Associated Stone Industries (Kotah) ... vs Commissioner Of Income Tax, Rajasthan on 5 February, 1997

Equivalent citations: 1997 TAX. L. R. 212, 1997 (3) SCC 323, (1997) 90 TAXMAN 553, (1997) 224 ITR 560, (1997) 1 SCALE 763, (1997) 4 SUPREME 197, (1997) 1 SCR 957 (SC), (1997) 2 JT 401 (SC), (1997) 138 CURTAXREP 260, (1997) 137 TAXATION 172

Bench: B.P. Jeevan Reddy, K.S. Paripoornan

PETITIONER:
ASSOCIATED STONE INDUSTRIES (KOTAH) LTD.

Vs.

RESPONDENT:
COMMISSIONER OF INCOME TAX, RAJASTHAN

DATE OF JUDGMENT: 05/02/1997

BENCH:
B.P. JEEVAN REDDY, K.S. PARIPOORNAN

ACT:

HEADNOTE:

JUDGMENT:

W I T H SPECIAL LEAVE PETITION (C) NO. 10840 OF 1980) J U D G M E N T Paripoornan, J.

The appellant is a public limited company. It was incorporated in the then Indian State of Kotah on 17.1.1945 for carrying on the business of quarrying stones. it is an assessee to Income-tax. This appeal is filed in pursuance to the certificate of fitness granted by the High Court of Rajasthan, Jaipur Bench dated 26.11.1979 arising out of the judgment and order dated 30.7.1979 in Income-tax Reference No. 24 of 1970. The said judgment is reported in (1981) 130 ITR 868 [CIT v. Associated Stone Industries (Kotah) Ltd.]. The High Court considered the validity of the re-assessments made on the appellant for the years 1950-51 to 1956-57 as also the legality f the assessments made for the years 1957- 58 to 1961-62 in its common judgment dated 30.7.1979 (ITR NO. 24 Of 1970). In

deciding the legality and validity of the re-assessments for the years 1950-51 to 1956-57 some aspects were decided in favour of the assessee/appellant. On a consolidated reference made by the Income-tax Appellate Tribunal in respect of the assessment Years 1950-51 to 1961- 62, seven questions of law were referred for the decision of the High Court. Out of the same the following 5 questions of law, namely question Nos. 1,2,5,6 and 7, which were answered against the assessee, are still in appeal before us:-

1. Whether, on the facts and in the circumstances of the case, the re-

assessments for the years 1950-51 to 1956-57, were validly made under section 34(1) (a) of the Indian Income-tax Act, 1922?

2. Whether, on the facts and in the circumstances of the case, the Revenue was entitled to contend that reassessments for the years 1954-55, 1955-56 and 1956-57 were validly made under section 34(1)(b) of the Act?

3. Whether an appeal can lie against an order levying penal interest under section 18A of the Act for the assessment years 1957- 58 to 1961-62?

4. Whether the assessee-company was entitled to a credit of the amount of excess royalty paid which is held to be in lieu of the income-

tax and super-tax liability of the company?

5. Whether, on the facts and in the circumstances of the case, the payment of royalty in excess of Rs.1,50,000 paid under clause 18 of the lease granted by the Government of His Highness the Maharao Saheb of Kotah on May 2, 1945, which has been held to be in lieu of income-

tax, super-tax etc., by the District Judge, Kotah, is a permissible deduction in the assessment years 1957-58 to 1960- 61?

2. At this stage, it should be mentioned that the assesee has filed special leave petition No. 10840 of 1980, by way of abundant caution against the very same judgment of the High Court to be considered in case the certificate granted by the High Court is found to be defective or unsustainable. it is unnecessary to consider the said special leave petition on merits separately.

3. We heard counsel.

4. the relevant facts for deciding the controversy involved in this appeal are not in dispute. The High Court has summarised them correctly in its judgment as follows:

> The then Maharao of Kotah State granted a lease to assessee-company on May 2, 1945, for a period of 15 years beginning from October, 1944. clause 18 of the lease agreement entered into by the assessee-company with the then Maharao of Kotah for

quarrying flooring stones was as under:-

> 18. (i) In consideration of the concessions and privileges granted by the GRANTOR and in lieu of income-tax, super-tax and excess profits tax, the GRANTEE covenants to pay to the GRANTOR royalty on the stone excavated at the rate of rupee one per 100 sq. ft., subject to the minimum amount of rs.1,50,000 per financial year, provided that the aforesaid rate of Re.1 per 100 sq. ft., will be operative so long as the selling rate of unpolished slabs does not exceed Rs. 10 per 100 sq. ft.; in the event of the selling rate going above this figure the royalty per 100 sq. ft. shall be increased by 25% of the excess over ten rupees.

(ii) The minimum royalty will be payable in four equal instalments in advance every quarter. Provided that if in any quarter the royalty payable calculated tat the rats mentioned in sub-para (i) exceeds the instalment of minimum royalty paid in advance for that quarter, the balance shall be made up within the next quarter.

The Kotah State merged with the United State of Rajasthan and the Indian I.T. Act, 1922, was brought into force in the newly formed State of rajasthan with effect from April 1, 1950. The assessee-company submitted an application to the commissioner of Income-tax for a declaration that it was exempt form the payment of income tax in accordance with the terms of the lease granted to it by the then Maharao of Kotah. But the aforesaid application was rejected. Thereafter, the assessee-company filed a civil suit in the court of the District Judge, Kotah, against the Union of India and the State of Rajasthan, seeking a declaration that it was exempt from payment of income tax and that the royalty paid by it in excess of the minimum amount of 1,50,000 was in lieu of income-tax, super-tax etc. The learned District Judge by his decree and order dated August 23, 1957, held that the royalty which was paid by the assessee-company to the State of Rajasthan, in accordance with the provisions of cl.18 of the grant, consisted of two parts, namely, the sum of Rs.1,50,000 represented royalty proper, while the remaining amount of royalty paid by the assessee-company was in lieu of income-tax, super-tax and excess profits-tax. According to the learned District Judge, the State of Rajasthan was entitled to the minimum royalty of Rs. 1,50,000 as, according to him, the said amount was attributable to the concessions and privileges granted by the Government to the assessee-company, while the remaining amount paid by the assessee-company, in excess of Rs.1,50,000, was further divisible into two parts consisting of the amount paid in lieu o income-tax, super-tax and excess profits tax, which was payable to the Union of India by way of federal taxes on incomes or profits, while the amount left by way of residue, out of the amount paid by the assessee-company under cl. 18 of the grant after the deduction of the income-tax, super-tax and excess profits tax, shall be payable to the State of Rajasthan. Thus, the State of Rajasthan was held entitled to the minimum royalty amount of Rs. 1,50,000 while the Union of India was held entitled to the amount equal to the tax liability of the assessee-company in respect of the federal taxes out of the excess royalty paid in that year, and the State of Rajasthan was entitled to the residue left out of the total amount paid by the assessee-company under cl.18 of the grant. The learned District Judge, however, dismissed the suit against the Union of India. The order passed by the learned District Judge, Kotah, had not binding effect so far as the Union of India is concerned.

The Income Tax Officer, in the assessments for the years 1950-51 to 1956-57, disallowed the deduction of the minimum royalty amount of Rs.1,50,000 from the taxable income of the assessee-company on the ground that the same was capital expenditure, while deduction of royalty paid by the assessee-company in excess of Rs.1,50,000 was allowed. The same position was maintained by him in respect of the assessments for the assessment years 1957-58 to 1961-62. In the year 1959, notices for reassessment of tax, under Section 34(1)(a) of the Indian Income Tax Act, 1922, were issued for the assessment years 1950-51 to 1956-57. The ITO reassessed the income of the assessee-company for the years 1950-51 to 1956-57 and held that as the amount of royalty paid by the assessee-company in excess of the sum of Rs.1,50,000 was in lieu of income-tax etc., the same could not be allowed as deduction to the assessee-company and as such that mount of excess royalty allowed earlier as deduction was disallowed and was added back to the income of the assessee-company. the assessee-company preferred appeals before the AAC against the aforesaid orders of reassessment passed by the ITO, Kotah, but the appeals were dismissed. Then the assessee-company filed appeals before the Income Tax Appellate Tribunal, which disposed of seven appeals relating to the reassessment proceedings made under Section 34(1)(a) of the Act, for the assessment years 1950-51 to 1956-57, by one consolidated order dated September 7, 1968. the Tribunal held that the proceeding under Section 34 of the Act could not be initiated in view of the decision of the Supreme Court in Calcutta Discount Com. Ltd. vs. ITO [(1961) 41 ITR 191]. It was held by the Tribunal that the assessee-company had disclosed all relevant or material facts and as there was no failure on the part of the assesee-company to disclose fully and truly any relevant material necessary for the assessments in respect of the years in question, the necessary pre-requisite conditions for invoking the jurisdiction for reassessment under Section 34(1)(a) of the Act were absent. The Tribunal further held that the proceedings for reassessment for the assessment years 1954-55, 1955-56 and 1956-57, although initiated within a period of four years from the date of the original assessment for those years, yet because such proceedings were initiated under Section 34(1)(a) of the Act, they could not be upheld as having been made under Section 34(1)(b) of the Act. The Tribunal also held that the portion of the excess royalty paid by the assessee-company to the State Government, which was equivalent to the tax liability of the assessee-company, could not be held as permissible deduction, as the income-tax and other taxes were payable to the Union Government. However, the remaining portion of the excess royalty, which was left out by way of residue, after deducting the amount paid in lieu of tax liability by the assessee-company, out of the excess royalty, was permissible deduction on the basis of the principles laid down by their Lordships of the Supreme Court in Gotan Lime Syndicate vs. CIT [(1966) 59 ITR 718]. It was further held by the Tribunal that the royalty paid on polished stones, in accordance with the provisions of cl. 19 of the agreement, constituted a part of the cost of the stones and is a permissible deduction, being an expenditure of revenue nature. The Tribunal lastly held that the assessee-company was entitled to the credit of the portion of the royalty, which was paid by it in lieu of income-tax and super-tax liability of the assessee-company.

By another order passed on September 7, 1968, the Tribunal allowed the appeals preferred by the assessee- company in respect of the assessment years 1957-58 to 1961- 62, holding that a sum of Rs.1,50,000, as the minimum amount of royalty payable by it, was expenditure of revenue nature and was a permissible deduction and that out of the excess royalty paid by the assessee-company, the residue left, after payment of the amount equivalent to income-tax, super- tax, etc., to the Union

Government, was also revenue expenditure and was a permissible deduction although the amount of excess royalty representing its liability in respect of income-tax, super-tax and other direct taxes payable to the Union of India couldnot be deducted from the taxable income of the assessee-company, adopting the reasoning given by it in the earlier order passed on the same day, which has been referred to above.

3. We are concerned only with the answers given by the High Court regarding questions Nos. 1,2,5,6 and 7, which are against the assessee. On question No. 1, the High Court held that the re-assessment proceedings for the years 1950-51 to 1956-57 were initiated and concluded validly under Section 34(1)(a) of the Act. On question No. 2, concerning the assessment years 1954-55, 1955-56 and 1956-57, the High Court found on the alternate plea, that the reassessments of the appellant-company for the said years could be justified under Section 34(1)(b) of the Act. On question No. 5, the High court held that the penal interest calculated and charged under Section 18A(6) or 18A(8) could only be challenged in an appeal against the order of assessment to tax and the assessee would be entitled to deny his liability to payment of penal interest also while denying his liability to be assessed to tax under the Act. it also agreed with the view expressed by the Allahabad, Andhra Pradesh, Madras, Karnataka, Gujarat, Gauhati and Bombay High Courts which held that no appeal lies against the order levying penal interest. The matter was left vague, without applying the law laid down by the High Court, to the facts of the case. On question No. 6, the High Court held that the assessee-company was not entitled to get credit for any amount of the excess royalty. On question No. 7, it was held that the expenditure being not one of a revenue nature cannot be a permissible deduction in the relevant assessment years.

4. We shall consider the above questions of law answered by the High Court (Questions 1,2,5,6 and 7) in seriatim. Question No. 1 relates to the legality and validity of re- assessments made for the years 1950-51 to 1956-57 under Section 34(1) (a) of the Income-tax Act, 1922. Sections 34(1)(a) and (b) of the Act are to the following effect:

> "34. Income escaping assessment --
>
> (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 under section 22 for and 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, in 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 low or depreciation allowance has been computed.

he may in cases falling under clause (a) at any time and in cases falling under clause (b) at any time within four years of the end of that year, serve on the assessee.....a notice."

It is evident that two conditions should be fulfilled to exercise jurisdiction under Section 34(1)(a) of the Act. (1) The Income Tax Officer should have reason to believe that income has escaped assessment, and (2) he must have reason to believe that such escapement is by reason of the omission or failure on the part of the assessee to make a return or to disclose fully and truly all material facts necessary for his assessment for the relevant year. It is now well settled by the decisions of this Court that the duty of the assessee is only to fully and truly disclose all material facts. The expression "material facts" contained in Section 34(1)(a) of the Act refers only to Primary facts, and the duty of the assessee is to disclose such primary facts. There is no duty cast on the assessee to indicate or draw the attention of the Income Tax Officer what factual or legal, or other inferences can ben drawn from the primary facts disclosed. (see - Calcutta Discount Co. Ltd. vs. ITO - 41 ITR 191). In this case, the Appellate Tribunal found in paragraph 12 of its order (page 321 of the paper book) thus:

> The primary fact in this case was the lease agreement and the terms and conditions thereof. This was before the Income-tax Officer from the beginning. He was aware of the triangular dispute between the assessee company, the State of Rajasthan and the Union Government pending before the District Court, Kotah. He was served with an interim injunction to refrain from proceedings with the assessments.
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> He had got the said injunction modified. In these circumstances, the charge against the assessee company that it had omitted or failed to fully and truly disclose any material fact fails completely.
>
> We are, therefore, of the opinion that the Income-tax Officer did not have any material whatsoever to have some reason to believe that as a reason of omission or failure on the part of the assessee-company to fully and truly disclose any relevant material necessary for its assessments for the years under appeal, income had escaped assessment. In other words, we hold that the material condition requisite for invoking jurisdiction under section 34(1)(a) was absent.
>
> We, therefore, hold that the reassessments completed under section 34(1)(a) are without jurisdiction and are, therefore, liable to be cancelled."
>
> On the other hand, the High Court has taken a different view of the matter by stating that the Income Tax Officer was not a party to the suit filed by the appellant, that a copy of the plaint filed in the court was not submitted to him and the assessee-company failed in its duty to make a pointed reference to the particular portion of the document, namely, clause 18 of the lease agreement dated 2,5,1945 and

in this view of the matter held thus:-

> Thus, we are satisfied that the Tribunal was not correct in holding that the assessee-company did not fail to disclose all material relevant or primary facts and the mere production of the lease agreement or some vague awareness on the part of the ITO about the triangular dispute between the assessee, the State of Rajasthan and the Union of India before the District Judge, Kotah, and the service of the interim injunction upon him, cannot lead to an inference that the ITO was aware as a matter of fact that the amount paid by the assessee-company under the lease agreement consisted not only or royalty proper but also some amount was paid in lieu of income-tax and other taxes."
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> In this view, it was held that the assessee-company failed to disclose all material or primary facts and so the proceedings under Section 34(1)(a) of 1922 Act were validity initiated and concluded. We are of the view that the approach and conclusion so made by the High Court are patently erroneous for the following reasons.
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> 5. The primary fact in this case is the lease agreement entered into by the appellant with the Maharao of Kotah State dated 2.5.1945. It was placed before the Income Tax Officer at the time of original assessments. It is not the duty of the assessee to draw the attention of the Income Tax Officer to any pa particular clause or portion of the document and invite him to draw any particular inference therefrom. Moreover, in the suit the Union of India and the State of Rajasthan were parties. The interim injunction passed by the court from assessing or levying any income tax against the assessee-company was varied on the representation made by the Union of lndia, by later orders.

Indeed, the Union of India and the Commissioner of Income- tax have filed written statements in the suit. The order of injunction was within the knowledge of the Income Tax Officer, as could be seen from the original assessments. The Income Tax Officer was aware of the triangular dispute between the assessee-company, State of Rajasthan and Union of India pending before the District Court. What is more, the order of injunction to refrain from proceeding with the assessments was served on the Income Tax Officer which was later modified. In view of these salient features, the High Court totally erred in holding that there was any omission on the part of the appellant-company to fully and truly disclose material or primary facts necessary for the assessments for the years in question. We, therefore, hold that the answer given to question No. 1 by the High Court that the reassessment proceedings initiated under Section 34(1)(a) of the Act were valid for the years 1950-57, is totally erroneous in law. We set aside the said finding and hold that the re-assessment proceedings for the assessment years 1950-57 under Section 34(1)(a) of the Act were invalid.

6. We shall now consider question No. 2 as to whether the Revenue could contend or defend the reassessments for the years 1954-55, 1955-56 and 1956-57 as validity made under Section 34(1)(b) of the Act?

The High Court has held on question No. 2 that re- assessments of the appellant-company for the said three years were justified under Section 34(1)(b) of the Act. We have noticed in the earlier portion of the judgment that a civil suit was filed in the Court of the District Judge, Kotah by the appellant-assessee against the Union of India and the State of Rajasthan seeking a declaration that it was exempt from payment of income tax and that the royalty paid by it in excess of the minimum amount of Rs. 1,50,000/- was in lieu of income tax, super-tax etc. Construing clause 18 of the grant, the District Judge held that the amount paid by the assessee consisted of two parts, namely, the sum of Rs. 1,50,000/- represented royalty proper, while the remaining amount, i.e., the amount paid over and above Rs. 1,50,000/- represented the amount in lieu of income tax, super-tax and excess profits tax. The State of Rajasthan was held entitled to Rs. 1,50,000/- which was attributable to the concessions and privileges granted by the Government to the appellant-company. The amount paid in excess of Rs. 1,50,000/- was further divisible into two parts. One part representing the amount paid in lieu of income tax, super tax and excess profits tax, which was payable to the Union of India and the residue out of the amount paid by the assessee-company under clause 18 of the grant after the deduction of the income tax, super tax and excess profits tax shall be payable to the State of Rajasthan. The State of Rajasthan will be entitled to the residue. The District Judge, however, dismissed the suit against the Union of India. In the appeal filed by the State of Rajasthan, it was held that the agreement dated 2.5.1945 became void on the coming into force of the Constitution of India on January 26, 1950, that the amount paid by the assessee-company in excess of the minimum of Rs. 1,50,000/- was refundable to it. The Income Tax Officer held that the amount of royalty paid by the appellant-company in excess of Rs. 1,50,000/- being in lieu of income tax, super tax and excess profits tax could not be allowed as deduction. In the re-assessment proceedings, the amount of excess royalty allowed earlier as deduction was disallowed and added back to the income of the assessee-company. The appeals filed by the appellant- assessee before the Appellate Assistant Commissioner were dismissed. The Appellate Tribunal held that the proceedings are invalid under Section 34(1)(a) of the Act for the years 1950-51 to 1956-57 and alternatively that the proceedings for re-assessment for the years 1954-55, 19555-56 and 1956- 57 though initiated within a period of four years from the date of the original assessment for those years, could not be sustained under Section 34(1)(b) of the Act, since the proceedings were initiated under Section 34(10(a) of the Act. The Tribunal also held that the portion of the excess royalty paid by the assessee-company to the State Government which was equivalent to the tax liability of the assessee- company is not a permissible deduction as the taxes were payable to the Union Government. It was further held that however, the remaining portion of the excess royalty which was left out by way of residue, after deducting the amount paid in lieu of tax liability by the assessee-company, (out of the excess royalty) was permissible deduction. In the High Court it was not disputed that re-assessment for the years 1954-55, 1955-56 and 1956-57 were taken within a period of four years from the date of completion of the original assessment proceedings and so they could have been validly made under Section 34(1)(b) of the Act. Nor was there any dispute before the High Court that the amount of royalty paid over and above the minimum royalty amount of Rs. 1,50,000/- was paid in lieu of income tax, super tax and excess profits tax and the amount which was so paid cannot be claimed as exempt from payment of income-tax. It was the income of the assessee-company and was chargeable to tax and which had, as a matter of fact, escaped assessment at the time of the completion of the original assessment. In the original assessment order, the Income Tax Officer allowed deduction for the entire amount paid by the assessee-company by way of royalty including the amount paid in lieu of

taxes as well as of the residue. The High Court held, on a resume of the above, that the Income Tax Officer had some "information" relating to escapement of income or under- assessment of income and since action was taken within four years of the original assessment such action could be sustained under Section 34(1)(b) of the Act, even if the proceedings were initiated under Section 34(1)(a) of the Act.

7. We are of the view that the reasoning and conclusion of the High Court in this regard are justified in law. The plea made in this behalf by the appellant's counsel was two fold.

(1) The first plea was that the proceeding initiated under Section 34(1)(a) of the Act, which was found to be invalid for the assessment years 1954-55, 1955-56 and 1956-57 cannot be sustained under Section 34(1)(b) of the Act.

Strong reliance was placed on the decision of the Allahabad High Court in Raghubar Dayal Ram Kishan v. C.I.T. (63 I.T.R. 572).

(2) The second plea was that the decision of the District Judge, Kotah rendered in the civil case was only based on the lease deed.

The lease deed as well as the decision of the District Judge were already available at the time of original assessment and cannot be considered to be fresh material or information sufficient to attract Section 34(1)(b) of the Act.

8. A look at Section 34, clauses (a) and (b) will show that the said clauses deal with two different situations. Section 34 is only a machinery section. They cover different contingencies and situations, but they do not deal with two distinct and separate jurisdictions. Section 34 as a whole -

- clause (a) or clauses (b) deals with cases of reopening of income escapement assessment. Whereas Section 34(1)(a) requires the formation of a belief by the Income Tax Officer, that there is a failure or omission on the part of the assessee to disclose fully and truly all material facts and there must be some material to form such a facts and there must be some material to form such a belief that the failure or omission on the part of the assessee has led to the escapement or under-assessment of income of the assessee, Section 34(1)(b) requires that even if there was no omission or failure on the part of the assessee, but the Income Tax Officer has information and he could form the belief that the income has escaped assessment, he could do so within the period of four years. There are limitations for the exercise of power under Section 34(1)(a), namely, that the Income Tax Officer is bound to record the reasons, which led to the formation of the belief and further sanction of the Commissioner of the Central Board of Revenue is required. Section 34(1)(b) is of wider import covering a larger class of cases. In ordinary civil actions, if a party prays for a larger relief and the Court holds that he is not entitled to the same, but it is apparent from the facts proved or admitted that the party is entitled to a lesser relief, it is always open to the court to grant the latter. Similarly, if the Income Tax Officer has initiated proceeding under the stringent and onerous provisions of Section 34(1)(a) which is found to be invalid, nothing could prevent the appellate or other higher authority from invoking Section 34(1)(b) if the pre-requisite conditions for the application of clause

(b) are satisfied. In other words, if the conditions for applicability of Section 34(1)(b) which only provides for shorter period of limitation is satisfied, the assessment though initiated under Section 34(1)(a) could be sustained or justified under Section 34(1)(b) of the Act. On this aspect, the decisions of various High Courts are not uniform. The Allahabad High Court in Raghubar Dayal Ram Kishan v. C.I.T. (63 I.T.R. 572) has held that it is not permissible. On the other hand, the Calcutta High Court in Mriganka Mohan Sur v. C.I.T. (95 ITR

503) has expressed dissent from the aforesaid decision of the Allahabad High Court has held that re-assessment proceedings initiated under Section 34(1)(a) of the Income- tax Act, 1922 though set aside by the Appellate Tribunal, can nevertheless be sustained under Section 34(1)(b) of the Act provided that on the materials on record, all the requirements under Section 34(1)(b) are satisfied. The same High Court in Nirmala Birla v. W.T.O. (105 ITR 483-FB) has followed its earlier decision. To similar effect is the decision of the Delhi High Court in Ganga Saran & Sons v. I.T.O. (130 ITR 212). A Division Bench of the Bombay High Court in Rajabally Hirji Meghani v. S. N. Sahane (170 ITR 614 has concurred with the decision of the Delhi High Court in Ganga Saran's case (130 ITR 212) in the context of a writ petition filed to strike down notices issued under Section 148 of the Income-tax Act. The other decisions which take similar view are T.M. Kousali v. Sixth ITO (155 ITR 739), CIT v. Banwarilal & Sons (137 ITR 91); Mysore Tobacco Co. Ltd. v. CIT (157 ITR 606) and CIT v. Surendra Kumar Bhadani (164 ITR 323).

9. Regarding the second plea, it is now fairly settled that the information obtained by the Income Tax Officer need not be one outside the record; it may be one obtained from the assessment records already available. The law on this point has been laid down in Salem Provident Fund Society Ltd. v. C.I.T. (42 ITR 547) and United Mercantile Co. Ltd. v. C.I.T. (64 ITR 218). These decisions have been quoted with approval by a Constitution Bench of this Court in Anandji Haridas & Co. v. S.P. Kasture (AIR SC 565). At page 573, the Court observed thus:

> "In Salem Provident Fund Society Ltd. Commr. of lncometax, Madras (1961) 42 ITR 547 (Mad) a division Bench of the Madras High Court interpreting the scope of the words 'information which has come into his possession' found in Sec. 34 of the Indian Income Tax Act, observed thus:
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> We are unable to accept the extreme proposition that nothing that can be found in the record of the assessment which itself would show escape of assessment or under-
>
> assessment, can be viewed as information which led to the belief that there has been escape from assessment or under-assessment.
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> Suppose a mistake in the original order of assessment is not discovered by the Income Tax Officer himself on further scrutiny but it is brought to his notice by another assessee or even by a subordinate or a superior officer, that would appear to be information disclosed to the Income Tax Officer. If the mistake itself is not extraneous to the record and the informant gathered the information from the record, the immediate source of information to the Income Tax Officer in such

circumstances is in one sense extraneous to the record. It is difficult to accept the position that while what is seen by another in the record is `information' what is seen by the Incometax Officer himself is not information to him. In the latter case he just informs himself. It will be information his possession within the meaning of section 34. In such cases of obvious mistakes apparent on the face of the record of assessment, that record itself can be a source of information, if that information leads to a discovery or belief that there has been an escape of assessment or under-assessment. The meaning of the word "information" came up again for consideration before a division bench of the Kerala High in United Mercantile Co. Ltd. v. Commr. of Income Tax. Kerala (1967) 64 ITR 218 (Ker). Their Lordships held that to `inform' means to "impart knowledge" and a detail available to the Incometax Officer in the papers filed before him does not by its mere availability become an item of information. It is transmuted into an item of information in his possession only if and when its existence is realised and its implications recognised."

We hold that though the proceedings of the three years 1954-55, 1955-56 and 1956-57 cannot be sustained under Section 34(1)(a) of the Act, they could be sustained or justified under Section 34(1)(b) of the Act, since the materials on record disclose that the conditions required to be fulfilled under section 34(1)(b) are satisfied. With great respect, we hold that the decision to the contrary of the Allahabad High Court in Raghubar Dayal Ram Kishan v. C.I.T. (63 ITR 572) is not good law.

We are next concerned with question No. 5 which deals with appealability of an order levying penal interest under Section 18A of the Act for the assessment years 1957-58 to 1961-62. The High Court has rightly answered question No. 5 stating that the penal interest calculated and charged under Section 18A(6) or 18A(8) can be challenged in an appeal filed by the assessee against the order of assessment to tax and the assessee would be entitled to deny his liability to payment of penal interest also while denying his liability to be assessed to tax under Section 18A of the Act. It was opined that no appeal would lie against the order levying interest under section 18A(6) or 18A(8) of the Act. The law so stated by the High Court is not open to objection. Under the Income-Tax Act, 1922 there was no specific right against an order levying interest. But, if an appeal is preferred against an order of assessment and interest is levied by the assessment order itself, the assessee can raise the question regarding the exigibility of interest. In this connection, the High Court has concurred with the view so expressed by the Allahabad High Court in Pt. Deo Sharma v. Cit (23 ITR

226), the Andhra Pradesh High Court in Boddu Seetharmaswamy v. CIT (28 ITR 156), the Madras High Court in South India Flour Mills Ltd. v. CBDT (70 ITR 863), the Karnataka High Court in National Products v. CIT (108 ITR 935), the Gujarat High Court in CIT v. Sharma Construction Co. (100 ITR 603), Gauhati High Court in K.B. Stores v. CIT (103 ITR 505) and the Bombay High Court in Keshardeo Shrinivas Morarka v. CIT (48 ITR 404). It is submitted that in this case the penal interest was levied under Section 18A(6) or (18A(8) in the assessment order and it was objected to

> in the appeal filed against the order of assessment. The assessee was entitled to take the objection regarding the levy of penal interest in the said appeal. The High Court has not dealt with the facts of this case pointedly in the light of law laid down by it nor has stated whether and if so the relief the assessee is entitled to in the matter while concurring with the view expressed by other High Courts regarding the law applicable in the instant matter. We direct the High Court to pass appropriate orders after ascertaining the factual situation and the consequential order that is necessary to give effect to the finding that may be arrived at, may also be passed. The matter shall stand remitted to the High Court for that purpose.

10. We are next concerned with questions No. 6 and 7 -- whether the appellant-company is entitled to credit of the amount of excess royalty paid by it to the State Government in lieu of income-tax, and super tax liability and also whether the payment of royalty in excess of Rs. 1,50,000/- paid under clause 18 of the lease deed dated 2.5.1945 is a permissible deduction for the assessment years 1957-58 to 1960-61.

11. In answering question No. 6, the High Court has held that the amount of excess royalty paid cannot be deemed to have been paid to Union of India in respect of the tax liability of the appellant-company, since no amount at all was paid to the Union of India by the appellant-company. It was also held that the excess royalty paid to the State Government cannot be said to be paid on behalf or as an agent of the Union of India. It was, therefore, held that the assessee-company was not entitled to get credit for any amount of the excess royalty, said to have been paid by the assessee-company to the State Government.

12. In answering question No. 7, the High Court held that the amount equal to the tax liability of the appellant- company for the relevant years, out of the excess royalty, was not a permissible deduction. The remaining portion or residue out of the excess royalty would partake of the same character as the minimum royalty of R. 1,50,000/- and is a permissible deduction. It was made clear that the amount equal to the tax liability of the assessee-company, out of the excess royalty, said to have been paid in lieu of income-tax, super tax etc., is not a permissible deduction.

13. It was argued before us that the High Court erred in answering questions No. 6 and 7 in the above manner ignoring the orders passed by the Court wherein the Union of India and State Government were parties and vital materials were available in that regard. Counsel submitted the arguments thus:

> The amount of excess royalty was clearly towards the payment of income-tax and super tax liability of the assessee-company. The aforesaid amount was received by the State of Rajasthan on behalf of the Union of India with the consent of the Union of India and under the orders of the District Judge, Kotah dated 18.02.1956 on the basis of an undertaking given to the Court. In such circumstances, the Tribunal had rightly held that the payment to the State Government was a payment by the assessee-company to the Union of India towards its tax liability and rightly gave a direction to the Income Tax Officer to give credit thereof to the assessee-company.

The Court of District Judge, Kotah passed a decree dated 25th September, 1956 in Civil Suit No. 17/53 against the State of Rajasthan and in favour of the Union of India to the effect that since the assessee-Company has paid full royalty and excess royalty to the State of Rajasthan upto 1956-57, the State Government should pay to the Union of India out of the excess royalty paid by the assessee-company the amount of income tax, super tax etc., that has been assessed and demanded and which may be further assessed and demanded by the Union of India from the assessee-company right from the assessment year 1950-51 to 1958-59. Accordingly, the District Judge, Kotah passed a decree for Rs. 23,99,474/- in favour of the Union of India and against the State of Rajasthan for payment to be made in respect of the income tax, super tax etc., levied and demanded from the assessee-company. The effect and the impact of this decree has escaped notice of the High Court. In the light of the aforesaid decree of a competent court in favour of the Union of India it will be deemed that the State of Rajasthan was holding the money paid by the assessee-company under the orders of the District Court and with the consent of the Union of India on behalf of the Income Tax Officer. The High Court has erred in ignoring this fact and in answering question No. 6 against the assessee-company. The entire amount of the royalty including the component of income tax and super tax etc., was deposited in the court of District Judge, Kotah under its order in Civil Suit No. 17 of 1953 and when the entire amount was withdrawn by the State of Rajasthan under the orders of the District Court subject to final decision of the suit and when the Court of District Judge at the conclusion of the suit ordered the State of Rajasthan for the payment of Rs. 23,99,474/- to the Union of India in respect of its income tax demand for the relevant assessment years, the High Court ought to have held that payment of the aforesaid amount was made to the Union of India and the assessee company was entitled to the credit of the amount from the Income-tax authorities. It was also stated that the High Court has not considered the matter from the point of view of Section 10(2)(xv) of the Income-tax Act, 1961 nor was the earlier decision of this Court inter-parties (Associated Stone Industries (Kotah) Ltd. v. C.I.T. - 82 ITR

896) adverted to in this regard. (The earlier decision reported in 82 ITR 896 was relating to the assessment years 1948-49 and 1949-50, when there was no law imposing income-

tax, super-tax etc., in the State of Kotah and this Court held that the excess royalty paid cannot be in lieu of income-tax, super tax etc., and was a payment on the terms of a contract. This is an important aspect to be borne in mind).

14. The above aspects have not been adverted to by the High Court in the judgment rendered. If, as a matter of fact, the above materials were available before the High Court, along with the statement of the case submitted by the Tribunal to the High Court, we should say that the High Court has not considered questions No. 6 and 7 in accordance with law. This is a matter for verification from the records land it is for the High Court to apply its mind to the above aspects and render a proper decision. We decline to answer questions No. 6 and 7, on the basis of the available records.

However, we remit the matter to the High Court to consider questions No. 6 and 7 afresh, in the light of the facts stated above.

15. The appeal is disposed of as above and the matter is remitted to the High Court to consider and pass appropriate orders regarding questions No. 5, 6 and 7, in the light of the observations contained in this judgment. There shall be no order as to costs in this appeal.