GUJARAT HIGH COURT

Navnagar Transport and Industries Ltd

Vs.

M.M. Parikh

Special Civil Appln. No. 802 of 1962

(J.M. Shelat, C.J. And P.N. Bhagwati, J.)

21.02.1964

JUDGMENT

Bhagwati, J.

1. A very interesting question of law arises on this petition. The question is whether an order under Section 23-A of the Income Tax Act, 1922. as it stood after its amendment by the Finance Act, 1955 can he made at any time or whether it is governed by the time-limit specified in Section 34(3). The facts giving rise to this petition are few and may be briefly stated as follows. The first petitioner is a Public Limited Company carrying on business of transporting goods and has its registered office at Jamnagar. Though the first petitioner is a Public Limited Company, it is not a Company in which the public are substantially interested within the meaning of Section 23-A. The second petitioner is the Managing Director of the first petitioner. The relevant accounting year of the first petitioner corresponding to the assessment year 1957-58 was the financial year ending 31st March 1957. The profit of the first petitioner for the assessment year 1957-58, according to its profit and loss account, was Rs. 65,473/- The first petitioner returned a sum of Rs. 74,102/- as its income for that assessment year. The Income-tax Officer added to the income returned four amounts : (1) Rs. 12,500/- on. account of excessive expenditure in respect of stores and spare-parts and overtime wages which were disallowed and certain .receipts which were treated as income, (2) Rs. 8,746/- on account of excessive Managing Agency Commission which was disallowed, (3) Rs. 13,129/- on account of excessive depreciation and (4) Rs. 10,921/- on account of certain other expenses which were disallowed. The Income-tax Officer thus determined the assessable income of the first petitioner at Rs. 10,769/-. The first petitioner appealed against this assessment, but the appeal was unsuccessful. The general meeting of the Company for passing the accounts for the accounting year 1956-57 which was the previous year for the assessment year 1957-58 was held on 4th December 1957 and at this meeting a dividend of Rs. 8,767/- was declared. Since this dividend of Rs. 8,767/- was less than 60 per cent of the assessable income of the first petitioner after deducting there from the amount of income-tax and

super-tax payable by the first petitioner, the Income-tax Officer issued a notice dated 15th November 1961 to the first petitioner calling upon the first petitioner to show cause, if any, why an order under Section 23-A should not be made against the first petitioner for the assessment year 1957-58. The first petitioner by its letters dated 24th April 1962, 8th May 1962 and 19th May 1962 pointed out to the Income-tax Officer the reasons why no order should be made under Section 23-A. The reasons were various, but it is not necessary for the purpose of the. present petition to set them out. It is sufficient to state that amongst various reasons the main reason then emphasized was that having regard to the smallness of the profit actually made, it would have been unreasonable for the first petitioner to distribute a larger dividend. The matter then went to the Inspecting Assistant Commissioner for his approval under Sub-Section (8) of Section 23-A and at that stage the first petitioner was again heard as required by that Sub-Section. The first petitioner reiterated before the Inspecting Assistant Commissioner the same submissions which he had made in reply to the notice of the Income-tax Officer and added one further submission, namely, that proceedings under Section 23-A were barred by reason of the period of limitation prescribed in Section 34(3) and that no order could, therefore, be made against the first petitioner under Section 23-A. These submissions were put on record by the first petitioner by its letter dated 9th July 1962 addressed to the inspecting Assistant Commissioner. Before the Inspecting Assistant Commissioner could decide whether he should grant or refuse approval to the Income-tax Officer for making an order against the first petitioner under Section 23-A, the petitioners filed the present petition for a writ of prohibition restraining the Income-tax Officer from taking action against the first petitioner under Section 23-A for the assessment year 1957-58 and a writ of certiorari quashing and setting aside the notice under Section 23-A issued by the Income-tax Officer against the first petitioner. The petition was opposed by the Income-tax Officer who was the respondent to the petition and he submitted an affidavit in reply to the petition pointing out the reasons for which, in his submission, the petition should be dismissed.

2. There were two grounds set out in the petition challenging the legality of the proceedings under Section 23-A and both the grounds were pressed before us by Mr. Kaji on behalf of the petitioners. The first ground was that by reason of the provisions of Section 34 (3) the proceedings under Section 23-A were barred. That was the main ground debated before us and we shall discuss it in some detail a little later, but a subsidiary ground - which was the second ground - was also advanced and that ground was that the first petitioner had no commercial profits in respect of which it could be asked to make a further distribution and that if such further distribution was ordered, it would amount to distribution of capital which would be contrary to law. Now whatever be the merits of this ground, we do not see why we should entertain it on this petition. The Inspecting Assistant Commissioner has not yet given his approval : It may be that he may accept the validity of the Contention of the first petitioner and refuse to give his approval. Even if the Inspecting Assistant Commissioner gives his approval, the first petitioner would still have an opportunity to argue its case before the Income-tax Officer and to persuade him not to make an order under Section 23-A on the ground that such order would not be justified by the facts of the case. If the first petitioner fails before the Income-tax Officer, it can carry the matter

in appeal before the Appellate Assistant Commissioner and if necessary from the Appellate Assistant Commissioner to the Tribunal. The first petitioner may even approach this Court by way of Reference under Section 66 if a question of law arises out of the order of the Tribunal. The first petitioner has, therefore, a specific and adequate alternative remedy available to it and it must pursue that remedy. Besides it is clear from the language of Section 23-A that the question whether having regard to the smallness of the profit made the payment of a larger dividend than that declared would be unreasonable or not is a question which is entrusted by the Legislature to the determination of the Revenue authorities and except on a Reference under Section 66 which may or may not lie to this Court according as a question of law arises or does not arise out of the order of the Tribunal, this Court cannot interfere and arrive at its own opinion on this question and on the strength of such opinion prevent the Revenue authorities from examining the question for the purpose of deciding whether an order under Section 23-A should be made. We are, therefore, of the view that this ground affecting the merits of the case is not a ground which we should entertain on this petition.

3. That takes us to the first ground which was the ground really pressed by Mr. Kaji on behalf of the petitioners. Mr. Kaji contended that an order under Section 23-A as it stood at the material time was an order of assessment and since Section 34(3) provided that no order of assessment shall be made after the expiry of four years from the end of the assessment year, no order under Section 23-A in respect of the assessment year 1957-58 could be made after the expiry of four years from the end of the assessment year 1957-58 i.e., after 31st March 1962 and the proceedings initiated by the Income-tax Officer for taking action against the first petitioner under Section 23-A for that assessment year were, therefore, beyond time and consequently without jurisdiction. This ground raised the question which we have set out at the commencement of the judgment, namely, whether an order under Section 23-A can be made at any time or whether it is governed by the period of limitation prescribed by Section 34(3). Now in order to answer this question it is necessary first to consider the terms of Section 34(3). The Section reads as follows :-

> "34(3). No order of assessment or reassessment, other than an order of assessment under section 23 to which clause (c) of Sub-Section (1) of Section 28 applies or an order of assessment or reassessment in cases falling within clause (a) of Sub-Section (1) or Sub-Section (1A) of this section shall be made after the expiry of four years from the end of the year in which the income, profits or gains were first assessable :
> Provided that where a notice under clause (b) of Sub-Section (1) has been issued within the time therein limited, the assessment or reassessment to be made in pursuance of such notice may be made before the expiry of one year from, the date of the service of the notice even if at the time of the assessment or reassessment the four years aforesaid have already elapsed :
> Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or reassessment may be made, shall apply

> to a reassessment made under section 27 or to an assessment or reassessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 31, Section 33, Section 33-A, Section 33-B, Section 66 or Section 66-A." It is clear from the language that the Section is general in its application and prescribes a period of limitation for every order of assessment or reassessment other than an order under Section 23 to which clause (c) of Sub-Section (1) of section 28 applies or an order of assessment or reassessment in cases failing within clause (a) of Sub-Section (1) or Sub-Section (1A) of Section 34. The period of limitation is relaxed in the case specified in the first proviso while it is dispensed with in the cases specified in the second proviso. We are, however, not directly concerned with these two provisos and we need not, therefore, say anything more about them. Since Section 34(3) applies generally to every order of assessment or reassessment barring the exceptions we have set out above, the next question we must consider is what is an order of assessment within the meaning of the Section.

4. It is a matter of common knowledge that the word "assessment" has been used in the Income-tax Act in different senses at different, places. As observed by the Judicial Committee of the Privy Council in *Commissioner, of Income-tax, Bom, and Aden v. Khemchand Ramdas*[1],

> "One of the peculiarities of most Income-tax Acts is that the word 'assessment' is used as meaning sometimes the computation of income, sometimes the determination of the amount of tax payable and sometimes the whole procedure laid. down in the Act for imposing liability upon the taxpayer. The Indian Income-tax Act is no exception in this respect. . . ."

What we must, therefore, consider is what is the meaning which the word "assessment" has in Section 34 (3). The subject matter with which Section 34 (3) deals and the reference in it to Sections 23 and 34 makes it clear that the word "assessment" which, is referred to in the Section comprises the entire procedure for imposing liability on. the assessee and the order of assessment is the order computing the income and determining the tax liability which is the culmination of the entire process of assessment. If an order under Section 23A is an order of assessment in the sense that it results in the imposition of tax liability on the assessee, it would be governed by the period of limitation set out in Section 34(3). The question, which would, therefore, require to be considered is : what is the nature of an order made under Section 23-A. Does it involve the process of assessment resulting in imposition of tax liability on the assessee ?

5. Now when we examine this question it is necessary to bear in mind that Section 23-A has not always been the same as we find it at the material time. Section 23-A as it stood prior to its amendment by the Finance Act, 1955, was radically different from the Section as it stood after the amendment and the Section with which we are concerned in this petition is the Section as it stood after the amendment, for the question that is required to be considered has arisen in regard

to the assessment year 1957-58. It is however necessary to consider the position as it obtained when Section 23-A was unamended because there are two decisions of the Supreme Court which have taken the view that an order under Section 23-A as unamended could be made at any time and there was no period of limitation which prevented the Income-tax Officer from resorting to that Section at any time he liked. Mr. Kaji contended that that was undoubtedly the position on the unamended Section, but after the amendment the position is entirely different and those decisions of the Supreme Court cannot be regarded as having any application in relation to the amended : Section. Section 23-A prior to the amendment provided as follows : (We are setting out here only the material part of the Section) : -

> "23-A. power to assess individual members of certain companies :- (1) Where the Income-tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company up to the end of the sixth month after its accounts for that previous year are laid before the company in general

[1](1938) 6 ITR 414 at p. 4116 : (AIR 1938 PC 175 at PP. 175-176)

> meeting are less than sixty per cent of the assessable income of the company of that previous year, as reduced by the amount of income-tax and super-tax payable by the company in respect thereof he shall, unless he is satisfied that having regard to losses incurred by the company in earlier years or to the smallness of the profit made, the payment of a dividend or a larger dividend than that declared would be unreasonable, make with the previous approval of the Inspecting Assistant Commissioner an order in writing that the undistributed portion of the assessable income of the company of that previous year as computed for income-tax purposes and reduced by the amount of income-tax and super-tax payable by the company in respect thereof shall be deemed to have been distributed as dividends amongst the shareholders as at the date of the general meeting aforesaid, and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purpose of assessing his total income :
>
> X X X X X"

This unamended Section came up for consideration before the Supreme Court in *Sardar Baldev Singh V. Commissioner of Income-tax, Delhi and Ajmer*[2] The Supreme Court pointed out the meaning and effect of the unamended Section in the following words :

> ". . . . . Section 23A requires that on an order being made under it, the undistributed portion of the assessable income of the company for a year as computed for income-tax purposes and after the deductions provided in the section, is to be deemed to have been distributed as dividends amongst the shareholders as at the date of the general meeting', being the meeting at which the accounts for the year concerned were passed, and 'thereupon, the proportionate share thereof of each shareholder shall be included in the

> total income of such share-holder for the purpose of assessing his total income'. The section creates a fictional income arising as on a specified date in the past and it does so for the purpose of that income being included in the income of the shareholders for assessment of their income-tax. The income must, therefore, be deemed to have been in existence on the date mentioned for the purpose of assessment to tax. . . . . We are unable to agree that an assessment could be made under Section 23A. That Section does not provide for any assessment being made. It only talks of the fictional income being included in the total income of the shareholders "for the purpose of assessing his total income". The assessment, therefore, has to be made under the other provisions of the Act including section 34, authorizing assessments. In our view, the assessment in this case had been properly made by the Income-tax Officer, Delhi, under the provisions of Section 34."

The Supreme Court took the view that R. 23-A was merely a computation section and not an assessment Section. It enacted merely a deeming provision creating fictional income in the hands of the shareholders and the fiction stopped there. The section did not provide for the making of an assessment on the shareholders in respect of such fictional income. The assessment of such fictional income in the hands of the shareholders could be made only by resort to the other provisions of the Act authorizing assessment, namely, Sections 23 and 34. If at the date when an order was made under Section 23A, the assessment of

[2](1960) 40 I. T. R. 605

the shareholder was not completed, the fictional income created by reason of the order under Section 23-A would be assessed in the hands of the shareholder along with his other income under Section 23. If, however, at the date of the order under Section 23-A the assessment of the shareholder was completed, the Revenue would have to take resort to Section 34. This was the view taken by the Supreme Court and in the later decision in *Commissioner of Income Tax Bombay City v. Navinchandra Mafatlal*[3], this view was reaffirmed by the Supreme Court. The same view was also reiterated by the Supreme Court in *Commissioner of Income-tax v. Robert, J. Sas*[4], Since Section 23-A as it stood unamended was merely a machinery or computation Section and was not an assessment Section providing for making of an assessment, obviously an order under Section 23-A could not be said to be an order of assessment. Such an order did not either compute the total income of the assessee or determine the tax liability of the assessee. It had to be followed by on order under Section 23 or Section 34 read with Section 23 and it was the latter order which was the order of assessment. It was for this reason that the Supreme Court said in Robert, J. Sas's Case, 1963-48 ITR 177 (SC) that an order under Section 23-A could be made at any time. Since the order under Section 23-A was not an order of assessment, Section 34(3) could clearly not apply to it. Apart from Section 34(3) there was no other provision in the Act which prescribed any period of limitation for an order under Section 23-A. An order under Section 23-A could, therefore, be made at any time. But for the purpose or assessing the fictional income created by the order under Section 23-A, the Revenue had to proceed under Section 23 or Section 34 and if the assessment under either of the two Sections was barred, such fictional

income could not be brought to tax. This was the position as it obtained in regard to the unamended Section 23-A.

6. The question is : has the amendment of Section 23-A made any difference to this position. Mr. Kaji contended that whereas prior to the amendment Section 23-A was merely a computation Section, it has now become an assessment Section and an order under Section 23-A is an order of assessment of a Company to super-tax in certain cases specified in the Section. The contention of the Department in relation to the unamended Section 23-A, namely, that Section 23-A was a self-contained section providing for making of an assessment on the share-holders, which was negatived by the Supreme Court now holds good in regard to the amended Section 23-A and the amended Section 23-A is argued Mr. Kaji, a self-contained Section imposing liability to super-tax and also providing for its computation and determination and that when an order under the amended Section 23-A is made, it is an order determining the amount of super-tax payable by the Company under the section. This contention was sought to be met by the learned Advocate General appearing on behalf of the Revenue by contending that what was imposed by the amended Section 23-A was not a tax but a penalty and that an order under the amended Section 23-A determining the penalty payable by the Company could not be said to be an order of assessment which would attract the applicability of Section 34(3). The main controversy between the parties, therefore, centred round the question as to whether the imposition or levy authorized to be made under Section 23-A as amended was a tax or a penalty.

7. While considering this question one circumstance stands out and it is that the Legislature has used the word "super-tax" to describe the imposition or levy authorized"

[3](1961) 42 ITR 53

[4](1963) 48 ITR 177 (SC)

under Section 23-A. It is no doubt true that we mast have regard to the substance of the matter in ascertaining the character and quality of the imposition or levy and we should not allow ourselves to be swayed unduly by any particular expression which may have been used by the Legislature. But in the context of the Income-tax Act it is certainly not without significance that the Legislature has used the word "super-tax" to describe the imposition or levy under Section 23-A. The Legislature was aware that in other parts of the statute it has used the word "penalty." Reference may be made in this connection to Sections 28 and 46. If the Legislature wanted to impose or levy a penalty by Section 23-A, it is reasonable to assume that the legislature would have used the word "penalty" which it had used in Sections 28 and 46 and not departed from what may be described as its own dictionary and used the word "super-tax" which plainly connotes nothing but tax. The explanation offered by the learned Advocate General for the Legislature not using the word "penalty" but using the word "super-tax" in Section 23-A was a two-fold one. The first explanation was that under Section 23-A in certain cases specified in Sub-Section (2) a locus penitentiae as it were was given to the Company and the Company could avoid payment of super-tax by making on receipt of a notice from the Income-tax Officer a further distribution of its profits and gains so that the total distribution made would not be less than the statutory percentage of the total income of the Company as reduced by the amounts

specified in Sub-Section (1) of Section 23-A and since such locus penitentiae was given to the Company, the Legislature might have thought it appropriate not to use the word "penalty" but to use the word "super-tax". This explanation does not in our opinion give any convincing reason why the legislature should not have used the word "penalty" and should have instead used the word "super-tax". Even when a penalty is sought to be imposed, a locus penitentiae may be given to the defaulting party. There is nothing inconsistent between the imposition of a penalty and giving of an opportunity to the defaulting party to make good the default if it wants to escape the penalty. Moreover, according to the submission of the learned Advocate General the imposition or levy under Section 23-A though described as "super-tax" was in fact a penalty and if, notwithstanding the imposition of penalty, a locus penitentiae was given to the Company, there is no reason why the word "penalty" should not have been used by the Legislature. The second explanation suggested by the learned Advocate General was that perhaps the Legislature used the word "super-tax" and not "penalty" because under Article 270 of the Constitution taxes on income are distributable between the Union and the States and taxes on income do not include Corporation tax so that Corporation Tax can be retained by the Union for its own purposes and since super-tax would be Corporation Tax within the meaning of that expression as used in Article 366(6), the Legislature intending that the imposition or levy collected under Section 23A(1) should be retained by the Union for its own purposes and should not be distributable between the union and the States described it as super-tax. But this argument postulates that the imposition or levy under Section 23-A. was Corporation tax and if that be so, it would be tax on income as appears clearly from the definition of "Corporation tax" contained in Article 366(6). This argument, therefore, far from supporting the submission of the learned Advocate General would, if correct, go to show that the imposition or levy under Section 23-A was tax on income and not penalty. Moreover, the legislative intent that the Union should be able to retain the imposition or levy collected under Section 23-A for its own purposes could have been achieved equally effectively by describing such imposition or levy as "penalty" and for the purpose of bringing about that result it was not at all necessary for the Legislature to use the word "super-tax."

8. Apart from the use of the word "super-tax" let us consider the true nature and effect of the order under Section 23-A and the object and purpose of the Legislature in enacting it. Before however, we do so, we may refer to the marginal note of Section 23-A on which some reliance was placed by Mr. Kaji on behalf of the petitioners. Now it is well-settled that the marginal-note cannot be regarded as an aid to construction of the Section and it cannot affect the plain and natural meaning of the language used in the Section but it can certainly be referred to as furnishing a clue to the meaning and purpose of the Section. The marginal-note to the amended Section 23-A is "Power to assess companies to super-tax on undistributed income in certain cases". The marginal-note clearly indicates the drift of the Section, namely, that the Section is intended for assessment of Companies to super-tax on undistributed income in certain cases and when we turn to the body of the Section we find that such is the meaning and effect of the Section and the Section does authorize assessment of Companies to super-tax on undistributed income in the cases specified in the Section.

9. Another circumstance to which we may also refer is the provision in Clause (a) of Sub-Section (1) of Section 23-A excluding the amount of super-tax payable under the Section in computing the amount of income-tax and super-tax payable by the Company by which the total income of the Company is required to be reduced for the purpose of calculation of the statutory percentage. This provision would indicate that but for it super-tax payable under the Section would have been included in the expression "super-tax payable by the Company" and it was, therefore, necessary to exclude it. But if this be so, it is evident that super-tax payable under the Section cannot be a penalty but must be a tax like other super-tax payable by the Company, This is of course a very slight circumstance and we do not place much reliance on it but it is certainly a circumstance which cannot be ignored.

10. Apart from these circumstances there is inherent evidence in Section 23-A itself to show that the imposition or levy made by the Section is a tax and not a penalty. The imposition or levy is not unrelated to the income of the Company. It is of course true that the imposition or levy is not on the total income of the Company but it is on the undistributed income of the Company. The quantum of super-tax is dependent on the extent of the undistributed income of the Company. The rate of 50 per cent is prescribed for a certain class of Companies while the rate of 37 per cent is prescribed for other Companies and that rate is to be applied to the undistributed income of the Company on which super-tax is imposed or levied. It is tins characteristic which clearly shows that what is imposed by Section 23-A is not a penalty but a tax. We may also mention here the fact that what Section 23-A provides is that the Company shall be liable to pay super-tax and not that the Company shall be liable to pay any amount by way of super-tax or as super-tax. If the latter expression had been used, there might have been some scope for the argument that what is imposed is a penalty and not a tax, though even this circumstance would not have been determinative of the question. This distinction appears in Sections 104 and 226 of the Australian Income-tax Act and it has been relied upon in some Australian; cases as affording an indication that what is imposed by Section 304 which corresponds to our Section 23-A is a tax and not a penalty. Moreover the words "apart from the sum determined as payable by it on the basis of the assessment under Section 23" in Section 23-A(1) also emphasize that the imposition or levy authorized under the Section is a tax like the tax assessed under Section 23 and is of the same nature as such tax and is not a penalty.

11. The conclusion that what is imposed by Section 23A is a tax and not a penalty is considerably strengthened if we have regard to the object and purpose of the Section. Section 23-A was brought on the statute book in 1939 to prevent avoidance of liability to pay super-tax by shareholders of certain classes of companies taking advantage of the disparity between the rates of super-tax payable by individuals and by Companies. The rates of super-tax applicable to companies being lower than the highest rates applicable to individual assessees, the Legislature enacted Section 23-A to prevent individual assessees from avoiding the higher incidence of super-tax by the expedient of transferring to companies the sources of their income and thereby

securing instead of dividends the benefit of the profits of the Company. The Legislature by the unamended Section 23-A invested the Income-tax Officer with power, in certain contingencies prescribed in the Section, to order that the undistributed balance of the assessable income reduced by the amount of taxes shall be deemed to have been distributed at the date of the general meeting. The Legislature enabled the income-tax Officer to create the fiction of distribution so that super-tax which the shareholders would have been liable to pay, had the income of the Company been distributed, can in. any event be recovered by the Revenue from the share-holders. The object was to strike at avoidance of super-tax by collecting from the shareholders super-tax which they might otherwise succeed in avoiding. The provision in the unamended Section 23-A was thus a fiscal provision and not a penal provision. It sought to get at super-tax which might otherwise have been avoided. The Legislature, however, it appears, felt that rather than create a fictional distribution and then tax the share-holders on such fictional distribution, it would be better to collect additional super-tax from the Company itself and therefore the Legislature amended Section 23-A by the Finance Act, 1955. The object of the Section remained the same, namely, to get at super-tax which might be avoided. Formerly the Revenue was entitled to recover it from the share-holders; now the Revenue can recover it from the Company. The provision still remained a fiscal provision. There is nothing in Section 23-A to indicate that the object of the Legislature when it amended the Section was to convert what was a fiscal provision into a punitive provision. Just as the object under the unamended Section 23-A was to impose a tax on the undistributed income in the hands of the share-holders, so also the object under the amended Section is to impose a tax on the undistributed income but in the hands of the Company. Since the Company would have already paid income-tax and super-tax on its total income, the amended Section 23-A provides that the Company shall be liable to pay additional super-tax on the undistributed income. What the Legislature still seeks to do by the amended Section 23-A is to get revenue and the character of the imposition remains, as before, fiscal and is not converted, from fiscal to punitive.

12. The learned Advocate General strongly relied on that part of Section 23-A which says that the Income-tax Officer shall make an order under the Section unless he is satisfied that having regard to the losses incurred by the Company in earlier years or to the smallness of the profit made, the payment of a dividend or a larger dividend than that declared would be unreasonable. His contention was that the very fact that the determination of the question whether this condition was fulfilled or not was left to the satisfaction of the Income-tax Officer showed that the imposition authorized under the Section could not be a tax. Now it is true that the question whether this condition is fulfilled' or not in a particular case is a question on which the Income-tax Officer has to be satisfied, but that satisfaction is not an arbitrary or subjective satisfaction in the sense that he can decide as he likes. His satisfaction has to be based on reason and is subject to appeal to the Appellate Assistant Commissioner and from the Appellate Assistant Commissioner to the Tribunal. All that has been done by the Section is to constitute him the Tribunal for deciding whether this condition is fulfilled. This provision cannot be regarded as so contradictory of the process of assessment of tax that from it we can infer that what is imposed

by Section 23-A is not tax but penalty. As a matter of fact when, we turn to Sections 10(4A) and 13, we find that even in what is admittedly a process of assessment, questions are left to the opinion of the Income-tax Officer, the correctness of which opinion can be tested in appeal before the Appellate Assistant Commissioner and the Tribunal.

13. The learned Advocate General also relied on the fact that by Sub-Section (8) of Section 23-A the previous approval of the Inspecting Assistant Commissioner is made a condition precedent to the making of an order under the Section and the Inspecting Assistant Commissioner is required before giving His approval to give the Company an opportunity of being heard. This provision is, however, in our opinion, quite a neutral provision. Since Section 23-A provides for imposition of additional super-tax on a Company which has already been assessed to Income-tax and super-tax, the Legislature might have thought it fit that some check should be put upon the Income-tax Officer and that he should not be permitted to make an order unless, he has obtained the previous approval of the Inspecting Assistant Commissioner and such previous approval should not be given unless the Company has had an opportunity of convincing the Inspecting Assistant Commissioner why an order under the Section should not be made assessing it to additional super-tax. An order under Section 23-A, being an order for payment of additional super-tax, the Legislature obviously provided this safeguard to the Company. Such a safeguard was also provided under the unamended Section 23-A which admittedly contained a fiscal provision. As a matter of fact we find that even when an assessment is sought to be reopened under Clause (a) of Sub-Section (1) of Section 34, there is a provision that the Income-tax Officer shall not reopen the assessment unless he has recorded his reasons for doing so and the Central Board of Revenue or the Commissioner as the case may be, is satisfied on such reasons that it is a fit case for the issue of notice reopening the assessment.

14. The learned Advocate General then relied on Section 55 which deals with the charge of super-tax and contended that super-tax would mean only such additional duty of income-tax as is specified in Section 55 and what is described as super-tax in Section 23-A is, therefore, not really super-tax as set out in Section 55. But we do not see how this argument can help the Revenue to establish its contention that what is imposed by Section 23-A is not tax but penalty. Super-tax is nothing but an additional duty of income-tax and that is what is stated also by Section 55. Section 55 imposes a charge of super-tax and that charge is on the total income of the Company at the rate or rates laid down by the Finance Act. But that does not mean that there cannot be another charge of super-tax in addition to the charge imposed by Section 55. While Section 55 imposes a general charge of super-tax on total income at the rate or rates laid down by the Finance Act. Section 23-A imposes an additional charge of super-tax on undistributed income in the case of certain class of Companies provided certain conditions are fulfilled. There is, therefore, nothing in Section 55 which in any way militates against the view that what is imposed by Section 23-A is a tax and not a penalty.

15. Lastly, the learned Advocate General contended that the view which we are inclined to take

would result in this anomaly that in the case of a Company whose income might be reassessed under Section 34(1)(a) or Section 34(1)(b) after the expiration of a period of four years from the end of the assessment year, it would not be possible to make an order under Section 23-A even though such reassessment may reveal that the provisions of Section 23-A were applicable to the Company. Mr. Kaji tried to point out that such would not be the position because in that event the Revenue would be entitled to pass an order under Section 34 read with Section 23-A. It is not necessary to enter into a consideration of these rival views and to decide which of them is correct. It may be that an order under Section 23-A can be passed by the Revenue by taking resort to Section 34 or it may be that no such order can be passed by the Revenue. But that is not a consideration which should deter us in placing upon the language of the Section the construction which it must necessarily bear. If any hardship is caused to the Revenue, the appeal must be to the Legislature and not to the Court.

16. If what is imposed by Section 23-A is a tax and not a penalty, it is clear that an order under the Section is an order of assessment. The Income-tax Officer acting under Section 23-A has first to ascertain whether the conditions of the Section are fulfilled and whether the Section is applicable to the Company. If it is, then he will have to arrive at the undistributed income of the Company liable to additional super-tax. He will then have to determine the rate applicable, namely, whether it is 50 per cent or 37 per cent according to the nature of the business carried on by the Company and he will then determine the additional super-tax payable by the Company. This process is certainly a process of assessment of the Company to additional super-tax. Section 23-A is a self-contained Section imposing additional super-tax and providing for its computation and determination and an order under the Section is certainly an order of assessment. Of course the result would be that there would be two orders of assessment in respect of the same Company, one a regular assessment under Section 23 and the other an assessment under Section 23-A. But we do not see why there, cannot be two orders of assessment in the case of an assessee. If there are two charges of tax made by the Act, not only there may be but there would ordinarily be two separate orders of assessment, one in respect of each charge. There is nothing in the scheme of the Act which in any way offends against the making of two different orders of assessment against an assessee.

17. This in our opinion is the only view of Section 23-A which we can take on a construction of the language of the Section. This view is however, fortified by a further consideration as regards the intention of the Legislature. Prior to the amendment by the Finance Act, 1955, even though an order under Section 23-A could be made at any time, the fictional income created by the order could not be assessed in the hands of the share-holders after the expiration of a period of four years from the end of the assessment year by reason of the provisions of Section 34. There was thus in effect an indirect period of limitation for the effective application of Section 23-A. The Department could not indefinitely keep its sword hanging over the heads of the share-holders. Now that the Legislature has amended the Section and shifted the liability on to the Company, could the Legislature have intended that the sword of the Department which could not effectively

strike after the expiration of a period of four years from the end of the assessment year should now be able to strike after an indefinite length of time ? When there is a period of limitation provided for taking action under Section 34(1)(a) in cases where the escaped income does not exceed Rs. 1,00,000/- could the Legislature have intended that there should be no period of Limitation at all for an order tinder Section 23-A which is an order of assessment to additional super-tax and that the threat of such an order should continue to be present up to the end of all time. is it not reasonable to assume that as Section 34(3) provided a general period of limitation for all assessment orders and Section 23-A was converted from a machinery Section into an assessment Section, the Legislature did not think it necessary to provide a separate period of limitation in respect of an order under Section 23-A, for the general period of limitation specified in Section 34(3) applied to such an order ?

18. In this view of the matter we are of the Opinion that an order under Section 23-A after its amendment by the Finance Act, 1955, is an order of assessment to which the period of limitation prescribed in Section 34(3) applies and such an order cannot, therefore, be made after the expiration of a period of four years from the end of the assessment year. Since in the present case the period of four years from the end of the assessment year 1957-58 expired on 31st March 1962 no order under Section 23-A could be made against the first petitioner in respect of the assessment year 1957-58 after 31st March 1962 and the present proceedings initiated by the Income-tax Officer against the first petitioner are, therefore, without jurisdiction. There will, therefore, be a writ of mandamus quashing and setting aside the notice issued by the respondent against the first petitioner and a writ of prohibition restraining the respondent from taking action against the first petitioner under Section 23-A for the assessment year 1957-58 on the basis of the notice dated 15th November 1961 issued by the respondent. The respondent will pay the costs of the petition to the first petitioner.
Petition allowed.