

**DR. ABEYSINGHE
V.
GUNAWARDENA, COMMISSIONER OF INLAND REVENUE
AND OTHERS**

COURT OF APPEAL.
F.N.D. JAYASURIYA, J.
C.A. NO. 328/87.
OCTOBER 30 1996.

Certiorari - Prohibition - Board of Review Department of Inland Revenue - Fraud and neglect in disclosure of income - Onus of proof - sections 118, 124(1) of Inland Revenue Act No. 28 of 1979 and sections 98, 104(1) of the Inland Revenue Act No. 4 of 1963.

A statutory presumption has the effect in law of shifting the onus of proof, as the Petitioner failed to rebut the statutory presumption arising in regard to fraud and wilful neglect in furnishing returns of income by adducing proof to the satisfaction of the Commissioner and the Board of Review, the penalties imposed under section 124(1) of the Inland Revenue Act No. 28 of 1979 and section 104(1) of the Inland Revenue Act No.4 of 1963 were justified. There was no error on the face of the record, no failure to consider the effect of material placed before the Board, no improper evaluation of evidence, no misdirection in point of fact or law or defect of procedure.

APPLICATION for writs of certiorari and Prohibition.

Stanley Fernando for Petitioner.

S. Sri Skantharajah, Senior State Counsel with **Adrian Perera** and **Mrs. Gamage**
State Counsel for 1st to 4th Respondents.

October 30, 1996.

F.N.D. JAYASURIYA, J.

The Petitioner, who is a doctor engaged in private practice at Matara and who also carries on business in agricultural undertakings and export trade has preferred this application for the issue of a writ of certiorari and prohibition seeking an order quashing the order of the Board of Review dated 05.01.87 constituted under Section 98 of the Inland Revenue Act No. 4 of 1963 read with Section 118 of the Inland Revenue Act No. 28 of 1979 which communication letter and order has been produced marked A10 and A11 as exhibits to the said application.

The Commissioner of Inland Revenue, by a letter dated 02.12.85 required the Petitioner to state in writing on or before 24.12.85, the grounds on which the Petitioner relies to prove that there was no fraud or wilful negligence in the disclosure of his income in the Returns submitted by the Petitioner for certain years of assessment which are specified in that letter. The said letter has been annexed to the petition as an exhibit marked A1(Y). The Commissioner General in issuing this letter purported to act under the provisions of section 124(1) of the Inland Revenue Act No. 28 of 1979. Upon receipt of this letter, the Petitioner replied to the Commissioner General stating the grounds on which he relied to prove that there was no fraud or wilful negligence in the disclosure of his income. A copy of the said letter has been annexed to the petition as an exhibit marked A1 (x). A perusal of document A1 (x) discloses that there are no facts set out therein to rebut a presumption of fraud or wilful neglect which arises in terms of the statutory provisions already referred to by me. It sets out that the petitioner's accounts in regard to wealth have been accepted by the Assessor, but in the computation of his income, both the Assessor and the Deputy Commissioner have increased his statutory income on the basis of heavy personal expenses incurred by the petitioner. The Petitioner sets out that he was unable to adduce cogent evidence in refutation of the assessment of his personal expenses arrived at by the Tax Authorities. The Petitioner has expressed the view that he was keen to settle his appeals with the Inland Revenue Department and that he had accepted the estimated income of his personal expenses

and the computation of his statutory income as assessed by the Tax Authorities. These facts recited in A1(x) are wholly insufficient to rebut the statutory presumption arising in regard to fraud and wilful neglect. A statutory presumption has the effect in law of shifting the onus of proof.

Thereafter, by letter dated 13th January, 1986, the first Respondent required the Petitioner to call over on 07.02.86 at the Regional Office of the Department of Inland Revenue for further inquiry into the matter of the imposition of a penalty under section 104(1) of the Inland Revenue Act No. 4 of 1963 read with section 124(1) of the Inland Revenue Act No. 28 of 1979. That letter has been produced as an exhibit marked A1. The Petitioner appeared before the first Respondent Commissioner General of Inland Revenue on that day with his registered auditor, Mr. Leelananda de Silva and his bookkeeper, Mr. Nandasena Gamage. Although in paragraph 7 of the Petition, the Petitioner wrongly states that the Commissioner of Inland Revenue failed to hold an inquiry, as stated in his letter; at the hearing of the argument in this matter, Senior State Counsel produced the official file maintained by the Department in respect of the Petitioner and wholly rebutted this incorrect assertion on the part of the Petitioner. The onus lay on the Petitioner to adduce facts and reasons to rebut the aforesaid statutory presumption. **A registered auditor, in terms of the practice and the rules that prevail in the Inland Revenue Department, has no right to an audience with the Assessor or the Assistant Commissioner to the exclusion of the tax-payer. The Tax Officials are entitled to have discussions and deliberations in the absence of the tax-payer, only when an attorney-at-law or a qualified Chartered Accountant appears before such officials.**

It is unfortunate that the Petitioner had not availed himself of the professional advice and services of the pleader who appeared before me in support of this application, when he appeared on the 7th of February, 1986 at the Regional Office of the Inland Revenue Department. In view of the default and omission on the part of the Petitioner to adduce facts, submissions and representations in rebuttal of the aforesaid statutory presumption on the 7th of February, 1986, the first Respondent by two notices dated 21.03.86 issued on the Petitioner in terms of section 124(1) of the Inland Revenue Act No. 28

of 1979, required him to pay a penalty of Rs.17,000 under section 104(1) of the Inland Revenue Act No. 4 of 1963 and a penalty of Rs.33,000 on the Petitioner under section 124(1) of the Inland Revenue Act No. 28 of 1979. Further, the first Respondent issued on the Petitioner an Order dated 07.02.86 imposing the aforesaid penalties on the Petitioner. These two notifications marked A2 and A3 and copy of the order dated 07.02.86 marked A4 have been annexed as exhibits to the present application.

Thereupon, the Petitioner appealed to the Board of Review against the first Respondent Commissioner's order dated 07.02.86 imposing penalties aggregating to a sum of Rs.50,000/- on the Petitioner. The Board of Review, having heard the appeal of the Petitioner on three days, by its order dated 05.01.87 dismissed the appeal of the Appellant-Petitioner.

The Commissioner of Inland Revenue, Matara, in his order imposing the penalty of Rs.50,000/- (marked as A4) in respect of the years of assessment 1973-74, 1974-75, 1975-76, 1976-77, and 1980-81, has held that the Petitioner has been assessed and called upon to pay tax on an additional income of Rs.871,501. The additional tax imposed in excess of the tax leviable on his returns for these years amounted to a sum of Rs.449,290. These additional assessments have become final and conclusive. Thus, the assessee has been called upon to pay taxes and he has paid the taxes in respect of a statutory income much in excess of what has been declared in his returns. On the basis of discrepancy in the amounts returned as income in his income tax returns and the amounts at which his statutory income has been assessed in the additional assessments the penalty that could have been imposed in terms of the aforesaid statutory provisions amounted to Rs.912,580. However, the Commissioner-General, taking into account the assistance furnished by the assessee-Petitioner in the settlement of the appeals, has limited the penalty to a very low sum of Rs.50,000/- in the aggregate. The penalty leviable has been detailed in regard to the different years of assessment and has been disclosed in the document A4. The Board of Review in its order dated 05.01.87 has spotlighted the fact that the additional assessments for the years of assessment 1973-74 and 1974-75 were made after the Appellant-Petitioner's returns for these years of assessment were rejected. The assessments for the years of

assessment 1975-76 to 1980-81 were estimated assessments issued by the Department on the failure of the assessee-Petitioner to submit returns. The Board of Review has emphasized that it is clearly manifest that in respect of the aforesaid first two years of assessment 1973-74 and 1974-75, the amounts returned by the Appellant-Petitioner were rejected by the Assessor and by the Assistant Commissioner as the returns did not correctly disclose his actual income for the aforesaid two years. In the result, the statutory presumption operated against the Petitioner and its legal effect was to shift the onus of proof on to the Appellant-Petitioner. The Board of Review, therefore, took the view that the only issue arising upon this appeal was whether the Appellant-Petitioner has discharged his onus of refuting the statutory presumption which arose that there was fraud or wilful neglect on his part in the disclosure of his income in his returns for the aforesaid relevant years of assessment. Learned counsel for the Petitioner has misconceived the legal position and assumed wrongly that the onus was on the Commissioner to establish fraud or wilful neglect on the part of the Petitioner. Having regard to the provisions of section 124(1) and section 104(1) of the aforesaid statutory provisions, the law puts the onus on the tax-payer to prove to the satisfaction of the Commissioner and the Board of Review that there has been no fraud or wilful neglect in his failure to disclose his correct income in his returns.

The income tax file which was produced at the hearing of this petition, established that both the Petitioner and his registered auditor failed to adduce any material except referring to the contents of the aforesaid document A1(X). At the Board of Review, it was open to the Appellant-Petitioner to lead evidence in discharge of the onus which lay on him in terms of the statutory provisions. The Board of Review has stressed this feature and stated thus: "In fact, the Appellant did not give any evidence before us in order to establish this fact, if it was the fact. It was merely put to the Board by way of a submission which was not supported by the Appellant by giving evidence in this regard." This court is of the considered view that both the Commissioner-General and the Board of Review have taken into consideration the highly insufficient material which is contained in the explanatory letter written by the Petitioner to the Commissioner-General and which has been produced marked A1 (X). For the reasons which I have already emphasized, the Board of Review has very correctly expressed the

view that the contents of the said document are unsatisfactory and the effect of its contents, are wholly insufficient to rebut the statutory presumption which arose to the detriment of the Appellant-Petitioner. The Board of Review has further emphasized thus: "Even before this Board the Appellant failed to give evidence in order to explain his failure to disclose his income for the relevant years of assessment. "This Court in the circumstances holds that the Board of Review was wholly justified in holding that the Appellant-Petitioner has failed to discharge the burden of establishing that there was no fraud or wilful neglect on his part in his failure to disclose his income for the aforesaid two years in his returns submitted to the department.

I have patiently given a hearing to learned counsel for the Petitioner who in his oral submissions reiterated the matter which he has set forth in paragraph 9 (i) (ii) (iii). For the reasons already adduced by me I hold that there is no merit or substance in the aforesaid contention. I hold that there is no error of law on the face of the record on a consideration of the entire material which has been placed before this Court and on a consideration of the order of the Board of Review dated 05.01.87 which has been marked as A11. There is no failure to consider the effect of material placed before the Board. There is no improper evaluation of evidence. There is no misdirection in point of fact or law and there is no defect of procedure discernible on a perusal of the record. In the circumstances I proceed to dismiss the application with costs in a sum of Rs: 500/- payable by the Petitioner to the first Respondent.

Application dismissed.