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

A. H. Mohideen
35, Alston Place,
Colombo 2.

APPELLANT

C.A. 02/2007
BRA/497 - Income Tax

Vs.

Commissioner General of Inland Revenue
Department of Inland Revenue,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 2.

RESPONDENT

BEFORE: Anil Gooneratne J. &
Deepali Wijesundera J.

COUNSEL: Dr. Shivaji Felix for the Appellant

Suren Gnanaraj S.C. for the Respondnet

ARGUED ON: 08.08.2013

DECIDED ON: 16.01.2014

GOONERATNE J.

This is an Income Tax stated case on questions of law where the Appellant being dissatisfied of the determination of the Board of Review dated 21.6.2006, required the Board of Review to state a case for the opinion of this court. The case stated referred 9 questions of law, and the first question of law was decided earlier by this court as a preliminary issue, and by order of this court dated 27.8.2009, decision pronounced in favour of the Respondent Commissioner General of Inland Revenue.

It is important to understand as to how the case stated was referred to this court. Very briefly the main issue seems to be the Appellants failure to declare in the Income Tax returns for the Year of Assessment 91/92, 92/93, 93/94 & 94/95, the lease rental income based on a lease agreement the Appellant had with M/s. Tropical Seed Company (Pvt.) Limited. However the appeal as regards the Year of Assessment for the year 91/92 had been upheld by the Board of Review itself, and what remained is the balance three assessments for the years 92/93, 93/94 & 94/95. The Assessor had issued notices of assessment or the Appellant on 20.5.1996, based on the Appellant's failure to declare the lease

rental and on an appeal to the Commissioner of Inland Revenue the Commissioner made his determination on 25.06.1999.

The Appellant being dissatisfied with the Commissioner General's determination appealed to the Board of Review. The Board allowed the Appellant's appeal for the Year of Assessment 1991/92 but dismissed the appeal for the balance Years of Assessment. The eight questions of law that concerns this court are as follows (as in document 'I' which was considered by this court at the hearing).

(i) Has the Board of Review erred in law by coming to the conclusion that it was not prevented from reopening this case since Section 4(3) of the Inland Revenue (Special Provisions) Act, No. 10 of 2003 (read with Section 4(4) of the Inland Revenue (Regulation of Amnesty) Act No. 10 of 2004 and Section 6(3) of the Interpretation Ordinance, No. 21 of 1901 (as amended) makes it clear that amount specified by the Appellant must be treated as his final tax liability?

(ii) Has the Board of Review erred in law by violating the "spirit and intention" of the first proviso to Section 140(10) of the Inland Revenue Act, No. 38 of 2000 (as amended by Section 52 of Inland Revenue (Amendment) Act, No. 37 of 2003), which makes it imperative that the Board of Review arrives at its determination within two years of the commencement of the hearing of this appeal?

(iii) Has the Board of Review erred in law by coming to the conclusion that the Assessor had sufficiently complied with the mandatory requirements of law under and in terms of Section 115(3) of the Inland Revenue Act, No.28 of 1979, for the year of assessment 1992/1993, 1993/1994 and 1994/1995?

(iv) Has the Board of Review erred in law by not considering whether the Assessor has provided sufficient justification for treating charges and services as rental income?

(v) Has the Board of Review erred in law by not drawing an adverse inference from the fact that the statement made by the Assessor in his communication of reasons for rejecting the return was palpably false?

(vi) Has the Board of Review erred in law by condoning the conduct of the Department of Inland Revenue by not drawing an adverse inference from the fact that the record of proceedings before the Commissioner of Inland Revenue was not made available to it after 15 July 1997?

(vii) Has the Board of Review erred in law by not drawing an adverse inference from the fact that the Returns of the Taxpayer were not made available to it when such returns were within the custody of the Department of Inland Review?

(viii) Has the Board of Review erred in law by coming to a conclusion against the weight of evidence?

The learned counsel on either side made very comprehensive and forceful submission, both oral and by way of written submissions. The main issue seems to revolve round the Inland Revenue (Special Provisions) Act No. 10 of 2003 and the act which provides for the repeal of the above act, by Inland Revenue (Regulations of Amnesty) Act No. 10 of 2004.

The learned counsel for the Appellant's, main contention proceeded on the basis that when Act No. 10 of 2003, was repealed by Act No. 10 of 2004, it did not retrospectively extinguish vested rights. The Act No. 10 of 2003 was validly enacted and validly repealed. Learned counsel for Appellant demonstrated that his client the Appellant in this appeal was a person who had a tax in dispute

and not a litigant who was liable to pay a tax, levy or penalty and had not acquired an amnesty under the repealed enactment Act No. 10 of 2003. It would not be possible for this court to repeat all the arguments put forward by both learned counsel since the case of each other are well documented and filed of record. In order to establish the above contention, attention of this court was drawn to Sections 4(3), 13 of Act No. 10 of 2003 and Sections 2, 4(4), 8 of Act No. 10 of 2004 with several other remarks to other provisions, of the Inland Revenue Act and Section 6 of the Interpretation Ordinance. Learned counsel for Appellant inter alia emphasized according to Section 4(3) of Act No. 10 of 2003 that the Tax specified by the Appellant in his return being the tax payable by him should be accepted by the Inland Revenue Department being the correct and reflecting tax liability of Appellant, i.e, a right vested by law which cannot be extinguished

The learned counsel for Appellant argued that any matter engaging a tax in dispute before the board deemed to be settled by operation of law, cannot be revived or restored by recourse to Section 4(4) of Act No. 10 of 2004. The Board of Review has no jurisdiction to continue hearing the appeal since it had been settled by operation of law.

I would prefer to include in this judgment the following passage from the written submissions presented to court on behalf of the Appellant as follows in verbatim.

In any event, even if there is any ambiguity on this score the matter must be resolved in favour of the taxpayer. Francis Bennion, in his well known work, Statutory Interpretation (London: Butterworths, 3rd Ed. 1997), at pg. 637) succinctly express his views regarding the principle against doubtful penalization in the following manner.

> It is a principle of legal policy that a person should not be penalized except under clear law ... The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction which penalizes a person where the legislator's intention to do so is doubtful, or penalizes him or her in a way which was not made clear.

Bennion is also of the view that the statutory interference with economic interests comes within the scope of the principle against doubtful penalization. Bennion expresses the position thus (at pg. 652):

One aspect of the principle against doubtful penalization is that in the exercise of state power the property or other economic interests of a person should not be taken away, impaired or endangered, except under clear authority of law.

The learned State Counsel argued otherwise and invited this court to the S.C Special Determination No. 26/2004. The following from the submissions of State Counsel are noted.

(a) Board of Review has jurisdiction to re-open proceedings pending before the Board.

(b) Section 4(3) of Act No. 10 of 2003 makes no express provision to the Board of Review. Nor does it refer to all proceedings previously pending before the Board and deemed to have been concluded or that the appeals are deemed to have been decided in favour of the Appellant.

(c) The effect of Section 2(2) of Act No. 10 of 2004 was to repeal Act No. 10 of 2003 and remove any concession, indemnity or immunity granted and revive all liabilities, duties and obligations existed prior to Act No. 10 of 2003. Status que which existed prior to Act No. 10 of 2003 was restored by Act No. 10 of 2004.

(d) Rights and liabilities enjoyed by the Appellant and Section 4(3) of Act No. 10 2003 were extinguished and the Appellant become liable to pay tax based on the assessment determined by the Commissioner ('D' of case stated).

The three statutes that concerns this court in this appeal, and as such the parties to this appeal would realize that the concession and indemnity granted to persons to whom the provisions of the Inland Revenue Act applied, at a certain point of time seems to have been repealed and or the concessions withdrawn within a short period of time of about 1 ½ years between Act No. 10 of 2003 & Act No. 10 of 2004. The Appellant attempts to demonstrate by referring to all three statutes (Act No. 10 of 2003, Act No. 10 of 2004 and the Interpretation Ordinance) that exceptionally, a vested right acquired by him in terms of Act No. 10 of 2003 remains and continue to be of force in law in his favour notwithstanding the provisions of Act No. 10 of 2004. The Respondent does not accept the above stance of the Appellant but emphasis that by the enacting of Act

No. 10 of 2004, completely makes Act No. 10 of 2003, to recede to the background except in certain very limited circumstances.

There is no doubt that the Appellant is not a person seeking an amnesty. Therefore this court is of the view that the Appellant would be bound by the provisions contained in Section 2(1) & 2(2) of Act No. 10 of 2004. The said section reads thus:

2(1) Subject to the provisions of section 3 of this Act the Inland Revenue (Special Provisions) Act No. 10 of 2003 is hereby repealed.

2 (2) Subject to the provisions of Section 3 of this Act, any person who, on the day immediately prior to the enactment of the Inland Revenue (Special Provisions) Act, No. 10 of 2003, was liable, to pay any tax, levy, penalty (including any penalty in respect of any offence), or fine or to forfeiture in terms of any of the laws specified in the Schedule to the aforesaid Act, shall continue to be liable to the payment of such tax, levy, penalty (including any penalty in respect of any offence), forfeiture or fine, notwithstanding anything done or any right or liberty acquired in terms of the provisions of the aforesaid Act.

In view of above section and its effect clearly envisage

(a) Repeal of Act No. 10 of 2003, subject to above.

(b) Appellant being placed in the status immediately before the enactment of Act No. 10 of 2003, subject to above.

(c) The benefit granted by Act No. 10 of 2003 being withdrawn or negated. I would highlight the words "notwithstanding anything done or any right or liberty acquired" in terms of the provisions of Act No. 10 of 2004.

(d) Assessee would continue to be liable.

I am remembered of the submission of learned counsel for the Appellant that his client is a person who has a tax in dispute and not a person liable to pay tax. As such the benefit that accrued to the Appellant would flow from Section 4(3) of the repealed Act No. 10 of 2003. Section 4(3) of Act No. 10 of 2003 reads thus:

> Where there is any tax in dispute under any of the laws specified in the Schedule hereto, pertaining to tax, in respect of any period ending on or before March 31,2000, in relation to a person who has not made a declaration in terms of Section 2, then the tax specified by such person, as being the amount of tax payable by him shall be accepted by the relevant authority, charged with the administration of the laws specified in the Schedule hereto, as being correct and reflecting the final tax liability of that person in respect of such period;
>
> Provided that no tax in dispute, which has been settled with the agreement of the person who has not made the declaration in terms of section 2, shall be re-opened.

If Act No. 10 of 2003 was not erased from the statute books of this country, by Act No. 10 of 2004, Section 4(3) above would definitely need to be adopted and accepted. Appellant having a 'tax in dispute' became entitled to compel the amount of tax specified by him as the amount of tax liable to be paid by him which had to be accepted by the Respondent Commissioner General of Inland Revenue, in terms of the above provision of law. Thus the Appellant at that point of time gained a right by operation of law which the Appellant describes as a vested right. However although the provision of the Interpretation Ordinance

the effect of Act No. 10 of 2004 was to completely negate the vested right acquired by the Appellant.

In the above context the provisions referred to in Section 6(3) of the Interpretation Ordinance need also to be consider to ascertain whether the benefit accrued to the Appellant by Act No. 10 of 2003 would continue to remain:

Section 6(3) reads thus:

Section 6 (3) of the Interpretation Ordinance, No. 21 of 1901 (as amended) provides as follows:

6(3) Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected –

(a) The past operation of or anything duly done or suffered under the repealed written law;
(b) Any offence committed, any right, liberty, or penalty acquired or incurred under the repealed written law;
(c) Any action, proceeding, or thing pending or in completed when the repealing written law comes into operation, but every such action, proceeding, or thing may be carried on and completed as if there had been no such repeal.

I find the answer to all above being considered in S.C Special Determinations No. 26/2004 where the court held the effect of Section 2(2) of Act No. 10 of 2004 and Section 6(3) of the Interpretation Ordinance. Held:

The effect of the above provision was to repeal Act No. 10 of 2003, subject to certain express reservations, and thereby remove the legal effect of any concession, indemnity or immunity that was granted and to provide for the revival of all liabilities, duties and obligations that existed prior to Act No. 10 of 2003. This was categorically recognized and accepted by the Supreme Court in S.C Special Determination No. 26/2004 on the Bill titled "inland Revenue (Regulation of Amnesty)" where the Court held:

"Clause 2(2) of the Bill makes further provisions to the effect that "Act No. 10 of 2003, shall except in so far as the same is necessary for the implementation of the provisions of Section 3 of this Act, be deemed to have never been in operation as if the same had not been enacted." It is to be noted that these words go beyond a repeal of Act No. 10 of 2003 and have the effect of wiping out that law from the statute book altogether ..... Additional Solicitor General conceded that Clause 2(2) cannot be enacted in the present form. But submitted that the purpose of clause 2(2) is to make express provision with regard to the part operation of Act No. 10 of 2003 as amended. He submitted that the said Act provided for amnesty and immunity from the operation of existing law and that the purpose of the present amendment is to revive the liability that had accrued under relevant law and thereby to restore the status quo ante."

Also considered the effect of Section 6(3) of the Interpretation Ordinance and held:

"The effect of Section 6(3) is that in the absence of any express provision, the repeal by itself does not affect the past operation or any right acquired under the law that is being repealed. However, by an express provision the past operation of the law that is being repealed could be denuded of any effect so that any right acquired there under would be of no force or avail.

Additional Solicitor General submitted that what is sought to be done by the present amendment is to restore the status quo ante so that any liability operative prior to the grant of the amnesty or immunity under Act No. 10 of 2003 is fully revived. We are of the opinion that in terms of Article 75 of the Constitution read with section 6(3) of the Interpretation Ordinance, it is within the legislative competence of Parliament to make provision for the revival of any liability, duty or obligation that was operative under the relevant laws and thereby remove the legal effect of any concession, indemnity or immunity granted under Act No. 10 of 2003 as amended..."

I am inclined to agree with the submissions of State Counsel as regards the (i) question of law, thus the Board of Review was not prevented from re-opening the case of the Appellant. Therefore all liabilities, duties and obligations that existed prior to Act No. 10 of 2003 has to be revived, and the Appellant would be liable to pay taxes based on the assessable income determined by the Commissioner of Inland Revenue.

As regards the 2nd question of law (ii) which more or less refer to the time limit of 2 years within which the Board of Review should make its determination. Appellant invited this court to consider Section 140(10) of Act No. 38 of 2000 as amended by Section 52 of Amendment Act No 37 of 2003. It reads thus:

> After hearing the appeal, the Board shall confirm, reduce, increase or annul the assessment as determined by the Commissioner-General on appeal, or as referred by him under section 139, as the case may be, or may remit the case to the Commissioner-

General with the opinion of the Board thereon. Where a case is so remitted by the Board, the Commissioner-General shall revise the assessment as the opinion of the Board may require. The decision of the Board shall be notified to the appellant and the Commissioner-General in writing:

Provided, however, the Board shall make its determination or express its opinion as the case may be, within two years from the date of commencement of the hearing of such appeal:

Provided further where the hearing of any appeal has commenced at the date of commencement of this Act, the appeal shall be determined or an opinion shall be expressed within two years from the commencement of this Act.

The above section contains two provisos, and as such intention as regards time limit can be gleaned from the second proviso to Section 140(10) as stated above. I would for purpose of clarity and to understand the case of the Appellant on this question incorporate from the written submissions of the Appellant the following:

1. The Appellant filed his appeal before the Board of Review on 17 August 1999. Consequently, the appeal is one that was filed prior to the enactment of the Inland Revenue Act, No. 38 of 2000. Consequently the time bar, envisaged by the second proviso to section 140(10), would come into operation within two years from the date of commencement of the Inland Revenue Act, No. 38 of 2000 (as amended). The Inland Revenue Act, No. 38 of 2000 became law on 3 August 2000. The time bar would

therefore come into effect on 3 August 2002. Alternatively, it could be argued that the time bar was engaged within two years from the enactment of Inland Revenue (Amendment) Act, No. 37 of 2003, which was certified as law on 14 November 2003. Consequently, the time bar would have been engaged on 13 November 2005.

2. The Minister of Finance in the Budget Speech 2003, Part I, Annex 3, set out the legislative intention behind the amendment when he stated as follows:

   Appeal procedure will be simplified to avoid delays for both income tax and VAT. Initial inquiry will be made by an assessor other than the assessor who made the assessment. The time limit up to and including CGIR's determination will be reduced to 02 years. The final settlement of questions of fact including the Board of Review will be within 04 years. A separate office will be set up for the Board of Review.

3. Therefore, the clear legislative intention was to ensure that an appeal against an assessment is disposed of within a total period of four years (i.e two years for the appeal to be determined by the Commissioner General of Inland Revenue and two further years for the appeal to be determined by the Board of Review resulting in a total period of four years).

4. The instant appeal was taken up for an oral hearing only on 17 February 2006 which is almost 6 ½ years since it was filed. It is submitted that the definition of the word "hearing" as used in the second proviso to section 140(10) must be interpreted having regard to the legislative intention of disposing of matters before the Board of Review speedily. It would be contrary to the legislative intention (and the Board of Review would be at liberty to take even twenty five years before orally hearing as appeal) if the operation date for the commencement of the time bar was construed to be the date of the oral hearing.

5. Further, section 140(1) of the Inland Revenue Act, No. 38 of 2000, provides as follows:
   140(1) As soon as may be after the receipt of a petition of appeal, the Secretary to the Board shall fix a date and time and place for the hearing of the appeal, and shall give fourteen day's notice thereof both to the appellant and to the Commissioner General.

I find that an area is left uncertain for interested parties to give different interpretation on time bar. Hearing need to be in camera and Section 140 subsection 7, 8 & 9 provide for adducing evidence. As such in the context of this case and by perusing the applicable provision, it seems to be that the hearing contemplated is nothing but 'oral hearing'. One has to give a practical and a meaningful interpretation to the usual day to day functions or steps taken in a court of law or a statutory body involved in quasi judicial functions, duty or obligation. If specific time limits are to be laid down the legislature need to say so in very clear unambiguous terms instead of leaving it to be interpreted in various ways. To give a restricted interpretation would be to impose unnecessary sanctions on the Board of Review. It would be <u>different or invalid</u> if the time period exceeded 2 years from the date of oral hearing. If that be so it is time barred.

In Silva Vs. Singam 71 NLR 308 at 311...

In giving this contextual interpretation to section 37 no departure is involved from the ordinary canons of interpretation of statutes for it is a well recognized rule that statutory provisions must be considered according to the context in which they appear. In particular where

sweeping general words are used it becomes necessary to examine their context in order to see whether they are not necessarily limited to a particular restricted meaning harmonizing with that context. As Maxwell observes a survey of the context in which words appear "is often indispensable even when the words are the plainest, for the true meaning of any passage is that which (being permissible) best harmonies with the subject and with every other passage of the statute". In the words of du Parcq, L.J. in Butcher v. Poole Corporation "it is of course impossible to construe particular words in an Act of Parliament without reference to their context and to the whole tenor of the Act".

Maxwell on The Interpretation of Statutes 12th Ed. Pg. 45...

Construction ut res magis valeat quam pereat

"If the choice is between two interpretations, the narrow of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result." "Where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system."

In accordance with these principles, the court should avoid interpretations which would leave any part of the provision to be interpreted without effect, will not narrow enactments designed to prevent tax evasion,

I would in answer to this question of law hold that the Board has not erred by arriving at its determination the way it was done in the said appeal

The Appellant's view is that commencement of the time bar will operate from the date on which he submitted to the jurisdiction of the Board. That would be according to the Appellant on receipt of the Petition of Appeal by the Board and not from the date of oral hearing. Emphasis on this point is by reference to 140(1) of Act No. 38 of 2000. As such Appellant submits it is the intention of the legislature that all of it should be concluded in 2 years and in the instant case it took 6 ½ years since filing the petition.

Learned State Counsel reply as follows:

(1) Based on Section 140 of Act No. 38 of 2000, legislature intended the word 'hearing' to mean an oral hearing.

(2) By Section 140(1) of the above Act the Secretary of the Board on receipt of the petition e – x a date and time for hearing and notify parties.

(3) Similarly section 140(3) and (4) of the Act provide for the attendance of the appellant or an authorized representative and the Assessor to attend the "hearing". Section 140(6) provides for the hearing to be in Camera, and Section 140 subsections 7, 8 and 9 provide for the adducing of evidence at the "hearing". Section 140(10) provides that the Board shall confirm, reduce, increase or annul the assessment "after the hearing" of the Appeal. It is therefore patently evident that the word "hearing" used consistently in Section 140 of Act No. 38 of 2000 means an "oral hearing" and no more.

It is very unfortunate that it took almost 6 ½ years or more to reach its conclusion from the date of filing the Petition of Appeal in the Board. But the oral hearing commenced on 17.2.2006 and Board made its determination on

21.6.2006. This of course is well within the time limit and I would go to the extent to state that the Board has been very conscious of early disposal of the appeal. Board cannot be faulted for getting the appeal fixed for hearing as stated above since it is the duty and function of the Secretary of the Board to fix a date and time for hearing and to notify the parties. If it was the intention of the legislature that hearing should be concluded within 2 years from the date of filing the petition or that the time period of 2 years begins to run from the date of filing the petition, there could not have been a difficulty to make express provision, in that regard. I do agree with the views of State Counsel. Hearing no doubt commence from the date of oral hearing. I would as such answer this question in favour of the Respondent and endorse the view of the Board of Review. It is not time barred, as the Board arrived at its determination within 2 years.

We will now get on to the (iii), question of law as to whether the Assessor had sufficiently complied with the mandatory requirements of law under Section 115(3) of the Inland Revenue Act No. 28 of 1979.

The above section reads thus:

Where a person has furnished a return of income, wealth or gifts, the Assessor may in making an assessment on such person under subsection (1) or under subsection (2), either –

(a) accept the return made by that person; or

(b) If he does not accept the return made by that person, estimate the amount of the assessable income, taxable wealth or taxable gifts of such person and assess him accordingly:

Provided that where an Assessor does not accept a return made by any person for any year of assessment and makes an assessment or additional assessment on such person for that year of assessment, he shall communicate to such person in writing, his reasons for not accepting the return.

Appellant draws the attention of this court to letters B2, B3 & B4 for the relevant Years of Assessment referred to therein. Emphasis as stated in these letters are regarding the Board of Review findings that the assessor was in error. The assessor state in B2, B3 & B4 you have not declared any rental income from premises...

The Board of Review at Pg. 13 of document 'H' where it is stated that the Assessor has erred and in fact the Appellant has declared the rental income in respect of the premises at Rs. 90,000/- per year as in agreement E2(b).

Learned State Counsel in his submissions stress that the reason for rejecting (vide 'B') is the failure to disclose a rental income of Rs. 51,429/= per month. State Counsel also refer to document 'c' of the case stated appealed to the Commissioner that the reasons communicated under Section 115(3) above are not tenable, which is an unqualified admission. Nor did the Appellant

challenge the assessments before the Commissioner General on the basis that no reasons have been given.

The burden is on the Appellant to prove that the assessment determined by the Commissioner is erroneous or excessive. There was no evidence led before the Board on the above aspect. Contents of letter C1 of 14.3.1996 is in accordance with the terms of the rent agreement. I do agree with the views of the Board of Review that G2, G3 & G4 notices submitted with the Petition of Appeal which state no rentals declared in the statement is factually incorrect but not sufficient to negate the notices, in the way as explained by the Board of Review.

The test applied in the case of Application No. 2367/80 in New 'Portman' case had been adopted by the Board. Thus in the case in hand sufficient reasons are given and it is in compliance with Section 115(3). In the above case the Court of Appeal held:

> In application No. 2367/80, the only ground on which the Notice of Assessment (P3) is attacked by learned Attorney for the petitioner is that the letter P2 rejecting the return does not state a reason. In my view it does. The reason given is that the Assessee had not disclosed his income from the lorries. A clue is given to the petitioner as to where he had gone wrong in his return. To the petitioner who received P2, the reason given is adequate and intelligible to enable him to formulate his grounds in order to appeal to the Commissioner. I refuse the application for Writs".

We are in agreement with the views expressed by the Board of Review. Assessor has complied with the requirement in Section 115(3) of the Act, and communicated the reasons for rejection of Appellant's returns

Board of Review has not erred in law.

(iv) Has the Board of Review erred in law by not considering whether the Assessor has provided sufficient justification for treating charges and services as rental income.

The rent receipts for a sum of Rs. 7500/= per month and charges and services for Rs. 43,729/= which adds to 51,429/= is shown as stated by the Appellant. The appellant's position is that Rs. 43,429/= is for charges and services. Assessor does not state as to why water, electricity, cleaning, security etc. are included as rental income. Appellant argue that charges and services are treated as business income which are deductible. (Section 23 of Act No. 28 of 1979) As such Appellant's state assessment by the Assessor is without a lawful basis.

Learned State Counsel argue that the onus of proving that the assessment is excessive is on the Appellant and further state that Appellant failed to adduce any evidence to prove his position before the Board of Review. What is stressed is the Appellant's failure to prove the above. I find that the Board of

Review has also expressed the same view. Further the Board gives further reasons to support the Assessor.

(a) Rent per month for 7510/= is in respect of year of assessment 95/96 & 96/97 which assessment is not before the Board.
(b) Rent receipts stated in E2 (a) not produced.
(c) No account for charges and services marked before Board
(d) Assessee given the benefit of claiming 25% deduction as well on charges & services component as rent.

This court does not wish to interfere with the views expressed by the Board since it is factually correct and could be adopted in law.

(v) Has the Board erred in law by not drawing an adverse inference from the fact that the statement made by the Assessor in his communication of reasons for rejecting the return was palpably false?

Appellant as stated earlier seeks to demonstrate that non disclosure of rental income is false in view of the observation of the Board that the Appellant in fact has declared rental income in respect of the premises at Rs. 90,000/= per year according to agreement E2 (b). It is the position of the Appellant that the Assessor relied on a false assertion and when making an assessment such an assessment lacks legal validity.

Learned State Counsel contends that the more serious finding of the Assessor is the non-disclosure of rental income. Board of Review according to the State Counsel was correct in not drawing any adverse interpretation. In support of his views refer to the case of Sangapla Vs. Urban Council Gampaha & Others 1990 2 SLR 289 at p. 298 held:

"The doctrine of severability clearly applies in situations where a tribunal or authority that is validly exercising its power, exceeds the limits of the power or authority only in certain respects. Professor H. W. R Wade in his work titled "Administrative Lava" (4th Edition pg. 302) has stated thus.

"an administrative act may be partially good and partially bad, it often happens that a tribunal or authority makes a proper order but adds some direction or condition which is beyond its powers. If the bad can be cleanly severed from the good, the Court will quash the bad part only and leave the good standing" and "Where the bad part of a decision is severable from the good, certiorari may be granted to quash the bad part only". (page 551)

As observed above I do not think that there is anything serious in this question of law and it is our view that the Board of Review has not erred in law as the burden in any event was on the Appellant to establish excessive assessment of tax

The other question (vi) refer as follows:

Has the Board erred in law by condoning the conduct of the Department of Inland Revenue by not drawing an adverse inference from the fact that the record of

procedures before the Commissioner was not made available to it after 15th July 1997?

Appellant refer to the proceedings of the Board at pg. 14 of document 'H' where the Board observes that 'we have not found the proceedings of any hearing before the Commissioner after 15th July 1997. "According to the statute (Section 117 (10) of Act No. 28 of 1979) a record of evidence need to be maintained. As such the Commissioner has not maintained any record of proceeding after 15th July 1997, and no record of evidence led by the Appellant in respect of receipts for charges and services. The Board of Review states that no evidence was led before it regarding these receipts. Appellant states that item of evidence was led before the Commissioner and it was not necessary to produce this evidence before the Board, all over again. This is the point stressed by the Appellant.

Learned State Counsel reply the Appellant stating there is no proof as to whether any proceedings were held by the Commissioner after 15th July, or that the Appellant was successful in establishing that there were in fact proceedings held after 15th July.

The answer to this question has already been considered, on the lines stated above of the burden to prove and establish being cast on the

Appellant. I do not see a basis to conclude that there was a real necessity for the Board to draw any adverse inference, since the material placed before the Board is more than sufficient to endorse the determination of the Assessor. As such nothing could flow from such an omission to hold with the Appellant.

(vii) the other question reads thus:

> Has the Board of Review erred in law by not drawing an adverse inference from the fact that the return of the tax payer was not made available, when it was without the custody of the Department of Inland Revenue.?

Appellant states that the Board observes that the returns were not made available. Appellant submitted the original returns to the Department of Inland Revenue. Such returns submitted by the Appellant clearly indicate that he declared rental income and whether the receipts in issue comprised of charges and services. As such board should draw an adverse inference against the Inland Revenue Department. Vital piece of evidence not produced.

The answer to above is very clearly stated by the Respondent, and I see no basis to defer from the submissions of learned State Counsel and I note the following:

(a) The Respondent submits that it was not disputed by the Department of Inland Revenue that the Appellant had disclosed Rs. 90,000/= per year as gross rent for the Years of Assessment 92/93, 93/94 and 94/94 in his returns. Instead, what was in dispute was the

correctness of that amount disclosed in the returns in view of the lessee claiming that it had paid the lessor Rs. 613,148 in respect of 92/93, Rs. 617,148 in respect of 93/94 and Rs. 617,148 as rent.

(b) In those circumstances, the returns of the appellant would not have made any difference to the decision that the Board of Review had to make in respect of the Appellant's failure to correctly declare his rental income.

(c) It was also not the case of the Appellant that the contents of his returns were material to the determination of the matters in appeal before the Board of Review. Therefore, the Board of Review was correct in law in not drawing any adverse inferences with regard to the returns of the Appellant.

(vii) Finally the question posed is whether the Board of Review erred in law by coming to a conclusion against the weight of evidence.

This court observes that ample material had been produced before the Assessor and the Board of Review. Merely because there had been some lapses on the part of the Assessor, would not suffice, to hold with the Appellant. One cannot pick and chose lapses and interpret to be unfavourable to the Revenue Department. It has been demonstrated very often by the Respondent that it was the burden of the Appellant to prove his case, but the Appellant has chosen not to lead evidence before the Board . As such I answer the above in favour of the Respondent and against the Appellant.

The entire case stated need to be followed based on all the facts placed before the Assessor and the Board. It is not an acceptable method to

merely choose the errors which cannot be so material to the case and reject the contention and the conclusion of the Board of Review. Important conclusions arrived by the Board could be summerised as

(a) No evidence led to establish rent and expenses in providing services.

(b) Onus of proving the assessment of the Commissioner is erroneous or excessive is on the Appellant.

(c) The 3 objections raised by the Appellant and dealt by the Board of Review in its order of 21.6.2006 more or less provide answers favourable to Respondent. Commissioner General of Inland Revenue, and a close examination of same would indicate that all questions (i) to (viii) referred to in this judgment were considered by the Board in dealing with the above objections which were overruled by the Board of Review.

(d) Board of Review would be the last opportunity to verify facts, but the Appellant for some reason or other could not discharge the onus of proving that the assessment was excessive or erroneous.

In all the above facts and circumstances of this appeal, all questions referred to above are answered in favour of the Respondent Commissioner General of Inland Revenue. As such we dismiss this appeal without costs.

JUDGE OF THE COURT OF APPEAL

Deepali Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL