

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.

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

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

Answer accordingly.

A. J. P.

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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 assessee's 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

* 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.

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Mahomed Nair Mahomed Alam v. Commissioner of Income-tax,⁽¹⁾ referred to.

On May 29, 1948, assessment orders were passed by the Income-tax Officer with regard to the assessments for the years 1945-46, 1946-47 and 1947-48.

On February 26, 1949, the assessee preferred appeals against the assessment orders before the Assistant Appellate Commissioner who dismissed the appeals as being time-barred. The Assistant Commissioner also refused to condone the delay.

The assessee therefore appealed to the Appellate Tribunal. The Tribunal held that the orders passed by the Assistant Appellate Commissioner dismissing the appeals as being time-barred and refusing to condone the delay were orders made under s. 30 of the Act and therefore it was not competent to the Tribunal to entertain the appeals.

The assessee applied for reference to the High Court and the question of law which was referred to the High Court was:—

“Whether the appeals before the Appellate Tribunal were competent.”

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 respondent.

CHAGLA C. J. 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 May 29, 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 February 26, 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 January 29, 1949, and he having filed the appeal within 30 days of that service, viz., on February 27, 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

⁽¹⁾ (1950) 19 I. T. R. 58.

decision of the Appellate Assistant Commissioner an appeal was preferred to the Tribunal, but the Tribunal held that the appeal was incompetent.

Now, in order to decide the question of competency we have to consider whether the order of the Appellate Assistant Commissioner was made under s. 30 (2) or s. 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-s. (2) of s. 30, 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 s. 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 annual 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 annual 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 s. 31. Now, s. 33 gives a right of an appeal to the Tribunal against an order of the Appellate Assistant Commissioner under either s. 28 or s. 31. Now, looking at the scheme of ss. 30 and 31 it is clear that a statutory right of appeal is conferred upon the assessee in cases that fall under s. 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 intermediate stage between the presentation of the appeal and the hearing of the appeal is provided by the last clause of s. 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

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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 hand 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 s. 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 s. 31, and once the appeal is heard under s. 31 every order, whatever the nature of it may be, that is made by the Appellate Assistant Commissioner is under s. 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 s. 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 *The Commr. of I. T. v. Mysore Iron and Steel Work.*⁽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 s. 31 of the Act but it was under s. 30 (2) and therefore no appeal lay to the Tribunal. At p. 685

⁽¹⁾ (1949) 51 Bom. L. R. 684.

of the report in our judgment we pointed out that the scheme of ss. 30 and 31 was fairly clear. The assessee has a statutory right to present an appeal within 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 Income-Tax*.⁽¹⁾ 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 s. 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 s. 30 and the power to grant extension is also given in that section the power is really exercised under s. 31, as the Appellate Assistant Commissioner when he decided 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

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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 s. 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*⁽¹⁾ 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 s. 30 (1) and the Orissa High Court held that that order was under s. 31 and an appeal lay to the Tribunal. At p. 667 the learned Chief Justice after setting out the provisions of s. 30 (2) observes as follows:

"...This makes it clear that the stage of admission is interposed between the presentation of an appeal and its hearing and disposal under s. 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 s. 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 s. 31 and not under s. 30 (2). Then there is a very recent judgment of the Allahabad High Court in *Mohd. Nain Mohd. Alam v. Commr. of Inc-tax*.⁽²⁾ In that case the Appellate Assistant Commissioner admitted an appeal under s. 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 s. 31 of the Act, and the Appellate Assistant Commissioner having once condoned the delay under s. 30 (2), the dismissal can only be under s. 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.

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

⁽¹⁾ (1950) 18 I. T. R. 660.

⁽²⁾ (1950) 19 I. T. R. 58.

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 s. 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 s. 30 (2) and is final and cannot be challenged before the Tribunal.

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.

Attorneys for applicant: *Payne and Co.*

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

Answer accordingly.

A. J. P.

APPELLATE CIVIL

Before Mr. Justice Bhagwati and Mr. Justice Vyas.

RAMIJABI MAKTUMSAHEB JAMADAR (ORIGINAL PLAINTIFF),
APPELLANT v. GHUDUSAHEB FARID AVATI (ORIGINAL DEFENDANT),
RESPONDENT.*

1951
Sept. 11

Bombay Hereditary Offices Act (Bom. III of 1874), ss. 4, 5—Rules framed under Act XI of 1852, Rules 1, 3, 5†—Rules framed under Bom. Act VII

* Letters Patent Appeal No. 39 of 1950.

† The rules framed under Act XI of 1852 read as under:

"1. The Honourable the Governor in Council affirms the principle that the lands of a Shetsanadi are liable to be resumed and given to another if the holder misconducts himself. In reserving this right, however,

the Governor in Council rules that it shall be exercised only in cases of extreme misconduct.

3. In ordinary cases of misconduct the dismissed Shetsanadi will be allowed to remain

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