IN THE COURT OF APPEAL OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of a case stated for the opinion of the Court of Appeal Under section 11 A of the Tax Appeals Commission Act No. 23 of 2011 as amended by Act No. 20 of 2013.

C A (Tax) Appeal No. 07 / 2015

The Commissioner General

of Inland Revenue.

Department of Inland Revenue,

Inland Revenue Building,

Sir Chittampalam A. Gardiner Mawatha,

Colombo 02.

APPELLANT

-Vs-

Classic Travel (Pvt) Ltd.

No. 379/4,

Galle Road,

Colombo 03.

RESPONDENT

Before: A H M D Nawaz J

P. Padman Surasena J

Counsel: Chaya Sri Nammuni SC for the Appellant.

F N Gunawardana for the Respondent.

Argued on: 2016-11-07

Decided on: 2017 - 04 – 06

JUDGMENT

P Padman Surasena J

1. BACKGROUND

When the Value Added Tax (hereinafter sometimes referred to as 'VAT') returns were submitted by the Respondent for certain taxable periods on

the basis that their supplies were zero rated, those returns were rejected by the Assessor on the basis that the commission income of the Respondent could not be considered as zero rated supply. The Assessor then issued a new VAT assessment in terms of section 28 of the Value Added Tax Act No. 14 of 2002 as amended.

In the appeal against the said decision of the Assessor, the Commissioner General of Inland Revenue (hereinafter sometimes referred to as 'Commissioner General'), by his determination dated 2013-08-02, confirmed the decision of the Assessor.

The Respondent thereafter appealed to the Tax Appeals Commission (hereinafter sometimes referred to as 'Commission'). In that appeal, the Respondent (Classic Travel (Pvt) Ltd.) raised a preliminary issue that the Commissioner General of Inland Revenue has breached rules of Natural Justice. The Tax Appeals Commission upheld that argument.

Being dissatisfied with the determination of the Tax Appeals Commission the Commissioner General of Inland Revenue has taken steps to initiate the appeal proceedings in this court.

2. QUESTIONS OF LAW

The questions of law formulated for the opinion of this Court by the Appellant in terms of section 11 A of the Tax Appeals Commission Act as amended by Act No. 20 of 2013 and Act No. 23 of 2011, is as follows.

1) Whether the Tax Appeals Commission acted in excess of its limited jurisdiction as it cannot assume jurisdiction it does not possess to decide on questions of law.
2) Whether the Tax Appeals Commission has erred in law to determine the appeal on the matters raised as preliminary objections by the appellant's counsel.
3) Whether the Tax Appeals Commission was empowered by the Hon. Minister of Finance who appointed it to hear and determine the appeal preferred by the Appellant, to give its determination without hearing the matters raised in the appeal.
4) Whether the Tax Appeals Commission has erred in law in determining a question of law and failed to give due consideration to the judgment of the case. A.M Ismail Vs. CIR-(SLTC Vol. VI Page 156) that question of law have to be decided by courts and the Tax Appeals Commission can decide on questions of fact.

5) Whether the Tax Appeals Commission has erred in Law, that coming in to conclusion that it is a violation of principle of natural justice where hearing of the appeal by one Commissioner and concluded hearing and the other commissioner issuing a notice of determination based on the records maintained by the first Commissioner.

3. CORRECTNESS OF THE DECISION REGARDING COMPLIANCE WITH RULES OF NATURAL JUSTICE

In an endeavor to find answers to the above questions of law, this Court must first appraise the sequence of events which formed the background of the impugned decision.

First and foremost, it has to be noted that it was the Commissioner - K Dharmasena who has heard the appeal preferred by the Respondent. According to the document marked **A1 (b)**, the said Commissioner - K Dharmasena had concluded the proceedings pertaining to this appeal and had reserved the determination. Commissioner - K Dharmasena has on 2013-03-07, recorded it in following terms;

"..... Chair said that hearings were concluded and determination together with reasons for the determination will be submitted to the Commissioner (Secretariat) to submit before the Commissioner General of Inland Revenue. ....."

However, a letter dated 2013-08-02 (marked **A 3**) had been issued under the hand of Commissioner D M Somadasa Dissanayake which contained the following passage.

".....Acting under the Authority delegated to me by the Commissioner General of Inland Revenue to here*(sic)* and determine the above appeals, and having considered the written and oral submission made by the authorized representatives and few officials on behalf of the appellant company, and the views, explanation, ruling submission made by the departmental officials on behalf of the revenue. I determine the above appeals by confirming the assessments issued under the above assessment numbers....."

Reasons for the above determination had been given on 2013-08-05. Although it was Commissioner D M Somadasa Dissanayake who had signed it, that document still contains the name K Dharmasena in its first page[1].

It is significant to note in the passage quoted from the document marked **A 3** above that Commissioner D M Somadasa Dissanayake has stated that he has considered the oral submissions made by the parties. This is manifest from the phrase "....having considered the written and oral submission ...." in the passage quoted above. However the available material does not support the fact that any such oral submission has ever been made before Commissioner D M Somadasa Dissanayake.

Learned State Counsel who appeared for the Appellant was not in a position to offer any explanation as to why Commissioner D M Somadasa Dissanayake instead of the Commissioner K Dharmasena had to make the determination when indeed it was Commissioner K Dharmasena who had heard the appeal and reserved his determination on 2013-03-07.

Further, the following questions also cry out for explanations in the above circumstances.

---

[1] It was corrected by a subsequent document.

I. Was the appointment of Commissioner K Dharmasena was cancelled?

II. Is the appointment of Commissioner K Dharmasena still in force?

III. What were the circumstances which prompted the Commissioner General of Inland Revenue to replace Commissioner K Dharmasena with some other official?

Learned State Counsel who appeared for the Appellant did not have answers to any of the above questions also. The statutory power exercised by the Commissioner-General under section 34 of the Value Added Tax Act is a power that has to be exercised by him judicially. Therefore, the law demands that he must act fairly observing rules of natural justice. It is a fact that the Commissioner General has replaced the officer who was due to pronounce the determination for which no reason has been assigned. He is not in a position to offer any explanation for such a move. Thus, this would, to say the least, be a necessary indication that the Commissioner-General has not acted fairly.

Further, fact that there is no proof that the appointment of commissioner K Dharmasena has been cancelled poses the question whether commissioner D M Somadasa Dissanaike in fact was authorized to make a determination

of this appeal which should otherwise have been done by commissioner K Dharmasena.

Thus, what is established before this Court is not the fact that the Commissioner General of Inland Revenue has complied with the rules of natural justice, but the quite opposite of it. Section 34 of the Value Added Tax Act No. 14 of 2002 as amended has conferred a right of appeal to a person dissatisfied with any assessment issued by an 'Assessor' or 'Assistant Commissioner' under that Act. The word 'appeal' itself denotes a right, in particular, for the appellant to be heard. This in turn means that the appellant must be afforded an opportunity to present a reasoned argument to persuade the authority concerned to re consider his case. One must be able to find a close link between such hearing and the eventual decision if the authority concerned has genuinely afforded such an opportunity to the appellant. In these circumstances it is the opinion of this Court that the Tax Appeals Commission has not erred when it held to strike down the determination by the Commissioner General for his failure to comply with the rules of natural justice.

4. CAN THE CASE BE SENT BACK FOR RE-INQUIRY

Learned State Counsel in the course of her submissions, sought to argue that the best course of action for the Tax Appeals Commission would have been to have the case sent back for the Commissioner General to reconsider the merits of the case.

Thus the next task this Court has to undertake is to ascertain whether it is possible to have this case sent back for a re-inquiry.

The explanation given by the Tax Appeals Commission in its reasoning as to why such a course of action is not possible, is based on section 34 of the VAT Act which states as follows,

".....every petition of appeal shall be agreed to or determined by the Commissioner General within two years from the date on which such petition of appeal is received by the Commissioner General unless the agreement or determination of such appeal depends on the furnishing of any document or the taking of any action by any person other than the appellant or the Commissioner General or an Assessor or an Assistant Commissioner. where such appeal is not agreed or determined within such

period the appeal shall be deemed to have been allowed and the tax charged accordingly....."

The time limit above section has laid down is for a determination to be made by the Commissioner General when an appeal has been preferred to him.

The Respondent being a tax payer has been granted by law a right of appeal to the Commissioner General. The Respondent in this instance has exercised that right. The Commissioner General is yet to hear that appeal according to law in its proper spirit as his previous determination has been invalidated by the Tax Appeals Commission.

According to the 'Appeal Report'[2] dated 2012-11-07 the date of appeal of the instant case is 2011-09-07 and the date the time bar commences to operate is 2013-09-06. The time period specified in section 34 of the VAT Act is to be reckoned from the date on which such petition of appeal is received by the Commissioner General. Thus the Commissioner General will not have power to hear that appeal at this moment.

[2] A report prepared by an Assessor

The Commissioner General in this instance has failed to accomplish any lawful hearing of the appeal up to now. Thus, he has failed to comply with the time frame prescribed in the above section. The invalidation of his previous determination amounts, in the eyes of law, to the said appeal being not heard.

Therefore it is clear when this Court holds that the determination by the Commissioner General is not valid, what remains valid is the determination by the Assessor.

Section 34 of the VAT Act has specified in no uncertain terms, the effect of such appeal is not agreed or determined within the specified period. Thus, in such a situation the appeal shall be deemed to have been allowed.

The above position appears to be in line with the fact that neither section 9(10) nor 11 A (6) of the Tax Appeals Commission Act provide that a case could be sent back for 're-inquiry'.

Consideration of the above sections in its form would make this position clear. These sections are reproduced below for easy reference.

Section 9 (10);

" ..... After hearing the evidence, the Commission shall on appeal either confirm, reduce, increase or annul, as the case may be, the assessment as determined by the Commissioner-General or may remit the case to the Commissioner-General with the decision of the Commission on such appeal. Where a case is so remitted by the Commission, the Commissioner-General shall revise the assessment in order that it is in conformity with such amount as stated in the decision of the Commission. .... "

Section 11 A (6);

" ... 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. Where a case is so remitted by the Court, the Commission shall revise the assessment in accordance with the opinion of the Court. ..... "

It is to be observed that both the aforementioned sections, the action to be taken either by the Commission or by the Commissioner-General when a case is so remitted have been restricted to the revision of the assessment

in order that it is in conformity with such amount as stated in the said decision. It is to be observed that these sections do not provide for the conduct of re-inquiries as has been provided for in the case of regular appeal proceedings. This could be to avoid any conflict with the operation of the time bar placed on the Commissioner General regarding the disposal of appeals made to him.

5. CAN THE TAX APPEALS COMMISSION DECIDE ON A QUESTION OF LAW?

In terms of section 7(1) (a) of the Tax Appeals Commission Act,

"..... a person who is aggrieved by the determination -

of the Commissioner-General of Inland Revenue appointed in terms of the Inland Revenue Act, given in respect of any matter relating to imposition of any tax, levy, charge, duty or penalty under the provisions of any of the enactments specified in Column I of Schedule I, or Schedule II to this Act;.....

may appeal to the commission in accordance with the provisions hereinafter set out: ....."

Section 9(10) of the Tax Appeals Commission Act as set out above, specifies the actions the Commission may take after hearing the evidence. It is open for the Commission on appeal either to confirm, reduce, increase or annul, the assessment determined by the Commissioner-General or to remit the case to the Commissioner-General with the decision of the Commission on such appeal. Thus, annulment of the assessment determined by Commissioner General is well within the powers of the Commission.

Section 2 of the Tax Appeals Commission Act requires that each panel of the Commission shall comprise one retired judge of the Supreme Court or the Court of Appeal. It is such panels which should hear and determine any matter before the commission. The Tax Appeals Commission Act has not placed any restriction on the Commission that they should not decide any question of law but only questions of fact.

Indeed, if a question of law is raised before the assessor, it will be the assessor who will decide that question of law first and it will be the same

question of law that will have to be determined in a subsequent appeal by the Commissioner-General and then by the Tax Appeals Commission thereafter. If this Court is to hold the opposite, it would bind the hands of Assessor who is confronted with a question of law raised before him.

It could be observed that even in the instant case, the 'Appeal Report' [3] dated 2012-11-07 prepared by an Assessor sets out the dispute between parties as;

".. Whether the total revenue of the company which consists of overriding commission income and service income falls within the definition of Zero rating in line with the definition given in the Air Navigation Act No. 55 of 1992 which mentioned under the section 7 of the Value Added Tax Act No. 14 of 2002. ... "

Although this Court did not go into the above question it would suffice at this stage to state here that a cursory glance through the above phrase would show the necessity for the decision maker to consider, interpret and at least obtain the basic meaning of the provisions of law referred thereto, in order to hear and dispose the appeal. It is not an exaggeration to say

[3] Ibid.

that most of the points raised in tax proceedings are nothing but points of law rather than points of facts.

If a question of law or fact or a question mixed with both law and fact is raised as a preliminary issue which goes to the root of the case, determining that issue first, would undoubtedly save time and resources of all stakeholders. Besides this, it is an accepted norm that a party agitating a question of fact or law must first have it raised before the original institution tasked to resolve that dispute. This is underpinned by the fact that such original institution may well uphold such argument saving time and resources of the appellate forum. Thus, there is also no merit in the statement that the Tax Appeals Commission has erred in law when it determined the appeal on the matters raised as preliminary objections by the learned counsel for the Appellant.

In these circumstances this Court is of the view that there is no merit in the statement that the Tax Appeals Commission does not possess power to decide on questions of law and hence it had in this case exceeded its jurisdiction.

6. OPINION OF COURT

In these circumstances this Court is of the opinion that it would suffice to answer 1st and 2nd questions of law stated for its opinion. The opinion of this court in respect of the said questions of law that have been formulated is as follows:

Opinion of this Court regarding question of law No. 01

> The Tax Appeals Commission has not acted in excess of its jurisdiction. It possesses jurisdiction to decide on questions of law.

Opinion of this Court regarding question of law No. 02

The Tax Appeals Commission has not erred in law when it determined the appeal on the matters raised as preliminary objections by the counsel for the Appellant.

Opinion of this Court regarding question of law No. 03, 04 and 05

It would not be necessary to provide specific answers to the questions of law No. 3, 4 & 5 in view of the opinion of this Court already given above in respect of the questions of law No. 01 and 02. Nevertheless if one is

interested in the opinion of this Court regarding these questions also, they are to be found amongst the reasoning of this judgment.

JUDGE OF THE COURT OF APPEAL

A H M D Nawaz J

I agree,

JUDGE OF THE COURT OF APPEAL