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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO.1201 OF 2014**

Commissioner of Income Tax-2

..Appellant

Versus

Mohan Vallabhdas Bhatiya

..Respondent

.....

Mr. Suresh Kumar for the Appellant.

Mr. F. V. Irani i/b. Atul Jasani for the Respondent.

.....

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

DATE : 24th JANUARY, 2017

PC.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 31st January, 2014 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2005-06.

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

“Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct in law, in holding that the gains from the purchase and sale of shares and mutual funds are to be treated as Long Term Capital Gains, ignoring that the

volume and frequency of transactions?”

3. The impugned order of the Tribunal dismissed the Revenue's appeal upholding the stand of the Assessee that the income earned on account of purchase and sale of shares and mutual funds were chargeable to tax under the head 'capital gains' and not as business income. The above concurrent finding by the Commissioner of Income Tax (Appeals) (CIT(A)) and the Tribunal was based on the following undisputed facts:- The respondent-assessee carries on business as a trader in shares. He also has investments, consequently he holds two portfolios one an investment portfolio showing the capital assets and the other is trading portfolio. The respondent-assessee was consistently showing gains on account of his investment portfolio and offering them to tax under the head 'capital gains'. In fact, that right from the Assessment Year 2003-04 till Assessment Year 2009-2010, the Revenue has consistently accepted the claim of the assessee with regard to the gain made on its investment portfolio is taxable under the head Capital gain except for the subject Assessment Year the Revenue is seeking to take a different view. This without pointing out change in the facts and circumstances of the case for the year under consideration from those existing in the earlier and subsequent years.

4. So far as borrowed funds are concerned, the Tribunal records the fact that a small amount of loan was taken from the relatives and it did not bear any interest. Moreover, the use of borrowed funds is not necessarily attributable for the investments made as there is no such finding given by the authorities below.

5. The grievance of the Revenue is that in the subject Assessment Year there were borrowed funds. Thus the gains claimed to have been made on investments are in fact trading gains.

6. We specifically asked whether this element was present for the earlier and subsequent years, Mr. Suresh Kumar was not in a position to respond to the same. It must be borne in the mind even before the Tribunal, the Revenue did not point out any variation in the facts and circumstances of the case for the subject Assessment Year from those of the earlier and subsequent years on account of income earned on investment. Moreover, as held by the Tribunal the loan which has been taken from relatives were for a small amount and further the use of these borrowed funds were not established to be for purchase of shares for investment by the authorities.

Therefore, in view of the fact that the Revenue has been consistently taking a view that the income earned on investments is taxable under the head capital gains no difference in facts and /or in law has been pointed out to take a different view for the subject Assessment Year. Moreover, the entire question of the nature of activity carried out by the respondent-assessee i.e. business or investment is a question of fact. Both the CIT(A) as well as the Tribunal have concurrently come to a finding of fact that the income earned on the investment portfolio is chargeable under the head capital gains and not under the head 'profits from trading of shares' which is not shown to be perverse.

7. In the above view, the question as formulated does not give rise to any substantial question of law. Thus no entertained.

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

(A. K. MENON, J.)

(M. S. SANKLECHA, J.)