
(1964) 03 BOM CK 0010

Bombay High Court

Case No: Misc. Application No. 143 of 1963

National Rayon
Corporation Ltd.

APPELLANT

Vs

G.R. Bahmani, Income
Tax Officer, Companies
Circle I (3), Bombay

RESPONDENT

Date of Decision: March 19, 1964

Acts Referred:

- Income Tax Act, 1922 - Section 35

Citation: (1965) 56 ITR 114

Hon'ble Judges: Y.S. Tambe, J; S.P. Kotwal, J

Bench: Division Bench

Advocate: N.A. Palkhivala, for the Appellant; G.N. Joshi, for the Respondent

Judgement

Tambe, J.

This is an application under article 226 of the Constitution of India wherein the petitioner, National Rayon Corporation Ltd., a public limited company, seeks to get quashed by a writ of certiorari the order made by the Income Tax Officer, Company Circle I(3), Bombay, the respondent hereto, on the 29th of January, 1963, in exercise of his powers u/s 35 of the Indian Income Tax Act, 1922 (II of 1922) (hereinafter called "the Act").

2. Facts in brief are : In the assessment year 1956-57, the previous year being calendar year 1955, the Income Tax of the assessee-company on its total income was computed at nil and the previous loss was ordered to be carried forward. The assessment order for the assessment year 1956-57 was made on February 17, 1958. In the previous year relating to the assessment year 1956-57, however the petitioner-company had declared dividends amounting to Rs. 15,77,340 on its ordinary subscribed share capital of Rs. 1,57,71,400. The declared dividend was in excess of 6 per cent of the capital investment. In the assessment year 1957-58, the assessee-company was assessee on a total income

of Rs. 61,69,943. For the purpose of computation of super-tax from the aforesaid assessee income, a sum of Rs. 4,67,705 was deducted, being the capital gain included in the total income on which the corporation tax was not payable. Thus the total income was reduced to Rs. 57,02,238. According to the provisions of the Finance Act, 1957, the corporation tax payable by the petitioner-company at the rate of 50 per cent, was calculated at Rs. 28,51,119. From this amount, a rebate at the rate of 30 per cent, was granted to the petitioner company, it being entitled to grant of rebate according to the provisions of the Finance Act. The rebate granted at the rate of 30% amounted to Rs. 17,10,671.40 nP. In the previous year relevant to the assessment year 1957-58, the petitioner-company had declared dividends and it appears that the dividends declared exceeded 6% of the capital investment. Under the provisions of the Finance Act, therefore, from the aforesaid amount of rebate determined there was a withdrawal to the extent of Rs. 1,27,971.20 nP. The net corporation tax determined payable by the petitioner-company was thus determined at Rs. 12,68,418.80. The aforesaid assessment order was made on the 14th of February, 1959, . Now it may be noted that in the withdrawals from the rebate in the assessment for the year 1957-58 there was no withdrawal in respect of the excess dividend declared by the petitioner-company in the previous year relevant to the assessment year 1956-57. The respondent purporting to act under the provisions of section 35 of the Act pointed out to the petitioner-company by his notice dated the 12th of December, 1962, that as the income of the petitioner-company for the assessment year 1956-57 was nil, the question of reducing the corporation tax rebate did not arise in that year even though the dividend declared by the petitioner-company in the assessment year 1956-57 was an excess dividend. The respondent has stated in the notice that as no rebate was given about this, unabsorbed reduction in the rebate should have been carried forward and set off against the rebate admissible for the assessment year 1957-58 to the extent of Rs. 78,894.50 nP. As this mistake is apparent from the records, the petitioner-company was requested to let the respondent know within one week whether the petitioner-company had any objection for the same. The petitioner-company by its attorney's letter showed cause and sent a reply wherein the petitioner-company had, on various grounds, objected to any action being taken u/s 35. We need however state here only the ground relevant for the purpose of this petition. It was contended that action proposed to be taken was not one of rectification of a mistake but amounted to change of view previously taken. In short, the contention of the petitioner-company was that the action proposed to be taken by the respondent was not one which was permissible under the provisions of law. The respondent by his order dated the 29th of January, 1963, made u/s 35 of the Act rectified the assessment for the year 1957-58 by further withdrawing the corporation tax rebate by Rs. 78,894.50 and ordered that fresh demand notice to be issued to the petitioner-company to pay the said amount of Rs. 78,894.50. It is these orders of the respondent which the petitioner-company seeks to get quashed by this petition under article 226 of the Constitution of India.

3. Mr. Palkhivala the learned counsel for the petitioner-company contends that the aforesaid order made by the respondent on the 29th of January, 1963, is without jurisdiction. His argument is that the condition precedent for the exercise of jurisdiction u/s 35 of the Act is that there must be a mistake apparent from the record. It is only if there is a mistake apparent from the record, the respondent-income tax Officer would have jurisdiction to rectify that mistake in exercise of his powers u/s 35 of the Act. In support of his argument, Mr. Palkhivala referred us to decisions reported in the following cases :

(1) M. Subbaraja Mudaliar v. Commissioner of Income Tax, (2) M. L. Janardhanan Pillai v. Income Tax Officer, Alleppey, (3) Ramniklal Tribhovandas v. V. R. Amin, First Income Tax Officer, C-II Ward, Bombay, (4) Walchand 1(3), Bombay, (5) Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Triumale.

4. Mr. Palkhivala states that by the impugned order the respondent has corrected a mistake, which, according to the respondent, was apparent from the record. He has withdrawn from the rebate granted in the assessment year 1957-58 the sum of Rs. 78,894.50 nP. on the ground that under the provisions of the Finance Act a larger amount ought to have been withdrawn in view of the excess dividends paid by the petitioner-company in the previous year relevant to the financial year 1956-57. According to Mr. Palkhivala on a true construction of the Finance Acts of 1956 and 1957 the view taken by the respondent-income tax Officer is clearly erroneous. At any rate the position in law is not so clear or self-evident on a mere reading of the relevant provisions of the Finance Acts of 1956 and 1957. Therefore, the mistake, even if any, in the assessment of 1957-58 cannot be termed as "a mistake apparent from the record" and therefore the order of the respondent-income tax Officer was without jurisdiction. Mr. Palkhivala has advanced certain arguments on the construction of the provisions of these two Finance Act, namely, Finance Acts of 1956 and 1957, to which we will later advert. The question that first arises for determination is in what circumstances an Income Tax Officer is empowered to take action u/s 35 of the Act. On a reading of section 35 it is clear that it is a power given to the Income Tax Officer to rectify his assessment order or a refund order and is exercisable if there is any mistake apparent from the record (i.e., the record of the assessment order or refund order). The expression "mistake apparent from record" has been construed by this court in a decision in Walchand Nagar Industries Ltd. v. V. S. Gaitonde, Income Tax Officer, Companies Circle I(3), Bombay. Facts in that case in brief were that the assessee-company was carrying on business of manufacturing sugar. By an order dated the 30th November, 1954, the assessee-company was assessee to Income Tax. In the total tax levied on the assessee-company additional Income Tax was charged in respect of dividends distributed in excess of the specified limit mentioned in the Finance Act, 1950. The order of the Income Tax authorities was further confirmed by the Income Tax Tribunal. The orders of the Income Tax Tribunal were challenged before this court so far as it went in upholding levy of additional tax on excess dividend. Ultimately, the Supreme Court decided that a levy of tax on excess dividend was bad in law. The assessee-company then made an application to the Income Tax authorities u/s

35 for rectification of the assessment order by deleting from the calculation the amount levied by way of additional tax in respect of excess dividends. The assessee-company claimed a refund of that amount. The Income Tax Officer held that though the Supreme Court has held that the levy of Income Tax on excess dividend was bad in law, he could not rectify that mistake as that was not a mistake apparent on the face of the record. The assessee-company filed a writ application under article 226 of the Constitution of India. This court held that a mistake to be a mistake apparent from the record may be a mistake either of law or of fact, but it must be one, to point out which, no elaborate argument or debate is required. In *M. Subbaraja Mudaliar v. Commissioner of Income Tax* the provisions of section 35 were considered by Mr. Justice Rajagopala Ayyangar, as he then was. At page 230 of his judgment it is observed 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 u/s 35 is not confined to clerical or arithmetical mistakes. On the other hand it does not cover any mistake which may be discovered by complicated process of investigation, argument or proof."

5. The other decision relied upon by the learned council for the petitioner-company is in *M. L. Janardhanan Pillai v. Income Tax Officer, Alleppey*, and relates to the construction of section 44 of the Travancore Income Tax Act, the provisions of which practically correspond to the provisions of the Indian Income Tax Act. In this case also a similar view has been taken. In *Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale* their Lordships of the Supreme Court were considering the ambit of the powers of the High Court in issuing a writ of certiorari. Their Lordships held that a High Court can exercise this power where the order sought to be quashed is made without jurisdiction or in excess of jurisdiction or where it suffers from an error of law which is apparent from the face of the record. In considering what was an error of law apparent on the face of the record, their Lordships held : "An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions cannot be said to be an error apparent on the face of the record."

6. Mr. Joshi, the learned counsel for the revenue, also has referred us to two decisions in this connection and they are (i) *Hari Vishnu Kamath v. Syed Ahmad Ishaque* and (ii) *M. K. Venkatachalam, Income Tax Officer v. Bombay Dyeing and Manufacturing Co. Ltd.* The decision in *M. K. Venkatachalam, Income Tax Officer v. Bombay Dyeing and Manufacturing Co. Ltd.* relates to the powers of the Income Tax Officer to correct the mistake committed by him in granting interest in excess of the amount payable under the provisions of law. What had happened in that case was that the Income Tax Officer assessee the assessee company to tax for the assessment year 1952-53 by his assessment order made on October 9, 1952, in which he gave credit for Rs. 50,063 being interest at 2 per cent. on the tax paid in advance u/s 18A(5) of the Income Tax Act. The law was subsequently amended giving retrospective effect to it by making the law operative from April 1, 1952. According to the amended provisions the amount of interest taken into account was in excess. The Income Tax Officer, therefore, purporting to act u/s

35 of the Act called upon the assessee-company to pay back the excess amount received by the assessee-company by way of interest on the amount of advance payment of tax made by the assessee-company. The order of the Income Tax Officer was challenged in this court. This court held that the mistake which the Income Tax Officer purported to correct was not a mistake apparent on the face of the record within the meaning of section 35 of the Act and therefore he had no jurisdiction to correct it u/s 35. On appeal to the Supreme Court, their Lordships, reversing the decision of this court, held that it was a mistake apparent on the face of the record. Their Lordships observed that "a glaring and obvious mistake of law can be rectified u/s 35 as much as a mistake of fact apparent from the record."

7. The other decision is the oft-cited decision of their Lordships in *Hari Vishnu Kamath v. Syed Ahmad Ishaque* relating to the powers of the court in issuing a writ of certiorari. Their Lordships have pointed out that the powers of this court are limited and they are exercisable only when a court acting in its authority has acted without jurisdiction or in excess of its jurisdiction or its order discloses an error of law apparent on the face of the record. What is an error of law apparent on the face of the record is dependent on the facts of each case.

8. The ratio decided of these authorities, in our opinion, is that the jurisdiction of the Income Tax Officer to make an order of rectification u/s 35 of the Act depends upon the existence of a mistake apparent from the record. That mistake need not be a clerical or arithmetical mistake. It maybe a mistake of fact as well as a mistake of law. A mistake becomes a mistake apparent from the record when it is a glaring, obvious or self-evident mistake. However, it is not possible to define precisely or exhaustively what is an error apparent from the record. But it can be said with certainty that a mistake which has to be discovered by a long drawn process of reasoning or examining arguments on points where there may conceivably be two opinions, it cannot be said to be a mistake or error which is apparent from the record. Mr. Joshi, learned counsel for the revenue, concedes that he has no dispute with the aforesaid principle of law but, according to him, the mistake rectified by the Income Tax Officer is a mistake which is clear and obvious, having regard to the facts on the record and the provisions of the Finance Act, 1957. The arguments of counsel for parties center round the provisions (i) and (ii) of clause D of Part II of the First Schedule of the Finance Act of 1956, and the first two provisions of clause D of Part II of the First Schedule of the Finance Act of 1957. Before we refer to these provisions we may state that said clause "D" of the Finance Acts of 1956 and 1957 relate to the rate at which and the manner in which super-tax payable by an assessee-company was to be computed. It is not in dispute that the petitioner-company was a company entitled to the benefits of the provisions relating to the grant of rebate from the amount of super-tax payable by it under the provisions of the Finance Acts both of 1956 and 1957. The Finance Act of 1956 would govern the assessment of the petitioner-company for the assessment year 1956-57 and the Finance Act of 1957 would govern the assessment of the petitioner-company for the assessment year 1957-58. The portion relevant in the

aforesaid clause D of the Finance Act of 1956 is in the following terms :

PART II

Rates of super-tax

	Rate
D. In the case of every company - On the whole of total income	Six annas and nine pies in the rupee.

Provided that -

(i) a rebate at the rate of five annas per rupee of the total income shall be allowed in the case of any company which.....

Provided further that -

(i) the amount of the rebate under clause (i) or clause (ii), as the case may be, of the preceding proviso shall be reduced by the sum, if any, equal to the amount or the aggregate of the amounts, as the case may be, computed as hereunder : -

(a) on the amount.....	at the rate of two annas per rupee
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(b) in addition, in the case of a company referred in clause (ii) of the preceding proviso which has distributed to its share-holders during the previous year dividends in excess of six per cent. of its paid-up capital, not being dividends payable at a fixed rate -

On that part of the said dividends which exceed 6 per cent. but does not exceed 10 per cent. of the paid-up capital;	at the rate of two annas per rupee.
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On that part of the said dividends which exceeds 10 per cent. of the paid-up capital;	at the rate of three annas per rupee.
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(ii) where the sum arrived at in accordance with sub-clause (a) or sub-clause (b) or both the sub-clauses of clause (i).....or clause (ii), as the case may be, of the preceding proviso, only so much of the amounts -

(a)

(b) distributed as dividends,

as is sufficient, in that order, in accordance with the rates specified in clause (i) of this proviso, to reduce the rebate to nil, shall be deemed to have been taken into account for the purpose....."

The relevant provisions of paragraph D of Part II of the First Schedule of the Finance Act of 1957 are in the following terms :

Paragraph D

In the case of every company, -

Rates of super-tax

On the whole of the total income

Provided that, -

(i) a rebate at the rate of.....

(a).....

(b).....

Provided further that, -

(i) the amount of the rebate under clause (i) or clause (ii) shall be reduced by the sum, if any, equal to the amount or the aggregate of the amounts, as the case may be, computed as hereunder : -

(a) on that part of the sum arrived at in accordance with clause (i) of the second proviso to paragraph D of Part II of the First Schedule to the Finance Act, 1956, as is referable to that amount of..... dividends, as the case may be, which has not been deemed to have been taken into account, in accordance with clause (ii) of the said proviso, for the purpose of reducing the rebate mentioned therein to nil.	the whole amount of such part
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(b)

(c) in addition, in the case of a company referred to in clause (ii) of the preceding proviso which has distributed to its shareholders during the previous year dividends in excess of six per cent. of its paid-up capital, not being dividends payable at a fixed rate....."

Clause (c) then proceeds to state the different rates at which the reduction in rebate has to be computed.

9. It is the contention of Mr. Palkhivala that on a true construction of the aforesaid provisions of law, the Income Tax Officer was in error in reducing the amount of rebate granted to the petitioner-company in the assessment year 1957-58. According to him, even though the petitioner-company had declared dividends in the previous year relating to the assessment year 1956-57 in excess of 6 per cent of paid-up capital, the provisions of sub-clause (a) of clause (i) of the second proviso to paragraph D of Part II of the First

Schedule of the Finance Act, 1957, were not attracted inasmuch as in the previous year relating to the assessment year 1956-57 the petitioner-company's total income was found to be nil; there was, therefore, no question of calculating any tax or super-tax payable by the petitioner-company, and consequently no occasion also arose to prove to make an account for reducing the amount of rebate. At any rate, Mr. Palkhivala contends that the question is a debatable one and the view taken by the Income Tax Officer cannot be sustained without the aid of elaborate and detailed arguments. The mistake, even if any, therefore, was not an obvious mistake on the face of the record which could have been corrected in exercise of powers u/s 35 of the Act.

10. Mr. Joshi on the other hand contends that the position in law is clear and self-evident, and on a mere reading of sub-clause (a) of clause(i) of the second proviso to Paragraph D of Part II of the First Schedule to the Finance Act of 1957 and ascertaining the facts on record, it is self-evident that the order made by the Income Tax Officer is the one which rectifies an obvious error of law. The argument of Mr. Joshi is that in the year previous to the year relating to the assessment year 1956-57 the petitioner-company had declared dividends in excess of 6 percent of the paid up capital. The income assessee being nil in the year no amount had been deducted from the rebate in the assessment of that year in respect of these dividends. That was therefore clearly deductible under the provisions of sub-clause (a) of clause (i) of the second proviso to paragraph D. In the assessment year 1957-58 in reducing the amount of rebate the assessing officer had taken into account only the provisions of sub-clause (c) of clause (i) of the second proviso and not sub-clause (a). Sub-clause (a) is only a measure of computation of the amount of reduction of rebate. Thus, it was a mistake apparent on the face of the record. The Income Tax Officer had jurisdiction to rectify the said mistake in exercise of his powers u/s 35 of the Act. With respect to the learned counsel for the revenue, we find it difficult to accept the contentions raised by him. By the Finance Act, 1956, a new scheme has been enacted which was obviously intended for the purpose of acting as a deterrent on certain companies declaring dividends in excess of 6 per cent of its capital investment. The scheme, in short, was that when conditions of section 55 of the Indian Income Tax Act were satisfied super-tax was levied at a certain rate mentioned in the Finance Act. From the amounts so calculated, a rebate was granted to certain companies which satisfied certain conditions mentioned therein. The amount of rebate which was so calculated for the purpose of reducing the amount of super-tax was liable to be reduced if that company declared dividends in excess of 6 per cent of its paid-up capital in the previous year relevant to the assessment year. By the Finance Act, 1957, the scheme was further enlarged in respect of reductions in the amount of rebate. Sub-clause (c) of clause (i) of the second proviso of paragraph D of Part II of the First Schedule of the Finance Act of 1957 relates to the reduction of the amount of rebate by reason of declaration of dividends in excess of 6 per cent during the previous year relevant to the assessment year 1957-58. Sub-clause (a) of clause (i) of the second proviso to paragraph D Part II of the First Schedule to the Finance Act of 1957 relates to the computation or determination of the amount that has to be deducted from the rebate by reason of excess dividends

paid not in the previous year relevant to the assessment year 1957-58 but by reason of excess dividend paid in the previous year relevant to the assessment year 1956-57. No doubt, the said sub-clause (a) enacts a measure of computation of the amount by which the amount of rebate has to be reduced on this count but it also specifies the amount of excess dividend in respect of which the reduction has to be computed or calculated. When we turn to the said sub-clause (a) of the Finance Act of 1957, we find that it provides for reduction of the rebate by the sum computed on that part of the sum as is referable to that amount of dividends "which has not been deemed to have been taken into account in accordance with clause (ii) of the said proviso for the purpose of reducing the rebate mentioned therein to nil. "The computation of reduction under the said sub-clause (a) thus depends on the existence of an amount of dividend "which has not been deemed to have been taken into account" not in its general sense but "in accordance with sub-clause (ii) of the said proviso for the purpose of reducing the rebate mentioned therein. "The amount of reduction which the Income Tax Officer has determined under the impugned order is in respect of the entire amount of excess dividend declared in the previous year relevant to the assessment year 1956-57. The issue that arises is whether that entire amount of excess dividends an amount which has "not been deemed to have been taken into account in accordance with clause (ii) of the second proviso to paragraph D of Part II of the First Schedule of the Finance Act of 1956".

11. We have already reproduced the said clause (ii) of the second proviso to paragraph D of Part II of the First Schedule of the Finance Act of 1956.

12. Now clause (i) of the second proviso to paragraph D of Part II of the First Schedule to the Finance Act of 1956, inter alia, provides for computation of an amount for the purpose of reduction of the amount of rebate by reason of declaration of excess dividend. Clause (ii) of the second proviso comes into play when the Income Tax Officer finds that the "sum arrived at in accordance with clause (i) of this proviso exceeds the amount of the rebate arrived at in accordance with clause (i) or clause (ii), as the case may be, of the preceding proviso." Thus the said clause (ii) of the second proviso provides what the Income Tax Officer has to do in case he finds that the amount of reduction as calculated in respect of excess dividends paid is more than the amount of rebate. In such a case, it directs to take into account only so much of the amounts distributed as dividends "as is sufficient, in that order in accordance with the rates specified in clause (i) of this proviso, to reduce the rebate to nil." It is only that portion of the amount of dividends which has been utilised for the purpose of reducing the rebate to nil which is deemed to have been taken into account under clause (ii) of the second proviso. It follows that the remaining amount would be the amount "not deemed to have been taken into account". The argument, according to the petitioner-company, is that there being no income to which the petitioner-company was assessee in the previous year relevant to the assessment year 1956-57, no question of computation of super-tax arose. Therefore, no question of determination of rebate from the amount of the super-tax determined also arose, and

consequently there was no amount computed or calculated for the purpose of reduction of the rebate to nil under clause (i) of the second proviso of the Finance Act, 1956, and, therefore, clause (ii) of the second proviso of the Finance Act, 1956, did not come into play or operation. Consequently there could be no amount which could be deemed to have been either taken into account or not taken into account. The argument on behalf of the revenue on the other hand is that no doubt there was no total income to which the petitioner-company was assessee in the assessment year 1956-57, none the less there had been declaration of dividend in excess of 6 per cent of the capital invested. Occasion therefore arose for determination of the amount by which the rebate had to be reduced under clause (i) of the second proviso. There being no rebate actually granted in that year, the amount calculated under clause (i) was not required to be taken into account for the purpose of reducing the rebate to nil. The entire amount thus would be deemed not to have been taken into account under clause (ii) of the second proviso of the Finance Act of 1956. The question that arises is, could there be an amount which could be deemed not to have been taken into account in accordance with clause (ii) of the second proviso for the purpose of reducing the amount of rebate to nil even when there was no occasion to make an account for that purpose, because there was no rebate granted ? There is no difficulty in holding that the entire amount of excess dividend declared in the assessment year 1956-57 was an amount not taken into account. But is it an amount of dividends "which has not been deemed to have been taken into account in accordance with the clause (ii) of the said proviso for the purpose of reducing the rebate to nil ?" In our opinion, here lies a debate. Having regard to the scheme of the Finance Act of 1956 and having regard to the language used in sub-clause (a) of clause (i) of the second proviso of Schedule D of the Finance Act of 1957, it is not possible to say that the view canvassed on behalf of the petitioner-company cannot conceivably be taken. It is not necessary for us to decide this question finally. It is sufficient to say that, in our opinion, the alleged mistake which the Income Tax Officer has purported to correct was not a mistake which could be said to be a mistake apparent from the record. The Income Tax Officer therefore acted without jurisdiction in making the impugned order of rectification. The petition will therefore have to be allowed and the writ of certiorari issued to quash the impugned order of the respondent dated the 29th of January, 1963, and the demand notice.

13. In the result, the rule is make absolute with costs.

14. Before parting with the case, we may mention that the reduction of rebate which the Income Tax Officer was making by his impugned order u/s 35 of the Indian Income Tax Act was on the ground that, in his opinion, the unabsorbed reduction in rebate relating to the assessment year 1956-57 was not carried forward and set off against the rebate admissible for the assessment year 1957-58 under the provisions of law. This was not done when the assessment order was made. Consequently, there was a short levy of tax in the assessment year 1957-58 to the extent of Rs. 78,894.50 nP. Hence, according to the respondent-income tax Officer, it was a mistake apparent on the face of the

assessment order which the respondent had passed. Therefore, he rectified it u/s 35 of the Indian Income Tax Act. The aforesaid line of reasoning adopted by the respondent-income tax Officer in rectifying the mistake in the assessment order has not been supported by Mr. Joshi.

15. A copy of the calculations made by the respondent-income tax Officer for the purpose of determination of the amount of tax levied on the petitioner-company in respect of the assessment year 1957-58 is filed on record by Mr. Joshi. Let it be taken on record and form a part of the record.

16. Petition allowed.