

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E" MUMBAI**

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI S. RIFAUR RAHMAN (ACCOUNTANT MEMBER)**

**ITA No. 3914/MUM/2019
Assessment Year: 2014-15**

Dy. CIT-1(3)(2),
Room No. 540, 5th floor, Aayakar
Bhavan, M.K. Road,
Mumbai-400020

Appellant

Vs. Tril Roads Private Limited,
Elphinstone Building, 2nd floor,
10, Veer Nariman Road,
Mumbai-400 001

PAN No. AACCN 6123 G

Respondent

Revenue by : Mr. Vijay Kumar Menon, DR
Assessee by : Mr. Nitesh Joshi, AR

Date of Hearing : 02/06/2021
Date of pronouncement : 18/08/2021

ORDER

PER S. RIFAUR RAHMAN, A.M.

The present appeal is filed by the Revenue against the order of the Commissioner of Income Tax (Appeals)-3, Mumbai [in short 'CIT(A)'] for the assessment year 2014-15 dated 01.03.2019 and arises out of assessment completed u/s 143(3) of the Income Tax Act, 1961 (in short the Act)

2. Brief facts of the case are, the assessee filed its return of income on 29.11.2014 declaring total income at Rs. Nil after setting off brought forward loss of Rs. 4,98,10,718/- and declaring book profit u/s 115JB of Rs.

4,78,77,928/-. The case was selected for scrutiny and notices u/ 143(2) and 142(1) of the Act was issued and duly served on the assessee. In response, the Ld. AR of the assessee attended and filed the relevant information as called for.

The assessee is engaged in the business of investment advisory services as well as development of real estate and infrastructure projects. The Assessing Officer (AO) observed during the assessment proceedings that there has been a change in the shareholding pattern of the assessee during the assessment year 2014-15. When the assessee was asked to show cause as to why provisions of section 79 should not be applied and set off of brought forward losses be denied. In response, the assessee submitted the shareholding of assessee is as below :-

	31.03.2013		31.03.2014	
Name of the Company	No. of shares	%	No. of shares	%
Tata Realty and Infrastructure Ltd. (TRIL)	3,60,000	24%	1500000	100%
Actis Infrastructure Roads Ltd. (Actis)	360000	24%		
TRIL Highway Project Limited (THPL)	780000	52%		
Total	15,00,000	100%	15,00,000	100%

Shareholding of THPL as below as on 31.03.2013:

	31.03.2013	
Name of the Company	No. of shares	%
Tata Realty and Infrastructure Ltd. (TRIL)	6,15,000	78.85%
Actis Infrastructure Roads Ltd. (Actis)	1,65,000	21.15%
Total	7,80,000	100%

The assessee submitted that Tata Realty & Infrastructure Ltd. (TRIL) held 65% of shares in the assessee-company as on 31.03.2013 (before merger), 24% directly and 41% indirectly (78.85% of 52%) through THPL. It was submitted during this assessment year, THPL was merged with TRIL w.e.f. 01.04.2013 as

per Hon'ble Bombay High Court order dated 21.03.2014. As a result, of merger, THPL ceased to exist and the shares held by THPL in assessee-company were transferred to TRIL. It was submitted that in order to carry forward and set off loss against the income of the previous year u/s 79 of the Act has to have not less than 51% of the voting power on the last day of the previous year the shares of the company were held by persons who initially held shares of the company not less than 51% of the voting power on the last day of the year or years in which loss was incurred. In the present case, assessee submitted that TRIL held 65% of the shares in the company as on 31.03.2013 and 100% as on 31.03.2014. Therefore, there is no change in the control and management of the assessee during either of the years.

The Assessing Officer rejected the contentions of the assessee by strictly interpreting provisions of section 79 of the Act and observed that the contentions of the assessee that more than 51% of the shares were held by the TRIL in both the years and therefore, the restrictions in section 79 would not apply is devoid of merits and cannot be accepted. Accordingly, the claim of set off of brought forward losses were rejected by the AO.

3. Aggrieved with the order of the AO, the assessee preferred appeal before Ld. CIT(A) and filed detailed submissions. After considering the detailed submissions of the assessee, the Ld. CIT(A) allowed the appeal filed by the assessee with the following observations :

“7. I have carefully considered the facts of the case, contentions of the AO and the submissions of the appellant. The entire issue turns on an interpretation of Section 79 of the Act. Therefore, the said Section, as it then stood, bears reproduction:

79. 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-

(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 and shareholding 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 that nothing contained in this section shall apply, to to any change in the 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 amalgamating or demerged foreign company continue to be the shareholders of the amalgamated or the resulting foreign company.

(b) [Omitted by the Finance Act, 1988, w.e.f. 01.04.1989]

The case of the AO is that Section 79 applies, because there is a change in shareholding - earlier Tata Realty & Infrastructure Ltd was holding 24% of the shareholding in the years in which the losses were incurred, and during the year of set off. it owns 100% of the shareholding. The case of the appellant is That there is no change in the "voting power", because in the years of losses Tata Realty & Infrastructure Ltd held 78.85% of the capital of TRIL Highway Projects Ltd. and. therefore, effectively held a further 41%, over and above its own direct holding of 24% effectively constituting 65% of the "voting power". It is a fact that Section 79 nowhere refers to ownership or shareholding, but

invokes the concept of "voting power". From the said terminology, it appears that the Section does not intend to cover the case of a reorganization within the same group of companies, which is in consonance with the object behind Section 79, which is to prevent misuse by a new owner purchasing shares of a loss making company, only to avail of the benefit of the said losses. In my opinion, if you consider the words "voting power" and "beneficially held" as they appears in Section 79 of the Act, in that event Tata Realty & Infrastructure Ltd did beneficially hold more than 50% of the shares the appellant in the two years in which losses were incurred i.e. Assessment Years 2012-13 and 2013-14. Despite the merger between Tata Realty Infrastructure Ltd. TRIL Highway Prefects Ltd, Tata Realty & Infrastructure Ltd. did beneficially hold more than 51% of the of the "voting power" earlier it held 65% through 24% directly and 41% indirectly, and in the current year of set off it holds 100% of the "voting power". The three Directors of TRIL Highway Projects Ltd are also on the board of Tata Realty & Infrastructure Ltd.

It is necessary to consider the decisions relied upon by the appellant. In the case of CIT vs. Select Holiday Resorts (P) Ltd, the facts were that the assessee was a 98% subsidiary of a company called IIPL The shares of IIPL were fully held by four persons of the same family, who on account of the said shareholding had the control and management of IIPL. as well as the assessee. The holding company (IIPL) merged with the assessee (the subsidiary) as a result of which IIPL came to an end, and the shares of the assessee were allotted to the four family members, who were the earlier shareholders of IIPL.

The Delhi Tribunal in the said case held as under:

Now examining the present case, we find that IIPL was holding 98% of the shares of the assessee company. On the other hand, 100% shares of IIPL were held by four persons of the family who were having the control and management of the IIPL as well as of the assessee company. Because of the merger of IIPL into the assessee company, the former came to an end as a

result of which the shares of amalgamated company were allotted to the shareholders of IIPL. Thus, it is clear that there is no change in the management of the Company which remained with the same family (set of persons) who was earlier exercising control. The assessee submitted a list of directors on the Board of the two companies prior to merger as well as the directors on the Board of merged company. It remained in the same hands. Thus, the Ld. Commissioner of Income Tax (Appeals) is correct in holding that change in more than 51% was due to merger in two companies. There was no change in the part of the Ld. CIT(A)'s adjudication wherein he has referred the Circular No. 528 dated 16.12.88 and considered the case of the present merger as akin to death of share holder. He also held that in the case of death of a living person the shares held by him get transferred to his legal heirs. Similarly when existence of a company is legally finished, the benefit of assets held by it (including shares of other company) will pass on to its shares holders. Under the circumstances, we fully agree with the view of the Ld. Commissioner of Income Tax (Appeals) and do not find any infirmity or illegality in the order of the Ld. Commissioner of Income Tax (Appeals). Accordingly, we uphold the same.

Aggrieved by the decision of Delhi Tribunal, the Department filed an appeal before the Delhi High Court. The Delhi High Court reiterating the views of the Delhi Tribunal culled out the findings of the Tribunal on the said issue and, thereafter, stated in paragraph 3 of the judgment as under:

"So far as second question i.e. the applicability of Section 79 is concerned, it is evident that during the earlier period 98% of the assessee's shares were held by IIPL. The holding company was amalgamated with the assessee company. However, the shareholders of that holding company i.e. IIPL continued to be shareholders of the assessee company itself. The shareholders beneficially entitled to 98% of the shares continued to be the same. In these circumstances, the prohibition from carrying forward the losses, placed by Section 79 does not operate the other hand section 79(a) makes the provision consequently

inapplicable. The conclusions of the Tribunal in this regard are unexceptionable. For the above reasons no substantial question of law can be determined by the Court".

I find that the that the Appellant's case is also of change in shareholding on account of merger, the Income-tax Appellate Tribunal Delhi Bench in the case of which has been held to be akin to the death of a shareholder by the Delhi Tribunal and has been approved by the Delhi High Court. I agree with the view that transfer on account of merger is akin to transfer on account of death of Shareholder. Therefore, I am of the view that provisions of of section 79 would not apply in the present case.

Similarly, in CIT vs AMCO Power Systems Ltd. (379 ITR 375) (Kar.) the High Court has relied on the concept of "voting power" which is provided for in Section 79, referred to the fact that the intention is to deny benefit of set off to a new owner who may misuse the losses available in a company, and may purchase the company only for availment of the said losses. However, the provisions of Section 79 should not apply when the "voting power" does not change, inasmuch as there is a reorganization/transfer of shares within the same group whereby the beneficial holding exceeds 51% in the year of loss, as also in the year of set off. The High Court also drew strength from The observations of the Supreme Court in the case of CIT vs. Italindia Cotton Co. (P) Ltd. (174 ITR 160) while arriving at its decision, and ultimately decided the issue in favour of the assesses.

Considering the above decisions, and the relevant facts, I hold that the appellant is entitled to set off the business loss brought forward from earlier years, as the provisions of Section 79 are not triggered in its case Grounds of appeal nos. 1, 2 and 3 are allowed."

4. Aggrieved with the above order, the Revenue is in appeal before us and raised following grounds of appeal :

1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing set-off of brought forward loss from Business & Profession of Rs.4,98,10,718/- in AY 2014-15.
 2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing set off of brought loss from Business & Profession of Rs.4,98,10,718/-, ignoring the judgement of Hon'ble Delhi High Court in the case of M/s Yum Restaurants (India) Pvt. Ltd. v. Income Tax Officer (ITA No. 349 of 2015).
5. The Ld. DR brought to our notice, the fact and findings of Ld. AO/CIT(A) in their respective orders. He submitted that there is change in shareholding pattern and the shareholding pattern at the time of incurring losses and the shareholding pattern at the time of set off is different. The invoking of section 79 is justified in this case. He supported the findings of Ld. AO and prayed that the order of Ld. CIT(A) may be set aside.
6. On the other hand, the Ld. AR brought to our notice the findings of Ld. CIT(A) and he also relied on the case laws by the Ld. CIT(A). He submitted that the beneficial owner and voting power used in section 79 indicates, in order to invoke provisions of section 79 only voting power is relevant and not shareholding pattern. He submitted that after merger proceedings, the assessee has 100% voting power compared to 24% directly and 41% indirectly. The same directors continue to be directors after the merger. Therefore, there is no change in the voting power as existed prior to merger. In this regard, he relied in the case of Commissioner of Income Tax, Bangalore v. AMCO Power System Ltd. (62 taxmann.com 350), Mumbai Tribunal judgement BancTec TPS India Private Limited v. CIT (ITA No. 2336/Mum/2019) dated 04th September 2019) and Mumbai Tribunal judgment in case of Wadhwa & Associates Realtors (P.) Ltd. v. Assistant Commissioner of Income Tax, 9(3) Mumbai.

7. Considered the rival submissions and material placed on record. We notice that the shareholding pattern of the assessee company is comprised of Tata Realty and Infrastructure Ltd. (TRIL) 24%, Actis Infrastructure Roads Ltd. (Actis) 24% and TRIL Highway Projects Ltd. (THPL) 52%. We further noticed that as on 31.03.2013 TRIL was holding 78.85% of THPL and Actis 21.15%. Therefore, effectively TRIL was controlling and holding shares in the assessee-company directly 24% and indirectly 41%. Consequent to merger of THPL with TRIL during this assessment year as per the order of Hon'ble Bombay High Court dated 21.03.2014, the shares held by THPL is consequentially transferred to TRIL. Therefore, effectively there is no change as far as the voting pattern and beneficial ownership as far as shareholding pattern in the assessee-company as on 31.03.2013. The shareholding pattern of TRIL in assessee-company is effectively increased from 24% to 76%. Considering the fact that the assessee is a subsidiary of TRIL, Actis and THPL before merger and after merger still a subsidiary of TRIL. It was brought to our notice that as on 31.03.2014 TRIL holds 100% shares of the assessee-company. In our considered view, effectively there is no change in the management as well as voting rights in the assessee-company. The company TRIL controls whole management directly as well as indirectly at the time of incurring loss and controlling directly after merger. It is effectively, the whole companies engaged in the same type of business and part of same group. The whole group managed by the same set of Directors and shareholders.

7.1 Effectively, we noticed that the Department is in appeal against the order of Ld. CIT(A) and with the plea that the Ld. CIT(A) has ignored the judgment of the Hon'ble Delhi High Court in the case of Yum Restaurants India Pvt. Ltd. (ITA No. 349/2015).

8. On careful consideration of the above decision, we noticed that Yum Restaurants (India) Pvt. Ltd. (Yum India) is 100% subsidiary of Yum USA through a series of intermediary companies and Yum USA is the ultimate holding of company of Yum India and Yum Singapore. Due to internal restructuring in Yum Asia, this company was split up into two companies called Yum India and Yum Singapore. The assessee claimed the benefit u/s 79 with the submission that there is no change in the shareholding or voting rights in the newly formed companies since the ultimate holding company remained same. This proposition was rejected by the ITAT and the Hon'ble Delhi High Court with the observation that there was indeed a change of ownership of 100% shares from Yum Asia to Yum Singapore and Yum India, both of which were distinct entities. Although, they might be AEs of Yum USA, there is nothing on the record to show that there was any agreement or arrangement that the beneficial owner of such shares would be with the holding company, Yum USA.

8.1 In the above case, there was no arrangement or agreement between the holding company and subsidiary companies, and these companies existed in the different international jurisdictions. The new company Yum India was formed as distinct and independent company. But the case under consideration belongs to same group of companies and the shares were invested by the shareholders within the group companies. The holding company is one of the shareholders controlling the other sister's concern. The share pattern clearly indicates that the holding company controls the whole business. Therefore, the case relied by the revenue is distinguishable.

Moreover, the Yum USA, Yum India and Yum Singapore were formed in different jurisdiction and they are independent entities through series of

intermediaries whereas in the case of assessee, shareholders/investor are part of same management in one single jurisdiction.

9. The fact on record shows that TRIL is a holding company of assessee-company as well as THPL. Therefore, the position does not change before and after merger of THPL with TRIL. Effectively, TRIL was controlling and having beneficial ownership of 76% (directly 24% and indirectly 41%) before merger and 76% after merger. Therefore, in our considered view the case relied by the Revenue is distinguishable on facts.

After careful consideration of the findings of Ld. CIT(A) we do not see any reason to interfere with the findings of Ld. CIT(A) and accordingly we dismiss the grounds of appeal filed by the Revenue.

10. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open Court on 18/08/2021.

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 18/08/2021

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to:

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

BY ORDER,

//True Copy//

(Dy./Assistant Registrar)
ITAT, Mumbai