

आयकर अपीलीय अधिकरण, मुंबई “ एल” खंडपीठ
Income-tax Appellate Tribunal -“K”Bench Mumbai
सर्वश्री राजेन्द्र,लेखा सदस्य एवं, राम लाल नेगी, न्यायिक सदस्य
Before S/Shri Rajendra,Accountant Member and Ram Lal Negi,Judicial Member
आयकर अपील सं./I.T.A./7032/Mum/2013,निर्धारण वर्ष /Assessment Year: 2007-08

Asstt. Director Income tax (Intl taxation)- Range- 1(2) Room No.119, 1st Floor, Scindia House NM Road, Ballard Pier Mumbai-400 038.	Vs.	M/s. Citibank Overseas Investment Corporation c/o.,Deloitte Haskins & Sells CA.s Tower-3, 28 th Floor, Indiabulls Finance Centre,Elphinstone Mill Compound, Senapati Bapat Marg,Mumbai-400 013. PAN:AABCC 5333 N
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

आयकर अपील सं./I.T.A./7418/Mum/2013,निर्धारण वर्ष /Assessment Year: 2007-08

M/s. Citibank Overseas Investment Corporation,Mumbai-400 013.	Vs.	Asstt. Director Income tax (Intl taxation)- Range- 1(2),Mumbai-400 038.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

C.O. No.21/Mum/15

M/s. Citibank Overseas Investment Corporation,Mumbai-400 013.	Vs.	Asstt. Director Income tax (Intl taxation)- Range- 1(2),Mumbai-400 038.
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(अपीलार्थी /Appellant)

(प्रत्यर्थी / Respondent)

Revenue by: Shri Jayant Kumar-CIT-DR

Assessee by: Shri Arvind V. Sonde

सुनवाई की तारीख / Date of Hearing: 16.10.2017

घोषणा की तारीख / Date of Pronouncement: 05.01.2018

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य, राजेन्द्र के अनुसार /PER RAJENDRA, AM-

Challenging the order dated 13/9/13 of CIT(A)-15,Mumbai the assessee and the Assessing Officer(AO)have filed the cross appeals for the year under consideration.The assessee had also filed cross objection .Assessee, a non-resident-company ,is a 100% subsidiary of M/s. Citibank,NA USA.It filed its return of income on 30/10/2011 disclosing Nil income. The AO completed assessment u/s. 143(3) r.w.s.144C(3) of the Act determining income at Rs.Nil. However,loss returned by the assessee was reduced.

ITA No/7418/Mum/13

2.First Effective Ground of appeal,raised by the assessee,is about loss on cancellation/roll - over of Forward Foreign Exchange Contract (FFEC).During the assessment proceedings the AO found that the assessee had entered into International Transactions(IT.s)with its Associate Enterprise(AE).He made a reference to the Transfer Pricing Officer(TPO)for computing the Arms Length Price(ALP) of the IT.s.

3. During the Transfer Pricing (TP) proceedings, the TPO found that the assessee had adopted CUP as most appropriate method for benchmarking the IT.s entered into it for consideration. The TPO observed that the year under consideration was the first year of TP proceedings, that FFEC were booked by the assessee in the earlier years, that it did not report the transactions in the earlier years, that the rate of USD as on 04/02/2002 was between Rs.47/- to Rs.48/-, that contracts entered on 04/02/2002 was @ 58.5%. He held that the transaction was unusual, that contracts were normally settled within a year, that the contracts were for five years in the matter under appeal, that the rate at which contract was signed was much more than the spot rate of USD vis- a-vis Indian currency, that it was a derivative contract that was not entered through exchange, that the bonafide of transaction was in question. He directed the assessee to justify the pricing of each and every contract entered/cancelled wherein huge losses were booked. As per the TPO the assessee was unable to submit any data from its AE regarding CUP for the transaction entered into, that it was claimed that it was collating the information. He permitted the assessee to file the necessary data. As it failed to furnish necessary details, so the TPO held that the IT.s of FFEC, entered into year 2000 and cancelled in year 2007 were not at Arm's Length. Accordingly total loss of the assessee on account of rollover/ cancellation was determined at Rs.16.59 crores as against Rs.52.10 crores. In short, he recommended an adjustment of Rs.35.51 crores.

3.1. The AO served draft assessment order on the assessee. In response to the same it filed a letter dated 24.01.2011, stating that it did not propose to file objections before the DRP. The AO, held that no capital asset was transferred resulting in capital loss, that the loss of Rs.52.10 crores on account of FFEC was to be computed under the head income from other sources. He referred to the orders of the earlier years of the AO and the First Appellate Authority (FAA) as well as the Directions of the Dispute Resolution Panel (DRP) for the AY.2002-03. Finally, he held that the loss of Rs.52.10 crores was loss from other sources, that same could not be carried forward/set off in the subsequent years.

4. Aggrieved by the order of the AO, the assessee preferred an appeal before FAA and filed elaborate submissions. It also submitted data of Bloomberg Future rate for five years. As the documents were not produced before the AO/TPO and the assessee had not filed any application u/r. 46A of the Income tax Rules, 1962, so the FAA did not accept the additional evidences and upheld the adjustment made by AO amounting to Rs.35.15 crores. However, he held that while deciding the appeal for AY 2001-02, the Tribunal had held that loss arising on rollover of FFEC was to be treated as capital loss.

5. Before us, the Authorised Representative (AR) stated that the assessee had submitted only one year data of Bloomberg during the TP proceedings, that the FAA rejected the data for the remaining four years, the data submitted by the assessee of an independent entity would prove that the transactions were at Arm's Length. He referred to the order of the TPO for the AY 2009-10 (Pg-65-73 of the PB). The Departmental Representative (DR) supported the order of the FAA.

6. We have heard the rival submissions and perused the material before us. We find that the FAA had rejected the additional evidences produced by the assessee before him, that the assessee had submitted the Bloomberg data for five years, that the TPO in the AY.2009-10 accepted the five years data of Bloomberg and made no adjustment. In these circumstances, we are of the opinion that matter should be restored back to the file of TPO/AO for fresh adjudication to consider additional evidences filed by assessee before the FAA. He is directed to afford a reasonable opportunity to the assessee. Effective Ground of the appeal raised by the assessee is allowed in part.

ITA/7032/Mum/2013

7. The solitary Ground of appeal, raised by the AO is about holding that the Loss on extension of FFEC had to be considered on capital account. The FAA had held that loss suffered by the assessee constituted capital loss and had to be considered as business Loss. It was agreed by the Representatives of both the sides that the issue raised by the AO stands decided by the order of the Tribunal for AY 2006-07 (7044/Mum/2010 dtd.16/01/2013). We are reproducing para No. 2 and 7 of the order.

".....2. The sole grievance of the Revenue is that the Ld. CIT(A) erred in holding that loss on extension of Forward Foreign Exchange contracts has to be considered on capital account and, hence, constituted a capital loss and to be considered it as business loss, ignoring the fact that the assessee did not have any PE in India, hence, the loss could not be business loss, it is in the nature of income from settlement of forward contracts in Foreign Exchange rate and is in the nature of "Other Sources".

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..... 7. We have considered the rival submissions and perused the orders of the lower authorities and also the decisions relied upon by the Ld. Sr. Counsel. We find that the AO has based his finding on the findings in assessee's own case taken for A.Y. 2001-02. In that case, we find that the Tribunal in ITA No. 4436/Mum/2005 has held as under:

"We have carefully considered the rival contentions and the orders passed by the Commissioner (Appeals) as well as by the Assessing Officer and the case laws relied upon by the learned Sr. Counsel for the assessee. The assessee is a non-resident company and has invested in the equity shares of Citicorp Finance India Ltd., which was done by bringing the capital in foreign currency in March 1997. In order to protect its investment in accordance with the provisions of F.E.M.A. (Foreign Exchange Management Act), wherein overseas investors are allowed to hedge their capital investment in India and accordingly, the assessee had entered into forward contract which are periodically rolled over. On account of this periodical roll over of forward contracts, the assessee has

realized a net gain in India at ` 2,93,47,992. Such a forward exchange contract to provide a hedging mechanism against adverse foreign exchange movement, the Tribunal in various cases has taken consistent view that in such a situation, the receipt is to be treated as capital receipt and the income or loss from such a transaction is to be considered as capital gain or capital loss. In Citicorp Banking Corporation, Bahrain (supra) and Citicorp Investment Bank Singapore (supra), it has been held that income on account of cancellation of forward exchange contract is chargeable under the head capital gains because it has a direct nexus with the investment of the assessee. Relevant findings given in Citicorp Investment Bank Singapore Ltd. are reproduced herein below:-

"We have perused the records and considered the rival submissions carefully. The dispute is regarding nature of income arising from early settlement of forward foreign exchange contract.

There is no dispute that the forward contract had been entered into by the assessee to safeguard the foreign exchange loan taken for purchase of debentures. There is also no dispute that debentures are capital assets and the income from sale of which has been treated as capital gain. The only dispute is regarding nature of income from the settlement of forward contract. We find that the same issue has already been considered by the Tribunal in the case of sister concern of the assessee i.e. Citicorp Banking Corporation Bahrain [ITA No. 6525/M/09] for the assessment year 2005-06. The Tribunal in the said case referred to the decision of Special Bench in the case of Apollo Tyres Ltd. (supra), in which nature of income arising from cancellation of foreign exchange forward contracts entered into by the assessee to safeguard the foreign exchange loan taken for purchase of plant and machinery had been considered. Since the forward contract had been taken to safeguard the foreign exchange loan taken in connection with acquisition of capital assets it was held that income arising from settlement of forward contract was capital in nature. The Tribunal in case of the sister concern noted that, the forward contract had been taken to safeguard foreign currency loan availed for purchase of shares which were capital assets. Therefore, income arising from settlement of forward contract was treated as capital in nature. The facts in the present case are identical with the only difference that in this case the assessee had acquired the foreign exchange loan for purchase of debentures which are admittedly capital assets. Therefore, in our view the case is covered by the decision of the Tribunal in case of Citicorp Banking Corporation, Bahrain (supra). The case of the assessee is also supported by the decision of DRP in assessee's own case for the assessment year 2007-08 in which it has held that loss arising from settlement of forward contract taken by the assessee to safeguard the foreign exchange loan taken for acquisition of shares/debentures was capital loss.

The Id. DR has raised an additional plea that the assessee should be given benefit of DTAA only if it was proved that money had been sent to Singapore. But we find that no dispute has been raised by authorities below regarding money being transferred to Singapore nor any such issue is in dispute before us. No doubt the respondent can raise an additional plea for the first time before the Tribunal in support of order of CIT(A) but same should be based on facts already on record. The plea raised on the presumption that money may not have been transferred to Singapore cannot be admitted at this stage. The dispute raised before us is only with regard to the nature of income from early settlement of forward foreign exchange contract taken to safeguard the foreign exchange loan which had been availed by the assessee for purchase of debentures.

The income from sale of debenture has been assessed as capital gain. Therefore, respectfully following the decision of the Tribunal in the case of sister concern Citicorp Banking Corporation, Bahrain (supra) we hold that gains arising from early settlement of forward foreign exchange contract has to be treated as capital gain. We accordingly set aside the orders of the CIT(A) and allow the appeals filed by the assessee."

Since no contrary decision has been brought to our notice, we respectfully follow the ratio laid down by the aforesaid decisions which has been consistently followed by the Tribunal, Mumbai Benches, and hold that the income arising from forward exchange contract is assessable as capital gain. Consequently, the grounds raised by the assessee are treated as partly allowed.

Respectfully following the ratio laid down by the aforesaid decisions, the ground raised by the revenue is dismissed. ”

Considering the above and following the order of the Tribunal for AY., we decide effective Ground of appeal against the AO.

C.O.No.21 of 2015

8.The AR of the of the assessee stated that if the matter was sent back to the file of TPO/AO with regard to the file of the assessee the CO would become infructuous. We have already restored back the effective Ground of the assessee to the file of TPO.So, the Cross objection of the assessee is treated as infructuous.

As a result, appeal of assessee is partly allowed, appeal of the AO is dismissed. C.O. of the assessee is treated as infructuous.

फलतः निर्धारिती द्वारा दाखिल की गई अपील अंशतः मंजूर की जाती है.निर्धारिती अधिकारी द्वारा दाखिल की गई अपील नामंजूर की जाती है और निर्धारिती का प्रत्याक्षेप निष्प्रभावी माना जाता है ।

Order pronounced in the open court on 05th January, 2018.

आदेश की घोषणा खुले न्यायालय में दिनांक 05 जनवरी, 2018 को की गई ।

Sd/-

(राम लाल नेगी / Ram Lal Negi)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक/Dated 05.01.2018.

Jv.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी

2. Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त

5.DR “K ” Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, के खंडपीठ,आ.अ.न्याया.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार Dy./Asst. Registrar

आयकर अपीलीय अधिकरण, मुंबई /ITAT, Mumbai.