1971 *Present :* **H. N. G. Fernando, C.J., and Thamotheram, J.**

M. Y. M. MAKEEN, Petitioner, *and* E. M. G. TILLEKERATNE (Deputy Commissioner of Inland Revenue) and another, Respondents

S. C. 862/69—Application for a Mandate in the nature of a Writ of Certiorari *and a Writ of* Mandamus

Finance Act No. 11 of 1963—Business turnover tax—Penalty payable under ss. 119 (5), 122 (3), 144.

Where any business turnover tax is in default, and the defaulter becomes liable to pay, in addition to such tax, a penalty in terms of section 122 (3) of the Finance Act, No. 11 of 1963, no deduction can be claimed against such penalty if the amount of the business turnover tax is subsequently reduced by reason of the relief provided in section 119 (5) and a refund of the excess amount already paid as tax is given.

APPLICATION for a Writ of *Certiorari* and a Writ of *Mandamus.*

M. Tiruchelvam, Q.C., with *K. Shanmugam* and *K. Kanag-Iswaran,* for the petitioner.

Shiva Pasupati, Senior Crown Counsel, for the respondents.

Cur. adv. vult.

July 10, 1971. H. N. G. FERNANDO, C.J.—

It is common ground in this case that the petitioner became liable, in terms of Section 122 of the Finance Act No. 11 of 1963 to pay a sum of Rs. 21,971 as turnover tax for the period ending 31st March 1968, and that there had been default in the payment of this amount. On account of that delay, sub-section (3) of s. 122 rendered the petitioner liable to pay in addition a penalty of Rs. 6,383.

A Certificate under s. 144 of the Act was issued by the Commissioner of Inland Revenue to the Magistrate's Court for the recovery of these two amounts, but in pursuance of the proviso to sub-section (6) of s. 144 the Court adjourned the matter to enable the petitioner to submit to the Commissioner his objection to the tax. Thereafter the Commissioner issued a second Certificate stating that the tax recoverable had been reduced to Rs. 3,260 and certified that the total amount to be recovered from the petitioner was Rs. 3,260 as tax in default, and Rs. 7,040 as penalty (payable under s. 122 (3)).

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Counsel for the petitioner has argued that since the amount of the tax in default was reduced from Rs. 21,971 to Rs. 3,260, there should also have been a proportionate reduction of the penalty payable under s. 122 (3).

It appears however from the affidavit of the Assessor filed in this Court that the reduction of the amount due from the petitioner as tax was not made on the ground that the amount of tax due from the petitioner in terms of s. 122 (1) for the relevant period was less than the amount originally certified i.e. Rs. 21,971. This reduction was allowed on a different ground to which I shall now refer. Sub-section (5) of s. 119 of the Act provides that the maximum amount of the business turnover tax charged from any person for any year in respect of any business, shall in no case exceed 80 per centum of the proceeds or income from that business, and the sub-section further provides that in such a case, the taxpayer shall be entitled to a refund of tax paid in excess of the maximum amount. In the present case, the reduction of the amount of tax in the second certificate to Rs. 3,260 was made on account of the fact that the petitioner would be entitled to the relief provided in sub-section (5) of s. 119.

An examination of the relevant sections establishes that the turnover tax due from any person in respect of any quarter, must be paid within 15 days after the expiry of that quarter, and that the tax is in default if not duly paid. As soon as tax is thus in default the liability to pay the penalty under sub-section (3) of s. 122 immediately arises ; and if the tax in default and the penalty are not paid, the Commissioner is entitled to recover the full amount of both items by the procedure set out in s. 144.

Thus the relief allowed by sub-section (5) of s. 119 does not release a person from the liability to pay in full the tax and any penalty accruing under sub-section (3) of s. 122. The relief allowed is only that if the amount of the tax paid (not including the amount of any penalty) exceeds the maximum amount referred to in sub-section (5) of s. 119, then there will be a subsequent refund of the excess amount *paid* as tax. In the present case the Commissioner in issuing the second Certificate for a reduced amount of tax has really given the petitioner greater relief than that for which sub-section (5) of s. 119 provides. But it is clear that no relief could legally have been claimed or allowed against the penalty which sub-section (3) of s. 122 imposed for the petitioner's delay in paying Rs. 21,971 admittedly due from him as tax for the relevant period.

(I understand from learned Crown Counsel that some subsequent amendment of the Act may have altered the legal position as set out above.)

I hold accordingly that the petitioner was not entitled to claim any deduction against the penalty which accrued on account of his default.

The application is refused with costs fixed at Rs. 210.

THAMOTHERAM, J.—I agree.

Application refused.