(1993) 07 GUJ CK 0034

In the Gujarat High Court

Case No : IT Reference No. 379 of 1980

Commissioner of Income Tax	APPELLANT
Vs	
G.R. Kothari	RESPONDENT

Date of Decision : 20-07-1993

Acts Referred:
Income Tax Act, 1961 — Section 256(1), 45, 47(iii), 48, 52

Citation : (1994) 76 TAXMAN 317

Hon'ble Judges : Y.B. Bhatt, J;G.T. Nanavati, J

Bench : Division Bench

Advocate : M.J. Thakore, for the Appellant; D.A. Mehta and R.K. Patel, for the Respondent

Judgement

G.T. Nanavati, J.—The following two questions have been referred to this Court by the income tax Appellate Tribunal u/s 256(1) of the income tax Act, 1961:

1. Whether, on the facts and in the circumstances of the case, the provisions of section 52(2) could be invoked in the absence of proof of avoidance or reduction of the assessee''s tax liabilities u/s 45 of the income tax Act?

2. Whether, on the facts and in the circumstances of the case, portion of the transaction attracting the provisions of section 4(1)(a) of the Gift-tax Act constituted a ''transfer under gift'' within the provisions of section 47(iii) of the income tax Act?

The assessee had transferred 50 shares in a company during the financial year 1971 -72 in favour of his two sons at the rate of Rs. 1,600 per share. The fair market value of the said shares on the date of the transfer was assessed by the assessee at Rs. 1,941 per share. The price difference in respect of those shares was, returned by the assessee for gift-tax purposes and gift-tax was, accordingly, charged by the Gift-tax Officer. The ITO deemed it fit to apply the provisions of section 52(2) of the income tax Act and computed long-term capital gains. The ITO also rejected the contention raised on behalf of the assessee that the provisions of section 47(iii) were attracted and, therefore, capital gains were not chargeable in respect of the said difference.

2. The assessee, therefore, preferred an appeal to the AAC. The AAC held that in the absence of any material to show that the assessee''s object was to avoid or reduce his tax liability, section 52(2) was not attracted. He also held that in view of the provisions of section 47(iii), the difference could not be taken into consideration for computing the capital gains u/s 48 of the Act.

3. Aggrieved by that order, the Department filed an appeal before the income tax Appellate Tribunal. Though the Tribunal did not agree with the reasoning of the AAC, it agreed with the conclusion that the provisions of section 52(2) would not apply to such cases as there was no material to show that the object of the assessee was to avoid or reduce the tax liability. The revenue, therefore, sought a reference of the above stated two questions to this Court. So far as question No. 1 is concerned, it is directly covered by the decision of the Supreme Court in K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, , wherein the Supreme Court has held that sub-section (2) of section 52, can be invoked only where the consideration for the transfer of a capital asset has been understated by the assessee, or, in other words, the full value of the consideration in respect of the transfer is shown at a lesser figure than that actually received by the assessee, and the burden of proving such understatement or concealment is on the revenue. The subsection 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. In view of this decision of the Supreme Court, the answer to question No. 1 will be in the negative, that is, against the revenue and in favour of the assessee. In view of our opinion, as regards question No. 1, we do not think it necessary to answer question No. 2 since the revenue is losing in any case. No order as to costs.