REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.9133-9134 OF 2003

COMMISSIONER OF INCOME TAX,
GAUHATI & ORS. …APPELLANTS

VERSUS

M/S. SATI OIL UDYOG LTD. & ANR. …RESPONDENTS

WITH

CIVIL APPEAL NO.9135 OF 2003

SUPREME COURT OF INDIA
JUDGMENT

J U D G M E N T

R.F.Nariman, J.

1. The question which arises for consideration in the present appeals is the constitutional validity of the retrospective amendment to Section 143(1A) of the Income Tax Act, 1961. Both the Single Judge and the Division Bench of the Gauhati High Court have held that the retrospective effect given to the

amendment would be arbitrary and unreasonable inasmuch as the provision, being a penal provision, would operate harshly on assessees who have made a loss instead of a profit, the difference between the loss showed in the return filed by the assessee and the loss assessed to income tax having to bear an additional income tax at the rate of 20%.

2. It may be mentioned at the outset that the same provision in its retrospective operation has been upheld by the Kerala, Madhya Pradesh, Rajasthan, Karnataka and Madras High Courts. (**Kerala State Coir Corpn Ltd. v. Union of India,** (1994) 210 ITR 121 (Ker); **Sanctus Drugs Pharmaceuticals Pvt. Ltd. v. Union of India,** (1997) 225 ITR 252 (MP); **DCIT v. Rajasthan State Electricity Board,** (2008) 299 ITR 253 (Raj); **Bidar Sahakari Sakkare Karkhane Niyamat v Union of India,** (1999) 237 ITR 445 (Kar); **Aluminium Industries Ltd. v. DCIT (Asst),** (1998) 234 ITR 165 (Ker); **Sukra Diamond Tools Pvt. Ltd. v. DCIT,** (1998) 229 ITR 682 (Mad)).

3. The facts necessary to decide these appeals are as follows.

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The respondent-herein in its annual return for assessment years 1989-1990 and 1991-1992 showed a loss of Rs.1,94,13,440/- and Rs.1,80,22,480/- respectively. By an assessment order dated 14.12.1992, the Assessing Officer levied an additional tax under Section 143 (1A) of Rs.5,62,490/- and Rs.8,09,290/- respectively for the two assessment years in question calculated in the manner provided in the Section.

4. Being aggrieved by the order dated 14.12.1992, the respondent filed two separate writ petitions to declare the provisions of Section 143 (1A) as *ultra vires* and consequentially prayed for the quashing of the order dated 14.12.1992. The learned Single Judge who heard the two petitions upheld Section 143 (1A) as amended in 1993 prospectively but held that insofar as it operated with effect from 1989 on losses made by companies, the section is arbitrary and unreasonable and would, therefore, have to be struck down. The Division Bench agreed with the Single Judge and dismissed the two writ appeals before it.

5. Shri Neeraj Kaul, learned Additional Solicitor General of India appearing on behalf of the appellants stated that the

amendment made to Section 143 (1A) with retrospective effect was merely clarificatory and that even without such amendment, the same position would obtain qua losses as would obtain qua profits inasmuch as the expression “income” would comprehend both profits as well as losses. He cited a number of judgments before us which we will refer to presently. On being questioned by the Bench about the true construction of Section 143 (1A), he very fairly submitted that since the object of Section 143(1A) is to prevent tax evasion, the said Section would have to be read in the light of the aforesaid object. Despite being served, no one appears for the respondents.

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Section 143 (1A) as it stood in 1989 is as follows:-

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“(a) Where, in the case of any person, the total income, as a result of the adjustments made under the first proviso to clause (a) of sub-section (1), exceeds the total income declared in the return by any amount, the Assessing Officer shall, -

(i) further increase the amount of tax payable under sub-section (1) by an additional income-tax calculated at the rate of twenty per cent of the tax payable on such excess amount and specify the additional income-tax in the intimation to be sent under sub-clause (i) of clause (a) of sub-section (1);

(ii) where any refund is due under sub-section (1), reduce the amount of such refund by an amount equivalent to the additional income-tax calculated under sub-clause (i).

(b) Where as a result of an order under (sub-section (3) of this section or) section 154 or section 250 or section 254 or section 260 or section 262 or section 263 or section 264, the amount on which additional income-tax is payable under clause (a) has been increased or reduced, s the case may be, the additional income-tax shall be increased or reduced accordingly, and, -

(i) in a case where the additional income-tax is increased, the Assessing Officer shall serve on the assessee a notice of demand under Section 156;

(ii) in a case where the additional income-tax is reduced, the excess amount paid, if any, shall be refunded.

Explanation. – For the purposes of this sub-section, "tax payable on such excess amount" means:-

(i) in any case where the amount of adjustments made under the first proviso to clause (a) of sub-section (1) exceed the total income, the tax that would have been chargeable had the amount of the adjustments been the total income;

(ii) in any other case, the difference between the tax on the total income and the tax that would have been chargeable had such total income been reduced by the amount of adjustments."

6. By the Finance Act of 1993, Section 143 (1A)(a) was substituted with retrospective effect from 1.4.1989 as follows:-

> "(*a*) Where as a result of the adjustments made under the first proviso to clause (*a*) of sub-section (1),—
>
> (*i*) the income declared by any person in the return is increased; or
>
> (*ii*) the loss declared by such person in the return is reduced or is converted into income,
>
> the Assessing Officer shall,—
>
> (*A*) in a case where the increase in income under sub-clause (*i*) of this clause has increased the total income of such person, further increase the amount of tax payable under sub-section (1) by an additional income tax calculated at the rate of twenty per cent on the difference between the tax on the total income so increased and the tax that would have been chargeable had such total income been reduced by the amount of adjustments and specify the additional income tax in the intimation to be sent under sub-clause (*i*) of clause (*a*) of sub-section (1);
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> (*B*) in a case where the loss so declared is reduced under sub-clause (*ii*) of this clause or the aforesaid adjustments have the effect of converting that loss into income, calculate a sum (hereinafter referred to as additional income tax) equal to twenty per cent of the tax that would have been chargeable on the amount of the adjustments as if it had been the total income of such person and specify the additional income tax so calculated in the intimation to be sent under sub-clause (*i*) of clause (*a*) of sub-section (1);
>
> (*C*) where any refund is due under sub-section (1), reduce the amount of such refund by an amount equivalent to the additional income tax calculated under sub-clause (*A*) or sub-clause (*B*), as the case may be."

7. The Memorandum explaining the provisions of the Finance Bill which introduced the said retrospective amendment is as under:

> "The provisions of section 143(1A) of the Income-tax Act provide for levy of twenty per cent additional income-tax where the total income, as a result of the adjustments made under the first proviso to section 143(1)(a), exceeds the total income declared in the return. These provisions seek to cover cases of returned income as well as returned loss. Besides its deterrent effect, the purpose of the levy of the additional income-tax is to persuade all the assesses to file their returns of income carefully to avoid mistakes.
>
> In two recent judicial pronouncements, it has been held that the provisions of section 143 (1A) of the Income-tax Act, as these are worded, are not applicable in loss cases.
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> The Bill, therefore, seeks to amend section 143(1A) of the Income-tax Act to provide that where as a result of the adjustments made under the first proviso to section 143 (1)(a), the income declared by any person in the return is increased, the Assessing Officer shall charge additional income-tax at the rate of twenty per cent, on the difference between the tax on the increased total income and the tax that would have been chargeable had such total income been reduced by the amount of adjustments. In cases where the loss declared in the return has been reduced as a result of the aforesaid adjustments or the aforesaid adjustments have the effect of converting that loss into income, the Bill seeks to provide that the Assessing Officer

shall calculate a sum (referred to as additional income tax) equal to twenty per cent of the tax that would have been chargeable on the amount of the adjustments as if it had been the total income of such person.

The proposed amendment will take effect from 1st April, 1989 and will, accordingly, apply in relation to the assessment year 1989-90 and subsequent years."

8. On a cursory reading of the provision, it is clear that the object of Section 143(1A) is the prevention of evasion of tax. By the introduction of this provision, persons who have filed returns in which they have sought to evade the tax properly payable by them is meant to have a deterrent effect and a hefty amount of 20% as additional income tax is payable on the difference between what is declared in the return and what is assessed to tax.

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9. A plain reading of the provision as it originally stood refers to "the total income".

10. Mr. Kaul, learned Additional Solicitor General is right in referring to the definition of "income" in Section 2(24) of the Income Tax Act, 1995 and drawing our attention to the fact that the said definition is an inclusive one. Further, it is settled law

at least since 1975 that the word “income” would include within it both profits as well as losses. This is clear from **Commissioner of Income Tax Central, Delhi v. Harprasad & Company Pvt. Ltd.,** (1975) 3 SCC 868, paragraph 17 of which lays down the law as follows:

> “17. From the charging provisions of the Act, it is discernible that the words “income” or “profits and gains” should be understood as including losses also, so that, in one sense “profits and gains” represent “*plus* income” whereas losses represent “*minus* income” [*CIT* v. *Karamchand Prem Chand*, (1960) 3 SCR 727 : 40 ITR 106 (SC) : *CIT* v. *Elphinstone Spinning and Weaving Mills*, (1960) 3 SCR 953 : 40 ITR 143 (SC)] . In other words, loss is negative profit. Both positive and negative profits are of a revenue character. Both must enter into computation, wherever it becomes material, in the same mode of the taxable income of the assessee. Although Section 6 classifies income under six heads, the main charging provision is Section 3 which levies income tax, as only one tax, on the “total income” of the assessee as defined in Section 2(15). An income in order to come within the purview of that definition must satisfy two conditions: Firstly, it must comprise the “total amount of income, profits and gains referred to in Section 4(1)”. Secondly, it must be “computed in the manner laid down in the Act”. If either of these conditions fails, the income will not be a part of the “total income” that can be brought to charge.”

11. This judgment has subsequently been followed in several judgments. The fairly recent judgment of this Court in **CIT Joint Commissioner of Income Tax, Surat v. Saheli Leasing & Industries Ltd.**, (2010) 6 SCC 384 referred to the aforesaid judgment and held as follows:-

> "23. In the aforesaid decision in *Gold Coin case* [(2008) 9 SCC 622 : (2008) 304 ITR 308] , the expression "income" in the statute appearing in Section 2(24) of the Act has been clarified to mean that it is an inclusive definition and includes losses, that is, negative profit. This has been held so on the strength of earlier judgments of this Court in *CIT* v. *Harprasad and Co. (P) Ltd.* [(1975) 3 SCC 868 : 1975 SCC (Tax) 158 : (1975) 99 ITR 118] and followed in *Reliance Jute and Industries Ltd.* v. *CIT* [(1980) 1 SCC 139 : 1980 SCC (Tax) 67 : (1979) 120 ITR 921] . After an elaborate and detailed discussion, this Court held with reference to the charging provisions of the statute that the expression "income" should be understood to include losses. The expression "profits and gains" refers to positive income whereas "losses" represents negative profit or in other words minus income. Considering this aspect of the matter in greater detail, *Gold Coin* [(2008) 9 SCC 622: (2008) 304 ITR 308] overruled the view expressed by the two learned Judges in *Virtual Soft Systems* [(2007) 9 SCC 665 : (2007) 289 ITR 83] .
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> 24. Relevant ITR paras 11 and 12 of *Gold Coin* [(2008) 9 SCC 622 : (2008) 304 ITR 308] dealing with income and losses are reproduced hereinbelow: (SCC p. 628, paras 15-16)

"*15*. When the word 'income' is read to include losses as held in *Harprasad case* [(1975) 3 SCC 868 : 1975 SCC (Tax) 158 : (1975) 99 ITR 118] it becomes crystal clear that even in a case where on account of addition of concealed income the returned loss stands reduced and even if the final assessed income is a loss, still penalty was leviable thereon even during the period 1-4-1976 to 1-4-2003. Even in the Circular dated 24-7-1976, referred to above, the position was clarified by the Central Board of Direct Taxes (in short 'CBDT'). It is stated that in a case where on setting of the concealed income against any loss incurred by the assessee under any other head of income or brought forward from earlier years, the total income is reduced to a figure lower than the concealed income or even to a minus figure the penalty would be imposable because in such a case 'the tax sought to be evaded' will be tax chargeable on concealed income as if it is 'total income'.

16. The law is well settled that the applicable provision would be the law as it existed on the date of the filing of the return. It is of relevance to note that when any loss is returned in any return it need not necessarily be the loss of the previous year concerned. It may also include carried-forward loss which is required to be set up against future income under Section 72 of the Act. Therefore, the applicable law on the date of filing of the return cannot be confined only to the losses of the previous accounting years."

25. The necessary consequence thereof would be that even if the assessee has disclosed nil income and on verification of the record, it is found that certain income has been concealed or has wrongly been shown, in that case, penalty can still be levied. The aforesaid position is no more res integra and according to us, it stands answered in favour of the Revenue and against the assessee."

12. Apart from the above, there is another indication contained in Section 143 1(a) as it stood in 1989. The said Section reads as under:

> "(1)(a) Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142,-
>
> (i) if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid and any amount paid otherwise by way of tax or interest, then, without prejudice to the provisions of sub-section (2), an intimation shall be sent to the assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued under section 156 and all the provisions of this Act shall apply accordingly; and
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> (ii) if any refund is due on the basis of such return, it shall be granted to the assessee :
>
> Provided that in computing the tax or interest payable by, or refundable to, the assessee, the following adjustments shall be made in the income or loss declared in the return, namely:-
>
> (i) any arithmetical errors in the return, accounts or documents accompanying it shall be rectified ;
>
> (ii) any loss carried forward, deduction, allowance or relief, which, on the basis of the information available in such return, accounts or documents, is prima facie admissible but which is not claimed in the return, shall be allowed ;

(iii) any loss carried forward, deduction, allowance or relief claimed in the return, which, on the basis of the information available in such return, accounts or documents, is prima facie inadmissible, shall be disallowed :

Provided further that an intimation shall be sent to the assessee whether or not any adjustment has been made under the first proviso and notwithstanding that no tax or interest is due from him:

Provided also that an intimation under this clause shall not be sent after the expiry of two years from the end of the assessment year in which the income was first assessable."

13. Even on a reading of Section 143 1(a) which is referred to in Section 143 (1A), a loss is envisaged as being declared in a return made under Section 139. It is clear, therefore, that the retrospective amendment made in 1993 would only be clarificatory of the position that existed in 1989 itself.

14. It was pointed out to us that the reason for the retrospective amendment made in 1993 was the judgments of the Delhi High Court in **Modi Cement Limited v. Union of India,** (1992) 193 ITR 91 and **JK Synthetics Limited v. Asstt. Commissioner of Income-Tax,** (1993) 2000 ITR 594, and the Allahabad High Court held in **Indo Gulf Fertilizers &**

Chemicals Corpn. Ltd. v. Union of India, (1992) 195 ITR 485, which held that losses were not within the contemplation of Section 143(1A) prior to its amendment.

15. The **J.K. Synthetics** judgment of the Delhi High Court was expressly upset by this Court in (2003) 10 SCC 623. By the time this Court delivered its judgment, the retrospective amendment to Section 143 (1A) had already been made, and this Court, therefore, set aside the Delhi High Court judgment.

16. Shri Kaul also cited before us the judgment of **Shiv Dutt Rai Fateh Chand v. Union of India,** (1983) 3 SCC 529. In this judgment, the validity of the retrospective amendment of Section 9(2A) of the Central Sales Tax Act was in question. This Court held that the imposition of penalty by a tax authority is a civil liability, though penal in character. For that reason alone, retrospective imposition of a penalty would not be hit by Article 20(1) of the Constitution which concerns itself with penalties that are levied by criminal statutes. In paragraph 34, the retrospective imposition of a penalty under Section 9(2A) was upheld in the following terms:

“34. In the instant case, the facts are one shade better. There is no dispute in this case about the validity of the tax payable under the Act during the period between January 1, 1957 and the date of commencement of the Amending Act. It has to be presumed that all the tax has been collected by the dealers from their customers. There is also no dispute that the law required the dealers to pay the tax within the specified time. The dealers had also the knowledge of the provisions relating to penalties in the general sales tax laws of their respective States. It was only owing to the deficiency in the Act pointed out by this court in *Khemka case* [AIR 1955 SC 765 : (1955) 2 SCR 483 : (1955) 6 STC 627] the penalties became not payable. In this situation, where the dealers have utilised the money which should have been paid to the Government and have committed default in performing their duty, if Parliament calls upon them to pay penalties in accordance with the law as amended with retrospective effect it cannot be said that there has been any unreasonable restriction imposed on the rights guaranteed under Article 19(1)(*f*) and (*g*) of the Constitution, even though the period of retrospectivity is nearly 19 years. It is also pertinent to refer here to sub-section (3) of Section 9 of the Amending Act which provides that the provisions contained in sub-section (2) thereof would not prevent a person from questioning the imposition or collection of any penalty or any proceeding, act or thing in connection therewith or for claiming any refund in accordance with the Act as amended by the Amending Act read with sub-section (1) of Section 9 of the Amending Act. Explanation to sub-section (3) of Section 9 of the Amending Act also provides for exclusion of the period between February 27, 1975 i.e. the date on which the judgment in *Khemka case* [AIR 1955 SC 765 : (1955) 2 SCR 483 : (1955) 6 STC 627] was delivered up to the date of the commencement of

> the Amending Act in computing the period of limitation for questioning any order levying penalty. In those proceedings the authorities concerned are sure to consider all aspects of the case before passing orders levying penalties. The contention that the impugned provision is violative of Article 19(1)(*f*) and (*g*) of the Constitution has, therefore, to be rejected."

17. In the present case as well, all assessees were put on notice in 1989 itself that the expression "income" contained in Section 143 (1A) would be wide enough to include losses also. That being the case, on facts here there is in fact no retrospective imposition of additional tax – such tax was imposable on losses as well from 1989 itself.

18. We have already stated in our judgment that the object of Section 143 (1A) is the prevention of tax evasion. Read literally, both honest asessees and tax evaders are caught within its net. An interesting example of such a case is contained in **Commissioner of Income Tax, Bhopal v. Hindustan Electro Graphites, Indore**, (2000) 3 SCC 595. On facts, the assessee had filed its return of income in which it showed that it had received a certain sum by way of cash compensatory support. Under the law as was then in force, the

said amount was not taxable and, therefore, not included in the return. Subsequently, such cash assistance was made taxable retrospectively. Section 143 (1A) was pressed into service by the Department, and this Court ultimately held as follows:-

> "12. The case before us does not represent even a bona fide mistake. In fact it is not a case where under some mistaken belief the assessee did not disclose the cash compensatory support received by it which he could offer to tax. It is true that income by way of cash compensatory support became taxable retrospectively with effect from 1-4-1967 but that was by amendment of Section 28 by the Finance Act of 1990 which amendment could not have been known before the Finance Act came into force. Levy of additional tax bears all the characteristics of penalty. Additional tax was levied as the assessee did not in his return show the income by way of cash compensatory support. The Assessing Officer on that account levied additional income tax. No additional tax would have been leviable on the cash compensatory support if the Finance Act, 1990 had not so provided even though retrospectively. The assessee could not have suffered additional tax but for the Finance Act, 1990. After he had filed his return of income, which was correct as per law on the date of filing of the return, it was thereafter that the cash compensatory support also came within the sway of Section 28. When additional tax has the imprint of penalty the Revenue cannot be heard saying that levy of additional tax is automatic under Section 143(1-A) of the Act. If additional tax could be levied in such circumstances it will be punishing the assessee for no fault of his. That cannot ever be the legislative intent. It shocks the very conscience if in the

circumstances Section 143(1-A) could be invoked to levy the additional tax. The following observations by the Constitution Bench of this Court in *Pannalal Binjraj* v. *Union of India* [(1957) 31 ITR 565 : AIR 1957 SC 397] are apt:

> 'A humane and considerate administration of the relevant provisions of the Income Tax Act would go a long way in allaying the apprehensions of the assessees and if that is done in the true spirit, no assessee will be in a position to charge the Revenue with administering the provisions of the Act with 'an evil eye and unequal hand'."

19. This case was cited before this Court in the **J.K. Synthetics** judgment which we have already dealt with, reported in (2003) 10 SCC 623. This Court first held that the judgment in **Hindustan Electro Graphites** had no application to the facts contained in the **J.K. Synthetics** case and then added that they had reservations about the correctness of the judgment in **Hindustan Electro Graphites Limited** principally because the assessee in that case had not challenged the provisions of Section 143 (1A).

20. In the present case, the question that arises before us is also as to whether bonafide assessees are caught within the net of Section 143 (1A). We hasten to add that unlike in **J.K.**

Synthetics case, Section 143 (1A) has in fact been challenged on Constitutional grounds before the High Court on the facts of the present case. This being the case, we feel that since the provision has the deterrent effect of preventing tax evasion, it should be made to apply only to tax evaders. In support of this proposition, we refer to the judgment in **K.P. Varghese v. ITO**, (1982) 1 SCR 629. The Court in that case was concerned with the correct construction of Section 52 (2) of the Income Tax Act:

> "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 assets 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."

21. On a strictly literal interpretation of Section 52 (2), the moment the fair market value of a capital asset by an assessee exceeds the full value of the consideration declared by the

assessee, in an amount of not less than 15% of the value declared, the full value for the consideration for such capital asset shall be taken to be the fair market value. A strictly literal reading would take into the tax net persons who have entered into bonafide transactions where the full value of the consideration for the transfer is correctly declared by the assessee. In such a situation, this Court held:-

> "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 Revenue Commissioner [1963] AC 557. 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 bonafide transaction where the full value of the consideration for the transfer is correctly declared by the assessee.”

The Court further went on to hold:-

“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."

Finally, the Court held:

> "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 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."

22. Taking a cue from the Varghese case, we therefore, hold that Section 143 (1A) can only be invoked where it is found on facts that the lesser amount stated in the return filed by the assessee is a result of an attempt to evade tax lawfully payable by the assessee. The burden of proving that the assessee has so attempted to evade tax is on the revenue which may be discharged by the revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has, in fact, attempted to evade tax lawfully payable by it. Subject to the aforesaid construction of Section

143 (1A), we uphold the retrospective clarificatory amendment of the said Section and allow the appeals. The judgments of the Division Bench of the Gauhati High Court are set aside. There will be no order as to costs.

……….…..…………………….....J.
(A.K. Sikri)

……….…..…………………….....J.
(R.F. Nariman)

New Delhi,
March 24, 2015.

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॥ यतो धर्मस्ततो जयः ॥
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