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

In the matter of a Case Stated under Reference No. TAC/IT/016/2014 by the Tax Appeals Commission under Section 170 of the Inland Revenue Act No. 10 of 2006 as amended

Lanka Ashok Leyland PLC

Panagoda,

Homagama.

APPELLANT

Case No. CA/TAX/14/2017

Vs.

Tax Appeal Commission Case No.

TAC/IT/016/2015

The Commissioner General of Inland Revenue,

Department of Inland Revenue,

Sir Chittampalam A. Gardiner Mawatha,

Colombo 02.

RESPONDENT

Before: Janak De Silva J.

Achala Wengappuli J.

Counsel:

F.N. Goonewardena for the Appellant

Manohara Jayasinghe State Counsel for the Respondent

Written Submissions tendered on:

Appellant on 17.07.2018

Respondent on 16.07.2018

Argued on: 23.07.2018

Decided on: 14.12.2018

Janak De Silva J.

The Appellant is a limited liability company domiciled in Sri Lanka. The principal activity of the Appellant is importing and selling of commercial vehicles and spare parts, provision of after sales services and ancillary services for Ashok Leyland motor vehicles.

The Appellant submitted the return of income for 2009/2010 on 29.11.2010 which was rejected by the assessor who then issued an assessment. The reason for rejection was that the Appellant had not made adjustments in respect of Nation Building Tax (NBT) paid on imports in calculating the profit and income for the year.

The Appellant then appealed to the Respondent against the assessment made by the assessor. However, the Respondent by his determination dated 13.11.2014 confirmed the assessment made by the assessor.

The Appellant then appealed to the Tax Appeals Commission (TAC) in terms of section 7 of the Tax Appeals Commission Act against the determination of the Respondent. However, the TAC confirmed the determination made by the Respondent.

The Appellant then moved the TAC to refer the following questions of law for the opinion of Court in terms of section 170 of the Inland Revenue Act No. 10 of 2006:

(1) Is Assessment No. ITA 12301100140V1 dated 30 November 2012 for the year 2009/2010 invalid in law in view of the Inland Revenue Department previously issuing Assessment No. 6490818 V0 dated 20 May 2011 for the same year of assessment on the basis of the return which had been duly fled by the Appellant for that year of assessment?

(2) Without prejudice to point 1 above, was the assessment for the year 2009/2010 dated 30th November 2012 on Assessment No. ITA 12301100140V1 time barred in terms of Section 163(5)(a) of the Inland Revenue Act No. 10 of 2006 (as amended) (the "Act") as applicable to such year of assessment?

(3) Should the appeal which has been filed against the assessment by the Appellant been allowed in terms of Section 165(14) of the Act since it has not been determined by the Commissioner General of Inland Revenue within the time period specified therein?

(4) Is Nation Building Tax paid at the time of importation of goods not a "prescribed tax or levy" for the purpose of section 26(1)(l)(iii) of the Act?

The Appellant has in the written submissions informed Court that Question 1 is not being pursued by the Appellant.

Time Bar in Section 163(5)(a) of the IR Act

The facts relevant to this question is that the Appellant filed its income tax return for the year of assessment 2009/2010 on 29th November 2010. The assessor issued an assessment on the Appellant for that year of assessment on 30th November 2012 which was received by the Appellant on 6th December 2012.

The provisions relating to the filing of returns and making of assessments are set out in sections 106(1) and 163(5) respectively of the Inland Revenue Act No. 10 of 2006 (IR Act). Accordingly, every person who is chargeable with income tax under this Act for any year of assessment shall, on or before the thirtieth day of September immediately succeeding the end of that year of assessment file a return and where the return is filed within this time, an assessment of the income tax payable by such person must be made before the expiry eighteen months from the end of that year of assessment.

Sections 106(1) and 163(5) of the IR Act was amended by Act No. 19 of 2009 which resulted in the filing of returns having to be done on or before the thirtieth day of November immediately succeeding the end of that year of assessment and the assessment having to be done before the expiry of two years from the end of that year of assessment.

Accordingly, the Appellant submits that any assessment relating to year of assessment 2009/2010 should have been issued before 31st March 2012 (i.e. 2 years after 31st March 2010) whereas it was issued only on 29th November 2012, which is almost 8 months after the deadline.

However, the learned State Counsel for the Respondent submits that this submission ignores the amendment made to sections 106(1) and 163(5) of the IR Act by Act No. 22 of 2011. He submitted that prior to the amendment the two-year period commenced on 1st April i.e. the very date after the conclusion of the year of assessment but after the amendment the commencement date was changed to 30th November.

He further submitted that the Appellant submitted his return on 29th November 2010 at which point the law in operation was the pre-2011 law according to which the two-year period within which the notice of assessment must be sent would conclude on 01st April 2012. It was submitted that if there was no change in the legal regime then the Appellant was entitled to assume on 1st April 2012 that his tax returns were accepted. However, the learned State Counsel submits that after the Appellant submitted his return but very importantly before 1st April 2012, the law was amended as a result of which the deadline for sending out a notice of assessment to the Appellant gets extended to 30th November 2012.

However, the learned counsel for the Appellant rejects this position and submitted that these amendments would come into operation for the year of assessment 2011/2012 and not to the previous year of assessment. In particular he directed the attention of court to the fact that the amendment made in 2011 takes effect on 1 April 2011 which is significant as it shows that the amendment was to take effect at the beginning of the year of assessment 2011/2012 although certified on 31st March 2011.

A similar issue arose sometime ago when the amendment to the IR Act in 2009 was the subject matter in *Seylan Bank PLC. v. The Commissioner General of Inland Revenue* [CA(Tax) 23/2013, C.A.M. 23.05.2015]. In that case this Court held that irrespective of whether the assessee had to submit the tax return on or before the 30th September or 30th November 2009, the assessor can send the assessment to the assessee within two years immediately succeeding that year of assessment. The Court further considered the amendments made to section 163 of the IR Act by

Act Nos. 22 of 2011, 18 of 2013 and 8 of 2014. It held that the two-year period given to the assessor to send the assessment against the assessee was to start from the end of the year of assessment originally, which is the 31st of March, every year. This date (the starting day of the period) has been further pushed down to the thirtieth day of November of the immediately succeeding year of assessment by Act No. 22 of 2011. The Court also held that section 163(5) of the IR Act is a procedural law and that even if the amendment has retrospective effect, it applies, if the amendment is only on procedural law.

Two judges sitting together as a rule follow the decision of two judges. Where two judges sitting together find themselves unable to follow a decision of two judges, the practice in such cases is also to reserve the case for the decision of a fuller bench [*Walker Sons & Co. (UK) Ltd. v. Gunatilake and others* (1978-79-80) 1 Sri.L.R. 231]. In any event, I am of the view that the reasoning in *Seylan Bank PLC. v. The Commissioner General of Inland Revenue* (supra) is sound and compelling and sets out the correct position in law.

I only wish to add that it is a recognized principle that in fiscal legislation it is a matter for the legislature to decide what consideration relating to the amelioration of hardship or to the interests of the economic progress of the people should be given effect to and economic considerations in respect of which such decisions are made must be largely left to the legislature in view of the inherent complexity of fiscal adjustment of diverse elements that requires to be made. [Inland Revenue (Amendment) Bill, S.C.S.D. 3/1980].

Time Bar in Section 165(14) of the IR Act

The Appellant submits that in terms of section 165(14) of the IR Act the appeal should have been determined by the Respondent within a period of two years from the date on which such petition of appeal is received by the Respondent which was not the case and in view of the provisions in the said section the appeal shall be deemed to have been allowed and tax charged accordingly.

The Appellant submitted that the appeal against the assessment was filed on 24th December 2012 and a purported acknowledgment of the appeal was made by Mr. J.M.K.B. Jayasundera, Assessor Unit – 6A on 9th January 2013. It was further submitted that section 165(2) of the IR Act required the acknowledgment to have been made by the Commissioner General of Inland Revenue and as

it was not done in this case, there was no valid acknowledgement and as such in view of section 165(6) of the IR Act the appeal should be considered as having been received on 24 December 2012. The Appellant then contended that the determination could not have been made on 13 November 2014 and should have been necessarily have been made after 24th December 2014 by which time it was time barred.

Court is of the view that there is no merit in the submission of the Appellant that the acknowledgment must be signed by the Respondent. The functions of the Inland Revenue Department are so multifarious that no Commissioner General of Inland Revenue could ever personally attend to all of them. In particular, Court will be slow to impose such requirements unless there is unequivocal language in the IR Act. It is true that the appeal has to be submitted to the Respondent. However, that does not mean that the acknowledgement must be by the Respondent. There is nothing in the IR Act which requires the acknowledgment to be made by the Respondent. Similar approach has been taken by our Courts in applying the *Carltona principle* in relation to administrative functions to be performed by Ministers [*M.S. Perera v. Forest Department and another* [(1982) 1 Sri.L.R. 187] and *Kuruppu v. Keerthi Rajapakse, Conservator of Forests* [(1982) 1 Sri.L.R. 163].

In any event, it is to be noted that the Appellant has mentioned 13.11.2014 as the date of the determination in its appeal made to the TAC dated 02.04.2015.

Prescribed Tax or Levy

In ascertaining profits or income for the purposes of the IR Act, the Appellant is entitled to deduct all outgoings and expenses. However, section 26 of the IR Act identifies certain non-deductibles in ascertaining profits or income. The question for determination is whether NBT paid at the time of importation of goods is not a "prescribed tax or levy" for the purpose of section 26(1)(l)(iii) of the Inland Revenue Act No. 10 of 2006 (as amended).

Section 2(1) of the Nation Building Tax Act No. 9 of 2009 as amended (NBT Act) states that the provisions of the Act apply to every person who:

(a) imports of any article, other than any article comprised in the personal baggage of the passenger, into Sri Lanka, ["baggage" shall have the same meaning as in section 107A of the Customs Ordinance (Chapter 235)]; or

(b) carries on the business of manufacture of any article; or

(c) carries on the business of providing a service of any description: or

(d) carries on the business of wholesale or retail sale of any article other than such sale by the manufacturer of that article being a manufacturer to whom the provisions of paragraph (b) applies.

The Appellant is an importer of vehicles and therefore pays NBT on its imports. In ascertaining its profits or income the Appellant deducted the NBT paid by it whereas the assessor and the Respondent took the position that it was not possible to do so and rejected the return and issued a new assessment. In appeal the Respondent and the TAC concurred with this conclusion of the assessor. It is in this context that question no. 2 was referred to this Court by the TAC.

NBT is not specifically identified in section 26 of the IR Act as a non-deductible. In the absence of any other provision, the Appellant is then entitled to deduct the NBT paid by it at the time of importation. However, section 26(1)(l)(iii) of the IR Act states that for the purposes of ascertaining the profits or income of any person from any sources no deduction shall be allowed in respect of "any prescribed tax or levy".

The prohibition in section 26(1)(l)(iii) of the IR Act in effect acts as an exemption when a person is not caught up within it as then the person can deduct all the expenses and outgoings of his business before calculating the taxable income. Exemption notifications must be interpreted strictly and, in its entirety, and not in parts [*Grasim Industries Ltd. & Anvor v. State of Madhya Pradesh & Anvor and Gwalior Sugar Co. Ltd. v. Madhya Pradesh Electricity Board & Ors* (1999) 8 SCC 547].

In *Zebra Technologies Corporation v. Judy Baar Topinka, as Treasurer of the State of Illinois, and The Department of Revenue* [799 N.E.2d 725 (2003), 344 Ill. App.3d 474, 278 Ill.Dec. 860] the Appellate Court of Illinois, First District, First Division held:

> "We are mindful that taxation is the rule and tax exemption is the exception. *Chicago Bar Ass'n v. Department of Revenue*, 163 Ill.2d 290, 301, 206 Ill.Dec. 113, 644 N.E.2d 1166 (1994). Here, taxpayer is claiming an exemption from tax on income that would otherwise be assessed but for the 80/20 rule. Thus, taxpayer has the burden of proving clearly that it comes within the statutory exemption. *United Air Lines, Inc. v. Johnson*, 84 Ill.2d 446, 455-56, 50 Ill.Dec. 631, 419 N.E.2d 899 (1981). Such exemptions are to be strictly construed, and doubts concerning the applicability of the exemptions will be resolved in favor of taxation. *United Air Lines*, 84 Ill.2d at 455, 50 Ill.Dec. 631, 419 N.E.2d 899."

Regulations made by the Minister under section 212 of the IR Act read with section 26 therein and published in Gazette Notification No. 1606/31 dated 19.06.2009 (Regulation) reads:

> *"Two thirds of the Nation Building Tax charged by the Nation Building Tax Act, No. 9 of 2009 payable for the period commencing on May 1, 2009 and ending on June 30, 2009, and for every quarter commencing on or after July 1, 2009, shall for the purposes of sub-paragraph (iii) of paragraph (l) of sub-section (1) of section 26 of the Inland Revenue Act No. 10 of 2006 be a prescribed levy".*

Hence, a portion of the NBT has been made a prescribed levy for the purposes of section 26(1)(l)(iii) of the IR Act. However, the Appellant contends that it has been made a prescribed levy only for the persons who pay NBT quarterly whereas the Appellant pays NBT at the point of importation on each article and therefore is not caught within the prohibition on deduction.

The Respondent on the other hand submits that the prohibition on deduction in terms of section 26(1)(l)(iii) of the IR Act covers all three persons referred to in section 2 of the IR Act including the Appellant and therefore the Appellant is not entitled to deduct the NBT paid by it on its imports.

In order to have a better understanding of the competing positions, it is important to examine certain other provisions in the NBT Act. Section 3(1) of the NBT Act reads:

> 3. (1) A tax to be called the "Nation Building Tax" (hereinafter referred to as "the Tax") shall, subject to the provisions of this Act, be charged from every person to whom this Act applies calculated at the appropriate rate specified in the Second Schedule to this Act, in the following manner: -
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> (i) in the case of a person referred to in paragraph (a) of subsection (1) of section 2, who imports any article into Sri Lanka on or after January 1, 2009 the tax shall be chargeable in respect of the liable turnover of such person arising from the importation into Sri Lanka of such article; and
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> (ii) in the case of a person referred to in paragraph (b) (c) or (d) of subsection (1) of section 2, for every quarter commencing on or after January 1, 2009 (hereinafter referred to as "relevant quarter", the tax shall be chargeable in respect of the liable turnover of such person for such relevant quarter.

Section 3(1) of the NBT Act deals with two separate and distinct incidents of the taxing regime. The first part is the charging section by which NBT is charged on every person to whom the Act applies, namely the persons referred to in section 2 of the NBT Act. The second part deals with the calculation of the NBT. Accordingly, NBT is calculated at the appropriate rate specified in the Second Schedule thereto in the case of importers of any article on the liable turnover of such person arising from the importation into Sri Lanka of such article and in the case of a person referred to in paragraph (b) (c) or (d) of subsection (1) of section 2, the NBT is calculated on the liable turnover of such person for such relevant quarter.

The Respondent has based its argument on the reference to quarter in the Regulation and submits that as an importer it does not pay NBT quarterly but only in respect of the liable turnover of such person arising from the importation into Sri Lanka of such article and as such the NBT it pays on every import is not a prescribed tax or levy.

I am unable to accede to this submission. The Regulation covers both the charging section as well as the calculation part referred to above. That is why the Regulation reads " ***Two thirds of the Nation Building Tax charged by the Nation Building Tax Act, No. 9 of 2009*** *payable for the period commencing on May 1, 2009 and ending on June 30, 2009, and for every quarter commencing on or after July 1, 2009...".* If one were to accept the submission of the Appellant it would amount to excluding part of the Regulation in its interpretation.

Furthermore, as the learned Senior State Counsel correctly submitted if the Minister actually intended to exclude importers from the application of the Regulation, he could easily have done so by referring to only the categories of enterprises referred to in paragraphs b), c) and d) of Section 2(1) of the NBT Act.

For the reasons aforesaid, Court answers the following questions of law as follows:

(1) Is Assessment No. ITA 12301100140V1 dated 30 November 2012 for the year 2009/2010 invalid in law in view of the Inland Revenue Department previously issuing Assessment No. 6490818 V0 dated 20 May 2011 for the same year of assessment on the basis of the return which had been duly fled by the Appellant for that year of assessment? **Does not arise for determination.**

(2) Without prejudice to point 1 above, was the assessment for the year 2009/2010 dated 30th November 2012 on Assessment No. ITA 12301100140V1 time barred in terms of Section 163(5)(a) of the Inland Revenue Act No. 10 of 2006 (as amended) (the "Act") as applicable to such year of assessment? **No.**

(3) Should the appeal which has been filed against the assessment by the Appellant been allowed in terms of Section 165(14) of the Act since it has not been determined by the Commissioner General of Inland Revenue within the time period specified therein? **No. There is no requirement that the acknowledgement must be signed by the Commissioner General of Inland Revenue.**

(1) Is Nation Building Tax paid at the time of importation of goods not a "prescribed tax or levy" for the purpose of section 26(1)(l)(iii) of the Act? **No. It is a "prescribed tax or levy" for the purpose of section 26(1)(l)(iii) of the Inland Revenue Act No. 10 of 2006 (as amended).**

For the reasons aforesaid, this Court confirms the Determination of the TAC.

The Registrar is directed to send a certified copy of this judgment to the TAC.

Judge of the Court of Appeal

Achala Wengappuli J.

I agree.

Judge of the Court of Appeal