

ALLAHABAD HIGH COURT

Mohd. Naim Mohd. Alam

Vs.

Commissioner of Income-tax

I.T. Misc. Case No. 6 of 1950

(Malik, C.J. and V. Bhargava, J.)

26.09.1950

JUDGMENT

Malik, C. J.

1. This is a reference under Section 66 (1), Income-tax Act. The following two questions have been referred to us for our opinion :

- "1. Whether by issue of a notice for hearing of an appeal the Appellate Assistant Commissioner of Income-tax is debarred from subsequently holding that the appeal is time-barred under Section 30 (2), Income-tax Act ?
2. Whether the refusal of the Appellate Assistant Commissioner of Income-tax to admit an appeal on the ground that it is time-barred is an order under Section 31, Income-tax Act and appealable to the Appellate Tribunal under Section 33, Income-tax Act ?"

From the facts set out below, it would appear that the second question does not really arise and, therefore, does not call for an answer.

2. The notice of demand was served on the assessee on 10-1-1947. The assessee filed an application for a copy of the order of assessment. On 29-8-1947, he sent a reminder by registered post that he had not received the copy of the order till then. No reply was received from the Income-tax Officer and on 20-11-1947, the assessee sent a second reminder by registered post. In reply to that reminder, he heard from the Income-tax Officer that the copy of the assessment order had been dispatched by registered post on 29th March 1947. The appeal was filed on 8th December, 1947. The appeal was thus, if the facts stated above were correct, filed beyond the period of 30 days from the date of the service of the notice of demand. Along with the memo of appeal, the assessee filed an affidavit stating that he did not receive the copy of the assessment order for which he had filed an application and that was the reason for the delay in filing the

appeal. The Appellate Assistant Commissioner of Income-tax admitted the appeal, or, to use the words of the Tribunal in the statement of the case, "made a formal registration" and thereafter issued a notice to the applicant on 4th February 1948, fixing 16th February 1948 "for its hearing and final disposal at Kanpur." The appeal could not be heard on 16-2-1948, but it was finally taken up on 29th February 1948, when the Appellate Assistant Commissioner of Income-tax dismissed it on the ground that it was time-barred. We may mention that on 18th February 1948, the Appellate Assistant Commissioner of Income-tax had issued a notice to the assessee to explain the delay in filing the appeal and the assessee on 20th February 1948, repeated what he had already said in the affidavit filed by him along with the appeal on 8th December 1947. The order of the Appellate Assistant Commissioner of Income-tax dismissing the appeal runs as follows :

"I accordingly refuse to admit the appeal. The same is hereby rejected."

The assessee filed an appeal before the Income-tax Appellate Tribunal and the Tribunal came to the conclusion that the order dated 29th February 1948, was an order under sub-section (2) of Section 30 and was not an order under Section 31, Income-tax Act, and therefore, the appeal did not lie to the Tribunal.

3. The relevant portion of sub-section (2) of Section 30, Income-tax Act is in the following terms :

"30 (2) - The appeal shall ordinarily be presented within thirty days of receipt of the notice of demand relating to the assessment.....but the Assistant Commissioner may admit an appeal after the expiration of the period if he is satisfied that the appellant had sufficient cause for not presenting it within that period."

We fail to understand the significance of the word 'ordinarily.' Probably, what is meant there-by is that the period of thirty days is not an inflexible period and a few days' delay is within the discretion of the Appellate Assistant Commissioner, to condone it. Be that as it may, the Appellate Assistant Commissioner of Income-tax has been given the right to admit an appeal even after the expiration of the prescribed period if he is satisfied that the appellant had sufficient cause for not presenting it within that period. There can be no doubt that the Appellate Assistant Commissioner did admit the appeal in the case before us. There is a presumption that a judicial and official act is regularly performed in accordance with the provisions of law. In the absence of anything to the contrary, we must, therefore, presume that when the Appellate Assistant Commissioner of Income-tax admitted the appeal, he was satisfied that it should be admitted. After the admission of the appeal, the only section that would apply at the final hearing is Section 31, Income-tax Act. No doubt, when dealing with the appeal under Section 31 of the Act, the Appellate Assistant Commissioner, on a re-examination of the facts may decide against the assessee even on the question of limitation. But after an order is passed under Section 30 (2),

Income-tax Act admitting an appeal and after notice is issued to the assessee fixing date and place for the hearing and final disposal of the appeal, the appeal can be disposed of only under Section 31 of the Act. We do not want to go into the larger question whether an order refusing to condone the delay under Section 30 (2) and thereafter rejecting the memorandum of appeal is an order under Section 30 (2), Income-tax Act, or, is an order under Section 31 of the Act. That question has been raised in another reference which is before us for decision. It is not necessary to express any opinion on that point in this case. It is admitted by learned counsel that the question framed by the Income-tax Appellate Tribunal, Allahabad, is not very happily worded and does not clearly bring out the point. We, therefore, re-frame the question as follows :

"Q. Whether, after admitting an appeal and issuing notice to the assessee fixing the date and place for the final hearing of the appeal, if the Appellate Assistant Commissioner of Income-tax comes to the conclusion that the appeal is time-barred and dismisses it on the ground that there is no sufficient cause for condonation of the delay, the order dismissing the appeal is an order under Section 31 or is an order under sub-section (2) of Section 30, Income-tax Act, and whether the Appellate Assistant Commissioner of Income-tax, having once admitted the appeal and passed an order under sub-section (2) of Section 30 of the Act, can re-consider the question, whether the appeal is time barred, at the time of the hearing of the appeal?"

4. Our answer to the second part of the question is that the Appellate Assistant Commissioner of Income-tax is not debarred from re-considering the question whether the appeal is time barred merely because he has passed an order under Sub-section (2) of Section 30, Income-tax Act, admitting it and the answer to the first part is that where the Appellate Assistant Commissioner of Income tax has admitted the appeal under Section 30 (2) of the Act, a subsequent order of dismissal, after notice was issued to the assessee fixing a date and place for the final hearing of the appeal, is an order under Section 31 of the Act.

5. Under the circumstances, the assessee is entitled to its costs which we fix at Rs. 100.
Answer accordingly.