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

INCOME TAX APPEAL NO. 1146 OF 2016

Pr. Commissioner of Income Tax-33 .. Appellant
v/s.
Krishna Tandon .. Respondent

Mr. Arvind Pinto for the appellant
None for the respondent

CORAM : AKIL KURESHI &
M.S. SANKLECHA, J.J.

DATED : 23rd JANUARY, 2019

P.C.

1. The Revenue is in appeal against the judgment of the Income Tax Appellate Tribunal ("the Tribunal" for short), raising following questions for our consideration :-

(i) Whether in law and on the facts of the instant case, was the Tribunal in error in holding that the assessee is an investor in shares, ignoring the volume, frequency and regularity of transactions thereby indicative that he was a trader in shares?

(ii) Whether in law and on the facts of the instant case was the Tribunal correct in holding that since no borrowed funds were utilized, the assessee is an investor; unmindful of the fact that traders no do necessarily have to borrow funds when they have sufficient liquidity?

(iii) Without prejudice to the above, whether the question of borrowed funds is the sole criterion for determining whether one is a trader or an investor

2. Though three questions are framed, the issue is single namely;

"Whether the receipts of the respondent assessee arising out of sale of shares should be taxed as his business income or capital gain ?"

3. The Revenue obviously argued that the assessee was in the business of buying and selling the shares, the assessee contends to the contrary.

4. The issue eventually reached to the Tribunal, which dismissed the Revenue's appeal making following observations :-

> "*6. We have heard both the parties and their contentions have carefully been considered. So far as it relates to the case of individual, for immediate preceding assessment year similar claim has been accepted by way of an assessment order passed under section 143(3) of the Act. According to the figures placed in the chart the assessee in earlier year has dealt in number of scrips i.e. 11 and in respect of A.Y. 2008-09 the scrips dealt in are 16. There is not much difference in the position of sale and purchase of shares except higher value of the shares", the period of holding is also substantial and main income has been earned by the assessee in two scrips only. All these positions have been described in the chart, which have been reproduced in the above part of this order. The AO has not brought out any substantial difference in the facts between the case for the year under consideration and for assessment year 2007-08. The assessee is an old person and is regularly making investment in the shares and the number of scrips dealt is also not high. We do not find any differential fact for the year under consideration as compared to the immediate preceding assessment year for which similar activity has been held to be assessable under the head capital gain. There is also no substantial difference in the activities carried out by the assessee in individual capacity vis-a-vis in the*

> *capacity of HUF. The assessee did not utilize the borrowed funds for making investment as the entire investment is made out of own capital of the assessee. Keeping in view all these facts, which have been accepted by Ld. CIT(A) by detailed discussion in the case of HUF and also in view of facts of the present case and position depicted in teh charts, we are of the opinion that Ld. CIT(A) did not commit any error in granting impugned relief to the present assessees. We decline to interfere in the relief granted by him. Accordingly, the appeals filed by the Revenue are dismissed.*"

5. It can thus be seen that the Tribunal was influenced by the facts that the claim of the assessee was accepted in the assessment order passed after scrutiny, that the assessee had dealt with few scrips for purchase and sale, that the assessee was a senior citizen and retired bank employee who had invested funds in different scrips in his individual capacity as well as in the capacity of a *Karta* of HUF and lastly that the assessee has not utilized any borrowed funds for making such investments. The investment was out of his own capital. In view of such relevant facts noticed by the Tribunal, we do not see any error in the view taken by the Tribunal. No question, therefore, arises.

6. The tax appeal is dismissed.

(M.S. SANKLECHA, J.) **(AKIL KURESHI, J.)**