

(1989) 04 KL CK 0010

In the High Court Of Kerala

Case No : Writ Appeal No's. 280, 281, 282 and 283 of 1989 and Original
Petition No's. 8237, 8257, 8291 and 8292 of 1988

T.K. Aboobacker and Others, P. Kunhammedkutty Haji and
Others, P. Mohammed Haji and Others and E.K. Abdul Khader
and Others

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 06-04-1989

Acts Referred:

Income Tax Act, 1961 — Section 206C, 295, 44AC

Citation : (1990) 82 CTR 164 : (1989) 177 ITR 358

Hon'ble Judges : K.S. Paripoornan, J;K.A. Nayar, J

Bench : Division Bench

Advocate : S.A. Nagendran, for the Appellant; R.K. Ravindranatha Menon,
Senior Advocate and N.R.K. Nair, for the Respondent

Judgement

K.A. Nayar, J.—These writ appeals are filed against the judgment in Original Petitions Nos. 8292 of 1988, 8237 of 1988, 8291 of 1988 and 8257 of 1988 by some of the writ petitioners therein. The writ petitioners are all citizens of India doing business in timber by participating in the auctions/ sales conducted in the various forest timber depots under the control of the concerned Divisional Forest Officers who are respondents in the writ appeals. The common grievances in the writ appeals are against section 44AC and Section 206C of the Income Tax Act, 1961, introduced by the Finance Act, 1988. Section 44AC is to come into force with effect from April 1, 1989, and Section 206C came into force with effect from June 1, 1988.

2. Section 44AC, in short, provides that in the case of a buyer obtaining in any sale by way of auction, tender or any other mode, conducted by the seller the right to receive timber obtained by any mode other than under a forest lease, a sum equal to 15 per cent. of the amount paid or payable by the buyer in respect of the sale of such right or as the purchase price shall be deemed to be the profits and gains of the buyer from the business of trading in such goods as

chargeable to tax under the head "Profits and gains of business or profession". In other words, when the appellants are purchasing timber in auction, 15% of the purchase price shall be deemed to be the profits and gains of business or profession. Section 206C is the provision for deduction at source and that section provides that a person being a seller referred to in Section 44AC, shall, at the time of debiting of the amount payable by the buyer referred to in that section to the account of the buyer or at the time of receipt of such amount from the said buyer in cash or by the issue of a cheque or draft or by any other mode, collect from the buyer in respect of the sale of timber obtained by any mode other than under a forest lease, 10 per cent of the amount as Income Tax on income comprised therein. The provisions of Sections 44AC and 206C are extracted hereunder :

"44AC. Special provision for computing profits and gains from the business of trading in certain goods.--(1) Notwithstanding anything to the contrary contained in Sections 28 to 43C, in the case of an assessee, being a person other than a public sector company (hereafter in this section referred to as the buyer), obtaining in any sale by way of auction, tender or any other mode, conducted by any other person or his agent (hereafter in this section referred to as the seller),--

(a) any goods in the nature of alcoholic liquor for human consumption (other than Indian made foreign liquor), a sum equal to forty per cent of the amount paid or payable by the buyer as the purchase price in respect of such goods shall be deemed to be the profits and gains of the buyer from the business of trading in such goods chargeable to tax under the head "profits and gains of business or profession" ;

(b) the right to receive any goods of the nature specified in column (2) of the Table below, or such goods, as the case may be, a sum equal to the percentage, specified in the corresponding entry in column (3) of the said Table, of the amount paid or payable by the buyer in respect of the sale of such right or as the purchase price in respect of such goods shall be deemed to be the profits and gains of the buyer from the business of trading in such goods chargeable to tax under the head "Profits and gains of business or profession".

TABLE

Sl. No. (1) Nature of goods (2) Percentage (3)

(i) Timber obtained under a forest lease Thirty-five per cent.

(ii) Timber obtained by any mode other than under a forest lease Fifteen per cent.

(iii) Any other forest produce not being timber Thirty-five per cent.

(2) For the removal of doubts, it is hereby declared that the provisions of Sub-section (1) shall not apply to a buyer (other than a buyer who obtains any goods from any seller which is a public sector company) in the further sale of any goods

obtained under or in pursuance of the sale under Sub-section (1).

(3) In a case where the business carried on by the assessee does not consist exclusively of trading in goods to which this section applies and where separate accounts are not maintained or are not available, the amount of expenses attributable to such other business shall be an amount which bears to the total expenses of the business carried on by the assessee the same proportion as the turnover of such other business bears to the total turnover of the business carried on by the assessee,

3. Explanation.--For the purposes of this section, "seller" means the Central Government, a State Government or any local authority or corporation or authority established by or under a Central, State or Provincial Act or any company, or firm."

"206C. Profits and gains from the business of trading in alcoholic liquor, forest produce, scrap, etc.--(1) Every person, being a seller referred to in Section 44AC, shall, at the time of debiting of the amount payable by the buyer referred to in that section to the account of the buyer or at the time of receipt of such amount from the said buyer in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, collect from the buyer of any goods of the nature specified in column (2) of the Table below, a sum equal to the percentage, specified in the corresponding entry in column (3) of the said Table, of such amount as Income Tax on income comprised therein,

TABLE

Sl. No. (1) Nature of goods (2) Percentage (3)

(i) Alcoholic liquor for human consumption (other than Indian made foreign liquor) Fifteen per cent.

(ii) Timber obtained under a forest lease Fifteen per cent.

(iii) Timber obtained by any mode other than under a forest lease Ten per cent

(iv) Any other forest produce not being timber Fifteen per cent.

Provided that where the Assessing Officer, on an application made by the buyer, gives a certificate in the prescribed form that to the best of his belief any of the goods referred to in the aforesaid Table are to be utilised for the purposes of manufacturing, processing or producing articles or things and not for trading purposes, the provision of this Sub-section shall not apply so long as the certificate is in force.

(2) The power to recover tax by collection under Sub-section (1) shall be without prejudice to any other mode of recovery.

(3) Any person collecting any amount under Sub-section (1) shall pay within seven days the amount so collected to the credit of the Central Government or as the Board directs.

(4) Any amount collected in accordance with the provisions of this section and paid under Sub-section (3) shall be deemed as payment of tax on behalf of the person from whom the amount has been collected and credit shall be given to him for the amount so collected on the production of the certificate furnished under Sub-section (5) in the assessment made under this Act for the assessment year for which such income is assessable.

(5) Every person collecting tax in accordance with the provisions of this section shall, within ten days from the date of debit or receipt of the amount, furnish to the buyer to whose account such amount is debited or from whom such payment is received, a certificate to the effect that tax has been collected, and specifying the sum so collected, the rate at which the tax has been collected and such other particulars as may be prescribed.

(6) Any person responsible for collecting the tax who fails to collect the tax in accordance with the provisions of this section, shall, notwithstanding such failure, be liable to pay the tax to the credit of the Central Government in accordance with the provisions of Sub-section (3).

(7) Without prejudice to the provisions of Sub-section (6), if the seller does not collect the tax or after collecting the tax fails to pay it as required under this section, he shall be liable to pay simple interest at the rate of two per cent. per month or part thereof on the amount of such tax from the date on which such tax was collectible to the date on which the tax was actually paid.

(8) Where the tax has not been paid as aforesaid, after it is collected, the amount of the tax together with the amount of simple interest thereon referred to in Sub-section (7) shall be a charge upon all the assets of the seller."

4. Section 44AC was introduced into the Income Tax Act, 1961, for computing the income chargeable to tax under the head "Profits and gains of business" and Section 206C was introduced for providing collection of tax at source at the time of purchase of any goods specified in Section 44AC. The object of these new provisions is for working out the profits on a presumptive basis to get over the problems in assessing the income and recovering the tax in the case of persons dealing in timber, forest produce etc. It is noted that a large number of such persons either do not maintain any books of account or the books maintained are irregular or incomplete. Further, locating such persons after the contract or agreement also became impossible in many cases. Tax collection from those persons was also found to be extremely difficult by the Department. Therefore, Sections 44AC and 206C were enacted providing for an easy method of assessment of income and recovery of tax in such cases. There have been certain safeguards and limitations made in the sections. The provisions of the section will apply only in respect of goods obtained from a seller as defined, in the Explanation to Sub-section (3) of Section 44AC of the Income Tax Act. "Seller", according to that Explanation, means the Central Government, a State Government or any local authority or Corporation or authority established by or

under a Central, State or Provincial Act, or any company or firm. A buyer who obtains goods in the course of a second sale, except where such a sale is made by a public sector company, will not come within the purview of the section. Thus, it is explained by the Central Board of Direct Taxes circulars that if A buys logs of timber from B who had purchased the same at an auction, then the provisions of Section 44AC of the Income Tax Act will apply only to B and not to A but if B is a public sector company, then buyer A will be liable to have his income "determined on a presumptive basis in accordance with the provisions of Section 44AC. Section 44AC, it will be seen, will apply only to persons engaged in the trading of goods referred to therein. It will not apply to cases where goods purchased by a buyer are utilised for the purpose of manufacturing, processing or producing any article or thing, Similarly, if the goods purchased are destroyed or lost subsequently, there would not be any occasion for trading in such goods and, therefore, the tax collected u/s 206C would have to be refunded. Section 206C also ensures that no tax will be collected at source from the buyer who purchases goods for the purpose of manufacturing, processing or producing any article. If a buyer, on an application made by him, obtains a certificate from the Assessing Officer and furnishes the same to the seller that the goods to be purchased are to be utilised for carrying on any of the activities referred to in the section, no tax need be paid u/s 206C of the Act. The presumptive rates of profits specified in respect of different commodities in Section 44AC of the Income Tax Act for determining the income chargeable to tax will be applied to the amount paid or payable by the buyer as the purchase price in respect of such goods. The purchase price for the purpose will be the cost of the commodity inclusive of any excise duty, sales tax or any other levy, whatever its nomenclature, paid for by the buyer for obtaining the goods. The purchase price will not however include any freight or transportation charges. The rate of profit will be applicable only for determining the income chargeable to tax under the head "Profits and gains of business or profession". The "seller" referred to in Section 44AC has to collect the tax at source from the buyer as required by the provisions of Section 206C and the collection of tax at source has to be made at the time when the seller debits the amount payable by the buyer or at the time of receipt of such amount. The amount collected by the seller shall be deposited in the account of the Central Government within seven days of the date of collection. The seller has to furnish to the buyer a certificate within ten days of the date of collection of tax stating the rate at which the tax has been collected and such other particulars as have been prescribed in Form 27D of the Income Tax Rules, 1962. The credit for the tax so collected will be given to the buyer at the time of his assessment and if the seller responsible for collecting the tax failed to do so, he will be liable to pay the tax credited with the Central Government within seven days of receipt of collection which will be the date of debiting the amount of the buyer or at the time of receipt of such amount, whichever is earlier. If the seller does not collect the tax or after collecting the same fails to pay it for crediting with the Central Government, he will be liable to pay simple interest at the rate of 2% per month. These are the guidelines given

by way of Central Board of Direct Taxes Circulars.

5. Even though the writ appellants raised several contentions in the writ petitions and repeated the same in the memoranda of writ appeals, only one ground is pressed before us at the time of admission, and we think rightly too, and that is the ground of legislative competency. The contention is that the tax is fixed at a percentage of the purchase price of the commodities and, therefore, the tax really is not on income but on purchase price. The sales tax cannot be levied, assessed or collected by the Union. In short, the question raised is on the legislative competence of the Union to levy the tax on these commodities.

6. The constitutional entry is entry 82 of List I to the Seventh Schedule which reads :

"Taxes on income other than agricultural income".

7. It is well-settled that the entries in the Lists are not powers of legislation but only fields or legislative heads and designed to define and to delimit the respective areas of legislative competence of the State and Union legislatures. The language of the entries will have to be given the widest scope and in interpreting the entry, it would not be reasonable to import any limitation by comparing or contrasting it with any other entry in the same list. Normally, the constitutionality will have to be presumed in interpreting the enactment, as stated by P. H. Lane, learned author of Australian Federal System, 2nd Edn., at pp. 106 and 107 :

"In testing the validity of a law, it is required to-

(i) scrutinize the very terms of the challenged law, its specific provisions and the law as a whole ; and

(ii) ascertain from these terms the precise and immediate impact of the law, what kind of control or restriction is exerted by the law in the realm of rights and duties.

8. Parliament has, *prima facie*, power to tax whom it chooses, power to exempt whom it chooses, power to impose such conditions as to liability or as to exemption as it chooses.

9. The power to tax is the one great power upon which the whole national fabric is based ... It is not only the power to destroy, but it is also the power to keep alive."

10. Therefore, in order to determine whether a tax was within the legislative competence of the legislature which imposed the tax, it is necessary to determine the nature of the tax. Section 4 of the Income Tax Act is the charging section which provides for a charge in respect of the total income of the previous year. And the total income is defined in Section 5 as the income of the previous year of a person from whatever source derived which is received or is deemed to be received or accrued or deemed to be accrued. For the purposes of charge of

Income Tax and computation of total income, all incomes have been classified under the heads mentioned in Section 14 and one such head is "Profits and gains of business or profession". It is under the head "Profits and gains of business or profession" that Section 44AC was introduced to deem a percentage of the amount payable for the purchase of timber by the assessee engaged in timber trade as his income from business. Whether that can be done is the question which has been answered already in *Bhagwan Dass Jain Vs. Union of India (UOI) and Others*, . It is noted with approval in that case the decision in *Resch v. Federal Commissioner of Taxation* [1942] 66 CLR 198 and the observation of Dixon J. of the High Court of Australia at page 224, as under :

"The subject of the Income Tax has not been regarded as income in the restricted sense which contrasts gains of the nature of income with capital gains, or actual receipts with increases of assets or wealth. The subject has rather been regarded as the substantial gains of persons or enterprises considered over intervals of time and ascertained or estimated by standards appearing sufficiently just, but nevertheless practical and sometimes concerned with avoidance or evasion more than with accuracy or precision of estimation. To include the annual value of the taxpayer's residence owned by himself or used rent-free and to fix it at five per cent. of the capital value has not been considered to introduce a new subject (*Harding's case* [1917] 23 CLR 119). To treat part of the undistributed profits earned during the current year as part of the assessable income of the shareholder imports no new subject (*Cornell's case* [1920] 29 CLR 39 ; *Kellow-Falkiner Pty. Ltd. v. Federal Commissioner of Taxation* [1928] 34 Aus LR 276), nor does it to substitute in the case of a foreign-controlled business, for taxable income ordinarily calculated a percentage of gross receipts fixed by the discretionary judgment of the Commissioner (*British Imperial Oil Cases* [1925] 35 CLR 422."

11. The above observation clearly lays down that income can be calculated at a percentage of gross receipts of any assessee. It is held in that case that even in its ordinary economic sense, the expression "income" includes not merely what is received or what comes in by exploiting the use of a property but also what one saves by using it oneself. That which can be converted into income can be reasonably regarded as giving rise to income.

12. Section 295 of the Income Tax Act is the rule-making power. In exercise of such power, a rule has been made in the case of income received from tea. 40% of the total income will be considered as profits and gains chargeable under the Income Tax Act and the rest, under the Agricultural Income Tax Act. Such a fixation was considered not objectionable under the Income Tax Act. If that be so, considering 15% of the total purchase price as income from business cannot be considered unconstitutional. The section relates to computation of the total income in the case of persons who are doing certain business. The entry under which the amendment is justified is "Taxes on income". It would embrace any profits or gains not only actually received but also income which is supposed by

the legislature to have notionally accrued (See *Bhagwan Dass Jain Vs. Union of India (UOI) and Others*, --paragraph 14 and *Commissioner of Income Tax/excess Profits Tax, Bombay City Vs. Bhogilal Laherchand*,). What can be converted into income also will come within the meaning of the word "income" in the entry. The entry is wide enough to confer power to prevent evasion of Income Tax also. Resort to fiction is of course permissible where it is necessary to deal with a device avoiding legitimate tax. The purchasers in all cases are traders carrying on business in a particular trade and what the assessee pays by way of purchase price is the amount invested in the business, namely, stock-in-trade. Since the tax is only on the traders, it is presumed by the legislature that a certain percentage of that purchase price will be treated as income. What he purchases is of course for re-sale in business and on re-sale it will normally be presumed that a larger sum than the purchase price paid by the assessee will be realised and, therefore, deeming a portion of the purchase price as income will not snap the nexus with the income mentioned in the entry. The Supreme Court held that for taxing law, whether it is taken as a measure of evading tax liability on income or taxing shareholders on the basis of the accumulated profits of the company, the distribution of its profits is deliberately withheld to avoid taxation as dividends will be within the competence of entry 82 of List I of the Seventh Schedule (See *Balaji v. ITO* [1962] 43 ITR 393). In considering the question as to whether a particular item in the possession of a citizen can be regarded as his income or not, it would be inappropriate to apply the test traditionally prescribed by the Income Tax Act as such. Having regard to the fact that the Legislature was aware of the nature of the trade and the difficulty in assessing and collecting the tax, it will be competent to the Legislature to devise a fiction for treating a percentage of the purchase price paid by the assessee as income coming under the head "Profits and gains". Therefore, it cannot be stated that the legislature has travelled beyond the legislative field assigned to it by entry 82 in List I (See *Navnitlal C. Javeri Vs. K.K. Sen*, Appellate Assistant Commissioner of Income Tax, "D" Range, Bombay,).

13. We, therefore, find no substance in the contention of the appellants. All the writ appeals are dismissed.