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

In the matter of a Stated Case by the Board of Review constituted under section 118 of the Inland Revenue Act No. 28 of 1979, for the opinion of the Court of Appeal under and in terms of section 122 of the Inland Revenue Act No. 28 of 1979.

Convenience Foods (Lanka) PLC

(Previously known as Soy Foods (Private) Limited and as Soy Foods (F&W Limited),

133, 7th Lane, Off Borupana Road,

Ratmalana.

APPELLANT

Case No. CA (TAX) 07/2010 **Vs.**

Board of Review Case No. BRA/482/SCA 234

The Commissioner General of Inland Revenue,

The Department of Inland Revenue,

Inland Revenue Building,

Sir Chittampalam A. Gardiner Mawatha,

Colombo 02.

RESPONDENT

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

Dr. Shivaji Felix for the Appellant

Anusha Fernando DSG for the Respondent

Argued On: 08.07.2019

Written Submissions tendered on:

Appellant on 07.12.2016 and 26.08.2019

Respondent on 14.02.2017

Decided on: 27.05.2020

Janak De Silva J.

The Appellant submitted its return for the year of assessment 1991/1992 on 30.11.1992 claiming tax exemption under and in terms of section 17(c) of the Inland Revenue Act No. 28 of 1979 as amended (IR Act) in respect of its profits.

The Assessor by letter dated 30.03.1995 rejected the claim for tax exemption. Aggrieved by this assessment the Appellant appealed under and in terms of section 117 of the IR Act to the Commissioner General of Inland Revenue by letter dated 18.05.1995.

The Respondent by determination dated 30.06.1998 dismissed the appeal. The Appellant appealed to the Board of Review by letter dated 17.08.1998 which was dismissed on 23.03.2010.

Aggrieved by the determination of the Board of Review, the Appellant by letter dated 20.04.2010 requested the Board of Review to have a Case Stated referred to this Court which was allowed.

The questions of law referred to Court are as follows:

(1) Has the Board of Review erred in law by coming to the conclusion that the determination of the Commissioner General of Inland Revenue is not time barred?

(2) Has the Board of Review erred in law by coming to the conclusion that the determination of the Commissioner General of Inland Revenue is not contrary to the principles of natural justice?

(3) Has the Board of Review erred in law by coming to the conclusion that despite the long delay experienced in hearing this appeal the Board of Review was not devoid of jurisdiction to continue to hear this appeal?

(4) Has the Board of Review erred in law in interpreting section 17(c) of the Inland Revenue Act No. 28 of 1979 (as amended)?

(5) In view of the facts and circumstances of the case has the Board of Review erred in law by coming to the conclusion that it did?

Time Bar

The Appellant has sought to raise two issues under this question of law.

Firstly it is contended that the Respondent failed to determine the appeal within three years in terms of section 117(12) of the IR Act.

The Appellant appealed against the notice of assessment by letter dated 18.05.1995. The determination of the Respondent is dated 30.06.1998, which according to the learned counsel for the Appellant is three years after the date of appeal.

Yet in terms of section 117(12) of the IR Act, the three year time period is to be calculated from the date on which the petition of appeal is received by the Respondent. The section specifies that every appeal shall be acknowledged and the date of the letter of acknowledgement shall for the purposes of the section be deemed to be the date of receipt of such appeal.

Although the brief does not contain a copy of the letter of acknowledgement that date is referred to in a report prepared by an Assessor as 11.07.1995. Hence the Respondent had time until 10.07.1998 to make the determination. The determination of the Respondent is dated 30.06.1998. Accordingly, the determination is not time barred.

Secondly, the Appellant contends that although the determination of the Respondent is dated 30.06.1998, the reasons for the determination are dated 20.07.1998. Hence it is submitted that the reasons did not exist at the date of the determination.

In my view, this issue does not arise on question no. 1 set out in the Stated Case. Yet, I have previously held that this Court has the power to hear and determine any question of law arising on the Stated Case provided that the answers to the new questions of law may result in the confirmation, reduction, increasing or annulling the assessment determined by the Commission, or requires the remitting of the case to the TAC with the opinion of the Court [*The Commissioner General of Inland Revenue v. Dr. S.S.L. Perera* [CA (Tax) 03/2017, C.A.M. 11.01.2019].

Section 119 of the IR Act allows any person who is dissatisfied with the determination of the Respondent to communicate it in writing within one week of the determination and the Respondent is then required to transmit his reasons in writing within one month of the date of determination.

The word "transmit" is defined by *Black's Law Dictionary* [St Paul, Minnesota: West Group, 7th Edn., 1999, Bryan A Garner (ed)], at p. 1505, as follows:

> *transmit, vb. 1. To send or transfer (a thing) from one person or place to another. 2. To communicate*

The learned counsel for the Appellant having referred to this definition contends that the obligation of transmitting within one month is statutorily limited to communicating the reasons for the determination (which the Commissioner General is required to possess at the time of the determination) whereas in the present matter the determination and the reasons for the determination has two days.

However, it appears that this is based on an assumption made by the Appellant [paragraph 16 of the written submissions dated 21.08.2009 before the Board of Review, paragraph 24 of the written submissions filed in this Court dated 14.02.2017, paragraph 23 of the written submissions filed in this Court dated 26.08.2019].

The Respondent has explained that the date which appears on the document containing the reasons for the determination is the date on which the reasons were signed and dated for the purposes of transmitting it to the Appellant [written submissions filed by the Respondent before the Board of Review, page 121 of the Board of Review Brief].

As the learned DSG correctly points out other than the bare assertion there is nothing on record which supports the position put forward by the Appellant. I am inclined to apply the presumption embodied in section 114(d) of the Evidence Ordinance that official acts have been regularly performed in the absence of any material to the contrary.

For the foregoing reasons, I answer question no. 1 in the negative.

Rules of Natural Justice

The facts forming the background to question no. 2 are as follows:

The Assessor who rejected the claim for tax exemption by letter dated 30.03.1995 is Mr. P.G.K. Samarathunge. However, the notice of assessment dated 31.03.1995 was sent to the Appellant bearing a frank of Mr. E.M.M. Medagoda. The determination together with the reasons for the determination dated 30.06.1998 was given by the same Mr. E.M.M.Medagoda.

Accordingly the Appellant contended that the determination of the Respondent was contrary to the rules of natural justice.

Let me restate some fundamental principles that guide this issue.

The principle that a person is disqualified from participating in a decision if there is a real danger that he or she will be influenced by a pecuniary or personal interest in the outcome is of general application in public law and is not limited to judicial or quasi-judicial bodies or

proceedings [per Sedley J. in *R. v. Secretary of State for the Environment, ex parte Kirkstall Valley Campaign Ltd.* (1996) 3 All E.R. 304 at 325].

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].

It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done [per Lord Hewart C.J. in *R. v. Sussex Justices, ex. parte McCarthy* (1924) 1 K.B. 256].

As the learned counsel for the Appellant submitted, the assessment under appeal has been issued under the authority of the Assessor who signed the notice of assessment. In the instant case the delegate of the Respondent and the Assessor who sent the notice of assessment is one and the same.

There is no allegation that Mr. E.M.M. Medagoda personally benefitted from the determination he made. Neither is there any allegation of any personal interest. In fact, in his preliminary ruling dated 23.04.1998 he states, inter alia, as follows:

> "Having considered the matter I am of the view that the fact that the assessment in question has been issued under my stamp should not prevent me from hearing the appeal. Since I have no connection whatsoever with the assessment, there is no room whatsoever for occasioning any injustice to the Appellant."

However, that is not the test in determining whether the rules of natural justice have been breached. In setting out the proper test, I wish to refer to the following excerpt of Lord Hope of Craighead in *Porter v. Magill* [(2001) UKHL 67; (2002) A.C. 357] as it succinctly captures the test in a modern setting:

> "100. The "reasonable likelihood" and "real danger" tests which Lord Goff described in *R v Gough* have been criticised by the High Court of Australia on the ground that they tend to emphasize the court's view of the facts and to place inadequate emphasis on the

public perception of the irregular incident: *Webb v The Queen* (1994) 181 CLR 41, 50 per Mason CJ and McHugh J. There is an uneasy tension between these tests and that which was adopted in Scotland by the High Court of Justiciary in *Bradford v McLeod*, 1986 SLT 244. Following Eve J's reference in *Law v Chartered Institute of Patent Agents* [1919] 2 Ch 276 (which was not referred to in *R v Gough*), the High Court of Justiciary adopted a test which looked at the question whether there was suspicion of bias through the eyes of the reasonable man who was aware of the circumstances: see also *Millar v Dickson* 2001 SLT 988, 1002L-1003B. This approach, which has been described as "the reasonable apprehension of bias" test, is in line with that adopted in most common law jurisdictions. It is also in line with that which the Strasbourg court has adopted, which looks at the question whether there was a risk of bias objectively in the light of the circumstances which the court has identified: *Piersack v Belgium* (1982) 5 EHRR 169, 179-180, paras 30-31; *De Cubber v Belgium* (1984) 7 EHRR 236, 246, para 30; *Pullar v United Kingdom* (1996) 22 EHRR 391, 402-403, para 30. In *Hauschildt v Denmark* (1989) 12 EHRR 266, 279, para 48 the court also observed that, in considering whether there was a legitimate reason to fear that a judge lacks impartiality, the standpoint of the accused is important but not decisive:

"What is decisive is whether this fear can be held objectively justified."

101. The English courts have been reluctant, for obvious reasons, to depart from the test which Lord Goff of Chieveley so carefully formulated in *R v Gough.* In *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, 136A-C Lord Browne-Wilkinson said that it was unnecessary in that case to determine whether it needed to be reviewed in the light of subsequent decisions in Canada, New Zealand and Australia. I said, at p 142F-G, that, although the tests in Scotland and England were described differently, their application was likely in practice to lead to results that were so similar as to be indistinguishable. The Court of Appeal, having examined the question whether the "real danger" test might lead to a different result from that which the informed observer would reach on the same facts, concluded in

Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451, 477 that in the overwhelming majority of cases the application of the two tests would lead to the same outcome.

102. In my opinion however it is now possible to set this debate to rest. The Court of Appeal took the opportunity in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 to reconsider the whole question. Lord Phillips of Worth Matravers MR, giving the judgment of the court, observed, at p 711 A-B, that the precise test to be applied when determining whether a decision should be set aside on account of bias had given rise to difficulty, reflected in judicial decisions that had appeared in conflict, and that the attempt to resolve that conflict in *R v Gough* had not commanded universal approval. At p 711B-C he said that, as the alternative test had been thought to be more closely in line with Strasbourg jurisprudence which since 2 October 2000 the English courts were required to take into account, the occasion should now be taken to review *R v Gough* to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence. Having conducted that review he summarised the court's conclusions, at pp726H-727C:

> "85 When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R v Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.""

In the circumstances of this matter, it cannot be said that there is no "real possibility", or a "real danger" of bias. It matters not that Mr. E.M.M. Medagoda was convinced he was not biased. Nor does it matter that he claims to have had no connection whatsoever with the assessment. The delegate was sitting as adjudicator in a case where the assessment under appeal has been

issued under his authority. A fair-minded and informed observer would conclude that there was a real possibility, or a real danger, that he was biased.

Wade and Forsyth, *Administrative Law*, [Oxford Oxford University Press, 11th Ed., 2014] at page 401 states:

> "Any indication that an adjudicator has prejudged the case, or any indication that he might do so, will normally disqualify him - as it did where a magistrate prepared a statement of the sentence halfway through the trial."

For the foregoing reasons, I answer question no. 2 in the affirmative.

Lack of Jurisdiction

The learned counsel for the Appellant contended that the long delay experienced in hearing this appeal has resulted in the Board of Review being devoid of jurisdiction to continue to hear the appeal.

It was pointed out that the Appellant appealed to the Board of Review by petition of appeal dated 17.08.1998 which was received by the Respondent on 19.08.1998. The oral hearing of the appeal took place on 30.06.2009.

The learned counsel for the Appellant has made detailed submissions on whether the time limit is directory or mandatory. However, before considering that position, I would like to set out the applicable time period for determining the appeal.

The IR Act as promulgated did not have a specific time period within which the Board of Review should hear and determine the appeal. The position was the same when the Inland Revenue Act No. 38 of 2000 was enacted.

A time limit was first introduced by Act No. 37 of 2003 to the Inland Revenue Act No. 38 of 2000. Section 140(10) of the Inland Revenue Act No. 38 of 2000 was amended by introducing two provisos.

The first proviso states that the Board of Review shall make its determination or express its opinion as the case may be, within two years *from the date of commencement of the hearing of such an appeal.*

The second proviso states that where the *hearing of any appeal has commenced at the date of commencement of this Act*, the appeal shall be determined or an opinion shall be expressed within two years *from the commencement of this Act.*

Hence the applicable provision depends on when the hearing of any appeal has commenced.

Firstly, the learned counsel for the Appellant submitted that "hearing" used in section 140(10) of the Inland Revenue Act No. 38 of 2000 does not refer to an oral hearing alone and that it must be in the given context have the same meaning as "to hear and determine" and referred Court to the statement of Selbourne C. in *Re. Green* [51 LJQB 44] where he held that " "hearing" includes not only its necessary antecedents but also its necessary or proper consequences". It was further pointed that a hearing does not necessarily mean an oral hearing [Lord Woolf, Jeffrey Jowell, Andrew Le Sueur et al in *De Smith's Judicial Review* (London; Sweet & Maxwell, 7th edn., 2013] at p. 428]. It was submitted that the "hearing" must be construed to mean the date on which the Appellant submitted to the jurisdiction of the Board of Review. Although this has not been fully explained it appears to mean the date on which the Appellant sent the petition of appeal to the Board of Review.

Nonetheless in *A.M. Mohideen v. Commissioner General of Inland Revenue* [BALJ 2015 Vol. XXI page 171 at 175] Gooneratne J. held that the hearing contemplated is nothing but an oral hearing. I am in respectful agreement with that part of his conclusion. It reflects a practical approach and mirrors the approach taken by Courts to civil proceedings [*Storer v. American Express Company* (V Sriskantha Law Reports 77)].

The oral hearing in this matter commenced before the Board of Review on 30.06.2009 and the determination is dated 23.03.2010. Hence the determination was made within the time frame.

Alternatively, the learned counsel for the Appellant contended that the words "commencement of this Act" in Act No. 37 of 2003 is not a reference to the amending Act No. 37 of 2003 but to the principal enactment, Inland Revenue Act No. 38 of 2000. Even in this context, hearing commenced on 30.06.2009 and it makes no difference to the analysis.

Nonetheless, I have no hesitation in rejecting that submission. Adopting such an interpretation leads to absurdity. The main Act was enacted in 2000 and the amendment in 2003 resulting in the lapse of 3 years in between. Yet the Appellant contends that a hearing commenced under the main Act after 2000 is time barred within two years from the commencement of the main Act even before the amending Act was enacted.

For the foregoing reasons, I answer question no. 3 in the negative.

Section 17(c) of the Inland Revenue Act No. 28 of 1979 (as amended)

The relevant statutory provision reads:

> "17C. (1) The profits and income within the meaning of paragraph (a) of section 3 (other than any profits and income from the sale of capital assets), of any company referred to in subsection (2), shall be exempt from income tax for a period of five years from the commencement of the year of assessment in which such company commenced to carry on business.
>
> (2) The provisions of subsection (1) shall apply to any company which -
>
> (a) commenced to carry on business on or after January 1, 1990;
>
> (b) is, on the recommendation of the Minister in charge of the subject of Industries, approved by the Minister by notice published in the Gazette on or before April 1, 1992 as a company to which this section applies; and
>
> (c) is engaged only in carrying on -
>
> (i) an industrial undertaking of pioneering nature in regard to industrial products or industrial processes; or

(ii) an undertaking for the provision of training in manufacturing processes, or computer software and computer related development, or industrial design:

Provided that such undertaking is not an undertaking formed by the splitting up, re-construction, or acquisition of any business which was previously in existence."

The conclusion of the Board of Review on this issue is not entirely clear as it reads:

> "We hold that the Appellant was formed by the splitting up, re-construction or acquisition of a business hitherto carried on by "Forbes" which was previously in existence. The Appellant was not an undertaking formed by the splitting up, re-construction, or acquisition of any business which was previously in existence as contemplated under section 17(c) of the Act."

The learned counsel for the Appellant contended that once the Minister makes a notice in terms of section 17(C)(2)(b) of the IR Act that a company is one to which section 17C applies, it means that it is a company to which the whole of section 17C applies including the proviso. In other words, the contention is that it is not up to the Respondent to decide whether the Appellant qualifies for the exemption in terms of section 17C as that question is determined by the Minister when the notice is made.

It is observed that section 17C (2) of the IR Act contains several requirements of which one is the notice made by the Minister. Other requirements are that it commenced to carry on business on or after January 1, 1990, is engaged only in carrying on an industrial undertaking of pioneering nature in regard to industrial products or industrial processes; or an undertaking for the provision of training in manufacturing processes, or computer software and computer related development, or industrial design.

I am inclined to accept the submission of the learned DSG that if the contention of the Appellant is correct, there would have been no purpose in including the other conditions contained in section 17(C) (a) and (c) of the IR Act as well as the prohibition in the proviso. It

would have sufficed for the legislature to have plainly stated that the Respondent would be required to grant the exemption simply upon the notice made by the Minister.

This is further buttressed by the fact that section 17(C)(2)(b) reads " is, on the recommendation of the Minister in charge of the subject of Industries, approved by the Minister by notice published in the Gazette on or before April 1, 1992 as a company to which this section applies**;** **and**". (Emphasis added)

In *S.B. Perera v. Standard Chartered Bank and Others* [(1995) 1 Sri.L.R. 73] Amerasinghe J. in holding that section 19 of the Industrial Disputes Act has two parts took into consideration the fact that they were separated by a semicolon.

Then the issue is whether the Appellant has fulfilled the required criteria to obtain the exemption. In this regard the application of the proviso to the present case needs to be examined to ascertain whether the Appellant is an undertaking formed by the splitting up, re-construction, or acquisition of any business which was previously in existence.

In *Shanmuganayagam and Another v. Commissioner General of Inland Revenue* [Sri Lanka Tax Cases Vol. IV page 308] the Supreme Court held that whether an undertaking is a new venture or an old one will depend on several factors. Transfer of assets from the old business to the so-called new venture is an indication of "continuation" as opposed to "creation" of a new venture. Furthermore, the carrying on of the former activities without abandoning them would indicate and it is not a new distinct or separate business from the old business. Even if the form of the business be altered resulting in a complete reconstruction by the old venture, it may nevertheless be a continuation of the old business.

The following evidence supports the fact that the Appellant was formed by the reconstruction/splitting of Forbes Ceylon Ltd. and as such is not entitled to the tax exemption:

(i) The admission in letter dated 09.01.1996 written by the Appellant to the Respondent that Forbes Ceylon Limited had pursuant to a tax incentive announced during 1989/1990 commenced production of soy products but that later a new company was formed as it was a requirement to obtain the tax exemption.

(2) The annual report of Forbes Ceylon Ltd. for the year 1989/1990 where it is stated that Forbes Ceylon Ltd. had set up a manufacturing division to produce textured soya.

(3) The incorporation of the Appellant on 01.04.1991 as a subsidiary of the Forbes & Walker Group.

(4) The principal activity of the Appellant being the manufacture of textured soya protein.

(5) The acquisition of the following assets by the Appellant from Forbes Ceylon Ltd. for the purpose of carrying on its principal activity:

(a) land, building, plant and machinery

(b) motor vehicles

(c) office space, accounting personnel, administration, shipping and data processing facilities.

(d) necessary facilities for marketing the products of the Appellant.

(6) Four Directors of the Appellant are also Directors of Forbes Ceylon Ltd.

For the foregoing reasons, the Appellant is an undertaking formed by the splitting up, re-construction, or acquisition of any business which was previously in existence.

Hence, I answer question no. 4 in the negative.

Question no. 5 is an all-encompassing question bringing within it question nos. 1 to 4. As explained above, the answer to question no. 2 is in the affirmative and as such the assessment confirmed by the Board of Review is annulled.

Accordingly, Court answers the questions of law in the Stated Case as follows:

(1) Has the Board of Review erred in law by coming to the conclusion that the determination of the Commissioner General of Inland Revenue is not time barred? **No.**

(2) Has the Board of Review erred in law by coming to the conclusion that the determination of the Commissioner General of Inland Revenue is not contrary to the principles of natural justice? **Yes.**

(3) Has the Board of Review erred in law by coming to the conclusion that despite the long delay experienced in hearing this appeal the Board of Review was not devoid of jurisdiction to continue to hear this appeal? **No.**

(4) Has the Board of Review erred in law in interpreting section 17(c) of the Inland Revenue Act No. 28 of 1979 (as amended)? **No.**

(5) In view of the facts and circumstances of the case has the Board of Review erred in law by coming to the conclusion that it did? **Yes in view of the answer to Question No. 2.**

The assessment confirmed by the Board of Review is annulled.

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

Judge of the Court of Appeal

N. Bandula Karunarathna J.

I agree.

Judge of the Court of Appeal