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

Amk

INCOME TAX APPEAL NO. 2345 OF 2013
WITH
INCOME TAX APPEAL NO. 2367 OF 2013

Commissioner of Income Tax, ...Appellant
Central-II

Versus

M/s. Passionate Investment ...Respondent
Management Pvt. Ltd.

.....

Mr. A. R. Malhotra a/w. Mr. N. A. Kazi for the Appellant.
Mr. J. D. Mistri, Senior Counsel a/w. Mr. Atul K. Jasani for the Respondents.

CORAM : S.C. DHARMADHIKARI &
DR. SHALINI PHANSALKAR-JOSHI, J.J.

DATE : 27th JUNE, 2016.

P.C.:

1. Heard both parties. Learned counsel appearing for the Revenue submits that in this Revenue Appeal the questions of law as proposed at page 6 (6.1 to 6.4) are all substantial questions of law, equally the re-framed question at para 6.5. They are reproduced hereinbelow:-

> 6.1 Whether, on the facts and circumstances of the case and in law the Hon'ble Tribunal was justified, in treating the income

of Rs.13,40,75,773/- as 'Capital Gain' instead of Business Income as the assessee is a trader in Shares and not an investor?”

6.2 “Whether, on the facts and circumstances of the case and in law the Hon'ble Tribunal was justified, in ignoring the memorandum of association which speaks of intention of the assessee?”

6.3 “Whether, on the facts and circumstances of the case and in law the Hon'ble Tribunal was justified, in ignoring the reasoned order of AO and directing to follow the rule of consistency?”

6.4 “Whether, on the facts and circumstances of the case in law the Hon'ble tribunal was justified, in not providing any cogent reasons as to why the huge transactions made by assessee cannot be treated as voluminous and adventure in the nature of trade?”

6.5 “Whether, on the facts and circumstances of the case and in law the Hon'ble Tribunal was justified, in restriction the disallowance u/s 14A of the I.T. Act, 1961 to the tune of Rs.18,65,942/-, whereas the disallowance as per Rule 8D of the I.T. Rules r.w.s 14A of the Act in view of the decision in the case of Godrej & Boyce Mfg. Co. Ltd. Vs. DCIT 328 ITR 81 (Bom) which is not accepted by the revenue and SLP has been filed before the Apex Court?”.

2. Mr. Malhotra would submits that the Assessing Officer had rightly proceeded on the footing that the income from profit and

sale of shares upto 66.75% of the total receipts credited to the profit and loss account. The Assessing Officer also found that income from business of financing from margin funding to the clients is merely 14.66% of the total income credited to the profit and loss account. Mr. Malhotra would invite our attention to the order of Assessing Officer in that regard and particularly at page 19 of the paper book to submit that one of the principal objects of the company as per the Memorandum of Association is to deal in shares, stocks etc. The business activity thus being to deal in shares, the Assessing Officer was right in the conclusion that he has reached. Our attention is invited to page 20 of the paper book. Our attention is also invited to the reliance that was placed by the Assessing Officer on certain judgments and particularly on the principle as emerging from the judgment in the case of **G. Venkataswami Naidu & Co. Vs. Commissioner of Income-tax (1959) 35 ITR 594 (SC)**. Thus, Mr. Malhotra's contention is that the Tribunal overlooked the settled principle in arriving at the conclusion that the character of such transaction is relevant. If the purchaser is a trader and the purchase of the commodity and and its re-sale is allied to his usual trade or business or incidental to it and if that is how the matter is approached by the Revenue, then the Tribunal's order cannot be sustained, according to Mr. Malhotra.

3. In relation to the question of law reframed as para 6.5, Mr. Malhotra would submit that, that is also a substantial question of law.

4. Upon reading the entire paper book including annexures thereto, we are unable to agree with Mr. Malhotra. The Commissioner of Income-tax i.e. the Appellate Authority on appraisal of the factual and legal position found that out of total 68 transactions charged under the head capital gain, 40 transactions constituted long term capital gains and balance; 28 were computed as short term capital gains. Further if one considers the sale after holding investment for more than 3 months, these constituted nearly 70% of the total transactions. These short term capital gains transactions included closed transactions which are also not in the nature of sale of shares. The entire analysis and data was submitted before and the Commissioner on total appraisal of the same concluded that the Assessing Officer's order cannot be sustained. The order passed by the Commissioner and running into more than 60 pages refers to not only the settled principles to which our attention

was invited but after applying them he found that the majority of the transactions of sale are after holding the shares for longer period. The investments held but not sold are also of longer period. The intention of the company was not to trade but to hold the same as investor. This coupled with the fact that the investments have fetched dividend income also. The investments were not sourced from interest bearing borrowed funds. All these facts were there in the earlier years and the department itself accepted the gains as capital gains. In view of this, gain from sale of shares cannot be taxed under the head of business income and the same needs to be taxed as capital gain. This finding of fact is arrived at by the Commissioner after perusing the entire record. He perused the Minutes Book for the earlier as well as current year. He also referred to the Board Meetings wherein it was decided that the shares have been purchased and invested on long term basis.

5. Noticing this aspect, the Tribunal in disposing of Ground No.1 of the Revenue's Appeal Memo in para 6 of the impugned order referred to the past history from the year 2001-02 to 2006-07 when the assessments have been made after thorough scrutiny. The department accepted the profit under the head capital gain. The

Tribunal referred to the rule of consistency only because the entire record reveals that the factual position is no different from the earlier assessment year namely 2007-08.

6. On the second question it found that once Rule 8D is prospective as held by this Court in the case of **Godrej & Boyce Mfg. Co. Ltd. Vs. DCIT (2010) 328 ITR 81 (Bom.)**, then, merely because the Revenue has not accepted this judgment and challenged it in further appeal will not either enable the Tribunal and equally us to take a different view. The factual position being identical to earlier Assessment years, it will not be possible to uphold the assessment order.

7. Once we come to the above conclusion, then this Income-tax Appeal need not be entertained. It raises no substantial question of law. It is accordingly dismissed.

8. As far as the second Income-tax Appeal No. 2367 of 2013 is concerned, Mr. Malhotra would submit that the substantial question of law as proposed by the Revenue deserves and merits consideration. He would submit that the Commissioner's order was affirmed by the

Tribunal without adverting to the language of Rule 8D. Mr. Malhotra has relied upon Section 14A to submit that by sub-section 2 thereof it is the obligation of the Assessing Officer to determine the amount of expenditure incurred in relation to such income which does not form part of the total income under the Income-tax Act, in accordance with such method as may be prescribed. In the instant case Rule 8D is relied upon by Mr. Malhotra. Mr. Malhotra submits that method of determining the amount of expenditure in relation to income not forming part of total income is firstly by having regard to the account of the assessee for the previous year and if the Assessing Officer is not satisfied with the correctness of claim of expenditure made or the claim made by the assessee that no expenditure has been incurred, then, sub-rule 2 would come into play. In sub-rule 2, if particularly clause (iii) thereof is applicable, then, the amount equal to 1/2% of the value of investment, income from which does not or shall not form part of the income as appearing in the balance-sheet of the assessee, on the first and last of the previous year ought to be the process followed. He, therefore, would submit that the Commissioner and the Tribunal were in complete error in not allowing the revenue to undertake the exercise that is mandated by Rule 8D for the Assessment Year 2008-09.

9. We are unable to accept his contention and for more than one reason. The Tribunal found that may be Rule 8D is prospective in nature and would be applicable for the Assessment Year 2008-09 but the situation is no different. In that the Tribunal refers to the detailed order of the Commissioner. The Commissioner found from the record that the conditions for applicability of provisions of Section 14A are that there should be expenses incurred and that expenses should have been claimed in computing total income. The section is referred to in detail in para 7.11 of the Commissioner's Order at page 77 of the paper book in this Appeal. Then, in para 7.12 the alternative argument of the assessee was referred. The argument was that the Assessing Officer erred in including the interest reversal of Rs.95,269/- while computing interest disallowance under Section 14A read with Rule 8D.

10. In para 7.13 the Commissioner reproduced the finding in relation to the Assessment Year 2007-08 and then concluded that the assessment order in that year directed to disallow Rs.18,65,942/- under Section 14A instead of Rs.2,96,23,551/- as made in the assessment order in the year in question, namely 2008-09. The

Commissioner concluded that the facts are identical to the earlier assessment year. There is a factual finding that borrowed funds were not used for acquiring the shares. The interest expenditure is not at all connected with the investment in shares and earning dividend income. Therefore, that should not be disallowed. In para 7.15, there is clear reference to Rule 8D(2)(iii). It is in these circumstances that he directed the Assessing Officer to follow his order for the earlier assessment year. Once the above factual position emerges from the record then, the Tribunal was not in any error in arriving at the conclusion that the Commissioner has restricted the disallowance to the extent of expenditure claimed. That would not require any interference. Such finding for the earlier Assessment Year 2007-08 has been confirmed for the Assessment Year in Question, once the position was identical on facts.

11. In view of the above, we do not find that there is any substantial question of law which enables us to entertain this appeal. The Findings of fact are not perverse, nor vitiated by any error of law. The appeal is devoid of merits and, therefore, dismissed. No costs.

[DR. SHALINI PHANSALKAR-JOSHI, J.] **[S.C. DHARMADHIKARI, J.]**