INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI
BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
SHRI SUDHIR KUMAR, JUDICIAL MEMBER

ITA No. 1212 & 1213/Del/2017
(Assessment Year: 2012-13 & 2013-14)

Mr. Tarun Sawhney, 124, Golf Links, New Delhi	Vs.	ACIT, Central Circle, Noida
(Appellant)		(Respondent)

PAN:AATPS0679L

Assessee by :	Shri Rohit Jain, Adv Ms. Somya Jain, CA
Revenue by:	Shri V. K. Dubey, Sr. DR
Date of Hearing	17/10/2024
Date of pronouncement	25/10/2024

O R D E R

PER M. BALAGANESH, A. M.:

1. These appeals in ITA Nos.1212 and 1213/Del/2017 for AY 2012-13 and 2013-14, arise out of the order of the Commissioner of Income Tax (Appeals)-I, Noida [hereinafter referred to as 'ld. CIT(A)', in short] dated 29.11.2016 against the order of assessment passed u/s 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 30.03.2014 for AY 2012-13 and 31.03.2015 for AY 2013-14 by the Assessing Officer (hereinafter referred to as 'ld. AO').

2. Identical issue is involved in both these appeals and hence they are taken up together and disposed of by this common order for the sake of convenience. With the consent of both the parties, the facts of Asst Year

2012-13 are taken up adjudication and the decision rendered thereon shall apply mutatis mutandis for Asst Year 2013-14 also except with variance in figures.

3. At the outset, there is a delay of 18 days in filing of appeal before us. We have gone through the condonation petition together with an affidavit thereon and we are convinced with the same. Accordingly, we hold that the assessee was prevented from sufficient cause from not filing the appeals in time. Accordingly, the delay in filing of appeals for both the years are hereby condoned and taken up for adjudication.

4. The only identical issue to be decided in this appeal is as to whether the ld CIT(A) was justified in confirming the action of the ld AO in not allowing the carry forward of Long Term Capital Loss (LTCL) arising on sale of shares and equity oriented mutual funds on which Securities Transaction Tax (STT) had been suffered by the assessee.

5. We have heard the rival submissions and perused the materials available on record. The assessee is an individual who was employed with M/s Triveni Engineering Limited and thereafter employed with M/s Triveni Turbine Limited with effect from 10.5.2011. The main sources of income for the assessee are income from salary, interest income on bank deposits and other investments and capital gains / losses. The assessee suffered LTCL of Rs 1,04,27,637/- in Asst Year 2012-13 on sale of equity shares and equity oriented mutual funds which were subject to levy of STT in the original return of income filed. The aforesaid loss was claimed to be carried forward to subsequent years in accordance with the provisions of the Act. The assessee filed a revised return wherein out of abundant precaution, the assessee withdrew the claim of carry forward of aforesaid LTCL. However, during the course of scrutiny assessment proceedings, the assessee vide letter dated 25.3.2014 for Asst Year 2012-13 requested the

ld AO to consider on merits, the aforesaid legal claim for carry forward of LTCL arising on sale of shares and equity oriented mutual funds which were subjected to levy of STT. The ld AO in the assessment order considered the issue on merits by holding that since the income from long term capital gains arising on transfer of equity shares and equity oriented mutual funds which are subjected to levy of STT is exempt from tax u/s 10(38) of the Act, the assessee is therefore not entitled to claim the benefit of carry forward of LTCL on such transactions. This action was upheld by the ld CIT(A). Aggrieved, the assessee is in appeal before us.

6. It would be relevant to understand that the capital gains per se on transfer of shares and equity oriented mutual funds, as a source, is liable to tax in the hands of every assessee and it is only when the same is subjected to levy of STT, it becomes exempt u/s 10(38) of the Act. Hence only if the said transfer of capital assets are made in the open market through a registered share broker registered in the stock exchange and subjected to levy of STT, the long term capital gains becomes exempt u/s 10(38) of the Act. On the contrary, if the transfer of such capital assets were made between two private parties without routing through the registered share broker in the recognized stock exchange and not suffering STT, then the long term capital gain would be liable to tax. In that event, the long term capital loss would be eligible to be carried forward to subsequent years as per the provisions of the Act. Hence capital gains, as a source per se, is liable to be exempt only under specified circumstances, on compliance to certain other conditions imposed. Further the proviso to section 10(38) of the Act specifically provides that the very same long term capital gain which had suffered STT would still become taxable while computing the book profits u/s 115JB of the Act. Hence it is very clear that the legislature never intended that the long term capital gains which had suffered STT would be completely

exempt from tax under all the provisions of the Act. It is exempt only under specified circumstances. Hence it could be safely concluded that capital gains as an independent source is not exempt from tax automatically. The carry forward of LTCL is governed by the provisions of section 74 of the Act, wherein, there is no embargo provided in the said section with respect to subject mentioned transactions. Hence the LTCL on sale of equity shares and equity oriented mutual funds, per se, would become eligible to be carried forward to subsequent years as per the provisions of the Act.

7. The ld AR before us rightly placed reliance on the decision of *Hon'ble Supreme Court comprising of 3 judges in the case of CIT vs Karamchand Premchand Ltd reported in 40 ITR 106 (SC)*. In the facts before the Hon'ble Supreme Court, the question of applicability of provisions of section 5 of the Business Profits Tax Act 1947 was subjected to consideration and applicability of the Act to business outside British India was considered. In that case, the assessee had business in British India and also a pharmaceutical business in Baroda which was at relevant time outside British India. Assessee's business in British India showed business profits assessable under 1947 Act, but business carried on in Baroda showed loss. Whether in view of provisions of section 5, assessee was entitled to deduct losses incurred by it in its Baroda business and set off them against profits made in British India was the question before the Hon'ble Supreme Court. The 3rd proviso to section 5 stipulated that the business income earned outside India would become taxable only when the said income is brought into India. In that case, the loss was incurred outside India. The Hon'ble Apex Court appreciated the fact that since there was loss incurred outside India, there would be no question of bringing the loss into India by the assessee. Accordingly, the Hon'ble Apex Court observed that :-

"On behalf of the appellant it has been pointed out that the expression used in the third proviso to section 5 is—"Provided further that the Act shall not apply to any income, profits or gains of a business etc." It is argued that this language, (namely, that the Act shall not apply) is apt to exclude from the purview of the Act business the profits of which accrue or arise in an Indian State, except in so far as such profits are brought into the taxable territories. In support of this argument a reference has been made to section 4(3) of the Indian Income-tax Act as it stood prior to 1939 and reliance is placed on the decisions in Commissioner of Income-tax v. Somasundaram Chettiar AIR 1928 Mad. 487; and Provident Investment Co. Ltd. In re [1932] 2 Comp. Cas. 312. It is true that section 4(3) of the Indian Income-tax Act, as it stood prior to 1939, said that "this Act (meaning the Indian Income-tax Act, 1922) shall not apply to certain classes of income", and in the two decisions cited it was held that the word "business" meant a business whose profits were being assessed in the year under consideration and there was no justification for deduction of the expenses of a foreign business. ***We do not, however, think that the use of the expression, "the Act shall not apply", is decisive in this case. We have to read the third proviso as a whole and in the context in which it occurs, in order to find out what it means. So read it is difficult to hold that it has the effect of excluding the Baroda business except in so far as the profits thereof are brought into the taxable territories. What it says in express terms is that the Act shall not apply to any income, profits or gains of business accruing or arising in an Indian State etc. It does not say that the business itself is excluded from the purview of the Act. We have to read and construe the third proviso in the context of the substantive part of section 5 which takes in the Baroda business and the phraseology of the first and second provisos thereto, which clearly uses the language of excluding the business referred to therein. The third proviso does not use that language and what learned counsel for the appellant is seeking to do is to alter the language of the proviso so as to make it read as though it excluded business the income, profits or gains of which accrue or arise in an Indian State. The difficulty is that the third proviso does not say so; on the contrary, it uses language which merely exempts from tax the income, profits or gains unless such income, profits or gains are received in or brought into India.***

Next, we have to consider what the expression "income, profits or gains" means. In the context of the third proviso, it cannot include losses because the latter part of the proviso says "unless such income, profits or gains are received etc. into the taxable territories". Obviously, losses cannot be brought into the taxable territories except in an accounting sense, and the expression "income, profits or gains" in the context cannot include losses. The expression must have the same meaning throughout the proviso, and cannot have one meaning in the first part and a different meaning in the latter part of the proviso. The appellant cannot therefore say that the third proviso excludes the business altogether,

because it takes away from the ambit of the Act not only income, profits or gains but also losses of the business referred to therein.

On behalf of the appellant it has been argued that though the language of the third proviso to section 5 of the Act is similar to that of section 14(2)(c) of the Indian Income-tax Act, the language of the two provisions is not identical and it is not correct to say that their effect is substantially the same. It is pointed out that the language of section 14(2)(c) was one of exemption only in respect of any income, profits or gains accruing or arising in an Indian State, though for purposes of "total income" the Income-tax Act applied thereto, and therefore the normal process of aggregating profits and losses wherever they occurred could be adopted. *But, says learned counsel for the appellant, the position is otherwise under the third proviso to section 5 of the Act, because, firstly, it uses the expression, "the Act shall not apply" and secondly, there is no question of exempting the profits from tax while including them for the purposes of "total income". We agree that the complication of excluding the profits from tax while including them for determining "total income" does not arise under the third proviso to section 5 of the Act; but the argument presented is the same as we have dealt with earlier.* ***The argument merely takes us back to the question—does the third proviso to section 5 of the Act merely exempt the income, profits or gains or does it exclude the business ? If it excludes the business, the appellant is right in saying that the position under the proviso is not the same as under section 14(2)(c) of the Indian Income-tax Act. If on the contrary the proviso merely exempts the income, profits or gains of the business to which the Act otherwise applies, then the position is the same as under section 14(2)(c). It is perhaps repetition, but we may emphasize again that exclusion, if any, must be done with reference to business, which is the unit of taxation. The first and second provisos to section 5 do that, but the third proviso does not.***

Lastly, it has been contended that the construction adopted by the High Court is likely to lead to consequences which the Legislature manifestly could not have intended. This contention has been pressed in respect of two matters : (a) computation of capital under the rules in Schedule II of the Act in a case where the assessee company sustains a loss in an Indian State ; and (b) relief for deficiency of profits where the assessee makes profits in an Indian State but sustains a loss in India. As to the first matter, it has been fully dealt with by the High Court with reference to rule 2A of the Rules in Schedule II and it has been rightly pointed out that no difficulty really arises by reason of rule 2A. Nor are we satisfied that any real difficulty arises with regard to relief for deficiency of profits when the assessee makes profits in an Indian State but sustains a loss in India. The Act will not apply to such profits unless they are brought into India, and if they are brought into India, section 6 will apply with regard to relief on the ground of deficiency of profits. It is unnecessary to consider here any hypothetical difficulty which may arise in the application of section 6.

> ***The appellant relies on the third proviso to section 5 of the Act in support of the contention that it excludes the Baroda business of the assessee and the losses of that business cannot be set off against the profits of the business in India, and the appellant can succeed only on establishing that the proviso clearly and without any ambiguity excludes the Baroda business. We agree with the High Court that if there is any ambiguity of language, the benefit of that ambiguity must be given to the assessee. However, the conclusion at which we have arrived is that on the language of the proviso as it stands, it does not exclude the Baroda business of the assessee but exempts only the income, profits or gains thereof unless they are received or deemed to be received in or brought into India. Accordingly, the High Court correctly answered the question of law referred to it. The appeal fails and is dismissed with costs.***
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> (EMPHASIS SUPPLIED BY US)

8. The ld DR vehemently relied on the order of *Hon'ble Supreme Court in the case of CIT vs Harprasad & Co. (P) Ltd reported in 99 ITR 118(SC)* wherein the question raised before the Hon'ble Supreme Court was as under:-

> *"Whether, on the facts and in the circumstances of the case, the capital loss of Rs. 28,662 could be determined and carried forward in accordance with the provisions of section 24 of the Indian Income-tax Act 1922, when the provisions of section 12B of the Income-tax Act, 1922, itself were not applicable in the assessment year 1955-56."*

9. We find that the Hon'ble Apex Court took into consideration the aspect that **capital gains as an independent source of income was excluded / exempt from the purview of taxation for an interim period from 1.4.1948 to 31.3.1956. Hence the capital gains as a source per se was exempt from tax.** Since the Asst Year involved before the Hon'ble Apex Court was 1955-56, which falls within the interim period of exemption of capital gains, the court held that loss arising in previous year under the head not chargeable to tax cannot be allowed to be carried forward and absorbed against income in subsequent years from taxable source. **(Emphasis supplied by us)** .

10. Hence the reliance placed by the ld. DR and by the lower authorities on this decision would not advance the case of the revenue as it is factually distinguishable.

11. This important distinction need to be kept in mind while addressing the issue in hand before us. Hence it could be safely concluded that if the **source or head of income itself is not excluded from taxation, the loss from the said source is available / allowable to the assessee to be set off or carry forward to subsequent years.** The source or head of income in the instant case is capital gains. We find that the source of income i.e capital gains per se is not exempt from tax. Only the long term capital gain where STT is suffered alone is exempt from tax. The same long term capital gain where STT is not suffered would still be liable to tax. Hence the denial of carry forward benefit of LTCL on STT suffered transaction would be unfair. We find that this issue had been duly considered by examining all the decisions on the impugned subject by the *Co-ordinate Bench of Mumbai Tribunal in the case of Raptakos Brett & Co Ltd vs DCIT reported in 69 SOT 383* wherein it was held as under:-

> ***"7.*** *We have heard rival submissions and perused the relevant findings given in the impugned orders. The main issue before us is, whether Long term capital loss on sale of equity shares can be set off against Long term capital gain arising on sale of land or not, as the income from Long term capital gain on sale of such shares are exempt u/s. 10(38). The nature of income here in this case is from sale of Long term capital asset, which are equity shares in a company and unit of an equity oriented fund which is chargeable to STT. First of all, Long term capital gain has been defined under section 2(39A), as capital gains arising from transfer of a Long term capital asset. Section 2(14) defines "Capital asset" and various exceptions and exclusions have been provided which are not treated as capital asset. Section 45 is the charging section for any profits or gain arising from a transfer of a capital asset in the previous year i.e. taxability of capital gains. Section 47 enlists various exceptions and transactions which are not treated as transfer for the purpose of capital gain u/s. 45. The mode of computation to arrive at capital gain or loss has been enumerated from sections 48 to 55. Further sub-section (3) of section 70 and section 71 provides for set off of loss in respect of capital gain.*
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> ***8.*** *From the conjoint reading and plain understanding of all these sections it can be seen that, firstly, shares in the company are treated as capital asset and no*

exception has been carved out in section 2(14), for excluding the equity shares and unit of equity oriented funds that they are not treated as capital asset. Secondly, any gains arising from transfer of Long term capital asset is treated as capital gain which is chargeable u/s. 45; thirdly, section 47 does not enlist any such exception that transfer of long term equity shares/funds are not treated as transfer for the purpose of section 45 and section 48 provides for computation of capital gain, which is arrived at after deducting cost of acquisition i.e. cost of any improvement and expenditure incurred in connection with transfer of capital asset, even for arriving of gain in transfer of equity shares; lastly, sections 70 & 71 elaborates the mechanism for set off of capital gain. Nowhere, any exception has been made/ carved out with regard to Long term capital gain arising on sale of equity shares. The whole genre of income under the head 'capital gain' on transfer of shares is a source, which is taxable under the Act. If the entire source is exempt or is considered as not to be included while computing the total income then in such a case, the profit or loss resulting from such a source do not enter into the computation at all. However, if a part of the source is exempt by virtue of particular "provision" of the Act for providing benefit to the assessee, then in our considered view it cannot be held that the entire source will not enter into computation of total income. In our view, the concept of income including loss will apply only when the entire source is exempt and not in the cases where only one particular stream of income falling within a source is falling within exempt provisions. Section 10(38) provides exemption of income only from transfer of Long term equity shares and equity oriented fund and not only that, there are certain conditions stipulated for exempting such income i.e. payment of security transaction tax and whether the transaction on sale of such equity share or unit is entered into on or after the date on which chapter VII of Finance (No.2) Act, 2004 comes into force. If such conditions are not fulfilled then exemption is not given. Thus, the income contemplated in section 10(38) is only a part of the source of capital gain on shares and only a limited portion of source is treated as exempt and not the entire capital gain (on sale of shares). If an equity share is sold within the period of twelve months then it is chargeable to tax and only if it falls within the definition of Long term capital asset and, further fulfils the conditions mentioned in sub-section (38) of section 10 then only such portion of income is treated as exempt. There are further instances like debt oriented securities and equity shares where STT is not paid, then gain or profit from such shares are taxable. Section 10 provides that certain income are not to be included while computing the total income of the assessee and in such a case the profit or loss resulting from such a source of income do not enter into computation at all. However, a distinction has been drawn where the entire source of income is exempt or only a part of source is exempt. Here it needs to be seen whether section 10(38) is source of income which does not enter into computation at all or is a part of the source, the income in respect of which is excluded in the computation of total income. For instance, if the assessee has income from Short term capital gain on sale of shares; Long term capital gain on debt funds; and Long term capital gain from sale of equity shares, then while computing the taxable income, the whole of income would be computed in the total income and only the portion of Long term capital gain on sale of equity shares would be removed from the taxable income as the same is exempt u/s 10(38). This precise issue had come up for consideration before the Hon'ble Calcutta High Court in Royal Calcutta Turf Club's case (supra), wherein the Hon'ble High Court

observed that "under the Income tax Act, 1961 there are certain incomes which do not enter into the computation of the total income at all. In computing the total income of a resident assessee, certain incomes are not included under s.10 of the Act. It depends on the particular case; where the Act is made inapplicable to income from a certain source under the scheme of the Act, the profit and loss resulting from such a source will not enter into the computation at all. But there are other sources which, for certain economic reasons, are not included or excluded by the will of the Legislature. In such a case, one must look to the specific exclusion that has been made."

The Hon'ble High Court was besieged with the following question

"Whether under s.10(27) read with s.70 of the I.T. Act, 1961, was the assessee entitled to set off the loss on the two heads, namely, Broodmares Account and the Pig Account, against its income of other sources under the head "Business""

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

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

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

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

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

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

While concluding the issue their Lordships observed that "it may be remembered that the concept of carry forward of loss does not stand in vacuo. It involves the notion of set- off. Its sole purpose is to set off the loss against the profits of a subsequent year. It pre-supposes the permissibility and possibility of the carried-forward loss being absorbed or set off against the profits and gains, if any, of the subsequent year. Set off implies that the tax is exigible and the assessee wants to adjust the loss against profit to reduce the tax demand. It follows that if such set-off is not permissible or possible owing to the income or profits of the subsequent year being from a non-taxable source, there would be no point in allowing the loss to be "carried forward". Conversely, if the loss arising in the previous year was under a head not chargeable to tax, it could not be allowed to be carried forward and absorbed against income in a subsequent year from a taxable source." The ratio and the principle laid down by the Hon'ble Apex Court would not apply here in this case, because the concept of income includes loss will apply

only when entire source is exempt or is not liable to tax and not in the case where only one of the income falling within such source is treated as exempt. The Hon'ble Apex Court on the other hand, itself has stated that if loss from the source or head of income is not liable for tax or congenitally exempt from income tax, then it need not be computed or shown in the return and Assessing Officer also need not assess it. This distinction has to be kept in mind. Hon'ble Calcutta High Court in Royal Turf Club have discussed the aforesaid decision of the Hon'ble Supreme Court and held that the same will not apply in such cases. Thus, in our conclusion, we hold that section 10(38) excludes in expressed terms only the income arising from transfer of Long term capital asset being equity share or equity fund which is chargeable to STT and not entire source of income from capital gains arising from transfer of shares. It does not lead to exclusion of computation of capital gain of Long term capital asset or Short term capital asset being shares. Accordingly, Long term capital loss on sale of shares would be allowed to be set off against Long term capital gain on sale of land in accordance with section 70(3).

10. *Coming to the decision of the ITAT Mumbai Bench in the case of Schrader Duncan Ltd. (supra), the issue involved there was, whether the loss on transfer of capital asset being units US 64 Scheme of Unit Trust of India can be allowed and entitled to carry forward the same for set off of in subsequent assessment years, when the income arising from such transfer of unit is exempt u/s. 10(33). The Tribunal held that the source both capital gain and capital loss on sale of units of US64 is itself excluded and not only the income arising out of capital gain. The Hon'ble Tribunal have noted the history of US64 Scheme and the purpose for which such scheme was launched. In this context of transfer of US64 scheme the Tribunal held that the provisions were not meant to enable the assessee to claim loss by indexation for set off against other capital gain chargeable to tax. This decision is slightly distinguishable and secondly, we have already discussed the issue at length and have held that the ratio of Hon'ble Calcutta High Court is applicable in the present case. Lastly, coming to the decision of Hon'ble Gujarat High Court in the case of Kishorebhai Bhikhabhai Virani (supra), we find that the issue involved in the present case was almost the same, wherein the Hon'ble High Court after following the decision of Hon'ble Supreme Court in the case of Hariprasad & Company (P.) Ltd. (supra), had decided the issue against the assessee. Since we have already noted down the ratio of Hon'ble Calcutta High Court, wherein the Hon'ble High Court has discussed this issue in detail after relying upon series of decisions of Hon'ble Supreme Court and have reached to a conclusion as discussed above, and, therefore, we are respectfully following the ratio of the decision of the Calcutta High Court. Further the said decision have not been referred or distinguished by the Hon'ble Gujarat High Court. Accordingly, we allow the assessee's ground no.1 and direct the Assessing Officer to allow the claim of set off of Long term capital loss on sale of shares against the Long term capital gain arising on sale of land."*

12. The ld DR before us vehemently relied on the decision of *Hon'ble Kerala High Court in the case of Apollo Tyres Ltd vs DCIT reported in 450*

ITR 618 (Ker) which had rendered the decision on the very same issue in favour of the revenue. We find that the decisions of *Hon'ble Gujarat High Court in the case of Kishorebhai Bhikhabhai Virani reported in 367 ITR 261 (Guj)* together with the decision of Hon'ble Supreme Court in the case of Harprasad & Co. reported in 99 ITR 118 (SC) were relied upon . We have already dealt with the distinctive feature of the facts prevailing in Harprasad & Co supra. Hence reliance placed on the said decision would not advance the case of the revenue. It is pertinent to note that the decision of Hon'ble Gujarat High Court has been considered by the Co-ordinate Bench of Mumbai Tribunal in the case of Raptakos Bros referred supra. Moreover, we find that the same issue in dispute was subject matter of consideration by the *Hon'ble Calcutta High Court in the case of Royal Calcutta Turf Club vs CIT reported in 144 ITR 709 (Cal)* which has been considered by the Mumbai Tribunal supra. Hence now we are left with a situation that one decision of non-jurisdictional high court (i.e Kerala) is against assessee and one decision of non-jurisdictional high court (i.e. Calcutta) is favouring assessee. Hence as decided by the *Hon'ble Supreme Court in the case of CIT vs Vegetable Products Ltd reported in 88 ITR 192 (SC)*, the construction that is favourable to the assessee should be considered. We find that the issue in dispute that source of income is not taxable per se (i.e capital gains as such) has been dealt extensively by the three judges bench of Hon'ble Supreme Court in the case of Karamchand Premchand supra (40 ITR 106- SC) and hold that to be more appealing to the facts of the instant case.

13. We further find that the request of the revenue vide letter dated 6.12.2022 addressed to the Hon'ble President of Tribunal for constitution of Special Bench in the light of divergent decisions given by the Delhi Tribunal and in the light of decisions of Hon'ble Gujarat High Court and Hon'ble Kerala High Court referred supra. The Hon'ble President of

Tribunal vide his order dated 21.6.2023 had rejected the request of the revenue for constitution of Special Bench. Hence this Bench is forced to look into the various divergent decisions of Tribunal and various High Courts and decide the issue hereinabove.

14. In view of the aforesaid detailed observations and in the light of ratio decidendi laid down by various judicial precedents hereinabove , we have no hesitation to hold that the assessee would be entitled for carry forward of LTCL on STT suffered transactions, to subsequent years as per the provisions of the Act. Accordingly, the grounds raised by the assessee are allowed.

15. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open court on 25/10/2024.

-Sd/-	-Sd/-
(SUDHIR KUMAR)	**(M. BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 25/10/2024
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi