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

In the matter of an Application for Special Leave to Appeal Under the Provisions of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka

S.C Appeal No.158/2018

S.C S.P.L L.A. No. 125/2017

CA/Tax Appeal No.07/15

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

Petitioner

-Vs-

Classic Travels (Pvt) Limited
379/4, Galle Road,
Colombo – 03

Respondent

-Vs-

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

Petitioner – Petitioner – Appellant

Classic Travels (Pvt) Limited,
379/4, Galle Road,
Colombo 03.

Respondent – Respondent – Respondent

BEFORE: B.P Aluwihare, P.C, J.
Vijith K. Malalgoda, P.C, J.
Arjuna Obeyesekere, J.

COUNSEL: Chaya Sri Nammuni, SSC for the Petitioner – Petitioner – Appellant
F.N Goonewardena for the Respondent – Respondent – Respondent

ARGUED ON: 03.11.2021.

WRITTEN SUBMISSIONS: Appellant on 12.06.2019 and 16.10.2023.
Respondent on 28.08.2019 and 25.11.2021.

DECIDED ON: 14.11.2023.

Judgement

Aluwihare, PC, J

The Petitioner – Petitioner – Appellant to this application (hereinafter referred to as the Appellant) is the Commissioner General of Inland Revenue. The Respondent – Respondent – Respondent (hereinafter referred to as the Respondent) is a limited liability company

incorporated under the laws of Sri Lanka and has been engaged in the business of a Travel Agent for airlines. The Respondent pursuant to Gazette Extraordinary No. 127/5 dated 17th December 2002 operated on the assumption that its service income was zero rated for the purpose of Value Added Tax (VAT) imposed in terms of the Value Added Tax Act No. 14 of 2002. Therefore, the Respondent did not pay any VAT on its service income.

The Respondent states that the above position was confirmed by a document issued by M.G Somachandra, Deputy Commissioner of the Inland Revenue Department (ACT17/9) dated 25.02.2008 (vide. P. 49 of the Brief). However, when the VAT returns were submitted by the Respondent for certain taxable periods, on the basis that their supplies were zero rated, the returns were rejected by the assessor stating that Commission Income of the Respondent could not be considered as a zero-rated supply and new VAT assessment had been issued in terms of Section 28 of the Value Added Tax Act of 2002.

The Respondent appealed against the said decision of the assessor to the Commissioner-General of Inland Revenue (hereinafter referred to as Commissioner-General) against the assessment. The Appeal was heard by Commissioner K. Dharmasena in the period of December 2012 to March 2013 and the said Commissioner reserved the determination. But the determination was issued by another Commissioner, namely D.M Somadasa Dissanayake by way of letter dated 02.08.2013 (vide p. 31 of the Brief). Thereafter, the reasons for the determination were issued on 05.08.2013, however, it was Commissioner D.M Somadasa Dissanayake who had signed the said reasons for the determination, but that document contained the name of Commissioner K. Dharmasena in its first page. Therefore, the Commissioner-General sought to replace page 1 of the reasons for the determination by letters dated 09.10.2013 and 14.10.2013. As per the reasons for the determination issued by Commissioner D.M Somadasa Dissanayake, dated 05.08.2013 as amended on 09.10.2013 (P 1 vide p. 4 of the brief), a note was inscribed as follows;

"The above appeals heard before K. Dharmasena (Commissioner (Zone III) and the dates of hearing mentioned above are dates of hearing made by him. Further, the names mentioned under the appearance are the persons appeared for the case.

I (Commissioner D.M Somadasa Dissanayake) have determined the above appeals upon letter dated 04.07.2013(CGIR/APP/H/2013) Commissioner General of Inland Revenue"

Hence, it is apparent that two separate Commissioners had heard and issued the determination. Aggrieved by the aforesaid determination the Respondent appealed to Tax Appeals Commission (hereinafter referred to as the TAC). At the TAC the Respondent raised a preliminary objection that there had been a violation of the principles of natural justice. The Appellant's response to the said preliminary objection was that the TAC has no jurisdiction to entertain preliminary objections and has been constituted only to consider the merits of the assessment. The TAC made its determination **(P8)** on 13.11.2014, whereby the TAC upheld that there was a violation of the principles of natural justice and the assessment was accordingly annulled.

The Appellant, aggrieved by the said determination made by the TAC, stated a case to the Court of Appeal on the following questions of law;

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 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 appeals 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 judgement of the case *A.M Ismail v CIR* (SLTC Vol. VI p. 156) that question of law have to be decided by courts and Tax Appeals Commission can decide on questions of fact?

5.Whether the Tax Appeals Commission had erred in law, that coming into conclusion that it is a violation of principles of natural justice where hearing of the appeal by one commissioner and concluded hearing the other commissioner notice of determination based on the record maintained by the first commissioner?

The Court of Appeal delivered its Judgement on 06.04.2017 in favour of the Respondent dismissing the appeal (vide p. 85 of the Brief). The Appellant being aggrieved with the

Judgement of the Court of Appeal, sought special leave to appeal from this court and Special Leave to Appeal was granted on the following questions of law;

1. Did the Court of Appeal err in law when holding that a Tax Appeal Commission could dispose its mandate on preliminary objections?

2.Has the Court of Appeal erred in law in not analyzing that the preliminary issue raised did not relate to the validity of the assessment made, which issue is in fact the dispute that is sought to be resolved and regarding which the questions of fact and law should have been considered by the Tax Appeals Commission?

3. Has the Court of Appeal erred in law in holding that the time bar provisions contained in Section 34 of the Value Added Tax Act would apply if the matter was sent back for re-hearing to the Commissioner by the Tax Appeals Commission?

Before considering the questions of law, the Court observes that the Appellant had submitted the final written submissions on 16.10.2023, despite arguments were heard on 03.11.2021 and parties, if wished, were required to file written submission within three weeks from the said date. Needless to say, the Rules of this Court are not mere procedural niceties but ensure that no prejudice is caused to the litigants. Therefore, the parties should adhere to the time limits provided by this Court. However, the Court considered the written submissions although belatedly filed by the Appellant.

Question of Law 01: Can the Tax Appeal Commission Dispose its Mandate on Preliminary Objections?

The Appellant argued that as per Section 9(10) of the Tax Appeals Commission Act No.23 of 2011 (as amended) a final determination cannot be given, which results in the assessment being annulled if the substantive tax issue is not considered by the TAC. On this basis the Appellant argues that the TAC erroneously disposed of its mandate by way of a preliminary objection. The contention simply stated was that the, the TAC is only mandated to consider appeals, on merit.

Section 9(10) of the Tax Appeals Commission Act provides that;

"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."* [Emphasis added]

I do not find merit in the contention of the Appellant referred to above, regarding the 1st question of law. The advantage of a preliminary objection is to prevent unnecessary litigation. Hence, the purpose of preliminary objections is not to stifle legitimate adjudication but to dispose a matter expeditiously when it is apparent that the action cannot be maintained. His Ladyship Justice Thilakawardena in ***Jathika Sevaka Sangamaya vs. Sri Lanka Ports Authority and Another*** **[2003] 3 Sri.L.R. 146 at 149** held that;

"*Preliminary objections are also particularly useful for actions which have no substance and where it is clear that such action could not possibly succeed. The purpose of raising preliminary objections is not to shut out or stifle legitimate adjudication. Preliminary objections are particularly unhelpful and are without basis in the context where facts and/or law is in dispute. It is also important to distinguish a preliminary objection from an objection on any point of law, which can be raised at any part of the trial unlike the preliminary objections, which by its nature is expected to be raised at the beginning of the proceedings prior to the beginning of the arguments in the case.*"

The Appellant also argued that in any event the preliminary objection raised by the Respondent does not go to the root of the issue, as the failure to abide by rules of natural justice is merely a "defect in the procedure" adopted by the Commissioner – General. Further, it was argued that no prejudice is caused by the lack of oral hearing as the documentary evidence including expert evidence was considered by the Commissioner-General. Moreover, the Appellant argued that the TAC cannot refuse to exercise jurisdiction on a tax matter in the guise of annulling the determination on a preliminary objection when the TAC is the arbiter of questions of fact. This argument presupposes that the jurisdiction of the TAC is limited to substantive matters of the assessment.

It is certainly true that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested but the purpose of a fair hearing is not merely to improve the chances of the tribunal reaching the right decision. At least two other important values are at stake as identified by Lord Reed in ***Booth v Parole Board*** **[2013] UKSC 61**.

The first is the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel. Justice entails that a person whose rights are significantly affected by a decision of an administrative or judicial body, should be allowed to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken. This aspect of fairness avoids resentment that will be aroused if a party to legal proceedings is placed in a position where it is impossible for him or her to influence the result. As observed by Lord Reed in *Booth v Parole Board* [supra] at [66];

"I would prefer to consider first the reason for that sense of injustice, namely that justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken."

The second value is the rule of law. Procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions per *Booth v Parole Board* [supra] at [71]. Hence, even if the documentary evidence was considered by the Commissioner- General as argued by the Appellant, there is a breach of the principles of natural justice.

In this backdrop it would be pertinent to consider the document marked and produced by the Appellant as 'P3', the letter [dated 02.08.2013] by which the Department of Inland Revenue communicated the determination of the Commissioner General, regarding the Respondent's appeal to the Commissioner General which had been signed by

Commissioner D.M.S Dissanayake. In communicating the decision, the writer states that *"…having considered the written and **oral submissions** made by authorized representatives and a few officials on behalf of the appellant company and the views, explanations ruling submissions made by the Department officials on behalf of the revenue, I determine the above appeal by confirming the assessment…"*

The Determination, however, gives three dates of hearing, namely 13.12.2012, 21.01.2013 and 07.03.2013 and the notation added by Commissioner DMS Dissanayake states that *"The above appeals heard before K. Dharmadasa (Commissioner Zon III) and the dates of hearing mentioned above are dates of hearing made by him."*

The above, clearly demonstrates that no hearings had taken place before Commissioner D.M.S Dissanayake and for him to say that he considered '***oral submissions** made by authorized representatives and a few officials on behalf of the appellant company.*' is patently incorrect and demands inquiry, not only from the perspective whether the Respondent was accorded a fair hearing but also whether the submissions made on behalf of them received due consideration. Therefore, it is incorrect to state that no prejudice is allegedly caused to the Respondent as submitted by the Appellant.

Further, if the Respondent was not provided with a fair hearing, then the assessment made by the Commissioner-General is defective and the fact that the assessment was made by another assessor is quite apparent. Then the TAC is not required to further consider the defective assessment of the Commissioner – General, since the objection of the Respondent goes to the root of the cause.

The Court of Appeal held in this regard at p. 18 that;

"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."

Whilst agreeing with the views expressed above, I am of the opinion that the legislature never intended to oust and limit the jurisdiction of the TAC to the substantive matters of the assessment. If the legislature intended to limit the jurisdiction of the TAC to substantive matters of the assessment, then such intention would be expressly provided. The only requirement of Section 9(10) is for the TAC to hear the evidence in appeal and either confirm, reduce, increase or annual the assessment determined by the Commissioner – General or remit the case to the Commissioner-General with the decision of the TAC. It is a recognized rule of interpretation that the duty of the Court is to construe Acts of Parliament according to the intent or will of the legislature and to give the words their meaning, even if that intention appears to the Court just or unjust or inconvenient or whatever may be the ulterior consequences of so interpreting them, as dislike of the effect of a statute is of no consequence.

I am also persuaded by the reasoning of His Lordship Justice Ruwan Fernando in the case of ***The Commissioner of General of Inland Revenue v. Cargills Food Service (Pvt) Ltd*** **Case No. CA/TAX/0013/2016 (C.A. Minutes 25.05.2023) at p. 37** regarding the interpretation of Section 11A of the Tax Appeals Commission Act. His Lordship stated that;

"*At this stage, it is relevant to note that the right of appeal by way of a case stated is a substantive right given to any person aggrieved by the decision of the TAC in terms of section 11A(1) of the TAC Act. When that right has already vested with the parties on the date the lis (proceedings) commenced in the TAC, that right cannot be denied to such party who seeks remedies to violated rights, unless that right has been taken away by a subsequent enactment, if it so provided expressly and not otherwise*"

Further at p. 39 the Court held that;

"*This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise*"

In my opinion if the interpretation advanced by the Appellant is accepted, the Court will inadvertently usurp legislative functions by limiting the scope of the appeal, when an express limitation is not provided by the Legislature. I find support for this view in terms of Section 8(1)(a) of the Tax Appeals Commission Act which provides that;

"*8(1) Any person aggrieved by the determination of-*

(a) the Commissioner-General, in respect of ***any matter*** *relating to the imposition of any tax, levy, charge, duty or penalty; or*

(b) the Director-General under subsection (1B) of section 10 of the Customs Ordinance (Chapter 235),

may if he is dissatisfied with the reasons stated by the Commissioner-General or the Director- General, as the case may be, prefer the appeal therefrom to the Commission within thirty days from the date of receipt of such reasons; or"

If the Legislature intended the jurisdiction of the TAC to be limited to only review of the substantive matter of the assessment, why would the Legislature in Section 8(1)(a) allow an appeal to the TAC in respect of *'any matter'* relating to the imposition of any tax, levy charge, duty, or penalty of the Commissioner - General? The rational conclusion that could be drawn is that the Legislature never intended to limit the jurisdiction of the TAC only to substantive issues.

It is a settled principle that a statute must be interpreted harmoniously. When two interpretations are available, the Court interprets the provision harmoniously so as to ensure the consistent operation of the Act. An interpretation that results in a clash of provision or reduces a provision to an inutility should be avoided. As held by Pasayat J, in ***Commissioner of Income Tax Vs Hindustan Bulk Carriers,*** **(2003) 3 SCC 57, P. 74**

"*The Court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare clause with other parts of the law and the setting in which the clause to be interpreted occurs. [See R.S. Raghunath v. State of Karnataka and Anr. (AIR 1992 SC 81)]. Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between two different sections or provisions of the same statute. It is the duty*

of the Court to avoid a head on clash between two sections of the same Act. [See Sultana Begum v. Prem Chand Jain (AIR 1997 SC 1006)] Whenever it is possible to do so, it must be done to construe the provisions which appear to conflict so that they harmonise. It should not be lightly assumed that Parliament had given with one hand what it took away with the other.

The provisions of one section of the statute cannot be used to defeat those of another unless it is impossible to effect reconciliation between them. Thus a construction that reduces one of the provisions to a 'useless lumber' or 'dead letter' is not a harmonised construction. To harmonise is not to destroy."

The principles enunciated above can be summarized as follows;

1. The Courts must avoid a head-on clash of seemingly contradicting provisions and must construe the contradictory provisions so as to harmonize them.
2. The provision of one section cannot be used to defeat the provision contained in another, unless the Court, despite all its effort, is unable to reconcile their differences.
3. When it is impossible to completely reconcile the differences in contradictory provisions, the Courts must interpret them in a manner so that effect is given to both the provisions as much as possible.
4. Courts must also keep in mind that interpretation that reduces one provision to an inutility is contrary to a harmonious construction.

Applying the principles above, the interpretation advanced by the Appellant is evidently contrary to a harmonious interpretation, since that interpretation ignores Section 8(1)(a) of the Act, thereby resulting in a conflict of the two provisions, as Section 8(1)(a) explicitly provides an appellant the ability to canvass '*any matter*' relating to the imposition of any tax, levy, charge, duty or penalty by the Commissioner – General before the TAC. In my view an interpretation stating that the TAC's jurisdiction is limited to substantive tax matters results in an inconsistency between the provisions. A 'matter' is "something to be tried or proved; an allegation forming the basis of a claim or defence" (Black's Law Dictionary 10th Edition). The use of the determinant word 'any' implies that the scope of questions of law that can be heard by the TAC was not limited to substantive

tax questions but is wide, subject to the jurisdictional requirements of the Act. Therefore, an interpretation that does not limit the TAC's jurisdiction to the substantive tax assessment is preferred as that construction avoids any clash between the provisions. In those circumstances, I see no merit in the Appellant's contention.

Question of Law 02: Has the Court of Appeal erred in law in not analyzing that the preliminary issue raised did not relate to the validity of the assessment made, which issue is in fact the dispute that is sought to be resolved and regarding which the questions of fact and law should have been considered by the Tax Appeals Commission?

The Appellant contends that as per Section 9(10) of the Tax Appeals Commission Act the word "confirm and annul" has to be in connection with the power to increase or reduce the assessment of the Commissioner-General. On that basis the Appellant argued that the decision of the TAC declaring the assessment of the Commissioner – General as void, was erroneous. This Court finds it difficult to appreciate the said contention of the Appellant. The word "annul" is defined in Black's Law Dictionary [11th Edition] as "the act of nullifying or making void". It is therefore apparent that the TAC had the power to declare the decision of the Commissioner-General as void.

The Appellant also sought to argue that the proper remedy for the Respondent was to challenge the assessment of the Commissioner – General by way of a writ as the forum of the TAC is exclusive to determining the validity of the assessment. The Appellant relied on ***A.M Ismail v Commissioner of Inland Revenue*** **SLTC Vol. IV at p. 156** as authority for the proposition that the Respondent should have sought review from the determination of the Commissioner-General by way of a writ and that a statutory appeal does not lie to annual the determination. In ***A.M Ismail v Commissioner of Inland Revenue*** **[Supra]** it was held that;

"An appeal from a determination of a Commissioner to the Board of Review is also very narrow in its scope. Further the Board of Review does not exercise judicial functions, but is merely an instrument created for the administration of the Revenue Law and its work is really administrative though judicial authorities are called for in the performance of its duties. It is a body created as an administrative check to see that a tax payer's liability is correctly ascertained. The fact that it could state a case in regard to a question of law

to the Supreme Court to determine the liability in regard to taxes does not give a Board of Review the authority to declare notices sent by, or proceedings before an Assessor void or to quash them. It has power to review or annul an assessment if it is proved that an assessee was not liable to pay the tax charged."

His Lordship Justice Abdul Cader made these observations in relation to the question whether it was mandatory to communicate to the taxpayer the reasons for rejecting a return on income tax under the Inland Revenue Act of 1968 (as amended). The instant appeal relates to the assessment made by the Commissioner-General and its validity. The facts can be distinguished since Section 9(10) of the Tax Appeals Commission Act expressly provides the power on the TAC to annul an assessment. Further, the Court also expressly recognized in ***A.M Ismail v Commissioner of Inland Revenue*** **[supra]** that the Board of Review has the power to review or annul an assessment if it is proved that an assessee was not liable to pay the tax charged. A taxpayer is entitled to a fair hearing to ensure that a proper assessment is recorded upon considering all relevant matters and the applicable provisions . If a taxpayer is not provided with a fair hearing, then the assessment is defective. Therefore, the TAC was correct in annulling the determination of the Commissioner-General and on that basis also, there is no conflict with the decision of ***A.M Ismail v Commissioner of Inland Revenue*** **[supra]**.

It is also relevant that writ remedies are not granted by the Court as of right but are discretionary. The granting of a writ remedy depends on various other circumstances, such as laches, or misconduct, misrepresentation or non- disclosure of facts and acquiescence, unlike a right of appeal under Section 9(10) of the Tax Appeals Commission Act.

A similar argument was canvassed before the Court of Appeal in relation to Section 11A(6) of the Tax Appeals Commission Act in ***The Commissioner General of Inland Revenue, v Janashakthi General Insurance Col. Ltd*** **Case No. CA (TAX) 14/2013 (C.A Minutes 20.05.2020)** and His Lordship Justice Janak De Silva rejected this argument and held that (at p. 08);

"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……..

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].”

His Lordship Justice Ruwan Fernando also held in ***The Commissioner of General of Inland Revenue v. Cargills Food Service (Pvt) Ltd*** [supra] at p. 57 in relation to Section 11A of the Tax Appeals Commission Act that;

“*It is relevant to note that a party has no absolute right in a judicial remedy where an inferior tribunal exceeds its jurisdiction, and where the absence or excess of jurisdiction is not apparent on the face of the proceedings. It is only discretionary, and depends on various other circumstances, such as laches, or misconduct, misrepresentation or non-disclosure of facts and acquiescence etc. The grant of a writ is always discretionary and is never demandable of right like in a case stated in terms of section 11A(1)*”

I am in agreement with the views expressed above and, in my opinion, they apply with equal force to Section 9(10) of the Tax Appeals Commission. If the Respondent is required to resort to judicial review to challenge a decision of the Commissioner-General, then such an interpretation would cause undue hardship and burden to the taxpayer, when an explicit right of appeal is provided[to the TAC].

Another reason why I reject the interpretation of the Appellant is that the Courts in their discretion will not normally make the remedy of judicial review available where there is an alternative remedy by way of appeal or where some other body has exclusive jurisdiction in respect of the dispute. However, judicial review may be granted in exceptional circumstances such as where the alternative statutory remedy is nowhere

near so convenient, beneficial and effectual or where there is no other equally effective and convenient remedy. This is particularly so where the decision in question is liable to be upset as a matter of law because it is clearly made without jurisdiction or in consequence of an error of law. This principle is discussed in "**Judicial Remedies in Public Law, Sir Clive Lewis, 5th edtn. at p. 75**;

"Judicial review is, in principle, available in relation to the acts and omissions of inferior courts such as the county court or magistrates' courts. In practice, the availability of judicial review is likely to be limited by the availability of other methods of challenge such as appeals. Judicial review will not normally be permitted if there are adequate alternative remedies available. There are rights of appeal against decisions of district judges and county courts, for example. Where the possibility of an appeal to a higher court exists, that route is the appropriate method of challenging the original decision rather than a claim for judicial review unless there are exceptional circumstances justifying bring a claim for judicial review."

Of course, the crux of the argument advanced by the Appellant was that judicial review is the *only* remedy in the instant appeal, and that the Respondent ought to have moved to have the assessment of the Commissioner – General quashed, by way of a writ, however, I am of the view that the interpretation advanced by the Appellant would deprive a party the most convenient, effectual and beneficial remedy.

In ***R v Brentford General Commissioners, ex parte Chan and others*** **[1986] STC 65** the taxpayers applied for an order to quash the decision of the General Commissioners of Income Tax for denial of natural justice. The court held that Section 56(6) of the Taxes Management Act 1970 of United Kingdom, gave the court the widest possible powers to remit cases to the commissioners for amendment or rehearing, including the power to deal with procedural irregularities and that judicial review would not be an appropriate remedy in a tax case unless there were exceptional circumstances. In determining whether judicial review was the appropriate remedy, the court by citing ***Ex p Waldron*** **[1985] 3 WLR 1090 at p. 1108** mentioned certain guidelines as follows;

"***Whether the alternative statutory remedy will resolve questions at issue fully and directly; whether the statutory procedure would be quicker or slower than procedure by***

way of judicial review; whether the matter depends on some particular or technical knowledge which is more readily available to the alternative appellate body, these are amongst the matters which a court should take into account when deciding whether to grant relief by judicial review where an alternative remedy is available"

Certainly, these guidelines are not exhaustive in determining whether judicial review is the appropriate remedy but applying them to the present case, in my opinion an appeal to the TAC can resolve an issue fully but judicial review may not, as the focus on the latter is the legality of the issue. Moreover, the members of the TAC would be more aware, perhaps, of the practice and the exigencies relating to fiscal law and practice, therefore can resolve the issues fully. On that basis judicial review would not be the proper remedy in this instance. I am also persuaded by the dicta of Lord Templeman in ***Preston v IRC*** **[1985] AC 835 at p. 362**

"*Judicial review should not be granted where an alternative remedy is available. In most cases in which the commissioners are said to have fallen into error, the remedy of the taxpayer lies in the appeal procedures provided by the tax statutes to the General Commissioners or Special Commissioners. This appeal structure provides an independent and informed tribunal which meets in private so that the taxpayer is not embarrassed in disclosing his affairs and the commissioners are not inhibited by their duty of confidentiality. The commissioners and the tribunals established to hear appeals from the commissioners have wide knowledge and experience of fiscal law and practice. Appeals from the General Commissioners or the Special Commissioners lie, but only on questions of law, to the High Court by means of a case stated and the High Court can then correct all kinds of errors of law including errors which might otherwise be the subject of judicial review proceedings*"

As judicial review is a collateral challenge and not an appeal, it will only be in exceptional circumstances that the courts will allow the collateral process of judicial review to be used to attack an appealable decision, when Parliament has expressly provided by statute an appellate procedure. But exceptional circumstances may arise when it would be unjust for the taxpayer to appeal a decision of the Commissioner – General. For example, if the Commissioner – General during the hearing acted illegally or *ultra vires*, then

exceptional circumstances may arise where judicial review is appropriate to challenge the alleged abuse at its inception. Otherwise, the taxpayer would be expected to proceed with the allegedly illegal hearing until the determination is issued by the Commissioner-General to appeal the Commissioner-General's assessment to the TAC.

Accordingly, in my opinion judicial review is not the proper remedy unless exceptional circumstances justify a claim for judicial review. If judicial review is eliminated as a remedy unless exceptional circumstances justify a claim, then the proper remedy would be an appeal to the TAC, therefore, I find no merit in the contention of the Appellant.

Question of Law 03: Has the Court of Appeal erred in law in holding that the time bar provisions contained in Section 34 of the Value Added Tax Act would apply if the matter was sent back for re-hearing to the Commissioner by the Tax Appeals Commission?

The Appellant argued that the Court of Appeal erred by holding that TAC and the Commissioner-General are time barred from hearing a fresh appeal of the instant case by virtue of Section 34 of the Value Added Tax Act. The gravamen of the Appellant's argument is that the Court of Appeal has the power to remit a case to the TAC for rehearing with any guidelines set by the Court as per Section11A(6) of the Tax Appeals Commission Act. It was also argued that the Section 34 of the Value Added Tax Act only imposes a time bar on the Commissioner - General in hearing a matter when an appeal is made from the assessment [of an assessor or an assistant commissioner] and has no application to the Court of Appeal since a case remitted will be a fresh inquiry. It was argued by the Appellant that a contrary interpretation would deprive much needed revenue to the State since an assessment would be annulled, and time barred for extraneous issues unrelated to the substantive tax assessment. The same argument was canvassed by the Appellant at the Court of Appeal, and the Court held [at p. 13] that;

"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. [Emphasis added]

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'."

It was further held by the Court that;

"*It is to be observed that both the aforementioned sections, [Sections 9(10) and 11A(6) of the Tax Appeals Commission Act] 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*"

Sections 9(10) and 11A (6) of the Tax Appeals Commission Act provides as follows;

Section9(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 11A(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"

The interpretation given to Section 11A(6) by His Lordship Justice Samarakoon in the case of ***Cargills Agrifood Ltd v The Commissioner General of Inland Revenue*** **C.A Tax 36/2014 (C.A Minutes 28.02.2023)** merits consideration. The Court held that;

"Hence, any two or more Judges of the Court of Appeal may,

(i) determine any question of law arising on the stated case,

It does not say may determine the 'determination' of the Commission.

(ii) confirm, reduce, increase or annul the assessment determined by the Commission,

(iii) or may remit the case to the Commission with the opinion of the Court, thereon.

This may or may not be on the 'determination' of the Commission, because the term 'thereon' refers to 'any question of law arising on the stated case'.

What does the next sentence mean?

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

If the question of law arose was not with regard to the 'assessment determined by the Commission', how shall the Commission 'revise the assessment'?

The answer is, that, the 'assessment', referred to in the last sentence is, the 'assessment' made by the assessor.

This is why, the previous sentence refers to the 'assessment determined by the Commission' but the last sentence just say 'assessment'.

The legislature will not waste words as well as it will not use words without a meaning.

Hence it is clear that,

(a) there can be a case stated on a question of law other than the determination of the Commission on tax,

(b) the Court has power to remit the case to the Commission, with its opinion on the question of law so arose and

(c) the Commission shall, on receiving such an opinion of the Court, revise the assessment of the assessor."

I am in agreement with the above views expressed by His Lordship Justice Samarakoon. In my opinion similar to above, Section 9(10) of the Tax Appeals Commission Act provides that;

The Commission shall on appeal;

1. either confirm, reduce, increase or annul, as the case may be, the assessment as determined by the Commissioner- General **or;**
2. remit the case to the Commissioner-General with the decision of the Commission on such appeal.
3. When a case is remitted by the Commission, the Commissioner-General is required to revise the assessment in order that it is in conformity with such amount as stated in the decision of the Commission.

On that basis the TAC can dispose of its mandate by a preliminary issue and remit the case to the Commissioner – General. The Commissioner – General thereafter, is required to revise the assessment of the assessor. But how can the Commissioner – General revise the assessment in conformity with 'such amount as stated in the decision of the Commission' if the TAC disposes of its mandate by way of a preliminary objection without considering the substantive tax issues?

The first possible interpretation that can reconcile the above position is the one adopted by the Court of Appeal. According to this interpretation, when the Commissioner-General's assessment is invalidated by the TAC, what remains is the assessment made by the assessor. The TAC cannot remit the case for a fresh inquiry, possibly due to the time-bar set forth in Section 34 of the Value Added Tax Act. However, I unable to agree with this interpretation for two reasons

First, if a taxpayer appeals the assessor's assessment to the Commissioner-General, and the Commissioner-General's assessment is later annulled due to reasons such as a breach

of natural justice or by way of any other preliminary objections, the taxpayer is left with what he believes to be an erroneous assessment of the assessor. In my opinion, this interpretation defeats the purpose of the appeal process. The second reason, as advanced by the Appellant, is that the correct tax liability of a taxpayer will be unascertained for extraneous reasons unrelated to the substantive tax issue, and I am in agreement with this view.

The second possible interpretation is to construe Section 9(10) narrowly as advanced by the Appellant, by limiting the jurisdiction of the TAC and holding that the TAC can only determine issues related to the substantive tax issues. This interpretation would limit the TAC's jurisdiction to an arithmetic revision and for the reasons explained above cannot be accepted, as the remedy for a taxpayer then would be limited to judicial review and is contrary to a harmonious interpretation of the Tax Appeals Act.

Of course, it can be argued that although the TAC correctly annulled the determination of the Commissioner – General, the TAC should have considered the substantive tax issue. Even the Appellant advanced a similar view in the alternative and stated that the TAC should have provided a decision separately on the preliminary question of law and the substantive matters. This view was also expressed in ***The Commissioner of General of Inland Revenue v. Cargills Food Service (Pvt) Ltd*** **[supra] at p. 60** which was also concerned with remitting a case, albeit from the Court of Appeal to the TAC, when the TAC annulled the assessment of the Commissioner – General, by upholding a preliminary objection. By virtue of Section 9(10), it appears to me, that the jurisdiction of the TAC is limited to the revision of the assessment of the Commissioner General, therefore, once the assessment of the Commissioner – General is annulled the TAC cannot reassess the assessor's assessment or in other words consider the substantive tax assessment, thereby exceeding its jurisdiction.

I am of the opinion that Section 9(10) of the Tax Appeals Commission Act provides two courses of action;

1. on appeal either confirm, reduce, increase or annul, as the case may be, the assessment as determined by the Commissioner- General (first limb); **or**

2. remit the case to the Commissioner-General with the decision of the Commission on such appeal (second limb)

It appears that the first limb may generally apply when determining the substantive matters of the assessment of the Commissioner – General, whereby the TAC can either confirm, annul, reduce or increase the assessment. In my view, the second limb includes the four powers provided under the first limb (i.e the power of the TAC to confirm, reduce, increase, or annul the assessment of the Commissioner-General) and the power to direct the Commissioner-General to revise the assessment in accordance with the 'decision' of the TAC. To put this in another way, the second limb apply;

(i) If the TAC is of the view that the amount of the assessment determined by the Commissioner- General must be either increased or reduced, the case may be remitted back to the Commissioner-General. The Commissioner - General is required to revise the assessment in accordance with such amount as stated in the decision of the TAC;

(ii) If the TAC annulled the assessment made by the Commissioner- General on questions other than substantive matters of the assessment, the case may be remitted back to the Commissioner-Geneal with its decision. The decision can include any guidelines or directions for the Commissioner-General to follow in revising the substantive matters of the assessor's assessment. Thereafter, the Commissioner-General is required, if so directed, to revise the assessor's assessment in accordance with such decision of the TAC. In such instances, the TAC is not required to provide an amount in its decision.

I support the above view, (in para (ii) above) with two propositions. First, the following view is apparent as per the Sinhala text of Section 9(10) of the Tax Appeals Commission Act, which provides as follows;

කොමිෂන් සභාව විසින් සාක්ෂි විභාග කිරීමෙන් පසුව, කොමසාරිස්-ජනරාල්වරයා විසින් තීරණය කරන ලද තක්සේරුව අභියාචනයේ දී, අවස්ථාවෝචිත පරිදි ස්ථිර කිරීම, අඩුකිරීම, වැඩි කිරීම හෝ අවලංගු කිරීම සිදු කළ යුතු ය ; ඒ පිළිබඳ කොමිෂන් සභාවේ තීරණය සමග කොමසාරිස්-ජනරාල්වරයා වෙත අදාළ කාරණය යොමු කළ හැකි ය. කොමිෂන් සභාව විසින් එසේ යම් කාරණයක් යොමු කල අවස්ථාවක, කොමසාරිස්-ජනරාල්වරයා විසින් කොමිෂන් සභාවේ තීරණයේ සඳහන් මුදල් ප්‍රමාණයට අනුකූල වන පරිදි තක්සේරුව ප්‍රතිශෝධනය කළ යුතු ය.

In my opinion, it is apparent that the first limb of the Sinhala text similar to the English text, contemplates the ability of the TAC to either confirm, reduce, increase, or annul the assessment of the Commissioner-General. However, the four powers are included in the second sentence of the Sinhala text because the use of the words "ඒ සම්බන්ධ" provides that when the four powers are exercised the case may be remitted back to the Commissioner-General in appropriate instances as stated by the words, "අදාළ කාරණය යොමු කළ හැකි ය". If the TAC can refer a **decision even in instances** where the power of annulment is exercised, then it follows that directions or guidelines can be provided in that decision of the TAC. Otherwise, the assessment being a nullity, there is no need for the TAC to refer a decision back to the Commissioner-General.

The second proposition is that it is a commonly accepted rule in the construction of a statute to adhere to the ordinary meaning of the words used and to the grammatical construction of a statute. However, if the literal construction is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience but no further. The following view is stated by **N.S Bindra, 'Interpretation of Statutes' [9th Edition] at p. 439**, citing ***Rex v Vasey*** **[1905] 2 KB 748**, as follows;

"*Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice presumably, not intended, a construction may be put upon it which modifies the meaning of the words, and the structure of the sentence*"

However, such an inference should not be made lightly. Bindra on the 'Interpretation of Statutes' at p. 439 [supra] states as follows;

"*In interpreting a statute, an intention contrary to the literal meaning of words of the statute should not be inferred unless the context or consequences which would ensure from a literal interpretation, justify the inference that the legislature has not expressed something which it intended to express, or unless such interpretation leads to any manifest absurdity or repugnance with this superadded qualification that the absurdity*

or repugnance must be such as manifested itself in the mind of the law-maker, and not such as may appear to be so to the Tribunal interpreting the statute."

Bindra on the 'Interpretation of Statutes' at p. 440 [supra] states further citing ***North v Templin*** 8 QBD 247 that;
"*Anyone who contends that a section of an Act of Parliament is not to be read literally must be able to show one of the two things, either that there is some other section which cuts down its meaning, or else that the section itself is repugnant to the general purview of the Act*"

In my opinion, the departure from the literal construction of Section 9(10) is justified in this instance as Section 8(1)(a) of the Tax Appeals Commission Act does not limit the jurisdiction of the TAC to substantive matters of the assessment for the reasons stated above. Further, if the Court of Appeals' interpretation is accepted then that interpretation would defeat the purpose of the appeal procedure and result in manifest absurdity. If a taxpayer appeals against the assessor's assessment to the Commissioner-General, and the TAC annuls the Commissioner-General's assessment through no fault of the taxpayer, leaving the taxpayer with the same assessor's assessment taxpayer initially contested, to say the least would be an absurd outcome.

Further, it appears that the intention of the legislature by establishing the TAC was to resolve tax disputes expeditiously, effectively, and efficiently by the establishment of an informed tribunal. This view is supported by the fact that Section 2(2) of the Tax Appeals Commission Act recognizes that the members appointed to the TAC comprise of persons that gained eminence in the field of taxation, finance and law. Therefore, an interpretation in furtherance of this object should be preferred. None of the interpretations provided by the Appellant advances this objective. The Appellant's interpretation unduly restricts the scope of the TAC. Hence, I am of the opinion that it is justified for the Court to depart from the literal construction of the section as stated above, which advances the object of the Act. In consideration of the interpretation above, it appears that the first error of the TAC and the Court of Appeal is the holding that the case cannot be remitted, when the provision provides otherwise. Both the TAC and the Court

of Appeal also fell into error in justifying the first error by resorting to Section 34 of the Value Added Tax Act.

Section 34(8) of the Value Added Tax Act provides that;

"*Every appellant shall attend before the Commissioner-General at time and place fixed for the hearing of the appeal. ……*

Provided further that every petition of appeal under this Chapter 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 Assistant Commissioner where such appeal is not agreed to or determined within such period the appeal shall be deemed to have been allowed and the tax charged accordingly*

Section 34(1) relates to appeals from the assessor or assistant commissioner to the Commissioner – General in regard to any assessment of penalty. Therefore, the time bar in Section 34(8) relates to the appeal from the assessor or assistant commissioner. If the time bar is not complied with, then the appeal is deemed to be allowed. In my view once the TAC remits a case to the Commissioner – General then it is heard as a fresh inquiry and the time bar in Section 34(8) of the Value Added Tax Act has no application.

Once a case is remitted from the TAC it is not an appeal from the assessor or assistant commissioner but a fresh hearing. Black's Law Dictionary 10th ed., defines remit as "to refer (a matter for decision) to some authority, esp. to send back (a case) to a lower court". Accordingly, once the TAC remits a case to the Commissioner – General, it is a fresh hearing on this basis, and I am of the view that Section 34(8) of the Value Added Tax Act will not be a fetter for the Commissioner General to revisit the Appeal made to him by the Respondent.

Conclusion

In these circumstances, I answer the Questions of Law arising in the instant Appeal as follows:

1.Did the Court of Appeal err in law when holding that a Tax Appeal Commission could dispose its mandate on preliminary objections?
No.

2.Has the Court of Appeal erred in law in not analyzing that the preliminary issue raised did not relate to the validity of the assessment made, which issue is in fact the dispute that is sought to be resolved and regarding which the questions of fact and law should have been considered by the Tax Appeals Commission?
No.

3. Has the Court of Appeal erred in law in holding that the time bar provisions contained in Section 34 of the Value Added Tax Act would apply if the matter was sent back for re-hearing to the Commissioner by the Tax Appeals Commission?
Yes.

In view of the answer given in question of law No. 3 the appeal is partially allowed and the Commissioner General is directed to re-hear the case.

Parties may bear the cost of this appeal.

Appeal is partially allowed.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda, P.C, J,

I agree.

JUDGE OF THE SUPREME COURT

Obeyesekere, J

I have read in draft the judgment of my brother Justice Buwaneka Aluwihare, PC and while his approach does appear to cut the Gordian Knot in the administration of tax law, I am unable to fully agree with it as it appears that we may be encroaching upon the legislative sphere.

The issue in this case relates to the determination of the Tax Appeals Commission (TAC) to annul an assessment issued under the Value Added Services Act No. 14 of 2002, as amended, which determination was upheld by the Court of Appeal. The TAC annulled the assessment on the basis that while one Commissioner had heard the appeal to the Commissioner General, another had issued the determination.

Leave to appeal was granted on the following three questions of law.

1. Did the Court of Appeal err in law when holding that a Tax Appeal Commission could dispose its mandate on preliminary objections?

2. Has the Court of Appeal erred in law in not analyzing that the preliminary issue raised did not relate to the validity of the assessment made, which issue is in fact the dispute that is sought to be resolved and regarding which the questions of fact and law should have been considered by the Tax Appeals Commission?

3. Has the Court of Appeal erred in law in holding that the time bar provisions contained in Section 34 of the Value Added Tax Act would apply if the matter was sent back for re-hearing to the Commissioner by the Tax Appeals Commission?

At the outset, I am constrained to note that the reference to a "preliminary objection" is not appropriate, since the so called objection was raised by the party who filed the appeal to the TAC. In essence, what was being sought was a summary determination of the issue.

In my respectful view this case ought to be approached from a different perspective. Tax administration has been plagued with unnecessary delays. In as much as State revenue remains uncollected for several years, taxpayers too have the burden of uncertainty with regard to their liability. It is noted that more than 10 years have lapsed since the decision of the Commissioner on behalf of the Commissioner General. It is not reasonable by the Respondent or the Revenue for the entire matter to be referred back to the Commissioner General at this stage. The TAC is an appellate body. If there are matters that have been urged by the Respondent at the oral hearing that have not been considered by the Commissioner in preparing his report, then those deficiencies can easily be supplied by the TAC. In this regard, it is important to bear in mind the scheme of the TAC Act. Sections 9(7), (8) and (9) are of particular importance, and are re-produced below:

"(7) *The Commission shall have power to summon to a hearing, the attendance of any person whom it considers capable of giving evidence respecting the appeal and may examine him as a witness, either on oath or otherwise. Any person so attending may be allowed by the Commission to be paid any reasonable expenses necessarily incurred by him in so attending.*

(8) *Except with the consent of the Commission and on such terms as the Commission may determine, the appellant shall not at the hearing, be allowed to produce any document which was not produced before the Commissioner-General, or to adduce the evidence of any witness whose evidence was not led before the Commissioner-General, or adduce evidence of a witness whose evidence has already been recorded at the hearing before the Commissioner-General.*

(9) *At the hearing of the appeal the Commission may, admit or reject any evidence adduced whether oral or documentary, and the provisions of the Evidence Ordinance relating to the admissibility of evidence shall not apply in respect of such evidence.*"

These provisions demonstrate the ample powers vested in the Commission to supplement any hearing deficiencies in the appeal before the Commissioner General. If the TAC had

felt that there was a deficiency in the hearing, it should have identified the relevant aspects that had not been considered (if any) and then evaluated whether such failures have resulted in a wrong decision. That would be consonant with its powers in appeal.

There are two conflicting interpretations with regard to the scope of the power of the TAC which have been highlighted by my brother. The first is that the restriction on the powers of the TAC in terms of Section 9(10) of the TAC Act be ignored and its powers be defined with reference to Section 8(1)(a). In other words, the limitation on the TAC's power implied in Section 9(10) which requires the Commissioner having to "*revise the assessment in order that it is in* ***conformity with such amount*** *as stated in the decision of the Commission"* should be expanded with reference to Section 8(1)(a) which refers to the right to appeal to the TAC in respect of ***any matter*** *relating to the imposition of any tax, levy, charge, duty or penalty".* My brother favours this interpretation.

The second interpretation is to limit the scope of the reference in Section 8(1)(a) in line with Section 9(10). This was the position articulated by the learned Deputy Solicitor General. The said argument is one which has the support of several previous decisions. The Supreme Court in the 5 judge bench decision in **D M S Fernando v Ismail** [(1982) IV SLTC 184], held as follows:

"*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 was available to him under the Inland Revenue Act.* ***Those provisions confine him to an appeal against the quantum of 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 acts. 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." (Emphasis added)*

The Court of Appeal decision in the above case is also illuminating. Victor Perera, J held as follows:

"The petitioner cannot canvass the validity or legality of these acts of the Assessor by way of an appeal to the Commissioner of Inland Revenue. The scope of an appeal to the Commissioner has been clearly laid down in the sections dealing with appeals. An appeal from a determination of a Commissioner to the Board of Review is also very narrow in its scope. Further the Board of Review does not exercise judicial functions, but is merely an instrument created for the administration of the Revenue Law and its work is really administrative though judicial attributes are called for in the performance of its duties. It is a body created as an administrative check to see that a tax payer's liability is correctly ascertained. The fact that it could state a case in regard to a question of law to the Supreme Court to determine the liability in regard to taxes does not give a Board of Review the authority to declare notices sent by, or proceedings before an Assessor void or to quash them. It has power to review or annul an assessment if it is proved that an assessee was not liable to pay the tax charged. The power to quash a notice or proceeding before an Assessor is vested in the courts and therefore this Court must be satisfied that the circumstances justify the exercise of such a jurisdiction."

In **Commissioner General of Inland Revenue v First Media Solutions (Pvt) Ltd** (CA/TAX/6/2016; CA minutes of 5th December 2019), Samayawardene, J in the Court of Appeal observed as follows;

"The very argument of the respondent tax payer is counterproductive. It opens the door for a constructive dialogue about whether the Tax Appeals Commission has the authority to declare Notices sent by the Commissioner General of Inland Revenue void purely on technical grounds, or whether it can only annul an assessment determined by the Commissioner General of Inland Revenue on merits. The dicta in Ismail v Commissioner General of Inland Revenue, Ranaweera v Ramachandran seem to me to be lending support for the latter view."

In **Ranaweera v. Ramachandran** [(Sri Lanka Tax Cases (Vol 2) 395], the Privy Council held that members of the Board of Review were not judicial officers. The Privy Council there cited the following passage from **Inland Revenue Commissioners V Sneath** [(1932) 2 KB 362]:

"I think the estimating authorities, even where an appeal is made to them, are not acting as judges deciding litigation between the subject and the crown. They are merely in the position of valuers whose proceedings are regulated by statute to enable them to make an estimate of the income of the tax payer for the particular year in question. The nature of the legislation for the imposition of taxes making it necessary that the statute should provide for some machinery whereby the taxable income is ascertained, that machinery is set going separately for each year of tax, and though the figure determined is final for that year, it is not final for any other purpose. It is final not as a judgment inter partes but as the final estimate of the statutory estimating body. No lis comes into existence until there has been a final estimate of the income which determines the tax payable. There can be no lis until the rights and duties are settled and thereafter questioned by litigation.

Romer LJ added (p 390)

"……But the only thing that the Commissioners have jurisdiction to decide directly and as a substantive matter is the amount of the tax payer's income for the year in question…

….On the whole of the material put before them on this part of the case their lordships' conclusion is that the Board of Review does not exercise judicial power but is one of the instruments created for the administration of the Income Tax Ordinance and that as such its work is administrative, though judicial qualities are called for in its performance."

In order to arrive at a decision in this regard, consideration must be given to several matters including the following:

(a) The historical role of the Board of Review and the Tax Appeals Commission

(b) Whether the TAC was created with the intention of exercising powers akin to the Court of Appeal in the exercise of its writ jurisdiction under Article 140 of the Constitution?

(c) Whether the TAC has the capacity to exercise such powers?

(d) Whether the exercise of such powers constitute the exercise of "judicial powers"?

(e) Which interpretation will provide for a harmonious, efficient and effective functioning of the revenue collection statutes, whilst ensuring fairness to the tax payer?

(f) Which interpretation will minimize delay and litigation?

(g) Would the TAC be entitled to use the entire gamut of administrative law principles in determining issues before it, including principles of proportionality, reasonableness etc.?

While the above matters and more particularly whether the TAC has the authority to deal with matters not concerning the merits of the appeal will have to be considered and answered by this Court in a suitable case, there is no necessity to consider such issues in this appeal if it is approached in the following manner.

It is clear that if the TAC only has the power to decide on the merits of the appeal, then the question of remitting a matter that deals with an issue other than the merits to the Commissioner General does not arise. The TAC would be wrong in entertaining such a matter. If that is the case, then this Court should remit the matter to the TAC to hear the dispute on its merits.

If the TAC can examine matters other than the merits, then does the TAC have the power to remit such other matter [i.e. a matter not relating to the substantive tax issue] to the Commissioner General? In my view, if the TAC has the power to examine matters other than the merits, then the power of remission too should include the power to remit the case on matters other than on merit. If it is assumed that the TAC does have the power to examine matters other than the substantive tax matter, then my brother's analysis explaining why the TAC should have the power to remit this matter to the Commissioner General is persuasive. I would only add that if the matter is so remitted, it does not mean that the Commissioner General has unlimited time to make such determination. He would need to do so within a reasonable time, which in the circumstances of the scheme of the Act cannot exceed the time set out in Section 34(8) from the date of reference.

However, I am of the view that even if the TAC could have remitted the matter to the Commissioner General it would not be reasonable to do so at this juncture after the lapse of more than 10 years. Given the extensive powers vested in the TAC in hearing an appeal and set out at the outset of this judgment, I am of the opinion that even if the TAC could remit the matter to the Commissioner General it should not do so, and that it should proceed to hear the matter on the merits.

In the above circumstances, the TAC and the Court of Appeal were in error in failing to ensure that the matter is not disposed of on the merits by the TAC.

In view of the above finding, the questions of law raised need not be answered. The decision of the Court of Appeal and the TAC are set aside and the matter is remitted to the TAC for a hearing on the merits. In view of the long delay the TAC is directed to conclude the hearing expeditiously.

JUDGE OF THE SUPREME COURT