

**Bunge and Co. Ltd. Vs. Income-tax Officer and ors.**

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**Court :** Kolkata

**Decided On :** Mar-06-1970

**Reported in :** [1971]79ITR93(Cal)

**Judge :** T.K. Basu, J.

**Acts :** [Income Tax Act, 1961](#) - Sections 160 to 164 and 195 to 201

**Appeal No. :** Matter No. 62 of 1967

**Appellant :** Bunge and Co. Ltd.

**Respondent :** income-tax Officer and ors.

**Advocate for Def. :** D. Gupta, Adv.

**Advocate for Pet/Ap. :** Ginwalla, Adv.

**Judgement :**

T.K. Basu, J.

1. The petitioner is a limited company incorporated under the laws of the United Kingdom and carries on business, inter alia, of exporting jute goods from India at 8, Old Court House Street, Calcutta.

2. According to the petitioner, it has agents in various countries for the sale of its export goods. The said foreign agents are non-residents within the meaning of the Income-tax Act, 1961 (hereinafter referred to as 'the Act'). The petitioner pays to its non-resident agents commission in respect of the sales made by them. Some of the non-resident agents act as agents-cum-buyers with the full knowledge and consent of the petitioner and some act as agents only. According to the petitioner, none of the said nonresident agents performs any activity or renders any services in India and their entire activities are in their own countries.

3. For the previous year relating to the assessment year 1962-63, a sum of 74,793-5-3 became due and payable by the petitioner to its non-resident agents. The said sum of 74,793-5-3 was duly remitted by the petitioner to the non-resident agents, after obtaining the previous permission from the Reserve Bank of India.

4. On the 5th January, 1967, the Income-tax Officer, Central Circle II, Calcutta, the respondent No. 1 herein, issued a notice to the principal officer of the petitioner-company in the following terms:

' Re. Assessment--I.T. 1962-63.

On a scrutiny of the statements filed by you, it is evident that your sales are completed in India and it follows therefrom that the commission and other payments to the different non-resident concerns are received in India. They are, therefore, liable to Indian income-tax on such receipts. Since the income has been earned through activities with you, I propose to treat you as an agent, for the limited purpose of recovery Under Section 201 of the Income-tax Act, 1961, in respect of all the parties to whom, in the aggregate; payment of 74,793 was made.

Your objection, if any, may please be stated, in writing, before January 17, 1967.'

5. The petitioner preferred an objection to the aforesaid notice on the 27th January, 1967, raising various contentions.

6. On the 13th February, 1967, the first respondent addressed another notice to the principal officer of the petitioner-company in the following terms:

'Sub. Action under Section 163 and 201 of I. T. Act, 1961--Treatment as agent--Show cause notice--Issue of.

In connection with the assessment of not only 1962-63 but for other years as well, you are liable to be treated as an agent for meeting out the tax liability arising on account of the dealings you had with the non-resident concerns and the commission payments arising therefrom.

Your letter dated January 27, 1967, explains that action for recovery of tax in default in respect of payments to non-resident traders does not arise beyond the period laid out by Section 231 of the Income-tax Act, 1961. I feel this time-limit has no consequence over the application under Section 201 and under Section 195,

On going through your replies to the show cause notices issued by the customs authorities, it is evident that in paras. 3(d), (e) and (f) to show cause notice No. 2, you have admitted having been financed by Buntex S.A. through Bunge & Co. (London). The invoices prepared by you for all sales effected shows, as your explanation reads for the charge of under-invoicing, that the gross amount inclusive of the commissions and financing charges payable to the foreign agents have been included in your invoice while what you receive is the value of goods at sight This difference is obviously, therefore, paid in India as the sales are concluded here. Consequently, you should have deducted tax on such payments to nonresidents under Section 195 of the Income-tax Act, 1961. Your failure, hence, calls for action under Section 201 of the Income-tax Act, 1961,

Before treating you as an agent, I am giving this fresh opportunity to you to discuss with me your objections. The case is posted for hearing on February 25, 1967, at 10-30 a.m. for compliance.'

7. This rule nisi was obtained on the 27th February, 1967, challenging the aforesaid two notices dated the 5th January, 1967, and 13th February, 1967.

8. Before dealing with the contentions of the parties, it will be useful to set out some of the relevant provisions of the Act. Section 160(1) provides as follows:

'For the purposes of this Act, 'representative assessee' means--(i) in respect of the income of a non-resident specified in Clause (i) of Sub-section (1) of Section 9, the agent of the non-resident, including a person who is treated as an agent under Section 163 ;...'

9. Section 161 provides as follows:

'(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.

(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.'

10. Section 163, in so far as is material for our purpose, provides as follows :

'(1) For the purposes of this Act, 'agent', in relation 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 nonresident, has acquired by means of a transfer, a capital asset in India : . . .

(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.'

11. The next group of sections which require to be noticed are Section 195 to Section 201 of the Act:

'195. (1) Any person responsible for paying to a non-resident, not being a company, or to a company which is neither an Indian company nor a company which has made the prescribed arrangements for the declaration and payment of dividends within India, any interest, not being 'interest on securities', or any other sum, not being dividends, chargeable under the provisions of this Act, shall, at the time of payment, unless he is himself liable to pay any income-tax and super-tax thereon as an agent, deduct income-tax and super-tax thereon at the rates in force :

Provided that nothing in this sub-section shall apply to any payment made in the course of transactions in respect of which a person responsible for the payment is deemed under the proviso to Sub-section (1) of Section 163 not to be an agent of the payee.'

12. Sections 197, 198, 199 and 200 of the Act lay down the procedure as to deduction of tax and payment thereof.

13. Section 201 of the Act, in so far as is material for our purpose, provides as follows:

'(1) If any such person and in the cases referred to in Section 194, the principal officer and the company of which he is the principal officer does not deduct or after deducting fails to pay the tax as required by or under this Act, he or it shall, without prejudice to any other consequences which he or it may incur, be deemed to be an assessee in default in respect of the tax:

Provided that no penalty shall be charged under Section 221 from such person, principal officer or company unless the Income-tax Officer is satisfied that such person or principal officer or company, as the case may be, has wilfully failed to deduct and pay the tax.

(2) Where the tax has not been paid as aforesaid after it is deducted, it shall be a charge upon all the assets of the person, or the company, as the case may be, referred to in Sub-section (1).'

14. The principal contention of Mr. Ginwalla, appearing on behalf of the petitioner, is that if a person is an 'agent' or is treated as an 'agent' under Section 163 of the Act he is liable under Section 161 of the Act to be assessed in respect of such income in his hands in his own name although in a representative capacity. This is made clear by Section 160 which speaks of the agent of a non-resident as a 'representative assessee'. In such cases, Section 166 provides that the income-tax authorities may also directly assess and recover the tax from such person on whose behalf there may be an agent. Section 167 of the Act authorises the Income-tax Officer to have the same remedies against all properties of any kind vested or under the control or management of any representative assessee and gives him the same power as he would have against the property of any person liable to pay any tax whether the demand is raised against the representative assessee or against the beneficiary direct.

15. This group of sections of the Act, it is pointed out, contains a complete machinery for assessment and recovery of tax from a person who is an 'agent' within the meaning of Section 163 of the Act.

16. Turning to the other group of sections from sections 195 to 201 of the Act, it is pointed out that Section 195 speaks of any person responsible for paying to a non-resident or to a company specified therein who is liable to deduct income-tax and super-tax on the sums so payable at the rates currently in force. Such person is also charged with the duty of making payment of the sums so deducted to the revenue. In the event of the failure of any such person to deduct or to pay the tax on the sums payable to a non-resident or a company, Section 201 provides that 'such person' shall be deemed to be an assessee in default in respect of such tax. The plain effect of

Section 201 is that such a person who has either failed to deduct the tax or to pay the same to the credit of the Central Government may be subjected to the recovery proceedings which are available under the Act in respect of assessee in default.

17. The former group of sections from sections 160 to 163 and the latter group of sections from sections 195 to 201 of the Act, it is contended, are mutually exclusive and operate on different fields. Pointed reference is made in this connection to the proviso to Section 195(1) of the Act which prescribes that nothing in Section 195(1) shall apply to any payment made in the course of transactions in respect of which a person responsible for the payment is deemed to be an agent of the payee under the proviso to Sub-section (1) of Section 163 of the Act. This, it is pointed out, puts the matter beyond the pale of controversy. It is clearly an expression of the legislative intention that these two groups of sections are entirely independent of each other and are mutually exclusive.

18. Consequently, it is submitted that there can be no question of the petitioner being treated as an agent within the meaning of Section 163 of the Act for the purpose of recovery in the manner prescribed by Section 201 thereof. Since the income-tax authorities, by virtue of the impugned notices are proposing to proceed against the petitioner in a manner not authorised by law, they should be restrained by a writ of prohibition from doing so.

19. Mr. Dipankar Gupta, appearing on behalf of the revenue, did not seriously contest the proposition that the same person cannot be treated as an agent under Section 163 of the Act and proceeded with under Section 201 at the same time. He, however, submitted that the income-tax authorities have not yet made up their minds as to whether the petitioner is to be treated as an agent under Section 163 of the Act or is to be proceeded with as 'any person' within the meaning of Section 195 thereof. He submitted that a notice has merely been issued at this stage as part of the process of giving an opportunity to the petitioner of making its submissions. Mr. Gupta contended that making statements on propositions of law is no part of a notice which is a mere link in the chain of such an opportunity process. It should not be treated as an integral part of the notice. It is merely a tentative view of a quasi-judicial authority which may be corrected at a subsequent stage. He invited me to draw the analogy of judicial officers and even judges of this court who express certain views in the course of the hearing of a case which view may not ultimately prevail. According to Mr. Gupta, this application is premature and it is only at the stage when the officer passes an order which may be erroneous in law that I should interfere.

20. I am unable to accept this contention of Mr. Gupta. It has been laid down by the Supreme Court in the case of East India Commercial Company, : 1983(13)ELT1342(SC) that, if assuming that the charges contained in a notice under the Sea Customs Act to be correct, they do not disclose an offence, then such a notice should be struck down as being without jurisdiction. In my view, a similar principle ought to be applied in the present case. When a notice, ex facie, proposes to take certain action against an assessee which is patently not authorised by law, such a notice should be held to be without jurisdiction and void.

21. It is to be noted that in reply to the first notice dated the 5th January, 1967, the petitioner raised the identical contentions in its letter dated the 27th January, 1967, as the ones that have been canvassed before me. Notwithstanding the above, however, the Income-tax Officer has persisted in adopting the same procedure in the

later notice dated the 13th February, 1967, viz., of treating the petitioner as an agent under Section 163 of the Act for the purpose of action under Section 201 thereof. This is quite clear from the heading of the second notice which speaks of action under sections 163 and 201 of the Act and of 'treatment as an agent'. Such an action, in my view, is plainly not permissible in law and the court is entitled to restrain the authorities from continuing proceedings on the basis of such a notice.

22. This contention of Mr. Ginwalla, therefore, succeeds.

23. I make it clear, however, that it would be open to the income-tax authorities, if and when they make up their minds to elect as to whether the petitioner should be proceeded against either under the former group of sections of the Act or the latter which are, in my view, mutually exclusive.

24. Mr. Ginwalla submitted next that the petitioner is not an agent of the foreign buyer within the meaning of Section 163 of the Act. Reliance was placed in this connection on a decision of the Supreme Court in the case of Commissioner of Income-tax v. R. D. Agarwal and Co., : [1965]56ITR20(SC) . This contention was sought to be resisted by learned counsel on behalf of the revenue.

25. Thirdly, Mr. Ginwalla argued that, in so far as recovery proceedings under Section 201 of the Act are concerned, they are barred by limitation with regard to the present assessment year in view of the provisions of Section 231 'of the Act, This contention also was sought to be repelled by Mr. Gupta on behalf of the revenue.

26. Lastly, Mr. Ginwalla relied on a circular being Circular No. 17 (XXXVII-1) of 1953 dated the 17th July, 1953 which has been set out in paragraph 5 of the petition. It was contended that, in view of the circular, a foreign agent of an Indian exporter is not liable to Indian income-tax. Mr. Gupta for the revenue contended that the circular cannot apply to agents-cum-buyers as in the present case. In any event, according to Mr. Gupta, the true legal character and the relation between the parties is a matter which requires investigation at a subsequent stage.

27. In view of the fact that I am setting aside the impugned notices on the basis of which the proceedings have been initiated, I do not feel that it would be appropriate for me at this stage to pronounce any opinion on the merits of the other contentions of the petitioner which I have recorded above.

28. I make it quite clear, however, that in the event of the income-tax authorities deciding to take fresh proceedings against the petitioner, it will be open to the petitioner to agitate all these questions in appropriate proceedings at an appropriate stage.

29. In the result, this application succeeds and the rule is made absolute. There will be a writ in the nature of mandamus directing the respondents to forthwith recall, cancel and withdraw the notices dated the 5th January, 1967, and the 13th February, 1967, and a writ in the nature of prohibition restraining the respondents from taking any steps or proceedings on the basis of the said two notices. The respondents would, however, be at liberty to proceed according to law in the light of the observations indicated above.

30. There will be no order as to costs.

