(1987) 65 CTR 190 : (1987) 166 ITR 823

High Court Of Kerala

Case No: Income-tax Reference No"s. 59 to 64 of 1981

Commissioner of Income Tax		APPELLANT
	Vs	
Fertilizers and Chemicals (Travancore) Ltd.		RESPONDENT

Date of Decision: Feb. 16, 1987

Acts Referred:
Income Tax Act, 1961 â€" Section 160, 161, 162, 163, 166

Citation: (1987) 65 CTR 190 : (1987) 166 ITR 823

Hon'ble Judges: T. Kochu Thommen, J; K.P. Radhakrishna Menon, J

Bench: Division Bench

Advocate: P.K.R. Menon and N.R.K. Nair, for the Appellant; K.V.R. Shenoi and K.A. Nayar, for the Respondent

Judgement

K.P. Radhakrishna Menon, J.
The Revenue is before us. The years of assessment are 1968-69 to 1972-73, the accounting periods

ending on March 31, 1968, March 31, 1969, March 31, 1970, March 31, 1971, and March 31, 1972, respectively. The questions referred are :

1. Whether, on the facts and in the circumstances of the case, the Order of the Income Tax Officer u/s 163 of the Income Tax Act for the

assessment year is invalid under law ?

2. Whether, on the facts and in the circumstances of the case, the order of the Income Tax Officer u/s 163 of the Income Tax Act, 1961, and the

regular assessment on the agent for the assessment year 1968-69 are invalid under law ?

2. Facts relevant and requisite for the disposal of these questions, briefly, stated are--M/s. Fertilisers and Chemicals (Travancore) Ltd., the

assessee, is a public sector undertaking. The assessee-company had entered into a collaboration agreement with Power Gas Corporation, U.K.,

as is seen from the agreement dated April 24, 1966. The object with which the agreement was entered into was for designing and constructing

synthesis gas plants based on I.C.I''s steam reforming process and ammonia synthesis plants based on I.C.I''s ammonia synthesis process.

Regarding payments, the assessee was to pay to the Power Gas Corporation, U.K., what was known as I.C.I. fees, and the Power Gas

Corporation will, in turn, transfer this amount to the I.C.I., U.K., another non-resident company. The total I.C.I. fees thus payable by the

assessee-company under the agreement was fixed at Rs. 49,42,830. A sum of Rs. 5,67,210 out of this, was paid by the assessee outside India

during the assessment year 1968-69. For the subsequent years also, similar payments were made by the assessee. So far as these payments are

concerned, the Income Tax Officer has treated the assessee-company as the agent of the non-resident foreign company u/s 163 of the Income Tax

Act and assessed the aforesaid amounts in the hands of the assessee-company, overruling the objections the assessee-company had raised in the

proceedings initiated by the Income Tax Officer u/s 163.

3. For the assessment year 1968-69, the assessing authority has also made a regular assessment upon the assessee. Copy of the order of

assessment is annexure A-6. Copies of the orders passed u/s 163 are annexures A-1 to A-5.

4. On appeal, the Appellate Assistant Commissioner cancelled the assessment as also the order u/s 163, entering the finding that the assessee-

company cannot be treated as an agent of the foreign company as there was no business connection between the foreign company and the

assessee. The Appellate Assistant Commissioner also found that since the non-resident foreign company, M/s. I.C.I. Ltd., had already been

assessed directly in India, the said foreign company should not have again been assessed ""through an agent"". Copy of the appellate order dated

March 27, 1976, allowing the appeals the assessee had filed against the orders u/s 163 declaring it as the agent of the non-resident is annexure B,

while copy of the order of the Appellate Assistant Commissioner allowing the appeal challenging the order of assessment for the year 1968-69 is

annexure-C.

5. The Revenue in the second appeals contended before the Appellate Tribunal that there was no bar to initiating assessment proceedings against

the non-resident agent, even if the principal, the non-resident foreign company, is available in India for assessment. Relying on a decision of the

Madras High Court in Abdul Azeez Dawood Marzook Vs. Commissioner of Income Tax, Madras, , the Appellate Tribunal upheld the contention

of the assessee as a result of which the appeals were dismissed. It can thus be seen from the order of the Appellate Tribunal that it has held that the

order treating the assessee as an agent of the non-resident was rightly cancelled by the Appellate Assistant Commissioner. Consequently, the order

of the Appellate Assistant Commissioner cancelling the assessment for the year of assessment 1968-69 has also been upheld.

6. The above questions, according to the Appellate Tribunal, arise from its aforesaid order.

7. From the facts available on record, it is clear that the assessee has been made liable for the tax that could be levied on the non-resident

assessee, by invoking the provisions contained in Chapter XV of the Income Tax Act, 1961 (Act 43 of 1961), for short, the ""income tax Act"". The

sections in this Chapter which are relevant for the purpose of disposing of the issues are Sections 160(1)(i), 161, 162, 163 and 166.

8. Before we deal with the points arising for consideration, we shall state certain fundamental principles that should be borne in mind in construing

these sections. The Income Tax Act focuses its attention primarily on the person who, in fact, receives the income, though, he may not have the

ownership or enjoyment thereof. The statute thus makes the person who carries on the business or profession liable to pay the tax although he is

not the owner of the business. It is also worthy of note that in several instances, convenience of assessment and collection of the tax is the reason

for making the person, though not the proprietor of the business and accordingly not entitled to enjoy the income therefrom, liable for the tax. (See

Executors oj the Estate of J.K. Dubash v. CIT [1951] 19 ITR 182). It is profitable in this connection to refer to the following observations of

Lord Cave in A.W. Williams (Surveyor of Taxes) v. W.M.G. Singer [1920] 7 Tax Cases 387) :

.....if the Income Tax Acts are examined, it will be found that the person charged with tax is neither the trustee nor the beneficiary as such, but

the person in actual receipt and control of the income which it is sought to reach. The object of the Acts is to secure for the State a proportion of

the profits chargeable, and this end is attained (speaking generally) by the simple and effective expedient of taxing the profits where they are

found.

9. The object sought to be achieved in enacting these sections in Chapter XV of the Income Tax Act is to fasten on the person who actually carries

on the business, the liability to pay the tax on the income received by him, regardless of its destination or enjoyment. It is also an object to catch the

income at the earliest point of time and tax the same where it is found, instead of waiting until such time when the income reaches the person who is

the owner thereof.

10. It is in this backdrop we have to construe these sections. Section 160(1) defines the various categories of representative assessees in respect

of the income set out against each. Sub-section (2) of Section 160 declares that every representative assessee shall be deemed to be an assessee

for the purposes of the Act. Section 161(1) says that every representative assessee, as regards the income in respect of which he is a

representative assessee, will be subject to the same duties, responsibilities and liabilities as if the income is received by or accrued to him

beneficially. He shall also be liable to assessment in his own name in respect of that income. None the less, any such assessment made on him shall

be deemed to be made in his representative capacity only. Regarding the recovery of the tax thus levied, the section says that subject to the other

provisions contained in Chapter XV, it shall be recovered from him in like manner and to the same extent as it would be leviable upon and

recoverable from the principal. Sub-section (2) of Section 161 was enacted, as observed by the Supreme Court in C.R. Nagappa Vs.

Commissioner of Income Tax, , ""presumably with an intention to remove the conflict of judicial opinion which arose in the interpretation of the

analogous provisions of Sections 40 and 41 of the Indian Income Tax Act, 1922"". This sub-section makes it clear that where any person is, in

respect of any income, assessable, following the procedure prescribed under Chapter XV, in the capacity of a representative assessee, he shall

not, in respect of the same income, be assessed under any other provisions of the Income Tax Act. While considering the scope of Section 161(1),

it is fruitful if we take into account the object with which Section 166 is enacted. These two sections together would constitute a code and,

therefore, to understand the scope of one, it is necessary to consider the scope of the other also. Section 166 virtually overrides the provisions

contained in Sections 160 - 165 and confers power on the Income Tax Officer to assess either the representative assessee or the person

represented by him (the principal) in respect of the income made mention of in Section 160 and recover the tax thus levied from the said assessee.

Section 162 provides that a representative assessee who pays any tax on behalf of the person whom he represents is entitled (a) to recover from

such person the tax so paid, and (b) to retain out of any moneys that may be in his possession or that might come to him in his representative

capacity, an amount equal to the tax so paid by him, and (c) to obtain a certificate from the Income Tax Officer specifying the amount to be

retained, pending final settlement of the tax liability of the person represented, in the case of any disagreement between the representative and the

represented, regarding the sum to be retained. On obtaining such certificate, the representative assessee would cease to be liable for any excess

tax that may be determined at the final settlement except to the extent to which he may at such time have in his hands additional assets of the non-

resident principal. Section 163 empowers the Income Tax Officer to treat any person in India as an agent and hence a representative assessee

(special cases) in relation to a non-resident for the purposes of the Income Tax Act, provided he is one who belongs to any one of the categories

enumerated in Section 163(1)(a), (b), (c) and (d). A person who, whether a resident or non-resident, has acquired by means of transfer, a capital

asset in India from the non-resident, is also an agent for the purposes of the Income Tax Act. These persons virtually are not agents appointed by

the non-resident. But they are appointed as such by the Income Tax Officer. It is mandatory that before a person is declared an agent within the

meaning of Section 163, he must be given an opportunity of being heard by the income tax Officer as to his liability to be treated as such. That is

expressly so enacted in Sub-section (2) of Section 163.

11. From the above, it is clear that the Income Tax Officer has power to assess the representative assessee in respect of the income received by

him on behalf of the non-resident in his hands and recover the tax from him. As observed by the Supreme Court in C.R. Nagappa Vs.

Commissioner of Income Tax, , if an income is assessed following the procedure prescribed under Chapter XV of the Income Tax Act in the

hands of a person in his representative capacity, the same income is not liable to be assessed under any other provisions of the Act. It is all the

more so because, in every case of assessment against a representative assessee, the assessee is liable to be proceeded against in the manner laid

down in Chapters II to XII of the Income Tax Act. In short, when once the assessing authority decides to assess the income in respect of which an

assessment can be had under Chapter XV, against the representative assessee, the assessment will be completed computing the income under

Chapters II to XII of the Income Tax Act. Merely because the Department initiated proceedings against the non-resident to assess his income

other than the income in question, it does not mean that the Department has abandoned its power to make an assessment on the agent of the said

non-resident, in respect of the income earned by, or derived to, the non-resident, through him. It is true that the tax is levied on the total income

and the total income of any previous year of an assessee includes all income from whatever sources they are derived. However, it is significant to

note that the charge of tax on the total income of an assessee is made subject to and in accordance with the provisions of the Income Tax Act. The

assessment of the income of a nonresident assessee in the hands of a representative following the procedure prescribed under Chapter XV of the

Income Tax Act will be an assessment in accordance with the Income Tax Act. The said assessment would, therefore, be a valid assessment. Even

after such assessment on the representative assessee, the other incomes of the non-resident can be assessed directly in the hands of the non-

resident. So long as the assessing authority has the power to exercise the option to make an assessment of the income the non-resident has earned

through his agent in India, either directly on him or against the representative assessee, following the procedure prescribed under Chapter XV, it is

for the said authority to decide as to whether it should assess the said income directly against the non-resident or to make an assessment against

each of the agents separately in respect of the income received by each one of them in terms of the provisions contained in Chapter XV. In such

cases, there is no multiplicity of assessments in respect of one assessee. Learned counsel for the Revenue, therefore, is right in his submissions that

the assessment made against the assessee-company in its capacity as representative assessee is valid and beyond challenge.

12. Notwithstanding the above position, learned counsel for the assessee submits that the assessment for the year of assessment 1968-69 is liable

to be declared invalid for the reason that the assessing authority has no jurisdiction to proceed against the company in a representative capacity,

inasmuch as the Department, in exercise of the power vested in it u/s 166, has assessed the non-resident directly as is seen from the proceedings

initiated by Company Circle, Calcutta, in District IV (Company Circle IV) against"" M/s. Imperial Chemical Industries Ltd., in respect of incomes

other than the income in dispute. The orders u/s 163 are also liable to be vacated for the reason that the assessee has no business connection with

the non-resident, learned counsel submits. Regarding this, i.e., whether the assessee has any business connection with the non-resident, it may not

either be proper or legal for us to give an opinion either way, because the Tribunal has not considered and disposed of this question although it was

raised by the assessee at the hearing of the appeal.

13. It is true that the non-resident is a regular assessee in ""Calcutta Range"". The assessment against the non-resident is already over. It is, however,

clear from the records that the income that is now assessed in the hands of the representative assessee has not been included in the income that has

already been assessed in the hands of the non-resident at Calcutta. Considering these aspects of the matter, the Tribunal has held thus :

The non-resident itself for these years is a regular assessee at Calcutta Range. It has various items of income. Those assessments are already over.

From the materials on record, it becomes clear to us that this item which is said to be assessed in the hands of the assessee is not included in the

assessments made on the non-resident. What appears to us is that such non-assessment of this item of income on the non-resident assessee is not

by any decision on the merits of the case of includibility but only an omission on the part of either the assessee or the assessing authority at

Calcutta, because we are assured by the departmental representative that reassessment proceedings against the non-resident assessee are in the

offing at Calcutta.

14. Taking advantage of the above observation, learned counsel for the assessee submits that since the non-resident has already been assessed, it

is not possible under law to have a separate assessment of the income the non-resident has earned through the assessee-company against it in a

representative capacity. In support of this argument, learned counsel relied on the decision of the Madras High Court in Abdul Azeez Dawood

Marzook Vs. Commissioner of Income Tax, Madras, . In that case, the Madras High Court was considering the constitutional validity of Section

42 of the Indian Income Tax Act, 1922. What was considered in that decision has succinctly been stated there thus (at page 164) :

The learned Advocate-General rightly pointed out that it was only when the non-resident principal could not be reached by the assessing

authority, the Income Tax Officer, that he has to exercise his option either to order the assessment in the name of the non-resident principal or in

that of the agent. The Income Tax Officer under such circumstances would only choose the more effective means of assessment with a view to the

ultimate collection of the tax assessed. That would really be the determining factor in the choice he has to make under the enabling provisions of

Section 42. As we have already pointed out, in whosesoever name the assessment is completed, the principal is not exonerated at all of his ultimate

liability. It is still the principal''s liability that is enforced in the hands of the agent, and the agent in that case is given full opportunity to participate in

the assessment proceedings. There could be little scope for any arbitrariness or caprice in the choice for which Section 42(1) provides.

15. This decision has not considered the impact of Sections 4 and 5 on an assessment made in accordance with the provisions of Chapter XIV of

the Income Tax Act. This ruling, therefore, has little application here.

16. The basis of the charge under the Income Tax Act, as already stated, is the total income of a previous year of a person and it includes all

income from whatever sources derived. However, it is pertinent to note that the total income is determined ""subject to the provisions of the Income

Tax Act"". The charge in respect of the total income is expressly declared to be ""in accordance with and subject to the provisions of this Act"".

These expressions ""in accordance with"" and ""subject to the provisions of the Act"" make it clear that the assessment of the income of a non-resident

accrued or arisen in India through an agent, shall be subject to and in accordance with the provisions contained in Chapter XV of the Income Tax

Act. They are special provisions and, therefore, they should be adhered to while assessing the income earned by a non-resident through an agent in

the hands of the agent. These special provisions cannot, as observed by the Supreme Court in The Commissioner of Wealth Tax, Andhra Pradesh,

Hyderabad Vs. Trustees of H.E.H. Nizam''s Family Hyderabad, , be ignored in favour of a general provision. Thus, if a fiscal enactment makes a

special provision regarding the manner in which the burden of taxation shall be borne by a particular set of assessees, then the said special

provisions shall prevail over the general provision. Chagla C.J. in Commissioner of Income Tax, Ahmedabad Vs. Balwantrai Jethalal Vaidya and

Others, , has observed as follows (at pages 194 and 195) :

If the assessment is upon a trustee, the tax has to be levied and recovered in the manner provided in Section 41. The only option that the

Legislature gives is the option embodied in Sub-section (2) of Section 41, and that option is that the Department may assess the beneficiaries

instead of the trustees, or having assessed the trustees, it may proceed to recover the tax from the beneficiaries. But, on principle, the contention of

the Department cannot be accepted that, when a trustee is being assessed to tax, his burden which will ultimately fall upon the beneficiaries should

be increased and whether that burden should be increased or not should be left to the option of the Department. The basic idea underlying Section

41, and which is in conformity with principle, is that the liability of the trustees should be co-extensive with that of the beneficiaries and in no sense

a wider or a larger liability. Therefore, it is clear that every case of an assessment against a trustee must fall u/s 41, and it is equally clear that, even

though a trustee is being assessed, the assessment must proceed in the manner laid down in Chapter III..... Section 41 only comes into play after

the income has been computed in accordance with Chapter III. Then the question of payment of tax arises and it is at that stage that Section 41

issues a mandate to the Taxing Department that, when they are dealing with the income of a trustee, they must levy the tax and recover it in the

manner laid down in Section 41.

17. The above observation of Chagla C.J. has become the law of the land on the Supreme Court making it part of its decision in C.R. Nagappa

Vs. Commissioner of Income Tax, . The Supreme Court accordingly held that (at page 633) :

The same considerations (considerations discernible from the above observations of Chagla C.J.) must apply in the interpretation of Section

161(2) of the Income Tax Act, 1961.

Sub-section (2) of Section 161 merely enacts that when income is assessed in the hands of a representative assessee in his own name, the

assessment shall be deemed to be made upon him in the representative capacity only and tax shall be levied and recovered in the manner provided

in Sub-section (1).

18. That means that the income of the non-resident received by the representative assessee will be treated as his income. u/s 4, the rate of tax must

be related to the total income of the previous year of the assessee. Since the total income of a representative assessee can be only the income

received by him on behalf of the non-resident and not any other income, during the previous year, the rate of tax will be that applicable to such

total income only. Section 161 read with Sections 4 and 5 makes this clear. Same view has been taken by the Calcutta High Court. (See Income

Tax Officer, ""F"" Ward and Others Vs. Eastern Scales (Pvt.) Ltd.,). It, therefore, follows that where a person is assessed in respect of the income

received by him on behalf of the non-resident in his representative capacity, his liability is not larger or wider than that of the non-resident. The

basic idea underlying Section 161(1) and which is in conformity with the principle (borrowing the observations of Chagla C.J. in Commissioner of

Income Tax, Ahmedabad Vs. Balwantrai Jethalal Vaidya and Others, , with appropriate changes introduced in the said observation to suit the

wording of this sub-section) is that the liability of the representative assessee should be co-extensive with that of the non-resident and in no sense a

wider or larger liability. It is, therefore, clear that every case of assessment of a representative assessee shall be in accordance with Sub-section (1)

of Section 161 ; and it is equally clear that although the representative assessee is assessed, the assessment must be made in the manner laid down

in Chapters II to XII of the Income Tax Act. This sub-section comes into play after the income is computed in accordance with the provisions

contained in Chapter IV. Then the question of payment of tax arises and it is at that stage the mandate of this sub-section comes to the fore. What

is that mandate ? It, in short, is this : The Revenue can levy the tax on the said income and recover it only in the manner laid down in the said sub-

section.

19. It is in this background that the main question, namely, whether the Department has the authority to assess the representative assessee in

respect of the income earned by the non-resident through the representative assessee separately in a case where, in regard to the other items of

income, the non-resident has already been assessed directly, raised by learned counsel for the assessee, requires to be considered. The answer

depends upon the construction of Section 166. A non-resident may have several representative assessees in respect of several heads under which

income is derived in his favour. We have already seen that in respect of the income derived to or earned by the non-resident through a

representative assessee, an assessment can be made upon that representative assessee in accordance with the provisions contained in Section 161.

There can, therefore, be more than one assessment in respect of the income accrued or arisen in favour of a non-resident provided there are more

than one representative assessee. In the light of the scheme of Chapter XV read with Sections 4 and 5, we see no objection in principle as to why

there should not be more than one assessment. However, u/s 166, the Department has the power to choose to tax a non-resident directly in

respect of the income which can be assessed upon the representative assessee in terms of Section 161(1). But when once such an assessment is

made, the Department cannot thereafter again assess the same income in the hands of the representative asses-see.

20. Let us now consider yet another point raised by learned counsel for the assessee in this regard. He argues that when once the Department

makes an assessment upon the non-resident directly, it cannot later on initiate proceedings in terms of Section 161 and assess the representative

assessee in respect of the income earned by the non-resident through him, but was omitted to be included in the total income of the non-resident.

In such cases of omission, learned counsel submits that the only possible method that can be adopted by the Department is to assess the said

income by initiating proceedings u/s 147. This argument at first blush is attractive. However, there is no substance in this argument. u/s 147, the

Income Tax Officer has the power to assess or reassess the escaped income of an assessee. Income is said to have escaped assessment under this

section when the income has not been charged in the hands of the assessee in the proper assessment year. The words ""escaped assessment"", as

observed by the Supreme Court in The Commissioner of Income Tax, Bombay City I, Bombay Vs. Narsee Nagsee and Co., Bombay, , ""apply

equally to cases where a notice was received by the assessee but resulted in no assessment at all and to cases when, due to any reason, no notice

was issued to the assessee and, therefore, there was no assessment of his income."" This section, although it is part of a taxing Act, ""imposes no

charge on the subject, and deals merely with the machinery of assessment"". (See CIT v. Mahaliram Ramjidas [1940] 8 ITR 442). It can thus be

seen that the proceedings initiated under this section can as well be for the purpose of assessing for the first time, the income which is chargeable

under the Income Tax Act. So far as the income in dispute is concerned, it is chargeable either in the hands of the assessee in the manner provided

for u/s 161, in his capacity as representative assessee, or in the hands of the non-resident. Since this income has not already been subjected to tax,

the same is liable to be assessed. Such assessment can be had either by initiating proceedings u/s 147 against a non-resident or the agent, because

he is also an assessee under the Act, or by initiating regular assessment proceedings in terms of Section 161 against the assessee in his

representative capacity. In this connection, it should be remembered that in respect of the income earned by the non-resident, there can be more

than one assessment provided he earns the said income through more than one agent. Whatever that be, in both the cases, the object is to assess

the income which has escaped assessment. If that be so, the assessing authority in exercise of the power vested in him u/s 166 can assess this

income either in the hands of the non-resident or the agent by initiating proceedings, u/s 147, or against the representative assessee in the manner

provided for u/s 161, The assessing authority in this case, in exercise of the power, has assessed the income in the hands of the assessee, in his

representative capacity. The assessment, therefore, cannot be challenged.

21. Inasmuch as a representative assessee can have recourse to Section 162 which confers on him the right to get reimbursement of the tax paid

by him as also the right to get a ""certificate from the Income Tax Officer for retention"", it cannot be said that he is aggrieved by the assessment

made upon him in accordance with the provisions contained in Chapter XV. If that be so, the challenge against the order of assessment by the

assessee, except perhaps in regard to the actual computation (this point, as it is unnecessary to consider in this case, is left open) is not sustainable.

22. We have already found that the Tribunal has not considered the question whether the assessee has any business connection with the non-

resident so as to treat him as an agent of the non-resident u/s 163. Only on deciding this issue, the question whether the orders passed by the

Income Tax Officer u/s 163 and the assessment for the year of assessment 1968-69 can be said to be valid or not. The question requires to be

considered afresh.

23. The questions referred to us in these circumstances cannot be answered. We accordingly decline to answer the questions.

24. We direct the parties to bear their respective costs in these tax referred cases.

25. A copy of this judgment under the seal of the High Court and the signature of the Registrar shall be forwarded to the Income Tax Appellate

Tribunal, Cochin Bench.