

(1969) 72 ITR 59

Bombay High Court

Case No: Income-tax Reference No. 8 of 1963

Commissioner of
Income Tax, Bombay

APPELLANT

Vs

Balvantrai S. Jain

RESPONDENT

Date of Decision: Nov. 22, 1968

Acts Referred:

Income Tax Act, 1922 " Section 34(1)

Citation: (1969) 72 ITR 59

Hon'ble Judges: Kotwal, C.J; V.S. Desai, J

Bench: Division Bench

Advocate: G.N. Joshi, R.J. Kolah, for the Appellant;

Judgement

Kotwal, C.J.

Though the question referred to us has been couched in somewhat wide language as follows :

Whether, on the facts and in the circumstances of the case, the proceedings initiated u/s 34 of the Indian Income Tax Act for the assessment year

1944-45 were valid ?

the short point that we have to decide in this reference is whether, on the facts and in the circumstances of the case, there was an omission or

failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the year in question. The assessment

year under reference is the year 1944-45 and the previous accounting year was the year ending the Samvat year 1999 (from 9th November,

1942, to 9th November 1943).

2. Balvantrai S. Jain was doing business as a contractor and was being assessed as an individual. In the year 1941 he joined a partnership firm

known as Tejoo Kaya & Co., Bhavnagar Works. When the assessee made his return for the assessment year 1942-43 the assessee filed full

details regarding the said partnership in Tejoo Kaya & Co. In the form of return for that year Part III was a part requiring the disclosure of

information in cases where the assessee was a partner in a firm or firms. In 1942-43 details about his partnership with Tejoo Kaya & Co. were

disclosed but when the assessee made his returns for the assessment years 1943-44 and 1944-45 Part III was not filed up. Though it has been

stated in the statement of the case that in those years ""the relevant portion having been scored out"" Part III was not filed up, what really appears to

be the case is that in those years ""the relevant portion having scored out"" Part III was not filled up, what really appears to be the case is that the

assessee entered against the space provided in Part III the word ""not applicable"" and drew a line across that Part. A similar return for the

assessment year 1944-45 was filled up by the assessee on 11th May, 1945 though it bears the date 24th April, 1945. Before and after this return

for 1944-45 was made, a firm of chartered accountant on behalf of the assessee wrote two letters, one on 8th June, 1944 pertaining to his returns

for the assessment years 1941-42 and 1942-43 and the other dated 24th February 1948, for the assessment years 1943-44 and 1944-45. The

contents of these have been strongly relied on in the Income Tax Officer and the Appellate Assistant Commissioner to show the alleged omission

or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. We will advert to these letters shortly.

The assessment on the assessee for the year 1943-44 was made on 25th February, 1948, and for the assessment year 1944-45 on 3rd January,

1949.

3. Till the latter date the assessment of the firm, Tejoo Kaya & Co., for the assessment year 1944-45 had not been completed. For the assessment

year 1943-44 the department accepted the assessee's claim of loss of Rs. 54,000 as per his letter dated 24th February, 1948. Similarly, for the

assessment year 1944-45 the assessment was completed without taking into account any share of the profit from the partnership.

4. The partnership came to be assessed for the assessment year 1944-45 on 17th December, 1949, and the assessee's share of the profits in the

firm was determined at Rs. 93,895.

5. Obviously, since this amount of Rs. 93,895 had been included in the assessee's for the year 1944-45, action was taken u/s 34(1) (a) of the

Income Tax Act and notice was issued against the assessee on 24th January, 1950. In compliance with this notice the assessee filed his return on

26th April, 1950, but before and after the return two letters came to be written on behalf of the assessee to the Income Tax Officer objecting to

the issuance of the notice and putting forward his case to show that there was no omission or failure on his part to disclose the material facts.

6. Now, before we turn to state what were the findings of the tax authorities and the Tribunal it will be convenient at this stage to refer to the letters

which the firm of chartered accountant on behalf of the assessee wrote. On 8th June, 1944, even prior to the date (May 11, 1945), when he made

his return for the assessment year 1944-45, it was stated on behalf of the assessee with reference to the assessment years 1944-45, it was stated

on behalf of the assessee with reference to the assessment years 1941-42 and 1942-43 :

We have been further asked to state that for part of S. Y. 1997 Mr. Balwantraji Jain was a partner with Messrs. Tejoo Kaya & Co., New

Nagpada, Bombay, in their works at Bhavnagar. No profits had been received out of this partnership in 1997 or later, as a dispute is going on in

connection with the affairs of this partnership. Hence no income has been shown or no loss has been claimed in connection with this partnership.

Our client reserves the right to claim the correct figure of loss as may be ascertained from the file of Messrs. Tejoo Kaya.

7. After the return for the assessment year 1944-45 was made the assessee's chartered accountants wrote on 24th February, 1948, a letter with

reference to the assessment years 1943-44 and 1944-45 in which they stated :

With reference to the above assessments, we have the honour to refer you to our letter of the 8th June, 1944 wherein we have stated that our

client was a partner with Messrs. Tejoo Kaya & Co., New Nagpada, Bombay, in their works at Bhavnagar and that no profits have been

received by him at the time, as there was a dispute going on regarding the partnership affairs. The matter went to the High Court and the final

judgment has been given by the High Court that the partnership loss in Bhavnagar works came to Rs. 3,50,000 and that our client was held to be

an 8 annas partner in Bhavnagar Works. The loss would normally therefore work out to Rs. 1,75,000 but as per other terms of the agreement our

client had to pay Rs. 35,000 in cash and a credit balance of Rs. 19,000 standing in the books of Messrs. Tejoo Kaya & Co. was also

appropriated towards meeting his share of loss as per the High Court judgment. Thus our client has actually suffered and paid a loss of Rs. 35,000

plus Rs. 19,000 i.e., Rs 54,000, as his share of loss in this partnership and we are claiming this loss against 1943-44 assessment and the return

filed is, therefore, subjected to this claim. "" With the letter the assessee's chartered accountants enclosed a copy of the judgment of the High

Court. It appears that a suit had been filed in the High Court for accounts of the partnership and that suit came to be settled between the parties

and, by the terms of settlement, the assessee was found liable to share the loss sustained by the partnership to the extent of Rs. 54,000, though the

total loss of the partnership, as ascertained by the High Court, amounted to Rs. 3,50,000.

After the notice u/s 34(1) (a) was issued on 24th January, 1950, the assessee, while making his return, also wrote a letter dated April 24, 1950,

objecting to the notice and the proceedings commenced against him. The assessee's accountants pointed out that the Income Tax Officer had been

fully acquainted with the existence of the assessee's partnership with Messrs. Tejoo Kaya & Co. in the course of the previous assessment

proceedings and referred to the two letters dated 8th June, 1944, and 24th February, 1948. They alleged that the department was taking recourse

to section 34(1) (a) simply because the reopening of the case u/s 34(1) (b) had already become barred by time. They alleged that the assessee had

disclosed all the material facts which were necessary for the assessment year 1944-45 and they had been disclosed fully and truly. Therefore, there

was no case for taking action u/s 34(1) (a) or (b). The Chartered Accountants also referred to the decree of the High Court which had been put

on record and urged that the assessee had paid half the loss under that decree and, therefore, it was incorrect to say that he had derived any

income from the partnership or had been under-assessed to any extent. A further letter to the same effect was addressed to the Income Tax

Officer on the 24th September, 1952, but the Income Tax Officer overruled the assessee's objections and completed the assessment u/s 34(1)

(a). The Income Tax Officer held that "the assessee had failed to disclose in the return of income on the basis of which the original assessment was

completed the full and true material facts necessary for his assessment for that year".

8. In appeal to the Appellate Assistant Commissioner, that officer considered the facts and circumstances, particularly the two letters dated the 8th

June, 1944, and the 24th February, 1948, and the fact that the assessee had in Part III of the return of income for the year 1944-45 stated "not

applicable". In view of these facts he held that "technically the full facts were not disclosed by the appellant for that year and the Income Tax

Officer was legally justified in taking recourse to action u/s 34(1) (a) to reopen, the assessment on the ground that the full particulars were not

supplied and that the appellant did not disclose that he had share in the profits of the firm of M/s. Tejoo Kaya & Co. at least for the relevant year

under consideration." As regards the assessee's letter of the 8th June, 1944, he had that that letter was not in connection with the assessment

proceedings of the relevant year (1944-45) and that "the Income Tax Officer cannot be expected to keep in his mind information disclosed in the

earlier assessment proceedings." As regards the letter dated 24th February, 1944, the Appellate Assistant Commissioner held that the assessee

had shown in that letter a loss "while in reality this worked out to a profit". Therefore, it could not be said that "the information given by the

appellant's letter dated the 24th February, 1948, even could be said to represent the true fact." He held that under all these circumstances "the

Income Tax Officer was technically correct in taking recourse to action u/s 34(1) (a)..." because the Income Tax Officer was under the impression

that the share of the appellant in the said firm of Tejoo & Co. was a loss and since there is no provision for allowance of the share of loss from an

unregistered firm in the assessments of the partner the said loss was not taken into account.

9. The assessee took the matter further in appeal to the Tribunal and by its order dated 8th March 1960, under reference, the Tribunal reversed

the finding of the Income Tax Officer and the Appellate Assistant Commissioner. The Tribunal held that there was no failure on the part of the

assessee to disclose fully and truly all material facts necessary for the assessment and that section 34(1) (a), therefore, could not be invoked. They

pointed out that it was true that the assessee in filling up Part III of the return had said that it was not applicable and thereby perhaps conveyed an

impression that he was not a partner in any firm, but the return did not stand alone. The assessee had written the letter dated 24th February, 1948,

through his chartered accountant and in that letter he had clearly disclosed the existence of the partnership and had pointed out that he had incurred

a loss. The Tribunal held : "In the face of this letter enclosing a copy of the High Court order, it becomes difficult, if not impossible, to say that the

assessee had failed to disclose fully and truly all material facts.

10. Counsel on behalf of the department has attacked these findings of the Tribunal and has urged that the conclusion which the Income Tax

Officer and the Appellate Assistant Commissioner had reached upon the material before them could not have been set aside by the Tribunal upon

a mere re-appreciation of the evidence. He has urged that, in the first place, the assessee in filing up Part III of the form when he made his return

was not only guilty of failing or omitting to state material facts but had positively misled the Income Tax Officer when he made the entry in the form

not applicable"" and scored out the blank space. So far as the letter of 8th June, 1944, is concerned he urged that it was only a letter pertaining to

the assessment years 1941-42 and 1942-43 and, therefore, could not be used by the assessee to show disclosure of material facts for the year

with which we are concerned, namely, the assessment year 1944-45. As regards the letter dated 24th February, 1948, he urged that, in fact and in

substance, that letter pertains to the year 1943-44 only and, therefore that letter cannot avail the assessee to show that he had disclosed the

material facts in the year 1944-45. Counsel also urged that the assessee persisted even in his letter objecting to the notice u/s 34(1) (a) in mis-

stating the fact, in so far as he has stated in both his letter dated 24th April, 1950, and the letter dated the 29th April, 1952, that he was not a

partner in the firm of Messrs. Tejoo Kaya & Co. Counsel sought to use these letters to show that the assessee was persisting in the

misrepresentation which he had initially made in his return for the year 1944-45.

11. Section 34(1) (a) requires it as a condition precedent to the action to be taken that the Income Tax Officer should have reason to believe that

by reason of the omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for his assessment for the year

in question, income, profits or gains have escaped assessment. There is no particular act or acts which have been specified as constituting an

omission or failure to disclose fully and truly all material facts, but the tax authorities have to come to a conclusion upon the totality of the facts and

circumstances whether there has been an omission or failure to disclose fully and truly the material facts. The words used moreover are ""material

facts"" and the Supreme Court has pointed out that what facts are material will differ from case to case. By the use of the word ""material"" the

assessee has been put under an obligation to disclose only the basic or primary facts and not all other facts which are not material. Besides, there is

a clear-cut distinction between material facts and mere inferences or conclusions drawn from the material facts, the material facts, as explained

above, have to be disclosed but not the conclusions or inferences : see Calcutta Discount Co. Ltd. v. Income Tax Officer, Companies District I,

Calcutta. At page 201 they held :

Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what

inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else - far less the

assessee - to tell the assessing authority what inferences, whether of facts or law, should be drawn. Indeed, when it is remembered that people

often differ as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessee must disclose what

inferences whether of facts or law - he would draw from the primary facts.

If from primary facts more inferences than one could be drawn, it would not be possible to say that the assessee should have drawn any particular

inference and communicated it to the assessing authority. How could an assessee be charged with failure to communicate an inference, which he

might or might not have drawn ?

12. Their Lordships then went on to consider the effect of the Explanation to section 34(1) and held that the Explanation has not the effect of

enlarging the section, by casting a duty on the assessee to disclose ""inferences"" - to draw the proper inferences being the duty imposed on the

Income Tax Officer. The same view was reiterated by their Lordships in a recent decision in Kantamani Venkata Narayana and sons v. First

Additional Income Tax Officer, Rajahmundry, where their decision in the Calcutta Discount company's case was affirmed and followed by them.

13. Now, what was the primary fact with the non-disclosure of which the assessee has been charged in the present case ? The primary fact that

had to be disclosed, in our opinion, was the fact that the assessee was a partner in the firm, Tejoo Kaya & Co. The Appellate Assistant

Commissioner has, on the other hand, suggested in the following paragraph that it was the non-disclosure of the profits. In paragraph 2 he has

stated :

As the Income Tax Officer was under the impression that the share of the appellant in the said firm of M/s. Tejoo Kaya & Co. was a loss and

since there is no provision for allowance of the share of loss from unregistered firm in the assessments of the partner, the said loss was not taken

into account. On all these circumstances I would think that the Income Tax Officer was technically correct in taking recourse to action u/s 34(1)

(a)....

14. Whether it was a profit or a loss was a matter of computation and, at the most, of drawing a certain conclusion from the facts. Indeed, this part

of the case made out in the Appellate Assistant Commissioner's order was not sought to be supported before us. The main argument has been that

the assessee suppressed from the Income Tax Officer the fact of his partnership with M/s. Tejoo Kaya & Co. and, therefore, got himself assessed

without the Income Tax Officer taking into account the profits of the partnership. It is only in that connection that great emphasis was laid upon the

statement of the assessee in Part III of the return that it was ""not applicable"".

15. Now, in the first place, the return must be read in the light of the letter which was written in order to explain the return itself, i.e., the letter

dated the 24th February, 1948. We may first dispose of the main contention on behalf of the department that this letter did not refer to the return

for the assessment year 1944-45 at all. We are unable to accept that contention for the simple reason that the assessee has at the very threshold of

the letter mentioned in the subject-heading of the letter ""1943-44 and 1944-45 assessment"". Therefore, obviously the letter was addressed to the

Income Tax Officer for the assessment year 1944-45 also. The letter proceeds to state that the assessee was a partner in Messrs. Tejoo Kaya &

Co. in their works at Bhavnagar and that no profits had been received by him at the time when the previous letter of 8th June, 1944, was written,

as there was a dispute going on regarding the partnership affairs. Then a reference is made to the suit in the High Court and to the fact that the final

judgment had been given by the High Court on 26th July, 1947. The letter proceeds to state that, according to this judgment, there has been a loss

in the Bhavnagar Works of Rs. 3,50,000 and that the assessee has been held to be an 8 annas partner in the Bhavnagar Works. Then it is sought

to be explained how the assessee has been liable for a loss of Rs. 54,000 and that, when he held a half share as ascertained by the High Court, the

loss would work out at Rs. 1,75,000. Next comes the sentence upon which great reliance has been placed on behalf of the department : ""Thus our

client has actually suffered and paid a loss of Rs. 35,000 plus Rs. 19,000, i.e., Rs. 54,000 as his share of loss in this partnership and we are

claiming this loss against 1943-44 assessment and the return filed is, therefore, subject to this claim"". On the date of this letter both the returns made

by the assessee for the assessment years 1943-44 and 1944-45 were pending disposal. The assessment had not been made. The assessment for

the year 1943-44 was made on 22nd April, 1948, and that for the year 1944-45 was made on 3rd January, 1949. Obviously the assessee had

addressed a letter apprising the Income Tax Officer of the fresh facts and the new development that had taken place as a result of the High Court

judgment for both the years. He has expressly stated that it was with reference to both the assessment years and we have already said that any fair

reading of this letter must lead to the conclusion that it was a letter written with reference to the assessment year 1944-45 also. We cannot,

therefore, merely brush aside this letter by saying that it only referred to the assessment year 1943-44 and that, therefore, it cannot be used to

show a true disclosure of facts for the assessment year 1944-45.

16. If this letter can be read as pertaining to the assessment year 1944-45, then there is no doubt that the assessee must be held to have disclosed

all the primary facts. It has been stated on behalf of the assessee in the letter that the assessee was a partner with Messrs. Tejoo Kaya & Co. Not

only that, but it has referred to a dispute regarding the partnership affairs and a suit filed in the High Court and decided by the High Court. The

letter has referred to the loss in the partnership but even the facts regarding the loss are not in the slightest degree incorrect. They are a true

representation of what the High Court had decided.

17. It has to be remembered that till that date the tax authorities had not touched the question of the profits of Messrs. Tejoo Kaya & Co. The firm

was only assessed on 17th December, 1949, and, therefore, the assessee could not state any other facts than those which were stated in the letter

so far as the profits or the loss of the partnership are concerned. Even assuming, therefore, that the statement regarding the loss or the profit was a

statement as regards a primary fact, still we can see nothing upon which it can be held that the assessee had omitted or failed to disclose fully and

truly the primary facts. As it happened, only because of the subsequent application of their minds to the income of the firm in December, 1949, the

department found that the assessee had made a profit of Rs. 93,295. On the date on which this representation was made, the representation was

fully true and it could not be said that there was any failure or omission to disclose fully and truly any material fact.

18. We have assumed so far in discussing the question that the statement as to the profit or the loss is a primary fact under such circumstances. We

rather think that it is a matter on which an inference is to be drawn by the department from the primary facts within the meaning of that expression

in the Calcutta Discount Company's case. After all, assessee who have done business do make returns of losses and the department on taking

accounts finds a profit, but for that reason alone it cannot be said that the assessee has failed to disclose a material fact fully and truly. If, upon

mere accounting, a different amount is found, it cannot be said that the assessee has failed or omitted to disclose a material fact. In this case,

however, that question, as we have shown, does not arise because the fact that there was a profit was fully unknown to the assessee and the

assessee, when he stated what was the result of the decision of the High Court, stated every fact which was in his possession and till that the every

fact which was wholly true.

19. If this letter gives the information, which on the face of it the letter furnishes to the department, we cannot understand how the Income Tax

Officer could possibly have been misled or even have misunderstood the entry which the assessee had made in his return in Part III ""not

applicable"". In order to understand the true import of that entry, it is necessary to see the circumstances as they existed at that time. The assessee

was having a dispute with the partnership as to whether he was a partner at all with Messrs. Tejoo Kaya & Co. That was the dispute before the

High Court. The High Court decided against him and held that he was a partner to the extent of 8 annas. When he made his return, however, the

judgment of the High Court was not out and, therefore, the assessee put down what was his case and what according to him he believed were the

true facts, namely, that he was not a partner. However, the moment that he was found to be a partner, he communicated that information to the tax

authorities and we have already shown that whatever was stated in that letter was strictly true upon the facts known till that date. The letter, in our

opinion, is clearly explanatory of the entry which the assessee made in his return and the statement in his return that Part III was ""not applicable

was true on the date on which it was made but, in the light of the subsequent decision of the High Court, the assessee by his letter, of 24th

February, 1948, attempted to explain why he had made that entry. If the Income Tax Officer had merely read the entry in the light of the letter, we

do not think that there would be any case made out for saying that the assessee had omitted or failed to disclose fully and truly any material facts.

20. Then we turn to the two letters which the assessee wrote after the notice u/s 34(1) (a) was served on him, namely, the letters dated 26th April,

1950, and 29th April, 1952. Counsel referred to the statement in the first of these letters in the penultimate paragraph as follows :

I also understand that the assessment of the firm of Messrs. Tejoo Kaya & Co., Bhavnagar Works, is the subject-matter of appeal. Without

prejudice to everything stated above, I don not admit that I was a partner in the firm of Messrs. Tejoo Kaya & Co., Bhavnagar Works, throughout

the continuance and finalisation of that works, as I left them in about May, 1942, whereafter the remaining partners continue to be partners and

therefore I would not be saddled with any liability in respect of that works for assessment or other purpose."" In the second letter the following

passage was relied on :

Apart from these, without prejudice to any of the above contentions, I submit that the attempt to charge me with the alleged profit from Bhavnagar

firm of Messrs. Tejoo Kaya & Co. are definitely bad and illegal inasmuch as I was not a partner in the relevant accounting period, nor at any

material time when the Income Tax proceedings against the said firm were started and completed. I ceased to be a partner in that firm in May,

1942, and therefore I cannot have anything to do with the Income Tax assessments of that firm for S. Y. 1999.

21. It was urged that even in 1952 the assessee was still saying that he was not a partner which shows his attitude which was calculated to mislead

the department.

22. In the first place, these are not letters which can be taken into account in determining whether the assessee was guilty of an omission or failure

to disclose fully and truly all material facts, for we must see the position as it existed on the date on which he was under a duty to disclose fully and

truly the material facts. These letters were written in 1950 and 1952 by which time the assessment for the year 1944-45 was completed. It was

completed long before on 3rd January, 1949. It cannot be said, therefore, that any recitals in these letters amounted to failure to disclose fully and truly the material facts.

23. But, in the second place, we may say that both the above paragraphs are carefully worded and both are prefaced by the expression ""without

prejudice to everything stated above"" or ""without prejudice to any of the above contentions"". Once a party makes a statement which he says is

without prejudice, we do not think that, in fairness to him, it can be used against him. It is open to the department to disregard the statement when

he prefaces it with the words ""without prejudice"" and to tell him that he cannot make a statement ""without prejudice"", but so long as that statement

is there, we do not think that, in fairness to him, it can be used against him. Thirdly and once again we may emphasise that after the disclosures

which the assessee had already made in his letter of the 24th February, 1948, and by the furnishing of the copy of the High Court judgment, we not

see how the assessee can be charged with omission or failure to disclose the material facts. Even according to the compromise before the High

Court, the firm was to be dissolved from 31st October, 1943. That, of Course, was a date agreed upon by the partners by way of a settlement

and cannot be said to be the actual date on which the firm was dissolved, but it was the assessee's case that it was dissolved in May, 1942, and all

that he has recorded in the passage to which we have referred above is that fact. In other words, in both these passages the assessee was merely

putting forward what was his case and what he believed to be the true case. At any rate there cannot be any misrepresentation or omission or

failure on his part to disclose all the material facts fully and truly when he had already disclosed the fact of the partnership and the fact of the

decision given by the High Court.

24. No doubt, the firm, Messrs. Tejoo Kaya & Co. was assessed on 17th December, 1949, and it is urged that at least thereafter he should have

known what was the decision and could not have made these statements. There also it appears that the assessment of Messrs. Tejoo Kaya & Co.

was an ex parte assessment and the assessee had not been noticed to appear. Therefore, it can hardly be said that what was revealed in that

assessment was known to the assessee. We do not think that the statements in the two letters of 26th April, 1950, and 29th April, 1952, affect the

issue at all, nor do we think that they contain any mis-statements of fact or amount to an omission or failure on the part of the assessee to disclose

fully and truly any material fact.

25. That the mere failure to fill up part of the Income Tax return cannot amount to a failure or omission to disclose the primary facts has been

decided in a recent decision of the Calcutta High Court in Sudhir Kumar Bhose v. Income Tax Officer. This court has also taken the view that it is

not in any way an omission to fill in a return that would amount to failure to disclose fully and truly the material facts : see D. R. Dhanwate v.

Commissioner of Income Tax. Therefore, the mere crossing out of Part III of the return would not bring the assessee within the mischief of the

section. We have already explained what is the effect, in our opinion of his simultaneously writing in Part III the words ""not applicable"". These

words, if read with the explanatory letter which the assessee wrote on 24th February, 1948, show that the facts were truly stated.

26. The profits in this case, if any, for which the assessee became liable were, as we have said, only ascertained when the assessment of the firm of

Messrs. Tejoo Kaya & Co. was made on 17th December, 1949. Therefore, till that date, the assessee cannot be charged with omission or failure

to disclose fully and truly that fact (assuming that it was a primary fact) in his return made much earlier on 11th May, 1945. Even the assessment

for 1944-45 was completed on 3rd January, 1949, before the firm and its profits ever came to be assessee. A person cannot be said to have

omitted or failed to disclose a fact if he had no knowledge of that fact. The words ""omission or failure to disclose fully and truly all material facts"" in

clause (a) of section 34(1) of the Income Tax Act cover only the case where the assessee knowing all the material facts does not mention them

fully and truly, in other words, where he deliberately withholds information. See P. R. Mukherjee v. Commissioner of Income Tax. The same view

has been taken in M. O. Thomakutty v. Commissioner of Income Tax. Having regard to the circumstances of the present case, the decision in that

case is some what instructive. In the latter case the assessee had for the assessment year 1948-49 made a return of his foreign income at an

estimated Rs. 40,000 as till that date the accounts of his foreign transactions had not been closed. The Income Tax Officer made the assessment

on 6th February, 1949, estimating the total foreign income provisionally at Rs. 50,000. Later on, it turned out that the foreign income was assessed

at Rs. 1,02,511 on the 13th March, 1954, and, therefore, the Income Tax Officer served a notice u/s 34 on the 23rd March, 1957, to reassess

the assessee and he made a fresh assessment on the basis of the foreign income being Rs. 1,02,511. It was held that there was nothing to show

that the assessee had deliberately given a wrong estimate of his income and, therefore, there were no circumstances justifying the application of

section 34(1) (a). The circumstances here are very much the same. The assessee did not know what his profits in Messrs. Tejoo Kaya & Co.

were. In fact upon such information as the assessee had till the date he made his return and even till the date on which he was assessed, there was

a loss and the assessee, therefore, cannot be charged with suppression of a material fact if he did not disclose that he had a profit from the firm, for

the profit has not been ascertained and he had no knowledge that there had been a profit at all until 17th December, 1949, when the firm was

assessed. Much the same view has been taken by the Madras High Court in E. M. Muthappa Chettiar v. Commissioner of Income Tax.

27. On the whole, therefore, we are satisfied that the decision of the Tribunal was a correct decision and that the assessee has not been guilty of

any omission or failure to disclose fully and truly any of the material facts or the primary facts necessary for his assessment for the year in question.

We may add here that it was an additional argument on behalf of the assessee having regard to the facts and circumstances here and, assuming that

there was any omission or failure on the part of the assessee, that the omission or failure as such had not occasioned the escapement of income but

the escapement of income was due to the mere fact that the firm of Messrs. Tejoo Kaya & Co. was not assessed for a long time, at least not until

the assessments of the assessee were completed. The assessment of the assessee for the year 1944-45 was completed on 3rd January, 1949, and

the profits of the firm, Messrs. Tejoo Kaya & Co., were assessed for the same year on 17th December, 1949. In this respect Mr. Kolah had

referred to a decision in Bhanji Lavji v. Commissioner of Income Tax. However, upon the view that we take, it is unnecessary to decide this

further question. We are of the opinion that the Tribunal correctly decided the case. We answer the question referred in the negative. The

Commissioner will pay the costs of the assessee.

28. We may also at this stage mention that in the course of the arguments before us counsel for the assessee stated that, so far as the profits of

Messrs. Tejoo Kaya & Co. are concerned, the Income Tax Investigation Commission has passed an order expressly exonerating the assessee

from any tax liability for the profits of Rs. 93,895 and that in the view of that finding which is plenary, these proceedings and the reference made

were infructuous. Since we have decided the matter in favour of the assessee, we are not called upon to say anything on this point.