(1986) 02 CAL CK 0007

Calcutta High Court

Case No: IT Reference No''s. 251 of 1977 and 112 of 1983

Commissioner of Income Tax		APPELLANT
	Vs	
Alfred Herbert (India) (P.) Ltd.		RESPONDENT

Date of Decision: Feb. 18, 1986

Acts Referred:

- Constitution of India, 1950 - Article 226
- Income Tax Act, 1922 - Section 10, 41, 43
- Income Tax Act, 1961 - Section 139(2), 143(3), 147, 147(a), 147(b)

Citation: (1986) 26 TAXMAN 145

Hon'ble Judges: Shyamal Kumar Sen, J; Dipak Kumar Sen, J

Bench: Division Bench

Advocate: Pal, P.K. Pal and Miss Seal, for the Appellant; B.K. Bagchi and A.N. Bhattacharji, for the Respondent

Judgement

Dipak Kumar Sen, J.

The assessee, Alfred Herbert (India) (P.) Ltd., is a company incorporated in India and as a subsidiary of Alfred Herbert Ltd. of Coventry, company incorporated in the United Kingdom, being a nonresident company. An agreement was entered into by and between the assessee and the non-resident company dated 27-6-1955 whereby the assessee was appointed as the sole selling agent of the non-resident company. In the assessment years 1968-69 to 1970-71 the relevant accounting years ending on 31-10-1967, 31-10-1968 and 31-10-1969, Alfred Herbert Ltd., UK was assessed to income tax in India in the status of a non resident company. The assessment orders were passed respectively on 5-9-1968, 7-8-1969 and 12-2-1971.

2. Thereafter, on 2-3-1971 the ITO passed orders u/s 163 of the income tax Act, 1961 (''the Act'') treating Alfred Herbert (India) (P.) Ltd., the assessee, as an agent of the non-resident company for the said assessment years 1968-69 to 1970-71.

3. Against the orders passed by the ITO u/s 163 the assessee filed revision applications before the Commissioner which it appears remained pending at the material time.

4. On 3-31971, the ITO issued notices u/s 148 of the Act, on the assessee in respect of the assessment years 1968-69 and 1969-70 calling upon the assessee to file returns of income as the agent of the non-resident company on the ground that income chargeable to tax for these two years had escaped assessment within the meaning of section 147 of the Act. For the assessment year 1970-71 the ITO issued notice u/s 139(2) of the Act calling upon the assessee to file a return of income also of the non-resident company.

5. In compliance with the above notices the assessee filed returns of income for the said assessment years showing nil income in each of the returns and also protested against the initiation of proceedings u/s 148.

6. The ITO rejected the protests of the assessee and made orders of assessment for the assessment years 1968-69 and 1959-70 u/s 143(3) read with section 147 and 191 of the Act and for the assessment year 1970-71 made an assessment u/s 143(3). Income for the said three assessment years were computed, respectively, at Rs. 10,75,000, Rs. 1,90,000 and Rs. 1,30,000.

7. Being aggrieved by the assessments the assessee preferred appeals before the AAC. The Commissioner upheld the conclusion of the ITO that there was business connection between the non-resident company and the assessee. The Appellate Commissioner, however, reduced the quantum of income assessed by the ITO, respectively, to Rs. 75,000, Rs. 40,000 and Rs. 30,000 for the said three assessment years.

8. From the order of the AAC both the assessee and the revenue preferred appeals before the Tribunal. At the hearing before the Tribunal the assessee sought to raise an additional ground of appeal to the effect that in view of the fact that order u/s 163 had been passed on 2-3-1971 and in view of the further fact that the original assessments for the relevant year were made on the non-resident there was no obligation on the part of the assessee to file a return of income for the said assessment years and the condition precedent for assumption of jurisdiction u/s 147(a) did not exist and the notices and the assessments made pursuant thereto were illegal, void and without jurisdiction.

9. A further additional ground sought to be raised was that the proceedings u/s 147(a) read with section 163 were void ab initio inasmuch as the original assessment had been completed on the nonresident company and the ITO having already exercised the option of assessing the non-resident directly was precluded from proceeding against the agent u/s 147(a).

10. The above additional grounds were sought to be raised in respect of the assessment years 1968-69 and 1969-70.

11. For the assessment year 1970-71 an additional ground was sought to be raised before the Tribunal to the effect that proceedings u/s 143(3) read with section 163 were void ab initio as the original assessment had been completed on the non-resident company and the ITO having already exercised the option of assessing the non-resident direct in the said original assessment was precluded from proceeding to assess the agent again u/s 143(3).

12. The Tribunal allowed the additional grounds to be raised inasmuch as in the opinion of the Tribunal the said grounds were all raised as question of law which went to the root of the matter.

13. The Tribunal considered and construed sections 160, 161 and 166 of the Act and held that the ITO had an option either to assess the non resident company directly or to assess it through its agent in India. Once the ITO opted for assessing the non-resident company directly he could not assess the non-resident company through an agent in India for the same assessment year. The assessment of the non-resident company could not be split into two parts, one part to be assessed in the hands of the non-resident company and the other in the hands of the agent of the non-resident company in India. The Tribunal came to the said conclusion on the authority of several decisions cited on behalf of the assessee.

14. The Tribunal also held that the assessee was not treated as an agent of the non-resident company during the currency of the accounting years involved and as such the assessee was not aware that it was to be treated as the agent of the non-resident company. Following the two decisions of the Supreme Court the Tribunal held that the assessee could not be expected to file the returns of income voluntarily for and on behalf of the non-resident company and, therefore, had not committed any default in not filing the returns of income for and on behalf of the non-resident company in respect of the first two years. The Tribunal also held that there was no question of reassessment in the hands of the assessee u/s 147(b) inasmuch as no assessment at all had been made in the hands of the assessee for the first two assessment years. The escaped income, if any, escaped in the hands of the non-resident company. The Tribunal allowed the appeals of the assessee on the additional grounds raised and not on merits of the reassessment. The appeals of the revenue were dismissed.

15. On the application of the revenue u/s 256(1) of the Act, the Tribunal has referred the following question of law arising out of its order for the opinion of this Court:

Whether, on the facts and in the circumstances of the case, and on a correct interpretation of sections 160, 161, 163 and 166 of the income tax Act, 1961, the Tribunal was right in law in holding that the assessment made in the hands of the assessee as an agent of the non-resident company in respect of income deemed to

have accrued or arises to the latter through or from a business connection in India was bad in law in view of the fact that the non-resident had already been assessed in respect of certain other items of income?

The above question has come up before us in income tax Reference No. 251 of 1977.

16. On an application of the revenue u/s 256(2), this Court also directed the Tribunal to refer the following question, inter alia, for the assessment year 1969-70 also as a question of law arising out of the order of the Tribunal for the opinion of this Court:

Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that the reassessment proceedings initiated by the income tax Officer were illegal and without jurisdiction?

The said question is before us in income tax Reference No. 112 of 1983. At the instance of the parties the two references have been heard together.

17. The learned advocate for the revenue drew our attention to the relevant sections of the Act, the material portions of which are noted hereafter:

2. In this Act, unless the context otherwise requires,

(1) to (6) ******

(7) ''assessee'' means a person by whom any tax or any other sum of money is payable under this Act, and includes--

(a)******

(b) every person who is deemed to be an assessee under any provision of this Act;

"160. (1) For the purposes of this Act, ''representative assessee'' means--

(i) in respect of the income of a non-resident specified in sub-section (1) of section 9, the agent of the non-resident, including a person who is treated as an agent u/s 163;

(ii) to (v) ******

(2) Every representative assessee shall be deemed to be an assessee for the purposes of this Act.

161. (1) Every representative assessee, as regards the income in respect of which he is a representative assessee, shall be subject to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially, and shall be liable to assessment in his own name in respect of that income;...

163. (1) For the purpose of this Act, ''agent'', in relation to a non-resident, includes any person in India--"

(a)******

(b) who has any business connection with the non-resident; or

(c) and (d) ******

(2) No person shall be treated as the agent of a non-resident unless he had had an opportunity of being heard by the income tax Officer as to his liability to be treated as such.

166. Nothing in the foregoing sections in this Chapter shall prevent either the direct assessment of the person on whose behalf or for whose benefit income therein referred to is receivable, or the recovery from such person of the tax payable in respect of such income.

Construing the said sections the learned advocate submitted that it was open to the income tax authorities to assess the non-resident company for a part of its income and also to reassess the agent of the non-resident company in India if any income had escaped assessment in the hands of the non-resident. For the purpose of assessment the non-resident company and its agent may be treated as two separate assessees and both are liable to be taxed. In support of his contentions the learned advocate for the revenue cited the following decisions:

(a) Commissioner of Income Tax Vs. Claggett Brachi and Co. Ltd., . In this case a non-resident sterling company had appointed an agent in India u/s 43 of the Indian income tax Act, 1922 (''the 1922 Act''). The agent filed returns of income on behalf of the assessee for two assessment years on which assessments were made. Subsequently the ITO came to the conclusion that for the said two years the income of the assessee had escaped assessment and issued notices to the agent of the assessee u/s 148. The agent contended that u/s 149(3) of the Act, no notice could be served on the agent of a non-resident assessee after the expiry of two years from the end of the relevant assessment year. The ITO thereupon issued notice u/s 148 for the said two years directly to the assessee. The assessee filed returns under protest contending that reassessment could not be made in the hands of the assessee as notice had already been served on the agent. The ITO completed the reassessment on the non-resident assessee directly. The assessments were challenged in appeal. The AAC rejected the appeal but the Tribunal took the view that as the assessments were originally made on the agent the direct reassessment could not be made on the assessee u/s 147(b). On a reference a Division Bench of the Andhra Pradesh High Court held that under the Act, there was no bar to reassess the income in the hands of the principal even though the original assessment had been made on the agent. Construing section 160 the High Court held that an agent who was the representative of the assessee would be deemed to be an assessee for the purpose of the Act. Therefore, the assessment made against the agent was in fact the assessment made against the principal. Construing section 166 the High Court held that it was made clear in the said section that the earlier

sections would not prevent direct assessment of the person on whose behalf or for whose benefit income had been received or recovered from such person of the tax payable. Reading the sections together it was held that the revenue at the time of reassessment would have option either to proceed against the agent or against the principal.

(b) Barium Chemicals Ltd. Vs. Income Tax Officer, . In this case the assessee entered into an agreement with a non-resident firm of UK for certain work to be executed by the latter and also for supply of certain machinery, designs, drawings and technical know-how connected with the manufacture of Bariam Salts. In respect of the said transaction the non-resident company was sought to be assessed to income tax in India. The ITO issued notice to the assessee to show cause as to why it would not be treated as an agent of the non-resident firm and passed an order holding the assessee to be such an agent. Thereafter, the ITO served a notice on the assessee u/s 148 requiring it to file the income for two assessment years. Simultaneously the ITO served similar notices also on the nonresident calling upon it to file its return of income for the same assessment years. Both the assessee and the non-resident firm filed nil returns of income.

During the pendency of the proceedings two applications under article 226 of the Constitution were filed before the Andhra Pradesh High Court challenging both the proceedings. It was contended before the High Court that u/s 166 the ITO had an option to initiate proceedings either against the non-resident firm or against the agent of the non-resident. Having exercised its option to proceed against the non-resident firm the revenue could not continue the proceedings against the agent.

The Andhra Pradesh High Court construed section 166 and held, inter alia, as follows:

Even a casual reading of section 166 would indicate that direct assessment or recovery of the tax from a non-resident firm is not barred because of the fact that, u/s 160 and section 163 of the Act, the ''representative assessee'', that is to say, the agent of the non-resident firm, is made liable for assessment and recovery of tax. There are no words in section 166 which would indicate that the law confers a discretion or option upon the income tax Officer to choose, either initially or subsequent to the initiation of proceedings, as to whether he wants to assess and recover the tax from the non-resident firm or its agent. What all the section says is that merely because the representative-assessee, that is to say, the agent, is, in law, made responsible for the assessment and recovery of tax, it would not bar the assessment and recovery of tax from the non-resident principal. In other words, the law holds not only the non-resident principal but also the agent of such non-resident firm liable for assessment and for the recovery of tax under such assessment. No question of selecting one or the other arises either for the purpose of assessment or for the purpose of recovery of tax. Both are equally liable.

... Thus, the terms ''either'' and ''or'' are used in section 166 to indicate the dichotomy between the assessment and the recovery. They are not, certainly, used for indicating that the assessment and recovery proceedings can be taken either against a non-resident principal or against the agent of such non-resident principal. There is no justification for reading anything of that kind in section 166. The marginal note of section 166 and the language of that section can leave no one in doubt that both the non-resident principal as well as the agent of such non-resident principal are liable to be assessed to tax... Consequently, it must follow that, even if the proceedings of assessment had been commenced as against the non-resident principal, still they can be continued as against the agent of the non-resident principal or, simultaneously, action for assessment and recovery of tax can be taken both against the non-resident principal as well as its agent. The argument, therefore, that having exercised his option to proceed against the non-resident firm, the income tax Officer could not continue the proceedings against the petitioner, i.e., the agent of the non-resident firm, is misconceived and we find no difficulty in rejecting it." (p. 640)

(c) Commissioner of Income Tax Bombay City-I Vs. Trustees of Miss Gargiben Trust (No. 1) and others, . In this case the income of a trust had been assessed in the hands of the beneficiary. Terms of the trust deed did not permit capital gains to be disbursed to the beneficiary. Such gains were directed to be added to the corpus of the trust. The ITO while determining the tax payable by the trust for the capital gains determined the total income of the trust which included the amount which was already brought to tax in the hands of the beneficiary and determining the tax payable on the capital gains the ITO took such total income and determined the average rate of tax with reference to such total income. The method was followed in the case of two other trusts in each of which the beneficiary was common. The orders of the ITO were upheld by the AAO. The Tribunal, however, held that for the purpose of determining the average rate of income tax the income other than the capital gains would be nil. The Tribunal directed that the capital gains should be taxed on the basis that they were the income of the trust. On a reference it was held by the Bombay High Court that the income of the trust arose only from the capital gains. The other income already taxed in the hands of the beneficiary should not be taken into account and included in the income even for determining the rate at which the income or the capital gains were liable to be taxed.

18. On the authority of the above decisions the learned advocate for the revenue submitted that the Tribunal has patently erred in setting aside the assessments in the hands of the assessee.

19. The learned advocate for the assessee contended, on the other hand, that law was well settled that in assessing a person either directly or through his representative the ITO had to make a choice as to which of the two would be assessed. In the case of a representation it could not be disputed that the income

was one. The only question which would arise would be in whose hands would such income be taxed. This was the law laid down by a number of High Courts as also the Supreme Court. He submitted that the two decisions of the Andhra Pradesh High Court cited and relied on behalf of the revenue should not be followed as the law laid down in the said decisions should not be held to be good in law.

The learned advocate for the assessee submitted further that, in any event, the reassessment u/s 147(a) in the hands of the assessee was clearly illegal inasmuch as it could not be said that there was any default on the part of the assessee to file its return on the ground of which the reassessment proceedings could be initiated. He submitted that till the assessee was treated as an agent of the non-resident foreign company, there could be no obligation or liability on the assessee to file any return. In the instant case, the assessee was held to be an agent of the non-resident company on 2-3-1971 and on the next day, that is, 3-3-1971, notice was given to the assessee u/s 148 read with section 147(a).

The learned advocate for the assessee also submitted that the reassessment could not also be supported under clause (b) of section 147 as action thereunder could not be taken unless the original assessment had been made in the hands of the assessee. In the instant case, admittedly, no prior assessment had been made on the assessee for the assessment year 1969-70 and, therefore, the assessee could not be proceeded against u/s 147(b).

The learned advocate for the assessee drew our attention to section 2(8) of the Act, which provides that under the Act assessment would include reassessment. It was submitted that in the instant case assessments admittedly having been made in the hands of the non-resident company reassessment could not be made in respect of the same income in the hands of its agent again. It was submitted that what was meant to be assessed under the Act was the total income of the assessee in an assessment year from whatever source such income arose and the Act did not permit splitting of such income and assess different parts of the same in different hands. It was submitted that the original assessments in the hands of the non-resident had not been set aside and they remained on record.

In support of his contentions, the learned advocate for the assessee cited the following decisions:

(a) East India Housing and Land Development Trust Ltd. Vs. Commissioner of Income Tax, West Bengal, . This decision of the Supreme Court was cited for the following observations:

... By section 6 of the income tax Act the following six different heads of income are made chargeable: (1) salaries, (2) interest on securities, (3) income from property, (4) profits and gains of business, profession or vocation, (5) income from other sources, and (6) capital gains. This classification under distinct heads of income, profits and gains is made having regard to the sources from which income is derived. income

tax is undoubtedly levied on the total taxable income of the taxpayer and the tax levied is a single tax on the aggregate taxable receipts from all the sources; it is not a collection of taxes separately levied on distinct heads of income...." (p. 51)

(b) Trustees of Chaturbhuj Raghavji Trust Vs. Commissioner of Income Tax, Bombay City II, . In this case, the Bombay High Court construed section 41 of the 1922 Act, which corresponds to sections 160 and 161 of the 1961 Act and held that section 41 provided for two alternative methods, namely, either to tax the income in the hands of the trustee or directly in the hands of the person on whose behalf the income was receivable under the trust. One of such methods having been availed of by the income tax Department in directly assessing the beneficiary, the other was no longer available to the department.

(c) Commissioner of Income Tax, Andhra Pradesh Vs. H.E.H. Mir Osman Ali Khan, . In this case the Supreme Court construed section 41 and held as follows:

Under this section the revenue has the option to levy or collect tax from the trustee or the beneficiary; the tax can be levied upon and recoverable from the trustee in the like manner and to the same amount as it would be leviable upon and recoverable from the person on whose behalf such income, profits or gains are receivable. In short, it imposes a vicarious liability on the trustee...." (p. 682)

(d) Panna Sanjay Trust Vs. Commissioner of Income Tax, Gujarat, . In this case, a Division Bench of the Gujarat High Court construed sections 160, 161, 164 and 166 of the Act, and held, inter alia, as follows:

...If, therefore, any portion of the income is receivable or is received by the representative-assessee specifically for the benefit of a particular beneficiary so that such income can be said to accrue to the beneficiary, the revenue has an option either to assess the representative-assessee in his representative capacity u/s 161 or to make direct assessment ob the beneficiary in respect of such income by virtue of the right expressly preserved u/s 166.

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... But, even apart from this clause, when ''such income'', that is, income which falls within the main part of section 164 or any part of ''such income'' is paid by the representative-assessee to the beneficiary, the beneficiary can always be assessed directly in respect of such amount since such amount would on receipt by the beneficiary form part of his total income and would be assessable in the hands of the beneficiary. Here also, section 166 operates to make it clear that the provision enacted in section 164 for assessment of '' such income'' in the hands of the representative-assessee as an association of persons shall not prevent direct assessment of the beneficiary in respect of any part of ''such income'' received by him. The revenue has thus two modes of assessment available in respect of the amount actually received by the beneficiary out of ''such income''; one is to assess it

as part of ''such income'' in the hands of the representative-assessee in a representative capacity u/s 164 and the other is to assess it directly in the hands of the beneficiary by including it in the total income of the beneficiary. Now, it was not disputed on behalf of the revenue, and indeed it could not be, that these two modes of assessment are alternative to each other. The revenue can adopt either the one or the other but not both. Either the revenue can bring the amount actually ""received by the beneficiary to charge in the hands of the representative-assessee in a representative capacity or bring it to charge in the hands of the beneficiary by direct assessment on him. If it is charged to tax in the hands of the beneficiary, it cannot again be brought to tax in the hands of the representative-assessee. This would appear to be clear on principle both having regard to the scheme of sections 161, 164 and 166 as also on the application of the doctrine that the revenue cannot, in the words of the Supreme Court in (1966) 60 ITR 95 (SC) , ''seek to -assess the one income-twice''...." (pp. 401-402)

(e) Premier Automobiles Ltd. Vs. S.N. Shrivastava Income Tax Officer, Acompanies Circle 1(3), Bombay and Another, . In this case, it was held by the Supreme Court that where during the assessment year concerned the asses see is treated as an agent of the non-resident principal it would become liable to pay advance tax in the financial year concerned.

(f) Rajapalayam Mills Ltd. Vs. The Commissioner of Income Tax, Madras, . This decision was cited for the following observation of the Supreme Court:

It is settled law that though the profits of each distinct business carried on by an assessee have to be computed separately in accordance with the provisions of section 10, the tax is chargeable under that section not separately on the profits of each business, but on the aggregate of the profits of all the businesses carried on by the assessee...." (p. 778)

(g) Haji Abdul Hamid Vs. Commissioner of Income Tax, . In this case, a Division Bench of the Allahabad High Court construed section 41 and held that under the said section the ITO could either assess the trustee in the same manner and to the same amount as the beneficiaries or make a direct assessment on the beneficiaries.

(h) Prem Nath Diesels v. CIT [1985] 22 Taxman 298. In this case a Division Bench of the Delhi High Court construing section 163 held that it is open to the ITO to assess either the representative or the nonresident at the initial stage. Once the non-resident was assessed, the representative-assessee could not be assessed after the statutory period. However, in the case before the Delhi High Court two years had passed after the end of the relevant assessment year before the revenue sought to proceed against the representative.

20. On a careful consideration of the facts and circumstances on records, the relevant sections of the Act and the decisions cited before us, it appears to us that apart from the two decisions of the Andhra Pradesh High Court, the other High

Courts have taken a uniform view that the revenue cannot proceed against a non-resident as also against his representative in India simultaneously.

21. The learned advocate for the revenue did not seriously dispute that if an income had been assessed in the hands of the non-resident the same income could not again be assessed in the hands of his representative. He contended that what was being sought to be reassessed was another part of the income of the non-resident which had escaped assessment in the hands of the latter and was, therefore, not the same income. He submitted that there was no bar in the statute whereby such escaped income cannot be assessed in the hands of the representative.

22. We are unable to accept this contention made on behalf of the revenue. On the facts before us for the assessment year 1970-71 there is no question of reassessment. The ITO knowing fully well that assessment in the said assessment year has already been in the hands of the non-resident had issued a fresh notice u/s 143(3) calling upon the assessee as the representative of the non-resident to file a fresh return. This amounts to an assessment of the same income both in the hands of the representative and also the principal.

23. So far as the other two assessment years are concerned, reassessment proceedings have no doubt been initiated, we note the definition in section 2(8) stating that assessment includes reassessment. There fore, what is sought to be assessed in the hands of the representative is an income which has already suffered assessment in the hands of the non-resident. We are unable to construe sections 160 to 166 of the Act, in the manner as has been done by the Andhra Pradesh High Court. With respect we agree with the views taken by the other High Courts. In our view, the Act does not postulate that the income can be split up and different parts of such income can be assessed in the hands of different persons. The Supreme Court has clearly laid down the law in H.E H. Mir Osman Ali Bahadur''s case (supra) this would lead to serious anomalies and complications. In Trustees of Miss Gargiben Trust (No. 1)''s case (supra), the capital gain was not payable to the beneficiary under the terms of the trust and, therefore, the same could be assessed only in the hands of the trust but it was treated as a separate income altogether and even for the purpose of ascertaining the rate at which the said income would be taxed the amount which was assessed in the hands of the beneficiary was delivered to be excluded by the Bombay High Court.

24. We cannot find fault with the findings of the Tribunal that the reassessment proceedings had been initiated illegally and without jurisdiction in the assessment year 1989-70. During the assessment year in question the assessee was not treated as an agent of the non resident company. Therefore, there was no obligation on the assessee to file any return of the income of the non-resident. Therefore, the basic requirement of section 147(a) was not present as there could not have been any default on the part of the assessee in not filing a return. Reassessment cannot also be supported u/s 147(b) as the condition precedent for assumption of jurisdiction

under the provisions of this clause are also not present. There has been no previous assessment of the assessee and there is no question of any income escaping the previous assessment.

25. For the reasons above, we answer the question referred in each of the references in the affirmative and in favour of the assessee. There will be no order as to costs.

Shyamal Kumar Sen, J.

I agree.