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**(1990) 2 BomCR 569 : (1990) 184 ITR 439**

**Bombay High Court**

**Case No:** Writ Petition No. 1095 of 1987

Udharam Aildas  
Thadani and others

APPELLANT

Vs

Inspecting Assistant  
Commissioner of  
Income Tax and others

RESPONDENT

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**Date of Decision:** March 23, 1990

**Acts Referred:**

Income Tax Act, 1961 " Section 269, 269C, 269C(1), 269C(2), 269D

**Citation:** (1990) 2 BomCR 569 : (1990) 184 ITR 439

**Hon'ble Judges:** T.D. Sugla, J

**Bench:** Single Bench

**Advocate:** S.E. Dastur, for the Appellant; Dr. V. Balasubramanian, for the Respondent

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**Judgement**

T.D. Sugla J.

1. By this petition under article 226 of the Constitution of India, the petitioners have challenged the jurisdiction of the Competent Authority to issue

the impugned notice dated July 14, 1986, u/s 269D(1) of the Income Tax Act, Income Tax Act, 1961.

2. The petitioners entered into an agreement into an agreement for purchase of the suit property for a sale consideration of Rs. 17,00,000 with the

vendors on February 6, 1979. A sum of Rs. 9,00,000 was paid by cheque to the vendors on the date of the agreement itself when possession of

the property was also handed over to the petitioners. Balance amount of Rs. 8,00,000 was paid on execution of the deed of conveyance on

November 4, 1981. Sale deed was lodged for registration on November 7, 1981, but was registered only on November 20, 1985.

3. On January 28, 1987, the petitioners wrote a letter to the Competent Authority stating that they had learnt that some notice stated to be a notice

of acquisition was affixed on the suit premises which they had not seen. The Competent Authority was requested to serve a notice upon them if

there was any such notice. In response thereto, the Competent Authority served on the petitioners on January 31, 1987, a copy of the notice u/s

269D/269D(1) dated July 14, 1986, also forwarding therewith a copy of the reasons recorded for initiating acquisition proceedings.

4. Soon thereafter, the petitioners filed the present petition. One of the averments in the petition is that the notice u/s 269D was not published in the

Official Gazette within nine months from the end of the month in which the deed of conveyance was registered. In any event, if at all published, the

Official Gazette was not available to the public before the said period. Other averments were that the conditions precedent for assumption of

jurisdiction u/s 269D read with 269C were not satisfied in this case. In particular, the Competent Authority's referring in the notice to the two

objects of transfer on consideration less than the actual consideration with the words ""and/or"" indicated that the Competent Authority had not

applied its mind as to whether the understatement of consideration in the document was with the object of one or the other or both. Non-

application of mind in this regard, according to the petitioners, was fatal to the assumption of jurisdiction u/s 269D read with section 269C.

5. Counsel for the petitioners pointed out that no affidavit-in-reply was filed on behalf of the respondents. Dr. Balasubramanian, however, stated

that he had a copy of the draft affidavit-in-reply in his file which indicates that the same must have been filed. It is pertinent to mention that the

affidavit-in-reply with Dr. Balasubramanian bears neither any date nor month. The year shown is 1987. Ordinarily, it is not possible to accept Dr.

Balasubramanian"s contention that the same must have been filed. Since, however, the draft copy does not also contain much, it may be assumed

to have been filed.

6. In view of this court"s judgment in the case of Unique Associates Co-operative Housing Society Ltd. Vs. Union of India and others, , the

conditions requisite for exercise of powers u/s 269C/269D of the Act are to be taken - (i) immovable property of value exceeding Rs. 1,00,000 is

transferred : (ii) the fair market value of the property exceeds the apparent consideration by more than 15% of such apparent consideration; (iii)

the consideration for the transfer as agreed between the parties has not been truly stated in the instrument of transfer; and (iv) such untrue statement

of consideration has been with the object of facilitating the reduction or evasion of the tax liability of the transferor or that of the transferee. There is

then a further condition that the Competent Authority shall initiate proceedings for the acquisition by notice to that effect published in the Official

Gazette before the expiry of nine months from the end of the month in which the instrument of transfer was registered.

7. It is proposed to consider the last condition first. In the draft copy of the affidavit-in-reply available with Dr. Balasubramanian which was taken

as an affidavit-in-reply, the averment made on behalf of the Revenue is that the notification was published in the Official Gazette on August 9,

1986. There is, however, no averment as to when that Official Gazette was made available to the public. The case of Dr. Balasubramanian for the

Department is that the said Gazette should be assumed to be available to the public on the day the notification was published in it or nearabout that

date, Placing reliance on a Gujarat High Court decision in the case of COMMISSIONER OF Income Tax, GUJARAT-III Vs. SHILABEN

KANCHANLAL RANA. COMMISSIONER OF Income Tax, GUJARAT-III v. BHAGWANDAS S. RESHAMWALA., , it was contended

that the availability of the Official Gazette within nine months was not a necessary condition. In any event, the burden to prove that the Official

Gazette was not available to the public during that period of nine months was on the petitioner which burden was, admittedly, not discharged.

8. The petitioners having made a categorical averment in the petition (vide paragraph 11) to this effect, according to Shri Dastur, it was for the

Revenue to specifically deny averment. This is not done. Secondly, the date of publication of the notification in the Official Gazette is given to them

by Dr. Balasubramanian for the first time during the course of the hearing. In the circumstances, it is, naturally, not possible for the petitioners to

ascertain and then establish that the particular Official Gazette was not available to the public within time.

9. This court, in the case of All India Reported Ltd. and others Vs. Competent Authority, Inspecting Assistant Commissioner of Income Tax and

others, , held that the publication of notice u/s 269D of the Income Tax Act, 1961, in the Official Gazette meant not only printing but also making

the Official Gazette available to the transferor, the transferee and other persons likely to be interested in the property and to the public. The facts in

that case were that the notice was published in the Official Gazette on November 10, 1972. The petitioners were able to show by cogent evidence

that Gazette was not available to the High Court Bar Association or even to the High Court library until long after the statutory period. The

enquiries made from the librarian of the High Court indicated that the said Official Gazette was not received by the High Court till then. The Court

concluded that the notification was not published in the Official Gazette as required u/s 269D within time and, that therefore, initiation of

proceedings u/s 269C was not valid. The least that the Revenue could have done in this case was to state the relevant facts in the affidavit-in-reply

such as when was the said Gazette received by the Income Tax Department and/or was posted by the Government Press publishing the Gazette.

Nothing of the kind is found even in the draft copy of the affidavit-in-reply available with Dr. Balasubramanian. It is, thus, possible to take the view

that the Official Gazette was not available to the public within the statutory period of nine months. However, in view of the conclusion of the court

on the other issue, the court refrains from expressing itself finally on this issue.

10. The Competent Authority has, while specifying the object of under statement, admittedly retained the words ""and/or"" between the two objects

mentioned in section 269D. Ordinarily, it would mean that the Competent Authority was not sure, at the time of the issue of notice, as to the object

of understating the consideration in the sale deed, i.e., whether that was done with object (a) or (b) or both. It may be, as pointed out by Dr.

Balasubramanian, that, at the stage of enquiry, it is difficult for the Competent Authority to be sure about the object of the petitioners" under stating

the value in the sale deed. The question, however, is, if that is one of the conditions for assumption of jurisdiction u/s 269C/269D, can or should

that aspect make any difference in the legal position.

11. The decision in All India Reported Ltd. and others Vs. Competent Authority, Inspecting Assistant Commissioner of Income Tax and others, is

that the use of the conjunction ""and/or"" in the notice indicates non-application of mind. Before the issue of notice, the Competent Authority was not

sure whether understatement of value in the sale deed was with the object of reduction or evasion of tax liability of the transferor or whether it was

for the purpose of concealment of income or the assets of the transferee or whether it was with the object to help both. Formation of this belief or

opinion is formed in regard to the categories of infringement or anyone of them, the authority will have no right to initiate a proceeding for

acquisition. By the use of the conjunction ""and/or"" for the two clauses of section 269D(a) and (b), the pre-condition and requirement for assuming

jurisdiction and exercise of the power was defective. Accordingly, I have to hold that the Competent Authority"s assumption of jurisdiction was

defective on this ground.

12. As for the question whether the other conditions referred to in this court"s judgment in Unique Associates Co-operative Housing Society Ltd.

Vs. Union of India and others, are satisfied in this case, the first condition is obviously satisfied as the sale consideration is Rs. 17,00,000. For the

second condition, the material on record is three sale instances which are of the years 1984 and 1985. Observing that the average sale price per

square yard in those cases worked out to Rs. 1,900, the Competent Authority assumed that the sale in this case being in the year 1981, the

reasonable market price would be half of the same, i.e., Rs. 950 per square yard. Firstly, there is nothing to indicate that the sale instances were of

Comparable lands. Assuming they were so, there is no material justifying the Competent Authority's taking 50% of the average market value of the

year 1984-85 to be the fair market value of similar land in the year 1981. This appears to be mere conjecture. Further, though the deed of

conveyance in this case was executed in the year 1981, the agreement of sale was of February, 1979, when, as stated earlier, more than half of the

consideration, i.e., a sum of Rs. 9,00,000 was paid and possession of the land was given. Thus, the estimate of the Competent Authority of the fair

market value of the suit property, considered in any manner, is without proper basis. Assuming further that the fair market value estimated by him

was reasonable, that would not be the end of the matter. Further condition is that the consideration for the transfer. In this context, reference may

usefully be made to this court's judgment in Unique Associates Co-operative Housing Society Ltd. Vs. Union of India and others, , where it is held

that the presumption contemplated in section 269C(2) is available after the proceedings u/s 269C are initiated and not for the purpose of initiation

of the proceedings. In the absence of the assistance of sub-section (2) of section 269C, satisfaction of this condition would require existence of

some material to suggest that some amount over and above the consideration shown in the sale deed, as a matter of fact, passed between the

vendors and the petitioners. This is what held by the Supreme Court in the case of K.P. Varghese Vs. Income Tax Officer, Ernakulam and

Another, , though in a different context. Except for stating that the transaction was at arm's length and, therefore, there could not be any

justification for the vendors" selling the suit property at a concessional rate so that it must be assumed that some consideration must have passed

between the parties beyond what was stated in the sale deed, Dr. Balasubramanian was not able to show any material which could even remotely

satisfy this condition precedent for assumption of jurisdiction. As stated by me earlier, the presumption under sub-section (2) is not available for the

assumption of jurisdiction u/s 269C. If that presumption is not available, there has got to be some material. Since, admittedly, there is no material to

suggest that any amount was paid by the petitioners to the vendors over and above the consideration stated in the sale deed, it has to be held that

the third condition is not satisfied.

13. Lastly, Shri Dastur placed reliance on a circular issued by the Board being Circular No. 461 dated July 9, 1986 published in Shriram Dagdualal

Vs. Commissioner of Income Tax, . This circular was issued by the Board to explain the reasons for introducing Chapter XXC in the Act in place

of Chapter XXA. The Board has categorically stated in that circular that, under the provisions of Chapter XXA, before the provisions, meaning

thereby sections 269C and 269D, could be invoked, it had to be proved that the consideration for transfer of an immovable property as agreed to

between the parties had not been truly stated in the instrument of transfer with the object of facilitating the reduction or evasion of the liability of the

transferor to pay tax or concealing the income or assets of the transferee. Since that was an impossible task and the provisions proved ineffective,

Chapter XXC was introduced. Taking a clue from the Board's understanding of the provisions also, one can easily say that the conditions requisite

mentioned in section 269C without the help of the presumptive clauses are required to be satisfied before the Competent Authority can assume

valid jurisdiction to initiate proceedings for acquisition u/s 269D/269C.

14. Having regard to the above discussion, it has to be held that the conditions were not satisfied. The impugned notice, therefore, requires to be

and is hereby quashed. Rule is made absolute in terms of prayer clause (a). No order as to costs.