Privy Council Appeal No. 16 of 1968

Donald Jason Ranaweera – – – – – – *Appellant*

v.

Claude Bertram Emmanuel Wickramasinghe – – – *Respondent*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH DECEMBER 1969

Present at the Hearing:

LORD MORRIS OF BORTH-Y-GEST
LORD DONOVAN
LORD WILBERFORCE
LORD PEARSON
LORD DIPLOCK

[*Delivered by* LORD DONOVAN]

The appellant (hereinafter called "the taxpayer") owns considerable landed property in Ceylon and has a large income. The respondent (hereinafter called "the Commissioner") is the Deputy Commissioner of Inland Revenue, Colombo.

The taxpayer appealed against assessments to Income Tax made upon him for the years of assessment 1950/51–1957/58 inclusive: and against assessments to profits tax for the years 1950–56, also inclusive. Following negotiations the taxpayer agreed with the Commissioner the figures of his income for these years. These agreed figures were, it seems, considerably in excess of the figures shown in the relevant returns which the taxpayer had made. The agreed figures were computed at the end of an examination of the increase in the taxpayer's wealth occurring between the years 1949 and 1957. As a result, the taxpayer agreed that Rs.2,400,000 should be included in the assessments upon him as being undisclosed income. This agreement was reached on 27th March 1961 when it was reduced to writing and signed by the taxpayer and an assistant Commissioner of Income Tax. The last paragraph of the document reads thus:

> "I have been informed that the settlement of my appeals on the above basis is without prejudice to the powers the Commissioner has to take action against me under the penal provisions of the Income Tax Ordinance in respect of any offences committed by me in connection with my returns for the years 1950/51 to 1957/58 and the information I have furnished in connection with the inquiries made into the appeals for these years."

The Commissioner thereafter considered the question of penalties and on 3rd July 1963 the taxpayer, in consideration of proceedings not being taken against him for the recovery of penalties, agreed in writing to pay to the Commissioner of Inland Revenue as penalties incurred for the years 1950/51–1957/58 the sum of Rs.450,000/-. The date for payment was first fixed at not later than 8th September 1963. Notwithstanding an extension of this date to 27th December 1963, the money was not paid and has not since been paid.

The agreement thus dishonoured plays no further part in this case. The Commissioner instead of seeking to enforce it, turned instead to the alternative remedy which he considered was available to him under the Income Tax Ordinance.

The relevant section is section 80 (1) which reads as follows:

> "80. (1) Where in an assessment made in respect of any person the amount of income assessed exceeds that specified as his income in his return and the assessment is final and conclusive under section 79, the Commissioner may, unless that person proves to the satisfaction of the Commissioner that there is no fraud or wilful neglect involved in the disclosure of income made by that person in his return, in writing order that person to pay as a penalty for making an incorrect return a sum not exceeding two thousand rupees and a sum equal to twice the tax on the amount of the excess."

On 10th February 1964 the Commissioner wrote to the taxpayer giving him notice that the Commissioner intended to proceed against him for penalties under s.80 (1) for the years of assessment 1955/56–1957/58 inclusive, and inviting him to shew cause on or before 3rd March 1964 why an order for such penalties should not be made. The claim for penalties was limited to these three years of assessment, since section 80 was first enacted in 1956.

Upon the taxpayer's request, an extension of time of one month was granted, but cause was not shewn. The Commissioner accordingly proceeded on 21st April 1964 to make an order under section 80 (1) the final paragraph of which order reads—

> "As the assessee has not satisfied me that there was no fraud or wilful neglect involved in the disclosure of income in his returns for the years of assessment 1955/56, 1956/57 and 1957/58 I order him under section 80 (1) of the Income Tax Ordinance to pay the following sums as penalties for making incorrect returns:
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> |---|---|---|---|---|
> | For 1955/56 | ... | ... | ... | Rs.180,000/- |
> | For 1956/57 | ... | ... | ... | Rs.50,000/- |
> | For 1957/58 | ... | ... | ... | Rs.120,000/-" |

Under the terms of section 80 (2) of the Income Tax Ordinance, the taxpayer was entitled to appeal from this order to the Board of Review set up under section 74 of the Ordinance and did so. One ground of appeal was that the Commissioner was without jurisdiction to impose the penalties in question. Another was that a proper opportunity for him to shew cause why these penalties should not be inflicted had not been afforded, and thus that the rules of natural justice had been broken. Both these pleas failed. Other matters were canvassed by the taxpayer before the Board of Review but these are no longer in issue. The Board dismissed the taxpayer's appeal and confirmed the penalties on 6th October 1964. Shortly before this, namely on 19th September 1964 the taxpayer presented a petition to the Supreme Court of Ceylon praying that a mandate in the nature of a Writ of *Certiorari* be issued directing the Commissioner to forward to the Supreme Court the record of the proceedings imposing the aforesaid penalties, and that the order be quashed. The petition again alleged that the order was a nullity in that the Commissioner was without jurisdiction to make it, and further was made in violation of the principles of natural justice on the ground already indicated above. The petition made no mention of the taxpayer's appeal to the Board of Review. That Board's decision of 6th October 1964 was made the subject of a later petition to the Supreme Court on 23rd November 1964.

The proceedings on this latter petition form the subject of a separate appeal to their Lordships which will be dealt with presently.

The petition of 19th September 1964 which sought the quashing of the Commissioner's order imposing penalties was dismissed by the Supreme Court on 29th September 1966. Final leave to appeal to their Lordships was granted on 3rd June 1967.

The allegation of a breach of the rules of natural justice is not now pursued. The sole ground of appeal is that the Commissioner was not entitled in law to impose penalties under section 80 of the Income Tax Ordinance. It is said that such imposition is an exercise of judicial power: that judicial power can, under the Constitution of Ceylon, be exercised only by a judicial officer appointed by the Judicial Service Commission: and that the Commissioner is not such an officer

The Supreme Court of Ceylon gave no reasoned judgment dismissing this contention. The explanation is that counsel for the taxpayer presented no argument to the Court in view of a previous decision which it had recently pronounced, and the reasoning of which was conclusive against him. This was the decision in *Xavier v. Wijeyekoon and Others* delivered on 22nd July 1966. (69 N.L.R. 197.) In that case Xavier had sought a writ of prohibition against the Ceylon Commissioner of Inland Revenue to restrain him from recovering a penalty also imposed by section 80 of the Income Tax Ordinance. The petition for the writ was likewise founded upon the contention that such penalties could be imposed only by the holder of a judicial office. This contention was unanimously rejected by the Court which held that an executive officer could lawfully impose them. The taxpayer in the present case argues that this decision was wrong.

The issue now presented involves considering the Constitution of Ceylon, the Income Tax Ordinance of Ceylon and the nature of the Commissioner's duties under that Ordinance.

The Constitution of Ceylon brought into force by the Ceylon (Constitution) Order in Council 1946 deals in Part VI thereof with the judicature. It provides by Article 53 that there shall be a Judicial Service Commission consisting of the Chief Justice, (as Chairman) a Judge of the Supreme Court, and one other person who is, or has been a Judge of the Supreme Court. The members of the Commission, other than the Chairman, are to be appointed by the Governor-General. Article 55 then provides that the appointment dismissal and disciplinary control of judicial officers is vested in the Judicial Service Commission. "Judicial Officer" is defined by the same article as meaning the holder of any judicial office but the term is not to include a Judge of the Supreme Court or a Commissioner of Assize. "Judicial Office" is defined by Article 3 of the Constitution as meaning any paid judicial office.

Part VII of the Constitution deals with the public service. By Article 58 it provides that there shall be a Public Service Commission of three persons appointed by the Governor-General. Article 60 enacts that the appointment transfer dismissal and disciplinary control of public officers is vested in the Public Service Commission. Article 3 of the Constitution defines a "public officer" as meaning any person who holds a paid office, other than a judicial office, as a servant of the Crown in respect of the Government of the Island, but with certain named exceptions. The Commissioner is admittedly a "public officer" within this definition.

The argument for the taxpayer is that if section 80 of the Income Tax Ordinance involves the exercise of judicial power then a judicial officer, appointed by the Judicial Service Commission, can alone exercise it. On the other hand, it would not be disputed that if the section does not involve the exercise of judicial power, but instead the doing of an administrative act, then the Commissioner in the present case had jurisdiction to make the order for the payment of penalties by the taxpayer.

The provisions of the Income Tax Ordinance may be conveniently considered at this point. By section 2, the term "Commissioner" includes the Commissioner of Inland Revenue and any Deputy Commissioner, so that nothing turns upon the fact that the respondent in this case was the Deputy Commissioner. Section 23 indicates that Income Tax in Ceylon is a yearly tax imposed at rates fixed each year by the House of Representatives: and it may be presumed that it is intended for the service of each such year. For the administration of the Act, section 3

provides, inter alia, that there may be appointed a Commissioner, a Deputy Commissioner, Assistant Commissioner and Assessors. Returns of income are to be made in a prescribed form to the Assessors (section 58 *et seq.*) and the same persons are to make the assessment. Any person aggrieved by the assessment made upon him may appeal to the Commissioner requesting him to review and revise the assessment. (Section 73). The Commissioner hears the appeal (unless it is disposed of by agreement beforehand) and may confirm, reduce, increase, or annul the assessment. Any person dissatisfied with the Commissioner's determination may appeal to the aforesaid Board of Review.

Then come the provisions of section 80 which have already been quoted. The taxpayer argues that here, at the very least, the Commisssioner is given a power which is judicial and not administrative. He has to make up his mind whether a taxpayer has " proved " the absence of fraud or wilful neglect, which is essentially a judicial function, and one which, when performed leads either to his discharge from all liability for penalties, or the infliction of them upon him. Reliance is also placed upon the provisions of sections 90 and 92 of the Income Tax Ordinance, which provide, as an alternative to proceedings under section 80, a prosecution for making incorrect returns etc. before a Magistrate who can inflict a fine or imprisonment or both. This it is said would clearly be an exercise of judicial power: and in essence the Commissioner, if he elects to proceed under section 80 instead, exercises the same kind of power.

The problem thus posed has confronted Courts in a number of countries, particularly those with written constitutions embodying a separation of powers. In those countries, as in the United Kingdom, Government agencies have been created for the discharge of some particular function, and for the task thus imposed upon them Executive Officers have been necessarily entrusted with the resolution of differences which may arise between the subject and the particular agency in the course of the agency's work. This is particularly so in the field of income tax though it is certainly not confined thereto. Accordingly officers appointed by the Executive may find themselves hearing evidence, weighing it, testing it, and coming to a conclusion upon it: and all the time having to do their best to be fair and impartial. In a word they have to act judicially. Yet in ordinary everyday language they would not be called " Judges " or " members of the Judiciary " or " holders of judicial office ". What is it then which distinguishes them from those who do hold and exercise such an office, seeing that the nature of the task which these Executive Officers have to perform and the qualities they must bring to bear upon it correspond on such occasions so closely, if not exactly, with the exercise of his office by a judge? The answer which has generally been given is that where the resolution of disputes by some Executive Officer can be properly regarded as being part of the execution of some wider administrative function entrusted to him, then he should be regarded as still acting in an administrative capacity, and not as performing some different and judicial function.

This is the reasoning which appears to their Lordships to underlie the decision of the Supreme Court of Ceylon in *Xavier and Wijeyekoon* (*supra*) and it is matched by decisions in other jurisdictions.

Thus in *Oceanic Navigation Company v. Stranahan* (1908) United States Reports, Volume 214, p. 320 the Supreme Court of the United States upheld the imposition upon the company of a penalty which it had incurred for an infringement of section 9 of a statute entitled " An Act to regulate the immigration of aliens into the United States ". It was argued for the Company that section 9 of the Act which empowered an executive officer to inflict a penalty for such infringement and to refuse clearance of the vessel while it remained unpaid, violated the constitution since it was an exercise of judicial power. The Court rejected the argument, saying " . . . the legislation of Congress from the beginning, not only as to tariff but as to internal revenue, . . . has proceeded on the

conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power".

A similar conclusion was reached in *Helvering, Commissioner of Internal Revenue v. Mitchell* (1937) United States Reports, Volume 303, p. 391, which concerned the imposition of a monetary penalty by such Commissioner upon a taxpayer for committing a fraud with intent to evade tax.

In 1930 their Lordships considered an appeal by the *Shell Company of Australia Ltd.*, against the *Federal Commissioner of Taxation for Australia* [1931] A.C. p. 275. In an earlier case the Company, then known as British Imperial Oil Company, had successfully contended that a Board of Appeal created under the Australian Income Tax Assessment Act of 1922 to consider income tax appeals, exercised part of the judicial power of the Commonwealth contrary to sections 71 and 72 of the Constitution of Australia. Not being established in accordance with these provisions the Board of Appeal was invalidly constituted and its decisions were of no effect. This ruling was given by the High Court of Australia and it was not appealed against. Instead, an amending Federal Statute was passed abolishing the Board of Appeal. A new Board was created called the Board of Review and its constitution was altered so that it not merely heard income tax appeals but its powers were closely equated with those of the Commissioner of Taxes himself. The Shell Company nevertheless objected to the Board of Review contending that it also exercised judicial power and was therefore as invalid as had been the superseded Board of Appeal. The High Court of Australia rejected that contention, and its decision was upheld by their Lordships on appeal. The following extracts from the judgment delivered by Lord Sankey may be quoted:

> "The authorities are clear to show that there are tribunals with many of the trappings of a Court which, nevertheless, are not Courts in the strict sense of exercising judicial power. It is conceded in the present case that the Commissioner himself exercised no judicial power. The exercise of such power in connection with an assessment commenced, it was said, with the Board of Review, which was in truth a Court.
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> In that connection it may be useful to enumerate some negative propositions on this subject:
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> 1. A tribunal is not necessarily a Court in this strict sense because it gives a final decision. 2. Nor because it hears witnesses on oath. 3. Nor because two or more contending parties appear before it between whom it has to decide. 4. Nor because it gives decisions which affect the rights of subjects. 5. Nor because there is an appeal to a Court. 6. Nor because it is a body to which a matter is referred by another body. See *Rex v. Electricity Commissioners* [1924] 1 K.B. 171.
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> Their Lordships are of opinion that it is not impossible under the Australian Constitution for Parliament to provide that the fixing of assessments shall rest with an administrative officer, subject to review, if the taxpayer prefers, either by another administrative body, or by a Court strictly so called, or, to put it more briefly, to say to the taxpayer 'If you want to have the assessment reviewed judicially, go to the Court. If you want to have it reviewed by business men, go to the Board of Review.'" (pp. 296–7)
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> "An administrative tribunal may act judicially, but still remain an administrative tribunal as distinguished from a Court, strictly so-called. Mere externals do not make a direction to an administrative officer by an ad hoc tribunal an exercise by a Court of judicial power.

> Their Lordships find themselves in agreement with Isaacs J., where he says: 'There are many functions which are either inconsistent with strict judicial action . . . or are consistent with either strict judicial or executive action . . . If consistent with either strictly judicial or executive action, the matter must be examined further . . . The decisions of the Board of Review may very appropriately be designated . . . "administrative awards," but they are by no means of the character of decisions of the Judicature of the Commonwealth.' They agree with him also when he says that 'unless . . . it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will.'
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> In that view they have come to the conclusion that the legislation in this case does not transgress the limits laid down by the Constitution, because the Board of Review are not exercising judicial powers, but are merely in the same position as the Commissioner himself—namely, they are another administrative tribunal which is reviewing the determination of the Commissioner who admittedly is not judicial, but executive."

Their Lordships now turn to a consideration of the Commissioner's functions under the Ceylon Income Tax Ordinance. By section 3 he is appointed "for the purposes of this Ordinance": and by subsequent sections a variety of duties are laid upon him. They concern the ascertainment of the taxpayer's statutory income, and the due collection of the proper tax. A number of powers and discretions are conferred upon the Commissioner to assist him in his work: power to compel the production of documents: power to restrict liability in certain cases: power to make repayments of over-paid tax: certain discretions in relation to the taxation of non-residents: a discretion to alter the basis of assessment in certain cases: to determine the allowances to be made for depreciation in plant and machinery, and so on. All this is clearly part and parcel of the Commissioner's administrative function. He is also given power to hear the appeals of persons aggrieved by the assessments made upon them: and though, when hearing such appeals the Commissioner must act judicially in the sense of being fair and impartial, this work is simply another step in the process of ascertaining the true amount of tax to be collected, and as such, should be regarded as administrative in character, and not as the exercise of judicial power.

Then come the provisions of section 80 of the Ordinance which have already been set out: and it is clear that before imposing a penalty under this section the Commissioner must give the taxpayer concerned an opportunity of proving the absence of fraud or wilful neglect. A taxpayer will no doubt generally plead an honest mistake or venial carelessness; and the Commissioner will have to make up his mind whether such a plea has been established. This question of fact should ordinarily be no more difficult than others upon which, under the Ordinance, the Commissioner is directed to come to a conclusion; and their Lordships do not see such a marked differentiation between the Commissioner's other duties and his duties under section 80 as to enable them to say that the latter involve the exercise of judicial power. The better view, in in their opinion, is that under section 80 the Commissioner is still performing his administrative duties albeit that he must act judicially in exercising the powers conferred upon him by the section. Their conclusion that this is not the same thing as the exercise of judicial power is unaffected by the circumstance that penalties may be imposed as an alternative by a Magistrate acting under sections 90–92 of the Ordinance. Indeed the fact that this procedure is an alternative might be said to support it.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The taxpayer appellant must pay the costs of the appeal.