

Mamta Marajan and ors Vs. Ito

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Court : Delhi

Decided On : Mar-31-2003

Reported in : (2004)86TTJ(Del)120

Appeal No. : ITA Nos. 2418, 2419 & 2438/Del/2002 31 March 2003 A.Y. 1998-99

Appellant : Mamta Marajan and ors

Respondent : ito

Judgement :

ORDER

S.K. Yadav, J.M.:

These appeals are preferred on behalf of the assessed against different orders of Commissioner (Appeals) passed in their respective cases for the assessment year 1998-99. Since common issue is involved in these appeals, these appeals were heard together and are being disposed off by this single consolidated order for the sake of convenience. Though the assessed raised various grounds of appeal but all grounds relate to the chargeability of capital gain accrued on sale of their immovable property.

2. The facts in nutshell borne out from the record are that during the year under appeal, assessed sold a plot no. 171 pocket 4 & 5 sector 23, Rohini for Rs. 1,82,500. This property was owned by assessed's along with Smt. Sangita Mahajan. Since the individual assessed had 1/4th share in this property it declared

capital gain of Rs. 2,500. The assessing officer after making market enquiries referred the case to the valuation officer under section 55A of the Act, and the valuation officer has estimated the fair market value at Rs. 23,29,200 and the individual assessed's 1/4th share came to Rs. 5,82,300 instead of Rs. 1,82,500. The assessing officer asked the assessed to submit objection to the valuation report and the assessed filed approved valuer's report and also an allotment letter of the DDA for an alternative plot to show that the value determined by the valuation officer was not correct. Finding no force in the Explanationn of the assessed, the assessing officer recomputed the capital gain on the basis of estimate made by the valuation officer at Rs. 3,92,300.

3. Aggrieved, the assessed preferred an appeal before the Commissioner (Appeals) with the submission that the assessed has purchased the property in the immediately preceding year and the cost of acquisition was accepted by the revenue. Once the costs of acquisition of the property declared in earlier year was accepted by the revenue, they cannot estimate the market value of the property at an exorbitant rate within a period of 6 months, as no property can fetch such an exorbitant profit on its sale within such a short span. The assessed has also pointed out the various defects in the valuation report and placed heavy reliance upon the judgment of Apex Court in the case of K.P. Varghese v. ITO : [1981]131ITR597(SC) . The assessed has also distinguished the fair market value with the full value of consideration of the capital asset and in support of his contention; he has placed reliance upon various judgments. The Commissioner (Appeals) re-examined the issue in detail in the light of various judgments relied upon by the assessed but he did not concur with the contention of the assessed and upheld the order of the assessing officer.

4. Now, the assessed preferred an appeal before the Tribunal and reiterated his contention. The learned counsel for the assessed Mr. A.K. Srivastava has emphatically argued that before rejecting the sale consideration of the capital asset declared by the assessed, the revenue has to bring some concrete material on record that the assessed had received more than what he has declared. A reference under section 55A is only made to determine a fair markets value is certainly not a full consideration received by the assessed. A full consideration

means a full amount which has been received by the assessed on sale of property and not that sum of amount which might have been received by the assessed according to the market rate. There may be difference in rates prevailing at the time of transfer of immovable property. In support of his contention the learned counsel; for the assessed has placed strong reliance of the judgment of Apex Court in the case of K.P. Varghese v. ITO & Anr. (supra) in which their Lordships have also read down the 1 provisions of sub-section (2) of section 52 of the Act. This section 52, of the Act has been omitted by the Finance Act, 1987, with effect from 1-4-1988 which means that the legislature do not want to doubt the bona fides of assessed who has declared the correct sale consideration.

5. The learned counsel for the assessed further argued that a capital gain has to be computed in accordance with the provisions of section 48 of the Income Tax Act according to which full value of consideration should be taken into account in order to determine capital gain and not the fair market value. In support of his contention the assessed has also relied upon the judgment of Delhi Bench in the case of Shri Shankata Prasad Gupta v. Income Tax Officer dated 3-1-2003 in ITA No. 1428/Del/E/2002. A copy of the order of the Tribunal is placed on record. A reliance on following judgments is also placed on behalf of the assessed

(i) CIT v. Shivakami Co. (P) Ltd. (1986) 52 CTR (SC) 108 : (1986) 159 TM 71 (SC)

(ii) William De Naronha & Ors. v. Assistant Commissioner & Ors. : [1997]227ITR27(All)

6. The learned departmental Representative on the other hand has submitted that whenever the revenue authorities doubt sale consideration declared by the assessed, the assessing officer is competent enough to make a reference under section 55A to DVO in order to determine a fair market value of the property. No doubt a fair market value in strict sense is not a full consideration received by the assessed. But whenever the assessing officer has brought some material on record that the assessed has under stated the sale consideration of immovable property, he can certainly make reference to the DVO to ascertain market value of the property and once the assessing officer brings some evidence on record along

with the valuation report, to establish that what the assessed has declared, is not correct and the sale consideration is much more, the onus is shifted upon the assessed and the assessed is required to prove by placing some evidence on record that what he has declared was in fact full sale consideration received by it. Onus to prove a particular facts always oscillates and shifts from one part to other from time to time. No doubt primary onus lies upon the revenue to disprove the claim of the assessed but once the assessing officer discharge the onus by placing some material on record, the onus shifts upon the assessed to prove its claim.

7. In the instant case, the assessing officer has doubted the sale consideration declared by the assessed after making the market enquiries and thereafter, a reference was made to the DVO to determine the fair market value and consequent thereto, the DVO has also made independent survey of the correctness of the instant sale of the plot in the vicinity and determined the market value of the property at Rs. 23,29,200. When these facts were confronted to the assessed, the assessed could not place evidence on record that he in fact has received that much of sale consideration which has been declared by it. In these types of cases, the fair market value estimated by the DVO should be treated as a full consideration in order to compute the capital gain.

8. The learned departmental Representative further commented on the judgments referred to by the assessed by stating that in none of these judgments it has been held that revenue authorities are precluded from making enquiries to ascertain the full consideration received by the assessed in order to determine the capital gain. The learned departmental Representative has also placed reliance on some of the judgments which are as under; in support of his contention that the assessing officer was justified in making a reference in the given circumstances (i) Mliam De Naronhe & Ors. v. Assm CIT & Ors.(supra) (h) Daulatram & Ors. v. Income Tax Officer & Anr. : [1990]181ITR119(AP) C. T Laxmandas v. Assistant Commissioner & Anr. : [1994]208ITR859(Mad)

9. On consideration of rival submission and from a careful perusal of record, we find that the assessed has declared the sale consideration on the basis of

documents executed by it. The revenue has doubted the claim of the assessed on the basis of market rate but what investigation was conducted by the assessing officer is not borne out from his order. He straightaway made the reference to the Valuation Officer to determine the fair market value in order to compute the capital gain and the DVO has estimated the fair market value on the basis of certain sale instances but it has not been stated in the valuation report that the plot of which sale instances are taken into account, are situated in the vicinity or adjoining the impugned plot. When the DVO's report was confronted the assessed, the assessed has filed the registered valuers report who relied upon the land rates on which land was allotted by the DDA. On careful perusal of the relevant provisions of sections 48, 55(A) and 45 we find that the capital gain are to be computed in accordance with the provisions of section 48 of the Income Tax Act and section 48 only talks about the full consideration received as a result of transfer of capital asset. It does not talk about the fair market value determined under section 55(A) of the Income Tax Act. The difference between the full value of consideration and the fair market value was examined by the Apex Court of the case of K.P. Varghese v. Income Tax Officer (supra) in which their Lordships have held after taking into account the scope of sub-section (2) of section 52 of the Income Tax Act which now have been omitted by the Finance Act, 1987, with effect from, 1-4-1988, that sub-section (2) of section 52 of the Income Tax Act can be invoked only where the consideration for transfer of capital asset has been under stated by the assessed or in other words, the full value of consideration in respect of transfer is shown as lesser figure than the actually received by the assessed and burden of proving such under statement or concealment is on the revenue. The sub-section has no application in the case of honest and bona fide transaction where the consideration received by the assessed, has been correctly declared or disclosed by him. Their Lordships have further held that what in fact never accrued or was never received, cannot be computed as capital gain under section 48. Sec. 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 assessed as a result of transfer of the capital asset. Now sub-section (2) has been omitted from the statute by the Finance Act, 1987, with effect from, 1-4-1988 and there is no deeming provision on

statute to infer that there was under statement of full sale consideration.

10. In the case of CIT v. Shivakami Co. (P) Ltd. (supra) their Lordships of the Apex Court again reiterated its view by holding that unless there is evidence that more than what was stated was received, no higher price can be taken to be the basis for computation of capital gain. Capital gain tax was intended to tax the gains of an assessed and not what the assessed might have gained. What is not gained cannot be computed as gained. Also laws, fiscal or otherwise, must be both, reasonable and justly interpreted whenever possible. Capital gain is not taxed on what might have been received or could have been taxed.

11. On careful perusal of judgments of apex Court, we are of the view that in the case of K.P. Varghese (supra) their Lordships of the Apex Court have read down the scope of section 52 of the Income Tax Act and placed all burden upon the revenue to prove that assessed has understated the sale consideration. Since section 52 has already been omitted from the statute, there is no provision at present under which inference can be drawn that assessed has understated the full value of the consideration under certain circumstances.

12. With regard to cases of section 56A, we are of the view that the assessing officer is competent to make a reference to determine fair market value of the asset and whenever the revenue has brought the complete material on record to prove that the assessed has received more consideration, than what he has declared, the assessing officer may recourse the provision of section 56A for determining the fair market value which can be used as a full consideration. But in the case in hand, the assessing officer has not brought on record except the DVO's report that the assessed has received more than what he has declared. On the basis of the DVO's report, the fair market value cannot be adopted as full value of consideration to determine the capital gain. We have also carefully examined the judgment in the case of S.P. Gupta v. Income Tax Officer (supra) and we find that identical issue was also adjudicated by the Tribunal in which it has been held that in such type of circumstances, fair market value cannot be used a full value of consideration. On conspectus of the facts and circumstances of the case and in the light of the ratio laid down in aforesaid judgments, we are of the considered

view that the revenue was not justified in rejecting the claim of the assessed. Accordingly, we set aside the order of Commissioner (Appeals) and delete the addition made on this count.

13. In the result, the appeal of the assessed is allowed.

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