**IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH, "C" AT KOLKATA**

(समक्ष)Before **श्री ऐ. टी. वर्की,** न्यायीक सदस्य **एवं/and** श्री एम .बालागणेश, लेखा सदस्य)

[Before Shri A. T. Varkey, JM & Shri M. Balaganesh, AM]

**I.T.A. No. 511/Kol/2017**
**Assessment Year: 2013-14**

| M/s. United Investments<br>PAN : AABFU3665 N | Vs. | ACIT, Circle – 40, Kolkata |
|---|---|---|
| Appellant | | Respondent |

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| Date of Hearing | 04.04.2019 |
| Date of Pronouncement | 01.07.2019 |
| For the Appellant | Shri S. Jhajharia, FCA |
| For the Respondent | Shri Sankar Halder, JCIT, Sr. DR |

## ORDER

**Per Shri A.T.Varkey, JM**

This is an appeal preferred by the Assessee against the order of the CIT(A) – 12, Kolkata dated 16.12.2016 for Assessment Year 2013-14.

2. The first ground of appeal of the assessee is as under:

> *"That on the facts and on the circumstances of the case the Ld. CIT(A) had grossly erred in confirming the addition of Rs. 4,48,776/- out of the total addition of Rs. 23,70,602/- made by the AO in the assessment framed u/s 143(3) of the Act by wrongly invoking the provisions of section 40(a)(ia) of the Act and also not appreciating the fact that mere reimbursement of such sum can never be subjected to TDS u/s 194C of the Act and also without prejudice the Learned CIT(A) had further failed to appreciate that the provisions of 40(a)(ia) of the Act could never be invoked by the AO following the decision of the jurisdictional High Court at Calcutta rendered on 23rd August, 2016, in the case of Principal Commissioner of Income Tax vs M/s. Tirupati Construction in ITAT No. 287 of 2016."*

3. Briefly stated facts as noted by the AO are that the assessee company had incurred 'horse expenses' of Rs.23,70,600/- against the income derived from horse racing, which was entirely paid to Royal Calcutta Turf Club. The appellant contended that the payment made to M/s Royal Calcutta Turf Club was in the nature of reimbursement of the expenses incurred by the club on their behalf and hence it was not required to withhold tax on these payments. After making enquiry u/s 133(6), the AO observed that the appellant had entered

into a works agreement with M/s Royal Calcutta Turf Club for rendering of several services and therefore the payment of Rs.23,70,600/- was made in lieu of the agreement with M/s Royal Calcutta Turf Club. The AO thus held that the appellant was required to withhold tax u/s 194C on the expenditure of Rs.23,70,600/- which it had failed to do so. The AO accordingly disallowed the entire expenditure of Rs.23,70,600/- u/s 40(a)(ia) of the Act. On appeal, the CIT(A), after examining the details of expenses paid to M/s Royal Calcutta Turf Club, noted that expenditure to the tune of Rs.19,21,824/- were not in the nature of 'works' and therefore the provisions of Section 194C was held to be not applicable to such payments. The Ld. CIT(A) accordingly deleted disallowance to the extent of Rs.19,21,824/- and confirmed the balance addition of Rs.4,48,776/-. Aggrieved the appellant is now in appeal before us.

4. We have heard rival submissions and gone through the order of the lower authorities. We find that the primary argument of the Ld AR is that the payee i.e. M/s Royal Calcutta Turf Club has duly included the subject mentioned receipts in their return of income and had paid taxes thereon which may be verified by the AO. The Ld DR also fairly agreed for the same. In view of the amendment to second proviso to section 40(a)(ia) read with section 201(1) of the Act, if the payees have included the subject mentioned receipts in their returns and paid taxes thereon, if any, then the disallowance u/s 40(a)(ia) of the Act would not operate in the hands of the payer. Hence in the interest of justice and fairplay, we deem it fit and appropriate, to remand this issue to the file of the AO for denovo adjudication of the issue in the light of second proviso to section 40(a)(ia) of the Act. The assessee is also given liberty to adduce fresh evidences in support of its claim before the AO. Accordingly, Ground No.1 raised by the assessee is allowed for statistical purposes.

5. The next ground of appeal raised by the appellant is against the Ld. CIT(A)'s action denying the claim for carry forward of long term capital loss of Rs.6,05,425/- incurred on sale of listed securities. Briefly states facts of the case are that the appellant is engaged in the business of horse racing and also acts as commission agent. The appellant had deployed its surplus funds by way of investments in listed shares & securities. During the relevant year the appellant had sold its holdings in different listed companies. The appellant derived long term capital gain of Rs.77,330/- and incurred long term capital loss of Rs.6,05,425/-. Before the AO the appellant was unable to furnish proper details and therefore the AO did

not allow the carry forward of long term capital loss. On appeal however the Ld. CIT(A) noted that the aggregate long term capital gain of Rs.77,330/- derived on sale of listed shares fulfilled the conditions prescribed in Section 10(38) and therefore held it to be exempt from income-tax. With regard to claim of long term capital loss of Rs.6,04,425/-; the Ld. CIT(A) held that since the gain derived from sale of long term listed shares was exempt then any loss incurred there from was to be ignored. He accordingly denied the appellant's claim for carry forward of long term capital loss of Rs.6,04,425/-u/s 74 of the Act. Being aggrieved by Ld. CIT(A)'s order, the assessee is now in appeal before us.

6. We have heard the rival submissions of both the parties. Assailing the order of the Ld. CIT(A), the Ld. AR appearing on behalf of the appellant submitted that the lower authorities erred on facts and in law in treating the long term capital loss incurred on sale of listed shares on the same footing as that of long term capital gain and thereby denying the carry forward of long term capital loss since long term capital gain was exempt u/s 10(38) of the Act. According to Ld. AR what is contemplated in section 10(38) is exemption of positive income and losses will not come within the purview of the said section. Inviting our attention to the provisions of Section 70 & 71 wherein the Legislature has laid down the manner in which the Long term capital loss is to be set-off and carried forward to subsequent years, the Ld. AR submitted that the Legislature has not put any embargo to exclude Long term capital loss from sale of shares to be set off against Long term capital gain arising on account of sale of other capital asset. The Ld. AR submitted that it is not a case where the source of income itself is exempt from tax and therefore any gain/loss derived in any manner there from is to be ignored for tax purposes. He submitted that capital asset is defined in Section 2(14) which inter alia includes shares & securities. The levy of income-tax on capital gain arising upon transfer of a capital asset has been provided in Section 45 and mode of computation has been elaborated in section 48. Certain exceptions have been provided in section 47 to those transactions which are not regarded as transfer. It is only if upon sale of shares which are listed on stock exchange, the assesse derives a positive income and fulfill the prescribed conditions set out in Section 10(38) that such gain is exempt from tax. According to Ld. AR there is nothing provided in Section 10(38) or for that matter Section 45 to 48 to state that long term capital loss on sale of shares are to be ignored as section 10(38) exempts the income arising from the transfer of long term capital

asset being an equity share or unit. He submitted that the scope of this specific exemption provision is meant from a particular specie of positive income cannot be enlarged and read into section 70 or 71 or sections 45 to 48 so as to draw an inference that long term capital loss on sale of shares are to be ignored for the purposes of the Act. In support of his contention, the Ld. AR strongly relied upon the decision of Hon'ble jurisdictional Calcutta High Court in the case of Royal Calcutta Turf Club v. CIT [1983] 144 ITR 709/12 Taxman 133 and the coordinate Bench of this Tribunal in the case of Raptakos Brett & Co. Ltd Vs DCIT (69 SOT 383). Per contra the Ld. DR relied on the order of the lower authorities. He submitted that the term 'income' is understood to include negative income i.e. loss as well and therefore he submitted that when the profits arises from transfer of shares of listed companies on which security transaction is paid is exempt u/s 10(38) of the Act, then as a corollary even the loss arising from such source also cannot be set off against any other income which is chargeable to tax. The Ld. DR accordingly pleaded that the orders of the lower authorities be confirmed.

7. After giving a thoughtful consideration to the facts of the case and the provisions of law; we find that the main issue to be decided in this ground is whether the long term capital loss arising on sale of long term listed shares can be assessed in terms of Section 45 of the Act and thereafter be permitted to be carried forward to be set off. It is the contention of the lower authorities that when the gain arising sale of long term listed shares is exempt from tax u/s 10(38) of the Act then by equal measure any loss arising in the hands of the assessee from transfer of listed securities sold on payment of STT should also remain outside the ambit of charging provisions of the Act. It is true that the judicial authorities including the Hon'ble Supreme Court in the case of CIT Vs J.H. Gotla (156 ITR 323) held that the expression 'income' shall include loss because the loss is nothing but negative income. It is cardinal principle of interpretation of statutes that the observations and findings of the Court must be understood in the context of the facts involved in the case decided by the Court. It is not proper to divorce the observation of the Court from the facts involved in the case. It is well laid down that the text of the statute must be understood in the context in which it is used and therefore any particular observation of the Court in the judgment cannot be considered or applied in its isolation or divorced from the context in which it was rendered. In the case of CIT Vs J.H. Gotla (supra), the issue before the Apex Court was

assessee's claim in the context of aggregation of income. Section 64 of the Act requires clubbing of income of the minor children or of the spouse and accordingly in the given circumstances the tax is required to be paid on aggregate income after clubbing. In this instant case it was the assessee's case that if the income accruing to the minor child or spouse was liable to be taxed on aggregate basis in the hands of the assessee then by equal measure the loss incurred by the minor and which was rightfully assessable under the Act was required to be included in the hands of the parent in terms of Section 64 of the Act. It is in this context that the Hon'ble Apex Court held that if the income assessable in the hands of the minor is required to be clubbed with the income of the parent then even the loss legally assessable in the hands of the minor was required to be clubbed in the hands of the parent and only thereafter the total income of the parent was required to be assessed. We thus note that in the decided case the Revenue had not proved that the any source from which the minor earned income or incurred loss was outside the purview of tax provisions. Admittedly the source of income in the hands of the minor was such which was liable to tax and if there had been any income then the same would have been included in the hands of the parent. In the light of this factual and legal position, the Hon'ble Supreme Court held that if the income was liable for clubbing in the hands of the parent then equally the same principle will apply with respect to loss which was negative income.

8. In our considered opinion the judicial concept that the term 'income' includes loss can be applied only when the entire source of such income falls within the charging provisions of the Act. Accordingly in a case where the source of income is otherwise chargeable to tax but only a specific specie of income derived from such source is granted exemption, then in such case the proposition that the term 'income' includes loss will not be applicable. It is only when the source which produces 'income' is outside the ambit of taxing provisions of the Act, in such case alone the 'income' including negative income can be said to be outside the ambit of taxing provisions and therefore the negative income is also required to be ignored for taxation purposes. As a corollary therefore where only one of the streams of income from the 'source' is granted exemption by the Legislature upon fulfillment of specified conditions, then the concept of 'income' includes 'loss' will not apply. In this background it is necessary to examine now as to whether the 'source' of long term capital gain i.e. long term capital asset being equity shares is completely outside the

charging provisions or not. On reference to Section 2(14) of the Act which defines the term 'capital asset', it is noted that there is no specific exception carved on in respect of equity shares or securities like in the case of agricultural land or personal effect. Further Section 45 which lays down the charge of tax on gain arising on transfer of 'capital asset' covers the long term capital gain derived on sale of equity shares whether or not they are listed on stock exchange and whether or not they are transferred on payment of STT. The manner and mode of computation of long term capital gain on sale of shares is uniformly laid down in Section 48 of the Act. In case the resultant figure is a long term capital loss, the manner for claiming its set off / carry forward has been set out in Section 74 of the Act. Therefore, on conjoint reading of all the applicable Sections, we find that nowhere any exception has been made with regard to long-term capital gain/loss arising on sale of equity shares and it is liable to income-tax like any other item of capital asset. In our considered view therefore it cannot be said that the source viz., transfer of long term capital asset being equity shares by itself is exempt from tax so as to say that any 'income' from such source shall include 'loss' as well.

9. We find that the exemption in respect of long term capital gain accruing on transfer of listed securities on payment of STT is granted under Section 10(38) of the Act. The said provision is part of Chapter III of the Income-tax Act, 1961 which bears the title 'Income which do not form part of the total income'. If one carefully analyzes various sub-sections of Section 10 then it is evident that each sub-section enlists specific specie of receipt to which exemption from tax is granted if certain conditions are fulfilled. We therefore find that Section 10 enlists various species of receipts which are otherwise revenue in nature but they are granted exemption from income-tax by the Legislature. The Legislature can grant exemption only when there is a positive income and not where there is a 'loss' or negative income on which admittedly there cannot be any charge of income-tax. In this regard one may gainfully refer to the CBDT Circular No.7/2013 dated 16.07.2013 issued in the context of Section 10A of the Act which also falls within Chapter III of the Act and grants exemption in respect of profits derived by undertaking located in SEZ/ FZE. In the said Circular the CBDT clarified follows:

*"4. Sub-section (6) of sections 10A and 10B were amended by Finance Act, 2003 with retrospective effect from 1-4-2001. Circular No. 7/2003, dated 5-9-2003 explains the amendments brought by Finance Act, 2003. The relevant paragraph is reproduced below:*

*"20. Providing for carry forward of business losses and unabsorbed depreciation to units in Special Economic Zones and 100% Export Oriented Units.*

*20.1 Under the existing provisions of sections 10A and 10B, the undertakings operating in a Special Economic Zone (under section 10A) and 100% Export Oriented Units (EOU's) (under section 10B) are not permitted to carry forward their business losses and unabsorbed depreciation.*

*20.2 With a view to rationalize the existing tax incentives in respect of such units, sub-section (6) in sections 10A and 10B has been amended to do away with the restrictions on the carry forward of business losses and unabsorbed depreciation.*

*20.3 The amendments have been brought into effect retrospectively from 1-4-2001 and have been made applicable to business losses or unabsorbed depreciation arising in the assessment year 2001-02 and subsequent years."*

***5.*** *From the above it is evident that irrespective of their continued placement in Chapter III, sections 10A and 10B as substituted by Finance Act, 2000 provide for deduction of the profits and gains derived from the export of articles or things or computer software for a period of 10 consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce such article or thing or computer software. The deduction is to be allowed from the total income of the assessee. The term 'total income' has been defined in section 2 (45) of the IT Act and it means the total amount of income referred to in section 5, computed in the manner laid down in the Income-tax Act.*

***5.1*** *All income for the purposes of computation of total income is to be classified under the following heads of income and computed in accordance with the provisions of Chapter IV of the Act-*

- *Salaries*
- *Income from house property*
- *Profits and gains of business and profession*
- *Capital gains*
- *Income from other sources*

*5.2 The income computed under various heads of income in accordance with the provisions of Chapter IV of the IT Act shall be aggregated in accordance with the provisions of Chapter VI of the IT Act, 1961. This means that first the income/loss from various sources i.e. eligible and ineligible units, under the same head are aggregated in accordance with the provisions of section 70 of the Act. Thereafter, the income from one ahead is aggregated with the income or*

*loss of the other head in accordance with the provisions of section 71 of the Act. If after giving effect to the provisions of sections 70 and 71 of the Act there is any income (where there is no brought forward loss to be set off in accordance with the provisions of section 72 of the Act) and the same is eligible for deduction in accordance with the provisions of Chapter VI-A or sections 10A, 10B etc. of the Act, the same shall be allowed in computing the total income of the assessee.*

*5.3 If after aggregation of income in accordance with the provisions of sections 70 and 71 of the Act, the resultant amount is a loss (pertaining to assessment year 2001-02 and any subsequent year) from eligible unit it shall be eligible for carry forward and set off in accordance with the provisions of section 72 of the Act. Similarly, if there is a loss from an ineligible unit, it shall be carried forward and may be set off against the profits of eligible unit or ineligible unit as the case may be, in accordance with the provisions of section 72 of the Act.[Emphasis given by us]*

10. The perusal of the above Circular makes it clear that the exemption under Section 10A is allowable only where the resultant income of the undertaking was positive. The Circular specifically clarifies that in the event the eligible undertaking incurs a loss, then such loss is not to be ignored on matching principle, but it can be set off and/or carried forward in terms of Section 72 of the Act. We therefore find that in analogous situation arising under Section 10A which is also part of Chapter III, the Board has accepted the legal proposition that even though the income is exempt but the loss arising from the same source is liable to be assessed and granted set off as per law. In view of the foregoing we find merit in the Ld. AR's contention that the exemption u/s 10(38) has been carved out in respect of a specific instance and that too where there is a positive income and upon fulfillment of conditions set out therein. We therefore find force in Ld. AR's submissions that merely because the capital gain arising on sale of long term listed shares upon payment of STT was exempt, for such reason alone the loss incurred on long term listed shares upon payment of STT will also be outside the charging provisions of the Act.

11. In this regard we find the Ld. AR's reliance on the judgment of the jurisdictional Calcutta High Court in the case of Royal Calcutta Turf Club Vs CIT (supra) to be relevant. In the decided case the assessee had incurred loss in its "broodmares" account and in "pig" a/c & which was set off against its income from other sources under the head 'Business'. The AO disallowed assessee's claim for set off on the ground that the income if derived from these 2 heads; were exempt u/s 10(27) of the Act and therefore correspondingly the

loss incurred from the same activity also did not enter the computational provisions of the Act. The AO's action of disallowing the claim for set off was upheld by the successive appellate authorities. On reference u/s 256(1) the Hon'ble High Court however held that Sec. 10(27) of the Act excluded in express term only the income derived from a business of livestock breeding or poultry or dairy farming. The said section did not exclude the business of livestock breeding or poultry or dairy farming out-rightly from the operation of the Act & therefore, the loss suffered by the assessee was admissible deduction in computing total income.

12. We also note that the above judgment of the jurisdictional Calcutta High Court was applied by the coordinate Bench of this Tribunal at Mumbai in the case of Raptakos Bret & Co. Ltd Vs DCIT (supra) involving similar facts as involved in the present case. In this case the assessee had incurred loss on sale of shares after paying STT & these shares were held on investment a/c for period more than 12 months. The assessee claimed that the loss incurred was to be assessed under the head 'capital gains' and its set off was permissible against capital gain earned on transfer of other capital assets. The AO however disallowed the assessee's claim for assessment of long term capital loss on the ground that "income" earned in similar transactions was not chargeable to tax in view of exemption granted by S. 10(38) of the I.T. Act. In the AO's opinion Sec. 10(38) was applicable equally to all transactions of sale of investment shares involving STT payment & irrespective whether the resultant effect was profit/income or loss. On further appeal this Tribunal relying on the judgment of the Hon'ble Calcutta High Court (supra) held that same considerations did not apply to the income exempt u/s 10 and the loss incurred in similar transactions. The ITAT therefore held that assessee was entitled to get its loss assessed & was also entitled to get such loss set off. The relevant extracts of the decision is as follows:

> ***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.*

***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."*

13. For the reasons set out above and following the decisions discussed above, we direct the AO to assess the long term capital loss incurred by the appellant on sale of listed shares and allow its carry forward in accordance with law. Ground No. 2 is therefore allowed.

14. In the result, the appeal of the assessee is allowed for statistical purposes.

Order is pronounced in the open court on 01 July, 2019

| Sd/- | Sd/- |
|---|---|
| (M. Balaganesh)<br>Accountant Member | (Aby T. Varkey)<br>Judicial Member |

Dated :01 July, 2019
Biswajit (Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – M/s. United Investments, C/o. Salarpuria Jajodia & Co, 7, C.R. Avenue, Kolkata – 70 072.
2. Respondent – ACIT, Circle – 40, Kolkata.
3. The CIT(A),
4. CIT ,
5. DR,

/True Copy, By order,

Assistant Registrar/H.O.O
ITAT, Kolkata