
(1950) 10 AHC CK 0024
In the Allahabad High Court
Case No : Misc. Case No. 58 of 1949

Municipal Board

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 11-10-1950

Acts Referred:

Income Tax Act, 1922 — Section 29, 30, 30(2), 31(1), 35

Citation : AIR 1952 All 249 : (1951) 19 ITR 21

Hon'ble Judges : Malik, C.J; Mushtaq Ahmad, J

Bench : Division Bench

Advocate : J. Swarup, for the Appellant; Walter Dutt and S.C. Das, for the Respondent

Final Decision : Disposed Of

Judgement

Malik, C.J.—In this reference u/s 66(1), Income Tax Act, the following four questions have been referred to this Court :

"(1) Whether on the facts stated, the order of the Appellate Assistant Commissioner refusing to admit the appeal in exercise of his discretion under last part of Section 30 (2) was an order u/s 30 (2) or should be treated as an order u/s 31, Income tax Act?

(2) Whether where the figures of an assessment are corrected u/s 33 (4), Income Tax Act, without having the effect of enhancing the assessment or reducing a refund and a corrected notice of "demand is issued, such a notice of demand amounts to notice of demand u/s 29 of the Act and confers a right of appeal on the applicant from the date of its receipt?

3. Whether Rule 21, Income tax Rules, framed u/s 59 of the Act is ultra vires of the powers of the Central Board of Revenue inasmuch as it prescribes the attachment of the notice of demand to the memo of appeal ?

4. Whether in the circumstances of the case, the applicant's appeal filed on

24-8-1946, in form B against the original assessment made on 20-7-1946 could legally be treated as an appeal arising out of the corrected assessment limitation or which should have been computed from the date of the receipt of the corrected order of demand dated 4-9-1946 ?"

2. The assessee is the Municipal Board, Agra, A notice of demand requiring the assessee to pay Rs. 9,586 as income tax was issued on 20-7-1946. The assessee had a period of thirty days to file an appeal before the Appellate Assistant Commissioner, that is, an appeal could be filed upto 23-8-1946. There were, however certain obvious errors in the order of the Income tax Officer and the assessee made an application u/s 35, Income tax Act, for rectification of the mistakes. The Income Tax Officer considered the objections and on 30-8-1946, the demand was reduced from Rs. 9,586 to Rs. 122 2-0. While this matter was pending before the Income Tax Officer the assessee sent an appeal dated 24-8-1946 which was received by the Excess Profit-tax Officer, Kanpur, on 26-8-1946, who sent it on to the Appellate Assistant Commissioner who received the memorandum of appeal on 9-9-1946. As the memorandum of appeal was not accompanied by the notice of demand as required by Rule 21 and the form prescribed thereunder it was ordered to be returned on the same day. On 19-9-1946, the assessee filed the order u/s 35 dated 30-8-1946 as the notice of demand. The Appellate Assistant Commissioner held that the appeal was barred by time. He refused to condone the delay and rejected the memorandum of appeal on 29-9-1946. Against that order an appeal was filed before the Tribunal but it was held that no appeal lay as the order was not an order u/s 31 but was an order u/s 30(2).

3. Recently in another case (I.-T. Misc. Case No. 6 of 1950, Mohd. Naim Mohd. Alam v. Commissioner of Income Tax, U. P. a question identical to the question No. 1 arose and was answered. The view taken by the Bench was that where the memorandum of appeal was rejected in limine the order must be deemed to be an order u/s 30 (2). Where, however, the Appellate Assistant Commissioner had admitted an appeal and had fixed a day and place for hearing of the appeal as required by Section 81 (1) if he had thereafter dismissed the appeal on the ground that the appeal was time barred, the order was an order u/s 31 and not u/s 80 (2). In that case it was argued that the Appellate Assistant Commissioner had not said, in the order admitting the appeal, that he was satisfied that the appellant had sufficient cause for not presenting it within the period of limitation. The Bench pointed out that there was a presumption that an official act was properly done and in the absence of anything to the contrary, it could not be presumed that the Appellate Assistant Commissioner had admitted the appeal under a mistake or by an oversight.

4. In the case before us, it is not stated that there was any order passed admitting the appeal and fixing a day and place for hearing of the appeal as required by Section 31 (1), the order must, therefore, be deemed to be an order u/s 80 (2) and not an order u/s 81. That is our answer to the first question.

5. Coming to the second question, learned counsel has urged that when on 30 8 1948, the Income Tax Officer reduced the demand from Rs. 9,586 to Rs. 122-2-0 a fresh notice was issued which was served on 4-9-1946, and that must be deemed to be the notice of demand u/s 29, from the date of service of which a fresh period of limitation has to be calculated.

6. Section 29, Income Tax Act, is as follows :

"When any tax, penalty or interest is due in consequence of any order passed under or in pursuance of this 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."

Learned counsel has urged that when on 30-8-1946, the application u/s 35 was granted the previous notice of demand must be deemed to have been cancelled and a fresh notice of demand issued to the assessee. A carbon copy of the notice of demand was shown to us and we found that it contained merely the information that the amount had been reduced and all other clauses relating to right of appeal, the period of limitation for the same etc., had been penciled through.

7. Whatever doubts there may be, about the interpretation of Section 29, are clearly removed when we come to Section 35 (4) of the Act. u/s 35, the Commissioner or the Appellate Assistant Commissioner have been given the right suo motu to rectify certain errors within four years of the date of any assessment or refund order. The assessee has also been given a right to move the Commissioner or the Appellate Assistant Commissioner for the rectification of mistakes which he discovers within the same period, The proviso, however, is to the effect that where the rectification is not in favour of the assessee but against him an order shall not be passed without giving the assessee a reasonable opportunity of being heard. Sub-section (4) of Section 35 is as follows :

"Where any such rectification has the effect of enhancing the assessment or reducing a refund the Income Tax Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be issued u/s 29, and the provisions of this Act shall apply accordingly."

It is clear, therefore, that a fresh notice of demand is required to be issued only when the assessment has been enhanced or the refund order has been modified to the detriment of the assessee. Where the order is in favour of the assessed, all that can be said is that a part of the demand has been cancelled or rescinded allowing the rest to stand. In such a case no question of a fresh notice of demand u/s 29 becomes necessary. That is our answer to the second question framed by the Tribunal. The assessee had, therefore, no fresh right of appeal from the date of the receipt of the notice of the order dated 30-8-1946.

8. In view of our answer to question No. 2 the assessee's appeal filed on 26

8-1946, was clearly time barred and, as the Appellate Assistant Commissioner refused to condone the delay, it is not necessary to answer the third and the fourth question which do not therefore arise. The defendant is entitled to its costs which we fix at Rs. 200.