

आयकर अपीलीय अधिकरण, कोलकाता पीठ “ए”, कोलकाता

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA

श्री राजेश कुमार, लेखा सदस्य एवं श्री संजय शर्मा न्यायिक सदस्य के समक्ष

[Before Shri Rajesh Kumar, Accountant Member & Shri Sonjoy Sarma, Judicial Member]

I.T.A. No. 46/Kol/2024

Assessment Year: 2014-15

Rita Gupta (PAN: AEDPG 9889 E)	Vs.	DCIT, Central Circle-2(2), Kolkata
Appellant / (अपीलार्थी)		Respondent / प्रत्यर्थी

Date of Hearing / सुनवाई की तिथि	20.03.2024
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	06.06.2024
For the Appellant/ निर्धारिती की ओर से	Shri S. K. Tulsiyan, Advocate Mita Rizvi, A.R
For the Respondent/ राजस्व की ओर से	Shri B.K. Singh, JCIT(Sr. D.R)

ORDER / आदेश

Per Rajesh Kumar, AM:

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)-26, Kolkata (hereinafter referred to as the Ld. CIT(A)"] dated 28.11.2023 for the AY 2014-15.

2. The only common issue raised in the various grounds of appeal is against the appellate order passed by the Ld. CIT(A) upholding assessment order wherein the claim of set off of loss amounting to Rs. 47,90,616/- arising out of quoted securities

with STT paid against the long term capital gain on sale of unquoted shares was rejected.

3. Facts in brief are that the assessee filed return of income on 31.07.2014 declaring total income of Rs. 18,31,980/-. Pertinent to note that a search action u/s 132 of the Act was conducted on 13.03.2014 at the residential and office premises of the IRC group and its key persons. The assessee was also covered in the said search. Thereafter the statutory notices were duly issued and served on the assessee. During the assessment proceedings, the AO called for various information from the assessee which were supplied and replied by the assessee and finally the assessment was framed making various additions including the addition of Rs. 47,90,616/- resulting on non-allowance of set off of loss from sale of equity shares on recognized stock exchange with STT paid against the profit on sale of unquoted equity shares. The AO rejected the said action on the ground that the long term capital gain on sale of quoted shares is exempt u/s 10(38) of the Act and similarly the loss incurred was also not liable to be set off against the other taxable income.

4. In the appellate proceedings, the Ld. CIT(A) dismissed the appeal of the assessee by upholding the order of AO on this issue on the same reasoning that since long term gain from sale of securities /shares are exempt in terms of provisions of Section 10(38) of the Act and therefore on the same analogy the long term capital loss resulting from the sale of equity shares with STT paid cannot be allowed to be set off against the taxable long term capital gain resulting from sale of any other asset. The Ld. CIT(A) while dismissing the appeal relied on the series of decision namely Harprasad & Co. Pvt. Ltd. [99 ITR 118], CIT vs. J. H Gotla [156 ITR 323], CIT vs. Coin health Food Pvt. Ltd. [304 ITR 308], decision of Gujarat High Court in the case of Kishorebhai Bhikhabhai Virani vs. ACIT [367 ITR 261], decision of Hon'ble Delhi Tribunal in the case of Nikhil Sawhney vs. ACIT [119 taxmann.com 372], decision of Hon'ble Mumbai Tribunal in the case of DDIT (International Taxation) vs. Asia Pacific Performance SICAV [2015] 55 taxmann.com 333. Aggrieved assessee

filed an appeal before the Tribunal challenging the said decision relied by the first appellate authority.

5. The Ld. A.R vehemently submitted that the long term capital loss Rs. 47,90,616/- incurred from the sale of equity shares on recognized stock was rightly set off against the long term capital gain amounting to Rs. 50,00,000/- earned from the sale of unquoted equity shares of M/s IRC Infra & Reality Pvt. Ltd. The Ld. A.R referred to provision of Section 45 of the Act and submitted that loss resulting from sale of quoted equity shares with STT paid can be set off against the long term capital gain resulting from the sale of unquoted equity shares. The Ld. A.R submitted the provision of Section 2(14) of the Act the term capital asset has been defined while providing certain exceptions and exclusions which have been specifically defined in sub-clause (i) and (vi). The Ld. A.R further submitted that as per provision of section 45(1) any profits of gain arising from the transfer of a capital asset effected in the previous year shall ,save as otherwise provided in Sections 54,54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H, be chargeable to income tax under the head capital gain and shall be deemed to be the income of the previous year in which the transfer took place. The ld. A.R has referred to provisions of Section 47 which enumerate certain transactions not to be regarded as transfer and consequently the provisions as contained in section 45 of the Act would not apply the said transactions as contemplated in Section 47. The Ld. A.R also referred to the computation provisions as contained in Section 48 of the Act and submitted that the section itself enumerates mode of computation of gain from sale of capital asset . The Ld. A.R vehemently submitted that the capital asset as defined in section 2(14) of the Act includes inter alia shares and securities. The ld. Counsel for the assessee drew attention of the Bench to the provisions of Section 10(38) of the Act which provide for exemption of any income by way of long term capital gain resulting from sale of shares/ securities with STT paid from the ambit of income. The Ld. A.R contended that the nothing has been provided in Section 10(38) of the Act or for that matter in Section 45 to 48 of the Act to state that long term capital loss resulting from sale of shares/securities with STT

paid is to be ignored on the ground that Section 10(38) of the Act exempts the income arising from the transfer of long term capital asset being an equity share or unit subject to fulfillment of certain conditions such as transfer to be made on the stock exchange and STT paid on the sale of securities. The Ld. A.R submitted that the legislature had not put any embargo or exclusion in respect of long term capital loss on sale of shares/securities carried out on the stock exchange to be set off against long term capital gain arising on sale of other capital asset. Reiterating his arguments, the Ld. A.R argued that the provisions of Section 2(14) of the Act defined the term capital asset and no specific exception has been carved on in respect of equity shares or securities as have been provided in the case of stock in trade, agricultural land, personal effects, Gold bonds and Special bearer bonds as enumerated in exceptions provided in (i) to (vi) to the said section. The Ld. A.R stated that Section 45 of the Act lays down the charge of tax on gain arising on transfer of capital asset thus covering the long term capital gain derived from sale of equity shares/securities whether or not they are listed on stock exchange and whether or not they are transferred with payment of STT. Again the manner and mode of computation of long term capital gain on sale of shares/securities is uniformly laid down in Section 48 of the Act. The Ld. A.R argued that where the resultant figure is long term capital loss, the manner for claiming its set off / carry forward has been set out in Section 70, 71(3) and 74 of the Act. The Ld. A.R submitted that conjoint reading of all these applicable sections, it is clear that no exception has been made with regard to long term capital gain/loss arising on sale of equity shares and it is liable to income tax like any other item of gain/loss from sale of capital asset. Therefore, it cannot be said that source i.e. transfer of long term capital asset being equity shares by itself is exempt from tax so as to say that any income from such source shall include loss as well. The Ld. A.R stated that the Section 10(38) of the Act is part of Chapter III of the Income Act which is titled as “income which do not form part of the total income”. The Ld. A.R stated that if the provisions of Section 10(38) are carefully analyzed then it is amply clear that specific specie of receipt to which exemption from tax is granted subject to fulfillment of certain condition. Accordingly Section 10 enlists various species of

receipts which are otherwise revenue in nature and they are granted exemption from income tax by the legislature and submitted that the legislature can grant exemption only when there is a positive income and not where there is a loss or negative income on which admittedly there cannot be any charge of income tax. The Ld. A.R has referred to Section 70, 71 and 74 of the Act as to how the aggregation of income the resultant amount is a loss from eligible unit it shall be eligible for carry forward and set off of losses in accordance with provision of Section 72 of the Act. The Ld. A.R has submitted that the issue is squarely covered by the decision of Co-ordinate bench wherein the identical issue has been decided in favour of the assessee by holding that loss resulting from sale of securities/quoted shares on stock exchange with STT paid would be eligible for set off against the income resulting from any other source of income and there is no embargo placed on such set off against any other income as the source of income has not been excluded from charging provisions and it is only a particular type of income has been exempted u/s 10(38) of the Act. The Ld. A.R in defense of argument relied on the decision of Co-ordinate Bench in the case of United Investments vs. ACIT [TS-379-ITAT-2019 (Kol)] and Raptakos Brett & Co. Ltd. vs. DCIT [TS-326-ITAT-2015 (Mum)-TP]. The Ld. A.R has relied on the decision of Hon'ble jurisdictional High Court in the case of Royal Calcutta Turf Club vs. CIT in [144 ITR 709 (Cal)]. The Ld. Counsel for the assessee submitted that the Hon'ble Calcutta High Court while passing the above order has considered the decision of Hon'ble Supreme Court in the case of CIT vs. KaramchandPremchand Ltd. in [1960] 40 ITR 106 (SC). The Ld. A.R distinguished the decisions as relied upon by the Ld. CIT(A) while passing the appellate order and submitted that the decision in the case of Harprasad & Co. Pvt. Ltd. (supra), CIT vs. J. H Gotla (supra), CIT vs. Coin health Food Pvt. Ltd. (supra) , were rendered under different facts except the decision of coordinate benches in the case of Nikhil Sawhney vs. ACIT (supra) and in the case of DDIT (International Taxation) vs. Asia Pacific Performance SICAV (supra) and decision of Gujarat High Court in the case of KishorebhaiBhikhabhai Virani vs. ACIT (supra) which were decided against the assessee under the similar facts. The Ld. A.R submitted that in the case of Nikhil Sawhney vs. ACIT (supra) the Co-ordinate

Bench has placed the sole reliance on the fundamental legal position as decided in the case of Harprasad & Co. Pvt. Ltd. (supra). The Ld. A.R submitted that the assessee is not disputed the fundamental legal position but the ratio in the said decision would apply only when the entire source is exempt and not liable to tax and not in the instant case where only a specific type of income under that source would be exempt. Similarly in the case of DDIT (International Taxation) vs. Asia Pacific Performance SICAV (supra), the Ld. A.R submitted that reliance was placed in the case of Harprasad & Co. Pvt. Ltd. (supra), CIT vs. J. H Gotla (supra), CIT vs. Coin health Food Pvt. Ltd. (supra) and decision of Gujarat High Court in the case of Kishorebhai Bhikhabhai Virani vs. ACIT (supra). The Ld. A.R submitted that the position as regards the decision of Hon'ble Apex court in the case of Harprasad & Co. Pvt. Ltd. (supra) has been extracted hereinabove whereas in other decisions of the coordinate benches were rendered under different facts and therefore not applicable to the case. So far as the third decision of Gujarat High Court in the case of Kishorebhai Bhikhabhai Virani vs. ACIT (supra) is concerned, the Hon'ble Gujarat High Court has not the decision of the jurisdiction High Court in the case of Royal Calcutta Turf Club vs. CIT in [144 ITR 709 (Cal)] and it is settled law when the two constructions are there then the construction favorable to the assessee has to be followed as has been held by the Hon'ble Apex Court in the case of *CIT vs. Vegetable Products Ltd.* 88 ITR 192 (SC). The Ld. A.R finally prayed that in view of the aforesaid legal position the appeal of the assessee may be allowed by setting aside the order of Ld. CIT(A) and directing the AO to allow the set off of long term capital loss resulting from sale of equity shares with STT paid against the loss suffered from sale of unquoted shares by the assessee during the year.

6. The Ld. D.R on the other hand relied on the orders of the authorities below by submitting that the law is very clear on this issue as when the long term capital gain from sale of shares/securities is exempt u/s 10(38) of the Act that the analogy loss arising from the sale of shares/securities cannot be allowed to be set off against the income under the same or other heads of income because that would have effected

of reducing the taxable income of the assessee which is not the intent of legislation. The Ld. D.R submitted that the conjoint reading of Section 2(14), 45, 47, 48, 70 & 71 of the Act and the various case laws such as Nikhil Sawhney vs. ACIT (supra), Harprasad & Co. Pvt. Ltd. (supra) and other as relied by the Id CIT(A), non-allowing the set off of long term capital loss from quoted shares against the long term capital gain resulting from unquoted shares was rightly made by the AO and upheld by the Ld. CIT(A). The Ld. D.R therefore prayed that the order of authorities below may kindly be affirmed.

7. We have heard the rival submissions and perused the material on record including the various case laws cited by the rival parties. The undisputed facts are that during the year, the assessee has earned long term capital gain of Rs. 50,00,000/- from sale of unquoted shares of M/s IRC Infra and Reality Pvt. Ltd. and also incurred long term capital loss of Rs. 47,90,616/- from sale of quoted equity shares which was executed on the registered stock exchange and STT was duly paid. Therefore the issue before us for adjudication is whether the long term capital loss suffered on sale of equity shares can be set off against the long term capital gain earned by the assessee on sale of unquoted equity shares or not. The assessee has vehemently contended before us that the provisions of Section 10(38) of the Act provide for exemption of long term capital gain resulting from sale of shares / securities subject to fulfillment of certain conditions as enumerated in that section and the entire source has not been exempted. We have perused the provisions of Section 2(14) which defines the capital asset and also various exceptions and exclusions enumerated which do not fall within the ambit of capital asset. We have also perused the provisions of Section 45 of the Act which is the charging provisions for the income or gain arising from transfer of capital asset which was effected in the previous year. Similarly Section 47 enumerates the transactions which are not regarded as transfer for the purpose of capital gain u/s 45 of the Act. Further the mode of computation of capital gain or loss has been provided in section 48 to 55. The mode and manner of computing the intra-head income/ loss and intra head setting off and carry forward of unabsorbed loss to

the subsequent years are contained in Section 70, 71 and 74. We observe from the perusal of section 2(14) of the Act that shares/securities are treated as capital asset and no exception has been provided in section 2(14) as has been provided in (i) to (vi) to the said section. Further the gain arising from the transfer of long term capital asset is treated for long term capital gain chargeable to tax u/s 45 and section 47 does not provide any exception that transfer of long term equity shares are not treated as transfer for the purpose of Section 45. Section 48 provides for computation of capital gain. After perusing the aforesaid sections conjointly and together, we find that nowhere any exclusion or exception has been provided to the long term capital gain resulting from sale of equity shares. In our opinion, it is only the long term capital gain resulting from sale of shares/securities which was granted exemption u/s 10(38) subject to the fulfillment of certain conditions and not the entire source which was excluded from the aforesaid sections. Therefore we are of the considered view that when the entire source is not excluded from the charging section and only special type of income is excluded then the interpretation of law has to be made strictly and cannot be deemed to include the any other income or loss resulting or falling within the same source. The case of the assessee is squarely covered by the decision of Hon'ble jurisdictional High Court in the case of *Royal Calcutta Turf Club vs. CIT* in (supra). In the said decision the assessee has incurred loss in broodmares account and in pig account which is set off against its income from other sources under the head business. The AO disallowed the claim for set off on the ground that the income if derived from these two heads were exempt u/s 10(27) of the Act and therefore correspondingly loss incurred from the same activities also did not enter the computational provisions of the Act. The AO's action of disallowing the claim of set off was upheld by the successive appellate authorities. On reference u/s 256(1) of the Act, the Hon'ble High Court held that Section 10(27) of the Act excluded term only the income derived from a business of livestock breeding or poultry or dairy farming. The said section did not exclude the business of livestock breeding or poultry or dairy farming out rightly from the operation of the Act and therefore the loss

suffered by the assessee was admissible deduction in computing the total income. The relevant portion is extracted below:

“Under the I.T. Act, 1961, there are certain incomes which do not enter into the computation of the total income at all. In computing the total income of a resident assessee, certain incomes are not included under Section 10 of the act. It depends on the particular case; where the Act is made inapplicable to income from a certain source under the scheme of the Act, the profit and loss resulting from such a source will not enter into the computation at all. But there are other sources which, for certain economic reasons, are not included or excluded by the will of the Legislature. In such a case, one must look to the specific exclusion that has been made.”

7.1. The Hon’ble High Court while passing the above decision considered the decision of Hon’ble Apex Court in the case of CIT vs. Karamchand Premchand Ltd. (supra). In the said case the assessee held a managing agency of a company in British India and also carried on a pharmaceutical business in the native state of Baroda without British India. During the relevant chargeable accounting periods showed profit in the managing agency business but incurred losses in the pharmaceutical business in the native state. The question was whether while determining the business profits of the assessee for the purpose of the business profits Tax Act, 1947 the losses incurred in the native state reduced the British Indian profits of the assessee. The relevant part the decision is extracted below:

“that the third proviso to section 5 of the Business Profits Tax Act took out of the ambit of the Act merely the “income, profits or gains” of a business in an Indian State and did not exclude the business itself. The loss suffered by the assessee in the pharmaceutical business carried on in the State of Baroda had to be deducted in computing the business income of the assessee for the purposes of the business profits tax.”

7.2. We have also perused the decision of coordinate bench in the case of United Investments vs. ACIT (supra) wherein the identical issue has been decided in favour of the assessee. The operative part is reproduced as under:

“6. We have heard the rival submissions of both the parties. Assailing the order of the Ld. CIT(A), the Ld. AR appearing on behalf of the appellant submitted that the lower authorities erred on facts and in law in treating the long term capital loss incurred on sale of listed shares on the same footing as that of long term capital gain and thereby denying the carry forward of long term capital loss since long term capital gain was exempt u/s 10(38) of the Act. According to Ld. AR what is contemplated in section 10(38) is exemption of positive income and losses will not come within the purview of the said section. Inviting our attention to the provisions of Section 70 & 71 wherein the Legislature has laid down the manner in

which the Long term capital loss is to be set-off and carried forward to subsequent years, the Ld. AR submitted that the Legislature has not put any embargo to exclude Long term capital loss from sale of shares to be set off against Long term capital gain arising on account of sale of other capital asset. The Ld. AR submitted that it is not a case where the source of income itself is exempt from tax and therefore any gain/loss derived in any manner there from is to be ignored for tax purposes. He submitted that capital asset is defined in Section 2(14) which inter alia includes shares & securities. The levy of income-tax on capital gain arising upon transfer of a capital asset has been provided in Section 45 and mode of computation has been elaborated in section 48. Certain exceptions have been provided in section 47 to those transactions which are not regarded as transfer. It is only if upon sale of shares which are listed on stock exchange, the assessee derives a positive income and fulfill the prescribed conditions set out in Section 10(38) that such gain is exempt from tax. According to Ld. AR there is nothing provided in Section 10(38) or for that matter Section 45 to 48 to state that long term capital loss on sale of shares are to be ignored as section 10(38) exempts the income arising from the transfer of long term capital M/s. United Investments. AY- 2013-14 asset being an equity share or unit. He submitted that the scope of this specific exemption provision is meant from a particular specie of positive income cannot be enlarged and read into section 70 or 71 or sections 45 to 48 so as to draw an inference that long term capital loss on sale of shares are to be ignored for the purposes of the Act. In support of his contention, the Ld. AR strongly relied upon the decision of Hon'ble jurisdictional Calcutta High Court in the case of [Royal Calcutta Turf Club v. CIT](#) [1983] 144 ITR 709/12 Taxman 133 and the coordinate Bench of this Tribunal in the case of [Raptakos Brett & Co. Ltd Vs DCIT](#) (69 SOT 383). Per contra the Ld. DR relied on the order of the lower authorities. He submitted that the term 'income' is understood to include negative income i.e. loss as well and therefore he submitted that when the profits arises from transfer of shares of listed companies on which security transaction is paid is exempt u/s 10(38) of the Act, then as a corollary even the loss arising from such source also cannot be set off against any other income which is chargeable to tax. The Ld. DR accordingly pleaded that the orders of the lower authorities be confirmed.

7. After giving a thoughtful consideration to the facts of the case and the provisions of law; we find that the main issue to be decided in this ground is whether the long term capital loss arising on sale of long term listed shares can be assessed in terms of Section 45 of the Act and thereafter be permitted to be carried forward to be set off. It is the contention of the lower authorities that when the gain arising sale of long term listed shares is exempt from tax u/s 10(38) of the Act then by equal measure any loss arising in the hands of the assessee from transfer of listed securities sold on payment of STT should also remain outside the ambit of charging provisions of the Act. It is true that the judicial authorities including the Hon'ble Supreme Court in the case of [CIT Vs J.H. Gotla](#) (156 ITR 323) held that the expression 'income' shall include loss because the loss is nothing but negative income. It is cardinal principle of interpretation of statutes that the observations and findings of the Court must be understood in the context of the facts involved in the case decided by the Court. It is not proper to divorce the observation of the Court from the facts involved in the case. It is well laid down that the text of the statute must be understood in the context in which it is used and therefore any particular observation of the Court in the judgment cannot be considered or applied in its isolation or divorced from the context in which it was rendered. In the case of [CIT Vs J.H. Gotla](#) (supra), the issue before the Apex Court was M/s. United Investments. AY- 2013-14 assessee's claim in the context of aggregation of income. Section 64 of the Act requires clubbing of income of the minor children or of the spouse and accordingly in the given circumstances the tax is required to be paid on aggregate income after clubbing. In this instant case it was the assessee's case that if the income accruing to the minor child or spouse was liable to be taxed on aggregate basis in the hands of the assessee then by equal measure the loss incurred by the minor and which was rightfully assessable under the Act was

required to be included in the hands of the parent in terms of Section 64 of the Act. It is in this context that the Hon'ble Apex Court held that if the income assessable in the hands of the minor is required to be clubbed with the income of the parent then even the loss legally assessable in the hands of the minor was required to be clubbed in the hands of the parent and only thereafter the total income of the parent was required to be assessed. We thus note that in the decided case the Revenue had not proved that the any source from which the minor earned income or incurred loss was outside the purview of tax provisions. Admittedly the source of income in the hands of the minor was such which was liable to tax and if there had been any income then the same would have been included in the hands of the parent. In the light of this factual and legal position, the Hon'ble Supreme Court held that if the income was liable for clubbing in the hands of the parent then equally the same principle will apply with respect to loss which was negative income.

8. In our considered opinion the judicial concept that the term 'income' includes loss can be applied only when the entire source of such income falls within the charging provisions of the Act. Accordingly in a case where the source of income is otherwise chargeable to tax but only a specific specie of income derived from such source is granted exemption, then in such case the proposition that the term 'income' includes loss will not be applicable. It is only when the source which produces 'income' is outside the ambit of taxing provisions of the Act, in such case alone the 'income' including negative income can be said to be outside the ambit of taxing provisions and therefore the negative income is also required to be ignored for taxation purposes. As a corollary therefore where only one of the streams of income from the 'source' is granted exemption by the Legislature upon fulfillment of specified conditions, then the concept of 'income' includes 'loss' will not apply. In this background it is necessary to examine now as to whether the 'source' of long term capital gain i.e. long term capital asset being equity shares is completely outside the M/s. United Investments. AY- 2013-14 charging provisions or not. On reference to Section 2(14) of the Act which defines the term 'capital asset', it is noted that there is no specific exception carved on in respect of equity shares or securities like in the case of agricultural land or personal effect. Further Section 45 which lays down the charge of tax on gain arising on transfer of 'capital asset' covers the long term capital gain derived on sale of equity shares whether or not they are listed on stock exchange and whether or not they are transferred on payment of STT. The manner and mode of computation of long term capital gain on sale of shares is uniformly [laid down in](#) Section 48 of the Act. In case the resultant figure is a long term capital loss, the manner for claiming its set off / carry forward has been set out in Section 74 of the Act. Therefore, on conjoint reading of all the applicable Sections, we find that nowhere any exception has been made with regard to long-term capital gain/loss arising on sale of equity shares and it is liable to income-tax like any other item of capital asset. In our considered view therefore it cannot be said that the source viz., transfer of long term capital asset being equity shares by itself is exempt from tax so as to say that any 'income' from such source shall include 'loss' as well.

9. We find that the exemption in respect of long term capital gain accruing on transfer of listed securities on payment of STT is granted under Section 10(38) of the Act. The said provision is part of [Chapter III of the Income-tax Act, 1961](#) which bears the title 'Income which do not form part of the total income'. If one carefully analyzes various sub-sections of [Section 10](#) then it is evident that each sub-section enlists specific specie of receipt to which exemption from tax is granted if certain conditions are fulfilled. We therefore find that [Section 10](#) enlists various species of receipts which are otherwise revenue in nature but they are granted exemption from income-tax by the Legislature. The Legislature can grant exemption only when there is a positive income and not where there is a 'loss' or negative income on which admittedly there cannot be any charge of income-tax. In this regard one may gainfully refer to the CBDT Circular No.7/2013 dated 16.07.2013 issued in the context of [Section](#)

10A of the Act which also falls within Chapter III of the Act and grants exemption in respect of profits derived by undertaking located in SEZ/ FZE. In the said Circular the CBDT clarified follows:

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10. The perusal of the above Circular makes it clear that the exemption under Section 10A is allowable only where the resultant income of the undertaking was positive. The Circular specifically clarifies that in the event the eligible undertaking incurs a loss, then such loss is not to be ignored on matching principle, but it can be set off and/or carried forward in terms of Section 72 of the Act. We therefore find that in analogous situation arising under Section 10A which is also part of Chapter III, the Board has accepted the legal proposition that even though the income is exempt but the loss arising from the same source is liable to be assessed and granted set off as per law. In view of the foregoing we find merit in the Ld. AR's contention that the exemption u/s 10(38) has been carved out in respect of a specific instance and that too where there is a positive income and upon fulfillment of conditions set out therein. We therefore find force in Ld. AR's submissions that merely because the capital gain arising on sale of long term listed shares upon payment of STT was exempt, for such reason alone the loss incurred on long term listed shares upon payment of STT will also be outside the charging provisions of the Act.

11. In this regard we find the Ld. AR's reliance on the judgment of the jurisdictional Calcutta High Court in the case of Royal Calcutta Turf Club Vs CIT (supra) to be relevant.....

12. We also note that the above judgment of the jurisdictional Calcutta High Court was applied by the coordinate Bench of this Tribunal at Mumbai in the case of Raptacos Bret & Co. Ltd Vs DCIT (supra) involving similar facts as involved in the present case.....

13. For the reasons set out above and following the decisions discussed above, we direct the AO to assess the long term capital loss incurred by the appellant on sale of listed shares and allow its carry forward in accordance with law. Ground No. 2 is therefore allowed.

14. In the result, the appeal of the assessee is allowed for statistical purposes.”

7.3. Similarly we note that the Co-ordinate Bench in another decision in the case of Raptacos Brett & Co Ltd. (supra) has also decided the similar issue by following the decision of Calcutta High Court in the case of Royal Calcutta Turf Club vs. CIT (supra) and by considering the decision of CIT vs. Hariprasad & Co. Pvt. Ltd. (supra) as relied by the Id CIT(A). The Co-ordinate Bench held that the decision of Hon'ble Apex Court in the case of CIT vs. Hariprasad & Co. Pvt. Ltd. did not apply to the case of the assessee as the principle laid down in the above decision would be applicable if entire source is excluded from the charging section.

8. We have also perused the decision relied upon by the Ld. CIT(A) as noted above and find that except two decisions of the coordinate benches namely Nikhil Sawhney (supra) and DDIT vs. Asia Pacific Performance SICAV (supra) and decision of Gujarat High Court in the case of Kishorebhai Bhikhabhai Virani vs. ACIT (supra) all other are distinguishable of facts. We note that in the said two decisions of the coordinate benches, the same issue has been decided against the assessee. In the case of Nikhil Sawhney (supra) the Co-ordinate Bench has relied on the decision of Hon'ble Supreme Court in the case of CIT vs. Hariprasad & Co. Pvt. Ltd. which has been rendered on the different principle that the income includes loss however the said legal proposition would hold only the entire source is exempt income and not liable to tax and not as in a case where the income falling within such source is treated as exempt. The Hon'ble Supreme Court in the case of Hariprasad & Co. Pvt. Ltd. (supra) has been held that the expression 'income' shall include loss because the loss is nothing but negative income. But in our opinion the principle laid down by the Hon'ble Apex Court that income includes negative income can be applied only when the entire source of income falls within the charging provision of Act but where the source of income is otherwise chargeable to tax but only a specific kind of income derived from such source is granted exemption, then in such case, the proposition that the term income includes loss would not be applicable. Thus if the source which produce the income is outside the ambit of charging provisions of the section in such case negative income or loss can be said to be outside the ambit of taxing provisions. Consequently the negative income is also required to be ignored for tax purpose. In other words, where only one of the streams of income from a source is granted exemption by the legislature upon fulfillment of specified conditions then the concept of income includes loss would not be applicable. Similarly in the second decision of DDIT vs. Asia Pacific Performance SICAV (supra) has relied on the decision of Hariprasad & Co. Pvt. Ltd. (supra), CIT vs. J H Gotla (supra) and CIT vs. Gold Coin Health Food Pvt. Ltd. (supra) which are distinguishable of facts. In the case of Kishorebhai Bhikhabhai Virani vs. ACIT (supra) the issue was decided against the assessee but in the said decision, the decision of Hon'ble Calcutta High Court in the

case of Royal Calcutta Turf Club (supra) has not been referred at all and considering the ratio laid down by the Hon'ble Supreme Court in the case of CIT vs. Vegetable Products Ltd. (supra) where there are two construction, then the construction/interpretation which is in favour of the assessee has to be followed.

9. Considering the facts of the present case in the light of various decisions as discussed above, we are of the view that the loss incurred on the sale of shares on stock exchange platform, where STT was duly paid, is eligible to be set off against the long term capital gain earned by the assessee from sale of unlisted shares. Accordingly we set aside the appellate order and direct the AO to allow the set off of the loss against the long term capital gain as claimed by the assessee.

10. In the result, the appeal of the assessee is allowed.

Order is pronounced in the open court on 6th June, 2024

Sd/-

(Sonjoy Sarma /संजय शर्मा)
Judicial Member/न्यायिक सदस्य

Sd/-

(Rajesh Kumar/राजेश कुमार)
Accountant Member/लेखा सदस्य

Dated: 6th June, 2024

SM, Sr. PS

Copy of the order forwarded to:

1. Appellant- Rita Gupta, 95N, Block-E, New Alipore, Kolkata-700053
2. Respondent – DCIT, Central-2(2), Kolkata
3. Ld. CIT(A)-26, Kolkata
4. Ld. Pr. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata