
(1984) 02 DEL CK 0028

In the Delhi High Court

Case No : Income Tax Ref. No. 247 of 1975

Commissioner of Income Tax

APPELLANT

Vs

Bharat Development (P) Ltd.

RESPONDENT

Date of Decision : 24-02-1984

Acts Referred:

Citation : (1984) 41 CTR 79 : (1986) 158 ITR 159 : (1984) 18 TAXMAN 394

Hon'ble Judges : D.P Wadhwa, J;D.K. Kapur, J

Bench : Division Bench

Judgement

D.K. Kapur, J.—The question referred to us for the asst. yrs. 1965-66 and 1966-67 is as follows :

"Whether, on the facts and circumstances of the case, the Tribunal was right in holding that the assessed was entitled to the benefits of s. 47(iii) of the IT Act, 1961?"

Although, the question raised is a very substantial one, we feel that it is not really necessary to answer this question in this particular case because of some other events which have occurred after the case was decided by the Tribunal.

2. The facts are that the assessed is a Private Limited Company which under the relevant period was under the control of the late Shri R. Dalmia. Certain shares which were held by the company were transferred to various persons. These shares included 3,600 shares of Patiala Biscuits Manufacturers (P.) Ltd., and 4,500 shares of Dalmia Dadri Cement Ltd. The shares in question were not normally quoted or dealt with in the stock market. According to the ITO, the intrinsic value of the shares was much higher than the price for which they were shown to have been transferred. The ITO calculated the price of the shares at Rs. 3,06,090 for the asst. yr. 1966-67. He held that the "capital gains" were Rs. 1,94,072 for the first year and Rs. 4,13,566 for the second year. It may be mentioned that the profit had been shown by the assessed company on the basis that it was a dealer decision of the Tribunal where by the assessed was treated

as not being a dealer in shares.

3. The Id. counsel for the assessed brought to our notice the fact that the Tribunal's earlier view had been upset by a decision of this court reported as *Bharat Development (P.) Ltd. Vs. Commissioner of Income Tax, Delhi (Central)*, . In that case, the income from share transactions which included similar sales of shares not normally quoted was held to be "business income". Thus the very basis of the decision in this case, namely, that the assessed was not a dealer in shares has been demolished, so the concept of "capital gains" which is involved in the present case no longer remains and hence, the question referred to us which only arises in a case of "capital gains" has become academic.

4. To continue the facts of the case, it may be mentioned that the AAC held that the profits were assessable under the head "capital gains" and not under the head "income from business". However, following the judgment of the Kerala High Court in the case of *K.P. Varghese Vs. Income Tax Officer, B-Ward and Others*, , it was held that s. 52 could not be invoked and hence, the additions made by the ITO were deleted.

5. On appeal to the ITAT it was held that the judgment of the Kerala High Court had been reversed by a Full Bench judgment also of the Kerala High Court reported as *Income Tax Officer, B-Ward and Another Vs. K.P. Varghese*, , and Therefore, the point decided by the AAC had to be decided against the assessed. However, the Tribunal then proceeded to apply the judgment of this Court reported as *SHIV SHANKAR LAL Vs. COMMISSIONER OF GIFT-TAX*, , and another case of the same assessed reported as *Shiv Shanker Lal Vs. Commissioner of Income Tax, Delhi*, , to hold that the transfers in the present case fell under the definition of gift given in s. 4(1)(a) of the GT Act, and hence, were excluded because of s. 47(iii) of the IT Act, 1961, from the purview of taxation as "capital gain".

6. This is the question referred to us. However, it has also been brought to our notice that the Full Bench judgment of the Kerala High Court has been reversed by the Supreme Court as per its judgment in *K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another*, . This means that the view of the AAC to the effect that s. 52(2) of the IT Act, 1961, cannot be invoked in this case has to be upheld. So, in any case, the question referred to us would not survive.

7. The result of this analysis is that the question referred to us need not be answered by us because it has become redundant due to the reversal of the Kerala High Court Full Bench decision in *K. P. Varghese's* case (supra) and also, because this court has already held the present assessed to be a dealer in shares as per the judgment aforementioned. The result would be that the sale of the shares in question in this case involving two assessment years would not attract "capital gains" and hence, neither s. 52 nor s. 47 would apply. We answer the question referred to us by holding that the income in question has to be treated as "business income" and not under the head "capital gains" and, Therefore,

the question referred to us has become redundant. If the assessed is not treated as a dealer in shares, then s. 52(2) is not attracted because of the Supreme Court's judgment in K. P. Varghese's case (supra), and in any event. Even if s. 52(2) applied, s. 47(iii) would apply and no capital gains would be involved. Having examined various aspects of the case as they now exist, we hold that the question referred to us has become redundant but even if it survived, it has to be answered in the affirmative in favor of the assessed and against the department.

8. We leave the parties to bear their own costs.