Calcutta Discount Company Limited vs Income-Tax Officer, Companies ... on 1 November, 1960

Equivalent citations: 1961 AIR 372, 1961 SCR (2) 241, AIR 1961 SUPREME COURT 372

Author: K.C. Das Gupta

Bench: K.C. Das Gupta, S.K. Das, M. Hidayatullah, J.C. Shah, N. Rajagopala Ayyangar

PETITIONER:
CALCUTTA DISCOUNT COMPANY LIMITED

Vs.

RESPONDENT:
INCOME-TAX OFFICER, COMPANIES DISTRICT, AND ANOTHER.

DATE OF JUDGMENT:
01/11/1960

BENCH:
GUPTA, K.C. DAS
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GUPTA, K.C. DAS
DAS, S.K.
HIDAYATULLAH, M.
SHAH, J.C.
AYYANGAR, N. RAJAGOPALA

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RF	1963 SC1356	(20)
R	1967 SC 338	(5)
F	1967 SC 523	(2)
F	1967 SC 587	(4,11)
E	1968 SC 49	(4)
R	1969 SC 944	(8)
F	1970 SC1011	(11)
D	1970 SC1982	(11)
F	1971 SC1635	(7)
R	1971 SC2074	(6)
RF	1971 SC2331	(4)
RF	1973 SC 370	(11)
R	1973 SC 989	(13,14)
R	1974 SC 478	(4)
RF	1975 SC 703	(11)

RF	1975	SC1268	(4)
RF	1976	SC1753	(8)
F	1977	SC 429	(11)
F	1985	SC 989	(10)
R	1986	SC1857	(2,7)
R	1987	SC1897	(26,35)
RF	1989	SC1088	(8)
RF	1991	SC 464	(4)

ACT:
Income-tax--Income escaping assessment--Non-disclosure of material facts by assessee--" Material facts ", meaning of--Indian Income Tax Act. 1922 (11 of 1922), as amended in 1948, s. 34(1)(a), Explanation--Constitution of India, Art. 226.

HEADNOTE:
The appellant, a private limited company, was assessed to income tax for the assessment years 1942-43, 1943-44 and 1944-45 by three separate orders dated January 26, 1944, February 12, 1944, and February 15, 1945, under S. 23(3) of the Indian Income Tax Act on returns filed by it with statements of account. On March 28, 1951, three notices under S. 34 of the Act were issued calling upon it to submit fresh returns for the said assessment years. The appellant filed the returns but thereafter applied to the High Court under Art. 226 of the Constitution for writs restraining the Income-tax Officer from initiating assessment proceedings on the basis of the said notices on the ground, inter alia, that he had no jurisdiction to issue the-said notices. In his report to the Commissioner of Income-tax for obtaining sanction to initiate the said proceedings the Income-tax Officer had stated as follows :-
" Profit of Rs. 5,46,002 on sale of shares and securities escaped assessment altogether. At the time of the original assessment the then I. T. O. merely accepted the company's version that the sale of shares were casual transactions and were in the nature of mere change of investments. Now the results of the company's trading from year to year show that the company has really been systematically carrying out a trade in the sale of investments. As such the company had failed to disclose the true intention behind the sale of the shares as such S. 34(1)(a) may be attracted".
The question for determination was whether in the circum-stance the Income-tax Officer was right in issuing notices on the assessee under S. 34(1)(a) of the Act.
Held, (per S. K. Das, K. C. Das Gupta and N. R. Ayyangar, jj.), that before the Income-tax Officer could issue a notice under $'. 34(1)(a) of the Indian Income-tax Act, two conditions precedent must co-exist, namely, that he must

have reason to believe (i) that income, profits or gains had been under-assessed and (2) that such under-assessment was due to non-disclosure of material facts by the assessee.

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Although what facts would be necessary and material for the assessment in a particular case must depend on the facts of that case, there could be no doubt that the burden of disclosing all the primary facts must invariably be on the assessee.

The Explanation to S. 34(1) made it clear that that burden could not be fully discharged by simply producing the account books and other documents, but the assessee must also disclose such specific items or portions thereof as are relevant to the assessment. But once he has done so, it is for the Income-tax Officer to draw the proper inferences of fact and law therefrom and the assessee cannot further be called upon to do so for him. The Explanation does not enlarge the scope of the section so as to include " the disclosure " of such inferences.

The question whether by the sale of shares the assessee in the instant case intended to change the form of investment or to make a business profit was one of an inferential fact and the failure to disclose such intention could not by itself amount to a failure or omission to disclose a material fact within the meaning of S. 34(1)(a) of the Act.

Where, however, the Income-tax Officer has prima facie reasonable grounds for believing that there has been a non-disclosure of a primary material fact, that by itself gives him the jurisdiction to issue a notice under s. 34 of the Act, and the adequacy or otherwise of the grounds of such belief is not open to investigation by the Court. It is for the assessee who wants to challenge such jurisdiction to establish that the Income-tax Officer had no material for such belief.

Since, in the instant case, there was no non-disclosure of a primary material fact which the assessee was bound to disclose under S. 34(1)(a) of the Act, the Income-tax Officer had no jurisdiction to issue the notices in question.

It is incorrect to say that the question of under-assessment by reason of non-disclosure of a material fact was relevant only for the purpose of applying either the longer or the shorter period of limitation prescribed by the section and not for jurisdiction and, therefore, not a proper matter for investigation under Art. 226 of the Constitution.

The High Courts have ample powers under Art. 226 of the Constitution, and are in duty bound thereunder, to issue such appropriate orders or directions as are necessary in order to prevent persons from being subjected to lengthy proceedings and unnecessary harassments by an executive authority acting without jurisdiction. Alternative remedies such as are provided by the Income-tax Act cannot always be a sufficient reason for refusing quick relief in a fit and

proper case.

Per Hidayatullah, J.-The Explanation to s. 34(1) of the Indian Income-tax Act clearly indicates that the-duty of the assessee thereunder does not end by merely producing evidence or disclosing the primary facts, but also extends to the disclosure

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of such other facts relating to status, agency, benami nature of the transaction, the nature of the trading and the like, which he knows but do not appear from the evidence, and which may be necessary for interpreting the evidence. If the evidence produced hides nothing and discloses everything, the assessee cannot be subjected to s. 34 merely because the Income-tax Officer misinterprets such evidence. But it is otherwise if the assessee raises a contention that is contrary to fact and requires the Income-tax Officer to discover the truth for himself for that would be to suppress a material fact that would attract the section.

Since, in the present case, an investment company dealing in stocks and shares, not only knowingly suppressed that fact but contended otherwise, there was non-disclosure of a material fact necessary for its assessment, and sufficient to attract S. 34(1) (a) of the Act.

Per Shah, J.-The expression " has reason to believe " in s. 34(1)(a) of the Indian Income-tax Act does not mean a purely subjective satisfaction of the Income-tax Officer but predicates the existence of reasons on which such belief has to be founded. That belief, therefore, cannot be founded on mere suspicion and must be based on evidence and any question as to the adequacy of such evidence is wholly immaterial at that stage.

Whether all the material facts necessary for the assessment had or had not been fully and truly disclosed in a particular case has to be examined, in the fight of the Explanation to S. 34(1)(a).

If there is disclosure of some facts but not all, a tax payer cannot resist reassessment on the plea that such non-disclosure was due to the negligence or inadvertence on the part of the Income-tax Officer to scrutinise the materials before him.

Where the existence of reasonable belief that there bad been under-assessment due to non-disclosure by the assessee, which is a condition precedent to exercise of the power under s. 34(1)(a) is asserted by the assessing authority and the record prima facie supports its existence, any enquiry as to whether the authority could reasonably hold the belief that the under assessment was due to non-disclosure by the assessee of material facts necessary for the assessment must, be barred.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 197 of 1954. Appeal from the Judgment and Order dated the 25th March, 1953, of the Calcutta High Court in Appeal from Original Order No. 54 of 1953.

Sachin Chaudhury, Sukumar Mitter, S. N. Mukherjee and D. N. Ghosh, for the appellant.

K. N. Rajagopal Sastri and D. Gupta, for the respondents. 1960. November 1. The Judgment of S. K. Das, K. C. Das Gupta and N. Rajagopala Ayyangar, JJ., was delivered by K. C. Das Gupta, J. M. Hidayatullah, J. and J. C. Shah, J., delivered separate Judgments.

DAS GUPTA J.-This appeal is against an appellate decision of a Bench of the Calcutta High Court by which in reversal of the order made by the Trial Judge the Bench rejected the present appellant's application under Art. 226 of the Constitution. The appellant is a private limited company incorporated under the Indian Company's Act and has its registered office in Calcutta. It was assessed to income- tax for the assessment years, 1942-43, 1943-44- and 1944-45 by three separate orders dated January 26, 1944, February 12, 1944, and February 15, 1945, respectively. These assessments were,made under s. 23(3) of the Indian Income- tax Act upon returns filed by it accompanied by statements of account. The first two assessments were made by Mr. L. D. Rozario the then Income-tax Officer and the last one by Mr. K. D. Banerjee. The taxes assessed were duly paid up. On March 28, 1951, three notices purporting to be under s. 34 of the Indian Income-tax Act, 1922, were issued by the income-tax Officer calling upon the company to submit fresh returns of its total income and the total world income assessable for the three accounting years relating to the three assessment years, 1942-43 1943-44 and 1944-45. The appellant company furnished re. turns in compliance with the notices but on September 18, 1951, applied to the High Court of Calcutta for issue under Art. 226 of the Constitution of appropriate writs or orders directing the Income-tax Officer not to proceed to assess it on the basis of these notices. The first ground on which this prayer was based was mentioned in the petition in these terms:-" The said pretended notice was issued without the existence of the necessary conditions precedent which confers jurisdiction under section 34 aforementioned, whether before or after the amendment in 1948 ". The other ground urged was that the amendment to s. 34 of the Income-tax Act in 1948 was not retrospective and that the assessment for the years 1942-43, 1943-44 and 1944-45 became barred long before March 1951.

The Trial Judge held that the first ground was not made out but being of opinion that the amending Act of 1948 was not retrospective, he held that the notices issued were without jurisdiction. Accordingly he made an order prohibiting the Income-tax Officer from continuing the assessment proceedings on the basis of the impugned notices. The learned Judges who heard the appeal agreed with the Trial Judge that the first ground had not been made out. They held however that in consequence of the amendment of s. 34 in 1948 the objection on the ground of limitation must also fail. A point of constitutional law which appears to have been raised before the appeal court was also rejected. The appeal was allowed and the company's application under Art. 226 was dismissed with costs.

The Company has preferred the present appeal on the strength of a certificate issued by the High Court under Art. 133(1)(a) of the Constitution.

The only point raised before us is that the courts below were wrong in holding that the first ground that the notices were issued without the existence of the necessary conditions precedent which confers jurisdiction under s. 34 had not been made out. As it is no longer disputed that s. 34 as amended in 1948 applies to the present case we have to consider the section as it stood after the amendment in 1948, in deciding this question of jurisdiction. The relevant portion of the section was in these words :-

> " 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 s. 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gain chargeable to income-tax have escaped assessment for that year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of excessive relief under the Act, or excessive loss or depreciation allowance has been computed, or
>
> (b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to income tax have escaped assessment for any year, or have been under-assessed, or assessed at too low a rate or have been made the subject of excessive relief under this Act, or that excessive loss or depreciation allowance has been computed.

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

> Provided that-
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> (i) the Income-tax Officer shall not issue a notice under this subsection, unless he has recorded his reasons for doing so and the Commissioner is satisfied on such reasons recorded that it is a fit case for the issue of such notice;
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> (ii) the tax shall be chargeable at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be; and

> (iii) where the assessment made or to be made is an assessment made or to be made on a person deemed to be the agent of a non-resident person under section 43, this sub-

section shall have effect as if for the periods of eight years and four years a period of one year was substituted.

Explanation-Production before the Income-tax Officer of account-books or other evidence from which material facts could with due diligence have been' discovered by the Income-tax Officer will not necessarily amount to disclosure within the meaning of, this section."

To confer jurisdiction under this section to issue notice in respect of assessments beyond the period of four years, but within a period of eight years, from the end of the relevant year two conditions have therefore to be satisfied. The first is that the Income-tax Officer must have reason to believe that income, profits or gains chargeable to income- tax have been under-assessed. The second is that he must have also reason to believe that such " under assessment "

> has occurred by reason of either (i) omission or failure on the part of an assessee to make a return of his income under s. 22, or (ii) omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for his assessment for that year. Both these conditions are conditions precedent to be satisfied before the Income-tax Officer could have jurisdiction to issue a notice for the assessment or re-assessment beyond the period of four years but within the period of eight years, from the end of the year in question.
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> No dispute appears to have been raised at any stage in this case as regards the first condition not having been satisfied and we proceed on the basis that the Income-tax Officer had in fact reason to believe that there had been an under-assessment in each of the assessment years, 1942-43, 1943-44 and 1944-45. The appellant's case has all along been that the second condition was not satisfied. As admittedly the appellant had filed its return of income under s. 22, the Income-tax Officer could have no reason to believe that under-assessment had resulted from the failure to make a return of income. The only question is whether the Income-tax Officer had reason to believe that " there had been some omission or failure to disclose fully and truly all material facts necessary for the assessment " for any of these years in consequence of which the under-assessment took place.
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> Before we proceed to consider the materials on record to see whether the appellant has succeeded ,in showing that the Income-tax Officer could have no reason, on the materials before him, to believe that there had been any omission to disclose material facts, as mentioned in the section, it is necessary to examine the precise scope of disclosure which the section demands. The words used are " omission or failure to disclose fully and truly all material facts necessary for his assessment for that year ". It postulates a duty on every assessee to disclose fully and truly all material facts

necessary for his assessment. What facts are material, and necessary for assessment will differ from case to case. In every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion. From the primary facts in his Possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise-the assessing authority has to draw inferences as regards certain other facts; and ultimately, from the primary facts and the further facts inferred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment, the proper tax leviable. Thus, when a question arises whether certain income received by an assessee is capital receipt, or revenue receipt, the assessing authority has to find out what primary facts have been proved, what other facts can be inferred from them, and taking all these together, to decide what the legal inference should be.

There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet a possible contention that when some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income-tax Officer might have discovered, the Legislature has put in the Explanation, which has been set out above., In view of the Explanation, it will not be open to the assessee to say, for example-" I have produced the account books and the documents: You, the assessing officer examine them, and find out the facts necessary for your purpose: My duty is done with disclosing these account-books and the documents". His omission to bring to the assessing authority's attention these particular items in the account books, or the particular portions of the documents, which are relevant, amount to " omission to disclose fully and truly all material facts necessary for his assessment." Nor will he be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed. The Explanation to the section, gives a quietus to all such contentions; and the position remains that so far as primary facts are concerned, it is the assessee's duty to disclose all of them-including particular entries in account books, particular portions of documents and documents, and other evidence, which could have been discovered by the assessing authority, from the documents and other evidence disclosed.

Does the duty however extend beyond the full and truthful disclosure of all primary facts ? In our opinion, the answer to this question must be in the negative. Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else-far less the assessee--to tell the assessing authority what inferences-whether of facts or law should be drawn. Indeed, when it is remembered that people often differ

> as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessee must disclose what inferences-whether of facts or law-he would draw from the primary facts.
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> If from primary facts more inferences than one could be drawn, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the assessing authority. How could an assessee be charged with failure to communicate an inference, which he might or might not have drawn ?
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> It may be pointed out that the Explanation to the sub- section has nothing to do with " inferences " and deals only with the question whether primary material facts not disclosed could still be said to be constructively disclosed on the ground that with due diligence the Income-tax Officer could have discovered them from the facts actually disclosed. The Explanation has not the effect of enlarging the section, by casting a duty on the assessee to disclose "

inferences "-to draw the proper inferences being the duty imposed on the Income-fax Officer.

We have therefore come to the Conclusion that while the duty of the assessee is to disclose fully and truly all primary relevant facts, it does not extend beyond this. The position therefore is that if there were in fact some reasonable grounds for thinking that there had been any non- disclosure as regards any primary fact, which could have a material bearing on the question of "under assessments that would be sufficient to give jurisdiction to the Income-tax Officer to issue the notice,% under s. 34. Whether these grounds were adequate or not for arriving at the conclusion that there was a non disclosure of material facts would not be open for the court's investigation. In other words, all that is necessary to give this special jurisdiction is that the Income-tax officer had when he assumed jurisdiction some prima facie grounds for thinking that there had been some non-disclosure of material facts.

Clearly it is the duty of the assessee who wants the court to hold that jurisdiction was lacking, to establish that the Income-tax Officer had no material at all before him for believing that there had been such non disclosure. To establish this the company has relied on the statements in the assessment orders for the three years in question and on the statement of Kanakendra Narayan Banerjee in the report made by him to the Commissioner of Income-tax for the purpose of obtaining sanction to initiate proceedings tinder s. 34 and also on his statement in the affidavit on oath in reply to the writ petition. The report is in these words:-

> " Profit of Rs. 5,48,002 on sale of shares and securities escaped assessment altogether.
>
> At the time of the original assessment the then I.T.O. merely accepted the company's version that the sale of shares were casual transactions and were in the nature of mere change of investments. Now the results of the company's trading from year to year show that the company has really been systematically carrying out a trade in the

> sale of investments. As such the company had failed to disclose the true intention behind the sale of the shares and as such s. 34(1)(a) may be attracted."

The only nondisclosure mentioned in the report is that the company had failed to disclose " the true intention behind the sale of the shares ". Mr. Choudhury contends that this is not an omission to disclose a material fact within the meaning of s. 34. The question whether sales of certain shares were by way of changing the investments or by way of trading in shares has to be decided on a consideration of different circumstances, including the frequency of the sales, the nature of the shares sold, the price received as compared with the cost price, and several other relevant facts. It is the duty of the assessee to disclose all the facts which have a bearing on the question; but whether the assessee had the intention to make a business profit as distinguished from the intention to change the form of the investments is really an inference to be drawn by the assessing authority from the material facts taken in conjunction with the surrounding circumstances. The law does not require the assessee to state the conclusion that could reasonable drawn from the primary facts. The question of the assessee's intention is an inferential fact and so the assessee's omission to state his " true intentions behind the sale of shares " cannot by itself be considered to be a failure or omission to disclose any material fact within the meaning of s. 34. Indeed, an assessee whose contention is that the shares were sold to change the form of investment and not with the intention of making a business profit cannot be expected to say that his true intention was other than what he contended it to be.. Dealing with this question the learned Chief Justice has said:-

> " The expression that the Respondent had failed to disclose " the true intention behind the sale of shares " may lack directness, but that deficiency of language is not sufficient to enable the Respondent to contend, in view of the circumstances alleged, that no failure to disclose facts was being complained of. On the facts as stated by the Income-tax Officer, it is clear that there had been a failure to disclose the fact that the Respondent was a dealer in shares and what the Income-tax Officer meant by the language used by him was that the Respondent had not disclosed that the sale of shares had been of the nature of a trading sale, made in pursuance of an intention to make a business profit, and not of the nature of a change of investment, made in pursuance of an intention to put certain capital assets into another form. If that be so, it is equally clear that the Income-tax Officer who, by the way, was a successor to the officers who had made the original assessments, was not merely changing his opinion as to facts previously known, but was taking notice of a new fact."

The learned Chief Justice seems to have proceeded on the basis that when from certain facts inferences are to be drawn there is a duty on the assessee to state what the correct inference should be and if he has made a wrong statement as regards the inferences to be drawn that also is an " omission or failure to disclose a material fact ". For the reasons given earlier we do not think that this is the correct position in law.

It is clear therefore that if one looked at this report only it would not be possible to say that the Income. tax Officer had any non-disclosure of material facts by the assessee in mind when he assumed jurisdiction. It has to be remembered however that in sending a report to the

Commissioner the Income-tax Officer might not fully set out what he thought amounted to a non-disclosure, because it is conceivable that the report may not be drawn up carefully and may not contain a reference to all the non-disclosures that operated on his mind. We have however on the record an affidavit sworn by the same Income-tax Officer who started the s. 34 proceedings. It is reasonable to expect that in this affidavit which was his opportunity to tell the court what non-disclosure he took into consideration he would state as clearly as possible the material facts in respect of which there had not been in his view a full and true disclosure. Mr. Banerjee's statements in this matter are contained in paras. 5, 6 and 7 of his affidavit. They are in these words:-

> It 5. With reference to paragraphs 2 and 3 of the said petition, I crave reference to the assessment orders therein mentioned. The assessment order dated the 15th February, 1945, was made by Sri Kali Das Banerjee now Income-tax Officer Companies District II and the other two assessment orders were made by L. D. Rozario who is now in the employment of M/s Lovelock & Lewes. I find from the notes made by me in the order sheet of the assessment year 1944-45 and my order dated the 7th July, 1944 that Mr. Smith of M/s. Lovelock & Lewes attended before me and stated that the profits of the company arising out of dealings in shares were not taxable as the company was not a dealer in shares and securities. Subsequently on the 18th August 1944, M/s. Lovelock & Lewes wrote a letter to me setting out the contentions of their clients and inter alia stated that throughout the whole history the company bought no shares what so. ever. Sri K. D. Banerjee was accordingly led to believe that the dealings in shares were casual transactions and were in the nature of mere change in investments and the profits resulting therefrom were not taxable. The assessment orders were made on the basis that the petitioner did not carry on any business dealings in shares. A copy of the said letter dated the 18th August, 1944, as also the relevant portion of the note sheet are included in the schedule hereto annexed and marked "
>
> 6. In the assessments for 1945-46 and 1946-47, which were completed in April 1950, the profits on sale of shares were included in the total assessable income of the company it having been then discovered that the petitioner was in fact carrying on business in shares contrary to its representation that it was not. The company filed appeals before the Appellate Assistant Commissioner, which were rejected in September 1950, and the assessments were confirmed. The company thereafter filed a second appeal before the In. come-tax Tribunal which appeals are now pending.
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> 7. With reference to para. 5 of the said petition, I deny that I pretended to act under s. 34 of the Income-tax Act as alleged. I have reasons to believe that by reason of the omission or failure of the company to disclose fully and truly all material facts necessary for its assessments, the income, pro. fits and gains chargeable to income-tax had been under assessed. I recorded my reasons and made three reports (one for each year) in the prescribed form and submitted them before the Commissioner of Income-tax and the latter was satisfied that it was a fit case for issue of a notice under s. 34 of the Income-tax Act. Thereafter I issued the prescribed notices under s. 34 of the Income-tax Act. The said reports were made and notices

> issued in respect of all the three years mentioned in the petition and copies of the report and notice for one of such years are included in the schedule hereto annexed and marked " A ".

The report and notices for the two other years are exactly similar."

It appears from this that the statements made by or on behalf of the company which the assessing authority considered to amount to non-disclosure of material facts were these:-(i) the company was not whole of its history the company bought no shares whatsoever. It has not been suggested before us that, in fact at any time up to the conclusion of the assessment proceedings for the years 1942-43, 1943-44 and 1944-45 the company did in fact make a single purchase of shares. Clearly therefore the Income-tax Officer had no reasonable ground for thinking that anything as regards the purchase of shares had not been disclosed. The company does not dispute that the statement was made on its behalf that it was not a "I dealer " in shares and securities. It appears clear that the Income-tax Officers who made the assessments for the years 1942-43, 1943-44 and 1944-45 proceeded on the basis that this was an investment company and considered the question whether in spite of its being an investment company certain sales of shares wherefrom the company made a profit were by way of trading in shares and not by way of changing the form of investment. Whether these sales by an investment company should in law be treated as trading transactions, and the profits made from the sales trading profits liable to tax, was the matter which it was the Income-tax Officer's task to decide. No duty lay on the company to admit that these transactions were by way of trade. The fact that on behalf of the company Mr. Smith of Lovelock & Lewes stated that the company was not a dealer in shares and securities does not therefore amount to an omission to disclose fully and truly any material fact. To ascertain whether the Income-tax Officer could have had in mind any non-disclosure as a ground for thinking that by reason of such non-disclosure an under assessment had occurred-apart from what was mentioned in the affidavit-we enquired from respondent's counsel whether he could suggest any other non-disclosure that might have taken place. Mr. Sastri suggested two. One is that the sales had not been disclosed; the other that the memorandum and articles of association of the company had not been shown. This suggestion is against the record and we have no hesitation in repelling it. Not only is it not the ground set out by the Income-tax Officer at any stage-not even in the affidavit in court, but the ,matters mentioned by the officer that the assessee had claimed that the profits realised were of a casual nature obviously indicate that the assessee disclosed ,that a surplus resulted from the sales which were also disclosed. The assessment orders it is true do not mention the details of the sales. They state however that the audited accounts of the company were furnished. The sales of shares were expressly mentioned in the report. In these circumstances it is reasonable to believe that as regards sale of shares full details were in fact disclosed.

Nor can we believe that the two Income-tax Officers L. D. Rozario and K. D. Banerjee concluded the proceedings without referring to the memorandum and articles of association of the company. These officers known well that the company was claiming to be an investment company only. They had to consider the question whether sales were of the nature of trade or of the nature of change of investment. It is unthinkable that they would not examine the memorandum of association. Besides, it is pertinent to note that in para. 4 of his affidavit Kanakendra Narayan Banerjee refers to the

Memorandum and articles of Association and states that " by its memorandum of association the company has been authorised to carry. on the various kinds of business which have been specified in sub-section (1) and (2) of cl. 3 of the said memorandum of associations He does not say that the articles or the memorandum of association were not shown during the assessment proceedings for the years 1942-43, 1943-44 and 1944-45. If he had any reason to believe that these were not shown he would have certainly mentioned that fact. For that would undoubtedly to non-disclosure of a material fact.

It must therefore be held that the Income-tax Officer who issued the notices had not before him any non-disclosure of a material fact and so he could have no material before him for believing that there had been any material non- disclosure by reason of which an under-assessment had taken place.

We are therefore bound to hold that the conditions precedent to the exercise of jurisdiction under s. 34 of the Income- tax Act did not exist and the Income-tax Officer had therefore no jurisdiction to issue the impugned notices under s. 34 in respect of the years 1942-43, 1943-44 and 1944-45 after the expiry of four years.

Mr. Sastri argued that the question whether the Income-tax Officer had reason to believe that under assessment had occurred " by reason of nondisclosure of material facts "

> should not be investigated by the courts in an application under Art. 226. Learned Counsel seems to suggest that as soon as the Income-tax Officer has reason to believe that there has been under assessment in any year he has jurisdiction to start proceedings under s. 34 by issuing a notice provided 8 years have not elapsed from the end of the year in question, but whether the notices should have been issued within a period of 4 years or not is only a question of limitation which could and should properly be raised in assessment proceedings. It is wholly incorrect however to suppose that this is a question of limitation only not touching the question of jurisdiction. The scheme of the law clearly is that where the Income-tax Officer has reason to believe that an under assessment has resulted from non- disclosure he shall have jurisdiction to start proceedings for re. assessment within a period of 8 years; and where he has reason to believe that an under assessment has resulted from other causes he shall have jurisdiction to start pro- ceedings for re-assessment within 4 years. Both the conditions, (i) the Income-tax Officer having reason to believe that there has been under assessment and (ii) his having reason to believe that such under assessment has resulted from nondisclosure of material facts, must co-exist before the Income-tax Officer has jurisdiction to start proceedings after the expiry of 4 years. The argument that the Court ought not to investigate the existence of one of these conditions, viz., that the Income-tax Officer has reason to believe that under assessment has resulted from non-disclosure of material facts cannot therefore be ,accepted.

Mr. Sastri next pointed out that at the stage when the Income-tax Officer issued the notices he was not acting judicially or quasi-judicially and so a writ of certiorari or prohibition cannot issue. It is well settled however that though the writ of prohibition or certiorary will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or directions to prevent such consequences.

Mr. Sastri mentioned more than once the fact that the company would have sufficient opportunity to raise this question, viz., whether the Income-tax Officer had reason to believe that under assessment had resulted from non- disclosure of material facts, before the Income-tax Officer himself in the assessment proceedings and, if unsuccessful there, before the appellate officer or the appellate tribunal or in the High Court under section 66(2) of the Indian Income-tax Act. The existence of such alternative remedy is not however always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action.

In the present case the company contends that the conditions precedent for the assumption of jurisdiction under s. 34 were not satisfied and come to the court at the earliest opportunity. There is nothing in its conduct which would justify the refusal of proper relief under Art. 226. When the Constitution confers on the High Courts the power to give relief it becomes the duty of the courts to give such relief in fit cases and the courts would be failing to perform their duty if relief is refused without adequate reasons. In the present case we can find no reason for which relief should be refused.

We have therefore come to the conclusion that the company was entitled to an order directing the Income-tax Officer not to take any action on the basis of the three impugned notices.

We are informed that assessment orders were in fact made on March 25, 1952, by the Income-tax Officer in the proceedings started on the basis of these impugned notices. This was done with the permission of the learned Judge before whom the petition under Art. 226 was pending, on the distinct understanding that these orders would be without prejudice to the contentions of the parties on the several questions raised in the petition and without prejudice to the orders that may ultimately be passed by the Court. The fact that the assessment orders have already been made does not therefore affect the company's right to obtain relief under Art. 226. In view however of the fact that the assessment orders have already been made we think it proper that in addition to an order directing the Income-tax Officer not to take any action on the basis of the impugned notices a further order .quashing the assessment made be also

issued. In the result, we allow the appeal, set aside the order made by the appellate Bench of the Calcutta High Court and restore the order made by the Trial Judge, Bose, J. The assessment orders made in the proceedings started under s. 34 of the Income Tax Act are also quashed. The appellant will get its costs here and below.

HIDAYATULLAH J.-I have had the advantage of reading the judgments prepared by my brethren, Das Gupta and Shah, JJ. The point involved in the case is a very short one, and the answer, as it appears to me, equally so. The appellant Company's income, profits and gains for the assessment years, 1942-43, 1943-44 and 1944-45, were duly assessed and taxed. The orders were respectively passed on January 26, 1944, February 12, 1944, and February 15, 1945. On March 28, 1951, three notices under s. 34 of the Indian Income-tax Act were issued calling upon the appellant Company to submit fresh returns in respect of the previous years relative to each of the assessment years above mentioned. Since this action was taken after more than four years, the matter fell to be governed by s. 34(1)(a) of the Indian Income-tax Act, as amended in 1948. The clause provided an extended period for sending a notice calling for a return for the purpose of assessing or reassessing income, profits and gains which had escaped assessment or had been under-assessed for any year within eight years, if 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 any year or to disclose fully and truly all material facts necessary for his assessment for that year ", the income, profits or gains chargeable to income-tax have escaped assessment etc. In the present case, the appellant Company, which is an investment Company, had produced in the back years a list of the shares sold by it, the statements of profit and loss account, and, I am prepared to assume, also the Memorandum and Articles of Association. But the appellant Company gave out that the sales of shares were casual transactions of change of investments. This statement was accepted, though it was found that in later years the Company was dealing in stocks and shares as a business venture, and its statement which was accepted, was not perhaps true.

The Income-tax Officer reported the matter to the Commissioner, and stated as follows:

"Profits of Rs. 5,48,002/- on sale of shares and securities escaped assessment altogether.

At the time of the original assessment the then I.T.O. merely accepted the company's version that the sales of shares were casual transactions and were in the nature of mere change of investments. Now the results of the company's trading from year to year show that the company has really been systematically carrying out a trade in the sale of investments. As such, the company has failed to disclose the true intention behind the sale of the shares and as such section 34(1)(a) may be attracted."

The appellant Company applied to the Calcutta High Court for a writ Under Art. 226 which was granted by a learned single Judge; but the order was, reversed on appeal in the High Court. The appellant Company has now appealed on a certificate under Art. 133(1)(c) of the Constitution. The contention of the appellant Company is that all the facts necessary to be disclosed were, in fact, disclosed, that it was not required further to concede that it was trading in shares, which was a matter of inference, from' the proved facts, for the Income-tax Officer to draw, and that there was thus no question of any non disclosure. This argument overlooks the addition of the Explanation to the section, which explains cl. (a) of the first sub-section.. It reads:

> " Explanation.-Production before the Income-tax Officer of account-books or other evidence from which material facts could with due diligence have been discovered by the Income- tax Officer will not necessarily amount to disclosure within the meaning of this section."

This means quite clearly that the mere production of evidence is not enough, and that there may be an omission or failure to make a full and true disclosure if some material fact necessary for the assessment lies embedded in that evidence which the assessee can uncover but does not. If there is such a fact, it is the duty of the assessee to disclose it. The evidence which is produced by the assessee discloses only primary facts, but to interpret the evidence, certain other facts may be necessary. Thus, questions of status, agency, benami nature of transactions, the nature of trading and like matters may not appear from the evidence produced, unless disclosed. If it be merely a question of interpretation of evidence by an Income-tax Officer from whom nothing has been hidden and to whom everything has been fully disclosed, then the assessee cannot be subjected to s. 34, merely because the Income-tax Officer miscarried in his interpretation of evidence. But it is otherwise, if a contention which is contrary to fact, is raised and the Income-tax Officer is set to discover the hidden truth for himself In the latter case, there is suppression of material fact, or, in other words, that lack of full and true disclosure which would entitle action under s. 34 of the Act.

The following example explains the meaning. Taking the present case, I set below two statements, one .,involving full disclosure and a contention, and the other, only a contention with a material fact suppressed :

> " (1). We are a trading company and our business is according to our memorandum of association 'to acquire, hold, exchange, sell and 'deal in shares, stocks, etc.'.

These sales, however, were not business sales but only change of investments into trustee securities as decided by the trustees.

(2) We changed industrial shares into trustee securities because I in or about 1934, the trustees decided to convert the Indian Industrial Shares held by the appellant into trustee securities'."

If the first is decided in favour of the assessee, there is an inference or decision by the Income-tax Officer from a full and true disclosure. If the second is decided in favour of the assessee, the question would arise if there was full and true disclosure.

In the present case, the question whether the transactions were casual transactions of changing investments or regular trading in stocks and shares involves not merely an inference, because the inference depends upon the fact that the appellant Company was formed to trade in stocks and shares. It was open to the appellant Company to contend that in spite of its business, a particular transaction was this and not that. But, if the appellant Company was an investment Company dealing in stocks and shares' and knowing this for a fact, did not disclose the fact, the statement was neither full nor true, as it involved a suppression of a material fact necessary for the assessment. The Explanation is quite obviously meant to reach an identical situation. The appellant Company might have placed the evidence before the income-tax Officer, but the Income-tax Officer had reason to believe that the disclosure was neither full nor true, because the fact that the Company was and shares was not disclosed. The Income-tax Officer in his report meant no more than this. He, therefore, felt that, prima facie, there was not only concealment of a fact but, on the contrary, maintaining of a falsehood, and this was sufficient to bring this matter within the extended period. Every contention contrary to the Income-tax Officer's opinion is not necessarily concealment of a material fact, but some contentions made with a mental reservation as to the true state of affairs may amount to such concealment, if they involve non-disclosure of facts related to other facts and known to the assessee.

The Company still persists that the sales of shares were casual transactions, and this contention will, no doubt, be decided hereafter. But the question will be decided after taking into consideration the nature of the business of the Company, and till that is done, the Income-tax Officer believes that the contention raise before and persisted in is not a mere contention but maintenance of a falsehood about the nature of the transactions and the business of the Company. The existence of such a belief is sufficiently established by the report of the Income-tax Officer and the satisfaction of the Commissioner, and this has not been gainsaid.

In my opinion, the Divisional Bench of the High Court rightly refused a writ in the circumstances, and I would dismiss this appeal with costs.

SHAH J.-I regret inability to agree with the judgment delivered by my learned brother Mr. Justice Das Gupta. The facts which give rise to this appeal have been fully set out by my learned brother and it is not necessary to reiterate the same.

Sub-section (1) of s. 34 of the Indian Income Tax Act, 1922 (in so far it is material) stood at the relevant date when the proceedings were commenced, as follows:

> S. 34:-(1) If--
>
> (a) the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of an for any year or to disclose fully and truly all material ,facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax have escaped assessment for that year, or have been under-assessed or assessed at too low a rate, or have been made the subject of excessive relief under the Act, or excessive loss or depreciation allowance has been computed, or

(b) notwithstanding that there has been no omission or failure as mentioned in cl. (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to income-tax have escaped assessment for any year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of excessive relief under this Act, or that excessive loss or depreciation allowance has been computed, he may in cases falling under cl. (a) at any time within eight years and in cases falling under cl. (b) at any time within four years of the end of that year, serve on the assessee, or, if the assessee is a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-s. (2) of s. 22 and may proceed to assess or re-assess such income, profits or gains or re-compute the loss or depreciation allowance; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section:

Provided that--

(i) the Income-tax Officer shall not issue a notice under this sub-section, unless he has recorded his reasons for doing so and the Commissioner is satisfied on such reasons recorded that it is a fit case for the issue of such notice;

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

(iii) where the assessment made or to be made is an assessment made or to be made on a person deemed to be the agent of a non-resident person under s. 43, this sub-

section shall have effect as if for the periods of eight years and four years a period of one year was substituted. Explanation:-Production before the Income-tax Officer of account books or other evidence from which material facts could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure within the meaning of this section.

This section provides machinery for assessment or reassessment if it be found that income, profits or gains "

have escaped assessment or have been under assessed or assessed at too low a rate or have been made subject to excessive relief under the Act or excessive loss or depreciation allowance has been computed ", which expression may for convenience of reference be compendiously referred to as are or have been under-assessed. Notice under s. 34(1)(a) may be issued if the Income Tax Officer has reason to believe that income in any year has been under assessed by reason of the failure on the part of the assessee to make a return of his income, or to disclose fully and truly all material facts necessary for assessment for the year in question. The authority of the Income Tax Officer is manifestly circumscribed by certain conditions, and may be exercised

only if those conditions exist and not otherwise. In the case in hand, we are concerned with the operation of cl. (1)(a) of s. 34. If that clause does not apply, notices of reassessment having been served more than four years after the end of the relevant year of assessment, must fail. On an analysis of the relevant provisions, the material conditions proscribed for the exercise of the power to commence proceedings for reassessment under s. 34(1)(a) are these:' (1) The Income Tax Officer has reason to believe,

(a) that income, profits or gains have been underassessed,

(b) that this under-assessment is by reason of omission or failure to make a return under s. 22 or by reason of failure to disclose fully and truly all material facts necessary for assessment for any year; (2) that a notice containing all or any of the requirements of s. 22(2) is served on the assessee within eight years from the end of the year of assessment;

(3) that the Income Tax Officer has recorded his reasons for issuing the notice and the Commissioner is satisfied on such reasons recorded that it is a fit case for issue of such notice.

The notices issued by the Income Tax Officer in the case before us undoubtedly fulfil conditions (2) and (3). Notices of reassessment were served before the expiry of eight years of the end of the relevant years of assessment. The Income Tax Officer also recorded his reasons in the reports submitted by him to the Commissioner and the Commissioner was satisfied that they were fit cases for the issue of such notices. The dispute in the appeal relates merely to the fulfilment of the two branches of the first condition and that immediately raises the question about the true import of the expression "has reason to believe" in s. 34(1)(a). The expression " reason to believe " postulates belief and the existence of reasons for that belief. The belief must be held in good faith: it cannot be merely a pretence. The expression does not mean a purely subjective satisfaction of the Income Tax Officer: the forum of decision as to the existence of reasons and the belief is not in the mind of the Income Tax Officer. If it be asserted that the Income Tax Officer had reason to believe that income had been underassessed by reason of failure to disclose fully and truly the facts material for assessment, the existence of the belief and the reasons for the belief, but not the sufficiency of the reasons, will be justiciable. The expression therefore predicates that the Income Tax Officer holds the belief induced by the existence of reasons for holding such belief. It contemplates existence of reasons on which the belief is founded, and not merely a belief in the existence of reasons inducing the belief; in other words, the Income Tax Officer must on information at his disposal believe that income has been underassessed by reason of failure fully and truly to disclose all material facts necessary for assessment. Such a belief, be it said, may not be based on mere suspicion: it must be founded upon information. That the Income Tax Officer has reason to believe that there was under assessment in the material years was not challenged by the appellant and in our opinion rightly. There are on the record the reports of the Income Tax Officer in which the belief is expressly set out. It also appears from the assessment orders for the years 1945-46 and 1946-47 that tax has been assessed on the profits made by sale of shares by the company in those years. Had the Income Tax

Officer reason to believe that by reason of failure to disclose fully and truly all material facts necessary for assessment for the three years in question, there had resulted underassessment ? The learned Trial judge, after setting out the evidence, held that the Income Tax Officer had materials before him showing that the company's trading from year to year disclosed that it had been systematically carrying on a trade in the sale of shares and securities. He observed:

> " Whether the materials were sufficient or not or whether the belief or opinion is erroneous or not, cannot..... be enquired into by the court..... If the Income Tax Officer has made a wrong decision as to the existence of the conditions precedent, the remedy is by way of appeals as provided by the Income Tax Act and by stating a case under s. 66 of the Act."

In appeal, the High Court confirmed the order. The High Court observed that " the use of the expression " the true intention behind the sale of shares " used in the report made by the Income Tax Officer under s. 34 to the Commissioner may lack directness, but that deficiency of language was not sufficient to enable the company to contend in view of the circumstances alleged that there was no failure to disclose facts being complained of ". The High Court also observed:

> "On the facts as stated by the Income Tax Officer, it is clear that there had been a failure to disclose the fact that the respondent was a dealer in ,shares and what the Income Tax Officer meant by the language used by him was that the respondent had not disclosed that the sale of shares had been of the ,nature of a trading sale, made in pursuance of an intention to put certain capital assets into another form. If that be so, it is equally clear that the Income Tax Officer who, by the way, was a successor to the officers who had made the original assessments, was not merely changing his opinion as to facts previously known, but was taking notice of a new fact."

Prima facie, the finding recorded by the Court of First Instance and confirmed by the Court of Appeal is one on a question of fact and this court would not be justified in entering upon a reappraisal of the evidence. But it is contended on behalf of the company that the finding is based on no materials, and to that plea I may advert. By s. 22 of the Income Tax Act, a duty is imposed upon every tax payer whose total income exceeds the maximum which is not chargeable to income-tax to make a return in the prescribed form and verified in the prescribed manner, setting forth his total income during that year. If the tax payer making the return fails to disclose fully and truly all material facts necessary for the assessment of the year in question, the jurisdiction of the Income Tax Officer to reassess is invited. The company in its petition for the issue of a writ contended by paragraph 7 that the notices were ultra vires and illegal and that the Income Tax Officer was not invested with jurisdiction to proceed thereunder, inter alia, for the reason-that the " pretended notice was issued without the existence of the necessary conditions precedent which confers jurisdiction under s. 34 aforementioned, whether before or after amendment in 1948." The Income Tax Officer, by his affidavit, submitted:

> Para 4:-" The statements made in paragraph 1 of the said petition are substantially correct. By its Memorandum of Association, the company has been authorised to

carry on the various kinds of business which have been specified in sub- cls. (1) to (32) of cl.

(3) of the said Memorandum of Association.

Para 5:-" With reference to paragraphs 2 and 3 of the said petition, I crave reference to the assessment orders therein mentioned. The assessment order dated the 15th February, 1945, was made by Shri Kali Das Banerjee now Income Tax Officer Companies District in II and the other two assessment orders were made by Mr. L. D. Razario who is now in the employment of M/s. Lovelock & Lewis. I find from the notes made by me in the order sheet of the assessment year 1944-45 and my order dated the 7th July, 1944, that Mr. Smith of Messrs. Lovelock & Lewis attended before me and stated that the profits of the company arising out of dealings in shares were not taxable as the company was not a dealer in shares and securities. Subsequently on the 18th August, 1944, Messrs. Lovelock & Lewis wrote a letter to me setting out the contentions of their clients and inter alia stated that throughout the whole of its history the company bought no shares whatsoever. Shri K. D. Banerjee was accordingly led to believe that the dealings in shares were casual transactions and were in the nature of mere change in investments and the profits resulting therefrom were not taxable. The assessment orders were made on the basis that the petitioner did not carry on any business dealing in shares. A copy of the said letter dated the 18th August, 1944, as also the relevant portion of the note sheet are included in the schedule hereto annexed and marked " A "." Para 6:- " In the assessments for 1945-46, and 1946-47 which were completed in April, 1950, the profits on sale of shares were included in the total assessable income of the company it having been then discovered that the petitioner was in fact carrying on business in shares contrary to its representation that it was not. The company filed appeals before the Appellate Assistant Commissioner which were rejected in September, 1950, and the assessments were confirmed. The company thereafter filed a second appeal before this Income-tax Tribunal which appeals are now pending."

Para 7:- " With reference to paragraph 5 of the said petition, I deny that I pretended to act under s. 34 of the Income Tax Act as alleged. I have reasons to believe that by reason of the omission or failure of the company to disclose fully and truly all material facts necessary for its assessments, the income, profits or, and gains chargeable to income-tax had been underassessed.I recorded my reasons and made 3 reports (one for each year) in the prescribed form and submitted them before the Commissioner of Income Tax and the latter was satisfied that it was a fit case for issue of a notice under s. 34 of the Income Tax Act. Thereafter issued prescribed notices under s. 34 of the Income Tax Act. The said reports were made and notices issued in respect of all the three years mentioned in the petition and copies of the report and notice for one of such years are included in the schedule hereto annexed and marked " A ". The report and notices for the two other years are exactly similar.

By these averments, the Income Tax Officer asserted (a) that he had reasons to believe that by reason of the omission or failure of the company to disclose fully and truly all material facts necessary for the assessment, income chargeable to income tax has been underassessed and that he had recorded his reasons in that behalf in the three reports submitted by him to the Commissioner; (b) that in the course of the assessment proceeding for the year 1944-45, it was represented on

behalf of the company that the sales of shares in that year were casual transactions and were in the nature of " mere change in investments " ; (c) that in the orders of assessment for the years 1945-46 and 1946-47 passed in April, 1950, profits earned by sale of shares held by the company were included in the total assessable income of the company, it having been discovered that the company was in fact carrying on the business of selling shares contrary to its earlier representations; and (d) that by its Memorandum and Articles of Association, the company was authorised to carry on the business of diverse kinds specified in sub-cls. (1) to (32) of cl. (3) thereof. Whereas by a mere bald assertion made by the company in its petition it was averred that the conditions precedent to the exercise of jurisdiction to re-assess did not exist, the Income Tax Officer stated in his rejoinder that he had reasons to believe that income bad been underassessed and he also set out the grounds on which that belief was founded. The existence of the reasons to believe that income was underassessed has, as already observed, not been challenged; nor is the court concerned with the question whether the materials may be regarded by a court before which a dispute is raised, sufficient to sustain the belief entertained by the Income Tax Officer. It is clear that the Income Tax Officer asserted on oath that when he issued the notice for reassessment, he had reasons to believe that income of the company had been underassessed and he set out the reasons in support of the belief.

Counsel for the company submitted that all the material facts necessary for the assessment were fully and truly disclosed in the course of the assessment for the years in question, and if the Income Tax Officer did not draw the correct inference, the jurisdiction to reassess could not be invoked. He urged that it was for the Income Tax Officer, on the preliminary facts disclosed to him, to raise his inference of fact and to base his conclusions on the preliminary as well as the inferential facts, and if, in arriving at his conclusion on the preliminary and the inferential facts., the Income Tax Officer committed an error, he could not seek to commence proceedings for reassessment on being apprised of the error. It was said that the Income Tax Officer knew that the company was an investment corporation, that the shares held by the company were sold from time to time, and that profits were earned by the sale of those shares, and that on these materials the Income Tax Officer might have held that the company was a dealer in shares, but if he did not draw that inference, the under assessment, if any, was not by reason of failure to disclose fully and truly all material facts. Counsel submitted that the condition of the exercise of jurisdiction under s. 34 is failure to disclose fully and truly all material facts necessary for assessment and not failure to instruct the Income Tax Officer about the legal inference to be drawn from the facts disclosed.

The duty imposed by the Act upon the tax payer is to make a full and true disclosure of all material facts necessary for the assessment; he is not required to inform the Income Tax Officer as to what legal inference should be drawn from the facts disclosed by him nor to advise him on questions of law. Whether on the facts found or disclosed, the company was a dealer in shares, may be regarded as a conclusion on a mixed question of law and fact and from the failure on the part of the company to disclose to the Income Tax Officer this legal inference no fault may be found with the company. But on the evidence in the case, the plea raised by the company that all material facts were disclosed cannot be accepted. The Income Tax Officer has in para. 6 of his affidavit referred to the assessment of the years 1945-46 and 1946-47: he has also referred to the Memorandum and Articles of Association of the company therein. In the assessment order for the year 1945-46, the Income Tax

Officer has set out cls. (1) and (2) of the Memorandum and Articles of Association of the company. They are:

> (1) " To acquire, hold, exchange, sell and deal in shares, stocks, debenture-stock, bonds, obligations and securities issued or guaranteed by any company, Government or public body constituted or carrying on business in British India or elsewhere; "
>
> (2) " Generally to carry on business as financiers and to undertake and carry out all such operations and transactions (except the issuing of policies of assurances on human life) as an individual capitalist may lawfully undertake or carry out; ".

The Income Tax Officer in his order of assessment for that year observed that those clauses indicated the purposes for which the company was formed, and also that " whenever the shares were first acquired, these became the commodities which could either be held or sold according to the best interests of the company, that whenever such a commodity is sold, it comes within the activities or properly speaking the profit making scheme as enumerated in the object clauses stated above. These shares sold in course of ten or twelve years whenever opportunities occurred for earning profits on making the sales..... This company was not an ordinary trader investing its surplus funds in shares and securities quite unconnected with its regular course of business so that the profit or loss also on sale of such shares or securities may be treated as not arising out of its regular business carried on. On the other hand, it is an Investment company of which the very first object clause is to hold and deal in shares. Profit on sale of such shares therefore arises out of its regular course of business and it must be taxable."

From that order of assessment, it is manifest that the Assessing Officer held that the company was formed with the object of acquiring, holding, exchanging, selling and dealing in shares, that the shares acquired became the trading assets of the company to be disposed of when opportunities occurred for earning profits; and that the activities of selling shares in which surplus assets of the company were invested were a part of the regular business carried on by the company.

There is no evidence that the Memorandum and Articles of Association referred to in para 4 of the affidavit were produced in the course of the assessment of the relevant years; nor is there evidence to show that it was disclosed that the acquisition of shares was incidental to the business activities and out of the surplus assets of the company and that the same were sold at profit as opportunities arose. There is also no ground for assuming that these facts must have been known to the Income Tax Officer. Counsel for the company suggested somewhat casually that under the Income Tax Rules and the practice prevailing with the Income Tax Officer, the Memorandum and Articles of Association of every company which was being assessed to tax are to be filed with the Income Tax Officer. But our attention has not been invited to any rule or any material to support the existence of a practice requiring a private limited company to file with the Income Tax Officer the Memorandum and Articles of Association.

The plea raised by counsel for the company must be examined in the light of the Explanation to sub-S. (1) of S. 34. The Explanation provides that " Production before the Income Tax Officer of

account books or other evidence from which material facts could with due diligence have been discovered by the Income Tax Officer will not necessarily amount to disclosure within the meaning of the section." If pro- duction of documents or other evidence from which material facts could with due diligence have been discovered does not necessarily amount to disclosure, it would be difficult to hold that a presumption about the production of a document at sometime in the past and its possible existence in the files of the Income Tax Officer relating to earlier years may be regarded as sufficient disclosure. Disclosure of some facts, but not all, though the facts not disclosed may have come to the knowledge of the Income Tax Officer, if he had carefully prosecuted an enquiry on the facts and materials disclosed, will not amount to a full and true disclosure of all material facts necessary for the purpose of assessment. A tax payer cannot resist reassessment on the plea that non-disclosure of the true state of affairs was due to the negligence or inadvertence on the part of the Income Tax Officer, and but for such negligence or inadvertence, a full and true disclosure of all material facts necessary, for the assessment would have been resulted.

There is no evidence on the record that the Memorandum and Articles of Association were ever produced before the Income Tax Officer in the course of proceedings for assessment. Again, the report of the Income 'tax Officer discloses that his predecessor in office was told that the sales of shares effected by the company were casual transactions and were in the nature of a mere " change of investments". This was not strictly accurate. The record therefore clearly shows that the company bad failed to disclose fully and truly all material facts in relation to assessment in two respects, (1) that it failed to produce the Memorandum and Articles of Association showing the purposes for which the company was incorporated, and (2)that the shares were acquired as part of the business of financiers. The company also made a statement which is partially untrue when it stated that sales were mere casual transactions. There were materials before the Income Tax Officer on which he had reason to believe that by reason of the failure of the company to fully and truly disclose material facts, its income was underassessed. Whether on these facts, a conclusion that in fact the company was carrying on the business of trading in shares could be founded, is at this stage entirely immaterial. If there was reason to believe, the alleged inadequacy of the materials on which the belief could be founded is of no moment. The Income Tax Officer has commenced proceedings for reassessment by issuing notices against the company and he has placed all the materials before the court on which it could be said that he had reason to believe that income of the company had been underassessed by reason of failure on the part of the company to disclose fully and truly all material facts relating to the assessment and if, on those materials, the Income Tax Officer could hold the belief which he says he did, the court in seeking to hold an enquiry into the question whether the Income Tax Officer, notwithstanding his affidavit and materials placed in support thereof, had reason to hold the requisite belief, would be arrogating to itself jurisdiction which it does not possess. If the conditions precedent do not exist, the jurisdiction of the High Court to issue high prerogative, writs under Art. 226 of the Constitution to prohibit action under the notice may be exercised. But if the existence of the conditions is asserted by the authority entrusted with the power and the materials on the record prima facie Support the existence of such conditions, an enquiry whether the authority could not have reasonably held the belief which he says he had reason to hold and he did hold, is, in my judgment, barred.

In that view, the proper order to pass in this appeal would be one of dismissal with costs.

BY COURT.-In view of the majority opinion, the appeal is allowed with costs here and below.