

## INCOME-TAX REFERENCE

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

CHAMPALAL ASHARAM, APPLICANT *v.* THE COMMISSIONER OF  
INCOME-TAX, BOMBAY SOUTH, BOMBAY, RESPONDENT.\*

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Mar. 3

*Indian Income-tax Act (XI of 1922), ss. 30 (2) and 31—Delay in filing appeal to the Appellate Assistant Commissioner—Notice to show cause regarding delay—Assessee showed cause for excusing delay—Notice under s. 31 of the Act for hearing and final disposal of appeal—Appeal heard on merits—Appeal rejected as time-barred—Whether order dismissing the appeal was order under s. 30 (2) and not appealable.*

There was delay of two days in filing the memorandum of appeal to the Appellate Assistant Commissioner, Poona, against the assessment order passed by the Income-tax Officer, Ahmednagar. The Appellate Assistant Commissioner issued a notice calling upon the assessee to show cause why his appeal should be entertained although out of time. The assessee showed cause why the delay in filing the appeal should be condoned. Thereafter the Appellate Assistant Commissioner issued a notice under s. 31 fixing the date of the hearing and final disposal of the appeal. The appeal was heard on merits by the Appellate Assistant Commissioner who dismissed it as it was time-barred. The assessee appealed to the Income-tax Appellate Tribunal who held that no appeal lay as the order of the Appellate Assistant Commissioner dismissing the appeal was an order under s. 30 (2) of the Indian Income-tax Act, 1922. On a reference to the High Court,

*Held*, that as the notice was issued under s. 31 of the Act and the hearing of the appeal was also fixed under that section, the final order dismissing the appeal on the ground that it was not filed within the period of limitation was an order under s. 31 of the Act and not under s. 30 (2), and was therefore appealable.

After the assessee had shown cause the Appellate Assistant Commissioner should have decided at that stage whether he should condone the delay or dismiss the appeal. As he did not dismiss the appeal, in law he must be deemed to have admitted the appeal and condoned the delay. It is open to him when the appeal comes on for hearing and final disposal under s. 31 to revise his decision and dismiss the appeal on the ground that sufficient cause was not shown for condoning the delay. If he does so, it would be under s. 31 and not under s. 30 (2) even though his order merely refuses to condone the delay.

*Mohd. Naim Mohd. Alam v. Commissioner of Income-tax, U. P.*,<sup>(1)</sup> followed.

*Dewan Chand v. Commissioner of Income-tax*,<sup>(2)</sup> not followed.

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\* Income-tax reference No. 23 of 1952.

<sup>(1)</sup> (1951) 19 I. T. R. 58.

<sup>(2)</sup> (1951) 20 I. T. R. 621.

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*K. K. Porbunderwalla v. Commissioner of Income-tax, Bombay City,*<sup>(1)</sup>  
 referred to.

Dismissal of the appeal by the Appellate Assistant Commissioner deprives the assessee of a right to challenge the assessment made by the Income-tax Officer and therefore ss. 30 and 31 of the Act should be liberally construed.

Facts material to this report are fully stated in the judgment.

At the instance of the assessee the following question was referred to the High Court:

Whether on the facts and circumstances of the case an appeal lies to the Tribunal from the order passed by the Appellate Assistant Commissioner, dated September 28, 1950, refusing to condone the delay?\*

The reference was heard.

*Sir Jamshedji B. Kanga* with *R. J. Kolah*, for the applicant.

*Sir Nusserwanji P. Engineer* with *G. N. Joshi*, for the respondent.

CHAGLA C. J.—The question that arises in this Reference is whether a certain order passed by the Appellate Assistant Commissioner was an order under s. 30 (2) or an order under s. 31. If the order was under s. 31 it was appealable; if it was one under s. 30 (2) no appeal could lie under that order. The Tribunal has taken the view that the order was under s. 30 (2) and therefore refused to entertain the appeal preferred by the assessee from that order, and the question submitted to us by the Tribunal in substance raises this question.

Now, a few facts might be stated. The assessment order was passed on April 30, 1949, and the notice of demand was served upon the assessee on February 13, 1950. The last day for preferring the appeal to the Appellate Assistant Commissioner was March 16, 1950. For certain reasons which it is not necessary to go into at the present stage, the assessee did not post the memo of appeal from Ahmednagar where he was living up to March 16, 1950, and the petition for appeal reached the Appellate Assistant Commissioner in Poona to whom it was posted on March 18, 1950. Therefore, when the petition for appeal reached him it was clearly out of time by two days. On May 5, 1950, a

<sup>(1)</sup> (1952) 21 I. T. R. 63.

\* The High Court reframed the question as follows:—

“Whether the order of the Appellate Assistant Commissioner, dated the September 20, 1950, is an order s. 31 and appealable?”

notice was issued by the Appellate Assistant Commissioner calling upon the assessee to show cause why his appeal should be entertained although out of time and on May 11, 1950, the assessee showed cause giving reasons why the delay should be condoned. Then on September 1, 1950, a notice was issued by the Appellate Assistant Commissioner under s. 31 to the effect that the appeal preferred by the assessee had been received and registered by the office of the Appellate Assistant Commissioner and September 19, 1950, was fixed for hearing and final disposal of the appeal at Ahmednagar and the assessee was informed that he should appear in that office in person or by an authorised agent or by a pleader duly instructed who would be able to answer all material questions arising in the appeal. He was further informed that in default of his appearance on the day mentioned the appeal will be heard and determined in his absence. Pursuant to this notice the appeal was heard on September 19, 1950, and it is not disputed that the appeal was heard on merits by the Appellate Assistant Commissioner. Ultimately on that day he passed an order to the effect that he saw no reason why the assessee could not submit the appeal petition within the period of limitation. The Appellate Assistant Commissioner, therefore, expressed the opinion that he was unable to condone the delay and the order he passed was that the appeal was rejected as time-barred, and the question arises whether on these facts the order of the Appellate Assistant Commissioner falls under s. 31 or under s. 30 (2).

Now, in our decision in *K. K. Porbunderwalla v. Commissioner of Income-tax, Bombay City*<sup>(1)</sup> we considered the scheme of s. 30 and 31 and we pointed out that there was an intermediate stage between the presentation of the appeal and the hearing of the appeal as provided by the last clause of s. 30 (2) and that intermediate stage relates to those appeals which were out of time, but for which the appellant asked for condonation of delay from the Appellate Assistant Commissioner and it was left to the decision of the Appellate Assistant Commissioner whether to condone or not to condone the delay. It is clear that it is only after that intermediate stage is passed that it is competent to the Appellate Assistant Commissioner to issue a notice fixing a day and place for the hearing of the appeal under s. 31. Now, in this case, as already pointed out, in order to decide whether the delay should be condoned or not,

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the Appellate Assistant Commissioner actually issued a notice to show cause upon the assessee on May 5, 1950. The assessee showed cause on May 11, 1950. It was open to the Appellate Assistant Commissioner to decide that no sufficient cause had been shown by the assessee for condonation of the delay. But instead of coming to that conclusion the Appellate Assistant Commissioner on the September 1, 1950, issued a notice under s. 31 and fixed the hearing of the appeal for September 19, 1950. Now, it is clear that the notice was issued under s. 31 and the hearing of the appeal was also fixed under s. 31. Therefore the ultimate order that the Appellate Assistant Commissioner passed was also under s. 31.

Reliance is placed on the fact that the only order that the Appellate Assistant Commissioner passed was refusing condonation and dismissing the appeal on the ground that it was time-barred. But it is open to the Appellate Assistant Commissioner, having taken the view at the intermediate stage under s. 30 (2) that delay should be condoned, and having admitted the appeal, to revise his decision and when the appeal comes on for hearing under s. 31 to take a different view and dismiss the appeal on the ground that no sufficient cause was shown for condoning the delay. If he does so, even though his order is merely refusing to condone the delay, the order would be under s. 31 and not under s. 30 (2). It is clear that no notice for the hearing and final disposal of the appeal can be issued and no hearing of the appeal can be fixed except under s. 31.

Sir Nusserwanji says that it may be that the Appellate Assistant Commissioner was in error in issuing a notice under s. 31 and he should not have issued the notice under that section. We do not think it is open to the Appellate Assistant Commissioner to contend that the notice which he issued in pursuance of which he heard the appeal and passed the final order was not a valid notice. In our opinion, the proper practice for the Appellate Assistant Commissioner to follow, which in this case he did follow, was first to issue a notice limited to the question of condonation of delay. That is exactly what he did on May 5. After the assessee had shown cause by his letter of May 11, the Appellate Assistant Commissioner should have decided at that stage whether he should condone the delay or he should dismiss the appeal. Not having dismissed the appeal, in law he must be deemed to have admitted the appeal and to have condoned the delay. Having done so, he then proceed to issue notice under

s. 31, and once he issued notice under s. 31 and passed an order, even though the order was in effect a reconsideration of his earlier decision, it was still an order under s. 31 and not an order under s. 30 (2).

Support for this view can be found in a recent decision of the Allahabad High Court in *Mohd. Naim. Mohd. Alam v. Commissioner of Income Tax*.<sup>(1)</sup> There the facts were practically identical. The Allahabad High Court held that the Appellate Assistant Commissioner of Income Tax was not debarred from reconsidering the question where an appeal was time-barred merely because he has passed an order under sub-s. (2) of s. 30 of the Income Tax Act, 1922, admitting it, and that High Court further held that where the Appellate Assistant Commissioner of Income Tax had admitted the appeal under s. 30 (2) of the Act a subsequent order of dismissal on the ground that the appeal was time-barred after the issue of the notice to the assessee fixing a date and place for the final hearing and final disposal was an order under s. 31 of the Act.

Sir Nusserwanji says that there is no order here admitting the appeal. As we have already pointed out that in law the Appellate Assistant Commissioner must be deemed to have admitted the appeal and s. 30 (2) does not contemplate the necessity of passing a formal order. As a matter of fact in the notice which he issued under s. 31 he states that the appeal was received and registered by the office and this was done after the notice to show cause with regard to the condonation of the delay had been issued against the assessee. Therefore it is clear that when this notice was issued on September 1, 1950, the appeal had not only been received but that the appeal was admitted; and when this notice was issued it was issued for the purpose of enabling the assessee to be heard on merits and in fact, as already pointed out, the assessee was heard on merits in this case. Sir Nusserwanji has relied on a recent judgment of the East Punjab High Court reported in *Dewan Chand v. Commissioner of Income Tax*.<sup>(2)</sup> In the judgment Mr. Justice Khosla at page 623 points out that:

"There is in reality only one question requiring our decision, viz., whether the order of the Appellate Assistant Commissioner of Income Tax declining to extend the time of limitation and dismissing the appeals as barred by time is appealable or not."

<sup>(1)</sup> (1951) 19 I. T. R. 58.

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As far as that question is concerned the East Punjab High Court takes the same view as we took in *K. K. Porbunderwalla v. Commissioner of Income Tax, Bombay City*,<sup>(1)</sup> but then they go on to consider the other question, and the discussion of that question will be found at page 625 and the view taken by the East Punjab High Court is that issuing of a notice under s. 31 does not imply that the appeal had been admitted in the sense contemplated by sub-s. (2) of s. 30. With respect, we are unable to agree with the view of the East Punjab High Court. In our view the view taken by the Allahabad High Court is the better view and, with respect, we prefer to accept the view taken by the Allahabad High Court to the view taken by the East Punjab High Court. It must be borne in mind that a dismissal of the appeal by the Appellate Assistant Commissioner deprives the assessee of a right to challenge the assessment made by the Income-tax Officer and if anything, ss. 30 and 31 should be liberally construed in favour of the assessee rather than against him so as to deprive him of the right to appeal to the Appellate Tribunal. Therefore, we are rather inclined in favour of the more liberal interpretation put by the Allahabad High Court than the construction put by the East Punjab High Court on these two sections. The question submitted to us does not really bring out the controversy between the department and the assessee. We would, therefore, re-frame the question and the re-framed question will be:

"Whether the order of the Appellate Assistant Commissioner dated September 20, 1950, is an order under s. 31 and appealable?"

and we answer that question in the affirmative. The Commissioner to pay the costs.

No order on the notice of motion except that the Commissioner should pay the costs of the motion.

Attorneys for applicant: *Rustomji & Ginwala.*

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

*Answer accordingly.*

P. M. P.

<sup>(1)</sup> (1952) 21 I. T. R. 63.