CASE NO.:
Appeal (civil) 1374 of 2003

PETITIONER:
Commissioner of Sales Tax & Ors.

RESPONDENT:
M/s Subhash & Company

DATE OF JUDGMENT: 17/02/2003

BENCH:
SHIVARAJ V. PATIL & ARIJIT PASAYAT

JUDGMENT:

J U D G M E N T

(Arising Out of S.L.P. (C) No. 389/2002)

ARIJIT PASAYAT,J.

Leave granted.

The controversy involved in the present case lies with a very narrow compass and, therefore, a brief reference to the factual aspects would suffice.

Respondent-Subhash Kimtee (hereinafter referred to as assessee) was the proprietor of a concern known as M/s Subhash and Company. He was registered as a dealer under the M.P. General Sales Tax Act, 1958 (hereinafter referred to as 'the Act') w.e.f. 28.5.1973. The registration continued to be operative till 22.10.1987. The assessment periods to which the dispute relates are (a) 27.10.1981 to 15.11.1982, (b) 16.11.1982 to 4.11.1983 and (c) 5.11.1983 to 24.10.1984. The assessments were originally completed for the assessment years 1981-82, 1982-83 and 1983-84 vide orders dated 12.9.1984, 29.8.1985 and 29.8.1985 respectively. Respondent applied cancellation of the certificate of registration on 14.12.1987 and the same was cancelled w.e.f. 23.10.1987. The Assessing Officer initiated proceedings for re-assessment under Section 19(1) of the Act on the basis of information that the respondent had purchased iron and steel from M/s Steel Terro, Indore and had enjoined certain benefits by issuing declaration forms in Form XII-J. The Assessing Officer was of the view that the benefits were not permissible in law and, therefore, there was short levy of tax and escapement of assessment. Accordingly, notices were issued for re-assessment in respect of the three years. The notices were issued on the address as indicated in the certificate of registration. It was indicated in the notices that the same may be pasted if the respondent-assessee was not available or he refused to accept the notice. Since it was learnt that the respondent-assessee was not residing at the address given, service by affixture was resorted to. Vide orders dated 13.12.1990, 13.12.1990 and 31.12.1990, re-assessments were done under Section 19(1) of the Act. On 23.4.1992, respondent-assessee challenged the orders of re-assessment by filing revision

petition before the revisional authority at Indore under Section 39(1)(b) of the Act on the ground that the notices and the orders of re-assessment as well as the original assessment orders were not served on him, rendering the re-assessment proceedings illegal. The revisional authority vide 3 separate but common order dated 23.4.1993 dismissed the revision petition recording a finding that service in both the original assessments as well as re-assessment proceedings had been duly effected by affixture and the orders were valid.

It was noted that respondent's certificate of registration remained in force till he applied for cancellation on 14.12.1987. As the notices were issued for service at the address given in the registration certificate, there was nothing illegal.

Respondent-assessee filed a writ petition under Articles 226 and 227 of the Constitution of India, 1950 (in short 'the Constitution')in the High Court of Madhya Pradesh, at Indore Bench on the ground that the procedure prescribed for service of notice as contemplated under Rule 63 of the M.P. General Sales Tax Rules, 1959 (in short 'the Rules') has not been followed. Accordingly, the principles of natural justice were violated. He took a stand that after closure of business in October 1980, he was appointed as a clerk, Grade II in Reserve Bank of India in November, 1980. Revenue contested the writ petition by filing a counter affidavit specifically stating that service had been duly effected at the last known address as per the registration certificate. There was a duty enjoined on the dealer under Section 32 of the Act to provide necessary information regarding change of address which has not been done by the respondent-assessee who continued to enjoy the benefits by issuing declaration forms by virtue of the certificate of registration up to 23.10.1987.

Learned Single Judge with reference to Rule 63 held that the service was effected properly inasmuch as the Assessing Officer had failed to record the reasons for his satisfaction that the assessing was evading service or that the service was not possible in any other manner before resorting to service by affixture as prescribed under Rule 63.

The writ petition was allowed with a direction that the re-assessments were to be done de novo in accordance with law after hearing the respondent-assessee within a period of 6 months from the date of order and no further notice was required as the respondent-dealer was already appearing in the matter.

Challenge was made by the respondent-assessee before a Division Bench on the ground that after having held that there was no valid service of notice, the direction for de novo assessment was untenable. It was further contended that challenge on the question of limitation was precluded by the direction.

The Division Bench held that the direction for de novo assessment without reserving any right for the respondent-assessee to raise the plea of limitation was not proper.

In support of the appeal, learned counsel for the appellants submitted that the respondent-assessee cannot

take advantage of his own lapses. He was required under Section 32 of the Act to indicate the change of address. Admittedly, he did not do so. Merely because at some point of time the departmental authorities sent letters by redirecting service by post to deposit the arrear of tax, it does not do away with the statutory requirement to inform the authorities about the change of address. Further, learned Single Judge had only found some procedural irregularity which did not invalidate the service of notice. Therefore, the direction for de novo assessment was in order.

In response, learned counsel for the respondent-assessee submitted that the learned Single Judge clearly held that there was no proper service of notice and, therefore, there was no service in the eye of law. That being the position, the re-assessment proceedings which were to be completed within a particular period could not have been extended by permitting de novo assessment.

Whether service of notice is valid or not is essentially a question of fact. In the instant case, learned Single Judge found that certain procedures were not followed while effecting service by affixture. There was no finding recorded that such service was nonest in the eye of law. In a given case if the assessee knows about the proceedings and there is some irregularity in the service of notice, the direction for continuing proceedings cannot be faulted. It would depend upon the nature of irregularity and its effect and the question of prejudice which are to be adjudicated in each case on the basis of surrounding facts. If, however, the service of notice is treated as nonest in the eye of law, it would not be permissible to direct de novo assessment without considering the question of limitation. There also the question of prejudice has to be considered.

Both learned Single Judge and Division Bench have missed to notice that Section 19(1) does not speak of "notice" before re-assessment. It only prescribes giving of "reasonable opportunity of being heard". It reads as follows :

"Where an assessment has been made under this Act or any Act repealed by Section 52 and if for any reason any sale or purchase of goods chargeable to tax under this Act or any Act repealed by Section 52 during any period has been under-assessed or has escaped assessment or assessed at a lower rate or any deduction has been wrongly made therefrom, the Commissioner may, at any time within five calendar years from the date of order of assessment, after giving the dealer a reasonable opportunity of being heard and after making such enquiry as he considers necessary, proceed in such manner as may be prescribed to reassess within a period of two calendar years from the commencement of such proceedings, the tax payable by such dealer and the Commissioner may, where the omission leading to such reassessment is attributable to the dealer, direct that the dealer shall pay, by way of penalty in addition to the amount of tax

so assessed a sum not exceeding that amount:

Provided that in case of an assessment made under any Act repealed by Section 52, the period for reassessment on the ground of under-assessment, escapement or wrong deduction shall be as provided in such Act notwithstanding the repeal thereof :

Provided further that any reassessment proceedings pending on the date of commencement of the Madhya Pradesh General Sales Tax (Amendment) Act,1978, be completed in accordance with the provisions in force before the date of such commencement and within a period of two calendar years from the date of such commencement."

Rule 63 deals with methods of serving notice or summons or order under the Act or any rules made thereunder.

The term "notice" is originated from the Latin word "notifia" which means "a being known" or a knowing is wide enough in legal circle to include a plaint filed in a suit. "Notice" has been defined in various Judicial Dictionaries and Dictionaries as follows :
The Judicial Dictionary, Words and Phrases Judicially Interpreted, Second Edn. By F. Stroud, (p.1299) :
"Notice is a direct and definite statement of a thing, as distinguished from supplying materials from which the existence of such thing may be inferred."

Webster's Universal College Dictionary, 1997 Edn. (p.543) :
"Information, warning or announcement of something impending; notification; to give notice of one's intentions; a written or printed statement conveying such information or warning; as for renting or employment, that the agreement will terminate on a specified date. "She gave her employer two weeks' notice."

Oxford Concise Dictionary :
"an intimation; intelligence, warning" and has the meaning in expression like "give notice", "have notice" or "formal intimation of something or instruction to do something" and has the expression like "notice to quit", "till further notice".

Chamber's 20th Century Dictionary 1993 (p.1154) :
"intimation; announcement; information; warning; a writing; placard, etc; conveying an intimation or warning; time allowed for preparation, etc."

Chamber's Dictionary vide Allied Chambers (India) Ltd; Reprint 1994, 1995 (p. 1154) :
"intimation; announcement; a formal

announcement made by one of the parties to a contract of his or her intention to terminate that contract; information, especially about a future event; warning; a writing; placard, board, etc. conveying an intimation or warning; time allowed for preparation; cognizance; observation; heed; mention; a dramatic or artistic review; civility or respectful treatment; a notion, etc."

Law Lexicon Dictionary A Legal Dictionary of Legal Terms and Phrases Judicially Defined. Fourth Edition, Vol.II, 1989(P.226):

'A person is said to have notice' of a fact, when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it.'

The Law Lexicon Dictionary, Second Edition, 1997 (p. 1322) :

(1) Intimation; a writing; placard, board, etc. conveying an intimation or warning (section 154, IPC and Article 61(2)(a), Constitution of India); (2) Knowledge or cognizance (Section 56, Indian Evidence Act).

"Notice", in its legal sense, may be defined as information concerning a fact actually communicated to a party by an authorized person, or actually derived by him from a proper source, or else presumed by law to have been acquired by him, which information is regarded as equivalent to knowledge in its legal consequences.

Dictionary further states:

Co.Lit 309 Tomlin's Law Dictionary

Notice is making something known, of what a man was or might be ignorant of before. And it produces diverse effects, for, by it, the party who gives the same shall have same benefit, which otherwise he should not have had; the party to whom the notice is given is made subject to some action or charge, that otherwise he had not been liable to; and his estate in danger of prejudice.

"Notice is a direct and definite statement of a thing as distinguished from supplying materials from which the existence of such thing may be inferred." (Per Parke, B. Burgh v Lege 5 M and W 420: 8 LJ, Ex.258)

The Dictionary gives some other definitions of "Notice" as:

- The legal instrumentality by which knowledge is conveyed, or by which one is charged with knowledge.

- The term "notice" in its full legal sense embraces a knowledge of circumstances that ought to induce suspicion or belief, as well as direct information of that fact.

- In its popular sense, "notice" is equivalent to information intelligence, or knowledge.

In Anandji Haridas and Co. (P) Ltd V. S.P.Kasture and Others (AIR 1968 SC 565), it was observed as follows :

"We are unable to accept the contention of Mr. Gokhale that a notice under Section 11 (4) (a) or IIA(1) is a condition precedent for initiating proceedings under those provisions or that it is the very foundation for the proceedings to be taken under those provisions. The notice contemplated under Rule 32 is not similar to a notice to be issued under Section 34 (1) (b) of the Income Tax Act, 1922. All that Sections 11(4) and 11A (1) prescribe is that before taking proceedings against an assessee under those provisions, he should be given a reasonable opportunity of being heard. In fact, those sections do not speak of any notice. But Rule 32 prescribes the manner in which the reasonable opportunity contemplated by those provisions should be afforded to the assessee. The period of 30 days prescribed in Rule 32 is not mandatory. The rule itself says that 'ordinarily' not less than 30 days notice should be given. Therefore, the only question to be decided is whether the defects noticed in those notices had prejudiced the appellants. It may be noted that when the assessees received the notices in question, they appeared before the assessing authority, but they did not object to the validity of those notices. They asked for time for submitting their explanation. The time asked for was given. Therefore, the fact that only nine days were given to them for submitting explanation could not have in any manner prejudiced them. So far as the mistake in the notice as regards the assessment year is concerned, the assessees kept silent about that circumstance till 1958. It was only when they were sure that the period of limitation prescribed by Section 11A had expired, they brought that fact to the notice of the assessing authority. It is clear that the appellants were merely trying to take advantage of the mistakes that had crept into the notices. They cannot be permitted to do so. We fail to see why those notices are not valid in respect of the periods commencing from February 1, 1953 till 31.10.55. We are unable to agree with Mr. Gokhale's contention that each one of those notices should be read separately and that we should not consider them together. If those notices are read together as we think they should be, then it is clear that those notices given the appellants the reasonable opportunity contemplated by Sections 11(4) (a) and 11-A (1). In Chatturam V. Commr. Of Income Tax Bihar, (1947 (15) ITR 302) = (AIR 1947 FC 32), the Federal Court held that any irregularity in issuing a notice under S. 22 of the Income Tax Act,1922 does not vitiate the proceeding; that

the income tax assessment proceedings commence with the issue of the notice but the issue or receipt of the notice is, however, not the foundation of the jurisdiction of the income tax officer to make the assessment or of the liability of the assessee to pay the tax. The liability to pay the tax is founded on Sections 3 and 4 of the Income Tax Act which are the charging sections. Section 22 and others are the machinery sections to determine the amount of tax. The ratio of that decision applies to the facts of the present case. In our opinion, the notices issued in the year 1955 are valid notices so far as they relate to the period commencing from February 1, 1953 to October 31, 1955."

Whenever an order is struck down as invalid being violation of principles of natural justice, there is no final decision of the case and, therefore, proceedings are left open. All that is done is that the order assailed by virtue of its inherent defect is vacated but the proceedings are not terminated. (See Guduthur Bros. V. Income Tax Officer, Special Circle, Bangalore (1960 (40) ITR 298 SC) and Superintendent (Tech.I) Central Excise,I.D.D. Jabalpur and Ors. v. Pratap Rai (1978 (114) ITR 231 SC). In Commisioner of Sales Tax, U.P. v. R.P. Dixit Saghidar (2001 (9) SCC 324), it was held as follows:

"We are unable to subscribe to the view of the High Court. The aforementioned passage quoted from the Tribunal's order shows that the Tribunal was of the view that once the order is quashed by the Assistant Commissioner, he could not in law remand the case for a decision afresh. As has been noted, before the Assistant Commissioner the counsel for the respondent had contended that the ex parte order should have been set aside because no notice had been received. When principles of natural justice are stated to have been violated it is open to the appellate authority, in appropriate cases, to set aside the order and require the Assessing Officer to decide the cases de novo. This is precisely what was directed by the Assistant Commissioner and the Tribunal, in our opinion, was clearly in error in taking a contrary view."

The view is clearly applicable to the facts of the present case.

The emerging principles are:-

(i) Non-issue of notice or mistake in the issue of notice or defective service of notice does not affect the jurisdiction of the assessing officer, if otherwise reasonable opportunity of being heard has been given;
(ii) Issue of notice as prescribed in the Rules constitutes a part of reasonable opportunity of being heard;

(iii) If prejudice has been caused by non-issue or invalid service of notice the proceeding would be vitiated. But irregular service of notice would not render the proceedings invalid; more so, if assessee by his conduct has rendered service impracticable or impossible.

(iv) In a given case when the principles of natural justice are stated to have been violated it is open to the appellate authority in appropriate cases to set aside the order and require the Assessing Officer to decide the case de novo.

In the instant case, the learned Single Judge and the Division Bench have not considered the question of prejudice, grant of reasonable opportunity in the aforesaid perspective.

In view of what has been stated in R.P.Dixit's case (supra), learned Single Judge was justified in directing de novo assessment by an order of remand. The direction was appropriate as the only ground on which the interference was made related to the violation of principles of natural justice by alleged improper service of notice. The Division Bench was not justified in upsetting the direction. The appeal is allowed but in the circumstances without any order as to costs.

We however make it clear that no opinion has been expressed by us on any aspect except limitation. It shall be open to the assessee to raise all other issues before the Assessing Officer which shall be considered in the proper perspective and in accordance with law.