1937 *Present:* **Abrahams C.J. and Fernando A.J.**

WIJESINGHE *v.* TEA EXPORT CONTROLLER.

IN THE MATTER OF AN APPLICATION FOR A WRIT OF *Certiorari.*

Tea Controller—Power vested in the Tea Controller—Deduction of assessment on discovery of error—Duty or discretion—Exercise of discretion—Appeal to the Board of Review—Tea Control Ordinance, No. 11 of 1933 s. 20.

The Tea Controller has a discretion whether or not to exercise the power conferred on him by section 20 of Ordinance No. 11 of 1933, with regard to the addition or deduction to be made or the discovery of an error in the assessment of the standard crop of an estate.

Where he does not exercise the discretion at all or exercises it unfairly his decision is open to review by the Board of Appeal.

THIS was an application by the Tea Controller for issue of a writ of *certiorari* to have the legality of an order made by the Board of Review, appointed under the Tea Control Ordinance, inquired into and to have the said order quashed. *Rule nisi* issued on *ex parte* application.

By his order dated February 25, 1937, the Tea Controller declared that the extent of an estate, viz., Walauwewatte, should be reduced to 24 acres from 32 acres. He also decided to recover the over-assessments, that had been made, in terms of section 20 of Ordinance No. 11 of 1933, and ordered that an amount equivalent to the over-assessments should be deducted from the assessment of the standard crop of the estate for the periods 1937-1938 and 1938-1939.

The fourth respondent, who is the present proprietor of the estate, appealed against the order to the Board of Review, who set aside the order of the Tea Controller.

Cyril E. S. Perera (with him *G. E. Chitty*), for the fourth respondent, showing cause against the making absolute of the *rule nisi* of *certiorari.*—The only ground upon which the *rule nisi* can be made absolute is that the order of the Tea Appeal Board was without jurisdiction. The question really is "have they decided the right matter?", not, "have they decided it wrongly?" The right of appeal is conferred in very wide terms by section 17 of the Tea Control Ordinance, No. 11 of 1933, and it is available to every person dissatisfied with a decision of the Controller which surely means dissatisfied for any reason whatever. The ultimate power in review is vested in the Board and no appeal lies from its order.

Application like the present for the issue of these high prerogative writs can only be made by a person who has a real grievance which gives him a *locus standi* to ask for the writ. (*Q. v. Nicholson*[1]; *Rex. v. Sharman*[2].)

The Controller has no status to make this application, for he is no more aggrieved or prejudiced than a Judge of an inferior Court would be whose decision is reversed in appeal. The Controller's order under section 20 was clearly subject to review by the Board. It was discretionary in him to make it and the Board could inquire upon appeal as to whether he had exercised a sound discretion in making it. The word "may" in section 17 means nothing more than "may in a proper case". It cannot mean "must" or "shall". (*Regina v. Bradley*[3].) There was therefore an order made in the exercise of the Controller's discretion under section 20; it was properly brought up in appeal before the Board and every condition precedent to the conferring of jurisdiction upon the Board to hear and determine the appeal was fulfilled. It does not therefore matter, since the order of the Board is defined as "final and conclusive", that they arrived at a wrong conclusion upon the matters which were properly before them. (*Lord Mayor of Leeds v. Ryder et al.*[4]) It is, however, submitted that their conclusion was in fact correct upon the merits.

Counsel cited the following cases, viz., *Colonial Bank of Australasia v. Willan*[5]; *Q.v. Board of Works, Southwark*[6]; *Rex v. Tabrum et al.*[7]

H. V. Perera, K.C. (with him *E. F. N. Gratiaen*), for the applicant in support of the rule.—The order of the Tea Appeal Board was clearly made without jurisdiction, for the reason that there was no discretion in the Controller which could be the subject of review. (*Re Baker, Nichols v. Baker*[8].) The word "may" in the section not merely confers a power but also imposes the duty to exercise it in every case brought to his notice. When once the under or over-assessment is proved he has no alternative but to increase or reduce the assessment, in respect of that particular estate, accordingly. It matters nothing that the estate has changed hands in the interval between the making of the original assessment and its correction by the Controller. The Ordinance makes the *estate* the unit of assessment in each case irrespective of ownership and the estate having lost or profited through an error in its assessment must also enjoy the benefit or suffer the loss consequent upon any amendment which it is the duty of the Controller to make under the section. It is a duty which he cannot avoid to suit the particular circumstances of any case and consists of a pure mathematical adjustment dependent upon the amount of the over or under-assessment proved and on nothing else.

The Controller is a person sufficiently interested to be entitled to apply for the writ. He need not be personally interested. He is interested on behalf of the tea industry and is almost in the position of a trustee.

Counsel cited *King v. Woodhouse*[9]; *King v. Minister of Health*[10].

[1] *(1899) 15 Times Law. Rep. 509.*
[2] *78 L. T. 320.*
[3] *(1894) 70 L. T. 379.*
[4] *(1907) A. C. 420.*
[5] *L. R. 5 P. C. 417.*
[6] *(1857) 8 E. & B. 529.*
[7] *(1907) 97 L. T. 551.*
[8] *(1890) 44 Ch. D. 262.*
[9] *(1906) 2 K. B. C. A. 501.*
[10] *(1925) 2 K. B. 363.*

E. A. L. Wijeyewardene, K.C., S.-G. (with him *T. S. Fernando, C.C.*), as *amicus curiae*.—Even if a writ of *certiorari* lies in this case, the question arises whether the Supreme Court could issue a writ to the Board of Appeal in respect of a decision given by it under section 20 of Ordinance No. 11 of 1933. The jurisdiction of the Supreme Court to issue a writ of *certiorari* is conferred by section 46 of the Courts Ordinance, No. 1 of 1899. This section should be read in the light of section 4 of the same Ordinance. The Supreme Court has held that it had no power to issue a writ of prohibition to a Court Martial—see *Application for a Writ of Prohibition.*[1] The same reasoning would operate against the issue of a writ of *certiorari* in the present case.

There is no good reason why the word " may " in section 20 of Ordinance No. 11 of 1933, should be construed as conferring a power coupled with a duty. The word " may " has its ordinary permissive meaning. See *In re Baker, Nichols v. Baker*[2] ; *Julius v. The Bishop of Oxford*[3].

[ABRAHAMS C.J.—Do you admit that the Tea Controller has a sufficient interest in the matter to apply for a writ of *certiorari* ?]

I am unable to say he has not, in view of the decision in *Rex v. Butt and another, ex parte* Brooke[4].

[ABRAHAMS C.J.—Does an error in the assessment of one tea estate react upon other tea estates ?]

Yes. If the word " may " is construed as imposing a duty, then the Tea Controller will be bound to make an order adding to the assessment of the standard crop of an estate even where a registered proprietor at the beginning of the period of control deliberately submits a return showing the acreage of his estate as lower than it actually is, and after some years, when the price of coupons has risen, points out the correct acreage to the Tea Controller. The legislature has given a discretion to the Tea Controller to add to or deduct from the assessment of the standard crop according to the circumstances of each case.

If " may " is given its ordinary meaning, an appeal would lie to the Board of Appeal against an order made by the Tea Controller under section 20. In such a case a writ of *certiorari* will not lie against the Board of Appeal even if the Supreme Court has the right to issue such a writ. See *The King v. Justices of Carnarvon*[5] ; *The King v. Justices of Lincolnshire*[6] ; *Queen v. The Board of Works for the District of St. Olave's*[7].

In the last mentioned case, the Court pointed out a distinction between Courts of first instance and Courts of Appeal regarding writs of *certiorari* issued to them.

If the Tea Controller had a discretion under section 20 of the Ordinance, then the Board of Appeal in reviewing the order of the Tea Controller has the same discretion. If therefore the Board of Appeal exercised a discretion in this case, then it has not usurped a jurisdiction which it did not possess.

Cur. adv. vult.

[1] *(1915) 18 N. L. R. 334.*
[2] *(1890) 44 Ch. D. 262.*
[3] *(1879) L. R. 5 A. C. 214.*
[4] *(1922) 38 Times L. R. 537.*
[5] *(1918) 1 K. B. 280.*
[6] *(1926) 2 K. B. 192.*
[7] *(1857) 8 El. & Bl. 529.*

December 17, 1937. ABRAHAMS C.J.—

I agree with the judgment of my brother Fernando, and would add a few observations. It was agreed by both sides that an error in the assessment of one tea estate would react favourably or unfavourably as the case might be, upon other tea estates, and it was argued on behalf of the applicant that where the estate had very probably benefited, it was right that it should subsequently make compensation, and that that was, therefore, the intention of the Legislature in enacting section 20 of the Ordinance, and that accordingly, the power conferred upon the Tea Controller by the use of the word "may" must perforce be exercised whenever the error was discovered. It has, however, been shown in this case that such an interpretation necessarily involves a hardship upon the registered owner, who was not the registered owner at the time the error was made, and it is a fundamental rule of the construction of statutes that an enactment should not be interpreted so as to create a hardship, and I see no excuse for inflicting a hardship upon the registered owner in this instance. As one of the members of the Board of Appeal observed, it is fairer that the whole industry should bear the loss rather than the innocent proprietor, because, distributed in that way, the effect on every other individual estate would be practically negligible, whereas the loss borne by the innocent owner would be substantial. I think, therefore, that a discretion is conferred upon the Tea Controller by the section, and if that discretion is either not exercised at all, as in this case, because the Controller thinks that it is not conferred upon him, or, if he exercised it unfairly in the circumstances, his decision is open to review by the Board of Appeal. The Board of Appeal has done what, in their opinion, the Tea Controller ought to have done and did not do, and, in my view, they were empowered to act as they did.

FERNANDO A.J.—

By his letter dated February 25, 1937, the Tea Controller decided that the extent of Walauwe estate should be reduced from 32 acres as declared to 24 acres which appeared to be the correct extent according to plan No. 457. He also decided to recover over-assessments that had been made from the first restriction year in terms of section 20 of Ordinance No. 11 of 1933. His order was to the effect that an amount equivalent to the amounts by which the previous assessments were in error was to be deducted from the assessment of the standard crop of the estate for the periods of assessment 1937-38 and 1938-39. By the same letter he notified the fourth respondent, who is the present proprietor, that an appeal lies against the decision.

The fourth respondent appealed against the decision and the Board of Appeal made order setting aside the order of the Tea Controller, dated February 25, 1937, so far as it related to the deduction from the standard crop of the total over-assessments made to the previous proprietor. The Tea Controller then applied to this Court for the issue of a writ of *certiorari* that is to say, that the order made by the Appeal Board and all proceedings in connexion therewith be called for in order to have the legality of the said order inquired into, that the said order be quashed as illegal, and

that the Controller's order of February 25 be restored. An *order nisi* was accordingly issued calling for the order and the proceedings therewith and requiring the first three respondents who constituted the Board of Appeal, and the fourth respondent, the proprietor, to show cause why a writ of *certiorari* should not issue. The first three respondents did not appear, but the fourth respondent appeared by Counsel and argued that under section 8 of Ordinance No. 11 of 1933, the Board of Appeal had the right to hear and determine all appeals from orders made by the Tea Controller under section 20, that any order made by them was final and conclusive and that a writ of *certiorari* could only issue on the application of an aggrieved party.

Counsel who appeared for the Tea Controller argued that under section 20 of the Ordinance the Controller was empowered on the discovery of an error in the assessment to make an adjustment, and that in considering the question of the manner in which the assessment should be adjusted an estate has to be assessed irrespective of the proprietor for the time being. He argued that in this particular case there was an admitted error in the assessment in that the estate had been assessed on the basis that it was 32 acres in extent, whereas in fact the extent was only 24 acres. Once this error was discovered, Counsel argued that the Tea Controller had no option but to reduce the assessment and to order that the amount by which the estate had been over-assessed should be deducted from the assessment for the period within which the error had been discovered. It was admitted that when the assessment was first made the proprietor of the estate was one Karuppan Pillai and that during the years 1933-34, 1934-35 and 1935-36 there was an over-assessment of 2,240 lb. for each year. There was a similar over-assessment for the year 1936-37, the benefit of which was enjoyed by the present proprietor, who had by that time become the owner. With regard to the assessments from 1933 to 1936, it was argued that the Tea Controller had no discretion and that by section 20 he was compelled to deduct the amount by which the estate had been over-assessed from the standard crop for the year 1936-37. The result of this deduction was that the crop of the estate for the year 1937-38 was assessed as *nil* and there was a further amount of 2,240 lb. to be deducted from the next period of assessment. Mr. Perera also contended that the Tea Controller having no discretion in the matter, the Board of Appeal could only make an order which the Tea Controller himself could have made, that their construction of section 20 to the effect that the Tea Controller had a discretion was tantamount to finding that the Board itself had a discretion or could exercise the discretion vested in the Tea Controller and that by this construction the Board had assumed a jurisdiction which they did not in fact possess. He, therefore, argued that the order made by the Board of Appeal involves an assumption of jurisdiction and that a writ of *certiorari* was the proper remedy.

The whole question depends on the construction to be given to section 20 of the Ordinance, which is in these terms: "*If it shall* appear to the Controller at any time that by reason of an incorrect return furnished by the registered proprietor or otherwise an error has been made in the assessment of the standard crop of any estate in respect of the period of assessment, he may order an amount equivalent to the amount by which

such assessment was in error to be added or to be deducted from the assessment of the standard crop of that estate for the succeeding period or periods of assessment ". It is not contested that there was an error in the assessment of the standard crop for the years 1933 to 1937, and it would appear that such error led to an over-assessment during those years. The real question is whether the words " he may order " mean that the Tea Controller *must* order the amount of over-assessment to be deducted or whether he has a discretion with regard to that deduction, and whether in making an order he should take into account the fact that during the period 1933 to 1936 the present fourth respondent was not the proprietor of the estate.

The Board of Appeal was of opinion that the legislature had given the Tea Controller a discretion because the Legislature felt that some case would arise in which such an order would not be just and that any proprietor succeeding a previous proprietor would be sufficiently protected by the discretion given to the Controller and by the right of appeal. The Chairman of the Board of Appeal also thought that the Tea Controller was wrong in deducting the over-issues made to the previous proprietor and that in a case where the benefit of the over-assessment has gone to a previous proprietor it would be less of a hardship for all proprietors of estates in Ceylon to bear the burden than for the fourth respondent alone to bear it.

Mr. H. V. Perera argued that the Controller must always exercise the power given to him by section 20 ; but in construing this section we must be guided by the rules that apply with regard to the interpretation of Statutes. As Cotton L.J. said in *In re Baker, Nichols v. Baker*[1] " great misconception is caused by saying that in some cases ' may ' means ' must '. It never can mean ' must ' so long as the English language retains its meaning ; but it gives a power and then it may be a question in what cases. where a Judge has a power given him by the word ' may ', it becomes his duty to exercise it. Nothing is said in the present Act as to the duty of the Judge to exercise the power given him by section 125 (4), but it is said that the whole object of the Act of Parliament was to secure equality amongst the creditors and that . . . . it is the duty of the Judge to make the order asked for because it is the object of the section to secure the rateable distribution ".

In addition to the use of the expression " he may order ", section 20 applies to a case where an error has been made either by reason of an incorrect return " or otherwise ". This expression " or otherwise " would make the section applicable even where the error in the assessment is caused not by the incorrect return which is made by the registered proprietor, but for a totally different reason. One might conceive of an error due to a mistake made by the Controller himself, or by some person in his office. In such a case it may still be right to penalize the estate because in fact the estate on a previous occasion has received the benefit of an over-assessment, but could it have been the intention of the Legislature to penalize A who is the proprietor, because by a mistake made by somebody else, B, the previous proprietor, received a benefit ? There can be no reason for thinking that the Legislature could have intended so to penalize

[1] *(1890) 44 Ch. D 262.*

A. The expression "or otherwise" appears clearly to indicate that, although the right to add or deduct is given by section 20, the powers so to deduct or add is to be exercised in cases where the Controller thinks that such deduction or addition is fair to the parties concerned. There can be no doubt that the result of such deduction, or addition, would be to the advantage or the prejudice of proprietors of other estates, but as the Chairman of the Board of Appeal himself observes, the proportion of such benefit or loss to each of the other estates would be so small as to be hardly appreciated.

Apart from the words of section 20, there is nothing in the Ordinance which makes it necessary to read the section so as to require the Tea Controller to make the addition or deduction in every case.

The Solicitor-General who appeared as *amicus curiae* referred to cases where a proprietor may, when the price of tea is low, deliberately send in an incorrect return which results in the under-assessment of his estate with the idea that he could apply for a correction of the error at a later stage when perhaps the price of tea is higher. Even in such a case, section 20 would not enable the Controller, according to the contention put forward by Counsel on his behalf, to refuse to make an addition at a later date because he thought that the proprietor had deliberately made an incorrect return for his own future advantage.

It is clear to my mind that section 20 does confer a discretion on the Tea Controller and that the addition or deduction to be made on the discovery of an error is a matter in which he can exercise a discretion. The Board of Appeal here has construed the Ordinance so as to give the Controller a discretion, and I think their decision was right. In the result the Board of Appeal has the power to exercise the same discretion as the Controller had, and they have not, in this case, usurped a jurisdiction which they did not have. It follows, therefore, that the application must fail.

The Tea Controller will pay to the fourth respondent his costs of these proceedings.

Rule discharged.