

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

**BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER  
& SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No.2009/Mum/2024  
(A.Y.2015-16)**

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| DCIT-15(1)(2)<br>Room No.126B, 1 <sup>st</sup> Floor,<br>Aayakar Bhavan,<br>M.K.Road,<br>Maharashtra - 400020 | Vs. | Hiranandani Healthcare<br>Private Limited,<br>Sector 10A, Mini Sea<br>Shore, Vashi<br>Maharashtra - 400705 |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AABCH5894D   |     |  |
| Appellant   | ..  | Respondent   |

|                 |                 |
|-----------------|-----------------|
| Appellant by :  | Dhivya Ruth     |
| Respondent by : | Atul T. Suraiya |

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| Date of Hearing       | 10.06.2024 |
| Date of Pronouncement | 21.06.2024 |

आदेश / ORDER

**PER AMARJIT SINGH, AM:**

The present appeal filed by the revenue is directed against the order passed by the CIT(A) NFAC for A.Y. 2015-16 of the Income Tax Act 1961. The revenue has raised the following grounds before us:

- "1. On the facts and in the circumstances of the case, the ITAT erred in allowing to carry forward the unabsorbed depreciation ignoring the fact that a plain reading of Sections 28, 29, 72 and 79 of the L. T. Act, reveals that unabsorbed depreciation which is integral part for determination of business loss/income cannot be excluded from the ambit of section 79 of the L. T. Act, because it provides to cover "losses" which can be worked out only after depreciation allowance as provided u/s 28 and 29 of the act.*
- 2. Whether on the facts and in the circumstances of the case the ITAT erred in allowing the carry forward of losses ignoring the facts that there is substantial change in shareholding pattern, hence the assessee*

*company is not eligible for set off of brought forward loss of Rs.17,41,15,920/-*

3. *The Appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored.*
4. *The appellant craves leave to amend, or alter any grounds or add a new grounds, which may be necessary.”*

2. The return of income declaring nil income was filed on 30.11.2015. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued on 12.04.2016. The assessing officer has made reference u/s 92CA(3) of the Act to the Transfer Pricing Officer for determining the Arm's Length Price under transfer pricing provisions. The TPO has not made any adjustment to arm's length price. The assessing officer has finalised the assessment on 28.12.2018. At para 6 of the assessment order the assessing officer has discussed the issue of set off brought forward loss for earlier years. The AO stated that assessee has claimed set off of brought forward losses of Rs.60,97,31,476/- against the income of Rs.17,41,16,054/- during the year under consideration. In this regard the assessing officer noticed that carry forward loss till assessment year 2012-13 had been disallowed by the AO due to change of shareholding pattern u/s 79 of the Income Tax Act, 1961. Therefore, the adjustment of carry forward losses for assessment year 2009-10 and 2010-11 with the income of assessment year 2015-16 was not allowed.

3. The assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) after following the decision of ITAT for assessment year 2012-13 in the case of the assessee itself has allowed the appeal of the assessee. The relevant extract of the decision of ld. CIT(A) is reproduced as under:

*“3.1 The taxpayer went on appeal against the 143(3) order of Ay 2012-13 and CIT(APPEALS) passed the order on 3/11/2022. There after the case went up before hon ITAT and the ITAT in a combined order dt 27/8/2023 for Ay 2012-13 and AY 2014-15 decided as under :-*

*10. in the instant case we noticed that there are only two share holders namely FHL and FHHPL Both the above said share holders as a group has beneficially held 51% of voting power in both the years i.e the year in which loss was incurred and the year in which the loss was sought to be set off, meaning there by there is no change in the share holding pattern of the group. We further noticed that the FHHPL is holding company of FHL. Hence the increase in share holding of FHL in the assessee company in any case would not result in the change in the voting power of the shareholders. Accordingly, we find merit in the contentions of learned AR that the provisions of section 79 will not be applicable in the facts of the present case. Hence, we are not able to agree with the view expressed by the tax authorities that the change in individual share holding of the share holders would also attract provision of section 79 of the Act. Accordingly, we set aside the order passed by CIT(APPEAL) on this issue and direct the assessing officer to allow set off of brought forward losses both in AY 2012-13 and 13-14.*

*3.2 What the ITAT held is that the provisions of section 79 are not applicable for Ay 2012-13 and 2014-15 since there is no change in share holding pattern during those years. But here the loss that is to be set off is for Ay 2009-10 and AY 2011-12.*

*3.3 Out of the loss of Rs.60,97,31,476 the loss relating to Ay 2012-13 which is unabsorbed business loss is Rs.101,62,902. This is eligible for set off following the ITAT order discussed above. But what gets precedence - loss relating to 2009-10 and 2010-11 which has cleared in the ITAT order dt 27/8/2023, since in AY 2012-13 claim of loss upto AY 2012-13 was blocked applying the provisions of section 79.”*

4. Heard both the sides and perused the material on record. The assessee is engaged in providing healthcare services and its shareholders are M/s Fortis Healthcare Ltd. (FHL) M/s Fortis Healthcare Holdings Pvt. Ltd. (FHHPL). Both these shareholders were having holding of 40% and 60% of the shares. Further during the assessment year 2012-13 there was change in shareholding pattern between both the shareholders, however, there was no change in the shareholders of the assessee company. In the change shareholding pattern holding of these two shareholders were changed in the case of M/s Fortis Healthcare Ltd. to 85% while holding of M/s Fortis Healthcare Holding Pvt. Ltd. to 15% as against earlier holding pattern of 40% & 60% of shares between these two shareholders. In the case of the assessee itself as referred by the ld. CIT(A) in his finding that on the similar issue and identical facts the ITAT in the combined order for A.Y.

2012-13 and A.Y. 2014-15 dated 27.08.2023 as discussed in the findings of CIT(A) held that there was same two shareholders except change in the shareholding pattern, therefore, provision of Sec. 79 will not be applicable in the facts of the case of the assessee. Following the decision of the ITAT in the case of the assessee as discussed supra in the findings of the Id. CIT(A) we don't find any merit in the ground of appeal filed by the revenue, therefore, both the ground of appeal filed by the revenue are dismissed.

5. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 21.06.2024

Sd/-

(Rahul Chaudhary)  
JUDICIAL MEMBER

Sd/-

(Amarjit Singh)  
ACCOUNTANT MEMBER

Mumbai, Dated 21.06.2024

PS: Rohit

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/BY ORDER,  
सत्यापित प्रति //True Copy//

(Asst. Registrar)  
ITAT, Mumbai