IN THE HIGH COURT OF DELHI AT NEW DELHI

IIA No. 67 of 2002

Date of Decision: May 3 ,2002

Commissioner of Income Tax .. Appellant
through
Mr.Sanjiv Khanna,Advocate
with Mr. Ajay Jha,
Advocate.

versus

Late Sh. Gulshan Kumar ... Respondent
through L.R.
through
None.

CORAM :

HON'BLE MR.JUSTICE DALVEER BHANDARI.
HON'BLE MR.JUSTICE VIKRAMAJIT SEN

1. Whether the Reporters of local papers may be allowed to see the judgment? yes
2. To be referred to the Reporter or not? yes

DALVEER BHANDARI, J. (Oral)

1. The appellant, Commissioner of Income Tax, has filed this appeal under Section 260A of the Income Tax Act,1961 (for short "the Act") against the order passed by the Income Tax Appellate Tribunal (for short "the Tribunal").

2. Brief facts which are relevant for the disposal of the appeal are recapitulated as under.

3. The respondent assessee on 27.8.1987 filed his income tax return declaring an income of Rs. 3,60,448/- for the assessment year 1987-88. On 27.3.1990 this amount was revised to an income of Rs. 4,18,400/-. The assessment was completed under Section 143(3) of the Act on 29.3.1990 and the total income was assessed at Rs. 16,31,125/-.

4. The Assessing Officer issued a notice under Section 148 of the Act on 18.3.1991 and in compliance of the said notice the assessee filed return on 2.7.1991 declaring income of Rs. 4,18,400/- for the assessment year 1987-88.

5. On 7.6.1986 and 5.8.1986 the respondent assessee had transferred 1250 fully paid up shares and 5000 partly paid up shares of M/s Tony Electronics to his employees, dealers and close relations at Rs. 100/- each per fully paid up share and Rs. 50/- each per partly paid up share. The sale consideration was also the cost price of each share to the assessee.

6. The Assessing Officer arrived at the conclusion that in the case of transfer of shares at the cost price the respondent assessee had deliberately furnished inaccurate particulars and income was under assessed. He accordingly completed the assessment at a total income of Rs. 19,74,805/-.

7. The respondent assessee preferred an appeal before

the Commissioner of Income Tax (Appeals) (for short "the CIT (A)"). After examining the facts, grounds of appeal and after hearing the assessee the CIT(A) deleted the addition on account of deemed capital gains. According to the CIT(A) it is not in dispute that the shares were transferred at cost price. He further observed that there is absolutely no material on record to show that the sale consideration was understated or that the appellant received anything directly or indirectly over and above the declared value of shares.

8. The CIT (A) observed that the legal position has been settled by a celebtrated judgement of the Apex Court in the case of KP Varghese vs. ITO reported in 131 ITR 597. The CIT(A) mentioned that the Section 52 was altogether omitted from the statute w.e.f. 1.4.88 because of the K.P. Verghese case (supra). He also observed that the sale consideration is fully backed by one recognised method of determining the fair market value of shares i.e. the yield method. Under the circumstances, the addition of Rs. 11,66,000/- being the amount of deemed capital gains made by the Assessing Officer cannot be upheld and the same is deleted.

9. The appellant revenue had preferred an appeal before the Tribunal against the said judgment of the CIT(A). The Tribunal observed that the order of the CIT (A) was reasonable and justified and consequently the appeal filed by the Revenue was dismissed.

10. The Revenue aggrieved by the order of the Tribunal preferred appeal under Section 260A of the Act. The Revenue submitted that the ITAT has wrongly interpreted Section 52 of the Act. The Revenue also submitted that the Assessing Officer rightly invoked Section 52(1) of the Act and correctly included Rs. 11,66,000/- as income from capital gains on transfer of shares.

11. Section 52(1) of the Act was considered in great detail by their Lordships in the case of K.P. Verghese (supra). The judgment of K.P. Verghese was followed in the subsequent judgment of the Supreme Court in Commissioner of Income Tax vs. Godawari Corporation reported as 200 ITR 567.

12. Section 52 of the Act, which was omitted by the Finance Act,1987 with effect from 1.4.1988, on which this case hinges heavily reads as under:-

"52. (1) Where the person who acquires a capital asset from an assessee is directly or indirectly connected with the assessee and the Income-tax Officer has reason to believe that the transfer was effected with the object of avoidance or

reduction of the liability of the assessee under section 45, the full value of the consideration for the transfer shall, with the previous approval of the Inspecting Assistant Commissioner, be taken to be the fair market value of the capital asset on the date of the transfer.

(2) Without prejudice to the provisions of sub-section (1), if in the opinion of the Income-tax Officer the fair market value of a capital asset transferred by an assessee as on the date of the transfer exceeds the full value of the consideration declared by the assessee in respect of the transfer of the value so declared, the full value of the consideration for such capital asset shall, with the previous approval of the Inspecting Assistant Commissioner, be taken to be its fair market value on the date of its transfer;

Provided that this sub-section shall not apply in any case --

(a) where the capital asset is transferred to the Government, or

(b) where the full value of the consideration for the transfer of the capital asset is determined or approved by the Central Government or the Reserve Bank of India.

13. This section came up for consideration before their Lordships of the Supreme Court in the case of K.P. Varghese (Supra). While interpreting Section 52 (1) their Lordships in this case observed that "Section 52(1) does not deem income to accrue or to be received which in fact never accrued or was never received. It seeks to bring within the net of taxation only that income which has accrued or is received by the assessee as a result of the transfer of the capital asset. But

since it would not be possible for the ITO to determine precisely how much more consideration is received by the assessee than that declared by him, sub-section (1) provides that the fair market value of the property as on the date of the transfer shall be taken to be the full value of the consideration for the transfer which has accrued to or is received by the assessee." The court also observed that "the net effect of this provision is as if a statutory best judgment assessment of the actual consideration received by the assessee is made, in the absence of reliable materials. The onus of establishing that the conditions of taxability are fulfilled is always on the Revenue. A statutory provision must be so construed, if possible, that absurdity and mischief may be avoided. Where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the legislature, the court may modify the language used by the legislature or even do some violence to it, so as to achieve the obvious intention of the legislature and produce a rational construction."

14. In the said case of K.P.Varghese (supra) their Lordships of the Supreme Court observed that "on a

plain and natural construction of the language of Section 52, sub-section (2), the only condition for attracting the applicability of that provision was that the fair market value of the capital asset transferred by the assessee as on the date of the transfer exceeded the full value of the consideration declared by the assessee in respect of the transfer by an amount of not less than 15% of the value so declared. Once the Income Tax Officer or the Assessing Officer is satisfied that this condition exists, he can proceed to invoke the provision in Section 52, sub-section (2), and take the fair market value of the capital asset transferred by the assessee as on the date of the transfer as representing the full value of the consideration for the transfer of the capital asset and compute the capital gains on that basis." The Court further observed that "To introduce any further condition such as understatement of consideration in respect of the transfer would be to read into the statutory provision something which is not there; indeed, it would amount to re-writing the section."

15. Their Lordships observed in the said case that the argument was based on a strictly literal reading of Section 52, sub-section (2), but the Court observed that "...we do not think such a

construction can be accepted. It ignores several vital considerations which must always be borne in mind when we are interpreting a statutory provision." The Court observed that the task of interpretation of a statutory enactment is not a mechanical task. It is more than a mere reading of mathematical formulae because few words possess the precision of the mathematical symbols. It is an attempt to discover the intent of the Legislature from the language used by it and it must always be remembered that the language is at best an imperfect instrument of the expression of human thought and, as pointed out by Lord Denning, it would be idle to expect every statutory provision to be "drafted with divine prescience and perfect clarity". In the said judgment their Lordships also quoted the distinguished American Judge, Justice Hand which reads as under:-

> "...it is true that the words used, even in their literal sense, are the primary and ordinarily the most reliable source of interpreting the meaning of any writing; be it a statute, a contract or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

16. Their Lordships of the Supreme Court further observed as under :-

"We must not adopt a strictly literal

interpretation of S.52, sub-s.(2), but we must construe its language having regard to the object and purpose which Legislature had in view in enacting that provision and in the context of the setting in which it occurs. We cannot ignore the context and the collocation of the provisions in which s.52, sub-s.(2), appears, because, as pointed out by judge Learned Hand in the most felicitous language:

> ".....the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create."

17. The Court observed that the primary objection against the literal construction of Section 52, sub-section (2) is that it leads to manifestly unreasonable and absurd consequences. It is true that the consequences of a suggested construction cannot alter the meaning of a statutory provision but it can certainly help to fix its meaning. It is a well-recognised rule of construction that a statutory provision must be so construed, if possible, that absurdity and mischief may be avoided. There are many situations where the construction suggested on behalf of the revenue would lead to a wholly unreasonable result which could never have been intended by the Legislature. Their Lordships gave an illustration which is quite apt and we think it proper to reproduce it.

It reads as under:-

> "A agrees to sell his property to B for a certain price and before the sale is completed pursuant to the agreement - and it is quite well known that sometimes the completion of the sale may take place even a couple of years after the date of the agreement - the market price shoots up with the result that the market price prevailing on the date of the sale exceeds the agreed price, at which the property is sold, by more than 15% of such agreed price. This is not at all an uncommon case in an economy of rising prices and in fact we would find in a large number of cases where the sale is completed more than a year or two after the date of the agreement that the market price prevailing on the date of the sale is very much more than the price at which the property is sold under the agreement. Can it be contended with any degree of fairness and justice that in such cases, where there is clearly no under-statement of consideration in respect of the transfer and the transaction is perfectly honest and bona fide and, in fact, in fulfilment of a contractual obligation, the assessee, who has sold the property, should be liable to pay tax on the capital gains which have not accrued or arisen to him? It would indeed be most harsh and inequitable to tax the assessee on income which has neither arisen to him nor is received by him, merely because he has carried out the contractual obligation undertaken by him. It is difficult to conceive of any rational reason why the Legislature should have thought it fit to impose liability to tax on an assessee who is bound by law to carry out his contractual obligation to sell the property at the agreed price and honestly carries out such a contractual obligation. It would indeed be strange if obedience to the law should attract the levy of tax on him."

18. The Court observed that it is now a well-settled rule of construction that where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the legislature, the

court may modify the language used by the legislature or even "do some violence" to it, so as to achieve the obvious intention of the legislature and produce a rational construction.

19. Their Lordships of the Supreme Court observed that the Court must obviously prefer a construction which renders the statutory provision constitutionally valid rather than that which makes it void. The Court held that the sub-section (2) of Section 52 can be invoked only where the consideration for the transfer has been understated by the assessee or, in other words, the consideration actually received by the assessee is more than what is declared or disclosed by him and the burden of proving such an understatement or concealment is on the revenue. This burden may be discharged by the revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has not correctly declared or disclosed the consideration received by him and there is an understatement or concealment of the consideration in respect of the transfer. Sub-section (2) has no application in the case of an honest and bona fide transaction where the consideration received by the assessee has been correctly declared or disclosed by him, and there is no concealment or

suppression of the consideration.

20. Reverting to the facts of this case the respondent assessee had transferred the shares at the cost price to the employees and near relations. The learned Tribunal held that the provision of Section 52 of the Act comes into operation only when actual consideration received by the assessee is not disclosed and the consideration declared in respect of the transfer is shown at a lesser figure than that actually received. The onus to prove that the assessee has not declared the actual consideration and that the consideration declared in respect of the transfer is shown at a lesser figure rests upon the revenue. It may be pertinent to mention that it is extremely difficult, if not impossible, for the revenue to discharge the onus placed by the Legislature. Perhaps for this reason and for the other reasons incorporated in K.P. Varghese's case (supra) led to deletion of Section 52 from the Act with effect from 1.4.1988. The Tribunal observed that in the present case the revenue has not made out a case that any consideration was concealed or not declared by the assessee. The learned CIT (A) has given finding in his order dated 10.1.1996 that "There is no material on record to show that the sale consideration was understated or that the

appellant received anything directly or indirectly over and above the declared value of shares. In fact, this is not the case of the Assessing Officer." The findings of the CIT (A) have been upheld by the learned Tribunal.

21. We have carefully considered the relevant provision and the decision of K.P. Varghese (supra) in extenso. The orders of the CIT(A) and the Tribunal have correctly reached to the conclusion that there is no material on record to show that the sale consideration was understated or the respondent assessee had received anything directly or indirectly over and above the declared value of the shares. In view of these findings, the provisions of Section 52 of the Act are not attracted. In view of the judgment of their Lordships of the Supreme Court in K.P. Varghese's (supra) the revenue is under an obligation to discharge that there is material to show that the sale consideration was understated or the assessee had received anything directly or indirectly over and above the declared value. It is always a difficult task for the revenue to establish this and perhaps for this reason the legislature in its wisdom had rightly decided to delete Section 52 of the Income Tax Act,1961 from the statute book with effect from 1.4.1988.

22. In our considered opinion, no interference is called for. The appeal filed by the Commissioner of Income Tax is devoid of any merit and is accordingly dismissed. In the facts and circumstances of the case, we direct the parties to bear their own costs.

(DALVEER BHANDARI)
JUDGE

(VIKARAMAJIT SEN)
JUDGE

MAY 3 ,2002.
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