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

In the matter of a Case Stated under Reference No. TAC/OLD/VAT/021 by the Tax Appeals Commission under Section 36 of the Value Added Tax Act No. 14 of 2002 as amended.

HSBC Electronic Data Processing Lanka (Pvt) Ltd.,
No. 439, Sri Jayawardenapura,
Welikada, Rajagiriya

Appellant

Case No. CA/TAX/17/2013
TAC Case No. TAC/OLD/VAT/021

Vs.

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

Respondent

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

F.N. Gunawardena for the Appellant

Sobhitha Rajakaruna SDSG with Manohara Jayasinghe SSC for the Respondent

Argued On: 23.05.2019 and 10.06.2019

Written Submissions tendered on:

Appellant on 18.06.2018 and 02.08.2019

Respondent on 18.06.2018 and 05.08.2019

Decided on: 12.05.2020

Janak De Silva J.

The Appellant is a limited liability company incorporated in Sri Lanka and its principal business is providing data processing services and handling call centre activities for HSBC entities overseas.

The taxable periods relating to this appeal is the twelve months from 01.01.2004 to 31.12.2004. On or around 21st February 2007 the Assessor issued an intimation letter in terms of section 29 of the Value Added Tax Act No. 14 of 2002, as amended (VAT Act) stating that the following items for the taxable periods ending December 2004 and December 2005 were liable for Value Added Tax (VAT):

(i) Board of Investment (BOI) grants are considered as taxable supplies liable at standard rate.

(ii) "Staff Transport" and "School Fees" are considered supplies made to employees.

On or around 5th August 2007 the Appellant received an assessment bearing No. 8363254 for the period ending December 2004 whereby a sum of Rs. 8,203,956 was imposed together with a penalty of Rs. 4,922,371/=.

The Appellant appealed to the Respondent against the said notice of assessment which was rejected. The Appellant then appealed to the Tax Appeals Commission (TAC) which dismissed the appeal.

Upon the application of the Appellant, the TAC has referred this Case Stated to Court containing the following questions of law:

(1) Is the VAT Assessment No. 8363254 or any portion thereof time barred in terms of the VAT Act?
(2) Is the determination of the TAC time barred by operation of law in terms of the Tax Appeals Commission Act No. 23 of 2011?

(3) Has there been a taxable supply by the Appellant under the VAT Act for the training grant given by the BOI of Sri Lanka?

(4) Are the Allowances granted to meet the costs of their children's education a taxable supply in terms of the VAT Act?

(5) Are the transport facilities provided by the Appellant to its employees after regular working hours a taxable supply in terms of the VAT Act?

(6) In the alternative to No. 5 above, would the provision of such transport facilities be an exempt supply in terms of the VAT Act?

Time Bar of Assessment

In terms of section 33(1) of the VAT Act, it shall not be lawful for the Assessor to issue an assessment after expiration of three years from the end of the taxable periods in respect of which the VAT return is furnished.

The Appellant contends that the assessment made in respect of seven taxable periods, covering the seven months from 01.01.2004 to 31.07.2004 is time barred as the notice of assessment covering the said seven months is dated 5th August 2007. Therefore, it is submitted that only the taxable periods beginning from 01.08.2004 fall within the period of three years.

In addressing this submission, it is important to note the distinction between an "Assessment" and "Notice of Assessment".

Section 28(1) of the VAT Act deals with the making of an Assessment and Notice of Assessment. Accordingly, the making of an Assessment is a departmental computation of the amount of VAT payable by a person for the relevant taxable period. Notice of Assessment is the formal intimation to the person of the fact that such an Assessment has been made.

The distinction between the "making of an Assessment" and "Notice of Assessment" has been clearly recognized in *Commissioner of Income Tax v. Chettinad Corporation Ltd.* (55 N.L.R. 553) which was quoted with approval by the present Supreme Court in *Ismail v. Commissioner of Inland Revenue* [(1981) 2 Sri.L.R. 78].

In the English case of *Honig and Others v. Sarsfiled (HM Inspector of Taxes)*[(59 TC 337 at 349-350), (1986) BTC 205] Fox LJ drew a distinction in the making of an assessment and the notice of assessment and held them to be different, the assessment being in no way dependent upon the service of notice. He held that giving of the notice was independent of the making of a valid

and effective assessment. This decision was cited with approval by Thomas J. in a recent decision of the Tax Chamber of the First Tier Tribunal in *Patrick v. Commissioner of Her Majesty's Revenue and Customs* [(2015) UKFT 508 (TC)] where he held that assessment and notice are two different things.

I arrived at a similar conclusion, with my brother Wengappuli J. agreeing, in *Stafford Motor Company (Private) Limited v. The Commissioner General of Inland Revenue* [C.A. (Tax) 17/2017; C.A.M. 15.03.2018].

The learned Counsel for the Appellant contended that the facts in *Honigs* case (supra) is different to the instant case as there was evidence in that case which indicated that the assessment itself had been done prior to the expiry of the time bar period which is not there in the instant case. I am unable to accept this submission.

Section 29 of the VAT Act states that where the Assessor does not accept a return furnished by any person under section 21 for any taxable period and makes an assessment or an additional assessment on such person for such taxable period under section 28 or under section 31, as the case may be, the Assessor shall communicate to such person by registered letter sent through the post why he is not accepting the return. The letter dated 21.02.2007 sent by the Assessor informs the Appellant to treat the letter as an intimation under section 29 of the VAT Act. On this view, the letter dated 21.02.2007 can be treated as indicative of an assessment having being made and therefore the assessment for the taxable period from 1st February 2004 to 31st December 2004 has been made within the time stipulated in Section 33(1) of the VAT Act.

However, the learned Senior State Counsel invoked the provisions in section 33(2) of the VAT Act (as amended by Act No. 7 of 2003) and submitted that while the general rule is that the assessment must be made within three years of the end of the taxable period, where a person or entity being assessed has failed to make a full and true disclosure of all the material facts necessary to determine the amount of tax payable by him for any taxable period the assessment can be made within a period of five years from the end of the taxable period to which the assessment relates.

I must add that the requirement is that such failure must be done *wilfully or fraudulently*.

In *Chellappah v. Commissioner of Income Tax* (52 N.L.R. 416 at 418) Basnayake J. (as he was then) held that ordinarily the word "wilfully" means deliberately or purposely without reference to bona fides but that in penal statutes it is used in a sense denoting deliberately or purposely and with an evil intention. The VAT Act being a fiscal rather than a penal statute, the word “willfully” in section 33(2) therein means deliberately or purposely without reference to bona fides.

In my view the Appellant has wilfully or fraudulently failed to make a full and true disclosure of all the material facts necessary to determine the amount of tax payable by it for the relevant period. This fact is confirmed by the letter of intimation dated 21st February 2007 which explains that the Appellant has failed to provide information on the time of supplies. Hence it was justifiable on the part of the assessor to invoke the amended section 33(2) of the VAT Act and make a singular assessment for the entire calendar year of 2004.

Accordingly, the assessment for the year 2004 is not time barred.

Time Bar of TAC Determination

The Appellant informed that this ground of appeal is not being pursued as the TAC commenced its sittings only on 8th March 20102. It is submitted that in these circumstances, the provisions of section 7 of the Tax Appeals Commission (Amendment) Act No. 04 of 2012 applies and the TAC determination was made on 28th February 2018 which is within the 12-month time bar period.

I wish to add that in any event, this Court holds that the time limit set out in section 10 of the Tax Appeals Commission Act No. 23 of 2011 (TAC Act) is only directory. We reached a similar conclusion in *Kegalle Plantations PLC vs. Commissioner General of Inland Revenue* [CA (Tax) 09/2017; C.A.M. 04.09.2018] and *Squire Mech Engineering (Pvt) Ltd., v. Commissioner General of Inland Revenue* [CA (Tax) 11/2017, C.A.M. 12.02.2019].

Training Grant given by BOI

In terms of Clause 10(viii) of the BOI Agreement the Appellant entered into, the BOI undertook to provide a training grant in the sum of Rs. 50,000/= per employee for the first 1500

employees employed by the enterprise. The Assessor included this in his assessment which the Appellant contends is erroneous as the training grant is not a taxable supply within the meaning of the VAT Act.

However, in my view the true questions are, as submitted by the learned Senior State Counsel, whether the professional training provided by the Appellant is a taxable supply. It is a supply of services provided by a registered person within the taxable period as part of carrying out a taxable activity. Such training is not exempted by the VAT Act. The value of the grant is the value of the taxable supply.

Cost of Children's Education

The expatriate staff of the Appellant was being provided with the perquisite of the educational expenses of their children being reimbursed by the Appellant. The issue is whether this is subject to VAT.

The learned counsel for the Appellant submitted that in order for the supply of goods and services to be considered as a taxable supply for the employer it must be carried out in the course of carrying out a taxable activity by the employer. He gives the example of a supermarket granting its employees a benefit of buying goods from the supermarket for the value of Rs. 5000 per month and submits that it would fall within the provisions of section 5(3) of the VAT Act. In other words, the submission is that the taxable supply must relate to taxable activity. It is further submitted that the Appellant is not providing educational services and therefore the educational expenses of the children of the expatriate staff reimbursed by the Appellant is not subject to VAT.

That in my view is not the correct test. Section 5(3) of the VAT Act states that "where a supply of goods and services is made by an employer to his employee as a benefit from employment, the consideration in money for the supply shall be the open market value of such supply…". The educational expenses of the children of the expatriate staff were being reimbursed by the Appellant. That was done only because they are employed by the Appellant and is thus a benefit they get from employment. It is not an exempt employment benefit as stipulated in the First Schedule of the VAT Act and is subject to VAT. This is further fortified by the fact that in

making the payments for this supply of service to its employees, the VAT paid by the Appellant has been claimed and allowed as input VAT credit in the VAT return of the Appellant.

Transport Facilities

The Appellant provides transport facilities to its employees outside ordinary working hours as it carries out its activities on a shift basis and the earliest shift starts at 6 a.m. and the last shift finishes at 2 a.m. The issue is whether these transport facilities are subject to VAT.

The Appellant submits that it is not a taxable activity within the meaning of the VAT Act and as such not subject to VAT. However, the Court is of the view that the issue can be decided from a different perspective and it is not necessary to undertake such an analysis.

The VAT Act was amended by Value Added Tax (Amendment) Act No. 13 of 2004 which was operative from 1st January 2004. The amendment made an amendment to Part II Item (b) (iv) of the First Schedule which now reads in the relevant part as follows:

Part II

For any taxable period commencing on or after January 1, 2004 -

b. The supply of -

(iv) Free or subsidised meals by an employer to his employees at their places of work and transport free or at a subsidised rate by an employer to his employees using a motor coach between the place of residence and workplace of such employees.

In terms of section 8 of the VAT Act, the above item is exempted from VAT. Accordingly, Court holds that the provision of such transport facilities is an exempt supply in terms of the VAT Act and that the assessment should be amended accordingly.

For the foregoing reasons, we answer the questions of law as follows:

(1) Is the VAT Assessment No. 8363254 or any portion thereof time barred in terms of the VAT Act? **No.**

(2) Is the determination of the TAC time barred by operation of law in terms of the Tax Appeals Commission Act No. 23 of 2011? **No. In any event, the time limit specified for the TAC to make its determination is not mandatory.**

(3) Has there been a taxable supply by the Appellant under the VAT Act for the training grant given by the BOI of Sri Lanka? **Yes**

(4) Are the Allowances granted to meet the costs of their children's education a taxable supply in terms of the VAT Act? **Yes**

(5) Are the transport facilities provided by the Appellant to its employees after regular working hours a taxable supply in terms of the VAT Act? **Does not arise in view of answer to question no. 6**

(6) In the alternative to No. 5 above, would the provision of such transport facilities be an exempt supply in terms of the VAT Act? **Yes.**

Therefore, acting in terms of the powers vested in this Court by section 11A (6) of the TAC Act, we remit the case to the TAC to revise the assessment in accordance with the opinion of the Court.

Judge of the Court of Appeal

N. Bandula Karunarathna J.

I agree.

Judge of the Court of Appeal