1960 *Present :* **T. S. Fernando, J.**

W. I. S. FERNANDO, Appellant, *and* H. A. MITRASENA (Assessor, Department of Inland Revenue), Respondent

S. C. 995—M. C. Colombo, 17978/B

Income tax—False statement in return made by assessee—Return not one required to be made by the Ordinance—Scope of assessee's liability—Income Tax Ordinance (Cap. 188), ss. 54 (1), (3) ; 64 ; 87 (1) (b).

An assessee, who had furnished in April 1953 a return of his income for the year of assessment 1952/53 as required by the Income Tax Ordinance and been assessed thereon and paid the tax due on the assessment, sent another return in May 1954 in respect of the same year of assessment as a result of a request made by the assessor that another return be furnished as the earlier return had been lost in his (the assessor's) office.

The assessee was charged with making a false statement in a return made under the Ordinance, viz., the return furnished in May 1954.

Held, that, as there was no provision of law which enabled the assessor to call for another return from a person who had already furnished a return as required by the Ordinance, been assessed thereon and had paid the tax on such assessment, the return made in May 1954 was not one required to be made under the Ordinance, and therefore was not one made under the Ordinance within the meaning of section 87 (1) (*b*).

APPEAL from a judgment of the Magistrate's Court, Colombo.

G. T. Samerawickreme, with *R. Bandaranayake*, for the accused-appellant.

P. Colin Thome, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 9, 1960. T. S. FERNANDO, J.—

The accused-appellant was charged in the Magistrate's Court on the charge reproduced below :—

> " That you did, within the jurisdiction of this Court at Colombo, between the 30th day of March 1954 and 27th day of May 1954, wilfully with intent to evade tax make a false statement or entry in the return furnished by you under the Income Tax Ordinance for the year of assessment 1952/53, to wit, by stating therein that your income from leasehold fibre mill, to wit, St. Mary's Fibre Mill, Wennappuwa, was Rs. 19,108/05 whereas in fact such income was more than the said sum and have thereby committed an offence punishable under Section 87 (1) (*b*) of the Income Tax Ordinance (Cap. 188). "

After trial, the learned Magistrate convicted the appellant and sentenced him to pay a fine of Rs. 750. The appeal has been pressed both on facts and on law. In regard to the appeal on the facts, it is sufficient to observe that it is not possible for this Court to hold either that there was not adequate material before the learned Magistrate to warrant his finding that the appellant had understated his income from the fibre mill in question or that in reaching that finding he has misdirected himself.

The question of law raised is that the return in respect of which the charge was framed was not a return *made* under the Income Tax Ordinance and therefore does not attract the penalties specified in Section 87 of the said Ordinance. To appreciate the point of law raised it is necessary to state the facts involved in its consideration and examine the relevant provisions of the Ordinance.

Section 54 (1) enables an assessor to give notice in writing to any person requiring him to furnish within the time limited by such notice a return of his income containing such particulars and in such form as may be prescribed. It is admitted that the return in respect of the year of assessment 1952/53 was called for from the appellant and was furnished by him in April 1953. On the basis of this return the assessor acting under Section 64 assessed the tax payable by the appellant and this tax was duly paid. In 1954 the assessor

received from a third party certain information which prompted him to make investigations into the income of the appellant, and in the course of these investigations the assessor discovered that the return made by the appellant for the year of assessment 1952/53 as well as the entire departmental file relating to the assessments of the appellant were missing. It is not doubted, however, that the assessment was made, and presumably the tax was paid, at a time anterior to the loss of the file. Upon the discovery of the loss, the assessor, to use his own words, " requested the appellant to send another return ". The appellant thereupon on 27th May 1954 sent the return P1 to which the charge relates. In the course of his evidence the appellant stated that P1 was a copy of the return he had furnished earlier, viz. in April 1953. An additional assessment was served upon the appellant after he furnished P1 and although he made successive appeals against this additional assessment, first to the Commissioner and then to the Board of Review, he was unsuccessful and finally paid the tax due on the additional assessment as well.

Mr. Samerewickreme's argument is that, notwithstanding that the appellant has paid the tax due on the additional assessment, there was no provision of law which enabled the assessor to call for another return from a person who had already furnished a return in terms of the Ordinance, been assessed thereon and had paid the tax due on the assessment. Inasmuch as Section 87 (1) penalises the making of a false statement or entry in a return *made under the Ordinance*, he contends that to constitute a return one that is *made* under the Ordinance it must be one that is *required to be made* under the Ordinance. This contention appears to me to be well founded, and Crown Counsel, in an attempt to meet it, sought to clothe with legal sanction the request made by the assessor for another return sometime in 1954 after tax had been assessed and paid in 1953 on the original return by pointing to Section 54 (3) of the Ordinance. That provision of law enables an assessor to call for " fuller or further returns " respecting any matter for which a return is required or prescribed by the Ordinance. In view, however, of the assessor's own evidence in this case that what he called for from the appellant in 1954 was another return because he discovered the original was lost, Crown Counsel was constrained to concede that this request could not be related to an exercise of the assessor's power under Section 54 (3) which appears to be limited to obtaining information and material in the shape of details and particulars of entries appearing on returns already received or by way of supplying omissions in such returns. No other provision of the Income Tax Ordinance was relied on as empowering the assessor to require the appellant to make the return P1. I am therefore compelled, somewhat regretfully, to reach the conclusion that P1 was not a return required to be made under the Ordinance and, for that reason, cannot be considered to be a return *made* under the Ordinance. In this view of the matter, even a belief by the assessor that he was entitled to call for another return for the year of assessment 1952/53 and a corresponding belief on the

part of the appellant that he was in law obliged to comply with the request of the assessor cannot have the effect of rendering the return actually furnished, one *made* under the Ordinance. In these circumstances the conviction has to be quashed and a direction made that the appellant be acquitted.

Before parting with this case, I should like to observe that the appellant stated in evidence that the return P1 was but a copy of the return made in April 1953. If the point that has been raised by Mr. Samerewickreme had been appreciated at the trial, it might have been possible for the prosecution, on the strength of this admission in evidence by the appellant, to have sought an amendment of the charge so as to relate the offence to the making of a false statement or entry in the original return made in April 1953. If such an amendment had been allowed, P1 could have been relied on as evidence of the nature of the false statement or entry made in the original return. Such an amendment of the charge not having been sought, the charge remained one in respect of an offence committed in 1954 and could not therefore have been related to an offence in respect of a return required to be *made* under the Ordinance.

Appeal allowed.