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

In the matter of a Case Stated under Reference No. TAC/IT/011/20113 by the Tax Appeals Commission under Section 170(2) of the Inland Revenue Act No. 10 of 2006 and Section 11A (2) of the Tax Appeals Commission Act No. 23 of 2011 (as amended)

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

Appellant

Case No. CA(TAX)20/2014
TAC Case No. TAC/IT/011/2013

Vs.

Ceylon Shell Flour Limited.,
No. 148/1, Kynsey Road,
Colombo 8.

Respondent

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

Anusha Fernando DSG for the Appellant

F.N. Gunawardena with E.D. Wickremanayake for the Respondent

Written Submissions tendered on:

Appellant on 01.08.2019

Respondent on 31.07.2019

Argued On: 24.09.2019

Decided on: 29.05.2020

Janak De Silva J.

The Respondent is a private limited liability company incorporated and domiciled in Sri Lanka. Its principal activity is the production of coconut shell flour which is a fine powder manufactured for the export market by grinding the coconut shells using a special machine. The raw material used for this production is the coconut shell which the Respondent purchases from an associate company called S.A. Silva & Sons Pvt. Ltd. dealing in the production of desiccated coconut.

The Respondent filed its return of income for the assessment year 2006/2007 on 03.04.2008. The Assessor by his letter dated 26.03.2011 rejected the return on the basis that coconut shell flour is not a conversion of produce referred to in the provisions of section 16(2) (a) of the Inland Revenue Act No. 10 of 2006 as amended (IRA 2006).

The Respondent appealed against the rejection to the Appellant on the basis that the assessment was issued after three years and hence time barred and additionally that the Assessor failed to communicate the reasons in writing in terms of section 163(3) of the IRA 2006.

A Deputy Commissioner under the authority of the Appellant having heard the appeal confirmed the assessment.

Aggrieved by this decision the Respondent appealed to the Tax Appeals Commission (TAC).

The TAC whilst holding with the Respondent on the question of time bar and proceeding to allow the appeal further held that "coconut shell flour is not an agricultural product".

Both the Appellant and Respondent filed appeals against the said determination of the TAC.

The cross appeal filed by the Respondent is CA (Tax) 21/2014 whilst the Respondent also filed CA (Tax) 03/2016 against the determination of the TAC for the years of assessment 2009/2010 where the TAC held that the assessment is not time barred and that the production of coconut shell flour made out of coconut shells is not an agricultural produce in terms of section 16(2)(b) of the Inland Revenue Act No. 10 of 2006.

On 24.09.2019 when all three matters were taken up, parties agreed that the determination the Court gives to the relevant questions in this Case Stated will be binding on the parties in CA (Tax) 21/2014 and CA (Tax) 03/2016. In this determination Court has, as requested by the parties, considered all the written submissions filed by them in the above three cases.

The questions of law raised in this Case Stated is as follows:

(1) Has the TAC erred in interpreting the provisions of section 163 of the aforesaid Act No. 10 of 2006 by concluding that the assessment was time barred?

(2) Is the principal activity of the Respondent an 'agricultural undertaking' in terms of section 16(2)(b) of the Inland Revenue Act No. 10 of 2006?

Time Bar

There is no dispute that the Respondent filed its income tax return for the year of assessment 2006/2007 on 3rd April 2008.

In terms of section 106(1) of the IRA 2006, the income tax return should be filed on or before the thirtieth day of September immediately succeeding the end of that year of assessment. According to section 217 of the IRA 2006 the year of assessment is twelve months period commencing on the first day of April of any year and ending on the 31st day of March in the immediately succeeding year. Hence the Respondent should have submitted the tax return for 2006/2007 on or before 30.09.2007.

Since the Respondent filed it late on 03.04.2008, the applicable time bar is set out in section 163(5)(b) of the IRA 2006 which reads:

> "No assessment shall be made where the tax payer has filed to make a return on or before such date referred to in paragraph (a) after the expiry of a period of three years from the end of that year of assessment".

Therefore, the relevant assessment for the year 2006/2007 had to be made on or before 31st March 2010.

However, by an amendment made to this section by Act No. 19 of 2009, the applicable time bar was extended to four years and September was changed to November.

The learned Counsel for the Respondent submitted that this has no application to the instant case as the Respondent is not a person who had to file his return by the 30th of November and the amendment therefore does not apply to it. It was further contended that the Respondent had an acquired right and that section 6(3)(b) of the Interpretation Ordinance protects such right. Finally, it was submitted that the amendment itself specifies, at section 27(1) to (6), the provisions that have retrospective effect and that the amendment made to section 163(5) of the principal enactment is not included therein.

A vested right is a certain or assured right contrasted with a contingent right which is conditional on the happening of an event. When the word 'vested' is used in this sense, Austin (Jurisprudence vol. 2, lect. 53) points out that in reality -a right of one class is not being distinguished from a right of another class but that a right is being distinguished from a chance or possibility of a right, but it is convenient to use the well-known expressions vested right and conditional or contingent right.

In *Mohammed Bhoy et al. v. Lebbe Maricar* (15 N. L. R. 466) it was held that the interests of a fideicommissaries cannot be sold in execution during the lifetime of the fiduciaries as it is a contingent interest within the meaning of section 216 (k) of the Civil Procedure Code where such an interest was created by will and contained the condition that, on the death of the fiduciaries, the property should pass to the fideicommissaries. The interest of the fideicommissaries, in this case, was "expectant on his surviving his father ". In *Silva v. Silva* (29 N. L. R. 373) a deed of gift created a fideicommissum in which the fideicommissary succeeded to the property after the death of the fiduciary. It was held that the former acquired "an assured and certain interest" which was liable to be seized and sold under section 218 (k) of the Civil Procedure Code.

When the amendment was made in 2009, the time period for the making of the assessment had not lapsed. This amendment extended the making of an assessment to the thirtieth day of November of the immediately succeeding year of assessment. In the light of these facts, I reject the submission that the Appellant had a vested right to have got the assessment made on or before 31st March 2010.

The time bar in Section 163(5)(a) of the IRA is procedural. In *A.G. v. Vernazza* [(1960) 3 All.E.R. 97 at 100] it was held that if the new act effects matter of procedure only, then prima facie, it applies to all actions, pending as well as future. This was reiterated in *Blyth v. Blyth* [(1966) 1 All.E.R. 524 at 535] where Lord Denning held that the rule that an act of Parliament is not to be given retrospective effect does not apply to statutes which only alters the form of procedure.

A similar issue arose in in *Seylan Bank PLC. v. The Commissioner General of Inland Revenue* [CA(Tax) 23/2013, C.A.M. 23.05.2015]. In that case this Court held that irrespective of whether the assessee had to submit the tax return on or before the 30th September or 30th November 2009, the assessor can send the assessment to the assessee within two years immediately succeeding that year of assessment. The Court further considered the amendments made to section 163 of the Act by Act Nos. 22 of 2011, 18 of 2013 and 8 of 2014. It held that the two-year period given to the assessor to send the assessment against the assessee was to start from the end of the year of assessment originally, which is the 31st of March, every year. This date (the starting day of the period) has been further pushed down to the thirtieth day of November of the immediately succeeding year of assessment by Act No. 22 of 2011. The Court also held that section 163(5) of the Act is a procedural law and that even if the amendment has retrospective effect, it applies, as the amendment is only on procedural law.

Therefore I hold that the time bar in this case will lapse only on 31.03.2011. The question then is whether the assessment was made before this date.

In this context, it must be reiterated that there is a distinction between "Assessment" and "Notice of Assessment" which has been clearly recognized in *Commissioner of Income Tax vs. Chettinad Corporation Ltd.* (55 N.L.R. 553 at 556) where Gratiaen J. held:

> "The distinction between an "assessment" and a "notice of assessment" is thus made clear: the former is the departmental computation of the amount of tax with which a particular assessee is considered to be chargeable, and the latter is the formal intimation to him of the fact that such an assessment has been made."

This was quoted with approval by the present Court of Appeal in *Ismail vs. Commissioner of Inland Revenue* [(1981) 2 Sri.L.R. 78].

Although *Commissioner of Income Tax v. Chettinad Corporation Ltd.* (supra) was decided upon a consideration of the relevant provisions of the Income Tax Ordinance No. 2 of 1932 as amended the distinction made therein between "assessment" and "notice of assessment" has been maintained in the IRA 2006.

In fact, Samarakoon C.J. in *D.M.S. Fernando and another vs. Ismail* [(1982) 1 Sri.L.R. 222 at 228) held:

> "The assessment so made in terms of section 93(2) must be followed by a Notice of Assessment in terms of section 95. That is the first time that the Assessee is apprised of the estimated income and taxable wealth and he must then know the reasons for non-acceptance of his return. It appears to me therefore that the duty to communicate reasons can be discharged by sending the reasons simultaneously with the Notice of Assessment."

The learned counsel for the Respondent contends that the assessment was issued on 20.04.2011 (page 102 of the Brief). However, that is the notice of assessment issued in terms of section 164 of the IRA 2006.

By letter dated 28.03.2011 (page 70 of the Brief) the Respondent was informed of the reasons for rejecting the return submitted by the Respondent which is referable to section 163(3) of the IRA 2006. Such rejection was possible only after a departmental computation of the amount of tax with which a particular assessee is considered to be chargeable.

Accordingly, I hold that the assessment for the year 2006/2007 is not time barred.

Agricultural Undertaking

Section 16 of the IR Act as amended by Inland Revenue (Amendment) Act No. 19 of 2009 reads:

> "(1) The profits and income within the meaning of paragraph (a) of section 3, other than any profits and income from the disposal of any capital asset, of any person or partnership from any agricultural undertaking carried on in Sri Lanka, shall be exempt from income tax for each year of assessment within the period of five years, commencing on April 1, 2006.

(2) In this section "agricultural undertaking" means -

(a) an undertaking for the purpose of the production of any agricultural, horticultural or any diary produce;

(b) an undertaking for the cleaning, sizing, sorting, grading, chilling, dehydrating, packaging, cutting, canning for the purpose of changing the form, contour or physical appearance of any produce referred to in paragraph (a), in preparation of such produce for the market; or

(c) any undertaking for the conversion of any produce referred to in paragraph (a) into such product as may be specified by the Commissioner-General, by Order published in the Gazette."

The learned counsel for the Respondent submitted that this being a provision for deduction, exemption or relief it should be interpreted liberally, reasonably and in favour of the Assessee. In support he referred to an extract from "The Law and Practice of Income Tax" by Dinesh Vyas, Vol. 1, 9th Ed., pages 26-27 which makes reference to "a plethora of judgments of the Supreme Court and various High Courts" of India.

However, the Indian Supreme has taken a different view in several cases. Provision providing for exemption in taxing statutes has to be construed strictly; where two views of the exemption are possible, it need not necessarily be construed in favour of the subject [*State Level Committee v. Morgardshammar India Ltd.* AIR 1996 SC 524]. The Supreme Court of India rejected the view that where two views of the exemption notification are possible, it should be construed in favour of the subject [*Collector of Central Excise, Bombay v. Parle Exports Pvt. Ltd.* (1989) 1 SCC 345].

In case of an ambiguity or doubt regarding an exemption provision in a fiscal statute, the ambiguity or doubt will be resolved in favour of the revenue and not in favour of the assessee [*Novopan India Ltd. v. Collector of Central Excise and Customs* (1994 Supp (3) SCC 606), *Liberty Oil Mills Pvt. Ltd. Bombay v. Collector of Central Excise, Bombay* (1995) SCC 451].

Sutherland in his *Statutory Construction* [Vol. 3, 296 (3rd Ed.)] states:

> "As a general rule grants of tax exemptions are given a rigid interpretation against the assertion of the tax-payer and in favour of the taxing power. The basis for the rule is the same as that supporting a rule of strict construction of positive revenue laws - that the burdens of taxation should be distributed equally and fairly among the members of society".

The analysis must begin by ascertaining the scope of section 16(2)(a) which in my view will cover any agricultural, horticultural or any diary produce. One cannot qualify it as any primary agricultural produce. In using the word *any*, the legislature has given a clear indication that it intended to provide for a wide application.

Sub-section 16(2)(c) of IRA 2006 is specific to products which are produced by conversion of any produce referred to in sub-section 16(2) (a) of IRA 2006 into another product. What is contemplated is a *conversion* of one product into another product. Examples are Yoghurt and curd which requires a process of conversion to be made to milk. Such products qualify for tax exemption only if gazetted in terms of this sub-section. In this situation, the conversion process changes the character of the produce in sub-section 16(2) (a) of IRA 2006 into another product.

However, in my view what is envisaged in sub-section 16 (2) (b) is a situation where the produce referred to in 16(2) (a) of IRA 2006 retains its character even after the acts referred to sub-section 16 (2) (b) of IRA 2006 are performed. This becomes clear when one considers the words "for the purpose of changing the form, contour or physical appearance of *any produce referred to in paragraph (a)*, in preparation of *such produce* for the market".

The Respondent grinds coconut shells and makes coconut shell flour which is a different product to the coconut shell. Hence in my opinion coconut shell flour is not an exempt item in terms of section 16 (2) (b) of the IR Act.

For the foregoing reasons, Court answers the questions of law as follows:

(1) Has the TAC erred in interpreting the provisions of section 163 of the aforesaid Act No. 10 of 2006 by concluding that the assessment was time barred? **Yes.**

(2) Is the principal activity of the Respondent an 'agricultural undertaking' in terms of section 16(2)(b) of the Inland Revenue Act No. 10 of 2006? **No.**

For the reasons aforesaid, this Court annuls the assessment determined by the TAC and confirm the Assessment made by the Assessor as confirmed by the Appellant.

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

Judge of the Court of Appeal

N. Bandula Karunarathna J.

I agree.

Judge of the Court of Appeal