

PATNA HIGH COURT

Maharani Gyan Manjari Kuari

Vs

Commissioner of Income Tax Bihar

(Monohar Lall, J.)

22.09.1943

JUDGMENT

Monohar Lall, J.

1. This is a reference by the Income-tax Appellate Tribunal under Section 66 (1) of the Indian Income-tax Act for the opinion of the Court of the following questions :-

(1) Whether the order of the Appellate Assistant Commissioner dated the 31st August 1941 in this case was an order under Section 30 or 31 of the Income-tax Act ?

(2) If the order was under Section 30 of the Income-tax Act, whether the Income-tax Appellate Tribunal could assume jurisdiction to consider it ?

(3) Whether the Appellate Tribunal could consider the merits of the order passed under Section 30 of the Income-tax Act ? The facts of the case lie in a very narrow compass. For the accounting period 1937 and 1938 the assessee was assessed on the 1st of August 1940 for a sum of Rs. 65,300. The very short order of the Income-tax Officer states that the assessee was served with the notice under Section 22 (2) and 34 on the 24th January 1940, but she did not comply with the notice. Against this order the assessee preferred a memorandum of appeal on the 18th January 1941 to the Appellate Assistant Commissioner of Income-tax. But he refused to admit the appeal and rejected it on the ground that the appeal was not in the Form 16 prescribed in Rule 21 of the Boards Rules. He says that paragraph 2 of the prescribed form which requires that "the notice of demand attached to the memorandum was served upon the assessee on a certain date" had been altered to "the notice of demand was not served on the petitioner". Upon this, assessee claimed, as stated by the Assistant Commissioner, that she had a right to appeal against an amount of tax charged even though there should be defect in the form of the appeal which she was unable to remedy because she never received the demand notice at all and only came to know of the tax charged by the Income-tax Officer in the course of the proceedings under Section 46 (2) of the Income-tax Act. It was also submitted to him by the assessee that in the special or extraordinary

circumstances this requirement of attaching the demand notice to the appeal form must be waived. The Assistant Commissioner took the view that this requirement of the Boards Rule was imperative and that the appeal filed in the altered form and without the demand notice being attached thereto was not maintainable - the Assistant Commissioner did not find that the notice of demand had actually been served on the assessee. He thus refused to entertain the appeal by his order dated the 31st of August 1941. Against this decision the assessee appealed to the Appellate Income-tax Tribunal under Section 33, Indian Income-tax Act. That Tribunal apparently were in sympathy with the assessee but found that they were unable to assume jurisdiction over this appeal for the simple reason that this order of the Appellate Assistant Commissioner complained against was not an order under Section 31 and observed that it was no doubt unfortunate that in respect of orders passed under Section 30 even though capricious the legislature had not provided any right of appeal to the higher authority. At page 11 they also made these observations : "Without expressing any opinion regarding the finding of the Appellate Assistant Commissioner that the appeals were not in the proper form we should state that it may not be possible in certain cases for the person to file the notice of demand as it may have been destroyed or lost and to give the date of service of the notice of demand as it might not have been actually served on him."The question whether the order of the Assistant Commissioner rejecting an appeal in limine was an order under Section 30 or 31 of the Indian Income-tax Act was expressly decided in the Full Bench case of Kunwarji Ananda v. Commissioner of Income-tax, Bihar and Orissa. The learned Chief Justice observed at page 202 that it was undoubtedly the duty of the Assistant Commissioner when the order of the Income-tax Officer came before him on appeal to decide whether or not he was precluded by the Act from going into the amount or rate of the assessment or the liability of the assessee, and if he was so precluded, he must reject the appeal - in that case the appeal was rejected summarily as being barred by the proviso to Section 30 which says that no appeal shall lie against an assessment under Section 23(4). The learned Chief Justice proceeds "in so rejecting the appeal he is, in my opinion, under Section 31 disposing of an appeal and such disposal is a proceeding in connection with an assessment under this Act."Wort, J., made these observations at page 206 : "It is argued that as there is no appeal in the case of a summary assessment by reason of the proviso to sub-section (1) of Section 30 the order of the Assistant Commissioner was not an order under Section 31; that it is only in the case of an order under Section 31 that the assessee is entitled to call upon the Commissioner to state a case to the High Court - see Section 66, sub-section (2) - and that only when there has been an order under section 31 has the High Court jurisdiction to call upon the Commissioner to state a case upon his refusal to do so. I cannot accept this argument in its entirety as I am not prepared to hold that under sub-section (3) of Section 66 the jurisdiction of the High Court is in any way limited; that is to say, if the High Court is of the opinion that a point of law arises, the High Court may call upon the Commissioner to state a case upon his refusal to do so. I cannot accept this argument in its

entirety as I am not prepared to hold that under sub-section (3) of Section 66 the jurisdiction of the High Court is in any way limited; that is to say, if the High Court is of the opinion that a point of law arises, the High Court may call upon the Commissioner to state a case thereon."Kulwant Sahay, J., observed as follows at page 214 : "It has been contended on behalf of the Crown that when an appeal is barred an order of the Assistant Commissioner dismissing the appeal on the ground of its being barred under the proviso to Section 30(1) is not an order passed under Section 31 within the meaning of Section 66(2) of the Indian Income-tax Act. This contention I am unable to accept. An order holding that no appeal lies is an order disposing of an appeal within the meaning of Section 31 and the question of law which can be referred to the High Court under Section 66 against such an order is, whether upon the facts found the assessment was properly made under Section 23 (4)."

Fazl Ali, J., (now my Lord the Chief Justice) expressed his opinion in these terms at page 215 : "It is argued that the language of this sub-section [i.e., Section 66, Sub-section (2)] clearly indicates that the assessee cannot move the Commissioner in those cases where no appeal lies and where therefore, no order under Section 31 or Section 32 can be passed. There is no doubt that a good deal can be said in support of this view but on the whole it appears to me that it is based on a somewhat narrow construction of Section 66 (2) and may in some case at least defeat the very object for which the section has been enacted. All that the sub-section requires is that there should be an order or a decision under Section 31 or Section 32 and the question of law which the assessee requires the Commissioner to refer to the High Court should arise out of such an order or decision.... In this case the Assistant Commissioner passed an order which is at least in form an order under Section 31. In passing the order the Assistant Commissioner also purported to act as the ordinary appellate authority and as far as I am aware there is no section in the Income-tax Act except Section 31, under which the order could have been passed.... Under Section 31 the Assistant Commissioner has the power to allow the appeal as well as to reject it and the mere fact that he rejects it on the ground that in his opinion no appeal lies will be no ground for treating the order as one not passed under Section 31."

Dhavle, J., also gave a concurrent view which I desire to quote from page 225 : "If the decision of the Assistant Commissioner be in favour of the assessee, there can be no question that the appeal must be heard on the merits and that the order disposing of the appeal will be an order under Section 31, so as to attract the operation of sub-section (2) and (3) of Section 66. Where, however, the Assistant Commissioner holds that an appeal is barred by the proviso, it has been urged by learned Counsel for the Income-tax Department that there is no order passed under Section 31 and that consequently the assessee is not entitled to resort to the provisions of sub-sections (2) and (3) of Section 66 for coming up to the High Court on question of law. It appears to me that this contention is unsound. If the order be not an order under Section 31, there is no

other section in the Act under which it can come. It is true that Section 31 deals with the hearing of the appeal, but does this necessarily mean a hearing of the appeal on the merits ? A hearing on the preliminary question whether an appeal lies is just as much an exercise of jurisdiction by the appellate authority as a hearing on the merits. Nor can it be definitely said, having regard to the scheme of the Act, that the legislature must have intended to bar not only appeal but also proceedings under Section 66 in the case of assessments under sub-section (4) of Section 23. The defaults that bring sub-section (4) of Section 23 into play have before now actually given rise to questions of law, and I see nothing improbable or incongruous in the legislature disallowing appeals against assessments while leaving it open to the assessee to obtain a reference to the High Court under sub-sections (2) and (3) of Section 66 on questions of law arising out of the order of the Assistant Commissioner rejecting an appeal on the ground that it is barred by the proviso to sub-section (1) of Section 30. Section 66 does not in terms require as a foundation an appellate order on the merits but only an order under Section 31."In the case of Commissioner of Income-tax, Bombay Presidency and Aden v. Khemchand Ramdas, Lord Romer, who delivered the judgment of their Lordships, observed as follows : "One of the questions of law arising out of the order of the Assistant Commissioner was whether the appeal to him was competent in view of the proviso to Section 30, sub-section (1). By deciding this question himself adversely to the respondents, the Commissioner could not deprive the respondents of the right of having the question decided by the Court. This was the view of the matter rightly taken by the Court, who, upon application made to them by the respondents under Section 66, sub-section (3), ordered the Commissioner to state a case and refer it to them for their decision." Although the question which arose in this case is somewhat different, the principle laid down is the same as that I have pointed out from the extensive quotations in Kunwarji Anandas case.

I desire to observe that the assessee cannot be expected to perform an impossibility. The assessee's contention was that she never received any demand notice and therefore she was not attaching into the memorandum of appeal. The Assistant Commissioner nowhere finds that this contention of the assessee was incorrect - apparently he accepted that contention. But he nevertheless blindly followed the provisions in the Rule that in preferring a memorandum of appeal to him the assessee must attach the demand notice and also state the date of service thereon, an impossible situation in a case where the demand notice has never been received by the assessee. It was pointed out by this Court in Raja Rajendra Narayan Bhanja Deo v. Commissioner of Income-tax, B. & O. that no period is prescribed within which a notice demanding income-tax under Section 29, Income-tax Act, 1922, is to be issued, and the mere fact that the ordinary form prescribed for such a demand contemplates that it will be issued during the current year of assessment, is not tantamount to an enactment that it cannot be issued afterwards. In that case a notice was issued 14 months after the expiration of the year of

assessment. The Department under the circumstances of the present case could issue another notice under Section 29 if the Assistant Commissioner was insisting on observing the rules to the very letter. In *Berry v. Farrow*, Bankes, J., held that the giving of a notice of assessment was not only made by express provision but was also necessarily implied in the right of appeal given to the party charged so as to afford him an opportunity of challenging the correctness of the assessment by appealing against it, and in the absence of due service of demand of payment there was no valid assessment. It would be intolerable, when the assessee was able to establish that she never got the demand notice, that the Assistant Commissioner should refuse to admit the appeal on merits by simply refusing or ignoring to investigate into the truth of the statement of the assessee and insist on taking his stand upon the fact that the form prescribed by the Rule has not been complied with. In such a case the proper thing for the Assistant Commissioner to do was to adjourn the admission of the appeal and to satisfy himself by such evidence as he chose to take whether the contention of the assessee was or was not correct - the assessee in this case was a pardons in lady. If the contention of the assessee was found to be correct he should have admitted the appeal and proceeded to dispose it of on merits. The order of the Assistant Commissioner was capricious and not a judicial order. For these reasons I would answer the questions as follows :-

- (i) The order of the Appellate Assistant Commissioner dated the 31st August 1941 was an order under Section 31 of the Indian Income-tax Act.
- (ii) Questions Nos. 2 and 3 do not require any answer.

The assessee is entitled to her costs. I would assess the hearing fee at Rs. 250. The Commissioner of Income-tax will refund the sum of Rs. 100 which the assessee had deposited as cost of the reference.

M.J.C. No. 94 of 1942.

The question framed in this case are the identical questions which were framed in M.J.C. Case No. 93 of 1942 and are answered accordingly. The assessee is entitled to her actual costs in this case incurred in the High Court. But as the two cases were heard together and no separate argument was advanced in this case, no hearing fee is allowed to the assessee. The Commissioner of Income-tax will refund the sum of Rs. 100/- deposited by the Commissioner as cost of the reference.

CHATTERJI, J. - I agrees.

Reference answered accordingly.