WWW.TAXSCAN.IN- Simplifying Tax Laws

IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.193/Coch/2016 : Asst.Year 2007-2008

M/s.Abad Trust C/o.Kaimal & Co. CAs 8/1365, T.D.East Road Mattancherry Kochi – 682 002. **PAN : AABTA7594G.**	Vs.	The Asst.Director of Income-tax (Exemption) Kochi.
(Appellant)		(Respondent)

Appellant by : Sri.P.K.Sasidharan, CA
Respondent by : Smt.Swapna Nanu Ambat, Adl.CIT-DR

Date of Hearing : 10.04.2018		**Date of Pronouncement : 19.04.2018**

O R D E R

Per George George K., JM

This appeal at the instance of the assessee is directed against the order of the Commissioner of Income-tax dated 29.02.2015. The relevant assessment year is 2007-2008.

2. The grounds raised read as follows:-

"1. The order of the Commissioner of Income Tax (Appeals) is bad in law and opposed to facts and circumstances of the case to the extent objected to hereunder.

2. The Commissioner of Income Tax (Appeals) has gone wrong in holding that the reopening of the assessment is valid.

WWW.TAXSCAN.IN- Simplifying Tax Laws

3. The Commissioner of Income Tax (Appeals) has failed in not adjudicating the ground regarding the jurisdiction of the Assistant Director of Income Tax (Exemption) to assess the Trust.

4. Since the assessment was completed u/s. 143(3) accepting the claim u/s.166 that the income is not assessable in the hands of the Trust, the observation that exemption was originally claimed u/s.26 is merely a change of opinion and this does not justify the reopening of the assessment.

5. The finding of the Commissioner of Income Tax (Appeals) that the income is assessable in the hands of the Trust is against the provision of the section 166.The Commissioner of Income Tax (Appeals) ought to have held that the income of the beneficiaries only can be assessed in the hands of the Trust in the capacity of representative assessee.

6. The Commissioner of Income Tax (Appeals) has gone wrong in not giving a clear finding on the ground regarding levy of interest u/s.234B & 234C and in respect of granting of interest u/s.244A.

7. For these and other grounds that may be permitted to be adduced at the time of hearing of the case, it is prayed that the orders of the lower authorities may be ordered to be modified to the extent prayed for in the appeal."

3. The brief facts of the case are as follows:-

3.1 The assessee is a family trust with 14 beneficiaries having equal shares. The return of income for assessment year 2007-2008 was filed on 31.07.2007 declaring `nil' income. During the previous year relevant to the assessment year the assessee was in receipt of only rental income

WWW.TAXSCAN.IN- Simplifying Tax Laws

amounting to Rs.67,14,805. The assessment was completed u/s 143(3) of the I.T.Act vide order dated 22.10.2008 accepting `nil' income. Subsequently, the assessment was reopened u/s 147 and in response notice u/s 148 of the I.T.Act, the assessee filed return on 20.04.2012 declaring `nil' income. The assessment u/s 143(3) r.w.s. 147 was completed on 06.02.2013 in the status of an AOP arriving at a total income of Rs.67,14,805 and the tax was computed at the maximum marginal rate. The Assessing Officer held the trust property belongs to the trust and not that of the beneficiaries and the shares of the beneficiaries though definite in the trust, they are not the co-owners of the trust property. Hence it was concluded by the A.O. that the rental income is to be assessed in the hands of the assessee-trust at the maximum marginal rate. The relevant observation of the A.O. while completing the reassessment, reads as follows:-

> *"As per section 26, where property ..... .is owned by two or more persons and their respective shares are definite and ascertainable such persons shall not in respect of such property be assessed as an Association of Persons, but the share of each such person in the income from the property as computed in accordance with sections 22 to 25 shall be included in his total income. Here the beneficiaries shares are definite but they are not co-owners. The property is owned by the Trust. The authorized representative did not raise specific contentions against this observation but stated that some of the beneficiaries have yet not chosen to file their returns for the assessment year 2007-08 and hence no refund has been claimed by them."*

4. Aggrieved by the order of reassessment, the assessee preferred an appeal to the first appellate authority. The

WWW.TAXSCAN.IN- Simplifying Tax Laws

assessee challenged the reopening of assessment, as not valid. On merits, it was submitted that the income of the beneficiaries only can be assessed in the hands of the trust in a capacity of a representative assessee. Further, it was submitted before the CIT(A) that the shares of the beneficiaries being determinative and the assessee-trust was having only income from house property, income of trust cannot be assessed at the maximum marginal rate but only at the normal rate. The CIT(A), however, dismissed the assessee's claim that the reopening of assessment as not legal. On merits, the CIT(A) held that the income of the trust was not to be liable for tax at the maximum marginal rate but only normal rate applicable to an AOP. However, the claim for determining tax as a representative assessee of the beneficiaries was rejected by the CIT(A), and he confirmed the action of the A.O. in taxing the rental income in the hands of the assessee-trust.

5. Aggrieved by the order of the CIT(A), affirming the A.O.'s view to tax the rental income in the hands of the assessee-trust, the assessee has filed the present appeal before the Tribunal.

5.1 The learned Counsel for the assessee submitted that the trust as such cannot be assessed to tax. It was submitted that separate assessments for each beneficiary has to be framed on the trustee as the representative assessee. It was contended that the tax to be paid by each beneficiary has to

WWW.TAXSCAN.IN- Simplifying Tax Laws

be paid by the trustee from the funds of the trust and debited to the accounts of the beneficiaries. It was submitted by the learned AR that the assets of the trust are held by the trustees not as an owner of the same, but as the trusted person for and on behalf of the beneficiaries who are the actual / real owner of the assets of the trust. Therefore, it was submitted that the observation of the A.O. that the trust is the legal owner of the assets of the trust is against the legal position. In support of the above submission, the learned AR had referred to section 3 of Indian Trust Act, 1882. The learned AR also referred to the judgment of the Hon'ble Apex Court in the case of CWT v. Trustees of NEH Nizam's family Trust [108 ITR 555]. It was contended by the learned AR, by referring to the Hon'ble Apex Court judgment that the amount of tax payable would be the same as that payable by each beneficiary in respect of his income, as if the beneficiaries were assessed directly. It was further submitted by the learned AR that by virtue of clause (iv) of section 161(1), the Assessing Officer ought to have worked out the share of each beneficiaries and separate assessments ought to have been made on each beneficiaries in the hands of the trustees. As regards the reopening of the assessment, it was submitted that the present stand of the Assessing Officer is only a mere change of opinion without any legal backing and hence the reopening cannot be held to be valid. It was submitted that the beneficiaries are the co-owners of the property and the assessment was completed u/s 143(3) in accordance with the provisions of section 26 of the I.T.Act. Therefore, there was no

WWW.TAXSCAN.IN- Simplifying Tax Laws

escapement of income, warranting issuance of notice u/s 148 of the I.T.Act.

5.2 The learned Departmental Representative present supported the order of the Assessing Officer and the CIT(A).

6. We have heard the rival submissions and perused the material on record. The assessment originally completed on 22.10.2009 was reopened as per the notice issued u/s 148 of the I.T.Act on 28.03.2012. The reasoning for issuing notice u/s 148 of the I.T.Act was that the property in question was owned by the trust and not by the beneficiaries, therefore, the provisions of section 26 of the I.T.Act does not have application. Section 26 of the I.T.Act reads as follows:-

> *"Whether property consisting of buildings or buildings and land appurtenant thereto is owned by two or more persons and their respective shares are definite and ascertainable, such persons shall not in respect of such property be assessed as an association of persons, but the share of each such person in the income from the property as computed in accordance with sections 22 to 25 shall be included in his total income.*
>
> *For the purposes of this section, in applying the provisions of sub-section (2) of section 23 for computing the share of each such person as is referred to in this section, such share shall be computed, as if each such person is individually entitled to the relief provided in that sub-section."*

6.1 According to the above provision, where a building and land appurtenant thereto are owned by two or more persons

and respective shares are definite and ascertainable, the share of each of such person's shall be computed in accordance with sections 22 to 25, and be included in the total income of such persons individually. In other words, if the co-owner's share in a property is ascertainable, the co-owner's shall not be assessed as A.O.P. The A.O. held that the beneficiaries of the Trust are not the owners of the property and hence the share of the benefit cannot be assessed in the hands of the beneficiaries. To examine whether the A.O.'s view is correct, we need to be looked into what is the inter se relationship between the trust, beneficiaries and the trustees. The Income Tax Act does not define a "Trust". The dictionary meaning of a Trust is " *legal arrangement in which a person or organization controls the property and or money for the benefit of another person or organization*" .The assets of the Trust are held by the Trust not as he owner of the same but as trusted persons for and on behalf of the beneficiaries (the real owners) and the role of the Trustee is to see that the assets and income of the trust are divided and distributed among the beneficiaries, in the manner in which the trustees are authorized by the settler. In other words the trustees or the trust have no ownership of the properties of the Trust. It is only the beneficiaries who are the joint owners of the assets of the trust.

6.2 As per section 3 of Indian Trust Act 1882, the definition of the trust is as follows:-

WWW.TAXSCAN.IN- Simplifying Tax Laws

> *"A Trust is an obligation annexed to the ownership of the property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner" Trivia: this definition has never been amended since its inception."*

6.3 From the above definition it is clear that the beneficiaries are the owners of the property of the trust and the trustees have only the duty and responsibility to manage the same in accordance with the power granted to the trustees by the Trust deed. When the beneficiaries become the joint owners' section 26 of the Income Tax Act, comes into play and mandates the assessment of the beneficiaries shares in their respective hands. The Hon'ble Bombay High Court in the case of *Bhavna Nalinkant Nanavati v. CIT [(2002) 255 ITR 529 (Bom.)]*, after referring to section 3 of the Trust Act held that beneficiaries are the real / actual owner of the trust property. The relevant findings of the Hon'ble Bombay High Court at page 538 and 539 reads as follows:-

> *"It is true that the legal title to the trust property stands transferred by the assessee to the trustees, but that has no effect of creating any interest in the trust property in favour of the trustees. It is not possible to hold that the right which a beneficiary gets under the trust is de hors the interest in the trust property. If that were so a beneficiary would never be liable to wealth-tax. The fundamental rights attributed to ownership would be the right to possess, enjoy and transfer the property or its income. In law the trustee has no power to either enjoy property or its income or transfer the property for his own benefit. Though he undoubtedly comes into possession of the property, the possession is for*

WWW.TAXSCAN.IN- Simplifying Tax Laws

the benefit of another, i.e., the beneficiary. The trust is, thus seen, merely a conduit pipe or a vehicle by means of which the donor passes on the interest which the donor had in the trust property in favour of the beneficiary. The effect is that a trust is a gift of trust property or interest in the trust property to the beneficiary.

The apex court was called upon to deal in the case of State Bank of India v. Special Secretary Land [1995] Suppl 4 SCC 30, with a situation where the State Bank of India was executor/trustee of certain properties under wills of individuals who were owners of the said properties. Some of the properties were vacant lands. A question arose as to whether the provisions of the Urban Land (Ceiling and Regulation) Act, 1976, could be applicable or not and whether exemption under section 19 of the said Act would be available to the bank in relation to land of such private trusts. Dealing with the provisions of the Trusts Act and its interaction with the provisions of the Land Ceiling Act as well as the State Bank of India Act, the court held that (page 36) :

"7. 'Vacant land held' under section 19 of the Act by the State Bank of India must be vacant land owned or possessed as owner thereof because of the definition clause (l) of section 2 of the Act. However, it is difficult for us to think that such owning or possessing as owner of the vacant land by the State Bank of India, could be regarded as referable to any land other than that vacant land to be owned or acquired by it under sub-section (6) of section 34 of the State Bank of India Act for the purpose of providing buildings or other accommodation in which to carry on the business of the State or for providing residences for its officers and other employees. It is equally difficult for us to think that the vacant land held, that is, owned or possessed as owner by any other bank specified in section 19 of the Act is not its owner with all the rights of ownership including the right of disposal vested in it. Therefore, when the

WWW.TAXSCAN.IN- Simplifying Tax Laws

> *bank holds the trust properties in due course of executing and administering the trust for the benefit of beneficiaries, it does not hold such property 'as the owner' or 'possess as owner' envisaged under the Act. In our considered view, no bank holds trust properties as owner envisaged under section 19 of the Act or possess vacant land as envisaged under section 19 of the Act. Thus, a bank even though regarded under Trusts Act as the owner of trust property vacant land for the purpose of executing or administering a trust, it cannot hold a trust property-vacant land as its owner or possessed as owner as could make that land eligible for the benefit of exemption envisaged under section 19 of the Act. . ."*
>
> *Applying the aforesaid ratio, though the trustees stand possessed of the trust property, the same is only for its administration and the beneficial ownership of the settlor remains with her as the sole beneficiary. Thus, there is no liability to gift-tax."*

6.4 Now let us examine the scheme of the assessment of income of private trust as laid out in various provisions of the I.T.Act. In respect of any income which a trustee receives or is entitled to receive on behalf or for the benefit of any person, the trustee would be considered as a representative assessee in terms of the provisions of section 160(1)(iv) of the Act. In terms of section 161(1) of the Act, every representative assessee, as regards the income in respect of which he is a representative assessee, shall be subject to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially, and shall be liable to assessment in his own name in respect of that income ; but any such assessment shall be deemed to be made upon him in his representative capacity only, and the

WWW.TAXSCAN.IN- Simplifying Tax Laws

tax shall, subject to the other provisions contained in this Chapter, be levied upon and recovered from him in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him. To the above rule laid down in section 161(1) of the Act, there are three exceptions. They are :

(a) Under section 161(1A), this rule of apportionment and determination of proportionate tax attributable to the beneficiary will not apply to any income earned by the trustee as profits and gains of a business. The whole of such income shall be taxed at the "maximum marginal rate". A similar proviso occurs also in section 164(1) restricting benefits where business income is involved.

(b) Under section 164(1), if the individual shares of the persons on whose behalf and for whose benefit the income is receivable are in determinate or unknown, such income, again, will be taxed at the "maximum marginal rate".

(c) In certain other circumstances, set out in the proviso to section 164(1), the relevant income will be assessable not at the maximum rate but at the rate applicable to it as if it were the total income of an association of persons.

6.5 Section 166 of the I.T.Act provides that the provisions relating to making assessment in the hands of a representative assessee, income of person on whose behalf or

WWW.TAXSCAN.IN- Simplifying Tax Laws

for whose benefit income is received or receivable by the representative assessee, shall not prevent either the direct assessment of the person on whose behalf or for whose benefit income therein referred to is receivable, or the recovery from such person of the tax payable in respect of such income.

6.6 Under section 61 of the Act *"all income arising to any person by virtue of a revocable transfer of assets shall be chargeable to Income-tax as the income of the transferor and shall be included in his total income".* Section 62 of the Act provides that if a transfer is irrevocable for a specified period than section 61 will not apply. Section 63 defines as to what is "transfer" and "revocable transfer" for the purposes of sections 60, 61 and 62 of the Act. It provides that : (a) a transfer shall be deemed to be revocable if— (i) it contains any provision 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 reassume power directly or indirectly over the whole or any part of the income or assets ; (b) "transfer" includes any settlement, trust, covenant, agreement or arrangement.

6.7 In the instant case, admittedly, the only source of income of the assessee-trust is income of the house property, therefore, section 161(1A) of the I.T.Act and proviso to section 164(1) of the I.T.Act is not applicable. Moreover, as mentioned earlier, since the beneficiaries are actual / real owners of the property, the share of the beneficiaries are also determined

WWW.TAXSCAN.IN- Simplifying Tax Laws

and this fact is also acknowledged by the CIT(A) at para 8.4 of the impugned order.

6.8 Section 161 of the I.T.Act, as stated in earlier paragraph, encompasses the liability of a representative assessee in relation to a trust. The said section reads as follows:

> *"Every representative assessee, as regards the income in respect of which he is a representative assessee, shall be subject to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially, and shall be liable to assessment in his own name in respect of that income; but any such assessment shall be deemed to be made upon him in his representative capacity only, and the tax shall, subject to the other provisions contained in this Chapter, be levied upon and recovered from him in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him."*
>
> *(emphasis given by us)*

6.9 Section 161 suggests that a representative assessee shall be subject to same duties and responsibilities as that of the identifiable beneficiaries of a trust. In other words, the share of income from the trust which devolves on the beneficiary is to treated as if it were the income of the beneficiary. This reiterates the language of the law which uses the terms in like manner and to the same extent. In the regard, the Apex court in the case of CIT v. Trustees of H.E.H. Nizam's Family (Remainder Wealth) Trust [1977) 108 ITR 555 had adjudged the case considering provisions of section 21 (1) of the Wealth-

WWW.TAXSCAN.IN- Simplifying Tax Laws

tax Act, 1957. This section is akin to section 161(1) of the Act. It held that - *Section 21 makes a special provision for assessment of a trustee of a trust. Therefore, whenever assessment is made on a trustee, it must be made in accordance with the provisions of section. Every case of assessment of a trust must necessarily fall under section 21 and a trustee cannot be assessed apart from and without a reference to the provisions of that section. Section 21(4) of the 1957 Act is analogous to section 164 of the 1961 Act. Analysing section 21(1) and 21(4), the Supreme Court observed that the provisions of the Act are similar to those of the Act.* Hence, by a parity of reasoning, whenever an assessment is made on trustees under the Act, section 161(1) is necessarily attracted. In other words, under section 161 the tax shall be levied upon and recovered from a trustee in a like manner and to the same extent as it would be leviable and recoverable from the person represented by him. Thus, income which comes to the share of a beneficiary has to be assessed as if it were the income of the beneficiary, and tax has to be levied accordingly:

6.10 The High Court of Bombay in CIT v. Marsons Beneficiary Trust [1991] 188 ITR 224 (Bombay) concluded that- *In the applications which are before us, the shares of the beneficiaries in the trust income are known and determinate. There can, therefore, be no question of section 164 being attracted. Looking to section 161 (1) and the decisions of our High Court and the Supreme Court, the income of the trust, whether it is business income or any other income, will, therefore, have to be treated*

as if it were distributed to the beneficiaries. Tax on the share of each beneficiary will have to be separately calculated as if it formed a part of the beneficiary's income. Tax payable by the trustees will be the sum total of tax so calculated on the share of each beneficiary. In fact, under section 166 the revenue has the option to assess the beneficiary directly. This does not make any difference to the quantum of tax which is liable to be paid. But the income cannot be taxed in the hands of the trustees as one unit under section 161(1)."

6.11 In the case of *CIT v. T.A.V.Trust [(2003) 264 ITR 52 (Ker.),* the Hon'ble Kerala High Cout was considering a case where assessee-trust was having business income as well as rental income from the building owned by the trust. The assessee-trust had claimed deduction of rental income. The A.O. however disallowed the claim of the assessee holding that the building in question was asset of the trust and the income there from has to be assessed in the hands of the trust. The A.O. accordingly treated the assessee-trust as a representative-assessee u/s 161(1A) of the I.T.Act and tax was charged on the whole income at the maximum marginal rate. In appeal, the CIT(A) allowed the appeal of the assessee. The ITAT confirmed the view taken by the CIT(A). The Revenue being aggrieved, filed reference application raising the following question of law:-

> *"Whether, on the facts and in the circumstances of the case and also in view of the provision contained in section 161(1A) of the Income-tax Act, the Tribunal*

WWW.TAXSCAN.IN- Simplifying Tax Laws

is right in law and fact in holding that the income from the trust properties has to be assessed in the hands of the beneficiaries ?"

6.12 The Hon'ble High Court answered the above question in affirmative that is in favour of the assessee. The Hon'ble jurisdictional High Court held that the beneficiaries are the real / actual owners and provisions of section 161(1A) have application only to the business income alone. The relevant finding of the Hon'ble jurisdictional High Court reads as follows:-

"The provisions of section 161(1) of the Act are similar to section 21(1) and (2) of the Wealth-tax Act. The Supreme Court in CWT v. Trustees of H. E. H. Nizam's Family (Remainder Wealth) Trust [1977] 108 ITR 555 also held that : "the consequences of the provisions in section 21(1) of the Wealth-tax Act is that the trustee is assessable 'in the like manner and to the same extent' as the beneficiaries. In the first place, there would have to be as many assessments on the trustee as there are beneficiaries with determinate and known shares, though for the sake of convenience, there may be only one assessment order specifying separately the tax due in respect of the wealth of each beneficiary. Secondly, the assessment of the trustee would have to be made in the same status as that of the beneficiary whose interest is sought to be taxed in the hands of the trustee. And, lastly, the amount of tax payable by the trustee would be the same as that payable by each beneficiary in respect of his beneficial interest, if he were assessed directly." It was also held that no part of the corpus of the trust properties can be assessed in the hands of the trustee. In view of the above, the reason stated by the Assessing Officer that the beneficiaries are not the owners of the building cannot be sustained. Hence, by applying the dictum

WWW.TAXSCAN.IN- Simplifying Tax Laws

laid down by this court in Thiruvenkata Reddiar's case [1981] 128 ITR 689 and by the Supreme Court in Trustees of H. E. H. Nizam's Trust's case [1977] 108 ITR 555 about the asset in question to the extent to which the beneficiary has a beneficial interest therein has to be deemed to be held by the beneficiary.

The position under section 161(1) of the Act is that a trustee under a trust cannot be assessed on the aggregate income received by it as a single unit. The assessment in the name of the trustee in terms of the sub-section can be made in two ways. The Assessing Officer may make as many assessments in the name of the trustee as there are beneficiaries and levy the tax appropriate to such income at the rate of tax applicable to total income of each beneficiary. The assessing authority, in the alternative, can make a single assessment on the trustee, but has to indicate in the order the share income of each beneficiary and tax attributable to it. Section 161(1A) is an exception to the above rule. Under section 161(1A) this rule of apportionment and determination of proportionate tax attributable to the beneficiary will not apply to any income earned by the trustee as profits and gains of a business. The whole of such income shall be taxed at the maximum marginal rate. A similar proviso occurs in section 161(1) restricting the benefits where business income is involved. Under section 164(1) if the individual shares of the persons on whose behalf and for whose benefit the income is receivable are indeterminate or unknown, such income, gain, will be taxed at the maximum marginal rate. In certain other circumstances, set out in the proviso to section 164(1), the relevant income will be assessable not at the maximum rate but at the rate applicable to it as if it were the total income of an association of persons. These are the only three exceptions to the rule in section 161(1) of the Act. Section 161 treats the assessee as having representative character. The assessment on the trustee is to be in like manner and to the same extent as if it were made on the

WWW.TAXSCAN.IN- Simplifying Tax Laws

beneficiary himself directly. The practical effect of this provision is to render the assessment of the trustee and the beneficiary identical in every respect. It was also held that in a case where the trustee received income by way of dividend, interest or capital gains, it cannot but be treated as dividend, interest or capital gains, respectively, in the representative assessment which is to be made on the trustee. The Authority for Advance Rulings in Advance Ruling P. No. 10 of 1996, In re [1997] 224 ITR 473 considered the scope of section 161(1A) of the Act and observed at page 541 thus, "It is true that section 161(1A) provides for a tax at the maximum rate on the income from business in the hands of a trust." To the same effect is the observation made at page 510 under exception (a).

Thus by virtue of the provisions of section 161(1) of the Act income from property received by the trust cannot but be treated as income from property in the representative assessment which has to be made on the trustee. This is so, notwithstanding the fact that the trust in which the appellant is a beneficiary is having income from profits and gains of business. In the case of a trust which is having income from business as well as income from house property, by virtue of the provisions of section 161(1A) of the Act, the income from the business earned by the trust shall be taxed at the maximum marginal rate treating it as a single unit and the income from house property has to be assessed in the hands of the trustee in the manner provided in section 161(1) of the Act. This intention of the Legislature is evident from the Statement of Objects and Reasons for the insertion of section 161(1A) of the Act vide the memorandum explaining the provisions of the Finance Bill (see [1984] 146 ITR (St.) 166), as also from the circular issued by the Central Board of Direct Taxes mentioned above.

The stand of the Department is that by virtue of the provisions contained in section 161(1A) of the Act, in

WWW.TAXSCAN.IN- Simplifying Tax Laws

a case where a trust is having income by way of profits and gains of business, income from property, income from interest, income from dividend and also income from capital gains, the entire income so received has to be treated as one and tax has to be levied at the maximum marginal rate. This according to us, is against the very scheme of the Act as also beyond the scope of section 161(1A) of the Act. If we accept the stand taken by the Department, it will result in arbitrariness and discrimination attracting article 14 of the Constitution also. The effect would be that a trust which is not having income by way of profits and gains of business but income under other heads will be entitled to the benefit of section 161(1), while a trust which is having income by way of profits and gains of business and also the income falling under other heads of income is being treated differently with a higher burden to the trust, which will amount to clear discrimination. That apart under the scheme of the Act, under section 14 of the Act, all income, for the purpose of charge of income-tax and computation of total income, is classified under different heads, salaries, income from house property, profits and gains of business, etc., and income from other sources. For each head of income separate computation provisions are also made. So far as the income from house property is concerned, sections 22 to 27 are provided. Section 26 of the Act deals with the property owned by the co-owners.

Now reverting to section 161(1A) of the Act it must be noted the sub- section (1A) only says, "notwithstanding anything contained in sub-section (1)" : in other words, it does not say "notwithstanding anything contained in this Act". Thus, though the provisions of sub-section (1A) override the provisions of sub-section (1) of section 161, it does not have the effect of overriding the provisions of section 26 of the Act and consequently computation of the income from house property has to be made under sections 22 to 25 of the Act since the Tribunal had entered a categorical finding that the shares of the beneficiaries

WWW.TAXSCAN.IN- Simplifying Tax Laws

> *are definite. As already noted, as per sub-section (1A), where any income in respect of which a representative assessee is liable consists of, or includes, income by way of profits or gains of business, tax shall be charged on the whole of the income in respect of which such person is so liable at the maximum rate. The income so liable referred to in the said sub-section is only the business income of the trust and not any other income. It is only the income by way of profits and gains of business that can be charged at the maximum marginal rate. Any other interpretation, according to us, is against the very scheme of the Act and further such an interpretation will make the provisions of sub-section (1A) of section 161 unconstitutional. It is a well settled position that if two constructions of a statute are possible, one of which would make it intra vires and the other ultra vires, the court must lean to that construction which would make the operation of the section intra vires (Johri Mal v. Director of Consolidation of Holdings, AIR 1967 SC 1568).*
>
> *We accordingly answer the question referred in the affirmative that is in favour of the assessee and against the Revenue."*

6.13 In view of the aforesaid reasoning and the judicial pronouncements cited supra, we hold that there has to be as many assessments on the trustee as there are beneficiaries with determinate and known shares, though for the sake of convenience, there may be only one assessment order specifying separately the tax due in respect of the income of each beneficiary. In other words, tax on the share of each beneficiary will have to be separately calculated as if it formed a part of the beneficiary's income. Tax payable by the Trust will be the sum total of the tax calculated on the share of each

WWW.TAXSCAN.IN- Simplifying Tax Laws

beneficiary. With these directions, we set aside the re-assessment order to the file of the Assessing Officer for reframing the assessment. It is ordered accordingly.

7. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced on this 19th day of April, 2018.

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Sd/-
(George George K.)
JUDICIAL MEMBER

Cochin ; Dated : 19th April, 2018.
Devdas*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT (Exemption)Kochi.
4. The CIT(Appeals)-III, Kochi.
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin