

1945

Present: Wijeyewardene J.

J. P. VAZ, Assessee, Appellant, and THE COMMISSIONER
OF INCOME TAX, ESTATE DUTY AND STAMPS,
Respondent.

575—M. C. Colombo, 34,559 (*Income Tax Appeal*).

Excess Profits Duty—Assessee in default—Agreement between Commissioner and Assessee—Issue of certificate for recovery of tax before Magistrate—Absence of notice under s. 76 (4)—Income Tax Ordinance, s. 80 (1).

Where, on an appeal by an assessee of Excess Profits Duty, an agreement is reached between the Commissioner and the Assessee within the meaning of section 69 (2) of the Income Tax Ordinance, a notice need not be issued in respect of such an agreement under section 76 (4) of the Ordinance.

The failure to issue such a notice does not affect the validity of a certificate issued by the Commissioner for the recovery of the tax before a Magistrate under section 80 (1) of the Ordinance.

An appeal does not lie to the Supreme Court from an Order of the Magistrate in a proceeding under section 80 (1).

Commissioner of Income Tax v. De Vos (35 N. L. R. 349) followed.

A PPLICATION to revise an Order of the Magistrate of Colombo.

H. V. Perera, K.C. (with him S. Nadesan and S. Nadarasa), for the assessee, appellants.

T. S. Fernando, C.C., for the Commissioner of Income Tax.

Cur. adv. vult.

March 21, 1945. WJJEWARDENE J.—

Acting under section 14 of the Excess Profits Duty Ordinance, No. 38 of 1941, read with section 80 of the Income Tax Ordinance, the Commissioner of Income Tax issued on March 1, 1944, a certificate certifying that the assessee had made default in the payment of Rs. 16,500 being the balance Excess Profits Duty due from him.

The Magistrate of Colombo summoned the assessee to appear in Court on March 8, 1944, and show cause why further proceedings should not be taken against him for the recovery of the amount.

After inquiry the Magistrate delivered his order on June 1, 1944, imposing on the assessee a fine of Rs. 16,500 and, in default, sentencing him to undergo six months' simple imprisonment.

In view of the decision in *The Commissioner of Income Tax v. De Vos*¹ counsel for the assessee did not claim a right to be heard in appeal but asked for relief by way of revision.

The assessee was assessed for Income Tax under the Income Tax Ordinance and for Excess Profits Duty under the Excess Profits Duty Ordinance. The assessee was dissatisfied with both the assessments and appealed to the Commissioner to review and revise the assessments.

The Excess Profits Duty was originally assessed at Rs. 50,000 and the notice of assessment C 4 required the assessee to pay that amount on or before November 2, 1943.

The Commissioner referred the Excess Profits Duty Appeal to the Assessor under section 69 (2) of the Income Tax Ordinance (made applicable by section 13 of the Excess Profits Duty Ordinance) and so informed the assessee by R4 of November 11, 1943. In view of the appeal the Commissioner acting under section 76 (2) of the Income Tax Ordinance (made applicable by section 14 of the Excess Profits Duty Ordinance) issued R5 on November 22, 1943, informing the assessee of the order made by him that out of the Excess Profits Duty "Rs. 47,500 shall be held over and that Rs. 2,500 shall be paid on or before November 30, 1943". The assessee did not pay Rs. 2,500 on the due date. In the meantime, the Commissioner received information that the assessee had transferred his properties including his stock in trade.

¹ (1933) 35 N. L. R. 349.

Acting under section 76 (3) of the Income Tax Ordinance (made applicable by section 14 of the Excess Profits Duty Ordinance) the Commissioner cancelled R5 and made a fresh order, which was communicated to the assessee by Notice C1 of December 28, 1943. By that notice he requested the assessee to pay Rs. 50,000 and a penalty of Rs. 50 on or before December 30, 1943, and informed him that he would have to pay a further sum not exceeding 10 per cent. of the Duty if the sum of Rs. 50,000 was not paid on that date. On January 5, 1944, the Commissioner took action under section 79 (3) of the Income Tax Ordinance (made applicable by section 14 of the Excess Profits Duty Ordinance) and issued a certificate C2 to the District Judge of Colombo for the recovery of Rs. 59,000 and issued a notice C3 at the same time to the assessee (*vide* section 79 (4) of the Income Tax Ordinance). A sum of Rs. 1,800 was realized by the seizure and sale of the assessee's property as a result of the proceedings in the District Court.

In the meantime the assessee's appeal against the Income Tax assessment came up before the Commissioner on January 25, 1944, in the presence of the assessee's authorised representative, and the Commissioner reduced the statutory income from Trade to Rs. 38,000. No objection was taken under section 71 (1) of the Income Tax Ordinance to the Income Tax so determined by the Commissioner. On that day the appeal to the Commissioner against Excess Profits Duty assessment was not decided. In fact, at that time the assessment appealed against had been referred back by the Commissioner to the Assessor. But an understanding was reached that, in view of the Commissioner's decision in the Income Tax Appeal, the Excess Profits Duty would have to be assessed on the basis that the statutory Income from Trade was Rs. 38,000. The Commissioner informed the assessee's authorised representative on that occasion that Rs. 15,000 should be paid on account of Excess Profits Duty, before February 29, 1944. On February 26, 1944, Mr. K. Candavanam who is referred to as an "Income Tax Adviser" and has interested himself in the assessee's matters paid (Rs. 15,000) by cheque C5 and obtained from the Commissioner receipt R2, which stated that the Commissioner had "received from Mr. K. Candavanam on behalf of J. P. Vaz (assessee) the sum of Rs. 15,000". After the receipt of that cheque the Commissioner issued R3 to the assessee giving particulars of the Excess Profits Duty and the payments received and credited to his account and showing a balance of Rs. 50 still due. According to R3 the assessee was given time till March 6, 1944, to pay the balance Rs. 50.

Mr. Candavanam stopped payment of the cheque C5 on February 28, 1944, and the Commissioner thereupon issued the certificate on which the present proceedings commenced in the Magistrate's Court.

It is necessary at this stage to consider the effect of a certificate issued by the Commissioner in terms of section 80 of the Income Tax Ordinance and the extent of the Magistrate's jurisdiction in the relative proceedings. The Commissioner's certificate is conclusive against any plea that the tax is "excessive, incorrect or under appeal" subject to the right of the assessee to the limited relief which the Magistrate may grant under the latter part of section 80 (2). On the other hand, the Commissioner's

certificate is only "sufficient evidence" that the tax is in default and it is open to the assessee to prove that the tax is not in default. The Magistrate has reached the decision in this case that the tax was in default, and it is this decision which the assessee seeks to canvass by his petition for revision.

The argument put forward on behalf of the assessee may be summarised as follows:—The Commissioner decided the Excess Profits Duty Appeal. He then sent notice R 3 in terms of section 76 (4) of the Income Tax Ordinance. According to that notice a balance sum of Rs. 50 was due on March 6, 1944. Even if a larger sum became due, owing to Mr. Candavanam stopping payment of the cheque C 5, for which the assessee had been given credit, still, in the absence of any further notice, the tax cannot be held to be in default before March 6, 1944.

I am unable to sustain this argument. The proceedings show clearly that the Excess Profits Duty Appeal had not been heard by the Commissioner. What happened on January 25, 1944, was that the Commissioner and the assessee's authorised representative reached an agreement within the meaning of section 69 (2) of the Income Tax Ordinance. A notice need not be issued by the Commissioner under section 76 (4) of the Income Tax Ordinance in respect of such an agreement. That section requires a notice to issue only in the following cases:—

- (a) Where there has been a final determination of an appeal under Chapter XI. of the Income Tax Ordinance;
- (b) Where a tax held over by the Commissioner under section 76 (2) becomes payable by a subsequent order of the Commissioner;
- (c) Where the Commissioner makes an order increasing the tax charged by the original assessment.

R 3 was not, in my opinion, a notice contemplated by the Ordinance. The tax was therefore in default when the Commissioner issued his certificate.

I do not think that in any event the circumstances of this case call for the exercise of the revisionary powers of this Court. Mr. Candavanam knew that a payment of Rs. 15,000 had to be made on or before February 29, 1944. He knew that, if that payment was made, the balance left could be paid on March 6, 1944. He issued the cheque for Rs. 15,000 on February 25, 1944, on behalf of the assessee as shown by the receipt R 4. R 3 was issued clearly after Mr. Candavanam forwarded the cheque as R 3 shows that the assessee was given credit for that cheque. It is as a result of the receipt of that cheque that R 3 was issued giving the assessee time to pay the balance on or before March 6, 1944. Mr. Candavanam chose to stop payment of that cheque and the assessee still claims that the tax was not due till March 6, 1944, in view of R 3. The assessee was summoned to appear in the Magistrate's Court on March 8, two days after the date when according to the assessee the tax fell due. No payment whatever was made during the pendency of the Magistrate's Court proceedings though the assessee's Counsel stated at the very commencement of the inquiry that he did not challenge the correctness of the amount. The assessee filed his papers in revision nearly six months after the Magistrate made his order.

I may add that the Crown Counsel who appeared for the Commissioner informed me at the argument that the assessee would be given credit for the sum of Rs. 1,800 realized by the sale of his property in the District Court proceedings.

I dismiss the appeal and refuse the application for revision.

Application refused.
