IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1697 OF 2016

WITH
INCOME TAX APPEAL NO.1698 OF 2016

WITH
INCOME TAX APPEAL NO.1699 OF 2016

WITH

INCOME TAX APPEAL NO.1700 OF 2016

Air India Limited ..Appellant

Vs.

Deputy Commissioner of Income Tax
(International Tax)Range 1 (1) (1),Mumbai
and Another ..Respondents

WITH
NOTICE OF MOTION NO.2735 OF 2016
IN
INCOME TAX APPEAL NO.1699 OF 2016

WITH
NOTICE OF MOTION NO.2736 OF 2016
IN
INCOME TAX APPEAL NO.1698 OF 2016

WITH
NOTICE OF MOTION NO.2737 OF 2016
IN
INCOME TAX APPEAL NO. 1697 OF 2016

WITH
NOTICE OF MOTION NO.2738 OF 2016
IN
INCOME TAX APPEAL NO.1700 OF 2016

Air India Limited .. Applicant

IN THE MATTER BETWEEN

Air India Ltd ..Appellant

Vs.

Deputy Commissioner of Income Tax
(International Taxation)Range 1 (1) (1),
Mumbai and Another ..Respondents

Mr.Jehangir Mistri, Senior Counsel a/w Mr. Nitesh Joshi, Mr. Prashant Beri i/b M/s Beri and Co, for the Appellant / Applicant in all Appeals.
Mr. Charanjeet Chanderpal a/w Mr. Parag Vyas, Ms. Namita Shirke, G. Raja Rani, for the Respondents in all Appeals.

CORAM :- **S.C. DHARMADHIKARI &**
B.P.COLABAWALLA, JJ.
DATE :- **DECEMBER 21, 2016.**

P. C.:

Though the Appeals and Notices of Motion are on Board, we have heard the Appeals finally. Mr. Mistri, learned Senior Counsel for the Appellants and Mr. Chanderpal, the learned counsel for the Respondents have no objection to this course.

2 Each of these Appeals were placed before us for admission. After hearing both sides on 21st November, 2016, we proceeded to admit the Appeals on the substantial questions of law enumerated and framed by our order.

3 We have found that detailed arguments were canvassed even at interim stage. Bearing in mind the debatable issue that we have taken up, the Appeals for hearing.

4 For deciding these Appeals, it would be convenient to take the facts in the case of Air India Limited V/s Deputy Commissioner of Income Tax (International Tax) Range in Income Tax Appeal No. 1699 of 2016.

5 That concerns assessment year 2000-2001 for which the previous year was the financial year ending on 31st March, 2000. The Appellant is an International Flag carrying airline of India and is wholly owned by the Government of India. It is engaged in the business of carrying passengers and goods by air since 2007.

6 In order to enable it to increase its market share pending purchase of new aircraft, the management decided to take some aircraft on wet lease basis. It entered into a Wet Lease Agreement with a company by name Caribjet Inc. based in Antigua and Barbuda a twin island country in West Indies (these entities shall hereafter be referred to as "Caribjet" for short). This agreement was initially valid up to 30th June, 1995 but lateron extended up to 31st December, 1995. Before expiry of this extended agreement i.e. on 22nd October, 1995, the Appellant entered into a fresh agreement for wet lease of three aircrafts with the same company which was to remain in force up to 31st December, 1997. The detailed terms and conditions were agreed upon between the Appellant and Caribjet including relating to technical warranties and obligations, tax responsibilities and dispute resolution mechanism. The Appellant specifically relied upon a clause in the agreement where-under any dispute, controversy or claim arising out of or relating to the agreement shall be resolved by parties by making a reference to the arbitration which shall be conducted in accordance with the United Nations Commission on International Trade Law Arbitration Rules. With respect to tax obligation, it was agreed

that Caribjet shall bear any and all taxes leviable upon it under the Act by virtue of entering into this agreement and accordingly the Appellant would be entitled to deduct from all payments to be made to Caribjet withholding taxes as per the Act. Annexure-A to the memo of Appeal is a copy of this agreement dated 22nd October, 1995. During the subsistence of various similar wet lease agreements, the Appellant used to approach the Indian Tax Authorities under Section 195 (2) of the Income Tax Act, 1961 (for short "I. T. Act") for determination of the amount of tax to be withheld in India. With respect to such applications, it appears that it has been consistently held that the provisions of Section 44BBA of the I. T. Act would apply to such payments and 5% of the gross receipts would be deemed to be income chargeable to tax in the hands of Caribjet. Since the rate at which tax was payable by a foreign company was 55% tax required to be deducted worked out 2.75% of the gross receipt. It was specifically stated in the said TDS certificates that the remittor and the person to whom money is remitted has no liability outstanding in respect of the remittances. The Appellant thus rely upon a No Objection Certificate issued under Section 195 (2) of the I. T. Act and annexed a copy of the same as Annexure-B.

7 Thereafter, alleging various defaults by Caribject, the Appellant submits that it terminated this agreement on 4th September, 1996. Caribjet alleged that termination of the agreement was wrongful. Therefore, a dispute arose and eventually the provision for arbitration was invoked by M/s.Caribjet. An Arbitral Tribunal was set up and which gave its Award on 19th January, 1999. It found that the wet lease agreement was wrongly terminated by the Appellant. On account of this, Caribjet became entitled to its claim for damages. Therefore, accrual of right to receive damages by Caribjet should relate to either assessment year 1997-98 being the year relevant for the termination of agreement or assessment year 1999-2000, when the said termination was found to be wrongful and not the current assessment year. There were subsequent awards passed by the International Arbitral Tribunal quantifying the amount of damages, deciding incidental issues but which are not relevant for the purposes of the present proceedings. Therefore, it was submitted that assuming without admitting that any income arises to Caribjet from the damages on account of wrongful termination of the wet lease agreement, the place of accrual of such damages would be outside India.

8 Thereafter, on 15th November, 1999, the International Arbitral Tribunal issued an Award quantifying amount of damages payable by the Appellant to Caribjet on account of the wrongful termination of the wet lease agreement. After set-off and counter claims made by the Appellant against Caribjet, the net amount payable by it to them worked out to USD 23.6 million. Once the amount quantified by the International Arbitral Tribunal to be paid to the Caribjet was in the nature of damages, then, it was not possible for the Income Tax Authorities to conclude that it was a receipt or an income in the hands of the present Appellant. It is such an issue which was consistently raised. It is only that a deduction was effected of INR.10,46,52,267, and that was deposited as tax arising in the hands of Caribject Inc from the receipt of damages. Therefore, the alternate argument was canvassed that any tax liability arises in India in respect of receipt of damages by Caribjet, it should be regarded as having been discharged by this payment by the Appellant and consequently, no income could be regarded as having escaped assessment.

9 The International Arbitral Tribunal having concluded the proceedings in the above manner what the Appellant did was

it relied upon an order dated 3rd November, 2010 in respect of proceedings under Sections 201 and 201A of the I. T. Act whereby it was held that it was impossible for the Appellant to deduct tax from the remittance made to Caribjet. The Revenue gave effect to that order of the Tribunal and directed that the net demand under Sections 201 and 201A of the I. T. Act was Nil. The Appellant approached the tax authorities and stated that in the light of the order passed on 3rd November, 2010, the amount of Rs. 10,46,52,267/- and the sum of Rs.5,00,00,000/- paid as interim arrangement should be refunded or the Appellant be given credit of the same against other demands.

10 From the record it appears that though the Appellant sought to file an Appeal against the Award of the Arbitral Tribunal before the Court in London that appeal was also rejected. The Appellant has also filed a suit in this Court being Suit No. 3228 of 2001 against Caribjet for recovery of taxes paid and amount demanded by the Income Tax Department from it along with interest which is pending. The Appellant insisted that no deduction of tax at source by the Appellant can be made despite the order dated 30th December, 1999 passed by the Deputy

Commissioner of Income Tax, Special Range-1, Mumbai under Section 195 (2) of the I. T. Act but that contention was negatived. Therefore, the Appeals were filed before the Commissioner of Income Tax (Appeals) and thereafter the Tribunal. The Tribunal had on 3rd November, 2010 allowed the Appeal of the Appellant on the ground that it was impossible for them to deduct tax on the remittance to be made to M/s.Caribjet. That is how on these orders gaining finality, that the Appellant made the demand as noted above on the department. The Appellant then submits that on 28th November, 2000, Caribjet filed its return of income for assessment year 2000-2001 with Deputy Commissioner of Income Tax, Mumbai offering Nil income to tax. In the said return, it explained that the damages received as per the International Arbitral Tribunal was neither an income nor was it chargeable to tax in India and hence was not offered to tax. That case was selected for scrutiny by issue of notice dated 28th November, 2001 under Section 143 (2) of the I. T. Act. In Caribjet's case, an assessment order was passed by Respondent No.1 on 28th March, 2003. The Appellant submitted that the primary liability to pay tax on its income is of Caribject since that entity filed its return, was appearing before the Revenue in the course of assessment

proceedings and later an assessment order has also been passed on it, no proceedings could have been initiated against the Appellant treating it as Caribjet's representative assessee and also making it liable to pay tax based on Caribjet's income. The basis for that demand was a reassessment order. The Appellant claimed that it was not aware of any further proceedings by Caribjet. Therefore, the assessment order as far as Caribjet is concerned had gained finality. However, on 15th March, 2001 and 15th February, 2002 show cause notices were issued by the first Respondent to the Appellant requiring it to show cause why it should not be treated as an agent of Caribjet in terms of Section 163 of the I. T. Act. That was in relation to damages received by Caribjet. The Appellant submitted that no cognizance should be taken of the earlier notice dated 15th March, 2001 as no further steps were taken by the Revenue based on that notice and they were proceeding with the assessment on Caribjet. Further, the second notice dated 15th February, 2002 shows that Respondent No.1 did not want to proceed based on the earlier notice issued under Section 163 of the I. T. Act. However, it is pertinent to note, according to the Appellant, that it filed detailed submissions before the first Respondent and these detailed submissions are

contained in their letter. The details of these letters are set out in paragraph 21 of the memo of the appeal. Throughout it was contended that the Appellant cannot be regarded as an agent/ representative assessee of Caribjet as per Section 163 of the I. T. Act. However, on 6th March, 2003, first Respondent passed an order under Section 163 of the I. T. Act treating the Appellant as a statutory agent of Caribjet by relying on the language of Section 163 (1) (b) and Section 163 (1) (c) of the I. T. Act, the Appellant's submissions were rejected. Annexure-R is a copy of this order. Aggrieved thereby, the Appellant preferred Appeal before the Commissioner of Income Tax (Appeals) and raised various grounds inter-alia that they cannot be treated as an agent of Caribjet or the representative assessee in law. In the meanwhile, by treating the Appellant as representative assessee of Caribject, the first Respondent issued a notice under Section 148 of the I. T. Act on 7th March, 2003 alleging that the income chargeable to tax in the hands of Caribjet for assessment year 2000-2001, had escaped assessment. That was sought to be assessed in the hands of the Appellant as a representative assessee. The said notice resulted in an assessment order of 27th March, 2003. This time, Section 144 read with Section 147 and 163 of the I. T. Act were

invoked. The Appellant submits that the order was passed within 20 days of issuing the notice, namely, within 20 days from 7th March, 2003. Therefore, the assumption of jurisdiction was faulted. Aggrieved by this assessment order, an Appeal was preferred before the Commissioner of Income Tax (Appeals) and copy of its grounds of Appeal is annexed as Annexure-U to the present Appeal.

11 The Commissioner of Income Tax (Appeals) by his order dated 12th October, 2004 upheld the action taken by the first Respondent treating the Appellant as an agent of Caribjet under Section 163 of the I. T. Act and dismissed its Appeal. It was held that the Appellant could be regarded as an agent of Caribjet in view of Section 163 (1) (b) as well as 163 (1) (c) of the I. T. Act. The above appellate order was challenged by filing an Appeal before the Income Tax Appellate Tribunal. The Commissioner of Income Tax (Appeals) in the meanwhile disposed off the Appeal against the assessment order passed by the first Respondent under Section 144 read with Sections 147 and 163 of the I. T. Act partly allowing it. In the course of appellate proceedings in regard to simultaneous assessment being carried out by the first Respondent against Caribjet as a principal assessee and the

Appellant as representative assessee, he had called for a remand report from the first Respondent. In the remand report dated 19th July, 2006, the first Respondent accepted that the same income was the subject matter of assessment in the hands of Caribjet as well as the Appellant. He further stated that the action taken against the Appellant under Section 163 of the I. T. Act was not confined only to assessment but it could also be for other purposes including for recovery of taxes. He has then justified his action as being initiated to safeguard the interest of the revenue. The Appellant then contends that with respect to their submission on non-taxability of the amount and non-application of Section 144 of the I. T. Act, the Commissioner of Income Tax (Appeals) has rejected the same. However, he allowed the Appeal in view of the well settled law that simultaneous assessments could not be made against the principal assessee as well as the representative assessee.

12 It is in these circumstances that the Appellant heavily relied upon the fact that they did not file Appeal to the Tribunal against the findings of the Commissioner of Income Tax (Appeals) on other issues. That was because its Appeal had been allowed on another ground. Annexure-X is a copy of the Appellate order

dated 17th August, 2006.

13 Hereafter what commences according to us is a curious round of litigation against the appellate order dated 17th August, 2006. It was first Respondent / Revenue which filed the Appeal before the Income Tax Appellate Tribunal. The sole ground was that the Commissioner of Income Tax (Appeals) erred in holding that the same income cannot be brought to tax in the hands of non resident and its agent being its representative assessee.

14 In view of the findings of the Commissioner of Income Tax (Appeals) in the appellate order dated 17th August, 2006 that there should not be simultaneous assessment, the Appellant before us could not have filed the Appeal. It could not have filed an appeal in respect of findings on other issues as the reassessment order stood cancelled. The Appellant therefore raised a plea before us that it cannot be said to be aggrieved by the order of the first appellate authority.

15 On 6th January, 2016, the Tribunal heard the Appeal filed by the Appellant against the appellate order upholding the order under Section 163 of the I. T. Act as well as the Revenue's

Appeal against the appellate order holding that no simultaneous assessment could be made on the Appellant as a representative assessee. The Revenue's Appeal was taken up for hearing first. The Tribunal, according to the Appellant, simply heard the issue raised in the first Respondent's appeal and was satisfied that the view taken by the first appellate authority was in consonance with the decision of the Supreme Court. Accordingly, the Appellant was not called upon to invoke the provisions of Rule 27 of the Income Tax (Appellate Tribunal) Rules, 1963 and urge that first Respondent erred in invoking his jurisdiction under Section 148 of the I. T. Act and making a best judgment assessment under Section 144 of the I. T. Act as well as the issue that the said receipt was not chargeable to tax in India.

16 The Appellant is aggrieved by the fact that by separate impugned order dated 5th April, 2016, the Income Tax Appellate Tribunal, at its bench at Mumbai allowed the Appeal of the first Respondent and dismissed that of the Appellant. With regard to Revenue's Appeal, the Tribunal concluded that the first Respondent had an option either to assess the principal or the agent and only when he passes the assessment order on one of them, he becomes functus officio in so far as the other assessment

is concerned. Therefore, it was not open to the Revenue to proceed against the Appellant as well as Caribjet till an assessment order was passed on either of them. It was thereafter observed that the assessment order was passed in the Appellant's case on 27th March, 2003 and on Caribjet on 28th March, 2003. In view thereof, according to the Tribunal, the assessment made on the Appellant was earlier in point of time. That was the operative and / or valid assessment. However, essential complaint is when the Income Tax Appellate Tribunal rendered such findings, it did not adhere to the principles of natural justice. The Appellant was not heard on these issues. The Tribunal also held that the issue on merits is covered against the Appellant by a decision of a co-ordinate Bench of the Tribunal in the case of **Caribjet Inc. V/s Deputy Commissioner of Income Tax (2005) 4 SOT 18 (Mum).** However, the Appellant's complaint is that the conclusion reached in that decision has no relevance to the issue involved and under consideration in the subject Appeals. Thus issue with respect to the validity of reassessment proceedings, application of Section 144 and tax on income, if any, arising from the damages awarded by the International Arbitral Tribunal, remained unadjudicated.

17 It is in these circumstances that this Appeal has been brought challenging the order dated 5th April, 2016 to the extent indicated. The Appellant has in the grounds essentially urged that given the controversy before the Tribunal, it should have appreciated that the Appellant was vitally affected. The Appellant therefore should have been heard. However, the Tribunal erred in observing that the core issues on merits are covered against the Appellant and when it rendered that finding, it relied upon its decision of a co-ordinate Bench of the Tribunal. The position could have been pointed out had the Appellant been heard. The substantial questions of law which we have framed and one of which is really under consideration presently is with regard to the approach of the Tribunal. The essential argument of Mr. Mistri, learned Senior Counsel appearing for the Appellant is that the Tribunal failed to appreciate that it held that the assessment of income allegedly arising to Caribjet on account of the damages awarded in its favour, is income in the hands of the assessee. Such a finding is in violation of the principles of natural justice and contrary to the well settled and binding principles in so far as procedure is concerned.

18 On the other hand, the counsel for the Revenue has

supported the impugned orders.

19 After hearing both sides at some length, we find that the case of **Caribjet Inc. v/s Deputy Commissioner of Income Tax, Circle 2(1)** (Income Tax Appeal Nos.3546, 3547 and 3548 (Mum) of 2001 relating to assessment years 1995-1996, 1996-1997 and 1997-1998 decided on 21st June, 2005, would have to be referred.

20 The facts in that case were that Caribjet a non-resident contended before the Tribunal that it had entered into agreements with Air India for wet leasing the aircrafts at the disposal of Air India. The Air India paid rental amounts as per the terms of the agreement entered into between them. When the assessing authority sought to assess the income of the assessee under the regular provisions of the I. T. Act, the assessee contended that its income should be assessed under Section 44BBA. Alternatively, the contention of the assesee was, that income deeming to accrue or arise in India was only such portion as was attributable to the operations carried out by the assessee in India. Therefore, in terms of Section 9 (1) (i), only the proportionate amount could be considered as taxable income in India. The Assessee Company

also raised alternate grounds before the assessing authority. But the assessing authority, on the basis of detailed reasons, mentioned in its order, held that the entire income arising to the assessee company out of the wet leasing of aircraft to Air India arose or accrued in India and therefore liable to be taxed under the regular provisions of the I. T. Act 1961. He did not, therefore, deem it proper to invoke Section 44BBA. Therefore, these findings were challenged before the Commissioner of Income Tax (Appeals). The first appeals were disposed off by granting certain reliefs on some incidental grounds raised before that authority but by confirming the main issue of computation of income in the hands of the assessee relating to its wet lease agreement with Air India. That was the only ground on which the Income Tax Appellate Tribunal decided the above appeals of Caribjet. The Tribunal concluded as under:-

> 14.We heard both sides in detail and considered all the aspects of the case. At the outset, we may make it very clear that the facts of the case and the arguments of the assessee as well as the findings of the lower authorities have been extensively reflected in the respective assessment orders running into more than 40 pages each and in the respective orders of the CIT(A) running into more than 70 pages each. Therefore, we have not elaborated down all those facts and arguments as well as the findings in toto for fear of repetition and flatulence. We have narrated the facts,

arguments and explanations in a concise manner so as to justify the adjudication of the issues raised before us.

15. Section 44BBA is applicable in a case, where the assessee, a non-resident, engaged in the business of operation of aircraft. The qualifying condition is that the assessee must be engaged in the "business of operation of aircraft". The expression "business of operation of aircraft" is a comprehensive term visualising the carrying on of the entire activities necessary for running the business of airlines engaged in the carriage of passengers, livestock, mail or goods. It is not sufficient to qualify a part of the conditions of "business of operation of aircraft" to press the provisions of Section 44BBA into service. In the present case, the assessee has entered into wet lease agreement with Air India on the basis of which the assessee leased out its aircrafts to Air India with its crew members. Every industry or business has got its own special features and characteristics. In the case of civil aviation, the responsibility of maintenance and technical upkeep of aircrafts are usually borne by the lessors, themselves. In many cases the crew members are also provided by the lessors. These are the different modalities of leasing out of aircrafts. Wet leasing of aircraft is different from dry leasing of aircrafts inasmuch as in wet leasing, the lessor used to shoulder some additional responsibilities. Such additional responsibilities may include providing of crews, responsibility towards repairs and maintenance, botheration on other technical, navigational and operational activities. These additional responsibilities undertaken by lessor/operators are in fact in the nature of Value Added Services. On the other hand, they do not make any fundamental distinction between dry leasing and wet leasing. The basic context and colour of both the transactions is nothing but leasing. Therefore, it would not be proper to conceive and give a

different colour and character to wet leasing than that of an ordinary leasing.

16. In the present case, the main thrust of arguments of the assessee is that the assessee-company is attending to various technical, mechanical, operational and navigational aspects of flying of aircrafts. But it is to be seen that all these responsibilities are essentially to be undertaken by the lessors themselves because of the peculiar nature of running of aircrafts as also owing to the features of the lease agreements. Discharging of these responsibilities, which are inherent in flying of aircrafts, cannot be considered as determining factors to conclude that the assessee was in fact carrying on the business of operation of aircraft. This is more prevalent when the assessee is the lesser of the aircraft and the crews are provided by the assessee as those responsibilities cannot be delegated to anybody or any other agencies.

17. Now let us analyse the case in a different angle. In a case of leasing of motor cars, the lessor may be taking up some responsibilities for providing additional facilities. In the case of a person leasing out ships, he would be taking up more responsibilities than the former case. And in the case of leasing out of aircrafts the lessor may be shouldering even more responsibilities. All such responsibilities carry a price/remuneration with it in the form of lease rentals. All these conditions and attachment of responsibilities are quite natural, prevalent and inherent depending upon the subject of lease. Simply for the reason that some contingency/responsibilities are embedded in the lease agreements and discharged by the lessor would not make the lessor having assumed the functions/business of the lessee. In a way, we emphasise that the assessee was only

leasing out the aircrafts.

18. Further, in the present case, all the flights were flown by the assessee under the banner of Air India. They are known as flights of Air India. The schedules are allotted to Air India by International Civil Aviation Authority. The routes are pre-determined. Tickets are issued by Air India. The passengers, mails and goods are transported at the sole risk and responsibility of Air India. The identity, commercial responsibility, civil liability, criminal liability and all other obligations arising out of and attached to carrying on the business of operation of aircrafts meant for transporting passengers, mails and goods are borne by Air India. The assessee was leasing out the aircrafts and providing mechanical support. When the crews of the assessee are flying the aircraft, Air India need not appoint any other agency to provide for navigational facilities.

19. Therefore, in our view, all the arguments advanced by the assessee on its operational and mechanical responsibilities did not change the character of lease into that of operation of aircraft. All such arguments advanced by the assessee are synthetic in nature. Therefore, we hold that the assessee was in fact leasing out its aircrafts to Air India and not carrying on "business of operation of aircraft". Therefore, we agree with the lower authorities that the income of the assessee is not to be brought to tax under the provisions of Section 44BBA of the Act.

20. The next ground of the assessee on exemption under section 10(15A) is not discussed by us as the same was not pressed at the time of hearing and also for the reason that the assessee has not satisfied the essential conditions thereto.

21. With regard to the question of proportionate income attributable to the activities carried on by the assessee in India, we do not see much force in the arguments. Section 9(1)(i) defines the scope of income deemed to accrue or arise in India. All income accruing or arising, whether directly or indirectly, through or from any business connection in India is deemed as income accrued or arisen in India. The basis of earning of revenue in India, as far as the assessee is concerned was its business connection with Air India. Therefore, the assessing officer has rightly considered the entire payment made by Air India as the basis for computing taxable income of the assessee. "

Caribjet's Appeals were dismissed with the above findings.

21 It has been submitted and rightly before us that what the Tribunal has done in the instant case is to take note of the appeals of the Revenue and which appeals were directed against the order passed by the Commissioner of Income Tax (Appeals)- the first appellate authority dated 17th August, 2006. There, the grievance was that the Commissioner of Income Tax (Appeals) erred in holding that the same income cannot be assessed first in the hands of the non-resident and simultaneously through its agent, representative of assessee and therefore his conclusion that income of Rs. 97,35,04,000/- is not required to be assessed but must be deleted, is erroneous. It recorded a concession stated

to be given by the learned counsel appearing for the assessee, namely, Air India Limited, as agent of Caribjet. That as far as the core issue on merit is covered against the assessee by the decision of the Co-ordinate Bench. Pertinently, that was an Appeal by the Caribjet and which was directed against the findings of the First Appellate Authority. We have reproduced all the relevant paragraphs of that order, in order to appreciate the rival contentions before us. We find that the Tribunal proceeded on the footing that the real issue is whether the Commissioner of Income Tax (Appeals) was justified in holding that the assessment is not to be framed on the assessee as an agent when the non-resident is also assessed to tax in respect of the same. Then, it reproduced the relevant facts, it then referred to the rival contentions. In paragraphs 8 and 9 of the impugned order, it held thus:-

> "8:-The question whether the same income can be taxed in the hands of the assessee, in his own name, as also in the hands of his agent under Section 163 in the representative capacity, came up for adjudication before Hon'ble Supreme Court in the case of Claggett Brachi (Supra). While dealing with this situation, Their Lordships have, inter alia, observed as follows:-
>
> 6. The second point urged before us is that when the ITO had taken the assessment proceedings against the Indian agent of the assessee, it was not open to him to take assessment proceeding against the assessee. It is open to an ITO to assess

either a non-resident assessee or to assess the agent of such non-resident assessee. It cannot be disputed also that if an assessment is made on one, there can be no assessment on the other, and therefore, in this case if the assessment had been made on the Indian agent, the assessment could not have been made on the assessee. However, facts show that the reassessment proceedings commenced against the agent were found to be barred by time by reason of Section 149 (3) of the Act. The issue of notice under Section 148 of the Act to the agent after the expiry of two years from the end of the relevant assessment year is prohibited by the statute. The ITO dropped the proceedings when he was made aware of that prohibition. The assessment proceedings taken by him against the agent have to be ignored and cannot operate as a bar to assessment proceedings directly against the assessee. On this point also, the High Court has taken the correct view when it answered the question in favour of the Revenue.

(Emphasis by underlining, supplied by us)

9. The legal position, as in our humble understanding and as a result of the law so laid down by Their Lordships, is that the Assessing Officer can only assessee one of the persons, either the principal or the agent, and once he does so, he is functus officio so far as assessment of that income is concerned. When he taxes the income in the hands of the assessee directly, he loses his right to tax the same income in the hands of the agent and vice versa. No inherent preference can be said to be in existence of either of them, i.e. agent and the principal, and when he taxes the same income in the hands of both of them, the assessment which is done at a later point of time ceases to be valid in the eyes of law. The words of Hon'ble Supreme

Court are unambiguous and, the assessment has been framed on the representative assessee, i.e. Air India, on 27th March, 2003, whereas the assessment is done directly on the principal, i.e. Caribjet Inc, on 28th March, 2003. On these facts, therefore, when the Assessing Officer exercised his option to bring the income to tax in the hands of Air India, as a representative assessee, he was perhaps legally functus officio so far as assessment of the same income in the hands of Carbijet Inc directly was concerned. However, merely because a day later, the Assessing Officer also taxed the same income in the hands of Carbijet Inc as well, the assessment of that income in the hands of the representative assessee- i.e. Air India, cannot faulted with. We are, therefore unable to hold, as has been held by the CIT (A), that the assessment in the hands of this income in the hands of Air India, in representative capacity, ceases to hold good in law because he has also taxed, though subsequently, the same income in the hands of the assessee directly. As a matter of fact, learned CIT (A) has frequently used the expression 'simultaneous' to describe this dual assessment, and it is there that he apparently fell in error. While the process of assessment may be simultaneous and somewhat parallel in approach, the assessment is not simultaneous. As we have noted above, there is no inherent preference for assessment directly on the principal, and the only limitation on the assessment vis-a-vis these two parties i.e. agent and the principal, are concerned, that once an assessment is made on one of them, the assessment for the same income thereafter cannot be made on the other. In the present case, the assessment is on two different dates, and the date of assessment on the Air India in a representative capacity is a day earlier than the assessment

on the Carbijet Inc directly. Therefore, the assessment in the hands of Air India, in the representative capacity, cannot be said to be legally unsustainable. It is only the assessment in the hands of Carbijet Inc which may not be sustainable in law but that aspect of the matter is wholly academic since, in view of the provisions of Section 165 of the Act, event hough the assessment may be in the hands of a representative assessee under section 163 (3), there is no bar on direct recovery, of taxes so held to be liviable, from Carbijet Inc. It is important to bear in mind the fact that, as section 165 categorically provides, nothing, inter alia, in Section 163, **"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 the tax payable in respect of such income.**" In effect thus, it is not only direct assessment on the principal, but also direct recovery from the principal-even though the assessment may be in the name of the agent under Section 163, that is permissible notwithstanding the provisions of Section 163. The decision of Hon'ble Calcutta High Court, in the case of Ganesh Chandra Dhar v/s CIT (1959) 35 itr 84 (Cal), may be referred to in this regard. In effect thus, whethr the assessment is made on the agent under section 163 or on the principal himself, the right of recovery from the principal remain intact anyway. Whether the assessment is on Carbijet Inc, in its own name, or in the hands of Air India, as an agent of Carbijet Inc, the demands in respect of the taxes so levied can always be enforced against Carbijet Inc, and, to that extent, Air India Limited will stand exonerated of its tax liability in this regard. As regards confirmation of demands raised on the Carbijet Inc, as we have noted, these demands

are wholly academic in effect. That has no bearing on the question, given the facts of this case, as to whether or not the demands raised on the assessee before us, in representative capacity, can be legally sustainable or not."

22 It is for these reasons it upheld the grievance of the Assessing Officer, reversed the conclusions arrived at by the Commissioner of Income Tax (Appeals) and concluded that the import income has been rightly assesed to tax in the hands of Air India Limited as an agent of Caribjet under Section 163 of the I. T. Act. At the same time it sought to clarify that nothing stated in the foregoing paragraphs, namely paragraphs 8 and 9, shall either be construed as coming in the way of direct recovery of due taxes from Caribjet and to that extent the Income Tax Authority has recovered the taxes. The liability of Air India shall stand exonerated.

23 This is how it proceeded to dispose off the Revenue's Appeal arising out of the order dated 17th August, 2006 of the First Appellate Authority (Income Tax Appeal No.6630/Mum/2006 for the assessment year 2000-2001). That was decided by the Mumbai Bench of the Income Tax Appellate Tribunal, in this manner.

24 However, it failed to note that there were two appeals by Air India and they were challenging the order dated 4th April, 2003 passed by the Commissioner of Income Tax (Appeals) upholding the assessee as an agent of Caribjet under Section 163 of the I. T. Act. The grounds raised were that the Commissioner erred in relying on the order to conclude that Caribjet was in receipt of the income from the appellant and further erred in confirming the order under Section 163 dated 6th March, 2003 passed by the Joint Director of Income Tax. The Commissioner of Income Tax (Appeals) erred in rejecting the submissions of the Appellant that the department having already passed an order under Section 195 (2) read with Section 201 of the I. T. Act and having already proceeded against the Appellant for recovery of tax in respect of compensation received by Caribjet for termination of lease, there cannot be double recovery in respect of the same compensation from the Appellant which is the order under Section 163 of the I. T. Act and that is how the Commissioner erred in confirming the order passed on 6th March, 2003. When none of the conditions prescribed in Section 163 of the I. T. Act for treating the Appellant as representative assessee of Caribjet was satisfied, then, the order under Section 163 dated

26th March, 2003 passed by the Joint Director of Income Tax could not be confirmed. The Tribunal recorded the submissions of the counsel for the assessee that in view of the subsequent developments and in the light of the advice, assessee does not wish to pursue these Appeals. The issue on merits stands covered against the assessee.

25 The departmental representative in the light of the submissions made by the assessee had nothing to say and therefore the matter was left to the Bench. The Bench proceeded to hold that the assessee Air India's grievances are not required to be adjudicated on merits.

26 That is how on 5th April, 2016 it pronounced that Income Tax Appeal No. 9320 and 9321/Mum/2004 for assessment year 2000-2001 and 2001-2002, deserves to be disposed off.

27 We are of the opinion that, it is here, that the Tribunal fell in error. If the Tribunal desired to arrive at the above conclusion and based on the so called subsequent developments, then, in the facts and circumstances of the present case it was

incumbent upon it to have granted full and complete opportunity to the Appellant before us. The Appellant has rightly therefore submitted that the damages awarded to Caribjet are held to be taxable in the hands of Air India Limited on the footing that it is a representative assessee (agent). At the same time, such a finding was in contradiction to the approach of the first Respondent who in the matters brought before him, had passed an order which had no adverse impact, as far as Air India is concerned. It was that advice and which possibly has been referred to by the Assessee's counsel. It is explained in the foregoing paragraphs as to how the Air India-Appellant before us did not challenge certain orders in further Appeal. However, when it was being proceeded against in the capacity noted above, namely, as a representative assessee (agent) of Caribjet, it deserved a full opportunity to point out the factual and legal position. We have reproduced the relevant finding and particularly in paragraph 9 of the impugned order. The Tribunal understood the legal position to mean that the Assessing Officer can only assess one of the persons, either principal or agent and once it does so, he is functus officio so far as assessment of that income is concerned. When he taxes the income in the hands of the assessee directly he loses his right to

tax the same income in the hands of the agent and vice-versa to tax the same. However, it proceeded to hold that no inherent preference can be said to be in existence of either of them. When the Assessing Officer taxes income at a later point of time it ceases to be valid in law. That is how it understood the legal position emerging from the judgment of the Hon'ble Supreme Court and referred in some detail above. Based on that, the assessment which has been framed on the representative assessee - Air India on 27th March, 2003 is also directly on the principal, namely Caribjet on 28th March, 2003. In other words, the assessment of the representative assessee Air India is followed by the assessment of Caribjet on the subsequent date. Therefore, when the Assessing Officer exercised its option to bring the income to tax in the hands of Air India, he was functus officio so far as assessment of the same income in the hands of caribjet. This is how the matter is perceived in the impugned order.

28 To our mind, Caribjet having not been aggrieved by any of the findings in the Income Tax Appellate Tribunal's orders and to which we have made an extensive reference how could the above findings be rendered has not been explained and clarified at all. The understanding is that merely because a day later the

Assessing Officer has also taxed same income in the hands of Caribjet means that the assessment of that income in the hands of representative of Air India cannot be faulted with. Whether this follows the understanding of the legal position as noted above is indeed a debatable issue. We are really surprised as to how mixing up of issues was permissible and to the detriment of somebody who was not before the Court. If such was the legal position and yet the Tribunal was of the opinion that the Commissioner's orders deserve to be set aside, it should have considered the impact of such a finding on the Appellant before us. It is in these circumstances that we are of the opinion that invocation of Section 163 by the Tribunal deserves a relook. The Tribunal's understanding is that even if the assessment is made on the agent under Section 163 of the I.T.Act, 1961, the rights of recovery from the principal will remain intact any way. In other words, it concluded that assessment is on Caribjet in its own name or in the hands of Air India, as an agent. The demands in respect of the tax so levied shall always be imposed against Caribjet and to that extent Air India Limited will stand exonerated from tax liability in this regard. At the same time, when the confirmation of demand raised on the Caribjet was brought to its notice, the Tribunal

commented that this is wholly academic. They have no bearing on the questions. It is that aspect and whether that has a definite bearing on the question has been missed completely from consideration.

29 It is in these circumstances that we are of the view that keeping these appeals pending in this Court and granting either limited protection to the Appellant or an unconditional stay would not serve the interest of justice. It would also affect and impact recovery of revenue if at all permissible in law. The Appeals would remain pending in this Court for years. Even if eventually taken up, the matter and issues may be relegated back to the Tribunal for rehearing. That would not serve the purpose of anybody. It is for these reasons that we are impressed by the argument of the Appellants that it had no proper and reasonable opportunity to put forward their case and conflicting findings are to their detriment rather than serving their cause. If the Tribunal has disposed off the above Appeals in such a perfunctory manner, then, that results in miscarriage of justice. It is this approach of the Tribunal in these matters which has essentially persuaded us to dispose off these Appeals finally. We, accordingly, allow these Appeals. We set aside the impugned orders. We restore the above

referred Appeals to the file of the Tribunal for a decision afresh on merits and in accordance with law. It would be in the interest of justice, if the Tribunal consolidates all matters and hear them together. How they should be disposed off, either by a common judgment or in what other legally permissible manner, is then left to the Tribunal.

30 We clarify that we have not expressed any opinion on the rival contentions. It is with a view to impress upon the Tribunal the real issue and controversy in these matters that we have extensively set out the factual and legal issues so also the rival contentions. We clarify that all of them are kept open for being raised before the Tribunal. All the Appeals are accordingly disposed off.

31 In view of the disposal of the above Appeals, nothing survives in the above Notices of Motion and the same are disposed off as such.

(B. P. COLABAWALLA, J.) (S. C. DHARMADHIKARI, J.)