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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.2437 OF 2013

Veena S. Kalra ..Appellant
Versus
The Assistant Commissioner of Income-tax
& anr. ..Respondents

....
Mr. V. S. Hadade for the Appellant.
Mr. A. R. Malhotra a/w N.A. Kazi for the Respondents.
....

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

DATE : 7TH JUNE, 2016

P.C.:

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 10th July, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2008-09.

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

"On the facts and in the circumstances of the case and in law, whether the Income-tax Appellate Tribunal was right in

holding that the appellant's intention was to trade in shares and not to hold the same as investment portfolio?”

3. Brief facts:-

(a) The appellant is an individual engaged in the business of dealing in derivatives i.e. Futures and Options. The respondent-assessee in its return of income for the A.Y. 2008-09 had claimed an amount of Rs.2.17 crores as a short term capital gains on account of dealing in shares and securities. The Assessing Officer by order dated 1st November, 2010 did not accept the appellant's claim of being investor in shares. The amount of Rs.2.17 crores was classified as income earned on trading of shares i.e. business income.

4. Being aggrieved the appellant carried the issue in appeal to the Commissioner of Income Tax (Appeals) (CIT(A)). In appeal, the CIT(A) sustained the order of the Assessing Officer to the extent of Rs.21.50 lakhs holding that the same is assessable as business income in respect of 11 scrips as the appellant-assessee had re-entered the same after selling it. However, the balance amount of Rs.1.96 crores was held to be classifiable as claimed by the appellant-assessee as short term capital gain.

5. Being aggrieved, the Revenue carried the issue in appeal to the Tribunal. The Tribunal by the impugned order dated 10th July, 2013 on a detailed analysis of the transactions which were carried out by the appellant concluded that for the subject assessment year, the entire amount of Rs.1.96 crores is also to be brought to tax under the head 'business income'. Thus, the entire amount of Rs.2.17 crores i.e. Rs.21.50 lakhs + Rs.1.96 crores was brought to tax as business income. The impugned order, inter alia, records the fact that the intention of the appellant while doing business in shares was to make quick profit and not hold the shares as investment. This was also indicated by the fact that during the subject assessment year the assessee had purchased shares valued at Rs.25.37 crores and sold shares valued at Rs.28.92 crores. Thus indicating that which was purchased during the year had been sold in its entirety during the same year. The stock turnover ratio and capital turnover ratio is recorded in the order at 1:16 and 1:10 during the subject assessment year. On these facts, the impugned order allowed the Revenue's appeal treating the entire amount of Rs.2.17 crores as income from trading in shares i.e. business income.

6. Being aggrieved, the appellant is in appeal before us. Mr. Hadade, the learned counsel for the appellant urges that for the earlier and

subsequent assessment years the Revenue has accepted the appellant's claim of trading in shares as being an action of investment resulting in short term capital gains. Thus, invoking the decision of this Court in ***CIT vs. Gopal Purohit 336 ITR 287*** it is submitted that consistency has to be followed and in this year also the profits made on account of purchase and sale of shares should be taxed under the head 'short term capital gain'. It is further submitted that the impugned order proceeds on the basis that the appellant in its balance sheet had not indicated that any amount was invested in shares inasmuch as they have not prepared an appropriate balance sheet. This finding according to Mr. Hadade cannot be sustained in view of the fact that she is an individual and therefore under no obligation to maintain and file a balance sheet. Lastly, he submits that this Court has admitted appeals raising identical question as raised herein i.e. appropriate classification of profits made on account of purchase and sale of shares as short term capital gains or business income. In the above view, it is prayed that this appeal be admitted for consideration.

7. We find that the impugned order of the Tribunal has elaborately dealt with the contention of the appellant that as for the earlier and subsequent assessment years profits arising on account of purchase and sale of shares has been classified as short term capital gains, the same

should be done in the subject Assessment years. The Tribunal on analysis of the facts noticed that the facts in the subject assessment year are different from the facts in the earlier and subsequent assessment years. Particularly the number of transactions in shares were in single or double digits in the years sought to be compared while transactions of purchase and sale of shares is of the magnitude of 346 transactions in the subject assessment year. Further differences in facts was also brought out in a chart in the impugned order on 13 parameters between the subject assessment year and the earlier and subsequent assessment years. In these circumstances the impugned order very correctly holds that the rule of consistency would not apply in the present case as there is a change in facts existing in the subject assessment year. In fact the decision in the case of Gopal Purohit (supra) relied upon by the appellant itself proceeds on the basis of no change in facts and circumstances in the two years. It is a settled principle of law that res judicata does not apply in tax matters for the reason that each assessment year gives rise to a separate cause of action. However, as held by the Apex Court in ***BSNL v/s. Union of India 282 ITR 273*** the orders passed in the earlier assessment years are generally accepted and followed not on the basis of principle of res judicata but on the doctrine of precedence so as to ensure that on identical facts in the absence of change in law the Revenue is bound to follow the view taken earlier. There is no merit in the submission that reliance on the inadequate mention in the Balance Sheet is immaterial since the appellant an individual for the reason that she was carrying a business in Futures and Options. Thus the obligation on the part of the assessee to file its Balance Sheet and disclose its investments. The last submission that appeals raising an identical question i.e. classification of Income as short term capital gains or business Income have been admitted for our consideration would requires admission of this appeal is not acceptable. This for the reason that appeals are admitted keeping in context the facts which give rise to the questions which were posed for our consideration. The order passed at the stage of admission of a tax appeal, cannot be treated as precedent.

8. On perusal of the order of the Tribunal, we find that the view taken by the Tribunal on the facts as existing in the present case is a possible view. Nothing has been shown to us to suggest that the finding is perverse. Accordingly, the question as framed for our consideration does not give rise to any substantial question of law. Thus, not entertained.

9. Appeal is dismissed. No order as to costs.

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

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