

**IN THE INCOME TAX APPELLATE TRIBUNAL "D", BENCH
MUMBAI**

**BEFORE SHRI M.BALAGANESH, AM
&
SHRI RAM LAL NEGI, JM**

**ITA No.3409/Mum/2018
(Assessment Year :2013-14)**

M/s. Rare Investments 151, Nariman Point Mumbai – 400 021	Vs.	The Commissioner of Income Tax (28), Mumbai R.No.114, Aaykar Bhavan Maharshi Karve Road Mumbai – 400 021
PAN/GIR No.AAHFR8059H		
(Appellant)	..	(Respondent)

Assessee by	Shri S.C. Tiwari & Ms. Rutuja N Pawar
Revenue by	Shri D.G. Pansari
Date of Hearing	03/09/2019
Date of Pronouncement	11/09/2019

आदेश / ORDER

PER M. BALAGANESH (A.M):

This appeal in ITA No.3409/Mum/2018 for A.Y.2013-14 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-28, Mumbai in appeal No.CIT(A)-28/IT-175/ITO-17(3)(1)/2016-17 dated 22/03/2018 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 22/03/2016 by the Id. Income Tax Officer- 17(3)(1), Mumbai (hereinafter referred to as Id. AO).

2. The only effective issue to be decided in this appeal of the assessee is as to whether the Id. CIT(A) was justified in upholding the action of the

Id. AO by not allowing the set off of long term capital loss on sale of shares with long term capital gain of the assessee in the facts and circumstances of the case.

3. The brief facts of this issue are that the assessee is a partnership firm engaged in the business of investment of shares, securities and bonds during the year under consideration. The Id. AO on perusal of the profit and loss account, computation of income and the various details furnished by the assessee observed that assessee had claimed set off of the long term capital gain of Rs.4,62,28,825/- (without indexation) incurred on sale of shares for which no security transaction tax (STT) was paid, with long term capital loss of Rs.4,71,41,155/- incurred on sale of shares on which it has paid STT and balance loss of Rs.9,12,330/-. The Id. AO show-caused the assessee that in view of the provisions of Section 10(38) of the Act while the claim of set off of STT paid long term capital loss with non-STT paid long term capital gain be not allowed to be set off in the assessment. The Id. AO after going through the reply filed by the assessee observed that the long term capital gains earned on sale of shares on which STT is paid as exempt u/s.10(38) of the Act and therefore, the loss incurred on sale of shares wherein STT has been paid and had resulted in long term capital loss cannot be allowed to be set off with non-STT paid long term capital gain. Accordingly, he proceeded to make an addition towards long term capital gains of Rs.3,43,92,549/- towards non-STT taxable long term capital gains in the assessment. The Id. CIT(A) placed reliance on the decision of Co-ordinate Bench of this Tribunal in the case of DIT(IT) vs. Asia Pacific Performance SICAV in ITA No.7106/Mum/2010 wherein the Tribunal had upheld the levy of penalty u/s.271(1)(c) of the Act on similar issue. The Id. CIT(A) observed that provisions of Section 70 and 71 relate to the set off of loss from one head against income from another contemplate loss from a source, the income

from which is liable to tax. He observed that if income from a source is altogether exempt from tax, loss from that source cannot be set off against income from a different source or income under different head. Reliance in this regard was placed on the decision of Hon'ble Madras High Court in the case of CIT vs. S.S. Thiagarajan reported in 129 ITR 115. With these observations, the Id. CIT(A) upheld the action of the Id. AO.

4. Aggrieved, the assessee is in appeal before us.

5. We have heard rival submissions and perused the materials available on record. The primary facts stated hereinabove remain undisputed and hence, the same are not reiterated for the sake of brevity. We find that the Id. AR had argued that long term capital loss on which STT is paid is not a source of income. According to the Id. AR, it is only a segment of the main source of income which is income arising from transfer of shares. The bifurcation of short term and long term capital gains based on the period of their holding are only classifications of source of income i.e. income from transfer of shares. They at any stretch of imagination cannot be construed as a separate source of income. The Id. AR vehemently argued that payment of STT on a long term capital gain or long term capital loss does not make it a separate source of income. He vehemently tried to drive home the point that in the instant case, the source of income is not exempt u/s.10(38) of the Act, only a particular segment of such source is exempt u/s.10(38) i.e. long term capital gains on which STT is paid. Accordingly, he pleaded that set off of STT paid long term capital loss is indeed permissible with non-STT paid long term capital gain. He also argued that the decision of Hon'ble Madras High Court relied upon by the Id. CIT(A) actually supports the case of the assessee, in support of which he drew our attention to the relevant head notes of the said decision which is as under:-

“Section 71. of the Income-tax Act, 1961 - Losses - Set-off from one head against income from another - Assessment years 1963-64 to 1966-67 - Whether if income from a source is altogether exempt from tax, loss from that source cannot be set-off against income from a different source or income under a different head - Held yes”

5.1. The Id. AR further relied on the decision of the Co-ordinate Bench of this Tribunal in the case of Raptakos Brett and Co. Ltd. vs. DCIT in ITA No.3317/Mum/2009 & 1692/Mum/2010 dated 10/06/2015 which in turn placed reliance on the decision of the Hon'ble Calcutta High Court in the case of Royal Calcutta Turf Club vs. CIT reported in 144 ITR 709 (CAL) wherein the facts as well as the decision rendered thereon are reproduced hereunder for the sake of convenience.

“3. The brief facts of the case, qua the issue raised in ground no.1 are that the assessee is a pharmaceutical company, engaged in manufacturing and sale of pharmaceuticals, formulations, dietetic specialities and animal husbandry. The assessee in the computation of income had shown Long term capital loss on sale of shares amounting to Rs.57,32,835/- and loss on sale of mutual funds units amounting to Rs.2,61,655/-. The said Long term capital loss has been set off against the Long term capital gains of Rs.94,12,00,000/- arising from sale of land at Chennai. The Assessing Officer held that the losses claimed cannot be allowed since the income from Long term capital gain on sale of shares and mutual funds are exempt u/s. 10(38). That apart, of the Long term capital loss in respect of shares where securities transaction tax has been deducted, would have been exempt from Long term capital gain had there been profits, therefore, Long term capital loss from sale of shares cannot be set off against the Long term capital gain arising out of the sale of land.

4. The learned CIT(A) too has confirmed the action of the Assessing Officer on the ground that exempt profit or loss construes separate species of income or loss and such exempt species of income or loss cannot be set off against the taxable species of income or loss. Tax exempt losses cannot be deducted from taxable income and, therefore, the Assessing Officer has rightly disallowed the claim of losses from shares to be set off against the Long term capital gain from sale of land.

5. Before us the learned senior counsel, Shri Soli Dastur, submitted that what is contemplated in [section 10\(38\)](#) is exemption of positive income and losses will not come within the purview of the said section. The set off of

Long term capital loss has been clearly provided in [sections 70 and 71](#). The Legislation 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. Even in the definition of capital asset u/s. 2(14), no exception or exclusion has been provided to equity shares the profit/gain of which are treated as exempt u/s. 10(38). Capital gain is chargeable on transfer of a capital asset u/s. 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. Nothing has been mentioned in [sections 45 to 48](#) that capital gain or loss on sale of shares are to be excluded as [section 10\(38\)](#) exempts the income arising from the transfer of long term capital asset being an equity share or unit. Legislature has given exemption to income arising from transfer of Long term capital asset being an equity share in company or unit of equity oriented fund, which is chargeable to STT. [Section 10\(38\)](#) cannot be read into [section 70](#) or [71](#) or [sections 45 to 48](#). In support of his contention, he strongly relied upon the decision of Hon'ble Calcutta High Court in the case of [Royal Calcutta Turf Club v. CIT \(1983\) 144 ITR 709 \(Cal\)](#). In this decision he submitted that similar issue with regard to the losses on account of breeding horses and pigs which are exempt u/s. 10(27) whether can be set off against its income of other source under the head "business". The Hon'ble High Court after considering the relevant provisions of [section 10\(27\)](#) and [section 70](#), held that [section 10\(27\)](#) excludes in expressed terms only any income derived from business of livestock breeding, poultry or dairy farming. It does not exclude the business of livestock breeding, poultry or dairy farming from the operation of the Act. The losses suffered by the assessee in respect of livestock, breeding were held to be admissible for deduction and were allowed to be set off against other business income. He drew our attention to the various observations and findings of the Hon'ble High Court and also the reliance placed by their Lordships to various decisions of Hon'ble Supreme Court, especially in the case of [CIT vs. Karamchand Premchand Ltd. \(1960\) 40 ITR 10](#)

6. He also referred to various observations of Hon'ble Supreme Court from the said decision. Thus, he submitted that the losses on account of sale of shares should be allowed to be set off against Long term capital gain on sale of land. In his fairness, he also pointed out before us that there is a decision of Hon'ble Gujarat High Court in the case of [Kishorebhai Bhikhabhai Virani vs. Asst. CIT \(2014\) 367 ITR 261 \(Guj\)](#), which has decided this issue against the assessee. However, he submitted that in the said decision, the decision of Hon'ble Calcutta High Court has not been referred at all. Therefore, this decision does not have precedence value as compared to the Calcutta High Court decision, which is based on Supreme Court decision on this point. He also pointed out that ITAT Mumbai Bench also in the case of [Schrader Duncan Ltd. Vs. Addl. CIT \(2012\) 50 SOT 68](#) has decided somewhat similar issue against the assessee. However, he

distinguished the said decision and highlighted the points as to why said decision cannot be followed.

6. On the other hand, the learned DR strongly relied upon the order of the AO and CIT(A) and submitted that, firstly, if the income from the Long term capital gain on sale of shares is exempt, then the loss from such sale of shares will also not form part of the total income and therefore, there is no question of set off against other income or Long term capital gain on different capital asset. Secondly, the decisions of Hon'ble Gujarat High Court and ITAT Mumbai Tribunal should be followed. He further submitted that it is quite a settled law that income includes loss also and, therefore, if the income from sale of shares does not form part of the total income, then the losses from such shares also will not form part of the total income. Thus, the order of the CIT(A) should be confirmed.

7. We have heard rival submissions and perused the relevant findings given in the impugned orders. The main issue before us is, whether Long term capital loss on sale of equity shares can be set off against Long term capital gain arising on sale of land or not, as the income from Long term capital gain on sale of such shares are exempt u/s. 10(38). The nature of income here in this case is from sale of Long term capital asset, which are equity shares in a company and unit of an equity oriented fund which is chargeable to STT. First of all, Long term capital gain has been defined under [section 2\(39A\)](#), as capital gains arising from transfer of a Long term capital asset. [Section 2\(14\)](#) defines "Capital asset" and various exceptions and exclusions have been provided which are not treated as capital asset. [Section 45](#) is the charging section for any profits or gain arising from a transfer of a capital asset in the previous year i.e. taxability of capital gains. [Section 47](#) enlists various exceptions and transactions which are not treated as transfer for the purpose of capital gain u/s. 45. The mode of computation to arrive at capital gain or loss has been enumerated from [sections 48 to 55](#). Further sub section (3) of [section 70](#) and [section 71](#) provides for set off of loss in respect of capital gain.

8. From the conjoint reading and plain understanding of all these sections it can be seen that, firstly, shares in the company are treated as capital asset and no exception has been carved out in [section 2\(14\)](#), for excluding the equity shares and unit of equity oriented funds that they are not treated as capital asset. Secondly, any gains arising from transfer of Long term capital asset is treated as capital gain which is chargeable u/s. 45; thirdly, [section 47](#) does not enlist any such exception that transfer of long term equity shares/funds are not treated as transfer for the purpose of [section 45](#) and [section 48](#) provides for computation of capital gain, which is arrived at after deducting cost of acquisition i.e. cost of any improvement and expenditure incurred in connection with transfer of capital asset, even for arriving of gain in transfer of equity shares; lastly, [section 70 & 71](#) elaborates the mechanism for set off of capital gain.

Nowhere, any exception has been made/ carved out with regard to Long term capital gain arising on sale of equity shares. The whole genre of income under the head capital gain on transfer of shares is a source, which is taxable under the Act. If the entire source is exempt or is considered as not to be included while computing the total income then in such a case, the profit or loss resulting from such a source do not enter into the computation at all. However, if a part of the source is exempt by virtue of particular "provision" of the Act for providing benefit to the assessee, then in our considered view it cannot be held that the entire source will not enter into computation of total income. In our view, the concept of income including loss will apply only when the entire source is exempt and not in the cases where only one particular stream of income falling within a source is falling within exempt provisions. [Section 10\(38\)](#) provides exemption of income only from transfer of Long term equity shares and equity oriented fund and not only that, there are certain conditions stipulated for exempting such income i.e. payment of security transaction tax and whether the transaction on sale of such equity share or unit is entered into on or after the date on which chapter VII of Finance (No.2) Act 2004 comes into force. If such conditions are not fulfilled then exemption is not given. Thus, the income contemplated in [section 10\(38\)](#) is only a part of the source of capital gain on shares and only a limited portion of source is treated as exempt and not the entire capital gain (on sale of shares). If an equity share is sold within the period of twelve months then it is chargeable to tax and only if it falls within the definition of Long term capital asset and, further fulfils the conditions mentioned in subsection (38) of [section 10](#) then only such portion of income is treated as exempt. There are further instances like debt oriented securities and equity shares where STT is not paid, then gain or profit from such shares are taxable. [Section 10](#) provides that certain income are not to be included while computing the total income of the assessee and in such a case the profit or loss resulting from such a source of income do not enter into computation at all.

However, a distinction has been drawn where the entire source of income is exempt or only a part of source is exempt. Here it needs to be seen whether [section 10\(38\)](#) is source of income which does not enter into computation at all or is a part of the source, the income in respect of which is excluded in the computation of total income. For instance, if the assessee has income from Short term capital gain on sale of shares; Long term capital gain on debt funds; and Long term capital gain from sale of equity shares, then while computing the taxable income, the whole of income would be computed in the total income and only the portion of Long term capital gain on sale of equity shares would be removed from the taxable income as the same is exempt u/s 10(38). This precise issue had come up for consideration before the Hon'ble Calcutta High Court in Royal Turf Club, wherein the Hon'ble High Court observed that "under the Income tax 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 s.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."

The Hon'ble High Court was besieged with the following question "Whether under s.10(27) read with s.70 of the I.T.Act, 1961, was the assessee entitled to set off the loss on the two heads, namely, Broodmares Account and the Pig Account, against its income of other sources under the head "Business"?"

Their Lordships after analysing the provisions of [section 70](#) and [section 10\(27\)](#) observed in the following manner:

"In this case it is important to bear in mind that set-off is being claimed under [Section 70](#) of the 1961 Act which permits set off of any income falling under any head of income other than the capital gain which is a loss, the assessee shall be entitled to have the amount of such loss set off against his income from any other source under the same head. We have noticed that in the instant case the exclusion has been conceded in computing the business income or the source of income from the head of business and in computing that business income, the loss from one particular source, that is, broodmares account and the pig account, had been excluded contrary to the submission of the assessee. The assessee wanted these losses to be set off. The Revenue contends that as the sources of the income are not to be included in view of the provisions of Clause (27) of [s. 10](#) of the 1961 Act, the loss suffered from this source could also not merit the exclusion. [Under the I.T. Act](#), there are certain incomes which do not enter into the computation of the total income at all. In this connection we have to bear in mind the scheme of the charging section which provides that the incomes shall be charged and [s. 4](#) of the Act provides that the [Central Act](#) enacts that the incomes shall be charged for any assessment year and in accordance with and subject to the provisions of the 1961 Act in respect of the total income of the previous year or years or whatever the case may be. The scheme of "total income" has been explained by [s. 5](#) of the Act which provides that subject to the provisions of the Act, the total income of the previous year of a person who is a resident includes all income from whatever source it is derived. In computing the total income, certain incomes are not included under [s. 10](#) of the Act. It depends on the particular case where certain income, in respect of which the Act is made inapplicable to the scheme of the Act, and in such a case, the profit and loss resulting from such a source do 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 we must look to the specific exclusion that has been made. The question is in this case whether s. 10(27) is a source which does not enter into the computation at all or is a source the income in respect of which is excluded in the computation of total income. How this question will have to be viewed, has been looked into by the Supreme Court in several decisions to some of which our attention was drawn. "

After discussing the various decisions of the Hon'ble Supreme Court specifically the decision of in the case of Karamchand Premchand (supra), the Hon'ble High Court came to the following conclusion:

"cl.(27) of s.10 excludes in express terms only "any income derived from a business of live-stock breeding or poultry or dairy farming. It does not exclude the business of livestock breeding or poultry or dairy farming from the operation of the Act. Therefore, the losses suffered by the assessee in the broodmares account and in the pig account were admissible deductions in computing its total income"

Thus, the ratio laid down by the Hon'ble Calcutta High Court is clearly applicable and accordingly we follow the same in the present case.

9. Now coming to the argument of the learned DR and learned CIT(A) that income includes loss and if income is exempt then loss will also not be taken into computation of the income, and such an argument is with reference to the decision of Hon'ble Supreme Court in the case of [CIT vs. Hariprasad & Company Pvt. Ltd.](#) (1975) 99 ITR 118 . The Hon'ble Supreme Court, opined that, if loss was from the source or head of income not liable to tax or congenitally exempt from income tax, neither the assessee was required to show the same in the return nor was the Assessing Officer under any obligation to compute or assess it much less for the purpose of carry forward. Further, the Hon'ble Supreme Court observed that "From the charging provisions of the Act, it is discernible that the words ' income ' or ' profits and gains' should be understood as including losses also, so that, in one sense 'profits and gains' represent ' plus income ' whereas losses represent 'minus income'. In other words, loss is negative profit. Both positive and negative profits are of a revenue character. Both must enter into computation, wherever it becomes material, in the same mode of the taxable income of the assessee. Although Section 6 classifies income under six heads, the main charging provision is [Section 3](#) which levies income-tax, as only one tax, on the 'total income ' of the assessee as defined in [Section 2\(15\)](#). An income in order to come within the purview of that definition must satisfy two conditions. Firstly, it must comprise the ' total amount of income, profits and gains referred to in [Section 4\(1\)](#)'. Secondly, it must be 'computed in the manner laid down in the Act'. If either of these conditions fails, the income will not be a part of the total income that can be brought to charge." While concluding the issue their Lordships

observed that "it may be remembered that the concept of carry forward of loss does not stand in vacuo. It involves the notion of set-off. Its sole purpose is to set off the loss against the profits of a subsequent year. It presupposes the permissibility and possibility of the carried-forward loss being absorbed or set off against the profits and gains, if any, of the subsequent year. Set off implies that the tax is exigible and the assessee wants to adjust the loss against profit to reduce the tax demand. It follows that if such set-off is not permissible or possible owing to the income or profits of the subsequent year being from a non-taxable source, there would be no point in allowing the loss to be "carried forward". Conversely, if the loss arising in the previous year was under a head not chargeable to tax, it could not be allowed to be carried forward and absorbed against income in a subsequent year from a taxable source." The ratio and the principle laid down by the Hon'ble Apex Court would not apply here in this case, because the concept of income includes loss will apply only when entire source is exempt or is not liable to tax and not in the case where only one of the income falling within such source is treated as exempt. The Hon'ble Apex Court on the other hand, itself has stated that if loss from the source or head of income is not liable for tax or congenitally exempt from income tax, then it need not be computed or shown in the return and Assessing Officer also need not assess it. This distinction has to be kept in mind. Hon'ble Calcutta High Court in Royal Turf Club have discussed the aforesaid decision of the Hon'ble Supreme Court and held that the same will not apply in such cases. Thus, in our conclusion, we hold that [section 10\(38\)](#) excludes in expressed terms only the income arising from transfer of Long term capital asset being equity share or equity fund which is chargeable to STT and not entire source of income from capital gains arising from transfer of shares. It does not lead to exclusion of computation of capital gain of Long term capital asset or Short term capital asset being shares. Accordingly, Long term capital loss on sale of shares would be allowed to be set off against Long term capital gain on sale of land in accordance with [section 70\(3\)](#)

10. Coming to the decision of the ITAT Mumbai Bench in the case of Schrader Duncan Ltd.(supra), the issue involved there was, whether the loss on transfer of capital asset being units US 64 Scheme of Unit Trust of India can be allowed and entitled to carry forward the same for set off of in subsequent assessment years, when the income arising from such transfer of unit is exempt u/s. 10(33). The Tribunal held that the source both capital gain and capital loss on sale of units of US64 is itself excluded and not only the income arising out of capital gain. The Hon'ble Tribunal have noted the history of US64 Scheme and the purpose for which such scheme was launched. In this context of transfer of US64 scheme the Tribunal held that the provisions were not meant to enable the assessee to claim loss by indexation for set off against other capital gain chargeable to tax. This decision is slightly distinguishable and secondly, we have already discussed the issue at length and have held that the ratio of Hon'ble

Calcutta is applicable in the present case. Lastly, coming to the decision of Hon'ble Gujarat High Court in the case of Kishorebhai Bhikhabhai Virani (supra), we find that the issue involved in the present case was almost the same, wherein the Hon'ble High Court after following the decision of Hon'ble Supreme Court in the case of Harprasad & Company Pvt. Ltd. (supra), had decided the issue against the assessee. Since we have already noted down the ratio of Hon'ble Calcutta High Court, wherein the Hon'ble High Court has discussed this issue in detail after relying upon series of decisions of Hon'ble Supreme Court and have reached to a conclusion as discussed above, and, therefore, we are respectfully following the ratio of the decision of the Calcutta High Court. Further the said decision have not been referred or distinguished by the Hon'ble Gujarat High Court. Accordingly, we allow the assessee's ground no.1 and direct the Assessing Officer to allow the claim of set off of Long term capital loss on sale of shares against the Long term capital gain arising on sale of land.”

5.2. The Id. AR also placed on record the order of Hon'ble Jurisdictional High Court against the appeal preferred by the revenue against the aforesaid Tribunal order wherein the Hon'ble High Court dismissed the appeal of the revenue for non-prosecution. Hence, we find that the decision of this Tribunal in Raptakos Brett & Co. Ltd., which in turn had placed reliance on the decision of Hon'ble Calcutta High Court had become final. We are inclined to accept the aforesaid arguments of the Id. AR. We also find that the Co-ordinate Bench of Kolkata Tribunal in the case of United Investments vs. ACIT in ITA No. 511/KOL/2017 dated 01/07/2019 had also endorsed the same view. We find that the provisions of Section 70-80 of the Act does not speak about payment of STT at all. There is no mention of STT even in Section 74 of the Act which talks about set off of carry forward of losses under the head "capital gains". Respectfully following the aforesaid decision, we are inclined to accept the argument of the Id. AR that the source of income remains income derived from transfer of shares and that STT paid long term capital loss and non-STT paid long term capital gains are only segments of such source and cannot be construed as a separate source altogether.

5.3. The Id. DR vehemently relied upon the orders of the lower authorities.

5.4. In view of the aforesaid observations and respectfully following the aforesaid decisions, we hold that assessee is entitled for set off of STT paid long term capital loss with non-STT paid long term capital gains in the facts of the instant case. Accordingly, the grounds raised by the assessee are allowed.

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

Order pronounced in the open court on this 11/09/2019

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 11/09/2019
KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai