

ITAT: Beneficial shareholding remained unaltered in Sodexo's intra-group share-transfer; Sec.79 inapplicable

Feb 24, 2023

Sodexo India Services Private Limited [TS-79-ITAT-2023(Mum)]

Conclusion

Mumbai ITAT quashes revision of Sodexo India's (Assessee) assessment initiated on the basis that the Assessee brought forward the losses of Rs.12.05 Cr. despite change in its shareholding beyond 51%; Holds that since the Assessee was assessed at a loss in regular assessment for AY 2017-18, it did not utilise the brought forward losses, thus the question of invoking Section 79 is not sustainable; Also observes that despite the change in shareholding pattern the ultimate French holding company remained the beneficial shareholder, thus, brought forward loss cannot be disallowed; ITAT remarks that the change in shareholding pattern was duly disclosed in audit report and even AO inquired about the change in shareholding, thus, observes, *"When the issue flagged by the Ld.PCIT has already been enquired into and discussed as per details submitted by the assessee and has taken a plausible view particularly in the face of the fact that "no set off" of brought forward loss has been claimed by the assessee during the year under consideration, the assessment order cannot be termed as erroneous under section 263 of the Act."* The change in shareholding pattern that triggered the revision occurred during the relevant previous year whereby the shareholding of Sodexo France SA increased from 25% to 99.99% whereas the shareholding of Sodexo Services Asia Pte. Ltd. reduced to zero; While allowing Assessee's appeal, ITAT also observes that PCIT invoked Explanation 2(a) to Section 263 while passing the revisionary order but the Explanation was not invoked while issuing the notice, thus, holds the invocation of Explanation 2(a) to be against the settled legal principles:ITAT Mum

Decision Summary

The ruling was delivered by the Division Bench of ITAT Mumbai comprising Shri Kuldip Singh, Judicial Member and Shri Gagan Goyal, Accountant Member

Advocate Dr. Sunil Moti Lala appeared for the Assessee while the Revenue was represented by Mr. Satyapal Kumar

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G", MUMBAI**

**BEFORE SHRI KULDIP SINGH (JUDICIAL MEMBER)
AND
SHRI GAGAN GOYAL (ACCOUNTANT MEMBER)**

I.T.A No.930/Mum/2022
(Assessment Year 2017-18)

Sodexo India Services Private Limited, 1 st Floor, Gemstar Commercial Complex, Ramchandra Lane Ext., Kanchpada, Malad (West) Mumbai 400 064 PAN : AAACR2547Q	vs	PCIT, Mumbai-5, Circle 13(2)(2) Room No.515, 5 th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400 020
APPELLANT		RESPONDENT

Assessee represented by	Shri Sunil Moti Lala
Department represented by	Shri Satyapal Kumar

Date of hearing	20/01/2023
Date of pronouncement	23/02/2023

ORDER

PER : KULDIP SINGH : JM

Appellant, Sodexo India Services Private Limited [hereinafter referred to as the 'assessee'] by filing the present appeal sought to set aside the impugned order dated 28/03/2018 passed by the Principal Commissioner of Income-tax, Mumbai-5, Mumbai (hereinafter referred to as the 'Ld.PCIT') invoking revisionary jurisdiction contained under

section 263 of the Income-tax Act, 1961 (in short, referred to as 'the Act') qua the assessment order for Assessment Year 2017-18, on the effective ground interalia that:-

"The Appellant most humbly raises the following grounds of appeal which are independent of and without prejudice to one another.

1.] On the facts and in the circumstances of the case and in law, the learned Principal Commissioner of Income-tax (PCIT) erred in passing the Order under Section 263 of the Income Tax Act, 1961 (the Act) setting aside the Assessment Order passed under Section 143(3) of the Act by wrongly holding the same to be erroneous in so far as it is prejudicial to the interest of the revenue without appreciating that the said assessment order was neither erroneous nor prejudicial to the interests of the revenue. Consequently, the order passed u/s 263 of the Act is without jurisdiction, bad in law and liable to be quashed.

2.] The Learned PCIT failed to appreciate that the provisions of Section 79 of the Act were not applicable to the case of the appellant. Further, the learned PCIT failed to appreciate that Sodexo SA, France being the ultimate holding company of the appellant controlled the voting power of the appellant both, prior to change in shareholding during the year and also after the change in shareholding & thus, the provisions of Section 79 of the Act were not applicable. Consequently, the order passed u/s 263 of the Act for invoking the provisions of Section 79 of the Act is bad in law and liable to be quashed.

3.] The learned PCIT failed to appreciate that no set off of loss had been claimed by /allowed to the appellant in respect of carried forward business losses in the assessment order passed u/s 143(3) of the Act for and hence, there was no prejudice caused to the revenue. Thus, assumption of jurisdiction under Section 263 of the Act is bad in law and, consequently the order passed u/s 263 of the Act is without jurisdiction, bad in law and liable to be quashed.

4.] The learned PCIT failed to appreciate that the appellant had categorically submitted during the assessment proceedings u/s 143(3) of the Act for AY 2017-18 that the provisions of Section 79 of the Act was not applicable which were considered and accepted by the AO & that the said view apart from being correct is nevertheless a possible view. Thus, the order passed u/s 263 of the Act by invoking Explanation 2 thereto to revise the assessment order passed u/s 143(3) of the Act is without jurisdiction, bad in law and liable to be quashed; even more so since the said Explanation has not been invoked in the . notice issued u/s 263 of the Act.

5.] The learned PCIT failed to appreciate that the provisions of Section 79 of the Act were not applicable to the case of the appellant. Further, the learned PCIT failed to appreciate the relevant provisions of the Double Taxation Avoidance Agreement (DTAA) between India and France and particularly Article 26 therein consequent to which the provision of section 79 of the Act were not applicable to the case of the appellant.

6.] The learned PCIT erred on facts and in law in directing the learned Assessing Officer to initiate proceedings for levying penalty under Section 270A of the Act.

7.] On the facts and in the circumstances of the case and in law, the learned PCIT erred in passing impugned order u/s 263 of the Act without providing the Appellant with sufficient and adequate opportunity and in breach of the principles of natural justice and in arriving at conclusions therein based on incorrect factual averments/legal inferences without considering/appreciating the facts of the case and the submissions made by the Appellant and therefore, the said order passed u/s 263 of the Act is bad in

law and liable to be quashed or alternatively set aside after expunging the findings/directions of the learned PCIT"

2. Briefly stated, facts necessary for consideration and adjudication of the controversy at hand are that the assessment on the basis of original return filed by the assessee declaring total loss at Rs.1,19,90,092/- was completed under section 143(3) of the Act at the total loss of Rs. 71,65,790/- by making addition of Rs.48,24,302/- on account of disallowance under section 36(1)(va) of the Act.

3. From the record, Ld.PCIT noticed that 75% and 25% of the shares of the assessee company were held by Sodexo Services Asia Pte Ltd and Sodexo S.A., France, respectively. However, on 31/02/2017 former share holder held no shares whereas the latter one held 99.99% shares of the assessee company. Noticing that there was a substantial change (more than 51%) in shareholding pattern when compared to the shares held on 31/03/2016, as per provisions contained under section 79 of the Act, the assessee company cannot set off its brought forward business loss of preceding assessment years to the tune of Rs.12,05,10,296/-, which made the assessment order passed under section 143(3) dated 06/12/2019 erroneous insofar as it is prejudicial to the interest of the Revenue. Declining the contentions raised by the assessee, Ld.PCIT set aside the assessment order passed under section 143(3) on the ground that the Assessing Officer has failed to conduct all enquiries which made the assessment order erroneous insofar as it is prejudicial to the interest of the Revenue.

4. We have heard the Ld.DR for the Revenue, perused the order passed by learned lower authorities and material available on record in the light of law applicable thereto.

5. Before proceeding further, we would extract, for ready perusal, notice issued by Ld.PCIT under section 263, which is as under:-

GOVERNMENT OF INDIA
 MINISTRY OF FINANCE
 INCOME TAX DEPARTMENT
 OFFICE OF THE PRINCIPAL COMMISSIONER OF INCOME TAX
 PCIT, MUMBAI-5

To, SODEXO INDIA SERVICES PRIVATE LIMITED 1ST FLOOR.GEMSTAR COMMERCIAL COMPLEX . RAMCHANDRA LANE EXTENSION,KANCHPADA,MALAD WEST Mumbai MUMBAI 400064 , Maharashtra India	
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PAN/TAN: AAAC4R2547Q	A.Y. 2017-18	DIN & Notice No : ITBA/REV1/2021- 22/1039076972(1)	Dated: 25/01/2022
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NOTICE FOR THE HEARING

M/s/Mr/Mrs

Subject: Notice for Hearing in respect of Revision proceedings u/s 263 of the INCOME TAX ACT, 1961 – Assessment Year 2017-18.

In this regard, a hearing in the matter is fixed on 01/02/2022 at 12:20 PM. You are requested to attend in person or through an authorized representative to submit your representation, if any alongwith supporting documents / information in support of the issues involved (as mentioned below). If you wish that the Revision proceeding be concluded on the basis of your written submissions / representations filed in this office, on or before the said due date, then your personal attendance is not required. You also have the option to file your submission from the e-filing portal using the link: incometaxindiaefiling.gov.in

Sub: Notice u/s 263 of the Income-tax Act, 1961 in your case for
 A.Y. 2017-18.reg.

In the instant case, the return was filed on 29.11.2017 declaring loss of Rs.1,19,90,092/-. The case was selected for scrutiny under CASS. The assessment u/s 143(3) was completed with a loss of Rs.71,65,790/- on 06.12.2019.

2. On perusal of case records, it is seen that 75% and 25% of the shares of the company were held by Sodexo Services Asia Pte Ltd and Sodexo S.A.. France respectively. However, on 31.03.2017, the former share holder held no shares, whereas the latter one held the whole shares of the assessee company. Further, it was also seen from the Tax Audit Report that the company had brought forwarded business loss of Rs.7,59,14,780/- for the assessment year (AY) 2014-15, Rs.2,35,00,110/- for the AY 2015-16 and Rs.2,10,95,397/- for the A.Y.2016-17.

3. It can be seen that during the year under consideration, there was a substantial change in share holding pattern when compared to the share held on 31.03.2016. As such, it attracts provisions of section 79 of income Tax Act, 1961. Therefore, in view of the factual position and provision of the Act stated above, the assessee company cannot utilize its total brought forwarded business loss of Rs.12,05,10,296/-, which resulted in potential tax effect of Rs.3,61,53,089/-.

4. As such, the assessment order is erroneous as section 79 of income Tax Act, 1961 was applicable since there was a change in Share pattern. Hence, the order passed u/s. 143(3) on 06.12.2019 is erroneous and prejudice to the interest of revenue, within the meaning of Sec.263 of the Act.

5. In this connection, you are hereby given an opportunity of being heard and your case is fixed for hearing on **01.02.2022 at 12:30PM.**, On that day, you may file submission online through ITBA or you may attend before the undersigned, either in person or through your authorized representative. In case of non-compliance on the stipulated date and time, it will be presumed that you have no objection to the proposed revision of the orders passed by the Assessing Officer u/s. 143(3) on 06.12.2019, as discussed above.

6. Undisputedly, Ld.PCIT, after noticing the shareholding pattern of Sodexo Services Asia Pte Ltd and Sodexo S.A., France to the tune of 75% and 25% respectively invoked the provisions contained under section 79 of the Act and reached the conclusion that there was a substantial change in shareholding pattern when compared to the shares held on 31/03/2016, the assessee company cannot utilize its total brought forward business loss of Rs.12,05,10,296/- which resulted in potential tax effect of Rs.3,61,53,089/- and thereby set aside the assessment order passed by the Assessing Officer under section 143(3) of the Act

being erroneous insofar as it is prejudicial to the interest of the Revenue.

7. However, Ld.AR for the assessee challenging the impugned order contended inter alia that no 'set off' of brought forward losses has been claimed by the assessee during the year under consideration; that there is no tax impact on the impugned assessment; that enquiries have been carried out by the Assessing Officer during the assessment proceedings and plausible view has been taken that Sodexo S.A., France is the ultimate holding company; that factum of the changes in the shareholding pattern has been duly disclosed in the tax audit report with ultimate power for voting share is same in the earlier years as well as in the year under consideration. However, on the other hand, the Ld.DR for the Revenue relied upon the order passed by Ld.PCIT.

8. We have perused the assessment order passed under section 143(3) of the Act framed on the basis of return of income filed by the assessee declaring business loss of Rs.1,19,90,092/- which was framed by determining loss at Rs.71,65,790/-. It is undisputed fact on record that "no set off" of business loss having incurred for the earlier years, which carried forward from earlier years has been claimed or allowed in the assessment by virtue of the impugned assessment order. In these circumstances, question of invoking provisions contained under section 79 of the Act vis-à-vis the change in shareholding during the year is unwarranted hence, not sustainable. So we are of the considered view that there is no error whatsoever in the impugned assessment order set aside by the Ld.PCIT.

9. Further more, the Ld.AR for the assessee drew our attention towards notice issued by the Assessing Officer during the assessment proceedings under section 142(1) of the Act requesting various details which is available at pages 74 – 82 of the paper book wherein a pertinent question has been put to the assessee that “There is substantial increase in share capital during the year, please furnish name and address of person who has invested in share capital”. Similarly, in another notice issued under section 142(1) AO put a question as to the “substantial increase in share capital during the year under consideration” and in response thereto, the assessee has duly replied, which has also been extracted at pages 3 to 9 of the impugned order passed by Ld.PCIT.

10. When the issue flagged by the Ld.PCIT has already been enquired into and discussed as per details submitted by the assessee and has taken a plausible view particularly in the face of the fact that “no set off” of brought forward loss has been claimed by the assessee during the year under consideration, the assessment order cannot be termed as erroneous under section 263 of the Act.

11. Furthermore, it is brought to the notice of the Bench that factum of changes in the shareholding pattern has been duly disclosed by the assessee in its tax audit report (Form 3CA / 3CD) in the year under consideration available at pages 35 to 71 of the paper book. We have perused the tax audit report particularly, page 50 of the paper book wherein pertinent question flagged by Ld.PCIT before the AO has been replied with as under:-

32	b	Whether a change in shareholding of the company has taken place in the previous year due to which the losses incurred prior to the previous year cannot be allowed to be carried forward in terms of section 79.	No
32	c	Whether assessee has incurred any loss referred to in section 73A in respect of any specified business during the previous year	No

12. Furthermore, when we have examined the reply filed by the assessee to the notice issued under section 143(1) of the Act at pages 85 to 89, again assessee explained the issue flagged Ld.PCIT before the AO as under:-

“As per Sr.No.32(b) of Form 3CD, There is no change in share holding of the company has taken place in the previous year due to which the losses incurred prior to the previous year can be allowed o be carried forward in terms of Section 79.”

13. The Ld.AR for the assessee also brought on record the fact that ultimate power for voting share was the same with the assessee company as in the year years as well as in the year under consideration and drew our attention towards page 204 of the paper book 211 to 212 in the Notes to financial statements available at page 211 details of shareholding more than 5% of the company is given as under:-

“d. Details of shareholding more than 5% shares in the Company

	As at March 31, 2016		As at March 31, 2015	
	No. of shares	%	No. of shares	%
Equity shares of Rs.10 each fully paid Sodexo S.A. France	5000.000	25	5000.000	25
Sodexo	15,000.000	75	15000.000	75

Services Asia Pte Ltd				
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So, ultimate holding company was Sodexo SA, France. Moreover, when beneficial ownership is with ultimate holding company, loss cannot be disallowed. However, in the instant case, no such loss was claimed by the Assessee.

14. In view of what has been discussed above, we are of the considered view that the Ld.PCIT has proceeded on wrong premise that the Assessing Officer has failed to do and did not conduct any enquiry qua the issue flagged by him. In this regard, while passing order under section 263 Ld.PCIT has also invoked the provisions contained under section 263(1) Explanation 2 (a) without invoking the said Explanation in the notice itself. It is settled principle of law that when Explanation 2 to section 263(1)(a) has not been invoked in the notice issued under section 263, the same cannot be applied to pass order under section 263 of the Act.

15. In view of the matter, we are of the considered view that Assessing Officer has passed the assessment order after enquiry and due verification on the basis of submissions and details furnished by the assessee by taking plausible view. Hence, assessment order is neither erroneous nor prejudicial to the interest of the revenue. Resultantly, impugned order passed by the Ld.PCIT being not sustainable in the eyes of law, is ordered to be quashed.

16. Consequently, the appeal filed by the assessee is hereby allowed.

Order pronounced in the open court on

Sd/-

sd/-

(GAGAN GOYAL)	(KULDIP SINGH)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dt : 23.02.23

Pavanan

प्रतिलिपि अग्रेषित Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि.,
मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

Asstt. Registrar / Senior Private Secretary
ITAT, Mumbai