**(1955) 02 OHC CK 0009**

**In the Orissa High Court**

**Case No :** S.J.C. No. 10 of 1953

Ramchandra Mardaraj APPELLANT

Vs

Commr. of Income Tax RESPONDENT

**Date of Decision :** 28-02-1955

**Acts Referred:**
Income Tax Act, 1922 — Section 34

**Citation :** AIR 1955 Ori 106 : (1955) 21 CLT 555

**Hon'ble Judges :** P.V.B. Rao, J;Misra, J

**Bench :** Division Bench

**Advocate :** K. Patnaik, for the Appellant; G.C. Das, for the Respondent

## Judgement

Misra, J.—This is a reference u/s 66(1), Income Tax Act by the Income Tax Appellate Tribunal, Madras Bench ''B'', at the instance of the assessee, the Raja Bahadur of Khallikote. The question referred to us is as follows :

"Whether the reassessment of the income for the assessment year 1939-40 by invoking the provisions of Section 34 was correct."

2. The assessee is the zamindar of Khallikote and derive his income, among other sources, from forests. For the assessment year 1939-40, the Income Tax officer made an assessment u/s 23(3); the accounting year for the relevant period ended on 31-3-39. In the original assessment u/s 23 (3) of the Act, the Income Tax Officer did not take the income from forests into account as till then the revenue authorities were under the impression that such income was agricultural income and as such was not assessable to Income Tax. On 17-4-1941, the Patna High Court held in the case of -- PROVINCE OF BIHAR Vs. MAHARAJA PRATAP UDAI NATH SAHI DEO OF RATUGARH AND ANOTHER., that income from forests such as Lakhar, Bankar and Phalkar from forests of spontaneous growth as distinct from forests grown by the process of cultivation were non-agricultural income and as such were assessable to Income Tax.

On 14-12-1942, a notice was issued to the assessee u/s 34 for the assessment year 1939-40 in respect of his income from forests. Apparently the Income Tax Officer treated the judgment of the Patna High Court as a definite information which had, come into his possession, and as a result of which he discovered that the income from forests had escaped assessment and so he issued notice u/s 34 of the Act. In pursuance to this notice the assessment was completed on 28-2-1944. The assessee filed an appeal against this order. Before the Appellate Assistant Commissioner the assessee raised a point that Section 34 was not applicable in the circumstances of the case, because, according to the assessee, the section to be operative contemplated the discovery of a fact, and the Income Tax Officer did not, in this case, discover any fact, because he already knew at the time of the original assessment that the assessee had forest income as well as interests on arrears of rent, etc.

This point was overruled by the Appellate Assistant Commissioner who held that the Patna High Court for the first time held in the case already referred to that incomes from forests of spontaneous growth as distinct from forests grown by the process of cultivation and tilling of the soil, were non -agricultural incomes, and in the opinion of the Appellate Assistant Commissioner this exposition of the correct meaning of agricultural income was a definite information of a fact not possessed by the Income Tax Officer at the time of the original assessment. Accordingly, he held that the Income Tax Officer was justified in invoking the provisions of Section 34 in this case. On facts, however, certain questions were raised, and in the opinion of the Appellate Assistant Commissioner, the quantum for the assessment u/s 34 had to be re-determined as indicated in his order dated 29-11-1944, and accordingly the case was remanded "to the Income Tax Officer.

Thereafter the Income Tax Officer made a fresh " assessment u/s 34 and Section 23(3). Against this -order the assessee again filed an appeal before the Appellate Assistant Commissioner. Before him the applicability of Section 34 was again questioned and the order was also attacked on merits. With regard to the first point, the Appellate Assistant Commissioner held that his predecessor in office had already decided the point, and that had become final as no appeal had been filed against that part of the order, and as such, the appellant was : debarred from raising that point over again before him. He then considered the merits of the assess- ment, and gave some relief to the assessee by excluding that portion of the income from forests which was the result of agricultural operations, He also gave some other minor relief in respect of house property which it is unnecessary to mention lor the purpose of this reference. Against this order the assessee filed an appeal before the Income Tax Appellate Tribunal. The question of the applicability of Section 34 was again raised; but they held that the Appellate Assistant Commissioner was right in holding that question having been finally decided by the first order of the Appellate Assistant Commissioner, and that order not having been made the subject of re-investigation and not having been set aside, was final.

 

Although they held that the appeal failed on this point alone, yet they went into the merits of the assessee''s contention, and held that if the state of law had been correctly expounded for the first time by the Patna High Court, that itself constituted ''definite information'' enabling the Income Tax Officer to act u/s 34. Accordingly they dismissed the appeal. Thereupon the assessee moved the Income Tax Appellate Tribunal to make a reference to this Court, and the Tribunal holding that a question of law does arise out of the said order, has stated a case for decision of the question set forth at the beginning of that order.

3. For the purpose of this reference we are to construe the provisions of Section 34 as it stood before the amendment of 1948. Before the amendment Section 34 ran 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 service 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 re-assess 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 sub-section:

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."

X X X

In order to attract the operation of the section, two things have to be established, one is that some definite information must come in the pos session of the Income Tax Officer, and the other is that in consequence of that information, the income tax Officer must discover that income, pro- fits or gains, chargeable to income-tar have escaped assessment in any year, or have been underassessed, or have been assessed at too low a rate, or have been the subject of excessive relief under the Act. Reading the language of the section as a whole, it seems to us that the section contemplates that the Income Tax Officer must discover some new facts, as a result of which he comes to the conclusion that certain income has either escaped assessment or has been under-assessed or has been assessed at too low a rate, or has been the subject of excessive relief under the Act. The words "definite information" cannot relate to information regarding a new decision as to the interpretation of a section of the Act. It is the established law that decisions of Courts of law do not create a new law. They only declare what the law is. Every man is supposed to know the law. The Income Tax Officer may not assess a certain income due to his ignorance of the law, but if he later on finds out that he was under a wrong impression about the existing law, it cannot be said that a definite information has come into his possession by virtue of which he discovers that certain income has escaped assessment.

The use of the words "information" and "discovers" suggests that the Income Tax Officer must have some definite information about certain facts as a result of which he discovers that certain income has escaped assessment. Just as the CPC provides that discovery of a new fact which was not within the knowledge of a party after exercise of due diligence, but which has subsequently come to his knowledge gives him a right to ask the Court to review its previous decision so also the Income Tax Act provides in Section 34 that if the Income Tax Officer comes into possession of definite information of certain facts as a result of which he discovers that a certain income has escaped assessment, he is entitled to reopen the assessment proceedings by issuing a fresh notice u/s 22(2) of the Act. That seems to us to be the plain meaning of the section. It may be pointed out that Section 34 was once amended in the year 1939. Before the amendment of that year, the section provided that if for any reason income, profits 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 make a fresh assessment.

It would be seen under this section before the amendment of 1939, all that had to be shown was that the income had escaped assessment, or had been assessed at too low a rate, and the cases show that position might arise by a mere error on the part of the Income Tax Officer on a question of law or fact. He might change his opinion and thereupon make a fresh assessment. Apparently, the Legislature thought that it was necessary to curtail the powers of the Income Tax authorities in that respect. Income Tax is a serious item in the expenditure of most people, and an assessee is entitled to know what his liability is, and it certainly seems unreasonable that, if his liability has been fixed at a certain figure, and he has based his future budget on that figure, he should subsequently be told that, owing to some mistake of the Income- tax Officer, he ought to have been charged at a heavier figure with the result that he may cause considerable embarrassment.

Presumably considerations of this nature led to the amendment of Section 34 in 1939 by which it was provided that 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, action may be taken.

 

4. Mr. K. Patnaik, learned counsel for the assessee, has drawn our attention to the case of --''income tax Appellate Tribunal, Bombay v. B.P. Byramji & Co. AIR 1946 Nag 188 (B). In that case the income of the assessee, for the charge-year 1939-40 was computed at Rs. 54,024/- for the purpose of Income Tax and super-tax. The officer who made the original assessment came to the conclusion that the rate at which the supertax was assessed by virtue of the provisions of Section 6(4)(v) of the Finance Act, 1939, should be the rate prescribed by the Finance Act of the previous year, viz., of 1938, and the assessment was accordingly made on 16-3-1940. In the following July, the successor in office of the assessing officer informed the assessee that he proposed to re-assess the income in consequence of definite information that had come into his possession. The ''definite information'' consisted only of his view of the law as to whether the rates of the Finance Act of 1938 or 1939 were applicable and as in his view the rates of Finance Act of 1939 were applicable that in his view constituted "definite information'' so as to attract the operation of Section 34.

It was found that the view of the second officer about the legal position was correct; but the question raised was whether a different view of the law entertained by the Income Tax Officer at a subsequent stage or by his successor constituted ''definite information'' within the meaning of Section 34 of the Act. Their Lordships after discussing the entire question came to the conclusion that u/s 34, Income Tax Act, as amended in 1939, the Income Tax Officer had no power to reopen the assessment proceedings, unless he acted in consequence of ''definite information'' which had come into his possession. A mistake of law was not a ground for reopening the assessment. The view of the succeeding officer even though it was correct, was not based on any definite information coming into his possession, but he only corrected a view of the mistake of law applied by his predecessor, and that was not a sufficient ground for applying Section 34 as amended in 1939.

5. Mr. Patnaik next referred to the case of the -- COMMISSIONER OF Income Tax, BOMBAY Vs. SIR MAHOMED YUSUF ISMAIL., . In that case under a deed of wakf executed by the assessee in 1929, the trustees paid 21 per cent of the income which was not included in the income of the assessee for the assessment year 1939-40. Later on the superior officer of the Income Tax Officer took the view that the provisions of Section 16 (3) (b) had been misconstrued, and the Income Tax Officer thereupon proceeded to reopen the assessment u/s 34. Under those circumstances it was held that no definite information came into the possession of the Income Tax Officer which resulted in his discovery that income had escaped assessment or had been under-assessed and he was, therefore, not entitled to reopen the assessment u/s 34. Beaumont C. J. pointed out that

"in order to take action u/s 34, there must be some information as to a fact which leads the Income Tax Officer to discover that income has escaped assessment or has been underassessed."

Chagla J. (as his Lordship then was) held that "word discover in Section 34 does not mean a men change of opinion on the same facts or on a question of law, or the mere discovery of a mistake of law."

6. Mr. G. C. Das, learned counsel for the Income Tax Department, contends that the words'' ''definite information'' are wide enough to cover not only information on a question of fact, but also information on a question of law, and therefore, the Income Tax Officer was justified in invoking the provisions of Section 34 in reopening the assessment after he received ''definite information'' that the Patna High Court had held in the case referred to above that income from forests of natural growth was not agricultural income. He relies strongly on the case of -- Benoy Kumar Sahas Roy Vs. Commr. of Income Tax, West Bengal, . Undoubtedly that decision is on all fours with the present case, and entirely supports Mr. Das''s contention. In that case the Income Tax Officer at the time of the original assessment was aware that the assessee had forest-income; but he did not include it in the assessment in the belief that it was not assessable. Subsequently he came to know that such income derived from the sale of forest trees of spontaneous growth was not agricultural income, and therefore, was not exempt from taxation. He derived this information from the decision in -- ''Maharaja of Kapurthala v. Commr. of Income Tax, C. P. & U. P. AIR 1945 Oudh 35 (E). Thereupon he reopened the assessment proceedings u/s 34, and issued notice to the assessee u/s 22(2).

It was this assessment which was the subject-matter of reference to the High Court, and one of the questions referred to was "whether on the facts and circumstances of this case Section 34 is applicable." Their Lordships, Chakravarti C. J. and Lahiri J. held upon a construction of the terms of Section 34 that:

"Although it may be possible to construe the section by limiting the information to purely factual information in the first, second and fourth cases, the third case viz., where the income has been previously assessed at too low a rate clearly suggests that the error may be an error in the application of the appropriate rate and, so an error of law and therefore the information may be an information as to that error. The third case does not contemplate the contingency where a lower rate was applied for the reason that the amount of the assessable income was determined at a lower figure because that contingency is covered by the second case. If in- formation as to the correct law is proper information in the third case, it must be so in all the four cases."

Therefore on this reasoning their Lordships held that in the facts and circumstances of that case the Income Tax Officer had ''definite information'' in his possession within the meaning of Section 34, and action under that section was, therefore, rightly taken. With great respect we are unable to accept the reasoning adopted by their Lordships, because the section contains several clauses, and in respect of one clause, there may be a possibility that income may have been assessed at too low a rate On account of some error of law. It is not safe to presume that the legislature intended that in all the four cases the ''definite information'' required under the section should relate to questions of law. Even in respect of the third case, it is difficult to conceive how a mere defect in the knowledge of the law with regard to the rate of tax possessed by an Income Tax Officer which is subsequently found by him to be incorrect can be said to constitute ''definite information'' within the meaning of Section 34 of the Act. Their Lordships pointed out that even in the Bombay case in COMMISSIONER OF Income Tax, BOMBAY Vs. SIR MAHOMED YUSUF ISMAIL., Beaumont C. J. had observed that

"the fact may be as to the state of the law for instance, that a case has been overruled or that a statute has been passed which has not been brought to the attention of the Income Tax Officer."

The Madras High Court also made a similar observation in the case of -- ''Raghavalu Naidu and Sons v. Commr. of Income Tax, Madras AIR 1945 Mad 311 (F). The observations made in those two cases were in the nature of obiter, and need not be discussed at great length; but even assuming that the said observations were correct, they applied to cases where prior to the date of assessment an earlier exposition of the law containing any decision of Court was overruled by a subsequent decision or a new law had been passed replacing the old law on the subject, and the Income Tax Officer had omitted to notice those facts, and when he came to know subsequently that the decision which he had followed at the time of the assessment had been overruled prior to the date of the assessment or that the law on which he proceeded had been replaced by any statute prior to the date of the assessment that fact itself may constitute ''definite information'' within the meaning of Section 34.

This view of the matter is amply illustrated by the decision -- In Re: Chhaturam Horilram Ltd., . In that case the assessee, a resident of Chota Nagpur which was a partially excluded area, was assessed to Income Tax for the year 1939-40 on 22-12-1939. On appeal the Income Tax Appellate Tribunal set aside the assessment on the ground that the Indian Finance Act, 1939, was not in force in Chota Nagpur, On a reference u/s 66(1), the High Court agreed with the view of the Appellate Tribunal. After the decision of the Appellate Tribunal, but before the date of the judgment of the High Court, the Governor of Bihar enacted Bihar Regulation 4 of 1942 which received the assent of the Governor- General on 30-6-42, and brought into force the Indian Finance Act, 1939, in Chota Nagpur with retrospective effect from 30-3-1939. Thereafter on 8-7-1941, the Income Tax Officer had issued notice to the assessee u/s 34 of the Act. On 8-2-1944, the Income Tax Officer passed an order cancelling the said notice u/s 34. On 12-2-1944 the In come-tax Officer again issued a fresh notice u/s 34 and reassessed the income for the year 1939- 40.

The question was whether the notice issued on 12-2-1944, was validly issued. The Patna High Court held that the circumstance that the Income Tax Officer came to know that Bihar Regulation 4 of 1942 had been promulgated constituted ''definite information'' in consequence of which the Income Tax Officer discovered that the income which was chargeable in 1939-40 had escaped assessment, and therefore, the notice u/s 34 issued on 12-2-1944, was validly issued. From the above resume of facts it would be seen that the ordinance in question had been promulgated before the decision on the reference u/s 66(1) had been pronounced, and the Finance Act of 1939 had been made applicable to Chota Nagpur i.e. before the close of the financial year 1939-40, with effect from 30-3-1939, by Bihar Regulation 4 of 1942. This was a case of change of law by a competent authority prior to the date when the 1st assessment was completed. This fact of the promulgation of the ordinance came to the knowledge of the Income Tax Officer much later, and the Patna High Court held that fact constituted ''definite information''. For the purpose of the present case it is not necessary to decide that hypothetical question.

In the present case the facts are that until the assessment was made, the Income Tax Department was under the impression that income from forests was agricultural income and as such was not assessable. It appears from, the statement of facts that for the assessment year 1939-40 (accounting year ending with 31-3-1939) an assessment was made originally u/s 23(3). The decision of the Patna High Court in the case of PROVINCE OF BIHAR Vs. MAHARAJA PRATAP UDAI NATH SAHI DEO OF RATUGARH AND ANOTHER., was pronounced on 17-4-1941. That decision was not a decision under the Income Tax Act. That was a decision under the Bihar Agricultural Income Tax Act. A contention was raised before their Lordships that ''Bankar'' (income derived from the sale of wood from virgin jungles not actually cultivated), ''Lakhar'' (income derived from letting land and trees for cultivation of lac) and ''Phalkar'' (income derived from the fruits of wild jungle trees and bushes) were not agricultural income and therefore could not be taxed under the Bihar Agricultural Income Tax Act. Their Lordships accepted that contention and held that Lakhar, Bankar, and Phalkar which is income derived from forests of spontaneous growth did hot constitute agricultural Income Tax and was not assessable to Income Tax under the Agricultural Income Tax Act.

That case did not overrule any previous decision u/s 4 of the Income Tax Act which exempts agricultural income from assessability to tax under the Income Tax Act. That was a decision under the Agricultural Income Tax Act, and the Income-tax Officer in the present case being informed that the Patna High Court had decided in that case that it was not, agricultural income liable to be taxed under the Agricultural Income Tax Act, sought to invoke his powers u/s 34, Income Tax Act. In our opinion, even if the observations made by Beaumont G. J, in the Bombay case or the observations made by their Lordships in the Madras case be held to be good, they do not apply to the facts of the present case. In this case, from the statement of facts it is clear that an assessment had already been made for the assessment year 1939-40, and long after that when the decisions of the Patna High Court under the Bihar Agricultural Income Tax Act was pronounced, the Income Tax Officer reopened the proceedings u/s 34. We are definitely of opinion that decision of the Patna High Court cannot be said to constitute ''definite information'' within the meaning of Section 34 so as to entitle him to reopen the assessment which had already been completed.

7. Mr. Patnaik further contends that whatever be the meaning of, the words ''definite information'' as occurring in Section 34, the second condition, viz., that the income had escaped assessment must be established before the section can come into play. His contention is that the Income Tax Department knew that the assessee was in receipt of income from his forests, and in fact, the assessee in his return had mentioned that he was in receipt of income from forests, but as it was agricultural income, it was not assessable to tax. Mr. G. C. Das the learned counsel for the department, contends that the return is not to be found in the paper-book, and therefore, no argument can be built upon it. But he admits that the Income Tax Department knew that the assessee was in receipt of income from forests but did not assess him on that income prior to the issue of the notice u/s 34. The words "has escaped assessment" in Section 34 have been interpreted by their Lordships of the Judicial Committee in the case of -- Sir Rajendra Nath Mukerjee v. Commr. of Income Tax, (1934) 61 Ind App 10, AIR 1934 PC 30 . Their Lordships pointed out that the income which has been duly returned for assessment cannot be said to have escaped - assessment within Section 34, though it has not been taxed within the assessment year. The words ''has escaped assessment'' in Section 34 cannot be read as equivalent to ''has not been assessed'', and the word ''assessment'' is not confined to the definite act of making an order of assessment. As the learned counsel for the Revenue does not admit that it was shown in the return that he was in receipt of income from the forests we have to take his admission that the department knew that the assessee was in receipt of income from his forests, and in any such case, it was always open to the department to assess the income from forests in the relevant assessment year even if the assessee did riot show it in his return. The Act confers wide powers on Income Tax Officers to assess such incomes which have not been shown by the assessee in his return, provided they come to know of the existence of such incomes through other sources. Therefore, the position is that although the department knew that the assessee was in receipt of incomes from his forests, they did not deliberate- ly assess him, because in their view of the law such incomes were not assessable to tax. Merely because there is a decision of the Court declaring that income from forests of spontaneous growth does not constitute agricultural income, the Income Tax Officer, in our opinion, is not justified in holding that the income from such forests during the relevant assessment year in respect of which assessment has been completed "has escaped assessment" within the meaning of Section 34, Income Tax Act. Therefore, in our opinion, the second condition for the exercise of powers u/s 34 has not been established in the present case.

8. Mr. G.C. Das, learned counsel for the Department, relied upon a decision of this Court, in -- ''Abdul Sattar Hazi Ahmad v. Commr. of Income Tax, B. & O. 19 CLT 161 (I). In our opinion, that case has no application to the facts of the present case. In that case, the Income Tax Officer had made an assessment oh the footing, that the assessee was an individual, but the "appellate authority took

 

a different view of the evidence and held that the assessee was a firm, and as such the firm had escaped assessment. On a direction from the appellate authority, the Income Tax Officer issued a notice u/s 34, and the question which was decided by their Lordships was that the fresh assessment by the original assessing, authority was valid when the appellate authority merely took a different view of the evidence as to the ownership of the business, and over and above that converted the individual appeal into an appeal on behalf of the firm without any objection by the partner who thereby escaped assessment. Their Lordships held that the discovery in such a case must be said to be on the basis of ''definite information'' of a fact. As stated above, that case has no application to the facts of the present case.

For the reasons stated above, we are of opinion that the re-assessment of the income for the assessment year 1939-40, in the present case, by invoking the provisions of Section 34 was not correct. The question, therefore, should be answered in the negative. The assessee is entitled to his costs.

Hearing fee Rs. 200/- (two hundred).

P.V.B. Rao, J.

9. I agree.

 