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payable of the nature specified in sub-section (1). As the particular must prevail over the general, the powers conferred under section 48 cannot be affected by the provisions embodied in clauses (i) and (j) of section 10(2) of the Act. The effect of an amending Act was considered in *D. R. Fraser and Company, Limited* v. *Minister of National Revenue* (1), and it was observed at page 33 that when an amending Act altered the language of the principal statute, the alteration must be taken to have been made deliberately. That rule, which is firmly established in the Law of Interpretation of Statutes, is fully applicable to the present case and it must be held that after the amendment of section 48, the Custodian Department was entitled to proceed under that section against the petitioner for the recovery of the amount in question

The learned counsel for the appellant made a faint attempt to press another argument, which was repelled by the learned Single Judge, that the renewal of the demand by the Custodian Department was barred on the principle of estoppel or *res judicata*. In the presence of the well-settled rule that there can be no estoppel against a statute nor can the principle of *res judicata* be invoked when there is a change of law, the contention raised is without substance.

In the result, the appeal fails and it is dismissed with costs.

G. D. KHOSLA, C.J.—I agree.

B.R.T.

CIVIL MISCELLANEOUS

Before D. Falshaw and Tek Chand, JJ.

DHARAM VIR VIRMANI,—*Petitioner.*

versus

THE COMMISSIONER OF INCOME-TAX, SIMLA,—*Respondent.*

Income Tax Reference No. 2 of 1959.

Income-tax Act (XI of 1922)—S. 34(1)(b)—Notice under—Whether valid.

1961

Sept. 20th

The Income-tax, Officer, while making the assessment, observed : "I am aware that in addition to the other income

(1) 1949 A.C. 24.

of the assessee he has shares in three partnerships, and he has shown me some figures regarding his income from these shares which show a loss, but I do not regard these figures as trustworthy, and I suspect that there may have been some profits. I, therefore, refuse to take these figures into account and leave the matter to be adjusted in accordance with the law when reliable information becomes available." After the final assessments had been made of those partnerships, the Income-tax Officer issued notice under section 34 of the Income-tax Act to the assessee and, after including the assessee's income from the three firms, computed his total income for the relevant year to be Rs. 71,798. The assessee challenged the validity of the notice and consequent reopening of the assessment.

Held that the notice under section 34 of the Act as amended in 1948 was valid as on the words of section 34(1) (b) as they stand at present the Income-tax Officer cannot be said to be precluded from re-opening the assessment under this sub-section once the information of the partnership assessments has reached him. The discovery of new facts of which the Income-tax Officer, was completely unaware at the time of the original assessment is no more necessary.

Case referred under section 66(1) of the Income-tax Act, 1922, by the Income-tax Appellate Tribunal (Delhi Bench) for decision of the following question of law arising out of the Tribunal's order, dated 2nd May, 1958, in I.T.A. No. 1916 of 1956-57.

"Whether the notice issued by the Income-tax officer, under section 34 of the Indian Income-tax Act was valid and legal?"

S. M. SIKRI, ADVOCATE-GENERAL, ROOP CHAND AND N. N.GOSWAMI, ADVOCATES, for the Petitioner.

D. N. AWASTHY AND H. R. MAHAJAN, ADVOCATES, for the Respondent.

ORDER

FALSHAW, J.—The question which has been referred to this Court by the Income-tax Appellate Falshaw, J.

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Tribunal, Delhi, under section 66(1) of the Income-tax Act is "Whether the notice issued by the Income-tax Officer under section 34 of the Indian Income-tax Act was valid and legal."

The question has arisen in the following circumstances. The case refers to the assessment of Shri Dharam Vir Virmani for the assessment year 1949-50, the account year ending the 31st of August 1948. The Income-tax Officer concluded his assessment on the 27th of September, 1949 on a total income of Rs. 29,942, but apparently the assessee, in addition to disclosing the material which led to the assessment on the above sum, had also mentioned that he was a partner in three firms styled Dhanpatmal Jawaladas, Bombay, Shri Mahabir Ingar Pattra Colliery Co., Katras Garh and Ram Narain Satya Paul, Jullundur. He had also given the figures of his income from the shares he held in these firms on the basis of the books of these firms. It is not mentioned in the statement of the case what these figures were, but it has been stated before us without contradiction that the net balance of the assessee's income from these sources showed a small loss. The Income-tax Officer dealt with this matter in the following words:—

> "During the year of account, the assessee had shares in (1) Dhanpatmal Jawaladas, Bombay, (2) Shri Mahabir Ingar Pattra Colliery Co., Katras Garh, (3) Ram Narain Satya Paul, Jullundur, only. The other partnership concerns mentioned in the last year's assessment order did not exist in the year of account. Assessed profit or loss from the partnership concerns in the year of account is not available, though according to the assessee the net result has been a loss. For the present, I ignore these shares and necessary rectification will be made on receipt of intimation about the assessed shares of profit or loss."

It seems that after the final assessments had been made of these partnerships for the years in question the Income-tax Officer issued a notice to the assessee

under section 34 of the Act which was received by him on the 30th of March, 1954 calling upon him to submit a return of the income that had escaped assessment. In response to this notice among other pleas, the assessee challenged the legality of the notice under section 34(1)(b) but his objections were overruled by the Income-tax Officer who, after including the assessee's income from the three firms, computed his total income for the relevant year to be Rs. 71,798. The validity of the notice was also challenged unsuccessfully before the appellate Assistant Commissioner and then before the Appellate Tribunal which, however, allowed the assessee's application under section 66(1) and referred the question set out above.

It may be stated that the Appellate Tribunal upheld the legality of the notice under section 34(1)(b) only on the strength of the decision of a learned Single Judge of the Andhra Pradesh High Court in the case of *Koppuravari Venkateswarlu* v. II Additional *Income-tax Officer, Guntur* (1). This was a decision in a petition under Article 226 of the Constitution challenging the issue of a notice under section 34(1)(b), but a perusal of the judgment shows that the facts were by no means the same as those in the present case. One of the sources of the assessee's income was a share in a partnership firm and in his return for the year 1951-52 he had shown his income from his share of the firm as Rs. 8,831, or at any rate his income from that source was provisionally taken to be that amount. The firm's assessment for the relevant year was not completed until March, 1955 when the assessee's share of the firm's income was held to be Rs. 24,000, and on this the Income-tax Officer issued a notice under section 34(1)(b) for reassessment. The petition under Article 226 was dismissed and it was held that section 34(1)(b) applied and not the provisions of section 35(5) which did not apply to an assessment completed before the 1st of April, 1952.

The obvious distinction between that case and the present one is that the assessee was at least provisionally assessed on a certain figure as his income from the

(1) XXXII I.T.R. 644.

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share in the partnership firm, whereas in the present case on the material before him the Income-tax Officer made no attempt to arrive at any figure and left the matter to be adjusted later.

The learned counsel for the assessee has, however, relied on two cases which appear to be more directly in point. The first of these is a decision of a Division Bench of this Court in *Chuni Lal Nayyer* v *Commissioner of Income-tax* (1). In that case the assessee firm in its return for the year 1943-44 stated that it had certain share in a business carried on by a firm at Ahmedabad, but the exact figure of his share in that firm was not available and should be obtained from the Income-tax Officer, Ahmedabad. Although, however, the Income-tax Officer, Amritsar, apparently sent a letter to the Income-tax Officer, Ahmedabad, enquiring about the matter this did not elicit a prompt reply, and when completing the assessment of the firm he either deliberately omitted or forgot to take into consideration the income from the Ahmedabad firm. Later, after the reply had been received from the Income-tax Officer at Ahmedabad, he issued a notice under section 34 and revised the original assessment by adding the Ahmedabad income. The question referred on these facts was whether in the circumstances of the case the intimation as to figures received from the Income-tax Officer, Ahmedabad, could be termed a definite piece of information which the Income-tax Officer discovered so as to justify the issue of a notice under section 34, and the question was answered by G. D. Khosla and Harnam Singh, JJ., in the negative on the finding that the correct interpretation of section 34 was that the evasion or escape of income must be discovered as a consequence of a fresh piece of definite information received by the Income-tax Officer and where the Income-tax Officer had already completed an assessment upon certain data he could not use the same data for revising assessment under section 34.

The other case relied on is a decision of Malik C.J. and Bhargava, J. of the Allahabad High Court in

(1) XX I.T.R. 568.

Debi Prasad Malviya v. *Commissioner of Income-tax, United Provinces, Lucknow* (1). In that case while assessing an assessee the Income-tax Officer knew that he had a one-third share in a partnership firm and that the profits from that firm had to be included in his total income, but in spite of that he finished the assessment and observed in the assessment order that as the assessment of the firm had not been completed necessary action for revising assessment by inclusion of the assessee's share of profits in the firm would be taken later on receipt of the report from the Income-tax Officer assessing the firm. Later after receiving the necessary information he issued a notice under section 34 and it was held that the notice under section 34 was illegal and that the Income-tax Officer had no authority to reopen the assessment already made by him. The passage in the judgment in which the law is discussed is quite brief and reads:

> "The portion quoted above clearly indicates that the Income-tax Officer knew that the Kanpur Iron Supply Company and the U.P. Iron Steel Company had made profits. He also knew that a portion of this profit which had come to the share of the assessee will have to be included in the total income. He was, however, anxious to finish the assessment on the basis of the materials before him. Section 23 of the Indian Income-tax Act contemplates that the Income-tax Officer should make a complete assessment on the basis of the total income of an assessee. It is not open to him to make assessments piecemeal and in a case where the Income-tax Officer has proceeded to assess one part of the income and has decided to assess the rest of the income on a later date, he cannot rely on the provisions of section 34 for the purpose of reopening the assessment. This is not a case where the Income-tax Officer had believed that there was no other income and the total income was as declared by the assessee on which he proceeded to

(1) XXII I.T.R. 539.

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assess the income-tax. From the order of assessment mentioned above, as also from several other orders, it appears that it was well-known that the assessee was being under-assessed. It cannot, therefore, be said that the fact was discovered later that the assessee had been under-assessed. In this view of the matter notice under section 34 was clearly wrong and the Income-tax Officer had no authority to reopen the assessment already made by him."

The relevant portion of section 34(1) reads:

"(a) ....
.....

(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 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 re-assess 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."

It is, however, to be noted that there has been quite a considerable change in the wording of section 34(1) since 1948, and that the decision of this Court in the case cited above was based on the wording of this sub-section as introduced in the amending Act of 1939 and superseded in 1948. The relevant portion of section 34(1) of 1939 Act read:

> "If in consequence of definite information which has come into his possession the Income-tax Officer discovers that income, profits or gains chargeable to income-tax have escaped assessment in any year, or have been under-assessed.....
> .....

There is obviously a world of difference between the words "the Income-tax Officer has in consequence of information in his possession reason to believe "and the words "If in consequence of definite information which has come into his possession the Income-tax Officer discovers". The latter words have rightly been interpreted by the Courts to mean that a re-assessment under section 34(1) could only be initiated in consequence of facts coming to the knowledge of the Income-tax Officer of which he was completely unaware at the time of the original assessment, and this was the basis of the decision of the learned Judges of this Court in *Chuni Lal Nayar's case*, (1). In view of the change of words this decision would seem to have ceased to be applicable.

The decision of the Allahabad High Court also appears to some extent, as can be seen from the passage cited above, to have been based on the wording regarding the discovery of new facts and to that extent its persuasive force is diminished, though the point was also raised that it was the duty of the Income-tax Officer to complete an assessment under section 23 of the Act on the total income of the assessee. There appears, however, to be some distinction between the facts of that case and those in the present case, since it was admitted there that the Income-tax Officer at the time of making the assessment knew that there were some profits from the assessee's share in

(1) XX I.T.R. 568.

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two other companies, whereas in the present according to the available data at the time of assessment the net income from the assessee's share in the three firms in question showed a loss, if only a small one.

As far as I can see there is nothing in the present words of section 34(1)(b) which would rule out a reassessment under these provisions in a case like the present one. Of course the matter would have been simple, and much trouble would have been saved, if the Income-tax Officer had accepted the assessee's figures from the books of the partnerships at their face value and had included the small loss in his computation of the assessee's income. In such a case I do not consider that when the true figures were received after the assessment of the partnerships there would have been any objection to reopening the matter under section 34(1) even as it was worded before 1948.

However, he did not choose to do so and what in effect he said in the assessment order was, "I am aware that in addition to the other income of the assessee he has shares in three partnerships, and he has shown me some figures regarding his income from these shares which show a loss, but I do not regard these figures as trustworthy, and I suspect that there may have been some profits. I, therefore, refuse to take these figures into account and leave the matter to be adjusted in accordance with the law when reliable information becomes available." I cannot see how on the words of section 34(1)(b) as they stand at present the Income-tax Officer can be said to be precluded from reopening the assessment under this subsection once the information of the partnership assessments has reached him. The argument advanced on behalf of the assessee might be put this way. The Income-tax Officer cannot reopen an assessment under section 34(1)(b) where he had any reason whatever to believe at the time of the original assessment that in due course information would be forthcoming which would justify the reopening of the assessment on the ground that income had escaped taxation. When, however, the argument is put in this way it clearly amounts to nothing more than falling back on the

wording of section 34(1) as it stood before 1948. In other words it amounts to re-importing the idea of discovery of fresh facts which evidently was deliberately omitted when the section was amended in 1948, and this I consider cannot be done.

It was suggested on behalf of the assessee that if at the time of the original assessment the Income-tax Officer would not accept the assessee's figures regrading his income from shares in the partnership it was his duty to postpone the completion of the assessment, if necessary for several years, to wait for the assessment of the partnerships, but in my opinion there must be so many of cases of this kind that such a course would result in great inconvenience both to the assessees and to the revenue department, and on the whole I am inclined to take the view that there is nothing illegal in the Income-tax Officer's concluding the assessment at the time to the best of his ability on the available data, even in a case where he may have reason to suspect that on full and reliable information becoming available the assessment may have to be reopened.

It may be mentioned that in the course of the arguments some reference was made to the provisions of section 35(5) of the Act which was introduced with effect from the 1st of April, 1952. This sub-section makes a specific provision for reopening the assessment of a partner in a firm when on the assessment or re-assessment of the firm it is found that his share in the profits has not been included or has been incorrectly calculated, but it is agreed that this sub-section could not be invoked in the present case regarding the assessment made in September, 1949. In the circumstances I would answer the question referred to us in the affirmative and order the assessee to bear the costs of the Commissioner. Counsel's fee Rs. 250.

TEK CHAND, J.—I agree.

B.R.T.