IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1947 OF 2013

Commissioner of Income Tax-19 ..Appellant

Vs.

Shri Chetan K. Desai ..Respondent

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Mr. Arvind Pinto a/w N.A. Kazi, Advocates for Appellant.
Mr. Nitesh Joshi a/w Atul Jasani and Ashok Bhogani, Advocates I/b Ashok Bhogani & Co. for Respondent.

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CORAM : M.S. SANKLECHA &
G.S. KULKARNI, JJ.
DATED : 20 OCTOBER 2015

P.C.:

This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the 'Act') challenges the order dated 5 December 2012 passed by the Income Tax Appellate Tribunal (the 'Tribunal'). The Assessment Year involved is A.Y. 2005-06.

2. Mr. Pinto, the learned Counsel submits that the proposed revised questions of law for our consideration as under:

> "1) Whether in law and on the facts of the instant case, was the Tribunal right in coming to the

conclusion that the respondent individual is an investor merely on the ground that certain mutual funds were held for more than 12 months, and the books were written in an appropriate manner, ignoring the fact recorded by the AO that the impugned gains were declared so in order to avail of a concessional rate of taxation?

2) Whether in law and on the facts of the case, was the Tribunal right in holding that the mere entry in books of accounts that shares are held as investment, make the respondent individual an investor, whereas the period of holding of these scrips, the frequency, the volume and value of transactions are indicative of being trader and not an investor?"

3. The respondent-assessee is an individual who filed return of income for the subject assessment year declaring a total income of Rs.1.49 crores. In the return it had declared short term capital gains of Rs.84.88 lakhs and long term capital gains of Rs.22.46 lakhs aggregating to Rs.1.07 crores. During the course of assessment proceedings, the Assessing Officer was of the view that the gains declared as capital gains was essentially profit on account

of trading in shares and consequently taxed the aggregate amount of Rs.1.07 crores declared as Capital Gain as business profits.

4. Being aggrieved, the respondent assessee carried the issue in appeal to the Commissioner of Income Tax (Appeals) (the 'CIT(A)'). The CIT(A) on examination of all the facts allowed the appeal of respondent-assessee. In particular so far as long term capital gain is concerned, the order of the CIT(A) records the fact that this was on account of redemption of mutual funds which were held for more than 12 months. It also records the fact that the respondent-assessee had received dividend on these mutual funds and on redemption there was a gain of Rs.22.46 lakhs. Moreover, the said mutual funds were held as investment and treated the same in the books of accounts. Further, the CIT(A) also records the fact that units of mutual funds cannot be traded and normally one has to only surrender the same against the redemption value thereof.

5. So far as short term capital gains are concerned, the CIT(A) placed reliance upon the Circular No.1827/1989 dated 31 August 1989 as modified by Circular No.4/2007 dated 15 June

2007 issued by the Central Board of Direct Taxes (the 'CBDT'). On examination of each of the parameter set out in the above instructions/circular of the CBDT reached the finding of fact taking into account the time devoted by the appellant to its investment activity bearing in mind that he is an active partner of business alongwith his brother which has a turnover of Rs.19.27 crores. Further the investment activity is an independent activity and has no relation to the business carried out in partnership of embroidery. On examination of the facts, it was concluded by the CIT(A) that motive for the investments by the assessee was for long term appreciation and to earn dividend income. This is also supported by the fact that the appellant has treated the shares as investment in its books of accounts and not as stock in trade. Further the sale of shares in a short period of time would not by itself lead to the inference that the respondent-assessee was in business of trading in shares as many times shares are also sold so as to avoid erosion in value thereof. The CIT(A) also held that no funds were borrowed by the respondent-assessee for its investments in shares. Thus taking an overall view including frequency of transactions and number of stock invested, concluded that the gain earned on short term capital gains claimed by the respondent-assessee could not be classified as income from trading. Thus the appeal of the assessee was allowed.

6. Being aggrieved, the revenue preferred an appeal to the Tribunal. So far as long term capital gain is concerned, the Tribunal on independent examination of the facts concurred with the view of the CIT(A). This by recording independently its reasons, which are similar to that of CIT(A). Thus the revenue's appeal on above ground was dismissed. So far as short term capital gain is concerned, the Tribunal on independent examination of facts reached the same conclusion as the CIT(A) for reasons though largely similar were independently recorded including the fact that so far as investment in shares are concerned, the assessee took delivery of the shares and not entered into intra-day trading.

7. The Tribunal particularly records the fact that it is not the case of revenue that shares which were reflected in the respondent-assessee's books of account as stock in trade were reclassified as

investment with intent to avoid and/or reduce tax-ability. This was in response to the submission by the Departmental Representative that the impugned gains have been offered as capital gains only to avail of concessional rate of tax applicable to it. It is very pertinent to note that the impugned order of the Tribunal has referred to the fact that for the earlier assessment years, the Assessing Officer had on the identical facts accepted the respondents claim on account of capital gain in respect of investment made in shares. However it records that the rule of consistency would not be applied and independently examined the facts and concluded that the respondent-assessee was engaged in investment and not trading of shares in the subject assessment year. In these facts, the Tribunal dismissed the revenue's appeal.

Regarding Question No.1:-

8. Mr. Pinto state that the grievance of the revenue is that the entire activity of declaring the gain made on account of sale of shares/units of mutual funds was only with the view of avail of lower rate of taxation applicable to profits made on account of

capital gains. We find that this issue has been dealt with by the Tribunal by recording the fact that it was not the case of revenue before the Tribunal that the respondent-assessee had converted it's stock in trade into the investment with the intention to avoid and/or reduce the tax. In the absence of any factual basis the allegation that the entire exercise was carried out as investment only to avail of the concessional rate of tax as urged by the revenue cannot be accepted. Moreover, on the issue of long term capital gains with regard to mutual funds, there are concurrent findings of facts by the CIT(A) and the Tribunal in favour of the respondent-assessee. It is not shown to be perverse in any manner. Consequently, Question No.1 as proposed does not give rise to any substantial question of law and accordingly not entertained.

<u>Regarding Question No.2</u>:-

9. The grievance of the Mr.Pinto is that the impugned order completely overlooked the fact that purchase turn over of Rs.8.07 crores and sales turn over of Rs.9.13 crores of the respondent-assessee is indeed very high. The transactions entered into by the

respondent-assessee are 205 during the year. On the above basis it is submitted that looking at the value and frequency of the transactions would itself be an indication of the fact that the respondent-assessee was engaged in the business of trading in shares. We find that the Assessing Officer in the Assessment Order gives a table of the transaction entered during the year. From the table, it is evident that a single purchase/sale transaction which are received/delivered in multiple lots i.e. more than one lot are each considered as separate transaction. The Assessing Officer has computed each lot as a separate transaction resulting in inflated figure of 205 transactions. So far large value of transactions are concerned, one must not loose sight of the fact that large value has to be looked at in the context of the wealth of the person concerned. In this case, the respondent-assessee is engaged in a very profitable business of embroidery which has turnover of Rs.19.28 crores and profit of Rs.9 crores during the subject assessment year. Thus the value of the transactions for purposes of deciding the issue is to be considered from case to case and there can be no absolute value beyond which the transaction would be considered to be trading.

Therefore in the facts of the present case, the view taken by the CIT(A) and Tribunal on the aforesaid facts is a plausible view. The determination of whether an assessee is carrying a trading or investment activity is to be determined on a cumulative assessment of various factors, which has in fact been done by the CIT(A) and the Tribunal. The revenue has not been able to show that the factual finding recorded by CIT(A) and the Tribunal is in any manner perverse and/or arbitrary. Accordingly, the proposed Question No.2 does not give rise to substantial question of law. Hence Question No.2 is not entertained.

10. In the above view, appeal is dismissed. No order as to costs.

[G.S. KULKARNI, J] **[M.S. SANKLECHA, J.]**