IN THE INCOME TAX APPELLATE TRIBUNAL

"I" BENCH, MUMBAI

BEFORE SMT. BEENA PILLAI (JUDICIAL MEMBER)

AND

MS. PADMAVATHY S (ACCOUNTANT MEMBER)

I.T.A. No.2765/Mum/2024
Assessment Year: 2016-17
&
I.T.A. No.2766/Mum/2024
Assessment Year: 2017-2018

Asia Investment Corporation (Mauritius) Limited 33, Edith Cavell Street, Port Louis, Republic of Mauritius Foreign **PAN:AAFCA0513L**	Vs.	**DCIT (IT) 1(1)(2),** 12, 3rd Floor, Mittal Court 22, Nariman Point, Mumbai-400021
(Appellant)		**(Respondent)**

Appellant by	Ms. Rachna Agarwal
Respondent by	Shri Vivek Perampurna, CIT-D.R.

Date of Hearing	09/01/2025
Date of Pronouncement	31/01/2025

ORDER

Per: Smt. Beena Pillai, J.M.:

Present appeals are filed by the assessee against the separate orders dated 18/03/2024, passed by the DCIT Circle 1 (1) (2),

Mumbai for assessment years 2016-17 and 2017-18 on following grounds of appeal:

A.Y. 2016-17

"1. Reopening had in law

i. On the facts and in the circumstances of the case and in law, the Assessing Officer ("AO") has erred in reopening the Appellant's case u/s 148 of the Income tax Act, 1961 (the Act) beyond a period of 4 years from the end of relevant assessment year.

ii. On the facts and in the circumstances of the case and in law, the AO has erred in invoking section 147 explanation 2(b) for reopening the Appellant's case and then revalidating the reopening u/s 148(1)(b) of the Act.

iii. On the facts and in the circumstances of the case and in law, the AO has erred in when no income chargeable to tax had escaped assessment. The case was reopened only to deem an income and disallowing the brought forward and carried forward losses.

iv. On the facts and in the circumstances of the case and in law, the reopening only on findings of a third party viz. DDIT (Investigation) on penny stock transaction, is bad in law.

II. Merits not considered

i. On the facts and in circumstances of the case and in law, AO and Hon'ble Dispute Resolution Panel ("DRP") ought to have considered facts and documents submitted by Appellant instead of concluding 'bogus losses on presumptions.

ii. On the facts and in circumstances of the case and in law, the AO and Hon'ble DRP ought not to have made an addition u/s 69 of the Act, without appreciating that the Appellant a SEBI registered FPI had discharged its onus of explaining the investment, nature and source.

iii. On the facts and in the circumstances of the case and in law, the AO and Hon'ble DRP ought to have allowed the carry forward of the short term capital losses during the year u/s 74 of the Act.

iv. *On the facts and in the circumstances of the case and in law, the AO and Hon'ble DRP has erred in disallowing the brought forward losses of previous years to be carried forward.*

All the above grounds are independent and without prejudice to one another.

The Appellant craves leave to add, to alter, to amend or to delete any ground of appeal, at or prior to hearing of the appeal as may be required to enable the Hon'ble Appellate Authority to decide this appeal in accordance with law."

A.Y. 2017-18:

"1. On the facts and in circumstances of the case and in law, Assessment Officer ("AO") and Hon'ble Dispute Resolution Panel ("DRP") ought to have considered facts and documents submitted by Appellant instead of concluding 'bogus losses' on presumptions.

2. On the facts and in the circumstances of the case and in law, the AO and Hon'ble DRP has erred in disallowing the brought forward and carry forward of capital losses including those of previous years.

All the above grounds are independent and without prejudice to one another.

The Appellant craves leave to add, to alter, to amend or to delete any ground of appeal, at or prior to hearing of the appeal as may be required to enable the Hon'ble Appellate Authority to decide this appeal in accordance with law."

Brief facts of the case are as under:

2. The assessee is incorporated in 2001 in Mauritius and is a Mauritius tax resident, a copy of residency certificate issued by Mauritius revenue authorities has been filed in the paper book. It is submitted that assessee was registered with securities and

exchange Board of India (SEBI) as a sub account of FII till 25/03/2015 and thereafter as a foreign portfolio investor (FPI) according to the SEBI (FPI) regulations. The assessee thus made investments in India and earns capital gains/losses, dividend income from its investment activities in accordance with SEBI (FPI) and RBI regulations. It is also submitted that assessee does not have any business activity in India.

2.1. For the years under consideration the assessee filed its return of income on 27/09/2016 for assessment year 2016-17 and 31/10/2017 for assessment year 2017-18, declaring total income to be nil. It is submitted that, for assessment year 2016-17 the assessment was completed under section 143(3) of the act on 23/10/2018 accepting the returned income. Subsequently, information received from the investigating wing that two companies being, Stampede Capital Ltd. and Virtual Global Capital Ltd., were involved in manipulation and obtaining of illegitimate capital gains/losses, wherein assessee was identified to be one of the beneficiaries.

2.2. Accordingly, notice under section 148 of the act was issued on 13/06/2021. Subsequently, in light of the decision of *Hon'ble Supreme Court* in case of *Ashish Aggarwal vs Union of India*, assessee's case was brought under the new reassessment regime. The assessee was provided with the details of information relied by the Ld.AO, based on which, notice under section 148A (b) of the Act, was issued for both the years under consideration. The Ld.AO

thus completed the procedure and an order under section 148A(d) was issued to the assessee on 23/06/2022 as a consequence of which notice under section 148 of the act was issued on 23/06/2022 for assessment years 2016-17 and 2017-18. Subsequently notice under section 142(1) was issued on 06/02/2023 under section 143 (2) was issued on 15/05/2023, along with the show cause notice dated 18/05/2023.

2.3. The main allegation of the revenue in the show cause notice identically issued for both the years under consideration on even date are as under. For the sake of convenience notice dated 18/05/2023 issued for assessment year 2016-17 is scanned and reproduced as under:

> *"In this case, information was uploaded by the DDIT(Inv)- Unit 5(1), New Delhi, with regards to the scrip manipulation and obtaining illegitimate Capital Gains and Losses for the scrips of Stampede Capital limited and Virtual Global Education Ltd. after a detailed analysis of the financial position of these companies and trading pattern in these scrips, wherein you had been identified as one of the beneficiaries. The details regarding the same had been shared with you during proceedings u/s 148A of the. Act. On the basis of material available on record and details furnished by you, it is seen that during the year under consideration, you have purchased 2,88,000 shares of Stampede Capital Ltd for Rs 11,80,12,290 and have sold 2,88,000 shares for Rs. 9,75,17,317 showing a loss of Rs. 2,04,94,972. During the same year, you have purchased 1,93,65,000 shares of Virtual Global Education Ltd for Rs 28,05,83,298 and sold 20,42,896 shares for Rs 1,32,97,239 showing a loss of Rs. 1,22,59,390. Further, you have not been able to substantiate the rationale for making*

investments in the shares of companies that have no sound financial base and witness high irregularity in trading patterns. Moreover, it is also to be noted that Stampede Capital Ltd has been placed in the Graded Surveillance Measure List of NSE and BSE. In light of these facts, you are hereby required to show cause why the short-term capital loss in these scrips amounting to Rs. 3,27,54,361 should not be treated as fictitious and thereby disallowed and why investments made in these securities amounting to Rs. 39,85,95,588 should not be added to your income as unexplained investment u/s 69C of the IT Act. It is also seen that you have shown carry forward of short-term capital losses amounting to Rs. 108,64,22,520 in your return filed in response to notice u/s 148. Please note that capital gain from shares is exempt in India for the year under consideration in view of India-Mauritius DTAA. Loss from an exempt source can neither be allowed as set off nor can be allowed to be carried forward and absorbed against income in subsequent years. In light of the same, you are required to show cause why the carry forward of short-term capital losses amounting to Rs. 108,64,22,520 should not be disallowed in your case."

2.4. In response to show cause notice, the assessee filed its reply on 23/05/2023 for both the years under consideration justifying the allowability of short-term capital loss carry forwarded by the assessee. The assessee also submitted on the genuineness of the loss and non applicability of section 69. It was submitted that, the assessee made various investments in India and is a regular investor being an FPI. The assessee submitted that, its activities are regulated by the reserve Bank and SEBI and is compulsorily required to have a single designated custodian and bank account.

2.5. Assessee submitted that, all its purchases and sales has to be done through the designated custodian. It was submitted that the assessee does not have cash in hand at any point of time and all its funds are sourced through inward remittances and out of balance in designated bank account. Therefore, it was submitted that, no unaccounted money can be brought into the books, as every transaction that assessee does of purchase as well as sale are rooted through the same banker.

2.6. The assessee further submitted that being an FPI, every purchase and sale has to be reported on the BSE website and hence no back dating or ante dating is possible in case of assessee. The assessee filed all details regarding loss suffered on sale of Virtual Global Education Ltd., and Stampeed Capital Ltd. It was submitted that the loss was not fictitious and that these scrips were two investments by assessee amongst various other investments. The assessee submitted that, as all the transaction are compulsorily to be done on the floor of stock exchange, and there is no off market transactions. It was submitted by the assessee that, its own team outside India evaluates the investments brought and sold. The assessee thus submitted that, the investments made in Virtual Global Education Ltd., and Stampeed Capital Ltd., cannot be treated as unexplained investments under section 69 of the Act.

2.7. The Ld.AO, however after considering the submissions of the assessee found the same to be not acceptable, as the assessee did not provide any details to substantiate the rationale behind making

the investments as the companies did not have strong fundamentals. The Ld. AO observed that, assessee has not made out a case as to how a loss-making company was preferred for investment and thus held that bogus profits and losses have been booked in the case of these companies. The Ld. AO held that the assessee was beneficiary of the bogus loss by trading in these companies and therefore not a genuine transaction. The Ld.AO, thus proposed to disallow the investments amounting to Rs.39,85,95,588/- for assessment assessment year 2016-17 and ₹28,05,83, 298/- for assessment year 2017-18 as unexplained investments under section 69 of the act.

2.8. In respect of carry forward of losses for assessment years 2016-17 and 2017-18, the Ld.AO was of the opinion that the same was not available to the assessee by observing as under:

> *"4.3.3 Having said that, it is also important to understand concepts of income, losses, carry forward, set-off etc in the context of the instant case of the assessee. 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 14 classifies income under five heads, the main charging provision is section 4 which levies income-tax, as only one tax, on the "total income" of the assessee as defined in section 2(45). 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 5(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.

4.3.4 Now, capital gains would be covered by the definition of "income" in sub-section

(24) of section 2, only if they were chargeable under section 45. Now, section 45 is not operative in respect of capital gains derived by a tax resident of Mauritius in India during AY 2017-18 by the virtue of the fact that the provisions of the DTAA between India and Mauritius override the provisions of the IT Act, 1961 to the extent they are more beneficial to the assessee. Thus, "capital gains", whether on the positive or the negative side, cannot be charged to tax in the hands of the assessee under section 45 or any other provisions of the Act. In the instant case, the first condition, namely, "total amount of income, profits and gains referred to in section 5(1)" is not satisfied. Thus, in the relevant previous year capital gains or "capital losses" do not form part of the "total income" of the assessee which could be brought to charge, and were, therefore, not required to be computed under the Act.

4.3.5 From what has been said above, it follows as a necessary corollary to the fact that the DTAA, read with the local tax laws of Mauritius, does not make income under the head "capital gains" chargeable, an assessee is neither required to show income under that head in his return, nor entitled to file a return showing "capital losses" merely for the purpose of getting the same computed and carried forward. Sub-section (1) of section

74 would not give him such a right because the operation of that sub-section is, in terms, confined to, (i) a loss which is which arises as the net result of computation under the head "Capital Gains", and (ii) to "income" which falls within the definition of "total income". Both these conditions necessary for the application of the sub-section are lacking in the present case.

4.3.6 It may be contended that under sub-section (1) of section 74, the assessee had an independent right to carry forward his capital loss, even if it could not be set off, owing to the non-taxability of capital gains in the hands of the assessee in India as well as Mauritius, against future profits, if any, in the immediate subsequent years. But it may be remembered that the concept of carry forward of loss does not stand in vacuum. 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 eligible 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. Therefore, it is settled law that loss and income from the same source of income cannot be treated differentially. Hence, short term capital loss from share transactions in the case of the assessee cannot be treated differentially with short term capital gain from similar share transactions. Both loss and gain from

similar transactions have to be treated similarly. Hence if income is exempt from taxation, loss would also be exempt.

4.3.7 Moreover, non-taxability of capital gains derived by a tax resident of Mauritius in India is in consonance with the provisions of the section 90(2) of the Act which allows the non-residents to, be governed by the provisions of the DTAA or Act, whichever is beneficial to them. Once decided, an assessee cannot revert back to the provisions of the IT Act, 1961 only for the loss incurring capital gain transactions.

4.3.8 Reliance is placed on the ratio(s) laid down in the decision of the Hon'ble Supreme Court in the case of CIT vs Hariprasad& Co Pvt Limited [99 ITR 118 (SC), 1975 CTR 65(SC)]. Again in the case of Kishorebhai Bhikhabhai Virani Vs ACIT in ITA No 440 of 2013, even the Hon'ble Hon'ble Gujarat High Court, has held that the loss from exempt source can neither be allowed as set off nor can be allowed to be carried forward and absorbed against income in subsequent years from the taxable source.

4.3.9 The reliance placed by the assessee on Flagship Indian Investment Company (Singapore) Limited (2010-TII-93-ITAT-MUM-INTL) is not accepted because the law as laid down by the Hon'ble Supreme Court in Hariprasad& Co Pvt Ltd supra has not been considered by the Ld Tribunal. Further, the Department is in appeal on the same issue before Hon'ble Bombay High Court in the case of CIT(IT)-2 Mumbai Vs Goldman Sachs India Investment (Singapore) Pte Ltd. in ITXA/2522/2022.

4.3.10 In view of the above discussion, the claim of the assessee to carry forward its short-term capital losses is hereby disallowed."

Aggrieved by the proposed disallowances/additions made by the Ld.AO, assessee preferred objections before the DRP.

3. The DRP after considering the submissions of the assessee upheld the proposed additions/disallowance. On receipt of the DRP directions, the Ld.AO passed the impugned orders by making additions in the hands of the assessee.

Aggrieved by the order of the Ld.AO, the assessee is in appeal before the *Tribunal*.

4. At the outset the Ld.AR submitted that facts leading to the issue alleged by the assessee before this *Tribunal* are identical for both the years under consideration. She submitted that, except for the value of addition there is no difference in the proceedings initiated by the authorities below and the basis on which the additions were made. It is submitted that the sale of scrips are also identical during the years.

4.1 The Ld.AR placed reliance on pages 173 and 174 of the paper book for assessment year 2016-17 to submit that, two scrips under consideration was purchased by the assessee through banking channels. It is submitted that the source of the purchase are from sale proceeds of other investments and inward remittances. For the sake of convenience the relevant pages are scanned and reproduced as under:

Asia Investment Corporation Mauritius Ltd
AY 2016-17

Chart demonstrating the available funds with assessee in Deutsche Bank India (DB India), the custodian, and invested into shares of Virtual Global Education Ltd and Stampede Capital Ltd

A. VIRTUAL GLOBAL EDUCATION LIMITED

Sr. No.	Date	Bank balance immediately prior to investment on relevant dates	Funds received by inward remittance from Mauritius	Available Bank balance in DB India on relevant dates (2 + 3)	Amount used for investment in Virtual Global	Remark
	(1)	(2)	(3)	(4)	(5)	
1	11.05.2015	2,43,84,115	6,37,32,500	8,81,16,615	3,31,84,625	
2	12.05.2015	8,83,29,103	9,61,46,250	18,44,75,353	3,65,13,450	
3	13.05.2015	20,41,22,400	-	20,41,22,400	3,50,43,333	Purchase of Virtual Global Education Ltd shares are out of sale
4	14.05.2015	18,44,63,617	-	18,44,63,617	3,50,30,744	proceeds of other shares in India which have been reinvested,
5	15.05.2015	17,59,65,667	-	17,59,65,667	3,50,99,040	other than the inward remittance in row no. 1, partly utilised for
6	18.05.2015	19,12,68,546	-	19,12,68,546	3,45,57,500	purchase of 11th May.
7	19.05.2015	14,24,59,244	-	14,24,59,244	3,52,57,200	
8	20.05.2015	21,10,72,177	-	21,10,72,177	3,61,77,792	

Note

1 Bank statement has been highlighted showing the purchases. In table above we have shown the balance prior to the investment, thus demonstrating that the assessee's sources was out of reinvestment of sales proceeds of shares.

2 The assessee has reinvested the sales proceeds of shares sold in India for purchase of Virtual Global education Limited shares.

3 Other than on 11.05.2015, where inward remittance of 6.37 crs was used to fund the purchase, the assessee has continuously maintained a debit balance in its bank account in India which was out of sales proceeds of shares sold in India

4 The balances in bank account in India, have been used to purchase the shares of Virtual global. Complete statement of sales and capital gains thereon have already been furnished. NSDL transaction statement has also been submitted.

Asia Investment Corporation Mauritius Ltd
AY 2016-17

Chart demonstrating the available funds with assessee in Deutsche Bank India (DB India), the custodian, and invested into shares of Virtual Global Education Ltd and Stampede Capital Ltd

B. STAMPEDE CAPITAL LIMITED

Sr. No.	Date	Bank balance immediately prior to investment on relevant dates	Funds received by inward remittance from Mauritius	Available Bank balance in DB India on relevant dates (2 + 3)	Amount used for investment in Stampede Capital	Remark
	(1)	(2)	(3)	(4)	(5)	
1	21.05.2015	17,07,81,434	-	17,07,81,434	67,72,160	
2	22.05.2015	22,57,91,734	-	22,57,91,734	69,72,160	Investment in Stampede Capital was out of reinvestment of sale proceed funds already in Bank balance in India
3	25.05.2015	32,04,95,364	-	32,04,95,364	73,11,298	
4	26.05.2015	13,28,83,895	-	13,28,83,895	1,34,90,574	
5	27.05.2015	11,93,93,320	5,12,38,000	17,06,31,320	-	
6	29.05.2015	3,58,82,703	50,93,600	4,09,76,303	1,47,86,710	Investment in Stampede Capital was out of utilisation of bank balances in India remaining out of inward remittance of 27th & 29th May / sale proceeds.
7	01.06.2015	2,61,89,593	-	2,61,89,593	2,03,65,290	
8	03.06.2015	4,20,47,743	-	4,20,47,743	1,84,18,796	Investment in Stampede Capital was out of reinvestment of sale proceeds.
9	05.06.2015	44,62,734	5,11,04,000	5,55,66,734	-	
10	10.06.2015	61,15,365	1,27,58,000	1,88,73,365	-	
11	11.06.2015	1,41,68,893	95,62,500	2,37,31,393	1,16,34,140	Investment in Stampede Capital was out of utilisation of bank balances in India remaining out of inward remittance of 05th, 10th & 11th June / sale proceeds
12	11.06.2015	1,20,97,253	-	1,20,97,253	81,14,378	
13	15.06.2015	40,09,457	96,08,250	1,36,17,707	-	
14	16.06.2015	1,12,51,956	1,02,50,000	2,15,01,956	1,02,64,747	Investment in Stampede Capital was out of utilisation of bank balances in India remaining out of inward remittance of 15th & 16th June / sale proceeds

Note

1 Bank statement has been highlighted showing the purchases. In table above we have shown the balance prior to the investment, thus demonstrating that the assessee sources was out of reinvestment of sales proceeds of shares and out of inward remittances.

2 The assessee has reinvested the sales proceeds of shares sold in India for purchase of Stampede Capital Limited shares as well as used inward remittances as demonstrated in chart above.

3 Complete statement of sales and capital gains thereon have already been furnished. NSDL transaction statement has also been submitted.

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4.2 It is submitted that, at all point of time, the assessee had sufficient funds to purchase the alleged scrips which the Ld.AO verified from the bank statements. The Ld.AR submitted that, the only reason why the authorities below did not accept assessee's submissions is that, these scrips did not have sound financial base and witnessed high irregularity in trading pattern as per the authorities. The Ld.AR submitted that, at the time when investments were made during the financial year 2015-16, these companies had sound financials. In support the Ld.AR placed

reliance on the balance sheet and statement of profit and loss account for year end 31/03/2016 of Virtual Global Education Pvt. Ltd. and Stampede Capital Ltd. placed at page 152-155 of the paper book for assessment year 2016-17. It is submitted that the audited statements were downloaded from the BSE website showing a positive network, during the financial year ending on 31/03/2016.

4.3 It is submitted that the investments were explained with detailed documentary and therefore, merely because the scrips subsequently were categorised as Penny stocks cannot itself be reasonable to challenge the investments made these scrips. She vehemently submitted that the additions made under section 69 of the act is not in accordance with the provisions of the act. She submitted that, the assessee would be entitled to claim relief under article 13 of the DTAA between India and Mauritius in case of. Gains and the loss were to be carry forwarded to the subsequent years, as per the Income Tax Act u/s. 74(1) of the Act.

4.4 The Ld.AR further submitted that, such kind of treatment to avail benefit of gains as per DTAA and carry forward of losses as per Income Tax Act, was a subject matter of consideration before the *Hon'ble Mumbai Special Bench* in case of *Sumitomo Mitsui Banking Corpn. Vs. DDIT* reported in *(2012) 19 taxmann.com 364* categorically observed as under:

"61. Section 90(2) of the Income-tax Act, 1961 provides that where the Central Government has entered into an agreement with the Government of any country outside India or specific territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee. This specific provision contained in section 90(2) makes it abundantly clear that in relation to the assessee like the one in the present case to whom the double tax avoidance treaty entered into by the Indian government applies, the provisions of Income-tax Act shall apply to the extent they are more beneficial to him, It, therefore, follows that if the provisions of the domestic law are more beneficial to the assessee than the provisions of the relevant tax treaty, the provisions of the domestic law shall override and prevail over the provisions of the treaty, Article 23 of the Indo-Japanese treaty, therefore, cannot be interpreted in a way as sought by Shri Girish Dave because if such interpretation is assigned to article 23 and the interest income which is otherwise not taxable in India as per the domestic law is held to be taxable relying on the provisions of the treaty, the same will run contrary to the provisions of section 90(2). Such interpretation, therefore, cannot be assigned to article 23 and the only interpretation which, in our opinion, can be assigned to the said article so as to make the provisions thereof in consonance with section 90(2) of the domestic law is that If there is an express provision made in the convention giving benefit to the assessee which is contrary to the domestic law, then the provisions of treaty can be relied upon which shall override and prevail over the provisions of the domestic law to give any benefit expressly given to the assessee under the treaty. The decision of

Hon'ble Supreme Court in the case of Azadi Bachao Andolan (supra) fully supports this view"

4.5 She thus submitted that, there is no evasion of Income Tax or profit shifting, that could be attributable in the hands of the assessee by availing benefits under both DTAA of gains as well as carry forward of loss as per Indian Income tax Act as the case may be. She also relied on the decision of *Coordinate bench of the Tribunal* in case of *Goldman Sachs India Investments (Singapore) PTE Ltd., [ITA No. 6619/Mum/2016] vide order dated* 09/04/2024 in support of this contention, wherein this coordinate bench of this *Tribunal* observed as under :

"6. From the above, we noted that it is very clear that while determining taxability of the income of an assessee, if provisions of the Act are more beneficial as compared to the tax treaty then the beneficial provisions of the Act will apply in determining the taxability of such income. Thus, having regard to the provisions of section 90(2) of the Act and given that the provisions of section 74 of the Act permit the Assessee to carry forward capital losses to subsequent assessment years, the provisions of the Act are more beneficial than the provisions of the IS treaty. For the year under consideration, the Assessee has filed its return of income in accordance with the provisions of the Act. Based on judicial jurisprudence, the provisions of the treaty cannot be thrusted upon the Assessee simply because the Assessee is a tax resident of a country with which India has entered into a tax treaty or on account of the mere perception of the AO that the Assessee may claim benefits under the tax treaty in subsequent years. Accordingly, we are of the view that the

capital losses incurred from transactions in the Indian capital markets amounting to Rs 205,969,056 should be construed as income accruing or arising from transactions undertaken in India falling within the scope of section 5 of the Act and therefore, the same should be eligible to be carried forward to subsequent years in accordance with the provisions of section 74 of the Act. We allow this issue of assessee."

4.6 The Ld. AR placed reliance on the decision of coordinate bench of *Tribunal* in case of *ACIT vs. J.P. Morgan India Investment Company Mauritius* Limited reported in *(2022) 143 taxman.com 82*, wherein this *Tribunal* observed and held as under:

"30. As stated above, the capital gain as per the Indian Mauritius DTAA is taxable in the resident country and the source country has given up its rights to tax the income. The question of computation in the source country does not therefore arise. Accordingly, the income from capital gains is not taxable in India as per Article 13(4) DTAA and accordingly, the mode of computation income in India as the source country will not arise. If the particular income is not to be taxed at all, the question of including the same under the total income and determining the taxability on the same will not arise and the contention of Ld. DR that the total income as per Act is to be calculated to determine the tax liability and thereafter, the benefit is to be given cannot upheld. Accordingly, we hold that the losses which have been brought forward from earlier years will be carried forward to the subsequent years without setting off the same against the gains of the previous year relevant to the assessment year in question for the reason that once the assessee has chosen the benefit of DTAA, then the capital gain is not at all taxable in India and therefore,

there is no question of setting off of loss from the earlier years. Accordingly, the Cross Objection raised by the assessee is allowed."

4.7 The Ld.DR on the contrary relied on orders passed by the authorities below.

We have perused submissions advanced by both sides in the light of records placed before us.

5. The Ld.AR did not argue on ground I challenging the validity of reopening. Accordingly, these grounds are dismissed as not pressed.

5.1 Admittedly assessee is a resident of Mauritius and is into the business of investments in Indian companies. Amongst the other investments, assessee purchased 2,88,000 shares of Stampede Capital and 1,93,65,000 shares of Virtual Global Education. During the relevant years under consideration assessee sold shares held in these companies and suffered short-term capital loss of Rs. 2,04,94,972.29/- and Rs.1,22,59,389.54/- respectively. It is alleged by the revenue that these scrips were found to be penny stocks, and assessment in case of assessee was reopened.

5.2 The Ld.AR submitted that, when the scrip were sold during the year assessee suffered loss as per the details reproduced hereinabove. The Ld.AO thus observed that, assessee booked bogus and fictitious loss. The assessing officer also observed that any capital gains from sale of shares by assessee is exempt in India by

virtue of Article 13 of India Mauritius treaty. Therefore loss from an exempt source can either be allowed to be set-off has to be allowed to be carry forward and absorbed against income in subsequent years.

5.3 In the present fact of the case, it has been proved beyond doubt that the shares of the alleged companies have been purchased by the assessee through proper banking channels for which the source has been established. Even otherwise, the authorities below has not doubted the purchase of the shares and the source from which they have been purchased. The claim of the assessee has been disallowed only on the ground that the alleged shares were subsequently found to be penny stocks.

5.4 In our opinion once the assessee establishes the manner in which the scripts were purchased which has not been found to be false by the authorities below, addition under section 68 cannot be made. Merely because the share purchased were alleged to be penny stock by revenue cannot be the sole reason to reach to the conclusion that, assessee invested in these scrips to earn fictitious bogus losses, and will not justify the addition made under section 68 of the act. In fact this should have been the reason for the assessing Officer to further investigate but cannot take place of an evidence.

5.5 It is an admitted position that for the year under consideration there is no gains were earned by the assessee from sale of any investments and therefore the assessee had no occasion to claim benefit of gains under Article 13 of India Mauritius DTAA. The observations of co-ordinate bench of this *Tribunal* in case of *Gold man Sachs Investment (Mauritius) Ltd. Vs. DCIT(International taxation)* reported in *(2021) 187 ITD 184, DCIT vs. Patni Computers systems Ltd.* reported in *(2008) 114 ITR 159 Pune* and *the decision of Co-ordinate bench of this Tribunal in case of Flagship Indian Investment Co. Mauritius Ltd. V. ASSTT. DIT* reported in *(2010) 38 SOT 426* reproduced herein above. Based on ratio laid down therein, we do not have any hesitation in holding that the assessee is entitled to claim benefit of carry forward of, the brought forward losses of the earlier years. We also draw support from CBDT Circular No. 22 of 1944 dated 1944 is clear on this aspect that reads as under:

> *"Total income is defined as the total amount of income, profits and gains referred to in sub- section (1) of section4 of the Indian Income-tax Act, 1922 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 of the Indian Income-tax Act, 1922. If the 'total income' is a loss, it has to be carried forward subject to the provisions of section 24(2) of the Indian Income-tax Act, 1922 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 relief in Indian taxation on account of the loss incurred by him in India."*

5.6 Based on the above discussions and observations and placing reliance on the decisions relied by the Ld.AR and referred to herein above, we hold that assessee cannot be denied the carry forward of the loss suffered during the year under consideration.

Accordingly grounds II (i) - (iv) for assessment year 2016-17 and grounds 1-2 for assessment A 2017-18 stands allowed.

In the result the appeals filed by the assessee for both the years under consideration stands partly allowed.

Order pronounced in the open court on 31/01/2025

Sd/-	**Sd/-**
(MS. PADMAVATHY S)	**(BEENA PILLAI)**
Accountant Member	**Judicial Member**

Mumbai:
Dated: 31/01/2025
Poonam Mirashi,
Stenographer

Copy of the order forwarded to:

(1)The Appellant
(2) The Respondent
(3) The CIT
(4) The CIT (Appeals)
(5) The DR, I.T.A.T.

True Copy
By order