

IN THE INCOME TAX APPELLATE TRIBUNAL

"I" BENCH, MUMBAI

BEFORE MS. PADMAVATHY S, ACCOUNTANT MEMBER

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.1219/MUM/2025

(Assessment Year :2022-2023)

**Eastspring Investments India Equity
Open Ltd.,**

3rd Floor, 355 NEX Rue du Savoir,
Cybercity Ebene, Mauritius
PAN – AADCP4503H

..... Appellant

v/s

DCIT (IT) – 2(2)(1),

Room No.606, 6th Floor,
Kautilya Bhavan, C-41 to C-43,
G-Block, Bandra Kurla Complex,
Bandra (East), Mumbai
Maharashtra - 400051

..... Respondent

Assessee by : Shri Ketan Ved
Ms. Riya Shah

Revenue by : Shri Satya Pal Kumar, CIT(DR)

Date of Hearing – 05/05/2025

Date of Order – 09/05/2025

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The assessee has filed the present appeal against the final assessment order dated 27.12.2024, passed under section 143(3) r.w. section 144C(3) of the Income Tax Act, 1961 (*"the Act"*), pursuant to the directions dated 30.11.2024 issued by the learned Dispute Resolution Penal-1, Mumbai, (*"learned DRP"*) under section 144C(5) of the Act, for the assessment year 2022-23.

2. In this appeal, the assessee has raised the following grounds: –

"Re.: Disallowance of set-off of brought forward short-term capital losses incurred on equity transactions that were subjected to Securities Transaction Tax (STT) against short term capital gains on sale of right forms not subject to STT"

1.1. The learned DCIT, under the directions of the Hon'ble DRP, has erred in not allowing the set-off of brought forward short-term capital loss incurred on equity transaction (taxable at 15%) which are subjected to STT against short term capital gains income in the year under consideration on sale of right form (taxable at 30%) which are not subjected to STT of Rs. 3,16,31,410/-.

1.2. The learned DCIT erred in rejecting the manner of set-off of short-term capital losses as adopted by the Appellant, (i.e., set-off of brought forward short-term capital losses of earlier years from sale of equity shares subjected to STT, first against short-term capital gains earned on the sale of right form not subject to STT for the year under consideration and then the balance losses against the short-term capital gains earned on sale of equity shares subjected to STT for the year under consideration and thereby offering net short-term capital gains subjected to STT for the year under consideration), and thereby taxing the gross short-term capital gains in respect of the sale of right form not chargeable to STT for the year under consideration, earned by the Appellant.

1.3. The learned DCIT failed to appreciate that income under the head 'Capital gains' is determined as per sections 45 to 55A of the Income-tax Act, 1961 ('the Act') whilst sections 111A and 115AD of the Act 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.

1.4. The learned DCIT 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.

1.5. The Appellant submits that the learned DCIT be directed to allow the set-off of brought forward short-term capital loss incurred on equity transaction (taxable at 15%) against short term capital gains income on sale of right form (taxable at 30%) of Rs. 3,16,31,410/-.

Re.: Lower amount of brought forward losses allowed as set-off than that claimed in the return of income:

2.1. The learned DCIT erred in granting the set-off of brought forward losses short by Rs. 13,30,56,789/- (i.e. Rs. 87,19,81,434/- allowed as against claimed of Rs. 1,00,50,38,223/-) than that claimed in the return of income while computing total income for the year under consideration.

2.2. The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject it is entitled to full set-off of brought forward losses of Rs. 1,00,50,38,223/- from its income as claimed by it in the return of income.

2.3. The Appellant submits that the learned DCIT be directed to grant full set-off of brought forward losses and to re-compute its tax liability accordingly.

3. Re.: Erroneous computation of the total income in the order and computation sheet appended with the order

3.1. The learned DCIT, has erred in computing the total income of the assessee at Rs. 14,84,76,27,580/- in the order and at Rs. 14,98,06,84,372/- in the computation sheet annexed with the order as against the total income of Rs. 13,09,50,27,488/- computed in the return of income.

3.2. The learned DCIT has erred in taxing the short-term capital gains of Rs. 1,72,09,68,685/- (taxable at 15%) as 'Income from Other Sources', despite this being classified as capital gains in the directions issued by DRP given that the appellant is a Foreign Portfolio Investor (FPI) and without appreciating the fact that the same has already been taxed under the head 'Capital Gains' in the return of income.

3.3. The learned DCIT has erred in taxing short term capital gains (taxable at 30%) of Rs. 3,16,31,410/- as 'Income from Other Sources', despite this being classified as capital gains in the directions issued by DRP given that the appellant is an FPI and without appreciating the fact that the same has already been taxed under the head 'Capital Gains' in the return of income.

3.4. The Appellant submits that considering the facts and circumstances of its case, the learned DCIT has failed to appreciate that altering the order of setting off losses would not impact the total income of the assessee.

3.5. The Appellant submits that the learned DCIT be directed to delete the erroneous addition to the total income of the appellant.

4. Re.: Erroneous computation of tax on erroneous addition in income from other sources

4.1. The learned DCIT has erred in computing tax on the erroneous addition of Rs. 1,75,26,00,095/- (Rs. 1,72,09,68,685/- plus Rs. 3,16,31,410/-) in income from other sources at the base tax rate of 40% plus surcharge and cess without any justification in the final assessment order.

4.2. On account of the rejection of the manner of set-off of the losses as adopted by the Appellant and duplication of income, the learned DCIT erred in computing the basic tax liability amounting to Rs.

2,12,07,96,016/- instead of Rs. 1,399,797,460/- as computed by the Appellant in the return of income.

4.3. The learned DCIT erred in levying surcharge amounting to Rs. 10,60,39,801/- instead of Rs. 6,99,89,873/- as computed by the Appellant, and health & education cess of Rs. 8,90,73,433/- instead of Rs. 5,87,91,493/- as computed by the Appellant in the return of income.

4.4. The learned DCIT has erred in levying interest of Rs. 22,57,29,711/- u/s. 234B of the Act on the Appellant.

4.5. The learned DCIT has erred in levying total interest and fee payable of Rs. 23,50,96,405/- without giving any bifurcation of Rs. 93,66,694/- (23,50,96,405 less 22,57,29,711) as to under which section of the Act does the said amount of Rs. 93,66,694/- falls into.

4.6. The Appellant submits that the learned DCIT be directed to re-compute the total income and tax liability.

5. Re: Initiating penalty proceedings under section 270A of the Act.

5.1. The learned DCIT erred in initiating penalty under section 274 read with section 270A of the Act, alleging under reporting of income by the Appellant."

3. The brief facts of the case are that the assessee is a Foreign Portfolio Investor in India and is registered with the Securities and Exchange Board of India. For the year under consideration, the assessee filed its return of income on 28.10.2022, declaring a total income of Rs.1309,50,27,488/-. The return filed by the assessee was selected for scrutiny, and statutory notices under section 143(2) and section 142(1) were issue and served on the assessee. In response to the query raised during the assessment proceedings, the assessee provided the following breakup of the capital gains: -

<i>Sr. No.</i>	<i>Particular</i>	<i>Amount</i>
<i>1.</i>	<i>Amount of STCG during the year under section 111A of the Act taxed at 15%</i>	<i>1,96,34,31,957</i>
<i>2.</i>	<i>Amount of STCL during the year under section 111A of the Act taxed at 15%</i>	<i>24,24,63,272</i>

3.	<i>Amount of STCG during the year (others) taxed @30%</i>	<i>3,16,31,410</i>
4.	<i>Amount of STCL during the year (others) taxed @30%</i>	<i>NIL</i>

4. Thus, during the year under consideration, the assessee reported a net short-term capital gains of Rs.175,26,00,094/- by setting off the amount of short-term capital loss [on which Securities Transaction Tax ("STT") was paid], which is taxable at 15% under section 111A of the Act, against the short-term capital gains (on which STT was not paid), which is taxable at 30% under section 115AD of the Act, and thereafter, set off the balance loss against the short-term capital gains earned on the transaction of sale of share subjected to STT. Accordingly, the assessee was asked to show cause as to why the set off of lower taxable loss should not be denied with the higher taxable gains. In its response, the assessee submitted that section 70 of the Act allows the assessee to set off the lower taxable losses against the higher taxable gains.

5. The AO, vide draft assessment order dated 20.03.2024 passed under section 144C(1) of the Act, disagreed with the submissions of the assessee and held that in the present case, the assessee has capital gains which are taxable at 15%, whereas the assessee has opted to set off the losses having lower taxability with the gains of higher taxability which is not in accordance with the provisions of the Act. Accordingly, the AO recomputed the computation of capital gains as follows: -

<i>Particulars</i>	<i>15%</i>	<i>30%</i>
<i>Short-term capital gains</i>	<i>1,96,34,31,957</i>	<i>3,16,31,410</i>
<i>Short-term capital losses other than</i>		<i>Nil</i>

<i>those covered under section 111A of the Income Tax Act, 1961</i>		
<i>Short-term capital losses covered under section 111A of the Income Tax Act, 1961</i>	<i>(24,24,63,272)</i>	
<i>Net short-term capital gains</i>	<i>1,72,09,68,685</i>	<i>3,16,31,410</i>

6. As a result, the AO vide draft assessment order, computed the total income of the assessee at Rs.1484,76,27,583/-, after making an addition of short-term capital gains amounting to Rs.172.09 crore taxable at 15% and short-term capital gains amounting to Rs.3,16,31,410/- taxable at 30%.

7. The learned DRP, vide its directions dated 30.11.2024 issued under section 144C(5) of the Act, rejected the objections filed by the assessee and upheld the computation of capital gains made by the AO vide draft assessment order. The learned DRP further noted that the issue under consideration is pending before the Hon'ble Bombay High Court in the case of DIT vs. M/s. DWS India Equity Fund, in ITA No.1414 of 2012 and there is no judicial finality on this issue.

8. In conformity with the directions issued by the learned DRP, the AO passed the impugned final assessment order under section 143(3) r.w. section 144C(13) of the Act assessing the total income of the assessee at Rs.1484,76,27,580/-. Being aggrieved, the assessee is in appeal before us.

9. During the hearing, the learned Authorized Representative ("*learned AR*") submitted that this issue is covered in favour of the assessee by various decisions of the Co-ordinate Bench of the Tribunal.

10. On the other hand, the learned Departmental Representative ("*learned DR*") vehemently relied upon the order passed by the lower authorities.

11. We have considered the submissions of both sides and perused the material available on record. The sole issue which arises for our consideration in the present appeal is whether the short-term capital loss (on which STT was paid) can be set off against short-term capital gains (on which STT was not paid). Before proceeding further, it is relevant to note the provisions of section 70(2) of the Act, which deals with the set off of short-term capital loss, and the same reads as follows: -

"(2) Where the result of the computation made for any assessment year under sections 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."

12. Thus, as per the provisions of section 70(2) of the Act, the short-term capital loss can be set off against gain from any other capital asset. Section 70(2) of the Act does not make any further classification between the transactions where STT was paid and the transactions where STT was not paid. The emphasis of the AO on the term "*similar computation*" also only refers to the computation as provided under sections 48 to 55 of the Act.

13. We find that while deciding a similar issue, the Co-ordinate Bench of the Tribunal in *iShares MSCI EM UCITS ETF USD ACC vs. DCIT*, reported in [2024] 164 taxmann.com 56 (Mum.-Trib.), following the decision of the Hon'ble Calcutta High Court in *CIT vs. Rungamatee Trexim (P.) Ltd.* [IT

Appeal number 812 of 2008, dated 19.12.2008], allowed the set off of short-term capital loss (on which STT was paid) against the short-term capital gains (on which STT was not paid). The relevant findings of the Co-ordinate Bench, in the aforesaid decision, are as follows: -

"016. This Leaves us with the only grounds relating to computation of short-term capital gain and set off of short-term capital loss. The only issue in this appeal is that assessee has earned short-term capital gain of 7 791,221/- which is chargeable to tax at the rate of 30%. Assessee claims that it has short-term capital loss on which securities transaction taxes are paid, and therefore such loss should be set-off against the short-term capital gain irrespective of the tax bracket of such gain and losses.

017. The only dispute between the assessee and revenue is as under:-

Sr. No.	Assessee's version	Revenue's Version
1.	<i>Short-term capital loss was set off against the net short-term capital gain on which no securities transaction taxes paid</i>	<i>Short-term capital loss should be first set of against short-term capital gain on which securities transaction tax is paid</i>
2.	<i>Balance short-term capital loss shall be first set of against short-term capital gain on which securities transaction taxes paid</i>	<i>If short-term capital loss still remains it is to be carried forward and not that of against short-term capital gain on which no securities transaction tax is paid and consequently short-term capital gain on which no securities transaction tax is paid is to be taxed at the rate of 30%</i>
3.	<i>If short-term capital gain on which securities transaction tax is paid still remains, such gains are set of against available brought forward short-term capital loss</i>	<i>One short-term capital gain on which no securities transaction tax is paid is proposed to be taxed at the rate of 30% the brought forward short-term capital loss allowed to be carried forward without utilizing such brought forward short-term capital loss was set off</i>

018. Provisions of section 70 of the income tax act provides for the set off of losses from one source against income from another source under the same head of income. According to section 70 (1) where assessee suffers loss in

respect of any source under any head of income other than capital gain, assessee is entitled to have the amount of such loss set off against his income from any other source under the same head. Therefore, these provisions speak about inter head adjustment other than the head of capital gains. For capital gains provisions of section 70 (2) of the act provides that where assessee suffers short-term capital loss, assessee shall be entitled to set off such losses against capital gain computed in a similar manner as under section 48 to 55 of the act. According to section 70 (3) of the act where assessee suffers long-term capital loss, assessee shall be entitled to set off such losses against long-term capital gains computed in similar manner as provided under section 48 to section 55 of the act. It is clear that section 48 to section 55 does not provide for rate of tax on capital gain. It specifically lays down the computation mechanism of capital gain and certainly not tax on such capital gains

019. Thus, it is clear that assessee has incurred short-term capital losses of Rs. 49,454,381/- (which is subject to securities transaction tax) and also earned short-term capital gain of Rs. 791,221/- (which is not subject to securities transaction tax and taxable as per section 115AD at the rate of 30%). Thus, assessee submits that that short-term capital loss on which securities transaction taxes paid, can be set off against the short-term capital gain which is not subject to securities transaction tax. Further such capital gain is also computed as per section 115AD of the act.

020. It is not the case before us that either in the computation of short-term capital gains or short-term capital loss there is any difference in the manner of computation. Therefore, short-term capital gain arising during the year and short-term capital loss arising during the year are computed in a similar manner as provided under section 48 to section 55 of the income tax act. Further as we have already stated that section 48 to section 55 of the income tax act does not lay down any rate of tax payable on short-term capital gain.

021. Therefore, we do not find any reason to deprive the assessee from set-off of short-term capital losses suffered by the assessee for the same year against the short-term capital gains earned by the assessee. Such claim is in accordance with the provisions of section 70 (2) of the act.

022. We find that several judicial precedents relied upon by the assessee also supports the case of the assessee. The honourable Calcutta High Court in Rungamatee Trexim ITA number 812 of 2008 dated 19 December 2008 held that there is no provision nor the act compels the assessee to first set off short-term capital gain which STT against short-term capital loss with STT and then allow set off against short-term capital gain without STT. Therefore, without multiplying judicial precedents, following the decision of the honourable Calcutta High Court, and several other judicial precedents of the coordinate benches relied upon before us, we allow ground number 4 - 10 of the appeal of the assessee and direct the assessing officer to allow set-off of short-term capital loss suffered by the assessee against short-term capital gain of Rs. 791,221/-."

14. We find that similar findings have been rendered by the Co-ordinate Benches of the Tribunal in favour of the taxpayer in the following decisions: -

1. Emerging Markets Index Non-Lendable Fund vs. DCIT, Mumbai, in ITA No. 4589/Mum/2023, order dated 05.08.2024.
2. Vanguard Total International Stock Index Fund vs. ACIT (IT) – 4(3)(1), in ITA No.4656/Mum/2023, order dated 13.12.2024.
3. JS Capital LLC vs. ACIT (International Taxation), reported in (2024) 160 taxmann.com 286
4. Dy.DIT vs. M/s. DWS India Equity Fund, in ITA No.5055/Mum/2010, order dated 11.04.2012.

15. The learned DR could not show us any cogent reason to deviate from the aforesaid judicial precedents. Therefore, respectfully following the aforesaid decisions, we direct the AO to accept the methodology adopted by the assessee for the computation of the capital gains.

16. From the perusal of the assessment order, we find that the AO, while making the impugned additions, added the short-term capital gains which were already considered by the assessee while computing its total income amounting to Rs.1309,50,27,488/-. Accordingly, the AO is directed to correctly compute the income of the assessee and levy the tax as per law. As a result, grounds no.1 to 4 raised in assessee's appeal are allowed.

17. The issue arising in ground no.5 pertains to the levy of penalty under section 270A of the Act, which is premature in nature and therefore is dismissed.

18. In the result, the appeal by the assessee is partly allowed.

Order pronounced in the open Court on 09/05/2025

**Sd/-
PADMAVATHY S
ACCOUNTANT MEMBER**

**Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER**

MUMBAI DATED: 09/05/2024

Prabhat

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The PCIT / CIT (Judicial);*
- (4) *The DR, ITAT, Mumbai; and*
- (5) *Guard file.*

By Order

Assistant Registrar
ITAT, Mumbai