

(1963) 04 MAD CK 0026

In the Madras High Court

Case No : Tax Case No. 20 of 1962 (Appeal No. 2)

Erode Yarn Stores

APPELLANT

Vs

The State of Madras

RESPONDENT

Date of Decision : 11-04-1963

Acts Referred:

Income Tax Act, 1961 — Section 31

Citation : (1963) 14 STC 724

Hon'ble Judges : Srinivasan, J; Jagadisan, J

Bench : Division Bench

Advocate : C.S. Chandrasekhara Sastry, for the Appellant; G. Ramanujam, for Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Srinivasan, J.—In suo motu revision proceedings u/s 34 of the Madras General Sales Tax Act, the Board of Revenue called for and

examined the original order of assessment made upon the petitioners and took the view that the assessing authority had failed to bring to tax the

value of the packing materials which was included in the sales turnover of cotton yarn. It also thought that a certain part of the turnover of the

cotton yarn had been wrongly exempted as second sales. In response to a notice issued by the Board of Revenue proposing to revise the

assessment and to re-fix the turnover, the petitioners assessees objected on the ground that as an appeal had been filed before the Tribunal the

Board was not competent to take proceedings u/s 34. Other objections to the assessability of the turnovers in question were also advanced. The

Board held that the assessees had not filed an appeal to the Tribunal and that therefore the Board was not prevented from taking action u/s 34. It

also revised the turnover as proposed.

2. It is against these orders that the present appeal has been filed.

3. Mr. Chandrasekhara Sastry, for the petitioners principally rested his arguments upon the scope of Section 34. He did not in view of certain

decisions of this Court deal with the question on merits, He conceded that if this Court should hold that the Board had jurisdiction and was not

prevented by any part of Section 34 from revising the order of assessment, he could not press the appeal on the merits. We therefore proceed to

consider the legal grounds advanced.

4. Section 34 of the Act confers power upon the Board of Revenue to call for and examine an order made by the assessing authority, to enquire

into the matter and subject to the provisions of the Act to pass such order thereon as it thinks fit. Sub-section (2) of Section 34 states :

The Board of Revenue shall not pass any order under Sub-section (1) if--

(a) the time for appeal against that order has not expired; or

(b) the order has been made the subject of an appeal to the Appellate Tribunal or of a revision in the High Court; or

(c) more than four years have expired after the passing of the order.

5. According to the learned counsel for the petitioners, the order of assessment was made by the Deputy Commercial Tax Officer on 15th

October, 1957. An appeal against the order of assessment to the Appellate Assistant Commissioner was disposed of on 12th November, 1959.

u/s 36 of the Act, a further appeal lies to the Appellate Tribunal and any person objecting to an order passed by the Appellate Assistant

Commissioner on appeal, may file a further appeal to the Tribunal within 60 days from the date on which the order was served upon him. The

Appellate Tribunal is competent to admit an appeal presented after the expiry of 60 days for sufficient cause, being shown. The assessee in this

case did not file an appeal within the period of 60 days from the date of communication of the appellate order of the Assistant Commissioner.

Admittedly they filed the appeal before the Tribunal beyond the period of limitation of 60 days, and filed also a petition for the condonation of the

delay in filing the appeal. On the date on which the petition was posted for hearing before the Tribunal, the petitioners-assessee did not appear

and their request for adjournment prayed for by a letter was refused. Both the petition for the condonation of the delay in the filing of the appeal and appeal petition itself were consequently dismissed.

6. It is not denied that the date of communication of the order of the Appellate Assistant Commissioner was 25th November, 1959, and the date of filing the appeal before the Appellate Tribunal was 27th June, 1961. The order of the Tribunal dismissing the petition for condonation of the delay and the appeal itself was on the 27th of March, 1962. The Board commenced the proceeding u/s 34 of the Act by notice dated 4th October, 1961.

7. The question that requires to be examined now is whether the Board is prevented from making an order u/s 34(1) of the Sales Tax Act, solely for the reason that long after the time for appeal against the Appellate Assistant Commissioner's order had expired, the assessee had filed an appeal petition before the Appellate Tribunal, the admission of which appeal was dependent upon the condonation of the delay in the filing thereof by the Appellate Tribunal. It is contended by Mr. Sastry that notwithstanding that the appeal petition had been presented out of time, it is nevertheless an appeal and that therefore the bar of Section 34(2)(b) would apply. For the department, Mr. Ramanujam contends that there could in effect be no appeal at all, unless and until the Tribunal had condoned the delay. While it is a right conferred on an assessee to present an appeal within the period of limitation, no such right exists in him to claim that even where the appeal petition is not presented within the period of limitation it is none the less an appeal for all purposes of the Act. It is urged therefore that the mere filing of an appeal petition beyond the period of limitation would not amount to saying that the order of the lower authority had been ""made the subject of an appeal"" to the Appellate Tribunal.

8. For the petitioners reliance has been placed upon a decision of the Supreme Court in *Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab*, In that case, the question that arose was whether an order made by the Appellate Assistant Commissioner dismissing an application to condone the delay in presenting an appeal petition and rejecting the appeal as time-barred was an order made u/s 31 of the Income Tax Act from which an appeal would lie to the Appellate Tribunal. Under the Income Tax Act,

an appeal against an order of assessment lies to the Appellate

Assistant Commissioner and u/s 30(2) the Appellate Assistant Commissioner may admit an appeal after the expiration of the period prescribed for

the presentation thereof, if he is satisfied that the appellant had sufficient cause for not presenting it within that period. Section 31 deals with the

hearing of the appeal. Section 33 provides for appeals against the orders made by the Appellate Assistant Commissioner and an appeal can be

filed to the Appellate Tribunal within 60 days from the date on which the order appealed from is communicated to the assessee. Under this section

it is an order of the Appellate Assistant Commissioner u/s 31 which is so appealable to the Appellate Tribunal. It would be noticed that the power

to condone the delay is conferred by Section 30(2), while the order that is made in appeal is u/s 31. Their Lordships of the Supreme Court had to

consider whether the refusal to condone the delay, which is in exercise of the power conferred upon the Appellate Assistant Commissioner u/s

30(2), followed by the dismissal of the appeal petition, could be treated as an order u/s 31 of the Act enabling an appeal to the Appellate Tribunal.

The decision was that an appeal presented out of time is an appeal and an order dismissing it as time-barred is one passed in appeal. Their

Lordships accepted the position that the refusal to excuse the delay is an order u/s 30(2) of the Act. They proceeded to observe :

Now, a right of appeal is a substantive right, and is a creature of the statute. Section 30(1) confers on the assessee a right of appeal against certain

orders....The appellant therefore had a substantive right u/s 30(1) to prefer appeals against orders of assessment made by the Income Tax Officer.

Then, we come to Section 30(2), which enacts a period of limitation within which this right is to be exercised. If an appeal is not presented within

that time, does that cease to be an appeal as provided u/s 30(1) ? It is well established that rules of limitation pertain to the domain of adjectival

law, and that they operate only to bar the remedy but not to extinguish the right. An appeal preferred in accordance with Section 30(1) must,

therefore, be an appeal in the eye of law, though having been presented beyond the period mentioned in Section 30(2), it is liable to be dismissed

in limine.

9. This decision however does not touch upon the point that is raised in the

present appeal. Their Lordships of the Supreme Court only decided that where the lower appellate authority has refused to condone the delay and consequently dismissed the appeal, that is nevertheless an order made in appeal which is appealable to the next higher appellate authority. But the question we have to deal with is whether the power of revision which is conferred upon the Board is rendered unexercisable solely for the reason that a belated appeal had been filed to the Appellate Tribunal.

There are three different bars enacted in Section 34(2) to the exercise of this revisional jurisdiction of the Board of Revenue. The first is, the Board cannot exercise it so long as the time for appeal against the order has not expired; the second is, it cannot do so when the order sought to be revised has been made "the subject of an appeal" to the Appellate Tribunal or of a revision in the High Court; and the third is, when more than four years have expired after the passing of the order. Anyone of these bars may operate. Whether or not the exercise of the power has been prevented by any of the first two bars, the Board's jurisdiction to revise the order is wholly taken away when four years have passed after the date of the order sought to be revised. It is easy to see that if the mere filing of an appeal petition, even if it is out of time, is to prevent the exercise of the power by the Board of Revenue, an assessee to whom notice of revision has been issued can present a belated appeal petition to the Appellate Tribunal and keep the matter pending till the four year period expires and effectively put it out of the power of the Board of Revenue to revise the order, even though ultimately the appeal petition might itself be dismissed as incompetent. It would, therefore, be reasonable to hold, in order to secure a harmonious construction, that when Section 34(2) (b) speaks of the order having been "made the subject of an appeal" to the Appellate Tribunal, it is an effective appeal to that appellate authority that is contemplated. The mere filing of a time-barred appeal with a petition to condone the delay cannot be treated as amounting to the order being "made the subject of an appeal". Whether or not it could be said to be so, if the delay is condoned and the appeal admitted for disposal on merits, we need not pause to consider. But where the petition to condone the delay is rejected and the appeal petition is also rejected in limine, it cannot certainly be said that the order had been made the subject of an appeal.

10. This view finds support in a decision of this Court in A. Vs. SREENIVASALU NAIDU v. COMMISSIONER OF Income Tax MADRAS.,

In that case, an analogous provision of the Indian Income Tax Act came to be considered. Section 33-A of the Income Tax Act provides for

revision by the Commissioner and this section also prevents the exercise of the power to revise where the order proposed to be revised has been

made the subject of an appeal"" to the Appellate Tribunal. Subba Rao, J. (as he then was) held that what was meant was that it should be the

subject-matter of an effective appeal, and if an appeal to the Appellate Tribunal is not admitted and is disposed of on the ground that it was filed

after the prescribed time, the order cannot be said to be the subject of an appeal. Our attention has not been drawn to any decision which has

taken a different view. Nor does the decision of the Supreme Court cited appear to have any direct application in considering the expression ""has

been made the subject of an appeal"".

11. It has been held by this Court in T.C. No. 19 of 1962 that the time limit of four years prescribed in Section 34(2)(c) for the exercise of the

power of revision of the Board of Revenue is absolute and that unless a final order in revision is made by the Board within that period of four

years, the Board loses the jurisdiction to make any order in revision. Conformably to that decision of ours, if Section 34(2)(b) is to be construed as

preventing the exercise of the power of revision by the Board even by the mere filing of an ineffective appeal far beyond the period of limitation, it

seems to us that this power of revision would be rendered almost nugatory as we said once before, any assessee can effectively prevent the

exercise of the revisional jurisdiction by merely filing an appeal beyond the period of limitation. That could not be the intention of the Legislature in

making use of an expression of a positive kind, viz., ""has been made the subject of an appeal to the Appellate Tribunal"".

12. We accordingly hold that, in the circumstances, the jurisdiction in revision was properly exercised by the Board. The petition fails and is

dismissed with costs. Counsel's fee Rs. 100.