

**IN THE INCOME TAX APPELLATE TRIBUNAL  
"L" Bench, Mumbai**

**Before Shri Jason P. Boaz, Accountant Member  
and Shri Pawan Singh, Judicial Member**

**ITA No. 8763/Mum/2010**  
(Assessment Year: 2007-08)

M/s. Citicorp Investment Bank (Singapore) Ltd. Trent House, 3 <sup>rd</sup> Floor "G" Block Plot No. 60, Next to Citibank BKC, Bandra (E), Mumbai-018	Vs.	Asstt. Director of Income Tax (International Taxation) - 1(2) 1 <sup>st</sup> Floor, Scindia House NM Road, Ballard Pier Mumbai 400038 PAN - AAACC5806F
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**Appellant**

**Respondent**

Appellant by: Shri P.J. Pardiwalla  
Respondent by: Shri Jasbir Chouhan

Date of Hearing: 13.06.2016  
Date of Pronouncement: 22.06.2016

**ORDER**

**Per Jason P. Boaz, A.M.**

This appeal by the assessee is directed against the order of assessment passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (in short 'the Act') dated 12.10.2010 for A.Y. 2007-08, in pursuance of the directions issued by the Dispute Resolution Panel-1 (DRP), Mumbai under section 144C(5) of the Act dated 28.09.2010.

2. The facts of the case, briefly, are as under: -

2.1 The assessee company is a foreign institutional investor (FII) investing in 100% debt securities issued by Government of India and other corporate bonds and earns LTCG, STCG along with interest on securities. As per the India-Singapore DTAA, capital gains is not taxable in India and interest income is taxed at beneficial rate of 15%. The assessee filed its return of income for A.Y. 2007-08 on 30.10.2007 declaring income of ₹133,009,051/- The case was selected for scrutiny. A draft assessment

order was passed under section 144C(1) of the Act vide order dated 18.12.2009.

2.2 Aggrieved with this draft order of assessment for A.Y. 2007-08, the assessee preferred its objections thereto before the DRP-I, Mumbai. The DRP-I, Mumbai vide directions issued under section 144C(5) of the Act dated 28.09.2010 disposed off/dismissed the objections raised by the assessee observing as under: -

**Ground No. 1** - *Relating to the set off of loss from settlement of forward contracts for foreign currency of ₹6,84,34,804/- against income from 'other sources'. AO's action in treating this loss as capital loss instead of under the head 'other sources'. Upheld.*

**Ground No. 2** - *Relating to the disallowance of carry forward of LTCG under section 79 of the Act incurred in the period of A.Y. 2003-04 of ₹4,94,64,507/- and A.Y. 2004-05 of ₹6,73,63,681/- by the AO was upheld.*

**Ground No. 3** - *Relating to the initiation of penalty proceedings under section 271(1)(c), the ground raised by the assessee was held to be premature and therefore dismissed.*

2.3 In pursuance of the directions issued by the DRP-1, Mumbai under section 144C(5) of the Act vide order dated 28.09.2010, the AO passed the impugned final order of assessment for A.Y. 2007-08 under section 143(3) r.w.s. 144C(13) of the Act vide order dated 12.10.2010, wherein the income of the assessee was determined at ₹13,30,09,651/-.

3. Aggrieved by the final order of assessment for A.Y. 2007-08 dated 12.10.2010, the assessee has preferred this appeal raising the following grounds: -

- “1. *The Assessing Officer and Dispute Resolution Panel (DRP) has erred in changing the stand taken by the department in earlier assessment years and thereby did not set off the loss arising from early settlement of forward contracts for foreign currency of ₹68,434,804/- against income from other sources by treating the loss as capital loss instead of loss under the head 'other sources'.*
2. *The Assessing Officer and DPR has erred in applying the provisions of section 79 of the Income-tax Act, 1961 (the Act) and denying carry forward of long term capital losses incurred in financial year relevant to assessment years 2003-04 of Rs.49,464,507/- and 2004-05 of Rs.67,363,681/- on the*

*grounds that there was a change in shareholding pattern in April 2004, ignoring the fact that Appellant has not claimed set-off of losses during the year under consideration.*

3. *The Assessing Officer erred in initiating the penalty proceedings under section 271(1)(c) of the Act for furnishing inaccurate particulars of income leading to a concealment of income.”*

4. **Ground No. 1**

4.1 In this ground, the assessee contends that the authorities below had erred in changing the stand taken by the Department in earlier years and thereby did not set off the loss of ₹6,84,34,840/- arising from early settlement of forward contracts for foreign currency against income from other sources by treating this loss as capital loss instead of loss under the head ‘other sources’.

4.2.1 According to the learned A.R. for the assessee, in the year under consideration the assessee had earned STCG of ₹7,30,20,556/-, incurred net long term capital losses of ₹8,01,43,145/- and short term capital losses on early settlement of forward contract for foreign currency amounting to ₹6,84,34,804/- arising on short term capital losses on early settlement of forward contract for foreign currency as a capital loss as disclosed by the assessee in its return of income for A.Y. 2007-08. According to the learned A.R. for the assessee, in doing so, the AO had changed the stand taken by the Department in A.Y. 1998-99 and 2005-06, wherein capital gains earned on early cancellation of forward contracts was by the AO re-characterized as income under the head ‘Income from other sources’. It is contended that the AO has not taken a consistent stand and no reason has been given by the AO for this change of stand, where in earlier year capital gains is re-characterised and taxed as ‘income from other sources’ and in this year the capital loss is being accepted as such when there was no change in the facts and circumstances in the case on hand.

4.2.2 The learned A.R. for the assessee brought to the notice of the Bench that on appeal by the assessee, a Coordinate Bench of this Tribunal, in the assessee’s own case for A.Y. 1998-99 and A.Y. 2005-06 in ITA No. 2877/Mum/2003 and ITA No. 910/Mum/2009 dated 08.06.2011 has

decided this issue in the assessee's favour holding that the capital gain/loss arising on early settlement of forward contracts takes the character of the underlying securities in respect of which the forward contract was booked and since the underlying securities were held on capital account, hence the capital gain/loss arising therefrom are to be treated accordingly as capital gain/loss and not under the head income from other sources. It is submitted that Revenue is in appeal before the Hon'ble High Court, inter alia, against this decision of the Coordinate Bench of this Tribunal (supra) on this issue. It was prayed that directions to be issued to the AO that, in the event of the Hon'ble Bombay High Court decides against the assessee by holding that Capital Gains arising on early settlement of forward contracts for foreign currency is to be assessed as 'Income from other sources', then the AO ought to re-characterise the said amount for this year in accordance with the consistent view taken by Revenue.

4.2 Per contra, the learned D.R. supported the order of the authorities below on this issue.

4.3.1 We have heard the rival contentions of both the parties and perused and carefully considered the material on record, including the judicial decision cited. Admittedly, in the year under consideration, the assessee had declared capital loss of ₹6,84,34,804/- from early settlement of forward contracts for foreign currency which the AO has accepted as returned. We find that the Coordinate Bench of this Tribunal in the assessee's own case for A.Y. 1998-99 and A.Y. 2005-06 in ITA No. 2877/Mum/2003 and ITA No. 910/Mum/2009 dated 08.06.2011 has considered the very same issue and held that the loss arising from early settlement of forward contracts in foreign exchange taken by the assessee to safeguard the foreign exchange loan taken for acquisition of shares/debentures was capital loss. At para 4.3 of the aforesaid order (supra), the Coordinate Bench has held as under: -

*"4.3 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 for purchase of debentures. There is also no dispute that the 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 in 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) vs. ACIT, 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.”*

4.3.2 Following the aforesaid decision of the Coordinate Bench of this Tribunal in the assessee's own case for assessment years 1998-99 and 2005-06 (supra), we do not find any error in the orders of the authorities below, in the year under consideration, in holding that the loss arising from settlement of forward contract taken by the assessee to safeguard the foreign exchange loan taken for acquisition of shares/debentures is capital loss as returned by the assessee. In our considered view, there is no requirement for us to issue directions to the AO as urged by the assessee, since the AO is bound to follow the directions of the Hon'ble High Court when the appeals before their Lordships is decided. Finding no merit in this ground raised and in the light of the decision of the Coordinate Bench

(supra) upholding the assessee's claim in the matter, we dismiss ground No. 1 raised by the assessee.

5. **Ground No. 2**

5.1 In this ground, the assessee contends that the authorities below had erred in applying the provisions of section 79 of the Act and thereby denying the assessee carry forward of long term capital loss incurred in the financial year relevant to A.Y. 2003-04 of ₹4,94,64,507/- and A.Y. 2004-05 of ₹6,73,63,681/- on the ground that there was a change in shareholding pattern in April 2004 (i.e. in A.Y. 2005-06) ignoring the fact that the assessee had not claimed set off of losses during the year under consideration.

5.2 The learned A.R. for the assessee for the assessee contends that the provisions of section 79 of the Act will be attracted only if in the year in which set off is claimed, there is a change in shareholding. According to the learned A.R. for the assessee, in the case on hand, in the period under consideration, i.e. A.Y. 2007-08, there is neither a change in shareholding nor has a claim for set off been made and therefore the provisions of section 79 of the Act can have no application. The change of shareholding in the case on hand took place in the period relevant to A.Y. 2005-06 and the assessee's claim for being entitled to carry forward the losses incurred in A.Y. 2003-04 and A.Y. 2004-05 was not denied. It was submitted that, it is apparent that no event has taken place in the year under consideration, i.e. A.Y. 2007-08 for the provisions of section 79 of the Act to come into play.

5.2.2 It is contended that since the assessee has not claimed set off of such losses till date, the question of disallowing the same does not arise now but rather ought to be examined in the year in which the set off is claimed. In this regard reliance was placed on the decision of the Hon'ble Apex Court in the case of CIT vs. Manmohan Das (1966) 59 ITR 699 (SC) wherein it was held that the issue of set off against profits and gains in the subsequent year has to be determined during the year in which such set off is claimed.

5.3 Per contra, the learned D.R. supported the orders of the authorities below on this issue.

5.4.1 We have heard the rival contentions of both the parties and perused and carefully considered the material on record. The facts of the matter as emanate from the record are that admittedly assessee claimed carry forward of long term capital loss (LTCL) of ₹4,94,64,507/- for A.Y. 2003-04 and of ₹6,73,63,681/- for A.Y. 2004-05, which was allowed by the AO vide orders of assessment dated 23.10.2006 and 13.12.2006 for those years respectively. The AO in the order of assessment for A.Y. 2007-08 (i.e. the year under consideration) was of the view that since there was a change in the shareholding pattern on 1<sup>st</sup> April, 2004, the aforesaid loss is to be disallowed in this year by invoking the provisions of section 79 of the Act. On appeal, the DRP upheld this view of the AO.

5.4.2 The issue before us is whether the provisions of section 79 of the Act would come into play or be attracted in the year under consideration, i.e. A.Y. 2007-08. A perusal of the provisions of section 79 of the Act indicates that the provisions thereof are attracted in the event that if the year under consideration there is a change in patterns of shareholding, then no loss incurred in any previous year shall be carried forward and set off against income of this year, i.e. A.Y. 2007-08 in the case on hand. From the facts on record, we notice that admittedly the aforesaid long term capital losses incurred by the assessee amounting to ₹4,94,64,507/- of A.Y. 2003-04 and of ₹6,73,63,681/- in A.Y. 2004-05 were allowed by the AO in the orders of assessment for those years. It is seen from a perusal of the assessee's return of income filed for the year under consideration i.e. A.Y. 2007-08, that no claim for set off has been made in respect of the aforesaid losses of assessment years 2003-04 and 2004-05 against the income of the year under consideration. It is also an undisputed fact that the change in shareholding pattern of the assessee company did not take place in the year under consideration but on 01.04.2004, which is in the previous year relevant to A.Y. 2005-06. In these factual circumstances, we find that in the year under consideration, neither has there been a change in the

shareholding pattern of the assessee nor has there been any claim for set off of carried forward of losses of the year's prior to A.Y. 2005-06. Hence, in our view, and as contended by the learned A.R. for the assessee the conditions precedent for invoking and bringing into play the provisions of section 79 of the Act are absent and have been wrongly applied by the AO to disallow the aforesaid losses, the set off of which were never claimed in this year. We, therefore, delete the order of the AO on this issue as the same matter is to be examined in the year in which such claim is preferred. Consequently ground No. 2 of assessee's appeal is allowed.

6. In **ground No. 3** the assessee challenges the action of the AO in initiating penalty proceedings under section 271(1)(c) of the Act in the year under consideration. In our view this ground has been raised prematurely and is not maintainable since no penalty has been levied in the impugned order for a cause of grievance to arise to the assessee. In this view of the matter we dismiss ground No. 3 raised by the assessee since it is premature and not maintainable.

7. In the result, the assessee's appeal for A.Y. 2007-08 is partly allowed.

Order pronounced in the open court on 22<sup>nd</sup> June, 2016.

Sd/-  
**(Pawan Singh)**  
**Judicial Member**

Sd/-  
**(Jason P. Boaz)**  
**Accountant Member**

Mumbai, Dated: 22<sup>nd</sup> June, 2016

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *DRP-1, Mumbai*
4. *The CIT/DIT, Mumbai*
5. *The DR, "L" Bench, ITAT, Mumbai*

*By Order*

//True Copy//

*Assistant Registrar*  
*ITAT, Mumbai Benches, Mumbai*

n.p.