

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

**BEFORE SHRI B.R. BASKARAN, AM &
SHRI N. K. CHOUDHRY, JM**

I.T.A. No. 1142/Mum/2023
Assessment Year: 2013-14)

**Hiranandani Healthcare Pvt.
Ltd.** Mini Sea Shore
Road, Sector-10-A, Vashi, Navi
Mumbai-400703.

**Commissioner of Income
Tax (Appeals)/National
Faceless Appeal Centre,
Delhi.**

PAN No. **AABCH5894D**

Appellant) : **Respondent)**

Appellant/Assessee by : Shri Atul Suraiya & Nilay Jhaveri
Respondent/Department by : Shri Surendra Kumar Meena

Date of Hearing : 17.08.2023
Date of Pronouncement : 30.08.2023

ORDER

Per N. K. Choudhry, JM:

The Assessee/Appellant herein has preferred this appeal against the order dated 20.02.2023 impugned herein passed by Ld. Commissioner of Income Tax (Appeals)/National Faceless Appeal Centre, Delhi {in short 'Ld. Commissioner'} under section 250 of the Income Tax Act 1961 (in short 'the Act').

2. In the instant case, the Assessee declared its total income at Rs. "NIL", by filing its return of income on dated 28.11.2013, which was processed under section 143(3) of the Act. Subsequently, the case of the Assessee was selected for scrutiny and therefore, statutory notices under section 143(2) and 142(1) of the Act were issued. In response to which the Assessee attended the assessment proceedings and filed its submissions and details, on perusing of which the Assessing Officer (AO) observed that the Assessee being a company is engaged in the business activity of running Hospital business / multispecialty Hospital at Navi Mumbai and during the year under consideration derived its income from "Business & Profession".

2.1 The AO further by observing that during the year the Assessee had adjusted the brought forward losses from earlier years against the business income of Rs. 37,09,306/-, vide order dated 22.02.2016 asked the Assessee to furnish the details, in response to which the Assessee furnished its submissions. By perusing the submissions, the AO by noticing *"that during the AY 2012-13 i.e. previous year, there was a change in shareholding pattern of the Assessee-company. Based on this, all brought forward losses upto 01.04.2012 were disallowed under section 79 of the Act by the then AO in his order dated 26.03.2015 under section 143(3) of the Act. Thus, no loss was allowed to be carry forward on completing the assessment of the Assessee for AY 2012-13"* vide noting dated 07.03.2010 show-caused the Assessee as to why brought forward losses adjusted against the income of Rs. 37,09,306/- should not be disallowed on the basis of assessment of AY 2012-13, wherein addition under section 79 of the Act was made and all carry forward losses were disallowed.

3. In response to the said show-cause, the Assessee could not file any satisfactory reply or submission, therefore, the brought forward losses adjusted against the income of Rs. 37,09,306/- of the Assessee were disallowed by the AO and added in the total income of the Assessee.

4. The Assessee being aggrieved against the said disallowance of brought forward losses adjusted against the income of Rs. 37,09,306/- preferred first appeal before the Ld. Commissioner. Though the Ld. Commissioner affirmed the disallowance qua brought forward losses adjusted against the income of Rs. 37,09,306/- as made by the AO, however, directed the AO to verify the correct figures as far as carry forward business losses is concerned, by holding as under:

“XIII.3.....During the year, a change in the share holding pattern of the assessee company took place subsequent to which, in the new and revised share holding, M/s Fortis Health Care Holdings Pvt. Ltd. M/s Fortis Health Care Holdings Pvt. Ltd was holding 15% of shares where as M/s Fortis Health Care Ltd was holding 85% of shares. During AY 12-13 M/s Fortis Health Care Holding was holding 60% of shares and M/s Fortis Health Care Ltd was holding 40% of shares. Accordingly issue stands governed by the provisions of sec 79.

XIII.4 Sec 79 is applicable here only for the reason that there has been a change in the share holding pattern in this previous year compared to AY 12-13. Details of share holding and applicability of sec 79 is there in the appellate order for AY 2012-13 (please see page 16. TABLE 2 of the appellate order for AY 2012-13 dtd 3/11/22. Since the taxpayer has filed a Nil Return based on the decision in the case of CIT v/s Manmohan Das and after years later in the case of Orra Fine Jewellery Pvt. Ltd v/s DCIT AO can examine sec 79 only in the year in which assessee claims set off of loses. The appellate order for AY 12-13 could be subject matter of further appeal (subject to clarification from the taxpayer). In the appellate order for AY 12-13 unabsorbed business losses were not allowed to be carried forward. The unabsorbed depreciation allowed to be carried forward is 21,77,87.812. The difference of Rs 292858569 is added back. The

*amount of Rs 292858569 is the unabsorbed business loss not allowed to be carried forward. **The assessing officer is directed to verify the correct figures as far as carry forward business loss is concerned.** The remaining business loss to be carried forward is Rs 18,71,25,561. The assessing officer can set off unabsorbed depreciation or business loss under MAT computation. Book profit is (84910475). Since the book profit is negative loss cannot be set off here. But business loss and depreciation is allowed to be carried forward under MAT computation.*

Under normal computation sec 79 is not applicable here following the decision in the case of Orra Fine Jewellery where in it was held that 'the assessing officer can examine the applicability of provisions of sec 79 only in the year in which loss is set off and not in the year in which assessee claims loss to be carried forward. Applying this decision it is held that assessee is eligible to set off loss under provisions of sec 79 in this year since loss is set off against income returned. Subject to the outcome of the appeal decision in the case of AY 12- 13 order already passed, it is held that assessee is eligible for set off unabsorbed business loss and depreciation under MAT provisions. The already assessed loss is covered protectively.

XIII.5 In the event the appeal is partly allowed."

- 5.** The Assessee being aggrieved is in appeal before us.

- 6.** Heard the parties and perused the material available on record. We observe that the AO while making the disallowance qua brought forward losses adjusted against the income of Rs. 37,09,306/- relied upon the assessment order pertaining to the AY 2012-13, wherein addition under section 79 of the Act was made and carry forward losses were disallowed. Further, the Ld. Commissioner as well in the impugned order also noted the said facts as well, and affirmed the action of the AO for not allowing the brought forward losses, against which the Assessee is in appeal before us.

6.1 The Assessee claimed that shareholding of the Assessee-company is of M/s. Fortis Healthcare Limited (FHL) and M/s. Fortis Healthcare Holdings Pvt. Limited (FHHPL). Both the above said shareholders were holding 40% and 60% of shares respectively as on 1.4.2011. During the year ending on 31.3.2012 relating to A.Y. 2012-13, the Assessee issued 30 Lakhs equity shares having face value at Rs.10/- each with a premium of Rs.90/- per share (totaling to Rs.100/- per share) to FHL. As a result, there was a change in share holding pattern between both the shareholders, i.e., the holding of FHL increased to 85%, while holding of FHHPL got reduced to 15%. The Assessee also had accumulated losses remaining to be set off as on 1.4.2011.

6.2 On the basis of change in pattern of shareholding of the Assessee company, question emerge "whether the case of the Assessee is hit by section 79 of the Act and therefore the Assessee is not entitled for claiming set off of the carry forward losses against its income earned during the year".

6.3 We observe that in the case pertaining to AY 2012-13, the then Assessing Officer rejected the claim for setting off of brought forward losses by holding that the Assessee is not entitled to carry forward and set off of accumulated losses available with the Assessee as on 31.3.2011 as the aforesaid change in shareholding pattern between two shareholders, would be hit by provisions of section 79 of the Act, which bars carry forward of losses, if any, if there is a change in shareholding pattern as mentioned in section 79 of the Act.

6.3.1 The Ld. CIT(A) affirmed the said decision of the then AO.

6.4 The Assessee being aggrieved preferred 2nd appeal before the Hon'ble Tribunal, who vide order dated 24-07-2023 in I.T.A. Nos. 3240/Mum/2022 (A.Y. 2012-13) and I.T.A. No. 204/Mum/2023 (A.Y. 2014-15) allowed the brought forward losses, by concluding as under:

5. We heard both the parties on this issue and perused the record. The above said issue revolves around Section 79 of the Act. Hence we extract below the relevant portion of the provisions of sec.79(1) of the Act:-

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

“Notwithstanding anything contained in this Chapter, where a change in shareholding has taken place during the 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”

6. It is the contention of the learned AR that the provisions of section 79 would be applicable only if the shares of the company carrying not less than 51% of the voting power beneficially held by “certain persons” were transferred to “other persons”. He submitted that the expression “persons” used in the above said section would refer to a ‘group of persons’, meaning thereby, not less than 51% of the voting power should be held by same group of persons as at the end of the year in which loss sought to be set off and also in the year in which loss was incurred. The Learned AR further submitted that, in the instant case, not less than 51% of the voting power was held by very same two shareholders in the year(s) of incurring losses and also in the years in which the said loss was

sought to be set off. He submitted that ratio of voting power inter-se the two shareholders has undergone change in the years under consideration due to issue of fresh shares to FHL. He submitted that the provisions of section 79 of the Act will not be applicable in case of change in the voting pattern between the persons falling in the same group. Accordingly, the learned AR contended that the tax authorities are not justified in applying the provisions of sec.79 of the Act to the facts of the present case and in rejecting the claim of set off of brought forward losses.

7. The Learned DR, on the contrary, submitted that the provisions of section 79 of the Act will be applicable if there is a change in the voting pattern of the persons who beneficially held shares of the company. Accordingly learned DR submitted that it is necessary to ascertain the beneficial ownership in the years in which loss was incurred and also in the years under consideration.

8. In the rejoinder, the learned AR explained that FHHPL is the holding company of FHL. He submitted that FHHPL holds 81.34% shares in FHL. Hiranandani Healthcare Pvt. Ltd. Hence, the ultimate beneficial owner in FHL is FHHPL only. Even if the voting share of FHL is increased by denting the voting share of FHHPL, yet the same would not affect beneficial ownership, since FHHPL is the ultimate beneficial owner. Accordingly he submitted that there is no change in the beneficial voting power in the instant case, as contemplated in the provisions of section 79 of the Act.

9. We heard the rival contentions and perused the record. There is no dispute with regard to the fact the assessee company is held by two shareholders, viz., FHL and FHHPL, both in the years in which losses were incurred and in the years in which the said accumulated losses are sought to be set off. A careful perusal of the section 79 would show that the said provision bars setting off brought forward losses if the shares of the company carrying not less than 51% of the voting power were not the beneficially held by the very same persons in the years in which the losses were incurred and the years in which the said loss was sought to be set off. The contention of the assessee is that the use of expression "persons" in section 79 of the Act would signify that the 'group of shareholders' in contrast to a single person. If the 51% of voting power is held by very same group of persons, then the provisions of sec. 79 would not be applicable, meaning thereby, the inter se change between the same

group will not be hit by sec.79 of the Act.

*10. In the instant case, we noticed that there are only two shareholders, viz., FHL and FHHPL. Both the above said shareholders, as a group, has beneficially held 51% of the 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 thereby, there is no change in the shareholding pattern of the group. We further noticed that the FHHPL is holding company of FHL. Hence, the increase in shareholding 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 the 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 shareholding of the shareholders would also attract provision of section 79 of the Act. Accordingly, we set aside the order passed by the learned CIT(A) on this issue and direct the Assessing Officer to allow set off brought forward losses both in A.Y. 2012-13 & 2013-14.*

6.5 As both the authorities below decided the issue qua brought forward losses, on the basis of assessment order passed for the AY 2012-13, which has been reversed by the Hon'ble Coordinate bench of the Tribunal in the decision referred to above and the Hon'ble Bench has **allowed set off of brought forward losses** by holding **that change in individual shareholding of the shareholders would also not attract the provisions of section 79 of the Act and therefore will not be applicable in the facts of the present case.**

6.6 Hence respectfully following the said decision of the Hon'ble Coordinate Bench, we are inclined to allow the claim of the Assessee qua setting off of the brought forward losses, consequently the same is allowed.

7. In the result, appeal filed by the Assessee stands allowed.

Order pronounced in the open court on 30-08-2023.

Sd/-

(B.R. BASKARAN)
Accountant Member

Dated: 30/08/2023

SK, Sr.PS.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

Sd/-

(N. K. CHOUDHRY)
Judicial Member

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai