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

In the matter of an Application for a Case Stated under Section 122 of the Inland Revenue Act No. 28 of 1979 and presently under Section 170 of the said Act No. 10 of 2006.

C.A. Application No.
Tax/01/2008

The Commissioner General of Inland Revenue,
Department of Inland Revenue,
Sir Cittampalam A Gardiner Mawatha,
Colombo 02.
APPELLANT

-Vs-

Koggala Garments (Pvt) Ltd.,
No. 929/929B, Main Road,
Nawagamuwa,
Ranala.
RESPONDENT

BEFORE : **Vijith K. Malalgoda, P.C. J, (P/CA) &**
A.H.M.D. Nawaz, J.

COUNSEL : Farzana Jameel, PC, ASG with Arjuna Obeysekera SDSG for the Appellant.

Dr. Shivaji Felix for the Respondent.

Argued on : 05.11.2014, 12.11.2014, 8.12.2014, 23.07.2015, 28.9.2015 and 20.01.2017

Written Submissions on : 19.09.2016 and 20.02.2017 (For the Appellant)
19.09.2016 and 08.02.2017 (For the Respondent)

Decided on : 05.04.2017

A.H.M.D. NAWAZ, J.

In the case at bar an argument has been put forward by the Respondent (Koggala Garments (Pvt) Ltd.) to the maintainability of the case stated namely the Appellant (the Commissioner General of Inland Revenue) must have come, by way of a writ of certiorari to quash the determination of the Board of Review and sought a mandamus on the Board of Review compelling it to determine the appeal made by the Respondent Company, instead of using the case stated procedure. This Court is called upon, in the circumstances, to rule on our own jurisdiction to hear and determine the case stated. *Is it judicial review (an application for orders in the nature of writs of certiorari and mandamus) that the Commissioner General of Inland Revenue should have sought?* or *Is it a case stated against the decision of the Board of Review that has to be preferred as has been done in this case under Section 122(1) of the Inland Revenue Act, No. 28 of 1979?* This is the principal question before us. The Commissioner has chosen to invoke the appellate jurisdiction of this Court in terms of Section 122(1) of the Inland Revenue Act, No. 28 of 1979 as amended and it is the argument of the Respondent taxpayer that this invocation is patently wrong.

The above are the two questions that have engaged the arguments presented before us and I must once again reiterate the diametrically rival arguments. While the learned Additional Solicitor General has contended that the case stated as has been adopted by the Commissioner is the right procedure, the learned Counsel for the Respondent Company Koggala Garments (Pvt) Ltd. has called in question such an invocation of this Court's jurisdiction and argued to the contrary that this Court has no jurisdiction to *quash the determination of the Board of Review on a jurisdictional issue, by way of a case stated.*

It is undeniable that this case also brings to the fore the traditional divide between appeal and review, given that the case stated to this Court proceeded on the basis that it is an appeal and even the marginal note to Section 122(1) of the Inland Revenue Act, No. 28 of 1979 as amended is entitled "Appeal on a question of law to the Court of Appeal". Even the latest written submissions presented by the Senior Deputy Solicitor General proceeds on the basis that the case stated that has been presented before this Court is in the form of an appeal and this argument is also strengthened by the title to Section 122 which refers to **Appeals to the Court of Appeal** as does the marginal note thereof. Whilst both the section and its marginal note refer to appeals, I observe that sub-sections (3) and (8) of 122 of the Inland Revenue Act, No. 28 of 1979 as amended are declaratory in that the case stated is regarded as an appeal. The decision given by this Court on a case stated is deemed to be a final judgment in a civil action in terms of Section 122(8) of the Inland Revenue Act, No. 28 of 1979 as amended and I must straightaway observe that the decision on the issue before this Court depends on the construction of Section 122(6) of the fiscal legislation that is engaged in this case-Inland Revenue Act, No. 28 of 1979 as amended. This sub-section which delineates the powers of this Court on a case stated sets out the remit of the powers of this Court on a case stated as follows:

> *"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 the Court upon such question, confirm, reduce, increase, or annul the assessment determined by the Board, or may remit the case to the Board with the opinion of the Court of thereon. Where a case is so remitted by the Court, the Board shall revise the assessment in accordance with the opinion of the Court."*

The question before us is whether we can hear and determine the questions of law that have been stated to this Court on this case stated, when none of the questions of law pertain to the assessments in the case. The Board of Review ruled on a jurisdictional issue of time bar and it was a determination on time bar. The determination of the Board of Review does not deal with the assessments that were before the Board and it was

fairly and squarely a decision on time bar. On this case stated the Commissioner-General of Inland Revenue seeks to quash this determination by having stated to this Court eight questions of law and none of them deals with the assessments in the case. In such a situation- Is a case stated which is akin to an appeal a proper remedy? or should the determination of the Board of Review be quashed by certiorari? This is the issue before us.

I have said that none of the questions of law set out in the case stated deals with determinations of the Board on assessments, because the Board never went into the merits of the assessments. So no questions of law could have been stated to this Court arising on assessments because there was no decision on assessments and the questions of law stated to this Court focus on the determination of the Board on its jurisdiction. It was a decision on jurisdiction sans a decision on assessments. If there is a decision on jurisdiction without a decision on assessment, the question before us can once again be encompassed in a nutshell -can this decision be quashed on a case stated *non obstante*? or Should this threshold decision on jurisdiction made by the Board be quashed by certiorari?

Before we look at the questions of law stated to us, let me set out the *lis* between the parties.

Proceedings before the Board of Review

Koggala Garments (Private) Limited, the Appellant before the Board of Review raised the following objections *in limine* when its appeal was taken up.

> *"(i) The Board of Review is 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 the amount specified by the Appellant must be treated as its final tax liability.*

(ii) *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), makes it imperative that the Board of Review arrives at its determination within two years from the commencement of the hearing of the appeal. Consequently,* ***since this two year period has lapsed the appeal must be deemed to have been allowed and the Board of Review is functus officio as far as the appeal made by this Appellant is concerned."***

As one could see, the preliminary objection (ii) is based on time bar and seeks to contend that the appeal preferred by Koggala Garments cannot be heard because the Board of Review is denuded of its jurisdiction to go into the merits of the appeal. The Board of Review upheld the second preliminary objection and allowed the taxpayer's appeal. However, in view of its determination on this matter, it did not consider it necessary to examine the first preliminary objection. There was no substantive hearing before the Board on the decision of the Commissioner-General's decision on assessments. The upshot of the determination of the Board of Review was that since time had lapsed, they would not look into the appeal-*vide* the determination of the Board of Review dated 11.01.2008. In coming to this conclusion on time bar, the Board of Review interpreted 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. So admittedly no hearing took place on the assessments. If there is a statutory provision on which the Board of Review placed a wrong interpretation, it is axiomatic that it would amount to illegality which would give rise to judicial review. In the *GCHQ* case (***R v. Minister for the Civil Service ex p Council of Civil Service Unions***[1]), Lord Diplock gave a brief description of illegality:

"By illegality as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it."

[1] (1985) 1 AC 374 at 410

The pith and substance of the argument of the learned Additional Solicitor General is that the Board of Review misinterpreted the provisions relating to time-bar and if that was the case, the learned Counsel for the Respondent has contended that the proper remedy is judicial review by way of mandates in the nature of writs and not a case stated. The learned Additional Solicitor General has put forward a contrary argument that even in a case stated which is akin to an appeal, this Court can quash a determination on jurisdiction for illegality because the misinterpretation on time bar would fall within the words "any question of law" in Section 122(8) of the Inland Revenue Act, No. 28 of 1979. Any question of law need not arise from a determination on an assessment under appeal but rather it can equally flow from a jurisdictional determination on jurisdiction-so contended the learned Additional Solicitor General. Thus this Court can go into the questions of law as stated to this Court-she argued. At this stage it becomes apposite to look at the questions of law stated to this Court.

Questions of Law on the Stated Case

The following questions of law have been raised by the Commissioner General of Inland Revenue (the appellant in the case) and stated to this Court for an opinion.

(a) *Whether the Board has erred in law to determine the appeal on the matters raised as preliminary objections by the Appellant's Counsel.*

(b) *Whether the Board was empowered by the Hon. Minister of Finance who appointed it to hear and determine the appeal preferred by the Appellant to give its determination without hearing the matters raised in the appeal.*

(c) *Whether the Board erred in law in determining that the provisions of the Inland Revenue Act No. 38 of 2000 are applicable retrospectively for the assessments under the Inland Revenue Act, No. 28 of 1979 for years of assessment 1992/1993 and 1993/1994.*

(d) *Whether the Board misdirected itself in law on deciding on the meaning to be given to the words "**within two years from the date of commencement of hearing of such appeal**" of sub section (10) of Section 169 of the Inland Revenue Act, No 10 of 2006.*

(e) *Whether the Board has erred in law in determining that the two years given statutorily to the Board to determine an appeal commenced from the date of acknowledgement of the appeal by the Secretary of the Board.*

(f) *Whether the Board has erred in law in determining a question of law and failed to give due consideration to the judgment of the case A. M. Ismail Vs CIR – (SLTC Vol. vi page 156) that questions of law have to be decided by Courts and the Board can decide on questions of fact.*

(g) *Whether the Board properly instructed as to the relevant law would reasonably have come to the conclusion which the Board has drawn since the legal position does not justify such conclusion.*

(h) Whether the Board acted in excess of its limited jurisdiction as it cannot assume jurisdiction it does not possess to decide on questions of law.

As I pointed out before, none of these questions of law impinge and impact upon the assessments which were under appeal to the Board of Review. The majority of the questions, when one reads between the lines, partakes of the character of grounds on which judicial review is sought. For instance the last question **(h)** is virtually a complaint that the Board acted *ultra vires*. The question **(g)** complains of *illegality* in that the question connotes the import that that Board committed an *illegality* by misinterpreting the relevant law, thus harking back to Lord Diplock's brief description of illegality. In fact the argument is to the effect that the Board cannot even consider the question of time bar and rule on its jurisdiction. If one looks at the question of law **(h)**, it suggests that questions of law cannot be gone into at all by the Board of Review. The words in the question of law **(h)** "*......it cannot assume jurisdiction it does not possess to decide on questions of law..*" are also supplemented by the written submissions of the Appellant dated 20.02.2017 wherein it is stated in paragraph 21 that "*it is respectfully submitted that the jurisdiction of the Board of Review is limited to confirming, reducing, increasing or annulling the assessment as determined by the Commissioner-General on appeal or else, to remit it to the Commissioner General for the revision of the assessment. It is therefore respectfully submitted that the*

Board of Review does not have the power to entertain and/or deal with questions of law challenging the jurisdiction of the Board of Review itself on the basis of a time bar which the Appellant alleges denudes the jurisdiction of the Board."

Any Tribunal can Rule on its Jurisdiction

The argument is that the Board of Review could not have considered the jurisdictional objection. Its jurisdiction circumscribed by Section 121(10) of the 1979 Act which states;

> "After hearing the appeal,
> the Board shall confirm, reduce, increase or annul the *assessment as determined* by the Commissioner-General on appeal, 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"

I hasten to point out that the law is to the contrary. H. W. R. Wade and C. F. Forsyth, in their well known tome, *Administrative Law* [Oxford: Oxford University Press, 11th ed., 2014], explain that a statutory tribunal is lawfully entitled to examine a jurisdictional issue that has been raised before it. They state, at p. 210, as follows:

> *"Where a jurisdictional question is disputed before a tribunal, the tribunal must necessarily decide it. If it refuses to do so, it is wrongfully declining jurisdiction and the court will order it to act properly. Otherwise the tribunal or other authority 'would be able to wield an absolutely despotic power, which the legislature never intended that it should exercise. It follows that the question is within the tribunal's own jurisdiction, but with this difference, that the tribunal's decision about it cannot be conclusive."*

Wade and Forsyth clearly support the proposition that a tribunal is fully entitled to decide a jurisdictional question that has been raised before it. However, if the tribunal

has got its answer to the jurisdictional question wrong, it is open to the aggrieved party to canvass the wrong answer on jurisdiction by way of judicial review.

Can the questions of law stated to this Court be answered on a case stated?

I have pointed out at the beginning of this judgment that this all important issue has to be resolved by recourse to Section 122(6) of the Inland Revenue Act, No. 28 of 1979 as amended which reads as follows:

> "122 (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 Board, or may remit the case to the Board with the opinion of the Court thereon. Where a case is so remitted by the Court, the Board shall revise the assessment in accordance with the opinion of the Court.***"

The argument on behalf of the Appellant Commissioner-General is that any question of law would include the eight questions of law that have been stated to this Court on this case stated. It has been contended that a literal interpretation of Article 138 of the Constitution vests the Court of Appeal with the power to correct all errors of fact and law committed by a tribunal. Since the Board of Review has erred in law, it is within the Constitutional power of this Court to correct such wrongs.

This argument ignores the well established principle that the right of appeal is a statutory right and it must be expressly created and granted by statute. In ***Martin v. Wijewardena***[2] the Supreme Court held that Article 138 of the Constitution is only an enabling Article and it confers jurisdiction to hear and determine appeals to the Court of Appeal. Article 138 does not *per se* create a right of appeal. Jameel, J. expressed the applicable principles, at p. 419, as follows:

> *"In the light of these authoritative statements it is not possible to accept the contention that there is implied in Article 138 an unfettered "RIGHT OF APPEAL" to the Court of Appeal. Nor, is it*

[2](1989) 2 Sri.LR 409

possible to accept the contention that this alleged "RIGHT OF APPEAL" under this Article 138 is only fettered to the extent provided for in the Constitution or other Law. An Appeal is a Statutory Right and must be expressly created and granted by statute. It cannot be implied. Article 138 is only an enabling Article and it confers the jurisdiction to hear and determine appeals to the Court of Appeal. The right to avail of or take advantage of that jurisdiction is governed by the several statutory provisions in various Legislative Enactments. That is to say, for appeals from regular courts, in the Judicature Act, and the Procedural Laws pertaining to those courts. ***For the various Tribunals and other Quasi – Judicial Bodies, in the respective statutes that created them."***

See the affirmation of this principle in ***Gunaratne v. Alan Thambinayagam and Others***[3], ***Bakmeewewa v. Raja***[4], ***Gamhewa v. Maggie Nona***[5], ***Mudiyanse v. Bandara***[6], and ***Malegoda v. Joachim***[7].

So it is Section 122(6) of the Inland Revenue Act, No. 28 of 1979 as cited above, that would govern the ambit and scope of the orders that this Court could make on a case stated. This provision is substantially mirrored in the subsequent fiscal enactments namely Section 141(6) of the Inland Revenue Act, No. 38 of 2000, Section 170(6) of the Inland Revenue Act, No 10 of 2006.

No Nexus between the Questions of Law and the Assessments

Upon a careful perusal of Section 122(6) of the Inland Revenue Act, No. 28 of 1979, it becomes patently clear that if the question of law stated to this Court does not arise on the assessments, this Court is denuded of jurisdiction to hear and determine that question of law. The appellate power needs recapitulation.

"122(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***

[3](1993) 2 Sri.LR 355
[4](1989) 1 Sri.LR 231
[5](1989) 2 Sri.LR 250
[6] SC Appeal 8/89 S.C minutes of 15.03.1991
[7](1997) 1 Sri.LR 88

> ***upon such question, confirm, reduce, increase or annul the assessment determined by the Board, or may remit the case to the Board with the opinion of the Court thereon. Where a case is so remitted by the Court, the Board shall revise the assessment in accordance with the opinion of the Court."***

The above provision makes it clear that upon the question of law stated to this court, this court is required to ***confirm, reduce, increase or annul the assessment determined by the Board, or remit the case to the Board with the opinion of the Court thereon.***

In other words, the Board of Review must have gone into the assessment in the first instance and thereafter the Board must state questions of law that arise or impinge on the assessment. The question of law must relate to the assessment. Thereafter this Court, in accordance with a decision of Court upon such question, ***confirms, reduces, increases or annuls the assessment determined by the Board, or remits the case to the Board with the opinion of the Court thereon.***

In this case, it needs recalling that the Board never went into the assessments. It only considered a jurisdictional objection and made its decision. So none of the eight questions of law that have been stated to this Court impacts on the assessments. Section 122(6) of the Inland Revenue Act, No. 28 of 1979 mandates a question of law arising on the assessment to be stated to this Court for an opinion. Only then this Court can finally ***confirm, reduce, increase or annul the assessment determined by the Board, or remit the case to the Board with the opinion of the Court thereon***.

It is not any question of law that this Court can go into in a case stated. It is only a question of law impacting on the assessment that this Court can hear and determine on a case stated. I am fortified in this interpretation by the words in Section 122(6) "………***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….."***. The conjunction "and" connotes that the words *any question of law* have to be read conjunctively with the requirement to *confirm, reduce, increase or annul the*

assessment upon such question of law. This shows that the question of law has to pertain to the assessment. In the case before us, none of the questions pertain to the assessments which went up in appeal before the Board of Review. The questions of law pertain only to a decision on jurisdiction which is susceptible to a challenge by way of judicial review.

The contention on behalf of the Appellant that this Court can go into any question of law is an invitation to read the section disjunctively. It is an invitation to substitute the word *or* in the room of the word *and* in Section 122(6). This argument is patently unsustainable and would be tantamount to driving a coach and horses through the section. In the end we hold that the case stated jurisdiction is limited in that it is only available to appeal against an assessment on a question of law which impinges on an assessment. Section 122(6) makes it plain as a pikestaff.

The appropriate time for stating a case on a point of law is after the conclusion of the substantive hearing. Where a tribunal has made an interim ruling which is challenged it is inappropriate for a case to be stated and the aggrieved party should seek permission to obtain judicial review. That is also the most appropriate mode of challenge where the complaint is that the inferior court misunderstood its role or functions–*see* the pronouncement in ***R v. Chief Commons Commissioner, ex p Winnington***[8].

In the circumstances we hold that the case stated procedure has been wrongly invoked. This Court accordingly proceeds to dismiss the case stated.

JUDGE OF THE COURT OF APPEAL

Vijith K. Malalgoda, P.C. J. (P/CA)
I agree

PRESIDENT OF THE COURT OF APPEAL

[8] The Times, November 26 1982.