

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**TAX APPEAL NO. 38 of 2017
With
TAX APPEAL NO. 76 of 2017****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE M.R. SHAH
and
HONOURABLE MR.JUSTICE B.N. KARIA**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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PRINCIPAL COMMISSIONER OF INCOME TAX, AHMEDABAD-

3....Appellant(s)

Versus

JAYANTIBHAI M. PATEL....Opponent(s)

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Appearance:

MR.VARUN K.PATEL, ADVOCATE for the Appellant(s) No. 1

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**CORAM: HONOURABLE MR.JUSTICE M.R. SHAH
and
HONOURABLE MR.JUSTICE B.N. KARIA****Date : 08/02/2017****ORAL JUDGMENT**

(PER : HONOURABLE MR.JUSTICE M.R. SHAH)

[1.0] As common question of law and facts arise in both the Appeals and as such are with respect to the same assessee but with respect to different Assessment Years, both these Appeals are decided and disposed of by this common judgment and order.

[1.1] Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the learned Income Tax Appellate Tribunal "D" Bench, Ahmedabad (*hereinafter referred to as "the learned tribunal"*) dated 30/03/2016 in ITA Nos.1051/Ahd/2011 for the Assessment Year 2007-08 by which the learned tribunal has dismissed the said Appeal preferred by the revenue and has confirmed the order passed by the learned CIT(A), revenue has preferred Tax Appeal No.38/2017 with the following proposed question of law;

"Whether in the facts and circumstances of the case, learned ITAT has erred in law and on facts in holding that the income of the respondent assessee arising from sale of shares /mutual funds is to be treated as capital gain instead of business income?"

[1.2] Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the learned tribunal dated 30/03/2016 in ITA No.2760/Ahd/2011 for the Assessment Year 2008-09 by which the learned tribunal has dismissed the said Appeal preferred by the revenue and has confirmed the order passed by the learned CIT(A), revenue has preferred Tax Appeal No.76/2017 to consider the aforesaid question of law.

[2.0] For the sake of convenience, facts of Tax Appeal No.38/2017 with respect to the Assessment Year 2007-08 are narrated and considered.

[2.1] The Assessing Officer framed scrutiny assessment under Section 143(3) of the Income Tax Act (*hereinafter referred to as "the Act"*) determining the total income of the assessee at Rs.2,03,36,870/- as against the return of income of Rs.1,79,49,940/-. It is required to be noted that in the return of income the assessee claimed short term capital gain of Rs.29,97,893/- and long term capital gain of Rs.20,51,626/- for sale of shares /mutual funds. However, the Assessing Officer, while framing the scrutiny assessment, did not agree with the same and treated the aforesaid income as income from business.

Feeling aggrieved and dissatisfied with the order passed by the Assessing Officer in considering the aforesaid income as income from business and consequently determining the total income at Rs.2,03,36,870/-, assessee preferred Appeal before the learned CIT(A). Learned CIT(A) considering the material on record and number of transactions, period of holding of shares /mutual funds etc. set aside the order passed by the Assessing Officer and allowed the claim of the assessee considering the income of Rs.29,97,893/- as short term capital gain and Rs.2,51,626/- as long term capital gain. Consequently, learned CIT(A) allowed the Appeal preferred by the assessee.

The order passed by the learned CIT(A) was carried in Appeal by the revenue and by the impugned judgment and order, the learned tribunal has dismissed the said Appeal preferred by the revenue.

[3.0] Similar order has been passed by the learned CIT(A) confirmed by the learned tribunal for the Assessment Year 2008-09.

[4.0] Shri Varun Patel, learned Counsel appearing on behalf of the revenue has vehemently submitted that the learned tribunal has materially erred in confirming the order passed by the learned CIT(A) in holding that the income of the assessee arising from the sale of shares /mutual funds is to be treated as capital gain instead of business income. It is vehemently submitted that considering the number of transactions of sale of shares /mutual funds, holding period and the frequent transactions, the learned tribunal ought to have held the income of the assessee from sale of shares /mutual funds as business income.

[4.1] It is further submitted by Shri Varun Patel, learned advocate appearing on behalf of the revenue that as such in the facts and circumstances of the case, the learned tribunal has materially erred in considering and /or relying upon its earlier decision in the case of one another assessee i.e. Shri Ashish N. Soparkar in ITA No.1050/Ahd/2011 for the Assessment year 2007-08 mechanically.

Making the above submissions, it is requested to admit /allow the present Appeals.

[5.0] We have heard Shri Varun Patel, learned Counsel appearing on behalf of the revenue at length. We have perused the impugned judgment and order passed by the Assessing Officer, learned CIT(A) and the learned tribunal. It is required to be noted that on appreciation of material on

record, more particularly, number of transactions, holding period, investment in shares /mutual funds etc. and considering the fact that for the earlier Assessment Years income from similar transactions are held as capital gain and not treated as business income, the learned CIT(A) for the Assessment Years 2007-08 and 2008-09 held that the income of the assessee arising from sale of shares /mutual funds is to be treated as capital gain instead of business income. The findings recorded by the learned CIT(A) confirmed by the learned tribunal cannot be said to be perverse and /or contrary to the evidence on record. At this stage, the observations made by the learned CIT(A) while holding that the income of the assessee arising from the sale of shares /mutual funds is to be treated as capital gain are referred to and considered in paragraph 2.2 to 2.2.3 as under;

“2.2. I have considered the submissions made by the A.R. of the appellant and the observations of the Assessing Officer in the assessment order. It is seen that the appellant is having income from salary, property, share of profit from partnership firm in addition to capital gain on sale of shares and mutual funds and income from other sources. The shares are held for fairly long period.

2.2.2. In the past, the revenue has accepted the holding of shares as investment and profit thereon has been assessed under the head “Capital gain” and shares shown as investment in the books of accounts /balance sheet. The transactions were on delivery basis. I have also gone through the

details produced before me by the A.R. of the appellant in respect of short term capital gain /long term capital gain (in form of Chart). Accordingly on the identical facts, the A.O. cannot deviate from the view adopted in earlier year. However, on going through the page no.11 (paper book no.1) that there are four transactions aggregating an amount of Rs.18,811/- in which there is a negative dates shown under the head short term capital gain which cannot be allowable as STCG.

2.2.3 Therefore, having considered the facts and circumstances of the case and the decision of Hon'ble Gujarat High Court and Mumbai High Court as laid down general guideline in this regard and the conduct of appellant has not been contradictory. Hence, in view of the Circular No.4/2007 of CBDT dated 15/06/2007, decisions relied on by the AR of the appellant, I hold that the appellant cannot be said to have been trading in shares. The A.O. is directed to accept the impugned amount as returned by the appellant under the head: Long Term Capital Gains" and Short Term Capital Gains" excluding Rs.18,811/- as per para 2.2.2 above. Thus, this ground of appeal is partly allowed."

[6.0] We are in complete agreement with the view taken by the learned CIT(A). As observed hereinabove and considering the material on record, more particularly, number of transactions, holding period and the treatment given with

respect to similar income in the earlier Assessment Years when the similar income is considered as capital gain and not treated as business income, it cannot be said that the learned CIT(A) as well as the learned tribunal have committed any error in holding the income of the assessee arising from sale of shares /mutual funds for which short term capital gain /long term capital gain was claimed, as capital gain instead of business income.

[7.0] In view of the above and for the reasons stated hereinabove, both these Appeals deserve to be dismissed and are accordingly dismissed as no substantial question of law arises.

(M.R. SHAH, J.)

(B.N. KARIA, J.)

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THE HIGH COURT
OF GUJARAT

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