



## Tax Insights

2 March 2023

### Revision under section 263 is not tenable where issue was examined during assessment proceedings – Provisions of section 79 cannot be invoked, where ultimate beneficial shareholder remains the same – Mumbai bench of the Tribunal

#### In brief

In a recent ruling<sup>1</sup>, the Mumbai bench of the Income-tax Appellate Tribunal (Tribunal) quashed the Principal Commissioner of Income-tax's (PCIT) revisionary order under section 263 of the Income-tax Act, 1961 (the Act) on the ground that the tax officer (TO) had taken a plausible view after enquiry and verification.

Tribunal further held that where beneficial shareholding remains same and/or no set-off of losses have been claimed or allowed, section 79 of the Act cannot be invoked.

#### In detail

##### Facts

- The taxpayer, an Indian company, had filed its return of income for the assessment year 2017–18 declaring tax losses.
- The TO completed the assessment under section 143(3) of the Act by making certain additions under section 36(1)(va) of the Act, and reducing the loss claimed by the taxpayer in its return.
- From the records, PCIT noticed that:
  - As on 31 March 2016, 75% of the shares of the taxpayer was held by A Co. and the balance 25% of the shares was held by B Co., which was the ultimate holding company;
  - However, on 31 March 2017, 99.99% shares of the taxpayer were held by B Co. and no shares were held by A Co.
- Considering that there was a substantial change (>51%) in the shareholding pattern of the taxpayer as on 31 March 2017, the PCIT held that the taxpayer cannot utilise its brought forward business loss of the preceding assessment years on account of section 79 of the Act.
- The PCIT passed an order invoking Explanation 2(a) to section 263(1) of the Act, setting aside the TO's order by holding the same to be erroneous and prejudicial to the interest of the revenue, on the ground that the TO failed to conduct all enquiries.

<sup>1</sup> ITA No. 930/Mum/2022

### Taxpayer's contentions

- The PCIT did not take into consideration that B Co., the ultimate holding company, controlled the voting power of the taxpayer, both before and after the change in shareholding, during the year. Accordingly, the provisions of section 79 of the Act were not applicable.
- No 'set-off' of brought forward losses was claimed by/ allowed to the taxpayer, therefore provisions of section 79 of the Act were not applicable.
- The changes in the shareholding pattern were duly disclosed to and considered / accepted by the TO during assessment proceedings. Thus, the order passed by the PCIT by invoking Explanation 2(a) to section 263(1) was bad in law and was liable to be quashed.

### Tribunal's ruling

- The TO had conducted enquiry into the issues flagged by the PCIT and had taken a plausible view, since 'no set-off' of brought forward loss has been claimed by the taxpayer, the order cannot be termed as erroneous.
- PCIT has wrongly concluded that the TO did not conduct any enquiry on the issues flagged by him during the assessment proceedings.
- When beneficial ownership is with ultimate holding company, loss cannot be disallowed.
- Explanation 2(a) to section 263 of the Act cannot be invoked while passing order under section 263 of the Act, if the same was not invoked at the time of issuing notice.
- Accordingly, the TO's order was neither erroneous nor prejudicial to the interest of the revenue, and hence the order passed by the PCIT was to be quashed.

### The takeaways

- This ruling re-emphasises the principle that the revision proceedings under section 263 of the Act cannot be invoked where an assessment has been concluded by the TO after due consideration of the facts/ submission made by taxpayers on an issue.
- The present ruling reconfirms the non-applicability of section 79 of the Act in cases where ultimate beneficial owner remains the same. The ruling also held non-applicability of section 79 of the Act on the fact that no set-off of losses were claimed by the taxpayer.

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