(1942) 09 BOM CK 0025

Bombay High Court

Case No: Income-tax Reference No. 3 of 1942

MESSRS. CHIMANRAM MOTILAL		APPELLANT
	Vs	
COMMISSIONER OF Income Tax, (CENTRAL), BOMBAY.		RESPONDENT

Date of Decision: Sept. 22, 1942

Acts Referred:

- Income Tax Act, 1961 - Section 34, 66(1)

Citation: AIR 1943 Bom 132 : (1943) 11 ITR 44

Hon'ble Judges: Beaumont, C.J; P. C. Malhotra, A.M.; N. R. Gundil, J.M.

Bench: Full Bench

Judgement

JUDGEMENT OF THE APPELLATE TRIBUNAL

Under Section 33 of the Indian Income Tax Act (XI of 1922) the Income Tax Appellate Tribunal, (Bombay Branch) (consisting of N. R. GUNDIL, Judicial Member, and P. C. MALHOTRA, Accountant Member) delivered the following judgment on May 10, 1941.

"This appeal calls into question a supplementary assessment made by the Income Tax Officer, u/s 34 of the Indian Income Tax Act and confirmed by the Appellate Assistant Commissioner of Income Tax, A Range, Bombay, on December 9, 1940.

2. The contest is in regard to the assessment made in the assessment year 1936-37. The original assessment for the year in question was made by the Income Tax Officer on July 9, 1937 computing the appellants assessable income at Rs. 1,47,160. Some time later, on definite information received, the same Income Tax Officer issued a notice u/s 34 to the appellant to make a fresh return of his income, stating that his income from "all sources" had partially escaped assessment. The matter came before another Income Tax Officer who on July 23, 1940, made a fresh assessment, computing the assessable income at Rs. 4,54,417. The appellant asks that this later assessment be set aside on three main grounds, which we will

consider in order.

3. In the first place, it is contended that the notice u/s 34 was irregular and invalid, because no particular source of income was shown in the notice as having escaped assessment. The learned counsel pointed out a form of the notice prescribed at page 269 of the Income Tax Manual, 7th Edition, and contended that the Income Tax Officer was bound to abide by the particular form. The present case is governed by Section 34 as it stood before the amendment of 1939. A form of notice under that section is prescribed in the Income Tax Manual, and one of the two footnotes referring to the mode of filing in the blank space in the body of the notice is worded "Here enter the source." No such footnote, however, occurs in the form in 8th Edition of the Income Tax Manual compiled after the Income Tax Act was amended in 1939. The learned departmental representative, however, maintained that Section 34 itself did not prescribe a notice in any particular form, and that the departmental instructions contained in the Income Tax Manual were intended only as directory and not by any means mandatory. He urged further that even if the Income Tax Officer had written a letter that would have been a sufficient compliance with law, provided it stated that an assessees income or part of his income had escaped assessment. Without going as far as to accept the latter proposition, it appear to us to be clear that all that Section 34 requires is a notice containing all or any of the requirements which may be included in a notice u/s 22(2) of the Act. This view is supported by In the matter of Messrs. Burn & Co., followed in Jawala Prasad Chobey v. Commissioner of Income Tax, Bengal. Moreover, in the present case, the appellant had no different sources of income. His only source was business. Thus the expression "all sources" occurring in the notice really meant one source, that is to say, the appellants business. That being so, we do not think that the appellant could be unaware of the source which was stated to have escaped assessment and which was intended to be re-assessed. At any rate, the appellant put in a return in compliance with the notice and might be therefore taken to have waived the irregularity, if any. We are therefore unable to hold that the notice was bad in law.

4. The most important dispute in this appeal reference to the re-assessment of three items, namely, Rs. 2,95,619, Rs. 8,368 and Rs. 3,000. The first is alleged to be a loss arising out of connected transactions of straddle business done by the appellant in Samvat 1990-91, and carried forward to the accounting year Samvat 1991-92. The second item is an aggregate of different sums lying to the credit of several individuals who are alleged by the respondent to be fictitious. The third item of Rs. 3,000 is alleged to be the amount paid by the appellant as rebate from exchange brokers, and not accounted for in his books.

(a) The sum of Rs. 2,95,619 is the opening debit balance in the Vilayat Badla account brought forward from the books of Samvat 1990-91, and represents the figure of losses incurred in silver speculation in India in the months of Shrawan, Bhadarva and also of Samvat 1990-91. The bringing forward of the losses into the accounts of

subsequent years was contrary to Setion 24 of the Income Tax Act as it stood before its amendment by the additions of several provisos in 1939. In other words, an assessee was not entitled to, any allowance in this respect so as to set of the losses thus brought forward to the profits of the next year. The learned counsel of the appellant, however, contended that the several transactions resulting in loss were a part of the straddle transactions done by the appellant in London, it would not be a correct thing to include the items of the loss in the profit and loss account of the Samvat 1990-91, as the connected transactions were done in England, and the profit amounting to Rs. 1,96,000 and odd has been brought in in the books of account for the year Samvat 1991-92; and that therefore this loss was really not for the Samvat 1990-91 but for 1991-92. The learned departmental representative, however, maintained that the appellant did not produce the books for the year Samvat 1990-91 at the time of the reassessment, nor produced them even at the time of the original assessment, and that therefore it was not established tab tiny straddle business was done by the appellant as alleged by him. We are not quite sure about the correctness of the second part of the learned departmental representatives statement, i.e., regarding the non-production of the books at the time of the original assessment. The record contains the Examiners report of the original assessment. It shows the details of the item of Rs. 2,95,619, which, in our opinion, was not possible to ascertain unless the books of Samvat 1990-91 were before the Examiner. However, the point has no material bearing on the question before us and need not be noticed further. The fact remains that we have little or no evidence of any straddle business done by the appellant in London in the year in question. Assuming, however, that he did such kind of business in London, it will have to be borne in mind that the loss with which we are concerned in this case had been incurred in respect of Bombay transactions, and had been ascertained before the end of the year, or, at any rate, before closing the accounts for that year. The transaction done in London could not in any sense be regarded as any part of the corresponding transactions made in India. Obviously, the London transactions must have been made as a cover for any possible losses here. In other words, the two sets of transactions were, in our opinion, altogether independent. We therefore fail to find any justification for the item of Rs. 2,95,619 not being adjusted in the profit and loss account of the year in which they were sustained. Next, the method of accounting adopted by the appellant has been to bring in the losses or profits in Bombay transactions in the particular financial year in which the settlements were made; and the losses and profits of England in the particular financial year in which the advises were received from England. It is, however, remarkable that in the years under assessment the has maintained the same method as adopted by him all through in the case of Vilayat Badla account, but has varied it in the case of Bombay transactions which he could not do. It was a variation in the method of accounting regularly employed by the assessee. It is admitted that the appellant has been continuously adopting the method as just stated. This part of the case may be summarised as follows. In the assessment year 1935-36, the appellant did not

include the losses suffered by him for the months of Shrawan, Bhadarva and Aso, i.e., he brought in the transactions of 9 months only for the Bombay transaction. But in the case of London transactions he followed his usual practice of bringing in the loss and profit of 12 months. In the assessment year 1936-37, however, he brought in his profit for the Vilayat Badla account (London transactions) for the period of 12 months as had been done by him all through in the previous year and also subsequent years; but in the case of the Bombay transactions he brought in profit and loss for 15 months which he could not do under the Act. In order to find out the assessable income for the assessment year 1936-37, only 12 months transactions should have been included as far as Bombay transactions were concerned, and not 15 months as was done by the appellant. His object in adopting the particular course that the did appears to us to be transparent enough. For the assessment year 1935-36 the appellant was assessed on a total income of Rs. 12,879 only. This income being divided among a number of partners, no tax could be levied from the appellant in that year. If the loss of Rs. 2,95,619 had been brought in the computation, as it should have been done, it would have made practically no difference to the appellants liability to the payment of the tax (sic) was concerned. He must have found that he had made large profits in the assessment year 1936-37 when he put in his return for 1935-36, on June 6, 1935. Accordingly, he cleverly manipulated his accounts by not bringing this item to the debit of his profit and loss account of 1935-36, but resorted to the device of carrying it forward the next year with a view to evade Income Tax on the profits accrued during the assessment year 1935-36. Apparently, the Income Tax Officer who made the first assessment was not able to detect the appellants underlying motive at that time, and so soon as he realised the effect of such an entry he forthwith served the appellant with a notice u/s 34. For these reasons, we are unable to hold that this item of loss should not be excluded form the assessment of the year under reference.

(b) Taking up the second item of Rs. 8,368 it is in aggregate of 5 items in a corresponding number of personal accounts. The appellant has a large number of such accounts. The Income Tax Officer required the appellant to prove that the 5 items were actually due by the appellant to the persons to whose credits they are lying. He appears to have thought that the parties were fictitious. The appellant wrote a letter to the Income Tax Officer giving the names and address of the persons to whom these amounts were due. The learned counsel for the appellant has urged that it was not possible for him to actually produce these parties before the Income Tax Officer, and it was the duty of the latter to make necessary inquiries regarding the persons to whom the amounts were shown to be due in the appellants books. The appellant was actually able to produce the parties in some cases, and the Income Tax Officer allowed those sums. In a big concern like that of the appellant where there are a large number of personal accounts we think that it was a hardship if a proudest of every creditor was insisted upon. Beyond the bare fact that the appellant was not able to produce these 5 persons, we do not find

anything to sustain the Income Tax Officers view more especially having regard to one of his remarks contained in his report dated July 8, 1940 to the Appellate Assistant Commissioner, Central, Bombay. He told the latter that the examination of accounts over again did not disclose any suspicious facts. We thing therefore that the sum of Rs. 8,368 was an aggregate of 5 different sum due by the appellant to the respective persons whose names and addresses were given by the appellant, and that it did not form a part of his income.

(c) The contest in regard to the last item of Rs. 3,000 has no substance whatsoever. Admittedly, this sum was not brought in in the appellants books. It was said that it really belonged to several sub-brokers. We think that it was the duty of the appellant to show the receipt of this sum as his income and claim a deduction for the payment alleged to have been made to the sub-brokers. In our opinion, his failure to do so justified the Income Tax Officer in adding back this item in the appellants assessment for the year under reference.

5. The last point taken by the appellants learned council is that the re-assessment u/s 34 was illegal as it was not proved that any income had escaped assessment at the time when it was originally made. From the facts stated before, it must be perfectly clear that the original assessment was wrong as the Income Tax Officer had taken into account the Bombay transaction of 15 months instead of 12 months; and secondly, because the sum of Rs. 3,000 had been received by the appellant as income and not accounted for in his books. The learned counsel relies upon the case of the Commissioner of Income Tax, Bombay v. Gopal Vaijnath. But far from supporting the appellant it appears to be reinforcing the view that we take of the case. The actual decision of the case depended upon its particular facts; but the observations of Beamount, C.J., and Rangnekar, J., are clearly to the effect that Section 34 should not be confined to cases in which a source has escaped assessment, but that its provisions extend to correcting assessment in which a deduction had been improperly allowed. Their Lordships expressed themselves in full agreement with the remarks by Rankin, C.J., in the Anglo-Persian Oil Company (India) Ltd. v. The Commissioner of Income Tax, which are to the effect that the Income Tax authorities can put right an assessment by which a deduction has been improperly allowed. That is exactly the case here. The Income Tax Officer who first made the assessment committed an error of judgment which amounted to a mistake of law by allowing a deduction of Rs. 2,95,619 from the assessable income of the appellant who had brought in 15 months transactions instead of 12 months in the computation. In other words, it was an improper deduction which could, in our opinion, be set right u/s 34. We, therefore, hold that he was fully justified in assessing the appellant endorse action 34 of the Indian Income Tax Act.

6. The result is that we partially allow this appeal, and order that the sum of Rs. 8,368 be allowed to the appellant and deduct it from the total assessable income for the year under reference. The rest of the appeal is dismissed."

On the application of the assessee u/s 66(1) of the Indian Income Tax Act (XI of 1922) as amended by Section 92 of the Indian Income Tax (Amendment) Act (VII of 1939) the Appellate Tribunal referred the case to the Bombay High Court :-

JUDGMENT

BEAUMONT, C.J. - This is a reference made by the Income Tax Appellate Tribunal, (Bombay Branch) u/s 66 of the Income Tax Act, and it raised two questions relating to a further assessment made on the assesses u/s 34 of the Income Tax Act.

The first question which presents no difficulty whatever is :

"Whether in the circumstances of this case the notice of reassessment issued to the applicant u/s 34 of the Income Tax Act was invalid or illegal for failure to specify the particular source of income that had escaped assessment ?"

The notice u/s 34 stated that the Income Tax Officer had reason to believe that the assesses income from all sources which arose, accrued or was received in the previous year had partially escaped assessment. It is said that the notice ought to have specified the particular source of income which was alleged to have escaped assessment, and reliance is placed on the form of notice given in the Income Tax Manual, which does state the source of the income which is alleged to have escaped assessment. But that form is not statutory. All that is necessary u/s 34 is that a notice should be given which sufficiently draws the attention of the assessees to the case which he has to meet, and as, admittedly, the assessees in this case have only one source of income, namely business, it seems to me plain that a notice say in that income from all sources had escaped assessment was quite sufficient to show them what the case was which they had to meet, namely, that some of their income from the only source from which any income was derived had escaped assessment.

The first question will therefore be answered by saying that the notice was valid.

The second question is : "Whether in the circumstance of the case a part of the applicants income had escaped assessment within the meaning of Section 34 of the Indian Income Tax Act, so that it could be reassessed by the second Income Tax Officer ?"

The year of assessment is 1936-37, which is the Maru year 1991-92. In the original assessment the Income Tax Officer allowed under Action 23 of the Act as a deduction from the profits of the accounting year a sum of about Rs. 3 lacs, being the loss which the assessees had sustained in relation to the business in the year 1990-91. He considered that the loss in question could be brought into the accounts for the year of assessment 1991-92, because the business done in Bombay and the business done in London were what is called straddle business, and he held that the accounts had not been closed at the end of the year 1990-91. Subsequently, the same Income Tax Officer came to the conclusion that he had made a mistake, that he ought to have held that the loss of Rs. 3 lacs was not incurred in the Maru year

1991-92, and could not be allowed u/s 24 and he, therefore, gave a notice u/s 34 alleging that the amount allowed as deduction had escape assessment. The actual hearing of the notice of re-assessment was carried out by another Income Tax Officer, Income Tax Officer. Who agreed that the sum of about Rs. 3 face ought not to have been allowed as a deduction and that the sum had escaped assessment.

Section 34 of the Act before the amendments of 1939 provided that if for any reason income, profit or gains chargeable to income tax had escaped assessment in any year or had been assessed at too low a rate, the Income Tax Officer might, at any time within one year of the end of that year, serve a notice, and then proceed to re-assessee by the method laid down under the Act for the original assessment.

It is argued by the assessees that it cannot be said that income has escaped assessment, unless there have been some additional facts brought to the notice of the Income Tax Officer, or some change in the law effected or revealed since the original assessment; and that it the Income Tax Officer merely changes his opinion, or if a fresh Income Tax Officer merely disagrees with the opinion of a previous Income Tax Officer, and therefore includes further income in the assessment, it cannot be said that any income has escaped assessment.

The view which was taken by the Rangoon High Court in Commissioner of Income Tax, Burma v. U Lu Nyo was that if once a source of income had been assessed, the matter was disposed of, and it could not be said that any income from that source had escaped assessment. But that view, which was not necessary for the actual decision of the particular case, which dealt with a difference of opinion between two Income Tax Officers on a mere matter of estimate, has not found favour with any other High Court in India. This Court differed from that view in Commissioner of Income Tax Bombay v. Manohar, although we agreed with the actual decision and followed it in that case which was also a case in which one Income Tax Officer had differed from an estimate formed by a previous Income Tax Officer. The Rangoon High Court in a later case, Commissioner of Income Tax v. Dey Brothers, adhered to its former opinion but, as I have said, no other High Court has accepted that view.

The other High Courts have taken the view that the only question u/s 34 is whether in fact income has escaped assessment, and that income which might have been, but was not assessed, has escaped assessment and one ground on which income may undoubtedly be shown to have escaped assessment, is that the true facts were not brought to the notice of the Income Tax Officer. But if one admits that in such a case income had escaped assessment, it has equally escaped assessment if the true facts were brought to the notice of the Income Tax Officer, but he failed to appreciate them or mislaid some file and did not consider some particular facts. Again, it cannot, I think, be disputed that as this court held in Commissioner of Income Tax, Bombay v. P.N. Contractor, if an assessment is based on a view of the law held to be correct by high Courts in India but subsequently within the year allowed by Section 34 held by the Privy Council to be incorrect and by reason of that

revealed change in the law it appears that some income has escaped assessment, that is a good ground for serving a notice u/s 34, and re-assessing the assessee. But if one accepts that view, it is very difficult to say that the case would not have failed within Section 34, if the decision of the higher tribunal had been given before the assessment though the Income Tax Officer did not know of the decision, or had failed appreciate it. It seems to me very difficult on the language of Section 34 to say that in order to hold that income may have escaped assessment, there must have been either some fresh facts brought to the notice of the Income Tax authorities or some change in the law and to hold that a mere change of opinion by the Income Tax Officer will not be sufficient to found a case under the section.

The Privy council in a recent case, Commissioner of Income Tax, Banegal v. Mahaliram Ramjidas, in which they were dealing with a decision of the Calcutta High Court in which it had been held that before a notice can be given u/s 34, the Income Tax Officer must hold some sort of judicial inquiry to satisfy himself that a proper case exists, were not prepared to accept that view and held that to enable and Income Tax Officer to intiate procceedings u/s 34 it is enough that the Income Tax Officer on the information which has before him and in good faith considers that he has good ground for believing that the assessees profits have for some reason escaped assessment, or have been assessed at too low rate. So that, a notice can be served if the Income Tax Officer is bona fide of opinion that the income has escaped assessment. High Courts in this country have held that an Income Tax Officer or his successor is entitled u/s 34 to re-assess the income, merely because he thinks that owing to some mistake in the first assessment income escaped assessment. That has been held by the Madras High Court in Commissioner of Income Tax v. Raja of Parlakimedi, by the Lahore High Court in Amir Singh Sher Singh v. Commissioner of Income Tax BIFB, and by the Calcutta High Court in P. C. Mallick and D. C. Aich, In re, whilst there is a dictum of Sir George Rankin in Anglo Persian Oil Co., Ltd. v. Commissioner of Income Tax to the effect that Section 34 is applicable to put right an assessment by which a deduction has been improperly allowed. The Income Tax Tribunal has based its decision in this case very largely on that dictum. The effect of those decision in this case very largely on that dictum. The effect of those decisions appears to be to allow Section 34 to be use as section giving power to the Income Tax Officer to revise his own decision or the decision of his predecessor and in view of the other provisions for revision in the his predecessor and in view of the other provisions for revision in the Income Tax Act, e.g., Section 33 and Section 35, it is rather strange that Section 34 should have that effect. But, as I have already pointed out, if it be once admitted that an assessment may be reopened u/s 34 (and the language seems to make such an admission inevitably it is very difficult to draw the line in any way, and to say that it can only be re-opened on a particular ground, such as change of facts, or alternation in the law. I may say that even if I disagreed with the decisions, which I do not, I should not be prepared to differ from decisions of other High Courts on an Act or this sort which applies throughout British India.

In my opinion, therefore, the notice u/s 34 was justified, but does not dispose of the matter. Income cannot be held to have escaped assessment merely on the Ipse Dixit of the Income Tax Officer. As held by this Court in Commissioner of Income Tax, Bombay v. Manohar, it is for the Income Tax Officer to establish to his own satisfaction on the assessment and subsequently before any Appellate Tribunal that income has escaped assessment; it is not for the assessee to prove that the original assessment was right and that no income has escaped assessment.

The facts of this case are peculiar. The Tribunal has that he fore the Income Tax Officer on the occasion of the first assessment the assesses books for the Maru year 1990-91 were produced though this was denied by the Commissioner. When the second assessment was made, which was not till 1940, more than six years after the close of the Maru year 1990-91, the books of that year were not available. The position is discussed in paragraph 8 of the assessees grounds of appeal where they point out that there have been many changes in the Income Tax Officer whose duty it was from time to time to deal with their assessment, and they say that they did produce the books for the Maru year 1990-91 at the original assessment and on subsequent occasions, but when it came to the last assessment, they had sent the books to their native place, where they had been destroyed as being more than six years old. There is no reason to doubt that state deuced at the original assessment. So that, it really comes to this, that the second Income Tax Officer has differed from the first not merely on the same material, but on much less material, than the first officer had. He holds without the books of 1990-91 that there was no straddle business in that year and without those books it seems difficult to arrive at that conclusion, when an officer who saw the books arrived at an opposite conclusion. The Appellate Tribunal no doubt has agreed with the second officers conclusion and they say that not withstanding that the books for the Maru year 1990-91 were originally produced, the fact remains that "we have little or no evidence of any straddle business done by the appellants in London in the year in question." But that is really throwing upon the assessee the burden of proving that income has not escaped assessment and that burden is thrown upon them at a time when, through the delay in dealing with the re-assessment, the necessary material is not available. In may opinion, an Income Tax Officer is not entitled to give a notice has that the assessees have failed to prove that the income has not escaped assessment. Therefore whilst I agree that the notice u/s 34 was justified though no fresh material was available, I do not agree that there is evidence that any income had escaped assessment. In may opinion the Tribunal ought to have held that there was no evidence on which the second Income Tax Officer could hold that any income had escaped assessment.
I would, therefore, answer the second question in the negative.

The Commissioner to pay three fourths of the cost. Certificate to issue that no question u/s 205 of the Government of India Act arises in this case.

KANIA, J. - Two questions have been submitted by the Tribunal for the determination of the Court. The necessary facts, reasons and our conclusion have been stated in respect of the first question by the learned Chief Justice in his judgment and I have nothing more to add to that.

As regards the second question, the facts are these. The assessment year was 1936-37 and the accounting year S. 1991 (Maru) was from the of November 8, 1934 to the of October 27, 1935. The sole item under which the assessees were assessed was business. According to them they had transactions in silver in Bombay and they were also doing straddle business in silver in Bombay and London. Straddle business done in Bomb during the last three months of Maru 1992 (which, by the very use of the word "straddle), must mean carry over so as to set off the outstanding business in London) showed that in carrying out the business the assessees in London) showed that in carrying out the business the assessees had paid in the market certain amounts. The amounts so paid were debited in their ledger. After considering all the facts the Income Tax Officer made the assessment order on the July 9. Before doing that, as the record shows, the assessees had produced than books of account of Samval 1990-91 and also of 1991-92. Not only that but an examiners report on those books was submitted to the then Income Tax Officer before he made the assessment. That officer came to the conclusion that the loss shown in the ledger of S. 1990-91 appertained to the transactions of S. 1991-92 and allowed the assessees to set off the debit items mentioned above against the profits for S. 1991-92. On no other footing he could allow a set off in respect of that loss against the business of S. 1991-92. It must be presumed that the Income Tax Officer was aware of the relevant provisions of the Income Tax Act.
Thereafter, on the of March 22, 1938 a notice u/s 34 was issued on the assessees to start re-assessment proceedings. The assessees appeared before the Income Tax Officer. In para 8 of the grounds of appeal before the Appellate Tribunal, they have stated that in the course of re-assessment, books of S. 1991-92 were called for and examined. The officer did not ask the assessees to produce the books of S. 1990-91. Before the officer could pass orders the case was transferred to another Income Tax Officer. That officer again never called for the Books of S. 1990-91. He examined only the books of 1991-92. Before he also could pass an order the case was again transferred to the Income Tax Officer, Section VII, Central, and it was only in 1940 that the officer asked to see the books of S. 1990-91 (1934-35). The assessees further stated that their books according to their usual practice after the assessment was made by the Income Tax Officer were sent away to their native palace except for one preceding year. They had accordingly sent over the books of S. 1990-91 to their native place after the assessment order was made on July 9, 1947. When in 1940 the demand for the reproduction of these books was made they made inquiries and it was found that the same were destroyed along with other old books as they had been moth-eaten. These facts which are set out in the grounds of appeal are not controverted. In 1940 without seeing the books of S. 1990-91 and without any

additional or new evidence the Income Tax Officer held that the straddle transactions were not proved and the debit items mentioned above appertained to the business of the previous year. He was therefore of opinion that the allowance made in making the previous assessment order was unjustified and had escaped assessment. The tribunal accepted the facts about the production of the books previously but appears to be pressed to consider the rest of the evidence. From the judgment of the Tribunal it is clear that before them also it was not alleged that any additional or new evidence was considered in making the re-assessment. In the course of its judgment the Tribunal observed that the transactions were independent and the method of accounting adopted had been altered. Admittedly these surmises were based on the fragmentary materials put before them and without considering and in the absence of the assessees books for S. 1990-91.

The question is whether under these circumstances the order made by the officer in 1940 on the basis that the income had escaped assessment, is justified. To put it in brief, the first officer had evidence of A, B, C and D before him and he came to the conclusion that the transactions were straddle transactions and that the loss on account of these transactions entered in the books of S. 1990-91 should be allowed to be set off against the business profits of S. 1991-92. When re-considering the matter u/s 34, the Income Tax Officer in 1940 had before him only three out of the above mentioned four pieces of evidence and no other evidence at all. On that evidence only he held that the item of Rs. 2.95,619 hand escaped assessment. In my opinion, the record thus clearly shows that there was no evidence before the Income Tax Officer or Tribunal to hold that any income had escaped assessment. The question of law about the application of Section 34 could arise only if on the same materials at least the second officer had come to a different conclusion.

On the question of interpretation of Section 34, considerable time has been spent and I think it is desirable under the circumstances to express my opinion on it. I may notice that I have not been a party to any previous decision on Section 34, although I am bound by the opinion of the Benches of this Court expressed in considering this section. It may also be noticed that the present discussion centers round Section 34 of the Act as it existed before the amendment. I make this clear, because the words of the amended section correspond more to the section of the English Act in force.

Under Section 34 the relevant words are that if for any reason income , profits or gains chargeable to Income Tax has escaped assessment, the Income Tax Officer may at any time within one year adopt proceedings by issuing a notice similar to the one u/s 22 of the Income Tax Act.

The first case on this point, to which our attention was drawn, is Commissioner of Income Tax v. Raja of Parlakimedi. It was decided by the Madras High Court. The income of certain houses had not been assessed in a particular year and in a subsequent year on a reconsideration of the matter by another officer, it was held

that the income of the houses was assessable. The question arose whether it could be re-assessed retrospectively. In dealing with the question Counts Trotter, C.J., relied on the words "too low a rate" used in Section 34 for the construction of the first part of Section 34 which deals with escaped assessment. That learned Chief Justice observed that because a lower rate of assessment could not be cure to mere inadvertence if income had not been assessed through inadvertence, it could equally be covered by the words "escaped assessment." I respectfully differ from this line of reasoning because a lower rate of assessment is not necessarily due to mere inadvertence. It may be due to various other considerations and not mere inadvertence.

The next case is Anglo-Persian Oil Co. v. Commissioner of Income Tax, where Rankin, C.J., had occasion to consider this Section 34. Although the point did not arise directly before him, he expressed the opinion on the meaning of that section and stated that the words were wide enough to cover a deduction which had been improperly allowed. About 5 months later came the decision of the Rangoon High Court in Commissioner of Income Tax, Burma v. U Lu Nyo, where three Judges of that Court came to the conclusion that the words "escaped assessment" in Section 34 did not cover the case of income which had been considered by the assessing officer and allowed to pass free or assessed in a particular way. According to them "escaped" must mean what had not been considered because once it had been considered by the Income Tax authorities, it became income which was assessed. That view was considered too narrow and not accepted by the Bombay High court in Commissioner of Income Tax, Bombay v. Manohar.

In between there arose an occasion for the Privy Council to refer to Section 34 in Sir Rajendranath v. Commissioner of Income Tax. As I read that judgment, it does not cover the point before us at all. In that case an assessee had made his return and while the consideration of that return was pending another assessees assessment was considered. It was found that a certain item which was included in that (second) return should not be included in that return but should be put in the first return. The argument before the Privy Council was that as one year had expired there was no justification for including this item under the first return. That argument was negatived, and, in my opinion, there can be no two opinions on the question. The only reference to Section 34 made by the privy Council was because it was used as an argument in support of the contention urged before them. Their Lordships had no occasion to consider the effect and meaning of the words "escaped assessment." They only negatived the contention that the words "has escaped assessment" were equivalent to "has not been assessed".

In the case of Commissioner of Income Tax, Bombay v. Manoha a Bench of this Court had occasion to consider the operation of Section 34. The facts found there were as follows : The first officer had according to his onion fixed a certain percentage of the price of gold and silver as profit to be assessed. Obviously that

was based on what one might call a rule of thumb. After some time a notice u/s 34 was issued and the second officer in his opinion thought that a highs rate should be taken for calculating the profits. That was equally another rule of thumb laid down by that officer. When the matter came before the Court, the Bench decided that this was not covered by Section 34. The burden of showing that income had escaped assessment (in the sense that the Income Tax Officer had some evidence before him to justify the conclusion that the income had escaped assessment) was on the Commissioner. The Bench found that there was no evidence except mere opinion, which, to put it at its highest, was a surmise. The Court therefore held that the second assessment was not justified. This opinion of our Court, I apprehend, was not properly appreciated by the learned Judges of the Rangoon High court in Commissioner of Income Tax v. Dey Brothers. They adhered to the view they had expressed in their previous case of Commissioner of Income Tax, Burma v. U Lu Nyo which, so far as the principle was concerned was accepted by this Court in Commissioner of Income Tax, Bombay v. Manohar.

Those cases came to be considered by the Lahore High Court in Amir Singh Sher Singh v. Commissioner of Income Tax. The learned Judges came to the conclusion that having regard to the opening wards of Section 34, viz., "for any reason" there was no justification for confining the meaning of the word "escape" within any limits, and all the different meaning given to the word "escape in Murrays Oxford Dictionary could be held applicable to the word "escape" when the matter came to be considered by the Income Tax Officer u/s 34. In Madden Mohan Lal v. Commissioner of Income Tax, a Full Bench of the Lahore High Court had occasion to consider again the meaning of Section 34 in view of the different opinions so far expressed by the three High Courts, and the majority of the Judges (Dalip Singh, J., dissenting) held that the meaning given to the word "escape" in Amir Singh Sher Singh v. Commissioner of Income Tax was correct. Mr. Justice Dalip Singh was of the opinion that the wry "escaped" should be limited to mean "eluded notice" and should not be given all the different meanings noted against that word in Murrays dictionary, in In re P. C. Mallick & D. C. Aich, the Calcutta High Court had occasion to consider the construction of Section 34. In that case a testator by his will directed inter alia certain payments of money to be made to certain beneficiaries and annuities to certain other persons out of the income of his property. In the assessment of Income Tax for the year 1933 made on the executors the Income Tax Officer allowed as a deduction a certain sum which was paid to the beneficiaries under the will. In January 1935 the Income Tax authorities came to the conclusion that the amount was improperly allowed and assessed it u/s 34 on the ground that it had escaped assessment in the year in question. It was held that having regard to the plain words of Section 34, it was impossible to say that the amount did not escape assessment in the year in question. In the course of his judgment Derbyshire, C.J., referred to a decision of this Court in Commissioner of Income Tax v. M. R. Naik. In that case because of an interpretation of mistake of law had been

committed in making the previous assessment and proceedings were considered to have been properly started u/s 34 within the prescribed time. In the Calcutta case when making the first assessment the Income Tax authorities had the figure of the amount which they allowed before them and after considering it allowed the deduction. The learned Chief justice held that the amount was not assessed and it was assessed because the Income Tax Officer made a mistake in 1933 which he attempted to put right in January 1935. Having regard to the general words used at the commencement of the section it was held that it was impossible to say that the amount had not escaped assessment in the year in question. The Allahabad and Madras cases do not appear to be discussed in the judgment.

In this state of the law the question is whether Section 34 gives to the Income Tax Officer a large revising power as contended on behalf of the respondent or whether it is limited only to set right what had seen either overlooked or misunderstood. The cases noted above clearly show that the Madras, Lahore and Calcutta High Courts are of the view that there is no justification to limb the operation of the word "escaped" as suggested by Sir Earthier Page in his judgment in the Rangoon case. The Bombay high Court has differed from the view of the Rangoon High Court and held that the meaning given to the word "escaped" appeared to be unnecessarily narrow in that case.

Our High Court has accepted the principle that unless it found it impossible conscientiously to accept the consensus of opinion of other High Courts it would follow the construction put on a section of an Act applicable to the whole of India by the other High Courts. Acting under that principle if necessary I whirl agree that Section 34 had that wider application. If the matter were at large, I confess that I am not prepared to give such wide meaning to the word "escaped." Section 34, in my opinion, should be construed along with the other sections of the Act. In the ordinary cause an order made after investigation by a particular officer should not at his sweet will and pleasure be allowed to be varied. There must in my view exist something either suppressed by the assessee, or a fact or point of law which he inadvertently or other wise omitted to consider before he could proceed to act u/s 34 of the Act. It is only in those cases that tha Incom-tax Officer or his successor occupying the same position has a right to revise the order. A mere change of opinion on the words "for any reason" used in Section 34 are very wide. However I think the words used in the section must be given a reasonable meaning having regard to the other powers contained in the Act. In my view if an assessing officer felt that he had committed an error bona fide it is open to him to refer the case u/s 33 to the Commissioner and of the Commissioner to act on such reference. I should hesitate considerably before assuming that u/s 34 the same Income Tax Officer has power to revise his order for one year, and, if the argument is carried to its logical extent, as many times as he liked within that year. The different meanings given to the word "escaped" in dictionary are not all applicable to the word at the same time. The context must be loved at and the meaning appropriate under the circumstances

only should be given to the word.

I agree that the se should be answered in the negative.

Reference answered accordingly.