

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

**SHRI NARENDRA KUMAR BILLAIYA, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No.2125/MUM/2025
Assessment Year: 2022-2023**

**Fidelity Rutland Square Trust II
Strategic Advisers FID EMG Markets Fund**

C/o. Ernst & Young LLP, 14th Floor, The Ruby,
29, Senapati Bapat Marg, Dadar (West),
Mumbai-400028, Maharashtra
[PAN:AAATF7270P]

..... **Appellant**

Vs.

**Deputy/Assistant Commissioner
of Income Tax (International Tax)
2(3)(1), Mumbai**

Kautilya Bhavan, G Block,
Bandra Kurla Complex
Mumbai - 400051, Maharashtra.

..... **Respondent**

&

**ITA No.2126/MUM/2025
Assessment Year: 2022-2023**

**Fidelity Salem Street Trust Fidelity
Sai Emerging Markets Index Fund**

C/o. Ernst & Young LLP, 14th Floor, The Ruby,
29, Senapati Bapat Marg, Dadar (West),
Mumbai-400028, Maharashtra
[PAN:AAATF5228P]

..... **Appellant**

Vs.

**Deputy/Assistant Commissioner
of Income Tax (International Tax)
2(3)(1), Mumbai**

Kautilya Bhavan, G Block,
Bandra Kurla Complex
Mumbai - 400051, Maharashtra.

..... **Respondent**

&
ITA No.2127/MUM/2025
Assessment Year: 2022-2023

**Fidelity Rutland Square Trust II:
Strategic Advisers Emerging Markets Fund**

C/o. Ernst & Young LLP, 14th Floor, The Ruby,
29, Senapati Bapat Marg, Dadar (West),
Mumbai-400028, Maharashtra
[PAN:AAATF4014H]

..... **Appellant**

Vs.

**Deputy/Assistant Commissioner
of Income Tax (International Tax)
2(3)(1), Mumbai**

Kautilya Bhavan, G Block,
Bandra Kurla Complex
Mumbai - 400051, Maharashtra

..... **Respondent**

&
ITA No.2155/MUM/2025
Assessment Year: 2022-2023

Employees Retirement System of Texas

C/o. Ernst & Young LLP, 14th Floor, The Ruby,
29, Senapati Bapat Marg, Dadar (West),
Mumbai-400028, Maharashtra
[PAN:AAATE3593J]

..... **Appellant**

Vs.

**Deputy/Assistant Commissioner of
Income Tax (International Tax)
2(2)(1), Mumbai**

Kautilya Bhavan, G Block,
Bandra Kurla Complex
Mumbai - 400051, Maharashtra

..... **Respondent**

Appearance

For the Appellant/Assessee : Shri Anish Thackar
For the Respondent/Department : Shri Satya Pal Kumar
Shri Krishna Kumar

Date

Conclusion of hearing : 09.06.2025
Pronouncement of order : 13.06.2025

ORDER

Per Bench:

1. These are four appeals preferred by the different assessees pertaining to Assessment Year 2022-2023 challenging four separate Final Assessment Orders [dated 29/01/2025, 29/01/2025,

29/01/2025 and 15/01/2025], passed by the Assessing Officer under Section 143(3) read with Section 144C(13) read with Section 144B of the Income Tax Act, 1961 [hereinafter referred to as 'the **Act**'], as per the directions issued by Commissioner of Income Tax [Dispute Resolution Panel (1)], Mumbai-3 [for short '**DRP**'] [on 04/12/2024, 04/12/2024, 04/12/2024 & 05/12/2024] under Section 144C(5) of the Act for the Assessment Year 2022-2023. Since identical grounds were raised in all the four appeals, the same were heard together and are, therefore, being disposed off by way of a common order.

ITA No.2125/MUM/2025 [Assessment Year 2022-2023]

We would first take up appeal preferred by **Fidelity Rutland Square Trust II Strategic Advisers FID EMG Markets Fund** against the Final Assessment Order, dated 29/01/2025, passed by the Assessing Officer under Section 143(3) read with Section 144C(13) read with Section 144B of the Act as per the directions issued by the DRP on 04/12/2024 under Section 144C(5) of the Act for the Assessment Year 2022-2023.

2. The Assessee has raised the following grounds of appeal:

"Based on the facts and circumstances of the case and in law, the Appellant craves leave to prefer an appeal against the order dated 29 January 2025, issued by the Deputy/Assistant Commissioner of Income-tax (International Tax)-2(3)(1), Mumbai (hereinafter referred to as 'the Ld. AO'], under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (Act), in pursuance of the directions dated 4 December 2024, issued by the Hon'ble Dispute Resolution Panel-1, Mumbai (DRP-1) on the following grounds, each of which is without prejudice to and independent of the others

On the facts and circumstances of the case and in law, the Ld. AO and the Ld. DRP have:

Merits of the case

Rejecting the hierarchy of set-off Short-term Capital Losses adopted by Appellant, and in raising a demand of INR 57,39,370.

1. *Erred in rejecting the hierarchy of set-off of short-term capital losses adopted by the Appellant and thereby, taxing the gross short-term capital gains in respect of transactions on the sale of shares not chargeable to Security Transaction Tax ('STT');*
2. *Erred 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.*
3. *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.*
4. *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.*
5. *Thus, the Ld. AO erred in raising a demand of INR 57,39,370.*

Errors in computation sheet appended with order.

6. *Erred in levying surcharge at the rate 25% on short-term capital gains (not subjected to STT) as against 15% as claimed by the Appellant in the return of income*
7. *Erred in granting credit for taxes deducted at source only to the extent of INR 50,618,157 as against INR 55,547,350 as claimed by the Appellant in the return of income.*
8. *Erred in levying interest under section 234C of the Act amounting to INR 3,50,285,*

Initiating penalty proceedings under section 270A of the Act.

9. *Erred in initiating penalty under section 270A of the Act alleging under reporting of income by the Appellant."*

Ground No.1 to 6:

3. The relevant facts in brief are that the Assessee, a trust organized in the United States of America, is registered with the Securities and Exchange Board of India (SEBI) as a Foreign Portfolio Investor. The Assessee makes portfolio investments in Indian securities in accordance with the SEBI (Foreign Portfolio Investors) Regulations, 2019. For the Assessment Year 2022-2023, the Assessee filed return of income on 27/07/2022 declaring total income of INR.318,44,39,730/-. In the return of income the Assessee offered to tax the net Short Term Capital Gains (STCG) of INR.3,70,83,534/- *[taxable at 15% under Section 111A of the Act]* computed in the following manner:

Particulars	Amount (In INR.)
Short-Term Capital Gains <i>[which is not subject to Securities Transaction Tax (STT) and taxable as per section 115AD of The Act at the rate of 30%]</i>	2,67,46,584
Add Short-Term Capital Gains <i>[subject to STT and taxable as per section 115AD read with section 111A of the Act at the rate of 15%]</i>	88,21,26,634
Less. Short-Term Capital Loss <i>[which is subject to STT]</i>	(87,17,89,684)
Net Short-Term Capital Gains Chargeable to Tax <i>[Offered to tax as STCG subject to STT and taxable as per section 115AD read with section 111A of the Act at the rate of 15%]</i>	3,70,83,534

4. The case of the Assessee was selected for scrutiny and the Assessing Officer noted that the Assessee had adopted following hierarchy of setting off the short term capital loss with short term capital gains:
- (a) Short Term Capital Loss (STT paid) was first set off against the Short Term Capital Gains (Non-STT: taxable at the rate of 30% under Section 115AD)
 - (b) Balance Short Term Capital Loss (STT paid) was set off against the Short Term Capital Gains (STT paid: taxable at the rate of 15% under Section 111A)

Thereafter, the Balance Short Term Capital Gain of

INR.3,70,83,534/- was offered to tax at the rate of 15% under Section 111A.

5. According to the Assessing Officer, the Assessee should have determined the Net Short Term Capital Gain for STT Paid transactions taxable at the rate of and Net Short Term Capital Gain for Non-STT Paid transactions, separately, since the non-STT trade transactions were taxable at the rate of 30% under Section 115AD and STT paid transaction were taxable at the rate of 15% under Section 111A. Section 115AD and Section 111A of the Act provided two separate manner of computation of capital gains. The hierarchy of set off followed by the Assessee has resulted in STCG of INR. 2,67,46,584/- being offered to tax at the lower rate of 15% under Section 111A of the Act whereas the same were taxable at the rate of 30% under Section 115AD of the Act. Therefore, in the Draft Assessment Order, dated 12/03/2024, the Assessing Officer proposed that the current year Short-Term Capital Loss of INR.87,17,89,684/- (STT paid transactions) be set-off against the Short-Term Capital Gains (STT paid transactions) of INR.88,21,26,634/- taxable under Section 111A of the Act. While that balance Short-Term Capital Gains (STT paid transactions) of INR.1,03,36,950/- be taxed @15% and the Short Term Capital Gains (non-STT paid transaction) be taxed @30% is INR.2,67,46,584/-.
6. In objections filed by the Assessee against the Draft Assessment Order before the DRP, the Assessee placing reliance upon various judicial precedents, contended that capital gains income as offered to tax by the Assessee should be accepted. However, the DRP rejected the objections raised by the Assessee observing that the issue had not attain finality since the appeal preferred by the Revenue in the case of Director of Income Tax (IT)-I (Appellant) Vs. M/s. DWS India Equity Fund, Income Tax Appeal

No.1414 of 2012 was admitted and was pending adjudication.

7. Accordingly, the Assessing Officer passed the Final Assessment Order, dated 29/01/2025, re-computing the taxable STCG as under:

Short-term capital gains/ (loss)	Taxable at 15% (STT paid)	Taxable at 30% (Non-STT paid)
Short-Term Capital Gains	88,21,26,634	2,67,46,584
Less: Short-Term Capital Losses	(67,17,89,654)	Nil
Net Short-Term Capital Gains	1,03,36,950	2,67,46,584

8. Being aggrieved, the Assessee has preferred the present appeal before the Tribunal on the grounds reproduced in paragraph 2 above.
9. We have considered the rival submissions and have perused the material on record.
10. The solitary issue that arise for consideration is whether Short Term Capital Loss from STT paid transactions can be set off against Short Term Capital Gains arising from Non-STT paid transactions prior to setting off the available Short Term Capital Gains arising from STT paid transactions.
11. We find that identical issue had come up for consideration before the Hon'ble High Court at Calcutta in the case of **Commissioner of Income Tax, Kol-II Vs. Rungamatee Trexim Pvt. Ltd.** [2008] [ITA No.812 of 2008], dated 19/12/2008. The Hon'ble Calcutta High Court decided the issue in the favour of the Assessee holding 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.

<u>Calculation of income/loss from capital gain</u>	
Short term capital loss with STT	(-)7.17,660/-
Short term capital gain with STT	<u>2,27,564/-</u>
Net Short Term capital loss with STT	(-) 4,90,096/-
Short term capital gain without STT	<u>7,29,584/-</u>
Net Short term capital gain	2,39,488/-
Less Brokerage	5,914/-
Taxable short term capital gain of normal rate	2,33,574/-
Long term capital gain at 10% rate (as per computation)	1,49,431/-

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 sitting off short term capital gain with STT against short term capital STT and then allow of set off 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.

All parties concerned are to act on a xerox signed copy of the minutes of this order on the usual undertakings.

*Urgent Xerox certified copy of this, if applied for, be supplied to the parties subject to compliance with all requisite formalities.”
(Emphasis Supplied)*

12. The above judgment was followed by the Co-ordinate Bench of the Mumbai Tribunal in the case of **Vanguard Total International Stock Index Fund**¹ wherein it was held as under:

"3. At the very outset, the Id. 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 REUIT/INVIT Units. The assessee filed its return of income

¹ ITA No.4656/Mum/2023 (Assessment Year 2021-2022), dated 13/12/2024

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:

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

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. xx xx

7. xx xx

8. xx xx

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 gain 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

xx xx

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.” (Emphasis Supplied)
13. On perusal of the above judicial precedents, it can be seen that it has been held that under Section 70 of the Act no chronology has been mentioned in respect of set off of losses. The provisions contained in the Act do not compel an assessee to first set off Short Term Capital Gain arising from STT paid transactions against Short Term Capital Loss from STT paid transaction and then allows set off against short term capital gain without STT paid transaction. 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/hierarchy of set off which was most beneficial to the Assessee.
14. During the course of hearing the Assessee had also relied upon the various decisions of the Mumbai Tribunal in the case of where identical views has been taken by the Co-ordinate Bench of the Tribunal:
- (a) iShares Edge MSCI EM Minimum Volatility UCITS ETF and others [ITA No.4562/Mum/2023, ITA No.4563/Mum/2023, ITA No.4565/Mum/2023, ITA No.4566/Mum/2023, ITA No.4599/Mum/2023, dated 29/05/2024],
 - (b) iShares MSCI EM UNCITS ETF USD ACC and others [ITA No.4564/Mum/2023, ITA No.4567/Mum/2023, ITA No.4570/Mum/2023, 31/05/2024],
 - (c) Emerging Market Index Non-Lendable Fund [ITA No.4589/Mum/2023, dated 05/08/2024],

- (d) Vanguard Emerging Markets Stock Index Fund A Series of VISPLC and Other [ITA No.1277/Mum/2025, ITA No.1278/Mum/2025, ITA No.1279/Mum/2025, ITA No.1280/Mum/2025, ITA No.1281/Mum/2025, ITA No.1282/Mum/2025, ITA No.1283/Mum/2025, dated 23/05/2025].
- (e) India Acorn Fund Ltd. [ITA No.4556/Mum/2023, dated 29/05/2024],
- (f) JP Trust [ITA No.6379/Mum/2024, dated 20/01/2025,
- (g) Fidelity Asian Value PLC [ITA No.4748/Mum/2023, dated 17/01/2025],
- (h) Emerging Market Equity Index Master Fund A Series of VISPLC and Others [ITA No.4588/Mum/2023 and ITA No.4594/Mum/2023, dated 30/08/2024],
15. On the other hand, we note that the Revenue had failed to bring on record any judicial precedents wherein a contrary view has been taken.
16. Therefore, respectfully following the above judicial precedents, we direct the Assessing Officer to accept the Net Short Term Capital Gains as offered to tax by the Assessee in the return of income. The additional demand raised on the Assessee on account of re-computation of capital gains by the Assessing Officer is deleted and the Assessing Officer is directed to re-compute the tax liability (including surcharge) as per law accordingly. Thus, in terms of aforesaid, Ground No.1 to 6 raised by the Assessee are allowed.
- Ground No.7:**
17. Ground No.7 raised by the Assessee is directed against the non-grant of credit of tax deducted at source. The Assessee has claimed that as against the credit of taxes deducted at source amounting to INR.5,55,47,350/- claimed in the return of income,

the Assessing Officer has granted credit only to the extent of INR.5,06,18,157/-. Therefore, the Assessing Officer is directed to verify the records and grant credit for the balance amount of taxes deducted at source as per law. In terms of aforesaid Ground No.7 raised by the Assessee is allowed for statistical purposes.

Ground No.8:

18. Ground No.8 raised by the Assessee pertains to levy of interest under Section 234D of the Act and the same is disposed off as being consequential in nature.

Ground No.9:

19. Ground No.9 raised by the Assessee pertains to initiation of penalty proceedings under Section 270A of the Act and the same is dismissed as being premature in nature.
20. In result, appeal preferred by the Assessee is partly allowed.

ITA No.2126/MUM/2025 [Assessment Year 2022-2023]

21. Next, we will take up appeal preferred by the Assessee (i.e., **Fidelity Salem Street Trust Fidelity Sai Emerging Markets Index Fund**) against the Final Assessment Order, dated 29/01/2025, passed by the Assessing Officer under Section 143(3) read with Section 144C(13) read with Section 144B of the Act as per the directions issued by the DRP on 04/12/2024 under Section 144C(5) of the Act for the Assessment Year 2022-2023.
22. The Assessee has raised the following grounds of appeal:
"Based on the facts and circumstances of the case and in law, the Appellant craves leave to prefer an appeal against the order dated 29 January 2025, issued by the Deputy/Assistant Commissioner of Income-tax (International Tax)-2(3)(1), Mumbai (hereinafter referred to as 'the Ld. AO'], under section 143(3)

read with section 144C(13) of the Income-tax Act, 1961 (Act), in pursuance of the directions dated 4 December 2024, issued by the Hon'ble Dispute Resolution Panel-1, Mumbai (DRP-1) on the following grounds, each of which is without prejudice to and independent of the others.

On the facts and circumstances of the case and in law, the Ld. AO and the Ld. DRP have:

Merits of the case

Rejecting the hierarchy of set-off Short-term Capital Losses adopted by Appellant, and in raising a demand of INR 8,28,146.

- 1. Erred in rejecting the hierarchy of set-off of short-term capital losses adopted by the Appellant and thereby, taxing the gross short-term capital gains in respect of transactions on the sale of shares not chargeable to Security Transaction Tax ('STT');*
- 2. Erred 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.*
- 3. 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.*
- 4. 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.*
- 5. Thus, the Ld. AO erred in raising a demand of INR 8,28,146/-.*

Errors in computation sheet appended with order.

6. *Erred in granting credit for taxes deducted at source only to the extent of INR 9,44,18,740 as against INR 9,47,66,743 as claimed by the Appellant in the return of income.*

7. *Erred in levying interest under section 234C of the Act amounting to INR 43,100.*

Initiating penalty proceedings under section 270A of the Act.

8. *Erred in initiating penalty under section 270A of the Act alleging under reporting of income by the Appellant."*

23. The relevant facts in brief are that the Assessee, a trust organized in the United States of America, is registered with the Securities and Exchange Board of India (SEBI) as a Foreign Portfolio Investor. The Assessee makes portfolio investments in Indian securities in accordance with the SEBI (Foreign Portfolio Investors) Regulations, 2019. For the Assessment Year 2022-2023, the Assessee filed return of income on 28/07/2022 declaring total income of INR.96,48,81,150/-. In the return of income the Assessee offered to tax the net Short Term Capital Gains (STCG) of INR.2,82,24,400/- *[taxable at 15% under Section 111A of the Act]* computed in the following manner:

Particulars	Amount (In INR.)
Short-Term Capital Gains <i>[which is not subject to Securities Transaction Tax (STT) and taxable as per section 115AD of The Act at the rate of 30%]</i>	1,77,58,894
Add Short-Term Capital Gains <i>[subject to STT and taxable as per section 115AD read with section 111A of the Act at the rate of 15%]</i>	1,29,01,641
Less. Short-Term Capital Loss <i>[which is subject to STT]</i>	(24,36,135)
Net Short-Term Capital Gains Chargeable to Tax <i>[Offered to tax as STCG subject to STT and taxable as per section 115AD read with section 111A of the Act at the rate of 15%]</i>	2,82,24,400

24. However, the Assessing Officer and DRP did not accept the

Assessee's treatment and recomputed the assessable capital gains as under:

Short-term capital gains/ (loss)	Taxable at 15% (STT paid)	Taxable at 30% (Non-STT paid)
Short-Term Capital Gains	1,29,01,641	1,77,58,894
Less: Short-Term Capital Losses	(24,36,135)	Nil
Net Short-Term Capital Gains	1,04,65,506	1,77,58,894

Accordingly, the Assessing Officer passed the Final Assessment Order, dated 29/01/2025, holding that STCG of INR.1,04,65,506/- was taxable at the rate of 15% under Section 115AD read with Section 111A of the Act and the balance amount of INR.1,77,58,894/- was taxable at the rate of 30% as per Section 115AD of the Act.

25. Being aggrieved, the Assessee has preferred the present appeal before the Tribunal on the grounds reproduced in paragraph 22 above.
26. We have considered the rival submissions and have perused the material on record. During the course of hearing both the sides had agreed that our findings/adjudication in the case of Fidelity Rutland Square Trust II Strategic Advisers FID EMG Markets Fund for the Assessment Year 2022-2023 [ITA No.2125/Mum/2025] shall apply mutatis mutandis to the present appeal. Accordingly, keeping in view identical facts and circumstances, and adopting the reasoning given while adjudicating ITA No.2125/Mum/2025 hereinabove, we proceed to adjudicate the ground raised in the present appeal.

Ground No.1 to 5:

27. Ground No.1 to 5 raised by the Assessee pertained to re-computation of net Short Term Capital Gains Tax liability. In view of Paragraph 3 to 16 above, we direct the Assessing Officer

to accept the Net Short Term Capital Gains as offered to tax by the Assessee in the return of income. The additional demand raised on the Assessee on account of re-computation of capital gains by the Assessing Officer is deleted and the Assessing Officer is directed to re-compute the tax liability (including surcharge) as per law accordingly. Thus, in terms of aforesaid, Ground No.1 to 5 raised by the Assessee are allowed.

Ground No.6:

28. Ground No.6 raised by the Assessee is directed against the non-grant of credit of tax deducted at source. The Assessee has claimed that as against the credit of taxes deducted at source amounting to INR.9,44,18,740/- claimed in the return of income, the Assessing Officer has granted credit only to the extent of INR.9,47,66,743/-. Therefore, the Assessing Officer is directed to verify the records and grant credit for the balance amount of taxes deducted at source as per law. In terms of aforesaid Ground No.6 raised by the Assessee is allowed for statistical purposes.

Ground No.7:

29. Ground No.7 raised by the Assessee pertains to levy of interest under Section 234C of the Act and the same is disposed off as being consequential in nature.

Ground No.8:

30. Ground No.8 raised by the Assessee pertains to initiation of penalty proceedings under Section 270A of the Act and the same is dismissed as being premature in nature.
31. In result, appeal preferred by the Assessee is partly allowed.

ITA No.2127/MUM/2025 [Assessment Year 2022-2023]

32. Next, we would take up appeal preferred by the Assessee (i.e.,

Fidelity Rutland Square Trust II : Strategic Advisers Emerging Markets Fund) against the Final Assessment Order, dated 29/01/2025, passed by the Assessing Officer under Section 143(3) read with Section 144C(13) read with Section 144B of the Act as per the directions issued by the DRP on 04/12/2024 under Section 144C(5) of the Act for the Assessment Year 2022-2023.

33. The Assessee has raised the following grounds of appeal:

"Based on the facts and circumstances of the case and in law, the Appellant craves leave to prefer an appeal against the order dated 29 January 2025, issued by the Deputy/Assistant Commissioner of Income-tax (International Tax)-2(3)(1), Mumbai (hereinafter referred to as 'the Ld. AO'], under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (Act), in pursuance of the directions dated 4 December 2024, issued by the Hon'ble Dispute Resolution Panel-1, Mumbai (DRP-1) on the following grounds, each of which is without prejudice to and independent of the others

On the facts and circumstances of the case and in law, the Ld. AO and the Ld. DRP have:

Merits of the case

Rejecting the hierarchy of set-off Short-term Capital Losses adopted by Appellant, and in raising a demand of INR 106,785,350.

- 1. Erred in rejecting the hierarchy of set-off of short-term capital losses adopted by the Appellant and thereby, taxing the gross short-term capital gains in respect of transactions on the sale of shares not chargeable to Security Transaction Tax ('STT');*
- 2. Erred 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.*

3. *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.*
4. *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.*
5. *Thus, the Ld. AO erred in raising a demand of INR 10,67,85,350.*

Errors in computation sheet appended with order.

6. *Erred in considering the brought forward long-term capital loss as Nil instead of INR.615,368,413 and not allowing the set-off of the same against the net long-term capital gain.*
7. *Erred in granting credit for taxes deducted at source only to the extent of INR 10,09,36,049 as against INR 106,223,167 as claimed by the Appellant in the return of income.*
8. *Erred in levying interest under section 234B and section 234C of the Act amounting to INR 26,946,836 and INR.583,049 respectively.*

Initiating penalty proceedings under section 270A of the Act.

9. *Erred in initiating penalty under section 270A of the Act alleging under reporting of income by the Appellant.”*
34. The relevant facts in brief are that the Assessee, a trust organized in the United States of America, is registered with the Securities and Exchange Board of India (SEBI) as a Foreign Portfolio Investor. The Assessee makes portfolio investments in Indian securities in accordance with the SEBI (Foreign Portfolio

Investors) Regulations, 2019. For the Assessment Year 2022-2023, the Assessee filed return of income on 29/07/2022 declaring total income of INR.2,76,16,85,960/-. In the return of income the Assessee offered to tax the net Short Term Capital Gains (STCG) of INR.3,70,83,534/- [*taxable at 15% under Section 111A of the Act*] computed in the following manner:

Particulars	Amount (In INR.)
Short-Term Capital Gains <i>[which is not subject to Securities Transaction Tax (STT) and taxable as per section 115AD of The Act at the rate of 30%]</i>	2,67,46,584
Add Short-Term Capital Gains <i>[subject to STT and taxable as per section 115AD read with section 111A of the Act at the rate of 15%]</i>	88,21,26,634
Less. Short-Term Capital Loss <i>[which is subject to STT]</i>	(87,17,89,684)
Net Short-Term Capital Gains Chargeable to Tax <i>[Offered to tax as STCG subject to STT and taxable as per section 115AD read with section 111A of the Act at the rate of 15%]</i>	3,70,83,534

35. However, the Assessing Officer and DRP did not accept the Assessee's treatment and recomputed the assessable capital gains as under:

Short-term capital gains/ (loss)	Taxable at 15% (STT paid)	Taxable at 30% (Non-STT paid)
Short-Term Capital Gains	88,21,26,634	2,67,46,584
Less: Short-Term Capital Losses	(87,17,89,684)	Nil
Net Short-Term Capital Gains	1,03,36,950	2,67,46,584

Accordingly, the Assessing Officer passed the Final Assessment Order, dated 29/01/2025, holding that STCG of INR.1,03,36,950/- was taxable at the rate of 15% under Section 115AD read with Section 111A of the Act and the balance amount of INR.2,67,46,584/- was taxable at the rate of 30% as per Section 115AD of the Act.

36. Being aggrieved, the Assessee has preferred the present appeal

before the Tribunal on the grounds reproduced in paragraph 36 above.

37. We have considered the rival submissions and have perused the material on record. During the course of hearing both the sides had agreed that our findings/adjudication in the case of Fidelity Rutland Square Trust II Strategic Advisers FID EMG Markets Fund for the Assessment Year 2022-2023 [ITA No.2125/Mum/2025] shall apply mutatis mutandis to the present appeal. Accordingly, keeping in view identical facts and circumstances, and adopting the reasoning given while adjudicating ITA No.2125/Mum/2025 hereinabove, we proceed to adjudicate the ground raised in the present appeal.

Ground No.1 to 6:

38. Ground No.1 to 6 raised by the Assessee pertained to re-computation of net Short Term Capital Gains Tax liability. In view of Paragraph 3 to 16 above, we direct the Assessing Officer to accept the Net Short Term Capital Gains as offered to tax by the Assessee in the return of income. The additional demand raised on the Assessee on account of re-computation of capital gains by the Assessing Officer is deleted and the Assessing Officer is directed to re-compute the tax liability (including surcharge) as per law accordingly. Thus, in terms of aforesaid, Ground No.1 to 6 raised by the Assessee are allowed.

Ground No.7:

39. Ground No.7 raised by the Assessee is directed against the non-grant of credit of tax deducted at source. The Assessee has claimed that as against the credit of taxes deducted at source amounting to INR.10,09,36,049/- claimed in the return of income, the Assessing Officer has granted credit only to the extent of INR.10,62,23,167/-. Therefore, the Assessing Officer is

directed to verify the records and grant credit for the balance amount of taxes deducted at source as per law. In terms of aforesaid Ground No.7 raised by the Assessee is allowed for statistical purposes.

Ground No.8:

40. Ground No.8 raised by the Assessee pertains to levy of interest under Section 234C of the Act and the same is disposed off as being consequential in nature.

Ground No.9:

41. Ground No.9 raised by the Assessee pertains to initiation of penalty proceedings under Section 270A of the Act and the same is dismissed as being premature in nature.
42. In result, appeal preferred by the Assessee is partly allowed.

ITA No.2155/MUM/2025 [Assessment Year 2022-2023]

43. Next, we would take up appeal preferred by the Assessee (i.e. **Employees Retirement System of Texas**) against the Final Assessment Order, dated 15/01/2025, passed by the Assessing Officer under Section 143(3) read with Section 144C(13) of the Act as per the directions issued by the DRP on 05/12/2024 under Section 144C(5) of the Act for the Assessment Year 2022-2023.
44. The Assessee has raised the following grounds of appeal:

"Based on the facts and circumstances of the case and in law, the Appellant craves leave to prefer an appeal against the order dated 15 January 2025, issued by the Deputy Commissioner of Income-tax (International Tax)-2(2)(1), Mumbai (hereinafter referred to as the Ld. AC)], under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (the Act'), in pursuance of the directions under section 144C(5) of the Act issued by the Hon'ble Dispute Resolution Panel-1, Mumbai ('Ld. DRP) dated 5 December 2024 on the following grounds, each of

which is without prejudice to and independent of the other

On the facts and circumstances of the case and in law, the Ld. AO and the Ld. DRP have:

General

- 1. Erred in assessing the total income of the Appellant at INR 4,039,645,670 as against the returned income of INR 2,761,685,960 offered by the Appellant and raising a demand of INR 913,038,655.*

Merits of the case

Rejecting the hierarchy of Set-off of Short-Term Capital losses adopted by the Appellant.

- 2. Erred in rejecting the hierarchy of set-off of short-term capital losses adopted by the Appellant and thereby, taxing the gross short-term capital gains in respect of transactions on the sale of shares not chargeable to Security Transaction Tax (STT);*
- 3. 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 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.*
- 4. 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.*
- 5. 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.*

Denial of set-off of brought forward Short-Term Capital Loss against current year Short-term capital gains:

6. *Erred in not granting set-off of the brought forward short-term capital losses of INR 319,604,829 against the short-term capital gains of the year under consideration.*

Errors in computation sheet appended with order.

7. *Erred in erroneously considering gross total income at INR 7,204,551,726 in the computation sheet as against assessed income of INR 4,039,645,670 as per the Final Order and thereby computing higher taxes due to, levy of higher surcharge and cess.*

Levy of interest under Section 234B and 234C

Levy of interest under section 234B of the Act-Rs. 23,19,37,630

8. *Erred in levying interest under section 234B of the Act amounting to INR 231,937,630, Levy of interest under section 234C of the Act-Rs. 13,330*

9. *Erred in levying interest under section 234C of the Act amounting to INR 13,330,*

Initiating penalty proceedings under section 270A of the Act.

10. *Erred in initiating penalty under section 270A of the Act alleging under reporting/ miss reporting of income by the Appellant."*

45. The relevant facts in brief are that the Assessee, a trust organized in the United States of America, is registered with the Securities and Exchange Board of India (SEBI) as a Foreign Portfolio Investor. For the Assessment Year 2022-2023, the Assessee filed return of income on 29/07/2022 declaring total income of INR.2,76,16,85,960/-. In the return of income the Assessee offered to tax the net Short Term Capital Gains (STCG) of INR.95,83,54,878/- [*taxable at 15% under Section 111A of the Act*] computed in the following manner:

Particulars	Amount (In INR.)
Short-Term Capital Gains	1,00,15,252

[which is not subject to Securities Transaction Tax (STT) and taxable as per section 115AD of The Act at the rate of 30%]

Add Short-Term Capital Gains 1,59,56,97,823
[Subject to STT and taxable as per section 115AD read with section 111A of the Act at the rate of 15%]

Less: Short-Term Capital Loss [which is subject to STT] (32,77,53,368)

Balance Short-Term Capital Gains 1,27,79,59,707
[Subject to STT and taxable as per section 115AD read with section 111A of the Act at the rate of 15%]

Less. Brought Forward Short-Term Capital Loss (31,96,04,829)

Net Short-Term Capital Gains Chargeable to Tax 95,83,54,878
[Offered to tax as STCG subject to STT and taxable as per section 115AD read with section 111A of the Act at the rate of 15%]

46. However, the Assessing Officer and DRP did not accept the Assessee's treatment and recomputed the assessable capital gain as under :

Short-term capital gains/ (loss)	Taxable at 15% (STT paid)	Taxable at 30% (Non-STT paid)
Short-Term Capital Gains	1,59,56,97,823	1,00,15,252
Short-Term Capital Losses other than those covered under Section 111A of the Act	Nil	Nil
Less: Short-Term Capital Losses	(32,77,53,368)	Nil
Net Short-Term Capital Gains	1,26,79,44,455	1,00,15,252

Accordingly, the Assessing Officer passed the Final Assessment Order, dated 15/01/2025, holding that STCG of INR.1,26,79,44,455/- was taxable at the rate of 15% under Section 115AD read with Section 111A of the Act and the balance amount of INR.1,00,15,252/- was taxable at the rate of 30% as per Section 115AD of the Act. Further, the Assessing Officer did not grant the set-off of the brought Forward Short-Term Capital Losses of INR.319,604,829/- against the Short-Term Capital Gains of the year under consideration.

47. Being aggrieved, the Assessee has preferred the present appeal before the Tribunal on the grounds reproduced in paragraph 44

above.

48. We have considered the rival submissions and have perused the material on record. During the course of hearing both the sides had agreed that our findings/adjudication in the case of Fidelity Rutland Square Trust II Strategic Advisers FID EMG Markets Fund for the Assessment Year 2022-2023 [ITA No.2125/Mum/2025] shall apply mutatis mutandis to the present appeal. Accordingly, keeping in view identical facts and circumstances, and adopting the reasoning given while adjudicating ITA No.2125/Mum/2025 hereinabove, we proceed to adjudicate the ground raised in the present appeal.

Ground No.1 to 7:

49. Ground No.1 to 7 raised by the Assessee pertained to re-computation of net Short Term Capital Gains Tax liability and set off of the Brought Forward Short Term Capital Losses. In view of Paragraph 3 to 16 above, we direct the Assessing Officer to accept the Net Short Term Capital Gains as offered to tax by the Assessee in the return of income. Further, the Assessing Officer is also directed to grant the benefit of set off of brought forward Short Term Capital Loss of INR.31,96,04,829/-. The additional demand raised on the Assessee on account of re-computation of capital gains by the Assessing Officer is deleted and the Assessing Officer is directed to re-compute the tax liability (including surcharge) as per law accordingly. The Assessing Officer is directed to re-compute the tax liability and surcharge payable by the Assessee accordingly. In terms of the aforesaid, Ground No.1 to 7 raised by the Assessee are allowed.

Ground No.8 & 9:

Ground No.8 & 9 raised by the Assessee pertains to levy of interest under Section 234B and 234C of the Act and the same is

disposed off as being consequential in nature.

Ground No.10:

1. Ground No.10 raised by the Assessee pertains to initiation of penalty proceedings under Section 270A of the Act and the same is dismissed as being premature in nature.
2. In result, appeal preferred by the Assessee is partly allowed.

Conclusion

3. In result, all the appeals are partly allowed.

Order pronounced on 13.06.2025.

Sd/-
(Narendra Kumar Billaiya)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated :13.06.2025
Milan, LDC

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त/ The CIT
4. प्रधान आयकर आयुक्त/ Pr.CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापितप्रति //True Copy//

उप/सहायकपंजीकार / (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai