

1933

*Present : Maartensz A.J.*COMMISSIONER OF INCOME TAX *v.* DE VOS.611—*P. C. Colombo, 5,512.*

*Income Tax—Recovery of tax from defaulter—Scope of section 80 (1) of the Ordinance—Right of appeal—Discretion of Commissioner—Ordinance No. 2 of 1932, ss. 79 and 80.*

The Commissioner of Income Tax is not bound to exhaust the remedies provided by section 79 (2) and (3) of the Income Tax Ordinance before he proceeds to recover any tax from a person in default under section 80 (1).

The proviso to the latter section does not preclude the Police Magistrate from deciding whether the Commissioner had properly exercised his discretion in proceeding under the section.

There is no right of appeal to the Supreme Court from an order made by a Police Magistrate in a proceeding under section 80 (1).

**A** PPEAL from an order made by the Police Magistrate of Colombo.

*H. V. Perera*, for appellant.

*Wendt, C.C.*, for the respondent.

*Cur. adv. vult.*

November 29, 1933. MAARTENSZ A.J.—

This is an appeal by an assessee against whom an order has been made in a proceeding under section 80 (1) of the Income Tax Ordinance, 1932.

The proceeding is not of a criminal nature and the provisions of the Criminal Procedure Code regarding appeals do not apply to the order made against the appellant. The Ordinance makes no provision for appeals from orders made under section 80, and I do not think the appellant has a right of appeal; but, as the objections to the order have been fully discussed, I shall treat the appeal as an application for revision.

Section 80 is one of a series of sections enacted for the purpose of recovering income tax from a person in default.

Section 79 (2) provides for the recovery of the tax by seizure and sale of the movable property of the defaulter. Sub-section (3) provides for the recovery of the tax by seizure and sale of the movable and immovable property of the defaulter on a writ of execution issued by a District Court having jurisdiction in any district where the defaulter resides, or in which any property, movable or immovable, owned by the defaulter is situated.

It was conceded that these remedies were alternative to each other. Section 80 (1) enacts:—

“Where the Commissioner is of opinion in any case that recovery of tax in default by seizure and sale is impracticable or inexpedient, or where the full amount of the tax has not been recovered by seizure and sale, he may issue a certificate containing particulars of such tax and the name and last known place of business or residence of the defaulter to a Police Magistrate having jurisdiction in the division in which such place is situate. The Police Magistrate shall thereupon summon such defaulter before him to show cause why further proceedings for the recovery of the tax should not be taken against him, and in default of sufficient cause being shown the tax in default shall be deemed to be a fine imposed by a sentence of the Magistrate on such defaulter for an offence punishable with fine only or not punishable with imprisonment, and the provisions of sub-section (1) of section 312 (except paragraphs (a), (c) and (h) thereof) of the Criminal Procedure Code, 1898, relating to default of payment of a fine imposed for such an offence shall thereupon apply, and the Magistrate may make any direction, which, by the provisions of that sub-section, he could have made at the time of imposing such sentence”.

It is clear from the evidence in the case that the Commissioner of Income Tax moved the Police Court under the provisions of section 80 (1) without taking either of the steps provided by section 79 for the recovery of the tax.

The main contention of the appellant was that the Commissioner of Income Tax was not entitled to proceed under section 80 (1) until he had ascertained that proceeding under section 79 had failed or were likely to fail.

In support of the contention it was pointed out (a) that a proceeding under section 80 (1) was of a more drastic character than the proceedings provided for by section 79, (b) that section 80 (1) provided for the defaulter showing cause against further proceedings being taken against him and it was urged that the proceedings referred to were the proceedings provided for by section 79, (c) that the phraseology of section 79 (3) differed from the phraseology of section 80 (1), which indicates that section 80 (1) should be resorted to after steps had been taken under section 79. I am unable to accept this contention. As regards the first objection the mere fact that a proceeding under one section is of a more drastic character than the proceedings provided for by another section does not limit the discretion of the person entitled to put the sections into operation. As regards the second, the proceedings mentioned in section 80 (1) do not, in my opinion, refer to proceedings under section 79 but to proceedings under the section itself. The defaulter can show cause against further proceedings by showing that the place where he resided or carried on

business was outside the jurisdiction of the Magistrate, or that he was entitled to a stay of proceedings for the reasons set out in sub-section (2) of the section.

As regards the change in phraseology, I do not think it has the effect contended for by the appellant. Section 79 (3) provides that where any tax is in default and the Commissioner is of opinion that recovery by the means provided for in sub-section (2) is impracticable or expedient, he may issue a certificate to a District Court having jurisdiction . . . . "for the purpose of having the movable or immovable property seized and sold by the Fiscal". At that stage the only other remedy was by seizure and sale of the movable property. It was necessary, however, in section 80 to refer to both remedies, and, accordingly, it provides that "where the Commissioner is of opinion in any case that recovery of tax in default by seizure and sale is impracticable or inexpedient or where the full amount of the tax has not been recovered by seizure and sale, he may issue a certificate".

The only difference is that in section 79 (3) movable property is specified, while in section 80 (1) the nature of the property is not specified. There is nothing in the difference of phraseology to indicate that the proceedings provided for by section 79, sub-sections (2) and (3) must be resorted to before the Commissioner takes action under section 80 (1).

The Commissioner is, in my opinion, by the terms of the sections, vested with absolute discretion as to what steps should be taken to recover the tax from the defaulter. He may even proceed under both section 79 and section 80 simultaneously; for section 83 enacts that "where the Commissioner of Income Tax is of opinion that application of any of the provisions of this Chapter has failed or is likely to fail to secure payment of the whole of the tax due from any person, it shall be lawful for him to proceed to recover any sum remaining unpaid by any other means of recovery provided in this chapter, save where an order has been made by a Police Magistrate under section 80 and carried into effect".

I am, therefore, unable to agree with the learned Magistrate's opinion that the Commissioner should first proceed under section 79 (2) and (3) of the Ordinance and that he can only proceed under section 80 (1) if such steps have failed.

I am also unable to agree with the learned Magistrate that the proviso to section 80 (1) precluded him from deciding whether the Commissioner had properly exercised his discretion. It is true the certificate states that the Commissioner is of opinion that "recovery of the said tax in default by seizure and sale is inexpedient", but that is not a particular which the Commissioner is required to state by section 80 (1), and is, therefore, not a statement to which the proviso, which enacts as follows:—

"Provided that nothing in this section shall authorize or require the Magistrate in any proceeding thereunder to consider, examine, or decide the correctness of any statement in the certificate of the Commissioner", applies.

The appeal is dismissed and the application for revision of the order refused.

*Affirmed.*