

GUJARAT HIGH COURT

I.-T. Commr.

Vs.

Kamalini

Income-tax Reference No. 118 of 1974

(B.J. Divan, C.J., P.D. desai, and B.K. Mehta, J.)

23.12.1977

JUDGMENT

B. J. Divan, C.J. (for himself and on behalf of B.K. Mehta J.) (majority view)

1. In this case at the instance of the Revenue the following question has been referred to us for our opinion:-

"Whether, on the facts and in the circumstances of the case, various amounts totaling to Rs. 18,000/- received by the assessee of the income of the six discretionary trusts are liable to be taxed in the hands of the assessee?"

2. The assessee is an individual. The assessment year under reference is 1969-70, the relevant previous year of account being Calendar Year 1968. The assessee is a beneficiary under nine different trusts. She is the sole beneficiary in three of the nine trusts and at the time of filing her return for the assessment year under reference, she included the income from the said three trusts in her return of income and there is no dispute between the parties regarding the income from those three trusts. The dispute in this case centres round income from other six trusts which are all discretionary trusts. During the year of account, that is, calendar year 1968, the assessee received the following amounts from the said six discretionary trusts in terms of the resolutions of the trustees of the respective trusts as distribution out of the income which the trustees of those six different trusts received during 1968:-

S. No.	Name of the Trust	Amount
1	Geeta Mayor B. Trust No. 1	Rs. 1,600/-
2	Ambalal Sarabhai D. Trust No. 4	Rs. 6,200/-
3	Manorama Sarabhai (K. 8 D-Trust)	Rs. 1,000/-

4	Sarladevi Sarabhai (G. 15) D. Trust	Rs. 1,400/-
5	Manorama Sarabhai D. Trust No. 1	Rs. 7,300/-
6	Anand Sarabhai (J. 9) D. Trust	Rs. 500/-.
		Rs. 18,000/-

The assessee was not the sole beneficiary in any of these six trusts but in each case she was one of the group of beneficiaries in each of the said trusts. The relevant clause conferring discretion on the trustees of these six different trusts was identical in each case and the clause runs as follows:-

"From and after the date hereof (i.e., the date of the Trust deed) and during the periods mentioned in this clause, the Trustees may either accumulate the net income of the Trust or at their discretion pay the same to the persons as mentioned therein or to any one or more of them to the exclusion of others or other of them for their, his or her absolute use or benefit in such proportion and in such manner as the Trustees may in their absolute discretion think fit....."

Thus the payment of income to any one or more of the beneficiaries depended upon the absolute discretion of the trustees and hence the shares of the beneficiaries including the assessee under each of these six trusts were indeterminate and unknown. The assessee contended that this income aggregating to Rs. 18,000/- received by her from the said trusts was not liable to be assessed in her hands and, according to her, the components aggregating to Rs. 18,000/- were taxable only in the hands of the trustees of the respective trusts in view of Section 164 of the Income-tax Act, 1961. The Income-tax Officer rejected this contention of the assessee and assessed the amount of Rs. 18,000/- in her hands under Section 166 of the Act.

3. Against the decision of the Income-tax Officer, the assessee carried the matter in appeal to the Appellate Assistant Commissioner. The order of the Income-tax Officer was confirmed by the Appellate Assistant Commissioner as in appeal the same view as the Income-tax Officer was taken by the Appellate Assistant Commissioner.

4. Against the decision of the Appellate Assistant Commissioner, the assessee took the matter in further appeal before the Appellate Tribunal. The Tribunal held that no part of the trust income is specifically receivable on behalf of or for the benefit of any of the beneficiaries including the assessee and, therefore, the assessee's case clearly came within the purview of Section 164. The Tribunal rejected the contention of the Revenue that Section 166 of the Act was applicable. Therefore, the Tribunal held that no direct assessment on the assessee could be made in respect of the said amount of Rs. 18,000/-. According to the Tribunal the amount of Rupees 18,000/- could be assessed only in the hands of the trustees of the respective trusts under Section 164 of the Income-tax Act. The Tribunal, therefore, allowed the appeal and thereafter at the instance of

the revenue the question hereinabove set out has been referred to us for our opinion.

5. This Reference first reached hearing before a Division Bench consisting of two of us (Divan, C. J. and P. D. Desai, J.) on or about February 13, 1976 and as it was felt that the legal position in this behalf was not free from doubt and that the whole problem required reconsideration, the matter was referred to a larger Bench. Hence this matter was placed before a Full Bench consisting of three of us. After the arguments were heard some time before June 1976 but before the judgment could be delivered, one of us (Divan, C. J.) was transferred from this High Court to the High Court of Andhra Pradesh and it was directed that the matter should not be treated as part-heard. It seems that no other Full Bench took up the matter during the intervening period and it was only in September 1977 that all the three of us having once again assembled in this High Court, the matter could be taken up for final hearing.

6. In the order of reference it was pointed out that the following passage from the decision of a Division Bench of this Court in *Commr. of Income-tax v. Arvind Narottam*¹ regarding the scope of Section 164 required reconsideration (at page 170 of AIR) :-

"But even here, 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 too, 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 order of reference to the larger bench makes it clear that these observations in Arvind Narottam's case were undisputedly obiter because the Court was there concerned with a case which fell within the purview of Section 161 (1) and it was in terms observed by Bhagwati C. J., speaking for the Division Bench that the Court in that case was not directly concerned with the interpretation of Section 164. However, when the Court came to decide *Panna Sanjay Trust v. Commissioner of Income-tax*², which decision was rendered within a very short time after the decision in Arvind Narottam's case, Section 164 directly fell for consideration. It was a case in which the trustees of a discretionary trust paid a certain amount out of the trust income to the beneficiary in exercise of their discretion. The amount received by the beneficiary was assessed to income-tax in her hands. The balance was assessed in the hands of the trustees but in determining the rate of tax, the amount already paid to the beneficiary was also included in the total income of the trust. The question was, whether this could be validly done and in considering that question, the same Judges who composed the Division Bench in Arvind Narottam's case construed the provisions of Section 164 and the passage which we have extracted above from

Arvind Narottam's case was in terms adopted while interpreting the main part of Section 164 and thus what was obiter dicta in Arvind Narottam's case became the ratio decidendi in Panna Sanjay Trust case. In Panna Sanjay Trust Case the Division Bench of this Court approved of the decision of the Bombay High Court in *Trustees of Chaturbhuj Raghavji Trust v. Commissioner of Income-tax*³, and it was felt by the Division Bench which referred the matter with which we are dealing in the instant case to a larger Bench, that in Panna Sanjay Trust case the decision in Trustees of Chaturbhuj Raghavji Trust case was approved and followed and in view of what was decided in Trustees of Chaturbhuj Raghavji Trust case the question requires to be reconsidered.

¹(1969) 73 ITR 490

³(1963) 50 ITR 693

²(1969) 74 ITR 396 (Guj)

7. In order to follow the decisions rendered on this branch of the law it is necessary to refer to the relevant provisions of the Indian Income-tax Act, 1922 (hereinafter referred to as 'the Act of 1922') and compare them with the analogous provisions in the Income-tax Act, 1961 (hereinafter referred to as 'the Act of 1961'). Section 40 of the Act of 1922 was included in Chapter V which dealt with "Liability in Special Cases". Sections 40 and 41 which are material for the purposes of this case provided for cases of "Guardians, trustees and agents" and with cases of "Courts of Wards, etc." Under Section 40 sub-section (1) where the guardian or trustee of any person being a minor, lunatic or Idiot (all of which persons were in subsection (1) included in the term 'beneficiary') was entitled to receive on behalf of such beneficiary, or was in receipt on behalf of such beneficiary of, any income, profits or gains chargeable under the Act, the tax was to be levied upon and recoverable from such guardian or trustee, as the case might be, in like manner and to the same amount as it would be leviable upon and recoverable from any such beneficiary if of full age or sound mind and in direct receipt of such income, profits or gains, and all the provisions of the Act were to apply accordingly. Sub-section (2) of Section 40 is not material for the purposes of this Judgment. Section 41 sub-section (1) provided as follows:

"In the case of income, profits or gains chargeable under this Act which the Courts of Wards, the Administrators-General, the Official Trustees or any receiver or manager (including any person whatever his designation who in fact manages property on behalf of another) appointed by or under any order of a Court, or any trustee or trustees appointed under a trust declared by a duly executed Instrument in writing whether testamentary or otherwise (including the trustee or trustees under any Wakf deed which is valid under the Mussalman Wakf Validating Act, 1913), are entitled to receive on behalf of any person, the tax shall be levied upon and recoverable from such Courts of Wards, Administrator-General, Official Trustee, receiver or manager or trustee or trustees, 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, and all the provisions of this Act shall apply accordingly".

The first proviso to Section 41 sub-section (1) stated-

"Provided that where any such income, profits or gains or any part thereof are not

specifically receivable on behalf of any one person, or where the individual shares of the persons on whose behalf they are receivable are indeterminate or unknown, the tax shall be levied and recoverable at the maximum rate, but, where such persons have no other personal income chargeable under this Act and none of them is an artificial juridical person, as if such income, profits or gains or such part thereof were the total income of an association of persons."

The rest of the provisions of Section 41 are not material for the purpose of this Judgment.

8. Chapter XV of the Act of 1961 deals with "Liability in Special Cases". In Chapter XV there are several groupings of Sections under the heads, A, B, C etc. Head "A" deals with "Legal representatives" and is not material for the purposes of this judgment. That head consists only of Section 159. Head "B" deals with "Representative assessee - general provisions" and Section 160 defines "representative assessee". For the purposes of this case we are concerned with clause (iv) of sub-section (1) of Section 160 and under that clause, "representative assessee" means, in respect of income which a trustee appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise (including any Wakf deed which is valid under the Mussalman Wakf Validating Act, 1913 (VI of 1913)) receives or is entitled to receive on behalf or for the benefit of any person, such trustee or trustees. Under sub-section (2) of Section 160, every representative assessee shall be deemed to be an assessee for the purposes of the Act of 1961. Section 161 sub-section (1) which is the crucial Section in this case provides-

"(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 favor of him beneficially, and shall be liable to assessment in his own name in respect of that income; but any such assessment shall be deemed to be made upon him in his representative capacity only, and the tax shall, subject to the other provisions contained in this Chapter, be levied upon and recovered from him in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him".

Under sub-section (2) of Section 161 it is provided-

"(2) Where any person is in respect of any income, assessable under this Chapter in the capacity of a representative assessee, he shall not, in respect of that income, be assessed under any other provision of this Act"

Sub-heading "C" of Chapter XV deals with "Representative assessee - special cases". Section 163 deals with "who may be regarded as agent" for the purposes of Section 163 particularly in the light of clause (1) of Section 160, which specifically says that a person who has to be treated as agent under Section 163 is also a representative assessee for the purpose of definitions in Section 160. Section 164 deals with "charge of tax where share of beneficiaries is unknown" and the Section runs thus-

"164. Where any income in respect of which the persons mentioned in clauses (iii) and (iv) of sub-section (1) of Section 160 are liable as representative assesseees or any part thereof, is not specifically receivable on behalf or for the benefit of any one person, or where the individual shares of the persons on whose behalf or for whose benefit such income or such part thereof is receivable (which persons are hereinafter in this Section referred to as the beneficiaries) are indeterminate or unknown, tax shall be charged as if such income or such part thereof were the total income of an association of persons, or, where such income or such part thereof is actually received by a beneficiary, then at the rate or rates applicable to the total income of the beneficiary if such course would result in a benefit to the revenue".

(Emphasis supplied by us.)

Section 166 which is also material for the purposes of this judgment provides-

"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."

9. A comparison of the first proviso to Section 41 (1) of the Act of 1922 and Section 164 which is the analogous Section of the Act of 1961 clearly brings out this distinction that whereas under the Act of 1922 the words were "the tax shall be levied upon and recoverable", under the Act of 1961 the words are "tax shall be charged". Similarly, it is to be borne in mind that under Section 161 of the Act of 1961 the words are "the tax shall be levied upon and recovered from him (representative assessee) in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him". The corresponding words in Section 41 (1) main portion were "the tax shall be levied upon and recoverable from in the like manner and to the same amount". Thus though the language of Section 161 (1) of the Act of 1961 and Section 41 (1) of the Act of 1922 is more or less identical except substitution of the word "extent" for the word "amount", a departure is made from the language of the first proviso to Section 41 (1) of the Act of 1922 when the Legislature came to enact Section 164 of the Act of 1961 which deals with the identical situation which was dealt with by the first proviso to Section 41 (1) of the 1922 Act. The marginal note mentions "Charge of tax where share of beneficiaries unknown" (emphasis supplied by us) and in the body of the Section it has been mentioned that "the tax shall be charged" as distinguished from "the tax shall be levied upon and recovered" etc. Section 4 of the Act of 1961 which is the charging Section provides that 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 the Act in respect of the total income of the previous year or previous years, as the case may be, of every person. It is thus clear that the charge created by charging Section 4 is to

be in accordance with, and subject to the provisions of the Act and, therefore, the charge in the case of special class of representative assessee created by Section 164 must prevail over the charge created by Section 4. Section 161 does not create a charge but Section 164 in terms creates a charge by using the words "tax shall be charged". In terms Section 164 provides that the tax in the situation contemplated by that Section is to be charged in the manner provided for therein and that being the case it must be clear that for cases falling within Section 164, the charging Section is Section 164 rather than Section 4 of the Act of 1961.

10. It may be pointed out that in *Saifudin Alimohamed v. Commissioner of Income-tax*⁴ the Bombay High Court had expressed the opinion, which, as pointed out by Shah J., as he then was, in *C. R. Nagappa v. Commissioner of Income-tax*⁵, was not necessary for the ultimate decision of the reference, that Section 41 of Act of 1922 conferred an option upon the Income-tax Officer either to assess the income as the income of the beneficiary or as the income of the trustee. The Division Bench of the Bombay High Court in Saifudin Alimohamed's case observed at page 247 (of ITR) of the report in that case in dealing with the case in which the trustees appointed by the Civil Court in a suit were carrying on the business on behalf of two minors:-

⁴(1954) 25 ITR 237

⁵(1969) 73 ITR 626 at p. 631

".....it was open to the Department to have assessed the income of the guardians under Section 10 on the basis that the particular business was carried on by the guardians in their own right, and the taxing department could have taken up the stand that they had no concern with what the guardians did with the profits after they had paid the tax on the income from the business; or it was open to the Department to proceed against the guardians under Section 41 and to tax in their hands only that income which they had received on behalf of the minors."

In connection with this passage from Saifudin Alimohamed's case, Shah J., in *C. R. Nagappa's* case observed at p. 631 (of ITR) : (at pp. 891-92 of AIR) of the report-

"It was apparently assumed that it was open to the Income-tax Officer either to assess and tax the guardians as if they were owners of the business and of the income accruing there from, or to tax them as trustees under Section 41. In so assuming the Court exalted Sections 40 and 41 into quasi-charging Sections. The observation was plainly obiter, for the Income- tax department had assessed the income in the hands of the guardians as trustees under Section 41."

In a later judgment of the same High Court, the Court reversed the earlier opinion: *Commissioner of Income-tax v. Balwantrai Jethalal Vaidya*⁶, The Court held in that case that the liability of trustees to income-tax is co-extensive with that of the beneficiaries and cannot in any case be a larger or wider liability. If the assessment is made upon a trustee, his liability to pay tax must be determined in accordance with Section 41 of the Income-tax Act. It was observed in that case that Section 41 gives no option to the taxing department to treat the income received by the

trustees on behalf of the beneficiary as his own income or to treat it as the income of the trustee on behalf of the beneficiary. It was further observed (by the Division Bench in Balwantrao Jethalal Vaidya's case)-

'If the assessment is upon a trustee, the tax has to be levied and recovered in the manner provided in Section 41. The only option that the Legislature gives is the option embodied in subsection (2) of Section 41, and that option is that the department may assess the beneficiaries instead of the trustees, or having assessed the trustees it may proceed to recover the tax from the beneficiaries. But on principle the contention of the department cannot be accepted that, when a trustee is being assessed to tax, his burden which will ultimately fall upon the beneficiaries should be increased and whether that burden should be increased or not should be left to the option of the department.

The basic idea underlying Section 41, and which is in conformity with principle, is that the liability of the trustees should be co-extensive with that of the beneficiaries and in no sense a wider or a larger liability. Therefore, it is clear that every case of an assessment against a trustee must fall under Section 41, and it is equally clear that, even though a trustee is being assessed, the assessment must proceed in the manner laid down in Chapter III."

It may be pointed out, while enacting Section 164 of the Act of 1961, the Parliament has in terms created a charge by using the words "tax shall be charged" and now there is no

⁶(1958) 34 ITR 187 at p. 194

question of the Court exalting the provisions of any particular Section into a quasi-charging Section.

11. In C. R. Nagappa's case, 73 ITR 626 , the Supreme Court was dealing with a case arising under the Act of 1961 and the main question was whether in a case falling under Section 161 sub-section (1) the application of Section 64 clause (v) of the Act of 1961 was to be excluded. The Supreme Court there pointed out that it was implicit in the terms of Section 161 (1) that the Income-tax Officer may assess a representative assessee as regards income in respect of which he is a representative assessee, but he is not bound to do so. He may assess either the representative assessee or the person represented by him; that is expressly so enacted in Section 166. Section 161 (2) does not purport to deny the Income- tax Officer the option to assess the income in the hands of the person represented by the representative assessee; it merely enacts that when a representative assessee is assessed to tax in exercise of the option of the revenue, he shall be assessed under Chapter XV and shall not in respect of that income be assessed under any other provision of the Act. Section 161 (2) was so enacted presumably with an intention of removing the conflict of judicial opinion which arose in the interpretation of the analogous provisions of Sections 40 and 41 of the Act of 1922.

12. At page 629 (of ITR) of the report, Shah J., as he then was, observed:-

"It is implicit in the terms of subsection (1) (of Section 161) that the Income-tax Officer may assess a representative assessee as regards income in respect of which he is a representative assessee, but he is not bound to do so. He may assess either the representative assessee or the person represented by him. That is expressly so enacted in Section 166.....

The Income-tax Officer may, therefore, assess the person represented in respect of the income of the trust property and the appropriate provisions of the I.-T. (Act) relating to the computation of the total income and the manner in which the income is to be computed will apply to that assessment. The Income-tax Officer may in appropriate cases assess the representative assessee in respect of that income and limited to that extent, and tax may be levied and recovered from him to the same extent as may be leviable and recoverable from the person represented by him."

To the same effect is the earlier decision of the Supreme Court in *Aggarwal Chamber of Commerce v. Ganpat Rai Hira Lal*⁷, The Supreme Court in that case was concerned with the case of an agent in India of a non-resident principal and the following passage from the speech of Viscount Cave in *Williams v. Singer*⁸, was cited with approval by the Supreme Court (at p. 273 of AIR):-

"The fact is that, if the Income-tax Acts are examined, it will be found that the person charged with tax is neither the trustee nor the beneficiary as such, but the person in actual receipt and control of the income which it is sought to reach. The object of the Acts is to secure for the State a proportion of the profits chargeable, and this end is attained (speaking generally) by the simple and effective expedient

⁷(1958) 33 ITR 245

⁸(1920) 7 Tax Cas 387

of taxing the profits where they are found."

It is this principle of taxing the profits where they are found which is the underlying principle, according to the Supreme Court, under Sections 40, 41 and 42 of the Act of 1922.

13. In *Commissioner of Income-tax v. R. L. Aggarwal and Co*⁹, the question was again of an agent in India of a non- resident principal and it was pointed out that Section 40 sub-section (2) was a machinery Section and that was also mentioned in Aggarwal Chamber of Commerce case (AIR 1958 Supreme Court 269). It was, therefore, contended that Section 161 sub-section (1), corresponding to Section 40 sub-section (2), was also a machinery Section and not a charging Section.

14. In *Commissioner of Income-tax v. Manilal Dhanji*¹⁰, the Supreme Court was dealing with a case of a trustee where the settlement was of sum of money for accumulation with interest to the

beneficiary who was a minor until the minor attained majority. There it was not a case of discretionary trust of the kind that is before us and at page 886 (of ITR) , the Supreme Court observed:-

"Under Section 41 of the Income-tax Act it was open to the Department either to tax the trustees of the trust deed or to tax those on whose behalf the trustees had received the amount. The true position of the assessee in this case was that he was a trustee and not the sole beneficiary under the trust deed. He held the income on trust for himself, his wife and his children. The shares of the beneficiaries were indeterminate and, therefore, under the first proviso to Section 41 (1) of the Income-tax Act, it was open to the department to levy and recover the tax at the maximum rate from the assessee; but that did not entitle the department to include the sum of Rs. 14,170/- in the total income of the assessee as though he was the sole beneficiary under the trust deed."

To this extent the provisions regarding discretionary trusts were considered but the main question was, as we have pointed out above. However, it may be reiterated that we are concerned with a case falling under Section 164 of the Act of 1961 which is under the heading "Representative assessee - special cases" as distinguished from Section 161 which is under the heading "Representative assesses - general provisions". Moreover, Section 161 in terms provides that under that Section, "tax shall, subject to the other provisions contained in this Chapter, be levied upon etc". It is thus clear that for cases falling under Section 164 one has to look only to the special provisions of that Section rather than to the provisions of Section 161.

15. It may be pointed out that the provisions of the Wealth Tax Act in Section 21 are similar to the provisions of Sections 161 and 164 of the Act of 1961. In *Commissioner of Wealth-tax v. Trustees of Nizam Family Trust*¹¹, Bhagwati J., speaking for the Supreme Court, has observed:-

⁹(1965) 56 ITR 20

¹¹(1977) 108 ITR 555 at p. 593: (1977 Tax LR 998 at p. 1009)

¹⁰(1962) 44 ITR 876

"This Court also observed that 'the same considerations must apply in the interpretation of Section 161 (2) of the Income-tax Act, 1961' (as was applicable under Section 41 of the Act of 1922). The same view, it may be pointed out, was taken by this Court in an earlier decision in *Commissioner of Income-tax v. Nandlal Agarwal*¹², These decisions given under the Income-tax law must apply equally in the interpretation of Section 21, since the relevant provisions of both the statutes are almost identical. That was pointed out by this Court in *Commissioner of Wealth-tax v. Kripashanker Dayashanker Worah*¹³, where it was said:

'Section 21 (1) of the Act is analogous to Section 41 (1) of the Indian Income-tax Act, 1922. The only difference between the two Sections is that whereas the former deals with assets, the latter deals with income. Subject to this difference, the two provisions are

identically worded. Hence, the decisions rendered under Section 41 (1) of the Indian Income-tax Act, 1922, have a bearing on the question arising for decision in this case'."

In view of this pronouncement of the Supreme Court it is clear that provisions of Section 21 of the Wealth Tax Act being almost in identical language and being analogous, to the provisions regarding representative assessee as enacted in Section 161 and Section 164 of the Income-tax Act, the decisions under the Wealth Tax Act will also have their impact in interpreting Section 161 and Section 164 of the Act of 1961. Section 21 (1) of the Wealth Tax Act is analogous to Section 161 of the Act of 1961 and Section 21 (4) of the Wealth Tax Act is analogous to Section 164 of the Income-tax Act, 1961. At page 593 of the report in 108 ITR: (at pp. 1009-1010 of 1977 Tax LR), Bhagwati J., speaking for the Supreme Court explained the scheme of Sections 21 and 21 (4) of the Wealth Tax Act as follows:-

"It must also be noted that the assessment which is contemplated to be made on the trustee under sub-section (1) or sub-section (4) of Section 21 is assessment in a representative capacity. It is really the beneficiaries who are sought to be assessed in respect of their interest in the trust properties through the trustee. Sub-section (1) provides that in respect of trust properties held by a trustee, wealth-tax shall be levied upon him 'in the like manner and to the same extent' as it would be leviable on the beneficiary for whose benefit the trust properties are held. This provision obviously can apply only where the trust properties are held by the trustee for the benefit of a single beneficiary or, where there are more beneficiaries than one, the individual shares of the beneficiaries in the trust properties are determinate and known. Where such is the case, wealth-tax can be levied on the trustee in respect of the interest of any particular beneficiary in the trust properties 'in the same manner and to the same extent' as it would be leviable upon the beneficiary and in respect of such interest in the trust properties, the trustee would be assessed in a representative capacity as representing the beneficiary. This, of course, does not mean that the revenue cannot proceed to make direct assessment on the beneficiary in respect of the interest in the trust properties which 'belongs to' him. The beneficiary would always be assessable in respect of his interest in the trust

¹²(1966) 59 ITR 758

¹³(1971) 81 ITR 763, 768: (1971 Tax LR 1756 at pp. 1758-59) (SC)

properties, since such interest 'belongs to' him and the right of the revenue to make direct assessment on him in respect of such interest stands unimpaired by the provision enabling assessment to be made on the trustee in a representative capacity. Sub-section (2) makes this clear by providing that nothing contained in sub-section (1) shall prevent either the direct assessment of the beneficiary for whose benefit the trust properties are held or the recovery from the beneficiary of the wealth-tax in respect of his interest in the trust properties which is assessed in the hands of the trustees. The revenue has thus two modes of assessment available for assessing the interest of a beneficiary in the trust properties: It may either assess such interest in the hands of the trustee in a representative capacity under sub-section (1) or assess it directly in the hands of the beneficiary by including it in

the net wealth of the beneficiary. What is important to note is that in either case what is taxed is the interest of the beneficiary in the trust properties and not the corpus of the trust properties. So also where beneficiaries are more than one, and their shares are indeterminate or unknown, the trustees would be assessable in respect of their total beneficial interest in the trust properties. Obviously, in such a case, it is not possible to make direct assessment on the beneficiaries in respect of their interest in the trust properties, because their shares are indeterminate or unknown and that is why it is provided that the assessment may be made on the trustee as if the beneficiaries for whose benefit the trust properties are held were an individual. The beneficial interest is treated as if it belonged to one individual beneficiary and assessment is made on the trustees in the same manner and to the same extent as it would be on such fictional beneficiary. It will, therefore, be seen that in this case too, it is the beneficial interest which is assessed to wealth-tax in the hands of the trustee and not the corpus of the trust properties,"

(Emphasis supplied by us).

16. In this decision in the Trustees of Nizam's Family Trust, (1977 Tax LR 998) the Supreme Court approved the earlier decision of this High Court in *Commissioner of Wealth-tax v. Kum. Manna G. Sarabhai*¹⁴, At page 177 of the report, Bhagwati C. J., as he then was, speaking for the Division Bench consisting of himself and T. U. Mehta J., in the Gujarat High Court explained the legal position under Section 21 of the Wealth Tax Act on the same lines as is subsequently explained in the Supreme Court decision in the Trustees of Nizam's Family Trust case. Dealing with the provisions of Section 21 sub-section (4) at page 178(of ITR) : (at p. 388 of Tax LR) of the report, he observed-

"This would clearly appear to be the position in regard to assessment where the trustees hold the trust properties for the benefit of a single beneficiary or, there being more beneficiaries than one, the individual shares of the beneficiaries in the trust properties are determinate and known. But what is to happen where there are more than one beneficiary and their individual shares in the trust properties are indeterminate or unknown? The answer to this question is provided in sub-section (4) which provides that where the shares of the beneficiaries for whose benefit the trust properties are held are indeterminate or unknown, the wealth-tax may be levied upon the trustees as if the beneficiaries for whose benefit the trust properties are held were an individual for the purposes of the Act. Since the

¹⁴(1972) 86 ITR 153 (Guj)

interests of the beneficiaries in the trust properties in such a case would be indeterminate or unknown, it would not be possible to make direct assessment on any beneficiary in respect of his interest in the trust properties nor would it be possible to levy wealth-tax on the trustees in respect of the interest of any beneficiary in the trust properties 'in the like manner and to the same extent as it would be leviable upon" such beneficiary, under sub-

section (1). The legislature, therefore, provides that, in a case of this kind, wealth-tax may be assessed on the trustees as if the beneficiaries were an individual, so that, for the purpose of assessment, a fiction would be created as if the trustees hold the trust properties for the benefit of a single beneficiary and assessment would be made on the trustees on such fictional basis under sub-section (1). When assessment is made on the trustees on the fictional individual, it is assessment on the trustees in a representative capacity and what is assessed to wealth-tax is the totality of the interest of the beneficiaries in the trust properties. It is, therefore, apparent that once assessment is made on the trustees in respect of the interest of the beneficiaries in the trust properties under sub-section (4), the beneficiaries cannot be again assessed directly in respect of their interest in the trust properties. The interest of the beneficiaries in the trust properties having suffered assessment to wealth-tax in the hands of the trustees in a representative capacity, cannot again be assessed to wealth-tax in the hands of the beneficiaries."

17. Mr. S. P. Mehta for the assessee in the instant case before us is right when he contends that the precise question which has arisen for determination before us has not arisen in a single case so far, namely, whether it is open to the tax authorities to proceed against the beneficiary under a discretionary trust who has actually received some amount from the trustees in exercise of their discretion in view of the language of Section 164. The cases up- till now arising in *Commissioner of Wealth-tax v. Kum. Manna G. Sarabhai* 1972 Tax LR 377 (Guj) (supra) or in Panna Sanjay Trust case (1969-74 ITR 396) (Guj) (supra) were cases where income in respect of a beneficiary under the discretionary trust having already been taxed in the hands of the trustees or in the hands of the beneficiary was sought to be included in the hands of the beneficiary or the trustee, as the case may be, or was sought to be taken into consideration once again for the purpose of computation of tax and the rate of tax. But the question before us is whether in case of discretionary trusts as they existed at the relevant time in the light of the provisions of Section 164 read with Section 166 it was open to the income-tax authorities to proceed at all against the beneficiary when the beneficiary under a discretionary trust has received some amount from the trustees of the beneficiary trust in exercise of the discretion of the trustees.

17-A. Mr. Desai for the Revenue has relied upon the decisions of the Courts in England in *Drummond v. Collins*¹⁵, (decided by the House of Lords), *Tollemache v. The Commrs. of Inland Revenue*¹⁶, (decided by Rowlatt, J., sitting singly in the King's Bench Division), *Lindus and Mortin v. The Commissioners of Inland Revenue*¹⁷, (decided by Finlay, J., sitting singly in King's Bench Division) and the decision of Finlay, J., in *Johnstone v. Chamberlain*¹⁸, and these English cases provide that when the trustees in the exercise of their discretion pay any amount or allow any benefit to be enjoyed by a beneficiary under

¹⁵(1915) 6 Tax Cas 525

¹⁷(1933) 17 Tax Cas 442

¹⁶(1926) 11 Tax Cas 277

¹⁸(1933) 17 Tax Cas 706

a discretionary

trust, then the receipt in the hands of the beneficiary can be taxed under the English Income-tax law. In *Drummond v. Collins*, (supra) Lord Loreburn observed at page 539 –

"They were payments made in fulfillment of a testamentary disposition for the benefit of the children in the exercise of a discretion conferred by the Will. They were the children's income, in fact."

Similarly, Lord Parker of Waddington observed in his speech, "the money in question was as soon as the Trustees had exercised their discretionary trust held in trust for these infants as beneficiaries and that the Section was a collecting section and not a taxing Section, and there was no reason in principle why it should not receive a liberal interpretation. Lord Wrenbury observed in his speech –

".....in this case the Trustees exercise their discretion in favor of the child, the interest of the child ceases to be contingent and becomes vested. Whether the money is paid to the child, or to the guardian of the child, or to the school master, or to the tailor or other person who supplies the wants of the child, it is paid to or to the use of the child and is income of the child."

The other three decisions which we have referred to above merely follow the principle laid down in *Drummond v. Collins*.

18. We are reluctant to follow uncritically and without a full analysis the provisions of the English law - and especially what has been stated in *Drummond v. Collins*¹⁹ and the three other English decisions because, as has been pointed out by the Supreme Court in *Commissioner of Income-tax v. Vazir Sultan and Sons*²⁰, and reiterated by Subba Rao, J., (as he then was) in *Commissioner of Income-tax v. A. Gajapathy Naidu*²¹,

"While considering the case law it is necessary to bear in mind that the Indian Income-tax Act is not in part materia with the British Income-tax statutes, it is less elaborate in many ways, subject to fewer refinements and in arrangement and language it differs greatly from the provisions with which the Courts in England have had to deal. Little help can therefore be gained by attempting to construe the Indian Income-tax Act in the light of decisions bearing upon the meaning of the income-tax legislation in England. But on analogous provisions, fundamental concepts and general principles unaffected by the specialities of the English income-tax statutes, English authorities may be useful guides." and then Subba Rao, J., further observed -

"The caution administered by this Court shall always be borne in mind in construing the provisions of the Indian statute. The provisions of the Indian Income-tax Act shall be construed on their own terms without drawing any analogy from English statutes whose terms may superficially appear to be similar but on a deeper scrutiny may reveal

differences not only in the wording but also in

¹⁹(1915-6 Tax Cas 525)

²¹(1964) 53 ITR 114 at page 117

²⁰(1959) 36 ITR 175

the meaning a particular expression has acquired in the context of the development of law in that country."

19. In our opinion, therefore, in the light of the caution administered by the Supreme Court in the earlier case of Vazir Sultan and Sons and reiterated in A. Gajapathy Naidu's case, it is not possible for us to rely on the concept of receipt in the hands of the beneficiary under a discretionary trust under the Income-tax law in England for the purpose of eliciting the legal position under Section 164 of the Act of 1961. As we have pointed out above, the language of Section 161 and Section 164 is different. Not only has the legislature used the terminology "the tax shall.....be levied" under Section 161 (1) while using in Section 164 the words "tax shall be charged", but again Section 161 (1) mentions that "the tax shall be levied upon and recovered from the representative assessee, subject to the other provisions contained in this Chapter, in like manner and to the same extent as it would be leviable upon and recoverable from the beneficiary". As the Supreme Court has pointed out in Trustees of Nizam's Family Trust case (1977 Tax LR 998 (SC)) the words "in like manner and to the same extent" in Section 161 are the words which bring in the concept of implicit right of the tax authorities to proceed against the trustees or against the beneficiary when there is a single beneficiary or in the case of there being more beneficiaries than one, the shares of the beneficiaries are determinate and known. Therefore, even the provisions of Section 161 (1) which by necessary implication give an option to the tax authorities to proceed either against the representative assessee or against the beneficiary but *qua* the representative assessee authorized the tax authorities to levy the tax and recover it from the representative assessee in the manner and to the same extent as it would be leviable upon and recoverable from the beneficiary, are to yield to other provisions of Chapter XV.

20. When one comes to Section 164, the only departure that is made from the scheme of Section 21 (4) of the Wealth-tax Act is that instead of creating the fiction that the body of beneficiaries is a single individual, under Section 164 the fiction is created that the income received by the representative assessee in cases covered by Section 164 is "as if the income were the total income of an association of persons." It is to be borne in mind that unlike the fiction in Section 21 (4) of the Wealth-tax Act, the fiction under Section 164 is that the income is deemed to be the income of an association of persons and the tax has to be charged as if the income of the trust were the income of an association of persons when it is not specifically receivable on behalf of or for the benefit of any one person or where the individual shares of the persons on whose behalf or for whose benefit such income or such part thereof is receivable are indeterminate or unknown. Therefore, it is clear that the tax is to be charged on such income as if it were the total income of an association of persons and the rates applicable to an association of persons and all provisions applicable in law to the income of an association of persons are applicable to this income which is covered by Section 164.

21. It was contended by Mr. Desai for the Revenue that Section 164 merely gives an option as to rates and that the main liability of a representative assessee in cases covered by Section 164 arises under Section 161 (1) of the Act. We are unable to accept this contention because the first part of Section 164 which creates the legal fiction about income in a case covered by Section 164 being the income of an association of persons deals both with the creation of fiction treating the income in such case to be the income of an association of persons requiring such income to be treated as income of an association of persons and, also provides for the rate to be applicable to such income of that association of persons and also creates a charge. But having made that provision, an option is given by the concluding portion of Section 164 that where such income or part thereof is actually received by the beneficiary, then the rate or rates applicable shall be the rate or rates applicable to the total income of the beneficiary if such course would result in a benefit to the revenue. It is clear that the concluding part of Section 164 still deals with income required by Section 164 to be treated as income of a fictional association of persons but instead of applying the rate applicable under the Finance Act of the year concerned to an association of persons, option is given to the tax authorities to apply the rate or rates applicable to the total income of the beneficiary to whom in exercise of the discretion a portion of the income or whole of the income has been given by the trustees. It is clear that the last part of Section 164 does not enable the tax authorities to proceed against the beneficiary. It is also clear from the distinction in the language between Section 161 (1) that "tax shall.....be leviable upon and recoverable from the person represented by him" and in Section 164 "tax shall be charged" and looking to the fact that Section 164 is an exception to the provisions of Section 161 (1), and as even Section 161 (1) says "subject to the other provisions contained in this Chapter" - and Section 164 is the provision of exception to Section 161 - it is clear that the provisions of Section 161 (1) cannot govern the case of a representative assessee when the facts bring the case of a particular representative assessee within Section 164. In our opinion, in view of the clear language of Section 4 which says that the charge shall be subject to and in accordance with the provisions of the Act and in view of the fact that there is also an exception contained in Section 161 (1) it is only the provisions of Section 164 which govern the case of a representative assessee when the facts bringing the case within the operative part of Section 164 exist and it must be borne in mind that the word "receivable" occurring in Section 164 must, as pointed out by Kotval, C. J., in *Commissioner of Income-tax v. Ratanbai Mathuradas*²², be interpreted to mean receivable under the deed of trust –

".....it has to be noticed that the words of the proviso to Section 41 are 'where any such income, profits or gains or any part thereof are not specifically receivable on behalf of any one person, or where the individual shares of the persons on whose behalf they are receivable are indeterminate or unknown'. The word 'receivable' indicates that we have to see whether upon the provisions of the trust deed, such as they are, the shares are indeterminate or unknown or otherwise and from this point of view it seems to us that the action which the trustees may have taken in notionally separating the shares would be

wholly irrelevant. We must look to what is provided by the deed and not to what the trustees may choose to do in the implementation of its terms."

It was urged that we should qualify this observation of Kotval, C. J., of the Bombay High Court in Ratanbai Mathuradas's case by mentioning that if in advance the trustees have exercised their discretion which taken together with the deed of trust indicates that the share of the income given to the particular beneficiary was no longer indeterminate or unknown and that the shares had become determinate and known, then the case would be taken out of Section 164, because it can be predicated in that eventuality that the individual shares of the persons on whose behalf the income was receivable were

²²(1968) 67 ITR 504 at page 512 (Bom)

determinate and known. It is not necessary for us to decide this point and we express no opinion in this connection. However, so far as the use of the word "receivable" is concerned, we agree with Kotval, C. J., that the word "receivable" used by the Legislature in Section 164 in the context in which it occurs indicates that it is to the document of trust that one has to look at, be it a testamentary document or deed of settlement inter vivos, and not the actual exercise of the discretion by the trustees in the course of the year.

22. In our opinion, our task has become easier since the decision of the Supreme Court in Trustees of Nizam's Family Trust case (1977 Tax LR 998) (SC) which was decided by the Supreme Court as recently as May 3, 1977 and since in the case falling under Section 21 (4) which is analogous to Section 164 where the beneficiaries are more than one and their shares are indeterminate and unknown the trustees are assessable in respect of the benefit and in such a case obviously it is not possible to make direct assessment on the beneficiaries because their shares are indeterminate and unknown and that is why it is provided that the assessment may be made on the trustees, that is, the representative assessee as if the income in the hands of the representative assessee were the income of an association of persons. In our view, after the decision of the Supreme Court in Trustees of Nizam's Family Trust case there is no scope for any difficulty posed by the language used in Arvind Narottam's case (AIR 1970 Gujarat 167) that the income in the hands of the beneficiary when the beneficiary receives the income in exercise of the discretion of the trustees under a discretionary trust would be charged to income-tax.

23. Section 166 merely permits direct assessment of the beneficiary or of the representative assessee when it can possibly be done under any of the provisions of Chapter XV, that is, preceding Section 166, that is, Sections 159 to 165, both inclusive. Section 166 permits either the direct assessment of the beneficiary or the recovery from the beneficiary of the tax payable in respect of the income referred to in any of Sections 159 to 165 as receivable even though the assessment might have been made on the representative assessee. The crucial question is not the provisions of Section 166 but Section 164 because if under Section 164 it is not open to the tax authorities to proceed against the beneficiary where the beneficiary is not any one person or where the individual shares of the persons on whose behalf or for whose benefit such income or such part thereof is receivable are indeterminate and unknown, it is not open to the tax authorities

to treat the income of the trust except as the income of a fictional association of persons and the last portion of Section 164 is only for the purpose of giving an option as to rates as explained above, the question of proceeding under Section 166 against the beneficiary directly or recovering from the beneficiary the tax payable by the representative assessee in respect of the amount paid in the course of a particular year of account by the trustees under a discretionary trust to one or other of the beneficiaries under Section 164 can never arise. As the very language of Section 166 says, it is an enabling section and as the Supreme Court has pointed out in C. R. Nagappa's case (AIR 1969 Supreme Court 888), Section 166 makes express what is implicit in Section 161 (1) but, as we have pointed out above, since Section 164 is an exception to Section 161 (1), the provisions of Section 166 can only apply to those cases falling under Sections 159 to 165 where they can possibly apply and since it is not possible, as pointed out by the Supreme Court in Trustees of Nizam's Family Trust case to proceed against the beneficiaries under Section 164, the provisions of Section 166 cannot apply to cases falling under Section 164.

24. Before parting with this case we may only point out that as pointed out by the House of Lords in *Gartside v. Inland Revenue Commissioners*²³, at page 711 of the report-

"The objects of a discretionary trust do not have interests extending to the whole or any part of the income of the trust fund and it must follow that they do not have interest in the fund."

It was pointed out by Lord Wilberforce at page 719 of the report –

"No doubt in a certain sense a beneficiary under a discretionary trust has an 'interest': the nature of it may, sufficiently for the purpose, be spelt out by saying that he has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a Court of equity. Certainly that is so, and when it is said that he has a right to have the trustees exercise their discretion 'fairly' or 'reasonably' or 'properly' that indicates clearly enough that some objective consideration (not stated explicitly in declaring the discretionary trust, but latent in it) must be applied by the trustees and that the right is more than a mere spes. But that does not mean that he has an interest which is capable of being taxed by reference to its extent in the trust funds income: it may be a right, with some degree of concreteness or solidity, one which attracts the protection of a Court of equity, yet it may still lack the necessary quality of definable extent which must exist before it can be taxed."

This passage, in our opinion, succinctly brings out the nature of the interest of a beneficiary under a discretionary trust and it is because of this nature of the beneficiary's interest under a discretionary trust and his right being merely a right to be considered by the trustees, that the legislature because of impossibility to deal with the income in such cases has made special provision in Section 164 to see to it that the income is treated as income of fictional association of persons, option being given to the tax authorities only as regards the rate of tax, namely, either

to apply the rate of tax applicable to an association of persons or to apply the rate of the beneficiary in case the trustees have exercised their discretion in favor of any beneficiary.

25. The principle of stare decisis which was invoked by Mr. Desai on behalf of the Revenue is not applicable to the facts of this case because the interpretation placed on analogous provisions of Section 21 (4) by the Supreme Court leaves no scope for the operation of the doctrine of stare decisis.

26. Considerable arguments were advanced on the doctrine of relation back when the question was being canvassed at the bar but looking to the clear provisions of first part of Section 164, there is no scope for operation of any question of relation back to the money in the hands of the beneficiary. As pointed out in *T. S. Srinivasan v. Commissioner of Income-tax*²⁴, :-

"We would not be justified in introducing uncertainties and anomalies in the working of the Act by introducing this doctrine (of relation back) for the purpose of Section 4 of the Act of 1961."

²³(1968) 70 ITR 663 (HL)

²⁴(1966) 60 ITR 36 at p. 40

It was again observed in *Commissioner of Income-tax v. A. Gajapathy Naidu's case* (53 ITR 114 at page 118) (supra):

"If an income accrues within a particular year, it is liable to be assessed in the succeeding year. When does the right to receive an amount under a contract accrue or arise to the assessee, i.e., come into existence? That depends upon the terms of a particular contract. No other relevant provision of the Act has been brought to our notice - for there is none which provides an exception that though an assessee does not acquire a right to receive an income under a contract in a particular accounting year, by some fiction the amount received by him in a subsequent year in connection with the contract, though not, arising out of a right accrued to him in the earlier year, could be related back to the earlier year and made taxable along with the income of that year. But that legal position is sought to be reached by a process of reasoning found favor with English Courts. It is said that on the basis of proper commercial accounting practice, if a transaction takes place in a particular year, all that has accrued in respect of it, irrespective of the year when it accrues, should belong to the year of transaction and for the purpose of reaching that result closed accounts could be reopened. Whether this principle is justified in the English law, it has no place under the Indian Income-tax Act."

It is clear in the light of these observations and particularly in the light of the provisions of Section 164 which we have examined above that the doctrine of relation back which was retrospective in effect which was considered by the Supreme Court in the context of provisions of Company Law in *Commissioner of Income-tax v. Mysore Electrical Industries Ltd*²⁵, and followed by this High Court in subsequent cases, cannot apply to the case before us viz., to the receipt of income by a beneficiary under a discretionary trust.

26-A. We may point out that the Minutes of the Tenth Meeting of the Direct Taxes Advisory Committee held on December 23, 1967 at Ahmadabad set out under Item 48 the conclusions of the Committee regarding Section 164 as follows :-

"The point related to the scope of the change made by Section 164 of the Income-tax Act. The Committee was informed that, where any amount is specifically receivable on behalf of a beneficiary and the trust has discretion in respect of the remaining sum only, the beneficiary will be assessable in respect of his share, as part of his total income, and the trust will be liable to tax on the remainder at the rate applicable to the remainder only. On the other hand, if the trust has complete discretion in respect of the entire income, the trust will be assessed on the whole of the income at the rate applicable thereto, but any part of the income which is actually paid to a beneficiary (in the exercise of discretion) will be charged to tax at the personal rate of the beneficiary where this is beneficial to revenue."

This Minute of the Direct Taxes Advisory Committee regarding the provisions of Section 164 reinforces the conclusion that we have arrived at independently on an examination of the provisions of Section 164 read in the light of the decision of the Supreme Court in

²⁵ (1971) 80 ITR 566 (SC)

Trustees of Nizam's Family Trust case (1977 Tax LR 998).

27. We, therefore, hold that the observations which were obiter dicta in Arvind Narottam's case (AIR 1970 Gujarat 167) and which were applied in Panna Sanjay's case (1969-74 ITR 396) (Guj) do not lay down the correct law and it must be held that the income under the discretionary trust is only assessable in the hands of the representative assessee as if it were the total income of a fictional association of persons and it is not assessable in the hands of the beneficiary even if the amount is paid to the beneficiary. In the event of any part of the income of the discretionary trust being paid to a beneficiary, the option is only as regards the rate at which the tax shall be charged but that too in the hands of the representative assessee only.

28. We therefore, answer the question referred to us in the negative, that is, in favor of the assessee and against the Revenue. The Commissioner of Income-tax will pay the costs of this Reference to the assessee.

29. **P.D. Desai, J.** (Minority view)

I have had the advantage of reading the draft judgment prepared by the learned Chief Justice and I regret my inability to agree with the reasons and conclusions recorded therein.

30. The question, which has been referred to us for our opinion together with the relevant facts,

has been set out in the judgment of the learned Chief Justice. The circumstances under which the matter has come up before the Full Bench have also been adverted to. The principal question, which arises for our consideration, is whether the Revenue has an option to tax in the hands of the beneficiary under a discretionary trust the amount actually received in the course of the previous year by him from the trustees in exercise of their discretion in view of the relevant provisions contained in Chapter XV of the Income-tax Act, 1961 (hereinafter referred to as 'the Act'). Since the answer to this question appears to be concluded in favor of the Revenue by certain observations in the decisions of the Division Bench of this Court in *commissioner of Income-tax v. Arvind Narottam*²⁶, and *Panna Sanjay Trust v. Commissioner of Income-tax*²⁷, the subsidiary question which arises for consideration is whether those observations correctly decided the point.

31. Before proceeding to consider these questions, I wish to clearly demarcate the field of controversy and the ambit of my decision. We are not concerned herein with the question whether the income received by the trustees of a discretionary trust, with or without power of accumulation reserved to them, is liable to be taxed at the option of the revenue, in the hands of the beneficiaries collectively, although no part of such income has been disbursed in the course of the previous year amongst the beneficiaries or any one or more of them in the exercise of the trustees discretion. On the facts and in the circumstances of the present case, such a question does not arise nor is it concluded by the decisions in Arvind's and Panna's cases so as to require reconsideration. Nor are we concerned herein with the question whether the income received by the trustees of a discretionary trust in an earlier previous year and distributed amongst the beneficiaries or any one or more of

²⁶73 ITR 490

²⁷(1969) 74 ITR 396 (Guj)

them in the course of a subsequent previous year is liable to be assessed in the hands of the beneficiaries at the option of the Revenue. On the facts and in the circumstances of this case, it does not appear to be in dispute that in the course of the same accounting period, during which the trustees of the six discretionary trusts received the income of the respective trusts the assessee received various amounts from the said discretionary trusts in terms of the resolutions of the trustees of the respective trusts as distribution out of such income. The view expressed by this Court in Arvind's and Panna's cases, in my opinion, also covers only such cases and the question of the correctness of such view has also to be examined in the said light. While answering the question referred to us, therefore, I shall confine myself within this limited range, namely, whether it is optional to the Revenue to tax either the trustees or the beneficiaries individually in respect of that portion of the income of the discretionary trust which is distributed amongst the beneficiaries in the exercise of trustees' discretion in the same accounting year in which it is received. This is the scope of my decision and I should be taken to have decided no more.

32. The answer to the question must necessarily depend, in the first place, upon the language of the relevant statutory provisions. Those provisions have been quoted verbatim in the judgment of the learned Chief Justice and I need not reproduce them. I shall confine myself only to analysing

those provisions.

33. The Act, under Chapter XV, makes certain persons liable to be taxed in respect of income received by them, although such income has not in fact beneficially accrued or arisen to them. The persons in respect of whom such special liability is created are called "representative assesseees". There are four categories of representative assesseees and we are concerned herein with one of them, namely, a trustee appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise. Such trustee is a representative assessee in respect of income which he receives or is entitled to receive "on behalf or for the benefit of any person" (underlining supplied) (Section 160 (1) (iv)). Such a representative assessee is deemed to be an assessee for the purposes of the Act (Section 160 (2)). In other words, by a fiction, the Act treats him as an assessee for the purposes of assessment, that is to say, in respect of the whole procedure for imposing liability of tax in respect of the income received by him in his representative capacity as a trustee. Every representative assessee, as regards the income in respect of which he is a representative assessee, is made subject to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favor of him beneficially and he is liable to be assessed in his own name in respect of that income (Section 161 (1), first part). By yet another fiction, therefore the income received by a representative assessee, although it does not truly belong to him, is treated as income received by or accruing to or in favor of him beneficially. On the basis of this fiction, in respect of such income, the representative assessee is liable to assessment in his own name and all duties, responsibilities and liabilities in respect of such assessment are foisted upon him. The assessment on the representative assessee in respect of such income, however, is deemed to be made upon him in his representative capacity only, and the tax, subject to the other provisions contained in Chapter XV, is to be levied upon and recovered from him "in like manner and to the same extent" as would be leviable upon and recoverable from the person represented by him (Section 161 (1), second part). In other words, the appropriate provisions of the Act relating to the computation of the total income and the manner in which the income is to be computed will apply to such assessment and tax may be levied and recovered from the trustee to the same extent as may be leviable and recoverable from the beneficiary. In the course of such assessment on the trustee, all exemptions, deductions, abatements and refunds will be required to be given as the beneficiary would have been entitled to in case of direct assessment. The interposition of the trustee does not, therefore, ordinarily affect the incidence of tax on the beneficiary. This provision, however, can obviously apply only when income is specifically receivable by the trustee on behalf or for the benefit of a single beneficiary or where there are more beneficiaries than one, the individual shares of the beneficiaries are determinate and known. Tax in such a case would be leviable on the trustee on the portion of the income to which any particular beneficiary is entitled in the same manner and to the same extent as would be leviable upon the beneficiary and in respect of such portion of the income, the trustee shall be assessed in a representative capacity as representing the beneficiary. This, however, does not mean that the Revenue cannot proceed to make direct assessment on the beneficiary in respect of the portion of the income to

which he is beneficially entitled. The beneficiary would always be assessable in respect of the income receivable or received by the trustee on his behalf or for his benefit, since such income must be taken to have accrued to him and would form part of his total income. The right of the Revenue to make direct assessment on him in respect of such income stands unimpaired by the provision enabling assessment to be made on the trustee in a representative capacity. As pointed out by the Supreme Court in *C. R. Nagappa v. Commissioner of Income-tax*²⁸, this right, in the first place, is implicit in the terms of section 161 (1) and, in the next place, it is expressly provided for in section 166, which enacts that nothing in the preceding sections of Chapter XV 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. The Revenue, therefore may assess the trustee as regards the income in respect of which he is a representative assessee but it is not bound to do so and it may either assess the trustee or the beneficiary. This legal position which is expounded in Nagappa's case finds support also in the decision of the Supreme Court in *C. I. T. v. Manilal Dhanji*²⁹, which examined the position in the light of Section 41 of the Income-tax Act, 1922. Be it noted that Section 41 (1) and the first proviso thereto between themselves cover the same field which is occupied by Section 161 (1) and Section 164 of the present Act. In substance, both the sections are analogous with slight modification as regards language to which I shall presently refer. The discretionary trust with which the Supreme Court was concerned in the said case was one in which the shares of beneficiaries were indeterminate and the first proviso to Section 41 (1) applied. It is in the context of these facts that it was observed in that case that - "Under Section 41 of the Income-tax Act it was open to the department either to tax the trustees of the trust deed or to tax those on whose behalf the trustees had received the amount." On similar lines is the decision of the Supreme Court in *Ramswaroop Das v. State of Bihar*³⁰, where the Court was concerned with Section 13 of the Bihar Agricultural Income-tax Act, 1948, which is broadly analogous to Section 161 (1). The decision of the Bombay High Court in *Govindrao Narayanrao Ghorpade v. Commissioner of Income Tax*³¹ which was rendered in the context of Section 41 (1) of the 1922 Act is also to the same effect. The position with regard to option in cases covered by Section 161 (1) thus seems

²⁸73 ITR 626

³⁰42 ITR 770

²⁹44 ITR 876

³¹(1963) 48 ITR 54

to be beyond any doubt or dispute, leaving aside for the time being the question whether even in respect of cases covered by Section 164, it would appear to have been *prima facie* covered by the decision in Manilal's case (*supra*).

34. Proceeding further with the analysis of the statutory provisions, when the trustee is, in respect of any income, assessable in the capacity of a representative assessee, he is not to be assessed in respect of such income under any other provision of the Act (Section 161 (2)). This provision makes it amply clear that the liability of a trustee to income-tax is co-extensive with that of the beneficiary and that in any case it cannot be a larger or wider liability. The option given to the Revenue to assess the trustee does not extend so far as to treat the income received by the trustee as his own income and even though he is being assessed, the assessment must proceed in the

manner laid down in Section 161 (1), that is to say, the tax is not liable to be levied under any other provision of the Act (See Nagappa's case (supra)).

35. Having thus cleared the ground in respect of the taxability of income specifically receivable by the trustee on behalf or for the benefit of a single beneficiary or where there are more beneficiaries than one, the individual shares of the beneficiaries are determinate and known, the question may be examined in respect of the taxability of the income which is not specifically receivable by the trustee on behalf or for the benefit of any one person, or where individual shares of the persons on whose behalf or for whose benefit such income is receivable are indeterminate or unknown. Tax, in such cases, is to be "charged" as if such income or such part thereof were the total income of an association of persons, or, where such income or any part thereof is actually received by a beneficiary, then at the rate or rates applicable to the total income of the beneficiary if such course would result in a benefit to the revenue (Section 164). What this section provides is that when income of the trust or part of it in respect of which it cannot be predicated with certainty that a particular beneficiary is beneficially entitled to it either wholly or in any determinate or known share so as to attract the applicability of the last part of Section 161 (1), such income would have to be taxed in the hands of the trustees as if it were the total income of an association of persons. The law thus clearly points to the status in which the income is to be taxed as also the rate. But even in a case covered by Section 164, where such income or a part thereof is actually received by a beneficiary, then it gives an option to the Revenue to tax such income in the hands of the trustees at the rate or rates applicable to the total income of the beneficiary if such course would result in a benefit to the Revenue. The crucial question is whether the Revenue has two modes of assessments available in respect of the amount actually received by the beneficiary out of such income in the course of the same accounting year as a result of the exercise of discretion by the trustees. In other words, the question is whether it is open to the Revenue to assess such income in the hands of the trustees in a representative capacity or to assess the portion of such income which is actually distributed to the beneficiaries during the course of the same accounting year directly in the hands of the beneficiaries by including it in the total income of each beneficiary.

36. In order to answer this question, the underlying principle of Sections 161 and 164 will have to be first appreciated. In *Aggarwal Chamber of Commerce Ltd. v. Ganpatrai Hiralal*³², the Supreme Court quoted with approval the following passage from the speech of *Viscount Cave in Williams v. Singer*³³, as rightly stating the underlying principle of Section 41 of the 1922 Act (at p. 273):-

"The fact is that, if the Income Tax Acts are examined, it will be found that the person charged with tax is neither the trustee nor the beneficiary as such, but the person in actual receipt and control of the income which it is sought to reach. The object of the Acts is to secure for the State a proportion of the profits chargeable and this end is attained (speaking generally) by the simple and effective expedient of taxing the profits where

they are found."

It would thus appear that the underlying object both of Section 161 (1) and Section 164 is to tax the person in actual receipt and control of the income which is sought to be taxed. Under our income-tax law, the tax liability arises at the latest on the last day of the accounting year and it would be permissible, therefore, to tax the beneficiary under a discretionary trust, provided by the exercise of discretion conferred upon them under the trust- deed before the last day of the year of account in which such income was received, the trustees have indicated that a part or the whole of the income was of the beneficial ownership of one or more of the beneficiaries. The money in question, so soon as the discretion was exercised in favor of one or more beneficiaries, was receivable by them in fulfilment of the disposition made by the instrument of trust itself and what was merely a right to be considered as a potential recipient of benefit by the trustees (which right is more than a mere spes as observed in *Gartside v. Inland Revenue Commissioner*³⁴, became a vested right to receive the income or such part of it as was to be applied in favor of the beneficiaries according to the exercise of discretion by the trustees. The money in question, as soon as the discretion was exercised, would be held in trust for the respective beneficiaries and they would be entitled to receive the same or to otherwise direct its disposal. In other words, before the year of account ended and the tax liability arose latest on the last day of the accounting year, the beneficiaries were the persons in whom a vested right to receive and control the income arose. If this be the true legal position even upon mere exercise of discretion-and it undoubtedly is-there is no reason why on principle the resulting payment upon the exercise of discretion could not be taxed optionally in the hands of the beneficiaries, for, they are the persons in actual receipt and control of the income.

37. Let us then consider whether there is anything in the language of Section 164 which rules out such an option. In this connection, it requires to be noted, in the first place, that Sections 160 and 161 on the one hand and Section 164, on the other, though they occur under two distinct headings in Chapter XV, are not totally independent or unconnected but they are a part of a single scheme. This is apparent from the fact that Section 164 opens with the words: "Where any income in respect of which the persons mentioned in clauses (iii) and (iv) of sub-section (1) of Section 160 are liable as representative assessee". The provisions of Section 160 (1) (iv), which define the term "representative assessee", and those of Section 160 (2) under which every representative assessee is deemed to be an assessee for the purposes of the Act are, therefore, inevitably projected into Section 164. Likewise, the provisions of Section 161 (1), first part, which subject

³²33 ITR 245

³⁴(1968 AC 553)

³³(1920) 7 Tax Cases 387 (411)

every representative assessee, as regards the income in respect of which he is a representative assessee, to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favor of him beneficially and which make him liable to assessment in his own name in respect of such income, are also inextricably engrafted upon

Section 164, for, a representative assessee is "liable" within the meaning of Section 164 to be taxed in respect of such income only by virtue of the provisions contained in Section 161 (1). Not only this, but Section 161 (2), which prohibits the assessment of a representative assessee under any other provision of the Act in respect of any income assessable in his hands under Chapter XV, will also have to be read along with Section 164. Even Section 161 (1), second part, which provides for levy and recovery of tax (subject to the other provisions contained in Chapter XV) from the representative assessee in like manner and to the same extent as it would be leviable upon and recoverable from the person whom he represents, has, to be read with Section 164 having regard to the words set out above in the bracketted portion. It would thus appear that the provisions of Sections 160, 161 and 164 will have to be read together and some portions of Sections 160 and 161 will have to be read into Section 164 in order to make the said section workable. Indeed, even apart from this compulsion of context, construction "ex visceribus actus" is a settled rule and, therefore, to ascertain the meaning of a clause in a statute, the Court must look at the whole statute, at what precedes and at what succeeds, and not merely at the clause under construction irrespective of the setting of the other relevant provision the scheme of the statute. Bearing this in mind let us consider the question of option.

38. As stated earlier, the liability of a representative assessee to be taxed even under Section 164 has to be spelt out of Section 161 (1), first part, having regard to the opening words of Section 164. All that Section 164 independently provides is the status in which and the rate at which tax is to be levied and recovered from the representative assessee in respect of the income received by him in cases covered by it. In other words Section 164, in substance and effect, supersedes Section 161 (1), second part, only and to that extent alone it is an exception to Section 161 (1). Indeed, in cases where the income of a discretionary trust is received by a beneficiary and the revenue opts to tax the trustees at the beneficiary as provided in Section 164, last part, the distinction between these two provisions loses all its significance for all practical purposes. Section 164, therefore, is no more than an enabling section similar to Section 161 (1) and nothing more or less could be read therein. If therefore, the option implicit in Section 161 (1) to tax either the representative assessee or the beneficiary is to be spelt out of the fact that the said sub-section is merely an enabling provision, then, such option would also be available in those cases covered by Section 164 where income is distributed by the discretionary trustees amongst the beneficiaries during the year of its receipt. It cannot be overlooked in this connection that the question of option arises to relation to the same income and the choice is limited to taxing such income either in the hands of the trustees or the beneficiaries. In cases covered by Section 161 (1), option can be exercised on the strength of the trust deed itself since the income in such cases is specifically receivable by the trustees on behalf or for the benefit of a single beneficiary or where there are more beneficiaries than one, the individual shares of the beneficiaries are determinate and known. So far as cases covered by Section 164 are concerned the exercise of option becomes possible only upon the discretionary trustees allocating amongst beneficiaries the whole or part of the income in the exercise of their discretion during the year of account, for, upon the happening of such event, the income is received by the beneficiaries in fulfilment of the

disposition made by the instrument of trust itself and such income becomes chargeable to tax in their hands in view of the provisions contained in Sections 4 and 5 of the Act. In my opinion, therefore, the option which is implicit in Section 161 (1) must also be read into Section 164. There is nothing in the language of Section 164 which debar the revenue from taxing the beneficiaries in respect of income which, pursuant to the exercise of discretion by the trustees, the beneficiaries have received during the course of the year of account. This very implication finds expression in Section 166 and, therefore, even the said section would be attracted in such cases.

39. It is said, however, that in enacting Chapter XV, the legislature has advisedly followed a special scheme and while enacting Section 164, it has deliberately chosen its language which makes the said section a charging section independent of Section 4 and that, therefore, in cases falling within Section 164, tax can be levied and recovered from the representative assessee alone under the provisions of the said section. It is emphasized in this connection: (1) that Section 164 falls under the heading "Representative assessee-special cases" as distinguished from Section 161 which is under the heading "Representative assessee general provision", (2) that the marginal note of Section 164 speaks of "Charge of tax where share of beneficiaries is unknown" and (3) that in the body of Section 164 it has been enacted that "tax shall be charged", as distinguished from "tax shall be levied upon and recovered from" in Section 161. Relying upon these features, it is said that Section 4, which is the charging section, having provided that income-tax shall be charged "in accordance with, and subject to, the provisions of this Act", the charge in case of special class of representative assessee created by Section 164 must prevail over the charge created by Section 4 and that one must look only at Section 164 to tax income in cases covered by it and assess such income only in the hands of the representative assessee. The question is whether this view-point is justified.

40. Now, so far as the question regarding distinct headings under which these two sections occur is concerned, I have already dealt with the matter earlier. Notwithstanding the manner in which they are enacted, both the sections are not independent and unconnected but they are the parts of a single scheme. No undue importance can, therefore, be given to this feature.

41. As regards the use of the word "charge" in the marginal note and body of Section 164 in contradistinction to the use of the expression "levied upon and recovered from" in Section 161, it is my view that this difference in the choice of language is of no significance. It appears to be well-settled by now that there is only one charging section in the Act and it is Section 4 read with Section 5. In *Chatturam v. C. I. T*³⁵ the Federal Court held that the liability to pay tax was founded on Sections 3 and 4 of the Income-tax Act, 1922 which were the charging sections. It quoted with approval the observations of Sargent LJ in *Williams v. Henry Williams Ltd.* (not reported) wherein the learned Judge held that the liability was definitely and finally created by the charging section and the subsequent provisions as to assessment and so on were machinery only for the purpose of quantifying the liability. In *Kesoram Industries and Cotton Mills Ltd. v.*

*Commissioner of Wealth-tax*³⁶, the effect of Section 3 of the 1922 Act was considered. The

³⁵15 ITR 302

³⁶59 ITR 767

said section was in terms similar to Section 4 of the present Act and it provided that 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 the said Act. It was observed that though the expression "charged" was used both in the case of the Central Act, i.e. the Finance Act, and the Income-tax Act, it could not have been the intention of the legislature to charge the income to income-tax under two Acts. Necessarily, therefore, the term "charged" was used in two different senses. The charging section was Section 3 and the Finance Act only gave rate for quantifying the tax. In *Motilal Ambaidas v. Commissioner of Income Tax*³⁷ a Division Bench of this Court consisting of this Chief Justice and myself was concerned with the question whether Section 41 (1) which uses the expression "and accordingly chargeable to income-tax as the income of that previous year" (underlining supplied) was a charging section so that the rule of strict construction, which applies only to the charging or the taxing section and not to the machinery provisions or the provisions for procedure for collection of tax was attracted. The learned Chief Justice, speaking for the Division Bench, referred to the decision of the Supreme Court in *Kesoram's case* (supra) and the other cases referred to in the said decision and observed as under at page 150:

"Thus, it is clear that according to several decisions by the highest Tribunals in the country, namely, the Federal Court, the Privy Council and the Supreme Court, Section 3 and 4 of the Act of 1922 were the charging section."

Reference was then made to the decisions of the Supreme Court in *Nalinikant Ambalal Mody v. Narayan Raw*³⁸, and *Commissioner of Income Tax v. Express Newspapers Ltd*³⁹, and it was pointed out that in those cases the Supreme Court emphasized that even under Section 3, which was a charging section, tax at the rate or rates mentioned in the Finance Act was to be charge for that particular year in accordance with and subject to the provisions of the 1922 Act and that since the business in *Express Newspapers Ltd.*'s case and the profession in *Nalinikant's case* was not being carried on in the relevant previous year, there was no question of the computation of the tax being charged in accordance with or subject to the provisions of that Act. Proceeding further, it was observed at page 150 as under:-

".....but neither in *Nalinikant Ambalal Mody's case* (1966) 61 ITR 428 nor in *Express Newspapers Ltd.'s case* (1964) 53 ITR 250 has the Supreme Court said that the provisions of Section 10 were provisions of a charging section. Indeed by now the position has been well recognised that it is only Section 3 read with Section 4 of the Act of 1922 and Section 4 read with Section 5 of the Act of 1961 which are the charging sections in the relevant Acts. The rest of the sections in the respective Acts constitute the machinery for computation and levying of tax and the machinery for the assessment of tax but the charge of tax is under Section 4 of the Act of 1961."

(underlining supplied).

On the basis of this reasoning, it was held that Section 41 (1) was not the charging
³⁷(1977) 108 ITR 136 (Guj) ³⁹53 ITR 250
³⁸61 ITR 428

section and, therefore, the principle of strict construction could not be invoked in construing the said section. It would thus appear to be well-settled on the authority of the highest Courts as also of this very Court that Section 4 read with Section 5 is the only charging section in the Act and that the sections next following are merely machinery sections for computation and levy of tax. It may be that in some of those machinery sections the word "charge" in its grammatical variations is used. However, the use of such word cannot raise those machinery sections to the pedestal of charging or quasi-charging sections. The said word has different shades of meaning and when it is used in the machinery sections it has to be understood, in the context of our income-tax law, as conveying the meaning 'levy and recovery'. The word 'charge' as used in those sections has not the same meaning as the word "charge" in Section 4. In the light of this settled legal position, it is not possible to hold that Section 164 is by itself the charging section in cases covered by it and that, therefore, charge of tax can be levied in cases covered by it thereunder only. In Section 164, the said word can only be construed as conveying the meaning "levied and recovered".

42. Apart from this, there is authoritative pronouncement holding Section 41 of the 1922 Act, which covered both the cases which are now separately covered by Sections 161 and 164, to be a machinery section and not a charging or a quasi-charging section (see Nagappa's case (supra)). Similar observations are to be found in respect of Section 40 (2) of the 1922 Act which is similar to Section 161 read with Section 160 (1) (i) of the new Act (See Aggarwal Chamber of Commerce's case (supra) and *Commissioner of Income Tax v. R. L. Aggarwal and Co*⁴⁰). In the context of Section 13 of the Bihar Agricultural Income-tax Act, 1948 also, which is analogous to Section 161, it was observed in Ramswaroop Das's case (supra) that it merely provides a machinery for recovery of tax and is not a charging section. All these observations made in the context of Sections 40 and 41 of the 1922 Act must apply with equal force both to the provisions of Sections 161 and 164. The view expressed therein that those sections were machinery sections and not charging or quasi-charging sections will operate directly to bar any view being taken that Section 164 is a charging section. Those observations cannot be brushed aside on the ground of apparent change in the language of Section 164 which, as shown earlier, has in reality, not brought about any difference in substance.

43. The foregoing discussion would show that having regard to the object underlying and the

language of section 164, it is not possible to hold that the revenue is debarred from exercising option to tax either the representative assessee or the beneficiaries in respect of income which, pursuant to the exercise of discretion by the trustees, the beneficiaries have received during the course of the year of account.

44. This view, which I am inclined to take, is supported by judicial dicta. In *Trustees of Chaturbhuj Raghavji Trust v. Commissioner of Income Tax*⁴¹ the Bombay High Court has also taken similar view. In that case, the trustees were directed under a trust-deed to pay

⁴⁰(56 ITR 20)

⁴¹(1963) 50 ITR 693

to the settlor's wife Champavahoo, after his death, such amount out of the income of the trust as they might think proper for the use and benefit of herself and her children till the youngest son attained the age of 18. The Trustees went on paying to her annually certain amount in pursuance to this direction. For four years preceding the assessment year 1955-56 the amount was assessed in the hands of Champavahoo and was excluded from the income of the trust in the hands of the trustees, but in assessment year 1955-56, Champavahoo was assessed on the sum received by her and the trustees were also assessed on the entire income of the trust (including the sum which was disbursed to Champavahoo) at the maximum rate under the first proviso to Section 41 (1) of the Income-tax Act, 1922. The trustees challenged their liability to be assessed in respect of the income disbursed to Champavahoo and the said challenge was upheld in the following words (at page 698):-

"Under sub-section (2) of Section 41, it is permissible for the income-tax authorities to make direct assessment on the person on whose behalf income, profits and gains from a trust are receivable. The assessment of Champavahoo, therefore, for the assessment year 1955-56 was a perfectly good and valid assessment under Section 41 (2). Section 41 having provided for two alternative methods, namely, either to tax the income in the hands of the trustees or directly in the hands of the person on whose behalf the income was receivable under the trust, and one of them having been availed of by the income-tax department in directly assessing Champavahoo in respect of the income, the other was no longer available to the department..... Section 41 was a special enabling provision which permitted the assessment in the hands of the trustees but did not preclude the direct assessment in the hands of the beneficiaries....."

Section 41 (2), be it noted, is similar to Section 166 of the present Act and it would appear that the assessment in Champavahoo's case was upheld on the basis of the express provisions of the said section. The revenue had contended in that case that the amount received by her was not capable of being directly assessed in the hands of Champavahoo under Section 41 (2), because the amount paid to her could not be said to have been "receivable" on her behalf within the meaning of the said sub-section. This contention was negated in the following words (at page

699):

"It is no doubt true that specific or definite sum out of the income or a specific part of the income of the trust property was not directed to be paid over to Champavahoo. But that, in our opinion, does not mean that she had no right to receive anything under the trust or that no part of the trust income was receivable on her behalf It may at the most be argued that until the quantum was decided upon by the trustees no specific amount could be said to be payable to Champavahoo. But in the present case not only the quantum was determined but the payment was also made to Champavahoo. In our opinion, therefore, the assessment in the hands of Champavahoo was not invalid."

The point which arises for determination herein was directly raised in that case, Curiously enough, the Revenue raised the question which the assessee has raised herein and the question was resolved against the Revenue. This decision of the Bombay High Court was delivered after the bifurcation and it is not binding. However, it was approved and followed in Panna's case (1969-74 ITR 396) (Guj) (supra) and it, therefore, assumes a different complexion, though sitting in the Full Bench, we may not still be bound by it.

45. In Arvind Narottam's case (AIR 1970 Gujarat 167) the Division Bench of this Court was not concerned directly with the question of interpretation of Section 164, as pointed out at page 496. However, the Division Bench, while dealing with the said question, made the following observations which support the aforesaid view (at p. 170):-

"But even here, 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 too, 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 under Section 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." 46. Similar observations are also to be found in Panna Sanjay Trust's case (1969-74 ITR 396) (Guj) where the question of construction of Section 164 directly arose. Since the observations are verbatim, the same, need not be reproduced.

47. It would thus appear that the view which has prevailed in this High Court since 1968 and in the Bombay High Court since 1962 appears to be that in the case of a discretionary trust, once

the discretion is exercised by the trustees and the income or part thereof has been paid by them to the beneficiaries, the beneficiaries can be validly taxed in respect of the amount received by them in view of the provisions contained in 166 read with Sections 4 and 5. In other words, even in cases covered by Section 164, the revenue has two modes of assessment available in respect of the amount actually received by the beneficiaries namely, either to tax such amount in the hands of the representative assessee under Section 164 or to assess it directly in the hands of the beneficiaries by including it in the total income of the beneficiaries. I am in entire agreement with this view and have not the slightest hesitation in affirming the same.

48. Even assuming, however, that another view is possible or preferable, the question which requires serious consideration is whether having regard to the fact that for such length of time the rights of the parties have been regulated in accordance with these decisions, we should readily overturn those decisions. It could be said without fear of contradiction that the revenue must have concluded many assessments following these decisions by taxing the beneficiaries directly in respect of income received by them under discretionary trusts. If a contrary view is now taken, all these assessments would be rendered *ultra vires* with the result that the concerned assesses would be entitled to claim refund of the tax collected from them pursuant to such null and void assessments. Not only the refund might have to be granted, but fresh assessments upon trustees in respect of income taxed in the hands of the beneficiaries might also become time-barred. Why should we, under such circumstances, review the decisions in Arvind and Panna's cases (AIR 1970 Gujarat 167 and 1969-74 ITR 396 (Guj)) and tread a new path? What are the compelling reasons to do so? It is not shown that in this very Court or any other High Court a contrary view has been taken. It is also not shown that those decisions in question were given per incuriam. Even assuming that certain aspect of the question were not brought to the notice of the Court which decided those cases, it would still be proper to decline to enter upon re-examination of the question since the decision have been followed in other cases (see *Md. Ayub Khan v. Commr. of Police Madras*⁴², and *T. G. Mudaliar v. State of Tamil Nadu*⁴³). In *Commissioner of Income-tax v. Balkrishna Malhotra*⁴⁴, the question before the Supreme Court was as to what was the true meaning of the word "assessment" in Section 34 (3) of the 1922 Act. In that context, the Supreme Court observed as follows (at page 762) (of ITR) : (at page 1515 of Tax LR) :

"As long back as Sept. 24 1953 the High Court of Madras in Vishwanathan Chettiar's case (AIR 1954 Madras 928) came to the conclusion that the word "assessment" in the proviso to Section 34 (3) means not merely the computation of the income of the assessee but also the determination of the tax payable by him. No other High Court has taken a contrary view. The revenue must have in all these years acted on the basis of that decision of the Madras High Court. Interpretation of a provision in a taxing statute rendered years back and accepted and acted upon by the department from. It may be that another view of the law is possible but law is not mere mental exercise. The Courts while reconsidering decision rendered a long time back particularly under taxing statutes cannot ignore the harm that is likely to happen by unsettling law that had been once settled. We may also

note that the Act has been repealed by the Income-tax Act, 1961. The corresponding provisions of the 1961 Act are materially different from the provisions referred to earlier. Under these circumstances we do not think that we would be justified in departing from the interpretation placed by the Madras High Court in Vishwanathan Chettiar's case though a different view of the law may be reasonably possible."

It is significant to note that this was the approach adopted by the Supreme Court in the context of the decision of a High Court which was under review before it. The note of caution sounded and weighty reasons given by the Supreme Court for not disturbing the judgment of the High Court which was delivered nearly 18 years back must apply with still greater force when the Court which seeks to review a earlier decision is the same Court or a Court, of co-ordinate jurisdiction. It is true that in the case before the Supreme Court the Madras view had held the field for nearly 18 years and that in the new Act the corresponding provision was materially different. In the case before us, 15 years have elapsed since this decision in Chaturbhuj's case (1963-50 ITR 693) (Bom) was rendered by the Bombay High Court and a decade has passed since Arvind's case (AIR 1970 Gujarat 167) was decided. The time which has elapsed since the decisions sought to be reviewed herein were delivered is thus shorter than that in the case before the Supreme Court. However, it cannot be gainsaid that even this shorter period is sufficient to attract

⁴² AIR 1965 SC 1623

⁴⁴ 81 ITR 759

⁴³ AIR 1973 SC 974

the applicability of the principal of stare decisis. In Special Civil Application Nos. 1005 and 1531 of 1975 decided on April 14, 1971 by a Full Bench of this Court, Bhagwati, C.J, (as he then was), speaking for the Court, rejected the contention of the petitioners in that case to review a decision rendered by the Bombay High Court about 15 years earlier although it was felt that if the point had arisen for decision before this Court for the first time, it would have been most certainly inclined to accept the view canvassed by the petitioners. In *Anandji and Co. Pvt. Ltd. v. State*⁴⁵, speaking for another Full Bench, I expressed the view that a practice which had been prevalent in this Court in the matter of taxing of costs for nearly a decade should be adhered to. It would thus appear that even a period of a decade or a decade and half has been considered sufficient to invoke the principle of stare decisis particularly when it appears that numerous cases have been decided following the earlier decision. As in the case before the Supreme Court, the provision of Section 164 and their effect on the incidence of tax have not remained static. The provisions have undergone material change and it may well be that a beneficiary under a discretionary trust may now prefer, in certain cases, to have the income actually received by him from the discretionary trustee taxed in his hands. If all these various factors are taken into account, in my opinion, there is no need to overturn the decisions in Chaturbhuj, Arvind and Panna's cases.

49. It is said, however, that the recent decision of the Supreme Court in *Commissioner of Wealth-tax v. Trustees of Nizam's Family Trust*⁴⁶, clinches the issue and that notwithstanding the earlier decisions and principle of stare decisis, there is now no scope to contend that the income which the beneficiary receives in exercise of the discretion of the trustees under a discretionary trust can

be charged to income-tax in his hands. In the said case, the Supreme Court was concerned with Section 21 of the Wealth tax Act, 1957. It is true that the decisions given under Section 21 of the Wealth tax Act must have their impact on the interpretation of Sections 161 and 164 of the Act, because the relevant provisions of both the statutes are almost identical. Sub-sections (1) and (4) of the Wealth tax Act are analogous to Section 161 (1) and 164 of the Act respectively. One important distinction, however, cannot be lost sight of. Under Section 21 (2) of the Wealth-tax Act, it is expressly enacted that "Nothing contained in Sub-section (1) shall prevent either the direct assessment of the person on whose behalf the assets above referred to are held, or the recovery from such person of the tax payable in respect of such assets" (underlining supplied). In other words, the legislature has expressly reserved the option under Section 21 (2) only to cases covered by Section 21 (1) which is analogous to Section 161 (1). As against this, Section 166, which expressly reserves such right in favor of the Revenue opens with the words "Nothing in the foregoing sections in this Chapter" (underlining supplied) and goes on to say "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". It would thus appear that Section 166 covers a much wider field than that covered by Section 21 (2). Where as the reservation of option under Section 21 (2) is only in relation to cases covered by Section 21 (1) of the Wealth-tax Act, the reservation of option under Section 166 is in respect of the cases covered by both Sections 161 (1) and 166. That this is the scope of Section 21 (2) of the Wealth-tax Act is indicated at page 594 (of ITR) : (at page 1010 of Tax LR) in Nizam's case (supra). The relevant observation in Nizam's case on

⁴⁵18 GLR 271 (FB)

⁴⁶108 ITR 555

which reliance is placed for canvassing the view that in cases covered by Section 164, income, even if it is distributed amongst the beneficiaries, cannot be taxed in their hands is as follows:-

"So also where beneficiaries are more than one, and their shares are indeterminate or unknown, the trustees would be assessable in respect of their total beneficial interest in the trust properties. Obviously, in such a case, it is not possible to make direct assessment on the beneficiaries in respect of their interest in the trust properties, because their shares are indeterminate or unknown and that is why it is provided that the assessment may be made on the trustees as if the beneficiaries for whose benefit the trust properties are held were an individual. The beneficial interest is treated as if it belonged to one individual beneficiary and assessment is made on the trustees in the same manner and to the same extent as it would be on such fictional beneficiary."

I am unable to appreciate how these observations throw any light on the precise question which arises for our determination in the present case. They might be advantageously pressed into service in cases covered by Section 164 where the discretionary trustees have not, in the exercise of their discretion, distributed income amongst the beneficiaries before the year of account closes. However, when the question of option arises, in the context of cases where distribution has already been made before the last day of the year of account, these observations provide no

guideline. It is difficult to predicate whether even in the context of the Wealth-tax Act the Supreme Court would have made similar observations had it been concerned with a case where before the relevant valuation date trust property had been distributed amongst the beneficiaries in exercise of their discretion by the trustees. Besides, a decision is only an authority for what is actually decided. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. It is not a profitable task to extract a sentence here and there from a judgment and to build upon it (See *State of Orissa v. Sudhansu Sekhar*⁴⁷). Even if, however, these observations in Nizam's case were to be treated as concluding the question so far as Section 21 of the Wealth-tax Act is concerned and as holding that even in a case where property held under a discretionary trust is distributed in exercise of the trustees' discretion, to one or more of the beneficiaries before the valuation date, such beneficiaries could not be charged with wealth-tax in respect of such property, the question will still require examination whether, having regard to the difference in the terminology of Section 21 (2) of the Wealth-tax Act and Section 166, which has been adverted to earlier, as also the long line of decisions under the Income-tax Law to which reference has been made earlier and which recognise an option, the decision in Nizam's case would govern the issue under consideration herein. I am, however, not required to go into that delicate question inasmuch as, in my opinion, even on a plain reading of the relevant observations in Nizam's case, there is nothing in them which concludes the issue in the manner contended.

50. It has been also said that Section 166 cannot be pressed into service in cases covered by Section 164, because, in the first place, on a true interpretation of Section 164, it is not open to the tax authorities to proceed against the beneficiaries in cases covered by it since it is the only charging section and, secondly, it is an enabling section and it merely states

⁴⁷ AIR 1968 SC 647

expressly what is implicit in Section 161 (1) and since Section 164 is an exception to Section 161 (1), the provisions of Section 166 cannot apply. As regards the first of these grounds, I have already expressed my view earlier. I am unable to read in Section 164 anything which prevents the tax authorities from proceeding against a beneficiary who has already received the income or part thereof pursuant to the exercise of discretion by the discretionary trustees in the course of the same accounting year. As for the second ground, I have stated earlier that Section 161 (1) and Section 164 are not two distinct provisions which have no impact whatsoever on each other. In fact, both the sections have got to be read together to make a composite scheme and Section 164 read by itself and divorced from the context of Sections 160 and 161 would itself have no meaning. Section 164 covers those cases which are not comprehended within Section 161(1), last part, and it is an exception only to that part. The scope of Section 164 does not extend beyond this.

51. It was urged on behalf of the assessee that Section 166 cannot apply because in case of a discretionary trust, even if income is distributed, it could not still be said that such income had been "receivable" on behalf or for the benefit of the beneficiary in whose favor the discretion is exercised. Now, in the first place, this contention stands answered by the decision of the Bombay

High Court in Chaturbhuj's case (1963-50 ITR 693) where Section 40 (2) was applied in case of a discretionary trust whose income or part thereof was made over to the beneficiary. An exactly similar argument there advanced by the revenue was in terms rejected. Be it noted in this connection, as pointed out by the Supreme Court in Nizam's case (108 ITR 555) at page 595 that wherever there is a trust, it is obvious that there must be beneficiaries under the trust, because the very concept of a trust connotes that though the legal title vests in the trustee, he does not own or hold the trust properties for his personal benefit but he holds the same for the benefit of others, whether individuals or purposes. It might be noted that in the context of sub-sections (1) and (4) of Section 21 of the Wealth-tax Act, the Supreme Court observed in Nizam's case at p. 595 that it was the beneficial interest which was taxable in the hands of a trustee in a representative capacity. It inevitably follows, therefore, that under Section 161 (1) and Section 164 also, what is taxed in the hands of a trustee in a representative capacity is the income which is receivable on behalf or for the benefit of the beneficiaries. It may be that in cases covered by Section 164, the income is not specifically receivable on behalf or for the benefit of any one person, or the individual shares of the persons on whose behalf or for whose benefit such income is receivable are indeterminate or unknown and, therefore, beneficiaries may not be able to say until the discretion is exercised that any part of the income belongs to them. This does not, however, mean that in the eye of law the trustees are the beneficial owners of income received by them in such cases. Though the legal title may vest in them, they still receive the income with an obligation annexed to hold the same for the benefit of persons in whose favor the discretionary trust is created and who become entitled to receive such income or part thereof in fulfilment of the disposition made by the settlor himself upon exercise of discretion by the trustees. It is not as if the trustees give to beneficiaries in such cases the income or part thereof which they have received as beneficial owners. What the trustees really do is to exercise their discretion as authorized by the trust deed in the matter of allocation, if any, of such income amongst the beneficiaries named by the settlor and upon the exercise of such discretion the beneficiaries receive the income by virtue of the settlement made by the author of the trust himself. Even a beneficiary under a discretionary trust has an interest in a certain sense in the income received by the trustees; as pointed out in the speech of Lord Wilberforce in Gartside's case (1968 AC 553) at pp. 617-618, he has a right to be considered as a potential recipient of benefit by the trustees, he has a right to have his interest protected by a Court of equity, and he has a right to have the trustees exercise their discretion fairly, reasonably and properly on objective consideration. It is true, as pointed out in the speeches of Lord Reid and Lord Wilberforce in the said case, that the objects of a discretionary trust do not have a right either individually or collectively to claim any part of the income received by the trustees and that their qualified interest, as indicated above, is not capable of being taxed by reference to its extent in the trust funds income. Such interest as they have lacks the necessary quality of definable extent which must exist before it can be taxed. From this, however, the converse does not necessarily follow, that is to say, it does not mean that the income of a discretionary trust received by the trustees is for their personal benefit.

The income of the trust fund is still received by them for the benefit of others though it is not

specifically receivable on behalf or for the benefit of any one person, or the individual shares of the persons on whose behalf or for whose benefit such income is receivable are indeterminate or unknown. In the definition of the word "representative assessee" (which term finds place both in Sections 161 (1) and 164) this legal position finds specific recognition because a person is said to be representative assessee in respect of income which, as a trustee, he "receives or is entitled to receive on behalf or for the benefit of any person ." Even in Section 164 the discretionary beneficiaries are specifically referred to as "the beneficiaries." In my opinion, therefore, section 166 would in terms be attracted in such cases covered by Section 164 where the beneficiaries have received the income or part thereof pursuant to the exercise of discretion by the discretionary trustees in the course of the same accounting year.

52. Reliance has been placed on the decision of the Bombay High Court in *Commissioner of Income Tax v. Ratanabai Mathuradas*⁴⁸, to canvass the view that the word "receivable " occurring in Section 164 must be interpreted to mean receivable under the deed of trust and that it is the instrument of trust that one has to look at be it a testamentary document or a deed of settlement inter vivos and not the actual exercise of discretion by the trustees in course of the year. I do not think it is necessary to consider in this case whether this is the correct interpretation of the concerned word or whether these observations have to be read in the context of and confined to the facts of the said case. I am proceeding in the present case on the footing that regard being had to the terms of the trust deed, the assessee was merely a discretionary beneficiary. All that I am holding is that even being such a discretionary beneficiary, pursuant to the exercise of discretion in her favor and upon her receiving her share of the income in the course of the year of account in which it was received by the trustees, the part of the income received by her is includible in her total income and liable to be taxed in her hands under Section 4 read with Section 5 having regard to the option implicit in Section 164 and expressly recognised by Section 166. In taking this view, the decisions in Ratanbai's case (supra), in so far as it interprets the word "receivable" in the manner that it has done, does not come in the way.

53. The only aspect of the case which troubled me to some extent was the contention of the assessee that under Section 4 read with Section 5, what is chargeable to tax is the first receipt after the accrual of the income and that, therefore, in the case of a discretionary trust, once income accrues to and is received by the trustee, he alone can be assessed in

⁴⁸(1968) 67 ITR 504

respect thereof under Section 164, for, any payment subsequently made to a beneficiary out of such income, in consequence of the exercise of discretion by the trustee, is nothing other than the further remittance or transmission of the income and such subsequent dealing with the income does not result in the first receipt of income within the meaning of Section 5 which could be brought to tax in the hands of the beneficiary under Section 4. The assessee sought support in this behalf from the decision of the Bombay High Court in *B. M. Kamdar*. In re 14 ITR 10 and the decision of the Supreme Court in *Keshav Mills Ltd. v. Commissioner of Income tax*³⁹, The Revenue attempted to meet this situation by urging that so soon as the discretion was exercised

by the trustee, the beneficiary became entitled to the payment by the virtual of the provision made in the instrument of the trust itself and that, therefore, the resulting the payment was the first receipt after the accrual of income and monies so received could be validly taxed in the hands of the assessee. In support of this submission, reliance was placed by the Revenue on the decision of the House of Lords in *Drummnd v. Colins*⁵⁰, which was followed and applied in *Tollemache v. Commissioner's of Inland Revenue*⁵¹, *Lindus and Hortin v. Commissioner of Inland Revenue*⁵², and *Johnstone v. Chamberlain*⁵³

54. Now, I do not think it is necessary to examine whether the decisions upon which the Revenue relies are relevant and whether they support the principle for which the Revenue contends in view of the pronouncement in *C. I. T. v. Vazir Sultan and Sons*⁵⁴, and *C. I. T. v.A. Gajapathy Naidu*, 53 ITR 114 in which the Supreme Court has pointed out that the provisions of the Indian Income-tax Act are required to be construed on their own terms without drawing any analogy from English statutes whose terms may superficially appear to be similar but on a deeper scrutiny may reveal differences not only in the wording but also in the meaning a particular expression has acquired in the context of the development of law in that country. Little help can, therefore, be gained by attempting to construe the Indian Income-tax act in the light of decision bearing upon the meaning of the income-tax legislation in England, I would rest my decision on this point independently of those decisions.

55. Under Section 5, subject to the provisions of the Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which (a) is received or is deemed to be received in India in such year by or on behalf of such person or (b) accrues or arises or is deemed to accrue or arise to him in India during such year or (c) accrues or arises to him outside India during such year. Now, it cannot be disputed that so far as cases covered by (a) above are concerned, it is the first receipt after accrual that is determinative for the purpose of taxation and that the same sum of money cannot be received by the person entitled to it *qua* income twice over. This concept is evolved so that it could be *inter alia* determined whether the income was received the previous year an whether it is the same income which, on its receipt on the first occasion, was taxed or was not liable to be taxed, which has been remitted or transmitted, by the person entitled it so that it is not treated as fresh income liable to be taxed in his hands again. Ordinarily, therefore, when Section 5 (1) (a) speaks of income "received", it is the first occasion when the receipt gets the money under his own control which is intended to be comprehended. This is made clear by the following observation in *Keshav Mill's case* (supra) (23 ITR 230 at page 41) in the context of Section 4 (1) (a) of the 1922 Act

⁴⁹23 ITR 230

⁵¹(1926) 11 Tax Cas 277

⁵³(1933) 17 Tax Cas 706

⁵⁰(1915) 6 Tax Cas 525

⁵²(1933) 17 Tax Cas 442

⁵⁴36 ITR 175

which was in parimateria with Section 5 (1) (a) of the present Act :

"It is true that the words used in Section 4 (1) (a) relate to the first receipt after the accrual of the income. Once it is received by the party entitled to it in respect of any subsequent

dealing with the said amount it cannot be said to be 'received' as income on that occasion The 'receipt' of income refers to the first occasion when the recipient gets the money under his own control. Once an amount is received as income, any remittance or transmission of the amount to another place does not result in 'receipt' within the meaning of this clause, at the other place..... If therefore, the income, profits or gains have been once received by the assessee even though outside British India they do not become chargeable by reason of the money having been brought in British India, because what is chargeable is the first receipt of the money and not a subsequent dealing by the assessee with the said amount. In that event they are brought by the assessee as his own money which he has already received enjoy the character of income profits or gains".

Two things cannot, however, be overlooked in the context of this principle called out on the true interpretation of Section 5 (1) (a). First, this principle has relevance in cases where Section 5 is made expressly subject to the other provisions of the Act and, therefore, if there is any other provisions as to assessment, that is to say, levy and recovery of tax, which has some bearing on this aspect of the matter such provision will have to be given effect to. Bearing in mind this legal position, let us examine the validity of the rival contentions on this point.

56. Now, on the view which I have taken, Section 164 is no more than an enabling section similar to Section 161 (1). There is an option implicit in it, similar to the option implicit in Section 161 (1), to tax either the representative assessee or the beneficiary in these cases where the income received by the discretionary trustees is distributed amongst the beneficiaries during the year of its receipt. This very implication finds its expression in Section 166 which, according to me, applies also in cases covered by Section 164. These various provisions creating a special liability to assessment, that is to say, levy and recovery of tax, will have to be treated as overriding the principle of first receipt found in provisions of Section 5 (1) (a). To put it differently, Section 5 (1) (a) will have to be read subject to these provisions and the principle that it is the first receipt after the accrual of the income which must determine the liability to tax will have to be treated as being of no relevance in cases where those provisions are attracted. Be it noted in this connection that it is the same income in respect of which tax has to be levied and recovered and that the choice is to the extent only whether to tax such income in the hands either of the trustees or the beneficiaries. There is, in other words, no question of double taxation of the same income in this concept of option. It is the same income which is subjected to tax, albeit only once, in different hands optionally. In the hands of the beneficiary, it is subjected to tax upon its receipt, under Section 166 read with Section 4 and Section 5. In the hands of the representative assessee it is taxed by fictionally treating it as if it was received by or accruing to or in favor of him beneficially. The points of time of receipt might differ. But since a special provision is made to tax the trustee in respect of the same income, and his liability to be taxed is made, broadly speaking co-extensive with that of the beneficiary at least in cases where income is actually received by the beneficiary and the Revenue exercises option under the last part of Section 164, the different points of receipt lose all significance. Once this legal position is

appreciated, it would become clear that the concept of first receipt embodied in Section 5 (1) (a) will have no bearing in the context of levy and recovery of tax under Section 164. In my opinion, therefore, the objection based on the ground of Section 5 (1) (a) has no merit.

57. Considerable debate had taken place at the hearing on an alternative way of answering the objection based on Section 5 (1) (a). The argument was that any amount received by a beneficiary pursuant to the exercise of discretion by a discretionary trustee is paid to him not merely as a voluntary disbursement made by the trustee but by virtue of the benefit conferred by the instrument of trust itself. What was merely a right to be considered by the trustee as a potential recipient of benefit became vested right to receive the income which was applied in favor of the beneficiary in pursuance of the exercise of discretion. Under such circumstances, by applying the doctrine of relation back, it could be said that the trustee, when he collected the income, did so on behalf or for the benefit of the beneficiary in whom a vested right to receive such income had accrued before the last day of the accounting year. In such a case proceeded the argument the receipt on the first occasion itself would be for and on behalf of the concerned beneficiary and there would be no question of tax being not levied on the income on the occasion of its first receipt within the meaning of Section 5 (1) (a). For the purposes of applying the doctrine of relation back, reliance was placed upon the decision of the Bombay High Court in *Commissioner of Income Tax v. Aryodaya Ginning and Manufacturing Co. Ltd*⁵⁵. and the decision of the Supreme Court in *C. I. T. v. Mysore Electrical Industries Ltd*⁵⁶. On the other hand, it was argued with considerable vehemence that the doctrine of relation back does not fit in with the scheme of the Income-tax Act and that if this doctrine was introduced in the context of the income liable to be taxed under Section 164, uncertainties and anomalies would be introduced. Strong reliance was placed in support of this argument on the decision of the Supreme Court in *T. S. Srinivasan v. C. I. T*⁵⁷.

58-A. Though I am prima fade of the view that even this alternative argument has merit and that by the application of the doctrine of relation back the difficulty, if any, envisaged on account of the principle of first receipt which is found embedded in the provisions of Section 5 (1) (a) can be overcome, I do not propose to finally decide that question in this case. I am not satisfied, tentatively speaking, that any difficulty or anomaly would arise by the application of the said doctrine in the context of Section 164. I might only indicate, however, that if the doctrine of relation back is applied on the basis aforesaid, it might well be that the liability to assessment might be regulated by the provisions of Section 161 (1) rather than Section 164, for, in that event, the income could be said to have been received by the trustee on behalf or for the benefit of the beneficiary. As earlier stated, however, I do not wish to finally, decide this point in the present case.

58. The foregoing discussion would show that I concur in the observations made in Arvind's case (supra) and Panna Sanjay's case (1969) 74 ITR 396 (Guj) (supra) and hold that the Revenue has an option to tax in the hands of the beneficiary under a discretionary trust the amount actually

received by him from the trustees in the course of the previous

⁵⁵³¹ ITR 145

⁵⁷⁶⁰ ITR 36

⁵⁶⁸⁰ ITR 566

year in exercise of their discretion. In this view of the matter, I am unable to subscribe to the view that the observations in the said two cases do not lay down the correct law and that the income actually received by a beneficiary under the discretionary trust in the course of the previous year is only assessable in the hands of the representative assessee. I, therefore, answer the question referred to us in the affirmative, that is to say, in favor of the Revenue and against the assessee. The assessee will pay the costs of the reference to the Revenue.

ORDER OF THE COURT

59. In view of the majority opinion the question referred to us is answered in the negative, that is, in favor of the assessee and against the revenue. The Commissioner will pay the costs of the reference to the assessee.

Answered in negative.