Privy Council Appeal No. 17 of 1968

Donald Jason Ranaweera – – – – – – *Appellant*

v.

R. Ramachandran and others – – – – – *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. DELIVERED THE 11TH DECEMBER 1969

Present at the Hearing:

LORD MORRIS OF BORTH-Y-GEST
LORD DONOVAN
LORD WILBERFORCE
LORD PEARSON
LORD DIPLOCK

[*Delivered by* LORD DONOVAN]

The appellant ("the taxpayer") appealed to the Board of Review in Colombo against penalties imposed upon him by the Commissioner of Inland Revenue under section 80 of the Income Tax Ordinance in the circumstances set out in their Lordships' judgment in the connected appeal to them by the taxpayer entitled *Ranaweera v. Wickramasinghe*. As narrated in that judgment, the Board of Review dismissed the appeal by Order dated 6th October 1964. Thereafter on 23rd November 1964 the taxpayer presented a petition to the Supreme Court praying for the issue of a mandate in the nature of a writ of *certiorari* to quash the said Order. The Supreme Court dismissed the petition on 16th October 1966, but granted leave to appeal to Her Majesty in Council.

The first second and third respondents to this appeal are members of the Income Tax Board of Review ("the Board"). They did not appear and were not represented. The fourth respondent was joined in the proceedings by the taxpayer simply to give him notice of his petition. No relief is claimed against him. He was, however, represented on this appeal and opposed the taxpayer's contentions.

In his appeal to the Board the taxpayer first argued that the imposition of a penalty upon him under section 80 was an exercise by the Commissioner of Income Tax of judicial power and was therefore a nullity since the Commissioner had not been appointed by the Judicial Commission. The Board rejected this contention, as their Lordships have now rejected it in the connected appeal. Other issues were raised by the taxpayer before the Board none of which were successful and none of which now remain.

The contentions which their Lordships now have to consider are that the Board in hearing and determining the taxpayer's appeal were exercising judicial powers: that the first, second and third respondents who constituted the Board on this occasion could not exercise such powers, not having been appointed by the Judicial Service Commission. Alternatively the first, second and third respondents were not validly appointed to the Board because they were at least "public officers" but

had not been appointed by the Public Service Commission. For either of these reasons the order of the Board dated 6th October 1964 was null and void.

In dismissing the taxpayer's petition the Supreme Court of Ceylon gave no reasons since Counsel for the taxpayer intimated that in view of the Court's decision in *Xavier v. Wijeyekoon and Others* (69 N.L.R. 197) he again proposed to present no argument.

Under the heading " Appeals to the Board of Review " section 74 (1) of the Income Tax Ordinance provides as follows:

> " For the purpose of hearing appeals in the manner hereinafter provided, there shall be a board of review (hereinafter referred to as ' the board ') consisting of not more than twenty members who shall be appointed from time to time by the Minister. The members of the board shall hold office for a term of three years but shall be eligible for reappointment."

The Minister referred to is the Minister of Finance.

Section 74 then goes on to deal with the constitution of the Board. Two members are to form a quorum, though in certain cases it is to be five. The Board is to have a legal adviser. The remuneration of members is to be fixed by the Minister.

Sections 75–77 confer jurisdiction upon the Board to hear appeals by taxpayers who are dissatisfied by a determination of the Commissioner of Inland Revenue on an appeal to him under section 73, and prescribe the procedure to be followed. Appellants are to attend in person or by an authorised representative: the assessor who made the assessment, or some other person authorised by the Commissioner of Inland Revenue is also to attend in support of the assessment: all appeals are to be heard in camera: the Board may summon and examine on oath or otherwise, any person they consider able to give evidence respecting the appeal. At the conclusion of the appeal the Board is to confirm, reduce, increase or annul the assessment, or it may remit the case to the Commissioner of Inland Revenue with the opinion of the Board thereon.

Section 76 of the Ordinance permits the Commissioner of Inland Revenue to refer an appeal direct to the Board if he considers that no useful purpose would be served by his hearing it.

The only provision concerning costs is to be found in section 77 (9) which empowers the Board to order an unsuccessful appellant to pay a sum not exceeding 100 rupees as costs of the Board.

Section 78 gives both the appellant and the Commissioner the right to require a case to be stated on a point of law for the opinion of the Supreme Court.

The first contention for the taxpayer is that the work of the Board involves the exercise of judicial power. The Board does nothing else, it is said, save hear and determine appeals. Unlike the Commissioner of Inland Revenue it has no administrative duties to perform such as, for example, the exercise of discretions which affect the quantum of a taxpayer's liability. Its work cannot therefore be properly described as administrative. When appeals come before the Board there is a *lis inter partes* to be determined, namely a dispute between the Commissioner of Income Tax on the one hand, and the taxpayer on the other; and so far as disputed questions of fact are concerned the Board's decision is final.

Counsel for the fourth respondent contended that when the Board hears appeals it is conducting one phase of the operations which go to determine a taxpayer's liability; and this is just as much part of the administration of the tax as is the hearing of appeals by the Commissioner himself.

Their Lordships think it is desirable to examine the functions of the Board a little more closely. When this is done it appears that the Board's functions on appeal are not limited to deciding disputed issues of fact or law, but that they are empowered to review matters which were the subject of a discretion exercised by executive officers. Thus under

section 11(7) of the Ordinance an Assessor has certain discretions regarding the assessment of interest. After conferring these the subsection concludes—

> "Any decision of an Assessor in the exercise of any discretion conferred upon him by this subsection may be questioned in an appeal against an assessment in accordance with Chapter XI."

In Chapter XI is to be found *inter alia* the power of the Board to hear appeals.

Section 15 gives other discretions to the Assessor in arriving at the amount of assessable income, and subsection (2) contains a similar provision to that above quoted

Section 56 confers important discretions on the Assessor in relation to the taxation of certain undistributed profits of companies, and in relation to transactions artificially reducing the amount of tax.

Again subsection (9) of the section says—

> "Nothing in this section shall prevent the decision of an Assessor in the exercise of any discretion given to him by this section from being questioned in an appeal against an assessment in accordance with Chapter XI."

The Ordinance also confers a number of discretions upon the Commissioner of Inland Revenue which, being exercised, will affect the quantum of an assessment upon the taxpayer. See, for example, section 11(1)(*a*) (depreciation allowances for wear and tear of plant etc.). Section 36(1) (liability of certain non-resident persons): section 37 (profits of certain businesses to be computed on a percentage of the turnover): and section 43(3) (ascertainment of the profits of a non-resident insurance company). There appears to be no such express enactment of a right to question the manner in which such discretions are exercised as there is in the case of Assessors: but since the amount of the assessment will be affected, and section 73 gives the right to a taxpayer to appeal if he is aggrieved by the amount of an assessment, their Lordships think that such a right must be implied. Indeed this would help to explain the existence of section 76 of the Ordinance which empowers the Commissioner to send an appeal direct to the Board if he thinks that no useful purpose would be served by his hearing it. If the Commissioner's own decision as to the exercise of a particular discretion affecting the amount of the assessment were the point at issue, he might well think it right to send the appeal direct to the Board.

The foregoing provisions show that the Board could become closely associated with the administration of the tax. Even otherwise, however, it would not follow in their Lordships' opinion that the Board when hearing appeals was exercising judicial power strictly so called. A broad and not a narrow approach to this problem is appropriate, and is exemplified by what was said in the Court of Appeal in England in the case of *Inland Revenue Commissioners v. Sneath* [1932] 2 K.B. 362. Greer L.J. speaking of Commissioners of Taxes in the United Kingdom said (p. 385)—

> "I think the estimating authorities, even when an appeal is made to them, are not acting as judges deciding litigation between the subject and the Crown. They are merely in the position of valuers whose proceedings are regulated by statute to enable them to make an estimate of the income of the taxpayer for the particular year in question. The nature of the legislation for the imposition of taxes making it necessary that the statute should provide for some machinery whereby the taxable income is ascertained, that machinery is set going separately for each year of tax, and though the figure determined in one year is final for that year, it is not final for any other purpose. It is final not as a judgment inter partes but as the final estimate of the statutory estimating body. No lis comes into existence until there has been a final estimate of the income which determines the tax payable. There can be no lis until the rights and duties are ascertained and thereafter questioned by litigation."

Romer L. J. added (p. 390)—

> " If the taxpayer is not content with such assessment he can bring the matter before the Special Commissioners by way of appeal. But the proceedings on the appeal are still merely directed towards ascertaining the income upon which the taxpayer is to be charged with surtax for the particular year of assessment, and the Special Commissioners may, if they think fit, increase the assessment made by them in the first instance. The appeal is merely another step taken by the Commissioners, at the instance of the taxpayer, in the course of the discharge by them of their administrative duty of collecting the surtax. In estimating the total income of the taxpayer the Commissioners must necessarily form, and perhaps express, opinions upon various incidental questions of fact or law. But the only thing that the Commissioners have jurisdiction to decide directly and as a substantive matter is the amount of the taxpayer's income for the year in question."

In a recent decision in England (*Slaney v. Kean* [1969] 3 W.L.R. 240) Megarry J. was inclined to think that these expressions of opinion were out of date since the passing of the Income Tax Management Act of 1964 which transferred many functions previously exercised by General and Special Commissioners of Income Tax to Inspectors of Taxes and the Board of Inland Revenue. He says (p. 246) " It seems to me that today the Commissioners discharge functions which are essentially judicial in nature. Virtually all their administrative functions have now gone, and their basic functions are judicial."

The taxpayer in the present appeal naturally quoted these observations in support of his argument: but the attention of the learned judge seems not to have been drawn to paragraph 3 of Schedule 4 of the Income Tax Management Act which enacts as follows:

> " On an appeal to the General Commissioners or Special Commissioners, the Commissioners shall have jurisdiction to review any relevant decision taken by an inspector or the Board in exercise of the functions transferred to the inspector or the Board by this Schedule."

The functions so transferred are identified in the Schedule by references to numerous provisions of the Income Tax Act 1952 and later Finance Acts: and if these are examined it will be seen that " relevant decisions " may be involved which will relate to many matters of administration and these the General and Special Commissioners are empowered to review. Their Lordships respectfully doubt therefore whether it is right to say that these Commissioners have virtually lost all their administrative functions, and that the observations of Greer L. J. and Romer L. J. above quoted must now be regarded as spent. On the contrary they would still appear to have persuasive force in relation to a case such as the present, even if the Board of Review's functions were confined to the determination of disputed issues of fact and law as a step in the determination of the taxpayer's income for the year of assessment in question.

Other authorities were canvassed in the course of the argument. They included *British Imperial Oil Company Ltd. v. Federal Commissioner of Taxation* 35 C.L.R. 422 and *Caffoor v. Income Tax Commissioner of Ceylon* [1961] A.C. 584: neither of which decisions call for detailed comment here. Both sides relied upon *Shell Company of Australia Ltd. v. Federal Commissioner of Taxation* [1931] A.C. 275 already noted in the connected appeal. On the whole of the material put before them on this part of the case their Lordships' conclusion is that the Board of Review does not exercise judicial power but is one of the instruments created for the administration of the Income Tax Ordinance, and that as such its work is administrative though judicial qualities are called for in its performance. It is irrelevant therefore that members of the Board were not appointed by the Judicial Service Commission.

The alternative contention of the taxpayer is that if the first second and third respondents are not " judicial officers " they are " public officers " within the meaning of the Constitution: and that their appointment to

the Board was invalid since it was made by the Minister and not by the Public Service Commission as required by section 60 of the Constitution.

" Public Officer " is defined in section 3 of the Constitution as meaning " any person who holds a paid office, other than a judicial office, as a servant of the Crown in respect of the Government of the Island ". Certain persons are declared not to be included in this definition, *e.g.* the Governor-General, the President, the Speaker or Minister, Senator or Member of Parliament and a number of others.

The narrow question here is, therefore, whether the first three respondents, as members of the Board, are correctly described as servants of the Crown in respect of the Government of Ceylon.

A specimen letter of appointment to the Board by the Minister of Finance was shown to their Lordships. It appoints the addressee for a period of three years and fixes his remuneration at 50 rupees for each meeting of two hours' duration or less, and 75 rupees for each meeting of more than two hours' duration, subject to an over-riding maximum of 500 rupees a month.

For the taxpayer it is said that a dilemma confronts the first three respondents from which there is no escape. If they are not " judicial officers " they must be " public officers ". The fourth respondent asserts, however, that the Constitution does not purport to be a code governing the method of appointment to every office to which are attached functions in the nature of public duties.

Their Lordships think they must find the solution to this problem in the meaning to be accorded to the words in the definition " servants of the Crown ". They regard this language as inapt to describe members of the Board having regard to the duties they have to perform. They recognise that the part-time nature of the work and the modest remuneration it attracts are not strictly relevant considerations. It is true, as the fourth respondent says, that the Crown in Ceylon cannot give members of the Board instructions as to how they are to do their work. What is also important is that although it is engaged, as their Lordships have held, in the administration of the Income Tax Ordinance, it is of the essence of the Board's function that its members remain independent and impartial; and this does not accord with any conception of them as " servants of the Crown ". They are more like independent arbitrators which the legislature has thought it right to appoint as an administrative check in favour of the taxpayer and as an additional assurance that his liability to tax will be correctly ascertained. It was urged on behalf of the taxpayer that unless they were " public officers " members of the Board would lose the protection enjoyed by those who are appointed by the Public Service Commission, and that the framers of the Constitution must have intended that protection to be afforded to persons entrusted with tasks similar to those of the Board. Their Lordships must nevertheless still come to a conclusion on the language of the definition; and they have reached the conclusion that members of the Board of Review cannot properly be described as " servants of the Crown " within the meaning of section 3 of the Constitution.

They will accordingly humbly advise Her Majesty that this appeal should also be dismissed. The taxpayer appellant must pay the costs of the appeal.

[*Dissenting Judgment by* LORD DIPLOCK]

I feel reluctantly compelled to record my own dissent from the view of the majority that a member of the Board of Review does not hold his office as a " servant of the Crown " within the meaning of that expression in the Constitution of Ceylon. The reasons stated for that conclusion are: " that once they are appointed the Crown in Ceylon cannot give members of the Board instructions as to how they are to do their job ". " it is of the essence of their function that they remain

independent and impartial" and "They are more like independent arbitrators which the legislature has thought it right to appoint. . . ."

These reasons would be conclusive that a member of the Board was not a "servant" if one were considering whether there existed between him and some other person the legal relationship of master and servant in private law. But the Constitution of Ceylon is concerned not with private law but with public law in which the compound expression "servant-of-the-Crown" has become a term of art descriptive of persons by whom the functions of Government of a State are carried out.

In the context of public law I myself should have regarded the characteristics of the office of member of the Board of Review which are relied upon to negative their being "servants" in private law, as pointing to the conclusion that their functions as "servants of the Crown" were more appropriately classified as judicial rather than executive or administrative so that they were "judicial officers" rather than "public officers" within the meaning of the Constitution.

I recognise however that within the special field of taxation there is a line of authorities anterior in date to the Constitution of Ceylon which discloses a tendency to treat as executive or administrative the function of deciding disputes between the Government and the taxpayer as to his legal liability under fiscal legislation although the decision-making function is of a kind which would have all the indicia of being judicial if the subject-matter of the legal liability were anything other than tax. I am not myself convinced that even these authorities compel the conclusion that the functions of the Board of Review under the Income Tax Ordinance of Ceylon are not judicial. But I do not find the reasoning of *Shell Co. of Australia v. Federal Commissioner of Taxation* [1931] A.C. 275 easy to apply beyond the particular statute with which it was concerned. It enumerates characteristics of a tribunal which are not conclusive to constitute it a "court" but throws little light upon what characteristics are conclusive either of its exercising judicial functions or of its exercising executive or administrative functions. Despite my doubts however I should not have felt justified in expressing positive dissent to a decision that the members of the Board of Review were "public officers" rather than "judicial officers".

The Constitution of Ceylon takes the form of a constitutional monarchy modelled upon that of the United Kingdom. Under such a constitution all functions of central government of the State, legislative, executive and judicial, are carried out in the name of the reigning monarch. In such expressions as "servant of the Crown" or "member of Her Majesty's service", "the Crown" and "Her Majesty" are used not in the personal but in a metaphorical sense to connote the central government of the State. No one would suggest that except as respects her personal staff there exists between Her Majesty as a natural person and a "servant of the Crown" a legal relationship which possesses the characteristics of the relationship of master and servant at common law, namely, that Her Majesty can give instructions as to the manner in which the servant of the Crown performs his work. On the contrary Her Ministers, by their advice, control the manner in which Her Majesty herself performs her duties under public law. Yet so far as I am aware it has never been suggested that Ministers of the Crown are not included in the expression "servants of the Crown". So clear was this thought to be by the United Kingdom parliament in 1947 that in the interpretation section (s. 38(2)) of the Crown Proceedings Act 1947, it is provided: "Officer", in relation to the Crown, includes any servant of His Majesty, and *accordingly* (but without prejudice to the generality of the foregoing provision) includes a "Minister of the Crown". A similar recognition that the expression "servant of the Crown" is wide enough to include a Minister of the Crown is to be found in the Constitution of Ceylon itself in which a Minister of the Crown is expressly excluded from the definition of "public officer" within which he would otherwise have fallen as holding "a paid office as a servant of the Crown in respect of the Government of the Island".

Control by some other person of the manner in which a person performs functions for the purposes of the central government of the State is not in my view a relevant test of whether or not he is a " servant of the Crown ". The legislation under which he is appointed may confer upon him a wide personal discretion to act as he thinks fit. If his responsibilities are of a judicial nature this may be inconsistent with any power in any other person to control the decisions which he makes in discharging them provided that he acts within his jurisdiction. Yet a person who performs judicial functions is none the less a " servant of the Crown ". (*Terrell v. Secretary of State for the Colonies* [1953] 2 Q.B. 482). There may be room for argument as to whether in view of their unique constitutional history judges of the Supreme Court of the United Kingdom are excluded from the category of servants of the Crown or " persons in His Majesty's service " as Sir William Holdsworth thought they were in 1931 (48 L.Q.R.); though I recall that in the oath of office I took as a Lord Justice of Appeal I swore that I would " well and truly *serve* our Sovereign Lady Queen Elizabeth the Second in the Office of one of the Lords Justices of Appeal ". However this may be as respects judges of the Supreme Court who in the Ceylon Constitution are expressly excluded from the definition of " judicial officer ", so far as I am aware it has never been suggested that persons appointed to other judicial offices are not servants of the Crown; and this too is implicitly recognised in section 2(5) of the Crown Proceedings Act 1947, of the United Kingdom and in the definition of " public officer " in the Constitution of Ceylon.

There may be cases where a function of central government such as the maintenance of order is carried out through officers appointed locally and paid out of local funds. Police constables are a well known example and there may be room for doubt whether in view of the manner of their appointment and the source of their pay they are strictly " servants of the Crown " or are as Blackburn J. put in *Mersey Docks v. Cameron* (11 H.L.C. 443 at pp. 464–5) only *in consimili casu*. This however does not arise in the present appeal.

A member of the Board of Review under the Income Tax Ordinance holds an " office ". It is so described in section 74(1). It is a " paid office ", for section 74(6) provides for his remuneration which is paid out of the revenues of the central government of Ceylon. In my opinion, the test whether or not he is a " servant of the Crown " in the sense in which that expression is used in public law is whether or not the functions conferred or imposed by the Income Tax Ordinance upon the Board of Review which he is appointed to perform are under the Constitution of Ceylon functions of central government.

The assessment and collection of taxes to defray the expenses of the central government of the country is a classic constitutional function of central government itself. The performance of this function must needs be undertaken by natural persons for the purpose of administering the fiscal legislation on the central government's behalf. Those natural persons who so administer it, at any rate if appointed by a Minister of the Crown acting in his official capacity and if paid out of the central revenues of Ceylon, are in my view " servants of the Crown ".

For this reason I myself would allow this appeal on the ground that the members of the Board of Review if not " judicial officers " are " public officers " and were not validly appointed as such.

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In the Privy Council

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