



itxa-1670-2013

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

INCOME TAX APPEAL NO.1670 OF 2013

Ratanlal J. Oswal .. Appellant  
V/s.  
Commissioner of Income Tax-8 .. Respondent.

WITH  
INCOME TAX APPEAL NO.1705 OF 2013

Rishi R. Oswal .. Appellant  
V/s.  
Commissioner of Income Tax-8 .. Respondent.

Mr. V. Shreedharan, Sr. Advocate with Mr. B. V. Jhaveri, for the Appellant  
in both the matters.

Mr. Arvind Pinto, for the Respondent in both the matters.

**CORAM: M.S.SANKLECHA, &  
N.M.JAMDAR, JJ.**

**DATE : 27<sup>th</sup> JULY, 2015.**

**P.C:-**

In these two Appeals under Section 260-A of the Income Tax Act, 1961 (the Act), the challenge is to common order dated 28<sup>th</sup> March, 2014 passed by the Income Tax Appellate Tribunal (the Tribunal). The common impugned order disposes of two independent appeals by a father and son for the Assessment Year 2006-07.

2 The basic issue which arises for our consideration in both the appeals is whether the Tribunal was correct in treating the income arising on purchase and sale of shares as business income and not as income from investments under the head 'capital gains' as sought by the Appellants.

3 Admittedly, the facts in both the appeals are identical and therefore, for the sake of convenience, we shall refer to the facts as arising in Income Tax Appeal No.1670 of 2013 i.e. the appeal of the father.

4 For the subject Assessment Year, the Appellant filed its return of income declaring a total income of Rs.1.16 Crores. During the assessment proceedings, the Assessing Officer found that an amount of Rs.21.37 lakhs offered as short term capital gains earned through one M/s. Mahasagar Securities Limited were not genuine being mere hawala entries. Thus, the amounts of Rs.21.87 lakhs was brought to tax as income from other sources. So far the balance amount of short term capital gains of Rs.81.71 lakhs is concerned, the Assessing Officer looking at the volume, frequency, the tax audit report as well as the fact that loan was taken to purchase shares, held the same was taxable under the head 'business income'. On the aforesaid exercise, the Assessing Officer by order dated 28<sup>th</sup> November, 2008 passed under Section 143(3) of the Act arriving at a total taxable income of Rs.1.16 Crores.

5 In appeal, before the Commissioner of Income Tax [CIT(A)], the Appellant submitted that the Assessing Officer was incorrect in treating short term capital gains on sale and purchase of shares as business income. This on the basis that for an earlier Assessment Year i.e. Assessment Year 2005-06, the income offered as short term capital gain was accepted and not treated as business income. Therefore, it was submitted on the principle of consistency the same ought to be followed. The CIT(A) after considering the submissions of the Appellant by order dated 13<sup>th</sup> July, 2009, concluded that the Appellant is a dealer in the sale and purchase of the shares and the order of the Assessing Officer on the

above aspect, calls for no interference.

6 On further appeal to the Tribunal, the Appellant contended that in view of this Court's decision in *CIT v/s. Gopal Purohit*<sup>1</sup> the view taken in the earlier Assessment Year should be followed in the subject Assessment Year also. The Tribunal on consideration of the facts found no reasons to disturb the order of the lower authorities. Thus, the income of Rs.81.71 lakh was brought to tax under the head 'business income' and not as 'short term capital gains' as claimed by the Appellant.

7 Mr. Shreedharan, learned Sr. Counsel appearing for the Appellant contends that a substantial question of law arises inasmuch as on the issue of tax-ability of income as capital gains or business income, the impugned order has been influenced by the fact that the Appellants dealing of shares through one M/s. Mahasagar Securities Ltd., was bogus. Thus, the impugned order stands vitiated as it has been influenced by unrelated facts. Further, it is submitted that the CIT(A) has not rendered any finding with regard to the issue of the nature of income on sale and purchase of shares by the Appellant. It is silent as to whether it is taxable as business income or under the head 'capital gains.' Further, it is submitted that in view of the decision of this Court in *Gopal Purohit* (supra), the authority should have followed its earlier practice and accepted the income on purchase and sale of shares as that of an investor under the head 'capital gains.' In any event, it is submitted that on similar issue viz: income on purchase and sale of shares to be taxed under the head 'capital gain' or as business income, appeals have been admitted by this Court. In the above view, it is submitted that these appeals be

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admitted. Finally, reliance was also placed upon the decision of the Supreme Court in *CIT v/s. H. Holck Larsen*<sup>2</sup> to contend that the issue whether or not, the income arising on the sale and purchase of shares is income arising from trading transactions or on account of investment, is a mixed question of law and fact. In the above view, it is submitted that the appeal ought to be admitted.

8 Mr. Pinto, learned Counsel appearing for the Revenue opposes the admission of these appeals. The findings of the Assessing Officer, CIT(A) and the Tribunal are reiterated.

9 We find that the Assessing Officer has on examination of the manner in which the Appellant carried out its activity of purchase and sale of shares found facts as under:-

- “(a) The assessee has carried out transaction with as many as six brokers, which normally an investor never do. This proves beyond doubt that the assessee is running a full fledged business of share trading. Hence, the transaction carried out cannot be treated as capital gain.
- (b) In majority of the cases, shares are purchased in huge quantity and holding period of shares were not significant. There are hardly any case where shares have been purchased and held for more than 6 months, 8 months or 1 year.
- (c) Further, the value of the shares transacted by the assessee runs into crores of rupees. It cannot be said that the assessee has carried out investments in those shares.

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- (d) Further, the assessee has also taken loans against purchase of shares on which even interest of Rs.11,72,892/- has been paid. Hence it cannot be said that the assessee is doing investments.
- (e) It may also be noted that the assessee himself was classified the transaction in shares as Share Trading in the Tax Audit Report, filed with the return of income where nature of business is written as "Income from Share Trading & Salary Income". Further, the submission of Tax Audit Report proves beyond doubt that the transactions in question are on trading account, as apart from share transactions shown as Short Term Capital Gain, there are no other transactions which is on trading account. Thus, the assessee himself admitted the transaction in question is on trading account and not on capital gain account. It has been shown as Capital Gain just to claim the benefit of lower tax rate, which is not permissible."

10 All the above facts are indicia of the Appellant doing business in shares as a dealer thereof and not as an investor. Normally, no investor would deal with six different share brokers, or for that matter borrow funds for the purposes of investment in shares. Further, the tax audit report filed by the Appellant had classified the Appellant's transactions in shares as shares trading transactions. Moreover, the impugned order of the Tribunal also records that the number of transactions carried out by two Appellants were 100 and 120 shares respectively in a very short period. Further, the turnover in case of the father was Rs.4.89 Crores and in case of son was Rs.4.12 Crores. All these were indicative of there being a regular systematic activity which is the activity of business being pursued by the Appellant.

11 We do not find any merit in the submission that the Tribunal in the impugned order while dealing with the issue of charging tax under the head 'business income' or as 'capital gain' was influenced by the fact that some transactions were found to be bogus. In fact, the impugned order after making the above observation with regard to the Appellant's conduct, observes that notwithstanding the same, the income on purchase and sale of shares is taxable as business income. The decision in the case of Gopal Purohit (supra) is completely distinguishable. In the present case, the assessee has not before the authorities led any evidence to show that the transaction in the earlier assessment and the present assessment years are identical, calling for the same treatment in view of the decision of this Court in Gopal Purohit (supra). This is particularly so when it is the Appellant's case that the view taken in the earlier Assessment Year be followed in this year on account of the principle of consistency. Moreover, in the case of Gopal Purohit (supra), the assessee therein was maintaining two types of transactions one as a dealer in shares subject to tax as business income and the other as as investor, subject to tax under the head 'capital gain'. No such finding is there in this particular case.

12 The other submission of Mr. Shreedharan, learned Senior Counsel for the Appellant that similar questions having been admitted which warranted the admission of this appeal, is not acceptable as they were admitted in the context of the facts and circumstance of those cases. Similarly, the contention that the CIT(A) has not rendered any finding about the nature of the Appellant's activity is not correct as in fact, after consideration of the submission of the Appellant, it has held that the Appellant is a dealer in purchase and sale of shares. Similarly, the decision of the Apex Court in Holck Larsen (supra) which had been relied upon,

would have no application to the facts of the present case. In the above case, the Supreme Court observed that two questions arise in cases where the Courts have to determine whether the purchase and sale of shares was as an investor or as trader. The first question is according to the Court is whether the findings of the Tribunal is based on evidence from which the conclusions arrived at by the Tribunal can be said to be either reasonable or possible. If the conclusions drawn by the Tribunal are pure inferences of facts, then no question of law arises and no occasion arises for interference with the order of the Tribunal. If, however, the conclusion arrived at by the Tribunal is such that no reasonable man could possibly have arrived at, then such a conclusion would be without any evidence and perverse in law. The Court further observed that if there is material to support the conclusion, the fact that another Court might have arrived at a different conclusion, is not a relevant factor. The second issue that would arise is the legal principles applicable to determine the nature of the transactions i.e. dealer in shares or investor in shares. In this case, the findings of the Tribunal are based on facts particularly borrowing funds for purchase of shares, frequency of purchase and sale of shares, the quantum of turnover are all the tests to be applied to determine the nature of the transaction. Nothing has been shown to us to indicate that the legal principles applied or the facts found, are incorrect and/or perverse.

13 It may be pointed out that an affidavit of the Appellant dated 29<sup>th</sup> June, 2015 has been filed along with appeal memo. We have not gone into the affidavit, as the same was not available before the Tribunal. Besides, this affidavit has been filed without having obtained any leave of the Court. This leave would have been granted if the Appellant would

have satisfied us that the Affidavit brings on record facts which were not available before the Tribunal and are necessary to be looked into in the interest of justice. Since this has not been done, we have not considered the affidavit of the Appellant dated 29<sup>th</sup> June, 2015.

14 In view of the above, we find that no substantial question of law arises for our consideration. Accordingly, both the **appeals** are **dismissed**. No order as to costs.

(N.M.JAMDAR,J.)

(M.S.SANKLECHA,J.)