

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "I", MUMBAI**

**BEFORE SHRI PRAMOD KUMAR (VP) AND SHRI RAM LAL NEGI (JM)**

**ITA No. 7399/MUM/2018  
Assessment Year: 2015-16**

Emerging Markets Growth Fund, Inc. C/o J P Morgan Chase Bank India Sub Custody, 6 <sup>th</sup> Floor, Paradigm Towers, MindSpace, Malad Goregaon Link Road, Malad (W), Mumbai - 400064 PAN: AAACE1943K	<b>Vs.</b>	The Asst. Commissioner of Income Tax (International tax)- 2(2)(1), Air India Building, Nariman Point, Mumbai - 400021
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by : Shri Niraj Sheth (AR)

Revenue by : Shri N.V. Nadkarni (Sr. DR)

Date of Hearing: 02/12/2019

Date of Pronouncement: 28/02/2020

**ORDER**

**PER RAM LAL NEGI, JM**

This appeal has been filed by the assessee against the order dated 26.10.2018, passed by the Asstt. Commissioner of Income Tax u/s 143(3) read with section 144C(13) of the Income Tax Act (for short 'the Act') in pursuance of directions issued by the Ld. Dispute Resolution Panel (DRP) u/s 144C(5) of the Act.

2. The assessee has challenged the impugned order passed by the Ld. CIT (A) on the following effective grounds:-

*"1. On the facts and circumstances of the case and in law, the learned AO has erred in not allowing the Appellant to set – off its short term capital losses (STCLs) incurred during AY 2015-16, amounting to Rs. 575,839,785, from sale of equity shares on which securities transaction tax (STT) has been paid, against the short term capital gains (STCGs) realized during AY 2015-*

*16, amounting to Rs. 30,170,588/- from sale of equity shares which were not subject to STT.*

*2. Without prejudice to Ground No. 1, on the facts and circumstances of the case and in law, the learned AO has erred in not allowing the Appellant to set off its brought forward STCLs relating to AY 2008-09 and AY 2009-10, amounting to Rs. 60,750,351 and Rs. 2,595,699,655 respectively from sale of equity shares on which STT has been paid, against the STCGs realized during AY 2015-16, amounting to Rs. 30,179,588, on sale of equity shares which were not subject to STT.*

*3. The learned AO has erred in holding that the Appellant has furnished inaccurate particulars of its income and thereby initiated penalty proceedings under section 271 (1) (c) of the Act.”*

3. Brief facts of the case are that the assessee a non-resident company incorporated under United States of America and registered with the Security and Exchange Board as a Foreign Institutional Investor (FII), filed its return of income for the assessment year under consideration declaring total loss at Rs. 83,95,90,499/- Since the return was selected for limited scrutiny, the AO issued notice u/s 143(2) and 142(1) of the Act. In response thereof, the authorized representative of the assessee attended before the AO and submitted the details. The assessee had claimed set off or adjustment of short term capital loss chargeable @ 15% against short term capital gain chargeable @ 30% tax rate. AO denied the claim of the assessee holding that the losses having the nature of STT not paid (30%) cannot be allowed to be set off against the income arising out of short term capital gain with STT. The draft assessment order was accordingly passed u/s 143 (3) r.w.s. 144C (1) of the Act determining the taxable income of Rs. 3,01,79,590/-.

4. The assessee filed objection before the Ld. DRP. The Ld. DRP after hearing the assessee affirmed the action of the AO and rejected the objection raised by the assessee. Based on the directions of the Ld. DRP, AO passed the assessment order dated 26.10.2018. The assessee is in appeal against the assessment order passed by the ACIT pursuant to the directions passed by the Ld. DRP.

5. At the outset, the Ld. counsel for the assessee submitted that sole issue raised by the assessee in this appeal is covered in favour of the assessee by the order of the “F” Bench of the ITAT, Mumbai rendered in the case of *First State Investments (Hong Kong) Ltd. vs. Assistant Director of Income Tax (International Taxation), Mumbai* ITA No. 2895/Mum/2008 AY 2005-06, reported in [2010] 132 TTJ 218. Since, the Tribunal has decided the identical issue in favour of the assessee in the similar set of facts in the aforesaid case, the impugned order, which is contrary to the findings of the Tribunal, is liable to be set aside.

6. On the other hand, the Ld. Departmental Representative (DR) did not controvert the fact that the issue involved in the present case is identical to the issue involved in the present case and the Tribunal has decided the identical issue in favour of the assessee. However, the Ld. DR supported the impugned order.

7. We have heard the rival submissions and perused the material on record including the decision of the coordinate Bench relied upon by the Ld. counsel for the assessee. We notice that the coordinate Bench in the case of *First State Investments (Hong Kong) Ltd. vs. Assistant Director of Income Tax (International Taxation), Mumbai* (supra), the coordinate Bench has decided the identical issue in favour of the assessee holding as under:-

*“12 A lot of emphasis has been laid by the learned CIT (A) on the words “under similar computation made” as used in sub-section (2), he has opined that these are two different categories of the transactions resulting into short-term capital gain viz. those taxable in the first period at the rate of 30 per cent and those taxable in the second period at the rate of 10 per cent and “similar computation made” refers to either of the two. In our considered opinion, there is a basic fallacy in the view adopted by the learned CIT (A) on this issue. Sections 111A and 115AD fall in Chapter XII, which provides for determination of tax in certain special cases. Thus, it is clear that all these sections from 110 to 115BC provide for a particular rate of tax to be applied on the incomes covered under these sections individually. Hence, these sections do not deal with the computation of income but only provide for the rate of tax*

*applicable on the income It is simple and plain and the matter of computation of income is a subject which comes anterior to the application of the rate of tax. Only when the income is computed as per the provisions of the Act, that the question of the applicability of the correct rate of income tax comes into being. Income under the head "Capital gains" is determined as per section 45 to 55A. Section 48 with the heading "Mode of computation" provides that the income chargeable under the head Capital gains is Capital gains shall be computed by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset, the expenditure incurred wholly and exclusively in connection with such transfer and the cost of acquisition of the asset along with the cost of any improvement, if any. Thus, the computation of capital gain, which is prescribed under section 48, cannot be confused with the rate of tax liable to be charged on the income under the head "Capital gain" so computed. Whereas, computation of capital gain is governed by section 48, but the rates of tax, insofar as we are concerned in the present appeal, are governed by sections 111A and 115AD."*

8. The coordinate Bench has decided the identical issue in favour of the assessee in the case discussed above. The Ld. DR did not point out any material change in the facts of the present case. Hence, respectfully following the decision of the coordinate Bench rendered in the case of *First State Investments (Hong Kong) Ltd. vs. Assistant Director of Income Tax (International Taxation), Mumbai* (supra), we allow the appeal of the assessee and direct the AO to delete the addition.

In the result, appeal filed by the assessee for assessment year 2015-2016 is allowed.

Order pronounced in the open court on 28<sup>th</sup> February, 2020.

Sd/-  
(PRAMOD KUMAR)  
VICE PRESIDENT

Sd/-  
(RAM LAL NEGI)  
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 28/02/2020

Alindra, PS

**आदेश प्रतिलिपि अग्रेषित/ Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /  
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai