

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "J", MUMBAI

Before Shri Vijay Pal Rao, Judicial Member &
Shri N K Billaiya, Accountant Member

ITA No.2638/Mum/2012 for Asst. Year: 2008-09

Just Lifestyle Pvt. Ltd. Live-II, Plot No. D-6, Street No.20, MIDC, Marol, Andheri (E), Mumbai- 400 093 PAN AADCP2398G	Vs.	DCIT- 8(2), Mumbai
(Appellant)		(Respondent)

Appellant By : Shri K Gopal
Respondent By : Shri Sanjeev Jain

Date of Hearing : 17.10.2013	Date of Pronouncement : 23.10.2013
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ORDER

Per N.K.Billaiya (AM) :

This appeal by the assessee is preferred against the order of the CIT(A) -16, Mumbai, dated 14.02.12, pertaining to A.Y. 2008-09.

2. The only grievance of the assessee is that the CIT(A) erred in upholding the disallowance of set off of carried forward business loss of A.Y. 2006-07 and A.Y. 2007-08 respectively u/s. 79 of the I.T.Act.

3. Briefly stated facts of the case are that during the course of scrutiny assessment proceedings the Assessing Officer noticed that the assessee has set off brought forward losses. The Assessing Officer further noticed that there was a change in the share holding pattern of the assessee company. The Assessing Officer was of the firm belief that the claim of the set off of brought forward losses is in contravention of the provisions of section 79 of the Act. The Assessing Officer

sought explanation from the assessee as to why not the set off of brought forward loss be disallowed in the year under consideration. The assessee filed a detailed reply. The relevant part is exhibited at page 3 & 4 of the assessment order. The Assessing Officer accepted the contention of the assessee to adjust the unabsorbed depreciation of the earlier years against current income. However, remaining loss was not allowed to be set off in the year under consideration nor it was allowed to be carried forward. The Assessing Officer observed that a plain reading of section 79 suggests that since the assessee has not complied with the conditions prescribed u/s. 79 of the Act, it is not eligible to carry forward the set off losses of earlier years. The assessee carried the matter before the CIT(A) but without any success. The CIT(A) thus held as under:

"33.1 I have carefully considered the contention of the appellant and also gone through the documents available on record. The provision of section 79 of the Act, clearly specify that 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 condition 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 the shares of the company, carrying not less than 51% of the voting power. The second condition is that the satisfaction of the A.O. that the change in the shareholding was not effected with a view to avoid or reduce any liability to tax. I find that the Ld. Assessing Officer found that there is a change in the shareholding pattern of the company though apparently it is within the same group but the fact remain that there was a change of the shareholding pattern. 51% or more of the equity share was not held beneficially by person who beneficially held shares of the company carrying not less than 51% of voting power on the last day of the year in which the loss was incurred. There is no concept of presuming that the company is not a separate legal entity and can be construed to be same as that of an individual or for the matter a shareholder. The company is an artificial juridical person as defined in Section 2(31) of the Act. Therefore, the assessee's contention that the shareholding pattern has not changed cannot be accepted, the provision of section 79 are clearly applicable to the facts of the appellant case."

Aggrieved, by this the assessee is before us.

4. The counsel for the assessee reiterated what has been submitted before the lower authorities. It is the say of the counsel that there was an agreement by which one of the share holder Mr. Shailesh Sanghani was representing S S Group and another share holder Mr. Shabbir Khorakiwala was representing another group known as S K Group. The agreement was with Priority One Marketing Pvt. Ltd., The counsel further argued that even with the change in the share holding pattern, the group controlled the shares of the assessee and, therefore, the substantial holding remained the same and the assessee was very much entitled for the set off of brought forward losses. The counsel further argued that the reference of share holders in section 79 relates to the beneficial holding in shares, which means that section would not apply if shares carrying 50% voting power continues to be held by the same group which held the shares carrying 51% of the voting power in the year in which the losses was incurred. Although within the group itself there may be any amount of change in the shareholding. The learned DR strongly supported the findings of the CIT(A).

5. We have carefully perused the orders of the lower authorities. The point in dispute is whether the change in the share holding pattern is hit by provisions of section 79 which would disentitle the assessee for the set off brought forward losses. Let us first consider the share holding pattern during the year under consideration and during the year of losses.

Sr. No	Name of the shareholder	% of shareholding in F.Y. 06-07 (A.Y. 07-08)	% of shareholding in F.Y. 06-07 (A.Y. 07-08)
1	Shailesh Sangani	10%	12.6%
2	Joel Cardoso	10%	0.4%
3	Priority Marketing Pvt. Ltd.	80%	3.2%
4	Manisha Sangani	0%	48.8%
5	Alefiya Khorakiwala	0%	14%
6	Sherebanu Khorakiwala	0%	14%
7	Shabbir Khorakiwala	0%	7%

Now let us consider this share holding pattern in the light of the relevant portion of section 79

"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]

..."

A perusal of the above chart shows that Priority One Marketing Pvt. Ltd. which held 80% of the shares in FY 2006-07 now hold only 3.2%. Mrs. Manisha Sanghani, who was not holding any shares in FY 2006-07 now holds 48.8% of the shares. It is the say of the counsel that by virtue of shareholders agreement dated 14.10.2005, which is exhibited at pages 45 to 64 of the paper-book, the share holding remained within the group and, therefore, the beneficial holding did not change. We do not find any force in this contention of the counsel. It is settled proposition of law that a company is a distinct legal entity and its identity is separate from the identity of its share holders/members. Let us take an example. X Ltd holds 51% shares in Y Ltd., this does not mean that the share holders of X Ltd hold 51% shares in Y Ltd. because X Ltd, Y Ltd and the share holders are all distinct and separate persons. In the case under consideration Priority One Marketing Pvt. Ltd., which was holding 80% shares is now holding only 3.2% shares. Mrs. Manisha Sanghani, who was not holding any share, is now holding 48.8% shares. It may be that Mrs. Manisha Sanghani was controlling the shares of Priority One Marketing Pvt. Ltd., but being a separate legal entity, it cannot be construed that the shareholding pattern has not

changed as the holding remains within the group. We fully agree with the findings of the CIT(A) that the provisions of section 79 are clearly applicable to the facts of the case. Accordingly, the findings of the CIT(A) are confirmed. The appeal filed by the assessee is dismissed.

6. Before closing, the assessee has relied upon the decision of the Tribunal, Delhi Bench in ITA No.1184 & 2460/Del/2008. We find that the facts of that case are different from the facts of the present case, as much as in that case there was a merger of two companies, wherein the Tribunal has considered the first proviso to clause [a] to section 79 and has held that when existence of a company is legally finished it is akin to death of a share holder. As the facts are clearly distinguishable the decision relied upon by the assessee is misplaced.

Order pronounced in the open court on 23rd October 2013.

Sd/-
(Vijay Pal Rao)
JUDICIAL MEMBER

Sd/-
(N.K.Billaiya)
ACCOUNTANT MEMBER

MUMBAI, Dt : 23rd October, 2013
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Copy forwarded to :

1. The Appellant
2. The Respondent
3. The C.I.T, Mumbai
4. The CIT (A)-16, Mumbai
5. The DR, "J"- Bench, ITAT, Mumbai

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BY ORDER

ASSISTANT REGISTRAR
ITAT, Mumbai Benches, Mumbai