THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR (VICE PRESIDENT)
AND
SHRI SAKTIJIT DEY (JUDICIAL MEMBER)

I.T.A. No.6531/Mum/2017
(Assessment year: 2014-15)

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| Swiss Reinsurance Company Ltd<br>A 701, 7th Floor, One BKC, Plot No.C-66, Bandra Kurla Complex, Mumbai-400 051<br>PAN : AACCS2650M | vs | Deputy Commissioner of Income-tax (International Taxation)-Range 4(2)(2), Mumbai |
| **APPELLANT** | | **RESPONDENT** |

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| Appellant by | Shri PJ Pardiwala, Sr.Counsel |
| Respondent by | Shri SS Iyengar, Sr.DR |

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| Date of hearing | 21-05-2021 |
| Date of pronouncement | 20-07-2021 |

**O R D E R**

**Per Saktijit Dey, JM:-**

Captioned appeal has been filed by the assessee assailing the final assessment order dated 10-10-2017 passed under section 143 (3) r.w.s. 144C(13) of the Income-tax Act, 1961 for the assessment year 2014-15 in pursuance to the directions of the learned Dispute Resolution Panel-II (DRP, in short), Mumbai.

2. Ground 1 being general in nature, does not require specific adjudication.

3. In grounds 2 and 3, assessee has challenged the taxability of income received from re-insurance business in India.

4. Briefly the facts are, the assessee is a company incorporated in Switzerland and is also a tax resident of that country. As stated by the assessing officer, the assessee is a global re-insurer and provides re-insurance services to various insurance companies, including, Indian insurance companies through its branches across the globe. Assessee's branch at Singapore provides re-insurance services to various Indian insurance companies. As observed by the assessing officer, the assessee has a wholly owned subsidiary in India named as Swiss Reinsurance Services Pvt Ltd (SRSIPL). Assessee has entered into an agreement with SRSIPL on 01-04-2009 for availing certain services from the Indian subsidiary, the details of which are enumerated in the agreement. As per the terms of the agreement, for rendering services, the Indian subsidiary is remunerated at cost (+) mark-up of 12%. In course of assessment proceedings, the assessing officer, on verifying materials on record, noticed that during the year under consideration the assessee had received insurance premia aggregating to the tune of Rs.1639,97,85,017/- from Indian insurers. Noticing this, the assessing officer called upon the assessee to explain why the aforesaid amount received from re-insurance business in India should not be brought to tax in India. In response, it was submitted by the assessee that since it has neither any business connection nor any permanent establishment (PE) in India, the amount received from re-insurance business cannot be taxed in India as per Article 7 of the India Switzerland Double Taxation Avoidance Agreement (DTAA, in short). The assessing officer, however, did not accept the claim of the assessee. He was of the view that since the assessee had entered into a service agreement with its Indian subsidiary, viz. SRSIPL for availing various services, such as, risk assessment services, market intelligence and administrative support services etc. for

remuneration, SRSIPL is a dependent agent of the assessee; hence, would constitute a PE under Article 5.5 of India Switzerland DTAA. Therefore, the amount received towards re-insurance business would be taxable in India. Having held so, the assessing officer estimated the total profits of the re-insurance business at 10% of the re-insurance premium collected. Out of such profit estimated at 10%, the assessing officer attributed 50% to the Indian PE and brought it to tax at the applicable rate.

5. Against the aforesaid decision of the assessing officer, assessee raised objections before learned DRP. Before learned DRP, though, the assessee specifically contended that identical issue arising in its own case in assessment year 2010-11 has been decided in favour of the assessee by the Tribunal by holding that SRSIPL does not constitute a PE, however, learned DRP upheld the decision of the assessing officer.

6. Shri PJ Pardiwalla, learned senior counsel appearing for the assessee submitted, identical issue arising in assessee's own case in preceding assessment years have been consistently decided in favour of the assessee. In this context, he drew our attention to the relevant orders of the Tribunal placed in the paper book. Thus, he submitted, the issue stands squarely covered in favour of the assessee.

7. The learned departmental representative, though, fairly submitted that the Tribunal has decided identical issue in favour of the assessee in the preceding assessment years; however, he relied upon the observations of the assessing officer and learned DRP.

8. We have considered rival submissions and perused materials on record. The core issue arising for consideration is, whether SRSIPL constitutes a PE of the

assessee in India so as to bring the business profit of the assessee to tax in India in terms of India-Switzerland DTAA. As we find, identical issue came up for consideration for the first time before the Tribunal in assessee's own case in assessment year 2010-11. While deciding the issue in ITA No.1667/Mum/2014 dated 13-02-2015, the Tribunal, after analyzing the service agreement between assessee and SRSIPL and all other relevant facts, concluded that neither the assessee has any business connection in India as per Explanation 2 to section 9(1) of the Act nor does it have any PE in India. The Tribunal, in very clear terms held that SRSIPL cannot be considered as a service/dependent agent PE of the assessee. The same view was reiterated by the Tribunal while deciding appeals for assessment years 2011-12 and 2012013 vide ITA Nos 1350 & 1351/Mum/2016 dated 223-01-2018, for assessment year 2013-14 vide ITA No.2759/Mum/2017 dated 04-07-2017 and for assessment year 2015-16 in ITA No.4898/Mum/2018 dated 26-12-2018. Thus, from the facts discussed above it is amply clear that the issue, whether SRSIPL can be considered as a PE of the assessee in India has arisen time and again before the Tribunal and the Tribunal has consistently decided in favour of the assessee. In fact, the impugned direction of the learned DRP would reveal that though learned DRP was conscious of the fact that the Tribunal has decided the issue in favour of the assessee in assessment year 2010-11; however, since the revenue has filed an appeal against the decision of the Tribunal, learned DRP decided the issue against the assessee just for the sake of keeping it alive. However, we are unable to accept the aforesaid reasoning of learned DRP. Therefore, respectfully following the decisions of the Tribunal in assessee's own case as referred to above, we decide the issue in favour of the assessee by holding that since SRSIPL is not a PE of the assessee, the profits earned from re-

insurance business cannot be brought to tax in India in terms of Article 7 of India Switzerland DTAA. Accordingly, addition is deleted. These grounds are allowed.

9. In grounds 4 and 5, assessee has challenged the disallowance of long-term capital loss arising from sale of shares.

10. Briefly the facts emerging from record are, the assessee was holding 12,34,476 shares constituting about 26% of the total shares of an Indian company, viz. TTK Healthcare Services Pvt Ltd (TTK, in short). These shares were acquired by the assessee in tranches under the Foreign Direct Investment (FDI, in short) route during the period from 08-03-2007 to 05-08-2010. All the shares having face value of Rs.10/- were acquired by the assessee with premium varying between Rs.35 to Rs.5,141.05. During the year under consideration, the assessee sold all its shares to Vidal Healthcare Services Pvt Ltd at mutually agreed terms of Rs.5 per share. In the process, assessee incurred long term capital loss of Rs.49,92,40,510/- and carry forward of such loss was claimed in the return of income filed for the impugned assessment year. After examining the facts relating to acquisition of sale of shares of TTK by the assessee, the assessing officer called for various details and asked the assessee to explain the justification of selling the shares at loss when they were purchased with very high premium. The assessing officer also called upon the assessee to furnish the valuation of the shares at the time of acquisition as well as at the time of sale under discounted cash flow (DCF) method as well as under rule 11UA. In response to the query raised, the assessee furnished all the details and also explained the reasons for disposing of the shares at a lesser value. Further, the assessee also furnished valuation report of the shares both, under net asset value and capitalization of earning method, as per which the value of shares were arrived at Rs.14.36 per share and Rs.13.82 per

share respectively. Additionally, the assessee also furnished a valuation report under DCF method valuing the share at (-) Rs.363/-. After examining the factual details, the assessing officer noticed that despite the fact that TTK was incurring cash loss in financial years 2008-09 and 2009-10, the assessee went ahead in buying shares with heavy premium. Further, he observed, when the assessee was called upon to value the shares of TTK as per rule 11UA, the assessee submitted that Rule 11UA prescribes the methodology for determining the fair market value of unquoted shares of a company for the purpose of section 56(2)(viia) and (viib) of the Act. Further, the assessee submitted, both section 56((2)(viia) and rule 11UA are attracted to the recipient of shares where there is an inadequate consideration paid by such recipient on purchase of shares. Therefore, it was submitted, since the assessee has sold the shares, section 56(2)(viia) and rule 11UA would not be applicable. The assessing officer, however, was not convinced with the aforesaid submissions of the assessee. He observed, there is no justifiable reason for the assessee in investing in shares of TTK with very high premium and thereafter selling them at huge loss. Thereafter, referring to and analyzing various other factual aspects, the assessing officer ultimately concluded that the long term capital loss claimed by the assessee on sale of shares is an artificial loss; hence, cannot be allowed. Accordingly, he disallowed the long term capital loss claimed by the assessee and consequently, denied the carry forward of the said loss to subsequent assessment year. Assessee challenged the aforesaid decision of assessing officer before learned DRP. After considering the submissions of the assessee in the context of facts and materials on record, learned DRP ultimately concurred with the decision of the assessing officer that the loss claimed by the assessee is an artificial loss. In terms of the aforesaid

directions of learned DRP, the assessing officer passed the impugned assessment order disallowing assessee's claim of long term capital loss.

10. The learned Senior Counsel for the assessee submitted, since the assessee has acquired the shares of TTK through FDI route, it has to follow the rules and regulations framed by Insurance Regulatory & Development Authority of India (IRDA) and Reserve Bank of India (RBI). He submitted, as per such regulation, there is an upper limit for investing in shares of an Indian company, which cannot exceed 26% of the whole shares. He submitted, the investment in shares through FDI route was approved by all the Regulatory Authorities including RBI. Copies of such approvals were furnished both before the assessing officer and learned DRP. He submitted, investment in shares of TTK was also approved in a board resolution. He submitted, as per FEMA regulations, no shares can be sold to a non resident at a lesser value. In this context, he drew our attention to the board resolution as well as the approval of the competent authority while purchasing shares of TTK. Drawing our attention to the audited financial statements of TTK, learned Senior Counsel submitted, TTK was incurring huge loss consistently over the years. However, to infuse capital in TTK for overcoming the loss, the assessee has to make investment by subscribing to shares at a premium. He submitted, it is a prudent commercial decision of the assessee to revive a loss making company, wherein, the assessee had stake. Drawing our attention to page 248 of the paper book, the he submitted, on 01-11-2011, IRDA had raised a query by asking TTK to justify the payment of unduly high premium by the assessee for buying the shares, whereas, during the same period shares were issued at par to the Indian promoter. He submitted, in response to the query raised by the IRDA, TTK had furnished its reply justifying subscription of shares at high premium by the

assessee. The learned counsel submitted, assessee had to subscribe to shares of TTK to keep the company going.

11. Countering various allegations of the assessing officer, learned senior counsel submitted, various allegations made by the assessing officer are without any basis. He submitted, when the events of acquisition and sale of shares have not been doubted and is factually proved, the loss arising from such transaction cannot be treated as artificial loss, as it has to be computed in terms of section 48 and other provisions of the Act. Further, he submitted, the allegation of the assessing officer that to set off the carry forward loss against the long term capital gain arising in future, the assessee has devised this mechanism, is wholly baseless as at the time of sale of shares, the assessee could not have foreseen the future event of capital gain arising in assessment year 2016-17. Thus, he submitted, the loss arising from sale of shares being genuine has to be allowed. The learned senior counsel submitted, in support of valuation of shares the assessee has furnished valuation report of an expert which has not been controverted by the assessing officer by bringing his own valuation done through an expert. Further, he submitted, there is no requirement for the assessee to furnish valuation under rule 11UA as it is only required while applying section 56(2)(viia) of the Act, that too, in case of a purchaser of shares. He submitted, the only provision which could have been applied by the assessing officer for determining the fair market value of shares is section 56CA. However, the said section having come to the statute on 01-04-2018, would not be applicable to the impugned assessment year. In support of his contention, the learned senior counsel relied upon a decision of Hon'ble Supreme Court in case of CIT vs George Anderson & Co Ltd (1967) 66 ITR 622 (SC).

12. The learned departmental representative, in addition to submissions made at the time of hearing, has also filed a written submission. The submissions of the learned departmental representative can be summarised, as under:-

- The assessee continued to buy shares of TTK in financial year 2010-11 at huge premium, in spite of the fact that the assessee has made up its mind of divesting its interest in TTK in the very same financial year itself. The company, to whom the stock was proposed to be sold, i.e. Vidal Healthcare Services Ltd was incorporated just 15 days prior to disclosure of divestment of interest, i.e. on 24-08-2010.
- During the entire period, Shri Girish Rao, the promoter of Vidal Healthcare Services Ltd was intrinsically linked to the assessee and TTK and was also the co-founder and managing director of TTK from 2002 to 2007. He was also associated with the assessee as general manager of Re-Healthcare Services Pvt Ltd. He also founded Vidal Healthcare Services Ltd. Further, the assessee failed to produce Shri Girish Rao before the departmental authority.
- During 2013-14, when the shares of TTK were sold at Rs.5, the company boasted its second highest reserve/surplus from financial year 2009-10 onwards.
- It is seen from record that in assessment year 2016-17, the assessee has set off the long term capital loss of Rs.49.92 crores against the capital gain of Rs.107.12 crores. Thus the assessing officer correctly observed that the loss was artificially created for setting off against future gain.
- The very fact that the assessee had purchased shares at huge premium, whereas, the shares were sold at part value to other shareholders and

subsequent sale of shares by the assessee sold at a substantially low value of Rs.5 per share, does not reflect natural behaviour of a prudent businessman.

13. In support of his contention, he relied upon the decision of ITAT, Delhi Bench in case of Heresh W. Chadha L/H of late W. N. Chadha vs DCIT (2011) 43 SOT 544(Del). Further, relying upon the decision of Vodafone International Holdings B.V. vs UOI (2012) 341 ITR 1 (SC) and applying the test/ratio laid down therein to ascertain whether the transaction entered into by the assessee relating to purchase and sale of share is bonafide or not, learned departmental representative submitted, very fact that the assessee had purchased the shares at huge premium as against similar shares sold at par value to other shareholders and the assessee subsequently sold the shares at below par value clearly indicates that it is a sham transaction using colourable device to create artificial loss. He submitted, looking at the entire scenario relating to this transaction, it is evident that at the time of investment in shares the assessee had given a public statement in September, 2020 of divesting its entire stock in TTK. Therefore, there was no commercial basis for investing in such high value, more particularly, when the value of share as per DCF method was (-) Rs.364/-. Further, he submitted, though the sale of share was originally contemplated by the assessee in September, 2010; however, the shares were ultimately sold on 13-06-2013 at a huge loss. He submitted, it is also interesting to note that just 15 days prior to the announcement of divestment of shares, Vidal Healthcare Services Ltd was formed. Therefore, the chain of events go to show that the close association of Shri Girish Rao with the assessee company was employed to undertake this transaction generating huge loss; hence, the assessee has failed the timing test.

Further, he submitted, though TTK was incurring losses during the relevant period; however, the assessee continued to buy shares at huge premium which defuse commercial and business prudence. Therefore, the assessee also failed commercial / business purpose test.

14. Finally, he submitted, assessee has artificially arranged the entire transaction to book the huge long term capital loss which demonstrates that the entire transaction relating to purchase and sale of shares is a sham transaction using colourable device. Thus, he submitted, the disallowance of loss claimed by the assessee should be sustained.

15. We have considered rival submissions and perused materials on record. We have also applied our mind to the decision cited before us. Undisputedly, the assessee, through FDI route had purchased, in tranches, shares of TTK at a substantially high premium. It is also a fact that assessee had sold the shares so acquired in the impugned assessment year at a below par value of Rs.5/- per share to an Indian entity. In the process, assessee has incurred long term capital loss. The assessing officer, alleging that the loss so claimed by the assessee has been artificially created, has disallowed the same. The reasoning of the assessing officer for doing so, broadly, is as under:-

> "Summary of Sequence of eventsf narrated above):
> *1. Swiss Re invested in TTK at a premium throughout FY 2007,FY 2008 and FY 2009.*
> *2. Berkshire Hathaway provided funds to help the Swiss reinsurer bounce back after it announced losses in 2008 and 2009.*
> *3. In January 2010, the Berkshire Hathaway and Swiss Re agreed to a retrocession transaction, under which Berkshire Hathaway took on a portfolio of Swiss Re's annually renewable life insurance policies, limiting Swiss Re's exposure to claims.*
> *4. In 2010, Swiss Re invested in TTK in two major tranches at a huge premium of Rs. 4703.71 and Rs. 5131.05.*
> *5. TTK continued to allot the same shares which it allotted to Swiss Re at a premium, to its other shareholders at par value, ie, Rs. 10*

*6. Swiss re continued to buy shares of TTK in FY 201 0-1 1 at huge premiums of Rs. 4703 and Rs 5131 till 05.08.2010 inspite of the fact that Swiss Re had made up its mind of divesting its interests in TTK in FY 2010-11 itself. The company to whom the stake was proposed to be sold was Vidal Healthcare Services Pvt Ltd and it was incorporated on 24* ***August. 2010 i.e.*** *iust 15* ***days prior to this big announcement, by*** *Mr Girish Rao.*

*7. All such decisions are backed by months of detailed negotiations and internal discussions. This clearly brings but the .fact that the assessee was already in the process of negotiations of the sale of shares of TTK to Vidal even when it was actively investing in TTK at a premium. The assessee though refused to submit any details in this regard, inspite of specifically asking for the same.*

*8. During the entire time, Mr Girish Rao was intricately linked to Swiss Re, TTK and Vidal. Mr. Girish Rao was the co-founder and acted as Managing Director of TTK from 2002 to 2007. He was also associated with Swiss Re as the General Manager of Swiss Re Health care Services Pvt Ltd, He founded and was also the majority stakeholder in Vidal.The assessee failed to produce Mr. Rao, inspite of specifically asking for the same during the scrutiny proceedings.*

*9. Inspite of the decision taken in 2010, Swiss Redid not sell its stake in TTK in 2010*

*10. During 2013, Swiss Re got embroiled in a legal tussle with Hathaway Berkshire which threatened to drag Swiss re in Arbitration proceedings.*

*11. During Late 2013, they negotiated a deal whereby Swiss Re would "recapture" some of the risk, in exchange for payment by Berkshire Hathaway of $610 million.*

*12. During the same time Berkshire Hathaway took on as much as $4 billion in liabilities from Cigna to reduce Cigna's risk.*

*13. Subsequently in 2013, Cigna TTK Health Insurance Company Ltd, got regulatory approval of IRDAI.*

*14. During 2013, when the shares of TTK were sold at Rs. 5, the company/boosted its*
*second highest reserves and Surplus from FY 2009-10 onwards.*

*15. The value paid for the shares of TTK was much above the value estimated by Rule S> 11 UA valuation. Similarly the valuation of the shares of TTK during the sale (Rs. 5) were much lower than what Rule 11 UA predicted (Rs. 58)*

*16. As per Rule 11UAthe sale of the shares would actually result in gains to Swiss Re (Rs 58- Rs.23) ie. Rs. 25/share.*

*17. From the records it is seen that in AY 2016-17, the assessee has utilized this loss of Rs. 49.92 crores to be set off against the capital gains of Rs. 107.12 crores arising out of an internal corporate restructuring of the assessee itself.*

*Thus the entire transaction in sum and substance is a colourful device*

*a. To inflate the cost of the shares of TTK and then selling them at below par value*
*to accommodate Hathaway Berkshire's interests through Cigna as part of its deal outside India.*

*b. To cause windfall gains to IvlK Girish'Rao*

*c. Use the current year loss to set off.the capital gains arising In future years of the*
*assessee itself and hence lower its own tax liability in the future years."*

16. It is a fact that assessee had challenged the disallowance of long term capital loss before learned DRP and in course of proceedings before learned DRP, the assessee had contested each of the aforesaid reasoning of the assessing officer with counter arguments supported by evidence. However, learned DRP has endorsed the decision of the assessing officer, more or less, accepting the reasoning of the assessing officer. Now, the sole issue before us is, whether the long term capital loss claimed by the assessee is allowable or not. Before we proceed to decide the core issue, it is necessary to observe, by share purchase agreement dated 08-12-2006, the assessee had initially purchased shares of TTK numbering 11,11,236 equity share of Rs.10/– face value at Rs.45. Subsequently, the assessee had purchased shares on 29-09-2009, 05-03-2010 and 05-08-2010 at a substantially high premium. The total shareholding of the assessee in TTK was to the extent of 26%. The balance 74% share in TTK was held by TTK group. On a perusal of documentary evidences placed on record, it is absolutely clear that the shares of TTK purchased on different dates between 08-03-2007 and 05-08-2010 with a premium was approved by the regulatory authorities, such as, IRDA and RBI. It is also a fact that as per FEMA regulations, the assessee cannot hold more than 26% of the total shareholding under the FDI route. There is no allegation that the aforesaid condition has been violated by the assessee.

17. Be that as it may, in the preceding years wherein the assessee had purchased the shares, no doubt has been raised by the departmental authorities either in case of the assessee or in case of TTK. Therefore, the allegation of the revenue authorities at the time of sale of shares in the impugned assessment year

that the cost of acquisition of shares is doubtful is wholly immaterial and based purely on conjectures and surmises. Before the departmental authorities, the assessee had submitted report of independent valuers determining the value of shares. Whereas, no valuation report has been obtained by the departmental authorities to counter the valuation of the assessee. Before learned DRP, the assessee has very categorically explained the reasons for purchasing the shares at high premium. Each of the objections raised by the assessing officer in the assessment order while denying the long term capital loss has been countered by the assessee before learned DRP with specific/to the point submission. The assessee has clearly explained the extent of control and management assessee was having in TTK after acquiring the shares.

18. Further, the assessee had also explained before the departmental authorities that as per FEMA regulations, the offer on right basis of unlisted shares to a foreign resident shall be at a price not less than the price at which the offer on right basis is made to the resident shareholder. Since shares to resident shareholders is issued at par, the assessee bought the shares at a premium. Further, as per FEMA regulations the price of unlisted shares issued to a foreign company should not be less than the valuation of shares done by a chartered accountant as per DCF method. Complying with the aforesaid regulation, shares of TTK were issued to the assessee at a price not less than the fair market value as per the valuation report. As regards the decision of investing in shares at a high premium, it is a commercial decision of the assessee and is not in violation of any rules or regulations including FEMA regulations. It is observed from the facts and materials on record, the assessing officer, while coming to his conclusion has not properly appreciated the facts on record and has based his conclusion on either

half-baked facts or purely on presumption and surmises. The submissions of the assessee that since TTK during the financial years 2008-09 and 2009-10 was facing financial hardship and to help TTK tide over the hardship the assessee had infused the additional capital by subscribing to shares at a premium, has not been properly appreciated in spite of the fact that the loss incurred by TTK is an undisputed factual position. Further, the explanation of the assessee that even after infusion of such capital, the revenue of TTK continued to decline, necessitating assessee's decision to dispose of its shareholding, has not been countered with strong and valid reasoning.

19. It is further relevant to observe, in course of assessment proceedings as well as before learned DRP the assessee has furnished valuation report determining the value of the shares under DCF method. As per such valuation report, value of shares was determined at Rs.7.19 per share. Therefore, the sale of shares by the assessee at Rs.5 per is not in excess of the value of share determined by the valuer, in compliance with the FEMA regulations. It is a matter of record that the sale of shares by the assessee to Vidal Healthcare Services Ltd at the agreed price of Rs.5 per share has been approved and sanctioned by the regulatory authorities, such as, IRDA. It is relevant to observe, vide letter dated 01-11-2011, a copy of which is at page 248 of the paper book, IRDA had called upon TTK to explain the reason for selling shares to the assessee at a substantially high premium as against sale of similar shares to resident shareholders at face value of Rs.10/-. Pertinently, in response to the query raised, TTK submitted its reply on 09-11-2011 explaining the reasons for selling the shares at a high premium to the assessee. However, after receiving assessee's reply there is no adverse observation/action by the regulatory authority with regard to the sale of

shares. Therefore, when the purchase and sale of shares of TTK by the assessee are within the legal frame work, there is no justification on the part of the departmental authorities in imputing motive and alleging that the transaction has been arranged to create artificial loss.

20. One of the allegations made by the assessing officer is, to take the benefit of set off of long term capital loss of the impugned assessment year against the capital gain arising in 2016-17 the assessee has arranged the transaction. In our view, the aforesaid reasoning of the assessing officer is fallacious as at the time of purchase of shares and sale thereof, the assessee could not have foreseen or anticipated the future event of capital gain arising in assessment year 2016-17. Therefore, the allegations based on which the assessing officer has denied the claim of long term capital loss are either presumptive or irrelevant and without any basis. Simple facts are, the assessee had purchased a capital asset by way of shares and after holding it for certain period, has sold it in the impugned assessment year at a loss. The fact that the shares sold by the assessee are long term capital asset is not disputed. Therefore, once the assessee had sold its long term capital asset, the computational provisions contained in section 48 and 49 of the Act would automatically get triggered and the gain/loss arising out of such transaction has to be computed in terms of sections 48 and 49 of the Act.

21. In the facts of the present case, undisputedly, after applying the computational provisions of sections 48 and 49 of the Act to the sale transaction of shares of TTK, long term capital loss arises. Therefore, the assessee is entitled to claim such long term capital loss. As regards the allegation of the assessing officer that assessee had not valued the shares under rule 11UA, we fully agree with the submissions of learned counsel for the assessee that rule 11UA is

application for valuation of assets specified under section 56(2)(vii), 56(2)(viia) and 56(2)(viid). Therefore, rule 11UA cannot be applied for determining the value of unlisted equity shares for any purpose other than section 56(2) of the Act. In any case of the matter, the assessee, on its part, has furnished valuation report of an expert determining the value of shares. Whereas, no such valuation has been done by the assessing officer to counter assessee's valuation. Similarly, the allegation of the assessing officer that the promoter of Vidal Healthcare Services Ltd, Shri Girish Rao was linked to the assessee is wholly irrelevant. Undisputedly, Vidal Healthcare Services Ltd is an independent corporate entity having its own separate identity. It is no way related to the assessee. Therefore, even assuming that Shri Girish Rao at some point of time was an employee of the assessee or somehow related to TTK would not be enough to conclude that the assessee and Vidal Healthcare Services Ltd are related parties.

22. As regards the allegation of the assessing officer that the assessee has invested in TTK at a premium and thereafter sold the shares at a loss to benefit Warren Buffet's Hathaway Berkshire, in our view, is totally irrelevant for deciding the issue in dispute. Rather, these allegations vindicate that the assessing officer has allowed his decision making process to be clouded by irrelevant material, presumption and surmises. In view of the aforesaid, we hold that the assessee having incurred long term capital loss in course of a genuine transaction relating to sale of shares, is eligible to claim set off and carry forward of such loss. We order accordingly. These grounds are allowed.

23. In the result, appeal is allowed.

Order pronounced in the open court on 20/07/2021.

Sd/- sd/-

| PRAMOD KUMAR | SAKTIJIT DEY |
|---|---|
| VICE PRESIDENT | JUDICIAL MEMBER |

Mumbai, Dt : 20/07/2021

Pavanan