

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

**BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI SUNIL KUMAR SINGH (JUDICIAL MEMBER)**

**ITA No. 4059/MUM/2024
Assessment Year: 2016-17**

DCIT (IT)-4(1)(1),
625, Kautilya Bhavan, G-Block,
Bandra Kurla Complex,
Mumbai-400051.

Appellant

Vs. Robeco Institutioneel Emerging Markets
Fonds,
C/O Ernst and Young LLP, 14th Floor,
The Ruby, 29 Senapati Bapat Marg,
Dadar (West),
Mumbai-400028.
PAN NO. AACTS 7682 L
Respondent

**ITA No. 4058/MUM/2024
Assessment Year: 2021-22**

DCIT (IT)-4(1)(1),
625, Kautilya Bhavan, G-Block,
Bandra Kurla Complex,
Mumbai-400051.

Appellant

Vs. Robeco Q1 Institutional Emerging
Markets Enhanced Index Equities Fund,
14th floor, The RC/O Ernst And Young
LLP, 29 Senapati Bapat Marg, Dadar
(West),
Mumbai-400028.
PAN NO. AABTR 2305 L
Respondent

Assessee by : None
Revenue by : Mr. Krishna Kumar, Sr. DR

Date of Hearing : 23/01/2025
Date of pronouncement : 29/01/2025



ORDER

PER OM PRAKASH KANT, AM

The captioned appeals by the Revenue are directed against orders, both dated 20.06.2024 passed by the Ld. Commissioner of Income-tax (Appeals) – 58, Mumbai [in short ‘the Ld. CIT(A)’] for assessment years 2016-17 and 2021-22 respectively. As identical grounds have been raised in both the appeals, therefore, same were heard together and disposed off by way of this consolidated order for the sake of convenience.

2. The grounds raised by the assessee in assessment year 2016-17 are reproduced as under:

1. Whether on the facts & circumstances of the case, Ld. CIT(A) has erred in holding that once the capital gains are considered as exempt under India Netherlands DTAA, there would not be any occasion for seeking adjustment of brought forward capital loss against such exempt capital gains.

2. Whether on the facts & circumstances of the case, Ld CIT (A) has erred in not appreciating that the assessable income is required to be computed as per provisions of the L.T. Act and benefit, if any, of the relevant Articles of the DTAA has to be taken on the net taxable income calculated after giving effect to all the provisions of the IT Act including section 74 of the Act.

3. Whether on the facts & circumstances of the case, Ld. CIT(A) has grossly erred in directing the A O. to allow carry forward of brought forward Short-term & Long term losses to the subsequent years ignoring provisions of section 74 of the Act as per which any brought forward long term & short term losses have to be set off



against current year Long term/Short term gains which are assessable for that AY as per the IT Act.

4. Without prejudice to the above grounds of appeal & in the alternate Ld. CIT (A) has erred in not appreciating that if an income (Capital gain) itself is exempted from taxation in the source country, then as per decision of Hon'ble SC in case of Harprasad & Co. Pvt Ltd (1975) 99 ITR 118, losses (or capital gains) should be given similar treatment (treated as exempt) & should not be allowed to be carried forward.

3. We have heard rival submissions of the parties and perused the relevant materials on record. The assessee is a registered foreign portfolio investor (FPI) registered with the Security and Exchange Board of India (SEBI). The assessee is a tax resident of Netherlands as per Article India Netherland Double Taxation Avoidance Agreement (DTAA). During the year under consideration, the assessee was engaged in purchase and sale of the securities. The assessee has shown income under the head 'capital gains and other sources'. For the year under consideration, the assessee filed return of income on 27.12.2021 declaring total income at Rs. Nil. In the return of income filed, the assessee has shown short term capital gain earned on transfer of equity shares amounting to Rs.1,65,42,777/- which is claimed as exempt under Article 13(5) India-Netherland DTAA. The assessee also earned net long term capital gain from transfer of equity shares amounting to Rs.2,38,79,450/- and claimed as exempt under Article 13(5) of India-Netherland DTAA. The assessee also earned income from long



term capital gain on buy back of equity shares amounting to Rs.13,10,67,006/- which is claimed as exempt u/s 10(38) of the Act. The assessee had incurred short term capital loss as well as long term capital loss in earlier years which was brought forward in the current year details of such losses is tabulated as under:

Assessment Years	Short term capital loss brought forward (INR)
A.Y.2011-12	4,86,45,424
A.Y.2012-13	75,17,581
A.Y.2013-14	82,82,795
A.Y.2014-15	3,00,64,911
A.Y.2015-16	33,79,91,711

3.1 During the year under consideration, the assessee claimed carry forward of the short term capital and long term capital loss. The return of income filed by the assessee was selected for scrutiny assessment and statutory notices under the Income-tax Act, 1961 (in short 'the Act') were issued and complied with. In the assessment, the Assessing Officer held that brought forward capital losses was to be adjusted against the current year capital gain under consideration and the remaining capital gains would Nil be eligible for treaty benefits. Accordingly, the Assessing Officer adjusted the carried forward short term capital losses against the short term and long term capital gain earned during the year under consideration.



3.2 On further appeal, the Ld. CIT(A) rejected the finding of the Assessing Officer observing as under:

“6.1 The assessee has filed its return of income for A.Y.2016-17 on 26.07.2016 declaring income of Nil. The assessee is tax resident of Netherlands and it is registered with SEBI as foreign portfolio investor. During the year under consideration, the assessee has earned short term capital gain of Rs.1,60,63,007/- and has claimed exemption under Article 13 of India-Netherland DTAA. The assessee has also earned Long term capital gain of Rs.13,10,67,006/- which is claimed as exempt u/s.10(38) of the IT Act. Further, the assessee has claimed brought forward short-term capital loss of Rs.43,25,02,482/- to be carried forward to future years. The AO in the assessment order has mentioned that the losses for A.Y.2011-12 to A.Y.2015-16 brought forward to A.Y.2016-17 were the same as the losses incurred during A.Y.2011-12 to A.Y.2015-16. The AO further has mentioned that the assessee in A.Y.2016-17 has sought treaty benefit for short term capital gain arisen during A.Y.2016-17 and for claiming the carry forward of short term brought forward capital loss, the assessee is claiming relief under the IT Act. The AO has mentioned that the treaty/act benefit is to be given to the assessee after computing total income as per domestic act. The AO further mentioned that the carry forward of carry forward loss is not denied to the assessee and the assessee was only allowed to carry forward, recomputed brought forward losses after taking into account set off for the short-term capital gains earned during A.Y.2016-17. The AO has rejected case laws submitted by the assessee and he has allowed total loss of Rs.41,64,39,475/- to be carry forward to A.Y.2017-18 as against carry forward loss of Rs.43,25,02,482/- as claimed by the assessee HAS

6.2 During the course of appellate proceedings, the assessee has relied on the judgment of Hon'ble ITAT Mumbai in the case of Flagship Indian Investment Co. (Mauritius) Ltd. vs. Assistant Director of Income Tax [2010] 38 SOT 426 (Mum) in which it was



held that the assessee was fully justified in claiming carried forward of brought forward losses of earlier years to subsequent year and, therefore, lower authorities had erred in disallowing its claim. Relevant portion of the order of the ITAT is reproduced as under-

“6. We have carefully considered the submissions of the rival parties and perused the material available on record. We find that the facts are not in dispute inasmuch as there is no dispute that the assessee is a non- resident company and not subjected to tax on capital gains in this year in India. It is also not in dispute that the assessee has shown capital losses amounting to Rs.87,06,49,335/- in the return for the Assessment Year 2002-03 and has claimed the same to be carried forward to the subsequent Assessment Years. However, it was denied by the AO on the ground that the entire capital gains earned by the assessee was exempt from tax under the Treaty, hence, the assessee is not entitled to have the benefit of carry forward of brought forward losses of earlier years. On appeal, the ld. CIT(A) upheld the view of the AO . Section 72 of the Act deals with the provisions for carry forward and set off of business losses. Sec.157 of the Act provides that "when, in the course of the assessment of the total income of any assessee, it is established that a loss of profits or gains has taken place which he is entitled to have set off under provisions of this section, the AO shall notify to the assessee by order in writing the amount of loss as computed by him for the purposes of this section". In the case before us the amount of brought forward loss of A.Y:05-06 Rs.87,06,49,335/- to be carried forward for subsequent years is not in dispute as per intimation u/s. 143(1) of the Act for the Assessment Year 2002-03. The only dispute is as to whether the set off can be considered or deemed to have been considered in the year under consideration or it may be allowed to be carried forward to the subsequent Assessment Years.

7. In CIT vs. Mohan Das (1966) 59 ITR 699 the Hon'ble Supreme Court has held (page 700 headnotes) as under : "(iv) That the assessee was following a vocation and his remuneration had to be computed under section 10 and the loss of profits suffered in that



vocation in any year could be carried forward to the next year to be set off against the profits of the succeeding year. Whether the loss in any year may be carried forward to the following year and set off against the profits and gains of the subsequent year under section 24(2) has to be determined by the Income tax officer who deals with the assessment of the subsequent year. A decision recorded by the income tax Officer who computes the loss in the previous year that the loss cannot be set off against the income of the subsequent year is not binding on the assessee".

8. In CIT vs. Western India Oil Distributing Co. Ltd. (2001) 249 ITR 517(SC) Their Lordships following the decision in CIT vs. Mohan Das (supra), have observed and held as under (page 517 headnotes): "From the decision of the High Court (see [1980] 126 ITR 498) that, since the Tribunal had found that the income of the assessee was assessable under section 10 of the Indian Income-tax Act, 1922, for the assessment years 1943-44 to 1953-54, but for the assessment year 1954-55, the assessee had secured a pecuniary advantage by reason of its income being assessed under the head "Income from other sources", and for that reason benefit of carry forward was denied to the assessee, while retaining that advantage the assessee could not be permitted to reagitate that question and submit that the income for that year had to be reassessed under the correct head "Business" under section 10, and, therefore, the unabsorbed depreciation for the years 1943-44 to 1953- 54 could be allowed to be set off against business income arising in the assessment years 1959-60 to 1962- 63, but not that relating to the assessment year 1954-55, the Department preferred appeals to the Supreme Court. The Supreme Court dismissed the appeals affirming the decision of the High Court that if the quantification of loss is properly and duly notified by following the prescribed procedure, such quantification may be impressed with the principle of finality, but the principle of finality did not apply to the determination of the source of income and to a decision whether the loss can or cannot be allowed to be carried forward by reason of the determination of the source."



9. The CBDT has also clarified the stand taken by the revenue vide Circular No.22 of 1944 dated 29.7.1944, para-2 (page 1408 of Direct Tax Circular Income tax by Chaturvedi & Pithisaria's Income tax Law (5th Edition) (10th Vol.)as under :

"Non-resident's Indian loss to be carried forward and not set off against foreign income 'Total income' is defined as the total amount of income, profits and gains referred to in the sub-section(1) of section 4 computed in the manner laid down in the Act. In the case of a non-resident, his foreign income is not included in his 'total income' which is to be computed subject to the provisions of section 24*. If the 'total income' is a loss, it has to be carried forward subject to the provisions of section 24(2)* and cannot be set off against any income which does not form part of the 'total income'. Otherwise, a non-resident would not get any A.Y:05-06 relief in Indian taxation on account of the loss incurred by him in India." (* of the 1922 Act.)*

10. Applying the ratio of the law laid down by the Their Lordships, to the facts of the present case and keeping in view the CBDT Circular (supra), we find that it is not the case of the revenue that the assessee has no brought forward losses to be carried forward to the subsequent year or the same have already been adjusted. In this view of the matter we are of the view that the assessee was fully justified in claiming the carried forward of brought forward losses of the earlier years to the subsequent years and the AO and the Id. CIT(A) have erred in not allowing the same. The AO is directed to allow the carry forward of brought forward loss of earlier years to the subsequent years according to law. The ground taken by the assessee is, therefore, allowed."

6.3 Further, the assessee has also relied on decision of Hon'ble ITAT Mumbai in the case of Swiss Finance Corporation (Mauritius) Limited vs. DCIT (IT)-4(2)(2) [2022] and Goldman Sachs Investments (Mauritius) Limited v Deputy Commissioner of Income-tax [2020] 120 Taxmann.com 23, ITAT Appeal No. 2201 (Mum) of 2017 wherein the Hon'ble ITAT placing reliance on Flagship Indian Investment Co. (Mauritius) Ltd (supra) held that once the capital gains are considered as exempt under the relevant tax treaty, there would not



be any occasion for seeking adjustment of brought forward short-term capital loss against such exempt capital gains.

6.4 In view of the facts of the case and decisions of the jurisdictional ITAT referred above, the assessee is allowed to carry forward loss of Rs. 43,25,02,482/- as claimed by it to the A.Y.2017-18 and thus, grounds of the appeal raised by the assessee are allowed. Accordingly, grounds of the appeal of the assessee are allowed.”

3.3 We have heard rival submissions of the parties and perused the relevant materials on record. We find that the Ld. CIT(A) has followed the binding precedent of the Co-ordinate Bench of the Tribunal in the case of Swiss Finance Corporate (Mauritius) Ltd. (supra) and Goldman Sachs Investment (Mauritius) Ltd. (supra) along with the decision of Co-ordinate Bench of the Tribunal in the case of Flagship Indian Investment Co. (Mauritius) Ltd. (supra). In view of the above, we do not find any infirmity in the order of the Ld. CIT(A) on the issue in dispute. The grounds raised by the Revenue are accordingly dismissed.

4. In assessment year 2021-22 identical grounds have raised as under:

1. Whether on the facts & circumstances of the case, Ld. CIT(A) has erred in holding that once the capital gains are considered as exempt under India Netherlands DTAA, there would not be any occasion for seeking adjustment of brought forward capital loss against such exempt capital gains.



2. Whether on the facts & circumstances of the case, Ld CIT (A) has erred in not appreciating that the assessable income is required to be computed as per provisions of the I.T. Act and benefit, if any, of the relevant Articles of the DTAA has to be taken on the net taxable income calculated after giving effect to all the provisions of the IT Act including section 74 of the Act.

3. Whether on the facts & circumstances of the case, Ld. CIT(A) has grossly erred in directing the A O. to allow carry forward of brought forward Short-term & Long term losses to the subsequent years ignoring provisions of section 74 of the Act as per which any brought forward long term & short term losses have to be set off against current year Long term/Short term gains which are assessable for that AY as per the IT Act.

4. Without prejudice to the above grounds of appeal & in the alternate Ld. CIT (A) has erred in not appreciating that if an income (Capital gain) itself is exempted from taxation in the source country, then as per decision of Hon'ble SC in case of Harprasad & Co. Pvt Ltd (1975) 99 ITR 118, losses (or capital gains) should be given similar treatment (treated as exempt) & should not be allowed to be carried forward

4.1 As grounds raised in the assessment year 2021-22 are identical to ground raised in assessment year 2016-17, therefore, following our finding in assessment year 2016-17, the grounds raised by the Revenue are also dismissed.

5. In the result, both the appeals of the Revenue are dismissed.

Order pronounced in the open Court on 29/01/2025.

Sd/-
(SUNIL KUMAR SINGH)
JUDICIAL MEMBER

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

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**Robeco Institutioneel Emerging
Markets Fonds & Robeco Q1
Institutional Emerging Markets
Enhanced Index Equities Fund
ITA No. 4059/MUM/2024 & ITA No.
4058/MUM/2024**



Mumbai;
Dated: 29/01/2025
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,
(Assistant Registrar)
ITAT, Mumbai