* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment reserved on: 28.03.2012
Judgment pronounced on: 23.04.2012

\+ **ITA 334/2009**

COMMISSIONER OF INCOME TAX VII … Appellant

versus

SHRI KARAN KHANDELWAL … Respondent

Advocates who appeared in this case:
For the Petitioner : Mr N.P. Sahni with Mr Ruchesh Sinha
For Respondent : Mr P.S. Khandelwal in person for Mr Karan Khandelwal

And

+ ITA No. 82/2009

THE COMMISSIONER OF INCOME TAX III … Appellant

versus

SUNIL BEDI … Respondent

Advocates who appeared in this case:
For the Petitioner : Mr Sanjeev Sabharwal
For Respondent : Mr Satyen Sethi with Mr Arta Trana Panda

CORAM:
HON'BLE MR. JUSTICE BADAR DURREZ AHMED
HON'BLE MR. JUSTICE V.K.JAIN

V.K. JAIN, J.

1. By this common judgment, we shall dispose of both the appeals referred above.

ITA No.334/2009 is directed against the order dated 25.04.2008 passed by the Income Tax Appellate Tribunal (herein after referred to as 'the Tribunal'), dismissing ITA No.454/del/07 filed by the Revenue, in respect of assessment of the respondent Sh. Karan Khandelwal, for the assessment year 2003-04. ITA No.82/09 is directed against the order dated 09.05.2008 passed by the Tribunal dismissing the ITA No.2008/del/06 filed by the revenue in respect of the assessment of the respondent Sh. Sunil Bedi, for the assessment year 2003-04. The facts giving rise to filing of these appeals can be summarized as under:

Prem Shanker Khandelwal HUF was the sole owner of the land measuring 18 biswas comprised in Khasra No.374 and land measuring 17 biswas comprised in Khasra No.375, in the revenue estate of Village Sikandarpur, Ghosi, Tehsil and District Gurgaon, situated at Main Mehrauli Gurgaon Road. A Memorandum of Understanding dated 22.03.2000, was executed between Prem Shanker Khandelwal (HUF), through its karta Sh. Premchand Shanker Khandelwal and Fashion Flare International Private Ltd. through its Managing Director Sh. Choudhary Ajay Latyan, with respect to the aforesaid land measuring 5300 sq. yards. Under the Memorandum of Understanding, Fashion Flare International Private Ltd. was to purchase the aforesaid land for the total consideration of Rs.6 crores 35 lacs. The seller was required to obtain approval/sanction/license to use the aforesaid land for construction of a commercial building, from concerned authorities of Haryana Government and the license as well as external development charges payable to the Authorities, for grant of permit /license to construct a commercial building on the

aforesaid land, were to be deposited by Fashion Flare International Pvt. Ltd., which could deduct the same from the said price agreed between the parties. All other charges and levies imposed by the Authorities on conversion of the land used for commercial building were to be deposited by the seller.

2. A Company namely Span Properties Pvt. Ltd., was then formed by Sh. P.S. Khandelwal, his son Neeraj Khandelwal and Mrs. Sheela Khandelwal, and they held the entire share capital of that company. The aforesaid land measuring 5300 sq. yards was transferred to that company for a sum of Rs.20,60,000/-. The company (Span Properties Pvt. Ltd.) entered into a Memorandum of Understanding dated 19.12.2008 with Fashion Flare Pvt. Ltd. Vide this memorandum of Understanding, the time for performance of the original MOU dated 22.03.2000, between Prem Shanker Khandelwal (HUF) and Fashion Flare Pvt. Ltd was extended upto 31.03.2001. It was agreed between them that if the permission which the seller had sought from the Government for construction of a commercial building on the aforesaid land is granted then the entire shareholding of Span Properties Pvt. Ltd. shall be transferred to Fashion Flare Pvt. Ltd., and the parties shall comply with the terms and conditions of the MOU dated 22.03.2000. It was further agreed that in case necessary permission/license/approval of Government of Haryana is not given till 31.03.2001, the entire understanding shall be nullified and shall have no effect. In that case, the seller was obliged to refund the advance money, which it had received from the purchaser.

3. A Collaboration Agreement dated 15.07.2002 was then executed between Span Properties Pvt. Ltd. on one hand and Ajay Chaudhary and Smt. Savita on the other hand. It would be pertinent to note that Sh. Ajay Chaudhary was the same person through whom Fashion Flare Pvt. Ltd. had entered into the MOU dated 19.12.2008 with Span Properties Pvt. Ltd. Under the Collaboration Agreement, the Choudharys' were to pay Rs.1 crore 40 lakh to Span Properties Pvt. Ltd as security deposit. They agreed to construct a Central Air Conditioned Multistoried Building on the aforesaid land and transfer half of the built up area (2760 sq. feet) to Span Properties (Pvt.) Ltd. free of any cost. Before execution of this Collaboration Agreement, Span had already obtained permission from Town and Country Planning Department of Haryana for change of land used for development of the commercial building on the aforesaid land after paying a sum of Rs.46,32,031/- on account of conversion charges, Rs.27,34,375/- on account of additional conversion charges, Rs.64,47,656/- on account of external charges and Rs.11,76,875/- on account of internal development charges. This Collaboration Aagreement dated 15.07.2002 was terminated mutually vide letter dated 13.08.2002 from Span International Pvt. Ltd. to Sh. Ajay Chaudhary and Smt. Savita Chaudhary.

4. A Collaboration Agreement dated 28.08.2002 was then executed between Span Properties Pvt. Ltd. and JMD Promoters Private Limited, through its Managing Director Shri Sunil Bedi. Under this MoU, JMD Promoters Private Limited agreed to construct a building having approximately 54,000 square feet of FAR on the land belonging to Span Properties Private Limited. The building

which JMD Promoters Private Limited had to construct on the land of Span Properties Private Limited was to be a centrally air conditioned multi-storey commercial building. A sum of Rs 2.50 crores was paid by JMD Promoters Private Limited to Span Properties Private Limited as a non-refundable security for due purpose of its obligations under the agreement and as part consideration. On completion of the project, 25% of the entire built up area of the building (13500 square feet) and basement with proportionate ownership rights in the land underneath was to come to the share of Span Properties Private Limited and simultaneously the amount of Rs 2.50 crores which it had received from JMD Promoters Private Limited as security was to be adjusted towards consideration. Thus under this agreement, JMD Promoters Private Limited was to pay Rs 2.5 crores and 25% of the built up area of the proposed air conditioned commercial building to Span Properties Private Limited.

5. An agreement dated 30.11.2002 was then executed between Shri Prem Shanker Khandelwal, Shri Niraj Khandelwal, Shri Karan Khandelwal and Shri Niraj Khandelwal (HUF) on the one hand and Shri Sunil Bedi, Managing Director of JMD Promoters Private Limited on the other. Under this agreement Khandelwals agreed to transfer entire share holding in Span Properties Private Limited consisting of 216200 fully paid up equity shares to Shri Sunil Bedi for a total sale consideration of Rs 2.50 crores. Pursuant to the aforesaid agreement, the

entire share holding of Khandelwals in Span Properties Private Limited was transferred to Shri Sunil Bedi.

6. Vide assessment order dated 13.03.2006, the Assessing Officer of Shri Karan Khandelwal held that the total worth of Span Properties Private Limited was Rs 6.35 crore, whereas Shri Sunil Bedi and Shri Pinki Bedi had paid Rs 5 crore, including loan liabilities of Span Properties Private Limited. He added Rs 60 lakh to the aforesaid amount of Rs 5 crore on account of brokerage and commission. The Assessing Officer was of the view that difference of Rs 75 lakh was nothing, but the amount paid by Shri Sunil Bedi for acquiring Span Properties Private Limited and that amount had not been recorded in the account books. He accordingly made addition of Rs 74,58,375/- to the income declared by Shri Karan Khandelwal in his return and also initiated penalty proceedings against him.

Vide assessment order dated 31.03.2005, the Assessing Officer of Shri Sunil Bedi took an identical view and made an addition of Rs 75 lakh to the income declared by Shri Sunil Bedi on the ground that the aforesaid amount represented the cash consideration paid to Khandelwas which had not been recorded in the books of account.

Appeals were filed by Shri Sunil Bedi as well as by Shri Karan Khandelwal against the orders passed by their respective Assessing Officers. Both the appeals

were allowed by CIT (Appeals). The orders passed by CIT (Appeals) were challenged by revenue before the Tribunal. The appeals filed by the revenue were, however, dismissed.

7. In these appeals, the following substantial question of law arises for our consideration:-

> "Whether in the facts and circumstances of the case the ITAT was correct in law in holding that the Assessing Officer was not justified in making the addition of Rs 75 lakhs being the difference between the apparent consideration and the real value of the assets of M/s Span Properties (P) Ltd.?"

8. It is an admitted position that vide MoU dated 22.03.2000, Fashion Flair International Private Limited had agreed to purchase land in question from Prem Shanker Khandelwal (HUF). The same consideration was maintained in the MoU dated 19.12.2000, the only difference being that under the first MoU, it was the land which was to be transferred to Fashion Flair International Private Limited, whereas under the second MoU, the entire share holding of Span Properties Private Limited was to be transferred by Shri Prem Shanker Khandelwal, Niraj Khandelwal and their heirs to Fashion Flair International Private Limited, after grant of permission by Government of Haryana for construction of a commercial building on the aforesaid land. Under these MoUs, the licence as well as external

development charges, etc. payable to the authorities, while obtaining permission/licence to construct a commercial building on the aforesaid land were to be borne by the seller. Thus, in the event of permission being granted by the concerned authorities for construction of a commercial building on the aforesaid land, the net amount payable to Khandelwals/Span Properties Private Limited would be Rs 6.35 crore minus the charges paid to the concerned authorities while obtaining permission for construction of a commercial building on the aforesaid land.

9. It is not in dispute that the requisite approvals, including charge of land use and licence for construction of a commercial building on land in question had been obtained and conversion charges, additional conversion charges, external development charges and external development charges had been paid by Span Properties Private Limited before it entered into the Collaboration Agreement dated 28.08.2002 with JMD Promoters Private Limited. The relevant clauses of the said agreement read as under:-

> "AND WHEREAS the Owners had applied to the Town & Country Planning Department of State of Haryana, vide its letter dated 31.12.2001, agreed to change of land use for development of Commercial Building on the said Plot subject to the fulfillment of the conditions mentioned therein and thereafter the CLU (bearing No. G-1313-8DP-2002/2424 dated 8.2.2002 with the validity up to 8.02.2004)

was granted to the Owners on the terms mentioned in the CLU/Licence and in the Annexures thereto on receipt of Rs 46,32,031/- on account of conversion charges, Rs 27,34,375/- on account of additional conversion charges, sum of Rs 64,47,656/- on account of external development charges and Rs 11,76,875/- on account of internal development charges. All enhancement in the aforesaid charges shall be borne by the Owners till the occupation/completion certificate.

AND WHEREAS the owners have also entered into an Agreement on 30.01.2002 in Form CLU-II (under rule 26(d) of Rules framed under the Punjab Scheduled Roads and Controlled Areas Restriction of Unregulated Development Act, 1963) with the Governor of State of Haryana, with regard to the development of a commercial Building on the said plot and payment of development and other charges and compliance of the other conditions of the CLU/licence.

10. The value of land in question, after change of land use so as to enable construction of a commercial building and payment of conversion charges, development charges, etc., was agreed by Kandelwals/Span Properties Private Limited and Fashion Flair International Private Limited at Rs 6.35 crore, vide MoUs dated 22.03.2000 and 19.12.2000. It can therefore be safely taken that the value was not less than Rs 6.35 crore on 15.07.2002 when the Collaboration Agreement was executed been Span Properties Private Limited and JMD Promoters Private Limited and on 30.11.2002, when the agreement for sale of share holding was executed between Khandelwal and Sunil Bedi, unless it is shown

that on account of reasons such as slump in the market or the permissible coverage/FAR being reduced or the land use having been changed from commercial to some other purpose, or some other reason, there was erosion in the market value of the land between 22.03.2000/19.12.2000 and 28.08.2002/30.11.2002. We find that this was not the case of the assessee either before the Assessing Officer or before the CIT (Appeals) or before the Tribunal that on account of slump in the market, the value of land in the locality had gone down between December, 2000 and November, 2002. No such plea has been taken even before us. It was, however, contended by the learned counsel for the assessees that at the time MoUs were executed on 22.03.2000 and 19.12.2000, the parties were under an impression that the permissible FAR on the land in question was 2, whereas Haryana Government permitted only 1.5 FAR while changing land use and accorded necessary approvals and that is why the market value of the property had gone down on account of permissible built up area having been substantially reduced. We have carefully perused the MoU dated 22.03.2000 as well as the MoU dated 19.12.2000. There is absolutely no mention in either of these MoUs from which it may be inferred that the parties believed that the permissible FAR at the time these MoUs were executed was 2. Admittedly, no attempt was made by the assessees to lead evidence before the Assessing Officer to prove that the permissible FAR at the time of execution of MoUs was 2. If the

permissible FAR on land in question at the time of execution of the MoUs, was 2, it could have been easily proved by the assessee before the Assessing Officer, by filing the relevant building bye-laws or summoning an official from the office of concerned Authorities in Haryana. Since neither the MoU gives any indication that the FAR in contemplation of the parties at the time of execution of these documents was 2 nor has any evidence been produced to this effect, we are unable to accept the plea that at the time MoUs were executed, the parties were under an impression that permissible FAR on land in question was 2. No other ground has been taken by the assessees to explain the alleged erosion in the market value between December, 2000 and November, 2002. We, therefore, are of the view that the Assessing Officer was justified in taking a view that the value of the land in question at the time of sale of the shares of Span Properties Private Limited to Shri Sunil Bedi was Rs 6.35 crore.

11. It is true that the transaction which ultimately materialized in this case was of transfer of the entire share holding of Span Properties Private Limited to Shri Sunil Bedi and not of sale of land in question to him. However, it is an undisputed fact that Span Properties Private Limited was not engaged in any other business activity at the relevant time and had no other asset. This is also evident from the balance sheet of the company which is available on record. Since the entire share holding of Khandelwas in Span Properties Private Limited was transferred to Shri

Sunil Bedi, he, on account of his ownership of the entire share holding of Span Properties Private Limited, also acquired ownership of the land in question. Hence, it would be difficult for us to accept that the value of the entire share holdings of Khandelwas in Span Properties Private Limited could have been less than Rs 6.35 crore minus the liabilities of the company. In fact, the MoU dated 19.12.2000 envisaged transfer of the entire share holding of Span Properties Private Limited to Fashion Flair International Private Limited, after grant of requisite permission to Span Properties Private Limited for construction of a commercial building on land in question. The relevant clauses of the MoU dated 19.12.2000 read as under:-

> AND WHEREAS, the FIRST PARTY had undertaken to obtain approval/sanction/permit/ licence to use the abovementioned land for construction of building from the concerned Authorities of the Government of Haryana
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> AND WHEREAS, the Government of Haryana has not yet granted requisite permission to the FIRST PARTY for the construction of commercial building on the aforesaid land and a revised application for construction of Departmental Store with the facility of Shops, Restaurants and Officers had been filed duly signed by the FIRST PARTY as described by the SECOND PARTY.
>
> AND WHEREAS, the parties have now mutually agreed as under:-

That the time of performance of the original understanding dated 22nd March, 2000 stands extended up to 31st March, 2001.

That the above said land BEARING KHASRA Nos. 374 (0-18 BISWAS) AND KHASRA No. 375 (0-17 BISWAS), situated on main Mehrauli-Gurgaon Road in the Revenue Estate of Village Sikandarpur Ghosi, Tehsil & District Gurgaon, Haryana has not been transferred by the FIRST PARTY in favour of any other person and shall not be transferred from the name of M/s Span Properties Pvt. Limited, 12 Jamuna Road, Civil Lines, Delhi-110 054 till 31st March, 2001 in any manner whatsoever.

If requisite permission as applied by the FIRST PARTY to the concerned Authority of the Government of Haryana is granted to the FIRST PARTY then the entire share holding of Ms Span Properties Pvt. Ltd. 12 Jamuna Road, Civil Lines, Delhi-110 054, shall be transferred by Shri Prem Shanker Khandelwa, Shri Niraj Khandelwal and their heirs to the SECOND PARTY in terms and conditions of the Memorandum of Understanding dated 22nd March, 2000 and the parties shall religiously comply with all the terms and conditions as recorded in the Memorandum of Understanding dated 22nd March, 2000."

If the entire share holding of Span Properties Private Limited on 19.12.2000, after grant of requisite permissions to Span Properties Private Limited for construction of a commercial building on land in question, was valued at Rs 6.35 crore on 19.12.2000, the Assessing Officer was justified in taking the same to be the true consideration for sale of this same share holding to Shri Sunil Bedi in November, 2002, unless it can be shown that on account of factors such as erosion

in the value of the assets of the company, the market value of its shares also had gone down during this period. But, that has not been shown to be the position in the case before us.

12. There can be no dispute with the proposition of law that if the Assessing Officer disputes the valuation discussed by the assessee, the onus is on the revenue to prove that the ostensible consideration disclosed by the assessee was not the true consideration and, therefore, there would be a presumption of correctness of the consideration disclosed in the agreement dated 30.11.2002 between Khandelwas and Shri Sunil Bedi. But, if the revenue is able to show from the material available to the Assessing Officer that actual consideration was more than the ostensible consideration disclosed by the assessee, the presumption stands duly displaced and the Assessing Officer would be justified in taking a view that the difference between the ostensible consideration and the real consideration reflected the amount which was paid by the purchaser to the seller, but was not reflected in the account books of the parties

13. During the course of arguments before us the learned counsel for the Assessee referred to the decisions of the Supreme Court in ***K.P. Varghese v. Income Tax Officer, Ernakulam And Anr.*** **(1981) 4 SCC 173** and ***Commissioner of Income Tax, Salem v. P.V. Kalyanasundaram*** **(2007) 10 SCC 487** and the

decisions of this Court in ***Commissioner of Income Tax Central-III v. Suneet Verma*** **145 (2007) DLT 280 (DB)**, ***Commissioner of Income Tax XI v. Shri Puneet Sabharwal*** **291 338 ITR 485 (Delhi)** and ***Commissioner of Income Tax v. Naresh Khattar*** **(2003) 261 ITR 664 (Delhi).**

14. In **K.P. Varghese** *(supra*), the assessee sold a house which he had purchased in 1958 to his daughter in law and five of his children, for the same consideration, in the year 1965. The Assessing Officer sought to reopen the assessment invoking the provisions of Section 52(2) of Income Tax Act and proposing to fix the market value of their house in the year 1965 at Rs.65,000/- and assess the difference of Rs.48,500/- as capital gains in the hands of the assessee, the action of the Assessing Officer was challenged by the assessee by way of a writ petition, which was allowed by a learned Single Judge of the High Court. The Full Bench of the High Court, however, set aside the decision of the learned single judge and concurred with the Assessing Officer.

The principal question which arouse for determination by the Supreme Court turned on the true interpretation of Section 52(2) of the Act which provided that if in the opinion of the Assessing Officer, the fair market value of a capital asset transferred by the assessee, as on the date of the transfer, exceeded the full value of the consideration declared by him, by an amount of not less than 15% of the value

declared, the full value of the consideration for such market asset shall be taken to be its fair market value on the date of the transfer.

The argument of the revenue was that the only condition for attracting the applicability of sub-Section 2 of Section 52 was that the fair market value of the capital asset transferred by the assessee as on the date of transfer should exceed the full value of the consideration declared by the assessee by an amount not less than 15% of the declared value.

Rejecting the contentions, the Supreme Court inter-alia observed as under:-

> "There are many situations where the construction suggested on behalf of the Revenue would lead to a wholly unreasonable result which could never have been intended by the legislature. Take, for example, a case where A agrees to sell his property to B for a certain price and before the sale is completed pursuant to the agreement and it is quite well-known that sometimes the completion of the sale may take place even a couple of years after the date of the agreement-the market price shoots up with the result that the market price prevailing on the date of the sale exceeds the agreed price at which the property is sold by more than 15% of such agreed price. This is not at all an uncommon case in an economy of rising prices and in fact we would find in a large number of cases where the sale is completed more than a year or two after the date of the agreement that the market price prevailing on the date of the sale is very much more than the price at which the property is sold under the agreement. Can it be contended with any degree of fairness and justice that in such cases, where there is clearly no understatement of

consideration in respect of the transfer and the transaction is perfectly honest and bonafide and, in fact, in fulfilment of a contractual obligation, the assessee who has sold the property should be liable to pay tax on capital gains which have not accrued or arisen to him. It would indeed be most harsh and inequitable to tax the assessee on income which has neither arisen to him nor is received by him, merely because he has carried out the contractual obligation under-taken by him. It is difficult to conceive of any rational reason why the legislature should have thought it fit to impose liability to tax on an assessee who is bound by law to carry out his contractual obligation to sell the property at the agreed price and honestly carries out such contractual obligation. It would indeed be strange if obedience to the law should attract the levy of tax on income which has neither arisen to the assessee nor has been received by him. If we may take another illustration, let us consider a case where A sells his property to B with a stipulation that after some-time which may be a couple of years or more, he shall resell the property to A for the same price could it be contended in such a case that when B transfers the property to A for the same price at which he originally purchased it, he should be liable to pay tax on the basis as if he has received the market value of the property as on the date of resale, if, in the meanwhile, the market price has shot up and exceeds the agreed price by more than 15%. Many other similar situations can be contemplated where it would be absurd and unreasonable to apply Section 52 Sub-section (2) according to its strict literal construction. We must therefore eschew literalness in the interpretation of Section 52 Sub-section (2) and try to arrive at an interpretation which avoids this absurdity and mischief and makes the provision rational and sensible, unless of course, our hands are tied and

we cannot find any escape from the tyranny of the literal interpretation

But the scope of Sub-section (1) of Section 52 is extremely restricted because it applies only where the transferee is a person directly or indirectly connected with the assessee and the object of the under-statement is to avoid or reduce the income-tax liability of the assessee to tax on capital gains. There may be cases where the consideration for the transfer is shown at a lesser figure than that actually received by the assessee but the transferee is not a person directly or indirectly connected with the assessee or the object of under-statement of the consideration is unconnected with tax on capital gains. Such cases would not be within the reach of Sub-section (1) and the aseessee, though dishonest, would escape the rigour of the provision enacted in that sub-section. Parliament therefore enacted Sub-section (2) with a view to extending the coverage of the provision in Sub-section (1) to other cases of understatement of consideration.

Thus it is not enough to attract the applicability of Sub-section (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 under-stated or in other words, shown at a lesser figure than that actually received by the assessee. Sub-section (2) has no application in case of an honest and bonafide 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-section (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 under-stated 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-section (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 exceeds by 15% or more the full value of the consideration declared in respect of the transfer and the first condition is therefore satisfied. The Revenue must go further and prove that the second condition is also 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 bonafide transaction and there may be no under-statement of the consideration. The fulfilment of the second condition has therefore to be established independently of the first condition and merely because the first condition is satisfied, no inference can necessarily follow that the second condition is also fulfilled. Each condition has got to be viewed and established independently before Sub-section (2) can be invoked and the burden of doing so is clearly on the Revenue. It is a well settled rule of

> law that the onus of establishing that the conditions of taxability are fulfilled is always on the Revenue and the second condition being as much a condition of taxability as the first, the burden lies on the Revenue to show that there is understatement of the consideration and the second condition is fulfilled. Moreover, to throw the burden of showing that there is no understatement of the consideration, on the assessee would be to cast an almost impossible burden upon him to establish the negative, namely, that he did not receive any consideration beyond that declared by him."

In para 18 of the judgment, the Supreme Court inter-alia held as under:-

> "We must therefore hold that Sub-section (2) of Section 52 can be invoked only where the consideration for the transfer has been understated by the assessee or in other words, the consideration actually received by the assessee is more than what is declared or disclosed by him and the burden of proving such under-statement or concealment is on the Revenue. This burden may be discharged by the Revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has not correctly declared or disclosed the consideration received by him and there is understatement or concealment of the consideration in respect of the transfer. Sub-section (2) has no application in case of an honest and bonafide transaction where the consideration received by the assessee has been correctly declared or disclosed by him, and there is no concealment or suppression of the consideration." (emphasis supplied)

Section 52 of the Act, which came up for consideration before the Supreme Court in the aforesaid case has since been omitted w.e.f. 1.04.1988. More

importantly, in the case before us, the burden which was placed on the revenue stands duly discharged from the consideration disclosed in the admitted documents viz. the Memoranda of Understanding dated 22.03.2000 and 19.12.2000, which are the documents filed by none other than the assessee. From the consideration disclosed in these documents, coupled with other facts and circumstances of the case, it can be safely inferred that the actual value of shareholding transferred by Khandelwals to Shri Sunil Bedi was not less than what is assessed by the AO and the assessees had not disclosed the actual consideration in their income returns and understated/concealed the actual consideration paid by Mr. Sunil Bedi to Khandelwals.

In **Sumeet Verma** *(Supra),* certain loose papers and documents were recovered during the course of his search. The Assessing Officer was of the view that those documents showed that some amount had been paid towards purchase of a property in Greater Kailash, over and above the amount disclosed in the conveyance deed. The Assessing Officer, therefore, held that there was an unexplained investment to the tune of Rs.41,50,000/-. The assessment order was however set aside by CIT (Appeals) and his order was maintained by the Tribunal. Considering the appeal filed by the revenue, it was noted by this Court that the revenue did not examine the father of the assessee with respect to contents of the documents which admittedly were in his handwriting, the mother of the assessee

had denied having paid any amount to the seller, over and above the disclosed amount, some flat owners who had purchased the properties in the same building had disclosed more or less the same price and even the sellers who were examined had denied having received any consideration over and above the amount disclosed in the conveyance deed. In these circumstances, this Court was of the view that the view taken by CIT (Appeals) and the Tribunals were unexceptionable.

In **Naresh Khatter** *(Supra),* it was noticed by this Court that the only basis for making the addition to the income of the assessee was the submission of the learned senior advocate in Civil Court with respect to the investment made by the assessee and, therefore, the only question for consideration before this Court was as to whether the Tribunal was justified in taking a view that mere statement of counsel was not conclusive of the matter. It was held by this Court that the Tribunal was correct in holding that merely because counsel for the assessee had made a statement in the Civil Court that the total investment in the property was Rs.13 crores it cannot be said that there was sufficient material to come to the conclusion that the said figure represented the actual investment. This Court was of the view that there has to be something more that considering the legal proposition, that burden was on the revenue to prove that the real investment exceeded the investment shown in the books of accounts of the assessee. In taking

this view, this Court relied upon the decision of the Supreme Court in **K.P. Varghese** *(supra)*.

In ***Puneet Sabharwal*** (supra), the Assessing Officer suspected that the cost of acquisition of three properties purchased by the assessee was more than the consideration disclosed by him. He, therefore, referred the matter to the Valuation Cell for determining the cost of this property on the date of acquisition. The District Valuation Officer reported a valuation higher by Rs.12.54 lakh. That amount was added by the Assessment Officer to the income of the assessee. The appeal filed by the assessee was allowed by the CIT (Appeals) and his order was maintained by the Tribunal. Rejecting the appeal filed by the Revenue, this Court, inter alia, held as under:

> As far as the question No. 2 is concerned, as already indicated above, the Assessing Officer solely relied upon the report of the DVO. Apart from this, there was admittedly no evidence or material in his possession to come to the conclusion that the Assessee had paid extra consideration over and above what was stated in the sale deed. This very issue has come up for consideration before this Court repeatedly and after following the judgment of the Supreme Court in the case of K.P. Varghese (supra), the aforesaid proposition of law is reiterated time and again. For our benefit, we may refer to the latest judgment of this Court in the case of CTT v. Smt. Suraj Devi 328 ITR 604, wherein this Court had held that the primary burden of proof to prove understatement or concealment of income is on the Revenue and it

> is only when such burden is discharged that it would be permissible to reply upon the valuation given by the DVO. It was also held that the opinion of the Valuation Officer, per se, was not an information and could not be relied upon without the books of accounts being rejected which had not been done in that case.
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> 9. The aforesaid principle of law has been reaffirmed in CTT v. Naveen Gera 328 ITR 516stating that opinion of the District Valuation Officer per se was not sufficient and other corroborated evidence is required. Mr. Maratha, learned Counsel appearing for the Revenue submitted that the judgment of the Supreme Court in K.P. Varghese (supra) has been explained by the Rajasthan High Court in the case of. Smt. Amar Kumari Surana v. Commissioner of Income Tax : [1997] 226 ITR 344 (Raj.).

In ***P.V. Kalyanasundaram*** (supra) the assessee purchased certain land for a sum of Rs.4.10 lakh. During a search, certain notes on loose sheets, allegedly in the hands of the assessee were found and seized. The department recorded the statement of the vendor who confirmed that he had in fact received a total sum of Rs.34.85 lakh, Rs.4.10 lakh by way of a Demand Draft and the balance in cash. The vendor later retracted from his statement and filed an affidavit deposing that the sale price was Rs.4.10 lakh only and the statements given earlier were incorrect. In a subsequent statement, he again reverted to the earlier position and deposed that the sale price was Rs.34.85 lakh. The Assessing Officer adopted the enhanced figure and made an addition to the income of the assessee. The appeal

filed by the assessee was however allowed by the CIT (Appeals). Noticing that the floor price fixed by the Authorities was much lower, the order of CIT (Appeal) was maintained holding that the fact as to the actual sale price of the property, the implication of the contradictory statements made by the vendor or whether reliance could be placed on the loose sheets recovered in the search were questions of fact. The appeal filed by the Revenue was dismissed.

The learned Counsel for Mr. Sunil Bedi has also relied upon ***CIT v. Ved Prakash Choudhary*** **[2008] 305 ITR 245 (Del),** ***CIT v. Prem Nath Nagpal*** **214 CTR 51 (Del)** ***CIT v. Shakuntala Devi*** **[2009] 316 ITR 46 (Del)** ***CIT v. Naveen Gera*** **[2010] 328 ITR 516 (Del)** ***CIT v. Kishan Kumar and Others*** **[2009] 315 ITR 204 (Raj.) and** ***CIT v. Dr. S.Bharti*** **[2002] 254 ITR 261 (Del).**

In **Ved Prakash** (supra) during the course of search at the residence of respondent two MoUs were recovered. The assessee admitted signatures on those MoUs but denied having received the amount mentioned in the documents. The Assessing Officer held that denial by the Assessee was only with a view to escape the payment of tax liabilities and accordingly made an addition of Rs.50 lakh. The Tribunal was of the view that though in view of Section 132(4A) of the Act, there was a presumption of correctness the contents of MoU, the presumption being rebuttable and the assessee having successfully rebutted the same, the addition was not justified. Dismissing the appeal filed by the Revenue it was held by the Court

that it was not obligatory on the Assessing Officer to make a presumption and even if the presumption was required to be made, the same was rebuttable. Noticing that the assessee had denied the transfer of any money by him to the sellers and the sellers had also denied receipt of any money from him, this Court was of the view that in these circumstances, there ought to have been corroborative evidence to show that there was in fact such a transfer of money.

In **Naveen Gera** *(supra)* the matter regarding valuation of the properties purchased by the assessee was referred to the District Valuation Officer. Based upon the Valuation Report, an addition was made by the Assessing Officer to the income of the Assessee. The addition was, however, deleted by CIT (Appeal) and the order passed by him was maintained by the Tribunal. Dismissing the appeal filed by the Revenue, this Court accepted the contention that in absence of any incriminating evidence that anything had been paid over and above than the stated amount, the primary burden was on the Revenue to show that there had been an understatement or concealment of income and it is only when such burden has been discharged, would it be permissible to rely upon the valuation given by the District Valuation Officer.

In Prem **Nath Nagpal** (supra), the assessee claimed to have acquired property in question for a consideration of Rs.18.5 lakh and spent Rs.29,29,162/- on its development. The District Valuation Officer however, valued the property at

Rs.3,04,62,000/-. Based upon the valuation report, the Assessing Officer made an addition of Rs. 1,87,33,000/- in respect of understatement of the cost of acquisition and additions of Rs.51,44,838/- in respect of understatement of expenditure on its development. The addition was however deleted by CIT (Appeal) and the appeal filed by the Revenue was dismissed by the Tribunal. Noticing that during search only ownership of the property had been seized and no incriminating document had been found, which could show that there was understatement of the purchase consideration or the cost of improvement, this Court found no basis for addition to be made to the income of the assessee.

In **Shakuntala Devi** (supra) the assessee had sold two plots of land. During the course of a search, certain documents related to sale and purchase of the property were found with him. The Assessing Officer made an addition on account of different between the valuation declared by the assessee and the valuation carried out at his behest. Another addition was made on account of unexplained deposits in the bank account of the assessee. With respect to addition pertaining to valuation of the properties, this Court noted that the Tribunal had discussed the valuation and accepted the valuation given by the assessee. It had also noted that the departments had failed to collect any information or material to show that any consideration over and above the stated sale consideration had changed hands. Taking note of the legal proposition that the onus to prove that the assessee had

received more consideration than what was stated in the documents of transfer rested on the Revenue and that burden had not been discharged. The appeal filed by the Revenue was dismissed.

In **Krishna Kumar** (supra), it was held that it is for the department to lead positive evidence to show the fair market value of the property and establish that the property was undervalued in the documents of sale. Noticing that there was no document except Stamp Valuation Authority rates it was held that the rates of Stamp Valuation Authority by itself could not be taken as the price at which the property was purchased.

The decision in **Dr. S.Bharti** does not deal with the issue arising before us and therefore is not applicable.

15. The proposition of law, which emerges from these decisions, including ***K.P. Varghese*** *(supra),* is that if the Assessing Officer disputes the valuation of a property, disclosed by the assessee, the onus is on the Revenue to prove that the sale consideration disclosed in the sale documents has been understated and in fact the assesse had received an amount higher than the amount disclosed by him. In other words, it is for the Revenue to establish that the actual consideration received by the assessee from the sale of the property was higher than the ostensible consideration. However, this onus, placed on the Revenue, need not necessarily be discharged by producing direct evidence of the assessee having received more than

the consideration disclosed in the sale documents. We appreciate the contention of the Revenue that the Assessing Officer may not always be in a position to produce direct evidence to this effect. In our view, the onus placed upon the Revenue can be discharged by establishing facts and circumstances, from which it can be reasonably inferred that the ostensible consideration was not the real consideration, and that the assessee had, in fact, received an amount higher than the amount disclosed by him in the sale documents, and consequently there was understatement or concealment of the consideration. This is also the view taken by Supreme Court in ***K.P. Varghese*** *(supra)*. Whether the onus placed upon the assessee has been discharged or not in a given case, would depend on the facts and circumstances of each case.

16. In the case of Karan Khandelwal, the Tribunal while dismissing the appeal filed by the Revenue observed as under:

> We have carefully considered relevant facts, arguments advanced. The assessee herein have sold capital assets being shared held by them in M/s Span Properties P. Ltd.. the consideration flowing to the assessee from the transfer of share is only Rs.250 lakh. There is no material to hold that over and above the sated consideration, the assessee has received something more. Thus, irrespective of the value of the property owned by M/s Span Properties P. Ltd. no sum over and above the state consideration was received by the assessee. The capital gain is computed as per provisions of Section 48 of the Act. Under Section 48, the income chargeable is to be computed by deducting from the full value of

consideration received or accruing as a result of transfer of the capital assets, the cost of acquisition of the assets transferred, the cost of any improvement thereto and the expenditure incurred in connection with such transfer. There is no provision in Section 48 to replace the "full value of consideration received or accruing with "the fair market value of such capital assets". We accordingly hold that since the assessee has not received anything over and above the stated consideration, the fair market value cannot be replaced for computing capital gain. Accordingly, the order of learned CIT (A) needs no interference.

In the case of Sunil Bedi, the Tribunal took the following view:

> We have perused the records and considered the matter carefully. The addition in this case has been made taking the market value of the property as per original MoU signed with Fashion Fair International Pvt. Ltd. for a sum of Rs.6.35 crore. The director of the said concern, had been examined and explained that the MoU was not executed as the company could not get the plot converted into commercial use. In any case, market value cannot be arrived only on the basis of MoU till the same is implemented. The cost of the land along with conversion charges as on 31.3.2012, was Rs.1,71,50,937/-. The assessee had purchased the same for a total consideration of Rs.5.60 crore. Even the valuation report cannot give the exact market value as there could always be difference of 10-15% in making the estimate by the valuer. In this case, the difference is about 50%. Moreover, the claim of the assessee that he had helped the seller in getting the plot converted into commercial use, has not been controverted by the revenue and, therefore comparatively lower sale value could be expected in case of the assessee. Under the circumstances, unless there is material to establish that the assessee had paid any consideration, over and above

> the consideration mentioned in the agreement, addition would not be justified. We see no infirmity in the order of CIT (A), deleting the addition and the same is, therefore, upheld.

17. It would thus be seen that the Tribunal failed to give due consideration to the fact that in the MoU dated 23.2.2000 as well as in the MoU dated 19.12.2000, the consideration agreed between the parties was Rs.6.35 crore, subject to the seller obtaining requisite clearances for construction of a commercial building on the land in question and that by the time agreement dated 30.11.2002 was executed between Khandelwals and Shri Sunil Bedi, all the requisite clearances, including change of land use, had been duly obtained by the seller, at its own cost, without any contribution from the purchaser. The Tribunal also failed to take note of the fact that vide MoU dated 19.12.2000 M/s Fashion Flair International Private Limited had agreed to pay Rs.6.35 crore to M/s Span Properties Private Limited for purchase of its entire shareholding subject, of course, to the M/s Span Properties Private Limited obtaining necessary approval for construction of a commercial building on the land in question, and that there was no material produced by the assessee to indicate that the market value of the land had gone down between December, 2000 and November, 2002. The Tribunal failed to take note of the fact that the burden which was placed upon the Revenue to show that there was an understatement of the sale consideration stood discharged from the admitted facts

and circumstances of the case including the terms and conditions of the MoUs dated 22.03.2000 and 19.12.2000. In these circumstances, the finding of the Tribunal that no sum over and above the stated consideration was received by Shri Sunil Bedi is clearly perverse since on considering the facts and circumstances above, no reasonable person could have returned such a finding.

18. We note from the order passed by the Assessing Officer that he has added the liability of 1,71,50,937/- as shown in the books on account of M/s Span Properties Private Limited to the apparent consideration of Rs.2.5 crore which Mr. Sunil Bedi claims to have paid to Khandelwals. The assessees do not claim that the liabilities of the company were higher than this amount. The Assessing Officer has further given benefit of Rs.60 lac to the assessee on account of liability towards brokerage of commission. We notice from a perusal of the Collaboration Agreement dated 28.8.2002 between M/s Span Properties Private Limited and M/s JMD Promoters Private Limited and the agreement dated 30.11.2002 between Khandelwals and Shri Sunil Bedi that there is no indication in these documents that the deal was struck through any property dealer/broker. There is no indication of any commission or brokerage in these documents. Even otherwise, it is quite unusual that a brokerage of Rs.60 lacs would be payable on a sale consideration of Rs.2.5 crore or even Rs.5 crore. We however would like to leave the matter at that,

without further deliberating on this aspect, since this is not an issue involved in the appeals before us.

19. For the reasons stated hereinabove, we answer the question in favour of the Revenue and against the assessee by holding that the Assessing Officer was justified in making the addition of Rs.75 lac, being the difference between the apparent consideration and real value of the assets of M/s Span Properties Private Limited.

The appeals are allowed. No order as to costs.

V.K.JAIN, J

BADAR DURREZ AHMED, J

APRIL 23, 2012
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