

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WTA Nos. 2/2007 and 3/2007**

**Judgment reserved on :28<sup>th</sup> January, 2011**

% **Judgment delivered on :18<sup>th</sup> February, 2011**

**1. WTA No. 2/2007**

**COMMISSIONER OF WEALTH TAX,  
DELHI – VI**

**...APPELLANT**

*Through:* Ms. Rashmi Chopra, Advocate.

*Versus*

**MOTOR & GENERAL FINANCE LIMITED**

**...RESPONDENT**

*Through:* Mr. O.S.Bajpai, Sr. Advocate  
with Mr. V.N.Jha, Advocate.

**AND**

**2. WTA No. 3/2007**

**COMMISSIONER OF WEALTH TAX,  
DELHI – VI**

**...APPELLANT**

*Through:* Ms. Rashmi Chopra, Advocate.

*Versus*

**MOTOR & GENERAL FINANCE LIMITED**

**...RESPONDENT**

*Through:* Mr. O.S.Bajpai, Sr. Advocate  
with Mr. V.N.Jha, Advocate.

**CORAM:**

**HON'BLE MR. JUSTICE A.K. SIKRI**

**HON'BLE MR. JUSTICE M.L.MEHTA**

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|--------------------------------------------------------------------------|-----|
| 1. Whether the Reporters of local papers be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not?                                    | Yes |
| 3. Whether the judgment should be reported in the Digest?                | Yes |

**M.L. MEHTA, J.**

1. These two appeals are filed by the Revenue against the common order dated 29<sup>th</sup> December, 2006 of the Income Tax Appellate Tribunal (hereinafter referred to as "the Tribunal") whereby the appeals of the Revenue against the common order dated 19<sup>th</sup> August, 2005 of the Commissioner of Wealth Tax (Appeal) [hereinafter referred to as "CWT(A)] for assessment years 1997-98 and 1998-99 were dismissed.
2. The respondent-assessee filed income tax returns for the assessment year 1997-98 and 1998-99 and during the course of scrutiny, the Assessing Officer (AO) found that the assessee is in receipt of amount from various properties and had shown rental receipts of Rs.6,14,36,188 (AY-1997-98) and Rs.2,34,18,846 (AY-

1998-99). Since the assessee had not filed wealth tax returns for these years and there being taxable wealth, the AO issued notice under Section 17 of the Wealth Tax Act, 1957 (hereinafter referred to as "the Act") on 09.06.2000, which was duly served upon the assess on 25<sup>th</sup> June, 2000. The AR of the assessee submitted a letter dated 3<sup>rd</sup> July, 2000 to the AO stating the notice issued to be bad in law mainly on the grounds that public is substantially interested in the shares of assessee company and so the proceedings are liable to be dropped. However, the AO not being convinced gave another opportunity and issued notice under Section 16(4) of the Act on 13<sup>th</sup> March, 2002 whereby the assessee was again asked to furnish return for the said years and also seek any further clarification about the notice under Section 17 of the Act already issued. In response thereto, the AR of the assessee filed written reply dated 26<sup>th</sup> March, 2002 taking the same stand as taken in the aforesaid letter of 3<sup>rd</sup> July, 2002. The AO not agreeing with the reasons given by the assessee that it being a public company and so not liable to file wealth tax return, proceeded to assess chargeable wealth at Rs.4,93,33,500 (AY-1997-98) and Rs.19,38,98,400 (AY-1998-99). The assessee filed appeals before the CWT(A), who confirmed the assessment order and assessee then filed appeals before the

Tribunal. Before the Tribunal, an additional ground of appeal was raised by the assessee regarding the effect of non-issue of notice under first proviso of Section 16(5) of the Act. The Tribunal while admitting the additional ground of appeal being legal noted as under:-

“After carefully examination of the rival submissions, we are of the view that additional ground raised by the assessee should be admitted and permitted to be raised by the assessee. In our opinion, it is mandatory for the Assessing Officer to issue notice under sub-section (5) of section 16 of the WT Act if circumstances provided in the sub-section are attracted in the given case. Requirement of issuing a statutory notice can not be done away merely on the ground that assessee was not cooperative or had knowledge of proceedings or participated in them. In fact notice under section (5) is to be issued to a person who has failed to comply with notice mentioned in the said section. Therefore, objection raised on behalf of the assessee to the admission of additional ground of appeal do not carry any weight. The decision of Kerala High Court relied upon by the revenue help the assessee’s case and no of the revenue. We are, therefore, inclined to admit additional ground of appeal and to see the legal effect of non issuance of notice under sub-section (5) of section 16 of the W.T. Act. The matter cannot be straight away decided in view of the second proviso to sub-section (5) of Section 16 of the Act which states that it shall not be necessary to give such an opportunity under sub-section (4) were not notices as provided under second proviso to sub-section (5) of W.T. Act. As notices issued under the above sub-section are required to be considered to record a filing, we have refrained from making any comments on the said notices.

3. In the aforesaid manner, the Tribunal remanded the case to the CWT(A) for fresh consideration in accordance with law. No other ground raised in the memo of appeal was pressed by the assessee before the Tribunal.
4. On remand, the CWT(A) called for the report of the AO. According to the AO, since the assessee did not file return of wealth for AY – 1997-98 and 1998-99, notice under Section 17 of the Act was issued and since assessee still failed to comply, another opportunity was given by issuing notice under Section 16(4) of the Act on 13<sup>th</sup> March, 2000. In response to this notice, AR of the assessee attended the proceedings on 22<sup>nd</sup> March, 2002 and 26<sup>th</sup> March, 2002 and filed written submissions stating that the company is not liable. Since no return was filed even after all this, assessment was completed under Section 17 & 16(5) of the Act. According to AO, since valid notice under Section 16(4) of the Act had been issued, no further notice under Section 16(5) of the Act was necessary before completing the assessment. This time CWT(A) vide common order dated 18<sup>th</sup> August, 2005 allowed the appeals of the assessee for both the assessment years. The CWT(A) was of the view that notice which was issued under Section 16(4)(i) of the Act, but the mandatory

notice of first proviso to Section 16(5) was not issued, which could be done away only where notice was issued under clause (ii) of sub-section (4) of the Section 16 of the Act prior to making of assessment. Since, no such notice was issued under clause (ii) of sub-section (4) of the Section 16 of the Act, the assessment without notice under first proviso to sub-section (5) is vitiated. The CWT(A), accordingly, allowed the appeals of the assessee.

5. The Tribunal agreed with the findings recorded by the CWT(A) and vide the impugned order held that assessment orders passed under Section 17/16(5) of the Act were not valid as the mandatory requirement of issue of notice under first proviso of Section 16(5) was not complied. It is against this impugned order that the Revenue has preferred these appeals.
6. The appeals were admitted on the following substantial questions of law:

“Admit on the following substantial questions of law:

- (a) Whether on the facts and circumstances of this case, is it mandatory to issue notice under Section 16 (5) of the Wealth Tax Act before passing best judgment assessment in case where return was not

filed pursuant to notice under Section 16 (4) of the Act?

- (b) Whether no notice under Section 16(5) of the Wealth Tax Act was required to be issued in view of the second proviso thereto, as notice under sub-section (4) of Section 16 had already been issued?

We may point out that the learned counsel for the respondent has argued that in the first round of litigation, the Tribunal had held that service of the aforesaid notice is mandatory and that order is not challenged by the Revenue. Therefore, insofar as present case is concerned, this question does not arise for consideration. We make it clear that this aspect shall also be considered.”

- 7. At the time of admission, the learned counsel, Mr.Bajpai, appearing for the respondent-assessee also submitted that in the first round of litigation, the Tribunal has already held that service of the aforesaid notice (under Section 16(5) of the Act) is mandatory and that order of the Tribunal is not challenged by the Revenue. While recording that this question does not arise in the present appeal, we proposed to deal with this aspect of the submission as well.
- 8. The submissions of Mr. Bajpai, learned counsel appearing for the assessee, before us are the same which are noticed in the order of the Tribunal. He submits that under first proviso to sub-

Section (5) of Section 16 of the Act, a notice was required to be issued by the Revenue for affording an opportunity before making best judgment assessment. He submits that this was mandatory, but as per second proviso it could be dispensed if a notice under clause (ii) of sub-Section (4) had been issued to the assessee prior to the making of the best judgment assessment. He submits that since no such notice was given under the first proviso and the notice which was given being under clause (i) and not clause (ii) of sub-Section (4), the assessment made by the AO is vitiated. On the other hand, learned counsel, Ms. Aggarwal, appearing for the Revenue submits that the notice which was contemplated under second proviso was under clause (i) and not clause (ii) of sub-section (4). She submits that clause (ii) notice was only for production of accounts, records or documents etc. which may be required by the AO where return had been filed under Section 14 or 15 of the Act. In case, where no return had been made, the notice contemplated was under clause (i) of sub-section (4) of Section 16. She submits that in the present case since still no return had been filed by the assessee, notice was issued under Section 17 of the Act and since no return was filed, it was issued under Section 16(4) of the Act calling upon the assessee to file return.

9. So far as the facts are concerned, there is no dispute. Those have been briefly noted above by us. The questions of law on which the appeals have been admitted are centered upon the interpretation of Section 16 of the Act. The CWT(A) and the Tribunal interpreted this Section in favour of the assessee.
10. We may note that Section 14 to Section 18 in Chapter IV of the Act deal with the assessment of wealth. Section 14 makes it mandatory to file return in case the wealth is chargeable to tax. Section 15 prescribes that if no return is furnished under Section 14(1) or under a notice issued under clause (i) of sub-section (4) of section 16, or that assessee after furnishing a return discovers any omission or wrong statement therein, he may furnish a return or a revised return, as the case may be. Section 15B prescribes for self assessment on the basis of returns furnished under Section 14 or 15 or in response to a notice under clause (i) of sub-section (4) of section 16 or under section 17. We are mainly concerned with the sub-Section (4) and sub-Section (5) of Section 16 of the Act.
11. The relevant portions of Section 16 are reproduced as under:

## **Section 16 (1)(2)(4) and (5)**

**16. ASSESSMENT.** - (1) Where a return has been made under section 14 or section 15 or in response to a notice under clause (i) of sub-section (4), (i) if any tax or interest is found due on the basis of such return, after adjustment of any amount paid by way of tax or interest, then, without prejudice to the provisions of sub-section (2), an intimation shall be sent to the assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued under section 30 and all the provisions of this Act shall apply accordingly; and

(ii) if any refund is due on the basis of such return, it shall be granted to the assessee and an intimation to this effect shall be sent to the assessee :

Provided that except as otherwise provided in this sub-section, the acknowledgment of the return shall be deemed to be intimation under this sub-section where either no sum is payable by the assessee or no refund is due to him :

Provided further that no intimation under this sub-section shall be sent after the expiry of two years from the end of the assessment year in which the net wealth was first assessable.

(1A) Omitted

(1B) Omitted

(2) Where a return has been made under section 14 or section 15, or in response to a notice under clause (i) of sub-section (4) of this section, the Assessing Officer shall, if he considers it necessary or expedient to ensure that the assessee has not understated the net wealth or has not under-paid the tax in any manner serve on the assessee a notice requiring him, on a date to be specified therein, either to attend at the office of the Assessing Officer or to produce, or cause to be produced there, any evidence on which the assessee may rely in support of the return :

Provided that no notice under this sub-section shall be served on the assessee after the expiry of twelve months from the end of the month in which the return is furnished.

(4) For the purposes of making an assessment under this Act, the Assessing Officer may serve, on any person who has made a return under section 14 or section 15 or in whose case the time allowed under sub-section (1) of section 14 for furnishing the return has expired, a notice requiring him, on a date to be specified therein, - (i) Where such person has not made a return within the time allowed under sub-section (1) of section 14 to furnish a return of his net wealth or the net wealth of any other person in respect of which he is assessable under this Act on the valuation date, in the prescribed form and verified in the prescribed manner, setting forth the particulars of such net wealth and such other particulars as may be prescribed, or (ii) to produce or cause to be produced such accounts, records or other documents as the Assessing Officer may require.

(5) If any person, - (a) fails to make the return required under sub-section (1) of section 14 and has not made a return or a revised return under section 15, or

(b) fails to comply with all the terms of a notice issued under sub-section (2) or sub-section (4), the Assessing Officer, after taking into account, all relevant material which he has gathered, shall after giving such person an opportunity of being heard, estimate the net wealth to the best of his judgment and determine the sum payable by the person on the basis of such assessment:

Provided that such opportunity shall be given by the Assessing Officer by serving a notice calling upon the person to show cause, on a date and time to be specified in the notice, why the assessment should not be completed to the best of his judgment :

Provided further that it shall not be necessary to give such opportunity in a case where a notice under sub-section (4) has been issued prior to the making of the assessment under this sub-section.

12. Sub-section (4) contemplates issues of notice in two situations namely (a) where return is filed under Section 14 or 15, as the case may be, (b) where no return filed and time allowed under sub-section (1) of Section 14 for furnishing return has expired. Both clauses (i) & (ii) deal with different situations of the operative part of Section (4) namely (i) Where return filed under Section 14 or 15 and (ii) Where no return filed within time prescribed in Section 14(1). Clause (i) provide for issue of notice calling upon to file return where no return has been filed by him in time allowed in sub-section (1) of Section 14. Clause (ii) does not talk about filing of return but only notice requiring production of record, accounts, documents, etc. as AO may require.
13. The word in between two clauses is 'or' and not 'and'. The plain reading of sub-section (4) would clarify that when the return had been filed under Sections 14 or 15, a notice under clause (ii) may be issued by the Assessing Officer for production of record, documents as may be required. No notice under clause (ii) is contemplated in a situation where return has not been filed at all

inasmuch as in the absence of return no documents or records may be required.

14. Sub-section (5) makes a provision for best judgment assessment in two situations; first, under Clause (a) where a person fails to make the return under sub-section (1) of Section 14 or under Section 15. Secondly, where he fails to comply with all the terms of notice issued under sub-section (2) or sub-section (4). However, before proceeding to make best judgment assessment, the Assessing Officer is required to give opportunity of hearing to the person concerned. The first proviso to sub-section states that opportunity of hearing is to be given by serving a notice calling upon him to show cause why the assessment should not be completed to the best of judgment of Assessing Officer. Second proviso provides that no notice of opportunity of hearing is required where a notice under sub-section (4) has been issued prior to the making of the best judgment assessment.
15. The learned counsel for assessee submits that no notice of hearing was provided by the Assessing Officer to the assessee and the notice issued under sub-section (4) was the one under clause (i) and not under clause (ii) of sub-section (4). In other

words his submission is that the notice of opportunity of hearing was mandatory, and the same could be dispensed with only in case a notice had been issued under clause (ii) of sub-section (4). To substantiate his submissions regarding notice of opportunity of hearing learned counsel relies upon various judgments namely, ***Colonisers v. ACIT*** (41) ITD 57 Hyderabad; ***Ponkunnam Traders v. Additional Income Tax Officer*** 83 ITR 508; ***Nawabkhan Abbaskhan v. State of Gujrat*** AIR 1974 SC 144 and ***Director of Income Tax v. Society for Worldwide Inter Bank Financial, Telecommunications*** [2010] 323 ITR 249 (Del.)

16. We have gone through the aforesaid judgments and there cannot be any dispute with regard to the proposition of law that where there are mandatory provisions of affording opportunity of hearing and the same was not complied, the decision taken in violation thereof was void. However, we see that this is not the situation in the present case. There is no dispute that the assessee did not make the return under Section 14(1). That itself was enough for the Assessing Officer to issue a notice to the assessee under clause (i) of sub-section (4), calling upon him to furnish the return. The assessee having failed to do so, clause

(a) of sub-section 5 comes into operation and entitles the Assessing Officer to proceed to make best judgment assessment. Where the return itself was not filed there was no need of any notice under clause (ii) of sub-section (4). In between clauses (a) and (b) of sub-section (5) also the word used is 'or' which means that in either of the two situations, as noticed above, the Assessing Officer was entitled to proceed for making best judgment assessment. It may be noticed that there is no mention of clauses (i) or (ii) after sub-section (4) in clause (b). It means that even where the assessee has failed to comply with the terms of the notice issued under clauses (i) or (ii) of sub-section (4), the Assessing Officer was entitled to proceed with framing best judgment assessment.

17. What is provided under the second proviso to sub-section (5) is a notice under sub-section (4) without any qualification of clause (i) or (ii). It means that if a notice under clause (i) in the case where return was not filed or a notice under clause (ii) calling upon to file documents, etc., had been issued, that was enough to dispense with issue of another notice of hearing opportunity contemplated in the first proviso of sub-section (5). We may clarify that if notice has been issued in clause (i) where return

has not been filed calling upon a person to file return or where a return has been filed calling upon the person to produce documents, etc, that would amount to issuance of notice contemplated in the second proviso and in such situation no separate notice of hearing opportunity was required to be issued before making best judgment assessment. We fail to understand as to how the learned counsel tries to introduce prior notice under clause (ii) of sub-section (4) only for the applicability of second proviso to sub-section (5). We are of the view that CWT(A) and Tribunal have given wrong interpretation to the provisions of sub-section (4) and sub-section (5) of Section 16 by stating that the statutory notice under first proviso could be done away only if prior notice was under clause (ii) of sub-section (4). We are unable to agree with the manner of interpretation of this provision by the authorities below and also by learned counsel for the respondent/assessee. This type of interpretation would amount to reading of what is not provided in the provision.

18. The submission of learned counsel for the respondent/assessee that the finding of the Tribunal in the first round of litigation that issue of notice under sub-section (5) is mandatory has become final, is untenable inasmuch as the Tribunal in those proceedings

opined the issuance of notice under sub-section (5) to be mandatory if the circumstances provided under sub-section are attracted in the present case. This was an opinion in the case which was ultimately remanded to CWT(A) for reconsideration. That opinion of the Tribunal was based on wrong interpretation of sub-section (5) as discussed above. The circumstances as prevailing did not attract issue of notice under sub-section (5) inasmuch as notice which was given under sub-section (4) was for calling upon to file the return and is the one which was contemplated in the second proviso.

19. Learned counsel also submits that when the notice under Section 17 was already given, the subsequent notice under Section 16(4) was invalid. In this regard also we are unable to agree with the submission of learned counsel inasmuch as notice under Section 17 dated 13<sup>th</sup> July, 2000 was issued to the assessee as income had escaped assessment for non filing of return. In response to this, the assessee denied its liability to pay tax on the ground that the public had interest in the company and so no wealth return was required to be filed by it.

20. Where the Assessing Officer had reasons to believe that the wealth chargeable to tax has escaped assessment whether by reasons of non-assessment or assessment at low rate or otherwise he may issue a notice under Section 17 calling upon to furnish the return and may proceed to assess or reassess and the return so filed was to be treated as return required to be furnished under Section 14. We do not see as to on what basis the learned counsel tries to argue that if notice was issued under Section 17, a subsequent notice under Section 16(4) was invalid. We have seen notices dated 13<sup>th</sup> March, 2002 which are apparently under Section 16(4). Vide these notices, the assessee was called upon to furnish the return for the assessment years 1997-98 and 1998-99. Since the notices had also been issued under Section 17, the assessee was also informed that clarification, if any, may be sought on notices under Section 17. In any case, assuming that notices under Section 17 were not required, the issue of notice under Section 16(4) was not to prejudice the assessee in any manner. This irregularity if at all it was there, that will not make the proceedings a nullity.

21. Learned counsel submits that now the assessment for the year 1997-98 and 1998-99 have become barred by limitation and proceedings cannot be revived or restored. He relies upon various judgments such as; **Hope Textiles Ltd v. UOI** [1994] 205 ITR 508 (SC); **CIT v. Escorts Farms Pvt. Ltd** [1989] 180 ITR 280 (Del.); **P. Vittal Pai v. Agricultural Income Tax Officer** [1976] 104 ITR 794 (Ker.); **Narinder Singh Dhingra v. CIT** [1973] 90 ITR 110 (Del.); **Ponkunnam Traders v. Additional Income Tax Officer** [1972] 83 ITR 508 (Ker.) and **Bengal Tea and Fabrics Ltd. v. ACIT** [1997] 223 ITR 729 (Gauhati). There is also no dispute to the proposition of law that Tribunal has no power to confer jurisdiction on Assessing Officer to remove bar of limitation. There also cannot be any dispute that Tribunal has wide powers and can direct Assessing Officer to make assessment in accordance with law. Thus, we do not find any merit in the submission of learned counsel inasmuch as the assessment of the relevant year has gone through various rounds of litigation before the authorities below because of no fault of the Revenue.
22. In view of our above discussion we answer question (a) in the negative that where return was not filed pursuant to notice

under Section 16(4) of the Act, no further notice was mandatory under Section 16(5) prior to passing of best judgment assessment. We answer the second question in affirmative in the sense that where notice under sub-section (4) of Section 16 had already been issued, no notice was required to be issued in view of second proviso to Section 16(5). Both the appeals are disposed of accordingly.

**M.L.MEHTA  
(JUDGE)**

**A.K. SIKRI  
(JUDGE)**

**FEBRUARY 18, 2011**  
'Dev'