

**IN THE INCOME TAX APPELLATE TRIBUNAL
"J" Bench, Mumbai**

**Before Shri G.S. Pannu, Accountant Member
and Shri R.L. Negi, Judicial Member**

ITA No. 5577/Mum/2016
(Assessment Year: 2011-12)

D C I T - 9(2)(1)
Room No. 665A, 6th Floor
Aayakar Bhavan, M.K. Marg
Mumbai 400020

M/s. B. Braun Medical
Inida P. Ltd.
A Wing, 601, 6th Floor
Boomerang, Chandivali
Farm Road, Chandivali
Andheri (E), Mumbai 400072

PAN – AAACB7394M

Appellant

Respondent

Appellant by: Shri Aarju Garodia
Respondent by: Shri Dinkle Hariya

Date of Hearing: 16.04.2018
Date of Pronouncement: 25.05.2018

ORDER

Per G.S. Pannu, AM

This appeal has been filed by the Revenue against the order of the CIT(A)-1, Panaji dated 17.06.2016 for A.Y. 2011-12.

2. Assessee has raised the following grounds of appeal: -

“1. The Ld. Commissioner of Income Tax (Appeals) [hereinafter referred to as “Ld. CIT(A)”] has erred in upholding the order of the Ld. Assessing Officer and treating the Short Term Capital Gains of Rs.44,26,537/- as Business Income.”

3. At the outset, it was a common ground between the parties that the issue raised in this appeal is covered by the decision of the Tribunal as well as the Hon'ble Bombay High Court in assessee's own case for A.Y. 2008-09. It is also noticed that the CIT(A) has followed the aforesaid precedents. It was also a common ground between the parties that the precedents have not been altered by any higher authority and they continue to hold the field. The respondent assessee is, inter alia, engaged

in the business of trading, manufacturing and assembling of medical equipments. During the course of assessment proceedings the AO noted that the assessee had made a Provision of ₹2,02,75,000/- towards slow moving inventory as on the end of the year, i.e. 31st March, 2011. On being show caused the assessee explained that the nature of business was the reason for making the provision for diminution in the value of inventories. The assessee explained that it is engaged in pharma business and there is expiry date for each of the items manufactured and traded in. It was explained that the products which are nearing expiry date are normally sold at a much lower rate than the market rate and the ones which are obsolete are sold even below the cost. The assessee classifies such material and estimates the realisable sale revenues there from, which are much lower than the normal sale revenues. The difference between the two is reflection of the diminution in the value of inventories, which has been accounted by way of the aforesaid Provision. The AO, however, did not accept the plea of the assessee as according to him it was a notional and contingent loss and could not be taken into consideration while computing the total income. The CIT(A), however, accepted the claim of the assessee by referring to the decision of the Tribunal in the case of assessee itself in ITA No. 99/PNJ/2013 dated 25.10.2013. A copy of the said decision has been placed before us. The relevant discussion in the order of the Tribunal reads as under: -

“2.3 We have heard the rival contention of both the parties, we find that the Assessee is engaged in pharma business and there is an expiry date on every item of manufacture. Stock-in-hand are highly perishable, as they are meant for human consumption, the question of 'life and death' is dependent on the quality of assessee's stock. There are regulatory authorities, who govern the production by a pharma company quite strictly and any aberration would immediately attract disqualification and may result in closure of business altogether. In the case of pharma products expiry date becomes vital and period of usage in case of pharma products is fixed and generally short. The items like disposable syringes have to be destroyed and a certificate has to be obtained. Therefore, in case of such products as the expiry date inches closer, the value of the product starts diminishing. This reduction in the value of the product is not 'notional' but real. The assessee has to regularly update its stock -in- trade and has to take

into account all the factors like expiry date etc. Therefore, the CIT(A) considering all these facts, has allowed the notional loss to the assessee. The CBDT has in detail clarified by circular No. 3-2010 dated 23.03.2010 that the 'marked to market' loss may be given different accounting treatment by different assessee's. Some may reflect such loss as a balance sheet item without making any corresponding adjustment in the Profit and Loss Account. Others may book the loss in the Profit and Loss account which may result in the reduction of book profit. In cases where no sale or settlement has actually taken place and the loss on marked to market basis has resulted in to reduction of book profits, such a notional loss would be contingent in nature and cannot be allowed to be set off against the taxable income. The same should therefore, be added back for the purposes of computing the taxable income of the assessee. We find that this CBDT Circular has been applied in the case of Notional Losses arising on various transaction wherein Board has clarified that notional losses cannot be set off against book profits. We find that facts of this case is that the assessee company has valued part of stock-in-trade lower than even the costs as the assessee is in pharmaceutical business, wherein the expiry date medicines and equipments like disposal syringes have to be destroyed. Therefore, we are of the view that CBDT Circular is not applicable to the facts of the assessee's case. Therefore, we are of the view that CIT(A) is justified in his action and our interference is riot required. In the result, this ground of appeal is dismissed."

4. Notably the said decision of the Tribunal was carried in appeal before the Hon'ble High Court of Bombay at Goa and vide order dated 07.07.2014 the order of the Tribunal has been affirmed with the following discussion: -

"3. As far as first question is concerned, both the authorities below namely Commissioner and Tribunal concurrently held that the product manufactured by Assessee engaged in pharma business has expiry date and therefore, in case of such product as the event of expiry date inches closer, the value of the product starts diminishing and this reduction in the value of the product is not notional but real. The lower authorities further held that the circular dated 23.3.2010 issued by CBDT is applicable in case of notional losses arising on various transactions. It was also held that said circular cannot be made applicable to the present case. We find no error in these findings, especially when the practice followed by assessee, since 1994, is never objected by Revenue."

5. In view of the aforesaid decision, which continues to hold the field, we find that CIT(A) has made no mistake in deleting the disallowance made by

the AO. The order of the CIT(A) is affirmed and Revenue fails in this appeal.

6. In the result, the appeal filed by Revenue is dismissed.

Order pronounced in the open court on 25th May, 2018.

Sd/-
(R.L. Negi)
Judicial Member

Sd/-
(G.S. Pannu)
Accountant Member

Mumbai, Dated: 25th May, 2018

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -1 Panaji*
4. *The Pr. CIT - 8, Mumbai*
5. *The DR, "J" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

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