

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal on a question of law by way of a case stated for the opinion of Honorable Court of Appeal of the Democratic Socialist Republic of Sri Lanka under and in terms of Section 170(2) of the Inland Revenue Act No. 10 of 2006 (as amended) read with Section 11A of the Tax Appeals Commission Act No. 23 of 2011 (as amended)

Squire Mech Engineering (Pvt) Ltd.,
No. 135/1, Old Kottawa Road,
Nawinna, Maharagama.

APPELLANT

Case No. CA/TAX/11/2017

Vs.

Tax Appeals Commission Case No.

TAC/VAT/012/2014

The Commissioner General of Inland Revenue,
Department of Inland Revenue,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

RESPONDENT

Before: Janak De Silva J.

Achala Wengappuli J.

Counsel:

Saliya Pieris P.C. with Upendra Walgampaya for the Appellant

Indula Ratnayake SC for the Respondent

Written Submissions tendered on:

Appellant on 20.03.2018

Respondent on 25.05.2018

Argued on: 02.08.2018

Decided on: 12.02.2019

Janak De Silva J.

The Appellant is a company engaged in the business of construction and civil engineering. It constructed the District Hospital Pottuvil which was funded by the International Federation of Red Crosses which is a foreign donor organization. Sri Lanka Red Cross Society was the direct contractor and the Appellant acted as sub-contractor. The Value Added Tax (VAT) return sent by the Appellant claiming an exemption was rejected as the Appellant has not got approval from the Minister of Finance and Planning for the exemption. It was the position of the Respondent that the Appellant had to pay VAT on services supplied for the construction of the District Hospital project at Pottuvil.

The Appellant made an appeal to the Respondent which was rejected. The Appellant then appealed to the Tax Appeals Commission (TAC) which was also rejected. Hence the Appellant moved that the TAC refer certain questions of law for the opinion of the Court which was allowed.

The questions of law referred by the TAC for opinion of Court are:

- (1) Whether the Tax Appeals Commission is mandated and/or empowered under the Tax Appeals Commission Act No. 23 of 2011 to make its determination disregarding the section 10 of the Tax Appeal Commission Act No. 23 of 2011 as amended up to 24th April by its amendment Act No. 10 of 2012 and amendment Act No. 20 of 2011?
- (2) Under Section 23 of the Value Added Tax Act No. 14 of 2002 every registered person shall account for tax on invoice basis. Provided however the Commissioner General may direct such person to account for tax on payment basis. Can the assessor disregard the Commissioner General's direction to the Appellant to account for tax on payment basis and issue the assessment on invoice basis?
- (3) Under Section 2(1)(a) of the Value Added Act No. 14 of 2002 at the time of supply, on every taxable supply of good and services, made in a taxable period, by a registered person in the course of carrying on or carrying out, a taxable activity shall charge the value added tax. And under section 8 of the Act, no tax shall be charged on the supply of goods or services and the importation of goods specified in the first schedule to this act as such supplies and imports are not taxable unless zero rated under section 7.

Now the question is can the appellant charge tax by issuing tax invoices on his supplies to a registered person who is engaged in the supply of goods or services specified in the first schedule to the VAT Act?

- (4) The item No. (1x) of the para (B) of the part 11 of the first schedule to the VAT Act No. 14 of 2002 goes as follows:

"Goods or Services funded directly by foreign organizations for the relief of sudden distress caused by natural or human disasters or any activity having regard to the interest of the national economy as approved by the Minister"

Does the phrase in the item "as approved by the Minister" necessarily, exclusively and purely mean the finance minister? Doesn't line Minister's approval considering the renovation of a tsunami affected District Hospital at Pottuvil tally with the above item?

Question 1

The Appellant submitted that the determination of the TAC is dated 21.03.2017 whereas in terms of the proviso to Section 10 of the Tax Appeals Commission Act No. 23 of 2011 as amended (TAC Act) the determination should have been made before 31.07.2015 as the section specifies a period of 270 days before which a determination must be made by the TAC.

In addressing this question, the fundamental issue to be determined is whether the time limit given in section 10 of the TAC Act is directory or mandatory. The question whether provision in a statute is mandatory or directory is not capable of generalization but when the legislature has not said which is which, one of the basic tests for deciding whether a statutory direction is mandatory or directory is to consider whether violation thereof is penal or not. It has been the traditional view that where disobedience of a provision is expressly made penal it has to be concluded that the provision is mandatory whereas if no penalty is prescribed non-compliance with the provisions, of a statute may held to be directory.

*Where the prescription of a statute related to performance of a public duty and where invalidation of acts done, in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty yet not promote the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. Neglect of them may be penal, indeed, but it does not affect the validity of the acts done in disregard of them. It has often-been held, for instance, **when an Act ordered a thing to be done by a public body or public officers and pointed out the specific time when it was to be done, then the Act is directory only and might be complied with after the prescribed time.** (Emphasis added) [Maxwell on Interpretation of Statutes, 11th Edition, at page 369].*

In *Nagalingam vs. Lakshman de Mel* (78 NLR 231, 237) in respect of a similar situation where the Commissioner of Labour had not made his order within the time prescribed under the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 Sharvananda J. (as he was then) held:

"The delay should not render null and void the proceedings and affect the parties, as the parties have no control over the proceedings. It could not have been intended that the delay should cause a loss of jurisdiction, that the Commission had to give an effective order of approval or refusal. In my view, a failure to comply literally with the aforesaid provisions does not affect the efficacy or finality of the Commissioner's order made thereon. **Had it been the intention of the Parliament to avoid such order nothing would be simpler than to have so stipulated.**" (Emphasis added)

Two Indian authorities *Raza Buland Sugar Co. Ltd., vs. Municipal Board, Rampur* (AIR 1965 SC 895) and *State of Mysore vs. V.K. Kangan* (AIR 1975 SC 219) states that as to whether a provision is mandatory or directory, would, in the ultimate analysis, depend upon the intent of the law-maker and that has to be gathered not only from the phraseology of the provision but also by considering its nature, its design and the ***consequence which would follow from construing it in one way or the other.***

In *Visuvalingam v. Liyanage* [(1985) 1 Sri LR 203] a Bench of nine Judges of the Supreme Court considered whether Article 126 (5) of the Constitution is mandatory or directory. Article 126 (5) of the Constitution provides that when an application to the Supreme Court for relief against violation of fundamental rights guaranteed by the Constitution has been made "the Supreme Court shall hear and finally dispose of any petition or reference under this Article within two months of the filing of such petition. . .". The Supreme Court by majority judgment held that the provisions of Article 126 (5) of the Constitution are directory and not mandatory.

Dealing with the argument that Article 126 (5) is mandatory and that even a fault of the court is no excuse, Samarakoon, C.J. said (at page 226) that:

"If that right was intended to be lost because the court fails in its duty the Constitution would have so provided. It has provided no sanction of any kind in case of such failure. To my mind it was only an injunction to be respected and obeyed but fell short of punishment if disobeyed. I am of opinion that the provisions of Article 126 (5) are directory and not mandatory. Any other construction would deprive a citizen of his fundamental right for no fault of his. While I can read into the Constitution a duty on the Supreme Court to act in a particular way I cannot read into it any deprivation of a citizen's guaranteed right due to circumstances beyond his control".

In terms of section 8(1) of the TAC Act, it is only a person who is aggrieved by the determination of the Commissioner General of Inland Revenue in relation to the imposition of any tax, levy, charge, duty or penalty or the Director General of Customs under subsection (1B) of section 10 of the Customs Ordinance who can prefer an appeal to the TAC. Section 9(10) of the TAC Act allows the TAC to on appeal confirm, reduce, increase or annul, as the case may be, the assessment determined by the Commissioner General of Inland Revenue or to remit the case to the Director General of Customs.

The TAC Act does not spell out any penal consequences for the failure on the part of the TAC to comply with the time limit set out in section 10 of the TAC Act. If the Appellant is correct in submitting that the time bar on the TAC is mandatory, it will result in the validity of the impugned determinations made by the Commissioner General of Inland Revenue and the Director General of Customs been maintained for no fault of the aggrieved party where the TAC fails to adhere to the time limit. Such deprivation of rights of the aggrieved party cannot be implied in the absence of clear and unambiguous statutory provisions. On the other hand, if the failure on the part of the TAC to adhere to the time limit should result in the aggrieved party obtaining the relief claimed, the legislature would have specifically stated so. For example, the second proviso to section 34(8) of the VAT Act specifically provides that "the appeal shall be deemed to have been

allowed and the tax charged accordingly” where the appeal to the Commissioner-General against an assessment made by the Assessor is not determined within the stipulated time of two years.

Accordingly, this Court holds that the time limit set out in section 10 of the TAC Act is only directory. We came to a similar conclusion in *Kegalle Plantations PLC vs. Commissioner General of Inland Revenue* [CA(Tax) 09/2017; C.A.M. 04.09.2018].

Question 2

This is not an issue raised before the Respondent when the Appellant appealed to the Respondent against the assessment made by the assessor. It was also not a point raised in the appeal made to the TAC. In fact, it was mentioned as a “fundamental VAT principle” in the third written submissions dated 11.07.2016 filed on behalf of the Appellant. This was not an issue considered by the TAC.

A case stated can be referred to this Court only on a question of law. Section 23 of the VAT Act requires every registered person to account for tax on an invoice basis unless the Commissioner-General directs such person to account for tax on a payment basis on such conditions as may be specified by him on an application made in that behalf by a registered person. In terms of section 83 of the VAT Act “Commissioner General “means the Commissioner-General of Inland Revenue appointed under the Inland Revenue Act, No. 38 of 2000 and includes a Commissioner, and a Deputy Commissioner specially authorized by the Commissioner-General either generally or for a specific purpose to act on behalf of the Commissioner-General. The letter relied upon by the Appellant (Appeal Brief Page 69) is signed by a Commissioner of Inland Revenue, LTU. Therefore, Question 2 in our view entails an examination of facts such as whether the Respondent did give permission to the Appellant to account for on payment basis for in terms.

In *D.J. Ranaweera vs. Commissioner of Inland Revenue* (70 N.L.R. 564) an attempt made by the appellant to raise the question that the Assistant Commissioner was never authorized to sign a certificate under Chapter 13 of the Income Tax Ordinance was refused by the Supreme Court on the basis that it was not raised before the Court of first instance. *Seetha v. Weerakoon* (49 N.L.R. 225) was cited in support of the proposition that a mixed question of fact and law cannot be raised for the first time in appeal.

Accordingly, this Court holds that the Appellant is not entitled to raise this question as a question of law.

Questions 3 and 4

The issue for consideration is who is the "Minister" in item No. (1x) of the para (B) of the part 11 of the first schedule to the VAT Act.

The learned President Counsel for the Appellant submits that it should be the Minister of Health as the Ministry of Health is the line ministry and the Chief Accountant of the Ministry of Health has by letter dated 16.07.2010 approved the project for tax exemption.

The learned State Counsel for the Respondent however submits that the word "Minister" is a reference exclusively to the Minister of Finance.

The VAT Act does not define who is meant by "Minister". However, section 2(m) of the Interpretation Ordinance as amended states:

"2. In this Ordinance and in every written law, whether made before or after the commencement of this Ordinance, unless there is something repugnant in the subject or context –

(m) "Minister" used with reference to any subject or function of Government shall mean the Minister to whom that subject or function has been assigned by the President and includes a person duly appointed to act in the place of such Minister"

Section 75(1) of the VAT Act gives power to the "minister" to make regulations in respect of matters required by the VAT Act to be prescribed or in respect of matters authorized by the VAT Act to be made. Obviously here the "minister" is the Minister of Finance as he is the minister to whom the subject or function has been assigned by the President.

It is a trite rule of interpretation that generally words are used in the same sense in an Act unless a contrary intention is clear. *Bindra, Interpretation of Statutes*, 10th Ed., 701: "Words are generally used in the same sense throughout in a statute unless there is something repugnant in the context. The same expressions, if it appears more than once in the same statute or for that matter in the same provision, should receive the same meaning unless, the context suggests otherwise...Where in a statute, a word is not defined, but is used in different sections, it ought to be interpreted in the same sense throughout, unless the context in any particular section plainly requires that it should be understood in a different sense." There is nothing in the VAT Act which shows any intention on the part of the legislature to use the word "minister" in a different sense.

On the contrary, there is clear indication that where it was the intention to specifically refer to a minister other than the Minister of Finance this was done in clear and specific terms. For example, item xxxi of Part I to Schedule I makes reference to the Minister in charge of the subject of tertiary education.

The Appellant has failed to produce any approval from the Ministry of Finance granting an exemption.

However, the learned Presidents Counsel for the Appellant submitted that there was a legitimate expectation on the part of the Appellant that it will get the exemption in view of letter dated 16.07.2010 sent by the Chief Accountant of the Ministry of Health by which he approved the project for tax exemption. There is a fundamental error in this argument as the said letter only states that a tax exemption is "recommended". There is a clear distinction between "approval" and "recommendation".

Furthermore, it is an established principle that a legitimate expectation will arise only if there is a holding out or representation by an authority vested with power to do so. [*Tokyo Cement Company (Lanka) Ltd. vs. Director General of Customs and others* (2005) BLR 24]. The Chief Accountant of the Ministry of Health is not as only the Minister of Finance can grant an exemption.

For the forgoing reasons, we answer the questions referred to Court as follows;

- (1) Whether the Tax Appeals Commission is mandated and/or empowered under the Tax Appeals Commission Act No. 23 of 2011 to make its determination disregarding the section 10 of the Tax Appeal Commission Act No. 23 of 2011 as amended up to 24th April by its amendment Act No. 10 of 2012 and amendment Act No. 20 of 2011? **The determination of the TAC is not time barred.**
- (2) Under Section 23 of the Value Added Tax Act No. 14 of 2002 every registered person shall account for tax on invoice basis. Provided however the Commissioner General may direct such person to account for tax on payment basis. Can the assessor disregard the Commissioner General's direction to the Appellant to account for tax on payment basis and issue the assessment on invoice basis? **The Appellant is not entitled to raise this question at this stage.**
- (3) Under Section 2(1)(a) of the Value Added Act No. 14 of 2002 at the time of supply, on every taxable supply of good and services, made in a taxable period, by a registered person in the course of carrying on or carrying out, a taxable activity shall charge the value added tax. And under section 8 of the Act, no tax shall be charged on the supply of goods or services and the importation of goods specified in the first schedule to this act as such supplies and imports are not taxable unless zero rated under section 7.


Now the question is can the appellant charge tax by issuing tax invoices on his supplies to a registered person who is engaged in the supply of goods or services specified in the first schedule to the VAT Act? **There was no exemption given by the Minister of Finance.**

- (4) The item No. (1x) of the para (B) of the part 11 of the first schedule to the VAT Act No. 14 of 2002 goes as follows:

"Goods or Services funded directly by foreign organizations for the relief of sudden distress caused by natural or human disasters or any activity having regard to the interest of the national economy as approved by the Minister"

Does the phrase in the item "as approved by the Minister" necessarily, exclusively and purely mean the finance minister? Doesn't line Minister's approval considering the renovation of a tsunami affected District Hospital at Pottuvil tally with the above item? **The Minister in item**

No. (1x) of the para (B) of the part 11 of the first schedule to the VAT Act is the Minister of Finance.

Accordingly, acting in terms of section 11A (6) of the ^{TAC}~~VAT~~ Act, we confirm the assessment  determined by the TAC.

The Registrar is directed to send a certified copy of this judgment to the TAC.

Judge of the Court of Appeal

Achala Wengappuli J.

I agree.

Judge of the Court of Appeal