

Calcutta Discount Co. Ltd.

Vs

Income-Tax Officer, Companies District I, Calcutta, and Another

Civil Appeal No. 197 of 1954

(S.K. Das, M. Hidayatullah, K.C. Das Gupta, J.C. Shah, N. Rajgopala Ayyangar JJ)

01.11.1960

JUDGMENT

DAS GUPTA, J. -

This appeal is against an appellate decision of a Bench of the Calcutta High Court by which in reversal of the order made by the trial judge the Bench rejected the present appellant's application under article 226 of the Constitution. The appellant is a private limited company incorporated under the Indian Companies Act and has its registered office in Calcutta. It was assessed to income-tax for the assessment years 1942-43, 1943-44 and 1944-45, by three separate orders dated January 26, 1944, February 12, 1944 and February 15, 1945, respectively. These assessments were made under section 23 (3) of the Indian Income-tax Act upon returns filed by it accompanied by statements of account. The first two assessments were made by Mr. L. D. Rozario the then Income-tax Officer had the last one by Mr. K. D. Banerjee. The taxes assessed were duly paid up. On March 28, 1951, three notices purporting to be under section 34 of the Indian Income-tax Act, 1922, were issued by the Income-tax Officer calling

The trial judge held that the first ground was not made out but being of opinion that the amending Act of 1948, was not retrospective, he held that the notices issued were without jurisdiction. Accordingly, he made an order prohibiting the Income-tax Officer from continuing the assessment proceedings on the basis of the impugned notices.

The learned judges who heard the appeal agreed with the trial judge that the first ground had not been made out. They held however that in consequence of the amendment of section 34 in 1948 the objection on the ground of limitation must also fail. A point of constitutional law which appears to have been raised before the appeal court was also rejected. The appeal was allowed and the company's application under article 226 was dismissed with costs.

The company has preferred the present appeal on the strength of a certificate issued by the High Court under article 133 (1) (a) of the Constitution.

The only point raised before us is that the court below were wrong in holding that the first ground that the notices were issued without the existence of the necessary conditions precedent which confers jurisdiction under section 34 had not been made out. As it is no longer disputed that section 34 as amended in 1948 applies to the present case we have to consider the section as it stood after the amendment in 1948, in deciding this question of jurisdiction. The relevant portion of the section was in these words :

"34. Income escaping assessment. - (1) If -

(a) the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income under section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax have escaped assessment for that year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of excessive relief under the Act, or excessive loss or depreciation allowance has been computed, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to income-tax have escaped assessment for any year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of excessive relief under this Act, or that excessive loss or depreciation allowance has been computed,

he may in cases falling under clause (a) at any time within eight years and in cases falling under clause (b) at any time within four years of the end of that year, serve on the assessee, or, if the assessee is a company, on the principal officer thereof, a notice containing all or any of the requirements which may be proceeded to assess or reassess such income profits or gains or recompute the loss or depreciation allowance; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section :

Provided that -

(i) the Income-tax Officer shall not issue a notice under this sub-section, unless he has recorded his reasons for doing so and the Commissioner is satisfied on such reasons recorded that it is a fit case for the issue of such notice;

(ii) the tax shall be chargeable at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be; and

(iii) where the assessment made or to be made is an assessment made or to be made on a person deemed to be the agent of a non-resident person under section 43, this sub-section shall have effect as if for the periods of eight years and four years a period of one year was substituted.

Explanation. - Production before the Income-tax Officer of account books or other evidence from which material facts could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to discovered within the meaning of this section."

To confer jurisdiction under this section to issue notice in respect of assessments beyond the period of four years, but within a period of eight years, from the end of the relevant year two conditions have therefore to be satisfied. The first is that the Income-tax Officer must have reason to believe that income, profits or gains chargeable to income-tax have been under-assessed. The second is that

he must have also reason to believe that such "under-assessment" has occurred by reason of either (i) omission or failure on the part of an assessee to make a return of his income under section 22, or (ii) omission or failure on the part of an assessee to disclose fully and truly and all material facts necessary for his assessment for that year. Both these conditions are conditions precedent to be satisfied before the Income-tax Officer could have jurisdiction to issue a notice for the assessment or reassessment beyond the period of four years, but within the period of eight years, from the end of the year in que

No dispute appears to have been raised at any stage in this case as regards the first condition not having been satisfied and we proceed on the basis that the Income-tax Officer had in fact reason to believe that there had been an under-assessment in each of the assessment years 1942-43, 1943-44 and 1944-45. The appellant's case has all along been that the second condition was not satisfied. As admittedly the appellant had filed its return of income under section 22, the Income-tax Officer could have no reason to believe that under-assessment had resulted from the failure to make a return of income. The only question is whether the Income-tax Officer has reason to believe that "there had been some omission or failure to disclose fully and truly all material facts necessary for the assessment" for any of these years in consequence of which the under-assessment took place.

Before we proceed to consider the materials on record to see whether the appellant has succeeded in showing that the Income-tax Officer could have no reason, on the materials before him, to believe that there had been any omission to disclose materials before him, to believe that there had been any omission to disclose material facts, as mentioned in the section, it is necessary to examine the precise scope of disclosure which the section demands. The words used are "omission or failure to disclose fully and truly all material facts necessary for his assessment for that year." It postulates a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material and necessary for assessment will differ from case to case. In every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion. From the prima

There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet the possible contention that when some accounts books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income-tax Officer might have discovered, the Legislature has put in the Explanation, which has been set out above. In view of the Explanation, it will not be open to the assessee to say, for example - "I have produced the account books and the documents : You, the assessing officer, examine them, and find out the facts necessary for your purpose : My duty is done with disclosing these account books and the documents." His omission to bring to the assessing authority's attention those particular items in the account books, or the particular portions of the documents, which are relevant, will amount to "omission to disclose fully and truly all material facts nece

Does the duty, however, extend beyond the full and truthful disclosure of all primary facts ? In our opinion, the answer to this question must be in the negative. Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else - far less the assessee - to tell the assessing authority what inferences, whether of facts or law, should be drawn. Indeed, when it is remembered that people often differ as regards what inferences should be drawn from given facts, it will be meaningless to

demand that the assessee must disclose what inferences - whether of facts or law - he would draw from the primary facts.

If from primary facts more inferences than one could be drawn, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the assessing authority. How could an assessee be charged with failure to communicate an inference, which he might or might not have drawn ?

It may be pointed out that the Explanation to the sub-section has nothing to do with "inferences" and deals only with the question whether primary material facts not disclosed could still be said to be constructively disclosed on the ground that with due diligence the Income-tax Officer could have discovered them from the facts actually disclosed. The Explanation has not the effect of enlarging the section, by casting a duty on the assessee to disclose "inferences" - to draw the proper inferences being the duty imposed on the Income-tax Officer.

We have, therefore, come to the conclusion that while the duty of the assessee is to disclose fully and truly all primary relevant facts, it does not extend beyond this.

The position, therefore, is that if there were in fact some reasonable grounds for thinking that there had been any non-disclosure as regards any primary fact, which could have a material bearing on the question of "under-assessment", that would be sufficient to give jurisdiction to the Income-tax Officer to issue the notices under section 34. Whether these grounds were adequate or not for arriving at the conclusion that there was a non-disclosure of material facts would not be open for the court's investigation. In other words, all that is necessary to give this special jurisdiction is that the Income-tax Officer had when he assumed jurisdiction some prima facie grounds for thinking that there had been some non-disclosure of material facts.

Clearly it is the duty of the assessee who wants the court to hold that jurisdiction was lacking, to establish that the Income-tax Officer had no material at all before him for believing that there had been such non-disclosure. To establish this, the company has relied on the statements in the assessment orders for the three years in question and on the statement of Kanakendra Narayan Banerjee in the report made by him to the Commissioner of Income-tax for the purpose of obtaining sanction to initiate proceedings under section 34 and also on his statement in the affidavit on oath in reply to the writ petition. The report is in these words :

"Profit of Rs. 5,48,002 on sale of shares and securities escaped assessment altogether.

At the time of the original assessment the then Income-tax Officer merely accepted the company's version that the sale of shares were casual transactions and were in the nature of mere change of investments. Now the results of the company's trading from year to year show that the company has really been systematically carrying on a trade in the sale of investments. As such the company had failed to disclose the true intention behind the sale of the shares and as such section 34 (1) (a) may be attracted."

The only non-disclosure mentioned in the report is that the company had failed to disclose "the true intention behind the sale of the shares." Mr. Choudhury contends that this is not an omission to disclose a material fact within the meaning of section 34. The question whether sales of certain shares were by way of changing the investments or by way of trading in shares has to be decided on

a consideration of different circumstances, including the frequency of the sales, the nature of the shares sold, the price received as compared with the cost price, and several other relevant facts. It is the duty of the assessee to disclose all the facts which have a bearing on the question; but whether the assessee had the intention to make a business profit as distinguished from the intention to change the form of the investments is really an inference to be drawn by the assessing authority from the material facts taken in conjunction with the surrounding circumstances. The law does not require the assessee to state th

"The expression that the respondent had failed to disclose 'the true intention behind the sale of shares' may lack directness, but that deficiency of language is not sufficient to enable the respondent to contend, in view of the circumstances alleged, that no failure to disclose facts was being complained of. On the facts as stated by the Income-tax Officer, it is clear that there had been a failure to disclose the fact that the respondent was a dealer in shares and what the Income-tax Officer meant by the language used by him was that the respondent had not disclosed that the sale of shares had been of the nature of a trading sale, made in pursuance of an intention to make a business profit and not of the nature of a change of investment, made in pursuance of an intention to put certain capital assets into another form. If that be so, it is equally clear that the Income-tax Officer who, by the way, was a successor to the officers who had made the original assessments was not merely changing his opinion as t

The learned Chief Justice seems to have proceeded on the basis that when from certain facts inferences are to be drawn there is a duty on the assessee to state what the correct inference should be and if he had made a wrong statement as regards the inference to be drawn that also is an "omission or failure to disclose a material fact." For the reasons given earlier we do not think that this is the correct position in law.

It is clear, therefore, that if one looked at this report only it would not be possible to say that the Income-tax Officer had any non-disclosure of material facts by the assessee in mind when he assumed jurisdiction. It has to be remembered, however, that in sending a report to the Commissioner, the Income-tax Officer might not fully set out what he thought amounted to a non-disclosure, because it is conceivable that the report may not be drawn up carefully and may not contain a reference to all the non-disclosures that operated on his mind. We have, however, on the record an affidavit sworn by the same Income-tax Officer who started the section 34 proceedings. It is reasonable to expect that in this affidavit which was his opportunity to tell the court what non-disclosure he took into consideration he would state as clearly as possible the material facts in respect of which there had not been in his view a full and true disclosure. Mr. Banerjee's statements in this matter are contained in paragraphs 5, 6 a

"5. With reference to paragraphs 2 and 3 of the said petition, I crave reference to the assessment orders therein mentioned. The assessment order dated the 15th February, 1945, was made by Sri Kali Das Banerjee now Income-tax Officer, Companies District II, and the other two assessment orders were made by L. D. Rozario who is now in the employment of M/s. Lovelock & Lewes. I find from the notes made by me in the order sheet of the assessment year 1944-45 and my order dated the 7th July, 1944, that Mr. Smith of M/s. Lovelock & Lewes attended before me and stated

that the profits of the company arising out of dealings in shares were not taxable as the company was not a dealer in shares and securities. Subsequently on the 18th August, 1944, M/s. Lovelock & Lewes wrote a letter to me setting out the contentions of their clients and inter alia stated that throughout the whole history the company bought no shares whatsoever. Sir K. D. Banerjee was accordingly led to believe that the dealings in shares were casual

6. In the assessments for 1945-46 and 1946-47, which were completed in April, 1950, the profits on sale of shares were included in the total assessable income of the company it having been then discovered that the petitioner was in fact carrying on business in shares contrary to its representation that it was not. The company filed appeals before the Appellate Assistant Commissioner, which were rejected in September, 1950, and the assessments were confirmed. The company thereafter filed second appeals before the Income-tax Tribunal which appeals are now pending.

7. With reference to paragraph 5 of the said petition, I deny that I pretended to act under section 34 of the Income-tax Act as alleged. I have reasons to believe that by reason of the omission or failure of the company to disclose fully and truly all material facts necessary for its assessments, the income, profits and gains chargeable to income-tax had been under-assessed. I recorded my reasons and made three reports (one for each year) in the prescribed form and submitted them before the Commissioner of Income-tax and the latter was satisfied that it was a fit case for issue of a notice under section 34 of the Income-tax Act. Thereafter I issued the prescribed notices under section 34 of the Income-tax Act. The said reports were made and notices issued in respect of all the three years mentioned in the petition and copies of the report and notice for one of such years are included in the schedule hereto annexed and marked 'A'. The report and notices for the two other years are exactly similar."

It appears from this that the statements made by or on behalf of the company which the assessing authority considered to amount to non-disclosure of material facts were these : (i) the company was not a dealer in shares and securities and (ii) throughout the whole of its history the company bought no shares whatsoever. It has not been suggested before us that in fact at any time up to the conclusion of the assessment proceedings for the years 1942-43, 1943-44 and 1944-45 the company did in fact make a single purchase of shares. Clearly, therefore, the Income-tax Officer had no reasonable ground for thinking that anything as regards the purchase of shares had not been disclosed. The company does not dispute that the statement was made on its behalf that it was not a "dealer" in shares and securities. It appears clear that the Income-tax Offices who made the assessments for the years 1942-43, 1943-44 and 1944-45 proceeded on the basis that this was an investment company and considered the question whether in s

To ascertain whether the Income-tax Officer could have had in mind any non-disclosure as a ground for thinking that by reason of such non-disclosure an under-assessment had occurred - apart from what was mentioned in the affidavit - we enquired from the respondent's counsel whether he could suggest any other non-disclosure that might have taken place. Mr. Sastri suggested two. One is that the sales had not been disclosed; the other that the memorandum and articles of association of the company had not been shown. This suggestion is against the record and we have no hesitation in repelling it. Not only is it not the ground set out by the Income-tax Officer at any stage, not even in the affidavit in court, but the matters mentioned by the Officer that the assessee had claimed that the

profits realised were of a casual nature obviously indicates that the assessee disclosed that a surplus resulted from the sales which were also disclosed.

The assessment orders it is true do not mention the details of the sales. They state, however, that the audited accounts of the company were furnished. The sales of shares were expressly mentioned in the report. In these circumstances, it is reasonable to believe that as regards sales of shares full details were in fact disclosed.

Nor can we believe that the two Income-tax Officers, L. D. Rozario and K. D. Banerjee, concluded the proceedings without referring to the memorandum and articles of association of the company. These officers knew well that the company was claiming to be an investment company only. They had to consider the question whether the sales were of the nature of trade or of the nature of change of investment. It is unthinkable that they would not examine the memorandum and articles of association. Besides, it is pertinent to note that in paragraph 4 of his affidavit Kanakendra Narayan Banerjee refers to the memorandum of association and states that "by its memorandum of association the company has been authorised to carry on the various kinds of business which have been authorised to carry on the various kinds of business which have been specified in sub-sections (1) and (2) of clause 3 of the said memorandum of association." He does not say that the articles or the memorandum of association were not shown during the

It must, therefore, be held that the Income-tax Officer who issued the notices had not before him any non-disclosure of a material fact and so he could have no material before him for believing that there had been any material non-disclosure by reason of which an under- assessment had taken place.

We are, therefore, bound to hold that the conditions precedent to the exercise of jurisdiction under section 34 of the Income-tax Act did not exist and the Income-tax Officer had therefore no jurisdiction to issue the impugned notices under section 34 in respect of the years 1942-43, 1943-44 and 1944-45 after the expiry of four years.

Mr. Sastri argued that the question whether the Income-tax Officer had reason to believe that under-assessment had occurred "by reason of non-disclosure of material facts" should not be investigated by the courts in an application under article 226. Learned counsel seems to suggest that as soon as the Income-tax Officer has reason to believe that there has been under-assessment in any year he has jurisdiction to start proceedings under section 34 by issuing a notice provided 8 years have not elapsed from the end of the year in question, but whether the notices should have been issued within a period of 4 years or not is only a question of limitation which could and should properly be raised in the assessment proceedings. It is wholly incorrect however to suppose that this is a question of limitation only not touching the question of jurisdiction. The scheme of the law clearly is that where the Income-tax Officer has reason to believe that an under assessment has resulted from non-disclosure he shall have jur

Mr. Sastri next pointed out that at the stage when the Income-tax Officer issued the notices he was not acting judicially or quasi- judicially and so a writ of certiorari or prohibition cannot issue. It is well settled however that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting with out jurisdiction. Where such action of an executive authority from acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or

directions to prevent such consequences.

Mr. Sastri mentioned more than once the fact that the company would have sufficient opportunity to raise this question, viz., whether the Income-tax Officer had reason to believe that under-assessment had resulted from non-disclosure of material facts, before the Income-tax Officer himself in the assessment proceedings and, if unsuccessful there, before the Appellate Officer or the Appellate Tribunal or in the High Court under section 66 (2) of the Indian Income-tax Act. The existence of such alternative remedy is not however always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action.

In the present case the company contends that the conditions precedent for the assumption of jurisdiction under section 34 were not satisfied and came to the court at the earliest opportunity. There is nothing in its conduct which would justify the refusal of proper relief under article 226. When the Constitution confers on the High Courts the power to give relief it becomes the duty of the courts to give such relief in fit cases and the courts would be failing to perform their duty if relief is refused without adequate reasons. In the present case we can find no reason for which relief should be refused.

We have therefore come to the conclusion that the company was entitled to an order directing the Income-tax Officer not to take any action on the basis of the three impugned notices.

We are informed that assessment orders were in fact made on March 25, 1952, by the Income-tax Officer in the proceedings started on the basis of these impugned notices. This was done with the permission of the learned judge before whom the petition under article 226 was pending, on the distinct understanding that these orders would be without prejudice to the orders that may ultimately be passed by the court. The fact that the assessment orders have already been made does not therefore affect the company's right to obtain relief under article 226. In view, however, of the fact that the assessment orders have already been made we think it proper that in addition to an order directing the Income-tax Officer not to take any action on the basis of the impugned notices a further order quashing the assessment made be also issued.

In the result, we allow the appeal, set aside the order made by the appellate Bench of the Calcutta High Court and restore the order made by the trial judge, Bose, J. The assessment orders made in the proceedings started under section 34 of the Income-tax Act are also quashed. The appellant will get its costs here and below.

SHAH, J. ❖

I regret inability to agree with the judgment delivered by my learned brother Mr. Justice Das Gupta.

The facts which give rise to this appeal have been fully set out by my learned brother and it is not necessary to reiterate the same.

Sub-section (1) of section 34 of the Indian Income-tax Act, 1922, (in so far as it is material) stood at the relevant date when the proceedings were commenced, as follows :

"34. (1) If -

(a) the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income under section 22 for

any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax have escaped assessment for that year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of excessive relief under the Act, or excessive loss or depreciation allowance has been computed, or

(b) Notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to income-tax have escaped assessment for any year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of excessive relief under this Act, or that excessive loss or depreciation allowance has been computed,

he may in cases falling under clause (a) at any time within eight years and in cases falling under clause (b) at any time within four years of the end of that year, serve on the assessee, or, if the assessee is a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22 and may proceed to assess or reassess such income, profits or gains or re-compute the loss or depreciation allowance; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section :

Provided that

(i) the Income-tax Officer shall not issue a notice under this sub-section, unless he has recorded his reasons for doing so and the Commissioner is satisfied on such reasons recorded that it is a fit case for the issue of such notice;

(ii) the tax shall be chargeable at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be; and

(iii) where the assessment made or to be made is an assessment made or to be made on a person deemed to be the agent of a non-resident person under section 43, this sub-section shall have effect as if for the periods of eight years and four years a period of one year was substituted.

Explanation. - Production before the Income-tax Officer of account books or other evidence from which material facts could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure within the meaning of this section."

This section provides machinery for assessment or reassessment if it be found that income, profits or gains "have escaped assessment or have been under-assessed or assessed at too low a rate or have been made subject to excessive relief under the Act or excessive loss or depreciation allowance has been computed," which expression may for convenience of reference be compendiously referred to as are or have been under assessed. Notice under section 34 (1) (a) may be issued if the Income-tax Officer has reason to believe that income any year has been under assessed by reason of the failure

on the part of the assessee to make a return of his income, or to disclose fully and truly all material facts necessary for assessment for the year in question. The authority of the Income-tax Officer is manifestly circumscribed by certain conditions, and may be exercised only if those conditions exist and not otherwise.

In the case in hand, we are concerned with the operation of clause (1) (a) of section 34. If that clause does not apply, notices of reassessment having been served more than four years after the end of the relevant year of assessment must fail. On an analysis of the relevant provisions, the material conditions prescribed for the exercise of the power to commence proceedings for reassessment under section 34 (1) (a) are these :

(1) The Income-tax Officer has reason to believe,

(a) that income, profits or gains have been under-assessed,

(b) that this under-assessment is by reason of omission or failure to make a return under section 22 or by reason of failure to disclose fully and truly all material facts necessary for assessment for any year;

(2) that a notice containing all or any of the requirements of section 22 (2) is served on the assessee within eight years from the end of the year of assessment;

(3) that the Income-tax Officer has recorded his reasons for issuing the notice and the Commissioner is satisfied on such reasons recorded that it is a fit case for issue of such notice.

The notices issued by the Income-tax Officer in the case before us undoubtedly fulfill conditions (2) and (3). Notices of reassessment were served before the expiry of eight years of the end of the relevant years of assessment. The Income-tax Officer also recorded his reasons in the reports submitted by him to the Commissioner and the Commissioner was satisfied that they were fit cases for the issue of such notices. The dispute in the appeal relates merely to the fulfillment of the two branches of the first condition and that immediately raises the question about the true import of the expression "has reason to believe" in section 34 (1) (a). The expression "reason to believe" postulates belief and the existence of reasons for that belief. The belief must be held in good faith : it cannot be merely a pretense. The expression does not mean a purely subjective satisfaction of the Income-tax Officer : the firm of decision as to the existence of reasons and the belief is not in the mind of the Income-tax Officer

That the Income-tax Officer had reason to believe that there was under-assessment in the material years was not challenged by the appellant and in our opinion rightly. There are on the record the reports of Income-tax Officer in which the belief is expressly set out. It also appears from the assessment orders for the years 1945-46 and 1946-47 that tax has been assessed on the profits made by sale of shares by the company in those years.

Had the Income-tax Officer reason to believe that by reason of failure to disclose fully and truly all material facts necessary for assessment for the three years in question, there had resulted under assessment ? The learned trial judge, after setting out the evidence, held that the Income-tax Officer had materials before him showing that the company's trading from year to year disclosed that it had been systematically carrying on a trade in the sale of shares and securities. He observed :

"Whether the materials were sufficient or not or whether the belief or opinion is

erroneous or not, cannot..... be enquired into by this court..... If the Income-tax Officer has made a wrong decision as to the existence of the conditions precedent, the remedy is by way of appeals as provided by Income-tax Act and by stating a case to the High Court under section 66 of the Act."

In appeal the High Court confirmed the order. The High Court observed that the use of the expression "the true intention behind the sale of shares" used in report made by the Income-tax Officer under section 34 to the Commissioner may lack directness, but that deficiency of language was not sufficient to enable the company to contend in view of the circumstances alleged that there was no failure to disclose facts being complained of. The High Court also observed :

"On the facts as stated by the Income-tax Officer, it is clear that there had been a failure to disclose the fact that the respondent was a dealer in shares and what the Income-tax Officer meant by the language used by him was that the respondent had not disclosed that the sale of shares had been of the nature of a trading sale, made in pursuance of an intention to make a business profit and not of the nature of a change of investment, made in pursuance of an intention to put certain capital assets into another form. If that be so, it is equally clear that the Income-tax Officer who, by the way, was a successor to the officers who had made the original assessments, was not merely changing his opinion as to facts previously known, but was a taking notice of a new fact."

Prima facie, the finding recorded by the court of first instance and confirmed by the court of appeal is one on a question of fact and this court would not be justified in entering upon a reappraisal of a evidence. But it is contended on behalf of the company that the finding is based on no materials, and to that plea I may advert. By section 22 of the Income-tax Act, a duty is imposed upon every taxpayer whose total income exceeds the maximum which is not chargeable to income-tax to make a return in the prescribed form and verified in the prescribed manner, setting forth his total income during that year. If the taxpayer making the return fails to disclose fully and truly all material facts necessary for the assessment of the year in question, the jurisdiction of the Income-tax Officer to reassess is invited. The company in its petition for the issue of a writ contended by paragraph 7 that the notices were ultra vires and illegal and that the Income-tax Officer was not invested with jurisdiction to proceed

The Income-tax Officer, by his affidavit, submitted :

Paragraph 4 : "The statements made in paragraph 1 of the said petition are substantially correct. By its memorandum of association, the company has been authorised to carry on the various kinds of business which have been specified in sub-clauses (1) to (32) of clause (3) of the said memorandum of association."

Paragraph 5 : "With reference to paragraphs 2 and 3 of the said petition, I crave reference to the assessment orders therein mentioned. The assessment order dated the 15th February, 1945, was made by Shri Kali Das Banerjee now Income-tax Officer, Companies District II, and the other two assessment orders were made by Mr. L. D. Rozario who is now in the employment of M/s. Lovelock & Lewes. I find from the notes made by me in the order sheet of the assessment year 1944-45 and my order dated the 7th July, 1944, that Mr. Smith of Messrs. Lovelock & Lewes attended before me and stated that the profits of the company was not a dealer in shares and

securities. Subsequently on the 18th August, 1944, Messrs. Lovelock & Levers wrote a letter to me setting out the contentions of their clients and inter alia stated that throughout the whole of its history the company bought no shares whatsoever. Shri K. D. Banerjee was accordingly led to believe that the dealings in shares were casual transactions and were in the nature

Paragraph 6 : "In the assessments for 1945-46 and 1947-48, which were completed in April, 1950, the profits on sale of shares were included in the total assessable income of the company it having been then discovered that the petitioner was in fact carrying on business in shares contrary to its representation that it was not. The company filed appeals before the Appellate Assistant Commissioner which were rejected in September, 1950, and the assessment were confirmed. The company thereafter filed second appeals before this Income-tax Tribunal which appeals are now pending."

Paragraph 7 : "With reference to paragraph 5 of the said petition, I deny that I pretended to act under section 34 of the Income-tax Act as alleged. I have reasons to believe that by reason of the omission or failure of the company to disclose fully and truly all material facts necessary for its assessments, the income, profits and gains chargeable to income-tax had been under-assessed. I recorded my reasons and made 3 reports (one for each year) in the prescribed form and submitted them before the Commissioner of Income-tax and the latter was satisfied that it was a fit case for issue of a notice under section 34 of the Income-tax Act. Thereafter I issued prescribed notices under section 34 of the Income-tax Act. The said reports were made and notices issued in respect of all the three years mentioned in the petition and copied of the report and notice for one of such years are included in the schedule hereto annexed and marked 'A'. The report and notices for the two other years are exactly similar."

By these averments, the Income-tax Officer asserted (a) that he had reasons to believe that by reason of the omission or failure of the company to disclose fully and truly all material facts necessary for the assessment, income chargeable to income-tax had been under-assessed and that he had recorded his reasons in that behalf in the three reports submitted by him to the Commissioner; (b) that in the course of the assessment proceeding for the year 1944-45, it was represented on behalf of the company that the sales of shares in that year were casual transactions and were in the nature of "mere change in investments;" (c) that in the orders of assessment year 1945-46 and 1946-47 passed in April, 1950, profits earned by sale of shares held by the company were included in the total assessable income of the company, it having been discovered that the company was in fact carrying on the business of selling shares contrary to its earlier representations; and (d) that by its memorandum and articles of association,

Whereas by a mere bald assertion made by the company in the petition it was averred that the conditions precedent to the exercise of jurisdiction to reassess did not exist, the Income-tax Officer stated in his rejoinder that he had reasons to believe that income had been under-assessed and he also set out the grounds on which that belief was founded. The existence of the reasons to believe that income was under-assessed has, as already observed, not been challenged; nor is the court concerned with the question whether the materials may be regarded by a court before which a dispute is raised, sufficient to sustain the belief entertained by the Income-tax Officer. It is clear that the Income-tax Officer asserted on oath that when he issued the notice for reassessment, he had reasons to believe that income of the company had been under-assessed and he set out the reasons in

support of the belief.

Counsel for the company submitted that all the material facts necessary for the assessment were fully and truly disclosed in the course of the assessment for the years in question, and if the Income-tax Officer did not draw the correct inference, the jurisdiction to reassess could not be invoked. He urged that it was for the Income-tax Officer, on the preliminary facts disclosed to him, to raise his inferences of fact and to base his conclusions on the preliminary as well as the inferential facts, and if, in arriving at his conclusion on the preliminary and the inferential facts the Income-tax Officer committed an error, he was to be held liable on being apprised of the error. It was said that the Income-tax Officer knew that the shares held by the company were sold from time to time, and that profits were earned by the sale of those shares, and that on these materials the Income-tax Officer might have held that the company was a dealer in shares, but if he did not draw that inference, the under-assessment, if any, was not by reason of failure

The duty imposed by the Act upon the taxpayer is to make a full and true disclosure of all material facts necessary for the assessment; he is not required to inform the Income-tax Officer as to what legal inference should be drawn from the facts disclosed by him nor to advise him on question of law. Whether on the facts found or disclosed, the company was a dealer in shares, may be regarded as a conclusion on a mixed question of law and fact and from the failure on the part of the company to disclose to the Income-tax Officer this legal inference, no fault may be found with the company. But on the evidence in the case, the plea raised by the company that all material facts were disclosed cannot be accepted. The Income-tax Officer has in paragraph 6 of his affidavit referred to the assessment of the years 1945-46 and 1946-47 : he has also referred to the memorandum and articles of association of the company therein. In the assessment order

"(1) To acquire, hold, exchange, sell and deal in shares, stocks, debenture-stock, bonds, obligations and securities issued or guaranteed by any company, Government or public body constituted or carrying on business in British India or elsewhere;

(2) Generally to carry on business as financiers and to undertake and carry out all such operations and transactions (except the issuing of policies of assurances on human life) as an individual capitalist may lawfully undertake or carry out;"

The Income-tax Officer in his order of assessment for that year observed that those clauses indicated the purposes for which the company was formed, and also that "whenever the shares were first acquired, these became the commodities which could either be held or sold according to the best interests of the company, that whenever such a commodity is sold, it comes within the activities or properly speaking the profit making scheme as enumerated in the object clauses stated above. These shares sold in course of ten or twelve years whenever opportunities occurred for earning profits on making the sales..... This company was not an ordinary trader investing its surplus funds in shares and securities quite unconnected with its regular course of business so that the profit or loss also on sale of such shares or securities may be treated as not arising out of its regular business carried on. On the other hand, it is an investment company of which the very first object clause is to hold and deal in shares. Profit o

From that order of assessment, it is manifest that the assessing officer held that the company was formed with the object of acquiring, holding, exchanging, selling and dealing in shares, that the shares acquired became the trading assets of the company to be disposed of when opportunities

occurred for earning profits; and that the activities of selling shares in which surplus assets of the company were invested were a part of the regular business carried on by the company.

There is no evidence that the memorandum and articles of association referred to in paragraph 4 of the affidavit were produced in the course of the assessment of the relevant years; nor is there evidence to show that it was disclosed that the acquisition of shares was incidental to the business activities and out of the surplus assets of the company and that the same were sold at profit as opportunities arose. There is also no ground for assuming that these facts must have been known to the Income-tax Officer. Counsel for the company suggested somewhat casually that under the Income-tax Rules and the practice prevailing with the Income-tax Officer, the memorandum and articles of association of every company which was being assessed to tax are to be filed with the Income-tax Officer. But our attention has not been invited to any rule or any material to support the existence of a practice requiring a private limited company to file with the Income-tax Officer the memorandum and articles of association.

The plea raised by counsel for the company must be examined in the light of the Explanation to sub-section (1) of section 34. The Explanation provides that "production before the Income-tax Officer of account books or other evidence from which material facts could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure within the meaning of the section." If production of documents or other evidence from which material facts could with due diligence have been discovered does not necessarily amount to disclosure, it would be difficult to hold that a presumption about the production of a document at sometime in the past and its possible existence in the files of the Income-tax Officer relating to earlier years may be regarded as sufficient disclosure. Disclosure of some facts, but not all, though the facts not disclosed may have come to the knowledge of the Income-tax Officer, if he had carefully prosecuted an enquiry on the facts and materials disclosed, will n

There is no evidence on the record that the memorandum and articles of association were ever produced before the Income-tax Officer in the course of proceedings for assessment. Again, the report of the Income- tax Officer discloses that his predecessor in office was told that the sales of shares effected by the company were casual transactions and were in the nature of a mere "change of investments." This was, not strictly accurate. The record, therefore, clearly shows that the company had failed to disclose fully and truly all material facts in relation to assessment in two respects, (1) that it failed to produce the memorandum and articles of association showing the purposes for which the company was incorporated, and (2) that the shares were acquired as part of the business of financiers. The company also made a statement which is partially untrue when it stated that sales were made a statement which is partially untrue when it stated that sales were mere casual transactions. There were materials before th

In that view, the proper order to pass in this appeal would be one of dismissal with costs.

HIDAYATULLAH, J. -

I have had the advantage of reading the judgments prepared by my brethren, Das Gupta and Shah, JJ. The point involved in the case is a very short one, and the answer, as it appears to me, equally so. The appellant company's income, profits and gains for the assessment years, 1942-43, 1943-44 and 1944-45, were duly assessed and taxed. The orders were respectively passed on January 26, 1944, February 12, 1944 and February 15, 1945.

On March 28, 1951, three notices under section 34 of the Indian Income-tax Act were issued calling upon the appellant company to submit fresh returns in respect of the previous years relative to each of after more than four years, the matter fell to be governed by section 34 (1) (a) of the Indian Income-tax Act, as amended in 1948. The clause provided an extended period for sending a notice calling for a return for the purpose of assessing or reassessing income, profits and gains which had escaped assessment or has been under- assessed for any year within eight years, if the Income-tax Officer "has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income under section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year", the income, profits or gains chargeable to income-tax have escaped assessment, etc.

In the present case, the appellant company, which is an investment company, had produced in the back years a list of the shares sold by it, the statements of profit and loss account, and, I am prepared to assume, also the memorandum and articles of association. But the appellant company gave out that the sales of shares were casual transactions of change of investments. This statement was accepted, though it was found that in later years the company was dealing in stocks and shares as a business ventures, and its statement which was accepted was not perhaps true.

The Income-tax Officer reported the matter to the Commissioner, and stated as follows :

"Profits of Rs. 5,48,002 on sale of shares and securities escaped assessment altogether.

At the time of the original assessment the then Income-tax Officer merely accepted the company's version that the sales of shares were casual transactions and were in the nature of mere change of investments. Now the results of the company's trading from year to year show that the company has really been systematically carrying out a trade in the sale of investments. As such, the company has failed to disclose the true intention behind the sale of the shares and as such section 34 (1) (a) may be attracted."

The appellant company applied to the Calcutta High Court for a writ under article 226 which was granted by a learned single judge; but the order was reversed on appeal in the High Court. The appellant company has now appealed on a certificate under article 133 (1) (c) of the Constitution.

The contention of the appellant company is that all the facts necessary to be disclosed were, in fact, disclosed, that it was not required further to concede that it was trading in shares, which was a matter of inference, from the proved facts, for the Income-tax Officer to draw, and that there was thus no question of any non-disclosure. This argument overlooks the addition of the Explanation to the section, which explains clause (a) of the first sub-section. It reads :

"Explanation. - Production before the Income-tax Officer of account books or other evidence from which material facts could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure within the meaning of this section."

This means quite clearly that the mere production of evidence is not enough, and that there may be an omission or failure to make a full and true disclosure, if some material fact necessary for the assessment lies embedded in the evidence which the assessee can uncover but does not. If there is

such a fact, it is the duty of the assessee to disclose it. The evidence which is produced by the assessee discloses only primary facts, but to interpret the evidence, certain other facts may be necessary. Thus, questions of status, agency, the benami nature of transactions, the nature of trading and like matters a question of interpretation of evidence by an Income-tax Officer from whom nothing has been hidden and to whom everything has been fully disclosed, then the assessee cannot be subjected to section 34, merely because the Income-tax Officer miscarried in his interpretation of evidence. But it is otherwise, if a contention which is contrary to fact, is raised and the Income-tax Officer is set to discover the hi

The following example explains the meaning. Taking the present case, I set below two statements, one involving full disclosure and a contention, and the other, only a contention with a material fact suppressed :

"(1). We are a trading company and our business is according to our memorandum of association 'to acquire, hold, exchange, sell and deal in shares, stocks, etc.' These sales, however, were not business sales but only change of investments into trustee securities as decided by the trustees.

(2). We changed industrial shares into trustee securities because 'in or about 1934, the trustees decided to convert the Indian Industrial Shares held by the appellant into trustee securities'."

If the first is decided in favour of the assessee, there is an inference or decision by the Income-tax Officer from a full and true disclosure. If the second is decided in favour of the assessee, the question would arise if there was full and true disclosure.

In the present case, the question whether the transactions were casual transactions of changing investments or regular trading in stocks and shares involves not merely an inference, because the inference depends upon the fact that the appellant company was formed to trade in stocks and shares. It was open to the appellant company to contend that in spite of its business, a particular transaction was this and not that. But, if the appellant company was an investment company dealing in stocks and shares, and knowing this for a fact, did not disclose the fact, the statement was neither full nor true, as it involved a suppression of a material fact necessary for the assessment. The explanation is quite obviously meant to reach an identical situation. The appellant company might have placed the evidence before the Income-tax Officer, but the Income-tax Officer had reason to believe that the disclosure was neither full nor true, because the fact that the company was an investment company trading in stocks and shar

The company still persists that the sales of shares were casual transactions, and this contention will, no doubt, be decided hereafter. But the question will be decided after taking into consideration the nature of the business of the company, and till that is done, the Income-tax Officer believes that the contention raised before and persisted in is not a mere contention but maintenance of a falsehood about the nature of the transactions and the business of the company. The existence of such a belief is sufficiently established by the report of the Income-tax Officer and the satisfaction of the Commissioner, and this has not been gainsaid.

In my opinion, the Divisional Bench of the High Court rightly refused a writ in the circumstances, and I would dismiss this appeal with costs.

ORDER. - In view of the majority opinion, the appeal is allowed with costs here and below.

Appeal allowed.

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