



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
 + **ITA No.720 of 2006**
 % DECISION DELIVERED ON: 6TH APRIL, 2011

COMMISSIONER OF INCOME TAX, DELHI-III
. . . APPELLANT

through : Mr. N.P. Sahni, Sr. Standing
 Counsel.

VERSUS

SASHI PRAKASH KHEMKA **. . . RESPONDENT**

through: Mr. Satyen Sethi with Ms. A.T.
 Panda, Advocates.

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. (ORAL)

1. This appeal pertains to the Assessment Year 1993-94. The respondent/assessee had filed return of income for that year in the status of individual on 29.10.1993. He owned 70,000 shares of a company named M/s NEPC Micon Ltd. 'Rights issue' was floated by the said company offering two equity shares per every share held by the existing shareholders at a



premium of ₹30 per share. The assessee renounced this right in favour of third parties and had received a sum of ₹36 per share. This renunciation of his right resulted in short term capital gain of ₹36 per share, which was clearly shown as such in the income tax return filed by him amounting to ₹25,20,000/-. Simultaneously, the assessee also claimed that because of the increase in share capital of the company and the dilution of their holding of shares of the company, the value of the shares already held by him diminished and he suffered capital loss consequent to the 'rights issue'. It was claimed as short term capital loss which was worked out by him at ₹65,10,000/- After adjusting the short term capital gain, which the assessee absorbed in the short term capital loss declared by him, the assessee went in appeal which was heard by the CIT (A). We may point out here that in a similar manner other family members of the assessee (Khemka Family) who had held shares in the company M/s NEPC Micon Ltd. had renounced the right arising out of 'rights issue' to third parties and in identical manner, they had shown capital gain as well as capital loss. Since the capital loss was higher, each of this family member adjusted capital gain from the capital loss showing net short term capital loss like the assessee herein. Appeal of one such family member, viz., Smt. Shivani Devi in



respect of Assessment Year 1993-94 itself was heard by the CIT (A), which was allowed by the CIT (A) holding that the claim for short term capital loss was to be allowed. In the said appeal, another issue relating to interest under Section 234A of the Income Tax Act (for brevity 'the Act') was also dealt with. This issue of computation of penal interest under Section 234A of the Act arose, as the AO had held that the return ought to have been filed on or before 30.06.1993, whereas it was filed on 29.10.1993. Therefore, the AO had calculated penal interest under the aforesaid provision from 01.07.1993. The contention of Shivani Devi was that in the income tax return, she had admitted business income and therefore, the income tax return was required to be filed on or before 31.10.1993, which was filed before that date and therefore, no interest was chargeable.

2. The CIT (A) set aside this order of the AO also in respect of Shivani Devi on the ground that in the impugned order passed by the AO, there was no reference to any income of business at 'NIL', though in the return, she did disclose the fact of being a partner in the firm and thus, return was due on or before 31.10.1993.
3. While hearing the appeal of the assessee herein, the CIT (A) followed the aforesaid order passed in the case of Shivani Devi



and allowed the same reliefs to the assessee also. It would be relevant to point out here that in the appeal filed by the assessee before the CIT (A), nobody had appeared on behalf of the Department and the same was allowed *ex parte*. Order of the CIT (A) dated 28.11.1995 in the case of the assessee reveals that out of 4 Paragraphs, the first three Paragraphs are devoted the non-appearance of the departmental representative in spite of various opportunities and in the last Paragraph, appeal was allowed in the following terms:

"4. It may be mentioned here that this appeal is identical with the appeals in ITA Nos.37, 40, 44, 46, 48, 50, 52, 56, 58, 62, 64 and 68/95-96, as has been discussed in detail in my order dated 13.11.1995 in ITA No.37/95-96 in the case of Smt. Shivani Devi for A.Y. 1993-94. On identical facts and in similar circumstances as dealt with the said order dated 13.11.1995, therefore, this appeal is also partly allowed."

4. Though in the end, it is said that the appeal is 'partly allowed', that is because of the reason that appeal in the case of Shivani Devi was also partly allowed inasmuch various grounds were raised by Shivani Devi and all of them were not accepted. However, insofar as two issues with which we are concerned, viz., short term capital loss claimed by Shivani Devi as well as challenge to the computation of penal interest under Section 234A of the Act, these two grounds of Shivani Devi were allowed.



5. Not only this, the order of the CIT (A) was not challenged by the Revenue. On the contrary appeal effect was given by the AO pursuant to the aforesaid order of the CIT (A). The AO, in this behalf, passed orders dated 28.11.1995. By this order, he deleted the addition of ₹25,20,000/- on account of short term capital gain. Thereafter, he passed another order dated 27.01.1997 under Section 154 of the Act, consequent to the CIT (A)'s order whereby short term capital loss of ₹25,20,000/- was carried forward to the subsequent year. The dispute, which has now arisen, emanates from subsequent order dated 14.03.1997 passed by the AO under Section 154 of the Act. By this order, the AO has withdrawn the benefit of carry forward of short term capital loss in terms of orders dated 27.01.1997. It is primarily on the premise that the assessee was not deriving any income from business and therefore, due date of filing the income tax return under Section 139(1) of the Act for the Assessment Year 1993-94 was 30.06.1993 and the same was filed only on 29.10.1993. Since the return was not filed by the specified/due date, the assessee was not eligible for the benefit of the loss to be carried forward.
6. The assessee challenged this order by preferring the appeal before the CIT (A) who confirmed the order of the AO.



7. Not satisfied with the above outcome, the assessee approached the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') by way of second appeal. This time, the assessee succeeded. The Tribunal has held that the due date of return in case of the assessee had already become final by virtue of CIT (A)'s order in the appeal filed by the assessee against the order of the AO under Section 143(3) of the Act and therefore, the AO could not exercise his powers of rectification under Section 154 of the Act.
8. The question that falls for consideration is as to whether the Tribunal was right in holding that in the case of this assessee, the question of fixing the due date by which the assessee was required to file the income tax return had become final by virtue of the order of the CIT (A) in appeal filed by the assessee against the order of the AO under Section 143(3) of the Act. As pointed out above, for this purpose, the Tribunal has referred to the earlier order passed by the CIT (A) in the case of Shivani Devi. The copy of the order of the CIT (A) in Shivani Devi case was produced before us. In that case, as noted above, the CIT (A) deleted the penalty interest charged under Section 234A of the Act holding that the income tax return was required to be filed on or before 31.10.1993 and it was filed in time as the same was filed on 29.10.1993. In



arriving at this conclusion, the CIT (A) had stated that even if the business income stated in the income was returned 'NIL', that would not make any difference because of the reason that Shivani Devi did disclose the fact that she was a partner in the firm and the return was filed in that category. It was, thus, on this basis that the due date of income tax return in case of Shivani Devi was fixed 31.10.1993.

9. In the case of the assessee herein, nothing has been brought on record to find out as to whether the assessee was also a partner in the firm. As stated above, the Tribunal has simply followed the orders in the case of Shivani Devi. However, in order to draw the parity, it was also necessary to find out as to whether there was complete unanimity of fact and especially as to whether the assessee was also a partner in the firm. Since this aspect is totally glossed over and ignored by the Tribunal, we are of the opinion that the case of Shivani Devi could not have been blindly followed without ascertaining the aforesaid fact.
10. For the above reason alone, we set aside the orders passed by the Tribunal and remit the case back to the Tribunal to arrive at a finding to the aforesaid effect and then consider as to whether the case of Shivani Devi is applicable to the facts of this case or not.



11. This appeal is disposed of in the aforesaid terms.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

APRIL 06, 2011

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