not suffer from any illegality: that section 31 of the Act does not suffer from the vice of excessive delegation of legislative power and that the petitioner is a "dealer" as defined under the Act. The result is that all the aforementioned writ petitions fail and the same are dismissed with no order as to costs. Civil Miscellaneous Petitions Nos. 618, 2420, 882 and 889 in Civil Writ Petitions Nos. 354, 418, 463 and 555 of 1975, are allowed.

Bhopinder Singh Dhillon, J.—I respectfully agree and have nothing to add.

N. K. S.

FULL BENCH

CIVIL MISCELLANEOUS

Before O. Chinnappa Reddy, Bhopinder Singh Dhillon and Rajendra Nath Mittal, JJ.

R. A. BOGA,—*Petitioner.*

versus

APPELLATE ASSISTANT COMMISSIONER OF INCOME TAX, A-RANGE, AMRITSAR AND ANOTHER,—*Respondents.*

Civil Writ No. 546 of 1968.

November 18, 1976.

Income Tax Act (XI of 1922)—Sections 23(2), 23-B, 31(3)(b), 34(3) and 35—Income Tax Act (43 of 1961)—Sections 143(3), 150, 154, 240, 246, 252(1)(a) and 297(1)—Original assessment completed under the 1961 Act when it ought to have been completed under the 1922 Act—Such assessment—Whether a nullity—Appellate Assistant Commissioner setting aside the assssment and directing the Income Tax Officer to make fresh assessment—Such direction—Whether could be issued—Fresh assessment—Whether can be made after the expiry of four years—Tax paid pursuant to provisional assessment—Whether liable to be refunded—Income-tax Officer ordering refund of such tax by mistake—Such mistake—Whether could be rectified.

Held, that where the Income-tax Officer completed the original assessment under the provisions of the Income Tax Act 1961 when he ought to have completed it under the Income Tax Act 1922, the assessment was not void. It was not a nullity and at the worst there was a technical irregularity. Merely because the Income-tax Officer

misquoted the relevant provision of law, the assessment could not be declared a nullity when the nature and extent of the power under the Act of 1922 as well as the Act of 1961 was precisely the same. The same Income-tax Officer had the necessary jurisdicton to complete the assessment under one or the other Act depending on whether the case fell under one or the other of the sub-clauses of section 297(1) of the Income-tax Act, 1961. That the Income-tax Officer invoked the provisions of one Act and not of the other Act would make no difference, if he could validly exercise the same power under the provisions of the other Act. The Appellate Assistant Commissioner could well have declared the assessment valid but he chose to set aside the assessment because of the technical defect and directed the Income-tax Officer to make a fresh assessment under the provisions of the old Act. He was competent to give such a direction under section 251(1)(a) of the 1961 Act as well as under section 31(3)(b) of the 1922 Act. Both the provisions enabled the Appellate Assistant Commissioner to set aside the assessment and direct the Income-tax Officer to make a fresh assessment. If the assessment made by the Income-tax Officer was entirely without jurisdiction and was a nullity, the Appellate Assistant Commissioner could not give a direction to make a fresh assessment after the expiry of the period of limitation, but where the assessment made by the Income-tax Officer was not entirely without jurisdiction but suffered from a mere technical defect, the Appellate Assistant Commissioner, in the exercise of his jurisdiction, could direct the Income-tax Officer to make a fresh assessment notwithstanding the expiry of the four years' period of limitation. In such an event, the fresh assessment would be saved by the provisions of section 150 of the new Act and second proviso to section 34(3) of the old Act. These provisions declare that the limitation of time would not apply to assessments or re-assessments made in consequence of or to give effect to any finding or direction contained in an order passed by any authority in a proceeding by way of appeal, reference or revision. Thus the Appellate Assistant Commissioner was competent to issue the direction which he gave to the Income-tax Officer and that the Income-tax Officer was competent to proceed with the fresh assessment notwithstanding the expiry of the period of four years prescribed by section 34(3) of the 1922 Act.

(Paras 6, 9 and 17).

Held, that the scheme of section 23-B of the 1922 Act, clearly is to treat provisional assessment as altogether distinct from regular assessment and, further to treat it not as a step towards regular assessment, but only as a design for speedy collection of tax. It is clear that provisional assessment is not meant to merge in regular assessment. If, therefore, regular assessment is set aside for any reason, it would not follow that the provisional assessment also stands set aside. Thus tax paid pursuant to provisional assessment is not liable to be refunded on the setting aside of the regular assess-

(Paras 21 and 23).

Held, that a mistake apparent from the record means an 'obvious and patent' or a 'glaring and obvious' mistake. Hotly debatable issues are excluded and hardly debatable issues are included. The issues may be complicated yet the mistake may be simple. It is a mistake apparent from the record. The test is not the complexity of the issues but the simplicity of the mistake. If an Income-tax Officer orders refund of tax paid pursuant to provisional assessment because of confusing the provisional assessment with regular assessment and because of the regular assessment having been set aside, his mistake is one apparent from the record which he can rectify.

(Para 27).

Case referred by Hon'ble Mr. Justice Ranjit Singh Sarkaria, on 2nd April, 1969 to a larger Bench for decision of complicated nature of the questions involved in the case. The Division Bench consisting of Hon'ble Mr. Justice Manmohan Singh Gujral and Hon'ble Mr. Justice Rajendra Nath Mittal, further referred the case on 13th January, 1975 to the Full Bench. The Full Bench consisting of Hon'ble Mr. Justice O. Chinnappa Reddy and Hon'ble Mr. Justice Bhopinder Singh Dhillon and Hon'ble Mr. Justice Rajendra Nath Mittal finally decided the case on 18th November, 1976.

Petition under Articles 226 and 227 of the Constitution of India praying that this Hon'ble Court be pleased to issue such writ, order or direction to the respondents as may do complete justice to the case of the petitioner, and in particular, be pleased to issue:—

(a) *A Writ, Order or direction in the nature of a certiorari or in the nature of a Mandamus and or otherwise quashing such part of the Order, dated 16th October, 1967, made by Respondent No. 1 as directs Respondents No. 2 to complete a fresh assessment under the provisions of the Repealed Act, and/or*

(b) *A Writ, Order or direction in the nature of certiorari or in the nature of prohibition and or otherwise quashing the notice, dated 12th January, 1968, issued by Respondent No. 2 under section 23 of the Repealed Act, with respect to assessment year 1960-61 and retaining him from issuing any such or further notices under section 22, or section 23, of the Repealed Act, and/or*

(c) *A writ, order or direction in the nature of Mandamus or Prohibition and/or otherwise, directing Respondent No. 2 not to take any action on the order, dated 10th October, 1959 made by Respondent No. 1, and/or*

(d) *A writ, order or direction in the nature of Mandamus or Prohibition and/or otherwise restraining Respondent No. 2*

from making any assessment under section 23 of the Repealed Act, in the case of the Petitioner for the assessment year 1960-61, and/or

(e) *Any such other order or orders as this Hon'ble Court may consider just and proper in the circumstances of the case.*

The cost of the petition be also awarded.

B. S. Gupta, Advocate with Shri Gurdev Singh, Advocate, *for the Petitioner.*

D. N. Awasthy, Advocate, with Shri B. K. Jhingan, Advocate, *for the Respondents.*

JUDGMENT

O. Chinnapa Reddy, J.

(1) The facts of the case have given rise to an interesting situation though not to questions of complexity as we first thought. Pursuant to a notice issued by the Income-tax Officer under section 22(2) of the Income-tax Act, 1922, the petitioner (assessee) submitted his return of income for the Assessment Year 1960-61 on 20th December, 1960. On 23rd December, 1960, the Income-tax Officer made provisional assessment under section 23-B of the Act and on the basis of the provisional assessment, he raised a demand on the petitioner for payment of provisional tax of Rs. 50,808. Thereafter, the Income-tax Officer also issued a notice under section 23(2) of the Act. The Income-tax Act, 1961, came into force with effect from 1st April, 1962. The assessment of the petitioner for the year 1960-61 was completed by the Income-tax Officer on 24th March, 1965. He purported to complete the assessment under section 143(3) of the 1961 Act. The assesseee preferred an appeal to the Appellate Assistant Commissioner under section 246 of the 1961 Act. One of the grounds urged by the petitioner before the Appellate Assistant Commissioner was that the Income-tax Officer should have completed the assessment under the provisions of Indian Income-tax Act, 1922, and not under the provisions of the Income-tax Act, 1961. This contention was accepted by the Appellate Assistant Commissioner, who set aside the assessment made by the Income-tax Officer and directed the Income-tax Officer to complete the assessment afresh from the

"return" stage. The order of the Appellate Assistant Commissioner which may be usefully extracted here was as follows:—

> "Assessment has been challenged both on technical grounds as well as on merits. Taking the technical objections first, it is contended before me that as the return of income was filed on 20th December, 1960, before the commencement of the Income-tax Act, 1961, the assessment should have been completed under the provisions of the Indian Income-tax Act, 1922 and the Income-tax Officer has erred in completing the assessment under the provisions of the Income-tax Act, 1961. I have considered the assessee's submissions very carefully and find that they have great force. The assessee's contention about the filing of the return before the commencement of the Income-tax Act, 1961 is correct and supported by the record. The appellant's contention that the Income-tax Officer should have completed the assessment under the provisions of the Indian Income-tax Act, 1922 and has erred in completing the assessment under the provisions of the Income-tax Act, 1961, is also correct and is supported by section 297(2)(a) of the Income-tax Act 1961. The assessment is, therefore, set aside with a direction to the Income-tax Officer to complete the fresh assessment from the return's stage. As I have set aside the assessment on the technical objections taken by the appellant, I have not considered it necessary to discuss the objections on merits."

(2) From a perusal of the order of the Appellate Assistant Commissioner, it is apparent that no argument was advanced at that stage to the effect that the order of assessment made by the Income-tax Officer on 24th March, 1965 was a nullity and that the Appellate Assistant Commissioner had no jurisdiction to direct the Income-tax Officer to make a fresh assessment as such fresh assessment would be barred by the time-limit prescribed by section 34(3) of the 1922 Act. Though the Appellate Assistant Commissioner did not expressly direct the Income-tax Officer to complete the assessment under the provisions of the 1922 Act, such a direction is patently implicit in the order. The order of the Appellate Assistant Commissioner was passed on 16th October, 1967. The petitioner preferred an appeal to the Income-tax Appellate Tribunal on 4th December, 1967, but withdrew the same subsequently. Consequent upon the

direction issued by the Appellate Assistant Commissioner, the Income-tax Officer issued a fresh notice under section 23(2) of the 1922 Act on 12th January, 1968. On 17th January, 1968, the assessee submitted written objections claiming that no assessment was permissible as the period of four years prescribed by section 34(3) of the Act had elapsed. As the Income-tax Officer was going ahead with the assessment despite his objections, the petitioner filed Civil Writ Petition No. 546 of 1968 challenging the notice issued to him on 12th January, 1968.

(3) On 27th February, 1968, the Income-tax Officer purporting to act under section 240 of the 1961 Act, granted a refund of tax of Rs. 97,055, making adjustments against demands of tax for later years. Subsequently, he issued a notice seeking to rectify the order for refund of tax on the ground that it had been wrongly allowed to the extent of Rs. 55,242. The assessee submitted his objections and, finally, the Income-tax Officer passed order, dated 5th June, 1971 rectifying the order of refund to the extent of Rs. 55,242. The Income-tax Officer observed in his order that the provisional tax paid pursuant to the provisional assessment, dated 23rd December, 1960 had been wrongly refunded. The appellate order of the Appellate Assistant Commissioner merely set aside the assessment made under section 143(3). The provisional assessment and provisional tax were never disputed and were never cancelled by the Appellate Assistant Commissioner. Therefore, the refund of provisional tax was wrong. The petitioner filed Civil Writ Petition No. 3396 of 1971 questioning this order of the Income-tax Officer.

(4) The first submission of Shri B. S. Gupta, learned counsel for the assessee was that there was no direction in the order of the Appellate Assistant Commissioner to complete the assessment under the provisions of the Income-tax Act, 1922, but that there was only a direction to dispose of the matter in accordance with law. According to the learned counsel, the effect of the order of the Appellate Assistant Commissioner was to declare the assessment, dated 24th March, 1965, a nullity, leaving it to the Income-tax Officer to proceed with fresh assessment if that was permissible under the law. Since by then the period of four years prescribed by section 34(3) had already expired, the Income-tax Officer had no jurisdiction to proceed with fresh assessment. We do not think we can agree with Shri Gupta's interpretation of the order of the Appellate Assistant

Commissioner. If the Appellate Assistant Commissioner was declaring the order of assessment, a nullity, there was no need for him to remit the matter to the Income-tax Officer for fresh assessment since even by then the period of four years had expired. Though the actual direction contained in the concluding part of the Appellate Assistant Commissioner's order did not refer to the provisions of 1922 Act, it is clear on a reading of the whole of the order that what the Appellate Assistant Commissoner in fact did was to direct the Income-tax Officer to complete the fresh assessment under the provisions of the Income-tax Act, 1922.

(5) The next submission of Shri Gupta was that the Appellate Assistant Commissioner was not competent to give a direction to the Income-tax Officer to complete the fresh assessment when the time for making the assessment had already run out. He submitted that the expression "finding" and "direction" in the second proviso to section 34(3) meant respectively, a finding necessary for giving relief to the assessee and a finding which the appellate or revisional authority was empowered to give under sections 31, 33, 33-A, 33-B, 66 or 66-A. He invited our attention to the decision of the Supreme Court in *Income-tax Officer* v. *Murli Dhar Bhagwan Dass* (1). That was a case in which the assessee preferred an appeal to the Appellate Assistant Commissioner against his assessment for the year 1949-50. The Appellate Assistant Commissioner took the view that certain interest income was received by the assessee not in the relevant accounting year, but in the previous accounting year. He, therefore, directed the deletion of that part of the income from the assessment for the year 1949-50 and the inclusion of it in the assessment for the year 1948-49. Pursuant to the direction, the Income-tax Officer initiated re-assessment proceedings under section 34(1) of the 1922 Act in respect of the assessment year 1948-49. The Supreme Court held, that the finding and the direction which the Appellate Assistant Commissioner was competent to give were finding and direction necessary for dealing with the assessment for the year in question and not with the assessment for some other year. In other words, they held that the Appellate Assistant Commissioner while dealing with an appeal relating to assessment for the year 1949-50, was not competent to give a finding and a direction in respect of the assessment for the year 1948-49. We do not understand the judgment of the Supreme Court as laying down that the finding and direction contemplated by section 34(3) were finding,

(1) 52 I.T.R. 335.

and direction which gave relief to the assessee in the sense of being to his advantage only. The limitation on the exercise of the power of the Appellate Assistant Commissioner was that the finding and direction should relate to the particular year and order of assessment.

(6) The substance of the argument of Shri Gupta was that the original assessment order made by the Income-tax Officer was a nullity and that it was so declared by the Appellate Assistant Commissioner. If Mr. Gupta was right in this submission, he would of course be right in submitting that the Appellate Assistant Commissioner had no jurisdiction to give a direction to the Income-tax Officer to make a fresh assessment without regard to the expiry of the four year period of limitation prescribed by section 34(3). We are, however, unable to agree with the submission of Shri Gupta that the original order of assessment was a nullity or that it had been so declared by the Appellate Assistant Commissioner. We are unable to hold that merely because the Income-tax Officer misquoted the relevant provision of law, the assessment could be declared a nullity when the nature and extent of the power under the Act of 1922 as well as the Act of 1961 was precisely, the same. The same Income-tax Officer had the necessary jurisdiction to complete the assessment under one or the other Act, depending on whether the case fell under one or the other of the sub-clauses of section 297(1) of the Income-tax Act, 1961. That the Income-tax Officer invoked the provisions of one Act and not of the other Act would make no difference, if he could validly exercise the same power under the provisions of the other Act.

(7) In *Hazari Mal Kuthalia* v. *Income-tax Officer, Special Circle* (2), the question arose whether the order of the Commissioner of Income-tax transferring a case from one Income-tax Officer to another purporting to be under section 5(5) and 5 (7-A) of the Indian Income-tax Act, when it ought to have been under section 5 of the Patiala Income-tax Act was void on that account. The Supreme Court said,

> "This argument, however, loses point, because the exercise of a power will be referable to a jurisdiction which confers

(2) 41 I.T.R. 12.

validity upon it and not to a jurisdiction under which it will be nugatory. This principle is well-settled."

In *Kandaswami* v. *Commissioner of Income-tax* (3), the Madras High Court stated the position thus:

"It is now well settled that the jurisdiction of any Tribunal does not depend upon the wrong provisions of law upon which the Tribunal might have purported to act, but upon the question whether the Tribunal had jurisdiction on a proper view of the functions and powers with which it is clothed under the law or the statute creating it. In other words, the Tribunal will not lose its jurisdiction which it undoubtedly has in a particular case because of its having misquoted the provision of law under which it exercised the jurisdiction."

In *Laxmi Industries and Cold Storage* v. *Income-tax Officer*, (4), the facts were that the assessee had filed a return of income for the assessment year 1961-62 before the 1961 Act came into force. The Income-tax Officer though bound to proceed under the 1922 Act [by reason of section 297 (2) (a) of the 1961 Act], proceeded with the assessment under the provisions of the 1961 Act. Pathak, J., said,

"..... the Income-tax Officer completed the assessment under the Act of 1961, when properly he should have done so under the Act of 1922. Inasmuch as he did enjoy jurisdiction to proceed under the Act of 1922, he must be considered to have dealt with the case under the jurisdiction and "even if he was not quite alive to it at the time", the proceedings must be ascribed to the jurisdiction existing in him which would give them validity rather than to the jurisdiction under which they would be void."

(8) The same question was considered by this Court in *The Commissioner of Income-tax* v. *Hargopal Bhalla and Sons*, (5), where it was said,

"The provisions of section 23(3) of 1922 Act are in *pari materia* with the provisions of section 143(3) of 1961 Act and deal with the same subject-matter, i.e., assessment. There is a

(3) 49 I.T.R. 344.
(4) 79 I.T.R. 248.
(5) 82 I.T.R. 243.

slight difference in the language, but the purport of the provisions in both the Acts is the same. The order of the Income-tax Officer passed under section 143(3) of the 1961 Act could, therefore, be legitimately held to have been passed in exercise of the powers vested in the Income-tax Officer under section 23(3) of 1922 Act."

This view was reiterated by this Court in *Kisan Workers Transport Co-operative Society Ltd.* v. *Commissioner of Income-tax*, (6), and by the Allahabad High Court in *Dhampur Sugar Mills Ltd.* v. *Commissioner of Income-tax*, (7). The Delhi High Court expressed the same view in *Commissioner of Income-tax* v. *Kishni Bai.*

(9) In the present case, the Income-tax Officer completed the original assessment under the provisions of 1961 Act, when he ought to have completed it under the 1922 Act. In view of the various authorities referred to above, the assessment was not void. It was not a nullity. At the worst, there was a technical irregularity. That was what the Appellate Assistant Commissioner said in his order. He remanded the case to the Income-tax Officer with a direction to make fresh assessment under the provisions of the old Act. The Appellate Assistant Commissioner could well have declared the assessment valid but he chose to set aside the assessment because of the technical defect and gave the direction already mentioned. He was competent to give such a direction under section 251(1)(a) of the 1961 Act as well as under section 31(3)(b) of the 1922 Act. Both the provisions enabled the Appellate Assistant Commissioner to set aside the assessment and direct the Income-tax Officer to make a fresh assessment. If the assessment made by the Income-tax Officer was entirely without jurisdiction and was a nullity, the Appellate Assistant Commissioner could not give a direction to make a fresh assessment after the expiry of the period of limitation, but where the assessment made by the Income-tax Officer was not entirely without jurisdiction, but suffered from a mere technical defect, the Appellate Assistant Commissioner, in the exercise of his jurisdiction, could direct the Income-tax Officer to make a fresh assessment notwithstanding the expiry of the four years' period of limitation. In such an event, the fresh assessment would be saved by the provisions of section 150 of the

(6) 88 I.T.R. 122.

(7) 90 I.T.R. 236.

(8) 1974(4) Taxation Law Reports, 914.

new Act and second proviso to section 34(3) of the old Act. These provisions declare that the limitation of time would not apply to assessments or reassessments made in consequence of or to give effect to any finding or direction contained in an order passed by any authority in a proceeding by way of appeal, reference or revision.

(10) Shri B. S. Gupta, learned counsel for the assessee, relied upon the decisions in *Commissioner of Income-tax* v. *Veeraswami Chettiar,* (9), *Naganatha Iyer* v. *Commissioner of Income-tax* (10), *Inter Asian Footwear Corporation* vs. *Appellate Assistant Commissioner,* (11), *Commissioner of Income-tax* v. *Muthukuruppan Chettian* (12), *Commissioner of Income-tax* v. *Rambaran Ramnath,* (13), and *Narinder Singh Dhingra* v. *Commissioner of Income-tax,* (14).

In *Commissioner of Income-tax* v. *Veeraswami Chettiar,* assessment for the assessment year 1950-51 was made under section 34 of the 1922 Act, without the issue of a notice. The assessment was set aside by the Appellate Assistant Commissioner with a direction to the Income-tax Officer to proceed under section 34 of the Act Pursuant to the direction of the Appellate Assistant Commissioner, the Income-tax Officer issued a notice to the assessee on 27th October, 1950 and thereafter proceeded with the re-assessment. The assessee objected on the ground that four years' period prescribed by section 34(3) had expired. The Madras High Court held that the direction given by the Appellate Assistant Commissioner travelled far beyond the scope of section 31 of the Act and it did not serve to remove the bar of limitation. It is evident that the earlier proceeding before the Income-tax Officer was entirely without jurisdiction as the condition precedent for the exercise of the power under section 34, namely, the issue of a notice, was not fulfilled. The Appellate Assistant Commissioner could not, by his direction, confer jurisdiction on the Income-Tax Officer. The learned judges observed,

> "Section 31(3) of the Act confers powers upon the appellate authority to set aside the assessments and direct the Income-tax Officer to make fresh assessment after making

(9) 49 I.T.R. 13.
(10) 60 I.T.R. 647.
(11) 66 I.T.R. 110.
(12) 78 I.T.R. 69.
(13) 104 I.T.R. 691.
(14) 90 I.T.R. 110.

such further enquiry as the Income-tax Officer thinks fit or the Appellate Assistant Commissioner may direct. But that contemplates that the assessment proceedings themselves had been validly initiated and it was set aside only for the reason that a proper enquiry had not been made by the Income-tax Officer, that is to say, the Income-tax Officer had been seized of jurisdiction in the matter and only the final order made by him was defective for some reason or other. But in a proceeding for reopening an assessment and making a reassessment under section 34, the Income-tax Officer acquires jurisdiction in a particular manner and it is not open to the appellate authority to make a direction which would have the effect of conferring jurisdiction in a case where such jurisdiction has not been properly acquired by the Income-tax Officer."

(11) In the case before us, the Income-tax Officer had validly acquired jurisdiction by the issue of a notice under section 22(2) of the 1922 Act and by the submission of a return by the assessee under the provisions of that Act. He went wrong in completing the assessment under the provisions of the New Act. There was no question of the Income-tax Officer having commenced the proceedings without jurisdiction or the Appellate Assistant Commissioner conferring jurisdiction where it did not exist.

(12) In *Naganatha Iyer* v. *Commissioner of Income-tax, the* Income-tax Officer, ignoring the returns filed by the assessee, issued notices under section 34(1)(a). He completed the assessments despite the protests of the assessee. The Appellate Assistant Commissioner set aside the assessments and directed the Income-tax Officer to proceed under section 34(1)(b). The Madras High Court, held that reassessment proceedings commenced by the Income-tax Officer, completely ignoring the returns filed by the assessee, were void. The direction given by the Appellate Assistant Commissioner was also void as he could not confer jurisdiction upon the Income-tax Officer where it did not exist. It was a clear case where the Income-tax Officer acted without jurisdiction in issuing notices under section 34, ignoring the returns filed by the assessee. The Appellate Assistant Commissioner could not confer jurisdiction where it did not exist.

(13) In *Inter Asian Footwear Corporation* v. *Appellate Assistant Commissioner* 11(ibid), the assessee preferred an appeal to the

Appellate Assistant Commissioner against an assessment made under section 23(3) of the Indian Income-tax Act, 1922, for the Assessment Year 1960-61. The Appellate Assistant Commissioner issued a notice under section 251(2) of the Income-tax Act, 1961, proposing to enhance the assessment. A learned Single Judge of the Allahabad High Court, held that the notice should have been issued under section 31(3) (a) of the 1922 Act and, therefore, the notice issued under section 251(2) of the 1961 Act was without jurisdiction. The learned Judge did not consider the question whether the notice could be deemed to be one issued under the provisions of the 1922 Act. No reference was made to the decision of the Supreme Court in *Hazari Mal Kuthalia* v. *Income-tax Officer, Special Circle* and the series of cases which followed that decision.

(14) In *Commissioner of Income-tax* v. *Muthukaruppan Chettiar,* the facts were as follows: Kuruppan, his son Muthukaruppan and two minor sons of Muthukaruppan, together, formed a Hindu Undivided Family which was assessed as such till the end of the Assessment Year 1948-49. For the Assessment Year 1949-50, and subsequent Assessment Years, it was claimed that there was a partition between Kuruppan on the one hand and Muthukaruppan and his son on the other. Karuppan filed returns in his individual capacity while Muthukaruppan and his sons filed separate returns as Hindu Undivided Family. The Income-tax Officer rejected the claim of partition and treating Karuppan's returns as returns of the original Hindu Undivided Family, assessed the family as before. The assessments relating to the returns filed by Muthukaruppan and his sons were closed with the endorsement "no assessment". In the appeals filed by Karuppan, the Appellate Assistant Commissioner upheld the partition. Thereafter, the Income-tax Officer issued notices under section 4 to the Hindu Undivided Family consisting of Muthukaruppan and his two minor sons and completed the assessments. On those facts, the Supreme Court, held that the Hindu Undivided Family consisting of Muthukaruppan and his sons had submitted voluntary returns and that there was no disposal of those returns. It was, therefore, held that the proceedings under section 34 were illegal. We do not see how this case is of any assistance to the assessee. All that was decided in that case was that voluntary returns submitted by the assessee not having been disposed of, there was no occasion for exercising the power under section 34 of the 1922 Act.

(15) In *Commissioner of Income-tax* v. *Rambaran Ramnath* the Income-tax Appellate Tribunal while setting aside the order of the

Inspecting Assistant Commissioner levying penalty, gave a direction which read as follows:—

> "We accordingly set aside the order of the Inspecting Assistant Commissioner, who shall, if need be, pass a fresh order as he thinks expedient in accordance with law."

This direction was interpreted by the Allahabad High Court to mean that it left the Inspecting Assistant Commissioner free to make a fresh order if he could make a valid order in law. The decision turned upon an interpretation of the order of the Income-tax Appellate Tribunal and does not assist the assessee in the present case. In *Narinder Singh Dhingra* v. *Commissioner of Income-tax;* a return was filed by the assessee for the Assessment Year 1961-62 on 8th March, 1962. The Income-tax Officer passed an assessment order under section 143(3) of the 1961 Act. The Income-tax Appellate Tribunal, while setting aside the order of assessment on the ground that it ought to have been made under the 1922 Act, gave direction that the Income-tax Officer should proceed with the assessment from the 'return stage' and make a fresh assessment according to law under the old Act. By that date, the period of four years prescribed by section 34(3) of the old Act had expired. A Division Bench of the Delhi High Court held that it was incompetent for the Tribunal to confer jurisdiction on the Income-tax Officer to remove the bar of limitation and proceed on the basis of the return long after the expiry of the period of limitation. The decision fully supports the assessee. However, with great respect, we do not agree with the decision. The learned Judges purported to follow *Commissioner of Income-tax* v. *Veeraswami Chettiar and Naganatha Iyer* v. *Commissioner of Income-tax.* We have already referred to these two decisions and explained why they do not apply to the facts of the present case. The learned Judges repelled the argument that the assessments could not be held to be invalid merely because of reference to the wrong provision of law, on the ground that it was not within the scope of the question referred to them for their decision. The learned Judges expressed the view that the question referred to them was based on the invalidity of the assessment and, therefore, the Revenue could not contend that the assessment was valid. The learned Judges appeared to equate "invalid" with "void" and "without jurisdiction". We are unable to agree with this view. An assessment might be declared invalid or defective for several reasons. The question to be considered was,

whether the assessment was without jurisdiction and void or whether it was merely irregular. The learned Judges did not consider the question whether an assessment made by invoking a wrong provision of law was altogether void merely on that ground, though the assessment was capable of being sustained under the correct provision of law. Where an assessment is found to be defective because of being made under an incorrect provision of law, the assessment would not be without jurisdiction and void. In such a case, it would be open to the appellate authority to confirm the assessment by reference to the appropriate provision of law or set aside the assessment and direct the Income-tax Officer to make a fresh assessment with reference to the correct provision of law. If the latter course were to be adopted, it would not mean that the appellate authority had declared the assessment to be without jurisdiction and void.

(16) The very Division Bench of the Delhi High Court, which decided the case of *Narinder Singh Dhingra* v. *Commissioner of Income-tax*, was faced with a somewhat similar situation in *Commissioner of Income-tax* v. *National Small Industries Corporation Ltd.* (15), where the question of law referred to the Court was:—

> "Whether on the facts and in the circumstances of the case, the rectification order could be passed only under section 35 of the Income-tax Act, 1922, and not under section 154(1)(a) of the Income-tax Act, 1961?"

The learned Judges, after referring to *Hazari Mal Kuthalia* v. *Commissioner of Income-tax and Commissioner of Income-tax* v. *Hargopal Bhalla and Sons*, accepted the argument advanced on behalf of the Revenue that the reference itself was incompetent as the rectification could have been made and must be considered to have been made under section 35 of the old Act and, therefore, the appeal to the Appellate Assistant Commissioner and the further appeal to the Income-tax Appellate Tribunal were incompetent. The decision clearly indicates a retreat from the view earlier expressed in *Narinder Singh Dhingra* v. *Commissioner of Income-tax*.

(17) In view of the foregoing discussion, we hold that the Appellate Assistant Commissioner was competent to issue the direction which he gave to the Income-tax Officer and that the Income-tax Officer was competent to proceed with the fresh assessment notwithstanding the expiry of the period of four years prescribed by

(15) 91 I.T.R. 579.

section 34(3) of the 1922 Act. C.W.P. 546 of 1968 is, therefore, dismissed with costs.

(18) C.W.P. 3396 of 1971 must also follow suit, but we have been invited to express our view on the question, whether it was competent for the Income-tax Officer to rectify the order of refund in the circumstances of the case if the order of the Appellate Assistant Commissioner directing fresh assessment and fresh assessment proceedings taken by the Income-tax Officer were to be declared invalid.

(19) The submission of Shri Gupta was that a provisional assessment made under section 23-B of the Indian Income-tax Act, 1922, was but part of the machinery devised to recover the tax that might ultimately be assessed and found payable by the assessee on the completion of the assessment proceedings. If no tax became payable in the regular assessment proceedings, any provisional tax paid by the assessee was bound to be refunded. According to him, the provisional assessment died with the regular assessment when the latter was set aside. In any case, it was argued that there was no apparent error such as could attract the provisions of section 35 of the 1922 Act or section 154 of 1961 Act.

(20) The Income-tax Officer ordered the refund of the provisional tax paid by the assessee as he was under the impression that by doing so he would be giving effect to the order of the Appellate Assistant Commissioner setting aside the regular assessment. Later, he thought that the refund had been wrongly ordered as the Appellate Assistant Commissioner never directed the refund of the provisional tax or set aside the provisional assessment The question for consideration is, whether the first impression or the second thought of the Income-tax Officer was correct. The further question for consideration is, whether the first impression of the Income-tax Officer was vitiated by such an apparent mistake as to attract the provisions of section 35 of the Indian Income-tax Act, 1922.

(21) Section 23-B of the 1922 Act, enabled the Income-tax Officer, at any time after the receipt of the return made under section 22, to proceed to make, in a summary manner, a provisional assessment of the tax payable by the assessee on the basis of his return and the accounts and documents, if any, accompanying it, after giving due effect to the allowance referred to in section 10(2) (vi) (b) and

the loss carried forward under section 24(2). Apparently, it was designed to facilitate early recovery of the tax at least to the extent admitted by the assessee himself or to the extent payable on the facts stated by the assessee himself. Naturally, at the stage of provisional assessment, there would be no scope for any enquiry into any disputed questions of fact or of law. Appeal was expressly barred against a provisional assessment. It was further provided by clause (7) of section 23-B that any amount paid or deemed to have been paid towards provisional assessment should be deemed to have been paid towards regular assessment, after a regular assessment was made under section 23. If the amount paid or deemed to have been paid towards the provisional assessment exceeded the amount payable under the regular assessment, the excess was to be refunded to the assessee. It was further provided by sub-section (8) that nothing done or suffered by reason or in consequence of any provisional assessment should prejudice the determination on the merits of any issue, which might arise in the course of the regular assessment under section 23. The scheme of section 23-B clearly was to treat provisional assessment as altogether distinct from regular assessment and, further to treat it not as a stop towards regular assessment, but only as a design for speedy collection of tax. It is clear that provisional assessment was not meant to merge in regular assessment. If, therefore, regular assessment, was set aside for any reason, it would not follow that the provisional assessment also stood set aside.

(22) Dealing with section 141 of the Income-tax Act, 1961, which is similar to section 23-B of the Indian Income-tax Act, 1922, the Supreme Court in *Jaipur Udyog Ltd. and another* v. *Commissioner of Income-tax*, (16), said:—

> "Section 141 of the Income-tax Act, 1961, authorises the Income-tax Officer to make a provisional assessment of the income of the assessee on the basis of the return made under section 139 and the accounts and documents, if any, accompanying the return. The assessment so made is summary and is based only on the return and the accounts and documents filed by the assessee. The Income-tax Officer is not bound to make any enquiry before making a provisional assessment, he is not bound even to give to the assessee any notice of his intention to

(16) 71 I.T.R. 799.

make a provisional assessment, nor to hear the assessee. He may, if he desires, call upon the assessee to elucidate the return or the entries posted in the accounts and documents, but he is not obliged to do so. Section 141 has been enacted with the object of expediting collection of tax on the basis of the return made by the assessee ..... The provisional assessment does not bind the assessee nor the department: the quantum of tax computed and the levy thereof are not binding upon the assessee and the revenue. Tax paid pursuant to provisional assessment is liable to be adjusted in the light of the final order in the regular assessment. An Appeal against the order is expressly prohibited."

(23) An identical question came up for consideration before the Allahabad High Court in *Jagan Nath Rameshwar Prasad* v. *Income-tax Officer and another,* (17). The learned Judges held that tax paid pursuant to provisional assessment was not liable to be refunded on the setting aside of the regular assessment. After referring to the scheme of the Act, they said:—

"In case the amount paid towards provisional assessment exceeds the amount payable under the regular assessment, the excess amount is to be refunded to the assessee. Except for this limited purpose the provisional assessment is a distinct proceeding. It is described as a provisional assessment only for the purpose of indicating that it is provisional as to the amount of the tax payable and that it does not preclude a regular assessment determining the tax liability finally ..... The provisional assessment does not merge in the final assessment. Moreover, if the regular assessment is a void proceeding and. therefore, non-est, the amount paid towards the provisional assessment continues to bear that character and cannot be deemed to have been paid towards the regular assessment. In the present case this Court has held that the regular assessment under section 23(4) of the Act was without jurisdiction and a nullity. It did not exist in the eye of law. In such a situation the provisions of section 23-B (7) are not

(17) 93 I.T.R. 16.

attracted as no regular assessment came to be made. The amount of tax paid by the appellant pursuant to the provisional assessment continues to bear that character. The order under section 23-D (1) has not been set aside and still remains a valid order and the amount paid by the assessee continues to be a valid payment. In these circumstances, the appellant is not entitled to a refund of that amount."

(24) We respectfully agree with the observations made by the learned Judges of the Allahabad High Court and we wish to add that the assessee is not altogether without remedy as was suggested by Shri B. S. Gupta, learned counsel for the assessee. The learned counsel urged that if provisional tax was paid and if later the assessee discovered that he had paid in excess of what was lawfully due from him, he would be without remedy to obtain refund of the excess tax paid by him if no regular assessment was ever made. Such a contingency would hardly arise, but, even so we do not think that the assessee would be without remedy. It would be open to the assessee to ask this Court for a mandamus to direct the Income-tax Officer to complete the assessment. It would perhaps be open to the assessee to file an application before the Income-tax Officer under section 48 of the 1922 Act seeking a refund of the excess amount paid by him. He would then have to establish that the tax paid by him exceeded the amount with which he was properly chargeable under the Act. Chargeability to Income-tax arises as soon as the income is earned. The quantification of the tax is postponed till the assessment is made. Where quantification of the tax payable is not done through a regular assessment, it would perhaps be open to the assessee to insist upon the determination of the tax to which he was properly chargeable under the Act and claim a refund of the excess, if any, paid by him. Perhaps, a suit also would not be barred. Whether a suit is filed or an application under section 48 is filed, the assessee would have to, as already indicated, establish that the provisional tax paid by him exceeded the amount with which he was properly chargeable under the Act.

(25) Shri Gupta urged that, in any case, the question whether the provisional assessment stood wiped out when the regular assessment was set aside was a debatable question and, therefore, there was no mistake apparent from the record. Reliance was placed upon

the decision of the Supreme Court in **Income-tax Officer v. Volkart Brothers** (18), where it was said:—

> "A mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process and reasoning on which there may conceivably be two opinions."

(26) We may also refer to *Income-tax Officer* v. *Bombay Dyeing and Manufacturing Co., Ltd.* (19). In that case, the Income-tax Officer had assessed the assessee for the Assessment Year 1952-53 on 9th October, 1952. He gave credit to the assessee for a sum of Rs. 50.503 which represented interest at 2 per cent on the advance tax paid by the assessee under section 18-A (5) as it then stood. Some months after the completion of the assessment, section 18-A (5) was amended by the addition of a proviso to the effect that the assessee was entitled to get interest at the rate of 2 per cent not on the whole of the advance tax paid by him but only on the difference between the advance tax paid and the tax assessed. It was provided that the amendment was to be deemed to have come into force on 1st April, 1952. The Income-tax Officer thereupon purported to rectify the mistake under section 35 of the 1922 Act. He held that the assessee was entitled to credit for Rs. 21,253 only and not for Rs. 50,603. The learned Judges of the Bombay High Court took the view that the Income-tax Officer was not competent to exercise any power under section 35 since the original order made by the Income-tax Officer if judged in the light of the law as it stood on that day was correct. The Supreme Court, however, held that the legislature had given retrospective operation to the amendment and if the proviso added by the amendment was deemed to be in force from 1st April, 1952, the Income-tax Officer was in error in giving credit for the interest on the whole of the advance tax paid. The Supreme Court also held that a completed assessment was also affected by the amendment since no assessment could ever be said to be final in the literal sense of the word as it was always liable to be modified in rectification proceedings under section 35 of the Act. It was held that the principle of the finality of orders could not be invoked by the assessee. They held that the mistake was 'glaring and obvious' and it could, therefore, be rectified under

(18) 82 I.T.R. 50.

(19) 34 I.T.R. 143.

section 35 of the 1922 Act. It would be seen from this decision of the Supreme Court that if a mistake was 'glaring and obvious', it would be a mistake apparent from the record notwithstanding the complexity of the issues involved.

(27) The basic principle is thus clear. A mistake apparent from the record means an 'obvious and patent' or a 'glaring and obvious' mistake. Hotly debatable issues are excluded. Hardly debatable issues are included. The issues may be complicated, yet the mistake may be simple. It is a mistake apparent from the record. The test is not the complexity of the issues but the simplicity of the mistake. In the present case the refund was the result of confusing the provisional assessment with the regular assessment. Because the regular assessment was set aside, the provisional tax was refunded. It could not be done. It was a patent mistake. The Income-tax Officer rightly rectified the mistake.

In the result both the civil writ petitions are dismissed with costs.

Bhopinder Singh Dhillon, J.—I agree.

Rajendra Nath Mittal, J.—I agree.

N.K.S.

2507) ILR Govt. Press Chd.