24 September 2025

Case Law of TOP FM Ltd vs MRA/ARC

We wish to shed light on the recent judgement issued by the Supreme Court of Mauritius in the case of TOP FM Ltd (the respondent), the Assessment Review Committee (ARC) (the co-respondent) v/s the Director-General (DG) of the MRA (the appellant) [2025 SCJ 412].

FACTS:

An amalgamation occurred in 2018 between TOP FM and its related company, Skywave Ltd. The latter had unrelieved tax losses to carry forward post the amalgamation.

In our article entitled **Tax Treatment of Losses under the Mauritius Income Tax Act** (https://www.dtos-mu.com/wp-content/uploads/2023/10/2023-10-05_Tax-treatment-of-Loss-in-Mauritius.pdf), the ARC judgment was highlighted whereby TOP FM was eligible to claim the carry forward of losses solely as per the provisions relating to change in shareholding, It was established that the amalgamation did not give rise to any change in ultimate shareholding which in turn justified the claim of the carry forward losses.

ISSUE:

The MRA was not satisfied with the ARC's ruling and the matter was appealed before the Supreme Court. The core contention revolved around whether the ARC erred in law in finding that TOP FM Ltd was entitled to claim the losses of Skywave Ltd pursuant to section 59A of the ITA?

SUBMISSIONS:

Appellant:

The rule of thumb is that specific provisions relating to amalgamation under section 59A of the Income Tax Act, that is, ''Transfer of loss on takeover or merger'', should prevail in lieu of the general provisions relating to change in shareholding under section 59 when dealing with the same subject matter.

The MRA concluded that neither the amalgamated companies were manufacturing entities nor any Minister's approval was granted for the carry forward of losses and submitted that the carry forward of losses post amalgamation was inappropriate.

Respondent:

One of the main arguments was around the fact that the amalgamation did not alter the property, rights, powers, and privileges availed by Skywave Ltd within a legal context, notably as per the

Companies Act 2001. It was held that TOP FM was eligible to the carry forward of the unrelieved tax losses post amalgamation, as part of such legal rights.

The respondent averred that the specific provisions under section 59A purports to be restricted to companies within manufacturing sectors. Regulation 19(5) was equally cited to further substantiate the eligibility of the claim of the carry forward losses.

Co-Respondent:

The ARC, in its determination, adopted the Hansard laws to adjudicate that the objective of section 59 was meant to apply solely to manufacturing companies.

COURT'S DECISION:

Ratio Decidendi:

In case of a takeover, merger or amalgamation, the strict conditions laid down under section 59A are purely relevant as opposed to section 59.

The Court was "*unable to read into section 250(5) of the Companies Act a right to claim tax losses upon amalgamation as part of the "liabilities and obligations" of the amalgamating company. Nor are unclaimed losses "property, rights, powers and privileges" of an amalgamating company''.*

The determination of the ARC was set aside.

Our observations

Section 59A (Transfer of Loss on Takeover or Merger) is a relatively new provision compared with the general loss carry forward provision of section 59 and was added to the Income Tax Act by Finance Act 2003, subsequently amended by Finance Act 2005 (to add Merger) and later amended by Finance Act 2016 (to add Takeover or Transfer of Undertaking deemed to be in the public interest).

It is our understanding that before the coming into effect of section 59A, that is before the year of assessment 2003/2004, the law allowed the carry forward of a company's tax losses in a commercially driven restructuring involving a merger or takeover, if the merger or takeover did not result in a change of more than 50% in the ultimate shareholding of the company (refer to Regulation 19(5) and 19(6)(a) of the Income Tax Regulations 1996, which are reproduced hereunder:

'' (5) For the purposes of section 59(b) of the Act, where a company claims to carry forward to an income year any loss incurred by it in any former income year, the claim shall not be allowed unless the Director-General is satisfied that:

(a) at the end of each of those income years not less than 50 per cent in nominal value of the allotted shares in the company was held by or on behalf of the same persons; and

(b) where the company has paid-up capital at the end of each of those income years, not less than 50 per cent of the paid-up capital at the end of each of those income years was held by or on behalf of the same persons.

(6) For the purposes of this regulation:

(a) shares in one company held by or on behalf of another company shall be deemed to be held by the shareholders in the last-mentioned company)''

It is our view that the intention of the legislature when introducing section 59A in 2003 was to safeguard employment by allowing the acquirer(*) to take advantage of the tax losses of the acquiree(**) (notwithstanding that there is a change in shareholding of more than 50% if the acquirer agrees to take over the employees of the acquiree).

In our humble opinion, when introducing section 59A, it could not have been the intention of the legislature to deny a company of its right to carry forward tax losses in a situation where there is no change in the ultimate shareholding of the company. However, it is worth noting that section 59A starts with the wording '' Notwithstanding the other provisions of this Act''. Would this mean that section 59A would take precedence over section 59 in any instances of takeovers or mergers where the change in ultimate ownership is less than 50% as specified in Regulation 19(5) and 19(6)(a), or should section 59 still apply in its initial and overarching intent?

We would welcome the views of our readers on the subject matter.

Definition of acquirer and acquiree as per section 59A:

*''acquiree'' means a company of which the assets and liabilities have been acquired by another company through a takeover or merger;

** ''acquirer'' means a company which has acquired the assets and liabilities of another company by means of a takeover or merger.

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