

## **No denial of set-off of losses if holding co. transferred its shareholding of assessee-co. to another subsidiary co.**

**Summary – The Ahmedabad ITAT in a recent case of CLP Power India (P.) Ltd., (the Assessee) held that where holding company of assessee transferred its entire shareholding in assessee company to another subsidiary company, in view of fact that in such a case beneficial ownership of assessee-company continued to vest in its ultimate holding company, provisions of sec. 79 placing restrictions in respect of carry forward and set off of losses incurred in previous years against profits of subsequent years would not apply to assessee's case**

### **Facts**

- For relevant year, the assessment order in case of assessee was passed under section 143(3). Subsequently, the Commissioner noticed that there was a change in shareholding of the assessee-company by more than 51 per cent of the voting power during the previous year and thereby attracting the embargo placed in section 79 whereby loss incurred in any year prior to previous year would not be allowed to be carried forward for set off in subsequent assessment year(s).
- The Commissioner opined that the Assessing Officer had failed to apply the correct position of law enjoined by section 79 and had overlooked and failed to make proper verification and enquiry in this regard. He thus passed a revisional order setting aside the assessment.
- On appeal:

### **Held**

- The supervisory jurisdiction conferred upon the Commissioner under section 263 has been invoked in the present case and the assessment order passed by the Assessing Officer under section 143(3) has been set aside on the ground that the business loss occurred prior to the change of shareholding is not permissible to be carried forward for set off against future losses in view of the restrictions placed under section 79. Consequently, the Commissioner quantified the irregular allowance of carry forward business loss as well as purported short levy of tax thereon. The Commissioner 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.
- To begin with, it is necessary to examine the central issue as to whether the embargo placed under section 79 is applicable in the facts of the case or not. As pointed out, the 100 per cent 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 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 continued to vest with the same holding company. Thus, the ultimate holding company continues to enjoy complete control over the assessee-company as before.

- It is ostensible from the facts noted that the ultimate holding-company (previous shareholderholder) continues to command control over the assessee-company in the same manner as before *albeit* indirectly and through another subsidiary company.
- The purpose of section 79 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.
- Interestingly, one may 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 per cent), 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 section 263 ceases to exist.
- Thus, there is considerable merit in the plea of the assessee that section 79 has not application in the absence of change in beneficial voting power. This being so, there is no error in the order of the Assessing Officer on this score. This apart, once these facts were brought to the notice of the Commissioner, he 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.
- In the absence of any change in the beneficial ownership, one is unable to comprehend the nature of enquiry sought by the Commissioner in this regard. Hence, it is held that the action of the Commissioner is devoid of sanction of law. Consequently, the order passed under section 263 by the Commissioner is required to be cancelled.
- In the result, appeal of the assessee is allowed.