

BOMBAY HIGH COURT

K.K. Porbunderwalla

Vs.

Commissioner of Income-Tax

Income-tax Ref. No. 7 of 1951

(Chagla, C.J. and Tendolkar, J.)

30.08.1951

JUDGMENT

Chagla, C.J.

1. This is a reference which raises a very short but important question as to the competency of an appeal to the Tribunal. Assessment orders were passed by the Income-tax Officer on 29-5-1948, with regard to the assessments for the years 1945-46, 1946-47 and 1947-48 and an appeal was preferred against these orders to the Appellate Assistant Commissioner, on 26-2-1949. The appellate Assistant Commissioner dismissed the appeal as being out of time. The contention of the assessee was that this appeal was in time because as required by law service of the notice of demand in respect of the assessment was not served upon him until 29-1-1949, and he having filed the appeal within 80 days of that service, viz., on 27-2-1949, the appeal was in time. This contention was not accepted by the Appellate Assistant Commissioner who held that the service of the notice of demand was validly made upon a representative of the assessee and therefore the appeal was barred by limitation. From this decision of the Appellate Assistant Commissioner an appeal was preferred to the Tribunal, but the Tribunal held that the appeal was incompetent.

2. Now, in order to decide the question of competency we have to consider whether the order of the Appellate Assistant Commissioner was made under Section 30 (2) or Section 31. Section 30 (2) provides that an appeal shall ordinarily be presented within 30 days of the receipt of the notice of demand relating to the assessment and we are concerned in this case with only that part of Sub-Section (2) of Section 80, which goes on to provide that the Appellate Assistant Commissioner may admit an appeal after the expiration of the period of 30 days if he is satisfied that the appellant had sufficient cause for not presenting it within that period. Then Section 31 provides for the hearing of the appeal and provides that the Appellate Assistant Commissioner shall fix a day and place for the hearing of the appeal, and may from time to time adjourn the hearing. Sub-section (3) provides that in disposing of an appeal the Appellate Assistant

Commissioner may, in case of an order of assessment, confirm, reduce, enhance or annul an assessment. Now, the contention of the Commissioner is that the order passed by the Appellate Assistant Commissioner was that the appeal against the orders of assessment was not entertained and dismissed. Therefore, according to the Commissioner there was no decision on merits. The order did not either confirm, reduce, enhance or annul the assessment and the appeal was dismissed on the preliminary ground that the appeal was time-barred and could not be entertained by the Appellate Assistant Commissioner.

Under the circumstances a contention is put forward that the order made by the Appellate Assistant Commissioner is not an order under Section 31. Now, Section 33 gives a right of an appeal to the Tribunal against an order of the Appellate Assistant Commissioner under either Section 28 or Section 31. Now, looking at the scheme of Sections 30 and 31 it is clear that a statutory right of appeal is conferred upon the assesses in cases that fall under Section 30 (1) and it is not disputed that an appeal is permissible against an order of assessment under that section. Section 32 provides for the period of limitation and the period of limitation is 30 days. An inter, mediate stage between the presentation of the appeal and the hearing of the appeal is provided by the last clause of Section 30 (2) and that intermediate stage relates to those appeals which are out of time but in which the appellant asks for condonation of delay from the Appellate Assistant Commissioner, and it is left to the decision of the Appellate Assistant Commissioner whether to condone or not to condone the delay. If he is satisfied that there is sufficient ground for condoning delay, then he might condone the delay; on the other band, if he is satisfied that there is no sufficient cause, then he might not condone the delay. It is only after he condones the delay that the appeal is admitted and on admission the appeal comes on for hearing under Section 31. But in all other cases, except the case to which I have just referred, the statute does not provide for any intermediate stage between the presentation of the appeal and the hearing of the appeal. Every appellant has a statutory right to have his appeal heard under Section 31, and once the appeal is heard under Section 31 every order, whatever the nature of it may be, that is made by the Appellate Assistant Commissioner is under Section 31. Therefore, in this particular case although the Appellate Assistant Commissioner did not hear the appeal on merits and held that the appeal was barred by limitation, his order was under Section 31, and the effect of that order was to confirm the assessment which had been made by the Income-tax Officer. Looking at it from another point of view the Legislature has chosen to give finality to the judgment of the Appellate Assistant Commissioner only in one specific case and that case is where the Appellate Assistant Commissioner refuses to condone the delay on the ground that there is no sufficient ground. The view taken by the Legislature is that in such a case there should be no further appeal and the party should abide by the decision of the Appellate Assistant Commissioner. But it is clear that it was not the intention of the Legislature that in a case where the Appellate Assistant Commissioner takes the view that the appeal is barred by limitation his view should be final and should not be challenged before the Tribunal. The Appellate Assistant Commissioner may take the view that the appeal is barred by limitation on various grounds; he may hold that the appeal is barred on appreciation of evidence as to facts, he may consider that the appeal is barred by

limitation on an interpretation of the law, but in every case his decision is subject to a challenge before the Tribunal. This view is in conformity with our decision in *Commr. of I.T. v. Mysore Iron and Steel Works*¹, That was a case where the Appellate Assistant Commissioner refused to condone the delay and declined to entertain the appeal and we held that the order was not under Section 31 of the Act but it was under Section 30 (2) and therefore no appeal lay to the Tribunal. At p. 685 of the report in our judgment we pointed out that the scheme of Sections 30 and 31 was fairly clear. The assessee has a statutory right to

¹51 Bom LR 684

present an appeal with 30 days without any order being required from the Appellate Assistant Commissioner for condonation of delay. But if the time prescribed expires, then the statutory right to present an appeal goes and an appeal can only be entertained provided it is admitted by the Appellate Assistant Commissioner after condoning the delay. Our attention has been drawn to judgments of the other High Courts which seem to have taken the same view. The first of the cases is *Special Manager, Court of Wards v. Commr. of Inc-tax, U.P.*², In that case the Appellate Assistant Commissioner refused to entertain an appeal on the ground that it was time barred and the Allahabad High Court held that it was not an order under Section 31 and no appeal lay to the Tribunal. But when we turn to the facts of the case, it is clear that an appeal was filed by the assessee after the expiry of 30 days from the service of the notice of demand and the Appellate Assistant Commissioner had refused to condone the delay on the ground that no sufficient ground was made out for condonation of delay. It was on that ground that the appeal was not admitted and the memorandum was rejected. At p. 212 of the report the learned Judges observe as follows :

"The other view at the same time may be possible that even though the period of limitation is prescribed under Section 30 and the power to grant extension is also given in that section the power is really exercised under Section 31, as the Appellate Assistant Commissioner when he decides not to extend the period of limitation may be said in a sense to have confirmed the assessment."

But their Lordships' observation really goes beyond what we held in the case of *Mysore Iron, and Steel Co. Ltd.* and they further point out that (p. 212) :

"This question may assume some importance in a case where the appeal was within time but the Appellate Assistant Commissioner made a mistake and refused to admit it on the ground that the appeal was barred by limitation or the question might well have to be seriously considered in a case where there was sufficient cause for condonation of the delay and the exercise of the discretion by the Appellate Assistant Commissioner was considered to be perverse."

Therefore, as regards the first part of this sentence it seems to suggest that the Allahabad High Court would have taken the same view as we are taking and the second part of the sentence goes

to show that the same Court would have in a proper case considered that where condonation of delay is refused on grounds which may be regarded as perverse, it may have to consider whether the order was or was not under Section 31 and whether an appeal would not be competent to the Tribunal. In the same volume in *Ramnarayan Das Madanlal v. Commissioner of Income Tax, B. and O³*, the Orissa High Court has taken the same view. In that case the Appellate Assistant Commissioner dismissed the assessee's appeal on the ground that it was incompetent as tax had not been paid as required by Section 30 (1) and the Orissa High Court held that that order was under Section 81 and an appeal lay to the Tribunal. At p. 667 the learned Chief Justice after setting out the provisions of Section 30 (2) observes as follows :

" . . . This makes it clear that the stage of admission is interposed between the
²(1950) 18 ITR 204 (All)
³1950-18 ITR 660 (Ori)

presentation of an appeal and its hearing and disposal under Section 31 in cases in which the appeal is not presented within the prescribed time-limit. The necessary inference, therefore, is that in all other cases the appeals, as soon as presented, must come for decision under Section 31."

Therefore, according to the Orissa High Court even when an appeal is not competent by reason of the fact that certain preliminaries required by the statute have not been complied with, the decision of the Appellate Assistant Commissioner dismissing the appeal on the ground of incompetency falls under Section 31 and not under Section 30 (2). Then there is a very recent judgment of the Allahabad High Court in *Mohd. Nain Mohd. Alam v. Commissioner of Income Tax⁴*, In that case the Appellate Assistant Commissioner admitted an appeal under Section 30 (2) having condoned the delay and then when the appeal came on for hearing he dismissed it on the ground that the appeal was time barred. The High Court held that the order was under Section 31 of the Act, and the Appellate Assistant Commissioner having once condoned the delay under Section 30 (2), the dismissal can only be under Section 31, even though the dismissal was on the ground that the appeal was barred by limitation. Therefore, the decisions to which I have just referred either actually take the same view as we are taking or suggest that if cases like this came before the Court they would take the identical view.

3. It is pointed out by Mr. Joshi that the Appellate Assistant Commissioner has in his judgment stated that he was not prepared to condone the delay in filing the appeal in time and therefore Mr. Joshi contends that he refused to admit the appeal because he thought that no sufficient ground was made out for condonation of delay. Now, the whole of the judgment makes it perfectly clear that what was argued before him was that the appeal was in time. It may be that in the alternative it was contended before him that if the appeal was out of time he should condone the delay as required by Section 30 (2). Therefore, the judgment of the Appellate Assistant Commissioner falls in two parts. There is a dismissal of the appeal on the ground that it is barred by limitation and there is also an order refusing to condone the delay as no sufficient ground was made out. To the extent that the appeal is dismissed on the ground that it is barred by limitation, the order is

appealable and the Tribunal was competent to hear the appeal. To the extent the order refuses to condone the delay, that order is made by him under Section 30 (2) and is final and cannot be challenged before the Tribunal.

4. Therefore, the answer that we give to the question referred to us is that the appeals before the Appellate Tribunal were competent only to the extent the Appellate Assistant Commissioner held that the appeals were barred by limitation and were not competent in so far as he refused to condone the delay. The Commissioner to pay the costs of the Reference.

Answer accordingly.

⁴1951-19 ITR 58 (All)