**BOMBAY HIGH COURT**

Onkarmal Meghraj

Vs

Commissioner of Income-Tax

(Kotwal, C.J. V Desai, J.)

30.01.1968

**JUDGMENT**

**Kotwal, C.J.**

1. This reference arises out of group of 12 assessments, 11 out of which are in respect of the assessment for the assessment year 1944-45 and one for the assessment years 1943-44. Assessments in all these cases were made taking recourse to section 34 of the Indian Income-tax Act and the question to be considered is whether the action taken was barred by time.

2. The assessee involved in this reference are some of the partners of the firm of M/s. Narayandas Kedarnath, which was formed in the year 1930. It consisted of 16 partners, 13 out of which belonged to three Hindu undivided families and the remaining three were outsiders. Thus, Narayandas Pokarmal and his three sons, Govindram, Bhagwandas and Vasudeo, formed one Hindu undivided family; Meghraj Pokarmal and his three sons, Onkarmal, Banarasilal and Beniprasad, were the members of another Hindu undivided family and Hanumandas Sewakram and his four sons, Kedarnath, Banarasidas, Durgaprasad and Harkisondas, formed the third Hindu undivided family. The partnership deed, however, showed these 13 persons constituting the three undivided Hindu families and the three outsiders as sixteen partners of the firm. Since the commencement of the firm up to the assessment year 1939-40, the sixteen partners were all assessed as individuals in respect of their respective shares of profits of the partnership firm. For the assessment years 1939-40, the sixteen partners were all assessed as individuals in respect of their respective shares of profits of the partnership firm. For the assessment years 1930-40, 1940-41 and 1941-42 the Income-tax Officer assessed them as six units : the three outsiders partners as three units and the remaining 13 constituting the Hindu undivided families as the three Hindu undivided family units represented by their respective kartas, Narayandas Pokarmal, Meghraj Pokarmal and Hanumandas Sewakram. It appears that the assessment for these three years on the said basis was made in pursuance of a settlement arrived at between the assessees and the income-tax department. The settlement, however, was to apply only for these three years relating and it was agreed that the Income-tax Officer was to make an order and declare that the partial partition disrupting the joint families had taken place on the 30th October, 1940, which was the last year of the previous year relating to the assessment year 1941-42, and grant registration for the firm for the assessment year 1942-43 on the said basis. It appears, however, that, although for the assessment years 1942-43 and 1943-44 returns were filed by the partners as individuals, the

Income-tax Officer made the assessment on the same basis, which he had adopted for the earlier three years, i.e. he divided the total income of the firm into six parts and assessed the income of the 13 partners as constituting three Hindu undivided family units. It appears that appeals for the assessment year 1942-43 were not filed by the assessee in time before the Tribunal. For the subsequent year, however, the three Hindu undivided families, which had been assessed by the Income-tax Officer, took their appeals to the Tribunal and the said appeal were allowed on the 31st July, 1953. The Tribunal held that the Income-tax Officer was not justified in treating the shares, which certain individuals had in the firm of Narayandas Kedarnath, as the income of the supposed Hindu undivided families. It, therefore, set aside the assessments made on the Hindu undivided families and directed that all the 13 persons should be assessed separately in accordance with the shares set out in the partnership agreement dated May 19, 1930. Now, in the meanwhile, for the assessment year 1944-45, for which all the 13 persons had filed their returns as individuals, the Income-tax Officer had made the assessments on the same basis, which he had adopted in the earlier years, and made assessments on the three Hindu undivided families. On the individual returns he made orders as "no assessments". Appeals were filed against the orders made on the three Hindu undivided families represented by their respective kartas to the Appellate Assistant Commissioner. While these appeals were pending before the Appellate Assistant Commissioner, the appeals for the earlier assessment year 1943-44, which the three Hindu undivided families represented by their kartas had filed before the Tribunal, were decided by the Tribunal in their favour as stated earlier. In accordance with the view taken by the Tribunal in the said appeals, the Appellate Assistant Commissioner allowed the appeals of the Hindu undivided families and quashed the orders of assessments made on the Hindu undivided families and directed the Income-tax Officer to tax the income in the hands of the separated members of the family, who were entitled to receive the same. This order was made by the Appellate Assistant Commissioner on the 3rd of March, 1954. In consequence of these directions given by the Appellate Assistant Commissioner, the Income-tax Officer issued notices under section 34 to the 13 persons on the 8th of April, 1954. The said notices were served on them on the 9th of April, 1954. Of these 13 notices, four were issued to individuals and the remaining nine were issued in the status of Hindu undivided families requiring them to submit returns on behalf of their respective Hindu undivided families. The four persons, to whom notices were issued as individuals, were Narayandas Pokarmal, Meghraj Pokarmal, Hanumandas Sewakram, represented by his legal representative, since he had died by that time, and the fourth was Beniprasad Meghraj, one of the sons of Meghraj Pokarmal. All these persons, to whom notices were issued, objected to the action taken by the Income-tax Officer and filed their returns under protest. They contended before the Income-tax Officer that the proceedings under section 34 where illegal and bad in law and without jurisdiction, as they were startesd after expiry of the period of limitation under section 34(3) and the second proviso to the said section was not applicable, being ultra vires and of no effect at least in so far as it was sought to be applied to the assessments of persons other than the assessees in whose cases the relevant order under section 33 was passed. The Income-tax Officer, however, took the view that, under the second proviso to section 34(3), there was no time limit for taking action for assessment or reassessment on the assessee or any person in consequence of, or to give effect to, any finding or direction contained in the appellate order of the Appellate Assistant Commissioner. He accordingly held that the action taken against the assessee was legal and valid towards their share in the partnership firm in the relevant year. The assessees appealed to the Appellate Assistant Commissioner and repeated their contentions before him. He, however, agreed with the view taken by the Income-tax Officer and held that the second proviso to section 34(3) applied to the case and, consequently, there was

no time-limit to the action to be taken. He also further held that all the 13 assessees came within the ambit of the second proviso to section 34(3). Against the orders of the Appellate Assistant Commissioner only 11 out of the 13 assessees preferred appeals before the Income-tax Appellate Tribunal. The two assessee, who did not appeal to the Tribunal, were Banarasidas and Harkisondas, the sons of Hanumandas Sewakram. Along with these 11 appeals, one more appeal, which was filed by Onkarmal Meghraj against the assessment made for the assessment year 1943-44, was also heard by the Tribunal. The notice under section 34 in that case had been issued on the 15th March, 1954. It was contended before the Tribunal that the second proviso to section 34(3) would not apply to the present cases; firstly, because the time within which action could be taken under section 34 had already expired before the said proviso in its present amended form became applicable and, secondly, because it had no application to persons, who were not parties to the order in which the direction or finding referred to in the said proviso had been given and, consequently, as against eight out of the eleven assessees excepting Narayandas Pokarmal, Meghraj Pokarmal and Hanumandas Sewakram, the proviso had no application inasmuch as they could not be regarded as parties to the appeals filed by the three Hindu undivided families, which were assessed. The Tribunal, however, held that the second proviso to section 34(3), in its present amended form, which received the assent of the President on the 24th May, 1953, was applicable retrospectively from the 1st of April, 1952. The assessment being in respect of the assessment year 1944-45, 8 years from the last day of the assessment year would expire only on the 31st March, 1953. The period of limitation, therefore, under section 34, if it was 8 years, was not over before the second proviso to section 34(3) became applicable. In its opinion, all the 11 cases before it were governed by section 34(1)(a) and, consequently, the period of limitation under which action could be normally taken under the said provision was 8 years. There is, however, no discussion in the order of the Tribunal as to why it regarded that the cases of 7 of the 11 assessees to whom notices under section 34 were issued in the status of Hindu undivided families fell under section 34(1)(a). In the case of the other four, viz., Narayandas Pokarmal, Meghraj Pokarmal, Hanumandas Sewakram by his legal representatives, and Beniprasad Meghraj, in whose cases the notices under section 34 were issued as individuals, the view taken by the Tribunal was that these four persons had in their original returns omitted or failed to disclose fully and truly all the material facts necessary for their assessments and, consequently, their cases were governed by section 34(1)(a). It appears from the statement of the case that the absence of any discussion in the order of the Tribunal as to how the cases of the 7 assessees were governed by section 34(1)(a) was attributable to the matter not nothing been disputed before them. Mr. Javeri, the learned counsel, appearing for the assessee before us, who had also appeared for them before the Tribunal, has submitted that the Tribunal is not justified in making such statement in the statement of case drawn by it. He points out that his case had always been that all the 11 cases were governed by the four years' period of limitation mentioned in section 34(1)(b) and none of the cases fell within the ambit of section 34(1)(a). His further argument in the cases of the seven assessees was that the second proviso to section 34(3) was not applicable in their case for the additional reason that they were not parties to the appeals in which directions were given by the Appellate Assistant Commissioner to assess the income in the hands of the separated members of the family. In view of the conclusions arrived at by them the Tribunal dismissed all the eleven appeals relating to the assessment for the assessment year 1944-45 and also the 12th appeal relating to the assessment for the assessment year 1943-44. It may be pointed out that in that case the eight years' period had expired on the 31st March, 1952, while the second proviso to section 34(3), as amended by the Amending Act of 1953, had only retrospective effect from the 1st of April, 1952. Even the eight years' period of limitation,

therefore, in that case had expired before the second proviso to section 34(3). became application. We do not find, however, from the Tribunal's order how it regarded the cases as governed by the second proviso to section 34(3). The assessees applied to the Tribunal for a reference under section 66(1) to this court on certain questions formulated by them as arising out of the Tribunal's order and on the said application the Tribunal has drawn up a statement of the case and referred to this court two questions of law as arising out of its order. The first of these relates to all the 12 appeals and is as follows :

> "Whether, having regard to the direction given by the Appellate Assistant Commissioner in his order dated March 9, 1954, in the case of the appropriate Hindu undivided families and having regard to the second proviso to section 34(3) as amended by section 18 of the Indian Income-tax (Amendment) Act, 1953, the reassessment made by the Income-tax Officer on January 31, 1955, in the case of any one or more of the assessees is governed by any limitation period such as is mentioned in the substantive part of section 34(3) ?"

3. The second question, which relates to the assessments of Narayandas Pokarmal, Meghraj Pokarmal, Hanumandas Sewakram by his legal representatives and Beniprasad Meghraj for the assessment year 1944-45 and in the case of Onkarmal Meghraj for the assessment year 1943-44, is as follows :

> "Whether in the case of the assessee, the remedy available to the Income-tax Officer had already become time-barred under section 34 before that section was amended in 1953 with retrospective effect from April 1, 1952 ?"

4. As we have already pointed out earlier, Mr. Javeri's case was that this question was material not only in the case of the five assessees referred to by the Tribunal, but also in respect of all the 12 cases because it had been his case all throughout that in respect of all the assessments the period of limitation was the four years' period, which had expired long before the second proviso to section 34 (3) was amended in 1953 with retrospective effect from April 1, 1952. Mr. Javeri has taken out a notice of motion and has prayed that the second question may be treated as relevant to be considered in connection with all the cases and the said notice of motion is also before us with the present reference.

5. The reference came up for hearing before this court on the 25th June, 1959, when in support of the order made by the Tribunal a contention was raised on behalf of the department that in view of the provisions of the Indian Income-tax (Amendment) Act (1 of 1959), the notices issued and the action taken in the present cases are not capable of being called in question on the ground that the period prescribed in that behalf had expired. This court, having examined the material provisions of the Income-tax (Amendment) Act (1 of 1959), held that the said provisions can have application if only the notices were issued under section 34(1)(a). It was, however, found that it was not clear from the record of the case as it stood whether the notices issued were under clause (a) of sub-section (1) of section 34 or under clause (b) of the said sub-section. It was pointed out that the Tribunal had proceeded on the footing that the notices fell within the terms of section 34(1)(a). This court, however, held that the reasons given by the Tribunal for proceedings on that footing were made in a different context and could not be regarded as conclusive or binding in considering whether the case was governed by the proviso to section 4 of Act 1 of 1959. It pointed out that the question as to whether the notices were issued under clause (a) of sub-section (1) of section 34 or not had to be decided on the basis of the consideration of several

34 or not had to be decided on the basis of the consideration of several matters : such as the notices actually issued, the reasons recorded by the Income-tax Officer for issuing the notices, the Commissioner's satisfaction on the reasons recorded by the Income-tax Officer and the orders of the Income-tax Officer and the appellate authority and the manner in which the assessment proceedings were dealt with and disposed of by them. In that view of the matter, this court directed that a supplementary statement of case of called for from the Tribunal and the matter may be further considered and disposed of after the said statement was received, after reframing the questions referred to by the Tribunal in a suitable manner. The supplementary statement as called for by this court has now been forwarded by the Tribunal annexing thereto such record as was indicated by this court in its order calling for the supplementary statement. In addition to the two questions which are referred to by the Tribunal and which we have already set out above, a further question will have now to be framed in view of the further contention raised and the supplementary statement called in respect thereof. We will accordingly frame an additional question as follows and make it question No. 3 :

> "Whether section 4 of the Income-tax (Amendment) Act (I of 1959) was applicable to any one or more of these assessments ?"

6. We will proceed to dispose of the additional question, which we have framed, viz., question No. 3, first as it requires the consideration of the material which has been supplied along with the supplementary statement of the case. Before proceeding to consider the material on record, we will briefly state the submissions, which have been made by counsels on either side relating to the manner in which the material on record is required to be approached and considered.

7. Section 4 of the Act (I of 1959), so far as is material for our purpose, is as follows :

> "No notice issued under clause (a) of sub-section (1) of section 34 of the principle Act at any time before the commencement of this Act and no assessment, reassessment or settlement made or other proceedings taken in consequence of such notice shall be called in question in any court, Tribunal or other authority merely on the ground that at the time the notice was issued or at the time the assessment or reassessment was made, the time within which such notice should have been issued or the assessment or reassessment should have been made under that section as in force before its amendment by clause (a) of section 18 of the Finance Act, 1956 (18 of 1956), had expired."

8. Mr. Javeri, the learned counsel for the assessee, has submitted that having regard to the wording of the section "no notice issued under clause (a)...." the notice must be factually issued under section 34(1)(a) at the initiation of the proceedings. Unless the notice when it was issued was intended to be issued under clause (a) of sub-section (1) of section 34, the notice would not fall within the ambit of section 4 and will not be protected from a challenge that it was barred by limitation. Mr. Javeri says that where the notice on its contents is clearly one under section 34(1)(a), there will be no diffculty in holding that it was issued under section 34(1)(a), but where, as in the present case, the notice itself is silent as to whether it is issued under sub-clause (a) or sub-clause (b), the intention of the person issuing the notice at the time when it was issued will have to be gathered from the material supplied by such matters as are referred to in the order of this court when it called for the supplementary statement. In considering the said material what will have to be ascertained is whether on the consideration of the said material a conclusion can

be positively reached that the notice at its initiation was intended to be given under section 34(1)(a). Mr. Javeri has argued that the department having sought to have the normal bar of limitation removed by reason of a special provision, the burden is on the department to prove satisfactorily that the case comes within the ambit of the special provision. What will have to be seen, therefore, on the consideration of the material is whether the department has discharged the said burden and the material on which it wants to rely can satisfactorily show that the action intended to be taken was under section 34(1)(a) of the Act.

9. Mr. Joshi, the learned counsel for the revenue, on the other hand, has argued that the question as to whether the notice was issued under section 34(1)(a) or not will have to be judged on the basis of the action which was possible under the law at the material time in force, the manner in which the action has been taken and how the Income-tax Officer has conducted himself in dealing with the proceedings. Mr. Joshi says that it is well settled that a notice under section 34 is not required to state whether it is under sub-clause (a) or sub-clause (b). The notice directed by section 34 is always a notice requiring a return to be filed under section 22(2) and the wording of the notice is the same whether the action is under section 34(1)(a) or under section 34(1)(a) or under section 34(1)(b). He has in that connection invited our attention to the Supreme Court case in *Kantamani Venkata Narayana and Sons v. First Additional Income-tax Officer, Rajahmundry and the Calcutta* case in P. R. Mukherjee v. Commissioner of Income-tax Mr. Joshi's further argument is that, as observed in Presidency Talkies Ltd. v. First Additional Income-tax Officer, City Circle II, Madras, it is not necessary in the notice itself at the initial stage to indicate whether the action is to be confined to a period of eight years or four years. After all the facts are investigated it will be open to the Income-tax Officer to make up his mind, having regard to the finding reached by him whether the assessment should be restricted to eight years or four years. Mr. Joshi's argument, therefore, is that a notice under section 34(1)(a) referred to in section 4 of Act 1 of 1959 is notice on the basis of which after investigation and making up his mind on the basis of the findings arrived at by him, the Income-tax Officer applies eight years' rule and makes an assessment under section 34(1)(a). According to Mr. Joshi, therefore, the predominating disposed of the matter.

10. Now, it seems to us that the question as to whether the notice was under section 34(1)(a) or under section 34(1)(b) must depend upon a consideration of all the facts and circumstances relevant to the determination of the question such as are indicated in the judgment of this court on the earlier occasion. Where this material on record has to be considered for the purposes of finding out whether it shows that the Income-tax Officer was proceeding to take action under section 34(1)(a), it may be necessary to remember, as pointed out by the Calcutta High Court in P. R. Mukherjee v. Commissioner of Income-tax, that it is possible that the Income-tax Officer having thought of taking action under one sub-clause may find that the said sub-clause is not applicable but the action could be justified under the second sub-clause is not applicable but the action could be justified under the second sub-clause and may thus change his mind and make the assessment under the sub-clause not originally contemplated by him, because under section 4 of the Act 1 of 1959, unless the action contemplated by the Income-tax Officer at its initiation was one under section 34(1)(a), section 4 of the Act 1 of 1959 will not be applicable. What will, therefore, have to b e seen is whether on the material on record it can be said that the action contemplated in the present case and the notice issued in pursuance thereof was one under section 34(1)(a).

11. Coming now to the several items of the material on record, the notices issued under section 34 by themselves give no help in deciding whether they are issued under section 34(1)(a) or under section 34(1)(b). The notices can be conveniently divided into two groups : one of seven which were issued to Hindu undivided families and the other of four, which were issued to individuals. The notices issued in each group are all similar and it will, therefore, suffice to refer to one notice in the case of the group of the seven assessees and one notice in the cases of the other four. Thus in the case of Onkarmal Meghraj, the notice issued to him, which appears at page 18 of the supplementary record, is addressed to him as "Onkarmal Meghraj (Hindu undivided family)" and states that, since the Income-tax Officer has reason to believe that his income assessable to income-tax has escaped assessment or has been under-assessed, the assessee is required to deliver a return of his total income for the relevant year. The notice issued to the persons in the other group, for instance, Hanumandas Sewakram by his legal heirs, is at page 407 and is in the same terms as the notice to Onkarmal Meghraj excepting that whereas Onkarmal Meghraj is described as Hindu undivided family there is no such description as to whether it is under section 34(1)(a) or section 34(1)(b). Mr. Joshi, however, on behalf of the department has submitted that in the cases of the seven assessees to whom notices have been given as Hindu undivided family there is an indication that the notice contemplated is under section 34(1)(a). His argument is that these persons had never submitted any returns as Hindu undivided family. Their original returns were in the capacity of individuals. The notice calling upon them to file returns as Hindu undivided family, is, therefore, indicative that they had failed to file returns as required by law and, therefore, their cases fell under section 34(1)(a).

12. We are afraid, we cannot accept the inference sought to be drawn by Mr. Joshi as the correct inference. The notice issued by the Income-tax Officer is in pursuance of the proposal made by him to the Income-tax Commissioner and the reasons given by him in support of his proposal and the sanction given by the Commissioner to the said proposal. Now, when we turn to the proposal made by the Income-tax Officer for action under section 34, we find that these proposals in the cases of all the seven persons belonging to one group are alike and the proposals in the cases of all the four persons belonging to the other group also are alike. Taking one from the former group, namely, that in the case of Onkarmal Meghraj, which appears at page 19 of the supplementary record, in the information supplied by the Income-tax Officer to the several queries which are made in the form in which the report is to be made by him, he has stated under the column relating to status "Hindu undivided family"; in the column which enquiries whether it is a new case or one in which reassessment has to be made, "new case" and in column No. 6 requiring a statement as to whether the case falls under clause (a) or (b) of section 34(1), he has merely mentioned : "2nd proviso to section 34(3)", and the reasons given by him as required by column 7 for starting proceedings under section 34 are "consequent to the Appellate Assistant Commissioner's direction in his order dated March 9, 1954, against appeal filed for 1944-45 in the case of Meghraj Pokarmal, the assessment has to be made on the assessee for 1944-45 on his income included in the assessment for 1944-45 in the case of Hindu undivided family of Meghraj Pokarmal as directed by the Appellate Assistant Commissioner, G-Range, Bombay." Underneath the report made by the Income-tax officer, there is an endorsement made by the Commissoner of Income-tax, Bombay City I, in compliance with column No. 8, which is that he is satisfied that it is a fit case for action under section 34 of the Income-tax Act. Mr. Joshi has argued that the statements made by the Income-Officer in his report under columns (2) and (4), viz., that the status is "Hindu undivided family" and that it is a "new case" are clearly indicative that the action contemplated is under section 34(1)(a). His argument is that the statement "new case" shows that

the assessee has not been assessed previously because no return has been filed by him. This statement is perfectly justified on the facts and circumstances of the case because the assessee as Hindu undivided family has filed no earlier return and the one filed by him originally as an individual could not be regarded as a return filed on behalf of the Hindu undivided family. Mr. Javeri, on the other hand, has argued that the expression "new case" cannot necessarily have the meaning that there has been no return filed earlier and no assessment made thereon. On the facts of the present case, he says that originally a return was filed and in spite of the return filed stating therein the income earned and liable to be taxed, the said return has resulted in no assessment, the Income-tax Officer having taken the view that the income was to be assessed in the hands of the Hindu undivided family. The meaning of the expression "new case", therefore, is that there was no original assessment in the present case on the return filed by the assessee as the order there was "no assessment" and it was a "new case", in the sense that the income had to be assessed for the first time in the hands of this assessee. It is true, says Mr. Javeri, that the present proposal is to require a return to be filed as Hindu undivided family but that does not mean that there was a failure to file a return originally or the assessee had omitted to file a return of his income. There was a return filed on which no assessment was made. It may be that, according to the Income-tax Officer, the return ought to have been filed in the capacity of a Hindu undivided family and not as an individual. It may amount to a wrong return but not a case of no return.

13. In our opinion, having regard to the facts and circumstances of the case that a return was originally filed, that it had resulted in no assessment, that the said return was filed by the assessee, Onkarmal Meghraj, although in a different status from the one in which he was now called upon to file the return and having regard to the circumstances of the case that the original return had resulted in no assessment not because the assessee had failed to declare his status as Hindu undivided family, but because the Income-tax Officer had taken the view that the income belonged to the bigger Hindu undivided family and not to Onkarmal Meghraj, the mention of the status as "Hindu undivided family" of the assessee proposed to be assessed and the description of the proposed proceeding of assessment as a "new case", could not be regarded as leading to a necessary conclusion that the proposal was intended to initiate the proceedings under section 34(1)(a). That the Income-tax Officer in making the proposal had not come to the conclusion that the case would fall under section 34(1)(a) would be evident from the statement which he has made in column No. (6) as also from the reasons which he has given for starting the proceedings. Column No. (6) requires a statement whether the case falls under clause (a) or (b) of section 34(1). If he was clear in his mind that it was a case coming under section 34(1)(a) and he was taking action under that provision we should have expected a statement to that effect to the query made in column (6). We find, however, that what he has stated is that the case falls under the second proviso to section 34(3). When we go to the reasons they bear out the statements that he has made in column No. (6), because in the reasons he has stated that consequent to the Appellate Assistant Commissioner's direction in his order dated March 9, 1954, against the appeal filed for 1944-45 in the case of Meghraj Pokarmal, the assessment has to be made on the assessee for 1944-45 on his income included in the assessment for the assessment year 1944-45 in the case of the Hindu undivided family of Meghraj Pokarmal as directed by the Appellate Assistant Commissioner, G-Range, Bombay. When we go t o the order of the Appellate Assistant Commissioner made in the appeal of Meghraj Pokarmal, Hindu undivided family, we find that the direction given by him is to tax the income assessed in the hands of the direction given by him is so tax the income assessed in the hands of the Hindu undivided family in the hands of the separated members of the family, who are entitled to receive the income. It seems to us that,

according to the Income-tax Officer, this direction enabled him under section 34(3) read with the second proviso thereof to take action under section 34 and assess the income in the hands of the separated members of the family of Meghraj Pokarmal. Mr. Javeri has argued that, having regard to the reasons given by the Income-tax Officer and the statement made by him in column (6), the Income-tax Officer appears to be under the impression that, where assessment is required to be made in pursuance of a direction given by the Appellate Assistant Commissioner in an appeal before him under section 32 of the Indian Income-tax Act, there is no question of limitation and also no question of further consideration as to whether the conditions of sub-clause (a) or sub-clause (b) of section 34(1) are satisfied or not. Alternatively, he has argued that, even if we assume that the Income-tax Officer was not labouring under a misapprehension and was conscious of the fact that even if the direction of the Appellate Assistant Commissioner enabled him to take action under section 34(1) beyond the period of eight years or four years as specified in the section, the action still had to be either under sub-clause (a) or sub-clause (b) of section 34(1), the reasons given by him would indicate that he was proceeding on the basis of sub-clause (b) inasmuch as the view taken by the Appellate Assistant Commissioner that the income was wrongly assessed in the hands of the bigger Hindu undivided family and had to be assessed in the hands of the separated members of the family constituted fresh information having come into the possession of the Income-tax Officer leading him to the conclusion that income had escaped assessment.

14. In our opinion, the submissions of Mr. Javeri are not without substance and the conclusions, which he has suggested as capable of being drawn from the statements made by the Income-tax Officer in his report, cannot be said to be either unreasonable or far fetched. It would indeed appear, as we will presently show from the order of the Income-tax Officer itself, that he does not appear to be aware that in dealing with the assessment it was necessary for him to ascertain whether the case would fall under sub-clause (a) or sub-clause (b) of section 34(1). At any rate, we have no doubt that the proposal made by him to the Commissioner for sanction to start proceedings under section 34 does not supply evidence that the Income-tax Officer was contemplating action under section 34(1)(a). The sanction given by the Commissioner also recorded on the proposal does not improve the position. What he has stated therein is that is satisfied that this is fit case for action under section 34 of the Income-tax Act. In the absence of any reasons given by the Commissioner for his conclusion as to the fitness of the case under section 34, it would be a pure speculation to hold that in his opinion the fitness depended upon the case having fallen under section 34(1)(a). In our opinion, therefore, the proposal of the Income-tax Officer and the sanction accorded to it by the Commissioner do not help in establishing that the action proposed to be taken was under section 34(1)(a).

15. The next item on the record is the representation made by the assessee on the service of the notice, which appears at page 50 of the supplementary record. The material part of the said representation for the purpose of the point under consideration is contained in the first item of paragraph 2 of the representation in which the assessee has contended, firstly, that the proceedings are started after the expiry of the period of limitation under section 34(3); secondly, that the limitation is not saved by the second proviso to section 34(3) as amended by section 18 of the Indian Income-tax (Amendment) Act, 1953, as it is not applicable to the facts and circumstances of the present case and, thirdly, that the said proviso was ultra vires and of no effect at any rate so far as it was sought to be applied to the assessments of persons other than the assessee in whose case the relevant order containing the directions was made. It is one of the

submissions of Mr. Joshi that the assessee understood the action that was taken against him as one under section 34 (1)(a) and in support of the said submission he has pointed out some material on record to which we will presently refer. Even on this representation Mr. Joshi has commented that the assessee has not set up a definite challenge on the ground that the action proposed to be taken could at best be under section 34(1)(b) and is, therefore, barred by time and also not saved by the second proviso to section 34(3). It is no doubt true, says the learned counsel, that a plea of limitation and the inapplicability of the second proviso to section 34(3) are set up in the representation, but that would not be sufficient to indicate that the assessee was setting up those pleas on the basis that the proposed action could at best be taken under section 34(1)(b) and not section 34(1)(a). These contentions are quite capable of being raised even if the proceedings are under section 34(1)(a) and having regard to the other material on record it would be seen that the proceedings taken against the assessee were understood by him as under section 34(1)(a).

16. We will deal with the other items of the material, to which Mr. Joshi has referred, later on. So far as the representation is concerned, we do not think that it indicates that the assessee understood that the action taken against him was under section 34(1)(a).

17. We have go to the order of assessment made by the Income-tax Officer which appears at page 28 of the supplementary record. The Income-tax Officer in his order has set out the contentions which were urged before him on behalf of the assessee, which are : (1) that the proceedings initiated under section 34 are illegal, bad in law and without jurisdiction as they had been started after the period of limitation under section 34(3) had expired; (2) that the second proviso to the said section 34(3) as amended is not applicable and (3) that the said amendment is ultra vires and of no effect at least in so far as it was sought to be applied to the assessments of persons other than the assessee in whose case the relevant order under section 33 is passed and it is sought to be applied retrospectively. When we turn to the manner in which these contentions have been disposed of by him, what the Income-tax Officer has stated is as follows :

> "The assessee's contentions of illegality of proceedings, etc., mentioned above are entirely untenable in view of the specific provisions made in the 2nd proviso to section 34 (3) of the Act. The action under section 34 is perfectly legal. Consequent on the Appellate Assistant Commissioner, G-Range, Bombay's directions, in his order dated March 9,1954, in the appeal filed for 1944-45 in the case of Meghraj Pokarmal, Hindu undivided family, the assessment proceedings had to be started against the assessee to give effect to the Appellate Assistant Commissioner's directions. The 2nd proviso to section 34(3) clearly envisages that there is no time-limit for taking action for assessment or reassessment on the assessee or any person in consequence of or to give effect to any finding or direction contained in the order under section 31, section 33, section 33A, section 33B, section 66 or section 66A of the Act. In the present case the Appellate Assistant Commissioner had jurisdiction to pass the order and I have jurisdiction to assess the assessee. Obviously, therefore, the action started by me to give effect to the directions of the Appellate Assistant Commissioner, G-Range, Bombay is legal and in order."

18. It is clear from this order that the Income-tax Officer has neither applied his mind nor made his findings as to whether the case of the assessee fell under section 34(1)(a) or under section 34(1)(b). It appears to be his view that, when findings or directions are contained in the Appellate

Assistant Commissioner's order under section 31 and assessment or reassessment is required to be made on the assessee or any person to give effect to the findings or directions of the Appellate Assistant Commissioner, the Income-tax Officer has jurisdiction to do so under section 34 without any question of limitation. Reading the contents of the proposal and the order of assessment made by the Income-tax Officer, we think Mr. Javeri is right in his submission that, in taking action under section 34 and making the assessment, the Income-tax Officer felt that in view of the second proviso to section 34(3), the directions of the Appellate Assistant Commissioner invested him with the jurisdiction to make an assessment under section 34 without bothering in any way to find out whether the conditions of section 34(1)(a) or section 34(1)(b) are satisfied or not. Now, in the present case, the assessments under section 34 were being made for the assessment year 1944-45. The notices that were issued under section 34 were served in April, 1955, which was beyond the period of eight years from the last date of the year of assessment. If the second proviso to section 34(3) were to be availed of in order to get rid of the bar of limitation to the initiation of the action under section 34, it was necessary to consider whether the proviso was applicable to cases. If the period of four years was applicable to the cases, the same having expired on the 31st March, 1949, the proviso could not help because in the present amended form it came on the statute book on the 6th of May, 1953, and had retrospective effect only from the 1st of April, 1952. If the period of eight years was applicable, then, of course the proviso would apply, since it had come into operation from the 1st of April, 1952, and the action would not be barred by time. It was necessary and essential, therefore, for the Income-tax Officer to determine whether the case fell within the four years' rule or the eight years' rule and the mere presence of the directions of the Appellate Assistant Commissioner was not sufficient to proceed with the assessment. The Income-tax Officer, however, does not appear to have applied his mind at all. Nor does he even appear to be aware that such an investigation was necessary to be made and conclusions recorded. Mr. Joshi says that, although there is no discussion in the order of the Income-tax Officer, the very fact that he has proceeded to make the assessment would indicate that he took the cases s coming within the eight years' rule. We do not think that any such conclusion in warranted by the order of the Income-tax Officer, nor would it be safe to draw such a conclusion in the present case having regard to the material so far considered by us.

19. The next item on record is the appellate order of the Appellate Assistant Commissioner, which appears at page 34 of the supplementary record. At the commencement of the order the Appellate Assistant Commissioner has set out the contentions raised in appeal by the assessee and the first contention, which he has set out, is that the Income-tax Officer has erred in starting action under section 34(1)(a). Mr. Joshi has strongly relied on this for his submission that it clearly shows that the assessee understood the proceedings taken against him as under section 34(1)(a). We may, however, point out that the memo of appeal in which the grounds of appeal taken by the assessee would be set out has not been produced before us. Mr. Javeri says that the contention as set out by the Appellate Assistant Commissioner in his order is what he has understood to be the contention of the assessee and not the contention of the assessee himself. Mr. Javeri says that there is nothing in the record of the Income-tax Officer to show that he had started action under section 34(1)(a). There was also no finding in his order that the assessment was being made under section 34(1)(a). In the circumstances, says Mr. Javeri, there was no warrant for the Appellate Assistant Commissioner to proceed on the basis that the action taken by the Income-tax Officer was under section 34(1)(a), and that the said action under section 34(1)(a) was maintainable. Mr. Javeri says in the alternative that, even assuming that such a

contention might have been taken in the appeal memo by the legal adviser of the assessee, who understood the action taken by the Income-tax Officer as one under section 34(1)(a), that would not bind the assessee and estop him from contending that the action was not initiated under section 34(1)(a). The manner in which the contention has been disposed of by the Appellate Assistant Commissioner indicates that the agreed with the view taken by the Income-tax Officer and did not appreciate the importance of considering the contention raised before him as to whether the case fell under section 34(1)(a) or section 34(1)(b). Dealing with the assessee's contention the Appellate Assistant Commissioner states :

> "Consequent on the Appellate Assistant Commissioner's directions quoted above, the Income-tax Officer started action under section 34 against the present appellant, viz., Onkarmal Meghraj, Hindu undivided family. It may be mentioned here that under the normal provisions of section 34(3), the period of limitation to s tart action had already expired but the Income-tax Officer relied on the second proviso to the said sub-section which prescribes no time-limit."

20. This is what he has stated with regard to the competency of the action under section 34. He has thereafter proceeded to consider the application of the proviso, which takes away the time-limit to the cases of persons other than the parties to the proceedings, in which the finding or direction was given, and holds that they cannot be treated as strangers to the proceedings. It seems to us from the Appellate Assistant Commissioner's order that the manner in which he has disposed of the assessee's contention is that, in view of the directions given by the Appellate Assistant Commissioner, the question of limitation does not arise and the assessee not being a stranger to the proceedings, the proviso is applicable to him. We do not think that the order of the Appellate Assistant Commissioner helps the department in showing that the action initiated under section 34 by the Income-tax Officer was under sub-clause (a) of sub-section (1) of section 34.

21. The last item on the record is the order of the Tribunal. It may be pointed out that the contention that the bar of limitation was saved under section 4 of Act 1 of 1959 was not raised before the tribunal and, consequently, the Tribunal has not considered whether the notices initiating the proceedings under section 34 were issued as contemplated under section 34(1)(a) of the Act. It is no doubt true that, in considering the application of the second proviso to section 34(3), the Tribunal had to consider whether the cases were governed by the eight years ' rule or the four years' rule and its conclusion appears to be that all cases are governed by the eight years ' rules. But that conclusion, as was pointed out by Justice Shah in the order made by him calling for the supplementary statement, was in a different context, viz., whether the action under section 34 could be justified under clause (a) of sub-section (1) or clause (b) of the said sub-section, and therefore, would not be helpful in deciding the question under section 4 of the Act (Act 1) of 1959, which required initiation of the proceedings under section 34(1)(a).

22. Having given our careful consideration to the entire material on record, were have come to the conclusion that it could not be said in the present case that the notices issued by the Income-tax Officer for assessment under section 34 were under section 34(1)(a) of the Act. We agree with Mr. Javeri that if the department wanted to avail of the provisions of section 4 of Act 1 of 1959 in order to avoid the bar of limitation, the burden was on the department to establish that the case fell within the ambit of the said provision. On the material on record it cannot that the

said burden has been discharged by the department. Consequently, we must come to the conclusion that the provision of section 4 of Act 1 of 1959 is not applicable to any one of the eleven cases relating to their assessment for the assessment year 1944-45.

23. There is one more case to be considered so far as this point is concerned and that is, the case of Onkarmal Meghraj for the assessment year 1943-44. The proposal for assessment in that case was made by the Income-tax Officer on the 21st January, 1954, and appears at page 24 of the record. He has mentioned the status as "Hindu undivided family". He has also referred to the proposed assessment as a "new case" and in column No. (6), in answer to the query whether the case falls under clause (a) or clause (b) of section 34(1), he has stated : "section 34(1)(a) and the second proviso to section 34(3)". The reasons given for the proposed assessment are that, consequent on the Income-tax Appellate Tribunal's finding for the assessment year 1943-44 in its order dated July 31, 1953, wherein the non-existence of the 3 Hindu undivided families, viz., Hanumandas Sewakram, Meghraj Pokarmal and Narayandas Pokarmal, partners of M/s. Narayandas Kedarnath, has been maintained in general; the income of the Hindu undivided families have now to be assessed in the hands of the individual members thereof who are represented as partners of Narayandas Kedarnath in their individual capacity. The above named assessee being one of them, action under section 34 is proposed against him. In view of the reasons given, it should have been expected that the notice issued should have been in the capacity of an individual. The proposal, however, gave the status as Hindu undivided family and the notice which was actually issued on the 15th March, 1954, and appears at page 23 of the record is also issued on the Hindu undivided family. That, however, is not material for the point under consideration. The sanction accorded accorded by the Commissioner is in similar terms as in other cases, viz., that "he is satisfied that this is a fit case for action being initiated under section 34 of the Act." In view of the specific mention of section 34(1)(a) in column (6) it is possible to say that in this case, the Income-tax officer was contemplating at any rate, when he made the proposal and gave the notice, that the action prepared to be taken was under section 34(1)(a). Mr. Javeri has argued that the mere mention of section 34(1)(a) in column (6) of the proposal should considered as sufficient to warrant a conclusion that the action was proposed to be taken under section 34(1)(a). That conclusion will have to be reached consideration of the entire material on record and so far as the material on record is concerned, there is no distinction between this case and the other cases.

24. As to the other material record, so far as this case is concerned, we find that the Income-tax Officer's order does not contain anything with regard to whether the action is maintainable or not and proceeds on the basis that it is maintainable. The Appellate Assistant Commissioner's order, on the other hand, does deal with the contention that the action is not maintainable, but disposed it of on the same grounds as in the other cases, viz., that the action having been taken under the second proviso to section. 34(3), there is no question of limitation. The only indication so far as the record of this case is concerned is the mention of section 34(1)(a) specifically in the proposal. Normally the said mention in the proposal by the Income-tax Officer must be regarded as indicative of his having considered the case as coming within that category for the purpose of initiation of the proceedings at any rate. Since there is nothing on record which can show that the said entry in column (6) is either by inadvertence or through mistake, we must give it its proper effect and hold that in that case action can action can be said do have been initiated under section 34(1)(a) and, consequently, section 4 of Act 1 of 1959 will apply to it and the challenge to the said assessment merely on the ground that the time within which the notice should have been issued under section 34(1)(a) as it stood before its amendment by clause (a) of section 18 of the

Finance Act of 1959 had expired.

25. Our answer to question No. 3, therefore, will be that section 4 of Act 1 of 1959 was not applicable to all the cases excepting the one in R.A. No. 881 i.e., the case of the assessment of Onkarmal Meghraj for the assessment year 1943-44.

26. Coming now to the first question, what is required to be considered is whether any one or more of the reassessment made by the Income-tax officer were governed by the second proviso to section 34(3) having regard to the direction given by the Appellate Assistant Commissioner in his order dated March 9, 1954 in the case of the appropriate Hindu undivided families. As we have already stated, the assessee were all partners in the partnership firm of Narayandas Kedarnath, each of them having a specific share in the profits of the partnership. This firm had started in 1930 and from 1930 to 1939 the assessees had returned their respective shares of income in the partnership firm as individuals and they were also assessed as such in respect of the said income. For the assessment years 1939-40, 1940-41 and 1941-42, as a result to a settlement arrived at between the department and the assessees, the income from the firm was assessed in six units : three units being the outsider-partners of the firm and the remaining 13 as belonging to three Hindu undivided families. Under the same settlement, however, registration for 1942-43 was to be granted on the basis there was a partial partition in the three Hindu undivided families partitioning interest to the members of the family in the partnership. Thereafter, for the years 1942-43, 1943-44 and 1944-45 the assessed had made returns of their income from the partnership firm as individuals but the Income-tax officer had not made any assessment on those returns treating them as cases of "no assessment" and assessed the income in the hands of the three Hindu undivided families as in the prior three years of assessment. The three Hindu undivided families not having taken their appeals to the Tribunal in time for the first year, viz., assessment year 1942-43, those assessments stood. For the assessment year 1943-44, however, the Tribunal allowed their appeals and quashed the assessment made on the Hindu undivided families and directed that the income should be assessed in the hands of the individual members thereof who are represented as partners of Narayandas Kedarnath firm in their individual capacity. When these appeals were decided by the Tribunal, the appeals filed by the Hindu undivided families for the subsequent year 1944-45 were before the Appellate Assistant Commissioner. In view to the decision of the Tribunal the Appellate Assistant Commissioner allowed the said appeals, quashed the assessments on the Hindu undivided family and directed the Income tax officer to tax the income assessed in the hands of the separated members of the family, who were entitled to receive the amount. Assessments were started under section 34 in pursuance of the directions of the Tribunal for the assessment year 1943-44 and in pursuance of the Appellate Assistant Commissioner's directions for the assessment year 1944-45. In all these assessments, the assessments for the assessment year 1943-44 were not challenge up to the assessees. Only one of them, viz., Onkarmal Meghraj, challenged said assessment for the Tribunal and for the assessment year 1943-44 and took his challenge up to the Tribunal, and for the assessment year 1944-45 all the assessments were challenged by the respective assessees. The grounds of challenge were that the action taken was beyond time and was not saved by the second proviso to section 34(3) in all the cases, and the said proviso any rate was not available in the case of the assessees who were not parties to the appeals in which the directions were given by the Appellate Assistant Commissioner or the Tribunal. Now, the Tribunal had held that all the cases were governed by the eight years' rule and consequently, the last date on which action under that rule could have been taken under section 34 for the assessment year 1944-45 was the

31st of March, 1953. The second proviso to section 34(3) in its amended form became applicable retrospectively from the 1st of April, 1952. Since at the time when the said proviso became applicable, the eight years' period within which action could have been taken against the assessee had not expired, the limitation of the said period of eight years was done away with by reasons of the proviso and the assessments made under section 34 by the Income-tax officer were not barred by the rule of eight years prescribed in the substantive part of section 34(3). Now, the contentions of the assessees. were as we have pointed out, that the assessees' cases were not governed by the eight years' rule, but by the four years' rule and the said period had expired in 1949. The proviso therefore, which became applicable retrospectively as from the 1st of April, 1952, could not apply to the cases and could not be availed of for removing the bar of limitation contained in the second provision of section 34(3). The further contention of the assessees was that with regard to eight of the eleven assessees, they were not parties to the appeals preferred by the Hindu undivided family to the Appellate Assistant Commissioner or to the Tribunal and, consequently the second proviso to section 34(3) was not applicable to them inasmuch as the said proviso had been declared to be ultra varies in so far as it affected persons, who were not parties to the proceedings in which the findings were made and directions given. The Tribunal negatived the first contention holding that all the cases were governed by the eight years' rule and consequently, the period of eight years not being over when the second proviso to section 34(3) became applicable the said proviso applied to the case and removed the bar of limitation. As to the second contention it held that the seven persons could not be treated as strangers to the proceedings since they were all interested in the proceedings and were affected by the orders made therein and the second proviso to s section 34(3), therefore, applied to all of them. It is the correctness of the these conclusions of the Tribunal that are challenged before us so far as the first question is concerned.

27. Mr. Javeri, the learned counsel appearing for the assessees has argued that the Tribunal has erred in holding that the cases of the assessees fell under section 34(1)(a) and were, therefore governed by the eight year's rule. His argument is that the conditions necessary to be satisfied order that the cases may fall under sub-clause (a) of sub-section (1) of section 34 are that in the first place, there must be an omission or failure on his part to disclose fully and truly all material facts necessary for the assessment of that year and in the second place such omission or failure must have led to the escarpment of income or its under-assessment, etc. His argument is that in the present case none of the conditions specified in section 34(1)(a) are satisfied. In the first place, he says that there has been no omission or failure on the part of the assessees to make a return. All the assessees had made returns and in each of the returns they had disclosed the income received by them towards their share in the partnership. There was also no failure on their part to disclose fully and truly all material facts, which were necessary for the assessment of the assessment of that year. Each one of them had returned their true and proper income disclosed all facts, which were necessary for assessment of the said income. Secondly, he says that, since there was no failure or omission on their part to make a return or to disclose truly and fully all necessary facts, which were necessary for the assessment of that year, it cannot be said that there has been any escarpment of income or its under assessment by reason of such failure or omission. Thirdly, he says, the orders made on the said returns were "no assessment". It is no doubt true that, although the returns were submitted, no assessments were made on the said returns, but that was not because of any omission or failure on their part to disclose fully and truly all the material facts, but because of the erroneous view taken by the income tax officer that the income was not be to be assessed in their hands but in the hands of the Hindu undivided

family. Mr. Javeri says that under the deed of partnership firm, They had all along returned their income as individuals. It is no doubt true that for three years, as result of the settlement between the assessees and the department, the income received by the individual partners was to be treated as the income of the three Hindu undivided families for the said three years. The settlement was to operate only for three years, and for the subsequent years, the family was to be treated as disrupted and the members separated from each other. The Income-tax Officer had accordingly made on order under section 25A and granted registration for the assessment year 1942-43 also that basis. In view of these circumstances, the returns filed by the assessee as individuals for the subsequent years were perfectly correct and proper and the Income-tax Officer was entirely wrong in taking the view that the income still belonged to the Hindu undivided family and in assessing it as such. According to him, therefore, none of the conditions of section 34(1)(a) are satisfied in the present case and the reassessment, therefore, cannot be treated as justified under section 34(1)(a).

28. Mr. Joshi, learned counsel for the revenue, on the other hand, has argued that the cases have been properly held by the Tribunal as failing under section 34(1)(a). He says that in the cases of seven of the eleven assessees who have been assessed under section 34 as smaller Hindu undivided families there has been failure or omission the part of these assessees to make a return. The returns, which were made by the seven assessees in their individual capacity, who are now assessed in then status of Hindu undivided family cannot be treated as returns made by the Hindu undivided families. In the case of these seven Hindu undivided families, therefore, the case is governed by section 34(1)(a) because it is a case of omission or failure to file return. As to the other four, he says that it is no doubt true that their original returns were as individuals and the present returns, which they were required to file, were also in the status of individuals. Still however, the present status as individuals, which is as a separated member of a Hindu undivided family is not the same as the former status of an individual, in which status the original returns were made, viz., as individual partners of a partnership firm and, therefore, even in the case of these four persons, there is a case of a failure on their part to make a full and true disclosure of all the material facts. Mr. Joshi's argument, therefore, is that all the eleven cases are governed by section 34(1)(a) : seven of them on the ground that they had failed to make a return originally and the remaining four on the ground that they had failed to disclose fully and truly all the material facts necessary for their assessment.

29. In our opinion neither the first group nor the second group can be regarded as failing under section 34(1)(a). Taking the case of the group of seven persons first, we cannot say that there was a failure on their part to make return. It is true that in the present assessment the status of these seven assessees is shown as the kartas representing their Hindu undivided families while the former returns, which these seven persons had made, wherein the status of individuals, but when all the necessary and material facts were either disclosed or known to the Income-tax Officer, the mere failure to mention the proper capacity would not make the return an invalid return or a return, which is non est. It may be pointed out that, on the facts and the circumstances of the case, it cannot be said definitely that the assessments in the case of these even persons must be as Hindu undivided families, because there is no clear evidence on record to show that there are actually these Hindu undivided families in existence or the persons are the kartas of the Hindu undivided families. Mr. Joshi says that the fact that the notices have been issued as Hindu undivided families and returns have been submitted in response to the said notices without raising the objection that the notices issued as Hindu undivided families are improper would

show that that is the correct status in which these assessees must be assessed. We may, however, point out that the assessees may not have found it worthwhile to raise an objection as to the status because it made no difference to the assessment. Similarly, even in the case of the first return submitted by the assessee, the Income-tax Officer, who must be taken to be aware of the settlement reached in the assessment of the three earlier years, viz., 1939-40 and 1941-42 and 1941-42 could have, instead of insisting on treating the income as belonging to three Hindu undivided families, proceeded on the returns filed by these seven person s as representing the smaller Hindu undivided families into which the larger Hindu undivided family was disrupted and made assessments on the said basis. There were, in our opinion, returns made by these seven assessee originally in which the facts material and necessary for their assessment were disclosed and which could have led to a proper assessment being made on them. It could, therefore, be treated as a case of no return. It is also clear that the order of "no assessment" made on these returns was not because of a wrong or improper return having been submitted by these assessees, but because of an erroneous view taken by the Income-tax Officer that the income had to be assessed in the hands of the Hindu undivided family.

30. As to the group of the other four assessees, it is difficult to see how their case could fall under section 34(1)(a) as held by the Tribunal. These four persons had submitted their returns as individuals and in the said returns had disclosed fully and truly the income received by them, which was liable to assessment. The Income-tax Officer had, however, made the assessment on the three Hindu undivided families represented by three of the four persons and assessed the income as the income of the Hindu undivided families. This result was not because of a failure or omission on the part of these persons to make a return of their respective incomes, but because the income was assessed in the hands of the Hindu undivided families. Assuming that the income not having been taxed in the hands of these persons as individuals, there could be said to be an escapement of assessment of income, it is clear that the said escapement was not due to any failure or omission on the part of the assessee but because of the erroneous view taken by the Income-tax Officer. The Tribunal has taken the view that they had not disclosed fully and truly in the said returns that their capacity as individuals was as the sole surviving coparceners. According to the Tribunal, their individuals status was a result of the disruption of the bigger Hindu undivided families into a number of smaller Hindu undivided families with each of the separated member being either the karta of the smaller Hindu undivided family. In the case of these four persons, their status as an individuals was as sole surviving coparcener and the income which they were returning still retained the character of joint family income in the hands of the sole surviving coparcener and this information was necessary to be disclosed in the former returns filed by them. Since that had not been done, their cases also fell under section 34(1)(a). According to the Tribunal, although the original as well as the assessment under section 34 were both made as individuals, they were made in two different sets of circumstances, which were diametrically opposed to each other; whereas the first return, as an individual, was as an individual partner of the partnership, the second was on the basis of a separated member of a Hindu undivided family; and an individual in the capacity of a sole surviving coparcener. It was because of this that the Tribunal held that there was a failure or omission on the part of these four persons to disclose fully and truly all material facts necessary for their assessment and the cases fell under section 34(1)(a).

31. In the first place, we do not agree that there is any justification for holding that the returns were made on the basis of diametrically opposite sets of circumstances. If the status in which the return is to be made is as an individual, no further information is required to be furnished under

the law of income-tax as to in what capacity the status as an individual is possessed or on what set of circumstances the status as an individual is claimed by the assessee. Secondly, even assuming that the assessee was an individual in the sense of being the sole surviving coparcener of a joint family, and the character of the property, from which he derived his income, was that of joint family property, the income derived from the said property was the income of the sole surviving coparcener and wholly belonged to him. If the return was to be made as an individual, who was making the return and had to be made as an individual, it was the income of the individual, who was making the return and had to be assessed on that basis. It really made no difference to the assessment of the income : whether the income, which belonged to the assessee, and which was returned by him, was derived by him from the property, which was his self-acquired property or from the property which he held as the sole surviving coparcener of the joint family. In the first place, since the return was rightly made in the status of an individual, there was no failure to make the return and since the explanation as to the capacity as an individual was not required to be disclosed, nor was it necessary for the purpose of assessment, it was not an omission or failure to disclose fully and truly all the material facts necessary for his assessment. Mr. Javeri, in this connection, has invited our attention to a decision of the Gujarat High Court in Bhanji Lavji v. Commissioner of Income-tax. In that case the assessee carried on sale of goods outside British India. Sale proceeds, however, were received in British India and were credited mainly in a bank account maintained by the assessee in British India and to a small extent with a company in British India. In the original assessment the assessee had disclosed that the sale proceeds were received in British India and had also disclosed the main bank account in which they were received. He had, however, not mentioned the account with the company in which a small portion of the sale proceeds were collected. The Income-tax Officer took the view that the receipt of the sale proceeds in British India did not attract chargeability and, therefore, did not go further into the question of the quantum of the sale proceeds. On a subsequent reopening of the assessment under section 34(1)(a), the question arose as to whether the conditions specified under that provision were satisfied in the present case. It was contended on behalf of the department that, inasmuch as the minor account with the company was not disclosed in the earlier proceedings, there was a failure on the part of the assessee to disclose fully and truly all necessary f acts for its assessment. The said contention was negatived and the court held that the fact that there were sale proceeds received in British India in the account of the company had no bearing on the assessment in the view taken by the Income-tax Officer and it was not a primary fact material or necessary for the assessment or relevant to the decision of the question before the Income-tax Officer. It was not a material fact within the meaning of that expression and the non-disclosure of that fact did not attract the applicability of section 34(1)(a). It was further held :

> "Quite apart from the question whether this was a material fact or not, no part of the income of the assessee had escaped assessment in consequence of non-disclosure of this fact because, though this income undoubtedly escaped assessment, the escapement was not by reason of non-disclosure of the sale proceeds received in the account with the company but by reason of the erroneous view taken by the Income-tax Officer that sale proceeds received in British India did not attract chargeability."
>
> 32. In the present case before us the non-disclosure in the first returns made by each of these four persons that the individual status held by them was on the basis of their being separated members of the Hindu undivided family was, in the first place, not material or necessary for their assessments. The income was as such assessable in their hands as

individuals whether it was derived from the property which they held as the sole surviving coparceners in the joint family or as individual partners in the partnership firm. It made no difference to the assessment whether the said explanation was given or not given. Secondly, the result of "no assessment" on the said returns was not due to the non-disclosure of this information, but because of the erroneous view taken by the Income-tax Officer that the income belonged to the bigger Hindu undivided family. Whether the explanation, which the Tribunal thought, ought to have been given by the assessees, was given by them or not, it would have made no difference having regard to the view taken by the Income-tax Officer, which was that the bigger Hindu undivided family had not been Gujarat High Court case cited by Mr. Javeri would, therefore, be applicable to the cases of these four persons as well.

33. In our opinion, therefore, the view taken by the Tribunal that the cases of these four persons would come within the ambit of section 34(1)(a) on the ground of their failure to disclose fully and truly all necessary and material facts necessary for their assessment is erroneous and cannot be upheld. In none of the eleven cases, therefore, the assessments made under section 34 by the Income-tax Officer could be taken as covered by section 34(1)(a) and, consequently, the rule of eight years' limitation will not apply to any one of them. If the rule of eight years' limitation is not applicable to these eleven cases, the second proviso to section 34(3) cannot be applied to them, because that proviso became applicable only from the 1st day of April, 1952, and the assessments under section 34 being in respect of the assessment year 1944-45, the action to be taken under section 34, unless it was under section 34(1)(a), would be barred much before the 1st of April, 1952.

34. As to the remaining case, which is of the assessment under section 34 in the case of Onkarmal Meghraj for the assessment year 1943-44, in the first place, that case again, on merits, cannot be treated as one falling under section 34(1) (a) and, moreover, the eight years' period for the reopening of the said case expired on 31st March, 1952, and, consequently, the second proviso to section 34(3) which became applicable from the 1st of April, 1952, cannot have any application to that case as well. It is true that, so far as that case is concerned, we have taken the view that the bar of limitation for taking action under section 34(1)(a) is removed in that case by reason of section 4 of Act 1 of 1959, but, so far as the application of the second proviso to section 34(3) is concerned, the said proviso can have no application to it. Moreover, as observed by Mr. Justice Shah in the remaining judgment, the application of section 4 of Act 1 of 1959 to the case merely protects the notices against the plea of the bar limitation and no other bar is to be abrogated thereby. So far as our answer to the first question relating to the case of this assessee is concerned, it will be the same as in the other cases.

35. The next contention that has been urged in connection with this question, is that at any rate, so far as the eight of the present eleven assessees relating to the assessment year 1944-45 are concerned, the second proviso to section 34(3) will not apply to them as they were not parties to the proceedings in which the direction or order was given and the same is the contention put forth on behalf of the assessee, Onkarmal Meghraj, regarding his assessment for the assessment year 1943-44. The argument of Mr. Javeri is that, so far as the 1944-45 assessments are concerned, these are in pursuance of and to give effect to the directions given by the Appellate Assistant Commissioner in the three appeals preferred by the three Hindu undivided families in whose hands the income was assessed by the Income-tax Officer. It may be mentioned that these three

Hindu undivided families were Narayandas Pokarmal, Meghraj Pokarmal and Hanumandas Sewakram. Mr. Javeri says that, although Narayandas Pokarmal, Meghraj Pokarmal and Hanumandas Sewakram were assessed as Hindu undivided families, all three of them had made undivided returns, and the Hindu undivided families which were taken to be existing by the Income-tax Officer for the purpose of these assessments were non-existing Hindu undivided families. It is on that for the earlier assessment year 1943-44 the Tribunal had quashed the assessments made on the Hindu undivided families and it was on the same basis that the Appellate Assistant Commissioner in appeal had quashed the assessments on these Hindu undivided families for the year 1944-45. Because the non-existing Hindu undivided families were held to be in existence and assessed as such, the persons who were held as the kartas of the said Hindu undivided families, had to file appeals as Hindu undivided families to the Appellate Assistant Commissioner and thereafter to the Tribunal for the first year and to the Appellate Assistant Commissioner for the second year. These appeals, however, though made on behalf of the supposed Hindu undivided families could not have the effect of representing any one else excepting the three persons, who had made the appeals. It is well settled that, after partition, the karta of the erstwhile Hindu joint family cannot represent the separated members. Both because the families were non-existing and the erstwhile kartas of the families were not representing the other members, the appeals filed by the Hindu undivided families could not represent the other persons and, consequently, none others excepting the three persons could be said to be parties to the said proceedings. Mr. Javeri says that, if the eight out of the eleven assesses excepting Narayandas Pokarmal, Meghraj Pokarmal and Hanumandas Sewakram could not be regarded as parties to the proceedings in which the orders were made or the directions were given, the second proviso to section 34(3) could not apply to them. It has been held in a number of cases that the second proviso to section 34(3), in so far as it affects persons other than parties to the proceedings in which the order is made or the finding given is ultra vires. Mr. Javeri argues that this court has taken the view that the second proviso to section 34(3) has been declared to be wholly ultra vires by the Supreme Court and on that view it would not be applicable in all cases. He has, however, been content to proceed on the basis that the second proviso to section 34(3) is ultra vires in so far as it affects persons other than parties to the proceedings. In view of the position adopted by Mr. Javeri that he would argue on the footing that the proviso is ultra vires so far as it affects persons other than parties to the proceeding, it is not necessary to consider the correctness or otherwise of the view taken by this court in M. Bhawanji Thakar v. S. P. Pande that the proviso has been wholly declared ultra vires by the Supreme Court by its decision in S. C. Prashar v. Vasantsen Dwarkadas. We may, however, point out the advantage of the supreme Court decision in the case of Commissioner of Income-tax v. Sardar Lakhmir Singh and the view expressed by Sarkar J. in the said decision. In Vasatsen Dwarkadas's case Sarkar J., when he expressed his view that he though that the second proviso to section 34(3) of the Income-tax Act is invalid, had preceded it by saying that he was taking that view for the reasons mentioned in the judgment in the case of Commissioner of Income-tax v. Sardar Lakhmir Singh. In the absence of that decision being before the court, it took the view that Sarkar J.'s opinion was that the second proviso to section 34(3) was wholly invalid and it is on that basis that it was held that the case of Vasantsen Dwarkadas had declared that the second proviso was wholly ultra vires. Subsequent decision of the Supreme Court in Income-tax Officer, A-Ward, Sitapur v. Murlidhar Bhagwan Das however, makes it clear that the law declared by the case of Vasantsen Dwarkadas is that the second proviso was ultra vires in so far as it affected persons other than those who were parties to the proceedings in which the order or finding was made. It appears to us, therefore, that the view expressed in Mahendra Bhawanji Thakar v. S. P. Pande may be incorrect and may not be capable

of being allowed to prevail in view of the subsequent decision of the Supreme Court in Income-tax Officer, Sitapur v. Murlidhar Bhagwan Das which makes it clear that the extent of the ultra vires nature of the second proviso to section 34(3) is only so far as it affects persons other than parties to the proceedings. Now, so far as the eight persons concerned, the Tribunal has taken the view that they cannot be treated as strangers to the proceedings inasmuch as they were interested in the appeals filed on behalf of the respective families. Mr. Javeri argues that this view taken by the Tribunal treating them as not being persons other than parties to the proceedings is not capable of being sustained in view of the several decisions of the Supreme Court and the High Courts.

36. In Commissioner of Income-tax v. Sardar Lakhmir Singh for the assessment year 1946-47, the assessee and his father, who were originally members of a Hindu undivided family, filed separate returns of income in their individual capacities. The Income-tax Officer, however, amalgamated their incomes and assessed the total income as the income of the Hindu undivided family. He did not make any protective assessment with regard to the separate income shown in the return of the assessee. The Appellate Assistant Commissioner set aside the assessment of the Hindu undivided family in view of the appellate order of the Tribunal in an earlier appeal against a similar assessment for the assessment year 1945-46. On 27th November, 1953, the Income-tax Officer made an assessment on the assessee in his individual capacity on the basis of the original return filed by him. The High Court on a reference held that the assessment was invalid on the ground that the period of limitation for the assessment of the income in question relevant for the assessment year 1946-47 under section 34, before it was amended in 1953, had expired on March 31, 1951, and the second proviso to section 34(3), as amended in 1953, did not have the effect of reviving the right of the Income-tax Officer to make an assessment for the year 1946-47 as it was given retrospective effect only from 1st April, 1952. The Supreme Court held that the second proviso to section 34(3), as amended in 1953, could not be availed of also for the reason that it was ultra vires in so far as it affected persons other than the assessees and the assessee in the case was not an assessee in the appeal of the Hindu undivided family, in which the assessment was quashed. Sarkar J. in his judgment pointed out :

> "The respondent, Lakhmir Singh, was not the assessee in the section 31 proceedings in consequence of which the assessment order against him was made. The assessee was his father as the karta of a non-existent family. The proviso is invalid against the respondent, Lakhmir Singh."

37. This case, in our opinion, is in point. Here also, as in that case, separated members of the family had filed returns as individuals but the income was assessed in the hands of the Hindu undivided families, which were really non-existent. Appeals were taken on behalf of the non-existent Hindu undivided families by the persons, who were supposed to be kartas according to the order made by the Income-tax Officer, and in those appeals the assessments had been quashed and directions given to assess the income in proper hands. Now, the persons, whose hands the income was sought to be assessed on the basis of the decision in Lakhmir Singh's case were not parties to the appeals filed by the supposed Hindu undivided families. Because the Hindu undivided families having been non-existent, these persons could not be said to have been represented by the supposed kartas of the non-existent Hindu undivided families. Similar view has also been taken in a Madras case in M. K. K. R. M. Chettiar v. Commissioner of Income-tax. In that case K and his son, M, who constituted a joint Hindu family, came to a partition on the

7th February, 1951, and the fact of partition was intimated by K and M to the Income-tax Officer in a proceeding relating to the assessment year 1949-50. Subsequently K as an individual and M as a karta of M's own family submitted voluntary returns of their respective incomes for the three assessment years 1950-51, 1951-52 and 1952-53. The Income-tax Officer refused to accept the partition. He treated K's returns for the three years as one made on behalf of the Hindu undivided family of K and M and the total income of K and M was assessed in the hands of K as the karta of the joint family. With regard to the returns filed by M on the behalf of the family consisting of himself and his minor sons, the Income-tax Officer, relying on his finding in K's assessment about the non-division of the main family, closed the file with an endoresement of "no assessment". Neither in the case of K nor in the case of M did the Officer make any protective assessment, but in M's case he merely recorded that if his order rejecting the plea of the partition were to be set aside on appeal, proceedings could be initiated under section 34 of the Act. In the appeals filed by K, the partition was accepted and, by an order dated 18th December, 1954, the assessments on K as the karta of an undivided family were cancelled. On 2nd March, 1957, notices under section 34(1) were issued for all the three years on K and M for bringing to tax their respective incomes as divided members. It was held by the Madras High Court that, as K was found to have been divided from his son, M, at the time when the submitted the returns, he did not purport to, and, in fact, would have no right to, represent his son, M, and the findings arrived at in the appeal preferred by K could not bind M and on the principle laid down in Income-tax Officer v. Murlidhar Bhagwan Das. M's case was not covered by the proviso.

38. In view of these decisions, the eight persons excepting the three others, who were considered to be the kartas of the three bigger Hindu undivided families, were not parties to the proceedings in the appeals before the Tribunal and the Appellate Assistant Commissioner filed by the three Hindu undivided families and, consequently, the second proviso to section 34(3) did not apply to them. So far as the three persons are concerned, they were undoubtedly parties to the proceedings in which the findings or orders were given because, although the appeals were filed on behalf of the non-existent Hindu undivided families, which were taxed, these three persons were the persons who were held as the kartas of the three Hindu undivided families and had been assessed in that capacity and it is they who had taken the further appeals on behalf of the supposed Hindu undivided families. In their cases, therefore, the second proviso to section 34(3) would not be inapplicable on the ground that they were not parties to the proceedings but in order that the said proviso should save the bar of limitation in the case of three persons, their cases must fall to be governed by the rule of eight years because the assessments were for the assessment year 1944-45 and the proviso had become applicable only from 1st of April, 1952. We have, however, found that in the case of these three persons there was neither a failure on their part to make returns, nor a failure or omission on their part to disclose fully and truly all material and relevant facts necessary for their assessment so as to lead to an escapement of assessment of their income. The reopening of their cases could only be on the basis of section 34(1)(b) on the ground that the view taken by the Tribunal and the Appellate Assistant Commissioner in quashing the assessments made on the Hindu undivided families and holding that the income was liable to be taxed in the hands of the individuals as separated members of the Hindu undivided family constituted information coming into the possession of the Income-tax Officer and leading him to the conclusion that income has escaped assessment. But that would make the four years' rule applicable and the four years' period would expire on the 31st March, 1949. It has been held that the proviso cannot have application to cases where the period of limitation provided under the substantive part of section 34(3) had already expired before the proviso in its amended form

became applicable. In that view of the matter, therefore, the second proviso to section 34(3) would not be applicable to these three cases also. This would dispose of not only the question No. 1 but also the question No. 2 as framed by the Tribunal, which is whether in the case of these assessees, the remedy available to the Income-tax Officer had already become time-barred under section 34 before that section was amended in 1953 with retrospective effect from April 1, 1952. We may point out that this question was framed also in connection with the twelfth case, which is of Onkarmal Meghraj relating to the assessment year 1943-44. We have already pointed out that in that case, irrespective of whether the eight years' or four years' rule applies, since the last date, even taking the longer period to be applicable, expired on 31st March, 1952, the proviso which became applicable from 1st day of April, 1952, would have no application. As we have stated earlier, the Tribunal has observed in its statement that the second question framed by it arises only in five cases, namely, in four cases of assessments for the assessment year 1944-45 in which the notices were issued to the assessees as to individuals and in the case of Onkarmal Meghraj for the assessment for the assessment year 1943-44. Mr. Javeri had contended before the Tribunal during the hearing of the application under section 61(1) that the question arose in the case of all the assessees and should not, therefore, be restricted to the four cases for assessment year 1944-45 in which notices were issued as to individuals, but the Tribunal had negatived the said contention on the ground that the Tribunal's order indicated that the question was argued before them only in the case of the four assessees while in the case of the other the argument was based on the ground that they were given and, consequently, the second proviso to section 34(3) would not apply to their cases on that ground only. We are not satisfied by the reason given by the Tribunal for restricting the second question only to some of the assessees and not to all. In the first place, we do not find from the Tribunal's order that there was any concession made on behalf of the assessee that in the cases of other assessees the remedy available to the Income-tax Officer had not already become barred under section 34 before the section was amended. Nor was there any finding given by the Tribunal or the lower authorities that the cases of these assessees came within the rule of eight years and, consequently, the remedy was not barred when the amended section became applicable. On merits we find that the question as to whether the eight years' rule or the four years' rule applied to those cases was necessary to be determined in the cases of these assessees as well. The only reason given by the Tribunal as to why it regarded that the question was material to be considered only in connection with the four cases was because Mr. Javeri had divided the cases into two groups in the course of his arguments before the Tribunal. That division, according to Mr. Javeri, was for the purpose of the additional point which was available to him in their cases. Having regard to the facts and circumstances of the case, we are inclined to accept the submissions of Mr. Javeri. Consequently, the notice of motion taken out by him must be allowed and the second question as framed by the Tribunal must be treated as applying to all the cases and our answer to that must be considered as applying to all of them.

39. In dealing with the first question we have considered the question as to whether the eight years' rule or the four years' rule was applicable in all cases and our conclusion has been that none of the cases falls in the eight years' rule and all of them can at best be treated as governed by the four years' rule. In that view of the matter, the remedy available to the Income-tax Officer to take action under section 34 was already barred before the section was amended in 1953 in all cases.

40. In the result, therefore, our answer to the two questions referred to us by the Tribunal will be

as follows :

So far as the first question is concerned, our answer will be that the second proviso to section 34(3) as amended by section 18 of the Indian Income-tax (Amendment) Act, 1953, is not applicable in the case of any one or more of the assessees and their assessments are governed by the period of limitation as mentioned in the substantive part of section 34(3). The question is accordingly answered in the affirmative.

41. Our answer to the second question is in the affirmative.

42. Our answer to the third question, which we have framed on the supplementary statement of the case, is in the negative so far as the cases of the eleven assessees for the assessment year 1944-45 are concerned, and is in the affirmative in the case of the assessment of Onkarmal Meghraj for the assessment year 1943-44.

43. The Commissioner will pay the costs of the assessee of the reference as well as of the notice of motion, which is made absolute.