

PUNJAB AND HARYANA HIGH COURT

General Agencies (India) Ltd

Vs

Commissioner of Income-Tax

(Bhandari, C.J. Falshaw, J.)

22 .10.1954

JUDGMENT

Falshaw, J.

1. The following question has been referred to by the Income-tax Appellate Tribunal: Whether on the facts and in the circumstances of this case the order of the Appellate Assistant Commissioner declining to admit the appeal was an order under Section 30(2) Income-tax Act and as such not appealable to the Tribunal?"

2. The facts of the case are that the appellant company called Messrs. General Agencies (India) Limited filed an appeal before the Appellate Assistant Commissioner under Section 30 of the Act with regard to the assessment year 1948-49 on 25-1-1949 against the assessment order of the Income-tax Officer. The appeal was filed within time, and a notice of a date of hearing was sent to the assessee under Section 31(1) of the Act.

The hearing of the appeal was, however, adjourned from time to time for a very long period, Ultimately it came before the Appellate Assistant Commissioner on 8th April 1952 when it was discovered that the appeal, though filed in time, was defective as there was no copy of the notice of demand attached to it. The appellate Assistant Commissioner accordingly dismissed the appeal in these words -

"It is the appellant's duty to see that the appeal petition was complete in all respects before filing it before an Appellate Authority. As the appellant failed to do it I decline to admit the appeal",

3. The assessee preferred an appeal against this order to the Appellate Tribunal which held that the order, being under Section 30(2) of the Act, was not appealable. The Tribunal, however, acceded to the assessee's petition under Section 66(1) and framed the above question. It appears

from the documents printed that the case of the assessee has been that in fact at the time when the appeal was filed the necessary document was filed along with it, and he has been asking for an enquiry into this matter, but for the purpose of answering the question framed for us we must assume that the appeal was in fact filed without the necessary document, since this is the basis on which the statement of the case proceeds, & the assessee had not objected to the way in which the case was stated.

4. It appears from the order of the Appellate Assistant Commissioner that when he discovered that the copy of the notice of demand was not attached to the appeal he issued a notice to the assessee to show cause why the appeal should be admitted. The assessee raised the objection that since notice had been issued to him, and the appeal had in fact come up for several hearings without actually being heard, the appeal had obviously been already admitted. This contention was overruled by the Appellate Assistant Commissioner on the strength of the decision in the case *Mohd. Nalm Mohd Alam v. Commissioner of Income-tax, U.P.*¹, in which it was held by Malik C. J., and Bhargava, J., that an Appellate Assistant Commissioner is not debarred from reconsidering the question whether an appeal is time-barred merely because he has passed an order under Sub-section (2) of Section 30 admitting it. It is, however, noteworthy that otherwise this decision goes dead against the case of the Income-tax Authorities, since it was also held that where the Appellate Assistant Commissioner of Income-tax has admitted the appeal under Section 30(2), a subsequent order of dismissal on the ground that the appeal is time-barred, after issue of notice to the assessee fixing a date and place for the final hearing of the appeal, is an order under Section 31 of the Act. Thus, if this part of the decision is also correct, both the Appellate Assistant Commissioner was wrong in heading his order as an order under Section 30(2), and the Appellate Tribunal was also wrong in refusing to admit the assessee's appeal on the ground that the order, being under Section 30(2) was not appealable.

5. Section 30 deals with appeals to the Appellate Assistant Commissioners against assessments and Sub-sections (2) and (3) are as follows:

"30(2) The appeal shall ordinarily be presented within thirty days..... of receipt of notice of demand relating to the assessment or penalty objected to..... but the Appellate 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.

(3) The appeal shall be in the prescribed form and shall be verified in the prescribed manner". Section 31 deals with the hearing of the appeal and Sub-section (1) reads-

"31(1) 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".

6. The question we have to consider is whether, once having issued notice under Section 31(1) for the hearing of the appeal, the order of the Appellate Assistant Commissioner refusing to admit the appeal on some technical point such as limitation or, as in the present case, failure to file the appeal in the proper form, can possibly be deemed to have been passed under Section 30. Undoubtedly dismissing or refusing to admit the appeal on one of these technical grounds is not one of the ways of disposing of the appeal which are contained in Sub-section (3) of Section 31, but 'prima facie' it would appear that once a notice has been issued under Sub-section (1) any order disposing of the appeal in any manner whatsoever must be deemed to have been passed under Section 31 and this view had been taken by other Courts besides the Allahabad Court in the case cited above. In '*Gyan Manjari Kuari v. Commr. of Income-tax, B and O.*, a decision of *Manohar Lall and Chatterji JJ.*²; the facts were that the assessee's appeal against her assessment had been dismissed by the Appellate Assistant Commissioner 'in limine' on the ground that the memorandum of appeal was not accompanied by a copy of the notice of demand, as in the present case. In fact in that case the assessee had crossed out the words on the appropriate form regarding the date on which the notice of demand had been served on her, and had written in its place that no notice of demand had been served on her at all. It does not even appear from the judgment that the order dismissing the appeal 'in limine' was passed after a notice of the date and place for the hearing of the appeal had been issued under Section 31(1). The appeal of the assessee to the Tribunal was rejected on the ground that the order of the Appellate Assistant Commissioner was one under Section 30 and not under Section 31. One of the questions framed for the consideration of the High Court was whether in fact the order was under Section 30 or under Section 31, and it was held that the order was one under Section 31. In giving this answer the learned Judges followed a Pull Bench decision of the Patna High Court in -- '*Ananda v. Commr. of income-tax B and O*³. That was a case in which an order of an Appellate Assistant Commissioner dismissing an appeal and holding that no appeal lay was an order under Section 31.

7. The learned Judges also relied on the observations of Lord Romer who delivered judgment of their Lordships of the Privy Council in the case of '*Commr. of Income-tax, Bombay Presidency & Aden v. Khemchand Ramdas*⁴, 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 certainly seems to imply that even when an appeal is rejected by the Appellate Assistant Commissioner on the ground that it is not competent, the order, although not specifically covered by any of the provisions of Sub-section (3) regarding the disposal of appeals, is nevertheless an order under Section 31 which entitles the aggrieved party to file an appeal before the Appellate Tribunal and also in due course to have a case stated under Section 66.

8. In '*Commr. of Income-tax v. Shahzadi Be-Gum*'⁵, a Division Bench of the Madras High Court had held that an order of the Appellate Assistant Commissioner refusing to condone the delay in filing an appeal and dismissing the appeal as time-barred is an order under Section 31 of the Act and is, therefore, appealable to the Appellate Tribunal. The following passage in the judgment is relevant:

"The appeal may be an Irregular appeal or an incompetent appeal or even may be an appeal which was presented out of time. But still the Appellate Court has to apply its mind before it rejects the appeal on a preliminary ground that no case for condoning the delay was made out or that the formalities required by law had not been complied with or that the appeal was incompetent.

In considering these questions the appellate Court is undoubtedly exercising an appellate power and not a power which is outside it. No doubt under Section 30(2) of the Act power is given to condone the delay if sufficient cause is made out. But suppose a sufficient cause is not made out, then what is the kind of order which the appellate Court is authorised to make and under which section of the Act? Which is the section of the Act that empowers the appellate Court to consider and weigh the reasons put forward in justification of the filing of the appeal out of time and to come to decision and reject the appeal?

The Act does not specifically empower the appellate authority to reject an appeal which is out of time or which did not comply with the formalities or even an appeal which was incompetent. Pushed to its logical conclusion, the argument on behalf of the Income-tax Commissioner would lead to the result that in such cases, the appellate Court would have no power at all to reject the appeal. That could not have been the result contemplated by the Legislature and that was for the reason that after the section conferring a right of appeal and empowering the appellate authority to excuse the delay if sufficient cause is made out and admit an appeal, there follows the section which defines the powers of the appellate Court and prescribes the procedure to be adopted in disposing of the appeal. Even in respect of the preliminary questions it cannot be doubted, and indeed it was not disputed, that the appellate Court is bound to hear the appellant after fixing a date for hearing. Which section confers such a power except 31? The Legislature, in our opinion, thought that all such matters are covered by Section 31 which defines the procedure to be

adopted and the power to be exercised by the Appellate Tribunal and, therefore, no other specific provision was made in the Act in that behalf'. Here again the observations of Lord Romer in -- 'Khemchad Ramdas's case (D)', were cited as apposite.

9. In -- '*K. K. Porbunderwalla v. Commr. of Income-tax Bombay City*'⁶, Chagla, C. J., and Tendolkar, J., drew a distinction between the two parts of an order of an appellate Assistant Commissioner, the first holding that the appeal was barred by time, and the second refusing to condone the delay, and held that while the order refusing to condone the delay was passed under Section 30(2) and so not appealable to the Tribunal, the order dismissing the appeal as barred by time was an order under Section 31 and so appealable.

10. Finally there is the case of '*Champalal Asharam v. Commr. of Income-tax, Bombay, South*'⁷, also a decision of Chagla, C. J., and Tendolkar, J. In that case the appeal of the assessee was apparently barred by time and the Assistant Commissioner had issued a notice to the assessee to show cause why the delay in filing the appeal should be condoned. After hearing him on this point the Appellate Assistant Commissioner did not pronounce any order on it but issued a notice under Section 31(1) fixing a hearing of the appeal and at that hearing he dismissed the appeal as barred by time and refused to condone the delay. It was held that after the assessee had shown cause the Appellate Assistant Commissioner should have decided whether he should condone the delay or dismiss the appeal, and, not having dismissed the appeal, in law he must be deemed to have admitted the appeal and to have condoned the delay.

Once he issued a notice under Section 31 and passed an order, even though the order was in effect a reconsideration of his earlier decision it was still an order under Section 31 and not under Section 30(2). In the course of his judgment Chagla, C. J., approved of the decision of the Allahabad High Court in -- '*Mohd. Naim Mohd. Alam's case (A)*', and dissented from a view of this Court in -- '*Dewan Chand v. Commr. of Income-tax*'⁸, which I shall presently discuss.

11. It will thus be seen that there is a great weight of authority in support of the view that an order dismissing an appeal, whether as barred by time or incompetent or defective in form, is an order under Section 31, and the Courts generally appear to have taken the view that the sections should be construed liberally in favour of the assessee, who should not be deprived of all right to agitate the matter in dispute any further on account of the fact that an Appellate Assistant Commissioner purports to pass his order under Section 30(2). In any case I myself find it difficult to hold that any order under Section 30(2) can possibly be passed in a case where the Appellate Assistant Commissioner has actually issued a notice under Section 31(1) and 'prima facie', after that has been done, any order disposing of the appeal must be deemed to be an order under Section 31.

12. As against this the learned counsel for the Commissioner has cited only two cases, the first of which is the decision of this Court referred to above in 'Dewan Chand's case (H)'. This decision undoubtedly supports his case as it was held therein by Weston C. J. and Khosla J., that an order of an Appellate Assistant Commissioner refusing to condone the delay in filing an appeal and rejecting the appeal as time-barred on the date of its hearing is an order under Section 30 (2) and not under Section 31 and that where there has been no extension of time or condonation of the delay the mere issue of a notice informing the assessee of the date on which the appeal would be considered does not mean that the appeal has been admitted in the sense contemplated by Section 30 (2). It does not appear from the judgment of Khosla J., that all the cases which have now been cited before us were cited in that case, and the two Patna cases to which I have referred above were distinguished on the ground that no question of limitation was involved in them.

Two earlier decisions of the Allahabad and Bombay High Court in -- '*Shivnath Prasad v. Commr. Income-tax, Central and U. P.*⁹', and -- '*Commr. of Income-tax, Bombay city v. Mysore Iron and Steel Works*', AIR 1949 Bom 400 (J), were cited with approval, but those decisions do not appear to be in conformity with the later views of these two Courts expressed in the cases of '*Mohd. Naim Mohd. Alam*', (A), and '*Chaman Lal Asharam*', (G), and with the utmost respect I do not feel that I can agree with the view of Khosla J., that the issue of a notice under Section 31 (1) makes no difference to the section under which the order dismissing the appeal must be deemed to have been passed.

13. The other case relied on is the decision of the Supreme Court in '*Commr. of Income-tax, Madras v. Mt. Ar S. Ar. Arunachalam Chettiar*^{10R}'. The facts of this case are somewhat peculiar. The assessee had his headquarters in India and also carried on a money-lending business at Maubin, Kaulalumpur and Singapore in Malaya. He had challenged the assessment of the Income-tax Officer for the year in question by way of appeal to the Appellate Assistant Commissioner, and also by a further appeal to the Appellate Tribunal, which partially allowed his appeal and issued certain directions. It appears, however, that when the matter came back to the Income-tax Officer for the purpose of giving effect to the orders of the Appellate Tribunal, he did not do so but made a fresh assessment on somewhat different lines. The Appellate Assistant Commissioner was not satisfied that the assessee had any right of appeal under Section 30 of the Act as there had been no assessment under Section 23 and no notice of demand had been served on the assessee under Section 29. He therefore declined to admit the appeal but expressed the view that the assessee's remedy might be by way of a miscellaneous application to the Tribunal complaining that the Income-tax Officer had either misconstrued or not given effect to the order of the Tribunal. This course was adopted by the assessee and the Tribunal accepted his application to the extent of setting aside a part of the order of the Income-tax Officer and

directing the latter to revise his computation accordingly. It was on this that the Commissioner approached the Tribunal with an application under Section 66 (1) asking for certain questions to be refer-red to the High Court, including the validity of the order of the Tribunal on the so-called miscellaneous application of the assessee. The Tribunal rejected the application but the Commissioner moved the High Court under Section 66 (2) and the High Court ordered a case to be stated. At the hearing of the reference, however, the High Court held that it was not competent and refused to answer the questions. The Commissioner then appealed to the Supreme Court. In these circumstances it was held firstly that the order of the Tribunal dated 20-2-1946 could not be regarded as an order passed by the Tribunal under Section 33 (4) so as to attract the operation of Section 66, and therefore the High Court could decline to entertain the references, and secondly that even conceding that the High Court having directed the Tribunal under Section 66 (2) to state the case was precluded from refusing to answer the question referred, the Supreme Court could entertain the question of the competency of the reference.

14. It will thus be seen that the point which was considered by the learned. Judges of the Supreme Court was far removed from the narrow point with which we are concerned in this case. All that was really held therein was that an order of an Appellate Tribunal directing an In-come tax Officer to give effect to its directions contained in an appellate order under Section 33 (4) of the Act after he had apparently failed to do so, is not an appellate order within the meaning of Section 33 (4) which can give rise to a reference to the High Court. There is, however, one passage in the judgment of Das J., which appears to support the contention ,of the Commissioner in the present case. This passage reads-

"Therefore, in carrying out the directions of the Tribunal and in doing what he did on 26-9-1945 the Income-tax Officer cannot be regarded as having acted under Section 23 or Section 27 of the Act and that being the position no appeal lay from that order of the Income-tax Officer under Section 30 (1) of the Act. The result of it was that there was no proper appeal before the Appellate Assistant Commissioner such as is contemplated by Section 30 (1) & therefore, the order made by the Appellate Assistant Commissioner cannot be regarded as an order made by him Under Section 31(3), for an order under Section 31(3) can only be made in disposing of an appeal properly filed under Section 30, & consequently no further appeal lay to the Appellate Tribunal under Section 33 (1) so as to enable the Appellate Tribunal to make an order under Sub-section (4) of that section. In the premises, there being no order which may properly be said to have been made under Section 33 (4), no question of law can be said to arise out of an order made under S, 33 (4) and consequently there can be no valid reference under Section 66, Sub-section (1) or Sub-section (2). If, therefore, the reference was incompetent for want of jurisdiction both

under Section 66(1) or Section 66(2) surely the High Court could decline to entertain it as it did. Even if the order dated 26-9-1945 made by the Income-tax Officer after the matter came back to him to give effect to the decisions of the Appellate Tribunal be regarded as an order made by him under Section 23 or Section 27 and as such appealable under Section 30 (1) then the order made by the Appellate Assistant Commissioner on 19-11-1945 declining to admit the appeal clearly amounted to a refusal on his part to exercise the jurisdiction vested in him by law. An order thus founded on an error as to his Jurisdiction may conceivably be corrected by appropriate proceedings but it cannot certainly be regarded as such an order as is contemplated by any of the Sub-sections of Section 31. Such an order not coming within the purview of Section 28 or Section 31 no appeal lay therefrom to the Appellate Tribunal under Section 33 (1) and if no such appeal properly came before the Appellate Tribunal it could not properly make an order under Section 33 (4)".

It is the latter part of these remarks which are particularly relied on, and although they are only 'obiter', since it had already been decided that the order of the Income-tax Officer in that case was not an order appealable under Section 30 (1), they are clearly authoritative as far as we are concerned. It appears to me, however, that they can be distinguished on the ground that in that case the order of the Income-tax Officer was clearly one against which no appeal lay to the Appellate Commissioner under Section 30 (1), whereas in the present case an appeal lay and was filed within time though defective in form. Moreover the whole matter has been considered by the learned Judges of the High Court from a completely different angle, and no attempt was made to consider the question whether, once an appeal has been admitted in the sense that a notice fixing the time and place for the hearing of the appeal has been issued under Section 31 (1), the order of the Appellate Assistant Commissioner disposing of the appeal is one under Section 30 (2) or under Section 31. As a matter of fact in the present case I do not see how the order can be said to be one under Section 30 (2) since the appeal was not rejected on the ground that it was barred by time, but on the ground that it was not in the proper form by reason of the fact that a copy of the demand notice had not been attached to the memorandum of appeal, and if the appeal could be dismissed at all on this ground it would appear to me that this could be done only under Section 30 (3), and, as has been pointed out in some of the cases referred to above, neither Sub-section (2) nor Sub-section (3) of Section 30 specifically contains any provision for rejecting an appeal. All that Sub-section (2) says is that an appeal shall be ordinarily filed within 30 days of the receipt of the notice of demand and the Appellate Assistant Commissioner may condone a delay, and Sub-section (3) simply says that the appeal shall be in the prescribed form and verified in the prescribed manner. The case is a hard one from the point of view of the assessee since he has alleged that in fact a copy of the notice of demand was attached to the appeal when it was

filed in January 1949, & that it had somehow disappeared during the period of three years for which the appeal remained pending before it was finally disposed of in this manner by the Appellate Assistant Commissioner, and he has asked for an investigation into this matter, and by accepting the Appellate Assistant Commissioner's description of this order as being under Section 30 (2) and so refusing to admit the appeal the Appellate Tribunal has precluded all possibility of any enquiry being held into the assessee's allegations, which 'prima facie' at least deserve some investigation.

On the whole, after considering the terms of the Act and the authorities mentioned above, I am of the opinion that the correct view of the matter is that taken by the High Courts of Allahabad and Bombay in the cases of -- "Mohd. Naim Mohd. Alam (A)", and 'Champalal Asharam (G)', and that the answer to the question framed should be that the order of the Appellate Assistant Commissioner is not under Section 30 (2) but under Section 31 of the Act and that as such it is appealable to the Tribunal, and I would also allow the assessee's costs in the reference. Counsel's fee Rs. 250/-.

Bhandari, C.J.

15. I agree.

Cases Referred.

- 1 AIR 1952 All 143 (A)
- 2 AIR 1944 Pat 112 (B)
- 3 AIR 1931 Pat 306 (FB) (C)
- 4 AIR 1938 PC 175 (D)
- 5 AIR 1952 Mad 232 (E)
- 6 AIR 1952 Bom 167 (F)
- 7 AIR 1954 Bom 112 (G)
- 8 AIR 1952 Punj 203 (H)
- 9 AIR 1935 All 572 (I)
- 10 AIR 1953 SC 118 (K)