

आयकर अपीलीय अधिकरण “जे” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “J” BENCH, MUMBAI

सर्वश्री राजेन्द्र, लेखा सदस्य एवं पवनसिंह न्यायिक सदस्य

Before Shri Rajendra, A.M. and Shri Pawan Singh, J.M.

आयकर अपील सं./ITA No.2788/Mum/2015, **निर्धारण वर्ष** /Assessment Year: 2010-11

ACIT-14(3)(1) 455, Aayakar Bhavan 4 th Floor, M.K. Marg Mumbai-400 020.	Vs.	M/s. Rajmudra Real Estate Private Ltd. 1858-34, Khernagar, Near P.F. Office, Bandra (E), Mumbai-400 051. PAN: AABCR 6712 Q
---	-----	--

(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

Revenue by: Ms. Anu Krishna Aggarwal-DR

Assessee by: Shri K. Gopal

सुनवाई की तारीख / **Date of Hearing:** **04.01.2017**

घोषणा की तारीख / **Date of Pronouncement:** **25.01.2017**

आयकर अधिनियम, 1961 की धारा 254(1) के अन्तर्गत आदेश

Order u/s.254(1) of the Income-tax Act, 1961 (Act)

लेखा सदस्य, राजेन्द्र के अनुसार/ PER Rajendra A.M.-

Challenging the order dated 26/02/2015 of the CIT (A)-22, Mumbai the Assessing Officer (AO) has filed the present appeal. Assessee-company, engaged in the business of development of real estate, filed its return of income declaring loss of Rs.3,73,65,308/-. The AO completed the assessment under section 143 (3) of the Act on 31/03/2013, determining its income at Rs.84.32 lakhs.

2. Effective ground of appeal is about allowing the assessee to carry-forward the losses of earlier years. During the assessment proceedings, the AO found that the shareholding pattern of the assessee had changed during the year under consideration. He directed it to furnish the details of shareholding on the first day and the last day of the assessment year. He found that Altime Construction P. Ltd. was holding hundred percent shares of the assessee-company during the year 2009-10, that in the subsequent year it held only 50% shares and rest were held by another company. He observed that there was change in shareholding pattern of the assessee. He directed it to explain as to why brought forward losses should not be disallowed to be carried-forward in view of the provisions of section 79 of the Act. In its reply, the assessee argued that section 79 was not applicable in its case. After considering the reply of the assessee, the AO referred to section and held that losses of any assessee incurred in any year prior to previous year would not be allowed to be carried forward if the shareholders for not caring less than 51% of the voting power as on first day of April of the previous year as well as on the last day of the March of the previous year, that as per the provisions of the Act, share-holder and companies were separate entities, that the Act did not provide direct

shareholder/ indirect shareholder, that the shareholders holding 51% of voting rights as on 1/4/2009 were not holding 51% or more as on 31/03/2010, that as per the provisions of section 79 the assessee was not eligible to be set off/carried forward the losses.

3. Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA). Before him, it made elaborate submissions and relied upon certain case laws. After considering the assessment order and the submission of the assessee, he held that an assessee had to hold 51% of the shares beneficially not just a registered share for non application of the provisions of section 79 of the Act, that Crescent Properties Private Ltd. and Crescent Engineering Private Ltd. controlled 100% shares of Alltime Construction Private Limited. till 2009, that in 2009 M/s. Aim Sales Agency Private Ltd. was allotted shares of assessee, that Alltime Construction Private Ltd and Aim Sales Agencies Private Ltd. held 50-50 percent shares, that examination of Alltime Construction Private Limited shareholding revealed that Crescent Engineering Private Ltd. and Crescent Properties Private Limited together controlled 66.66% shares of Aim Sales Agencies Private Limited, that Crescent Engineering Private Ltd. and Crescent Properties Private Limited were holding 83.34% shares of the assessee even after September 2009, that All-time Construction Private Ltd. and Aim sales Agencies Private Limited together beneficially control more than 51% shares of the assessee company. He referred to the cases of Amco Power System Ltd. (123 TTJ 238) and Swadeshi Match Company (139 ITR 833) and allowed the appeal filed by the assessee.

4. Before us, the Departmental Representative (DR) supported the order of the AO and the Authorised Representative (AR) relied upon the order of the FAA.

5. We have heard the rival submissions and perused the material. Before proceeding further, we would like to consider the background of the section and basic principles governing it. Section deals with carry forward and set-off of losses in the case of certain companies and its provisions are as under :

"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, riot 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 ; or
(b) the Income-tax Officer is satisfied that the change in the shareholding was not effected with a view to avoiding or reducing any liability to tax."

5.1.Section 79 was not part of the Indian Income tax,Act,1922-it was brought on statute book for the first time by the present Act and it was at the stage of the Select Committee when the Act was enacted that several changes were made in the language of the section and the provisions of the section.At present the section contains two clauses.But,when the Income-tax Bill,1961,was moved in the Lok Sabha,clause 79 of the Bill contained only provisions which included merely, clause (a) and there was no reference therein to clause (b) at all.This Bill was referred by the Lok Sabha to a Select Committee and the Committee by its report presented on 10.08.1961,in paragraph 41 thereof stated **that the provisions of the clause should be applied where a change in the shareholding of the company had been brought about with the intention of reducing tax liability**’.The clause was redrafted accordingly.It is as a result of this report of the Select Committee that clause (b) had been introduced in section 79 before it was passed by Parliament.

5.2.Broad principles,governing the section,can be summarised as under:

i.The provision,on its own language,shows that it applies to a company in which the public are not substantially interested.

ii.The words, ‘Notwithstanding anything contained in this Chapter’ have been used only for the purpose of showing that whatever may have been provided in the other provisions of the Chapter as regards carry forward of losses,those provision would not apply as section 79 made a departure from those provisions.The overriding nature of the section is not to disturb the concept of loss as envisaged in these provisions but only to prevent the adjustment of brought forward loss in certain cases.

iii.The expression ‘the change in the shareholding’shows that the section contemplates a change of the type referred to in clause (a) and clause (b).Clause (b) is not entirely independent of clause (a).It will apply in a case where benefit under clause (a) is not available to the assessee.In short,the two conditions contained in clauses (a) and (b) of section 79 are cumulative and are not alternative.

iv.The word ‘unless’according to grammatical meaning is equivalent to ‘if not’ and this word followed by the disjunctive‘or’occurring between clause (a) and (b) clearly on a grammatical interpretation goes to show that clause (a) and (b) are to be applied disjunctively and not conjunctively.

v.Article ‘the’ has been used in clause (b) shows that a change of the type referred to in clause (a),namely, that more than 51 % of the voting power of the group at the two relevant dates had been changed.Even in such a case the very fact that the benefit of clause (a) may

not be available to such an assessee will not disentitle him to the benefit of clause (b), if he was entitled to the benefit of the same.

vi. The result of a substantial change in the shareholding of a company is to treat the company as if it was newly incorporated and had not incurred any losses prior to the previous year, unless it came within the exception provided in the statute. The object sought to be served by enacting section 79 is to be to discourage assessee claiming a reduction of their tax liability on the profits earned in companies which had sustained losses in earlier years. It was not unusual for a group of persons to acquire a company, which had suffered losses in the earlier years, in the expectation that the company would earn substantial profits after such acquisition, and they would benefit by a reduction of the tax liability on those profits on a set-off of losses carried forward from earlier years before the acquisition. The acquisition of a company in such a case would be effected by a change in its shareholding and the control over the company could be ensured by securing the beneficial ownership of shares carrying 51% or more of the voting power. If the change in the shareholding did not result in holding voting power of 51% or it was established that the shares of the company carrying not less than 51 % of the voting power were beneficially held by the same persons, both on the last day of the previous year as well as the last day of the year or years in which the loss was incurred, it could be presumed that there was no change in the control over the company and the disqualification imposed on the company because of the change in its shareholding would stand removed.

vii. Even where the change in shareholding is substantial, the company could satisfy the AO that the change in the shareholding, was not effected with a view to avoiding or reducing any liability to tax. In other words, before the loss incurred in the earlier year is allowed to be carried forward there should be such a change in the shareholdings as contemplated by clause (a) and further the AO should be satisfied that such a change in the shareholdings seems to have been brought about only with a view to continue the same business conveniently.

viii. Section 79 forms part of Chapter VI and is connected with the carry forward and set off of losses which are provided for in section 72 onwards. Section 32(2) pertains to depreciation allowance -ances/carrying forward of unabsorbed depreciation allowance and section 33(2) is about carrying forward of development rebate which, has not been absorbed in the preceding AY. Both these sections deal with certain allowances being made while computing the total income from profits and gains from business. These are allowances which are being permitted to the assessee. It cannot be held that a depreciation allowance or development rebate is 'incurred' in view of the language of section 32/33. Depreciation/Development rebate is

allowed, if the conditions of the relevant sections are satisfied. Therefore, by the use of the words 'loss incurred' and the reference to the chapter in which section 79 occurs, it is obvious that the provisions of section 79 do not apply to unabsorbed depreciation allowance/ unabsorbed development rebate. In other words, by excluding unabsorbed depreciation or unabsorbed development rebate from the content of the expression losses in section 79, there is no attempt to give any narrow interpretation to the word loss. It cannot have, in any case, a wider definition to include items which are in fact not losses under the Act, at least for the purposes mentioned in Chapter VI.

5.3. It can be safely said that the section was enacted with the object of preventing what may be shortly described as buying of losses by taking over controlling interest in the shareholding of a company which had carried forward losses. We find that the FAA has not passed a speaking order. From his order, it is not clear as what was the shareholding for the initial year and what changes took place during the year under consideration. He has listed names of several companies and their shareholding pattern. But, nothing is coming out as to how the provisions of section 79 are applicable or not. He has not commented upon the clause (a) and (b) of the section and their applicability to the facts of the case. Therefore, we are of the opinion that, in the interest of justice, matter should be restored back to his file for fresh adjudication. He will decide the matter after affording a reasonable opportunity of hearing to the assessee. Effective ground of appeal is decided in favour of the AO, in part.

As a result, appeal filed by the AO stands partly allowed.

फलतः निर्धारित अधिकारी द्वारा दाखिल की गई अपील अंशतः मंजूर की जाती है.

Order pronounced in the open court on 25th January 2017.

आदेश की घोषणा खुले न्यायालय में दिनांक 25 जनवरी, 2017 को की गई।

Sd/-

Sd/-

(पवनसिंह/Pawan Singh)

(राजेन्द्र / RAJENDRA)

न्यायिक सदस्य / JUDICIAL MEMBER

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक. Dated : 25.01.2017.

Jv. Sr. PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3. The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4. The concerned CIT /संबद्ध आयकर आयुक्त

5. DR " E " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ, आ.अ.न्याया. मुंबई

6. Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.