

(1985) 05 CAL CK 0037

In the Calcutta High Court

Case No : Income-tax Reference No. 217 of 1976

Commissioner of Income Tax

APPELLANT

Vs

M. Nath

RESPONDENT

Date of Decision : 06-05-1985

Acts Referred:

Income Tax Act, 1961 — Section 45, 52(2)

Citation : (1986) 54 CTR 102 : (1986) 158 ITR 78

Hon'ble Judges : Dipak Kumar Sen, J;Ajit K. Sengupta, J

Bench : Division Bench

Advocate : B.K. Naha, for the Appellant;D. Pal and Dilip Dhar, for the Respondent

Judgement

Ajit K. Sengupta, J.—This is a reference u/s 256(2) of the Income Tax Act, 1961. This reference relates to the assessment year 1964-65.

2. On appeal, before the Appellate Assistant Commissioner, it was urged that no intention to avoid or reduce the appellant's tax liability was made out in this case. The transfer was made merely for the purpose of benefiting the lady and it was an honest transaction entered into out of love and affection. It was urged that the Income Tax Officer was wrong in coming to the conclusion that the transfer was made with the object of avoidance of liability u/s 45. The Appellate Assistant Commissioner agreed with this argument and observed that the Income Tax Officer had brought on record no material to substantiate that the transaction was effected with the object of avoidance or reduction of liability u/s 45. He, therefore, cancelled the Income Tax Officer's order in respect of capital gains.

3. Before the Tribunal, no serious argument was made in regard to the applicability of Section 52(1) of the Act. The Tribunal held that in the absence of any evidence to show that the transfer was made with the object of avoidance or reduction of tax liability in relation to the assets, Section 52(1) would not apply. The main argument of the Department before the Tribunal was that Section

52(2) applied to this case and on this basis, the order of the Income Tax Officer should have been sustained.

4. The Tribunal found on a clear reading of the Income Tax Officer's and the Appellate Assistant Commissioner's orders that they never proceeded to consider the question from the point of view of Section 52(2) but they had proceeded only on the ground that the transfer being to a near relative there was reason to believe that it was effected with the object of avoidance or reduction of the liability of the assessee u/s 45. To make sure regarding the correct position in this regard, the Tribunal saw the order of the Appellate Assistant Commissioner and it showed that the order was one u/s 52(1) and not u/s 52(2). It was, therefore, held that the entire argument of the departmental representative in regard to Section 52(2) was without any foundation in fact. Accordingly, the departmental appeal was dismissed.

5. On the aforesaid facts, the following question stated to be the question of law has been referred to this court:

"Whether, on the facts and in the circumstances of the case, the Tribunal is justified in holding that Section 52(2) of the Income Tax Act, 1961, was not applicable?"

6. Section 52(1) provides as follows :

"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 u/s 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."

7. The necessary ingredients of the section are firstly, that there should be a direct or indirect connection between the person who acquires the capital asset and the assessee. Secondly, the Income Tax Officer should have reason to believe that the transfer was effected with the object of avoidance or reduction of the liability of the assessee to capital gains and, thirdly, if the first two conditions are satisfied, then the full value of the consideration for the transfer can be taken to be the fair market value of the capital asset on the date of the transfer.

8. Second requirement of Section 52(1) can be satisfied only if there is cogent material on which the Income Tax Officer would have reason to believe that the transfer was effected with the object of avoidance or reduction of the liability to capital gains. There must be facts showing that the object was to avoid or reduce the liability to capital gains tax. The Supreme Court in the case of K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, , held that when capital gains are computed by invoking Section 52(1), it is not any fictional accrual or receipt of income which is brought to tax. Subsection (1) does not deem income to

accrue or to be received which, in fact, never accrued or was received. It, therefore, follows that the mere fact that fair market value exceeded the full value of the consideration received will not justify the application of Section 52(1). The Income Tax Officer having failed to show that the object of the transfer was avoidance or reduction of the tax liability by the transferor sought to support his action by applying the provision of Section 52(2).

9. Section 52(2) at the material time provided as follows :

"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."

10. It is no doubt true that even if the materials do not justify action u/s 52(1), if such materials disclose that the conditions for invoking provisions of Section 52(2) have been satisfied, the Tribunal can go into that question. However, the facts of this case do not justify the assumption of jurisdiction u/s 52(2) either. The Supreme Court in K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, , has held that Section 52(2) 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 understatement or concealment is on the Revenue. This sub-section 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 unless it is established that the consideration actually received by the assessee is more than what is declared or disclosed by him. Section 52(2) does not create any fictional receipt. It does not deem as receipt something which is not in fact received. On the facts found by the Tribunal provision of Section 52(2) cannot be invoked in this case.

11. In the premises, the aforesaid question in this reference must be answered in the affirmative and in favour of the assessee.

12. There will be no order as to costs,

Dipak Kumar Sen, J.

13. I agree.