

| आयकर अपीलीय अधिकरण न्यायपीठ, मुंबई |  
IN THE INCOME TAX APPELLATE TRIBUNAL  
"I" BENCH, MUMBAI

BEFORE SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER  
&  
MS. KAVITHA RAJAGOPAL, HON'BLE JUDICIAL MEMBER

**I.T.A. No. 4656/Mum/2023**  
**Assessment Years: 2021-22**

<b>Vanguard Total International Stock Index Fund</b> C/o Erst & Young LLP 14 <sup>th</sup> Floor, The Ruby 29, Senapati Bapat Marg Dadar (West) Mumbai - 400028 <b>[PAN: AADPG5298D]</b>	Vs	<b>Assistant Commissioner of Income tax (International Tax) - 4(3)(1)</b>
<b>अपीलार्थी/ (Appellant)</b>		<b>प्रत्यर्थी/ (Respondent)</b>
Assessee by :	Shri Anish Thacker & Shri Pranay Gandhi, A/Rs	
Revenue by :	Shri Krishna Kumar, Sr. D/R	

सुनवाई की तारीख/Date of Hearing : 11/12/2024  
घोषणा की तारीख /Date of Pronouncement: 13/12/2024

**आदेश/ORDER**

**PER NARENDRA KUMAR BILLAIYA, AM:**

This appeal by the assessee is preferred against the order dated 30/10/2023 framed u/s 144C(13) r.w.s. 143(3) of the Act, pertaining to AY 2021-22.

2. The grievance of the assessee reads as under:-

*“Based on the facts and circumstances of the case and in law, the Appellant craves leave to prefer an appeal against the order dated 30 October 2023, issued by the Assistant Commissioner of Income-tax (international Tax) - 4(3)(1), Mumbai [hereinafter referred to as 'the learned ACIT'], under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (Act), in pursuance of the directions under section 144C(5) of the Act issued by the Hon'ble Dispute Resolution Panel - II, Mumbai (DRP-II) dated 22 September 2023 on the following grounds, each of which is without prejudice to and independent of the others:*

*Ground of Appeal No. 1: Assessment proceedings completed by the learned ACIT based on a notice issued under section 143(2) of the Act, by the Assistant Commissioner of Income-Tax/ Deputy Commissioner of Income-Tax (International Taxation) - 1(1)(1), Delhi (i.e., non-jurisdictional officer) is invalid and liable to be quashed.*

1. The learned ACIT erred in completing the assessment proceedings without issue of notice under section 143(2) of the Act as the notice to initiate the impugned proceedings was issued by the Assistant Commissioner of Income-Tax/ Deputy Commissioner of Income-Tax (International Taxation) - 1(1)(1), Delhi and consequently the impugned order passed by the learned ACIT is without jurisdiction, bad in law and liable to be quashed.

Ground of Appeal No. 2 - 3: The Deputy Commissioner of Income-tax (international Tax) - 4(1)(1) [hereinafter referred to as 'the learned DCIT'"] erred in issuing an order under section 143(3) read with section 144C(3) of the Act and withdrawing the same.

2. The learned DCIT erred in passing an order under section 143(3) read with section 144C(3) of the Act, dated 20 February 2023 (received on 24 February 2023), notwithstanding that the Appellant had filed objections to the draft order dated 28 December 2022, on 25 January 2023, which was within the time limit specified in section 144C(2) of the Act.

3. The learned DCIT erred in withdrawing the order under section 143(3) read with section 144C(3) of the Act, dated 20 February 2023, in the absence of any provisions in the Act permitting the same.

Ground of Appeal No. 4: The learned ACIT erred issuing an order under section 143(3) read with section 144C(13) of the Act thus vitiating the principles of section 144C of the Act.

The learned ACIT erred in issuing an order dated 30 October 2023, under section 143(3) read with section 144C(13) of the Act, considering that an order under section 143(3) read with section 144C(3) of the Act was already issued by the DCIT and thus vitiating the principles of section 144C of the Act.

Ground of Appeal No. 5: The learned ACIT erred in rejecting the manner in which the Appellant set off its short-term capital losses, and in raising a demand of IN 24,004,036.

5. The learned ACIT erred in not allowing the manner of set-off of short-term capital losses as adopted by the Appellant, i.e., set-off of short-term capital loss (incurred during the year and brought forward from earlier years), in respect of sale of shares subjected to securities transaction tax (STT) first against short-term capital gains earned on the sale of shares not subject to STT, and thereby taxing the gross short-term capital gains in respect of the sale of shares not chargeable to STT, earned by the Appellant.

6. The learned ACIT failed to appreciate that income under the head 'Capital gains' is determined as per sections 45 to 55A of the Act whilst sections 111A and 115AD only provide for determination of tax in certain cases and therefore, gains arising on transactions subjected to STT and those not subjected to STT are no different and satisfy the 'similar computation' condition specified in section 70(2) of the Act.

7. The learned ACIT failed to appreciate that section 70 of the Act does not provide any hierarchy for set-off of losses, the short-term capital loss arising from sale of shares subjected to STT can be first set-off against the short-term capital gains arising from sale of securities not subjected to STT instead of short-term capital gains arising from sale of shares subjected to STT.

8. The learned ACIT erred in not following the binding decisions of the jurisdictional Tribunal and rejecting the set-off merely because the Department has preferred an

*appeal before the jurisdictional High Court against one of the orders of the jurisdictional Tribunal.*

*9. Thus, the learned ACIT erred in raising a demand of IN 24,004,036.*

*Ground of Appeal No. 6: Errors in computation sheet appended with order.*

*10. On account of the rejection of the manner of set-off of the losses as adopted by the Appellant, the learned ACIT erred in levying surcharge amounting to INR 345,801,182 instead of INR 329,100,807 as computed by the Appellant, and health & education cess of INR 105,979,249 instead of INR 100,857,800 as computed by the Appellant.*

*11. The learned ACIT erred in levying interest under section 234A of the Act amounting to INR 1,753,104 without appreciating that there was no delay in filing the return of income and payment of taxes by the Appellant.*

*Ground of Appeal No. 7: Initiating penalty proceedings under section 270A of the Act.*

*12. The learned ACIT erred in initiating penalty under section 274 read with section 270A of the Act, alleging under reporting of income by the Appellant.*

*The Appellant craves leave to add, alter, vary, omit, substitute or amend any or all of the above grounds of appeal, at any time before or at, the time of the appeal, so as to enable the Hon ble Income-tax Appellate Tribunal to decide this appeal according to law."*

3. At the very outset, the ld. Counsel for the assessee argued the appeal on the issues raised vide Ground No. 5.

4. Representatives of both the sides were heard at length. Case records carefully perused and the relevant documentary evidence brought on record duly considered.

5. During the year under consideration, the assessee earned short term capital gain, interest on IT refund, dividend return from Indian companies and interest from REIT/INVIT Units. The assessee filed its return of income on 12/03/2022 declaring total income at Rs.11,40,04,39,930/-. The assessee is a trust organized in U.S.A. and is registered with the Securities & Exchange Board of India (SEBI) as a Foreign Portfolio Investor. The entire quarrel revolves around the following short term capital gains/losses:-

<i>STCG(non STT)</i>	<i>742,238,907</i>
<i>STCL(current STT)</i>	<i>(616,271,201)</i>
<i>STCL(bf) STT</i>	<i>(223,701,502)</i>
<i>Balance STCL(STT)</i>	<i>(9,77,33,796)</i>
<i>STCG(STT)</i>	<i>174,64,01,537</i>
<b><i>Net STCG(STT)</i></b>	<b><i>164,86,67,741</i></b>

5.1. The underlying facts show that the assessee had short term capital gains on STT paid shares, short term capital loss on STT paid shares and also short term capital gains on non-STT paid shares and short term capital losses on non-STT paid shares.

6. From the chart exhibited hereinabove, it can be seen that the assessee has first set off STT losses against non-STT gains within the remaining STT losses is set off against the STT gains. By this the assessee has exhausted all the losses (current and brought-forward) both the STT paid and non-STT paid against short term capital gains (non STT) to arrive at net short term capital gains (non STT) at Rs.8,79,11,797/- and the short term capital gain (STT paid) was kept without any set off at the same figure of Rs.6,35,68,115/-.

6.1. This can be further understood from the statement showing computation of total taxable income and tax liability which is as under:-

<b>NAME : VANGUARD TOTAL INTERNATIONAL STOCK INDEX FUND</b>		<b>PREVIOUS YEAR : 2020-21</b>
		<b>ASSESSMENT YEAR : 2021-22</b>
		<b>PAN : AABTV0442N</b>
		<b>STATUS : NON-RESIDENT TRUST</b>
<b>ADDRESS : C/O ERNST AND YOUNG LLP 14TH FLOOR, THE RUBY, 29 SENAPATI BAPAT MARG DADAR (WEST) MUMBAI - 400028</b>		
<b>STATEMENT SHOWING COMPUTATION OF TOTAL TAXABLE INCOME AND TAX LIABILITY</b>		
<b>Particulars</b>	<b>Amount INR</b>	<b>Amount INR</b>
Short-term capital loss brought forward		(223,701,502)
Long-term capital loss brought forward		(17,481,946,189)
<b>Income under the head Capital Gains</b>		
Short-term capital gains u/s 111A of the Income-tax Act, 1961 (The Act)	1,746,401,537	
Add: Short-term capital gains (others)	742,238,907	2,488,640,444
Less: Short-term capital loss (current year)		(616,271,201)
Net Short-term Capital Gains for the year		1,872,369,243
Less: Brought forward short-term capital loss		(223,701,502)
<b>Total short-term capital gains chargeable to tax</b>		<b>1,648,667,741</b>
Long-term capital gains (current year) taxable u/s 112 of the Act	0	
Less: Long-term capital loss (current year) taxable u/s 112 of the Act	(1,172)	(1,172)
Net LTCG/ LTCL for the year taxable u/s 112 of the Act		(1,172)
Long-term capital gains (current year) taxable u/s 112A of the Act	48,984,611,636	
Less: Long-term capital loss (current year) taxable u/s 112A of the Act	(43,512,394,502)	5,472,217,134
Net Long-term Capital Gains/(Loss) for the year taxable u/s 112A of the Act		5,472,217,134
Total Long-term Capital Gains/(Loss) for the year		(A + B) 5,472,215,962
Less: Brought forward long-term capital loss		(5,472,215,962)
<b>Total long-term capital gains chargeable to tax</b>		<b>0</b>
Balance short-term capital loss carried forward		0
Balance long-term capital loss carried forward		(12,009,730,227)
<b>Income from other sources</b>		
Dividend from Indian companies	9,712,761,358	
Interest under section 244A of the Act	2,164,905	
Interest from REIT/ INVIT Units	36,845,924	9,751,772,187
<b>Total taxable income</b>		<b>11,400,439,928</b>
<b>Rounded off under section 288A of the Act</b>		
		<b>11,400,439,930</b>
<b>Income-tax payable -</b>		
On short-term capital gains	15.0%	247,300,161
On interest under section 244A of the Act	30%	649,472
On dividend from Indian companies	20%	1,942,552,272
On interest from REIT/ INVIT Units	5%	1,842,296
<b>Add:</b>	Surcharge on capital gains @ 15%	37,095,024
	Surcharge on dividend income @ 15%	291,382,841
	Surcharge on other income received @ 25%	622,942
<b>Tax payable including surcharge</b>		<b>2,521,445,008</b>
<b>Add:</b>	Health and education cess @ 4%	100,857,800
<b>Tax payable including surcharge and health and education cess</b>		<b>2,622,302,808</b>
<b>Add:</b>	Interest under section 234A of the Act Interest under section 234B of the Act Interest under section 234C of the Act	337,077
<b>Total tax, surcharge, education cess and interest payable</b>		<b>2,622,639,885</b>
<b>Less:</b>	<b>Taxes paid/ deducted at source</b>	
	Tax deducted at source	(2,471,483,476)
	Advance tax paid	(262,063,137)
	Self assessment tax paid	
<b>Balance tax refundable</b>		<b>(110,906,728)</b>
<b>Balance tax refundable (rounded off)</b>		<b>(110,906,730)</b>

7. To justify its action, the assessee took a stand before the AO that Section 70 of the Act, provides for bifurcation of capital losses into short-term capital loss and long-term capital loss. Long-term capital losses are

permitted to be set off only against long term capital gains whereas long term capital losses are permitted to be set off against any capital gains.

7.1. It was further explained that the Act does not specify the manner and hierarchy of set off of short term capital losses against short term capital gains where the gains are subjected to different tax rates.

7.2. This contention of the assessee did not find any favour with the AO, who was of the firm belief that Section 115AD of the Act provides taxation @ 30% on short term capital gains where STT is not paid and Section 111A provides taxation @15% on short term capital gains where STT is paid. The AO further observed that nowhere in the Act there is a mention about the nature of adjustment of such STT paid and non-STT paid losses. The AO was further of the firm belief that if the Act has created a special category such as u/s 111A of the Act, where short term capital gain will be taxable @ 15% then, it inherently means that 15% loss will be used to set off 15% gains. The AO accordingly recomputed the short term capital gains as under:-

STCG(STT)	174,64,01,537	
STCL(current STT)	(61,62,71201)	
STCL(bf) STT	(22,37,01,502)	
Net STCG(STT)	90,64,28,834	Taxable @ 15%
Net STCG(non STT)	74,22,38,907	Taxable @ 30%

8. Objections raised before the Id. DRP were dismissed.

9. We have given a thoughtful consideration to the orders of the authorities below. It is true that different rates of taxes have been provided u/s 115AD and 111A of the Act in respect of gains on non-STT paid shares and STT paid shares but it is also a fact that u/s 70 of the Act, no chronology has been mentioned in respect of set off of losses

nor there is any provision in the Act that losses of non-STT paid shares cannot be set off against the gains on STT paid shares. The decision of the Hon'ble High Court of Calcutta, is on this issue in *ITA No. 812 of 2008; judgment dated 19/12/2008*, wherein the Hon'ble High Court held as under:-

*"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 assessee 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><u>2,27,564/-</u></i>
<i>Net Short Term capital loss with STT</i>	<i>(-) 4,90,096/-</i>
<i>Short term capital gain without STT</i>	<i><u>7,29,584/-</u></i>
<i>Net Short term capital gain</i>	<i>2,39,488/-</i>
<i>Less Brokerage</i>	<i><u>5,914/-</u></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 first setting off short term capital gain with STT against short term capital STT and then allow offset of remaining loss of Rs.4,90,096/- against short term capital gain without STT. The mode of set 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.*

10. This view has been followed by the Co-ordinate Benches in *JS Capital LLC in ITA No. 3396/Mum/2023, East Bridge capital Master Fund I Ltd. in ITA No. 2976/Mum/2023, DWS India Equity Fund in ITA No. 5055/Mum/2010, M/s. T. Rowe Price International Discovery Fund in ITA No. 7627/Mum/2011.*

11. Considering the facts of the case in totality, in light of the decisions of the Hon'ble Calcutta High Court (*supra*), we do not find any merits in the computation done by the AO. We accordingly direct the AO to accept the computation of the assessee. Ground No. 5 is allowed.

12. Ground Nos. 1 to 4 become academic in nature and hence not adjudicated.

13. Ground No. 6 relates to the error in computing the levy of surcharge. We direct the AO to look into the error and levy surcharge as per the provisions of law and further if the return of income is filed

within extended period of limitation, considering the Covid period, levy interest u/s 234A of the Act as per the provisions of law and if found that the return has been filed within the extended period then no interest is leviable.

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

**Order pronounced in the Court on 13<sup>th</sup> December, 2024 at Mumbai.**

*Sd/-*  
(KAVITHA RAJAGOPAL)  
JUDICIAL MEMBER

*Sd/-*  
(NARENDRA KUMAR BILLAIYA)  
ACCOUNTANT MEMBER

Mumbai, Dated 13/12/2024

*SC Sp/2*

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

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

आदेशानुसार/ BY ORDER,  
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Assistant Registrar  
आयकर अपीलीय अधिकरण  
ITAT, Mumbai