
(1993) 03 RAJ CK 0024

In the Rajasthan High Court

Case No : Income Tax Reference No. 82 of 1981

Commissioner of Income Tax

APPELLANT

Vs

Raja Narendra

RESPONDENT

Date of Decision : 10-03-1993

Acts Referred:

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

Citation : (1994) 210 ITR 250

Hon'ble Judges : K.C. Agrawal, C.J;V.K. Singhal, J

Bench : Division Bench

Advocate : G.S. Bapna, for the Appellant;

Judgement

V.K. Singhal, J.—The Income Tax Appellate Tribunal, Jaipur Bench, Jaipur, has referred the following question of law arising out of its order dated June 11, 1980, in respect of the assessment years 1974-75 and 1975-76 :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the provisions of Section 52(2) of the Income Tax Act, 1961, were not applicable in relation to the capital gains arising from the sale of parts of the property known as Binai House, Ajmer, for the assessment years 1974-75 and 1975-76 ?"

2. The brief facts of the case are that the property known as Binai House was sold for a consideration of Rs. 90,000 to one Shri Ram Lal on conditional sale. The assessee has repurchased the said property on June 20, 1973, for the same consideration of Rs. 90,000 and sold it to different persons. In the assessment year 1974-75, the sales were effected as under:

Rs.

1. Dineshchand Agarwal 27-2-1974 32,000

2. Smt. Chikli Devi 27-2-1974 31,000

3. Shri Bajrang Lal 27-2-1974 17,000

4. Gaffarkhan and Sattarkhan 21-6-1973 40,000

3. The Income Tax Officer observed that the value shown in the sale deed was not the correct fair market value and the portion sold to Dinesh Chand Agarwal and Chikli Devi were of higher fair market value as valued by the Valuation Officer of the Department and the property sold to Gaffarkhan and Sattar Khan was resold by them after its purchase for a sum of Rs. 50,500. Since the fair market value exceeded by more than 15 per cent. of the sale consideration, the fair market value in respect of three portions, the Income Tax Officer determined the values as under :

Rs.

1. Shri Dineshchand Agarwal 59,000

2. Smt. Chikli Devi 36,500

3. Shri Gaffarkhan and Sattarkhan 50,500

4. The capital gains were computed at Rs. 91,300 for the year 1974-75.

5. In the assessment year 1975-76, it was observed by the Income Tax Officer that the property sold to Sattar Khan for Rs. 40,000 was immediately sold by him for Rs. 1,23,000 and the Departmental Valuation Officer has also determined the value at Rs. 1,20,000. Another portion of the property was sold to Gaffar Khan for Rs. 41,000 and thus the capital gains of Rs. 1,02,500 were determined for the assessment year 1975-76 by determining the sale value at Rs. 1,61,000 and the cost of acquisition at Rs. 58,500.

6. Against these assessment orders appeals were preferred and the contention that there must be some material to show that some amount in excess over what have been shown under the transaction as received has either been received or has accrued, was rejected.

7. A second appeal was preferred before the Income Tax Appellate Tribunal, Bombay Bench "D", Camp, Jaipur. It was contended that the Income Tax Officer has not been able to bring any material to show that the consideration shown in the sale deeds was an understatement and simply on the basis of the subsequent sale of the property by the purchaser fetching a higher value it could not be presumed that it was a case of understatement. The Income Tax Appellate Tribunal came to the conclusion that the bona fides of the transaction have not been assailed and the fact that the property has actually been sold by the purchaser's for a higher consideration later on could only be the starting point for making an enquiry whether the transactions in question were bona fide or not. Without establishing that the transactions were mala fide in so far as the consideration was concerned, the provisions of Section 52(2) of the Income Tax Act could not have been applied.

8. The provisions of Section 52 have been omitted by the Finance Act, 1987, with effect from April 1, 1988. The applicability of the provisions of Section 52 were considered by the apex court in K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, and it was held as under (at page 614) :

"Thus, it is not enough to attract the applicability of Sub-section (2), that the fair market value of the capital asset transferred by the assessee as on the date of the transfer exceeds the full value of the consideration declared in respect of the transfer by not less than 15 per cent. of the value so declared, but it is furthermore necessary that the full value of the consideration in respect of the transfer is understated or, in other words, shown at a lesser figure than that actually received by the assessee. Sub-section (2) has no application in the case of an honest and bona fide transaction where the consideration in respect of the transfer has been correctly declared or disclosed by the assessee, even if the condition of 15 per cent. difference between the fair market value of the capital asset as on the date of the transfer and the full value of the consideration declared by the assessee is satisfied. If, therefore, the Revenue seeks to bring a case within Sub-section (2), it must show not only that the fair market value of the capital asset as on the date of the transfer exceeds the full value of the consideration declared by the assessee by not less than 15 per cent. of the value so declared, but also that the consideration has been understated and the assessee has actually received more than what is declared by him. There are two distinct conditions which have to be satisfied before Sub-section (2) can be invoked by the Revenue and the burden of showing that these two conditions are satisfied rests on the Revenue. It is for the Revenue to show that each of these two conditions is satisfied and the Revenue cannot claim to have discharged this burden which lies upon it, by merely establishing that the fair market value of the capital asset as on the date of the transfer exceeds by 15 per cent. or more the full value of the consideration declared in respect of the transfer and the first condition is, therefore, satisfied. The Revenue must go further and prove that the second condition is also satisfied. Merely by showing that the first condition is satisfied, the Revenue cannot ask the court to presume that the second condition too is fulfilled, because even in a case where the first condition of 15 per cent. difference is satisfied, the transaction may be a perfectly honest and bona fide transaction and there may be no understatement of the consideration. The fulfilment of the second condition has, therefore, to be established independently of the first condition and merely because the first condition is satisfied, no inference can necessarily follow that the second condition is also fulfilled. Each condition has got to be viewed and established independently before subsection (2) can be invoked and the burden of doing so is clearly on the Revenue. It is a well-settled rule of law that the onus of establishing that the conditions of taxability are fulfilled is always on the Revenue and the second condition being as much a condition of taxability as the first, the burden lies on the Revenue to show that there is an understatement of the consideration and the second condition is fulfilled. Moreover, to throw the burden of showing that there is no

understatement of the consideration on the assessee would be to cast an almost impossible burden upon him to establish a negative, namely, that he did not receive any consideration beyond that declared by him."

9. It was further observed (at page 616) :

"It is, therefore, clear that Sub-section (2) cannot be invoked by the Revenue unless there is understatement of the consideration in respect of the transfer and the burden of showing that there is such understatement is on the Revenue. Once it is established by the Revenue that the consideration for the transfer has been understated or, to put it differently, the consideration actually received by the assessee is more than what is declared or disclosed by him, Sub-section (2) is immediately attracted, subject of course to the fulfilment of the condition of 15 per cent. or more difference, and the Revenue is then not required to show what is the precise extent of the understatement or in other words, what is the consideration actually received by the assessee. That would in most cases be difficult, if not impossible, to show and hence Sub-section (2) relieves the Revenue of all burden of proof regarding the extent of understatement or concealment and provides a statutory measure of the consideration received in respect of the transfer. It does not create any fictional receipt. It does not deem as receipt something which is not in fact received. It merely provides a statutory best judgment assessment of the consideration actually received by the assessee and brings to tax capital gains on the footing that the fair market value of the capital asset represents the actual consideration received by the assessee as against the consideration untruly declared or disclosed by him. This approach in the construction of Sub-section (2) falls in line with the scheme of the provisions relating to tax on capital gains. It may be noted that Section 52 is not a charging section but is a computation section. It has to be read along with Section 48 which provides the mode of computation and under which the starting point of computation is "the full value of the consideration received or accruing". What in fact never accrued or was never received cannot be computed as capital gains u/s 48. Therefore, Sub-section (2) cannot be construed as bringing within the computation of capital gains an amount which, by no stretch of imagination, can be said to have accrued to the assessee or been received by him and it must be confined to cases where the actual consideration received for the transfer is understated and since in such cases it is very difficult, if not impossible, to determine and prove the exact quantum of the suppressed consideration, Sub-section (2) provides the statutory measure for determining the consideration actually received by the assessee and permits the Revenue to take the fair market value of the capital asset as the full value of the consideration received in respect of the transfer."

10. The above decision was again followed by the apex court in Commissioner of Income Tax, Madras Vs. Shivakami Co. Pvt. Ltd., wherein it was held that understatement of a value is a mis-statement of value and unless there is evidence that the consideration actually received by the assessee was more than

what was disclosed or declared by him, no higher price can be taken to be the basis for computation of capital gains. The onus is on the Revenue to prove that there was understatement by the assessee, i.e., the consideration received by the assessee in respect of the transaction was not truly declared or disclosed by him but was shown at a lower figure. What is intended to be taxed is the actual gains of an assessee, not what an assessee might have gained or could have gained or received. The inference might be drawn in certain cases but to come to a conclusion that a particular higher amount was in fact received must be based on such material from which such an irresistible conclusion follows.

11. In the light of the above two judgments of the apex court, we are of the view that the Income Tax Appellate Tribunal was right in coming to the conclusion that the provisions of Section 52(2) of the Income Tax Act were not applicable in relation to the capital gains earned in relation to Binai House, Ajmer, for the assessment years 1974-75 and 1975-76.

12. The reference is accordingly answered in favour of the assessee and against the Revenue. No orders as to costs.