

RAMALIN
V.
COMMISSIONER OF INLAND REVENUE

COURT OF APPEAL

WIJETUNGA J. AND ANANDACOOMARASWAMY J.

C. A. NOS. 891/83 AND 892/83

D. C. COLOMBO NO. 14740/TAX AND

14726/TAX

JUNE 6, 1988.

Income Tax — Inland Revenue Act No. 4 of 1963, Ss. 49 and 111(1) — Liability of wife to pay taxes imposed on her deceased husband — Defaulter.

The executor of a deceased person's estate is chargeable with tax with which such deceased person would be chargeable if he were alive; but for such liability to arise the executor should be charged with tax qua executor. A defaulter is a person who having been duly assessed as being 'chargeable with tax' has omitted to pay such tax on or before the due date. The petitioner was not a defaulter as she had not been assessed. She was not liable therefore to pay her late husband's taxes although she had admitted liability in court and even paid three instalments.

Mohamed Hamza v. Commissioner of Inland Revenue C.A. 454/81 — C. A. Minutes of 29.1.88 not followed.

Cases referred to

1. *Philip v. Commissioner of Inland Revenue*, Sri Kantha's Law Reports Vol. 1 P. 133
2. *M. E. de Silva v. The Commissioner of Income Tax* 53 NLR 280
3. *Mohamed Hamza v. Commissioner of Inland Revenue* C. A. 454/81 C. A. Minutes of 29.1.88

APPLICATIONS in revision of order of the District Court of Colombo.

Stanley Fernando for petitioner.

K. Sripavan, State Counsel, for respondent.

Cur. adv. vult.

August 25, 1988

WIJETUNGA, J.

In each of these applications, the petitioner seeks to set aside the order made by the learned District Judge imposing the tax

due as a fine and in default, a term of six months simple imprisonment. The certificates in respect of unpaid taxes were filed under Section 111(1) of the Inland Revenue Act No. 4 of 1963 on the basis that the petitioner had defaulted in the payment of the said sums payable as taxes on behalf of her late husband. Having appeared in court, the petitioner had commenced payment in instalments of Rs. 250/- in each case from 4.10.82. Three such payments had been made, though there had been no admission of liability. Then, on 15.6.83 (apparently with a change of Judge) the petitioner had admitted liability and the amounts due on the said certificates had been imposed as fines, with default sentences as aforesaid. Monthly instalments of Rs. 1000/- and Rs. 2000/- respectively had also been ordered. It is at this stage that the present applications have been filed in this court. The petitioner avers that the admission of liability by her was *per incuriam*, that she is not liable to pay her late husband's taxes as no assets of her late husband had come into her hands, that she was not assessed in terms of Section 49 (iii) (a) of the Inland Revenue Act, No. 4 of 1963 and that she is not a tax defaulter. The recovery procedure laid down in Section 111 of the Inland Revenue Act, she submits, is not applicable to her.

Learned Counsel for the petitioner submits that no assessments had been issued on her *qua executrix* and that Section 111 of the Act permits only 'defaulters' to show cause why further proceedings for the recovery of tax should not be taken. Section 49 of the Act, he submits, does not impose vicarious liability on an *executrix* unless she has first been charged with tax, which has not been done in the instant cases.

Learned State Counsel, however, submits that proceedings had rightly been taken under Section 111 and that the *executrix* is liable under Section 49 to pay the taxes payable by the deceased person and that the petitioner came within the definition of 'executor' in Section 129 of the Act.

Counsel for the petitioner relies on the case of *Philip v. Commissioner of Inland Revenue*, (1) where the petitioner who was described in the certificate as the principal officer of a limited

liability Company was held not to be a defaulter, as it was the Company and not he who had been assessed to tax and it was further held that the court had no jurisdiction to proceed against him under Section 111 of the Act. In that case, the court dealt with Section 90 of the Inland Revenue Act which reads as follows:— "The Secretary, manager or other principal officer of every company or body of persons corporate or unincorporate shall be answerable for doing all such acts, matters or things as are required to be done under the provisions of this Act by such company or body of persons:

Provided that any person to whom a notice has been given under the provisions of this Act on behalf of a company or body of persons shall be deemed to be the principal officer thereof unless he proves that he has no connection with the company or body of persons or that some other person resident in Ceylon is the principal officer thereof."

He also cited the case of *M. E. de Silva v. the Commissioner of Income Tax*, (2) where income tax due from a limited liability Company was in default and the Commissioner of Income Tax, purporting to initiate proceedings under Section 30 of the Income Tax Ordinance, sought to recover the tax from the Managing Director of the Company and not from the Company itself and it was held:—

- (i) that the certificate issued by the Commissioner of Income Tax did not preclude the Managing Director from taking objection that he was not the 'defaulter' within the meaning of Section 80 of the Income Tax Ordinance. A defaulter, for the purpose of Section 80, is a person who having been duly assessed under Section 64 as being 'chargeable with tax', has omitted, in contravention of Section 76, to pay such tax on or before the date specified in the notice of assessment served on him as the person so chargeable, and
- (ii) that the provisions of Section 62 of the Income Tax Ordinance do not make the principal officer of a Company chargeable out of his personal assets with income tax levied on the Company's assessable income.

However, in that case, Gratiaen, J. dealing with the words "for doing all such acts, matters and things as would be required to be done under the provisions of the Ordinance by an individual acting in such capacity" in Section 61(1) went on to make the following observations at page 284; "I regard it as significant and indeed conclusive that, notwithstanding this provision, it was considered necessary to add express words in other parts of the Ordinance imposing vicarious 'Chargeability' on trustees, executors and partners, whereas no such special provision had been made in the case of the principal officer of a limited liability Company in respect of tax for which the Company is primarily liable." As similar provision has been made in Section 49 of the Inland Revenue Act, these observations are applicable to that Section and indicate that vicarious 'chargeability' has thereby been imposed on an executor. Thus, the position of an executor is not the same as that of a principal officer of a Company in regard to 'chargeability'. Unlike the principal officer of a Company, the executor is 'chargeable' with tax with which such deceased person would be chargeable if he were alive, subject to the provisions of that Section. But, the matter does not end there. For proceedings to be initiated under Section 111 of the Act, the executor should also be a 'defaulter'. Gratiaen, J. in *M. E. de Silva v. The Commissioner of Income Tax*, (supra) dealing with a similar provision under the earlier Income Tax Ordinance expresses the opinion that "a defaulter is a person who, having being duly assessed as being 'chargeable with tax,' has omitted to pay such tax on or before the date specified in the notice of assessment served on him as the person so chargeable." I would respectfully adopt these words for the purposes of the instant cases. Applying this definition, could it be said that the petitioner in these cases is a defaulter?

Learned State Counsel relied on the case of *Mohamed Hamza v. Commissioner of Inland Revenue*, (3) where it was held by Ramanathan, J. that the administrator of the estate of the deceased steps into the shoes of the deceased and is made chargeable with tax and that the words of Section 49 are of wide import and are sufficient to impose liability on the petitioner despite the fact that he was not 'duly assessed.' With great respect, I am unable to agree with this view. The executor of a

deceased person is no doubt chargeable with tax with which such deceased person would be chargeable if he were alive. But, in my opinion, for such liability to arise, the executor should first be charged with tax qua executor. In this connection it is important to bear in mind that the provisos to that Section place certain limitations in regard to penal liability, assessability, as well as the quantum of liability of an executor. Once again, the observations of Gratiaen, J. in De Silva's case (*supra*) become relevant. Having set down the successive stages contemplated by the Income Tax Ordinance in the assessment and recovery of income tax, he states that "no person can or should be exposed to the drastic penalties provided by Section 80 unless and until he has previously received a notice of assessment charging him with liability which, if disputed, could have been challenged in appropriate proceedings under the Ordinance." This judgment was cited with approval by G. P. S. de Silva, J. in *Philip v. Commissioner of Inland Revenue* (*supra*) when he held that the petitioner in that case was not a defaulter as it was the Company and not the petitioner who had been assessed to tax.

In the instant cases, the certificates filed in the District Court in respect of unpaid taxes do not even indicate the capacity in which the petitioner is sought to be made liable, other than stating that the amounts were 'payable as taxes on behalf of late Mr. D. William.' Nor do the affidavits filed by the Commissioner-General of Inland Revenue in this court disclose that the petitioner had, at any stage prior to proceedings being initiated against her as a 'defaulter', been charged with tax. Though undoubtedly the petitioner comes within the definition of 'executor' in Section 129 of the Act, that by itself does not make her a 'defaulter' in respect of whom proceedings could have been taken by the Commissioner General for recovery under Section 111 of the Act. The court would not have jurisdiction to proceed against her for recovery of tax due from the deceased person, unless it is established that she is a 'defaulter' within the meaning of that Section. 'Chargeability' with tax does not necessarily result in liability to pay such tax.

I am, therefore, of the opinion that the petitioner in the instant cases, not having been duly charged with tax, is not a 'defaulter'

against whom proceedings could have been initiated under Section 111 of the Act. Consequently, the orders made by the learned District Judge cannot be sustained in law.

Ranjit Wijemanne v. Commissioner of Income Tax, Ceylon Tax Cases, Volume 1 page 437 is sufficient precedent for this court to act in the exercise of its revisionary powers in circumstances such as these.

I would, therefore, set aside the orders made by the learned District Judge on 15.6.83 and discharge the petitioner from these proceedings. She will be entitled to a refund of the amounts already paid.

ANANDACOOMARASWAMY, J. — I agree

Orders set aside.
