light of law laid down by the Supreme Court in the case of T.R.F supra. In the result, both the substantial questions of law are answered accordingly. In the result, the appeal is disposed of.

**Sd/-  
JUDGE**

**Sd/-  
JUDGE**

SS