1947 *Present:* **Howard C.J. and Windham J.**

WICKREMESINGHE, Appellant, *and* THE COMMISSIONER OF INCOME TAX, Respondent.

S. C. 2—Income Tax, Case Stated.

Income Tax Ordinance—Fee paid to assessee as arbitrator—Casual and non-recurring nature—Profits from employment—Sections 6 (1) (a)-(h)—Notice in writing of case stated—Section 74 (3).

The assessee, who was an ex-Civil Servant and a Government pensioner, was appointed arbitrator by the Colombo Municipal Council in arbitration proceedings connected with the purchase by the Council of the Colombo Tramways. For acting as arbitrator he received a fee of fifteen thousand rupees.

Held, that this was not profit of a casual and non-recurring nature and was taxable under section 6 (1) (*h*) of the Income Tax Ordinance.

Semble, that the transaction came within the words "any employment" in section 6 (1) (*b*).

Held, further, that a delay of two days in giving notice of the case stated in terms of section 74 (3) of the Ordinance did not deprive the Supreme Court of jurisdiction to hear the case.

THIS was a case stated under section 74 of the Income Tax Ordinance by the Board of Review.

H. V. Perera, K.C. (with him *N. M. de Silva* and *S. Wijesinha*), for the assessee, appellant.—"Employment" as used in section 6 (1) (*b*) connotes a contract of employment, and the existence of an employer. Had it a wider meaning, it would have been used in section 6 (1) (*a*) along with "trade, business, profession or vocation", as in British Income Tax Acts before 1922. It is used separately under a different head and so, as in Britain since 1922, has a restricted meaning. In Britain, originally the word "Employment" used to be included under Schedule D of the Income Tax Acts, which read "profession, employment or vocation". This was a fairly comprehensive definition of persons working on their own account. Schedule E applied to offices. By section 18 Finance Act, 1922, the Legislature transferred "Employment" from Schedule D to Schedule E. As used in Schedule E, "Employment" was used in a sense analogous to office or post (*Davies v. Braithwaite*[1]). It connotes a contract of employment. The Income Tax Ordinance of Ceylon was enacted in 1932; it must be presumed to adopt the scheme of the English Income Tax Act. Section 6 (1) (*a*) corresponds to Schedule D and section 6 (1) (*b*) to Schedule E. Employment is thus used in narrower sense in section 6 (1) (*b*), involving master and servant relationship and existence of Employer. *Partridge v. Mallandaine*[2] and other English cases before 1922 on meaning of "Employment", followed by the Board, would not be applicable as they deal with employment as used in Schedule D. Section 6 (2) (*a*) provides a similar indication. The crucial word is *the* employer; it presupposes existence of *an* employer, which is a pre-requisite of a "profit from any employment".

[HOWARD C.J.—What about "or others"?].

[1] *1931 2 K. B. 628.* [2] *2 Tax Cases 180.*

Those two words appear in context of "the employer or others"; only wages, &c., derived by a person, already having an employer, from others by virtue of his employment—*e.g.*, tips received by a waiter—are included; "or others" was the outcome of an amendment in 1934; it catches up payments from other sources received by an employee by virtue of his employment besides those received from his employer. The late Mr. Wickremesinghe was appointed an arbitrator—a semi-judicial capacity—clearly no master and servant relationship existed or could exist. The payment he received is not "profit of any employment". This payment is further exempt under section 6 (1) (*h*) as being "a profit of casual and non-recurring nature". This provision is based on the concept of casual profits of British Income Tax Law: such profits are of a "non-recurring" nature. The examples of casual profits cited by the Board in its decision all show the meaning of that term; by this criterion, this payment is clearly a casual profit. However, whereas in Great Britain a casual profit is taxable, in Ceylon it is not. The Board failed to realise this distinction and their decision is based on a misconception; they enumerate examples of similar profits taxable in Britain, and by analogy hold that this payment is taxable in Ceylon.

Commissioner of Income Tax, Madras v. M. Ahmed Badsha Saheb[1] states criterion to be adopted. The profit has to be looked at as a whole in relation to the circumstances in which it accrued, in order to decide whether it is of a casual and non-recurring nature. In his judgment, Leach C.J. impliedly rejects the view taken in *In re Chunilal Kalyan Das*[2]. In this case Walsh J. interprets "non-recurring" as "non-recurrable", which are not the same, thereby unwarrantedly restricting the meaning of "profits of a casual and non-recurring nature".

In *Thornhill v. Commissioner of Income Tax*[3] Soertsz J. incidentally referred to section 6 (1) (*b*) and suggested that it contemplates "windfalls". He does not however consider the meaning of section 6 (1) (*b*) or give an exhaustive definition of it; he merely refers to the commonest class of cases to which section 6 (1) (*b*) applies, and does not seek to define it. The late Mr. Wickremesinghe acted only on this occasion as an arbitrator; he did not function in this capacity in any other matter. The payment received was a casual profit and, in the circumstances, of a non-recurring nature.

H. H. Basnayake, K.C., Acting Attorney-General (with him *H. W. R. Weerasooriya, C.C.*), for the Commissioner of Income Tax, respondent.—The payment is taxable under both section 6 (1) (*b*) and section 6 (1) (*h*). The Ceylon Income Tax Ordinance is based on the New Zealand Act, which contains a classification similar to our section 6. It is unsafe to presume that our Ordinance follows the scheme of the English Act. The term "employment" is used here in a wider sense and includes the case of a man working on his own account. Further, in any event, "or others" in section 6 (2) (*a*) is wide enough to include payments received from all persons, quite apart from whether an employer exists or not. It is also not of a "casual and non-recurring nature"; the emphasis

[1] *A. I. R. 1944, Madras 63.* [2] *A. I. R. 1925, Allahabad 469.*

[3] *(1940) 41 N. L. R. 313.*

is on "nature". The criterion is the existence of some intrinsic characteristic in the profit which renders it casual and non-recurring. This is the *ratio decidendi* of *In re Chunilal Kalyan Das* (*supra*) ; nor does this case conflict in principle with the subsequent case of *Commissioner of Income Tax, Madras v. M. Ahmed Badsha Saheb* (*supra*) which merely states a general rule that the question whether any profit is of a "casual and non-recurring nature" or not must be decided on the particular facts appertaining to it. In England, the fee in question would be taxable. See *8 Tax Cases 525.*

A preliminary objection exists to the hearing of this appeal. It is only now that I have been informed of the facts on which this objection is based. The notice required by section 74 (3) was given to the Commissioner two days subsequent to the transmission of the case to the Supreme Court. It should have been sent "at or before the time" the case was transmitted. See *Cosmas v. Commissioner of Income Tax*[1] ; *North-Western Blue Line v. Perera*[2] ; *Duke of Atholl v. Read*[3].

H. V. Perera, K.C., in reply.—The preliminary objection should have been taken before the hearing, not after its conclusion. Otherwise, the objection must be taken to have been waived. The notice sent to the Commissioner was within the period of 14 days allowed by section 74 (2) for the transmission of the case to the Supreme Court. Section 74 (3) must be read with section 74 (2).

In any event section 74 (3) is not a condition precedent to conferring jurisdiction on the Supreme Court to hear this appeal; it is only an incidental provision.

In *Cosmas v. Commissioner of Income Tax* (*supra*) there was an inordinate delay. Poyser J. however stated that "at or before the time" might possibly give some latitude. See also *Ex parte Rosenthal*[4].

Cur. adv. vult.

October 2, 1947. HOWARD C.J.—

This application is made by the appellant under section 74 of the Income Tax Ordinance (Cap. 188) on a point of law by way of case stated by the Board of Review. The appellant is the widow of the late Mr. C. L. Wickremesinghe, who as an ex-member of the Ceylon Civil Service was a pensioner of the Government. In the year preceding the year of assessment 1944-45, the deceased agreed with the Municipal Council of Colombo to act as the Arbitrator nominated by the Council in arbitration proceedings connected with the purchase by the Council of the Colombo Tramways. For acting as Arbitrator the deceased received the sum of Rs. 15,000 which was included in the assessment to Income Tax made on the deceased's income. Despite appeals by the appellant this assessment was confirmed by the Commissioner of Income Tax and the Board of Review.

On behalf of the appellant Mr. H. V. Perera has contended that the sum of Rs. 15,000 did not form part of the deceased's income or profits chargeable with tax on the ground that it did not come under any of the descriptions of profits or income in section 6 (1) (*a*)-(*g*) of the Ordinance

[1] *(1938) 39 N. L. R. 457.*
[2] *(1943) 44 N. L. R. 523.*
[3] *(1934) 2 K. B. 92.*
[4] *L. R. (1882) 20 Ch. D. 315.*

and that it was excluded from section 6 (1) (*h*) as being of a casual and non-recurring nature. The Acting Attorney-General on the other hand maintains that the sum earned by Mr. Wickremesinghe is taxable under each of paragraphs (1) (*a*), (1) (*b*) and (1) (*h*) of section 6. He relies mainly on section 6 (1) (*h*) and argues that it was not a profit of a casual and non-recurring nature. In connection with the expression "casual and non-recurring" nature our attention has been invited to various authorities. In *The Commissioner of Income Tax, Madras v. M. Ahmed Badsha Saheb* [1], it was held by Leach C.J., that there can be no rule laid down with regard to what is of a casual and non-curring nature. Each case must be decided on its particular facts. In that particular case the assessee was a merchant dealing in hides and he entered into an agreement to act as an arbitrator. This agreement was entirely apart from his business and was made with no stipulation for remuneration but as a friend of the family. The task involved more time than anticipated and though there was no legal obligation the Court decided to grant the arbitrators a reward for their services. In these circumstances the Court held that the remuneration was of a casual and non-recurring nature. *In the matter of Chunni Lal Kalyan Das* [2] it was held that the adventure of a business man who is enabled, through his business associations, to negotiate a large transaction and thereby to earn a heavy commission, may undoubtedly be in fact non-recurring in the sense that so successful an adventure would not be likely to occur again. But, on the other hand, it is a class of transaction which might occur to any such business man once only or half a dozen times again, during the course of the year. Profits arising from such a transaction are not of a casual or non-recurring nature. In his judgment Walsh J. invited attention to the use in the exemption of the word "nature" rather than "occurrence". If the word occurrence had been used there would have been much to be said for the contention of the assessee. The use of the word "nature" connoted a class of dealing which might occur several times. The word "nature" was used independently of the accident of the event happening in fact once only or more often in a fortunate year. Again in *Thornhill v. The Commissioner of Income Tax* [3] it was held that income tax is payable on proceeds of the sale of coupons issued under the Tea and Rubber Control Ordinances. At p. 318 Soertsz J. who gave the judgment stated as follows:—

> "Examined in this way, the amount in question appears to me to be 'profits and income' derived from a business, namely, an agricultural undertaking, and assessable to income tax under section 6 (1) (*a*) of the Income Tax Ordinance.
>
> If, however, this view is incorrect and the amount is not assessable under that sub-section, I am clearly of opinion that it is not a receipt which escapes altogether from the Ordinance. I find it impossible to resist the conclusion that this is a taxable receipt for, as very pertinently observed by the Board 'if the appellant's contention is accepted, the owner of a 500-acre estate may get it registered, refrain from harvesting its produce, receive coupons, derive large sums of

[1] *A. I. R. (1944) Madras 63.* [2] *A. I. R. (1925) Allahabad 469.*
[3] *(1940) 41 N. L. R. 313.*

money thereby, and escape taxation altogether in respect of the money he receives in connection with his owning and maintaining an estate'. I agree with the Board that if it is assumed that this amount does not fall within the scope of section 6 (1) (*a*), it is caught up by the 'residuary' sub-section (1) (*h*), for this amount is not something casual or something in the nature of a windfall. It is something that will recur, or, at least, that can be made to recur as long as the Tea and the Rubber Control Ordinances continue in operation".

It is conceded by Mr. Perera that the sum earned by Mr. Wickremesinghe would have attracted tax in England although it is of a casual nature. This is clear from the judgment of Rowlatt J. in *Ryall v. Honeywill*[1]. Mr. Perera contends, however, that the law in Ceylon in regard to a transaction of this character is by reason of the wording of the Income Tax Ordinance different from that in England.

In my opinion it is, without departing from the principle formulated in the Madras case that each case must be decided on its particular facts, difficult to distinguish the present case from *Thornhill v. The Commissioner of Income Tax* and the Allahabad case. The employment of the late Mr. Wickremesinghe as an arbitrator was something that could be made to occur again. It was a class of dealing which might occur only once, but might occur several times. It did not exhaust itself in one effort. In these circumstances the sum of Rupees 15,000 was not a profit of a casual and non-recurring nature.

Although it is unnecessary to decide the point I think the Attorney-General was correct in his contention that the transaction came within the words "any employment" as used in section 6 (1) (*b*) of the Ordinance. Mr. Perera contends that the word "employment" connotes an engagement by someone else. In this connection the following passage from the judgment of Denman J. in *Partridge v. Mallandaine*[2] is in point :—

> "The words are 'profession, employment or vocation'. I do not feel myself disposed to put so limited a construction upon the word 'employment' as Mr. Graham desires us to put upon it. I do not think 'employment' necessarily means a case in which a person is set to work by other means to earn money. A man may employ himself in order to earn money in such a way as to come within that definition."

The Acting Attorney-General has also taken a technical objection to the hearing of this application. Under section 74 (3) of the Ordinance the applicant is required "at or before the time" when he transmits the stated case to the Supreme Court, to send the other party notice in writing of the fact that the case has been stated on his application and shall supply him with a copy of the stated case. The stated case was transmitted to the Supreme Court on January 22, 1947; on the same day notice in writing of such transmission was sent to the Clerk to the Board of Review, an officer in the Department of Income Tax. On January 24, 1947, notice in writing was sent to the Commissioner. The Acting

[1] *8 Tax Cases 524.* [2] *2 Tax Cases 180.*

Attorney-General has argued that notice in writing to the Commissioner as provided in section 74 (3) was a "condition precedent" to the hearing of this appeal. He referred us to *Cosmas v. The Commissioner of Income Tax*[1]. The head note of this case is as follows :—

> "Where a person, on whose application a case was stated for the opinion of the Supreme Court under section 74 of the Income Tax Ordinance, transmitted the case to the Supreme Court on January 17, 1938, and gave notice to the Income Tax Commissioner on March 21, 1938—
>
> *Held,* that the appellant had failed to comply with the requirement of section 74 (3) that the notice should be given at or before the time he transmits the case to the Supreme Court."

It will be observed that the delay in giving the required notice to the Commissioner was in that case over two months. In this case it amounts to two days. In his judgment at p. 458, Poyser J. stated that the words "at or before the time" though they might possibly give some latitude, certainly do not permit of a delay of some five weeks in complying with the provisions of this sub-section. I do not regard this case as an authority for the proposition that a delay of a day or two in giving the notice under section 74 (3) of the Ordinance will deprive the Court of jurisdiction to hear this application.

For the reasons I have given, I am of opinion the application should be dismissed with costs.

WINDHAM J.—I agree.

Application dismissed.