

BOMBAY HIGH COURT

Chimanram Motilal

Vs

The Commissioner of Income-Tax

(John Beaumont, Kt., C.J. Kania, J.)

22.09.1942

JUDGMENT

John Beaumont, Kt., C.J.

1. This is a reference made by the Income-tax Appellate Tribunal (Bombay Bench) under Section 66 of the Indian Income-tax Act, 1922, and it raises two questions relating to a further assessment made on the assessee under Section 34 of the Indian Income-tax Act.
2. The first question, which presents no difficulty whatever, is :Whether in the circumstances of this case the notice of re-assessment issued to the applicant under Section 34 of the Income-tax Act was invalid or illegal for failure to specify the particular source of income that had escaped assessment ?
3. The notice under Section 34 stated that the Income-tax Officer had reason to believe that the assessee's income from all sources which arose, accrued or was received in the previous year had partially escaped assessment. It is said that the notice ought to have specified the particular source or income which was alleged to have escaped assessment, and reliance is placed on the form of notice given in the Income-tax Manual, which does state the source of the income which is alleged to have escaped assessment. But that form is not statutory. All that is necessary under Section 34 is that a notice should be given which sufficiently draws the attention of the assessee to the case which he has to meet, and as, admittedly, the assessee in this case has only one source of income, namely business, it seems to me plain that a notice saying that income from all sources had escaped assessment was quite sufficient to show them what the case was which they had to meet, namely, that some of their income from the only source from which any income was derived had escaped assessment.
4. The first question will, therefore, be answered by saying that the notice was valid.
5. The second question is :Whether in the circumstances of the case a part of the applicant's

income had escaped assessment within the meaning of s, 34 of the Indian Income-tax Act, so that it could be re-assessed by the second Income-tax officer ?

6. The year of assessment is 1936-37, which is the Maru year 1991-92. In the original assessment the Income-tax Officer allowed under Section 24 of the Act as a deduction from the profits of the accounting year a sum of about Rs. 3 lakhs, being the loss which the assessee had sustained in relation to the business, in the Maru year 1990-1. He considered that the loss in question could be brought into the accounts for the year of assessment, 1991-92, because the business done in Bombay and the business done in London were what is called straddle business, and he held that the accounts had not been closed at the end of the year 1990-1. Subsequently the same Income-tax Officer came to the conclusion that he had made a mistake, that he ought to have held that the loss of Rs. 3 lakhs was not incurred in the Maru year 1991-92, and could not be allowed under Section 24 and he, therefore, gave a notice under Section 34, alleging that the amount allowed as deduction had escaped assessment. The actual hearing of the notice of reassessment was carried out by another Income-tax Officer, who agreed that the sum of about Rs. 3 lakhs ought not to have been allowed as a deduction, and that the sum had escaped assessment.

7. Section 34 of the Act before the amendments of 1939 provided that if for any reason income, profits or gains chargeable to income-tax had escaped assessment in any year or had been assessed at too low a rate, the Income-tax Officer might, at any time within one year of the end of that year, serve a notice, and then proceed to re-assess by the method laid down under the Act for the original assessment.

8. It is argued by the assessee that it cannot be said that income has escaped assessment, unless there have been some additional facts brought to the notice of the Income-tax Officer, or some change in the law effected or revealed since the original assessment; and that if the Income-tax Officer merely changes his opinion, or if a fresh Income-tax Officer merely disagrees with the opinion of a previous Income-tax Officer, and, therefore, includes further income in the assessment, it cannot be said that any income has escaped assessment.

9. The view which was taken by the Rangoon High Court in *Com. of Inc. Tax, Burma v. U Lu. Nyu*¹ was that if once a source of income had been assessed, the matter was disposed of, and it could not be said that any income from that source had escaped assessment. But that view, which was not necessary for the actual decision of the particular case, which dealt with a difference of opinion between two Income-tax Officers on a mere matter of estimate, has not found favour with any other High Court in India, This Court differed from that view in *Commsr. of Income Tax, Bombay v. G.V. Manohar* although we agreed with the actual decision, and followed it in that case, which was also a case in which one Income-tax Officer had differed from an estimate formed by a previous Income-tax Officer. The Rangoon High Court in a later case,

*Commissioner of Income Tax v. Dey Brothers*² adhered to its former opinion, but, as I have said, no other High Court has accepted that view.

10. The other High Courts have taken the view that the only question under Section 34 is whether in fact income has escaped assessment, and that income which might have been, but was not, assessed, has escaped assessment, and one ground on which income may undoubtedly be shown to have escaped assessment, is that the true facts were not brought to the notice of the Income-tax Officer. But if one admits that in such a case income has escaped assessment, it has equally escaped assessment if the true facts were brought to the notice of the Income-tax Officer, but he failed to appreciate them, or mislaid some file, and did not consider some particular facts. Again, it cannot, I think, be disputed, that, as this Court held in *Commissioner of Income Tax, Bombay v. Pirojbai Contractor*³ if an assessment is based on a view of the law held to be correct by High Courts in India, but subsequently within the year allowed by Section 34 held by the Privy Council to be incorrect, and by reason of that revealed change in the law it appears that some income has escaped assessment, that is a good ground for serving a notice under Section 34, and re-assessing the assessee. But if one accepts that view, it is very difficult to say that the case would not have fallen within Section 34, if the decision of the higher tribunal had been given before the assessment, though the Income-tax Officer did not know of the decision, or had failed to appreciate it. It seems to me very difficult, on the language of Section 34, to say that in order to hold that income may have escaped assessment, there must have been either some fresh facts brought to the notice of the Income-tax authorities, or some change in the law; and to hold that a mere change of opinion by the Income-tax Officer will not be sufficient to found a case under the section.

11. The Privy Council in a recent case in *Commissioner of Income Tax, Bengal v. Messrs. Mahaliram Ramjidas*⁴ in which they were dealing with a decision of the Calcutta High Court, in which it had been held that before a notice can be given under Section 34, the Income-tax Officer must hold some sort of judicial inquiry to satisfy himself that a proper case exists, were not prepared to accept that view, and held that to enable an Income-tax Officer to initiate proceedings under Section 34 it is enough that the Income-tax Officer on the information which he has before him and in good faith considers that he has good ground for believing that the assessee's profits have for some reason escaped assessment, or have been assessed at too low a rate. So that, a notice can be served if the Income-tax Officer is bona fide of opinion that the income has escaped assessment. High Courts in this country have held that an Income-tax Officer, or his successor, is entitled, under Section 34, to re-assess the income, merely because he thinks that owing to some mistake in the first assessment income has escaped assessment. That has been held by the Madras High Court in *Commr. of Income Tax v. Rajah of Parlakimedi*⁵, by the Lahore High Court in *Amir Singh Sher Singh v. Commsr. of Income Tax*, and by the Calcutta High

Court in *P.C. Mallick and D, C, Aich, In re* (1939) 8 I.T.R. 236, whilst there is a dictum of Sir George Rankin in *Anglo-Persian Oil Co. Ltd. v. Com. of Inc. Tax* to the effect that Section is applicable to put right an assessment by which a deduction has been improperly allowed. The Income-tax Tribunal has based its decision in this case very largely on that dictum. The effect of those decisions appears to be to allow Section 34 to be used as a section giving power to the Income-tax Officer to revise his own decision or the decision of his predecessor, and in view of the other provisions for revision in the Income-tax Act, e.g.s. 33 and Section 35, it is rather strange that Section 34 should have that effect. But, as I have already pointed out, if it be once admitted that an assessment may be reopened under Section 34, (and the language seems to make such an admission inevitable), it is very difficult to draw the line in any way, and to say that it can only be reopened on a particular ground, such as change of facts, or alteration in the law. I may say that even if I disagreed with the decisions, which I do not, I should not be prepared to differ from decisions of other High Courts on an Act of this sort which applies throughout British India.

12. In my opinion, therefore, the notice under Section 34 was justified, but that does not dispose of the matter. Income cannot be held to have escaped assessment merely on the ipse dixit of the Income-tax Officer. As held by this Court in *Commsr. of Income Tax, Bombay v. Manohar* (supra) it is for the Income-tax Officer to establish to his own satisfaction on the assessment, and subsequently before any Appellate Tribunal, that income has escaped assessment; it is not for the assessee to prove that the original assessment was right, and that no income has escaped assessment.

13. The facts of this case are peculiar. The Tribunal has held that before the Income-tax Officer on the occasion of the first assessment the assessee's books for the Maru year 1990-91 were produced, though this was denied by the Commissioner. When the second assessment was made, which was not till 1940, more than six years after the close of the Maru year 1990-91, the books of that year were not available. The position is discussed in paragraph 8 of the assessee's grounds of appeal, where they point out that there have been many changes in the Income-tax Officer whose duty it was from time to time to deal with their assessment, and they say that they did produce the books for the Maru year 1990-91 at the original assessment and on subsequent occasions, but when it came to the last assessment, they had sent the books to their native place, where they had been destroyed as being more than six years old. There is no reason to doubt that statement. The Tribunal has held as a fact that all these books were produced at the original assessment. So that, it really comes to this, that the second Income-tax Officer has differed from the first not merely on the same material, but on much less material, than the first Officer had. He holds, without the books of 1990-91, that there was no straddle business in that year, and without those books it seems difficult to arrive at that conclusion, when an Officer who saw the books

arrived at an opposite conclusion. The Appellate Tribunal, no doubt, has agreed with the second officer's conclusion, and they say that notwithstanding that the books for the Maru year 1990-91 were originally produced, the fact remains that "we have little or no evidence of any straddle business done by the appellants in London in the year in question." But that is really throwing upon the assessee the burden of proving that income has not escaped assessment, and that burden is thrown upon them at a time when, through the delay in dealing with the re-assessment, the necessary material is not available. In my opinion, an Income-tax Officer is not entitled to give a notice saying that income has escaped assessment, thereafter to wait for years, and then, when the relevant books have been destroyed, say that the assessee has failed to prove that the income has not escaped assessment. Therefore, whilst I agree that the notice under Section 34 was justified, though no fresh material was available, I do not agree that there is evidence that any income had escaped assessment. In my opinion, the Tribunal ought to have held that there was no evidence on which the second Income-tax Officer could hold that any income had escaped assessment.

14. I would, therefore, answer the second question in the negative.

15. The Commissioner to pay three-fourths of the costs.

16. Certificate to issue that no question under s, 205 of the Government of India Act arises in this case.

Kania, J.

17. Two questions have been submitted by the tribunal for the determination of the Court. The necessary facts, reasons and our conclusion have been stated in respect of the first question by the learned Chief Justice in his judgment and I have nothing more to add to that.

18. As regards the second question, the facts are these. The assessment year was 1936-37, and the accounting year Section 1991 (Maru) was from November 8, 1934, to October 27, 1935. The sole item, under which the assessee was assessed, was business. According to them, they had transactions in silver in Bombay, and they were also doing straddle business in silver in Bombay and London. Straddle business done in Bombay during the last three months of Maru 1991 (which, by the very use of the word "straddle", must mean carry over so as to set off the outstanding business in London) showed that in carrying over the business the assessee had paid in the market certain amounts. The amounts so paid were debited in their ledger. After considering all the facts the Income-tax Officer made the assessment order on July 9. Before doing that, as the record shows, the assessee had produced their books of account of Samvat 1990-91 and also of 1991-92. Not only that, but an examiner's report on those books was submitted to the then Income-tax Officer before he made the assessment. That Officer came to

the conclusion that the loss shown in the ledger of S. 1990-91 appertained to the transactions of S. 1991-92 and allowed the assessee to set off the debit items mentioned above against the profits for S. 1991-2. On no other footing he could allow a set off in respect of that loss against the business of S. 1991-92. It must be presumed that the Income-tax Officer was aware of the relevant provisions of the Income-tax Act.

19. Thereafter, on March 22, 1938, a notice under Section 34 was issued on the assesseees to start reassessment proceedings. The assesseees appeared before the Income-tax Officer. In para. 8 of the grounds of appeal before the Appellate Tribunal, they have stated that in the course of re-assessment books of S. 1991-92 were called for and examined. The officer did not ask the assesseees to produce the books of Samvat 1990-91. Before the officer could pass orders, the case was transferred to another Income-tax Officer. That officer again never called for the books of S. 1990-91. He examined only the books of 1991-92. Before he also could pass an order, the case was again transferred to the Income-tax Officer, Section VII, Central, and it was only in 1940 that the officer asked to see the books of S. 1990-91 (1934-35). The assesseees further stated that their books, according to their usual practice, after the assessment was made by the Income-tax office, were sent away to their native place, except for one preceding year. They had accordingly sent over the books for S. 1990-91 to their native place after the assessment order was made on July 9, 1937. When in 1940 the demand for the reproduction of these books was made they made inquiries, and it was found that the same were destroyed along with other old books as they had been moth-eaten. These facts, which are set out in the grounds of appeal, are not controverted. In 1940 without seeing the books of S. 1990-91 and without any additional or new evidence the Income-tax Officer held that the straddle transactions were not proved and the debit items mentioned above appertained to the business of the previous year. He was, therefore, of opinion that the allowance made in making the previous assessment order was unjustified and had escaped assessment. The Tribunal accepted the facts about the production of the books previously but appears to be pressed to consider the rest of the evidence. From the judgment of the Tribunal it is clear that before them also it was not alleged that any additional or new evidence was considered in making the re-assessment. In the course of its judgment the Tribunal observed that the transactions were independent and the method of accounting adopted had been altered. Admittedly these surmises were based on the fragmentary materials put before them and without considering and in the absence of the assesseees' books for S. 1990-91.

20. The question is whether, under these circumstances, the order made by the Officer in 1940, on the basis that the income had escaped assessment, is justified. To put it in brief, the first officer had evidence of A, B, C and D before him, and he came to the conclusion that the transactions were straddle transactions, and that the loss on account of these transactions entered in the books of S. 1990-91 should be allowed to be set off against the business profits of S. 1991-

92. When reconsidering the matter under Section 34, the Income-tax Officer in 1940 had before him only three out of the abovementioned four pieces of evidence and no other evidence at all. On that evidence only he held that the item of Rs. 2,95,619 had escaped assessment. In my opinion, the record thus clearly shows that there was no evidence before the Income-tax Officer or the Tribunal to hold that any income had escaped assessment. The question of law about the application of Section 34 could arise only if on the same materials at least the second officer had come to a different conclusion.

21. On the question of interpretation of Section 34, considerable time has been spent, and I think it is desirable under the circumstances to express my opinion on it. I may notice that I have not been a party to any previous decision on Section 34, although I am bound by the opinion of benches of this Court expressed in considering this section. It may also be noticed that the present discussion centres round Section 34 of the Act as it existed before the amendment. I make this clear, because the words of the amended section correspond more to the section of the English Act in force.

22. Under Section 34 the relevant words are that if for any reason income, profits or gains chargeable to income-tax has escaped assessment, the Income-tax Officer may at any time within one year adopt proceedings by issuing a notice similar to the one under Section 22 of the Indian Income-tax Act.

23. The first case on this point, to which our attention was drawn, is *Commr. of Income Tax v. Rajah of Parlakimedi*. (1925) 2 I.T.C. 104(SUPRA) It was decided by the Madras High Court. The income of certain houses had not been assessed in a particular year, and in a subsequent year on a reconsideration of the matter by another officer, it was held that the income of the houses was assessable. The question arose whether it could be re-assessed retrospectively. In dealing with the question *Coutts Trotter C.J.* relied on the words "too low a rate" used in Section 34 for the construction of the first part of Section 34, which deals with escaped assessment. That learned Chief Justice observed that because a lower rate of assessment could not be due to mere inadvertence, if income had not been assessed through inadvertence, it could equally be covered by the words "escaped assessment." I respectfully differ from this line of reasoning, because a lower rate of assessment is not necessarily due to mere inadvertence. It may be due to various other considerations, and not mere inadvertence.

24. The next case is *Anglo-Persian Oil Co. Ltd. v. Com. of Inc. Tax* where *Rankin C.J.* had occasion to consider this Section 34. Although the point did not arise directly before him, he expressed the opinion on the meaning of that section and stated that the words were wide enough to cover a deduction which had been improperly allowed. About five months later came the decision of the Rangoon High Court in *Com. of Inc. Tax, Burma v. U Lu Nyo (1933) 1 I.T.R.*

373(SUPRA) where three Judges of that Court came to the conclusion that the words "escaped assessment" in Section 34 did not cover the case of income which had been considered by the assessing officer and allowed to pass free or assessed in a particular way. According to them "escaped" must mean what had not been considered, because once it had been considered by the Income-tax authorities, it became income which was assessed. That view was considered too narrow and not accepted by the Bombay High Court in *Commsr. of Income Tax, Bombay v. G.V. Manohar*⁶.

25. In between there arose an occasion for the Privy Council to refer to Section 34 in *Rajendra Nath Mukerjee v. Income-tax Commissioner*⁷ As I read that judgment, it does not cover the point before us at all. In that case an assessee had made his return, and while the consideration of that return was pending, another assessee's assessment was considered. It was found that a certain item which was included in that (second) return should not be included in that return but should be put in the first return. The argument before the Privy Council was that as one year had expired, there was no justification for including this item under the first return. That argument was negated, and, in my opinion, there can be no two opinions on the question. The only reference to Section 34 made by the Privy Council was because it was used as an argument in support of the contention urged before them. Their Lordships had no occasion to consider the effect and meaning of the words "escaped assessment." They only negated the contention that the words "has escaped assessment" were equivalent to "has not been assessed."

26. In the case of *Commsr. of Income Tax, Bombay, v. G.V. Manohar (supra)* a bench of this Court had occasion to consider the operation of Section 34. The facts found there were as follows. The first officer had, according to his opinion, fixed a certain percentage of the price of gold and silver as profit to be assessed. Obviously that was based on what one might call a rule of thumb. After sometime a notice under Section 34 was issued, and the second officer in his opinion thought that a higher rate should be taken for calculating the profit. That was equally another rule of thumb laid down by that officer. When the matter came before the Court, the bench decided that this was not covered by Section 34. The burden of showing that income had escaped assessment (in the sense that the Income-tax Officer had some evidence before him to justify the conclusion that the income had escaped assessment) was on the Commissioner. The bench found that there was no evidence except mere opinion which, to put it at its highest, was a surmise. The Court therefore held that the second assessment was not justified. This opinion of our Court, I apprehend, was not properly appreciated by the learned Judges of the Rangoon High Court in *Commissioner of Income Tax v. Dey Brothers.(1936) 4 I.T.R. 209(Supra)* They adhered to the view they had expressed in their previous case of *Com. of Inc. Tax, Burma v. U Lu.Nyu (supra)* which, so far as the principle was concerned, was accepted by this Court in *Commsr. of Income Tax, Bombay v. G.V. Manohar (supra)*.

27. Those cases came to be considered by the Lahore High Court in *Amir Singh Sher Singh v. Commsr. of Income Tax*.⁸ The learned Judges came to the conclusion that having regard to the opening words of Section 34, viz. "for any reason" there was no justification for confining the meaning of the word "escape" within any limits, and all the different meanings given to the word "escape" in Murray's Oxford Dictionary could be held applicable to the word "escape" when the matter came to be considered by the Income-tax Officer under Section 34. In *Madan Mohan Lal v. Commsr. of Income Tax* . a full bench of the Lahore High Court had occasion to consider again the meaning of Section 34 in view of the different opinions so far expressed by the three High Courts, and the majority of the Judges (Dalip Singh J., dissenting) held that the meaning given to the word "escape" in *Amir Singh Sher Singh v. Commsr. of Income-tax* (supra) was correct. Mr. Justice Dalip Singh was of the opinion that the word "escaped" should be limited to mean " eluded notice," and should not. be given all the different meanings noted against that word in Murray's Dictionary.

28. In *P.C. Mallick and D.C. Aich, In re*⁹ the Calcutta High Court had occasion to consider the construction of Section 34. In that case a testator by his will directed inter alia certain payments of money to be made to certain beneficiaries, and annuities to certain other persons out of the income of his property. In the assessment of income-tax for the year 1933 made on the executors, the Income-tax office allowed as a deduction a certain sum which was paid to the beneficiaries under the will. In January, 1935, the Income-tax authorities came to the conclusion that the amount was improperly allowed and assessed it. under Section 34 on the ground that it had escaped assessment in the year in question. It was held that having regard to the plain words of s, 34 it was impossible to say that the amount did not escape assessment in the year in question. In the course of his judgment Derbyshire C.J. referred to a decision of this Court in the *Commissioner of Income Tax, Bombay v. D.R. Naik*. In that case because of an interpretation of certain existing law by the Privy Council it was ascertained that a mistake of law had been committed in making the previous assessment and proceedings were considered to have been properly started under Section 34 within the prescribed time. In the Calcutta case when making the first assessment the Income-tax authorities had the figure of the amount which they allowed before them, and after considering it allowed the deduction. The learned Chief Justice held that the amount was not assessed and it was assessed because the Income-tax Officer made a mistake in 1933 which he attempted to put right in January, 1935. Having regard to the general words used at the commencement of the section it was held that it was impossible to say that the amount had not escaped assessment in the year in question. The Allahabad and Madras cases do not appear to be discussed in the judgment.

29. In this state of the law the question is whether Section 34 gives to the Income-tax Officer a large revising power as contended on behalf of the respondent, or whether it is limited only to set

right what had been either overlooked or misunderstood. The cases noted above clearly show that the Madras, Lahore and Calcutta High Courts, are of the view that there is no justification to limit the operation of the word "escaped" as suggested by Sir Arthur Page in his judgment in the Rangoon case. The Bombay High Court has differed from the view of the Rangoon High Court and held that the meaning given to the word "escaped" appeared to be unnecessarily narrow in that case.

30. Our High Court has accepted the principle that unless it found it impossible conscientiously to accept the consensus of opinion of other High Courts it would follow the construction put on a section of an Act applicable to the whole of India by the other High Courts. Acting under that principle, if necessary, I would agree that Section 34 had that wider application. If the matter were at large, I confess that I am not prepared to give such wide meaning to the word "escaped." Section 34, in my opinion, should be construed along with the other sections of the Act. In the ordinary course an order made after investigation by a particular officer should not, at his sweet will and pleasure, be allowed to be varied. There must, in my view, exist something, either suppressed by the assessee, or a fact or point of law which he inadvertently or otherwise omitted to consider, before he could proceed to act under Section 34 of the Act. It is only in those cases that the Income-tax Officer, or his successor occupying the same position, has a right to revise the order. A mere change of opinion on the same facts and law is not covered by the section. I admit that the words "for any reason" used in s, 34 are very wide. However, I think the words used in the section must be given a reasonable meaning having regard to the other powers contained in the Act. In my view, if an assessing officer felt that he had committed an error bona fide, it is open to him to refer the case under Section 33 to the Commissioner, and for the Commissioner to act on such reference. I should hesitate considerably before assuming that under Section 34 the same Income-tax Officer had power to revise his order for one year, and, if the argument is carried to its logical extent, as many times as he liked within that year. The different meanings given to the word "escaped" in a dictionary are not all applicable to the word at the same time. The context must be looked at and the meaning appropriate under the circumstances only should be given to the word.

31. I agree that the second question should be answered in the negative.

Cases Referred.

1(1933) 1 I.T.R. 373

2(1936) 4 I.T.R. 209

3(1936) 39 Bom. L.R. 123

4(1940) L.R. 67 I.A. 239, s.c. 42 Bom. L.R. 997

5(1925) 2 I.T.C. 104

6(1935) 3 I.T.R. 372

7(1933) L.R. 61 I.A. 10, s.c. 36 Bom. L.R. 267

8(1936) 3 I.T.R. 171
9(1939) 8 I.T.R. 236

