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

In the matter of an Appeal in terms of Section 144 of the Inland Revenue Act No. 24 of 2017 against the Order/Determination of the Tax Appeals Commission dated 26.04.2018 received by the Appellant on 01.05.2018 in respect of File No. TAC/IT/008/2014

Access International (Private) Limited,

No. 278, Union Place,

Colombo 02.

APPELLANT

Case No. CA(Tax)11/2018

Vs.

1. Mr. Ivan Dissanayake,
   Commissioner General of Inland Revenue,
   Department of Inland Revenue,
   Inland Revenue Building,
   Sir Chittampalam A. Gardiner Mawatha,
   Colombo 02.
2. Justice Hector Yapa,
   Chairman – Tax Appeals Commission,
   No. 109, Rotunda Tower, 6th Floor,
   Galle Road,
   Colombo 03.
3. Justice Sunil Rajapaksha,
   Member – Tax Appeals Commission,
   No. 109, Rotunda Tower, 6th Floor,
   Galle Road, Colombo 03.

4. Mr. S. Swarnajothi,
   Member – Tax Appeals Commission,
   No. 109, Rotunda Tower, 6th Floor,
   Galle Road,
   Colombo 03.
5. Hon. Attorney General,
   Attorney General's Department,
   Hulftsdorp,
   Colombo 12.

RESPONDENTS

Before: Janak De Silva J.

Achala Wengappuli J.

Counsel:

Romesh De Silva P.C. with Harsha Amarasekera P.C. and Kanchana Pieris for the Appellant

Nerin Pulle DSG with S. Gnanaraj SSC Counsel for the 5th Respondent

Written Submissions tendered on:

Appellant on 18.07.2018

Respondent on 17.07.2018

Argued on: 12.06.2018

Decided on: 12.02.2019

Janak De Silva J.

This is an appeal made under section 144 of the Inland Revenue Act No. 24 of 2017 (Act) against the Order/Determination of the Tax Appeals Commission (TAC) dated 26.04.2018 said to have been received by the Appellant on 01.05.2018 in respect of File No. TAC/IT/008/2014.

When this matter was supported on 12.06.2018 the learned DSG appearing on behalf of the 5th Respondent raised two preliminary objections namely:

(1) That the Appellant has only filed a notice of appeal without filing petition of appeal which violates the applicable law and the rules of this Court

(2) That the Appellant has failed to make an appeal requesting the TAC in terms of Section 144(2) of the Act prior to making this appeal

In addition to the above issues the Court was of the view that the following issue also arises for consideration namely:

(3) Whether the provisions of the Act will apply to this application made by the Appellant in view of Section 203(1) of the Act

Parties were directed to file written submissions on the above preliminary issues which they have done. Prior to dealing with these preliminary issues it is necessary to briefly set out the factual matrix of the case in so far as it relates to the preliminary issues.

Factual Matrix

The Appellant submitted the returns of income for the year of assessment 2010/2011 and claimed a tax exemption under section 13(dddd) of the Inland Revenue Act No. 10 of 2006 as amended (2006 Act) for the commission income of Rs. 398,392,868/= received from the supplier Mabey & Johnson Ltd. UK. The assessor disallowed the tax exemption. The Appellant appealed to the Commissioner General of Inland Revenue who rejected the appeal on 17.11.2015. The Appellant then appealed to the TAC which dismissed the appeal by its determination dated 26.04.2018 which was said to have been received by the Appellant on 01.05.2018.

The Act

The Act was certified on 24.10.2017. In the ordinary course of events the Act would have become operative with effect from that date in view of Article 80(2) of the Constitution. However, section 1 of the Act specifically states that the Act comes into operation on April 1, 2018. I shall later advert to the significance of this fact to the issues to be determined by Court.

Difference in the Appeal Procedure

Prior to the Act coming into operation Section 170 of the 2006 Act set out the procedure to be followed in making an appeal to this Court on a question of law against a decision of the Board of Review or the TAC. This was repealed by the Tax Appeals Commission (Amendment) Act No. 20 of 2013 and a new procedure in making appeals was established thereunder. Accordingly, section 11A (1) of the Tax Appeals Commission Act No. 23 of 2011 as amended (TAC Act) requires any party, seeking a case stated to be referred to this Court, to make an application to the TAC to state a case on a question of law for the opinion of Court.

On the contrary, section 144(1) of the Act requires a party before the TAC who is dissatisfied with the decision of the TAC to file a notice of appeal with this Court. The Appellant submits that the Act does not in any event repeal the TAC Act. Whilst this is true, section 138 of the Act, under the heading "Objections and Appeals", states that in the event of any conflict or inconsistency between the provisions of the Act and the provisions of any other written law, the provisions of the Act shall prevail. It is in this context that this Court has to determine the applicable appeal procedure for the instant case and to ascertain its conformity with it.

Applicability of the Act

I will first deal with issue (3) formulated by Court as the other two issues raised by the learned DSG need to be considered only if the Act is applicable to the instant case.

Section 202(1) of the Act repeals the 2006 Act. However, section 203(1) of the Act provides that the 2006 Act shall continue to apply for the years of assessment commencing prior to the date on which this Act comes into effect. The instant case deals with issues arising in the year of assessment 2010/2011. However, the learned DSG submits that the effect of section 203(1) of the Act is to apply the substantive provisions of the 2006 Act such as whether the Appellant was entitled to an exemption from income tax for the year of assessment on its commission income to the instant case and that section 203(1) of the Act has no bearing on the question as to whether the Appellant could have invoked the appellate procedure set out in section 144 of the Act.

However, there are several factors which negates the position articulated by the learned DSG.

The fact that the Act which in the ordinary course of events would have been effective from 24.10.2017 was made effective from April 1, 2018 is significant for that is the date on which the next year of assessment 2018/2019 begins. The cumulative effect of these facts is an indication that the intention of the legislature was to make the Act operative for the years of assessment 2018/2019. These facts by themselves is not determinative of the issue before Court since as the learned DSG submitted it could well mean that the intention of the legislature was to make only the substantive provisions of the Act applicable to the years for assessment commencing prior to the date on which the Act became effective.

However, section 202(5) of the Act states that ***appeals, prosecutions and other proceedings*** commenced before the commencement of the Act shall continue and shall be disposed of as if this Act had not come into force.

This provision is comparable to section 6(3)(c) of the Interpretation Ordinance which reads:

> "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 –
>
> ...
>
> (c) any ***action, proceeding, or thing pending or incompleted*** 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" (emphasis added)

Our courts have sought to adopt a wide interpretation to the words "action, proceeding, or thing pending or incompleted" in section 6(3)(c) of the Interpretation Ordinance in order to mitigate any hardship caused to persons due to ex post facto legislation and to protect vested or acquired rights of parties. Acquired rights in this context must be understood in the context of the statement of Channell J. in *Starvey v. Graham* [(1899) 1 Q.B. 406 at 411] where he defined "rights acquired "as "some specific right which in one way or another has been acquired by an individual, and which some persons have got and others have not. It does not mean a "right" in the sense in which it is popularly used, such as a "right" which a person has to do which that which the law does not expressly forbid."

In *Vanderpoorten et al v. The Settlement Officer* (48 NLR 361) proceedings were commenced under the Waste Lands Ordinance No. 1 of 1897. During the course of the proceedings the Waste Lands Ordinance was repealed by the Land Settlement Ordinance. Proceedings were continued under the Waste lands Ordinance and Final Order was made. The appellants thereafter presented a petition under section 24 of the Land Settlement Ordinance claiming the land. The question arose whether the petition was validly made. Keuneman A.C.J. held (at page 364):

> "Under section 1 of the Waste Lands Ordinance the Government Agent has to publish notice calling for claims. Under section 2, where no claim is made within 3 months the Government Agent makes an order declaring the land to be the property of the Crown.

> Under sections 3 and 4 provision is made for inquiry into claims made within the prescribed period, and the making of an appropriate order. Section 20 permits claims to be made within one year of any order declaring the land to be property of the Crown, and sets out the procedure to be adopted. All these various steps appear to me to be part of the same "action, proceeding, or thing" and the repealing Ordinance did not prevent all these various steps being proceeded with until a final result is achieved. I think any other interpretation would result in hardship, which was not contemplated by the Legislature."

In *Perumawasam Silva et al., v. Balasingham (A.G.A. Kalutara)* (53 N.L.R. 421) Pulle J. held that the word "proceeding" in section 6(3)(c) of the Interpretation Ordinance can be read in the wider sense.

In *Kiribanda v. Biso Menika* (60 NLR 94) H.N.G. Fernando J. (as he was then) held that an ordinary civil action does not necessarily terminate with the entry of a decree, and procedure for execution of the decree is a step in the action, however long the interval between the decree and the application for execution. If therefore an action has been instituted under some Statute, section 6(3)(b) of the Interpretation Ordinance will enable the action to be continued right up to the execution despite the repeal of the Statute. He further held that the right to seek enforcement of the order from time to time was a right which the applicant acquired when she first made application to the Registrar under the Ordinance for an order of maintenance, and the repealed provision for enforcement can therefore be invoked so long as the order remains in force.

In *Don Edwin v. Commissioner for Workmen's Compensation* (63 N.L.R. 83) Weerasooriya J. held that in the context of section 6(3)(c) of the Interpretation Ordinance proceedings taken under section 41 of the Workmen's Compensation Ordinance for the enforcement of an award are analogous to proceedings in execution of a decree, and are a continuation of the action in which the award was made.

In *State Timber Corporation v. Moiz Goh (Pvt) Ltd.* [(2000) 2 Sri.L.R. 316] Jayawickrema J. held that in the context of section 6(3)(c) of the Interpretation Ordinance arbitral proceedings means and include the enforcement of the arbitral award.

However, in *Thambiah Seevaratnam and two others v. The Assistant Commissioner of Cooperative Development, Jaffna* [79(II) NLR 104 at 108] Ratwatte J. held that section 6(3)(c) of the Interpretation Ordinance will apply only in cases where there is no specific provision made in the repealing Act whereas there is specific provision in section 202(5) of the Act dealing with ***appeals, prosecutions and other proceedings*** commenced before the commencement of the Act. Nevertheless, I am of the view that in interpreting those provisions it is in the interests of justice for Court to adopt a wider interpretation similar to the wider interpretation adopted by courts to section 6(3)(c) of the Interpretation Ordinance.

The question arises whether "any appeal, prosecution or other proceeding" commenced before the commencement of the Act in the instant case since this appeal to this Court was made by notice of appeal dated 24.05.2018 whereas the Act came into operation on 01.04.2018. In other words, the appeal to this Court in the instant case was made after the Act came into operation. One can therefore contend that no appeal commenced before the commencement of the Act and as such section 202(5) of the Act is inapplicable.

Such an approach would lead to a narrow interpretation of the word "appeal" which affects acquired or vested rights of the Appellant since the Appellant appealed to the TAC before the commencement of the Act. In terms of section 11A (1) of the TAC Act the Appellant has the right to apply to the TAC to state a case on a question of law for the opinion of this Court. Furthermore, section 11A (5) of the TAC Act allows this Court to send the case stated back to the TAC for amendment and the TAC shall then amend the case accordingly. Additionally, after a case stated is referred, this Court can act under section 11A (6) of the TAC Act and inter alia remit the case to the TAC with the opinion of the Court and where a case is so remitted by the Court, the TAC has to revise the assessment in accordance with the opinion of the Court. This Court can also confirm, reduce, increase or annul the assessment determined by the TAC. Furthermore, in view of section 11A (7) of the Act Court may, pending the determination of the case stated, make an interim determination as regards the amount of tax recoverable in respect of the amount of tax in dispute.

In my view these provisions support the view that the case stated to this Court in terms of section 11A (1) of the TAC Act is in a fact a step in the appeal made by the Appellant to the TAC. That appeal commenced before the commencement date of the Act and as such comes within section 202(5) of the Act. Accordingly, it has to be continued and disposed of as if the Act had not come into force.

Therefore, the Appellant cannot have recourse to section 144 of the Act and file a notice of appeal as has been done in the instant case.

In view of the conclusions set out above, there is no need for any determination to be made on the other two preliminary objections raised by the learned DSG on behalf of the 5th Respondent as they arise only if the Act applies to the instant case.

For the reasons set out above, I dismiss the appeal filed by the Appellant with costs.

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