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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO.331 OF 2015

Jitendra K. Shah ...Appellant
vs.
Deputy Commissioner of
Income Tax, Circle 16(3) ...Respondent

Mr.Ashok J. Patil for the appellant
Mr.Suresh Kumar for the respondent

CORAM : A.S.OKA, &
A.K.MENON,JJ.
DATE : NOVEMBER 7, 2017

P.C.:

1 Heard the learned counsel appearing for the appellant. The challenge in this appeal is to the Judgment and order dated 18th June 2014 passed by the the Income Tax Appellate Tribunal, A Bench, Mumbai (for short “the Appellate Tribunal”) which is a common order on the appeals filed by the assessee and the respondent. What was impugned before the Appellate Tribunal was the order of the Commissioner of Income Tax in an appeal preferred by the appellant-revenue.

2 With a view to appreciate the submissions made by the parties, a brief reference to the facts of the case is necessary. According to the case of the appellant, he conducts activity of financing and trading business in shares. Present appeal relates to the assessment year 2008-2009 for which the

appellant filed a return declaring his total income as Rs.67,70,912/-. The Assessing Officer determined the total income at Rs.70,05,490/-. The Assessing Officer treated the income accrued from the shares by the appellant as income from the business. The Commissioner of Income Tax (First Appellate Authority), in the appeal preferred by the appellant partly modified the order passed by the AO. The first Appellate Authority bifurcated Short Term Capital Gains (STCG) in two parts, investment and trade. Rs.16,62,263/- was held as income from business of the appellant-assessee.

3 In an appeal preferred by the appellant before the Appellate Tribunal, the order of the first Appellate Authority has been confirmed. The appeal preferred by the respondent-revenue has been dismissed.

4 The learned counsel for the appellant invited our attention to the chart which is a part of Judgment and order of the first Appellate Authority. The submission is that in case of earlier assessment years, on similar facts, the Assessing Officer adopted different approach. The submission is that principle of consistency ought to have been followed as in the case of earlier assessment year, on more or less similar facts,the respondent-revenue accepted the income from the STCG as income from the capital gain and it was not treated as the income from business. He, therefore, pressed into service substantial questions of law framed in paragraph 5

of the Memorandum of Appeal which are based on principle of consistency and principle analogous to res judicata.

5 We have considered the submissions. We have perused the impugned Judgment. In paragraph 2.3 of the decision of the Appellate Tribunal, the submissions made by the authorised representative of the appellant have been noted. Paragraph 2.3 reads thus:

> "2.3 Before us, Authorised Representative (AR) stated that in the earlier years on similar facts income from the share trading was taxed under the head STCG, that there was no change in facts and circumstances for the year under appeal, that order for the previous years were passed u/s.143(3) of the Act, that no borrowed funds were used for earning STCG, that holding period of shares proved that the assessee was not indulging in trading. He referred to the page no.19,36,93 and 99 of the paper book. He relied upon the judgment of Radhasoami Satsang (193ITR 321) delivered by the Hon'ble Apex Court. Departmental Representative (DR) supported the order of the FAA."

6 In paragraph 2.4, the Appellate Tribunal held that the question of treating income from the share trading in one particular assessment year has to be

decided on the basis of the facts relevant for that assessment year. Past history and entry in books of accounts have a limited role. Considering the principles laid down in paragraph 2.4 which in our view have been correctly laid down, the Appellate Tribunal considered the facts of the case. It was observed that the number of scrips purchased and sold during the year was 100% more than the last assessment year. It was also observed that in the turnover of purchase value and sale, there is a huge increase from Rs.2.37 crores to 5.98 crores. It was found as a matter of fact that the assessee earned Rs.16.10 lakhs on the trading of shares which were held by him only for a period of one to seven days. Thus, a finding of fact was recorded that major portion of STCG was out of the sale of shares that were held only for a maximum period of one week. Thereafter, the Appellate Tribunal referred to the finding of the first Appellate Authority. Short holding period, volume of the scrips and frequency of the transactions are major factors to decide the issue as to whether the assessee is an investor or was doing business in shares and security. After considering the peculiar facts of the relevant assessment year namely that the STCG of Rs.16.62 lacs was from the shares which were held for a maximum period of one week, the finding of fact recorded by the first Appellate Authority has been upheld by the Appellate Tribunal. As already quoted above, a sum of Rs.16,62,262/- was held as business income. In our view, the findings of fact recorded by the Appellate Tribunal are based on record.

There is no perversity. There is no error of law committed by the Appellate Tribunal. Hence, no substantial question of law arises. Appeal is dismissed with no order as to costs.

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