

IN THE INCOME TAX APPELLATE TRIBUNAL “I” BENCH, MUMBAI

**BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI RAJ KUMAR CHAUHAN, JM**

ITA No.4139/Mum/2023
(Assessment Year: 2019-20)

Sukhpal Singh Ahluwalia 6/24, Milan Building, 87, Tardeo Road, Opp. Tardeo A C Market, Mumbai-400 034	Vs.	Income Tax Officer (International Tax) Ward 1(1)(1), Room No.1817A, 18 th Floor, Air India Building, Nariman Point, Mumbai-400 021
(Appellant)		(Respondent)

PAN No. AZUPA6884D

Assessee by	:	Shri Rashmikant C. Modi & Ms. Ketki Rajeshirke, ARs
Revenue by	:	Shri Soumendu Kumar Sash, DR

Date of hearing:	18.04.2024
Date of pronouncement :	27.05.2024

ORDER

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by Mr. Sukhpal Singh Ahluwalia, Mumbai [Assessee/ Appellant] for A.Y. 2019-20 against the assessment order passed by the Income Tax Officer, International Transaction, ward 1(1)(1), Mumbai [Ld. AO] dated 21st September, 2023, wherein the return of income filed by the assessee as Non Resident Indian on 1st August, 2019, at a total income of ₹13,94,170/-, is assessed at ₹7,41,60,670.

The assessment order is passed pursuant to direction of learned Dispute Resolution Panel (DRP) under Section 144C(5) read with section 254 of the Income-tax Act, 1961 (the Act) dated 4th August 2023.

02. Brief facts of the case show that assessee is a non-resident Indian. He is deriving income from salaries, capital gains and other sources. He filed his return of Income [ROI] on 1/8/2019 at Rs 13,94,170/-. Draft Assessment order was passed on 29/09/2021 u/s 143 (3) 144C(1) of the Act at Total income of Rs. 74160670/-. Assessee filed objections before Dispute Resolution Panel, Mumbai, which were not signed by the assessee, and therefore ld. DRP passed direction dismissing the objections. Assessee approached ITAT in ITA No 2179/Mum/2022 which was disposed of order dated 30/11/2022 restoring matter to the file of the Ld. DRP for issuing directions afresh. Pursuant to that fresh directions were passed disposing the objection of the assessee on 9/5/2023 confirming draft assessment order. Thus, Final assessment order dated 21/09/2023 was passed u/s 143 (3) rws 144C (13) of the Act determining total income of the assessee at Rs. 74160670/-.

03. Assessee aggrieved with the Assessment order has preferred appeal before us raising following Ground of appeal:-

“1. On the facts and in the circumstances of the case and in law, the Learned AO has erred in computing the Long-Term Capital Gain at Rs. 7,27,66,500/- as per provisions of section 112 of The Income Tax Act,

1961 instead of specific provisions of section 115C r.w.s Section 48 of The Income Tax Act, 1961 relating to long term capital gain earned on foreign exchange assets by a non-resident.

2. The Long-Term Capital Gain ought to have been computed as per the provisions of section of 115C r.w.s Section 45 to 48 and after giving effect to the first proviso to section 48 of The Income Tax Act, 1961. Accordingly, the Long-Term Capital Gain ought to be computed at USD 6,64,568 equivalent to INR Rs. 4,54,63,022/- as per the revised computation of income filed by the Assessee during assessment proceedings along with documents to substantiate the same.

3. On the facts and circumstances of the case and in law, the Learned AO has erred in not allowing the set off of Brought Forward Long-Term Capital Losses of Rs. 5,47,18,953/- against the Long-Term Capital Gain earned during the year under consideration as per the provisions of Section 74 of The Income Tax Act, 1961.

4. On the facts and in the circumstances of the case, the Appellant submits that the real income as per the various applicable provisions of the Income Tax Act, 1961 be computed irrespective of the mistakes committed by oversight in the original Return of Income.

The Appellant submits that the Revised Statement of Total Income submitted before the lower authorities of Income Tax Department be considered and real income be computed.”

04. Ground no 1 and 2 of the appeal is against computation of capital gain in the hands of a non-resident Indian assessee on sale of unlisted shares of an Indian private Limited company acquired by him in 2015. Assessee purchased 615 shares of St. Patrick's Realty Private Limited on 2/2/2015 by remitting \$29,90,556.61 and further 423 shares of that company on 23/10/2015 by further remitting \$ 20,00,000/- from overseas. Assessee sold these shares on 21/5/2018 to M/s Shweta Estate Private limited and sales consideration of GBP 42,10,818.08 was remitted by seller in Barclays bank U K bank account of the assessee.
05. In the computation of Income, assessee disclosed capital gain of Rs 28750358/- by considering the sales consideration of Rs 386866500/-, cost of acquisition with indexation u/s 112 of the Act of Rs 358116142/-. Assessee has also brought forward capital losses of ₹33,97,160/- for A.Y. 2013-14, and ₹255,51,198/- for A.Y. 2014-15 totaling to ₹2,87,50,358/-. Assessee disclosed this transaction in schedule BFLA as long-term gain chargeable to tax u/s 112 of the Act. Computation of capital gain on sale of shares of St. Patrick's Realty limited was made as under:-



No of shares	Purchased on	Cost	Sold On	Consideration	Gain without Indexation	Gain with indexation
615	2/2/2015	18,45,00,000	21/5/2018	227242500	42742500	11992500
432	4/12/2015	12,96,00,000	21/5/2018	159624000	30024000	16757858
		314100000 Indexed cost of acquisition 358116142		386866500	72766500	28750358

06. As the assessee has, long term carried forward capital losses of Rs. 5,47,18,953/- for Ay 2013-14 to 2018-19 which is more than long term capital gain of Rs 28750358, he claimed set off of the same and Long-term capital gain was offered at Rs Nil.

07. The learned Assessing Officer was of the view that.

- i. u/s 112 of the Act assessee cannot claim benefit of first and second proviso of section 48 of the Act , thus, u/s 112 assessee is not entitled to the benefit of indexation. Assessee has claimed benefit of cost inflation index while computing capital gain, which is not allowable.

- ii. Long term capital loss carried forward by the assessee from earlier years is computed after indexation benefit [20 % tax Bracket] whereas the long-term capital gain is taxable without indexation @ 10 %. This is not permissible .
08. Therefore, show cause notice was issued on 23rdSeptember 2021 on this issue. The learned Assessing Officer proposed to compute the long-term capital gain without indexation of ₹7,27,66,500/- and did not want to give benefit of set off of long-term capital loss.
09. Assessee agreed that long-term capital gain must be computed without indexation. The assessee also gave the details of brought forward long-term capital loss brought forward and submitted that according to the provision of law it is allowable.
010. Assessee also submitted that as assessee is a non-resident Indian, and has acquired the shares in foreign currency, his income is to be computed under Chapter XII A u/s 115D (2) of the Act which provides for no deduction under second proviso to section 48 of the act only.
011. Thus, according to that the long-term capital gain worked out in US\$ as under :-

No of shares	Purchased on	Cost In USD	Sold On	Consideration In USD	Gain without Indexation	Gain with indexation
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615	2/2/2015	2990556.61	21/5/2018	33,21,777.99	331221.38	(167204.72)
432	4/12/2015	20,00,000	21/5/2018	23,33,346.49	3,33,346.49	1,28,662.08
		49,90,556.61		56,55,124.48	6,64,567.87	(38,582.64)

012. Assessee as per the above working submitted that long term capital loss of \$ 6,46,567.87 is equivalent to Rs. 4,54,63,022/- (exchange rate Rs 68.4099) would arise. Further as per section 115D (2) (a) only the second proviso to section 48 does not apply but the first proviso to section 48 applies to it, therefore assessee is also entitled to indexation benefit as per first proviso to section 48 of the Act. Thus, accordingly there would be long term capital loss of \$38,582.64 amounting to long term capital loss of Rs. 26,39,435/-.
013. The assessee states that he has acquired the shares in foreign currency, submitted copies of certificate of foreign inward remittances for two different tranches of investment made for purchase of shares and proof of sales consideration received in foreign currency from buyer of the shares.
014. The Id. Assessing Officer considered the explanation of the assessee and held that.
- Inthe case of a non-resident individual transferring or selling shares of an unlistedcompany, first as well as 2nd proviso to Section 48 does not apply and computation is

to be made on sale of shares under Proviso to Section 112 of the Act only.

- ii. With respect to the set off losses, he held that Section 70(3) of the Act provides that any long-term capital loss computed in accordance with proviso to Section 48 to 55 of the Act shall be set off against long-term capital gain, which has been arrived at under similar computation made for that assessment year. Therefore, any long-term capital loss computed with indexation benefit cannot be set off against long-term capital gain computed without indexation benefit. Therefore, he refused to give any set off of brought forward losses.

015. Accordingly, he computed the long-term capital gain of ₹7,27,66,500/- and passed draft assessment order under Section 144C of the Income-tax Act, 1961 (the Act) on 29th September 2021, computing the total income of the assessee at ₹7,41,60,665/-.
016. The assessee filed an objection before the learned Dispute Resolution Panel-2, Mumbai-1, who passed the direction on 4th August 2023, wherein the objection of the assessee was dismissed.
017. Consequently, the assessment order under Section 143(3) read with section 144C(13) of the Act was passed on 21st September 2023, at the same amount as per draft assessment order. Therefore, the assessee is aggrieved.

018. The main grievance of the assessee is the computation of long-term capital gain of the shares acquired by the assessee in foreign currency. According to him, the computation of capital gain made by the learned Assessing Officer u/s 112 of the Act is incorrect as specific provision of Section 115D governs such computation. The second grievance of the assessee is non-granting of the benefit of brought forward losses of ₹5,47,18,953/-. The learned Authorized Representative submitted a paper book containing 133 pages and the case law compilation of 5 judicial precedents relied upon. The learned Authorized Representative submitted that.

- i. Assessee is a non-resident Indian. He has purchased shares of an unlisted company in foreign currency, assessee has held shares beyond specified period of time and undisputedly those are long term capital asset, hence, the long term capital gains is required to be computed, therefore the capital gain is required to be computed as per special provision relating to certain incomes of non-resident Indian covered under Chapter XIA of the Act. He referred to the provision of Section 115C and 115 D of the Act. According to that Chapter it only prevents the computation as per second proviso to Section 48 of the Act.
- ii. He further stated that provision to Section 112 (1) (c) of the Act is not applicable in case of the assessee who is a non-resident Indian purchasing shares in convertible foreign exchange for which provision of Chapter XIA of the Act are applicable.



- iii. With respect to the set off of long-term capital loss, he submits that set off could be allowed to the assessee in respect of different rate of tax. He referred to the decision of co-ordinate Bench in the case of JS LLC Vs. ACIT 3396/Mum/2023, for A.Y. 2020-21, dated 26thFebruary 2024. He further stated that Hon'ble Kolkata High Court in 812 of 2008 has also supports the case of the assessee He further referred to the decision of the co-ordinate Bench in First State Investments (Hongkong) Ltd. 33 SOT 26, Mumbai, wherein it has been held that set off of losses from one source against income from other source under the same head is permissible. Thus, according to him the assessee deserves to set off long term capital losses brought forward.
019. The learned Departmental Representative vehemently supported the order of the learned Assessing Officer and stated that issue is squarely covered against the assessee by the decision of the co-ordinate Bench in case of Legatum ventures ltd, Mumbai vs. ACIT in ITA No. 1627/Mum/2022, dated 15thMarch 2023.
020. The learned Authorized Representative submitted that the decision of co-ordinate Bench is with respect to Section 112 whereas, the claim of the assessee is with respect to the provision of Chapter XIII A of the Act which is a special provision relating to certain income of non-resident. Thus, the facts of the case of M/S. LEGATUM VENTURES LTD, MUMBAI (supra)do not apply.

021. We have carefully considered the rival contentions and perused the orders of the lower authorities. Following facts are not in dispute :-

- (i) Assessee is a non-resident Indian who is assessed to tax in India.
- (ii) Assessee acquired shares of an unlisted Indian company by remitting foreign exchange in India in two tranches in February and December 2015.
- (iii) These shares were sold to an Indian entity on 21/05/2018 and remittances were made by buyer to bank account of assessee in U K.
- (iv) Thus, the Assessee acquired shares in the foreign currency and sold those shares in the foreign currency.
- (v) Assessee has available long term capital losses brought forward from earlier years.

022. In these facts , the issue is computation of capital gain in the hands of the assessee on sale of these shares.

023. Provision of section 112 of the Income tax Act provides as under :-

[Tax on long-term capital gains.

112. (1) Where the total income of an assessee includes any income, arising from the transfer of a long-term capital asset, which is chargeable

under the head "Capital gains", the tax payable by the assessee on the total income shall be the aggregate of,—

(c)	in the case of a non-resident (not being a company) or a foreign company,—
(i)	the amount of income-tax payable on the total income as reduced by the amount of such long-term capital gains, had the total income as so reduced been its total income ; *and
²⁵ [(ii)	the amount of income-tax calculated on long-term capital gains [except where such gain arises from transfer of capital asset referred to in sub-clause (iii)] at the rate of twenty per cent; and
(iii)	the amount of income-tax on long-term capital gains arising from the transfer of a capital asset, being unlisted securities ²⁶ [or shares of a company not being a company in which the public are substantially interested], calculated at the rate of ten per cent on the capital gains in respect of such asset as computed without giving effect to the first and second proviso to section 48;]

024. Above provisions applies in case of a non-resident assessee where the shares are not acquired in foreign Currency. In such Circumstances , Assessee cannot claim benefit of the First and second proviso to section 48 of the Act.

025. First proviso to section 48 provides that in the case of an assessee, who is a non-resident, capital gains arising from the transfer of a capital asset being shares in, or debentures of, an Indian company shall be computed by converting the cost of acquisition, expenditure incurred wholly and exclusively in connection with such transfer and the full value of the consideration received or

accruing as a result of the transfer of the capital asset into the same foreign currency as was initially utilised in the purchase of the shares or debentures, and the capital gains so computed in such foreign currency shall be reconverted into Indian currency, so, however, that the aforesaid manner of computation of capital gains shall be applicable in respect of capital gains accruing or arising from every reinvestment thereafter in, and sale of, shares in, or debentures of, an Indian company.

026. Second proviso to section 48 provides that where long-term capital gain arises from the transfer of a long-term capital asset, other than capital gain arising to a non-resident from the transfer of shares in, or debentures of, an Indian company referred to in the first proviso, the provisions of clause (ii) shall have effect as if for the words "cost of acquisition" and "cost of any improvement", the words "indexed cost of acquisition" and "indexed cost of any improvement" had respectively been substituted.
027. Thus, while calculating capital gain by applying provisions of section 112 (1) C) of the act , benefits of computation of capital gain without benefit of foreign exchange fluctuation as well as indexation both the does not apply. Therefore, the



computation shall be made in Indian Currency and without indexation benefit.

028. However, there is beneficial provision is applicable in case of **Non-Resident Indians** , if the specified capital assets are acquired in foreign currency as per Chapter XII of The Income tax Act. These provisions do not apply to Non-Resident who are not Non-Resident Indians. As per section 115C (e) non-resident Indian" means an individual, being a citizen of India or a person of Indian origin who is not a "resident. Further As per section 115C (f) (i) specified assets also includes shares of an Indian Company. According to section 115 (b) foreign exchange asset means any specified asset which the assessee has acquired or purchased with, or subscribed to in, convertible foreign exchange. Section 115 (d) defines long-term capital gains" means income chargeable under the head "Capital gains" relating to a capital asset, being a foreign exchange asset, which is not a short-term capital asset. Further if the income of the Non-Resident Indian is computed under this chapter than according to section 115D (1) No deduction in respect of any expenditure or allowance shall be allowed under any provision of this Act in computing the investment income of a non-resident Indian. Further as per section 115D (2)

such assessee is also denied deduction under Chapter VI-A and benefits contained in the provisions of the second proviso to section 48 to income chargeable under the head Capital gains. Then U/s 115 E tax is computed in the manner laid down therein. According to section 115 I it is the choice of the assessee to opt for benefit in this chapter or not.

029. The contention of the assessee is that above transaction of purchase and sale of shares satisfies all the conditions of chapter XII of the Act , computation of capital gain be made accordingly.
030. Assessee is a non-resident Indian, who sold shares of an Indian company acquiring such shares in foreign currency and selling those shares in foreign currency. Therefore, such shares are specified assets. There is no dispute that such a sale of shares is long term capital gain [Acquired in 2006 and sold in 2018] . Therefore,the assessee's transaction satisfies the definition of chapter XII u/s 115C of the Act. Therefore, the computation of capital gain is to be made subject to the conditions of section 115D. Assessee is not granted any deduction under CH VIA as well as second proviso to section 48 of the Act. There is no claim of assessee under CH VI A of The Act. However,the assessee also claims benefit of indexation which is prohibited under second proviso of section 48 of the Act. Hence the same deserves to be rejected. Assessee cannot be granted benefit of indexation.

031. Reliance by the Ld. DR on the decision of Legatum Ventures[2023] 149 taxmann.com 436 (Mumbai - Trib.)[15-03-2023] does not apply to the assessee as that decision was on the issue that whether Section 112(1)(c)(iii) is a special provision for computation of capital gains in case of a non-resident, arising from transfer of unlisted shares and securities, hence, for taxation of non-resident assessee on sale of unlisted shares, capital gains had to be computed only by reference to provisions of section 112(1)(c)(iii), without giving effect to first and second provisos to section 48 of The Act. Here the computation is required to be made in terms of Chapter XII of the Act and not u/s 112 of the Act.
032. Therefore, the computation of the long-term capital gain on sale of shares is upheld as under :-

No of shares	Purchased on	Cost In USD	Sold On	Consideration In USD	Gain without Indexation
615	2/2/2015	2990556.61	21/5/2018	33,21,777.99	331221.38
432	4/12/2015	20,00,000	21/5/2018	23,33,346.49	3,33,346.49
		49,90,556.61		56,55,124.48	6,64,567.87

033. Now the above capital gain needs to reconvert into Indian Currency. Rule 115 of The Income tax Rules 1962 provides that The rate of exchange for the calculation of the value in rupees of any income accruing or arising or deemed to accrue or arise to the assessee in foreign currency or received or

deemed to be received by him or on his behalf in foreign currency shall be the telegraphic transfer buying rate of such currency as on the specified date. Though the assessee has computed the gain by converting it at some rate however same needs to be verified. The ld. AO may verify the exchange rate and compute the long-term capital gain of \$6,64,567.87 in Indian Rs. Therefore, Ground no. 1 and 2 of the Appeal are partly allowed.

034. Ground no 2 is with respect to set off of the long-term capital Loss Brought Forward for the year. Against the above capital gain assessee has available long term capital loss brought forward to be set off or not.
035. The ld. DR relied up on decision of Kerala High court in case of Apollo Tyres Limited [2021] 130 taxmann.com 295 (Kerala)/[2022] 284 Taxman 229 where in it is held that Long-term capital loss arising out of sale of shares and units of mutual funds on which STT was paid and covered under section 10(38) could not be set off against long-term capital gains arising out of sale of land as per section 70(3) of the Act.
036. The Ld. AR submits that it is not the case of any exempt loss being set off against long term capital gains as decided by Honourable Kerala High court. In the present case Assessee asks for set off taxable capital gain against available long term capital Loss. He referred to the provisions of section 70 of the Act and submits that assessee is eligible for the same. It



is further submitted that issue is covered in favour of the assessee by the following decisions:-

- i. JS Capital LLC[2024] 160 taxmann.com 286 (Mumbai - Trib.)
- ii. GSB Capital Markets Ltd. v. Dy. CIT [2016] 65 taxmann.com 178/156 ITD 770 (Mum. - Trib.)
- iii. Asstt. DIT (International Taxation) v. Legg Mason Asia (Ex Japan) Analyst Fund [2013] 38 taxmann.com 12/[2014] 61 SOT 277 (Mum. - Trib.)
- iv. VEMF -A, LP v. Dy. CIT (IT) [IT Appeal No. 6727 (Mum) of 2016, dated 10-4-2017]
- v. CIT v. Rungamatee Trexim (P.) Ltd. [IT Appeal No. 812 of 2008, dated 19-12-2008] Calcutta High Court
- vi. First State Investments (Hongkong) Ltd. v. Asstt. DIT (International Taxation) [2009] 33 SOT 26 (Mum. - Trib.)
- vii. Vipul A. Shah [2011] 13 taxmann.com 40 (Mumbai)/[2011] 47 SOT 189 (Mumbai)

037. Thus, the Issue is squarely covered in favour of the Assessee.

038. We have carefully considered rival contentions and perused the orders of lower authorities. We have also considered all the relevant judicial precedents cited before us. Issue in this ground of appeal is that when assessee has long term capital gain during the year can it be allowed to be set off against the

long-term capital loss brought forward by the assessee from earlier previous years.

039. It is not the fact of the case that loss or gain earned by the assessee did not enter the computation at all. Both are chargeable to tax under the head capital gain as income. Therefore, the decision of Honourable Kerala High court relied up on by the ld. DR does not apply to the facts of the case as in that case the loss earned by the assessee was exempt u/s 10 (3*) of The Act and did not enter in to the computation of total income at all.
040. Section 74 for Losses under the head "Capital gains provides that Where in respect of any assessment year, the net result of the computation under the head "Capital gains" is a loss to the assessee, the whole loss shall, be carried forward to the following assessment year, and in so far as such loss relates to a long-term capital asset, it shall be set off against income, if any, under the head "Capital gains" assessable for that assessment year in respect of any other capital asset not being a short-term capital asset. It is undisputed that brought forward losses in the case of the assessee is long term capital loss. As the assessee has, long term carried forward capital losses of Rs. 5,47,18,953/- for Ay 2013-14 to 2018-19 .
041. The Provisions with respect to the same is enshrined u/s 70 Set off of loss from one source against income from another source under the same head of income of the Act provides that 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.

042. Contention of the revenue is that this long-term capital gain is chargeable to tax @ 10 % u/s 115 E (ii) or under section 112C (iii) of the Act and the loss brought forward by the assessee is not similarly computed as that loss was computed in the 20 % tax Bracket. Contentions of the assessee is that similar computation is required to be seen with respect to computation u/s 48 to 55 of the Act and not with respect to Tax Rates.
043. In the present case the income of the computation of gain is made as per the provisions of section 48 to 55 of the Act and computation of tax as per section 115 E of the Act. It is a special chapter applicable to NRI which also provides that some of benefits (second proviso to section 48 of the act) provided under section 48 shall also not apply to the assessee, but computation is made u/s 48 to 55 of the Act only.
044. We find that coordinate bench has decided this issue in favour of the assessee that difference in tax rates cannot disentitle assessee from setting of losses if otherwise allowable. In Capital International Emerging Markets Fund[2013] 37 taxmann.com 45 (Mumbai - Trib.)/[2013] 145 ITD 491 (Mum) it is held as under :-

“3.2 We have heard the rival submissions and perused the material. We find that identical issue was decided in the favour of the assessee by the Tribunal in the case of DWS India Equity Fund (supra) in following manner :

"5. We have perused the records and considered the rival contentions carefully. The dispute is regarding set off of short-term capital loss arising from STT paid share transactions against short term capital gain arising from non STT transactions. The assessee had earned short term capital gain of Rs. 40,25,93,717/- from non STT transactions and it had incurred short term capital loss of Rs. 1,26,45,10,006/- from STT paid transactions. The issue is whether short term capital loss can be set off against short term capital gain mentioned above. Under the provisions of section 70(2), short term capital loss arising from any asset can be set off against short term capital gain arising from any other asset under a similar computation made. The AO held that since gain was from shares on which no STT was paid and loss from STT paid transactions, these fell in different categories and could not be set off against each other. We find that this aspect has already been examined by the Mumbai bench of the Tribunal in the case of First State Investments (Hong Kong) Ltd. v. ADIT (supra), in which it has been held that the phrase "under similar computation made" refers to computation of income, the provisions for which are contained under sections 45 to 55A of the Act. The Tribunal also held that



the matter of computation of income was a subject which came anterior to the application of rate of tax which are contained in section 110 to 115BBC. Therefore, merely because the two set of transactions are liable for different rate of tax, it cannot be said that income from these transactions does not arise from similar computation made as computation in both the cases has to be made in similar manner under the same provisions. The Tribunal, therefore, held that short term capital loss arising from STT paid transactions can be set off against short term capital gain arising from non-SIT transactions. The case of the assessee is identical. Therefore, respectfully following the decision of the Tribunal, we see no infirmity in the order of CIT(A) and the same is, therefore, upheld.

6.In the result, appeal of the revenue is dismissed. "

Respectfully, following the above-mentioned order of the Tribunal, we decide ground no.7 in favour of the assessee."

045. Coordinate bench in case of Vipul A. Shah[2011] 13 taxmann.com 40 (Mumbai)/[2011] 47 SOT 189 (Mumbai)where facts were that t the long-term capital gain that accrued to the assessee during the previous year was a sum of Rs. 63,11,933. We have also seen that in arriving at this figure the assessee had set off the long-term capital loss of Rs. 6,74,991 against the long-term capital gain of Rs.

69,86,923 + 2,65,054. While computing the long-term capital loss the assessee availed of the benefit of indexation as per the second proviso to section 48 of the Act. However, while computing the long-term capital gain the assessee did not avail the benefit of indexation and took the benefit of proviso to section 112(1) of the Act by which long term capital gain was taxable only at 10 per cent as against the normal rate of 20 per cent had the benefit of indexation been claimed. Thus, the issue was whether the set off of long-term capital loss against the long-term capital gain as claimed by the assessee could be allowed. On these facts it was held that :-

“16. A plain reading of the provisions of section 70(3) of the Act shows that the first part of the provisions refers to a loss as computed under sections 48 to 55 of the Act in respect of any capital asset. The second part of the provisions refers to income if any as arrived at under **similar** computation. Thus, the second part refers only to the mode of computation under sections 48 to 55 and that would be the correct interpretation. It cannot be said that the second part of the provisions by using the expression "**similar** computation", refers to a **similar** computation under either the second proviso to section 48 or proviso to section 112(1) of the Act. As rightly contended on behalf of the assessee, the provisions of section 70(3) of the Act existed much prior to the mode of computation of capital gain without applying the benefit of indexation which were introduced later by an Amendment in the year 2000. It cannot be

therefore that the Legislature would have contemplated while enacting the provisions of section 70(3) of the Act a situation as contemplated by proviso to section 112(1) of the Act, when it used the expression "**similar** computation" in section 70(3) of the Act. We also find force in the submission of the learned counsel for the assessee that **similar** restrictions could not be imposed when long term capital loss is sought to be carried forward and set off against long term capital gain in the later assessment year in terms of the provisions of section 74(1)(b) of the Act. The learned counsel for the assessee had relied on several judicial pronouncements before us but those decisions did not deal with the issue in the light of the stand taken by the Assessing Officer and therefore those decisions are not being referred to in this order. For the reasons stated above, we hold that that the expression "**similar** computation" used in section 70(3) of the Act does not refer to the computation under sections 48 to 55 of the Act (*sic*) and not the computation second proviso to section 48 of the Act *vis-à-vis* proviso to section 112(1) of the Act but the computation under sections 48 to 55 of the Act. The Assessing Officer is therefore directed to accept the claim of the assessee in this regard. The appeal of the assessee is accordingly allowed.”

046. Other Judicial precedents cited before us also deal with more or less similar issues and hold that difference in rate of tax on capital gain does not make the computation dissimilar u/s 48



to 55 of the Act for the simple reason that section 48 to 55 are not specifying any rate of tax. Hence, respectfully following the decisions relied up on by the Id. AR, we direct the Id. AO to grant set off of brought forward long-term capital losses to the assessee. Accordingly , we allow ground no 3 of the appeal .

047. In view of our decision in Ground no 1 -3 of the appeal ground no 4 is redundant and hence, dismissed.

048. In the result, appeal of assessee is partly allowed.

Order pronounced in the open court on 27.05.2024.

Sd/-
(RAJ KUMAR CHAUHAN)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 27.05.2024

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to:

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

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai