IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.2022 OF 2013

Commissioner of Income Tax 5. ...Appellant
Vs.
M/s.Payash Securities Pvt.Ltd. ...Respondent

....

Mrs.S.V.Bharucha, for Appellant-Revenue.

Mr.S.C.Tiwari with Ms.Rutuja Pawar, for the Respondent.

....

CORAM : M.S. SANKLECHA &
G.S. KULKARNI, JJ.

DATED : 18 November 2015

P.C.:

1. This appeal by the Revenue filed under Section 260A of the Income Tax Act, 1961 (the Act), challenges the order dated 19 April 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The matter relates to the Assessment Year 2006-07.

2. The appellant – Revenue urges the following question of law for our consideration:-

"(1) Whether on the facts and the circumstances of the case and in law, the Tribunal was justified in accepting the assessee's claim that purchase and sale of shares, mutual funds reflected in 1062 transactions were in the nature of investment inspite of the fact that the AO had held that the assessee was a trader in shares and not an investor and hence, profit on such trading activity was taxable as business income instead of capital gains as claimed by the assessee ?

(2) Whether on the facts and the circumstances of the case and in law the Tribunal was justified in setting aside the notice issued under Section 148 and subsequent reassessment under Section 147 as bad in law inspite of the fact that the reopening was done within four years and that proviso to Section 147 would not apply ?”

3. The respondent-assessee is engaged in the business of investment and trading in shares and securities. For the subject Assessment Year, the Assessing Officer while passing order under Section 143(3) of the Act on 29 December 2008 accepted the claim of the petitioner under the head “Long term capital gain” and “Short term capital gain” arising out of sale and purchase of shares and securities. Thereafter, on 28 March 2011 the Assessing Officer issued a reopening notice and the reasons in support of the same as

communicated to the respondent reads as under:-

> "*On perusal of assessment records it is noted that during the relevant previous year, the assessee had purchased and sold shares of around 63 companies within a period of 12 months with total sale consideration received of Rs.377.45 crores and purchase value of Rs.684.66 crores. It was further noted that shares were purchased and sold on more than 1062 occasions, in which approx. 98% of sales occasions were within less than 12 months.*
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> *Taking into consideration, the number, volume and frequency of transactions carried out by the assessee, in my opinion, assessee's activity of purchase and sale of shares amounts to trading activity and not an investment activity and hence profit earned from such activity amounting to Rs.20.60 Cr. should be brought to tax "business income" as against assessee's claim of "short term capital gains".*
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> *I therefore have reason to believe that income to the extent of differential tax amount has escaped assessment within the meaning of Section 147 of the I.T.Act. The assessment is therefore reopened u/s.147 of the I.T.Act.*"

4. The respondent contested the jurisdiction of the Assessing Officer to reopen the assessment essentially on the ground that the reopening notice was issued on account of mere change of opinion.

This is on account of the fact that during the regular assessment proceeding leading to the Assessment Order dated 29 December 2008 under Section 143(3) of the Act this aspect had been enquired into and allowed. However, the Assessing Officer did not accept the respondent's contention and by order dated 29 December 2011 passed on reassessment treated the income declared under the head 'capital gains' as 'business income'. In appeal the CIT(A) also did not disturb the order dated 29 December 2011 of the Assessing Officer.

5. The Tribunal by the impugned order accepted the respondent's contention and held the reopening notice dated 28 March 2011 is without jurisdiction. The impugned order records the fact that a detailed enquiry into the nature of the income declared as capital gains was done as is evident from the questionnaire dated 11 June 2008 issued to the respondent-assessee and the detailed response thereto by letter dated 18 June 2008 during the regular assessment proceedings under Section 143(3) of the Act leading to the order dated 29 December 2008. The

impugned order also records the fact that similar transactions have, in the past and in subsequent Assessment Years, been accepted. Besides, it records the fact that it is not disputed that the reopening notice dated 28 March 2011 was issued consequent to objections of the Audit party who on the same facts took a different view from that of the Assessing Officer in regular assessment proceedings.

6. Mrs.Bharucha, learned Counsel for the Revenue also urges that the impugned order ought not to have set aside the reopening notice under Section 148 of the Act as the number of sale and purchase transactions aggregating to 1062 in number were being offered under the head “Short term capital gain”. This itself indicated the fact that it was business income.

7. We find the aforesaid submission is not well founded as the Tribunal in the impugned order has recorded that the transactions of purchase and sale which is the basis of the reopening is factually not correct. The transactions of purchase and sale were of 62 scrips during the year. The sale and purchase of a scrip in

large number when placed by the assessee on the electronic system of Stock Exchange appear broken in different transaction in view of multiple buyers and sellers of the same. Therefore, a single transaction of purchase or sale which may appear as many transactions when in fact it is not so. Be that as it may, so far as reopening of assessment is concerned, the same can only be done on the satisfaction of the provisions of Section 147 of the Act. In the present facts, the issuing of reopening notice is a clear case of change of opinion on the part of the Assessing Officer as the order under Section 143(3) of the Act in the regular assessment proceedings had been passed on examination of the very issue now being raised in the reopening notice. As observed by the Supreme Court in "***Commissioner of Income Tax Vs. Kelvinator of India Ltd., (320 ITR 561)***" a power to reassess is not a power to review. Therefore, an assessment cannot be reopened on a mere change of opinion in the absence of any fresh tangible material.

8. In view of the above, the impugned order of the Tribunal in allowing the respondent's appeal has only followed the settled

position of law that reopening of assessment on mere change of opinion in the absence of fresh tangible material, is without jurisdiction. Accordingly, the questions as framed by the Revenue do not give rise to any substantial question of law and accordingly, not entertained.

9. The appeal is dismissed. No order as to costs.

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