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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Decision delivered on: 12.12.2023*

+ **W.P.(C) 12276/2018**

AKUM DRUGS AND PHARMACEUTICALS LIMITED.. Petitioner
Through: Mr Arvind Kumar, Adv.

versus

DEPUTY COMMISSIONER OF
INCOME TAX, DELHI-1

..... Respondent

Through: Mr Prashant Meharchandani, Sr
Standing Counsel with Mr Akshat
Singh, 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 02.08.2017 issued under Section 148 of the Income Tax Act, 1961 [in short, "Act"], concerning Assessment Year (AY) 2011-12.
2. Besides this, challenge is also laid by the petitioner to the order dated 11.10.2018, passed by the Assessing Officer (AO), disposing of the petitioner's objections preferred *vis-à-vis* the reasons to believe generated by the AO.
3. Notice in this writ petition was issued on 16.11.2018. Since then, a counter-affidavit has been filed on behalf of the respondent/revenue, followed by a rejoinder.



4. The moot point which arises for consideration is as to whether the AO had triggered the reassessment proceedings against the petitioner in accordance with law.

5. In order to adjudicate the instant writ petition, the following broad facts are required to be noticed.

5.1 The petitioner had filed its Return of Income (ROI) for the aforementioned AY on 28.09.2011. The ROI was selected for scrutiny and, accordingly, notice was issued under Section 143(2) of the Act. The petitioner was also issued a notice under Section 142(1) of the Act, which was accompanied by a questionnaire. A perusal of the questionnaire shows that a whole host of queries were raised by the AO.

6. The record shows that the petitioner filed a reply to the queries raised, which included its response to the exemption claimed for the period in issue under Section 80-IC of the Act.

6.1 Once the AO was satisfied, an assessment order under Section 143(3) of the Act was framed on 30.01.2014. *Via* this assessment order, the petitioner's ROI, pegged at Rs.37,15,44,272/-, was accepted. The petitioner, however, paid taxes according to the book profit calculated in line with the provisions of Section 115JB of the Act.

6.2 The book profits were crystallised at Rs.78,91,83,398/-. Pertinently, the petitioner had claimed deductions amounting to Rs. 27,67,09,081/- under Section 80-IC of the Act.

7. It appears that this aspect, i.e., concerning deductions claimed under Section 80-IC of the Act was examined by the AO while framing the assessment order under Section 143(3) of the Act.

8. The record shows that after nearly four years have passed, i.e., on



02.08.2017, a notice under Section 148 of the Act was issued to the petitioner, on the ground that the income otherwise chargeable to tax has escaped assessment.

9. Concededly, the petitioner filed its reply to the said notice on 10.07.2018. It was brought to the notice of the AO that the petitioner had been subjected to a scrutiny assessment and that the claim of deduction under Section 80-IC of the Act concerning eligible unit III was examined.

9.1 In other words, the stand of the petitioner was that it had disclosed fully and truly all material facts and, therefore, there was no reason to trigger reassessment proceedings against it.

9.2 The petitioner also emphasised the fact that the reopening was bad in law and it amounted to change of opinion, without any fresh material being available with the AO.

9.3 Furthermore, it was the petitioner's submission that even otherwise on merits, the deduction under Section 80-IC of the Act was correctly claimed by the petitioner.

10. The objections raised by the petitioner in the commencement of the reassessment proceedings did not find favour with the AO and, accordingly, *via* order dated 11.10.2018, the objections were rejected. The rejection of the objections impelled the petitioner to approach this court by way of the instant writ petition.

11. Mr Arvind Kumar, learned counsel who appears on behalf of the petitioner, has made the following broad submissions:

(i) The reassessment proceedings were triggered after a lapse of four years. Even then, the petitioner had fully and truly disclosed all material facts. The AO had not brought on record any fresh material to justify the



initiation of reassessment proceedings.

(ii) Even according to the AO, the reassessment proceedings were commenced against the petitioner on account of an audit objection received from the concerned department, without the AO independently applying his mind as to whether this was a fit case for triggering reassessment proceedings against the petitioner.

(iii) The facts obtaining in this matter would clearly demonstrate that it was a case of change of opinion. The issue concerning the claim of deduction under Section 80-IC by the petitioner *vis-a-vis* eligible unit III was examined thoroughly by the AO during the scrutiny proceedings and, therefore, the same aspect could not have found the basis for triggering the reassessment proceedings.

(iv) Although the audit objection had been answered by the AO at the relevant time and recommended dropping off the proceedings, while issuing notice under Section 148 of the Act recourse was taken to the same audit objection without due application of mind.

12. Mr Prashant Meharchandani, learned senior standing counsel, who appears on behalf of the respondent/revenue, defended the initiation of reassessment proceedings against the petitioner and in this behalf, largely relied upon the reasons to believe set forth by the AO. It is Mr Meharchandani's contention that the deduction under Section 80-IC was wrongly claimed.

13. We have heard learned counsel for the parties and perused the record.

14. According to us, what has clearly emerged is that the reassessment proceedings against the petitioner had been triggered based on the audit objections. Therefore, in the fitness of things, it would be proper to set down



not only the audit objections but also the response of the concerned AO at the relevant time as to why audit objections were not sustainable:

“The assessment of M/s Akums Drugs & Pharmaceutical’s Limited for the assessment year 2011-12 was completed after scrutiny in January 2014 determining an income of Rs. 37,15,44,272/- under normal provisions after allowing the deduction of Rs.27,67,09,081 under section 80IC. Audit scrutiny revealed that assessee had six units out of which five units were eligible for deduction under Section 80IC. While calculating the deduction of Unit-III assessee restricted the deduction at Rs. 7,01,22,868 after adjusting the notional losses of Rs. 4,80,21,684 pertaining to assessment year 2010-2011 under Section 80IC. Further, audit noticed that notional losses of Rs. 333,706,761/- (Rs. 38,35,81,39/- + Rs. 24,73,26,938 and Rs. 4,80,21,684 pertaining to assessment year 2008-09, 2009-10 and 2010-11 respectively) were available to be set off. After setting off available lossess income should have been assessed at Nil of Unit-III instead of Rs. 7,01,22,868. The mistake resulted in incorrect assessment of income of Rs. 7,01,22,868 involving short levy of tax of Rs. 3,12,12,704.”

“Reply of Audit objection:-

On perusal of assessment records of A.Y. 2008-09 & 2009-10, it is noticed that though there was losses of Rs.3.84 crore and Rs. 24.73 crore of Unit-III, however both the losses have been set off from the Income of the Unit-I & Unit-II of their respective assessment years; and after adjusting the lossess, net income has been considered for the purpose of deduction under section 80IC (copies of computation of income for A.Y. 2008-09 & 2009-10 are enclosed for perusal). Since, the above lossess have already been set off from the income of other units of the said assessment year, no lossess of Rs. 2.84 cr & 24.73 cr were available to be set off from the income for the year under consideration i.e. A.Y. 2011-12.

In view of the above facts, the audit objection raised by audit party is not acceptable and may kindly be dropped.”

15. As would be evident from the extracts set forth hereinabove, the deduction claimed by the petitioner amounting to Rs.7,01,22,868/- was flagged by the auditor as notional losses, which were available for the preceding AYs, i.e., AY 2008-09, AY 2009-10 and AY 2010-11, and were not set-off.



16. According to the auditor, had those notional losses had been set-off, the income for the eligible Unit-III would have been “Nil” instead of Rs.7,01,22,868/-, which was claimed as deduction.

17. It is on this basis that the auditor concluded that there was a short levy of tax amounting to Rs.3,12,12,704/-. It appears that the auditor, perhaps, had missed the fact that the petitioner had, in fact, set off the losses for AY 2008-09 and AY 2009-10 concerning Unit-III against the income of Units-I and II.

18. Furthermore, according to the AO, the net income for the purposes of Section 80-IC was considered only after losses had been adjusted.

18.1 In other words, the AO brought to the notice of the auditor that since the losses for Unit-III had already been set-off against other units, no losses were available for set-off in AY 2011-12 and thus, the deduction was correctly claimed by the petitioner.

18.2 According to us, the matter, perhaps, should have ended with this response from the AO. However, as noticed above, reassessment proceedings under Section 148 of the Act were triggered against the petitioner.

19. A perusal of the reasons to believe, which is at Annexure P-8, would show that this very aspect formed the basis for initiating reassessment proceedings. For the sake of convenience, the relevant part of the reasons to believe is set forth hereafter:

“From the records available it is noticed that the assessee had six units out of which five units were eligible for deduction under section 80IC. In assessment year 2011-12 assessee has earned profit of Rs. 11,81,44,552/- from Unit-III. While calculating the deduction allowable under section 80IC for the instant assessment year of Unit-III, assessee has restricted the deduction at Rs. 7,01,22,868/- after adjusting the notional losses of Rs.



4,80,21,684/- pertaining to assessment year 2010-11 under section 80IC. Further it is noticed that notional lossess of Rs. 33,37,06,761/- (Rs. 3,83,58,139/- + 24,73,26,938 and Rs. 4,80,21,684/- pertaining to assessment year 2008-09, 2009-10 and 2010-11 respectively) for Unit-III were available to be set off. After setting off available lossess, income of Unit-III, should have been assessed at Nil, instead of Rs. 7,01,22,868/- for the purposes of claiming deduction under section 80IC. For the purpose of claim of deduction under section 80IC intra head or inter head adjustment are not permissible. The assessee has claimed deduction under Section 80 IC on amount of Rs. 7,01,22,868/- besides permissible deduction to the assessee for other units. On perusal of details I have reasons to believe that the claim and allowance of deduction 80IC of Rs. 7,01,22,868/- for Unit-III has resulted into under assessment/ escapement of income which was chargeable to tax and resultantly short levy of tax in the assessment year 2011-12.”

20. Therefore, clearly, the AO while triggering the reassessment proceedings had not applied his mind independent of what the auditor had flagged. As a matter of fact, the AO did not even examine the reply given by his counterpart to the audit objection.

20.1 This apart, Mr Arvind Kumar is right that this very aspect concerning claim of deduction under Section 80-IC of the Act was examined in the scrutiny proceedings and it was only when the AO was satisfied that the assessment order dated 30.01.2014 was framed.

21. The logical sequitur of this assessment order was that the petitioner obviously had truly and fairly disclosed all material facts. There is not a whisper in the reasons to believe which would point in the direction that the petitioner had failed to disclose truly and fairly all material facts.

22. Since the reassessment proceedings were triggered after four years, the AO ought to have indicated as to what were those material facts which the petitioner had failed to disclose.

23. Thus, the impugned proceedings are flawed on various grounds, i.e., borrowed satisfaction, reasons to believe not adverting to the failure on the



part of the petitioner to disclose truly and fairly all material facts, and also the change of opinion.

24. Thus, for the foregoing reasons, we are inclined to allow the writ petition. Consequently, the impugned notice dated 02.08.2017 and the order dated 11.10.2018, whereby, the petitioner's objections were rejected, are quashed.

25. The writ petition is disposed of, in the aforesaid terms.

26. Parties will act based on the digitally signed copy of the order.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

DECEMBER 12, 2023

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