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

In the matter of an appeal by way of Stated Case on a question of law for the opinion of the Court of Appeal under and in terms of Section 11A of the Tax Appeals Commission Act No. 23 of 2011 (as amended).

Hemas Manufacturing (Private) Limited
No. 75, Braybrooke Place, Colombo 02.

Appellant

Case No. CA/TAX/35/2014
Tax Appeals Commission
No. TAC/IT/021/2013

Vs.

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:

Dr. Shivaji Felix for the Appellant

Farzana Jameel P.C. ASG with Suranga Wimalasena SSC for the Respondent

Written Submissions tendered on:

Appellant on 15.10.2018 and 14.12.2018

Respondent on 15.10.2018

Decided on: 31.01.2020

Janak De Silva J.

The Appellant is a company incorporated in Sri Lanka and engages in the business of manufacturing and marketing of personal care products. The taxable period relating to the dispute is the year of assessment 2008/2009.

The factory of the Appellant located at Welisara was relocated to Dankotuwa under the Three Hundred Enterprises Program. The Appellant claimed qualifying payment relief under section 34(2)(m) and section 21(2)(c) of the Inland Revenue Act No. 10 of 2006 as amended (2006 Act) against other income while claiming exemption from income tax by virtue of a BOI Agreement to relocate the project.

The Assessor rejected the return of income tax of the Appellant on the grounds that an imposition of income tax on investment does not apply to the Appellant and further that section 34(2)(m) is not applicable. Accordingly, the Assessor issued an assessment against which the Appellant appealed to the Respondent who confirmed the assessment by his decision dated 11.04.2013.

The Appellant appealed to the Tax Appeals Commission (TAC) which dismissed the appeal. On an application made by the Appellant, the TAC has submitted a Case Stated to this Court seeking its opinion on the following questions of law:

1. Is the Appellant lawfully entitled to claim qualifying payment relief under and in terms of section 34(2)(m) of the Inland Revenue Act No. 10 of 2006 (as amended) read with section 21(2)(c) of the said Act?
2. Is the amount assessed, as confirmed by the Tax Appeals Commission, excessive and without lawful justification?
3. In view of the facts and circumstances of the case did the Tax Appeals Commission err in law when it came to the conclusions that it did?

The Appellant and the Board of Investment of Sri Lanka (BOI) entered into altogether four agreements. These are agreements entered into in terms of section 17 of the Board of Investment of Sri Lanka Act Law No. 4 of 1978 as amended (BOI Law).

Section 17(1) of the BOI Law states that the Commission shall have the power to enter into agreements with any enterprise in or outside the Area of Authority and to grant exemptions from any law referred to in Schedule B hereto, or to modify or vary the application of any such laws, to such enterprises in accordance with such regulations as may be made by the Minister.

The principal agreement No. 3274 dated 20.03.2006 was entered into as the Appellant sought approval under the Three Hundred (300) Enterprises Program to relocate its project site to Dankotuwa. The BOI granted approval subject to the terms and conditions in the said agreement. Clause 13(vi) therein reads:

> "The provisions of the laws set out in the said Law No. 4 of 1978 which are inconsistent with the benefits, and/or exemptions and/or privileges set out in sub clauses (i) to (iv) above shall not be applicable to the Enterprise in relation to the project. The Enterprise shall be subject to all other laws, not referred to in Schedule B of the Law No. 4 of 1978 save and except any exemptions and/or benefits and/or privileges specifically granted to it by such other laws and/or regulations framed thereunder".

At this point of time the 2006 Act was not a law referred to in Schedule B of the BOI Law. It was so included by the Board of Investment of Sri Lanka (Amendment) Act No. 36 of 2009 certified on 15.07.2009 and applies to the dispute before Court only due to section 3 therein stating that the amendment made in Schedule B to the principal enactment by section 2 shall for all purposes be deemed to have come into force on March 31, 2006, being the date on which the Inland Revenue Act, No. 10 of 2006 came into force.

A Supplementary Agreement was entered into between the Appellant and the BOI dated 09.07.2007 wherein Clause 13(i) reads:

> "For a period of five (5) years reckoned from the year of assessment as may be determined by the Board (referred to as 'tax exemption period') the provisions of the Inland Revenue Act No. 10 of 2006 relating to the **imposition, payment and recovery of income tax** in respect of the profits and income of the Enterprise shall not apply to the profits and income of the Enterprise". (emphasis added)

The TAC has proceeded on the basis that the Appellant is seeking to obtain "qualifying payments" for the profits and income of the Enterprise whereas it appears that the Appellant is attempting to claim that this exception is sought in relation to the other profits and income of the Appellant and not the profits and income of the Enterprise. The jurisdiction of the Court is limited to questions of law and this Court must proceed on the basis that the Case Stated is based on the factual matters considered by the TAC.

In determining what are the provisions of the 2006 Act that will not apply in respect of the profits and income of the Enterprise within the meaning of the above agreement, it is important to understand the structure of the 2006 Act.

As the learned ASG correctly submitted sections 2 to 6 of the 2006 Act identifies the different sources of income recognised by it and then sections 7 to 24 defines the sources of income which are exempt from income tax. Section 25 sets out the permitted deductions in arriving at the *assessable income* while section 26 identifies deductions that are prohibited. Thereafter, section 28 sets out what comprises total statutory income and section 32 sets out the deductions that can be made from the total statutory income in arriving at the *assessable income*. Section 33 specifies the *taxable income* while section 34 specifies different types of "qualifying payments", that is expenditure which is recognised as an expense that the law permits to be deducted in arriving at *assessable income*.

In my view all of these provisions come within the words "**imposition, payment and recovery of income tax"** in clause 13(i) referred to above. For example, a tax payer cannot pay nor can the State recover taxes unless qualifying payments as set out in section 34 of the 2006 Act are deducted from the statutory income in order to arrive at the assessable income.

Hence when the Appellant was granted tax exemptions from the 2006 Act by the BOI agreements for the profits and income of the Enterprise, the Appellant ceased to enjoy, *as a matter of law*, the possibility of resorting to sections 34 or 22 of the 2006 Act to claim "qualifying payments" for the profits and income of the Enterprise.

This becomes clearer when section 21(2)(c) of the 2006 Act is considered which applies in respect of expenditure incurred in the relocation, which is not less than one hundred million rupees. It is observed that the Appellant entered into the agreements with the BOI for the purpose of "relocating the Enterprise" to enjoy the tax benefits given by the BOI. In terms of the BOI agreement the Appellant is entitled to 5 years tax exemption and a concessionary rate of tax for another two years immediately after the tax exemption period. After these two years tax is charged only at the rate of 20% and in addition the Appellant is entitled for duty free imports of project related goods. The regime under the 2010 Act is different since section 21 therein gives only five (5) years income tax exemption and qualifying payment reliefs.

Thus, there were two possible regimes by which the Appellant could have addressed the question of "qualifying payments" for the profits and income of the Enterprise. The Appellant chose to take the more beneficial route and is now trying obtain the benefit of the alternative regime which he chose not to take. Therefore, *independent of the matter of law adverted to above*, as a matter of fact, the Appellant cannot be allowed to approbate and reprobate.

In *Ranasinghe v. Premadharma and others* [(1985) 1 Sri.L.R. 63 at 70] Sharvananda J. (as he was then) held:

> "In cases where the doctrine of approbation and reprobation applies, the person concerned has a choice of two rights, either of which he is at liberty to adopt, but not both. When the doctrine does apply, if the person to whom the choice belongs irrevocably and with full knowledge accepts the one, he cannot afterwards assert the other; he cannot affirm and disaffirm".

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

1. Is the Appellant lawfully entitled to claim qualifying payment relief under and in terms of section 34(2)(m) of the Inland Revenue Act No. 10 of 2006 (as amended) read with section 21(2)(c) of the said Act? **No.**
2. Is the amount assessed, as confirmed by the Tax Appeals Commission, excessive and without lawful justification? **No.**
3. In view of the facts and circumstances of the case did the Tax Appeals Commission err in law when it came to the conclusions that it did? **No.**

Accordingly, Court confirms the determination made by the TAC.

The Registrar of the Court is directed to send a certified copy of this determination to Secretary Tax Appeals Commission.

Judge of the Court of Appeal

Achala Wengappuli J.

I agree.

Judge of the Court of Appeal