

M. M. PARIKH, INCOME-TAX OFFICER, SPECIAL
INVESTIGATION CIRCLE-B, AHMEDABAD

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NAVANAGAR TRANSPORT & INDUSTRIES
LTD. & ANR.

November 1, 1966

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[J. C. SHAH, V. RAMASWAMI AND V. BHARGAVA, JJ.]

Indian Income-tax Act (11 of 1922), s. 23A—Order under—Whether an “order of assessment”—Section 23A, whether a charging section—Limitation under s. 34(3) if applies.

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The appellant-Income-tax Officer issued a notice to the assessee-company to show cause why an order under s. 23A of the Indian Income-tax Act, 1922 should not be made for the assessment year 1957-58. The assessee applied to the High Court for a writ to restrain the appellant from giving effect to the notice. The High Court held that an order under s. 23A of the Act after its amendment by the Finance Act, 1955, was an “order of assessment” to which the period of limitation prescribed by s. 34(3) applied and since such an order could not be made after the expiration of four years from the end of the assessment year 1957-58 the proceedings initiated against the assessee in respect of the assessment year 1957-58 after March 31, 1962 was without jurisdiction.

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HELD : Section 23A is not a charging section and an order made thereunder is not an “order of assessment” to which the period of limitation prescribed by s. 34(3) applied.

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Section 23A before it was amended by Finance Act, 1955 was procedural. Section 23A(1), after it was amended by the Finance Act, 1955 provides within itself machinery for imposition of liability to pay additional super tax, but it has not on that account been made a charging section. A charge to tax arises under ss. 3, 4 and 5 of the Act for payment of income-tax and super tax and not under s. 23A. [47 E]

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Section 23A does not use the expression “assessment” in the body of cl. (1) : and to the title of the section after it was amended, viz. “Power to assess companies to super-tax on undistributed income in certain cases”, it is impossible to give any exalted meaning so as to convert what is an order directing payment of tax into an order of assessment within the meaning of s. 34(3) of the Indian Income-tax Act, 1922. Every order which contemplates computation of income for determination of the amount of tax payable is not an order of assessment within the meaning of the Act : nor does prescribing of procedure for determining and imposing tax liability make it an order of assessment. The Income-tax Act contemplates making of diverse orders by Income-tax Officers directing payments of sums of money by tax payers which are of the nature of orders for payment of tax, but still are not orders of assessment. [45 A.D.]

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1082 of 1965.

A Appeal from the judgment and order dated February 21, 1964 of the Gujarat High Court in Special Civil Application No. 802 of 1962.

S. V. Gupte, Solicitor-General, R. D. Karkhanis and R. N. Sachthey, for appellant.

B *S. T. Desai and K. R. Chaudhari*, for the respondents.

R. Vankatraman and R. Gopalakrishnan, for intervener No. 1.

S. P. Mehta, D. Pal and D. N. Gupta, for intervener No. 2.

D. Pal and D. N. Gupta, for intervener No. 3.

C *R. Gopalakrishnan and S. Swaminathan*, for intervener No. 4.

The Judgment of the Court was delivered by

Shah, J. M/s Navanagar Transport & Industries Ltd.—hereinafter called ‘the assessee’—is a company in which “the public are not substantially interested” within the meaning of s. 23A

D of the Indian Income-tax Act, 1922. At the annual general meeting held on December 4, 1957, the Company declared Rs. 8,767/- as dividend payable to the shareholders for the year ending March 31, 1957. The Income-tax Officer, Special Investigation Circle, Ahmedabad, determined the taxable income of the assessee for the assessment year 1957-58 at Rs. 1,10,769/-. Since the dividend declared

E by the Company was less than the statutory percentage of the total income of the Company, as reduced by the taxes specified in cls. (a) & (b) of sub-s. (1) of s. 23A, the Income-tax Officer issued a notice on November 15, 1961 calling upon the assessee to show cause why an order under s. 23A should not be made for the assessment year 1957-58 and submitted the record to the Inspecting Assistant Commissioner seeking permission under sub-s. (8). The assessee

F then applied to the High Court of Gujarat under Art. 226 of the Constitution for a writ of *mandamus* restraining the Income-tax Officer from giving effect to the notice under s. 23A against the assessee.

The High Court held that an order under s. 23A of the Income-tax Act, 1922, after its amendment by the Finance Act, 1955, is an

G “order of assessment” to which the period of limitation prescribed by s. 34(3) applies and since such an order cannot be made after the expiration of four years from the end of the assessment year 1957-58 the proceedings initiated against the assessee in respect of the assessment year 1957-58 after March 31, 1962 was without jurisdiction. The Income-tax Officer has appealed to this Court with certificate

H granted by the High Court.

Section 23A has undergone changes from time to time. Before it was amended by the Finance Act, 1955, s. 23A enacted that

where the Income-tax Officer is satisfied, that the dividends distributed by the Company are less than sixty per cent of the assessable income of the Company as reduced by the income-tax and super-tax payable by the Company, he shall make an order (except in certain circumstances specified) that the undistributed portion of the assessable income of the Company computed for income-tax purposes as reduced by the income-tax and super-tax in respect thereof be deemed to have been distributed as dividends among the shareholders and thereupon the proportionate share of each shareholder shall be included in the total income of each shareholder for the purpose of assessing his total income. Before an order under s. 23A, as it then stood, became effective, two steps had to be taken—

(i) an order had to be made that the undistributed portion of the assessable income of the Company shall be deemed to have been distributed as dividends among the shareholders; and (ii) the deemed income of each shareholder had to be included in the total income of such shareholder for the purpose of assessing his total income. An order declaring that the undistributed portion of the income shall be deemed to have been distributed was not an order of assessment: the order of assessment was made only when the Income-tax Officer took action against each shareholder for bringing the deemed income of each shareholder to tax in his individual assessment. The Legislature did not provide any period of limitation for making an order declaring that the undistributed portion of the income shall be deemed to be distributed as dividends. But since the order had to be followed up in the assessments of the shareholders individually, the order would, if made, be ineffective, if it was not made within the period prescribed by s. 34(3); see *Commissioner of Income-tax, Bombay City-I v. Robert J. Sas and Others.*⁽¹⁾ The procedure for bringing to tax undistributed income of companies which distributed less than the statutory percentage of its total income was clumsy and dilatory. Before tax could be recovered, enquiry had to be made into the matters referred to in s. 23A (1) and also whether the Company was one in which the public were not substantially interested, and after the order was made, each individual shareholder had to be separately assessed in respect of the deemed income.

The Legislature by the Finance Act, 1955, altered the scheme for imposition and collection of tax. Section 23A as amended by the Finance Act, 1955, read as follows:

“(1) Subject to the provisions of sub-sections (3) and (4), where the Income-tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company within the twelve months immediately following the expiry of that previous year

(1) [1963] Supp. 2 S.C.R. : 209:48 I.T.R. 177.

A are less than sixty per cent of the total income of the company of that previous year as reduced by—

(a) the amount of income-tax and super-tax payable by the company in respect of its total income, but excluding the amount of any super-tax payable under this section;

B (b) the amount of any other tax levied under any law for the time being in force on the company by the Government or by a local authority in excess of the amount, if any, which has been allowed in computing the total income; and

C (c) in the case of a banking company, the amount actually transferred to a reserve fund under section 17 of the Banking Companies Act, 1949 (X of 1949);

D the Income-tax Officer shall, unless he is satisfied that, having regard to losses incurred by the company in earlier years or to the smallness of the profits made in the previous year, the payment of a dividend or a larger dividend than that declared would be unreasonable, make "an order in writing that the company shall, apart from the sum determined as payable by it on the basis of the assessment under section 23, be liable to pay super-tax at the rate of four annas in the rupee on the undistributed balance of the total income of the previous year, that is to say, on the total income reduced by the amounts, if any, referred to in clause (a), clause (b) or clause (c) and the dividends actually distributed, if any:

E Provided that—

F (a) in the case of a company whose business consists wholly or mainly in the dealing in or holding of investments; and

G (b) in the case of any other company where the reserves (including the amounts capitalised from the earlier reserves) representing accumulations of past profits which have not been the subject of an order under this sub-section, exceed either the aggregate of—

(i) the paid-up capital of the company exclusive of the capital, if any, created out of its profits and gains which have not been the subject of an order under this sub-section, and

H (ii) any loan capital which is the property of the shareholders, or the actual cost of the fixed assets of the company, whichever of these is greater,

this section shall apply as if for the words 'sixty per cent of the total income', wherever they occur, the words 'the whole of the total income' had been substituted.

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(2) No order under sub-section (1) shall be made—

(i) in the case of a company referred to in clause (a) of the proviso to that sub-section, which has distributed not less than ninety per cent of its total income as reduced by the amounts, if any, referred to in clause (a), clause (b) or clause (c) of that sub-section, or

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(ii) in the case of any other company which has distributed not less than fifty-five per cent of its total income as reduced by the amounts, if any, aforesaid, or

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(iii) in any case where according to the return made by a company under section 22, it has distributed not less than sixty per cent of its total income as reduced by the amounts, if any, aforesaid, but in the assessment made by the Income-tax Officer under section 23 a higher total income is arrived at, and the difference in the total income does not arise out of the application of the proviso to section 13 "or sub-section (4) of section 23 or the omission by the company to disclose its total income fully and truly, unless the company, on receipt of a notice from the Income-tax Officer that he proposes to make such an order, fails to make within three months of the receipt of such notice a further distribution of its profits and gains so that the total distribution made is not less than sixty per cent of the total income of the company of the relevant previous year as reduced by the amounts, if any, aforesaid.

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(3) Where on an application presented to him in this behalf by a company within the period of twelve months referred to in sub-section (1) or within the period of three months referred to in sub-section (2), the Commissioner of Income-tax is satisfied, having regard to the current requirements of the company's business or such other requirements as may be necessary or advisable for the maintenance and development of that business, the declaration or payment of a dividend or a larger dividend than the proposed to be declared or paid would be unreasonable, he may reduce the amount of the minimum distribution required of that company under sub-section (1) to such figure as he may consider fit and further determine the period within which such distribution should be made.

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The principal change made by the amendment was that in the conditions prescribed by the section, the Company and not the

- A** shareholders were made liable to pay tax, and for that purpose the procedure was rationalised. The original scheme which contemplated two orders—one against the Company and the other against each individual shareholder was replaced by the imposition of tax liability upon the Company, on the income-tax Officer being satisfied about the existence of preliminary conditions which attracted liability to additional super-tax.
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By the Finance Act 26 of 1957 the section was further modified. Sub-sections (1) & (2), insofar as they are material, were substituted by the following sub-sections:

- C** “(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 within the twelve months immediately following the expiry of that previous year are less than the statutory percentage of the total income of the company of that previous year as reduced by—
- D** (a) the amount of income-tax and super-tax payable by the company in respect of its total income, but excluding the amount of any super-tax payable under this section;
- E** (b) the amount of any other tax levied under any law for the time being in force on the company by the Government or by a local authority in excess of the amount, if any, which has been allowed in computing the total income; and
- (c) in the case of a banking company, the amount actually transferred to a reserve fund under section 17 of the Banking Companies Act, 1949;
- F** the Income-tax Officer, shall, unless he is satisfied that having regard to losses incurred by the company in earlier years or to the smallness of the profits made in the previous year, the payment of a dividend or a larger dividend than that declared would be unreasonable, make an order in writing that the company shall, apart from the sum determined as payable by it on the basis of the assessment under section 23, be liable to pay super-tax at the rate of fifty per cent in the case of a company whose business consists wholly or mainly in the dealing in or holding of investments, and at the rate of thirty-seven per cent in the case of any other company, on the undistributed balance of the total income of the previous year, that is to say, on the total income reduced by the amounts, if any, referred to in clause (a), clause (b) or clause (c) and the dividends actually distributed, if any.
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(2) No order under sub-section (1) shall be made,—

- (i) in the case of a company whose business consists wholly or mainly in the dealing in or holding of investments which has distributed not less than ninety per cent of its total income as reduced by the amounts, if any, referred to in clause (a), clause (b) or clause (c) of sub-section (1); or
- (ii) in the case of any other company whose distribution falls short of the statutory percentage “by not more than five per cent of its total income as reduced by the amounts, if any, aforesaid; or
- (iii) in any case where according to the return made by a company under section 22, it has distributed not less than the statutory percentage of its total but in the assessment made by the Income-tax Officer under section 23 a higher total income does not arise out of the application of the proviso to section 13 or sub-section (4) of section 23 or the omission by the company to disclose its income fully and truly;

unless the company, on receipt of a notice from the Income-tax Officer, that he proposes to make such an order, fails to make within three months of the receipt of such notice a further distribution of its profits and gains, so that the total distribution made is not less than the statutory percentage of the total income of the company as reduced by the amounts, if any, aforesaid;”

Sub-sections (3) to (7) of s. 23A as introduced by the Finance Act, 1955, were omitted. By this amendment, the scheme for imposing liability for payment of additional super-tax was not altered.

It was urged before the High Court, and the argument appealed to the High Court, that an order under s. 23A as amended by the Finance Act, 1955, and as further modified by the Finance Act, 1957, by the Income-tax Officer directing payment of additional super-tax was an order of assessment which could only be made before the expiry of the period of limitation prescribed by s. 34(3) of the Income-tax Act, 1922. In support of this view, it was said that the expression “assessment” used in the Indian Income-tax Act, 1922, has different meanings in the context in which it occurs: sometimes it is used as meaning computation of income, sometimes as determination of the amount of tax payable, and sometimes the procedure for imposing liability upon the tax-payer.

- A** Reliance in this behalf was placed upon the judgment of the Privy Council in *Commissioner of Income-tax, Bombay Presidency & Aden v. Khemchand Ramdas*.⁽¹⁾ But s. 23A does not use the expression "assessment" in the body of cl. (i); and to the title of the section after it was amended, viz. "Power to assess companies to super-tax on undistributed income in certain cases", it is impossible
- B** to give any exalted meaning so as to convert what is an order directing payment of tax into an order of assessment within the meaning of s. 34(3) of the Indian Income-tax Act, 1922. Every order which contemplates computation of income for determination of the amount of tax payable is not an order of assessment within the meaning of the Act: nor does prescribing of procedure
- C** for determining and imposing tax liability make it an order of assessment. The Income-tax Act contemplates making of diverse orders by Income-tax Officers directing payments of sums of money by tax-payers which are of the nature of orders for payment of tax, but which are still not orders of assessment. For instance, under s. 18A(1) the Income-tax Officer is entitled to direct advance payment of tax. An order may also be made under s. 35(9) where the
- D** Income-tax Officer is satisfied that the income-tax payable by a Company on its profits and gains out of which the Company has declared a dividend, has not been paid within three years after the financial year in which the dividend was declared, he may proceed to recompute the amount by reducing it in the same proportion as the amount of income-tax remaining unpaid by the Company bears
- E** to the amount of income-tax payable by it on such profits and gains. Similarly under sub-s. (10) of s. 35, before it was deleted by the Finance Act, 1959, where a rebate of income-tax was allowed to a company on a part of its total income and subsequently the amount on which the rebate of income-tax was allowed was availed
- F** of by the Company, for declaring dividends in any year, the Income-tax Officer had to recompute the tax by reducing the rebate originally allowed. Again by s. 35(11), as added by the Finance Act of 1958, development rebate in respect of a ship, machinery or plant under s. 10(2)(vi-b) could be deemed to have been wrongly allowed if the ship, machinery or plant was sold or otherwise transferred, or the amount credited to the reserve account under that clause was diverted for another purpose within ten years, and the Income-
- G** tax Officer had to recompute the income, and levy tax on the footing of such recomputed income. In each of these cases there is computation of income, determination of tax payable and procedure is prescribed for imposing liability upon the tax-payer. But still these are not orders of assessment within the meaning of s. 23. The salient feature of these and other orders is that the liability to
- H** pay tax arises not from the charge created by statute, but from the order of the Income-tax Officer.

(1) 61.T.R. 414.

The argument that s. 23A is a self-contained section imposing liability to pay additional super-tax does not convert that section into one for assessment of tax. There is undoubtedly a hearing before liability is imposed for payment of additional super-tax; there is declaration of liability and the liability is determined in the manner prescribed by the section. That there is, as was argued before this Court, "a considerable parallel between ss. 23 & 23A" will not justify the assumption that what is done by an order under s. 23A as amended is assessment of tax liability. There is a vital difference between the assessment of tax under s. 23 and imposition of liability under s. 23A. Tax liability quantified by an order under s. 23 is a charge statutorily imposed by ss. 3 & 4 of the Act. It is true that the statutory liability is, till the last day of the year of account, ambulatory, but the charge is still a statutory charge on income. The function of the Income-tax Officer is to compute the taxable income and to crystallize the charge on the taxable income. Under s. 23A there is no statutory charge in respect of additional super-tax and the liability is imposed by the order of the Income-tax Officer. Source of the liability to pay additional super-tax is not in ss. 3 & 4 of the Act: it lies in and arises out of the order of the Income-tax Officer. Before imposing liability for additional super-tax, the Income-tax Officer has to determine whether the Company is one to which the provisions of s. 23A apply; he has also to determine whether the Company has distributed within twelve months immediately following the expiry of the previous year the statutory percentage of the total income of the Company as reduced by the taxes and levies prescribed therein; he has also to determine whether, having regard to the loss incurred by the Company in the earlier years or to the smallness of the profits made in the previous year, the payment of a dividend or a larger dividend than that declared would be unreasonable. It is after making these enquiries that the Income-tax Officer may make the order directing payment of additional super-tax at the rates prescribed. The process to be followed is not the process of assessment, but of determining whether the liability should be charged and imposed. For that purpose the Company is given a right to explain the reasons for failure to distribute the statutory percentage of profits as dividends. In certain special circumstances contemplated by sub-s. (2) of s. 23A, the order imposing tax liability cannot be made unless the Company after receiving a notice from the Income-tax Officer that he proposes to make such an order fails to make within three months of the order further distribution of its income so that the total distribution made is not less than the statutory percentage of the total income of the Company of the relevant previous year as reduced by the amounts, if any, aforesaid. Provision was also made in sub-s. (3) inserted by the Finance Act of 1955 authorising the Commissioner of Income-tax to reduce the amount of minimum distribution required of a Company, if having regard to the current

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A requirements of the Company's business or such other requirements as may be necessary, or advisable for the maintenance or development of the business, the declaration or payment of a dividend or a larger dividend than that proposed to be declared was unreasonable.

B It was urged that under the Indian Income-tax Act 43 of 1961 the Parliament has prescribed by s. 106 for making an order under s. 104 (of which the scheme is similar to the scheme of s. 23A as amended) a period of limitation. Section 106 of the Income-tax Act, 1961, provides that no order under s. 104 shall be made after the expiry of four years from the end of the assessment year relevant to the previous year referred to in sub-s. (1) of that section, or after
C the expiry of one year from the end of the financial year in which the assessment or re-assessment of the profits and gains of the previous year aforesaid is made, whichever is later. But the provisions of s. 23A have to be construed as they stood before the Act of 1961 was enacted, and the mere fact that the Legislature has chosen to specify a period of limitation for making an order imposing liability under s. 104 of the Act of 1961 upon a Company which has
D failed to distribute the statutory percentage of its distributable income will not justify an inference that such a period of limitation was implicit in the previous Act.

E Section 23A, before it was amended by the Finance Act, 1955, was undoubtedly procedural: *Commissioner of Income-tax, Bombay City-I v. Afco (Private) Ltd.*⁽¹⁾. Section 23A (1), after it was amended by the Finance Act, 1955, provides within itself machinery for imposition of liability to pay additional super-tax, but it has not on that account been made a charging section. A charge to tax arises under ss. 3, 4 & 55 of the Act for payment of income-tax and super-tax and not under s. 23A.

F Some additional indication which supports the view which we have expressed is furnished by ss. 30 & 31 of the Indian Income-tax Act. Section 30 provides for appeals from certain specified orders of the Income-tax Officer to the Appellate Assistant Commissioner. Under s. 30 an assessee denying his liability to be assessed under the Act may appeal against the order of assessment. If the assessee
G is a company it may also appeal against an order made under s. 23A (1) under s. 30. If an order under s. 23A were to be regarded as an order of assessment, it was plainly unnecessary to retain, after the amendment by the Finance Act, 1955, the right to appeal against the order made under sub-s. (1) of s. 23A by an independent clause. It is true that by s. 20(4) of the Finance Act, 1955, it was expressly enacted that the provisions of s. 23A of the Income-tax
H Act as in force immediately before April 1, 1955, shall continue to apply to a company in respect of which profits and gains of the

(1) [1963] Supp. 1 S.C.R. 766 : 48 I.T.R. 76.

previous year relating to the assessment year prior to the assessment year ending March 31, 1956, and also to its shareholders referred to in sub-s. (1) of s. 23A as then in force in respect of their appropriate previous years, and this necessitated that the right to appeal against the order under s. 23A before it was amended be preserved. But there is nothing in s. 30 which indicates that the reference to the right of appeal was restricted to orders under s. 23A, before the Act was amended by the Finance Act, 1955, and that it did not refer to an order made under s. 23A(1) after that clause was amended. The specific clause relating to the right of appeal reserved against the order under sub-s. (1) of s. 23A is general, and confers a right of appeal against the order passed under sub-s. (1) of s. 23A before it was amended by the Finance Act, 1955, and also under s. 23A after it was amended. There is no such reservation of the nature suggested by counsel for the assessee, and we see no reason to hold that the Legislature intended to make such a reservation and did not expressly so provide.

Under sub-s. (2) of s. 30 different periods of limitation for filing appeals against various orders under the Income-tax Act are prescribed. Against an order of assessment, an appeal lies within 30 days from the date of receipt of notice of demand objected to, and against an order under s. 23A an appeal lies within 30 days from the intimation of an order under that section. The Act does not call the order under s. 23A (1) for payment of additional super-tax a notice of demand. If the argument that an order under s. 23A, after it was amended, is an order of assessment, evidently the period of limitation covered by the first clause, namely, thirty days from the receipt of notice of demand will apply. It could not have been intended that the right of appeal could be exercised either within thirty days from the date on which an order under s. 23A was intimated or within thirty days from the date of receipt of notice of demand. Similarly, s. 31, which deals with the right of appeal from an order of assessment to the Appellate Assistant Commissioner, provides by sub-s. (3) that in disposing of an appeal the Appellate Assistant Commissioner may, in the case of an order of assessment—(a) confirm, reduce, enhance or annul the assessment or (b) set aside the assessment and direct the Income-tax Officer to make a fresh assessment after making such further inquiry as the Income-tax Officer thinks fit, or the Appellate Assistant Commissioner may direct, etc. and in the case of an order under sub-s. (1) of s. 23A under cl. (d) confirm, cancel or vary such order. If an order under sub-s. (1) of s. 23A was an order of assessment, even after the Act was amended, it was unnecessary to retain cl. (d) in that form.

The right to prefer an appeal could obviously be exercised both against an order under s. 23A before it was amended and after it was amended. Since the Legislature has not chosen to make

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A suitable amendments to restrict the right of appeal only to those cases where the right is exercised against an order declaring that the undistributed portion of the income shall be deemed to be distributed, it may reasonably be inferred that the right is exercisable in respect of the orders made prior to the amendment made by the Finance Act, 1955, and also orders made thereafter.

B It was pointed out that under s. 45 of the Act reference to sub-s. (3) of s. 23A could only be to the section as it stood before the amendment by the Finance Act, 1955. Insofar as it is material, s. 45 provides:

C "Any amount specified as payable in a notice of demand under sub-section (3) of section 23A shall be paid within the time, at the place and to the period mentioned in the notice or order,"

D Under sub-s. (3) of s. 23A before it was amended by the Finance Act of 1955, tax payable on the proportionate share of any member of a company in the undistributed profits was liable to be recovered from the Company if it could not be recovered from the shareholder. By the Finance Act, 1955, this clause was deleted and another clause which had nothing to do with recovery of tax was substituted as sub-s. (3). By the Finance Act, 1957, that new sub-s. (3) has been deleted. Section 45 deals with recovery of tax and in the context in which it occurs, reference in s. 45 to sub-s. (3) of s. 23A can only mean reference to that sub-section as it stood prior to the Finance Act of 1955. But that cannot be a ground for inferring that by s. 23A which is referred to in ss. 30 & 31 only intended to refer to the section as it stood before the Finance Act, 1955.

E The appeal is allowed and the petition filed by the assessee is dismissed with costs in this Court and the High Court.

Y.P.

Appeal allowed.