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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 837 OF 2015

Pr. Commissioner of Income Tax-21 … Appellant
Versus
Smt. Sarah Faizal Hawa …Respondent

Mr. Sham Walve, for the Appellant.
Mr. K. Gopal, with Mr. Tanmay Phadke, i/b Jitendra Singh, for the Respondent.

CORAM: M.S.SANKLECHA &
RIYAZ I. CHAGLA, JJ.
DATED: 30TH JANUARY 2018

PC:-

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 6 February 2015 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order dated 6 February 2015 is in respect of Assessment Year 2007-08.

2 The Revenue urges the following reframed question of law for our consideration:

> *"(a) Whether on the facts and in the circumstance of the case and in law, the Tribunal was right in treating the Respondent as an investor in shares, when according to the Revenue she was a trader in shares?"*

3. In the subject Assessment Year, the Respondent had filed its return of income offering the gains made on account of sale of

shares under the head of capital gains as had been done in the earlier Assessment Year 2004-05, 2005-06 and 2006-07 and accepted by the Revenue. However, the Assessing Officer during the course of scrutiny assessment found that the Respondent had borrowed funds to the tune of Rs.2.35 Crores from one M/s. H.G. Hawa, a partnership firm (of which the Petitioner is a partner), the number of shares purchased and the fact that the Respondent was not carrying any other business activity except dealing in shares. Thus by Assessment order dated 22 December 2003 held that the Respondent is a trader in shares and the gain made on sale of shares should be charged to tax under the head profits or gains in business and not under the head capital gains.

4. Being aggrieved, the Respondent – Assessee preferred an Appeal to the Commissioner of Income Tax (Appeals) (CIT(A)). By an order dated 14 May 2010, the CIT (A) held that the Respondent has disclosed her holding in shares as investment consistently year after year and has also been charged to tax under the head capital gains in respect of profits made on sale of shares as an investor. It also found as a matter of fact that the transaction of shares were delivery based transactions and there was no running account with a stock broker for carrying on the

activity of purchase and sale of shares. Besides it found that the receivable of huge dividend on the shares held by her would also be indicative of her being an investor. So far as borrowing of funds is concerned, the CIT (A) has recorded a finding of fact that the Respondent had not borrowed any funds from M/s. H.G. Hawa and Co. and on the contrary an amount of Rs.1.88 Crores was receivable by her. On the aforesaid facts the CIT (A) allowed the Appeal of the Respondent - Assessee and held that the Respondent to be an investor in shares.

5. Being aggrieved, the Revenue carried the issue in appeal to the Tribunal. By the impugned order the Tribunal on consideration of the facts upheld the view of the CIT (A). Moreover it also records the fact that the funds invested in shares by the Respondent was from surplus funds available with her after payment of tax. Thus the Revenue's appeal was dismissed.

6. Mr. Walve, learned counsel for the Revenue challenges the impugned order on the ground that it is perverse as impugned order completely ignores the finding of fact arrived at by the Assessing Officer had entered a finding of fact that the Respondent had borrowed funds to the tune of Rs.2.35 Crores

from M/s. H.G. Hawa and Co., a partnership firm. Thus on the above basis alone the Respondent should be held to be as trader in shares.

7. We find that on facts the CIT (A) found on examination of the extracts of the accounts as well as the balance sheet of the parties that the Respondent had no borrowings from M/s. H.G. Hawa & Co. On the contrary, it found sums were receivable by the Respondent from M/s. H.G. Hawa and Co. to the extent of Rs. 1.88 Crores on account of loans extended by the Respondent to the M/s. H.G. Hawa and Co. Further this finding of fact has also been found to be correct by the Tribunal in the impugned order.

8. Thus the only grievance articulated on behalf of the Revenue in on an issue of fact and it cannot be accepted as it is on the face of concurrent finding of fact by the CIT(A) and the Tribunal. Infact, once the CIT(A) has on examination of evidence found that there was no evidence to support the finding of the Assessing Officer of the Respondent borrowing funds, no grievance in respect thereof was made by the Revenue before the Tribunal as the same finds no mention therein. Thus this concurrent finding of fact is not perverse.

9. We are further informed that for the earlier Assessment Years as well as subsequent Assessment Years, Respondent – Assessee is being treated as investor in shares by the Appellant-Revenue. We find that after considering all the indicia to determine the nature of purchase of sale of shares the impugned order has concluded that the Respondent was a investor in shares which finding is not perverse. Moreover the view taken by the Tribunal is in accord with the decision of this Court in the case of ***CIT V. Gopal Purohit***[1] as the Respondent is being consistently being held to be an investor by the Revenue for the earlier and subsequent Assessment Years on similar facts.

10. In view of the above, the question as framed does not give rise to any substantial question of law. Thus not entertained.

11. Accordingly, ***Appeal dismissed***. No order as to costs.

(RIYAZ I. CHAGLA J.) **(M.S. SANKLECHA, J.)**

1 (2011) 336 ITR 287 (Bom).