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law. If a section of a statute is clearly misconstrued, or if a provision of the law is overlooked or not applied, and that appears from the judgment of the lower Court itself, then the superior Court may interfere by a writ of *certiorari*. But that certainly is not the case here. Therefore, in my opinion, this is not a proper case where a writ of *certiorari* should be issued to correct what is suggested is an error of law. I express no opinion whatever on the contention that the Authority has erroneously come to the conclusion, which he has done with jurisdiction on the applications made before him by respondent No. 2.

The result is, both the petitions fail and must be dismissed with costs.

Attorneys for petitioner, *Crawford Bayley & Co.*

Attorneys for respondents, *Little & Co.*

Petitions dismissed.

A. J. P.

INCOME-TAX REFERENCE

1951 Aug. 28

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Tendolkar.

N. N. KOTAK, APPLICANT *v.* COMMISSIONER OF INCOME-TAX, BOMBAY, RESPONDENT.*

Indian Income-tax Act (XI of 1922), ss. 29, 30, 46 (1)—Penalty for default in payment of tax—Whether mere notice for levying penalty is compliance with the provisions of the Act or whether an order under s. 46 (1) is necessary.

The assessee who was assessed to income-tax for the years 1944-45 and 1945-46 failed to pay the full amount of his tax. Thereupon on June 23, 1948, the Income-tax Officer purported to pass an order in the following terms. "Tax not paid; Issue penalty notice" Pursuant to this order a demand for payment of penalty was made.

Held, that under s. 46 (1) of the Income-tax Act it is necessary that the Income-tax Officer must pass a formal order imposing a penalty and that order must state the specific sum to be paid by the assessee as penalty. It is only after such an order is passed that a notice of demand can be served. Therefore, the passing of the order is a condition precedent to the validity of the notice of demand.

Held, therefore, that as in this case no formal order had been passed as required by s. 46 (1) the notice of demand was bad and the penalty imposed on the assessee was void in law.

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* Income-tax Ref. No. 4 of 1951.

The assessees were partners in the firm of Messrs. Kotak and Co. The assessment order for the payment of tax for the assessment year 1944-45 was passed on September 16, 1947, and that for the assessment year 1945-46 was passed on February 13, 1948. In response to the demands only a part payment of the tax was made. Thereupon on June 23, 1948 the Income-tax Officer passed an order in the following terms:

"Tax not paid. Issue Penalty notice" and "Tax not paid. Issue notice under s. 46 (*1*) for penalty."

Pursuant to this order a penalty was levied which worked out to 5 per cent of the arrears of tax due. In appeal the Appellate Commissioner reduced the penalty to 2½ per cent.

The assessee appealed to the Tribunal contending that the order passed by the Income-tax Officer on June 23, 1948, was not an order in accordance with s. 46 (*1*) and was therefore not a valid order. The Tribunal rejected the contention.

The question referred to the High Court was as follows:—

"Whether in the circumstances of the case the penalty imposed by the Income-tax Officer under s. 46 (*1*) of the Act is void in law."

The reference was heard.

R. J. Kolah with *N. A. Palkhiwalla,* for the assessee.

G. N. Joshi with *C. K. Daphtary,* Solicitor General, for the Commissioner.

CHAGLA C. J. The assessee in this case was assessed for the years 1944-45 and 1945-46. He failed to make the full payment in respect of his assessment for these years. Thereupon on June 23, 1948, the Income-tax Officer purported to pass an order to the following effect. "Tax not paid; Issue Penalty Notice." Pursuant to this order a demand was made for payment under s. 29 and the notice of demand mentioned what was the amount of penalty that the assessee had to pay. The assessee appealed to the Appellate Assistant Commissioner from the order under s. 46 (*1*) and the Appellate Assistant Commissioner reduced the penalty. Then there was an appeal to the Tribunal and the Tribunal upheld the decision of the Appellate Assistant Commissioner. The contention urged before the Tribunal and also before us is that the penalty imposed was contrary to law inasmuch as no proper order was passed by the Income-tax Officer under s. 46 (*1*). That sub-section provides that when an assessee is in default in making payment of income-tax, the Income-tax Officer may in his discretion direct that in addition to the amount in arrears a sum not exceeding that amount shall be

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recovered from the assessee. It is clear that the direction that the Income-tax Officer has to give under s. 46 (*1*) must be a direction which must take the form of an order and that order must state the specific sum which the assessee has got to pay by way of penalty. The limitation laid down upon the Income-tax Officer under that sub-section is that the amount which the assessee has to pay as penalty must not exceed the amount of arrears. Now, the contention of Mr. Joshi is that s. 46 (*1*) merely provides for a departmental direction to be given by the Income-tax Officer. According to him that departmental direction is carried out when the notice of demand is given under s. 29 and it is sufficient if in the notice of demand the actual amount which has to be paid by the assessee is mentioned. Now, when we turn to s. 29, what it provides is that when any tax penalty or interest is due in consequence of any order passed under or in pursuance of the Income-tax 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. Therefore, the notice of demand can only be served under this section provided tax, penalty or interest is due in consequence of an order passed under the Act. Therefore the condition precedent to the validity of the notice of demand under s. 29 must be an order passed under the Act, and the notice is merely consequential upon that order. Therefore, if there is no order under the Act, then no notice can be served under s. 29. Therefore, if Mr. Joshi's contention is sound that no order is required under s. 46 (*1*) and in fact no order was passed under that sub-section, then the notice of demand under s. 29 is clearly bad and there was no liability of the assessee to comply with that notice. As I stated before the contention of Mr. Joshi that no order is required under s. 46 (*1*) is clearly untenable, because when one looks at the scheme of the Act a right of appeal is provided by s. 30 of the Act against the penalty imposed, and it cannot be suggested that the right of appeal given under s. 30 is against a direction made by the Income-tax Officer under s. 46 (*1*) which does not even specify what is the amount of the penalty which the assessee has got to pay. Under s. 46 (*1*) there must not only be a formal order which imposes a penalty but it must also specify the actual amount of the penalty which the assessee is liable to pay. After that order is passed then, consequential upon that order, a notice of demand may be served under s. 29 and the assessee has a right of appeal against

such order under s. 30 of the Act. Inasmuch as the order passed by the Income-tax Officer in this case under s. 46 (1) does not specify the amount of the penalty, the order is bad and the notice of demand is equally bad as it follows upon an invalid order of the I. T. O. In the result the penalty imposed by the I. T. O. is not valid in law and we shall therefore answer the question referred to us in the negative. The Commissioner to pay the costs of the reference.

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Attorneys for applicants: *Manilal, Kher, Ambalal and Co.*

Attorney for respondents: *N. K. Petigara.*

Answer accordingly.

A. J. P.

INCOME-TAX REFERENCE

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Tendolkar.

K. K. PORBUNDERWALLA, APPLICANT *v.* COMMISSIONER OF INCOME-TAX, BOMBAY CITY, RESPONDENT.*

1951 *Aug.* 30

Indian Income-tax Act (XI of 1922), ss. 30 (2), 31—Appeals dismissed by Assistant Appellate Commissioner as being time-barred and delay not condoned—Whether a further appeal to the Tribunal competent.

An order of the Assistant Appellate Commissioner dismissing an appeal as being time-barred is an order passed under s. 31 of the Income-tax Act and the assessee has a right to appeal from such order to the Appellate Tribunal under s. 33 of the Act.

But an order by him refusing to condone the delay and to entertain the appeal is an order passed under s. 30 (2) of the Act and is final and no appeal lies to the Tribunal from such order.

Held, therefore, that the appeals before the Appellate Tribunal from the orders of the Assistant Appellate Commissioner in appeal were competent only to the extent that he held that, the assessees' appeals were barred by limitation and not competent in so far as he refused to condone the delay.

Commissioner of Income-tax v. *Mysore Iron and Steel Works*[1]; *Special Manager, Court of Wards* v. *Commissioner of Income-tax*[2]; *Ramnarayan Das Madanlal* v. *Commissioner of Income-tax*[3] and

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* Income-tax Ref. No. 7 of 1951.

[1] (1949) 51 Bom. L. R. 684. [2] (1950) 18 I T. R. 204.

[3] (1950) 18 I. T. R. 660.