K.P. VARGHESE

v.

THE INCOME-TAX OFFICER, ERNAKULAM, AND ANOTHER B

September 4, 1981

[P.N. BHAGWATI AND E.S. VENKATARAMIAH, JJ.]

Capital gains—Whether understatement of consideration in a transfer of property is a necessary condition for attracting the applicability of sub-section (2) of section 52 of the Income Tax Act, 1961—Burden of proof of such understatement is on the Revenue—Interpretation of statutes, explained, C

The appellant assessee sold his house in Ernakulam on 25th of December, 1965 to his daughter-in-law and five of his children for the same price of Rs. 16,500 at which he purchased in the year 1958. The assessment of the D assessee for the assessment year 1966-67 for which the relevant accounting year was the calendar year 1965 was thereafter completed in the normal course and in this assessment, no amount was included by way of capital gains in respect of the transfer of the house, since the house was sold by the assessee at the same price at which it was purchased and no capital gains accrued or arose to him as a result of the transfer. On 4th April 1968, however, the Income Tax Officer issued a notice under section 148 of the Act seeking to reopen the assessment of the E assessee for the assessment year 1966-67 and requiring the assessee to submit a return of income within thirty days of the service of the notice, without stating what was the income alleged to have escaped assessment. However, by his subsequent letter dated 4th March, 1969, the Income Tax Officer stated that he proposed to fix the fair market value of the house sold by the assessee at Rs, 65,000 as against the consideration of Rs. 16,500 for which the house was sold and assess the difference of Rs. 48,500 as capital gains in the hands of F the assessee. The objections raised by the assessee were overruled and an order of re-assessment was passed by the Income Tax Officer including the sum of Rs. 48,500 as capital gains and bringing it to tax under sub-section (2) of section 52, taking the view that this sub-section did not require as a condition precedent that there should be under statement of consideration in respect of the transfer and it was enough to attract the applicability of the sub-section if the fair market value of the property as on the date of the transfer exceeded the full value of G the consideration declared by the assessee by an amount of not less than 15% of the value so declared. The assessee thereupon filed a writ petition in Kerala High Court challenging the validity of the order of re-assessment insofar as it brought a sum of Rs. 48,500 to tax relying on sub-section (2) of section 52 of the the Income Tax Act, 1961. The writ petition was allowed, but in appeal the Full Bench by a majority judgment agreed with the views of the Income Tax H Officer and dismissed the writ petition. Hence the assessee's appeal by certificate.

A Allowing the appeal, the Court

HELD : 1 : 1. Sub-section (2) of section 52 of the Income Tax Act, 1961
can be invoked only where the consideration for the transfer has been under-
stated by the assessee or in other words, the consideration actually received by
the assessee is more than what is declared or disclosed by him. Sub-section (2)
B has no application in case of an honest and bonafide transaction where the consi-
deration received by the assessee has been correctly declared or disclosed by him
and there is no concealment or suppression of the consideration. [657 B, C-D]

1 : 2. The burden of proving an understatement or concealment is on the
Revenue, which may be discharged by it 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
C understatement or concealment of the consideration in respect of the transfer.
[657 B-C]

1 : 3. Sub-section (2), in the instant case, had no application and the
Income Tax Officer could have no reason to believe that any part of the income
of the assessee had escaped assessment so as to justify the issue of a notice under
D section 148. It was a common ground between the parties and that was a
finding of fact reached by the Revenue Authorities that the transfer of the pro-
perty by the assessee was a perfectly honest and bonafide transaction where the
full value of the consideration received by the assessee was correctly disclosed at
the figure of Rs. 16,500. The order of re-assessment made by the Income Tax
Officer pursuant to the notice issued under section 148 was accordingly without
jurisdiction. [657 D-G]

E

2 : 1. The task of interpretation of the statutory enactment is not a
mechanical task. It is more than mere reading of mathematical formula
because few words possess the precision of mathematical symbols. It is an
attempt to discover the intent of the legislature from the language used by it
and it must always be remembered that language is at best an imperfect instru-
ment for the expression of human thoughts and it would be idle to expect every
F statutory provision to be "drafted with divine prescience and perfect clarity".
Courts, therefore, must eschew literalness in the interpretation of a statutory
provision and construe the language having regard to the object and purpose
which the legislature had in view in enacting that provision and in the context
and the setting in which it occurs. [640 C-D, F-G, 642 B-C]

2 : 2. Where the plain literal interpretation of a statutory provision produ-
G ces a manifestly absurd and unjust result which could never have been intended
by the legislature, the Court may modify the language used by the legislature or
even "do some violence" to it so as to achieve the obvious intention of the legis-
lature and produce a rational construction. The Court may also in such a case
read into the statutory provision a condition which, though not expressed, is
implicit as constituting the basic assumption underlying the statutory provision.
H It is true that the consequences of a suggested construction cannot alter the
meaning of a statutory provision but they can certainly help to fix its meaning.
[641-A 642 C-E]

Luke v. *Revenue Commissioner,* [1963] A.C. 557; *Headan's case* [1584] 3 Co. Rep. 7(a); *In re May Fair Property Company,* LR [1898] 2 Ch. Dn; *Eastman Photographic Material Company* v. *Comptroller-General of Patents, Designs and Trade Marks,* L.R. [1898] A.C. 571, quoted with approval,

2:3. The speeches made by the Members of the Legislature on the floor of the House when a Bill for enacting a statutory provision is being debated are inadmissible for the purpose of interpreting the statutory provision but the speech made by the Mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation is enacted. [654 E-G]

Lok Shikshana Trust v. *Commissioner af Income-Tax,* 101 I.T.R. 234; *Indian Chamber of Commerce* v. *Commissioner of Income-tax,* 101 I.T.R. 796; *Additional Commissioner of Income-tax* v. *Surat Art Silk Cloth Manufacturers Association,* 121 I.T.R. 1, referred to.

2:4. Again it is undoubtedly true that the marginal note to a section cannot be referred to for the purpose of construing the section but it can certainly be relied upon as indicating the drift of the section or to show what the section dealing with. It cannot control the interpretation of the words of a section particularly when the language of the section is clear and unambiguous but, being part of the statute, it *prima facie* furnishes some clue as to the meaning and purpose of the section. [647 A-B]

Bushel v. *Hammond,* [1904] 2 KB 563, quoted with approval.

Bengal Immunity Company Limited v. *State of Bihar,* [1955] 2 SCR 603, referred to.

2:5. The rule of construction by reference to *contemporanea expositio* is a well established rule for interpreting a statute by reference to the exposition it has received from contemporary authority, though it must give way where the language of the statute is plain and unambiguous. [650 B-C]

Baleshwar Bagarti v. *Bhagirathi Dass,* I.L.R. 35 Calcutta 701, approved.

Deshbandhu Gupta and Co. v. *Delhi Stock Exchange Association Ltd.,* [1979] 4 S.C.C. 565, referred to.

2:6. Having regard to the well recognised rule of interpretation, a fair and reasonable construction of section 52 sub-section (2) would be to read into it a condition that it would apply only where the consideration for the transfer is understated or in other words, the assessee has actually received a larger consideration for the transfer than what is declared in the instrument of transfer and it would have no application in case of a bonafide transaction where the full value of the consideration for the transfer is correctly declared by the assessee. [642 E-F]

3. Several considerations which lead to this conclusion are :

(a) The first consideration is the object and purpose of the enactment of section 52(2). The speech made by the Finance Minister while moving the amendment introducing sub-section (2) clearly states what were the circumstances in which such sub-section (2) came to be passed, what was the mischief for which section 52 as it stood then did not provide and which was sought to be remedied by the enactment of sub section (2) and why the enactment of that sub section was found necessary. The object and purpose of sub section (2), as explicated from the speech of the Finance Minister, was not to strike at honest and bonafide transactions where the consideration for the transfer was correctly disclosed by the assessee but to bring within the net of taxation those transactions where the consideration in respect of the transfer was shown at a lesser figure than that actually received by the assessee, so that they do not escape the chargeable tax on capital gain by understatement of the consideration. This was real object and purpose of the enactment of sub section (2) and the interpretation of this sub-section must fall in line with the advancement of that object and purpose. [642 F, 646 B-F]

(b) Further the marginal note to section 52 as it now stands, was originally a marginal note only to what is presently sub-section (1) and significantly enough, this marginal note remained unchanged even after the introduction of sub-section (2)suggesting clearly that it was meant by Parliament to apply to both sub-sections of section 52 and it must therefore be taken as indicating that, like sub-section(1), sub-section (2) is also intended to deal with cases where there is under-statement of the consideration in respect of the transfer. [647 C-D]

(c) The placement of sub-section (2) in section 52 does indicate in some small measure that Parliament intended that sub-section to apply only to cases where the consideration in respect of the transfer is under-stated by the assessee. If Parliament intended sub-section (2) to cover all cases where the condition of 15% difference is satisfied, irrespective of whether there is under-statement of consideration or not, it is reasonable to assume that Parliament would have enacted that provision as a separate section and not pitch-forked it into section 52 with a total stranger under an inappropriate marginal note. Moreover there is inherent evidence in sub-section (2) which suggests that the thrust of that sub-section is directed against cases of under-statement of consideration. The crucial and important words in sub-section (2) are : "the full value of the consideration declared by the assessee". The word 'declared' is very eloquent and revealing. It clearly indicates that the focus of sub-section (2) is on the consideration declared or disclosed by the assessee as distinguished from the consideration actually received by him and it contemplates a case where the consideration received by the assessee in respect of the transfer is not truly declared or disclosed by him but is shown at a different figure. [647 D-G, 648 A-B]

(d) The two circulars issued by the Central Board of Direct Taxes dated 7th July, 1964 and 14th January, 1974 are not only binding on the Tax Department in administering or executing the provision enacted in sub-section (2), but are in the nature of *contemporanea expositio,* furnishing legitimate aid in the construction of sub-section (2). It is clear from these two circulars that the Central Board of Direct Taxes, which is the highest authority entrusted with the execution of the provisions of the Act understood sub-section (2) as limited to cases where the consideration for the transfer has been under-stated by the assessee. These two circulars are legally binding on the Revenue and this legally binding character attaches to the two circulars even if they be found not in accordance with the correct interpretation of sub-section (2) and they depart or deviate from such construction. [650 A, F-G] A

Navnitlal C. Jhaveri v. *K.K. Sen,* 56 I.T.R. SC 198; *Ellerman Lines Ltd.* v. *Commissioner of Income-tax, West Bengal,* 82 I.T.R. 913 (SC), followed. B

4 : 1, 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. 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. [653 F-H, 654 A] C

4 : 2. If the Revenue seeks to bring a case within sub-section (2), it must show not only that the fair market value of the capital asset as on the date of 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 case where the first condition of 15% difference is satisfied, the transaction may be a perfectly honest and *bona-fide* transaction and there may be no 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. D E F

[653 B-F]

4 : 3. The object of imposing the condition of difference of 15% or more between the fair market value of the capital asset and the consideration declared in respect of the transfer clearly is to save the assessee from the rigour of sub-section (2) in marginal cases where difference in subjective valuation by different individuals may result in an apparent disparity between the fair market value and the declared consideration. This condition of 15% or more difference is merely intended to be a safeguard against undue hardship which would be occasioned to the assessee if the inflexible rule of the thumb enacted in sub-section (2) were applied in marginal case and it has nothing to do with the question of burden of proof, for the burden of establishing that there is understatement of the conside- G H

A ration in respect of the transfer always rests on the Revenue. The postulate underlying sub-section (2) is that the difference between one honest valuation and another may range upto 15% and that constitutes the class of marginal cases which are taken out of the purview of sub-section (2) in order to avoid hardship to the assessee. [654 B-C, F-H]

B 4 : 4. Once it is established by the Revenue that the consideration for the transfer has been under-stated, sub-section (2) is immediately attracted, subject of course to the fulfilment of the condition of 15% or more difference, and the Revenue is then not required to show what is the precise extent of the under-statement or in other words, what is the consideration actually received by the asseesee. That would in most cases be difficult, if not impossible, to show and hence sub-section (2) relieves the Revenue of all burden of proof regarding the extent of under-statement or concealment and provides a statutory measure of the C consideration received in respect of the transfer. It does not create any fictional receipt. It does not deem as receipt something which is not in fact received. It merely provides a statutory best judgment assessment of the consideration actually received by the assessee and brings to tax capital gains on the footing that the fair market value of the capital asset represents the actual consideration received by the assessee as against the consideration untruly declared or disclosed by him. This approach in construction of sub-section (2) falls in line with the scheme of D the provisions relating to tax on capital gains. [665A-E]

4 : 5. Section 52 is not a charging section but is a computation section. It has to be read alongwith section 48 which provides the mode of computation and under which the starting point of computation is "the full value of the consideration received or accruing". What in fact never accrued or was never received cannot be computed as capital gains under section 41. Therefore sub-E section (2) cannot be construed as bringing within the computation of capital gains an amount which, by no stretch of imagination, can be said to have accrued to the assessee or been received by him. [655 E-F]

4 : 6. This construction of sub-section (2) also marches in step with the Gift Tax Act, 1958. If a capital asset is transferred for a consideration below its market value, the difference between the market value and the full value of the F consideration received in respect of the transfer would amount to a gift liable to tax under the Gift Tax Act, 1958. Since the Income Tax Act, 1961 and the Gift Tax Act, 1958 are parts of an integrated scheme of taxation the same amount which is chargeable as gift could not be intended to be charged also as capital gains. [656 A-C]

G 4 : 7. Besides, under Entry 82 in List I of the Seventh Schedule to the Constitution which deals with "Taxes on income" and under which the Income Tax Act, 1961 has been enacted, Parliament cannot "choose to tax as income an item which in no rational sense can be regarded as a citizen's income or even receipt. Sub-section (2) would, therefore, on the construction of the Revenue, go outside the legislative power of Parliament, and it would not be possible to H justify it even as an incidental or ancillary provision or a provision intended to prevent evasion of tax. [656 E-F]

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4 : 8. Sub-section (2) would also be violative of the fundamental right of the assessee under Article 9(1) (f)—which fundamencal right was in existence at the time when sub-section (2) came to be enacted—since on the construction canvassed on behalf of the Revenue, the effect of sub-section (2) would be to penalise the assessee for transfering his capital asset for a consideration lessser by 15% or more than the fair market value and that would constitute unreasonable restriction on the fundamental right of the assessee to dispose of his capital asset at the price of his choice. The Court must obviously prefer a construction which renders the statutory provision constitutionally valid rather than that which makes it void. [656 F-H, 657 A] B

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 412(NT) of 1973

From the judgment and order dated the 5th July, 1972 of the Kerala High Court at Ernakulam in Writ Appeal No. 127 of 1970. C

M. M. Abdul Khadher, *S.K. Mehta*, *E.M.S. Anam*, *P.N. Puri* and *M.K. Dua* for the appellant. D

S.T. Desai and *Miss A. Subhashini* for the respondent.

Anil B. Diwan, *Dinesh Vyas*, *P.H. Parekh* and *R.N. Karanjawala* for the intervener.

S. Swaminathan, *N. Srinivasan* and *Gopal Subramaniam* for the intervener. E

Debi Pal, *Praveen Kumar* and *A.K. Sharma* for the intervener.
K.R. Kazi and *S.C. Patel* for the intervener.

N.A. Palkhiwala, *P.H. Parekh*, *J.B. Dadachanji*, *H. Salve* and *Ravinder Narain* for interveners. F

S.C. Patel for the intervener.

J.B. Dadachanji for the intervener.

G

B.K. Mohanty and *C.S. Rao* for the intervener.

P.A. Francis and *M.N. Shroff* for the intervener.

The Judgment of the Court was delivered by H

BHAGWATI, J. The principal question that arises for determination in this appeal by certificate is whether understatement of consideration in a transfer of property is a necessary condition for attracting the applicability of section 52 sub-section (2) of the Income Tax Act 1961 (hereinafter referred as the Act) or it is enough for the Revenue to show that the fair market value of the property as on the date of the transfer exceeds the full value of the consideration declared by the assessee in respect of the transfer by an amount of not less than 15% of the value so declared. The facts giving rise to the appeal are not very material but since they from the backdrop against which the question arises for consideration, we may briefly state them.

The assessee was the owner of a house situated in Ernakulam, which he had purchased in 1958 for the price of Rs. 16,500. On 25th December 1965 the assessee sold the house for the same price of Rs. 16,500 to his daughter-in-law and five of his children. The assessment of the assessee for the assessment year 1966-67 for which the relevant accounting year was the calendar year 1965 was thereafter completed in the normal course and in this assessment, no amount was included by way of capital gains in respect of the transfer of the house since the house was sold by the assessee at the same price at which it was purchased and no capital gains accrued or arose to him as a result of the transfer. On 4th April 1968 however the Income tax Officer issued a notice under section 148 of the Act seeking to reopen the assessment of the assessee for the assessment year 1966-67 and requiring the assessee to submit a return of income within thirty days of the service of the notice. The notice did not state what was the income alleged to have escaped assessment but by his subsequent letter dated 4th March 1969 the Income-tax Officer intimated to the assessee that he proposed to fix the fair market value of the house sold by the assessee on 25th December 1965 at Rs. 65,000 as against the consideration of Rs. 16,500 for which the house was sold and assess the difference of Rs. 48,500 as capital gains in the hands of the assessee. The assessee raised objections against the reassessment proposed to be made by the Income-tax Officer but the objections were over-ruled and an order of reassessment was passed by the Income-tax Officer including the sum of Rs. 48,500 as capital gains and bringing it to tax. Though the sale of the house by the assessee was in favour of his daughter-in-law and five of his children who were persons directly connected with him, the Income-tax Officer could not invoke the aid of section 52 sub-section (1) for bringing the sum of

Rs. 48,500 to tax, because there was admittedly no under-statement A
of consideration in respect of the transfer of the house and it was
not possible to say that the transfer was effected by the assessee
with the object of avoidance or reduction of his liability under
section 45. The Income-tax Officer therefore rested his decision to
assess the sum of Rs. 48,500 to tax on sub-section (2) of section 52
and taking the view that this sub-section did not require as a B
condition precedent that there should be under-statement of consi-
deration in respect of the transfer and it was enough to attract the
applicability of the sub-section if the fair market value of the pro-
perty as on the date of the transfer exceeded the full value of the
consideration declared by the assessee by an amount of not less
than 15% of the value so declared, which was indisputably the C
position in the present case, the Income-tax Officer assessed the sum
of Rs. 48,500 to tax as capital gains. The assessee thereupon
preferred a writ petition in Kerala High Court challenging the
validity of the order of reassessment in so far as it brought the sum
of Rs. 48,500 to tax relying on section 52 sub-section (2) of the
Act. D

The writ petition came up for hearing before Isaacs J. sitting
as a single Judge of the High Court and after hearing both parties,
the learned Judge came to the conclusion that under-statement of
consideration in respect of the transfer was a necessary condition
for attracting the applicability of section 52 sub-section (2) and since E
in the present case there was admittedly no under-statement of
consideration and it was a perfectly bonafide transaction, section 52
sub-section (2) had no application and the sum of Rs. 48,500 could
not be brought to tax as capital gains under that provision. The
Revenue appealed against this decision to a Division Bench of the F
High Court and having regard to the importance and complexity of
the question involved, the Division Bench referred the appeal to a
Full Bench of three Judges. The Full Bench heard the appeal but
there was a division of opinion, two Judges taking one view and
the third Judge taking another. While Raghvan C.J. agreed sub-
stantially with the view taken by Isaacs J., Gopalan Nambiar J. and G
Vishwanath Iyer J. took a different view and held that in order to
bring a case within section 52 sub-section (2), it is not at all necessary
that there should be under-statement of consideration in respect of
the transfer and once it is found that the fair market value of the
property as on the date of the transfer exceeds the full value of the H
consideration declared by the assessee in respect of the transfer by

an amount of not less than 15% of the value so declared, section 52 sub-section (2) is straightaway attracted and the fair market value of the property as on the date of the transfer is liable to be taken as the full value of the consideration for the transfer. The writ petition was accordingly dismissed and the order of re-assessment sustained by the majority decision reached by the Full Bench. Hence the present appeal by the assessee with certificate obtained from the High Court.

It will be noticed from the above statement of facts that the principal question arising for determination in this appeal turns on the true interpretation of section 52 sub-section (2). But in order to arrive at its proper interpretation, it is necessary to refer to some other provisions of the Act as well. Section 2 clause (24) defines the word 'income'. The definition is inclusive and covers 'capital gains' chargeable under section 45. Section 4 is the charging section and it provides that income tax shall be charged in respect of the total income of the previous year of every person. Section 5 defines the scope of 'total income' by providing that the total income of the previous year of a person who is resident shall include all income from whatever source derived which is received or is deemed to be received in India in such year by him or on his behalf or accrues or arises or is deemed to accrue or arise to him in India during such year or accrues or arises to him outside India during such year. Section 14 enumerates the heads of income under which income shall, for the purposes of charge of income tax and computation of total income, be classified and they include "capital gains". Section 45 provides that any profits or gains arising from the transfer of a capital asset effected in the previous year shall be chargeable to income rax under the head "capital gains" and shall be deemed to be the income of the previous year in which the transfer took place. The mode of computation of capital gains is laid down in section 48 which provides that 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, two amounts, namely, (i) expenditure incurred wholly and exclusively in connection with such transfer and (ii) the cost of acquisition of the capital asset and the cost of any improvement thereto. Then follows section 52 which is the material section requiring to be construed in the present appeal. That section consists of two sub-sections and runs as follows :

(1) Where the person who acquires a capital asset from an assessee is directly or indirectly connected with the assessee and the Income-tax Officer has reason to believe that the transfer was effected with the object of avoidance or reduction of the liability of the assessee under section 45, the full value of the consideration for the transfer shall, with the previous approval of the Inspecting Assistant Commissioner, be taken to be the fair market value of the capital asset on the date of the transfer. A B

(2) Without prejudice to the provisions of sub-section (1), if in the opinion of the Income-tax Officer the fair market value of a capital asset transferred by an assessee as on the date of the transfer exceeds the full value of the consideration declared by the assessee in respect of the transfer of such capital assest by an amount of not less than fifteen per cent of the value declared, the full value of the consideration for such capital asset shall, with the previous approval of the Inspecting Assistant Commissioner, be taken to be its fair market value on the date of its transfer. C D

There is a marginal note to section 52 which reads : Consideration for transfer in cases of under-statement". It may be pointed out that originally when the Act came to be enacted, section 52 consisted of only one provision which is now numbered as sub-section (1) and it was by section 13 of the Finance Act 1964 that sub-section (2) was added in that section with effect from 1st April 1964. E F

Now on these provisions the question arises what is the true interpretation of section 52, sub-section (2). The argument of the Revenue was and this argument found favour with the majority Judges of the Full Bench that on a plain natural construction of the language of section 52, sub-section (2), the only condition for attracting the applicability of that provision is 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 by the assessee in respect of the transfer by an amount of not less than 15% of the value so declared. Once the Income-tax Officer is satisfied that this condition exists, he can proceed to G H invoke the provision in section 52 sub-section (2) and take the fair market value of the capital asset transferred by the assessee as on the date of the transfer as representing the full value of the consideration for the transfer of the capital asset and compute the capital gains on that basis. No more is necessary to be proved, contended the Revenue. To introduce any further condition such as understatement of consideration in respect of the transfer would be to read into the statutory provision something which is not there: indeed it would amount to rewriting the section. This argument was based on a strictly literal reading of section 52 sub-section (2) but we do not think such a construction can be accepted. It ignores several vital considerations which must always be borne in mind when we are interpreting a statutory provision. The task of interpretation of a statutory enactment is not a mechanical task. It is more than a mere reading of mathematical formulae because few words possess the precision of mathematical symbols. It is an attempt to discover the intent of the legislature from the language used by it and it must always be remembered that language is at best an imperfect instrument for the expression of human thought and as pointed out by Lord Denning, it would be idle to expect every statutory provision to be "drafted with divine prescience and perfect clarity." We can do no better than repeat the famous words of Judge Learned Hand when he said : "— —it is true that the words used, even in their literal sense, are the primary and ordinarily the most reliable, source of interpreting the meaning of any writing : be it a statute, a contract or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." We must not adopt a strictly literal interpretation of section 52 sub-section (2) but we must construe its language having regard to the object and purpose which the legislature had in view in enacting that provision and in the context of the setting in which it occurs. We cannot ignore the context and the collocation of the provisons in which section 52 sub-section (2) appears, because, as pointed out by Judge Learned Hand in most felicitous language : "— —the meaning of a sentence may be more than that of the separate words as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create". Keeping these observations in mind we may now approach the construction of section 52 sub-section (2).

The primary objection against the literal construction of section 52 sub-section (2) is that it leads to manifestly unreasonable and absurd consequences. It is true that the consequences of a suggested construction cannot alter the meaning of a statutory provision but they can certainly help to fix its meaning. It is a well recognised rule of construction that a statutory provision must be so construed, if possible that absurdity and mischief may be avoided. 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 poperty 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 under-statement 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. It is now a well settled rule of construction that where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the legislature, the court may modify the language used by the legislature or even 'do some violence' to it, so as to achieve the obvious intention of the legislature and produce a rational construction, Vide : *Luke* v. *Inland Reuenue Commissioner*(1) The Court may also in such a case read into the statutory provision a condition which, though not expressed, is implicit as constituting the basic assumption underlying the statutory provision. We think that, having regard to this well recognised rule of interpretation, a fair and reasonable construction of section 52 sub-section (2) would be to read into it a condition that it would apply only where the consideration for the transfer is under-stated or in other words, the assessee has actually received a larger consideration for the transfer than what is declared in the instrument of transfer and it would have no application in case of a bonafinde transaction where the full value of the consideration for the transfer is correctly declared by the assessee. There are several important considerations which incline us to accept this construction of section 52 sub-section (2).

The first consideration to which we must refer is the object and purpose of the enactment of section 52 sub-section (2). Prior to the introduction of sub-section (2), section 52 consisted only of what is now sub-section (1). This sub-section provides that where an assessee transfers a capital asset and in respect of the transfer two conditions are satisfied' namely, (1) the transferee is a person directly or indirectly connected with the assessee and (ii) the

(1) [1963] AC 557.

Income-tax Officer has reason to believe that the transfer was effected with the object of avoidance or reduction of the liability of the assessee to tax on capital gains, the fair market value of the capital asset on the date of the transfer shall be taken to be the full value of consideration for the transfer and the assessee shall be taxed on capital gains on that basis. The second condition obviously involves under-statement of the consideration in respect of the transfer because it is only by showing the consideration for the transfer at a lesser figure than that actually received that the assessee can achieve the object of avoiding or reducing his liability to tax on capital gains. And that is why the marginal note to section 52 reads: "Consideration for the transfer in cases of under-statement". But, it must be noticed that for the purpose of bringing a case within sub-section (1), it is not enough merely to show understatement of consideration but it must be further shown that the object of the under-statement was to avoid or reduce the liability of the assessee to tax on capital gains. Now it is necessary to bear in mind that when capital gains are computed by invoking sub-section (1) it is not any fictional accrual or receipt of income which is brought to tax. Sub-section (1) does not deem income to accrue or to be received which in fact never accrued or was never received. It seeks to bring within the net of taxation only that income which has accrued or is received by the assessee as a result of the capital asset. But since the actual consideration received by the assessee is not declared or disclosed and in most of the cases, if not all, it would not be possible for the Income-tax Officer to determine precisely what is actual consideration received by the assessee or in other words how much more consideration is received by the assessee than that declared by him, sub-section (1) provides that the fair market value of the property as on the date of the transfer shall be taken to be the full value of the consideration for the transfer which has accrued to or is received by the assessee. Once it is found that the consideration in respect of the transfer is understated and the conditions specified in sub-section (1) are fulfilled, the Income-tax Officer will not be called upon to prove the precise extent of the undervaluation or in other words, the actual extent of the concealment and the full value of the consideration received for the transfer shall be computed in the manner provided in sub-section (1). The net effect of this provision is as if a statutory best judgment assessment of the actual consideration received by the assessee is made, in the absence of reliable materials.

A 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
B 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
C therefore enacted sub-section (2) with a view to extending the coverage of the provision in sub-section (1) to other cases of under-statement of consideration. This becomes clear if we have regard to the object and purpose of the introduction of sub-section (2) as appearing from *travaux preparatoire* relating to the enatment of that provision. It is a sound rule of construction of a statute firmly
D established in England as far back as 1584 when *Heydon's case*(1) was decided that".. for the sure and true interpretation of all statutes in general---four things are to be discerned and considered : (1) What was the common law before the making of the Act, (2) What was the mischief and defect for which the common law did not provide, (3) What remedy the Parliament hath resolved
E and appointed to cure the disease of the Commonwealth, and (4) The true reason of the remedy, and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy". In *in re Mayfair Property Company*(2) Lindley. M.R. in 1898 found the rule "as necessary now as it was when Lord Coke reported *Heydon's case*". The rule was reaffirmed
F by Earl of Halsbury in *Eastman Photographic Material Company* v. *Comptroller General of Patents, Designs and Trade Marks*(3) in the following words.

G "My Lords, it appears to me that to construe the Statute in question, it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to

(1) [1584] 3 Co. Rep. 7a.
H (2) LR [1898] 2 Ch. 28.
(3) LR [1898] AC 571.

A

the later Act which provided the remedy. These three being compared I cannot doubt the conclusion."

This Rule being a Rule of construction has been repeatedly applied in India in interpreting statutory provisions. It would therefore be legitimate in interpreting sub-section (2) to consider that was the mischief and defect for which section 52 as it then stood did not provide and which was sought to be remedied by the enactment of sub-section (2) or in other words, what was the object and purpose of enacting that sub-section. Now in this connection the speech made by the Finance Minister while moving the amendment introducing sub-section (2) is extremely relevant, as it throws considerable light on the object and purpose of the enactment or sub-section (2). The Finance Minister explained the reason for introducing sub-section (2) in the following words : B C

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

Now it is true that the speeches made by the Members of the Legislature on the floor of the House when a Bill for enacting a statutory provision is being debated are inadmissible for the purpose of interpreting the statutory provision but the speech made by the Mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation is enacted. This is in accord with the recent trend in juristic thought not only in Western countries but also in India that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible. In fact there are at least F G H three decisions of this Court, one in *Loka Shikshana Trust* v. *Commissioner of Income-Tax*(1) the other in *Indian Chamber of Commerce* v. *Commissioner of Income-tax*(2) and the third in *Additional Commissioner of Income-tax* v. *Surat Art Silk Cloth Manufacturers Association*(3) where the speech made by the Finance Minister while introducing the exclusionary clause in section 2 clause (15) of the Act was relied upon by the Court for the purpose of ascertaining what was the reason for introducing that clause. The speech made by the Finance Minister while moving the amendment introducing sub-section (2) clearly states what were the circumstances in which sub-section (2) came to be passed, what was the mischief for which section 52 as it then stood did not provide and which was sought to be remedied by the enactment of sub-section (2) and why the enactment of sub-section (2) was found necessary. It is apparent from the speech of the Finance Minister that sub-section(2) was enacted for the purpose of reaching those cases where there was under-statement of consideration in respect of the transfer or to put it differently, the actual consideration received for the transfer was 'considerably more' than that declared or shown by the assessee, but which were not covered by sub-section (1) because the transferee was not directly or indirectly connected with the assessee. The object and purpose of sub-section (2), as explicated from the speech of the Finance Minister, was not to strike at honest and bonafide transactions where the consideration for the transfer was correctly disclosed by the assessee but to bring within the net of taxation those transactions where the consideration in respect of the transfer was shown at a lesser figure than that actually received by the assessee, so that they do not escape the charge of tax on capital gains by under-statement of the consideration. This was real object and purpose of the enactment of sub-section (2) and the interpretation of this sub-section must fall in line with the advancement of that object and purpose. We must therefore accept as the underlying assumption of sub-section (2) that there is under-statement of consideration in respect of the transfer and sub-section (2) applies only where the actual consideration received by the assessee is not disclosed and the consideration declared in respect of the transfer is shown at a lesser figure than that actually received.

(1) 101 ITR 234.
(2) 101 ITR 796.
(3) 121 ITR 1.

This interpretation of sub-section (2) is strongly supported by the marginal note to section 52 which reads 'Consideration for transfer in cases of under-statement'. It is undoubtedly true that the marginal note to a section cannot be referred to for the purpose of construing the section but it can certainly be relied upon as indicating the drift of the section or, to use the words of Collins MR in *Bushel* v. *Hammond*(1) to show what the section is dealing with. It cannot control the interpretation of the words of a section particularly when the language of the section is clear and unambiguous but, being part of the statute, it prima facie furnishes some clue as to the meaning and purpose of the section. Vide *Bengal Immunity Company Limited* v. *State of Bihar*(2) The marginal note to section 52. as it now stands, was originally a marginal note only to what is presently sub-section (1) and significantly enough, this marginal note remained unchanged even after the introduction of sub-section (2) suggesting clearly that it was meant by Parliament to apply to both sub-sections of section 52 and it must therefore be taken as indicating that, like sub-section (1), sub-section (2) is also intended to deal with cases where there is under-statement of the consideration in respect of the transfer.

But apart from these considerations, the placement of sub-section (2) in section 52 does indicate in some small measure that Parliament intended that sub-section to apply only to cases where the consideration in respect of the transfer is under-stated by the assessee. It is not altogether without significance that the provision in sub-section (2) was enacted by Parliament not as a separate section, but as part of section 52 which, as it originally stood, dealt only with cases of under-statement of consideration. If Parliament intended sub-section (2) to cover all cases where the condition of 15% difference is satisfied, irrespective of whether there is under-statement of consideration or not, it is reasonable to assume that Parliament would have enacted that provision as a separate section and not pitch-forked it into section 52 with a total stranger under an inappropriate marginal note. Moreover there is inherent evidence in sub-section (2) which suggests that the thrust of that sub-section is directed against cases of under-statement of consideration. The crucial and important words in sub-section (2) are : "the full value of the consideration declared by the assessee", The word 'declared'

(1) [1904] 2 KB 563.
(1) [1955] 2 SCR 603.

is very eloquent and revealing. It clearly indicates that the focus of sub-section (2) is on the consideration declared or disclosed by the assessee as distinguished from the consideration actually received by him and it contemplates a case where the consideration received by the assessee in respect of the transfer is not truly declared or disclosed by him but is shown at a different figure. This of course is a very small factor and by itself of little consequence but alongwith the other factors which we have discussed above, it assumes same significance as throwing light on the true intent of sub-section (2).

There is also one other circumstance which strongly reinforces the view we are taking in regard to the construction of sub-section (2). Soon after the introduction of sub-section (2), the Central Board of Direct Taxes, in exercise of the power conferred under section 119 of the Act, issued a circular dated 7th July, 1964 explaining the scope and object of sub-section (2) in the following words :

> "Section 13 of the Finance Act has introduced a new sub-section (2) in section 52 of the Income-tax Act with a view to countering evasion of tax on capital gains through the device of an under-statement of the full value of the consideration received or receivable on the transfer of a capital asset.
>
> The provision existing in section 52 of the Income-tax Act before the amendment (which has now been remembered as sub-section (2) enables the computation of capital gains arising on transfer of a capital asset with reference to its fair market value as on the date of its transfer, ignoring the amount of the consideration shown by the assessee, only if the following two conditions are satisfied :
>
> (a) the transferee is a person who is directly or indirectly connected with assessee, and
>
> (b) the Income-tax Officer has reason to believe that the transfer was effected with object of avoidance or reduction of the liability of assessee to tax on capital gains.
>
> In view of these conditions, this provision has a limited operation and does not apply to other cases where the

> tax liability on capital gains arising on transfer of capital assets between parties not connected with each other, is sought to be avoided or reduced by an under-statement of the consideration paid for the transfer of the asset."

The circular also drew the attention of Income-tax Authorities to the assurance given by the Finance Minister in his speech that sub-section (2) was not aimed at perfectly honest and bonafide transactions where the consideration in respect of the transfer was correctly disclosed or declared by the assessee, but was intended to deal only with cases where the consideration for the transfer was under-stated by the assessee and was shown at a lesser figure than that actually received by him. It appears that despite this circular, the Income-tax Authorities in several cases levied tax by invoking the provision in sub-section (2) even in cases where the transaction was perfectly, honest and bonafide and there was no under-statement of the consideration. This was quite contrary to the instructions issued in the circular which was binding on the Tax Department and the Central Board of Direct Taxes was, therefore, constrained to issue another circular on 14th January, 1974 whereby the Central Board, after reiterating the assurance given by the Finance Minister in the course of his speech pointed out :

> "It has come to the notice of the Board that in some cases the Income-tax Officers have invoked the provisions of section 52(2) even when the transactions were bonafide. In this context reference is invited to the decision of the Supreme Court in *Navnitlal C. Jhaveri* v. *K. K. Sen*[1] and *Ellerman Lines Ltd.* v. *Commissioner of Income-tax, West Bengal*[2] wherein it was held that the circular issued by the Board would be binding on all officers and persons employed in the execution of the Income-tax Act. Thus, the Income-tax Officers are bound to follow the instructions issued by the Board."

and instructed the Income-tax Officers that "while completing the assessments they should keep in mind the assurance given by the Minister of Finance and the provisions of section 52(2) of the Income-tax Act may not be invoked in cases of bonafide trans-

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(1) 56 ITR 198.
(2) 82 ITR 913.

actions". These two circulars of the Central Board of Direct Taxes are, as we shall presently point out, binding on the Tax Department in administering or executing the provision enacted in sub-section (2), but quite apart from their binding character, they are clearly in the nature of *contemporanea expositio* furnishing legitimate aid in the construction of sub-section (2). The rule of construction by reference to *contemporanea expositio* is a well established rule for interpreting a statute by reference to the exposition it has received from contemporary authority, though it must give way where the language of the statute is plain and unambiguous. This rule has been succinctly and felicitously expressed in Crawford on Statutory Construction (1940 ed) where it is stated in paragraph 219 that "administrative construction (i. e. contemporaneous construction placed by administrative or executive officers charged with executing a statute) generally should be clearly wrong before it is overturned; such a construction, commonly referred to as practical construction, although non-controlling, is nevertheless entitled to considerable weight; it is highly persuasive." The validity of this rule was also recognised in *Baleshwar Bagarti* v. *Bhagirathi Dass*[1] where Mookerjee, J. stated the rule in these terms :

> "It is a well-settled principle of interpretation that courts in construing a statute will give much weight to the interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it."

and this statement of the rule was quoted with approval by this Court in *Deshbandhu Guptu & Co.* v. *Delhi Stock Exchange Association Ltd.*[2] It is clear from these two circulars that the Central Board of Direct Taxes, which is the highest authority entrusted with the execution of the provisions of the Act, understood sub-section (2) as limited to cases where the consideration for the transfer has been under-stated by the assessee and this must be regarded as a strong circumstance supporting the construction which we are placing on that sub-section.

But the construction which is commending itself to us does not rest merely on the principle of *contemporanea expositio*. The

(1) ILR 35 Cal. 701.
(2) [1979] 4 SCC 565.

two circulars of the Central Board of Direct Taxes to which we A
have just referred are legally binding on the Revenue and this
binding character attaches to the two circulars even if they be
found not in accordance with the correct interpretation of sub-
section (2) and they depart or deviate from such construction. It
is now well-settled as a result of two decisions of this Court, one in B
Navnitlal C. Jhaveri v. *K.K. Sen*(1) and the other in *Ellerman Lines
Ltd.* v. *Commissioner of Income-tax, West Bengal*(2) that circulars
issued by the Central Board of Direct Taxes under section 119 of
the Act are binding on all Officers and persons employed in the
execution of the Act even if they deviate from the provisions of the
Act. The question which arose in *Navnitlal C. Jhaveri's case* (supra) C
was in regard to the constitutional validity of sections 2(6A) (e) and
12(1B) which were introduced in the Indian Income Tax Act 1922
by the Finance Act 1955 with effect from 1st April, 1955. These
two sections provided that any payment made by a closely held
company to its shareholder by a way of advance or loan to the
extent to which the company possesses accumulated profits shall be D
treated as dividend taxable under the Act and this would include
any loan or advance made in any previous year relevant to any
assessment year prior to the assessment year 1955-56, if such loan
or advance remained outstanding on the first day of the previous
year relevant to the assessment year 1955-56. The constitutional
validity of these two sections was assailed on the ground that they E
imposed unreasonable restrictions on the fundamental right of the
assessee under Article 19(1) (f) and (g) of the Constitution by taxing
outstanding loans or advances of past years as dividend. The
Revenue however relied on a circular issued by the Central Board
of Revenue under section 5(8) of the Indian Income-tax Act 1922
which corresponded to section 119 of the Present Act and this F
circular provided that if any such outstanding loans or advances
of past years were repaid on or before 30th June 1955, they would
not be taken into account in determining the tax liability of the
shareholders to whom such loans or advances were given. This
circular was clearly contrary to the plain language of section 2(6A)(e)
and section 121(B), but even so this Court held that it was binding G
on the Revenue and since "past transactions which would normally
have attracted the stringent provisions of section 12(1B) as it was
introduced in 1955, were substantially granted exemption from the

(1) 56 ITR 198. H
(2) 82 ITR 913.

operation of the said provisions by making it clear to all the companies and their shareholders that if the past loans were genuinely refunded to the companies they would not be taken into account under section 12(1B)" sections 2(6A) (e) and 12(1B) did not suffer from the vice of unconstitutionality. This decision was followed in *Ellerman Lines case* (supra) where referring to another circular issued by the Central Board of Revenue under section 5(8) of the Indian Income Tax Act 1922 on which reliance was placed on behalf of the assessee, this Court observed :

> "Now, coming to the question as to the effect of instructions issued under section 5(8) of the Act, this Court observed in *Navnit Lal C. Jhaveri* v. *K. K. Shah* Appellate Assistant Commissioner, Bombay.
>
> "It is clear that a circular of the kind which was issued by the Board would be binding on all officers and persons employed in the execution of the Act under section 5(8) of the Act. This circular pointed out to all the officers that it was likely that some of the companies might have advanced loans to their shareholders as a result of genuine transactions of loans, and the idea was not to affect such transactions and not to bring them within the mischief of the new provision.
>
> The directions given in that circular clearly deviated from the provisions of the Act, yet this Court held that circular was binding on the Income-tax Officers."

The two circulars of the Central Board of Direct Taxes referred to above must therefore be held to be binding on the Revenue in the administration or implementation of sub-section (2) and this sub-section must be read as applicable only to cases where there is under-statement of the consideration in respect of the transfer.

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 under-statement of the consideration and the second condition is fulfilled. Moreover, to throw the burden of showing that there is no under-statement 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.

But the question then arises why has Parliament introduced the first condition as a pre-requisite for the applicability of sub-section (2) ? Why has Parliament provided that in order to attract the applicability of sub-section (2) the fair market value of the capital asset as on the date of the transfer should exceed by 15% or more the full value of the consideration for the transfer declared by the assessee ? The answer is obvious. The object of imposing the condition of difference of 15% or more between the market value of the capital asset and the consideration declared in respect of the transfer clearly is to save the assessee from the rigour of sub-section (2) in marginal cases where difference in subjective valuation by different individuals may result in an apparent disparity between the fair market value and the declared consideration. It is a well-known fact borne out by practical experience that the determination of fair market value of a capital asset is generally a matter of estimate based to some extent on guess work and despite the utmost bonafides, the estimate of the fair market value is bound to vary from individual to individual. It is obvious that if the restrictive condition of difference of 15% or more between the fair market value of the capital asset as on the date of the transfer and the consideration declared in respect of the transfer were not provided in sub-section (2), many marginal cases would, having regard to the possibility of difference of opinion in subjective assessment of the fair market value, fall within the mischief of that sub-section and the statutory measure enacted in that sub-section for determining the consideration actually received by the assessee would be applicable in all its rigour in such cases. This condition of 15% or more difference is merely intended to be a safeguard against under hardship which would be occasioned to the assessee if the inflexible rule of the thumb enacted in sub section (2) were applied in marginal cases and it has nothing to do with the question of burden of proof, for the burden of establishing that there is under-statement of the consideration in respect of the transfer always rests on the Revenue. The postulate underlying sub-section (2) is that the difference between one honest valuation and another may range upto 15% and that constitutes the class of marginal cases which are taken out of the purview of sub-section (2) in order to avoid hardship to the assessee.

It is therefore clear that sub-section (2) cannot be invoked by A
the Revenue unless there is under-statement of the consideration in
respect of the transfer and the burden of showing that there is such
under-statement is on the Revenue. Once it is established by the
Revenue that the consideration for the transfer has been under-
stated or, to put it differently, the consideration actually received by
the assessee is more than what is declared or disclosed by him, sub- B
section (2) is immediately attracted, subject of course to the fulfil-
ment of the condition of 15% or more difference, and the Revenue
is then not required to show what is the precise extent of the under-
statement or in other words, what is the consideration actually
received by the assessee. That would in most cases be difficult, if C
not impossible, to show and hence sub-section (2) relieves the
Revenue of all burden of proof regarding the extent of under-
statement or concealment and provides a statutory measure of the
consideration received in respect of the transfer. It does not create
any fictional receipt. It does not deem as receipt something which
is not in fact received. It merely provides a statutory best judgment D
assessment of the consideration actually received by the assessee
and brings to tax capital gains on the footing that the fair market
value of the capital asset represents the actual consideration received
by the assessee as against the consideration untruly declared or
disclosed by him. This approach in construction of sub-section (2)
falls in line with the scheme of the provisions relating to tax on E
capital gains. It may be noted that section 52 is not a charging
section but is a computation section. It has to be read alongwith
section 48 which provides the mode of computation and under
which the starting point of computation is "the full value of the
consideration received or accruing". What in fact never accrued or
was never received cannot be computed as capital gains under F
section 48. Therefore sub-section (2) cannot be construed as
bringing within the computation of capital gains an amount
which, by no stretch of imigination, can be said to have
accrued to the assessee or been received by him and it must
be confined to cases where the actual consideration received
for the transfer is under-stated and since in such cases it is very G
difficult, if not impossible, to determine and prove the exact quantum
of the suppressed consideration, sub-section (2) provides the statu-
tory measure for determining the consideration actually received by
the assessee and permits the Revenue to take the fair market value
of the capital asset as the full value of the consideration received in H
respect of the transfer.

A This construction which we are placing on sub-section (2) also marches in step with the Gift Tax Act, 1958. If a capital asset is transferred for a consideration below its market value, the difference between the market value and the full value of the consideration received in respect of the transfer would amount to a gift liable to tax under the Gift Tax Act, 1958, but if the construction B of sub-section (2) contended for on behalf of the Revenue were accepted, such difference would also be liable to be added as part of capital gains taxable under the provisions of the Income Tax Act, 1961. This would be an anomalous result which could never have been contemplated by the legislature, since the Income Tax Act, C 1961 and the Gift Tax Act, 1958 are parts of an integrated scheme of taxation and the same amount which is chargeable as gift could not be intended to be charged also as capital gains.

Moreover, if sub-section (2) is literally construed as applying D even to cases where the full value of the consideration in respect of the transfer is correctly declared or disclosed by the assessee and there is no understatement of the consideration, it would result in an amount being taxed which has neither accrued to the assessee nor been received by him and which from no view point can be rationally considered as capital gains or any other type of income. E It is a well settled rule of interpretation that the Court should as for as possible avoid that construction which attributes irrationality to the legislature. Besides, under Entry 82 in List I of the Seventh Schedule to the Constitution which deals with "Taxes on income" and under which the Income Tax Act, 1961 has been enacted, Parliament cannot "choose to tax as income as item which in no F rational sense can be regarded as a citizens income or even receipt. Sub-section (2) would, therefore, on the construction of the Revenue, go outside the legislative power of Parliament, and it would not be possible to justify it even as an incidental or ancillary provision or a provision intended to prevent evasion of tax. Sub-section (2) would also be violative of the fundamental right of the assessee under G Article 19 (1) (f)—which fundamental right was in existence at the time when sub-section (2) came to be enacted—since on the construction canvassed on behalf of the Revenue, the effect of sub-section (2) would be to penalise the assessee for transferring his capital asset for a consideration lesser by 15% or more than the H fair market value and that would constitute unreasonable restriction on the fundamental right of the assessee to dispose of his capital asset at the price of his choice. The Court must obviously prefer a construction which renders the statutory provision constitutionlly valid rather than that which makes it void.

We must therefore hold that sub-section (2) of sec. 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 of 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. We find that in the present case, it was not the contention of the Revenue that the property was sold by the assesssee to his daughter-in-law and five of his children for a consideration which was more than the sum of Rs. 16,500 shown to be the consideration for the property in the Instrument of Transfer and there was under-statement or concealment of the consideration in respect of the transfer. It was common ground between the parties and that was a finding of fact reached by the Income-tax Authorities, that the transfer of the property by the assessee was a perfectly, honest and bonafide transaction where the full value of the consideration received by the asseessee was correctly disclosed at the figure of Rs. 16,500. Therefore, on the construction placed by us, sub-section (2) had no application to the present case and the Income-tax Officer could have no reason to believe that any part of the income of the assessee had escaped assessment so as to justify the issue of a notice under section 148. The order of re-assessment made by the Income-tax Officer pursuant to the notice issued under section 148 was accordingy without jurisdiction and the majority judges of the Full Bench were in error in refusing to quash it.

We accordingly allow the appeal, set aside the order passed by the Full Bench and restore the Order of Issac, J. allowing the writ

A petition and quashing the Order of re-assessment made by the Income-tax Officer. The Revenue will pay the costs of the assessee throughout.

B S.R. *Appeal allowed.*