
(1956) 04 MAD CK 0043
In the Madras High Court

C.W. Spencer

APPELLANT

Vs

The Income Tax Officer

RESPONDENT

Date of Decision : 24-04-1956

Acts Referred:

Income Tax Act, 1961 — Section 23A

Citation : (1956) 69 LW 957 : (1956) 2 MLJ 518

Hon'ble Judges : Rajagopalan, J

Bench : Division Bench

Judgement

Rajagopalan, J.—Each of the petitioners held ten shares in Gannon, Dunkerley & Co., Limited, Bombay. Each of them obtained a further

80 shares when bonus shares were issued by the Company in 1948. They disclosed in their returns for the assessment year 1950-51 the dividend

income on those go-shares. The books of the company showed that each of them had in addition 1260 shares registered in his name. The claim of

the petitioners was that these shares were in their names as the nominees of one of the controlling shareholders of that company, viz., M.R.

Morarka.

2. Proceedings were taken against Gannon, Dunkerley & Co., hereinafter referred to as the "Company" u/s 23-A of the Income Tax Act, which

resulted in an order, dated nth March, 1955. On an apportionment of those undisbursed profits each of the petitioners was liable to treat as part of

his income, assessable in the year of assessment 1950-51 a sum of Rs. 16,411 (the dividend on 1350 shares) and pay Income Tax on that basis

u/s 23-A. Notices were issued to the petitioners u/s 34 of the Act on 23rd March, 1955 and they were asked to show cause against revised

assessment for the assessment year 1950-51.

3. Each of the petitioners applied under Article 226 of the Constitution for the issue of a writ of Prohibition, to restrain the departmental authorities

from taking any further proceedings to assess the petitioners u/s 34. Though an interim stay of further proceedings was first granted, those orders

were modified to permit the department to complete the assessment within the period of limitation prescribed by Section 34 of the Act. The

learned Counsel for the respondents, the departmental authorities, then represented that completion of the assessment during the pendency of the

proceedings in this Court under Article 226 would not be pleaded in bar of the investigation of the alleged invalidity of the initiation of proceedings

u/s 34 of the Act with the notices dated 23rd March, 1955.

4. The contentions of the learned Counsel for the petitioners were:

(i) Section 23-A was ultra vires and was beyond the legislative competence of the Legislature which enacted it.

(ii) Even if Section 23-A had been validly enacted, it became void under Article 13 of the Constitution, as enforcement of those statutory

provisions would result in an infringement of the fundamental rights guaranteed by Article 14 and Article 19 of the Constitution.

(iii) Even if the provisions of Section 23-A were enforceable against the petitioners, Section 34 of the Income Tax Act would not be applicable, as

there was no escape of assessment in the assessment year in question within the meaning of Section 34.

(iv) Even if Section 34 was applicable, the bar of limitation imposed by it would invalidate the notices issued on 23rd March, 1955.

5. Before we deal with the question of legislative competence of the Legislature to enact Section 23-A in the form in which it stood in the relevant

assessment year - it was subsequently amended again - it may be useful to set out how the problem of evasion of liability to Income Tax

particularly super-tax, with reference to undisbursed profits of a company, incorporated or otherwise, was tackled by the Legislatures in America,

England and India.

6. In Simon's Income Tax, Second Edition, Volume 3, page 341, the nature of the problem for the Legislatures was set out:

Generally speaking, surtax is charged only on individuals, not on companies or

other bodies corporate. Various devices have been adopted from time to time to enable the individual to avoid surtax on his real total income or on a portion of it, and one method involved the formation of what is popularly called a "one-man company". The individual transferred his assets, in exchange for shares, to a limited company, specially registered for the purpose, which thereafter received the income from the assets concerned. The individual's total income for tax purposes was then limited to the amount of the dividends distributed to him as practically the only shareholder, which distribution was in his own control. The balance of the income, which was not so distributed, remained with the company to form, in effect, a fund of savings accumulated from income which had not immediately attracted surtax. Should the individual wish to avail himself of the use of any part of these savings he could effect this by borrowing from the company, any interest payable by him going to swell the savings fund; and at any time the individual could acquire the whole balance of the: fund in the character of capital by putting the company into liquidation.

7. The trouble, loss to the country's exchequer, was the same whether the company was controlled by one man or by a numerically larger group of persons, as distinct from the companies in which the public were substantially interested. In this class of controlled companies the company was a juristic person distinct from the shareholders who were each a separate juristic entity. The liability to tax on income was not the only legal obligation, to define and impose which Legislatures and Courts have been called upon in various countries to look at the human individuals covered by the mask of a juristic person like the company.

8. Friedman has discussed some aspects of this problem in his "Legal Theory", Third Edition, page 400. We are however concerned now only with the case, in which the device of a corporate personality is used for evasion of tax obligations.

9. The levy of Federal Income Tax in the United States of America was put beyond the pale of constitution controversy by the 16th Amendment to the Constitution effected in 1913. The present position in America, in relation to undisbursed profits of controlled companies, was summed up by Corwin in his treatise "The Constitution And What It Means Today", at page 213. Congress may, in order to compel corporations to distribute their profits and

thereby render them taxable in the hands of stockholders, levy a special tax on such accumulated profits in the hands of the corporation, without transcending its powers under the Sixteenth Amendment, or violating the Fifth Amendment.

10. The same position was explained by Mertens in his "The Law of Federal Income Taxation", Volume 7, at page 325.

The code imposes a high surtax, in addition to all other taxes under Chapter 1 of the code, upon corporations which are "formed or availed of for

the purpose of preventing the imposition of the surtax upon its shareholders or the shareholders of any other corporation, through the medium of

permitting earnings or profits to accumulate instead of being divided or distributed"... The surtax applies whether the avoidance was accomplished

through the formation or use of only one corporation or a chain of corporations.

11. A detailed history of the legislative measures in America is furnished by Mertens at pages 328 to 336 of his book cited above. We shall set out

some extracts from that passage:

Congress recognised at the very beginning that the corporate form of doing business and holding property, especially in closed corporations, might

be used as a device to evade individual surtax. It inserted, therefore, in the 1913 Act, a provision designed to prevent corporations from

accumulating a surplus beyond the reasonable requirements of the business. That Act and the 1916 Act provided for including in the income of the

stockholder, the share of corporate gains or profits to which the shareholder would have been entitled if there had been a division or distribution -

the statute in such a case was designed to look through the corporate entity.

In 1921, Congress, fearful that the whole penalty section might be held invalid, abandoned the idea of taxing the shareholders and introduced the

presently operative notion of a penalty tax against corporations. The 1921 Act was the first Act to impose a separate penalty on the corporation;

here the corporate entity was not ignored, but an additional tax burden was placed upon corporation....

12. The learned author then referred to the change effected by the 1924 Act.

Furthermore, it offered an alternative remedy, viz., the shareholders could agree with the commissioner that tax could be levied on their distributive

shares as if there were no corporation but rather a partnership or personal service corporation, and in that event there was no tax upon the corporation as such.

After setting out the subsequent legislative history, the author recorded at page 335:

The 1938 Act, which enacted what is substantially the present Code provision, continued the policy of levying a special tax on corporations

formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders or the shareholders of any other corporation.

One of the changes effected by the 1938 Act was : It was provided that the earnings or profits are accumulated beyond the reasonable needs of

the business shall be determinative of the purpose to avoid surtax unless the corporation by the clear preponderance of the evidence shall prove to

the contrary.

13. The position in England was summed up in Simon's Income Tax, 2nd Edition, Volume 3, at page 341:

With a view to preventing this avoidance, Section 21 of Finance Act, 1922, now replaced by Section 245 of Income Tax Act, 1952 was enacted,

attaching super-tax (later surtax) liability to such a company's income, if a reasonable part of such income had not been distributed within a

reasonable time. The assessment to surtax is made on the member of the company (or members where more than one individual is concerned) "in

the name of the company", and in a sum equal to the appropriate part of the Company's income of the year in question attributable to each

member, after deducting amounts already distributed to him. For computing the rate of surtax to be charged, the amount so apportioned to each

member is deemed to be the highest part of his total income.

The tax is payable by the company, except in so far as the members elect to pay, but if the company defaults, the tax is recoverable from the

members

To the same effect were the observations of Singleton, L.J., in *Latilla v. Inland Revenue Commissioner* (1949) 2 All E.R. 589 .

It is, I think, essential to bear in mind that one is not considering income which has been received, nor tax which has become due in respect of

income received, by a taxpayer. The Finance Act, 1922, Section 21, initiated a

scheme of taxing a private company which did not distribute what -
was considered to be a reasonably sufficient proportion of its income.

One arrived at the amount of the tax by reference to the total income of the member - and the apportioned income was to be deemed to be the highest part of the income, thus attracting the highest rate of tax, but the liability to pay the tax was placed on the company, and is still on the company. The change made by the Finance Act, 1936, Section 19(5), was to provide that, if the company did not discharge its debt or liability, the tax is to be recoverable from the member. The tax was, and is, payable by the company. It is a tax on the company. It is only if it is not paid by the company within the time specified that it becomes recoverable from the member.

14. The Legislature in India took steps later than the Parliament in England to meet this kind of possible evasion of tax liability. Section 23-A was included in the Indian Income Tax Act by the Amending Act XXI of 1930. As enacted in 1930, the relevant portions of Clauses (1) and (2) of

Section 23-A ran:

(1) Where the Income Tax Officer is satisfied that any firm or other association of individuals carrying on any business, other than a Hindu

undivided family or a company, is under the control of one member thereof, and that such firm or association has been formed or is being used for

the purpose of evading or reducing the liability to tax of any member thereof, he may, with the previous approval of the Assistant Commissioner,

pass an order that the sum payable as Income Tax by the firm or association shall not be determined, and thereupon the share of each member in

the profits and gains of the firm or association shall be included in his total income for the purpose of his assessment thereon.

(2) Where the Income Tax Officer is satisfied that a company is under the control of not more than five of its members and that its profits and gains

are allowed to accumulate beyond its reasonable needs, without being distributed to the members, or that a reasonable part of its profits and gains,

has not been distributed to its members in such manner as to render the amount distributed liable to be included in their total income, and that such

accumulation or failure to distribute is for the purpose of preventing the imposition of tax upon any of the members in respect of their shares in the

profits and gains so accumulated or not distributed, the Income Tax Officer may pass an order that the sum payable as Income Tax by the

company shall not be determined, and thereupon the proportionate share of each member in the profits and gains of the company, whether such

profits and gains have been distributed to the members or not, shall be included in the total income of such member for the purpose of his

assessment thereon.

The proviso to Section 23-A(2) excluded companies in which the public were substantially interested.

15. Act VII of 1939 substituted Clause (1) of Section 23-A as amended for Clauses (1) and (2) of the old Section 23-A enacted in 1930. The

relevant portion of Sub-section (1) of Section 23-A as enacted in 1939 ran:

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 meeting are less than sixty per cent, of

the assessable income of the company of that previous year - he shall - make 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 - 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.

The proviso to the amended Clause (1) of Section 23-A excluded companies in which the public were substantially interested.

16. It was Section 23-A(1) as enacted by Act VII of 1939 that applied to the petitioners in the relevant assessment year. The position u/s 23-A,

as it stood before it was amended again in 1955, was summed up by Kanga in his treatise on Income Tax, third edition, page 689:

Where the whole or a portion of a company's net income of the previous year was not distributed as dividends, the Income Tax Officer was

bound in the circumstances specified in the section to make an order in writing that the undistributed income of the company should be deemed to

have been distributed amongst the shareholders, and thereupon the

proportionate share thereof of each shareholder was included in the total income of such shareholder for the purpose of assessing his total income. The Income Tax Officer had to apportion the undistributed profit among the shareholders who would have received it, and in the proportions in which they would have received it, if the whole amount had been distributed by the company by way of dividend in accordance with the rights of the members as defined in the Memorandum; and Articles of Association of the company.

Thus this section in effect created fictional or notional dividend-income which was not in fact received by the shareholder. The notional dividend was deemed to have been distributed as on the date on which the accounts of the previous year were laid before the company in general meeting.

An order made under this section was not itself an order of assessment. It had to be followed by an assessment on the shareholder either u/s 23 or u/s 34 before the shareholder could be held liable to pay tax in respect of the notional dividend-income.

Section 23-A was recast by the Finance Act of 1955. The relevant portion of Clause (1) now runs:

...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 sixty per cent, of the total income of the company of that previous year the Income Tax Officer shall make an order in writing that the company shall, apart from the sum determined as payable by it on the basis of the assessment u/s 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....

The proviso to Section 23-A(1) as amended in 1939 was replaced by a new clause in 1955. Section 23-A(9) ran:

nothing contained in this section shall apply to any company in which the public are substantially interested....

17. The most noticeable change effected by the 1955 Amendment was pointed out by Kanga at page 688:

Formerly the operation of this section resulted in the levy of tax on the shareholders by the inclusion of the notional dividend (which was in fact not

distributed by the company) in their total income; now the levy is on the company alone which has to pay additional super-tax at a flat rate of four annas in the rupee on the undistributed profits.

18. Undistributed profits of a company are still its profits. They constitute the income of the company. Until the company declares a dividend, no portion of those profits can become the income of the shareholders. In England or in India the position is the same. The shareholder cannot compel the company by any process of law to declare a dividend. What Section 23-A did before it was amended in 1955 was to create a legal fiction.

Stone, C.J., in *S. C. CAMBATTIA Vs. COMMISSIONER OF INCOME TAX, BOMBAY.*, :
...looking at the scheme of the Act, Section 23-A is a procedural section and not a charging section. It creates a notional income, which is wholly artificial, and which does not in fact exist in the pocket of any shareholder. Within the terms of that section this artificial income is to be deemed to have been distributed...We are not dealing with anything concrete as no distribution has in fact taken place and no shareholder has in fact received any income.

19. Apart from the tax levied on the profits of a company, undisbursed profits of controlled companies have come in for a special levy of Income Tax. The incidence of that tax was but incidental to that levy. In America the incidence first fell on the shareholder. Subsequently the incidence was shifted to the company. That was virtually the legislative pattern the Indian Legislature followed. Till 1955 the incidence was on the shareholder. Now it is on the company. In America for a time the shareholder could elect to bear the burden of the tax. That alternative has not so far been provided in the Indian Statutes in that form. But it should be remembered that, though the incidence of the tax up to 1955 was on the shareholder, provision was made in Section 23-A(3) as it stood during that period for the collection of the tax from the company, if it could not be recovered from the shareholder. In England the incidence of the tax was on the company. Now it falls upon the shareholder if the company fails to pay.

20. The question of legislative competence to enact such a legislative provision could not of course arise in England. The question in the form in which it could arise in India, either under the Government of India Act, 1935, or under the Constitution, with their Legislative Lists, could not arise

in America either. But the Sixteenth Amendment of the American Constitution still requires that the tax should be on income, which is what the relevant entry in the Legislative Lists requires in India.

21. It is the validity of Section 23-A as it was enacted in 1939, that is now in issue. The legislative power to enact that provision had to be founded

on Entry 54 in List I of the Seventh Schedule of the Government of India Act, 1935 "Taxes on income other than agricultural income". It should,

however be remembered that what the Legislature did in 1939 was to amend an existing provision of law and not to enact something wholly new.

The competence of the Legislature that enacted Section 23-A in 1930 had to be tested with reference to the provisions of the Government of India

Act, 1919. The position under the Act of 1919 was summed up by Beaumont, C.J., in *THE PATIALA STATE BANK, IN RE.*, .

I think that properly considered, Income Tax is a tax on a person in relation to his income. The tax is not imposed on income generally; it is

imposed on the income of a person, natural or artificial, as defined in Section 3. The assessment has to be made against a person and the tax has to

be collected from the assessee...But in my opinion that does not mean that legislation as to Income Tax can never be regarded as legislation as to a

thing in British India within the meaning of Section 65 of the Government of India Act. In my opinion, a tax on income accruing or arising or

received in British India by a person resident outside British India, is legislation relating to some thing, i.e., certain income, in British India, and

therefore to my mind, it falls within the very wide and general words of Section 65.

22. We can however, well afford to exclude from further consideration this aspect of the case and to discuss the problem of legislative

competence, as if the power to enact Section 23-A in 1939 has to be tested with reference to the Entry 54 in List I of the Seventh Schedule to the

Government of India Act, 1935.

23. In *B.M. Amina Umma Vs. Income Tax Officer, Kozhikode*, , the learned Judges quoted with approval the well-settled rule of construction that

was explained by Chagla, C.J., in *Col. Sir J.N. Duggan and Another Vs. The Commissioner of Income Tax, Bombay City*,

It is well settled now that a large and liberal interpretation must be placed upon

all entries in the Seventh Schedule of the Government of India Act, and that the widest import and significance must be given to the language used by Parliament in these various entries. It must not be forgotten that the Legislature created by the Government of India Act was a sovereign Legislature within its own sphere, and that, when a topic was assigned to a particular Legislature in respect of which it could legislate, then all possible powers with regard to that topic must be attributed to that Legislature.

24. It was that principle that was re-affirmed by the Supreme Court in *Navinchandra Mafatlal Vs. The Commissioner of Income Tax, Bombay*

City, . After referring to *Croft v. Dunphy* (1933) A.C. 156, and the observations of Gwyer, C.J., in *In re The Central Provinces and Berar Act*

(XIV of 1938) (1939) 1 M.L.J. 1 : 1939 F.C.R. 18 , Das, J., (as he then was) observed:

It should be remembered that the problem before us is to construe a word appearing in Entry 54 which is a head of legislative power. As pointed

out by Gwyer, C.J. in *The United Provinces v. Atiqa Begum* (1940) F.C.R. 110 : (1941) 1 M.L.J. 65, none of the items in the Lists is to be read

in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and

reasonably be said to be comprehended in it. It is therefore clear - that in construing an entry in a List conferring legislative powers the widest

possible construction according to their ordinary meaning must be put upon the words used therein.

25. The legislative practice that prevailed both in England and in India prior to 1939 sanctioned the concept of a notional income as the basis of

levy of tax on income. A controlled company's undisbursed profits were treated for the purpose of tax as the income of the individual

shareholders. That concept was retained in Section 23-A as enacted in 1939. We find it difficult to accept the contention, that Entry 54 did not

permit that continuance. That the legal fiction had been invoked earlier than 1935 both in England and in India is certainly a very relevant factor in

determining what was the scope of Entry 54, as Parliament envisaged it when it enacted that provision in the Government of India Act, 1935.

26. To focus attention on the incidence of the tax for which also Section 23-A provided to the exclusion of the basis of taxation, can only tend to

cloud the issue of legislative competence. What was it that was taxed, undisbursed profits. Undisbursed profits were undoubtedly income, a part thereof. True it was the income of the company and it remained as part of the assets of the company even after the taxing authorities had passed an order u/s 23-A. Except notionally, and then only for the purposes of the incidence of the tax, undisbursed profits did not become the income of the shareholders. Nonetheless, the position remains that what was taxed, undisbursed profits, was income. The net profits of the company were subject to tax. A provision for a further levy on undisbursed profits, which constituted a part of the net profits of the company would still be a statutory provision to tax income. Legislative power to provide for a further levy on the same income, the income of the company, could not be denied. Whether the constitutional validity of such a levy could be challenged on other grounds would be a different problem. The expediency of such an additional levy is a problem which the Courts could not decide. So, what Section 23-A did was, in essence, to tax income, the income of the company. Only, the incidence of that tax was not on the company in the first instance but on the shareholder, who had no doubt no legal right to get his share of the undisbursed profits of the company. Had the Legislature the competence in 1939 to provide for such an incidence would appear to be the real question.

27. To what extent the incidence of the tax affects the question of legislative competence to levy the tax was discussed in a judgment of this Court, to which one of us was a party in *B.M. Amina Umma Vs. Income Tax Officer, Kozhikode*, . After referring to the observations of Viscount Finlay in *Jhon Smith & Son v. Moore* (1930) 12 Tax Cas. 266 , the judgment proceeded: This passage brings out in sharp relief the basis of taxation and the incidence of the tax. The incidence of the tax whether it is the immediate and apparent incidence, or whether it is the ultimate or real economic incidence, does not in our opinion limit the taxing power given to the Central Legislature by Entry 54 of List I. All that Entry 54 requires is that the tax must be a tax on income other than agricultural income. The impugned provision, Section 16(3)(a)(ii) of the Income Tax Act provided only for a tax on income. It does not cease to be a tax on income either in form or in substance, though it provides for the incidence of the tax not on the person

whose income is to be assessed to tax, but on another.

The contention, that such a provision was opposed to the true concept of Income Tax, which was essentially a tax on the income of the person

assessed, was specifically rejected, see the observations at page 145. Yet, that in substance was the plea of the learned Counsel for the petitioners

in this case also with reference to Section 23-A. u/s 23-A the tax was on the income of the company. The primary incidence of that tax was on the

shareholders of the company. That did not alter the nature of the tax. It was still a tax on income.

28. In *Penang and General Investment Trust Ltd. v. Inland Revenue Commissioners* (1943) A.C. 486, Lord Macmillan pointed out that it was the

character of the distribution not its ultimate tax effect, that was referred to in the analogous English Section 21 of the Finance Act of 1922. In *B.M.*

Amina Umma Vs. Income Tax Officer, Kozhikode, reference was also made to the observations of the Supreme Court in *Commissioner of*

Income Tax/excess Profits Tax, Bombay City Vs. Bhogilal Laherchand, :

The term deemed brings within the net of chargeability income not actually accruing but which is supposed notionally to have accrued. It involves a

number of concepts. By statutory fiction income which can in no sense be said to accrue at all may be considered as so accruing. Similarly the

fiction may relate to the place, the person or be in respect of the year of taxability.

Legitimate fictions were thus well within the ambit of the legislative power founded on Entry 54 in List I.

29. We have already referred to the observations of Das, J., in *Navinchandra Mafatlal Vs. The Commissioner of Income Tax, Bombay City*, ,

where he pointed out

that the word income should be construed to extend the power to all ancillary or subsidiary matters which can fairly and reasonably be said to be

comprehended in it. The legislative measures designed to prevent evasion of a tax on income would thus be within the scope of the legislative

power to tax income.

30. It is was on *Eisner v. Macomber* 64 L. Ed. 521, Mr. Jagadisa Ayyar, learned Counsel for the petitioners relied to a considerable extent to

support his contention, that undisbursed profits in the hands of the company, of

which the petitioners were shareholders did not become income at all in the hands of the petitioners. He contended further that, if it was not the assessee's income, the Legislature could not validly levy a tax on that sum treating it as income within the scope of Entry 54 in List I. The question for decision in *Eisner v. Macomber* 64 L. Ed. 521, was formulated in these words:

This case presents the question whether, by virtue of the 16th Amendment, Congress has the power to tax, as income of the stockholder...a stock

dividend made lawfully and in good faith against profits accumulated by the corporation since 1st March, 1913.

31. That question was answered in the negative by Pitney, J., on behalf of the majority of the Supreme Court. The ground on which that answer

was rested was that the stock dividend represented by the issue of stock certificates to the existing shareholders, was capital and not income.

At page 533 the learned Judge observed:

The Sixteenth Amendment applies to income only, and what is called the stockholder's share-in the accumulated profits of the company is capital,

not income.

32. Earlier he had observed:

...enrichment through increase in value of capital investment is not income in any proper meaning of the term.

33. In *Commissioner of Inland Revenue v. Blott* (1921) 2 A.C. 171, an assessment to super-tax under the Finance Act, 1910, was made upon the

assessee for a certain year in respect of an allotment to him of bonus shares in the limited company. The House of Lords held by a majority that for

the purposes of the super-tax the shares so allotted to the assessee could not be treated as part of his total income from all the sources for the

previous year within the meaning of Section 66, Sub-section (2) of that Act, as in much as they were not part of his income but were an addition to

his capital in that year. The case, it should be remembered, was decided well before the English Parliament brought the undistributed profits of

controlled companies within the net of taxation by the Finance Act of 1922. Learned Counsel for the petitioners referred to this decision in support

of his contention, that undistributed profits held by the company could not be treated as income of the shareholder within the meaning of the term,

"income" in Entry 54. In *Blott's Case* (1921) 2 A.C. 171, Viscount Haldane did not rest his decision on *Eisner v. Macomber* 64 Law Ed. 521, see

his observations at page 188. Lord Cave, however, observed:

In an American case *Eisner v. Macomber* 64 Law Ed. 521, a similar question arose for the decision of the Supreme Court of the United States.

The question there was, whether Congress had power under the Sixteenth Amendment to the Constitution to tax as income of the stockholder and

without apportionment among the States a stock dividend made in good faith by a corporation; and the question was decided by a majority of the

Court, in the negative. The law there in question, no doubt, differs from ours; but the luminous reasoning of Pitney, J., in that case is relevant to the

question now under consideration, and compels my assent.

34. Whether undisbursed profits of a company of a given year, and a controlled company at that, could fall within the scope of the term income,

and whether a proportionate share of those undisbursed profits, ascertained not by the company but by a taxing officer, could be treated notionally

by the Legislature as the income of the shareholder, were not the questions that specifically arose for decision in *Eisner v. Macomber* 64 Law Ed.

521. No doubt Pitney, J., pointed out at page 533:

...the Government...insisted as an alternative that, by the true construction of the Act of 1916, the tax is imposed not upon the stock dividend, but

rather upon the stockholder's share of the undivided profits previously accumulated by the corporation; the tax being levied as a matter of

convenience at the time such profits become manifest through the stock dividend. If so construed, would the Act be constitutional?

35. The learned Judge continued:

That Congress has power to tax shareholders upon their property interests in the stock of corporations is beyond question; and that such interests

might be valued in view of the condition of the company, including its accumulated and undivided profits, is equally clear. But that this would be-

taxation of property because of ownership, and hence would require apportionment under the provisions of the Constitution, is settled beyond

peradventure by previous decisions of this Court.

After referring to *Brainard v. Hubbard* 20 Law. Ed. 272, Pitney, J., concluded with the passage extracted above, that what was called the

stockholder's share in the accumulated profits of the company was capital and not income. The real question in *Eisner v. Macomber* 64 Law. Ed.

521, was whether the distribution of stock certificates after the accumulated profits of the company had been capitalised could be treated as

receipt of income by the shareholder. The real nature of such a stock dividend was explained by the learned Judge at page 530:

A "stock dividend" shows that the company's accumulated profits have been capitalized, instead of distributed to the stockholders or retained as

surplus available for distribution in money Or in kind should opportunity offer. Far from being a realization of profits of the stockholder, it tends

rather to postpone such realization, in that the fund represented by the new stock has been transferred from surplus to capital, and no longer is

available for actual distribution.

The essential and controlling fact is that the stockholder has received nothing out of the company's assets for his separate use and benefit; on the

contrary, every dollar of his original investment together with whatever accretions and accumulations have resulted from employment of his money

and that of the other stockholders in the business of the company, still remains the property of this company and subject to business risks which

may result in wiping out of the entire investment. Having regard to the very truth of the matter, to substance, and not to form, he has received

nothing that answers the definition of income within the meaning of the Sixteenth Amendment.

36. The learned Counsel for the petitioners urged that the principle laid down by Pitney, J., in *Eisner v. Macomber* 20 Law Ed. 272, should be

extended to a case of notional distribution of undisbursed profits without the issue of a stock certificate. He contended that the position of a

shareholder should not be worse if no scrip was issued. But this argument overlooks that the undisbursed profits, for taxing which Section 23-A

provided, did not constitute capital accretions either in the hands of the company or notionally even with reference to the shareholder.

37. The learned Advocate-General urged that the basic principle that underlay the decision in *Eisner v. Macomber* 64 Law. Ed. 521, that

distribution of accumulated profits of a company by the issue of stocks amongst its shareholders would only increase the value of the capital of the

shareholder and would not represent a receipt of income by the shareholder of that company, could not apply to this country, in view of the decision of our Supreme Court in *Navinchandra Mafatlal Vs. The Commissioner of Income Tax, Bombay City*, where it was held that capital gains which became taxable u/s 12-B of the Act also fell within the scope of income in Entry 54 of List I. At page 837 of the judgment of the Supreme Court, the learned Judge referred to *Eisner v. Macomber* 64 Law. Ed. 521, as one of the cases, which supported the argument that a very wide meaning should be ascribed to the word income. No specific reference was made by the learned Judge to the ultimate basis of the decision in *Eisner v. Macomber* 64 Law. Ed. 521, that income did not include what was really an accretion to capital in the hands of the shareholder. Whether a distribution of stock dividend would come within the scope of capital gains, with which Section 12-B of the Act dealt, is not the question before us. We are concerned only with the undisbursed profits retained by the company in its hands, which neither the taxing authorities nor the shareholder could compel the company by any process of law to distribute to the shareholders as dividend. Such undisbursed profits constitute in fact the income of the company.

38. The learned Advocate-General pointed out that even in America undisbursed profits of a company were taxed as income and the validity of such a tax was sustained. *Brainard v. Hubbard* 20 Law. Ed. 272, was one such case. There the tax was levied on the shareholder, and its validity was upheld. We have pointed out that this case was referred to and explained in *Eisner v. Macomber* 64 Law. Ed. 521. Two other cases which the learned Advocate-General referred to were *Helvering v. National Grocery Co.* 82 Law. Ed. 1346, and *Helvering v. North-west Steel Rolling Mills* 85 Law. Ed. 29. In these cases, however, the tax was levied on the corporation. In *Helvering v. National Grocery Co.* 82 Law. Ed. 1346, Justice Brandes observed at pages 1352-53:

It is said that the statute is unconstitutional because the liability imposed is not a tax upon income, but a penalty designed to force corporations to distribute earnings in order to create a basis for taxation against the stockholders. If the business had been carried on by Kohl individually all the year's profits would have been taxable to him. If, having a partner, the business

had been carried on as a partnership, all the year's profits would have been taxable to the partners individually, although these had been retained by the partnership undistributed...Kohl, the sole owner of the business, could not, by conducting it as a corporation, prevent Congress, if it chose to do so, from laying on him individually the tax on the year's profits. If it preferred, Congress could lay the tax upon the corporation, as was done by Section 104. The penal nature of the imposition does not prevent its being valid, as the tax was otherwise permissible under the constitution.

39. The learned Advocate-General referred to cases where English Courts have upheld such a levy on undisbursed profits of controlled companies. But then, they may not be of direct assistance to us in answering the question of legislative competence of the Indian Legislature to enact Section 23-A.

40. As we pointed out, undisbursed profits constituted income, and Section 23-A taxed that income. The machinery for taxing that income involved the creation of the legal fiction that the proportionate share of those undisbursed profits was the income of the shareholder. He was assessed on that income. The primary incidence of the tax was on the shareholder. Section 23-A (3) provided for an alternative incidence on the company itself. Neither of those provisions for the incidence of the tax altered the nature of the tax. It was still a tax on income, and that was well within the scope of Entry 54 of List I of the Seventh Schedule of the Government of India Act, 1935. B.M. Amina Umma Vs. Income Tax Officer, Kozhikode, , is a direct authority of this Court for the position, that the incidence of the tax does not limit the legislative power founded on Entry

54.

41. Mr. Jagadisa Ayyer contended that the enactment of a legal fiction, to treat as income what was not income at all was a colourable exercise of legislative power, which should be sufficient to invalidate Section 23-A. The scope of statutory fictions, within the legislative competence of the Legislature to enact in exercise of the powers founded on Entry 54, was explained in Commissioner of Income Tax/excess Profits Tax, Bombay City Vs. Bhogilal Laherchand, , and that was applied by this Court in B.M. Amina Umma Vs. Income Tax Officer, Kozhikode, .

42. With reference to Navinchandra Mafatlal Vs. The Commissioner of Income Tax, Bombay City, , on which the learned Advocate-General

relied, to support his contention that legislation to prevent evasion of tax was within the ambit of the power to tax, and that it was ancillary to the

power to tax income, which Entry 54 authorized, Mr. Jagadisa Ayyar contended that, that principle could not be invoked, if his contention was

accepted, that what Section 23-A taxed as the income of the assessee was not his income at all. Of course, under legislation authorized by Entry

54 only income could be taxed. Mr. Jagadisa Ayyar urged that, if there was no liability because there was no income, no question of evasion of

liability could arise. This is only another aspect of the main argument of Mr. Jagadisa Ayyar, that the Legislature had not the competence to tax in

the hands of the shareholder what had never in fact accrued to him, though what was taxed was income that had accrued to the company. That

contention we have already negated.

43. Besides, the legal fiction enacted by Section 23-A does correspond to reality, if the veil of the legal personality of the corporate person, the

company is pierced, in order to look at the real person behind that corporate personality. It should be remembered that Section 23-A deals with

controlled companies, as distinguished from companies in which the public have a substantial interest. In fact, in popular parlance, such companies

have come to be called ""Section 23-A companies"", even as in England they are known as ""Section 245 companies"". The extract from Simon's

Income Tax, second edition, volume 3, page 341, which we have set out above explained the real possibilities of evasion by a person or group of

persons by resort to the device of a corporate personality. The income does in reality belong to them, and is under their control all the time. The

evasion of liability to super-tax is equally real. That in such companies there might be an individual member or two in a minority unable to force a

factual distribution at any given point of time, cannot affect the reality of the situation which Section 23-A was designed to meet. The basic

assumption that underlies Section 23-A is the identity of the interests of the shareholders and the controlled company. That assumption is founded

on reality. The shareholder created a veil of a corporate personality as legally distinct from his juristic personality. That was legal. The legislature

countered that with a legal fiction. That was also legal. If both are forgotten the tax-payer and the tax-gatherer proceed on the realities of the situation. The profits are taxed.

44. We should like to guard ourselves against being understood to imply that unless the statutory fiction also corresponds to reality - it is almost a self-contradicting statement - the legal fiction would be beyond the legislative competence of the Legislature to enact. We have referred to this aspect, only to emphasise that the legal fiction enacted by Section 23-A was never intended to be either harsh or unjust in its operation. In the case of controlled companies accumulation of profits for the legitimate needs of the company should not be discouraged. But accumulation for avoidance of tax liability had to be prevented. That was just what Section 23-A was designed to achieve.

45. That in individual cases it may operate harshly would not affect the main question at issue - legislative competence.

46. We are of opinion, that Section 23-A was intra vires the Legislature which enacted it in 1939, independent of the fact, that what the Legislature did in 1939 was only to continue a legal fiction already in existence.

47. The next question is, did Section 23-A fall under the ban of Article 13 of the Constitution?

48. Section 23-A as we have had occasion to point out already, is not a charging but procedural section of the Act. An order passed u/s 23-A

against the company is not itself an order of assessment. It, however, defines also the liability of the shareholder of the company, and provides for

an order of assessment as against him. It is well-settled now, that the "Equal Protection of Laws" Article 14 of the Constitution guarantees applies

to substantive as well as to procedural laws. The complaint of the petitioners was that Section 23-A was discriminatory in its effect and that as

assesseees u/s 23-A they were denied what the Act accorded to others, including themselves, assessed under circumstances other than those for

which Section 23-A provided. Mr. Jagadisa Ayyar pointed out that, while other assesseees could claim a right of appeal against orders of

assessment, the proviso to Section 30, Clause (1) of the Act restricted the right of appeal of a shareholder assessed by the order against the

company, which was the basis of the order of assessment against the

shareholder. The second feature which the learned Counsel stressed was that, though the shareholder was the person on whom Section 23-A cast the primary liability to pay the assessed tax, he was denied an opportunity to show cause against the order being passed against the company u/s 23-A.

49. Even at the outset we may observe that the apparent is not a real discrimination in this class of assessment u/s 23-A. We have already adverted to the substantial identity of interest of the controlled company and its shareholders. The company is entitled to notice. It is entitled to appeal against the order passed u/s 23-A. These provisions safeguard the interests of the shareholders as effectively, as provision for notice to the shareholder and a right of appeal separately conferred upon him would have done.

50. Even if the form and not the substance alone that matters, the apparent discrimination is not, in our opinion, an unconstitutional discrimination.

51. The third proviso to Section 30(1) runs:

Provided further that a shareholder in a company in respect of which an order u/s 23-A has been passed by an Income Tax Officer, may not in respect of matters determined by such order appeal against the assessment of his own total income.

52. The scope of the restricted right of appeal under this proviso was examined at length by Chagla, C.J., and Tendolkar, J., in *Navinchandra Mafatlal Vs. Commissioner of Income Tax, Bombay City*, . It should be needless to set out that discussion over again.

53. As the learned Advocate-General pointed out, the effect of the third proviso to Section 30(1), which precluded a shareholder from challenging the correctness of the order against the company passed u/s 23-A on the basis of which he was eventually assessed, was to enact a conclusive presumption, that the order against the company was correct in the appeal by the shareholder against his assessment. The validity of such conclusive presumptions, as part of the procedural law, has been upheld by Courts. That, however, still leaves the charge of discrimination to be answered. Reasonable classification was the defence, and, in our opinion, that should prevail.

54. The controlled companies or as they are popularly known Section 23-A companies, constitute a well-defined class. So do their shareholders.

The identity of interest between the company and its shareholders in that class is a well-recognised reality. The object of Section 23-A is to prevent evasion of tax liability, which the screen of corporate personality would have otherwise helped. The right of appeal conferred on the company is virtually for the benefit of its shareholders. That a further right of appeal is denied to each individual shareholder may not amount to a denial of an effective opportunity, to correct by way of appeal any error in an order passed u/s 23-A. The corporate personality of the company could be utilised by the shareholder to exercise a real right of appeal. The difficulties of permitting each of the shareholders to appeal against the order passed u/s 23-A should be obvious. The shareholders, even if they are few, may be scattered and an adjudication of the same question by different appellate authorities may, apart from other inconveniences both to the authorities and the company lead to the grave inconvenience of conflicting decisions. The advantage of a single appeal against an order passed u/s 23-A should be equally obvious. The possibility of using the name of the company to avoid tax liability was removed. The possibility, indeed it would normally be a reasonable certainty, of the use of the name of the company for protecting the interests of the shareholder was left intact. The classification of the shareholders of the Section 23-A companies is valid and it is a just and reasonable relation to the object sought to be achieved by the impugned legislative provision, Section 23-A.

55. What we have said about the restriction on the shareholder's right of appeal will apply also to the absence of a provision for a notice to the shareholder apart from the company before an order is passed u/s 23-A. The identity of interest runs through all the stages from that of accumulation of undisbursed profits to that of final payment of tax either by the shareholder in his own name or in the name of the company under Clause (3) of Section 23-A.

56. Mr. Jagadisa Ayyar complained that there was no specific provision for a shareholder to get his individual order of assessment corrected, if the appeal against the order passed u/s 23-A preferred in the name of the company succeeded in whole or in part. That was an additional ground on which he sought to sustain the charge of discrimination. The learned Counsel apparently overlooked the specific provision made by the Act in

Section 35(7) for correction and rectification of such errors.

57. We have refrained from examining the position, whether even if the third proviso to Section 30(1) was discriminatory and that that

discrimination was unconstitutional, that would affect the validity of the liability of the shareholder sanctioned by Section 23-A or whether the

validity of the proviso to Section 30(1) could alone be put in issue. We have held that the apparent discrimination is not real. In any event, it is not

unconstitutional.

58. In our opinion Section 23-A does not offend Article 14 of the Constitution;

59. On the assumption, that the levy of the tax on the shareholder u/s 23-A was illegal, the petitioners at one stage pleaded that their fundamental

right guaranteed by Article 31 of the Constitution had been violated. Mr. Jagadisa Ayyar, learned Counsel for the petitioners, realized he could not

sustain that plea, in view of the decision of the Supreme Court in Laxmanappa Hanumantappa Jamkhandi Vs. The Union of India (UOI) and

Another, .

60. The next line of attack was that the fundamental right guaranteed by Article 19(1)(f) the Constitution was violated by the illegal levy. The

learned Counsel for the petitioners relied on Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others, . That decision is not an

authority for the position which the learned Counsel put forward, that a tax levy is illegal if it constitutes an unreasonable restriction on the right of a

citizen to hold property. What was held in Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others, , was that, if the levy was

illegal, a threat to collect such a tax would constitute a threat of infringement of the fundamental right to hold property. We have held that Section

23-A was intra vires. The levy was not illegal. We do not consider it necessary to express any final opinion on the question; but the contention of

the learned Advocate-General, that the reasonableness or otherwise of a taxing measure is not justiciable in Courts would appear to be well-

founded if the American authorities, referred to by Basu at page 135 in his ""Commentaries on the Constitution of India"" furnish an acceptable

guide.

61. Adverting again to the absence of a provision for notices to the shareholders independent of the company before an order is passed against the

company u/s 23-A, learned Counsel for the petitioners referred to a passage at page 685 in Rottschaefer on ""Constitutional Law."" The learned

author stated:

The due process clause of the Fourteenth Amendment requires that a tax-payer shall be given notice of, and an opportunity to be heard on, any

matters on which depend the validity, existence, and amount of any tax liability imposed upon him, except where the matter is one such that a

hearing thereon can have no effect upon the decision on any of these factors.

62. The limitations of an appeal to the doctrine of due process, in considering the constitutional validity of statutory provisions in this country have

been explained by the Supreme Court. Independent of the authority of law which Article 265 of our Constitution requires, there is no scope for the

application of the doctrine of due process as it is understood in America.

63. We are of opinion that Section 23-A does not infringe any fundamental right of the petitioners and the ban imposed by Article 13 of the

Constitution does not apply. We do not consider it necessary to consider whether independent of the petitioner in W.P. No. 575 of 1955 the

petitioner (Mr. Spencer) in W.P. No. 574 of 1955 could invoke Article 19(1)(f) of the Constitution.

64. The next question is whether Section 34 of the Act could apply to either of the petitioners.

65. We shall first set out the relevant dates. The account year of the petitioners ended on 31st March, 1950 and the relevant assessment year

ended on 31st March, 1951. The undisbursed profits of the company were of the year ending with 31st March, 1949, the corresponding

assessment year was 1940-50 ending on 31st March, 1950. The date of the meeting at which the undisbursed profits were deemed to have been

apportioned between the shareholders, within the scope of Section 23-A was 23rd December, 1949. That was the date on which the petitioners

share of those undisbursed profits of the company notionally accrued to them. That accrual could not have been taken into account and was not

taken into account when the petitioners' assessment for the assessment year 1950-51 was completed on 28th February, 1951. The order u/s 23-

A was passed on nth March, 1955. Notices u/s 34 were issued to the petitioners on 23rd March, 1955. Neither of the petitioners in fact received

his proportionate share of the undisbursed profits. But then, that is not relevant in determining their liability to be assessed under the procedure laid

down by Section 23-A. Neither the assessing authority who completed the assessment nor either of the petitioners was aware at any time before

28th February, 1951, that any share of those undisbursed profits of the company did accrue or could accrue to the petitioners as on 23rd

December, 1949. The information was possible only after nth March, 1955.

66. The main contention of the learned Counsel for the petitioners was that when there was in fact no income in the relevant accounting year, there

could be no escape of income from assessment to attract Section 34 of the Act. A similar contention was negatived in *Navinchandra Mafatlal Vs.*

Commissioner of Income Tax, Bombay City, . The learned Judges held that such a case would fall within the scope of Section 34(1)(b) of the Act.

Learned Counsel for the petitioners invited us to consider the question afresh and differ if need be from the learned Judges of the Bombay High

Court who decided *Navinchandra Mafatlal Vs. Commissioner of Income Tax, Bombay City, .*

67. No doubt both the learned Judges who decided *Navinchandra Mafatlal Vs. Commissioner of Income Tax, Bombay City, ,* expressed their

opinion, that the language of Section 34 would have to be strained to some extent to attract Section 34 to an assessment of a notional income of

the shareholder u/s 23-A. The observations of Chagla, C.J., were at page 256 and those of Tendolkar, J., were at page 267. With all respect to

those Judges we do not consider it quite necessary to express any agreement of ourselves with that view.

68. It is a realm of fiction we have to deal with, a valid legal fiction, but nonetheless a fiction. What are the limits of that fiction? Do they exclude the

application of Section 34? As a result of the legal fiction enacted by Section 23-A, the share income of the undisbursed profits of the company

accrued to the petitioners on 23rd December, 1949. That income was not taxed in the hands of the petitioners in the assessment year 1950-51.

69. Learned Counsel for the petitioners urged that the mere factum of non-assesment in 1950-51 was not enough to establish that there was an

escape of assessment in that year within the meaning of Section 34. He relied on the observations of their" Lordships of the Privy Council in *Sri,*

Rajendranath Mukerjee v. Commissioner of Income Tax, Bengal (1934) 2 ITR 71 : 66 M.L.J. 121 : L.R. 61 IndAp 10 .

70. Dealing with the argument, if an assessment is not made on income within the tax year then that income has escaped assessment within that

year, and can be subsequently assessed only u/s 34 within this prescribed period of limitation their Lordships observed:

This involves reading the expression "has escaped assessment" as equivalent to "has not been assessed". Their Lordships cannot assent to this

reading. It gives too narrow a meaning to the word "assessment" and too wide a meaning to the word "escaped".

71. The scope of these observations must of course be construed with reference to their context, which context should be clear from the

succeeding passage at page 77. Their Lordships point out:

To say that the income of Burn & Company which in January, 1928, was returned for assessment and which was accepted as correctly returned,

though it was erroneously included in the assessment of Martin & Company has escaped assessment in 1927-28 seems to their Lordships an

inadmissible reading. The fact that Section 34 requires a notice to be served calling for a return of income which has escaped assessment strongly

suggests that income which has already been duly returned for assessment cannot be said to have escaped assessment within the statutory meaning.

72. Their Lordships then recorded their approval of the dicta of Rankin, C.J., in Lachhiram Basantlal v. Commissioner of Income Tax, Bengal

I.L.R.(1930) Cal. 909.

Income has not escaped assessment if there are pending at the time proceedings for the assessment of the assessee's income which have not yet

terminated in a final assessment thereof.

73. In the case of the petitioners their share of the undisbursed profits was not disclosed in their returns for the assessment year 1950-51. The

share of the petitioners in the undisbursed profits of the company of which they were shareholders was not, as we pointed out, in the contemplation

of any one, either of the petitioners or the assessing authority. In that respect the case of the petitioners certainly differed from that their Lordships

had to consider in Sri Rajendranath v. Commissioner of Income Tax (1934) 2 ITR 71 : 66 M.L.J. 121 : L.R. 61 IndAp 10 . The petitioner's share

of the undisbursed profits of the company was not disclosed and could not have been disclosed at any time before their returns were accepted and

the assessments were completed on 28th February, 1951. It was not therefore a case which could fall within Section 34(1)(a). There was no

default on the part of the petitioners. They could not include in their returns what was not known to them at all. But the effect of the legal fiction

enacted by Section 23-A was that the income in question accrued on 23rd December, 1949. It was a notional income. It was a fictional income.

But nonetheless the effect of the fiction was an accrual on 23rd December, 1949. If there had been an accrual on 23rd December, 1949, the

amount should have been assessed in the relevant assessment year. It was not assessed. The original assessment proceedings were not pending on

the date notice was issued u/s 34. It was, therefore, in our opinion, a case of escaped assessment which fell within the scope of Section 34(1)(b).

74. The learned Advocate-General invited our attention to the observations of Jagannadhadas, J., in *Chatturam Horilram Ltd. Vs. Commissioner*

of Income Tax, Bihar and Orissa, . Commenting on the statutory provision that the Indian Finance Act of 1939 shall be deemed to have come into

force in the area to which this Regulation extends on the 30th day of March, 1939, the learned Judge observed:

By virtue of this deeming provision the Indian Finance Act of 1939 must be assumed even factually to have come into operation on the date

specified and the tax must be taken to have become chargeable in that very year, though the actual liability for payment could not arise until proper

and valid steps are taken for quantification of the tax.

75. The learned Advocate-General urged that the principle laid down in that case that by fiction the law existed during the relevant period though it

was in fact enacted later could be extended to the fiction enacted by Section 23-A that income accrued in the case of the petitioners on 23rd

December, 1949, though the fact was ascertained only after 11th March, 1955. We accept the contention of the learned Advocate-General. We

have already referred to the fairly extensive limits of legally permissible fictions indicated by the Supreme Court in *Commissioner of Income*

Tax/excess Profits Tax, Bombay City Vs. Bhogilal Laherchand, .

76. Suppose in fact the income had accrued to the petitioners on 23rd December,

1949 and suppose that the petitioners came to know of that only on nth March, 1955 it would have been a clear case of escape of assessment not within the case of Section 34(1)(a) but within the scope of Section 34(1)(b). That was the legal result of the fiction enacted by Section 23-A.

77. Mr. Jagadisa Ayyar next contended that recourse to Section 34 was not permissible, if that was based on events that happened subsequent to the assessment for 1950-51. The order u/s 23-A, dated 11th March, 1955, was of course, long subsequent to the assessment year 1950-51. The learned Counsel referred to *Anderton and Halstead Ltd. v. Birrell* (1932) 1 K.B. 271, which was in its turn considered in *Dodworth v. Dale* 20 Tax Cas. 520, and also to *D. & G.R. Rankine v. Commissioner of Inland Revenue* 32 Tax Cas. 520 in which both the earlier decisions were noticed. It may not be necessary to examine the scope of each of those decisions at this stage. The English cases were considered by the Supreme Court in *India United Mills Ltd. Vs. Commissioner of Excess Profits Tax, Bombay*. No doubt the learned Judges specifically stated at page 29: Whatever the position if the question were to arise under the Indian Income Tax Act - and there is no need to express any final opinion on it - having regard to the nature and scope of the provisions of the Excess Profits Tax Act and in particular Section 26(3), we are of opinion that the word "discovers" in Section 15 of the Act is of sufficient amplitude to take in subsequent events which have a material bearing on the facts and circumstances on which assessment had been made or relief granted.

78. As a fact no doubt it was on the subsequent event, the order u/s 23-A, dated 11th March, 1955, that proceedings were initiated u/s 34 against the petitioners. But then, we have also to give effect to the legal fiction enacted by Section 23-A. Once again we have to refer to that legal fiction enacted by Section 23-A and we have to equate it to a factual accrual on 23rd December, 1949. In that sense, it was not a case of a subsequent event at all.

79. We respectfully agree with the final conclusion of the learned Judges who decided *Navinchandra Mafatlal Vs. Commissioner of Income Tax, Bombay City*, and we hold that the claim of the department to re-open the assessment for 1950-51 in the case of the petitioners came within the purview of Section 34(1)(b) of the Act.

80. The last contention of the learned Counsel for the petitioners was that in any event, the notice dated 23rd March, 1955, issued u/s 34 of the Act was barred by limitation. The fallacy that underlay this plea was, that the period of four years for which Section 34(1) provided was computed by the petitioners from 31st March, 1950, the end of their year of account. The expression used in Section 34(1)(b) is escaped assessment for any year". It was a similar expression "any year" that was used in Section 34(1)(a). The period of limitation, whether it is eight years for cases falling u/s 34(1)(a) or four years falling u/s 34(1)(b), has to be computed from the end of that year. Though the expression "year" has not been further defined by Section 34 itself, it should be clear from the context of the section itself that the year referred to is the assessment year and has no reference to the accounting year, which is elsewhere specified by the Act itself as the previous year. In *Viswanathan Chettiar v. Commissioner of Income Tax* (1954) 1 M.L.J. 390 : (1954) ITR 79 , it was assumed without any discussion that the period of four years should be computed from the close of the year of assessment. Though that question was not specifically decided in that case, the assumption, in our opinion, was correct. There can be an escape from assessment only when there is an assessment. Whatever be the year of account, which is the previous year as specified by the Act, the assessment can only be in what is normally referred to as the assessment year, and which has been designated year in the Income Tax Act. If the period of four years is computed from the end of the assessment year 31st March, 1951, as in our opinion it should be, that action taken on 23rd March, 1955, to issue notices u/s 34 against the petitioners was well within the four-year period of limitation prescribed by the section.

81. In *Navinchandra Mafatlal Vs. Commissioner of Income Tax, Bombay City* , the learned Judges held that the period of limitation should be computed from the end of the year in which the order is made against the company u/s 23-A of the Act.

82. We consider it unnecessary in this case to examine the correctness of that view. The alternatives which we have to choose in this case are the end of the accounting year and the end of the assessment year. It should be sufficient to say that we are unable to find any basis in the language of

Section 34, taking the scheme of assesment in the Income Tax Act, as a whole also into account, to sustain the plea of the petitioners, that the

period of limitation should be computed from the end of the accounting year of the assessee. We are clearly of opinion that the expression ""any

year"" in Section 34(1)(b) should be construed as the assessment year. That suffices to reject the contention of the learned Counsel for the

petitioners that the notices, dated 23rd March, 1955, were issued beyond the period of limitation prescribed by Section 34(1) of the Act.

83. The rule in each of these petitions is discharged, and we direct that the petitions be dismissed with costs.