1958 *Present:* **H. N. G. Fernando, J.**

N. PUSWELLA, Petitioner, *and* COMMISSIONER OF INCOME TAX, Respondent

S. C. 463—Application for Revision in M. C. Avissawella, 25,690

Income tax—Default in payment—Proceedings for recovery before a Magistrate—" Showing cause " against imposition of penal sanction—Income Tax Ordinance, s. 80.

In proceedings under section 80 of the Income Tax Ordinance for the recovery of tax in default, a Magistrate would desist in special circumstances from imposing the penal sanction. Such special circumstances are made out if it is shown that the default in payment was due to causes beyond the control of the defaulter, *and* that there was no lack of good faith on his part, *and* that at the time when section 80 is invoked, the defaulter has not the means to make payment.

APPLICATION to revise certain orders made by the Magistrate's Court, Avissawella.

G. E. Chitty, Q.C., with *K. Sivagurunathan* and *M. D. H. Jayawardene*, for the Petitioner.

A. C. Alles, Deputy Solicitor-General, with *R. S. Wanasundera*, Crown Counsel, for the Respondent.

Cur. adv. vult.

December 5, 1958. H. N. G. FERNANDO, J.—

This is an application for the revision of an order made under Section 80 of the Income Tax Ordinance, directing that a sum of Rs. 28,000 odd, being income tax in default, be deemed to be a fine imposed on the petitioner and sentencing the petitioner to imprisonment in default of payment of the fine.

The petitioner is the widow of one D. S. Puswella who died on 23rd November, 1946. She applied on 10th February 1947 for letters of administration to the estate of her deceased husband. The statement of assets and liabilities furnished with her application show assets to the total value of about Rs. 550,000 and total liabilities of about Rs. 525,000. Of the liabilities, about Rs. 350,000 was due on mortgages and bonds, and the major portion of the balance was due on cheques which had been issued by the deceased. Letters of Administration were issued to the petitioner on 19th July 1947.

On 9th June 1947, notice of additional assessment was served on the petitioner of tax due upon income of the deceased prior to his death. The amount of the assessment was for a sum of just over Rs. 50,000, and an appeal was preferred to the Commissioner against this assessment.

In consequence of this appeal, the assessment was reduced by the Board (of Review ?), and a revised assessment for Rs. 39,000 was served on the petitioner on 28th September 1949. Certain sums due under the revised assessment were subsequently recovered, and the amount of Rs. 28,000 odd, certified to be due from the petitioner represents the unpaid balance *plus* penalty. The certificate is dated 3rd January 1957, and was filed in the Magistrate's Court on 4th January 1957. Meanwhile, the Administration proceedings were continued in the District Court of Colombo, in the course of which all the properties of the deceased were sold, in most instances under decrees which had been obtained in actions against the estate. The Amended Final Account was filed about October 1950 showing a balance *against the Estate* of about Rs. 1000. On 2nd November 1950, the District Judge noted that "the estate is insolvent", and subsequently, on 23rd November 1950 the Testamentary proceedings were terminated and the petitioner's bond as administratrix was discharged. It will be seen that proceedings for the recovery of tax from the petitioner by recourse to Section 80 of the Ordinance were only instituted six years later.

Mr. Chitty's first argument for the petitioner was that the provisions of Section 80 of the Ordinance can be utilised only against an individual defaulter in his personal capacity, and not against a person, such as an executor or administrator, acting in his representative capacity. I do not propose to set out the grounds of this argument, because I have come to the conclusion that the petitioner must succeed even on the basis that Section 80 can be utilised against an executrix. But it seems to me that the following considerations are of importance :—

(*a*) Section 78 (1) declares that tax due upon an assessment are a first charge on the assets of the defaulter, and Section 79 provides that unpaid tax will normally be recovered by the seizure and sale of property of the defaulter either through an agent of the Commissioner or else through a District Court.

(*b*) It is reasonable to suppose that these provisions would apply even where there is default on the part of an executor or administrator in paying tax due from him in his representative capacity, for else the Legislature must be taken to have been content to rely on voluntary payments in the case of tax due from the estate of deceased persons. There is nothing in Section 78 or Section 79 to indicate any intention to depart from the ordinary rule that civil debts due from a deceased person can be recovered by the seizure and sale of property forming part of his estate.

(*c*) Having regard to Section 27, which declares that an executor "shall be liable to all acts, matters and things as the deceased person if he were alive would be liable . . . .", the executor is liable to pay the tax and would *prima facie* be a defaulter if he fails to make payment. The only seeming difficulty is that Sections 78 and 79 do not in terms exclude recourse to the personal assets of the defaulter in the case where he is an executor. But this difficulty would not arise if the expression "property of the defaulter" occurring in those sections

is construed to mean "property of the defaulting executor, in his capacity as such"—a construction which is necessary having regard to the third Proviso to Section 27.

(*d*) The clearest case for the application of Section 80 would be that in which an "individual" assessee fails, without excuse, to pay tax despite his possession of the means to pay. If an executor, in the same way, deliberately refuses to apply the assets of the estate in the payment of tax, there is no reason why the quasi-penal provisions of Section 80 should not, in the absence of express provision to the contrary, be available against him.

Assuming then, that Section 80 is applicable, the question is whether the petitioner has shown "sufficient cause why further proceedings for the recovery of tax should not be taken", and I have first to determine what would be "sufficient cause" in the contemplation of the section. It is relevant in this connection to appreciate the purpose of Section 80 and that purpose in my opinion is only to compel payment of the tax by imposing the sanction of imprisonment in default of payment.

There is an important difference between sub-section (3) of Section 79, which provides for recovery through a District Court, and the provisions of Section 80. In the former case, the District Court performs a merely ministerial function, for the Court is bound to set the process of execution by seizure and sale in motion against the property of the defaulter and it is not open to a defaulter to show any cause against the issue of process: if the Commissioner can point to some property of the defaulter, execution will follow automatically without the exercise by the Court of any discretion as to whether process should or should not issue. On the other hand, when the personal sanction provided for in Section 80 is invoked by the Commissioner, the Magistrate has first to afford the defaulter an opportunity to show cause why further proceedings, i.e., the imposition of the personal sanction, should not be taken. In the latter case then, the Magistrate has no power to impose the personal sanction if sufficient cause is shown.

The Legislature has in Section 80 (2) stated negatively the nature of cause which cannot be shown :—"any plea that the tax is excessive, incorrect or under appeal shall not be entertained ". The argument for the Crown has been that the only cause which a defaulter can show under Section 80 is that tax has actually been paid. It seems that it is scarcely necessary to provide for such an eventuality. The Section is concerned with an attempt by a public officer to enforce payment on behalf of the Crown of an amount, the correctness of which cannot be challenged, and the possibility of an attempt to recover what has already been paid would be remote if not non-existent. (Indeed, if payment is the "cause" contemplated in Section 80, there seems no reason why Section 79 (3) should not have provided for the same cause). When the Legislature, in empowering a Magistrate to deal with a defaulter in the same manner as if he had been convicted of a criminal offence, afforded an opportunity to the defaulter to show cause why he should not be thus dealt with, the Legislature must surely have intended that in special circumstances a

Magistrate would desist from imposing the penal sanction. Such special circumstances are in my opinion made out if it is shown that the default in payment was due to causes beyond the control of the defaulter, *and* that there was no lack of good faith on his part, *and* that at the time when Section 80 is invoked the defaulter has not the means to make payment. The provision for cause to be shown negatives an intention to extract a pound of flesh in every case of non-payment of income tax.

Indeed the Magistrate in the present case appears to have formed a similar view, for he has examined the facts of the case before deciding to make his order against the petitioner. His findings with respect to this question may be summarised as follows :—

(1) He holds that the petitioner admitted that she had used some of the income of the estate to buy certain properties for herself. It is now conceded for the Crown that this finding is untenable.

(2) He finds that the petitioner failed to make payments of the debts of the estate in their proper order, or, in other words, that she unduly postponed the payment of the income tax until a stage was reached when assets were not available to pay the tax.

(3) He finds also that although a notice of assessment for Rs. 50,000 odd was issued on 9th June 1947, the petitioner failed to inform the District Court of this liability and thus deprived the Commissioner of the benefit of the priorities given by Section 78 of the Income Tax Ordinance.

It is convenient for me to deal together with the findings referred to at (2) and (3) above. Although the assessment was served on 9th June 1947, that assessment did not acquire finality until the termination of the proceedings and the service of the revised assessment on 28th September 1949. If there was a duty to acquaint the Court of the Commissioner's claim, that duty did not arise until this latter date, at which stage the appeal had been partially determined in favour of the petitioner. A mere glance at the Final Account suffices to show that there was a multitude of claims against the estate and it is impossible from the evidence which has been recorded and from the history of the testamentary proceedings to reach the conclusion that in October 1949, there were still moneys available for the payment of the income tax. While it undoubtedly appears that unsecured debts were paid out of the assets, it is clear that many of these claims had crystallised into actions against the estate and that payments were made to the credit of those actions. Moreover, although the revised assessment was for a sum of Rs. 39,000, about Rs. 16,000 was actually recovered by the Commissioner through seizures or payments recorded in the Final Account, and the nett tax deficit at the time the estate was closed amounted only to Rs. 23,000. Even if assets were available in October 1949, the fact that they were not utilised to pay the income tax is attributable, not only to some default on the part of the petitioner, but equally to the failure of the Commissioner to take expeditious steps for recovery under Section 79 of the Ordinance. The administration of the estate clearly involved the petitioner in a large number of law suits and exposed her to numerous

claims by various creditors of the estate, and if in such a situation she failed to take account of the fact that by October 1949, the Commissioner's claim had become a first charge in preference to unsecured debts, can it be said that this failure amounted to a deliberate refusal on her part to satisfy the claim ? Having regard to all the circumstances which I have just mentioned, the petitioner succeeded in showing, firstly that the assets were insufficient to meet all the claims against the estate, and secondly that the failure to pay the claim of the Commissioner was due to the complexity and difficulty of the task of administration and to the fact that the claim became a legal liability at a stage when sufficient assets to meet it were no longer available. There is nothing in the evidence to show that she did not act in good faith. Moreover she derived no benefit from the estate and no assets of the estate have been traced to her hands.

I would hold that the petitioner has shown sufficient cause why further proceedings should not be taken against her for recovery. In the exercise of my powers in revision I would quash the orders under Section 80 made against the petitioner.

Application allowed.