

IN THE INCOME TAX APPELLATE TRIBUNAL “E” BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAM LAL NEGI, JM

I.T.A. No.3986/Mum/2015
(Assessment Year: 2010-11)

Dy. CIT-7(3)(1), Aayakar Bhavan, M. K. Road, Churchgate, Mumbai-20	Vs.	M/s. Clear Channel Communication India Pvt. Ltd. (Now known as Outdoor Edge Solution Pvt. Ltd.) 5 th Floor, 52 Film Centre, 68 Tardeo Road, Mumbai-400 034
PAN/GIR No. AABCM 6403 F		
(Appellant)	:	(Respondent)
Appellant by	:	Shri Manjunatha Swamy
Respondent by	:	Shri Rakesh Joshi
Date of Hearing	:	25.04.2018
Date of Pronouncement	:	11.07.2018

ORDER

Per Shamim Yahya, A. M.:

This appeal by the Revenue is directed against the order of the Id. Commissioner of Income Tax (Appeals) dated 20.03.2015 and pertains to the assessment year 2010-11.

2. The grounds of appeal read as under:

- (i) On facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance and carry forward of loss of Rs.17,97,18,000/- claimed to be incurred on sale of shares and further erred in allowing the carry forward of current year business loss of Rs.29,68,24,841/-
- (ii) On facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that the loss on sale of shares was correctly claimed as the net worth of the company (whose shares were sold) had eroded, without having regard to the

fact that in the assessment order, the AO had clearly brought out the fact that the net worth was Rs.4.89 Crores.

(iii) On facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in holding that the shareholding of the assessee company, exceeding 51%, changed during A.Y.2010-11 whereas the AO had established that it changed during A.Y. 2011-12 and hence the carry forward of loss was not allowed by the AO.

(iv) On facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in holding as above, by unduly relying upon the agreement for sale of shares and thereby holding that the shareholding had changed during A.Y.2010-11 and the new shareholders also elected new directors.

(v) On facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in holding that shareholding had changed, by distinguishing between registered shareholders and beneficial shareholders, basing this observation on the ground that through the agreement for sale of shares, the beneficial shareholding had changed and that beneficial shareholding was material and not registered shareholding, without having regard to the fact that such agreement cannot be regarded as actual change in shareholding under the Companies' Act. Moreover, no evidence has been filed with ROC that shareholders which have sold the shares held the same on "behalf of purchasers", during A.Y.2010-11.

(vi) On facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in relying upon the decision of the Mumbai ITAT in the case of DCIT Vs. Colgate Palmolive India Ltd., which deals with business expediency of acquiring business of other company, which is not relevant to the present case.

(vii) Without prejudice to the above grounds, on facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in treating the loss as "business loss" and not speculation loss, without having regard to the fact that the assessee itself had taken an alternative ground during the assessment proceedings that the loss may be treated as Speculation Loss.

(viii) The appellant prays that the order of the Ld. CIT(A) on the above grounds be confirmed the order of the AO.

3. Brief facts of the case are as under:

In this case the assessing officer noted that from the perusal of tax audit report, it was noticed that the assessee company has claimed brought forward business losses and unabsorbed depreciation of earlier years in the following manner:

A.Y.	Business Loss (Rs.)	Unabsorbed depreciation (Rs.)	Total (Rs.)
2000-01	0	708462	708462
2001-02	0	3072647	3072647
2002-03	0	13587394	13587394
2003-04	13743374	7217427	20960801
2004-05	0	8922430	8922430
2008-09	13013395	2473243	15486638
2009-10	124167626	2738962	126906318
	150924395	38720565	189644690

The assessing officer noted that in addition to the above mentioned brought forward business losses and unabsorbed depreciation, the assessee has also claimed carry forward of current years losses of Rs.29, 94,62,204/- which comprises of business losses of Rs.29,68,24,841/- and unabsorbed depreciation of Rs.26,37,360/-. The Assessing Officer further noted that it is observed from the notes to the accounts that Deesha Leasecon Private Limited has purchased 97.20% stake in the assessee's company from Clear Channel Mumbai Pvt. Ltd., but the same was pending for transfer for want of board approval as on the date of the balance sheet. In this regard, the assessing officer referred to the provisions of section 79 of the Income Tax Act, 1961.

4. In light of the above, the assessing officer asked the assessee to furnish a note on the applicability of provisions of section 79 of the Act. The gist of assessee's submissions was noted by the assessing officer as under:

- > During the year, Clear Channel Pacific Pte. Limited has sold its 97.20% shareholding in the assessee company to DeeshaLeasecon Private Limited.
- > In the month of May, 2009 DeeshaLeasecon Private Limited applied to the assessee company for transfer of the shares in its name but as per provisions of the Companies Act, shares of a private limited company cannot be transferred to other

than the existing shareholders unless the existing shareholders decline or express their unwillingness to exercise their right of pre-emption. Therefore, a No Objection was sought from the other existing shareholder viz. Ogilvy & Mather Limited, who was holding 2.80% in the company, hence, though the shares actually changed hands in this year, the transfer process was delayed because of this reason which has been reported by the tax auditor in the tax audit report.

5. From the above, the assessing officer observed that the assessee company's shareholders are (i) Clear Pacific Pte. Limited holding 97.20% shareholding and (ii) Ogilvy & Mather Limited holding 2.80% shares in the assessee company. He observed from the assessee's written submissions that the assessee insists that the change in its shareholding pattern has taken place in the year under consideration.

6. For verification of the same, the assessing officer referred to the data from official website of the Registrar of companies and the data from ITD system. From the above, the assessing officer inferred that the name of Deesha Leasecon Private Limited is appearing in A.Y. 2011-12 only and not in A.Y. 2010-11.

7. In view of the above, the assessee was asked as to why the provisions of section 79 should not be invoked and its claim of earlier years brought forward losses and unabsorbed depreciation as well as those of assessment years 2010 - 11 should not be rejected. The Assessing Officer noted the assessee's response as under:

"As we have submitted earlier also the existing shareholder of the company has changed in the month of May, 2009 and the transferee share holders also applied for transfer of share in their name but due to first right of refusal was available to the other share holder, Ogilvy & Mather Ltd. who was holding 2.80% in the company and a NOC was sought from them, which delayed the transfer proceedings and ultimately the transfer took place only in August, 2010. But the effective control of voting right has been transferred in May, 2009 itself. This can

be verified at your end also from the transacting parties independently. The assessee on its own disallowed claim of brought forward losses of Rs.15.09 crore but as far as unabsorbed depreciation is concerned the same does not hit by the provisions of 79 of the I T Act. This position has also clarified by the CBDT while explaining provisions of Finance Act, 1988 vide circular No.528 dated 16/12/199. Copy of relevant portion of which is reproduced hereunder:

"26.1 Under the existing provisions of s.79 of the Income Tax Act, 1961, no loss incurred by a closely held company in any year prior to the previous year in which a change in its shareholding took place, is allowed to be carried forward and set off against its income, unless the conditions mentioned in that section are satisfied. The first condition is that on the last day of the previous year, there is no change in the beneficial holding of shares of the, carrying not less than 51 per cent, of the voting power. The second condition is the satisfaction of the Assessing Officer that the change in the shareholding was not effected with a view to avoid or reduce any liability to tax.

26.2 Some courts held that the above two conditions are cumulative in effect and unless both are satisfied, the assessee cannot be deprived of the benefit of carry forward of loss. As per these decisions the burden of proof to show that the change in the shareholding has been effected with a view to avoid or reduce the tax liability envisaged in cl. (b) of this section is on the Assessing Officer. To set at rest the judicial controversy in this regard, cl. (b) of s. 79 has been deleted by the Amending Act.

26.3 With a view to avoiding hardship likely to be caused in genuine cases, it has also been provided that the set off of brought forward losses in the " case of closely held companies will not be denied in a case where change in shareholding to the extent of 51 per cent, or more of the voting power takes place in the event of death of any shareholder or on account of a gift by any shareholder to his relatives, as defined in s.2(41) of the Income Tax Act, 1961.

26.4 These amendments will come into force w.e.f. 1st April, 1989, and will, accordingly, apply in relation to the asst.yr. 1989-90 and subsequent years.

[Sec. 21 of the Finance Act, 1988]"

In the above circular also the word used by the Board is brought forward losses and unabsorbed depreciation is not been referred over here. Had the intention of legislature is to be include both then they would have refer both the term as used in section 72A, 72AA & 72AB of the Act. In this regard we rely on the decision of Supreme Court in case of CIT Vs. Shri SubhLaxmi Mills Ltd (2011) (249 ITR 795) (SC) wherein the Apex court has held that in applying s. 79 only the business loss should be taken into account and not the unabsorbed depreciation or unabsorbed development rebate. Therefore, considering the above facts you are

requested to kindly treat change in shareholding during the assessment year 2010-11 itself and allow unabsorbed depreciation of earlier year and business loss of current year i.e. A.Y. 2010-11.'

8. However, the Assessing Officer was not convinced. He held that the change in scheduled pattern taken place subsequently and, hence, he proceeded to invoke the provisions of section 79 of the Act. The Assessing Officer concluded as under:

x-iv. In view of the discussion made in the preceding paragraphs and also having regard to the above cited provision of Section 79 of the Act, it is hereby held that the assessee company is not entitled to carry-forward and / or set-off of brought forward business losses of earlier years as well as the business loss of the year under consideration to and in its return of income for A.Y. 2011-12. Therefore, in view of the provision of Section 79 of the Act, the assessee's claim for carry-forward of earlier years' business losses totaling Rs.15,09,24,395/- and also the current year's business loss of Rs.29,68,24,841/-, hereby stands rejected. Penalty proceedings u/s.271(l)(c) are hereby initiated for furnishing inaccurate particulars of income /concealment of particulars of income.

xv. Nonetheless, the assessee's plea with regard to allowance of its claim of carry forward of unabsorbed depreciation is, however, accepted.

Apropos loss on sale of investment of Rs.17,97,18,000/-:

9. In this regard, the Assessing Officer noted that the loss claimed by the assessee at Rs.29,68,24,841/- is not eligible for carryforward. He noted that this loss includes Rs.17,97,18,000/- on account of sale of shares held to be the assessee's company in Clear Channel Mumbai Pvt. Ltd. to Deesha Leasecon India Private Limited. On the Assessing Officer's enquiry regarding the justification of the losses, the assessee made submissions, the gist of which were noted by the Assessing Officer as under:

- The assessee has stated that during the year under scrutiny it has sold 53603 number of shares of Clear Channel Mumbai Private Limited representing 41 % shareholding in that company for a total consideration of Rs.1,000/- to Deesha Leasecon Private Limited vide Agreement dated 25.05.2009.

- The assessee has stated that no valuation report had been obtained at the time of transaction and hence it expressed its inability to provide the same.
- The assessee further explained that Clear Channel Pacific Pte. Limited, a Singapore based professional company was in the business of worldwide advertising and that it was running its business through its subsidiary i.e. the assessee company and step subsidiary i.e. Clear Channel Mumbai Private Limited but the entire business of the said foreign company in India was running in losses, therefore, it decided to dispose of the Indian business to Deesha Leasecon Private Limited which is also in the same business, vide Agreement dated 25.05.2009.
- While explaining the sale consideration of Rs.1,000/- against 53603 number of shares of Clear Channel Mumbai Private Limited, the assessee stated that since the entire capital of the Indian Group Company had eroded, the value of shares was taken as NIL and a token consideration of Rs.1000/- for transfer of shares was decided.

10. Without prejudice to his earlier findings rejecting the entire assessee's claim of carry forward losses including that of present year, the Assessing Officer noted the following:

- > On being specifically asked for, the assessee company expressed its inability to provide a copy of the valuation report at the time of the said transfer vide Agreement dated 25.05.2009 in respect of the sale of 53603 shares of Clear Channel Mumbai Private Limited for a sale consideration of Rs.1,000/- as against its Book Value of Rs.17,97,19,000/-.
- > Further, the assessee company has furnished a note on justification on sale of shares of Clear Channel Mumbai Private Limited wherefrom it is seen that the assessee company has shown the net worth of Clear Channel Mumbai Private Limited as under :-

Equity Share Capital	13,07,390
Add : Reserves	4,76,22,317
Net worth	4,89,29,707

Thus, the assessee has itself shown the net worth of Clear Channel Mumbai Private Limited at a positive figure of Rs.4,89,29,707/- and as such it cannot be said that capital of the said company i.e. Clear Channel Mumbai Private Limited had fully eroded and that business of that company also was running into losses and hence it cannot be said that the consideration decided by the parties is at arm's length.

vi. In view of the above observations, a further opportunity was given to the assessee company vide this office letter dated 13.02.2013, whereby the assessee was required to explain the basis of the sale consideration at Rs.1000/- in respect of sale transaction of shares of Clear Channel Mumbai Private Limited and to prove the commercial expediency for sale of such investments at this juncture for such a tiny sum of Rs.1,000/- as against the cost of acquisition of Rs.17,97,19,000/-. The assessee was also required to furnish the details of purchase of such shares, including the bills / contract notes etc., income tax returns, statement of income, balance sheet, profit & loss account with annexures and schedules thereto of its subsidiary viz. Clear Channel Mumbai Private Limited for the year of purchase of its shares and for the year of sale of those shares. The assessee was specifically asked to produce for verification the Investment Register maintained by it.

11. The assessee responded as under:

'Regarding valuation of shares we again reiterate the fact that the transaction is between two independent parties and the consideration of for acquisition of both the companies i.e. Clear Channel Mumbai Pvt Ltd and Clear Channel Communication Pt. Ltd and networth of both the company together comes to (-) 8.71 crore, which means there is liability of Rs.8.71 crore, so who is interest in paying for taking liability of third person. Therefore the consideration taken is only a token to effect of transfer and value of shares is Nil. We have also submitted valuation report, wherein the valuer has opined valuation of shares as Nil. Therefore you are requested to kindly accept the value as declared by the assessee. We are enclosing herewith copy of balance sheet of Clear Channel Mumbai Pvt Ltd for both the year as desired by you.'

12. However, the Assessing Officer was not convinced. He disallowed the entire losses claimed by observing as under:

viii. From the submissions reproduced hereinabove vis-a-vis the assessee's earlier submissions dated Nil, the following facts emerge that need to be considered here as are significant for the purpose of deciding the genuineness of the transaction of sale of shares of its subsidiary for a meager consideration of Rs.1,000/- as against the cost of acquisition of Rs.17,97,19,000/-;

- On the one hand, in its earlier submissions dated Nil, the AR of the assessee has submitted, "No valuation report has been taken at the time of transaction hence we are unable to provide the same." On the other hand, in the submissions reproduced hereinabove, the assessee has referred to a

valuation report whereas the valuation report, which the assessee talks about, is the valuation report which appears to have been issued by M/S.BSR& Co., Chartered Accountants, on 27.05.2010 which is the report on the transfer of equity shares of the assessee company by its non-resident holding company viz. Clear Channel Pacific Pte. Limited. To DeeshaLeasecon Private Limited. The said valuation report is, thus, obtained specifically in respect of the equity shares of the assessee company for the purpose of transfer from the hands of its non-resident holding company to another resident company which is by virtue of the compliance of the FEMA Regulations as the transaction related to transfer of stake from the hands of a non-resident company to a resident company. But, nowhere, the said valuation report talks about the valuation of shares of Clear Channel Mumbai Private Limited. By giving reference to such a valuation report, the assessee is trying to confuse the things and conjoin the two different things and different transactions and, thus, trying to mislead the department.

- Moreover, the assessee's plea that the networth of both the companies together comes to (-)8.71 crore is not tenable in view of the fact that both the companies are different entities in the eyes of law and hence the networth of two different companies cannot be taken together.
- The assessee company, vide its AR's letter dated 20.02.2012, has stated to have enclosed therewith copy of Balance Sheet of Clear Channel Mumbai Private Limited for both the years i.e. the year of acquisition of its shares and the year of sale. But, the assessee has not enclosed such copies with its written submissions dated 20.02.2012, it has merely made a mention of having enclosed but not actually enclosed such copies. Thus, the assessee is trying to conceal the material facts from the department.
- In its Note on sale of shares of Clear Channel Mumbai Private Limited annexed to its earlier submission dated Nil, the assessee has itself arrived at the positive net worth of Rs.4,89,29,707/- as on 31.03.2009 and hence by no stretch of imagination or logic, the assessee's plea of negative networth of Clear Channel Mumbai Private Limited can be accepted. From the said Note, it is also appearing that there are reserves and surplus of Rs.4,76,22,317/- standing in the books of Clear Channel Mumbai Private Limited and as such there arises no question of negative net worth of the said subsidiary.
- Further, in the Statement given along with its earlier submission dated Nil, the assessee has shown that out of total number of 66677 shares of Clear Channel Mumbai Private Limited the assessee company has sold 41% stake i.e. 53603 number of shares at a consideration of Rs.1,000/- and the balance number of 13074 shares are also shown at a figure of Rs.1,000/-. However,

there is nothing on record to show as to what is the basis of taking the consideration of Rs.1,000/-for 53603 shares and showing the same figure of Rs.1,000/-. However, there is nothing on record to show as to what is the basis of taking the consideration of Rs.1000/- for 53603 shares and showing the same figure of Rs.1000/- for the balance 13074 shares.

- On being specifically asked for vide this office letter dated 13.02.2013, the assessee has failed to furnish the details of purchase of such shares, investments for such a tiny sum of Rs.1000/- as against the cost of acquisition of Rs.17,97,19,000/-.
- On being specifically asked for vide this office letter dated 13.02.2013, the assessee has failed to furnish the details of purchase of such shares, including the bills / contract notes etc.
- On being specifically asked for vide this office letter dated 13.02.2013, the assessee has failed to furnish the income tax returns, statement of income, balance sheet, profit & loss account with annexures and schedules thereto of Clear Channel Mumbai Private Limited for the year of purchase of its shares and for the year of sale of those shares.
- The assessee has not even stated the year of its purchase despite being specifically asked for. The assessee has also not produced for verification the Investment Register.

ix. In view of the above observations, there apparently seems to be a mala fide intention on the part of the assessee company while entering into such a transaction of sale of shares of Clear Channel Mumbai Private Limited for an alleged consideration of Rs.1,000/- in respect of 53603 number of shares whose value in the books stood at Rs.17,97,19,000/- as on the date of the alleged transaction i.e. 25.05.2009.

x. It comes out very clear that the transaction of sale of shares of Clear Channel Mumbai Private Limited, whose book value stood at Rs.17,97,19,000/-, for the alleged consideration of Rs.NIL and adopting the alleged token consideration at Rs.1,000/- is nothing but a sham transaction and hence such loss cannot be said to be an admissible loss in the hands of the assessee company either as a speculation loss or a part of its business loss or a capital loss. Therefore, the assessee's claim for loss of Rs.17,97,18,000/- stands rejected, which is without prejudice to rejection of assessee's entire claim of carry-forward of its returned loss as discussed in sub-paragraphs (i) to (xv) of paragraph [I] hereinabove. Penalty proceedings u/s.271(1)(c) of the Income Tax Act, 1961 are hereby initiated for furnishing inaccurate particulars of income / concealment of particulars of income.

xi. Without prejudice to the rejection of the assessee's claim of loss of Rs.17,97,18,000/- on sale of shares of its subsidiary as discussed heretofore, it is made clear here that the said loss of Rs.17,97,18,000/- can, by no stretch of imagination or logic, be said to be a part of the business loss as claimed by the

assessee company in its return of income. in response to the query made in the course of the scrutiny proceedings as to how the said loss is allowable as a business loss, the assessee company, vide its letter dated NIL, has stated as under:-

"With reference to above and under instruction from our above client we hereby submit that during the year assessee has sold shares of Everest Media Private Limited and claimed a loss of Rs.17,97,18,000/-. The investment was a business investment as this company was also in the business of advertisement. Since the shares of the company were acquired to expand the existing business of the company, hence the loss was claimed as business loss, relying on the decision of Karnataka High Court in case of CIT vs. Malabar Industrial Co. Ltd.(320 ITR 486).

But during the assessment proceedings on being pointed out that as per deeming provisions of explanation to section 73 of the Income Tax Act, 1961, losses arises on dealing in shares of a company shall be treated as speculation loss. Therefore, we are enclosing herewith revised computation of total income wherein the loss on sale of such shares treated as speculation loss as per provisions of section 73 of the Income Tax Act, 1961. You are requested to kindly accept the revised claim of the assessee in view of the recent decision of jurisdictional ITAT in case of Rachna S Talreja vs. DCIT (ITA No.2139/Mum/2010) wherein the Hon'ble Tribunal has held that A O is duty bound to accept the revised computation filed during the course of assessment".

Without prejudice to the rejection of the entire loss of Rs.17,97,18,000/- as held in the preceding paragraphs, the assessee's plea of treating this loss of Rs.17,97,18,000/- as 'speculation loss' is considered and accepted having regard to the Explanation to Section 73 of the Act. Nevertheless, even if that be so, such speculation loss is hereby held to be not allowed to be carried forward to subsequent year(s) in view of the provision of Section 79 of the Act as held in sub-paras (i) to (xv) of paragraph [I] hereinabove."

13. Against the above order, the assessee appealed before the Id. Commissioner of Income Tax (Appeals).

14. The Id. Commissioner of Income Tax (Appeals) elaborately noted the submission of the assessee. Considering the above, as regards the treatment of loss on share as business losses, the Id. Commissioner of Income Tax (Appeals) held as under:

2.3 Decision:

I have considered submission of the applicant as well as observation of the A O. Considering the consolidated position of the company, which was not denied by the A O., there is no doubt that networth of the company has been completely eroded. Therefore the company has lost intrinsic value of its shares. AO has doubted intention of the company due to smallness of the sale consideration, which in my opinion cannot be sole ground to reach this conclusion. The bonafide of the assessee is proved that M/s Deesha Leasecon. Pvt Ltd has not only purchased the shores of CCMPL but also of the appellant company. The nature of business expediency could vary from case to case but what is important is that there must be an underlying motive to serve business interests of the assessee in making such investment. The facts of the case suggest that the appellant company which is in the business of advertisement has invested in the shares of another company in the same line of business with a motive to expand its business base. However it failed to achieve its objective and therefore decided to take exit. Since the company in which shares are subscribed is engaged in the same business hence any investment in such a company is justified for pure commercial considerations, and, therefore, loss on sale of such shares is admissible as business losses. In the case of DCIT Vs Gujarat Small Industries Corporation (84 TTJ 22), Mumbai Tribunal held that from the facts on record, it is obvious that the Girnar Scooter Ltd. was floated for the same purpose as a subsidiary and later on sold off when the loss started mounting hence loss on sale of shares in subsidiary was business loss in nature. The same view was taken by the Mumbai Tribunal in the case of Colgate Palmolive India. Therefore respectfully following the above decisions as well as considering the facts of the case, the loss incurred by the assessee company on sale of shares is treated as business loss. Therefore this ground of the appellant is allowed.

15. Apropos the issue of carry forward of losses, the ld. Commissioner of Income Tax (Appeals) decided the issue in favour of the assessee by holding as under:

I have considered the submission of the appellant as well as observation of AO. There is no denial that the shareholding pattern of the assessee company has changed. Now, only question is in which year such change took place. As per assessee the said change took place in F.Y 2009-10 whereas as per AO the change took place in F.Y 2010-11. In support of its claim the appellant submitted copy of agreement with the seller, which is between independent parties and also demonstrated that due to change in shareholding in F.Y 2009-10, the buyer has taken control of the appellant company by appointing director by the new shareholder. Therefore, I find force in the submission of the appellant. The main purpose of section 79 is to find out when the change in management of the

company took place by virtue of change in beneficial shareholding of the company and to determine the quantum of loss to be disallowed due to such change. AO has not denied genuineness of the agreement between the old shareholder and new shareholders. The change in management is also evident from the minutes of the company as well as documents filed with the ROC. The contention of the AO that intimation to ROC is done in F Y 2010-11 cannot be accepted, as in F Y 2010-11 only registration of such transfer took place in the records of company. In the record of ROC, information is available only for change in registered shareholding of the company. The intention behind the provisions of section 79 Is to discourage the practice of taking over loss making companies by setting off such losses with the profits of new management. Therefore to achieve the object of the statue one has to look at the actual conduct of the parties by looking at the prevalent circumstances of the transaction. Such circumstances suggest that the actual transfer of shares took place in FY 2008-09. Only by change in shareholding one can participate in the management of the company and since the new shareholder has participated in the management of assessee company in F Y 2009-10, hence beneficial shareholding took place in the same year. Therefore in my opinion absurd result will follow if one restrict only to the change in registered shareholding of the company for the purpose of section 79 of the Act, which uses the word change in beneficial shareholding. This interpretation can be found in the decision of Hon'ble Bombay High Court in case of CIT Vs. Swadeshi match Co. (139 ITR 833)(Bom) wherein the jurisdictional high court considered that shareholder includes beneficial shareholders also. The court further held that the beneficial shareholders are only the real shareholders and they also reminded that whenever it is a question of giving certain enhanced benefit to the assessee and if both constructions are possible, and in our opinion, they are, then also it is desirable to adopt the construction which will benefit the assessee.

Following the above decisions as well as considering the facts of the case, it is safe to hold that the change in shareholding of the appellant company has taken place in the A.Y 2010-11. Therefore, business losses upto A.Y 2009-10 is not allowed to be carried forward, which the appellant rightly did not claim and losses for current year i.e. A Y 2010-11 is allowed to be carried forward to be set off against the future income of the appellant company. Accordingly this ground of the appeal is allowed in favour of the appellant.

16. Against the above order, the Revenue is in appeal before us.
17. We have heard both the counsel and perused the records. The Id. Departmental Representative relied upon the order's of the assessing officer.

18. Per Contra, the Id. Counsel of the assessee supported the order of the Id. Commissioner of Income Tax (Appeals) with further additional submissions of his own. The submission of the learned counsel of the assessee is summarized as under:

19. As regards the implication of section 79 of the Act, the learned counsel of the assessee submitted as under:

1.1 The Ld AO has disallowed loss on the plea that as per data collected from ROC website the actual shareholding changed on 6/8/2010 therefore the contention of the appellant that change in shareholding took place in A Y 2010-11 was found to be questionable by virtue of established position of law that unless a shareholder is registered shareholder, he can not be said to be a shareholder of a company registered under provisions of Companies Act, 1956.

1.2. Here the Ld A O is of the opinion that for the purpose of section 79 the shareholder should be registered shares holder, which is contrary to the provisions of law. For the benefit of Your Honour the said section is reproduced hereunder:-

"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 carry-ing 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"

1.3. From the reading of the above provisions of the law it is very clear that provisions of this section applies if there is change of more than 51% voting power held as beneficial holder of the shares and not registered or legal holder. The language of this section is plain and simple, since there is no ambiguity in the language of the section therefore principle of literal interpretation applies and as per these principles, if the language of the statute is clear and unambiguous, it would be erroneous to discard the plain meaning of the words. Therefore the literal rule demands that if the meaning of the statutory construction is clear, the courts must apply the same regardless of the result. This plea has been accepted by the

Supreme Court in case of Orissa warehousing Corporation Ltd Vs. CIT (237 ITR 589)(SC) wherein the Apex Court held as under: -

"A fiscal statute shall have to be interpreted on the basis of the language used therein and not de hors the same. No words ought to be added and only the language used ought to be considered so as to ascertain the proper meaning and intent of the legislation. The Court is to ascribe natural and ordinary meaning to the words used by the legislature and the Court ought not, under any circumstances, to substitute its own impression and ideas in place of the legislative intent as is available from a plain reading of the statutory provisions."

1.4. There Ld A 0 artificially imported the word registered shareholder, which is not permitted. It may be noted that similar wording is used in section 2(22)(e) of the Act and recently Hon'ble Supreme Court in case of National Travel Services Vs CIT (401 ITR 154}(SC) held as under:

"This is why "shareholder" now, post amendment, has only to be a person who is the beneficial owner of shares. One cannot be a registered owner and beneficial owner in the sense of a beneficiary of a trust or otherwise at the same time. It is clear therefore that the moment there is a shareholder, who need not necessarily be a member of the Company on its register, who is the beneficial owner of shares, the Section gets attracted without more. To state, therefore, that two conditions have to be satisfied, namely, that the shareholder must first be a registered shareholder and thereafter, also be a beneficial owner is not only mutually contradictory but is plainly incorrect. Also, what is important is the addition, by way of amendment, of such beneficial owner holding not less than 10% of voting power. This is another indicator that the amendment speaks only of a beneficial shareholder who can compel the registered owner to vote in a particular way, as has been held in a catena of decisions starting from Mathalone v. Bombay Life Assurance Co. Ltd. [1954] SCR 117."

1.5. Therefore the Apex Court has made it very clear that when the particular section uses the word "beneficial" shareholder it cannot be understood as registered shareholder. In this case it has not been disputed the fact that the erstwhile shareholder M/s Clear Channel Pacific Pte. Ltd. (CCPPL) has entered into an agreement in May 2009 to transfer the shares of appellant company to M/s Deesha Leasecon Pvt. Ltd. By entering into such a binding agreement CCPPL has given up all its beneficial rights attached to the shares of the appellant company. Once the beneficial rights are being transferred vide agreement in May 2009, the shares held by the said CCPPL is in fiduciary position till the transfer of the said shares by the appellant company in its records. The said transfer was on hold due to non receipt of NOC from the existing shareholder. Further by virtue of this agreement the new management got right in the management of the company from this date of agreement as indicated in clause 2.3 of the said agreement. The new

management, exercising the powers given in the said agreement in clause 4.6, appointed their directors in the company and some of the old management directors were resigned from the company, details of which given above. Therefore the contention of Ld A 0 that registered shareholder of the company has to be changed in the year under consideration is not in sync with the provisions of law.

1.6. Further Ld CIT(A) appeal has rightly relied upon the Board circular No. 704 of 1995, copy enclosed, which clearly says that in case the transactions take place directly between the parties and not through stock exchanges the date of contract of sale as declared by the parties shall be treated as the date of transfer provided it is followed up by actual delivery of shares and the transfer deeds. In this case date of agreement is date of contract and in the said agreement it is clearly mentioned in clause 4 that the shares shall be handed over alongwith transfer deed. Therefore on the date of agreement the shares are transferred to the purchaser as per above circular. This circular is binding on the department, hence plea of AO needs to be rejected.

1.7. Without prejudice to the above submission and to support the decision of Ld CIT(A) under rule 27 of the Act, if contention of Ld AO accepted that change in shareholding took place on 06/08/2010 and not in May 2009, in that case in the impugned assessment year, provisions of section 79 of the Act can't be invoked. In such case both on first day of the Assessment year as well as last day of the assessment year, shareholders are same, hence there is no bar on carry forwarding the current year losses as well as brought forward losses. Therefore if Hon'ble Bench is inclined to accept the view of Ld AO, the assessee request to allow B/f Loss of Rs. 15.09 crore as well as current year loss of Rs. 29.94 crore to carry it forward as in that case there is no implication of section 79 of the Act.

1.8. Further as desired by the Hon'ble Bench we are enclosing herewith agreement to transfer shares, communication and minutes of company to that effect, balance sheet as on 31.3.2010 of assessee company as well as CCM and Deesha Leasecon Pvt. Ltd. for your kind perusal.

20. As regards the claim of loss of Rs.17.97 crore, the submissions of the learned counsel of the assessee is as under:

2.1. The Ld AO on page 16 para II states that the assessee company has sold 41% stake in CCM to M/s Deesha Leasecon Pvt. Ltd, representing 53603/- equity shares of face value of Rs. 10/- , for a total consideration of Rs. 1000/- and recorded loss of Rs. 17.97 crore, in its books of accounts. According to AO the networth of CCM is Rs. 4.89 crore, hence the value of shares can not be arrived at Rs. 1000/- and accordingly he has disallowance loss of Rs. 14.97 crore.

2.2. In this regard we submit that the assessee company has agreed to buy shares of both CCI and CCM alongwith liability in the company. As per valuation report of BSR & Co., Copy enclose don page network of both the company comes to Rs. (8.71 Crore), which means assessee has accepted liability to that extent in this combined deal. M/s Deesha Leasecon needs to buy this shareholding because if the same remained in CCI, O & M Ltd., who is also one of the shareholder in CCI to the extent of 2.80%, will get a stake in CCM. Hence to avoid the same, Deesha Leasecon has purchased the same vide agreement between them, Copy enclosed on page 39.54. Further the transaction is between two independent parties and there is no allegation of any other consideration being paid by Deesha Leasecon. Hence in such case dept. can not question consideration agreed by the Parties. In this regard reliance placed on K.P.Vergheese vs. Income Tax Officer A Nr 131 ITR 597 (SC)

"It is well settled rule of law that the onus of establishing that the conditions of taxability are fulfilled is always on the Revenue and the burden lies on the Revenue to show that there is an understatement of the consideration. Moreover, to throw the burden of showing that there is no understatement of the consideration on the assessee would be to cast an almost impossible burden upon him to establish a negative, namely, that he did not receive any consideration beyond that declared by him."

2.3. The Ld AO has not conducted any enquiry to verify the genuineness of the claim of assessee. He has neither confirm with Deesha Leasecon nor to Clear Channel Pacific Pte Ltd to ascertain the nature of transaction. The action of Ld AO is totally arbitrary and without considering the overall scenario of the case. No businessman will pay consideration based on book value on standalone basis, when the combined value of both the companies is in negative. Ld CIT(A) has rightly relied upon the decision of Coordinating bench in case of DCIT Vs. Colgate Palmolive India Ltd. (ITA No. 548/M/2009) dated 25/10/2011, relevant portion reproduced by Ld CIT(A) on page 20 of his order. Therefore considering the facts of the case, Hon'ble bench is requested to kindly allow loss of Rs. 17.97 crore.

2.4. Without prejudice to above, we submit that Rule 11UA of the Income Tax Rules, 1962, which was inserted with effect from 29/11/2012, determines valuation of unlisted companies for the purpose of section 56 of the Act. The relevant portion of same is reproduced hereunder:-

(b) the fair market value of unquoted equity shares shall be the value, on the valuation date, of such unquoted equity shares as determined in the following manner, namely:—

the fair market value of unquoted equity shares = $\frac{(A-L)}{(PE)} \times (PV)$,

Where,

A = book value of the assets in the balance-sheet as reduced by any amount of tax paid as deduction or collection at source or as advance tax payment as reduced by the amount of tax claimed as refund under the Income-tax Act and any amount shown in the balance-sheet as asset including the unamortised amount of deferred expenditure which does not represent the value of any asset;

L = book value of liabilities shown in the balance-sheet, but not including the following amounts, namely:—

- (i) the paid-up capital in respect of equity shares;
- (ii) the amount set apart for payment of dividends on preference shares and equity shares where such dividends have not been declared before the date of transfer at a general body meeting of the company;
- (iii) reserves and surplus, by whatever name called, even if the resulting figure is negative, other than those set apart towards depreciation;
- (iv) any amount representing provision for taxation, other than amount of tax paid as deduction or collection at source or as advance tax payment as reduced by the amount of tax claimed as refund under the Income-tax Act, to the extent of the excess over the tax payable with reference to the book profits in accordance with the law applicable thereto;
- (v) any amount representing provisions made for meeting liabilities, other than ascertained liabilities;
- (vi) any amount representing contingent liabilities other than arrears of dividends payable in respect of cumulative preference shares;

PE = total amount of paid up equity share capital as shown in the balance-sheet; PV = the paid up value of such equity shares;"

2.5. Though the above rule does not applicable directly in the case of assessee, however if the valuation worked out as per this rule, the networth of company represents valuation of total share capital. Since the assessee has purchased only 41% of share capital hence value comes to Rs. worked out valuation as per above rule, it comes to Rs. 2,00,61,180/- (41% of 4,89,29,707). Hence at most value of shares can be determined at Rs. 2,00,61,180/- and the resultant loss will be Rs. 15,96,57,820/- (17,97,19,000 -2,00,61,180). Accordingly alternatively loss incurred on sale of shares can be restricted to that extent.

2.6. As far as treating the said loss as speculation loss, the assessee has already filed revised computation before AO to treat the same as speculation loss in view of the explanation to section 73 of the Act.

21. Furthermore, the learned counsel of the assessee placed reliance upon the decision of the Hon'ble Apex Court in the case of *National Travel Services vs. CIT* [2018] 401 ITR 154 (SC) for the proposition that a shareholder has only to be a person who is beneficial owner of shares, he need not necessarily be a registered shareholder.

22. We have carefully heard the submissions and perused the records. At the outset, we note that the ground of the Revenue that the Id. Commissioner of Income Tax (Appeals) has allowed the entire carry forward business loss is misplaced inasmuch as the Id. Commissioner of Income Tax (Appeals) has only allowed the carry forward of loss of Rs.17,97,18,000/- incurred on sale of shares in the current year.

23. As regards the invocation of provisions of section 79 is concerned, firstly we may gainfully refer to the provisions of section 79 which reads as under:

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

79. Notwithstanding anything contained in this Chapter, where a change in shareholding has taken place in a previous year,—

- (a) in the case of a company not being a company in which the public are substantially interested and other than a company referred to in clause (b), 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 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;
- (b) in the case of a company, not being a company in which the public are substantially interested but being an eligible start-up as referred to in section 80-IAC, the loss incurred in any year prior to the previous year shall be carried forward and set off against the income of the previous

year, if, all the shareholders of such company who held shares carrying voting power on the last day of the year or years in which the loss was incurred,—

- (i) continue to hold those shares on the last day of such previous year; and
- (ii) such loss has been incurred during the period of seven years beginning from the year in which such company is incorporated:

24. We find that it is undisputed in this case that there is a change in the shareholding pattern. The plea of the assessee is that the agreement to transfer the shares was duly entered. This agreement was entered into in May 2009. It has been submitted that by entering into such a binding agreement Clear Channel Pacific Pte. Ltd. has given up all its beneficial rights attached to the shares of the assessee company. The said transfer was on hold due to non-receipt of no objection certificate from the existing shareholder, we find considerable force in the submission of the counsel of the assessee. The assessing officer's view that it is only the registered shareholders which need to be considered, is not at all sustainable in view of the fact that the section uses the term “beneficially held”, and not registered shareholders. The facts of the present case indicate that there has been a valid agreement for transfer of shares and the same was put on hold only awaiting no objection certificate from the existing shareholders. It is also not the case that subsequently the said agreement was not given effect. Furthermore, the Hon'ble jurisdictional High Court in the case of *Swadeshi Match Company* 139 ITR 833 has considered that shareholder includes beneficial shareholders also. Similar view was taken by the Hon'ble Apex Court in the case of *National Travel Services* (supra). Hence, on the touchstone of this case law in the present case by no stretch of imagination it can be said

that there is no change in the beneficially shareholding pattern. The Id. Commissioner of Income Tax (Appeals) has also given finding that the change in management pursuant to the above beneficial change of shareholders is also evident from the minutes of the company and the documents filed with the registrar of company. Furthermore, the CBDT Circular in this regard mandates that if the transaction takes place directly between the parties and not through stock exchanges, the date of contract of sale as declared by the parties shall be treated as the date of transfer provided it is followed up by the actual delivery of shares and the transfer deeds. In the present case, there is no dispute that the said agreement was duly given effect. In view of the discussions here in above and in light of the case law from the jurisdictional High Court and the CBDT Circular, we are of the considered opinion that there is no infirmity in the order of the Id. Commissioner of Income Tax (Appeals) holding that the change in shareholding of the assessee company has taken place in assessment years 2010-11. As a consequence, the loss of the current year shall be allowed to be carried forward.

25. As regards the treatment of current year, the claim of business loss, we find that the Id. Commissioner of Income Tax (Appeals) has held the same to be business loss. However, we are of the considered opinion that the Id. Commissioner of Income Tax (Appeals) has erred in this regard. The assessee in its submission has itself conceded that the same is a speculation loss. This is having regard to the Explanation to section 73 of the Act. Hence, we hold that the loss for the current year can only be considered as

speculation loss and not business loss as held by the Id. Commissioner of Income Tax (Appeals).

26. Furthermore, as regards the quantification of losses of Rs.17,97,18,000/-, it is noted that the assessee has claimed that it has transferred the shares of its subsidiary for a consideration of Rs.1,000/- as against the cost of acquisition of Rs.17,97,18,000/-. This has arisen on account of sale of 41% stake in CCM to M/s Deesha Leasecon Pvt. Ltd, representing 53603 equity shares of face value of Rs. 10/-. While rejecting the assessee's claim of loss, the Assessing Officer has noted that the net worth of CCM is Rs.4.89 crores. Further, the Assessing Officer did not give credence to the valuation report of the BSR & Company. The claim of the assessee was that the holding company Clear Channel Pacific Pte. Limited, a Singapore based professional company was in the business of worldwide advertising and that it was running its business through its subsidiary i.e. the assessee company and step subsidiary i.e. Clear Channel Mumbai Private Limited but the entire business of the said foreign company in India was running in losses, therefore, it decided to dispose of the Indian business to Deesha Leasecon Private Limited which is also in the same business, vide Agreement dated 25.05.2009. It is further the claim of the assessee that its sale of shares is part of the above scheme and hence against token sale consideration of Rs.1000/-, 53603 number of its shares of Clear Channel Mumbai Private Limited was transferred. The justification was given that the entire capital of the Indian Group Company was eroded, hence, the value of shares was taken as NIL and a token consideration of Rs.1000/- for transfer of shares was decided. However, the Assessing

Officer had noted that the net worth of Clear Channel Mumbai Private Limited was shown at Rs.4,89,29,707/-. Hence, the Assessing Officer did not accept the assessee's contention that since the combined net worth of Clear Channel Mumbai Pvt Ltd and Clear Channel Communication Pt. Ltd was (-) 8.71 crore, the valuation on transfer should be taken at Nil. In this regard, we are of the considered opinion that the assessee's claim that in arriving at valuation of shares of Clear Channel Mumbai Private Limited, the combined net worth of both the subsidiary companies, i.e., the assessee and Clear Channel Mumbai Private Limited should taken together, is not acceptable and hence the same has been rightly rejected by the Assessing Officer. The reference of the Id. Counsel of the assessee on various case laws in this regard is not germane as the same were rendered upon different fact. The valuation of Clear Channel Mumbai Private Limited has to be done on a standalone basis. In this regard, in the absence of any cogent valuation we are of the considered opinion that we can take recourse to Rule 11 of the Income Tax Rules, 1962 for determining the valuation of unlisted companies for the purpose of section 56 of the Act. The relevant portion of same is reproduced hereunder:-

(b) the fair market value of unquoted equity shares shall be the value, on the valuation date, of such unquoted equity shares as determined in the following manner, namely:—

the fair market value of unquoted equity shares = $\frac{(A-L)}{(PE)} \times (PV)$,

Where,

A = book value of the assets in the balance-sheet as reduced by any amount of tax paid as deduction or collection at source or as advance tax payment as reduced by the amount of tax claimed as refund under the Income-tax Act and any amount shown in the balance-sheet as asset including the unamortised amount of deferred expenditure which does not represent the value of any asset;

L = book value of liabilities shown in the balance-sheet, but not including the following amounts, namely:—

- (i) the paid-up capital in respect of equity shares;
- (ii) the amount set apart for payment of dividends on preference shares and equity shares where such dividends have not been declared before the date of transfer at a general body meeting of the company;
- (iii) reserves and surplus, by whatever name called, even if the resulting figure is negative, other than those set apart towards depreciation;
- (iv) any amount representing provision for taxation, other than amount of tax paid as deduction or collection at source or as advance tax payment as reduced by the amount of tax claimed as refund under the Income-tax Act, to the extent of the excess over the tax payable with reference to the book profits in accordance with the law applicable thereto;
- (v) any amount representing provisions made for meeting liabilities, other than ascertained liabilities;
- (vi) any amount representing contingent liabilities other than arrears of dividends payable in respect of cumulative preference shares;

PE = total amount of paid up equity share capital as shown in the balance-sheet; PV = the paid up value of such equity shares;"

27. As already noted hereinabove the net worth of the said company was Rs.4,89,29,707/- which conforms to the above. By application of this Rule, since the assessee was the owner of only 41% of the share capital being transferred, the valuation as per above Rule comes to Rs.2,00,61,180/- (-) 41% of 4,89,29,707/-. Hence, the value of its shares can be determined at Rs.2,00,61,180/- and the resultant loss will be Rs.15,96,57,820/- (17,97,18,000 – 2,00,61,180), i.e., cost of acquisition – valuation as above. Hence, we are of the considered opinion that the above loss should be allowed as speculation loss to the assessee. We order accordingly.

28. In the result, the Revenue's appeal stands partly allowed.

Order pronounced in the open court on 11.07.2018

Sd/-

(Ram Lal Negi)
Judicial Member

Mumbai; Dated : 11.07.2018

Roshani, Sr. PS

Sd/-

(Shamim Yahya)
Accountant Member

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai