

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“I” BENCH, MUMBAI**

**BEFORE SMT KAVITHA RAJAGOPAL, JM &  
MS PADMAVATHY S, AM**

**I.T.A. No.4562/Mum/2023  
(Assessment Year: 2021-22)**

<b>ISHARES EDGE MSCI EM MINIMUM VOLATILITY UCITS ETF, C/o Ernest &amp; Young LLP, 17<sup>th</sup> Floor, The Ruby, 29, Senapti Bapat Marg, Dadar (West) Mumbai-400028. PAN : AADCI3482N</b>	Vs.	<b>DCIT (International Tax)- 2(2)(2), 1606, 16<sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai-400021.</b>
<b>Appellant)</b>	<b>:</b>	<b>Respondent)</b>

**I.T.A. No.4599/Mum/2023  
(Assessment Year: 2021-22)**

<b>ISHARES MSCI BRIC ETF [ As A Successor To ISHARES BRIC INDEX MAURITIUS CO. (liquidated)], C/o Ernest &amp; Young LLP, 17<sup>th</sup> Floor, The Ruby, 29, Senapti Bapat Marg, Dadar (West) Mumbai-400028. PAN : AAFCI3335Q / AACCI5900N</b>	Vs.	<b>DCIT (International Tax)- 2(2)(2), 1606, 16<sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai-400021.</b>
<b>Appellant)</b>	<b>:</b>	<b>Respondent)</b>

**I.T.A. No.4563/Mum/2023  
(Assessment Year: 2021-22)**

<b>iShares Emerging Markets IMI Equity Index Fund,</b>	Vs.	<b>DCIT (International Tax)- 2(2)(2), 1606, 16<sup>th</sup> Floor,</b>
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C/o Ernest & Young LLP, 17 <sup>th</sup> Floor, The Ruby, 29, Senapti Bapat Marg, Dadar (West) Mumbai-400028. <b>PAN : AABTB6669D</b>		Air India Building, Nariman Point, Mumbai-400021.
<b>Appellant)</b>		
:		<b>Respondent)</b>

**I.T.A. No.4565/Mum/2023**  
(Assessment Year: 2021-22)

<b>iShares Core MSCI EM IMI UCITS ETF</b> , C/o Ernest & Young LLP, 17 <sup>th</sup> Floor, The Ruby, 29, Senapti Bapat Marg, Dadar (West) Mumbai-400028. <b>PAN : AADCI7836E</b>	Vs.	<b>DCIT (International Tax)-2(2)(2)</b> , 1606, 16 <sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai-400021.
<b>Appellant)</b>		
:		<b>Respondent)</b>

**I.T.A. No.4566/Mum/2023**  
(Assessment Year: 2021-22)

<b>ISHARES MSCI EM ASIA UCITS ETF</b> , C/o Ernest & Young LLP, 17 <sup>th</sup> Floor, The Ruby, 29, Senapti Bapat Marg, Dadar (West) Mumbai-400028. <b>PAN : AADCI7835H</b>	Vs.	<b>DCIT (International Tax)-2(2)(2)</b> , 1606, 16 <sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai-400021.
<b>Appellant)</b>		
:		<b>Respondent)</b>

**Appellant/Assessee by** : Shri Anish Thacker a/w Pranay Gandhi, CA

**Revenue/Respondent by** : Shri Anil Sant, Sr. DR

**Date of Hearing** : 22.05.2024

**Date of Pronouncement** : 29.05.2024

**ORDER****Per Bench:**

These appeals by the different assesseees are against the separate final orders of assessment passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (the Act) by the Assistant Commissioner of Income Tax (International Tax) Circle-2(2)(2), Mumbai [for short 'the AO] dated 31.10.2023, 14.10.2023 & 30.10.2023 for the AY 2020-21. The issues contended by the assesseees in all these appeals are common and therefore these appeals were heard together and disposed of through this common order. The issues contended and the grounds raised by all the assesseees are tabulated below –

<b>Issue</b>	<b>ITA.No.4562/ Mum/2023</b>	<b>ITA.No.4563/ Mum/2023</b>	<b>ITA.No.4565/ Mum/2023</b>	<b>ITA.No.4566/ Mum/2023</b>	<b>ITA.No.4599/ Mum/2023</b>
General	Ground No.1		Ground No.1	Ground No.1	
Order u/s.143(3) r.w.s.144C(13) – Time barred	Ground No.2	Ground No.1	Ground No.2	Ground No.2	Ground No.1
Jurisdictional issue	Ground No.3	Ground No.2	Ground No.3	Ground No.3	Ground No.2
Order passed in the name of non-existing entity					Ground No.3
Set off of current year Short Term Capital Loss	Ground No.4 to 7	Ground No.3 to 6	Ground No.4 to 7	Ground No.4 to 7	Ground No.4 to 7
Set off of brought forward Short Term Capital Loss		Ground No.7	Ground No.9	Ground No.9	
Carry forward of Short Term Capital Loss not allowed to be set off	Ground No.8 to 9	Ground No.8	Ground No.8 to 10	Ground No.8	Ground No.8 to 12
Arithmetic errors in the computation sheet	Ground No.10 to 13	Ground No.9 to 11	Ground No.11 to 14	Ground No.10 to 11	
Levy of interest under section 234A		Ground No.12			Ground No.13

Levy of interest under section 234B	Ground No.14	Ground No.13			Ground No.14
Levy of interest under section 234C					Ground No.15
Initiation of penalty proceedings under section 270A of the Act	Ground No.15	Ground No.14	Ground No.15	Ground No.12	
Refund determined to be payable			Ground No.16		

2. During the course of hearing the ld AR brought to our attention the letter dated 14.05.2024 filed by all the assesseees withdrawing the legal grounds raised pertaining to the issue of order u/s.143(3) r.w.s.144C(13) being time barred, the Jurisdictional issue and the issue of Order passed in the name of non-existing entity. The ld AR prayed that these grounds may be disposed of accordingly. Therefore the grounds as tabulated above by all the assesseees contending the legal issue are dismissed as withdrawn.

### **Set off of current year Short Term Capital Loss**

3. The brief facts to the assessee in **ITA No. 4562/Mum/2023** is that the assessee is a fund organized as a company in Ireland 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 2021-22 on 11.03.2022 declaring a total income of Rs. 19,42,23,490/-. 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 Short Term Capital Gain (STCG) on derivative transactions amounting to Rs. 1,83,87,174/- and after setting off of Short

Term Capital Loss (STCL) of Rs.4,63,80,284 the assessee has offered net capital loss of Rs. 2,79,93,110/- as under:

Particulars	15%	30%	Total
Short-term capital gains	1,76,97,553	6,89,621	1,83,87,174
Short-term capital loss			(4,63,80,284)
Short-term capital losses other than those covered under section 111A of the Income Tax Act, 1961		(6,89,621)	
Short-term capital losses covered under section 111A of the Income Tax Act, 1961	(1,76,97,553)		
Net Short-term capital gains	Nil	Nil	(2,79,93,110)

4. 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 AO proceeded to re-compute the net STCG as under and accordingly brought to tax the STCG of Rs.6,89,621-

Particulars	15%	30%
Short-term capital gains	1,76,97,553	6,89,621
Short-term capital losses other than those covered under section 111A of the Income Tax Act, 1961		Nil
Short-term capital losses covered under section 111A of the Income Tax Act, 1961	(4,63,80,284)	
Net Short-term capital gains	(2,86,82,731)	6,89,621

5. 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.

6. 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 as per the provisions of section 70(2) of the Act there is no restriction to set off the losses arising from STCG which are taxed at different rates. The ld. AR also submitted that the that income computed under "similar computation" as contained in section 70(2) does not mean that the income should be taxed at the same rates only are allowed to be set off. The ld. AR argued that the assessee has the prerogative to set off the loss and the gain in such a way within the framework of law to reduce the tax liability. The ld. AR placed reliance on the decision of the Hon'ble Calcutta High Court in the case of Rungamatee Trexim Pvt. Ltd. [2008] (ITA No. 812 of 2008 dated 19.12.2008) to submit that the similar issue has been considered by the Hon'ble High Court and the issue is decided in favour of the assessee. The ld. AR also drew our attention to the decision of the co-ordinate bench in the case of J.S. Capital LLC Vs. ACIT (Int. Taxation) (2024) 160 taxmann.com 286 where a similar view has been held by the co-ordinate bench. The ld. AR also submitted a case law compilation containing the various other decisions of the co-ordinate bench and also the decisions of Bangalore and Calcutta Benches of the Tribunal in which the issue is decided in favour of the assessee.

7. 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%.

8. We have heard the parties and perused the material available on record. We notice that Hon'ble Calcutta High Court in the case of Rungamatee Trexim Pvt. Ltd. (supra) has considered a similar issue and held that

*“In Ground Nos.5 and 6 the assessee has objected to the mode of set off adopted by the Assessing Officer in assessing income from short term capital cases. During the year under consideration the assessee earned short term capital gain of Rs.7,29,584/- in transaction in shares where security transaction tax was not paid and income was subject to tax at normal rate. The assessee also earned short term capital gain of Rs.2,27,564/- in transaction in shares where security transaction tax was paid and income was eligible for concessional rate of tax under section 111A.*

*The assensee also suffered short term capital loss of Rs.7.17,660/- in transactions in shares involving payment of security transaction tax. In the impugned order the A.O. computed the capital gain in the following manner without discussing any reasons for adopting such mode of computation.*

*Calculation of income/loss from capital gain*

<i>Short term capital loss with STT</i>	<i>(-) 7,17.660/-</i>
<i>Short term capital gain with STT</i>	<i>2,27,564/-</i>
<i>Net Short Term capital loss with STT</i>	<i>(-) 4,90,096/-</i>
<i>Short term capital gain without STT</i>	<i>7,29,584/-</i>
<i>Net Short term capital gain</i>	<i>2,39,488/-</i>
<i>Less Brokerage</i>	<i>5,914/-</i>
<i>Taxable short term capital gain of normal rate</i>	<i>2,33,574/-</i>
<i>Long term capital gain at 10% rate (as per computation)</i>	<i>1,49,431/-</i>

*I have perused the assessment order and have considered submissions of the A/R. In the impugned order the A.O has not given any reasons for fleet sitting off short term capital gain with STT against short term capital STT and then allow ofset off of remaining loan of Rs.4,90,096/- against short term capital gain without STT. The mode ofset off adopted by the A.O. shown that be accepted in principle that short term capital loss with STT can be legally set off against short term capital gain without STT. According to the assessee, the chronology for the set off by the A.O. was contrary to chronology adopted by the assessee, only because the assessee's mode resulted in concessional rate of the tax being applied to higher amount of short term capital gain which resulted more tax benefit to an assessee.*

*On perusal of the provision of section 70, I find that there is no prohibition nor the Act compels the assessee to first set off short term capital gain with STT against short term capital loss with STT and then allows set off against short term capital gain without STT. In absence of any specific mode of set off provided in the Act and in absence of any prohibition and in absence of any specific chronology for set off prescribed in the Act, the assessee was entitled to exercise his option with regard to the chronology of set off which was most beneficial to the assessee. It is settled proposition of law that when a provision of the Act gives option to the assessee, such option should be exercised which will favour the assessee and not the revenue. The A/R for the assessee was well justified in relying on the decision of the Calcutta High Court and the Circular of the Board dated 7.7.1955 since the principles laid down therein appeared to be fully applicable.”*

*The Commissioner of Income Tax (Appeals) therefore came to the conclusion in favour of the assessee. He further came to the conclusion that the disallowance has been made on presumption.*

*In these circumstances, the order passed by the Commissioner of Income Tax and subsequent thereto, the Commissioner of Income Tax (Appeals) had already considered the case of the department and upheld the order passed by it. We have carefully considered the said question and in our considered opinion, there is no illegality or irregularity in respect of the order so passed by the learned Tribunal. We, accordingly, find that there is no reason to interfere with the order so passed by the learned Tribunal and further the order so passed by the learned Tribunal does not suffer from any illegality or irregularity and we find that no substantial question of law is involved in this appeal. Hence, we dismiss the appeal.”*

9. We further noticed that the co-ordinate bench in the case of J S Capital LLC (supra) has taken a similar view where it has been held that

*"7. Heard both the sides and perused the material on record. During the year under consideration the assessee has claimed STCG on sale of derivatives taxable @ 30% and during the year under consideration the assessee has also claimed STCL taxable @15% and the same was set off against the STCG which was taxable @ 30% as referred above. In addition to the above the assessee has also claimed brought forward STCL taxable @ 15% to set off against the balance STCG earned on sale of derivatives. The AO after referring provisions of section 70(2) arrived at the conclusion that STCG on derivatives taxable at the rate of 30% and STCL taxable at the rate of 15%*

were not falling under the similar computation. Therefore the claim of set off was disallowed. The assessee claimed that mere difference in rate of taxation cannot be taken as the reason for disallowance of set off as both the STCG under the category of similar computation. In this regard, we have perused the various judicial pronouncements referred by the Ld. Counsel as mentioned above. We find that in the decision of GSB Capital Markets Ltd. (supra) the co-ordinate Bench of the Tribunal, Mumbai held that loss arisen from transfer of short term capital assets which are brought forward from earlier years can be set off against the capital gain assessable for subsequent assessment year in respect of any other capital asset which could be either LTCG or STCG. Further, we have perused the decision of ITAT, Mumbai in the case of Legg Mason Asia (Ex Japan) Analyst Fund (supra) wherein it is held that loss arisen on short term capital asset is to be set off against income arising from such assets for same year, irrespective of whether transactions are categorized as off market transactions or on market transactions.

8. We have also gone through the decision of ITAT, Mumbai in the case of VEMF-A, LP (supra) wherein on identical issue and similar fact the ITAT has decided the issue in favour of the assessee. The relevant extract of the decision is reproduced as under:

"7. We have heard the rival submissions and perused the relevant material on record. We begin with the decisions cited before us. In First State Investments (Honkong) Ltd. (supra), the assessee earned STCG on sale of shares in the A.Y. 2005-06. It bifurcated such STCG into two periods de upto 30-9-2004 (in which tax was chargeable @ 30% and transactions were not chargeable to STT) and period post 30-9-2004 (in which case the reduced rate of 10% was applicable on STCG where transactions were chargeable to STT in view of section 115A). As against this, the assessee had also suffered STCL of Rs. 8.14 lacs upto 30-9-2004 and Rs. 169.23 lacs in post 30-9-2004 period. The assessee claimed that STCL in later period be allowed to be set off against STCG of former period to the extent of excess of STCG over STCL upto cut off date re. 30-9-2004. However, revenue authorities held that STCL suffered by the assessee in the period before cut off date should be set off against STCG of that period and remaining amount be taxed @30%. The Tribunal held that (1) in view of provision of section 70(2), the assessee had a choice in taking decision about setting off of STCL from one transaction against any other STCG, whether within or outside the cut off date re 30-9- 2004 and (i) the assessee was justified in setting off STCL of later period against STCG of former period to the extent of excess STCG over STCL upto cut off date de 30-9-2004.

*The above order has been followed by the Co-ordinate Bench in Fidelity Investment Trust Fidelity Overseas Fund (supra) and DWS India Equity Ltd. (supra). The decision in DWS India Equity Ltd. has been followed in Capital International Emerging Markets Fund (supra).*

*In Rungamatee Trexim (P) Ltd. (supra), Hon'ble Calcutta High Court held as under:*

*"On perusal of the provision of section 70, I find that there is no prohibition nor the Act compels the assessee to first set off short term capital gain with STT against short term capital loss with STT and then allows set off against short term capital gain without STT. In absence of any specific mode of set off provided in the Act and in absence of any prohibition and in absence of any specific chronology for set off prescribed in the Act, the assessee was entitled to exercise his option with regard to the chronology of set off which was most beneficial to the assessee. It is settled proposition of law that when a provision of the Act gives option to the assessee, such option should be exercised which will favour the assessee and not the revenue.*

*8. To sum up, under the provisions of section 70(2), STCL arising from any asset can be set off against STCG arising from any other asset under a similar computation made. Merely because the two set of transactions are liable for different rate of tax, it cannot be said that income from these transactions does not arise from similar computation made as computation in both the cases has to be made in similar manner under the same provisions. Therefore, STCL arising from STT paid transactions can be set off against STCG arising from non-STT transactions."*

*9. It is clearly held in the finding of the co-ordinate Bench of the Tribunal as referred above that under the provisions of section 70(2), STCL arising from any asset can be set off against STCG arising from any other asset under a similar computation made irrespective of different rate of tax. Therefore, the issue in appeal in the case of the assessee is squarely covered by the decision of the ITAT as referred above. Therefore following the decision of ITAT (supra), we allow the appeal of the assessee.*

*10. In the result, the appeal of the assessee is allowed."*

10. We also noticed that the similar view has been expressed in various other 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 being similar, 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 the ground raised by the assessee in this regard is allowed.

11. The facts in other assessee's' pertaining to this issue in **ITA.No.4599 / Mum / 2023, ITA.No.4563 / Mum /2023, ITA.No.4565 / Mum/ 2023 and ITA.No.4566 / Mum / 2023** are identical and therefore our decision in **ITA.No.4562/Mum/2023** is mutatis mutandis applicable to these assessee's' case also. According we hold that in **ITA.No.4599 / Mum / 2023, ITA.No.4563 / Mum / 2023, ITA.No.4565 / Mum / 2023 and ITA.No.4566/Mum/2023** also the AO is not correct in denying the set off of current year STCL against the STCG to the assessee and therefore the addition made in these cases are deleted.

### **Set off of brought forward Short Term Capital Loss**

12. While contending the said issue in **ITA.No.4563/Mum/2023**, the ld AR drew our attention to the computation sheet (page 1 of the paper book) to submit that the assessee in the return of income has claimed both brought forward as well as current year short term capital loss but the assessing officer while assessing the income did not consider the brought forward loss and that the DRP has also not considered the objections raised in this regard. The ld AR further submitted that the arguments presented for setting off of current year losses are applicable to brought forward loss also and that the rate of tax at which the STCG is not criteria for brought forward STCL also.

13. We heard the parties and perused the materials on record. We notice that the AO while assessing the income of the assessee in the order passed under section 143(3) of the Act, has considered only the current year STCL and made addition accordingly denying the set off. However it is noticed that the assessee has in the return of income has claimed both brought forward as well as current year STCL against the STCG of the year under consideration. In our considered view, even while considering the brought forward loss the set off of STCL cannot be denied for the reason that the STCG is taxed at different rates. Therefore the principle laid down our decision with regard to setoff of current year STCL should be applicable to brought forward STCL also. Accordingly we direct the AO to consider the brought forward loss claimed by the assessee and allow the setoff as per the directions given in this order.

14. From the issues contended by the assessees as tabulated in the earlier part of this order it is clear similar issue is contended by the assessee in **ITA.No.4566/Mum/2023** and therefore, the above decision with regard to bought forward STCL is mutatis mutandis applicable to the said assessee in **ITA.No.4566/Mum/2023** also. It is ordered accordingly.

15. In view of our decision with regard to setting off of current year as well as brought forward STCL against the STCG, the grounds raised by the assessees with regard to carry forward of the STCL not allowed to be set off has become academic and does not warrant any adjudication.

### **Arithmetic errors in the computation sheet**

16. The ld. AR submitted that there are certain arithmetical errors in the computation sheet and that the assessee has filed a petition under section 154 of the Act requesting for rectification of the errors before the AO. The ld. AR drew our attention to the petition filed under section 154 before the AO which is part of Paper Book. The ld. AR prayed for direction to dispose of the petition rectifying the mistakes apparent on record.

17. After hearing the ld. DR we direct the AO to consider the petition seeking rectification filed under section 154 of the Act by the assessee and dispose of the same in accordance with law. The AO is further directed to give an opportunity of being heard to the assessee.

18. From the issues contended by the assessees as tabulated in the earlier part of this order it is clear that this issue is common across all assessees in **ITA.No.4563 / Mum /2023, ITA.No.4565 / Mum/ 2023 and ITA.No.4566 / Mum / 2023.** Therefore we direct the AO in all these assessees' case also to consider the petition seeking rectification filed under section 154 of the Act by the assessees and dispose of the same in accordance with law. It is ordered accordingly.

### **Levy of interest under section 234A**

19. In **ITA No. 4563/Mum/2023** the assessee has raised ground contending the issue of levy of interest under section 234A. In this regard the ld. AR submitted that there is no delay in filing the return of income in this case which is evident

from the intimation under section 143(1) (page 24 of PB) where the extended due date has been mentioned as 31.12.2021 and that the AO in the final order of assessment has stated that the original return of income has been filed by the assessee on 27.12.2021. Therefore, the ld. AR submitted that the AO is not correct in levying the interest under section 234A of the Act.

20. We have heard the ld. DR. From the perusal of the above facts and the material on record we see merit in the contention that there no delay in filing the return of income. We therefore, direct the AO to examine the evidences / materials on record and give relief to the assessee in accordance with law.

21. This issue is contended by the assessee in **ITA No. 4599/Mum/2023** also and we direct the AO to examine whether there has been a delay in filing the return based on evidences and materials on record and decide on the levy of interest under section 234A in accordance with law. Needless to say that the assessee be given an opportunity of being heard. It is ordered accordingly.

**Levy of interest under section 234B and 234C & Initiation of penalty proceedings under section 270A of the Act**

22. The grounds raised by these assesseees on the issue of levy of interest under section 234B and 234C & initiation of penalty proceedings are consequential/premature and hence they do not warrants separate adjudication.

23. In **ITA.No.4565/Mum/2023** a ground is raised with regard to refund determined to be payable to the assessee. In this regard we issue direction to the AO accordingly.

24. In the result, the appeals of the assesseees in **ITA.No.4599/Mum/2023, ITA.No.4562/Mum/2023, ITA.No.4563/Mum/2023, ITA.No.4565/Mum/2023 and ITA.No.4566/Mum/2023** are partly allowed.

*Order pronounced in the open court on 29-05-2024.*

**Sd/-**  
**(KAVITHA RAJAGOPAL)**  
**Judicial 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

**Sd/-**  
**(PADMAVATHY S)**  
**Accountant Member**

BY ORDER,

(Dy./Asstt. Registrar)  
**ITAT, Mumbai**