

R.M. AMBERKAR
(Private Secretary)

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

INCOME TAX APPEAL (IT) NO. 390 OF 2016

Pr. Commissioner of Income Tax- 17,
Mumbai .. Appellant

Versus

Hardik Bharat Patel .. Respondent

-
- Mr. Sham Walve for the Appellant
 - Mr. Sanjiv M. Shah for the Respondent
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**CORAM : AKIL KURESHI &
M.S. SANKLECHA, JJ.**

DATE : NOVEMBER 19, 2018.

P.C.:

1. This appeal under Section 260 A of the Income Tax Act, 1961 (Act), challenges the order dated 3.3.2015 passed by the Income Tax Appellate Tribunal, Mumbai Benches H", Mumbai ("**the Tribunal**" for short). This appeal relates to the Assessment Year 2008-09.

2. The Revenue has urged following reframed questions of law for our consideration:

“ (a) Whether on the facts and in the circumstances of the case and law, the Tribunal was justified in directing the AO to treat the profit

arising on the frequent and voluminous transactions initiated with borrowed funds in shares as 'Long Term Capital Gain' instead of 'Business Income?'

(b) Whether on the facts and circumstances of the case and in law, was the Tribunal justified in directing the AO to treat the notional loss incurred on Futures & Option transaction as normal business loss?"

3. Regarding Question No. (a):-

(a). The impugned order of the Tribunal dismissed the Revenue's appeal by following its order dated 1st May, 2013 in the case of same assessee for assessment years 2007-08 and 2008-09 treating its income on sale of shares as classifiable under the head '*capital gain*'. According to the learned counsel for Revenue, the appeal of the Revenue from the earlier order dated 1st May 2013 of the Tribunal for the assessment years 2007-08 and 2008-09 has been admitted on 7th March, 2016 by this Court being Income Tax Appeal Nos. 2313 and 2290 of 2013 (CIT V/s. Hardik Patel). Therefore, this appeal also requires consideration. It is the further case of the Revenue that the amount invested in shares were out of borrowed funds and therefore, the same has to be treated as business income and not as investment is to be classified as long term capital gains.

(b) However, we find that the earlier order dated 1st May 2013 of the Tribunal dealt with the issue of short term capital gain while in this case, the issue involved is with regard to long term capital gain.

(c) Besides our attention is drawn to Circular No. 6 of 2016 dated 29.2.2016 issued by the Central Board of Direct Taxes (CBDT). This circular issued with regard to the issue of taxability of surplus on sale of shares and securities, - whether as capital gain or business income in case of long term holdings of shares and securities i.e in excess of 12 months. It has clarified therein that with a view to reduce litigation and uncertainty in the matter of taxability, as long term capital gains or business income - the assessee has an option to treat the income from sale of listed shares and securities as income arising under the head '*Long Term Capital Gains*', then the same shall be accepted by the assessing officer. However, the stand once taken by the assessee would not be subject to change and consistently the income on the sale of securities which are held as investment would continue to be taxed as long capital gains

or business income as opted by the Assessee. The circular makes no distinction whether the investments made in shares were out of borrowed funds or out of its own funds. Thus, the distinction which has been sought to be made by the Revenue cannot override the above CBDT Circular, which is binding upon it.

(d) In the above view, as the issue stands concluded in favour of the Respondent by the above CBDT Circular, the above question as proposed does not give rise to any substantial question of law. Hence, not entertained.

4. Regarding Question (b):-

(a) Mr. Walve, the learned counsel for the Revenue, very fairly states that this issue stands concluded against the Revenue by the decision of this Court in the case of **Commissioner of Income Tax Vs. Bharat R. Ruia (HUF)** reported in **[2011] 337 ITR 452 (Bom)**.

(b) In the above view, the Question 2 as proposed does not give any rise to any substantial question of law. Hence, not

entertained.

5. Accordingly, Appeal is dismissed.

[M.S. SANKLECHA, J.]

[AKIL KURESHI, J]