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

In the matter of an Appeal to the Supreme Court from the judgement of the Court of Appeal, dated 08 June 2018, in CA (Tax) Appeal No 10/2013, under and in terms of Article 128 (2) of the Constitution read with section 11A (9) of the Tax Appeals Commission Act, No. 23 of 2011 (as amended)

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

Appellant

SC. Appeal No. 114/2019

SC (SPL) LA 217/2018

C.A (Tax) Appeal No. 10/2013

Tax Appeals Commission

Appeal No. TAC/OLD/VAT/017

vs,

Janashakthi Insurance Company Limited,
No. 47, Muttiah Road,
Colombo 02.

Respondent

And between

Janashakthi Insurance PLC
(Previously Known as
Janashakthi Insurance Company Limited
and thereafter as
Janashakthi Insurance Company PLC),
No. 675, Dr. Danister de. Silva Mawatha, Colombo 09.
(Previously of No. 47, Muttiah Road, Colombo 02)
And also of,
No. 55/72, Vauxhall Lane, Colombo 02.

Respondent -Appellant

Vs.

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

Appellant-Respondent

Before: **Justice Vijith K. Malalgoda, PC**
Justice Murdu N. B. Fernando, PC
Justice E. A. G. R. Amarasekara

Counsel: **Dr. Shivaji Felix for the Respondent-Appellant instructed by Heshan Mamuhewa**
Ms. Chaya Sri Nammuni, SSC for the Appellant-Respondent

Argued on 31.10.2019

Decided on 26.06.2020

Vijith K. Malalgoda PC J

The Court of Appeal by its Judgement dated 08.06.2018 had allowed a case stated filed before the Court of Appeal by the Commissioner General of Inland Revenue and the Respondent before the Court of Appeal being dissatisfied by the said Judgment had preferred a Special Leave to Appeal application

before the Supreme Court. This Court by its order dated 15.05.2019 had granted Special Lave on the following questions of law,

a) Did the Court of Appeal err in law by failing to answer the case stated?

b) Did the Court of Appeal err in law by applying the provisions of the Electronic Transactions Act No. 19 of 2006?

c) Did the Court of Appeal err in law by not deciding the case and sending it to the Tax Appeals Commission with its opinion?

d) If one or more questions of law are answered in affirmative, should this appeal be sent back to the Court of Appeal to answer the questions referred to in the said case stated?

As revealed before this court, the determination of the Tax Appeals Commission (hereinafter referred to as TAC) dated 26. 02.2013 which was challenged before the Court of Appeal by way of a case stated, arose from an appeal against two assessments for Value Added Tax (hereinafter referred to as VAT) for the period ended on 31.03.2004 and 28.02.2005 which was confirmed by the Commissioner General of Inland Revenue by determination dated 16.06.2008 under and in terms Section 34 (12) of the Value Added Tax Act No. 14 of 2002 (as amended) (hereinafter referred to as VAT Act).

In the said appeal before the TAC, the Respondent (the Appellant before this Court) had raised two preliminary objections, namely;

a) that the relevant assessment is not valid as it has not been signed and/or do not bear the name and the designation of the person making the assessment.

b) that the said appeal to the TAC is time barred

The TAC by its determination dated 26.02.2013 upheld the first of the above two preliminary objections and overruled the second.

Being dissatisfied with the said determination of the TAC dated 26.02.2013, the Commissioner General of Inland Revenue (the Respondent before this court) had taken steps to initiate the appeal proceedings before the Court of Appeal.

Accordingly, the TAC has forwarded a case stated before the Court of Appeal and the said case stated contained the following questions of law, for the consideration of the Court of Appeal.

1. Whether Tax Appeals Commission has the jurisdiction to annual an Assessment due to service of unsigned notice of the assessment, even all other mandatory requirements have been fulfilled in order to make the assessment.
2. Whether duly served notice of Assessment with omission of signature affect the validity of assessment.
3. Whether duly served notice of Assessments, which was printed and issued by the computer, without signature of issuing officer, is an error covered by the section 61 of the VAT Act.

4. Whether Assessee can challenge the validity of assessment at the hearing of Appeals Commission
5. Whether Assessee can raise an issue as a preliminary objection at the hearing of Appeal at the Appeals Commission, which has not been raised at the time of appeal.
6. Whether issuing a notice of assessment by an Assessor, which is generated through computer under the provision of section 28 of the VAT Act, is exercising of discretionary power of ministerial act.
7. Whether the name of the Commissioner General, Deputy Commissioner or Assessor duly printed or signed on the assessment notice under section 60 of the VAT Act is a mandatory requirement.

As observed by this court, the procedure in forwarding a case stated before the Court of Appeal by the TAC and the subsequent steps that is being taken by the Court of Appeal is identified under the provisions of the Tax Appeals Commission Act No 23 of 2011 (hereinafter referred to as TAC Act) and the decisions of the Appellate Courts too had interpreted some of these provisions.

Section 11A (1) and (2) of the TAC Act provides the acceptance of the case stated by the TAC and transmitting to the Court of Appeal as follows;

11A (1) Either the person who preferred an appeal to the commission under paragraph (a) of the subsection (1) of section 7 of this Act or the Commissioner General may make an

application requiring the Commission to state a case on a question of law for the opinion of the Court of Appeal. Such application shall not be entertained unless it is made in writing and delivered to the secretary to the Commission, together with a fee of one thousand and five hundred rupees, within one month from the date on which the decision of the commission was notified in writing to the Commissioner General or the Appellant, as the case may be.

(2) The case stated by the commission shall set out the facts, the decision of the commission, and the amount of the tax in dispute where such amount exceeds five thousand rupees, and the party requiring the commission to state such case shall transmit such case, when stated and signed to the Court of Appeal, within fourteen days after receiving the same."

When the case stated is transmitted to the Court of Appeal, it contains the questions of law that is to be considered by the Court of Appeal. As decided in a series of Appellate decisions, it is the duty of the TAC in terms of section 11 A (2) of the TAC Act, to state a case on a question of law for the opinion of the Court of Appeal. It is the TAC that must state a case on a question of law for the opinion of the Court of Appeal. This is clear upon a consideration of section 11 A (2) of the TAC Act which states that, "the case stated by the Commission."

Even though it is not directly connected to the questions of law that are to be answered by this court, when considering whether the Court of Appeal has correctly acted within its powers, vested by the statute, it is necessary for me to consider, both the TAC and the Court of Appeal had correctly used its powers vested on them by the TAC Act.

The party preferring an appeal may in the application propose certain questions of law for consideration by the TAC to be referred to Court of Appeal as part of the case stated, but the TAC cannot blindly adopt the proposed questions of law without giving its mind to them.

This was considered by *Basnayake C.J. in* ***R.M. Fernando Vs. Commissioner of Income Tax (Reports of Ceylon Tax Case's Vol l page 571*** as follows;

> "The responsibility for stating a case is vested by the statute in the Board of Review and although the statue provides for the appointment of a clerk and legal adviser to the Board it cannot delegate its function to either of them. Though in the performance of its statutory duty it may make use of its ministerial officers, the ultimate responsibility of the due and proper performance of its duty rests with the Board and the Board alone. If it is the practice to leave the preparation of the case entirely to one of his ministerial officers and for the Board merely sign the case as stated by such officer that practice is not warranted by law and must cease forthwith."

However as observed by me, the TAC had failed to give their mind to the questions of law submitted by the Appellant in the instant case, and merely submitted them for the consideration of the Court of Appeal. In this regard I would like to refer to the paragraph 10 of the case stated, signed by the chairman and two other members of the TAC, which reads as follows;

> "**10.** The questions of law raised by the Commissioner General of Inland Revenue (Appellant) for the opinion of the Court of Appeal are as follows……"

When a case stated is received by the Court of Appeal for its opinion, the Court of Appeal had been vested the following powers by the TAC Act when submitting its opinion,

> **11 A (5)** Any two or more Judges of the Court of Appeal may cause a stated case to be sent back to the commission for amendment, and the Commission shall amend the case accordingly.
>
> **(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.

When considering the above positions of the TAC Act it is clear that the legislature had expected the Court of Appeal to consider the case stated once it is remitted to the Court of Appeal, and prior to it being determined by the Court. Opportunity had been given for two or more Judges to consider the case stated and sent it back to the TAC for amendments of the case stated and the TAC is bound to effect the amendments that are recommended by the Court of Appeal.

The next stage of a case stated before the Court of Appeal is the determination of the questions of law that are being identified in the case stated. In this regard my attention has already being drawn to two important aspects, namely;

the requirement of the TAC to give its mind for the questions of law that are being submitted by the Appellant, without repeating the same in the case stated and opportunity granted by section 11 A (5) of the TAC Act for the Court of Appeal to consider the questions of law that are being raised in the case stated and if necessary to refer them back to TAC for necessary amendments.

As observed by me both the above steps introduced to the TAC Act gives the opportunity to the TAC and the Court of Appeal to carefully consider the questions of law that are to be contained in the case stated before it being taken up for hearing before the Court of Appeal.

In addition to the statutory provisions found in the TAC Act, our Appellate Courts too have considered the process before the Court of Appeal in a case stated and opined that the Court of Appeal's power in considering the questions of law is not restricted to the questions identified in the case stated, but

the Court is permitted to consider new questions of law agreed upon by the court, if the answers to new questions of law may result in the confirmation, reduction, increasing or annulling the assessment determined by the Commission.

In this regard I am mindful of the dicta of *Abrahams C.J.,* in ***Commissioner of Income Tax Vs. Sarverimuttu Ratty (Report of Ceylon Tax Case, Vol 1 page 103 at 109*** to the effect,

> "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 cause 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"

As observed by me one of the main grievances of the Appellant before this court is the non-consideration of the majority of the questions of law raised in the case stated by the Court of Appeal. The first question of law, that is to be answered by us is based on this.

The Court of Appeal when finding answers to the questions before them, had considered the provisions in sections 60 and 61 of the TAC Act which is relevant in finding answers before them. Since the questions of law that was before the Court of Appeal were mainly on the validity of the assessment notices served on the Respondent before the Court of Appeal, (Appellant before us) the Court of

Appeal had considered the legality of section 60 of the VAT Act and also considered whether the provisions in section 60 are covered by the provisions of section 61 of the VAT Act.

The validity of the arguments that was considered in the said Judgement was not a matter to be considered by us in appeal but what is to be considered by us is, whether the Court of Appeal had answered the questions before them adequately when considering the case stated before them.

As already observed by me, there are specific provisions in the TAC Act which governs the process before the TAC as well as a case stated before the Court of Appeal. In the said process, much importance has been given for identification of the questions of law that is to be considered in the case stated by making provisions for the TAC to reconsider the question that are submitted by the Appellant and two Judges to consider them once again and referred it back to TAC to reconsider them.

In these circumstances, it is clear that once a case stated is fixed for hearing it only contain the questions that are to be considered by court and/or nothing else.

However, this does not restrict the Court of Appeal considering an additional question of law if the court is of the view that the said question or questions may result in the confirmation, reduction, increasing or annulling the assessment determined by the Commission. Similarly the Court of Appeal is free to decline to answer any of the question or questions, that is included in the case stated, if the court is of the view that it may not result in the confirmation, reduction, increasing or annulling the

assessment determined by the commission, but in any other instance, the Court of Appeal is required to answer all the questions before them.

As observed by this court, the Court of Appeal in its opinion had only answered 3 questions out of the 7 questions before them. Questions 1, 2, 4 and 5 had only answered as “it depends on the facts of each case” but the court had failed to consider those questions in the circumstances of the instant case, and answer them accordingly.

The Court of Appeal in its order had also considered the provisions of the Electronic Transactions Act No 19 of 2006, without any question of law being framed by the TAC or by the Court of Appeal itself, with regard to the relevancy of the said Act when answering the case stated. As already observed by me, there is no restriction on the Court of Appeal in considering an additional question of law outside the case stated, if it is observed by Court, that answering such question may result in confirmation, reduction, increasing or annulling the assessment detrained by the commission.

However as observed by me, there is no such question that has been framed by court, but the Court had proceeded to discuss the relevancy of the provisions of the Electronic Transactions Act No 19 of 2006, since the said Act had facilitated and promoted the use of more electronic records and documents. (page 23 of the C.A. Judgment)

However, when answering question 6 which refers to the assessment which is generated through computer, no reference had been made to the provisions of the Electronic Transactions Act No 19 of

2006 by the Court of Appeal, even though several provisions of the said Act had been discussed at length in the said Judgement.

In these circumstances, consideration of the said material by this court will not serve any purpose for the reason that the said discussion is outside the case stated.

When considering the matters that had already being discussed in this Judgment, I answer the 1st, 2nd and the 4th questions of law before this court in affirmative. In the said circumstances answering the 3rd question will not arise. The Judgement of the Court of Appeal dated 08.06.2018 is set aside. The Court of Appeal is hereby directed to answer all the questions that has been raised in the case stated, if answering the said questions may result in conformation reduction increasing or annulling the assessment determined by the Commission

Appeal allowed.

Judge of the Supreme Court

Justice Murdu N. B. Fernando, PC

I agree,

Judge of the Supreme Court

Justice E. A. G. R. Amarasekara

I agree.

Judge of the Supreme Court