IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI

BEFORE SHRI AMIT SHUKLA, JM &
MS PADMAVATHY S, AM

I.T.A. No. 686/Mum/2025
(Assessment Year: 2020-21)

Qualcomm Asia Pacific Pte. Ltd., 80, Robinson Road, Singapore Central Area, Singapore Central Area, Singapore-99999. **PAN: AAACQ2819E**	Vs.	**CIT(A)-57,** 5th Floor, Earnest House, Nariman Point, Mumbai-400021.
Appellant)	:	**Respondent**)

Appellant /Assessee by	:	Shri Nishant Thakkar / Ms Jasmin Amalsadwala, AR
Revenue / Respondent by	:	Shri Krishna Kumar, Sr. DR
Date of Hearing	:	24.03.2025
Date of Pronouncement	:	28.03.2025

O R D E R

Per Padmavathy S, AM:

This appeal by the assessee is against the order of the Commissioner of Income Tax (Appeals)-57, Mumbai (in short "CIT(A)") dated 21.11.2024 for Assessment Year (AY) 2020-21. The assessee raised the following grounds of appeal:-

"1. The Learned Commissioner of Income Tax (Appeals) ('Ld. CIT(A)') erred in upholding the order under section 143(1) of the Act issued by Centralised Processing Centre (Ld. CPC) without appreciating the fact that due procedure

of intimating the proposed adjustments vide notice under section 143(1)(a) of the Income-tax Act, 1961 ("the Act") was not followed which is a gross violation of principle of natural justice.

2. The Ld. CPC erred in law and facts, considering that adjustment undertaken in the intimation passed under section 143(1) of the Act are not in the nature of prima facie adjustment and requires thorough examination of facts and application of mind and hence, amounts to extraterritorial jurisdiction exercised by the tax authorities, which is bad in law.

3. The Ld. CIT(A) erred in upholding the Impugned Order passed by Ld. CPC without appreciating the fact that Ld. CPC is precluded from making such adjustments in the Impugned Order.

4. The Ld. CIT(A) has erred in making reference to the provisions and corresponding explanations to section 251 of the Act without appreciating that actions taken by Ld. CPC against the appellant are without any jurisdiction and that powers of CIT(A) are co-terminus and co-extensive to the powers of CPC.

5. The Ld. CIT(A) erred in enhancing the Appellants income and ignoring binding judicial precedents which is in gross violation of the principles of judicial discipline.

6. The Ld. CIT(A) failed to appreciate that in case of multiple sources of income, an Assessee is entitled to adopt provisions of the Act for one source of income while applying the provisions of Double Taxation Avoidance Agreement (DTAA) for the other source of income.

7. The Ld. CIT(A) failed to consider the sale of shares of different entities as different source of income and thereby erred in treating the Long Term Capital Gain (LTCC) and Long Term Capital Loss ('LTCL') as 'single source/stream of income.

8. The Ld. CII(A) erred in holding that the long terms capital losses amounting to INR 7,14,76,415 would be set off and thereafter the balance net Long Term Capital Gains only would become eligible for claim of exemption under para 4 of Article 13 of India -Singapore DTAA."

2. The assessee is a company registered in Singapore and filed and filed the return of income for the AY 2020-21 on 15.02.2021 declaring Nil income. The

assessee during the year under consideration has earned Long Term Capital Gain (LTCG) from the sale of 63 ideas Infolabs Pvt. Ld. to the tune of Rs. 23,42,22,400/- and from the sale of Reverie Language Technologies Pvt. Ltd. to the tune of Rs. 14,48,08,653/-. The assessee treated the said LTCG as not taxable as per Article-13 of the DTAA between India and Singapore since these shares were acquired prior to 01.04.2017 eligible under the grandfathering provisions. The assessee for the year under consideration also incurred a Long Term Capital Loss (LTCL) of Rs. 2,29,03,528/- from the sale of Deck App Technologies Pvt. Ltd. and a loss of Rs. 4,85,72,887/- from the sale of Deck App Technologies Pte. Ltd. (Singapore). The assessee in the return of income claimed carry forward of the LTCL under the provisions of the Income Tax Act, 1961 (the Act). The return filed by the assessee was processed under section 143(1) of the Act and in the intimation issued the LTCL to the tune of Rs. 2,29,03,528/- was not allowed to be carried forward. Aggrieved the assessee filed a petition for rectification under section 154 of the Act and the claim of the assessee was rejected by the Assessing Officer (AO) by passing the order of rectification under section 154 of the Act. On further appeal against the order under section 154 of the Act the CIT(A) held that the LTCL from the sale of both the scrip cannot be carried forward and need to be setoff against the LTCG earned by the assessee. The CIT(A) further held that only the net LTCG after setting off the LTCL is eligible for exemption as per Article 13 of the DTAA between India and Singapore. Thus the CIT(A) enhanced the disallowance ofLTCL. The assessee is in appeal before us against the order of the CIT(A).

3. The ld. AR submitted that the CIT(A) has enhanced the denial of carry forward of LTCL for the reason that the LTCG are exempt under the DTAA and that the loss from same source of income cannot be allowed to be carried forward.

The ld. AR further submitted that the gains are claimed to be exempt under the DTAA and the loss is carried forwards under the provisions of the Act which permissible since loss or gain arising out of each transaction is a separate source which is to be considered separately for the purpose of taxation. The ld. AR in this regard relied on the decisions of the Co-ordinate Bench in the case of ACIT vs. J.P. Morgan India Investment Company Mauritius Ltd., (2022) 143 taxmann.com 82, Bay Capital India Fund Ltd., Mauritius vs. ACIT (ITA No. 4475/Mum/2023 dated 20.06.2024) and Matrix Partners India Investment Holdings LLC vs. DCIT (ITA No. 3097/Mum/2023 dated 29.01.2025).

4. The ld. DR on the other hand relied on the orders of the lower authorities.

5. We heard the parties and perused the material on record. The assessee during the year under consideration has earned LTCG which have been claimed as exempt under Article-13 of the DTAA between India and Singapore since these shares were acquired prior to 01.04.2017 and that the grandfathering provisions are applicable. The assessee also made LTCL on sale of two different scrip which was claimed to be carried forward under the provisions of the Act. While processing the return under section 143(1) the AO did not allow the carry forward of loss from one of the scrip amounting to Rs. 2,29,03,528/-. The assessee filed a petition under section 154 of the Act which was rejected. The CIT(A) while considering the appeal filed by the assessee against the order under section 154 denied the carry forward of the LTCL arising from the sale of both the scrips and held that the same needs to be set off against the LTCG. The CIT(A) further held that the LTCG after setting off of the losses is only eligible for claiming exemption under Article-13 of the DTAA between India and Singapore. Accordingly the issue for our consideration is whether only the net LTCG is eligible for treaty benefits or

whether the assessee can claim the treaty benefits towards LTCG and the LTCL can be carried forward under the Act. In this regard we notice that the Co-ordinate Bench in the case of J.P. Morgan India Investment Company Mauritius Ltd. has considered a similar issue where it has been held that

"DECISION

12. We have heard the rival submissions and also perused the relevant findings and material placed on record. The controversy involved in this appeal is, whether in the year in which assessee has clamed benefit of DTAA while claiming exemption from taxation of capital gain as per Article 13(4) of Indian Mauritius DTAA, without setting off of short term capital loss and long term capital los from earlier year and he allowed to be carry forward to the subsequent years on the ground that in the earlier yours when assessee suffered loss it chose not to claim benefit under DTAA and computed the love as per domestic low, i.e., under the Income Tax Act.

13. First of all, it is well settled principle that the tax treaties allocate taxing rights to the treaty partner in the following three manners:-

(a) Rights are allocated (only) to the source country in respect of certain income (e.g. income from immovable property is taxed in the country where the property is located in this case the computation of income in the country of residence is of no consequence as the taxing rights am given solely to the country of source. The country of residence gives up the right to tax the income or alternatively gives full credit of the tax paid in the country of source.

(b) Income is taxed in the country of source and also the country of residence but as the income is taxed in the country of residence, the country of source limits its right to tax the income. In this case, the computation income is also provided in the treaty (e.g. Royalties/FTS are taxed on gross basis in the country of source but at a lower rate).

(c) Income is taxed only in the country of the taxpayer's residence. In this case, the country of source gives up its taxing rights of such income entirely and therefore the computation of income in the country of source is immaterial, [e.g. Business income in the absence of the Permanent Establishment (PE) when a foreign enterprise does not have a PE in India, there is no computation done when the income is reported in India].

14. In the case of a situation of tax relief, the country where a particular income arises (source country), consciously gives up its taxing rights in respect of a particular income arising from source(s) in that country in favour of the other treaty partner country (residence country). The residence country may or may not levy tax on the said income, for e.g. some countries like Singapore, Hong Kong etc. do not levy tax on the income unless it arises in their own territory, as they follow a 'territorial' model of taxation.

15. In case of income, where a country consciously gives up its rights to tax 'income' (i.e, positive income) of resident of the treaty partner arising on its own shores, it automatically does not mean that losses which had arisen in earlier year in the subject country are not allowed to be carried forward.

16. The said principle of allocation of taxing rights has also been considered and propagated in various judicial precedents and commentary ITAT Mumbai in this regard in case of APL Co. Pte Ltd ADET (International Taxation) [2017] 78 taxmann.com 240 (Mum-Trib.) has observed as under:

> *"12. There is another angle to interpret Article 24, which is that, the said Article purports to exclude tax exemption in India if the income is not remitted or received in Singapore for taxation purpose on the premise that this is a foreign income to Singapore. First of all, it has to be seen whether shipping income is exempt from tax in India and; secondly, whether the shipping income is foreign income to Singapore which would then be taxable upon receipt or remittance to Singapore. The shipping income is dealt with under Article 8, which states that "profits derived by an enterprise of a contracting state from the operation of ships..... in international traffic shall be taxable only in that state, le resident state." The word "only" debars the other contracting state to tax the shipping income, that is, India is precluded from taxing the shipping income even if it is sourced from India. An enterprise which is tax-resident of Singapore is liable for taxation on its shipping income only in Singapore and not in India. Whence India does not have any taxation right on a shipping income of non-resident entity, which is exclusive domain of the resident state, there is no Question of any kind of exemption or reduced rate of taxation in the source state. It only envisages territorial and jurisdictional rights for taxing the income and India has no jurisdiction for any taxing right which are governed by Article 8. There is no stipulation about exemption under Article 8 of the shipping income which as pointed out by Id. Senior Counsel has been specifically provided in some of the Articles like Article 20, 21 & 22. Hence, it cannot be reckoned that shipping income earned from India is to be treated as exempt from tax or taxed at*

reduced rate, which is a condition precedent for applicability of Article 24, albeit India at the threshold does not have the jurisdiction to tax the shipping income of the non-resident entity……."

16.1 Eminent author Klaus Vogel in his commentary on "Double Taxation Conventions" has opined as under-"

"19. [Allocation of taxing rights; exclusive or shared] For the purpose of eliminating double taxation, the Convention establishes two categories of rules. First Articles 6 to 21 determine, with regard to different classes of income, the respective rights to tax of the State of source or situs and of the State of residence, and Article 22 does the same with regard to capital. In the case of a number of items of income and capital, an exclusive right to tax is conferred on one of the Contracting States. The other Contracting State is thereby prevented from taxing those items and double taxation is avoided. As a rule, this exclusive right to tax is conferred on the State of residence. In case of other items of income and capital, the right to tax is not an exclusive one. As regards two classes of income (dividends and interest), although both States are given the right to tax, the amount of tax that may be imposed in the State of source is limited. Second, insofar as these provisions confer on the State of source of situs a full or limited right to tax, the State of residence must allow the relief so as to avoid double taxation; this is the purpose of Articles 23A and 236. The Convention leaves it to the Contracting States to choose between two methods of relief i.e. the exemption method and the credit method.

Further in Third class: Exclusive residence State taxation] Other items of income or capital may not be taxed in the State of source or situs; as a rule they are taxable only in the State of residence of the taxpayer. This applies, for example, to royalties (Article 12), gains from alienation of shares or securities (Paragraph 5 of Article 13, subject to the exception of paragraph 4 of Article 13)....."

17. Thus, the application of a treaty can result in the entire (gross) income being not subject to tax in India in a year where a taxpayer claims treaty benefits. Therefore, in a year in which a taxpayer claims benefit of Article 13(4) of the India Mauritius tax treaty, the entire gains he earns will not be taxable at all as India has given up its taxing rights in respect thereof Thus, the entire amount of gains for the year (before set off of brought forward losses) will go out of the taxing provisions if Assessee has chosen to be assessed as per Treaty.

18. Further, the provisions of sections 4 and 5 are expressly made subject to the provisions of the Act which means that they are subject to the provisions of section 90 of the Act. By necessary implication they are subject to the terms of the Double Taxation Avoidance Agreement, if any, entered into by the Government of India. If it was not the intention of the legislature to make a departure from the general principle of chargeability to tax under section 4 and the general principle of ascertainment of total income under section 5 of the Act, then there was no purpose in making those sections "subject to the provisions" of the Act.

19. Thus, as a corollary, where treaty provisions are beneficial as compared to the provisions of the Act; the taxpayer has right to rely on the treaty provisions.

20. Section 90(2) of the Act reads as under:

> *"90(2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case maybe, under sub-section (1) for granting relief of tax, or as the case maybe, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee."*

21. From the above, it is clear that the provisions of the Act can be resorted to only when these are more beneficial (compared to Treaty).

22. The said proposition has been accepted by the Supreme Court in the case of Azadi Bachao Andolan (supra), wherein it was held as under:-

> *"A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a double taxation avoidance agreement. When that happens, the provisions of such an agreement, with respect to cases to which where they apply, would operate even if inconsistent with the provisions of the Income-tax Act. We approve of the reasoning in the decisions which we have noticed. If it was not the intention of the legislature to make a departure from the general principle of changeability to tax under section 4 and the general principle of ascertainment of total income under section 5 of the Act, then there was no purpose in making those sections "subject to the provisions" of the Act. The very object of grafting the said two sections with the said clause is to enable the Central Government to issue a notification under section 90*

towards implementation of the terms of the DTAs which would automatically override the provisions of the Income-tax Act in the matter of ascertainment of chargeability to income tax and ascertainment of total income, to the extent of inconsistency with the terms of the DTAC."

23. There could however be years where a taxpayer chooses not to claim treaty benefit as we have already noted above that he can do so under the provisions of section 90(2) of the Act. When he does so, his income will have to be computed under the provisions of the Act for that year. This will include the provisions for carry forward of loss.

24. In the present case, Assessee being the resident of Mauritius holding valid TRC is eligible to claim treaty benefits. In this regards, Article 13 of India Mauritius DTAA on Capital gains is noteworthy. The relevant extracts of Article 13 of India- Mauritius treaty are reproduced as under:

"4. Gains derived by a resident of a Contracting State from the alienation of any property other than those mentioned in paragraphs (1), (2) and (3) of this article shall be taxable only in that State."

25. Thus, under DTAA between India Mauritius, the taxing rights on capital gains falling under Article 13(4) is kept with country of residence, i.e. Mauritius and hence the same is not taxable in country of source, i.e.,, in India

26. In the previous year for the Assessment year under appeal (A.Y. 2016-17) the Assessee chose to be governed by the provisions of the tax treaty and consequently the gains earned in that year were not offered to tax. The question of touching the brought forward capital losses in this Assessment year does not arise as the eligibility to carry these losses forward was determined in the year they were suffered. The entire capital gains earned during the previous year were claimed to not be taxable under the treaty. As a result, the capital losses were carried forward as it is to the subsequent years.

27. In the instant case, in the earlier years (A.Y. 2009-10, A.Y. 2011-12 to A.Y. 2014-15) the Assessee had incurred capital losses.

28. Thus, it is for an assessee to examine whether or not, in the light of the applicable legal provisions and in the light of the precise factual position, the provisions of the Income-tax Act are beneficial to him or that of the applicable double taxation avoidance agreement. Thus, these losses were therefore computed under the provisions of the Act, as in those earlier years, the Assessee chose not to be governed by provisions of the treaty for those years

but by the provisions of the Act. These provisions included the provisions of section 74 of the Act which deal with carry forward and set off of these losses.

29. In so far as reliance placed by Ld. DR in the case of RM. Muthaiah (supra), the Hon'ble Court has clearly held as under.-

When a power is specifically recognized as vesting in one, exercise of such a power by others, is to be read, as not available; such a recognition of power with the Malays/an Government, would take away the said power, from the Indian Government, the Agreement thus operates as a bar on the power of the Indian Government in the instant case. This bar would operate on ss. 4 and 5 of the IT Act, 1961.

30. As stated above, the capital gain as per the Indian Mauritius DTAA is taxable in the resident country and the source country has given up its rights to tax the income. The question of computation in the source country does not therefore arise. Accordingly, the income from capital gains is not taxable in India as per Article 13(4) DTAA and accordingly, the mode of computation income in India as the source country will not arise. If the particular income is not to be taxed at all, the question of including the same under the total income and determining the taxability on the same will not arise and the contention of Ld. DR. that the total income as per Act is to be calculated to determine the tax liability and thereafter, the benefit is to be given cannot upheld. Accordingly, we hold that the losses which have been brought forward from earlier years will be carried forward to the subsequent years without setting off the same against the gains of the previous year relevant to the assessment year in question for the reason that once the assessee has chosen the benefit of DTAA, then the capital gain is not at all taxable in India and therefore, there is no question of setting off of loss from the earlier years. Accordingly, the Cross Objection raised by the assessee is allowed. In view of the aforesaid findings, the other ground in Cross Objection is purely academic in nature."

6. The following principles emanate from the perusal of the above –

(i) Where treaty provisions are beneficial as compared to the provisions of the Act, the taxpayer has right to rely on the treaty provisions as per section 90(2) of the Act.

(ii) The words "subject to the provisions of the Act" as contained in Sections 4 and 5 conveys the intention of the legislature to make a departure from the

general principle of changeability to tax under the said section and the provisions of section 90 of the Act is one such departure.

(iii) The terms of the DTAA as notified would automatically override the provisions of the Act when it comes to ascertainment of chargeability of a particular income and its taxability to the extent of inconsistency between the two.

(iv) The right of the tax payer not to avail the benefit under the treaty and to choose to compute the income under the Act cannot be restricted

(v) Once the source country has given up the right to tax the income as per the terms of the DTAA, then the question of computation in the source country does not arise.

(vi) If the particular income is not to be taxed at all, the question of including the same under the total income and determining the taxability on the same will not arise

7. Now when we will apply the above principles to assessee's case - As per Article 13 of India Singapore DTAA, the gain on transfer of shares acquired prior to 01.04.2017 cannot be taxed in the source country i.e. India. Therefore the LTCG earned on sale of shares in assessee's case cannot be taxed in India. Accordingly the LTCG does not enter in the computation of total income of the assessee. The assessee has computed the LTCL to be carried forward under the provisions of the Act and the assessee cannot be restricted from choosing not to avail the DTAA benefits. When the LTCG does not enter into the computation of total income then the question of setting off of the LTCL against the said gain does not arise.

8. The next contention of the revenue that the entire transaction of sale of shares carried out by the assessee resulting in LTCG & LTCL should be considered as one source and therefore the assessee cannot avail benefit under both

the DTAA and the Act for each of the transaction. This issue has been considered by the coordinate bench in the case of Matrix Partners India Investment Holdings, LLC (supra)

> *6.5. The Ld.AR placed reliance on the following observations by Hon'ble Mumbai Special Bench in case of Montgomery Emerging Market Fund reported in (2006) 100 ITD 217 in support of the above argument. Hon'ble Special bench observed the distinction between 'source of income' and 'head of income' and that there can be multiple source of income under the same head of income. Hon'ble Special Bench also observed that, what is taxed by the Act is not different source of income, independently and that income from different source is clubbed under respective heads that are finally aggregated into the total income. The relevant extract of the observations of the Hon'ble Special Bench in this regard held as under:-*
>
> > *"44. Therefore, it is very apparent that source of income does not mean head of income. The Assessing Officer has proceeded on a hypothesis as if the source of income is the head of income itself. This is not a proper construction of law provided in section 70. Short term capital gains/loss as well as long term capital gains/loss both are computed under the head "capital gains" for the aggregation of income culminating into total income which is taxable under the Income-tax Act. What is taxed by the Income-tax Act is not different sources of income independently, but income from different sources clubbed under respective heads and finally aggregated into the total income. The classification of income under different heads for computing the total income does not interfere with the independent character of different sources of income available to an assessee. Both, short term capital gains/loss and long term capital gains/loss are different sources of income, falling under the same head "capital gains". Even under short term capital gains, different transactions will be different sources of income resulting in short term capital gains/loss. Likewise, different transactions of long term capital assets will be different sources of income for an assessee to arrive at long term capital gains/loss. This is reflected in the scheme of computation of capital gains provided in section 48 where gains or loss is computed on the basis of individual asset and transaction and not on the basis of class of assets. Therefore, we have to agree with the argument of the learned senior counsel that every transaction of a property is a different source of income for the assessee. Head of income is not the source of income. Source of income is having the direct nexus with the stream or fountain out of which the income springs to the assessee. Head of income is provided for clubbing purpose of those like minded incomes derived from*

different sources for the purpose of aggregation and allowable deductions.

(emphasis supplied)

6.5.1. From the above one can infer that there is no basis in grouping long term/short term capital assets. It can also be inferred that, long term and short term are different sources of income. Further, Hon'ble Special bench also observed that even the different short term assets and long term assets involved in the respective transactions are again different sources of income. In the present facts of the case, losss earned from sale of shares of Maharana and the gain earned from sale of shares of Maharana are therefore different sources of income. And further as per the observations of Hon'ble Special Bench, even under short term/long term computation, every transaction is a different source.

9. The ratio laid down by the coordinate bench in the above case is that each transaction is a separate source of income for the assessee and therefore the assessee can choose to apply either the provisions of DTAA or the Act for each of the transactions. We notice that a similar view has been held by the Tribunal in the case of Bay Capital India Fund Ltd., Mauritius (supra). In view of these discussions and respectfully following the decisions of the Co-ordinate Bench we hold that the assessee is entitled to claim the treaty benefits for the LTCG and is eligible to carry forward the LTCL under the provisions of the Act. The grounds raised by the assessee in this regard are allowed.

10. Ground No.1 & 2 pertain to the contention that the denial of carry forward of LTCL should not have been done and in the intimation under section 143(1) of the Act. The ld. AR in this regard submitted that the assessee has not received any intimation as per the 1st proviso to section 143(1)(a) of the Act and submitted the screenshots from the e-proceeding to substantiate the said claim. The ld. AR accordingly submitted that the order of the lower authorities are in breach of the mandatory prescription of law as contained in the 1st proviso to section 143(1)(a)

of the Act. The ld. AR in this regard placed reliance on the decision of Ahmadabad Bench of the Tribunal in the case of Satish Chandra H Berawala Vs. DCIT (ITA No. 940/Ahd/2024 dated 27.11.2024). The ld. AR made the alternate submission that the issue of allowability of the LTCL being carried forward is a debatable issue and therefore the disallowance of the claim through intimation under section 143(1) of the Act cannot be allowed

11. We heard the parties and perused the material on record. From the perusal of the evidences submitted by the assessee there is merit in the submission of the assessee that the assessee has not received the intimation under section 143(1)(a) of the Act with regard to disallowance of carry forward of LTCL. Further it is a settled legal position that the adjustment under section 143(1) cannot be made when the issue is debatable. In the given case from the perusal of the intimation we notice that the CPC has disallowed the carry forward of LTCL as claimed by the assessee under the provisions of the Act. The impugned issue of whether the LTCL is to be allowed to be carried forward as per the Act or to be set off against the LTCG for giving exemption under the DTAA is a debatable issue. Therefore in our considered view, the AO is not correct in making the disallowance of carry forward of LTCL as enhanced by the CIT(A). These grounds of the assessee are thus allowed.

12. In result the appeal of the assessee is allowed.

Order pronounced in the open court on 28-03-2025.

Sd/-	***Sd/-***
(AMIT SHUKLA)	**(PADMAVATHY S)**
Judicial Member	**Accountant Member**

**SK, Sr. PS*

<u>Copy of the Order forwarded to</u> :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai