

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

INCOME TAX APPEAL NO.1121 OF 2009

The Commissioner of Income Tax-25. ...Appellant.
Vs.
Gopal Purohit. ...Respondent.

....
Ms.Suchitra Kamble for the Appellant.
Mr. S.C. Tiwari with Mr.R.Asokan for the Respondent.

.....
**CORAM : DR.D.Y.CHANDRACHUD AND
J.P.DEVADHAR, JJ.**

January 6, 2010.

P.C. :

The following questions of law have been formulated in the appeal filed by the revenue against the judgment of the Income Tax Appellate Tribunal, dated 10th February 2009:

“a) Whether, on the facts and circumstances of the case and in law, the Hon’ble ITAT was justified in treating the income from sale of 7,59,003 shares for Rs. 5,00,12,879/- as an income from short term capital gain and sale of 3,88,797 shares for rs.6,65,02,340/- as long term capital gain as against the “Income from business” assessed by the A.O.?”

b) Whether, on the facts and circumstances of the case and in law, the Hon’ble ITAT was justified in holding that principle of consistency must be applied here as authorities did not treat the assessee as a share trader in preceding year, in spite of existence of similar transaction, which cannot in any way operate as res-

judicata to preclude the authorities from holding such transactions as business activities in current year?

c) Whether, on the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in holding that presentation in the books of account is the most crucial source of gathering intention of the assessee as regards to the nature of transaction without appreciating that the entries in the books of accounts alone are not conclusive proof to decide the income?"

2. The Tribunal has entered a pure finding of fact that the assessee was engaged in two different types of transactions. The first set of transactions involved investment in shares. The second set of transactions involved dealing in shares for the purposes of business (described in paragraph 8.3 of the judgment of the Tribunal as transactions purely of jobbing without delivery). The Tribunal has correctly applied the principle of law in accepting the position that it is open to an assessee to maintain two separate portfolios, one relating to investment in shares and another relating to business activities involving dealing in shares. The Tribunal held that the delivery based transactions in the present case, should be treated as those in the nature of investment transactions and the profit received therefrom should be treated either as short term or,

as the case may be, long term capital gain, depending upon the period of the holding. A finding of fact has been arrived at by the Tribunal as regards the existence of two distinct types of transactions namely, those by way of investment on one hand and those for the purposes of business on the other hand. Question (a) above, does not raise any substantial question of law.

3. In so far as Question (b) is concerned, the Tribunal has observed in paragraph 8.1 of its judgment that the assessee has followed a consistent practice in regard to the nature of the activities, the manner of keeping records and the presentation of shares as investment at the end of the year, in all the years. The revenue submitted that a different view should be taken for the year under consideration, since the principle of *res judicata* is not applicable to assessment proceedings. The Tribunal correctly accepted the position, that the principle of *res judicata* is not attracted since each assessment year is separate in itself. The Tribunal held that there ought to be uniformity in treatment and consistency when the facts and circumstances are identical, particularly in the case of the assessee. This approach of the

Tribunal cannot be faulted. The revenue did not furnish any justification for adopting a divergent approach for the Assessment Year in question. Question (b), therefore, does not also raise any substantial question.

4. In so far as Question (c) is concerned, again there cannot be any dispute about the basic proposition that entries in the books of account alone are not conclusive in determining the nature of income. The Tribunal has applied the correct principle in arriving at the decision in the facts of the present case. The finding of fact does not call for interference in an appeal under Section 260A. No substantial question of law is raised. The appeal is accordingly dismissed.

(Dr.D.Y.Chandrachud, J.)

(J.P.Devadhar, J.)