IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Income Tax Appeal No.110 of 2016 (O&M)
DATE OF DECISION: 24.01.2017

The Pr. Commissioner of Income Tax-2, Chandigarh.

…..Appellant

versus

M/s Quark Media House India Pvt. Ltd. Mohali.

.....Respondent

CORAM:- HON'BLE MR.JUSTICE S.J. VAZIFDAR, CHIEF JUSTICE
HON'BLE MR. JUSTICE DEEPAK SIBAL, JUDGE.

Present: Ms. Urvashi Dugga, Advocate for the appellant

Mrs. Radhika Suri, Senior Advocate with
Ms. Rinku Dahiya, Advocate, for the respondent

..

S.J. VAZIFDAR, CHIEF JUSTICE:

This is an appeal against the order of the Income Tax Appellate Tribunal dismissing the appeal against the order of the Commissioner of Income Tax (Appeals) allowing the assessee's appeal against the order of the Assessing Officer. The matter pertains to the assessment year 2006-07.

2. According to the appellant, the following substantial questions of law arise:-

i) Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is right in deleting the addition by holding that the transaction with a related party was not in terms of provisions of Section 40A(2)(b) of the Income Tax Act whereas the provisions of this Section were clearly applicable to the facts of the case?

ii) Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is right in holding that reference made under section 55A of the Income Tax Act was bad in law whereas the Assessing Officer in the surrounding circumstances, had rightly invoked the

provisions of this section to determine the fair market value of the capital asset sold?

iii) Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is right in holding that the Hon'ble Supreme Court's decision rendered in the case of McDowell & Co. Ltd. v. CTO 154 ITR 148 is not applicable on the facts of the case?

iv) Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is perverse in not deciding the specific ground of appeal taken by the appellant at Ground No.2 which is regarding passing of appellate order by the learned CIT(A) without affording an opportunity of being heard to the Assessing Officer which was specifically requested for in the ITNS-51 submitted to the CIT(A)?

However, only questions-2 and 3 were argued before us. The appeal is accordingly admitted in respect of questions No.2 and 3.

3. The respondent-assessee filed its return of income declaring income from other sources at ₹ 37,13,113/- after claiming exemptions in the sum of about ₹ 13.50 crores under section 10-B of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'). The case was selected for compulsory scrutiny pursuant to which notices under section 143(2) and 142(1) of the Act were issued. A reference was made to the Transfer Pricing Officer (TPO) in view of an international transaction between the assessee and one of its associate enterprises which exceeded ₹ 5 crores.

During the course of the assessment proceedings the Assessing Officer noticed that M/s Quark Media House (India) Pvt. Ltd. i.e. the assessee by a sale deed dated 29.04.2005 transferred to M/s Quark City India Pvt. Ltd. land admeasuring 24000 sq. yards in the industrial area of Mohali together with the building constructed thereon for a consideration of ₹ 25.10 crores. The building comprised of a built up area of 13520.27 sq. meters complete with infrastructure and modern facilities permanently embedded

including HVAC system, electrical installation, networking equipment, office equipment, drinking water plant, water treatment plant and a swimming pool.

4. It is not necessary to consider two aspects which the Assessing Officer dealt with in detail, namely, the valuation of the land and the building and the relationship between the assessee and the purchaser thereof viz. M/s Quark Media House (India) Ltd. These aspects were not questioned on behalf of the assessee. We have for the purpose of this appeal proceeded on the basis that the market value of the property sold by the assessee to M/s Quark City India Pvt. Ltd. is about 70 crores and that the assessee and the vendee M/s Quark City India Pvt. Ltd. are inter-connected group companies.

In this regard, it is sufficient, therefore to note two things. By a letter dated 22.10.2009 the Assessing Officer made a reference to the District Valuation Officer (DVO) under section 55-A of the Act to ascertain the fair market value of the land and the building. The D.V.O. by his report forwarded under cover of a letter dated 31.12.2009 estimated the value of the property at ₹ 70.08 crores.

Secondly, the Assessing Officer accordingly for the purpose of capital gains valued the property at ₹ 70,08,70,000/- after considering in detail the nature of the property and other expenses of sale. The Assessing Officer also dealt with the issue of the two entities being closely related in detail. For the purpose of this appeal it is sufficient to note that the assessee is a fully owned subsidiary of M/s Quark Media House SARL, Switzerland and M/s Quark City India Pvt. Ltd. i.e. the vendee is a 100%

subsidiary of another foreign company, namely, F.E. Holdings Mauritius Ltd. The two foreign companies are part of Quark group, the holding company of which is Quark Inc. USA.

5. The question that falls for consideration is whether for the purpose of calculating the capital gains arising on account of the said transaction, the sale price ought to be taken as ₹ 25 crores as mentioned in the sale deed or ₹ 70 crores which is the value of the property arrived at by the Assessing Officer. The answer to this question also requires a consideration as to whether the Assessing Officer rightly made a reference to the D.V.O. under section 55A to ascertain the fair market value of the property.

6. The Assessing Officer after noting the contentions on behalf of the assessee observed that a good case had been made out on behalf of the assessee that the full consideration received by the assessee for the sale of the property is the value stated in the sale deed. He, however, observed that the assessee had failed to address the real issue that because the assessee and the purchaser are related parties with common Directors and management, the sale transaction was not carried out at the market price. In other words according to him the price mentioned in the sale deed was not the market value and this was in view of the relationship between the parties. He disbelieved the assessee's contention that the transaction was a *bona fide* one having been entered into as per the bargain negotiated keeping in view all the market circumstances prevalent at the relevant time. According to him, this is a case where the business substance of the matter should be considered over

the form. He held that the transaction was not entered into at the market rate but was so arranged and structured that the assessee had no tax liability on account thereof and was therefore a colourable device to avoid the tax liability.

7. The Commissioner of Income Tax (Appeals) held that the expression "full value of consideration" used in Section 48 cannot be construed as having a reference to the market value of the asset transferred; that the question of market value does not arise; that what is to be seen is the consideration actually arrived at between the parties for the transaction and that the adequacy or inadequacy of the price bargained between the parties is not relevant. The CIT(A) concluded that the Assessing Officer had erred in considering the fair market value for the purpose of computing the capital gain and that the Assessing Officer had not shown that the assessee had received any consideration other than that mentioned in the sale deed. The CIT(A) further held that the Assessing Officer had unnecessarily emphasized that the price was below the market price as the vendee and the assessee were closely related as this issue is not relevant for the purpose of computing the capital gain.

The CIT(A) further held as follows: The only factor on the basis of which the Assessing Officer made the assessment was that the assessee sold the assets below the market price and that this factor was inapplicable for the purpose of computation of capital gain under section 48 of the Act. The Assessing Officer failed to establish that the assessee had received any consideration other than that stated in the sale deed. In the absence thereof the conclusion that the assessee had structured the transaction

to avoid income tax or to minimize it is without basis and justification. It is not necessary for us to consider the findings of the CIT(A) regarding the mode of computation for that issue as already mentioned was not raised before us. Section 55A does not entitle the Assessing Officer to disturb the sale consideration as stated in the sale deed. It was not necessary to compute the fair market value and therefore, the Assessing Officer could not have referred the matter to the D.V.O.

8. The Tribunal agreeing with the CIT(A) observed as follows: The full value of consideration is the full sale price actually paid and cannot be construed as having a reference to the market value of the asset/property transferred. What is to be determined is the consideration bargained for and not the market value in the case of sale while computing the capital gains. The Assessing Officer has no authority to substitute the fair market value of consideration actually paid unless it is demonstrated that the assessee had received more than what was declared by him. In the present case it was not the case of the Assessing Officer that the assessee had received any consideration more than what was mentioned in the sale deed. Therefore, there was no necessity for computing the fair market value and the Assessing Officer accordingly could not have referred the matter to the D.V.O.

9. Ms. Dugga, the learned counsel appearing on behalf of the appellant-revenue, contended that for the purpose of computing the capital gains the Assessing Officer is entitled to ignore the consideration stated in the sale deed if he is satisfied that the same is far less than the fair value or

the market value thereof. She further submitted that for the purpose of determining the actual consideration it was always open to the Assessing Officer to refer the matter under section 55A to the D.V.O. She further submitted that even if section 48 does not permit the reference to the D.V.O. under section 55A, the respondent's case is covered by Section 50C. The Assessing Officer could have arrived at the true valuation of the property under section 50C. The submission that the Stamp Authority is bound by the circle rate is erroneous. The circle rates are only indicative and not determinative.

10. Mrs. Suri, the learned senior counsel appearing on behalf of the respondent on the other hand submitted as follows:-

i) The reference to the D.V.O. under section 55A in the present case was without jurisdiction. It is only where the provisions of Chapter-IV require determination of the fair market value, can the reference be made to the D.V.O. Section 48 requires determination of the full value of the consideration received or accruing and not the determination of the fair market value.

ii) The full value of consideration received or accruing is the actual amount bargained for between the parties and not the fair market value of the asset that is transferred.

iii) The value of the asset/transaction can be computed under section 50C only at the instance of the assessee by the authorities under the Indian Stamp Act. If the valuation under the Indian Stamp Act is higher then that would be the valuation under section 50C. In the case before us the transaction

value is more than the circle rate and the rate assessed by the Stamp Valuation Authority.

iv) In any event there is no finding in the present case that the assessee received any consideration than that shown in the sale deed.

11. Sections 48, 50C and 55A of the Act in so far as they are relevant and applicable to the assessment years 2006-07 read as under:-

Mode of computation.

48. 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 asset and the cost of any improvement thereto:

Special provision for full value of consideration in certain cases.

50C. (1) Where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government (hereafter in this section referred to as the "stamp valuation authority") for the purpose of payment of stamp duty in respect of such transfer, the value so adopted or assessed or assessable shall, for the purposes of section 48, be deemed to be the full value of the consideration received or accruing as a result of such transfer.

Following provisos shall be inserted to sub-section (1) of section 50C by the Finance Act, 2016, w.e.f. 1-4-2017 :

Provided that where the date of the agreement fixing the amount of consideration and the date of registration for the transfer of the capital asset are not the same, the value adopted or assessed or assessable by the stamp valuation authority on the date of agreement may be taken for the purposes of computing full value of consideration for such transfer:

Provided further that the first proviso shall apply only in a case where the amount of consideration, or a part thereof, has been received by way of an account payee cheque or account payee bank draft or by use of electronic clearing system through a bank account, on or before the date of the agreement for transfer.

(2) Without prejudice to the provisions of sub-section (1), where—

(a) the assessee claims before any Assessing Officer that the value adopted or assessed or assessable by the stamp valuation authority under sub-section (1) exceeds the fair market value of the property as on the date of transfer;

(b) the value so adopted or assessed or assessable by the stamp valuation authority under sub-section (1) has not been disputed in any appeal or revision or no reference has been made before any other authority, court or the High Court,

the Assessing Officer may refer the valuation of the capital asset to a Valuation Officer and where any such reference is made, the provisions of sub-sections (2), (3), (4), (5) and (6) of section 16A, clause (i) of sub-section (1) and sub-sections (6) and (7) of section 23A, sub-section (5) of section 24, section 34AA, section 35 and section 37 of the Wealth-tax Act, 1957 (27 of 1957), shall, with necessary modifications, apply in relation to such reference as they apply in relation to a reference made by the Assessing Officer under sub-section (1) of section 16A of that Act.

Explanation 1.—For the purposes of this section, "Valuation Officer" shall have the same meaning as in clause (r) of section 2 of the Wealth-tax Act, 1957 (27 of 1957).

Explanation 2.—For the purposes of this section, the expression "assessable" means the price which the stamp valuation authority would have, notwithstanding anything to the contrary contained in any other law for the time being in force, adopted or assessed, if it were referred to such authority for the purposes of the payment of stamp duty.

(3) Subject to the provisions contained in sub-section (2), where the value ascertained under sub section (2) exceeds the value adopted or assessed or assessable by the stamp valuation authority referred to in sub-section (1), the value so adopted or assessed or assessable by such authority shall be taken as the full value of the consideration received or accruing as a result of the transfer.

Note: The words "value" and "assessable" used throughout Section 50C and explanation-2 were inserted by Finance (No.2) Act, 2009 with effect from 01.10.2009.

Reference to Valuation Officer.

55A. With a view to ascertaining the fair market value of a capital asset for the purposes of this Chapter, the Assessing Officer may refer the valuation of capital asset to a Valuation Officer—

(a) in a case where the value of the asset as claimed by the assessee is in accordance with the estimate made by a registered valuer, if the Assessing Officer is of opinion that the value so claimed is less than its fair market value;

(b) in any other case, if the Assessing Officer is of opinion—

(i) that the fair market value of the asset exceeds the value of the asset as claimed by the assessee by more than such percentage of the value of the asset as so claimed or by more than such amount as may be prescribed in this behalf; or

(ii) that having regard to the nature of the asset and other relevant circumstances, it is necessary so to do,

and where any such reference is made, the provisions of sub-sections (2), (3), (4), (5) and (6) of section 16A, clauses (ha) and (i) of sub-section (1) and sub-sections (3A) and (4) of section 23, sub-section (5) of section 24, section 34AA, section 35 and section 37 of the Wealth-tax Act, 1957 (27 of 1957), shall with the necessary modifications, apply in relation to such reference as they apply in relation to a reference made by the Assessing Officer under sub-section (1) of section 16A of that Act.

Explanation.—In this section, "Valuation Officer" has the same meaning, as in clause (r) of section 2 of the Wealth-tax Act, 1957 (27 of 1957).

Note: The concluding words in Section 50A(a) "is less than its fair market value" were substituted by the words "is at variance with its fair market value by the Finance Act, 2012 with effect from 01.07.2012."

Re: Question (ii)

12. The first and the main question concerns the ambit and the meaning of the words *"full value of the consideration received or accruing as a result of the transfer of the capital asset"*. On behalf of the assessee it is contended that these words and especially the words *"full value of the consideration received or accruing"* refer to the consideration arrived at between the parties and not the fair market value thereof. On behalf of the revenue it was contended otherwise.

13. Mrs. Suri, firstly relied upon the judgment of the Supreme Court in *Commissioner of Income Tax, West v. George Henderson and Co. Ltd. (1967)* 66 ITR 622 where section 12B of the 1922 Act fell for consideration. Section 12B of the 1922 Act as it was in force on April, 1, 1947 read as under:-

"Section 12-B of the Income Tax Act as it was in force on April 1, 1947 provided as follows:

"12-B. (1) *Capital Gains*.— The tax shall be payable by an assessee under the head 'Capital gains' in respect of any profits or gains arising from the sale, exchange or transfer of a capital asset effected after the 31st day of March, 1946 and before the first day of April, 1948, and such profits and gains shall be deemed to be income of the previous year in which the sale, exchange or transfer took place:

* * *

(2) The amount of a capital gain shall be computed after making the following deductions from the full value of the consideration for which the sale exchange or transfer of the capital asset is made, namely:

(*i*) expenditure incurred solely in connection with such sale, exchange or transfer;

(*ii*) the actual cost to the assessee of the capital asset, including any expenditure of a capital nature incurred and borne by him in making any additions or alterations thereto, but excluding any expenditure in respect of which any allowance is admissible under any provisions of Section 8, 9, 10 and 12.

Provided that where a person who acquires a capital asset from the assessee, whether by sale, exchange or transfer, is a person with whom the assessee is directly or indirectly connected, and the Income Tax Officer has reason to believe that the sale exchange or transfer was effected with the object of avoidance or reduction of the liability of the assessee under this section, the full value of the consideration for which the sale, exchange or transfer is made shall with the prior approval of the Inspecting Assistant Commissioner of Income Tax, be taken to be the fair market value of the capital asset on the date on which the sale, exchange or transfer took place:

* * *

Provided further that where the capital asset became the property of the assessee or of the previous owner where the cost of the capital asset to the previous owner is to be taken in accordance with sub-section (3) before the 1st day of January, 1939, he may, on proof of the fair market value thereof on the said date to the satisfaction of the Income Tax Officer, substitute for the actual cost such fair market value which shall be deemed to be the actual cost to him of the asset, and which shall be reduced by the amount of depreciation, if any allowed to the assessee after the said date and increased or diminished as the case may be by any adjustment made under clause (*vii*) of sub-section (2) of Section 10:

* * *

> This section was inserted in the Income Tax Act, 1922 by the Income Tax and Excess Profits Tax (Amendment) Act, 1947 (22 of 1947) which received the assent of the Governor-General on April 18, 1947, but the amending Act was deemed to have come into force on March 31, 1947.

Sub section (2) provided that the amount of the capital gain shall be computed after making deductions mentioned therein from the full value of the consideration for which the sale, exchange or transfer of the capital asset is made. The words though not identical to those in Section 48 of the Act are similar.

In that case prior to 01.01.1939, the respondent purchased 1500 shares of a company during the accounting year ending 31.03.1937. On 01.04.1946, the respondent transferred these shares to one Girdhari Lal Mehta at the rate of ₹ 136/- per share although the market value on that date was ₹ 620/- per share. On the same day, Girdhari Lal Mehta in turn sold the shares to Jardine Skinner & Co. at the rate of ₹ 100/- per share but retained the share scrips with blank transfer forms until May, 1946 when the shares were registered in the name of Jardine Skinner & Co. In March, 1947, Jardine Skinner & Company transferred the shares to Jardine Henderson & Co. at the rate of ₹ 493-10-0 per share. The Assessing Officer while assessing the respondent to tax for the assessment year 1947-48 held the capital gain to be ₹ 484/- per share being the difference between the market price of ₹ 620/- per share and the sale price of ₹ 136/- per share. The Appellate Assistant Commissioner affirmed the order but varied the quantum of capital gain holding that on the date of

acquisition of the shares by the respondent i.e. 1.1.1939 the market value of the share was ₹ 153/- per share and that this figure should be taken as the actual cost in view of the third proviso to Section 12B(2). The Appellate Assistant Commissioner also held that the sale was effected with the object of avoidance of tax. The Tribunal dismissed the appeal but on the ground adopted by the Appellate Assistant Commissioner, a reference was made to the High Court. A majority of the Judges of the High Court answered in favour of the assessee-respondent.

The Supreme Court held as under:-

> **"5.** The question therefore arises in the present case as to what is precisely the finding of fact arrived at by the Tribunal as regards the full value of the consideration. It is necessary to state at the outset that the Income Tax Officer and the Appellate Assistant Commissioner assessed the tax on the footing that the first proviso to Section 12-B(2) applied and therefore the market value of the shares must be taken to be the full value of the consideration for the transfer. The Appellate Tribunal, however, rejected the contention of the appellants that the first proviso to Section 12-B(2) applied to the case, but nevertheless proceeded to affirm the order of the Appellate Assistant Commissioner. In para 7 of the order dated August 23, 1951 the Appellate Tribunal stated that "these shares were transferred by the assessee company to one Giridharilal Mehta on 1st April, 1946 at the book value of Rs 136 per share, though the market value of those shares on that date was admittedly Rs 620 per share". In para 8 of the order the Appellate Tribunal has remarked that the assessee refused to give any further facts to explain why it sold shares to Giridharilal Mehta at Rs 136 per share when the market price of the shares stood at Rs 620 per share and also why Giridharilal Mehta again sold the shares on the same date at Rs 100 per share at a loss of Rs 54,000, and then again within a few months thereafter why Jardine Skinner & Co. sold the shares at Rs 493/10 per share. In para 9 the Appellate Tribunal recorded the finding that prima facie *the transaction* was not a bona fide one, and proceeded to say that "if the assessee refuses to disclose all the facts leading to the transaction, and the facts immediately after the transaction, we must hold that it will react to the prejudice of the assessee". In para 10 the Appellate Tribunal has observed that

under Section 12-B(2) of the Income Tax Act, the Income Tax Officer has to compute the capital gains after making certain deductions from the full value of the consideration for the sale and he therefore has a right to know the full value. The Appellate Tribunal added:

"The assesses cannot shut out the Income Tax Officer from finding out what is the full value of the asset transferred by merely putting a figure on the document of transfer. The Income Tax Officer in this case took the value to be the market price of the shares. There is no dispute that the market price of the shares was Rs 620 per share. We cannot say therefore that in the circumstances the Income Tax Officer was in any way wrong in determining the full value of the shares."

In para 11 the Appellate Tribunal held that the first proviso to Section 12-B (2) did not apply to the case and the sale was not effected with the object of avoidance or reduction of the liability of the assessee under that section, and then observed as follows:

> "But the right of the Income Tax Officer to determine the full value of the assets is always there specially in a case where the assessee refuses to give all the information to the Income Tax Officer and the value of the assets given by him is so suspiciously low. We therefore think there is no substance, in the points raised by Mr Issac".

It was contended by Mr Asoke Sen on behalf of the respondent that there was no express finding of the Appellate Tribunal that the respondent actually sold the shares at the market price of Rs 620 per share and that the respondent received that market price of the shares as consideration for the transfer. Reference was made to para 7 of the order of the Appellate Tribunal wherein there is an express finding that the shares were transferred by the respondent to Giridharilal Mehta on April 1, 1946 at the book value of Rs 136 per share, though the market value on that date was Rs 620 per share. Mr Asoke Sen further submitted that it could not be argued from paras 8 to 11 of the order of the Appellate Tribunal that there was an inferential finding that the shares were actually sold at Rs 620 per share by the respondent. On behalf of the appellants Mr Narsaraju pointed out that in the statement of the case dated July 29, 1952 the Appellate Tribunal has said that by the previous order dated August 23, 1951 the Appellate Tribunal had come to the conclusion that the sale had been effected at Rs 620 per share and that the market price of the shares must have been paid. It was, however, pointed out on behalf of the respondent that the statement of the case was not an agreed statement and that it was drawn up by the Appellate Tribunal whose constitution

> was different from that of the Appellate Tribunal which made the order dated August 23, 1951. It is true that the Court is bound to proceed normally on the findings of fact which are mentioned in the statement of the case. But if the statement of the case does not correctly summarize or interpret the finding recorded in the order of the Appellate Tribunal which has been made part of the case, the Court is entitled to look at the order itself in order to satisfy itself what was actually the finding of the Appellate Tribunal.
>
> **6.** After having heard Counsel for both the parties and having scrutinized the order of the Appellate Tribunal dated August 23, 1951 and the statement of the case dated July 29, 1952, we have reached the conclusion that the question of law referred to the High Court cannot be answered as the language used by the Appellate Tribunal in recording its finding as to the actual contract price paid to the respondent by Giridharilal Mehta for the sale of 1500 shares is obscure and its import cannot be determined. In these circumstances we consider that the best course is for the Appellate Tribunal to rehear the appeal and record a clear finding after hearing the parties and after giving an opportunity to the respondent to explain the unusual nature of the transaction and the conduct of the parties concerned therein. After recording a clear finding as to what was the actual price received by the respondent for the sale of the shares to Giridharilal Mehta the Appellate Tribunal will finally dispose of the appeal. On behalf of the respondent Mr Asoke Sen said that his client will give a proper explanation of the transactions and of the conduct of the parties involved before the Appellate Tribunal at the time of the further hearing of the appeal. If the assessee gives explanation of the transaction the Tribunal will be entitled to call upon it to produce documentary or other evidence in support of the explanation. The Tribunal will also be entitled to call for elucidation of the explanation or the evidence. The appellant will be entitled to give evidence in rebuttal."

14. Considering the language of sub section (2) of Section 12B of the 1922 Act, we are of the opinion that the judgment applies to Section 48 of the 1961 Act. The language of sub section (2) in this regard is similar to the language of the opening part of Section 48 of the Act.

15. The judgment undoubtedly holds that the expression "*full value of the consideration*" cannot be construed as the market value but as the price bargained for by the parties to the sale. It is necessary for the Assessing Officer to

ascertain as to what was the price bargained for by the parties to the sale.

16. The judgment, however, does not support Mrs. Suri's further submission that the price stated in the sale-deed must irrespective of anything also be considered to be the sale price for the purpose of computing the capital gain. In our view this absolute proposition is not well founded. The Assessing Officer must determine whether the price stated in the agreement for sale is infact the price bargained for by the parties thereto. In other words, the full value of the consideration is neither the market value nor necessarily the price stated in the document for sale but the price actually arrived at between the parties to the transaction. If therefore it is found that the price actually arrived upon between the parties is not the price reflected in the document, it is the price bargained for by the parties to sale that must be considered for determining the capital gain under section 48. The Supreme Court did not hold that inferences cannot be drawn by the Assessing Officer from the facts established. In fact in paragraph-5 the Supreme Court observed that there was no inferential finding that the shares were sold at the market price of ₹ 620/- per share. This read with the operative part of the order in paragraph-6 remanding the matter to record a finding as to the actual price received makes it clear that the finding can be based on inferences as well. In paragraph-6 the assessee is given an opportunity to explain the unusual nature of the transaction. It cannot be suggested that even if there was no explanation by the assessee, the Assessing Officer was bound not to draw an adverse inference.

17. Even on principle we see no reason to denude the Assessing Officer the right to draw an inference especially an irresistible inference. Take for instance a case where the property worth crores of rupees is sold for merely ₹ 1 lakh and there is no explanation for the same despite the parties being at arms length. The Assessing Officer is not bound to accept the statement in the sale deed unless he can prove that additional consideration was paid. The initial burden to prove the same is undoubtedly on the Department. But in such a case the onus clearly shift upon the assessee. If the assessee is unable to offer an explanation, the Department must be taken to have discharged the burden.

The judgment certainly does not hold that the price mentioned in the document is sacrosanct and that the same must be considered to be the price bargained between the parties to the transaction. That would indeed result in an absurdity for the parties could then by merely stating an incorrect price in the sale deed avoid the tax on capital gains altogether.

18. Mrs. Suri then relied upon the judgment of the Supreme Court in *Commissioner of Income Tax, Calcutta v. Gillanders Arbuthnot & Co. (1973)87 ITR 407* where the Supreme Court held:-

> "Now let us see what is the impact of Section 12-B (2) on that transaction? Under that provision, the amount of capital gains has to be computed after making certain deductions from the full value of the consideration for which the sale is made. What exactly is the meaning of the expression "full value of the consideration for which sale is made?" Is it the consideration agreed to be paid or is it the market value of the consideration? In the case of sale for a price, there is no question of any market value unlike in the case of an exchange. Therefore in cases of sales to which the first proviso to sub-section (2) of Section 12-B is not attracted, all that we have to see is what is the consideration bargained for. As mentioned

> earlier to the facts of the present case, the first proviso is not attracted. As seen earlier, the price bargained for the sale of the shares and securities was only rupees seventy-five lakhs. The facts of this case squarely fall within the Rule laid down by this Court in *C.I.T.* v. *George Henderson & Co. Ltd.* .....
>
> It may be noted that in that case the market value of the shares which were allotted at Rs. 136 per share was Rs. 620 per share."

Our observations with respect to *CIT v. George Henderson & Co. Ltd. (1967)66 ITR 622*, apply equally to this judgment.

19. Mrs. Suri relied upon a judgment of the Delhi High Court in *Commissioner of Income Tax v. Smt. Nilofer I.Singh 2008 SCC (Delhi) 1522*. This was a case under the 1961 Act. In that case the assessee sold two properties, one being a residential flat in Mumbai for ₹ 10 lacs and the other a building in New Delhi for ₹ 23.50 lacs. The Assessing Officer was of the view that the sale consideration did not reflect the fair market value and therefore, referred the matter to the Valuation Officer. The fair market value arrived at by the Valuation Officer was far higher than the prices declared by the assessee. The dispute centred upon the expression "*full value of consideration*". The revenue contended that the expression refers to the full market value whereas the assessee contended that the expression cannot have any reference to the fair market value. The Division Bench held:-

> "6. This controversy has already been settled by the Supreme Court in the case of CIT v. George Henderson and Co. Ltd., [1967] 66 ITR 622, the very expression "full value of consideration" was under consideration of the Supreme Court though in the context of the provisions of the Indian Income-tax Act, 1922. The provisions of section 12B of the 1922 Act pertain to capital gains. Sub-section (1) was in pari materia to section 45(1) of the present Act and sub-section (2) of section

12B of the 1922 Act was in pari materia to the provisions of section 48 of the present Act. The Supreme Court was of the view that the expression "full value of consideration" in the main part of section 12B(2) of the Act cannot be construed as having a reference to the market value of the asset transferred but the expression only meant, the full value of a consideration received by the transferor in exchange of the capital asset transferred by him. The Supreme Court also observed that in the case of a sale the full value of consideration is the full sale price actually paid. It was further of the view that the expression "full value" means the whole price without any deduction, whatsoever, and it cannot refer to the adequacy or inadequacy of the price bargained for. Nor did it have any necessary reference to the market value of the capital asset which is the subject-matter of the transfer.

7. In CIT v. Gillanders Arbuthnot and Co., [1973] 87 ITR 407, the Supreme Court while considering the provisions of section 12B of the 1922 Act again observed that in the case of a sale price of an asset, there would be no question of any market value, unlike in the case of an exchange and the Supreme Court also observed that, in the case of a sale, all that one had to see was—What was the consideration bargained for?

8. These decisions make it more than clear that the expression "full value of consideration" that is used in section 48 of the present Act does not have any reference to the market value but only to the consideration referred to in the sale deeds as the sale price of the assets which have been transferred..

9. With regard to the arguments of the learned counsel for the appellant based on the provision of section 55A of the said Act, it is immediately to be noticed that the said provision begins with the expression "with a view to ascertaining the fair market value of a capital asset". In other words, the reference to a Valuation Officer under section 55A is for the object of ascertaining the fair market value of a capital asset. It is only when the Assessing Officer is required to ascertain the fair market value of a capital asset that the provisions of section 55A can be invoked. There may be certain situations where the Assessing Officer is required to determine the fair market value. One of the situations is indicated in section 45(4) of the said Act where the profits or gains arising

from the transfer of a capital asset by way of distribution of capital assets on the dissolution of a firm or other association of persons or body of individuals are to be computed is in question. In such a situation, the provision itself makes it clear that for the purposes of section 48, the fair market value of the asset on the date of such transfer shall be deemed to be the full value of the consideration received or accruing as a result of the transfer. In a situation, as one obtaining under section 45(4) of the Act, since there is no apparent consideration for the transfer of the asset, the full value of the consideration has to be determined in an indirect manner and that indirect manner has been indicated to be the fair market value of the asset. Thus, when the fair market value of the asset under section 45(4) is to be determined, it is obvious that section 55A of the Act would get triggered and a reference to the Valuation Officer would be necessary.

10. Another instance where the fair market value would have to be determined is provided in section 45(1A) of the Act. Under this provision, where the assessee receives an amount from the insurer on account of damage or destruction to any capital asset as a result of natural calamities such as floods or fires, explosions, etc., the question of determining the capital gains is also connected with the determination of the fair market value of the asset on the date of receipt of such amounts from the insurer. In section 45(1A) of the said Act also, it is indicated that for the purposes of section 48 of the said Act, that is for computation of capital gains, the value of any money or the fair market value of the asset on the date of such receipts shall be deemed to be the full value of the consideration received or accruing as a result of such transfer of capital asset. In this situation also the Assessing Officer would be required to compute the fair market value of the asset and, therefore, a reference to the Valuation Officer under section 55A of the said Act would be necessary.

11. But, the facts of the present case are entirely different. The present case involves sales simpliciter where the full value of the considerations are the sale prices of the two properties indicated above. For the purposes of computing capital gains in such a case as the one before us, there is no necessity for computing the fair market value and,

therefore, the Assessing Officer could not have referred the matter to the Valuation Officers."

We are entirely in agreement with the observations of the Division Bench in so far as they pertain to the issue under consideration. The reliance upon the judgment of the Supreme Court in *George Henderson & Co. Ltd.* case (supra) is also well founded. The language of Section 12B(2) of the 1922 Act is similar to that of Section 48 of the 1961 Act. The issue is, therefore, covered by the judgment of the Supreme Court.

20. We do not read the observations in paragraph-7 to mean that the consideration referred to in the sale deed cannot be questioned at all. The judgment if read as a whole does not indicate such an absolute or blanket rule. There is nothing in the judgment to indicate that the revenue had contended that the full value of consideration received or accruing was other than what was mentioned in the sale deed. It is probably in that view of the matter that the Division Bench held that the expression "full value of consideration" refers only to the consideration referred to in the sale deed. If, however, that is what was meant, we respectfully disagree. The full value of consideration referred to in Sections 45 and 48 of the Act refers to the full value actually received or accruing and not what the parties merely state or declare in the sale deed as was paid or payable and received or accruing. Such a view would as we mentioned earlier enable a party to avoid the liability to tax on account of capital gains by merely stating the incorrect price to be the consideration for sale or transfer of the

asset. That could not have been the intention of the legislature.

21. In *Dev Kumar Jain v. Income Tax Officer and another (2009) 309 ITR 240 (Delhi)*, the Assessing Officer considered the sale price disclosed in the agreement to be low and made a reference to the District Valuation Officer for the purpose of determining the fair market value of the property on the date of sale. The District Valuation Officer determined the value to be much higher. It was contended on behalf of the revenue that the assessee was given several opportunities to file objections and to produce evidence. After referring to the judgments, which we have already referred to, the Division Bench held :-

> "**9.** Before us the learned counsel for the Revenue submitted that this was a case where the assessee had not supplied documents, therefore, the ratio of the judgment in the case of the *Smt. Nilofer I. Singh*, [2009] 309 ITR 233 (Delhi) was not applicable. We are not in agreement with the submission made by the learned counsel for the Revenue for the reasons that there is nothing on record to show that the assessee received a consideration for the sale of the said property in excess of that which was shown in the agreement to sell. That being the case the decision in the case of *Smt. Nilofer I. Singh*, [2009] 309 ITR 233 (Delhi) would bind the Revenue. The Tribunal, in our view erred in accepting the stand of the Revenue that actual sale consideration recorded in the agreement to sell would be substituted by the value arrived at by the DVO under section 55A of the Act. The question of law as framed is answered in favour of the assessee and against the Revenue."

The judgment, therefore, proceeded on the basis that there was nothing on record to show that the assessee received a consideration for the sale of the property in

excess of that which was shown in the sale-deed. The Division Bench did not take into consideration the effect of the District Valuation Officer having valued the market price at ten times the amount stated in the document. Inferences on that basis were not even suggested. We do not read the judgment as having held that the amount mentioned in the sale document is sacrosanct and is the only basis on which the capital gain is to be computed.

22. A Division Bench of this Court by a judgment dated 05.03.2014 in *Commissioner of Income Tax-III, Ludhiana v. Shri Dharam Pal Aggarwal ITA NO. 462 of 2010* framed the following questions of law:-

i) Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is right in ignoring the provisions contained in Section 55A of the IT Act which specifically empower the Assessing Officer to ascertain the fair market value of capital asset for the purposes of computation of capital gains?

ii) Whether on the facts and in the circumstances of the case, the Hon'ble ITAT is right in law in ignoring the findings of the Assessing Officer that at the time of sale of capital asset in question there was no notification of circle rates of Delhi Government and hence, reference to the DVO was necessary in the circumstances?

The assessee had sold the immovable property by two sale-deeds and invested the sale proceeds in National Housing Bank Bonds which were eligible for deduction under section 54EC of the Act. The Assessing Officer made a reference to the Departmental Valuation Officer under section

55A who determined the fair market value to be much higher than the price shown in the documents. The question before the Court was whether the Assessing Officer was justified in making the reference to the DVO under section 55A for ascertaining the market value of the capital assets which were transferred. The Division Bench referred to the judgments which we already noted and held:-

> "10. The Hon'ble Supreme Court reiterated the aforesaid view in CIT v. Gillanders Arbuthnot & Co. (1973) 87 ITR 407. Thus, it emerges that the expression "full value of consideration" appearing in section 48 of the Act does not have any reference to the fair market value but to the consideration referred to in the sale deeds as the sale price of the assets which have been transferred."

What we observed in respect of paragraph-7 of the judgment of Delhi High Court in *Commissioner of Income Tax v. Smt. Nilofer I.Singh (2009) 309 ITR 233 (Delhi)* applies equally to paragraph-10 of the judgment in this case. It is obvious that the Division Bench considered the consideration referred to in the sale deeds to be the actual amount received by or accruing to the assessee. The Division Bench did not hold that where it is established that the price mentioned in the sale deed is not the amount actually received by or accruing to the assessee it must nevertheless be the basis of computing the capital gains. Such a contention was neither raised before nor decided by the Division Bench. This is apparent also from paragraph-8 of the judgment which reads as under:-

> "These decisions make it more than clear that the expression "full value of consideration" that is used in Section 48 of the present Act does not have any reference to the market value but only to the consideration

> referred to in the sale deeds as the sale price of the assets which have been transferred".

The price to be considered is the consideration received or accruing as a result of the transfer and not necessarily the price that the assessee states that it received or which has accrued to it. At the cost of repetition a view to the contrary would lead to the absurdity of enabling an assessee to avoid capital gains merely by stating that an incorrect price as having been received by it or accruing to it.

23. The matter, however, does not end there. In view of the facts of this case the assessee must succeed. Mrs. Suri submitted that there was no finding that the assessee received any consideration other than that shown in the sale agreement. This is correct. The assessment order does not proceed on the basis that the assessee received any amount in addition to what is stated in the sale deed. It proceeds only on the basis that the assessee and the purchaser being related parties, the property was sold at a very low price. The CIT(A) also noted that the Assessing Officer had not shown that the assessee had received any consideration other than the consideration mentioned in the sale agreement. The CIT(A) further noted that the Assessing Officer had unnecessarily emphasized that the assessee and the purchaser were related parties and therefore, the vendee was in a position to exercise influence in the decision of the assessee and hence the assessee sold the property at the price below the market price. The Tribunal also noted this aspect in paragraph-9. The Tribunal observed that it was not the case of the Assessing Officer that the assessee received a consideration more than what was mentioned in the sale deed

and that the Assessing Officer had therefore, erred in considering the fair market value.

24. In the case of related parties, there is yet another aspect. The presumption against the value being understated (not undervalued) is greater where parties are connected or related. Their relationship is a factor which could justify a price lower than the market price. Where parties are strangers there must be some explanation for an undervaluation.

25. We must, therefore, proceed on the basis that it is not the case of the revenue that the assessee received any amount other than what was mentioned in the sale agreement. In this view of the matter and in view of the judgments referred to earlier especially the judgments of the Supreme Court it must follow that there was no occasion for the Assessing Officer to determine the fair market value. The Assessing Officer was only concerned with the amounts actually received by the assessee. The amount actually received was admittedly the amount mentioned in the sale agreement.

26. It follows then that the reference to the DVO under section 55A was without jurisdiction. Section 55A opens with the words "*with a view to ascertaining the fair market value of a capital asset for the purposes of this Chapter, the Assessing Officer may refer the valuation of capital asset to a Valuation Officer*". However, in view of the judgments of the Supreme Court, what falls for determination under section 48 is not the fair market value of the capital asset but the full value of the consideration received or accruing as a result of the transfer of the capital asset.

27. Section 55A is not redundant on account of this view. It would apply to the provisions of Chapter IV which require the determination of the fair market value of capital assets. Some of these provisions have been noted by the Delhi High Court in *Smt. Nilofer I.Singh case* (see paragraph-8 quoted above).

This is made expressly clear from the judgment of the Supreme Court in *Smt. Amiya Bala Paul v. Commissioner of Income Tax (2003) 262 ITR 407*, where the Supreme Court held:-

> **"17.** Besides, Section 55-A having expressly set out the circumstances under and the purposes for which a reference could be made to a Valuation Officer, there is no question of the Assessing Officer invoking the general powers of enquiry to make a reference in different circumstances and for other purposes. (See *Padam Sen* v. *State of U.P.* [AIR 1961 SC 218 : (1961) 1 Cri LJ 322], AIR para 8, *Arjun Singh* v. *Mohindra Kumar* [AIR 1964 SC 993] , AIR para 19.) It is noteworthy that Section 55-A was introduced in the Act by the Taxation Laws (Amendment) Act, 1972 when Sections 131(1), 133(6) and 142(2) were already on the statute-book. Learned counsel for the appellant has correctly submitted that if the power to refer any dispute to a Valuation Officer was already available in Sections 131(1), 133(6) and 142(2), there was no need to specifically empower the Assessing Officer to do so in certain circumstances under Section 55-A.
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> **18.** We may also note Section 269-L of the Act which enables the competent authority appointed under Section 269-B:
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> "269-L. (1)(*a*) for the purpose of initiating proceedings for the acquisition of any immovable property under Section 269-C or for the purpose of making an order under Section 269-F in respect of any immovable property, require a Valuation Officer to determine the fair market value of such property and report the same to him;
>
> (*b*) for the purpose of estimating the amount by which the compensation payable under sub-section (1) of Section 269-J in respect of any immovable property may be reduced or, as the case may be, increased under clause (*a*) or clause (*b*) of sub-section (2) of that section, require the Valuation Officer to make such estimate and report the same to him."
>
> **19.** The Valuation Officer referred to has, according to the Explanation to the section, the same meaning as in clause (*r*) of Section 2 of the Wealth Tax Act, 1957. Under sub-section (2) of Section 269-L, the Valuation Officer to whom a reference is made under clause (*a*) or

clause (*b*) of sub-section (1) is given all the powers he has under Section 38 of the Wealth Tax Act, 1957. And if in an appeal under Section 269-G against the order for acquisition of any immovable property, the fair market value of such property is in dispute, the Appellate Tribunal shall, on a request being made in this behalf by the competent authority, give an opportunity of being heard to any Valuation Officer nominated for the purpose by the competent authority.

20. From this it is clear that whenever reference to a Valuation Officer appointed under the Wealth Tax Act is permissible under the Income Tax Act, it has been statutorily so provided.

21. Apart from the aforesaid, a Valuation Officer is appointed under the Wealth Tax Act and can discharge functions within the statutory limits under which he is appointed. It is not open to a Valuation Officer to act in his capacity as Valuation Officer otherwise than in discharge of his statutory functions. He cannot be called upon nor would he have the jurisdiction to give a report to the Assessing Officer under the Income Tax Act except when a reference is made under and in terms of Section 55-A or to a competent authority except under Section 269-L.

22. We are, therefore, of the view that the High Court incorrectly answered the question referred to it in the affirmative. The Tribunal had not erred in holding that the Assessing Officer cannot refer the matter to the Valuation Officer for estimating the cost of construction of the house property. The appeal is accordingly allowed and the decision of the High Court set aside. There will be no order as to costs."

28. In *Commissioner of Income Tax, Madras v. Shivakami Co. P. Ltd. (1986) 159 ITR 71,* the Supreme Court held that the assessee's sold the shares to two persons who were directly or indirectly connected with them at prices considerably less than their break-up value. The Supreme Court then held as follows:-

"13. It may be mentioned that Section 52 of Income Tax Act, 1961 (hereinafter referred to as "1961 Act") corresponds to the first proviso of Section 12-B(2) of 1922 Act. The first proviso to Section 12-B(2) read as follows:

"Provided that where a person who acquires a capital asset from the assessee, whether by sale, exchange, relinquishment or transfer, is a person with whom the assessee is directly or indirectly connected, and the Income Tax Officer has reason to believe that the sale, exchange, relinquishment or transfer was effected with the object of avoidance or reduction of the liability of the

assessee under this section, the full value of the consideration for which the sale, exchange, relinquishment or transfer is made shall, with the prior approval of the Inspecting Assistant Commissioner of Income Tax, be taken to be the fair market value of the capital asset on the date on which the sale, exchange, relinquishment or transfer took place."

14. Section 52 of 1961 Act came up for consideration by this Court in *K.P. Varghese* v. *ITO, Ernakulam* [(1981) 4 SCC 173 : 1981 SCC (Tax) 293 : AIR 1981 SC 1922 : (1981) 131 ITR 597] . This Court held that so far as material for the present purpose sub-section (2) of Section 52 could be invoked only where the consideration for the transfer of a capital asset had been understated by the assessee, or, in other words, the full value of the consideration in respect of the transfer was shown at a lesser figure than that actually received by the assessee, and the burden of proving such understatement or concealment was on the revenue. This Court observed that the sub-section had no application in the case of an honest and bona fide transaction where the consideration received by the assessee had been correctly declared or disclosed by him.

15. In the instant case, on behalf of the revenue, it was contended that it was accepted both by the Tribunal and the High Court that the transactions in question were done in order to defeat the claim of the revenue. The facts found were that there was a sale. The High Court has stated that the Tribunal had found that the consideration was not *understated* (emphasis supplied). Counsel for the revenue contended that this was not correct. On the other hand, an inference could be drawn that the consideration was understated. The High Court also noted that the explanation given by the assessee for effecting the sale was not acceptable.

16. As it appears from the decision of this Court in *K.P. Varghese case* [(1981) 4 SCC 173 : 1981 SCC (Tax) 293 : AIR 1981 SC 1922 : (1981) 131 ITR 597] , the onus was on the revenue to prove that there was understatement in the document not that the goods were sold at undervalue. Understatement of value is a misstatement of value. Selling goods at an undervalue to defeat revenue is different from understating the value in the document of sale. Counsel for the revenue contended that in the background of the facts of this case, the evil design of the assessee was clear and he said that it was difficult to know the mind of man. Therefore, an inference could be drawn in the facts of this case as noted by the Tribunal that there was understatement of value in the document. Though the legislation in question is to remedy the social evil and should be read broadly and should be so read that the object is fulfilled, yet the onus of establishing a condition of taxability must be fulfilled by the revenue. There is no evidence direct or inferential that the consideration actually received by the assessee was more than what was disclosed or declared by him. The

relationship between the parties has been established. The desire to defeat the claims of the revenue has also been established but the fact that for this the assessee had stated a false fact in the document is not established. What appears from the Tribunal's order was that the real and main object was to safeguard these shares from being taken over by the Government in settlement of tax dues, and also that the buyer and seller were indirectly connected with each other.

17. The first proviso to Section 12-B(2) of 1922 Act provides "full value of the consideration for which the sale, exchange, relinquishment or transfer is made" to be taken as the basis for the computation of the capital gains. Therefore, unless there is evidence that more than what was stated was received, no higher price can be taken to be the basis for computation of capital gains. The onus is on the revenue — the inferences 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. In the instant case, no such attempt was made.

18. As this Court has explained in *K.P. Varghese case* [(1981) 4 SCC 173 : 1981 SCC (Tax) 293 : AIR 1981 SC 1922 : (1981) 131 ITR 597] the second ingredient that is to say that the word "declared" in subsection (2) of Section 52 of the Act is very eloquent and revealing. It clearly indicated that the focus of sub-section (2) was on the consideration declared or disclosed by the assessee as distinguished from the consideration actually received by him and it contemplated a case where the consideration received by the assessee in respect of the transaction was not truly declared or disclosed by him but was shown at a different figure. Capital gains was intended to tax the gains of an assessee, not what an assessee might have gained. What is not gained cannot be computed as gained. All laws, fiscal or otherwise, must be both reasonably and justly interpreted whenever possible. Capital gains tax is not a tax on what might have been received or could have been taxed. In this case, the revenue has made no attempt to establish that there was any understatement though it might be that shares were sold at an undervalue.

19. In view of the ratio of *K.P. Varghese case* [(1981) 4 SCC 173 : 1981 SCC (Tax) 293 : AIR 1981 SC 1922 : (1981) 131 ITR 597] the proviso to Section 12-B(2) of the Act can be invoked only when the consideration for the transfer of capital asset has been understated by the assessee. There is no evidence as discussed above that the full consideration received by the assessee in the transfer of the assets involved in these cases has been understated. The proviso helps or enables the department by providing a way to determine the market value. But the proviso is applicable only where the full value for the consideration has not been stated. There is no evidence, direct or inferential, in these cases that the full consideration had not been stated in the document."

Thus the Assessing Officer proceeded on the erroneous basis that as the assessee and the purchaser are interconnected and the property was sold at an undervalue he had the jurisdiction to invoke the provisions of section 55A or even otherwise to determine the fair market value. As held by the Supreme Court it then is a distinction between undervaluation and understatement of the value. The Assessing Officer did not find the consideration to have been understated. He, therefore, was not entitled to determine the fair market value.

29. The judgment relied upon in *Commissioner of Income Tax, Bangalore v. B.C.Srinivasa Setty AIR 1981 Supreme Court 972*, is of no assistance in the determination of the issues that fall for our consideration as they were neither raised before us nor decided by the Supreme Court. The question, therefore, essentially was whether the goodwill falls within Section 48 of the Act. The Supreme Court held that the character of the computation provisions in each case bears a relationship to the nature of the charge. Thus the charging section and the computation provisions together constitute an integrated code. It was held that when there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section. The Supreme Court observed that the goodwill generated in a newly commenced business cannot be described as an 'asset' within the terms of Section 45 and therefore, its transfer is not subject to income-tax under the head "capital gains".

30. Ms. Dugga relied upon a judgment of the Andhra Pradesh High Court in case *Daulat Ram and others v. Income Tax Officer and another (1990) 181 ITR 119*. In that case the Income Tax Officer made a reference to the Valuation Officer in respect of a building owned by Daulat Ram, Ashok Kumar and Smt. Vanita Daulat Ram. The Valuation Officer submitted a report. The second reference by the Income Tax Officer was made to the Valuation Officer which was objected to. It is this notice which was challenged. However, from paragraph-3 of the judgment, it is evident that the power of the Income Tax Officer to make any reference to the Valuation Officer was challenged. Ms. Dugga relied upon paragraphs-9 to 15 of the judgment which read as under:-

> "9. Point No. 1.—It is quite manifest from section 55A of the Act that it enables the Income-tax Officer to have the fair market value of a capital asset ascertained through the agency of a Valuation Officer.
>
> 10. The crucial provision is that this section is provided by the Taxation Laws (Amendment) Act, 1972, to be effective from January 1, 1973, with a deliberate object of empowering the Income-tax Officer to find out the market value of a capital asset for the purpose of Chapter IV which is titled "Computation of total income". It comprises sections 14 to 59. The said Chapter is divided into six sub-chapters. They are:
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> 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.
>
> 11. Bearing the frame of the Chapter in mind, wherein resides section 55A which, though falls within the sub-chapter "Capital gains", if we make a careful analysis, the intention of the Legislature becomes pretty obvious, as the words that have been employed are "for the purpose of this chapter" denoting thereby that while computing the income, various factors might fall for determination and, therefore, whenever such contingency does arise, the Income-tax Officer who is, as stated earlier, invested with the power, can as well ascertain through the agency of a Valuation Officer. Learned counsel for the

petitioners, Sri Ranganathachari, argued with great vehemence that this power could be exercised vis-a-vis the ascertainment of the value of a capital asset in relation to capital gains only and nothing else. We apprehend, we are not persuaded to accede to this submission as it would be causing violence to the very explicit language used in the very section apart from the contextual interpretation. The mere residence of the section within the sub-chapter "capital gains" cannot be a guidance to hold that it pertains to that sub-chapter alone inasmuch as, as pointed out earlier, the word "Chapter" occurring in the section, is crucial in coming to this conclusion. The word employed is "Chapter" and not "Capital gains", which amply and unambiguously demonstrates the intention of the Legislature.

12. Hence, we have no hesitation in holding that section 55A of the Act empowers the Income-tax Officer to have the fair market value of a capital asset determined by referring the same to a Valuation Officer. On such reference, the provisions, inter alia, of sub-sections (2) to (6) of section 16A and sub-sections (3) and (4) of section 23 of the Wealth-tax Act, 1957, are ipso facto applicable by extension, as laid down under section 55A of the Act itself. So also, the "Valuation Officer" in section 55A of the Act has the same meaning as in clause (r) of section 2 of the Wealth-tax Act. Consequently, it is not in dispute that the Rules framed under the Wealth-tax Act will also apply in this behalf.

13. Before the said amended section 55A was enacted, though no specific provision existed, the authority concerned was taking shelter under section 142(2) of the Act, which reads: "For the purpose of obtaining full information in respect of the income or loss of any person, the Income-tax Officer may make such inquiry as he considers necessary", and trying to achieve the object as is now explicitly enacted in section 55 A.

14. Though in the counter, the stand taken by the Revenue is that it is not section 55A but section 136 that governs the situation in this behalf, most part of the argument was devoted by learned standing counsel for the Revenue stating that the relevant provision is section 55A, section 136 being only incidental to the main. Be that as it may, a mere wrong reference to a particular provision in the Act cannot demolish the case of the respondent if it could be traceable to a correct statutory provision which the Revenue, at any rate at the time of argument, has, very rightly, realized that it was indeed traceable to section 55A of the Act.

15. From the foregoing, therefore, it is quite manifest that section 55A is the provision that holds the field in answering the first point framed in this behalf. Therefore, the answer is that the reference to the Valuation Officer under section 55A is valid."

Mrs. Suri rightly submitted that this judgment is contrary to the judgments already referred to by us and that the Andhra Pradesh High Court had not even referred to these judgments. We are, therefore, not inclined to and cannot follow the judgment.

31. For the same reason we are, with respect unable to agree with the judgment of the Madras High Court in *C.T.Laxmandas v. Assistant Commissioner of Income Tax (1994) 208 ITR 859* which following the above judgment of the Andhra Pradesh High Court.

32. The reliance upon Section 50C is of no assistance to the Revenue either. Mrs. Dugga's submission that the Assessing Officer's can be supported under section 50C is not well founded. Even assuming that the Assessing Officer was entitled to invoke Section 50C to have the fair market value determined, it would make no difference. In view of sub section (3) the rate adopted, assessed or assessable by the Stamp authority would prevail. It is common ground that in this case the consideration stated in the sale document is even higher than the valuation by the Stamp authority.

33. In the circumstances, question (ii) is answered in the affirmative in favour of the assessee.

Re: Question (iii)

34. The judgment of the Supreme Court in *Ms. McDowell & Co. Ltd. v. Commercial Tax Officer, (1985) 154 ITR 148* does not warrant a different view of the matter. The view that we have taken in respect of question (ii) cannot be altered in view of the judgment in McDowell's case (supra). The ratio of

the judgment of the Supreme Court referred to earlier is that for the purpose of Section 48, the full value of the consideration received by or accruing to the assessee must be taken into consideration for the purpose of computing the capital gain and that the market price of the property is not relevant for this purpose. The authorities under the Act cannot possibly take a different view of the matter.

35. In *Commissioner of Income Tax v. Walfort Share and Stock Brokers P. Ltd. (2010) 326 ITR 1,* the Supreme Court observed:-

> "20. The real objection of the Department appears to be that the assessee is getting tax-free dividend; that at the same time it is claiming loss on the sale of the units; that the assessee had purposely and in a planned manner entered into a premeditated transaction of buying and selling units yielding exempted dividends with full knowledge about the fall in the NAV after the record date and the payment of tax-free dividend and, therefore, loss on sale was not genuine. We find no merit in the above argument of the Department. At the outset, we may state that we have two sets of cases before us. The lead matter covers the assessment years before insertion of Section 94(7) vide the Finance Act, 2001 w.e.f. 1-4-2002. With regard to such cases we may state that on facts it is established that there was a "sale". The sale price was received by the assessee. That, the assessee did receive dividend. The fact that the dividend received was tax free is the position recognised under Section 10(33) of the Act. The assessee had made use of the said provision of the Act. That such use cannot be called "abuse of law". Even assuming that the transaction was pre-planned there is nothing to impeach the genuineness of the transaction. With regard to the ruling in *McDowell & Co. Ltd.* v. *CTO* (1985) 154 ITR 148 (SC), it may be stated that in the later decision of this Court in *Union of India* v. *Azadi Bachao Andolan* (2003) 263 ITR 706] it has been held that a citizen is free to carry on its business within the four corners of the law. That, mere tax planning, without any motive to evade taxes through colourable devices is not frowned upon even by the judgment of this Court in *McDowell & Co. Ltd. case* (supra). Hence, in the cases arising before 1-4-2002, losses pertaining to exempted income cannot be disallowed. However, after 1-4-2002, such losses to the

extent of dividend received by the assessee could be ignored by the AO in view of Section 94(7). The object of Section 94(7) is to curb the short-term losses. Applying Section 94(7) in a case for the assessment year(s) falling after 1-4-2002, the loss to be ignored would be only to the extent of the dividend received and not the entire loss. In other words, losses over and above the amount of the dividend received would still be allowed from which it follows that Parliament has not treated the dividend stripping transaction as sham or bogus. It has not treated the entire loss as fictitious or only a fiscal loss. After 1-4-2002, losses over and above the dividend received will not be ignored under Section 94(7). If the argument of the Department is to be accepted, it would mean that before 1-4-2002 the entire loss would be disallowed as not genuine but, after 1-4-2002, a part of it would be allowable under Section 94(7) which cannot be the object of Section 94(7) which is inserted to curb tax avoidance by certain types of transactions in securities. There is one more way of answering this point. Sections 14-A and 94(7) were simultaneously inserted by the same Finance Act, 2001. As stated above, Section 14-A was inserted w.e.f. 1-4-1962 whereas Section 94(7) was inserted w.e.f. 1-4-2002. The reason is obvious. Parliament realised that several public sector undertakings and public sector enterprises had invested huge amounts over a last couple of years in the impugned dividend stripping transactions so also declaration of dividends by mutual fund are being vetted and regulated by SEBI for last couple of years. If Section 94(7) would have been brought into effect from 1-4-1962, as in the case of Section 14-A, it would have resulted in reversal of a large number of transactions. This could be one reason why Parliament intended to give effect to Section 94(7) only w.e.f. 1-4-2002. It is important to clarify that this last reasoning has nothing to do with the interpretations given by us to Sections 14-A and 94(7). However, it is the duty of the court to examine the circumstances and reasons why Section 14-A inserted by the Finance Act, 2001 stood inserted w.e.f. 1-4-1962 while Section 94(7) inserted by the same Finance Act as brought into force w.e.f. 1-4-2002."

36. As we noted earlier it is not the case of the Revenue that the actual consideration is higher than that stated in the sale deed. The Assessing Officer was, therefore, bound to consider the actual consideration. He was not entitled to take the market value of the property on the

basis of the judgment in McDowell's case for that would be contrary to the judgment which specifically dealt with question (ii).

Question (iii) is, therefore, also answered in the affirmative in favour of the assessee and against the appellant.

37. In the circumstances, the appeal is dismissed.

(S.J. VAZIFDAR)
CHIEF JUSTICE

24.01.2017
ravinder sharma

(DEEPAK SIBAL)
JUDGE

NOTE:
Whether speaking/non-speaking: Speaking√
Whether reportable: Yes√