


Tax Insights**15 September 2021****Applicability of section 79 of the Act denied where there is no change in voting power and beneficial ownership – Mumbai bench of the Tribunal****In brief**

The Mumbai bench of Income-tax Appellate Tribunal (Tribunal) denied the applicability of section 79 of the Income-tax Act, 1961 (the Act), where voting power and beneficial ownership effectively remained the same. Furthermore, the Tribunal distinguished the Delhi High Court's decision¹, relied upon by the Revenue, from the facts of the present case.

In detail**Facts**

- As on 31 March 2013, A Co. held 24% shares, B Co. held 24% shares, and C Co. held 52% of the shares in the taxpayer.²
- A Co. held 78.85% shares and B Co. held 21.15% shares in C Co. Effectively, A Co. owned 65% shares (in aggregate) in the taxpayer, i.e. 24% directly and 41% (78.85% of 52%) indirectly through C Co.
- During assessment year (AY) 2014-15, C Co. was merged into A Co., resulting in the transfer of shares held in taxpayer to A Co. As on 31 March 2014, A Co. owned 100% of the taxpayer's shares.
- According to the taxpayer, since A Co. held 65% of shares as on 31 March 2013 and 100% as on 31 March 2014, the provisions of section 79 of the Act will not come into play. This is so because there was no change in the voting pattern and beneficial ownership, the set-off of brought forward losses was claimed while filing the income-tax return for AY 2014-15.
- The Tax Officer alleged that there was a change in the shareholding pattern during the said AY and accordingly denied the claim of brought forward losses by invoking the provisions of section 79 of the Act.

¹ Yum Restaurants India Private Limited v. ITO [2016] 66 taxmann.com 47 (Delhi)

² ITA No. 3914/MUM/2019

Tribunal's ruling

- According to the Tribunal, section 79 of the Act was not triggered in the fact pattern as:
 - A Co. was effectively controlling and holding majority stake prior to the merger (24% directly and 41% indirectly) as well as post-merger.
 - There is no effective change in the management or the voting power in the taxpayer.
 - The whole group was managed by the same set of Directors and shareholders.
- The Tribunal distinguished the Delhi High Court's decision¹, relied upon by the Revenue, on the following grounds:
 - There was no express arrangement to substantiate that Yum USA was the beneficial owner of shares, whereas in the present case, the share pattern indicates that the holding company (A Co.) controls the business.
 - Yum Asia and Yum Singapore were distinct and independent entities whereas A Co. owned both C Co. and the taxpayer, i.e. the same group of companies.
 - Yum USA, Yum India, and Yum Singapore was formed in different jurisdictions and they are independent entities through a series of intermediaries, while in the present case, the companies are part of the same management in a single jurisdiction.

The takeaways

Applicability of section 79 of the Act on intra group restructuring has been a matter of debate in several cases and there are conflicting High Court and Tribunal rulings on the issue. Distinguishing the decision of the Delhi High Court¹ and in line with the judgment of the Karnataka High Court³, the Mumbai bench of the Tribunal has laid emphasis on the importance of the aspect of change in effective voting power to trigger provision of section 79 of the Act.

While the decision¹ of the Delhi High Court has been distinguished, applicability of section 79 of the Act in such restructuring would continue to be litigated until the view attains finality before the Supreme Court of India. This ruling has been pronounced based on specific facts, and its reliance may need to be evaluated on a case-to-case basis.

³ CIT v. AMCO Power Systems Limited [2015] 379 ITR 375 (Karnataka)

Our Offices

Ahmedabad 1701, 17 th Floor, Shapath V, Opp. Karnavati Club, S G Highway, Ahmedabad – 380051 Gujarat +91-79 3091 7000	Bengaluru 6 th Floor Millenia Tower 'D' 1 & 2, Murphy Road, Ulsoor, Bengaluru – 560 008 Karnataka +91-80 4079 7000	Chennai 8 th Floor Prestige Palladium Bayan 129-140 Greams Road Chennai – 600 006 Tamil Nadu +91 44 4228 5000
Hyderabad Unit – 1, 8 th Floor, Octave Block E2, Parcel – 4, Salarpuria Knowledge City, Raidurg, Hyderabad – 500081 Telangana +91-40 44246000	Kolkata 56 & 57, Block DN. Ground Floor, A- Wing Sector - V, Salt Lake Kolkata – 700 091 West Bengal +91-033 2357 9101/ 4400 1111	Mumbai PwC House Plot No. 18A, Guru Nanak Road (Station Road), Bandra (West), Mumbai – 400 050 Maharashtra +91-22 6689 1000
Gurgaon Building No. 10, Tower – C 17 th & 18 th Floor, DLF Cyber City, Gurgaon – 122002 Haryana +91-124 330 6000	Pune 7 th Floor, Tower A - Wing 1, Business Bay, Airport Road, Yerwada, Pune – 411 006 Maharashtra +91-20 4100 4444	For more information Contact us at pwctr.knowledgemanagement@in.pwc.com

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