ISMAIL

v.

COMMISSIONER OF INLAND REVENUE

COURT OF APPEAL.
RANASINGHE, J. ABDUL CADER, J. AND VICTOR PERERA, J.
C. A. APPLICATION 1390/79.
JULY 17, DECEMBER 8, 9, 10, 1980.

Income Tax Ordinance (Cap. 242)—Inland Revenue Act, No. 4 of 1963—Inland Revenue (Amendment) Laws, Nos. 17 of 1972 and 30 of 1978—Inland Revenue Act, No. 28 of 1979—Principles of interpretation applicable—Procedure of assessment—Powers and duties of assessor—Additional assessments—Assessor rejecting returns and accounts—Limitations on such powers—Estimate of income and wealth—Meaning of terms "assessable" and "taxable" income—"Assessment" and "notice of assessment"—"Assessment of amount of tax" and "assessment of quarterly instalment of tax".

Appeal to Commissioner—Board of Review—Powers of Board—Writ of Certiorari and Prohibition—When does the writ lie.

The petitioner, a tax payer, submitted to the Department of Inland Revenue in August, 1976, his return for the year of assessment 1975/76. The return related to his income for the period 1.4.74 to 31.3.75 and was in terms of the auditor's statement disclosing an assessable income of Rs. 88,915 and nett wealth of Rs. 315,599. The quarterly tax on the self assessment basis had been paid totalling Rs. 36,096. In August, 1977, the petitioner and his auditors had an interview with the Assessor and by letter dated 10.8.77 forwarded a statement disclosing an additional income of Rs. 248,359 and other information with a view to finalising his income tax matters. He also gave an explanation for the non disclosure of this additional income earlier. Thereafter the petitioner and his auditors had other interviews with the assessor in January, 1978 and October, 1978. The petitioner made payments towards settling the liability arising from the additional income disclosed, but after his interview with the Deputy Commissioner in October, 1978 he received no further communication.

Thereafter in 1979 the petitioner received a notice of assessment showing a larger amount of assessable income and wealth than was returned or declared by him. The notice was dated 30.3.79 but was posted on 21.4.79 according to the registered cover that contained the Notice. The petitioner sought from the Court of Appeal a Writ of Certiorari and/or Prohibition quashing this assessment.

The respondents relied on a copy of a letter dated 4.4.79 allegedly sent by the assessor to the petitioner. This letter said *inter alia*, "the reasons for rejecting the returns and accounts have already been intimated to you . . ." and ". . . as the assessment for 1975/76 became time barred on 31.3.79 I have already made assessments as a protective measure estimating the profit from trades at Rs. 794,230 and nett wealth at Rs. 916,099". The respondents were unable to prove that such a letter was sent or to give evidence as to how and when the letter was sent. The respondents also filed an affidavit which stated, inter alia, that "at these interviews the petitioner was informed that his return and statement for the relevant year of assessment will not be accepted".

After considering the history of the relevant legislation, the effect of the subsequent amendments and the question whether the writ will lie in the instant case.

Held

(1) That the provisions of section 93(2) (of the Inland Revenue Act No. 4 of 1963 as amended) are mandatory and that the provisos in section 94 and section 96C are also mandatory as relating back to section 93 (2) and are conditions precedent to the making of assessments of income, wealth and gifts under section 95 and also the making of assessments of the amount of tax under section 94 and section 96C.

(2) That it is competent to a Court to examine the validity of an assessment or notice and quash such assessment or notice on substantial grounds where there has been no conformity with or where the same is not according to the intent and meaning of the law.

(3) (a) That from the affidavit of the respondent it was clear that the Assessor had not addressed his mind to the new duties imposed on him by section 93 (2) (*b*) and section 96C (3) and that there was non-compliance with the same.

(*b*) That at some stage after 31st March, 1979, the Assessor had realised that the law as amended had imposed a duty on him in regard to the giving of reasons for not accepting the returns, and by his letter (of 4.4.79) he was seeking to cover up his failure to perform that duty by adverting to an oral communication of reasons.

(*c*) That it cannot be said that the Assessor in fact made an assessment of tax in terms of section 96C exercising his judgment as he himself states it was done as a protective measure.

(*d*) That the Assessor had attempted to keep the matter open to make a proper assessment later.

(*e*) That the Assessor had no jurisdiction to make such a tentative assessment in order to circumvent the law in respect of the prescribed time limit or for future compliance with the law.

(*f*) That there has been total non-compliance with the relevant sections of the law.

(4) That the power exercised by the Assessor is not referable to a jurisdiction which confers validity, as the non-observance of the mandatory provisions of the Law No. 30 of 1978 deprive the Assessor of jurisdiction to issue the notice which he did issue.

(5) That the notice of assessment in question was not a notice sent under section 96C, nor does it purport to be so sent, and there is no indication under what particular section of the law the notice was issued.

(6) (a) That the petitioner cannot canvass the validity or legality of these acts of the Assessor by way of an appeal to the Commissioner of Inland Revenue.

(*b*) That the Board of Review does not have the authority to declare notices sent by an Assessor or proceedings before an Assessor void or to quash them.

(7) That the petitioner was entitled to the Writs applied for.

Held further (Abdul Cader, J. dissenting)

(8) That the rejection of a return and the notice communicating the reasons for not accepting a return should be an exercise before the actual assessment of income, wealth

or gifts is made for the purpose of sending the statutory Notice of Assessment referred to in section 95.

Per Abdul Cader, J. (dissenting): "I do not agree that the communication of reasons for rejecting the return should be made at some point of time prior to taxation." (Semble: It would be sufficient if the communication is sent with the notice of assessment.).

Cases referred to

(1) *Silva v. Commissioner of Income Tax, (1947) 1 C.T.C. 336; 36 C.L.W. 46.*
(2) *Commissioner of Income Tax v. Chettinad Corporation, (1954) 1 C.T.C. 455; 55 N.L.R. 553.*
(3) *Gamini Bus Co. v. Commissioner of Income Tax, (1952) 1 C.T.C. 431; 54 N.L.R. 97.*
(4) *Gurmukh Singh v. Commissioner of Income Tax, (1944) I.L.R. (Lahore) 365.*
(5) *Guillain v. Commissioner of Income Tax, (1949) 1 C.T.C. 361; 51 N.L.R. 241.*
(6) *Jayanetti v. Mitrasena, (1968) 3 C.T.C. 328; 71 N.L.R. 385.*

APPLICATION for a Writ of Certiorari and /or Prohibition.

C. Sivapragasam, with *Mano Devasagayam,* for the petitioner.

S. W. B. Wadugodapitiya, Deputy Solicitor-General with *K. G. Kamalasabayson,* State Counsel, for the respondents.

Cur. adv. vult.

January 29, 1981.

ABDUL CADER, J.

The facts are set out in the judgment of Victor Perera, J. When the Legislature amended section 93 and section 96 (C) (3) by Amendment Law No. 30 of 1978, it made it obligatory for the assessor "to communicate to the assessee in writing the reasons for not accepting the return." Section 96 (C) (3) applies to tax payers on self-assessment and 93 to other tax payers. It is agreed that section 96 (C) (3) applies to the petitioner. The proviso (*d*) to section 96 (C) (3) reads as follows:

> "Where an assessor does not accept a return made by any person for any year of assessment and makes an assessment on that person for that year of assessment, he shall communicate to such a person in writing his reasons for not accepting the return."

Thus, there is no doubt whatsoever that it is mandatory on the assessor to communicate to the assessee his reasons for not accepting the return, as in this case where the assessor has not accepted the return of the petitioner. In fact, the Deputy Solicitor General conceded this.

The question is at what point of time these reasons should be communicated to the assessee. I am unable to agree with the submissions made by the petitioner's counsel that this communication of reasons should precede the assessment and communication of the tax to the assessee. Counsel urged that it is only if the reasons are furnished to the assessee before taxation that the assessee will have an opportunity to convince the assessor that the reasons are questionable and thereby persuade the assessor to make a just assessment. But such an interpretation can lead to difficulties. Thus, for instance, if the assessee chooses to appeal against the reasons to the Commissioner, then to the Board and then to the Court of Appeal and thereafter to the Supreme Court, the three-year period within which the taxation should be done could well expire, as in view of the subsequent amendment to section 96 (C) by 30 of 1978 it may well be possible to argue that the notice of assessment referred to in section 96 (C) (3) refers to what I have described as a communication of the estimate of the taxable income and wealth.

But apart from this practical difficulty, the amendment law itself leaves me in no doubt that there is no requirement to communicate the reasons for not accepting the return before the assessment of the tax. Section 93 (2) reads as follows:

> "Where a person has furnished a return of income, wealth or gifts, the assessor may (*a*) either accept the return and make an assessment accordingly; (*b*) if he does not accept the return, *estimate* the amount of the assessable income, taxable wealth or taxable gifts of such person and *assess* him accordingly and communicate to such person in writing the reasons for not accepting the return."

I have quoted this section to spotlight the distinction between "estimate" and "assess." Thus, in subsection (*a*) when the assessor accepts the return, he makes an *assessment* accordingly and in subsection (*b*) if he does not accept the return, he makes an *estimate* of the assessable income, etc., and proceeds to assess. Therefore, this section makes it clear that "estimate" is distinct and different from "assess"; and that while assessment refers to the assessment of tax, estimate refers to the prior job that the assessor has to do for the purpose of taxes, namely, deciding the amount of the assessable income, taxable wealth and taxable gifts. Section 96 (C) (3) makes no reference to estimate. It states: "The

assessor may assess the amount which in the judgment of the assessor ought to be paid by such person." Obviously, this is a reference to the tax that the assessee ought to pay and, therefore, the word "assess" in this clause can only refer to the assessment of tax. Proviso (*d*) which I have quoted earlier is applicable to subsection (3) and, therefore, the clause "makes an assessment on that person for that year of assessement" in this proviso can only mean "an assessment of the amount which in the judgment of the assessor ought to have been paid by such person" occurring in section 96 (C) (3).

Section 96 (C) (3) reads as follows:

> "Where, in the opinion of the Assessor, any person chargeable with any tax .... has paid as the quarterly instalment of that tax....an amount less that the proper amount which he ought to have paid....the Assessor may assess the amount which in the judgment of the Assessor ought to have been paid by such person and shall by notice in writing require such person to pay forthwith the difference between the amount so assessed and the amount paid by that person."

Provided that (*d*):

> "Where an Assessor does not accept a return made by any person for any year of assessment and makes an assessment on that person for any year of assessment, he shall communicate to such person in writing his reasons for not accepting the return."

To my mind, it is clear that what is expected of the assessor is that when he requires the assessee in writing to pay the difference, the assessor is required to communicate in writing to the assessee in addition his reasons for not accepting the return. Two communications are to be made to the assessee by the assessor, one calling upon him to pay the difference in the tax and other giving reasons why the assessor had not accepted the return. But I do not agree that the communication of reasons for rejecting the return should be made at some point of time prior to taxation. I can see nothing in the proviso to warrant such a construction.

In this case, since notice of assessment is dated 30.3.79, although the envelope D1 bears the postal mark "20th April, 1979", I shall

assume that the notice of assessment was, in fact, issued on 30.3.79. The reasons, said to have been posted to the petitioner 1R1, bears the date "4th April, 1979". The 1st respondent, D. M. S. Fernando, has stated in paragraph 6 of her affidavit that the petitioner was informed by letter dated 4th April, 1979, thus, making it clear that 1R1 was, in fact, dated 4th April, 1979, although it contains on the face of it the word "March" between "4/4" and "1979".

The petitioner has denied receipt of 1R1. No evidence has been placed before us that this letter was, in fact, posted and, if so, when it was posted and the burden is on the respondent to prove this. I hold that there is no proof that "the reasons for not accepting the return" has been communicated in writing to the petitioner. There is a reference to oral communication in 1R1, but even assuming that it was done (in fact, there is no affidavit from Rajaratnam, the writer of 1R1 that he did so) that communication will not meet the requirements of the law that the communication be in writing. Therefore, the communication on which the respondent can rely is 1R1 itself, but (1) the posting of 1R1 has not been proved and (2) it is dated 4.4.79.

The question now is whether it is a peremptory requirement of the Law that communication of the reasons should accompany the notice of assessment of tax. The Deputy Solicitor General urged that it was not mandatory on the assessor to communicate the reasons along with the notice of assessment, to which the petitioner responded that unless the reasons are known to the assessee, the assessee will not be in a position to appeal within the period provided by the law. The Deputy Solicitor referred us to the proviso to section 97 (1) which reads as follows:

> "Provided that the Commissioner, upon being satisfied that owing to.... other reasonable cause, the appellant was prevented from appealing within such period, shall grant an extension of time for preferring the appeal."

He submitted that the failure to communicate the reasons would be "reasonable cause" owing to which the Commissioner would readily grant an extension of time.

I am of the view that where the law specifically casts a duty on the Commissioner to communicate reasons, the Commissioner

cannot shirk that duty and avoid responsibility by referring to certain discretionary powers that the Commissioner has. The amendments referred to have been made to protect the interests of the tax payers and, in my opinion, the tax payer has vested interests to know the reasons when he receives the notice of assessment why he had been taxed to pay a sum different from what he had assessed himself on the basis of his own return. If the Commissioner is permitted to delay the communication, it would not be possible to fix a time limit for such delay. I take the view that when the Commissioner failed to communicate the reasons, he failed to perform a mandatory duty cast on him.

In this case, it has not been proved that such a communication has been made in writing to the petitioner, and, therefore, the assessor has failed to perform the statutory duty cast on him to communicate the reasons to the assessee.

The next question that arises is whether a notice that requires the petitioner to pay an additional tax is invalidated by the failure to communicate the reasons. Section 96 (C) which I have already quoted empowers the assessor to require the petitioner to pay forthwith the difference *provided* that the assessor "shall communicate to him his reasons for not accepting the return." It appears to me that the main section is qualified by the proviso and, therefore, where there has been non-compliance with the proviso, notice requiring the petitioner to pay the difference in tax becomes void.

Yet another submission made by the petitioner was that the assessor has not exercised his judgment as required by section 96 (C) (3). There is a good deal of substance in this contention. This is what 1R1 says:

> "As assessment for 1975-76 became time-barred on 31.3.79, I have already made the assessment as a protective measure estimating the profits from trade at Rs. 784,230, net wealth at Rs. 916,099."

It would appear from these words that the assessor was not exercising his judgment to arrive at a definite figure by way of taxation, but rather that he was making a rough estimate as a "protective measure" to keep the matter alive for settlement after negotiation, "as the assessment for 1975-76 became time-barred on 31.3.79."

In the result, I hold that the petitioner is entitled to an order quashing the assessment issued by the 1st respondent dated 30th March, 1979, and costs as fixed by Perera, J.

VICTOR PERERA, J.

This application for writ of certiorari and/or prohibition on the Commissioner of Inland Revenue has raised a very important issue which affects the Inland Revenue Department and all persons liable to pay income tax, wealth tax or gifts tax and which requires a careful consideration of the present administrative procedure and machinery for the assessment of income, wealth or gifts and the assessment of the tax chargeable and the collection thereof in the light of the Inland Revenue (Amendment) Law, No. 30 of 1978.

It will therefore be necessary to examine the provisions dealing with income tax from its inception in this country and the various amendments in the law from time to time in order to appreciate the need for, the purpose and effect of the amendments of the law that became necessary and to consider whether in that context the amendments embodied in the Law No. 30 of 1978 in some positive way, had altered the administrative procedures and imposed mandatory duties on assessors in regard to assessments and the effect of a non-compliance with such procedures and such duties. This is the question that arises for decision on this application before us.

The Income Tax Ordinance, No. 2 of 1932 (Cap. 242, Revised Legislative Enactments) made provision for the imposition and *recovery of income tax* only for the first time in this country. Chapter IX of that Ordinance dealt with Returns of Income in sections 58 to 67. Chapter X in sections 68 to 71 dealt with Assessments. Section 68(1) empowers an Assessor if he is of the opinion that a person is chargeable with tax to assess him requiring him to furnish a return. Section 68(2) and (3) are as follows:

> "(2) Where a person has furnished a return of income, the Assessor may either—
>
> (*a*) accept the return and make an assessment accordingly; or
>
> (*b*) if he does not accept the return, *estimate the amount of the assessable income* of such person and assess him accordingly.

(3) Where a person has not furnished a return of income and the assessor is of the opinion that such person is chargeable with tax, *he may estimate the amount of the assessable income* of such person *and assess him accordingly."*

According to the Shorter Oxford Dictionary 'estimate' means an 'approximate calculation based on probabilities' and therefore the 'estimate' becomes the basis of the assessment of the taxable income. This was the definition adopted by Canakaratne, J. in the case of *Silva v. Commissioner of Income Tax,* (1) at page 340.

Section 69 of the Income Tax Ordinance provided for additional assessments and empowered an Assessor, where it appeared that a person chargeable with tax had not been *assessed* or *had been assessed less than the proper amount,* to assess such person at the amount or additional amount at which *according to his judgment* such person ought to have been assessed.

From an examination of these sections, it appears to me without doubt that the words *assess* or *assessment* there referred to, contemplated the amount of income that had to be assessed either on the basis of a return or on the basis of an estimate made by the assessor. This was the first step that had to be taken in order to *ascertain the assessable* income for the purpose of the computation of tax chargeable. The second step was the computation of the taxable income after the deductions and allowances provided in the law. "Assessable income" has been defined as the residue of the total statutory income after deducting the deductions provided in the law and "Taxable Income" has been defined as the residue of assessable income after deducting the amount of the allowances allowed by law in the Inland Revenue Act.

The next stage was reached when the assessment, arrived at either on the basis of a return of the assessee, or on the basis of the estimate by the assessor and the taxable income *goes before the Assistant Commissioner* and he then notifies the assessee of the amount of the assessment and the charge of the tax made.

Section 71 (1) reads as follows:

"An Assistant Commissioner shall give a notice of assessment to each person who has been *assessed stating the amount of income assessed and the amount of tax charged."*

According to the procedure that was adopted the form used by the Assistant Commissioner to give this notice in terms of section 71 contained:

(1) details of the assessment of income,
(2) the assessable income,
(3) the taxable income, and
(4) the amount of tax charged.

In the case of the *Commissioner of Income Tax v. Chettinad Corporation* (2) at page 458, Gratiaen, J. with Gunasekera, J. agreeing, pointed out as follows:

> "It is important to avoid confusion between requirements contained in the relevant enactments as to *'an assessment'* on the one hand and *'a notice of assessment'*,"

and having analysed the procedure that was adopted in the Income Tax Department in regard to assessments under section 64 and section 76, which were later amended as sections 68 and 71, stated as follows:

> "Section 64 of the Income Tax Ordinance empowers an Assessor to assess every person (as defined in the Ordinance) who in his opinion is chargeable with income tax. The assessment so prepared by an assessor is then scrutinized and either approved or amended by an Assistant Commissioner, who in due course signs the assessment, if he is satisfied that, in its final form, it charges the person to whom it relates with the full tax with which he should be charged (section 66). Eventually section 67 empowers an Assistant Commissioner to issue a notice of assessment to each person who has been assessed stating the amount of income assessed and the amount of the tax charged.
>
> The distinction between *assessment* and *a notice of assessment* is thus made clear, the former is the departmental computation of the amount of the tax with which a particular person is considered chargeable and the latter is the formal intimation to him of the fact that such an assessment has been made."

At page 459, Gratiaen, J. further held that the analogous procedure ought to be followed by taxing authorities in the case where excess profits duty is chargeable.

The assessor should prepare an assessment, the assessment should be scrutinised and signed (after amendment if necessary) by an Assistant Commissioner and thereafter the Assistant Commisioner must issue a notice of assessment. Thus it is clear that the department acted in stages and that was what the Income Tax Ordinance clearly provided.

In terms of this Law if the assessor did not accept a return, he made his own *assessment of income* and when *additional assessments of income* had to be made he did so 'according to his judgment', but *he did not have to indicate any reasons to the assessee* and in actual practice, the assessee was at the mercy of an assessor as the estimate could be arbitrary and even capricious. The law had been so framed that it gave an assessee only one opportunity to question this assessment, that is, if he was aggrieved by the amount of an assessment, he could appeal to the Commissioner *to review* and *revise* such assessment in terms of section 73 (1) of the Ordinance. The Commissioner could confirm, reduce, increase or annul the assessment and make a determination on the facts placed before him. The Commissioner then had to make a determination. In Chapter XI, sections 73 to 80 dealt with appeals. If a person is dissatisfied with the determination of the Commissioner, he could appeal to the Board of Review. At the inquiry at the Board of Review, an appellant could not urge the grounds other than those stated by him except with the consent of the Board of Review. However, section 77 (4) provided as follows:

> "(4) The *onus of proving* that the assessment as determined by the Commissioner on appeal or as referred by him under section 76 (to the Board of Review) as the case may be, is excessive shall be on the appellant."

The provisions of section 79 put the question of what was meant by the term *assessment* beyond any doubt as it states as follows:

> "Where no valid objection or appeal has been lodged within the time limited by this Chapter *against an assessment as regards the amount of assessable income assessed thereby* or where the amount of the assessable income has been agreed to under section 73 (2) or where the amount of the 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.*"

It was necessary to deal with this aspect of the matter fully as there appeared to be some confusion during the course of argument as to what the term 'assessment' referred to, as the term 'assessment' had been used in Law No. 17 of 1972 and the Law No. 30 of 1978 with reference to the *amount of the tax* in section 96 (C). It is significant that a new Chapter XIA was introduced to deal only with the assessment of the quantum of tax.

The Inland Revenue Act, No. 4 of 1963, was introduced to consolidate the law relating to the imposition of income tax, wealth tax or gifts tax and to make certain consequential amendments to other written laws. This was the first time that wealth tax and gifts tax were introduced. The returns of income, wealth and gifts were dealt with in Chapter X; section 81 of Act No. 4 of 1963, provided that it was the duty of every person chargeable with income tax, wealth tax or gifts tax for any year of assessment if he had not been required by the assessor under section 82 to make a return of income, wealth or gifts of that year to send a return to the Commissioner. Section 82 provided for the Assessor to give notice in writing to any person requiring him to make a return. This Chapter dealt with the procedure for the Assessor to obtain information in regard to matters set out in the return by giving notice in writing to furnish details, books or receipts and by requiring the party concerned to attend in person or by an authorised representative for the purpose of being examined regarding his income, wealth or gifts. These were all steps preliminary to making an assessment.

Chapter XI dealt with assessments. Section 93 (1) provided that every person who in the opinion of an Assessor is chargeable with income tax, wealth tax or gifts tax had to be assessed by the Assessor. Section 93 (2) provided that where a person had furnished a return of income, wealth or gifts, the Assessor may either—

(*a*) accept the return and make an assessment accordingly; or

(*b*) if he does not accept the return *estimate the amount of the assessable income, taxable wealth or taxable gifts* of such person and assess him accordingly."

Section 93 (3) provided that where a person had not furnished a return of income, wealth or gifts and the assessor is of the opinion that such person is chargeable with tax, he may estimate *the amount of the assessable income,* taxable wealth and taxable gifts.

Section 94 provided for an additional assessment by an Assessor of income, wealth or gifts within 6 years if the person concerned had not been assessed or had been assessed less than the proper amount.

These provisions followed the same pattern of administrative action under the earlier law—

(1) the acceptance of the return, the figures submitted forming the basis of the assessment of income, wealth and gifts,

(2) in the absence of a return, an assessment of income, wealth or gifts being made on the basis of an estimate and

(3) where a person's income, wealth or gifts had not been assessed or if found to have been under assessed, the assessor could make an assessment of income, wealth or gifts at an amount which according to his judgment such person ought to have been assessed.

Under this law too the assessment of the income, wealth and gifts had to be made for the purpose of arriving at the assessable income, wealth or gifts and thereafter when this was completed, the assessor was obliged in terms of section 95 of the act which replaced section 71 of the Ordinance to give notice of the assessment to each person who has been so assessed stating—

(1) the amount of income, wealth or gifts, and

(2) the amount of tax charged.;

The power to send the notice of assessment was given to, and a duty was imposed on, an Assessor and not the Assistant Commissioner as provided in section 71 of the repealed Ordinance. Counsel for the petitioner pointed out the volume of work had increased and more Assessors were appointed and given greater

powers to perform the functions that had been performed by the Assistant Commissioners.

To my mind it is clear on an analysis of these provisions of the Act No. 4 of 1963 too, that the Assessor's first and primary duty was *to make an assessement of income, wealth or gifts* in order to arrive at the assessable income, wealth or gifts. With the assessment as the basis the next step was the determination of assessable income, wealth or gifts. Then the Assessor computes the taxable income making the necessary deductions and allowances permitted. Thereafter he had to *fix the tax to be charged* according to the rates specified and *send the notice of assessment under section 95.* Thus the assessee received only *one notice* of the assessment of income, wealth and gifts indicating the assessable income and taxable income and also the *notification* to pay the tax so charged. In the meantime he has had no opportunity to know beforehand whether his return was accepted or rejected or what the assessment that was going to be made as forming the basis of the tax he was made liable to pay.

The assessee could not have challenged the assessment of income, wealth or gifts, however arbitrary it may have been before the notice of assessment nor was he informed why his return was rejected and how or why an estimate was substituted in place of the figures submitted by him. His only remedy was to appeal against the amount of the assessment to the Commissioner under section 97.

This section 97 of the Act, repealed section 73 of the Income Tax Ordinance in regard to appeals. Section 97 (1) provided for an appeal within 30 days after the notice of assessment. It is also clear that the term 'assessment' referred to in Act No. 4 of 1963 only referred to assessment of income, wealth or gifts. In computing the term 30 days after the notice, one has to refer to section 91 (2) which provides that the notice of an assessment shall be served personally or by being sent by post by a registered letter and section 94 (b) which provided that a notice sent by post shall be deemed to have been served on the day succeeding the day on which it would have been received in the ordinary course by post. At the argument before us it was conceded that the 30 days period after the date of notice was to be construed accordingly.

The Inland Revenue (Amendment) Law, No. 17 of 1972, came into operation in December 1972. The administrative machinery

remained the same as Chapter XI of Act No. 4 of 1963 was retained with a few modifications, and the powers of an Assessor to make assessments of income, wealth and gifts in the same manner as he had done earlier continued and the procedure hitherto followed was maintained.

However, the Legislature appears to have considered a scheme for the speedy recovery of tax during the year of assessment, as under the earlier law the tax was charged and recovered *only after* the notice of assessment of income, wealth or gifts was sent under section 95. Without amending the earlier law in regard to returns and assessments, provision was therefore made for a person liable to income, wealth or gifts tax to pay the tax due from him in instalments voluntarily without having to wait till he received a notice under section 95 and even before he submitted his return of income, wealth or gifts. With that end in view, it enacted a new Chapter XIA, inserted immediately after section 96. In this Chapter were introduced for the first time provisions dealing with the *"assessment of the amount of the tax"* and the same are contained in sections 96 (A), 96 (B) and 96 (C). They provide for—

(1) a self assessment of profits, income, nett wealth and taxable gifts, and

(2) the voluntary payment of the tax so chargeable according to the said self assessment.

There was no requirement that a self assessment of profits, income, wealth or gifts should be communicated or forwarded to the assessor. What was required was only the regular payment of the quarterly instalments of tax as computed by the tax payer himself on the dates specified. The assessment of the income, wealth and gifts was known only to the tax payer. Section 96A and section 96B made this provision operative only in respect of any year of assessment commencing from or after 1st April 1972. These instalments were made payable—

(a) notwithstanding anything to the contrary in this Act, and

(*b*) notwithstanding that no *assessment* had been made.

The word *'assessment'* found in sub-section (B) referred clearly to the assessment of income, wealth and gifts as provided in the

earlier Chapter XI. The new sections in no way, displaced the already existing obligation of a person liable to tax to send his return in terms of sections 81 and 82 nor did they remove the wide powers of an Assessor to make assessments of income, wealth or gifts as provided in section 93 (1), sub-section 1A (which was introduced by this Law) and sub-section (2) and (3) and in section 94.

In this context, it will be necessary to consider the *very limited or restricted scope of the new section 96 (C).* This section clearly and unmistakably gave new powers to an assessor *"to make an assessment of the quarterly tax instalments"* even ignoring the voluntary computation of the quarterly tax instalments by the tax payer and that only *"where a person chargeable fails to pay the quarterly instalment of tax."* The Assessor was empowered where there was such a failure alone, *to assess the amount* that should be paid. When the Assessor thus assesses the quantum of tax, which of necessity would be arbitrary, he had a duty imposed on him to send *a notice in writing* requiring such person to pay the tax so assessed forthwith. No duty was cast on the Assessor simultaneously to serve a notice of assessment of income, wealth or gifts even if he had made an arbitrary estimate for the purpose of this assessment. The Assessor was permitted to retain that information to himself and was not obliged to communicate the same to the tax payer.

The proviso to section 96 (C) (3) even enabled the Assessor to make an additional assessment of the quarterly tax. The proviso reads:

> "Provided that nothing in the preceding provisions of this sub-section shall preclude an Assessor from making an additional assessment in respect of a person on whom an assessment under this sub-section is made."

The "assessment" made under this sub-section is only the *"assessment of tax"* and nothing more.

Section 96 (C) (4) once again refers *not* to an additional assessment of income, wealth or gifts, but to the assessment of the quarterly tax made under sub-section (3). It refers to the notices in writing in respect of the quarterly tax assessed and provides that the particulars in the notice shall be deemed the quarterly *assessment* of tax, *a person ought to have paid.*

Having analysed the limited purpose and scope of the sections, the functions of the assessor under these sections and, in particular, section 96 (C), it is clear to my mind that sub-section (5) had a definite place and meaning, though the learned Deputy Solicitor-General in the course of his submissions doubted its relevance. This sub-section made it possible for the receipient of a notice of the "assessment of the quarterly tax" made under this section to *appeal against* it in the same manner as an appeal under section 97 of the Revenue Law from a notice of assessment under section 95. While an additional duty was imposed on an assessor, the tax payer was simultaneously given an additional right of appeal.

I have therefore come to the conclusion that Chapter XIA introduced in 1972, provided for and dealt with only the self assessment and payment of the quarterly instalments of tax on a voluntary basis or on a compulsory basis on an estimated assessment of the quarterly tax, *only* where there was a *failure* to pay the quarterly tax. It imposed a mandatory duty on the Assessor to issue a notice of such "assessment of tax" in writing and gave the assessee the right to appeal therefrom notwithstanding that, an assessment of income, wealth or gifts or an additional assessment thereof, was not made prior to such appeal. The paramount concern was the speedy collection of tax though the assessment of income and wealth may be delayed in the normal course within the period of 6 years provided by the Law.

Even after the amendment of the Law in 1972 in regard to income, wealth or gifts, an Assessor had the power to act arbitrarily in making the assessment of income, wealth or gifts. An Assessor was still obliged to make his assessment of income, wealth or gifts either on the basis of the tax payer's returns or on the basis of an estimate made by him. Thereafter he had a statutory duty to issue the notice under section 95 of the amount of income, wealth or gifts assessed and the tax charged. In my view, even after the amendments brought into operation in 1972, the Assessor had to act under section 93 in regard to accepting of assessments or arbitrary assessments and additional assessments under section 94.

Before I deal with the changes brought about by the amendment of the Revenue Law, No. 30 of 1978, I would refer to the bounds within which an Assessor could have rejected and substituted his own assessment under section 93 and section 94 of the Inland Revenue Law prior to 1978. The courts have considered the far

reaching arbitrary powers granted to an Assessor under the existing law in several cases and have from time to time commented on the improper approach made by assessors in exercising those powers. The areas of dispute between an assessor and assessee would necessarily revolve around the reasons of the Assessor for, and the basis of his making the arbitrary assessment of income or wealth. But the assessee was completely in the dark in regard to the reasons or basis for not accepting the return even when the notice of assessment was served on him under section 95. An assessee, when he filed his appeal could therefore not formulate his grounds of appeal except in general terms. However, under the provisions dealing with the appeal in section 97 (2) he was obliged to set out the precise grounds of such appeal and necessarily he had to confine himself to such grounds when the appeal was considered by the Commissioner.

In the case of *Gamini Bus Co. Ltd. v. C. I. T.* decided in 1952 by the Privy Council (3) Viscount Simon made the following observation at page 432:

> "He (the assessor) was of course perfectly entitled to do this according to the best of his judgment and it was *not necessary for him to give his reasons for rejecting the appellant's return* or *for arriving at his own estimate.*"

and at page 436:

> "Their Lordships cannot consider this part of their judgment without emphasising in the plainest terms that it would be wholly improper to justify the rejection of the appellant's accounts and the substitution of a higher figure of assessment merely because, in the case of other tax payers in the same line of business, the conclusion has been reached that their accounts were not accurately kept, and that their returns required to be rejected. Each tax payer is entitled to have *his assessement fixed, if his own return is not accepted,* at a figure which the taxing authorities *honestly believe to be proper* in his individual case, and no argument that in this class of business the figure of return is habitually understated can be used to prove that this happened in his also."

In the case of *Gurmuk Singh v. Commissioner of Income Tax,* (4), which had been referred to at page 426 in the above case the

Indian Law where the provisions were almost similar were considered and contained the following observations:

"(*a*) An Income Tax Officer is not bound to rely on such evidence as is produced by the assessee as he considers to be false.

(*b*) He can have recourse to the proviso to section 13 even in those cases where he rejects the accounts produced by the assessee on the ground that they are not genuine and thus fail to represent truly his income and profits.

(*c*) If he proposes to make an estimate in disregard of the evidence, oral or documentary, led by the assessee, he should in fairness disclose to the assessee the material on which he is going to found that estimate.

(*d*) He is not, however, debarred from relying on private sources of information which sources he may not disclose to the assessee at all.

(*e*) In case he proposes to use against the assessee the result of any private enquiries made by him, *he must communicate to the assessee the substance of the information so proposed to be utilised to such an extent as to put the assessee in possession of full particulars of the case he is expected to meet and should further give him ample opportunity to meet it, if possible."*

Under the Indian Income Tax Law at the time there was no provision for communicating reasons for rejecting a return and the Court set out clearly the guidelines for a Tax Officer when he exercises such wide powers.

In the case of *Guillain v. Commissioner of Income Tax* (5), the assessee though called upon to furnish returns and to give information *before making an assessment,* failed to do so. Thereupon acting under these sections, the Assessor proceeded to assess him "at the additional amount at which, according to his judgment, such person ought to have been assessed." The Supreme Court held that in as much as the onus was upon the assessee to displace the assessment, the assessee took great responsibility in not producing material which would undoubtedly have been of great value *for the purpose of forming* the assessor's opinion. In the circumstances, the Court held that the assessor was not bound

by strict rules of evidence and was entitled to make an assessment according to his judgment.

This case was considered in the case of *Jayanetti v. Mitrasena* (6), and Weeramantry, J. held:

> "No doubt assessors, in view of the amplitude of the discretion vested in them under section 69, and the far reaching consequences of additional assessments which they make, will have prominently before them *the principles of justice and fair play* which must underline the exercise of so wide a discretion, ... As has been observed in regard to additional assessments, under the English Acts, legal evidence is not necessary as a preliminary to an additional assessment but there must be information before the inspector 'which would enable him, acting honestly to come to the conclusion' that such a state of facts exists."

Up to 1978, therefore, the position was that an Assessor could under the law act arbitrarily though he was expected to act according to the principles of justice and fair play, honestly to come to a conclusion on the basis of existing material and to exercise his judgment with responsibility. When the Assessor did form such a judgment, the burden is shifted on the assessee to displace the assessment he had decided to make, according to his judgment. But still as the law stood, the tax payer was given no opportunity to know beforehand the reasons for not accepting a return or the basis of an estimate made against him nor had he an opportunity of setting out the grounds of an appeal precisely, if he decided to lodge an appeal.

Counsel for the petitioner referred us to the Budget Speech of the Minister of Finance, made on the 15th November, 1977, in which he indicated his proposals to amend the law in regard to estimated assessments. This becomes relevant to understand the mischief at which the Act was directed and not for the purpose of interpreting the amending Act. It was proposed to make provision by which, where an assessor does not accept a return made by a tax payer, he will conduct an inquiry and *issue an order giving reasons for rejection of a return and for estimating a tax payer's income.* In regard to the time limit for making assessments, the Minister had proposed the 6 years limit should be reduced to 3 years as a tax payer should not be kept in abeyance as to

whether his returns have been accepted or not. Counsel for the petitioner argued that the intention of the Legislature in enacting Law No. 30 of 1978 could be gathered from these proposals. Counsel's contention was that the surrounding circumstances, the state of the law as it stood and the remedies suggested are aids to the interpretation of the law. He contended that there was a clear intention that the act of rejecting a return was meant to be a condition precedent to the tax payer being served with a notice of assessment under Chapter XI and also a condition precedent to the exercise of the limited powers given him under Chapter XIA.

Counsel for the petitioner contended that it was the duty of a court called upon to interpret a statute to ascertain the intention of the Legislature. He cited, Maxwell, on the Interpretation of Statutes (12th Edn., p.40) where it was stated that in order to interpret any amending statute, it is necessary to consider:

(1) how the law stood when the statute to be considered was passed;

(2) what the mischief was under the old law;

(3) the remedy provided by Parliament to cure the mischief.

He also urged that it was the duty of Judges, called upon to interpret a statute, "to make such construction as shall suppress the mischief and advance the remedy." There could be no doubt what was the mischief that had to be remedied. The scope of the amendment contemplated when legislation was introduced for consideration by Parliament is also relevant. A Bill to amend the Revenue Act, No. 4 of 1963, was presented by the Minister in the National State Assembly on the 7th June, 1978, which was published in the Gazette on 30th June, 1978. The statement of the legal effect of this bill in regard to sections 93, 94, 96B and 96C are set out as follows:

Clause 34: amends section 93 of the principal enactment and and the legal effect of this clause will be to *impose a duty on an assessor* who rejects a return furnished by any person to state his reasons for rejecting the return.

Clause 35: This clause amends section 94 of the principal enactment and the legal effect of this clause will be:

(i) to reduce the time limit within which an assessment or additional assessment may be made under that section on any person in respect of any year of assessment commencing on or after April 1, 1973;

(ii) to remove the time limit applicable to assessment of gifts tax; and

(iii) to impose a duty on an Assessor who rejects a return furnished by any person to state his reasons for rejection the return.

Clause 37: amends section 96(C) of the principal enactment and the legal effect of this clause will be:

(i) to reduce the time limit within which an assessment or additional *assessment may be made under that section* on any person in respect of any year of assessment commencing on or after April 1, 1973;

(ii) to remove the time limit applicable to assessment may of gifts; and

(iii) *to impose a duty on an Assessor* who rejects a return furnished by any person to state his reasons for rejecting the return.

After the Bill was tabled and considered, the Inland Revenue (Amendment) Law, No. 30 of 1978, was passed and certified on 21st July, 1978. Sections 93 and 94 dealt with the powers of the Assessor to make assessments of assessable income, taxable wealth and taxable gifts and to make additional assessments of income, taxable wealth and taxable gifts. The amended section 93, sub-section (2) imposed a duty on the Assessor who rejected a return furnished by any person to communicate to such person in writing the reasons for not accepting the return. This section clearly dealt with the assessment of income, wealth and gifts, *the rejection of a return and a communication had to be done before the notice of assessment* stating the amount of the assessment of income, wealth and gifts and the amount of the tax charged is sent under section 95. The amending law clearly contemplated that the notice communicating the reasons for not accepting of a return should be an exercise before the actual assessment of

income, wealth or gifts is made for the purpose of sending the statutory notice of assessment referred to in section 95. No useful purpose would be served if the notices communicating the reasons for non-acceptance of a return are sent simultaneously or at any time after the notice of assessment is issued under section 95. The purpose of communicating the reasons for the rejection of a return could only be for the purpose of giving the tax payer an opportunity before he receives the statutory notice of assessment under section 95, to put the assessee in possession of full particulars of the case he is expected to meet, in order that he could assist the Assessor if he does not accept the return to reconsider his rejection if satisfactory reasons are urged by the assessee before the final assessment is made. It appears to me that the learned Deputy Solicitor-General's submissions that the communication could be given at *any time* after the statutory notice under section 95 or the submission that it could be sent simultaneously with the statutory notice or within the appealable time in order to formulate the grounds of appeal to the Commissioner are too far fetched and not what the Legislature contemplated. As I understand it, the purpose of the amendments was to compel an assessor to make his *assessments of income, wealth or gifts* whether on the basis of a return or on the basis of his estimate expeditiously so that the tax could be assessed within the period of 3 years.

The law gives an Assessor a period of three years to examine and investigate a return. In the meantime an assessee keeps on paying the tax instalments. Therefore a strict compliance with the mandatory provision of section 93(2)(*b*) does not entail a loss to the State in regard to the collection of revenue. The law expects an Assessor to act expeditiously to enable the State to collect the revenue as well.

It is to be noted that section 93(2)(*b*) is not a proviso. It is a substantive part of the section which imposes a duty on an Assessor to communicate reasons in writing for not accepting a return. Therefore there could be no doubt whatsoever that it was a condition precedent to making his assessment after such communication.

The substantive provision contained in section 93(2)(*b*) has been repeated as a *proviso* in section 94 in regard to additional assessments. Section 94 also deals with assessments of income,

wealth and gifts. But the proviso relates to the assessment of income tax, wealth tax or gifts tax restricting the said exercise in point of time and making it conditional that there should have been a consideration of a return, which if not accepted, had to be followed by a written communication of reasons for not accepting the return. The reference in section 96(C) to what had to be done under section 93(2) clearly indicates that in the performance of duties imposed on an Assessor under section 94 and section 96 (C) there should a compliance with the substantive provision of the law contained in section 93(2)(*b*). The inclusion of proviso 96(C) (d) was a re-affirmation of the imperative duty imposed under section 93(2)(*b*).

Section 94 proviso (a) states that *no assessment of income tax or wealth tax or gifts tax* shall be made:

(i) in respect of any year of assessment prior to April 1, 1972 after 6 years;

(ii) in respect of the years of assessment commencing from April 1, 1972, April 1, 1973 and April 1, 1974, *after March 31, 1979;* and

(iii) in respect of any year on or after April 1, 1975, after 3 years.

This would necessarily mean that the assessment of income, wealth or gifts had to be done under section 94 prior to the assessment of the tax as contemplated by this proviso. The taxing process provided for, under this proviso before certain fixed dates, could not take place without a proper and valid assessment of income, wealth or gifts prior to taxing. For there to be a proper and valid assessment, the condition precedent referred to in proviso (*c*) had to have been observed. The proviso (*c*) circumscribes the jurisdiction of the assessor and does not permit him to make an assessment of *income, wealth or gifts tax,* where he had not communicated in writing his reasons for not accepting the return. What he is obliged to communicate is not the assessment of tax but the reasons for not accepting the return of income, wealth or gifts.

The learned Deputy Solicitor-General when questioned as to the effect of an Assessor ignoring any of the clauses in proviso (*a*) in making an assessment and making assessment of tax after the

prescribed time, in this case after 31st March, 1979, quite correctly conceded that such an assessment was illegal or void and liable to be quashed by Court. The Assessor had no jurisdiction to make an assessment of tax after that date, for the relevant period, unless the tax payer came within proviso (*b*). In this instant case no claim was made that the Assessor purported to act under these provisos.

Counsel for the petitioner contended that a non-compliance with the duties referred to in proviso (*c*) as well as the making of any assessment of tax after the prescribed date would render an assessment illegal or void as there was a total lack of jurisdiction. If this is the resulting position under section 94 as amended, the same situation will arise if the provisos to section 96(C) (3)(d) were not complied with.

In section 94, the proviso is only a qualifying proviso. The effect of a qualifying proviso, according to the ordinary rules of construction, is to qualify something enacted therein, which but for the proviso would be within it (Craies on Statute Law, 7th Edn. p.218).

In regard to the effect of a proviso, it will be useful to refer to the rules of interpretation discussed in texts dealing with the Interpretation of Statutes. In regard to provisos, the general rule is clear, namely,

> "Compliance with a proviso taken by itself renders it necessary that certain steps had to be done earlier in order that the operation of the earlier part of the section could become operative".

Maxwell in The Interpretation of Statutes (12th Edn.) at page 190 states as follows:

> "If the language of the proviso makes it plain that it was intended that the proviso was to have an operation more extensive than that of the provision which it immediately follows, it must be given such wider effect.
>
> If a proviso cannot reasonably be construed otherwise than as contradicting the main enactment, then the proviso will prevail on the principle that 'it speaks the last intention of the makers'."

I am of the view that Chapter XI, that is, sections 93, 94 and 95 have to be considered separately as they deal only with assessments of income, wealth or gifts and are the general provisions that have to be complied with whether an Assessor acts under Chapter XIA or not.

It will now be necessary to consider Chapter XIA after the amendments enacted in 1978.

I have already examined the provisos to section 96(C) before the amended Law No. 30 of 1978, and come to the conclusion that the provisions in the entire Chapter XIA including section 96(C) dealt only with an assessment of the amount of the quarterly tax in the self assessment scheme introduced in 1972. The entire section 96(C) has been re-introduced but sub-section (3) was repealed and a new sub-section (3) was enacted in its place. This sub-section has deviated considerably from the original sub-section 96(C)(3). The circumstances under which the Assessor could act were altered from a failure to pay the quarterly tax to an under payment only. The power an Assessor originally had to assess when a person has failed to pay the instalments was removed. It reads as follows:

> "(3) Where in the opinion of the Assessor any person chargeable with any income tax, wealth tax or gifts tax has paid as quarterly instalment of that tax for that year of assessment an amount less than the proper amount, the Assessor *may assess the amount which in the judgment of the Assessor ought to have been paid by such person* and shall, *by a notice in writing require that person to pay forthwith* the difference between the amount so assessed and the amount paid by that person."

Therefore it is only when the Assessor has formed the opinion, that the tax payer has paid less than the instalment due, that he could assess the amount of the instalment.

However, the proviso (a) to the sub-section states that no assessment shall be made of income tax or wealth tax or gifts tax—

> (i) in respect of the years of assessment commencing April 1, 1972, April 1,1973 and April 1,1974 after March 31, 1979; and

(ii) in respect of any year of assessment commencing on or after April 1, 1975 after 3 years.

Thus an assessor even where instalments had been under paid, could make no assessment of the amount due as the instalment of tax for the year commencing April 1, 1974 to 31st March, 1975, after 3 years from the end of that year of assessment. He was also bound by proviso (*d*) which states:

"(*d*) where an Assessor does not accept a return made by any person for any year of assessment and makes an assessment on that person for that year of assessment, *he shall communicate in writing his reasons for not accepting the return.*"

This proviso necessarily implies that to give validity to an Assessor's action in giving a notice in writing to pay the difference in the tax instalment as assessed by him, the Assessor should have previously considered the return of income, wealth or gifts submitted and either accept it or not or in the event of his not having accepted it, the Assessor should have communicated in writing the reasons for not accepting the return. If the Assessor had so communicated in writing the tax payer could have made representations and placed facts to support his return or accept an estimate of income by the Assessor if additional facts had become available to the Assessor to justify his estimate and were made known to the tax payer. This was a duty imposed on an Assessor by the amendment as this duty did not exist in the old law. Further this duty had to be exercised before he makes the assessment. If he exercises this duty, only then he has the jurisdiction to make an assessment of income, wealth or gifts tax.

If the Assessor had taken the steps so contemplated and then formed the opinion that though the tax payer had paid instalments, he should have paid more, he was obliged by a notice in writing to require that person to pay forthwith the difference.

At that stage even if a notice of assessment, though validly made, had not been served on him under section 95, he could still *have appealed against this notice in writing* issued under section 96 (C) (1), under the provisions of 96 (C) (5) as he has been given the right to appeal against this notification of the

assessment of tax made under this section, even though he received no notice under section 95.

Chapter XIA as amended by Law No. 30 of 1978, is complete and all the conditions precedent necessary for the Assessor to exercise his powers within the time specified have been provided for and the tax payer has been protected, in that he has been given a prior opportunity of disputing the rejection of his return, before the actual final assessment of income, wealth or gifts is made and he has also the right to appeal against the assessment of the tax instalment even before the notice of assessment is issued under section 95.

The jurisdiction for an Assessor to act under Chapter XIA is clearly defined. If the Assessor had failed to deal with the returns submitted under the provisos to section 93 (2) he had no jurisdiction to exercise the one and the only function provided for in this Chapter, namely, the assessment of the amount of tax instalment payable and the demanding of the payment of the difference in tax forthwith.

Taking all these matters into consideration, I have arrived at the conclusion that the provisions in section 93 (2) are mandatory and that the provisos in section 94 and section 96 (C) are also mandatory as relating back to section 93 (2) and are conditions precedent to the making of assessments of income, wealth and gifts under section 95 and also to the making of the assessment of the amount of tax under sections 94 and 96 (C). The question that this Court has to determine is whether the non-compliance of any of those provisions which were specially enacted by the amending Law No. 30 of 1978 would vitiate and render void such assessments even if such assessments purport to have been made under any of these provisions.

The section dealing with the validity of assessments is section 96 which has been retained. This section reads as follows:

> "96 (1) No *notice, assessment,* certificate or other proceeding *purporting* to be in accordance with the provisions of this Act shall be *quashed* or deemed to be *void* or *voidable* for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of this Act and if

the person assessed or intended to be assessed or affected thereby is designated therein according to common intent and understanding.

(2) Without prejudice to the generality of sub-section (1) an assessment shall not be *impeached* or affected

(*a*) by reason of a mistake therein as to the name or surname of the person chargeable, the amount of the income, wealth or gifts assessed or the amount of tax charged, or

(*b*) by reason of any variance between the assessment and the *notice thereof,*

if the notice of such assessment is duly served on the person to be charged and contains in substance and effect the particulars mentioned in paragraph (a) of this sub-section.

On an examination of this section, it is clear that the 'want of a form' or 'mistake' or 'defect' or 'omission' in the assessment itself or a notice will not effect the validity of the assessment if the assessment or notice is in substance and effect in conformity with or according to the intent and meaning of this law. Therefore, it necessarily follows that it is competent to a Court to examine the validity of an assessment or notice and quash such assessment or notice on substantial grounds where there has been no conformity with or where the same is not according to the intent and meaning of this law.

The significance of the words 'no notice, assessment, certificate or other proceeding purporting to be in accordance with the provisions of the Act' arises for consideration in this case as submissions have been made that—

(1) the notice sent on the 21st April, 1979, bearing a date 30th March, 1979, does not purport to have been issued under any particular section and was out of time and therefore was without jurisdiction,

(2) that there had been no conformity with the specific mandatory provisions of the amended law and that there was a total lack of jurisdiction,

(3) the proceedings taken in this case were not according to the intent and meaning of the law,

(4) that there had been a breach of the principles of fairness and natural justice.

In the instant case, the petitioner was admittedly a tax payer and his tax file bore No. 70/6039/24/2, Colombo North Regional Office. In or about August 1976 he had submitted his return for the year of assessment 1975/76, i.e. the period from 1.4.74 to 31.3.75 in terms of the auditor's statement filed with his petition marked 'A', which disclosed an assessable income of Rs. 88,915, and a net wealth of Rs. 315,599. The quarterly tax on the self assessment basis had been paid totalling to a sum of Rs. 36,096 (documents B1 to B5).

The petitioner and his auditors had several interviews with the Deputy Commissioner of Inland Revenue and the assessor dealing with this file in or about August 1977, January 1978 and October 1978. The assessor who had dealt with this matter at the interviews was one K. Rajaratnam. After the interview in 1977, the petitioner had admittedly forwarded a statement disclosing an additional income of Rs. 248,359 by letter dated 10.8.77, marked 'C' and other information with a view to finalising his income tax matters. He also gave an explanation for the non-disclosure of this additional income earlier. These were proceedings presumably under sections 82 and 83.

The petitioner in his affidavit in paragraph 9 has testified that he had made payments towards settling this additional income so disclosed. The petitioner complains that after his last interview with the Deputy Commissioner and the assessor in October 1978, he received no further communication whatsoever.

The petitioner's position is that being a tax payer who had not only paid his quarterly instalments for the year 1975/76, but also one who had sent his returns, the Assessor should have exercised his powers under section 96C (3) if in the opinion of the Assessor, he had paid less than the proper amount payable by him, by *assessing the amount which in his judgment ought to have been paid.* But before he could have exercised this power, he should have considered the returns and sent a notice in writing giving his reasons if he did not accept the returns. Compliance with section

96 (C) (3) would have given him jurisdiction to exercise this power. If the Assessor chose to exercise his powers under this sub-section 96 (C) (3) he should have sent him a notice in writing requiring him to pay the difference forthwith. The assessment of the quarterly tax for the purpose of the notice had to be made before March 31, 1979. In this case, there does not seem to have been an assessment of the quantum of the quarterly tax instalments and there is no evidence that the Assessor had exercised his judgment in that particular respect. After amendment to the Law was effected on the 21st July, 1978, the Assessor had an interview in October, 1978. But the Assessor had failed to perform the mandatory duty in regard to the return sent in August 1976 and the additional return sent in August 1977 of giving his consideration to the said returns and deciding whether he accepted or did not accept the said returns. If he had not accepted the returns, it is obvious that he would have recorded such reasons and then carried out the duty of communicating to the petitioner the reasons for not accepting his returns in terms of the mandatory provisions of section 93 (2) (*b*). If he had performed this duty in conformity with or in accordance with the intent and meaning of this law, he was in duty obliged to communicate the reasons for not accepting the returns. The Assessor had sufficient time between October 1978 after the last interview and the 31st March, 1979, to perform the duties imposed on him in terms of section 93 (2) (*b*) in regard to the assessment of income, wealth or gifts and also in terms of secion 96 (C) (3) in regard to the assessment of the quarterly tax.

According to the affidavits of the petitioner the only matter that was in dispute which transpired at the interviews was in regard to the assessable income. There was no question raised about his nett wealth as declared by him in his returns. An affidavit has been filed by Mrs. D. M. S. Fernando, the 1st respondent. She admittedly was not the Assessor who dealt with this particular file nor was she present at the interviews. She has testified in paragraph 5 of her affidavit not disputing the facts alleged by the petitioner. She does not refer to any notice in writing giving reasons for not accepting the returns being given to the petitioner. In the affidavit, however, she states further as follows:

"At *these interviews* the petitioner was informed that his return and statement for the relevant year of assessment *will*

not be accepted. After investigation into the return and subsequent statements made by the petitioner, *an assessment was made* on 30th March 1979 of the wealth and income tax for the year 1975/76."

No affidavit was filed by Mr. K. Rajaratnam, the Assessor who dealt with this file and the returns.

It was conceded at the argument by counsel for the respondents, that the 1st respondent personally did not attend to this tax return and that the Assessor who dealt with the file was still in the department. In fact he has signed the letter purported to have been sent on 4.4.79 (1R1). From this affidavit it is clear that the Assessor had not addressed his mind to the new duties imposed on him by section 93 (2) (*b*) and section 96 (C) (3) and that there was a non-compliance with the same.

The document 'D1' complained of was the notice issued on the usual form used under section 95 marked 'D1' purporting to bear the 1st respondent's name. The notice 'D' bears a date 30.3.79 and in the application No. C. A. 1391 the notice marked 'C' is dated 31.3.79 which is scored off and the date re-typed underneath as 30.3.79. It is a curious fact that a later date should have been entered first and an earlier date entered later. Be that as it may, the notice 'D' in this case was posted under registered cover only on the 21st April, 1979, as it evidenced by "D1". The date on "D1" is being challenged in view of 1R1. The respondents relied on a copy of a letter dated 4.4.79 which was produced as "1R1". The petitioner denied having received such letter and the respondents were unable to prove that such a letter was sent or to give any evidence as to how and when the letter was sent. However, there is the denial by the petitioner of having received this letter in April 1979, though he admits having been sent a copy thereof in June 1979 after this application was made to Court. The letters 1R2 and 1R3 sent by the petitioner on 30th April, 1979, made no reference to the receipt of such a letter.

The contents of this letter 1R1 are:

"The statement of accounts in respect of the copra business and the books of accounts are unsatisfactory. The reasons for rejecting the returns and accounts had already been intimated to you, in particular the price differences paid by B. C. C. in respect of copra deliveries were not brought into account.

As the assessment for 1975/76 *became time barred on 31.3.79* I have already made assessments as a *protective measure* estimating the profits from trades at Rs. 794,230 and nett wealth at Rs. 916,099."

The Assessor who signed the notice of assessment is the 1st respondent and not the Assessor who dealt with this file.

It would appear from the contents of this letter that at some stage after 31st March, 1979, at least the Assessor had realised that the law as amended had imposed a duty on him in regard to the giving of reasons for not accepting the returns, and that by this letter he was seeking to cover up his failure to perform that duty by adverting to an oral communication of reasons. The reference to the assessment having already on 31.3.79 become time barred, that an assessment was made as a *protective measure*, the fact that there was no proof forthcoming that 1R1 was ever sent and the fact that the so called assessment was posted only on 21st April, 1979, all show that the assessor had not acted with a correct appreciation of the far reaching changes introduced by Law No. 30 of 1978 which prescribed certain conditions precedent to making an assessment of income under section 93 and an assessment of the amount of tax under section 96 (C). Document 'D' was not a notice sent under section 96 (C) nor does it purport to be so sent.

It is necessary that the respondents should realise the specific duties imposed on them as these provisions have been repeated in the Inland Revenue Act, No. 28 of 1979, which is the Law now in operation for the year commencing 1st April, 1978, so that the Inland Revenue Department could recover the tax found to be due from tax payers with expedition as provided in this law without jeopardising the rights of the State to collect the revenue due to it. The law gives an Assessor a period of 3 years to examine and investigate a return while an assessee keeps on paying the tax instalments on the specified dates.

In regard to the date of the notice of assessment, it was conceded that the relevant date is the date of posting as a notice sent by post shall be deemed to have been served on the day succeeding the day on which it would have been received in the ordinary course of business. In this case the notice was admittedly posted on 21st April, 1979, long after the effective date referred

to in section 96 (C) (3), namely 31st March 1979. In this case it cannot be considered a valid notice under section 96 (C) (3) or even a valid notice under section 95 as there has been an absolute non-compliance with the mandatory provisions of section 93 (2) even if the assessment was made on 30.3.79.

The question whether this Court will issue the Writs applied for under these circumstances has now to be determined.

The petitioner cannot canvass the validity or legality of these acts of the Assessor by way of an appeal to the Commissioner of Inland Revenue. The scope of an appeal to the Commissioner has been clearly laid down in the sections dealing with appeals. An appeal from a determination of a Commissioner to the Board of Review is also very narrow in its scope. Further the Board of Review does not exercise judicial functions, but is merely an instrument created for the administration of the Revenue Law and its work is really administrative though judicial attributes are called for in the performance of its duties. It is a body created as an administrative check to see that a tax payer's liability is correctly ascertained. The fact that it could state a case in regard to a question of law to the Supreme Court to determine the liability in regard to taxes does not give a Board of Review the authority to declare notices sent by, or proceedings before an Assessor void or to quash them. It has power to review or annul an assessment if it is proved that an assessee was not liable to pay the tax charged. The power to quash a notice or proceeding before an Assessor is vested in the courts and therefore this Court must be satisfied that the circumstances justify the exercise of such a jurisdiction.

It is clear from the facts above enumerated and on the analysis of the provisions of the law applicable in this case, that there has been a total non-compliance with the mandatory provisions of the Law No. 30 of 1978. Where a statute requires a thing to be done in a particular manner, without expressly declaring what shall be the consequence of non-compliance, if the requirement is mandatory as is contemplated in section 93 (2) (*b*), the omission is necessarily fatal to its validity.

The petitioner has had no opportunity after October 1978 to challenge or correct any estimate made by the Assessor before he made the final assessment. There has been a total non-compliance with the relevant sections of the law. It cannot be said that the

Assessor in fact made an assessment of tax in terms of section 96 (C) exercising his judgment as he himself states it was done as a *protective measure,* whatever that may mean. Therefore it is obvious that no assessment of tax was made by the exercise of his judgment, but the Assessor had attempted to keep it open, as it were, to make a proper assessment later. The Assessor had no jurisdiction to make such a tentative assessment in order to circumvent the law in respect of the prescribed time limit or for future compliance with the law.

In this case the power exercised by the Assessor is not referable to a jurisdiction which confers validity. The non-observance of the mandatory provisions of the Law No. 30 of 1978 deprives the jurisdiction of the Assessor to issue the notice which he did issue. Further he does not even indicate under what particular section of the law this assessment notice was issued, whether it was under sections 93, 94 or 96 (C) (3) as amended by Law No. 30 of 1978 and no attempt was made at the argument of this matter to explain this procedure.

I am therefore of the view that the notice of assessment purporting to bear the date 30.3.79 should be quashed and hold that the petitioner is entitled to the writs applied for. The petitioner will be entitled to costs fixed at Rs. 1,050.

RANASINGHE, J.—I agree.

Application allowed.

Notice of assessment quashed.

S. M. Uwais,
Attorney-at-Law.