

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

BEFORE SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER AND  
SHRI ANIKESH BANERJEE, JUDICIAL MEMBER

ITA 4475/Mum/2023  
(Assessment year : 2021-22)

<b>Bay Capital India Fund Limited, Mauritius</b> C/o Minesh Shah & Associates LLP, Office 18, 31 <sup>st</sup> Floor, Marathon Futurex, Mafatlal Mills Compound, NM Joshi Marg, Lower Parel (E), Mumbai-400 013 <b>PAN : AAFCB7668K</b>	vs	<b>Assistant Commissioner of Income- tax,</b> Air India, Nariman Point, Mumbai, 18 <sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai-400 021
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee by : Shri Sukhsagar Syal  
Respondent by : Shri Anil Sant – Addl.CIT DR  
  
Date of hearing : 18/06/2024  
Date of pronouncement : 20/06/2024

**ORDER**

**PER ANIKESH BANERJEE, J.M:**

Instant appeal of the Assessee is preferred against the order of the Learned Assistant Commissioner of Income-tax, Circle 1(2)(1), Mumbai [for brevity, 'Ld.AO'] dated 20/10/2023 passed under section 143(3) r.w.s 144C(13) of the Income-tax Act, 1961 (in short, 'the Act'), for Assessment Year 2021-22 in

pursuance to the direction of theLd. CIT (DRP-1) Mumbai-1 (in short, 'DRP') passed U/s. 144C(5) of the Act, date of direction 26/09/2023.

2. The impugned order has been assailed by the assessee on the following grounds of appeal before us: -

**"Grounds of Appeal**

1. *The Assessing Officer/DRP erred in first setting off the entire brought forward long term capital losses of INR 18,96,19,458 of AY 2019-20 and AY 2020-21 against the long term capital gains claimed as not eligible for tax under the Tax Treaty of INR 26,36,44,954 and then considering balance long term capital gains of INR 7,40,25,496 as not chargeable to tax under the Tax Treaty.*
2. *The Assessing Officer/DRP ought to have accepted the position that the Appellant had adopted in its tax return viz, if the long term capital gains on sale of equity shares acquired prior to April 1, 2017 as not chargeable to tax in terms of Article 13 and set off of Rs 4,60,73,065 being the long term capital loss for the AY 2019-20 and AY 2020- 21 against the long term capital gains that were eligible to tax in terms of Article 13.*
3. *The tax effect due to the above results in additional tax on account of addition of INR 4,60,73,065 as long-term capital gains and disallowance of carried forward loss of INR 14,35,46,393 and the refund has reduced by that effect.*
4. *The Appellant does not agree with the adjustment by the Assessing Officer and DRP, that the brought forward long-term losses should be first set-off against exempt longterm capital gains under the Tax Treaty and only balance capital gains should be claimed as exempt under the Tax Treaty.*
5. *Without prejudice to the above, the Appellant also stated that even if brought forward capital losses are incorrectly adjusted against current year exempt gains then the brought forward capital losses should be first set-off against current*

*year taxable gains and only the balance should be adjusted against the non-chargeable gains of current year.*

*6. The Appellant crave leave to add, amend and/ or alter any ground of appeal before final disposal of the appeal.”*

3. Brief fact of the case is that the assessee, Bay Capital India Fund Ltd is incorporated under the laws of Mauritius and is a tax resident of Mauritius. The assessee is registered with the Securities and Exchange Board of India ('SEBI') as Foreign Portfolio Investor ('FPI'). During the impugned assessment year, the assessee earned capital gains and dividend income under the head Income from other sources. The assessee filed the ROI and had claimed as exempt capital gains of Rs.26,36,44,954/- being grandfathered capital gains under the India-Mauritius DTAA. Further, the assessee had earned long term capital gains of Rs.4,60,73,065/- during the year, out of which brought forward capital losses of Rs.4,60,73,065/- have been adjusted. Similarly, the assessee had earned short term capital gains of Rs.8,15,63,722/- during the year out of which brought forward capital losses of Rs.3,26,08,435/- have been adjusted. This has resulted in net short term capital gains of Rs.4,89,55,286/- during the impugned assessment year, which has been offered to tax at the rate of 15%. It is to be noted that even though the assessee has earned both types of gains during the year - i.e. grandfathered gains (exempt) as well as non-grandfathered gains (non-exempt), the assessee has not adjusted the brought forward losses against the exempt gains considering Article 13 of the India-Mauritius Tax Treaty (in short DTAA). The adjustment has been done selectively with the taxable gains only. Therefore, vide notice dated 29.11.2022, the assessee was requested to show cause as to why

the brought forward losses should not be adjusted with the exempt gains. The revenue has accepted the DTAA but adjusted the grandfathered LTCG i.e. exempted income with the brought forwarded loss and rest amount accepted as exempted income. So, the entire amount of non-grandfathered LTCG & STCG are taxed in India. In the final assessment order, the proposal of the Id. DRP is accepted and levied the tax accordingly. Being aggrieved on final assessment order the assessee filed an appeal before us.

4. The Ld.AR argued and placed that the assessee claimed as exempt grandfathered LTCG amount to Rs.26,36,44,954/- in pursuance of DTAA. The extract of the Article 13(4) of the India Mauritius Treaty is reproduced as under: -

*“4. Gains derived by the 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.”*

The Ld.AO wrongly adjusted this exempted income with the brought forward losses. The exempted income is earned from the grandfathered capital gain. The rest of the amount of non-grandfathered capital gain amount to Rs.4,60,73,065/- which is taxable in India. Further rest of the non-grandfathered short term capital gain amount of Rs.8,15,63,722/- is also treated as taxable income and tax @15% after adjusting with brought forwarded loss.

4.1. The Ld.AR respectfully relied on the order of the co-ordinate bench of ITAT, Mumbai Tribunal in the case of **DCIT (International Taxation) vs Swiss Finance**

**Corporation (Mauritius) Ltd.[2023] 146 taxmann.com 203 (Mumbai-Trib).** The relevant paragraphs are as follows: -

*“9. We have considered the rival submissions and perused the material on record. We note that the Assessee had made detailed submission before the CIT(A) which have been reproduced by the CIT(A) in paragraph 5 of the order impugned. The Assessee had placed reliance of the decision of the Tribunal in the case of Goldman Sachs Investments (Mauritius) Ltd. (supra), DCIT vs. Patni Computers Systems Ltd.: (2008) 114 ITD 159 and Flagship Indian Investment Co. (Mauritius) Ltd. Vs. ACIT [2010] 133 TTJ 792 (Mum). The CIT(A) allowed the appeal filed by the Assessee by following the decision of the Tribunal in the case of Goldman Sachs Investments (Mauritius) Ltd. (supra), wherein the other two decisions of the Tribunal were also considered and relied upon. The relevant extract of the aforesaid decision of the Tribunal reads as under:*

*“11. On a perusal of the grounds of appeal, we find, that there are two facets on the basis of which the observations of the A.O/DRP as regards carry forward of the earlier years capital losses has been assailed by the assessee before us, viz. (i). that the A.O/DRP had erred in concluding that the Short term capital losses brought forward by the assessee from the preceding years were to be first "set off" against the short term and long term capital gains for the year under consideration i.e A.Y 2013-14, and only the balance amount of short term capital losses were to be carried forward to the subsequent years; AND (ii). that the A.O/DRP had erred in denying the assessee's right to carry forward the Long term capital losses brought forward from the preceding years, despite the fact, that the same were determined and permitted to be carried forward by the A.O vide his assessment order passed u/s 143(3), dated 19-3- 2015 for A.Y 2012-13.*

*12. We shall first deal with the grievance of the assessee that as to whether the A.O/DRP were right in law and the facts of the case, in concluding, that the short term and long term capital gains earned by the assessee from transfer of securities in India during the year under consideration i.e A.Y. 2013-14, were to be adjusted against the STCL brought forward by the assessee from the earlier years, and thus, only the balance amount of STCL was to be carried forward to the subsequent years. At this stage, we may herein observe that the assessee had claimed the short term*

*and long term capital gains arising in its hands from transfer of securities during the year under consideration i.e A.Y. 2013-14, as exempt, under Article 13 of the IndiaMauritius Tax Treaty. As regards the claim of the assessee that the capital gains on transfer of securities in India was not exigible to tax in India as per Article 13 of the India-Mauritius tax treaty, we find, that the same is not in dispute. On a careful perusal of the observations of the DRP, we find that a direction has been given by the panel for adjustment of the brought forward STCL against the short term and long term capital gains earned by the assessee during the year under consideration. We are thus confronted with a direction of the DRP, wherein despite accepting that the short term and long term capital gains earned by the assessee from transfer of securities during the year under consideration were exempt from tax in India under Article 13 of the India-Mauritius tax treaty, the panel had directed that the brought forward STCL be first adjusted against such exempt short term and long term capital gains, and only the balance amount of brought forward STCL be carried forward to the subsequent years. In our considered view the aforesaid direction of the DRP is bereft of any reasoning and does not merit acceptance. We are unable to comprehend that now when admittedly the short term and long term capital gains earned by the assessee from transfer of securities during the year in question are exempt under Article 13 of the India-Mauritius Tax Treaty, where would there be any occasion for seeking adjustment of the brought forward STCL against such exempt income. Our aforesaid view is squarely covered by the order of the ITAT, Mumbai in the case of Flagship Indian Investment Company (Mauritius) Ltd. (supra). In the case of the assessee before the Tribunal that pertained to A.Y. 2005-06 the assessee had brought forward capital loss of Rs. 87,06,49,335/- from transfer of securities in A.Y. 2002-03. The aforesaid loss was determined in the hands of the assessee vide an intimation under Sec. 143(1) for A.Y 2002-03. Observing, that since the capital gains were not taxable in India as per Article 13 of the Indian-Mauritius Tax Treaty, the A.O being of the view that capital loss would also be exempted, and therefore, the assessee would not be entitled to claim the benefit of carry forward of such capital losses of the earlier years, thus, declined the set-off of the same against the capital gains for the relevant assessment years. On appeal, the CIT(A) upheld the order of the A.O. On further appeal, the Tribunal concluded that the assessee was fully justified in claiming the carry forward of the capital losses of the earlier years to the subsequent years, and both the A.O and the CIT(A) were in error in not allowing the same. Accordingly, the A.O was directed to allow the carry forward of the capital losses of the earlier years to the subsequent years, according to law. As in the aforesaid case, in the case of the present assessee before us, as the short term and*

*long term capital gains earned by the assessee from transfer of securities during the year in question are admittedly exempt from tax under Article 13 of the India-Mauritius tax treaty, therefore, the brought forward STCL of the previous years was rightly carried forward by the assessee to the subsequent years. As regards the reliance placed by the Id. D.R on the observations of the lower authorities that as the words "income" or "profits and gains" were to include losses also, therefore, now when Sec. 45 of the Act, by virtue of the IndiaMauritius tax treaty was rendered unworkable in respect of "capital gains" derived by the assessee from transfer transactions carried out in India, the "capital losses" would also not form part of its "total income", and thus, were not required to be computed under the Act, we are afraid the same does not find favour with us. Before advertng any further, we may herein reiterate that the DRP vide its order passed u/s 144C(5), dated 21-11-2016, had concluded, that now when the "capital loss" was allowed to be carried forward by the A.O, vide his order passed under sec. 143(3), dated 19-3-2015 for A.Y 2012-13, the same could not have thereafter been reviewed in the assessment proceedings of any subsequent year. As the said observation of the DRP has not been assailed any further by the revenue in appeal before us, the same thus had attained finality. Now coming to the claim of the revenue that as Sec. 45 of the Act, by virtue of India-Mauritius tax treaty was rendered unworkable in respect of "capital gains" derived by the assessee from transfer of securities in India, therefore, the "capital losses" would also not form part of the assessee's "total income", and thus, could not be computed under the Act, we are afraid does not find favour with us. Apropos the aforesaid observation of the A.O, we are of the considered view that the same had been arrived at by loosing sight of the fact that the "capital losses" in question had been brought forward from the earlier years and had been determined and allowed to be carried forward by the A.O while framing the assessment for A.Y 2012-13, vide his order passed u/s 143(3), date 19-3-2015, and had not arisen during the year under consideration i.e A.Y 2013-14. Accordingly, the claim of the A.O that the "capital losses" b/forward from the earlier years, pertaining to a source of income that was exempt from tax was thus not to be carried forward to the subsequent years, being devoid of any merit, is thus rejected. At this stage, we may herein observe that it is for the assessee to examine whether or not in the light of the applicable legal provisions and the precise factual position the provisions of the IT Act are beneficial to him or that of the applicable DTAA. In any case, the tax treaty cannot be thrust upon an assessee. In case the assessee during one year does not opt for the tax treaty, it would not be precluded from availing the benefits of the said treaty in the subsequent years. Our aforesaid view is fortified by the order of*

the ITAT, Pune in Patni Computer Systems Ltd. (supra). We thus in terms of our aforesaid observations, not being able to persuade ourselves to subscribe to the view taken by the A.O/DRP, who as noticed by us hereinabove had sought adjustment of the b/forward STCL against the exempt short term and long term capital gains earned by the assessee during the year in question, thus 'set aside' the order of the A.O in context of the issue under consideration. Accordingly, we direct the A.O to allow carry forward of the b/forward STCL of Rs. 3926,36,70,910/- to the subsequent years. The Grounds of appeal Nos. 1 and 2 are allowed in terms of our aforesaid observations.

13. We shall now advert to the second limb of the grievance of the assessee. As is discernible from the records, the assessee had brought forward from the preceding years Long term capital losses aggregating to Rs. 7,63,95,386/- [B/forward LTCL from A.Y 2009-10: Rs. 1,09,800/- (+) B/forward LTCL from A.Y 2012-13 : Rs. 7,62,85,586/-]. Admittedly, the aforesaid Long term capital loss of Rs. 7,63,95,386/- was determined and allowed to be carried forward by the A.O while framing the assessment in the case of the assessee for A.Y 2012- 13, vide his order passed u/s 143(3), dated 19-3-2015. In fact, the aforesaid factual position had duly been taken cognizance of by the DRP at Para 2.3 of its order passed u/s 144C(5), dated 21-11-2016. As observed by us hereinabove, the DRP had observed that once the STCL was allowed to be carried forward by the A.O in a scrutiny assessment order passed u/s 143(3) for a particular assessment year, the same cannot be reviewed in the assessment proceedings of any subsequent assessment year. In our considered view, now when the DRP had directed the A.O to allow carry forward of the STCL brought forward from the preceding years, there can be no justification for denial of carry forward of similarly placed Long term capital losses brought forward by the assessee from the preceding years. We thus are of the considered view that as Long term capital losses of Rs. 7,63,95,386/- were determined and permitted to be carried forward by the A.O while framing the assessment in the case of the assessee for A.Y 2012-13, vide his order passed u/s 143(3), dated 19-3-2015, the assessee therefore would be duly entitled to carry forward the same to the subsequent years. As observed by us hereinabove, the assessee had also moved with the DRP a rectification application u/rule 13 of the Income-tax (Dispute Resolution Panel) Rules, 2009 r.w sec. 144C(5) of the Act, dated 11-1-2017, seeking a direction for carry forward of the b/forward Long term capital losses. After considering the issue, the DRP vide its order passed u/rule 13 of the Incometax (Dispute Resolution Panel) Rules, 2009, dated 01-12-2017, had concluded, that following the rationale adopted for allowing the carry forward of brought forward STCL, the Long term capital losses

amounting to Rs. 7,63,95,386/- that were brought forward from the preceding years were also to be allowed to be carried forward to the subsequent years. At the same time, the DRP observed that as the assessee during the year in question i.e A.Y 2013-14 had shown short term and long term capital gains, therefore, the b/forward losses would be first 'set off' against such income, and the remaining losses would be allowed to be carried forward to the subsequent years. Accordingly, it was observed by the DRP that as the assessee had during the year in question i.e A.Y 2013-14 shown Long term capital gains of Rs. 5,63,11,782/-, therefore, the same would be first set off against the b/forward Long term capital losses of Rs. 7,63,95,386/-, and the balance amount would be allowed to be carried forward to the subsequent years. However, as the DRP in its order u/s 144C(5), dated 21-11-2016 at Page 8 - Para 2.10 had directed adjustment of the Long term capital gains of Rs. 5,63,11,782/- as against the b/forward STCL of Rs. 3926,36,70,910/-, as per sec. 74(1)(a) of the Act, therefore, pursuant to its aforesaid directions, it had therein directed that its observations recorded in Para 2.9 to Para 2.12 would also stand modified. We have given a thoughtful consideration to the aforesaid issue before us, and on the basis of our observations recorded hereinabove, we herein conclude that the assessee is duly entitled for carry forward of its brought forward Long term capital losses of Rs. 7,63,95,386/- to the subsequent years. Further, in terms of our observations and reasoning adopted for concluding that the brought forward STCL of the earlier years are not to be adjusted against the Short term capital gain earned by the assessee during the year in question, we herein direct that on the same basis the brought forward Long term capital losses of the earlier years shall not be set off against the Long term capital gain earned by the assessee from transfer of securities during the year in question i.e A.Y 2013-14. The Ground of appeal No. 3 is allowed in terms of our aforesaid observations." (Emphasis Supplied).

10. In the present case, there was no dispute that the Assessee was entitled to claim the benefit of exemption from tax in India granted by Article 13(4) of the DTAA in respect of Short/Long Term Capital Gains arising during the relevant previous year. The contention of the Revenue was that the aforesaid benefit of Article 13(4) of DTAA could only be claimed in respect of net/balance Short/Long Term Capital Gains after setting off Brought Forward Short/Long Term Capital Gains in terms of Section 74 of the Act. The Tribunal had, in the case of Goldman Sachs Investments (Mauritius) Ltd. (supra), rejected

*theaforesaid contention of the Revenue holding that the Assessee was entitled to claim benefit of Article 13(4) of DTAA in respect of the entire current year Short/Long Term Capital Gains (without setting of the Brought Forward Short/Long Term Capital Gains). The Tribunal also permitted carry forward of the Brought Forward Short/Long Term Capital Gains to the subsequent assessment years holding that the Short/Long Term Capital Loss permitted to be carried forward in a previous assessment could not be reviewed in the assessment proceedings of a subsequent assessment year. In view of the aforesaid, we find merit in the contention of the Ld. Authorised Representative for the Assessee that all the issues raised by the Revenue in the present appeal stand decided in favour of the Assessee by the decision of Tribunal in the case of Goldman Sachs Investments (Mauritius) Ltd. (supra). Accordingly, we do not find any infirmity in the order passed by the CIT(A). Ground No. 1, 2 and 3 raised by the Revenue are dismissed.”*

4.2.The reliance is placed by the Id. AR in the case of **ACIT vs J.P. Morgan India Investment Company Mauritius Ltd (2022) 143 taxmann.com 82 (Mumbai – Trib.)**. The relevant paragraphs are as follows: -

*“25. Thus, under DTAA between India Mauritius, the taxing rights on capital gains falling under Article 13(4) is kept with country of residence, i.e., Mauritius and hence the same is not taxable in country of source, i.e., in India. 26. In the previous year for the Assessment year under appeal (A.Y. 2016-17) the Assessee chose to be governed by the provisions of the tax treaty and consequently the gains earned in that year were not offered to tax. The question of touching the brought forward capital losses in this Assessment year does not arise as the eligibility to carry these losses forward was determined in the year they were suffered. The entire capital gains earned during the previous year were claimed to not be taxable under the treaty. As a result, the capital losses were carried forward as it is to the subsequent years.*

*27. In the instant case, in the earlier years (A.Y. 2009-10, A.Y. 2011-12 to A.Y. 2014-15) the Assessee had incurred capital losses.*

28. Thus, it is for an assessee to examine whether or not, in the light of the applicable legal provisions and in the light of the precise factual position, the provisions of the Income-tax Act are beneficial to him or that of the applicable double taxation avoidance agreement. Thus, these losses were therefore computed under the provisions of the Act, as in those earlier years, the Assessee chose not to be governed by provisions of the treaty for those years but by the provisions of the Act. These provisions included the provisions of section 74 of the Act which deal with carry forward and set off of these losses.

29. In so far as reliance placed by Ld. DR in the case of R. M. Muthaiah (supra), the Hon'ble Court has clearly held as under:-

*“When a power is specifically recognized as vesting in one, exercise of such a power by others, is to be read, as not available; such a recognition of power with the Malays/an Government, would take away the said power, from the Indian Government; the Agreement thus operates as a bar on the power of the Indian Government in the instant case. This bar would operate on ss. 4 and 5 of the IT Act, 1961.”*

4.3. Reliance is also placed in the case of **Goldman Sachs Investments (Mauritius) Ltd. Vs DCIT (international Taxation)-2(3)(2) [2020] 120 taxmann.com 23 (Mumbai-Trib)**. The relevant paragraphs are as follows: -

*“12. We shall first deal with the grievance of the assessee that as to whether the A.O/DRP were right in law and the facts of the case, in concluding, that the short term and long term capital gains earned by the assessee from transfer of securities in India during the year under consideration i.e A.Y. 2013-14, were to be adjusted against the STCL brought forward by the assessee from the earlier years, and thus, only the balance amount of STCL was to be carried forward to the subsequent years. At this stage, we may herein observe that the assessee had claimed the short term and long term capital gains arising in its hands from*

*transfer of securities during the year under consideration i.e A.Y. 2013-14, as exempt, under Article 13 of the IndiaMauritius Tax Treaty. As regards the claim of the assessee that the capital gains on transfer of securities in India was not exigible to tax in India as per Article 13 of the India-Mauritius tax treaty, we find, that the same is not in dispute. On a careful perusal of the observations of the DRP, we find that a direction has been given by the panel for adjustment of the brought forward STCL against the short term and long term capital gains earned by the assessee during the year under consideration. We are thus confronted with a direction of the DRP, wherein despite accepting that the short term and long term capital gains earned by the assessee from transfer of securities during the year under consideration were exempt from tax in India under Article 13 of the India-Mauritius tax treaty, the panel had directed that the brought forward STCL be first adjusted against such exempt short term and long term capital gains, and only the balance amount of brought forward STCL be carried forward to the subsequent years. In our considered view the aforesaid direction of the DRP is bereft of any reasoning and does not merit acceptance. We are unable to comprehend that now when admittedly the short term and long term capital gains earned by the assessee from transfer of securities during the year in question are exempt under Article 13 of the India-Mauritius Tax Treaty, where would there be any occasion for seeking adjustment of the brought forward STCL against such exempt income. Our aforesaid view is squarely covered by the order of the ITAT, Mumbai in the case of Flagship Indian Investment Company (Mauritius) Ltd. Vs. ADIT (I.T)-3(2), Mumbai (2010) 133 TTJ 792 (Mum). In the case of the assessee before the Tribunal that pertained to A.Y. 2005-06 the assessee had brought forward capital loss of Rs. 87,06,49,335/- from transfer of securities in A.Y. 2002-03. The aforesaid loss was determined in the hands of the assessee vide an intimation under Sec. 143(1) for A.Y 2002-03. Observing, that since the capital gains were not taxable in India as per Article 13 of the Indian-Mauritius Tax Treaty, the A.O being of the view that capital loss would also be*

*exempted, and therefore, the assessee would not be entitled to claim the benefit of carry forward of such capital losses of the earlier years, thus, declined the set-off of the same against the capital gains for the relevant assessment years. On appeal, the CIT(A) upheld the order of the A.O. On further appeal, the Tribunal concluded that the assessee was fully justified in claiming the carry forward of the capital losses of the earlier years to the subsequent years, and both the A.O and the CIT(A) were in error in not allowing the same. Accordingly, the A.O was directed to allow the carry forward of the capital losses of the earlier years to the subsequent years, according to law. As in the aforesaid case, in the case of the present assessee before us, as the short term and long term capital gains earned by the assessee from transfer of securities during the year in question are admittedly exempt from tax under Article 13 of the India-Mauritius tax treaty, therefore, the brought forward STCL of the previous years was rightly carried forward by the assessee to the subsequent years. As regards the reliance placed by the Id. D.R on the observations of the lower authorities that as the words "income" or "profits and gains" were to include losses also, therefore, now when Sec. 45 of the Act, by virtue of the IndiaMauritius tax treaty was rendered unworkable in respect of "capital gains" derived by the assessee from transfer transactions carried out in India, the "capital losses" would also not form part of its "total income", and thus, were not required to be computed under the Act, we are afraid the same does not find favour with us. Before advertng any further, we may herein reiterate that the DRP vide its order passed u/s 144C(5), dated 21.11.2016, had concluded, that now when the "capital loss" was allowed to be carried forward by the A.O, vide his order passed under Sec. 143(3), dated 19.03.2015 for A.Y 2012-13, the same could not have thereafter been reviewed in the assessment proceedings of any subsequent year. As the said observation of the DRP has not been assailed any further by the revenue in appeal before us, the same thus had attained finality. Now coming to the claim of the revenue that as Sec. 45 of the Act, by virtue of India-Mauritius tax treaty was rendered*

*unworkable in respect of “capital gains” derived by the assessee from transfer of securities in India, therefore, the “capital losses” would also not form part of the assessee’s “total income”, and thus, could not be computed under the Act, we are afraid does not find favour with us. Apropos the aforesaid observation of the A.O, we are of the considered view that the same had been arrived at by losing sight of the fact that the “capital losses” in question had been brought forward from the earlier years and had been determined and allowed to be carried forward by the A.O while framing the assessment for A.Y 2012-13, vide his order passed u/s 143(3), date 19.03.2015, and had not arisen during the year under consideration i.e A.Y 2013-14. Accordingly, the claim of the A.O that the “capital losses” b/forward from the earlier years, pertaining to a source of income that was exempt from tax was thus not to be carried forward to the subsequent years, being devoid of any merit, is thus rejected. At this stage, we may herein observe that it is for the assessee to examine whether or not in the light of the applicable legal provisions and the precise factual position the provisions of the IT Act are beneficial to him or that of the applicable DTAA. In any case, the tax treaty cannot be thrust upon an assessee. In case the assessee during one year does not opt for the tax treaty, it would not be precluded from availing the benefits of the said treaty in the subsequent years. Our aforesaid view is fortified by the order of the ITAT, Pune in DCIT Vs. Patni Computer Systems Ltd. (2008) 114 ITD 159 (Pune). We thus in terms of our aforesaid observations, not being able to persuade ourselves to subscribe to the view taken by the A.O/DRP, who as noticed by us hereinabove had sought adjustment of the b/forward STCL against the exempt short term and long term capital gains earned by the assessee during the year in question, thus „set aside“ the order of the A.O in context of the issue under consideration. Accordingly, we direct the A.O to allow carry forward of the b/forward STCL of Rs. 3926,36,70,910/- to the subsequent years. The Grounds of appeal Nos. 1 and 2 are allowed in terms of our aforesaid observations.”*

5. The Ld.DR vehemently argued and submitted written submission. The relevant part of the submission is as follows:-

*“In this case, the claim of exemption of the assessee shall be applicable to the capital gains as computed under the Indian Income Tax Act, 1961 first. The brought forward losses of Rs.1,30,50,565 (from AY 2019-20) and Rs.17,65,68,893/- (from AY 2020-21) have to be set off against the grandfathered gains first, for the simple reason that these investments were made earlier (in 2015 and 2016) than the non-grandfathered investments (which were made 2017 onwards). Moreover, even on perusal of date-wise sales made during the AY 2021-22, it is seen that most of the grandfathered gains have been made in the initial part of the year even while the non-grandfathered gains are distributed over the latter part of the year. Contrary to the assessee's contention, the period in which these losses have been made would not be relevant to the discussion at hand and the manner of set off of these losses shall still remain the same.*

*In its submission dated 05.12.2022, assessee has relied upon certain case laws of the Hon'ble ITAT, however, these case laws are distinguishable and not applicable to the present case. In the case of Sikha Sanjaya Sharma vs DCIT as well as G.K. Ramamurthy v JCIT - 21(2), Mumbai, the exempt income earned is exempt under the Income tax Act, 1961 itself. In the present case, however, as discussed above, the exempt income has to be claimed after computing the capital gains as per the Income Tax Act, 1961. Further, in the case of Goldman Sachs Investments (Mauritius) Ltd v Deputy Commissioner of Income tax (International Taxation) - 2(3)(2), the department has not accepted the decision of the Hon'ble ITAT and further appeal has been filed in this case.*

*Further, it is pertinent to note that the matter under examination is a legal issue. As it has been discussed in details above, in view of the binding precedents set by the Supreme Court in cases like M.S.P Nadar Sons v CIT [1993] 68 Taxman 152 (SC), CIT v M.S.P Nadar Sons [1989] 43 Taxman 231 (Madras), CIT v VVenkatchalam [Civil Appeal No.3044 of 1983, dated 13.4.1993] and B.M. Kamdar, In re [1946] 14 ITR 10 (Bombay), it is imperative to emphasize that "Capital Gains" as part of "Total Income" for an A.Y. is to be computed as per provisions of the Domestic Act and the during that process, the question of Treaty benefit does not arise, since Treaty does not lay down any computation mechanism. The option of provisions of Treaty v. Domestic Income Tax Act application is subsequent to the determination of the net "Capital Gains" which forms the "Total Income". Further, in this case, the Approach of the applicant endeavors to take benefit of Domestic Income Tax Act and DTAA simultaneously, not permissible. In light of the above decision of the Hon'ble Apex Court and High Court, with due respect to the decision of the Hon'ble ITAT and bowing before it with reverence; a distinction is prayed from the cases relied upon by the Applicant."*

6. We heard the rival submission and perused the documents available on record. There is no dispute that the assessee is entitled to get exemption under Article-13(4) of DTAA amount to Rs. 26,36,44,954/-. But the dispute between the parties is whether it will be adjusted with the brought forwarded loss or not. Considering the plain reading of the section that capital loss, after being carried forward, can be set off only against income under the head capital gains. Therefore, existence of a taxable income is a precondition for a set of losses against such income. In

this appeal, the gains of Rs.26,36,44,954/- are admittedly exempt by virtue of article 13(4) of the treaty. The said gains, therefore, cannot be termed as income for the purpose of section 74 of the Act. We relied on the orders of the Coordinate Bench of ITAT-Mumbai in the cases of **Swiss Finance Corporation (Mauritius) Ltd**(supra) and **J.P. Morgan India Investment Company Mauritius Ltd**(supra). In our considered view the answer is against revenue. The exempted income is not a part of taxable Gross Total Income. The non-grandfathered LTCG will be adjusted with brought forwarded loss, following the order of **Goldman Sachs Investments (Mauritius) Ltd**.(supra). The orders which are relied on by the Id. DR are distinguishable. The impugned final assessment order is dismissed. The appeal of the assessee is succeeded.

7. In the result, the appeal of the assessee bearing **ITA No. 4475/Mum/2023** is allowed.

Order pronounced in the open court on \_\_\_\_\_ day of June, 2024.

(NARENDRA KUMAR BILLAIYA)  
ACCOUNTANT MEMBER

Mumbai, दिनांक/Dated: /06/2024

Pavanan

(ANIKESH BANERJEE)  
JUDICIAL MEMBER

**Copy of the Order forwarded to:**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकरआयुक्त CIT
4. विभागीयप्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,  
Mumbai
5. गार्डफाइल/Guard file.

BY ORDER,

//True Copy//

(Asstt. Registrar), ITAT, Mumbai

	Details	Date	Initials	Designation
1	Draft dictated on PC on	19.06.2024		Sr.PS/PS
2	Draft Placed before author	19.06.2024		Sr.PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on			Sr.PS/PS
7.	File sent to the Bench Clerk			Sr.PS/PS
8	Date on which the file goes to the Head clerk			
9	Date of Dispatch of order			