

**IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, MUMBAI**

**SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 1016/MUM/2023
(Assessment Year: 2016-17)**

**M/s Real Time Interactive Media
Private Limited,**

10th Floor, Ankush Apt.,
10th Lane Khetwadi, Mumbai - 400004
[PAN: AAECR6050N]

..... **Appellant**

**Income Tax Officer,
3(3)(1), Mumbai,**
Aaykar Bhavan,
Maharishi Karve Road,
Mumbai - 400020

Vs

..... **Respondent**

Appearance

For the Appellant/Assessee : None
For the Respondent/Department : Shri Rajendra Chandekar

Date

Conclusion of hearing : 14.11.2023
Pronouncement of order : 29.11.2023

ORDER

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Appellant has challenged the order, dated 02/12/2022, passed by the Ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2010-11, whereby the Ld. CIT(A) had dismissed the appeal of the Assessee against the Assessment Order, dated 29/11/2018, passed under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. When the appeal was taken up for hearing, in response to the query from the Bench the Learned Departmental Representative submitted that the solitary issue involved in the present appeal pertains to carry forward and set off of loss pertaining to prior years in terms of Section 79 of the Act.
3. On perusal of the Assessment Order, we found that vide Assessment Order, dated 29/11/2018, the Assessing Officer rejected Appellant's claim for set-off of brought forward losses of INR 65,28,955/- on the ground that there was change in the shareholding of the Appellant company during the previous year relevant to the Assessment Year 2016-17 on account of which provisions of Section 79 of the Act were attracted.
4. Being aggrieved, the Appellant preferred appeal before CIT(A) and contended that the shares of the Appellant-company were transferred to the relatives of the shareholders by way of gift and therefore, the provisions of Section 79 of the Act were not attracted in view of Proviso to Section 79 of the Act. However, the CIT(A) rejected the contention of the Appellant holding that there was neither any Proviso nor any Explanation to Section 79 of the Act which provided for carry forward losses in case of change of the shareholding by way of gift. Thus, the CIT(A), dismissed the appeal preferred by the Appellant, vide order, dated 02/12/2022.
5. The Appellant has now challenged the above order of the CIT(A), by way of the present appeal before the Tribunal.
6. When the appeal was taken up for hearing, none was present for the Appellant. However, given the legal issues involved in the appeal we proceeded to adjudicate the appeal after hearing the Ld. Departmental Representative supported the order passed by the

CIT(A). The Ld. Departmental Representative contended that admitted position that there was change of more than 51% of the shareholding of the Appellant-company and therefore, the provisions of Section 79 of the Act clearly attracted.

7. We have perused the orders passed by the authorities below; given a thoughtful consideration to the submissions advanced by the Ld. Departmental Representative; taken into consideration the submission made by Appellant before the Assessing Officer & CIT(A) as recorded in the aforesaid orders, and examined the position in law.
8. We note that the appeal before us pertains to the Assessment Year 2016-17 and Section 79 of the Act as applicable at the relevant time read as under:

"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—

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.” (Emphasis Supplied)

9. First Proviso to Section 79 of the Act clearly provides that the provisions contained in Section 79 of the Act shall not apply in case the change in the voting rights takes place on account of transfer of shares by way of gift to any relative of the shareholder making such gift. The aforesaid proviso to Section 79 of the Act was inserted by Finance Act 1988, Clause 21 of which read as under:

"Amendment of Section 79

21. In Section 79 of the Income-tax Act, with effect from the 1st day of April, 1989,—

(a) In clause (a),

(i) the word "or" occurring at the end shall be omitted;

(ii) the following proviso shall be added at the end, namely: —

"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.";

(b) Clause (b) shall be omitted."

10. The relevant extract of the Circular No. 528 of 1988, dated 26/12/1988, issued by the Central Board of Direct Taxes dealing with the scope and effect of above amendment read as under:

"Modification of the provisions relating to carry forward and set off of taxes in the case of certain companies

26.1 – 26.2 xx xx

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 section 2(41) of the Income-tax Act, 1961

26.4 These amendments will come into force with effect from 1st April, 1989, and will, accordingly, apply in relation to assessment year 1989-90 and subsequent years.

[Section 21 of the Finance Act, 1988]" (Emphasis Supplied)

11. In our view, the above Proviso to Section 79 of the Act inserted by Finance Act, 1988 escaped attention of the Assessing Officer and the CIT(A). Therefore, we remand the issue back to the file of the Assessing Officer for fresh adjudication with the directions to the Assessing Officer to verify whether the change of shareholding was on account of gift by the existing shareholder to their relatives as defined in Section 2(41) of the Act and accordingly apply the applicable provisions of Section 79 of the Act read with first proviso thereto. In terms of the aforesaid, the contention raised by the Appellant in terms of Ground B in the present appeal is allowed for statistical purposes. The other grounds/contentions of the Appellant being argumentative in nature are not adjudicated separately.
12. In result, the present appeal is allowed for statistical purposes.

Order pronounced on 29.11.2023

Sd/-
(Om Prakash Kant)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 29.11.2023
Alindra, PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai