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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 17.05.2023

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W.P.(C) 10921/2019 & CM APPL. 45147/2019

DR. WILLMAR SCHWABE INDIA PRIVATE LIMITED

..... Petitioner

Through: Mr Nishant Thakkar, Advocate.

versus

ADDITIONAL COMMISSIONER OF INCOME TAX & ORS.

Respondents

Through: Mr Ruchir Bhatia, Sr. Standing Counsel.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

1. This writ petition is directed against the notice dated 27.09.2018 issued under Section 148 of the Income Tax Act, 1961 [in short, "the Act"] and the order dated 02.09.2019, whereby objections preferred by the petitioner with regard to the commencement of the reassessment proceeding were disposed of. The impugned notice and order concern Assessment Year (AY) 2012-13.
2. In this petition, notice was issued on 15.10.2019. The record shows that despite opportunities having been given, counter-affidavit has not been filed on behalf of the respondents/ revenue. Having regard to the fact that a considerable amount of time has lapsed, we are not inclined to grant, on this count, further opportunity to the respondent/ revenue to file a counter-affidavit in the matter.
3. We have, however, heard Mr Nishant Thakkar, counsel who appears on behalf of the petitioner, and Mr Ruchir Bhatia, senior standing counsel, who appears on behalf of the respondent/ revenue, in support of their respective stands, based on the record presently available to the court.
4. Mr Thakkar says that although there are several flaws in the impugned proceeding, the principal flaw is evident upon perusal of the reasons recorded by the Assessing



Officer for triggering the reassessment proceedings.

4.1 In this context, it is pointed out by Mr Thakkar that the reassessment has been triggered after the lapse of four (4) years from the end of the relevant AY, i.e., AY 2012-13, and therefore, the provisions of the first proviso appended to Section 147 of the Act would apply.

4.2 Mr Thakkar says that a plain reading of the reasons would show that there is no whisper whatsoever that the petitioner had failed to disclose, truly and fully, all material facts relevant for assessment, as required by the first proviso appended to Section 147 of the Act.

5. Mr Bhatia seeks to valiantly defend a position that we are unable to accept, i.e., that the reassessment proceeding has been rightly triggered against the petitioner. This is evident on a perusal of the reasons recorded by the Assessing Officer (AO).

***“Sub:-Reason for reopening of the assessment in the case of M/s Dr. Willmar Schwabe India Pvt. Ltd. for A. Y. 2012-13 u/s 147 of the Act, 1961.*”**

The Assessee company was engaged in the business of manufacturing of homoeopathic medicines. During the year, the assessee company has booked a turnover of Rs.61,26,41,926/- and has shown a net profit of Rs.5,68,50,807/-. Return of income in this case was e-filed on 27.11.2012 declaring NIL income and the same was processed u/s 143(1) on returned income. The case was selected for scrutiny and assessment u/s 143(3) of IT Act 1961 was completed for AY 2012-13 on 25.03.2015 determining an income of Rs 66,539/- after setting off brought forward losses of Rs 6,22,76,063/-.

During perusal of assessment record of AY 2012-13, it is observed that the volume discount given by the company, covers under incentive and commission. Resultantly the payment on account of volume discount paid was nothing but in the nature of commission only, thereby attracting the provision of Section 194H of the Income Tax Act. Capital expenses of Rs 9.28 lacs were also claimed as revenue expenses which are also not allowable, as per IT Act, 1961. Further on payment of Rs.82,42,606/- made on account of freight charges, no TDS was deducted, hence this expenses is also not allowable u/s 40(a)(ia) of the I.T. Act, 1961. The omission to disallow the above mentioned amounts resulted in under assessment of income of Rs.605.09 lakh.

Further, during perusal of assessment record of A.Y. 2012-13, it is also observed that the income of assessee had been calculated after setting



off of the brought forward business loss and unabsorbed depreciation amounting to Rs.6,22,76,063 Benefit of the brought forward losses & unabsorbed depreciation was given despite of the fact that neither auditors report in form 3CD, nor the reply of the notice dated 14.3.2015 asking the acknowledgements of ITRS & computation of income for A.Y. 2001-02 to 2004-05 were provided by the assessee. Moreover set off of the unabsorbed depreciation amounting to 238.80 lacs for A.Y. 2001-02 was also allowed. Thus an amount of Rs. 6,22,76,063/- has been incorrectly set off against the taxable income resulting into under assessment of income to that extent. The treatment given by the assessee for adjustment of unabsorbed depreciation u/s 32(2) of I.T. Act, 1961 is not in accordance with the view taken by Hon'ble Supreme Court of India in the case of M/s Peerless General Finance and Investment company Ltd. vide its order dated 08.12.2015.

Thus the income of the assessee has been underassessed by an amount of Rs.12,27,85,275/-(Rs.6,05,09,212/- + Rs.6,22,76,063/-) and I have reason to believe that this income has escaped assessment for A.Y. 2012-13 and hence, it is proposed to re-assess such income and also any other income which comes to my notice subsequently in the course of the proceedings u/s 147 of I.T. Act, 1961.”

6. As it evident upon perusal of the aforementioned extract, the AO found fault with the assessment carried out *qua* the petitioner on account of fact that the unabsorbed business loss and depreciation amounting to Rs. 6,62,76,063/- had been carried forward and set off in AY 2012-13.

6.1 The AO was of the view that both business loss and unabsorbed depreciation could not be adjusted i.e., set off, in AY 2012-13, beyond the period prescribed for adjustment under the provisions of the Income Tax Act, 1961.

6.2 We may note that while disposing of the objections *via* order dated 02.09.2019, the purported infraction committed by the petitioner *vis-a-vis* unabsorbed business loss was dropped.

6.3 Therefore, the aspect that the AO had an objection to was with regard to carry forward and its set off of unabsorbed depreciation.

7. The AO also flagged other issues, which according to him, required reopening of the assessment. These issues concerned volume discount given by the assessee, which was in the nature of an incentive and so called commission, capital expenses amounting



to Rs. 9.28 lakhs, which according to the AO, were wrongly claimed as revenue expense, and lastly, freight charges amounting to 82,42,606/-, on which tax at source had not been deducted, and hence deduction could not be claimed as an expense, in view of the provisions of Section 40(a)(i) of the Act.

8. Having regard to the backdrop of the case, based on the submission advanced by the counsel for the parties, we are of the view that Mr Thakkar is right in his contention that since there is no reference in the reasons for the reopening, to the fact that the petitioner had failed to disclose, truly and fully, all material facts relevant for carrying out the assessment, the reassessments proceeding is flawed.

9. Since the proceeding was triggered after the expiry of four (4) years from the end of the relevant AY, the concerned officer, was required to assert that income chargeable to tax has escaped assessment on account of the failure on the part of the petitioner to disclose truly and fully all material facts necessary for assessment *qua* the concerned AY, as stipulated in the first proviso appended to Section 147 of the Act.

10. For the foregoing reasons, we are inclined to set aside the impugned notice dated 27.09.2018 and the impugned order dated 02.09.2019.

11. It is ordered accordingly.

12. This writ petition is disposed of, in the aforesaid terms.

13. Pending applications will stand closed.

(RAJIV SHAKDHER)
JUDGE

(GIRISH KATHPALIA)
JUDGE

MAY 17, 2023/v

[Click here to check corrigendum, if any](#)