

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

In the matter of a case stated by the
Tax Appeals Commission Constituted
under Tax Appeals Commission Act
No.23 of 2011 for the opinion of the
Court of Appeal under Section 11A of
the Tax Appeals Commission Act
No.23 of 2011 (as Amended).

ACL Cables

No.60, Rodney Street,

Colombo 08.

Appellant

Case No: CA(Tax) 16/2014

Tax Appeals Commission Case No:

TAC/OLD/SD/001

Vs.

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:

Hiran De Alwis with Heshan Thambimuttu for the Appellant

Milinda Gunatilleke SDSG for the Respondent

Written Submissions tendered on:

Appellant on 10.07.2018

Respondent on 16.07.2018

Argued on: 18.05.2018

Decided on: 15.02.2019

Janak De Silva J.

The Appellant is a company listed in the Colombo Stock Exchange. On 09.02.2007 the Appellant made a bonus share issue to its existing ordinary shareholders on the basis of one bonus share for each share held by the existing shareholders. A total number of 14,973,420 bonus shares were issued. Each bonus share was valued by the Appellant at Rs. 10/= per share which reflects the nominal value of an ordinary share issued by the Appellant. Accordingly, the Appellant on 20.04.2007 paid a sum of Rs. 748,671.00 as stamp duty based on a total valuation of Rs. 149,734,200.00.

The assessor disagreed with the valuation and payment and issued a notice under section 10 of the Stamp Duty (Special Provisions) Act No. 12 of 2006. The notice stated that the assessment has been made on the basis of a valuation taking the value of the bonus share issued at Rs. 140.00 and the rate of stamp duty payable at 0.5%. It was the position of the revenue authorities that accordingly, the stamp duty in dispute is the balance amount payable of Rs. 9,732,724.00 and the penalty of Rs. 3,773,302.00.

The Appellant appealed to the Respondent who confirmed the assessment. The Appellant then appealed to the Board of Review in terms of section 138(3) of the Inland Revenue Act No. 38 of 2000 which appeal was heard and determined by the Tax Appeals Commission (TAC) in terms of Tax Appeals Commission Act No. 23 of 2011 as amended. The TAC confirmed the determination of the Respondent. The Appellant requested that the TAC refer a case stated to this Court and accordingly, the TAC has referred the following questions of law to this Court:

- (1) Is the determination of the value in terms of the provisions of the Stamp Duty Act wrongful in law and violates the provisions of the Companies Act?
- (2) Does the judgment in SC Appeal No. 40/2010 in relation to stamp duty payable on bonus shares based on par value applicable?
- (3) Is the determination of the Tax Appeals Commission time barred?
- (4) Did the bonus shares have open market value on the date of the bonus issue?
- (5) Was the assessor correct in considering the market price as at 06.03.2007 for a bonus issue made on 09.02.2007?
- (6) Was stamp duty payable on shares for which share certificates were renounced by shareholders to facilitate direct lodgement to the Central Depository System?
- (7) Is stamp duty payable in respect of bonus shares?
- (8) If so, who is liable to pay stamp duty?
- (9) Whether definitions found in Section 71 of the Stamp Duty Act No. 43 of 1982 applicable in interpreting provisions of the Stamp Duty (Special Provisions) Act No. 12 of 2006?
- (10) In any event is the assessment excessive?

During the argument the learned Counsel for the Appellant informed that the Appellant is not pursuing question no. (3). In any event we have in *Kegalle Plantations PLC vs. Commissioner General of Inland Revenue* [CA(Tax) 09/2017, C.A.M. 04.09.2018] held that the time limit within which the TAC must hear and determine an appeal is directory and not mandatory.

The remaining questions broadly fall within three categories namely whether stamp duty is payable on bonus shares, if so the basis on which stamp duty must be paid and who is liable to pay the stamp duty.

Whether Stamp Duty is Payable on Bonus Shares?

The Appellant submits that stamp duty is not payable on bonus shares for three reasons:

- (i) The majority decision in *The Commissioners of Inland Revenue v. John Blott* (H.L.) [(1921) 2 A.C. 171] established that bonus shares results in the distribution capital and thus is not liable for tax. Hence the issuance of bonus shares does not attract income tax in Sri Lanka. It was submitted that the same view was held by the Supreme Court of the United States in *Eisner v. Macomber* [1920, 252 U.S. 189].
- (ii) In *Associated Motorways PLC v. The Commissioner General of Inland Revenue* [SC Appeal No. 40/2010, S.C.M. 04.04.2014] the Supreme Court held that a share is a chose in action which cannot be categorised as property and accordingly cannot be subject to stamp duty.
- (iii) The assessor wrongfully invoked the provisions of the Stamp Duty Act No. 43 of 1982 whereas section 13 of the Stamp Duty (Special Provisions) Act No. 12 of 2006 mandates that the provisions of that Act shall prevail over the Stamp Duty Act No. 43 of 1982 if any inconsistency arises between the two Acts.

At the outset it must be pointed out that the Appellant never contended that stamp duty was not payable on bonus shares. The Appellant did in fact pay stamp duty on the bonus shares at the par value and only contested that it is not bound to pay stamp duty at the market value. The Appellant cannot approbate and reprobate.

In *Ranasinghe v. Premadharma and others* [(1985) 1 Sri.L.R. 63 at 70] Sharvananda C. J. held:

“In cases where the doctrine of approbation and reprobation applies, the person concerned has a choice of two rights, either of which he is at liberty to adopt, but not both. When the doctrine does apply, if the person to whom the choice belongs irrevocably and with full knowledge accepts the one, he cannot afterwards assert the other; he cannot affirm and disaffirm”

The decision in *The Commissioners of Inland Revenue v. John Blott* (H.L.) (supra) is not relevant to the instant case as the Supreme Court in *Associated Motorways PLC v. The Commissioner General of Inland Revenue* (supra) held that stamp duty is payable on the share certificates issued for bonus shares based on par value.

It is correct that the Supreme Court in *Associated Motorways PLC v. The Commissioner General of Inland Revenue* (supra) categorised a bonus share as a chose in action but that that was in the context of determining that the definition of “value” in section 71 of the Stamp Duty Act No. 43 of 1982 is inapplicable to the facts of the said case. The Supreme Court in fact held that stamp duty is payable on the share certificate issued for bonus shares as stamp duty under Stamp Duty (Special Provisions) Act No. 12 of 2006 is imposed on a share certificate which is a “specified instrument” within the meaning of the Act.

Therefore, the question posed by the Appellant, namely whether stamp duty is payable for bonus shares is not the relevant question. The proper question is whether stamp duty is payable on the share certificate issued for bonus shares as stamp duty under Stamp Duty (Special Provisions) Act No. 12 of 2006 and the answer is in the affirmative.

The Appellant sought to argue that no stamp duty was payable for share certificates where they were renounced by shareholders to facilitate direct lodgement to the Central Depository System (CDS). We are not inclined to accept this position. Rules 3.8 and 15 of the Listing Rules of the Colombo Stock Exchange (CSE) establishes that share certificates must be issued for all bonus shares directly lodged into CDS accounts.

Basis on which Stamp Duty is Payable on Bonus Shares

Learned Senior Deputy Solicitor General (SDSG) for the Respondent submitted that stamp duty on bonus shares are payable on the market value. He particularly relied on sections 3(1) and 4(f) of the Stamp Duty (Special Provisions) Act No. 12 of 2006 and sections 15(1) and 71 of the Stamp Duty Act No. 43 of 1982.

The learned counsel for the Appellant countered by submitting that the facts of *Associated Motorways PLC v. The Commissioner General of Inland Revenue* (supra) are identical to the facts of the instant case and that this Court is bound by the decision of the Supreme Court therein that stamp duty is payable on the share certificate issued for bonus shares based on par value.

Having closely scrutinised the facts and the legal issues considered by the Supreme Court in *Associated Motorways PLC v. The Commissioner General of Inland Revenue* (supra) this Court is of the view that the facts and the legal issues in the said case and the instant case are the same and as such this Court is bound to follow the decision of the Supreme Court.

In *Associated Motorways PLC v. The Commissioner General of Inland Revenue* (supra) the Supreme Court gave anxious consideration to two Gazette notifications namely No. 1439/1 and 1465/19 and took due cognizance of the change in the wording from “market value” to “aggregate value” and considered the change to be a clear indication of a change in the basis of ascertaining the value of a bonus share for the purposes of payment of stamp duty.

It is true that this Court is not bound by a judgment of the Supreme Court if it was made *per incuriam* [*Ramanathan Chettiar v. Wickremarachchi and others* (1979) 2 Sri.L.R. 395]. However, the learned SDSC did not pursue such a line of argument. He only contended that the judgment in *Associated Motorways PLC v. The Commissioner General of Inland Revenue* (supra) is distinguishable. Having carefully considered that decision and the facts and the legal issues involved in the instant case this Court is of the view that it is not so distinguishable.

Per Incuriam

The term *per incuriam* is generally used in the context of the *Stare Decisis* principle. In this context, it has received a restricted meaning.

The leading authority on the *per incuriam* principle is *Young v. British Aeroplane Co. Ltd.* [(1944) K.B. 718] where Lord Greene M.R. (at pages 725-6) held that *per incuriam* decisions are where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute although he stressed that they do not think that it would be right to say that there may not be other cases of decisions given *per incuriam* although such cases

would obviously be of the rarest occurrence and must be dealt with in accordance with their special facts.

Later cases have sought to clarify the scope and meaning of the term *per incuriam*. In *Police Authority for Huddersfield v. Watson* [(1947) K.B. 842 at 847] Lord Goddard, Lord Chief Justice held that what is meant by giving a decision *per incuriam* is giving a decision when a case or a statute has not been brought to the attention of the court and it has given its decision in ignorance or forgetfulness of the existence of that case or that statute.

However, Courts were reluctant to lay any rigid rule in identifying decisions made *per incuriam*. As Sir Raymond Evershed MR stated in *Morelle v Wakeling* [(1955) 2 Q.B. 379 at p 406]:

"As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. ***This definition is not necessarily exhaustive*** but cases not strictly within it which can properly be held to have been decided *per incuriam* must, in our judgment, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of Lord Greene, of the rarest occurrence. In the present case it is not shown that any statutory provision or binding authority was overlooked, and *while not excluding the possibility that in rare and exceptional cases a decision may properly be held to have been per incuriam on other grounds*, we cannot regard this as such a case. As we have already said, it is, in our judgment, impossible to fasten upon any part of the decision under consideration or upon any step in the reasoning upon which the Judgments were based and to say of it: "*Here was a manifest slip or error*." (Emphasis added)

Although that decision was overruled in *Attorney General v. Parsons* [1956] AC 421, it was without criticism of that general proposition.

In *Rickards v. Rickards* [(1989) 3 W.L.R. 748] the Court of Appeal sought to provide some general considerations on the exceptional categories as follows:

“First, the preferred course must always be to follow the previous decision, but to give leave to appeal in order that the House of Lords may remedy the error. This was attempted in Bokhari v. Mahmood, but failed because of the understandable reluctance of the defendant to prosecute the appeal. Second, certainty in relation to substantive law is usually to be preferred to correctness, since this at least enables the public to order their affairs with confidence. Erroneous decisions as to procedural rules affect only the parties engaged in relevant litigation. This is a much-less extensive group and accordingly a departure from established practice is to that extent less undesirable. Third, an erroneous decision which involves the jurisdiction of the court is particularly objectionable, either because it will involve an abuse of power if the true view is that the court has no jurisdiction or a breach of the court's statutory duty if the true view is that the court is wrongly declining jurisdiction. Such a decision, of which this case provides an example, is thus in a special category. Nevertheless, this court must have very strong reasons if any departure from its own previous decisions is to be justifiable.”

The learned SDSC submitted that the Supreme Court misconstrued section 49(1) of the Companies Act No. 7 of 2007. Assuming that is true, yet it does not make the decision *per incuriam*. The Supreme Court considered the relevant provision and even if it came to a wrong conclusion this Court cannot under the guise of *per incuriam* disregard the decision of the Supreme Court.

Who is liable to pay the Stamp Duty?

The Appellant submitted that the stamp duty if any has to be paid by the transferee or assignee of the bonus share.

This Court is not minded to accept the point made by the Appellant. The applicable statutory provisions are found in sections 6(b) and 6(e) of the Stamp Duty (Special Provisions) Act No. 12 of 2006. Accordingly, in the case of a transfer or assignment of any share, the stamp duty is

payable by such transferee or assignee and in all other cases by the person drawing making or executing such instrument.

In ascertaining the nature of a bonus share issue in that context, section 4(f) of Stamp Duty (Special Provisions) Act No. 12 of 2006 is instructive as it draws a clear distinction between a new or additional issue of a share and a transfer or assignment of a share. An issue of a bonus share is not a transfer or assignment. It is allotted to a shareholder. Hence in a bonus share issue there are no transferees or assignees. Accordingly, in such a situation the applicable provision is section 6(e) of Stamp Duty (Special Provisions) Act No. 12 of 2006 and as such the stamp duty on a share certificate issued for bonus shares must be paid by the person executing the instrument which in this case is the Appellant.

For the foregoing reasons Court answers the questions of law as follows:

- (1) Is the determination of the value in terms of the provisions of the Stamp Duty Act wrongful in law and violates the provisions of the Companies Act? **Stamp duty is payable on the share certificate issued for bonus shares based on par value.**
- (2) Does the judgment in SC Appeal No. 40/2010 in relation to stamp duty payable on bonus shares based on par value applicable? **Yes.**
- (3) Is the determination of the Tax Appeals Commission time barred? **Not pursued by the Appellant. In any event, No.**
- (4) Did the bonus shares have open market value on the date of the bonus issue? **Does not arise as stamp duty is payable on the share certificate issued for bonus shares based on par value.**
- (5) Was the assessor correct in considering the market price as at 06.03.2007 for a bonus issue made on 09.02.2007? **No as stamp duty is payable on the share certificate issued for bonus shares based on par value.**
- (6) Was stamp duty payable on shares for which share certificates were renounced by shareholders to facilitate direct lodgement to the Central Depository System? **Yes**

- (7) Is stamp duty payable in respect of bonus shares? **Stamp duty is payable on the share certificate issued for bonus shares.**
- (8) If so, who is liable to pay stamp duty? **Appellant.**
- (9) Whether definitions found in Section 71 of the Stamp Duty Act No. 43 of 1982 applicable in interpreting provisions of the Stamp Duty (Special Provisions) Act No. 12 of 2006? **No in the circumstances of the case.**
- (10) In any event is the assessment excessive? **Yes, as stamp duty is payable on the share certificate issued for bonus shares based on par value.**

Accordingly, acting in terms of section 11A (6) of the TAC Act, we annul the assessment determined by 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