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JYOTENDRASINHJI
v.
S.I. TRIPATHI AND ORS.

APRIL 2, 1993

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[B.P. JEEVAN REDDY AND N. VENKATACHALA, JJ.]

C

Constitution of India, 1950: Articles 136, 226 read with provisions in Chapter XIX-A. Income Tax Act 1961—Settlement Commission's order—Interference or judicial review under Article 226 or 136—Scope—Commission's interpretation of settlement deeds—Effect of.

D

Income Tax Act, 1961: Sections 61, 63, 164(1), 166—U.S. settlement deed/trust deed—Whether discretionary—Revocability under section 63—Settlor's power under U.S. deed—Extent of—Revenue's option to tax income from a discretionary trust in the hands of trustees or beneficiaries.

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Income Tax Act, 1961: Sections 5, 63, 164(1)—U.K. settlement deed/trust deed—Income declared and shown in Tax returns by settlor and after his death by his son—Taxability of—Payment of taxes in UK or USA on Income from settlement deeds—If proved, not taxable in India.

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Interpretation of Document—U.S.A. or U.K. settlement deeds or trust deeds—Construction—"Transfer", "family members". "descendants of the family members"—Meaning of—Income derived from such trusts whether taxable in India.

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The appellant's father executed on 1.1.1964, three deeds of settlements (trust deeds) in the United States of America. The terms in them all were identical. The object of these trusts was to provide for the education, maintenance and up-keep of the members of the settlor's family and their descendants. He also executed two settlements in U.K. with the very same object.

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The settlor (appellant's father) was filing returns of his income in India including therein whole of the income arising from the trusts. For the assessment years 1964-65 to 1969-70, he filed the returns. Since he died on 22-8-1969, i.e. in the middle of the accounting year (relevant to the assessment year 1970-71), two returns were filed, one up to the date of his

death and the other from the date of his death to the end of the accounting year, by his eldest son, the appellant, including the whole of the income from the trusts. A

The appellant filed appeals against the assessment orders pertaining to the assessment years 1965-66 and 1966-67 contending that the income from U.S. trusts was not taxable in India either in the hands of settlor or in his hands and that the inclusion of the said income in the returns by the settlor and by the appellant was a mistake. B

The appellant preferred revisions against other assessment orders, where appeal was barred, taking the plea of non-taxability with respect to the income from U.K. trusts and from the U.S. trusts. C

The Appellate Assistant Commissioner allowed the appeals.

The Revenue's appeals to the Tribunal were allowed holding that the A.A.C. acted contrary to Rule 46(2) of the Income Tax Rules in admitting the additional grounds and in looking into new material. The Tribunal remitted the appeals back to A.A.C. At that stage the appellant approached the settlement commission under Chapter XIX(A) of the Income Tax Act, 1961. D

The Settlement Commission went into all the aspects of the matter and computed the taxable income of appellant's father and his income for the assessment years 1964-65 to 1970-71 and 1970-71 to 1982-83. It directed the I.T.O. to compute the total income for each of the said assessment years accordingly and raise demand for the tax due. E

The appellant preferred two sets of appeals before this Court against the two orders of the Settlement Commission. C.A.s. 1301-07 of 1991 related to the assessment years 1964-65 to 1970-71 and C.As.1288-1300 of 1991 related to the assessment years 1970-71 to 1982-83. F

The appellant contended that the settlement Commission erred in law in holding that the U.S. trusts were revocable trusts within the meaning of Section 63 of the Act; that for attracting Section 63, the deed of transfer must give the transferor a right to re-transfer directly or indirectly whole or any part of the income or assets to the transferor or it must give him a right to re-assume power directly or indirectly over the whole or any part of income or assets; that in the present case such power was not given to the transferor; that U.S. trusts were discretionary trusts and G H

- A** therefore the assessment could be made only upon the trustees and not upon the beneficiaries-recipients; that the revenue could not take advantage of the mistake of law on the part of the settlor or the appellant; that with the death of the settlor, the U.S. trusts ceased to be revocable trusts and the appellant could not be taxed on the income received by him from the said trust, because only the trustee could be taxed; that the U.K. trusts were also discretionary trusts and not specific trusts as held by the Settlement Commission and the assessment could be made only upon the trustees and not upon the beneficiaries-recipients; that the Settlement Commission committed a legal error in including the income from the U.K. trusts in the total income of the settlor and the appellant even though it was not paid out by the trustee nor received by the assesseees in India; that in the U.S.A. and U.K., tax was levied upon the respective trust incomes under the laws of those countries; that levying tax over again in India on the very same income amounted to double taxation and therefore the tax levied in India was to be waived.

- D** The Revenue submitted that even if any principles were decided by the Settlement Commission, they did not bind the Income Tax authorities in proceedings relating to subsequent years; that the order of the Commission was relevant to and was confined only to the assessment years to which it related; that this Court under Article 136 of the Constitution would not be able to go into the merits of the order; that the Settlement Commission's interpretation on the U.S. and U.K. trusts was perfectly in order and did not call for any interference by this court; that during his life-time, the settlor had declared that he had received income from the U.K. and U.S. trusts and had included the same in his returns of income for each of the assessment years relevant herein; that the appellant too acted similarly and therefore the argument of not receiving the income from UK trusts was a mere after-thought and should not be given any credence; that a trustee or the trustees was/were expected to act reasonably and in furtherance of the object of the trusts; that they were to apply the income for the purposes specified, because they could not just accumulate it; that applying the test of reasonableness, it was to be held that ordinarily, the trustee ought to distribute the income each year; and that it was to be held that the income from the UK trusts had rightly been taken into account by the Commission while passing its orders.

- H** Dismissing the appeals, this Court,

HELD : 1.01. The finality clause contained in Section 245-I does not and cannot bar the jurisdiction of the High Court under Article 226 or the jurisdiction of this court under Article 32 or under Article 136, as the case may be. But that does not mean that the jurisdiction of this court in the appeal preferred directly in this court is any different than what it would be if the assessee had first approached the High Court under Article 226 and then come up in appeal to this court under Article 136. A party does not and cannot gain any advantage by approaching this Court directly under Article 136, instead of approaching the High Court under Article 226. This is not a limitation inherent in Article 136; it is a limitation which this court imposes on itself having regard to the nature of the function performed by the Commission and keeping in view the principles of judicial review. [955 D-E]

1.02. The scope of enquiry, whether by High Court under Article 226 or by this Court under Article 136 is also the same - whether the order of the Commission is contrary to any of the provisions of the Act and if so, has it prejudiced the petitioner/appellant-apart from ground of bias, fraud & malice which, of course, constitute a separate and independent category. [956-B]

1.03. The appellant power under Article 136 is similar to power of judicial review, where the appeal is directed against the orders of the Settlement Commission.

Sri Ram Durga Prasad v. Settlement Commission, 176 I.T.R. 169 and *Chief Constable of the N.W. Police v. Evans*, [1982] 1 W.L.R. 1155, referred to. [956-D]

1.04. The only ground upon which this Court can interfere in these appeals is that the order of the Commission is contrary to the provisions of the Act and that such contravention has prejudiced the appellant. [956-E]

1.05. The main controversy in these appeals relates to the interpretation of the settlement deeds - though it is true, some contentions of law are also raised. The commission has interpreted the trust deeds in a particular manner. Even if the interpretation placed by the commission on the said deeds is not correct, it would not be a ground for interference in these appeals, since a wrong interpretation of a deed of trust cannot be said to be a violation of the provisions of the Income Tax Act. [956-F]

A 1.06. The interpretation placed upon the said deeds by the Commission does not bind the authorities under the Act in proceedings relating to other assessment years. [956-G]

B 1.07. Though it is not necessary, strictly speaking, to go into the correctness of the interpretation placed upon the said deeds by the commission, and it is enough if this court confines itself to the question whether the order of the Commission is contrary to the provisions of the Act, yet, for the sake of completeness, the Court examine whether the order of Commission is vitiated by any such wrong interpretation. [956-H, 957-A]

C 2.01. A discretionary trust is described as a trust where the trustees have been vested with a discretion in the matter of distribution of trust income among the specified class of beneficiaries. In the case of such trusts, the trustees have a discretion to pay whole or part of the income to such member or members of the designated class as they think fit and in such proportion as they deem appropriate. [957 C-D]

Snell's Principles of Equity, 25th Edn. (1965) page 129, referred to.

[957-E]

E 2.02. The US settlement deed empowers the trustee to hold, manage, invest and re-invest the principal of the trust fund, to collect and receive the income thereof and to pay or apply so much of the net income as the trustee shall in his absolute and uncontrolled discretion deem advisable to or to the use of one of more members of the settlor's family. It is thus a discretionary trust.

F 2.03. Para 1(2) of the U.S. Deed empowers the settlor/transferor and the trustee, acting together to direct the trustee, at any time, to pay over the entire income and/or entire corpus or a part thereof to such member of the settlor's family or their descendants as they may direct. The said power cannot be exercised by the settlor acting alone. [958-B]

G 2.04. The power, properly construed, is given to the settlor to be exercised together with the trustee - and not to the trustee to be exercised together with the settlor. The trustee is anyhow vested with an absolute discretion to distribute the income of or the principal of the trust to such member of the family, as he thinks appropriate, under the clause preceding and paras following para 1(2). If so, there was no point in saying that

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he can, together with the settlor, be empowered to pay over part or whole of income/principal to "such one or more members of a class composed of the family members living." It cannot also be forgotten that the trustee in this case is a Bank - one of the largest in the U.S.A. - and not an individual acquainted with the affairs of the settlor's family. [958-H, 959-A] A

2.05. Section 63 does not say that the power of revocation vesting in the transferor should be absolute or unconditional. [959-B] B

2.06. Section 63(1) also does not say that the deed of transfer must confer or vest an unconditional or an exclusive power in the transferor to give the power/direction of the nature contemplated by it. Merely because the concurrence of the trustee had to be obtained by the transferor/settlor for giving the said direction it cannot be said that the deed does not contain a provision giving the transferor a right to re-assume power directly or indirectly over the whole or any part of income or assets within the meaning of Section 63(a)(ii) of the Act. [960 B-C] C

2.07. During the lifetime of the settlor, the entire income arising from the three U.S. trust deeds was bound to be and was rightly included in the income of the settlor by virtue of Section 63 read with Section 61. [961-B] D

2.08. With the death of the settlor, Section 63 ceased to apply even though the aforesaid clause empowers not only the settlor but also the Maharaja for the time being to exercise the said power. [961-C] E

2.09. Section 63 is attracted only where such power is given to the transferor - and the appellant (the son of the settlor) is not and cannot be called the transferor. It is not denied that so far as the income from the U.S. trusts is concerned, it was indeed received by the appellant. [961-D] F

2.10. The trustees in the case of a trust declared by a duly executed instrument in writing are treated as representative assesseees (Section 160(1)(iv)). It is equally true that in the case of a discretionary trust, trustees are liable to be taxed in respect of the income received by them at the rate specified in Section 164(1). [961-F] G

2.11. Section 166 states in unmistakable terms that nothing contained in the preceding provisions in the chapter shall preclude the Revenue from making a direct assessment upon the beneficiary and/or recovering the tax payable from such person. [962-B] H

A 2.12. By virtue of Section 166, the Revenue has an option in the case of a discretionary trust either to make an assessment upon the trustees or to make an assessment upon the beneficiaries. Of course, both the trustee and the beneficiary cannot be simultaneously taxed in respect of the same income. The assessments made by the Commission on the deceased-settlor and the appellant are thus unexceptionable. [966-D]

B *Behramji Sorabji v. Commissioner of Income Tax, Bombay*, 16 I.T.R. 301; *Commissioner of Income Tax, Bombay City v. Ratilal Nathalal*, 25 I.T.R. 426; *Tarunendra Nath Tagore v. Commr. of Income Tax*, 33 I.T.R. 492 (Calcutta); *K. Subramania Pillai v. Agricultural Income Tax Officer, Thukalay*, 53 I.T.R. 764; *Commissioner of Income Tax, Punjab v. Raghbir Singh*, 57 I.T.R. 408; *Nagappa v. C.I.T.*, 73 I.T.R. 626 and *Ram Swaroop Das v. The State of Bihar*, 42 I.T.R. 770, referred to.

Sevantilal Maneklal v. C.I.T., 67 I.T.R. 1, distinguished.

D *C.I.T. v. Kamalini Khatau*, 112 I.T.R. 652 - (Gujarat) (F.B.) Agreed with the dissenting opinion.

E 3.01. Both the settlor and the appellant have been receiving the income from the UK trusts during the several assessment years concerned herein. The settlor had voluntarily included the entire income from the U.K. trusts in his income in the returns filed by him for the assessment years 1964-65 to 1969-70. It is unlikely that he would have so included unless he really received it. The Commission treated those declarations as proof of the settlor's real intention. The Commission also relied upon certain other circumstances including the manner in which the accounts of these trusts were maintained in support of their opinion that all concerned with the trusts, acted on the basis that the trust income was flowing to the settlor, and after his death to the appellant. The Commission also referred specifically to similar declarations made by the appellant in his returns. Even subsequent to the death of the settlor, the Commission pointed out, the appellant has been making similar declarations from time to time. [967 C-E]

H 3.02. The appellant did not say that he did not receive the income from the U.K. trusts. All he said was, since it is a discretionary trust, its income is not taxable in his hands. If he had not received the income, he would have put forward that fact in the forefront. But he did not. Section

5 of the Act is wide enough to bring all such income to tax. In case appellant proves that any income has been taxed in U.S. or U.K., the same income shall not be taxable over again in India. [967-H, 968-D] A

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 1301-07 of 1991 B

From the Judgment and Order dated 31-3-89 of the Income Tax Settlement Commission Bombay in Settlement Application No. 10/5/41/78-IT.

Ashok Desai, Debi Pal, B.K. Mehta, N.K. Sahu, U.K. Sagar and P.H. Parekh for the Appellant. C

Dr. V. Gaurishankar and S. Rajappa for the Respondents.

The Judgment of the Court was delivered by

B.P. JEEVAN REDDY, J. These appeals are preferred against the orders of the Settlement Commission dated March 31, 1989 in pursuance of the offers of settlement made by the appellant. Civil Appeals 1301-07 of 1991 relate to the assessment years 1964-65 to 1970-71 while Civil Appeals 1288-1300 of 1991 relate to the assessment years 1970-71 to 1982-83. Under its orders, the Settlement Commission computed the taxable income of the appellant's father (who died on August 22, 1969) and of the appellant for the aforesaid assessment years and gave certain directions, applying which the I.T.O. was directed to compute the total income for each of the said assessment years and raise demand for the tax due. The main issue in all these matters is the assessability of income from five foreign trusts created by the appellant's father, Sri Vikramsinhji. D
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Sri Vikramsinhji, Ex-ruler of Gondal executed three deeds of settlements (trusts deeds) in the United States of America on December 19, 1963 and two deeds in the United Kingdom on January 1, 1964. The three settlements executed in U.S. are in identical terms. Similarly, the two settlements, executed in U.K. are similar. The two sets of settlements, however, differ from each other in certain particulars, though both the sets are meant for the benefit of the settlor and the members of his family. We may refer to the relevant clauses in the settlements executed in U.S. in the first instance. G
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- A** Under the U.S. settlements, The National City Bank, New York is constituted the sole trustee. The trust is created for the benefit of the grantor/settlor, his wife and children and their spouses (referred to as family members) and their descendants. The trustee is empowered to collect the income from the trust properties and to apply the same among the family members and/or their descendants in such manner as he thinks appropriate. He is also authorised to terminate the trusts for any reason (including tax reasons) and to transfer, convey and pay off the property held thereunder to any person or persons then eligible to receive the income of the trusts. On such termination, the entire assets in the hands of the trustee are to be paid over to the then Maharaja (Ruler) or to his living male descendants in equal shares per stripes. The clause which is relevant herein, which according to the Revenue, makes the trusts revocable ones - we may refer to it as para 1(2) for the sake of convenience - reads thus:
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- D** "Anything hereinabove to the contrary notwithstanding, at any time and from time to time the Trustee shall transfer, convey and pay over any portion of the income of the trust fund and any portion or all of the principal held in trust to or to the use of such one or more members of a class composed of the Grantor, the wife or widow of the Grantor, the children of the Grantor living from time to time, the spouse of any child of the Grantor then living or deceased (hereinafter referred to as the "Family Members"), and the descendants of the Family Members living from time to time, in such amounts, shares and proportions, either absolutely or in trust, and upon such terms and conditions (including the grant of a further power to appoint) as the Trustee and a Maharaja who shall have attained the age of eighteen (18 years) shall at any time and from time to time appoint and direct in a written instrument which refers to and specifically exercises this power and which is duly executed by the Maharaja and by the Trustee then acting here-under. The foregoing power to appoint may be released in whole, or in part by the Maharaja or by the Trustee or by both at any time by one or more written instruments duly executed by the Maharaja or by the Trustee or by both and delivered to
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the Trustee then acting here-under, *provided, however*, that if either the Maharaja or the Trustee, but not both of them, shall release such power, then the party not so releasing shall continue to have the power to appointment hereinbefore provided, acting alone."

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Clauses (2) and (3) of the deeds confer an absolute discretion upon the trustee to pay over or apply in his discretion, any part or whole of income or any part of or whole of the principal to "any person then eligible to receive the income of this trust" at such time and in such manner, as he may decide in his absolute discretion. Clause (3) says further that "the Trustee may omit eligible members of the class from any and all such payments and applications, and no such payment or application or omission of a person from participation therein shall cause a charge against or otherwise effect the future interest or share of any person here under." Any determination made by the trustee in good faith in exercising the said discretion is held to be binding and conclusive. It is not necessary to notice other clauses of these settlements except to say that the object of these trusts is to provide for the education, maintenance and up-keep of the members of the settlor's family and their descendants.

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The settlor died on August 22, 1969. During his lifetime, the settlor, Vikramsinhji was filing returns of his income in India including therein whole of the income arising from the U.S. trusts. The returns were filed by him for the assessment years 1964-65 to 1969-70 (both years inclusive). Since he died in the middle of the accounting year relevant to the assessment year 1970-71, two returns were filed for the said assessment year, one upto the date of the death of the settlor and the other from the date of the death of settlor to the end of the accounting year. These returns were filed by his elder son, Jyotendrasinhji, appellant, in these appeals. In these returns too, the appellant included whole of the income from the U.S. trusts in the respective returns. At this stage, the appellant says. he was advised that the income from U.S. trusts was not taxable in India either in the hands of settlor or in his hands and that inclusion of the said income in the returns by the settlor and by the appellant was a mistake. Urging the said contention, the appellant filed appeals against the assessment orders pertaining to the A.Ys. 1965-66 and 1966-67. Inasmuch as the appeals were barred with respect to other assessment orders, he preferred revisions

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- A before the Commissioner of Income Tax. (It may be mentioned at this stage itself that the income from U.K. trusts was included in the aforesaid returns just as the income from U.S. trusts was included. Similarly, the plea of non-taxability was urged with respect to the income from U.K. trusts on the same basis as was urged with respect to the income from the U.S. trusts).

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- C The Appellate Assistant Commissioner, Rajkot admitted additional grounds and allowed the aforesaid appeals by his orders dated April 4, 1975 and August 20, 1975. The Revenue went-up in appeal to Tribunal. The Tribunal allowed the appeals holding that the A.A.C. acted contrary to Rule 46(2) of the Income Tax Rules in admitting the additional grounds and in looking into new material. Accordingly it set aside his orders and remitted the appeals back to A.A.C. It is at this stage that the appellant approached the settlement commission under chapter XIX(A) of the Income Tax Act, 1961.

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- E We may now notice the relevant clauses in the deeds of settlements executed in U.K. Under these settlement deeds, one Mr. Robert Hampton Robertson McGill was designated as the trustee, referred to in the deeds as "the original trustees". These trusts too were created for the benefit of the settlor, the members of his family and their descendants, referred to as 'beneficiaries'. The deeds define the expression "the trustees" to mean and include the original trustee or the other trustees for the time being appointed in terms of the deeds of settlement. The expression "the beneficiaries" was defined to mean and include (a) the settlor, (b) the children and remoter issue for the time being in existence of the settlor, and (c) any person for the time being in existence who is the wife or widow of the settlor or the wife or widow or husband or widower of any of them, the children and remoter issue of the settlor. The clauses which are relevant for our purposes read thus: (We have, for the sake of convenient reference, numbered them as clauses (3) and (4)).

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- H "3. THE Settlor hereby directs that the Trustee shall and accordingly the Trustees shall stand possessed of the Trust Fund and the income thereof upon the trusts following that it 1 to say :-

(1) *UPON TRUST* to raise and pay out of the capital thereof any further estate duty which may still be payable thereon in respect of the death of the Settlor's father His Late Highness Shri Bhojrajji Maharaja Saheb of Gondal who died on the Thirty first day of July One Thousand nine hundred and fifty two and any interest payable on such duty and any costs incurred in connection with the ascertainment or payment of such duty and interest.

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(2) Subject as aforesaid *UPON TRUST* for all or such one more and more exclusively of the others or other of the Beneficiaries at such age or time or respective ages or times if more than one in such shares and with such trusts for their respective benefit and such provisions for their respective advancement and maintenance and education at the discretion of the Trustees or of any other person or persons as the person who for the time being is the Maharaja or (of the title is abolished) would have been the Maharaja had the title not been abolished shall at any time during the specified period by any deed or deeds revocable or irrevocable appoint AND in default of and subject to any such appointment upon he trusts and with and subject to the powers and provisions hereinafter declared and contained concerning the same PROVIDED ALWAYS that the foregoing power of appointment shall not be capable of being exercised :-

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(a) by anyone other than the Settlor or the Elder son or the Younger Son; or

(b) in favour of the person making the appointment save with the consent of the Trustees (being at least two in number or a trust Corporation) such consent to be testified by their being parties to the deed of appointment and executing the same.....

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4. SUBJECT aforesaid the Trustees shall stand possessed of the Trust Fund and the income thereof upon the trusts

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A following that is to say :-

(1) The income of the Trust Fund accruing during the life of the Settlor shall belong and be paid to the Settlor

B (2) Subject as aforesaid the income of the Trust Fund accruing during the life of the Elder Son shall belong and be paid to the Elder Son.....

C (3) Subject as aforesaid the Trust Fund shall be held in Trust for the person who (being a descendant of the Elder Son) first during the specified period :

(a) becomes the Maharaja or would become the Maharaja if his title had not been abolished and

(b) attains the age of eighteen years..... "

D It is not necessary to notice the other provisions/clauses of these deeds.

E During his lifetime, the settlor, Vikramsinhji, was including the whole of the income from these trusts in his returns of income just as he was doing in the case of U.S. trusts. The said income was also included in the two returns filed by his son for the A.Y.1970-71. Thereafter, however, the appellant took the stand, as mentioned hereinbefore, that the income from these trusts is not includible in his income. He also took the stand that the inclusion of the said income in the returns submitted by his father for the A.Ys.1964-65 to 1969-70 and by him in the returns relating to A.Y.1970-71 was under a mistake. This submission too was the subject matter of the appeals and the revisions filed before the A.A.C. and the Commissioner of Income Tax, referred to hereinbefore. When the appellant approached the settlement commission with an application for settlement, it related to the income from U.K. trusts as well.

G The Settlement Commission heard the arguments in extenso spread over several days and disposed of the matter under two elaborate orders. One order relates to A.Ys. 1964-65 to 1970-71 (Vikramsinhji) and the other to A.Ys.1970-71 to 1982-83 (Appellant). The findings of the Commission which constitute the bases for its orders may briefly be stated as the following :

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(i) Though the U.S. settlements are in the nature of discretionary trusts, they fall within the mischief of sub-clause (ii) of Clause (a) of Section 63 of the Act. For this reason, the whole of the income arising from the trust properties was liable to be included and was rightly included in the income of the settlor/transferor, Sri Vikramsinhji.

(ii) On the death of the settlor, the U.S. settlement deeds ceased to be revocable but inasmuch as the entire income thereunder was received by the appellant, Sri Jyotendrasinhji, it constitutes his income and could be and was lawfully taxed in his hands.

(iii) So far as the U.K. trusts are concerned, clause (3) did never come into operation inasmuch as no additional trustees were appointed as contemplated by it. If so, clause (4) sprang into operation where under the entire income under the settlements flowed to the settlor during his lifetime and on his death, to his elder son, the appellant herein. In other words, these settlements are in the nature of specific trusts. In any event, the entire income from these trusts was received by the settlor during his lifetime and after the settlor's death, by the appellant. Therefore, the said income was rightly included in the total income of the settlor and the assessee during the respective assessment years.

On the above bases, the Commission computed the taxable income of the settlor under both the sets of trusts for A.Ys.1964-65 to 1970-71 (upto the date of the death of the settlor) as also the income of the appellant for the A.Ys.1970-71 to 1982-83. The appellant then preferred these two sets of appeals against the two orders.

At the stage of granting leave, this court ordered (vide the order dated March 22, 1991) that the appellant shall not be entitled to question the jurisdiction of the settlement commission to decide the issues before it and that he will "confine himself in appeal only to the questions relating to correctness or otherwise of the Commissioner's order."

Sri Ashok Desai, learned counsel for the appellant urged the following contentions :

(1) The settlement commission erred in law in holding that the U.S. trusts are revocable trusts within the meaning of Section 63 of the Act. For attracting Section 63, the deed of transfer should give the transferor a right

A to re-transfer directly or indirectly whole or any part of the income or assets to the transferor or it must give him a right to re-assume power directly or indirectly over the whole or any part of income or assets. In this case, the relevant clause does not give the transferor such a power. The power is given to the trustee to be exercised with the concurrence of the transferor/settlor. Even if, for any reason, the clause is construed as giving such a power to the settlor/transferor, Section 63 is not attracted inasmuch as the power is given not to him as such but jointly to him and the trustee. Such a power does not attract the mischief of Section 63.

C (2) The U.S. trusts are discretionary trusts. In such a case, the assessment can be made only upon the trustees and not upon the beneficiaries-recipients. The Revenue has no option in such a situation. It must necessarily tax the trustees and trustees alone. The Revenue cannot take advantage of the mistake of law on the part of the settlor or the appellant.

D (3) At any rate, with the death of the settlor, the U.S. trusts ceased to be revocable trusts, assuming that they were so during his lifetime. So far as the appellant is concerned, he cannot be taxed on the income received by him from the said trust. Only the trustee can be taxed.

E (4) So far as U.K. trusts are concerned, the settlement commission has committed an error of law in holding that clause (3) could come into operation only if and when the settlor appointed the additional trustees as contemplated by it. In fact, the trust had come into existence with the sole trustee (McGill) and it did not depend upon the appointment of additional trustees. Clause (3) prevails over clause (4). If so, the U.K. trusts/settlements are also discretionary trusts and not specific trusts as held by the Settlement Commission. In such a case again the assessment can be made only upon the trustees and not upon the beneficiaries recipients.

G (5) So far as U.K. trusts are concerned, no income was received by the settlor or the appellant either in U.K. or in India. So long as the trustees decided not to exercise the discretion to distribute the income, no income arose to any of the beneficiaries. The deeds do not prescribe a time-limit within which the trustees should exercise their discretion to distribute income. Until the trustees take a decision to distribute and distribute the income, the beneficiaries have no right to income nor can it be said that the income accrues to them. The Settlement Commission committed a legal error in including the income from the U.K. trusts in the total income of

the settlor and the appellant even though it was not paid out by the trustee nor received by the assesseees. At any rate, no income was received in India.

(6) In both the U.S. and U.K., tax has been levied upon the respective trust incomes under the laws of those countries. Levying tax over again in this country on the very same income amounts to double taxation. On this ground too, the tax levied in India must be waived.

On the other hand, Dr. Gauri Shankar, the learned counsel for the Revenue made the following submissions :

(i) The Settlement Commission is not a regular Tribunal. Its function is different from other quasi-judicial authorities created by the Income Tax Act. Where an offer of settlement has been made, the commission either accepts it or rejects it subject to such conditions and terms as it thinks fit to impose in that behalf. As the name itself suggests, it is a settlement - a sort of composition. It need not even give reasons for its order. Even if any principles are decided by the Commission, they do not bind the Income Tax authorities in proceedings relating to subsequent years. The order of the commission is relevant to and is confined only to the assessment years to which it relates. The jurisdiction of this court under Article 136 in an appeal against the orders of settlement commission must be conditioned by above considerations. This court would not be able to go into the merits of the order. The commission's order cannot be dissected, inasmuch as it is a package deal. Either it stands or falls as a whole.

(ii) The interpretation placed by the commission on both U.S. and U.K. trusts is perfectly in order and does not call for any interference by this court. Indeed, under the impugned orders, several benefits have been conferred upon the settlor and the appellant like waiving of penalties, interest and other liabilities attaching to the assesseees under the Act. While accepting the same, the appellant cannot be allowed to disown those features of the order which go against him.

(iii) The argument of not receiving the income from U.K. trusts is a mere after-thought and should not be given any credence. During his lifetime, the settlor had declared that he had received income from both the U.K. and U.S. trusts and had included the same in his returns of income for each of the assessment years relevant herein. The appellant too acted similarly.

- A (iv) A trustee or the trustees, as the case may be, are expected to act reasonably and in furtherance of the object of the trusts. They must apply the income for the purposes specified. They cannot just accumulate it. Applying the test of reasonableness, it must be held that ordinarily, the trustee ought to distribute the income each year. As a matter of fact, it was so distributed. If so, it must be held that the income from these U.K. trusts has rightly been taken into account by the commission while passing its orders.

- The first question we have to answer is the scope of these appeals preferred under Article 136 of the Constitution against the orders of the Settlement Commission. The question is whether all the questions of fact and law as may have been decided by the commission are open to review in this appeal. For answering this question one has to have regard to the scheme of Chapter XIX-A. The said chapter was inserted by the Taxation Laws (Amendment) Act, 1975 with effect from April 1, 1976. A somewhat similar provision was contained sub-sections (1A) to (1D) of Section 34 of the Income Tax Act, 1922, introduced in the year 1954. The provisions of Chapter XIX-A are, however, qualitatively different and more elaborate than the said provisions in the 1922 Act. The proceedings under this chapter commence by an application made by the assessee as contemplated by Section 245-C. Section 245-D prescribes the procedure to be followed by the commission on receipt of an application under Section 245-C. Sub-section (4) says: "after examination of the records and the report of the commissioner received under sub-section (1), and the report, if any, of the commissioner received under sub-section (3), and after giving an opportunity to the applicant and to the commissioner to be heard, either in person or through a representative duly authorised in this behalf, and after examining such further evidence as may be placed before it or obtained by it, the settlement commission may, *in accordance with the provisions of this Act, pass such order as it thinks fit* on the matters covered by the application and any other matter relating to the case not covered by the application, but referred to in the report of the commissioner under sub-section (1) or sub-section (3)." Section 245-E empowers the Commission to re-open the completed proceedings in appropriate cases, while Section 245-F confers all the powers of an Income Tax authority upon the Commission. Section 245-H empowers the Commission to grant immunity from penalty and prosecution, with or without conditions, in cases where it is satisfied that the assessee has made a full disclosure of his income and

its sources. Under Section 245-HA, the Commission can send back the matter to assessing officer, where it finds that the applicant is not cooperating with it. Section 245-I declares that every order of settlement passed under sub-section (4) of Section 245(D) shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in Chapter XIX-A, be re-opened in any proceeding under the Act or under any other law for the time being in force. Section 245-L declares that any proceedings under chapter XIX-A before the settlement commission shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 and for the purposes of Section 196 of the Indian Penal Code.

It is true that the finality clause contained in Section 245-I does not and cannot bar the jurisdiction of the High Court under Article 226 or the jurisdiction of this court under Article 32 or under Article 136, as the case may be. But that does not mean that the jurisdiction of this Court in the appeal preferred directly in this court is any different than what it would be if the assessee had first approached the High Court under Article 226 and then come up in appeal to this court under Article 136. A party does not and cannot gain any advantage by approaching this Court directly under Article 136, instead of approaching the High Court under Article 226. This is not a limitation inherent in Article 136; it is a limitation which this court imposes on itself having regard to the nature of the function performed by the Commission and keeping in view the principles of judicial review. May be, there is also some force in what Dr. Gauri Shankar says viz., that the order of commission is in the nature of a package deal and that it may not be possible, ordinarily speaking, to dissect its order and that the assessee should not be permitted to accept what is favourable to him and reject what is not. According to learned counsel, the Commission is not even required or obligated to pass a reasoned order. Be that as it may, the fact remains that it is open to the Commission to accept an amount of tax by way of settlement and to prescribe the manner in which the said amount shall be paid. It may condone the defaults and lapses on the part of the assessee and may waive interest, penalties or prosecution, where it thinks appropriate. Indeed, it would be difficult to predicate the reasons and considerations which induce the commission to make a particular order, unless of course the commission itself chooses to give reasons for its order. Even if it gives reasons in a given case, the scope of Enquiry in the appeal remains the same as indicated above viz., whether it is contrary

- A to any of the provisions of the Act. In this context, it is relevant to note that the principle of natural justice (*audi alteram partem*) has been incorporated in Section 245-D itself. The sole overall limitation upon the Commission thus appears to be that it should act in accordance with the provisions of the Act. The scope of enquiry, whether by High Court under Article 226 or by this Court under Article 136 is also the same - whether the order of the Commission is contrary to any of the provisions of the Act and if so, has it prejudiced the petitioner/appellant apart from ground of bias, fraud & malice which, of course, constitute a separate and independent category. Reference in this behalf may be had to the decision of this Court in *Sri Ram Durga Prasad v. Settlement Commission* 176 I.T.R. 169, which too was an appeal against the orders of the Settlement Commission. Sabyasachi Mukharji, J., speaking for the Bench comprising himself and S.R. Pandian, J. observed that in such a case this Court is "concerned with the legality of procedure followed and not with the validity of the order." The learned Judge added "judicial review is concerned not with the decision but with the decision-making process." Reliance was placed upon the decision of the House of Lords in *Chief Constable of the N.W. Police v. Evans*, [1982] 1 W.L.R.1155. Thus, the appellate power under Article 136 was equated to power of judicial review, where the appeal is directed against the orders' of the Settlement Commission. For all the above reasons, we are of the opinion that the only ground upon which this Court can interfere in these appeals is that order of the Commission is contrary to the provisions of the Act and that such contravention has prejudiced the appellant. The main controversy in these appeals relates to the interpretation of the settlement deeds - though it is true, some contentions of law are also raised. The commission has interpreted the trust deeds in a particular manner, Even if the interpretation placed by the commissic. on the said deeds is not correct, it would not be a ground for interference in these appeals, since a wrong interpretation of a deed of trust cannot be said to be a violation of the provisions of the Income Tax Act. It is equally clear that the interpretation placed upon the said deeds by the Commission does not bind the authorities under the Act in proceedings relating to other assessment years.

In view of the above, though it is not necessary, strictly speaking, to go into the correctness of the interpretation placed upon the said deeds by the commission, and it is enough if we confine ourselves to the question whether the order of the Commission is contrary to the provisions of the

Act, we propose to, for the sake of completeness, examine also whether the order of Commission is vitiated by any such wrong interpretation? A

U.S. TRUSTS:

The sole trustee under this settlement deed is the First National City Bank, New York. The deed empowers the trustee to hold, manage, invest and re-invest the principal of the trust fund, to collect and receive the income thereof and to pay or apply so much of the net income as the trustee shall in his absolute and uncontrolled discretion deem advisable to or to the use of one or more members of the settlor's family. It is thus a discretionary trust. A discretionary trust is described as a trust where the trustees have been vested with a discretion in the matter of distribution of trust income among the specified class of beneficiaries. In the case of such trusts, the trustees have a discretion to pay whole or part of the income to such member or members of the designated class as they think fit and in such proportion as they deem appropriate. Section 164(1) sets out the same idea in the following words: B C D

"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....."

In Snell's Principles of Equity, 25th Edn. (1965), P.129, a discretionary trust is defined in the following words: E

"A discretionary trust is one which gives the beneficiary no right to any part of the income of the trust property, but vests in the trustees a discretionary power to pay him, or apply for his benefit, such part of the income as they think fit..... The beneficiary thus has no more than a hope that the discretion will be exercised in his favour." F

That these trusts are discretionary trusts is not in controversy. The main question is whether Para 1(2), quoted hereinbefore, makes it a revocable trust within the meaning of Section 63? The said clause begins with a *non-obstante* clause, "anything hereinabove to the contrary, notwithstanding" thereby giving it an overriding effect over what has been said in the earlier recitals. It then says that "at any time and from time to time, the trustee shall transfer, convey and pay over any portion or of the income H

A of the trust fund and any portion or of all the principal held in trust", to such member of the settlor's family "as the trustee and a maharaja who shall have attained the age of 18 years shall at any time and from time to time appoint and direct in a written instrument which refers to and specifically exercise this power and which is duly executed by the Maharaja and the trustee then acting here-under." In other words, the said clause
B empowers the settlor/transferor and the trustee, acting together to direct the trustee, at any time, to pay over the entire income and/or entire corpus, or a part thereof to such member of the settlor's family or their descendants as they may direct. The said power cannot be exercised by the settlor acting alone. The question is whether the said clause attracts Section 63?

C Section 63 defines the expressions "transfer" and "revocable transfer". It says that for the purposes of Sections 60, 61 and 62, "a transfer shall be deemed to be revocable if (i) it contains any provisions for the re-transfer directly or indirectly of the whole or any part of the income or assets to the transferor or (ii) it in any way gives the transferor a right to re-assume power directly or indirectly over the whole or any part of the income or assets." The expression "transfer" is defined to include any settlement, trust,
D covenant, agreement or arrangement. The expression "family members" occurring in the aforesaid clause in the trust deeds is defined in the deeds to mean "the children of the grantor living from time to time, the wife or widow of the grantor, the spouse of any child of the grantor then living or deceased." The "descendants of the family members" which expression also occurs in the aforesaid clause is defined in the deeds to mean "the descendants of the family members living from time to time during the trust term."

F The contention of Sri Ashok Desai, the learned counsel for the appellant is that Section 63 will be attracted only where the transferor is vested with the exclusive and/or absolute power to give direction of the nature contemplated therein and not where such a power has to be exercised by the transferor jointly with another person or with the concurrence or consent of another person. Indeed, he argues that the said power
G is really given to the trustee to be exercised in concert with the Settlor. We find it difficult to agree with the learned counsel. Firstly, the power, properly construed, is given to the settlor to be exercised together with the trustee - and not to the trustee to be exercised together with the settlor. The trustee is anyhow vested with an absolute discretion to distribute the
H income of or the principal of the trust to such member of the family, as he

thinks appropriate, under the clause preceding and paras following para 1(2). If so, there was no point in saying that he can, together with the settlor, be empowered to pay over part or whole of income/principal to "such one or more members of a class composed of the family members living". It cannot also be forgotten that the trustee in this case is a Bank - one of the largest in the U.S.A. - and not an individual acquainted with the affairs of the settlor's family. Now coming to Section 63, it is equally not possible to agree with the learned counsel. Section 63 does not say that the power of revocation vesting in the transferor should be absolute or unconditional. As pointed out by Chagla, CJ. in *Behramji Sorabji v. Commissioner of Income Tax, Bombay*, (16 I.T.R. 301), "the only question that has got to be asked is whether the transfer is capable of being revoked by the assessee or not.....it may be that before the power is exercised, the consent of two beneficiaries might have to be taken but even so, although the revocation may be contingent or conditional, still the deed remains a revocable deed of trust." The same idea was reiterated by Tendulkar, J. in the said judgment, in the following words:

"It is urged by Sir Jamshedji on behalf of the assessee that the words "revocable transfer" in this section require that the transfer should be revocable absolutely and unconditional and that by reason of the fact that the transfer in this case could not be revoked under clause 10 of the trust deed without the consent of the wife and the children or any two of them, it is not a revocable transfer within the meaning of Section 16(1)(c). Apart from any authority, and reading the section by itself, I am unable to agree with this contention. It would involve my reading into the section words which are not there, and the Court is not entitled to do so unless it appears that giving effect to the section as it stands would lead to an obvious absurdity or inconvenience which could not have been contemplated by the legislature. No such position arises in this case."

We find ourselves in agreement with the said opinions. Section 63 of the present Act corresponds to the proviso appended to Section 16(1)(c) of the 1922 Act. The first proviso read thus: "provided that for the purposes of this clause the settlement, disposition or a transfer shall be deemed to be revocable if it contains any provision for the re-transfer directly or

A indirectly of the income or assets to the settlor, disponent or transferor or in any way gives settlor, disponent or transferor a right to re-assume power directly or indirectly over the income or assets." Section 63(1) also does not say that the deed of transfer must confer or vest an unconditional or an exclusive power in the transferor to give the power/direction of the nature contemplated by it. Accordingly, we hold that merely because the concurrence of the trustee had to be obtained by the transferor/settlor for giving the said direction it cannot be said that the deed does not contain a provision giving the transferor a right to re-assume power directly or indirectly over the whole or any part of income or assets within the meaning of Section 63(a)(ii) of the Act.

C In this view of the matter, it is not necessary for us to refer to other decisions cited before us in any detail. The decision of this Court in *Commissioner of Income Tax, Bombay City v. Ratilal Nathalal*, 25 I.T.R. 426 emphasises that the power of revocation must be given to the settlor as settlor and not in any other capacity. In the deeds before us, the power is indisputably conferred upon the Settlor in the very same capacity and not in any different capacity. The other decision of this court in *Sevantilal Maneklal v. C.I.T.* 67 I.T.R. 1 is distinguishable for the reason that the power of the settlor therein was merely to choose among the several objects of the trust and, therefore, it was held that it does not attract Section 63.

E On the other hand, *Tarunendra Nath Tagore v. Commr. of Income Tax* 33 I.T.R. 492 - Calcutta was a case where the trust deed empowered the settlor to cause a re-transfer of the trust assets, in certain specified contingencies. The question was whether such a provision makes the transfer a revocable one within the meaning of the first proviso to Section 16(I)(c) of the 1922 Act. It was held that it does, notwithstanding the fact that the power had to be exercised only in certain specified contingencies. The decision of the Madras High Court in *K. Subramania Pillai v. Agricultural Income Tax Officer, Thukalay* 53 I.T.R. 764 was also a case where the power of revocation was to be exercised in certain specified contingencies alone. Even so, it was held that it was a revocable settlement.

G *Commissioner of Income Tax, Punjab v. Raghubir Singh* 57 I.T.R. 408 was case where the trust deed provided for the application of the trust income for satisfying the debts which the settlor was under an obligation to discharge. The question was whether the provision makes the deed a

revocable one. It was held that it did not, inasmuch as there was no provision for re-transfer of the income or the assets to the settlor. It was observed that the mere fact that the settlor's debts had to be discharged from the trust income did not bring it within the four corners of the first proviso to Section 16(1)(c). A

In the light of the above discussion, it must be held that during the lifetime of the settlor, the entire income arising from the three U.S. trust deeds was bound to be and was rightly included in the income of the settlor by virtue of Section 63 read with Section 61. The commission was right in holding so. B

With the death of the settlor, Section 63 ceased to apply even though the aforesaid clause empowers not only the settlor but also the Maharaja for the time being to exercise the said power. Section 63 is attracted only where such power is given to the transferor - and the appellant (the son of the settlor) is not and cannot be called the transferor. It is not denied that so far as the income from the U.S. trusts is concerned, it was indeed received by the appellant. The only argument is that inasmuch these trusts are discretionary trusts, the income therefrom must necessarily be taxed and can only be taxed in the hands of the trustees and not in the hands of the beneficiary. It is argued that the Revenue has no choice to tax either the trustees or the beneficiaries in such a case. We are unable to agree. C

The trustees in the case of a trust declared by a duly executed instrument in writing are treated as representative assessee (Section 160(1)(iv)). It is equally true that in the case of a discretionary trust, trustees are liable to be taxed in respect of the income received by them at the rate specified in Section 164(1). (Section 164(1) has undergone several changes since 1962. D

The sub-section as introduced by the Finance Act, 1970 with effect from April 1, 1970 provided that in such case "tax shall be charged - (i) as if the relevant income or part of relevant income were the total income of the association of persons, or (ii) @65%, whichever course would be more beneficial to the Revenue." For the purpose of this case, it is not necessary E

to notice the provisos appended to sub-section (1) or the subsequent amendments to the sub-section). F

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At the same time, Section 166 expressly declares that "nothing in the foregoing sections in this chapter shall prevent either the direct assessment H

- A of the person, on whose behalf or for whose benefit income therein referred is receivable or the recovery from such person of the tax payable in respect of such income." Language of this section is clear. The opening words "nothing in the foregoing sections in this chapter" - which means chapter XV, wherein Sections 159 to 165 among other sections occur - give
- B it an over-riding affect over the preceding provisions in the chapter. The Section states in unmistakable terms that nothing contained in the preceding provisions in the chapter shall preclude the Revenue from making a direct assessment upon the beneficiary and/or from recovering the tax payable from such person. The Revenue has thus been given an option to
- C tax the income from a discretionary trust either in the hands of the trustees or in the hands of the beneficiaries. This Court in *Nagappa v. C.I.T.*, 73 I.T.R. 626 and the majority of High Courts have understood this Section in this manner. In *Nagappa*, the appellant had executed seven separate trusts settling specific properties for the benefit of his minor children. He appointed himself, his wife and his married daughter as the trustees. Under
- D each deed, a portion of the income was to be utilised immediately for the benefit of the beneficiary and the balance accumulated for his or her benefit and handed over to the beneficiary on the specified date. The entire income of the trusts (including the income accumulated) was included in the income of the appellant (*Nagappa*) which was questioned by him. His
- E contention was that the "I.T.O. was bound to assess the income under each deed of trust separately in the hands of the trustees as "representative trustees" and was incompetent in view of the express enactment of sub-section (2) of Section 161 to assess the income in the hands of Nagappa or of the beneficiaries." The contention was rejected with reference to Section
- F 161(1) and Section 166 by Shah, J. (speaking for the Bench comprising Shah, Ramaswami and Grover, JJ.) in the following words:

- "It is implicit in the terms of sub-section (1) that the Income-tax Officer may assess a representative assessee, but he is not bound to do so. He may assess either the
- G representative assessee or the person represented by him. That is expressly so enacted in section 166 which states:

- "Nothing in the foregoing sections in this Chapter shall prevent either the direct assessment of the person on
- H 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."

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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 income-tax 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.

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The contention raised by counsel for Nagappa that, since the trustees were assessable in respect of the income of the beneficiaries under Section 161(1), that income could not by virtue of sub-section (2) of Section 161 be assessed in the hands of the beneficiary is contrary to the plain terms of Section 166. Sub-section (2) of Section 161 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. We will presently state the reasons why the rule was so enacted by Parliament. But on the plain words used by Parliament the plea raised by counsel that the representative assessee alone may be assessed as regards income in respect of which he is a representative assessee cannot be accepted."

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The learned Judge then went on to explain the reasons for which section 166 among other provisions was enacted.

In another case arising under the Bihar Agricultural Income Tax Act, 1948, a Bench of this Court comprising J.L. Kapur, M. Hidayatullah and

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A J.C. Shah, JJ. took a similar view in *Ram Swaroop Das v. The State of Bihar*, 42 I.T.R. 770, even though that Act and did not contain a provision similar to Section 166. Section 13 of the Bihar Act provided:

B "Where any person holds land, from which agricultural
income is derived, as a common manager appointed under
any law from the time being in force, or under any agree-
ment or as receiver, administrator or the like on behalf of
persons jointly interested in such land or in the agricul-
tural income derived therefrom the aggregate of the sums
payable as agricultural income-tax by each person on the
C agricultural income derived from such land and received
by him shall be assessed on such common manager,
receiver, administrator or the like, and he shall be deemed
to be the assessee in respect of the agricultural income-
tax so payable by each such person and shall be liable to
D pay the same."

It was urged that because of Section 13, the Receiver alone can be assessed in respect of the income of the estate under his charge and that no assessment can be made upon the person who actually received such income from the receiver. The said contention was rejected by Shah, J.
E speaking for the Bench in the following words:

"In our view, there is no substance in the contention raised by the appellant. The liability to pay tax is charged on the agricultural income of every person. The income though
F collected by the Receiver was the income of the appellant. By S.13, in addition to the owner, the Receiver is to be deemed to be an assessee. But the fact that the Receiver may, because he held the property from which income was derived in the year of account, be deemed to be an assessee and liable to pay tax, does not absolve the appel-
G lant, on whose behalf the income was received from the obligation to pay agricultural income-tax. Section 13 merely provides a machinery for recovery of tax, and is not a charging section. When property is in the possession of the Receiver, common manager or administrator, the
H taxing authorities may, but are not bound, to treat such

persons as assessee and recover tax. The taxing authorities may always proceed against the owner of the income and assess the tax against him. The definition in the connotation of "person" undoubtedly include a Receiver, trustee, common manager, administrator or executor, and by such inclusion, it is open to the taxing authorities to assess tax against any such persons; but on that account the income in the hands of the owner is not exempt from liability to assessment of tax."

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The principle of this decision does support our view, notwithstanding certain variance between the provision concerned in the said decision and those concerned herein.

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Sri Ashok Desai, however, placed strong reliance upon a Full Bench decision of the Gujarat High Court in *C.I.T. v. Kamalini Khatau*, 112 I.T.R. 652 where the majority (Divan, C.J. and B.K. Mehta, J. - with P.D. Desai, J. dissenting) appears to take a contrary view. Before we deal with the decision, it would be interesting to note that the counsel for the appellant Sri N.A. Palkhivala who appeared for the appellant before the Settlement Commission had himself repudiated this argument, though another counsel, who appeared for the appellant at a later stage, did not agree with the view expressed by Sri Palkhivala. The Commission has recorded the submission of Sri Palkhivala in the following words:

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"We may mention here that when Shri N.A. Palkhivala appeared before us on behalf of the applicant he had stated that although according to the Gujarat High Court's decision in the case of *Smt. Kamalini Khatau*, 112 ITR 652 the income of a discretionary trust is assessable only in the hands of a representative assessed and not in the hands of the beneficiaries, he would not object to assessment of the amounts received by the beneficiaries in their hands in the present case, for two reasons. Firstly, according to Shri N.A. Palkhivala the Gujarat High Court's decision in question was erroneous and it was dissently judgment in that case to the contrary, which was correct. Secondly, in the case before us, the representative assesses, namely, the trusts, being situated outside India, could

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A not be taxed in India and in such cases it would not be proper not to assess the beneficiaries, for that will lead to the entire income escaping the Indian income-tax in the case of both the representative assessee and the beneficiaries."

B Be that as it may, we have been taken though both the opinions in the Full Bench decision in extenso. We are told that an appeal is pending against the said decision in this Court. In the circumstances, we are not inclined to deal with the said opinions in any detail except to say that we are inclined to agree with the dissenting opinion of P.D. Desai, J. and are not concerned with the reasoning of the majority.

C For the above reasons, we cannot agree with Mr. Ashok Desai. We hold that by virtue of Section 166, the Revenue has an option in the case of a discretionary trust either to make an assessment upon the trustees or to make an assessment upon the beneficiaries. Of course, both the trustee and the beneficiary cannot be simultaneously taxed in respect of the same income. The assessments made by the Commission on the deceased-settlor and the appellant are thus unexceptionable.

U.K. TRUSTS:

E The first contention urged with respect to U.K. trusts is that the commission has wrongly construed clause (3) which we have extracted hereinbefore. Sri Desai argues that the trust had already come into existence with the appointment of the sole trustee, Mr. McGill, and that the coming into existence of the trust did not depend upon the appointment of additional trustees. The commission was wrong in holding that until and unless the additional trustees are appointed, the trust in clause (3) does not come into existence. Properly construed, says Sri Desai, clause (3) creates a discretionary trust. Inasmuch as the sub-clause does not prescribe any time limit within which the trustees must decide to distribute the income among the beneficiaries, says the counsel, clause (4) has not and had never come into operation. In this case the trustees never did decide not to exercise their discretion under clause (3). If so, no income ever arose or accrued to the Settlor or the appellant under clause (4). If the trustees fail to exercise their discretion under clause (3), the only remedy for the beneficiaries is to approach the court to compel the trustees to exercise their discretion one way or the other, but they cannot say that the trust

income has accrued to them. Clause (4) comes into operation, says the counsel, only where the trustees decide not to distribute the income among the specified beneficiaries; only then does the trust income belongs to and has to be paid over to the settlor - and after the death of the settlor to his elder son, the appellant. Accordingly, the counsel says, the Commission was wrong in law in treating these trusts as specific trusts.

In our opinion, however, the question urged is academic in the facts and circumstances of the case. As a matter of fact, both the settlor and the appellant have been receiving the income from these trusts during the several assessment years concerned herein. Sri Vikramsinhji had voluntarily included the entire income from the U.K. trusts in his income in the returns filed by him for the assessment years 1964-65 to 1969-70. It is unlikely that he would have so included unless he really received it. The Commission treated those declarations as proof of the settlor's real intention. The Commission also relied upon certain other circumstances including the manner in which the accounts of these trusts were maintained in support of their opinion that all concerned with the trusts, acted on the basis that the trust income was flowing to the settlor, and after his death to the appellant. The Commission also referred specifically to similar declarations made by the appellant in his returns. It referred to his statements made in the two returns filed for the assessment year 1970-71, one relating to the income received by his father till his death and the other with respect to the income received by him during the accounting year after the death of his father. Even subsequent to the death of Sri Vikramsinhji, the Commission pointed out, the appellant has been making similar declarations from time to time. For instance, in the letter dated March 3, 1975 written by the appellant to the I.T.O., A-Ward, Rajkot relating to the A.Y. 1972-73, he had stated, "as per statement of U.K. sent herewith, the trustees have arrived at income of 13,027 pounds for the benefit of Sri Jyotendrasinhji. According to our opinion, this income is not taxable as U.K. trust is discretionary. However, as it has been taken last, the income may be included in the hands of Sri Jyotendrasinhji subject to our appeal". It is significant to notice the ground of non-taxability put forward in the said letter. The appellant did not say that he did not receive the income. All he said was, since it is a discretionary trust, its income is not taxable in his hands. If he had not received the income, he would have put forward that fact in the forefront. But he did not. Similarly, in the return relating to the A.Y. 1973-74, a note was appended by the appellant to the following effect:

- A "Late H.H. Maharaja Vikramsinhji of Gondal has created trusts in UK. The assessee has been informed that *income falling in the hands of the assessee is 12,627 pounds*. This is, therefore, shows as income in his return." (emphasis added). It is true that the appellant had argued before the commission that the settlor as well as himself had included the said income in their returns out of ignorance and on the basis of wrong legal advice but
- B the said explanation has not been accepted by the commission - and we must go by the findings of the commission. It is not brought to our notice that during any of the years concerned herein, did the appellant ever say that he did not receive the income from these trusts. If so, the question of law urged is of mere academic interest and need not be dealt with by us.
- C Section 5 of the Act is wide enough to bring all such income to tax.

So far as the plea of double taxation is concerned, the observation made by the Commission in that behalf is quite adequate. It has stated that in case appellant proves that any income has been taxed in U.S. or U.K., the same income shall not be taxable over again in India.

D

For the above reasons, the appeals fail and are dismissed. No costs.

V.P.R.

Appeals dismissed.