* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 12th December, 2017
Date of decision: 20th April, 2018

\+ **INCOME TAX APPEAL Nos. 405/2005 & 406/2005**

ARJUN MALHOTRA ..... Appellant
Through: Mr. Ved Jain &Mr.Pranjal Srivastava, Advocates.

versus

COMMISSIONER OF INCOME TAX .... Respondent
Through Mr. Zoheb Hossain, Sr. Standing Counsel for the Revenue

INCOME TAX APPEAL No. 389/2007

DIRECTOR OF INCOME TAX, NEW DELHI .... Appellant
Through Mr. Zoheb Hossain, Sr. Standing Counsel for the Revenue

versus

ARJUN MALHOTRA ..... Respondent
Through: Mr. Ved Jain &Mr.Pranjal Srivastava, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MS. JUSTICE PRATHIBA M. SINGH

SANJIV KHANNA, J.:

ITA Nos.405/2005 and 406/2005 have been filed by an individual, Arjun Malhotra impugning common order dated 29th January, 2004 passed by the Income Tax Appellate Tribunal (hereinafter referred to as 'the tribunal') deciding ITA Nos.1433/Del/2002 and 1434/Del/2002 relating to

Assessment Years (AY, for short) 1998-99 and 1999-2000, respectively. The afore-stated appeals were admitted for hearing vide order dated 15th July, 2005 on the following substantial questions of law:-

ITA No. 406/2005

"(1) Whether the Income Tax Appellate Tribunal was correct in law in holding that shares owned by the appellant at NIIT were not transferred in the assessment year 1998-99 but were transferred on 05.05.1998 (Assessment Year 1999-2000) when the same were delivered by the bankers to the purchasers (Glad Investment Pvt. Ltd.)?

(2) Whether the Income Tax Appellate Tribunal was correct in concluding that on the alleged date of sale of shares, i.e., 14.08.1997, the assessee owned a residential house in Mussoorie and, therefore, was not entitled to exemption u/s 54F of the Income Tax Act, 1961?

ITA No. 405/2005

(3) Whether the Income Tax Appellate Tribunal was correct in taking the market value of the shares quoted at the stock exchange on 05.05.1998 as the basis for computing the capital gains under Section 48 of the Income Tax Act?"

2. ITA No.389/2007 filed by the Director of Income Tax, i.e. the Revenue, relates to AY 1999-2000 and impugns order dated 23rd June, 2006 passed by the tribunal in Appeal No.1167/Del/2005 deleting/cancelling penalty for concealment of income under Section 271(1)(c) of the Income Tax Act, 1961 (for short 'the Act'). This appeal, vide order dated 16th July, 2008, was directed to be listed along with ITA Nos.405/2005 and 406/2005 without a substantial question of law being framed.

3. The assessee for the AY 1998-99 had filed his return of income of Rs.2,33,89,820/- on 15th September, 1998. The income was revised to Rs.2,33,49,680/- vide revised return filed on 29th June, 1999.

4. For the AY 1999-2000, the assessee had filed its return of income on 29th June, 1999 declaring income of Rs.24,24,010/-.

5. In the returns of income for the AY 1998-99, under the head 'long term capital gain' the assessee had disclosed transfer consideration of Rs.5 Crores on sale of one lakh equity shares of NIIT to M/s Glad Investment Pvt. Ltd. ('M/s GIPL' for short). Date of transfer declared was 14th August, 1997. The assessee had claimed deduction under Section 54F of Rs.5 Crores on account of having purchased immovable property 5, Golf Links, New Delhi for Rs.10.75 Crores on 8th August, 1998.

6. The Assessing Officer vide assessment order dated 27th March, 2001 for the AY 1998-99 held that one lakh equity shares of NIIT were not sold and transferred to M/s GIPL vide agreement dated 14th August, 1997. The transfer was on 30th September, 1998 i.e., in the subsequent AY 1999-2000. After referring to the term 'transfer' in relation to capital assets as defined in Section 2(47) of the Act and Section 45(1) of the Act which states that profits and gains from transfer of the capital assets shall be deemed to be the income of the previous year in which the transfer takes place, the Assessing Officer held that income from capital gains from transfer/sale of one lakh equity shares of NIIT would be assessable in the AY 1999-2000 and accordingly claim for deduction under Section 54F would be considered in the said year. Total taxable income was assessed at Rs.2,38,02,380/- on

account of certain additions with which we are not concerned.

7. Assessment Order for the AY 1999-2000 referred to the assessment order for the AY 1998-99 and the findings recorded therein. It was held that the transaction of sale/transfer of shares to M/s GIPL was not on arm's length and through any broker or through stock exchange. Father and spouse of the assessee were the directors of M/s GIPL and shares of M/s GIPL were held by the assessee's wife, children, parents and investment companies operating from the assessee's residence. Registered office of M/s GIPL was same as assessee's residence. The transfer of shares in favour of M/s GIPL in the statutory records of NIIT was made on 30th September, 1998, more than a year after the purported agreement dated 14th August, 1997 between the assessee and GIPL. Consideration was not paid by M/s GIPL in cash, but by way of 5 lakh 5% non-cumulative preference shares of Rs.100/- each, purportedly issued by GIPL to the assessee on 25th August, 1997. These preference shares were redeemed on 31st July, 1998 for Rs.5 Crores. M/s GIPL had failed to file annual accounts and balance sheets for the year ending 31st March, 1998 with Registrar of Companies till the passing of the assessment order. Explanation given by the assessee for the delay in actual issue of preference shares etc. was rejected by the Assessing Officer. On the other hand, the Assessing Officer held that the assessee had backdated the transaction of transfer of shares as the market price of NIIT shares in September, 1998 had arisen and increased to around Rs.1300/- to Rs.1400/- per share as against Rs.450/- per share on 14th August, 1997. In case, one lakh NIIT shares had been sold at the market price in September, 1998, they would have exceeded the purchase value of the immovable property 5, Golf

Links, New Delhi of Rs.10.75 Crores. During the AY 1999-2000, the assessee had sold 65,552 equity shares of NIIT to M/s GIPL on 2nd April, 1998 for Rs.5,89,96,800/- resulting in capital gains of Rs.5,87,09,331/-. Further, M/s GIPL had a book loss of Rs.1,63,10,300/- as per return for the AY 1998-99 and any profit in future on sale of the transferred NIIT shares would be adjusted against this accumulated book loss.

8. Assessment Order records that to investigate, whether this was a case of legitimate tax planning or tax evasion and whether the transaction was genuine, notices under Section 131 of the Act were issued to NIIT. Further, investigation had revealed that the assessee had lodged 76,000 and 24,000 equity shares statedly sold to M/s GIPL on 14th August, 1997 with Deutsche Bank AG on 22nd August, 1997 and 25th September, 1997, respectively. Subsequently, these shares were transferred in the name of the said bank on 28th August, 1997 and 29th September, 1997 respectively. Thereafter, Deutsche Bank AG had transferred these shares to M/s GIPL on 30th September, 1998. Copies of the transfer deeds executed by the assessee in favour of Deutsche Bank AG were filed and taken on record. NIIT's record had revealed that one lakh shares were transferred by the assessee to Deutsche Bank AG on the aforestated dates and then by Deutsche Bank AG to M/s GIPL on 30th September, 1998. Deutsche Bank AG vide letter dated 17th March, 2001 had stated that loan of Rs.2 Crores was extended by the Deutsche Bank AG to M/s GIPL on 10th September, 1997, and 1 Lakh equity shares were pledged with them by the assessee. As the value of the shares pledged was more than Rs.5 lakhs, in terms of the instruction issued by the Reserve Bank of India, these equity shares were physically

transferred in the name of the bank. Subsequently, the bank had released the shares in favour of M/s GIPL on the instructions of the assessee vide letter dated 14th August, 1997 that he had agreed to sell the shares to M/s GIPL. Accordingly, Deutsche Bank AG was authorized to release the shares and transfer the shares in favour of M/s GIPL once the loan secured against the pledge of shares was settled by M/s GIPL. Deutsche Bank AG were unable to give the exact date on which the letter dated 14th August, 1997 was received by them as the letter did not bear acknowledgement seal or receipt stamp, which was unusual as accepted by Mr. R.P. Verma, Head of Loan Administration. The shares were released by the bank to M/s GIPL on 5th May, 1998. Assessing Officer observed and held that this letter dated 14th August, 1997 must have been received before 5th May, 1998. M/s GIPL in response to the summons under Section 131 of the Act had accepted that they had not filed Form 2 with the Registrar of Companies which was required to be filed within 30 days of allotment of shares under the provisions of the Companies Act, 1956. M/s GIPL could not answer, whether any dividend was paid on the preference shares allotted to the assessee.

9. Upon exhaustive and detailed examination, the Assessing Officer concluded that non-cumulative preference shares were not allotted and was a sham and a cover up to show that the transfer was on 14th August, 1997 to justify sale price of Rs.450/-, when the fair market value of each share of NIIT prevailing on the date of transfer, i.e. 30th September, 1998 was Rs.1300/- to Rs.1400/-. The Assessing Officer observed that the shares were pledged vide Guarantee and Memorandum of Pledge dated 20th

August, 1997 with Deutsche Bank AG by the assessee and not by M/s GIPL. If the shares were the property of M/s GIPL, these shares could not have been pledged by the assessee as his own property. Accordingly, transfer deeds for 24,000 shares on 10th September, 1997 and for 76,000 shares 14th August, 1997, in favour M/s GIPL were sham documents. Similarly, there was no evidence of allotment and redemption of non-cumulative preference shares of Rs.5 Crores, which were sham transactions. Assessing Officer held that Agreement to Sell dated 14th August, 1997 was a pretence and allotment of 5 lakh 5% non-cumulative shares of M/s GIPL was not proven.

10. The second part of the assessment order relates to the legal effect of having not established that the transfer of one lakh NIIT shares had taken place on 14th August, 1997. Assessing Officer took the date of sale/transfer for the purpose of capital gains as 5th May, 1998, i.e. the date when the shares were released by Deutsche Bank AG to M/s GIPL on the instructions of the assessee. He observed that the full value of the consideration received by the assessee as a result of transfer was unknown as it was not a bona fide transfer. What was the bargain price could not be ascertained as the transaction was not at arm's length for M/s GIPL was a family controlled company of the assessee. M/s GIPL had financed assessee's foreign trips without any cause or reason. Thus, there was a possibility that M/s GIPL might have compensated the assessee for shares purchased and hence there was no alternative but to estimate the sale consideration. Market price of NIIT shares on National Stock Exchange on 5th May, 1998 was Rs.1493/-, as stated vide letter dated 19th March, 2001 of NIIT in respect to notice under Section 131 of Act. Accordingly, the Assessing Officer computed the value

of capital gains as Rs.14.93 Crores. Deduction under Section 54F in respect of purchase of House No.5, Golf Links, New Delhi for Rs.10.75 Crores was allowed and the balance amount of Rs.4,18,00,000/- was treated as long term capital gains. In other words, the Assessing Officer assumed the transfer price of each share of NIIT as Rs.1,493/-, instead of Rs.500/- per share.

11. Appeals filed by the assessee were dismissed by the Commissioner of Income Tax (Appeals) vide orders dated 13th March, 2002.

12. Tribunal by common order dated 29th January, 2004 has dismissed the second appeals filed by the assessee. Tribunal in the impugned order has referred to the expression 'sale' defined in Section 4 of the Sales of Goods Act, 1930 to hold that sale would take place on transfer of title in the goods from the seller to the buyer, and where transfer of property in the goods would take place at a future time or was subject to some condition to be fulfilled, the contract would not be a contract for sale, but an agreement for sale. As per Section 2(47) of the Act, the word 'transfer' includes any transaction whether by way of becoming a member or acquiring shares in a cooperative society, a company or other association of member or by way of agreement or arrangement or any other manner whatsoever which had the effect of transferring or enabling enjoyment of any immovable property. Movable goods could be transferred from the seller to the buyer, irrespective of the fact whether transfer documents were executed or not, when sale consideration was paid. Specific reference was made to the agreement dated 14th August, 1997 between the assessee and M/s GIPL to the effect that the purchaser was to acquire the shares free from all lien and encumbrances

with benefit of accumulated profits and right to all dividends etc., for consideration of Rs.5 Crores. The agreement had also stated that upon signing of the agreement, the assessee as seller would deliver to the purchaser, i.e. M/s GIPL, share certificates with duly executed instruments and that, M/s GIPL shall allot 12.5% preference shares to the assessee to be redeemed at par. The clauses were not adhered to and complied with. The assessee had retained possession of the shares that were later pledged with Deutsche Bank AG as collateral security for grant of loan of Rs.2 Crores to M/s GIPL vide pledge document executed on 20th August, 1997. These shares were then transferred in the name of the bank on 10th September, 1997 in lieu of the loan advanced to M/s GIPL. Documents produced by Deutsche Bank AG prove and conclude that the shares were delivered to the bank by the assessee on 20th August, 1997 and transferred in the name of the bank on 10th September, 1997. Therefore, the assessee would not have written an earlier letter dated 14th August, 1997 to the Deutsche Bank AG that he had offered one lakh shares of NIIT as a collateral security for grant of loan to M/s GIPL.

13. On the question of sale consideration, it was observed that there was no question of allotment of preference shares till delivery of shares and the preference shares were allegedly allotted to the assessee on 25th August, 1997 and later redeemed on 31st July, 1998 against payment of Rs.5 Crores by M/s GIPL to the assessee. There was no evidence to prove allotment of preference shares on 14th August, 1997, except book entries. As per Section 75 of the Companies Act, M/s GIPL was required to file details of allotment of preference shares with numbers, nominal amount, names and addresses of

the allottees within 30 days to the Registrar of Companies. Balance sheet of M/s GIPL as on 31st March, 1998 had not been filed with the Registrar of Companies till completion of assessment, i.e. 7th March, 2001, though it was stated that the audit was completed and finalized on 1st September, 1998.

14. Thus, the tribunal observed that 1,00,000 NIIT shares were transferred on 5th May, 1998 when the bankers had handed over the shares to M/s GIPL in the period relevant to the AY 1999-2000.

15. Tribunal thereafter examined the issue whether the assessee would be entitled to exemption under Section 54F of the Act in the AY 1998-1999 as the assessee was also owner of a residential house in Mussoorie. The assessee had claimed having sold the house to one Sarabjeet Singh for Rs.4 Lakhs on 20th July, 1997 and had relied upon an agreement to sell. Tribunal held that the agreement to sell was not executed on stamp paper applicable to the State of Uttar Pradesh and was not attested by "marginal" witnesses. The assessee had received Rs.2 Lakhs as advance money and professed that he had delivered the possession but there was no evidence that the cheque of Rs.2 Lakhs was honoured. Sale proceeds of Rs.1,99,490/- and Rs.99,650/- were credited in the account of the assessee on 4th August, 1997 and 12th September, 1997, respectively, which was after 20th July, 1997, i.e. the date on which the assessee had statedly handed over vacant possession. The assessee, during the course of the proceedings, had also produced copy of sale deed executed on 24th September, 1997 in respect of property known as “Swaran Kutir” with garage for Rs.1,70,000/-. The sale proceeds were paid through cheque of Rs.1 Lakh on 2nd August, 1997 and Rs.70,000/- in cash at the time of execution of sale deed. This it was stated would not indicate

handing over of physical possession of the property to the buyer on 20th July, 1997. The second deed with regard to the "main building of Harnam Niwas and kitchen" was not filed. It was observed that in view of the fact that the assessee had not been able to show that actual possession of the property was handed over to the purchaser on or before purchase of the immovable property in Golf Links, the assessee was not entitled to exemption under Section 54F of the Act.

16. Lastly, the tribunal considered the question of sale consideration. Shares of NIIT were quoted in the stock exchange and therefore the market rate on 5th May, 1998 should be adopted to work out the sale consideration. Decision in the case of ***K.P. Verghese versus Income Tax Officer, Ernakullum and Another***, [1981] 131 ITR 597 (SC) was distinguished on the ground that ratio expounded related to transaction between strangers and when genuineness of the transaction was not doubted, though there was dispute with regard to the sale consideration. In such cases, it was observed, that onus was on the Revenue to prove that the consideration received was over and above the amount actually paid. In the present case, once the document, i.e. the agreement to sell dated 14th August, 1997 was ignored, the authorities had to work out the sale consideration on the basis of market value as the parties were connected and the transaction was not at arm's length. M/s GIPL had, for one reason or the other, provided money and undertaken all visits of the assessee. The sale consideration shown was not the real consideration and the only option left with the Assessing Officer was to work out the real consideration and adopt the market rate of the shares on the date of transfer. Exact finding and observation, read:-

"18. Once it is held that the shares were transferred in the assessment year 1999-2000. The next question comes "what would be its sale consideration?" Having given a thoughtful consideration to the rival submissions on this issue, we are of the view that to determine the sale consideration of the NlIT shares, we have to revert back to the sale agreement of the shares dated 14th August, 1997 according to which the assessee had agreed to sell 1,00,000 NlIT shares to M/s. Glad Investment (P) Ltd. for a sum of Rs. 5 Crores and the same was paid to the assessee in the form allotment of preferential shares to the assessee, which would be redeemed at par at the discretion of the Board. This sale agreement has already been examined by us alongwith the other documents executed by the assessee in the fore-going paras and we finally held that these shares were not sold by the assessee through the aforesaid agreement dated 14.8.97 and all these documents were prepared by the assessee with the intention to bring this sale transaction within the financial year 1997-98 relevant to the assessment year 1998-99. Once it has been held that this agreement is not a valid agreement, sale consideration of the shares cannot be determined on the basis of this agreement. In these circumstances the sale consideration can only be determined on the basis or its market value when these shares were in fact sold and transferred in favour of Glad Investment (P) Ltd. It has already been held in the fore-going paras that the actual transfer of shares in favour of Glad Investment (P) Ltd. was effected only on 5.5.1998 when the shares were transferred by the bankers in favour or Glad Investment (P) Ltd. As such, we have to determine the value of the sale consideration of 1,00,000 NIIT shares as on 5.5.98. Since, the shares are quoted at the exchange, the rates of shares as on 05.05.98 should be adopted to work out the value of shares and its sale consideration. On perusal of the orders of the lower authorities, we find that the assessing officer has adopted the rates of NIIT shares as on 5.5.1998 as quoted on stock exchange.

> 19. We have also carefully examined the judgment of the apex court in the case of K.P Verghese (supra) and we find that the judgment was rendered in a context when the transaction was entered between the strangers and the genuineness of the transaction was not doubted and the dispute was with regard to the sale consideration. In those type of case their Lordships of the apex court have held that the onus is upon the revenue to prove that over an above the sale consideration have passed from the buyer to the seller. But in the instant case the genuineness of the document on the basis of sale consideration was claimed was doubted in the light of other documentary evidence of the assessee and it was finally held that the agreement to sell was not genuine documents on the basis of which sale consideration can be determined. Once this document is ignored, one has to work out the sale considerations on the basis of the market value. Moreover, in the instant case, it has already been held that the assessee and the buyer are closely connected and the transaction is proved to be at arm's length. It is also evident from the record that the assessee has been drawing substantial amount from M/s Glad Investment (P) Ltd. on one reason or the other and he has also undertaken the foreign visits at the cost of the buyer i.e. Glad Investment (P) Ltd. It means what has been shown as a sale consideration by the assessee is not the real consideration and in these circumstance only one option left with the assessing officer to work out the real sale consideration is to adopt the market rate of shares as on the date of transfer. Since he has adopted that rate quoted at the stock exchange and worked out the capital gain, we find no infirmity in his action which was later on approved by the Commissioner of Income tax (Appeals). Accordingly, these issues are decided against the assessee."

17. The first two questions of law raised in ITA No. 406/2005 relating to Assessment Years 1998-99 are primarily factual. Counsel for the appellant, during the course of arguments, had not pressed the said questions.

However, in the written submissions filed by the appellant it was asserted that the findings of the tribunal on both the questions was perverse and, therefore, require interference. On the first question, it was submitted that the tribunal has ignored two crucial facts, which were also noticed by the Assessing Officer. Firstly, Deutsche Bank AG had vide letter dated 17th March, 2001 confirmed having received the letter dated 14th August, 1997 written by the assessee for release of the shares directly to M/s GIPL. Copy of the said letter has been enclosed with the written submissions. Reference was made to the contents of the letter dated 14th August, 1997, which was addressed to the Manager, Deutsche Bank, AG. Submissions state that the letter was duly received and could not have been ignored even if the receipt stamp of the bank was missing. Secondly, the Assessing Officer had called for transfer deeds, which were dated 14th August, 1997 and were received by NIIT on 22nd August, 1997.

18. We would deprecate and would not accept written submissions raising grounds and issues, which were not pressed at the time of oral hearing. Further, documents and papers cannot be filed with the written submissions. These documents are not part of the appeal record. In case fresh documents or papers were to be filed, recourse by filing an application under Order XLI Rule 27 of the Code of Civil Procedure or permission to file was required and mandated. We therefore, reject and not take into consideration the factual contention that the transfer deeds were received by NIIT on 22nd August 1997, which contention even otherwise is rather strange, if not incongruous for Deutsche Bank AG has stated that the assessee, i.e. Arjun Malhotra, had deposited the said shares as security with the bank on 10th

September, 1997 for a loan of Rs.2 Crores which was extended to M/s GIPL. If the shares had been deposited by the assessee with NIIT on 22nd August, 1997, then the shares would not have been pledged by the assessee as security with Deutsche Bank AG on 10th September, 1997. Shares were certainly not pledged by M/s GIPL. This is undisputed. The letter purportedly dated 14th August, 1997 also appears to be back dated for the first paragraph of the letter states that "I had provided the 100,000 shares of NIIT as collateral security for grant of loan to Glad Investments. Shares are currently registered in your name". The shares were pledged with the bank on 10th September, 1997 and this fact was acknowledged and accepted in the letter dated 17th March, 2001. Therefore, it should be accepted that the letter though dated 14th August, 1997 was in fact issued after the shares pledged were registered in the name of M/s GIPL, sometimes after 10th September, 1997. The findings recorded by the tribunal as to the date of transfer are primarily based on facts. In view of the aforesaid discussion, substantial question No. 1 in ITA No. 406/2005 is answered against the appellant-assessee and in favour of the Revenue.

19. With regard to the second question raised for Assessment Year 1998-99, again findings by the tribunal are factual. The appellant-assessee has not placed on record any document or material referred to in the impugned order or the orders of the authorities to establish and show that the conclusion drawn was wrong and contrary to material on record. In fact, had the Assessing Officer not treated the shares as transferred in the AY 1999-2000, the appellant-assessee would not have been entitled to benefit under Section 54F of the Act on sale of 100000 NIIT shares to M/s GIPL as per the

findings approved and recorded by the tribunal i.e., the assessee being owner of an existing house.

20. In view of the aforesaid position, substantial question No. 2 in ITA No. 406/2005 is answered against the appellant-assessee and in favour of the Revenue.

21. This brings us to the last issue and the substantial question of law in ITA No. 405/2005, which was the only issue argued by the counsel for the appellant-assessee. The question raised relates to substitution of the sale consideration with the market value of the shares quoted at the stock exchange on 5th May, 1998 as the fair market value of the shares. In other words, the issue raised is whether the Assessing Officer could have changed the actual sale consideration of Rs.500/- per share of NIIT, with the market price of Rs.1,493/- per share of NIIT as on 5th May, 1998. The Assessing Officer had on the basis of the fair market value increased the total sale consideration from Rs.5,00,00,000/- to Rs.14,93,00,000/-.

22. Section 48 of the Act deals with computation of income chargeable under the head "capital gains". The relevant portion of Section 48 reads as under:-

> "**48. Mode of computation**.—The income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely: —
>
> (i) expenditure incurred wholly and exclusively in connection with such transfer;

> (ii) the cost of acquisition of the asset and the cost of any improvement thereto;"

Section 48 refers to the full value of consideration received or accruing as a result of transfer of a capital asset. It states that from the full value of consideration received or accruing, deduction would be allowed in respect of expenditure incurred wholly and exclusively in connection with the transfer and cost of acquisition of asset and cost of any improvement thereto. The provisos relate to benefit in the form of index cost of improvement, etc. with which we are not concerned and, hence, no reference is being made. Interpretation of expression "full value of the consideration received or accruing" had come up for consideration before the Supreme Court in ***Commissioner of Income Tax, West Bengal and Another versus George Henderson and Company Limited***, [1967] 66 ITR 622 (SC) in which *pari materia* provision in the form of Section 12B of the Income Tax Act, 1922 was examined and interpreted. In the said case, shares had been transferred for consideration of Rs.136/- per share when the market value on the date of transfer was Rs.620/- per share. The Assessing Officer had treated the difference of Rs.484/- per share as income arising from sale of shares treating the market price of Rs.620/- per share as full value of consideration. The Supreme Court did not agree with the Revenue and held that actual consideration had to be taken into account and not the market price. It was observed as under:-

> **"4.** For the reasons already stated, we are of the opinion that the expression "full value of the consideration" cannot be construed as the market value but as the price bargained for by the parties to the sale. The dictionary meaning of the word

> "full" is "whole, or entire, or complete" (*Shorter Oxford English Dictionary*). The word "full" has been used in this section in contrast to "a part of the price". Consequently, the words "full price" mean "the whole price". Clause (2) of Section 12-B itself clearly suggests that if no deductions are made as mentioned in sub-clause (*ii*) thereof, then that amount represents the full value of the consideration or the full price. In other words, when deductions are made as specified in sub-clauses (*i*) and (*ii*), then that amount does not represent the full value. The expression "full value" means the whole price without any deduction whatsoever and it cannot refer to the adequacy or inadequacy of the price bargained for. Nor has it any necessary reference to the market value of the capital asset which is the subject-matter of the transfer."

The ratio was followed in ***Commissioner of Income Tax, Calcutta versus Gillanders Arbuthnot and Company***, [1973] 87 ITR 407 (SC).

23. The aforesaid two decisions did not examine the proviso to Section 12B(2) of the Income Tax Act, 1922, which was incorporated as Section 52 of the Act, i.e. Income Tax Act, 1961. Subsequently, the first proviso was numbered as sub-section (1) with insertion of sub-section (2) with effect from 1st April, 1964. However, Section 52 was deleted/omitted by Finance Act, 1987 with effect from 1st April, 1988 in view of the judgment of the Supreme Court explaining both sub-sections 1 and 2, in the case of ***K.P. Varghese*** (supra), Section 52 of the Act before its omission was 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 such capital asset by an amount of not less than 15 per cent of the value 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 the transfer."

Interpreting sub-section (1) to Section 52 in ***K.P. Varghese*** (supra), it was held that the said provision applies where an assessee transfers a capital asset in respect of which (i) the transferee was a person directly or indirectly connected with the assessee; and (ii) the Assessing Officer has reasons to believe that the transfer was given effect with the object of avoid or reduce liability of the assessee to tax on capital gains. When the two conditions were satisfied, the fair market value of the capital asset on the date of transfer was to be taken as the full value of consideration for taxing capital gains. On the second contention, it was held that an under-statement of consideration in respect of the transfer than what was actually received must be shown. Under-statement of consideration cannot be assumed because the fair market value was higher than the amount received. Higher fair market value by itself cannot be a ground and reason to assume and hold that there was under-statement of consideration. It was only when there was under-

statement of consideration i.e., when consideration actually received was higher and more than actually declared, that the fair market value of the capital asset on the date of transfer was to be taken as the full value of consideration. Therefore, under-statement should be first established and then the Assessing Officer could take the fair market value of the share capital asset as the full value of consideration. The exact words used by the Supreme Court read as under:-

> "**7.** The first consideration to which we must refer is the object and purpose of the enactment of Section 52 sub-section (2). Prior to the introduction of sub-section (2), Section 52 consisted only of what is now sub-section (1). This sub-section provides that where an assessee transfers a capital asset and in respect of the transfer two conditions are satisfied, namely, (*i*) the transferee is a person directly or indirectly connected with the assessee and (*ii*) 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 to tax on capital gains, the fair market value of the capital asset on the date of the transfer shall be taken to be the full value of consideration for the transfer and the assessee shall be taxed on capital gains on that basis. The second condition obviously involves understatement of the consideration in respect of the transfer because it is only by showing the consideration for the transfer at a lesser figure than that actually received that the assessee can achieve the object of avoiding or reducing his liability to tax on capital gains. And that is why the marginal note to Section 52 reads: "Consideration for the transfer in cases of understatement". But, it must be noticed that for the purpose of bringing a case within sub-section (1), it is not enough merely to show understatement of consideration but it must be further shown that the object of the understatement was to avoid or reduce the liability of the assessee to tax on capital gains. Now it is necessary to bear in mind that when

> capital gains are computed by invoking sub-section (1) it is not any fictional accrual or receipt of income which is brought to tax. Sub-section (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 the actual consideration received by the assessee is not declared or disclosed and in most of the cases, if not all, it would not be possible for the Income Tax Officer to determine precisely what is actual consideration received by the assessee or in other words 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. Once it is found that the consideration in respect of the transfer is understated and the conditions specified in sub-section (1) are fulfilled, the Income Tax Officer will not be called upon to prove the precise extent of the undervaluation or in other words, the actual extent of the concealment and the full value of the consideration received for the transfer shall be computed in the manner provided in sub-section (1). 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."

Supreme Court held that the scope of sub-section (1) to Section 52 was extremely limited, and applied when the transferees were directly or indirectly connected with the assessee and to cases where there was actual under-statement, in the sense that the income/consideration paid was in fact higher and more than declared. Interpreting sub-section (2) and not accepting the strict literal construction, it was held that sub-section (2) would apply only when the consideration in respect of transfer was under-

stated by the assessee by 15% and in that event the Assessing Officer could take the market value instead of the consideration declared or disclosed by the assessee as the full value of consideration received or accrued. Sub-Section (2) would not apply where the consideration declared or disclosed by the assessee was the actual consideration received by it, but this actual consideration was less than the fair market value. Where the assessee had declared truly and correctly the consideration received by him, sub-section (2) would not apply and cannot be invoked to substitute the actual consideration received with the fair market value of the consideration.

24. In view of the aforesaid discussion and pronouncement of law in ***K.P. Varghese*** (supra), we fail to fathom how the tribunal had distinguished the said decision solely and entirely on the ground that in the present case the transaction was not at arm's length (see paragraphs 18 and 19 of the order of the tribunal quoted above in paragraph 16). ***K.P. Varghese*** (supra) case holds that sub-sections (1) and (2) relate to transactions, which were not at arm's length between related parties and third parties respectively, but the two provisions were integrally connected inasmuch as they would apply when there was evidence and material to show that the consideration declared and disclosed was under-stated and not the actual consideration received by the assessee. Only when the said pre-condition was satisfied, the Assessing Officer was entitled to treat the fair market value as the full value of consideration. Difference between the consideration actually received and market value of consideration by itself would not justify invoking the said Section. The aforesaid ratio has been followed by the Supreme Court in ***Commissioner of Income Tax, Madras versus Shivakami***

Company Private Limited, [1986] 159 ITR 71 (SC), which observes that the provision would apply only when there was consideration and which consideration actually received was more than the consideration disclosed or declared. Further, onus was on the Revenue to prove under-statement of the said consideration. Section 52 was not meant to apply to tax capital gains on the basis that the assessee might have gained or could have gained a higher price which in fact was not received. Reference can be also made to ***Commissioner of Income Tax, Bombay versus M/s Godavari Corporation Limited,*** [1993] 200 ITR 567 (SC) and judgments of this Court in ***CIT versus Dinesh Jain***, ***HUF***, [2013] 352 ITR 629 (Del) and ***Commissioner of Income Tax versus Late Sh. Gulshan Kumar (Decd.) through L.R.***, [2002] 257 ITR 703 (Del).

25. As noted above, Section 52 of the Act was omitted by Finance Act, 1987 with effect from 1st April, 1988. The said provision, therefore, was not applicable in the Assessment Year 1999-2000. We have referred to the aforesaid judgment in ***K.P. Verghese*** (supra) as this judgment was referred to and distinguished by the tribunal in the impugned order. We have also referred to ***K.P. Verghese*** (supra) to elucidate that the legal ratio propounded with reference to then applicable Section 52 of the Act would be against the Revenue even if the said Section was applicable. It is obvious that when Section 52 of the Act itself was not applicable, the Assessing Officer could not have substituted the actual sale consideration received by the Assessee with another figure stating that this was the fair market value. The aforesaid discussion would also take care of the argument that M/s GIPL had paid for foreign travel of the assessee. The fact that M/s GIPL had incurred any such

expenditure would not be a ground and reason to substitute the actual consideration received with the figure relying upon the market quotation of the share as the fair market value.

26. It is not that the Revenue was remediless in the present case. The difference between the fair market value and the actual consideration declared could have been taxed as gift under the Gift Tax Act, 1958 which was applicable till 1st August, 1998. However, for some reason which Revenue is unable to explain, provisions of the Gift Tax Act, 1958 were not invoked and applied. Thus, what was apparent and simple to adopt and tax the under-statement of fair market value, was strangely ignored and allowed to lapse. Addition was made, indirectly invoking Section 52, which provision was not in the Statute, and which provision as per Judicial pronouncement in ***K. P. Vergese*** (supra) could not have been invoked.

27. We had repeatedly adjourned the matter to enable the counsel for the Revenue to ascertain and justify how the fair market value could be substituted for the consideration declared as the transaction in the present case was certainly not at arm's length and subterfuge was adopted. Counsel for the Revenue, after due deliberation had expressed his inability to justify the said substitution stating that there was a gap or lacuna, which was rectified by statutory amendments subsequently. However, reference was made to the Calcutta High Court judgment in ***Mrs. A. Ghosh versus Commissioner of Income Tax, West Bengal-II***, [1983] 141 ITR 45 (Cal). In the said case, the assessee had acquired debentures, which were subsequently exchanged by exercising option to acquire fully paid up equity shares. The acquired equity shares were sold. Dispute arose as to the cost

of acquisition of the equity shares. It was held that cost to acquire the debentures cannot be treated as the cost of acquisition of equity shares for acquisition of the debenture with the right to conversion for acquisition of shares and acquisition of equity shares were two different goods. We would not go into the said aspect or ratio and pronounce our opinion on the same for this is not the issue arising in the present case. The Calcutta High Court was not examining the same factual background. The Calcutta High Court was examining issue of the cost of acquisition of the equity shares. The appellant-assessee had acquired non-cumulative preference shares on transfer of 100000 equity shares of NIIT. This is not in debate or doubt. This is not the case of the Revenue that the market value of the non-cumulative preference equity shares were issued by M/s GIPL were of a higher value. Non-cumulative preference shares did not have right of conversion. Non-cumulative preference equity shares were redeemed at par during the relevant period and payment of Rs.5,00,00,000/- was received.

28. Accordingly, the substantial question of law in ITA No. 405/2005 is answered in favour of the assessee and against the Revenue. Decision of the tribunal to this extent is set aside and reversed. Tribunal was not correct in holding that the market value of the shares quoted in the stock exchange on 5th May, 1998 can be taken as a basis for computing capital gains under Section 48 of the Act.

29. In view of the aforesaid finding on the substantial question of law framed in ITA No. 405/2005, we are not required to frame any substantial question of law in ITA No. 389/2007 filed by the Revenue impugning the order deleting/cancelling penalty for concealment of income under Section

271(1)(c) of the Act. The said appeal would be treated as dismissed.

30. Appeals are disposed of, with no order as to costs.

-sd-

(SANJIV KHANNA)
JUDGE

-sd-

(PRATHIBA M. SINGH)
JUDGE

APRIL 20, 2018
Pk/VKR