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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 233 OF 2015

Zikrullah Abbasali Choudhary … Appellant

vs.
Dy. Commissioner of Income Tax … Respondents
Circle 2(3), Pune.

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Mr. Ruturaj H. Gurjar i/b. Mr. M. C. Naniwadekar for the Appellant.
Mr. Sham Walve for the Respondent.

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CORAM : A.S. OKA & A.K. MENON, JJ.
DATE : 31st OCTOBER, 2017

P. C.

1. Heard learned Counsel appearing for the appellant. He has pressed into service the following questions of law which are formulated in paragraph 5 of the Memorandum of Appeal

"1. Whether on the facts and in the circumstances of the case, the ITAT was justified in confirming the treatment of gains received by the assesseee from sale of shares as "Income from other sources", instead of "long term capital gains" as duly declared by the assessee?

2. Whether on the facts and in the circumstances of the case, the ITAT was justified in law in relying on irrelevant material such as the alleged "admission" by the assessee through assessee's *letter dated 24.12.2009, when on a proper analysis of the said letter, there is no such admission ?*

3. Whether on the facts and in the circumstances of the case, the ITAT was justified in law in taking into account irrelevant materials, and not taking into consideration relevant materials duly produced before it ?

2. On the basis of search conducted under Section 132 of the Income Tax Act, 1961 a notice under Section 153A was issued pursuant to which the appellant assessee filed a return declaring total income of Rs. 97,58,950/-. In the return, Long Term Capital gain of Rs.65,97,975/- was claimed on the basis of sale of shares of M/s. Tanu Health Care Ltd. and M/s. Comfort Intech Ltd. The Assessing Officer found that appellant-assesssee had purchased the said shares at a very nominal price and had sold the same at a very high price. It was observed by the Assessing Officer that the appellant- assessee acquired the shares in March 2004 and the payment towards the same has been made in April, 2005. The explanation offered by the appellant-assessee was that he had asked his broker to buy the said stock for him and the payment was made by him later on. The Assessing Officer called upon the appellant to Show cause as to why the capital gain should not be considered as income from other sources. A letter dated 24th December, 2009 was submitted by the appellant to the Assessing officer. The material part of the said letter reads thus :

> *"This is to bring to your kind notice that my shares dealings of M/s. Tanu Health Ltd. Purchased the shares of M/s. Tanu Healthcare Ltd. Through the brokers by paying Account payee Cheques. The purchase & sale of shares are made through my demat Account. Sale are also made through the brokers for which I have received the cheques. All these details I have submitted to your office.*
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> *But there is constant pressure from your office to surrender the income earned from the dealings in share of M/s. Tanu Healthcare Ltd. As such to buy the metal peace and to concentrate on my business affairs uninterruptedly I submit to your suggestions.*
>
> *Further, I assure you that I will pay the Income Tax on above income, provided the Tax Liability is arrived at without Interest & Penalty as promised by you."*

3. The Assessing Officer proceeded to consider the sum of Rs. 93,48,858/- declared by the appellant-assessee as "income from other sources". Being aggrieved by the Order of the Assessing Officer, an appeal was preferred by the appellant before the Commissioner of Income Tax (Appeals). By the judgment and order dated 20th February, 2012 the appeal was dismissed by the Commissioner of Income Tax (Appeals). Being aggrieved by the said order, an appeal was preferred by the appellant-assessee before the Appellate Tribunal which has been dismissed by the impugned judgment and order.

4. The submission of the learned Counsel appearing for the appellant is that the Assessment Order as well as the appellate order of the first Appellate Authority are passed only on the basis of the statement made by the appellant-

assessee in the letter dated 24th December, 2009 without examining any other material. He submitted that even the Appellate Tribunal was impressed by the contents of the said letter as is clear from paragraph 9 of the impugned judgment and order of the Appellate Tribunal. He pointed out that in fact, the said letter specifically records that the transactions were genuine as the purchase and the sale of shares were through the demat account of the appellant and cheque payment was received from the brokers after the sale of shares. His submission is that the letter read as whole does not constitute any admission of surrender of income. The submission is that the statement at highest will be an admission on point of law.

5. Lastly, he submitted that the Appellate Tribunal did not consider material proofs such as contract notes and the fact that the transactions were made by account payee cheques. He would, therefore, submit that an order of remand be made to the Appellate Tribunal with the direction to the Appellate Tribunal to consider the material produced by the Appellant and thereafter to decide the issue whether Capital Gain of Rs.93,48,858/- claimed by the appellant can be treated as income from other sources.

6. We have given careful consideration to the submissions. After having carefully perused the impugned judgment and order, we do not agree with the submission that the Appellate Tribunal was impressed only by contents of the said letter. In paragraph 6.3 and 6.4, the Appellate Tribunal after

considering the various details and material produced by the appellant has recorded the following findings :

> *6.3 From the various details furnished by the assessee we find the cost of purchase of shares of M/s. Tanu Health Care Ltd. Were made after alapse of more than one year from the date on which shares were purchased by the broker. The assesssee was not known to the broker. During the course of search the statement of the assessee was recorded wherein he has stated that the sale transactions were done as per advice of his friend Shri Anand Jaju, Pune who has expertise in share market. The relevant question and answer of the assessee are as under :*
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> > *Q.No.11 In your statement recorded on oath on 24-10-2007, you were asked about your investment in shares of "Tanu Healthcare P. Ltd." as it appears the transaction appears to be a colourable transaction wherein the payment for acquiring shares was made after a lapse of more than one year from the date on which the shares were actually acquired by you. Do you have to offer your comment about this ?*
> >
> > *Ans : As stated earlier, I have entered into this transaction with a genuine belief to earn some profit. Accordingly, I have made cheque payment for this investment and have recd. back some handsome returns through cheques only. As stated earlier, this was done as per advice of my friend Shri Anan Jaju from Pune who hold expertise in share market investment. To the best of my knowledge, the entire transaction is genuine and accounted for."*
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> *6.4 From the submission of the Ld. Counsel for the assessee we find the assessee is not known to the broker and made the transaction of purchase of shares on the advice of his friend and the cost of purchase of shares was not given to the broker. Only a few days before the sale of shares the payment has been made and the assessee after selling the shares got huge amount of profit. It is strange to believe that a person not known to the assessee will invest in the purchase of shares on behalf of his unknown client without receiving any money and after a period of one year will given away an amount of above Rs. 90 lakhs profit without retaining the same for himself. Even the middleman, i.e. in the instant case, friend of the assessee who had*

expertise in purchase and sale of shares has not made any profit for himself and has given away the money to the assessee which is very substantial. All these things in our opinion are against human probabilities."

7. The learned Counsel appearing for the appellant relied upon what is observed in paragraph 6.9. It is true that in first part of paragraph 6.9, there is a reference to the said letter . However, the said paragraph reiterates that surrounding circumstances of the case prove that the transactions in purchase and sale of shares is a colourable device especially when the assessee had not done any such transaction in the preceding or subsequent year and the assessee did not know the broker. Findings of fact arrived at by the Tribunal in paragraph 6.3 and 6.4 are on the basis of material on record and therefore, it cannot be said that the Appellate Tribunal has relied upon only the alleged admission of the appellant on the point of law.

8. No substantial question of law arises. There is no merit in the appeal and accordingly, the same is dismissed.

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(A.K. MENON, J) **(A.S. OKA, J)**