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

In the matter of an Application of a Case Stated for the opinion of the Court of Appeal under and in terms of Section 36 of the Value Added Tax Act (as amended) read with Section 141 of the Inland Revenue Act No. 38 of 2000 (as amended) and Section 11A of the Tax Appeals Commission Act No.23 of 2011 (as amended).

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

Appellant

Case No. CA (TAX) 14/2013

TAC No: TAC/OLD/VAT/016

Vs.

Janashakthi General Insurance Col. Ltd
No. 46, Muttiah Road, Colombo 02.

Respondent

Before: Janak De Silva, J.
N. Bandula Karunarathna J.

Counsel:

Anusha Fernando, DSG for the Appellant

Dr. Shivaji Felix for the Respondent

Written Submissions tendered on:

Appellant on 03.09.2018, 26.10.2018 and 11.10.2019

Respondent on 01.08.2018, 17.09.2018 and 11.10.2019

Argued on: 14.10.2019

Decided on: 20.05.2020

Janak De Silva J.

The Respondent received a notice of assessment in respect of assessment bearing No. 8201798 dated 26th April 2006 for Value Added Tax (VAT) for taxable period ending on 31st March 2003.

The Respondent appealed to the Appellant against the notice of assessment by petition of appeal dated 22nd May 2006 on the grounds stated therein. The Appellant confirmed the assessment. The Respondent appealed to the Board of Review which failed to hear and determine the matter until the Tax Appeals Commission (TAC) was set up. Consequently, when the matter was taken up before the TAC, the Respondent raised what were referred to as two preliminary objections namely:

i. The assessment is contrary to law and therefore of no force or avail in law.
ii. The appeal to the TAC was time barred by operation of law.

Although, the petition of appeal filed by the Respondent contained 12 grounds, the TAC did not make any ruling on them but addressed only the "two preliminary objections" raised by the Respondent. The TAC by its determination dated 26.02.2013 rejected the objection on time bar but upheld the objection on the validity of the assessment and annulled the assessment that had previously been confirmed by the Appellant. The basis of the TAC determination was that no lawfully valid notice of assessment has been served on the taxpayer.

Aggrieved by the determination of the TAC on the preliminary objection, the Appellant made an application for a Case Stated (X4) which was made in terms of section 36 of the Value Added Tax Act No. 14 of 2002 as amended. The TAC has forwarded to Court a Case Stated containing seven questions of law which are the same suggested by the Appellant by X4.

When this matter was taken up for hearing on 04.11.2013, the Respondent raised a preliminary objection in relation to the parties named in the caption namely that, the Respondent had been named the Appellant. In 2015, this Court held that the preliminary objection raised by the Respondent lacked clarity and the Respondent was permitted on 14.07.2015 to re-formulate the preliminary objection. On 30.09.2015, the Court dismissed the preliminary objection.

By motion dated 21st March 2017, the Appellant sought to amend the questions of law. Thereafter on 21.03.2018, the Appellant moved to amend the questions of law set out in the Case Stated in terms of motion dated 9th March 2018 to which the Respondent objected. Parties were allowed to file written submissions and this order pertains to the issue of amending the questions of law in the Case Stated.

The proposed questions of law as set out in motion dated 9th March 2018 are as follows:

1. Having held that it had no jurisdiction did the TAC err in law in making a further order to annul the assessment?
2. If so, should the order to annul the assessment be set aside?
3. Did the Commission err in law in characterising the absence of a printed name or signature as a jurisdictional issue?
4. Did the Commission err in law in permitting the Respondent who invoked the jurisdiction of the Commission to challenge its jurisdiction?
5. Did the Commission err in law in holding it had no jurisdiction?
6. In any event, was the Respondent precluded in law from raising the issue of a lack of printed name or signature for the first time before the Commission?
7. Is the notice of assessment and/or the assessment substantially compliant with the VAT Act?
8. Is the printed name or signature of the person making the assessment only a directory requirement?
9. In any event, is the absence of a printed name or signature excusable in terms of section 61 of the VAT Act?
10. In any event, did the Commission err in law in annulling the assessment?

The objections of the Respondent to the proposed amendments as correctly summarized by the Appellant, albeit one, is as follows:

i. The Appellant (and not the TAC) must decide the questions law.
ii. The Appellant must decide the questions of law within one month.
iii. The questions of law must be properly identified by the Appellant at the time a request for a Case Stated is made.
iv. Once an application for a Case Stated is made, the question of law identified by the Appellant are concretized.
v. The Appellant by setting out the questions of law on which an application for a Case Stated is made has nailed his/her colours to the mast and is not permitted to change his position thereafter.
vi. The Appellant is not lawfully empowered to unilaterally change the questions of law.
vii. The Appellant has been remiss and must suffer the consequences of his actions. The State is not a privileged suitor in a tax appeal.

viii. The proper course of action would have been for the Appellant to challenge the decision of the TAC by way of an application for judicial review in view of the decision in *The Commissioner General of Inla nd Revenue v. Koggala Garments (Private) Limited* [C.A. (TAX) 01/2008, C.A.M. 05.04.2017].

ix. None of the questions of law raised by the Appellant constitute questions of law under section 11A of the Tax Appeals Commission Act No. 23 of 2011 as amended (TAC Act).

x. The questions of law are abstract and cannot form the subject matter of a Case Stated.

I will now address each of these objections.

(i) The Appellant (and not the TAC) must decide the questions law.

The Respondent referred to section 11A (1) of the TAC Act and submitted that it is the Appellant who must decide the questions of law. However, the section reads "…or the Commissioner-General may make an application requiring the Commission to state a case on a question of law …". Thus, it is the TAC that must state a case and not the Appellant as submitted by the Respondent although in practice, it may be convenient for a prospective Appellant to propose certain questions of law for the consideration of the TAC to be included in a Case Stated.

In fact, in *Commissioner-General v. Dr. S. S. L. Perera* [C.A. (Tax) 03/2017, C.A.M. 11.01.2019], I held that:

> *"Accordingly, in my view the obligation to frame the questions of law is initially placed on the TAC and not the Appellant as contended by the Respondent. In fact, Basnayake C.J. in R.M. Fernando v. Commissioner of Income Tax (Reports of Ceylon Tax Cases, Vol. I, page 571 at 577) specifically stated that "it is not for the appellant to state the questions of law arising on a Case Stated."*

(ii) The Appellant must decide the questions of law within one month.

The Respondent relying on section 11A (1) of the TAC Act contended that once the questions of law is set out by the Appellant, it cannot be changed later. It appears that the Respondent has placed much emphasis on the one month time period mentioned therein. However, in my opinion, such emphasis is misplaced.

Section 11A (6) of the TAC Act reads:

> "Any two or more Judges of the Court of Appeal may **hear and determine any question of law arising on the stated case** and may in accordance with the decision of Court upon such question, confirm, reduce, increase or annul the assessment determined by the Commission, or may remit the case to the Commission with the opinion of the Court, thereon." (Emphasis added)

The words "hear and determine any question of law arising on the Case Stated" appeared in section 74(5) of the Income Tax Ordinance No 2 of 1932 and was interpreted by Basnayake C.J. in *R.M. Fernando v. Commissioner of Income Tax* (supra. at 577) to mean that it requires the Court to hear and determine any questions of law arising on the Case Stated and not any question or questions formulated by the Board.

Previously in *M.P. Silva v. Commissioner of Income Tax* (Reports of Ceylon Tax Cases, Vol. I, page 336 at 338) Canekeratne J. having considered section 74(5) of the Income Tax Ordinance No 2 of 1932 held that "all questions that could be raised on the whole case was intended to be left open". The learned Judge chose to follow the dicta in *Ushers Wiltshire Brewery v. Bruce* [(1915) A.C. 433 at 465,466].

In *Commissioner of Income Tax v. Saverimuttu Retty* (Reports of Ceylon Tax Cases, Vol. I, page 103 at 109) Abrahams C.J. did make a similar statement by stating:

> "Incidentally there was no reference to us on this point by the Board of Review, since that point was not put to the Board when they were called upon to adjudicate in appeal, but we are not, of course precluded from considering any point upon which the actual decision of the Board might be upheld, no matter what might have been their reasons for arriving at that decision".

It is an established rule of interpretation that the legislature is presumed to know the law, judicial decisions and general principles of law. *Bindra's Interpretation of Statutes*, 10th ed., page 235 states as follows:

> "The legislature must be presumed to know the course of the legislation, as well as the course of judicial decisions in the country, *a fortiorari* of the superior courts of the country. It is a well-settled rule of construction that when a statute is repealed and re-enacted, and words in the repealed statute are reproduced in the new statute, they should be interpreted in the sense which had been judicially put on them in the repealed

Act, because the legislature is presumed to be acquainted with the construction which courts have put upon the words, when they repeat the same words, they must be taken to have accepted the interpretation put on them by the court as correctly reflecting the legislative mind."

In *Nilamdeen v. Nanayakkara* (76 N.L.R. 169) it was held that it is a well-known rule of construction that where the legislature uses in an Act a legal term which has received judicial interpretation, it must be assumed that the term is used in the sense in which it has been judicially interpreted. There is also another rule of construction that where the words of an old statute are made part of a new statute, the legal interpretation which has been put upon the former by courts of law is applicable to those same words in the new statute.

Therefore, this Court can hear and determine any question of law arising on the Case Stated. This provides the opportunity to either party to propose a new question of law or to amend a question of law to this Court. Where the Court is of the view that it arises from the Case Stated they can be accepted as part of the Case Stated provided that the answers to the new or amended questions of law may result in the confirmation, reduction, increasing or annulling the assessment determined by the TAC, or requires the remitting of the case to the TAC with the opinion of the Court so that the TAC can revise the assessment in accordance with the opinion of the Court.

If the submissions of the Respondent is to be accepted, it will make section 11A (6) of the TAC Act redundant. This Court will not be able to hear and determine any questions of law arising on the Case Stated if such question was not raised at the time the Case Stated was set out.

There is a further reason why the contention of the Respondent must fail. A Case Stated can contain only questions of law. In civil appeals, it is an established principle that a question of law can be raised for the first time in appeal. [*Thalagala v. Gangodawila Co-operative Society Ltd* (48 N.L.R. 472), *Jayawickrama v. Silva* (76 N.L.R. 427), *Simon Fernando v. Bernadette Fernando* (2003) 2 Sri.L.R. 158, *Seetha v. Weerakoon* (49 N.L.R. 225), *Somawathie v. Wilson and Others* (2010) 1 Sri.L.R. 128]. I see no valid reason why the same principle cannot apply in a Case Stated.

(iii) The questions of law must be properly identified by the Appellant at the time a request for a Case Stated is made,

(iv) Once an application for a Case Stated is made, the question of law identified by the Appellant are concretized and

(v) The Appellant by setting out the questions of law on which an application for a Case Stated is made has nailed his/her colours to the mast and is not permitted to change his position thereafter.

Accepting the positions articulated above will again render section 11A (6) of the TAC Act meaningless. I have explained earlier that this Court has power to consider questions of law other than what is set out in the Case Stated [*Commissioner-General of Inland Revenue v. Dr. S. S. L. Perera* (supra)]. Where any party to a Case Stated proposes new questions of law or seeks to amend the questions of law, that must be considered as part of such process since by the time a Case Stated is taken up for hearing much time has lapsed from its transmission to this Court and addressing the issue of amending or adding questions of law will contribute to a delay in the proceedings.

(vi) The Appellant is not lawfully empowered to unilaterally change the questions of law.

The complaint that the Appellant is unilaterally seeking to change the question of law is without foundation. In the first place, the duty to formulate the questions of law is on the TAC. Therefore, this Court has the power to frame new questions of law arising from the Case Stated or to amend the questions of law already framed whilst whether the questions of law proposed by the Appellant should become part of the Case Stated is decided by Court after hearing the objections if any of the Respondent.

(vii) The Appellant has been remiss and must suffer the consequences of his actions. The State is not a privileged suitor in a tax appeal.

It is surprising that the learned counsel for the Respondent has framed this objection in this manner. The principle I identified in *Commissioner-General of Inland Revenue v. Dr. S. S. L. Perera* (supra) applies to all Case Stated matters irrespective of the identity of the party that makes the application. Similarly, if and when this Court allows the application of the Appellant,

this Court will apply the principle to all Case Stated matters irrespective of the identity of the party who made the application.

(viii) The proper course of action would have been for the Appellant to challenge the decision of the TAC by way of an application for judicial review in view of the decision in *The Commissioner General of Inland Revenue v. Koggala Garments (Private) Limited* [C.A. (TAX) 01/2008, C.A.M. 05.04.2017].

The Respondent contends that none of the questions of law raised by the Appellant, either in the original or modified form, can lawfully constitute questions of law for the opinion of Court in terms of section 11A of the TAC Act as the answers to the questions posed do not have an impact on the assessment per se and the proper course of action that should have been adopted by the Appellant was to challenge the decision of the TAC by way of judicial review. Reliance is placed on the decision of this Court in *The Commissioner General of Inland Revenue v. Koggala Garments (Private) Limited* (supra).

This objection raises the vexed question of the co-existence of statutory right of appeal and judicial review. I will address this aspect before proceeding to consider the judgment in *Commissioner General of Inland Revenue v. Koggala Garments (Private) Limited* (supra) on which the objection is based.

Let me start the analysis by restating two established principles. Firstly, judicial review being a discretionary remedy may be refused where there is an adequate and effective remedy such as a statutory appeal. Secondly, judicial review is concerned with the legality of a decision whereas an appeal inquires whether the decision is right or wrong.

There may be situations where an Appellant in a statutory appeal proceeding wishes to raise questions relating to legality such as the breach of the rules of natural justice or an issue on the jurisdiction of the decision maker. A multitude of judicial authority supports the proposition that jurisdictional questions can be raised by way of appeal.

In *Regina v. Inland Revenue Commission ex parte Preston* [(1985) A.C. 835 at 862], Lord Templeman expressly held that on appeal High Court can correct all kinds of errors of law including errors which might otherwise be subject to judicial review. Similar approach was taken in *R. v. Minister of Housing and Local Government ex parte Finchley Borough Council* [(1955) 1 W.L.R. 29 at 25], *Re Purkiss' Application* [(1962) 1 W.L.R. 902 at 914], *Essex County Council v. Essex Incorporated Congregational Church Union* [(1963) A.C. 808], *Snell v. Unity Finance Company Limited* [(1964) 2 Q.B. 203], *Arsenal Football Club Ltd v. Ende* [(1977) Q.B. 100 at 116].

Breach of the common law principles of natural justice can be dealt with by the appellate system in the tax field [*R. v. Brentford General Commissioners Ex. p. Chan* (1986) S.T.C. 65; *R. v. Commissioner for the Special Purposes of the Income Tax Acts Ex. p. Napier* (1988) 3 All E.R. 166; *Banin v. Mackinlay (Inspector of Taxes)* (1985) 1 All E.R. 842].

Furthermore, given that the established position is that a tribunal exceeds its jurisdiction if it makes any error of law [*Anisminic Ltd v. Foreign Compensation Commission* (1969) 2 A.C. 147], statutory appeal procedure will be made redundant in the event it is held that jurisdictional questions cannot be raised in such appeal procedure.

The general principle thus gleaned is that jurisdictional issues which may form the basis of judicial review can be raised in a statutory appeal.

The learned counsel for the Respondent has cited the decision in *Commissioner General of Inland Revenue v. Koggala Garments (Private) Limited* (supra) to submit that the Appellant should have sought judicial review against the impugned order of the TAC on the preliminary objection. In particular, the following paragraphs have been quoted:

> *"If the questions of law stated in this court does not arise on the assessments, this court is denuded of jurisdiction to hear and determine the questions of law."* (Nawaz, J. at page 10)
>
> *"The appropriate time for stating a case on a point of law is after the conclusion of the substantive hearing. Where a tribunal has made an interim ruling which is challenged, it is inappropriate for a case to be stated and the aggrieved party should seek permission to obtain judicial review. This is also the most appropriate mode of challenge where the complaint is that the inferior court misunderstands its role or function."* See the pronouncement in *R. v. Chief Commissioner, ex parte Winnington* [The Times, November 26, 1982]."

The Respondent submits that none of the questions of law raised by the Appellant, either in their original or modified form, can lawfully constitute questions of law for the opinion of Court in terms of section 11A of the TAC Act and therefore, the determination of the TAC on the preliminary issue should have been impugned by way of judicial review. It is further submitted that even if the Appellant succeeds in the appeal by having the questions of law answered in his favour, it would not result in the amount of tax assessed being confirmed since the substantive issues raised by the taxpayer's appeal have not been considered by the TAC.

Let me begin by considering the first paragraph of *The Commissioner General of Inland Revenue v. Koggala Garments (Private) Limited* (supra):

> *"If the questions of law stated in this court does not arise on the assessments, this court is denuded of jurisdiction to hear and determine the questions of law."*

Yet, as explained earlier section 11A (6) of the TAC Act specifically allows this Court to hear and determine any question of law arising on the Case Stated and does not require it to arise on the assessments.

Furthermore, the two paragraphs quoted from *Commissioner General of Inland Revenue v. Koggala Garments (Private) Limited* (supra) is in my opinion mutually inconsistent.

Let me give an example. A case before the TAC raises the question of whether the assessment is time barred in addition to substantive issues. The TAC decides to take up the time bar issue as a preliminary objection as raised by the taxpayer. If the TAC overrules the preliminary objection then we are told, by the second part quoted from *Koggala Garment case* (supra), that the taxpayer must resort to judicial review as the TAC has not looked at the substantive issues. Yet if the taxpayer succeeds in its challenge on time bar of assessment, then it is in relation to a matter arising on the assessment and, we are told by the first part of the quotation in *Koggala Garment case* (supra), the Commissioner General of Inland Revenue can move for a Case Stated to be referred to this Court.

The present case provides a further example of the inconsistency of the two parts quoted from *Koggala Garment case* (supra). If the same issue was decided by the TAC in favour of the Appellant, then the Respondent can seek to submit a Case Stated relying on the first part quoted, as it is a matter arising on the assessment. In that situation, if the Respondent succeeded on the Case Stated, the assessment made would have to be annulled. But the second part of the quote states it is not possible to submit a Case Stated as there was no hearing on the substantive issues.

Therefore, with the greatest of respect, I am unable to agree with the reasoning in the *Koggala Garment case* (supra). The learned counsel for the Respondent submitted that the judgment of this Court in *Koggala Garment case* (supra) was affirmed by the Supreme Court on 04.05.2018 in *Commissioner General of Inland Revenue v. Koggala Garments (Private) Limited* [S.C. Spl. L.A. Application No. 114/2017] when the Supreme Court refused special leave to appeal. However, in *B.M. Karunadasa, Asst. Commissioner of Labour v. W. Balasuriya, Sports of Kings* [CA (PHC) APN 97/2010, C.A.M. 17.07.2013] Salam J. (with Rajapakse J. agreeing) held that it is a

misconception to come to the conclusion that the refusal of leave by the Supreme Court constitutes the affirmation of the judgment of the lower court and cannot be considered as creating a precedent.

I wish to add that there are other reasons in my view why *Koggala Garment case* (supra) does not reflect the correct legal position.

Firstly, it is trite law that any provision of law should be interpreted so that it would apply in a manner consistent with the Constitution being the Supreme Law of the land. An interpretation that may result in a provision being applied in a manner inconsistent with the Constitution has to be avoided. [*Ismalebbe v. Jayawardena, Assistant Commissioner of Agrarian Services and Others* (1990) 2 Sri.L.R. 199 at 204-205]. As explained above, applying the ratio in *Koggala Garment case* (supra) creates situations where if a preliminary issue is answered in favour of one party, the aggrieved party must resort to judicial review, which is discretionary, whereas if it is answered in favour of the other party, the aggrieved party may submit a Case Stated which is available as of right.

Secondly, such a situation is in any event contrary to public policy since it results in two different procedures for two types of parties arising from the same decision.

Thirdly, even if it is assumed that the decision of this Court has to be connected to an assessment, the reversal of an annulment done by the TAC as in this case is directly connected to the assessment. If this Court so decides, and remits its opinion to the TAC, the TAC will have to reverse the annulment of the assessment it made and thereafter decide the substantive issue. Such a course of action is covered by the words "revise the assessment" in section 11A (6) of the TAC Act. There is no basis to say that the phrase "revise the assessment" is limited to arithmetic revisions.

Thirdly, it overlooks the basic rule of interpretation that the greater power includes the lesser power. The principle that the grant of a greater power includes the grant of a lesser power is an accepted principle that has been recognized in virtually every legal code from time immemorial. It has been recognized and applied in Sri Lanka. [*M.B. Ibealebbe v. The Queen* (65 N.L.R. 433 at 435), *The Queen v. A.D. Hemapala* (65 N.L.R. 313 at 322)].

Fourthly, *Koggala Garment case* (supra) relies on the decision in *D.M.S. Fernando v. Mohideen Ismail* [(1982) 1 Sri.L.R. 222 at 234] where Samarakoon C.J. held:

> "There was another matter that was raised incidentally. It was contended by the Deputy Solicitor General that the Respondent was not entitled to maintain this application for writ because an alternative remedy by way of appeal as available to him under the

Inland Revenue Act. Those provisions confine him to an appeal against the quantum of the assessment. The Commissioner has not been given power to order the Assessor to communicate reasons. He may, or may not, do so as an administrative act. The Assessor may, or may not, obey. The Assessee is powerless to enforce the execution of such administrative act. The present objection goes to the very root of the matter and is independent of quantum. It concerns the very exercise of power and is a fit matter for writ jurisdiction. An application for writ of certiorari is the proper remedy."

In that matter, the writ jurisdiction was sought to assail the assessment of the Assessor for his failure to give reasons for the rejection of the return in writing. It is not a matter that arose after the appeal made to the Commissioner General of Inland Revenue and an appeal to the Board of Review or a statutory appellate body unlike in this case. Furthermore, the Supreme Court only states that the proper remedy is judicial review and not that it is the only remedy. The above statement must be understood and limited to that context.

In any event, I may add that the reversal of an annulment of the assessment made by the TAC is directly connected to the assessment. An order reversing an annulment of an assessment is intrinsically intertwined with the validity of an assessment and as such is connected to an assessment.

The Respondent further contended that there has been a delay of more than five years before the questions of law were proposed. As the learned DSG submitted this objection overlooks the fact that on 04.11.2013 when the matter was taken up for the first time, the Respondent raised a preliminary objection and in 2015 this Court found that it lacked clarity and the Respondent was permitted to reformulate it. Thereafter, Court made order on 30.09.2015 dismissing the preliminary objection. The application to amend the questions of law was made by the Appellant for the first time in January 2017.

Furthermore, the authorities are clear that a question of law can be raised at anytime. No prejudice is caused to any party by accepting amended questions of law at any time before the conclusion of the hearing provided parties have been given a fair opportunity to address the questions of law before judgment.

I have given careful consideration to the questions of law set out in the motion dated 9th March 2018 filed by the Appellant. In my view, question 10 is vague and as such should not be allowed. All other questions are questions of law, arising from the Case Stated and the answers to which may result in the confirmation, reduction, increasing or annulling the assessment determined by the TAC, or requires the remitting of the case to the TAC with the opinion of the Court.

Therefore, I allow the Appellant to amend the questions of law as requested to the extent specified above.

For all the aforesaid reasons, questions of law Nos. 1 to 9 in the motion dated 9th March 2018 filed by the Appellant will now constitute the questions of law in this Case Stated.

Judge of the Court of Appeal

N. Bandula Karunarathna J.

I agree.

Judge of the Court of Appeal