

(1954) 09 OHC CK 0002
In the Orissa High Court
Case No : S.J.C. No. 4 of 1952

Bansidhar Mohanti

APPELLANT

Vs

Commr. of Income Tax

RESPONDENT

Date of Decision : 20-09-1954

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1922 — Section 30(2), 31, 33A, 66(1)

Citation : AIR 1955 Ori 1 : (1954) 20 CLT 686 : (1955) 28 ITR 625

Hon'ble Judges : Narasimham, J; Misra, J

Bench : Division Bench

Advocate : B. Mohanty and C.K. Ghosh, for the Appellant; G.C. Das, for the Respondent

Judgement

Narasimham, J.—This is a reference by the Income Tax Appellate Tribunal u/s 66(1), Income Tax Act, for a decision by this Court of the following question of law:

"Whether on the above facts and circumstances of this case the order of the Appellate Assistant Commissioner not admitting the appeal which was admittedly barred by limitation was an order passed u/s 30(2), Income Tax Act or was an order passed u/s 31 of the Act."

2. The material facts are as follows:

The assessee was assessed to Income Tax for the year 1946-47 and the demand notice was served on him on 6-5-1948. He applied for a copy of the assessment order on 28-5-1948 and it was supplied to him on 9-6-1948.

Under Section 30(2), Income Tax Act, he was entitled to file an appeal against the assessment order, before the Appellate Assistant Commissioner within thirty days of the date of receipt of the notice of demand after excluding the time taken for obtaining a copy of the assessment order. Thus the appeal should have been filed before the Appellate Assistant Commissioner on 18-6-1948.

As it appeared to be prima facie time barred the Appellate Assistant Commissioner called upon the assessee to satisfy him about the existence of sufficient cause for not presenting the appeal within the time limit. The assessee showed cause and stated that he suffered from rheumatism during the relevant period. His cause was, however, held to be not satisfactory and the Appellate Assistant Commissioner by his order dated 3-9-1948 refused to admit the appeal.

Thereupon, the assessee filed an appeal before the Appellate Tribunal who held that inasmuch as the Appellate Assistant Commissioner had dismissed the appeal u/s 30(2), Income Tax Act, no appeal lay before the Appellate Tribunal u/s 33 of that Act but it referred the case to the High Court u/s 66(1) of the Act.

2a. Sub-section (i) of Section 30, Income Tax Act, confers on the assessee a right of appeal against an assessment made by the Income Tax Officer in various circumstances which it is unnecessary to describe in detail here. It may be assumed that in the present case the assessee had a right of appeal under that sub-section against the order of assessment of the Income Tax Officer.

But Sub-section (2) of that section says that the appeal shall ordinarily be presented within thirty days of receipt of the notice of demand relating to assessment and the last portion of that subsection confers discretion on the Appellate Assistant Commissioner to "admit" an appeal after the expiry of the period of limitation if he was satisfied that the appellant had sufficient cause for not presenting it within that period.

Section 31 describes in detail the procedure to be followed by the Appellate Assistant Commissioner for the hearing of the appeal. It was rightly conceded by Mr. Mohanty that the provisions of Section 31 would apply only after an appeal had been admitted u/s 30(2). After such admission the Appellate Assistant Commissioner may pass any order under Sub-section (3) of Section 31. Sub-section (1) of Section 33 confers on the assessee a further right of appeal to the Appellate Tribunal against an order passed by the Appellate Assistant Commissioner u/s 31.

Sub-section (4) of Section 33 describes the procedure to be followed by the Appellate Tribunal for the hearing of the appeal and for passing final orders thereon. Section 66(1) says that within sixty days of the date upon which an assessee is served with notice of an order passed by the Appellate Tribunal under Sub-section (4) of Section 33 he may require the Tribunal to state a case for the decision of the High Court. The Tribunal has purported to act in pursuance of this sub-section. It will be obvious from a mere reading of these sections that the jurisdiction of the Tribunal to state a case for the decision of the High Court u/s 66(1) arises only in respect of those orders of the Tribunal which come within the scope of Section 33 and further the jurisdiction of the Tribunal as an appellate authority u/s 33 arises only against those orders of the Appellate Assistant Commissioner which come within the scope of Section 31.

It has already been shown that Section 31 would ordinarily apply only after an

appeal has been admitted by the Appellate Assistant Commissioner. An order of the Appellate Assistant Commissioner refusing to condone the delay in filing an appeal u/s 30(2) and refusing to admit the appeal would not ordinarily be an order u/s 31 but would be an order u/s 30(2). Consequently, the Tribunal had no jurisdiction to hear the appeal u/s 33 nor can a case be validly stated u/s 66(1).

3. Mr. Mohanti, however, contended relying on -- Champaklal Asharam Vs. Commissioner of Income Tax, Bombay South, that--once the Appellate Assistant Commissioner issued notice for hearing of the appeal u/s 31 and then refused to condone the delay his order would amount to an order u/s 31 which was appealable u/s 33.

The facts of that case are, however, slightly different from the facts of the present case. There it appears that before issuing notice for the hearing of the appeal u/s 31, the Appellate Assistant Commissioner had called upon the assessee to show cause for the delay in filing the appeal and then issued notice u/s 31 for the hearing of the appeal and had also heard the appeal on merits. On these facts, the Bombay High Court held that his order issuing notice for the hearing of the appeal would amount to admission of the appeal after condoning the delay and his subsequent order refusing to condone the delay and rejecting the appeal as time-barred would be an order revising his own previous order and would come within the scope of Section 31.

In the present case, however, the statement of facts as given by the Tribunal shows that the appeal was not admitted by the Appellate Assistant Commissioner even at the preliminary stage. He merely called upon the assessee to satisfy him about the existence of sufficient cause for not presenting the appeal within the time limit; as he was not satisfied with the cause shown he refused to admit the appeal. This case, therefore, would come within the intermediate stage of rejecting an appeal u/s 30(2) and not the subsequent stage of hearing an appeal on merits after he had decided to condone the delay. Thus, on facts this case can be clearly distinguished from the Bombay case.

Mr. Mohanti, however, relied on a Calcutta decision reported in -- "Gour Mohan Mullick v. Commr. of Agricultural Income Tax, West Bengal" AIR 1994 Cal 468 (B) and also on an earlier decision of the Orissa High Court reported in -- Ramanarayan Das Madanlal Vs. Commissioner of Income Tax, where it was held under similar circumstances, that even an order refusing to admit appeal may amount to an order u/s 31. It is unnecessary to discuss these decisions in detail inasmuch as the views put forward in them may require modification in the light of the later decision of the Supreme Court reported in -- Commissioner of Income Tax, Madras Vs. Mtt. Ar. S. Ar. Arunachalam Chettiar, which I shall discuss in the next paragraph. But I may point out that in the Orissa case it was recognised that when an appeal was not admitted as being time-barred that order would be an order u/s 30(2) and not u/s 31.

4. From time to time various High Courts in India appear to have taken a

somewhat liberal view as regards construction of Sections 31 and 33 so as to confer a right of appeal on an assessee against the orders of an Appellate Assistant Commissioner refusing to admit an appeal under some circumstances. But in a recent decision of the Supreme Court cited above, a very strict construction was put on Sections 30, 31, 33 and 66(1) and it was held that unless the order of the Appellate Assistant Commissioner could be held to come within the strict terms of Section 31, no appeal lay to the Tribunal u/s 33 and no reference to the High Court could be made u/s 66(1).

Doubtless, in that Supreme Court decision the main question for consideration was whether an appeal lay to the Appellate Assistant Commissioner u/s 30(1) where no assessment had been made on the assessee u/s 23 and no notice of demand had been served on him u/s 29. The Appellate Assistant Commissioner held that no appeal lay to him and declined to admit the appeal. But he suggested that a miscellaneous application might be made to the Tribunal against the order of the Income Tax Officer concerned. Thereupon, such an application was made to the Tribunal who passed orders in favour of the applicant, revising the order of the Income Tax Officer. Their Lordships of the Supreme Court held that an order declining to admit an appeal passed by the Appellate Assistant Commissioner would not be an order u/s 31 & that consequently the Tribunal had no jurisdiction to entertain an appeal against that order u/s 33(4) and that a subsequent reference to the High Court u/s 66(1) would be incompetent.

It is true that the facts of that case are slightly different from the facts of the present case inasmuch as here an appeal lay to the Appellate Assistant Commissioner. But for the bar of limitation, the appeal would have been admitted as a matter of course and heard u/s 31. I do not think this makes any essential difference as regards the principles laid down by their Lordships of the Supreme Court. In fact, in the penultimate paragraph of their Judgment they made it clear that even if in that case an appeal lay to the Appellate Assistant Commissioner and he had declined to admit the appeal, thereby refusing to exercise jurisdiction vested in him by law such an order would not come within the scope of Section 31 so as to attract the appellate jurisdiction of the Tribunal u/s 33(1). These observations are wide enough to cover cases where the Appellate Assistant Commissioner refused to admit an appeal after declining to condone the delay in exercise of the discretionary power conferred on him by Section 30(2).

5. The assessee is, however, not without any remedy. Section 33A of the Act confers on the Commissioner of Income Tax jurisdiction in those cases where no appeal lies, to revise all orders passed by subordinate authorities including the Appellate Assistant Commissioner. Hence, when the latter refused to exercise his discretion in favour of the assessee and to condone the delay the assessee could have applied to the Commissioner of Income Tax.

We notice from the paper book that the assessee's Advocate Mr. Mohanti asked for an adjournment from the Tribunal for the purpose of moving the

Commissioner. But apparently, no such application was eventually made. Further, in appropriate cases this Court's Jurisdiction under Article 226 of the Constitution may perhaps be invoked where it is clear that the Appellate Assistant Commissioner had refused to exercise jurisdiction vested in him by law and the Income Tax Act does not provide any alternative remedy against his order. It is, however, un-necessary to decide this question at great length in this reference.

6. We are satisfied that the Tribunal took the correct view in holding that the assessee had no right of appeal against the order of the Appellate Assistant Commissioner which was an order u/s 30(2) and not u/s 31, Income Tax Act. The reference is answered accordingly. Both parties will bear their own costs.

Misra, J.

7. I agree.