PETITIONER:
INCOME TAX OFFICER

Vs.

RESPONDENT:
CH. ATCHAIAH

DATE OF JUDGMENT11/12/1995

BENCH:
JEEVAN REDDY, B.P. (J)
BENCH:
JEEVAN REDDY, B.P. (J)
KIRPAL B.N. (J)

CITATION:
1996 AIR 883 1996 SCC (1) 417
JT 1995 (9) 441 1995 SCALE (7)186

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

B.P.JEEVAN REDDY.J.

This appeal is directed against the judgment of the Andhra Pradesh High Court allowing the writ petition filed by the respondent and issuing a writ of prohibition restraining the appellant (respondent in the writ petition) from taking any action pursuant to the notice dated March 17, 1972 issued under Section 148 of the Income Tax Act, 1961 [1961 Act].

The respondent in this appeal, Sri Atchaiah, and another person, Sri Kondal Reddy, purchased an extent of 454.11 acres in a village in Medak District in Andhra Pradesh from Sri Ikramuddin and Smt. Azizunnisa Begum under a sale deed dated October 20, 1962 for a consideration of Rupees seventy five thousand. Even prior to the execution of the sale deed, the said lands had been notified for acquisition under the Land Acquisition Act. The respondent and Kondal Reddy appeared before the Land Acquisition Officer claiming compensation. By award dated February 4, 1964, the Land Acquisition Officer determined the compensation at Rs.1,38,794.12 annas which amount was received by the respondent and Kondal Reddy on December 4, 1964, in equal shares. At their instance, a reference was made under Section 18 of the Land Acquisition Act. The learned District Judge enhanced the compensation by Rs.3,95,026.00 (according to the appellant, the figure is Rs.4,17,477/-). The enhanced compensation was also shared between the respondent and Kondal Reddy in equal proportion.

In the assessment proceedings relating to Assessment Year 1965-66, the Income Tax Officer included a sum of Rs.35,397/-, treating it as the capital gain, in the income of the respondent. (This figure was arrived at after deducting the amount contributed by the respondent towards the purchase of the said lands.) Again, in the assessment relating to Assessment Year 1968-69, the enhanced

compensation falling to the share of respondent was brought to tax as capital gain. Sri Kondal Reddy was also taxed in the same manner for both the said assessment years.

On February 18, 1972 the Income Tax Officer issued a notice to both the respondent and Kondal Reddy under Section 148 of the Income Tax Act stating that he has reason to believe that income chargeable to tax for the Assessment Year 1964-65 has escaped assessment. He called upon them to file a return. On April 3, 1972, the respondent and Kondal Reddy filed a "Nil" return. On August 3, 1972, the Income Tax Officer gave a notice to both of them stating that in the return filed by them they have not mentioned the status in which the return was filed. The Income Tax Officer proposed to tax them as an Association of Persons and bring the entire profit made by them as capital gain in the hands of such Association of Persons. The respondent and Kondal Reddy raised certain objections to the proposed assessment but finding that the Income Tax Officer was inclined to proceed with the assessment, they approached the Andhra Pradesh High Court by way of a writ petition questioning the aforesaid notice dated February 19, 1972.

The main contention urged by the respondent was that the Income Tax Officer having assessed the share of each of them in their respective individual hands, has no jurisdiction to assess the same income as the income of and in the hands of the Association of Persons aforesaid. Having exercised the discretion vested in him to assess them individually with respect to their shares, it was contended, it was not open to him to assess them as an Association of Persons with respect to the very same income. Certain other contentions were also raised with respect to the validity of the impugned notice with which objections, however, we are not concerned herein. The High Court accepted the respondent's contention. It rejected the contention urged by the learned standing counsel for the Revenue that the decisions relied upon by the respondent-writ petitioner were all rendered with reference to the provisions in the Indian Income Tax Act, 1922 [1922 Act] and that the principle of the said decisions cannot be extended to the cases arising under the 1961 Act. The High Court found that the position under the present Act is no different from the position under the 1922 Act notwithstanding the difference in the language employed in the relevant provisions of the 1961 Act. The High court opined that even under the present Act, the Income Tax Officer has an option to assess either the Association of Persons as a unit or the members thereof individually and that having exercised the option to assess the members of the Association of Persons as individuals, he cannot seek to tax the Association of Persons with respect to the very same income. The High Court also rejected an alternative contention put forward by the Revenue, viz., inasmuch as the previous assessments in individual capacity were made for the Assessment Year 1965-66 and because the impugned notice is for the Assessment Year 1964-65, the Income Tax Officer is not precluded from taxing the income in the hands of the Association of Persons. This argument was rejected by the High Court holding - "in our view, there is a fallacy in this argument. When making an assessment the Income Tax Officer exercised his option and chose to assess the individual, but he did so for the year 1965-66 as the amount was received by the assessee on December 4, 1964. The question is not for what particular year the assessment was made, but whether the Income Tax Officer exercised his option in levying the tax on the income in the hands of individual or in the hands of the association."

In this appeal, Dr. Gauri Shanker, learned counsel for the Revenue, urged that the High Court was clearly in error in holding that under the present Act, the Income Tax Officer has an option to tax either Association of Persons or its members individually. Learned counsel submitted that while such an option was available to the Income Tax Officer under the 1922 Act, no such option is available under the present Act. According to the present Act, the learned counsel says, the right person has to be taxed and merely because a wrong person is taxed, it does not operate as a bar to taxing the right person. In other words, his contention is that if in law the income in question had to be taxed in the hands of Association of Persons, it had to be taxed as such and the mere fact that the said income was taxed in the hands of individual members of Association of Persons does not bar the Income Tax Officer from taxing the Association of Persons. Sri A. Panduranga Rao, learned counsel for the appellant-assessee, contended, on the other hand, that there is no difference between the position obtaining under the 1922 Act and the present Act and that, therefore, the decisions rendered under the 1922 Act hold good equally under the present enactment. The learned counsel supported the reasoning and conclusion of the High Court. Learned counsel also brought to our notice that though the Andhra Pradesh High court had taken a different view in a subsequent decision in Choudry Brothers v. Commissioner of Income Tax [(1986) 158 I.T.R.224], the said view has since been overruled by the Full Bench of that Court in Commissioner of Income Tax v. B.R. Constructions (202 I.T.R.222). The Full Bench, it is stated, has affirmed the correctness of the decision under appeal (which is reported in 116 I.T.R.675). The learned counsel has also filed written arguments, which we have perused.

In our opinion, the contention urged by Dr. Gauri Shanker merits acceptance. We are of the opinion that under the present Act, the Income Tax Officer has no option like the one he had under the 1922 Act. He can, and he must, tax the right person and the right person alone. By "right person", we mean the person who is liable to be taxed, according to law, with respect to a particular income. The expression "wrong person" is obviously used as the opposite of the expression "right person". Merely because a wrong person is taxed with respect to a particular income, the Assessing Officer is not precluded from taxing the right person with respect to that income. This is so irrespective of the fact which course is more beneficial to the Revenue. In our opinion, the language of the relevant provisions of the present Act is quite clear and unambiguous. Section 183 shows that where the Parliament intended to provide an option, it provided so expressly. Where a person is taxed wrongfully, he is no doubt entitled to be relieved of it in accordance with law* but that is a different matter altogether. The person lawfully liable to be taxed can claim no immunity because the Assessing Officer [Income Tax Officer] has taxed the said income in the hands of another person contrary to law. We may proceed to elaborate.

Section 3 of the Indian Income Tax Act, 1922, as amended by the Indian Income Tax (Amendment) Act, 1939, read as follows:

> "3. Charge of Income-tax.-- Where any Central Act enacts that income tax shall be charged for any year at any rate or rates tax at that rate or those rates shall be charged for that year in accordance with, and subject to the

provisions of, this Act in respect of the total income of the previous year of every individual, Hindu undivided family, company and local authority, and of every firm and other association of persons or the partners of the firm or the members of the association individually."

(Emphasis added)

*Apart from questioning the levy by way of appeal, revision and reference, it is suggested, the assessee can also resort to Section 155(2). We, however, express no opinion on the applicability of Section 155(2) since it does not directly arise in this case.

The expression "person" was defined in clause (9) of Section 2 in the following words: "9. 'Person' includes a Hindu undivided family and a local authority".

As against the above provisions, Section 4 of the Present Act (before it was amended by the Direct Tax Laws (Amendment) Act, 1987, with effect from April 1, 1989) read thus:

"4(1). Where any Central Act enacts that income tax shall be charged for any assessment year at any rate or rates, income tax at that rate or those rates shall be charged for that year in accordance with and subject to the provisions of this Act in respect of the total income of the previous year or previous years, as the case may be, of every person:

Provided that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.

(2) In respect of income chargeable under sub-section (1), income-tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act."

(The amendments made by the aforesaid Amendment Act of 1987 do not make any difference so far as the present controversy is concerned.) The expression "person" is defined in clause (31) of Section 2 in the following words:

"'Person' includes--

(i) an individual,

(ii) a Hindu undivided family,

(iii) a company,

(iv) a firm,

(v) an association of persons or a body of individuals, whether incorporated or not,

(vi) a local authority, and

(vii) every artificial juridical person, not falling within any of the preceding sub-clauses."

A comparison of the provisions of both enactments immediately bring out the difference between them. Section 3 of the 1922 Act provided that in respect of the total income of a firm or an Association of Persons, the income tax shall be charged either on the firm or the Association of Persons or on the partners of the firm or on the members of the Association of Persons individually. It is evident that this

option was to be exercised by him keeping in view of the interest of Revenue. Whichever course was more advantageous to Revenue, he was entitled to follow it. In such a situation, it was generally held that once the Income Tax Officer opted for one course, the other course was barred to him. But no such option is provided to him under the present Act. Section 4 extracted hereinabove says that income tax shall be charged on the total income "of every person" and the expression "person" is defined in clause (31) of Section 2. The definition merely says that expression "person" includes inter alia a firm and an Association of Persons or a body of individuals whether incorporated or not. There are no words in the present Act which empower the Income Tax Officer or give him an option to tax either the Association of Persons or its members individually or for that matter to tax the firm or its partners individually. If it is the income of the Association of Persons in law, Association of Persons alone has to be taxed; the members of the Association of Persons cannot be taxed individually in respect of the income of the Association of Persons. Consideration of the interest of Revenue has no place in this scheme. When Section 4(1) of the present Act speaks of levy of income tax on the total income of every person, it necessary means the person who is liable to pay income tax in respect of that total income according to law. The tax has to be levied on that person, whether an individual, Hindu Undivided Family, Company, Firm, Association of Persons/BOP, a local authority or an artificial juridical person. From this, it follows that if income of A is taxed in the hands of B, A may be legitimately aggrieved but that does not mean that B is exonerated of his liability on that account. B cannot say, when he is sought to be taxed in respect of the total income which is lawfully taxable in his hands, that since the Income Tax Officer has taxed very same income in the hands of A, he himself cannot be taxed with respect to the said total income. This is not only logical but is consistent with the provisions of the Act. In this connection, it may be pointed out that where the Parliament wanted to provide an option, a discretion, to the Income Tax Officer, it has provided so expressly. Section 183 [which has since been omitted with effect from April 1, 1993 by the Finance Act, 1992] provided that in the case of an unregistered firm, it is open to the Income Tax Officer to treat it, and make an assessment on it, as if it were a registered firm, if such a course was more beneficial to Revenue - in the sense that such a course would fetch more tax to the public exchequer. Section 183 read as follows

> "183. Assessment of unregistered firms.-- In the case of an unregistered firm, the Assessing Officer--
> (a) may determine the tax payable by the firm itself on the basis of the total income of the firm, or
> (b) if, in his opinion, the aggregate amount of the tax payable by the firm if it were assessed as a registered firm and the tax payable by the partners individually if the firm were so assessed would be greater than the aggregate amount of the tax payable by the firm under clause (a) and the tax which would be payable by the partners individually, may proceed to make the assessment under sub-section (1) of section 182 as if the firm were a

registered firm; and, where the procedure specified in this clause is applied to any unregistered firm, the provisions of sub-sections (2), (3) and (4) of section 182 shall apply thereto as they apply in relation to a registered firm."

It may be mentioned that Section 183 corresponded to Section 23(5) (b) of the 1922 Act. The 1922 Act not only provided an option to the Income Tax Officer in the matter of firm and Association of Persons under Section 3 but also expressly enabled him to assess an unregistered firm as a registered firm [Section 23(5)(b)], if by doing so, more tax accrued to the State. The 1961 Act has omitted the first option, while retaining the second.

In this connection, it would be relevant to notice the relevant provisions of the draft Bill proposed by the Law Commission in its XIIth Report, which constitutes the basis for the 1961 Act. Clause (27) of Section 2 of the draft (definition of "person") did expressly provide an option similar to the one contained in Section 3 of the 1922 Act. Clause 27 read thus:

"(27) 'Person' includes--
(i) an individual,
(ii) a Hindu undivided family,
(iii)a company,
(iv) a firm or other association of persons, whether incorporated or not, or the partners of the firm or the members of the association individually,
(v) a body of individuals, whether incorporated or not,
(vi) a local authority, and
(vii)every artificial juridical person, not falling within sub-clauses (i) to (vi)"

(Emphasis added)

In the "Notes on Clauses" appended to the draft, the Commission stated:

"27. Person. The definition of 'person' in existing section 2(9) has been amplified.
The existing definition includes (a) Hindu undivided family and (b) a local authority. The General Clauses Act, defines 'person' as including a company or association or body of individuals whether incorporated or not. The charging section (section 3) of the Income-tax Act enumerates the units for taxation as 'individual, Hindu undivided family, company, local authority, firm and other association of persons, or the partners of a firm or the members of the association individually'. Section 4 of the Act refers to a 'person'.
It seems desirable to have a comprehensive definition of the word 'person' in the Act so as to cover all entities mentioned in --
(i) the existing definition [S.2(9)].
(ii) the existing charging provisions [sections 3 and 4], and
(iii) the General Clauses Act.
The definition has therefore been

amplified on the above lines."

The Parliament, however, chose not to accept the suggested definition in total it deleted the words indicating the option. The Committee, which drafted the draft Bill comprised Sri P.Satyanarayana Rao, Sri G.N.Joshi and Sri N.A.Palkhivala, who was specifically appointed as a member for the purpose of the revision of the Income Tax Act. [Extracts are taken from the XIIth Report of the Law Commission of India, published by Government of India, Ministry of Law.]

This question has also been troubling the High Courts in the country. As a matter of fact, Patna and Andhra Pradesh High Courts have taken different views. Be that as it may, we may mention that the Patna High Court in Mahendra Kumar Agarwal v. Income Tax Officer [(1976) 103 I.T.R.688], Punjab and Haryana High Court in Rodamal Lalchand v. Commissioner of Income Tax [(1977) 109 I.T.R.7], Andhra Pradesh High Court in Choudry [supra] and Delhi High Court in Punjab Cloth Stores v. Commissioner of Income Tax [(1980) 121 I.T.R.604] have taken the view which we have taken. On their other hand, Madras High Court in Commissioner of Income Tax v. Blue Mountain Engineering Corporation [(1978) 112 I.T.R.839] and Patna High Court in its earlier decision in Commissioner of Income Tax v. Pure Nichitpur Colliery Company [(1975) 101 I.T.R.79] have taken the opposite view. The Andhra Pradesh High Court first expressed the other view, then in Choudry it took the view which we have taken and the again in B.R. Constructions (F.B.), it has gone back to the other view and reiterated the view taken in the judgment under appeal. In Ramanlal Madanlal v. Commissioner of Income Tax [(1979) 116 I.T.R.657], Sabyasachi Mukharji, J., speaking for a Bench of the Calcutta High Court, recognized the distinction in the language employed in Section 3 of the 1922 Act and Section 4 of the present Act but that was a case of an unregistered firm where the Income Tax Officer had assessed the incomes in the hands of the partners individually. In such a situation, the learned Judge held, the Income Tax Officer cannot, at the same time, bring the unregistered firm to tax in respect of the very same income. Section 183 was also referred to in that connection.

The decision of the High Courts taking the contrary view appears to have been influenced largely by the decisions of this Court in Commissioner of Income Tax v. Kanpur Coal Syndicate [(1964) 53 I.T.R.225] and Commissioner of Income Tax v. Murlidhar Jhawar and Purna Ginning and Pressing Factory [(1966) 60 I.T.R.95] which were rendered under the 1922 Act and have not given due weight to the marked difference in the language of the relevant provisions in the two enactments.

For the above reasons, the appeal is allowed. The judgment of the High Court is set aside. We must make it clear that we have pronounced only upon one question referred to above. We have not expressed ourselves on any other contention urged by the assessee before the Income Tax Officer or for that matter before the High Court. It is open to the assessee to urge these contentions before the Income Tax Officer, if he is so advised, according to law. There shall be no order as to costs.