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JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S MISCELLANEOUS APPEAL NO. 17 OF 1984

BEFORE: THE HON. MR. JUSTICE CARBERRY, J.A.  
THE HON. MR. JUSTICE CAREY, J.A.  
THE HON. MR. JUSTICE ROSS, J.A.

REGINA v. RALPH THOMAS

Mr. Carl Thomas for Appellant.  
Miss D. Wilson for the Revenue Board.

January 31; February 1 & 8, 1985

CAREY, J.A.:

This is an appeal against a decision of His Honour, H. R. Marsh, Esq., one of the Resident Magistrates in the parish of Clarendon, sitting at May Pen, on 19th January, 1984, whereby he ordered the payment of \$6,066.25, representing income tax for the years 1971 - 1973, and the amount of 80¢ for costs.

The appellant had been duly assessed on 29th August, 1975, for income tax in respect of the years stated above but was not served with the notices of assessment until as late as 8th August, 1983. The complaint was laid on 13th September, 1983, and the same points urged below were once again pressed upon us. It should be noted that there was no question but that the assessment had been made within the time limit of six years prescribed in sec. 72 (4) of the Income Tax Act which is hereafter set out.

There were two points, one of substance and the other less so, which were canvassed. As to the latter, it was said that when proceedings were first instituted against the appellant, i.e., on 24th February, 1983, no notice of assessment had up to then been served upon him and the proceedings were statute-barred. This was a reference to a previous complaint in respect of the same tax laid on that date which was never proceeded with.

The short answer to the contention is that before a step to enforce payment in respect of unpaid income tax by way of complaint can be made, a notice of assessment must be served on the tax-payer. This has been made quite plain in R. v. Bragg [1951] 6 J .L.R. 56. We quote the head note which accurately reflects the decision of the then Court of Appeal:

"The appellant was ordered by a Resident Magistrate to pay certain amounts in respect of income tax for the years of assessment 1948, 1949 and 1950. It was admitted that the appellant had not been served personally with notices setting out the amounts at which he had been assessed for income tax for the years in question, and there was no evidence from which the Court could infer that he had been served by registered post.

HELD: That, as the provisions of the Income Tax Law Cap. 201, ss. 23 (1) and 44 (3), as to service on the appellant of the notices of assessment, had not been complied with, the orders of the Resident Magistrate should be set aside."

The present provisions of the Income Tax Act are substantially similar to those of section 23 (1) and section 44 (3) of the earlier Income Tax legislation which relate to service of notice of assessments upon the tax-payer. See section 75 (4) Income Tax Act. But the dismissal of the complaint is not necessarily an end of the tax-payer's liability to pay his tax.

In order to achieve that goal, some statutory provision must be found, which plainly abolishes the tax debt. This brings us to learned counsel's ground of substance. It was put in this way: the provisions in the Income Tax Act dealing with the assessment of income tax and the requirement for notifying the taxpayer of his liability should all be read together and he referred us to section 72 (4) and section 75 (1) of the Income Tax Act. It was the manifest intention of Parliament, he said, that after six years, the obligation to pay Income Tax becomes statute-barred.

We will say at once that that argument, attractive though it appears, is really devoid of merit. This court in an unreported case, viz., R. v. Aris & ors. R.M.C.A. 138/78, 13th

June, 1979, answered the precise question posed by that argument, in this way:

"There is no limitation period for the bringing of a complaint for recovery of Income Tax which has been properly assessed.

Although the court then indicated it would put its reasons in writing, we have not been able to locate them.

It becomes necessary therefore to consider the relevant provisions of the Income Tax Act. These are 72 (1) which provide:

"72. (1) The Commissioner shall proceed to assess every person liable to the payment of tax as soon as may be after the expiration of the time allowed to such person for the delivery of his return:

Provided that where the whole amount of tax remaining unpaid is the subject of a deemed assessment under sub-section (5) of section 67 it shall not be necessary to make an actual assessment.....

"(4) Where it appears to the Commissioner that any person liable to tax in respect of any year of assessment has not been assessed or has been assessed to a less amount than that which ought to have been charged the Commissioner may, within the year of assessment or within six years after the expiration thereof, assess such person at such amount or additional amount or surcharge, as according to his judgment ought to have been charged:

Provided that where any form of fraud or wilful default has been committed by or on behalf of any person in connection with or in relation to income tax, assessments, additional assessments and surcharges on that person to income tax for that year may, for the purpose of making good to the Crown any loss of tax attributable to the fraud or wilful default, be made as aforesaid at any time:

Provided further that any person who disputes such assessment, additional assessment or surcharge, may appeal to the Revenue Court in the same manner as an appeal may be made against an assessment."

"75.—(1) The Commissioner shall cause to be served personally on, or sent by registered post to each person whose name appears on one of the assessment lists, a notice addressed to him at his usual place of abode or business, stating the amount at which he is assessed and the amount of tax payable by him, and informing him of his right under subsection (4)."

Of the provisions set out above, only one of these, prescribes a time limit, viz., section 72 (4). That requires the Commissioner to assess a taxpayer either within the year of assessment or within six years of the expiration thereof. There is no time limit where wilful neglect or fraud on the part of the taxpayer exists. Section 75 (1) which requires the Commissioner to give notice of assessment is silent as to any time frame. So, ex facie, the Commissioner is at liberty to serve notice at any time, provided, of course, he has assessed the taxpayer within six years of the year of assessment. There is certainly no ambiguity about the matter.

In the course of the hearing, the court drew counsel's attention to Pickford v. Quirke [1927] 13 T.C. 251, where a point not dissimilar to the present appeal arose. That case concerned Excess Profits Duty chargeable under the U.K. Income Tax Acts which contained provisions requiring additional assessments to be made within a prescribed time limit, then, of three years. The taxpayer contended the assessment had not been made within the period. In response Rowlatt, J., said this at p. 264:

"Now the Act of Parliament here is imposing a time limit and it can make the time limit apply to any step in the proceedings that it chooses; the draftsman can make it apply to any step in the proceedings that he chooses."

And later he added:

".... but I have simply got to look at this Sub-section and to see what is the act, what is the step that must be taken within the three years. That is all I have got to see."

In this appeal likewise, we need do no more than to look at the sub-section to see what is the act that is to take place within six years. Plainly it is the assessment which must take place within six years, and not the service of the notice of assessment or the recovery of the debt which are separate and distinct steps.

But perhaps more importantly, income tax is not collected under the Act bearing that name, but under the Tax Collection Act, which is the Act under which the present complaint was made. Section 79 (1) (a) of the Income Tax Act is as follows:

"79.—(1) Where any income tax, being due and payable, remains unpaid—

- (a) the Collector of Taxes may proceed to enforce payment under the provisions of the Tax Collection Act in like manner as if an assessment under the provisions of that Act for the enforcement of taxes had been made."

There is no provision in that Act limiting the time for the making of complaints. Indeed, to the contrary, section 47 prescribes:

"47. Nothing in any law relating to summary proceedings shall preclude the Collector of Taxes or Assistant Collector of Taxes from proceeding by distress, or under the provisions of section 46, for the recovery of the said taxes, duties, arrears, and surcharge, at any time until full payment shall have been made to the Government of this Island for the same."

We need do no more than to call attention to the words "at any time." That is enough to dispose of this appeal. But it would not be amiss, we think, to observe that while Parliament can impose a time limit with regard to any step in the process, it has chosen to do so with regard to the making of assessments only. It has certainly not chosen to prescribe any time frame for notifying the taxpayer of the assessment or for enforcing the collection of the tax. There are on the other hand time limits imposed on the taxpayer as to the time within which he must send in his return, the time within which he may challenge the assessment and the time within which he ought to pay the tax assessed. As the law now stands, no such time constraints burden the Commissioner of Income Tax. It however illustrates the common law maxim that time does not run against the Crown. That must be the taxpayer's solace.

It was for these reasons that we dismissed the appeal and upheld the decision of the learned Resident Magistrate.