1951 *Present:* **Gratiaen J.**

M. E. DE SILVA, Appellant, *and* THE COMMISSIONER OF INCOME TAX, Respondent

S. C. 507 with Application 512—M. C. Colombo, 5,061

Income Tax Ordinance (Cap. 188)—Tax due from Company—Proceedings taken against Director personally for recovery of the tax—Conclusive nature of certificate issued by Commissioner of Income Tax—Vicarious liability—Sections 62, 64, 76, 80.

Where income tax due from a limited liability Company was in default and the Commissioner of Income Tax, purporting to initiate proceedings under Section 80 of the Income Tax Ordinance, sought to recover the tax from the Managing Director of the Company and not from the Company itself—

Held, (i) that the certificate issued by the Commissioner of Income Tax did not preclude the Managing Director from taking objection that he was not the " defaulter " within the meaning of Section 80 of the Income Tax Ordinance. A defaulter, for the purposes of Section 80, is a person who, having been duly assessed under Section 64 as being " chargeable with tax ", has omitted, in contravention of Section 76, to pay such tax on or before the date specified in the notice of assessment served on him as the person so chargeable.

(ii) that the provisions of Section 62 of the Icome Tax Ordinance do not make the principal officer of a Company chargeable out of his personal assets with income tax levied on the Company's assessable income.

[1] *(1936) 16 C. L. Rec. 204.*

APPEAL, with application in revision, against an order of the Magistrate's Court, Colombo.

N. K. Choksy, K.C., with *N. M. de Silva*, *H. Mack* and *B. D. Gandevia*, for the accused appellant.

T. S. Fernando, with *A. Mahendrarajah*, Crown Counsel, for the Attorney General.

Cur. adv. vult.

November 5, 1951. GRATIAEN J.—

The facts to which this appeal relates are not in dispute.

The appellant was the Managing Director of an incorporated Company with limited liability carrying on business in Colombo under the name of the Ceylon Building Syndicate Limited. The Company had from time to time been duly assessed to pay income tax under the provisions of the Income Tax Ordinance (Cap. 188) and on 10th June, 1950, the aggregate amount of tax in default—including a sum added under Section 76 (5) for non-payment—was Rs. 9,720. The Commissioner of Income Tax therefore initiated proceedings under Section 80 of the Ordinance for the recovery of the amount in default in the Magistrate's Court of Colombo. A certificate was issued by the Commissioner for the purpose of these proceedings declaring *the appellant* (as the " principal officer " of the Company) *and not the Company itself* to be the defaulter chargeable with tax for the relevant years of assessment. Admittedly the earlier notices of assessment had been made out by the taxing authority on the basis that the Company was the assessee, and no suggestion had at that time been made that vicarious liability to pay the amounts concerned was imputed to the appellant by virtue of his office. Pending the proceedings before the learned Magistrate the Commissioner of Income Tax issued an amended certificate declaring that " the amount of tax to be recovered *from the defaulter Mr. M. E. de Silva, Managing Director, Ceylon Building Syndicate*, ... had been reduced to Rs. 6000 ".

The appellant took objection to the proceedings for the recovery of the tax under Section 80, in so far as his personal liability was alleged to be affected, on the ground that he was not the " defaulter " within the meaning of the Section. After inquiry the learned Magistrate over-ruled this objection. The judgment proceeds on the basis (*a*) that the proviso to Section 80 (1) precluded the Court from " considering, examining or deciding the correctness of any statement in the certificate of the Commissioner "; and (*b*) that in any event, by virtue of Section 62 of the Ordinance, the appellant, as principal officer of the Company, was " answerable for doing all such acts, matters or things as are required to be done under the provisions of the Ordinance by (the Company) ". The learned Magistrate took the view that these words imposed a personal obligation to pay the tax due by the Company, and accordingly sentenced the appellant to undergo a term of 6 weeks' simple imprisonment. There can be no question that, if the learned Magistrate's ruling on these questions of law be

correct, his order was properly made in the exercise of the special jurisdiction vested in Magistrates under Section 80 (1) of the Income Tax Ordinance.

Learned Crown Counsel has submitted, and Mr. Choksy concedes, that no appeal lies against an order purporting to have been made by a Magistrate under Section 80 (1) of the Ordinance. *Commissioner of Income Tax v. de Vos* [1] and *Vaz v. Commissioner of Income Tax* [2]. In both these decisions, however, it was indicated that the correctness of such orders could appropriately be examined by this Court in the exercise of its revisionary powers. It is on this basis that I propose to consider the questions of law which were fully argued before me.

The conclusion at which I have arrived is that the tax in respect of which the Company was in default could not be deemed under Section 80 (1) of the Ordinance to be a fine imposed on the appellant personally. The sentence of imprisonment passed on the appellant was therefore irregular, and must be set aside. For the reasons which I shall indicate, the fundamental objection raised by the appellant under Section 80 of the Income Tax Ordinance should have been upheld.

I shall first consider the preliminary ruling given by the learned Magistrate with regard to the effect of the proviso to Section 80 (1) which is in the following terms:—

"*Provided that nothing in this section shall authorise or require the Magistrate in any proceedings thereunder to consider, examine, or decide the correctness of any statement in the certificate of the Commissioner.*"

Section 80 (2) of the Ordinance proceeds to declare as follows:—

> "In any proceeding under sub-section (1) *the Commissioner's certificate shall be sufficient evidence that the tax has been duly assessed and is in default*, and any plea that the tax is excessive, incorrect, or under appeal shall not be entertained, except that where any person proceeded against has not appealed within the proper time against the assessment in respect of which the tax is charged and alleges that the tax is in excess of the sum which would have been charged if he had so appealed, the Court may adjourn the matter to submit to the Commissioner his objection to the tax."

The real purpose of the proviso to Section 80 (1) is to prevent a defaulter who has been duly assessed to income tax for which he is properly chargeable from re-agitating in the course of proceedings taken under Section 80 (1) for the recovery of such tax, the correctness of the assessments served on him. The reason is obvious. A Magistrate's jurisdiction in matters of this kind is the jurisdiction of a Court of execution *simpliciter*, and not that of an appellate tribunal. An assessee who disputes the correctness of an assessment made on him has already had access to other machinery prescribed by the Ordinance, although Section 80 (2) and Section 80 (3) do afford some limited relief to an assessee who desires a further opportunity of satisfying the Commissioner (and not the Court) that the amount of the original assessment should be reconsidered.

[1] *(1933) 36 N. L. R. 349.* [2] *(1945) 46 N. L. R. 201.*

So much is clear enough, but I am not prepared to accede to the further proposition that the combined effect of the proviso to Section 80 (1) and of Section 80 (2) is to prevent an *alleged* defaulter against whom proceedings have been initiated from satisfying the Magistrate that he was not duly assessed. or that he was not a defaulter in respect of any tax for which he was properly chargeable under the provisions of the Ordinance. If, for instance, A is assessed to pay tax, and proceedings are taken under Section 80 against B for the recovery of such tax, I see nothing in the language of the Section which precludes B from raising the objection that he was *not* in truth or in law the defaulter against whom an order under the Section could properly be made. This proposition is implicit in the relevant part of Wijeyewardene J's judgment in *Vaz's case* (*supra*). Indeed, Section 80 (2) makes the Commissioner's certificate in such proceedings only " sufficient evidence that the tax has been duly assessed and is in default ". I am content in this connection to adopt, with respect, the observations of Bennett J. *in re Duce and Beets Cash Chemists* (*Southern*) *Limited's Contract*, (*1937*) *Ch. 642 at page 647*:—

> " It is a truism that the word ' sufficient ' is not the same word as and has not the same meaning as ' conclusive ' . . . . . I think one must find some context of a compelling kind before one can decide that the word *sufficient* has the same meaning as *conclusive* ".

For these reasons I am satisfied that it was open to the appellant to raise the objection before the learned Magistrate that, where the Company of which he was admittedly the principal officer had defaulted in the payment of income tax, the Company and the Company alone must be regarded as the defaulter against whom proceedings under the Ordinance could be instituted for recovery of the tax. The soundness of this objection depends, of course, on the true meaning of Section 62 of the Income Tax Ordinance which is in the following terms: —

> " The secretary, manager or other principal officer of every company or body of persons corporate or incorporate shall be answerable for doing *all such acts, matters or things* as are required to be done under the provisions of this Ordinance by such company or body of persons :
>
> Provided that any person to whom a notice has been given under the provisions of this Ordinance on behalf of a company or body of persons shall be deemed to be the principal officer thereof unless he proves that he has no connection with the company or body of persons or that some other person resident in Ceylon is the principal officer thereof ".

Learned Crown Counsel contends that the " answerability " of the " principal officer " of a company is wide enough to include an absolute and unqualified responsibility to pay, out of his own personal assets if necessary, the Company's dues; and that this responsibility would arise even if the Company's income had never reached his hands or had, for that matter, accrued and been expended at a date long prior to the date of his appointment. Mr. Choksy has argued, on the other hand, that in the context in which the section appears in the Ordinance, the principal officer is only made responsible by virtue of his office for such matters as

the furnishing of returns and the giving of information which an assessor is entitled to call for in order to assess the Company's liability to tax. In other words, Mr. Choksy submits that Section 62 does not, expressly or by necessary implication, impose vicarious liability on the principal officer for the payment of tax for which the Company is primarily and, indeed, solely chargeable.

The question for my decision is not free from difficulty, but I take the view that, on an examination of the entire scheme of the Income Tax Ordinance, Mr. Choksy's contention is entitled to prevail.

The imposition of vicarious liability under a statute is not lightly to be presumed, and such liability must necessarily be imposed in clear and unambiguous language. Can it be said that the words of Section 62, appearing as they do in a context dealing with machinery designed to supply an assessor with information regarding the details of a potential tax payer's income, satisfy this test ? It is significant that in every other case where vicarious liability has been imposed, the language of the Ordinance is very explicit. For instance, under Section 21 the income of a married woman who is not living apart from her husband " shall . . . . be deemed to be the income of her husband and shall be charged accordingly ". Similarly the chargeability of receivers, trustees and executors is unambiguously provided for in the Sections appearing in Part B of Chapter 8 of the Ordinance ; Section 35 makes the tax due by a non-resident person recoverable in certain cases from his agent in Ceylon and, if there be more than one such agent, they are made jointly and severally liable for the payment of the principal's tax; Section 29 (7) makes express provisions for the recovery of tax due by a non-resident partner from persons other than himself. In the case of trustees, co-trustees and co-executors, each is made " answerable " under section 61 (1)—in the same way as the principal officer of a Company is answerable under Section 62— " for doing all such acts, matters and things as would be required to be done under the provisions of the Ordinance by an individual acting in such capacity ". I regard it as significant and indeed conclusive that, notwithstanding this provision, it was considered necessary to add express words in other parts of the Ordinance imposing vicarious " chargeability " on trustees, executors and partners, whereas no such special provision had been made in the case of the principal officer of a limited liability Company in respect of tax for which the Company is primarily liable.

The matter may also be looked at from another angle. The successive stages contemplated by the Ordinance in the assessment and recovery of income tax from members of the public are (1) the furnishing of a return of income by or on behalf of the person chargeable with tax; (2) the service of a notice of assessment by the taxing authority on the assessee or on some person who represents him, and the fixing of a date on or before which payment must be made; (3) the opportunity of an appeal by or on behalf of an assessee who is dissatisfied with the assessment served on him; and finally (4) the agony of payment or, as an equally painful alternative, the recovery of tax from the defaulting assessee in accordance with one or other of the alternative methods prescribed by Chapter 13.

Section 64 permits an assessment to be made on any person " who is in the opinion of an Assessor *chargeable* with tax ", and no person can or

should be exposed to the drastic penalties provided by Section 80 unless and until he has previously received a notice of assessment charging him with liability which, if disputed, could have been challenged in appropriate proceedings under the Ordinance. If this test be applied, it follows that the appellant was not " duly assessed " and was not a " defaulter ", so that the conditions precedent to the institution of proceedings against him under Section 80 of the Ordinance were not complied with.

I hold that the provisions of Section 62 of the Ordinance do not make the principle officer of a Company chargeable out of his personal assets with tax levied on the Company's assessable income. *A fortiori*, proceedings for the recovery of such tax under Section 80 are not available *against him* "as a defaulter ". In my opinion a defaulter for the purposes of Section 80 is a person who, having been duly assessed under Section 64 as being " chargeable with tax ", has omitted, as required by Section 76, to pay such tax on or before the date specified in the notice of assessment served on him as the person so chargeable. The order sentencing the appellant to a term of imprisonment for non-payment of tax due by the Company was therefore not authorised by law. I accordingly quash the order made by the learned Magistrate on May 8, 1951. My decision does not of course preclude the Commissioner of Income Tax from taking such proceedings as he may be advised for the recovery of the tax from the Ceylon Building Syndicate Limited.

Order quashed.