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

In the matter of an application of a case stated under section 11A of the Tax Appeals Commission Act No. 23 of 2011 as amended by Act No. 20 of 2013

The Commissioner General of Inland Revenue,

Department of Inland Revenue,

Inland Revenue Building,

Sir Chittampalam A. Gardiner Mawatha,

Colombo 02.

**APPELLANT**

**Case No. CA/TAX/03/2017**

**Vs.**

**Tax Appeal Commission Case No.**

**TAC/IT/044/2015**

Dr. S.S.L. Perera,

No. 07, Manel Place,

Sirimal Uyana,

Ratmalana.

**RESPONDENT**

**Before:** Janak De Silva J.

Achala Wengappuli J.

**Counsel:**

Manohara Jayasinghe State Counsel for the Appellant

Riad Ameen with P. Balendran for the Respondent

**Written Submissions tendered on:**

Appellant on 25.09.2018

Respondent on 26.09.2018

**Argued on:** 31.07.2018

**Decided on:** 11.01.2019

**Janak De Silva J.**

A Case Stated under Section 11A of the Tax Appeals Commission Act No. 23 of 2011 as amended (TAC Act) was transmitted to this Court by the Appellant by letter dated 14.02.2017. It contained the following questions of law:

(1) Whether the Tax Appeals Commission has erred in law to determine the appeal on the matters raised as preliminary objections by the Appellant?

(2) Whether the Tax Appeals Commission acted in excess of its limited jurisdiction as It cannot assume jurisdiction it does not possess to decide questions of law?

(3) Whether the Tax Appeals Commission has failed to give due consideration to the finding of the Supreme Court case (DMS Fernando and another vs. A.M. Ismail – SC No. 22/1981) that "writ of certiorari is the proper remedy" when the assessor fails to give reasons for the rejection of the return?

(4) Whether the "audi alteram partem" principle is applicable to a person who was not comply with the request to be presented for an interview (to be heard)?"

On 15.11.2017 the Appellant sought permission to submit additional questions of law. The Respondent reserved his right to object to any new questions of law.

The Appellant by motion dated 01.05.2018 moved Court to accept the following additional questions of law:

(1) Did the Tax Appeals Commission err in law when it held that reasons for the assessment had to be given, in the circumstances of this case?
(2) Did the Tax Appeals Commission err in law when it held that reasons for not accepting the return of the Respondent has not been communicated to the Respondent?
(3) Did the Tax Appeals Commission err in law when it held that the assessment was confirmed by the Appellant without affording the Respondent a hearing?

On 31.07.2018 the learned counsel for the Respondent informed that the Respondent is objecting to the additional questions of law. On the same day, parties informed that they are willing to dispose this matter by way of written submissions. Both parties have filed written submissions.

The Respondent submits that the obligation to set out the questions of law is, in terms of section 11A of the TAC Act, on the Appellant and that new questions of law cannot be permitted to be raised at this point of time. Reliance is placed on the decision in *Consolidated Goldfileds PLC vs. Inland Revenue Commissioners* (1990) STC 357.

Section 11A (1) and (2) of the TAC Act reads:

> "(1) Either the person who preferred an appeal to the Commission under paragraph (a) of subsection (1) of section 7 of this Act (hereinafter in this Act referred to as the "appellant") or the Commissioner-General may make an application requiring the Commission to state a case on a question of law for the opinion of the Court of Appeal. Such application shall not be entertained unless it is made in writing and delivered to the secretary to the Commission, together with a fee of one thousand and five hundred rupees, within one month from the date on which the

decision of the Commission was notified in writing to the Commissioner -General or the appellant, as the case may be.

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

In terms of section 11A (1) of the TAC Act, either the person who preferred an appeal to the Tax Appeals Commission (TAC) under paragraph (a) of subsection (1) of section 7 of the TAC Act or the Commissioner-General may make an application requiring the TAC to state a case on a question of law for the opinion of the Court of Appeal. It is the TAC that must state a case on a question of law for the opinion of this Court. This is clear upon a consideration of section 11A (2) of the TAC Act which states that "**the case stated by the Commission"**.

In this regard it is important to ascertain what falls within a "case stated". In *Rajapakse v. Commissioner of Income Tax* (Reports of Ceylon Tax Cases, Vol. I, page 27 at 33) Drieberg J. held that "A 'case stated' should, I think, contain in addition to a statement of the facts the matter of law submitted for decision formulated as a question". Accordingly, in my view the obligation to frame the questions of law is initially placed on the TAC and not the Appellant as contended by the Respondent. In fact, Basnayake C.J. in *R.M. Fernando v. Commissioner of Income Tax* (Reports of Ceylon Tax Cases, Vol. I, page 571 at 577) specifically stated that "it is not for the appellant to state the questions of law arising on a case stated".

Of course, a party preferring an appeal may in the application propose certain questions of law for consideration by the TAC to be referred to this Court as part of the case stated. But the TAC cannot blindly adopt the proposed questions of law without giving its mind to them. Such a course of action will amount to an abdication of its statutory responsibilities.

It is said that the current practice is that the TAC forwards all the questions of law set out in the application preferred by an appellant to this Court as part of the case stated. In this respect, I reiterate the following statement of Basnayake C.J. in *R.M. Fernando v. Commissioner of Income Tax* (Supra. at 578):

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

The next question is whether this Court is bound to answer only the questions of law referred in the case stated by the TAC.

Section 11A (6) of the TAC Act reads:

> "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." (emphasis added).

The words "hear and determine any question of law arising on the stated case" appeared in section 74(5) of the Income Tax Ordinance No 2 of 1932 and was interpreted by Basnayake C.J. in *R.M. Fernando v. Commissioner of Income Tax* (Supra. at 577) to mean that it requires the Court to hear and determine any questions of law arising on the stated case and not any question or questions formulated by the Board. Previously in *M.P. Silva v. Commissioner of Income Tax* (Reports of Ceylon Tax Cases, Vol. I, page 336 at 338) Canekeratne J. having considered section 74(5) of the Income Tax Ordinance No 2 of 1932 held that "all questions that could be raised on

the whole case was intended to be left open". The learned Judge chose to follow the dicta in *Ushers Wiltshire Brewery v. Bruce* [(1915) A.C. 433 at 465,466].

In *Commissioner of Income Tax v. Saverimuttu Retty* (Reports of Ceylon Tax Cases, Vol. I, page 103 at 109) Abrahams C.J. did make a similar statement by stating:

> "Incidentally there was no reference to us on this point by the Board of Review, since that point was not put to the Board when they were called upon to adjudicate in appeal, but we are not, of course precluded from considering any point upon which the actual decision of the Board might be upheld, no matter what might have been their reasons for arriving at that decision".

It is an established rule of interpretation that the legislature is presumed to know the law, judicial decisions and general principles of law. *Bindra's Interpretation of Statutes*, 10th ed., page 235 states as follows:

> "The legislature must be presumed to know the course of the legislation, as well as the course of judicial decisions in the country, *a fortiorari* of the superior courts of the country. It is a well-settled rule of construction that when a statute is repealed and re-enacted, and words in the repealed statute are reproduced in the new statute, they should be interpreted in the sense which had been judicially put on them in the repealed Act, because the legislature is presumed to be acquainted with the construction which courts have put upon the words, when they repeat the same words, they must be taken to have accepted the interpretation put on them by the court as correctly reflecting the legislative mind."

In *Nilamdeen v. Nanayakkara* (76 N.L.R. 169) it was held that it is a well-known rule of construction that where the legislature uses in an Act a legal term which has received judicial interpretation, it must be assumed that the term is used in the sense in which it has been judicially interpreted. There is also another rule of construction that where the words of an old statute are made part of a new statute, the legal interpretation which has been put upon the former by courts of law is applicable to those same words in the new statute.

Accordingly, I hold that it is open for this Court to consider questions of law other than what is set out in the case stated. However, I wish to state that such a course of action is permissible only if the answers to the new questions of law may result in the confirmation, reduction, increasing or annulling the assessment determined by the Commission, or requires the remitting of the case to the TAC with the opinion of the Court. Questions of law which are purely of academic interest cannot be raised [*Navaratnam v. Commissioner of Income Tax* (Reports of Ceylon Tax Cases, Vol. I, page 378 at 381)]. The same test applies to the to questions of law to be formulated by the TAC for reference to this Court.

For the reasons set out above, I am of the view that the additional questions of law proposed by the Appellant should be accepted as they fulfil the requirements set out above.

Accordingly, the questions of law to be determined by this Court in this case stated are:

(1) Whether the Tax Appeals Commission has erred in law to determine the appeal on the matters raised as preliminary objections by the Appellant?

(2) Whether the Tax Appeals Commission acted in excess of its limited jurisdiction as It cannot assume jurisdiction it does not possess to decide questions of law?

(3) Whether the Tax Appeals Commission has failed to give due consideration to the finding of the Supreme Court case (DMS Fernando and another vs. A.M. Ismail – SC No. 22/1981) that "writ of certiorari is the proper remedy" when the assessor fails to give reasons for the rejection of the return?

(4) Whether the "audi alteram partem" principle is applicable to a person who was not comply with the request to be presented for an interview (to be heard)?"

(5) Did the Tax Appeals Commission err in law when it held that reasons for the assessment had to be given, in the circumstances of this case?

(6) Did the Tax Appeals Commission err in law when it held that reasons for not accepting the return of the Respondent has not been communicated to the Respondent?

(7) Did the Tax Appeals Commission err in law when it held that the assessment was confirmed by the Appellant without affording the Respondent a hearing?

The substantive matter will in due course be fixed for argument.

Judge of the Court of Appeal

**Achala Wengappuli J.**

I agree.

Judge of the Court of Appeal