

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ “आई” मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL “I” BENCH, MUMBAI
BEFORE S/SHRI N. K. BILLAIYA, (AM) AND AMIT SHUKLA, (JM)
सर्वश्री एन. के. बिलैय्या, लेखा सदस्य, एवं अमित शुक्ला, न्यायिक सदस्यके समक्ष

आयकर अपील सं./I.T.A. No.3213/Mum/2009
(निर्धारण वर्ष / Assessment Year 2005-06)

Asstt. Commissioner of Income Tax, Cir. 6(1), Room No.506, 5 th floor, Aayakar Bhavan, M K Marg, Mumbai-400020	बनाम/ Vs.	Boots Piramal Health Care Ltd (now known as M/s Nicholas Piramal Consumer Products Pvt.Ltd) Peninsula Corporate Park, Nicholas Piramal Tower, Ganpatrao Kadam Marg, Lower Parel, Mumbai-400013
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No.2714/Mum/2009
(निर्धारण वर्ष / Assessment Year 2005-06)

Piramal Health Care Ltd (successor in the business of Boots Piramal Healthcare Pvt.Ltd), Nicholas Piramal Tower, Ganpatrao Kadam Marg, Lower Parel, Mumbai-400013	बनाम/ Vs.	The Addl. Commissioner of Income Tax, Cir. 6(1), Mumbai.
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A. No.4129/Mum/2008
(निर्धारण वर्ष / Assessment Year 2004-05)

Boots Piramal Health Care Ltd (Now merged with Piramal Healthcare Ltd., Nicholas Piramal Tower, Ganpatrao Kadam Marg, Lower Parel, Mumbai-400013	बनाम/ Vs.	Income Tax Officer 6(1)(2), Mumbai-400020
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. :AAACB5803B

अपीलार्थी ओर से / Revenue by	Shri Sachhidanand Dubey
प्रत्यर्थी की ओर से/ Assessee by	Shri Jahangir D Mistry

सुनवाई की तारीख / Date of Hearing : 3.2.2015

घोषणा की तारीख /Date of Pronouncement : 18.2.2015

आदेश / ORDER

PER N. K. BILLAIYA (AM)

These are the cross-appeals by the Revenue and the assessee against the very same order of the Id.CIT(A)-VI, Mumbai dated 27.2.2009 pertaining to the assessment year 2005-06. The Appeal No.4129/Mum/2008 is the appeal filed by the assessee against the order of Id. CIT(A)-V, Mumbai dated 17.1.2008. All these three appeals were heard together and are being disposed of by this common order, for the sake of convenience.

I.T.A. No.2714/Mum/2009 (By assessee)

2. The assessee has raised three substantive grounds of appeal which relate to the disallowance of expenditure for purchase of license for windows of Rs.30,000/. During the course of assessment proceedings, the AO noted that the assessee has claimed repairs and maintenance. It was also found that the assessee itself has disallowed a sum of Rs.201,800/- treating as capital expenditure and claimed depreciation on it. It was explained that these expenditures were not incurred for the purchase of any kind capital assets and since not asset of enduring benefit has been acquired, these expenditures cannot be capitalized as capital assets. The explanation of the assessee was not accepted by the assessing officer who

treated a sum of Rs.4,48,144/- as capital expenditure and allowed depreciation as per the provisions of law.

3. The assessee carried the matter before the Id CIT(A) and explained that the expenditures were incurred on networking which are revenue in nature. It was further pointed out that the assessee has deducted tax at source on some of the payments which itself shows that the expenditure are revenue in nature. The Id.CIT(A) was convinced by the submissions made by the assessee. However, while deleting the addition made by the AO, the Id.CIT(A) confirmed the addition of Rs.30,000/- being the license purchased for window. Aggrieved by this the assessee is before us.

4. We have carefully perused the orders of authorities below. We find that the expenditure are incurred for the purchase of application software and therefore are revenue in nature. Windows being application software cannot be treated as capital assets and therefore any license fee paid for the purchase of windows has to be allowed as revenue expenditure as the soft ware has to be updated every year. We accordingly set aside the findings of the Id.CIT(A) and direct the AO to delete the addition. Ground No.1 is allowed.

5. Ground No.2 of the appeal is against the disallowance of Rs.2,66,59,853/- on the alleged ground that such expenditure pertains to prior period expenses. While scrutinizing the return of

income, the AO noticed that the assessee has debited a sum of Rs.2,66,59,853/- to its profit and loss account. The assessee was asked to justify its claim. The assessee filed a detailed reply explaining that due to financial irregularities committed by the erstwhile Chief Finance Officer and an employee from the account department some fraud/ irregularities were perpetrated which has resulted into fraud. The company has found and detected the financial irregularities during the financial year 2004-05 relevant to the assessment year under consideration and therefore the amount of Rs.2,66,59,853/- has been claimed as revenue expenditure/loss. The AO considered and examined the submissions made by the assessee. The AO observed that the assessee has also made a claim of Rs.1,23,20,570/- in the immediately preceding year i.e. assessment year 2004-05 which has been debited once again claimed during the year under consideration i.e. assessment year 2005-06. The AO was of the opinion that the assessee is just taking a chance and claiming deduction though he is also aware that it cannot be allowed treating the entire expenditure as prior period expenses. The AO disallowed the same. Aggrieved, the assessee carried the matter before the Id.CIT(A) and reiterated what has been stated before the AO. After considering the facts and the submissions, the Id. CIT(A) observed that the assessee could not accurately identify the individual party-wise balances and accordingly the amount were

reflected on aggregate debits in financial statement. The Id. CIT(A) further observed that such expenditure pertains to prior period expenditure and cannot be allowed as deduction in this year as the books of account of the assessee are audited and there is no mention in the audit report that there is any discrepancy in the accounting of expenditure. The Id.CIT(A) finally concluded by holding that prior period expenditure cannot be allowed in this year. The Id. CIT(A) was convinced that the AO was justified in disallowing the expenditure on the ground that the assessee has not claimed the expenditure in the original return nor in the revised return. Aggrieved by this the assessee is before us.

6. Before us, the Id.counsel reiterated what has been stated before the lower authorities. The Id. counsel brought to our notice the noting appended to the financial statement and pointed out that in the financial statement itself the assessee has explained how the financial irregularities have perpetrated by the Chief Finance Officer and an employee. The said note is exhibited at pages 34 and 35 of the paper book. The Id. Counsel further brought to our notice Exs.178 to 190 and explained that the detailed expenditure of each transaction was explained to the AO during the course of assessment proceedings itself. The Id. counsel further stated that every item of expenditure has been explained. Without verifying the details filed by the assessee, the AO has treated the entire claim as prior period

expenditure without realizing that financial irregularities were detected during the year under consideration and therefore there is no question of treating the amount as prior period expenditure.

7. Per contra, the Id. DR stated that the onus was upon the assessee to establish that the expenditure was genuine. The assessee has not brought any evidence on record to substantiate its claim and therefore, there is no error in the findings of the revenue authorities.

8. We have considered the rival contentions and carefully perused the orders of authorities below. We have also considered the relevant documents referred to and brought to our notice. It is undisputed fact that certain accounting and financial irregularities have been perpetrated by the Chief Finance Officer. It would be pertinent to first understand the nature of financial fraud which primarily comprises :

(i) Advancing monies to various parties by way of inter corporate deposits and discounting of bills of exchange without adequate authorizations and credit evaluation of the borrowers;

(ii) Wrong credits to the parties against short term loans taken from other bodies corporate and consequently non-recording of the loans taken and

(iii) Payments made to acquire personal assets, or withdrawals of a personal nature debited to wrong account etc;

9. On notice of these financial irregularities, the assessee has accounted for interest on loans taken of Rs.3,33,42,922/- during the financial year under consideration. This interests includes interest of Rs.2,66,59,853/- which has been treated as prior period expenditure. As a matter of fact, this amount of Rs.2,66,59,853/- which relates to the financial transaction have been debited during the year under consideration has to be allowed during the year when it is discovered. This is in line with the Board circular No.35D(XLVII-20)(F.No.10/48/65-IT(A-I) dated 24.11.1965. The Hon'ble Supreme Court in the case of Associated Banking Corporation Of India Limited. vs CIT reported in 56 ITR 1(SC) has held that *"the loss by embezzlement must be deemed to have occurred when the assessee came to know about the embezzlement and realized that the amount embezzled could not be recovered"*. In another decision, the Hon'ble Supreme Court in the case of Badridas Daga V/s CIT reported in 34 ITR 10) (SC) has held that *"the losses which have been suffered by the assessee as a result of misappropriation by an employee have (1) which was incidental to the carrying on the business and should therefore be deducted in computing the profit of the business."*

10. It would not be out of place to mention here that a FIR has also been lodged against the Chief Finance Officer which was brought to the notice of the AO which clearly shows that the defalcation has taken place.

11. Considering all these facts in totality in the light of judicial decisions mentioned hereinabove. In our considered opinion, since fraud and financial irregularities were detected during the year under consideration. The claim of such financial irregularities has to be allowed during the year under consideration itself. We find that the complete details of transactions were submitted by the assessee before the AO. The AO did not care to verify the same. The assessment order pertains to assessment year 2005-06 and we are entering in the assessment year 2015-16. Ten years have since been lapsed, it would be gross injustice to the assessee, if we restore this issue to the file of AO for verification of the details. Considering the details and judicial decisions, we set aside the findings of the Id. CIT(A) and direct the AO to delete the addition of Rs. Rs.2,66,59,853/-. Ground No.2 is allowed.

12. Ground No.3 relates to disallowance of Rs.1,43,000/- on account of foreign exchange fluctuation treated it as capital loss.

13. The AO found that the assessee has debited Rs.1,43,000/- as loss on foreign exchange variation. . Necessary details were filed by

the assessee before the AO, but the AO was of the firm belief that this is a contingent liability as the actual liability arises only at the time of actual payment of its liability. The AO accordingly disallowed Rs.1,43,000/-. The assessee carried the matter before the Id CIT(A) but without any success. While disallowing this ground of the assessee, the Id. CIT(A) observed that the assessee has obtained a loan on capital account. Hence, the variation, on account of foreign exchange fluctuation would be capital loss and not revenue loss.

14. Before us, the Id. counsel stated that the Id. CIT(A) has not appreciated the facts in the right perspective. It is the say of the Id.counsel that foreign exchange fluctuation was not on account of loan taken by the assessee but it was on account of revenue expenditure and therefore, the ratio laid down by the Hon'ble Supreme Court in the case of Sulej Cotton Mills Ltd V/s CIT reported in 116 ITR 1)(SC) squarely apply to this issue.

15. The Id. DR relied upon the findings of revenue authorities.

16. Annexure 16 at page 200 of the paper book has carefully been perused by us which is a details of claim of foreign exchange fluctuation loss. A perusal of the same shows that the fluctuation are on account of revenue expenditure. There are also gain which have been noted while claiming loss of Rs.1,43,000/-. We find force in the contention of the Id.counsel. The ratio laid down by the Hon'ble

Supreme Court in the case of Sulej Cotton Mills Ltd(supra) squarely apply on the facts of the present case, wherein the Hon'ble Supreme Court has held that "Where profit or loss arises to an assessee on account of appreciation or depreciation in value of foreign currency held by him, on conversion into another currency, such profit or loss would ordinarily be trading profit or loss if foreign currency is held by assessee on revenue account or as a trading asset or as part of circulating capital embarked in business. *But, if on the other hand, the foreign currency is held as a capital asset or as fixed capital, such profit or loss would be of capital nature.*"

6.5 Considering the facts of the case in the light of ratio laid down by the Hon'ble Supreme Court, we set aside the finding of the Id. CIT(A) and direct the AO to delete the addition of Rs.1,43,000/- Ground No.3 of the appeal is allowed.

17. In the result, the appeal filed by the assessee is allowed.

I.T.A. No.3213/Mum/2009 (By Revenue)

The Revenue has take four substantive grounds in this appeal.

18. Ground No.1 relates to deletion of Rs.4,88,86,386/- added back by the AO under section 40(a)(ia) of the Act.

19. During the course of assessment proceedings, the assessee was asked to reconcile the expenses debited in the profit and loss account with TDS done on it. The assessee filed reconciled

statement. The AO noticed that the TDS has not been made for certain expenditures totaling to Rs.4,88,86,386/-.The AO proceeded by disallowing the same u/s 40(a)(ia) of the Act.

20. Before the Id.CIT(A), the assessee once again filed a detailed chart showing the reasons why the TDS was not made. The Id.CIT(A) after carefully perusing the chart found that most of the expenses were reimbursement and in some of the cases the assessee has obtained no deduction certificate from the respective AO and wherever the TDS was applicable, the assessee has deducted the same. The Id.CIT(A) also verified the challans. Having been convinced the Id.CIT(A) deleted the addition.

21. Before us, the Id. DR supported the findings of the AO. The Id. counsel of the assessee reiterated the same submissions what has been submitted before the First Appellate Authority. The Id.counsel also brought to our notice the detailed chart which was filed before the lower authorities. The same is exhibited at pages 61 to 64 of the paper book.

22. We have carefully considered the orders of the authorities below and the relevant documentary evidence brought on record before us. In our considered opinion, the Id.CIT(A) has very rightly appreciated the documentary evidence and the details submitted by the assessee. We have also considered the documentary evidence

and after perusing the details as submitted by the parties concerned, we do not find any reason to interfere with the findings of the Id. CIT(A). Ground No.1 is therefore dismissed.

23. Ground No.2 relates to deletion of Rs.4,18,144/- added by the AO as capital expenditure. The Id. CIT(A) has considered this issue at para 3 of his order, wherein he has given categorical findings that the assessee has incurred expenditure on repair and maintenance and no new assets has been brought in to existence. As no distinguishing facts have been brought on record by the Id.DR, we do not find it necessary to interfere with the order of Id.CIT(A). Ground No.2, is therefore, dismissed.

24. Ground No.3 relates to deletion of addition of Rs.1,19,42,804/- added back by the AO on account of advertisement expenditure. The AO noticed that an amount of Rs.1,19,42,804/- has been allocated to the account of M/s Nicholas Piramal India Ltd (NPIL) on account of advertisement expenses for Saridon BME. It was explained by the assessee that TDS is done on these expenses by NPIL and therefore the assessee has not done TDS on these credits to NPIL. The AO was not convinced with this reply of the assessee and disallowed the entire sum of Rs.1,19,42,804/-.

25. Before the Id. CIT(A), the assessee explained that NPIL incurred advertisement expenditure and the assessee reimbursed

the same and hence NPIL has to deduct tax at source and if the assessee is required to make TDS it would amount to double taxations since, expenditure is subject to TDS by NPIL. After considering the entries of the statement, the Id.CIT(A) found that the assessee has simply made reimbursement and therefore not required to make further TDS. The Id.CIT(A) deleted the entire addition.

26. Before us, the Id. DR supported the assessment order, the Id. counsel of the assessee reiterated the same facts what has been stated before the lower authorities. It is an undisputed fact that the advertisement expenses have been incurred by the NPIL. It is also an undisputed fact that the assessee has simply credited it to the account of NPIL as reimbursement of the expenditure. It is further found that NPIL has made TDS on the advertisement expenses. All that being the facts of the matter, we do not find any reason to interfere with the finding of the Id CIT(A). The ground No.3 is accordingly dismissed.

27. Ground No.4 relates to deletion of Rs.21,84,331/- added by the AO being an amount of expenditures paid to various vendors without TDS. While scrutinizing the return, the AO noticed that the assessee has debited to the profit and loss account an amount of Rs.21,84,331/- on account of misappropriation of assets. The assessee was asked to explain the same. It was explained by the assessee that Account Executive of the company did fraudulent

transactions by issuing cheques in the name of M/s Anmol Manas Agency and accounted the cheques in the vendor accounts. It was pointed out by the assessee that FIR has already been lodged. The AO considered these submissions made by the assessee. The AO was of the opinion that the payment has been made to the vendor for expenditure without deducting tax at source. The AO further observed that the assessee has not furnished any progress or outcome of the FIR filed and the details of action taken by the Police against the said employee of the assessee. The AO disallowed the entire amount of Rs.21,84,331/-.

28. Before the Id. CIT(A), the assessee once again explained the nature of transaction and the misappropriation done by the employee of the assessee. After considering the facts and the submissions, the Id. CIT(A) was of the firm belief that loss is required to be allowed in the year in which it was detected. The Id. CIT(A) deleted the entire addition of Rs.21,84,331/-. The Id. CIT(A) drew support from the decision of the Hon'ble Supreme Court in the case of Associated Banking Corporation Of India Limited (supra) and Badridas Daga (supra). Aggrieved by the decision of the Id. CIT(A), the Revenue is before us.

29. The Id. DR supported the order of AO. The Id. counsel for the assessee reiterated the same facts what has been submitted before the lower authorities.

30. We have perused the orders of authorities below. An identical issue on embezzlement and misappropriation of funds have been decided by us in assessee's appeal in ITA No.2714/Mum/2009 qua ground No.2 of that appeal, wherein we have followed the ratio laid down by the Hon'ble Supreme Court, which has been followed by the Id. CIT(A) while deleting the present addition. We, therefore, do not find any reason to interfere with the findings of Id. CIT(A). Ground No.4 is dismissed.

31. The appeal filed by the revenue is, therefore, dismissed.

I.T.A. No.4129/Mum/2008 (By Assessee)

32. Since we have deleted the entire addition made in assessment year 2005-06 amounting to Rs. 2,66,59,853/-, the issue raised by the assessee in this appeal become otiose. Accordingly, the appeal filed by the assessee dismissed as infructuous.

33. In the result, the appeal bearing ITA No.2714/Mum/2009 filed by the assessee is allowed, appeal bearing ITA No.3213/Mum/2009 filed by the Revenue is dismissed and the appeal by the assessee bearing ITA No.4129/Mum/2008 is dismissed.

The above order was pronounced in the open court on 18th Feb, 2015.

घोषणा खुले न्यायालय में दिनांक:18th Feb, 2015 को की गई ।

sd

sd

(अमित शुक्ला / **AMIT SHUKLA**) (एन. के. बिलैय्या, लेखा सदस्य/ **N. K. BILLAIYA**)

न्यायिक सदस्य / JUDICIAL MEMBER लेखा सदस्य / **ACCOUNTANT MEMBER**

मुंबई Mumbai:18th Feb,2015.

व.नि.स./ SRL , Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned
4. आयकर आयुक्त / CIT concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai concerned
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

true copy

सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai