

**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**“I” BENCH, MUMBAI**  
**BEFORE SMT. BEENA PILLAI (JUDICIAL MEMBER)**  
**AND**  
**MS. PADMAVATHY S (ACCOUNTANT MEMBER)**

**I.T.A. No.4632/Mum/2023**  
**Assessment Year: 2021-22**

|                                                                                                                                                  |     |                                                                                                                                                      |
|--------------------------------------------------------------------------------------------------------------------------------------------------|-----|------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>TVF Fund Ltd</b><br>C/o M/s. G.M. Kapadia &<br>Co. 1007, Raheja<br>Chambers, 231, Nariman<br>Point,<br>Mumbai-400021<br><b>PAN:AAECT0015H</b> | Vs. | <b>Deputy<br/>Commissioner of<br/>Income Tax,<br/>International Tax<br/>Circle 4(1)(2)</b><br>Air India Building,<br>Nariman Point,<br>Mumbai-400021 |
| <b>(Appellant)</b>                                                                                                                               |     | <b>(Respondent)</b>                                                                                                                                  |

|                      |                              |
|----------------------|------------------------------|
| <b>Appellant by</b>  | Shri Nitesh Joshi/Harsh Shah |
| <b>Respondent by</b> | Shri Krishna Kumar, Sr. D.R. |

|                              |             |
|------------------------------|-------------|
| <b>Date of Hearing</b>       | 14/01/2025  |
| <b>Date of Pronouncement</b> | 23/ 01/2025 |

**ORDER**

**Per: Smt. Beena Pillai, J.M.:**

The present appeal filed by the assessee arises out of final assessment order dated 23/10/2023 passed by the Ld. DCIT Circle-4(1)(2), Mumbai for assessment year 2021-22 on following grounds of appeal:

*“1. The impugned Assessment order passed by the learned Deputy Commissioner of Income tax (International Taxation) 4(1)(2) (hereinafter referred to "the Assessing Officer") is void ab initio since it is passed beyond the time limit provided under section 153 the Income tax Act, 1961 ("the Act"). The Assessing officer erred in not following the ratio laid down by the Hon'ble jurisdictional High Court in the case of Shelf Drilling Ron Tappmeyer Ltd. [2023] 153 taxmann.com 162 (Bombay) and the Hon'ble Madras High Court in the case of Roca Bathroom Products (P.) Ltd. [2021] 127 taxmann.com 332 (Madras).*

*2. Without prejudice to the what is stated in 1 above, the Assessing Officer erred in setting off the carried forward short term capital loss of Assessment Year 2020-21 amounting to Rs.9,94,33,237/- (which as per Double Taxation Avoidance Agreement entered into between India and Mauritius (DTAA) is loss arising from sale of shares acquired post 1.4.2017 (non-grandfathered) and from taxable source as per the provisions of the Act) against the short term and long term capital gains earned during the previous year relevant to assessment year under appeal which was claimed as not chargeable to tax under the provisions of the DTAA instead of allowing the same to be carried forward as per the provisions of section 74 of the Act.*

*3. (a) Without prejudice to what is stated in 1 above the Assessing Officer erred in law in setting off the carried forward Long term capital losses incurred during the Assessment Year 2020-21 amounting to Rs.45,67,23,162/- (which as per DTAA is loss arising from sale of shares acquired post 1.4.2017 and from taxable source as per the provisions of the Act) against the long term capital gains earned during the previous year relevant to assessment year under appeal which was claimed as not chargeable to tax under the provisions DTAA instead of allowing the same to be carried forward as per the provisions of section 74 of the Act.*

(b) *The Assessing Officer erred in law in setting off the Long term capital loss of incurred during the previous year relevant to assessment under appeal amounting to Rs.11,29,28,448/- (which as per Article 13(3B) of the DTAA is taxable as per the provisions of the Act) against the short term and long term capital gains earned during the year under appeal which was claimed as not chargeable to tax under the provisions of the DTAA instead of allowing the same to be carried forward as per the provisions of the section 74 of the Act.*

4. *The Assessing Officer erred in holding that mode of computation of capital gains should be as per the provisions of domestic laws and the benefit of the DTAA should be applied on the net capital gain which forms part of the total income.*

*The appellant submits that the Assessing Officer failed to appreciate that as per section 90(2) of the Act, each provision of the Act should be considered separately and therefore for determining total income, the income under head "Capital gains" has to be first determined considering the provision of Act or the DTAA, whichever is more beneficial and once it is first determined that the gains are not chargeable to tax in India as per Article 13(4) of the DTAA and do not form part of the total income, the question of set off does not arise.*

5. (a) *The Assessing Officer erred in inter-alia making the following finding which are contrary to the actual factual and legal position: -*

- (i) *The Assessing officer erred in holding the approach of the appellant is to take benefit of the Act and the DTAA simultaneously. The appellant submits that it has made no such claim and that it has made its entire computation of income as per the provisions of the DTAA.*
- (ii) *The Assessing Officer failed to appreciate that as per the DTAA, gains in respect of shares acquired post 1.4.2017 are*

*taxable as per the Act and that these are the only losses which are carried forward for set off against the gains as the same are required to be computed as per the Act.*

- (iii) *The Assessing Officer erred in concluding that when the appellant has adopted DTAA benefit, resorting to carry forward under section 74 during the year, is claiming both Act and DTAA provisions for capital gains simultaneously and thus appellant has adopted a hybrid approach. The appellant reiterates that it has made its entire computation of income by adopting the DTAA provisions and has not adopted a hybrid approach.*

6. *The Assessing Officer failed to bring out any distinction from the facts of the case of the appellant with that of the various decisions of the jurisdictional Income tax Appellate Tribunal which were relied upon by the Appellant and have held that no set off of losses can be made against the income not chargeable to tax under the DTAA relying upon on certain judicial precedents which have no relevance to the facts of the case and are distinguishable.*

7. *Without prejudice to what is stated above the Assessing Officer erred in computing the total income and setting off of losses in the Computation Sheet (issued alongwith the Assessment order) to a sum of Rs.35,61,18,070/- as against a sum of Rs.20,55,13,620/- as determined in Assessment order and consequently arriving at an incorrect demand of Rs.2,33,75,696/--*

8. *The Assessing officer erred in reflecting an amount of Rs 2,73,054/- as refund already issued in the computation sheet when no refund is in fact received by the Appellant*

9. *The appellant submits that the Assessing Officer be directed:*

- a) *to not set off the losses carried forward and as well as incurred during the year from taxable sources against the income earned during the year under appeal and not chargeable to tax as per the provisions of DTAA:*
- b) *to allow carry forward of short term capital loss and long term capital losses from taxable sources to the subsequent years*
- c) *Without prejudice to what is stated above to correctly compute the total income in the computation sheet and cancel the demand raised.*

*and to modify the assessment in accordance with the provisions of the Act.*

*10. Each of the above grounds of appeal are independent and without prejudice to each other.*

*11. The appellant craves liberty to add, to alter and/or amend the grounds of appeal as and when given.”*

**Brief facts of the case are as under:**

**2.** The assessee is company incorporated in Mauritius and registered with the securities and exchange board of India (SEBI) as a foreign portfolio investor (FPI). The assessee earns income in the nature of capital gain, interest of dividend from the activities carried on. It is submitted that, the assessee made investment in the Indian Capital Market which are undertaken or recognise stock exchange (National Stock Exchange/ Bombay Stock Exchange) and it is regulated by the SEBI under FPI Regulation 2019. The assessee has

obtained all necessary permission to carry out investment activities in shares and securities of Indian companies.

**2.1** The assessee is a resident of Mauritius as define under Article 4 of double taxation avoidance agreement (DTAA) and holds a valid tax residency certificate (TRC) issued by Mauritius tax authorities. During the year under consideration, the assessee earned long term capital gain amounting to Rs. 2,25,71,57,929/-. The assessee also earned short term capital gain on sale on derivatives of Rs. 39,66,97,422/- out of sale of share/derivatives respectively acquired prior to 01/04/2017. The assessee thus claimed benefit of DTAA as per section 90(2) of the Act. Accordingly, assessee claimed the long-term and short-term capital gains to be exempt under Article 13(3) and Article 13(4) of India Mauritius DTAA as it stood prior to amendment.

**2.2** It was further noted, by the Ld. AO that during the year assessee had brought forward long-term capital loss of Rs. 45,67,23,162/- from assessment year 2020-21 and long-term capital loss suffered during the year under consideration of Rs. 11,29,28,448/-. The Ld. AO noted that, assessee carry forwarded the brought forward short-term capital loss of Rs. 9,94,33,237 after setting off sum of Rs. 3,76,76,098/- during the year under consideration. The assessee chose to avail treaty benefit as per India Mauritius DTAA in respect of the Long-term and short-term capital gains earned from sale of shares.

**2.3** A show-cause notice dated 26/12/2022 was issued calling upon assessee as to why the short-term and long-term capital loss should not be set off against the long-term and short-term capital gains during the year under consideration. In response to the said notice, vide reply dated 28/12/2022 the assessee submitted that, taxable profits or loss construe separate species of income or loss and such exempt species of income or loss cannot be set off against the income or loss that is chargeable to tax. The assessee thus submitted that the losses in the present facts cannot be set off against the capital gains whether, short-term or long-term, that is exempt in the hands of the assessee by virtue of India Mauritius DTAA. In support of this contention the assessee placed reliance on CBDT Circular No. 22 of 1944 dated 29/07/1944. He also placed reliance on following decisions in support of the claim:

- 1. Decision of Hon'ble Supreme Court in case of Hariprasad Co.(P.) Limited reported in 199 ITR 118*
- 2. Decision of Hon'ble Gujarat High Court in case of Kishore Bhai Bhikha Bhai Virani reported in (2014) 367 ITR 261*
- 3. Flagship Indian Investment Co (Mauritius) Ltd (2010) 38 SOT 426 (Mum).*
- 4. J.P.Morgan India Investment Company Mauritius Limited [ITA No.2382/Mum/2021]*
- 5. Swiss Finance Corporation (Mauritius), Ltd reported in (2023) 146 Taxmann.com203.*

**2.4** The Ld. AO after considering the submissions of the assessee rejected the claim availed under the DTAA in respect of the gains

earned, which is the beneficial provision. The Ld. AO placed reliance on the decision of *Hon'ble Delhi Tribunal* in case of *Foramer S.A. Vs. DCIT reported in (1995) 52 ITD 115* held that, since methodology of computing capital gains is not provided in the treaty, the same is to be decided as per the provisions of the Act and provisions of the treaty are to be applied to the extent they are beneficiary to the assessee. He also placed reliance on the decision of *Hon'ble Calcutta High Court* in case of *CIT vs. Davy Ashmore India Ltd. Reported in (1991) 190 ITR 626* and the decision of *Hon'ble Andhra Pradesh High Court in case of CIT vs. Visakhapatnam) Port Trust, reported in 1983 ITR 146.*

**2.5** In respect of the decision relied by the assessee, the Ld. AO opined that further appeal has been filed before the *Hon'ble Bombay High Court* and were therefore not applicable to the present facts of the case. The Ld. AO thus computed capital gains in the hands of the assessee after setting off long-term and short-term capital losses against the long-term and short-term capital gains earned by the assessee before the determining the amount that was held to be exempt in Article 13(3)/(4) of India Mauritius DTAA.

Aggrieved by the order of the Ld. AO the assessee preferred objection before the DRP.

**2.6** The DRP to upheld the proposed computation.

On receipt of the DRP direction the Ld. AO passed the impugned order restricting exemption under Article 13(3)/(4) of India Mauritius DTAA after setting off the short-term and long-term capital losses against the short-term and long-term capital gain.

Aggrieved by the order of the Ld. AO assessee is in appeal before this *Tribunal*.

**3.** Ground No. 1 raised by the assessee is challenging the final assessment order passed by the Ld. AO to be void *ab initio* as it is passed beyond the period of limitation as per the ratio laid down by the Hon'ble Bombay High Court in case of shelf drilling *Ron Tappmeyer Ltd.* Reported in (2023) 153 *taxmann.com* 162.

The Ld. AR submitted that the issue is not contested by the assessee before this tribunal as per the instructions by the assessee. **Accordingly ground No. 1 raised by the assessee is dismissed as infructuous.**

**4.** The Ld. AR submitted that **Grounds No. 2-6 & 9** are on the aspect of the manner in which the exemption available to the assessee under Article 13 of India Mauritius DTAA has been computed by the Ld.AO.

**4.1** The Ld.AR submitted that, there is no dispute between the parties that the long-term/short-term capital gains earned by the assessee are out of the shares/derivatives that were acquire prior to 01/04/2017. He submitted that, as per Article 13(3)/(4) of India

Mauritius DTAA, any gains arising out of sale of assets acquired prior to 01/04/2017 are to be taxed, based on the residency of recipient. He submitted that, India Mauritius DTAA prior to the gave exclusive right to tax the gains as per the state of residence of the recipient.

**4.2** The Ld. AR thus submitted that, the brought forward short-term / long-term capital loss were to be carry forwarded to the subsequent years, as per the Income Tax Act u/s. 74(1) of the Act. It is submitted that, the losses suffered by the assessee on sale of the shares acquired post 01/04/2017 and therefore, in any event these cannot be set off against capital gains earned on shares acquired prior to 01/04/2017. The Ld. AR submitted that the amendment introduced vide Notification dated 10/08/2016 w.e.f. 01/04/2017 gave right to India to tax capital gains arising out of alienation of shares of an Indian company acquired on or after 01/09/2017. He submitted that the said losses will have to be set off against gains arising from the shares acquired post 01/04/2017. He thus vehemently apposed the computation of net gain computed by the Ld. AO in order to arrive at exempt gain under Article 13(3)/(4) of DTAA.

**4.3** The Ld. AR further submitted that, such kind of treatment to avail benefit of gains as per DTAA and carry forward of losses as per Income Tax Act, was a subject matter of consideration before the *Hon'ble Mumbai Special Bench* in case of *Sumitomo Mitsui Banking*

Corpn. Vs. DDIT reported in (2012) 19 taxmann.com 364 categorically observed as under:

*“61. Section 90(2) of the Income-tax Act, 1961 provides that where the Central Government has entered into an agreement with the Government of any country outside India or specific territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, 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. This specific provision contained in section 90(2) makes it abundantly clear that in relation to the assessee like the one in the present case to whom the double tax avoidance treaty entered into by the Indian government applies, the provisions of Income-tax Act shall apply to the extent they are more beneficial to him, It, therefore, follows that if the provisions of the domestic law are more beneficial to the assessee than the provisions of the relevant tax treaty, the provisions of the domestic law shall override and prevail over the provisions of the treaty, Article 23 of the Indo-Japanese treaty, therefore, cannot be interpreted in a way as sought by Shri Girish Dave because if such interpretation is assigned to article 23 and the interest income which is otherwise not taxable in India as per the domestic law is held to be taxable relying on the provisions of the treaty, the same will run contrary to the provisions of section 90(2). Such interpretation, therefore, cannot be assigned to article 23 and the only interpretation which, in our opinion, can be assigned to the said article so as to make the provisions thereof in consonance with section 90(2) of the domestic law is that If there is an express provision made in the convention giving benefit to the assessee which is contrary to the domestic law, then the provisions of treaty can be relied upon which shall override and prevail over the provisions of the domestic law to give any benefit expressly given to the assessee under the treaty. The decision of Hon'ble Supreme Court in the case of Azadi Bachao Andolan (supra) fully supports this view”*

**4.4** He thus submitted that, there is no evasion of Income Tax or profit shifting, that could be attributable in the hands of the assessee by availing benefits under both DTAA of gains as well as carry forward of loss as per Indian Income tax Act. He also relied on

the decision of *Coordinate bench of the Tribunal* in case of *Goldman Sachs India Investments (Singapore) PTE Ltd.*, [ITA No. 6619/Mum/2016] *vide order dated 09/04/2024* in support of this contention, wherein this coordinate bench of this *Tribunal* observed as under :

*“6. From the above, we noted that it is very clear that while determining taxability of the income of an assessee, if provisions of the Act are more beneficial as compared to the tax treaty then the beneficial provisions of the Act will apply in determining the taxability of such income. Thus, having regard to the provisions of section 90(2) of the Act and given that the provisions of section 74 of the Act permit the Assessee to carry forward capital losses to subsequent assessment years, the provisions of the Act are more beneficial than the provisions of the IS treaty. For the year under consideration, the Assessee has filed its return of income in accordance with the provisions of the Act. Based on judicial jurisprudence, the provisions of the treaty cannot be thrust upon the Assessee simply because the Assessee is a tax resident of a country with which India has entered into a tax treaty or on account of the mere perception of the AO that the Assessee may claim benefits under the tax treaty in subsequent years. Accordingly, we are of the view that the capital losses incurred from transactions in the Indian capital markets amounting to Rs 205,969,056 should be construed as income accruing or arising from transactions undertaken in India falling within the scope of section 5 of the Act and therefore, the same should be eligible to be carried forward to subsequent years in accordance with the provisions of section 74 of the Act. We allow this issue of assessee.”*

**4.5** The Ld. AR also placed reliance on the decision of coordinate bench of tribunal in case of *J.P. Morgan India Investment Company Mauritius Limited* reported in ITA No. 2382/MUM/2021 *vide order dated 27/09/2022*, wherein this *Tribunal* observed and held as under:

*“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.”*

**4.6** On the contrary, the Ld.DR placed reliance on computation of capital gains by the Ld. AO and submitted that, the tax liability in the hands of the assessee has to be calculated first as per the Income Tax Act, as there is no specific provision under India Mauritius DTAA for computation of Income under the head capital gains. He submitted that once the capital gains are determine as per Income Tax Act, benefit under DTAA is to be granted, if there is a gain in the net result. He also submitted that, before giving effect to the provisions of DTAA as per section 90(2) of the Act, the taxable income has to be calculated as per various provisions of the act which includes provisions u/s. 70/74 of the Act. The Ld. DR submitted that, the assessee cannot adopt selective approach in respect of capital gains from sale of shares as exempt as per DTAA ,

and claiming carry forward of loss suffered under the Income Tax Act. The Ld. DR thus place reliance of observation of Ld. AO/DRP.

We have perused the submission advance by both sides in the light place before us.

**5.** Admittedly there is long-term capital gain and short-term capital gain on sale of share / derivatives acquired by the assessee prior to the 01/04/2017. The assessee also has short-term capital loss and long term capital loss, brought forward from A.Y. 2020-21. It is also an admitted fact that the assessee suffered long term capital loss and short term capital loss from sale of shares that was acquired after 01/04/2017.

**5.1** Based on the above undisputed facts, the beneficial provision to claim exemption under the DTAA are different in these two periods because, any capital gain arising out of sale of shares acquired prior to 01/04/2017 was exempt under article 13(3)/(4) of DTAA as it was taxable based on the residency of the recipient. In the present facts the assessee is admittedly a resident of Mauritius as defined under Article 4 of DTAA. Thus the gain earned by the assessee upon sale of shares /derivatives acquired prior to 01/04/2017 cannot be subjected tax in India.

**5.2** In the year 2016 Article 13 of DTAA was amended which was notified on 10/08/2016 wherein, any gains on sale of shares of an Indian company acquired after 01/04/2017 is liable to be taxed on

full rate under the provisions of the Income Tax Act. Admittedly, the losses in the present facts of the case suffered by the assessee arises out of sale of shares of Indian company acquired post 01/04/2017.

**5.3** The Ld.AO while computing the exemption under Article 13(3)/(4) netted off the losses against the gains, thereby taxing the gains which, otherwise is exempt as per the pre-amended Article 13(3)/(4) of India Mauritius DTAA. In our view the computation of capital gains earned will have to be as per the provisions of DTAA prior to amendment and will be taxable as per the residency of the assessee as India had given up its right to tax such gains prior to 01/04/2017. As there is no dispute that assessee is resident of Mauritius, the question of taxing capital gains earned on sale of share/derivatives acquired prior to 01/04/2017, cannot arise to be in India, as they do not enter into the computation of income as per the Income Tax Act.

**5.4** In so far as brought forward losses from A.Y. 2020-21 are concerned, these are from the sale of share/derivatives acquired post 01/04/2017 and can only be set off against any gains that would arise from sale of share /derivatives acquired after 01/04/2017. Under such circumstances assessee will have to be allowed the carry forward losses and cannot be set off against the foreign income. Accordingly, as the gain is not chargeable to tax, no

loss can be set off against such exempt income. CBDT circular No. 22 of 1944 dated 1944 is clear on this aspect and reads as under :

*“Total income is defined as the total amount of income, profits and gains referred to in sub- section (1) of section 4 of the Indian Income-tax Act, 1922 computed in the manner laid down in the Act. In the case of a non-resident, his foreign income is not included in his 'total income' which is to be computed subject to the provisions of section 24 of the Indian Income-tax Act, 1922. If the 'total income' is a loss, it has to be carried forward subject to the provisions of section 24(2) of the Indian Income-tax Act, 1922 and cannot be set off against any income which does not form part of the 'total income'. Otherwise, a non resident would not get any relief in Indian taxation on account of the loss incurred by him in India.”*

**5.5** The above discussion is also supported by the observations of co-ordinate bench of this Tribunal in case of *Gold man Sachs Investment (Mauritius) Ltd. Vs. DCIT(International taxation)* reported in (2021) 187 ITD 184, *DCIT vs. Patni Computers systems Ltd.* reported in (2008) 114 ITR 159 Pune and the decision of Co-ordinate bench of this Tribunal in case of *Flagship Indian Investment Co. Mauritius Ltd. V. ASSTT. DIT* reported in (2010) 38 SOT 426 reproduced herein above. Based on ratio laid down therein, we do not have any hesitation in holding that the assessee is entitled to claim benefit of carry forward of, the brought forward losses of the earlier years and it cannot be set off against the capital gains earned by the assessee during the year, that is exempt in present facts.

**Accordingly the grounds 2-6 & 9 raised by the assessee are stands allowed.**

**6. Ground No. 7 & 8 raised by the assessee are consequential in nature and do not require adjudication.**

**7. Ground No. 10 and 11 are general in nature and also does not require adjudication.**

**In the result the appeal filed by the assessee stands partly allowed**

**Order pronounced in the open court on 23/01/2025**

**Sd/-  
(MS. PADMAVATHY S)  
Accountant Member**

**Sd/-  
(BEENA PILLAI)  
Judicial Member**

Mumbai:  
Dated: 23/01/2025  
Poonam Mirashi,  
Stenographer

Copy of the order forwarded to:

- (1) The Appellant
- (2) The Respondent
- (3) The CIT
- (4) The CIT (Appeals)
- (5) The DR, I.T.A.T.

True Copy  
By order