(1961) 2 ILR (Cal) 575

Calcutta High Court

Case No: Appeal from Original Order No. 146 of 1958

Debt Dutt Moody		APPELLANT
	Vs	
T. Bellan		RESPONDENT

Date of Decision: Sept. 8, 1960

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 5 Rule 10, Order 5 Rule 16, Order 5 Rule 17, Order 5 Rule 18A, Order 5 Rule 19
- Constitution of India, 1950 - Article 226
- Finance Act, 1956 - Section 18, 34
- Income Tax Act, 1961 - Section 16, 19, 2, 22, 22(1)

Citation: (1961) 2 ILR (Cal) 575

Hon'ble Judges: Lohiri, C.J; Bachawat, J

Bench: Division Bench

Advocate: S. Chowdhury and T.K. Basu, for the Appellant;E.R. Meyer and B.L. Pal, for the Respondent

Judgement

Lahiri, C.J.
The Appellant in this appeal is an Assessee whose Writ petition for quashing an ex parte assessment u/s 34(l)(a) has been, dismissed by Mr. Justice Sinha by a judgment, dated April 22, 1958. The facts so far as they are material for the purposes of the present appeal are as follows:

For the assessment year 1948-49 the Appellant was assessed upon a total income of Rs. 79,319 and the tax demand on this amount was duly paid by the Appellant. Subsequently, a notice u/s 34(1)(a) of the Indian Income Tax Act was ordered to be issued against the Assessee on March 27, 1957. According to the department this notice was served upon the Assessee personally on March 28, 1957 and also by registered post on April 4, 1957. As the Appellant did not comply with the notice purported to have been served on him u/s 34(1)(a), his income was re-assessed ex parte and a sum of Rs. 53,987 was added to his

original income. Thereafter the Petitioner wrote several letters to the income tax authorities claiming that the notice u/s 34(1)(a) purported to have been served upon him was time barred and as such the re-assessment was illegal and invalid in law. The department reiterated its claim that the notice u/s 34(1)(a) had been personally served upon the Appellant on March 28, 1957 and therefore the re-assessment u/s 34 was valid. Thereafter, the Petitioner moved this Court under Article 226 of the Constitution and obtained a Rule nisi calling upon the Respondents to show cause why a Writ, in the nature of certiorari should not be issued against the Respondents, for quashing the purported notices u/s 34 of the Indian Income Tax Act and also subsequent proceedings or orders purported to have been taken or issued in pursuance of the said notices.

2. The only ground upon which the Appellant based his claim was that the notice u/s 34(1)(a) was served beyond the period of limitation of eight years provided for by Section 34 of the Act and consequently all the proceedings taken in pursuance of such a notice were invalid. Before Mr. Justice Sinha the Appellant denied the story of personal service of the notice upon him on March 28, 1957 and further contended that both the issue and the service of the notice must be completed within the period of eight years contemplated by the first proviso (ii) to Sub-Section 1 of Section 34. The last contention of the Appellant as indicated above is based upon a claim that the word "issue" must be equated to the word "serve". Mr. Jnstice Sinha overruled both the contentions of the Appellant and dismissed his writ petition.

3. In this appeal before us, Mr. Chowdhury has raised a new point which was not raised before Mr. Justice Sinha and which goes to the root of the whole matter. He has argued that the word "year" as occurring in, Section 34 means the accounting year and not the assessment year or the financial year and consequently the notice which was issued on March 27, 1957 is beyond the period of eight years as contemplated by the first proviso (ii) of Section 34(1). The assessment year in the present case is 1948-49; the accounting year therefore is 1947-48 which ended on March 31, 1948. The notice dated March 27, 1957 is certainly beyond eight years from. March 31, 1948. If therefore the first point raised by Mr. Chowdhury is found to be good, the Appellant is hound to succeed in any event. Since the question, raised is a pure question of law, we have allowed Mr. Chowdhury to raise it for the first time in appeal. In support of his contention Mr. Chowdhury has relied upon a decision of a Division Bench of the Mysore High Court in the case of H.N.S. Iyengar v. First Additional Income Tax Officer, Mysore City AIR [I960] Mys. 77 (S.R. Das Gupta, C.J. and A. Narayana Pai. J.) which lays down that the starting point of limitation nuder Section 34(1)(a) is the end of the accounting year, for which the return of the income has to be made u/s 22. There lordships further held that though the word ""year" might mean the assessment year in Clause (b) of Section 34(1), it cannot bear the same meaning in Clause (a). The reason for the decision, is that Section 34(2) authorises the Income Tax Officer to serve on the Assessee a notice containing all or any of the requirements which may be included in a notice u/s 22(2) and Section 22(2) requires the Assessee to furnish particulars of his total income during the "previous year".

From this provision, their Lordships hold that the return which has to be furnished u/s 22 by the Assessee is the return of his income for the previous year. At p. 78 Das Gupta. C.J. observes as follows:

The return mentioned in Clause (a) of Sub-section (1) of Section 34 is the return of the income u/s 22 for any year. It seems to me, reading the said clause along with the provision of Section 22, that "any year" mentioned therein should be "previous year" and the return of the income referred to therein would be the return of the income" of the previous year.

4. With the utmost respect to the learned Judges who decided that case, I am unable to agree with their view. Section 3 of the Indian Income Tax Act, which is the charging section provides that income tax for "any year" shall be paid at the rate or rates enacted by a Central Act in accordance with the provisions of the Indian Income Tax Act "in respect of the total income "of the previous year". The plain meaning of this section, is that the charge of income tax is upon the income of a financial year, but it is in respect of the total income of the previous year. Similar is the provision of Section 55 which is the charging section for super-tax. That section provides that "in addition to the "income tax charged for any year there shall be charged, levied "and paid for that year in respect of the total income of the "previous year of any individual and additional duty "of income tax at the rate or rates laid" down for that "year by a Central Act". Both in Section 3 and in Section 55 it is contemplated that income tax and super-tax shall be charged upon the income of a finacnial year in respect of the total income of the previous year. u/s 59(5) the rules made under the Income Tax Act shall have effect as if enacted in the Act. The form of notice u/s 22 as prescribed by Rule 18A is, therefore, a part of the Indian Income Tax Act. The heading of that notice is as follows:

Return of total income and of total world income of the previous year for assessment in the year commencing on the 1st April, 19.....

Form A prescribed by Rule 19 of the Rules framed under the Indian Income Tax Act is similarly a part of the statute. The heading of this form is (a) "Form of return of total income" Income Tax year 19..... 19....." (b) "Statement "of total income and total world income during the previous year "ended ". These provisions leave no room for doubt that the scheme of the Indian Income Tax Act is that the Assessee is taxed upon his total income of a financial year, which is also described in the Act as assessment year or income tax year in respect of his total income of the previous year. I cannot agree with the proposition that the return which, the Assessee is required to furnish u/s 22 is the return for his income of the previous year. In my opinion, the return u/s 22 is the return for the financial year which is also described as the assessment year or the income tax year. In support of this conclusion Mr. Meyer cited before us certain observations of the Supreme Court in the case of Commissioner of Income Tax, Madras v. K. Srinivasan (1952) 23 ITR 87. At p. 92 Mahajan, J. made the following observations:

Under the Act of 1918 income tax was levied on the income of the current year, that is the year of assessment, but as the income of that year could not be known till after the expiry of the year the assessment was made on the basis of the income of the previous year; but after the close of the assessment year an adjustment used to be made on the basis of the income of the assessment year: the Act of 1922 introduced a change in this respect. u/s 3 of the Act the income of the previous year is made the subject of the charge and tax is levied on the income of the previous year though it is a tax for the assessment year.

5. The last clause of this passage clearly indicates that the tax that is levied is the tax for the assessment year and consequently the return that is furnished by the Assessee u/s 22 is also a return for the assessment year. Then again at p. 93 Mahajan, J. oberved as follows:

The scheme of the Act is that by the charging section, that is Section 3, income tax is levied for a financial year at the rate proscribed by the Annual Finance Act on the total income of the previous year of every individual etc. Each previous year''s income is the subject of separate assessment in the relative assessment year.

This passage also supports the conclusion which I have arrived at Mr. Meyer also cited before us the decision of the Judicial Committee in the case of AIR 1928 1 (Privy Council) . 14 which was a case of super-tax u/s 55 of the Indian Income Tax Act. In that case Viscount Cave L.C. observed that according to Section 55 of the Indian Income Tax Act a tax-payer used to pay at the rate or rates laid down by the Central Legislature for that year and His Lordship pointed out that that year meant the year of assessment.

6. Mr. Meyer also cited before us several other cases in which it was assumed that the starting point of limitation of eight years u/s 34 was the last date of the assessment year and not the last date of the previous year or the accounting year. But since the controversy, about the meaning of the word "year'' was not raised in any of those cases, I need mot consider them in detail. For these reasons, I hold that the word "year'' occurring in Section 34(7) (a) of the Indian Income Tax Act means'' the financial year or the assessment year or the income tax year and not the accounting year or the previous year as held by the Mysore High Court. The first point raised by Mr. Chowdhury an support of the appeal must accordingly be overruled. I, therefore, hold that the notice which was issued upon the Assessee in the present case on March 27, 1957 was within the period of limitation of eight years.

7. The second point that has been raised by the Appellant is that u/s 34 of the Indian Income Tax Act, as it now stands the notice is not only required to be issued but also required to be served within the period of eight years and in this case the notice was not served within that period. The answer of the department to this argument is two-fold. In the first place, it is argued that assuming without admitting that the notice is both required to be issued and served within the period of eight years, the notice in the present case was both, issued and served during that period. In the second place, it is argued that the

notice u/s 34 is only required to be issued within the period of eight years, hut it may be served upon the Assessee at any time. The first argument of the department is based on a question of fact, namely, whether the Assessee was personally served with the notice on March 28, 1957 as alleged by the department. Though this is a disputed question of fact which is not ordinarily triable in a proceeding under Article 226 of the Constitution, Sinha, J. has decided this question as the Assessee will be otherwise without a remedy. Upon a consideration of the affidavits and the relevant documentary evidence His Lordship has found that the notice was personally served upon the Assessee on March 28, 1957. Mr. Chowdhury has challenged this finding of fact on the ground that the alleged personal service is not a valid service within the meaning of Order 5 of the CPC which is attracted to the personal service of notices under the Income Tax Act by the provisions of Section 63(7). In the first place, it is contended by Mr. Chowdhury that there is no evidence to show that a copy of the notice was handed over to the Assessee. On this point the affidavit of Bellan, Income Tax Officer, Companies District IV is to the effect that a copy of the notice was served on the Petitioner on March 28, 1967 by the Inspector Haridas Chatterjee attached to his office. The affidavit of Haridas Chatterjee is no doubt silent on the question as to whether a copy of the notice was actually handed over to the Assessee, but he says that he went to the Assessee''s residence at No. 8, Middleton Street, on March 28, 1957 and "served" the notice u/s 34(1) on the Assessee at about 3 p.m. To the same effect is the entry in the personal diary of Inspector Chatterjee where also he-uses the word "served". I have no doubt in my mind that when the Inspector says in his affidavit that he served the notice on the Assessee, ho really meant that he served the notice by handing it over to the Assessee. At any rate, the Appellant might have cross-examined Inspector Chatterjee on this point upon the affidavit affirmed by him, but instead of doing it the Appellant did not even raise the point in his petition under Article 226 that no copy of the notice was actually handed over to him. The second ground of attack on the validity of the personal service is based upon the fact that the serving officer did not take the signature of the Assessee to whom the copy of the notice was delivered or tendered, to an acknowledgment of service endorsed on the back of the original notice. On this point Sinha, J. has found that when the notice was tendered to the Appellant, he asked one of his officers named Jhummarmll Bengani to sign an acknowledgment slip. That slip is a printed form known as "tear off acknowledgment slip I.T. 57". The affidavit of Inspector Chatterjee is to the effect that this acknowledgment slip was signed by Bengani in his presence under the orders of the Appellant and this slip was handed over to the personal clerk of the Income Tax Officer. The acknowledgement slip I.T. 57 was put up before the Income Tax Officer, who upon, an inspection of the same recorded an entry in the order sheet to the effect that the notice u/s 34 had been served on March 28, 1957. That acknowledgment slip could not be produced in the, trial court as it was missing and an enquiry had been started by the department over the loss of that acknowledgment slip. A specimen form of the tear off acknowledgment slip, however, was produced in the trial court and another such form has been produced before us. In view of the entry in the order sheet of the Income Tax Officer. I have no doubt that the acknowledgment slip signed by Bengani was produced before the Income Tax Officer Bellan on March 28,

1957. That, acknowledgment slip, in my opinion, is equivalent to the endorsement on the original notice as required by Order 5, Rule 16 of the Code of Civil Procedure. This third ground of attack on the validity of the personal service is based Upon the provisions of Order 5, Rule 17, CPC Code. Mr. Chowdhury contends that when the Assessee refused to sign the acknowledgment slip it was the duty of the serving officer to serve the notice by affixation on some conspicuous part of the Assessee"s house, but" that was not done in the present case. On this point the affidavit", of Inspector Haridas Chatterjee is to the effect that the acknowledgment slip for service of the notice was signed by Bengani under instructions from the Assessee. Mr. Choudhury does not challenge the truth of the statement made by Haridas Chatterjee in his affidavit, but he contends that this is not in compliance with the requirements of Order 5, Rule 17. In my opinion, the argument of Mr. Chowdhury is based upon a misconception. Haridas Chatterjee does not state in his affidavit that the Assessee refused to sign the acknowledgment receipt. He says that as soon as the notice was handed over to the Assessee he instructed his officer Bengani to sign the acknowledgment. This instruction by the Appellant to Bengani to sign the acknowledgement amounts, in my opinion, to the acknowledgement of service by Appellant himself. The signature by Bengani on the acknowledgement slip in the circumstances of the present cases is tantamount to endorsement by the Assessee himself. Consequently, Order 5, Rule 17 is not attracted to the facts of the present case and there was no obligation on the part of the serving officer to serve the notic by affixation as required by Order 5, Rule 17 of the Code. As all the grounds of attack on the validity of personal service fail, I hold that the notice Was personally served upon the Assessee on March 28, 1957. The starting point of the period of limitation of eight years being March 31, 1948 I hold thai; the notice was both issued and personally served upon the Assessee within the period of limitation.

8. It now remains to consider the alternative argument advanced on behalf of the Revenue to the effect that u/s 34 as it stands after its amendment by the Finance Act of 1956, the notice is only required to be issued within a period of eight years but that it may be served at any time upon the Assessee. On this point Sinha J. has pointed out that in view of the finding that the. notice was personally served on the Assessee on March 28, 1957 within the period of limitation "it is scarcely necessary "to deal with this question", but His Lordship proceeded to express his opinion upon, the point as it was argued before him.

9. The position is exactly the same in the appeal before us. Sinha, J. has held that the effect of the amendment of Section 34 by the Finance Act of 1956 is that a notice under Clause (a) of Section 34(1) is to be issued within the time specified in Clause (ii) of the first proviso, that is, within eight years, but it could be served "at any time" as provided for by the main body of the section. It is to be noticed that prior to the amendment of Section 34 in 1956 it was held by Chagla C.J. and Tendolknr J. of the Bombay High Court in the case of Commissioner of Income Tax, Bombay South, Bombay Vs. D.V. Ghurye, ; Commissioner of Income Tax, Bombay South Vs. D.V. Ghurye, that in a case coming u/s

34(1)(a) if the notice is issued within the time mentioned in Section 34(7) but served on the Assessee after the expiry of that time the notice is bad in law. In that case the "notice u/s 34 was issued for the assessment year 1943-44 on March 20, 1952 and, the notice was served on the Assessee on April 16, 1952. On those facts the learned Judges held that the notice was bad. u/s 34 as it stood on the date of that decision the Income Tax Officer had authority "at any time within eight years" to serve on the Assessee a notice containing all or any of the requirement which may be included in a notice u/s 22(2). Proviso (i) to the section contained a provision that the Income Tax Officer shall not "issue" a notice under this Sub-section unless he has recorded his reasons for doing so and the Commissioner was satisfied on such reasons recorded that it was a fit case for issue of such notice. As a result of the amendment in 1956 the Income Tax Officer has been authorised in cases falling under Clause (a) "at "any time" to serve on the Assessee the notice containing requirements of Section 22(2). The limitation of eight years has been transferred from the main, body of the section to Clause (ii) of the first proviso which runs as follows.

Provided that the Income Tax Officer shall not issue a notice under Clause (a) of Sub-section (1) for any year if eight years have elapsed after the expiry of that order" unless the escaped income is likely to amount to one lakh of rupees or more.

Sinha, J. has held that the effect of amendment of 1956 is to supersede the decision of the Bombay High Court referred to above. As against this view Mr. Chowdhury has contended that the first proviso to Sub-Section 3 of Section 34 and Section 4 of the Indian Income Tax Amendment Act I of 1959 make it clear that the Legislature used the words "issue" and "serve" in the same sense. It has also been contended that the word "issue" connotes a continuous process which terminates in the delivery of the notice to the Assessee. According to this argument the word "service" means and includes issue plus delivery of the notice to the Assessee and therefore there can be no service if at any stage before the actual delivery of the notice to the Assessee, the issue ceases to be a valid issue. Mr. Meyer on the other hand has put forward an extreme contention to the effect that, issue is completers soon as the order of issue has emanated from the mind of the Income Tax Officer and found its place in an entry in the order sheet. The argument advanced by Mr. Chowdhury finds some support from the language of the first proviso to Sub-Section 3 of Section 34 and also of Section 4 of Act I of 1959. As it is not necessary to express any final opinion on the merits of the rival contentions in this appeal, I do mot propose to decide this question now. The question will be decided in a case where a notice is issued within the period of eight years specified in Clause (i) of the first proviso to Sub-section (1) of Section 34, but served beyond the period of eight years. For these reasons I would direct that the (observations of Sinha, J. to the effect that u/s 34 as it now stands all that is necessary is that the notice should be issued within eight years, but that it may be served at any time beyond eight years, be expunged from His Lordship"s judgment: As the notice in the present case was, both issued and served upon the Assessee within the period of eight years contemplated by Clause (ii) of the first proviso

to Sub-section (1) of Section 34, no other question arises for our consideration.

10. Before concluding I should mention that Mr. Meyer also contended before us that as a result of the introduction of the new Sub-Section 4 to Section 34 by the Income Tax Amendment Act I of 1959, there has been an implied repeal of Clause (ii) of the first proviso to Sub-section (1) of Section 34. Mr. Meyer contends that the new Sub-Section 4 is retorspective in its operation and validates any notice issued prior to the coming into operation of Act I of 1959 after the expiry of eight years. I am entirely unable to accept this argument. The language of the new Sub-Section 4 is as follows:

A notice under Clause (a) of Sub-section (1) may be issued at any time notwithstanding that at the time of the issue of the notice the period of eight years specified in that Sub-section before its amendment by Clause (a), of Section 18 of the Finance Act, 1956 had expired in respect of the year to which the notice relates.

11. The language of this Sub-section is plainly addressed to the future and it is impossible to hold that it has retrospective operation. Moreover, what the Sub-section validates it a notice issued after the expiry of eight years u/s 34 as it stood before its amendment in 1956 and it has no effect upon a notice issued after the amendment of Section 34 by the Finance Act of 1956. I am, therefore, unable to hold that the new Sub-Section 4 impliedly repeals'' Clause (ii) of the first proviso to Sub-Section 1 of Section 34, which was introduced by the Finance Act of 1956. This conclusion is supported by a decision of the Bombay High Court by Shah and Desai, JJ. in the case of Onkarmal Meghraj Vs. Commissioner of Income Tax, Bombay I, . With regard to the effect of the new Sub-Section 4 Their Lordships held as follows:

Evidently this provision is prospective in terms-ami a notice u/s 34(1)(a) may since the enactment of Act I of 1959 be issued at any time notwithstanding that the period of eight years-prescribed by Sub-section(1) Clause (a) before it was amended by Act of 1956 had expired.

12. For the reasons given above, I find it impossible to interfere, with the decision arrived at by Sinha, J. and I would direct that the appeal be and the same is hereby dismissed. In the circumstances of the case there will be no order as to costs.

Bachawat, J.
The relevant facts may be stated briefly.

On January 29, 1951, the Appellant was assessed to income tax for the assessment year 1948-49 ending on March 31. 1949 on a total income of Rs. 79,319. The relevant previous year was the year ending on March 31, 1948. On March 22, 1957 the income tax Officer proposed to initiate proceedings u/s 34(1)(a) of the Indian income tax Act for re-opening the assessment for the assessment year 1948-49 and recorded in writing his reason for doing so. On March 27, 1957 after obtaining the approval of the Commissioner of Income Tax, Calcutta, he passed an order for the issue of the notice u/s 34(1)(a). One

copy of the notice was sent to the Appellant by post and was admittedly received by him on April 4, 1957. The date of the posting of the notice is not known. On March 28. 1957, the Income Tax Officer directed the Income Tax Inspector to serve the notice on the Appellant on the same day. On March 28, 1957 the Inspector took the notice from the office and proceeded to the residence, of the Appellant with a view to serve the notice upon him. It is the ease of the Respondents that the Appellant was personally served with the notice on March 28. The Appellant disputes this service. The Appellant did not comply with the notice. On July 30, 1.957 the Income Tax Officer made an ex parte assessment order for the assessment year 1948-49 u/s 23 (4) read with Section 34(1)(a). On August 19, 1957 the Appellant was served with a, notice of demand u/s 29 for Rs. 29,595-94 nP. On August 30, 1957 the Appellant obtained a rule from D. N. Sinha, J. colling upon the Respondents to show cause why the above notice and the proceedings there under should not be quashed and set aside and why the Respondents should not forbear from giving effect to them. The Appellant challenged the validity of the notice and of the subsequent proceedings on the around that the issue of the notice was barred by limitation. The Respondents on the other hand contended that (a) the notice was served on the Appellant on March 28. 1957 within the period of limitation and (b) alternatively assuming that the Appellant was not served with the notice on March 28, 1957 the notice was, issued within the period of limitation and that a notice u/s 34(2)(a) issued in time could be served at any time thereafter. The learned Judge accepted both branches of the Respondents'' contention and discharged the rule. The Appellant has preferred an appeal from this order.

2. The question whether the issue of the notice was barred by limitation must be judged by the law in force in March, 1957 when the notice is said to have been issued, i.e., by Section 34 as it stood after its amendment by Clause (a) of Section 18 of the Finance Act, 1956 (XVIII of 1956). The Appellant''s objection is that the issue, if any, of the notice was barred by the law then in force. During the pendency of this appeal., the Indian'' Income Tax Amendment Act, 1959 (I of 1959) came into force and a subsidiary question has arisen whether that, Act precludes the Appellant from raising the objection.

3. By Section 4 of Act I of 1959 a notice u/s 34(1)(a) issued, before the commencement of that Act cannot be called in question merely on the ground that, at the time of the issue, the period of time within which it should have been issued u/s 34 as in force before its amendment by Act XVIII of 1956 had expired. The Appellant does not question the notice on the ground above-mentioned. His objection is that at the time of the, issue of the: notice the time prescribed for its issue by Section 34(1) as it stood after its amendment by Act XVIII of 1956 had expired. That objection is not barred by Section 4 of Act I of 1959.

Section 2 of Act I of 1959 inserted Sub-section (4) in Section 34 and thereby provided that a notice u/s 34(7) (a) may be issued at any, time though at the time of the issue the period of eight years specified in Section 34(7) before its amendment by Act XVIII of 1956 had expired in respect of the year to which the notice relates. Section 2 of Act I of 1959 also does not preclude an attack on the validity of a notice issued after the amendment,

of Section 34 by Act XVIII of 1956 based on the ground that at the time of its issue, the time prescribed by the first proviso to! the amended Sub-section (7) of Section 34 had expired. I have come to this conclusion for two reasons. Firstly, Sub-section (4) of Section 34 is prospective in its operation. It applies to a notice issued after the commencement, of Act I of 1959 and not to a notice; issued in March, 1957. Secondly, Sub-section (4) of Section 34 does not repeal the first proviso to Sub-section (1) of that section and does not enable the Income Tax Officer to issue a notice in contravention of the proviso. The notice u/s 34(7)(a) must, still be issued within the time prescribed by Clause (ii) of the first proviso to Sub-section (7) of Section 34.

3. By Clause (ii) of the first proviso to Sub-section (7) of Section 34 as it stood in March, 1957 and as it stands now it is "provided that the "income tax Officer shall not issue a notice under Clause (a) of Sub-section (1) ** * for any year, if eight years have"" ""elapsed after the expiry of that year", where the escaped income is less than one lakh of rupees. In the instant case the escaped income is less than one lakh of rupees. The question is whether the notice in this case was issued within the time limit prescribed by this proviso.

4. In this Court Mr. Chaudhuri on behalf of the Appellant raised a now contention for the first time. Relying on the decision in H.N.S. Iyengar v. First Additional Income Tax-Officer, Mysore City (supra).. Mr. Chaudhuri contended that the starting point of limitation for the issue of a notice u/s 34(1)(a) is the end of the previous year to which, the assessment sought to be reopened relates. In this case, March 31, 1948, was the end of the previous year to which the assessment for 1947-48 related. Eight years from that date expired on March 31, 1956. Admittedly the notice in this case was not issued within that period. According to the Respondents the notice was issued in March. 1957. Mr. Chaudhuri, therefore, contended that on the admitted facts of the case the issue of the notice was barred by limitation. This contention raises a pure question of law and though taken for the first time in appeal is open to the Appellant. We must, therefore, examine the correctness of this contention. The contentions is supported by the decision in H.N.S. Iyengar v. First Additional Income Tax Officer, Mysore City, (supra) but I am unable to agree with that decision. Clause (ii) of the first proviso to Section 34(2) forbids the issue of a notice u/s 34(2)(a) "for any year if eight "years have elapsed after the expiry of that year" if the escaped income is less than one lakh of rupees. The opening part of Section 34(1)(a) refers to failure of the Assessee "to make a return of "his income u/s 22 for any year". The Mysore High Court ruled that the words "any year" in the opening part of Section 34(7) (a) refer to the previous year, for by Section 22 a return is made of the income of the previous year, that those words have the same meaning in the proviso to Section 34(2) and that therefore no notice u/s 34(1)(a) can. be issued if eight years have elapsed after the expiry of the relevant previous year.

5. In my opinion, this Mysore ruling is erroneous. The return u/s 22 is made for an income tax year. The opening part of Section 34 refers to the failure of the Assessee to make a return of his income for any income tax year. Throughout Section 34 the expression "any

year" and "that year" refer to any income tax year for which the proceedings u/s 34 are taken. In my opinion the eight years period of limitation for the issue of the notice u/s 34(7)(a) specified in the first proviso to Sub-section (i) of "Section 34 commensess to run from the expiry of the income tax year. That period of limitation does not commence to run from the end of the previous year in respect of which the assessment was made. The expressions "any year" and "that year" in Section 34 do not mean the previous year or the earning year.

6. I have come to those conclusions for the following reasons: (1) By the notice under Sub-sections (1) and (2) of Section 22 the Assessee is required to furnish a return in the prescribed form setting forth, his total income during the previous year. The forms of the return and of the notice under Sub-section (1) of Section 22 are prescribed by Rule 19 and 18A of the Indian Income Tax Rules, 1922. By Sub-Section 5 of Section 59, Rules 19 and 18A and the forms prescribed by them have effect as if they were enacted in the Act itself. Section 22 read with Rules 19 and 18A shows that the return is for an income tax year and that it sets forth the total income of the previous year. The income tax year is also called the tax year, the fiscal year, the assessment year and the financial" year. (2) By Sections 3 and 55 income tax and super tax are charged for an income tax year in respect of the total income of the previous year of the Assessee at the rate or rates of tax laid down for that year by a Central Act. In Commissioner of Income Tax, Madras v. K. Srinivasan and K. Gopalan, (1952 ITR 87. (supra) at 92. Mahajan, J., observed "Under Section 3 of the Act the income of the previous year "is made the subject of the charge and tax is levied on the "income of the previous year though it is a tax for the assessment "year." The return u/s 22 is made for an income tax year in order to enable the levy of the charge for that year and it has to set forth the income of the previous year, for that income is the subject matter of the charge for the tax year. The expression "return of his income u/s 22" is the opening, part of Section 34 can only mean the return of the Assessee"s income for all income tax year. (3) The notice u/s 22 is given for a tax year, and the assessment under it is made for that year. Likewise the notice u/s 34 is given for a tax year and the. reassessment under it is made for that year as if the proceedings are being taken u/s 22. (4) Where Section 34(7) speaks of "assessment for that year" and of income which has "escaped" "assessment for that year" the expression "that year" can only mean the tax year. Income chargeable to tax is assessed or escapes assessment for a tax year and not for a previous year. (5) Prima facie the expression "any year" has the same meaning in both Clause (a) and (b) of Sub-section (1) of Section 34. In that part of Clause (b) of Sub-section (1) which speaks of income which had escaped assessment for any year it can only mean the tax year. There is nothing to show that the legislature intended to give a different meaning to the same expression in Clause (a) of Sub-section (7). (6) By using in Sub-section (1A.) the expression, "that income, profits or gains "chargeable to income tax have escaped assessment for any "year in respect of which the relevant previous year falls wholly "or partly within" a certain period, the legislature plainly indicates that the expression "any year" means the tax year and not the previous year. (7) Sub-section (1B) as also Sub-clause (i) of the first proviso to Sub-section (1) of

Section 34 show that the expression "any year" means a year ending on March 31. The previous year may or may not end on March 31, but the financial year always ends on that date. (8) Where the Assessee has omitted to make a return of his income u/s 22 for an income tax year, the relevant previous year for that year will not be known to the Income Tax. Officer. In such a case if the Mysore judgment is correct, the limitation for the issue of a notice under Clause (a) of Sub-section (1) of Section 34 will commence to run from a date not known to the Income Tax Officer. The language of Section 34 does not support this conclusion. (9) Sub-section (11) of Section 2 shows that the Assessee may have separate previous years for separate sources of income. In such a case, if the Mysore judgment is corect separate notices must issue u/s 34. for the separate previous years in respect of the ame tax year and there will be separate starting points of limitation for the issue of,those notices. The language of Section 34 is not capable of such a construction. (10) On a plain construction of the Act as it stands now, the starting point of limitation is the end of the tax year in queslion. The same construction was given to Section 34 as it stood from, time to time. Section 34 of the Indian Income Tax Act, 1922 has a long memory. It remembers (a) its predecessor, viz., Section 25 of the Indian Income Tax Act (Act VII of 1918), (6) its own brith with the Indian Income Tax Act (At XI of 1922) on April 1, 1922, (c) its amendment as from April 1, 1939 by Section 41 of the amending Act VII of 1939, (d) its amendment as from November 26, 1941 by Section 19 of the amending Act XXIII of 1941. (e) its re-birth and replacement as from March 30, 1948 by Section 8 of Act XLBIII of 1948, (f), its amendment as from. April 1, 1952 by Section 16 of the amending Act XXV of 1953, (g) the addition of Sub-sectionss (A1) to (1D) as from July 17, 1954 by the amending Act XXXIII of 1954, (It) its amendments as from April I, 1956 by Section 18 of the Finance Act 1956 (Act XVIII of 1956). (i) the addition, of Sub-section (4) by Section 2 of the amending Act I of 1959. During its long career the section has sustained various shocks and time and again it has rehabilitated itself. But the section cannot recall any judicial ruling at any point of time that the starting point of limitation for the issue of a notice under it is end of the previous year. Hither to it has always been assumed that the starting point of the limitation for the issue of the notice under it is the end of the assessment year.

(11) The Courts had occasion to construe Section 34 as it stood from time to time between March 30, 1948 and April 1, 1956. From the point of view of the meaning of the expression "any year" the structure of the section as it then stood was not materially different from its structure as it now stands. In Income Tax Officer, Income Tax Officer, Companies District 1, Calcutta and Another Vs. Calcutta Discount Co. Ltd., , the validity of a notice u/s 34 issued on March 28, 1951 in respect of the assessment years 1942-43. 1943-44 and 1944-45 was in question. Chakravartti, C.J. observed at pp. 481.-82, that "the Income-lax Officer would he "entitled to issue a notice within eight years from the end of "any assessment year in respect of which proceedings or further "proceedings seemed to he called for," and that, "All the three "assessment years in question in the present case ended ** "within eight years from the date of the notices and accordingly "the proceedings taken are authorised by the section and are "valid."

In Gopiram Agarwalla Vs. First Additional Income Tax Officer and Others, , K.C. Das Gupta, C.J., observed: "It is also "clear that ordinarily such a notice has to be issued within eight ""years after the expiry of the assessment year in question.".

In Commissioner of Income Tax, Bombay, South Bombay v. D.V. Ghurye (supra), the Bombay High Court had to deal with a notice in respect of assessment year 1943-44 issued on March 30, 1952 and served on April 16, 1952. Chagla, C.J., observed: "Now Section 34(1) deals with the notice and it provides "that in cases falling under Clause (a) with which we are concerned "in this case, he may serve a notice within eight years of the "end of that year which in this case would be the 31st March, "1944."

(12) The structure of Section 34 as it stood between 19ï¿½2 and 1939 was somewhat different. The opening part of Section 34 read: "If "for any reason income, profits, or gains chargeable to income-"tax has escaped assessment in any year, or has been assessed at "too low a rate the income tax Officer may, at any time within "one year at the end of that year serve * * *." Even under the section as it then stood it was always held that the words "any year" mean any tax year and that the starting point of limitation for the service of the notice was the end of the tax year in respect of which the proceedings u/s 34 was called for.

In (1934) 2 ITR 71 (Privy Council) . 10, 14, Lord Macmillan, referring to the notice u/s 34 as it then stood, observed: "Such notice may be served "only within one year after the expiry of the tax year, "

In Commissioner of Income Tax, Punjab, North-West Frontier Province and Delhi v. Nawal Kishore Khairati Lal (1937) L. R. 65 IndAp 12, the Privy Council had occasion, to consider the validity of a notice u/s 34, dated February 13, 1928 in respect of the assessment year 1926-27, Sir George Rankin observed at page 19: "The notice "of February 13, 1928 was served before the expiry of one year "from the end of the financial year 1926-27. Subject therefore, ""to the merits of the. case,, and to the answer to be given to the "second of the "three questions referred, the notice of February 13, "was a valid initiation of proceedings to assess the Respondent "firm as an agent u/s 43 and in respect of the year of "assessment 1926-27. Proceedings if begun in time are not by "the Act required to be completed within any time limit." In Re Burn and Co. Ltd. I. L. R. (1933) Cal. 132, a notice u/s 34 was issued on March 31, 1931 in respect of assessment years 1928-29 and 1929-30. Counsel for the Assessee admitted that in respect of the assessment year 1929-30 the notice was served within the time limit allowed by Section 34; but as regards the assessment year 1928-29 the court held that the notice was time barred.

The proceedings u/s 34(1)(a) in the instant case is in respect of the assessment year 1948-49 which expired on March 31, 1949. Eight years after that date elapsed on March 31, 1957. By Clause (1) of the first proviso to Sub-section (1) of Section 34 the Income Tax Officer could issue the notice under Clause (a) of Sub-section (1) on or before March

31, 1957. Now there can be no doubt that a notice is completely issued when it is served upon the Assessee in accordance with law. In agreement with the learned trial Judge, I am satisfied that the notice in this case was duly served on the Appellant on March 28, 1957. The notice was therefore issued within the time prescribed by Clause (ii) of the first proviso to Section 34.

By Section 63 of the Income Tax Act a notice u/s 34 of the Act may be served as if it were a summons issued by a court under CPC Code, 1908. In this case on March, 25, 1957, the Income Tax Inspector took the notice from the office of the Income Tax Officer, went to the Appellant''s residence at No. 8. Middleton Street, Calcutta, and served the notice upon him on the same day at about 3 p.m. Under instructions from the Appellant his clerk one Shri Bengani signed the acknowledgement for the service on a printed slip known as. I.T. 57. On the return of the Inspector to the office, the acknowledgement slip was put up before the Income Tax Officer on the same day. The Income Tax Officer saw the slip and by an order of the same date declared the notice to he served on the Appellant. On the materials on the record, I am satisfied that the Inspector served the notice upon the Appellant in the manner provided for by rules 10 and 16 of order 5 of the CPC Code, 1908 by delivering a, copy of the notice to the Appellant and by obtaining the requisite signature to an acknowledgement of service.

Mr. Choudhury, however, contended that the service of the notice on March 28, 1957 was not in compliance with Rule 10 and 16 of order 5 of the CPC Code. He contended that (a) a copy of the notice was not delivered to the Appellant, (b) the serving officer did not require the signature of the Appellant to an acknowledgement of service endorsed on the original notice. Both branches of the contention raise new questions of fact. These contentions were not raised in the court below and cannot be entertained for the first time in appeal. If these contentions were pressed before the learned Judge, he might have directed the filing of further affidavits. The case of the Appellant in the; court below was that he was never served with the notice on March 25, 1957 and not that the service on him on that date was not in accordance with law. Now that the service has been proved he cannot turn round and make a new case in appeal. Even the materials on the record show that the present contentions of the Appellant are baseless. The Inspector has stated that he served the notice upon the Appellant and that the Appellant''s clerk signed the acknowledgement under the instructions of the Appellant. This statement implies that the Inspector delivered a copy of the notice to the Appellant and asked him to sign the acknowledgement slip. The original slip is missing. It was a tear off acknowledgement slip known as I.T. 57. I can safely presume that it was attached to the original notice.

Mr. Choudhury next contended that as the Appellant did not himself sign the acknowledgement, he must be deemed to have refused to sign it. He contended that in the circumstances the primary mode of service failed and in the absence of affixation of the notice on the outer door of the premises, there was no service in accordance with law. There is no substance in this contention. The Appellant did not refuse to sign the acknowledgement. On the contrary he by his agent signed it. The Appellant expressly

authorised Shri Bengani to sign the acknowledgement on his behalf. The signature of Shri (Bengani is in law the signature of the Appellant. In The Queen v. The Justice of Kent at 307, [1873] 8 Q.B. 305, Blackburn, J., said "No doubt at "common law, where a person authorises another to sign for him, "the signature of the person so signing is the signature of the "person authorising it; nevertheless there may be cases in which "a statute may require personal signature."" The general common law rule and its exception were recognised in Commissioner of Agriculture Income Tax, West Bengal v. Shri Keshab Chandra Mondal [1950] S.C.R. 377. In the last case Das, J., observed, at p. 38-3: "There is no doubt that the true rule as laid down in "judicial decisions and indeed as recognised by the High Court "in the case before us is that unless a particular statute expressly "or by necessary implication or intendment excludes the common "law rule, the latter must prevail."

Rules 16 and 17 of Order 5, CPC Code, 1908, do not either expressly or by necessary intendment exclude the general common law rule as to signature, Where the Defendant expressly authorises another to sign for him the acknowledgement of service, the signature of the person so signing is the signature of the Defendant. There is no refusal by the Defendant to sign the acknowledgement within the meaning of Order 5, Section 17 of the CPC whore the acknowledgement is signed on his behalf by some person expressly authorised by him to do so.

It follows that the notice u/s 34(1)(a) was issued within the time allowed by law. Consequently the attack of the Appellant on the validity of the notice must fail.

Mr. Meyer pressed before us an alternative contention. He argued that the notice u/s 34(1)(a) was issued on March 27, 1957 when the Income Tax Officer made the order for its issue and in any event when the notice was handed over by the Income Tax Officer to the Inspector for service upon the Appellant. He argued that assuming that the Appellant was not served with the notice on March 28, 1957, still the notice was sufficiently issued within the meaning of Clause (ii) of the first proviso to Section 34(2) and there was no limitation of time for the service of the notice upon the Appellant. This contention appears to have found favour in the trial court. The learned Judge held that the notice was issued on March 27, 1957 and that a notice issued within, the time specified in the proviso could be served at any time. On behalf of the Appellant it has been contended that this ruling is erroneous and that a notice u/s 34(1)(a) is not issued until it is served on the Assessee. In support of the Appellant"s contention the following arguments may be noted: (1) Assuming that the Appellant was not served on March 28. 1957, the issue of the notice though begun on March 27 was not completed before March 31. The making of the order for the issue of the notice and the delivery of the notice to the Inspector are all steps in the issue of the notice. The last step in the issue is service and the issue is completed when the notice is served. The issue of the notice must be completed within the time prescribed. It is not sufficient that the issue is begun within that time. Clause (ii) of the first proviso to Section 34(1)(a) forbids the service of the notice after the expiry of the lime prescribed for issue, for service is part of the issue. (2) The notice must issue from the

Income "Tax Officer to the Assessee. A notice is not issued until it Teaches the person notified. Section 34(1B) refers to the notice as a notice issued to the Assessee. (3) Section 34(1)(a) requires the Income Tax Officer to serve the notice. He may serve it himself or by an agent or by post but in spite of the delivery of the notice to the post or to the Inspector, the notice until service, is in the eye of law with the Income Tax Officer. (4) The word "issue" in the transitive sense as applied to notice has no fixed legal meaning, see Title Issue in P. Ramanatha Iyer"s Law Lexicon and in Ronald Burrows" Words and Phrases and the cases cited therein. In the context of Section 34(2) "issue" includes service, (") In the proviso to Sub-section (3) of Section 34 of the Indian Income Tax Act and in Section 4 of Act I of 1950 the legislature refers to the time limited for service of the notice as the time limited for its issue and thereby indicates that service is part of issue. (6) In several parts of Section 34 the legislature refers to notices served under Sections 22. 34(2) and 34(1A) as notiecs issued there under. (7) The power to serve the notice at any time conferred by Section 34(2)(a:) is controlled by Clause (ii) of the first proviso to it and in cases where the escaped income is less than one latch of rupees a notice u/s 34(7)(a) may be served at any time within the time prescribed by clause (ii) of the first proviso to Section 34(1)(A). (8) After the deletion of the words "within eight ""years" in Section 34(2) it was gramatieally necessary to retain the vrard.s "at any time" in order to distinguish the cases falling under Clause (a) from the cases falling under Clause (b). While making the deletion the legislature also introduced the first proviso to Section 34(1) in its present form. (9) The protection given by Clause (ii) of the first proviso to Section 34(2) to an Assessee whose escaped income is less than one lakh of rupees becomes illusory if there is no lime limit for the service of the notice.

There is considerable force in, these arguments and they require careful consideration. Without further consideration I am not prepared to say that the notice was issued within the time prescribed although it was not served within that time. Since the notice in this case was served within the time prescribed, the appeal must fail and I need not express final opinion on the alternative contention of Mr. Meyer.

I agree in the Order proposed by my Lord.