

PATNA HIGH COURT

Commissioner of Income-Tax

Vs

Surendra Kumar Bhadani

(Uday Sinha and N Ahmad , JJ.)

23.04.1986

JUDGMENT

Uday Sinha, J.

1. These are consolidated references under Section 256(1) of the Income-tax Act, 1961. Some questions have been referred to us at the instance of the Revenue and others at the instance of the assessee. The following questions have been referred at the instance of the Revenue :

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that the proceedings under Section 147(a) were not valid ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in cancelling the proceedings on the ground that the proceedings have been initiated under Section 147(a) and not under Section 147(b)?

(3) Whether, on the facts and in the circumstances, the Tribunal was justified in cancelling the order under Section 154 of the Income-tax Act ?"

2. The questions referred to us at the instance of the assessee are the following:

"(1) Whether on an appeal by the Hindu undivided family, the Appellate Assistant Commissioner was competent to give a finding and direction to assess the individual so as to lift the bar of limitation under Section 34(1) and proviso?

(2) Whether the Tribunal was right in holding that action under Section 147(b) had not become barred at the point of time when the Appellate Assistant Commissioner gave directions ?

(3) Whether the Tribunal was right in holding that action under Section 34(1)(a) of the Indian Income-tax Act, 1922, had been taken in the name of the deceased and no such proceeding initiated under Section 34 against the assessee was pending at the

commencement of the new Act ?"

3. The assessee is an individual being the legal heir of late Jhari Ram Bhadani, The concerned assessment year is 1953-54.

4. For the aforesaid assessment year, M/s Jhari Ram Bhadani and Sons was originally assessed in the status of a Hindu undivided family on a total income of Rs. 8,217 on October 27, 1953. The assessment was later rectified under Section 154 as Rs. 8,893. That was again rectified under Section 154 and assessment was completed on a total income of Rs. 12,705 on September 16, 1958. In the assessment proceeding, Jhari Ram Bhadani as karta of the Hindu undivided family contended that the dividends of Hirjee Mills Ltd., Bombay, were the assets of Jhari Ram Bhadani as "individual", since the shares stood in his individual name and, therefore, the Hindu undivided family was not liable to that extent. The Income-tax Officer rejected the stand of the Hindu undivided family that the aforesaid income was not the income of the Hindu undivided family. On appeal, the Appellate Assistant Commissioner deleted the "deemed dividend" from the assessment of the Hindu undivided family holding that since the Hindu undivided family was not the registered shareholder of the company, it could not be saddled with the liability of tax on the "deemed dividend". Having deleted the "deemed dividend" from the income of the Hindu undivided family, the Appellate Assistant Commissioner directed the Income-tax Officer by order dated April 22, 1961, to take action under Section 34 read with Section 31 of the Indian Income-tax Act, 1922, for assessing that deemed dividend income in the hands of the registered shareholder. That direction having been given, the Income-tax Officer initiated proceedings under Section 34(3) of the 1922 Act against Jhari Ram Bhadani, who was by then dead. No return was filed in answer to the notice. That proceeding never came to a close. While it was pending, the Income-tax Officer with the approval of the Central Board of Direct Taxes initiated proceedings under Section 147(a) of the Act and issued notice on October 15, 1965, to Surendra Kumar Bhadani, legal heir of late Jhari Ram Bhadani, "individual". A return of Rs. 1,87,038 was filed.

5. Various objections were raised on behalf of the assessee. The main objection of the assessee was that the initiation of proceedings under section 147 of the Act was barred by time. Suffice it to say that the assessee's objections made no impact on the Income-tax Officer. He, therefore, reassessed the income of the assessee in terms of Section 147 of the Act adding Rs. 1,78,865 as dividend income of the assessee deemed to have been declared under Section 23A in the case of M/s. Hirjee Mills Ltd., Bombay. The Income-tax Officer also initiated a proceeding under Section 271(1)(a) for late filing of the return of income.

6. The matter was then taken in appeal. The Appellate Assistant Commissioner upheld the contention urged on behalf of the assessee holding that the reassessment proceedings were ab

initio void. In his view, the Appellate Assistant Commissioner having pronounced that the registered shareholder should be taxed in respect of the deemed dividend, the Income-tax Officer should have proceeded only under Section 34(1)(b) and not under Section 34(1)(a). The view of the Appellate Assistant Commissioner, in appeal against the reassessment order was that there had been no omission or failure on the part of the assessee and, therefore, the case would not fall within the ambit of Section 34(1)(a) and so the shorter period of limitation in terms of Section 34(1)(b) would be applicable.

7. The matter was then taken in appeal by the Revenue to the Tribunal. The Tribunal posed the following questions :

" (i) Whether the findings and direction given by the Appellate Assistant Commissioner were valid in law ?

(ii) Whether the reassessment proceeding for assessing the deemed dividend was to be taken under Section 147(a) or under Section 147(b) of the 1961 Act, corresponding to Section 34(1)(a) and Section 34(1)(b) of the Indian Income-tax Act, 1922 ?

(iii) Whether the limitation for taking any such action had become barred at the point of time when the Appellate Assistant Commissioner had given the direction ?

(iv) Whether any valid proceeding under Section 34 of the old Act was pending against the present assessee at the time of commencement of the new Act ?

(v) Whether the action for reopening of assessment could be validly taken under Section 147 read with Section 153 of the Income-tax Act?

(vi) Whether the assessment made was valid in law ?" The first issue was decided in favour of the Revenue. It was held that the individual member alone could be assessed in respect of the deemed dividend declared under Section 23A. In regard to the second issue, the Tribunal held that the reassessment proceeding could be taken, but

only under Section 34(1)(b) of the Income-tax Act, 1922, corresponding to Section 147(b) of the 1961 Act. In regard to the third issue, the Tribunal held that the limits placed by Section 34 for initiating the action were removed by the proviso. Thus, the time for taking action had not become barred at that time. In the view of the Tribunal, the law did not provide any time-limit for taking any action under Section 34. In regard to the fourth issue, the Tribunal held that no valid proceeding was pending under Section 34 against the assessee. In regard to the fifth issue, the Tribunal held that the direction of the Appellate Assistant Commissioner was legal and valid and

the action taken in pursuance thereof was also valid. In its view, the Explanation to Sub-section (3) of Section 153 would have applied, if such direction had not been given. In regard to the sixth and the last issue, whether the assessment was valid in law, the Tribunal held that the assessment was saved by the 2nd proviso to Section 34(3), though it had been made more than four years after the end of the assessment year. The Tribunal thereafter considered the question whether the reopening of, the assessment under Section 147(a) could be upheld on the ground that action could have been taken under Section 147(b). The Tribunal held that it could not substitute the order of the Income-tax Officer passed under Section 147(a) as an order under Section 147(b). In fine, the Tribunal held that the order of the Income-tax Officer was invalid, as action was taken under Section 147(a) and not under Section 147(b). The order of the Tribunal gave umbrage to both the parties. Questions have, therefore, been referred to us, as stated earlier, at the instance of both the parties.

8. I shall first consider whether the Tribunal was right in holding that the action not having been initiated in terms of Section 147(b), the proceeding was invalid. In my view, the Tribunal was not right in the view that it took in the matter for reasons which I shall set out hereinafter. Section 147 of the Act empowers the Revenue to initiate and take steps to assess income which has escaped assessment. The escapement has been divided into two categories--where the assessee is in default and where the Revenue is in default. Section 147(a) covers cases where the escapement has been occasioned on account of omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for his assessment. Section 147(b) covers cases where there has been no omission or failure on the part of the assessee but the Income-tax Officer has reason to believe that income chargeable to tax has escaped assessment. In either situation, the Income-tax Officer has the jurisdiction to initiate reassessment proceedings. The power to reassess, however, is limited by the provisions of Section 153(2) which sets a time-limit for the initiation of a reassessment proceeding. Section 153(2) lays down that no order of assessment, reassessment or recomputation shall be made, if it has to be made under Clause (a) of Section 147, after the expiry of four years from the end of the assessment year in respect of which notice under Section 148 was served. Section 153(2)(b) provides that no assessment or reassessment or re-computation shall be done where action is taken in terms of Clause (b) of Section 147 after the expiry of four years from the end of the assessment year in which the income was first assessed or after the expiry of one year from the date of service of the notice under Section 148, whichever is later. The conjoint effect of Sections 147 and 149(2), therefore, is that where income has escaped assessment, a limitation period is fixed for initiating proceeding for reassessment. The crucial aspect is limitation of time. If the limitation placed by Section 153(2) disappears and there is a case for reopening of assessment, no holds are barred. Such a situation is taken care of by Sub-section (3) of Section 153, which, leaving aside irrelevant matter, reads as follows :

"(3) The provisions of Sub-sections (1) and (2) shall not apply to the following classes of assessments, reassessments and recomputations which may, subject to the provisions of Sub-section (2A), be completed at any time--

(i) where a fresh assessment is made under Section 146;

(ii) where the assessment, reassessment or recomputation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under Section 250, 254, 260, 262, 263 or 264 or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act;

(iii) where, in the case of a firm, an assessment is made on a partner of the firm in consequence of an assessment made on the firm under Section 147."

9. Let us apply the law to the facts of the instant case. In this case, the Hindu undivided family was assessed (on income) which included deemed income from Hirjee Mills. The Hindu undivided family of which the present assessee (the individual) was the karta asserted that the income in question was the income of the individual and not of the Hindu undivided family and, therefore, it was not liable to be assessed as the income of the Hindu undivided family. The Hindu undivided family failed before the Income-tax Officer. The stand of Jhari Ram Bhadani, karta of the Hindu undivided family, however, succeeded before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner in exercise of his appellate power directed that Jhari Ram Bhadani, the "individual", i.e., the present assessee, should be assessed in regard to the deemed income from the Hindu undivided family. In accordance with the direction, the reassessment proceeding in regard to Jhari Ram Bhadani, the individual, was taken, It will thus be seen that proceeding for reassessment under Section 147 was initiated to give effect to the finding and the direction of the Appellate Assistant Commissioner. The instant case, therefore, comes within the periphery of Section 153(3)(ii). It is thus obvious that no question of limitation would arise. The direction of the Appellate Assistant Commissioner had to be given effect to and, therefore, the provision in regard to limitation set down by Sub-sections (1) and (2) of Section 153 had to be put on the shelf. The Tribunal was thus justified in holding that the initiation of the proceeding was not barred by time. To that extent, the finding of the Tribunal must be endorsed. Thus, there was no question of limitation involved.

10. The next question is after having initiated a proceeding under Section 147(a), whether action could be taken in terms of Section 147(b). The Tribunal, in my view, fell into a serious error in holding that since sanction had been obtained to act in terms of Section 147(a) and since the case fell within the ambit of Section 147(b), the order of the Income-tax Officer was invalid. The bar of limitation having been lifted, the distinction between Clauses (a) and (b) of Section 147

becomes irrelevant, if it is conceded that there was an escapement, whosoever be at fault--the assessee or the Department--action for reassessment could be taken. The Central Board of Direct Taxes would be bound to accord approval for initiation of reassessment proceeding. In my confirmed view, therefore, there was no sanctity left in the difference between Clauses (a) and (b) of Section 147. The Tribunal was, therefore, not right in rejecting the stand of the Revenue that the order of reassessment was valid. The conclusion of the Tribunal was that the instant case fell within the category of Section 147(b) and not Section 147(a). The facts in relation to a deemed dividend had been disclosed. It was known to the Revenue that the shares stood in the name of Jhari Ram Bhadani, the individual. There was thus no omission or failure on the part of the assessee. The case would, therefore, not fall within the ambit of Section 147(a). It is incontrovertible, however, that the said dividend was liable to be taxed and had not been taxed. The escapement was, therefore, for reasons other than those contemplated by Section 147(a).

11. The initiation of the proceeding under Clauses (a) or (b), however, could not be conclusive of the matter. Even if proceedings had been initiated in terms of Section 147(a) but if the facts fell within the ambit of Section 147(b), it would be quite in order to resort to that provision, if the conditions necessary for initiation of proceeding under Section 147(b) were available. The view that I have taken receives ample support from a Full Bench decision of the Calcutta High Court in *Smt. Nirmala Birla v. WTO* [1976] 105 ITR 483. C. J. Sankar Prasad Mitra, in an unanimous judgment, held that where a reassessment under Section 34(a) (section 17(1)(a) of the Wealth-tax Act) (since the case related to Indian Income-tax Act, 1922), is set aside by the Appellate Tribunal, it would be open to the Tribunal to treat the reassessment as one properly made under Section 34(1)(b) (section 17(1)(b) of the Wealth-tax Act) provided that, on the materials on record, all the necessary conditions under Section 34(1)(b) (section 17(1)(b) of the Wealth-tax Act) were satisfied. To quote the words of Mitra C.J. (page 496):

"It is, therefore, clear that there is no bar to a notice under Clause (a) being treated as a notice under Clause (b)."

12. The Full Bench in that behalf endorsed the view taken in *Mriganka Mohan Sur v. CIT* [1974] 95 ITR 503 (Cal). In this connection, it would also be useful to refer to a decision of the Punjab and Haryana High Court in *CIT v. Ess Ess Kay Engineering Co. Pvt. Ltd.* [1982] 137 ITR 446, where Goyal J. held that Clause (a) or (b) of Section 147 does not deal with two separate jurisdictions. His Lordship observed that it was not necessary to specify in the notice the particular clause of Section 147 under which it was being issued. The following words of Goyal J. are significant (page 451):

"If the notice is issued within the period of four years, resort can be had to either of the two clauses by the Income-tax Officer and if it is issued beyond that period, Clause (b) cannot be

invoked under any circumstance and proceedings can be taken only under Clause (a)."

13. It will thus be seen that, limitation permitting, the clause under which the proceeding has been initiated is not of much significance. That would have significance if the limitation questions were germane. In the instant case, there is no question of limitation. The proceeding was initiated on the direction of the Appellate Assistant Commissioner. The case would, therefore, fall within the category of Section 153(3).

14. Lastly, the authoritative pronouncement of the Supreme Court in *CIT v. Onkarmal Meghraj (HUF)* [1974] 93 ITR 233 (SC), cannot be ignored. That was a case where assessment had been done on "individual" partners pursuant to the direction of the Appellate Assistant Commissioner. The Income-tax Officer issued a notice of reassessment under Section 34 of the Indian Income-tax Act, 1922, to the individual partners, N, M and H, and their sons. The question was whether the assessment proceeding made pursuant to the direction of the Appellate Assistant Commissioner was barred by limitation. Their Lordships of the Supreme Court held that the second proviso to Section 34(3) could be availed of at any time in the case of N, M and H and the reassessments made on them were not barred by limitation. In regard to the sons of the partners, N, M and H, the position was held to be different. They were not assessee before the Appellate Assistant Commissioner and they were not intimately connected with the assessee, i. e., the Hindu undivided family and, therefore, the second proviso to Section 34(3) was not applicable in their case. It follows that where the assessment is in pursuance of a direction of the Appellate Assistant Commissioner or the Tribunal, there would be no question of limitation. That question would be relevant, if the persons sought to be proceeded against were not intimately connected with the assessee before the Appellate Assistant Commissioner, when the direction was issued. On the facts of the case before the Supreme Court, it was held that the sons of the three partners were not intimately connected with the assessee, i. e., the Hindu undivided families, as there was no Hindu, undivided family. In the instant case, Jhari Ram Bhadani was the karta of the Hindu undivided family and in his presence, the Appellate Assistant Commissioner had issued the direction of reassessment of Jhari Ram Bhadani in respect of the "deemed income". It cannot, therefore, be denied that Jhari Ram Bhadani, the "individual", was intimately connected with Jhari Ram Bhadani, the karta of the Hindu undivided family. The instant assessee, Surendra Kumar Bhadani, has been proceeded against as the sole legal heir of Jhari Ram Bhadani. He has not been proceeded against in his personal capacity as one of the co-sharers of the Hindu undivided family, but as heir of Jhari Ram Bhadani, since the latter was dead at the time of initiation of the proceeding.

15. Learned counsel for the assessee strongly relied upon the decision of the Supreme Court in *Johri Lal (HUF) v. CIT* [1973] 88 ITR 439 (SC), in support of his proposition that where action had been taken under Section 34(1)(a), it was not open to the Revenue to treat it as a proceeding

under Section 34(1)(b). In my view, the reliance placed upon the Supreme Court decision is entirely misplaced. There were several assumptions in that case which do not exist in the case before us. Further, that was not a case where there was a direction by the appellate authority. The reassessment had not been undertaken because of any direction. That makes a world of difference. I am, therefore, unable to hold that having initiated a proceeding under Section 147(a), it was not open to the Income-tax Officer to resort to an order in terms of Section 147(b).

16. Mr. K. N. Jain, learned counsel for the assessee, contended that the direction of the Appellate Assistant Commissioner to assess the deemed income as income of the assessee and to reassess Jhari Ram Bhadani, the "individual", was illegal and without jurisdiction. The submission is entirely fallacious. The validity of the direction was challenged by the assessee before the Tribunal, but without any success. The correctness and validity of the direction, therefore, cannot be challenged now. It must be held to be barred by the principle of *res judicata*. The direction to reassess Jhari Ram Bhadani, the "individual" was ordered in the presence of Jhari Ram Bhadani and on his invitation. The direction having become final, the challenge to reassessment has no substance and must be rejected.

17. Mr. Jain also submitted that the direction of the Appellate Assistant Commissioner was to assess the deemed income in the hands of the registered shareholders. It did not mean a direction to assess the deemed income in the hands of Jhari Ram Bhadani, the individual, and, therefore, the bar of limitation could not be lifted. Mr. Jain was candid enough to concede that if the direction had been to assess Jhari Ram Bhadani, the "individual", the bar of limitation would have become ineffective. I regret, I find no substance in this submission. It is not disputed that the shares were registered in the name of Jhari Ram Bhadani, the "individual". The direction of the Appellate Assistant Commissioner, therefore, to assess the income only means a direction to assess the income in the hands of Jhari Ram Bhadani. The registered shareholder could only mean a direction to assess the income in the hands of Jhari Ram Bhadani. The registered shareholder could not mean anybody else. The meaning and intention were obvious.

18. My conclusions, therefore, in this behalf, are that although the case fell within the ambit of Section 147(b) and not Section 147(a), yet the initiation of the reassessment proceeding was valid. The Tribunal was not justified in cancelling the proceeding on the ground that the proceeding had been initiated under Section 147(a) and not Section 147(b).

19. The last question referred at the instance of the Commissioner is whether the Tribunal was justified in cancelling the order under Section 154 of the Income-tax Act. I regret, the Tribunal was not correct in setting aside the order under Section 154 of the Act. The position is that the Appellate Assistant Commissioner had directed that the deemed income had to be assessed in the hands of Jhari Ram Bhadani, the "individual". That direction had to be given effect to. The

assessment of the assessee had, therefore, to be consequently rectified. Now that I have held that the Tribunal was not correct in cancelling the order of assessment, the order for rectification under Section 154 must be upheld. In that view of the matter, the third question at the instance of the Revenue must be decided in favour of the Revenue and against the assessee.

20. We now come to the questions referred at the instance of the assessee. The first question is whether the Appellate Assistant Commissioner was competent to give the direction to assess the individual, so as to lift the bar of Section 34(1), second proviso ? In my view, the validity of the direction of the Appellate Assistant Commissioner was the subject-matter of challenge before the Tribunal. The challenge failed. The matter has thus become final. The assessee could not be allowed to challenge it collaterally. I am unable to appreciate the submissions vigorously urged at the Bar. It cannot be disputed that the Appellate Assistant Commissioner had ordered that the "deemed income" was not the income of the Hindu undivided family, but it had to be assessed as income of the assessee, the "individual". Learned counsel for the assessee did not dispute that the Appellate Assistant Commissioner had that jurisdiction apart from the fact that that order had been complied with. That direction having been made, the second proviso to Section 34(3) would come into effect. The terms of this proviso read as follows :

"Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or reassessment may be made, shall apply to a reassessment made under Section 27 or to an assessment or reassessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under Section 31, Section 33, Section 33A, Section 33B, Section 66 or Section 66A."

21. The direction to reassess being invulnerable, the challenge to the jurisdiction lacks substance. The lifting of the bar of limitation is a natural consequence of making a direction under Section 31. The submission would have substance, if the power of the Appellate Assistant Commissioner to issue directions to the Income-tax Officer in terms of Section 31(3)(b) had been questioned. That is not the position here. The Appellate Assistant Commissioner had directed as follows in his order dated February 22, 1961.

"The Income-tax Officer is, however, directed to take action under Section 34 read with Section 31 for assessing this income in the hands of the registered shareholder for the relevant year. He is entitled to do so under the second proviso to Sub-section (3) of Section 34."

22. The above direction was upheld by the Tribunal in its order dated January 10, 1962, in I.T.A. No. 1942 of 1961-62. The objection of the assessee seems to be to the last sentence in the order of the Appellate Assistant Commissioner quoted above where it was said that the Income-tax Officer would be entitled to assess in terms of the second proviso to Sub-section (3) of Section

34. There would have been no difference in the legal position, even if that sentence had not been there. The Appellate Assistant Commissioner was only setting down the law in terms of the Act. Even if that sentence had not been there, the Income-tax Officer in terms of Section 34(3), second proviso, would be entitled to initiate proceedings under Section 147 for reassessment of the assessee. The direction was a sequel to the stand of Jhari Ram Bhadani, the karta, that the sum in question was not the income of the Hindu undivided family. The stand of the karta of the Hindu undivided family having been accepted by the Appellate Assistant Commissioner, the rest would be a natural concomitant of the acceptance of the stand of the assessee as karta. The position in law is absolutely clear and, therefore, it would be futile to encumber this judgment by reference to the authorities on this point. In my view, there can be no doubt that the Appellate Assistant Commissioner was competent to give a finding and a direction to assess the individual which would lift the bar of limitation under the second proviso to Section 34(1).

23. The next question is whether the Tribunal was right in holding that the action under Section 147(b) had not become barred at the point of time when the Appellate Assistant Commissioner gave directions ? This question again falls down to the power of the Appellate Assistant Commissioner to issue necessary directions. Section 147 is exactly the same as Section 34 in its content. Whatever could be done in terms of Section 34 of the old Act, could be done under Section 147 of the new Act. It is true that the direction of the Appellate Assistant Commissioner was made four years after the order of the assessment of the individual. But here was a case where while hearing the appeal of the Hindu undivided family, a direction had been made. It cannot be disputed that the Appellate Assistant Commissioner could give such a direction. If he had the jurisdiction to make such a direction, the question of bar of time is meaningless. The direction had been made on February 22, 1961, under the 1922 Act and had been made in terms of Section 31. The new Act came into force on April 1, 1962. As a sequel to the direction, if the 1961 Act had not come into being, action could have been taken under Section 34. The question thus is whether action could have been taken under the new Act or not. The provision equivalent to Section 34 is Section 147 and the provision equivalent to the second proviso to Section 34(3) is Section 153(3) of the new Act. Sub-section (3) of Section 153 covers the same ground as the second proviso to Section 34(3). The question is whether action under Section 147(b) had become barred when the direction had been made. The direction had been made on February 22, 1961, in terms of the old Act under Section 34 and not under Section 147(b). The Income-tax Officer took action under Section 148 on October 15, 1965. Return was filed in answer to the notice, on protest, on March 16, 1970, showing income of Rs. 1,87,038. In terms of Section 153(2), the reassessment could not be done after the expiry of four years from the end of the assessment year in which notice under Section 148 was served. Apparently in terms of Section 153(2), steps for reassessment ought to have been taken on or before March 31, 1965. It was, in fact, taken on October 15, 1965. In terms of Section 153(2), it was certainly beyond time, but

precisely for such a situation, Section 153(3) was enacted which reads as under:

"(3) The provisions of Sub-sections (1) and (2) shall not apply to the following classes of assessments, reassessments and recomputations which may, subject to the provisions of Sub-section (2A), be completed at any time--...

(ii) where the assessment, reassessment or recomputation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under Section 250, 254, 260, 262, 263 or 264 or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act;..."

24. Thus the bar of limitation for initiating proceedings under Sections 147 was lifted. In that view of the matter, there can be no question of the matter having become barred by time when the Appellate Assistant Commissioner gave the direction.

25. The last question referred at the instance of the assessee is whether the Tribunal was right in holding that action under Section 34(1)(a) of the 1922 Act had been taken in the name of the deceased and no such proceeding initiated under Section 34 against the assessee was pending at the commencement of the new Act ? It was submitted that a proceeding having been initiated against Jhari Ram Bhadani, another proceeding under Section 147 of the Act could not be initiated. In substance, two parallel proceedings are not permitted by law. Thus contended Mr. K. N. Jain for the assessee. The submission on behalf of the assessee is that a proceeding under the old Act which had been initiated under Section 34 was pending when the new Act came into force. That was the proceeding which should have been taken to its logical conclusion and, therefore, the present proceeding under Section 147 was illegal and without jurisdiction. The submission is untenable. The fact of initiation of a proceeding under Section 34 of the 1922 Act has not been mentioned by the Income-tax Officer. The Appellate Assistant Commissioner did state that a proceeding under Section 34 had been initiated. According to the Appellate Assistant Commissioner, the proceeding under Section 34(1)(a) had been initiated on August 11, 1961. No return was filed by the late Jhari Ram Bhadani who had died long before that date. No return having been filed, the Income-tax Officer issued a notice under Section 22(4) on January 7, 1965, but did not complete the proceeding for assessment. Before the proceeding under Section 34(1) was closed or completed, the Income-tax Officer took parallel action under Section 148 by issuing a notice to Surendra Kumar Bhadani as legal heir of Jhari Ram Bhadani under Section 147(a) on October 15, 1965. From these facts, it will be seen that the proceeding under Section 34(1)(a) was initiated against Jhari Ram Bhadani who was dead long before the initiation of the proceeding. The proceeding was thus against a dead person. It does not require much argument to appreciate that a proceeding against a dead person is a nullity. It must be deemed to be non est in the eye of law. That is why the Tribunal, in its order at paragraph 15, held that although, as a

fact, a proceeding under Section 34(1)(a) had been initiated against the deceased, Jhari Ram Bhadani, that was no proceeding in the eye of law. I am in complete agreement with the view of the Tribunal. That proceeding must be deemed to be non est. The inescapable conclusion must be that no proceeding under Section 34 was pending on April 1, 1962, when the new Act came into force. I am unable to find any error in the conclusion of the Tribunal in this behalf. A proceeding may be bad or barred by limitation, but it is invalid. A proceeding against a dead person is no proceeding. It has no existence in the eye of law.

26. Lastly, learned counsel for the assessee submitted that the proceeding under Section 34 of the 1922 Act was initiated and notice was issued to Surendra Kumar Bhadani, legal heir of the late Jhari Ram Bhadani. In support of this fact, Mr. K. N. Jain showed to us a photostat copy of a notice purporting to be of some notice issued to Surendra Kumar Bhadani. I regret, I am unable to take any notice of the document shown to us. This court is not permitted to take additional evidence. The orders of the Appellate Assistant Commissioner and the Tribunal do not show that any notice was issued to Surendra Kumar Bhadani in any proceeding under Section 34 of the 1922 Act on August 11, 1961, The order of the Appellate Assistant Commissioner shows that the proceeding was initiated against Jhari Ram Bhadani. The notice must, therefore, have been issued in that very name. In that view of the matter, there is no scope for holding that a proceeding under Section 34 of the 1922 Act was pending on April 1, 1962, as also in 1965 when the present proceeding was initiated.

27. There is yet another aspect of the matter. In *Atma Ram Bindra Ban v. CIT* [1960] 39 ITR 418 (Punj), a Division Bench of the Punjab High Court (Delhi Bench) held that Section 34(1) places no limit on the number of notices of reassessment that may be issued so long as they are within the time-limit specified in that section. To quote the words of Chopra J. (p. 420):

"There can be no restriction as to the number of proceedings that can be taken to reopen the assessment where it is found that any income of the assessee has for one reason or another escaped assessment. Similarly, there can be no bar to a fresh notice being given even though proceedings on a previous notice are still pending and have not been finally disposed of."

28. Further, the decision of the Supreme Court in *CIT v. K. Adinarayana Murthy* [1967] 65 ITR 607 (SC), supports the proposition that a notice under Section 34 may be issued while another proceeding under Section 34 for reassessment may be pending. In this case, the facts were that the assessee had been assessed as "individual" for the assessment year 1949-50. For the assessment year 1954-55, the Income-tax Officer took the status of the respondent to be that of an "individual". He issued a notice under Section 34 to reopen the assessment for the assessment year 1949-50 in the status of an "individual". The respondent, however, filed a return in the status of a Hindu undivided family. While the reassessment proceeding was pending, the Appellate

Assistant Commissioner in an appeal against the assessment for the year 1954-55 held that the status of the respondent was that of a Hindu undivided family. Thereafter, the Income-tax Officer issued a fresh notice under Section 34 to reassess the income of the respondent for the year 1949-50 as a Hindu undivided family. A second return was duly filed pursuant to the second notice and the Income-tax Officer made an assessment accordingly. Both the notices were in identical terms. The question was whether the assessment made pursuant to the second notice and the second return, ignoring the first return filed pursuant to the first notice, was valid. The Supreme Court laid down the law by stating that since the correct status of the respondent was that of a Hindu undivided family, the first notice issued in the status of individual was illegal and without jurisdiction and, therefore, the Income-tax Officer was entitled to ignore the return filed by the assessee as non est in law. The second notice was held to be valid and the return filed in response to that notice and the assessment thereon were valid. Applying the law laid down by the Supreme Court to the instant case, the position which emerges is, assuming that a proceeding under Section 34 had been initiated and during its pendency a proceeding under Section 147 was initiated on the basis of the law laid down by the Supreme Court in CIT V. K. Adinarayana Murthy [1967] 65 ITR 607 (SC), it must follow that the Income-tax Officer and the Tribunal were within their rights in ignoring the first proceeding and proceeding to reassess on the basis of the proceeding initiated under Section 147. They were entitled to treat the first proceeding as non est. For those reasons, I am of the view that the Tribunal was right in holding that no proceeding under Section 34(1)(a) was pending at the commencement of the new Act.

29. The issues involved in these references are simple. The assessee claimed that an item of income was the income of Jhari Ram Bhadani, the "individual", and not of Jhari Ram Bhadani and sons, Hindu undivided family. The stand of Jhari Ram Bhadani was accepted by the Appellate Assistant Commissioner. The Appellate Assistant Commissioner directed reassessment of Jhari Ram Bhadani, the "individual", so far as the "deemed income" had escaped assessment. The assessee agitated the jurisdiction of the Appellate Assistant Commissioner to issue the direction to reopen the assessment of Jhari Ram Bhadani, the "individual". Action was taken in terms of the direction. The Appellate Assistant Commissioner had ample jurisdiction to direct reopening of the assessment. The Tribunal rejected the stand of the assessee in regard to the jurisdiction to issue direction for reassessment of the assessee. The power to issue direction thus became barred by the principle of res judicata. Independent of the principle of res judicata, the power of the Appellate Assistant Commissioner to issue the direction cannot be doubted. The direction having been made, the bar of limitation contained in the second proviso to Section 34(3) and Section 153(3) is lifted. There is no time-limit for initiating reassessment proceedings. The time taken in initiating the reassessment proceeding under Section 147 after the direction had to be excluded. The lifting of the bar of limitation was not an arbitrary act of the Appellate Assistant Commissioner. It had legal sanction. Even if the Appellate Assistant Commissioner had

not observed that the Income-tax Officer would be entitled to do so under the second proviso to Sub-section (3) of Section 34, even then the Income-tax Officer would be within his rights to initiate reassessment proceeding either under Section 34 or under Section 147. The bar got lifted not by the enunciation of the law in that direction, but because of the force of the statute. The proceeding initiated against Jhari Ram Bhadani, the deceased, in February, 1961, under Section 34(3) was non est, as it was against a dead person. Being non est, it is obvious that there was no proceeding pending when the instant proceeding was initiated in October, 1964. These, in substance, cover the entire gamut of the controversy. The action initiated under Section 147(a) was no bar to treating it as a proceeding under Section 147(b). Once the bar of limitation was lifted, there was no other bar to it. The assessee, in short, has no case to agitate.

30. To sum up, my conclusions in regard to question No. 1, referred to at the instance of the Revenue is that the Tribunal was correct in holding that the proceeding should have been under Section 147(b) and not under section 147(a). My answer in regard to question No. 2, referred to at the instance of the Revenue, however, is that the initiation of proceeding under Section 147(a) and not under Section 147(b) did not make any difference in passing the order of reassessment. The Tribunal was thus not justified in cancelling the proceeding on that ground. In regard to question No. 3 at the instance of the Revenue, it must be held that the Tribunal was not justified in cancelling the order under Section 154 of the Act.

31. In regard to the questions referred to at the instance of the assessee, my view on the first question is that the Appellate Assistant Commissioner was competent to give a finding and direction to the Income-tax Officer to assess the "individual", so as to lift the bar of limitation under Section 34(1), second proviso. The Tribunal was right in that behalf. In regard to question No. 2 at the instance of the assessee, my view is that the Tribunal was right in holding that action under Section 147(b) had not become barred at the point of time when the Appellate Assistant Commissioner gave the direction. In regard to question No. 3, the Tribunal was right that since the proceeding was against a dead person, there was no proceeding at the commencement of the new Act.

32. For the reasons stated above, all the questions referred at the instance of the Revenue and the assessee are decided in favour of the Revenue and against the assessee. The references are thus disposed of with costs. Hearing fee Rs. 500 (Rupees five hundred) payable by the assessee to the Revenue.

33. Let a copy of this judgment be transmitted the Income-tax Appellate Tribunal in terms of Section 260 of the Income-tax Act, 1961.

Nazir Ahmad, J.

34. I agree.

