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1937 *Present :* **Abrahams C.J. and Maartensz J.**

COMMISSIONER OF INCOME TAX *v.* SAVERIMUTTU CHETTY.

S. C. 195

Income Tax—Appeal to Commissioner—Reference back to assessor and adjustment of tax—Additional assessment—Power of assessor to reassess—Income Tax Ordinance, No. 2 of 1932, ss. 65, 69 (2), and 75.

Where, on an appeal to the Commissioner of Income Tax by a person aggrieved by an assessment, the Commissioner directed the assessor under section 69 (2) to make further inquiry, and an agreement was reached as to the amount at which the assessee was liable to be taxed,—

***Held,* that it was competent to the assessor to make an additional assessment under section 65 of the Ordinance in respect of the assessment of the assessee for the same year.**

The proviso to section 75 does not prevent such assessment where the amount of the tax has been adjusted under section 69 (2) of the Ordinance. Such additional assessment may be made in respect of an amount previously reached by some miscalculation or by the deduction of an allowance, which ought not to have been made.

THIS was a case stated by the Board of Review under section 74 of the Income Tax Ordinance, No. 2 of 1932. The assessee was assessed for the year 1934-1935, and he appealed to the Commissioner of Income Tax. The Commissioner acting under section 69 (2) of the Ordinance directed the assessor to make further inquiry. As a result the income tax payable was reduced, the revision being effected by an allowance to the assessee of the sum of Rs. 1,749 as earned income allowance.

On March 17, 1936, the assessor made an additional assessment upon the assessee in respect of the same year of assessment. The assessor contended that the allowance of Rs. 1,749 as earned income was erroneously made. It was contended for the assessee that the assessor had no authority to make a further assessment under section 65. The Board of Review upheld the contention and, at the request of the Commissioner, stated a case for the Supreme Court.

J. E. M. Obeyesekere, C.C., for the Income Tax Commissioner, appellant.—On the occasion of the first appeal to the Commissioner he referred the dispute to the assessor for further inquiry under section 69 (2) of Ordinance No. 2 of 1932. The assessor then came to an arrangement with the assessee whereby an earned income allowance of Rs. 1,749 was allowed in respect of the assessable income. The matter in dispute was therefore not determined on appeal within the meaning

of section 75. That being so, the assessor was entitled in the next year of assessment to make an additional assessment under section 65. An additional assessment may be in respect of an allowance previously disallowed thus affecting taxable income only. The corresponding section of the English Act of 1918 is section 125. Our section is wider in its terms Counsel also referred to *Williams v. The Trustees of W. W. Grundy* [1]. Further, section 75 refers to assessable income only. We are here concerned with taxable income. It is not unusual for the proviso to a section to contain what is in effect an additional and a substantive provision.

N. Nadarajah, for assessee, respondent.—An assessor has no power under section 65 to revise an assessment or to delete an allowance that has already been given. Therefore an allowance granted under section 16 cannot subsequently be disallowed, *cf.* English Law of Income Tax, section 125, Dowell's *Income Tax Laws at p. 184.* The right to make an "additional" assessment under section 65 lies in respect only of an item that has escaped assessment. There is no power to make an additional assessment in respect of an allowance previously disallowed.

The power given by section 65 to make an additional assessment is subject to the provisions of section 75. The words "determined on appeal" mean termination of the matter (as here by agreement between the assessor and the assessee).

Obeyesekere, C.C., in reply.

Cur. adv. vult.

May 14, 1937. ABRAHAMS C.J.—

This is a case stated by the Board of Review under section 74 of the Income Tax Ordinance, No. 2 of 1932. The facts, so far as they are material to the consideration of the point of law on which the case has been stated, are as follows:—M. Saverimuttu Chetty, who may be called for convenience the assessee, was originally assessed for Income Tax for the year of assessment 1934-1935 on the basis that his assessable income was Rs. 9,413, and his taxable income was Rs. 4,913. Upon his taxable income he was called upon to pay Rs. 245.65 as income tax. His taxable income was reached by deducting certain allowances amounting to Rs. 4,500. The assessee appealed against this assessment to the Commissioner of Income Tax under the provisions of section 69 (1) of the Ordinance, which enables any person aggrieved by an assessment made under this Ordinance to appeal to the Commissioner within twenty-one days from the date of the notice of such assessment. This must be done by what the section calls a "notice of objection". The Commissioner, acting under section 69 (2) of the Ordinance, directed the assessor to make further inquiry. By virtue of the provisions of this sub-section an agreement may be reached as to the amount at which the assessee is liable to be assessed, and this in fact happened, and, as a result, the assessable income was assessed at Rs. 8,745, the taxable income at Rs. 2,496, and the income tax payable was reduced to

[1] *18 Tax Cases 271.*

Rs. 124.80 This revision was effected by an allowance to the assessee of the sum of Rs. 1,749 as earned income allowance under the provisions of section 16 (1) (*b*) of the Ordinance.

On March 17, 1936, the assessor made an additional assessment upon the assessee, in respect of the same year of assessment, assessing his assessable income at Rs. 8,866, his taxable income at Rs. 4,366, and the tax payable at Rs. 218.30. There was no dispute over the increase of the assessable income. The assessor contended that the allowance of Rs. 1,749 which had been previously made to the assessee as "earned income" had been erroneously made. It is not our province to consider whether the error was in fact made or not, as we are limited in a reference under section 74 of the Ordinance to points of law.

The assessee again appealed to the Commissioner of Income Tax against the additional assessment, on the ground that it was incorrect. The Commissioner dismissed the appeal and upheld the assessment. The assessee thereupon appealed to the Board of Review and contended before that authority that the additional assessment was invalid in law as the assessor had no power to make the further-assessment. He contended that the power given by section 65, which I shall presently quote in detail, to make an additional assessment was subject to the provisions of section 75, which I shall also quote in detail. The Board of Review upheld this contention, and at the request of the Commissioner stated a case for the decision of this Court.

Section 65 under which the assessor purported to make the reassessment (I avoid for the moment the expression of "additional assessment" since its meaning is disputed by counsel for the assessee) in March, 1936. reads as follows:—

> "65 Where it appears to an assessor that for any year of assessment any person chargeable with tax has not been assessed or has been assessed at less than the proper amount, the assessor may, within the year of assessment or within three years after the expiration thereof, assess such person at the amount or additional amount of which according to his judgment such person ought to have been assessed, and the provisions of this Ordinance as to notice of assessment, appeal, and other proceedings shall apply to such assessment or additional assessment and to the tax charged thereunder:
>
> Provided that, where the non-assessment or under-assessment of any person for any year of assessment is due to fraud or wilful evasion, such assessment or additional assessment may be made at any time within ten years after the expiration of that year of assessment."

Section 75, which the Board of Review were of the opinion precluded the assessor from making this reassessment, reads as follows:—

> "75 Where no valid objection or appeal has been lodged within the time limited by this Chapter against an assessment as regards the amount of the assessable income assessed thereby, or where the amount of the assessable income has been agreed to under section 69 (2), or where the amount of such assessable income has been determined

on objection or appeal, the assessment as made or agreed to or determined on appeal, as the case may be, shall be final and conclusive for all purposes of this Ordinance as regards the amount of such assessable income: Provided that nothing in this Chapter shall prevent an assessor from making an assessment or additional assessment for any year of assessment which does not involve reopening any matter which has been determined on appeal for the year."

Crown Counsel submits, first of all, that assuming this is an additional assessment, and he contends that it is, and indeed the Board of Review regarded it as such although counsel for the assessee now disputes that it is, this is not a matter which had been determined on appeal in terms of the proviso to section 75. He points out that in the body of the section there is a reference, first of all, to an agreement as to the amount of the assessable income under section 69 (2), and secondly to the determination of the amount of such assessable income on objection or appeal, and therefore in view of the fact that there was an agreement reached between the assessee and the assessor in respect of the assessment of taxable income, the matter was adjusted at that stage and certainly could not have been said to have been determined on appeal. There is not a shadow of doubt in my mind that that contention is right. Section 69 of the Ordinance contemplates the following procedure whereby an assessee who has been wrongly assessed in any respect can obtain a redress of his grievance. He can file an objection in writing to the assessment. This done, the Commissioner may direct an assessor to make further inquiry and the assessor and the assessee may between themselves settle the matter or, in the language of sub-section (2) to section 69, make the "necessary adjustment" as a result of their agreement. If no agreement is reached, the Commissioner hears the appeal and decides accordingly. There is therefore a contrast drawn in the body of section 75 between an agreement as to the amount of the assessable income and the determination of the assessable income on appeal.

Counsel for the assessee, however, argues that the words "determined on appeal" in the proviso, apply as much to the adjustment on agreement as they do to the decision of the Commissioner on appeal, because they are all parts of appeal proceedings under section 69 and it is not possible to arrive at the agreement between the assessor and the assessee until appeal proceedings have been initiated. Apart from any ordinary grammatical interpretation of the words "determined on appeal", and in my opinion they obviously mean in their primary significance "decided by an authority adjudicating in the matter", it would be an amazing thing if the Legislature should intend to give one meaning to a phrase in the body of the section and another meaning to it in the proviso, so that the expression of the proviso included matters which were contrasted with it in the body of the section.

Crown Counsel also submits that section 75, on the face of it, refers to assessable income only, whereas the appeal in this case was lodged in respect of an assessment regarding taxable income. He says that if that is so, there is nothing to preclude the assessor from making an

additional assessment under section 65. Indubitably section 75 refers to assessable income only, but it is possible that the proviso to the section extends beyond the mere exception to or qualification of the matters dealt with in the body of the section, which is, of course, the primary function of the proviso, and may possibly refer also to other matters connected with assessment, for instance, matters in connection with the assessment of taxable income. So that I think this point had better be left intact in view of the successful result of Crown Counsel's preceding argument.

Mr. Nadarajah, for the assessee, raises a fresh point on the meaning of section 65. He contends that a proper construction of the expression "additional amount" does not authorize the assessor in making this reassessment. He submits that the words "additional amcunt" apply to an item of income which at the previous assessment escaped assessment by reason of omission from the assessee's return or because it had been overlooked by the assessor. I see no reason for interpreting the expression that way. It seems to me to be sufficiently wide in its ordinary meaning to cover an amount previously reached by some miscalculation or by the subtraction of an allowance which ought not to have been made and which by the correction of the error is then augmented to a proper figure. The use of the expression "under-assessment" in the proviso to the section makes that construction perfectly clear. Incidentally there was no reference to us on this point by the Board of Review, since that point was not put to the Board when they were called upon to adjudicate in appeal, but we are not, of course, precluded from considering any point upon which the actual decision of the Board might be upheld, no matter what might have been their reasons for arriving at that decision.

In my opinion, on the point of law referred to us, the finding of the Board of Review was wrong and the matter should now go back for a decision upon the facts. I do not think that this is a case where any order should be made as to costs.

MAARTENSZ J.—I agree.

Appeal allowed.