

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

INCOME TAX APPEAL NO. 325 OF 2016

Ramilaben D. Jain

... Appellant

Vs

The Assistant Commissioner of
Income Tax Range 14(2)

... Respondent

Mr. Nitesh Gandhi i/b Mr. Vipul Joshi for the Appellant.

Mr. A.R. Malhotra with Mr. N.A. Kazi for the Respondents.

**CORAM : S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.**

MONDAY, 20TH AUGUST, 2018

P.C. :

1 By this appeal, the assessee questions the concurrent findings of fact rendered by the Commissioner (Appeals) and the Tribunal.

2 The Income Tax Appellate Tribunal, Mumbai Bench, had before it an appeal of the assessee for the year 2007-08.

3 She claimed that she is a housewife. She claimed short term capital gains on sale and purchase of shares as well as speculation income from trading of shares.

4 The Assessing Officer, however, found that the assessee integrated both and this is a systematic activity or trading of shares with business motive. Thus, this is a trading activity and, therefore, he treated the short term capital gain offered by the assessee as business income.

5 Then the Commissioner was approached by the aggrieved assessee who upheld the finding of the Assessing Officer and dismissed the appeal.

6 Thereafter, the Tribunal was approached and the argument of the assessee's representative as noted in paragraph 3 of the impugned order of the Tribunal is that this assessee has been showing the profit on sale and purchase of shares as short time capital gain which was accepted by the Assessing Officer and, therefore, for the year under consideration, he should not take a different stand. Thus, for Assessment Year 2007-08, the

finding for Assessment Year 2006-07 ought to follow. Just because the assessee is having a speculative transaction in the trading of shares, the investment cannot be treated as a trading activity. Hence, the short term capital gain offered by the assessee cannot be treated as business income.

7 Reliance was placed on this Court's judgment in the case of *Commissioner of Income Tax-25 vs. Gopal Purohit 336 ITR 287* and today Mr. Gandhi, learned advocate appearing on behalf of the assessee would submit that the substantial question of law is that the appellate authorities failed to apply their mind to the entire conspectus of facts. They did not examine the transactions wherein the assessee had a holding period of more than one month. There were at least ten transactions of this nature and, therefore, the treatment that is required to be given to such transactions results in the Tribunal failing to apply its mind as the last fact-finding authority. In other words, insofar as such transactions are concerned, there is enough amount which the Tribunal should have considered as a basis for sending the case back. If the Tribunal has not done that, we should send this case back to the Tribunal is, therefore, the request.

8 Mr. Malhotra appearing on behalf of the Revenue, on the other hand, would submit that these are concurrent findings of fact and in that regard our attention is invited to the Commissioner's order where he notes the salient features. He has noted that the income from other sources is shown out of which dividend income is negligible. The actual dividend received from shares works out to Rs.189/-. There was trading / speculative income / loss for earlier Assessment Years arising from trading in shares. Even for Assessment Years 2004-05, 2003-04, in the statement of income it is treated as a profit on sale of shares. Hence, the past history is extremely relevant. A real investor is not influenced by short term fluctuations, particularly negative ones and it is only the trader who is guided by these considerations.

9 The assessee included certain loss transactions and it is, therefore, clear that these are squared up with other sale transactions either on the same day or next day or within five days. Hence Mr. Malhotra would submit that if one of the tests and to be applied from the decisions of this Court and the Hon'ble

Supreme Court are applied, these findings of facts are rightly returned. They raise no substantial question of law and they are neither perverse or vitiated by any errors of law apparent on the face of the record.

10 With the assistance of both Mr. Gandhi and Mr. Malhotra we have perused the appeal Memo and all its annexures. The order under appeal was delivered by the Tribunal on 27th April, 2015. It had before it an appellate order of the Commissioner (Appeals) dated 6th October, 2010.

11 It noted all the facts as also the submissions of the assessee and then applied the relevant tests.

12 Mr. Gandhi would submit that this is a case akin to at least two matters which were decided by this Court, namely, Income Tax Appeal No.325 of 2015 together with Income Tax Appeal No.326 of 2015, *Jaya Chheda, legal heir of late Hitesh S. Bhagat vs. Assistant Commissioner of Income Tax*, decided on 8th November, 2017. Hence, when seventy three transactions were examined and in ten, the holding period was more than one

month, at least in relation to those cases the Tribunal should have found out the effect of the same on the taxable income. If it was not possible for the Tribunal to have examined this issue by referring to these transactions, the Commissioner or the Assessing Officer could have been called upon to do so. Having failed to do this results in a substantial question of law.

13 We do not find any substance in these contentions for in *Jaya Chheda's* case, there were indeed peculiar facts. There, for the Assessment Year 2007-08 (one of the Assessment Years under consideration) the assessee claimed short term capital gains of Rs.3,44,93,842/-. The Assessing Officer called upon the assessee to furnish details in relation to this claim with supporting documents. They were furnished. In the order of the Assessing Officer, the details of the transaction in shares throughout the year are set out and he came to the conclusion that the assessee had made delivery based transactions in over forty one scrips, not once but generally a number of times. The entire amount claimed as short term capital gain should be treated as business income.

14 The assessee preferred an appeal before the Commissioner and succeeded. The Commissioner directed the Assessing Officer to assess the entire income as a short term capital gain.

15 Then this Court noted the facts for the further Assessment Year 2008-09. The position was more or less identical. The two appeals preferred by the Revenue before the Appellate Tribunal resulted in this Court making detailed reference to the legal principles and the submissions canvassed. It reproduced verbatim the findings in the Tribunal's order. It then concluded that at least for the Assessment Year 2007-08, the Tribunal should have noted that the Commissioner was impressed with the fact that business activities in shares have been carried out only on 93 days out of the entire year and the average period of holding is 69 days. That is how the Commissioner directed the entire amount claimed to be treated as a short term capital gain. This was a strait jacket formula which was adopted by the Commissioner (Appeals) and unmindful of the transactions.

16 The Appellate Tribunal in the detailed order referred only to 44 transactions out of 86 and in respect of the 44 transactions no details were examined. Hence, both transactions could not have been treated on par when the factual aspects with regard to both were peculiar. This necessitated intervention if this Court and the finding of this Court is that as a last appellate body, the Tribunal should have considered these mixed questions. It was empowered by law to consider these mixed questions of law and fact. It should have also referred to all details in relation to these 44 transactions and could not have made a general and sweeping observation by relying on only 42 transactions. That is how it erred in reversing the order of the Commissioner.

17 Eventually this Court did not accept the assessee's plea, but remanded the case back. Such a judgment, therefore, turns essentially upon its peculiar facts and we do not see how it can assist Mr. Gandhi in this case.

18 In Income Tax Appeal No. 1974 of 2011 decided on 20th June, 2012, the Revenue brought the appeal. The Revenue brought the appeal aggrieved by the order of the Tribunal. This

Court noted that the Tribunal has examined all the transactions and did not fail to perform its duty unlike the observation and conclusion in *Jaya Chheda* (supra). Hence there is no perversion found in the order of the Tribunal in the case of *Suresh R. Shah* (supra). The Revenue's appeal was dismissed.

19 The Revenue Circular has been issued on the point that there should not be application of any general formula or there should not be a sweeping conclusion, but a case to case test or approach should be adopted.

20 In the instant case, the Tribunal was not unmindful of all these legal principles, the tests evolved and even the caution administered by the Circular. The Circular, in fact, is later than the Tribunal's order impugned in the instant appeal.

21 However, the details of the sales and purchase in shares during the year resulted in the conclusion of the Tribunal that total 73 transactions were disclosed. Only one transaction is shown in long term capital gain category. The other transactions are sales and purchase of shares during the year itself. Out of 72

transactions showing the short term capital gain, only in the case of ten transactions, the holding period is more than one month. In the majority of the transactions the period of holding is even less than one week. That is ranging from one day to seven days. Hence the argument was rejected that merely because ten transactions disclose holding period of more than one month that is not reflective of the transactions undertaken during the year under assessment. In fact, the trend is that the majority transactions have a feature in the holding of shares from one day to seven days. The assessee sold the shares within a period of one week from the date of purchase in more than eighty per cent of the cases. It is this trend which resulted in the concurrent finding against the assessee. The intention of the assessee in indulging in these transactions is to earn profit at the earliest possible occasion and when there is a rise in the price. The assessee is moving as per the stock market trend. At the first available opportunity, the assessee is selling the shares. This type of activity of sale and purchase is rightly termed, not as an investment, but actuated by motive of sale and purchase so as to earn profit at the earliest occasion. In the year 2006-07, which is immediately preceding the assessment year, the assessee herself

offered the profit from sale and purchase of shares as business income. Hence, the shifting stands as also the peculiar nature of the transactions resulted in the Tribunal upholding concurrent findings against the assessee.

22 We do not find any perversity in the approach of the Tribunal. The questions proposed are not substantial questions of law as there is no error of law committed by the Tribunal while deciding the assessee's appeal. The present appeal is devoid of merit and is dismissed. No order as to costs.

B.P. COLABAWALLA, J.

S.C. DHARMADHIKARI, J.