VICTORIA
v
THE DEPUTY COMMISSIONER OF INLAND REVENUE

COURT OF APPEAL
DISSANAYAKE, J. AND
SOMAWANSA, J.
CA 1235/87
1236/87
M.C. KANDY 63672
M.C. KANDY 63676
MAY 31, AND
JULY 31, 2002 AND
SEPTEMBER 26 AND
OCTOBER 11, 2002

Inland Revenue Act, No. 28 of 1979, sections 125(1), and 130(1) – Certificate for the recovery of tax – Who is a defaulter? – Notice of assessment did not specify a date to pay fine – No default sentence – Validity.

The respondent sought the recovery of two sums of money, being income tax and wealth tax allegedly defaulted by the petitioner. On being summoned to show cause, the petitioner contended that, he is not a defaulter in terms of section 125(1) in that, the notice of assessment did not specify any date on or before which the petitioner was requested to pay. The learned Magistrate rejected this contention. The petitioner moved in revision, and further contended that, the learned Magistrate in imposing the fines failed to specify a default sentence, making the order void.

Held :

(i) In terms of section 125(1) a tax payer is deemed to be a defaulter if he fails to pay such quarterly instalment on or before the date given in section 97(1) and he will be deemed to be a defaulter if he fails to wipe off his full liability by 30th November immediately succeeding the end of the year of assessment.

(ii) If the tax payer fails to pay any tax or wipe off his liability by the 30th November or has not sent a return section 115 applies.

When the assessor demands the payment by notice he would be demanding taxes that are already in default and the due dates are long past. The legislature in its wisdom has enacted in section 115(1) that the assessor shall demand the tax forthwith.

(iii) However, in terms of the proviso to section 115(1) there is a situation which requires the assessor to specify a date i.e. if he is of the opinion that the tax payer is about to leave the country or that it is expedient to do so and require him to pay the taxes earlier than the date given in section 97(1). Thus when he advances the date of payment it is quite logical that he should specify a date for payment. In the instant case, notices of assessments are all normal assessments section 125(1) read with section 97(1) and not a situation that arises under section 115(1).

(iv) Imposition of a fine need not be accompanied by a default sentence, if it is to be a valid order.

(v) Section 130(1) of the Act casts no duty on the Magistrate to say in so many words that the petitioner has not shown sufficient cause as required by section 130(1). It is apparent from his order that having considered the submissions/authorities cited/material placed before him, he was not satisfied with the cause shown by the petitioner.

APPLICATION in revision from the order of the Magistrate's Court of Kandy.

Cases referred to:

1. *De Jong* v *Commissioner of Income Tax* – 57 NLR 279
2. *Charlotte Beatrice Perera* v *Commissioner of Inland Revenue* – 70 CLW 46
3. *Mohamed Raphic Mohamed Hamza* v *Commissioner of Inland Revenue* – SC Appeal No. 3/89- MC Kalutara 44289 – 44300 SCM 1.12.1991
4. *Puswella Perera* v *Commissioner of Inland Revenue* – (1966) 70 CLW 46
5. *Vairayan Nadar* v *Commissioner of Inland Revenue* – 72 NLR 164
6. *Smale* v *Commissioner of Inland Revenue* – (1971) 74 NLR 355

7. *Rajan Phillips* v *Commissioner of Inland Revenue* – Srikantha's Law Reports Vol. 2 – Part 10.
8. *M.E. de Silva* v *Commissioner of Inland Revenue* – 53 NLR 280
9. *Nilaweera* v *Commissioner of Inland Revenue* – 63 NLR 485

Stanley Fernando for petitioner.

A.H.M.D. Nawaz, State Counsel, for respondents.

Cur.adv.vult

September, 18, 2003.

SOMAWANSA, J.

These are two revision applications preferred from the orders of the learned Magistrate of Kandy dated 22.09.1987 made in respect of two cases. As against the order in case No.63672 revision application No. 1235/87 has been preferred and as against the order in case No. 63676 revision application No. 1236/87 has been preferred. In both revision applications the petitioner is V.P.B. Victoria and as the facts in the two applications are identical parties have agreed that both applications could be taken together.

The relevant facts are two certificates marked P1 were filed by the respondent in the Magistrate Court of Kandy under section 130(1) of the Inland Revenue Act, No.28 of 1979 for the recovery of two sums of money Rs.700,544/- and Rs.1,075,333/- being income tax and wealth tax allegedly defaulted by the petitioner. On being summoned by the learned Magistrate to show cause why further proceedings should not be taken against the petitioner for the recovery of the said amounts, the only cause shown by the petitioner was that he was not a defaulter within the meaning of section 125(1) of the Inland Revenue Act, No.28 of 1979 in that the notice of assessments that were served on the petitioner marked P2A, P2B and P2C did not specify any date on or before which the assessee was required to pay the taxes. At the conclusion of the inquiry the learned Magistrate by his order dated 22.09.87 came to a finding that the petitioner was a defaulter and proceeded to impose the said amounts of tax as a fines in terms of section 130(1) of the Inland Revenue Act.

At the hearing of the revision applications one of the matters raised by the counsel for the petitioner was that the learned Magistrate erred

in law and rendered the proceedings instituted under section 130(1) of the Inland Revenue Act abortive, in that the learned Magistrate in imposing fines failed to specify a default sentence. In support of this contention counsel cited the decision of the Supreme Court in the case of *De Jong* v *Commissioner of Income Tax.*[1] In that case the facts were:

"The appellant, an assessee who defaulted his payment of income tax, was summoned under section 80(1) before the Magistrate. On his admitting that this amount was due the Magistrate made an order as follows: "I fine the accused Rs.9,993. Time till 1.2 for fine". This time was extended from time to time as a result of payments by instalments. In the meantime the appellant was adjudicated an insolvent. The Commissioner filed in those proceedings a notice under section 81 claiming payment from the receiver. The claim of the Commissioner was not satisfied, even in part, as there were no assets in the hands of the receiver. The appellant was granted a certificate of conformity of the third class. He, thereupon made an application to the Magistrate for an order of discharge of the appellant from the proceedings in case No.38,322. The Magistrate rejected the application and ordered him to pay the balance of Rs. 4,645 and gave him time to pay. The appellant appealed from that order.

Held:

1. that the power vested in a Magistrate under section 312(1) (b) of Criminal Procedure Code of directing that an offender shall suffer a term of imprisonment in default of payment of a fine to which he is sentenced can be exercised only at the time of the imposition of the sentence and not thereafter.

2. that where the Magistrate in proceedings under section 80(1) of the Income Tax Ordinance merely makes an order that the defaulter should pay the tax, without giving any direction that in default of payment he should suffer a term of imprisonment, it is not open to the Magistrate to give that direction subsequently.

3. that no further proceedings can now be taken under section 80(1) of the Income Tax Ordinance.

4. that in view of the above, it is unnecessary to consider the argument as to whether the order of the Magistrate should be set aside".

If one were to examine the said judgment it is apparent that Weerasooriya, J. in his judgment does not say that imposition of a fine must be accompanied by a default sentence if it is to be a valid order. What was held in that case was that the power vested in a Magistrate under section 312(1) (b) of Criminal Procedure Code of directing that an offender shall suffer a term of imprisonment in default of payment of a fine to which he is sentenced can be exercised only at the time of the imposition of the sentence and not thereafter, and that the Magistrate when proceeding under section 80(1) of the Income Tax Ordinance merely makes an order that the defaulter should pay the tax, without giving any direction that in default of payment he should suffer a term of imprisonment, it is not open to the Magistrate to give that direction subsequently.

In the case of *Charlotte Beatrice Perera* v *Commissioner of Inland Revenue*[2] T.S. Fernando, J. opted not to follow *De Jong* v *Commissioner of Inland Revenue* (*supra*) and in interpreting the corresponding Section 85(1) of the Inland Revenue Tax Ordinance held–

1. "That it is not obligatory on a Magistrate in every case where tax in default is deemed by section 85(1) of the Income Tax Ordinance to be a fine, to order a term of imprisonment in default of payment of fine.

2. That although no appeal lies against an order made in pursuance of section 85(1) of the Ordinance, it is open to the Supreme Court to alter such order in the exercise of its power of revision".

Per T.S. Fernando, J.

(a.) "No question of convicting a person arises where proceedings under section 85 of the Ordinance have been taken. Where sufficient cause has not been shown, the tax in default shall be deemed to be a fine imposed by a sentence of the Magistrate on the defaulter for an offence punishable with fine only or not punishable with imprisonment".

(b.) "This Court does not ordinarily interfere with the exercise of a judicial discretion. But the learned Magistrate, in making the order sought to be revised here acted on the assumption that he was obliged, at the time of imposition of the fine, also to make an order in respect of imprisonment in default of payment. De Jong's case[1] had been cited before him, and Weerasooriya, J. had there made the observation that the object of the proceedings under section 85(1) would be defeated if the Magistrate merely makes an order that the defaulter should pay the tax as a fine. The learned Magistrate, therefore acted in the instant case as if he had no discretion in regard to the question whether imprisonment in default of payment should be ordered or not".

It is also pertinent at this point to refer to section 130(1) of the Inland Revenue Act, No. 28 of 1979 which provide for proceedings for recovery before a Magistrate. The Section reads as follows:

130(1) "Where the Commissioner-General is of opinion in any case that recovery of tax in default by seizure and sale is impracticable or inexpedient, or where the full amount of the tax has not been recovered by seizure and sale, he may issue a certificate containing particulars of such tax and the name and last known place of business or residence of the defaulter to a Magistrate having jurisdiction in the division in which such place is situate. The Magistrate shall thereupon summon such defaulter before him to show cause why further proceedings for the recovery of the tax should not be taken against him, and in default of sufficient cause being shown, the tax in default shall be deemed to be a fine imposed by a sentence of the Magistrate on such defaulter for an offence punishable with fine only or not punishable with imprisonment, and the provisions of sub-section (1) of section 291 (except paragraphs (a), (d), and (i) thereof) of the Code of Criminal Procedure Act, No.15 of 1979, relating to default of payment of a fine imposed for such an offence shall thereupon apply and the Magistrate may make any direction which, by the provisions of that subsection, he could have made at the time of imposing such sentence".

In the case of *Mohamed Raphic Mohamed Hamza* v *Commissioner of Inland Revenue* [3] Fernando, J.observed at page 6

of his judgment:

> "It is strictly unnecessary to consider this question, but in view of section 59 proviso (iii), and the decisions in *Puswella Perera* v *Commissioner of Inland Revenue*(4), *Vairayan* v *Commissioner of Inland Revenue*(5) and *Smale* v *Commissioner of Inland Revenue*(6). I am of the view that no default sentence should have been imposed, particulary as sentence should have been imposed, particulary as there was some evidence suggesting that assets of the deceased had been disposed of by the heirs after his death but prior to the appellant being appointed administrator".

In view of the above reasoning I am unable to agree with the counsel for the petitioner that the learned Magistrate has erred in law.

It is also submitted by the counsel for the petitioner that the learned Magistrate erred in law in holding in his order that the only matter that a Magistrate can consider in a case shown by the alleged defaulter in proceedings under section 130(1) of the Inland Revenue Act is whether the defaulter has paid the tax or whether the person who is liable to pay the tax has been brought before court. In Support of the contention the counsel has cited the said unreported judgment of Mark Fernando, J., in *Mohamed Raphic Mohamed Hamza* v *Commissioner of Inland Revenue Regional Office Kalutara* (*supra*). He also submits that the learned Magistrate has erred in law in misconstruing the ratio decidendi of the judgment of G.P.S. de Silva, J. as he then was in *Rajan Phillip* v *Commissioner of Inland Revenue*(7). I am unable to agree with this submission of the counsel for the petitioner, for nowhere does the learned Magistrate say that the only matters that he can consider are whether the defaulter has paid the tax or whether the person who is liable to pay the tax has been brought before Court. *Rajan Phillip* v *Commissioner of Inland Revenue (supra)* was cited before the learned Magistrate by the counsel for the petitioner. In that case the facts were Rajan Phillip the principal officer of Gemmex Ltd., was taken to Court for recovery when the assessment was in the name of the company. An objection was taken that Rajan Phillip could not be vicariously held liable for the tax due from Gemmex Ltd. The learned Magistrate over-ruled the objection and held Rajan Phillip as principal officer of Gemmex Ltd. was liable and imposed the sum due as a fine and a default term of simple imprisonment. In the revision application filed by Rajan Phillip on page 135

G.P.S. de Silva, J. as he then was did say "on a plain reading of section 111(1) and section 106 I agree with Mr. Ambalavanar's submission that proceedings in terms of section 111 are available only against the defaulter, that is to say a person who has been assessed to tax and has defaulted in the payment of such tax as required under the provisions of this Act". In that case he proceeded to hold that since the company had been assessed the defaulter was the company and recovery proceedings were not available against the principal officer. His Lordship also reiterated the ratio of Gratien, J. in *M.E. de Silva* v *Commissioner of Inland Revenue*(8) the facts were:

> "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 Income 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".

In the circumstances, it is apparent that Rajan Phillip's case (*supra*) has no application to the instant case as in that case Rajan Phillip who had not been assessed was taken to Court whereas in the instant case the petitioner who had been assessed was brought before the learned Magistrate. In fact the learned Magistrate in his order did refer to Rajan Phillip's case and stated that on a perusal of that decision it transpired that a Magistrate should consider whether the defaulter has paid the tax or not or whether the person who has

been assessed is brought before Court. However he did not say that these were the only two matters that he could go into.

In the case of *Mohamed Raphic Mohamed Hamza* v *Commissioner of Inland Revenue* (*supra*) Fernando, J. cited numerous precedents to show that an alleged defaulter is entitled on a variety of grounds to show that the Magistrate's Court has no jurisdiction. In that case action was filed against the administrator (son of Hamza) of the estate of the deceased. But the assessment was made in the name of the deceased during his lifetime. Fernando, J. held that the son was not liable because he was not a defaulter. In any event this case was decided under the Inland Revenue Act, No. 04 of 1963. The instant case falls within the ambit of Inland Revenue Act, No. 28 of 1979. However in the instant case the challenge in the Magistrate's Court had been to the notice of assessment and not to the assessment made. In fact the learned Magistrate did come to a definite finding that the petitioner was indeed a defaulter.

Another matter raised by the counsel for the petitioner is that the learned Magistrate has misdirected himself in law in holding that the certificate filed by the respondent marked P1 is conclusive evidence that the taxes specified in the said certificate is in default and that it is not necessary for him to consider the causes shown by the petitioner that he is not a defaulter and thus failed to consider the provisions of section 130(7) of the Inland Revenue Act, Section 130(7) reads as follows:

> "In any proceeding under subsection (1), the Commissioner-General'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."

The counsel has also cited the decision in *Nilaweera* v *Commissioner of Inland Revenue*.[9] However on an examination of the order of the learned Magistrate, I am unable to agree with this submission for nowhere in his order does the learned Magistrate say that the certificate filed by the respondent is conclusive evidence nor does he say that it is not necessary for him to consider the causes shown by the petitioner. The learned Magistrate refers to section 130(2) which reads as follows:

130.(2) "The correctness of any statement in a certificate issued by the Commissioner-General for the purposes of sub section (1) shall not be called in question or examined by the Magistrate in any proceeding under this section and accordingly, nothing in that subsection shall be read and construed as authorizing a Magistrate to consider or decide, the correctness of any statement in such certificate or to postpone or defer such proceeding for a period exceeding thirty days by reason only of the fact that an appeal is pending against the assessment in respect of which the tax in default is charged".

It is to be seen that in his order the learned Magistrate refers to section 130(2) and to the provisions contained therein. It is conceded that in the case cited by counsel for the petitioner *Nilaweera* v *Commissioner of Inland Revenue (supra)* Gunasekera, J. observed at 487.

"Subsection (2) of the section provides that in any proceeding under subsection (1) the Commissioner's certificate shall be sufficient evidence that the tax has been duly assessed and is in default. It must be noted that the certificate is to be merely sufficient, and not conclusive, evidence of these facts. Moreover, the provision that it shall be evidence connotes that an issue as to whether the tax has been duly assessed can arise for decision in such a proceeding. With respect I agree with the view taken in de *Silva's (supra)*[8] that the provisions of these subsections do not have the effect of preventing an alleged defaulter from satisfying the Magistrate that he was not duly assessed".

However the said observations of Gunasekera, J. have no relevance to the instant case in view of the fact that as stated above the only challenge in the Magistrate's Court had been to the notice of assessment and that too to the absence of the date of payment. There was no dispute as regards the certificate filed by the respondent and the learned Magistrate on the material placed before him has come to a finding that the petitioner is a defaulter.

Counsel for the petitioner also submits that in refusing to consider the submission of facts and law urged by the petitioner in the proceedings before the learned Magistrate that he was not a defaulter within the meaning of section 125(1) of the Inland Revenue Act, the Magistrate acted ultra vires the Inland Revenue Act and imposed a

fine without making any determination that the petitioner had not shown sufficient cause as required by the provisions of section 130(1) of the Inland Revenue Act. However it should be noted that section 130(1) of the said Act cast no duty on the Magistrate to say in so many words that the petitioner has not shown sufficient cause as required by section 130(1) of the said Act. It is quite apparent from his order that having considered the submissions made by the parties, the authorities cited and the material placed before him, he was not satisfied with the cause shown by the petitioner. That would be the only logical conclusion that one could arrive at.

These revision applications raise a fundamental question of law in that should notice of assessment issued in terms of section 115(1) of the Inland Revenue Act, No.28 of 1979 require the assesee to pay tax on or before a particular date. The main thrust of the counsel for the petitioner is that the notice of assessment should have a specified date on or before which the assessee is required to pay tax and in the absence of such a specific date the assessee does not become a defaulter. In the instant case, it is admitted that the notice that was served on the petitioner marked P2A, P2B and P2C did not specify a date on or before which the petitioner was required to pay the amounts. Rather what the said notices marked P2A, P2B and P2C specified was that further penalties will be added if the tax and penalty charges are not paid forthwith.

Payment of tax by self assessment that is prevailing today is to be found in Chapter XIV section 97 of the Inland Revenue Act, No. 28 of 1979 which reads as follows:

> 97(1) "Any income tax, wealth tax or gift tax which any person is liable to pay under this Act for any year of assessment shall be paid by such person to the Commissioner-General in four instalments on or before the fifteenth day respectively of August, November and February in that year of assessment and the fifteenth day of May of the next succeeding year of assessment notwithstanding that no assessment has been made on him by an assessor. Each such instalment is hereinafter referred to as a "quarterly instalment".

According to section 163, year of assessment is interpreted to mean as 'the period of 12 months commencing on the 1st day of April

of any year and ending on the 31st day of March in the immediately succeeding year'. It appears that in terms of section 97(1) of the Inland Revenue Act, No.28 of 1979 there is an obligation on the part of the tax payer to pay these quarterly instalments on or before the relevant date. Words in the said section 97(1) makes it clear that there need not be any assessment that should be served on the tax payer when section 97(1) imposes the burden on payment of tax through self computation. The question arises then as to how the tax payer should compute the quantum. It is to be seen that section 97(2) of the said Act solves this problem.

Section 97(2) of the said Act reads as follows:

> 97 (2) "The quarterly instalment of a tax payable by any person for any year of assessment shall be one quarter of the tax payable by him for that year of assessment".

Section 125(1) of the Inland Revenue Act, No.28 of 1979 defines how taxes are deemed to be in default. The said section 125(1) reads as follows:

> 125(1) "Where a quarterly instalment of a tax or a part of such instalment for any year of assessment is not paid on or before the date specified in section 97(1) for the payment of that instalment, such instalment of tax or part thereof, or where any tax or part thereof assessed by an assessor for any year of assessment and required to be paid on or before the date specified in the notice of assessment (such date, in the case of any tax which is required to be paid under section 97(1), being a date earlier than the date before which such tax or part there is required to be paid under that section) is not so paid, such tax or part thereof shall be deemed to be in default–".

On a close scrutiny of section 125(1) would show that the section has two limbs. It could be seen that the 1st limb refers to a tax in default with reference to the dates given in section 97(1) while tax in default with reference to a date given in a notice of assessment is referred to in the 2nd limb.

Accordingly in terms of section 125(1) read with section 97(1) there is a duty cast on the tax payer to pay quarterly instalments of any year of assessment which would fall on the 15th day of August, November,

February and May. However in terms of section 125(2) proviso (ii) he must wipe off his full liability by making the full payment by 30th day of November immediately succeeding the end of the year of assessment in respect of which such quarterly instalment of tax become due, the proviso (ii) to section 125(2) reads as follows:

(ii) "where any person has paid as quarterly instalment of tax for any year of assessment a sum which is not less than one quarter of the income tax and wealth tax payable by such person for the year immediately preceding that year of assessment, such person shall not be liable to pay penalty in respect of such quarterly instalment of tax under the preceding provisions of this section until the thirtieth day of November immediately succeeding the end of the year of assessment in respect of which such quarterly instalments of tax became due."

Accordingly, it is to be seen that in terms of section 125(1) of the said Act the tax payer is deemed to be a defaulter if he fails to pay each quarterly instalment on or before the date given in section 97(1) of the said Act and also he will be deemed to be a defaulter if he fails to wipe off his full liability by 30th November immediately succeeding the end of the year of assessment.

Let us now consider the situation where the tax payer has failed to pay any tax or wipe off his liability by 30th November or has not sent a return. In such a situation section 115 of the Inland Revenue Act comes into play. The said section reads as follows:

115(1) "Where any person, who in the opinion of an assessor is liable to any income tax, wealth tax or gift tax for any year of assessment has not paid such tax or has paid an amount less than the proper amount which he ought to have paid as such tax for such year of assessment the assessor may, subject to the provisions of subsection (3) and (5) and after the fifteenth day of November immediately succeeding that year of assessment, 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 –

(a) the amount of tax so assessed, if such person has not paid any tax for that year of assessment, or

(b) the difference between the amount of tax so assessed and the amount of tax paid by such person for that year of assessment, if such person has paid any amount as tax for that year of assessment".

When the assessor sets about assessing the tax payer in terms of section 115 of the Inland Revenue Act, No. 28 of 1979 and demand the payment by notice he would be demanding taxes that are already in default and the due dates for payment are long past. Hence the legislature in its wisdom has enacted in section 115(1) that the assessor shall demand the tax forthwith. However in terms of the said section 115(1) there is also a situation which requires the assessor to specify a date. The situation is provided for in the proviso to section 115(1) which reads as follows:

"Provided that an assessor may, subject to the provisions of subsection (3) and (5), assess any person for any year of assessment at any time prior to the fifteenth day of November immediately succeeding that year of assessment if he is of the opinion that such person is about to leave Sri Lanka or that it is expedient such person to pay such tax to the Commissioner-General earlier than as required under section 97(1)".

In the case of proviso situation the assessor can assess even prior to 15th November if he is of the opinion that the tax payer is about to leave Sri Lanka or that it is expedient to do so for the protection of the revenue and require him to pay the taxes earlier, than the dates given in section 97(1) of the Act. Thus when he advances the date of payment it is quite logical that he should specify a date for payment. Accordingly, if the tax payer does not pay on or before the date specified in the notice then what is not paid on or before that date would be regarded as a default in terms of the 2nd limb of section 125(1) of the said Act. The 2nd limb of section 125(1) reads as follows:

125(1) "or where any tax or part thereof assessed by an Assessor for any year of assessment and required to be paid on or before the date specified in the notice of assessment (such date, in the case of any tax which is required to be paid under section 97(1), being a date earlier than the date before which such tax or part thereof is required to be paid under that section) is not so paid, such tax or part thereof shall be deemed to be in default."

The notice of assessment referred to in the 2nd limb of section 125(1) is the notice of assessment contemplated in the proviso to section 115(1) and if proviso to section 115(1) gives rise to an assessment the notice must specify a date and the payment of the amount specified in such notice has to be paid on or before the date specified in the notice.

Applying these principles to the instant action and on a perusal of the notice of assessment marked P2A, P2B and P2C it is to be seen that the said notices are all normal assessments made after 15th November immediately succeeding the end of the year of assessment in respect of which such quarterly installments of tax become due.

Notice marked	Year of assessment	The date after which the Assessor could assess
P2A	1982/83	15 November 1983
P2B	1983/84	15 November 1984
P2C	1991/92	15 November 1982
	Date of Notice	**Last date before which assessment must be made**
	15.11.1984	31.03.86
	12.07.1985	31.03.87
	26.11.1984	31.03.85

It is to be noted that when the notices were issued asking the petitioner to pay forthwith the due date for respective year of assessment were long past and the notices of assessment were all within 3 year period for in terms of section 115(5) of the said Act an assessment gets time barred in 3 years.

The Counsel for the petitioner was also heard to say that the assessments in dispute were made under section115(2) of the Inland Revenue Act, No. 28 of 1979. The said section 115(2) reads as follows:

> "Where it appears to an assessor that any person liable to income tax, wealth tax or gift tax for any year of assessment has been assessed at less than the proper

amount, the Assessor may subject to the provisions of sub-section (3) and sub-section (5), assess such person at the additional amount at which according to his opinion such person ought to have been assessed and the provisions of this Act as to notice of assessment, appeal and other proceedings shall apply to such additional assessment and to the tax charged thereunder."

Section 115(2) refers to an additional assessment. In terms of this section if the tax payer has been under assessed for whatever reason the assessor may undertake a second assessment and the provisions of the Act as to notice of assessment, appeal and other proceedings shall apply. It appears that even in terms of section 115(2) of the Inland Revenue Act the tax assessed is on the total income on which he should have paid the tax on his own and are taxes already in default for the respective year of assessment. Hence the proviso situation in terms of the 2nd limb of section 125(1) will have no application to section 115(1) of the said Act.

There is one other matter that needs our attention, that being the agreement said to have been entered into between the petitioner and the respondent on 30.10.85. The said agreement is purported to be contained in the notes of interview marked R1. It is submitted by the counsel for the petitioner that the document marked R1 does not constitute an agreement in terms of which the partners of the partnership agreed to be assessed on the taxes specified in the respective certificate marked P1. This agreement was never a part of the proceedings before the learned Magistrate. However reference has been made in the respondent's affidavit to the said agreement and the said agreement said to contain in the assessor's notes of interview has been marked R1. In any event, in view of the Inland Revenue (Special Provisions) Act, No. 10 of 2003 it becomes necessary to consider the validity of this agreement.

The position taken by the petitioner is that there is nothing in the notes of interview marked R1 indicating that the precedent partner has agreed to the assessment of additional income as proposed by the assessor. That though two of the partners have signed the notes of interview they have not agreed to pay the taxes arising from the proposed additional income nor has the quantum of the total taxes payable been specified in the notes of interview marked R1. There is

also no mention about the additional net wealth or wealth tax which is specified in the certificate of taxes in default marked P1. Also it is submitted that the post-script remark to the agreement made by assessor to the effect. "I find the precedent partner to make untruthful statements, very incorporative and difficult and also the fact that the precedent partner had stated that he was unable to meet the tax liabilities arising from the additional income proposed to the assessed would go to show that there was no *consensus ad idem*. As for the post-script remark it has been made it appears after the agreement was signed by the two partners of the partnership and has no bearing on the agreement. It appears to me with all the short comings there is the petitioner who has come to an agreement with the respondent and this becomes manifest with the placing of the signatures of the two partners on the pages containing the notes of the interview.

Furthermore, it is evident from the two letters marked P8 and P10 addressed to the respondent by the petitioner wherein reference is made to the agreement entered by the parties. Letter marked P8 is dated 30.10.1986 while letter marked P10 is dated 14.02.1986 and the agreement as found in the interview notes marked R1 is dated 30.10.85. Therefore it could be seen that having entered into an agreement as is shown in document marked R1 which fact is admitted by the petitioner by the letters marked P8 and P10 he seeks to repudiate the said agreement in the said two letters on the basis that he placed his signature to the said agreement under duress. It is pertinent to note that the petitioner takes up this position nearly 4 months after he signed the agreement as shown in R1. It is strange for a partner of a business to sleep over his rights for 4 months. It appears that having agreed to the proposals discussed before the assessor at the interview he now seeks to go back on the agreement reached as per document marked R1.

For the above reasons, I would dismiss the two revision applications marked CA1235/87 and CA1236/87 with costs fixed at Rs. 5000/-. The Registrar is directed to return the case record to the appropriate Magistrate's Court forthwith.

DISSANAYAKE, J. - I agree

Application dismissed.