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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) 13380/2018

DR. WILLMAR SCHWABE INDIA PRIVATE LIMITED Petitioner

Through: Mr Nishant Thakkar, Advocate.

versus

ADDITIONAL COMMISSIONER OF INCOME TAX & ORS. Respondents

Through: Mr. Abhishek Maratha, Sr. Standing
Counsel with Mr. Akshat Singh, Jr.
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)

Prefatory Facts

1. This writ petition is directed against the notice dated 26.03.2018 issued under Section 148 of the Income Tax Act, 1961 [in short, "the Act"], and the order dated 20.11.2018, whereby objections preferred by the petitioner was disposed of.
2. The reassessment proceeding was triggered against the petitioner, *inter alia*, for carrying forward unabsorbed business losses and unabsorbed depreciation, and setting them off against income accruing to the petitioner in Assessment Year (AY) 2011-12.
3. It may be relevant to note that while disposing of the petitioner's objections *via* the aforementioned impugned order dated 20.11.2018, the Assessing Officer (AO) restricted the purported infraction said to have been committed by the petitioner, with regard to unabsorbed depreciation.
4. To be noted, the unabsorbed depreciation which the petitioner concededly set off in the AY in issue is an amount equivalent to Rs.7,63,79,560/-. The period over which this depreciation had accumulated spanned between AY 1998-99 and 2001-02.
5. A perusal of the impugned order would show that the AO was of the view that the unabsorbed depreciation should not have been set off in the AY in issue, i.e., 2011-12, as



it was beyond the prescribed period provided in the Act for carrying forward unabsorbed depreciation.

Submissions of Counsel

6. Mr Nishant Thakkar, counsel for the petitioner, points out that prior to the Finance Act, 1996, unabsorbed depreciation could be carried forward for an unlimited period, and post the Finance Act, 1996, this period was restricted to eight (8) years. Furthermore, Mr Thakkar submits that this restriction *qua* the period for which unabsorbed depreciation could be carried forward was removed, pursuant to Finance Act, 2001.

7. In sum, it is Mr Thakkar's submission that in the period in issue, i.e., AY 2011-12, there was no bar on the petitioner setting off unabsorbed depreciation which had accrued over the period spanning AY 1998-99 to AY 2001-02.

8. Besides this, it is Mr Thakkar's contention that a bare perusal of reasons furnished by the AO would show that there is no whisper whatsoever, that the petitioner had failed to disclose, fully and truly, all material facts necessary for the purpose of assessment.

8.1 Mr Thakkar says that since the reassessment has triggered after the expiry of four (4) years from the end of the relevant AY, this condition required compliance, as stipulated in the first proviso appended to Section 147 of the Act.

9. In support of his plea that both the steps taken by the petitioner, i.e., the carrying forward of unabsorbed depreciation, and its the setoff, were permissible, Mr Thakkar relied upon the judgment of the Coordinate Bench of this Court in *Motor & General Finance Ltd. vs. ITO, 2017 (18) Taxmann.com 14 (Delhi)*.

Reasons and Analysis

10. We may note that notice in this petition was issued as far back as on 12.12.2018. Despite this, the record shows that the respondent/revenue has failed to file a counter-affidavit, up until now.

10.1 Given the fact that more than four (4) years have passed since notice was issued in the petition, we are not inclined to grant, on this count, further time to counsel for the respondent/ revenue.



10.2 However, we have heard counsel for the parties, based on the record presently available. Having heard the counsel for the parties, we are of the view that both submissions advanced by Mr Thakkar deserve to be accepted.

11. For the sake of convenience, the reasons furnished by the AO for triggering the reassessment proceeding are extracted hereinafter:

Sub: Reasons recorded for initiating proceedings u/s 147/ 248 of the Act in the case of M/s. Dr. Willmar Schwabe India Pvt. Ltd. (PAN: AAACD0463D) for the A.Y. 2011-12 – reg.

The Assessee e-filed its ITR for the A.Y. 2011-12 on 26.11.2011 declaring its income as Nil after claiming set off of brought forward business losses and unabsorbed depreciation loss. The case was selected for scrutiny and assessment u/s 143(3) of I.T. Act of this assessment for A.Y. 2011-12 was completed in March-2015 determining an income of Rs.19380/- after setting off brought forwarded loss of Rs.7,63,79,560/-.

During perusal of assessment record of A.Y. 2011-12, it is observed that the income of assessee had been calculated after setting off of the brought forward business loss and unabsorbed depreciation amounting to Rs.763,79,560/- for the A.Y. 1998-99 to 2001-02 with the income A.Y. 2011-12. As per Sub-section 3 of Section 72 of the Income Tax Act, 1961, these losses and unabsorbed depreciation should have been set off maximum till A.Y. 2006-07 to 2009-10. Thus an amount of Rs.763,79,560/- 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 the Hon'ble Supreme Court 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.7,63,79,560/- and I have reason to believe that this income has escaped assessment for A.Y. 2011-12 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

11.1 A perusal of the reasons furnished by the AO for triggering the reassessment proceeding would show that there is no reference to the fact that the petitioner had failed



to disclose, fully and truly, all material facts necessary for carrying out the assessment.

11.2 Since the proceeding was triggered after the expiry of four (4) years from the end of the relevant AY, the concerned officer, i.e., the Additional Commissioner of Income Tax, 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.

11.3 In our view, this is sufficient to set aside the impugned order.

12. That said, we are also inclined to accept the other submissions made by Mr Thakkar on merits, that both the carry forward of unabsorbed depreciation and its set off, are permissible in AY 2011-12.

Conclusion

13. For the foregoing reasons, we are inclined to set aside the impugned notice dated 26.03.2018 and the impugned order dated 20.11.2018.

13.1 It is ordered accordingly.

14. This writ petition is disposed of in the aforesaid terms.

(RAJIV SHAKDHER)
JUDGE

(GIRISH KATHPALIA)
JUDGE

MAY 17, 2023/v

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