Income Tax Appellate Tribunal - Mumbai
Mrs. Deepika A. Mehta vs Assistant Commissioner Of Income ... on 26 June, 1996
ORDER A. Kalyanasundharam, A.M.

1. These are appeals by two assessees of the same group that involve common issues and, therefore, these appeals have been grouped and are being disposed of by this common order. Three of the common issues involve the identical issues as were considered in the appeals for the asst. yr. 1990-91, namely, violation of principles of natural justice by the Revenue in the framing of the assessments, additions based on the report of auditor M/s Arjun K. S. Aiyar & Co., Chartered Accountants (hereinafter referred to as AKSR) are wholly unjustified and the additions for rights acquisitions of rights shares.

2. The appellants had raised an additional ground of appeal that reads, "the learned CIT(A) failed to appreciate that the notice issued under s. 148 is bad in law and the consequent assessment is, therefore, also bad in law and void". The appellants also had challenged the levy of interest under ss. 234A and B of the IT Act, 1961 (hereinafter referred to as the Act) in the like manner as was raised in their appeal for the asst. yr. 1990-91.

3. On the three common issues for the two assessment years, it is agreed between the assessee and the Revenue that they involve identical facts, circumstances are similar and that the conclusion for the asst. yr. 1990-91 would apply with equal force. Considering the above and the fact that the additions, basis of the additions being similar in every respect to the facts for the asst. yr. 1990-91 and the same two assessees were involved, that was extensively argued by both parties, which was disposed of by a separate order, we direct the Assessing Officer (AO) to redo the assessment relating to these additions and while doing that, AO would remember that all our directions, guidelines and observations would apply with equal force to the present two assessment years as well and would have to follow them in these two assessment years.

4. On the first of the additional ground of appeal Mr. Mistry, the learned counsel for the appellants, submitted that this is a pure question of law and does not need any verification of any fact excepting the reading of the provisions of the sections for reopening of the assessment and the notice that is issued for reopening. He submitted that though the ground of appeal had stated that CIT(A) ought to have held that reopening as invalid but, because he did not touch upon it, he be permitted to address the Bench as the question does not require any searching of any fact. Mr. Tilaqchand, the learned senior Departmental Representative, submitted that the question does not require any investigation of facts.

5. We have considered these preliminary arguments on the admission of the additional grounds of appeal. Though the question has not been happily worded but it does bring out the controversy that is the very basis of the assessment and his being a pure question of law that does not require any investigation into the facts other than the provisions of the section under the Act, consideration of the notice which was the basis of reopening of the assessment, date of issue and the date of filing of return, which facts are available on the face of the assessment order itself. We accordingly permit the counsel to place his arguments on this additional question involving law before us for our

consideration. Apart from the fact that the question raises an interesting issue, it does bring to force the vital point of the need on the part of Revenue of ensuring that every notice issued with reference to the Act brings the real intention behind the section and does not create any contradiction with the provisions of the section of the Act.

6. Mr. Mistry, the learned counsel, contended that the reopening of assessment is based upon a notice issued for the purpose and that he would show that the notice issued on the appellants is not in line with the intention of the Act and, therefore, such a notice that does not carry with it the intention of the provisions of the Act, is invalid and illegal. He pleaded that the provisions of s. 148(1) of the Act be read first to appreciate the point he would be placing before us. He contended that the s. 148(1) of the Act states that for purposes of reopening of an assessment, the Assessing Officer (AO) shall serve on the assessee a notice requiring him to furnish within such period, not being less than thirty days, as may be specified in the notice, a return of his income. He had provided a copy of the notice that was issued in the instant cases and submitted that the notice gives a direction to the assessee to deliver to the AO within thirty days from the date of service of the notice a return in the prescribed form in respect of which the assessee is assessable for the assessment year.

7. He pointed out that while the section allows furnishing of a return within such period not less than thirty days, the notice restricts the time for filing of the return by giving a direction to file the return within thirty days from the date on which the notice was served on the assessee. He contended that because the notice does not speak the same language as the section, it is invalid and illegal. He submitted that on the face of it, it may appear that the notice speaks the language of the section but, the Bombay High Court in CIT vs. Ekbal & Co. (1945) 13 ITR 154 (Bom) had categorically held that the words 'not less than thirty days' and 'within thirty days' do not convey the same meaning and the curbing of time by the notice requiring the assessee to file the return within thirty days, is an illegal notice. He contended that the Bombay High Court (supra) had observed that the words 'not less than thirty days' indicates clear thirty days while, 'within thirty days' talks of time within two points, the start and the end point, and therefore, does not allow thirty whole days. He accordingly pleaded that, in the light of the Bombay High Court decision (supra), the notice had to be held as invalid and illegal in the eye of law.

8. Mr. Mistry further contended that the Bombay High Court had another occasion to examine the same aspect though in a slightly different concept in CIT vs. Ramsukh Motilal (1955) 27 ITR 54 (Bom) and the conclusion was the proceedings based upon an invalid notice are bad in law and must be quashed. He contended that the Supreme Court had upheld this decision in Y. Narayan Chetti & Ors. vs. ITO (1959) 35 ITR 388 (SC) by observing that the notice prescribed under s. 34 of the Indian IT Act, 1922 (hereinafter referred to as 1922 Act) for purpose of initiating reassessment proceedings is not a procedural requirement but, the service of the prescribed notice on the assessee is a condition precedent to the validity of any assessment made under that section. He contended that Supreme Court in the said case had held that if no notice is issued or if the notice issued is shown to be invalid, then the proceedings taken by the ITO without a notice or in pursuance of an invalid notice would be illegal and void.

9. He submitted that the section that permits issuing of notice under the 1922 Act and the present Act are identically worded and, therefore, the jurisdictional High Court decision in Ekbal & Co. (supra) should be applied along with the Supreme Court decision (supra) and the present proceedings must be quashed. He also placed reliance on the decision of the Tribunal in Prabhat Saw Mills & Timber Merchants vs. ITO (1994) 51 ITD 548 (Bang) in support of his proposition that when a notice is found to be invalid, all proceedings based on such invalid notice must be quashed. He contended that the Revenue had realised their folly of the notice not bringing out the intention of the Act and this is clear from the fact of they withdrawing the notices issued in other cases when they were pointed as above and in a few other cases, they had modified the notice to read as within 31 days in place of the earlier within thirty days. He had placed on our records such notices in support of the above submissions.

10. Mr. Mistry submitted that the words 'not less than' had been examined by the Supreme Court in its two decisions, namely, CIT vs. Braithwaite & Co. Ltd. (1993) 201 ITR 343 (SC) and in CIT vs. New India Industries Ltd. (1995) 212 ITR 653 (SC) and both these decisions were with reference to the words appearing in the Second Schedule to The Companies (Profits) Surtax Act, 1964, which prescribed the rules for computing the capital of a company for the purposes of that Act. The words 'not less than' appeared in relation to amount borrowed for the creation of a capital, the agreement of borrowal providing for repayment during a period not less than seven years. In the first case, the borrowal was repaid in exactly seven years and the Supreme Court upheld the denial of inclusion of the borrowal as part of the capital by observing that the words 'not less than seven years' meant seven years and more. The second case was also decided likewise.

11. Mr. Tilaqchand, the learned senior Departmental Representative, submitted that the objection raised by the counsel could not be given a serious consideration when the appellants had filed their return in compliance to the notice and that too within the time of thirty days and this action of the assessee must be treated as a waiver on the part of the assessee. He filed extracts from Principles of Statutory Interpretation and Halsbury's Law of England and contended that invariably, the date on which the notice is received has to be excluded and in support of this contention, he relied on the Supreme Court decision in AIR 1972 SC 1293.

12. Mr. Tilaqchand submitted that with the introduction of the IT Act, 1961, there had been complete overhaul of the 1922 Act and because of the provisions of s. 292B of the Act, the decision of the Bombay High Court in Ekbal & Co. (supra) is no longer applicable. He pleaded that Calcutta High Court in its two decisions, namely, CIT vs. Anand & Co. (1994) 207 ITR 418 (Cal) and in National Insurance Co. Ltd. vs. CIT (1995) 213 ITR 862 (Cal) had held that corrective mistakes should not be held to come in the normal operation of the section. He submitted that evolution of new law is an important concept that was recognised by the Supreme Court in CWS (India) Ltd. vs. CIT (1994) 208 ITR 649 (SC) at page 656 of ITR and he also drew our attention of the learned authors Chaturvedi & Pithisaria in their book on Income-tax Law, 4th Edn. Vol. 7 at pages 56 & 57. He contended that the section and the notice must be read together and this reading indicates that there is no contradiction at all and submitted that the notice is only a communication of the section and is a procedural issue. In support of this contention, he placed reliance on Orissa High Court decision in CIT vs. Orissa State Warehousing Corpn. (1993) 201 ITR 729 (Ori) and on a sales-tax

case. He contended that the notice is a mere spokesperson for the section and this does not take away the rights of the assessee.

13. Mr. Mistry referred to few decisions to touch on the point that the wrong wording in the section could not be taken lightly as a mistake capable of correction by any officer because, the notice is part of the rules prescribed the statute. He contended that the Bombay High Court (supra) had examined the aspect of waiver by the assessee by filing the return too soon and had categorically held that the filing of the return does not mean waiver of the right to challenge the validity of the notice and had upheld the invalidity of the notice.

14. We have heard the rival submissions and have given them our very careful consideration. The issue raised by the assessee is rather intriguing and in the light of the submissions of the Departmental Representative that there had been a total overhaul of the 1922 Act it has aroused sufficient excitement too. We have, therefore, to examine the issue with reference to the similarity or its absence of between the 1922 Act and the Act, it is necessary to reproduce the provisions of ss. 34(1) and 22(2) of the 1922 Act and comparative provisions of ss. 148(1) and 139(2) of the Act.

| Sec. | 1922 Act | Sec. | 1961 Act |
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| 22(2) | | 139(2) | Before Amendment (Upto 31st March, 1989) |
| | In the case of any person whose total income is, in the ITO's opinion, of such an amount as to render such person liable to income-tax, the ITO may serve a notice upon him requiring him to furnish, within such period, not being less than thirty days as may be specified.... a return in the prescribed form, | | In the case of any person who, in the AO's opinion, is assessable under this Act, whether on his own total income or..... the AO may before the end of the relevant assessment issue a notice to him and serve the same upon him requiring him to furnish, within thirty days from the date of service of the notice.... After 1st April, 1989 the section stands deleted |
| 34(1) | | 148(1) | Before Amendment (upto 31-3-89) |
| If the ITO has reason to believe that by the reason of the omission or failure on the part of an assessee to make a return under s. 22. ..... | | | Before making any assessment, reassessment.... under s. 147, the AO shall serve on the assessee a notice containing all or any of the requirement which may be included in a notice under sub-s. (2) of s. 139.... and the provisions of this Act shall..... apply accordingly as if the notice were a notice issued under that sub-section. |
| or, | | | |
| notwithstanding that there has been no omission or failure.... the ITO has in consequence of information in his possession reason to believe that income, .... have escaped assessment, | | | |

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| .... | |
| He may in cases falling under cl. (a).... | |
| (b), serve on the assessee, ....., a notice containing all or any of the requirement which may be included in a notice under sub-s. (2) of s. 22 and the provisions of this Act shall.... apply accordingly as if the notice were a notice issued under that sub-section. | |
| | After Amendment (from 1st April, 1989) |
| | Before making the assessment, reassessment.... Under s. 147, the AO shall serve on the assessee a notice requiring him to furnish within such period, not being less than thirty days, as may be specified in the notice, a return of his income. |

The notice that is issued and served on the appellant under the Act contains the followi

"I, therefore, propose to assess/reassess (recompute the loss/depreciation allowance)..... for the said assessment year and I hereby require you to deliver to me within thirty days from the date of service of this notice a return in the prescribed form of your income/the income or..... in respect of which you are assessable for the said assessment year."

15. The law maker while overhauling the 1922 Act by the IT Act, 1961, had apparently kept in view the contradiction between the language of the section and the notice under the 1922 Act and in order to bring uniformity between the section and the notice, had substituted the words used in the notice, namely, a notice to him and serve the same upon him requiring him to furnish, within thirty days from the date of service of the notice in the section itself. Thus, there remained no conflict between the section and the notice because the notice spoke the intention of the section and accordingly, there was no likelihood of a similar situation arising as was considered by the Bombay High Court in Ekbal & Co. (supra). The claim of the Departmental Representative that there was overhaul of the provisions under the 1961 Act, in view of the above, is found to be correct.

16. However, the amendment by the Direct Tax Laws (Amendment) Act, 1987, killed the uniformity that existed between the section and the notice and brought back to life the buried conflict as existed under the 1922 Act by using the words, the AO shall serve on the assessee a notice requiring him to furnish within such period, not being less than thirty days, as may be specified in the notice, a return of his income, which words were part of s. 22(2) of the 1922 Act, namely, the ITO may serve a notice upon him requiring him to furnish, within such period, not being less than thirty days, as may be specified.... a return in the prescribed form. The anomaly that was removed by the 1961 Act was thus reintroduced by the amendment w.e.f. 1st April, 1989, and the folly of the law maker is that, while introducing the amendment to the section, he overlooked that the notice also needed amendment so that it speaks the same language as the section itself. It is an unfortunate creation by the law maker

which may be unintended but, all the same it has given rise to a poser in the like manner as was considered by the jurisdictional High Court in Ekbal & Co. (supra).

17. We shall now proceed to examine the issue and the decision in Ekbal & Co. (supra). The question that was considered by the Bombay High Court in the said case was, "whether the notice issued in the present case to the assessee under sub-s. (2) of s. 22 of the IT Act satisfies the requirements of the sub-section in regard to the period of time that should be allowed to the assessee for furnishing the return". The contents of the notice had been reproduced in the judgment and for the sake convenience, it is reproduced here. "In pursuance of the provisions of s. 22(2) of the Indian IT Act, 1922, you are hereby required to prepare a true and correct statement of total income and your world income during the previous year in the attached form (along with such other particulars as are required to complete the form) and to deliver it to me at my office duly signed by you within thirty days of the receipt of the notice (should the former date be less than 30 days after the receipt of the notice)." The s. 22(2) was also reproduced and this is extracted once again.

"In the case of any person whose total income is, in the ITO's opinion, of such an amount as to render such person liable to income-tax, the ITO may serve a notice upon him requiring him to furnish, within such period, not being less than thirty days, as may be specified..... a return in the prescribed form....."

The Court observed that, "the important words to note are 'within such period, not being less than thirty days'.... So the notice depends for its validity on the words, 'in the attached form..... duly signed by you within thirty days of the receipt of the notice.....' The Tribunal in its judgment after referring to certain passages from Maxwell on 'Interpretation of Statutes', 8th Edn., stated as follows - The learned author proceeds to observe that where 'not less than' or such other expression is used specifying the time for doing an act the ending terminal must also be excluded from the computation. Sec. 22(2) clearly lays down that an assessee must be given a period of 'not less than 30 days' from the receipt of the notice to furnish the return of his total income. It would, therefore, follow that he must have thirty clear days and thirty days must be excluded from the computation. In the present case as we have already pointed out the assessee was asked to furnish the return within 30 days. Such a requirement did not amount to giving him clear 30 days for the purpose. We, therefore, think that the notice in this case is illegal. The fact that the assessee submitted a return later or that it was accepted for the purpose of making the assessment does not, in our opinion, cure the defect that initially lay in the notice.....

I agree with the statement of the Tribunal..... In my judgment expressions 'within thirty days' and 'not less than thirty days' are two quite different things.'Within thirty days' is within two points of time, one at which the period begins and the other at which it expires. On the other hand, 'not less than thirty days' is outside these two points of time. There must be an interval of not less than thirty days and that means thirty days clear. The period must continue beyond the expiration of the stated time. Whereas 'within' the stated period must mean what it says, something less than the moment of expiration. In my opinion, therefore, the notice is invalid."

18. The reading of the above judgment makes it absolutely clear that terms 'within thirty days' and 'not less than thirty days' do not mean the same thing and in fact, the former is shorter than the latter in terms of period of time. Therefore, when the section requires allowing of a period of time that is not less than thirty days, the notice having restricted the time and directing the assessee to file the return within thirty days of the date of service of the notice, which period of time being shorter than what is intended by the section, the said notice is clearly invalid. Since, the notice is found to be invalid, all the proceeding that followed such invalid notice must all fall and accordingly the reassessments are all quashed. It is clarified that directions given in para 3 will remain mere observations since we have quashed the reassessments.

19. The appellants had raised two additional questions stating them to be pure questions of law that relate to the leviability of interest under ss. 234A & 234B of the Act and reliance was placed on the order of the Special Court Judge where it was held that interest under s. 234A alone could be levied. The Revenue consented that these being pure questions of law may be admitted.

20. After considering the rival submissions, and considering the decision of the Supreme Court in Asstt. CIT vs. A. K. Menon & Ors. (1995) 215 ITR 364 (SC), IT Act being a separate statute which has not been superseded by the Securities Transactions Act of 1992, the question of levy of interest under the ss. 234A & B need to be examined with reference to the provisions of the Act alone. However, because the notice had been found to be invalid and the proceedings having been quashed, the issue becomes academic and we, therefore, do not express any opinion on these questions.

21. In the result, the appeals by the assessee are allowed in part.