IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 635 OF 2018

Principal Commissioner of Income
Tax – 11, Mumbai ….Appellant

V/s.
Schott Glass India Pvt. Ltd. ….Respondent

Mr. P.C. Chhotaray for Appellant.
Mr. Jeet Kamdar i/b Mr. Atul K. Jasani for Respondent.

CORAM : K.R. SHRIRAM &
FIRDOSH P. POONIWALLA, JJ.
DATED : 12th JULY 2023

P.C. :

1. The following three substantial questions of law are proposed to be framed.

QUESTION OF LAW

1. Whether on the facts and in the circumstances of the case, the Hon'ble ITAT was justified in deleting the adjustment of Rs.10,26,28,141/- to the manufacturing income, without appreciating the fact that in the TP Study report, the assessee had benchmarked its transactions using two segments namely manufacturing and indenting but during the TP proceedings, it separated the losses from solar test, arbitrarily to present better margins under manufacturing segment?

2. Whether on the facts and in the circumstances of the case, the Hon'ble ITAT was justified in directing to allow the set off of brought forward unabsorbed depreciation for A.Y. 1999-2000 and 2000-01 against incomes of A.Y. 2010-11 in contravention of the pre-amended provisions of section 32(2) of the Act applicable period of 8 years immediately succeeding the assessment year for which such depreciation allowance was first computed got expire in A.Y. 2007-08 and 2008-09 respectively?

3. Whether on the facts and in circumstances of the case and in law, the Tribunal was right in directing to allow the set off of brought forward unabsorbed depreciation for A.Y. 1999-2000 and 2000-01 i.e. for the period prior to amendment in sub section (2) of Section 32 of the Act w.e.f. 1/4/2002?

QUESTION NO. 1

2. This appeal impugns an order dated 8th March 2017 passed by the Income Tax Appellate Tribunal (ITAT) for Assessment Year 2010-11. Revenue had approached the ITAT challenging the directions of the Dispute Resolution Panel (DRP), Mumbai passed on 27th November 2014 whereas the assessee had filed cross objections and challenged the order of the Assessing Officer (A.O.) passed on 29th January 2015.

3. Assessee was engaged in the business of trading and manufacturing of glass. Assessee filed its return of income on 15th October 2010 showing NIL income under normal provisions and book profit of Rs.9.21 Crores under Section 115 JB of the Income Tax Act, 1961 (the Act). The A.O. issued a draft order under Section 143(3) read with Section 144C(1) of the Act vide letter dated 26th February 2014 proposing to add :

> *(a) Adjustment on account of Transfer Pricing (TP) of Rs.34.49 Crores.*
> *(b) Dis-allowance out of repairs and maintenance of Rs.31.63 Lakhs.*
> *(c) Rejection of claim of set off of brought forward unabsorbed depreciation of Rs.2.86 Crores.*

4. Challenging the order passed by the Transfer Pricing Officer (TPO)/A.O., assessee filed objections before the DRP. Vide its letter dated 27th November 2014 DRP issued directions under Section 144C(5) of the Act. Pursuant thereto, the A.O. completed the assessment under Section 143(3) read with Section 144C(13) of the Act determining the income of

the assessee at Rs. NIL under normal provisions and book profit of Rs.9.21 Crores.

5. The TPO after considering the material before him determined the Profit Link Indicator (PLI) of Operating Profit (OP)/Operating Cost (OC) at 25.83%. Accordingly, an adjustment amounting to Rs.10.26 Crores was proposed in the manufacturing segment.

6. Assessee in its objections before the DRP contended that the TPO was wrong in including the solar testing cost which was operating in nature, that it was an extraordinary cost, that it had undertaken trial run for production of solar receiver tubes during the year under consideration, that the economic conditions turned unviable and there was no demand for solar tubes, that assessee stopped manufacturing the tubes, that it had incurred huge costs with respect to solar test activity, that the Associated Enterprise (AE) had paid compensation to assessee to recover from the losses, that the activity resulted in loss, that same had to be excluded in the PLI computation of manufacturing segment, that even if it was part of manufacturing activity it had to be excluded as an unusual event, that the TPO had not excluded the non operating expenditure and income while computing PLI, that if the non operating expenditure/income was considered the net cost plus markup ratio will be 17.39% and operating margin ratio would be 14.81% etc.

7. The A.O./TPO had problem with assessee excluding losses in solar trial in computing the PLI of manifesting segment in respect of Solar Test (ST). Assessee had during the year undertaken solar trial test activity to produce solar receiver tubes. The activity was undertaken from 9th October 2009 to 23rd November 2009. Admittedly, assessee's regular business is production of tubes for pharmaceutical packaging and the solar trial activity was an exception to its regular business. Assessee had conducted solar trial looking into opportunity of high profitable solar receiver tubes production which is a component of concentrated solar power plant. The solar trial test business did not take off the way the company expected and therefore assessee decided to discontinue the solar trial test activity and decided to provide for impairment of the assets used for solar trial activity considering no use in near future.

8. While going through the Transfer Pricing Study Report, the TPO found that (i) assessee had benchmarked its transaction after segmentalizing the activities into manufacturing and indenting, i.e., there were only two segments as per segmental accounting and (ii) Assessee, however, while computing the margin (PLI) had divided the segmental accounting into three parts, that ST had separate segment from the manufacturing segment and that the same was not so presented in the audited segmental accounting.

9. Mr. Chhotaray relying on the judgment of the Hon'ble Apex Court in ***Apollo Tyres Ltd. vs. Commissioner of Income Tax***[1] submitted that so much as the A.O. has to accept the authenticity of the accounts with reference to the provisions of the Companies Act, it applies equally to assessee as well. Since assessee had only benchmarked its transactions in two segments, i.e., manufacturing and indenting, assessee could not have created third segment for solar trial. Therefore, the adjustment amounting to Rs.10.26 Crores as proposed by the A.O. in the manufacturing segment was correct.

10. After considering the order passed by the TPO and the objections raised by assessee, the DRP held that in Schedule 20 of the Annual Accounts of assessee the revenue from ST activity was shown at Rs.10.27 Crores as against cost of Rs.11.58 Crores resulting in net loss of Rs.1.31 Crores. The DRP also observed that in the notes to accounts Schedule 22, Item No. 21 revealed that assessee had undertaken ST activity to produce solar receiver tubes, between 9th October 2009 to 23rd November 2009 as against assessee's regular business of production of tubes for pharmaceutical packaging. The DRP also noted that the Annual Accounts indicated and in particular the directors report indicated that the solar trial activity was an exception to its regular business and the company had made provision for impairment of assets of Rs.13.90 Crores as per Accounting Standard 28. The DRP also noted that in the Annual Accounts it is noted

1 (2002) 274 ITR 254

that the expenses for ST activity were exceptional. The DRP therefore directed TPO to exclude losses in solar trial run up in computing the PLI of manufacturing segment. The DRP also held that the expenses/income under the head non operating transactions had to be excluded for arriving at the correct PLI. This has been upheld by the ITAT.

11. As held by the Hon'ble Apex Court in *Apollo Tyres Ltd.* (supra) the A.O. has to accept the authenticity of the accounts. It is not a case of the A.O. that the accounts of assessee have not been scrutinized or certified by statutory auditors or approved by the company in general meeting or has not been filed before the ROC. In fact, Mr. Chhotaray stated that the company should also accept these accounts as much as the A.O. has accepted the accounts of assessee. The Directors note in the Annual Accounts specifically refers to solar trial test and how the activity undertaken did not take off and how having regard to the principles of accounting standard of impairment of assets (AS 28) assessee has made the provisions of Rs.13,90,63,509/- in respect of such impairment. The auditors have accepted it. The accounts have been approved by the company in general meeting and has also been filed by the Registrar of Companies. Therefore, the ITAT was correct in not interfering with the order of the DRP with regard to computation of PLI. The DRP has correctly held that the ST activity was an extraordinary item and was not part of the regular business of assessee and there was impairment of asset.

QUESTION NOS. 2 AND 3

12. As regards the proposed questions of law no. 2 and 3, Mr.Chhotaray in fairness agreed that the issue would be covered by the order of the Hon'ble Apex Court in the case of ***Principal Commissioner of Income Tax, Vadodara 1 vs. Petrofills Co-operative Ltd.***[2] which upheld the order dated 5th March 2018 passed by the Gujarat High Court. Even this court in the case of ***Commissioner of Income Tax vs. Hindustan Unilever Ltd.***[3] has taken the same view that depreciation should be allowed to be carried forward.

13. In the circumstances, Appeal dismissed.

(FIRDOSH P. POONIWALLA, J.) **(K.R. SHRIRAM, J.)**

2 (2021) 130 Taxman.com 191 SC
3 (2017) 394 ITR 73 (Bom)