

BOMBAY HIGH COURT

Arvind N. Mafatlal

Vs

T.A. Balakrishnan

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

30.01.1967

JUDGMENT

Kotwal, C.J.

1. We are concerned in this petition with a notice issued under section 59 of the Estate Duty Act, 1953 (Act 34 of 1953), with a view to reopening an assessment in respect of the estate of the late Navinchandra Mafatlal. The petitioner is the person against whom the notice was issued. He is the son of the deceased and admittedly the accountable party under the Act. The circumstances under which the notice came to be issued are briefly as follows :Navinchandra Mafatlal passed away on 31st of August, 1955, and in due course a return in regard to the assessment of estate duty was filed on behalf of the petitioner by a chartered accountant on 18th February, 1956. The late Navinchandra was the chairman and managing director of a private limited company known as Mafatlal Gagalbhai & Company Ltd., having its registered office in Bombay. The subscribed and paid-up capital of the company consisted of 25,250 ordinary shares of Rs. 100 each and 75,750 preference shares of Rs. 100 each, out of which Navinchandra owned 2,150 ordinary shares and 9,050 preference shares. Navinchandra had, some time prior to his death, gifted away some part of his share capital to various persons and at the time of his death he only held 975 ordinary shares and 9,050 preference shares of the company. We are primarily concerned in this petition with the valuation of the 2,150 ordinary shares.

2. On 28th March, 1956, after the return was filed, the Assistant Controller of Estate Duty asked the petitioner a number of questions which were replied to and along with the reply was also filed a valuation report dated 10th December, 1956. The replies to the questions were given on 13th February, 1959. The petitioner has also alleged that in the meanwhile a number of hearings took place at which several questions were discussed in connection with the return. On 22nd March, 1960, the then Deputy Controller of Estate Duty, Mr. Jhala, made an assessment order which is at exhibit F. In the order the Deputy Controller has stated that there were several points arising out

of the return submitted by the accountable person but all except one of those points had been disposed of by discussion with the parties and agreed figures were included in the computation given in the assessment order.

3. In order to complete the narration of facts resulting in the issuance of the notice under section 59 of the Act, it is necessary to state that after the assessment order was passed there came into force on 1st July, 1960, the Central Act, 33 of 1958, known as the Estate Duty (Amendment) Act, 1958, whereby substantial changes were made in the then existing Estate Duty Act. One of those changes was to bring into force the new section 59 of the Estate Duty Act as amended. It was after the section came into force on 23rd January, 1963, that the notice which is impugned in the present petition came to be issued by the Deputy Controller of Estate Duty.

4. Consequent upon the issue of the notice, the petitioner or his chartered accountant had an interview with the Controller of Estate Duty on 16th April, 1963 and thereafter wrote several letters some of which are filed before us explaining the petitioner's position and disputing the right of the Deputy controller of Estate Duty to issue the notice at all. There were further interviews and a number of letters were exchanged by which the petitioner demanded from the respondent Deputy Controller, the "information" in his possession on the basis of which he claimed to reopen the assessment already made under his powers under section 59 of the Estate Duty Act. It is the petitioner's case that until he filed the present petition and raised the issue before the court the so-called "information" on the basis of which the respondent claimed to act, was never disclosed to him. The petitioner insisted that the assessment order made on 22nd March, 1960 was a final order, which was no liable to be reopened under law, especially in view of the fact that all possible information had been placed before the then Deputy Controller of Estate Duty and after long discussion that order came to be passed as an agreed order. From the order of assessment dated March 22, 1960, it does appear that the order was virtually passed upon an agreement between the assessee and the department on all points except one and so far as the point on which there was any difference, it does not affect the dispute between the parties in the present petition.

5. On 16th March, 1964, the respondent wrote to the chartered accountants of the petitioner a letter in which he disclosed his own computation of the value of the ordinary shares of the company which the deceased held and informed the petitioner that the various contentions which he had put forward were being considered. Meanwhile he offered his own valuation of the ordinary shares "on the assets basis as at the date of death of the deceased" and called upon the petitioner to let him have his views regarding the same. It may be stated here that in the assessment order dated 22nd March, 1960, the computation of the value of those shares was made at Rs. 1,250 per share whereas in the computation now made by the deputy controller of

Estate Duty the value of each share was assessed at Rs. 2,800, i.e., more than twice the original value of the shares. Though the petitioner has stated that on the date of his death the deceased owned 975 ordinary shares, it is now not in dispute that the date of his death the deceased owned 975 ordinary shares, it is now not in dispute that the assessment has to be made on the basis that the deceased owned 2,150 ordinary shares, for the transfer which is by way of gift would be caught under the Act. On this basis, the total valuation comes to Rs. 33,32,500 and the additional duty payable comes to Rs. 13,33,400.

6. Now the assessment is sought to be made under the provisions of section 59 of the Estate duty Act as amended on 1st July, 1960, and it is the contention of the petitioner that the valuation made on 22nd March, 1960, was by virtue of an assessment order which had become final and was not liable to be reopened under section 59, because on the date of making the order the section was not at all in force. It came into force subsequently by the Amending Act on 1st July, 1960. The petitioner says that therefore he had acquired a right and an immunity from assessment and that the notice now issued against him should for that reason be declared bad. In answer to this contention it has been urged on behalf of the department that there was first of all no right in favour of the petitioner assessee, because under the provisions of the Estate Duty Act prior to amendment a similar provision was made in section 62 of the Act and action could have been taken under that section within 3 years from the date of the assessment, viz., 22nd March, 1960, and therefore, the notice issued on 23rd January, 1963, could well have been issued, because the petitioner had acquired no immunity from taxation. The original assessment itself was liable to be reopened under section 62. It has also been urged for the assessee that the grounds upon which the deputy Controller could have acted under section 62 of the Act prior to amendment have not at all been made out. This is not admitted on behalf of the department. The department urges that the Deputy Controller who made the original assessment overlooked or made a mistake in regard to several matters to which we shall presently advert, including an important rule, namely, rule 15 of the Estate Duty (Controlled Companies) Rules, 1953. The petitioner's case has been that neither section 62 nor rule 15 of the said Rules applied to his case. It has also been urged on behalf of the petitioner that assuming that action could be taken under section 59 for the reasons advanced by the department, the requirements of section 59 itself have not been fulfilled by the department. In particular it has been urged that section 59 requires that there should be "information" in the possession of the controller of Estate duty and that there was no such information in his possession when he issued the notice on 23rd January, 1963. On behalf of the department a number of facts and circumstances have been alleged which according to them constituted the necessary information entitling them to act under the provisions of section 59. We shall refer to these various allegations when we come to consider the individual points under each one of the provisions of law.

7. Now before we turn to discuss the points raised it is necessary to say a word about the history of the legislation.

8. The Estate Duty Act of 1953 (Act No. 34 of 1953), was amended by the Estate Duty (Amendment) Act, 1958 (Act No. 33 of 1958), which came into force from 1st July, 1960, by virtue of a notification in the Gazette of India. Inter alia, the Amending Act substituted by section 53 thereof a number of sections in the Estate Duty Act of 1953. These were section 56 to 65 and at the same time repealed several sections of the old Act. We are only concerned with the legislative change brought about so far as section 62 of the unamended Act was concerned. Section 62 as it stood prior to amendment and in so far as it is necessary for the purposes of this petition, runs as follows :

"62. Rectification of mistakes relating to valuation for estate duty. - (1) If, after the determination of the estate duty payable in respect of any estate, it appears to the Controller that, by reason of any mistake apparent from the record or of any mistake in the valuation of any property in any case other than a case in which the valuation has been the subject-matter of an appeal under this Act or of the omission of any property, the estate duty paid thereon is either in excess of or less than the actual duty payable, he may, either on his own motion or on the application of the person accountable and after obtaining the previous approval of the Board, at any time within three years from the date on which the estate duty was first determined -

(a) refund the excess duty paid, or, as the case may be, (b) determine the additional duty payable on the property :

Provided that where the person accountable had fraudulently underestimated the value of any property or omitted any property, the period shall be six years :

Provided further that no order shall be made under this sub-section unless the person accountable has been given an opportunity of being heard."

9. Now this section does not find place in the amended Act, but the subject-matter of that section is to be found spread over different sections which were introduced by the amendment and they are sections 59, 61 and 73A, which sections introduce separately a period of limitation for actions to be taken under the Act. Section 59 as introduced by the amending Act deals with the subject "Property escaping assessment" and section 61 with the subject "Rectification of mistakes". Section 59 is in the following terms :

"59. Property escaping assessment. - If the Controller, -

(a) has reason to believe that by reason of the omission or failure on the part of the person accountable to submit an account of the estate of the deceased under section 53 or section 56 or to disclose fully and truly all material facts necessary for assessment, any property chargeable to estate duty had escaped assessment by reason of under-valuation of the property included in the account or of omission to include therein any property which ought to have been included or of assessment at too low a rate or otherwise, or

(b) has, in consequence of any information in his possession, reason to believe notwithstanding that there has not been such omission or failure as is referred to in clause (a) that any property chargeable to estate duty has escaped assessment, whether by reason of under-valuation of the property included in the account or of omission to include therein any property which ought to have been included, or of assessment at too low a rate or otherwise, he may at any time, subject to the provisions of section 73A, require the person accountable to submit an account as required under section 53 and may proceed to assess or reassess such property as if the provisions of section 58 applied thereto."

10. Section 61 merely provides that at any time within five years from the date of any order passed by him, the Controller may, on his own motion, rectify any mistake apparent from the record and shall, within a like period rectify any such mistake which has been brought to the notice of the Controller, by the person accountable. The proviso says that no rectification can take place unless the person accountable has been given a reasonable opportunity of being heard in the matter. Now it will be noticed, therefore, that the change brought about by the amending Act was partly to split up section 62 and relegate its provisions to different sections. At the same time we shall presently show that completely new provisions were brought into force. Section 62 indicated three grounds upon which the Controller may proceed to exercise his power to correct mistake and the three grounds were : (1) mistake apparent from the record, or (2) any mistake in the valuation of any property in any case other than a case in which the valuation has been the subject-matter of an appeal under the Act (old Act), or (3) the omission of any property. If these grounds exist, then the controller could exercise one of two powers, viz., (a) to refund the excess duty paid, or as the case may be, (b) determine the additional duty payable on the property. The period of limitation was three years, but in the case of a fraudulent under-estimation or omission, the period was six years. Thus the old section 62 was in terms limited to the collection of additional duty payable on the property or the refund of excess duty paid. The grounds upon which this power could be exercised were the three grounds stated above. Of these three grounds, we are not concerned in the present case with the omission of the property, because it is common ground that no property has been omitted but the case made out on behalf of the department was under the first two grounds, viz., that there has been "a mistake apparent from the record" or a "mistake in the valuation of any property" within the meaning of those words in section 62.

11. Now the department has issued the notice impugned in the present proceedings under section 59. Curiously enough, though the action has been sought to be supported on the ground that there was a mistake either from the record or a mistake in the valuation of any property, no notice has been issued under section 61 and section 59 does not speak of mistake as a ground for assessment or reassessment. So far as section 59 is concerned also, it is the department's case that it is only clause (b) that would apply. They have not founded their right to issue the notice upon clause (a) of section 59. Clause (b) of section 59 prescribes the ground for action by the phrase "has, in consequence of any information in his possession, reason to believe..... that any property chargeable to estate duty has escaped assessment, whether by reason of under-valuation of the property included in the account or of omission to include therein any property which ought to have been included, or of assessment at too low a rate or otherwise..." This ground for action under section 59(b) is nowhere to be found referred to in the old section 62. To that extent the Amending Act brought about a radical departure in the powers conferred upon the Controller. Clause (b) of section 59 prescribes that if any property chargeable to estate duty has escaped assessment, the Controller "may proceed to assess or reassess such property as if the provisions of section 58 applied thereto." The provisions of section 58 also introduced by the amending Act relate to initial assessments. This if the grounds prescribed in clause (b) of section 59 exist then the Controller has power to assess or reassess as if the provisions of section 58 applied thereto, that is to say, as if the first assessments were to be made. This is a completely new power conferred upon the Controller and it is comparable to the power conferred by section 34 of the Indian Income-tax Act. But all this shows that there is a vast distinction between the remedies provided by the old section 62 and the new remedy provided by section 59(b) the power is to assess or reassess the property as if the provisions of section 58 applied, that is to say a completely new assessment has to be made. We point out this difference here because it will be of some importance when we come to consider the argument on behalf of the department that section 59 is virtually a continuation of the remedy prescribed by the old section 62 and that there was no difference made by the amending Act in the rights of the assessee.

12. Now the first contention on behalf of the petitioner was this that section 59 of the Act under which the respondent sought to make the reassessment in the present case by his notice dated 23rd January, 1963, was introduced in the Act only with effect from 1st July, 1960, that is to say after completion of the assessment upon the estate by the order of assessment dated 22nd March, 1960. Therefore, the amending Act can have no effect or operation so far as the assessment made on 22nd March, 1960, which was a final and completed assessment. It was urged that the person accountable had acquired finality and immunity from reassessment. It was also urged that section 62 prior to its amendment only permitted rectification of mistakes relating to the valuation of the property but that the section has no application to the present case. To this the reply of the department has been that the assessment made on 22nd March, 1960, was liable to be reopened

under the provisions of section 62 within three years from the date on which the estate duty was first determined and since the estate duty in the present case was determined by the assessment order dated 22nd March, 1960, the notice issued on 23rd January, 1963, was within three years from the date of the first assessment. It was also urged that section 62, as it was before it was repealed by the amending Act of 1958, was substantially the same as section 59 introduced by the amending Act, and therefore, the assessee could not say that the order of assessment was a final order or that the estate of the deceased had acquired immunity from reassessment. As a part of the same argument it was also urged that the same action could have been taken under rule 15 of the Estate Duty (Controlled Companies) Rules, 1953, and that, therefore, action could be taken in spite of the amending Act or alternatively that action could be taken under 15 read with section 62 of the old Act, and therefore, no immunity was acquired.

13. Now it is the general principle which is well-settled that retrospectivity of a statute is not to be presumed and the general principle is thus quoted at page 388 in Craies on Statute Law, "Philosophical writers have, it is true, denied that any legislature ought to have such a power, and it is indisputable that to exercise it under ordinary circumstances must work great injustice. But before giving such a construction to an Act of Parliament one would require that it should either appear very clearly in terms of the Act or arise by necessary and distinct interpretation. And perhaps no rule of construction is more firmly established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matter of procedure, unless that effect cannot be avoided doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only." At pages 390 and 391, Craies points out that there are only two exceptions which rebut the presumption against a retrospective effect and they are either "express enactment" or "necessary implication from the language employed".

14. This principle was applied to the interpretation of a taxation statute in Commissioner of Income-tax v. Khemchand Ramdas. In that case the Privy Council was concerned with the provisions of sections 34 and 35 of the Indian Income-tax Act, which provisions, as we have already said, are substantially similar to the provisions of section 59 of the Estate Duty Act. The assessee in that case had been assessed as a registered firm on 17th January, 1927. The amount of tax demanded was paid on 13th February, 1928. The Commissioner of Income-tax cancelled the order registering the assessee as a firm and directed the Income-tax Officer to take necessary action. A registered firm was not then liable to super-tax but consequent upon the cancellation of the registration, the firm became liable to super-tax. Therefore, the firm was assessed to super-tax on 4th May, 1929. It was held that the assessment made on 17th January, 1927, was final both in respect of income-tax and super-tax and that the fresh action taken by the Income-tax Officer on

4th May, 1929, was beyond time though it was taken pursuant to the directions of the Commissioner. The Privy Council held that a final assessment once made could not be reopened except in circumstances detailed in sections 34 and 35 of the Act and within the time limited by those sections. The Commissioner's powers under section 33 could only be exercised subject to the provisions of sections 34 and 35 and two sections were exhaustive and prescribed the only circumstances in which and the only time in which such fresh assessments could be made and fresh notices of demand could be issued. At that time the action under section 34 could be taken within one year of the assessment and, therefore, that time having elapsed the assessment originally made had become final. At page 424 the principle was thus stated by Lord Romer :

"It is possible that the final assessment may not be made until some years after the close of the fiscal year. Questions of difficulty may arise and cause considerable delay. Proceedings may be taken by way of appeal and cause further delay. Until all such questions are determined and all such proceedings have come to an end, there can be no final assessment. But when once a final assessment is arrived at, it cannot in their Lordships opinion be reopened except in the circumstances detailed in sections 34 and 35 of the Act (to which reference is made hereafter) and within the time limited by those sections."

15. In *Delhi Cloth and General Mills Co. Ltd. v. Income-tax Commissioner Delhi*, again a case under the Indian Income-tax Act - (section 66A was there being considered) - the principle was thus stated by Lord Blanesburgh at page 425 :

"The principle which their Lordships must apply in dealing with this matter had been authoritatively enunciated by the Board in the *Colonial Sugar Refining Co. v. Irving*, where it is in effect laid down that, while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. Their Lordships can have no doubt that provisions which, if applied retrospectively, would deprive of their existing finality orders, which, when the statute came into force, were final, are provisions which touch existing rights."

16. In *Regina v. General Commissioners of Income-tax for Wallington*, the Queen's Bench Division was concerned with the applicability to section 58 (2) of the English Income Tax Act, which permitted reopening of assessment and making of additional assessment to income-tax on the ground that fraud or wilful default had been committed. In that case also the General Commissioners had decided the case of the taxpayer and determined the assessment up to 1954-55, leaving two further years, namely, 1955-56 and 1956-57. The matter came before the

Commissioners at the end of 1961, when they were asked not merely to determine the two outstanding assessments, but also to certify whether under section 58 (5) of the Finance Act 1960, that the tax charged by the assessments for the years 1943-44 to 1953-54, should carry interest or not. The High Court held at page 228 (see judgment of MacKenna J.) : "upon the general principle which denies retrospective effect to legislation, section 58 can apply only to assessment made after the commencement of the Finance Act, 1960, unless the statute clearly provides to the contrary. Section 58 does not do so. Section 44 provides that the provisions of Part III, in which section 58 is found, shall have effect in relation to any year of assessment, whether ending before or after the commencement of the Act. That means that an assessment made in respect of assessment years ending before the commencement of the Act will not be, for that reason, outside section 58. It does not mean that section 58 will apply even to an assessment made before the commencement of the Act. The assessment must be made after the Act." And then the learned judge quoted with approval a passage from Maxwell on the Interpretation of Statutes, which is in the same terms as the passage which we have quoted from Craies on Statute Law.

17. In the light of these general principles we turn to examine whether in the present case the order passed on 22nd March, 1960, was a completed and final order which could not be reopened except by virtue of express enactment or necessary intendment. We may first of all dispose of a point which Mr. Joshi made on behalf of the department that the order was not final, because the assessee had preferred an appeal. In the first place the plea is not to be found stated in any part of the affidavits filed on behalf of the department, but it is also not disputed that that appeal was filed at the instance of the assessee claiming a reduction of tax and nothing further, and in regard to minor item. We do not think that in a case where the assessee claims that he is not liable to tax it can possibly be urged that the department's right to assess or reassess was kept alive. In fact, even on that occasion the department could not have claimed that the assessee was liable to a higher rate of taxation or to a higher amount of tax. Therefore, the mere fact that an appeal on behalf of the assessee was pending would not, in our opinion, affect the question whether the order passed on 22nd March, 1960, was final and completed order or not. That order was a completed and final order.

18. We have already said that the provisions of section 59 are substantially similar to the provisions of section 34 of the Indian Income-tax Act and, while cases directly under the Estate Duty Act are rare so far as this country is concerned, because it is a comparatively recent Act, questions such as the one we have before us, have arisen in regard to the provisions of section 34. The case nearest in point to the one before us came before the Supreme Court in *S. S. Gadgil v. Lal and Co.* In that case, the circumstances were somewhat peculiar. Under clause (1) of section 34, as it then stood, a notice of assessment or reassessment could not be issued against a person

after the expiry of one year from the end of the year of assessment, but the section was amended by section 18 of the Finance Act, 1956, extending that period to two years from the end of the assessment year and the amendment was given retrospective effect from the 1st of April, 1956. The Income-tax Officer had issued a notice under section 34 on 12th March, 1957, calling upon the assessee to show cause why the assessee should not be treated as an agent under section 43 in respect of certain non-residents, in regard to the assessment year 1954-44. The end of that assessment year was 31st March, 1956, but the notice was issued on the 12th March, 1957. The Act had given retrospective effect to the amendment only from the next day after the end of the year of assessment. Under these circumstances, it was contended that section 18 of the Finance Act had only a limited retrospective operation and could not affect the assessment which had been final and completed for the year 1954-55. It became completed at the end of the year of assessment, namely, on 31st March, 1956, and, therefore, the amendment coming into force on 1st April, 1956, could not apply to that assessment. The Supreme Court pointed out that the period prescribed by section 34 for assessment is not a period of limitation, but it merely imposes a fetter upon the power of the Income-tax officer to bring to tax escaped income. As to the contention that at the end of the year of assessment 1954-55, the assessee had acquired a right of immunity from reassessment, which could not be affected by a statute which came into force subsequently, the Supreme Court quoted with approval the principle stated in *Ahmedabad Manufacturing & Calico Printing Co. Ltd. v. S. G. Mehta, Income-tax Officer* : "It must be remembered that if the Income-tax Act prescribes a period during which the tax due in any particular assessment year may be assessed, then on the expiry of that period the department cannot make an assessment. Where no period is prescribed the assessment can be completed at any time but once completed it is final. Once a final assessment has been made, it can only be reopened to rectify a mistake apparent from the record (section 35) or to reassess where there has been an escapement of assessment of income for one reason or another (section 34)." As regards the provisions of section 18 of the Finance Act, 1956, the Supreme Court held at page 240 : "The legislature has given to section 18 of the Finance Act, 1956, only a limited retrospective operation, i.e. up to April 1, 1956, only. That provision must be read subject to the rule that in the absence of an express provisions or clear implication, the legislature does not intend to attribute to the amending provision a greater retrospectivity than is expressly mentioned, nor to authorize the Income-tax officer to commence proceedings which before the new Act came into force had by the expiry of the period provided become barred."

19. A similar question came up for decision before this court in *S. C. Prashar v. Vasantsen Dwarkadas*. In that case a firm of Purshottam Laxmidas was registered under the Indian Income-tax Act. Another firm of Vasantsen Dwarkadas had filed a return for the assessment year 1942-43 and applied for registration. The petitioner in that case was the only heir and legal representative of Dwarkadas Vussonji was a common partner in both the firms of Purshottam Laxmidas and

Vasantsen Dwarkadas. The income of the firm of Vasantsen Dwarkadas was added to the individual Dwarkadas Vussonji who, as we have said, was a partner in the firm of Purshottam Laxmidas also and for subsequent assessment years the firm of Vasantsen Dwarkadas was held to be merely a branch of the firm of Purshottam Laxmidas and the registration of the firm of Vasantsen Dwarkadas was refused. Appeals were filed before the Appellate Tribunal by the firm of Vasantsen Dwarkadas against the refusal of registration and by Purshottam Laxmidas in regard to excess profits tax with which it was charged. Under the order passed by the Appellate Tribunal, it was held that the individual Dwarkadas was not the sole proprietor of the firm of Vasantsen Dwarkadas but that the business of the firm of Vasantsen Dwarkadas belonged to the firm of Purshottam Laxmidas. Thus ended the initial proceedings for the assessment years 1942-43. On April 30, 1954, the Income-tax Officer served upon the firm of Purshottam Laxmidas a notice under section 34 of the Income-tax Act for the assessment year 1942-43 on the ground that the income of the individual Dwarkadas, had to be included in the income of the firm of Purshottam Laxmidas. It was contended before this court that the notice could not be issued more than eight years after the end of the assessment year 1942-43 on the ground that the income of the firm of Vasantsen Dwarkadas for that year which had been originally included in the income of the individual Dwarkadas, had to be included in the income of the firm of Purshottam Laxmidas. It was contended before this court that the notice could not be issued more than eight years after the end of the assessment year 1942-43, which ended on March 31, 1943. Therefore, the notice of April 30, 1954, was clearly beyond time even having regard to the provisions of section 34 as amended in 1953. The Amending Act came into force on 1st April, 1952. It was held both by the learned single judge (Mr. Justice S. T. Desai) and by the Division Bench in appeal that the remedy available to the Income-tax Officer had already become barred under section 34 before amendment in 1953 and that gave rise to a vested right to the assessee which could not be affected excepted by clear and express terms used by the legislature. By the amending Act of 1953, the legislature had expressed its intention not to give any retrospective operation to the section further than 1st April, 1952. The remedy and the right of the officer to reassess was, therefore, lost before 1st April, 1952, and therefore, the notice was invalid.

20. The principle was thus stated by Chief Justice Chagla at page 890 :

"Therefore, on the validity of the notice, the very short question that we have to consider is whether, if the remedy or the right to issue a notice under section 34 was already barred at the date when the amending legislation came into force, the amending legislation could revive the remedy by providing an extended period of limitation. The amending Act came into force on 1st April, 1952, and on that date the period of eight years from 31st March, 1943, had already expire. Therefore, the remedy available to the Income-tax Officer assessing the assessee in respect of escaped income had already become barred. Found a legislation by providing that

from 1st April, 1952, there would be no limitation at all in respect of that remedy revive the remedy which was already lost to the Income-tax Officer ? It seems to us that the proposition of law is settled beyond any doubt that, although limitation is a procedural law and although it is open to the legislature to extend the period of limitation, an important right accrues to a party when the remedy against him of another party is barred by the existing law of limitation and that vested right cannot be affected except by the clearest and most express terms used by the legislature. It is not suggested that a sovereign Parliament cannot take away vested rights, but the court must be loath to construe any legislation as interfering with vested rights unless the law-making authority has clearly so provided."

21. On behalf of the department, it was pointed out that the decision of the Division Bench to which we have just referred was set aside in appeal by a majority decision by the Supreme Court in *Prashar v. Vasantsen Dwarkadas*. But having gone through the several judgments of the Supreme Court it is clear that the decision of the Division Bench on the question of the retrospective operation of section 34 was not set aside by the Supreme Court. It is unnecessary here to analyse the several judgments referred to in that case, for that decision was considered in two cases of the Gujarat High Court, *Mathurdas Govinddas v. G. N. Gadgil, Income-tax Officer, and Commissioner of Income-tax v. Shantilal Punjabhai*, and the effect of that decision upon the decision of the Division bench of this court was dealt with and it has been pointed out in both those judgments that the view taken by the Division Bench of this court in *Prashar v. Vasantsen Dwarkadas*, so far as Court. In *Mathurdas Govinddas v. Gadgil, Income-tax Officer*, the effect of the Supreme Court decision was thus put at page 642 :

"It is now settled by the decision of the Calcutta High Court in *Debi Dutt Mody v. T. Belan* and the decision of the Bombay High Court in *S. C. Prashar v. Vasantsen Dwarkadas*, that if the right of the Income-tax Officer to reopen an assessment is barred under the law for the time being in force, no subsequent enlargement of the time can revive such right in the absence of express words or necessary intendment. The decision of the Bombay High Court was of course taken in appeal and was reversed by the Supreme Court, but on this point, out of five judges, two judges expressed one view, two judges expressed another view and the fifth judge did not express any opinion at all with the result that the decision of the Bombay High Court stands so far as this point is concerned."

22. In *Commissioner of Income-tax v. Shantilal Punjabji* the effect of the Supreme Court decision upon the view taken by the Division taken by the Division Bench of this court in *Prashar v. Vasantsen Dwarkadas* was considered and at page 73 it reopen an assessment which is barred under section 34 and no subsequent enlargement of time can revive such right by section 31 of the Amendment Act of 1953, as we have pointed out in *Mathurdas Govinddas v. G.*

N. Gadgil, the Bombay decision in Prashar v. Vasantsen Dwarkadas still holds good and is binding upon us as on this point. Out of the five learned judges, two took the view, two a contrary view and the fifth judge, Sarkar J., did not express any opinion at all and, therefore, as held by the Bombay High Court, section 31 did not save the right of the taxing authorities to issue the notice after the right to do so was time-barred under section 34 (1)." With respect we are in agreement with this view as to the effect of the decision of the Supreme Court in Prashar v. Vasantsen Dwarkadas, so far as the decision of this court in Prashar v. Vasantsen Dwarkadas is concerned.

23. On behalf of the department considerable stress was laid by Mr. Joshi upon a decision of a Division Bench of the Calcutta High Court in Income-tax Officer v. Calcutta Discount Co. Ltd. In that case the Calcutta High Court was also concerned with the provisions of section 34 of the Indian Income-tax Act as amended by Act 48 of 1948, but before its subsequent amendment. In that case the assessee had been assessed under section 23 (3) of the Income-tax Act for the years 1942-43, 1943-44, and 1944-45, but on 28th March, 1951, the assessee was served with notices under section 34 calling upon him to submit fresh returns of its income for the said three years on the ground that certain profits from the time of the original assessment and that the assessee had failed to disclose the true intention behind the sales of those shares. The assessee moved the High Court directly against those notices and contended, inter alia, that the Amendment Act, 48 of 1948 was expressly made retrospective only from 30th March, 1948, and it had no further retrospective operation and that, therefore, the notices issued on 28th March, 1951, more than 3 years after the close of the last year of assessment in question in that case were barred by time and that the original orders of assessment had become final and could not be reopened. The Calcutta High Court took the view that the section introduced by Act 48 of 1948 was not a new provision at all. It was merely a variation of an old provision which it replaced and, therefore, the ordinary principle of law to which we have referred above, that upon the making of a final assessment a vested right accrues to the assessee, could not be given effect to, because there was no new right created by the amending Act 48 of 1948. At page 488, Chief Justice Chakravarti posed the question : It is, however, pertinent to enquire what the vested rights in the present case are ? Mr. Meyer contended that there were no vested rights at all, because the subject-matter of section 34 was mere procedure." That point was answered against the department at page 489 as follows :

"From one point of view, a vested right claimed in such circumstances would seem to be a right not to pay the tax legally due or a right worthy of little respect and indeed not a right at all."

24. It seems to us that the latter observation of the Chief Justice in Calcutta Discount Co's. case is

directly in conflict with the decision of the Supreme court in *S. S. Gadgil v. Lal and Co.*, to which we have already referred, but the point which the learned Chief justice made, that the provisions of Act 48 of 1948 did not introduce a new provision at all, but only brought about a variation in the old provision, was thus put by him at page 489 :

"As I have already pointed out, the section introduced by Act XLVIII of 1948 is not a new provision altogether, but a variant of an old provision which it replaced. In my opinion, so far at least as initiation of proceedings is concerned, there is no substantial difference between the two from the point of view of the assessee's rights. The new section authorises, as the old section did, initiation of proceedings within eight years from the end of an assessment year or, in case of an innocent escape or under-assessment of income, within four years. So far there is no difference. The basis for the initiation of proceedings is also the same, viz., escape of income from assessment or under-assessment, whether as to the quantum of the income or as to the rate, or allowance of excessive relief. There is an apparent difference in that, under the old section, there had to be a discovery on the basis definite information, whereas under the new section it is sufficient if there is reason to believe its existence. This difference, however, is to a certain extent neutralised, because in providing when the Income-tax Officer can start proceedings within eight years, the old section says that he can do so when, according to him, the assessee has 'concealed the particulars of his income order liberately furnished inaccurate particulars thereof', while the new section says that he can do so when, according to him, the escape or under-assessment has been due to the omission or failure of the assessee 'to disclose fully and truly all material facts necessary for his assessment' - which seems to me to be practically the same - and both sections use the expression 'has reason believe'."

25. It was because the learned Chief Justice took this view of the provisions of the amending Act 48 of 1948 that he held that the Act would apply retrospectively. According to him there was no new right created by the Act, but it was only a variant of an old right which it replaced. Thus, he held that the assessee had in that case no vested right.

26. It has been pointed out in a number of cases subsequently that the *Calcutta Discount Co.'s* case must be held to have established the principle that completed or final orders cannot be reopened unless there are express statutory provisions or necessary intendment to be gathered from the provisions of the statute. This was first of all pointed out by the decision of Chief Justice in *Prashar's* case. At page 892 the case is relied on before the Division Bench and thus commented by Chief Justice Chagla :

"The period of limitation under the amended section 34 continued to be the same as it was before the amendment, and the learned Chief Justice (Chakravarti C.J.) in his judgment is

at pains to point out at two place that the demanded section would not have had retrospective effect if it had attempted to revive a remedy which had already been barred. At page 490 the learned Chief Justice says :

'... and since the time-limits for so proceeding were the same, the new section affects no rights previously unaffected'."

27. And at the bottom of that page : '... It is true that if time is enlarged by a new enactment, but at the date when the enactment comes into force, no proceeding can any longer be commenced in a particular case under the previous law, the new enactment will not apply to such a case.'

28. And lower down on page 491 : '... As to time, none has a vested right in a period of limitation and a change of the period which does not altogether take away a right of action subsisting at the date of change or revive a right, then already barred under the old law, can always be made and the period applicable thereafter will be the new period, whether enlarged or abridged'."

29. The same comment was made as regards the Calcutta Discount Co.'s case by the Supreme Court in *S. S. Gadgil v. Lal and Co.*, at page 240 as follows :

"Therefore, the view that even when the right to assess or reassess has lapsed on account of the expiry of the period of limitation prescribed under the earlier statute, the Income-tax Officer can exercise his powers to assessee or reassess under the amending statute which gives an extended period of limitation, was not accepted in Calcutta Discount Company's case."

30. Mr. Justice S. K. Das in his judgment in *Prashar v. Vasantsen Dwarkadas*, at page 14 similarly observed with reference to the Calcutta Discount company's case :

"Some reliance was placed on the decision of the Calcutta High Court in *Income-tax Officer v. Calcutta Discount Co. Ltd.*, which later came to this court on a different point. I am of the opinion that the decision is of no help to the present appellants. It was said in that decision that the plain effect of the substitution of new section 34 with effect from March 30, 1948, was that from that date the Income-tax Act was to be read as including the new section as a part thereof; the further effect of the express language of the section was that, so far as cases coming within clause (a) of sub-section (1) were concerned, all assessment years ending within eight years from March 30, 1948, and from subsequent dates, were within its purview. The learned Chief Justice of the Calcutta High Court took particular care in that decision to point out that what was not within the purview of the section was an assessment which ended before eight years from March 30, 1948. That decision, therefore, does not in any way assist the present appellants."

31. We do not think, therefore that the decision in the Calcutta Discount Company's case, takes any view contrary to the view taken in the decision to which we have referred but on the contrary it affirms the principle that, unless there is express statutory provision or necessary intendment to be found from the language of a statute, completed and final orders of assessment cannot be reopened. The Calcutta Discount Company's case was, upon the findings of the division Bench in that case, an exception to the rule, because it was held that the rights created by the amending Act of 1948 were not new rights but merely a variant of the old rights under the replaced section.

32. In the light of these principles, we can find nothing in the provisions of section 59 to suggest that it has been given any retrospective operation. Reference was made to section 73A which was also introduced into the Estate Duty Act by the same amending Act, 33 of 1958. Section 73A provides as follows :

"No proceedings for the levy of any estate duty under this Act shall commence -

(a) in the case of a first assessment, after the expiration of five years from the date of death of the deceased in respect of whose property estate duty became payable; and

(b) in the case of a reassessment, after the expiration of three years from the date of assessment of such property to estate duty under this Act."

33. Clause (a) of the section is obviously inapplicable here, because this is not a case of a first assessment. This is undoubtedly an attempt at reassessment and to that extent clause (b) would be attracted provided it has the necessary application to the present case. There is nothing in clause (b) of section 73A to suggest a retrospective operation. No doubt, clause (b) says "in the case of a reassessment, after the expiration of three years from the date of assessment of such property to estate duty under this Act," but it does not say that the date of assessment must be a date prior to the coming into force of section 73A. Therefore, even though section 59 is subject to the provisions of section 73A, we do not think that by virtue of section 73A, clause (b), section 59 would apply for any period prior to the date of the coming into force of the Act, namely, 1st July, 1960, much less where the assessment has been final and completed, in the present case. In any case section 73A, clause (b), will clearly apply to cases of reassessment made after its provisions came into force, i.e., prospectively. If then the provisions of section 73A, clause (b), can apply prospectively and there is no express provision or necessary intendment to suggest the retrospective operation we can see no reason why we should give this clause any retrospective operation at all. Though clause (b) says that in the case of a reassessment, the assessment cannot be reopened after the expiry of three years from the date of assessment, it does not say that a reassessment can take place in a case where a final order has already been passed.

34. Then we turn to the contention on behalf of the department that the order of assessment passed on 22nd March, 1960, did not become final and did not give rise to rights in favour of the assessee because of the existence of the provisions of section 62 of the old Act. It was urged that, under the provisions of section 62 of the old Act, the department could still have taken action against the assessment and, therefore, there was no completed or final order and no right vested in the assessee.

35. In this connection, we may here dispose of an ancillary point which was raised by Mr. Joshi on behalf of the department and that is that the provisions of section 62 of the old Act are in pari materia with the provisions of section 59 of the new Act, and, therefore, on the analogy of the reasoning of chief Justice Chakravarti in the Calcutta Discount Company's case, section 59 is not a new provision at all, but only a variant of the old provision which it replaced, namely, section 62. We are unable to accept this contention, We have already indicated when considering the provisions of section 62 that its ambit was strictly limited. In the first place, the grounds upon which action could be taken under that section were only, mistake apparent from the record, mistake in the valuation of any property, or omission of any property. Section 59 does not at all deal with any case of mistake. In fact, in the Estate Duty Act as amended, the question of rectification of mistake is relegated to the new section 61 and that section has not been invoked by the department at any stage. Secondly, the action that could be taken under section 62 was only two-fold. If the assessee applied, he could be refunded the excess duty, if any, paid by him or so far as the department is concerned, the only action that could be taken was to determine the additional duty payable on the property. In no case could an assessment made be reopened under the old section 62. In other words, the assessee could not be called upon to render a fresh account or to submit a fresh return which under section 59 the department is expressly authorised to do. The words in section 59 are decisive in this respect, "may.... require the person accountable to submit an account as required under section 53 and may proceed to assessee or reassess such property as if the provisions of section 58 applied thereto." Section 53 requires that every person accountable for estate duty shall, within six months of the death of the deceased, deliver to the Controller an account in the prescribed form and verified in the prescribed manner. That is the initial return which the person accountable is called upon to make and that is what the Controller is authorised to call for under section 59, if the conditions of that section are fulfilled. Therefore, it is a completely new account that could be called for. That could not be done under the old section 62. Similarly, power is given to the Controller to proceed to assess or reassess the property as if the provisions of section 58 applied thereto. Section 58 deals with the subject of "assessment" and it refers obviously to the assessment of the principal value of the estate of the deceased to determine the amount payable as estate duty. Therefore, the cumulative effect of reading the provisions of section 58 along with the provisions of section 59 is that if the conditions of section 59 is that if the conditions section 59 are fulfilled, the Controller can call

upon the person accountable to render a fresh account and assess him as if he were assessing him for the first time under section 59. None of these powers or remedies, if we may say so, are conferred upon the department under the old section 62. These, in our opinion, are the fundamental differences between the rights or remedies under the old section 62 and the new section 59. Whatever similarity there was between the rights or remedies under the old section 62 and the new section 59 was in regard to the question of mistake which, in the amended Act, has been relegated to section 61, but section 61 had not been invoked by the department. So far as section 59 is concerned, in our opinion, it is not in any sense merely a variant of the old section 62 so as to attract the provisions of section 62 as held in the Calcutta Discount Company's case. We may stress here that in coming to this conclusion we have not compared the grounds upon which action could be taken under section 59 or under section 62, because of the remark of Chief Justice Chakravarti that those difference in the grounds upon which action could be taken were immaterial.

36. Then we turn to consider whether the right to proceed was still open to the department upon the provisions of section of section 62 itself. Mr. Joshi conceded that the third ground for rectifying mistakes mentioned in the section namely, omission of any property, is not available to the department in the present case. He merely relied upon the other two grounds "mistake apparent from the record" and "mistake in the valuation of the property". As regards the former, Mr. Joshi emphasised that the words are "mistake apparent from the face of the recore." In reinforcing this distinction he relied upon the decision of the Supreme Court in Income-tax Officer v. Asok Textiles Ltd. In that case a company, which fell within the ambit of section 18A of the Finance Act, was assessed for its accounting period ending December 31, 1951, in its first assessment year 1952-53, and its net assessable income was determined at a certain figure. Later it was found that the company had declared a much larger dividend and it was liable to pay additional income-tax with respect to the excess dividends under the Finance Act, 1952, but this fact had been overlooked by the Income-tax Officer in the original assessment. The Income-tax Officer, therefore, first made an order of rectification under section 35 and imposed an additional Income-tax on the assessee, but later discovered that even that was erroneous and made a second order of rectification and thereby levied income-tax at a much higher rate under section 18A of the Act. It was urged that the mistake which was apparent from the record. The High Court of Kerala in that case had given a finding that it was not a mistake apparent on the face of the record and the Supreme Court pointed out that finding was not sufficient to take the case out of the provisions of section 35 where the words used are "mistake apparent from the record". At page 735, Mr. Justice Kapur contrasted the provisions of section 35 with the provisions of Order 47, rule 1, of the Code of Civil Procedure and remarked :

"The language of the two is different because according to section 35 of the Act which

provides for rectification of mistakes the power is given to the various income-tax authorities within four years from the date of any assessment passed by them to rectify any mistake 'apparent from the record' and in the Civil Procedure Code the words are 'an error apparent on the face of the record' and the two provisions do not mean the same thing."

37. At a later stage, the learned judge pointed out that the power of review under Order 47, rule 1, was more restricted in scope than the power under section 35, but the extent of that restriction was not indicated. It seems to us that upon the particular facts of that case it was held that the error sought to be corrected was a mistake apparent from the record, though it was not an error apparent on the face of the record. But the facts of the present case are entirely different. To that extent, therefore, we do not think that the distinction pointed out in that case would apply here.

38. We may also point out that in the same judgment, the learned judge quoted with approval the following passage from the decision of the Supreme Court in *Maharana Mills (Private) Ltd. v. Income-tax Officer, Porbandar* :

"The power under section 35 is no doubt limited to rectification of mistakes which are apparent from the record. A mistake contemplated by this section is not one which is to be discovered as a result of an argument but it is open to the Income-tax Officer to examine the record including the evidence and if he discovers any mistake he is entitled to rectify the error provided that if the result is enhancement of assessment or reducing the refund then notice has to be given to the assessee and he should be allowed a reasonable opportunity of being heard."

39. Therefore, despite the distinction which was drawn between the words "apparent from the record" and "error apparent on the face of the record, the Supreme Court itself has indicated that even under the words "apparent from the record" the mistake contemplated is not one which is to be discovered as a result of an argument, but it must be a mistake which becomes apparent from the examination of the record. We fail to see upon that view how section 62 of the unamended Act will not apply to the facts of the case. The words of section 35 of the Income-tax Act are to that extent in pari materia with the words of section 62. We may also mention here that it was urged by Mr. Palkhivala that the very provisions of the law which fell to be considered in *Asok Textiles Ltd.* case namely Schedule I, Part I, Item B, proviso (ii), of the Finance Act (23 of 1951) were declared not to levy a charge of income-tax at all and to that extent offended against section 3 of the Indian Income-tax Act. See *Commissioner of Income-tax v. Khatau Makhanji Sng. & Wvg. Co. Ltd.*, and that, therefore, the question which arose in *Asok Textiles Ltd.* case need not be gone through. However, it is unnecessary to go into that question, because even accepting the view in *Asok Textiles Ltd.*'s case, we do not think that section 62 would be attracted in the

present case.

40. In paragraph 15 of the affidavit of the Second Assistant Controller of Estate Duty dated 19th January, 1967, the grounds upon which the department claimed they were entitled to reopen the assessment have been stated. There are two grounds mentioned : (a) that either through error or inadvertence or lack of vigilance the deputy Controller of Estate Duty completely overlooked the mandatory provisions of rule 15 when he made the original assessment on 23rd March, 1960, and (b) that the assessing officer had proceeded on the basis that the company was a dealer in shares, whereas the correct position was that the company was an investment company and therefore a mistake by the assessing officer in making the original assessment was apparent from the records. Both these grounds were pressed before us as justifying the application of section 59(b) of the Act. Rule 15 was also relied upon to show that the provisions of the old section 62 could be invoked upon the ground that rule was overlooked.

41. And, so we turn to consider whether rule 15 applies to the facts of the present case. Rule 15 introduces a principle of valuation for estate duty on shares and debentures of certain companies, namely, controlled companies and the principle which it introduced was referred to by counsel as being valuation "on assets basis" as distinct from valuation on the basis of the market value of the shares. We have already indicated that in the original assessment in the present case the valuation of the shares was made on the "market value" basis and the value of each share thus arrived at was Rs. 1,250. The valuation sought to be made on the basis of section 59 after reopening of the assessment is Rs. 2,850 per share on the "assets basis". The new point made on behalf of the department is that the facts were not looked at from the point of view of rule 15 at all, and that rule 15 read with section 36 (1) was overlooked by the Deputy Controller when he made the original assessment order.

42. The point that rule 15 was overlooked was not made or made known to the petitioner until a fairly late stage of the proceedings in the present petition. In fact, the petitioner had written several letters asking for the grounds upon which the assessment was being reopened and, particularly, if as the department had alleged they had some information what that information was, but in reply to none of these letters was any information vouchsafed. They are the letters dated 9th October, 1963, 14th November, 1963, and 16th January, 1964. Even in the reply which the department made to the several queries made on behalf of the petitioner by his chartered accountants, namely, letter dated 16th March, 1964 (exhibit N), the ground upon which the department was claiming to reopen the assessment was not stated beyond mentioning "reassessment under section 59". At any rate, rule 15 was nowhere adverted to. Therefore, the petitioner cannot be blamed for not raising any issue as regards non-applicability of rule 15 in the petition. It was only when it was disclosed for the first time in the return supported by the

affidavit of Mr. Ramesh L. Butani, the 2nd Assistant Controller of Estate Duty, that the petitioner became aware that "the information" in the possession of the department was that rule 15 had not been considered. When the petitioner in his affidavit dated 21st October, 1966, denied that rule 15 was applicable, the reply on the part of the department was made in the affidavit of Mr. K. C. Gopalakrishnan, the 2nd Assistant Controller of Estate Duty. In paragraph 7 of that affidavit, it was alleged, "I say that the statement of Shri A. N. Mafatlal in subparagraph of paragraph 4 of the said rejoinder that rule 15 was considered along with all relevant questions by the assessing officer making the original assessment is contrary to the facts on record. I deny that rule 15 was considered along with all relevant questions."

43. Now it was rightly contended by counsel for the assessee that neither of these two officers who have made these affidavits, namely, Mr. Butani and Mr. Gopalakrishnan had any connection with the making of the original assessment. In fact, it is not in dispute that the two officers who were connected with the making of the original assessment were Mr. Shastri, the Assistant Controller of Estate Duty, and the then Controller, Mr. Jhala, who is now one of the members of the Appellate Tribunal. It was urged on behalf of the department that Mr. Jhala, having been promoted as a Member of the Tribunal, could not be expected to make an affidavit but, at any rate, the Assistant Controller, Mr. Shastri, was still in the service of the department and he could well have made an affidavit. As a matter of fact, in the course of the arguments some notes made by Mr. Shastri were placed before us and they show that it was really Mr. Shastri who made the original assessment. No affidavit, however, has been filed by this officer and, therefore, we think that the affidavits filed by Mr. Butani and Mr. Gopalakrishnan have very little value. So far as the petitioner is concerned, he has, in sub-paragraph of paragraph 4 of his affidavit, categorically stated, "I further state that rule 15 was considered along with all relevant questions and that relevant information and documents were furnished to show that the deceased had no 'control' within the meaning of sub-rule (3) of rule 15 and it was shown that the deceased was not in the position of a 'governing director' and that he had not the powers of the board of directors. It was contended that the resolution of the board and the article 125 of the company under which the powers of the board were delegated did not amount to 'control' within the meaning of rule 15. All the facts relating to 'control' within the meaning of the rules were disclosed in the course of assessment proceedings". Besides these pleadings there is absolutely nothing before us to show whether rule 15 was considered or not. In these circumstances, we can see no reason why we should not accept the affidavit of the petitioner that rule 15 was considered by the original assessing officer. There is no denial of this on the part of the original assessing officer, who was still available. So far as the affidavits of Butani and Gopalakrishnan are concerned, they are admitted to have been made only from the record.

44. Another circumstance that also must be taken into account is the fact that, when the original

assessment was made, several meetings took place between the petitioner and his representatives and the assessing officer. This is clear from the correspondence between the parties and from the letter dated 28th March, 1956 (exhibit E), from the Assistant Controller to the chartered accountants of the petitioner and their reply dated 13th February, 1959, and other letters. At all these meetings, which were held from time to time, points arising out of the return were discussed and it appears that the petitioner or his representatives were able to satisfy the assessing officer and the Deputy Controller of Estate Duty who finally passed the assessment order regarding those points. Therefore, most of those points were disposed of by discussion and agreed figures were included in the assessment order. This is clear from paragraph 3 of the assessment order dated 22nd March, 1960, at exhibit F. In paragraph 3, the Deputy Controller has recorded, "There were several points arising out of the return submitted by the accountable person. All except one of them have been disposed of by discussion with the parties and agreed figures are included in the computation given below."

45. One of the points which Mr. Joshi made on behalf of the department was that if rule 15 had been discussed, some mention of it would have been found in the assessment order. We think that the absence of reference to rule 15 in the assessment order cannot indicate in the present case that rule 15 was not discussed or considered at the time of the original assessment because, as we have shown, all the points of difference or dispute at the time of the assessment were in the words of the assessment order "disposed of by discussion with the parties and agreed figures" were included in the computation made. Therefore, there is nothing upon the record to suggest that rule 15 was not considered.

46. On behalf of the department, it has been stated that all that the assessing officer considered was the valuation of shares under section 37 of the Estate Duty Act. If one turns to section 37, it provides :

"Where the articles of association of a private company contain restrictive provisions as to the alienation of shares, the value of the shares, if not ascertainable by reference to the value of the total assets of the company, shall be estimated to be what they would fetch if they could be sold in the open market...."

47. Thus section 37 provides that it is the market value of the shares that would prevail "if not ascertainable by reference to the value of the total assets of the company". In other words, it is the value which is ascertainable, by reference to the value of the total assets of the company which must be made in the first instance and, then, if that valuation is not ascertainable then only the market value has to be resorted to. Though rule 15 purports to have been made under the rule-making power contained in section 20(e), we have no doubt that it makes detailed provisions for computation of the valuation of shares on the basis of the total assets of the company in terms of

the provisions of section 37. If then it is an admitted position that section 37 was considered by the officer who made the original assessment, there can be hardly any doubt that he must have applied his mind to both the alternative principles of valuation mentioned in section 37 and that can only mean that rule 15 must have been considered by him. At any rate, section 37 indicates two methods of valuation, (1) on the basis of the total assets of the company, and (2) on the basis of the market value. The first is under section 37 preferred to the second and it is only in the event that the first principle cannot apply that the second principle is made applicable. Now if the assessing officer makes the assessment on the basis of the second principle, namely, that of market value, we cannot but hold that he must have considered the first principle, namely, the valuation on "the assets basis", and rejected it as not ascertainable. This again would support the affidavit made by the petitioner that rule 15 was considered. At any rate, in view of the complete absence of any reference to rule 15 in the record of the original assessment proceedings, in the absence of any affidavit by the officer making the original assessment and the other circumstances which we have discussed, we cannot but hold in the present case that rule 15 was considered by the assessing officer when he made the original assessment.

48. In this view, it seems to us hardly necessary to consider whether, upon the facts and circumstances of this case, rule 15 could possibly apply, but since elaborate arguments have been addressed by both the sides whether rule 15 could apply at all, and the matter may not rest with this court, we think we must deal with that point.

49. Sub-rule (1) of rule 15, makes provision for three separate cases, but what was relied on behalf of the department was only clause (a) thereof which is in the following words :

"15. (1) Where for the purposes of estate duty there pass, on the death of a person shares in or debentures of a controlled company then if -

(a) the deceased had the control of the company at any time during the three years ending with his death;...

the principal value of the shares or debentures, in lieu of being estimated in accordance with the provisions of sub-section (1) of section 36 of the Act shall be estimated by reference to the net value of the assets of the company in accordance with the provisions of the next succeeding sub-rule."

50. Sub-rule (2) deals with what are the items that have to be taken into account in ascertaining the principal value of the shares. We are not here concerned with the provisions of that sub-rule. We are not here concerned with the provisions of that sub-rule. But sub-rule (3) is important, for it defines when a person is deemed to have had control of a company. Sub-rule (3) provides :

"(3) For the purposes of this rule a person shall be deemed to have had control of a company at any time if he then had -

(a) the control of powers of voting on all questions or on any particular question, affecting the company as a whole which if exercised would have yielded a majority of the votes capable of being exercised thereon; or

(b) the capacity to exercise, or to control the exercise, of any of the following powers, that is to say, the powers of a board of directors or of a governing director of the company, power to nominate a majority of directors or a governing director thereof, power to veto the appointment of a director thereof, or powers of a like nature;

or if he could have obtained such control or capacity by an exercise at that time of a power exercisable by him or with his consent."

51. Sub-rule (4) is not relevant for our purposes, because it deals with the valuation of shares or debentures of a class, viz., a class to which permission to deal has been granted by a recognised stock exchange, which is not the case here. Sub-rule (5) provided that "control of a company which a person had in a fiduciary capacity shall be disregarded for the purpose of this rule." Sub-rule (6) provides, "In this rule references to the assets of a company shall be construed as references to the assets that it had at the death of the deceased."

52. The principal argument for the department has been that the deceased had or must be deemed to have had control of the company, Mafatlal Gagalbhai & Company Ltd. Therefore, rule 15 would clearly apply and, since, it was overlooked, there is a mistake apparent from the record within the meaning of the old section 62, or alternatively that constitutes information in the possession of the assessing officer within the meaning of section 59 of the amended Act.

53. It is clear, upon a perusal of sub-rule (3) side by side with sub-rule (1) of rule 15, that the two provisions are complementary and that, when sub-rule (1) of rule 15 provides that the estate duty shall be computed on the "assets basis" when the deceased had the control of the company at any time within three years ending with his death, sub-rule (3) defines what shall be deemed "control of a company". Therefore, sub-rule (3) must be read in the context of the provisions of rule 15 (1). What we would emphasize here is that it is the control of the company that has to be looked at and not the control of the management or of the board of directors of the company, for, in the course of the argument or of the board of directors of the company, for, in the course of the arguments, most of the facts and circumstances relevant to possible control over the board were referred to, to suggest that it is the control of the company.

54. Now, at the very outset, the petitioner has stated the facts which are relevant for this purpose.

In paragraph 2, he has stated that the subscribed and paid up capital of the company was 1,01,00,000 consisting of 25,250 ordinary shares of Rs. 100, and 75,750 preference shares of Rs. 100 each. Out of this, the maximum number of shares held by the deceased at any time during the three years ending with his death was 2,150 ordinary shares and 9,050 preference shares. It is an admitted position between the parties that the preference shares do not count for the purposes of the point before us. As to the ordinary shares, the petitioner has attempted to show that at the time of his death the deceased held 975 ordinary shares, but it was conceded that, for the purposes of the computation of estate duty, the total of 2,150 ordinary shares must be taken into account, because his transfer of the remaining shares is caught within the provisions of the Act and cannot go to lessen the value of the estate. This fact has been admitted on behalf of the department in paragraph 5 of the affidavit of Mr. Butani. Obviously, if that was the total number of shares held by the deceased, he could not be said to have a controlling interest in the share capital of the company, but then other facts were alleged in paragraph 12 of Mr. Butani's affidavit which require to be considered and which may be stated in his own words as follows :

"I say that the deceased was the managing director of the company at the relevant time, and that the deceased had authority to exercise all the powers, authorities and discretions expressed to be vested in the directors generally. He was also the chairman of the company. I submit that the deceased had the capacity to exercise the powers of the board of directors of the company, or of a governing director of the company. I further submit that the deceased had also the capacity to control the exercise of the powers of the board of directors of the company. I submit that the deceased had control or must be deemed to have had control of the company as contemplated by the said rule."

55. Now in these pleadings three further facts are alleged : (1) that the deceased was the managing director of the company : (2) that the deceased had authority to exercise all the powers, authorities and discretions expressly vested in the directors generally which has been subsequently clarified in the affidavit of Mr. Gopalakrishnan by referring to article 125 of the articles of association of the company and to the resolution passed by the company on the 23rd June, 1955, which is at exhibit E collectively, and (3) that he had the capacity to exercise the powers of the board of directors of the company, which is also founded upon the same resolution.

56. The powers of the managing director are mentioned in article 125 of the articles of association of the company in the following terms :

"The directors may from time to time appoint anyone or more of their body to be managing director or managing directors for such period and upon such terms as to remuneration and otherwise as they think fit, and may vest in such managing director or managing directors such of the powers hereby vested in the directors generally as they think fit and

such powers may be made exercisable for such period or periods and upon such terms as they may determine, and they may remove any managing director or directors so appointed and may fill up any vacancy in the office of managing director or directors. Mr. Mafatlal Gagalbhai shall be the first managing director."

57. The person last mentioned was the father of the deceased, Navinchandra, and the founder of the firm. What was stressed on behalf of the department was that this article gives the board of directors the power to vest in the managing director such of the powers as are vested by the article in the directors generally, and that is precisely what the board had done at its meeting held on the 23rd June, 1955. The resolution dated 23rd June, 1955, runs as follows :

"Seth Navinchandra Mafatlal, the managing director of the company appointed under article 125 of the articles of association of the company, is appointed managing director for a further period of one year with all the powers as are vested in the directors generally by the articles of association of the company or by law on the same remuneration as last..."

58. It is also not disputed that such resolutions were being passed in the previous years and were being renewed from year to year by the board of directors in favour of the deceased.

59. Now in the first place, though no doubt the resolution read along with article 125 does give the managing director the powers of the board of directors as are vested in the board of directors by the articles, all that one can say is that the managing director was given plenary powers of management of the company. But we fail to see how powers of management can be approximated with control of the company such as is required by rule 15. We have already indicated that in respect of his shareholdings, the deceased did not have a controlling interest in the company, that is to say, at least more than 50% of the share capital of the company. Therefore, looked at from the point of view of his real control over the company, there was none so far as the deceased was concerned. He could at a general meeting have been always outvoted by the other shareholders and it is well known that the real control of a company lies in the fact that a person or persons hold a majority of the shares in a company and on whether they can control the general meetings of the company. That the deceased had no power to do in the present case.

60. Even so far as the management of the company so vested in the deceased is concerned, two facts may be emphasized, which show, in our opinion, categorically that it was not the deceased who was controlling the board of directors or the management of the company, but that it was really the board of directors or the management of the company, but that it was really the board of directors who were controlling him. These two important facts are : (1) that the operation of

the resolution was limited only to one year at a time. Surely, it is a poor way of exhibiting control of a company that a managing director has to go and ask the board of directors to give him his powers annually. (2) Secondly, article 125 itself vests plenary power of removal of the managing director in the board of directors and that power remained uncontrolled. In other words, the power of the board to remove the managing director could be exercised at any time. It was disputed that they could remove him in the course of one year after having passed a resolution such as is to be found at exhibit E, but we think that notwithstanding such resolution they could have removed him for sufficient cause. But that apart, so far as the power to remove him is vested in the board of directors and the board of directors carefully considered the exercise of that power and limited it to one year at a time, we do not think that in the circumstances of the present case they ever intended to part with their power of control in favour of the managing director. It is quite clear that it was the managing director who was under the control of the board of directors and not vice versa as alleged on behalf of the department.

61. Some reference was made in the arguments to the definition of "manager" in the old Companies Act and to the new definition of "managing director" in the present Indian Companies Act to speed out the powers of control. We do not think that we need go into those definitions upon the view that we have taken in the present case. In our opinion, upon the facts placed before us there is no manner of doubt that the deceased, though appointed the managing director with full powers of the board of directors for one year, did not have the control of the company within the meaning of rule 15. Rule 15, therefore, could not have applied in the circumstances of the case.

62. Though we have discussed the applicability of rule 15 to the facts and circumstances of the present case, we may stress here that we are not directly called upon to do that. We embarked upon the enquiry because of the protracted arguments that were addressed to us on that point by both the parties and because the point arises in an ancillary way. The real question in issue before us is whether ignoring or overlooking of rule 15 constituted either "a mistake apparent from the record" or "a mistake in the valuation of any property" within the meaning of section 62 of the Estate Duty Act, 1953, or whether the realisation of the fact that rule 15 was not considered by the Deputy Controller (and here we assume that it was not considered), while making the original assessment, constituted information in the possession of the succeeding Deputy Controller who wishes to reopen the assessment with a view to reassessing the estate of the deceased under section 59(b) as amended.

63. So far as the clauses invoked in favour of the department, "mistake apparent from the record" or "any mistake in the valuation of any property" are concerned, we may point out that what must be made to appear is a mistake. In this respect, we have already pointed out that, when making

the amendment by the amending Act of 1958, the subject-matter of section 62 was split up and its provisions with reference to rectification of mistakes were relegated to section 61 of the new Act. The present notice has no reference to section 61. The present notice is only under section 59. The provisions of section 61 and the provisions of the old section 62 which refer to "mistake" are analogous to the provisions of section 35 of the Indian Income-tax Act. Dealing with the provisions of section 35, a Division Bench of this court pointed out in the case of National Rayon Corporation Ltd. v. G. R. Bahmani, Income-tax Officer, that "mistake" includes no doubt a mistake of fact as well as a mistake of law, but section 62 requires a mistake apparent from the record and with reference to the identical words in section 35 of the Indian Income-tax Act the Division Bench pointed out that a mistake becomes a mistake apparent from the record when it is a glaring, obvious or self-evident mistake. A mistake which has to be discovered by a long drawn process of reasoning or examination of arguments on points where there may conceivably be two opinions cannot be said to be a mistake or error which is apparent from, the record. See page 117 and the several cases referred to therein. The Division Bench quoted with approval the observations of the Madras High Court in M. Subbaraja Mudaliar v. Commissioner of Income-tax, at page 230, that "the jurisdiction of the officer to rectify a mistake is dependent on the mistake being apparent from the record. It is no doubt true that a mistake capable of being rectified under section 35 is not confined to clerical or arithmetical mistakes. On the other hand, it does not cover any mistake which may be discovered by a complicated process of investigation, argument or proof". The same view was taken by the Supreme Court in Venkatachalam v. Bombay Dyeing and Mfg. Co. Ltd. The Supreme Court adopted the principle laid down by the Privy Council in Commissioner of Income-tax v. Khemchand Ramdas. Of course in the Bombay Dyeing case the Supreme Court held that a glaring and obvious mistake of law can be rectified under section 35. That was so held upon the facts of that case. At page 149 and 150 the Supreme Court observed :

"At the time when the Income-tax Officer applied his mind to the question of rectifying the alleged mistake, there can be no doubt that he had to read the principal Act as containing the inserted proviso as from April 1, 1952. If that be the true position then the order which he made giving credit to the respondent for Rs. 50,603-15-0 is plainly and obviously inconsistent with a specific and clear provision of the statute and that must inevitably be treated as a mistake of law apparent from the record. If a mistake of fact apparent from the record of the assessment order can be rectified under section 35, we see no reason why a mistake of law which is glaring and obvious cannot be similarly rectified."

64. In the present case, we are quite unable to find any mistake, much less a mistake which is "glaring and obvious" or which "is plainly and obviously inconsistent with a specific and clear provision of the state". The department, it appears, merely reconsidered the provisions of section

62 read with rule 15 and changed its opinion, though there was no mistake apparent from the record.

65. Having considered the question of the applicability of rule 15, in so far as its alleged non-application could constitute a mistake under the provisions of section 62, we hold that there was no mistake and, therefore, section 62 would not be applicable to the facts and circumstances of the present case. If that be so, then the point we have earlier made that section 59 cannot affect a final and concluded order of assessment made in favour of the petitioner, becomes reinforced. The finality of the order of assessment made on 22nd March, 1960, is not affected by any right existing in favour of the department arising under section 62. Therefore, the provisions of section 59 would not apply, because section 59 was brought into force as a law long after the assessment order was made.

66. In connection with section 59, counsel for both the parties have argued at length question whether, even assuming that section 59 applies upon the facts and circumstances of the case, it could be invoked in favour of the department at all. Since, the question has been discussed at length, we would briefly refer to the point here. We have already said that subsection (a) of section 59(b) runs as follows :

"59. Properly escaping assessment. - If the Controller, -

(b) has, in consequence of any information in his possession, reason to believe notwithstanding that there has not been such omission or failure as is referred to in clause (a) that any property chargeable to estate duty has escaped assessment, whether by reason of under-valuation of the property included in the account or of omission to include therein any property which ought to have been included, or of assessment at too low a rate or otherwise, he may at any time, subject to the provisions of section 73A, require the person accountable to submit an account as required under section 53 and may proceed to assess or reassess such property as if the provisions of section 58 applied thereto."

67. We have earlier contrasted the provisions of section 59(b) with the provisions of the old section 62 and we have indicated that the provisions made a complete departure from the provisions of the old section 62. Section 62 was concerned with the "rectification of mistakes", which is a subject now relegated to the new section 61 and section 59 has no reference to any mistake. It is a new provision analogous to the provisions of section 34 (1) (b) of the Indian Income-tax Act and gives, subject to certain conditions, power to the department to assessee or reassess.

68. Now, the conditions which have to be fulfilled, before a new assessment or reassessment can

take place according to the section, are that the Controller : (a) must have in his possession "information", (b) that he must in consequence of such information (c) have reason to believe that (d) any property chargeable to estate duty has escaped assessment. What is challenged on behalf of the assessee is that there was any information whatever in the possession of the Controller or that it was in consequence of that information that he was proceeding to reassess the petitioner. Now these provisions we have said are analogous to the provisions of section 34 (1) (b) and though there is no reported decision directly upon the provisions of section 59, for it is very recent, several cases were brought to our notice on the provisions of section 59, for it is very recent, several cases were brought to our notice on the provisions of section 34 (1) (b) as to what constitutes "information". In *Maharaj Kumar Kamal Singh v. Commissioner of Income-tax*, the Supreme Court pointed out that "information" included not only information as to any fact, but it included information as to the true and correct state of the law. In that case, "the information as to the true and correct state of the law" was the subsequent decision of the Privy Council overruling a decision of the Patna High Court in *Kamakshya Narain Singh v. Commissioner of Income-tax*, but whether it is an information on a point of fact or point of law, the Supreme Court pointed out at page 5 :

"It is clear that two conditions must be satisfied before the Income-tax Officer can act under section 34 (1) (b). He must have information in his possession, which, in the context, means that the relevant information must have come into his possession subsequent to the making of the assessment order in question and this information must lead to his belief that income chargeable to income-tax has escaped assessment for any year, or that it has been under-assessed or assessed at too low a rate or has been made the subject of excessive relief under the Act."

69. The two essential conditions, therefore, are that the information must be subsequent to the original order of assessment sought to be reopened and that the information must lead to the belief that the property chargeable to estate duty has escaped assessment.

70. In *Sayaji Mills Company Ltd. v. Commissioner of Income-tax*, the Gujarat High Court held at page 108 that the information must necessarily be information received subsequent to the order of under-assessment. At page 108 they held, "The information which is relied upon for the purpose of taking action under section 34 (1) (b) was available to the Income-tax Officer and it cannot, therefore, be said that after the assessee was under-assessed he obtained any information in consequence of which he had such information before under-assessment, he cannot rely on such information for taking action under section 34 (1) (b)." In *K. T. Kubal & Co. Pvt. Ltd. v. Commissioner of Income-tax*, and in *Dr. M. R. Dalal v. Commissioner of Income-tax*, a Division Bench of this court (to which my learned brother was a party), with reference to the same

provision of law, held that, if all the documents were placed before the assessing officer and he had considered them, he could not upon the same documents come to a contrary conclusion. In the latter case, the assessment had been made on the basis that a certain trust was irrevocable for a period of 7 years. The trust deed was filed before the assessing officer and on that basis the assessment orders were passed. Subsequently, the Income-tax Officer noticed that the period of 7 years in which the trust was irrevocable had expired and that the trust had become revocable and, therefore, the entire income from the trust was liable to be assessed in the hands of the assessee himself. He, therefore, attempted to reopen the assessment. The Division Bench held at page 501 : "The documents clearly establish that the information that the trust has become revocable since 1946 was available on the record, and, therefore, it cannot be said that any fresh information was received by the Income-tax Officer as a result of the communication received by him from the Income-tax Officer, A-IV Ward, Bombay... The material question is whether that officer, i.e., who made the assessment on January 27, 1954, knew that the trust had become revocable or not, and on that aspect of the case, there is no finding by either the income-tax authorities or the Tribunal that Income-tax Officer had no knowledge that the trust had become revocable. The mere fact that the Income-tax Officer who reopened the assessment had no knowledge can hardly be of any relevance to sustain reopening of the assessment under section 34 (1) (b)." To the same effect are the decisions in *Ram Kishan Oil Mills v. Commissioner of Income-tax* and *Purshotamdas Thakurdas v. Commissioner of Income-tax*. Upon these authorities it is clear that the information contemplated in section 59 would, of course include the information both as to fact as well as the information as to law, but whatever be the nature of the information it must be information obtained subsequent to the order of assessment. It is also now settled law that a mere change of opinion is not the same thing as having information in his possession.

71. We have already said that one of the main points of the department has been that rule 15 was ignored by the assessing officer. The alleged ignoring of that rule has been sought to be taken advantage of both in application of the provisions of section 62 and, therefore, indirectly of section 59 and the application of the provisions of section 59 directly. As we have said, the petitioner from the very outset has been challenging the right of the Deputy Controller to reopen the proceedings and in almost every letter that the petitioner's representatives wrote they asked what the information was or what was the basis for the fresh proceedings. In the letter of 9th October, 1963 (exhibit L coll.) they said at the end of the letter, "It would however be desirable if you will kindly tell us briefly the grounds of justification for commencing the proceedings under discussion." In the letter dated 14th November, 1963, paragraph 11, they plainly alleged, "In view of the foregoing facts on record the discussion from time to time... there is no information as a consequence of which you could now take proceedings under section 59(b). The proceedings now sought to be similar point was made at the end of their letter dated 16th March, 1964.

72. At no stage was it disclosed what was the information in the possession of the department. On the other hand, the only reply the department gave was by their letter dated 16th March, 1964. They acknowledged the earlier letters on behalf of the petitioner and stated that they were being considered and in the letter they gave a new computation of the value of each share owned by the assessee in Mafatlal Gagalbhai & Co. Private Limited. In the petition, the petitioner has stated that the respondent had no information in his possession within the meaning of section 59(b) of the Act on the basis of which he could have started reassessment proceedings (vide para. 9 (2)). In reply to this, in the affidavit of Mr. Butani, rule 15 was invoked and it was stated : "I say that it was, therefore, mandatory that the shares should have been valued on the assets basis, as provided in the said rule 15", and that constituted "information". Another circumstance which constituted information was stated to be, "I say that the Appellate Assistant Commissioner, however, by an order made subsequent to the said original assessment held the company was not a dealer in shares and that this constitutes information within the meaning of the said section 59(b) of the said Act." This was further clarified in the affidavit of Mr. Gopalakrishnan in paragraph 15 of his affidavit where it is state, "I repeat that the then My. Controller of Estate Duty, who issued the impugned notice, discovered that the officer making the original assessment (a) had either through error or lack of vigilance had completely overlooked the mandatory provisions of the said rule 15, (b) that the assessing officer had proceeded on the basis that the company was a dealer in shares, whereas the correct position was that the company was an investment company, and therefore, a mistake made by the assessing officer making the original assessment was apparent from the records. I submit that these constitute information within the meaning of section 59(b) of the said Act."

73. Thus two facts or circumstances are alleged as constituting "information". One is the fact of overlooking of rule 15. We have already dealt with this ground. The other ground is that the company was a dealer in shares, whereas the correct position was that the company was an investment company. In this respect, the only material placed before us by Mr. Joshi on behalf of the department was to refer to an answer given on behalf of the petitioner to a questionnaire "A" issued by the department, where a statement has been made "The company is essentially an investment company". In the affidavit of Mr. Gopalakrishnan we have shown that it is stated that the Appellate Assistant Commissioner had given a finding that they are dealers in shares. No such order has been produced before us. We presume that, if a finding of that kind was at all given by the authority under the Estate Duty Act or even for that matter under the Indian Income-tax Act or any other fiscal enactment, it could only be by a written order, but no such order has been placed on record. Therefore, the allegation remains completely unsubstantiated and we cannot accept the statement that some such order was passed. Apart from this, there is nothing before us to show that the company was a dealer in shares. We must hold, therefore, that there was no information in the possession of the Deputy Controller such as is required under the

provisions of section 59(b) to enable him to reopen the order passed on 22nd March, 1960. The fact that the deceased was the managing director, the fact that the articles of association of the company were before the assessing officer as well as the facts relating to the interest of the deceased in the company and the nature of the business activities of the company and the resolution which is now sought to be invoked, do not carry the matter any further in favour of the department. All the information necessary to come to a conclusion as to the valuation of the shares was in the possession of the department. There was no information received by them subsequent to the order of assessment. Therefore, there was no jurisdiction to proceed to repent the assessment.

74. Some cases, which took more or less the view that, so long as income has escaped assessment, there is a power to repent proceedings under section 34 (1) (b) of the Indian Income-tax Act, were referred to. They are : *Saraswati Devi Lohia v. Commissioner of Income-tax and Asghar Ali Mohammed Ali v. Commissioner of Income-tax* and the decision of the Madras High Court in *Commissioner of Income-tax v. Rathinasabapathi Mudaliar*. All these cases take the view that the "information" relevant to section 34 (1) (b) need not be wholly extraneous to the record of the assessment itself, as for instance, an error or inadvertence in assessment by which income had escaped assessment, is discovered after the assessment. In *Asghar Ali Mohammad Ali v. Commissioner of Income-tax*, Chief Justice Desai held that "the word 'information' used in the provision covers all kinds of information received from any person whatsoever or in any manner whatsoever or in any manner whatsoever. All that is required is that the Income-tax Officer should learn something, i.e., he should know something which he did not know previously". In fact, the learned Chief Justice went on to doubt whether, when income had in fact escaped assessment and an assessment order had been made under section 34, the order of assessment can be set aside on the mere ground that the Income-tax Officer had no "information in his possession to justify the issue the of a notice under section 34." The last mentioned judgment makes no distinction between "information" and a mere "change of opinion". In fact, it was held in that decision of a Division Bench of this court (to which also my learned brother was a party) in which this views was considered. That is reported in *Commissioner of Income-tax v. Malegaon Electricity Co. Private Ltd.* The decision of the Madras High Court just referred to was cited before the Division Bench and with reference to that decision, Chief Justice Tambe said :

"This decision undoubtedly supports Mr. Joshi's contention. The ratio of the decision appears to be that even if on reconsideration of the material on record the Income-tax Officer realises, subsequent to the original assessment, that he had committed an error, which has resulted in the escapement of tax or under-assessment, that amounts to an information within the meaning of the section. With respect, we feel some hesitation in going to the extent to which this decision would take us. It would virtually amount that

section 34 (1) (b) confers a power a power on the Income-tax Officer enabling him to correct his own mistakes by reviewing his own decision on the same set of facts, which are clearly patent on the record. We find it difficult to equate 'in consequence of information in his possession' with 'in consequence of discovery of an error on re-examination of the record.' The Supreme Court decision referred to in this decision does not, in our opinion, go to that extent."

75. The Division Bench relied upon the decision of the Supreme Court in *Maharaj Kumar Kamal Singh v. Commissioner of Income-tax*, to which we have already referred. With respect, we agree with the remarks of the Division Bench of this court and normally its decision is also binding is also binding on us.

76. We may also say that the decision in the case just cited of the *Malegaon Electricity Co. Private Ltd.* directly covers the point raised in the present case. In that case, the facts were simple. In the course of the accounting year the assessee-company had sold its undertaking to another company on 19th September, 1951, but the assessee-company did not disclose in its return the excess of the sale price of building, plant and machinery over the written down value either in sections in the form of the return relating to the total income or in section D claiming that it was not taxable under any other provision of the Act. During the course of the assessment, however, the assessee had sent a letter to the Income-tax Officer stating that the assessee was enclosing the documents relating to the sale and the break-up of the sale price along with the directors' resolution in that behalf. Nevertheless, the assessment was made without reference to the excess sale price. Some time after the assessment was completed, the Income-tax Officer realised that the profits accruing from the sale of the property concerned would fall within the ambit of section 10 (2) (vii) of the Act and had not been assessed and he, therefore, started proceedings under section 34. It was held that "it did not appear anywhere in the records in clear terms that the sale transaction had resulted in the assessee obtaining a price for the building, plant and machinery in excess of its written down value, and though that fact could have been ascertained by correlating the various documents on record, working on them, making arithmetical calculations, the mere failure on the part of the Income-tax Officer to correlate the various materials could not entitle the assessee to claim that assessment could not be reopened under section 34 (1) (b)." Strong reliance was placed by Mr. Joshi on behalf of the department upon this decision, but in that case the Division Bench clearly held that the primary facts had not been stated by the assessee at the time of the original assessment. At page 810, the Division Bench observed as follows :

"On the record, therefore, the information that the sale price of these items was in excess of the written down value cannot be said to be patently available to the Income-tax

Officer. The order of the Income-tax Officer does not show that any contention was raised before him that, though the transaction had resulted in obtaining excess price, it was not profit within the meaning of section 10 (2) (vii), inasmuch as the assessee did not carry on any business in the year of account. Thus, the position obtaining is that, on the material on record, it cannot be said that the Income-tax Officer had knowledge that the price fetched in respect of the said items of assets had exceeded the written down value. The said knowledge has been subsequently obtained by the Income-tax Officer on correlating various facts and ascertaining the resultant position after the completion of the original assessment. Thus the knowledge as to the correct position after the completion of the original assessment. Thus the knowledge as to the correct position of factual matters has been subsequently obtained by the Income-tax Officer on correlating various facts and ascertaining the resultant position after the completion of the original assessment. Thus the knowledge as to the correct position of factual matters has been obtained by the Income-tax Officer subsequent to the completion of the original assessment and that would, in our opinion, amount to information within the meaning of section 34 (1) (b)."

77. Mr. Joshi relied on this passage to urge that even in the present case the correct position has been ascertained only after the correlation of all the facts and, therefore, the principle of the Malegaon Electricity Co.'s case should apply here. The passage just quoted is immediately followed by a further clarification as follows :

"A distinction has to be made between facts, which are clearly or patently on the record and facts, which could be gathered or could have been gathered with due diligence by elaborately correlating the various facts on the record. As regards the former, it can, without hesitation, be said that the information as to the facts, which are patently or clearly on the record was within the possession of the Income-tax Officer at the time of the original assessment. The same cannot be said of the latter because the correct factual position emerges only after the Income-tax Officer has correlated the various facts and ascertained what the resulting position is. Knowledge secured in the latter case, subsequent to the assessment, in our opinion, is 'information' within the meaning of section 34 (1) (b)."

78. In the present case, it can hardly be said that there were any facts which, even if correlated, could have amounted to "information" in the possession of the Deputy Controller. We have already shown that there were no such facts available to the department. The Malegaon Electricity Co.'s case therefore, is distinguishable upon its own facts.

79. In the view which we take, it is unnecessary to go into the further point urged by Mr. Palkhivala on behalf of the petitioner as to vires of rule 15 What Mr. Palkhivala urged was that, if

rule 15 were to justify the assessment of estate duty on the "assets basis" without providing for it in the tax law, it is ultra vires of sections 36 and 37 of the Act. We have already shown that, in our opinion, rule 15 does not apply to the facts and circumstances of the present case. Therefore, it is unnecessary to consider whether it is also ultra vires the provisions of the Act.

80. In the result, we allow the petition and quash the notice dated 23rd January, 1963, and prohibit the respondent from making any order of reassessment upon that notice. The respondent to pay the petitioner's costs quantified at Rs. 2,000.

81. Petition allowed

