
(1970) 03 KL CK 0002
In the High Court Of Kerala
Case No : O.P. No. 3293 of 1969

K.P. Varghese

APPELLANT

Vs

Income Tax Officer and others

RESPONDENT

Date of Decision : 03-03-1970

Acts Referred:

Constitution of India, 1950 — Article 19(1)(f), 226, 265
Income Tax Act, 1961 — Section 14, 147, 148, 15
Transfer of Property Act, 1882 — Section 122

Citation : (1970) KLJ 622

Hon'ble Judges : M.U. Isaac, J

Bench : Single Bench

Advocate : C.T. Peter and T.C. Karunakaran, for the Appellant; P.K. Krishnan Kutty Menon, for the Respondent

Final Decision : Allowed

Judgement

M.U. Isaac, J.—The question arising for decision in this case is whether Section 52 of the Income Tax Act 1961 has any application in computing capital gains arising from the transfer of a capital asset for a consideration lesser than its fair market value; in other words, whether the capital gains is to be computed on the basis of the actual consideration arising to the assessee or on the basis of the fair market value of the asset transferred. The facts, in so far as they are necessary for the decision of the above question, are not in dispute. The petitioner is an assessee to income tax. For the year 1966-67, his total income during the year ending on 31-12-1965 was fixed at Rs. 97,890/-; and he was assessed accordingly. He had purchased an item of house property situate within the Municipal town of Ernakulam in 1958 for a consideration of Rs. 16,500/-. On 25--12-1965, he sold it for the same consideration in favour of a daughter-in-law and five of his children. On 4-4-1968, the Income Tax Officer issued a notice, Ex. P-1, to the petitioner u/s 148 of the Act, stating that he had reason to believe that the petitioner's income chargeable to tax for the year 1966-67 had escaped assessment, and he proposed to re-assess the said income, and requiring the

petitioner to submit a return in the prescribed form within 30 days of the service of the notice. Ex. P-1 did not disclose any particulars of the income alleged to have escaped assessment. The petitioner, however, filed a return. Subsequently the Income Tax Officer, by his letter, Ex. P-3 dated 4-3-1969, disclosed to the petitioner what was the escaped income, which he proposed to assess. Ex. P-3 stated that the Income Tax Officer proposed to fix the fair markets value of the property sold by him on 25-12-1965 at Rs. 65,000/- as against the consideration of Rs. 16,500/- for which it was transferred, and to assess the difference of Rs. 48,500/- as capital gains. The petitioner was also required to file his objections, if any, to the said proposal with necessary evidence on or before 12-3-1969. The petitioner submitted his objections, Ex. P-4, on the same day. By his order, Ex. P-5 dated 31-3-1969, the Income Tax Officer over-ruled all the objections raised by the petitioner, and re-assessed him by including the said sum of Rs. 48,500/- as part of his total income for the year 1966-67. This writ Petition has been filed to quash Ex. P-5. The main objection raised by the petitioner before the Income Tax Officer was that there was no question of any capital gains, when a capital asset is transferred for the same consideration as for which it was originally acquired. There is no dispute that petitioner actually received only Rs. 16,500/- by the sale of the property. The difference between the fair market value and the actual consideration received by petitioner was treated as gift under Sec. 4 of the Gift Tax Act, 1958, and assessed under that Act. The income tax Officer, however, held that Section 52 of the Act applied to the case, and that capital gains has accordingly to be computed on the basis of the fair market value of the asset. The only question pressed before me by the learned counsel for the petitioner is whether Section 52 has any application to the case. The point does not appear to be covered by any judicial pronouncement. The learned counsel for the petitioner and for the Department have argued the case with ability and thoroughness.

2. In order to appreciate the respective contentions of the learned counsel, it is now necessary to refer to the relevant statutory provisions. Section 2(24) of the Income Tax Act, 1961 defines "income". It is an inclusive definition; according to which income includes eight specific items enumerated therein. Item (vi) is "any capital gains chargeable u/s 45". Section 4 contains the charging provisions; and income tax is charged for any assessment year in respect of "the total income" of the previous year. Section 5(1) deals with the total income of a resident in India; and it reads:

5. Scope of the total income:--(1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which--

(a) is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year; or

(c) accrues or arises to him outside India during such year:

Provided that, in the case of a person not ordinarily resident in India within the meaning of sub-section (6) of Section 6, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India.

Sections 7, 8, and 9 of the Act deal with "deemed incomes" which I may have to consider later. Chapter IV of the Act contains Sections 14 to 39, and it deals with computation of total income. Section 14 enumerates the heads of income; and it reads as follows:

14, Heads of income:--Save as otherwise provided by this Act all income shall, for the purposes of charge of income tax and computation of total income, be classified under the following heads of income:--

A.--Salaries

B.--Interest on securities.

C.--Income from house property.

D.--Profits and gains of business or profession.

E.--Capital gains.

F.--Income from other sources.

The fifth head is "capital gains"; and Sections 45 to 55 deal with this matter. It is sufficient to read Sections 45, 48 and 52.

45 Capital Gains. Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 53 and 54, be chargeable to income tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place.

48. Mode of computation and deductions:--The income chargeable under the head "Capital gains" shall be computed by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts namely

- (i) expenditure incurred wholly and exclusively in connection with such transfer;
- (ii) the cost of acquisition of the capital asset and the cost of any improvement thereto

52. Consideration for transfer in case of understatement:--(1) 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 affected with the object of avoidance of 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.

(2) Without prejudice to the provisions of subsection (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 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 Inspecting Assistant Commissioner, be taken to be its fair market value on the date of its transfer.

Section 47 of the Act provides that nothing contained in Section 45 shall apply to the transfers mentioned therein; and one of them is "any transfer of a capital asset under a gift or a will or an irrevocable trust." The word "gift" is not defined in this Act. But it is defined both in Section 122 of the Transfer of Property Act, 1882 and Section 2 (xii) of the Gift Tax Act, 1958. Section 122 of the Transfer of Property Act reads:--

"Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee and accepted by or on behalf of the donee.

Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void.

Section 2 (xii) of the Gift Tax Act reads:

"Gift" means the transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration in money or money's worth, and includes the transfer of any property deemed to be gift u/s 4;

Section 4 of the Gift Tax Act reads:--

4. Gifts to include certain transfers: For the purposes of this Act,--

(a) where property is transferred otherwise than for adequate consideration, the amount by which the market value of the property at the date of the transfer exceeds the value of the consideration shall be deemed to be a gift made by the transfer;

(b) * * * * *

(c) * * * * *

(d) * * * * *

(Clauses (b), (c), and (d) are omitted, being unnecessary for the present discussion).

To some extent both the definitions are substantially the same; but the inclusion in the definition of gift in the Gift Tax Act of the transfer of any property deemed to be a gift u/s 4 makes a vital difference. For example, if a property having a market value of Rs. 1,00,000/- is transferred for a consideration of Rs. 10,000/- it is not a gift as defined in the Transfer of Property Act; it is a sale. But under the Gift Tax Act, it is a gift in respect of Rs. 90,000/-, which represents the difference between the market value of the property and the actual consideration for which it is transferred. It is on this basis that the petitioner was assessed under the Gift Tax Act on a sum of Rs. 48,500/-. This is the identical amount which has been now included in the total income of the assessee and assessed as escaped income as per the impugned order Ext. P-5.

3. Now I shall state the respective contentions of the learned counsel. Shri C.T. Peter, the learned counsel for the petitioner contended that we are in this case concerned only with item (vi) included in the definition of income in Section 2(24) of the Income Tax Act, 1961, "any capital gains chargeable u/s 45", and that u/s 45, what is chargeable to income tax under the head "capital gains" is only "any profits or gains arising from the transfer of a capital asset". He further submitted that no profits or gains rose to the petitioner in this case from the transfer of the capital asset, as admittedly he transferred it for the same amount for which he acquired it, and no manner of benefit arose to him out of the said transaction. Shri P.K. Krishnakutty Menon, the learned counsel for the Revenue met this argument by stating that what is chargeable to income tax u/s 4 of the Act is "the total income" of the previous year, and the total income of a person as stated in Section 5 of the Act includes not only all income which is received by or accrues or arises to him, but also all income which is deemed to be received by, or to accrue or arise to him. He, therefore, submitted that what is chargeable under the head "capital gains" is not only "any profit or gains arising from the transfer of a capital asset" as provided in Section 45, but also any profits or gains deemed to arise from the transfer of a capital asset under any provision of the Act. Then he relied on Section 48, which lays down the method of computation of "capital gains", and Section 52 which deals with consideration for transfer in cases of under statement. Section 48 provides that capital gains shall be computed by deducting from the full value of the consideration "received or accrued as a result of the transfer of the capital asset, the cost of its acquisition and improvements thereto and the expenditure incurred in connection with the said transfer. Now I came to the controversial section 52, which I have already quoted. According to the learned counsel for the Revenue, the case falls under Sub-Section (1) and at any rate, it falls under Sub-section (2); and in either case, the full value of the transfer shall be taken to be the fair market value of the capital asset on the date of its transfer. The term "fair market value, is defined in Section 2(22A) of the Act; and it is as follows:--

(22A) "fair market value", in relation to a capital asset, means--

(i) the price that the capital asset would ordinarily fetch on sale in the open

market on the relevant date; and

(ii) where the price referred to in sub-clause (i) is not ascertainable, such price as may be determined in accordance with the rules made under this Act;

There is no dispute that the transfer in this case was for a consideration much less than the fair market value. So, if Section 52 applies to the case, the learned counsel for the Revenue is right in his submission that what is chargeable under the head "capital gains" is not only profits or gains arising from the transfer of a capital asset, but also profits or gains deemed to arise from the said transfer u/s 52; and the controversy is whether this section applies.

4. The learned counsel for the petitioner submitted first that one of the conditions for the application of Sub-section (1) of Section 52 is that 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 and that he has not stated so either in the notice, which he issued for re-assessment or in the impugned order of assessment that he had reason to believe any such thing, and that sub-section (1) has no application to the case. I do not think that it is necessary to state expressly this jurisdictional facts either in the notice initiating the proceeding or in the order of assessment. If the proceeding is questioned for want of jurisdiction, the income tax Officer may have to satisfy the court of the existence of facts on the basis of which he acted. But the question whether the transfer was effected with the object of avoidance or reduction of the liability of the assessee u/s 45 depends on whether by the said transfer he has avoided or reduced any such liability. In other words, a person is entitled to make a gift of any capital asset belonging to him or sell it for a price less than its fair market value; and if he does so, does he thereby incur a liability u/s 45? If he does not, there is no question of such a transfer being with the object of avoidance or reduction of any such liability. This takes me back to the main question whether a person is chargeable on capital gains not only on profits or gains arising u/s 45, but also on profits or gains which would be deemed to have arisen to him u/s 52.

5. The learned counsel for the petitioner next contended that this being a case where the transferee is directly or indirectly connected with the assessee, it must fall under sub-section (1) provided the other conditions mentioned therein are satisfied, and that sub-section (2) has no application to such a case. I am unable to accept this argument. Sub-section (2) is "without prejudice to the provisions of sub section (1)"; and the question whether sub-section (2) applies to a case depends on its own provisions. It would obviously apply to a case where the fair market value of the capital asset transferred exceeds "the full value of the consideration declared by the assessee" in respect of the said transfer. The question is whether this is such a case. I again come back to the same question whether income tax is chargeable on capital gains not only on profits or gains arising u/s 45, but also on profits or gains which would be deemed to have arisen u/s 52.

6. The learned counsel for the Revenue submitted that income tax is chargeable under the income tax Act not only on income received by or accruing or arising to, a person, but also on income deemed to be received by, or to accrue or arise to him under the Act. In other words, even if an income does not arise, an amount can be deemed to be income, if the Act so provides, and would be chargeable. In this context he referred me to Sections 7, 8, 9, and 64 of the Act; and submitted that Section 52 contains a similar provision in respect of capital gains. I am unable to accept the general proposition that income tax can be charged on income which does not actually exist, but which may be deemed as income under this Act. The Income Tax Act is a law made by Parliament in exercise of its legislative power falling under entry 82 in List I of the VII Schedule to the Constitution, namely "Taxes on income other than agricultural income". Obviously Parliament can make law under this entry to tax only income; it cannot by law provide that something which is not income, or a non-existing income would be deemed income and charge a tax on it. The classical statement of Lord Macnaughten in *London Country Council v. Attorney General* 1901 A.C. 26 may be quoted in this context The learned Law-Lord said:

Income tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else.

The statement may appear to be very elementary; but it is very meaningful.

7. I shall now examine some of the provisions in the income tax Act relating to deemed income. First is Section 7. It deals with income accruing to an assessee in relation to a recognised provident fund. The next is Section 8; and it deals with dividends declared or paid by a company. Both these sections deal with incomes actually arising or accruing to an assessee; and they seem to have been enacted for the purpose of clarification, and particularly to fix the year of the receipt of such incomes for the purpose of assessment. The next section referred to is Section 9; and it provides that the incomes mentioned therein shall be deemed to accrue or arise in India. Four kinds of incomes are mentioned in the said section; and all of them are incomes actually accruing or arising to the assessee. The deeming provision is only with regard to the place where they accrue. This section appears to have been enacted for the purpose of providing clearly that the incomes mentioned therein shall be deemed to accrue or arise in India, on account of the special features relating to the said incomes. Section 64 of the Act also does not deal with any deemed income. It provides that in computing the total income of any individual there shall be included all such income as arising directly or indirectly to the spouse or a minor child of the individual or to any other person under the special circumstances mentioned therein. So the provisions contained in the above sections do not lend any support to the contention of the learned counsel for the Revenue. It is relevant to note in this context that the validity of the corresponding provision in the Indian Income Tax Act, 1922 was sustained by the Supreme Court in *Balaji Vs. Income Tax Officer, Special Investigation Circle*, on the ground that it was a provision

enacted for preventing evasion of tax and was, therefore, within the competence of the Central Legislature.

8. I am however concerned only with the provisions in the income tax. Act, 1961 relating specifically to "capital gains"; and in my view Section 45 is categorical that profits or gains arising from the transfer of a capital asset alone are chargeable to income tax under the head "capital gains". The words "any profits or gains arising from the transfer of a capital asset" used in Section 45 can mean only what they plainly states. They cannot mean, as the learned counsel for the Revenue contends, not only any such profits or gains, but also any profit or gains deemed to arise from such transfer. If that was ever intended, Parliament could have achieved that object by using the words "any profits or gains arising or deemed to arise from the transfer of a capital asset" in Section 45 of the Act. The definition of "income" in Section 2(24) of the Act also makes it abundantly clear that income under the head "capital gains" includes only "any capital gains chargeable u/s 45". I have to construe Section 52 of the Act on this fundamental background.

9. In my view that section has application only to a case where the consideration in a transfer is under-stated. Sub-section (1) of Section 52 deals with a case where the transfer is between persons directly or indirectly connected and the income tax Officer has reason to believe that it was effected with the object of avoiding or reducing the liability of the transfer u/s 45. Avoidance or reduction of such liability is possible only by understanding the consideration. In this context, reference may be made to the decision of the Madras High Court in Sundaram Industries Private Ltd. Vs. Commissioner of Income Tax, . In that case, the assessee, who had purchased some shares for a sum of Rs. 93,660/- sold them to three, ladies who were closely related to the directors of the assessee for a sum of Rs. 66,900/-. The market value of these shares on the date of sale was determined by the income tax Officer to be Rs. 1,56,964/-. Accordingly he treated the difference between the cost and market prices, namely Rs. 62,404/- as capital gains, by virtue of the first proviso to Section 12B(2) of the Indian income tax Act, 1922. This proviso contains a provision similar to sub-section (1) of Section 52 of the income tax Act, 1961. The assessee contended that, though the sale was for a consideration much less than the market value, the transaction was honest and real and it was intended to benefit the transferees, and that in such a case no capital gains arose to the assessee and there was no scope for the application of the proviso. The court in upholding the above contention stated--

What the proviso gets at for charge is the actual capital gain which the vendor should, in the circumstances have made but is made to appear that the gain as shown by the consideration for the transaction to be much less or nil. We are not persuaded to think that the proviso discourages or avoids honest transactions made out of love and affection or for other conceivable reasons on pain of being on an assumption, hauled up, if we may use the expression, for having

attempted to avoid or reduce the tax liability and on that basis made liable to tax on the difference between the consideration for the transaction and the fair market value. That simply, as we read the proviso, is not its purpose. It does not treat what is not an actual capital gain as a deemed capital gain. In fact, occurring as it does as the first proviso to sub-section (2) dealing with the procedural aspect of computation, it should, we think, be interpreted as limited to escaped capital gain, which is so in truth and in fact, and not intended to bring about fictional gain on an assumption and charge the same.

The position is the same with regard to Section 52(1) of the income tax Act, 1961, and the sentence, which I have underlined in the above passage exactly agrees with my view on the question. The following statement appearing in the decision of the Supreme Court in *Killick Nixon and Company Vs. Commissioner of Income Tax, Bombay*, also indicates that Section 52(1) has application only to a case of under-statement of, consideration. In the above decision, dealing with the scope of the first proviso to Section 12B(2) of the Indian income tax Act, 1922, the Court said:

It is open to the income tax Officer, if it appears to him, that with the object of avoiding or reducing the liability of the assessee to pay tax, the full value of the consideration for which the sale, exchange or transfer is made is understated and the person acquiring the capital asset is a person with whom the assessee is directly or indirectly connected, to determine the fair market value of the capital asset on the date on which the sale, exchange or transfer took place.

10. Sub-section (2) of Section 52 applies if, in the opinion of the income tax Officer, the fair market value of the capital asset transferred by an assessee exceeds the value of the consideration declared by the assessee in respect of the transfer. To declare means to make known, to announce. The use of the words "declared by the assessee" in the sub-section is significant. They are not equivalent to "received by or accrued to the assessee" or "arising to the assessee." They are different ideas; and in my view, sub-section (2) also relates to a case of under-statement of the true consideration in the deed of transfer.

11. The heading of Section 52 of the Act also lends support to the above view. The headings given to the various sections in the Act were there in the bill introduced in parliament; and they form part of the Statute. These headings have, therefore, to be regarded as preambles to the sections; and they indicate the subject matter intended to be dealt with in the sections which follow the headings. The language employed in Section 52 of the Act is unhappy and lacks in clarity; and in such a case, the heading of the section affords a key in construing the section. Maxwell on Interpretation of statutes, Twelfth Edition, at page 11 states:

The headings prefixed to sections or sets of sections in some statutes are regarded as preamble to those sections. They cannot control the plain words of the statute, but they explain the ambiguous words.

Sir Richard Henn Collins, M.R., in *Fletcher v. Birkenhead Corpn.* (1907) 1 K.B. 205 stated:

The headnote to the report of the case of *Hammersmith and City Ry. Co. v. Brand* (1869) L.R. 4 H.L. 161 seems to me to state fairly the result of that decision, as being that "the headings of different portions of a statute are to be referred to, to determine the sense of any doubtful expression in a section ranged under any particular heading. Lord Chelmsford said in giving judgment, "The sections of the Railways Clauses Acts are, as your Lordships know arranged in order under different heads, which indicate the general object of the provisions, immediately following; and these may be usefully referred to, to determine the sense of any doubtful expression in a section ranged under a particular heading.

The following statement appearing in the speech of Lord Dilhorne in *Fisher v. Raven* 1964 A.C. 210 at 232 would also indicate the extent to which the heading of a section can be put to use in construing that section. The House of Lords was in that case concerned with the construction of Section 13 in the Debtors Act, 1869. The learned Lord stated--

It is also to be noted that the Debtors Act, 1869, is entitled "An Act for the Abolition of Imprisonment for Debt, for the punishment of fraudulent debtors, and for other purposes." Section 13 of this Act is included in Part II, which is headed "Punishment of Fraudulent Debtors." The long title of the Act and the heading of Part II support the view that the Act was only intended to deal with those who owe money, debtors in the ordinary sense of the word, and the view that "obtained credit" in section 13 means, and only means, credit for the payment of money.

12. There is another reason which compels me to reject the construction canvassed by the learned counsel for the Revenue to be given to Section 52 of the income tax Act. Suppose an assessee has a capital asset, whose cost of acquisition including improvements thereto is Rs. 20,000/-; he transfers it for a consideration of Rs. 25,000/-; the expenditure incurred by him in connection with the transfer is Rs. 5,000/-; and the fair market value of the asset on the date transfer is Rs. 1,00,000/-. By the above transfer, the assessee does not make any capital gains according to the plain language of Sections 45 and 48 of the Act; but according to the construction, which the learned counsel for the Revenue puts to Section 52, the assessee has derived capital gains amounting to Rs.75,000/-. The same is the position, even if the transfer was made for a nominal consideration of Re. one; but if he transfers it without any consideration, Section 47(iii) of the Act operates; and the assessee does not derive any capital gains at all. In all these three instances, the assessee is liable to pay gift tax on the difference between the market value of the asset and the actual consideration for which it is transferred. This is a very illogical, if not an absurd, position. I cannot assure that Parliament intended that, unless the language used in, the Statute plainly states so; and in that case, there is no scope for any interpretation, and the court has to give effect to what the legislature has plainly

stated. Certainly this is not the position with regard to Section 52 of the Act.

13. In this context, it is interesting to notice what the Central Board of Revenue has stated in its departmental circular regarding the scope of Section 52 of the income tax Act, 1961. The relevant instructions appear in paragraph 62 in the Board's income tax Circular and Letters etc. "No. X/11/56 at pages 142 of the above publication.

62. Section 13 of the Finance Act has introduced a new sub-section (2) in section 52 of the income tax Act with a view to countering evasion of tax on capital gains through the device of an understatement of the full value of the consideration received or receivable on the transfer of a capital asset.

The provision existing in section 52 of the income tax Act before the amendment (which has now been renumbered as sub-section (1)) enable the computation of capital gains arising on transfer of a capital asset with reference to its fair market value as on the date of its transfer ignoring the amount of the consideration shown by the assessee, only if the following two conditions are satisfied;

(a) the transferee is a person who is directly or indirectly connected with the assessee; and

(b) 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 to tax on capital gains.

In view of these conditions, this provision has a limited operation and does not apply to other cases where the tax liability on capital gains arising on transfer of capital assets between parties not concerned with each other, is sought to be avoided or reduced by an understatement of the consideration paid for the transfer of the asset.

The Board of Revenue has also quoted the observations of the Minister of Finance in regard to the provisions of Section 52(2) during his reply to the debate in the Lok Sabha at the time of clause by clause consideration of the Finance Bill, 1964. They appear in paragraph 65 at page 143 of the above publication. The Honourable Minister stated:

To-day, practically every transaction of the sale of property is for a much lower figure than what is actually received. The deed of registration mentions a particular amount; the actual money that passes is considerably more. It is to deal with these classes of sales that this amendment has been drafted.....It does not aim at perfectly Bona fide transactions but essentially relates to the day-to-day occurrences that are happening before our eyes in regard to the transfer of property. I think, this is one of the key sections that should help us to defeat the free play of unaccounted money and cheating of the Government.

Neither the speech of the Minister nor the circular of the Central Board of Revenue is a guide for the interpretation of the section. But the speech discloses

the object of the Government in getting the particular provision enacted; and the Board's circular shows how the Department has understood and interpreted the particular provision. Both these things do not support the construction contended for by the Revenue's learned counsel. On the other hand, they are in agreement with the view that I have expressed, namely, Section 52 is intended to operate only in cases of under-statement of consideration, done with a view to dishonestly escape from liability.

14. The learned counsel for the petitioner put forward an alternative argument in support of his contention that capital gains can be computed only on the basis of the actual consideration received by or arising to, an assessee from the transfer of a capital asset, and not on the basis of its fair market value. Neither the income tax Act, 1961 nor the General Clauses Act defines "gift". Section 47(iii) of the income tax Act provides that nothing contained in Section 45 shall apply to any transfer of a capital asset under a gift. According to the learned counsel, in the absence of a definition of "gift" in the income tax Act and the General Clauses Act, the definition in the Gift Tax Act should be adopted for the purposes of the income tax Act in preference to the definition in the Transfer of Property Act. Then the difference between the fair market value and the actual consideration received by or accruing to an assessee from the transfer of a capital asset is a gift as defined in the Gift Tax Act; and it is excluded in computing capital gains by virtue of Section 47(iii) of the income tax Act. In other words, the capital gains has to be computed on the basis of the actual consideration. I find considerable force in this argument. In the first place, if the definition in the Gift Tax Act is adopted, Section 52 of the income tax Act can never yield to the interpretation, which the learned counsel for the Revenue seeks to put on it; and the unreasonable result which arises from such an interpretation of the said section, which I have already indicated, can be avoided. Secondly, the income tax, the wealth-tax, the gift tax and the expenditure tax form different heads of an integrated system of taxation; and they are all administered by officers of the income tax Department. The imposition of tax under one head must have a relevancy to the liability under the other heads of tax. It is, therefore, reasonable to think, particularly having due regard to the exclusion of gift from the field of capital gains, that the legislature did not intend to charge income tax on an amount which is liable to gift tax. This is also a weighty circumstance to adopt for the purposes of the income tax Act the definition of gift in the Gift Tax Act in preference to the one given in the Transfer of Property Act. In the result, I hold that capital gains has to be computed on the basis of the actual consideration arising to a person from the transfer of a capital asset, and not on the basis of its fair market value, and that Section 52 of the income tax Act, 1961 has no application to this case.

15. Now I come to a preliminary objection raised by the learned counsel for the Revenue to the maintainability of this writ petition. The objection was raised after the petitioner's learned counsel completed his arguments on the merits of the case. The respondent's learned counsel contended that the question whether

capital gains is to be computed on the basis of the actual consideration or on the basis of the fair market value of the capital asset transferred is one within the competence of the income tax Officer to decide, that the Act provides for an assessee aggrieved by the order of the income tax Officer an adequate remedy by way of appeal, that the petitioner has availed of this remedy by filing an appeal from the order of assessment, and it is pending, and that under these circumstances this Court should not exercise its jurisdiction under Article 226 of the Constitution to grant relief to the petitioner. The learned counsel for the petitioner submitted that the appeal was filed after the filing of this writ petition, that the appeal has raised other questions also, and that in view of the objection raised to the maintainability of this writ petition, the petitioner has withdrawn the appeal. The learned counsel further submitted that the question raised in this writ petition is one relating to the jurisdiction of the income tax Officer, that he cannot by an erroneous decision assess under the head "capital gains" something which is not capital gains under the Act, and if he does so, his order is liable to be quashed by a writ of certiorari. A large number of decisions were cited by the learned counsel on both sides in support of the rival contentions.

16. It is well established that the relief under Article 226 of the Constitution is discretionary. This article confers very wide powers on the High Courts but it has to be exercised along recognised lines and subject to certain self-imposed limits. Existence of an alternative remedy does not bar the jurisdiction of the Court to issue a writ under Article 226; but it is a material circumstance to be taken into consideration in exercising the discretion in granting the writs. S.R. Das, C.J. in *State of U.P. v. Mohammed Nooh* AIR 1958 S.C. 86 at 93 stated:--

It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute, (Halsbury's Laws of England, 3rd edn., Vol II p. 130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior Court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies.

In *Thansingh Nathmal and Others Vs. A. Mazid, Superintendent of Taxes*, , the Supreme Court said:--

The jurisdiction of the High Court under Art 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary; it is not exercised merely because it

is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Art. 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy.

The principles governing the exercise of jurisdiction under Article 226 of the Constitution in entertaining petitions against the orders of taxing authorities have been stated by the Supreme Court in *Bhopal Sugar Industries v. Sales Tax Officer* AIR 1967 S.C. 549. The Court said:--

The Legislature has set up an elaborate and self contained machinery for investigating whether a transaction is liable to be taxed because it is of the nature of a retail sale within the meaning of the Act. The taxing Officer is invested with authority to determine the nature of the transaction and its liability to tax, and against his decision there is an appeal to the appellate authority and a further right of revision to the Commissioner. It is true that the jurisdiction of the High Court under Art. 226 is extensive, but normally the High Court does not exercise that jurisdiction by entertaining petition against the order of taxing authorities, when the statute under which tax is sought to be levied provides a remedy by way of an appeal or other proceeding to a party aggrieved and thereby by-pass the statutory machinery. That is not to say that the High Court will never entertain a petition against the order of the taxing Officer. The High Court has undoubtedly jurisdiction to decide whether a statute under which a tax is sought to be levied is within the legislative competence of the Legislature enacting it or whether the statute defines constitutional restrictions or infringes any fundamental rights, or whether the taxing authority has arrogated to himself power which he does not possess or has committed a serious error of procedure which has affected the validity of his conclusion or when where the taxing authority threatens to recover tax on an interpretation of the statute which is erroneous. The High Court may also in appropriate cases determine the eligibility to tax of transactions the nature of which is admitted, but the High Court normally does not proceed to ascertain the nature of a transaction which is alleged to be taxable. The High Court leaves it to the tax payer to obtain an adjudication from the taxing authorities in the first instance.

Reference may also be made to another decision of the Supreme Court in *The Commissioner of Income Tax, Gujarat Vs. A. Raman and Company*, in that case, their Lordships upheld the decision of the High Court quashing the notices issued by the income tax Officer u/s 147 of the income tax Act, 1961 requiring the assessee to show cause why certain assessments made against the assessee should not be re-opened, on the ground that, on the materials on record, the income tax Officer had no reason to believe that income chargeable to tax had escaped assessment. Speaking of the scope of the discretionary powers which

the High Court may exercise under Article 226 of the Constitution, the Supreme Court said:--

The High Court exercising jurisdiction under Article 226 of the Constitution has power to set aside a notice issued u/s 147 of the income tax Act, 1961, if the condition precedent to the exercise of the jurisdiction does not exist. The Court may, in exercise of its powers, ascertain whether the income tax Officer had in his possession any information: the Court may also determine whether from that information the income tax Officer may have reason to believe that income chargeable to tax had escaped assesment. But the jurisdiction of the Court extends no further.

The learned counsel for the Revenue relied strongly on the following passage appearing in the decision of the Supreme Court in *Lalji Haridas Vs. R.H. Bhatt and Another*, in support of his contention that I should not entertain this writ petition, as the point raised by the petitioner is one properly falling for the decision of the Departmental authorities:

Mr. Pathak for the appellant attempted to argue that the notice issued against the appellant is, on the face of it, invalid, because it is barred by time. We did not allow Mr. Pathak to develop this point, because we took the view that a plea of this kind must ordinarily be taken before respondent No. 1 himself. The jurisdiction conferred on the High Court under Article 226 is not intended to supercede the jurisdiction and authority of the income tax Officers to deal with merits of all the contentions that the assessees may raise before them, and so it would be entirely inappropriate to permit an assessee to move the High Court under articles 226 and contend that a notice issued against him is barred by time. That is a matter when the income tax authorities must consider on the merits in the light of the relevant evidence.

Apart from this aspect of the matter however, the plea of limitation sought to be raised by Mr. Pathak was not even specifically made as it should have been in the writ petition filed before the High Court. One of the grounds taken in the writ petition was that the Appellate Assistant Commissioner had "instead of treading the assessment order a nullity and having the same set aside, illegally remanded the case back to the Income tax Officer to save limitation". It would be noticed that at its highest, this ground can mean that the result of the remand order was to attempt to save limitation; it has no relevance on the point sought to be raised by Mr. Pathak that the notice issued against his client initially was barred by time. But, as we have already indicated, a plea of this kind cannot be permitted to be raised in writ proceedings, and so we refused Mr. Pathak permission to develop this point.

The learned counsel submitted that bar of limitation is a matter which affects the jurisdiction of income tax Officer and that the above decision is an authority for the proposition that even such a matter falls properly for the decision of the income tax Officer and the High Court should not interfere with the proceedings

of an income tax Officer on this ground.

17. The learned counsel for the Revenue also relied on a Division Bench decision of this Court in *income tax Officer v. R.M. Subramania Iyer* 1969 K.L.R. 992, which reversed my decision in O.P. 805 of 1966. In that case, I quashed a notice issued by the income tax Officer u/s 147 of the income tax Act, 1961, holding that the proposed proceeding was time-barred. The Division Bench held that the writ petition should not have been entertained, as this was a matter within the jurisdiction and competence of the income tax Officer to decide. The Division Bench quoted the passage extracted above from the decision of the Supreme Court in *Lalji Haridas's* case and observed that the full impact of the said decision was not realised as the last sentence in the above passage was not extracted in my judgment. The learned counsel for the petitioner pointed out that this sentence is only repetition of what is stated in the second and third sentences in the above passage, and that the above decision of the Supreme Court does not lay down any proposition that the jurisdiction of the High Court under Article 226 of the Constitution should not be exercised to prohibit and income tax Officer from pursuing an action which he has no authority to initiate on account of the bar of limitation. The learned counsel also submitted that the decision in that case was influenced by the peculiar facts and circumstances of the case, which are relevant in deciding whether the discretionary jurisdiction under Article 226 should be exercised or not. In that case, the income tax Officer, having reason to believe that the income of the appellant assessable for the year 1949-50 escaped assessment, issued a notice to him requiring him to submit a return of his income. The appellant, thereupon, made a return showing an income of Rs. 46/-. The income tax Officer assessed his income at Rs. 4,74,046/-. The appellant filed an appeal before the Appellate Assistant Commissioner, and urged that the assessing authority did not give the appellant the opportunity to examine all his witnesses. The appellate authority partly accepted this contention, and remanded the case to the income tax Officer directing him to submit a report after examining the witnesses cited by the appellant. While making this order, the appellate authority commented that the appellant appeared to me determined to adopt dilatory proceedings and delay the final disposal of the proceedings taken against him. The appellant filed an appeal from the remanding order before the Appellate Tribunal. When these matters were pending, the writ petition was filed by him to quash the order of assessment, and the notices sent to him by the income tax Officer pursuant to the order of remand, requiring the appellant to appear before the income tax Officer and give his evidence. The High Court summarily dismissed the petition. Special leave was obtained to appeal from the decision of the High Court on the ground that the statute under which the impugned proceedings had been commenced was invalid; and the appellant obtained also an order of stay of proceedings from the Supreme Court. This was the only ground of law and jurisdiction taken in the petition for special leave. At the hearing of the appeal, Mr. Pathak, the learned counsel for the appellant conceded that he was not in a

position to justify or substantiate that contention; and he attempted to raise and argue a new point, namely the proceedings initiated by the income tax Officer were time-barred. The Supreme Court did not permit the learned counsel to develop this point and in doing so, it also pointed out that this ground was neither taken in the writ petition nor in the appeal before the Appellate Assistant Commissioner.

18. The learned counsel for the petitioner may be within his rights to argue that the above decision of the Supreme Court is based on the peculiar facts and circumstances of the case, though he contended for a contrary position before the Division Bench in income tax Officer v. R.M. Subramania Iyer 1969 K.L.R. 992. The said decision is binding on me; and I take it as an authority for the proposition that this court should not interfere in exercise of its jurisdiction under Article 226 of the Constitution with a proceeding of an income tax Officer on the ground that it is time-barred. I cannot accept the contention that in the light of the decisions of the Supreme Court referred to above, the Division Bench decision of this Court does not lay down the correct law.

19. I am, however, of the opinion that the decision in The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others, does not apply to the instant case. The question whether a proceeding initiated by the income tax Officer is time barred or not is a matter, as pointed out by the Division Bench, within the competence and jurisdiction of that authority to decide. The question whether the difference between the fair market value of a capital asset and the actual consideration for which it is transferred is capital gains or not under the income tax Act is also a question for the income tax Officer to decide; but it is a preliminary question, on the correct decision of which his jurisdiction to deal with it depends. He cannot, by an erroneous decision whether on a question of fact or of law, bring the subject within his jurisdiction and assess something, which is not income or does not exist as income under the Act. If he does so, he acts without jurisdiction, and his proceeding is liable to be quashed under Article 226 of the Constitution. This proposition is well established by the decisions of the Supreme Court in Bhopal Sugar Industries v. Sales Tax Officer AIR 1967 S.C. 549 and the Commissioner of Income Tax, Gujarat Vs. A. Raman and Company, , to which reference has been already made. The decisions of the Supreme Court in The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others, , Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others, and the The Bengal Immunity Company Limited Vs. The State of Bihar and Others, have also laid down the above proposition. These are cases where tax was attempted to be levied under an invalid law. The same would be the position if a tax is attempted to be levied without any authority of law. It would be an infringement of Articles 265 and 19(1) (f) of the Constitution. In Shivram Poddar Vs. Income Tax Officer, Central Circle II, Calcutta, and Another, the Supreme Court stated that the income tax Act provides a complete machinery for the assessment of tax and relief in respect of improper or erroneous orders made by the Revenue authorities, and that resort to the High Court in exercise of its

extraordinary jurisdiction under Article 226 of the Constitution in matters relating to assessment, levy and collection of income tax may be permitted only, when questions of infringement of fundamental rights arise or when on undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess. In the present case, the facts are not disputed: and in my view what the income tax Officer has assessed as capital gains is something which is neither capital gains nor income falling under any other head under the income tax Act. The petitioner, is, therefore, entitled to invoke the jurisdiction of this Court under Article 226 of the Constitution. In the result, I allow this Original Petition and quash Ex. P-5, the impugned order of assessment. The parties will bear their own costs.