

ALLAHABAD HIGH COURT

Municipal Board

Vs.

Commissioner of Income-tax

Misc. Case No. 58 of 1949

(Malik, C. J. and Mushaq Ahamd, J.)

11.10.1950

JUDGMENT

Malik, C. J.

1. In this reference under Section 66 (1), Income-tax Act, the following four questions have been referred to this Court :

"(1) Whether on the facts stated, the order of the Appellate Assistant Commissioner refusing to admit the appeal in exercise of his discretion under last part of Section 30 (2) was an order under Section 30 (2) or should be treated as an order under Section 31, Income-tax Act ?

(2) Whether where the figures or an assessment are corrected under Section 35 (4), Income-tax Act, without having the effect of enhancing the assessment or reducing a refund and a corrected notice of "demand is issued, such a notice of demand amounts to notice of demand under Section 29 of the Act and confers a right of appeal on the applicant from the date of its receipt?

(3) Whether R. 21, Income tax Rules, framed under Section 59 of the Act is ultra vires of the powers of the Central Board of Revenue inasmuch as it prescribes the attachment of the notice of demand to the memo of appeal ?

(4) Whether in the circumstances of the case, the applicant's appeal filed on 24-8-1946, in form B against the original assessment made on 20-7-1946 could legally be treated as an appeal arising out of the corrected assessment limitation or which should have been computed from the date of the receipt of the corrected order of demand dated 4-9-1946?"

2. The assessee is the Municipal Board, Agra. A notice of demand requiring the assessee to pay Rs. 9,586 as income tax was issued on 20-7-1946. The assessee had a period of thirty days to file an appeal before the Appellate Assistant Commissioner, that is, an appeal could be filed upto 23-

8-1946. There were, however certain obvious errors in the order of the Income tax Officer and the assessee made an application under Section 35, Income tax Act, for rectification of the mistakes. The Income-tax Officer considered the objections and on 30-8-1946, the demand was reduced from Rs. 9,586 to Rs. 122-2-0. While this matter was pending before the Income-tax Officer the assessee sent an appeal dated 24-8-1946 which was received by the Excess Profit-tax Officer, Kanpur, on 26-8-1946, who sent it on to the Appellate Assistant Commissioner who received the memorandum of appeal on 9-9-1946. As the memorandum of appeal was not accompanied by the notice of demand as required by R. 21 and the form prescribed there under it was ordered to be returned on the same day. On 19-9-1946, the assessee filed the order under Section 35 dated 30-8-1946 as the notice of demand. The Appellate Assistant Commissioner held that the appeal was barred by time. He refused to condone the delay and rejected the memorandum of appeal on 29-9-1946. Against that order an appeal was filed before the Tribunal but it was held that no appeal lay as the order was not an order under Section 31 but was an order under Section 30(2).

3. Recently in another case (*Mohd. Naim Mohd. Alam v. Commissioner of Income-tax¹*, U. P. a question identical to the question No. 1 arose and was answered. The view taken by the Bench was that where the memorandum of appeal was rejected in limine the order must be deemed to be an order under Section 30 (2). Where, however, the Appellate Assistant Commissioner had admitted an appeal and had fixed a day and place for hearing of the appeal as required by Section 31 (1) if he had thereafter dismissed the appeal on the ground that the appeal was time barred, the order was an order under Section 31 and not under Section 30 (2). In that case it was argued that the Appellate Assistant Commissioner had not said, in the order admitting the appeal, that he was satisfied that the appellant had sufficient cause for not presenting it within the period of limitation. The Bench pointed out that there was a presumption that an official act was properly done and in the absence of anything to the contrary, it could not be presumed that the Appellate Assistant Commissioner had admitted the appeal under a mistake or by an oversight.

4. In the case before us, it is not stated that there was any order passed admitting the appeal and fixing a day and place for bearing of the appeal as required by Section 31 (1), the order must, therefore, be deemed to be an order under Section 30 (2) and not an order under Section 31. That is our answer to the first question.

5. Coming to the second question, learned counsel has urged that when on 30-8-1946, the Income-tax Officer reduced the demand from Rs. 9,586 to Rs. 122-2-0 a fresh notice was issued which was served on 4-9-1946, and that must be deemed to be the notice of demand under Section 29, from the date of service of which a fresh period of limitation has to be calculated.

6. Section 29, Income-tax Act, is as follows :

"When any tax, penalty or interest is due in consequence of any order passed under or in

pursuance of this Act, the Income-tax Officer shall serve upon the assessee or other person liable to pay such tax, penalty or interest a notice of demand in the prescribed form specifying the sum so payable."

Learned counsel has urged that when on 30-8-1946, the application under Section 35 was granted the previous notice of demand must be deemed to have been cancelled and a fresh notice of demand issued to the assessee. A carbon copy of the notice of demand was shown to us and we found that it contained merely the information that the amount had been reduced and all other clauses relating to right of appeal, the period of limitation for

¹ I.-T. Misc. Case No. 6 of 1950

the same etc., had been penciled through.

7. Whatever doubts there may be, about the interpretation of Section 29, are clearly removed when we come to Section 35 (4) of the Act. Under Section 35, the Commissioner or the Appellate Assistant Commissioner have been given the right suo motu to rectify certain errors within four years of the date of any assessment or refund order. The assessee has also been given a right to move the Commissioner or the Appellate Assistant Commissioner for the rectification of mistakes which he discovers within the same period. The proviso, however, is to the effect that where the rectification is not in favor of the assessee but against him an order shall not be passed without giving the assessee a reasonable opportunity of being heard. Sub-section (4) of Section 35 is as follows :

"Where any such rectification has the effect of enhancing the assessment or reducing a refund the Income-tax Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be issued under Section 29, and the provisions of this Act shall apply accordingly."

It is clear, therefore, that a fresh notice of demand is required to be issued only when the assessment has been enhanced or the refund order has been modified to the detriment of the assessee. Where the order is in favour of the assessee, all that can be said is that a part of the demand has been cancelled or rescinded allowing the rest to stand. In such a case no question of a fresh notice of demand under Section 29 becomes necessary. That is our answer to the second question framed by the Tribunal. The assessee had, therefore, no fresh right of appeal from the date of the receipt of the notice of the order dated 30-8-1946.

8. In view of our answer to question No. 2 the assessee's appeal filed on 26-8-1946, was clearly time barred and, as the Appellate Assistant Commissioner refused to condone the delay, it is not necessary to answer the third and the fourth question which do not therefore arise. The defendant is entitled to its costs which we fix at Rs. 200.

Reference answered.