CALCUTTA HIGH COURT

P.R. Mukherjee

Vs.

Commissioner of Income-tax

Income-tax Ref. No. 114 of 1953

(Chakravartti, C.J. and Sarkar, J.)

04.01.1956

JUDGMENT

Chakravartti, C.J.

1. The facts of this Reference are a little unusual in that in making an assessment on the assessee, the Department seems to have proceeded by the method of trial and error.

2. It appears that there are in the town of Howrah three houses, standing in the name of a lady, named Srimati Lila Devi. Those houses are premises Nos. 132, 133 and 134, Netaji Subhas Road. On premises No. 132 stands a cinema-house called 'Shyamasree Talkies' which is also in the name of the lady and which has been functioning since March, 1946.
In February, 1948, Lila Devi voluntarily submitted a return of her income For the accounting year 1946-47 which, in her case, was the usual financial year. The return showed an income of Rs. 334-13-0 from property and Rs. 5,682-7-0 as income from the cinema business. The Income-tax Officer accepted the lady's figure as regards her income from property, but thought that the true income from the cinema business should be Rs. 11,500/- and not the amount shown by her. He did not, however, complete the assessment. He was about to do so when his mind appears to have been assailed by doubts as to whether the capital on which the business was being run was the lady's own and, if not, whether she would be the right person to be assessed. For the removal of that doubt he issued a notice to the lady on 9-6-1948, and asked her to explain the source from which the capital introduced by her into the business had come. The amount, it appears, was Rs. 25,381/-.

3. By a letter dated 22-6-1948, the lady replied to the notice served on her and stated that the capital of the cinema business had come from the dowry given to her by her father. The actual text of the letter has been set out in the order of assessment. The lady, it appears, said that the amount had been paid to her by her father in cash on various dates and since no record had been

kept, neither her father, nor herself was in a position to furnish the exact dates of payment and receipt of the various sums. The Income-tax Officer was not prepared to accept the lady's explanation as true. He recorded an order to the effect that since the lady was unable to produce any evidence that the capital had really come from her father, it was to be presumed that the contributor had been her husband, the present assessee.
In that view, he kept the lady's assessment pending and issued a notice to the present assessee on 21-7-1948, under Section 22(2), read with Section 34 of the Act, asking him to furnish a return of his income For the assessment year 1947-48. The assessee filed a return on 30-7-1948, in which, besides showing his receipt from salary of Rs. 7,348/- he included the sums of Rs. 3347-13-7 and Rs. 5,347-10-0 as his wife's income assessable in his hands under Section 16(3) of the Act. The inclusion of the last two sums was "under protest". It seems somewhat curious that the assessee should have included those sums at all even when furnishing his return, but the Tribunal points out that he must have come to know of the order recorded by the Income-tax Officer in his wife's file. The assessment of the assessee was next taken up. His return as to his income from salary was accepted and in addition to that income, the amounts of Rs. 335/- and Rs. 11,500/-, which had already been determined in the wife's file as her income from house property and the cinema business respectively, were included in his total income. The assessee appears to have accepted the assessment and did not appeal against it. The assessment was completed on 31-7-1948, and on the same day the wife's file was closed.

4. It will be seen that although the Income-tax Officer taxed the wife's income in the hands of the assessee on the basis that the income had arisen from capital transferred by him to her directly or indirectly, he did not seek to assess the amount of the contribution itself in the hands of the assessee as his income. Being too occupied with the fruits, he seems to have forgotten the tree.

5. But the Income-tax Officer had not yet done with the assessee. Apparently, his mind continued to dwell on the assessment and on 17-10-1948, he recorded a note to the effect that the assessee had not disclosed, in the course of his assessment, the fact that it was he who had advanced to his wife the capital For the cinema business. This, the Income-tax Officer added, he had already found to be a fact and since the fact had not been disclosed by the assessee, it was a case to be dealt with under Section 34(1)(a) of the Act. The Income-tax Officer next proceeded to obtain the Commissioner's sanction under the proviso to Sub-Section (1) of Section 34 and having obtained it, directed on 9-1-1950, that a notice do issue to the assessee. Actually, the notice was issued on 11-1-1950, and it was a notice under Section 34 of the Act, not specifying whether it was under Clause (a) or Clause (b) of the sub-section.

6. By the time the stage of assessment was reached, the Income-tax Officer who had so long been dealing with the case had apparently been transferred to some other charge. The case of the assessee was taken up by a different Income-tax Officer and he made an assessment on 30-5-1950, whereby he included the sum of Rs. 25,381/-in the assessment of the assessee as income derived from some undisclosed source. He stated in his order that the amount had been advanced

by the assessee to his wife "For the construction and equipment of Shyamasree Cinema".

7. This time the assessee did not accept the assessment and appealed. The appeal did not succeed and the Appellate Assistant Commissioner held that even if the sum of Rs. 25,381/- was not the assessee's but his wife's income, as it had apparently been contended before him to be, it would, still be assessable in the hands of the assessee under Section 16(3) of the Act.
The way in which the Appellate Assistant Commissioner phrased his order might suggest that he was merely giving an alternative reason for upholding the assessment, but it would appear from the operative portion of the order that he held the amount as an item of undisclosed. Income from the cinema business itself. Although the assessment was upheld, its basis appears to have been altered.

8. The assessee then preferred a further appeal to the Appellate Tribunal. That appeal also failed and the decision of the Tribunal was that the sum of Rs. 25,381/- had been rightly assessed in the assessment of the assessee as his income from some undisclosed source. The Tribunal thus replaced the assessment on the basis on which the Income-tax Officer had placed it.

9. Before the Appellate Assistant Commissioner the assessee had sought to contend that the capital, appearing in the books of the 'Shyamasree Talkies', had not been supplied by him to his wife at all and there was no justification for treating the amount as a contribution from him. The Appellate Assistant Commissioner made short work of that argument by pointing out that, in the first and the original assessment, the assets of the cinema business had been treated assessee transferred by the assessee to his wife and that assessment had not been appealed from. It was, therefore, no longer open to him to plead that the capital had not even come from him and that the only matter with which the appeal then before the Appellate Assistant Commissioner, was concerned, was whether the amount of Rs. 25,381/- should or should not be assessed in the hands of the assessee as an income amount. Before the Tribunal it appears to have been contended that the Appellate Assistant Commissioner had not been right in holding that the question, whether or not the capital had been contributed by the assessee, stood concluded by the order of the original assessment which had become final. The Tribunal thought that the view taken by the Appellate Assistant Commissioner was right. They pointed out - a fact which I had forgotten to mention - that in the return filed by the assessee in compliance with the present notice under Section 34, he snowed his income as the amount already assessed, thus including therein the wife's income and making no protest as to the same.

10. Two other points were urged before the Tribunal. It was contended that the Income-tax Officer had no jurisdiction in the facts of the case to issue a notice under Section 34 and consequently, the assessment was invalid. It was next contended that even assuming that the assessment was grounded in a valid notice, it was still bad on the merits, inasmuch as the lady's explanation as to the source from which the capital amount had come ought to have been accepted. The Tribunal overruled both the contentions.

In dealing with the first, they held that the case clearly came under both Section 34(1)(a) and Section 34(1)(b) and that the issue of the notice under the section was amply justified. In dealing with the second question, they observed in passing that even if the lady had received some money from her father, it must have been exhausted in acquiring the site of the cinema-house and erecting a construction thereon which had cost respectively Rs. 15,270/- and Rs. 50,000/-. The Tribunal did not, however, find as a fact that any part of even the outlay on the acquisition of the site and the construction of the building had really come from the lady's father, but only said that even if she had at all received any gifts from her father, as alleged by her, no part of the sum of Rs. 25,381/- could be said to be accounted for by such gifts. The finding of the Income-tax Officer was, therefore, upheld.

11. The assessee then required the Tribunal to refer the disputed questions to this Court for decision. In accordance with that requisition, the following two questions have been referred :-

> (1) "Whether on the facts above set out, the issue of the notice under Section 34(1) by the Income-tax Officer in January, 1950, and the supplemental assessment following thereon are valid ?"
>
> (2) "Whether on the materials on record (which have been fully set out above), the Tribunal was entitled to find that the sum of Rs. 25,381 was the assessee's income from undisclosed sources of the accounting year ending 31-3-1947 ?"

12. Mr. J.C. Pal, who appeared on behalf of the assessee, took a preliminary objection with respect to the first question. He said that the form of the question was inaccurate and too wide, inasmuch as the Income-tax Officer had been satisfied as to the existence of a case under Section 34(1)(a) and had issued a notice under that Clause of the sub-section, whereas the question asked in a general form whether the issue of a notice under Section 34(1) was valid. If, indeed, the notice had been issued under Section 34(1)(a), the question would have to be amended, because to describe the notice as one under Section 34(a) would not be in accordance with fact and an opinion expressed on the validity of such a notice would be an opinion on a basis which did not exist. Mr. Meyer pointed out that no objection had been taken to the frame of the question before the Tribunal, but it appears to me that whether or not any objection was taken would be immaterial, if indeed the actual notice issued in the case had been described in the question inaccurately.

It appears, however, from a reference to the office copy of the notice which is on the record that, actually, it did not mention Clause (a) of Section 34(1) and indeed did not even mention Sub-Section (1) of the section, but simply mentioned Section 34. There can thus be no valid objection to the form of the first question.

13. Taking the first question now on the merits, the Tribunal has found, as I have already pointed out, that the facts of the case brought it both under Clause (a) of Section 34(1) and Clause (b). Mr. Pal's first contention was that neither of the Clauses was attracted, but I did not hear him advance any substantial ground in support of that contention. Clause (a) of Section 34(1)

contemplates a case where there has been "omission or failure on the part of an assessee to make a return of his income under Section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year" and where, by reason of such omission or failure, income has escaped assessment or has been under-assessed, or assessed at too low a rate. I need not refer to the remaining alternatives. Clause (b) of the sub-section contemplates a case where also income has escaped assessment or has been under assessed or assessed at too low a rate, but that has happened, "notwithstanding that there has been no omission or failure as-mentioned in Clause (a) on the part of the assessee", and the Income-tax Officer has information in his possession in consequence of which he has reason to believe that an escape from assessment or under-assessment or assessment at too low a rate has taken place. In the present case, there was no failure to make a return so far at least as the second assessment was concerned, but by not appealing against his first assessment, the assessee had accepted the position that the capital which had produced his wife's income had, in fact, been contributed by him.

If after accepting that position as established by his first assessment, he did not, when called upon to make a return by the second notice under Section 34, include the capital of Rs. 25,381/- in his return, he was 'prima facie' at least omitting or failing to disclose fully and truly all material facts necessary for his assessment. It is true that he may have omitted to include the amount in the view that though it had been contributed by him, it had not been paid out of his income. But it ought to be borne in mind that what Clause (a) of Section 34(1) and For the matter of that Clause (b) contemplates is the aspect of things as it may appear to the Income-tax Officer's mind at the time lie is considering the assess ability of the assessee. Since the Income-tax Officer had before him his own finding made in the wife's assessment as also in the course of the earlier assessment of the assessee himself that the capital amount had been contributed by him and since this contribution had not been mentioned in the return filed in compliance with the first notice under Section 34, or otherwise disclosed, I am unable to see why this was not a case where the Income-tax Officer might properly have reason to believe that the amount had been contributed out of income and that a failure or omission on the part of the assessee, as contemplated by Clause (a) of the sub-section had occurred. It cannot be said that, still, it could not be that the escape from assessment had been due to such omission or failure - the Income-tax Officer having discovered the contribution - because what the Income-tax Officer had found positively was only that the money had been paid by the assessee but not also that it had been paid out of his income. The latter the Income-tax Officer might well have come to believe later. In my view, the case comes clearly under Clause (a) of Section 34(1) and if that be so, it does not appear that it is necessary to consider the first question further.

14. But the Tribunal has held that the case came under Clause (b) as well and we had some argument before us on that alternative view. The important words with which Clause (b) opens are : "Notwithstanding that there has been no omission or failure as mentioned in Clause (a) on the part of the assessee". The Clause, therefore, presupposes the absence of some conduct on the part of the assessee of which Clause (a) contemplates presence. What is such conduct ? The words of Clause (a) are : "omission or failure * * to disclose fully and truly all material facts'. I

am leaving out the case of an omission or failure to make a return. The words I have just quoted may, in one view, cover a bare omission or failure to mention all material facts and, in another view, they may be said to cover only the case where the assessee, knowing all the material facts, does not mention them fully or truly or, in other words, deliberately withholds information or full information. Support For the second view would seem to be afforded by the grammatical meaning of the words "omission", "failure" and "disclose". It may well be said, and I should think said correctly, that a person cannot be said to have omitted or failed to disclose something when, of such thing, he had no knowledge. A similar implication is carried by the word "disclose", because one cannot be expected to disclose a thing or said to have failed to disclose it, f unless it is a matter which he knows or knows of. Of the two meanings of the relevant words in Clause (a) I, as at present advised, should think that the second is the correct view. If that be so, then the words with which Clause (b) opens must be taken as contemplating both a case where there has been no actual omission or failure to mention all material facts at all and the case where there has been an omission or failure in fact, but such omission or failure was not in respect of facts known to the assessee at the time and, therefore, not deliberate.

If such be the comprehensive meaning of the opening words to Clause (b), it is possible to imagine a case where a failure or omission did in fact occur and yet it would be Clause (b) and not Clause (a) which would be applicable. I do not, however, think that the question of the applicability of Clause (b) in the facts of the present case need be pursued further, because there was here an omission or failure in fact and since the assessee must now be taken to have supplied the capital to his wife, it cannot possibly be said that the omission or failure was unintentional or caused by ignorance of the real facts. I must point out that at no stage does the assessee appear to have contended that although, the amount had been contributed by him to his wife's business, it had not been contributed out of his income and that he had either borrowed it or supplied it from old accumulated funds in his hands. The only contention which he ever advanced or wanted to advance was that he had not supplied the money at all. In those circumstances, I find it difficult to agree with the Tribunal that Clause (b) also might apply to the case. I am not forgetting that the matter has got to be looked at from the Income-tax Officer's point of view or, to put it more accurately, by reference to the state of his mind at the relevant time and the aspect which the facts might appear to bear in his view. Regarded from that stand point as well, I do not think that the position is any different. The Income-tax Officer had himself found in the earlier assessment that the assessee had advanced to his wife the capital of the Shyamasree business. In the order recorded on 17-10-1949, he referred to that finding and went on to say "this fact was not disclosed by the husband in his assessment. This is, therefore, a case under Section 34(1)(a)". I cannot, therefore, see how even regarded from the Income-tax Officer's point of view, it could be said that this was a case where there had been no omission or failure as mentioned in Clause (a) of Section 34(1). In my opinion, the case came clearly under Clause (a) of Section 34(1) and the issue of the notice, taken as a notice under that Clause and the assessment based thereon were both perfectly valid.

15. The only point urged before the Tribunal with respect to Section 34 was that the facts of the

case did not attract the section at all and, therefore, the Income-tax Officer had no right in law to invoke it. Before us Mr. Pal wanted to raise other points. He contended in the first place, that the notice issued in the case was bad, because it was a notice under Section 34(1) whereas the Commissioner's sanction had been obtained for a notice under Section 34(1)(a). In fact, the notice was not, as I have already pointed out, even a notice under Section 34(1), but was a notice under Section 34, referred to in that broad and bare form. Be that as it may, Mr. Pal appears to me to be twice barred, from raising that contention. In the first place, it had never been contended before the Tribunal that the notice was bad, inasmuch as it had not been issued in accordance with the Commissioner's sanction. In the second place, we do not know in what form the Commissioner's sanction was given. There is nothing in the paper-book to show what kind of note was submitted by the Income-tax Officer to the Commissioner and what the order passed on that note was. We could consider Mr. Pal's new point only it we ourselves went through the original records and found out for ourselves what the facts relating to the sanction was, a course which I consider to be wholly impossible to be followed in a reference under Section 66(1) of the Act.

16. It was then contended by Mr. Pal, that at least appeared it from the paper book, that the notice had been issued under Section 34(1) and it was open to him to argue that such a notice was bad, inasmuch as it did not specify whether it was a notice under Clause (a) of the sub-section or under Clause (b). Once again, I think that Mr. Pal is debarred from raising the point and For the same reason. It does not appear to have been contended at any stage of the case that the mere fact that the notice did not specify the particular Clause of Section 34(1) under which it was being issued, was itself sufficient to invalidate it. It is true that the question referred asks in a broad form whether the issue of the notice under Section 34(1) was valid, but, as I have always said, it is not possible for a party in a reference under Section 66(1) to take advantage of the form of the question and try to raise new points which had never been raised or investigated before the authorities below.

I do not, therefore, feel called upon to deal even with the second of the new points sought to be raised by Mr. Pal. I may, however, observe in passing that it does not appear to me to have any substance. The statute does not prescribe any form in which the notice contemplated by Section 34 should be issued. The principal fact in both Clause (a) and Clause (b) of Section 34(1) is that income has escaped assessment for any year or has been under-assessed or assessed at too low a rate. That fact is common to both the Clauses. The difference between the two Clauses is that Clause (a) contemplates a case where the assessment or under-assessment was caused by an omission or failure on the part of the assessee to do certain things and Clause (b) contemplates a case where such escape from assessment or under-assessment occurred in spite of there having been no such omission or failure. The practical consequence of the presence of such omission or failure in one case and the absence thereof in the other is that, in the first case, the period within which the notice contemplated by the section can be issued is longer. I do not see how that difference makes it necessary or imperative that the notice itself must specify under which of the two Clauses of the section it is being issued. All that the section itself says is that the Income-tax

Officer may "serve on the assessee * * a notice under Sub-Section (2) of Section 22". The main notice to be issued is, therefore, a notice under Section 22(2) of the Act and Section 34 only authorises the issue of such a notice in spite of there having been a previous assessment or in spite of the time For the issue of a notice in the normal way having expired. It is true that when answering a notice issued under the section, the assessee may take plea of limitation and For the purposes at such a plea, it may be necessary for him to know whether his case is being treated as one under Clause (a) or as one under Clause (b). It appears to me, however, that whether the case is treated as coming under one Clause or the other will transpire in the course of the assessment proceedings and it is neither required of the Income-tax Officer, nor is it necessary that he should specify the Clause in the notice itself. Even when a Clause is specified, it is conceivable that when making the actual assessment, the Income-tax Officer may come to hold that it comes I under the other Clause. Suppose a notice issued under the section specifies Clause (a) on the basis of a belief of the Income-tax Officer that the assessee has omitted or failed to disclose fully and truly all material facts. To recall an illustration I gave in the course of the argument, an assessee may have a relative living in a distant country who may die leaving to the assessee under his will a house-property situated within the taxable territories. The Income-tax Officer may come to know of the legacy and if he finds that the income from that property was not included in the return, he may issue a notice under Section 34 and let me assume that he specifies in the notice Clause (a) as the Clause under which it is being issued. It is quite possible that when appearing before him in compliance with such a notice, the assessee may satisfy the Income-tax Officer that he was totally unaware that any legacy had been left to him by his relative and he could not possibly have disclosed an income accruing to him of which he did not know.
The Income-tax Officer may well accept that explanation. Can it be said that in such a case as that, if the explanation is accepted, the Income-tax Officer will be prevented from making an assessment on the basis that the case comes under Clause (b) of Section 34(1), provided he is within time For the purposes of that Clause ? Whether or not there had been an omission or failure to disclose the income, the fact that the income had escaped assessment will remain and if income which ought to have been assessed is discovered as having remained unassessed, that will be a sufficient ground for proceeding to its assessment, provided, however, the period of limitation has not already expired. I am giving that illustration only For the purpose of pointing out that the Income-tax Officer cannot possibly be tied down to the section or the Clause which he mentioned in the notice and if he be free to make an assessment provided there is some escaped or under assessed income and provided that the time for making an assessment has not run out, it cannot be essential to the validity of a notice that a particular Clause of Section 34(1) should be specified. I do not wish to say anything further on this point, as I have already held that not having been raised before the Tribunal, it does not arise out of the appellate order and cannot be agitated before us.

17. The above is all that requires to be said with respect to the first question. As regards the second, the answer seems to me to be plain. The question asks whether the Tribunal had materials before it on which it could properly hold that the sum of Rs. 25,381/- was the assessee's

income from undisclosed sources. It is certainly true that the finding rests on a double presumption. The amount appears in the books of a business which stands in the name of the wife and the first presumption is that it is a capital contribution by the wife's husband, that is to say, the present assessee. The second presumption is that the contribution made by the assessee to his wife's business was made out of his income, that is to say, it was itself an income amount in his hands. Had it not been For the course adopted by the assessee, lit might be a matter for serious consideration before a tribunal of fact whether from the mere presence of this sum in the account of the capital of the wife's business, it could be presumed that it came from the wife's husband and then whether the presumption that the amount had come from the husband could be followed up by a further presumption that it was a contribution from the husband's income. The matter, however, appears to be concluded by the course which the proceedings have taken and the position which the assessee himself has chosen to accept. It would be recalled that in the assessment made on the basis of the first notice under Section 34, it was held that the income of the business was liable to be assessed in the hands of the assessee under Section 16(3) of the Act. That decision meant that the income of Rs. 11,500/-, arising out of the business standing in the wife's name, had arisen from assets transferred by the assessee to her directly or indirectly. The assessee accepted that assessment and did not appeal from it. That clearly means that he was accepting the position that the capital which had produced the income of Rs. 11,500/- had been transferred by him to the wife and therefore, the sum had belonged to him before such transfer. There can be no doubt that the sum of Rs. 25,381/- with which we are here concerned was the capital or a part of the capital which had produced the income of Rs. 11,500/-. The conclusion, therefore, seems to me to be inescapable that the assessee was accepting the ownership or the prior ownership of the amount. If then he did so, it must now be treated in the first instance as an amount of money which had gone from him to the wife's business, although it is theoretically possible that it might have been paid by him as much out of some capital fund in his possession or out of borrowed money as out of his income. It does not appear from the materials before us that the assessee ever contended that this amount, although contributed by him, had not been contributed out of his income or that he had claimed to have contributed it out of borrowings or out of some capital fund. It is also to be remembered that in the return filed in compliance with the second notice under Section 34, the assessee included the wife's income from business and house property in his own assessment and when confronted by a threatened assessment on the capital amount contributed by him on the basis that it had been paid out of his income he does not seem to have offered any explanation. In those circumstances, I find it impossible to hold that the Tribunal had no material before it on which it could properly hold that the amount concerned was the assessee's income from undisclosed sources. It should be remembered further that the income returned as respects the business was not accepted by the Income-tax Officer who estimated the true income at a higher figure. In view of such estimate of the income of the business made, this amount of Rs. 25,381/- could not be treated as having arisen out of the business itself, since there would be no further scope of any further income and, therefore, it seems to me that the basis adopted by the Income-tax Officer and the Appellate Tribunal was the correct basis, whereas that adopted by the Appellate Assistant Commissioner was not.

18. As regards the second question also, Mr. Pal attempted to raise a new point before us. He said that the only material which the Income-tax Officer had had before him was the balance-sheet of the cinema business and that was a document For the period commencing on 15-3-1946, and ending on 31-3-1947. The accounting year, it will be remembered, was the period commencing on 1-4-1947, and ending on 31-3-1948. Mr. Pal's point was that since the period covered by the balance-sheet commenced fifteen days earlier than the accounting year, it was quite possible that the amount of Rs. 25,381/- even assuming that it had been contributed by the assessee, had been contributed during those fifteen days and not any date within the accounting year. If the money had been paid before the commencement of the accounting year, Mr. Pal's contention was that it could not be included in the assessment for 1947-48.

19. I am unable to see how it can be open to Mr. Pal to raise this new point before us or how it can be possible for us to deal with it. The point was never raised before the Appellate Tribunal, nor, as far as I can see, before either of the other two authorities. There is again nothing before us to show that the Income-tax Officer had before him only the balance-sheet of the business and nothing else. It is quite conceivable that he had referred to the books of the business and had found there the dates on which the various sums making up the amount of Rs. 25,381/- had been paid and that those dates were all within the accounting year. Had' this point been raised before the Tribunal, the necessary investigation of facts might have been made and there would have been a finding as to whether the Income-tax Officer had had before him any other material and whether the dates on which the various sums had been contributed were ascertainable and, if so, what those dates were. As I have said, the point was not raised and no investigation with regard to it having been called for none was made. In those circumstances, it seems to me quite impossible to entertain the point sought to be raised by Mr. Pal and less possible to give a decision on it.

20. For the reasons given above, the answers to the questions referred must, in my opinion, be as follows :-

Question 1 : "Yes".
Question 2 : "Yes".

21. The Commissioner of Income-tax, West Bengal, will have his costs of this Reference.

Sarkar, J.

22. I agree.
Answers in the affirmative.