

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "F", MUMBAI**

**BEFORE SHRI JASON P. BOAZ (AM) AND SHRI SANDEEP GOSAIN (JM)**

**ITA No. 4656 /MUM/2013  
Assessment Year: 2008-09**

The DDIT(IT)-2(2), Scindia House, Ballard Pier, N.M.Road, Mumbai- 400038.	<b>Vs.</b>	M/s. Union Investment Luxembourg S.A. A/C Uniasia Pacific, C/O BSR & Co, Lodha Excellus, 1 <sup>st</sup> Floor, Apollo Mills Compound, N.M.Joshi Marg, Mumbai- 400011.  PAN : AAACU7349F
<b>(Appellant)</b>		<b>(Respondent)</b>

Appellant by : Shri. Vikash Agarwal  
Respondent by : Shri. Niraj Sheth.

Date of Hearing: 23/02/2016  
Date of Pronouncement: 29/02/2016

**ORDER**

**PER JASON P. BOAZ, AM**

This appeal by the Revenue is directed against the order of the CIT(Appeals)-10, Mumbai dt. 28/03/2013 for Asst. Year 2008-09.

2. The facts of the case, briefly, are as under:-

2.1 The assessee company, established , is an approved sub-account of Union Investment Luxembourg S.A. a Foreign Institutional Investor ('FII') registered with SEBI, invests in Indian Securities in accordance with SEBI regulations for Asst. year 2008-09, the assessee filed its return of income on 30/09/2008

declaring total income of Rs. 48,90,51,424/-. The case was selected for scrutiny. In the course of assessment proceedings the assessee was provided with copy of 'AIR' and requested to reconcile the entries with the custodian trade report and the bank statements. The assessment was completed u/s 143(3) r.w.s.144C(3) of the Income Tax Act, 1961 (in short 'the Act') vide order dt. 02/02/2011, wherein the assessee's income was determined at Rs. 56,61,11,864/-; by considering Rs. 7,70,60,440/- as unexplained investment and bringing the same to tax under the head "Income from other sources"@40% plus surcharge and education cess. In this order the Assessing Officer also denied set off of short term capital gains ('STCG') on which no STT was paid against Short term capital loss ('STCL').

2.2. Aggrieved by the order of assessment dt. 02/02/2011 for Asst. year 2008-09, the assessee preferred an appeal before the CIT(Appeals)-10, Mumbai. The Ld. CIT(A) allowed the assessee's appeal vide the impugned order dt. 28/03/2013.

3. Aggrieved by the order of the CIT(Appeals)-10, Mumbai dt. 28/03/2013 for Asst. year 2008-09, the revenue has preferred this appeal before the Tribunal raising the following grounds:-

*1) "On the facts and in the circumstances of the case and in law, whether the Ld. CIT(A) erred in allowing STCL (on STT paid transactions) to be set-off against the STCG. (on non- STT paid transactions), when the STCG' eligible for special discounted rate under section 111A does not cover merely transactions which result in profit but also includes all eligible transactions, whether resulting in gain or loss."*

2) *“On the facts and in the circumstances of the case and in law, whether the Ld.CIT(A) erred in directing Assessing Officer to levy tax @10% instead @ 30% on STCG’ amounting to Rs.7,04,43,724/- earned on sale of equity shares underlying GDRs even when assessing officer clearly established in the assessment order that STCG’ amounting to Rs. 7,04,43,724/- to be taxed @30%.”*

3). *“The appellant prays that the order of the CIT(A) on the above ground(s) be set aside and that of the Assessing Officer be restored.”*

4). *“The appellant craves leave to amend or alter any ground or add a new ground which may be necessary.”*

4. Ground at Sr. No. 3 and 4 being general in nature, no adjudication is called for thereon.

5. Grounds No. 1

5.1 In this ground, Revenue contends that the Ld.CIT(A) had erred in allowing STCL on STT paid transactions to be set off against the STCG’ on non-STT paid transactions, when the STCG’ eligible for special discounted rate u/s 111A of the Act does not merely cover transactions which result in Profit but also include all eligible transactions, whether resulting in gain or loss. The Ld. AR was heard in support of the grounds raised and placed strong reliance on the order of the Assessing Officer in this issue.

5.2 Per contra, the Ld. AR supported the finding rendered in the impugned order of the Ld. CIT(A) on this issue. It is submitted by the Ld.AR that the assessee has an option to set off its STT paid loss against non-STT paid income

even though it has STT paid income available for set off. It was contended that the Ld. CIT(A) in allowing the assessee appeal on this issue correctly followed the decision of the co-ordinate bench of this Tribunal in the case of First State Investments (Hong Kong) vs. ADIT [(2010) 132 TTJ (Mum) 218] wherein on an identical issue, the co-ordinate bench held that the assessee had the choice to set-off STT paid losses first against non-STT paid profits and thereafter the remaining loss, if any, against STT paid profits.

5.3.1 We have heard the rival contentions and perused and carefully considered the material on record, including the judicial pronouncement cited. We find that the identical issue, as in the case on hand, was considered by the co-ordinate bench of this Tribunal in the case of First State Investments (Hong Kong) vs. ADIT [(2010) 132 TTJ (Mum) 218]] wherein, it has been held at para 11 thereof that the set off as proposed by the assessee cannot be denied, which is extracted hereunder: -

*“11. In the present appeal, the controversy is still narrower inasmuch as the short-term capital loss which was set-off by the assessee against the short term capital gain, has been accepted and the net figure of short-term capital gain after set-off of short term capital loss continues to remain the same. The dispute is only about the choice of setting off of short-term capital loss suffered after the cut-off date against the short-term, capital gain earned prior to the cut-off date. This position has arisen due to the introduction of section 111A for the first time from this year only which provides for lower rate of tax on short-term capital gains arising on the transactions which have suffered securities transaction tax. It is further pertinent to mention that such dispute is relevant only for the first year of the operation of this provision and cannot crop up in the later years. Here we are*

*concerned with the set-off of short term capital loss from one or more transactions with the short term capital gain from one or more transactions spread over the year, both before and after the cut-off date. Effectively the question is about the setting off of short-term capital loss and such set off is governed by sub-section (2) of section 70, which has been reproduced above. Primarily the use of word "any" to represent the transaction which resulted in the short-term capital loss is indicator of the initial determination of short-term capital loss or short-term capital gain, as the case may be, from each transaction distinctly. Suppose the assessee entered into one transaction of purchase and sale of the shares of company 'A', which resulted into short-term capital loss and there are other 9 transactions of purchase and sale of shares which resulted into short-term capital loss or short-term capital gain as the case may be, it is mandatory to determine short-term capital loss or short-term capital gain in respect of each of the 10 transactions. Then the employment, of the expression "any other" capital asset in the later part of the sub-section for the purpose of set-off clearly indicates that the short-term capital loss from one transaction has to be considered disjointedly for set-off against the short term capital gain of any other transaction Further presume that in the above example, all 9 other transactions resulted into profit. Now the question to be decided is as to who will have the last word to determine the preference over the order of the set-off of loss from the first transaction with the short-term capital gain in any or the other 9 transactions The relevant words used somewhere in between sub-section (2) are that "the assessee shall be entitled" to have the amount of such loss set-off against' the income in respect of any other capital asset. Prima-facie there is cue in the*

*language of the sub-section that the option is with the assessee and he will decide as to whether the short-term capital loss from the first transaction ought to be set off against the short-term capital gain of the transaction No. 2 or 3 or 4 etc, as the case may be. Our view about the vesting of the discretion in assessee for the purposes of set-off of short-term capital loss against any short-term capital gain is fortified when the language of sub-section (3) of section 70 is considered, which specifically prohibits the setting off of long term capital loss against short-term capital gain. it has been provided in unambiguous words in sub-section (3) that the long-term capital loss can be set off only against long-term capital gain and not against the short-term capital gain, if the intention of the Legislature had been not to confer the choice on the assessee in the matter of setting off of the short-term capital loss suffered in the post cut-off date against the short-term capital gain of the pre-cut-off date, it would have clearly set out such intention in the language of sub-section (2) itself, as has been done in sub-section(3.) In the absence of an stipulation in this regard in stub-section (2), we are satisfied that the choice has been left over to the assessee in taking decision about the setting off of short-term capital loss from one transaction against any other short-term capital gain, whether within or outside the cut-off date. If higher benefit pours it, from the exercise of the option in a particular way vis-a-vis the lower benefit resulting in the other way, then the higher benefit available as per law should not be denied. The Special Bench of the Tribunal in the case of Montgomery Emerging Markets Fund (supra) has also ruled in favour of the assessee by holding that the set-off of long-term capital loss against the short-term capital gain was permissible under section 70, in the period prior to the amendment.”*

5.3.2 Following the aforesaid decision of the co-ordinate bench of this Tribunal in the case of First State Investments (Hong Kong)(supra), we hold that the set off as proposed by the assessee in the case on hand is to be allowed, and accordingly uphold the order of the Ld. CIT(A) in directing the Assessing Officer to permit the set off of the STCL (STT paid) against STCG' (non STT paid). Consequently, ground no.1 of the revenue appeal is dismissed.

#### 6. Ground No: 2

6.1 In this ground revenue contends that the Ld. CIT(A) erred in directing the Assessing Officer to levy tax @ 10% instead of @ 30% on STCG' amounting to Rs. 7,04,43,724/- earned on sale of equity shares underlying GDR's even when the Assessing Officer has established in the order of assessment that STCG amounting to Rs. 7,04,43,724/- is to be taxed @ 30%. The Ld. DR for revenue was heard in support of the grounds raised and he placed reliance on the findings in the order of the Assessing Officer.

6.2 Per contra, the Ld. AR for the assessee submitted that there was no error in the impugned order of the Ld. CIT(A) on this issue in directing the Assessing Officer to levy tax@ 10% on the STCG' amounting to Rs. 7,04,43,724/- earned on sale of equity shares and relying GDR's as claimed by the assessee. The Ld. DR contends that this grounds raised by revenue is factually erroneous as there is no discussion by the Assessing Officer as to why he applied the tax @ 30% on STCG' amounting to Rs. 7,04,43,724/- as against tax @ 10% offered by the assessee, except in para 5.7 of the impugned order where the Assessing Officer has grouped the impugned STCG' of Rs. 7,04,43,724/- along with non-STT paid STCG' of Rs. 12,333/- applying the tax @ 30% in respect of both these amounts.

6.3 We have heard the rival contentions and perused and carefully considered the material on record. On an appraisal thereof, we concur with the observations of the Ld. CIT(A) that no reasons have been given by the Assessing Officer for taxing the said STCG' @ 30%, whereas the assessee has shown the same as STT paid and therefore liable to tax @10% in the return of income. Evidence to this effect has also been placed before us at pgs 41 and 60 of the assessee's paper book which indicate that the assessee has in fact paid STT in respect of this transaction. Before us, Revenue has failed to controvert both the evidence placed before us and the finding of the Ld.CIT(A) in this regard. In this factual matrix of the case, we uphold the order of the Ld. CIT(A) on this issue in directing the Assessing Officer to tax this amount of Rs. 7,04,43,724/- @ 10%. It is ordered accordingly. Consequently, ground no: 2 of the revenue's appeal is dismissed.

7. In the result, the Revenue's appeal for Asst. year 2008-09 is dismissed.

Order pronounced in the open court on 29<sup>th</sup> February, 2016

Sd/-  
(SANDEEP GOSAIN)  
JUDICIAL MEMBER

Sd/-  
(JASON P.BOAZ)  
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 29/02/2016

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**

Pramila