



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

BEFORE SHRI PRASHANT MAHARISHI, AM  
AND  
SHRISANDEEP SINGH KARHAIL, JM

ITA No. 4589/MUL/2023

A.Y.2021 – 22

Emerging Markets Index  
Non-Lendable Fund  
C/O Ernst & young LLP  
17<sup>th</sup> floor  
The Ruby  
29, Senapati Bapat Marg  
Dadar (West)  
Mumbai – 28  
(Appellant)  
PAN  
Assessee by  
Revenue by

The Deputy Commissioner of  
income tax (International  
taxation) – circle –2 (2) (1)  
Vs. 1722, 17<sup>th</sup> floor,  
Air India building,  
Nariman point,  
Mumbai – 21

(Respondent)  
AAAAE3262D  
Shri Anish Thacker & Pranay  
Gandhi

Shri Anil Sant additional  
Commissioner of income tax

Date of hearing  
Date of pronouncement

7 May 2024  
5 August 2024

ORDER

PER PRASHANT MAHARISHI, AM:

1. This appeal is filed by Emerging Markets Index NonlendableFund (the appellant) for assessment year 2021 – 22 against the assessment order passed by The Deputy Commissioner Of Income Tax, International Taxation, Circle – 2 (2) (1), Mumbai (the learned AO) dated 15/10/2023 wherein the return of income filed by the assessee on 27/12/2021 at a total income of Rs. 923,071,640/- was assessed at Rs. 992,154,207/-, passed in pursuance of direction of The Dispute Resolution Panel – 1, Mumbai (the learned DRP) dated 12/9/2023.



2. Assessee is aggrieved and has raised 12 grounds of appeal including ground number 2 and 3 challenging the validity of the assessment order holding it to be time barred as well as invalid. Ground number 1 is general in nature, ground number 9 is against the levy of interest under section 234A, ground number 10 against the levy of interest under section 234B and ground number 11 on levy of interest under section 234C of the act. Ground number 12 is against initiation of penalty proceedings under section 270A of the act. Ground number one is general , ground number 2 and 3 not pressed, ground number 9 – 11 are consequential and ground number 12 is premature hence dismissed.
3. This leaves us with the ground number 4 – 8 of the appeal. The brief fact of the case shows that appellant is a fund organized as an Association of person in the United States of America and is registered with the Securities And Board Of India [SEBI] as a foreign portfolio investor [FPI] . The assessee filed his return of income on 27/12/2021 declaring income of Rs. 921,371,640/-. This return of income was picked up for scrutiny. Several notices were issued, and consequently draft order of assessment was passed on 19/12/2022 against which the assessee filed an objection before the learned dispute resolution panel who passed a direction on 12/9/2023 which resulted into the assessment order dated 15/10/2023.
4. The brief controversy involved in this appeal is that for the assessment year the assessee has earned a short-term capital gain amounting to Rs. 3 and 75,16,809. Bifurcations of the above sum was as under: –

SERIAL NUMBER	PARTICULARS	AMOUNT
1	Short-term capital gains (which is not subject to securities transaction tax and taxable as per section 115AD of the act at the rate of 30%	7,07,82,605

2	Less: - short-term capital loss which is subject to securities transaction tax	(8,53,41,255)
3	Net short-term capital loss which is subject to security transaction tax	(1,45,58,650)
4	And short-term capital gains (subject to security transaction tax and taxable as per section 115AD read with section 111A of the act at the rate of 15%	5,20,75,459
5	Net short-term capital gain subject to security transaction tax and taxable as per section 115AD read with section 111A of the act at the rate of 15%	Three 75,16,809
6	Less brought forward short-term capital loss	3,75,16,809
7	Total short-term capital gains chargeable to tax	Nil

5. Therefore, from the above it is apparent that the assessee has set off short-term capital loss(ST to paid) first against short-term capital gain(non-securities transaction tax). The balance is set off against short-term capital gain (STT paid). The balance short-term capital loss, STT paid) is not sufficient to entirely cover the short-term capital gain (non-STT, then the gains are set of against the available brought forward short-term capital loss. The learned assessing officer and the learned dispute resolution panel did not accept the computation of the assessee for the reason that according to them the short-term capital gain of Rs. 52,075,459/- is chargeable to tax at the rate of 15% and short-term capital gain of Rs. 70,782,605/- is chargeable to tax at the rate of 30%. The current year's short-term capital loss of Rs. 85,341,255 is also chargeable to tax at the rate of 15 percent. Therefore, according to the learned assessing officer, the non-taxable short-term capital loss of Rs. 33,265,796 and short-term capital gain of Rs. 7,07,82,605 cannot be set off

against each other. Therefore, the treatment given by the learned assessing officer was that short-term capital loss on which security transaction tax is paid is required to be first set off against the short-term capital gain on which securities transaction tax is paid. If still short-term capital loss on which security transaction tax remains, it is carried forward and not set off against the short-term capital gain on which securities transaction tax is not paid. Thus, short-term capital gain on which security transaction tax is not paid is taxed at the rate of 30%. The brought forward of short-term capital loss on which STT is paid is allowed to be carried forward.

6. The learned assessing officer computed short-term capital gain of the assessee as under:-

Serial number	particulars	Taxed at the rate of 15%	Taxed at the rate of 30%
1	Short-term capital gain	5,20,75,459	7,07,82,605
2	Short-term capital losses other than those covered under section 111 A of the act	Nil	Nil
3	Less current year's short-term capital losses	8,53,41,255	Nil
4	Net taxable short-term capital gain/loss	3,32,65,796	7,07,82,605

7. The learned authorized representative referred to the provisions of section 70 of the income tax act and submitted that that this section does not specify the manner and hair RK of set-off of short-term capital loss against short-term capital gain where the gains are subjected to a differential tax rate. Consequently, in the absence of a specific stipulation in the act, the assessee while computing the net



short-term capital gain taxable under the act has first set of the total short-term capital loss whether subject to STT or not against short-term capital gain taxable at the rate of 30% and the balance has been set off against short-term capital gain taxable at the rate of 15%. He further submitted that that the reference of similar computation under section 70 (2) only nods computation of capital gain as per the provisions of section 48 – 55 of the act without any reference to the provisions of the act relating to tax rate applicable to taxation of such gains. He relied upon the decision of the coordinate bench in 33 SOT 26, 2862/M/2022, 160 taxmann.com 686. Thus, he submitted that in absence of specific stipulations for set-off, the assessee has the choice to choose the set of approach which is beneficial to it. He further submitted that the differential rate of tax applicable to taxation of gains arising from the transfer of short-term capital asset during a particular year does not in any manner to the assessee claim set-off of short-term capital loss against the short-term capital gain subject to tax at normal rates and against the short-term capital gain subject to tax under section 111A of the act. Thus in computing the tax liability the short-term capital loss may be first set of against short-term capital gain taxable at the rate of 30% and the balance be set off against short-term capital gain taxable at the rate of 15%. Once again he submitted that in absence of any provisions to the contrary in the act, the assessee may adopt the basis that is most beneficial to it, even if such a basis has the effect of reducing the overall tax liability. He placed reliance on the decision of the honourable Kolkata High Court in ITA number 812 of the eight dated 19 December 2008, decision of special bench in 100 ITD 217. He further referred to several judicial precedents. He further stated and has drawn our reference towards the intimation under section 143 (1) of the act dated 22 September 2022 wherein the set off of brought forward short-term capital loss from earlier years against the current short-term capital gain has been allowed. Thus, it was submitted that the assessee must be permitted to 1<sup>st</sup> set of its short-



term capital loss against the short-term capital gains earned on the transaction of sale of shares which are not subjected to securities transaction tax and the balance short-term capital gain earned on the transaction of sale of shares subject to securities transaction tax. The learned authorized representative further referred to paper book containing 45 pages and also brief synopsis of submission along with a legal purpose book containing 19 judicial precedents of 142 pages.

8. The learned departmental representative vehemently supported the orders of the learned lower authorities. He submitted that assessee has earned short-term capital gain on which it has not paid security transaction tax and therefore same is chargeable to tax under section 115AD of the act at the rate of 30%. Such gain is 7,07,82,605/-. Assessee has short-term capital loss on which assessee has paid the securities transaction tax therefore such loss is in the category of 15% tax rate. Thus, assessee is avoiding tax liability at the rate of 30% by setting of the short-term capital loss which was subject to charge at the rate of 15%. He submitted that this is not the intention of the law and further not the spirit and letter. Accordingly, it was submitted that the orders of the learned lower authorities deserve to be confirmed.
9. We have carefully considered the rival contentions and perused the orders of the learned assessing officer, direction of the learned dispute resolution panel. The facts are tabulated already in above-mentioned paragraphs wherein the rival contentions are tabulated. The short controversy here is with respect to set off of losses from one source against income from another source under the same head of income. Provisions of section 70 (2) deals with the situation wherein there is a loss in respect of any short-term capital asset, the assessee is allowed to have the amount of such loss set off against the income, as arrived at under a similar computation made for the assessment year in respect of any other capital asset. Assessee has earned short-term capital gain on which no securities transactions



tax is paid and therefore according to the provisions of section 115AD tax is payable at the rate of 30% according to 115AD (1) (ii) of the act. The assessee has also incurred short-term capital loss on which securities transaction tax is paid and according to section 111A capital gain would have been chargeable to tax at the rate of 15%. In such category assessee has incurred loss which is higher than the short-term capital gain which is chargeable to tax at the rate of 30%. Therefore, the assessee reduced short-term capital gain which is chargeable to tax at the rate of 30% by short-term capital loss which is subject to taxation at the rate of 15%. Thus, the net result was further loss. And this loss was once again set off against short-term capital gain chargeable to tax at the rate of 15%. Thus, in nutshell, assessee is not paying tax on short-term capital gain at the rate of 30% but reducing the same by a short-term capital loss which otherwise would have been chargeable to tax at the rate of 15%. Section 70 (2) qualifies that that computation has to be made under the provisions of section 48 – 55 in respect of a short-term capital asset. If it results into a loss, such loss can be set off against capital gain of any other short-term capital asset, if the gain is also computed under section 48 – 55 of the Act. There is no restriction of set-off of capital losses and capital gain if both are taxed at a different rate. The word 'similar computation' is with respect to the mode of computation as prescribed under section 48 to section 55 of the act. Sections covered in this bracket are not concerned or prescribing any rate of tax on capital gain. This issue is squarely covered in favour of the assessee by the decision of the coordinate benches in (1) JS Capital LLC v ACIT (International Taxation)[2024] 160 taxmann.com 286 (Mumbai - Trib.) and (2) iShares MSCI EM UCITS ETF V Deputy Commissioner of Income-tax (International Taxation)[2024] 164 taxmann.com 56 (Mumbai - Trib.). further, situation may arise that where the assessee has incurred a short-term capital loss which is otherwise as again would have been chargeable at the tax rate of 30% and also has a short-term capital



gain chargeable to tax at the rate of 15%, assessee at his option can claim set off of such short-term capital loss or may also carry forwarded. This is because of the reason that the provisions of section 70 (2) give an entitlement to the assessee, thus it is an option.

10. In view of above facts and discussion, following the binding judicial precedents, we direct the learned assessing officer to allow set off of short-term capital loss of Rs. 85,341,255 against the short term capital gain of Rs. 70,782,605/- though those gains are chargeable to tax at different rates in terms of provisions of section 70 (2) of the act with respect to set off of losses from one source against income from another source under the same head of income. Accordingly ground number 4 – 8 are allowed.
11. In the result appeal of the assessee is partly allowed.

Order pronounced in the open court on 05/08/2024.

Sd/-

(SANDEEP SINGH KARHAIL)  
(JUDICIAL MEMBER)

Sd/-

(PRASHANT MAHARISHI)  
(ACCOUNTANT MEMBER)

Mumbai, Dated: 05/08/2024

*Dragon*

Copy of the Order forwarded to :

The Appellant, The Respondent, The CIT, The DR ITAT & Guard File

BY ORDER,

Sr. Private Secretary/ Asst. Registrar  
Income Tax Appellate Tribunal, Mumbai