ALLAHABAD HIGH COURT

Lakshman Prakash

Vs.

Commissioner of Income Tax

Income Tax Ref. No. 413 of 1954
(M.C. Desai, C.J., Jagdish Sahai and Brijlal Gupta, JJ.)

27.07.1962

JUDGMENT

Desai, C.J.

1. The following question has been referred by the Income-tax Appellate Tribunal, Delhi Bench:

> "Whether in the fact and circumstances of this case and on a true interpretation of the relevant terms of Sections 31 and 34 the assessment for year 1944-45 made on the assessee on 24-1-52 in the status of an 'individual' was in order ?" The reference was laid before a Bench which, considering that a decision of another Bench of this Court may require reconsideration, has referred it to a larger Bench, and so it has been laid before us.

2. We are concerned with the assessment for the year 1944-45, the relevant account year being the financial year 1943-44. The assessee is Lakshman Prakash, who calls himself proprietor of Messrs. National Emporium. In the assessment years 1940-41 and the next three years the assessee was assessed as a Hindu undivided family. For the assessment year in question the assessee filed a return in his capacity as an individual and not as a manager of a Hindu undivided family. On 29-3-49 the Income-tax Officer assessed him as representing a Hindu undivided family, but without discussing his status and without noticing that the return had been filed by an individual. The assessee preferred an appeal which was allowed by the Appellate Assistant Commissioner because the Income-tax Officer had not discussed the question of his status. The operative part of his order ends with these words :

> "the assessment proceedings, which have accordingly to be set aside to be made

de novo in accordance with law after determination of the status of the appellant."

3. In compliance with this order the Income-tax Officer on 24-1-52 passed another assessment order against the assessee but as an individual. The assessee preferred an appeal from that order on the grounds that in the remand proceedings he could be assessed only as representing a Hindu undivided family and that the assessment order was barred by time. The Appellate Assistant Commissioner dismissed the appeal, holding that no question of limitation arose because the assessment was made in pursuance of his order, that the assessee was estopped from pleading that he could not be re-assessed in his capacity as an individual and that the issue of a notice under Section 28 (3) had the effect of extending the period of limitation for making an assessment to eight years. The assessee went up in appeal to the Income-tax Appellate Tribunal, which upheld the assessment order.

4. The assessee wanted the Tribunal to refer two more questions to this Court, but it refused to do so, and we are not called upon to answer them.

5. The assessment order in question, having been passed on 24-1-52, was barred by time, if it could not be made after the expiry of four years from the end of the assessment year, and, within time, if it could be made within eight years of it. Section 34(3), as it was in force up to 31-3-1952 lays down that no order of assessment or re-assessment can be made after the expiry of four years from the end of the year in which the income, profits or gains were first assessable. There are two exceptions to this law, but, admittedly, the present case does not come under either of them. There are two provisos, one laying down that, where a notice under Section 34 (1)(b) has been issued within four years from the end of the assessment year, the assessment or re-assessment to be made in pursuance of it may be made before the expiry of one year from the date of the service of the notice, and the other being :

"Provided further that nothing contained in this sub-section shall apply to a reassessment made under Section 27 or in pursuance of an order under Section 31".

Since 1-4-1952 this proviso is to the effect that an assessment or reassessment may be made at any time if it is made on the assessee or any person in consequence of, or to

give effect to, any finding or direction contained in an order under Sections 31, etc.

6. Originally an assessment order is made by an Income-tax Officer under Section 23, sub-section (1), or sub-section (3), or sub-section (4), depending upon whether the return filed by the assessee is correct and complete, whether evidence was called for by the Income-tax Officer and produced and whether there was failure on the assessee's part to make the return or to comply with all the terms of a notice. If an Income-tax Officer in the course of assessment proceedings finds that the assessee failed to furnish the return, or failed to furnish it within the time allowed and in the prescribed manner, or failed to comply with a notice issued under Section 22(4), or 23(2), or concealed the particulars of his income, or deliberately furnished inaccurate particulars of it, he is empowered by Section 28 to impose upon him a penalty. An appeal from an assessment order made by an Income-tax Officer lies to the Appellate Assistant Commissioner, vide Section 30. The powers of the Appellate Assistant Commissioner when exercising appellate jurisdiction are described in Section 31 (3). He may confirm, reduce, enhance or annul the assessment, or set aside the assessment and direct the Income-tax Officer to make a fresh one, after making, such further enquiry as he thinks fit, or is directed to make.

7. By setting aside the assessment and directing a de novo assessment to be made after determining the status of the appellant the Appellate Assistant Commissioner exercised the power conferred upon him by Section 31 (3)(b). The Income-tax Officer determined the status and assessed the appellant in compliance with the direction. Therefore, his order was one made in pursuance of an order under Section 31. What, however, was contended before us was that the appellant before the Appellate Assistant Commissioner was a Hindu undivided family, whereas income in the hands of an individual has now been assessed by the Income-tax Officer, that the Appellate Assistant Commissioner could direct the Income-tax Officer to assess afresh the appellant as a Hindu undivided family, because no individual was an appellant before him and under his jurisdiction and that the proviso applied to reassessment and not to an assessment made for the first time. Section 3, which is the charging section, lays down that

> "income-tax shall be charged.....in respect of the total income.....of every individual, Hindu undivided family" etc.

Income-tax is to be charged on income, but it must be income of an individual, a Hindu undivided family, etc. Therefore, it is really an individual, a Hindu undivided family etc. who is to be assessed to income-tax on the basis of his total income. Though the income is the basis of the income-tax, it is the individual, Hindu undivided family, etc. who is to be assessed to pay the tax, and consequently Section 22 requires an Income-tax Officer to give a general notice requiring every person, whose income during the previous year exceeded a certain amount, to furnish a return of his total income, and authorizes him to issue a special notice to any person whose total income, in his opinion, exceeds the amount. Section 23 makes it clear that the Income-tax Officer determines the income-tax payable by an assessee after assessing his total income. The income has to be assessed first, because the amount of the income-tax depends upon it. The income is not "charged" with any tax but is only "assessed" and it is the person deriving the income who is directed to pay the tax. The income-tax law makes a distinction between an individual and a Hindu undivided family; though it is a human being who is being assessed, he can be assessed either as an individual or as a Hindu undivided family. If he is assessed as an individual, his income as an individual will be assessed, whereas if he is assessed as a Hindu undivided family, the income of the Hindu undivided family will be assessed. A human being may have two capacities; he may be an individual and also Hindu undivided family, and in that case he will constitute two assessees, (1) he, as an individual, to be assessed on his individual income, and (2), he, as a Hindu undivided family, to be assessed on the income of the Hindu undivided family. Since the return in the instant case was filed by an individual, the assessee before the Income-tax Officer was an individual. The Income-tax Officer originally assessed him on the income derived by the Hindu undivided family of which he was admittedly the manager, and not on the income derived by him as an individual from his self-acquired property. In other words, the Income-tax Officer assessed him as a Hindu undivided family and not as an individual. Since he was present before the Income-tax Officer in person, he could be assessed on the income derived by him in either capacity. The Income-tax Officer could hold him to be a Hindu undivided family, assess his income in that capacity and pass an assessment order accordingly. Or he could hold him to be an individual, assess his income as such and pass an assessment order accordingly. He could, therefore, pass an assessment order against him as a Hindu undivided family, but the error he committed was of not making any enquiry into his status and not deciding that the income had been derived by him as a Hindu undivided family. Had he gone into the question of his status and had he determined that he had derived the income as a

Hindu undivided family, the Appellate Assistant Commissioner would not have found anything wrong in his order. An Income-tax Officer is certainly not bound by any statement of an assessee in his return; he is not bound to treat an income as income of an individual simply because in the return the assessee claimed that the income was his as an individual's and not his, as a Hindu undivided family's. It was the duty of the Income-tax Officer to assess the income of Lakshman Prakash, who had filed the return. If he held one capacity, his duty was to assess his income in that capacity. If he held both capacities, he could assess his incomes in both capacities. What I cannot accept is that the Income-tax Officer could not assess his income in a capacity other than that claimed by him in his return. Since the Income-tax Officer could pass an assessment order against Lakshman Prakash as an individual in respect of his income as such, or as a Hindu undivided family in respect of the income derived in that capacity, the subsequent order assessing him as an individual cannot be said to be without jurisdiction. I do not appreciate the argument of Sri. R.S. Pathak that Lakshman Prakash before the Appellate Assistant Commissioner was a legal entity different from that against whom the second assessment order was passed by the Income-tax Officer. Lakshman Prakash was the appellant before the Appellate Assistant Commissioner and he is the person against whom the second assessment order has been passed; the only difference is that in the appeal he challenged his being assessed to tax on the basis of the income derived by him as a Hindu undivided family and now he has been assessed on the basis of the income derived by him as an individual. Really he was before the Appellate Assistant Commissioner in both capacities. He was before him as a Hindu undivided family, because he was assessed as such, but he was also there as an individual, because he claimed before the Appellate Assistant Commissioner that he had filed the return as an individual and could have been assessed only on the income derived by him as such. The Appellate Assistant Commissioner had to decide whether he was an individual or a Hindu undivided family and could have decided the question himself without remanding the case to the Income-tax Officer. He could have held that he was a Hindu undivided family, and, if he had so held, he would have been bound to confirm the assessment order and dismiss his appeal, because it was within the jurisdiction of the Income-tax Officer to hold that the income shown as the income of an individual was in fact the income of a Hindu undivided family represented by Lakshman Prakash. He could have also held that he was an individual, and, if he had done so, he would have set aside the assessment order and directed the Income-tax Officer to assess him on his income as an individual. What he could himself do could have been directed by him to

be done by the Income-tax Officer. It is immaterial that the appeal before him was by a Hindu undivided family; he had to decide in the appeal whether the appellant was a Hindu undivided family or an individual. Lakshman Prakash, who had alleged that the income which was liable to assessment in his hands had been acquired by him as an individual, but who was assessed as if he had acquired it as a Hindu undivided family, and had appealed from the assessment could not contend in the subsequent proceedings before the Income-tax Officer that he was a total stranger or even a different legal entity. His position in the subsequent proceedings was not at all different from what it was in the earlier proceedings before the Income-tax Officer and the Appellate Assistant Commissioner. The substance of the order of the Appellate Assistant Commissioner was that the Income-tax Officer should do what he should have done in the first instance, that is to decide whether the assessee was an individual or a Hindu undivided family. If after a proper decision that he was a Hindu undivided family he could assess him as such, I have not the slightest hesitation in saying that the Appellate Assistant Commissioner could direct him to do so and that he could do so in compliance with the direction.

8. The second assessment order passed by the Income-tax Officer was a reassessment as far as Lakshman Prakash was concerned. It was reassessment also of the income; previously the income was assessed as in the hands of a Hindu undivided family and now it was assessed as in the hands of an individual. The second assessment of the income was reassessment.

9. The proviso under consideration has been held to authorize an Income-tax Officer to reassess an assessee for an assessment year in pursuance of, or to give effect to, a finding or direction of the Appellate Assistant Commissioner or the Tribunal in an appeal from assessment for a subsequent or preceding assessment year. If an Appellate Assistant Commissioner or the Tribunal in an appeal from an assessment in respect of a particular assessment year can give a finding or direction, which can be given effect to or acted upon by the Income-tax Officer by altering the assessment for another assessment year, I see no reason to hold that an Appellate Assistant Commissioner in an appeal by a Hindu undivided family cannot give a direction or a finding which can be given effect to or acted upon by the Income-tax Officer by altering the assessment of the appellant as an individual. In the case of assessment for either of two assessment years it is the same person concerned and equally the assessee, who can be assessed as an individual or as a Hindu undivided family is the

same person. The fact that in one case the difference is in the assessment year and in the other case it is in the capacity does not make the two differences distinct from each other.

10. Sri R. S. Pathak strongly relied upon *S. C. Prashar v. Vasantsen Dwarkadas,* [1] a judgment of the Bombay High Court given by Chagla, C. J., Tendolkar, J., concurring, and *Hazarilal v. Income-tax Officer,* [2] a judgment of this court given by Bhargava, J., Upadhya, J., concurring. The essential facts in the Bombay case are these : There were two firms, (1) Purshottam Laxmidas owned by Dwarkadas and Parmanand and (2) Vasantsen Dwarkadas, owned by three persons Vasantsen s/o Dwarkadas, Narandas and Nanalal. In the assessment year 1942-43 the Income-tax Officer treated the income of the second firm Vasantsen Dwarkadas as the income of Dwarkadas as an individual and assessed him on it. The Tribunal later held, in an appeal by Dwarkadas from the assessment, that the second firm was nothing but a branch of the former firm, that its income was income of the former firm and not that of Dwarkadas individual and that it could be included in the income of the former firm if permitted by law. The Income-tax Officer on 30-4-54 gave notice under Section 34 to the former firm Purshottam Laxmidas and the Bombay High Court held that the notice was barred by time. The second proviso to Section 34 (3) had been amended by then but the learned Chief Justice held that before it was amended, eight years prescribed for giving a notice under section 34 had passed. He, therefore, considered the proviso as it stood before the amendment. Then he observed :

> ".....the Tribunal gave its finding that the income of the firm of Vasantsen Dwarkadas was the income of Purshottam Laxmidas in the assessment of Dwarkadas and to that assessment Purshottam Laxmidas was a stranger.....The right to assess a stranger to assessment under Section 34 arises in consequence of or to give effect to any finding or direction contained in an order under the various sections enumerated in the proviso.....In the first place, it is difficult to understand how a Tribunal can give a finding or a direction affecting a third party who is not before the Tribunal. In this very case the assessee before the Tribunal was Vasantsen Dwarkadas,.....as representing his father; in that appeal the firm of Purshottam Laxmidas was not before the Tribunal; and yet this proviso contemplates that a finding or a direction could be given by the Tribunal affecting Purshottam Laxmidas on which action can be taken by the Income-tax authorities, and it is precisely because the Tribunal in its order has

given a direction or a finding.....that the Income-tax Officer can include the income of Vasantsen Dwarkadas in the income of Purshottam Laxmidas in the assessment of Dwarkadas, that these proceedings have ensued."

These observations made it clear that the Tribunal can give a finding or a direction affecting a third party, who is not before it, that an Income-tax Officer can, in pursuance of such a finding or direction, proceed to assess the third party and that the proviso contemplates a finding or direction being given by the Tribunal on which action can be taken by the Income-tax authorities against the third party. It is because of these reasons that the learned Chief Justice held the proviso to be unconstitutional as infringing Article 14. Had there been no Article 14 he would have upheld the order of the Income-tax authorities. What is noteworthy is that he did not deny jurisdiction to the Tribunal to give a direction or finding affecting a third party and jurisdiction to the Income-tax authorities to act on such a direction or finding. The observations of the learned Chief Justice, therefore, do not support the contention of Sri R.S. Pathak that the Appellate Assistant Commissioner in an appeal by a Hindu undivided family could not give a direction or a finding with regard to an individual.

11. The facts of Hazarilal's case, 1960-39 ITR 265 : AIR 1960 Allahabad 97 were as follows :

Hazarilal was assessed in his personal capacity for the assessment year 1947-48 and subsequently the Income-tax Officer discovered that he had earned undisclosed income from an undisclosed source. He, therefore, issued a notice to him under Section 34 (1)(a) on 27-1-52 in respect of the assessment for 1946-47 and made a fresh assessment on 27-3-52 by adding a certain amount to the income originally assessed for the assessment year 1947-48. He preferred an appeal and the Appellate Assistant Commissioner allowed it and deleted the addition made in the income for the assessment year 1947-48 and directed the Income-tax Officer to revise the assessment in the light of his order. He found that the income from the undisclosed source was earned by him in January, 1946 which would be an account year for the assessment year 1946-47 and not 1947-48. On receipt of his order the Income-tax Officer on 4-1-56 issued a notice under Section 34 (1)(a) to the assessee for re-assessment of his income for the assessment year 1946-47. This Court held that the notice was barred by time. Dealing with the second proviso to Section 34 (3), as it stands now, Bhargava, J., observed as follows :

"The scope of the orders that can be passed is....to be determined by the powers which an Appellate Assistant Commissioner of income-tax has when passing an order under section 31..... His power of recording findings is limited to matters which he is called upon to decide when passing an order in appeal in conformity with the details laid down in Section 31 (3). Any order passed by him, which is beyond the scope of Section 31 (3), would be an order without jurisdiction and, similarly, any finding recorded by him, which is not necessary for the purpose of making an order covered by section 31(3), would be a finding without jurisdiction. Further, when applying the second proviso to section 34(3) of the Income-tax Act, the Income-tax Officer is only competent to take into account orders which are in conformity with the provisions of section 31(3) and findings which are necessary for passing those orders. Orders, which are outside the scope of Section 31 (3) or findings which are not at all necessary for making such orders, cannot be taken into account by the Income-tax Officer for the purpose of relying on the second proviso to Section 34 (3).....The word 'finding' in law has a definite meaning and that is indicated by the provisions of the C. P. C. where it is indicated that a finding is a decision of a court on material questions in issue. Issues are framed on material questions of fact or law and the decision of the court recorded on such issues has been called a 'finding'. We do not think that there is any other wider meaning of the word 'finding' in common use which can be applied to this word as used in the proviso.....That this interpretation is the proper interpretation to be given to the word 'finding' was also indicated by Chagla, C. J., in his judgment in 1956-29 ITR 857 : AIR 1956 Bombay 530."

12. With great respect I find myself unable to agree with these observations. There is no justification for confining 'finding', as used in the second proviso, to a finding only on a material issue. A decision on a material issue is undoubtedly a finding but this is no reason for saying that a decision on any other issue or question is not a finding. A finding is nothing but what one finds or decides and a decision on a question even though not absolutely necessary or not called for is a finding. It is not correct to say that in Hazarilal's case, 1960-39 ITR 265 : AIR 1960 Allahabad 97 the jurisdiction of the Appellate Assistant Commissioner was confined to finding that the income was not of the account year relevant to the assessment year and that he could not find that it was income of the earlier or succeeding year. There was nothing to prevent his

finding that it was the income of a certain year and that being income of that year it could not be considered for assessment. 1956-29 ITR 857 : AIR 1956 Bombay 530 on which the learned Judges relied, itself contemplates that a finding or direction can be given by the Tribunal affecting a stranger to the appeal before it and that the direction or finding can be given effect to or acted upon by the Income-tax Officer; vide the observations of the learned Chief Justice at page 900. When he observed.

> "In the first place, it is difficult to understand how a tribunal can give a finding or a direction affecting a third party who is not before the Tribunal",

he did not intend to lay down that the Tribunal cannot give such a finding or a direction but only intended to question the constitutionality (or even the propriety) of empowering it to give such a finding or direction. He questioned the legality, not the factuality, of so empowering it. The only law by which the legislature is governed is the Constitution, and so the constitutionality of a provision conferring the power on it was questioned and it was an error to treat the observation as questioning the existence or conferment of the power. His statement that "yet this proviso contemplates that a finding or a direction could be given by the Tribunal affecting Purshottam Laxmidas" (a person not a party before it) shows that he found that the power did exist, i.e. that the Tribunal could give such a finding or direction. It is because he found that a stranger is liable to be proceeded against under Section 34 in consequence of a direction or finding given against him by the Tribunal that he proceeded to consider the constitutionality of the proviso. It is a different matter that he held it to be unconstitutional; the question that I am discussing is of the jurisdiction of the Tribunal to give a finding or direction not strictly and absolutely necessary in the appeal. I respectfully agree with Balkrishna Ayyar, J. when he laid down in *Simrathmull v. Addl. Income-tax Officer,* [3] that a finding of an Appellate Assistant Commissioner that a certain income would be liable to be assessed in a certain assessment year was "a finding clear enough to fall within the second proviso to Section 34 (3)." In *General Construction and Supply Co. v. Income-tax Officer,* [4] Chainani, C. J., and Mody, J., repelled the argument that an appellate authority dealing with the assessment for a certain year could record a finding and give directions in regard to the income for that year only and had no authority to record any finding in regard to the income assessable in any other year. The learned Chief Justice, who delivered the judgment, preferred 1959-36 ITR 41 : AIR 1959 Madras 328 (supra) to 1960-39 ITR 265: AIR 1960 Allahabad 97 (supra) and referred to *Indurkar v. Pravin Chandra,* [5] In the case of

Indurkar, 1958-34 ITR 397 (Bom) the Appellate Assistant Commissioner found that a certain income did not form part of the income for the assessment year 1945-46 and went on to observe that the assessee "could be assessed, if at all, for the tax year 1944-45 for which the Income-tax Officer may take necessary steps if so advised". Tendolkar, J., with whom S. T. Desai, J., agreed, held that this observation involved no finding or direction. Though he observed that the Appellate Assistant Commissioner was not called upon to determine whether the income was assessable in 1944-45, he held that there was no finding or direction, not because he had no jurisdiction to give such a finding or direction but because he was interpreted not to have given any such finding or direction. The Appellate Assistant Commissioner's saying that the Income-tax Officer might take necessary steps "if so advised" was not a direction to him to take steps. There would have been no question of the Income-tax Officer's being "advised" to take necessary steps if he had been "directed" by the Appellate Assistant Commissioner himself to take them. What the latter meant was simply this that the former was free to take necessary steps and this was only a statement of the law and not a direction. The Appellate Assistant Commissioner did not even give a finding that the income was assessable in 1944-45; he used the words "if at all", which meant that he did not intend to find definitely that it was assessable in 1944-45 : What he meant was that if it was assessable, it was assessable only in 1944-45; since he did not find that it was assessable in one year or the other this was rightly held to be not a finding that it was assessable in 1944-45. Tendolkar, J., pointed out at p. 400 that he did not in fact determine that it was the income for 1944-45 and, therefore, there was no finding which could be given effect to by the Income-tax Officer. The observation of the Appellate Assistant Commissioner in Hazarilal's case, 1960-39 ITR 265 : AIR 1960 Allahabad 97 was quite different. I am not aware of any law to the effect that decisions or findings by a court should be confined to the irreducible minimum; there is no rationing of decision or findings to be given by Courts. On the other hand I find that the law is that when a court decides a case on two alternative findings, each one of them operates as res judicata and is a binding authority and that a trial court should decide all issues even though the findings on some of them are sufficient to enable it to decide the case one way or the other. The law, therefore, is not that a finding unnecessarily given is no finding; it may bind not only other courts but also the parties. It may be that a court should not give a gratuitous finding or a direction to the prejudice of a total stranger, but the finding given in Hazarilal's case, 1960-39 ITR 265 : AIR 1960 Allahabad 97 was admittedly not against a total stranger and was certainly not a gratuitous finding. I am completely at a loss to understand why the

Appellate Assistant Commissioner in the case was bound to give the finding in these words "the income is not assessable in 1947-48", and these words only, and could not, as a preliminary finding, say that the income was assessable in 1946-47 (and, therefore, not assessable in 1947-48) or explain the finding by adding that the income was assessable not in 1947-48 but in 1946-47. He had to find as a matter of fact in which year the income had accrued and he had to find as a matter of law in which year it could be assessed. As the result of the two findings he could say not only that it was not assessable in 1947-48 but also that it was assessable in 1946-47. Even if he did not actually find that it was assessable in 1946-47 that was the undoubted effect of the findings that it was the income of the financial year 1945-46 from an undisclosed source and that this financial year was the account year for the purpose of assessment.

13. Bhargava, J., considered at p. 274 (of ITR) that in certain cases "the parties actually in appeal may not subsequently be liable to the tax and the tax may become due, as a result of the appellate decision, from others or vice versa" and cited the example of a Hindu undivided family, pointing out that the tax assessed on a Hindu undivided family may become payable by an individual member of it or the tax assessed on an individual may, as a result of an appeal, be found payable by the Hindu undivided family. He said that this is the only case in which an Appellate Assistant Commissioner is competent to record a finding in an appeal by one assesses affecting a person other than him. Why this exception has been made and how an Appellate Assistant Commissioner gets jurisdiction to give a finding affecting a person other than the appellant before him has not been explained by the learned Judge.

14. With great respect I do not agree with Bhargava, J., that the Income-tax Officer could take into account only those orders which were in conformity with the provisions of Section 31 (3) and only those findings which were necessary for passing those orders. It is certainly not open to an Income-tax Officer to sit in judgment over an order of the Appellate Assistant Commissioner or the Tribunal and to say that the findings given by them were uncalled-for and that he would not comply with the directions based on them. The law has been made clear in a recent decision of the Supreme Court in *Bhopal Sugar Industries Ltd. v. Income-tax Officer,* [6] The facts in that case were that the Tribunal directed the Income-tax Officer to ascertain the average transport charges per maund from the centers to the factory, the Income-tax Officer, however, ascertained the average transport charges from the farms to the factory and passed an assessment order and the Judicial Commissioner on appeal

upheld the assessment on the ground that the Tribunal had gone wrong in considering the transport charges from the centres instead of from the farms. The Supreme Court had no hesitation in overruling the Judicial Commissioner by observing, at p. 622 (of ITR) :

> "By that order the respondent virtually refused to carry out the directions which a superior tribunal had given to him in exercise of its appellate powers in respect of an order of assessment made by him. Such refusal is in effect a denial of justice, and is further more destructive of one of the basic principles in the administration of justice based as it is in this country on a hierarchy of courts. If a subordinate tribunal refuses to carry out directions given to it by a superior tribunal in the exercise of its appellate powers, the result will be chaos in the administration of justice....."

The Supreme Court also pointed out that the order of the Tribunal directing the transport charges to be ascertained from the centres had not been challenged before the Judicial Commissioner and had become final and binding on the parties and could not be questioned by the Income-tax Officer in any way. The view taken by Bhargava, J., must be deemed to have been overruled by this decision of the Supreme Court.

15. In the case before us there was a definite finding given by the Appellate Assistant Commissioner that the appellant could not be assessed as a Hindu undivided family without a finding that the income was that of a Hindu undivided family and not his as an individual's and there was a clear instruction by him to the Income-tax Officer to determine his status first and then assess his income in that status. The assessment made by the Income-tax Officer was a reassessment of the income in pursuance of the order made under Section 31. In Hazarilal's case, 1960-39 ITR 265 : AIR 1960 Allahabad 97, Bhargava, J., observed that the connection between the finding recorded by the Appellate Assistant Commissioner and the notice issued under Section 34 by the Income-tax Officer was a remote one and that an action taken on such a remote connection could not be said to be in consequence of the finding. Again, with great respect to the learned Judge, I am unable to agree. The issue of a notice by the Income-tax Officer followed as a matter of course the finding of the Appellate Assistant Commissioner that the income was assessable in 1946-47. Not only this, there was a definite direction given by him to the Income-tax Officer to revise the assessment in the light of his order, which meant nothing but that he should include

the income in the income for the assessment year 1946-47. The Income-tax Officer was bound to comply with this direction and to issue a notice under Section 34. It is not easy to appreciate the learned Judge's observation at p. 278 (of ITR) that

> "the notice issued under Section 34 (1)(a) for the assessment year 1946-47, was really a consequence of independent facts which the Income-tax Officer had before him in order to justify his belief that the requirements of this provision of law were satisfied".

I do not see what independent facts the Income-tax Officer had before him other than his own willingness to comply with the direction of the Appellate Assistant Commissioner. The facts in the case of Indurkar, 1958-34 ITR 397 (Bom), as has been noticed, were quite distinguishable and, therefore, it was held that an act not required to be done by an Appellate Assistant Commissioner cannot be said to be an act done in pursuance of an order made by him. In the instant case there was a definite direction calling upon the Income-tax Officer to assess the appellant after determining his status. Therefore, the determination of the status and the assessment as an individual, were acts done in consequence of an order made under Section 31.

16. In the instant case we are concerned with the words "in pursuance of", which appear to be of a wider import than "in consequence of". Anything done in compliance of an order is undoubtedly a thing done in pursuance of it.

17. Under the second proviso as it stands today not only the assessee but also any other person may be assessed or reassessed at any time. Two classes of persons are comprehended in the phrase "any person", (1) all those who are connected in some manner with the assessee, or with the income which is to be assessed and (2) all others, who may be called total strangers. In an appeal by an assessee an order of the Appellate Assistant Commissioner will contain a direction either about the assesses or about any person belonging to the former class. It will naturally not contain any direction with regard to any person belonging to the latter class. The result would be that any person belonging to the former class will be liable to be assessed regardless of any time-limit whereas any person belonging to the latter class will not be liable to be assessed after four years because on account of there being a total absence of any finding or direction in respect of him nothing would be required to be done in regard to him in consequence of, or to give effect to, any finding or direction in the Appellate

Assistant Commissioner's order. This distinction between the two classes of third parties has been held in Prashar's case, 1956-29 ITR 857 : AIR 1956 Bombay 530 to be unconstitutional. The question posed by Chagla, C. J., was "whether there is any basis for distinguishing between persons who are liable to pay tax and who have failed to pay tax and with regard to whom a finding or direction is given, and persons who are liable to pay tax and who have failed to pay tax and with regard to whom no finding or direction is given" (see p. 901 (of ITR)), and replied on the same page,

> "there is no reason why the Legislature should have excepted persons with regard to whom no finding or direction is given.....We see no rational basis whatever for the distinction made between these two types of people who fall in the same category and with regard to which there was not the slightest difficulty in having a uniform provision of law."

He then proceeded to equate the case before him with *Suraj Mall Mohta and Co. v. Visvanatha Sastri,*[7] and ended with these words at page 903 (of ITR) :

> "If in this case we were satisfied that the Legislature was dealing with one category of tax evaders and will be dealing with another category or other categories in future, then undoubtedly this case would fall within the ratio of the judgment of the Supreme Court on which the Advocate-General has relied. But.....in this case there are no different categories. The category is one and it is not pointed out.....that there would be any difficulty in the application of this particular proviso to other tax evaders besides those who have been discovered by the fortuitous circumstance of having the honour of being associated with the particular assessment..." I find great difficulty in concurring with the learned Chief Justice. The general law is, as contained in Section 34 (3), that a tax evader may be assessed within four years from the end of the assessment year. This is subject to the proviso that a tax evader in respect of whom a finding or direction is given in an appellate order may be assessed without regard to time-limit. The Legislature has undoubtedly made a distinction between a tax evader in respect of whom a finding or direction is given in an appellate order and one who is such a total stranger to the assessee or to the income sough to be assessed that there can be, and hence there is, no direction or finding in regard to him, but I see nothing irrational in the distinction. In the first place, a direction or finding is given in regard to a tax evader in an appellate order

because he is connected with the income.

An appellate order cannot possibly deal in one appeal with cases of thousands and thousands of incomes escaping assessment. Naturally it would deal only with the assessee or with the income under consideration. There is a rational basis for an appellate authority's distinguishing between a person in respect of whom it should or may give a finding or a direction and others. This is a distinction made by the appellate authority itself and not by the Legislature. Once it has made the distinction, and given a finding or direction in regard to the person, the proviso to Section 34 (3) comes into the picture and provides that the person can be assessed without regard to the limit of time mentioned in Section 34 (3). It certainly could rationally say that the persons in respect of whom a finding or direction has been given by an appellate court may be assessed without regard to the limit of four years, so that the direction or finding is effectuated and does not remain a dead letter. The case of the person had been inquired into by the appellate authority and it found that he was liable to be assessed; it was not unreasonable for the Legislature to distinguish his case from the case of other tax evaders. It had to make provision for the appellate authority's order being complied with or given effect to, otherwise there would be no sense in allowing it to be made. If it was made after the expiry of four years from the end of the assessment year, it would be completely a useless order in the absence of the proviso. If it was made only a short time before the four years had expired it might be rendered useless if the Income-tax Officer could not complete the assessment before the expiry of four years. It would have been bad if even after a tax evader was discovered in a proceeding no action could be taken to assess him. In *Commissioner of Income Tax v. Kishoresingh Kalyansingh Solanki,* [8] S.T. Desai and V.S. Desai, JJ., observed at page 532 as follows :

> "It is inconceivable that the Legislature would lay down any absolute rule prescribing a period of limitation which would operate in this absurd manner. That position seems to have been realised at the time of enacting the proviso to section 34 and the way we read that proviso, it seems to us that the proviso was enacted only ex abundanti cautela."

The law always makes a distinction between a wrong-doer or offender who is discovered and the others. The law punishes only those wrong-doers and offenders who are discovered; others go unpunished. It is impossible in practice to avoid this distinction.

> "Statutes of limitation are vital to the welfare of society and are favored in the law.....They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary"

(see *Wood v. Carpenter,* [9]

So the provision was enacted in section 34 (3) fixing a time-limit for assessment or re-assessment. But when the case of an assessee or an income is already under consideration before a court, the reasons for giving a time-limit for assessment or re-assessment loses much force and that explains why the Legislature removed such cases from the time-limit. It had to allow sufficient time for the finding or direction contained in an appellate order to be given effect to or acted upon. It could do so by fixing a time-limit computed from the date of the appellate order but it could also do so by exempting it altogether from the time-limit, on the supposition that without any limit it would be given effect to within the time within which normally a remand proceeding would be completed. If the legislature did not intend to give special precedence to such cases, it could leave them to their normal fate. The classification struck down as unconstitutional in the case of Suraj Mall Mohta and Co., 1954-26 ITR 1 (supra), was a different classification, it being one between tax evaders discovered during an investigation conducted under section 5 of the Taxation of Income (Investigation Commission) Act and tax evaders discovered by an Income-tax Officer. The two classes of tax evaders were dealt with differently and the Supreme Court held that the difference in the treatments had no bearing on the question whether they were discovered during an investigation or by an Income-tax Officer, Chagla, C. J., said that the decision in Prashar's case, 1956-29 ITR 857 : AIR 1956 Bombay 530, was "identical" but, with great respect, I fail to see any identity. A person in regard to whom a direction or finding is given by an appellate authority is certainly discovered as a tax evader but not any other person. If action is taken against any other person, it is on suspicion or information in the possession of the Income-tax Officer but there is a material difference between a finding given by an appellate authority and suspicion or information in the possession of an income-tax Officer. The distinction is between a person who has been found by an authority to have evaded tax and another person who has not been so found before any action to assess him is taken.

In Hazarilal's case, 1960-39 ITR 265 : AIR 1960 Allahabad 97, Bhargava, J., observed at p. 275 (of ITR) :

> "The class of persons covered by the expression 'any person' would be persons belonging to those sections who, under the Income-tax Act, are intimately connected with and interested in the proceedings taken against the assessee and whose assessments under the Act are affected by the orders passed in those proceedings."

Such an arbitrary, restricted meaning was not given to the expression by Chagla, C. J., and is not supported by any authority. There would hardly be any person, other than the assessee, who would be so intimately connected with, and interested in, the assessment proceedings and who would be bound by the appellate order.

18. The unamended proviso does not refer to "any person" and the question of its constitutionality does not arise. Even if it did I would hold that exemption of an assessment or reassessment done in pursuance of an appellate order from the time-limit imposed by section 34 (3) was not arbitrary or hostile and did not infringe Article 14.

19. The appellant himself claimed that the income was derived by him as an individual and he could be assessed as an individual.

20. In the result 1 would answer the question in the affirmative. The reference should be returned to the Appellate Tribunal with a copy of the judgment under the seal of the Court and the signature of the Registrar, as required under section 66 (5) of the Act. The Commissioner of Income-tax should get his costs assessed at Rs. 200/- from the assessee.

Jagdish Sahai, J.

21. This is a reference under Section 66 (1) of the Indian Income-tax Act (hereinafter referred to as the Act). The case came up for hearing before a Bench consisting of Desai, C. J. and Brijlal Gupta, J. who referred it to a Full Bench in view of the importance of the question involved.

22. The reference was made at the instance of Sri Laxman Prakash who was a member

of a Hindu Undivided family. This Hindu Undivided family was assessed to income-tax (hereinafter referred to as tax) for the assessment years 1940-41, 1941-42, 1942-43 and 1943-44. For the assessment year 1944-45 (the relevant accounting year being the financial year 1943-44), Laxman Prakash submitted a return in the status of an individual and not on behalf of the Hindu undivided family. The Income-tax Officer, however, assessed the income shown by Laxman Prakash in the hands of the Hindu undivided family on 29th March 1949. The Hindu undivided family preferred an appeal before the Appellate Assistant Commissioner, inter alia, on the ground that the assessment was invalid in the absence of the determination of the question by the Income-tax Officer whether the income belonged to the individual, that is the applicant, or to the Hindu undivided family. The Appellate Assistant Commissioner accepted his contention and finding that the entire proceedings for assessment has been vitiated by the non-determination of the status of Laxman Prakash, set aside the assessment and directed fresh assessment to be made after an enquiry. The Income-tax Officer thereafter enquired into the matter afresh and by means of an order dated the 24th January 1952 assessed the applicant in the status of an individual on the finding that the income did not belong to the Hindu undivided family but to Laxman Prakash. Laxman Prakash then filed an appeal before the Appellate Assistant Commissioner and two submissions were made on his behalf. The first submission was that under Section 31 of the Act the Appellate Assistant Commissioner had no jurisdiction to direct an enquiry and an assessment to be made on a person other than the one who had appealed and consequently the Income-tax Officer had no jurisdiction to assess Laxman Prakash as an individual. The second one was that the second assessment was made beyond the period of limitation provided by Section 34 of the Act. The Appellate Assistant Commissioner repelled both these submissions and upholding the assessment order made by the Income-tax Officer dismissed the appeal. Laxman Prakash then filed an appeal before the Income-tax Appellate Tribunal (hereinafter referred to as the Tribunal) and the two submissions made before the Appellate Assistant Commissioner were repeated before the Tribunal also. The Tribunal, however, did not accept the submissions made on behalf of Laxman Prakash and dismissed the appeal. The Accountant Member and the Judicial Member gave separate but concurring judgments. Sri Laxman Prakash then made an application under Section 66 (1) of the Act, which has been allowed and the Tribunal has referred the following question of law to us :

"Whether in the facts and circumstances of this case and on a true interpretation

of the relevant terms of Sections 31 and 34 the assessment for the year 1944-45 made on behalf of the assessee on 24-1-1952 in the status of an 'individual' was in order."

Mr. Pathak who has appeared for Laxman Prakash made before us the same submissions which were made before the Appellate Assistant Commissioner and the Tribunal. I will take first the submission with regard to the power of the Appellate Assistant Commissioner under Section 31 (3) of the Act which reads as follows :

"In disposing of an appeal the Appellate Assistant Commissioner may in the case of an order of assessment :
(a) confirm, reduce, enhance or annul the assessment, or
(b) set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further enquiry as the Income-tax Officer thinks fit or the Appellate Assistant Commissioner may direct and the Income-tax Officer shall thereupon proceed to make such fresh assessment and determine, where necessary, the amount of tax payable on the basis of such fresh assessment."

Mr. Pathak's submission is that the provision for fresh enquiry and fresh assessment in clause (b) of section 31(3) is only in respect of the person who has appealed and not others who after an enquiry are found to be owning the income. In other words it is contended that the Appellate Assistant Commissioner could only direct the Income-tax Officer to make a fresh enquiry and reassess the Hindu undivided family, and not Laxman Prakash in his individual capacity. Before I come to consider the question of law and the true scope of Section 31 (3) of the Act I would like to go into another question on which in my opinion the answer has to be given against the assessee in respect of Lakshman Prakash's liability to be taxed as an individual. I may recall that Laxman Prakash had himself filed the return in the status of an individual. In the appeal which he filed as Karta on behalf of the Hindu undivided family he had taken up the position that the income should be assessed in his hands in the status of an individual and the assessment on the Hindu undivided family was wrong. It is well established that a Hindu undivided family is neither a corporation nor is it a juridical entity distinct from members who constitute it. The coparceners who are members of the Hindu undivided family are undoubtedly owners of its property and though there is a corporate enjoyment of the property the Hindu undivided family has no independent

existence apart from the individuals who constitute the same. (See *Mahabir Prasad v. M. S. Yagnik,*).[10] In *Jugal Kishore v. Wealth Tax Officer,* [11] I had taken the same view and had expressed myself in the following words :

> "When it is said that the ownership of the coparcenery property vests in the whole body of parceners it is not intended to say that some one else as distinct from the constituents of the undivided family is the owner of the same."

A Hindu undivided family is an association of persons as distinct from an artificial association (See *Commissioner of Income Tax v. Sarwan Kumar,*)[12] which was followed by the Andhra High Court in *N. V. Subrahmanyam v. Additional Wealth Tax Officer,* [13] in *Ram Kumar Ram Niwas v. Commissioner of Income Tax,* [14] The Hindu undivided family is not a separate legal entity from those who constitute it as is a company from its share-holders or a corporation from its members. Consequently in the appeal that was filed on behalf of the Hindu undivided family by Laxman Prakash as Karta he and all the other members who constituted the joint Hindu family were the appellants. It cannot, therefore, be said that Laxman Prakash was not an appellant before the Appellate Assistant Commissioner. In this view of the matter even if I accept the interpretation put upon the words "fresh assessment" suggested by Mr. Pathak the order directing a fresh enquiry and assessment on Laxman Prakash in his individual status could be passed under Section 31 (3) of the Act.

23. While recording this finding I am not oblivious of the fact that a Hindu undivided family is assessed to income-tax and super tax as a distinct entity from the members who constitute it. The income earned by the Hindu undivided family is assessed in its hands and only the separate incomes earned by its constituent members are assessed in their hands separately. But that is not because one is distinct from the other. The Hindu undivided family is not a juridical person. The reason why it is taxed as a unit and tax on its income is not levied separately on its members or coparceners is to avoid scope for legal ingenuity, difficulties and disputes. The fact that in the present case the Hindu undivided family as such was taxed does not however mean that the appeal by the Hindu undivided family was an appeal by any one else than the members who constituted it. Consequently I have no difficulty in coming to the conclusion that Sri Laxman Prakash was one of the appellants in the appeal filed by the Hindu undivided family. Notions of different capacities of Lakshman Prakash i.e., one as an individual and the other as a member of the Hindu Undivided family are

misconceived in this case. When he was one of the appellants in the appeal filed by the Hindu undivided family it was he himself who was the appellant as was the case in the appeal filed against his individual assessment. In that view of the matter even if we accept the restricted interpretation on the words "fresh enquiry and assessment" occurring in Section 31 (3)(b) of the Act the Income-tax Officer would have as a consequence of the remand order passed by the Appellate Assistant Commissioner jurisdiction to assess Laxman Prakash in his individual status.

24. An alternative approach to the matter is that in any case the bar of estoppel against Lakshman Prakash clearly operates. He himself having taken up the position in the return submitted by him that the income was liable to be assessed in his hands as an individual and having in the capacity of an appellant in the appeal filed by the Hindu undivided family reiterated that position it is in my judgment no longer possible for him to urge that the assessment on him as an individual is illegal. He made representations to the Appellate Assistant Commissioner that the income was liable to be assessed in his hands as an individual and thus obtained from him an order setting aside the assessment made on the Hindu undivided family and directing a fresh assessment after determining the status of the appellant. He cannot now be heard to say that he is not bound by the orders passed by the Appellate Assistant Commissioner. Even though the principles of estoppel may not operate in assessment proceedings for another year it is difficult to escape their bar in the same proceedings on the principles of justice and equity. (See *Jawala Prasad v. Commissioner of Income Tax Bengal,* [15]

25. There is another doctrine which, to my mind is applicable against Laxman Prakash, the same being that a party cannot approbate and reprobate in the same or connected proceedings. In other words it is not open to a party to blow hot and cold in the same breath and take two mutually exclusive positions in the same or connected proceedings as and when it suits him. The principle is so well accepted that no authority need be cited in its support.

26. I will now come to the question whether considering the language of Section 31 (3)(b) of the Act it can be held that the Appellate Assistant Commissioner had no jurisdiction to direct de novo proceedings and a fresh assessment in the hands of any one who was found to own the income. It is true that the language of this clause is extremely wide and there are no words in it which would necessarily restrict the scope

of the powers of the Appellate Assistant Commissioner to pass orders only with regard to the person who has appealed. It would be noticed that after the words, "to make fresh assessment" or after the words, "and the Income-tax Officer shall thereon proceed to make fresh assessment", the words "on the appellant" do not exist. It is also noteworthy that no such words are found even after the words, "where necessary amount of tax payable on the basis of such fresh assessment". That being the position at the first sight it may have appeared that clause (b) of Section 31 (3) was wide enough to include the direction of an inquiry and a fresh assessment in the hands of whomsoever (whether the person who had appealed or a stranger) was found to own the income. It also occurs to me that if the idea was to confine the fresh inquiry and the fresh assessment against the person who had appealed there was no necessity of having an independent clause (b) and the matter could have been made free from all difficulty if clause (a) of Section 31 (3) would have been made to read as follows :

Clause (a) "Confirm, reduce, enhance or annul the assessment or after setting aside the assessment remand the case for fresh inquiry and assessment."

27. The words "remand the case" would necessarily have had the effect of making the inquiry and fresh assessment only in respect of the person who had appealed. But the Legislature is the best judge as to how and in what language it would express its intention. Having carefully considered all the clauses of Section 31 it appears to me that even though clause (b) has been very widely worded it would be subversive of the scheme of Section 31 to hold that orders prejudicial to strangers as opposed to persons who had appealed could also be passed under that section. It is elementary that in an appeal which is nothing but the continuation of the original proceedings orders in respect of the parties to the proceedings or the appeal alone can be passed. There is nothing in the language of clause (b) of Section 31 (3) to suggest that orders in respect of third parties could also be passed, and the mere fact that in that clause there is no specific reference to the person appealing would not be material; because the context in which that clause stands suggests that it refers throughout to the person who has filed the appeal and not to strangers.

28. It would be noticed that there are no express words in clause (b) of Section 31 (3) to show that orders in respect of third parties could also be passed. In connection with the words "and the Income-tax Officer shall thereon proceed to make fresh assessment and determine the necessary amount of tax payable on the basis of such fresh

assessment," it has not been provided that the liability for the payment of the tax could be on any one else than the person who had appealed. If the idea was that assessment could also be made on third parties there would have been some indication to that effect in clause (b) of Section 31 (3) of the Act. In that case the Income-tax Officer would have been required not only to make a fresh assessment and determine the amount of tax payable on the basis of such fresh assessment but also to mention as to who was liable to pay that amount. It is true that the Income-tax authorities are not merely tribunals deciding the rights of parties but are also agents of the State acting in the interest of the general body of tax payers to see what the true assessment ought to be and in that sense if it comes to their notice that some one else should be taxed they would have the power to do so. That is true of the Income-tax Officer, the Commissioner of Income-tax, the Director of Inspection and the Inspecting Assistant Commissioner of Income-tax, but is not true of the Appellate Assistant Commissioner of Income -tax. The functions of the Appellate Assistant Commissioner are not administrative and are judicial or quasi judicial. The proviso to Section 5 (8) of the Act clearly provides that no departmental or executive instructions or directions shall be given "so as to interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his appellate functions." It is clear from a perusal of the various provisions of the Act that the powers exercised by the Appellate Assistant Commissioner are confined to the parties before him in appeal and he has no such general powers as to pass orders against strangers.

29. But I have already said above that in the appeal filed by the Hindu Undivided Family the point raised was that the income was liable to be taxed in the hands of Laxman Prakash in the status of an individual and not in that of the Hindu Undivided Family. The Appellate Assistant Commissioner, therefore, had the jurisdiction to decide this matter. Under sub-section (2) of Section 31 the Appellate Assistant Commissioner could have made such further inquiry as he thought fit or cause that inquiry to be made by the Income-tax Officer. It cannot be said that while exercising powers under Section 31 of the Act the Appellate Assistant Commissioner could not have decided as to whether the income should be assessed in the hands of the Hindu Undivided Family or Laxman Prakash in the status of an individual. If he could decide that matter himself he could under clause (b) of section 31(3) have directed the Income-tax Officer to investigate into that question and make a fresh assessment either in the hands of Laxman Prakash as an individual or that of the Hindu Undivided Family. The necessity for a remand arose because, even though the return filed by

Laxman Prakash had clearly showed his status as an individual, without determining that question the Income-tax Officer had assessed the income in the hands of the Hindu Undivided Family. Laxman Prakash himself had raised that question and the Appellate Assistant Commissioner had either to decide that matter himself or to remand the case to the Income-tax Officer. Under these circumstances it does not appear to me that he exceeded the jurisdiction conferred upon him by Section 31 of the Act. The Income-tax Officer had no choice in the matter. He was bound by the order of the Appellate Assistant Commissioner and had to comply with it. It was not within his power to have either doubted or challenged the order or to have created difficulties in its implementation. As a subordinate it was his duty to carry out the directions faithfully. In the case of 1960-40 ITR 618 , the Supreme Court has held that an Income-tax Officer is bound to carry out the directions of the higher authorities. For the reasons mentioned above in my judgment there are no merits in the first submission of Mr. Pathak and it has got to be held that neither the Appellate Assistant Commissioner nor the Income-tax Officer acted without jurisdiction or in excess of the powers conferred upon them, in this case.

30. The next question requiring our attention is whether the assessment on Laxman Prakash in his individual capacity by means of an order dated the 24th January, 1952 was barred by time. By virtue of Section 34 of the Act a notice may be issued within a period of eight years from the end of the relevant assessment year in cases where the assesses has failed to make a return or has concealed his income; subject to the condition that the Income-tax Officer has recorded his reasons in writing for doing so and the Commissioner is satisfied on such reasons recorded that it is a fit case for the issue of such notice even after the expiry of the period of eight years. If the income which has escaped assessment is likely to be at least one lakh of rupees in the aggregate for one or more years prior to the eight year period the Income-tax Officer can issue a notice after obtaining previous sanction of the Central Board of Revenue. In cases where there is no failure on the part of the assessee to make a return of his income and there is no concealment of his income, notice for the escaped income can be issued only within a period of four years from the end of the relevant assessment year. Except as provided above no assessment order can be passed after the period of limitation has expired. On behalf of the assessee it is contended that inasmuch as the subsequent assessment was made on the 24th of January 1952, that is, more than four years after the expiry of the year 1943-44, it was an assessment barred by time and consequently invalid. On behalf of the Department reliance is placed by Mr. Gopal

Behari upon the second proviso to Section 34 (3) which at the relevant time read as follows :

> "Provided further that nothing contained in this sub-section shall apply to a reassessment made under Section 27 or in pursuance of an order under Section 31, Section 33, Section 33 (a), Section 33 (b), Section 66 or Section 66 (a)."

In 1953 the second proviso to sub-section (3) was amended and now it reads as follows :

> "Provided further that nothing contained in this section limiting the time within which any action may be taken or any order of assessment or reassessment may be made shall apply to a reassessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under Section 31, Section 33, Section 33 (a), Section 33 (b), Section 66 or Section 66 (a).".

This amendment has come into force from 1st of April, 1952. A perusal of the language of this proviso before and after the amendment reveals first, that the second proviso was no longer a proviso to sub-section (3) but to the whole section and secondly, no limitation was to apply in case falling under the second proviso with regard to an assessment made on the assessee and also against any person or against a person who was a stranger to the assessment and whereas the original proviso limited its operation to an order made under the various sections enumerated above the amended proviso extended its sweep by providing that the assessment or a reassessment may be made in consequence or to give effect to any finding or direction contained in the order under the various sections. Even though limitation is a procedural law and amendments can be applied retrospectively, in the present case on all the material dates the amended second proviso did not exist. On the 24th of January, 1952 when the second assessment was made or earlier when the appeal of the Hindu Undivided Family was decided the amendment which was made in 1953 did not exist. Obviously, the amended second proviso could not be posthumously applied to cases which have already been decided as was the instant case. The Income-tax Officer or the Appellate Assistant Commissioner could have acted only under the unamended second proviso. Consequently, the validity of their orders has got to be determined on the basis of the unamended second proviso. For purposes of limitation the present case will fall under sub-section (3) of Section 34, because it is not a case

of concealment of income or a failure to make a return. Therefore, if the Income-tax Officer assessed Laxman Prakash in the status of an individual "in pursuance of an order under Section 31 of the Act....." the assessment would be valid irrespective of the expiry of the period of limitation. In the Shorter Oxford Dictionary amongst others the following meanings have been given to the word "pursuance" : An action or following out, continuation; an action or proceeding in accordance with a plan, direction or order. The Appellate Assistant Commissioner had directed the Income-tax Officer to hold a fresh inquiry and decide whether the income shown in the return was liable to be assessed in the hands of the Hindu Undivided Family or of Laxman Prakash in the status of an individual and to assess it in the hands of whosoever was found to own the income. There was a direct connection between the order under Section 31 of the Act and the impugned assessment. It cannot, therefore, be denied that the Income-tax Officer passed the assessment order dated the 24th January, 1952 in pursuance of an order made under Section 31 of the Act. For this reason I am satisfied that the assessment order dated the 24th January, 1952 is protected by the unamended Section 34 (3) of the Act. It was contended by Mr. Pathak that if this view of Section 34 (3) is taken, it would result in the infringement of the rights of a third person (in the present case Laxman Prakash) and the proviso would be invalid under Article 14 of the Constitution. In my judgment it would be a misdescription to call Laxman Prakash a stranger. When the income was assessed in the hands of the Hindu Undivided Family it was assessed in his hands along with other co-parceners. Similarly, when he was assessed in the status of an individual the income was assessed in his hands. In any case, Laxman Prakash was the appellant in the appeal filed by the Hindu Undivided Family and it was on his express request that the Appellate Assistant Commissioner passed the order directing the Income-tax Officer to make a fresh inquiry and assess the income either in the hands of the Hindu Undivided Family or that of Laxman Prakash in the status of an individual to whomsoever the income was found to belong. Therefore, the order passed by the Income-tax Officer in the appeal filed by the Hindu Undivided Family was, so far as Laxman Prakash is concerned, in the nature of a consent order which is binding upon him. It is trite that a party who consents to an order cannot avoid it. Inasmuch as Laxman Prakash cannot be treated to be a third party or a stranger in the appeal filed by the Hindu Undivided Family, no question of the unamended second proviso being unconstitutional arises.

31. It is elementary that a court should not enter upon the question of constitutionality

unless it is absolutely necessary or unavoidable for the ascertainment of the rights of the parties before it or to grant the relief asked for. A court would not proceed to declare a law to be unconstitutional if it is possible to dispose of the case upon some other ground. In every case where the question of the constitutionality of a law is raised the court will first see whether the impugned provision is at all attracted to the facts of the case and whether the case can be disposed of on grounds other than the constitutionality of the statute. Vide *State of Bihar v. Hurdut Roy Moti Lall Jute Mills,* [16] Inasmuch as I have held that Laxman Prakash was not a stranger it is not necessary to go into the question whether or not the unamended Section 34 (3) of the Act is ultra vires.

32. For the reasons mentioned above I would answer the question referred to us in the affirmative and against the assessee. I would also award costs against him which I would assess at a sum of Rs. 200/-.

33. I may state that I have not felt the necessity of either agreeing or disagreeing with the decisions in 1956-29 ITR 857 : AIR 1956 Bombay 530, 1960-39 ITR 265 : AIR 1960 Allahabad 97, 1958-34 ITR 397 (Bom), 1959-36 ITR 41 : AIR 1959 Madras 328 and 1962-44 ITR 16 (Bom) which were cited at the bar, for the simple reason that they are cases dealing with the amended second proviso to Section 34 of the Act and not to the unamended one and we are not in this case concerned with the amended second proviso.

Brijlal Gupta, J.

34. I have had the advantage of reading the judgments prepared by my Lord the Chief Justice and by Jagdish Sahai, J. I agree that the answer to the question referred should be in the affirmative. I also agree with the order regarding costs.

35. The case was referred to a Full Bench on the request of Sri Gopal Behari, learned counsel for the Income-tax Department as he had stated that a question of the constitutionality of the second proviso to Section 34 (3) and of the correctness of the decision of a Division Bench of this Court in 1960-39 ITR 265 : AIR 1960 Allahabad 97 might be involved. I agree with Jagdish Sahai, J. that for the decision of this case it is not necessary to go into those questions.

Question answered in affirmative.

Cases Referred.

1. 1956-29 ITR 857: AIR 1956 Bom 530
2. 1960-39 ITR 265: AIR 1960 All 97
3. 1959-36 ITR 41, at p. 46: AIR 1959 Mad 328 at p. 330
4. 1962-44 ITR 16 (Bom)
5. 1958-34 ITR 397 (Bom)
6. 1960-40 ITR 618
7. 1954-26 ITR 1
8. 1960-39 ITR 522 (Bom)
9. (1879) 25 Law Ed 807)
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11. AIR 1961 All 487 (FB)
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13. AIR 1961 And Pra 75
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15. 1935-3 ITR 295 (Cal)
16. AIR 1960 SC 378