1949 *Present :* **Dias J. and Gunasekara J.**

GUILLAIN, Appellant, *and* COMMISSIONER OF INCOME TAX, Respondent

S. C. 431—Income Tax, Case Stated, 25/69—BRA, 202.

Income Tax—Additional assessment—Appeal by assessee—Burden of proof—Income from undisclosed source—Non-disclosure of information by assessee—Effect on assessment—Evidence—Rules of evidence—How far binding on Assessor—Income Tax Ordinance (Cap. 188), sections 64 (3), 65, 73 (4).

(i) The burden of proof in an income tax appeal, whether to the Commissioner under section 69 of the Income Tax Ordinance or to the Board of Review under section 73 (4), lies on the assessee.

(ii) It came to the knowledge of the income tax authorities that the assessee-appellant, although his declared source of income was his salary as the manager of an hotel, had to his credit in two banks a large sum of nearly two lakhs of rupees. The assessee, although called upon to furnish returns and to give information, failed to do so. Thereupon, the assessor, acting under section 65 of the Income Tax Ordinance, proceeded to assess him "at the amount or additional amount at which according to his judgment such person ought to have been assessed".

Held, that, inasmuch as the onus was upon the assessee to displace the assessment, the assessee took grave responsibility in not producing materials which would undoubtedly have been of great value for the purpose of forming the assessor's opinion. In the circumstances the assessor was not bound by the strict rules of evidence and was entitled to make an assessment according to his judgment.

CASE stated by the Board of Review under section 74 of the Income Tax Ordinance.

N. E. Weerasooria, K.C., with *G. T. Samerawickrame*, for assessee-appellant.—

The findings of the Commissioner are based on conjecture and suspicion only and not on facts. The question whether there is any evidence to support the findings apart from the adequacy of evidence is a question of law and one fit for determination on a case stated. See *American Thread Co. v. Joyce* [1].

The initial onus has been cast on the assessee without any proof being adduced against him. It is not open to the taxing authorities to do this and then to disbelieve the assessee's assertion that he received no profits and impose a tax without any affirmative proof. See *In re Bishnu Priya Chowdhurani* [2].

The appellant gave evidence to the effect that there were no undisclosed profits liable to taxation in his hands and stated categorically the sources from which he received sums of money. This is the only evidence in the case. The Commissioner has suggested in his order that the appellant was engaged in Black Market operations in liquor. That would amount to a criminal offence. There is no evidence at all to support that suggestion. It is submitted that the Commissioner was not entitled to speculate in that way or to assume conduct amounting to a criminal offence without evidence.

[1] *(1912) 106 L. T. 171.*

[2] *50 Cal. 507.*

One of the documents relied on by the Commissioner is R 23 which is said to be a comparative statement of profits from other Bars as appearing in departmental files. The names of the Bars are not given. These are altogether *res inter alios actae* and not binding on the appellant. Apart from that, if the Commissioner had material which he wished to use, he should have put it to appellant to enable the latter to show the true effect of that evidence and its applicability or otherwise to the case. Where the names and identity of the Bars are withheld this cannot be done. It is submitted that the evidence is worthless and should not have been considered.

The document R 23 is a letter written on behalf of the appellant to the assessor for the purpose of a settlement and is marked " without prejudice ". It is referred to several times in the order as containing admissions which are used to support the findings if they do not form their basis. The objection to this document is twofold : (*a*) It should not have been admitted at all, (*b*) The true effect of a document marked " without prejudice " is that no admission is made thereby but a basis of settlement proposed. See *Cory v. Bretton* [1].

By reason of the alleged admissions the Commissioner has proceeded on the footing that it was common ground that there were undisclosed profits and he has thereby gravely misdirected himself as to appellant's case.

M. F. S. Pulle, K.C., Acting Attorney-General, with *H. W. R. Weerasooriya, Crown Counsel*, for the Commissioner of Income Tax, respondent.—

In Income Tax appeals the onus has always been considered to be on the assessee to show that the assessment is wrong. See *Haythornthwaite v. Kelly* [2] ; *Norman v. Golder* [3]. The documents produced in this case show that the assessor repeatedly called on the appellant for explanations but the latter failed to give any. In such circumstances taxing authorities have been held entitled to make an estimated assessment on such materials as are available to them. See *Mcpherson & Co. v. Moore* [4].

The returns of the appellant for previous years disclose only a small amount received as remuneration for employment. The discovery of a large sum like Rs. 198,557·10 in his bank account coupled with his failure to give any explanation suggests that he had some undisclosed source of profit and justified the assessor making an additional assessment. The appellant gave evidence and put forward certain explanations to the Commissioner which he did not accept. It is submitted that in view of appellant's previous conduct the Commissioner was entitled to say that he would not act on his bare word, especially when evidence to corroborate him was available but was not brought forward.

The Commissioner has found that the appellant had undisclosed profits in his hands and has pointed out that operations in the Black Market in liquor was the probable source. There is an independent finding on the relevant facts.

With regard to R 29 which is a comparative statement of Bars' profits no objection was taken at the time this document was put in or in the petition of appeal to the Board. The objection to it, if any, must therefore

[1] *4 C. & P. 462.*
[2] *11 Tax Cases 664.*
[3] *26 Tax Cases 297.*
[4] *6 Tax Cases p. 114.*

be taken to have been waived. Apart from that when an assessee has failed to disclose relevant material when called upon to do so, the assessor is entitled to make an estimate and for that purpose to rely on any material in his possession—*Ganga Ram Balmokand v. The Commissioner of Income Tax, Punjab* [1].

With regard to R 23 too no objection was taken at the time it was put in or in the petition of appeal to the Board. Any objection to it also must therefore be taken to have been waived. Further, under sections 71 (4) no grounds other than those stated in the petition could have been urged before the Board and *a fortiori* before this court. The present appeal is really from the order of the Board but no reasons against it have been urged. It is the order of the Commissioner that has been attacked.

Apart from the admission in the letter R 23 which has been objected to, the petition of appeal to the Board goes on the footing that there have been undisclosed profits and the only question that remained was as to the amount. The same admission therefore as is contained in the letter is found in it. There is also ample evidence otherwise to support the finding of the Commissioner which should be affirmed.

N. E. Weerasooria, K.C., in reply.—Rightly considered the petition of appeal to the Board does not contain an admission to the effect that the appellant had undisclosed profits in his hands.

The order of the Board confirms the order of the Commissioner and is for that reason subject to the same infirmities and open to the same criticism.

Section 74 of the Ordinance vests the Board with jurisdiction to state a case and this court is called upon to hear and determine the questions of law arising on the stated case. Reference to the petition of appeal to the Board need not therefore be made to decide what such questions are nor can they be restricted to such as are contained in it.

Cur. adv. vult.

September 22, 1949. DIAS J.—

This is a "Case-stated" by the Board of Review under section 74 of the Income Tax Ordinance (Chapter 188).

The following facts are not in dispute: Mr. G. F. Guillain (hereafter referred to as "the assessee") carried on a business in Ceylon known as "The Ceylon Hides & Skins Co." (hereafter called "the hides business"). In 1936 the assessee acquired the Hotel Metropole in Colombo. Because his father-in-law, Mr. Vander Poorten, had obtained a money decree against him, and in order to prevent the hotel being seized under the writ of his father-in-law, the assessee adopted the expedient of having the transfer of the hotel made out, not in his own name, but in the name of his wife, whose power of attorney he held. Although the assessee was ostensibly only the salaried manager of the Hotel Metropole, he, in fact, appropriated all the profits from that business and merely paid his wife an allowance, and on one occasion paid her hospital bill. Both husband

[1] *11 Report of Income Tax Cases p. 19.*

and wife submitted income tax returns and were assessed thereon. The profits or income from the Hotel Metropole were shown in the wife's income tax returns.

In the year 1938, either owing to deteriorating world conditions or from other causes, the assessee found that his hides business was not remunerative. The money relating to this business was banked by the assessee in the National Bank of India and the Chartered Bank. The exhibits R 27 and R 28 show that in December, 1938, the credit balances lying in both accounts aggregated a sum of Rs. 99·83 only. The assessee admits that since 1938 his hides business was in a moribund condition.

R 7 is the income tax return which the assessee forwarded to the authorities for the period 1944/45, *i.e.*, from April 1, 1943, up to March 31, 1944. He stated under the heading " Principal Employment " that he was the salaried manager of the Hotel Metropole and that his employer was his wife. His salary is stated to be Rs. 200 per mensem. Under the heading " Trades, Businesses and Professions " he stated that he was the owner of The Ceylon Hides & Skins Co. but declared that there were " no transactions " in regard to that business during the year in question. Under the heading " Bank Interest " he stated that he had earned no bank interest. Under the head " Notes & Explanations " the assessee declared " It must be noted—(1) There were no transactions this year by the Ceylon Hides & Skins Co., (2) My salary at the Hotel Metropole was brought from Rs. 200 to Rs. 300 a month from January, 1944 ".

In his return R 6 for the tax year 1945/46, *i.e.*, from April 1, 1944, up to March 31, 1945, the assessee declared that his salary as the manager of the Hotel Metropole was Rs. 3,600 per annum. He stated that the hides business had no transactions during that year, and that he earned no bank interest. Under " Notes & Explanations " the assessee stated " Claim for special allowance—Please consider that on the 15th March, 1945, a sum of French francs 30,000 or an equivalent of Rs. 2,015·75 was sent by me to my distressed family in liberated France as urgent relief ".

The assessee's return for the year 1946/47 (*i.e.*, from April 1, 1945, up to March 31, 1946) is the exhibit R 5, the contents of which in the main are identical with R 6.

According to these returns R 5, R 6 and R 7, it is clear that during the period involved the assessee had no income other than his salary as the manager of the Hotel Metropole.

The assessee has admitted that though his return for 1944/45 shows that he received no bank interest, he did receive a sum of Rs. 234, as bank interest which should have been included in his return.

About the beginning of 1947 the Income Tax authorities had reason to believe that the assessee had not made a full disclosure of his income. In such cases the Ordinance vests the authorities with wide powers. Not only may an assessor give notice in writing to any person who is believed to be liable to pay income tax to disclose his income in proper form (s. 54 (1)), but a duty is also cast upon every person chargeable with tax for any year of assessment and who has not been noticed by the Income Tax Department to make a return of his income without being noticed to do so—s. 54 (2).

About the beginning of 1947 it came to the knowledge of the authorities that the assessee, although his only declared source of income was his salary as the manager of the Hotel Metropole, had to his credit in the two banks the large sum of Rs. 198,557·10. They considered this was a matter which merited investigation, because this sum which aggregated nearly two lakhs might on investigation disclose income received by the assessee and which he had not disclosed.

Not only does the Income Tax Ordinance empower the authorities to call for information, but under s. 65 they have the power to make additional assessments within three years after the expiration of the year of assessment, and in cases where the non-assessment or under-assessment is due to fraud or wilful evasion, the additional assessment may be made within ten years after the expiration of the year of assessment. Commenting on a similar provision of the Income Tax Act in Britain, Lord Hanworth M.R. said in *Haythornthwaite & Sons v. Kelly* [1]—" It is to be observed that that period of six years may, and I daresay in some cases does, put a very serious burden indeed upon the subject, because it means this—that although the subject may have cleared up his income tax, I use rather a neutral word—five years before, yet, he is still liable to have a further assessment made upon him for a period which does not expire until six years after the expiration of the year of assessment. For that reason, it is very important that accounts should be kept and documents preserved, lest there should be a further assessment made upon a person or a company ".

The authorities, having decided that further investigations were necessary, and that an additional assessment might have to be made, called upon the assessee to submit further returns for the years in question. The correspondence which has been produced indicates the extremely unsatisfactory and evasive manner in which the assessee answered the queries put to him. For example—he was required to produce for inspection his bank pass books, bank statements and cheque counterfoils. He at first ignored the letter, and when his attention was invited, replied that he had not preserved the documents. He was then called upon to supply information with regard to the Hotel Metropole and the hides business. He was also told that if he had not preserved the requisite documents, he should obtain copies of them—see R 11 of May 28, 1947. This was not done.

Where a person has not furnished a return of income when called upon to do so, and the assessor is of opinion that such person is chargeable with tax, the law allows the assessor " *to estimate* the amount of the assessable income of such person, and to assess him accordingly "—ss. 64 (3), 65. This the assessor proceeded to do in this case. In *Ogilvie v. Barron* [2] Rowlatt J. said in sending a case back for a further assessment " It must go back in order that the Commissioners may state, and state in terms, what is the figure which they arrive at, applying their minds and their judgments truly and actually to the figures of the relevant years—*guessing them, if you like*, if they do not know them and if they cannot be informed of them ; *guessing them, if you like*, to the best of their ability *from the sources of information they have*, and from the

[1] *11 Tax Cases p. 664.* [2] *11 Tax Cases p. 808.*

best of their skill and judgment, but applying their minds really to that . . . . They must really apply their minds to the real question, and if they will tell the Court what figure they arrive at—when they really do that—then the Court, of course, must accept it ". In *Macpherson & Co. v. Moore* [1] the Scottish Court of Session held that where an assessee does not choose to state an account so that the amount of profits may be strictly determined, he cannot complain if " a random assessment " is made upon him by the Crown.

The additional assessment thus made against the assessee is as follows:—

	1944/45 Rs. c.	*1945/46* Rs. c.	*1946/47* Rs. c.
Income assessed	.. 103,240 0	.. 103,600 0	.. 103,600 0
Tax payable	.. 23,501 74	.. 35,870 56	.. 36,279 22
Tax in dispute	.. 23,239 94	.. 35,520 14	.. 35,894 76

What the assessor did was this: He took the income disclosed in the returns R 5, R 6 and R 7 and on the material available to him he added Rs. 100,000 for each year and the undisclosed interest. The assessor had reason to believe that the assessee had not disclosed his full income. The assessee, although called upon to furnish returns and to give information, failed to do so. Therefore, the assessor under s. 65 of the Ordinance proceeded to assess him " at the amount or additional amount at which *according to his judgment* such person ought to have been assessed ". In *Commissioner of Income Tax v. Savarimuttu Chetty* [2] this Court pointed out that such additional assessment may include amounts omitted, or overlooked, or miscalculated.

The appeal of the assessee under s. 69 of the Ordinance came up for consideration by Mr. T. D. Perera, the Commissioner of Income Tax, on July 25, 1947—see XI. On that day Advocate Mr. Chitty appeared for the appellant-assessee. The matter was adjourned for July 28, 1947, when Mr. E. F. N. Gratiaen, K.C., with the late Mr. Advocate D. W. Fernando represented him. On this day the assessee began, and gave evidence and was cross-examined. Learned counsel raised no question as to who should begin, or as to the party on whom the *onus* lay. On the application of learned counsel the inquiry was postponed until August 6, 1947, for the purpose of effecting a settlement or compromise in regard to the additional liability—see s. 69 (2) (3). When the proceedings were resumed on October 30, 1947, Mr. T. D. Perera had been succeeded by Mr. Rajapatirana. No objection was taken to the latter continuing the inquiry. On this last day Advocate Mr. Jayawickreme appeared for the appellant. The same firm of proctors instructed all three learned counsel.

The findings of the Commissioner of Income Tax are as follows: (1) The assessee had failed to disclose profits amounting to Rs. 142,000 during the period January 1, 1940, to June 3, 1947, and (2) the assessments under appeal were reduced as follows:—

1944/45 Profits from trade reduced to Rs. 56,169

1945/46 Profits from trade reduced to Rs. 50,797

1946/47 Profits from trade reduced to Rs. 41,904

[1] *6 Tax Cases at p. 114.* See also *Wall v. Cooper, 14 Tax Cases at pp. 555, 559.*
[2] *(1937) 39 N. L. R. at p. 5.*

The assessee appealed against this order to the Board of Review under s. 70. His petition of appeal is the exhibit X 2. For the reasons given in X 5, the Board of Review dismissed the appeal. The assessee then requested the Board to " state a case " for consideration by the Supreme Court under s. 74. The " case-stated " sets out the following points of law :—

(*a*) That the Commissioner and the Board were wrong in that they misdirected themselves in casting the initial *onus* on the applicant to disprove a case that had not been made at all, and in the extent of the *onus* that was cast on the applicant ;

(*b*) That the Commissioner and the Board have misdirected themselves in requiring corroboration of the applicant's story, and a minimum degree of proof which are not legal requirements in a case of this kind ;

(*c*) That the Commissioner erred in making the applicant liable to the assessment in place of his wife who is the owner of the business ; and

(*d*) That there has been—

(i) a misreception of evidence, and

(ii) a failure to consider evidence which was properly admissible.

The Supreme Court in dealing with a " case-stated " under s. 74 has only to decide the questions of law which have been stated by the Board. Subject to the decision by this Court of such points of law, the decision of the Board of Review is final. What is a " question of law " has been laid down in *R. v. Seeder de Silva* [1]. It is a fundamental matter that all questions of fact are for the authority, whether the Commissioner of Income Tax or the Board of Review, who is charged with the matter, and this Court can interfere only if there is some error of law—it being, of course, an error of law if a finding of fact is arrived at with no evidence to support it. It is not an error of law to arrive at a finding of fact where there is, so to speak, evidence both ways—*Montague Burton, &c. v. Commissioner of Inland Revenue* [2]. In *Wall v. Cooper* [3] Lord Hanworth said : " It is for the Commissioners to determine the facts. They had material before them on which they can come to the conclusion that they have, and having done so this Court cannot any more than could Mr. Justice Rowlatt interfere with their decision on fact ". We can consider the findings of fact reached by the Commissioner or the Board of Review only in so far as they are caught up within the questions of law set out in the case-stated.

I shall now proceed to deal with each of the questions of law submitted for our consideration :

(*a*) *Was the onus wrongly laid on the assessee ?*

I am clearly of opinion that there is no substance in this submission. Once an assessment has been made—whether it is one made on a return submitted by the assessee, or an estimated assessment made under the provisions of s. 64 (2) (*b*) or s. 65, there arises a rebuttable presumption

[1] *(1940) 41 N. L. R. p. 340.* [2] *28 Tax Cases at p. 58.*

[3] *14 Tax Cases at p. 559.*

that the official act of assessment has been rightly and regularly performed. Therefore, when an assessee appeals against such an assessment, the *onus* of displacing this presumption rests on him, and it is for the assessee to begin and to satisfy the Commissioner that the assessment is wrong or excessive. It is to be observed that the learned counsel who appeared before the Commissioner did not object to begin. S. 102 of the Evidence Ordinance makes the position quite clear—"The burden of proof in a suit or proceeding lies on that person who would fail, if no evidence at all were given on either side". When this appeal came up for determination before the Commissioner of Income Tax, had no evidence at all been led on either side, the appeal would have to be dismissed because there existed a presumption that the assessment was regularly made. When the assessee appealed to the Board of Review, s. 73 (4) clearly shows that the "*onus* of proving that the assessment as determined by the Commissioner on appeal . . . . . is excessive shall be on the appellant".

There is direct authority of the English Court of Appeal on this question of the *onus* in Income Tax appeals.

In *Haythornthwaite v. Kelly* [1] the facts were as follows: The appellant company was assessed for income tax for the years 1920/21 in the sum of £4,905 less a deduction of £1,317. At the end of the year the company showed that the year's trading had resulted in a loss, and the assessment was reduced to Nil under s. 34 of the Income Tax Act, 1918. In 1924 the authorities discovered that the company's capital account had been increased by a sum of £22,920 stated to represent money paid in by the individual shareholders. The authorities came to the conclusion from this and other information that profits chargeable to tax had been omitted from the first assessment. Therefore an additional assessment was made on the company for the year 1920/21 in the sum of £50,000. The company appealed, and one of the questions for decision was as to the party on whom the *onus* lay. Lord Hanworth M.R. said at p. 667: "It is quite plain that the Commissioners are to hold the assessment standing good, unless the subject—the appellant—establishes before the Commissioners by evidence satisfactory *to them* that the assessment ought to be reduced or set aside". (At p. 668) "The question of whether they accept that evidence or not is a matter for the discretion of the Commissioners . . . . Inasmuch as the *onus* lay upon the Company to displace the assessment, those who were concerned for the company took a grave responsibility in not producing, if they were available, materials which would undoubtedly have been of serious import and great value for the purpose of forming the Commissioners' opinion". Sargent & Lawrence L.JJ. agreed. This case was followed by the English Court of Appeal in *Norman v. Golder* [2] when Lord Greene M.R., Finlay & Morton L.JJ. held that this question of *onus* was not an arguable one. An application to appeal to the House of Lords was refused.

In my opinion this question of law can be answered only in one way. The *onus* in an income tax appeal whether to the Commissioner under s. 69 or to the Board of Review under s. 73 (4) lies on the assessee. Not only

[1] *11 Tax Cases 664.* [2] *26 Tax Cases at p. 297.*

did the *onus* lie on the assessee in the present case but the facts which would enable the Commissioner to reduce or set aside the additional assessment were facts which were peculiarly within his own knowledge. He did not disclose them when called upon to do so. This point of law, therefore, fails.

(*b*) *Did the Commissioner of Income Tax and the Board of Review misdirect themselves in requiring corroboration of the assessee's story? Did the Commissioner or the Board call for a minimum degree of proof from the assessee?*

What was the case which the assessee had to meet? In his income tax returns the assessee showed as his sole source of income his salary as manager of the Hotel Metropole. Upon investigation, the assessor discovered that for the years of assessment 1942/43 to 1947/48 the assessee had deposited in the two banks large sums of money although his hides business terminated in 1938 and the assessee had declared that he had no other source of income than his salary as hotel manager.

These deposits are as follows:

	National Bank Rs. c.	*Chartered Bank* Rs. c.	*Total* Rs. c.
Year to December 31, 1941	Nil	5,250 0	5,250 0
December 31, 1942	45,837 19	13,863 20	59,700 39
December 31, 1943	60,491 14	9,881 80	70,372 94
December 31, 1944	46,036 85	3,373 2	49,409 87
December 31, 1945	39,223 97	9,806 41	49,030 38
December 31, 1946	8,200 0	16,800 0	25,000 0
			258,763 58

It will be recalled that on December 31, 1938, the balance to the credit of the assessee in both banks was less than Rs. 100. The Income Tax Department when it discovers a state of facts like this would be justified in calling upon the assessee to submit a further return of his income, so that the authorities might satisfy themselves that no evasion of income tax has taken place. When called upon to do so, the assessee failed to supply the information called for. Even assuming that the assessee appropriated the whole of the profits of the Hotel Metropole, his drawings were only about Rs. 48,000. When on May 28, 1947, the Commissioner by his letter R 11 called for further information from the assessee, the latter on June 3, 1947, drew out of both banks the sum of Rs. 198,557·10. Under s. 81 (1) (*b*) of the Ordinance the Commissioner has power to call upon a banker holding money on account of a defaulter to pay the amount of the tax to the Department. The Commissioner drew the inference that the act of the assessee in drawing out this money was to prevent its being seized by the authorities, in the same way by which he placed the Hotel Metropole beyond the reach of his father-in-law. What is more on June 6, 1947, the assessee and his wife entered into the agreement A 7, the wife's power of attorney in the assessee's favour was revoked, and the wife took charge of the Hotel displacing the assessee as manager.

When the case come up in appeal not only had the assessee to explain all these facts and circumstances, but where corroboration of his testimony was available any tribunal would expect that such corroboration would be forthcoming. No doubt s. 134 of the Evidence Ordinance enacts

that " No particular number of witnesses shall in any case be required for the proof of any fact ", but at the same time where facts are deposed to by a person who is vitally interested in a matter and who has available witnesses and documents who can be called and which can be produced in order to support his word, and such person does not call them or produce the documents, the tribunal would be entitled to draw an inference adverse to the party who withholds such evidence. In *Haythornthwaite v. Kelly* [1] the fact that the assessee had books of account which could have been but were not produced, was held to lead to an inference adverse to the appellant—see at pp. 669–670. The Court of Appeal pointed out that " inasmuch as the *onus* lay upon the company to displace the assessment, those who were concerned for the company took a grave responsibility in not producing, if they were available, materials which would undoubtedly have been of serious import and great business value for the purpose of forming the Commissioner's opinion "—at p. 668. " When that is not done it is not surprising that the Commissioners as well as others may draw inferences which are not satisfactory to the company but inferences which displace the apparent hardship on the subject "—at p. 670.

I hold that in the circumstances of this case the Commissioner of Income Tax was entitled to direct himself that he would not accept any particular evidence unless it was corroborated. It is impossible for me to say that he was wrong in so doing, or that either he or the Board of Review misdirected themselves on the point.

What was the explanation of the assessee for his possession of this large sum of money ? He stated that part of this money represented the profits of the Hotel Metropole which he appropriated. This the Commissioner has accepted, and in his final decision he has deducted a sum of Rs. 43,500 on this account as well as a sum of Rs. 10,000 as being savings on his salary. These aggregate Rs. 53,500. The Commissioner has also allowed to the assessee a sum of Rs. 8,869 alleged to have been remitted to France. He has disallowed the balance as not having been proved. Counsel for the assessee claimed that the total sum which ought to be deducted should be Rs. 149,427 made up as follows :

(1) Rs. 37,000 receipts from an arbitration award in 1931
(2) 5,000 cash in hand
(3) 7.927 debts due in France
(4) 72,000 hotel profits
(5) 7,500 De Bossu's debt
(6) 20,000 " A married woman's money given to the assessee for safe-keeping "

The Commissioner rejected (1). In regard to (2) the Commissioner allowed to the assessee not Rs. 5,000 but Rs. 10,000 as savings from salary. Claim (3) was not accepted. On (4) the Commissioner allowed to the assessee a sum of Rs. 43,500. Claims (5) and (6) were rejected. The Commissioner found as a fact that the undisclosed profits aggregated Rs. 153,926, but " in order to bring it to a round figure and to take in any possible further adjustment " he determined that the undisclosed

[1] *11 Tax Cases p. 664.*

profits to be assessed additionally was Rs. 142,000, and he directed that the assessments under appeal should be reduced in the manner indicated in his order.

In my opinion this point of law fails.

(c) *Did the Commissioner err in making the assessee liable for the assessment in place of his wife who is the owner of the business ?*

I must confess that I cannot follow this contention. The question was not who should be assessed, but whether Mr. G. F. Guillain, the assessee, should be assessed ? On this point the assessee himself admits that he took all the profits of the Hotel Metropole. Furthermore, neither the Commissioner nor the Board of Review has held that the undisclosed profits which have now been assessed are profits from the Hotel Metropole. Neither the Commissioner nor the Board of Review has held that the Hotel Metropole belongs to the wife of the assessee. In the petition of appeal to the Board of Review the lawyers of the assessee have stated that this was immaterial—" The appellant submits that the question as to whom the Hotel belonged or what the appellant's position was in regard to the Hotel has no bearing on income tax liability "—see X 2, paragraph 5.

It is not impossible for a man to derive an income from some secret source which he has not disclosed or does not desire to disclose.

In my opinion this point is without substance. The assessee has not been made liable for income tax which his wife should pay.

(*d*) (i) *Has there been a misreception of evidence ?*

This legal objection applies to the admission of the two documents R 23 and R 29.

As I have already indicated, on July 28, 1947, after the assessee had given evidence, his learned counsel asked that the inquiry should be adjourned so that a settlement or compromise might be reached. On August 14 a minute in the assessor's file R 31 shows that the proctor for the assessee saw the assessor " for a preliminary discussion regarding the figures on which the assessment will be made ". The assessor gave him the figures and also undertook to send to the proctor a statement showing how those figures had been arrived at. By his letter R 32, dated August 15, the assessor sent to the proctor the statement. To this letter the assessee's proctor wrote the letter R 23 dated September 10, 1947, and marked it " Without prejudice ".

It is contended that it was improper for the Commissioner to have considered a letter sent " without prejudice " in his order X 1. Undoubtedly a letter written without prejudice is privileged—s. 23, Evidence Ordinance. But parties to a non-criminal proceeding are entitled to waive rules of procedure and evidence. So far as the record goes the exhibit R 23 was admitted without any objection from the assessee or his lawyers. In the petition of appeal to the Board of Review no point has been raised nor any complaint made in regard to the admission of R 23. In the case-stated there is no specific reference either to R 23 or R 29.

With regard to R 29 the following passage in the Commissioner's finding is criticised : " The assessor has also put before me a statement (R 29) showing rates of gross profits in the bars in Colombo and the rates of gross profits in the bar in the Hotel Metropole. I have examined the statement with the relative files, and it is quite clear from this statement that there has been a serious understatement of profits by Mr. Guillain.

The learned Attorney-General cited the Indian case of *Ganga Ram Balmokand v. The Commissioner of Income Tax, Punjab* [1]. In this case the authorities after examining the accounts of the assessees who were a firm of soap manufacturers and the evidence produced under s. 23 (2) of the Indian Income Tax Act were not satisfied either with the correctness or the completeness of the accounts, mainly on the ground of the absence of any stock register and vouchers, and the inability of the assessees to prove the total consumption of raw materials, &c., as compared with other soap manufacturers in the locality. The Indian Income Tax authorities, therefore, made an estimate by raising the value of the sales from Rs. 314,456 to Rs. 350,000. The High Court held that in the circumstances the assessor was justified in acting as he did. The authorities which have been cited earlier in this judgment indicate that a distinction must be drawn between an assessee who produces his books and accounts and makes a full disclosure, and one who either makes a return which the authorities are unable to accept, (s. 64 (2) (*b*)), or one who fails to furnish any return at all (s. 64 (3)) or one who has been under-assessed (s. 63). In the latter cases the assessor is entitled to " estimate " the income or to assess the defaulter " according to his judgment ". In doing so the English Courts have gone to the extent of holding that the assessor may " guess " the estimated income—*Ogilvie v. Barron* [2]. This may appear to be a hardship on the assessee, but in reality it is not so. Where an assessee does not choose to submit his accounts, or fails to make a true and full disclosure, or by fraud or wilful evasion endeavours to escape liability, so that the amount of his profits cannot be strictly determined, he cannot complain if a " random assessment " is made upon him by the Crown—*Macpherson v. Moore* [3]. In such cases the authorities are not bound by the strict rules of evidence.

The Attorney-General submitted that the Commissioner of Income Tax had on the facts of this case independently reached the conclusion that the sum of Rs. 198,557·10 could not possibly represent profits from the Hotel Metropole or the hides business. There is force in that submission. All the facts and circumstances support the view that this sum or the greater portion of it accrued to the assessee as profits from some undisclosed source. One may speculate as to what that source could be, but it is irrelevant. Therefore, having formed this view, the Commissioner in order to test the correctness of his finding independently arrived at, looked at R 29 in order to see how the assessee's figures compared with similar businesses. I agree with the Attorney-General that the particular passage in the Commissioner's findings is not happily worded, but what he means appears to be clear when the findings are

[1] *11 Reports of Income Tax Cases, p. 10*
[2] *11 Tax Cases, p. 808.*
[3] *6 Tax Cases at p. 114.* See also *Wall v. Cooper, 14 Tax Cases at p. 555 559*

regarded as a whole, namely, that the returns for the Hotel Metropole do not justify the inference that this large sum of Rs. 198,557·10 could be the profits from the Hotel Metropole. It could not possibly have accrued from the hides business, which admittedly was in a moribund condition at the material dates. Therefore, this money or the greater portion of it must represent profits from some undisclosed source.

The record shows that R 29 was admitted *inter partes* and without objection from the assessee or his legal advisers. I am therefore constrained to hold that no objection can now be taken to the admission of the document. In the case stated no specific reference has been made to R 29.

(*d*) *Has there been a failure to consider evidence which was properly admissible?*

In giving evidence before the Commissioner the assessee stated "A certain married lady had given me certain money to keep in trust for her—Rs. 9,000 in April 1945, and Rs. 11,000 in May 1945. I returned the Rs. 20,000 on 6th June, 1947". The Commissioner in his judgment says "Before me it was argued that the lady was Mrs. B. Vander Poorten and that the money was for purchase of jewellery which did not materialise. A letter was produced from Mrs. Vander Poorten but it was not marked as a document". Therefore, the Commissioner cannot be blamed for not considering evidence which was not properly produced before him. No complaint was made about this matter in the petition of appeal to the Board of Review. At the hearing of the appeal before the Board, counsel "endeavoured in opening his case to read in evidence some letters and an agreement entered into between the appellant and his wife. The Board was not willing to allow fresh evidence to be led at this stage and did not give permission to counsel to mark these documents". This reference cannot refer to the agreement A7 which was already in. In the case stated there is no reference to any letter from Mrs. B. Vander Poorten. S. 73 (7) vests the Board of Review with a discretion to admit or to reject any evidence adduced whether oral or documentary. There was furthermore no proper application to the Board to admit the letter. For these reasons I hold that there has been no failure to consider evidence which was properly admissible.

It was finally contended that R 23 and R 29 have not been properly construed by the Commissioner. The Commissioner in his finding states that R 23 "admits undisclosed profits up to Rs. 60,026". Assuming that the Commissioner has drawn an incorrect inference from the contents of R 23, this is an inference on a question of fact, and not on any question of law, and I fear that this Court cannot interfere. The same applies to the document R 29. It is also to be noted that there is nothing alleged in the case stated about any misconstruction of documents. In the petition of appeal to the Board of Review, X2, the appellant stated in his prayer "The appellant begs that the Board of Review should be pleased to examine the contentions of the appellant and to cause the said assessment to be reduced to Rs. 38,650 which said sum should be distributed between the Income Tax years 1942/43 to 1947/48 and from 1.1.1947 to 3.6.1947 in such manner as to the learned Board may seem equitable". That clearly is an admission by the assessee

that a sum of Rs. 38,650 is undisclosed income of the assessee for which he is liable to pay income tax. The learned acting Attorney-General has pointed out that this sum of Rs. 38,650 is arrived at as follows :

Rs.	72,480·00 hotel profits
	10,000·00 savings from salary
	37,000·00 arbitration award
	5,000·00 cash in hand
	7,927·00 debts due in France
	7,500·00 De Bossu's debt
	20,000·00 married lady's money
	159,907·00

If this sum is deducted from the Rs. 198,557·10 which the assessee had in the bank, the balance is Rs. 38,650·00 which the assessee admits in R 2 is undisclosed income for which he has to pay tax. The Attorney-General further pointed out that the contention now advanced was not taken before the Board of Review.

The evidence before the Commissioner, oral, documentary and circumstantial, giving the go-by to R 23 and R 29, amply justify his findings. I dismiss the appeal and confirm the assessment determined by the Board of Review with costs.

GUNASEKARA J.—I agree.

Appeal dismissed.

1949 *Present :* **Wijeyewardene C.J. and Pulle J.**

UKKU AMMA *et al.*, Appellants, *and* JEMA *et al.*, Respondents

S. C. 78.—D. C., Kurunegala, 4,281.

Lease—Exceeding one month—Pro tanto *alienation—Lessee not put in possession—His right to sue third parties in possession—Lessor not a necessary party—No distinction between short and long leases.*

A lessee under a notarial lease who has not been put in possession of the property leased can bring an action against third parties in possession of the property and compel them to surrender possession to him without making the lessors parties to the action. The distinction between short and long leases is not part of the law of Ceylon.

APPEAL from a judgment of the District Judge, Kurunegala.

H. W. Jayewardene, for defendants appellants.

H. V. Perera, K.C., with *C. R. Gunaratne* and *W. D. Gunasekara*, for plaintiffs respondents.

Cur. adv. vult.