
(1976) 05 AHC CK 0053
In the Allahabad High Court
Case No : Income-tax Reference No. 860 of 1972

H.B. Ghosh

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 20-05-1976

Acts Referred:

Income Tax Act, 1961 — Section 45, 52, 52(1)

Citation : (1976) 5 CTR 171 : (1977) 110 ITR 247

Hon'ble Judges : R.M. Sahai, J;C.S.P. Singh, J

Bench : Division Bench

Advocate : B.C. Dey, for the Appellant; Deokinandan, for the Respondent

Judgement

C.S.P. Singh, J.—The Income Tax Appellate Tribunal, Allahabad Bench, Allahabad, has referred the following question for our opinion:

" Whether, on the facts and in the circumstances of the case, the provisions of Section 52 are attracted and the assessee is liable to pay tax on the capital gains ? "

2. The facts leading up to this case may be shortly stated. The assessee received a plot of land measuring 5 kattas 6 chits and 36 square feet in Lake Garden Area in the Bangur Land Development Scheme at Calcutta from his brother, Sri H. S. Ghosh, on July 2, 1963. This plot was sold by the assessee to Sri J. C. Sarvadhikari for a sum of Rs. 20,000 on March 21, 1964. The purchaser was the father-in-law of the assessee's daughter. The Income Tax Officer took the View that inasmuch as the assessee had paid an amount of Rs. 21,123 and the fair market value of the property on the date of transfer was not less than Rs. 42,000, the provisions of Section 52 of the Act were applicable and as Such he imposed capital gains tax on the assessee in respect of this transaction. The decision was reversed by the Appellate Assistant Commissioner. The Tribunal has, however, taken the view that inasmuch as the consideration for which the assessee had sold the property was less than the fair market value, it could be

inferred that the transaction was effected with the object of avoidance or reduction of the liability to tax. On this conclusion, it held that the case was covered by Section 52(1) of the Act and has reversed the order of the Appellate Assistant Commissioner and upheld the order of the Income Tax Officer.

3. Counsel for the department has tried to urge that the question as framed permitted the department to justify the imposition of capital gains tax with reference to Section 52(2) of the Act. He drew our attention to a decision of the Supreme Court in the case of *The Keshav Mills Co. Ltd. Vs. Commissioner of Income Tax, Bombay North*, . We are, however, of the view, that it is not possible to permit the department to do so on the facts of the present case. The Appellate Assistant Commissioner considered the imposition of tax with reference to Section 52(1) and went into the question as to whether the transaction has been effected with a view to avoid or reduce the tax liability. The Tribunal likewise proceeded on the same footing. It referred to the decision of their Lordships of the Supreme Court in the case of *I.C.I. (India) Private Ltd. Vs. The Commissioner of Income Tax, West Bengal*, and laid down the requirements that had to be fulfilled before the provisions of Section 52(1) of the Act could be applied to a particular case. It specifically went into the question as to whether the transaction in dispute was made with a view to avoid or reduce the tax liability. This being so, the question as referred must be read in the light of the decision given by the Tribunal, and as the Tribunal has considered the case only with reference to Section 52(1) of the Act, it is not possible for us to read the question as being of such a general nature as to permit the argument sought to be raised. There is also another difficulty which prevents us from considering the question referred with reference to Section 52(2) of the Act and that is that there is nothing on the record to indicate that the Inspecting Assistant Commissioner had given previous approval as is required by Section 52(2) of the Income Tax Act. Counsel for the department urged that this may be presumed, on the principle that all official acts must be presumed to be regularly done. In the present case, however, it is not possible to make such a presumption as the case has been considered only u/s 52(1) of the Act.

4. Considering the question with reference to Section 52(1) of the Income Tax Act, we are unable to uphold the view of the Tribunal. Before Section 52(1) can be applied, the Income Tax Officer must have 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 assessment order does not disclose any such satisfaction, neither does it contain any recital that the Income Tax Officer had reason to believe that the transaction in question was made for the object contemplated u/s 52(1) of the Act. The Tribunal has come to the conclusion that the transaction was effected for such a purpose, on account of the fact that the sale consideration was very low and had no relation to the fair market value, and further that in case the property had been sold for the actual market value, the assessee would have become liable to a higher amount of tax as his income for that year was nearly Rs. 43,000. There seems to be an error in this approach.

The formation of the belief that the transaction has been effected in order to avoid or reduce the tax liability has to be initially that of the Income Tax Officer. We have already indicated that the assessment order does not indicate that the Income Tax Officer entertains such a belief. This being so, it was not open to the Tribunal to infer from the facts as is existing on the record, that the Income Tax Officer must have entertained such a belief. In a case where the assessment order does not indicate the formation of any such reasonable belief as is contemplated by Section 52(1) of the Act, the infirmity cannot be cured on appeal before the Tribunal. Counsel for the department urged that the question as to whether the transaction was entered into with a view to avoid the tax liability is a question of fact and it is not open for us to go into the question in this reference. He drew our attention to a decision of the Supreme Court in the case of *Karnani Properties Ltd. Vs. The Commissioner of Income Tax, West Bengal*, . We do not dispute the principle laid down in *Karnani Properties Ltd. Vs. The Commissioner of Income Tax, West Bengal*, , that unless an appropriate question challenging a finding of fact has been referred, it is not open to go into that question. In the present case, we feel that the question as framed envisages an inquiry as to whether the finding of the Tribunal that the income tax Officer could be ascribed with the belief that the transaction was one for avoidance of tax, is correct as the second part of the question is couched in the words "and the assessee is liable to pay tax on the capital gains ". This postulates an inquiry as to whether all the ingredients that are necessary for making the assessee liable to capital gains were present. We have already held that the Income Tax Officer had in fact not formed a reasonable belief, as is required u/s 52(1) of the Act, and this being, so the requirements of Section 52(1) are not satisfied in the present case.

5. We, therefore, answer the question by saying that the provisions of Section 52 were not attracted, and the assessee is not liable to pay tax on the capital gains. The assessee is entitled to his costs which is assessed at Rs. 200. Counsel's fee is assessed at the same figure.