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

INCOME TAX APPEAL NO. 2302 OF 2013

Commissioner of Income Tax-9 .. Appellant

v/s.

M/s. Evergreen Investment & Services Pvt. Ltd. .. Respondent

Mr. Arvind Pinto for the appellant
Ms. Aasifa Khan for the respondent

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

DATED : 7th MARCH, 2016.

P.C.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 5th April, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2007-08.

2. This appeal raises the following questions of law for our consideration :-

(i) Whether on the facts and in the circumstances of the case

and in law, the Tribunal was correct in ignoring the fact that the respondent company as per its Memorandum of Association was primarily to deal with shares and therefore its income would be that of business rather than on capital gains as held by the CIT(A)?

(ii) Whether on the facts and in the circumstances of the case, the Tribunal was justified in ignoring the fact that the respondent company in a subsequent assessment year namely A.Y. 2008-09 has accepted the treatment of these sales as business income and following upon the rule of consistency this income be treated as business income for AY 2007-08 also."

3. The respondent assessee is mainly engaged in the business of dealing in shares. The respondent assessee has shown income arising on account of its investment under the head of "capital gains". The respondent assessee before the Assessing Officer sought to justify its income on account of capital gains by virtue of Resolution of the Board of Directors, approving scrips in which it would invest. This investment was distinct and separate from its regular business of dealing in shares. It is further pointed out that the average holding of these investments was more than 6 to 8 months in respect of short term gains / loss. The

object of investment was to earn dividends. The respondent assessee had consequent to the Board Resolution invested in 26 scrips and booked gains / loss only in 16 of those scrips. Besides, it was pointed out that in its books, these scrips / shares were always considered as a part of its investment portfolio and not on trading account as is evident from its books of accounts.

4. The Assessing Officer by his order dated 27th November, 2009 did not accept the above, holding that the respondent assessee had organized its portfolios into trading and investment only for its own convenience. Consequently, the Assessing Officer brought to tax as business income of Rs.17.04 lakhs and Rs. 1.24 crores offered by the respondent assessee as long term capital gains and short term capital gains respectively.

5. Being aggrieved, the respondent assessee carried the issue in appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. By its order dated 15th September, 2010 the CIT(A) held that where the shares were held for a period of 30 days or less and claimed as investments, would be excluded from the investment portfolio and brought to tax as business income. However, save and except the

above, it held that other shares which were shown as investments would be entitled to the benefit of short term capital gains and long term capital gains as claimed by the respondent assessee. It has accepted the respondent assessee's justification to be investor in shares even when it deals in them, while recording a further fact that no borrowed funds were used in making the investments. Thus, partly allowing the respondent assesse's appeal by its order dated 15th September, 2010.

6. Being aggrieved, the Revenue carried the issue in appeal before the Tribunal. The Tribunal by the impugned order dated 5th April, 2015 while upholding the findings of the CIT(A) also relied upon the fact that for an earlier Assessment Year 2006-07, in respect of similar transactions the department accepted the respondent assessee's offering the income made on investment of shares as short terms capital gains and long term capital gains during the scrutiny proceedings. It further records that there is no change in facts in subject assessment years to the facts existing in A.Y. 2006-07. In the above view, the Tribunal dismissed the Revenue's Appeal. Being aggrieved, the Revenue is in appeal before us.

7. Keeping in mind the aforesaid basic facts leading to this appeal, we shall consider the question as raised for our consideration.

8. Re. Question No.(i) :-

(a) Mr. Pinto, learned Counsel for the Revenue states that as the Memorandum of Association of the respondent assessee has as its object clause dealing in shares, it must follow that any income earned by the respondent assessee in respect of shares should be classified only as business income. This according to him even if income arises from investments as claimed by the respondent assessee. The memorandum of association has not been produced before us and nor is it a part of the record. It is not the case of the Revenue that there is any prohibition in the Memorandum of Association to hold shares in investments. Infact, this was not an issue even raised by the Revenue before the Tribunal as no mention of the same is found either in the impugned order or in the grounds of the Revenue before the Tribunal. Thus, the question as framed does not arise from the impugned order of the Tribunal. Accordingly, question (i) as framed does not give rise to any substantial question of law. Thus, not entertained.

9. Re. Question No.(ii) :-

Mr. Pinto, learned Counsel for the Revenue in support of question no.(ii) relied upon the Assessment order passed for the subject Assessment Year 2008-09 to contend that the respondent assessee therein has accepted the profits earned on sale of shares is to be taxed under the head of profit and gain of business. Thus, it is submitted that in this year also the profit earned on sale of investment should also be charged to tax as business income. We find that no such submissions were made before the Tribunal or even urged in the grounds of appeal. Thus, the Assessment order for A.Y. 2008-09 is not a part of the record. Therefore, this question as framed by the Revenue also does not arise from the impugned order of the Tribunal. Consequently, no substantial question of law arises. Thus, not entertained.

10. The manner in which the question of law has been framed by the Revenue, shows the casual manner in which appeals are being filed. Questions are framed on issues which do not arise from the order of the Tribunal. Filing of such appeals without proper application of mind not only leads to harassment of the assessee but also in precious judicial time being lost in considering such appeals. This is particularly unfair when large number of appeals are awaiting consideration by this Court.

11. Notwithstanding the above, on merits we find that the CIT(A) as well as the Tribunal have on consideration of all the facts concluded that the respondent assessee has subsequent to the Resolution of its Board made investment in shares as investments. The gains / loss earned on these investments were held to be chargeable to tax under the head capital gains on consideration of all facts and application of applicable law i.e. well settled test to distinguish between gains of trading and capital gains. In the above view, as two authorities have come to concurrent findings of fact that the claim made for short term capital gains and long term capital gains by the respondent assessee was justified. This findings of fact has not been shown to be perverse and / or arbitrary giving rise to any question of law.

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

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