

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F" MUMBAI**

**BEFORE SHRI S. RIFAUZ RAHMAN (ACCOUNTANT MEMBER) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)**

**ITA No.5412/MUM/2019
(Assessment Year: 2009-10)**

&

**ITA No. 5413/MUM/2019
(Assessment Year: 2013-14)**

Asst. Commissioner of
Income Tax,
Circle 5(2)(1), R. No. 525,
Aayakar Bhavan,
M.K. Road,
Mumbai – 400 020

M/s JNJ Holdings Pvt.
Vs. Ltd, Raval Building No.1,
2nd Floor, 428,
Bhadkamkar Marg,
Mumbai – 400 004

PAN No.AAACJ2047D

(Revenue)

(Assessee)

Revenue by : Ms. Usha Gaikwad, D.R
Assessee by : Shri Hiro Rai, A.R

Date of Hearing : 23/08/2021
Date of pronouncement : 29/09/2021

ORDER

PER RAVISH SOOD, J.M:

The present appeals filed by the revenue are directed against the respective orders passed by the Commissioner of Income Tax (Appeals)-10, Mumbai, dated 10.05.2019 for A.Y 2009-10 and A.Y 2013-14, which in turn

arises from the respective assessment orders passed by the A.O u/s 143(3) r.w.s 147 of the Income Tax Act, 1961 (for short 'Act'), dated 28.03.2016 for A.Y 2009-10 and u/s 143(3), dated 22.02.2016 for A.Y 2013-14.

2. As common issues are involved in the aforementioned appeals, therefore, the same are being taken up and disposed off by way of a consolidated order. We shall first take up the appeal filed by the revenue for A.Y 2009-10, wherein the impugned order has been assailed on the following solitary ground before us :

“On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in allowing mark to market loss of Rs. 10,68,95,694/- on account of decrease in the value of closing stock without taking into consideration Board circular No. 3/2010 dated 23.03.2010 and the fact that such loss is nothing but speculation loss within the meaning of Explanation to section 73 of the I T Act, 1961.”

3. Briefly stated, the assessee company which is engaged in the business of investment and dealing in shares and securities had filed its return of income for A.Y 2009-10 on 26.09.2009, declaring a loss of Rs. (-) 27,55,34,864/-. The return of income was initially processed as such u/s 143(1) of the Act. Subsequently, the case of the assessee was reopened u/s 147 of the Act.

4. Assessment was framed by the A.O vide his order passed u/s 143(3) r.w.s. 147, dated 28.03.2016, wherein after making an addition of “Mark to Market loss” of Rs. 10,68,95,694/- the returned loss of the assessee company was scaled down by the A.O to an amount of Rs. (-) 16,89,39,170/-. During the course of assessment proceedings, it was observed by the A.O that there was a diminution in the value of the “Closing stock” by an amount of Rs. 10,68,95,694/-. On being queried, it was submitted by the assessee that the aforesaid diminution in the value of the ‘closing stock’ of equity shares was for the reason that it was consistently valuing its stock-in-trade at cost or market value, whichever is lower. Justifying the diminution in the value of its stock-in-trade, it was submitted by the assessee that it being a non-banking financial company registered with Reserve Bank of India that was engaged in the

business of buying and selling shares and securities of listed companies was mandated by law to follow the provisions of the Non-Banking Financial Companies Prudential Norms (Reserve Bank) Directions, 1998 issued by the Reserve Bank of India in exercise of the powers conferred on it by section 45JA of the Reserve Bank of India Act, 1934. It was submitted by the assessee that as per the aforesaid directions the quoted current investments for each category of investments such as equity shares, preference shares etc. were to be valued at cost or market value, whichever is lower. It was further stated by the assessee that in compliance to the aforesaid directions it had valued the closing stock of shares and securities at lower of the cost or market value, as a result whereof there was a decrease in the value of stock-in-trade by an amount of Rs. 10,68,95,694/-. However, the A.O was not inclined to accept the aforesaid claim of the assessee. It was observed by the A.O that as per the 'Explanation' to sub-section (1) of section 73 of the Act, any loss computed in respect of a speculation business carried on by an assessee shall not be set-off except against the profits and gain of a speculation business. The A.O was of the view that as the business of the assessee consisted of purchase and sale of shares of other companies, therefore, the loss suffered in such business would be covered by the 'Explanation' to Section 73 of the Act. Also, the A.O while concluding as hereinabove was of the view that the loss emanating from the valuation of the 'closing stock' could not be dissected and would form part of the assessee's business of purchases and sale of shares. In support of his aforesaid conviction the A.O took support of the judgment of the Hon'ble Supreme court in the case of Chairrup Sampatram Vs. CIT (1953) 24 ITR 481 (SC). It was further observed by the A.O that the valuation of the 'closing stock' at less than the cost by the assessee cannot be said to be a loss that had arisen from the valuation of the 'closing stock', but in fact was a part and parcel of the loss of its business of purchase and sale of shares. It was observed by the A.O that the valuation of the 'closing stock' at less than the cost is accounting for the anticipated loss from the business of purchase and sale of shares. Backed by his aforesaid observations, the A.O vide his order passed u/s 143(3) r.w.s.

147, dated 28.03.2016 after making an addition of the "Mark to Market loss" of Rs. 10,68,95,694/- assessed the loss of the assessee company at Rs. (-)16,89,39,170/-.

5. Aggrieved, the assessee carried the matter in appeal before the CIT(A). It was observed by the CIT(A) that the issue involved in the appeal before him, viz. disallowance of the loss on account of "Mark to Market value" of closing stock of equity shares was squarely covered by the order passed by the Tribunal in assessee's own case for A.Y 2002-03, A.Y 2003-04, A.Y 2010-11 and A.Y 2011-12, wherein disallowance of the aforesaid claim of loss of the assessee was vacated by the Tribunal. Observing that the facts and the issue involved in the case of the assessee remained the same as were there before the Tribunal in the aforementioned years the CIT (A) respectfully followed the view therein taken and vacated the disallowance made by the AO.

6. The revenue being aggrieved with the order of the CIT(A) has carried the matter before us. We have heard the Ld. Authorized Representatives for both the parties, perused the orders of the lower authorities and the material available on record. As observed by us hereinabove, the issue involved in the present appeal of the revenue i.e. declining of the of the assessee's claim of "Mark to Market loss" of stock-in-trade of equity shares had came up in the assessee's own case for the preceding years i.e. A.Y 2002-03, A.Y 2003-04, A.Y 2010-11 and A.Y 2011-12, wherein the Tribunal after taking cognizance of the fact that the assessee had consistently been following the said method of valuation of closing stock and the same had throughout been accepted by the department, thus, vacated the addition. On a perusal of the order of the CIT(A), we find that he had vacated the impugned addition by observing as under:-

"6.3.1 I have considered the submission of the appellant, carefully gone through the order of the AO, perused the material on record, and referred to the case laws relied upon by the appellant and the AO.

6.3.2 After hearing the learned AR and perusing the material on record, I find that this issue has been considered by the Hon'ble ITAT in appellant's own

case for AY 2002-03, AY 2003-04, AY 2010-11 and AY 2011-12 and the Hon'ble ITAT held as under:

AY 2002-03 :

7 We have heard rival submissions and considered them carefully. We noted in the findings of the Ld. CIT(A) the assessee has been following the method of valuation of Closing stock consistently and the same has been accepted by the department itself. We have further noted that this method of valuation has been approved by the Supreme Court in various cases mentioned above and in the case of Sakthi Trading Co. in 250 ITR 871. Therefore, in view of these facts and circumstances we have no hesitation confirming the order of the Ld. CIT(A). Accordingly, we confirm the order of the CIT(A).

AY 2003-04 :

7. We have considered the submissions made by both parties, material on record and orders of authorities below. We find that in the similar facts, the Tribunal in assessee's own case in ITA No.4738/Mum/05 for A.Y.2002-03 vide order dated 11th February, 2008 decided in favour of assessee. The Tribunal, after examining the issue in detail, confirmed the order of Id. CIT(A). The relevant findings of the Tribunal are as under :

‘We have heard, rival submissions and considered them carefully. We noted in the findings of the Id. CIT(A) the assessee has been following this method of valuation of closing stock consistently and the same has been accepted by the department itself. We have further noted that this method of valuation has been approved by the Supreme Court in various cases mentioned above and in the case of Sakthi Trading Co. in 250 ITR 871. Therefore, in view of these facts and circumstances, we have no hesitation in confirming the order of the Id. CIT(A)’. Accordingly, we confirm the order of the Id. CIT(A)’.

Respectfully following the decision of the co-ordinate Bench of the Tribunal, we confirm the order of Id. CIT(A). Thus, this ground of the Revenue stands rejected.

AY 2010-11 & AY 2011-12 :

4. At the outset, the learned Counsel for the assessee stated that the assessee has valued outstanding derivatives transactions at lower of cost or market value as on the date of balance sheet i.e. 31.3.2010. The learned Counsel assessee explained that assessee has debited mark to market losses on account of the outstanding equity derivatives in the profit and loss account and the list of outstanding equity future contracts mentioning the cost and

the market value as on 31.3.2010 was filed before the A.O. and before CIT(A) also. It was also, the contention of the assessee that assessee is consistently following the policy and value the outstanding stock position of equity derivatives lower of cost or market value. The assessee has filed complete details before A.O., but A.O. simply brushed aside everything and merely stated that the liability is contingent. The learned Counsel for the assessee relied on the case of Hon'ble Supreme Court in the case of CIT vs. Woodward Governor India P. Ltd. (2009) 312 ITR 254 (SC). On the other hand, the learned Sr. Departmental Representative relied on the orders of the lower authorities and also filed copy of instruction No. 3/2010 dated 23.3.2010, wherein, tax implication of forward foreign exchange contracts is explained. She particularly referred to the following paragraphs of this circular:-

“As the revenue implications of such transaction are large, the Assessing Officers need to examine the statements of accounts and the notes to accounts with a view to find out any reference to any loss on account of forex-derivatives. In some cases, these losses may be camouflaged under the ‘financial charges’ ‘foreign exchange loss’ or some similar head which may make it difficult to detect them. In such cases, the Assessing Officers should make a specific query asking the assessee to give a break up of any ‘Marked to Market’ loss on a forex derivatives included in the Profit and Loss Account and examine whether such transactions are ‘eligible transaction’ in terms of Sec.43(5)(d). An adjustment to the taxable income may therefore be made, if necessary, keeping in view the provisions of law referred to above’.

5. We have heard the rival contentions and gone through the facts and circumstances of the case. Admittedly, neither the A.O. nor CIT(A) has discussed the facts but we find from the details that the assessee has valued outstanding equity derivative transactions at lower of cost or market value in the balance sheet as on 31.3.2010. Admittedly, the assessee has debited mark to market losses on account of diminution in the value of outstanding equity derivatives. We find that this issue has been settled by Hon'ble Supreme Court in the case of Woodward Governor India P. Ltd. (supra), wherein, it is clearly held that losses suffered by the assessee on account of fluctuation in the rate of foreign exchange has on the date of balance sheet is item of expense under section 37(1) of the Act. For valuing closing stock at the end of the year, the value prevailing of the last date is relevant because profit and loss is embedded in the closing stock, While anticipated loss is taken into account and the anticipated profit in the shape of appreciation of value of the closing stock is to be brought into accounts. In view of the principle laid down by the Hon'ble Supreme Court, we are of the view that the assessee is entitled to this loss and he has rightly claim so. Accordingly, we reverse the orders of the lower authorities and allow this claim of the assessee.

6.3.3. This issue has also been adjudicated by my Ld. predecessor in appellant's own case in AY 2011-12 in Appeal No. CIT(A)-10/OCIT-5(2)/149/2014-15 and vide para No. 5.2 of the order dated 18/03/2016 ,he has held as under:

5.2 I have carefully considered the facts of the case and submissions made by the Ld. AR. As seen from the order of the Hon'ble jurisdictional FTAT for AY 2002-03 and AY 2003-04 dated 11/02/2008 and 10/09/2008 respectively, the issue is squarely covered the relevant paragraph of their orders which is similar in both the years (the ITAT has relied on its own earlier order) is reproduced as under:

“7 We have heard rival submissions and considered them carefully. We noted in the findings of the Ld. CIT(A) the assessee has been following this method of valuation of closing stock consistently and the same has been accepted by the department itself. We have further noted that this method of valuation has been approved by the Supreme Court in various cases mentioned above and in the case of Shakti Trading Co. in 250 ITR 871. Therefore, in view of these facts and circumstances we have no hesitation in confirming the order of the Ld. CIT(A). Accordingly we confirm the order of the order of the Ld. CIT(A).”

5.2.1 In view of the above discussion the ground is allowed.

6.3.4 Since the issue under consideration is identical to that of the case decided by the Hon'ble ITAT in appellant's own case for AY 2002-03, AY 2003-04, AY 2010-11 and AY 2011 -12, so also the case decided by my predecessors for AY 2011-12, respectfully following the decisions of Hon'ble ITAT and my predecessors, the disallowances made by the Assessing Officer are reversed.

6.3.5 In view of the above discussion, these grounds of appeals are allowed.”

7. As the facts and the issue involved in the present appeal of the assessee before us i.e the addition made by the A.O w.r.t diminution in the value of 'closing stock' of equity shares remains the same as were there before the Tribunal in the assessee's own case for the aforementioned preceding years, therefore, finding no infirmity in the view taken by the CIT(A) who had followed the view taken by the Tribunal we find no reason to dislodge the well reasoned order of the CIT(A) and uphold the same. Insofar the support drawn by the A.O from the CBDT Instruction No. 03/2010, dated 23.03.2010, to the effect that

the notional loss should not be allowed is concerned, we are of the considered view that as stated by the ld. A.R, and rightly so, as the said CBDT instruction is in context of reporting of mark-to-market losses on account of forex-derivatives by an assessee, thus, the same cannot be applied to the method of valuation of closing stock of equity shares.

8. Before parting, we may herein observe that the ld. A.R had in the course of hearing of the appeal had apart from supporting the order of the CIT(A) also assailed the validity of the jurisdiction assumed by the A.O for reopening the assessee's case u/s 147 of the Act. However, in the absence of any cross-appeal or cross-objection or a preliminary objection having been filed by the assessee before us, we are afraid that the said claim of the assessee cannot be adverted to and therein adjudicated upon by us.

9. Resultantly, the appeal filed by the revenue is dismissed in terms of our aforesaid observations.

ITA No. 5413/Mum/2019 (AY 2013-14)

10. We shall now take up the appeal filed by the revenue for A.Y 2013-14.

11. The revenue has assailed the impugned order passed by the CIT(A), dated 10.05.2019 on the following effective grounds before us :

“1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in allowing mark to market loss of Rs. 2,79,95,834/- on account of decrease in the value of closing stock without taking into consideration Board circular No. 3/2010 dated 23.03.2010 and the fact that such loss is nothing but speculation loss within the meaning of Explanation to section 73 of the I T Act, 1961.

2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting “the provision for MTM margin Equity Stock Future” of Rs. 4,44,461/- on account of decrease in the value of closing stock without taking into consideration Board circular No. 3/2010 dated 23.03.2010 and the fact that such loss is nothing but speculation loss within the meaning of Explanation to section 73 of the I T Act, 1961.”

12. Briefly stated, the assessee company had e-filed its return of income for A.Y 2013-14 on 17.09.2013, declaring a loss of Rs. (-) 1,24,90,716/-. Subsequently, the case of the assessee was selected for scrutiny assessment u/s 143(2) of the Act.

13. Assessment was thereafter framed by the A.O vide his order passed u/s 143(3), dated 22.03.2016 and the income of the assessee company was assessed at Rs. 1,59,49,130/- after making the following additions:-

Sr. No.	Particulars	Amount
1.	Disallowance of Mark-to-Market loss of closing stock-in-trade of equity shares.	Rs. 2,79,95,384/-
2.	Disallowance of Mark-to-Market margin Equity Stock Futures.	Rs. 4,44,461/-

14. Aggrieved, the assessee carried the matter in appeal before the CIT(A). Observing, that the aforementioned issues were squarely covered by the orders passed by the Tribunal in the assessee's own case for the earlier years, the CIT(A) vacated the said additions and allowed the appeal.

15. We have heard the Ld. Authorized Representative for both the parties, perused the orders of the lower authorities and the material available on record. Insofar the challenge to the order of the CIT(A), on the ground, that he had erred in allowing "Mark to Market" loss of Rs. 2,79,95,384/- qua the decrease in value of 'closing stock' of equity shares, we find that the facts and the issue involved in respect of the said issue remain the same as were there before us in the appeal filed by the revenue before us in the assessee's own case for A.Y 2009-10 in ITA No. 5412/Mum/2019. Accordingly, our view taken while disposing off the ground of appeal No. 1 in the aforesaid appeal for A.Y 2009-10 in ITA No. 5412/Mum/2019 shall apply mutatis mutandis for the purpose of disposal of the aforesaid ground. Accordingly, the **Ground of appeal No. 1** is dismissed in terms of our aforesaid observations.

16. We shall now take up the claim of the revenue that the CIT(A) had erred in deleting the addition made by the A.O of the “Provision for MTM margin Equity Stock Future” of Rs. 4,44,461/-. As is discernible from the records, the CIT(A) while vacating the addition made by the A.O of the Provision for Mark-to- Market Equity Stock Futures had relied on the order passed by the Tribunal in the assessee's own case for A.Y 2010-11 and A.Y 2011-12. On a perusal of the aforesaid orders of the Tribunal, we find that it was therein observed as under :

“7.3.1. I have considered the submission of the assessee, carefully gone through the order of. the AO, perused the material on record, and referred to the case laws relied upon by the appellant and the AO.

7.3.2 After hearing the learned AR and perusing the material on record, I find that this issue has been considered by the Hon'ble ITAT in appellant's own case for AY 2010-11 and AY 2011-12, The relevant part of the order is reproduced below for ready reference:

2 The only common issue in these appeals of assessee is as regards to the order of CIT(A) confirming the action of the AO in disallowing the mark to market losses of diminution in value of outstanding equity derivatives amounting to Rs. 44,53,452/- in AY 2010-11 and Rs. 6,79,267/- in AY 2011-12. The facts and circumstances are exactly identical and the grounds raised by assessee are identically worded

3. Brief facts of the case that the assessee company is non banking Finance Company registered with RBI and also engaged in the business of buying and selling of shares and securities of listed companies and also making investment in equity shares of listed companies. The AO during the course of assessment proceedings noticed that the assessee has debited mark to market margins on equity shares at Rs, 44,53,452/and according to him, this is contingent liability in nature and disallowed by observing in Para 5 as under:-

“5 The assessee has debited for MTM Margin Equity Stock Futures at Rs. 44,53,452/-. This expense is contingent in nature and not known in real as on 31/03/2010. Contingent in nature

provision cannot be allowed in P&L account and the same amount is disallowed and added to the income of the assessee.”

4.
.....

5. We have heard the rival contentions and gone through the facts and - circumstances of the case. Admittedly, neither the A.O. nor CIT(A) has discussed the facts but we find from the details that the assessee has valued outstanding equity derivative transactions at lower of cost or market value in the balance sheet as on 31.3.2010. Admittedly, the assessee has debited mark to market losses on account of diminution in the value of outstanding equity derivatives. We find that this issue has been settled by Hon'ble Supreme Court in the case of Woodward Governor India P. Ltd. (supra), wherein, it is clearly held that losses suffered by the assessee on account of fluctuation in the rate of foreign exchange has on the date of balance sheet is item of expense under section 37(1) of the Act. For valuing closing stock at the end of the year, the value prevailing of the last date is relevant because profit and loss is embedded in the closing stock. While anticipated loss is taken into account and the anticipated profit in the shape of appreciation of value of the closing stock is to be brought into accounts. In view of the principle laid down by the Hon'ble Supreme Court, we are of the view that the assessee is entitled to this loss and he has rightly claim so. Accordingly, we reverse the orders of the lower authorities and allow this claim of the assessee.

7.3.4 Since the issue under consideration is identical to that of the case decided by the Hon'ble ITAT in appellant's own case for AY 2010-11 and AY 2011-12, respectfully following the decisions of Hon'ble ITAT, the disallowance of Rs. 4,44,461/-, made by the Assessing Officer is reversed.”

17. We have given a thoughtful consideration and find no infirmity in the view taken by CIT (A) who had followed the order of the Tribunal for A.Y 2010-11 and A.Y 2011-12 and had vacated the aforesaid addition of Rs. 4,44,461/-. We, thus, concurring with the view taken by the CIT(A) uphold his order as regards the aforesaid issue under consideration. The **Ground of appeal No. 2** is dismissed.

18. The appeal filed by the revenue is dismissed in terms of our aforesaid observations.

19. Resultantly, both the appeals of the revenue i.e. for A.Y 2009-10 in ITA No. 5412/Mum/2019 and for A.Y 2013-14, ITA No. 5413/Mum/2019 are dismissed in terms of our aforesaid observations.

Order pronounced in the open court on 29/09/2021.

Sd/-

(S.Rifaur Rahman)
ACCOUNTANT MEMBER

Sd/-

(Ravish Sood)
JUDICIAL MEMBER

Mumbai;

Dated: 29.09.2021

Alindra, PS

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//

(Sr. Private Secretary)
ITAT, Mumbai