

(1935) 03 CAL CK 0048

In the Calcutta High Court

Case No : "Notice under Section 34 of the Income Tax Act (XI of 1922) Office of the Income Tax Officer, District IV-3, Calcutta. Dated Calcutta, the 8th February, 1934 No. 1288/IV-3. The proprietors Mahaliram Ramjidas (firm) , 21, Roopchand Ray Street, Calcutta

RAMJIDAS MAHALIRAM, IN RE.

Date of Decision : 06-03-1935

Acts Referred:

Income Tax Act, 1922 — Section 22(2), 34
Specific Relief Act, 1877 — Section 46

Citation : (1936) 4 ITR 25

Hon'ble Judges : McNair, J

Bench : Division Bench

Judgement

MCNAIR, J. - This is an application on behalf of the firm of Mahaliram Ramjidas for a writ of certiorari directing the Commissioner of Income Tax, Bengal, to bring up the records of certain assessment proceedings pending before the Income Tax Officer of District IV-3, Calcutta, relating to an assessment in respect of the financial year 1932-33, wherein the registered partnership firm of Mahaliram Ramjidas are the assesseees, to the end that an order of the said Income Tax Officer passed in the said proceedings on the 5th February, 1934, purporting to be u/s 34 of the Indian Income Tax Act, 1922, and all proceedings consequent upon such order be quashed, including an order of the Income Tax Commissioner, dated the 3rd of November, 1934, and purporting to dispose of an application by the assesseees u/s 33 of the Act, dated the 15th September, 1934, or for such further or other orders by writ of prohibition or otherwise as the Court may deem just and just and expedient. In the alternative, the applicants ask (i) for an order directed to the Commissioner of Income Tax, Bengal, requiring him to hear and determine the assesseees application of the 15th September, 1934, and/or to state a case, according to law, and (ii) for an injunction restraining the Income Tax Officer and/or the Commissioner from further proceeding under any order purporting to be u/s 34 of the Income Tax Act in regard to the assesseees income for the Sambat year 1987-88 pending the disposal of this motion.

The petitioners are a registered partnership carrying on business in Calcutta and use the Sambat year for accounting in the usual course of their business.

The Sambat year 1987-88 corresponds to the period from the 31st October, 1930, to the 9th of November, 1931.

Their income during the Sambat year 1987-88, for the purpose of income tax, fell to be assessed during the financial year ending on the 31st of March, 1933.

The return which was submitted by the petitioners contained a statement that the firm sustained a loss of over Rs. 8 lakhs.

The Income Tax Officer, on the 23rd December, 1933, made an assessment pursuant to Section 23 (3) of the Income Tax Act assessing the petitioners firm at "nil".

On the 5th of February, 1934, the Income Tax Officer made an order for notice to issue u/s 22(2) read with section 34 of the Income Tax Act calling for a return of income assessable in 1932-33. The notice which was dated the 8th of February, 1934, stated that the Income Tax Officer had reason to believe that the assessee's income had wholly escaped assessment and he called upon the petitioners within thirty days of the receipt of the notice to deliver to him a return, in the attached form, of their income from all sources assessable in the year ending 31st of March, 1933.

Under protest, the petitioners made another return, wherein the figures shown corresponded with their former return for this period and the Income Tax Officer on the 21st of May, 1934, called for the petitioners trading books for their accounting years 1987-88, 1985-86, and 1984-85. A further notice called for the petitioners pass books for the years 1984-85 to 1988-89 a period of five years which was clearly in excess of the Income Tax Officers powers. The petitioners were also required to give evidence. They appeared under protest in June, July and August, 1934, and produced their books. In August 1934, the petitioners wrote to the Income Tax Officer protesting against certain entries which had been recorded in the Income Tax officers books and which they characterised as being "erroneous."

On the 1st of September, 1934, the Income Tax Officer wrote to the petitioners saying that he had held that all the proceedings relating to their assessment were valid, and that they should be continued and computed. For this purpose the accounts for the Sambat year 1987-88 would be "thoroughly examined," as well as the books already called for. The petitioners state that they asked for particulars of the reasons for the Income Tax Officers procedure, which they contended were ultra vires, and for the orders on which they were based, but without result.

On the 15th of September, 1934, they presented a petition to the Commissioner of Income Tax under, amongst others, Section 33 of Income Tax Act.

The Commissioner, on the 8th of December, 1934, forwarded to the petitioners a copy of his order dated the 3rd of November, 1934, which was in the followings terms :-

"Order :- I have considered the application of the assessee, dated the 15th of September, 1934. I am not prepared to interfere or to take any action u/s 33 or 66 of the Act, at this stage, when the assessment is still before the Income Tax Officer. The assessee may be informed accordingly."

The petitioners complained that this method of disposing of this matter was to pass an order prejudicial to the petitioners and they submitted that the Commissioner's action was without jurisdiction. They submit that the machinery of the Act, does not give them any method of obtaining relief, and they accordingly applied to this Court for the issue of a writ of certiorari addressed to Commissioner, to have the proceedings paused. In the alternative, they asked for an order u/s 45 of the Specific Relief Act, 1877, requiring the Commissioner to hear the complaint or to state a case. During his reply Mr. Barwell for the petitioners stated that the only relief for which he was now asking in view of the arguments for the Crown and the affidavit of the Commissioner, was for a writ of prohibition.

At the outset of the hearing, the Advocate-General, who appeared to oppose the application, submitted a preliminary objection to the effect that the application, as framed would not lie. He referred to paragraph 24 of the petition, in which it is stated that u/s 66 of the Income Tax Act an assessee cannot compel an Income Tax Commissioner to state a case except in reference to orders u/s 31 or 32, which do not apply here, and to their contention that in the circumstances they were faced with a complete denial of justice. He relies on the amendment of Section 66 of the Income Tax Act (XI of 1922) which was made by Act XVIII of 1933. Prior to the amendment, Section 66, sub-section (2) read as follows :-

"Within sixty days of the date on which he is served with notice of an order u/s 31 or Section 32....assessee in respect of whom the order....was passed may, by application accompanied by a fee of one hundred rupees or such lesser sum as may be prescribed, require the Commissioner to refer to the High Court any question of law arising out of such order... and the Commissioner shall, within sixty days of the receipt of such application draw up a statement of the case and refer it with his own opinion thereon, to the High Court."

The Act has been amended in 1933 by adding after the words "Section 32" the following words "or of an order u/s 33 enhancing an assessment to otherwise prejudicial to him" so that the section now reads :-

"Within sixty days of the date on which he is served with notice of on order u/s 31 or Section 32 or of an order under or an order u/s 33 enhancing an assessment or otherwise prejudicial to him.....they assessee..... may..... require the commissioner to refer to the High Court any question of law arising out of such order...."

Sections 31 and 32 which deal with an appeal to the Assistant Commissioner and from him to the Commissioner are admittedly irrelevant to the present matter.

Section 33 empower the Commissioner to call for the record of any proceeding, to make enquiries and pass such orders as he thinks fit, provided that he shall not pass any order prejudicial to an assessee without hearing him or giving him a reasonable opportunity of being heard.

The petitioners in paragraph 24 of their petition state that they are unable to obtain a reference except in regard to orders made u/s 31 or 32 from which it would appear that they were unaware of the recent amendment.

Section 66, sub-Section (2), now provides that within sixty days of the date on which he is served with notice of an order u/s 33 enhancing an assessment or otherwise prejudicial to him an assessee may by application accompanied by a fee of one hundred rupees or such lesser sum as may be prescribed, require the Commissioner to refer to the High Court any question of law arising out of such order and the Commissioner, shall, within sixty days, state a case and refer it to the High Court.

There follow two provisos. The first, that a reference shall lie from an order u/s 33 only on a question of law arising out of that order itself, and not on a question of law arising out of a previous order u/s 31 or Section 32, revised by the order u/s 33.

The second, that, if in exercise of his power of revision u/s 33, the Commissioner decides the question or rejects the application, or refuses to state the case, the assessee may, within thirty days from the date on which he receives notice of the order passed by the Commissioner, withdraw his application and obtain a refund of his fee.

Sub-Section (3) provides that if an application be made under sub-Section (2) and the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may apply to the High Court, and the High Court may require the Commissioner to state the case and refer it to the Court.

The Advocate-General contends that the recent amendment of the Income Tax Act, by Act XVIII of 1933, has given an assessee remedies which he did not previously possess; that he has not chosen to avail himself of those remedies, and that he cannot now say that there is no machinery within the terms of the Act whereby he can obtain relief. In the circumstances, he says, the petitioners have not shown that they are entitled to invoke those powers of the Court which are only applicable to exceptional circumstances.

It is further argued that the Commissioner has not come to any decision. He has not passed an order but has made a statement that in his opinion the time is not yet ripe for him to interfere with the proceedings which are being conducted by the Income Tax Officer.

The communication by the Commissioner, dated the 3rd of November, 1934, is headed "order" and it must be taken to have been intended to be an "order". It purports to have been made after considering the assessee's application that the Commissioner should exercise his discretion u/s 33 and it must be assumed that it is an order made in the exercise of that discretion and under the powers provided by Section 33. It follows that if it is an order prejudicial to the assessee and containing a question of law, Section 66 provides machinery whereby the assessee may have the legality of that order referred to the High Court for decision.

The assessee, in support of their contention that they are not confined to the relief afforded by the provisions of the Income Tax Act, rely on the case of *Alcock, Ashdown and Company, Limited v. Chief Revenue Authority of Bombay*, where the Privy Council held that when power is given to a public authority there may be circumstances which will couple the power with the duty to exercise it, and that under the provisions of section 51 of the old Income Tax Act of 1918 "always supposing that there is a serious point of law to be considered, there does lie a duty upon the Chief Revenue authority to state a case for the opinion of the Court, and if he did not appreciate that there is such a serious point, it is in the power of the Court to control him and to order him to state a case". Since the enactment of the new Income Tax Act of 1922 the above case has to some extent become obsolete.

The new Act has in Section 66 empowered the Court to require the Commissioner to state a case and refer it and has laid down the limitations under which such a reference shall be made.

There is in the framework of the Act provides no specific or adequate remedy. See *V. E. A. Chettyar Firm v. Commissioner of Income Tax*, *The Commissioner of Income Tax, Burms v. C. P. L. E. Firm* and *Tata Hydro Electric Agency, Limited v. Commissioner of Income Tax, Bombay*.

This objection is in my opinion valid. I will deal with it more fully in regard to the claim for a writ of prohibition at the conclusion of my judgment.

The next contention of the Advocate-General is that there is no power in the High Court to issue a writ against the Income Tax Commissioner. He refers to Clause 4 of the Charter establishing the Supreme Court at Fort William in Bengal. By that clause, the Chief and Puisne Justices are to have such jurisdiction and authority as the Justices of the Court of Kings Bench have, and may lawfully exercise within that part of Great Britain called England, by the common law thereof. By Clause 21 of the Charter it was ordained and established that all Courts and Magistrates therein referred to should "be subject to the order and control of the said Supreme Court of Judicature at Fort William in Bengal, in such sort, manner and form, as the inferior Courts and Magistrates of..... England are, by law, subject to the order and control of our Court of Kings Bench, to which end, the said Supreme Court of Judicature, at "Fort William in Bengal," was "empowered

and authorised, to award and issue a writ or writs of mandamus, certiorari, procedendo or error..... directed to such Courts or Magistrates as the case may require, and to punish any contempt of a wilful disobedience thereunto by fine and imprisonment".

In 1780 the East India Company Act, 1780 (21 Geo. III c. 70), was enacted. Section 8 of that Act provided that the Supreme Court shall not have or exercise any jurisdiction, in any matter concerning the revenue or concerning any act ordered or done in the collection thereof, according to the usage and practice of the country or the regulations of the Governor-General in Council.

The Government of India Act (5 & 6 Geo. V c. 61) which repealed the above Act, provided by Section 106, sub-section (2) that the High Courts have not and may not exercise any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force.

The contention is that in matters of revenue the High Court has no jurisdiction, and that income tax being a matter concerning revenue or its collection, the High Court may not exercise its powers against the Income Tax Commissioner.

This argument was put forward on behalf of the Crown in the case to which I have already referred, *Alcock, Ashdown and Company, Limited v. Chief Revenue Authority of Bombay*, but the Privy Council held that the High Court had power to make an order requiring the Chief Revenue Authority to perform a duty under the Income Tax Act. It is noteworthy, however, that the aid of the Court was there invoked u/s 46 of the Specific Relief Act which enables the High Court to make an order requiring any Specific Act to be done or forborne..... by any person holding a public office whether of a permanent or a temporary nature..... subject to certain provisos which are cumulative.

A question in the appeal was whether the Court had any jurisdiction to order the Chief Revenue Authority to state a case, and from the report it appears, that, before the Board, it was argued "that even if the Authority had a duty, the Court could not require him to exercise it"; and for this purpose reliance was placed upon the well-known general purview of Indian legislation which excludes matters of revenue from the consideration of the ordinary Civil Courts, the principle being exemplified in the case of *Spooner v. Juddow*, and upon Section 106, sub-section (2) of the Government of India Act". LORD PHILIMORE in delivering the opinion of the Board says [I. L. R. 47 Bom. 742] :-

"Upon the point thus broadly stated, their Lordships have no difficulty in pronouncing a decision. To argue that if the legislature says that a public officer, even a Revenue Officer, shall do a thing, and he without cause or justification refuses to do that thing, yet the Specific Relief Act would not be applicable, and there would be no power in the Court to compel him to give relief to the subject, is to state a proposition to which their Lordships must refuse assent..... In their Lordships view, the order of a High Court to a Revenue Officer to do his statutory

duty would not be the exercise of "original jurisdiction in any matter concerning the revenue."

Although, as I have stated above, the material part of that decision can no longer be relied on owing to the amendment of the Income Tax Act, there is no reason to doubt the validity of the general proposition there laid down that this court has power in a proper case to compel a public officer, and even a revenue officer, to carry out a duty imposed upon him.

The learned Advocate-General took a further preliminary objection that a single Judge on the Original Side is not competent to deal with an application of this character. It should be made, he says, before a Bench of at least two Judges of the High Court and that Bench should be the Bench appointed by the Chief Justice to deal with income tax matters.

In this connection reliance is placed, first, on Section 66-A, sub-section (1), of the Income Tax Act which provides that when any case has been referred to the High Court u/s 66, it shall be heard by a Bench of not less than two Judges of the High Court; secondly, on the rules made under the Income Tax Act which are set out in Chapter XXX-A of the Rules and Orders of the Calcutta High Court (Original Side).

Rule 1 provides that all references u/s 66 of the Indian Income Tax Act, 1922,shall be presented to the Registrar, original Side, and shall be dealt with on the Original Side.

Rule 3 provides that the Registrar shall lay the matter before the Chief Justice who shall appoint a Bench u/s 66-A of the Income Tax Act to hear the reference.

Rule 5 provides that every application u/s 66 (3) of the said Act shall be presented to the Registrar, original Side, who shall submit the same to the Chief Justice or to the Bench appointed by the Chief Justice.

Rule 6 is also relied on, which provides that vakils and attorneys shall be entitled to appear and act in all matters governed by these rules.

With reference to Rule 6 it has been argued by the Advocate-General that while vakils and attorneys can appear in income tax matters, in matters on the Original side, only those counsel or advocates who have been specially admitted are entitled to appear and plead.

This is not a reference, nor is it an application under Income Tax Act, and neither that Act nor the rules under it are applicable.

Although, incidentally, the matter concerns income tax, and the provisions of the Income Tax Act have to be considered in coming to a decision, yet this is not an application u/s 66 or any other section of the Income Tax Act. The relief sought is by a writ of certiorari or prohibition which is issued by the Court under the power and authority conferred on it by the Charter.

I have already referred to those powers and it was recently decided in *In re national Carbon Company, Incorporated*, that those powers include the power in a proper case to issue a writ of prohibition.

It was there pointed out, that there is, in the Charter, no mention of any authority to issue a writ of prohibition, but PANCKRIDGE, J., sitting on the Original Side of this Court, held in a decision with which I am fully in accord, that there was no intention by Clause 21 of the Charter to curtail the powers, co-extensive with those of the Kings Bench, which had been given by Clause 4 and which include the power to issue a writ of prohibition.

It was never suggested, and I do not think it can be suggested, that a Judge sitting on the Original Side has not the right to exercise the powers with which the Court is vested under the Charter and those are the powers which are now invoked.

Assuming then that the facts are such as to justify the issue of a writ as prayed, I am of opinion that the application was subject-matter of the application be connected with proceedings under the Income Tax Act.

These were the preliminary questions argued. On the merits Mr. Barwell submits that the order of the Income Tax Officer of the 5th of February, 1934, is without jurisdiction.

The assessment made their return on the 21st of December 1932 and forwarded it without profit and loss account to the Income Tax Officer, who served a notice u/s 22 (4) on the proprietors of the firm to produce their books.

The assessment order shows that Mr. Kantilal Jatia, a member of the firm, appeared in response to the notice and produced the firms rakarah, nakal and khata and explained the items.

On 23rd of December, 1932, the firm was assessed u/s 23 (3) at "Nil" for 1932-33, and an application u/s 26-A to renew the firms registration for the purposes of the Act was granted .

On the 5th of February 1934, the income tax Officer made the order for a notice to issue u/s 22(2) read with section 34 and on the 8th of February 1934, the following notice was received by petitioners :

Whereas I have reason to believe that your income from business and other sources which should have been assessed in the financial year ending 31st March, 1933, has wholly escaped assessment, I therefore propose to assess the said income that has escaped assessment.

I hereby require you to deliver to me, not later than 9th March, 1934, within 30 days of the receipt of this notice a return in the attached form of your income from all sources which was assessable in the said year ending 31st March, 1933.
Sd.... 7-2-34."

Section 34 provides :-

"If for any reason income, profits or gains chargeable to income tax has escaped assessment in any year or has been assessed at too low a that, the Income Tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains..... a notice containing all or any of the requirements which may be included in 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."

The section provides for a re-opening of the assessment and empowers the income tax authorities to call for books and evidence, but before these powers may be exercised and the assessment that has been closed may be re-opened the essential pre-requisite is that something chargeable to income tax has escaped assessment. The notice u/s 34, it will be observed, merely states that the income tax authority "has reason to believe" that income has escaped assessment. That Mr. Barwell contends, is not sufficient. The Act in many instances, notably in Sections 22 (2), 23 (1) and (2), 23A, 24A, 25, 46 (1) and elsewhere uses expressions such as "in the Income Tax Officers opinion", "If the Income Tax Officer is satisfied" or "If the Income Tax Officer has reason to believe" or "the Income Tax Officer may in his discretion direct," which give the Income Tax Officer a discretion and power to use that discretion.

In Section 34 no such discretion is allowed. What is contemplated is that some item liable to tax has in fact escaped taxation, and only when that fact is in existence may the income tax authorities use their powers to reopen an assessment which has already been closed and which under the scheme of the Act is otherwise intended u/s 23 to be closed finally.

It is the general policy of the law that when accounts have been gone into and a balance has been struck and agreed upon, such an agreement should not lightly be set aside. It is not unlikely that the legislature had this principle in mind and were unwilling to have an assessment re-opened merely at the discretion of the income tax authority in view of the inevitable dislocation to the assessee's accounts and business.

In any event, Section 34 has been so worded that it does not leave the matter in the discretion of the Income Tax Officer but provides that the machinery in Section 22 may be set in motion a second time only if an item chargeable to income tax has escaped assessment, and the ordinary meaning of those words is that the escape from assessment is a fact.

Moreover, that is a fiscal statute in which the actual words of the Act must be strictly adhered to. See *Partington v. The Attorney General*.

It is contended that even if the order had stated, "whereas your income which should have been assessed has wholly escaped assessment" that statement

would have been untrue and no valid order or proceedings, could be made or held, founded on an incorrect premise.

An assessment has been made and it cannot be said with truth that the assessee's income from all sources has wholly escaped assessment.

In *In re Lachhiram Basantlal*, RANKIN, C.J., in delivering the judgment of the Court said :-

"Section 34 deals with income which has escaped assessment and it may be, though it is not necessary for the present purpose to decide it, that income cannot be said to have escaped assessment except in the case where an assessment has been made which does not include the income."

And in *Rajendranath Mukerji v. Commissioner of Income Tax, Bengal*, LORD MACMILLAN says :-

"The fact that Section 34 requires a notice to be served calling for a return of income which has escaped assessment strongly suggests that income which has already been duly returned for assessment, cannot be said to have "escaped" assessment within the statutory meaning.

In *In re Satyendramohan Roy Chaudhuri*, the question for decision was whether, after an assessment made u/s 23(4) of the Act is reopened u/s 34, by reason of certain specified heads of income having been assessed at the option of the assessee, so that his income under one head should be reduced if his income under another head were enhanced.

The Commissioner of Income Tax was of opinion that Section 34 :

"gives no general powers of revision to the Income Tax Officer and that the Income Tax Officer cannot reopen the assessment of the income, profits or gains of an assessee from any source in respect of which he has no reason to believe that the assessee has been under-assessed. In his view, it appears to be the intention of the Act that general powers of revision should only be exercised by the Commissioner acting u/s 33 and that the powers of the Income Tax Officer under Sections 34 and 35 are strictly limited by the terms of the sections themselves."

It was held that the assessee had no right to have the whole assessment reopened.

In delivering judgment the learned Chief Justice says :-

"As a matter of the true construction of this section, it appears to me that if the legislature had meant to say that if in any case it appears to the Income tax Officer that an assessee has been assessed upon too low a figure or too low a rate the Income Tax Officer may issue a fresh notice u/s 22 (2) and may proceed to reassess such assessee afresh, the language employed would have been noticeably different from that which we find in the present section."

In some of the cases to which I have been referred, the Income Tax Officer has stated the particular heads of income which have escaped assessment; in other it is not clear what form of notice was issued. There is no standard form of notice. See *In re Burn & in Co.*

But apart from the fact whether the notice was correct in form, the principle which in above cases lay down is that the words of the Act do not empower the Income Tax Officer to reopen an assessment merely to enquire further into the assessee's books in case something assessable may be found : and if I am right in my view, that it is an essential pre-requisite to reopening an assessment that an item of income, profits or gains has escaped assessment, the Income Tax Officer cannot give himself jurisdiction by an erroneous finding of fact. The assessee complains that they have never been given any indication of the heads of income which are said to have escaped assessment and no reply has been received to their request for information. If the Income Tax Officer is entitled to reopen an assessment merely on suspicion, no doubt he is justified in maintaining silence, but in my view no such intention of the legislature appears in the words of the section. This view is supported by the decision of a Bench of the Burma High Court in *Commissioner of Income Tax v. U Lu Nyo*, where it was held that when one Income Tax Officer had completed an assessment an attempt by his successor to go behind and revise the assessment merely because he disagreed with his predecessor's finding as to the amount of assessable income was not an assessment u/s 34.

Mr. Issacs, who in its later stages argued the case for the Crown in the absence of the Advocate-General, contended that the jurisdiction of the Income Tax Officer was territorial, and provided the assessee was within his territorial jurisdiction, which was not contested, the Income Tax Officer was empowered to perform the function entrusted to him u/s 22 and Section 34 and for that purpose to come to a finding of fact. I cannot agree that the mere grant of territorial jurisdiction entitles the Income Tax Officer to come to a finding of fact enabling him to reopen an assessment u/s 34. The real question in my opinion is whether the section is so worded as to grant the Income Tax Officer apart from his territorial jurisdiction, the power to determine conclusively the question of fact upon which his jurisdiction depends.

The legislature, in my view, has provided that if a certain state of facts exists and is shown to the Income Tax Officer to exist, before he proceeds to reopen the assessment u/s 34, he shall have jurisdiction to take proceedings, but not otherwise.

It is not for him to decide whether that state of facts exists, and if he reopens the assessment without its existence he is acting without jurisdiction.

I find no words in Section 34 which empower the Income Tax Officer to determine whether the preliminary state of facts exists.

In this connection I have been referred to the cases of *The Queen v. Bolton*; *The*

Queen v. Nunneley and The Queen v. Commissioners for Special Purposes of Income Tax, in which LORD ESHFR, M. R., states the two contentions and points out that the correctness of the one or the other must depend on the powers with which the legislature has invested a tribunal or body. See The King v. General Commissioners of Taxes for the District of Clerkenwell and The King v. Bradford.

Mr. Isaacs further argued that prohibition could only issue with reference to persons exercising judicial functions and that the functions of the Income Tax Officer are administrative.

In support of this argument he referred to the cases of Ex parte Death and The King v. The Commissioners for the General Purposes of Income Tax for Kensington.

But these cases which are decided on the English Income Tax Acts are not authoritative on a construction of the Indian Act where the income Tax Officer combines the duties under the English Acts of the Surveyor, the Commissioner and the Special Commissioners. In India, for instance, the assessee may be called upon u/s 23 to give evidence at the outset, in support of his return, whereas the Surveyor in England has no right to obtain legal evidence and is merely an administrative Officer.

The Commissioners jurisdiction does not begin until the Surveyor has discovered an omission u/s 52 of the Taxes Management Act but the Income Tax Officer in India is vested at the outset with judicial powers and Section 37, which invests the Income Tax officer with power to issue commissions for the examination of witnesses, provides that any proceeding before an Income Tax Officer..... under "this chapter" shall be deemed to be a "judicial proceeding". "This Chapter" includes the provisions of Sections 22 and 34.

At the conclusion of their case the petitioners contended that their real grievance was against the orders of the Income Tax officer u/s 22 and Section 34 which were without jurisdiction and for which the Act gives no specific or adequate remedy. The answer is that the Act does provide the Commissioner with power of revision with power of revision u/s 33 and the Commissioner has purported to exercise those powers u/s 33 and has made an order.

The petitioners allege that that order is unsatisfactory and that the Commissioner has given them no opportunity of being heard. If that be so the question raised is a question on the construction of the Act and so a question of law, and as it is an order which the assessee considers prejudicial to them, they could have availed themselves of the provisions of Section 66 and had the legality of the order tested by the Court. Their contention that an application u/s 66 would entail delay and that delay is the essence of their complaint, even if correct, does not justify them in neglecting the remedy provided by the Act, and in seeking instead to call in aid the extraordinary powers of the Court.

It is evident that the legislature intended the Commissioner to deal with questions that came to his notice u/s 33, and if he passed an order which the assessee considered prejudicial it provided a method by which the legality of the proceedings could be tested. It was obviously their intention that the provision of Section 66 relating to a reference should be strictly complied with, and if there was no such compliance, they intended the Commissioner's orders to be final and the jurisdiction of the High Court to be excluded.

It is clear from the English decisions that the power of exercising prohibition is discretionary, and that the Court should not be chary of exercising it to control persons who are entrusted with the power of imposing any obligation upon individuals and who attempt to exercise those powers in excess of their jurisdiction.

It has also been laid down that the fact that there is a right of appeal is not necessarily fatal to a claim for prohibition : *White v. Steele* approved in *The King v. North, Ex parte Oakley*, but the guiding principle appears to be that the writ in such a case will not issue unless the want of jurisdiction complained of is based upon a breach of a fundamental principle of justice.

Here the orders complained of do not, in my opinion, come within the exception and am not satisfied that this is a case in which a writ of prohibition should issue.

The Commissioner stated in his order of the 3rd of November, 1934, that he was not willing, at the date, to interfere or take any action u/s 33 or Section 66 of the Act. In view of my decision that the proceedings by the Income Tax officer in revision were irregular, the learned Commissioner may feel called upon now to look further into the matter.

The facts have been stated on affidavit by the petitioners and complaints are made of the actions of the Income Tax Officer. The only affidavit in opposition is by the Commissioner who must of necessity state matters according to the information he has received. No affidavit is filed by the Income Tax Officer.

After careful consideration of all the circumstances I order that the application be dismissed but that each party do bear their own costs.

Application dismissed.