

(1980) 11 CAL CK 0005
In the Calcutta High Court
Case No : Matter No. 220 of 1972

Controller of Estate Duty

APPELLANT

Vs

Smt. Ila Das and Others

RESPONDENT

Date of Decision : 26-11-1980

Acts Referred:

Estate Duty Act, 1953 — Section 58, 59, 62

Citation : (1981) 25 CTR 16 : (1981) 132 ITR 720

Hon'ble Judges : Sudhindra Mohan Guha, J; Sabyasachi Mukharji, J

Bench : Division Bench

Advocate : Ajit Sengupta and M.L. Bhattacharjee, for the Appellant; Meghnath Banerjee, for the Respondent

Judgement

SABYASACHI MUKHARJI J.

1. One Debendra Nath Das died on the 26th December, 1957. To the misfortune of whoever are his heirs--we are, however, not actually concerned as to that--he left certain properties. The question of valuation of his estate still lingers on in 1980, twenty-three years after his death and may perhaps linger on for an ultimate solution for a decade more.

2. The original account in respect of his estate was filed on 9th April, 1959. The assessment was completed under the E.D. Act, 1953, on 29th of January, 1960. The accountable person preferred an appeal before the CBR and it must be stated that the question of valuation of the two properties which are the subject-matter of this reference was not a matter in appeal before the CBR. The appeal was disposed of by the CBR on 30th August, 1961. The deceased during his lifetime was the owner of several premises including, inter alia, premises Nos. 95 and 96, Ultadanga Main Road, and the said premises had been acquired by acquisition proceedings by the Collector on the 27th September, 1957, that is to say, during the lifetime of the deceased. The compensation amounting to Rs. 5,76,119 awarded by the Collector had been received by the deceased during his lifetime and formed part of the balance in the bank account which was

considered in the assessment proceedings under the E.D. Act. It is stated in the order of the Deputy Controller of Estate Duty dated 31st of July, 1962, that after completion of the assessment, information was received to the effect that certain further amounts forming part of the estate of the deceased which had been left out from the assessment, required to be included in the estate and charged to duty. A notice u/s 59 of the E.D. Act as amended by the E.D. (Amendment) Act, 1958, was accordingly issued on the 16th of December, 1961, calling upon the accountable person to deliver an account of all the properties including which the Deputy Controller described in his order, "further assets ascertained after completion of the original assessment ". The accountable person filed an account in Form E.D.-I on 18th July, 1962, declaring the value of the various assets at the amount originally assessed but not including the further amounts which had accrued to the estate since the date of the original assessment. The Deputy Controller in his order stated, inter alia, as follows :

"Rs. 1,31,778.17 awarded by the President, Calcutta Improvement Tribunal, over and above the compensation of Rs. 5,76,119 in respect of the property at Nos. 95 and 96, Ultadanga Main Road. This property was acquired under the Land Acquisition Act, 1894, and possession was taken by the Collector on 27th September, 1957. Compensation amounting to Rs. 5,76,119 awarded by the Collector was received by the deceased during his lifetime and this formed part of the balance in the bank included in the original assessment. A reference case was filed against the said award before the Improvement Tribunal, Calcutta. The President, Improvement Tribunal, Calcutta, by his order No. 28, dated 19th January, 1960, awarded the following further amounts in respect of this property :

Rs.

Enhanced valuation 1,779.24 np.

Statutory allowance u/s 23(2) 86,684.77 "

Compensation u/s. 48A 26,081.00 "

Interest at 6% per annum from 27-9-57 to 11-1-60 15,749.94 "

Costs 1,460.22 "

1,31,778.17 np."

3. He went on to observe that as the right to receive compensation rightly due under the Land Acquisition Act, including the enhancement in the sum which might be awarded by the higher judicial authorities, accrued to the deceased during his lifetime, the further amount subsequently awarded by the President of the Tribunal formed part of the estate. His attention was drawn by the learned advocate on behalf of the accountable person to Section 34(5) of the E.D. Act. According to the Deputy Controller, the section provided that no property should be aggregated more than once nor should estate duty in respect thereof be

levied more than once on the same property. The Deputy Controller expressed his inability to understand the relevancy of the section in the context of the facts of the case. The compensation of Rs. 5,76,119 received by the deceased during his lifetime had no doubt been included in the estate and had already been assessed. Subsequent enhancement by the President, Improvement Tribunal, the Deputy Controller observed, could not be treated as the same property as the original compensation of Rs. 5,76,119.

4. It was urged before the Deputy Controller on behalf of the accountable person that the sum of Rs. 5,76,119 related to the property of premises Nos. 95 and 96, Ultadanga Main Road. The Deputy Controller found the argument not to be tenable. The property, according to him, the premises Nos. 95 and 96, Ultadanga Main Road, did not form part of the estate of the deceased at the time of his death. It had already vested in the State Govt. Even apart from this if it was found that the value of a property was under-estimated in the original assessment, according to the Deputy Controller, Section 59 authorised the reopening of the assessment in order to include the proper value of the property and to subject the same to duty. Any further amount that was added to the value originally assessed in order to offset the under-valuation could not, therefore, according to the Deputy Controller, be obviously considered as the same property as the amount already assessed. Thereafter, therefore, the Deputy Controller after deducting certain interest and costs added to the estate a sum of Rs. 1,16,241. We need not detain ourselves with the propriety and validity or the correctness of the deletion of the amounts from the total compensation. The accountable person had stated in his letter dated 7th June, 1960, that a further appeal against the decision of the President, Improvement Tribunal, had been filed in the High Court. In case any further amount was awarded to the estate as a result of the High Court decision, the same could be included in the estate by rectification of the order, directed the Deputy Controller. The Deputy Controller further observed that the accountable person deliberately had failed to include this amount in the account filed by him even though he was informed specifically that the assessment was reopened in order to include this amount. The Deputy Controller was of the view that the accountable person had rendered himself liable to penalty u/s 60(1)(c) and proceeded in respect of the same. We are not concerned with this aspect of the order made by the Deputy Controller. We may mention the two items that were included in the reassessment order passed, namely, a sum of Rs. 15,654 which was held by the Deputy Controller to be the enhancement in the market value of property at No. 93, Ultadanga Main Road, or alternatively the statutory allowance awarded in respect of this property, another item of Rs. 1,16,214 as mentioned hereinbefore included, which related to the further amount awarded by the President, Improvement Tribunal, in respect of properties at Nos. 95 and 96, Ultadanga Main Road. For the present purpose, we are only concerned with the question of compensation of Rs. 1,16,214.

5. The accountable person appealed to the Appellate Controller and it was urged before him that the initiation of proceedings u/s 59 of the E.D. Act was invalid,

ineffective and bad in law. The merits of the addition were also contested. The Appellate Controller decided the appeal against the accountable person on both these aspects.

6. The accountable person thereafter went up on further appeal before the Income Tax Appellate Tribunal. After setting out the facts and the order of the Deputy Controller, the Tribunal noted the contentions urged before it and thereafter referring to Section 59 of the E.D. Act, the Tribunal went on to observe that it was clear from the order of the Deputy Controller, an extract from which it had set out earlier by the Tribunal that the action taken u/s 59 was on the ground that after completion of the assessment information had been received and, therefore, the Tribunal felt that the provisions of Section 59(b) of the E.D. Act could be invoked.

7. According to the advocate for the accountable person before the Tribunal all the material facts had been made available during the course of the original assessment proceedings and there was no information which came into the possession of the Deputy Controller subsequent to such assessment and the provisions of Section 59(b) were, therefore, not attracted. On behalf of the revenue, however, it was urged that the award of the President of the Improvement Tribunal, both in respect of premises Nos. 95 and 96, Ultadanga Main Road as well as No. 93, Ultadanga Main Road, with which we are not concerned came to the notice of the Deputy Controller subsequent to the completion of the original assessment and, therefore, there was information within the meaning of Section 59(b) of the E.D. Act for reopening the assessment. Thereafter, the Appellate Tribunal had set out the relevant facts and observed that the accountable person had declared even at the assessment stage the fact that the award of the Land Acquisition Collector was not accepted and was subject to the pending appeal. The accountable person had also indicated the extent of relief claimed in appeal. However, there is nothing on the record to indicate that fact. The President of the Improvement Tribunal had given his judgment on 23rd of September, 1959, in Case No. 103/58 which was brought to the notice of the Deputy Controller. From the copy of the judgment which was produced before the Tribunal it was found that there was an application made for obtaining a certified copy on 30th of September, 1959, and a copy was also delivered on the 1st of December, 1959. The last date of hearing of the estate duty proceeding which led to the original assessment was on the 21st of January, 1960. By this date, the copy of the award had also been taken on behalf of the accountable person. The Deputy Controller of E.D. when finalising the original assessment was thus unaware of the fact that the President of the Improvement Tribunal had rendered his judgment whereby an additional amount of Rs. 1,31,778, particulars of which were stated earlier, had been awarded in respect of the property acquired. The fact that such a judgment had been delivered prior to the completion of the assessment came to the notice of the Deputy Controller only subsequent to the completion of the assessment and, therefore, the judgment of the President of the Improvement Tribunal did,

according to the Appellate Tribunal, constitute "information" within the meaning of Section 59(b) of the E.D. Act, 1953, as amended by the Act of 1958.

8. The next aspect that required consideration of the Tribunal was whether the provision of Section 59(b) could be applied to the present proceeding. The Tribunal, after referring to the relevant legislative history and the provisions of the statute and several decisions, came to the conclusion that the provisions of Section 59 could not be invoked for reopening the assessment which, in the present case, was made on the 29th January, 1960. It, therefore, set aside the reassessment.

9. On this, the following question has been referred to this court u/s 64(1) of the E.D. Act, 1953:

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in cancelling the reassessment made u/s 58(3) read with Section 59 of the Estate Duty Act of 1953 on the ground that the provisions of Section 59 of the said Act (which came into force on 1st July, 1960) could not be invoked for reopening the estate duty assessment originally completed on 29th January, 1960?"

10. In order to appreciate the contention, though we have referred to the relevant dates, it is necessary to refer to a few other dates, namely, 1st of July, 1960, when the E.D. (Amend.) Act came into force, though on the 19th of September, 1958, the E.D. (Amend.) Act, 1958, had received the assent of the President. As we have mentioned before, the original assessment under the E.D. Act was completed on the 20th of January, 1960. Appeal against the original assessment was pending at the time when the E.D. (Amend.) Act came into force on the 1st day of July, 1960. It has to be borne in mind that the question of principal value of the estate was the subject-matter of appeal and the subject-matter of appeal was not whether specifically the principal value of premises Nos. 95 and 96, Ultadanga Main Road, was to be enhanced or not. As a matter of fact, as a result of the decision of the CBR, the principal value of the estate which was determined at Rs. 20,11,076 was reduced, on the basis of the other grounds taken, to Rs. 19,11,076 by the CBR by an order dated 30th August, 1961. As we have mentioned before, the notice u/s 59 was issued in respect of the valuation of the two premises with which we are concerned on 16th of December, 1961. The accountable person filed a fresh E.D. account or return in E D-I. on the, 18th of July, 1962. There was a reassessment order made including the sum of Rs. 1,61,241 on the 31st of July, 1962, as we have mentioned hereinbefore and the order of the Appellate Controller upholding the said-order was passed on the 2nd June, 1964, and the Tribunal, in this case, disposed of the appeal on the 19th of August, 1971, holding that Section 59 of the Act could not be invoked. Thereafter, the question, as we have indicated, has been referred to this court.

11. The main question in this reference, therefore, is whether Section 59 of the E.D. Act, 1953, which was introduced by the E.D. (Amend.) Act, 1958, could be

applied to the facts and circumstances of this case. In order to appreciate this controversy, it would be necessary to refer to the relevant provisions of the E.D. Act. Under the unamended provisions of the scheme of the Act, u/s 5 of the Act, levy of the estate duty had been provided. Similar is the position after the amendment. In essence, it stipulates that estate duty shall be levied and paid upon the principal value of the property which pass on the death and such principal value has to be ascertained in accordance with the provisions of the Act. The rate of duty has been fixed u/s 35 of the Act. Part I of the Act containing Sections 1 to 4 deals with the definitions and interpretations, etc. For our present purpose, we need not detain ourselves with those sections. Part II containing Sections 5 to 20 deals with the imposition of estate duty and the property which pass on the death and which is deemed to pass on death. Part III containing Sections 21 to 33 deals with the exception from the charge of duty and exemptions. Part IV containing Sections 34 to 35 deals with aggregations of property and rates of duty. Part V containing Sections 36 to 43 deals with the principles of valuation of the property and Part VI containing Sections 44 to 50 deals with deductions allowable. We need not consider these provisions for our present purpose. Part VII containing Sections 51 to 73 dealing with the collection of duty is to a certain extent material for our present purpose. Section 53 prescribes the duties and liabilities of the person accountable. Section 55 gives the Controller power to ask for statement, particulars, etc., and Section 56 provides for penalty. In the unamended provisions, the section was headed "Penalty for default". In the amended provision penalty is dealt with in Section 60 which is headed " Penalty for default or concealment". We need not consider in detail the conditions for the imposition of penalty as was stipulated under the unamended provisions of Section 56 or the amended Section 60 for our present purpose. Similarly, Section 57 of the unamended Act stipulated the duty of the executor to specify all chargeable property. Section 56 of the amended provision dealt with the circumstances for the grant of representation. The unamended provision of Section 58 provided that estate duty, penalty or interest or any other sum chargeable under this Act had been determined in consequence of any order passed or in pursuance of the Act that the Controller should serve a notice of demand in the prescribed form specifying the sum so payable and the time within which and the place at which it was payable. Section 58 of the unamended provision provides for the procedure for the assessment. It is more or less similar to the present procedure of the I.T. Act for assessment and Section 73 of the amended provision deals with the notice of demand and the method of recovery of duty, penalty, etc. Section 59 of the unamended provision stipulated that no proceedings for levy of estate duty should be commenced after the expiration of 12 years from the date of death of the deceased in respect of whose property estate duty became leviable. Section 73A deals with the similar provision after the amendment of 1958, and shortened the period of the first assessment to 5 years and in case of reassessment to 3 years. It is also not material for us to discuss the difference between the old Section 59 and the new Section 73A. Section 60 provided for how the duty to be paid and security for

payment to be furnished. That is dealt with in Section 57 in certain circumstances of the amended provision with which also we need not detain ourselves. Section 61 of the unamended provision dealt with the Controller's power in respect of valuation. This is covered by the provisions of Section 58 of the unamended provision. But the main provision to which we must refer and on the basis of which learned advocate for the revenue laid great stress was Section 62 of the unamended provision which dealt with the rectification of a mistake relating to valuation for estate duty. In view of the argument advanced before us, it would be necessary to set out in extenso Section 62 before the Act was amended by the E.D. (Amend.) Act, 1958. The said section read as follows:

" 62. Rectification of mistakes relating to valuation for estate duty.-

(1) If, after the determination of the estate duty payable in respect of any estate, it appears to the Controller that, by reason of any mistake apparent from the record or of any mistake in the valuation of any property, in any case other than a case in which the valuation has been the subject matter of an appeal under the Act, or of the omission of any property, the estate duty paid thereon is either in excess of or less than the actual duty payable, he may, either on his own motion or on the application of the person accountable and after obtaining the previous approval of the Board, at any time within three years from the date on which the estate duty was first determined-

(a) refund the excess duty paid, or as the case may be,

(b) determine the additional duty payable on the property: Provided that where the person accountable had fraudulently underestimated the value of any property or omitted any property, the period shall be six years :

Provided further that no order shall be made under this sub-section unless the person accountable has been given an opportunity of being heard:

(2) Nothing contained in Sub-section (1) shall render any person accountable to whom a certificate that the estate duty has been paid is granted liable for any additional duty in excess of the assets of the deceased which are still in his possession, unless the person accountable had fraudulently attempted to evade any part of the estate duty in the first instance."

12. Section 61 of the Act after its amendment by the Act of 1958 deals with the rectification of mistakes and is in the following terms :

"61. Rectification of mistakes.--At any time within five years from the date of any order passed by him or it, the Controller, the Appellate Controller or the Appellate Tribunal may, on his or its own motion, rectify any mistake apparent from the record and shall, within a like period, rectify any such mistake which has been brought to the notice of the Controller, the Appellate Controller or the Appellate Tribunal, as the case may be, by the person accountable :

Provided that no such rectification shall be made which has the effect of

enhancing the estate duty payable unless the person accountable has been given a reasonable opportunity of being heard in the matter."

13. It has to be noticed that no provision for reassessment in case of property escaping assessment has been made. This was introduced for the first time by the E.D. (Amend.) Act, 1958. It is also very material to set out the actual term of Section 59 after its amendment. The said section, after its amendment, reads as follows I " 59. If the Controller,--

(a) has reason to believe that by reason of the omission or failure on the part of the person accountable to submit an account of the estate of the deceased u/s 53 or Section 56 or to disclose fully and truly all material facts necessary for assessment, any property chargeable to estate duty has escaped assessment by reason of under-valuation of the property included in the account or of omission to include therein any property which ought to have been included or of assessment at too low a rate or otherwise, or

(b) has, in consequence of any information in his possession, reason to believe notwithstanding that there has not been such omission or failure as is referred to in Clause (a) that any property chargeable to estate duty has escaped assessment, whether by reason of under-valuation of the property included in the account or of omission to include therein any property which ought to have been included, or of assessment at too low a rate or otherwise,

he may at any time, subject to the provisions of Section 73A, require the person accountable to submit an account as required u/s 53 and may proceed to assess or reassess such property as if the provisions of Section 5858 applied thereto."

14. Section 63 of the unamended provision deals with the appeals preferred and determined by the Controller and Section 64 deals with the statement of the case to the High Court, etc., with which we are not concerned, Similarly, Sections 62, 63 and 64 of the amended provisions deal with the appeals against orders of the Controller and appeal to the Appellate Tribunal and reference to the High Court. We would not have referred to these provisions at all except for the purpose that reliance had been placed on certain decisions of this court where these provisions of the appeal had been considered.

15. According to the learned advocate for the revenue a reading of Sections 5, 34 and 58 would show that all property passing on death should be aggregated so as to form one estate and thereafter the duty should be levied. No duty could be levied without having an account delivered by the accountable person or prepared by the Controller. He further urged that u/s 55 of the unamended Act the Controller was to ask for a statement of account where the proceeding had been initiated by the Controller. Section 21 of the E.D. (Amend.) Act, 1958, according to learned advocate for the revenue, had brought about changes by substituting, inter alia, new sections for Sections 56 to 65 of the unamended Act. According to learned advocate for the revenue, it would be evident from the analysis of the aforesaid Sections 56 to 65 of the unamended Act with the

corresponding provisions of Sections 56 to 63 and 73A of the Amendment Act that s, 57 introduced by the Amendment Act of 1958 incorporated, according to him, the provisions of the old Sub-section (1) of Section 58 and Section 60. He further submitted that the provisions of Section 61 of the old Act had been incorporated in Section 58 (1), (2) and (3) for some procedural changes. Under the old Section 61, the Controller could issue notice of amendment, which was not necessary under the new procedure. He further submitted that Section 58(4) of the Amendment Act corresponded to Section 61(2) of the old Act and the provisions of the old Section 62 had been incorporated in Section 59 and Section 61 of the Amendment Act. Previously both rectification and reassessments were dealt with in Section 62. Now, according to him, rectification and reassessments are dealt with in Section 61 and z 59 deals exclusively with reassessment. He, therefore, submitted that the old provisions had to be read along with rr. 12 to 25 of the E.D. Rules and as soon as an account or property or an affidavit of valuation was received by the Controller, Rule 17 of the E.D. Rules required that he would straightaway calculate the duty payable at the appropriate rate on the principal value of the estate, as set out in the account of property. Having determined the duty, the Controller had to send a demand notice straightaway and the determination of duty under Rule 17, according to him, was not final. If the Controller, he argued, after determining the duty payable on the basis of the account under Rule 17 was of the opinion that the value of the property was under-estimated, he could make an enquiry into the value of the property in such manner as he considered fit. Rule 17 which dealt with calculation and adjustment of the duty had been omitted from 1st July, 1960, in view of Section 57 substituted by the Amendment Act. Rule 17 was as follows ;

" 17. Calculation and adjustment of duty.--Duty shall, in the first instance, be calculated at the proper rate according to the principal value of the estate as set forth in the account delivered u/s 53 or Clause (a) of Section 57 or prepared under Sub-section (2) of Section 61 of the Act but, if afterwards it is found that for any reason too little duty has been paid, the additional duty shall be payable and be treated as duty in arrear subject to the conditions specified in Sub-section (2) of Section 62 of the Act."

16. If after the completion of the assessment or determination of the duty u/s 61, it was urged on behalf of the revenue, it appeared to the Controller that either there was a mistake or there was an omission, then he could invoke the provisions of Section 62. He, therefore, urged that it should be noted that Section 62 of the old Act enabled an assessment to be modified both for and against an accountable person u/s 62. It corresponds to both Sections 34 and 35 of the Indian I.T. Act, 1922. Mistakes apparent from the records were rectifiable u/s 62. Similarly, any underassessment owing to the omission of any property was also rectifiable u/s 62. The only limitation was that an assessment could not be reopened except with the previous permission of the CBR. It should be noted, according to learned advocate for the revenue, that the period of limitation of three years or six years prescribed by Section 63 was in respect of the

completion of the proceedings and not in respect of the initiation of the proceedings. He further submitted that even when an estate duty assessment had been completed in the first instance on the 31st March, 1954, the additional assessment proceedings should be completed by 31st March, 1957. It was not sufficient if the additional assessment proceedings were initiated within the three years' period. That should be completed within that period. It was, therefore, urged by him that it should be remembered that the limitation prescribed by Section 59 of the Act applied to additional assessment proceedings as well. Additional proceedings could not, therefore, be commenced after 12 years from the date of death of the deceased. The question of the accountable person having a vested right, according to learned advocate for the revenue, did not arise at all. The assessment, he urged, had been made on the 29th January, 1960, which could have been reopened and completed within three years from that date. Action in this case was taken u/s 59 on December 16, 1961, and the assessment was completed on the 31st July, 1962. Accordingly, he urged that there was no question of the accountable person acquiring any vested right.

17. Alternatively, in any event, he urged that the proceedings had not become final because the proceedings were subject to rectification or reassessment u/s 62 of the old Act. Furthermore, at the material time, an appeal was pending against the original order and there was no finality to the assessment at that stage. In support of this submission he drew our attention to several decisions to which we shall presently refer. The order of the CBR was passed on 30th August, 1961, and as such the assessment in any event became final after the new amendment had come into operation, according to him. Assessment in this case, it was urged, was reopened u/s 59(b) as there was an omission with regard to the properties at Nos. 95 and 96, Ultadanga Main Road. Accordingly, because of the omission of the property, as contemplated u/s 62 of the unamended Act, the said provision could have been invoked. But, inasmuch as by that time Section 59 had come into effect, the procedure contained in Section 59 was resorted to by the Controller.

18. Therefore, in our opinion, on this aspect, the main question that has to be considered is, whether Section 62 of the unamended Act read with the relevant rules contained within it the same power which was varied or expanded by the introduction of Section 59 in the E.D. (Amend.) Act, 1958, because if the new Act u/s 59(b) was only a variant of the old power under different conditions then perhaps in view of the decisions of this court and the observations of the Supreme Court in several decisions, to which we shall presently refer, it would have been possible to accept the argument urged on behalf of the revenue that there was no question of any vested right in the assessee of not being subjected to the procedure of reassessment when the assessment was completed. If, on the other hand, the new Section 59 was not the variant of the powers of rectification embedded in old Section 62 read with the Rules and other provisions of the Act, then, the question would arise whether the assessee has any vested right in any assessment proceeding not to be subjected to the procedure of

reassessment even though his property might have been under-assessed or escaped assessment. Incidentally, two other questions arise and would require adjudication, viz., whether the assessment proceedings had been taken in respect of a property which had been subjected to tax or in respect of a property right or value of that property which was underestimated due to the knowledge that has come subsequently into the hands of the revenue, because on this will depend whether reassessment even under the new Act could at all be done or not. This question arose, as would be clear from the pronouncement of the Supreme Court in a recent decision which we shall first deal with. Two other aspects require consideration in this case, that is, whether the Act of 1958 is retrospective by the intent of the Act or by necessary implication in view of the nature of the mischief that was sought to be remedied and whether, secondly, there was any finality in the old assessment proceedings in view of the pending appeal before the CBR. These are the questions which require determination. We shall first, therefore, consider the question on what ground the reassessment had been taken, viz., whether it was on the question of under-valuation of any right or any property or whether it was in respect of a property which had already been subjected to tax.

19. As mentioned hereinbefore, the Deputy Controller in his order dated 31st July, 1962, had stated that in the original assessment this property was included in the form of compensation received for the acquisition of premises Nos. 95 and 96, Ultadanga Main Road, Calcutta, which had been acquired during the lifetime of the deceased. The compensation of Rs. 5,76,119 received by the deceased during his lifetime had no doubt been included in the estate and already been assessed. The enhancement now awarded by the President, Improvement Tribunal, could not be considered as the same property as the original compensation of Rs. 5,76,119 merely because the right to receive compensation had been included.

20. There is a certain amount of confusion on this aspect, because the Deputy Controller had stated that a sum of Rs. 5,76,119 was included as compensation received for the property which had been acquired by the Government. It was not included as indicating the right to receive compensation, because this amount had already been received and was credited in the account of the estate of the deceased which was included. Now, when the matter went up in appeal before the Appellate Controller, the Appellate Controller observed that a part of the compensation and other allowances which were allowed initially were included in the original assessment and the deceased had the right to receive the additional amounts. The proceedings were undoubtedly pending in the form of an appeal before the Calcutta Improvement Tribunal.

21. The Income Tax Appellate Tribunal observed that in respect of the property for which the assessee had the right to receive compensation an additional compensation had been awarded. Therefore, this assessment was reopened.

22. Learned advocate for the revenue contended before us that the assessment

in this case was reopened u/s 59(b) as there was omission with regard to the properties at Nos. 95 and 96, Ultadanga Main Road, Calcutta. In this connection, he referred to para. 9 at p. 52 of the Tribunal's order. There the Tribunal observed that inasmuch as in respect of the properties at Nos. 95 and 96, Ultadanga Main Road, the Tribunal had held that there was information to warrant the reopening of the assessment (if the provisions of Section 59(b) were otherwise applicable), the Tribunal would have to uphold the reopening of the assessment. And, accordingly, because of the omission of any property as contemplated u/s 62 of the unamended Act, the said provision could have been invoked.

23. Our attention was drawn to the decision of the Supreme Court in the case of Mrs. Khorshed Shapoor Chenai and Others Vs. Assistant Controller of Estate Duty, Andhra Pradesh and Others, . There it was held by the Supreme Court that lands which were compulsorily acquired by the Government during the lifetime of the deceased could not form part of his estate but the right to receive compensation therefore at market value on the date of the notification for acquisition which would accrue to the deceased would be property that would pass on his death. There the Supreme Court further observed that where lands were compulsorily acquired under the Land Acquisition Act there were not two rights, one a right to receive compensation and the other a right to receive extra or further compensation : the claimant had only one right which was to receive compensation for the lands at their market value on the date of the relevant notification and it was this right which was quantified by the Collector u/s 11 and by the Civil Court u/s 26 of that Act. The Collector's award u/s 11 was nothing more than an offer of compensation made by the Government to the claimant whose property was acquired. If the offer was acquiesced in by total acceptance the right to compensation would not survive but, if the offer was not accepted or was accepted under protest and a reference was sought by the claimant u/s 18, the right to receive compensation should be regarded as having survived and kept alive, which the claimant prosecuted in the civil court. It was not correct to say that no sooner had the Collector made his award u/s 11 than the right to compensation was destroyed or ceased to exist or was merged in the award or that what was left after the award with the claimant was a mere right to litigate over the correctness of the award. The claimant could litigate the correctness of the award because his right to compensation was not fully redeemed but remained alive which he prosecuted in a civil court. This, however, did not mean that the evaluation of this right done by the civil court subsequently would be its valuation as at the relevant date for the purpose of either the E.D. Act or W.T. Act. It was the duty of the assessing authority under either of those enactments to evaluate the property (the right to receive compensation at market value on the date of the relevant notification) as on the relevant date (i. e., the date of death under the E.D. Act or the valuation date under the W.T- Act). In the case of the right to receive compensation, which was property, the estimated value could never be below the figure quantified by the Collector because u/s 25(1) of

the Land Acquisition Act, the civil court could not award any amount below that awarded by the Collector. The estimated value could be equal to the Collector's award or more but could never be equal to the tall claim made by the claimant in the reference nor equal to the claim actually awarded by the civil court. Before the Supreme Court it was challenged that the accountable person had only a right to get an extra compensation, which was an inchoate right which could not be called "property", and whether that claim amounted to a right to property capable of sale in the open market was a highly debatable question, and a mistake which had to be discovered after a lengthy discussion and debate could not be said to be a mistake apparent on the record. It was, secondly, urged that land acquisition proceedings and land references in the civil court not being part of the assessment record a mistake discovered by reference to such other record was not a mistake apparent from the record of the case. It was then urged that the extra compensation received by the legal heirs of the deceased belonged to them and not to the deceased and hence it was not property that passed on the death of the deceased, and no property escaped assessment. In other words, under the guise of rectification, the enhanced compensation could not be taken into account and, therefore, the impugned notice was illegal and without jurisdiction. It was urged mainly that assuming that the right to receive compensation survived and it was that right which was being prosecuted by the heirs of the deceased in the civil court, the impugned notice had not been issued on the ground that such right to compensation had been under-valued on the earlier occasion and required to be properly valued as at the death but the basis on which it was issued was clearly unsustainable in law inasmuch as the respondent had issued it in that case on the assumption that there had been escapement of assessment to duty because the lands in the original assessment had been under-valued in view of the glaring enhanced compensation awarded by the civil court and the High Court's decision upholding the issuance of such notice on the wrong basis was liable to be set aside. The Supreme Court dealing with this contention observed that this contention urged on behalf of the assessee appeared to be well founded and the impugned notice u/s 59(a) of the Act would have to be quashed on that ground. Since in that case the awards made by the Special Deputy Collector were not accepted by the heirs of the deceased and land references were sought by them and the same were pending in the civil court at the relevant date (being the date of Shapoor's death), the notice u/s 59(a) would have been valid if the same had been issued on the basis that such right to compensation had been under-valued on the earlier occasion and required to be properly valued as on the date of the death but what was found was that the notice was issued by the revenue on the wrong assumption that the acquired lands still formed part of the estate of the deceased and that having regard to the glaring enhanced compensation granted by the civil court for the lands, the said lands had been under-valued in the original assessment. In this background the Supreme Court was unable to uphold the action of the revenue. But in the instant case it is true that the premises Nos. 95 and 96, Ultadanga Main Road, no longer belonged to the deceased after its acquisition

and what belonged to the assessee was the right to receive compensation. The compensation, the deceased did not accept as the correct value and he had the right to receive compensation on the acquisition of his property. He was contesting that right. Therefore, the compensation that he had received for the right he had stated in the original return and the original assessment was made on that basis. The subsequent information upon which the opening was made in this case was not in respect of a separate property, but in respect of the same right which gave a wrong figure or under-estimated the figure of the right that the deceased had, namely, the amount which had been awarded in the first instance which the deceased had disclosed, but the proper value of that amount was determined by the President of the Improvement Tribunal to be enhanced by the amount of Rs. 1,16,000 odd which had been included in the reassessment. Therefore, in this case it was not a question of two properties being the subject-matter in respect of premises Nos. 95 and 96, Ultadanga Main Road. It was a right to receive compensation the value of which had been included by the deceased, but the proper value had not been included because of the circumstances involved. In those circumstances, in our opinion, it could certainly be said that there was information, otherwise the reopening was not permissible, and that there was certainly undervaluation of the property of the deceased. So, we are unable to accept the submission urged on behalf of the accountable person that in respect of one property two rights were being made the subject-matter of duty. The principles enunciated by the Supreme Court do not apply to the facts of this case.

24. The next question that has to be gone into is whether the assessment was final or the pendency of the appeal made any difference. In this connection reference was made to several decisions. We must first refer to the observation of the Judicial Committee in the case of (1938) 6 ITR 414 (Privy Council) , where the Judicial Committee observed that though the I.T. Act, nowhere imposed any limit of time within which an assessment under the provisions of Sections 23 and 29 was to be made and the service of notice of demand would be there for being made at any time (that was the position at the relevant time), yet, after a final assessment under those sections had been made, the ITO could not go on making fresh computations and issuing fresh notices of demand to the end of all time. A final assessment once made could not be reopened except in circumstances in Sections 34 and 35 and within the time prescribed by the section. The Commissioner's power u/s 33 could only be exercised subject to the provisions of Sections 34 and 35. An assessment once made was final unless the point in issue was in appeal or was reopened under conditions stipulated by the Act. It was urged that in this case, as we have mentioned before, an appeal was pending before the Central Board which was disposed of after the issue of the impugned notice in this case. It was urged that there was no finality. In this connection reliance was placed on the observation of the Division Bench of this court in the case of Satyanarayan Prosad Vs. Diana Engineering Co., , where it was observed at p. 126 of the report that in connection with the ground in

respect of an appeal under the West Bengal Premises Rent Control (Temporary Provisions) (Amendment) Act, 1950, that where an appeal was pending when the Amending Act came into force it could not be said that the matter had been finalised. The aforesaid observation, in our opinion, cannot be applied to the instant case. Though as we have mentioned before, there was an appeal to the Board of Revenue, yet the question whether a particular property, namely, the right to receive compensation in respect of the premises Nos. 95 and 96, Ultadanga Main Road, was not the subject-matter of the appeal before the CBDT and it is well settled that in fiscal legislations unlike civil courts the powers of the appellate authorities are circumscribed by the subject-matter of the appeal. As the question of the under-valuation of the property was not the subject-matter of the appeal or whether the assessment could be reopened or not on this ground was not the subject-matter of the appeal, in our opinion, the fact that an appeal was pending does not affect the finality of the assessment so as to confer upon the revenue an additional right of reopening a completed assessment on the point which was not the subject-matter of the appeal.

25. Therefore, the main question that calls for consideration is whether in view of the introduction of Section 59 which became effective on and from 1st of July, 1960, the proceeding which was initiated by the notice of 16th December, 1961, was valid. Now, that depends on three questions, as we have mentioned before, viz., whether the new power u/s 59 was only a variant of the old power u/s 62 of the amended Act. We have set out the terms of the section. It appears to us that rectification of mistakes in the valuation of an estate at that time is entirely a different thing from reopening a completed assessment and placing the whole assessment to a fresh scrutiny. In this respect we could do no better than refer to the observations of the Division Bench of the Bombay High Court in the case of Arvind N. Mafatlal Vs. T.A. Balakrishnan, Deputy Controller of Estate Duty, Bombay, , where the Division Bench discussed the relevant provisions of the section, and was of the opinion that there was substantial distinction between the remedies provided by old Section 62 and the new provided u/s 59 of the E.D. Act. Under old Section 62 all that could be done was to determine the additional duty payable in the property or refund the excess duty paid whereas in Section 59 after the amendment there is power to assess or reassess the property as if the provision of Section 58 applied, that is to say, a completely new assessment can be made. Section 59, therefore, cannot be treated as virtually a continuation of the remedy prescribed by the old Section 62. The Division Bench also observed that the fact that the appeal was pending would not affect the question that the assessment order was final or not. The Division Bench noted the observations of Chief Justice Chakravarti, in the case of Income Tax Officer, Companies District 1, Calcutta and Another Vs. Calcutta Discount Co. Ltd., , a decision to which we shall presently refer, and observed that the observation of Chief Justice, Chakravarti was directly in conflict with the decision of the Supreme Court in the case of S.S. Gadgil, Income Tax Officer, Bombay Vs. Lal and Company, , decision to which also we shall refer. With respect, however, we

may point out that this observation is not perhaps correct. The observation of the Supreme Court in the case of *S.S. Gadgil, Income Tax Officer, Bombay Vs. Lal and Company*, , was not in conflict with the observation of Chief Justice Chakravartti. But the Division Bench of the Bombay High Court held that Section 59 of the amended provision was not a variant of Section 62 of the unamended provision and we are in respectful agreement and from that point of view the Division Bench of the Bombay High Court was right in saying that the Calcutta High Court in the case of *Income Tax Officer, Companies District 1, Calcutta and Another Vs. Calcutta Discount Co. Ltd.*, , proceeded on the basis that the provision which the Calcutta High Court had to construe throughout was that the power of reopening was there both before and after the amendment and only the conditions for the exercise of the power were altered. But in the instant case there was no power of reassessment or reopening a completed assessment in its entirety but only a power of rectification of mistakes if certain conditions were there one of the conditions being under-valuation of the property. But rectification of a completed assessment without reopening the assessment is a different thing from reopening the entire assessment subjecting the assessee to a process of new assessment. To that extent we respectfully agree that the *Income Tax Officer, Companies District 1, Calcutta and Another Vs. Calcutta Discount Co. Ltd.*, , proceeded entirely on a different basis and the Division Bench of the Bombay High Court held that as the assessment had become final, when the new amended provision came into effect, resort to Section 59 could not be made. We are in respectful agreement with the observation of the Division Bench of the Bombay High Court.

26. In this connection reference may also be made to another decision of the Gujarat High Court in the case of *Controller of Estate Duty Vs. N.A. Merchant*, , where the Division Bench of the Gujarat High Court had to deal with the same problem. The Gujarat High Court observed that the cardinal principle of construction of a statute must always be interpreted prospectively unless the language of the statute made it retrospective either expressly or by necessary implication. Retrospective operation was not to be given to a statute so as to impair vested rights or the legality of a past transaction. There were no words, the Division Bench further observed, giving retrospective effect to the amended provision of Section 59 of the E.D. Act, 1953, nor was it necessary to read by necessary implication any retrospective effect into the provisions of Section 59. The principle is well settled that an assessee was entitled not to be subjected to reassessment once the original assessment was finalised and unless the statute permitted reassessment to be carried out, an assessment once reached must be treated as final and complete. The content of the power, the Division Bench further noted, conferred on the Controller u/s 59 after its amendment was totally different from the content of the power under the old Section 62. The words "omission of property " were the only things common in the amended Section 59 and the old Section 62. But the context in which the words appeared and the power, to which this circumstance of omission of property gave rise, were

completely different. Under the old Section 62 the Controller could proceed only against the specific property mentioned in the notice to the accountable person and all that could be done was to determine the additional duty payable on the property or refund the excess duty paid. Under the amended Section 59 the Controller has an entirely new power of reassessment, that is, starting the entire assessment proceedings de novo as if he was starting fresh proceedings u/s 58. The Controller could bring to tax all the property which escaped assessment on the earlier occasion. Section 59, after its amendment, was not retrospective in its operation and was not a variant of the provisions of the old Section 62 and hence reliance could not be placed on it for reopening an assessment which was completed before July 1, 1960 (the date on which the Amendment Act of 1958 came into force), since the reopening of the assessment would take away the right of the accountable person not to have the assessment reopened.

27. Chief Justice Divan also referred to the observation of Chief Justice Chakravartti in the case of Income Tax Officer, Companies District 1, Calcutta and Another Vs. Calcutta Discount Co. Ltd., , which we have referred to and observed that that case was distinguishable because Chief Justice Chakravartti had proceeded on the basis that the power, which he had to construe, under the amendment in Section 34 of the Indian I.T. Act, 1922, was a variant of the old power, which was not the position in that case before the Gujarat High Court. We are in respectful agreement with the aforesaid distinction made by Chief Justice Divan in the aforesaid decision. The Division Bench of the Gujarat High Court also relied on the Division Bench of the Bombay High Court in the case of Arvind N. Majatlal [1968] 67 ITR 449 which we have referred to hereinbefore.

28. While on this aspect it may be appropriate to refer to the observation of the Supreme Court in the case of Banarasi Devi Vs. Income Tax Officer, Calcutta, , where at p. 105, the Supreme Court put the proposition as follows :

"To the present case a general rule of construction of the fiscal Acts would apply, and not the exception engrafted on that rule; for Section 4 of the Amendment Act (their Lordships were dealing with Section 4 of the Indian Income Tax Act, 1922, which amended Section 34(1) of the Indian Income Tax Act, 1922) cannot be described as a provision laying down the machinery for the calculation of tax. In substance it enables the Income Tax Officer to reassess a person's income which has escaped assessment, though the time within which he could have so assessed had expired under the Act before the amendment of 1959. It resuscitates a barred claim. "Therefore, the same stringent rules of construction appropriate to a charging section shall also apply to such a provision. "

29. Our attention was, however, drawn to the decision of the Supreme Court in the case of S.S. Gadgil, Income Tax Officer, Bombay Vs. Lal and Company, , which we have mentioned before, which was referred to by the Division Bench of the Bombay High Court in the case of Arvind N. Mafatlal Vs. T.A. Balakrishnan, Deputy Controller of Estate Duty, Bombay, , where referring to the observation of Chief Justice Chakravartti in Income Tax Officer, Companies District 1, Calcutta

and Another Vs. Calcutta Discount Co. Ltd., , the Supreme Court at p. 240 observed that the Amending Act of 1948 with which the court was concerned in Calcutta, Discount Co.'s case came into force on September 8, 1948, but Section 1(2) prescribed that the amendment in Section 34 of the Indian I.T. Act, 1922, should be deemed to have come into force on March 30, 1948, and the period under the unamended section within which notice could be issued u/s 34(3) against the assessee-company ended on 31st March, 1951. In considering whether the amended statute applied, the question was one of interpretation, that is, to ascertain whether it was the intention of the Legislature to deprive the taxpayer of the plea that action for assessment or reassessment could not be commenced, on the ground that before the Amending Act became effective, it had become barred. Therefore, the view that even when the right to assess or reassess had lapsed on account of the expiry of the period of limitation prescribed under the earlier statute, the ITO could exercise powers to assess or reassess under the amending statute, which gave an extended period of limitation, was not accepted in the Calcutta Discount Co.'s case. That was the reading of the Supreme Court of the observation of Chief Justice Chakravarti, and we may say with respect that that was the correct reading as we shall refer to the said observation of Chief Justice, Chakravarti. In that case before the Supreme Court under Clause (iii) of the proviso to Section 34(1) of the Indian I.T. Act, 1922, as it then stood, a notice of assessment or reassessment could not be issued against a person deemed to be an agent of a non-resident u/s 43, after the expiry of one year from the end of the year of assessment. The section was amended by Section 18 of the Finance Act, 1956, extending this period of limitation to two years from the end of the assessment year. The amendment was given retrospective effect from April 1, 1956. On March 12, 1957, the ITO issued a notice calling upon the assessee to show cause why in respect of the assessment year 1954-55, the assessee should not be treated as an agent u/s 43 in respect of certain non-residents. The assessee, inter alia, contended that the proposed action was barred by limitation. On March 27, 1957, the officer issued a notice u/s 34 and assessed the assessee as the agent of the non-resident relying upon the third proviso to Section 34(1) as amended in 1956, on an estimate of the income of the non-resident. It was held that the right to commence a proceeding for assessment against the assessee as the agent of a non-resident for the assessment year 1954-55 ended on March 31, 1956, under the Act before it was amended in 1956. Although authority was conferred upon the ITO to assess a person as an agent of a non-resident within two years from the end of the assessment year, the authority under the Act before it was amended having already come to an end, the amended provision did not assist him to commence a proceeding even though at the date when he issued the notice it was within the period provided by the amended provision. This was so notwithstanding that there was no determinable point of time between the expiry of the time provided under the provision before the amendment and the commencement of the Amending Act. The Legislature had given to the amending provision, Section 18 of the Finance Act, 1956, only a limited retrospective

operation, that is, up to April 1, 1956. That provision had to be read subject to the rule that in the absence of an express provision or clear implication, the Legislature did not intend to attribute to the amending provision greater retrospectivity than what was expressly mentioned, or to authorise the ITO to commence proceedings which before the new Act came into force had, by the expiry of the period provided, become barred. The notice dated March 27, 1957, was, therefore, invalid. A proceeding for assessment, it was held by the Supreme Court, was not a suit for the adjudication of a civil right. But that an Income Tax proceeding was in the nature of a judicial proceeding between contesting parties, was a matter which was not capable of even a plausible argument. The ITO, who had power to assess and recover tax, was not acting as a judge deciding a litigation between the citizen and the State. The Supreme Court, however, noted that the period prescribed by Section 34 of the I.T. Act for reassessment was not a period of limitation. The section in terms imposed a fetter upon the power of the ITO to bring to tax escaped income. It prescribed different periods in different classes of cases for enforcement of the right of the State to recover tax. Therefore, if the situation was that under the provision of Section 34, as it stood before the amendment as well as the provision as it stood after the amendment, there was a power for reopening the assessment, then there was only an alteration of the condition upon which that assessment could be reopened. It was submitted that Section 34 laid down a rule of limitation for commencing action for assessment and reassessment and in the absence of any "express provision in that, the retrospective effect could not be given effect. The Supreme Court was unable to accept this argument and in this connection referred to the observations of Chief Justice Chakravarti. The Supreme Court noted that the right for commencing proceedings for assessment against the assessee as an agent of a non-resident party under the I.T. Act before it was amended ended on March 31, 1956. It was true that under the Amending Act, by Section 18 of the Finance Act, 1956, an authority was conferred upon the ITO, to assess a person as an agent of a foreign party u/s 43 within two years from the notice of the order of assessment. But the authority of the ITO under the Act, before it was amended by the Finance Act, 1956, had already expired, and the amending provision would not assist him to commence a proceeding even though at the date when the notice was issued it was within the period provided by that amending Act. This would be so notwithstanding the fact that there had been no determinable point of time between the "expiry of the time provided under the old Act and commencement of the Amending Act. The Legislature had given to Section 18 of the Finance Act, 1956, only a limited retrospective operation. That provision must be read subject to the rule that in the absence of an express provision or clear implication, the Legislature did not intend to attribute to the amending provision a greater retrospectivity. In the instant case, before us, there was no indication that there was any retrospective intention. On the contrary, the indications are otherwise because, though the Act received the assent of the President on the 19th September, 1958, the provisions of the Act came into operation with effect from July, 1960, that is to say, two years

thereafter--a situation which is completely different from the position with which Chief Justice Chakravarti had to deal.

30. Learned advocate for the revenue sought to urge that really the amendments brought about by Section 59 were clarificatory in nature. He, in this connection, drew our attention to the report of the Select Committee as well as to the notes on clauses introducing the Amendment Act. He also referred to an unreported decision of this court in the case of Dilip Kumar Bose v. CED in Matter No. 372 of 1968, judgment delivered on 1st June, 1973, by Mr. Justice Hazra, to which I was also a party. There, we had to construe whether in an assessment under the E.D. Act for levy of estate duty Section 55 was properly applied. There, what happened was that, during the pendency of the assessment proceeding, a new provision for appeal was introduced. u/s 53 of the old Act, there was a provision for appeal against the determination by the Controller. Section 62 of the new Act provided an appeal against the order of the Controller and an additional appeal was provided to the Appellate Tribunal from the order of the Controller. Now, the question was which of these provisions would be applicable. Dealing with the provisions of Sections 62 and 63, it was observed that the amendments were really clarificatory in nature. In this connection reference was also made to the relevant provisions of the Act. Under the old Act, there was a provision for appeal. There were also certain provisions for appeals under the new Act. It was only a change of procedure, and the stages of appeal were altered. There, the question was not whether the new power that was conferred was a variant of the old power embedded in the unamended Act. Here, the situation is entirely different. If the view which we have taken is correct, then the section which permitted the reassessment dealt entirely with a different situation, then, in our opinion, the ratio of the said decision cannot be of any assistance to the parties in this case. In this connection reference has also been made to the observations of this court in the case of Hiralal Jeramdas Vs. Commissioner of Income Tax, Bombay City I, . There, the learned single judge of this court had to deal with a different situation. There, what had happened was that for probate of the will of N, in pursuance of a provisional assessment, probate duty of Rs. 9,897"50 was paid in the shape of court fees on July 12, 1956. Subsequently, the Assistant Controller valued the estate and assessed the estate duty on July 31, 1957, at Rs. 29,719 from which after deducting the probate duty of Rs. 9,897"50 u/s 50 of the E.D. Act, 1953, the estate duty payable was determined by him at Rs. 19,822.50. On appeal, the Appellate Controller reduced the valuation of the estate duty and the estate duty was consequently reduced to Rs. 29,252.50 out of which he allowed a deduction of Rs. 9,897"90 for probate duty paid and the estate duty payable became Rs. 19,254"90. On the final assessment of probate duty, due to increased valuation of the estate, an additional sum of Rs. 7,256.67 was found to be payable on December, 1962, for probate duty. The petitioner, a son of N, who had been appointed receiver to the estate of N, claimed that the entire probate duty of Rs. 17,114.17 was deductible from the estate duty of Rs. 29,252.50; thus only Rs. 12,138.23 would be payable as estate duty and that

the payments for estate duty to the extent of Rs. 14,650 had already been made. He, therefore, applied on December 19, 1962, to the Deputy Controller for a refund of the excess payment. The Assistant Controller rejected this application, on the ground that it was time barred and called upon the petitioner to pay the balance of the estate duty of Rs. 4,714.90. The petitioner then filed a writ petition for directing the respondents to refund the excess payment as claimed by him and restraining the respondents from taking steps to realise the balance of the estate duty as claimed by the Assistant Controller. It was held by the learned single judge that as Section 62, which was introduced by the Amending Act of 1958, provided a period of five years from the date of the order, within which a mistake could be rectified, and enlarged the time for a rectification of the mistake from three years, as before the amendment, and made an order under the Act rectifiable, it affected a vested right and must be deemed to have come into force only from 1st July, 1960, when the Amendment Act was made effective by a notification. Therefore, under the amendment of Section 61, the estate duty authorities had no power to rectify mistakes in assessments completed before 1st July, 1960. u/s 62, as it stood before the amendment of 1958, the rectification could be made only within three years from the date on which the estate duty was first determined. This question cropped up before the Supreme Court in the case of Assistant Controller of Estate Duty, Hyderabad Vs. Nawab Sir Mir Osman Ali Khan Bahadur, H.E.H. the Nizam of Hyderabad and Others, , where the Supreme Court kept this question open and sent the matter back to the Andhra Pradesh High Court for decision.

31. As a good deal of argument was advanced on the ratio of the decision of this court in the case of Income Tax Officer, Companies District 1, Calcutta and Another Vs. Calcutta Discount Co. Ltd., , it is necessary to refer to the said decision in greater detail. As we have mentioned before, the question involved in that decision was the effect of the substitution of the new Section 34, with effect from 30th March, 1948, by the Income Tax and Business Profits Tax (Amend.) Act, 1948. Mr. Justice Bose, before whom the writ application first came up for consideration, held that the power to reopen the assessment was there in view of the existing provision of Section 34 of the I.T. Act, 1961. On a consideration of the argument before it, the Division Bench was unable to agree with the views expressed by Mr. Justice Bose. Before dealing with the argument the Division Bench had set out the relevant portion of Section 34, as it stood before and after the amendment, and it is necessary to refer to the relevant portions. Section 34, before the amendment, was as follows :

"34. (1) If in consequence of definite information which has come into his possession, the Income Tax Officer discovers that income, profits or gains chargeable to Income Tax have escaped assessment in any year, or have been under-assessed, or have been assessed at too low a rate, or have been the subject of excessive relief under this Act, the Income Tax Officer may, in any case in which he has reason to believe that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars thereof,

at any time within eight years and in any other case at any time within four years of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under Sub-section (2) of Section 22 and may proceed to assess or reassess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that subsection :

Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be."

32. After the amendment, the section read as follows :

"34. (1) If-

(a) the Income Tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income u/s 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to Income Tax have escaped assessment for that year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of excessive relief under the Act, or excessive loss or depreciation allowance has been computed, or

(b) notwithstanding that there has been no omission, or failure as mentioned in Clause (a) on the part of the assessee, the Income Tax Officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to Income Tax have escaped assessment for any year, or have been under-assessed or assessed at too low a rate, or have been made the subject of excessive relief under this Act, or that excessive loss or depreciation allowance has been computed,

he may in cases falling under Clause (a) at any time within eight years and in cases falling under Clause (b) at any time within four years of the end of that year, serve on the assessee, or, if the assessee is a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under Sub-section (2) of Section 22 and may proceed to assess or reassess such income, profits or gains or recompute the loss or depreciation allowance ; and the provisions of this Act, shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section :

Provided that--.....

(ii) the tax shall be chargeable at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be ;

(3) No order of assessment u/s 23 to which Clause (c) of Subsection (1) of

Section 28 applies or of assessment or reassessment in cases falling within Clause (a) of Sub-section (1) of this section shall be made after the expiry of eight years, and no order of assessment or reassessment in any other case shall be made after the expiry of four years, from the end of the year in which the income, profits or gains were first assessable.

Provided that where a notice under Sub-section (I) has been issued within the time therein limited, the assessment or reassessment to be made in pursuance of such notice may be made before the expiry of one year from the date of the service of the notice, even if such period exceeds the period of eight years or four years, as the case may be,"

33. There was a deeming provision in Sub-section (2) of Section 1 which provided that Sections 3 to 13 should come into force with effect from 30th March, 1958, and the amendment made in the I.T. Act by Section 2 should be deemed to be operative so as to apply in relation to all assessments subsequent to the assessment for the year ending on 31st March, 1958. Since Section 34, as amended, had a predecessor which prescribed the same limits of time for initiation of proceedings, more or less in the same circumstances, the learned Chief Justice was of the opinion that it would prima facie appear that by the new section no pre-existing right had been adversely affected. It was important to remember that the section, according to the learned Chief Justice, imposed no new burden of tax at all. Where there was an assessable income, the liability to tax was already attached to it under the charging sections of the Act. Its measure had also been determined under the provisions of the relevant Finance Act, although it might not have been computed or fully paid. Section 34 only authorised an enquiry with a view to verifying whether there was an assessable income which had escaped assessment or had not been fully assessed. The learned Chief Justice was of the view also that it had also authorised an assessment or reassessment if the enquiry resulted in an affirmative finding. From one point of view, the learned Chief Justice felt that a vested right claimed in such circumstances would seem to be a right not to pay the tax legally due or a right to regain one's concealed income. But the learned Chief Justice was of the further view that the section introduced by the Act was not a new provision at all but a variant of an old provision which it replaced (underlined by us). The Division Bench was of the opinion that so far as the initiation of proceedings was concerned, there was no substantial difference between the two from the point of view of the assessee's rights. The new section authorised, as the old section did, the initiation of proceedings within 8 years from the end of an assessment year or, in the case of an innocent escape or underassessment of income, within 4 years. The basis for the initiation of proceedings was also the same, namely, escape of income from assessment or under-assessment, whether as to the quantum of the income or as to the rate or allowance of excessive relief. There was an apparent difference in that, under the old section, there had to be a discovery on the basis of a definite information, whereas under the new section it was sufficient if there was reason to believe in existence. This difference,

however, was to a certain extent neutralised because, according to Chief Justice Chakravartti, in providing as to when the ITO could start proceedings within 8 years, the old section provided that he could do so when, according to him, the assessee had concealed the particulars of his income or deliberately furnished inaccurate particulars thereof, while the new section said that he could do so when, according to him, the escape or under assessment was due to the omission or failure of the assessee to disclose fully and truly all material facts necessary for its assessment which seemed to be practically the same in both the sections and both the sections used the expression "had reason to believe". The only real difference, according to the learned Chief Justice, was whereas while the old section allowed the same time for the initiation or the completion of the proceedings, the new section allowed one further year for its completion. Read in that context, the learned Chief Justice was of the view that the new section had authorised, over and above the old one, one further year for the completion of assessment. If that is the real position, then only the time for a completion after the initiation of the proceedings had been altered and, therefore, such an amendment would be only procedural. Therefore, the ratio of the decision in that case has to be understood in the said light specially in view of the observations made by the Supreme Court, which we have also noted, in the decision in the case of Banarasi Devi Vs. Income Tax Officer, Calcutta, . This case was considered, as we have mentioned, by the Supreme Court in the case of S.C. Prashar, Income Tax Officer, Market Ward, Bombay and Another Vs. Vasantsen Dwarkadas and Others, . There, at p. 14, Mr. Justice S. K. Das observed that though some reliance had been placed before their Lordships on the decision in the case of Income Tax Officer, Companies District 1, Calcutta and Another Vs. Calcutta Discount Co. Ltd., , the learned judge was of the opinion that the said decision was not of any help to the parties. In the said decision it was stated that the plain effect of the substitution of the new Section 34 was that, from the date of insertion, the I.T. Act was to be read as including a new section as a part thereof and further observed that the effect of the language of Clause (a) of Sub-section (1) was that all assessment years ending within 8 years on 30th March, 1958, and the subsequent dates were within this purview. The learned Chief Justice of the Calcutta High Court, Mr. Justice Das, however, noted and took particular care in that decision to point out that what was not within the purview of the section was an assessment which ended before 8 years from 30th March, 1948. That decision of the learned Chief Justice, Mr. Justice Das felt, would in no way assist his Lordship in the dispute before their Lordships. Mr. Justice Kapoor, at p. 29 of the report, referred to the said decision but did not express any opinion because his Lordship felt that the subsequent amendments had made it unnecessary for the point to be decided before the Supreme Court. Mr. Justice Hidayatullah, as the learned Chief Justice then was, had occasion to deal with this aspect exhaustively. His Lordship after setting out the relevant section had referred to the observations of learned Chief Justice Chakravartti, which we have set out hereinbefore. It has to be borne in mind that his Lordship was also proceeding on the basis that the power to reopen the assessment had always

been there in the I.T. Act and in that light his Lordship had approved the observations of the Calcutta High Court, referred to hereinbefore.

34. This question was again considered in the decision of the Supreme Court in the case of S.S. Gadgil, Income Tax Officer, Bombay Vs. Lal and Company, . There, the question was whether as a result of the amendment of Section 34, an agent of a non-resident could be assessed u/s 43 after the expiry of one year from the end of the year of assessment. In that context, at p. 239 of the report, the Supreme Court referred to the decision of Chakravartti C.J. in the case of Income Tax Officer, Companies District 1, Calcutta and Another Vs. Calcutta Discount Co. Ltd., and at p. 240 (of 53 ITR) observed as follows :

"But it may be recalled that the amending Act of 1948, with which the court was concerned in Income Tax Officer, Companies District 1, Calcutta and Another Vs. Calcutta Discount Co. Ltd., , came into force on September 8, 1948, but Section 1 (2) prescribed that the amendment in Section 34 of the Indian Income Tax Act, 1922, shall be deemed to have come into force on March 30, 1948, and the period under the unamended section within which notice could be issued u/s 34(3) against the assessee company ended on March 31, 1951. Before that date, the amending Act came into operation, and at no time had the right to reassess become barred.

In considering whether the amended statute applies, the question is one of interpretation, i. e., to ascertain whether it was the intention of the legislature to deprive a taxpayer of the plea that action for assessment or reassessment could not be commenced, on the ground that before the amending Act became effective, it was barred. Therefore, the view that even when the right to assess or reassess has lapsed on account of the expiry of the period of limitation prescribed under the earlier statute, the Income Tax Officer can exercise his powers to assess or reassess under the amending statute which gives an extended period of limitation, was not accepted in Income Tax Officer, Companies District 1, Calcutta and Another Vs. Calcutta Discount Co. Ltd., ."

35. There their Lordships held that the right to commence a proceeding for assessment against the assessee as an agent of a non-resident under the I.T. Act before it was amended, ended on 31st March, 1956. It was true that under the Amending Act by Section 18 of the Finance Act, 1956, authority was conferred upon the ITO to assess a person as an agent of a foreign party u/s 43 within two years from the end of the year of assessment. But their Lordships of the Supreme Court held that the authority of the ITO under the Act before it was amended by the Finance Act, 1956, having already come to an end, the amending provision would not assist him to commence a proceeding even though at the date when he issued notice it was within the period provided by the Amending Act. If that is the correct principle or ratio of the decision of the Supreme Court, then, before the amendment of the present E.D. Act by the Act of 1958, which came into effect in 1960, there was no right to reopen, and unless we hold that the new right u/s 59 is a variant of the old Section 62, the

estate duty authorities, before this amendment, had no right to reopen the assessment even though when the assessment was sought to be reopened that power was there. The right having been lost, it could not have been revived unless retrospective effect was clearly given in the statute by the language used in the statute itself.

36. The Bombay High Court in the case of Arvind N. Mafatlal Vs. T.A. Balakrishnan, Deputy Controller of Estate Duty, Bombay, , understood the said decision of the Supreme Court in that light. We are in respectful agreement with the ratio of the Bombay High Court as referred to hereinbefore. As we have already referred to the said decision in detail, it is not necessary for us to refer to the same again.

37. The Gujarat High Court also followed the same decision in the case of Controller of Estate Duty Vs. N.A. Merchant, . We are also in respectful agreement with the learned Chief Justice of the Gujarat High Court on the construction and the ambit of the power u/s 59 of the new Act after the amendment and u/s 62 of the old Act before the amendment. In that light, we are of the opinion that a claim or a right which had become barred cannot exist, except by express language or by necessary implication.

38. Our attention was drawn to some of the decisions on the question as to how a statute of this nature should be read. Reliance was placed on the decision of the Supreme Court in the case of Sree Bank Ltd. Vs. Sarkar Dutt Roy and Co., . There, in the context of the provisions of the Act, the Supreme Court observed that they found in the scheme, which they had set out in para. 6 of the judgment at p. 1956 to 1957, that the provision with which their Lordships were concerned were retrospective in operation. The Supreme Court observed that it was firmly established that a retrospective operation was not to be given to a statute so as to impair an existing right or obligation, except as regards matters of procedure unless that effect could not be avoided without doing violence to the language of the enactment. An enactment ought to be construed as prospective only when it was expressed in language which was fairly capable of either interpretation. Where, however, a statute was passed with the object of protecting the public against some evil or abuse, it might be allowed to operate, retrospectively, even if by such operation it would deprive some person or persons of vested right. For the retrospective operation of the provisions of an Act it was not necessary that it must be stated that its provisions would be deemed to have always been in existence. In this connection, we may refer to the fact that learned advocate for the revenue drew our attention to the object clause or notes on clauses. He emphasised the fact that the Legislature thought that the new provisions were only a variant of the old provisions that were there before the amendment. It is true that in case of doubt the courts can and should refer to the object clause or the notes on clauses. But when the Legislature says that a certain section is declaratory of the previous section, then that expression of the Legislature is not conclusive of the actual meaning of the expression used in the statute. Whether

it was declaratory of the old provisions or not, that depends on the interpretation of the language used in the statute. Now, the power to reopen an assessment is a very vital power and is always considered to be so in the fiscal statute. If in that light the statute is given new power which was not there previously, then that interpretation that such power is declaratory of the old provisions of the Act negates the contention of the learned advocate for the revenue that the Legislature intended to give the statute retrospective effect. As the learned judges of the Supreme Court found in the case of *Sree Bank Ltd.* [1965] 35 Comp Cas 881 a particular mischief, viz., the widespread misconduct by the directors of privately owned banks before their liquidation needed special treatment, the entire scheme of the Act was scrutinised to find out whether the statute was intended to cover retrospective operation. Here, the very fact of the declaration, if we are to take them as of any assistance to us, negates that there was any particular mischief which the Legislature sought to remedy by the new power. The Legislature felt that the old powers were there, but whether that view of the Legislature had been correctly expressed in the old provisions is a matter for the construction of the statute by the court. In that view of the matter, we are of the opinion that the observations made in the case of *Sree Bank Ltd. Vs. Sarkar Dutt Roy and Co.*, cannot be of any assistance to the revenue in the instant case.

39. Reliance was also placed on the decision of the Supreme Court in the case of *Sukhram Singh and Another Vs. Harbheji*, . There, the Supreme Court reiterated the well-known principles and one of the principles reiterated was the one that declaratory statutes were to be considered to be retrospective. But whether a particular statute is actually declaratory or not depends on the language of the statute. Hidayatullah C.J. observed at p. 1117 of the report that sometimes statutes had retrospective effect when the declared intention was clearly and unequivocally manifest from the language employed in the particular law or in the context of connected provisions. As we have held hereinbefore we are in respectful agreement with the Bombay High Court and the Gujarat High Court. We are of the opinion, applying the principles enunciated by the Bombay High Court and the Gujarat High Court in the instant case, that there was no intention of the Legislature to make the new provision retrospective.

40. Our attention was drawn to certain passages in Maxwell on the Interpretation of Statutes, 12th Edn., at p. 137 of the book, whereby the learned advocate sought to urge that the old provisions of Section 62 should be construed as only a variant of the new provisions of Section 59 of the Act. For the reasons as we have held, we are unable to agree with the said contention. The only other aspect that remains to be considered is the pendency of the appeal. We have already dealt with this aspect. We may also, in this connection, refer to the relevant decisions to which our attention was drawn. Reference was made to the observation of the Supreme Court in the case of *State of Madras v. Madurai Mills Co. Ltd.* [1967] 19 STC 144. There, the Supreme Court observed that it could not be said that it would be a merger of the order of assessment made by the

Deputy Commercial Tax Officer later on with the earlier order in revision of the Deputy Commissioner, because the question of exemption of the value of yarn purchased from outside the State of Madras was not the subject-matter of revision before the Deputy Commissioner. That decision, in our opinion, would not be of any assistance to the revenue. If anything, it supports this viewpoint that the pending appeal before the Board, in the instant case before us, was not regarding the right of reassessment of the revenue, but the right to have some lesser value of the property. The ratio of the decision, in our opinion, in the case of Arvind N. Mafatlal Vs. T.A. Balakrishnan, Deputy Controller of Estate Duty, Bombay, of the report, would be applicable.

41. Reference was also made to the decision of the Supreme Court in the case of Nani Gopal Mitra Vs. The State of Bihar, of the report, the Supreme Court observed that the effect of the application of this principle, that is to say, the effect of repeal of Section 6 of the General Clauses Act of 1897, was that the pending cases, although instituted under the old Act but still pending, were governed by the new procedure under the amended law. This observation was made in connection with the prosecutions under the Prevention of Corruption Act. In our opinion, it would not be proper for us in disposing of this case to refer to the principles applicable in the construction of purely penal provisions and how they have to be guided. Therefore, we need not proceed to examine the principles enunciated by the Supreme Court in the said decision in greater detail.

42. For the reasons we have already mentioned hereinbefore, in our opinion, the Tribunal was right in holding that the reopening of the estate duty assessment was barred and, in that view of the matter, we answer the question in the affirmative and in favour of the accountable person.

43. In the facts and circumstances of the case, parties will pay and bear their own costs.

Sudhindra Mohan Guha, J.

44. I agree.