

“Question 2. If question 1 should be answered in the negative, should the order of this court be a dismissal without prejudice?”

Where an appellant fails to file assignments of error as required by the applicable rule (28 U. S. C. 862, 880; Rule No. 11 of the Rules of the Circuit Court of Appeals for the Eighth Circuit), the appeal may be dismissed. Compare Rules of this Court No. 9 and No. 27, pars. 4, 5. But where an appeal is properly before the Court and, upon hearing the appeal, the Court determines that such assignments of error as have been duly filed have been abandoned, the Court may affirm the decree from which the appeal is taken.

Question No. 1 is answered in the affirmative.

HELVERING, COMMISSIONER OF INTERNAL
REVENUE, *v.* NORTHERN COAL CO.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
FIRST CIRCUIT.

No. 18 (October Term, 1933). Petition for Rehearing Argued
October 8, 1934.—Decided October 22, 1934.

Under § 1005 (a) of the Revenue Act of 1926, a petition for the rehearing of a case in which this Court has affirmed a judgment sustaining a decision of the Board of Tax Appeals can not be entertained if filed more than 30 days after the issuance of this Court's mandate.

Petition for rehearing denied.

* Together with No. 19 (October Term, 1933), *Helvering v. C. H. Sprague & Son Co.*, certiorari to the Circuit Court of Appeals for the First Circuit; No. 20 (October Term, 1933), *Helvering v. U. S. Refractories Corp.*, certiorari to the Circuit Court of Appeals for the Third Circuit; and No. 21 (October Term, 1933), *Helvering v. Oswego & Syracuse R. Co.*, certiorari to the Circuit Court of Appeals for the Second Circuit.

These cases came up by certiorari, 289 U. S. 718, 719, 720, to review judgments sustaining decisions of the Board of Tax Appeals overruling deficiency assessments of income and profits taxes. 24 B. T. A. 307, 62 F. (2d) 742; 23 B. T. A. 872, 64 F. (2d) 69; 24 B. T. A. 1346, 62 F. (2d) 518. The judgments below were affirmed by an equally divided Court October 23, 1933, 290 U. S. 591. Petitions for rehearing in three of them were denied in November, 1933, and the mandates in all four were issued in that month. On May 21, 1934, the Term not having ended, the Government asked leave to file the present petition. By order of May 28, 1934, the petition was entertained and attention was directed to § 1005 of the Revenue Act of 1926. 292 U. S. 612.

Mr. Justin Miller, with whom *Solicitor General Biggs* and *Mr. Erwin N. Griswold* were on the brief, for petitioner.

The Government advanced as ground for rehearing that on March 5, 1934, in *Helvering v. Newport Co.*, 291 U. S. 485, the Court had decided in the Government's favor the precise question presented by the cases sought to be reargued, viz., that tax assessment waivers, executed after the statutory period for assessment had expired and while the Revenue Act of 1926 was in effect, were valid. And it contended that, apart from the provisions of § 1005 of that Act, there could be no question of the power of this Court to set aside or modify its judgments upon application made at the Term in which they were entered. This is an inherent power vested in the Court by the Constitution. Congress can not eliminate such essential judicial characteristics of federal courts, even of those created by its own Acts; and its Acts should not be construed as so intending. See *United States v. Hudson*, 7 Cranch 31, 34; *Gordon v. United States*, 117 U. S. 697, 701-702, 704; *In re Debs*, 158 U. S. 564, 594; *Kansas v. Colorado*, 206 U. S. 46, 82; *United States v. Evans*, 213 U. S. 297;

United States v. Klein, 13 Wall. 128, 146-147; *Ross v. United States*, 8 App. D. C. 32, 37, 40; *Stephens v. Cherokee Nation*, 174 U.S. 445, 478; *Muskrat v. United States*, 219 U.S. 346, 362; *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 444; *Kilbourn v. Thompson*, 103 U.S. 168, 190-191.

But, properly interpreted, neither the purpose nor the effect of § 1005 was to limit this Court in its control of its own judgments during the Term.

Mr. Paul F. Myers, with whom *Mr. Edmund B. Quiggle* was on the brief, for respondents in Nos. 18 and 19.

Mr. W. W. Montgomery, with whom *Mr. Robert P. Smith* was on the brief, for respondent in No. 20.

Mr. Douglas Swift for respondent in No. 21.

PER CURIAM.

In these cases, the judgments were severally affirmed on October 23, 1933, by an equally divided Court. 290 U. S. 591. Petitions for rehearing in Nos. 18, 19, and 21 were denied on November 20, 1933. The mandates of the Court were severally issued in the four cases on November 29, 1933. The present petitions for rehearing were filed on May 21, 1934.

Section 1005 (a) (4) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 110, 111, U.S.C., Tit. 26, § 640, with respect to decisions of the Board of Tax Appeals, provides:

"Sec. 1005 (a). The decision of the Board shall become final— . . .

(4) Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed."

In view of the authoritative and explicit requirement of the statute and of its application to these cases, the petitions for rehearing are severally denied.