CALCUTTA HIGH COURT

Maharaja Bikram Kishore

Vs

Province of Assam

(Harries, C.J.)

30.03.1948

JUDGMENT

Harries, C.J.

1.This is a reference made by the Assam Agricultural Income-tax Board under Section 28(5) of the Assam Agricultural Income-tax Act, 1939. The reference is made in respect of the assessment to agricultural income-tax of the assessee, His Highness the Maharaja of Tripura, for the years 1939-40, 1940-41 and 1941-42.The facts giving rise to this reference can be shortly stated follows : The Assam Agricultural Income-tax Act (Act IX of 1939) was passed in the month of August, 1939, and was to have effect from the month of April of that year. A notice under Section 19(1) of the Act was served upon a pleader who described himself as Am-Muktear of His Highness the Maharaja of Tripura calling upon him to make a return of the agricultural income of His Highness for the year 1939-40. The Am-Muktear filed an objection alleging that there was no necessity for a return to be made as the property of the Maharaja or of the Tripura State in Assam was part of the State property and, therefore, not assessable to the Assam agricultural income-tax. The property in question was a large zemindary known as the Chakla Roshanbad which was situate within the Province of Assam. It appears that the Income-tax Officer accepted the contention of the Am-Muktear and no assessment was made.By an order dated May 27, 1941, the Agricultural Income-tax Officer, however, re-opened the matter under Section 30 of the Act and issued a notice on the Assistant Manager of the Tripura Raj estate calling upon him to make a return of the income for the year 1939-40. The Am-Muktear of the Tripura State filed a return of the agricultural income under protest and eventually the Agricultural Income-tax Officer found the agricultural income to be Rs. 66,830 and assessed the tax at Rs. 4,639-1-0. The income was held to be that of the Tripura State which was assessed as an association of individuals.No steps were taken for some time to make an assessment for the year 1940-41. However, on May 27, 1941, notice under Section 30 of the Assam Act was served on the Assistant Manager of the Tripura State alleging that the income for that year had escaped

assessment and calling upon him to file a return. A return was filed under protest and eventually the agricultural income was assessed at Rs. 66,541 and the tax at Rs. 9,233. Again the assessee was stated to be an association of individuals.Proceedings for the assessment year 1942-42 were started on July 7, 1941. A return of income was filed under protest and eventually the total agricultural income was assessed at Rs. 65,411 and the tax payable for the year 1941-42 was assessed at Rs. 9,056-7-0, the assessee again being described as an association of individuals.Being dissatisfied with the assessments for the years 1939-40, 1940-41 and 1941-42 His Highness the Maharaja of Tripura on April 20, 1942, filed an appealed the matter came in due course before the Appellate Assistant Commissioner of Agricultural Income-tax who disposed of the three appeals by an order dated July 26, 1943. He held that the zemindary known Chakla Roshanabad belonged not to the Tripura State s suggested but to the Maharaja of Tripura personally and that with respect to this zemindary the latter was a zemindary and British subject and, therefore, liable to pay taxation in the Province of Assam. He did not accept the view of the Agricultural Income-tax Officer that the assessee was an association of individuals and he amended the assessment making the Maharaja personally the assessee.Being dissatisfied, His Highness the Maharaja on September 18, 1943, filed three petitions requiring the Assam Board of Agricultural Income-tax to make a reference under Section 28(2) of the Act to the High Court for determination of certain questions of law.The Assam Agricultural Income-tax Board on November 13, 1943, stated a case by which it referred seven questions for the determination of the High Court. The matter came before this Court and by a judgment dated April 25, 1945, Derbyshire, C.J., and Gentle, J., were of opinion that before the reference could be decided the status of the Maharaja required clarification. In the view of the Court information should be obtained from the Crown Representative of India as to the precise status of His Highness and the State of Tripura. The Registrar of the Court was accordingly instructed to write to the Secretary of the Crown Representative asking for answers to the following questions :-

1. Is the State of Tripura an independent State ? If not, what is its status with regard to the Crown ?

2. Is His Highness of Maharaja of Tripura the sovereign ruler of the State of Tripura ?The Court directed the Board of Agricultural Income-tax to re-state the case after answers had been obtained from the Crown Representative to the questions propounded by the Court.

The reply was received from the Secretary to His Excellency the Crown Representative on June 8, 1945, and it is in these terms :-

> "Lieutenant Colonel His Highness Maharaja Manikya Sir Bir Bikram Kishore Deb Barman Bahadur, a K.C.S.I., Maharaja of Tripura, has been recognised by His Majesty as the Ruler of the Indian State of Tripura since the August 13, 1923. His Majestys Government do not regard or treat His Highness or his subjects as subjects of His Majesty

and they do not regard or treat Tripura as being part of British India or of His Majestys Dominions. Tripura is an Indian State and the Maharaja is a Ruler as defined in sub-section (1) of Section 311 of the Government of India Act, 1935.

But, though His Highness is thus not independent, His Majestys Government accord to him the status of a Sovereign Ruler under the suzerainty of His Majesty exercised through His Majestys representative for the exercise of the functions of the Crown in its relations with Indian States. As such he possesses various attributes of sovereignty, including internal sovereignty, which is not derived from British law, but is inherent in the Ruler, as subject, however, to the suzerainty of His Majesty and to the exercise by His Majestys Representative of such rights, authority and jurisdiction as have by treaty, grant, usage, sufferance, or otherwise passed to and are exercisable by His Majesty. These include the conduct of international relations, the exercise of jurisdiction over Europeans and Americans, interference to settle disputes as to succession to the State, a the suppression of gross misrule in the State, and the regulation of armaments and the strength of Military Forces.

The Maharaja is, in regard to proceedings in the Civil Courts in India, covered by the provisions of Sections 85 and 86 of the Indian Code of Civil Procedure."

Eventually the Assam Agricultural Income-tax Board re-stated the case, bearing in mind the observations of this Court. In the case as stated nine questions were formulated. They are as follows :-

"1. Whether the Appellate Assistant Commissioner had jurisdiction to alter an assessment made by the Agricultural Income-tax Officer on the Tripura State into an assessment on the petitioner personally where no proceedings were started and no notices were served under the Act on the petitioner himself personally.

2. Whether the Appellate Assistant Commissioner of Agricultural Income-tax had jurisdiction to assess the income for 1939-40 in the light of the order of the Agricultural Income-tax Officer dated June 26, 1941.

3. Whether in view of the terms of the sanad granted by the paramount power and the judicial decisions referred to in paragraph 8 of the application, the Appellate Assistant Commissioner had jurisdiction to hold that Chakla Roshanabad did not belong to the Tripura State as such as but belonged to His Highness the Maharaja in his personal capacity.

4. Whether the zemindary of Chakla Roshanabad is as a matter of law the property of the State or of the petitioner personally.

5. Whether the money received from the Assam Government under the agreement dated February 13, 1897, was income or agricultural income within the meaning of the Assam Agricultural Income-tax Act, 1939 (Assam Act IX of 1939).

6. Whether the income of the accounting year 1345 B.S. (assessment year 1939-40) can be deemed to have escaped assessment within the meaning of section 30 of the Assam Agricultural Income-tax Act, 1939 (Assam Act IX of 1939).

7. Whether the salami realised in respect of settlement of lands is agricultural income within the meaning of the Assam Agricultural Income-tax Act, 1939 (Assam Act IX of 1939).

8. Whether in determining the agricultural income a deduction of 15 per cent. of the arrears of rent due but not realised during the accounting period should be made under clause (c) of Section 7 of the Assam Agricultural Income-tax Act, 1939 (Assam Act IX of 1939).

9. Is the income derived from the Chakla Roshanabad Estate liable to tax under the Assam Agricultural Income-tax Act -

(a) by assessment upon the State of Tripura or

(b) by assessment upon His Highness the Maharaja of Tripura."

The most important question in this reference is whether the Maharaja is liable to be taxes and this to some extent must depend upon the nature of the property, namely, Chakla Roshanabad which lies within the Province of Assam. The questions relating to this matter are questions Nos. 3, 4 and 9 and it will be convenient to deal with these three questions together. Chakla Roshanabad is a large zemindary in the plains adjoining the Tripura State. It seems clear from the history of the Tripura State that Chakla Roshanabad at one time formed part of the State. The State, a however, was overrun by the Moghuls and for some time lost its independence. The Moghuls were, however, driven out, but subsequently they again attacked Tripura and overran the portion of the State in the plains, a namely, Chakla Roshanabad. After the second conquest it doers not appear that the Moghuls actually occupied the hilly tracts which now form the State of Tripura. In due course the Moghuls were expelled by the British and it is clear that the British did not disturb the Rajahs possession or sovereignty over that portion of his domain which now constitutes the State of Tripura. It is equally clear, a however, a that the British did not return Chakla Roshanabad to the then ruling Raja. Eventually, however, they settled Chakla Roshanabad as a zemindary with the then ruling prince. It appears that some years later Chakla Roshanabad was settled with third parties, but at the time of the permanent settlement it was again settled with the ruler of Tripura, and has remained in the family ever since.

There can be no doubt that Chakla Roshanabad is now a zemaindary situate in the Province of

Assam and if the zemindary was owned by a private person no question could possibly have arisen as to the liability of that person to pay agricultural income-tax. However it is contended on behalf of the assessee that Chakla Roshanabad, though a zemindarya in the Province of Assam, is the property of the Tripura State. It is not contended, and indeed could not be contended, that Chakla Roshanabad forms part of the State of Tripura. What is urged, however, is that it is property belonging to the State.

It appears to me that the State of Tripura apart from the ruler has no juridical existence. The ruler is the State and is the source of all authority within its boundaries. Chakla Roshanabad was settled with the then ruler and if the present ruler holds the property in his capacity as ruler then it could clearly in my view be State property. On the other hand if Chakla Roshanabad was settled with the then ruler in his personal capacity then the property could be regarded as the property of the Maharaja.

The Board of Agricultural Income-tax was of opinion that Chakla Roshanabad formed part of the personal property of the then assessee, the Maharaja of Tripura. But in my view the early history of this zemindary shows that it is the property of the Maharaja in his capacity as ruler.

When the British drive out the Moghuls they left the Raja undisturbed in what is now the State of Tripura. As I have said, a they did not return to him Chakla Roshanabad and, a therefore, that property no longer forms part of the State. The British authorities, however, seem to have realised that the loss of Chakla Roshanabad to the then Raja was a serious matter and they settled the zemindary with him and the land has been so settled since the permanent settlement. It appears to me that the obvious inference is that the British, while not prepared to return Chakla Roshanabad to the State, a were equally not prepared to deprive the State of the whole of the income from that property. It appears to me that it was for that reason that Chakla Roshanabad was settled with the then Raja and has remained part of the State property to this day.

That Chakla Roshanabad was regarded as a State property by the authorities is I think clear from the terms of a sanad dated June 21, 1904, addressed to His Highness the Raja of Hill Tipperah and signed by Lord Ampthill, Viceroy and Governor-General of India. That sanad begins with these words :-

"Whereas, with a view to continuing the representation of the ruling house and the dignity of Hill Tipperah, it is desirable to remove all doubts as to the rule of succession to the Chiefship of the said State, and the ownership of the zemindaris and other property in British India which appertain thereto and are held therewith....."

It is conceded that Chakla Roshanabad is part of the other property in British India referred to in this sanad and such property is said to appertain to the Chiefship of the State and is held

therewith. It seems to me clear from the terms of this sanad that the Viceroy and Governor-General regarded Chakla Roshanabad as State property, that is, a as belonging to the ruler in his capacity as ruler and not in his private capacity. The Board of Agricultural Income-tax has not regarded this sanad as of any great importance as in the view of the Board it simply related to succession. But it appears to me that the authorities treated the right to succession to the gaddee as involving the right to succession to Chakla Roshanabad among other properties. If it was State property it would devolve in the same manner as the gaddee or Chiefship would devolve. That would not necessarily be so if the property was the private or personal property of the ruler. In my judgment the early history of Chakla Roshanabad strongly suggests that the property was and is held by the Maharaja in his capacity as ruler.

The succession to Chakla Roshanabad has also been the subject of judicial decisions and in my view these cases also establish that Chakla Roshanabad is a property belonging to the ruler for the time being and not to that person in his personal capacity. In other words, it is State property and not private.

In Neelkisto Deb Burmono v. Beerchunder Thakoor, the Privy Council had to consider a suit in the nature of an ejectment brought by the half-brother of the late Raja of Tipperah to recover from his uterine brother the then Raja a zemindary forming part of the Raj of Tipperah.

The zemindary in question was Chakla Roshanabad and it seems clear that their Lordships of the Privy Council regarded this property as forming part of the royal possessions of the ruling prince. At page 534 Lord Chelmsford who delivered the judgment of the Board stated :

"The suit was one in the nature of and ejectment..... to recover a very valuable zemindary, being that part of the royal possessions of the Rajah of Tipperah which lies within the Indian territories of the British Crown. The Rajah of Tipperah, though in respect to these lands subject to the laws and Courts of British India, is in fact an independent price with a considerable territory known as the Tipperah Hills, and as the title to the zemindary and to the Raj is the same, the dispute respecting the former involves a question of the right of succession to the Musnud or throne of the independent principality".

It seems clear from this case that their Lordships treated Chakla Roshanabad not as the personal property of the then ruling Rajah, but as property belonging to him in his capacity as ruler.

The matter was again considered by a Bench of this Court in Beer Chunder Manikya v. Raj Coomer Nobodeep Chunder Deb Burmono. Cal, 535. In that case a member of the royal family of Hill Tipperah brought a suit against the Rajah to have it declared that with respect to certain land situate within British India and forming portion of the possessions of the Rajah, he was entitled to the post of Juboraj, and to succeed to succeed land on the death of the Rajah, and also

claimed maintenance, and sought to have it declared that such maintenance should be a charge on the revenue of the land situate in British India. This Court held that the British Courts had no jurisdiction to entertain the suit, it not being one for immovable property. It was held that the Rajah was not subject to the jurisdiction of the Court.

It seems clear that in this case the Bench treated the zemindary which was in fact Chakla Roshanabad, a as property held by the ruler in his capacity as ruler and not held by him as his private property.

Lastly, this zemindary known as Chakla Roshanabad was considered in a case decided by five Judges of this Court in Shamarendra Chandra Deb Barman v. Birendra Kishore Deb Barman. That was a suit brought ostensibly for a declaration in regard to rights to immovable property within British territory belonging to the Rajah of Tipperah. The real object, however, was to set aside the appointment by such sovereign of his son as his immediate successor. The Court held that Courts in British India had no jurisdiction to decide the question as to who was entitled to succeed to the Chiefship of a foreign sovereign state. At page 787, Maclean, C.J., observed :-

"The defence is that the present Raja is the ruler of the sovereign State of Hill Tipperah whose succession to that State de facto et de jure has been recognised by the Government of British India, and that as such Sovereign Prince, a the said Raja holds and by right of his succession to the throne of the said State, enjoys, as part of his royal possessions, the properties specified and described in the schedule to the plaint, the said Rajas title to the throne of Hill Tipperah and to his royal possessions both without and within British Indian territory being one and the same, and the latter an appendage to the said throne following the course of succession thereto."

It appears that the Special Bench accepted this defence and appears to have treated Chakla Roshanabad as part of the royal possessions which would descend to the person entitled to the gaddee on the death of the then ruler.

Though the precise point which has to be considered in this case did not arise in the three cases to which I have made reference, it is clear, however, that the Courts treated Chakla Roshanabad not as the personal property of the ruler, but as part of the royal possessions which were situate outside the State of Tripura.

For these reasons I am satisfied that the opinion of the Board of Agricultural Income tax that Chakla Roshanabad is the personal property of the Maharajah cannot be sustained. It has in law been regarded as royal property descending with the gaddee and a right to the gaddee gave a right to the possession of the zemindary.

In my view it is also clear that the Maharaja is an independent ruler and, therefore, not amenable

to the ordinary jurisdiction of the Courts in India. International law always gives to the ruler of an independent state certain privileges. In Halls International Law, 8th Edition, at page 220, it is said :-

"A sovereign, while within foreign territory, possesses immunity from all local jurisdiction in so far and for so long as he is there in his capacity of a sovereign. He cannot be proceeded against either in ordinary or extraordinary civil or criminal tribunals, he is exempted from payment of all dues and taxes, he is not subject to police or other administrative regulations, his house cannot be entered not by the authorities of the State, and the members of his suite enjoy the same personal immunity as himself."

Oppenheim in his book on International Law, Vol, I, Fifth Edition, at page 590, observes :-

"He (meaning a sovereign) must be granted so-called exterritoriality conformably with the principle, par in parem non habet imperium, according to which one sovereign cannot have any power over another sovereign. He must, therefore, in very point be exempt from taxation, rating and every fiscal regulation and likewise from civil jurisdiction, except when he himself is the plaintiff."

It is clear that an ambassador is exempt from taxation. Holland in his Lectures on International Law, at page 201, observes :-

"An ambassador is exempt from taxation and also from customs dues; by right as to property held in his representative capacity and by courtesy as to property held otherwise. An ambassador is given rights givens to his sovereign and it is because the sovereign is exempt from taxation that such exemption is given to the ambassador."

It appears to me clear that a sovereign prince is not liable to taxation in another state. In the case of Parliament Belge it was held :-

"As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each state declines to exercise by means of any of its Courts. Any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory."

At page 210 it was observed :-

"The public property of every state, being destined to public uses, cannot with reason be submitted to the jurisdiction of the Courts of such state, because such jurisdiction, if exercised,

must divert the public property from its destined public uses; and that, by international comity which acknowledges the equality of states, if such immunity grounded on such reasons exist in each state with regard to its own public property, the same immunity must be granted by each state to similar property of all other states. The dignity and independence of each state require this reciprocity."

It is clear from this last observation that state property of a particular state is not subject to the jurisdiction of another state though the property lies in the latter state.

It was contended, however, that the principles of international law applicable to independent sovereigns had no application to rulers of Indian States because the latter were not, in the true sense of the word, independent. It is clear from the reply of His Excellency the Crown Representative that the Maharajah of Tripura is not independent in the full sense of the word. In internal matters he is undoubtedly independent. But he was not in control of foreign relations and was subject to the British Crown as the paramount power. The reply which I have set out makes it clear, however, that the Indian Government did not regard Tripura as part of British India and treated the ruler as independent. He was treated as an independent prince having the privileges conferred by Section 86 of the Code of Civil Procedure.

In my view, however, though the Maharaja of Tripura cannot be said to be independent in the full sense of the word he must be regarded in international law as an independent sovereign. Indian rulers and rulers of States with similar powers to Indian rulers have always been regarded by the Courts in England as beyond their jurisdiction.

In Statham v. Statham and His Highness the Gaekwar of Baroda, it was held that the Gaekwar of Baroda was not capable of being made a Co-Respondent in a suit for divorce in the High Court of Justice in England; and his name was ordered to be struck out of the petition. In that case the Court had asked the India Office for a certificate as to the status of the Gaekwar of Baroda and the certificate was in very similar terms to the certificate given by the Crown Representative in the present case. It was clearly in the mind of Bargrave Deane, J., that the Gaekwar of Baroda was not in the true sense of the word independent. Yet he held that he was entitled to the privileges of a sovereign ruler and, therefore, he was not amenable to the jurisdiction of the English Courts.

A very similar case was Mighell v. Sultan of Johore. In that case the Sultan of Johore was sued for breach of promise of marriage. Whilst residing in England sit was alleged that he had proposed marriage with the plaintiff under an assumed name as if he were a private individual. The Court obtained a certificate from the Colonial Office as to the status of the Sultan. It is quite clear from the terms of that certificate that the Sultan was not in the true sense of the word

independent. Nevertheless, the Court of Appeal held that he was entitled to the privilege of an independent sovereign and was, therefore, not amenable to the jurisdiction of the Court.

The right to sue the Gaekwar of Baroda was considered by the Privy Council in Gaekwar Baroda State Railway v. Hafiz Habib Ul Huq and their Lordships held that a suit brought against a railway through its manager and engineer-in-chief, where the railway was neither a state railway nor a company railway but was owned and managed by a sovereign prince was in reality suit against such sovereign prince and when brought in a British Indian Court without compliance with the provisions of Sections 86 and 87 of the Civil Procedure Code, was not maintainable. Here again the Gaekwar of Baroda, though not sovereign in the true sense of the word, was treated by the Court as a sovereign prince.

It is clear, therefore, from these cases that English Courts have treated Indian rulers as independent and entitled to the privileges granted to such rulers by international law.

There are provisions in the Code of Civil Procedure relating to suits brought by and against Indian rulers, namely, Sections 86 and 87. Section 86 makes it clear that an Indian prince or chief may be sued in an Indian Court with the consent of the Crown Representative, but such consent cannot be given except in certain special cases set-out in sub-section (2). He can under this sub-section be sued if he is in possession of immovable property situate within British India and the suit is with reference to such property or for money charged thereon.

From the provisions of Sections 86 and 87 of the Code of Civil Procedure sit is clear that the Government of India does not grant to the rulers of Indian States the full rights granted by International law. But it is clear that Indian rulers are normally regarded as out-side the law and can only be sued in very special cases with the consent of the Crown Representative.

In this reference we are not considering whether suits can be instituted against the Maharajah of Tripura. The point might arise if he was assessable and some formal proceedings were brought to recover the amount of tax assessed on him. There is nothing, however, in Sections 86 and 87 which would suggest that an Indian ruler is amenable to taxation in British India in respect of State Property held by him in British India.

It was contended on behalf of the Assam Government that the Assam Agricultural Income-tax Act makes no exception in favour of an independent ruler. The Act as framed in wide enough to cover all persons deriving income in Assam from agricultural sources. That being so, it is urged that even if international law exempted a ruling prince from liability to taxation, that immunity had been taken away by the Provincial Act.

It is true that there is nothing in the Provincial Act exempting a ruling prince but it is a well-

established rule of construction that a statute will not be construed as overriding international law unless the words of the statute compel the Court to put such as construction upon it. In Maxwells Interpretation of Statutes, 7th Edition, the rule is stated at page 127 as follows :-

"Under the same general presumption that the Legislature does not intend to exceed its jurisdiction, every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations, or with the established rules of international law. If, therefore, it designs to effectuate any such object, it must express its intention with irresistible clearness to induce a Court to believe that it entertained it, for if any other construction is possible, it would be adopted to avoid imputing such an intention to the Legislature....

For instance, although foreigners are subject to the criminal law of the country in which they commit any breach of it, and also, for most purposes, to its civil jurisdiction, a foreign sovereign, an ambassador, the troops of a foreign nation and its public property are, by the law of nations, not subject to them and statutes would be read as tacitly embodying this rule."

It appears to me that in construing the provisions of the Assam Agricultural Income-tax Act, we must give effect to this principle enunciated in Maxwells Interpretation of Statutes. There is nothing in the Act to show that the Provincial Legislature intended to take away the privileges of a foreign sovereign and that being so, we must so construe the Act as to preserve such privileges.

During argument reference was made to certain provisions in the Government of India Act and, in particular, to Section 155 which made it clear that the property of Indian States was not liable to Federal taxation. In my view, however, these provisions cannot assist the Court in deciding this question as Federation never came into existence. It is quite clear, however, from the provisions of the Government of India Act that the Government of India had no authority over Indian States.

For these reasons it appears to me that the rulers of Indian States are not amenable to taxation in British India, particularly where the property is State property as I have held Chakla Roshanabad to be.

The question whether an Indian ruler is liable to taxation in respect of income arising from property in British India has been considered on a number of occasions. In Commissioner of Income-tax, Bombay City v. A. H. Wadia, as Agent to the Gwalior Durbar a Bench held that income arising from shares of public companies held by the Durdbar but which had nothing to do with the money-lending business conducted by the Durbar was not assessable to income-tax. In that particular case the Durbar had claimed a refund under Section 48(1) or a set-off under Section 18(5) of the Indian Income-tax Act of the income-tax alleged to be deemed under Section 49B to have been paid by it as a shareholder in respect of certain dividends. The Court

held that as the Durbar was not assessable under the Act in respect of these dividends it could not claim a refund under the sections to which I have made reference.A similar point was considered in Accountant-General, Baroda State v. Commissioner of Income-tax, Bombay City, in which it was held that the ruler of the Baroda State is a sovereign and he is not subject to the Municipal Laws of India. Therefore the Indian Income-tax Act does not apply to him and he cannot be treated as an assessee for any purposes under the Act. It was further held that under Section 48 of the Indian Income-tax under Section 3 of the Act can apply for a refund. Consequently, the Baroda State is not entitled under Section 48 to a refund of income-tax deducted from the dividends on shares held by that State in certain joint stock companies in British India.In these two cases it was clearly held that an Indian State or ruler is not assessable to Indian income-tax, particularly if the shares held are held as part of the royal or Durbar property.It is to be observed that the Indian Income-tax authorities l; have declined to assess the Maharaja of "Tripura to income-tax in respect of certain income me which accrued due to him Calcutta. However, the fact that the Indian Income-tax authorities did not consider the Maharaja liable cannot affect our decision in the case. The two Bombay cases, however, are very strong authorities in support of the Maharajas contention that he cannot be made liable to agricultural income-tax in Assam.

Great reliance was placed by the Government of Assam upon a decision of a Bench of the Allahabad High Court in Kunwar Bishwanath Singh v. Commissioner of Incomes-tax, C.P. and U.P., in which it was held that the late Maharaja of Benares was liable to be assessed to income-tax on certain income derived from zemindary situate in the United Provinces. In my view, however, this case cannot help the Government of Assam. It is true that the learned Judges who decided the case came to the conclusion that the Maharaja of Benares, though a ruling prince, was not wholly independent, but that does not appear to be the ground for their decision. The case was decided upon to the terms of the instrument of transfer which created the independent State of Benares. It is pointed out that in Section 26 of the instrument of transfer it was distinctly stated that in the other estates in possession of His Highness; which were outside the State of Benares - and presumably the income derived in the case which was sought to be assessed was from such estates - he was to continue to have the status and responsibilities of a landholder under the ordinary law. In other words, the instrument of transfer created the independent State of Benares and in terms made the Maharaja liable for other properties held by him outside the boundaries of the State land within British India. With respect to such properties he was to continue to have the statues and responsibilities of a land-holder under the ordinary law. One of the liabilities of a land-holder under the ordinary law is to pay income-tax son income derived from the property if such income is taxable. There is no such provision relating to Chakla Roshanabad. This zemindary was settled at the time of the permanent settlement with the ruler of Tripura and there is nothing to suggest that in such settlement he; laws to have the status and responsibilities of a land-holder; under the ordinary law. That being so the case of Kunwar

Bishwanath Singh v. Commissioner of Income-tax, C.P. and U.P., in which it was held that the Maharaja of Benares was liable to Indian incomes-tax is no authority upon the point now before us. It appears to me that the two Bombay cases to which I have referred should be followed land that being so, it must be held that the Maharaja of Tripura is not assessable to agricultural income-tax, though the property, namely, Chakla Roshanabad lies with the Province of Assam and outside the borders of the Tripura State.As I have held that the Maharaja is not liable to taxation, the other questions submitted do not really arise. However, I shall deal shortly with the questions, as the answers to them may be important if an appraisal is filed.

Question 1 - Whether the Appellate Assistant Commissioner had jurisdiction to alter an assessment made by the Agricultural Income-tax Officer in the Tripura State into an assessment on the petitioner personally where no proceedings were started and no notices were served under the Act on the petitioner himself personally.

As I have stated earlier in this judgment, the first assessment by the Income-tax Officer was made not on the Maharaja personally, but on the State of Tripura as an association of individuals. When the appeal by the assessee came before the Assistant Commissioner he changed the assessment to one on the Maharaja personally.The powers of the Assistant Commissioner upon appeal are contained in section 24(5) of the Assam Agriculturalised Income-tax Act, 1939. That sub-section is in these terms :-

"In disposing of an appeal, the Assistant Commissioner of Agricultural Income-tax may in the case of an order of assessment - (a) confirm, reduce, enhance or annul the assessment; (b) set aside the assessment and direct the Agricultural Income-tax Officer to make a fresh assessment; after such further enquiry as may be directed; or, in the case of an order under Section 21 or 22 confirm, cancel or vary such order :

Provided that no enhancement of an assessment shall be; made under this section, unless the appellant has had a reasonable opportunity of showing cause against such enhancement".

The Board of Agricultural Income-tax appears to have thought that all that the Assistant Commissioner did on appeal was to confirms the assessment, but he changed the assessment on an association of individuals to assessment upon the Maharaja personally. It appears to me that he did far more than confirm the assessment. He in fact set aside the original assessment and assessed the Maharaja personally for the first time. The Maharaja personally had never had an opportunity of contesting the matter before the Income-tax Officer land in my judgment the Assistant Commissioner on appeal had no power to vary the assessment and to make the Maharaja liable for the first time. It was in fact an entirely new assessment upon a new assessee and his act can in no way be described as a confirmation, reduction, enhancement or annulment

of the assessment. In such a case the Assistant Commissioner should in my view have acted under the provisions of sub-section (5)(b) of Section 24 of the Act and set aside the assessment and sent the matter backs to the Agricultural Income-tax Officer to make a fresh assessment. I am, therefore, bound to hold that the act of the Assistant Commissioner on appeal in changing the assessment to one against the Maharaja personally was not warranted under the provisions of the Act.

Question 2. - Whether the Appellate Commissioner of Agricultural Income-tax had jurisdiction to assess she income for 1939-40 in the light of the order of the Agricultural Income-tax Officer dated June 26, 1940.

By an order of June 26, 1940, the Agricultural Income-tax Officer had held that Chakla Roshanabad was a part and parcel of the State of Tripura and, therefore, the Maharaja was not liable to be assessed. However, the Income-tax Officer re-opened the matter under Section 30 of the Act and made an assessment to describe the assessee as an association of individuals. It appears to me that the Appellate Assistant Commissioner could not, on appeal, alter the assessment into one against the Maharaja personally for the reasons which I have already given in answer to question 1. Another point was raised, namely, whether the Income-tax Officer could re-opens the matter under Section 30. But I shall deal with that point; later in my answer to question 6.

Question 5 - Whether the money received from the Assam Government under the agreement dated February 13. 1897, was "income" or "agricultural income" within the meaning of the Assam Agricultural Incomes-tax Act 1939 (Assam Act IX of 1939).

It appears that the Maharaja had given a lease of certain property to the South Sylhet Tea Company, but the Assam Government claimed the land as belonging to them. The matter was compromised by an agreement and the Maharaja gave up all claims to the land in consideration of the receipt of certain sums of money some of which were payable annually. It appears to me that l; these sums payable under this agreement may be regarded as part of the Maharajas income but not part of any agricultural income. They are due under an agreement and cannot be said to be income arising from agricultural land or agricultural property. This point was not seriously pressed by the Assam Government.

Question 6. - Whether the income of the accounting year 1345 B.S. (assessment year 1939-40 can be deemed to have "escaped assessment" within the meaning of Section 30 of the Assam Agricultural Income-tax Act, 1939 (Assams Act IX of 1939).

It will be remembered that the Income-tax Officer made no assessment in the first place as he was of opinion that Chakla Roshanabad lay within the State of Tripura and, therefore, clearly

outside the Act.

Later, however, he seems to have changed his view land issued a notice under Section 30 claiming that the income had escaped assessment; for the year 1939-40. It certainly had not been assessed for that year because the Income-tax Officer thought that the income was not assessable. The question which arises, therefore, is whether income has escaped assessment because Incomes-tax authorities have wrongly assumed or held that such income was not taxable. In a sense it can be said to have escaped assessment. but on the other hand this income was made the subject of an enquiry by the Income-tax Officer land was; held to be not assessable. The Board of Agricultural Income-tax was of opinion that this income had escaped assessment and, therefore, the provisions of Section 30 applied. On behalf of the assessee, however, it was income does not escape assessment unless it has been overlooked land it was urged that in a case such as the present one the proper procedure was to apply by way of review to the Commissioner under section 27 of the Act. Section 27 empowers the Commissioner of Agricultural Incomes-tax of his own motion or on petition, to call for the records of any proceedings under the Act and to make appropriate orders provided that he cannot make any order prejudicial to the assessee without hearing him or giving him a reasonable opportunity to be heard.

The matter was considered by a Bench of three Judges of this Court in In the matter of Messrs. Lachhiram Basantlal and Basantlal Nathani. The corresponding section in the Indian Income-tax Act is Section 34 and at page 311, Rankin, C.J., Observed :-

"Section 34 deals with income which has escaped assessment; land it may be, though it is not necessary for the present purpose to decide it, that income cannot be said to have escaped assessment except in the case where an assessment has been made which does not include the income. I do not proceed upon that footing because it is unnecessary for the purpose of the present case. At all events, income has not escaped assessment; if there are spending at the time proceedings for the assessment of the assessees income which have not yet terminated in a final assessment thereof".

This observation of the learned Chief Justice is not applicable to the present case because proceedings had determinated in the case before us when the incomes-tax Officer had; specifically; held that the agricultural income for the year 19309-40 arose lout of property forming part of the Tripura State and, therefore, not taxable. The income had been expressly considered land had been held l; not to be taxable. The observations Rankin, C.J., cannot assist in arriving at a conclusion whether income which has not been taxed by reason of an erroneous decision has escaped taxation.

The matter was again considered by a Bench of this Court in Anglo-Persian Oil Company

(India), Ltd. v. Commissioner of Income-tax, Bengal. In that case it was held that Section 34 of the Indian Income-tax Act was not limited to cases of non-disclosure by the assessee or discovery of; new matter by, or inadvertence on the part of, the taxing authorities; it covers cases of error by the latter. When it appeared that the; original allowance of a deduction was unwarranted, there was a case of income i.e., part thereof, escaping assessment and Section 34 could be applied to re-open the assessment and assess such amount. This case appears to be some authority for the proposition that if income is not taxed by reason of an error of the taxing authorities it has escaped assessment.

A similar view was taken by this Court in In re Messrs. P. C. Mallick and D. C. Aich, in which a Bench held that the words "escaped assessment" in Section 34 of the Indian Income-tax Act mean also "has not been assessed". In the view of the Bench there was nothing in the section to restrict the operation of the section only to cases of non-inclusion of the income sin the return, hence an item which was allowed to be deducted from total assessable income could be said to have escaped assessment.

The construction so Section 34 of the Indian Incomes-tax Act was considered by their Lordships of the Privy Council in Rajendranath Mukherji v. Commissioner of Income-tax, Bengal. At pages 290 and 291, Lord Macmillan who delivered the judgment of the Board observed :-

"The appellants, however, submit that this is a case of income escaping assessment within the meaning of Section 34. Assessment. They argue, is a definite act, indeed the most critical act in the process of taxation. If an assessment is not made on income within the tax year, then that income, they submit, has escaped assessment within that year, and can be subsequently assessed only under Section 34 with its time limitation. This involves reading the expression has escaped assessment as equivalent to has not been assessed. Their Lordships can not assent to this reading. It give too narrow a meaning to the word assessment and too wide a meaning to the word escaped. That the word assessment is not confined in the statute to the definite act of making an order of assessment appears from Section 66 which refers to the course of any assessment. To say that the income of Burn & Co. which is January, 1928, was returned for assessment and which was accepted as correctly returned, though it was erroneously included in the assessment of Martin & Co. has escaped assessment in 1926-28 seems to their Lordships an inadmissible reading. The fact that Section 34 requires a notice to be served calling for a return of income which laws escaped assessment strongly suggests that income, which has already been duly returned for assessment, cannot be said to have escaped assessment within the statutory meaning. Their Lordships find themselves in agreement with the view expressed in In re, Lachhiram Basantlal, by the learned Chief Justice (Rankin) : Income has not escaped assessment if there are pending at the time proceedings for the assessment of the assessees income which have not yet terminated in a final assessment thereof. It may be that, if no notice calling for a return under

Section 22 is issued within the tax year, then Section 34 provides the only means availerable to the Crown of remedying the omission. But that is a different matter."

From this observation it is clear that Lords Macmillan was of opinion that income which had already been duly returned for assessment could not be said to have escaped assessment within the statutory meaning. In the present case the Maharaja had made a return of his income l; under protest for the year 1939-40 and after consideration the Income-tax Officer had held that it was not assessable. That being so, the case appears to fall within the observations of Lord Macmillan that as the income had already been duly returned for assessment it could not be said to have escaped assessment within the statutory meaning.

In Commissioner of Income-tax v. U. Lu Nyo, it was held that Section 34 of the Indian Incomes-tax Act did not entitle an Income-tax Officer to go behind and revise an assessment made by his predecessor which was completed and had become final. It appears that in the course of assessment for 1929-30 the Incomes-tax Officer rejected the accounts of the assessee for the year 1928-29 respect of his tobacco business and upon the materials before him assessed the income under Section 23(3) of the Income-tax Act. In the following year another Income-tax Officer in the course of assessment proceedings for the year 1930-31 took the view that his predecessor had estimated the quantity of tobacco at too high, and the profit at too low a figure, and purporting to proceed under Section 34, assessed what he regarded as the income which had escaped assessment; for the year 1929-30. The Court was of opinion that the provision of Section 34 could not; be prayed in aid to overcome the effect of a possible mistake made in an earlier assessment. At page 121, Page, C.J. observed :-

"The Income-tax Officer had no jurisdiction to revise the assessment for the previous year which was completed and had become final. We are of opinion that the assessment which he made was not under Section 34, buy was an attempt by one Incomes-tax Officer in the previous year, merely because of disagreed with his predecessors finding as to the amount of the assessable income. In our opinion he had no jurisdiction to do so."

In the present case a notice was issued under Section 30 because the Incomes-tax Officer was of opinion that the view previously held by him that this income was derived from State property was wrong. In other words he claimed to revise his earlier order which had become final.

The view of the Lahore High Court is to be effect that income can escape assessment by reason of an error of the Incomes-tax authorities. Dalip Singh, J., however, dissented and in his view the income of the Maharaja in the present case for the year 1939-40 could not be said to have escaped assessment : Madan Mohan Lal v. Commissioner of Income-tax, Punjab.

It will be seen that the authorities on this subject are conflicting. But it appears to me that this

Court must now follow the observations of Lord Macmillan in the case of Rajendranath Mukherji v. Commissioner of Income-tax, Bengal, and hold that the income of the Maharaja for the year 1939-40 had not escaped assessment because it had been duly returned for assessment, and that being so, it could not, in the view of Lord Macmillan, be said to have escaped assessment within the statutory meaning of that phrase. The Board of Agricultural Income-tax was of opinion that this income had escaped assessment. But I cannot agree with that view and I, therefore, must hold that proceedings could not be taken under Section 30; of the Assam Agricultural Income-tax Act in respect of this income for the year 1939-40.

Question 7. - Whether the salami realised in respect of settlement of lands is "agricultural income" within the meaning of the Assume Agricultural Income-tax Act, 1939 (Assam Act IX of 1939).

The Board was of opinion that salami was income But on the materials before us at the moment it is difficult to say whether this salami was or was or was not income. In the case of Raja Bahadur Kamakshya Narain Singh v. Commissioner of Income-tax, Bihar and Orissa, their Lordships held that the salami paid for a mining lease under which a monthly royalty calculated on the tonnage of coal extracted, subject to a minimum amount after a certain date, is payable is a capital receipt. It is a single payment made to purchase the general right to enjoy the benefits granted by the lease.

In Province of Bihar v. Maharaja Pratap Udai Nath Sahi Deo of Ratugarh, a bench of three Judges of the Patna high Court of which I was a member held that salami could not be regarded as income as a matter of law. It might in certain cases be regarded as payment of rent in advance and in such cases it could be rightly regarded as income. If it could not be regarded as rent in advance it could not be regarded as income and would, therefore, not be taxable. Prima facie salami is not income and it is for the Income-tax authorities to say that there do exist facts which would make salami income. In that particular case it was held that upon the facts stated the salami was not income.

A similar view was taken in three Patna cases : Raja Shiva Prasad Singh v. The Crown, Commissioner of Income-tax v. Maharajadhiraj Kumar Visweshwar Singh and Rani Bhubaneshwari Kuar v. Commissioner of Income-tax, Bihar and Orissa.

There is however a case of this Court, Birendra Kishore Manikya v. Secretary of State for India, in which it was held tax salami or premium received on settlement of waste land, but not on transfer of holding, is exempt from assessment of income-tax on the ground presumably that it was agricultural income and, therefore, not assessable under the Indian Income-tax Act.

We are of course bound by the decision of this Court. But it is difficult to answer the question

submitted because it is not stated how the payments of salami arose. If they arose from the settlement of the waste lands such would in the view of this Court be agricultural income. But it could not be income if the payment were made in respect of transfers. At page 780 of the report in the case of Birendra Kishore Manikya v. Secretary of State for India, Mookerjee A. C.J., observed :-

"There can be little doubt that when a lease is granted, the amount fixed for periodical payment is not independent of the amount paid in a lump sum as premium. The capitalised value of sum periodically payable taken along with the premium constitutes in the aggregate the consideration for the grant so that the larger the one element, the smaller the other. From this point of view, we must hold that the premium paid for the settlement of waste lands on abandoned holdings may reasonably regarded as rent or revenue derived from land within the meaning of that expression as used in the definition of agricultural income in Section 2(1)(a).

But these considerations do not apply to the salami or premium paid for recognition of a transfer of a holding from one tenant to another. When the transfer is recognised, the original tenancy continues and there is no demise. The sum paid as salami or premium in such circumstances is obviously not rent in any sense of the term; nor can it be deemed the return, yield or profit of any ano The money is paid by the transfer to the landlord to purchase peace, so that he may not contest the validity of the transfer. We cannot hold that the money so levied by the landlord can be comprised within the scope of the definition of agricultural income."

In my view it seems impossible to give a precise answer to this questions as it is not know in respect of what transactions the amount returned as salami was received.

Question 8. - Whether in determining the agricultural income a deduction of 15 per cent. of the arrears of rent due but not realized during the accounting period should be made under clause (c) of Section 7 of the Assam Agricultural Income-tax Act, 1939 (Assam Act IX of 1939).

In ascertaining the agricultural income a deductions must be made by reason of Section 7(c) of the Act a sum equal to 15 per cent of the total amount rent which accrued due in the previous agricultural year in respect of the charges for collecting the same. It is to be observed that the deductions is 15 per cent. of the total amount of rent which accrued due, and not 15 per cent. of the total amount of rent collected. If in a particular year all the accrued rent is collected together with arrears due for past years, the deduction allowed is 15 per cent. of the rent which accrued due and not 15 per cent. of the total collected.

That appears to be the view of the Board of Agricultural Income-tax and with that view I agree.

The assessee will be entitled to the return of the deposit if any and the costs of this reference.

Hearing fee assessed at 30 gold mohurs.

MUKHERJEA J. - I agree.

Reference answered accordingly.