

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "C", MUMBAI**

**BEFORE SHRI RAJESH KUMAR (AM) AND SHRI RAM LAL NEGI (JM)**

**ITA No. 2734/MUM/2014  
Assessment Year: 2004-05**

Citicorp International Finance Corporation, First International Finance Centre, 8 <sup>th</sup> Floor, Plot No. C-54 and C-55, G Block, Bandra Kurla Complex, Bandra (East), Mumbai - 400051 PAN: AACCC2105R	<b>Vs.</b>	The Asst. Director of Income Tax, Range 1(3), Scindia House, N.M. Marg, Mumbai - 400005
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by : Shri F.V. Irani (AR)

Revenue by : Ms. Neha Thakur (DR)

Date of Hearing: 27/02/2020

Date of Pronouncement: 28/02/2020

**ORDER**

**PER RAM LAL NEGI, JM**

This appeal has been filed by the assessee against the order dated 11.11.2013 passed by the Commissioner of Income Tax (Appeals)-10 (for short 'the CIT(A), Mumbai, for the assessment year 2004-05, whereby the Ld. CIT(A) has dismissed the appeal filed by the assessee against the penalty order passed by the AO u/s 271 (1) (c) of the Income Tax Act, 1961 (for short the 'Act').

2. In the present case, the AO passed assessment order u/s 143 (3) of the Act determining the total loss of the assessee at Rs. 8,16,94,799/-, as against the loss declared by the assessee at Rs. 10,05,07,353/-. AO further disallowed the claim of brought forward losses amounting to Rs. 6,15,64,833/- for the Assessment Year (AY) 2003-04. In the first appeal, the Ld. CIT (A) confirmed the disallowance made by the AO. On the basis of the said disallowances, AO

initiated proceedings u/s 271 (1) (c) of the Act and levied penalty. The said order was confirmed by the Ld. CIT(A).

2. The assessee has challenged the impugned order passed by the Ld. CIT (A) on the following effective grounds:-

*“Ground No. 1*

*The Commissioner of Income –tax (Appeals)-10, Mumbai (hereinafter referred to as the CIT (A)) erred in upholding the action of the Assistant Director of Income-tax (International Taxation)-1(2), Mumbai (hereinafter referred to as the “AO”) in levying penalty of Rs. 38,56,611 on tax alleged to be evaded on Rs. 1,88,12,736/- being the difference in the determination of long-term capital loss on sale of equity shares in Indian companies, arising on account of denial of the benefit of indexation under the second proviso to section 48 of the Income-tax Act, 1961.*

*Ground No. 2*

*The CIT (A) erred in not adjudicating upon the levy of penalty of Rs. 1,26,20,637/- on the tax alleged to be evaded on Rs. 6,15,64,083/- being long term capital loss pertaining to assessment year 2003-04 which was not allowed to be carried forward raised vide ground no. 3 in the appeal before him.”*

3. At the outset, the Ld. counsel for the assessee submitted that the ITAT, Mumbai has decided both the issues in favour of the assessee in quantum appeal ITA No. 8513/Mum/2010 AY 2004-05. Since, the Tribunal has decided both the issues in favour of the assessee, the impugned order does not survive. The Ld. counsel submitted before us the copies of order dated 05.02.2016 and 12.07.2017 passed by the coordinate Bench in assessee’s appeal aforesaid.

4. On the other hand, Ld. Departmental Representative (DR) fairly admitted that the Tribunal has decided both these issues in favour of the assessee in quantum appeal.

5. We have heard the rival submissions and perused the material on record including the two orders passed by the coordinate Bench in assessee’s appeal ITA No. 8513/Mum/2010. The coordinate Bench has decided the first issue in favour of the assessee holding as under:-

*“5. We heard the rival contentions and carefully gone through the orders of the authorities below and found from the record that the assessee company being a non resident is not covered by the first proviso to Sec. 48, however, it is entitled for benefit of indexation since the shares were purchased in Indian currency. The first proviso to Sec. 48 ensures that a non-resident, who utilizes his foreign currency, is taxed after taking into consideration the fluctuation in the exchange rate. The Indian rupee, which has in the past appreciated against various currencies, long term capital gains payable can increase. Therefore, the NRI assessee who had purchased shares in Indian currency would be entitled to benefit of second proviso to Sec. 48 on sale of equity shares in question.*

*6. Respectfully following the ratio laid down by the Hon’ble Delhi High Court we do not find any merit in the action of the lower authorities declining the benefit of second proviso to Sec. 48. AO is accordingly directed to re-compute the capital gains.”*

6. Similarly, the coordinate Bench has decided the second issue in favour of the assessee holding as under:-

*“6. In the present case before us also, the facts are identical that the loss pertains to AY 2003-04, which was never disturbed by the AO to be allowed to carry forward in terms of provisions of section 80 r.w.s. 139 (3) of the Act. If at all AO has to disallow the same, he has to first take action in AY 2003-04 and not in AY 2004-05. The genuineness of the claim of loss is not in doubt and the facts are undisputed. Accordingly, and in view of the facts of the case, we allow the claim of the assessee and this issue of appeal of the assessee is allowed on this issue.”*

7. Admittedly, in the present case, the coordinate Bench has decided both the issues in favour of the assessee in quantum appeal ITA No. 8513/Mum/2010 for the AY 2004-05, vide two orders dated 06.07.2016 and 12.07.2017. Since, the disallowances, on the basis of which the AO imposed penalty and the Ld. CIT(A) confirmed the same have been deleted by the coordinate Bench in quantum appeal, the impugned order does not survive.

Hence, we allow the appeal of the assessee and set aside the impugned order passed by the Ld. CIT (A). Accordingly, we direct the AO to delete the penalty.

In the result, appeal filed by the assessee for assessment year 2004-05 is allowed.

Order pronounced in the open court on 28<sup>th</sup> February, 2020.

Sd/-  
(RAJESH KUMAR)  
ACCOUNTANT MEMBER

Sd/-  
(RAM LAL NEGI)  
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 28/02/2020

Alindra, PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /  
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai