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

INCOME TAX APPEAL NO.155 OF 2017

Dilipkumar Vishindas Lakhi … Appellant

V/s.

The Joint Commissioner of Income Tax … Respondent

Mr.Subhash Shetty i/by Mr.Atul Jasani for the Appellant.
Mr.Ashok Kotangle with Mr.Prabhakar Ranshur for the Respondent.

CORAM : AKIL KURESHI AND
SARANG V.KOTWAL, JJ.
DATE : MARCH 12, 2019.

P.C.:-

1. Assessee has filed this appeal against the judgment of the Income Tax Appellate Tribunal raising following questions for our consideration:-

> "(1) Whether in the facts and circumstances of the case and in law, the Tribunal was right in holding that the gains arising from transfer of shares held for a period of less than 30 days is to be treated as business income and not as capital gains?
> (2) Whether in the facts and circumstances of the case and in law, the Tribunal was right in upholding the disallowance on a reasonable basis made under

Section 14A of the Act for the assessment year 2007-08 when no method has been prescribed under subsection(2) for the relevant assessment year ?"

2. At the outset, counsel for the assessee stated that question No.2 involves a very small amount and he therefore only on this count does not press this question.

3. The surviving question pertains to the decision of the Tribunal treating the assessee's receipt from sale of shares held by him for less than 30 days, as his business income.

4. The materials on record would suggest that assessee is mainly engaged in the business of trading of diamonds. The assessee also engaged himself in buying and selling shares. The Assessing Officer and CIT (Appeals) on the basis of the frequency of sale and purchase of shares and duration of holding such shares as also the volume came to the conclusion that the shares held by the assessee for less than 12 months would give rise to business income upon sale. The Tribunal give partial relief to the assessee and held that all the shares which were held by the

assessee for more than 30 days would qualify as capital gain and not as business income.

5. Counsel for the assessee submitted that the Assessing Officer has introducing an artificial cut off line for holding that shares held for less than 30 days will give rise to business income, a demarcation not provided in the Income Tax Act.

6. On the other hand, learned counsel Mr.Ashok Kotangle for the revenue drew our attention to the relevant facts and argued that the Tribunal has considered the relevant parameters and came to the conclusion which calls for no interference.

7. At the outset, we may record that learned counsel for the assessee is correct in contending that the mere demarcation of holding shares for less than 30 days or more cannot be conclusive or even in a given case the determinative factor. However, in the present case, we must appreciate the essence of the order of the Tribunal in overall facts and circumstances of the case. After noticing the assessee's activity of buying and selling

shares and income generated from such activity, the Tribunal while granting partial relief for the Assessee had recorded that the same was done in peculiar facts of the case. The ultimate directions of the Tribunal therefore must be viewed in such backdrop.

8. The facts on record would suggest that during the period relevant to assessment year 2007-08, which is under consideration, the assessee had executed as many as 106 transactions of buying and selling shares within less than 30 days. The total value of sale transactions was Rs.7.11 crores. The assessee had also engaged in buying and selling shares of sizable volume and value after holding them for a period ranging between two months to upto 200 days. It was also noticed that the assessee was indulging intra-day transactions without taking delivery of the shares which gave rise to the assessee's speculative income.

9. When seen in totality of the facts and circumstances of the case, one cannot find fault to the Tribunal's conclusion that the

assessee was not purely an investor in shares. The Tribunal introducing the demarcation line of holding of shares of less than 30 days and more than 30 days for giving different treatment for receipts arising out in sale of such shares would not vitiate the very foundation of the Tribunal's finding. No question of law arises. Income Tax Appeal is dismissed.

(SARANG V.KOTWAL,J.) **(AKIL KURESHI,J.)**

....