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

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Decision delivered on: 24.11.2023

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ITA 660/2023 & CM APPL. 60770/2023PR. COMMISSIONER OF INCOME TAX,
DELHI-1

..... Appellant

Through: Mr Vipul Agrawal, Sr Standing
Counsel with Mr Gibran Naushad and
Ms Sakshi Shairwal, Standing
Counsels.

versus

M/S BURDA DRUCK INDIA PVT. LTD.

..... Respondent

Through: None.

CORAM:**HON'BLE MR. JUSTICE RAJIV SHAKDHER****HON'BLE MR. JUSTICE GIRISH KATHPALIA****[Physical Hearing/Hybrid Hearing (as per request)]****RAJIV SHAKDHER, J. (ORAL):****CM No. 60770/2023 [Application filed on behalf of the appellant seeking
condonation of delay of 152 days in filing the appeal]**

1. This is an application moved on behalf of the appellant/revenue seeking condonation of delay in filing the appeal.
- 1.1 According to the appellant/revenue, there is a delay of one hundred and fifty-two (152) days in filing the appeal.
2. Since we intend to deal with the appeal, on merits, the delay is condoned.
3. Accordingly, the application is disposed of.



ITA 660/2023

4. This appeal concerns Assessment Year (AY) 2014-15.
5. *Via* the instant appeal, the appellant/revenue seeks to assail the order dated 05.12.2022 [stamped on 04.01.2023] passed by the Income Tax Appellate Tribunal [in short, “Tribunal”].
6. The short issue that emerges from the order of the Tribunal is whether the following observation, made in the assessment order dated 22.12.2016, was legally tenable:

*“3. ... B/F losses is not allowed to be carry forward as per para 3, 4, & 5.
...”*
7. The record shows that the respondent/assessee filed its Return of Income (ROI) for the AY in issue i.e., AY 2014-15 on 29.11.2014.
8. In the ROI, the respondent/assessee had declared a current loss amounting to Rs. 17,56,64,494/-.
9. The respondent/assessee, was thereafter, subjected to a ‘scrutiny assessment’, whereupon, an assessment order dated 22.12.2016 was passed, resulting in the acceptance of loss return. However, as noted hereinabove, while framing the assessment order, the impugned observation was made by the AO.
10. The respondent/assessee, being aggrieved, preferred an appeal with the Commissioner of Income Tax (Appeals) [in short, “CIT(A)”].
11. It is required to be noted that, the respondent/assessee had carried forward business losses from earlier years, amounting to Rs. 44,71,06,071/-, unabsorbed depreciation amounting to Rs. 48,14,14,166/-, and capital loss of an earlier year amounting to Rs. 5,15,650/-.



12. The record shows that the CIT(A), while dismissing the appeal, adverted to Section 79 of the Income-tax Act, 1961 [in short, “Act”].

13. Being aggrieved, the respondent/assessee preferred an appeal with the Tribunal. The Tribunal allowed the appeal and directed the AO to expunge the concluding remark “brought forward loss is not allowed to be carry forward as per para 3, 4 and 5”.

13.1 The reason given by the Tribunal for expunging the remark was that the AO was only required to notify the assessee about the amount of loss, as computed by him for the relevant AY. Furthermore, the Tribunal held that the question of whether the loss, incurred in any year, could be carried forward to the following year, and set off against the profits had to be decided by the AO who would deal with the assessment concerning the subsequent year.

13.1 In support of this view, the Tribunal relied on the judgment rendered by the Supreme Court in *Commissioner of Income-tax v. Manmohan Das (Deceased)*, (1966) 59 ITR 699 (SC) [05-11-1965].

14. Mr Vipul Agrawal, learned senior standing counsel, who appears on behalf of the appellant/revenue, says that the view taken by the Tribunal is unsustainable in law since there was a change in shareholding of more than fifty-one (51) percent concerning the respondent/assessee and therefore, the aspect of whether or not business losses could be carried forward was within the remit of the AO.

15. Having heard the submissions of Mr Agrawal and examined Section 79 of the Act, as it then prevailed, we believe that the view taken by the Tribunal is correct.

15.1 For convenience, Section 79, as it then stood, is extracted hereafter:



“Carry forward and set off of losses in the case of certain companies.

79. Notwithstanding anything contained in this Chapter, where a change in shareholding has taken place in a previous year in the case of a company, not being a company in which the public are substantially interested, no loss incurred in any year prior to the previous year shall be carried forward and set off against the income of the previous year unless—

(a) on the last day of the previous year the shares of the company carrying not less than fifty-one per cent of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less than fifty-one per cent of the voting power on the last day of the year or years in which the loss was incurred[* *] :*

[Provided that nothing contained in this section shall apply to a case where a change in the said voting power takes place in a previous year consequent upon the death of a shareholder or on account of transfer of shares by way of gift to any relative of the shareholder making such gift :]

[Provided further that nothing contained in this section shall apply to any change in the shareholding of an Indian company which is a subsidiary of a foreign company as a result of amalgamation or demerger of a foreign company subject to the condition that fifty-one per cent shareholders of the amalgamating or demerged foreign company continue to be the shareholders of the amalgamated or the resulting foreign company.]

(b) [Omitted by the Finance Act, 1988, w.e.f. 1-4-1989.]”

16. Section 79 of the Act prohibits carry forward and set off of losses that occurred in a period before the previous year, when in a previous year, there has been a change of shareholding unless the case fits in any of the provisos referred to therein.

16.1 The Tribunal, in sum, concluded that it was not within the remit of the AO, dealing with the AY in issue, to make an observation concerning an aspect that would fall within the jurisdiction of the AO, when the aspect concerning carry forward and set off losses would come to the fore.

16.2 A textual reading of Section 79 makes it evident that it does not empower an AO, who exercises jurisdiction *qua* a particular AY, to place



limitations on the adjudicatory powers of the AO who would be called upon to deal with the matter in subsequent years.

17. The Supreme Court, while interpreting the provisions of Section 24 of the Indian Income-tax Act, 1922, which is *pari materia* to Section 72 of the Act, had made the following apposite observations in the ***Manmohan Das*** case:

“4. The second question presents little difficulty. In making his order of assessment for the year 1950-51, the Income Tax Officer declared that the loss computed in that year could not be carried forward to the next year under Section 24(2) of the Income Tax Act, as it was not a business loss. The Income Tax officer has under Section 24(3) to notify to the assessee the amount of loss as computed by him, if it is established in the course of assessment of the total income that the assessee has suffered loss of profits. Section 24(2) confers a statutory right (subject to certain conditions which are not material) upon the assessee who sustains a loss of profits in any year in any business, profession or vocation to carry forward the loss as is not set off under sub-section (1) to the following year, and to set off against his profits and gains, if any, from the same business, profession or vocation for that year. Whether the loss of profits or gains in any year may be carried forward to the following year and set off against the profits and against the same business, profession or vocation under Section 24(2) has to be determined by the Income Tax Officer who deals with, the assessment of the subsequent year. It is for the Income Tax Officer dealing with the assessment in the subsequent year to determine whether the loss of the previous year may be set off against the profits of that year. A decision recorded by the Income Tax Officer who computes the loss in the previous year under Section 24(3) that the loss cannot be set off against the income of the subsequent year is not binding on the assessee.”

[Emphasis is ours]

18. Furthermore, there is another facet of the matter that, according to us, Mr Agrawal has failed to address while invoking the provisions of Section 79 of the Act. This concerns the right of the respondent/assessee, *albeit* as per law, to carry forward ‘unabsorbed depreciation’ and ‘capital losses’.

19. A perusal of Section 79 of the Act would show that unabsorbed depreciation and capital losses do not fall within its scope and ambit.



20. There is, in our opinion, no practical efficacy in the assessee carrying forward business losses, unabsorbed depreciation, and capital losses unless there is a possibility of setting off those losses in the future, *albeit* subject to the provisions of the Act. These are the aspects, in our opinion, that the concerned AO would examine in the relevant AY in which such set off is claimed.

20.1 Therefore, the mere fact that the Tribunal has expunged the impugned observations, in our view, cannot impact the stand of the appellant/revenue.

20.2 Thus, for the aforesaid reasons, in our opinion, no interference is called for with the impugned order.

21. According to us, no substantial question of law arises for our consideration.

22. The appeal is, accordingly, closed.

23. Parties will act based on the digitally signed copy of the judgment.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

NOVEMBER 24, 2023

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