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 COMMISSIONER  
 OF  
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Crown wants us to do, would, in my opinion, be legislating instead of interpreting the section. The view which we are taking is not without authority, and I need refer only to *Vedathanni v. Commissioner of Income-tax, Madras.*<sup>(1)</sup> It is said that that was a decision under section 14 (I) of the Indian Income-tax Act; but reading the judgment carefully, it seems to me that the point which has arisen before us also arose before the Judges of the Madras High Court, and the whole *ratio decidendi* of that case is that the expression "undivided Hindu family" has to be understood in the sense in which it is understood in the Hindu law.

The learned Advocate General has referred to an unreported decision of the Calcutta High Court and produced an uncertified copy of the judgment. I have no hesitation in saying, with respect to the learned Judges in that case, that their reasoning does not appeal to me and is opposed to the fundamental principles of the Hindu law.

For these reasons, I agree that the questions raised must be answered in the manner proposed by my Lord the Chief Justice.

*Answer accordingly.*

Y. V. D.

<sup>(1)</sup> (1932) 56 Mad. 1, s. B.

## APPELLATE CIVIL.

*Before Sir John Beaumont, Chief Justice, and Mr. Justice Rangnekar.*

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THE COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY AND ADEN,  
 REFEROR *v.* GOPAL VALJINATH MANOHAR, ASSESSEE.\*

*Indian Income-tax Act (XI of 1922), section 34—Income-tax—Assessment—Low rate of profits assessed—Revision of assessment in following year—"Escaped assessment", meaning of.*

In the course of assessment for the year 1932-33, the Income-tax Officer added to the assessee's income a certain percentage on the sale of gold and silver, 3 per cent. on the sale of gold and 5 per cent. on the sale of silver, and on that basis made the

\*Civil Reference No. 2 of 1935.

assessment under section 23 (3) of the Indian Income-tax Act, 1922. In the next year of assessment a different Income-tax Officer came to the conclusion that his predecessor had estimated the profits too low considering that the price of gold had risen rapidly during the last two months of the previous year of assessment. He, therefore, re-assessed the income under section 34 of the Indian Income-tax Act. A question being raised whether the profits had "escaped assessment" within the meaning of section 34 of the Indian Income-tax Act, 1922, at the time of the original assessment for the year 1932-33 :

*Held*, that it could not be said that the income had escaped assessment or was assessed at too low a rate within the meaning of section 34 of the Indian Income-tax Act, 1922, inasmuch as the Income-tax Officer of the subsequent year only thought that the Income-tax Officer of the earlier year made a wrong assessment as to income, and he gave his reasons for so thinking; but he did not prove that in fact the assessee received any greater income than the income in respect of which he was assessed.

Where it is proved that the assessee had received an income from a particular source greater than that on which he was assessed at on the first occasion, or that the assessment was at a flat rate at a certain per cent. whilst in fact profits at a higher rate have been made, then the income has escaped assessment within the meaning of section 34.

*In re the Anglo-Persian Oil Company (India) Limited*,<sup>(1)</sup> *The Commissioner of Income-tax v. Raja of Parlakimedi*,<sup>(2)</sup> followed.

*Dictum* of the Chief Justice in *In re The Commissioner of Income-tax v. U Lu Nyo*,<sup>(3)</sup> that the Income-tax Officer had no jurisdiction to revise the assessment for the previous year which was completed and had become final, dissented from.

The burden of showing that income has "escaped assessment" or that it has been assessed at too low a rate lies on the Commissioner.

*Per Rangukar J.* All that section 34 of the Income-tax Act, 1922, means is that if in the taxing year the income assessed is not the whole of the income in the year of assessment, then within a time-limit provided in the section it is open to the Income-tax authorities to revise it, whether the assessment previously made was inadvertent or deliberate or was due to a wrong allowance or improper deduction or a low rate.

CIVIL REFERENCE made by the Commissioner of Income-tax, Bombay Presidency and Aden, under section 66 (2) of the Indian Income-tax Act XI of 1922.

The assessee was a merchant of Nasik carrying on business in gold and silver. For the purposes of assessment for the financial year 1932-33, the assessee made a return of his

<sup>(1)</sup> (1933) 60 Cal. 840.

<sup>(2)</sup> (1925) 49 Mad. 22.

<sup>(3)</sup> (1933) 12 Rang. 118.

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income, showing therein a total income of Rs. 12,187 for the Samvat 1987, that being his "previous year" under section 2 (II) of the Indian Income-tax Act, for the purposes of his assessment for the year in question. The Income-tax Officer assessed on a total income of Rs. 14,525 made up of Rs. 14,111 from business and Rs. 414 from "property". The "business" income was made up of Rs. 11,294 from "money-lending" business and Rs. 2,661 from dealings in gold and Rs. 450 from dealings in silver. The latter two were estimated at a flat rate of 3 per cent. under section 13 of the Indian Income-tax Act.

In the course of the examination of accounts of Samvat 1988, for the assessment of the subsequent financial year viz., 1933-34, it was noticed by the new Income-tax Officer, who had succeeded the former one that the price of gold had risen very rapidly during the last two months of the previous year of assessment and the Income-tax Officer for that year had underestimated the profits derived from the sale of gold. The assessee was accordingly assessed under section 23 (3) read with section 34 for the year 1932-33, on an income of Rs. 16,613, with an increase of Rs. 2,088 (Rs. 16,613—Rs. 14,525), estimating gross profit at 15 per cent. on "gold" sales.

The assessee appealed to the Assistant Commissioner of Income-tax, Central Division. He agreed with the view taken by the Income-tax Officer, but reduced the gross profit on "gold" business to 4 per cent. on the sale price and enhanced the gross profit in "silver" to 10 per cent. In the result, the supplementary assessment was reduced to one on an income of Rs. 15,870.

As against the Assistant Commissioner's order, the assessee petitioned to the Commissioner to revise the order or otherwise to refer the following questions for decision of the High Court under section 66 (2) of the Indian Income-tax Act :—

(1) "Whether the re-assessment in this case was in accordance with the provisions of section 34 of the Act, when the source of income re-assessed was

already assessed once by the learned Income-tax Officer under section 23 (3) of the Act ?

(2) "Whether it is legal to re-assess the income of Samvat year 1987 on the basis of the income assessed for Samvat year 1988, though the books of accounts being unclosed for both the years and when the income of Samvat year 1987 was not estimated on the basis of the income of Samvat year 1988 at the time of original assessment ?

(3) "Whether it is legal to re-assess the income under the provisions of section 34, when the original assessment was levied under section 23 (3) of the Act and when once the same source is already assessed ?"

The Commissioner of Income-tax was of opinion that in view of the facts the three questions formulated by the assessee resolved themselves into one question only, namely :—

"Whether in the circumstances of the case, a part of the income, profits and gains from sales of gold in the year 1987 Samvat can be said to have 'escaped' assessment within the meaning of section 34 of the Income-tax Act, 1922, at the time of the original assessment for the year 1932-33 ?"

The Commissioner was of opinion that the supplementary assessment was fully justified for reasons as follows :—

"The fact that there was a rise in the price of 'gold' in 1987 Samvat in the last two months of that year is not denied. Therefore, it was clearly a fresh datum pointing to higher profits and as this greater margin of gross profit was not taken into consideration by the former Income-tax Officer in his original assessment made on the 24th June 1932, to the extent of this extra profit, income had 'escaped' assessment within the meaning of section 34 of the Act."

The reference was heard.

*K. McI. Kemp*, Advocate General, with *G. Louis Walker*, Government Solicitor, for the referor.

*Engineer*, with *Ranchhoddas and Hakim*, for the assessee.

BEAUMONT C. J. This is a case stated by the Commissioner of Income-tax under section 66 (2) of the Indian Income-tax Act. The question arises in this way. The assessee carries on business at Nasik as a money-lender, and he also buys and sells gold and silver. He buys ornaments, turns them into metal, and sells the metal in Bombay. He keeps no books of account, and, therefore, the Income-tax Officer was not able to ascertain with accuracy what the

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profits were from the sales of gold and silver, but in the year of assessment 1932-33 the Income-tax Officer added to the assessee's income a certain percentage on the sale of gold and silver, 3 per cent. on the sale of gold and 5 per cent. on the sale of silver, and on that basis he made the assessment under section 23 (3) of the Act. In the next year of assessment a different Income-tax Officer dealt with the matter, and he came to the conclusion that, as the price of gold had risen very rapidly during the last two months of the previous year of assessment, the Income-tax Officer for that year had underestimated the profits derived from the sale of gold; he considered that the flat rate on sale of gold should have been 15 per cent. instead of 3 per cent., and on that basis he came to the conclusion that income had escaped assessment for the year 1932-33, and he, therefore, reassessed the income under section 34 of the Indian Income-tax Act. There was an appeal to the Assistant Commissioner, who agreed generally with the view taken by the Income-tax Officer, but for some reason, which is not apparent, he assessed the income on the sale of gold at 4 per cent. on the sale price, and the income on the sale of silver at 10 per cent. on the sale price; that is to say, he raised the original rate by 1 per cent. in the case of gold and 5 per cent. in the case of silver, and made an assessment on that basis.

The question which the Commissioner has raised is :

“ Whether in the circumstances of the case, a part of the income, profits and gains from sales of gold in the year 1937 Samvat can be said to have ‘ escaped ’ assessment within the meaning of section 34 of the Income-tax Act, 1922, at the time of the original assessment for the year 1932-33 ? ”

That question purports to be a summary of three questions which the assessee had desired to raise, and which related to the income generally of the assessee and covered income from the sale of silver as well as his income from the sale of gold. I think the omission in the question raised by the Commissioner of any reference to the sale of silver must be by inadvertence. Clearly, having regard to the assessment

made by the Assistant Commissioner, the question should cover both the sale of gold and of silver in Samvat 1987. The question should be amended in that way.

We have had some discussion as to the meaning and scope of section 34 of the Indian Income-tax Act. That section provides that if for any reason the income, profits or gains chargeable to income-tax has escaped assessment in any year or has been assessed at too low a rate, the Income-tax Officer may, within a time limit therein specified, re-assess such income. It seems to me that the burden of showing that income has escaped assessment or that it has been assessed at too low a rate, lies on the Commissioner. We have been referred to a decision of the Full Bench of the Rangoon High Court in *In re The Commissioner of Income-tax v. U Lu Nyo*,<sup>(1)</sup> as supporting the proposition that income from a particular source cannot be re-assessed under section 34. I agree with the actual decision in that case which was one where the Income-tax Officer of the subsequent year disagreed with the estimates of the Officer in the previous year, but in the course of his judgment the learned Chief Justice said that the Income-tax Officer had no jurisdiction to revise the assessment for the previous year which was completed and had become final. If that proposition is correct, it would confine section 34 to cases in which a source of income has escaped assessment, and that in my view is too narrow a limit. I feel no doubt that if it were proved that Rs. 2,000 had been received as income from a particular source, while the assessment was only on Rs. 1,000, or if it were proved that the assessment was at a flat rate of 3 per cent., whilst in fact profits at a higher rate had been made, then income would have escaped assessment within the meaning of section 34. That view was taken by the Calcutta High Court in *In re The Anglo-Persian Oil Company (India) Limited*,<sup>(2)</sup> and by the Madras High Court in *The Commissioner of Income-tax v.*

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*Raja of Parlakimedi*,<sup>(1)</sup> with both of which decisions I agree. The question in this case really is whether the Income-tax Officer has proved that any income escaped assessment. In my opinion all that the evidence comes to is that the Income-tax Officer of the subsequent year thinks that the Income-tax Officer of the earlier year made a wrong assessment as to income, and he gives his reasons for so thinking. But he does not prove that in fact the assessee received any greater income than the income in respect of which he was assessed. It is not suggested that any facts which were before the second Income-tax Officer were not before the first Income-tax Officer. I guard myself against expressing any opinion upon what the position would be if it were shown that the assessee had given false evidence or suppressed material facts, and thereby induced the assessment made by the first Income-tax Officer. That is not the case here. The first Income-tax Officer knew, or had the means of knowing, that the price of gold was rising and with that fact before him he estimated the profits at a particular rate on sales, and the second Income-tax Officer does no more than say that in his opinion on the facts the estimate of the first Income-tax Officer was obviously too low. That is not proof that any income escaped assessment or was assessed at too low a rate. In my opinion the question, amended as I have suggested, must be answered in the negative.

The assessee to have his taxed costs from the Commissioner on the Original Side scale.

RANGNEKAR J. I agree. I think the burden of proving that the income has escaped assessment within the meaning of section 34 of the Indian Income-tax Act was on the income-tax authorities, and it has clearly not been discharged. The question as to the true construction of section 34 of the Act was raised on behalf of the assessee, and I would like to state my view upon it. There seem to be from the decided cases two views taken as regards the meaning of this section.

<sup>(1)</sup> (1925) 49 Mad. 22.

One view is that the section is used in correcting an assessment in which a deduction has been improperly allowed or a low rate has been calculated or there has been under-assessment otherwise. The other view is that the word "escaped" refers to income which has actually escaped assessment and not to any income which has already been the subject of assessment. In my opinion the first view is correct. The words of the section are clear, and upon the plain meaning of the section there seems to be no reason to limit the scope of the section. All that the section means is that if in the taxing year the income assessed is not the whole of the income in the year of assessment, then within a time-limit provided in the section it is open to the Income-tax authorities to revise it, whether the assessment previously made was inadvertent or deliberate or was due to a wrong allowance or improper deduction or a low rate. I respectfully dissent therefore from the view taken by the Rangoon High Court in *In re The Commissioner of Income-tax v. U Lu Nyo*,<sup>(1)</sup> where it was held that it was not open to an Income-tax Officer to go behind and revise the assessment made by his predecessor which was completed and had become final. In my opinion the remarks of the learned Chief Justice in that case in the last paragraph at page 121 are too wide and do not correctly represent the meaning of the section. In my opinion, the true meaning of the section is as indicated in the remarks, though *obiter*, of Chief Justice Rankin in *In re The Anglo Persian Oil Company (India) Limited*,<sup>(2)</sup> at page 845, namely :—

"I see no way of holding that section 34 is inapplicable to put right an assessment, by which a deduction has been improperly allowed. Such a case is, in my opinion, a case of income escaping assessment . . ."

I agree, therefore, that the question raised must be answered in the negative.

*Answer accordingly.*

J. G. R.

<sup>(1)</sup> (1933) 12 Rang. 118.

<sup>(2)</sup> (1933) 60 Cal. 840.