IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI SPECIAL BENCH 'L' MUMBAI

BEFORE SHRI VIMAL GANDHI, HON'BLE PRESIDENT,
SHRI N.V. VASUDEVAN, JUDICIAL MEMBER AND
SHRI J. SUDHAKAR REDDY, ACCOUNTANT MEMBER

ITA NO. 2965/M/06 to ITA NO.2968/M/06
ASSTT. YEARS: 1998-99 to 2002-03

J.M. Baxi & Co., As agents of M/s Thoresen Chartering Singapore Pte. Ltd. 16, Bank Street, P.O.Box No.731, Fort, Mumbai 400 001	Vs	Dy.Director of Income Tax (Intl. Tax)-2(1), Mumbai.

ITA NOS. 2868/M/06 to ITA NO.2871/M/06
ASSTT. YEARS: 1998-99 to 2002-03

Dy.Director of Income Tax (Intl. Tax)-2(1), Mumbai. (Appellant)	Vs	J.M. Baxi & Co., As agents of M/s Thoresen Chartering Singapore Pte. Ltd. 16, Bank Street, P.O.Box No.731, Fort, Mumbai 400 001 (Respondent)

Appellant by: S/Shri Sunil M. Lala, Jitesh Jhanakria
& Krishna Kanakia
Respondent by: Smt. Malathi Sridharan & Shri Rajeev Nabar, CIT

O R D E R

'ER VIMAL GANDHI, PRESIDENT

This Special Bench has been constituted u/s 255(3) of the Income Tax

t on the recommendation of Bombay 'L' Bench to consider the following

stion:-

"Whether on the facts and in the circumstances of the case the time limit provided u/s 149(3) would apply to the assessee who has voluntarily filed the return of his principal non-resident, and in whose case no order u/s 163 has been passed treating him as the agent of the non-resident?"

2. The controversy under question has arisen with assessee, M/s J.M. Baxi & Co. filing returns for Asstt. Years 1998-99 to 2002-03 as agent of non-resident Singapore company, M/s Thoresen Chartering Singapore Pte. Ltd.(TCSPL). M/s J.M. Baxi and its principal claimed that under Article 8 of Double Taxation Avoidance Treaty, the freight collected in India on account of various vessels owned/chartered by TCSPL was taxable at a lower rate. The returns for above assessment years are claimed to have been accepted u/s 143(1) of Income Tax Act (hereinafter the Act). Subsequently, the revenue took it to be a case of escaped income as TCSPL was showing revenues by way of commission and not receipt from operation of ships. Accordingly, Assessing Officer issued notices u/s 148 of the Income Tax Act, dated 6.1.05 both to the principal as also on M/s J.M. Baxi & Co. as agent of the non-resident. The assessments made on the principal are reported to have been cancelled as reasons in accordance with provisions of Section 148 were not recorded. We are not concerned with those assessments as those assessments and related questions are pending before the regular bench. In the case of assessments made through the agent M/s

J.M. Baxi & Co., it was found that notices issued u/s 148 in the first three assessment years i.e. 1998-99, 1999-2000, 2000-01were issued after the expiry of period of two years from the end of the relevant assessment year and were claimed to be out of time u/s 149(3) of the Act. It is an admitted position that in the fourth assessment year, notice was issued within the said period of two years and, therefore, this controversy is not involved in that year. During the course of hearing, it was agreed by the parties that the question referred to us is to be considered only in the first three assessment years.

3. The provision of Section 149(3) giving rise to the controversy in question is as under:-

> *"149(3) If the person on whom a notice under section 148 is to be served is a person* ***treated as the agent of a non-resident under section 163*** *and the assessment, reassessment or recomputation to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of a period of two years from the end of the relevant assessment year."*

4. It has been claimed before us that assessee is an agent of the non-resident u/s 163 and, therefore, provision of Section 149(3) is applicable in this case. The revenue, on the other hand, has contended that above statutory provision is not applicable to a person who is "agent" under the general law and that assessee has never been treated an agent u/s 163 of the

Act. Having seen conflict of decisions between various authorities, the regular Bench of ITAT which heard the matter, thought it fit to refer the question for consideration of the Special Bench. This is how the issue has been brought before us.

5. We have heard both the parties. Learned counsel for the assessee Shri Sunil Lala drew our attention to provisions of Section 149 of the Act and contended that in terms of above provision, no notice u/s 148 of the Act could be issued to the assessee as "agent" of the non-resident after two years from the end of the relevant assessment year. In this connection, he drew our attention to the agreement between the assessee and its principal and pointed out that the assessee was an agent of the non-resident under clauses (a), (b) and (c) of sub-section (1) of Section 163 and, therefore, he was an agent u/s 163 of the Act. The learned counsel also referred to provisions of Section 160(1)(i) of the Act to contend that the said provision covered not only general agents, but also persons who are treated as agent u/s 163 of the Act. According to the learned counsel, it did not make any difference to assessee's case if the assessee was also held to be an agent u/s 160(1)(i) besides Section 163 of the Act. It was not necessary that a specific order u/s 163(2) of the Act should be passed as the said Section is applicable both to an agent u/s 160(1)(i) or to an agent u/s 163(1) of the Act. In this

connection, he drew our attention to the commentaries of learned author Shri N.A. Palkhivala in "Law And Practice of Income Tax", Eighth Edition, Vol. 1 page 1278. The learned author has observed, "A person who is an agent of non-resident under the general law may be assessed as an agent. Even if a person is not an agent under the general law, he may still be assessed as an agent" if he is covered by clauses (a) to (d) of sub-section (1) of Section 163 or is a person who has acquired by means of transfer a capital asset in India from a non-resident.

6. The learned counsel further submitted that the assessee had filed suo moto returns as agent of the non-resident. He drew our attention to assessment order for the Asstt. Year 1998-99 (page 29 of the paper book). This order was passed on the assessee treating it as agent of the non-resident. Similar was the position in the two subsequent assessment years. As the assessee had filed returns suo moto as an agent, for and on behalf of principal, and assessment was made through the agent, there was no need to issue notice or pass order under provisions of Section 163(2) of the Act. Therefore, it could not be disputed that assessee was treated as an agent u/s 163 of the Act. In the above background when assessment was made on the assessee and notice was also issued to the assessee as "agent" of the non-resident, it was not right for the revenue to argue that assessee was not

"treated" as an agent of the non-resident. Learned counsel further contended that if assessee had not filed the return suo moto, the revenue authorities would have issued notice and treated the assessee as "agent" u/s 163(2) of the Act for making an assessment of the non-resident through it. Merely because assessee, as a law abiding citizen, has not waited for a specific order u/s 163(2) of the Act, the assessee should not be made to suffer. The learned counsel vehemently contended that a law abiding citizen cannot be put at a disadvantage. Shri Sunil Lala emphasized that if the assessee had not filed returns and waited for the revenue to invoke Section 163(2) of the Act, the present controversy would not have arisen. In support of above proposition that a law abiding citizen should suffer a disadvantage, the learned counsel relied upon the following decisions:-

1. ITO Vs Indian Rubber & Plastic Co. 15 ITD 1(Bom) (SB)
2. Delhi Development Authority and Other (084)-AIR-3263-SC
3. Warthyhully Estates Ltd. vs. Agricultural ITO & Anr. 235 ITR 324 (Kar)

Learned counsel for the assessee relied on certain case laws to contend that no order need be passed u/s 163(2) of the Income Tax Act. According to the learned counsel, Punjab & Haryana High Court in the case of Hazoora Singh Vs CIT 160 ITR 746 had taken a contrary view but the

said decision was given on peculiar facts involved in that case and is distinguishable. The ld. Counsel cited and relied upon the decision of the Hon'ble Delhi High Court, in the case of CIT Vs Madhawan Bashyam 214 CTR 335 wherein it has been held that notice u/s 148 on the agent of the non-resident, has to be served within two years of the assessment year involved. According to the learned counsel, above decision of Hon'ble Delhi High Court was the only decision on the issue involved before us and, therefore, should be followed by this Tribunal as a binding authority. For the aforesaid proposition, that only decision of a High Court, being of an authority superior than the Appellate Tribunal, should be treated as binding. The learned counsel relied upon the following decisions:-

1. CIT Vs Smt. Godavaridevi Saraf 113 ITR 589 (Bom)
2. ITO Vs Ranisati Fabric Mills (P) Ltd. 116 TTJ 177 (Mum)
3. ITO Vs. P.M. Suthar 52 TTJ 260(Ahd) ™
4. DCIT Vs ING Investment Management (India) – ITA Nos. 1239 & 5203/Mum/2005
5. CIT Vs Vrajilal Manilal & Co. 127 ITR 512 (MP)
6. CIT Vs Nirmalabai K. Darekar 186 ITR 242 (Bom)
7. CIT Vs G.M. Mittal Stainless Steel Ltd. 271 ITR 219 (M.P.)
8. Sayaji Iron Works Quary Pvt. Ltd. & Ors. Vs ITO
9. Tej International (P) Ltd. Vs DCIT 69 TTJ 650 (Del)
10. ITO Vs Daga Capital Management (P) 119 TTJ 289 (Mum)(SB)

The learned counsel also argued that the following benches of the Tribunal had taken the same view that notice u/s 148 on the agent of the non-resident, after the expiry of two years from the concerned assessment year is out of time. He referred to following cases:-

1. Dy Director of Income Tax, Mumbai Vs R Lines Limited, Mauritius in ITA No. 309/Mum/05 & C.O.No.283/Mum/05
2. Tidewater Marine International Inc. Vs DCIT 96 ITD 406
3. Tidewater Marine International Inc. Vs DCIT 97 TTJ 137

9. Learned counsel also referred to decision of Ahmedabad Bench of the Tribunal in the case of Pankaj Savailal Patel Vs CIT 104 TTJ (Ahd) 249 and submitted that the aforesaid case was distinguishable on facts as in the said case, "power of attorney" was not accepted as agent of the non-resident assessee u/s 163 of the Act. Ld. Counsel further pointed out that in the above case, notice u/s 148 was issued in the name of the assessee and was served on the power of attorney who was not an agent u/s 163 of the Act. The Bench specifically observed that power of attorney was never treated as an agent of the non-resident. Accordingly, provision of Section 149(3) was held to be not applicable. The decision, therefore, was given on peculiar facts and can not be applied against the assessee. Similar was the position of the decisions of Hon'ble Madras High Court in the case of CIT Vs Express Newspapers (P)

Ltd. 111 ITR 347 and of Hon'ble Punjab & Haryana High Court in the case of Hazoora Singh Vs CIT 160 ITR 746. All those decisions were given on peculiar facts. The decision of Delhi High Court in the case of CIT Vs Madhwan Bashyam 214 CTR 335 (Delhi), on the other hand, was on all fours and was the only decision on the point. The said decision, therefore, has to be applied in these cases to answer the question under reference in favour of the assessee.

10. It was again emphasized that assessee was an agent u/s 163 of the Act in the light of agreement between the assessee and its principal and was covered under clauses (a), (b) and (c) of sub-section (1) of Section 163. Merely because the assessee could also be an agent u/s 160(1)(i) of the Act, it would not follow that the assessee was not treated as an agent of the non-resident u/s 163. The assessee was clearly treated as an agent of the non-resident as the assessee had all along filed returns on behalf of its principal and notices issued by the revenue for assessment were also served on the assessee. It was immaterial that no order u/s 163(2) of the Act was passed in this case. Alternatively, in case it is held that provisions of Section 163(2) are mandatory, then assessment made on the assessee as "agent of the non-resident" without complying with the mandatory provision are bad in law

and are liable to be quashed. Either way, the matter has to be decided in favour of the assessee.

11. Learned DR opposed above submissions. She pointed out that assessee as "agent" of the non-resident was engaged in booking freight from India in the ships of the non-resident principal. Therefore, to get benefit of Article 8 of DTAA between India and Singapore, assessee was submitting returns as agent on behalf of the non-resident and had all along represented and accepted to be the agent of the non-resident under the law. This is an undisputed position. In these circumstances, it was argued that provisions of Section 149(3) had no application. The assessee was an agent under the General Law i.e. a natural agent or a common law agent. The provision of Section 163(2) was applicable only in cases of persons covered under various clauses of Section 163(1) who were not agents under the general law and who were treated as agent of the non-resident under sub-section (2) of Section 163 of the Act. She further submitted that liability to be taxed an agent of non-resident is imposed by Section 161(1) of the Income-tax Act. In both the sections 160(1)(i) or 163(1), the definition of agent was an inclusive definition. As per the settled law, words 'includes' or 'including' widens the scope of the definition by taking into consideration

veral other persons who are not natural agents. Ld. DR referred to the ıse of CIT Vs Taj Mahal Hotel 82 ITR 44 (S.C.).

2. It was argued that distinction between a natural agent u/s 160(1)(i) of the Act and a statutory agent or deemed agent of non-resident u/s 163 has been appreciated by various courts in India. She referred to decision of the Hon'ble Punjab & Haryana High Court in the case of Hazoora Singh Vs CIT (supra). In that case, Shri Hazoora Singh was treated as an agent of Shri Mohinder Singh, a non-resident because he was buying land in the name of Shri Mohinder Singh. He was held to be an agent u/s 182 of the Indian Contract Act and was held liable to submit return for Asstt. Year 1967-68 although order u/s 163(2) appointing him as an agent u/s 163 was passed on 21.3.1970. Their lordships observed as under:-

> *"The provisions of s. 163 are, therefore, inclusive and do not define the term "agent". Therefore to find out the definition of the term "agent", we have to fall back on the provisions of the Indian Contract Act. Sec. 182 of the said Act defines the agent as a person employed to do any act for another or to represent another in dealing with third persons. For the appointment of an agent, it is not necessary that there must be written authority and it was not disputed that the appointment can be made even orally. When Hazoora Singh purchased the land on 15th Sept., 1966, in the name of Mohinder Singh, a non-resident, he obviously acted as the agent of the latter and was, therefore, his agent on the said date within the meaning of s. 163. So the order passed on 21st March, 1970, by the ITO did not clothe him with the capacity of an agent of the non-resident, even though by this order*

he was treated as agent of the non-resident. In the capacity of the agent of the non-resident, he would be a representative assessee within the meaning of s. 160 right from the date on which he acted as agent of the non-resident and purchased the land in his name. For a person to be the representative assessee within the meaning of s. 160, it is not necessary that he must have been treated as agent under s. 163 because the agent of a non-resident is the representative assessee in respect of the income of the non-resident irrespective of the fact whether he has been treated as agent under s. 163 or not. It is only in addition to an agent of the non-resident that persons who are treated as agent under s. 163 are also included in the definition of representative assessee within the meaning of s. 160(1)(i) of the Act. Hazoora Singh was, therefore, a representative assessee in respect of the income of Mohinder Singh, a non-resident, during the accounting year as well as the assessment year and as such was liable to file the return under s. 139 within the prescribed period."

13. Ld. DR then referred to the decision of Hon'ble Bombay High Court in the case of Jadavji Narshidas & Co. Vs CIT 31 ITR 1 wherein the short question was whether an assessment made on the assessee as an agent of non-resident principal was bad in law on the ground that no notice u/s 43 of the I.T. Act was served on him. Their Lordships observed as under:-

"The question then is, having made that return without a notice under s. 43 being served upon him, could he then urge that the assessment made on that return was bad for failure to issue the notice? The answer to the question must depend upon whether the notice under s.43 is a condition precedent to the assumption of jurisdiction by the ITO for the purpose of assessing the assessee as an agent of the non-resident principal. The question

answers itself when one looks at ss.42 and 43. It is s. 42 that imposes the liability upon the agent. That is a charging section with regard to the liability of an agent to pay the tax due by his non-resident principal. Sec. 43 is procedural and it lays down the procedure for determining who is the agent who has got to meet the liability which has already been fixed under s. 42.

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If, therefore, on principle, apart from authorities, the notice under s. 43 has nothing whatever to do with the jurisdiction of the ITO to tax and agent for the liability to pay tax of the non-resident principal, then the notice contemplated by that section cannot be looked upon as a condition precedent which cannot be waived by the assessee. If the notice can be waived, then there cannot be a clearer case of waiver than the one we have before us. The assessee submits a return as an agent without being called upon to do so under s. 22(2); he admits his status. It is then difficult to understand why a notice should be served upon him or why he is prejudiced by the notice not being served upon him. Section 43 also provides that after a notice has been served an opportunity must be given to the assessee to be heard by the ITO as to the liability of the agent. That again is necessary when the assessee denies his liability as an agent. But in a case where the liability is admitted, neither a notice is necessary nor this opportunity to be heard by the ITO would be necessary."

14. Ld. DR also referred to the decision of Hon'ble Gujarat High Court in the case of CWT Vs Dilawar Syndicate (P) Ltd. 213 ITR 589 where as per head note it has been observed as under:-

"Sub-section (2) of section 22 of the Wealth Tax Act, 1957 gives a list of the persons who can be deemed to be agents of non-resident assessees. If such persons are to be treated as agents, the requirement of giving notice will become applicable. There is no such requirement of issuing a notice to a person who is otherwise appointed as agent or who has acted as agent and who has been accepted as agent of the assessee, before the levy of penalty.

Held, that the respondents had acted as agents of the assesses by filing returns voluntarily and represented the assessees throughout the assessment proceedings. In fact, they had described themselves as agent of the assessees and, thus, admitted that they were the agents of the assessees. Therefore, it was not necessary for the Wealth Tax Officer to give any further notice to them under section 22(2) before levying any penalty upon the assesses under section 18(1)(a)."

15. Ld. DR contended that to be a person "treated as an agent u/s 163" it is not necessary that there should be an order u/s 163 but as persons mentioned in different clauses of sub-section (1) of Section 163 are not natural agents (under the general law) but statutory agents, it is necessary to pass order u/s 163(2) for treating such persons as statutory agent of the non-resident. Such order has to be in writing as such order is appealable u/s 246(1)(d) of the Act.. She also referred to page 1278 to 1280 of Commentary of Kanga & Palkhivala on Income Tax Act, Eighth Edition to emphasize that two types of agents, natural agents under general law and statutory agents under section 163 have been recognized in the commentary.

The same view is also available in the Commentary of Chaturvedi & Pithisaria on Income Tax, Fifth Edition at page 5557. Referring to the case in hand, the ld. DR submitted that the assessee was an agent under the law as is evident from agent's agreement with the principal, copy of which is available at page 56 of the paper book. Perusal of various clauses of the agreement would leave no amount of doubt that assessee was an agent of the non-resident. She also drew our attention to the letter of the Assessing Officer at page 87 of the paper book, wherein it was made clear that assessee was being treated as agent of the non-resident u/s 160 of the I.T.Act. The position was also clear from statement of facts furnished by the assessee in the appeals, which is available at page 12 of the paper book. All along, assessee has admitted that he was agent of the non-resident. This was also clear from the clearance certificate obtained from the revenue which are available at pages 27 to 36 of the paper book. The assessee had also given an undertaking to the revenue to pay taxes on behalf of the non-resident principal, copy is available at page 20. Thus, voluminous evidence on record clearly showed that assessee represented himself to be an agent of the non-resident u/s 160(1)(i) of the Act and in that capacity, it was liable to discharge obligations of an agent u/s 161 of the Act. Liability emanates from above section and not from Section 163 which was merely a machinery

provision. Ld. DR further submitted that machinery section is to be construed in a reasonable manner so that purpose of making assessment is advanced and not defeated. Ld. DR also controverted submission of ld. Counsel for the assessee that the decision of Hon'ble Delhi High Court was the only decision on the point. She submitted that decisions of Hon'ble Bombay, Punjab & Haryana and Gujarat High Courts were direct on the point wherein distinction between agent and a statutory agent (or deemed agent) was noted and applied. The decision of Hon'ble Delhi High Court was distinguishable as the said case was a case of statutory agent u/s 163. There is no consideration of provision of Section 160 or 161 in the decision, which is essential for finding liability of a representative agent. It was also pointed out that income for which proceedings were taken in this case was assessable u/s 9(1)(i) of the I.T. Act. Ld. DR also distinguished other decisions relied upon by ld. Counsel for the assessee.

16. In rebuttal, ld. Counsel for the assessee stated that the decision of Hon'ble Bombay High Court in the case of Jadavji Narshidas & Co. Vs CIT 31 ITR 1 and the decision of ITAT Pune Bench in the case of Rlines were all in favour of the assessee. The Hon'ble Gujarat High Court had merely followed the decision of Hon'ble Bombay High Court in the case of Jadavji Narshidas & Co. Vs CIT (supra). Even if the assessee was a natural agent, it

was also a statutory agent u/s 163 of the I.T.Act. Merely because assessee had filed returns suo moto, as a law abiding citizen, it could not be held that the case was not covered u/s 163. It was submitted that clauses (a), (b) and (c) of sub-section (1) of Section 163 are clearly attracted in this case and, therefore, its claim could not be denied merely because it was an agent u/s 160(1)(i) of the Act.

17. In order to resolve the controversy, we have to take into account the provisions of the following Sections:

"B. – Representative assesses – General provisions

Representative assessee.

160. *(1) For the purposes of this Act, "representative assessee" means –*

(i) in respect of the income of a non-resident specified in sub section (1) of section 9, the agent of the non-resident, including a person who is treated as an agent under section 163;

(ii)xxxxx
(iii)xxxxx
(iii)xxxxx
(iv)xxxxx

(2) Every representative assessee shall be deemed to be an assessee for the purposes of this Act.

Liability of representative assessee.

161. *(1) Every representative assessee, as regards the income in respect of which he is a representative assessee, shall be subject to the same duties,*

responsibilities and liabilities as if the income were income received by or accruing to or in 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.

[(1A) Notwithstanding anything contained in sub-section (1), where any income in respect of which the person mentioned in clause (iv) of sub-section (1) of section 160 is liable as representative assessee consists of, or includes, profits and 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 marginal rate:

***Provided** that the provisions of this sub-section shall not apply where such profits and gains are receivable under a trust declared by any person by will exclusively for the benefit of any relative dependent on him for support and maintenance, and such trust is the only trust so declared by him.*

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

Right of representative assessee to recover tax paid.

***162.** (1) Every representative assessee who, as such, pays any sum under this Act, shall be entitled to recover the sum so paid from the person on whose behalf it is paid, or to retain out of any moneys that may be in his*

possession or may come to him in his representative capacity, an amount equal to the sum so paid.

(2) Any representative assessee, or any person who apprehends that he may be assessed as a representative assessee, may retain out of any money payable by him to the person on whose behalf he is liable to pay tax (hereinafter in this section referred to as the principal), a sum equal to his estimated liability under this Chapter, and in the event of any disagreement between the principal and such representative assessee or person as to the amount to be so retained, such representative assessee or person may secure from the Assessing Officer a certificate stating the amount to be so retained pending final settlement of the liability, and the certificate so obtained shall be his warrant for retaining that amount.

(3) The amount recoverable from such representative assessee or person at the time of final settlement shall not exceed the amount specified in such certificate, except to the extent to which such representative assessee or person may at such time have in his hands additional assets of the principal."

C. – Representative assesses – Special cases

Who may be regarded as agent.

***163.** (1) For the purposes of this Act, "agent", in relation to a non-resident, includes any person in India –*

(a) who is employed by or on behalf of the non-resident; or
(b) who has any business connection with the non-resident; or
(c) from or through whom the non-resident is in receipt of any income, whether directly or indirectly; or
(d) who is the trustee of the non-resident;

and includes also any other person who, whether a resident or non-resident, has acquired by means of a transfer, a capital asset in India:

***Provided** that a broker in India who, in respect of any transactions, does not deal directly with or on behalf of a non-resident principal but deals with or through a non-resident broker shall not be deemed to be an agent under this section in respect of such transactions, if the following conditions are fulfilled, namely:-*

(i) the transactions are carried on in the ordinary course of business through the first-mentioned broker; and

(ii) the non-resident broker is carrying on such transactions in the ordinary course of his business and not as a principal.

[Explanation – For the purposes of this sub-section, the expression "business connection" shall have the meaning assigned to it in Explanation 2 to clause (i) of sub-section (1) of section 9 of this Act.]

(2) No person shall be treated as the agent of a non-resident unless he has had an opportunity of being heard by the [Assessing] Officer as to his liability to be treated as such."

D – Representative assesses – Miscellaneous provisions

Direct assessment or recovery not barred.

***166.** Nothing in the foregoing sections in this Chapter shall prevent either the direct assessment of the person on whose behalf or for whose benefit income therein referred to is receivable, or the recovery from such person of the tax payable in respect of such income."*

Remedies against property in cases of representative assesses.

167. The Assessing Officer shall have the same remedies against all property of any kind vested in or under the control or management of any representative assessee as he would have against the property of any person liable to pay any tax, and in as full and ample a manner, whether the demand is raised against the representative assessee or against the beneficiary direct."

18. In order to decide whether assessee is an 'agent' under the General law or is a 'statutory agent' under section 163(1), we have to take into account not only above quoted provisions but also corresponding provisions of old Indian Income-tax Act, 1922. These are contained in Sections 42 and 43 of the said Act and are as under: [reproduced from the case of **Nandlal Bhandari Mills Ltd., Cawnpore 7 ITR 452 (All)**]:

"42(1) In the case of any person residing out of British India, all profits or gains accruing or arising to such person, whether directly or indirectly, though or from any business connection or property in British India, shall be deemed to be income accruing or arising within British India, and shall be chargeable to income-tax in the name of the agent of any such person, and such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax:

Provided that any arrears of tax may be recovered also in accordance with the provisions of this Act from any assets of the non-resident person which are, or may at any time come, within British India."

43. Any person employed by or on behalf of a person residing out of British India, or having any business connection with such person, or through whom such person is in the receipt of any income, profits or gains upon whom the Income-tax Officer has caused a notice to be served of his intention of treating him as the agent of the non-resident person shall, for all the purposes of this Act be deemed to be such agent:

Provided that no person shall be deemed to be the agent of a non-resident person, unless he had an opportunity of being heard by the Income-tax Officer as to his liability."

In the said case, Nandlal Bhandari Mills Ltd., Indore was engaged in manufacture of textile at Indore. It had appointed firm Nandlal Bhandari & Sons, as agent of the company. The aforesaid agent opened a branch of the company at Cawnpore, known as Nandlal Bhandari Mills, Ltd., Cawnpore which was treated as agent of non-resident firm Nandlal Bhandari & Sons, Indore u/s 43 of the Act. The assessment was made on the principal through agent. The appeal of the assessee having been dismissed, the following question was referred for decision of Allahabad High Court, u/s 66(2) of the Act:

"Whether on the facts proved or admitted, Messrs, Nandlal Bhandari Mills Ltd., Cawnpore, were and could be treated as agents of the non-residents Messrs. Nandlal Bhandari & Sons, within the meaning of Sections 42 and 43 of the Income-tax Act."

After considering statutory provisions of section 42(1) and 43, their Lordship held that conditions of section 42 and 43 were satisfied. The branch at Cawnpore had a business connection with the non-resident and, therefore, the branch at Cawnpore was rightly held to be "deemed agent" of the non-resident. Para 28 of the decision is relevant and is as under:

"28. Nandlal Bhandari & Sons of Indore are the managing agents of Nandlal Bhandari Mills Ltd., Indore, on whose behalf they have opened a branch at Cawnpore under their own control. Nandlal Bhandari & Sons supply goods to the branch at Cawnpore, which are sold in British India, and they receive a commission on the sales effected. It is true that according to cl. 7 of the agreement the commission does not become payable until the annual accounts of the company have been taken, but their claim to the commission is dependent upon the sale of goods in

British India. Clause 12 of the agreement even suggests that they might be competent to retain their commission before transferring the profits to the company, and this is the view which was taken by the Asstt. CIT, but even if it be held, having regard to the provisions of cl. 7 that Nandlal Bhandari & Sons, are only entitled to receive their commission when the annual accounts of the company are made up, the fact remains that their right to this commission accrues upon the sales effected at Cawnpore. This being the position, we think it must be held that this commission is in the nature of profits or gains accruing or arising to the non-resident through or from a business connection in British India within the meaning of s. 42, and must, therefore, be deemed to be income accruing or arising in British India; and since there is a "business connection" between the branch at Cawnpore representing in British Inhdia the Company at Indore, and the non-resident firm of Nandlal Bhandari & Sons, the resident branchy at Cawnpore must be deemed to be the agents of the non-resident firm within the meaning of s.43, and the profits accruing in British India to the non-resident firm will be chargeable in the name of their fictional agents in British India."

In the case of **CIT vs. Metro Goldwyn Mayer (India) Ltd. 07 ITR 176,** Bombay High Court, with reference to section 42 and 43, observed as under:

"*Section 42 provides:-*

'(1) In the case of any person residing out of British India, all profits or gains accruing or arising, to such person, whether directly or indirectly, through or from any business connection or property in British India, shall be deemed to be income accruing or arising within British India, and shall be chargeable to income-tax in the name of the agent of any such person, and such agent shall be deemed to be for all the purposes of this act, the assessee in respect of such income-tax.'

That section requires, first of all, that there should be profits or gains accruing or arising to a person residing outside British India and those profits or gains must directly or indirectly arise from or through a business connection or property in British India. When that happens, an agent can be charged, but, of course, there may be no agent in British

India, and to get over that difficulty Section 43 provides for the appointment by the Income-tax Officer of a statutory agent. But I think Section 43 is really only machinery for giving effect to Section 42, and the mere appointment of an agent under Section 43 would be of no consequence unless tax can be levied under Section 42."

In the case of **Messrs. Govindram Seksaria, *In re. 11 ITR 104***, their Lordship of Bombay High Court held as under:

"The fourth question is:

"Whether, in the absence of a fresh notice under Section 43 in respect of the assessment year 1935-36, the assessment levied on the assesses as agents for Mahavirprasad Vishwanath is valid in law."

I think that Mr. Setalvad's argument on behalf of the Commissioner that the larger question, whether notice once given under Section 43 will ensure for subsequent years, does not really arise because of the action of the assesses in this particular case. I ill only say that I see obvious difficulties in holding that an appointment of an agent for one year will hold good for subsequent years. In order to justify the appointment of an agent under Section 43 the Commissioner has to be satisfied on certain questions of fact, and the assessee has a right to dispute his liability to be deemed the agent. It is obvious, that although an agent may fail in a particular year to resist the claim that he is an agent, circumstances may alter, and in the next year he might be able to resist the claim. However, in this particular case the agents did not dispute their liability to be assessed in respect of the year1935-36. They were actually assessed, and they paid the tax and it seems to me that that amounts to an admission on their part that in respect of the year 1935-36 they were the agents of the principal for the purposes of Section 43. The re-assessment under Section 34 is a part of the assessment for the year 1935-36, and although the actual re-assessment was not made until the beginning of 1940, the facts necessary to constitute them agents for the re-assessment were the same, and have to be determined for the same date as in the case of the original assessment. I think that in the face of their conduct it is not open to the assessees to assert that for the year 1935-36 they were not the agents of

the principal. I have no doubt that the answer to question (4) must be in the affirmative."

In the case of **Ramnarayan Rajmal vs. CIT 24 ITR 442,** their Lordship of Bombay High Court, on section 42 and 43, observed as under:

"Turning to Section 42, it deals with income which in fact does not accrue or arise within the taxable territories, but which by reason of the provisions of that section is deemed to accrue or arise within the taxable territories. Section 42 sets out various heads in respect of which a non-resident can be charged to tax. Therefore the first thing that has got to be ascertained under Section 42 is whether a non-resident is liable to tax in respect of one or more heads mentioned in Section 42. Having determined that, the next question is whether he has an agent, and if he has an agent the taxing Department has been given the option to charge the tax either in the name of the non-resident or in the name of his agent, and if the taxing Department assesses his income in the name of his agent certain important consequences follow and those consequences are that the agent shall be deemed to be for the purposes of the Act the assessee in respect of such income-tax. In our opinion, it is clear that in order that the agent should become liable to pay tax he should be an agent qua the particular head mentioned in Section 42 in respect of which the non-resident is liable to tax or in other words, the income liable to tax under Section 42 must be connected with the agency in respect of which the assessee is the agent. Section 42 does not mean that if a particular person is an agent in respect of one head under Section 42 he would be liable to pay tax in respect of all the heads under which the non-resident may earn income which will be liable to tax under the provisions of Section 42.

Now, the second proviso to Section 42 throws considerable light on the interpretation of Section 42 itself. That proviso gives the right to the agent to retain, out of the moneys payable by him to his principal the non-resident, a sum equal to his estimated liability under Section 42, and he has also been given the right to secure from the Income-tax Officer a certificate stating the amount to be so retained pending final settlement of the liability and the certificate so obtained shall be his

warrant for retaining that amount. Therefore the legislature realising that the agent may have no right against his principal in the event of his being called upon to pay tax and being compelled to pay the tax, gives him a special right of retainer as an agent so that to the extent of that retainer at least he would be indemnified against his principal. If the interpretation sought to be put upon Section 42 by the Department were correct, it would mean this that although a person may be the agent of a non-resident in respect of a small business where his principal may earn profits to the extent of a few thousands and the liability to tax in respect of that business may be very small, if that principal has other large business in respect of which the assessee has nothing whatever to do, if he has properties in the taxable territories, if he is earning interest in the taxable territories, the agent can be assessed in respect of all that income and can be made liable to pay tax although what he could retain under the second proviso might be a very small amount of the tax which the non-resident might become liable to pay. But the difficulties do not cease there because if under Section 42, a person becomes an agent, for all purposes of the Act he has got to follow and obey the machinery of assessment. He has got to make a return of the income of his principal, if called upon he has got to produce accounts and documents, and if he fails to do so he is liable to be assessed according to the best judgment assessment. It is difficult to understand how the poor agent who has done some small business on behalf of his non-resident principal and who knows nothing about the properties which his principal has or about other business that the principal has transacted, can possibly make a proper return of his income, and yet he might render himself liable to a best judgment assessment and to the payment of tax for which he may have no wherewithal at all.

Sir Nusserwanji on behalf of the Commissioner has relied on Section 43. It has often been pointed out by this Court that Section 43 is a machinery section and undoubtedly it points out who can be appointed an agent, and any person employed by or on behalf of the person residing out of the taxable territories or having any business connection with such person may be deemed to be an agent for the purposes of Section 42. But when we have to determine what the liability of such an agent is, we do not turn to Section 43, but we must turn to Section 42. Undoubtedly, the assessee in this case can be deemed to be an agent for the purposes of Section 42, but the question still remains as to what his liability is as such agent and that liability must be determined on the

terms of Section 42 and not on the terms of Section 43, and it is clear reading Section 42 itself and looking at the scheme of the Indian Income-tax Act that the liability of the agent under Section 42 is not in respect of all income earned by the principal under the various heads under Section 42, but his liability is restricted and limited to the income earned through his agency, income arising in respect of heads qua which he is an agent."

In the case of **Turner Morrison & Co. Ltd. vs. CIT 23 ITR 152,** their Lordship of the Supreme Court made the following observation on the statutory provisions:

"The last main point urged by Mr. Mitra is that as soon as Turner Morrison & Co. Ltd., were treated as agents under Section 43, the provisions of Section 42 were immediately attracted. In support of this contention Mr. Mitra relies on the decisions in Imperial Tobacco Company of India Ltd. vs. The Secretary of State for India (1922) ILR 49 Cal.721) , Commissioner of Income-tax, Bombay vs. Metro Goldwyn Mayer (India) Ltd. (1939) 7 ITR 176 and Caltex (India) Ltd. vs. CIT, Bombay City (1952) 21 ITR 278 where it has been held that Section 43 is only a machinery for giving effect to Section 42. To say that Section 43 is really only machinery for giving effect to Section 42 is not to say that Section 43 has no other purpose. Section 42 refers to income, profits or gains accruing or arising directly or indirectly through or from (i) any business connection in India, (ii) any property in India, or (iii) any assets or sources of income in India, or (iv) any money lent at interest and brought into India in cash or in kind, or (v) the sale, exchange or transfer of a capital asset in India. All these incomes by virtue of this section have to be deemed to be income accruing or arising within India and where the person entitled to such income, profits or gains is a non-resident such income, profits and gains are made chargeable to income-tax either in his name or in the name of his agent who is to be deemed to be for all the purposes of this Act the assessee in respect of such income-tax. Section 43, however, refers to a person (a) employed by or on behalf of a non-resident, (b) having any business connection with such non-resident, or (c) through whom such non-resident is in receipt of any income, profits or gains. A person who

comes within one or other of these three categories may, under this section, be treated by the Income-tax Officer as agent of the non-resident and such person is for all the purposes of this Act to be deemed to be such agent. The third category refers to a person through whom the non-resident is in receipt of any income, profits or gains. The portion of Section 43 which refers to the person through whom the non-resident is in receipt of any income, profits or gains does not necessarily attract the provisions of Section 42, for the income, profits and gains received by the person who is treated as agent under Section 43 may not fall within any of the several categories of income, profits or gains referred to in Section 42. The language of Section 43 will also attract the provisions of Section 40, for that section also contemplates a person who is entitled to receive on behalf of the non-resident any income, profits and gains chargeable under this Act and may even attract the provisions of Section 4(I)(a). In our opinion there is no warrant for the contention that n appointment of a person as a statutory agent under Section 43 only attracts Section 42 for such appointment is for all purposes of the Act and not only for the purposes of Section 42."

In the case of **Raghava Reddi and Another vs. CIT 44 ITR 720 (SC),** their Lordship made the following observations on Section 42 and 43:

"Under section 42, all income, profits or gains accruing or arising, whether directly or indirectly, through or from any business connection in the taxable territories are deemed to be income accruing or arising within the taxable territories, and if the person entitled to the income, profits or gains is not resident in the taxable territories, it is chargeable to income-tax either in his name or in the name of his agent, and in the latter case, such agent is deemed to be, for all the purposes of the Act, the assessee in respect of such income-tax. The provisos to the section enable the application of section 18, and the tax may be recovered by deduction under that section and the agent or any person who apprehends that he may be assessed as such an agent is also enabled to retain out of the money payable to the non-resident person a sum equal to his estimated liability. The section thus creates a vicarious liability, in so far as the agent is concerned, for the tax which the non-resident has to pay; but as a safeguard for him, he is enabled to retain from the money he has to pay, a sum equal to his own liability in the event of his

being treated as the assessee. Section 43 lays down who can be deemed to be an agent, and it is provided that any person having any business connection with a non-resident person or through whom the non-resident is in receipt of any income, profits or gains is to be deemed to be such an agent, if the Income-tax Officer has caused a notice to be served of his intention of treating him as the agent of the non-resident person. Such persons are conveniently described as "statutory agents"."

19. We have given careful thought to the rival submissions of the parties and examined them in the light of material available on record, statutory provisions and case law cited at the Bar. At the very outset, we may state that the basic contention of the assessee that he is and should be considered as an agent under clauses (a), (b) & (c) u/s 163(1) of the Act, is misplaced. Provisions of sections 160 to 166 of the Income-tax Act, 1961 as also corresponding provisions of 1922 Act, are/were enabling provisions which empower the Income-tax authorities, give them an option, to make assessment of the non-resident, if they are able to get at him within India or make assessment on agent of such non-resident. The option is with the Income-tax authorities and not with the non-resident or his agent to claim that he be assessed under a particular clause of section 163 and not under 160(1)(i) read with section 161 of the Income-tax Ac. On above premises, we proceed to examine the referred question.

20. Under the Income-tax Act, 1922, a distinction was made between an 'agent' u/s 42 of the Act and a 'deemed agent' or a 'statutory agent' u/s 43 of the Income-tax Act. The terms used in the two provisions were 'agent' and 'deemed agent' or 'statutory agent'. It was further held that section 43 was a machinery provision. The case of **Metro Goldwyn Mayer (India)**

Ltd. (supra) wherein their Lordship has clearly observed that an agent (of the non-resident) can be charged to tax, but there may be no agent in British India and to get over this difficulty, section 43 provided for the appointment by the Income-tax Officer of a statutory agent. This way distinction between 'agent' and 'statutory agent' was drawn as noted above. Above decision has been followed and applied in large number of cases and this distinction was maintained throughout. See further the decision of the Bombay High Court in the case of **Messrs. Govindram Seksaria,** ***In re. 11 ITR 104,****(quoted above).*

20.1 The Hon'ble Bombay High Court again considered above provisions in the case of **Ramnarayan Rajmal vs. CIT 24 ITR 442,** and held that for determining liabilities of an agent, we do not turn to section 43 but must turn to section 42. Undoubtedly the assessee in that case could be "deemed to be an agent" for purpose of section 42 and for liabilities of such an agent, have to be determined in terms of section 42 and not on terms of section 43. This, according to their Lordship was clear on reading of section 42 itself and looking at the scheme of the Indian Income-tax Act. However, liability of agent u/s 42 was not in respect of all income earned by the principal under the various heads, but his liability is restricted and limited to the income earned through his agency as an agent.

20.2 In the case of **Turner Morrison & Co. Ltd. vs. CIT 23 ITR 152,** (supra), their Lordship of Supreme Court has observed that section 43 is only machinery for giving effect to section 42, is not to say that section 43 has no other purpose. After considering various income assessable under sections 42 and 43, their Lordship stated that the portion of section 43 which

refers to the person through whom the non-resident is in receipt of any income, profit or gains does not necessarily attract the provision of section 42, for the income, profit and gains received by the person who is treated as agent u/s 43, may not fall within any of the several categories of income, profits or gains referred to in section 42.

20.3 In the case of **Raghava Reddi and Another vs. CIT 44 ITR 720 (SC),** (supra), their Lordship again stated that section 43 lays down who can be "deemed to be an agent" and further noted that such persons are conveniently described as 'statutory agents'.

21. It is clear from above referred to decisions that a distinction between an agent and a statutory agent or deemed agent u/s 43 was maintained. The latter section also provided for treating a person as an agent u/s 43, though he may not fall in any of the several categories referred to in section 42. The basic scheme and purpose of above provisions has been retained under the 1961 Act. However, sections relating to direct assessment of the non-resident under 1961 Act are separate and in case he is directly charged to tax then his liability has to be seen under sections 4, 5 and 9 of the 1961 Act. Agent of a non-resident can be independently taxed as a "representative assessee", as per mechanism provided in sections 160 to 166 of the Act.

21.1 Further Sections 42 and 43 of the old Act and Sections 160 to 166 of the 1961 Act relating to liabilities of an agent of the non-resident are differently worded. Under the old Act, in section 42, it was provided that income of the non-resident could be assessed either in his name or in that of his agent, if there was a business connection. However, under the 1961 Act,

as noted above, liability of a non-resident is fixed as per separate provision and not clubbed with agent as was done u/s 42 of the old Act. Whereas section 160 relates to General provisions, relating to a representative assessee; section 163 deal with special cases of an agent of the non-resident as a representative assessee. The liability of the representative assessee is fixed u/s 161 which, of course, is applicable to representative assesses both falling in general and in special category. In respect of income of a non-resident, specified in sub-section (1) of section 9, the agent of non-resident can be treated as a representative assessee u/s 160(1)(i), but in order to prevent avoidance, evasion or facilitating collection of taxes, several other persons are included in the term 'agent' u/s 163(1). Under the old Act of 1922, these persons were termed as 'statutory agents' or 'deemed agent'. In the 1961 Legislation, the words "statutory agent" or "deemed agent" are no longer employed. Even if you are an 'agent' u/s 163(1), your liability is equated with the agent of the non-resident under clause (i) of sub-section (1) of section 160. The agent of the non-resident, as per above provision, is agent including a person who is treated as an agent u/s 163. The word "including" or "includes" enlarges the meaning of the expression and effect is to import and add things or person which would not otherwise be regarded as 'included' in that sense. The words 'include' and 'including' have been interpreted by several Courts. We may refer to the following:

> *"The word 'include' when used, enlarges the meaning of the expression defined to comprehend not only such things as hey signify according to their natural import but also those things which the clause declares that they shall include. See [P.Kasilingam vs. PSG College of Technology AIR 1995 SC 1395 at 1400; CIT, AP vs. Taj Mahal Hotel AIR 1972 SC 168, (1971) 3 SCC 550].*

Further, on consideration of section 163, we find that title of the section is "**who may be regarded as an agent**". There is definition of "agent" u/s 163 and the same is for **purposes of the Act.** Wherever the word 'agent' is employed including clause (i) of sub-section (1) of section 160. There is nothing in the language or in the context of the provision to suggest that the word 'agent' as defined would not apply to 'agent' falling under any category (clause) of sub-section (1) of section 163; all are representative assesses of the non-resident. This is made clear from the title providing for persons who are to be "regarded" as agent of the non resident for all sections including sections 160 and 161 of the Act. By use of words "including", an extended meaning has been given to the term, "agent". Therefore, scheme of assessment of an agent under Act of 1961 is different from the scheme under the old Act. There is no distinction between agent under above sub-section (1) of section 163 or 'agent' under clause (i) of sub-section (1) of section 160. Various categories mentioned in sub-section (1) of Section 163 are liable to be assessed as representative assesses like the agent under section 160(1)(i). As per the above clause, the representative assessee for non-resident is not only '**agent**' but includes '**a person who is treated as an agent u/s 163**. The treatment of a person as an agent u/s 163, as we would presently show, is different from his inclusion (mention) under various clauses of section 163(1) of the Act. In other words, person categorised under any clause of sub-section (1) of section 163 is an agent and "**not treated as an agent u/s 163**". His obligations and liabilities are same as of an "agent" covered under clause (i) of sub-section (1) of section 160. If it is held otherwise, as contended on behalf of the revenue that these persons are statutory agents as understood under section 43 of the old Act and fall in a different category than "agent" under section 160(1)(i),

then purpose of sub-section (1) of section 163 would be defeated. There is no machinery other than section 160(1)(i) to assess such persons as representative assessees. Merely because a person is required to be regarded as an agent u/s 163(1), it can not follow that he is treated as an agent u/s 163 or more precisely u/s 163(2). The person covered under any of the clauses is an agent as is more than clear from language of section 163, providing definition of an "agent" and having title "**who may be regarded as agent**". Such persons have same liabilities as a natural agent would have under the General Law. These are not persons treated as an agent u/s 163 of the Act.

22. Next important question is: What is the meaning of the expression, "persons who are treated as an 'agent' u/s 163"? In order to answer this question, we have once again to go to provision of Section 43 of 1922 Act. The said section specifically provided that any person employed by or through whom non resident was in receipt of income and upon whom the Income-tax Officer, "has caused a notice to be served of his intention of treating him as the agent of the non-resident person, shall for all purposes of this Act be deemed to be such an agent". As per proviso to the section, an opportunity of being heard by the Income-tax Officer was required to be given, as liability of such person, to be deemed to be an agent of non-resident. There is no similar requirement under any section as provided in section 43 of old Act although requirement of the proviso to provide "opportunity of being heard as to his liability to be treated as such", has been retained in sub-section (2) of Section 163 in 1961 Act. The expression "treated as an agent of non-resident" u/s 163 is also retained in Section 149(3), and in some other section. When these provisions are read in conjunction with section 246(1)(d) of Income-tax Act, it is clear that passing

of an order u/s 163(2) of the Act treating the person as agent of non-resident is an appealable order. Therefore, opportunity of being heard as provided u/s 163(2) is not mere requirement of notice, but an order has to be passed under the said provision. The person treated as an agent of the non-resident is entitled to file appeal against the said order.

22.1 In the case of **CIT vs. Kanhaya Lal Gurmukh Singh 87 ITR 476 (P&H),** their Lordship after considering provisions of sections 162, 246 and 148 of Income-tax Act, 1961 and other relevant provisions, held that passing of an order u/s 163(2) must precede issuance and service of notice u/s 148 on the person "treated as an agent u/s 163". The aforesaid decision of Punjab & Haryana High Court has also been followed by Bombay High Court in the case of **CIT vs. Belapur Sugar & Allied Industries Ltd. 141 ITR 404.** In the above mentioned decision, their Lordship also considered as to what is the meaning of the word '**treated**'. B.R.Tuli, J with whom Harbans Singh, CJ agreed, observed as under:

> *"There is difference between the meaning of the words "deemed" and "treated". What is implied by the word "deemed" is that whether a person is or is not the agent of a non-resident in actual fact, he will be treated as such if he answers to the description stated in section 43 of the 1922 Act. The word "treated" used in section 149(3) of the 1961 Act, on the other hand, implies that the person to whom notice under section 148 is to be issued has already been adjudged to be the "agent" of the non-resident liable to file the return of income of the non-resident and to pay the income-tax to be assessed on him. If it is held that no difference has been made by the change in the language, there was no point in the legislature changing the phraseology in the 1961 Act. The purpose of the change in the language is clear that an order treating a person as an agent of the non-resident has to be passed before issuing notice under section 148 of the 1961 Act."*

The learned CJ while agreeing with the view expressed by BR Tuli, J, noted various differences between I.T Act 1961 and the Old Act as under:

1922 Act	1961 Act
That no appeal was provided against treatment of a person as an agent under the old Act.	However, under the 1961 Act, an appeal can be filed by a person who is treated as an agent u/s 163(2).
Section 34(1) of the old Act provides for a notice being given by the ITO with regard to income that escaped assessment and the second proviso to sub-section (1) runs as under: 'Provided further that the ITO shall not issued a notice under this sub-section for any year, after the expiry of two years from that year, if the person on whom the assessment or reassessment is to be made in pursuance of the notice is a person deemed to be the agent of a non-resident person under section 43.'	Relevant portion of section 149 of the Act is to the following effect: '(3) If the person on whom a notice under section 148 is to be served is a person treated as the agent of a non-resident under section 163 and the assessment ..... to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of a period of two years from the end of the relevant year.'
Section 43: 'Any person employed by .....a person residing out of the taxable territories, or having any business connection with such person,..... upon whom the Income-tax Officer has caused a notice to be served on his intention of treating him as the agent of the non-resident person shall, for all the	Section 163'(1) For the purposes of this Act, 'agent' in relation to a non-resident, includes any person in India – (a) who is employed by .... The non-resident; or (b) (b) who has any business connection with the non-resident; or ...

purposes of this act, be deemed to be such agent:	(2) No person shall be treated as the agent of a non-resident unless he had had an opportunity of being heard by the Income-tax Officer as to his liability to be treated as such.'

The learned CJ also agreed that word 'treated' in the new Act is different from the word 'deemed' used in section 43 of the 1922 Act.

23. Aforesaid decision of three Judges was not cited before the Bench in the case of **Hazoora Singh** (supra) and in several other cases on the subject, which lead to a different decision in those cases. However, as noted above, in the case of Kanhaya Lal Gurmukh Singh (supra), the word "treated" was held to be "adjudication" of liability of such person (agent) to be treated as such. This inference also follow from the plain language of section 163(2) providing opportunity of being heard by the Assessing Officer to the agent as to his liability to be treated as such. Thus 'treatment' is calling upon a person to discharge the liabilities of an agent of non-resident after hearing him of his liability as such. In other words liabilities of a representative assessee of the non-resident can be fastened on such person in accordance with provisions of the Act after hearing him. It is, therefore, clear that an assessment on the person who voluntarily files return as agent of the non-resident, is not treatment of the person "as agent of the non-resident u/s 163". Treatment, as already held, is adjudication of liability and occasion to make such adjudication will not arise unless question is raised by the concerned person. So a person who admits his status of agent of non-

resident is not a person "treated" as agent of the non-resident. Treatment of a person as agent of the non-resident is quite different from assessment or re-assessment of non-resident through such a person. This would also be in line with provision of Section 149(3) as interpreted by Punjab & Haryana High Court and various other courts. The treatment has to be prior to service of notice on the person who is desired to be assessed. Service of notice u/s 148 is first step in the assessment and not assessment. Therefore, assessment of person as agent of non-resident is not "treatment" as envisaged under section 163(2). It is adjudication which must precede assessment.

23.1 The above view would also be in line with the view which Chagla J took in the case of **Jadavji Narshidas & Co. vs. CIT 31 ITR 1**, laying down that necessity to treat a person as an agent of non-resident would arise in a case where such a liability is disputed or contested. Where the person himself represents or accepts or admits to be the agent of non-resident, the question of treating such person as agent of non-resident by passing an order would not arise. It would be quite an absurd situation where the person represent an agent of the non-resident or admits by his conduct by filing a return of income of the non-resident, yet the Income-tax authorities are required to give him an opportunity of being herd to be treated as an agent of non-resident and pass an order u/s 163(2). Opportunity of being heard and passing of an order would have meaning only in cases where the person to be treated as an agent, denies his liability. In such a situation, the Assessing Officer is required to adjudicate and pass an order.

24. Another relevant question is whether order u/s 163(2) is required to be passed only in respect of persons mentioned in sub-section (1) of Section

163 or would cover the case of an agent, under law. We have already held that word "agent" for the purpose of section 160(1)(i) is defined in section 163, the latter provision has no different meaning. Section 163(2) is a machinery section for treatment of an agent (of every kind). There is nothing in sub-section (2) of Section 163 to restrict its application to persons mentioned under sub-section (1) of section 163 and not to "agent" under the general law. Provisions of section 163 are machinery provisions and, should be given a wider meaning rather than restricted meaning. The expression "agent of non-resident" in section 163(2) covers "agent" as a representative assessee u/s 160(1) (i) and persons regarded as agents u/s 163(1). All these persons can be treated as an agent u/s 163 of the non-resident. Any person who denies his liability to be treated as an agent of the non-resident is required to be given an opportunity of being heard by the Assessing Officer in terms of section 163(2) of the Act and, an order has to be passed treating him to be an agent or otherwise. Therefore, provision of section 163(2) is applicable to agent of every category who denies his liability to be treated as an agent. From the above discussion, it necessarily follows that under provisions of section 160 to 166, there are agents of two types: (1) agents who admit their liability as agents of non-resident. Such liability may be expressly admitted or it may be implied from their act and conduct. Having accepted themselves to be the "agent" of the non-resident, the question of giving opportunity of being heard to such agents or passing order, treating them as agent of the non-resident, would not arise. (2) There can be agents under sections 160(1)(i) or 163(1) who deny their liability to be agents of the non-resident assessee. Because of their stand, it becomes necessary for the Assessing Officer to allow an opportunity of being heard to them and then adjudicate the matter relating to their liability to be agent of the non-resident

in terms of section 163(2) of the Act. When an order u/s 163(2) is passed holding such person to be an agent of the non-resident, such person falls in the category of person who is treated as an agent under section 163. Difficulties can arise in cases where action u/s 148 for making assessment for the first time for a particular assessment year, is required to be taken. There being no return filed by the agent on behalf of the non-resident, it is necessary for the Assessing Officer to initiate action under section 163(2) and thereafter issue the notice u/s 148 of the Act. That would of course be in the interest of the revenue. However, in the light of clear admission of the agent here, this aspect is not arising in this case. We, therefore, need not conclusively decide this aspect. Once order on above lines is passed, such persons are equated with agents under general law and both would fall and covered under provisions of section 160(1)(i) of the Act and would have similar rights, obligations and liabilities of an agent u/s 161, 162 and 166 of the Income-tax Act. They would have to discharge liabilities and obligations under the Act and would also be entitled to retain with them out of funds belonging to the non-resident as per statutory provisions. Now whether a particular person would fall under first category or second category, would depend upon facts and circumstances of the case. This distinction is maintained u/s 149(3), 163(2), 195, 246(1)(d) etc. of the Income-tax Act.

25. In the light of above legal quoting, we proceed to examine facts of the present case.

26. In the present case, it is an undisputed position that assessee had an agreement with its principal. The salient features of the said agreement are as under:-

"1. J.M. Baxi & Co. will act as the Agents for Thoresen Chartering (Pte) Ltd. at Bombay, Porbandar, Bedi Bandar and Kandla and other West Coast Indian ports subject to performance of respective agents.

2. The agents will in all matters act loyally and faithfully to the principals, and adhere to their orders and instructions in relation to any particular matter and will act in such a manner as they reasonably consider most beneficial to the Principal's interest.

3. The agents will not act as Agents, or represent any vessels which operate in competition to Thoresen Chartering (Pte) Ltd. without the prior written approval of the Principals.

4. The agents shall perform all agency services for the vessels owned, operated, chartered and/or managed by the Principals, including solicitations and arrangements for stevedoring services, tallymen, surveyors, supervision, pilots, berths or buoys, ship's stores, fuel and diesel oil replenishments, ship's articles, cash advance to master, repairs and such similar services."

27. Having regard to above terms, it cannot be disputed that assessee is agent of the non-resident. The assessee never disputed its liability to be assessed as agent of the non-resident. Not only income tax returns were signed and filed as agent for and on behalf of the non-resident, but several other documents were furnished with the income tax authorities including an undertaking that taxes due from the non-resident would be paid by the assessee agent. Having regard to above clear and undisputed facts, it was

not necessary for authorities in this case to provide any opportunity of being heard to the assessee as regards his liability to be treated as an agent under the Act. In fact, it would have looked absurd to provide such an opportunity of being heard to a person who has accepted and never disputed his liability to be assessed as an agent. Therefore, there was no occasion to pass any order u/s 163(2) of the I.T. Act. In other words, there was no question of "treating the assessee as an agent of the non-resident" and, therefore, provision of Section 149(3) had no application in this case. As noted earlier with reference to provisions of old Act and Section 163(2) of the Act, these provisions are for the benefit of the agent relating to his liabilities under the Act. The benefit of provision (opportunity of being heard) can be waived by the agent as authoritatively held by their Lordships of Bombay High Court. Having regard to the act and conduct of the assessee noted above in detail, it is difficult to dispute that the assessee did not waive this benefit or privilege under the statutory provision. Therefore, the assessee agent can not turn around and raise an objection of failure to provide an opportunity of being heard u/s 163(2). The assessee was not and could not be treated as an agent u/s 163 of the Act. Besides, the circumstances under which original returns in all the assessment years under reference were filed u/s 139, accepting position of "agent of non-resident" remained unaltered. These unaltered

circumstances are to be considered at the time of application of Section 147/148 of the Act for assessment of non-resident through the agent. As pointed out by their Lordships of Bombay High Court, assessment includes reassessment. It is not possible to contend that he is an agent for filing returns u/s 139(1) and for regular assessment but not for reassessment. Therefore, on the facts and circumstances of the case, provision of Section 149(3) has no application in this case nor was there any necessity to pass any order in terms of Section 163(2) of the Act in this case.

28. Having given our view as above, we deem it necessary to deal with other contentions raised on behalf of the assessee. It was vehemently contended that the assessee, as a law abiding citizen, had suo moto filed return of income as agent of the non-resident and, therefore, the assessee should not be placed at a disadvantage. We do not find any force in the above contention. In our considered opinion, the assessee, by submitting returns as agent of the non-resident, only discharged its obligation under the law. If as a law abiding citizen, the assessee chose to submit returns suo moto u/s 139(1) of the Act, it should not hesitate to do so u/s 148 of the Act. We do not see any disadvantage to the assessee in this case. Let the assessee remain a law abiding citizen and comply with the provisions in a proceeding u/s 147/148 of the Income Tax Act.

29. The assessee had also vehemently contended that decision of Hon'ble Delhi High Court in the case of CIT Vs Madhwan Bashyam 214 CTR 335 was the only direct decision on the subject and, therefore, should be followed with respect by the Appellate Tribunal. We have no difficulty in accepting above legal proposition. However, as noted earlier, decision of Hon'ble Delhi High Clourt is not the only decision relevant on the point in issue. There are several other decisions of different High Courts and also of Supreme Court of India. We have seen that binding decision in the case of Kanhaiya Lal Gurumukh Singh 87 ITR 476(P&H) was not cited and applied in the Hazoora Singh and thus a contrary view was taken. This is true of several other decisions including the case of Madhwan Bashyam (supra). In the reported case, detailed facts are not available nor various decisions relevant to the issue were placed before the Hon'ble High Court. Even reference to provision of Section 160 or 161 is not shown to have been made. It is not clear whether the agent in that case had denied his liability to be treated as an agent. All the same, their Lordships in para 7 of the decision have held as under:-

> *"In our opinion, if a person filing a return as an agent of the assessee is not accepted as an agent for further proceedings, then the AO must pass an order so that the agent or assessee can file an appeal. But, as in the present case, if the proceedings have gone on as if there is no objection to the person filing a return being*

treated as an agent of the assessee, no specific order needs to be passed in this regard."

30. Our view is quite in line with the above observations. Reference was also made to the decision of ITAT 'K' Bench Mumbai in the case of Deputy Director of Income Tax Vs R. Lines Ltd. 2007 TIOL 123, but both the parties agreed that above decision has no application to the facts of the case. Certain other decisions of the Tribunal were cited and relied upon before us by the learned counsel for the assessee. However, in those decisions, true meaning and import of expression "treated as an agent u/s 163" was not appreciated with reference to the case law we have considered in detail. For the above reasons, we deem it unnecessary to make detailed reference to them.

31. In the light of above discussion, we answer the question referred to Special Bench in the negative and in favour of the revenue and against the assessee. The matter may now be placed before the regular Bench for disposal in accordance with law.

Sd/-	Sd/-	Sd/
(J. SUDHAKAR REDDY)	(N.V.VASUDEVAN)	(VIMAL GANDHI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER	PRESIDENT

DT. 5th March, 2009
DRS/GS