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

**INCOME TAX APPEAL NO. 168 OF 2013**

Commissioner of Income Tax-11 ..Appellant

Vs.

Dr. Rajesh M. Parikh ..Respondent

....

Mr. Charanjeet Chanderpal, Advocates for Appellant.
Mr. Percy Pardiwalla, Sr. Advocate i/b Atul Jasani for Respondent.

....

**CORAM : M.S. SANKLECHA &**
**G.S. KULKARNI, JJ.**
**DATED : 27th JANUARY 2015**

**P.C.:**

1. This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 (the 'Act') challenges the order dated 31st January 2012 passed by the Income Tax Appellate Tribunal (the 'Tribunal'). The Assessment Year involved is 2003-04.

2. The Revenue has raised following question of law for our consideration:-

> *"(A) Whether on the facts and in the circumstance the Tribunal was correct in not appreciating the facts in the proper perspective and as to whether the findings of Tribunal are not perverse, as the same do not take into account all the relevant facts on record?*

> *(B) Whether on the facts and circumstances of the case, Tribunal is correct in dismissing Revenue's appeal without considering the fact that the share transactions entered by the assessee are adventure in the nature of trade and hence liable to be assessed as income from business?"*

3. In the subject assessment year, the respondent-assessee filed his return of income declaring his income at Rs.1.95 lakhs. The Assessing Officer by order dated 30th December 2005 passed under Section 143(3) of the Act determined total income at Rs.2.90 lakhs. This was after allowing set off of short-term capital gain of Rs.1.17 crores against the carry-forward short-term capital loss of Rs.1.45 crores.

4. On 21st February 2008 the Commissioner of Income Tax passed an order in Revision under Section 263 of the Act holding that the Assessment order treating the amounts earned on sale of shares as short-term capital gains was erroneous and prejudicial to the interest of revenue. Thus the Assessing Officer was directed to pass a fresh assessment in accordance with law.

5. The Assessing Officer by an order dated 24th December 2008 passed under Section 144 r/w 263 of the Act did not accept the petitioner's claim of capital gain on account of sale of shares and treated it as unexplained income. This in view of his holding that the transaction of purchase and sale of shares was undertaken by the sub-broker.

Consequently, the Assessing Officer added an amount of Rs.1.17 crores to the income of the respondent assessee to determine the income at Rs.1.19 crores for A.Y. 2003-04.

6. Being aggrieved, the respondent-assessee appealed to the Commissioner of Income Tax (Appeals) (the 'CIT(A)'). On detailed examination of evidence before him the CIT(A) concluded that the amount received on sale of share is taxable as capital gains in the hand of the respondent-assessee and not as income from other sources. It further held that the respondent-assessee is entitled to carry forward loss from the earlier years. On further appeal by the revenue, the Tribunal by the impugned order upheld the finding of the CIT(A) that the assessee is entitled to claim the benefit of capital gains in respect of the purchase and sale of the shares. The impugned order also records the fact for the earlier years when the respondent-assessee has undertaken the same sort of transactions resulting in loss, the revenue has accepted the same. Accordingly, the Tribunal dismissed the appeal of the revenue.

7. The grievance of the revenue is that the orders of CIT (Appeals) and the Tribunal have completely ignored the fact that the assessee has not taken delivery of the shares and had only received the difference between the purchase and sale amounts. This it is submitted is particularly so when the settlement cycle of the stock exchanges is from

Monday to Friday. The purchaser/investor has mandatorily to take delivery of the shares purchased within the cycle. This aspect has been completely ignored by the authorities. Moreover, the amount of share purchased was never transferred to the D-MAT Account of the assessee and continued to remain in the D-MAT Account of the sub-broker evidencing non-genuineness of the transaction. Thus, it is submitted that the orders suffer from perversity and the appeal needs to be admitted.

8. We find that the orders of the CIT (Appeals) as well as the Tribunal are detailed orders rendering findings of fact about the nature of the transaction of purchase and sale of shares entered into by the respondent-assessee. The aforesaid finding of fact was reached on consideration of the following:-

(a) Similar transactions in the past was accepted by the revenue when loss returned.

(b) Certificate given by the sub-broker confirming that transaction belonged to appellants.

(c) The shares purchased had been taken dealivery of within the settlement cycle, but the same was kept as collateral security by the sub-broker as security for payment to be received from respondent-assessee.

(d) The purchases shares were thereafter transferred to the D-MAT account of the respondent-assessee; and

(e) The contract notes produced by the respondent-assessee for purchase and sale of shares has not been challenged by the revenue.

On the consideration of the above, the concurrent finding of facts arrived at both by the CIT(A) and the Tribunal cannot be said to be perverse and/or arbitrary. In view of the aforesaid finding of the facts by the authorities, we find no substantial question of law arise.

9. For the reasons indicated hereinabove, the **appeal** is **dismissed.** No order as to costs.

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

S.S.DESHPANDE