ITAT: Assessee eligible for selection of more beneficial provision; Allows carry forward of STCL

Nov 05, 2024

Morgan Stanley Mauritius Company Ltd [TS-807-ITAT-2024(Mum)]

Conclusion

Mumbai ITAT holds that the Assessee (Morgan Stanley Mauritius) eligible for choosing the beneficial provisions provided under the Act or the India-Mauritius DTAA (DTAA), section 90(2), thus allows carry forward of the short term capital loss under the Act; Opines that the Assessee is eligible for choosing the beneficial provision of the India-Mauritius DTAA towards the long term capital gain (LTCG) earned during the relevant AY and, for the short term capital loss brought forward, the Assessee can choose the beneficial provisions provided under the domestic law and carry forward the same without setting off against the LTCG earned in relevant AY; ITAT emphasises that in the present case, the LTCG arising from sale of the shares was treated as not taxable in India by the Assessee in view of Article 13(4) of the DTAA, thus the Assessee did not adjust the said capital gains against the short term capital gain brought forward from earlier years; Rejects Revenue’s argument that the Assessee could not adopt selective approach for treating the LTCG arising from the sale of shares as not taxable as per the DTAA, however claiming carry forward of the short term capital gain invoking domestic low provisions; Points out that under Section 90(2), the Assessee can chose beneficial provisions between the Income-Tax Act, 1961 and the applicable DTAA and concurs with the Assessee’s submission that as far as taxability of the LTCG during the year under consideration, it was more beneficial under the Article 13(4) of the DTAA, however as regards the brought forward short term capital loss, Assessee opted for domestic provisions, which was more beneficial than the DTAA provisions; Thus, opines that the Assessee is eligible for carry forward of the same and not required to adjust against any LTCG or short term capital gain during the year under consideration as the same is more beneficial to the Assessee; Relies on co-ordinate bench ruling in J.P. Morgan India Pvt. Ltd., Credit Suisse (Singapore) Co. (Mauritius) wherein the theory of the segregation of capital gain for drawing DTAA to the extent of more beneficial to the assessee, was upheld; Further relies on co-ordinate bench ruling in Indium IV (Mauritius) Holding wherein it was held that income arising from the separate stream has to be treated separately and therefore, different treatment could be sought by the Assessee for the LTCG arising in the year under consideration and short term capital loss which has been brought forward from the earlier years.:ITAT Mum

Decision Summary

The ruling was delivered by the Division Bench of Mumbai ITAT comprising Shri Om Prakash Kant, Accountant Member and Ms. Kavitha Rajagopal, Judicial Member.

Mr. Sunil Moti Lala appeared for the Assessee and the Revenue was represented by Ms. Somogyan Pal, CIT-DR.

Assessee, a tax resident of Mauritius, registered as foreign portfolio investor (FPI) under SEBI, received income for AY 2020-21, in the nature of the capital gains arising from its investment in Indian securities and filed return of income declaring income of Rs.47.49 Cr; Revenue, during the course of scrutiny assessment, noted that the Assessee claimed Long term capital gains of Rs. 68.39 Lacs as exempt under Article 13(4) of the India-Mauritius DTAA and also showed brought forwards short term capital loss of Rs. 885.52 Cr; Revenue held that the Assessee was not entitled for carry forward of brought forward losses to subsequent AY for the reason that the assessee can’t be allowed for selective approach of taking either ‘DTAA’ or ‘benefit under the Act’, thus rejected Assessee’s claim of the carry forward of short term capital losses, which was confirmed by the DRP. Aggrieved, Assessee preferred the present appeal.

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

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
MS. KAVITHA RAJAGOPAL (JUDICIAL MEMBER)

ITA No. 3316/MUM/2023
Assessment Year: 2020-21

Morgan Stanley Mauritius Company Ltd., C/o S R B C & Associates LLP, 14th floor, The Ruby, 29, Senapati Bapat Marg, Dadar (West), Mumbai-400028. **PAN NO. AADCM 5927 G** **Appellant**	**Vs.**	Dy. CIT (International Taxation) – Circle 3(2)(2), 16th floor, Room No. 1615, Air India Building Nariman Point, Mumbai-400021. **Respondent**

Assessee by	:	Mr. Sunil Moti Lala
Revenue by	:	Ms. Somogyan Pal, CIT-DR

Date of Hearing	:	29/08/2024
Date of pronouncement	:	28/10/2024

ORDER

PER OM PRAKASH KANT, AM

This appeal has been preferred by the assessee against final assessment order dated 21.07.2023 passed by the Ld. Dy. Commissioner of Income-tax, International Taxation, Circle 3(2)(2), Mumbai [in short 'the Ld. Assessing Officer'], pursuant to the direction of Ld. DRP dated 27.06.2023 for assessment year 2020-21, raising following grounds:

> *Based on the facts and circumstances of the case, Morgan Stanley Mauritius Company Limited (hereinafter referred to as 'the Appellant') respectfully craves leave to prefer an appeal under section 253 of the Act against the order dated 21 July 2023 (served on 24 July 2023) passed under section 143(3) read with section 144C(13) of the Act (hereinafter referred to as the 'Order) by the Deputy Commissioner of Income-tax (International Taxation), Circle - 3(2)(2), Mumbai (hereinafter referred to as the 'Learned AO'), in pursuance of the directions issued by the Hon'ble Dispute Resolution Panel - 3, Mumbai (Hon'ble DRP), on the following grounds, each of which are without prejudice to one another:*
>
> *Ground No. 1: Initiation of assessment proceedings is invalid*
>
> *On the facts and circumstances of the case and in law, the notice issued under section 143(2) of the Act is invalid and thus, initiation of assessment proceedings is invalid as the notice was issued by the National Faceless Assessment Centre instead of the jurisdictional assessing officer, even though international taxation matters are specifically excluded from Faceless Assessment.*
>
> *Ground No. 2: DRP directions is bad in law as not signed by all the 3 presiding members*
>
> *On the facts and circumstances of the case and in law, the directions issued by the Hon'ble Dispute Resolution Panel (DRP) dated 27 June 2023 is invalid and bad in law as the directions are signed only by one presiding Member of the Panel, without appreciating that the Hon'ble DRP is a collegium of three Commissioners of Income Tax and therefore the directions issued by the Panel needs to be signed by all the members of the Panel*
>
> *Ground No. 3: Order is null and void as underlying DRP directions are bad in law*
>
> *On the facts and circumstances of the case and in law, the order passed under section 143(3) read with section 144C(13) of the Act is invalid since the same is pursuant to the Directions issued by the Hon'ble DRP which is signed only by one presiding member and not by all the members of the Panel, thereby rendering the consequential final order null and void.*
>
> *Ground No. 4: Order is time barred*
>
> *On the facts and circumstances of the case and in law, the Order dated 21 July 2023, passed by the Learned AO under section 143(3) read*

with section 144C(13) of the Act, is without jurisdiction and bad in law inasmuch as the same has been passed beyond the time limit prescribed in Section 153 of the Act.

The learned AO erred in not passing the order within the time limit prescribed under section 153 of the Act which is the outer time limit for passing the order and hence, the order dated 21 July 2023 which is passed after 30 September 2022 (time limit as per Section 153 of the Act) is time barred and liable to be quashed.

Ground No. 5: Denial of brought forward losses to be carried forward to subsequent years

On the facts and circumstances of the case and in law, pursuant to the directions of the DRP, the learned AO has erred in denying the Appellant's right to carry forward short term capital loss (STCL) of INR 8,583,167,968 brought forward from earlier years (i.e. INR 892,680,120 from AY 2013-14 and INR 7,690,487,848 from AY 2016-17) to subsequent years, on the ground that the capital gains earned by the Appellant (prior to 1 April 2017) were exempt from tax under the Double Taxation avoidance agreement entered into between the Government of Republic of India and the Government of Mauritius (IM treaty).

In the course of passing the final assessment order, the learned AO has ignored:

- *the provisions of section 90(2) of the Act which provides that where the Central Government has entered into an agreement with the Government of any country outside India for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to an assessee to whom such agreement applies, the provisions of the Act shall apply to the extent, they are more beneficial to that Assessee; and*
- *the fact that every assessment year is a separate unit and it is upto the discretion of the Assessee to determine whether the provisions of the Act are more beneficial or the provisions of the treaty.*

Ground No. 6: Initiation of penalty proceedings under section 270A of the Act

On the facts and circumstances of the case, the learned AO erred in initiating penalty proceedings under section 270A of the Act for under-reporting of income.

The Appellant craves leave to add, alter, vary, omit, substitute, amend or withdraw any or all of the above grounds of appeal and to submit such statements, documents and papers as may be considered necessary either at or before the hearing of this appeal so as to enable the Hon'ble Income -tax Appellate Tribunal to decide this appeal according to law.

2. Briefly stated, facts of the case are that the assessee is a corporate entity and tax resident of Mauritius registered as foreign portfolio investor (FPI) under Security Exchange Board of India (SEBI), FPI regulations to carry out portfolio investment activities in Indian securities. In the year under consideration, the assessee received income in the nature of the capital gains arising from its investment in Indian securities. The assessee filed return of income on 15.01.2021 declaring total income at Rs.47,49,42,920/- which also included income under the head 'other sources' from interest on debenture/bonds etc. The return of income filed by the assessee was selected for scrutiny assessment and statutory notices under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. During scrutiny proceedings, the Assessing Officer observed that assessee shown net long term capital gains of Rs.68,39,68,998/- arising from alienation of shares acquired prior to 01.04.2017. The said capital gain was claimed as exempt from the tax in India by the assessee in accordance with Article 13(4) of the India-Mauritius (IM) Double Taxation Avoidance Agreement (DTAA). Further, the assessee also shown brought forward short term capital loss of Rs.885,52,50,765/- from earlier assessment years. The assessee stated that losses pertain to assessment years for which return of income was filed under the provisions of the Act being more beneficial than the India Mauritius DTAA. It was submitted that said loss had not been utilized in the current year and therefore, same was carried forward to the subsequent years.

The detail of short term and long term capital gain/loss suffered by the assessee in the relevant year has been reproduced by the Assessing Officer in para 3 of the impugned assessment order. For ready reference, same is extracted as under:

Particulars	*[Amount In INR)*		
	Net Gain/ (loss)	*Gain exempt (loss) ignored under the Treaty/ Act*	*Taxable gains/ capital gains/ (loss)*
A] Short term			
Equity shares (covered under	*(9,753,534)*	-	*(9,753,534)*
Total (A)	*(9.753,534)*	-	*(9,753,334)*
B] Long term capital gains' (loss)			
On derivatives	*(63,840)*	*(63,840)*	
On Mutual Funds covered under seclion 112A]	*(452,624)*	*(452,624)*	
Equity shares covered under section 112AJ	*695,755,142*	*683,968,998*	*1,932,611 [1]*
Total (B)	*695,236,678*	*663,452,534*	*1,932,611*

[1]"After set-off of short-term losses of IN 9,753,534 and exemption of INR 100,000 under section 112A of the Act."

2.1 In the opinion of the Assessing Officer, the assessee was not entitled for carry forward of brought forward losses to subsequent years, for the reason that assessee can't be allowed for selective approach of taking either 'treaty benefit' or 'benefit under the Act'

Before the Assessing Officer the assessee submitted that section 90(2) of the Act allows the assessee to apply the provisions of the Act to the extent more beneficial to the assessee. The Ld. Authorized Representative (AR) of the assessee further placed reliance on the decision of the Co-ordinate Bench of the Tribunal in the case of (i) Goldman Sachs Investments (Mauritius) Ltd. v. Deputy Commissioner of Income Tax, (International Taxation)-2(3)(2) [2021] 187 ITD 184 (Mumbai - Trib.), (ii) Deputy Commissioner of Income-tax (International Taxation) v. Swiss Finance Corporation (Mauritius) Ltd. [2023] 146 taxmann.com 203 (Mumbai – Trib.), (iii) DCIT (IT) -1 (2)(2), Mumbai v. M/s. Bluebay Mauritius Investment Ltd ITA No. 1370/Mum/2021 and ITA No. 1369/Mum/2021 (Mumbai - Trib.), (iv) ACIT-3(1)(1), Mumbai v. M/s J. P. Morgan India Investment Company Mauritius Limited ITA No. 2382/Mum/2021 (Mumbai - Trib.) and (v) Flagship Indian Investment Co. (Mauritius) Ltd. v. Assistant Director of Income-tax (Inti. Taxation)-3(2) [2010] 38 SOT 426 (Mumbai - Trib.). The assessee also referred to the CBDT Circular No. 22 of 1944 dated 29.07.1944 and submitted that the loss included in the total income has to be carried forward and cannot be set off against income which does not form part of the total income. It was further submitted that each assessment year being an independent year the, assessee could invoke the India Mauritius treaty for claiming exemption article 14(4) and continue to carry forward its losses without setting off losses against the income which is not chargeable to tax under the India Mauritius treaty. However, the Ld. Assessing Officer rejected the contention of the assessee in his draft assessment order passed on 21.09.2022. The relevant observations of the Assessing Officer are reproduced as under:

> *"5. The above contention of the assessee is considered but not found acceptable for the following reasons:*
>
> *(i) As per the Article 13 of DTAA between India &Mauritius, gains derived by resident of a Contracting State from the alienation of any property in securities acquired prior to 1 April 2017 shall be taxable only in that state. Thus, any capital gain from trading in securities in India by a tax resident of Mauritius is taxable only in Mauritius and is excluded from taxable income in India.*
>
> *The claim made by the assessee is that nature of capital gain arises in India is exempt from tax in India. The gains include loss. Therefore, if a gain is exempt from taxation, loss would also be exempt. It is also trite law that loss from an exempt source can neither be allowed to be set off nor can be allowed to be carried forward and absorbed against income from taxable sources in subsequent years. Though assessee has relied on the judgement of Hon'ble Mumbai ITAT in the case of Goldman Sachs Investments (Mauritius) Limited (supra), the same is not tenable as department has filed an appeal against the said judgement before the Hon'ble Bombay HC.*
>
> *(ii) The assessee had claimed the benefit of sub-section (1) of Sec. 74 of the Act for carrying forward the capital losses pertaining to the same type and nature of income for set-off against future capital gains in subsequent assessment years. As there cannot be any taxable income from these sources, the only plausible reason for carry-forward of loss will be for it to be set-off against taxable income arising on equity purchases made after 1/04/2017. This will lead to a situation where gains/profit for equity purchases before 01/04/2017cannot be taxed nor be set-off against losses while losses will be set-off against taxable income. Considering the difference in the taxability of the capital gains income for shares purchased prior to and after 01.04.2017, the carry-forward and set-off loses is not tenable. It cannot be said that two reasonable interpretations are possible and the one in favour of assessee has to be adopted, therefore the reliance of assessee on the judgement of Hon'ble SC in the case of CIT v Vegetable Products Ltd [1973] 88 ITR 192 (SC) is misplaced.*
>
> *(iii) Assessee being resident of Mauritius, Sec. 45 by virtue of the India-Mauritius tax treaty was made inapplicable in respect of "capital gains" and therefore the "capital losses" will also not form part of the "total income" of the assessee. Applicability of section 74(1)will require (i). a*

loss which arises as the net result of computation under the head "Capital Gains"; and (ii). to "income" which falls within the definition of "total income". However, as these conditions are not satisfied the provisions of Sec. 74 are not applicable in the present case. The reliance placed by the assessee on Circular No. 22 of 1944, dated 29-7-1944, para-2 is also incorrect. The said circular reads as below:

Non-resident's Indian loss to be carried forward and not set off against foreign income.-'Total income' is defined as the total amount of income, profits and gains referred to in the sub-section(1) of section 4 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*. If the 'total income' is a loss, it has to be carried forward subject to the provisions of section 24(2)* 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." (* of the 1922 Act.)**

It therefore only states that non-taxable 'foreign income' which is not included in total-income should not be used for set-off of loses. In the present case there is only one source of income which is investments in equities and assessee is selectively opting for the operation of IT Act and Treaty for the income arising from the same source.

(iv) The contention of the assessee that each assessment year is an independent assessment year and hence it can claim benefit of IM treaty for the current year while carrying forward the losses from earlier years as per IT Act is not tenable. As discussed in the preceding paragraph, section 74(1) will not be applicable to the assessee as the during A. Y. 2020-21 assessee has claimed capital gains income to be exempt as per IM Treat. This will imply that losses being brought forward cannot be said to be part of the total-income anymore."

3. Aggrieved, the assessee filed objection before the Ld. DRP but could not succeed. Pursuant to the direction of the Ld. DRP, the Assessing Officer passed the impugned final assessment order and rejected the claim of the carry forward of short term capital losses of assessment years 2013-14 and 2016-17. The relevant table of disallowance of the said carry forward losses is reproduced as under:

Sr. No.	***AY***	***Short Term Capital Loss (in INR)***	***Treatment of loss***

1.	*2013-14*	*892,680,120*	*Loss denied (Reasons provided in 5-7)*
2.	*2016-17*	*7,690,487,848*	*Loss denied (Reasons Provided in 5-7)*
Total loss brought forward denied		***8,583,167,968/-***	

3.1 Aggrieved, the assessee is in appeal before the Tribunal raising the grounds as reproduced above.

4. Before us, the Ld. counsel for the assessee has filed a Paper Book containing pages 1 to 14, which is a copy of the submission dated 13.07.2021 filed before the Assessing Officer.

5. In ground Nos. 1 to 4, the assessee has challenged initiation of the assessment proceedings but the Ld. counsel for the assessee submitted that if ground No. 5 of the appeal is allowed in favour of then he might not pursue the grounds and same may be left open for deciding at appropriate stage if so required. Accordingly, firstly, we are adjudicating the ground No. 5 of the appeal of the assessee.

5.1 The ground No. 5 of the appeal concern to denial of brought forward losses to be carried forward to the subsequent years.

5.2 Before us, the Ld. counsel for the assessee submitted that the Ld. Assessing Officer has ignored the basic principle of section 90(2) of the Act which provides option to the assessee for choosing provisions out of Income-tax Act or treaty, which is more beneficial to the assessee. According to the Ld. counsel brought forward short term capital losses pertains to earlier year and in those years the assessee opted for application of the provisions of the Income-tax

Act and under those provisions only short term capital loss has been brought forward to the year under consideration for further carry forward to the subsequent years. As far as the capital gain arising in the year under consideration, has been claimed as exempt in view of Article 13(4) of the India Mauritius DTAA. The Assessing Officer has disputed only carry forward of the short term capital losses. The Ld. counsel relied on the decision of the Co-ordinate Bench of the Tribunal in the case of Flagship Indian Investment CO (Mauritius) Ltd. (supra) wherein also the capital losses pertaining to assessment year 2002-03 were claimed to be carried forward for subsequent assessment years. Further, the Ld. counsel relied on the decision of Credit Suisse (Singapore) Ltd. v. CIT (International Taxation) in ITA No. 1107 and 1108/Mum/2022 wherein the Tribunal accepted the theory of the segregation capital gain and capital losses for drawing benefit of DTAA/Act to the extent they were more beneficial to the assessee. The Ld. counsel also relied on the decision of the Co-ordinate Bench of the Tribunal in the case of Indium IV (Mauritius) Holdings Ltd. v. DCIT (International Taxation) [2023] 155 taxmann.com 336 (Mumbai-Trib.) wherein also the Assessing Officer was directed to allow assessee's claim of carry forward of the capital gain.

5.3 On the contrary, the Ld. Departmental Representative (DR) relied on the decision of the Hon'ble Supreme Court in the case of CIT v. Harprasad & Co. (P.) Ltd. [1975] 99 ITR 118 (Supreme Court) and submitted that exempt source of loss does not enter into return of income and therefore, the capital loss which was exempted under the treaty provisions was not entitled or eligible for to be carried forward to the subsequent years for setting off against capital gain of the subsequent years. The Ld. DR also relied on the decision of the Hon'ble Supreme Court in the case of CIT v. J.H. Gotla [1985] 156 ITR 323 (SC) wherein it is held that while computing the assessee's income the minor children which is liable to be added u/s 16(3) (of the 1922 Act) would include profit and loss from the business of the assessee's spouse and minor children and accordingly upheld brought forward of business loss of such business. The Ld. DR also relied on the decision of the Hon'ble Calcutta High Court in the case of Royal Calcutta Turf Club to CIT [1983] 12 Taxman 133 wherein Hon'ble Court has observed that where the Act may inapplicable to the income from 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. The Ld. DR also relied on the decision of the Co-ordinate Bench of the Tribunal in the case of Dy. CIT (International Taxation) v. Asia Pacific Performance SICAV [2015] 55 taxmann.com 333 (Mum) wherein it is held that loss on transaction (of transfer) of long term capital assets specified u/s 10(38) on which securities transaction tax is paid shall be adjusted against capital gain on which security transaction is paid. In view of the decisions relied upon the Ld. DR submitted that before giving in effect to the provisions of relevant

DTAA as per section 90(2) of the Act, the taxable income of any assessee has to be calculated as per various provisions of the Income-tax Act including the provisions related to carry forward and set off of losses. As per sub-clause (a) & (b) of section 74(1) of the Act, brought forward losses under the head 'capital gain' have to be set off against the income if any, under the head 'capital gains' assessable for the current year against the brought forward losses on account of capital gains.

6. We have heard rival submission of the parties and perused the relevant material on record. The issue in dispute involved is regarding the allowability of the carry forward of the brought forward short term capital loss to subsequent years. Under the provisions of section 74 of the Act if in any of the assessment year , computation under the head 'capital gain' is loss to the assessee then whole of such loss is to be carry forward to the following assessment years and thereafter same is to be set off against short term capital gain or long term capital gain and remaining loss if any which could not be set off, shall be carried forward to the following assessments and so on. In the instant case, the long term capital gain arising from sale of the shares in the year under consideration has been treated by the assessee as not taxable in India in view of Article 13(4) of the India Mauritius DTAA and the assessee has not adjusted the said capital gains against the short term capital loss which were brought forward from the earlier year i.e. assessment

year 2013-14 and 2016-17. According to the Assessing Officer in the year in which said loss arose to the assessee, the assessee taken benefit of the Article 13(4) of the Act and treated the gain arising from the sale of the shares as not taxable in India and therefore, the said loss also was being not taxable in India in view of Article 13(4) of the Act was not eligible to be carried forward to subsequent years. According to the Assessing Officer, the assessee could not adopt selective approach for treating the long term capital gain arising from the sale of shares as not taxable in view of treaty provisions but claiming carry forward of the short term capital gain invoking domestic low provisions. However, according to the assessee in view of provisions of section 90(2) of the Act the assessee can chose beneficial provisions out of Income-tax Act as well as under the DTAA. According to him as far as taxability of the long term capital gain during the year under consideration is concerned, it was more beneficial under the Article 13(4) of the India Mauritius DTAA and therefore, assessee opted over the invoking of said provisions. However, in respect of short term capital loss which is brought forward from earlier year, the assessee opted invoking of the domestic provisions of the Act and therefore, assessee is eligible for carry forward of the same and not required to adjust against any long term capital or short term capital gain during the year under consideration as the same is more beneficial to the assessee. In this regard, the assessee has relied on the decision of the Co-ordinate Bench of the Tribunal in the case of M/s

J.P. Morgan India Pvt. Ltd., wherein, the Tribunal has held that assessee is eligible for benefit of the carry forward of the losses. The relevant finding of the Tribunal is reproduced as under:

> *"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 are 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]."*

6.1 Further, the Co-ordinate Bench of the Tribunal in the case of Credit Suisse (Singapore) Co. (Mauritius) Ltd. (supra) upheld the theory of the segregation of capital gain for drawing DTAA to the extent of more beneficial to the assessee. The relevant finding of the Tribunal is reproduced as under:

> *"8. In the case of Flagship Indian Investment Co (Mauritius) Ltd.(supra), the assessee had claimed benefit of Article -13 of the DTAA in respect of 'Capital Gains' and had sought to carry forward capital losses of the earlier years as the same could not be set off against capital gains for the relevant assessment year. The Assessing Officer and CIT(A) rejected assessee's claim of carry forward of capital losses on the pretext that since the assessee had*

claimed benefit of exemption under Article 13 of the DTAA on capital gains, capital losses are also exempt. When the issue reached before the Tribunal, the Coordinate Bench placing reliance on the decision in the case of CIT vs. Western India Oil Distributing Co. Ltd., 249 ITR 517 (SC) and CIT vs. Manmohan Das 59 ITR 699(SC) and also after considering CBDT Circular No.22 of 1944 dated 29/07/1944 held that the assessee is justified in claiming carry forward of brought forward losses of the earlier years to the subsequent years and at the same time upheld assessee's claim of capital gains as exempt under the provisions of Article -13 of the DTAA. Thus, the Tribunal accepted the theory of segregation of capital gains and capital losses for drawing benefits of DTAA/the Act to the extent they are more beneficial to the assessee.

9. In the case of Goldman Sachs Investments (Mauritius) Ltd. (supra), the Co-ordinate Bench placing reliance on the decision of Flagship Indian Investment Co (Mauritius) Ltd.(supra) reiterated the position that the assessee is entitled to the benefit of Article-13 of DTAA in respect of capital gains and allowed carry forward of capital loss under the provisions of the Act. For the sake of completeness relevant extracts of the findings of the Coordinate Bench are reproduced herein under:-

> *"12. ....We are unable to comprehend that now when admittedly the short term and long term capital gains earned by the assessee from transfer of securities during the year in question are exempt under Article 13 of the India-Mauritius Tax Treaty, where would there be any occasion for seeking adjustment of the brought forward STCL against such exempt income. Our aforesaid view is squarely covered by the order of the ITAT, Mumbai in the case of Flagship Indian Investment Company (Mauritius) Lid. (supra). In the case of the assessee before the Tribunal that pertained to A. Y. 2005-06 the assessee had brought fonward capital loss of Rs. 87,06,49,335/-from transfer of securities in A.Y. 2002-03. The aforesaid loss was determined in the hands of the assessee vide an intimation under Sec. 143(1) for A.Y 2002-03. Observing, that since the capital gains were not taxable in India as per Article 13 of the Indian-Mauritius Tax Treaty, the A.O being of the view that capital loss would also be exempted, and therefore, the assessee would not be entitled to claim the set-off of the same against the capital gains for the relevaye assetment years. On benefit of carry forward of such capital losses of the earlier years, thus, declined the appeal, the CIT(A) upheld the order of the A.O. On further appeal, the Tribunal concluded that the assessee was fully justified in claiming the carry forward of the capital losses of the earlier years to the subsequent years, and both the A.O and the CIT(A) were in error in not allowing the same. Accordingly, the A.O was directed to allow the carry forward of the capital losses of the earlier vears to the subsequent years, according to law. As in the aforesaid case, in the case*

of the present assessee before us, as the short term and long term capital gains earned by the assessee from transfer of securities during the year in question are admittedly exempt from tax under Article 13 of the India-Mauritius tax treaty, therefore, the brought forward STCL of the previous years was rightly carried fonvard by the assessee to the subsequent years........

The Tribunal further held:

.... Now coming to the claim of the revenue that as Sec. 45 of the Act, by virtue of India-Mauritius tax treaty was rendered unworkable in respect of "capital gains" derived by the assessee from transfer of securities in India, therefore, the "capital losses" would also not form part of the assessee's "total income", and thus, could not be computed under the Act. we are afraid does not find favour with us. Apropos the aforesaid observation of the A.O, we are of the considered view that the same had been arrived at by loosing sight of the fact that the "capital losses" in question had been brought forward from the earlier years and had been determined and allowed to be carried forward by the A. while framing the assessment for A.Y 2012-13, vide his order passed u/s 143(3), date 19-3-2015 and had not arisen during the year under consideration i.e A.Y 2013-14. Accordingly, the claim of the A.O that the "capital losses" b/forward from the earlier years, pertaining to a source of income that was exempt from tax was thus not to be carried forward to the subsequent years, being devoid of any merit, is thus rejected. At this stage, we may herein observe that it is for the assessee to examine whether or not in the light of the applicable legal provisions and the precise factual position the provisions of the IT Act are beneficial to him or that of the applicable DTAA. In any case, the tax treaty cannot be thrust upon an assesses. In case the assessee during one year does not opt for the tax treaty, it would not be precluded from availing the benefits of the said treaty in the subsequent years. Our aforesaid view is fortified by the order of the ITAT, Pune in Palm Computer Systems Ltd. (supra). We thus in terms of our aforesaid observations, not being able to persuade ourselves to subscribe to the view taken by the A.O/DRP, who as noticed by us hereinabove had sought adjustment of the b/forward STCL against the exempt short term and long term capital gains earned by the assessee during the year in question, thus 'set aside' the order of the A.O in context of the issue under consideration. Accordingly, we direct the A.O to allow carry forward of the b/forward STCL of Rs. 3926,36,70,910/- to the subsequent years."

From the reading of above decisions, it is evident that there is no impedement in segregating capital losses and capital gains from different source of income under the head 'capital gains' for the *purpose of claiming the benefit of DTAA/ provisions of the Act as the case may be, whichever is more beneficial to the assessee in terms of section 90(2) of the Act."*

6.2 Further, the identical issue of carry forward of the brought forward capital loss has been adjudicated by the Tribunal in the case of Indium IV (Mauritius) Holding Ltd. (supra), wherein the Tribunal held that income arising from the separate stream has to be treated separately and therefore, different treatment could be sought by the assessee for the long term capital gain arising in the year under consideration and short term capital loss which has been brought forward from the earlier years. The relevant finding of the Tribunal is reproduced as under:

> *"22. Therefore, it is clear that source of income has a direct nexus with the stream out of which the income springs to the assessee. The heads of income are provided to aggregate similar incomes derived from different sources for deduction and taxation purposes. In the head of income "Capital Gains", the short-term and long-term assets are different sources of income, but each transaction constituting the short- term and long-term assets are different sources of income. Accordingly, gains/losses arising from different transactions are distinct transactions and a separate source of income; accordingly, STCG/STCL and LTCG/LTCL are distinct and separate streams of income arising to an assessee. Section 90(2) of the Act provides the provisions of the Act or the provisions of the Treaty, whichever are beneficial, shall apply to the assessee. As held by the Bangalore ITAT and affirmed by the Hon'ble Karnataka High Court in case of IBM World Trade Corpn. (supra), the provisions of section 90(2) of the Act will apply to each stream of income and not the head of income. Respectfully, following the decisions in case of IBM World Trade Corpn. (supra), Dimension Data Asia Pacific Pte. Ltd. (supra) and Montgomery Emerging Markets Fund (supra), the Assessee has claimed beneficial provisions of the India - Mauritius DTAA in respect of STCG and allowed to carry forward the LTCL as per section 74 of the Act."*

6.3 In view of above discussion, we are of the opinion that the assessee is eligible for choosing the beneficial provision of the India

Mauritius DTAA as far as long term capital gain earned during the year under consideration. As far as short term capital loss brought forward is concerned the assessee is eligible for choosing the beneficial provisions provided under the domestic law and carry forward the same without setting off against the long term capital gain for subsequent years. The ground No. 5 of the appeal of the assessee is accordingly allowed.

6.4 Since, we have already allowed the ground No. 5 of the appeal of the assessee the ground Nos. 1 to 4 of the appeal are merely rendered academic and therefore same are left open to be any appropriate stage if so required.

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

Order pronounced in the open Court on 28/10/2024.

Sd/-	**Sd/-**
(KAVITHA RAJAGOPAL)	**(OM PRAKASH KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai;
Dated: 28/10/2024
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai