

आयकर अपीलीय अधिकरण
मुंबई पीठ "आई", मुंबई
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री अमरजीत सिंह, लेखाकार सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER
आ.अ.सं. 2976/मुं/2023 (नि. व. 2020-2021)
ITA No.2976/MUM/2023(A.Y. 2020-2021)

East Bridge Capital Master Fund I Ltd.
C/o. Ernst & Young LLP, 17th floor,
The Ruby, 29th Senapati Bapat Marg,
Dadar West,
Mumbai – 400 028
PAN:AAECE8814F

..... अपीलार्थी/Appellant

बनाम Vs.

The Dy.Commissioner of Income Tax (IT)
- 2(2)(1), Mumbai

..... प्रतिवादी/Respondent

Assessee by : S/Shri Madhur Agarwal & Fenil Bhatt, Advocates
Revenue by : Shri Ajay Kumar Sharma, CIT (DR)

सुनवाई की तिथि/ **Date of hearing** : **18.01.2024**
घोषणा की तिथि/ **Date of pronouncement** : **10.04.2024**

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

This appeal by the Assessee is directed against the assessment order dated 15.7.2023 passed u/s. 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (in short 'the Act'), for the Assessment Year 2020-21.

2. The primary issue in appeal by Assessee is rejection of method of set-off of Short Term Capital Losses (STCL) incurred from transactions liable to tax at lower rate, against Short Term Capital Gains (STCG) chargeable to tax at higher rate i.e., 30% plus surcharge and cess.

3. The facts germane to the primary issue raised in appeal are as under:

During the period relevant to Assessment year under appeal, the Assessee earned STCGs and also STCLs. The Assessee after set-off of STCLs from STCGs, offered to tax net capital gains of Rs.70,95,52,656/-. The details of STCGs/STCLs earned by the Assessee and the net STCG after set-ff of STCL are tabulated as under:

| Particulars | 15% | 30% | Total |
|---|----------------|------------------|------------------|
| Short-term capital gains | 63,14,67,867/- | 1,75,26,12,868/- | 2,38,40,80,735/- |
| Short-term capital losses other than those covered under section 111A of the Income Tax Act, 1961 | | (91,67,10,537) | (91,67,10,537) |
| Short-term capital losses covered under section 111A of the Income Tax Act, 1961 | | (75,78,17,542) | (75,78,17,542) |
| Net Short-term capital gains | 63,14,67,867/- | 7,80,84,789/- | 70,95,52,656/- |

In assessment proceedings, the Assessing Officer did not agree with the computation of net STCG by the Assessee. The Assessing Officer objected to set-off of losses of Short Term Capital Gains taxable at 15%, against the STCG taxable at higher rate, i.e., @ 30% even though the Assessee was having gains in STCG category taxable at lower rate. The Assessing Officer re-computed capital gains as under:

| Particulars | 15% | 30% |
|---|----------------|----------------|
| Short-term capital gains | 63,14,67,8671 | 1,75,26,12,868 |
| Short-term capital losses other than those covered under section 111A of the Income Tax Act, 1961 | | (91,67,10,537) |
| Short-term capital losses | (75,78,17,542) | |

| | | |
|--|----------------|--------------|
| covered under section 111A of the Income Tax Act, 1961 | | |
| Net Short-term capital gains | (12,63,49,675) | 83,59,02,331 |

Thus, the Assessing Officer determined STCG taxable under the normal provisions at Rs.83,59,02,331/- as against Rs.70,95,52,656/- offered by the Assessee.

4. Aggrieved against draft assessment order dated 8.9.2022, the Assessee filed objections before the Dispute Resolution Panel (DRP). The DRP vide direction dated 28.6.2023 dismissed the objections. The Assessing Officer in accordance with the directions of the DRP passed the impugned assessment order. Hence, the present appeal.

5. Shri Madhur Agarwal appearing on behalf of Assessee submitted that the DRP and Assessing Officer have erred in holding that the Assessee cannot set-off STCLs suffered in category liable to tax at lower rate against STCG liable for tax at higher rate. The provisions of section 70(2) of the Act allows the Assessee to set-off losses against the income arrived under the same head of income. The section does not put embargo for setting off STCLs liable to tax at lower rate against STCG in category liable for higher rate of tax. To support his submissions, he placed reliance on the following decisions:

1. ACIT Vs. Mac Charles India Ltd. in ITA No.586/Bang/2012 for Assessment Year 2007-08 decided on 23.1.2015;
2. DCIT Vs. JP Morgan Fund in ITA No. 2862/Mum/2022 for Assessment Year 2016-17, decided on 21.3.2023; and
3. First State Investments (Hongkong) Ltd. Vs. Assistant Director of Income Tax (International Taxation), Mumbai [132 TTJ 218 (Mumbai)]

5.1 The Id. Counsel for the Assessee further, submitted that in ground no.5 and 6 of appeal, the Assessee has assailed computation of total income by the Assessing Officer. It is submitted that in the computation sheet attached to the assessment order, the Assessing Officer has erred in

computing total tax liability of the Assessee at Rs.97,28,06,059/- as against Rs.25,18,30,676/-.

5.2 The Id. Counsel further submitted that in ground no.7 of the appeal, the Assessee has assailed levy of interest under section 234B of the Act. He pointed that the Assessing Officer has levied interest of Rs.2,32,25,440/- u/s. 234A of the Act. He pointed that the due date for filing return of income for the Assessee was 30.9.2020. Due to hardship caused by Covid-19 Pandemic, due date for filing return of income for the relevant Assessment Year was extended to 15.2.2021 vide Taxation and Other Laws (Relaxation of Certain Provisions) Act, 2020 (in short 'TOLA') The Assessee filed its return of income electronically on 4.2.2021, that is well within the extended time. Hence, the Assessee is not liable to pay interest u/s. 234A of the Act.

6. Per contra, Shri Ajay Kumar Sharma representing the Department, vehemently defended the impugned assessment order and direction of the DRP. The Id Departmental Representative (in short 'Id. DR') referring to the provisions of section 70(2) of the Act submitted that the expression used in sub section (2) is "similar computation" i.e., within the same category. Thus, STCLs taxable under 15% category can be set-off against STCGs taxable at the rate of 15%. STCL falling under 15% category cannot be set-off against gains taxable at the rate of 30%.

7. We have heard rival sides and have examined orders of the authorities below. We have also considered the decisions cited before us by the Counsel for the Assessee. The Assessee has suffered STCL on assets liable to tax at 15% at the same time the Assessee has earned STCG liable to tax at 30%. Though the Assessee had gains in category taxable of 15% yet the Assessee set-off STCL from the said category against STCG liable to tax at higher rate, i.e., at 30%. We find that similar controversy has been considered by the Coordinate Bench in the case of ACIT Vs. Mac Charles India Ltd. (supra). In the said case in identical transactions, the Assessee had set-off losses arising on sale of shares which are liable to tax at 10% against STCG arising

on other assets taxable at 30%. The Assessing Officer rejected Assessee's method of set-off of STCLs. The Assessee carried the issue before the CIT(A). The First Appellate Authority accepted Assessee's method of computation and reversed the findings of Assessing Officer. The Department carried the issue in appeal before the Tribunal. The Co-ordinate Bench dismissed the appeal of Revenue holding as under:

"13. We have considered his submissions and are of the view that the same are not acceptable. A perusal of the provisions of section 70(2) clearly shows that if there a short term capital loss, the assessee is entitled to have the said capital loss set off against any other short term capital gain. This right given to the assessee is unqualified and therefore the assessee is free to choose as to how the set of short term capital loss has to be claimed. The assessee has claimed the set off in such a manner that it results in payment of low taxes. That cannot be a ground to deny a legitimate right which the assessee has in law. This is the principle adopted by the CIT(A) in allowing relief to the assessee. We are of the view that the reasoning adopted by the CIT(A) is just and proper and calls for no interference. In view of the above conclusions on a plain reading of the relevant provisions of section 70(2) and section 111A of the Act, we do not wish to refer to the case laws to which a reference has been made by the CIT(A) in his order. For the reasons given above, we confirm the order of the CIT(A) and dismiss ground No.2 raised by the Revenue."

(Emphasized by us)

8. In the case of First State Investments (Hongkong) Ltd. (supra) under similar situation, the Assessing Officers rejected Assessee's manner of set-off of STCL in category liable to tax at 10% against STCG taxable at 30%. The Revenue made similar argument as is made in the instant case with regard to expression used in section 70(2), i.e., 'under similar computation'. The Co-ordinate Bench rejected arguments of the Department by 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 there 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 that 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 sections 45 to 55A. Section 48 with the heading "Mode of computation" provides that the income chargeable under the head "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.

13. In view of the foregoing discussion, we hold that the authorities below erred in negating the assessee's computation of short-term capital gain. We, therefore, overturn the impugned order and allow this ground of appeal.”

(Emphasized by us)

9. In the case of JP Morgan Fund (supra), the Tribunal had dealt with similar controversy. The Co-ordinate Bench after placing reliance on the decision of Special Bench in the case of Montgomery Emerging Markets Fund [(2006)100 ITD 217/Mum/SB] dismissed Revenue's appeal. Thus, in light of un-disputed facts of the case and the decision referred above, we have no hesitation in accepting Assessee's manner of set-off of STCL category liable to tax at the rate of 15%, against STCG taxable at the rate of 30%. Thus, the Assessee succeeds on ground no.1 to 4 of appeal.

10. In ground no.5 & 6, the Assessee has assailed mistake in the computation sheet annexed to the assessment order. Since we have allowed ground no.1 to 4 in Assessee's appeal, the computation sheet has to be revised by the Assessing Officer. The ground no.5 & 6 of appeal are consequential, hence, require no separate adjudication.

11. In ground no.7 of appeal, the Assessee has assailed charging of interest u/s 234A of the Act. Taking into consideration the facts narrated by the ld. Counsel for the Assessee, we deem it appropriate to restore this issue back to the file of Assessing Officer for de-novo adjudication after verification of facts and the provisions of TOLA. Thus, ground no.7 is allowed for statistical purpose.

12. In ground no.8 of appeal, the Assessee has assailed charging of interest under 234B of the Act. Levy of interest u/s 234B of the Act is mandatory and consequential, therefore, ground no.8 is dismissed.

13. In ground no.9 of appeal, the Assessee has assailed initiation of penalty u/s 270A of the Act. Challenge to penalty proceedings at this stage is pre mature, hence, ground no.9 of appeal is dismissed as such.

14. In the result, appeal of the Assessee is partly allowed.

Order pronounced in the open court on Wednesday the 10th day of April 2024.

Sd/-
(AMARJIT SINGH)
लेखाकारसदस्य / ACCOUNTANT MEMBER

Sd/-
(VIKAS AWASTHY)
न्यायिकसदस्य / JUDICIAL MEMBER

मुंबई / Mumbai, दिनांक / Dated: 10.04.2024
Mini, Sr. PS

प्रतिलिपिअग्रेषित Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant ,
2. प्रतिवादी / The Respondent.
3. The PCIT
4. विभागीयप्रतिनिधि, आय. अपी. अधि. , मुंबई / DR, ITAT, Mumbai
5. गार्डफाइल / Guard file.

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai