CALCUTTA HIGH COURT

Ramanlal Madanlal

Vs

Commissioner of Income-Tax

(Sabyasachi Mukharji and S M Guha, JJ.)

06.02.1978

JUDGMENT

Sabyasachi Mukharji, J.

1. The assessee is a partnership-firm. It maintained accounts on mercantile system.The relevant previous years for the assessment years 1-965-66, 1967-68 and 1968-69, in respect of which this reference has been made, were calendar years ending on 31st December, 1964, 31st December, 1966, and 31st December, 1967. For the respective three years under assessment, the total income was computed at Rs. 11,081, Rs. 6,314 and Rs. 60,428. For the assessment year 1965-66, the ITO observed in his order that the assessee had not filed any declaration under Section 184(7) of the I.T. Act, 1961, and he proceeded to complete the relevant assessments on the assessee as an unregistered firm. For the two other assessment years, viz., the assessment years 1967-68 and 1968-69, the assessee's status was also taken as that of an unregistered firm. Being dissatisfied with the aforesaid assessments, the assessee-firm appealed to the AAC, who passed a consolidated order on the 28th April, 1971, covering the assessment years 1965-66 to 1968-69. Among the other grounds relating to the additions made in the relevant assessments, the assessee-firm disputed the assessments on the ground that the partners of the firm had already been assessed individually on their respective shares of income from the assessee-firm. It was contended that the ITO was wrong in demanding payment of tax from the assessee as an unregistered firm and it was bad in law inasmuch as the partners were already assessed to tax and there should not have been two assessments over the same income. Following the decision of the Supreme Court in the case of *CIT v. Murlidhar Jhawar and Purna Ginning and Pressing Factory*[1], the AAC held that once the ITO had exercised his option and assessed the partners individually he could not thereafter assess the same income in the hands of the firm. It was, therefore, concluded that the ITO went wrong in taxing the same income once again in the hands of the assessee as an unregistered firm. The AAC, however, directed that the assessments should be revised accordingly.

2. The revenue preferred appeals from the decision given by the AAC. There were certain preliminary objections taken before the Tribunal with which we need not detain ourselves in view of the question that has been referred to this court. It was submitted on behalf of the revenue that the assessee-firm had been allowed registration for the purpose of income-tax assessments till the assessment year 1964-65 and the ITO was under the belief that there would be continuance of registration as the assessments for all the 12 partners were completed prior to the filing of the returns of income for the relevant assessment years by the assessee-firm. It was submitted that the assessee-firm submitted income-tax returns declaring the status as that of a registered firm for the assessment year 1965-66, and for other assessment years it was that of a firm only. Reliance was placed before the Tribunal on behalf of the revenue on the decision of the Supreme Court in the case of *ITO v. Bachu Lal Kapoor*[2] and it was submitted that due to the developments after the completion of the assessments in the case of the partners, the ITO in assessing the firm and its partners could not be said to have exercised his option. On the other hand, on behalf of the assessee it was contended that the said decision was not relevant. The Tribunal found from the records that the partners of the firm had submitted their respective return of income for all the three assessment years disclosing their share of income from the assessee-firm as a registered firm and none of the partners had any interest in any other firm. It was also found that the returns of income for the relevant assessments were filed by the assessee-firm after the completion of the assessments in the case of the partners. Having regard to Section 4 of the I.T. Act, 1961, the Tribunal found that here in this case the partners had sought to be assessed on their individual share of income from the assessee-firm as a registered firm and the said firm was treated as a registered firm till the assessment year 1964-65. The returns of the total income were filed subsequent to the assessments of the partners and no application under Section 184(7) of the I.T. Act was filed for any of the assessment years with which the Tribunal was concerned. Therefore, it was held by the Tribunal that the ITO had acted upon the returns filed by the partners under a belief that the assessee would for those assessment years continue to have the benefit of registration. In view of this, the Tribunal held that the AAC was not justified in his decision that the ITO was wrong in taxing the income of the assessee-firm again in the hands when its partners were already assessed to income-tax over the same income individually. Therefore, the assessments for the years involved in the case of the assessee-firm were restored to that extent and the ITO, who had jurisdiction over the partners, was directed to give effect to the Tribunal's decision in the assessments of the partners for all the three years in accordance with the provisions of Section 86(iii) of the I.T. Act, 1961, if he had not already done, to do it immediately after the completion of the relevant assessments in the case of the assessee-firm.

3. On this under Section 256(1) of the I.T. Act, 1961, the Tribunal has referred to this court the following question:

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the ITO was justified in taxing the income in the hands of the assessee as an unregistered firm for the assessment years 1965-66, 1967-68 and 1968-69 when its partners were already assessed to income-tax over the same income individually for the aforesaid assessment years ?"

4. This question has to be resolved in the background of certain basic facts. Those facts have been found by the Tribunal and may again be reiterated. The assessee is a firm. Up to the income-tax year 1964-65, the assessee was taxed as a registered firm and had been granted registration and the firm had been treated as a registered firm till the assessment year 1964-65. The returns of the total income were filed subsequent to the assessment of the partners and no application under Section 184(7) of the I.T. Act, 1961, was filed for any of the assessment years under consideration. It has also to be accepted as the Tribunal has found that the ITO had acted upon the returns filed by the partners under a belief that the assessee would for those assessment years continue to have the benefits of registration.

5. In order to appreciate the various contentions raised in this case it would be relevant to refer to the relevant provisions of the Indian I.T. Act, 1922, and I.T, Act, 1961. The relevant provisions so far as the Indian I.T. Act, 1922, is concerned are Section 2(9), Section 3, Section 14(2)(a), Section 14(2)(b), Section 23(5)(a), Section 23(5)(b), Section 24(1) & Section 24(2). Section 2(9) of the Indian I.T. Act, 1922, defined a person as under :

"2. (9) 'Person' includes a Hindu undivided family and a local authority."

6. Section 3 of the Indian I.T. Act, 1922, 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." Section 14(2) read as follows :

"14. (2) The tax shall not be payable by an assessee-

(a) if a partner of an unregistered firm, in respect of any portion of his share in the profits and gains of the firm computed in the manner laid down in Clause (b) of Sub-section (1) of Section 16 on which the tax has already been paid by the firm ; or (aa) if a partner of a registered firm, in respect of that portion of his share in the profits or gains of the firm as is equal to the difference between his share in the total income of the firm and his share in such total income excluding the

income-tax, if any, payable by the firm, the shares in either case being computed in the manner laid down in Clause (b) of subsection (1) of Section 16: Provided that in relation to super-tax the provisions of this Clause shall have effect as if for the words 'excluding the income-tax, if any, payable by the firm' the words 'excluding the income-tax, if any, payable by the firm, at the rate of income-tax applicable to its total income, on the amount of its profits or gains from all sources other than from any business carried on by it' had been substituted ;

(b) if a member, of an association of persons other than a Hindu undivided family, a company or a firm, in respect of any portion of the amount which he is entitled to receive from the association on which the tax has already been paid by the association."

7. Sub-sections (1), (2) and (3) of Section 23 deal with the circumstances in which an ITO can make the assessment in the various contingencies dealt with in those different sub-sections. Sub-s. (4) of Section 23 dealt with the situation that where a person fails to make a return the ITO can make the assessment in the said and other contingencies. Sub-section (5) of Section 23 was in the following terms :

> "(5) Notwithstanding anything contained in the foregoing subsections, when the assessee is a firm and the total income of the firm has been assessed under Sub-section (1), Sub-section (3) or Sub-section (4), as the case may be,--
>
> (a) in the case of a registered firm,
>
> (i) the income-tax payable by the firm itself shall be determined ; and
>
> (ii) the total income of each partner of the firm, including therein his share of its income, profits and gains of the previous year, shall be assessed and the sum payable by him on the basis of such assessment shall be determined:.....
>
> (b) in the case of an unregistered firm, the Income-tax Officer may, instead of determining the sum payable by the firm itself, proceed to assess the total income of each partner of the firm, including therein his share of" its income, profits, and gains of the previous year, and determine the tax payable by each partner on the basis of such assessment, if, in the Income-tax Officer's opinion, the aggregate amount of the tax including super-tax, if any, payable by the partners under such procedure would be greater than the aggregate amount which would be payable by the firm and the partners individually, if separately assessed; and where the procedure specified in this clause is applied to any unregistered firm, the provisos to Clause (a) of this sub-section shall apply thereto as they apply in the case of a registered firm."

8. We may now refer to the relevant provisions of the I.T. Act, 1961. Section 2(31), which deals with the definition of "person", reads as follows :

> "2. (31) ' 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."

9. Section 4 which replaced the old Section 3 of the Indian I.T. Act, 1922, and deals with the charge of income-tax, is as follows :

> "4. Charge of income-tax.--(1) Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, incqme-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."

Section 86 which deals with the similar situation as in Section 14 of the Indian I.T. Act, 1922, is as follows :

"86. Other incomes.--Income-tax shall not be payable by an assessee in respect of the following--
.....

(iii) if the assessee is a partner of an unregistered firm, any portion of the assessee's share in the profits and gains of the firm computed in the manner laid down in Section 67 on which income-tax is payable by the firm;.....

(v) if the assesee is a member of an association of persons, or a body of individuals other than a Hindu undivided family, a company or a firm, any portion of the amount which he is entitled to receive from the associa tion or body on which income-tax has already been paid by the association or body."

10. We may also incidentally refer to Section 77 of the 1961 Act which deals with the losses of unregistered firm or their partners and which reads as follows:

"77. Losses of unregistered firms or their partners.--(1) Where the assessee is an unregistered firm which has not been assessed as a registered firm under the provisions of Clause (b) of Section 183, any loss of the firm shall be set off or carried forward and set off only against the income of the firm.

(2) Where the assessee is a partner of an unregistered firm which has not been assessed as a registered firm under the provisions of Clause (b) of Section 183 and his shaje in the income of the firm is a loss, then, whether the firm has already been assessed or not-

(a) such loss shall not be set off under the provisions of Section 70, Section 71 or Sub-section (1) of Section 73 ;

(b) nothing contained in Sub-section (1) of Section 72 or sub-section (2) of Section 73 or Sub-section (1) of Section 74 shall entitle the assessee to. have such loss carried forward and set off against his own income."

11. Section 155 deals with the amendment of the assessments and their consequences. Counsel for the revenue drew our attention to Sub-sections (1) and (2) of Section 155 which read as follows :

"155. Other amendments.--(1) Where in respect of any completed assessment of a partner in a firm it is found -

(a) on the assessment or reassessment of the firm, or

(b) on any reduction or enhancement made in the income of the firm under this section, Section 154, Section 250, Section 254, Section 260, Section 262, Section 263 or Section 264, that the share of the partner in the income of the firm has not been included in the assessment of the partner or, if included, is not correct, the Income-tax Officer may amend the order of assessment

of the partner with a view to the inclusion of the share in the assessment or the correction thereof, as the case may be ; and the provisions of Section 154 shall, so far as may be, apply thereto, the period of four years specified in Sub-section (7) of that Section being reckoned from the date of the final order passed in the case of the firm.

(2) Where in respect of any completed assessment of a member of an association of persons or of a body of individuals it is found-

(a) on the assessment or reassessment of the association or body, or

(b) on any reduction or enhancement made in the income of the association or body under this section, Section 154, Section 250, Section 254, Section 260, Section 262, Section 263 or Section 264, that the share of the member in the income of the association or body, as the case may be, has not been included in the assessment of the member or, if included, is not correct, the Income-tax Officer may amend the order of assessment of the member with a view to the inclusion of the share in the assessment or the correction thereof, as the case may be ; and the provisions of Section 154 shall, so far as may be, apply thereto, the period of four years specified in Sub-section (7) of that section being reckoned from the date of the final order passed in the case of the association or body, as the case may be."

12. In this connection, we have to refer to the provision of Section 183 of the I.T. Act, 1961, which, deals with the assessment of an unregistered firm and reads as follows:

"183. In the case of an unregistered firm, the Income-tax 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 82 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."

13. In s. 184 of the I.T. Act, 1961, the scheme for registration of firms has undergone a radical change. In the 1922 Act, the registration had to be applied for each year. But under the scheme of the 1961 Act, as envisaged in Section 184, the registration of the firm would continue, once

granted, provided the conditions laid down in Sub-section (7) of Section 184 are complied with. In this case, as we have mentioned hereinbefore, the firm in question was registered before the relevant previous year.

14. In the case of CIT v. Kanpur Coal Syndicate [1964] 53 ITR 225, the Supreme Court had to consider some aspects of this question. The Supreme Court observed at page 228 of the report as follows :

"Section 3 imposes a tax upon a person in respect of his total income. The persons on whom such tax can be imposed are particularised therein, viz., Hindu undivided family, company, local authority, firm, association of persons, partners of firm or members of association individually. The Section, therefore, does not in terms confer any power on any particular officer to assess one of the persons described therein, but is only a charging Section imposing the levy of tax on the total income of an assessable entity described therein. The section expressly treats the association of persons and the individual members of an association as two distinct and different assessable entities. On the terms of the section the tax can be levied on either of the said two entities according to the provisions of the Act. There is no scope for the argument that tinder Section 3 the assessment shall be only on the association of persons as a unit though after such assessment the share of income of a member of that association may be added to his other income under Section 14(2) of the Act. This construction would make the last words of the section, viz., 'members of the association individually' a surplusage. This argument is also contrary to the express provisions of Section 3, which mark out the members of the association individually as a separate entity from the association of persons. Income of every person, whether he is a member of an association or not is liable to the charge under the head 'every individual'. Section 14(2)(b) only says that if such an individual happens to be a member of an association of persons which has already beeri assessed, the tax would not be payable in respect of the share of his income again. That, under the Act, an assessment can be made on an association of persons as a unit or, alternatively, on the individual members thereof in respect of their respective shares of the income was assumed by this court in Commissioner of Income-tax v. Raja Reddy Mallaram[1964] 51 ITR 285 (SC). We, therefore, hold that Section 3 impliedly gives an option to an appropriate authority to assess the total income of either an association of persons or the members of such an association individually." The Supreme Court also considered this aspect of the matter in the case of CIT v. Murlidhar Jawar and Puma Ginning and Pressing Factory . There, what happened was that M, P and G who were carrying on business in groundnut, cotton and cotton seed were each assessed to tax at a third share in Rs. 51,280 computed as profits of the business for the assessment year 1954-55. Thereafter, the ITO assessed them in the status of an unregistered firm computing the income of the joint venture at Rs. 80,925. The Tribunal held that the ITO had the option to assess the individual parties to the joint venture and he having

exercised that option it was not open to him thereafter to reassess the same income collectively in the hands of the three parties to the joint venture in the status of an unregistered firm. It was held by the Supreme Court that the partners of an unregistered firm might be assessed individually or they might be assessed collectively in the status of an unregistered firm. The ITO should not seek to assess the one income twice, once in the hands of the partners and again in the hands of the unregistered firm. The Supreme Court referred to the previous decision in the case of CIT v. Kanpur Coal Syndicate . We may also in this connection refer to the Supreme Court decision in the case of ITO v. Bachu Lal Kapoor [1966] 60 ITR 74. There, what had happened was that for the assessment year 1952-53 the respondent was assessed to income-tax as karta of the HUF consisting of himself, his wife and a minor son. In a suit filed against him by the wife and the son, a compromise was effected. On 20th October, 1952, the decree was passed. On 18th January, 1954, the ITO accepted the claim of partition under Section 25A of the Indian I.T. Act, 1922, and for the assessment years 1953-54, 1954-55 and 1955-56, the members of the family were assessed as individuals. Subsequently, on 24th March, 1960, the ITO issued a notice under Section 34 to the respondent as karta of the HUF in regard to the assessment year 1955-56. The respondent thereupon moved the Allahabad High Court under Article 226 of the Constitution for quashing the notice on the following grounds, (1) that the income for the assessment year 1955-56 had already been assessed in the hands of the member and it could not be assessed again as the income of the family, (2) that as the family had ceased to exist and the partition was recognised, no valid notice could be issued to the respondent in his capacity as the karta of the family. In his counter-affidavit, the ITO stated that he had information that notwithstanding the compromise decree, the members of the family were living together and had joint mess and the business was run by the respondent and; therefore, the compromise was make-believe one and the family, in fact, had continued to be the joint Hindu family. The High Court held that the notice was invalid on the ground that as the assessment of the income in the hands of the members of the family for the assessment year was not set aside, the same income could not be assessed again in the hands of the family by taking proceedings under Section 34. The Supreme Court was of the view (1) that the HUF was a distinct and assessable entity and if its income had escaped assessment for any one year, the ITO could issue a notice to the family under Section 34 of the Act. In setting out the grounds, the Supreme Court held, (2) that, if the case of the revenue was true, and the fact of the existence of the joint family was kept back from the knowlege of the ITO then it would be a clear case of the family's income escaping assessment and in such a case it could not be said that the ITO had elected to assess the members with the knowledge that the family existed, (3) that while the section was conferring an option on the ITO to assess either an association of persons or the members of the association individually, no such option was conferred on him in the case of HUF, but, (4) so long as the HUF existed, the individual member thereof could not be separately assessed in respect of his income, (5) therefore, the ITO had

jurisdiction to initiate proceedings under Section 34 of the Act against the respondent as karta of the HUF, (6) that, however, after all assessment proceedings initiated under Section 34 culminated in the assessment of the HUF, the appropriate apportionment had to be made by the ITO in respect of the tax realised by the revenue on that part of the income of the family assessed in the hands of the individuals. To do so was not to reopen the final orders of assessment but in reality to arrive at the correct figure of tax payable by the HUF.

This was the view until the new Act, that is, the I.T. Act, 1961, came into effect. We have noticed the scheme of taxation introduced in the new Act. While Section 4 of the I.T. Act, 1961, provides that tax for an assessment year in respect of the income of the previous year of every person shall be so imposed accordingly, the section deals with the imposition of tax in respect of "every person" unlike Section 3 which enumerated the different taxable units. But Sub-section (31) of Section 2 provides the "definition of person" which includes an individual, Hindu undivided family, a firm and/or an association of persons or a body of individuals. The other provisions of taxing the firm as well as its members remained the same as in the 1922 Act, with only this. difference in the scheme of registration of the firm, as we have noted before.

After the new Act came into operation, this question came up for consideration by the different High Courts. This question was also considered by K. L. Roy J., in the case of Juthika Devi v. CIT, in Matter No. 411 of 1969, and by a judgment delivered on 3rd December, 1969, K. L. Roy J. held that in the new Act, it was specific in the charging section itself, as was done in the earlier Act, and Section 2(31) defined a person to include an individual, a Hindu undivided family, a company, a firm, an association of persons or a body of individuals, whether incorporated or not, a local authority and every artificial juridical person. Then, his Lordship referred to different provisions and the decision of the Supreme Court in the case of CIT v. Kanpur Coal Syndicate [1964] 53 ITR 225 and observed that the position was the same and, therefore, the inclusion of the share income of the petitioner in that case from the association of persons, which had already been assessed on the association, was not tenable in law. But, there, the learned judge was really concerned with the maintainability of the Writ petition, because it was not disputed before the learned judge that the tax on the share income of the petitioner from the association of persons which had already been assessed as an association, was not justifiable in law. His Lordship was really concerned whether, in those circumstances, the notice, which was impugned in the application under art. 226 of the Constitution could be corrected in view of the facts and circumstances of the case. This decision went up in appeal and the decision of K. L. Roy J. was confirmed by the Division Bench of this High Court in Appeal No. 302 of 1970, by a judgment delivered on 21st March, 1973.

Some of these aspects were again considered by me in the case of Hindusthan Mills Stores

Supply Co. v. CIT (I.T. Reference No. 10 of 1973--See p. 681 infra of this volume). But, there also no specific argument was considered as to whether after the introduction of the 1961 Act, there had been change in the position, as such. This view was approved by another Division Bench of this High Court in the case of Manoharlal Gupta & Co. v. CIT (I.T. Ref. No. 158 of 1973). In the case of Ballabhdas Ishwardas v. CIT (I.T. Ref. No. 179 of 1970--See p. 685 infra of this volume), I was concerned with the question of assessability of a registered firm and was not really concerned with the question of assessability of an unregistered firm after the introduction of the 1961 Act, when the persons of the said firm had already suffered the assessment.

But it appears that in the case of Ch. Atchaiah v. ITO. (See p. 675 infra of this volume), the Division Bench of the Andhra Pradesh High Court had to consider the question whether the fresh assessment in the hands of the members of the association was not permissible where an assessment had been made on the association of persons, under the Act of 1961. There, it was found that once the ITO had exercised the option to assess the income in the case of the individual members, he could not, therefore, seek to assess the income of the association. It was held there was no change in the legal position of the 1922 Act, even after the introduction of the Act of 1961 in this regard. Dealing with the case of the Supreme Court decision in the case of ITO v. Bachu Lal Kapoor [1966] 60 ITR 74, upon which reliance was placed on behalf of the revenue, the court observed (See p. 678 infra of this volume) as follows:

"It is seen that the whole basis of this decision is that if there is an HUF, an individual member thereof could not be separately assessed in respect of its income. In other words, in the case of an HUF, the officer has no option to assess the individual or the family. But in the case of an association of persons the position is different as the officer has such an option. This distinction is clearly pointed out at pages 79 and 80 of the judgment where their Lordships observed that this was not a case of election between two alternative units of assessment, but an attempt to bring to tax the income of an assessable entity which had escaped assessment and that under Section 3 of the Act there is no question of any election between an HUF and a member thereof in respect of the income of the family. If an HUF exists, the ITO has to assess it in respect of its income. Reference was made to Section 14(1) of the Act which says that any part of the income received by its members cannot be assessed over again. The distinction between an association of persons and an HUF was expressly referred to and it was observed :

'While Section 3 confers an option on the ITO to assess either the association of persons or the members of the association individually, no such option is conferred on him thereunder in the case of an HUF, as its existence excludes the liability of its members in respect of the income of the former received by the latter.' The above decision of the Supreme Court has no application to the facts of this case where we are concerned with the assessment of an association of persons in

respect of which we have already held that even under the new Act there is an option to assess either the association as the unit or the members individually. It is true, in the above decision, the Supreme Court gave a direction that if the assessment proceedings initiated under Section 34 culminated in the assessment of the HUF, appropriate adjustments had to be made by the ITO in respect of the tax realised by the revenue on that part of the income of the family assessed in the hands of the individuals. But that direction was given because the original assessment in the hands of the individuals was contrary to the provisions of the Act. In a case of association of persons, if the officer exercises his option and assesses the tax in the hands of the members individually, it cannot be said that the assessment is invalid. Hence, no question of adjustment arises."

15. This question was again considered by the Division Bench of the Patna High Court in the case'of CIT v. Pure Nichitpur Colliery Co. [1975] 101 ITR 79. There the Division Bench held that under Section 67 of the I.T. Act, 1961, as it stood in the assessment years 1964-65, 1965-66 and 1966-67, the decision of the Supreme Court in the case of CIT v. Kanpur Coal Syndicate [1964] 53 ITR 225 and CIT v. Murlidhar Jhawar and Puma Ginning and Pressing Factory [1966] 60 ITR 95 continued to be applicable and once the option was exercised by the ITO of taxing the share income in the hands of the partners, he had no jurisdiction to tax the total income of the unregistered partnership firm in its hands. In the case of Mahendra Kumar Agrawalla v. ITO [1976] 103 ITR 688, another Division Bench of the Patna High Court, however, held that under the Indian I.T. Act, 1922, once the income of the "association of persons" was charged to income-tax in the hands of the members individually, there could be no fresh assessment of the income in the hands of the association because that would amount to double taxation of the income. Under Section 3 of that Act the ITO had the option to assess either of the two units of assessment and once having exercised the option to assess one unit it was not open to him to assess the other unit. But, under Section 4 of the I.T. Act, 1961, no such option of election between the two taxable units has been given to the ITO and as such he is quite competent to initiate proceedings under Section 147 of the Act of 1961 with a view to tax the income of an assessable unit if it had escaped assessment. If the assessment proceedings initiated under Section 147 should culminate in the assessment of the association of persons, then, in view of the provisions of Section 86(v) of the Act, appropriate adjustments would have to be made by the ITO in respect of the tax realised for that part of the income of the association which had been assessed on the members of the association. In the case of Rodamal Lalchand v. CIT [1977] 109 ITR 7, the Division Bench of the Punjab and Haryana High Court had to consider this question again. There it was observed that the definition of "person" in Section 2(31) of the I. T. Act, 1961, made no distinction between a firm or its partners, association of persons or body of individuals, whether incorporated or not, or the members of the association or the body of individuals in their individual capacity. The charging section of the Act, that is, Section 4, views

each category of taxable entity alike as a distinct and different unit. In the case of a firm it would mean a firm or a partner. Similarly, in the ease of an association of persons or a body of individuals, it would mean the association of persons or the body of individuals or the members. The option given by the word "or" to the assessing authority in the charging Section 3 of the Indian I. T. Act, 1922, to proceed against any out of these had then been withdrawn in the 1961 Act. In taxation matters it was a rule that the charging section guides the machinery sections of the Act. Therefore, there was no prohibition in Section 4 of the Act restraining the assessing authority from proceeding against the firm, which was a taxable entity, even though two of its partners had been separately assessed in respect of their share of the income from the partnership business. The position that once the income of an entity had been assessed and taxed in the hands of the other taxable entities mentioned in Section 3 of the 1922 Act, no tax could be levied on the first entity, could not prevail under the 1961 Act.

16. It is clear, therefore, that under the 1922 Act in the" case of an unregistered firm once the partners had been assessed, the firm could not be assessed or vice versa. We are concerned whether the same position prevails in respect of an unregistered firm prior to the amendment by the Taxation Laws (Amend.) Act, 1970. The only difference material for the present purpose is the difference in the language of Section 3 of the 1922 Act and Section 4 of the 1961 Act. The other scheme of taxation in respect of partners and the firm or members of the association of persons remains the same. In this context does it follow that the legislature wanted to depart from the theory established under the 1922 Act, that once the partners had been assessed an unregistered firm could not be assessed or vice verse in the 1961 Act ? We would do well in approaching this problem, to remind ourselves of the observations in the case of Seaford Court Estates Ltd. v. Asher [1949] 2 All ER 155 at page 164 where the Court of Appeal in England observed as follows:

"Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief

which it was passed to remedy, and then he must supplement the written words so as to give 'force and life' to the intention of the legislature. That was clearly laid down (3 Co. Rep. 7b) by the resolution of the judges (Sir Roger Manwood C. B. and the other barons of the Exchequer) in Heydon's case, and it is the safest guide today. Good practical advice on the subject was given about the same time by Plowden in his note (2 Plowd. 465) to Eyston v. Studd. Put into homely metaphor it is this : A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out ? He must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases." Therefore, it is our primary duty to find out the intention of Parliament which must be found out from the language of the statute read in the above manner. But in this case we have the aid of the intention of Parliament in the Notes on Clauses. In the Notes on Clauses of the I. T. Bill, 1961, which introduced the I. T. Act, 1961, in Chap. II, it was stated as follows :

"Basis of charge.

Clause 4.--This section corresponds to section 3 of the existing Act with the following changes :--

(i) for the different entities, individual, Hindu undivided family, etc., mentioned in the section, the word 'person' has been substituted ;

(ii) the proviso makes it clear that notwithstanding that tax is to be paid in respect of the income of a previous year, tax may be recovered on current income wherever so provided ;

(iii) it is made clear that even where tax is deducted at source or paid in advance liability to pay the tax arises by virtue of this provision." It is perhaps now well settled that in case of doubt it is permissible to refer to the debates as also to the Notes on Clauses. Reliance in this connection may be placed on the observation of the Supreme Court in the case of Sole Trustee, Loka Shikshana Trust v. CIT [1975] 101 ITR 234 at page 251. It is also necessary in this connection to remember that the partners of an unregistered firm until the amendment by the Taxation Laws (Amend.) Act, 1970, were considered to be distinct assessable units both under the Indian I.T. Act, 1922, and under the I.T. Act, 1961. Therefore, one income in the hands of two assessable units as the same income should not normally be made to suffer taxation twice unless the clear intention of the legislature is there to tax the same income twice. It is true that double taxation is permissible if the legislature distinctly enacts the same, but when there are general words of taxation and these have to be interpreted, these should not be so interpreted as to tax the subject twice over to the Same tax. The Constitution, however, does not contain any prohibition against double taxation as such. (See in this connection the observations of the Supreme Court in the

case of Jain Brothers v. Union of India [1970] 77 ITR 107 at page 112). In that case, the Supreme Court held that on this view taxation on a registered firm as well as the partners thereof was permissible under the scheme of the I.T. Act. The next principle that has to be borne in mind is that though in fiscal law the charging section is the most important provision, the said charging section must be understood and construed in the light of the machinery provided in order that the charge may be effectuated. Bearing the aforesaid principles in mind and having regard to the intention of Parliament for introducing the change, in our opinion, as there has been no substantial change in the machinery provided for taxation under the 1961 Act, the partners of an unregistered firm as well as the firm itself cannot be taxed twice. In other words, in the case of an unregistered firm and its partners there cannot be simultaneous taxation.

17. On behalf of the revenue, however, it was contended that in this case the assessee-firm was a registered firm until the relevant assessment year. The ITO had no ground to presume that the same state of affairs would not continue and the assessee would not put forward an application under Sub-section (7) of Section 184 of the I.T. Act, 1961, and, therefore, when he made the assessment of the partners, the time to file the return by the assessee-firm had not expired. Therefore, it was presumed that the same state of affairs would continue and in those circumstances it was contended that the ITO had no occasion to exercise the option and he could not and he did not exercise any option. It is true that the question of exercise of option can only arise when there is an opportunity of choice between the alternatives. But, in our opinion, it is not so much a question whether the ITO could have exercised an option or not, but in this case there being an assessment on the partners, the liability of the firm to be assessed did not exist. If that was the position, then the further question whether the ITO could have exercised any option does not arise. But on this aspect of the matter it may be mentioned that there was no warrant for the ITO to presume that the same state of affairs would continue as was in the previous year. The effect of Sub-section (7) of Section 184 is not that the registration would continue as such but that the registration would continue provided the conditions are fulfilled, namely, an application is made in the prescribed form. There is no warrant for the ITO to presume that that condition would be fulfilled in the instant case when he made the assessment.

18. In the above view of the matter we must hold that the Tribunal was not right in holding that the ITO was justified in taxing the income in the hands of the assessee, an unregistered firm, for the relevant assessment years.

We may here observe that the Tribunal in its order has directed the ITO to give effect to the provisions of Section 86(iii) of the 1961 Act. If the assess-

ments are bad then this direction would be of no avail.

19. In the premises, the question referred to this court is answered in the negative and in favour of the assessee. In the facts and circumstances of this case, each party will pay and bear its own costs.

Sudhindra Mohan Guha, J.

I agree.

Cases Referred.

1[1966] 60 ITR 95
2[1966] 60 ITR 74