

## **ITAT: Quashes revisionary order disallowing set off of accumulated losses u/s 79; Follows Karnataka HC AMCO Power ruling**

**Nov 23, 2021**

Bechtel France SAS [TS-1057-ITAT-2021(Mum)]

### **Conclusion**

Mumbai ITAT allows Assessee's appeal, holds Assessee eligible for set off of accumulated losses despite the change in its shareholding due to internal restructuring since the ultimate control over the Assessee remained unchanged; Follows Karnataka HC ruling in [AMCO Power](#) favourable to the Assessee over Delhi HC ruling in [Yum Restaurants](#) relied upon by CIT for revising the assessment; Assessee-Company (Bechtel France SAS), incorporated in France, is engaged in the business of procurement and construction with a project office at Mumbai and site offices at Jamnagar and Hazira to build a grass root refinery and petrochemicals complex for Reliance Petroleum Ltd./Reliance Industries Ltd.; Assessee was assessed for AY 2014-15 u/s 143(3) r.w. Section 144C which was revised by the CIT u/s 263 on the basis that AO lost the sight of a change in the shareholding w.e.f. from Jan 1, 2014 as 99.99% shares of the Assessee held by BNT International Corporation were transferred to another group company Bechtel Limited, thus, CIT held that the Assessee was not entitled to set-off the accumulated loss of Rs.26.92 Cr. against its income for AY 2014-15 under the provisions of Section 79 by following Delhi HC ruling in *Yum Restaurants*; On Assessee's appeal, ITAT notes that the ultimate holding company i.e., Bechtel Group Inc. remained the same despite the transfer of shares, thus, the ultimate control over the Assessee remained with same shareholders after the transfer of shares and it was merely a case of an internal restructuring; Thus, holds that the provisions of Section 79 restraining the allowability of the benefit of carry forward and set-off of business losses would not come into play; Relies on Karnataka HC ruling in *AMCO Power* where it was held that where control of an assessee company remains with the holding company even after the change in the shareholding, the provisions of Section 79 denying the benefit of carry forward of losses do not get triggered; Notes that both *Yum Restaurants* and *AMCO Power* rulings are of non-jurisdictional HCs and contrary to one another, relies on Bombay HC ruling in [Siemen's India](#) as per which the Revenue is obligated to take a view which favours the Assessee; Holds that since the Revenue has taken a possible and plausible, CIT cannot alter it by exercising the revisionary powers u/s 263; Thus, quashes the revisionary order and restores the assessment order.:ITAT Mum

### **Decision Summary**

The ruling was delivered by the Division Bench of Mumbai ITAT comprising Shri Pramod Kumar, Vice President and Shri Ravish Sood, Judicial Member.

Advocate Sunil M. Lala appeared for the Assessee while the Revenue was represented by Mr. Sunil Kumar Jha, DR.

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "I" MUMBAI****BEFORE SHRI PRAMOD KUMAR (VICE PRESIDENT) AND  
SHRI RAVISH SOOD (JUDICIAL MEMBER)****ITA No.830/MUM/2021  
(Assessment Year: 2014-15)**

M/s Bechtel France SAS C/o. Deloitte Haskins And Sells LLP, 28 <sup>th</sup> Floor, Tower 3, Indiabulls Finance Centre, Senapati Bapat Marg, Elphinstone (West) Mumbai – 400 013	Vs.	Deputy Commissioner of Income Tax (International Taxation), Range 1(2)(2), Room No. 1811, 18 <sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai – 400 021
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**PAN No. AAACB2195A****(Assessee)****(Revenue)**

Assessee by	:	Shri Sunil M. Lala, A.R
Revenue by	:	Shri Sunil Kumar Jha, D.R
Date of Hearing	:	09/11/2021
Date of pronouncement	:	12/11/2021

**ORDER****PER RAVISH SOOD, J.M:**

The present appeal filed by the assessee is directed against the order passed by the Commissioner of Income Tax (International Taxation)-1, Mumbai (for short 'CIT') u/s 263 of the Income Tax Act, 1961 (for short 'Act'), dated 25.03.2021, which in turn arises from the order passed by the A.O u/s 143(3) r.w.s 144C(3), dated 02.02.2018. The assessee has assailed the impugned order on the following grounds before us:

**"1. Grounds of appeal in relation to validity of Order u/s 263**

1. On the facts and circumstances of the case and in law, Learned Commissioner of Income Tax, International Tax, Range 1, Mumbai (hereinafter "Ld. CIT") has erred in passing the Order dated 25 March 2021 u/s. 263 of the Income-tax Act, 1961 ("hereinafter referred to as the Act").
2. On the facts and circumstances of the case and in law, the Ld. CIT has erred in holding that the order passed by the Learned Joint Commissioner of Income-tax (hereinafter referred to as 'Ld. AO') u/s. 143(3) read with section 144C of the Act

was erroneous and prejudicial to the interests of revenue and, has, thereby erred in revising the same u/s 263 of the Act.

3. On the facts and circumstances of the case and in law, the Appellant submits that the Order passed by the Ld. AO was neither erroneous nor prejudicial to the interest of the revenue and, hence, the revision of the same by the Ld. CIT u/s 263 of the Act is erroneous and bad in law.
4. On the facts and circumstances of the case and in law, the Appellant prays that the impugned order passed by Ld. CIT u/s 263 of the Act, setting aside order passed by the Ld. AO u/s 143 read with section 144C of the Act, is to be struck down and the order u/s 143(3) read with section 144C passed by Ld. AO be restored.

Without prejudice above grounds of appeal in Sr. No 1 to 4 above, appellant submits below grounds of appeal.

**II. Denial of carry forward of business losses pursuant to the provisions of Section 79 of the Act**

5. On the facts and circumstances of the case and in law, the Ld. CIT has erred in observing that the Appellant is not entitled to carry forward and set off of the business losses of INR 26,92,22,927/- pertaining to earlier years in the current assessment year (i.e. AY 2014-15) by applying the provisions of section 79 of the Act and has directed the AO to examine this further.
6. The Appellant submits that considering the facts and circumstances of the case and the law prevailing on the subject, the provisions of Section 79 are not applicable in the instant case and the stand taken by the Ld.CIT is not in accordance with the law.
7. The Appellant submits that it should be allowed to set-off the brought forward losses against its total income for the year under consideration.

The appellant craves leave to add, alter, amend, substitute and/or modify or withdraw in any manner whatsoever all or any of the foregoing grounds of appeal at or before the hearing of the appeal.”

2. Shorn of unnecessary details, the assessee company, viz. Bechtel France SAS, a company incorporated in France and engaged in the business of procurement and construction had set up a project office at Mumbai with site offices at Jamnagar and Hazira to build a grass root refinery and Petrochemicals Complex for Reliance Petroleum Ltd./Reliance Industries Ltd. Original assessment was framed by the A.O vide his order passed u/s 143(3) r.w.s 144C(3), dated 02.02.2018, wherein the income of the assessee was determined at Rs.2,56,16,730/- under the normal provisions and u/s 115JB at an amount of Rs.28,61,62,533/-.

3. After the culmination of the assessment proceedings, it was observed by the CIT that there was a change in the shareholding of the assessee company from 1<sup>st</sup> January, 2014 i.e from BNT International Corporation to Bechtel Limited. It was observed by the CIT, that though pursuant to the aforesaid change in the shareholding the assessee company as per Sec. 79 of the Act was not entitled to set-off its brought forward losses against its income for the previous year under consideration, however, the A.O losing sight of the said material fact had summarily allowed the assessee's claim for set-off of the brought forward losses of Rs.26,92,22,927/- against its income for the year under consideration. Backed by his aforesaid observations, the CIT being of the view that the order passed by the A.O was rendered as erroneous insofar it was prejudicial to the interest of the revenue, thus, issued a 'Show cause' notice u/s 263 of the Act, therein calling upon the assessee to explain as to why the order passed by the A.O u/s 143(3) r.w.s 144C(3), dated 02.02.2018 may not be revised on the aforesaid count. In reply, the assessee tried to impress upon the CIT that as its aforesaid claim which was in order had been accepted by the A.O while framing the assessment after necessary deliberations, therefore, the same could not be revised u/s 263 of the Act. However, the CIT not finding favour with the claim of the assessee, therein, inter alia drawing support from the judgment of the Hon'ble High Court of Delhi in the case of Yum Restaurants (India) Pvt. Ltd. [TS 5118-HC-2016 (New Delhi)-O] concluded, that the assessee pursuant to the change in its shareholding was as per Sec. 79 of the Act not entitled to set-off the brought forward accumulated business losses of the earlier years against its income for the year under consideration. Accordingly, the CIT held the order passed by the A.O u/s 143(3) r.w.s 144C(3), dated 02.02.2018 as erroneous insofar it was prejudicial to the interest of the revenue and set-aside the same to his file with a direction to call for and examine the shareholding pattern of the assessee

company prior to & post transfer of the equity shares and therein arrive at a logical conclusion qua the applicability of the provisions of Sec. 79 of the Act.

4. Aggrieved, the assessee has assailed the order passed by the CIT u/s 263 of the Act, dated 25.03.2021 in appeal. Before us, it was the claim of the Id. Authorized Representative (for short 'A.R') for the assessee that the CIT had traversed beyond the scope of his jurisdiction and revised the order passed by the A.O u/s 143(3) r.w.s 144C(3), dated 02.02.2018. Elaborating on his aforesaid contention, it was submitted by the Id. A.R that the CIT in exercise of his revisional jurisdiction u/s 263 had sought to dislodge the assessee's claim for set-off of the brought forward losses which was as per mandate of law and had been accepted by the A.O only after necessary deliberations in the course of the assessment proceedings. In order to buttress his aforesaid claim, it was submitted by the Id. A.R that as despite the change in the shareholding pattern of the assessee company its beneficial ownership continued to vest in its ultimate holding company, viz. Bechtel Group Inc; therefore the restrictions qua the carry forward and set-off of losses incurred by the assessee company in the previous years against its profit and gains of the subsequent years as contemplated in Sec. 79 of the Act were not applicable. In support of his aforesaid contention the A.R had relied on the order of the ITAT, Mumbai in the case of the Banc Tec TPS India (P) Ltd. Vs. PCIT [(2019) 111 taxmann.com 321 (Mumbai – Tribunal)] and the order of the ITAT, Ahmedabad in the case of CLP Power India (P) Ltd. vs. DCIT [(2018) 93 taxmann.com 326 (Ahmedabad –Tribunal)]. Apart from that, it was submitted by the Id. A.R that as the aforesaid claim of the assessee which was as per the mandate of law had been accepted by the A.O while framing the assessment after necessary deliberations, therefore, the CIT was clearly divested of his jurisdiction to revise the order qua the issue in hand. Also, in support of his aforesaid claim that the provisions of Sec.79 of the Act were not applicable to the case of the assessee company, the Id. A.R had relied on the

judgment of the Hon'ble High Court of Karnataka in the case of CIT Vs. Amco Power Systems Ltd. (2015) 62 Taxmann.com 350 (Kar).

5. Per contra, the Id. Departmental Representative (for short 'D.R') relied on the order passed by the CIT u/s 263 of the Act. It was submitted by the Id. D.R that as the A.O had not deliberated on the provisions of Sec.79 of the Act, and not conducted any inquiry qua the set-off of the brought forward losses of the previous year against its income for the year under consideration, therefore, the CIT had rightly invoked his revisional jurisdiction and passed the order u/s 263 of the Act.

6. We have heard the Id. Authorized Representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them to drive home their respective contentions. Admittedly, it is a matter of fact borne from the record that M/s BNT International Corporation i.e the immediate holding company of the assessee which was holding 99.99% of the shares of the assessee company had sold all of the said shares to its fellow subsidiary company, viz. Bechtel Ltd. Accordingly, during the year under consideration there had been a change in the shareholding of the assessee company i.e from one Bechtel Group Company to another Bechtel Group Company. However, as the ultimate holding company i.e Bechtel Group Inc. remained the same, thus, the ultimate control over the assessee company remained with same shareholders post transfer of the shares as it was a mere case of an internal restructuring. Be that as it may, we are of the considered view that as Bechtel Group Inc. i.e the ultimate holding company of the assessee, despite the change in the shareholding in the assessee company from BNT International Corporation to Bechtel Ltd. i.e from one group company to another group company, had, however, by virtue of being the holding company continued to control the voting power of the assessee company, thus, the provisions of Sec.

79 of the Act restraining the allowability of the benefit of carry forward and set-off of business losses would not come into play in the case before us. Our aforesaid conviction is as per the mandate of the judgment of the Hon'ble High Court of Karnataka in the case of CIT, Bangalore Vs. Amco Power Systems Ltd. (2015) 379 ITR 375 (Kar). In the said case, the Hon'ble High Court finding favour with the claim of the assessee that the shareholding pattern is distinct from the voting power of the company, observed, that though the shareholding of the holding company was reduced to 6% during the year in question, however, by virtue of being the holding company and, considering the fact that its another subsidiary company held 45% shares in the assessee company its voting power could not be said to have been reduced to less than 51%. On the basis of its aforesaid observations the Hon'ble High Court concluded that the provisions of Sec. 79 contemplating the denying of benefit of carry forward of losses would not be attracted in the case of the assessee before them. In sum and substance, it was observed by the Hon'ble High Court that as the control of the assessee company before them remained with the holding company as the change in the shareholding had not resulted in reduction of its voting power to less than 51%, therefore, the provisions of Sec.79 denying the benefit of carry forward of losses to the assessee company would not come into play. The Hon'ble High Court while concluding as hereinabove had observed as under:

"16. The Tribunal, after accepting the submission of the assessee, held that 51% of the voting power was beneficially held with the ABL during the assessment years 2002-03 and 2003-04 also, and would thus be entitled to carry forward and set-off of business losses for the previous years.

17. The fact that ABL is the holding Company of APIL, which is the wholly owned subsidiary of ABL and that Board of Directors of APIL are controlled by ABL, is not disputed. The submission of the learned counsel for the respondent assessee that the shareholding pattern is distinct from voting power of a Company, has force. Section 79 of the Act specifies that "not less than 51% of the voting power were beneficially held by persons who beneficially held shares of the Company carrying not less than 51% of the voting power." Since the ABL was having complete control over the APIL, which is the wholly owned subsidiary of ABL, in our view, even though the shareholding of ABL may have reduced to 6% in the year in question, yet by virtue of being the holding Company, owning 100% shares of APIL, the voting power of ABL cannot be said to have been

reduced to less than 51%, because together, both the companies had the voting power of 51% which was controlled by ABL.

17A. The purpose of Section 79 of the Act would be that benefit of carry forward and set-off of business losses for previous years of a company should not be misused by any new owner, who may purchase the shares of the Company, only to get the benefit of set-off of business losses of the previous years, which may bear profits in the subsequent years after the new owner takes over the Company. For such purpose, it is provided under the said Section that 51% of the voting power which was beneficially held by a person or persons should continue to be held, then only such benefit could be given to the Company. As we have observed above, though ABL may not have continued to hold 51% shares, but Section 79 speaks of 51% voting power, which ABL continued to have even after transfer of 49% shares to TAFE, as it controlled the voting power of APIL, and together, ABL had 51% voting power. Meaning thereby, the control of the company remained with ABL as the change in shareholding did not result in reduction of its voting power to less than 51%."

Now, in the present case before us, the CIT in support of his contention that pursuant to the change in the shareholding pattern the assessee company was not entitled to set-off its brought forward losses of the previous years against its income for the year under consideration had drawn support from the judgment of the Hon'ble High Court of Delhi in the case of Yum Restaurants (India) Pvt. Ltd. [TS 5118-HC-2016 (New Delhi)-O], wherein a view contrary to that of the Hon'ble High Court of Karnataka in the case of CIT, Bangalore Vs. Amco Power Systems Ltd. (2015) 379 ITR 375 (Kar) was arrived at by the High Court. In the backdrop of the aforesaid conflicting judgments of the non-jurisdictional High Court's, we are of the considered view, that as held by the Hon'ble High Court of Bombay in the case of K. Subramanian & Anr. Vs. Siemen's India Ltd. & Anr. (1985) 156 ITR 11 (Bom), the A.O was obligated to take a view which was in favor of the assessee and not against him. Backed by the aforesaid facts involved in the case of the assessee before us read a/w the aforesaid position of law, we are of the considered view that no infirmity arises from the order of the A.O whose view qua the issue in question is in conformity with the judgment of the Hon'ble High Court of Karnataka in the case of Amco Power Systems Ltd. (supra), which being a view favourable to the assessee, he was obligated to follow as per the judgment of the Hon'ble jurisdictional High Court in the case of Siemen's India Ltd. & Anr.



(supra). Be that as it may, we are of a strong conviction that as the A.O while framing the assessment had taken a possible and a plausible view with respect to the issue under consideration i.e the entitlement of the assessee company to set-off its brought forward losses of the previous years as against its profits for the year under consideration, therefore, on the said count itself the CIT was divested of his jurisdiction to have revised the assessment order u/s 263 of the Act. We, thus, in terms of our aforesaid deliberations are unable to sustain the order passed by the CIT u/s 263 of the Act, dated 25.03.2021 and quash the same; and restore the order passed by the A.O u/s 143(3) r.w.s 144C(3), dated 02.02.2018. The Grounds of appeal Nos. 1 to 7 are allowed in terms of our aforesaid observations.

7. Resultantly, the appeal filed by the assessee is allowed in terms of our aforesaid observations.

Order pronounced in the open court on 12.11.2021

Sd/-  
(Pramod Kumar)  
VICE PRESIDENT

Sd/-  
(Ravish Sood)  
JUDICIAL MEMBER

Mumbai;

Dated: 12.11.2021

PS: Rohit

**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//

(Sr. Private Secretary)  
**ITAT, Mumbai**