IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

INCOME TAX APPEAL NO.100 OF 2014

Commissioner of Income Tax-II,
Nashik, Kendriya Rajaswa Bhavan,
Gadkari Chowk, Old Agra Road,
Nashik-422002 ..APPELLANT

VERSUS

Shri Chhatarmal Gokulchand Chhajer,
K-2, MIDC Area, Jalgaon ..RESPONDENT

Mr Alok M. Sharma, Advocate for appellant;
Mr R. R. Chandak, Advocate for respondent

CORAM : PRASANNA B. VARALE
AND
S. M. GAVHANE, JJ.

DATE : 5th July, 2018

ORAL ORDER:

Heard Mr Sharma, learned Counsel appearing on behalf of the appellant and Mr Chandak, learned Counsel appearing on behalf of respondent.

2. The appellant Commissioner of Income Tax–II, Nashik, by the present appeal challenges the order dated 28th October, 2013, passed by the learned Member, Income Tax Appellate Tribunal, Pune Bench 'B", Pune in Income Tax Appeal No. 699/PN/2012 for the assessment year 2008-2009.

Brief facts giving rise to the present appeal are as follows:

The respondent assessee is the full time Managing Director of one M/s Mahavir Packaging and is also engaged in the activity of trading of shares. The respondent assessee filed e-Return of his income for the assessment year 2008-2009 on 30th September, 2008 and declared the total income for the said year @ Rs.2,45,42,750/-. While submitting the return, the assessee has shown business loss of Rs.56,94,446/- on account of dealing in futures and options and has shown short term capital gain of Rs. 2,55,08,393/- of account dealing in shares. The assessee has shown his long term capital gain of Rs.59,41,819/- on sale of shares seeking exemption under Section 10 (38) of the Income Tax Act, 1961 (for short 'the Act'). The Assessing Officer passed Assessment Order under Section 143(3) of the Act on 20th December, 2010. The income was assessed at Rs.2,46,22,650/-. The Assessment Officer was of the opinion that the main turnover from dealing in shares is approximately 94% and that from futures and options is approximately 6% and then further opined that the assessee has shown loss as business loss, whereas profit in dealing in shares has been shown as capital gain, out of which an amount of 2,55,08,393/- has been shown as short term capital gain. Considering the huge volume of frequent transactions in shares amounting to 94% and treating the same as gain on dealing in shares, the Assessment Officer considered the said income as business income. To arrive at this conclusion the Assessment Officer took recourse to a Circular issued by the Central Board of Direct Taxes i.e.

CBDT Instruction No.1827 dated 31st August, 1989 as well as another Circular No.4 of 2007 dated 15th June, 2007.

3. Being aggrieved by the assessment order passed by the Assessment Officer, the respondent assessee preferred an appeal before the Commissioner of Income Tax (Appeals)-II, Nashik. The Commissioner of Income Tax (Appeals), by relying upon an earlier order passed by his predecessor in the case of assessee himself for the year 2006-07 and by relying on the order of Income Tax Appellate Tribunal, Ahmadabad, directed the Assessing Officer to work out and to compute short term capital gain and business profit on the basis of holding period of shares. The holding period was taken as one month.

4. Being aggrieved by the order passed by the Commissioner of Income Tax (Appeals)-II, Nashik, dated 24th January, 2012, the Revenue preferred an appeal before the Income Tax Appellate Tribunal, Pune. The respondent assessee had also filed cross objection against the order of the Commissioner. The Income Tax Appellate Tribunal, Pune Bench "B", Pune dismissed the appeal filed by Revenue and allowed the cross objection filed by the respondent assessee. The Income Tax Appellate Tribunal was pleased to hold that the classification made by the Commissioner of Income Tax (Appeals), namely, sale of shares held for more than one month would be charged as capital gain and surplus of shares held for less than one month

would be treated as profit from business is not reasonable and the Commissioner of Income Tax (Appeal) committed an error in making the said classification is the submission of the appellant. Being aggrieved by the order of the Income Tax Appellate Tribunal, Pune Bench B, the Revenue is before this Court by the present appeal.

5. Mr Sharma, learned Counsel appearing for the appellant vehemently submitted that the order of the Income Tax Appellate Tribunal, Pune Bench B is unsustainable and further submitted that the substantial questions of law are raised in the present appeal. In his submission, Mr Sharma heavily relied on the order passed by the Assessment Officer.

6. *Per contra*, learned Counsel appearing for the respondent assessee submitted that in identical facts and circumstances, the Division Bench of this Court, in Income Tax Appeal No.62 of 2015 could not find any favour with the appellant. On the contrary, the Division Bench was of the opinion that no substantial question of law arises and resultantly, the appeal was dismissed.

7. Learned Counsel appearing on behalf of the respondent assessee also relied on the judgment of the Division Bench of this Court at Principal Seat in Income Tax Appeal No. 1121 of 2009 and it was further submitted that the said judgment was subjected to a challenge before the Honourable the

Apex Court in Special Leave Petition and the Honourable Apex Court dismissed the Special Leave Petition.

8. On perusal of the order passed by the Assessment Officer, it reveals that the Assessment Officer refused to accept the submissions of the assessee on the ground that the assessee was dealing with the futures and options as well as shares and main turnover from dealing in shares which is approximately 94% whereas 6% of the turnover from futures and options account. It may not be necessary to give other details, suffice to say that the Assessment Officer, on assessment found that the number of transaction i.e. purchase and sale in case of short term capital gain shown by the assessee are on frequent i.e. almost on every alternate day. The Assessment Officer was of the opinion that this frequency is indicative of the fact that the intention of assessee was to earn profit and not to hold the commodity as investment. As such, the gain earned by the assessee is the business income and same cannot be treated as capital gain.

9. The Commissioner of Income Tax (Appeals), on going through the grounds raised by appellants as well as the order passed in case of the appellant himself for earlier year i.e. assessment year 2006-2007 as well as considering the judgment of the Income Tax Appellate Tribunal, Ahmadabad in case of Sugamchand C. Shah Vs. ACIT [(2010 Tax Pub (DT) 1398 (Ahd-Trib)] directed the Assessment Officer to work out and compute short

term capital gain and business profit afresh. Resultantly, the appeal was partly allowed.

10. The Income Tax Appellate Tribunal, Pune Bench, on consideration of material placed before it as well as on going through the judgments and orders relied on by the rival parties, arrived at a conclusion that the Assessment Officer committed an error. It may be useful for our purposes to refer to the observations of the Income Tax Appellate Tribunal, Pune and the same read thus:

> "7. After going through the rival submissions made by the parties, we find that assessee is an individual along with other activity of dealing in trade of shares. Assessee had shown short term capital gains of Rs.2,55,08,393/- and long term capital gains of Rs.59,41,819/- and claimed exemption u/s. 10(38) of I.T. Act of account of trading of shares. Keeping in view of volume of transactions of shares period of holding, intention of assessee, use of borrowed funds and magnitude of purchases and sales, Assessing Officer treated short term capital gains as business income. Assessing Officer however, allowed exemption u/s 10(38) on account of long term capital gains. <u>In an identical facts, CIT(A) for A.Y. 2006-07 had held dominant object of the assessee, shares based on delivery as investment and that the surplus of such transaction was required to be treated as capital gain. CIT(A) in said order further held that assessing Officer was not justified in treating surplus on sale of delivery based shares as business income.</u> Accordingly, he directed the assessing officer to treat said

> surplus as short term capital gains as claimed by the assessee. ....Assessing Officer had calculated on an average holding period of 1.5 months. While IPCL was not trades at all, shares of many scrips like Birla Corp., Dena Bank, Hind Motor, Infosys, Prithivi Info, SRF, TCS, SCI, SIRPUR, etc. were sold in parts within a week of their purchase"

11. Our attention was invited to the order of this Court dated 20th February, 2018 to submit that in identical circumstances, the Division Bench of this Court could not find any favour with the appellant. On going through the order on the the Division Bench, we find considerable merit in the submission of learned Counsel appearing for respondent assessee. The similar grounds which are raised in the present appeal were raised in the Income Tax Appeal No.62/015 The counsel appearing for the appellant submitted before this court that the Tribunal failed to consider the frequency of transaction enormous amount of purchase transaction and also failed to consider Circular dated 15th February, 2007. In Income Tax Appeal No.62 of 2015 , the assessee was subjected to assessment and in the preceding year i.e. assessment year 2005-06 the Assessment Officer considered the transaction of the assessee as 'short term' and 'long term' capital gain and in the subsequent year the Assessment Officer has hold the transaction as share to the business income. The Tribunal set aside the order. The appeals filed were filed by the Department and these appeals were dismissed holding that the transactions in shares to be a long term and short term capital gain depending upon the holdings. On these facts, the Division Bench could not

find favour with the appellant and observed that no question of law arises in the appeal and the appeal was dismissed. Learned Counsel appearing for the assessee was also justified in placing reliance on the judgment of the division Bench in Income Tax Appeal No.1121/2009. It may be useful for our purposes to refer to the observations of the Division Bench and same read thus :

> "2. The Tribunal has entered a pure finding of fact that the assessee was engaged in two different types of transactions. The first set of transactions involved investment in shares. The second set of transactions involved dealing in shares for the purposes of business (described in paragraph 8.3 of the judgment of the Tribunal as transactions purely of jobbing without delivery). The Tribunal has correctly applied the principle of law in accepting the position that it is open to an assessee to maintain two separate port folios, one relating to investment in shares and another relating to business activities involving dealing in shares. The Tribunal held that the delivery based transactions in the present case, should be treated as those in the nature of investment transactions and the profit received therefrom should be treated either as short term or, as the case may be, long term capital gain, depending upon the period of the holding. A finding of fact has been arrived at by the Tribunal as regards the existence of two distinct types of transactions namely, those by way of investment on one hand and those for the purposes of business on the other hand. Question (a) above, does not raise any substantial question of law.
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> 3. In so far as Question (b) is concerned, the Tribunal has

observed in paragraph 8.1 of its judgment that the assessee has followed a consistent practice in regard to the nature of the activities, the manner of keeping records and the presentation of shares as investment at the end of the year, in all the years. The revenue submitted that a different view should be taken for the year under consideration, since the principle of res judicata is not applicable to assessment proceedings. The Tribunal correctly accepted the position, that the principle of res judicata is not attracted since each assessment year is separate in itself. The Tribunal held that there ought to be uniformity in treatment and consistency when the facts and circumstances are identical, particularly in the case of the assessee. This approach of the Tribunal cannot be faulted. The revenue did not furnish any justification for adopting a divergent approach for the Assessment Year in question. Question (b), therefore, does not also raise any substantial question."

12. The judgment of the Division Bench in ITA No1121/2009 was challenged by the Revenue before the Honourable the Apex Court by way of Special leave Petition. The copy of the order passed by the Honourable the Apex Court was placed before us. The order of the Apex Court reads thus:

"Heard learned Counsel for the petitioner.
Delay condoned.
The Special leave petition is dismissed."

13. Considering the above referred facts and more particularly in view of the judgment of this Court in Income Tax Appeal No.62 of 2015 and Income Tax Appeal No.1121 of 2009, we are of the opinion that the Tribunal has

passed the order on findings of facts and these findings of facts do not call for interference in the present appeal nor any substantial question of law is raised in the appeal. Thus, the appeal deserves to be dismissed and accordingly the same is dismissed.

(S. M. GAVHANE, J.) **(PRASANNA B. VARALE, J.)**

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