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

INCOME TAX APPEAL NO. 848 OF 2014

Commissioner of Income Tax-4 .. Appellant

v/s.

Shri Upendra K. Doshi .. Respondent

Mr. Suresh Kumar a/w Ms. Padma Divakar for the appellant
None for the respondent

CORAM : M.S. SANKLECHA &
A.K. MENON, J.J.

DATED : 15th NOVEMBER, 2016.

P.C.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges a common order dated 14th August, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Years 2005-06, 2006-07 and 2008-09.

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

> *"(i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in relying on the decision of jurisdictional High Court in the case of Commissioner of*

Income Tax Vs. Gopal Purohit (2010), 336 ITR 287 and Mumbai Tribunal's decision in the case of Sri. Hardik Bharat Patel Vs. DCIT (ITA No.227/Mum/2011) wherein it has been held that principle of consistency should be followed and the profit from transfer of shares should be accepted in the earlier orders rather than business income, as held by the Assessing Officer on the basis of verification and investigation on this issue?"

3. The impugned order of the Tribunal relating to Assessment Year 2008-09, while dismissing the Revenue's appeal had directed the Assessing Officer to treat an amount of Rs.1.24 crores arising on account of purchase and sale of shares as Short Term Capital Gain. The impugned order dismissed the appeal of the Revenue that the above amount of Rs.1.24 crores should be classified as "Business Income". The impugned order of the Tribunal while dismissing the Revenue's appeal placed reliance upon its decision in respect of Assessment Years 2006-07 and 2005-06.

4. The appeal in respect of Assessment Year 2006-07 filed by the Revenue, being Income Tax Appeal No. 869 of 2014 was admitted on 18th October, 2016 on the following re-framed substantial question of law.

> *"Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in directing the Assessing Officer to treat the profit arising on the frequent and voluminous transactions carried out with borrowed funds in shares as "Short Term Capital Gain" instead of "Business Income" ?*

5. Today, we have admitted the Revenue's appeal relating to Assessment Year 2005-06, being Income Tax Appeal No.850 of 2014 on the following substantial question of law.

> *"Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in directing the Assessing Officer to treat the profit arising on the transactions carried out with borrowed funds as "Short Term Capital Gain" instead of "Business Income" ?*

6. Mr. Suresh Kumar, learned Counsel for the Revenue places reliance upon the aforesaid two orders of this Court admitting the Revenue's appeal and prayed that the present appeal also be admitted on an identical question.

7. However, we specifically asked Mr. Suresh Kumar whether the transactions in the subject assessment year were frequent and voluminous or whether they were carried out with borrowed funds as

was the case in the appeal relating for Assessment Years 2005-06 and 2006-07. Mr. Suresh Kumar, learned Counsel for the Revenue points out that the Commissioner of Income Tax (Appeals) has in the subject assessment year rendered a finding of fact that the investment activity carried out by the respondent assessee were out of its own funds and not out of borrowed funds. Further, he also invited our attention to the findings of the Commissioner of Income Tax (Appeals) that the frequency and volume of share transactions are not such so as to constitute a trading activity.

8. Therefore, the facts in the present case are completely different from the facts existing in Assessment Years 2005-06 and 2006-07. In the subject assessment year, the assessee has carried out the business activity out of its own funds and the authorities have also rendered a finding of fact that the transactions are not large nor so frequent so as to hold that the respondent assessee was a trader in shares.

9. The finding of fact arrived at both by the CIT(A) as well as the Tribunal for the subject assessment year that the respondent assessee was an investor in shares out of its own funds and considering the volume and frequency of purchase / sale of shares is not a trader has

not been shown to be perverse by the Revenue. In the above view, the question as proposed by the Revenue does not give rise to any substantial question of law. Hence, not entertained.

10. Accordingly, the appeal is dismissed. No order as to costs.

(A.K. MENON, J.) **(M.S. SANKLECHA, J.)**