

(2014) 03 KL CK 0108
In the High Court Of Kerala
Case No : ITA No. 201 of 2011

The Commissioner of Income Tax

APPELLANT

Vs

P.M. Aboobacker

RESPONDENT

Date of Decision : 20-03-2014

Acts Referred:

Income Tax Act, 1961 — Section 132 132(4) 143(3) 52

Citation : (2014) 270 CTR 217 : (2014) 363 ITR 447

Hon'ble Judges : Manjula Chellur, C.J.;A.M. Shaffique, J

Bench : Division Bench

Advocate : P.K.R. Menon, GOI Taxes and Sri. Jose Joseph, SC, Income Tax, for the Appellant; P. Balakrishnan, for the Respondent

Judgement

A.M. Shaffique, J.—This appeal is filed by the Revenue against the order passed by the income tax Appellate Tribunal, Cochin Bench in ITA No. 267/Coch/2009 with reference to the assessment year 2006-2007. The facts involved in the above case would disclose that the assessee, owner of a shopping complex, submitted his return of income for the assessment year on 15.11.2007. The assessing officer, while making the assessment u/s 143(3), had completed the assessment determining the total income at Rs. 1,05,85,935/-. While determining the said amount as the income, the Assessing Officer included an amount of Rs. 54,20,000/- as undisclosed investment. This was based on an information obtained during search and seizure operation at the residence of Mr. P.A. Noushad. He had given information stating that he had sold 19.5 cents of land to the assessee. He also disclosed that though the price mentioned in the sale deed was only Rs. 24,00,000/-, he had actually paid Rs. 78,20,200/-. He had also stated that he purchased the said property from one Mrs. M.S. Mariamma Kurian for Rs. 66,20,000/-, though the price mentioned in the said sale deed was only Rs. 21,75,000/-. It is based on this factual situation that the return of the assessee was finalised. The assessee preferred an appeal before the Commissioner of income tax (Appeals), who allowed the appeal deleting the said addition. The revenue carried the matter before the Tribunal and the Tribunal

dismissed the appeal based on the judgments of the Supreme Court in K.P. Varghese v. income tax Officer, K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, and Commissioner of Income Tax, Salem Vs. P.V. Kalyanasundaram,

2. While impugning the aforesaid orders of the appellate authorities, the revenue relies upon the decision in Commissioner of Income Tax Vs. Medical Trust Hospital and Others, to contend that subsequent retraction of the statement has to be ignored when the said person had declared the higher value in his return of income and paid tax thereon. The revenue has raised the following substantial questions of law:

1. Whether, on the facts and in the circumstances of the case and the receipt of on money having been admitted by the assessee in the sworn statement, the examination in cross, the affidavit, the tax return -

i. the Tribunal is right in law and fact in relying on the consideration shown in the sale deed;

ii. the Tribunal is right in law and fact in interfering with the assessment order and are not the reliance on the sale deed and the interference with the assessment order perverse and against law and logic.

2. Whether, on the facts and in the circumstances of the case and considering the distinguishing features,

i. the Tribunal is right in law and fact in relying on the decisions of the Hon"ble Supreme Court in K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, and Commissioner of Income Tax, Salem Vs. P.V. Kalyanasundaram,

ii. should not the Tribunal have relied on the decision of the Hon"ble Kerala High Court reported in Commissioner of Income Tax Vs. Medical Trust Hospital and Others,

3. Heard learned standing counsel appearing for the Department and the learned counsel appearing for the assessee.

4. It is the main argument of the appellant that the judgment of the Supreme Court in K.P. Varghese's case (supra) has no application to the facts and circumstances involved in the case.

5. In K.P. Varghese's case, the issue involved was whether understatement of consideration in transfer of property is a necessary condition for attracting the applicability of sub-section (2) of Section 52 of the income tax Act, 1961. Sub-section (2) indicated that if in the opinion of the income tax Officer, fair and market value of a capital asset transferred by an assessee as on the date of 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 15% 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. The Supreme Court

held that if 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 transfer exceeds the full value of the consideration declared by the assessee for 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. It is also held that these conditions have to be satisfied and the burden of proving satisfaction of such two conditions vests on the revenue. It is not enough that the revenue established any one of the conditions.

6. In P.V. Kalyanasundaram's case (supra), the issue involved was the finding regarding valuation of a property. Being a question of fact, the Supreme Court held that to ascertain the actual sale price of the property, the contradictory statement made by a person or the loose sheets recovered in the course of search could be relied upon. Such issues being questions of fact cannot be gone into as a substantial question of law.

7. In the case on hand, the revenue strongly relies upon the evidence available before the Assessing Officer to prove the actual value of land purchased by the assessee from Sri. Noushad. An affidavit is filed as Annexure B, which is part of the record of the Assessing Officer in which Mr. Noushad has, in categorical terms, stated that he purchased the aforesaid property for Rs. 66,20,000/- and he sold the said property to the assessee for Rs. 78,20,000/-. That apart, during search, he had given a statement u/s 132(4) on the same terms. Further, the assessee requested for cross examining the aforesaid Noushad and his sworn statement was recorded by the Assessing Officer and he was cross examined by the assessee. The witness spoke in accordance with the statement he had given earlier and confirmed the said earlier statement regarding the actual transaction. Though he was cross examined, nothing was brought out to suggest otherwise. Further, Mr. Noushad has declared the income and had paid tax on the amount received by him for sale of property at the price mentioned by him in the statement. The first appellate authority observed that the Assessing Officer had made the assessment only on the deposition of Mr. Noushad and other circumstantial evidence gathered by him. The statement of payments annexed to the deposition made by Mr. Noushad shows only cash withdrawals from his bank account and in no way it has been correlated to Mrs. Mariamma. There is no acknowledgement by Mrs. Mariamma in regard to the fact that she had received Rs. 66,20,000/-. In the absence of any evidence linking the payments stated to be paid by the appellant, merely based on the statement of Mr. Noushad, it cannot be stated that the assessee has received additional consideration. It is found that when it is the duty of the revenue to prove beyond doubt that additional consideration has exchanged hands, in the absence of any material and evidence, such a decision cannot be taken on mere assumption or probabilities. Hence, it was found that the assessing officer has failed to establish that additional consideration has been paid by the assessee.

8. The Tribunal confirmed the opinion that the decision of the Supreme Court

squarely applies to the facts of the case and therefore confirmed the order passed by the first appellate authority.

9. The learned standing counsel relies upon the judgment of this Court in *C.I.T. v. Medical Trust Hospital and Others* (supra). That was a case where the question involved was whether a retracted statement can be taken into consideration for the purpose of adducing evidence regarding the value of property. In the said case, in a statement u/s 132 before the inspecting officers, purchaser stated that he had reported Rs. 41 lakhs being the differential price which, according to him, was paid to the assessee for purchase of land and building over and above the value declared in the sale document and paid tax thereon. Subsequently, he gave a statement contrary to his earlier stand. It is held that when the person who gave the statement u/s 132(4) declares the income and pays tax thereon, it is a reconfirmation of that statement. But, subsequently, even if he goes back from the earlier statement while cross examination, the Assessing Officer was justified in rejecting the evidence given by the purchaser in cross examination. It is further found that the Tribunal and the first appellate authority went wrong in relying upon the statement in cross examination and in accepting the case of the respondent that the building was sold for the price declared in the document.

10. There is no dispute about the fact that the revenue is liable to prove the fact that there was undervaluation of the property as shown in the sale deed and that a higher amount has been paid by the purchaser to the seller. The question is apparently one of fact. On consideration of the factual materials, the first appellate authority as well as the Tribunal unanimously held that the evidence was lacking to come to such a conclusion. The argument of the appellant is that such findings are perverse as substantial evidence was available on record and the first appellate authority had relied upon irrelevant consideration to reject such evidence. Further, the Tribunal did not re-appreciate the evidence, whereas it has just confirmed the order passed by the first appellate authority. On a perusal of the evidence available on record, the following facts are clear:

(1) That Mr. Noushad has given a statement u/s 132(4) of the income tax Act stating that he sold the property for Rs. 7,82,00,000/-.

(2) This is further confirmed by an affidavit dated 6.11.2008 of Mr. Noushad, indicating that he had purchased the property for Rs. 66,20,000/- and sold the property for Rs. 78,20,000/-.

(3) When the assessee requested for cross examination and Mr. Noushad was summoned and sworn statement was recorded on 10.2.2008, he stated the details about the purchase of property from Smt. Mariamma Kurian for Rs. 66,20,000/- and sold the property in favour of the assessee for Rs. 78,20,000/- and the fact that a lesser amount was shown in the sale deed.

(4) During cross examination, he denied the suggestions made by the assessee and there is nothing to indicate that Mr. Noushad has given a false statement.

(5) Mr. Noushad has declared the income from sale of property and has paid tax.

When these materials are available, can it be said that the revenue has not proved their case? We are of the view that the oral evidence, which is supported by Section 132(4) statement and the affidavit of Mr. Noushad, which is uncontroverted even during cross examination, can be treated as sufficient evidence to show that the property has been sold for Rs. 78,20,000/-. The first appellate authority had gone a little further and had indicated that the revenue has not adduced any further evidence to show that Mr. Noushad had paid Rs. 66,20,000/- to Smt. Mariamma Kurian for purchasing the property and the assessee has paid the differential amount to Mr. Noushad. Apparently, these are all instances where the parties do not maintain any records and they deal in undisclosed amounts. This Court in Medical Trust Hospital's case had occasion to observe that it is a notorious fact that on account of the high stamp duty prevalent in the State undervaluation is a normal course adopted by the parties to avoid stamp duty and huge expenditure on transfer of property. Therefore, the evidence made available by the Revenue is a probable evidence. It is relevant to note that if at all the assessee wanted to disprove the evidence given by Mr. Noushad, the assessee could have proved otherwise by giving some evidence to show the market value of the land in the locality. No such evidence is adduced by the assessee. Therefore, this was a case in which the revenue has to prove the existence of a fact that undervaluation was made by the assessee and that the assessee has paid more amounts for purchase of property amounting to Rs. 54,20,000/-. When that fact is proved, the burden shifts to the assessee to prove otherwise. He had an opportunity to cross examine the witness and there was nothing on record to indicate that the witness had spoken a false story. Under these circumstances, we are of the opinion that even in the absence of any other material produced by the revenue, the uncontroverted evidence of Mr. Noushad was in favour of coming to a finding that the assessee has not declared the actual investment made for acquiring the said building. The findings of the appellate authority as well as the Tribunal to the aforesaid extent are perverse and therefore it gives rise to a substantial question of law as stated in the memorandum of appeal.

In the result, the appeal is allowed, the questions of law are found in favour of the Department and we set aside the orders passed by the Commissioner of income tax (Appeal) and the Tribunal and confirm the order passed by the Assessing Officer.