Commissioner of Income-tax Vs. N.S. and North Malabar Public Conveyance (P.) Ltd.

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Court : Kerala

Decided On : Sep-27-1974

Reported in : [1976]102ITR36(Ker)

Judge : P. Govindan Nair, C.J. and; P. Subramonian Poti, J.

Acts : Income Tax Act, 1961 - Sections 45, 48, 52 and 52(2)

Appeal No. : Income-tax Referred Case No. 7 of 1973

Appellant : Commissioner of Income-tax

Respondent : N.S. and North Malabar Public Conveyance (P.) Ltd.

Advocate for Def. : K.P. Radhakrishna Menon, Adv.

Advocate for Pet/Ap. : P.A. Francis and; P.K. Ravindranatha Menon, Advs.

Judgement :

Govindan Nair, C.J.

1. This is a reference by the Income-tax Appellate Tribunal, Cochin Bench, under Section 256(1) of the Income-tax Act, 1961, for short, the Act, and the following question has been referred for our decision :

'Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that in the absence of any material to show that the assessee had received anything more than Rs. 80,000, being the consideration mentioned in the sale deed, there was no scope for the application of Section 52(1) of the Income-tax Act, 1961 ?.'

2. The assessee is a private limited company. It owned two non-residential buildings. The buildings were sold by the company to one Smt. N. K. Vimala, one of its shareholders for Rs. 80,000. The Income-tax Officer during the course of the assessment for the year 1969-70, found that the fair market value of the buildings sold by the assessee was much higher than the value stated as consideration in the deed of transfer. The full market value, he found, was Rs. 1,20,000. He also found that the under-statement of the value of the sale deed was with the object of reduction of the liability of the assessee for income-tax under Section 45 of the Act. He, accordingly, included in the income of the assessee the difference between the sum of Rs. 1,20,000 and Rs. 80,000 mentioned in the sale deed. The assessee appealed, and the Appellate Assistant Commissioner relying on the decision of this court in K. P. Varghese v. Income-tax Officer, (1) : [1970]77ITR719(Ker) allowed the appeal holding that Section 52 of the Act was not applicable, since it had not been brought out that the assessee had received by way of consideration anything more than what has been stated to have been received in the sale deed. It was then the turn of the department to appeal to the Tribunal and one of the contentions that was raised before the Tribunal was that the requirements of Section 52 had been satisfied. The Tribunal held that unless it is shown that the assessee had received by way of consideration more than

what was stated in the deed of transfer there was no scope for the application of the provisions of Section 52(1) or 52(2) of the Act. For this purpose it relied on the ruling of this court in K. P. Varghese v. Income-tax Officer, already referred to. The Tribunal also rejected the contention raised before it that the Income-tax Officer had really applied Section 52(2) and not Section 52(1). It held that the subsection that was applied by the Income-tax Officer was sub-section (1) of Section 52.

3. The department wanted the following question to be referred to this court in accordance with Section 256(1) of the Act, and the application is at page 15 of the paper book :

'Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was correct in law in holding that the assessee cannot be assessed to income-tax for capital gains by applying the provisions of Section 52 of the Income-tax Act, 1961 ?'

4. It is clear that the question that has actually been referred to this court is different from the question that the department wanted to be referred. We are satisfied that the real question that arose for decision before the Appellate Tribunal and which had in fact been considered by the Appellate Tribunal will be brought out only if it is worded in the manner indicated by the department in its application under Section 256(1) of the Act, The facts are not in dispute and the question referred is a pure question of law. We think, therefore, that this is an appropriate case where we should reframe the question to bring out the real point that arose for decision and which was decided by the Tribunal, and, consequently, arose from the order of the Tribunal. We, therefore, reframe the question referred to us as follows :

'Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was correct in law in holding that the assessee cannot be assessed to income-tax for capital gains by applying the provisions of Section 52 of the Income-tax Act, 1961 ?.'

5. Section 45 of the Act imposes a tax on any profits or gains arising from the transfer of a capital asset under the head 'capital gains' and Section 48 thereof providing for computation enacts that 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 capital asset 'and the cost of any improvement thereto.And Section 52 is in these terms :

'52. (1) Where the person who acquires a capital asset from an assessee is directly or indirectly connected with the assessee and the Income-fax 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, betaken 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 fifteen per cent, 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.'

6. It is only necessary to refer to Section 47(iii) in addition. This section exempts from the purview of Section 45.'any transfer of a capital asset under a gift or will or an irrevocable trust'. This provision need not detain us further because no contention had been raised at any time that by virtue of this clause under Section 47, the assessee was not liable to tax under the head 'capital gains' nor is it necessary to refer to the section, for it is admitted that if there had been 'capital gains' the same is income liable to tax under the Act.

7. The real question is, therefore, the interpretation of Section 52, Here again on the facts established and found by the income-tax authorities as well as the Tribunal, it is unnecessary to consider the scope and ambit of Sub-section (1) of Section 52 though we might mention the difference between the two Sub-sections. Sub-section (1) is applicable to all cases where there is a difference between the full consideration for the transfer and the fair market value of the property transferred where there is reason to believe that the transfer was effected with the object of avoidance or reduction of the liability of the assessee under Section 45. In what circumstances it will be possible for the Income-tax Officer to state justifiably that he had reason to believe that the transfer was effected with the object of avoidance or reduction of the liability of the assessee under Section 45 it may be difficult to define for all types of cases, as the conclusion must vary depending on the facts and circumstances of each case, and it being unnecessary for us to consider the scope of the provision in this reference, we express no opinion whatever on that aspect.

8. Now, turning to Sub-section (2) of Section 52 all that the section requires for its application is that there must be a difference between the fair market value of a capital asset transferred by an assessee as on the date of transfer and the full value of the consideration declared by the assessee in respect of the transfer of such capital asset which is more than 15% of the consideration declared by the assessee. If there is such a difference, the fair market value of the property shall be taken to be the full consideration for the transfer is what the section provides. Once the full consideration for the transfer is thus determined, the computation of the 'capital gains' as required by Section 48 of the Act becomes a pure arithmetical process. Applying the section to the facts of this case as found by the Tribunal, since the difference between Rs. 1,20,000 which has been found to be the fair market value of the buildings transferred by the assessee and the sum of Rs. 80,000 which is the consideration declared by the assessee in the sale deed as the value of those buildings is in excess of 15% of the sum of Rs. 80,000, Section 52(2) is attracted and the difference between Rs. 1,20,000 and Rs. 80,000, namely, Rs. 40,000, is 'capital gains' for the purpose of determining the income and should be computed as such under Section 48 of the Act.

9. In the light of the above, our answer to the question which we have refrained must be in the negative, that is, in favour of the department and against the assessee. We answer the question accordingly. We direct the parties to bear their respective costs in this reference.

10. A copy of this judgment under the seal of the High Court and the signature of the Registrar will be forwarded to the Income-tax Appellate Tribunal, Cochin Bench.