

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

**BEFORE SHRI AMIT SHUKLA, HON'BLE JUDICIAL MEMBER AND  
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER**

**ITA NO.2423/MUM/2022(A.Y: 2017-18)**

|   |    |  |
|---|----|--|
| Indium IV (Mauritius) Holdings Limited<br>Office 201, 2 <sup>nd</sup> Floor, Sterling Tower<br>14 Poudriere Street, Port Louis<br>Mauritius<br><br><b>PAN: AACCI4907P</b> | v. | DCIT (International transaction)-2(2)(1)<br>Room No. 1722, 17 <sup>th</sup> Floor<br>Air India Building, Nariman Point<br>Mumbai – 400 021 |
| <b>(Appellant)</b>  |    | <b>(Respondent)</b>  |

|                                      |          |  |
|--------------------------------------|----------|--|
| <b>Assessee Represented by</b>       | <b>:</b> | <b>Shri Anish Thacker &amp;<br/>Shri Pranay Gandhi</b> |
| <b>Department Represented by</b>     | <b>:</b> | <b>Shri Pankaj Mehta</b>                               |
|                                      |          |  |
| <b>Date of conclusion of Hearing</b> | <b>:</b> | <b>08.09.2023</b>                                      |
| <b>Date of Pronouncement</b>         | <b>:</b> | <b>06.10.2023</b>                                      |

**ORDER**

**PER S. RIFAUR RAHMAN (AM)**

**1.** This appeal is filed by the assessee against the final Assessment Order and directions of the Dispute Resolution Panel of Learned Commissioner of Income Tax (DRP-1), Mumbai [hereinafter in short

"Ld.DRP"] dated 14.06.2022 for the A.Y.2017-18 passed u/s.144C(5) of Income-tax Act, 1961 (in short "Act").

**2.** Brief facts of the case are, assessee filed its Return of Income for A.Y. 2017-18 on 30.11.2017 declaring its total loss of ₹.14,35,11,469/-. The Return was selected for scrutiny under CASS and notices u/s.143(2) and 142(1) of the Act were issued along with detailed questionnaire and in response assessee submitted the submissions through ITBA portal on 20.11.2020, 20.04.2021 and 26.05.2021.

**3.** The Assessee company is incorporated in Mauritius on 19.12.2008, as a public company limited by shares. The Assessee is a tax resident of Mauritius under the India - Mauritius Double Taxation Avoidance Agreement (DTAA). It invests in Indian securities directly under the Foreign Direct Investment (FDI) route or indirectly through its subsidiaries. The case was referred to the Transfer Pricing Officer (in short "TPO") u/s 92CA of the Act for determination of Arm's Length Price in relation to the international transaction.

**4.** Assessing Officer observed from the Computation of total income, that under the head "Capital Gains", Assessee had carried forward the long term capital loss on sale/redemption of Shares amounting to

₹.14,35,11,469/- but has claimed the Short Term Capital Gains on sale/redemption of Shares amounting to ₹.2,19,26,65,193/- as exempt under Article 13 of the India-Mauritius Tax Treaty. Thus, the Assessee had opted for the benefit of DTAA of India-Mauritius Treaty and at the same time the benefit under Income Tax Act, 1961.

**5.** The Assessing Officer observed that as per Article 13 of the DTAA between India and Mauritius, gains derived by a resident of a contracting State from the alienation of any property other than in securities 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. Further, he observed that, no tax is imposed on Capital Gains except on transactions in land and immovable property under the Tax system in Mauritius. Capital losses are not allowed since capital gains are not tax-deductible. In a nutshell, he observed that capital gains derived by a tax resident of Mauritius in India are not taxable in India, and the same is not tax-deductible in Mauritius. Hence, the Article 13 of the Treaty is the most beneficial to the tax resident of Mauritius as far as Capital Gains derived by it in India is concerned. Since, the capital gains derived by the tax resident of Mauritius in India is exempt, the question of carrying forward of capital losses from such

transactions does not arise at all either in India or in Mauritius. Further, Assessing Officer analysed the definition of income u/s. 2(24), Section 45 and DTAA in his order from Para Nos. 7.9 to 7.13, accordingly, he rejected the submissions of the assessee and the capital loss carried forward by the assessee.

6. Aggrieved assessee preferred an objections before Ld. DRP u/s.144C(5) of the Act and filed grounds of appeal along with detailed submissions which is reproduced by Ld. DRP in Para No. 4 at Page No. 3 to 19 of the order and Ld. DRP summarized the submissions of the assessee as under: -

- *The denial of carry forward of forward of long-term capital losses amounting to INR 143,511,469, incurred during AY 2017-18, is incorrect and without basis because*
- *An assessee has the option to apply the "provisions" of the Act to the extent they are more beneficial than the "provisions" of the DTAA. The use of the expression "provisions" means that each provision of the Act may be considered separately and the consequences of the application of each provision to the taxpayer would determine whether it is favorable or unfavorable.*
- *Where there is no specific provision in the DTAA, it is the basic law, i.e., the Act, that will govern the taxation of income.*
- *The provisions of the Act, relating to set-off of long-term capital losses were claimed by the Assessee (being more beneficial) and the provisions of the IM Treaty were claimed as regards taxability of short-term capital gains.*

- *There is no bar on the Assessee to elect to be governed by the provisions of the Act or the DTAA.*
- *It is not for the AO to speculate that there would be no taxable income for the Assessee, and hence there is no point in carrying forward losses."*

7. After considering the detailed submissions of the assessee, Ld.DRP decided the issue against the assessee with the following observations: -

*"5.1 During the impugned assessment year, the assessee earned long term capital loss and short term capital gains. The assessee has claimed that short-term capital gains as exempt from tax in India in accordance with Article 13(4) of the India Mauritius DTAA. However, the assessee has sought to carry forward the long-term capital losses. As per the arguments advanced by the assessee, it is permissible to adopt either the provisions of the Income Tax Act or the Article of DTAA, depending on which is more beneficial to the assessee, even when both the streams are assessable under a single head of income.*

*5.2 We have carefully considered the submissions made by the assessee. During the financial year concerned, the assessee had sold Indian equities. While some of the transactions have resulted in long term capital gains, some have resulted in short term capital loss. However, the basic nature of the transaction is the same i.e., sale of equities resulting in gain/ loss.*

*5.3 Article 13 of India Mauritius DTAA as it stood for the relevant assessment year (AY 2017-18) provided as under:*

*ARTICLE 13*

***CAPITAL GAINS***

*1. Gains from the alienation of immovable property, as defined in paragraph (2) of article 6, may be taxed in the Contracting State in which such property is situated.*

*2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a*

*permanent establishment (alone or together with the whole enterprise) or of such a fixed base, may be taxed in that other State.*

*3. Notwithstanding the provisions of paragraph (2) of this article, gains from the alienation of ships and aircraft operated in international traffic and movable property pertaining to the operation of such ships and aircraft, shall be taxable only in the Contracting State in which the place of effective management of the enterprise is situated.*

*4. Gains derived by a resident of a Contracting State from the alienation of any property other than those mentioned in paragraphs (1), (2) and (3) of this article shall be taxable only in that State.*

*5. For the purposes of this article, the term "alienation" means the sale, exchange, transfer, or relinquishment of the property or the extinguishment of any rights therein or the compulsory acquisition thereof under any law in force in the respective Contracting States."*

*5.4 As per para 4 of Article 13, Capital Gains of a Mauritius tax resident on sale of equity shares in India shall be taxable only in Mauritius. The said Articles does not exclude losses from its ambit. Even under the Income Tax Act, section 14 which gives classification of income under separate five head, the fourth head of income is 'Capital Gains. It is a settled law that income includes loses. In the case of CIT v. Harprasad & Co. (P.) Ltd. [1975] 99 ITR 118 (SC), it has been held that, "From changing provisions of the Act, it is discernible that the words "income" or "profit and gains" should be understood as including loses also, so that, in one sense "profits and gains" represent plus income whereas loses represent "minus income". In other words, loss is negative profit. Both must enter into computation, whereas it becomes material, in the same mode of the taxable income of the assessee."As losses have not been specifically excluded in the Article 13, the word 'Gains' will also include Losses'. Further the Article makes no distinction between short term or long term nature of income.*

*5.5 Section 90(2) of the Income Tax Act provides that, where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.*

5.6 Thus the assessee has a choice to be governed either by the Act or the Treaty. In the present case, the assessee has chosen to be governed by Article 13 of the India Mauritius DTAA. This being so, all the income/ loss arising out of sale of equity shares will be governed by the provisions of Article 13 and the provisions of Income Tax Act will not apply. As noted earlier, it is settled law that loss and income from the same source of income cannot be treated differently. Hence, long term capital loss from share transactions in the case of the assessee cannot be treated differently from long term capital gain from similar share transactions. Both loss and gain from similar transactions have to be treated similarly. Hence, if income is claimed exempt from taxation, loss would also be exempt. There is no mention of loss from share transaction in the treaty and it mentions only income. But income includes loss. Where the income from a particular source itself is out of the computation machinery while computing the total income, as the assessee itself has opted out of it on the strength of DTAA, there shall be no reason as to why the losses of the same very source shall be given a different treatment.

5.7 The claim of the assessee, taken to its extreme logical end would suggest that an assessee can treat each sale transaction as a distinct source of income. Thus, a transaction in one lot of shares sold resulting in gains can be claimed as exempt under the treaty and the transaction of sale in another lot of the same shares resulting in a loss can be claimed as carry forward of loss under the Income Tax Act. There is no dispute that the assessee has a choice as to whether it wishes to take the benefit of Tax Treaty or not, and be taxed as per the Act otherwise. It is only that the selective claim of treating gains as not taxable invoking treaty and claiming losses to be covered by the Act, which is not permitted.

5.8 The Panel has also considered the case laws relied on by the assessee in support of its contentions.

5.9 In the case of IBM World Trade Corporation [2012] 54 SOT 39 (Bangalore) (URO), the application of the provisions of the Act for Royalty arising from contracts prior to 01.06.2005 and the application of DTAA to royalty arising from contracts on or after 01.06.2005, was accepted. Here the Royalties were treated separately under the Income Tax Act. Rates of applicable tax were claimed separately for the different royalty agreements. The issue was rates applicable under the Income Tax Act for agreements entered into before and after the cut off. This was not an issue of selective interpretation of treaty and domestic law. Hence, it has no applicability in the facts of the present case.

5.10 *In the case of Foramer S.A. [1995] 52 ITD 115 (Delhi), the issue was of determining the profit of PE as per treaty and the dispute was as to how claim for depreciation was to be computed. Assessee wanted it to be computed as per applicable IT Depreciation rate. The Treaty does not specify and rate. The Treaty also mentions where any term is not defined the same can be as per the Domestic Tax Laws. This decision again is not on the issue before us and is not relevant.*

5.11 *In the case of British Airways Plc [2002] 80 ITD 90 (Delhi), the issue was taxability of income from ground/ engineering services which was held to be not forming part of Transportation of Goods and Persons and thus not covered by Article 8 of Treaty. This decision is clearly not relevant and does not support the case of assessee.*

5.12 *In view of the foregoing discussion, it is held that Article 13 of the India Mauritius DTAA cannot be selectively applied. Hence, the assessee is not entitled to carry forward the Long Term Capital Losses for the year under consideration i.e. AY 2017-18 to the subsequent years and the decision of the AO is upheld.*

5.13 *The assessee is also aggrieved that adequate/ reasonable opportunity of being heard was not given by the AO. The Panel has given its thoughtful consideration to the submissions. The Panel notes that section 144C is a complete code in itself and is applicable in the case of eligible assessee as defined in section. 144C(15)(b). Section 144C(1), as it stood for AY 2017-18, provides that the Assessing Officer shall, notwithstanding anything to the contrary contained in this Act in the first instance, forward a draft of the proposed order of assessment to the eligible assessee if he proposes to make any variation in the income or loss returned which is prejudicial to the interest of such assessee. Thus, it is very clear that no final order is passed in the case of an eligible assessee and once the assessee exercises its option to file objections before the DRP it gets an opportunity to object to any addition/ adjustment proposed by the AO. Therefore, no addition can be made behind the back of the assessee or without providing him an opportunity to explain its stand by countering the arguments/ conclusions of the AO/ TPO, bringing fresh evidence etc. It follows that, unlike assessments in the case of an assessee who is ineligible for the purposes of section 144C, the eligible assessee gets an opportunity to contest the proposed action of the AO at the draft stage itself if it opts to file objections before the DRP. The judicial rulings relied upon by the assessee are either related to cases where 144C was not applicable or where at the assessment stage the assessee was denied the right of being*

*heard. None of the decisions are therefore applicable in the present set of facts. Accordingly, this objection of the assessee is rejected."*

**8.** Aggrieved assessee is in appeal before us raising following grounds in its appeal: -

*"1. Erred in fact and law in denying the Assessee's right to carry forward the long-term capital losses amounting to INR 143,511,469, incurred during AY 2017-18 considering loss and gains from different transaction as same source of income.*

*2. Erred in concluding that once the Assessee elected to apply the provisions of section 90(2) of the Act with respect to short-term capital gains, it cannot revert to the provisions of the Act only for the purpose of carry forward of long-term capital losses.*

*3. Erred in stating that the Assessee had not responded to the show cause notice dated 13 September 2021, without considering the request of the Assessee, dated 22 September 2021, seeking additional time in making the submission as the learned AO had served the notice on an e-mail id that was not in use. The correct e-mail id was communicated to the learned AO vide letter dated 19 April 2021."*

**9.** At the time of hearing, Ld. AR of the assessee brought to our notice facts of this case that assessee has earned short term capital gain which is not taxable in India as per India-Mauritius Tax Treaty and assessee has incurred long term capital loss which assessee is applying/making the option of carrying forward losses u/s. 74 of the Act. He submitted that assessee has an option to apply the provisions of Income-tax Act, 1961 or treaty whichever is beneficial to the interest of the assessee, this is a settled proposition. Further, he brought to our notice Page No. 42 of the Paper Book which is Press Release of the

CBDT dated 10.05.2016, protocol for amendment of the convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains between India and Mauritius. He brought to our notice the amendments as per which India gets taxation rights on capital gains arising from alienation of shares acquired on or after 01.04.2017 in a company resident in India w.e.f. Financial year 2017-18, while simultaneously protection to investments in shares acquired before 01.04.2017 has also been provided.

**10.** Further, Ld. AR of the assessee vide letter dated 05.07.2023 submitted as under: -

*"2. During the financial year ended 31 March 2017, the Assessee has earned gains/ incurred losses on the alienation of shares of Indian companies (not subject to security transaction tax) as under:*

| Sr. No   | Particulars  | Amount (in INR) | Amount (in INR) |
|----------|--|-----------------|-----------------|
| <b>A</b> | <b>Long-term capital gains / (losses)</b>  |                 |                 |
| 1.       | On swap of shares of DishaMicrofin Private Limited for Fincare Business Services Private Limited (refer Exhibit 1)     | 205,559,302     |                 |
| 2.       | On swap of shares of Future Financial Services Limited for Fincare Business Services Private Limited (refer Exhibit 2) | (298,053,929)   |                 |
| 3.       | On sale of shares of India Finserve Advisors Private Limited (refer Exhibit 3)   | (51,016,842)    |                 |
|          | Net long-term capital loss carried forward (A)   |                 | (143,511,469)   |
|          |  |                 |                 |
| <b>B</b> | <b>Short-term capital gains / (losses)</b>   |                 |                 |
| 1.       | On swap of shares of DishaMicrofin Private Limited for Fincare Business Services Private Limited (refer Exhibit 1)     | 15,963,444      |                 |

| Sr. No  | Particulars  | Amount (in INR) | Amount (in INR) |
|---|--|-----------------|-----------------|
| 2.  | On swap of shares of Future Financial Services Private Limited for Fincare Business Services Private Limited (refer Exhibit 2) | 35,126,620      |                 |
| 3.  | On sale of shares of India Finserve Advisors Private Limited (refer Exhibit 3)   | (12,387,266)    |                 |
| 4.  | Sale of shares of Fincare Business Services Private Limited (refer Exhibit 4)  | 1,936,359,461   |                 |
| 5.  | Sale of shares of DishaMicrofin Private Limited (refer Exhibit 5)  | 217,602,934     |                 |
| Net short-term capital gains claimed exempt under Article 13 of IM Treaty (B) |  |                 | 2,192,665,193   |

3. *All the purchase and sale transactions giving rise to these capital gains have been entered before 1 April 2017.*

4. *In the return of income for AY 2017-18, the gains/ losses have been shown as depicted below.*

- *Short-term capital gains of INR 2,192,665,193 have been claimed as not taxable in India taking recourse to Article 13(4) of the India Mauritius Tax Treaty (IM Treaty). The IM Treaty read with the Protocol dated 10 May 2016 amended Article 13 of the IM Treaty to inter alia provide for taxing gains earned from alienation of shares acquired on or after 1 April 2017 to be taxed as per the domestic tax laws of India where the shares sold are of an Indian company. Thus, gains earned on alienation of shares acquired prior to 1 April 2017 continue to not be taxable in India.*

- *Net long-term capital loss (non-STT paid) of INR 143,511,469 was incurred during the year. Section 74(1) of the Income-tax Act, 1961 (Act) does not permit offsetting such long-term capital losses against short-term capital gains. Such long-term capital losses shall be available for set-off only against long-term capital gains. Thus, the said long-term capital losses have been carried forward in accordance with the provisions of section 74(2) of the Act.*

5. *The issue for adjudication by your Honours is the correctness of the Appellant's claim for treaty taxability for short term capital gains and taxability under the Act for net long term capital loss by treating the two as separate and distinct streams of*

*income. Corollary to the issue is the Appellant's eligibility to carry forward the net long term capital loss for set-off against future long term capital gains.*

6. *In this regards, reliance is placed on the decision of the Hon'ble Special Bench of the Mumbai ITAT in case of Montgomery Emerging Markets Fund (2006) (100 ITD 217) (Mum Trib.) (SB) (Refer Pg. No. 72 to 83 of the Legal Paperbook) wherein it has been held that each source of income is a separate source of income and in multiple sources of income, an assessee is entitled to adopt the provisions of the Act for one source while applying provisions of treaty for the other source.*

*The relevant extract is reproduced below:*

*"51. Therefore, in the facts and circumstances of the case, we find that the assessee had its right to set off the long term capital loss against short term capital gains for the reason that every transaction relating to the assets brought under the common head of income "capital gains" is to be treated as separate source of income. Every transaction is, for that matter, a source of income with reference to transfer of that asset. Further, during the relevant period, statute has not placed any distinction between long term asset and short term asset or for that matter long-term capital gains and short term capital gains. It was within the legitimate right of the assessee to choose the option which is more favourable to it so that it could avail the benefit of concessional rate of tax on the long term capital gains*

*52. Therefore, the question is answered in favour of the assessee and against the Revenue."*

7. *Further, reliance in this regard is also placed on the following decisions, wherein it has been held that each stream of income has to be looked into separately and assessee can decide whether to claim beneficial of Act vs treaty on different streams of income:*

- *DCIT v. Patni Computer Systems Limited (2008) 114 ITD 159, (Refer Pg. No 84 to 89 of the Legal Paper book) (Refer para 8)*

- *ACIT v J. P. Morgan India Investment Company Mauritius Ltd (ITA No. 2382/Mum/2021) dated 27 September 2022 (Refer Pg. No. 50 to 59 of the Legal Paper book);*
- *Swiss Finance Corporation (Mauritius) Limited (ITA No. 1338/MUM/2021 and 2449/MUM/2021) dated 7 October 2022 (Refer Pg. No. 60 to 71 of the Legal Paper book) (Refer Para 10);*
- *Goldman Sachs Investments (Mauritius) Ltd. (ITA No. 2201/Mum/2017) dated 24 September 2020; and*
- *Bluebay Mauritius Investment Limited (ITA No. 1369/Mum/2021 and ITA No. 1370/Mum/2021) dated 29 April 2022.*

8. *Thus, the claim made by the Assessee to carry forward the long-term capital losses to subsequent years should be allowed as the same is not eligible to be set-off against the short-term capital gains earned during the year under consideration which are not taxable in India by virtue of Article 13(4) of India Mauritius DTAA owing to the provisions of section 74(1) of the Act.*

9. *In light of the above, it is humbly submitted that:*

*The denial of carry forward of forward of long-term capital losses amounting to INR 14,35,11,469, incurred during AY 2017-18, is incorrect and without basis because*

*a Assessee has the option to apply the "provisions of the Act to the extent they are more beneficial than the "provisions of the DTAA. The use of the expression "provisions" means that each provision of the Act may be considered separately and the consequences of the application of each provision to the taxpayer would determine whether it is favourable or unfavourable.*

*b. The assessee can chose to be governed either by the provisions of the Act or the provisions of the treaty whichever are more beneficial qua each source of income. In other words, the assessee can chose to be governed by the provisions of the Act for one source of income and by the provisions of the treaty for (a different another source of income.*

*c. The provisions of the Act, relating to set-off of long-term capital losses were claimed by the Assessee (being more beneficial) and the provisions of the IM Treaty were claimed as regards taxability of short-term capital gains.”*

**11.** On the other hand, Ld. DR relied on the direction of the Ld. DRP and referred to the findings of the Ld. DRP in Para No. 5.6, wherein Ld.DRP has discussed elaborately and gave a clear reason why the assessee cannot carry forward the long term capital loss of the same head of income which assessee preferred to take advantage of the treaty as well as Income-tax Act, 1961.

**12.** In the rejoinder, Ld. AR of the assessee submitted that in the same assessment year, assessee can take two (2) different benefits in the same year. In this regard he relied on Page No. 72 of the Paper Book which is the decision of the Special Bench in the case of JCIT *v.* Montgomery Emerging Markets Fund [2006] 100 ITD 217 (Mumbai) (Special Bench).

**13.** Considered the rival submissions and material placed on record, we observe from the records that assessee is a company incorporated in and a tax resident of Mauritius engaged in investment activities in India through the Foreign Direct Investment Route or through subsidiaries. It holds a valid Tax Residency Certificate (TRC) issued by the Mauritian

Tax Authorities. During the financial year ended 31<sup>st</sup> March 2017, the Assessee has earned gains/ incurred losses on the alienation of shares of Indian companies (not subject to security transaction tax) as under: -

| <b>Sr. No</b> | <b>Particulars</b>   | <b>Amount (in INR)</b> | <b>Amount (in INR)</b> |
|---------------|--|------------------------|------------------------|
| <b>A</b>      | <b>Long-term capital gains / (losses)</b>  |                        |                        |
| 1.            | On swap of shares of DishaMicrofin Private Limited for Fincare Business Services Private Limited (refer Exhibit 1)             | 205,559,302            |                        |
| 2.            | On swap of shares of Future Financial Services Limited for Fincare Business Services Private Limited (refer Exhibit 2)         | (298,053,929)          |                        |
| 3.            | On sale of shares of India Finserve Advisors Private Limited (refer Exhibit 3)   | (51,016,842)           |                        |
|               | long-term capital loss carried forward (A)   |                        | (143,511,469)          |
|               |  |                        |                        |
| <b>B</b>      | <b>Short-term capital gains / (losses)</b>   |                        |                        |
| 1.            | On swap of shares of DishaMicrofin Private Limited for Fincare Business Services Private Limited (refer Exhibit 1)             | 15,963,444             |                        |
| 2.            | On swap of shares of Future Financial Services Private Limited for Fincare Business Services Private Limited (refer Exhibit 2) | 35,126,620             |                        |
| 3.            | On sale of shares of India Finserve Advisors Private Limited (refer Exhibit 3)   | (12,387,266)           |                        |
| 4.            | Sale of shares of Fincare Business Services Private Limited (refer Exhibit 4)  | 1,936,359,461          |                        |
| 5.            | Sale of shares of DishaMicrofin Private Limited (refer Exhibit 5)  | 217,602,934            |                        |
|               | short-term capital gains (B)   |                        | 2,192,665,193          |

The tax treatment adopted in respect of capital gains and losses from transfer/ alienation of Indian securities have been offered to tax as follows: -

- *Long-Term Capital Loss - carried forward under section 74(1) of the Act for set-off against long-term capital gains, if any, earned in eight subsequent years.*
- *Short-Term Capital Gains - Claimed as exempt from tax in India in accordance with Article 13(4) of the India-Mauritius DTAA*

**14.** It is relevant to note that all the purchase and sale transactions giving rise to these capital gains have been entered before 01<sup>st</sup> April, 2017. The issue under consideration is, the assessee has claimed short term capital gain under the treaty and claimed long term capital loss as eligible to carry forward under the Income Tax Act. Whether the Assessee's claim to carry forward the LTCL is correct or not. The non-taxability of STCG has been accepted by the Assessing Officer and is not in dispute.

**15.** With regard to Choice of Act or Treaty Provisions is qua stream of income, in terms of section 90(2) of the Act, the assessee is eligible to apply the provisions of the Act or the Treaty, whichever is more beneficial to it. We observe that as per the Article 13 of the India-Mauritius Treaty, gains derived by a resident of Mauritius from the

alienation of shares shall be taxable only in Mauritius. Unlike other Articles, such as Article 10 Dividend', Article 11 'Interest or Article 12- 'Royalty (which are specifically to be taxed on gross basis), Article 13 dealing with Capital Gains only allocates the taxing rights between India and Mauritius and does not regulate the quantification and computation of capital gains. This issue is left entirely to the sovereigns.

**16.** We observe that the charging provisions in respect of Capital Gains are contained in section 45 of the Act. The provisions of section 48 to 51 of the Act have laid down the computation mechanism. In respect of capital gains for, two classes of assets viz long term and short term assets. Classification of capital assets between long and short term is determined depending on the period of holding. Further, taxation of STCG and LTCG is also governed under different sections being 111A of the Act in case of STCG and 112 / 112A of the Act in respect of LTCG. Accordingly, the scheme of the Act itself recognizes STCG/ STCL and LTCG / LTCL to be separate and distinct sources of income.

**17.** We further observe that this distinction is highlighted upon perusal of section 70 of the Act governing intra-head set-off of current year losses which is reproduced hereunder: -

*"Set off of loss from one source against income from another source under the same head of income.*

*70 (1) Save as otherwise provided in this Act, where the net result for any assessment year in respect of any source falling under any head of income, other than "Capital gains" 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.*

*(2) Where the result of the computation made for any assessment year under sections 48 to 55 in respect of any short-term capital asset is a loss, the assessee shall be entitled to have the amount of such loss set off against the income, if any, as arrived at under a similar computation made for the assessment year in respect of any other capital asset*

*(3) Where the result of the computation made for any assessment year under sections 48 to 55 in respect of any capital asset (other than a short-term capital asset) is a loss, the assessee shall be entitled to have the amount of such loss set off against the income, if any, as arrived at under a similar computation made for the assessment year in respect of any other capital asset not being a short-term capital asset."*

**18.** From the above provisions, it is clear that the short term capital loss can be carried forward or adjusted intra head but the long term capital loss can be carried forward or intra head adjusted cannot be made against the short term capital loss or gain. Therefore, the legislature has kept this difference in carry forward as well as intra head adjustment separate for LTCG/LTCL and STCG/STCL. On further perusal of Section 70 to Section 74, it can be seen that the Legislature itself has recognized LTCG/LTCL and STCG/ STCL to be two distinct sources owing to computational dissimilarities. Accordingly, the Assessee, by virtue of

the provisions of section 90(2) of the Act is eligible to claim the beneficial provisions of the Treaty in respect of STCG and with regard to LTCL, the assessee has only option to apply the provisions of section 74 of the Act, accordingly chose to carry forward LTCL.

**19.** In this regard, for the proposition that a taxpayer is able to choose the provisions of the Act or those of the Treaty for different sources of income, reliance is placed on decision of Bangalore ITAT in case of IBM World Trade Corpn. *v.* DDIT (IT) [2012] 20 taxmann.com 728 (Bangalore). In this case, it is held that in case of multiple sources of income an Assessee is entitled to adopt provisions of the Act for one source of Income while applying the provisions of DTAA for the other source.

*"The assessee has invoked the benefit of the Treaty only in respect of royalty income arising from the agreements entered into before 1-6-2005. In respect of agreements entered into on or after 1-6-2005, the assessee has offered royalty income at the rate of 10 per cent as per the provision of section 115JA. The concerned contracts are different: the source of income is different; and the provisions under which royalty income is taxable, are different and the assessee was, therefore justified in offering the royalty income arising under two different contracts at two rates - one under the Act and one under the Treaty, [Para 7.6]*

**20.** The aforementioned decision in case of IBM World Trade Corporation (*supra*) has been upheld by the Hon'ble Karnataka High Court in the case of DIT (IT) *v.* IBM World Trade Corporation [2021] 436

ITR 641 (Karnataka). The above decision was relied by the coordinate bench in the case of Dimension Data Asia Pacific Pte. Ltd. v. DCIT (IT) [2018] 99 taxmann.com 270 (Mumbai) wherein placing reliance on the decision of Hon'ble Karnataka High Court in case of IBM World Trade Corporation (Supra), the ITAT has held as under: -

*"..... are of the view that as per Section 90(2), the assessee is entitled to claim benefits of the Double Tax Avoidance Agreement to the extent the same are more "beneficial" as compared to the provisions of the Act. While doing so, in cases of multiple sources of income, an assessee is entitled to adopt the provisions of the Act for one source while applying the provisions of the DTA for the other ....."*

**21.** Further, the Special Bench of the Mumbai ITAT in case of JCIT v. Montgomery Emerging Markets Fund [2006] 100 ITD 217 (Mumbai) (SB) has held that long term capital gains and short term capital gains are separate sources of income and merely because these are clubbed under the same head of income, their identity as separate sources does not get obliterated. The relevant extract is reproduced below:

*"44. Therefore, it is very apparent that source of income does not mean head of income. The Assessing Officer had proceeded on a hypothesis as if the source of income is the head of income itself. This is not a proper construction of law provided in section 70 Short-term capital gains/loss as well as long-term Capital gains/loss both are computed under the head capital gains for the aggregation of income culminating into total income which is taxable under the Income-tax Act. What is taxed by the Income-tax Act is not different sources of income independently, but income*

*from different sources clubbed under respective heads and finally aggregated into the total income. The classification of income under different heads for computing the total income does not interfere with the independent character of different sources of income available to an assessee. Both, short-term capital gains/loss and long-term Capital gains/loss are different sources of income, falling under the same head 'Capital gains.....' "*

**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 Corporation (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 Corporation(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.

**23.** In view of the above, we direct the Assessing Officer to allow the Assessee's claim for carry forward of LTCL amounting to ₹.14,35,11,469/-.

**24.** In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 06<sup>th</sup> October, 2023

Sd/-  
**(AMIT SHUKLA)**  
**JUDICIAL MEMBER**

Mumbai / Dated 06/10/2023  
Giridhar, Sr.PS

Sd/-  
**(S. RIFAUR RAHMAN)**  
**ACCOUNTANT MEMBER**

**Copy of the Order forwarded to:**

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

//True Copy//

BY ORDER

(Asstt. Registrar)  
**ITAT, Mum**