OD-22

ITA/181/2011

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

COMMISSIONER OF INCOME TAX,
KOLKATA-XII, KOLKATA

-Versus-

MANOJ MURARKA

Appearance:
Mr. Om Narayan Rai, Adv.
...for the appellant.

Mr. Arvind Agarwal, Adv.
Mr. Farhan Ghaffar, Adv.
...for the respondent.

BEFORE:
The Hon'ble JUSTICE T.S. SIVAGNANAM
-And-
The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

Date : 24th November, 2022.

The Court : This appeal filed by the revenue under Section 260A of the Income Tax Act, is directed against the order dated 21st May, 2004 passed by the Income Tax Appellate Tribunal, "A" Bench, Kolkata (the Tribunal) in ITA No. 1239/Kol/2003 and ITA No.1180/Kol/2003 for the assessment year 1998-99.

The appeal was admitted on 28th November, 2011 on the following substantial questions of law:

(i) *Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal erred in law in holding that the sum of Rs.20,91,38,000/- should not be treated as part of the consideration for sale of membership card but compensation received in the nature of capital receipt not liable to tax ?*

(ii) *Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal erred in law in holding that the compensation received was for loss of source of Income and as such capital receipt not liable to tax ?*

(iii) *Whether the sum of Rs.20,91,38,000/- should be treated as part of sale consideration for transfer of membership card of Delhi Stock Exchange in terms of agreement dated January 5, 1995 and as such liable to be assessed as long term capital gain ?*

We have heard Mr. Om Narayan Rai, learned standing counsel for the appellant/revenue and Mr. Arvind Agarwal, learned counsel assisted by Mr. Farhan Ghaffar, learned Advocate for the respondent/assessee.

The first objection raised by the learned counsel for the respondent is that the revenue has preferred appeal against the very same impugned order passed Tribunal in ITA/127/2006 and the same was dismissed by the Hon'ble Division Bench by order dated 17th May, 2006 and, therefore, a fresh appeal against the very same order passed by the learned Tribunal is not maintainable. Secondly, it is submitted that before this appeal was admitted, the application for condonation of delay in filing the appeal was heard by the Hon'ble Division Bench on 21st November, 2011 on which date GA/1735/2011 and GA/1734/2011 were listed. It is submitted that the delay of 2428 days was condoned subject to payment of costs assessed at Rs.50,000/- to the respondent/assessee by the Government, with a further direction to recover the said amount from the concerned officials of the Income Tax Department who were responsible for the delay. It is submitted by the learned Advocate for the respondent that the order has not been complied with. On the above two grounds, the learned Advocate for the respondent would contend that the appeal requires to be dismissed.

Mr. Om Narayan Rai, learned Advocate for the appellant/revenue submits that he does not have any specific written instruction as to whether the appeal in ITA/127/2006 was filed challenging the very same impugned order in this appeal as the order passed in ITA/127/2006 dated 17th May, 2006 does not indicate the case number assigned to the matter by the Tribunal. Therefore, the learned senior standing counsel seeks time to get instruction from the department.

In our considered view, keeping the first issue raised by the learned Advocate for the respondent as regards the maintainability of this appeal aside for the time being, if we peruse the order dated 21st November, 2011 in this appeal, a decision can be taken. For better appreciation, the order is quoted hereinbelow:

> *"The Court:- We have heard the learned counsel for the parties and have gone through the application for condonation of delay. The delay in preferring the appeal is 2428 days. The explanation given in the petition is far from satisfactory. Ordinarily the matter of this nature should have been dismissed in limine. However, when we notice the tax effect in this matter is so high it would not be proper for us to reject this application without hearing the matter. Therefore, we reluctantly condone the delay and we think that the appeal which is intended to be admitted, be placed for hearing on next Monday. This order allowing the prayer for condonation is subject to payment of costs assessed at Rs.50,000/- to be paid by the appellant to the respondent. This cost shall initially be paid by the Government, thereafter the department concerned shall make an enquiry as to who are at fault for not taking care for preservation of the records and papers. If any of the officers and/or staff are found to be negligent, costs awarded by us shall be recovered from their salaries in proportionate to their lapses, of course after giving a chance of hearing to the concerned officer and staffs.*
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> *The cost has to be paid within a period of three weeks from date as prayed for the learned Counsel for*

the appellant. In default of payment of costs this order will stand recalled and subsequent order, if any passed in favour of revenue will also stand recalled.

GA 1734 of 2011 is accordingly disposed of."

As noted above, the delay was condoned subject to payment of costs assessed at Rs.50,000/- by the Government to the respondent/assessee.

The learned Advocate for the respondent submits that till date the costs has not been remitted. In such circumstances, the order dated 21st November, 2011 itself provides for the contingency. It has been ordered that in default of payment of costs, the order condoning the delay will stand recalled. Thus, in absence of compliance of the direction issued by the Hon'ble Division Bench in its order dated 21st November, 2011 and the costs having not been paid to the assessee, the order dated 21st November, 2011 is required to be recalled and is accordingly recalled.

That apart, it is not clear as to how the appeal was admitted on 28th November, 2011 though three weeks was granted to pay the costs.

The submission made by the learned Advocate for the respondent that his client has not been paid the costs, is placed on record.

For the above reasons, the appeal filed by the revenue (ITA/181/2011) stands dismissed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

A/s./S.Das.