1953 *Present :* **Nagalingam S.P.J.**

G. F. C. GUILLAIN, Petitioner, *and* COMMISSIONER OF INCOME TAX, Respondent

S. C. 294—Application for revision in M. C. Colombo, 37,624

Income tax—Proceedings for recovery before Magistrate—Stage at which further time will not be granted —Income Tax Ordinance (Cap. 188), s. 80.

In proceedings under section 80 of the Income Tax Ordinance for the recovery of unpaid tax, the assessee cannot ask for further time after the Commissioner issues his certificate under section 80 (3) confirming (or reducing) his assessment. At that stage, there is no other question outstanding which the assessee can urge as a ground for staying further proceedings for the recovery of the tax due from him.

APPLICATION to revise an order of the Magistrate's Court, Colombo.

A. B. Perera, for the petitioner.

G. F. Setukavaler, Crown Counsel, for the respondent.

Cur. adv. vult.

October 5, 1953. NAGALINGAM S.P.J.—

This is an application to revise an order made by the learned Chief Magistrate of Colombo sentencing the petitioner to a term of six months rigorous imprisonment on his declining to pay a sum of Rs. 4,844 claimed by the Commissioner of Income Tax as excess profits duty due from him. Learned Counsel for the petitioner complains that the Magistrate should have fixed the matter for inquiry on the date on which he made the order imposing the sentence and that by the learned Magistrate declining to accede to the request on the part of the petitioner to fix the matter for inquiry the petitioner has been denied justice.

For a full appreciation of the argument advanced, it will be necessary to go back to the date on which the petitioner appeared in answer to the summons served on him calling upon him to show cause why further proceedings should not be taken against him for the recovery of the excess profits duty assessed to be due from him. On the date the petitioner appeared he was represented by counsel. On that date the learned Magistrate made a minute, " Time granted till 29.4.53 under section 80(2). "

Learned counsel for the petitioner states that in Income Tax cases minutes such as the one made by the learned Magistrate are made as matters of routine without any application therefor being made by the assessee. I am not prepared to act on such a statement without proper material being placed before the Court by way of an affidavit of facts. On the contrary I incline to the view that the order was a considered order made by the learned Magistrate upon the application of the petitioner's counsel.

It is obvious that under the proviso to section 80(1) of the Income Tax Ordinance the Magistrate has no jurisdiction to consider, examine or decide the correctness of any statement in the certificate of the Commissioner, but under section 80(2) the Magistrate is empowered to adjourn the matter where the assessee has not appealed within the proper time against the assessment made upon him. It has not been suggested by Mr. Perera who appeared for the petitioner that in point of fact the petitioner had appealed against the assessment and that the provisions of sub-section (2) did not apply and that the Magistrate's order therefore was one which could be stated to bear intrinsic testimony of the routine nature of the order. But on the contrary the case has been argued on the footing that the petitioner had in fact not appealed against the assessment made on him.

The question arises, how did the learned Magistrate become aware of the fact that there had been no appeal against the assessment, for that is the only foundation upon which the learned Magistrate could have made an order under section 80(2). In fact it does not appear that the petitioner could have shown cause against the summons other than to make an application under section 80(2) in the circumstances of this case. I would hold that it was on an application made to the learned Magistrate that time was granted for representations to be made to the Commissioner. On the date fixed, after the period allowed to

submit to the Commissioner the objections to the tax, the petitioner's counsel moved that the matter be fixed for inquiry. But apparently the petitioner had made representations to the Commissioner, for the Commissioner had in the meantime issued his certificate under section 80(3), confirming his assessment. At that stage, therefore, there was no other question outstanding which the petitioner could have urged as a ground for staying further proceedings for the recovery of the excess profits duty alleged to be due from him.

Mr. Perera was unable to say even at the argument of the petition what the particular matter was that he desired to be fixed for inquiry. He made an attempt to show that the petitioner being a French subject governed by French Law was not liable to pay duty from profits earned by his wife, who was the person who ran the business of an hotel, the profits of which were the subject of the duty. But that was a subject of controversy that could and should have been taken in the earlier stages of the proceedings culminating in the assessment, and the matter could have been taken up by way of appeal in succession to the Commissioner of Income Tax, the Board of Review, and finally to this Court ; but the petitioner does not appear to have pursued the remedy granted to him by law. On the other hand I can well understand his reticence for not so doing. Whatever may be the rights between husband and wife under the law of domicile of a person, the fiscal laws of the country of their residence are in no way affected thereby. In fact in this country itself there are sections of people where the property rights of husband and wife are distinct and separate ; nevertheless the husband by virtue of the provisions expressly enacted in that behalf becomes liable to pay duty on the income or excess profits earned by the wife.

I do not therefore think that there is any substance in the contention that any prejudice has been caused to the petitioner as a result of the application to fix the matter for inquiry being refused by the learned Magistrate, for in fact there was at that time no matter to be fixed for inquiry. When I make this observation I do not lose sight of the fact that it certainly is open to a party summoned before the Magistrate to show either that he is not a defaulter in the sense that he has in point of fact paid and discharged any duty imposed on him or that he is not a defaulter in the sense that he was not the person who was assessed, but that he was a third party—see *de Silva v. Commissioner of Income Tax* [1]. Those matters relate to questions which cannot fall under the category of questions which a Magistrate is forbidden to consider or examine under section 80 (1) ; those are matters *de hors* the statement contained in the certificate.

I therefore see no reason to interfere with the order of the learned Magistrate, which is affirmed. The application is refused.

Application refused.

[1] *(1951) 53 N. L. R. 280.*