<u>IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA</u>

Mr. P.A.N. Jayantha,
Deputy Commissioner,
Department of Revenue,
Western Provincial Council,
Duminda Building,
No. 76-1/1,
Galle Road,
Colombo 4.
And 4 Others
<u>1st-5th Respondent-Appellants</u>

CA CASE NO: CA (PHC) 126/2010
HC COLOMBO CASE NO: HC/WA/11/2008

<u>Vs</u>.

Abeywardena Distributors (Pvt) Ltd.,
No. 101/C,
Katuwawela,
Boralesgamuwa.
<u>Petitioner-Respondent</u>
The Lion Brewary Ceylon PLC.,
No. 254,
Colombo Road,
Biyagama.
<u>6th Respondent-Respondent</u>

Before: K.K. Wickramasinghe, J.
Mahinda Samayawardhena, J.

Counsel: Susantha Balapatabandi, A.S.G., P.C., the 1st-5th Respondent-Appellants.
Maithri Wickremesinghe, P.C., with Rakitha Jayatunga for the Petitioner-Respondent.

Decided on: 05.11.2019

Mahinda Samayawardhena, J.

This is an appeal filed by the Commissioner of the Department of Revenue of the Western Provincial Council (appellant) against the Judgment of the High Court dated 14.09.2010 whereby the Notice of Assessment (X18) served on the petitioner (respondent) on the ground that the petitioner is liable to pay Turnover Tax was quashed by way of a writ of certiorari on the premise that the said decision is *ultra vires*.

When this matter came up for argument, the learned Additional Solicitor General for the appellant and the learned President's Counsel for the respondent agreed to dispose of the argument by way of written submissions.

This appeal revolves around the question of charging Turnover Tax by the Western Provincial Council.

Section 3 of the Financial Statute of the Western Province (R4), insofar as relevant to the present purposes, reads as follows:

> *3(1) Subject to such limits and exemptions as may be prescribed by law…there shall be charged for every quarter…from every person who carries on any business in the province a tax (hereinafter referred to as "the turnover tax") in respect of the turnover made by that person from that business.*
>
> *3(2) For the purpose of this chapter "business" shall mean selling by wholesale or retail of any commodity or article but shall not include a sale by a manufacturer.*

Accordingly, the appellant can charge turnover tax only from a person who is not a manufacturer carrying on the business of selling by wholesale or retail of any commodity or article.

Hence the argument of the appellant in the written submission that "*A business thus becomes liable to turnover tax where it is not carried out by a manufacturer and where it secures a turnover within the meaning of the statute*", is not incomplete, if not incorrect. A business not carried out by a manufacturer to become liable to turnover tax, such business shall be "*selling by wholesale or retail of any commodity or article*".

The commodity involved in this case is beer; and the manufacturer is The Lion Brewery Ceylon PLC (the Lion Brewery); and the respondent is, according to Agency Agreement (X1), a Commission Agent of the Lion Brewery who was paid a commission for the services rendered.

Section 3 quoted above does not permit the appellant to impose turnover tax on commission income.

The appellant seems to be admitting that, if the said Agency Agreement is enforced as it is, the respondent is not liable to pay turnover tax. This I say because the appellant in the written submission states that "*These appellants submit with respect that the said parties had in fact not abided by the tenure of this agreement thereby rendering the respondents liable to turnover tax.*"

Even if the appellant does not admit it, in my view, if the respondent and the Lion Brewery acted in terms of X1, the respondent cannot be made liable pay turnover tax as the respondent did not carry on the business of selling beer either wholesale or retail.[1]

The respondent was a Commission Agent acting on behalf of the Principal, the Lion Brewery.

The argument of the respondent that the business of the respondent, as per X1 Agreement, is that of a Commission Agent and that its income is the commission income has been accepted by the Central Government in relation to charging Economic Service Charge.[2]

The invoices marked by both the appellant and the respondent to establish their cases state that they are the invoices of the Principal-the Lion Brewery and the respondent is only the Agent of the Principal. The Agent was acting on behalf of the Principal, and the sale by the respondent reflected in those invoices was

[1] Vide inter alia clauses 4.1(xvi), (xxxix), 5.1(ii), 7.1-7.6 of X1.

[2] Vide X10 at page 150 of the brief.

the sale of the Principal and not of the Agent. To facilitate that sale, the respondent Agent was given a commission. What has transpired at the interview and reflected on the Notes of Interview (R6) makes no difference.

The appellant states that there are two VAT registration numbers in the invoices, one for the Principal and the other for the Agent indicating the respondent indulges in selling. The respondent in his counter affidavit, drawing attention to X21-X21(viii) has clearly stated that VAT was paid by the respondent not on the sales but on the commission income.[3] This has not been denied by the appellant.

The appellant in the written submissions states that "*Section 2(1) of the Economic Service Charge Act No.13 of 2006 imposes on persons a charge in respect of every part of the relevant turnover of such person or partnership for that relevant quarter. The said Act defines "relevant turnover" in section 3(2) to mean, the aggregate turnover for that relevant quarter of every trade, business carried on or exercised by such person or partnership as the case may be in Sri Lanka whether directly or through an agent.*"

The appellant then states that the respondent has lodged the return in relation to Economic Service Charge for the relevant period in question wherein the respondent himself has declared that the turnover for the said period was Rs.130,503,295/=[4], and therefore the respondent is now estopped from taking up a

[3] Vide paragraph 6 at page 317 of the brief.

[4] Vide the said return at pages 195-198 of the brief.

different position when it comes to Turnover Tax, which is against the doctrine of approbate and reprobate.

I need to stress two matters on that point.

One is, as the appellant has stated in the written submissions which I quoted above, Economic Service Charge shall be paid on the turnover of every trade and business whereas the Turnover Tax shall be paid only on the sale by wholesale or retail of any goods. Hence those two cannot be equalised.

The other is, the said return in respect of Economic Service Charge for the quarter 2008/09(1) had later been found by the respondent to be on the wrong turnout. Hence the respondent has by letter dated 06.08.2008 made an appeal for a refund.[5] The impugned Notice of Assessment X18 is dated 10.09.2008, a date subsequent to the said appeal. Hence the appellant cannot base his case on the said (erroneous) return in relation to Economic Service Charge.

The respondent in paragraph 14 of his counter affidavit whilst tendering supporting documents has stated that, in respect of Economic Service Charge for the quarters 2008/09(2), 2008/09(3), 2008/09(4), 2009/10(1), the respondent filed returns on the correct basis, which is, the commission received by the respondent from the Principal for his services as a Commission Agent, and they have been accepted by the Department of Inland Revenue. This has not been denied by the appellant.

[5] Vide page 194 of the brief for that appeal.

For the aforesaid reasons, I dismiss the appeal without costs.

Judge of the Court of Appeal

K.K. Wickremasinghe, J.

I agree.

Judge of the Court of Appeal