it is a more harsh provision to the subject. There is no guideline in the Act as to when the Government will resort to either of these remedies. Thus, it would be seen that in cases of recovery of money or resumption of the site and forfeiture of money paid, the Government may choose and discriminate in proceeding against one person in one manner and another person in another manner. The Act creates a charge on the property. The Act forbids creation of a third party right by the transferee until the amount represented by the charge is paid in full. In the teeth of statutory security and enforceability it is totally unreasonable restriction on the enjoyment of property by resuming the site for defaults in payments of property by resuming the site for defaults in payments of money and forfeiting the moneys paid by the transferee.

(9) From what has been stated above, there does not appear to be any material difference in the provisions of the Act as compared to the provisions of the capital Act which provisions have been struck down by their Lordships of the Supreme Court.

(10) For the reasons recorded above, the writ petition is allowed and the provisions of section 13 of the Act are declared *ultra vires* Articles 14 and 19 (1) (f) of the Constitution of India. Consequently, the impugned order passed under the provisions of section 13 of the Act is quashed. However, there will be no order as to costs.

S. S. Dewan, J.—I agree.

N. K. S.

Before P. C. Jain and C. S. Tiwana, JJ.

COMMISSIONER OF INCOME-TAX, PATIALA,—*Applicant.*

versus

M/S. DEHATI CO-OPERATIVE MARKETING-CUM-PROCESSING SOCIETY,—*Respondent.*

Income Tax Reference No. 65 *of* 1975.

November 21, 1978.

Income-tax Act (XLIII of 1963)—*Sections* 139, 148 *and* 271(1)(*i*)—*Income-tax (Appellate Tribunal) Rules,* 1963—*Rule* 11—*Assessee not filing return under section* 139(1)—*Notice under section* 148 *to file the return within the period stipulated therein—Belated return filed in pursuance of the said notice—Penalty for the period prior to the*

issuance of the notice under section 148—*Whether could be imposed*—*New ground of attack not urged before any subordinate authority*—*Order of the Assistant Appellate Commissioner sought to be supported on the basis of such ground*—*Appellate Tribunal*—*Whether could allow such ground to be urged.*

Held, that after a default is committed by an assessee to furnish a return under section 139(1) of the Income Tax Act, 1961, the Income Tax Officer would be able to take action without issuing him a notice under section 139(2) of the Act. If the provisions relevant in connection with notices under sections 139(2) and 148 of the Act are omitted from section 271 of the Act, the result would be that after the Income Tax Officer or the Appellate Assistant Commissioner comes to the finding that any person has without reasonable cause failed to furnish a return, he can direct such person to pay the penalty. Even though the customary method of asking an assessee to show cause against the payment of the penalty is that of issuing a notice under section 139(2) of the Act yet this cannot be said to be the sole method of issuing notices contemplated by section 271 of the Act. If the default has once occurred there has to be an express provision of law for relieving a defaulter of the penalty. The condonation of delay and the exemption of the defaulter from the payment of penalty could not occur indirectly by the issuance of a notice for some other kind of default made under the provisions of the Act apart from those contained in section 139(1) of the Act. Moreover, if this view is not accepted, it would put a premium on concealment of income and evasion of tax. If there is any vagueness in a taxing law it has to be interpretted in favour of the tax-payer. There is, however, no authority for the view that the law has to be interpreted in favour of a person who is a tax evader. Payment of tax is distinct from the payment of penalty. Payment of tax can be construed liberally in favour of a tax-payer but a provision with regard to the payment of penalty cannot be so construed. Thus, on the failure of an assessee to furnish a return penalty can be imposed even for the period prior to the date of the default made in pursuance of a notice issued under section 148 of the Act. (Paras 6 and 10).

Additional Commissioner of Income-tax vs. *Bihar Textiles* (1975) 100 I. T. R. 253 DISSENTED FROM.

Held, that under rule 11 of the Income Tax (Appellate Tribunal) Rules 1963, an appellant can be allowed to urge such a ground in support of the appeal which has not been set forth by him in the memorandum of appeal. It has then been mentioned that the Tribunal, if it so desires in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal. The only proviso to this rule is that the Tribunal

cannot rest its decision on a new ground unless the party who would be affected thereby has had a sufficient opportunity of being heard on that ground. If the appellant can be allowed a concession of the nature contained in rule 11, there is no justification for denying the respondent in an appeal a similar concession. The powers of the Appellate Tribunal are similar to the powers of the Appellant court under the Civil Procedure Code. In so far as a respondent only wants to maintain the decree of the lower court which is in his favour, he is entitled to support it on fresh grounds if he can do so and the appellate court also will have jurisdiction to permit him to do so, provided that the fresh grounds which he wants to urge do not require a further investigation into facts which are not already on record and are not based on facts which were neither alleged nor admitted nor proved and which the other side was never called upon to meet in the lower court. (Para 3).

Case referred by Income-tax Appellate Tribunal, Chandigarh Bench,—vide *order, dated 3rd October,* 1972 *to the Hon'ble High Court for its opinion referring the following questions of law arising of the Tribunal's order dated* 31*st December,* 1974 *in I. T. A. No.* 1594 *of* 1972-73 *A/Y* 1969-70.

(1) *Whether on the facts and circumstances of the case the Tribunal was right in law in allowing the assessee to raise before the Tribunal a ground which had not been raised before or adjudicated upon by the Appellate Assistant Commissioner* ?

(2) *Whether on the facts and circumstances of the case the Tribunal was right in law in holding that penalty in the instant case could be imposed only in respect of the delay that occurred after service of the notice under section* 148, *Income-Tax Act* ?

D. N. Awasthy, Advocate, with B. K. Jhingan, Advocate, *for the Appellant.*

B. S. Gupta, Advocate, *for the Respondent.*

JUDGMENT

C. S. Tiwana, J.

(1) In this reference made by the Income-tax Appellate Tribunal at the instance of the Commissioner of Income-tax, Patiala II, Patiala, the main point for determination is whether on the failure of an assessee to furnish a return no penalty can be imposed prior to the

date of the default made in pursuance of a notice issued under section 138, Income-tax Act (hereinafter referred to as the Act). The other minor point upon which reference has been made is for determination of this fact whether an assessee can be allowed to raise a new ground of attack in appeal before the Income-tax Appellate Tribunal in the absence of that ground having been taken before the Income-tax Officer.

(2) The relevant facts of the case in hand may be stated with the help of the order of reference dated July 22, 1975. The assessee is Messrs Dehati Co-operative Marketing-cum-Processing Society, Sangrur. The assessee had to furnish the return of the income under section 139(1)(a) of the Act before June 30, 1969. A notice under section 148 of the Act was served on the assessee on August 10, 1970, calling upon it to furnish a return before September 9, 1970. The return was belatedly filed on February 24, 1971. There was thus a delay of five complete months. The Income-tax Officer for the imposition of penalty calculated the period of delay as being that of nineteen months commencing from June 30, 1959. The explanation for the delay given before the Income-tax Officer was that the assessee had this impression that a co-operative society was not chargeable to income-tax. The delay after the service of the notice was tried to be explained on the ground that there had been transfer of an old Accountant and the new Accountant was unable to complete the return by the due date. Any of these grounds for escaping from the payment of the penalty did not find favour with the Income-tax Officer. A penalty of Rs. 12,668 was imposed. The Appellate Assistant Commissioner, by taking into consideration the payment of Rs. 21,130 made under section 140A(1) of the Act by way of self-assessed tax, reduced the penalty to Rs. 4,638. At the time of hearing of the case before the Tribunal both the parties agreed that in view of the retrospective amendment of section 271(1)(i) of the Act by virtue of the Direct Taxes (Amendment) Act, 1973, the reduction in penalty made by the Appellate Assistant Commissioner could not be sustained on the basis of the tax assessed under section 140A of the Act. The assessee was allowed by the Tribunal to support the order of the Appellate Assistant Commissioner in relation to the reduction of the penalty on a new ground, namely, that as the proceedings in the course of which the Income-tax Officer had recorded his requisite satisfaction under section 271(1)(a) of the Act were based on the return furnished in response to the notice under section 148

of the Act, the date for furnishing the return under section 139(1) became irrelevant for computing the period of default. The Tribunal gave this finding that there was only a delay of five months as the return was furnished with that much delay after the receipt of the notice under section 148 of the Act. The proportionate penalty for five months amounted to Rs. 3,333 as against the penalty of Rs. 4,638 as upheld by the Appellate Assistant Commissioner. The assessee had not appealed before the Tribunal. However, the reduction by the Appellate Assistant Commissioner in the penalty was sustained by the Tribunal.

The questions referred to this Court for opinion were formulated as follows by the Tribunal:—

(1) Whether on the facts and circumstances of the case the Tribunal was right in law in allowing the assessee to raise before the Tribunal a ground which had not been raised before or adjudicated upon by the Appellate Assistant Commissioner ?

(2) Whether on the facts and circumstances of the case the Tribunal was right in law in holding that penalty in the instant case could be imposed only in respect of the delay that occurred after service of the notice under section 148, Income-tax Act ?

(3) Rule 11 of the Rules and Orders relating to Appellate Tribunal can be of some help in giving a decision on Question No. 1. Under this rule an appellant can be allowed to urge such a ground in support of the appeal which has not been set forth by him in the memorandum of appeal. It has then been mentioned that the Tribunal, if it so desires in deciding the appeal, shall not be confined to the grounds set forth in the memorandum of appeal or taken by leave of the Tribunal. The only proviso to this rule is that the Tribunal cannot rest its decision on a new ground unless the party who would be affected thereby has had a sufficient opportunity of being heard on that ground. If the appellant can be allowed a concession of the nature contained in rule 11, there is no justification for denying the respondent in an appeal a similar concession. There is even an authority of the Bombay High Court in support of the view which we intend to take. It is reported as *Commissioner of*

Income-tax, Bombay City I v. *Hazarimal Nagji and Co.*, (1). In it the respondent's right to support the Appellate Assistant Commissioner's order on a new ground is discussed. The law laid down in this authority with which we respectfully agree was summarised in the headnote as follows:—

> "The powers of the Appellate Tribunal are similar to the powers of the appellate court under the Civil Procedure Code. In so far as a respondent only wants to maintain the decree of the lower court which is in his favour, he is entitled to support it on fresh grounds if he can do so, and the appellate court also will have jurisdiction to permit him to do so, provided that the fresh grounds which he wants to urge do not require a further investigation into facts which are not already on record and are not based on facts which were neither alleged nor admitted nor proved and which the other side was never called upon to meet in the lower court."

(4) For the determination of Question No. 2, some provisions of the Act even though otherwise well known have to be recapitulated. Every person who has an assessable income has to furnish a return without any notice to him as required by section 139(1) of the Act. If the return is not furnished by the date fixed by the statute, a notice under section 139(2) of the Act can be issued by the Income-tax Officer which has to be served before the end of the relevant assessment year. By such notice the assessee can be required to furnish within thirty days from the date of service of the notice a return of his income during the previous year. If the Income-tax Officer has failed to serve such a notice, he can make use of the power given to him under section 148 of the Act. The matter relating to the income escaping assessment has at first to be considered under section 147 of the Act. If the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return under section 139 of the Act for any assessment year to the Income-tax Officer, income chargeable to tax has escaped assessment for that year, he may assess such income for the assessment year concerned. Before making the assessment, he has to issue a notice under section 148 of the Act. In this kind of

(1) (1962) 46 I.T.R. 1168.

notice all or any of the requirements which may be included in a notice under section 139(2) of the Act can be mentioned. The Income-tax Officer has, however, to record his reasons before issuing notice under section 148 of the Act. Then the relevant provision for the imposition of penalty is contained in section 271(1) of the Act. This provision by omitting the words which are not relevant in this case would read something like this—

> "If the Income-tax Officer or the Appellate Assistant Commissioner in the course of any proceedings under this Act is satisfied that any person has without reasonable cause failed to furnish the return of total income which he was required to furnish under sub-section (1) of section 139 or by notice given under sub-section (2) of section 139 or section 148 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by sub-section (1) of section 139 or by such notice, as the case may be, he may direct that such person shall pay by way of penalty, in addition to the amount of tax, if any payable by him, a sum equal to two per cent of the assessed tax for every month during which the default continued."

(5) The view taken by the Tribunal in respect of the period of default is only supported by an authority of the Patna High Court reported as *Additional Commissioner of Income-Tax* v. *Bihar Textiles,* (2). The question referred for decision was whether the delay under section 139(1) of the Act is condoned if a notice under section 139(2) was issued to the assessee. The question was answered in favour of the assessee. It was remarked that once a notice under section 139(2) is duly issued during the relevant assessment year there cannot be any penalty for failure to furnish the return as required by sub-section (1) of section 139 of the Act. This reasoning was adopted in the body of the judgment that once a notice under sub-section (2) of section 139 of the Act is issued that precludes the penal provision being attracted in so far as the failure to furnish the return under sub-section (1) of section 139 is concerned. One reason given for this view was that an Income-tax Officer was empowered under section 139(2) of the Act to issue a

(2) (1975) 100 I.T.R. 253.

notice even before the period prescribed under sub-section (1) of section 139 of the Act. When once it is held that under sub-section (2) of section 139 the Income-tax Officer has power to curtail the period prescribed under section 139(1), it does not stand to reason as to why the power for extending such a time within any point of time in the relevant assessment year be not held to be inherent in him. It was then remarked that it must be held that by issuance of a notice under section 139(2) within the relevant assessment year the period prescribed in sub-section (1) of section 139 was duly extended and no penalty could be levied for any default committed in respect of the provisions of section 139(1).

(6) We are of the view that the Patna Hiigh Court did not consider all the aspects of the matter and, therefore, we do not follow the law as laid down by it. After a default is committed by an assessee to furnish a return under section 139(1) of the Act, would the Income-tax officer be unable to take any action without issuing him a notice under section 139(2) of the Act? If the provisions relevant in connection with notices under sections 139(2) and 148 of the Act are omitted from section 271 of the Act, the result would be that after the Income-tax Officer or the Appellate Assistant Commissioner comes to this finding that any person has without reasonable cause failed to furnish a return, he can direct such person to pay the penalty. Even though the customary method of asking an assessee to show cause against the payment of the penalty is that of issuing a notice under section 139(2) of the Act yet this cannot be said to be the sole method of issuing notices contemplated by section 271 of the Act. If the default has once occurred there has to be an express provision of law for relieving a defaulter of the penalty. The condonation of delay and the exemption of the defaulter from the payment of penalty could not occur indirectly by the issuance of a notice for some other kind of default made under the provisions of the Act apart from those contained in section 139(1) of the Act. Another reason for discarding the Patna view is that it puts a premium on concealment of income and evasion of tax. We are not unmindful that if there is any vagueness in a taxing law it has to be interpreted in favour of the tax-payer. There is, however, no authority for the view that the law has to be interpreted in favour of a person who is a tax-evader. Payment of tax is quite distinct from the payment of penalty. A provision with regard to the payment of tax can be construed

liberally in favour of a tax-payer, but a provision with regard to the payment of penalty cannot be so construed.

(7) We would now notice the authorities going against the view taken by the Patna High Court. The first such authority is *C. V. Govindarajulu Iyer* v. *Commissioner of Income-tax, Madras*, (3). There is a reference to the provisions of the Income-tax Act, 1922. It may be mentioned that section 22 of the old Act corresponds to section 139 of the Act. The holding of the authority is that the Income-tax Officer was competent in the course of the proceedings taken by him under section 34 read with section 22(2) of the Income-tax Act, 1922, to assess such income, to levy a penalty under section 28(1) (a) of that Act for failure without reasonable cause to furnish a return pursuant to a notice under section 22(1). It was a case where an assessee failed to furnish a return of his total income as required by a notice under section 22(1), but no notice under section 22(2) was issued by the department within the year of assessment. Under the old Act there used to be a general notice under section 22(1) for the furnishing of returns by the assessee. This view was taken in the authority under discussion that once assessment proceedings have commenced they can only come to an end either by an order of assessment or by an order declaring that no assessment can be made. In the case being considered *C. V. Govindarajulu Iyer* v. *Commissioner of Income Tax, Madras* (3 supra) there was admittedly no such order, and when eventually proceedings were taken under section 34 such proceedings must be deemed to relate to the proceedings which commenced with the public notice under subsection (1) of section 22.

(8) The next authority is of the Rajasthan High Court reported as *Commissioner of Income-tax, Rajasthan* v. *Indra and Co.*, (4). The holding is that an assessee is liable to penalty for not submitting his return as required in a notice under section 139(1) of the Act even though he subsequently files a return under section 139(2) of the Act and an assessment is made on the basis of that return. Two contentions were made on behalf of the assessee. The first contention was that as soon as notices under section 139(2) of the Act were issued it must be taken that the delay in the filing of the returns under sections 139(1) was condoned. The other contention

(3) (1948) 46 I.T.R. 391.

(4) (1971) 79 I.T.R. 72.

was that the Income-tax Officer had not mentioned in the assessment order that the penalty proceedings were being initiated for default under section 139(1). The Appellate Assistant Commissioner rejected both the arguments. The assessees then preferred appeals before the Tribunal and the Tribunal took the view that as in each case the assessment proceedings had been initiated and completed on the basis of returns submitted under section 139(2) it was not permissible under law that penalty should be imposed for any default committed in not submitting the returns under section 139(1). The import of the words "as the case may be" occurring in section 271 of the Act has been explained in this authority for taking the ultimate view, and we can do no better than repeat the discussion of the Rajasthan High Court contained in the authority itself. The relevant portion reads as follows:—

> "The Tribunal contrasted the language of section 271(1)(a) of the Act with the language of section 28(1)(a) of the old Act and noticed that the words "as the case may be" were added in clause (a) of sub-section (1) of section 271 of the Act and these words substantially modified the corresponding provisions of section 28(1)(a) of the old Act. The Tribunal proceeded to say that under the Act minimum penalty is provided and that minimum penalty is to be calculated for every month during which default continued and this calculation is possible only when the limits of time during which the default continued can be determined. The Tribunal took the view that so far as the time of commencement of the default is concerned, it was known and definite in the instant case. It was, however, not possible to determine the point of time when the default ceased in either of these two cases, for the simple reason that the default in these cases never ceased as none of the assessees had filed any return as required under section 139(1). We have to examine whether this reasoning is correct.
>
> The addition of the words "as the case may be" at the end of section 271(1)(a) of the Act presents us with no problem in interpretation. Under this section, the defaults contemplated are of four kinds :
>
> 1. Any person who without reasonable cause has failed to submit return of total income which he was required to furnish under sub-section (1) of section 139, or

2. Any person who without reasonable cause has failed to furnish the return of total income which he was required to furnish by notice given under sub-section (2) of section 139 or section 148; or

3. Any person who without reasonable cause has failed to furnish it within the time allowed and in the manner required by sub-section (1) of section 139, or

4. Any person who without reasonable cause has failed to furnish it within the time allowed and in the manner required by notice given under sub-section (2) of section 139 or section 148.

The words "as the case may be" have been put because all these four cases have been condensed in one paragraph and these words only mean that whichever the case may be, the person shall be deemed to have committed default for which penalty was to be imposed under section 271(1)(i) of the new Act. These words "as the case may be" have their full meaning when we construe section 271(1)(a) in this light. They were not necessary in section 28(1)(a) of the old Act, for the reason that the words at the end of section 28(1)(a) "by such notice" covered all the defaults mentioned therein, as all the defaults could be committed only when appropriate notices as required in section 22(1) or section 22(2) or section 34 of the old Act had been given. The words "by such notice" meant a notice as may have been given either under section 22(1) or section 22(2) or section 34. Because the word "such" covered the entire ground, it was not necessary to put the words "as the case may be" in section 28(1)(a) at its end, but it became necessary to add these words in clause (a) of sub-section (1) of section 271 of the Act, because there were two kinds of default contemplated under it, one committed even when no notice is given and the other committed after notice. It may be mentioned that under the Act, no notice is to be issued

for filing the return under section 139(1) and every person, if his total income exceeded the maximum amount which is not chargeable to income-tax, has to furnish the return of his income by or before a particular date as mentioned therein.

This being the position we do not find that there is any ground for shifting the words "as the case may be" out of their context and take them and read them in connection with the words "in the course of any proceedings" in the said Act as appears to have been done by the Tribunal. Such a queer construction is neither warranted by the language of the enactment nor by any other consideration."

Further on, it was remarked that a contrary view would mean that any person liable to pay income-tax could sit comfortably without any fear of the imposition of penalty and not furnish his return as required under section 139(1) and wait till a notice is given to him under section 139(2) and then file a return within the time mentioned in that notice.

(9) The third authority is of the Madras High Court, viz., *R. Chandrasekaran* v. *Commissioner of Income-tax* (5). The holding is that the levy of penalty under section 271(1)(a) of the Act even with reference to a default of not responding to the public notice under section 22(1) of the 1922 Act was valid. It cannot be contended that in a case where notice for reassessment was issued penalty could be levied only with reference to the delay or default, if any, in pursuance of such notice. If the assessee was unable for any reason to comply with the public notice under section 22(1) he should have approached the authorities for extension. On his failure to do so he committed the default. The last authority to be considered is of the Gujarat High Court reported as *S. Balaram* v. *Commissioner of Income-tax, Gujarat I,* (6). This question was answered in the affirmative in this authority whether penalty could be legally leviable in reassessment proceedings for the original

(5) (1976) 104 I.T.R. 454.
(6) (1976) 105 I.T.R. 674.

default of not filing the return. The holding would be further clear from the following headnote:—

> "In reassessment proceedings under section 148 of the Income-tax Act, 1961, the original default committed by an assessee in not filing any return can be penalised. The words "as the case may be" occurring in section 271(1)(a), which did not occur in section 28(1)(a) of the 1922 Act, refer only to the last two defaults mentioned in that section and not to the first two defaults. Therefore, the words "as the case may be" do not make any substantial difference between the proviso to section 28(1)(a) of the Act of 1922 and section 271(1)(a) of the Act of 1961. It is, therefore, open to the Income-tax Officer in reassessment proceedings under sections 147 and 148 read with section 297(2)(g) of the Act of 1961 to take cognisance of a default committed under section 22(1) of the Act of 1922 and to impose penalty under section 271(1)(a)."

Another circumstance going against the assessee particularly in this case is that no serious objection seems to have been taken before the Income-tax officer for obtaining an exemption in the payment of penalty for all the nineteen months merely on this ground that no penalty was payable in spite of the default committed under section 139(1) of the Act. If such had been the case this ground need not have been urged that the assessee was unaware of this legal position that even by a co-operative society penalty was payable. It has also been noted by the Income-tax Officer in his order dated October 3, 1972, that a prayer had been made by the learned counsel appearing on behalf of the assessee that a lenient view in relation to the default should be taken. If the liability was altogether denied, an indirect admission of the liability by asking for leniency need not have been made.

(10) Thus on the basis of the preponderance of view of the different High Courts and for the reasons already stated, question No. 2 is answered in the negative. This view of the Tribunal was erroneous that the penalty could only be imposed for a period of five months. It was required to be imposed for the whole of the period commencing from June 30, 1969 to February 24, 1971, when the return was filed. The period of default thus comes to nineteen complete months. As already made clear Question No. 1 is answered

in the affirmative. The Tribunal was justified in allowing the assessee to raise such a ground which had not been taken before or adjudicated upon by the Income-tax Officer. The assessee shall pay the costs of this reference to the Commissioner of Income-tax.

Prem Chand Jain, J.—I agree with the conclusion.

N.K.S.

Before S. S. Sandhawalia C.J., and R. N. Mittal, J.

RAJ KUMAR VERMA,—*Petitioner.*

versus

STATE OF HARYANA and others,—*Respondents.*

Civil Writ Petition No. 3642 *of* 1978.

November 23, 1978.

Punjab Government National Emergency (Concession) Rules 1965—*Rule* 4(*ii*)—*Interpretation of—Benefit of military service in regard to seniority—Whether available on second or subsequent appointment in public service.*

Held, that sub-rules (i), (ii) and (iii) of rule 4 of the Punjab Government National Emergency (Concession) Rules, 1965 are mutually exclusive and are to be read and interpreted independently. Each of these sub-rules deals with a separate situation in the career of a public servant, namely, the issues of increment, seniority and after retirement his pension. There is no warrant to read the provisions of one sub-rule into that of the other. Therefore, reading rule 4(ii) independently there is not even the remotest inkling either expressly or by necessary intendment that the benefit of military service with regard to seniority is to be circumscribed to the first appointment only. Wherever the framers of the rules wished to confine the benefit of this military service only on the first appointment, they have expressly said so. Nothing having been said with regard to the benefit of military service in relation to seniority, it is plain that the same could not be restricted or cut down by a process