IN THE INCOME TAX APPELLATE TRIBUNAL
Mumbai "H" Bench, Mumbai.

Before Shri B.R. Baskaran (AM) & Shri Narender Kumar Choudhry (JM)

I.T.A. No. 3240/Mum/2022 (A.Y. 2012-13)
I.T.A. No. 204/Mum/2023 (A.Y. 2014-15)

Hiranandani Healthcare Private limited Mini Sea Shore Road, Sector 10A Vashi, Navi Mumbai-400 703. PAN : AABCH5894D	Vs.	CIT (A)/ National Faceless Appeal Centre, Delhi
(Appellant)		(Respondent)

Assessee by	Shri Sukhsagar Syal & Shri Atul Suraiya
Department by	Smt. Madhumalti Ghosh
Date of Hearing	24.07.2023
Date of Pronouncement	27.07.2023

O R D E R

Per Bench :-

Both the appeals filed by the assessee are directed against the orders passed by the learned CIT(A), National Faceless Appeal Centre, Delhi and they relate to A.Y. 2012-13 & 2014-15. Both the appeals were heard together and are being disposed of by this common order, for the sake of convenience.

2. In both the appeals the assessee is contesting the decision of the tax authorities in rejecting the claim for set off brought forward losses by applying provisions of section 79 of the I.T. Act. In A.Y. 2012-13 the assessee is also contesting the addition of Rs. 27 crores made under section 68 of the Act.

3. The facts relating to the case are stated in brief. The assessee is engaged in providing health care services. The shareholders of the assessee

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company are M/s. Fortis Healthcare Limited (FHL) and M/s. Fortis Healthcare Holdings Pvt. Limited (FHHPL). Both the above said shareholders were holding 40% and 60% of shares respectively as on 1.4.2011. During the year ending on 31.3.2012 relating to A.Y. 2012-13, the assessee issued 30 Lakhs equity shares having face value at Rs.10/- each with a premium of Rs.90/- per share (totaling to Rs.100/- per share) to FHL. As a result, there was a change in share holding pattern between both the shareholders, i.e., the holding of FHL increased to 85%, while holding of FHHPL got reduced to 15%. It is pertinent to note that the assessee was having accumulated losses remaining to be set off as on 1.4.2011.

4. The Assessing Officer took the view that the above said change in shareholding pattern between two shareholders, referred above, would be hit by provisions of section 79 of the Act, which bars carry forward of losses, if any, if there is a change in shareholding pattern as mentioned in section 79 of the Act. Accordingly, the Assessing Officer held that the assessee is not entitled to carry forward and set off of accumulated loss available with the assessee as on 31.3.2011. Accordingly, he rejected the claim for set off of brought forward losses both in A.Ys. 2012-13 & 2014-15. The learned CIT(A) also confirmed the same

5. We heard both the parties on this issue and perused the record. The above said issue revolves around Section 79 of the Act. Hence we extract below the relevant portion of the provisions of sec.79(1) of the Act:-

> **Carry forward and set off of losses in case of certain companies.**
>
> "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 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

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than fifty-one per cent of the voting power on the last day of the year or years in which the loss was incurred"

6. It is the contention of the learned AR that the provisions of section 79 would be applicable only if the shares of the company carrying not less than 51% of the voting power beneficially held by "certain persons" were transferred to "other persons". He submitted that the expression "persons" used in the above said section would refer to a 'group of persons', meaning thereby, not less than 51% of the voting power should be held by same group of persons as at the end of the year in which loss sought to be set off and also in the year in which loss was incurred. The Learned AR further submitted that, in the instant case, not less than 51% of the voting power was held by very same two shareholders in the year(s) of incurring losses and also in the years in which the said loss was sought to be set off. He submitted that ratio of voting power inter-se the two shareholders has under gone change in the years under consideration due to issue of fresh shares to FHL. He submitted that the provisions of section 79 of the Act will not be applicable in case of change in the voting pattern between the persons falling in the same group. Accordingly, the learned AR contended that the tax authorities are not justified in applying the provisions of sec.79 of the Act to the facts of the present case and in rejecting the claim of set off of brought forward losses.

7. The Learned DR, on the contrary, submitted that the provisions of section 79 of the Act will be applicable if there is a change in the voting pattern of the persons who beneficially held shares of the company. Accordingly learned DR submitted that it is necessary to ascertain the beneficial ownership in the years in which loss was incurred and also in the years under consideration.

8. In the rejoinder, the learned AR explained that FHHPL is the holding company of FHL. He submitted that FHHPL holds 81.34% shares in FHL.

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Hence, the ultimate beneficial owner in FHL is FHHPL only. Even if the voting share of FHL is increased by denting the voting share of FHHPL, yet the same would not affect beneficial ownership, since FHHPL is the ultimate beneficial owner. Accordingly he submitted that there is no change in the beneficial voting power in the instant case, as contemplated in the provisions of section 79 of the Act.

9. We heard the rival contentions and perused the record. There is no dispute with regard to the fact the assessee company is held by two share holders, viz., FHL and FHHPL, both in the years in which losses were incurred and in the years in which the said accumulated losses are sought to be set off. A careful perusal of the section 79 would show that the said provision bars setting off brought forward losses if the shares of the company carrying not less than 51% of the voting power were not the beneficially held by the very same **persons** in the years in which the losses were incurred and the years in which the said loss was sought to be set off. The contention of the assessee is that the use of expression "persons" in section 79 of the Act would signify that the 'group of shareholders' in contrast to a single person. If the 51% of voting power is held by very same group of persons, then the provisions of sec. 79 would not be applicable, meaning thereby, the inter se change between the same group will not be hit by sec.79 of the Act.

10. In the instant case, we noticed that there are only two shareholders, viz., FHL and FHHPL. Both the above said shareholders, as a group, has beneficially held 51% of the voting power in both the years, i.e., the year in which loss was incurred and the year in which the loss was sought to be set off, meaning thereby, there is no change in the shareholding pattern of the group. We further noticed that the FHHPL is holding company of FHL. Hence, the increase in shareholding of FHL in the assessee company, in any case, would not result in the change in the voting power of the shareholders. Accordingly, we find merit in the contentions of the learned AR that the

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provisions of section 79 will not be applicable in the facts of the present case. Hence, we are not able to agree with the view expressed by the tax authorities that the change in individual shareholding of the shareholders would also attract provision of section 79 of the Act. Accordingly, we set aside the order passed by the learned CIT(A) on this issue and direct the Assessing Officer to allow set off brought forward losses both in A.Y. 2012-13 & 2013-14.

11. The other issue urged in A.Y. 2012-13 relates to the addition made under section 68 of the Act. We noticed earlier that the assessee has issued 30 lakhs equity share of Rs. 10/- with a premium of Rs.90/- per share, i.e., at a total price of Rs. 100/- each during the year relevant to AY 2012-13. In this process, the assessee received share premium of Rs. 27 crores. The Assessing Officer noticed that the accumulated loss as on 31.3.2012 in the hands of the assessee stood at Rs. 58.60 crores. Accordingly, he took the view that the share premium collected by the assessee on the above said issue of shares is not commensurate with the overall financial position of the assessee company. Hence, the Assessing Officer asked the assessee to justify the share premium received by it and also proposed to assess the share premium as revenue receipt.

12. In response to the above said query, the assessee submitted that the share premium can be assessed as income, only under the provisions of section 56(2)(viib) of the I.T. Act, which was inserted by the Finance Act 2012 w.e.f. 1.4.2013. Hence, the provisions of section 56(2)(viib) shall be applicable w.e.f. A.Y. 2013-14 only. Accordingly, it was submitted that the share premium cannot be assessed as income of the assessee in AY 2012-13, since sec. 56(2)(viib) is applicable from AY 2013-14 only. The assessee further submitted that the share premium has been collected on the basis of the valuation report prepared by M/s. Vinod Sunil & Company, CAs, who had valued the shares of the assessee company under “Discounted cash flow” (DCF) method. The share value arrived at Rs. 97.74 per share by the valuers.

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Hence the assessee has issued shares @ Rs.100/- per share which included premium amount of Rs.90/- per share. Accordingly, the assessee contended that the premium collected by it is justified.

13. The Assessing Officer, however, did not accept the above said explanations given by the assessee. He took the view that the share premium collected by the assessee requires to be examined under the provisions of section 68 of the Act. The Assessing Officer took the view that the assessee has not offered proper explanations with regard to nature and source of share premium received by it. Accordingly he assessed the share premium amount of Rs. 27 crores as unexplained cash credit under section 68 of the Act.

14. The learned CIT(A) also took the view that the charging of premium of Rs.90/- per share, when assessee company was running into a huge loss would put the commercial expediency in question. Accordingly, he confirmed the addition made under section 68 of the Act.

15. We heard the parties on this issue and perused the record. We notice that the assessing officer has invoked the provisions of sec.68 of the Act for assessing the share premium amount as income of the assessee, since the provisions of sec.56(2)(viib) (which taxes share premium amount collected in excess of fair value) was inserted from the succeeding assessment year AY 2013-14. It is pertinent to note that the assessee has issued shares to its existing share holder only. Further, the AO has not doubted the par value of Rs.10/- per share collected by the assessee, but assessed share premium amount only doubting the eligibility of the assessee to collect share premium at Rs.90/- per share. We notice that the Ld CIT(A) has also observed that the commercial expediency of the decision in collecting high share premium is put into question in view of huge accumulated losses. Thus, both the tax authorities have actually expressed the view that the share premium of

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Rs.90/- is not justified in view of the accumulated losses. However, the fact remains that the assessee could collect the premium of Rs.90/- on the basis of valuation done under Discounted Cash Flow method, which takes into consideration future cash inflows. However, the tax authorities have given importance to past losses. Be that as it may, ultimately, the discussions made by the tax authorities and assessee has boiled down to the quantum of share premium collected.

16. Under these set of facts, it is required to be examined as to whether the provisions of sec.68 could be invoked by the assessing officer? The provisions of sec.68 would be attracted when the assessee fails to prove the identity of the creditor, credit worthiness of the creditor and genuineness of transactions. The examination u/s 68 of the Act has to be with reference to the creditor who has given money to the assessee. We notice that there is no doubt in the mind of tax authorities about the three ingredients mentioned above in respect of share premium amount of Rs.27 crores collected from FHL, i.e, the AO has seems to have accepted that the FHL has the capacity and credit worthiness to subscribe to the shares. The addition has been made only on the ground that the assessee has failed to substantiate the share premium @ Rs.90/- per share, i.e., the capacity of the assessee to charge high share premium is being questioned by the tax authorities. In our considered view, the above said question would not be covered by the provisions of sec.68 of the Act, since we have noticed earlier the provisions of sec 68 would be directed towards the creditor only. Accordingly, we are of the view that the tax authorities are not justified in assessing share premium amount u/s 68 of the Act. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete the addition of Rs.27 crores made u/s 68 of the Act.

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17. In the result, both the appeals of the assessee are allowed.

Pronounced in the open court on 27.7.2023.

Sd/-	Sd/-
(Narender Kumar Choudhry)	(B.R. Baskaran)
Judicial Member	Accountant Member

Mumbai.; Dated : 27/07/2023

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//

(Assistant Registrar)
ITAT, Mumbai

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