

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'डी', अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
“ D ” BENCH, AHMEDABAD

सर्वश्री एस.एस.गोदारा, न्यायिक सदस्य एवं प्रदीप कुमार केडिया, लेखा सदस्य के समक्ष ।
BEFORE SHRI S.S. GODARA, JUDICIAL MEMBER &
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No.1123/Ahd/2016
(निर्धारण वर्ष / Assessment Year : 2011-12)

CLP Power India Pvt.Ltd. 6 th Floor, Chanakya Building Off Ashram Road Ahmedabad-380 009	बनाम/ Vs.	The Dy.CIT(OSD) Range-1 Ahmedbad-380 015
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACP 6900 B		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से/ Appellant by :	S/Shri S.N. Soparkar & P.M. Mehta, ARs
प्रत्यर्थी की ओर से/Respondent by :	Shri Prasoon Kabra, Sr.DR

सुनवाई की तारीख / Date of Hearing	19/02/2018
घोषणा की तारीख /Date of Pronouncement	23/04 /2018

आदेश / O R D E R

PER PRADIP KUMAR KEDIA - AM:

The captioned appeal has been filed at the instance of the assessee against the order dated 02/03/2016 of the Commissioner of Income Tax-I, Ahmedabad [Pr.CIT in short] under s.263 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") concerning Assessment Year (AY) 2011-12.

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2. In this appeal, the assessee seeks to assail the action of the Pr.CIT in invoking section 263 of the Act and contends that the subject assessment orders framed under s.143(3) of the Act passed by the Assessing Officer (AO) cannot be termed as erroneous and prejudicial to the interests of the revenue.

3. The relevant facts in brief are that the assessment under s.143(3) of the Act for AY 2011-12 was completed by the AO vide its order dated 21/03/2014 determining the total loss at Rs.6,69,65,830/- after making certain adjustments to the loss declared by the assessee. Thereafter, the Pr.CIT in exercise of his revisionary power, issued notice under s.263 of the Act calling upon the assessee to show-cause as to why the assessment order passed under s.143(3) referred above should not be treated as erroneous and prejudicial to the interests of the revenue. The contents of show-cause notice is reproduced hereunder.

"In this case, Assessee was allowed to carry forward the business losses and unabsorbed depreciation allowance for set off against the future income. During the year, the Assessee Company transferred its holding of shares, in favour of GPEC Ltd., a fellow subsidiary of ultimate holding company CLP Holding Ltd., Hong Kong on 31-3-2011. As per the provisions of Section 79 of the Act, where a change in shareholding of more than 51 percent of the voting power on the last day of the year or years in which the loss was incurred has taken place in a previous year, 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. In the case of the Assessee, there is a change of share holding pattern took place in the A.Y. 2011-12 and such change in share holding pattern is more than 51%.

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Therefore, the loss incurred prior to such change took place is not allowed to be carried forward in view of the provisions of Section 79 of the Act. This being not done resulted into irregular allowance of carry forward of business losses for set off to the extent of Rs. 9,24,43,289 and consequent short levy of tax of Rs.2,77,35,986."

4. It was thus alleged by the Pr.CIT that examination of records revealed that the assessment order so passed is erroneous in so far as it is prejudicial to the interests of the revenue for the reason that the AO has failed to conduct requisite enquiry with respect to allowability of carry forward of loss incurred having regard to the provisions of section 79 of the Act owing to substantive change of shareholding pattern of assessee-company. It was observed by the Pr.CIT that the AO has wrongly accepted the claim of carry forward of business losses for set off to the extent of Rs.924.43 lakhs and consequent short levy of tax in the vicinity of Rs.277.35 lakhs. It was *inter alia* noted by the Pr.CIT that as per the tax audit report filed by assessee, it is manifest that there is a change in share holding of the assessee-company by more than 51% of the voting power during the previous year of change in shareholding pattern relevant to assessment year attracting the embargo placed in section 79 of the Act whereby loss incurred in any year prior to previous year shall not be allowed to be carried forward for set off in subsequent assessment year(s). The Pr.CIT alleged that the AO has failed to apply the correct position of law enjoined by section 79 of the Act and has overlooked and failed to make proper verification and enquiry in this regard. The Pr.CIT

accordingly cancelled the assessment framed under s.143(3) of the Act and set aside the above issue to the file of the AO for *de novo* adjudication.

5. Aggrieved by the action of the Pr.CIT, the assessee is in appeal before the Tribunal agitating the jurisdiction usurped by the Pr.CIT under s.263 of the Act.

6. The Ld.AR for the assessee at the outset submitted that the assessment order sought to be impugned under s.263 of the Act has been passed after taking into account relevant facts placed on record. On facts, the Ld.AR submitted that, in the present case, 100% shares of the assessee-company were held by CLP Power (GPEC) Limited, Mauritius. Thus, the assessee-company was fully owned subsidiary of the aforesaid company. During the year, the shares held by GPEC were transferred to CLP Power India Pvt.Ltd. who is again a fully owned subsidiary of the same holding company, namely CLP Power (GPEC) Limited, Mauritius. The Ld.AR accordingly submitted that one can see from the aforesaid transfer that the beneficial ownership continues with the same holding company despite transfer of shares of the assessee-company by the ultimate parent company to another wholly owned subsidiary company which in turn now holds shares of the assessee-company. The Ld.AR accordingly contended that in the absence of change in the 'beneficial'

ownership of shares, section 79 has no application on facts. It was thus submitted that the assessment order passed under s.143(3) is neither erroneous nor prejudicial to the interests of the revenue. The Ld.AR next submitted that the facts in issue are squarely covered by the decision of the Hon'ble Karnataka High Court in the case of CIT vs. AMCO Power Systems Ltd. reported at 379 ITR 379 (Kar.). The Ld.AR consequently submitted that the AO has taken a correct view in accordance with law and there is scope for any enquiry in this regard.

7. The Ld.DR, on the other hand, relied upon the order of the Pr.CIT in question and contended that despite the change in share hold pattern, the AO has omitted to examine the issue in the backdrop of section 79 of the Act which rendered its order to be both erroneous as well as prejudicial to the interests of the revenue. The Ld.DR referred to the decision of Hon'ble Supreme Court in the case of Daniel Merchants Pvt.Ltd. & Another vs. ITO in SLP No.23976/2017 order dated 29/11/2017 to submit that setting aside the order of the AO by the designated authority for the purposes of conducting proper enquiry into vital issue by invoking section 263 of the Act cannot be interfered. The Ld.DR accordingly submitted that the action of the Pr.CIT vs. 263 is in sync with authority of law on both the premises namely applicability of section 79 to the facts as well as lack of enquiry in this regard.

8. We have carefully considered the rival submissions and perused the orders of the authorities below and material placed on record. The supervisory jurisdiction conferred upon the Pr.CIT under s.263 of the Act has been invoked in the present case and the assessment order passed by the AO under s.143(3) for AY 2011-12 has been set aside on the ground that the business loss occurred prior to the change of share holding is not permissible to be carried forward for set off against future losses in view of the restrictions placed under s.79 of the Act. Consequently, the Pr.CIT quantified the irregular allowance of carry forward business loss as well as purported short levy of tax thereon. The Pr.CIT has also alleged that the assessment has been completed in a perfunctory manner endorsing the claim of carry forward of business losses for set off in future assessment year without conducting any enquiry necessitated in this regard in the light of section 79 of the Act.

9. To begin with, we shall examine the central issue as to whether the embargo placed under s.79 of the Act is applicable in the facts of the case or not. As pointed out, the 100% voting power was earlier held by the ultimate holding company GPEC Mauritius itself. The voting power (shareholding) of the assessee-company so held by the ultimate holding company was transferred to another company (CLP India Pvt.Ltd.) which is again a subsidiary of GEPC. Thus, in effect, even after the transfer of shares by the ultimate holding company to another subsidiary, the

beneficial ownership of the assessee-company continues to vest with the same holding company. Thus, the ultimate holding company continues to enjoy complete control over the assessee-company as before.

9.1. In the light of these facts, we have perused section 79 of the Act and notice that the aforesaid provision envisages “*not less than 51% of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less than 51% of the voting power*”. It is ostensible from the facts noted that the ultimate holding-company (previous shareholder holder) continues to command control over the assessee-company in the same manner as before albeit indirectly and through another subsidiary company.

9.2. The purpose of section 79 of the Act is implicit. It seeks to curtail misuse of benefit of carry forward and set off of business losses of earlier years of a company and prohibits its availability in the hands of any new owner. In the instant case, it is manifest that no such misuse can be inferred since the beneficial ownership did not change hands.

9.3. Interestingly, we also take note of the expression “held” used in section in distinction to the expression “owned”. Needless to say, the expression held is far more elastic to cover the situation whereby if a person is found capable of influencing the voting rights to the extent of

specified percentage (51%), section 79 will not be triggered. Therefore, while the legal ownership might have changed, the ownership/control/voting power of the assessee-company continues to be beneficially held by the same owner. This inevitably means that the cause for issuance of notice under s.263 ceases to exist.

10. In view of the discussion noted above, we find considerable merits in the plea on behalf of the assessee that section 79 has not application in the absence of change in beneficial voting power. This being so, we see no error in the order of the AO on this score. This apart, once these facts were brought to the notice of Pr.CIT, the Pr.CIT ought to have appreciated the case of the assessee objectively in perspective and could not shrink his sacrosanct obligations and resort to simply set aside a completed assessment on non-existent ground. Thus, the prerequisites of section 263 are not satisfied.

11. We also do not visualize any merit in the plea on behalf of the Revenue about the lack of enquiry on the factual aspects. In the absence of any change in the beneficial ownership, we are unable to comprehend the nature of enquiry sought by the Pr.CIT in this regard. Hence, we are disposed to hold that the action of the Pr.CIT is devoid of sanction of law. Consequently, the order passed under s.263 of the Act by the Pr.CIT is required to be cancelled. We do so accordingly.

9. In the result, appeal of the assessee is allowed.

This Order pronounced in Open Court on 23/ 04/2018

Sd/-
(एस.एस.गोदारा)
न्यायिक सदस्य
(S.S. GODARA)
JUDICIAL MEMBER

Ahmedabad; Dated 23/ 04/2018

टी.सी.नायर, व.नि.स./T.C. NAIR, Sr. PS

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

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

आदेशानुसार/ BY ORDER.

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad