

**(1992) 04 KL CK 0020**  
**In the High Court Of Kerala**  
**Case No : ITR No. 149 of 1989**

O. THOMAS and Others

APPELLANT

Vs

COMMISSIONER OF INCOME TAX.

RESPONDENT

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**Date of Decision :** 13-04-1992

**Acts Referred:**

Income Tax Act, 1961 — Section 147, 45

**Citation :** (1992) 103 CTR 232

**Hon'ble Judges :** K.S. Paripoornan, J;K. S. Paripoornan, J

**Bench :** Division Bench

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## Judgement

K. S. PARIPOORNAN, J. :

The Tribunal has referred the following two questions of law, for the decision of this Court :

(a) Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the full value of the consideration of Rs. 44,245 was not the fair market value for the application of s. 52(1) of the IT Act, 1961 ?

(b) Whether, on the facts and in the circumstances of the case, the Tribunal was right in confirming the assessment, especially in view of the fact that the ITO had only invoked s. 52(1) of the Act, without recording any finding that the transfer was made with a view to avoid or reduce the capital gains tax ?

2. The respondent herein is the Revenue. The original assessee died, pending the reference. His legal heirs have been impleaded as Applicant Nos. 1 and 2, as per orders passed by this Court in CMP No. 4095 of 1991.

3. The assessee was the director of a private limited company. He owned a house at Kollam. Its extent was 37 cents. 17 cents were purchased in 1950 at the rate of Rs. 300 per cent. The remaining portion was gifted to the assessee by his father. A house was constructed in the property in 1952-53 at a cost of Rs. 27,000. The building was never let. The assessee's sister was in occupation. The

assessee sold the property to his sister, by registered sale deed dt. 30th November, 1971 for an amount of Rs. 44,245.

4. In the return submitted for the asst. yr. 1972-73, the assessee did not disclose any capital gains arising from the sale of the above property. The original assessment was on 21st December, 1974. The assessment was reopened under s. 147(b). The assessee filed the return. The ITO took the view that the fair market value of the property, on the date of sale, was Rs. 84,600. He invoked s. 52(1) of the IT Act and computed the capital gains for the sale of the property at Rs. 39,800, taking the market value of the property as on 1st January, 1954 at Rs. 14,800.

5. In appeal, the AAC confirmed the said assessment. The assessee took up the matter in second appeal before the Tribunal.

6. The main plea of the assessee before the Tribunal was that s. 52(1) of the Act was wrongly invoked and the ITO did not record the finding that the sale had been made with the object of avoiding or reducing the liability arising under s. 45 of the Act. On the basis of materials, the Tribunal fixed the fair market value of the property, on the date of sale, at Rs. 67,000 instead of Rs. 84,600 adopted by the assessing authority. The capital gains, according to the Tribunal, would be Rs. 22,200. The Tribunal held that s. 52(1) of the Act is inapplicable. In its opinion, s. 52(2) of the Act is applicable and, in the light of the decision of the Kerala High Court in Commissioner of Income Tax Vs. N.S. and North Malabar Public Conveyance (P.) Ltd., , the assessment made was valid. The Tribunal found that the plea of the assessee, that since the ITO invoked s. 52(1), and had not recorded the finding that the transfer had been made with the view of avoiding or reducing the tax liability under s. 45, the computation of capital gains was not property done cannot be accepted. It is, thereafter, at the instance of the assessee, the Tribunal referred the above two questions of law for the decision of this Court.

7. We heard counsel for the applicants assessee, M/s. Menon and Pai, and counsel for the respondent-Revenue, Mr. P. K. R. Menon.

8. After holding that s. 52(1) of the IT Act is applicable, the Tribunal observed thus :

".... But the facts disclose that the case is governed by s. 52(2). In this connection reference may be made to the decision of the Kerala High Court in Commissioner of Income Tax Vs. N.S. and North Malabar Public Conveyance (P.) Ltd., . There, the assessee which was a private limited company sold its two non-residential buildings to one of its shareholders for Rs. 80,000. The ITO found that the fair market value of the buildings in question was much higher, viz., Rs. 1,20,000. Therefore, he invoked the provisions of s. 52 of the IT Act, 1961 and computed the capital gains accordingly. On appeal, the AAC held that s. 52 was not applicable since it had not been brought out that the assessee had received by way of consideration anything more than what had been stated to have been

received in the sale deed. Thereupon, the department preferred an appeal to the Tribunal and one of the contentions urged on behalf of the department was that the ITO had really applied s. 52(2) and not s. 52(1). The Tribunal rejected the contention and held that the ITO had applied only s. 52(1). The Tribunal further held that since it had not been established that the assessee received something more than the consideration stated in the sale deed, the provisions of that section would not apply following the decision of the single Judge of the Kerala High Court in *K.P. Varghese Vs. Income Tax Officer, B-Ward and Others*, . On a reference the High Court held that on the facts the case fell under s. 52(2) and, hence, the ITO was justified in computing the copied gains by taking the fair market value as the full consideration received for the sale in question had been made with a view to avoid or reduce the liability arising under s. 45. Still the Court held that since on the facts that the case was covered by s. 52(2) the computation of capital gains was properly made by taking the fair market value as on the date of sale as the full value of consideration. In view of the about decision, the contention taken by the assessee's learned counsel before us that since the ITO had invoked s. 52(1) and since he had not recorded any finding that the transfer had been made with a view to avoid or reduce the tax liability under s. 45 the computation of capital gains was not properly done cannot be accepted."

9. Counsel for the assessee contended that the decision of the Tribunal is plainly erroneous in law, in view of the decision of the Supreme Court in *K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another*, . It was argued that the decision of the Court in *CIT vs. N. S. & North Malabar Public Conveyance (P) Ltd.* (supra), which was relied on and applied by the Tribunal, stands overruled by the aforesaid decision of the Supreme Court. On the other hand, counsel for the Revenue contended that the questions referred to this Court by the Revenue do not arise for consideration since the assessee had not questioned the applicability of s. 52(2) of the Act in sustaining the assessment order.

10. We are of the view that the decision of the Tribunal dt. 17th August, 1978 has made a wrong approach to the entire question. The decision is erroneous in law. In *K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another*, , the Supreme Court, advertent to s. 52(2), stated the law thus :

"It is not enough to attract the applicability of sub-s. (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% 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-s. (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% 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-s. (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% 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-s. (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 and the first condition is, therefore, 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% 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 and merely because the first condition is satisfied. Each condition has got to be viewed and established independently before sub-s. (2) can be invoked and the burden of doing so is clearly on the Revenue ...."

It will be evident from the above decision of the Supreme Court that it is not enough for the Revenue to show that the fair market value of the property, as on the date of transfer, exceeds the full value of the consideration declared by the assessee in respect of the transfer by not less than 15% of the value so declared. It is further necessary to show that the consideration has been understated and the assessee had actually received more than what is declared by him. In para 7 of the order, the Tribunal, after referring to the decision in CIT vs. N. S. & North Malabar Public Conveyance (P) Ltd. (supra) held that the failure to record a finding that the transfer had been made with a view to avoid or reduce the tax liability under s. 45 of the Act is not necessary. According to the Tribunal, even in the absence of a finding by the ITO that the sale in question had been made with a view to avoid or reduce the liability arising under s. 45 of the Act, s. 52(2) of the Act will apply. The test applied by the Tribunal, following the decision of this Court in CIT vs. N. S. & North Malabar Public Conveyance (P) Ltd. (supra), and the conclusion arrived at, are plainly against the decision of the Supreme Court in K. P. Verghese vs. ITO & Anr. (supra). The observation contained in Income Tax Law (Chaturvedi and Pithisaria), Fourth Edn., Vol. 2, at page 2032, is to the effect that the decision in CIT vs. N. S. & North Malabar Public Conveyance (P) Ltd. (supra) does not lay down the correct proposition of law on the point. We concur with the said observation.

11. In the light of the above, the order of the Tribunal, confirming the assessment under s. 52(2) of the Act, is plainly erroneous in law. In our view, Question No. 1 does not arise, on the facts of this case. Question No. 2, referred

to this Court, should be answered in the negative and against the Revenue and in favour of the assessee. The Tribunal was in error in confirming the assessment.

12. Sec. 52(2) of the Act was wrongly invoked. The finding that the transfer was made with a view to avoid or reduce the capital gains tax, is a necessary pre-requisite. The Revenue should show that the consideration specified in the document is understated and the assessee has actually received more than what is declared by him. We answer Question No. 2 on the above lines.

The Income Tax reference is answered as above. There shall be no order as to costs.