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

BEFORE SHRI ANIKESH BANERJEE, JM &
MS PADMAVATHY S, AM

I.T.A. No. 3329/Mum/2023
(Assessment Year: 2020-21)

Jane Street Asia Capital Ltd. Level 6th North Avenue Maker Maxity, G. Block, Bandra Kurla Complex, Mumbai-400051. **PAN : AADCJ0800F**	Vs.	**The ACIT (Int. Tax) Circle-3(1)(1),** Room No. 1605, 16th Floor, Air India Building, Nariman Point, Mumbai-400021.
Appellant)	:	**Respondent)**

Appellant/Assessee by	:	Shri Dhanesh Bafna a/w Hardik Nirmal, CA
Revenue/Respondent by	:	Shri Anil Sant, Sr. DR
Date of Hearing	:	16.05.2024
Date of Pronouncement	:	17.05.2024

O R D E R

Per Padmavathy S, AM:

This appeal is against the final order of assessment passed by the Assistant Commissioner of Income Tax (International Tax) Circle-3(1)(1), [for short 'the AO] dated 26.07.2023 for the AY 2020-21. The assessee raised the following grounds of appeal:

"Each of the grounds and/ or sub-grounds of the appeal are independent and without prejudice to the other:

1. On the facts and in the circumstances of the case and in law, the final assessment order dated 26 July 2023 passed by the Assistant Commissioner of Income-tax-International tax Circle 3(1)(1), Mumbai ('Ld. AO') under section

143(3) read with section 144C(13) of the Income-tax Act, 1961 ("Act") is bad in law and void ab initio.

2. On the facts and in the circumstances of the case and in law, the final assessment order dated 26 July 2023 passed by the Ld. AO under section 143(3) read with section 144C(13) of the Act having been passed beyond the limitation provided in terms of section 153 of the Act, is illegal, being barred by limitation, void-ab-initio and is therefore liable to be quashed.

3. On the facts and in the circumstances of the case and in law, the notice under section 143(2) of the Act issued by the Assistant Commissioner of Income Tax, National Faceless Assessment Centre-1(1)(2), Delhi ['NaFAC] is without jurisdiction and consequently, all proceedings to the aforesaid notice under section 143(2) of the Act are also bad in law, void-ab-initio and liable to be quashed.

4. On the facts and in the circumstances of the case and in law, the Ld. AO erred in not allowing set-off of short-term capital loss (STCL) under section 111A read with section 115AD of the Act (taxable at 15%) against short-term capital gains ('STCG) under section 115AD of the Act (taxable at 30%).

In doing so, the Ld. AO has erred in:

a. holding that short-term capital loss of AY 2020-21 covered under section 111A read with section 115AD of the Act (subject to tax rate of 15%) cannot be set-off against short-term capital gains of AY 2020-21 taxable under section 115AD of the Act (subject to tax rate of 30%).

b. not appreciating the fact that section 70(2) of the Act grants an unconditional right to set-off short- term capital loss against short-term capital gains regardless of differential tax rate.

5. On the facts and in the circumstances of the case and in law, the Ld. AO failed to state and apply the correct amount of Total Income of the Appellant when making its determinations in the notice of demand and computation sheet in connection with the final assessment order dated 26 July 2023.

6. On the facts and in the circumstances of the case and in law and as a consequence of the misstatement by the Ld. AO in Ground 5 above, the Ld. AO erred in determining the Total Income of the Appellant amounting to INR 25,96,09,77,929/- and thereby, consequentially determining the demand of INR 6,04,21,14,390/-.

7. On the facts and in the circumstances of the case and in law and as a consequence of the misstatement by the Ld. AO in Ground 5 above, the Ld. AO erred in levying interest under section 234B of the Act amounting to INR 1,66,33,63,320/-.

8. On the facts and in the circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under section 270A of the Act in consequence of misreporting of income."

2. The assessee is a non-resident entity incorporated in Mauritius and registered with the Securities and Exchange Board of India (SEBI) as a Foreign Portfolio Investor (FPI) for carrying out investment activity in Indian market. The assessee filed a return of income for AY 2020-21 on 06.01.2021 declaring a total income of Rs. 12,97,56,33,560/-. The case was selected for scrutiny and the statutory notices were duly served on the assessee. During the course of assessment proceedings, the AO noticed that the assessee has disclosed a Short Term Capital Loss (STCL) on equity transactions at Rs. 97,10,809/- which has been adjusted against Short Term Capital Gain (STCG) on derivative transactions amounting to Rs. 14,50,09,21,212/-. The AO was of the view that the loss arising from equity transaction which is taxable at 15% cannot be set off against the gain arising out of derivative transactions which is taxed at 30% and accordingly did not allow the set off claimed by the assessee. The relevant observations of the AO in this regard are extracted below:

6.3 Further, the assessee also made a request for personal hearing which was granted. Thereupon Shri Pinak Shah, AR from PWC of the assessee appeared and discussed the case. The above submission of the assessee is given a careful thought but the same is not acceptable. Section 70(2) states that "Where the result of the computation made for any assessment year under section 48 to 55 in respect of any short-term capital asset is a loss, the assessee shall be entitled to have the amount of such loss set off against the income, if any, as arrived at under a similar computation made for the assessment year in respect of any other capital asset."

6.4 So, the law is very clear on set off of losses as it says "income, if any arrived at under a similar computation". The computation should be similar which means the short term capital gains to be taxed at 30% and short term capital gains to be taxed at 15% should be set off against the losses arrived at a similar computation i.e. Short term capital gains computed u/s 111A to be set off against the short term capital losses computed u/s 111A and similarly other STCG (i.e. which are taxed at 30%) to be set off against other STCL. In the present case, there is a Short Term Capital Gain of Rs. 14,50,09,21,212/- (taxable @30%) was adjusted against current Years Short Term Capital Loss (taxable @15%). Thus, rejecting the computation of income filed by the assessee, the income of the assessee is recomputed as under considering the provisions of section 70(2) of the IT Act 1961.

Penalty proceedings u/s 270A of the IT Act 1961 is also initiated for misreporting of income leading to the concealment."

3. Aggrieved the assessee filed its objections before the DRP who confirmed the action of the AO. The assessee is in appeal before the Tribunal against the final order of assessment passed by the AO pursuant to the directions of the DRP.

4. The ld. AR submitted that the only reason for the AO to deny the benefit of set off of STCL to the assessee is that the STCG against which it is the set off is taxed at a different rate. The ld. AR further submitted that the issue is settled by various decisions of the co-ordinate bench which has been consistently holding the issue in favour of the assessee. The ld. AR in this regard placed reliance on the decision of the co-ordinate bench in the case of First State Investments (Hong Kong) Ltd. Vs. ADIT (International Taxation) (ITA No. 2895/Mum/2008 dated 23.07.2009). The ld. AR also submitted that the co-ordinate bench in one of the latest decisions in the case of East Bridge Capital Master Fund (I) Ltd. Vs. DCIT (ITA No. 2976/Mum/2023 dated 10.04.2024) has held similar view on the issue.

5. The ld. DR on the other hand submitted that the wordings used in section 70(2) which contains provisions with regard to set off of STCL states that the set off should be allowed for 'similar computations' which would mean that the computations which are subject to similar tax. The ld. DR therefore, argued that the STCL which is taxed at 15% cannot be allowed to be set off against the Capital Gain which is taxed at 30%.

6. We have heard the parties and perused the material available on record. We notice that the co-ordinate bench has considered the similar issue in the case of East Bridge Capital Master Fund (I) Ltd. (supra) and held that:

> *"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 Co- ordinate 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:*
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> > *"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."

7. We also noticed similar view has been expressed in many other of decisions of the co-ordinate bench, copies of which are submitted by the ld. AR in the legal Paper Book. The facts in assessee's case are similar and therefore, respectfully following the decision of the co-ordinate bench we hold that the AO is not correct in denying the set off of STCL against the STCG to the assessee for the reason that they are taxed at different rates. Accordingly the order of the AO is set-aside and Ground No.4 which is the effective ground on this issue is allowed.

8. Ground No.1 is general and Ground No. 5 to 8 are consequential. Therefore, these grounds do not warrant a separate adjudication. Ground No. 2 & 3 pertain to the legal contentions which have become academic in view of our decision on merits with regard to the issue under consideration.

9. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 17-05-2024.

Sd/-	***Sd/-***
(ANIKESH BANERJEE)	**(PADMAVATHY S)**
Judicial Member	**Accountant Member**

**SK, Sr. PS*

Copy of the Order forwarded to :

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

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai