

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

INCOME TAX APPEAL NO.3053 OF 2009

The Commissioner of Income Tax-12. ...Appellant.
Vs.
Shri Darius Pandole. ...Respondent.

....
Ms.Anamika Malhotra for the Appellant.
Mr.F.V.Irani with Mr.Atul K.Jasani for the Respondent.

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

June 16, 2010.

P.C. :

The Revenue, in its appeal under Section 260A of the Income Tax Act, 1961, has raised the following substantial questions of law:

“a) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in not upholding the action of the AO of treating the loss on sale of shares as capital loss ignoring the fact that instead of showing the shares as “stock in trade” in the balance sheet it was shown by the assessee under the head “investments”.

b) Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct in applying the ratio of the decision of the case of Radhasoami Satsang v/s.CIT in the assessee’s case as it is an established fact that the principle of res-judicata does not apply to the income-tax proceedings.”

The appeal relates to Assessment Year 2003-04.

2. Both for Assessment Years 1997-98 and 2002-03, scrutiny assessments were framed under Section 143(3). In the course of the assessment proceedings for Assessment Year 2002-03, a notice was issued to the assessee under Section 142(1) on 7 November 2003 in which the assessee was called upon to clarify as to why the loss on the sale of shares had been debited to the profit and loss account as a business expense. The assessee submitted a representation on 16 December 2003 in support of his contention that his business consisted of the purchase and sale of shares. The letter of the assessee recorded that during the course of discussions, the Assessing Officer had pointed out that he intended to treat the loss under the head "income from capital gain" mainly on account of the fact that his stock of shares had been shown under the head "investments" in the balance sheet. The assessee submitted on the basis of precedent that the trading receipt would not be cease to be so by being written up in the books of account in a particular manner and that the entries in the

books of account could not alter or affect the character of the transaction. The same position obtained for Assessment Year 1997-98 where a similar query was raised by the Assessing Officer to which the assessee had replied on 18 September 1999. Assessments were thereafter completed for Assessment Years 1997-98 and 2002-03 and the contention of the assessee was duly accepted.

3. It is in this factual background that the Tribunal, while deciding the appeal for Assessment Year 2003-04 has observed that there was no change in the set of facts and circumstances as they obtained for Assessment Years 1997-98 and 2002-03. The Tribunal was correct in holding that there was a due application of mind by the Assessing Officer to the very same issue during the course of the earlier two Assessment Years and that the assessments were finalized after considering the reply filed by the assessee specifically to the query raised by the Assessing Officer. In the circumstances, the Tribunal was, in our view, justified in following the decision of the Supreme Court in **Radhasoami Statsang vs. C.I.T.**, (1992) 193 ITR 321 (SC). While the

principle of res judicata could not as an abstract principle apply to assessment proceedings since each year of assessment has to be considered separately, yet when a fundamental aspect was duly considered after a query was raised by the Assessing Officer and was answered by the assessee on the same facts, a change in view, was evidently not warranted for the Assessment Year in question. So construed, we do not find that the decision of the Tribunal will give rise to any substantial question of law. The view which we have taken is consistent with the principle laid down by the Division Bench of this Court in **Karsandas Ranchhoddas vs. CIT**, (1972) 83 ITR 256. The Appeal is hence dismissed.

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

(J.P.Devadhar, J.)