1966 *Present :* **H. N. G. Fernando, S.P.J., T. S. Fernando, J., and Sri Skanda Rajah, J.**

A. P. XAVIER, Petitioner, *and* S. N. B. WIJEYEKOON and 3 others, Respondents

S. C. 263/65—Application for Mandates in the nature of a Writ of Prohibition and Writ of Certiorari under Section 42 of the Courts Ordinance

Income tax—Incorrect return—Power of Commissioner to impose a penalty on assessee—Constitutional validity of such power—Principle of Separation of Powers—Scope—Income Tax Ordinance (Cap. 242), ss. 80 (1) (2), 90—Writ of Prohibition.

The imposition, by executive officers, of penalties under Revenue Statutes and similar cases, where the penalties have " the remedial character of sanctions ", does not involve the exercise of judicial power.

Accordingly, when the Commissioner of Inland Revenue (or the Board of Review), acting under section 80 of the Income Tax Ordinance, imposes a money penalty against an assessee for making an incorrect return, he does not exercise judicial power such as can only be exercised by a person appointed by the Judicial Service Commission. A Writ of Prohibition does not, therefore, lie to restrain the Commissioner from recovering the penalty.

APPLICATION for Writs of Prohibition and Certiorari.

E. B. Wikramanayake, Q.C., with *K. Sivagurunathan* and *J. V. C. Nathaniel*, for the Petitioner.

H. L. de Silva, Crown Counsel, with *P. Naguleswaran*, Crown Counsel, for the Respondents.

Cur. adv. vult.

July 22, 1966. H. N. G. FERNANDO, S.P.J.—

Section 80, sub-section (1) of the Income Tax Ordinance (Cap. 242) provides as follows :—

" Where in an assessment made in respect of any person the amount of income assessed exceeds that specified as his income in his return

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

In the present case, the Commissioner acting under that sub-section imposed a penalty against the petitioner ; the amount of the penalty was reduced by the Board of Review on an appeal taken to the Board under sub-section (2). The petitioner thereafter applied to this Court for a writ of prohibition to restrain the Commissioner from recovering the reduced penalty. Learned Crown Counsel does not concede that a writ may properly issue in the circumstances, but it suffices for present purposes to consider only the contention of the petitioner that neither the Commissioner nor the Board of Review had jurisdiction to impose a penalty against the petitioner.

This contention is based on the proposition that section 80 (1) confers judicial power, which can only be exercised by a person appointed by the Judicial Service Commission. The principal reason urged in favour of this proposition is that section 80 is intended to be an alternative to section 90. Under the latter section, a person who makes an incorrect return under the Ordinance is guilty of an offence punishable with fine and imprisonment upon conviction in a court of law : therefore, it is argued, when the legislature provided in section 80 for the imposition of a penalty without prosecution, this alternative power to punish a person making an incorrect return is itself equivalent to the exercise of judicial power.

Counsel for the petitioner conceded that Parliament can validly empower an executive officer to impose a penalty in a case where the income returned by a person is less than his income as assessed under the Ordinance. But he contended that section 80 (1) requires a judicial determination because of the clause " unless that person proves to the satisfaction of the Commissioner.... ". I am unable to accept this distinction. An executive power is not converted into a judicial power by reason of the fact that the power will not be exercised if the subject is able to establish, to the satisfaction of the person empowered, the existence of some mitigatory circumstance.

In addition, I am in agreement with the submission of learned Crown Counsel that every exercise of power to impose a penalty is not to be regarded as the exercise of judicial power.

In *Ocean Steam Navigation Co. v. Stranahan*[1] [1909, U. S. Reports Lawyers Edition p. 1013] the U. S. Supreme Court considered the nature of a Statute which provided that " if it shall appear to the satisfaction of the Secretary of the Treasury that any alien brought to the United States (in a vessel) was afflicted with a loathsome or dangerous contagious disease....., the master or owner (of the vessel) shall pay to the collector of customs the sum of 100 dollars for each and every violation of the provisions of this section ". The Court examined the validity of the contention that " in all cases of penalty or punishment, enforcement must depend upon the exertion of judicial power, either by civil or criminal process ", and the further contention that the Statute had entrusted judicial power to administrative officials.

In rejecting these contentions, the Court stated that the " settled judicial construction, not only as to the tariff, but as to internal revenue, taxation and other subjects, has proceeded on the conception that it was within the competency of Congress.....to impose appropriate obligations and to sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power ".

In *Helvering v. Mitchell*[2] [U. S. Reports, 82, Lawyers Edition p. 917] the Court discussed the validity of provision in a Revenue Act to the effect that " if any part of the deficiency (in an income tax return) is due to fraud with intent to avoid tax, then 50 per cent. of the total amount of such deficiency shall be assessed, collected and paid ". The assessee in that case had previously been charged in the Courts, under a different provision of the Statute, but upon the same facts, with the offence of wilfully attempting to evade tax. He had been acquitted of that charge, and the objection taken to the imposition of the penalty was founded on the arguments—(*a*) that the former acquittal operated as *res judicata* on the question of fraud with intent to evade tax, and (*b*) that the liability to the penalty despite the previous acquittal offended the principle of " double jeopardy " embodied in the Constitution.

In rejecting these arguments, the Court cited with approval the dictum I have quoted above from the 1909 decision, and then proceeded :—" The remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to re-imburse the Government for the heavy expense of investigation and the loss resulting from the tax-payer's fraud ". Such a sanction was held to be a civil, as opposed to a criminal, sanction. What the

[1] *1909, U. S. Reports, Lawyers Edition p. 1013.*
[2] *U. S. Reports, 82, Lawyers Edition p. 917.*

Court meant by the expression " civil sanction " is made clear by the further statement that " the determination of the facts upon which liability is based may be by an administrative agency instead of a jury". It is implicit in this statement that the imposition of the sanction does not involve the exercise of judicial power in a context in which the sanction is imposed by an administrative authority under Statute. That precisely is the case here.

The Commissioner of Inland Revenue undoubtedly holds a public office, and not a judicial office. The decisions of this Court and of the Privy Council in cases under the Bribery Act, and the Muslim Marriage and Divorce Act, are in no way here relevant. The problems which arise in this case and in others call for consideration of the true scope and effect of the principle of the Separation of Powers. In the consideration of these novel problems, this Court cannot derive any assistance from the " traditional " source, the English Law Reports. But decisions in other jurisdictions, where the principle has been constitutionally adopted, particularly in the United States where the Courts have discussed the meaning and effect of the principle so often and in many different contexts, are of great persuasive authority. And in none of several recent cases in this Court have I heard any argument that such decisions, as have upheld the validity of Statutes, are not in accord with the principle of the Separation of Judicial Power as recognized by our Constitution.

In the order made in Application No. 414 of 1964[1] for the quashing of a conviction and sentence by a Court Martial, there is some discussion, relevant also to the present case, of the recent judgment of the Privy Council concerning the Separation of Judicial Power under our Constitution.

I would hold accordingly in the instant case that the imposition of a penalty under section 80 of the Income Tax Ordinance did not constitute the exercise of judicial power. No other ground was urged before us for the issue of the Writ of Prohibition sought in this case. The application for that Writ is refused.

T. S. FERNANDO, J.—I agree.

SRI SKANDA RAJAH, J.—I agree.

Application refused.

[1] *(1964) 69 N. L. R. 193.*