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

In the matter of an appeal by way of Stated Case on a question of law for the opinion of the Court of Appeal under and in terms of section 11A of the Tax Appeals Commission Act, No. 23 of 2011 (as amended).

The Commissioner General of Inland Revenue
Department of Inland Revenue
Inland Revenue Building
Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

APPELLANT

CA No. CA/TAX/07/2019
Tax Appeals Commission No. TAC/VAT/002/2015

v.

Rhino Roofing Products Limited
No. 752, Baseline Road,
Colombo 09.

RESPONDENT

BEFORE	:	Dr. Ruwan Fernando J. & M. Sampath K. B. Wijeratne J.
COUNSEL	:	Anusha Fernando, DSG for the Appellant. Dr. Shivaji Felix with Nivantha Satharasinghe for the Respondent.
WRITTEN SUBMISSIONS	:	16.01.2020 & 15.01.2021 (by the Appellant) 24.02.2020 & 14.06.2021 (by the Respondent)
ARGUED ON	:	25.02.2021 & 04.05.2021
DECIDED ON	:	20.07.2021

<u>M. Sampath K. B. Wijeratne J.</u>

Introduction

The Respondent, Rhino Roofing Products Limited, is a company incorporated in Sri Lanka for the manufacture and supply of roofing sheets.

The Respondent company submitted its Valued Added Tax (hereinafter referred to as "VAT") returns periodically and the Assessor refused to accept the returns for the taxable period from August 2009 to November 2010 (090902 – 101202) on the basis that the quantity discounts given to the dealers were not allowable in determining VAT, in terms of the VAT Act No. 14 of 2002, as amended (hereinafter referred to as the "the VAT Act"). Accordingly, the Assessor issued assessments for the said period in terms of Section 29 of the VAT Act.

The Respondent company appealed to the Commissioner General of Inland Revenue (hereinafter referred to as "the CGIR") against the said assessment.

The CGIR, in his determination dated 24th December 2015, confirmed the assessment of the Assessor. Thereafter, the Respondent company appealed to the Tax Appeals Commission (hereinafter referred to as "the TAC") in terms of Section 7 of the Tax Appeals Commission Act No. 23 of 2011, as amended (hereinafter referred to as "the TAC Act").

The TAC, by its determination dated 26th June 2018, reversed the determination of the CGIR and annulled the assessment.

The CGIR, being aggrieved by the said decision, moved the TAC to state a case on the following questions of law for the opinion of this Court, in accordance with Section 7 of the TAC Act:

1. *Whether the TAC has erred in interpreting the 'value of supply of goods or services' pursuant to Section 5 (1) of the Value Added Tax Act No. 14 of 2002.*
2. *Whether the TAC has erred in interpreting the 'open market value' pursuant to Section 83 of the Value Added Tax Act No. 14 of 2002.*
3. *Whether the TAC has erred in interpreting the 'adjustment of tax by credit or debit notes' as stipulated in Section 25 of the Value Added Tax Act No. 14 of 2002.* (vide 'X4').

However, it appears that when the TAC stated the Appellant's case to this Court, it had inadvertently mentioned incorrect sections in the first and third questions of law. The Appellant, without proceeding to correct this mistake, has reproduced the same questions in its written submissions. Be that as it may, since the Respondent company has tendered its written submissions based on the questions in 'X4', I will proceed to decide this matter on those questions, which appear above.

At the argument, the learned Counsel for the Respondent drew the attention of Court to the fact that there is a difference in the amount of Tax in dispute in the case stated by the TAC to this Court and that which was in dispute in the Petition of Appeal submitted to the TAC by the Respondent, Rhino Roofing Products Ltd ('X2' at page 35 of the docket). The Tax in dispute

in the former is Rs. 371,251,099/- whereas in the latter, it is only Rs: 62,217,501/-. Later, both parties acknowledged that the TAC, based on the CGIR's letter dated 6th May 2019 ('A2'), has clarified that the Tax in dispute is Rs. 62,217,501, by its letter dated 4th June 2019.

Since all three questions of law are interconnected, it would not be possible to compose separate sections of this judgement without causing unnecessary repetition, and I will therefore consider them simultaneously.

The Appellant's contention is that the Respondent should not be allowed to adjust the value of a taxable supply for the purpose of calculating VAT, owing to a quantity discount granted to its dealers subsequent to the time of supply. It was argued by the Appellant that the TAC erred in holding that it is permitted under Section 25 of the VAT Act.

The Respondent contended that the TAC has correctly interpreted the phrase, 'value of the supply of goods or services', and arrived at its determination.

Briefly, the facts relevant to this appeal are as follows.

The Respondent, at the time of supplying roofing sheets, issues invoices to all its dealers for the value of the supply, at a discounted rate. At the end of each month, the dealers are given a further discount ranging from 2% - 10% as an incentive, based on the total value of their purchases during the month. This could be called a 'quantity discount'.

The Respondent's contention is that it is unable to ascertain the actual value of taxable supplies at the time of issuing invoices, for which subsequent quantity discounts may be applicable. Therefore, it issues credit notes at the end of each taxable period for the value of the supplies made during the said period, and submits its VAT returns to the CGIR accordingly.

A distinction must be made at this juncture, between the two types of invoices and credit notes issued to those who purchase roofing sheets from the Respondent. For those who are VAT registered, the Respondent initially issues 'tax invoices' at the time of supply, and subsequently adjusts the value of supply using 'tax credit note'. For those who are not VAT registered, the Respondent initially issues non-tax invoices (which are commonly known as 'commercial invoices') at the time of supply, and adjusts the value of supply using ordinary 'commercial credit note'. This

distinction is of importance, particularly when answering the third question of law.

The learned Counsel for the Respondent relied on the illustration in the 'Manual of Value Added Tax (2007)' issued by the Department of Inland Revenue (hereinafter referred to as "the IRD"), and argued that a previously accepted consideration for a supply of goods or services can subsequently be changed.

The learned Deputy Solicitor General for the Appellant countered the above arguments by stating that Section 25 of the Act should not be considered in isolation and has to be read in conjunction with the other provisions in the Act. She submitted that in terms of Section 2 of the Act, VAT is charged 'at the time of supply' of goods or services. The 'time of supply of goods' is defined in Section 4 of the Act which reads thus:

> ***4.*** *(1) The supply of goods shall be deemed to have taken place at the time of the occurrence of any one of the following, whichever, occurs earlier: -*
>
> > *(a) the issue of an invoice by the supplier in respect of the goods; or*
> >
> > *(b) a payment for the goods including any advance payment received by the supplier; or*
> >
> > *(c) a payment for the goods is due to the supplier in respect of such supply; or*
> >
> > *(d) the delivery of the goods have been effected.*
> >
> > *(2) (...).*

In the instant case, admittedly, the taxable supply has taken place at the time an invoice is issued to a dealer.

According to Section 5 (1) of the Act, the value of a taxable supply of goods or services, shall be such amount where the supply is:

> *(a) For a consideration in money, be such consideration less any tax chargeable under the Act which amount shall not be less than the open market value:*
>
> *(b) (...).*

'Open Market Value' is defined in Section 83 of the Act as follows:

83. ***"open market value"*** *in relation to the value of a supply of goods or services at any date means, the consideration in money less any tax charged under this Act, which a similar supply would generally fetch if supplied in similar circumstances at that date in Sri Lanka, being a supply freely offered and made between persons who are not associated persons.*

The learned Counsel for the Respondent argued that 'open market value' is not an abstract concept and is determined after taking into account the consideration paid, less tax, and other applicable circumstances. It was submitted that in the instant case, the consideration paid by the dealer to the supplier was adjusted at the end of the month, according to the quantity discount granted, and that VAT had to be determined on the adjusted value of the supply.

The learned Counsel for the Respondent argued that Section 25 of the VAT Act provides for such an alteration. Section 25 reads thus;

25. *(1) Where a registered person, has issued a tax invoice and accounted for an incorrect amount of tax by undercharging or overcharging tax on a supply made to another person, he shall be entitled to issue to such other person a tax debit note or a tax credit note, as the case may be, for the purpose of adjusting the amount of tax so undercharged or overcharged.*

Provided, however, the adjustment in respect of input tax under claimed on an original tax invoice shall be made in respect of a tax debit note or a tax credit note issued not later than six months after the issue of the original tax invoice, to which the tax debit note or the tax credit note relates.

(2) Upon the issue of the tax debit note or tax credit note, as the case may be, in respect of a supply and in relation to the period in which such note was issued –

(a) the supplier shall pay as output tax such amount of the tax that was chargeable in respect of the supply as in excess of the amount that was accounted for or deduct as input tax such amount as was accounted for as output tax as exceeds the amount of tax chargeable; and

(b) the person to whom the supply was made shall if such person is a registered person pay as output tax such amount of the tax that was deducted by him as input tax as exceeds the proper amount that should have been deducted or deduct as input tax such amount as was deductible as exceeds the actual amount deducted by him, as the case may be.

The learned Deputy Solicitor General argued strenuously that Section 25 has no application to the matter in issue. She submitted that the original invoice represents the value of supply as at the date of the invoice, in accordance with Section 4 (1) (a) of the Act. Further, it was submitted that the nature of the discounts being conditional upon a dealer reaching a purchase target set by the Respondent, does not represent the open market value in terms of Section 5 (1) (a) of the Act. The learned Deputy Solicitor General stressed that a variance in the value of supply is not envisaged in the Act.

In response, the learned Counsel for the Respondent relied upon several judgments delivered by Indian Courts to buttress his argument that the taxable value of a supply must necessarily be that which the supplier is actually paid consideration for, once all allowable adjustments are made. The learned Deputy Solicitor General strongly challenged the applicability of the said Indian authorities by submitting that the laws of two jurisdictions are materially different to the point in issue. I accept that those authorities are not binding on our Courts. Yet, they may have persuasive value in establishing the applicable principles of taxation.

The learned Counsel for the Respondent cited *Godavari Fertilisers and Chemicals Limited v. Commissioner of Commercial Taxes,*[1] wherein the Andra Pradesh High Court held that the turnover of a dealer is calculated after allowing any cash or other discounts on the value at the point of sale, allowed in respect of any sale, and after all amounts allowed as discounts are deducted from the total receipts.

It is important to note that according to Section 2 (1) (s) of Andra Pradesh General Sales Tax Act, 1957, as amended, 'turnover' is subject to **any** cash or other discounts. As is stated in the aforementioned judgment, Rule 6 (1)

[1] (2004) 138 S.T.C. 133 AP

(a) of the Andhra Pradesh General Sales Tax Rules, 1957 also provides for the deduction of discounts in determining the turnover.

The Andra Pradesh High Court, having considered the said provisions, held that in order to arrive at the turnover of a dealer, the net receipts must be taken into account after allowing any cash or other discounts on price, in respect of any sale, and all amounts allowed as discounts should be deducted from the turnover.

However, it must be observed that the Andra Pradesh High Court has allowed the above discounts acting under specific provisions of law.

Nevertheless, in the case of *Deputy Commissioner of Sales Tax (Law) Board of Revenue (Taxes) v. M/s Advani Oorlikon (P) Ltd.*,[2] the Supreme Court of India initially observed that cash discounts and trade discounts are wholly distinct and separate concepts and are not to be confused with one another. The Court then went on to hold that although Section 2 (h) of the Central Sales Tax Act, 1956, expressly allows only cash discounts to be deducted from the sale price, trade discounts must also be allowed to be deducted from the sale price of goods.

Hence, it appears to me that the Supreme Court of India has allowed the deduction of trade discounts in determining the taxable turnover, irrespective of the fact that it is not *expressly* allowed in their statutory provisions.

In the conjoined appeal of *M/s IFB Industries Ltd. v. State of Kerala* and *India Cements Ltd. v. The Assistant Commissioner and Others*,[3] the Supreme Court of India applied the case of *Union of India and others v. Bombay Tyres International (P) Ltd.*,[4] wherein the Court held that 'trade discounts' or discounts allowed in the trade (by whatever name such discounts are described), should be allowed to be deducted from the sale price, having regard to the nature of the goods, if established under agreements or under terms of sale or by established practice, where the allowance and nature of the discount is known at or prior to the removal of the goods. The Court further held in the said case that such trade discounts shall not be disallowed only because they are not payable at the time of

[2] (1980) 1 S.C.C. 360

[3] (2012) 4 S.C.C. 618

[4] (2005) 3 S.C.C. 787

each invoice or deducted from the invoice price. Applying the said authority, the Court held that the deduction of trade discounts from the taxable value should not be disallowed solely on the ground that the amounts discounted were not shown in the sales invoices, at the time of supply.

Hence, it appears that the Supreme Court of India has expressed the view that any discount, in trade has to be considered as a discount, irrespective of its description, as well as holding that such discounts need not be reflected in the sale invoice at the time of supply. The crucial point seems to be that the *terms* of the discount are known at the time of supply, even though the *exact value* need not be known.

The Indian Supreme Court has thus adopted a common-sense approach in allowing for the value of a supply of goods to be adjusted, in the light of discounts applicable following the time of such supply.

In the instant appeal, it was submitted by the Respondent that there is a genuine practical inability to ascertain the exact sale price at the time invoices are issued. This argument was accepted by the TAC in reaching its determination in favour of the Respondent taxpayer. It is true that our VAT Act, unlike the Andra Pradesh General Sales Tax Act, 1957, or the corresponding Rules, does not *expressly* provide for the deduction of any discounts in determining the taxable value of a supply. Yet, the parties are not at variance that discounts at the time of sale are allowed. The issue is whether post-sale discounts can be deducted from the initial value of a supply, in order to determine the amount of tax to be charged.

At the argument, the learned Counsel for the Respondent brought to the notice of the Court a Sri Lankan authority, *Oriflame Lanka (Pvt) Ltd. v. The Commissioner General of Inland Revenue and Another* (hereinafter referred to as '*Oriflame*'),[5] wherein this Court had allowed adjustments for initial discounts on the purchase price as well as subsequent performance-based discounts for the purpose of calculation of VAT.

The facts of *Oriflame*, in so far as they are relevant to the matter in issue, are as follows. The Oriflame products were not available for sale in the wholesale or retail market. Those products could only be purchased from persons identified as 'beauty consultants'. They collected orders from their

[5] CA (Writ) Application No. 307/2007, decided on 09.05.2011

customers and placed their order with Oriflame each month. Oriflame sold its products to the beauty consultants at a price 30% less than the catalogue price, constituting the first discount. Other than this discount granted at the time of sale, the beauty consultants were also given a performance discount based on the quantity of purchases made in a particular month, which constituted the second discount. An important distinction to be made with the instant appeal is that Oriflame only issued the invoices once both applicable discount had been determined.

Oriflame calculated VAT on the actual consideration paid by the beauty consultants, considering the 30% discount on the purchase price as well as the performance discount, and tendered their VAT returns accordingly. The CGIR rejected the returns and issued assessments on the grounds that the taxable supply had been understated by misrepresenting sales promotion expenses as performance discounts.

Sriskandarajah, J., who delivered the judgment in *Oriflame* held that only what Oriflame actually receives as purchase consideration (after both types of discounts are allowed where applicable) at the end of each month was to be considered the price at the time of supply; the value of the supply on which VAT was payable.

His Lordship cited *Elida Gibbs Ltd v. Commissioners of Customs and Excise* (hereinafter referred to as '*Elida Gibbs*'),[6] wherein the Court of Justice of the European Communities (Sixth Chamber) observed that:

"*The basic principle of the VAT system is that it is intended to tax only the final consumer. Consequently, the taxable amount serving as a basis for the VAT to be collected by the tax authorities cannot exceed the consideration actually paid by the final consumer which is the basis for calculating the VAT ultimately borne by him.*".[7]

Elida Gibbs Ltd., was a manufacturer of toiletries and 70% of its products were sold to retailers and the balance to wholesalers. In order to promote retail sales, the company operated two coupon schemes. The first offered a price reduction at the point of sale, for the production of money-off coupons circulated in magazines or newspapers. The said price reduction was reimbursed to the retailers. Under the second scheme, the consumer

[6] C 317/94; [1996] STC 1387

[7] *Ibid.* at para. 19

could obtain a cash refund from the company by returning the cashback coupons printed on the label of the product.

Elida Gibbs Ltd., claimed that the amount of money refunded on coupons constituted a discount and therefore, VAT had to be charged on the value once adjusted for these coupons.

The Court therefore observed that:[8]

"*In circumstances such as those in the main proceedings, the manufacturer, who has refunded the value of the money-off coupon to the retailer or the value of the cashback coupon to the final consumer, receives, on completion of the transaction, a sum corresponding to the sale price paid by the wholesalers or retailers for his goods, less the value of those coupons. It would not therefore be in conformity with the directive* (sic) *for the taxable amount used to calculate the VAT chargeable to the manufacturer, as a taxable person, to exceed the sum finally received by him.* ***Were that the case, the principle of neutrality of VAT vis-à-vis taxable persons, of whom the manufacturer is one, would not be complied with****.*

Consequently, the taxable amount attributable to the manufacturer as a taxable person must be the amount corresponding to the price at which he sold the goods to the wholesalers or retailers, less the value of those coupons (emphasis added)."

It was further observed that:[9]

"*…in order to ensure observance of* **the principle of neutrality***, account had to be taken, when calculating the taxable amount for VAT, of situations where a taxable person who, having no contractual relationship with the final consumer but being the first link in a chain of transactions which ended with the final consumer, granted the consumer the reduction through retailers or by direct repayment of the value of the coupons* (emphasis added)."

The principle, as decided by the Court of Justice of the European Communities, that where a trader supplied goods for a stated consideration, but under a sales promotion arrangement, was obliged to pay an amount

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[8] *Supra* note 6, at para. 28, 29

[9] *Ibid.* at para. 31

away to the ultimate consumer or to an intermediary in the chain of supply, the consideration on which the trader should finally be liable to VAT was to be reduced by the amount so paid away, is applicable to the instant case. It was true that what was paid away was in the form of a voucher rather than money, but that did not change the result in *Elida Gibbs*.

Under the principle of neutrality, a trader should not be charged VAT on an amount greater than the true proceeds to him of the supply transaction, or an amount greater than the true cost of the supply to the ultimate customer. If the terms of the supply provided for circumstances where the trader, having received a consideration for it in the first instance, was later obliged to part with an amount related in some way to the supply transaction, the true proceeds of the supply must be determined after taking account of what the trader had to part with.

It must be noted that unlike the laws applicable to *Elida Gibbs* (where Article 11 (A) (1) (a) read with Article 11 (C) (1) of Directive 77/388/EEC of the Council of the European Communities makes express provision for the reduction of the taxable value of supply, after the time of supply), the Sri Lankan VAT Act does not make such express provision. However, the principle of neutrality is generally applicable, and has been given effect by this very Court through the aforementioned judgement of His Lordship Sriskandarajah J., in *Oriflame*.

Though fiscal statutes generally require strict interpretation, N. S. Bindra has stated that:[10]

'*The principle that fiscal statutes should be strictly construed does not rule out the application of the principles of reasonable construction to give effect to the purposes or intention of any particular provision as apparent from the scheme of the Act, with the assistance of such external aids as are permissible under the law.*'

Therefore, the principle of neutrality as invoked in *Oriflame* can be applied in the instant case through a combined reading of Section 4 (1) (a), Section 5 (1) (a), Section 25 (the last of which is to be applied specifically in the context of VAT invoices), and other relevant sections of the VAT Act, as well as the Manual of Value Added Tax (2007) published by the IRD. The

[10] N. S. Bindra, *Interpretation of Statutes*, Eighth Edition, 1997. at pp.674-675

procedural aspects of this will be dealt with at a later stage in the judgement.

I therefore hold that the value of a supply of goods as enacted through the various provisions of the VAT Act can accommodate post-sale quantity discounts such as those in issue in the instant appeal, without being contrary to the meaning of the 'time of supply' as specified in Section 4 of the Act, so long as the terms of any such discount are known to any and all potential customers at the actual time of supply.

The learned Deputy Solicitor General submitted a numerical illustration in her written submissions, in order to buttress her argument that if the post-sale adjustment of VAT were allowed, there would be a loss incurred upon the State. The learned Counsel for the Respondent submitted in his written submissions that if the said adjustment was disallowed, then the IRD would receive a greater amount of tax than it ought to, owing to the net value of the supply being changed.

I begin analysing this issue by first observing that the learned Deputy Solicitor General has not been clear in her explanation of exactly how the State incurs a loss if post-sale adjustments of VAT were allowed. Upon carefully considering the calculations at play, my opinion is that taking the actual value of supply after allowing for the deduction of any post-sale discounts, to be the taxable value of supply, causes no loss to the State and does not overcharge the taxpayer.

By way of illustration, in a transaction such as the one in the instant case, and where each step follows the other temporally:

> (a) a certain amount is paid for a supply of goods, at the time of said supply (this is the initial value of supply);
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> (b) tax is calculated on the value of supply in (a), and remitted to the IRD;
>
> (c) a post-sale quantity discount is offered on the supply of goods, and the value in (a) is adjusted to a lower value (this lower value is now the actual value of supply); and
>
> (d) tax is calculated on the adjusted value of supply in (c),

the actual value of the supply would now be the adjusted value in (c).

In the context of an adjustment arising out of a discount, it should be apparent that the adjusted value of supply in (c) is less than the initial value of supply in (a). It should also be apparent that (d), i.e. the amount of tax calculated on the adjusted value of the supply, is less than (b), i.e. the amount of tax calculated on the initial value of the supply. The customer will have to be reimbursed the amounts of **1)** (a) - (c) (the quantity discount), and **2)** (b) - (d) (the amount of tax overcharged). The IRD would be in possession of the tax amount (b), when it should only be in possession of the tax amount (d), since the actual value of supply is (c), not (a). Therefore, the supplier is at a loss, i.e. the amount (b) - (d). The supplier will in effect have collected and remitted the correct tax amount (d), as well as some extra tax amount (b) - (d) to the IRD. Therefore, in the final analysis, the supplier would have been overcharged and the principle of neutrality violated. The IRD would therefore have to allow for the extra amount it has received, i.e. (b) - (d) to be credited back to the supplier, in this case, the Respondent.

What appears to happen in the learned Deputy Solicitor General's calculations is that the State mysteriously 'loses' some amount (b) - (d), though in actuality, this is merely an illusion, since the State ought not to have been in possession of that amount in the final analysis, once the adjustment is allowed according to the principle of neutrality.

It should therefore become clear that there is no loss incurred upon the State if post-sale adjustments are made to the taxable value of the supply. Lending further support to this conclusion is the fact that the Legislature has in its wisdom allowed for the counter proposition where the CGIR on the face of it 'benefits' from an adjustment, where tax is undercharged on a supply, and must subsequently be adjusted by way of debit notes (see Section 25 in general).

I therefore hold, after having reasoned as above, that the TAC has not erred in interpreting the 'value of the supply of goods or services' pursuant to Section 5 (1) of the VAT Act.

As regards the interpretation of the 'open market value' in the instant case, the learned Deputy Solicitor General submitted on behalf of the Appellant that the concept of an 'open market value' would stand to be violated if the variation in the discounts were allowed to stand. In the present case, some dealers are eligible for the full 10% quantity discount, while some are

eligible for a value between 2% and 10%, depending on the quantities purchased from the Respondent company. It is unclear whether some dealers do not even get the benefit of the 2% discount, but that is unimportant for the purposes of this appeal.

In my view, the definition of the open market value would be met where the discount is available to all those who satisfy the terms of the discount, without any discrimination. The Section 83 definition of the open market value does not appear to be breached by the practices of the Respondent, since a similar supply would generally be eligible for the same discount. The only contention may be that the discounts are available post-sale, but this condition, in my view, falls within the 'similar circumstances' mentioned in the definition under Section 83. The crucial factor is that the availability of the discount, its terms, and how the varying percentages are assigned, must be known to all customers of the Respondent at the time of supply, which appears to be the case on the facts before this Court. It must also be the case that the discount is available on equal terms, regardless of the VAT registration status of the customer. This final point will be of crucial importance to the determination on the third question of law, and shall be more fully elaborated on shortly.

I therefore hold that the TAC has not erred in interpreting the concept of 'open market value' pursuant to Section 83 of the VAT Act.

The learned Deputy Solicitor General, having drawn the attention of this court to the Petition of Appeal to the TAC by the Respondent (at page 84 of the appeal brief) submitted that the Respondent company itself had admitted that most of its customers are not VAT registered and therefore, the company does not issue VAT invoices to them but issues commercial invoices (or 'non-tax invoices') in terms of Section 20 (6) of the VAT Act. She further submitted that following the assessments in issue in this case being made, the Respondent company has altered its accounting practices with respect to how it handles post-sale discounts and the adjustment of the value of a supply. However, on this latter point, she has not adduced any material in support, and this Court can therefore not consider it further.

Section 25 applies only to VAT registered persons who have been issued with a tax invoice. The Respondent company can make a distinction between registered and non-registered dealers when its VAT returns are submitted. Therefore, having two types of dealers alone is not a ground to

hold that Section 25 does not apply. However, it is clear from the provisions in the Act that commercial invoices are not meant to be adjusted using Section 25, as pointed out by the learned Deputy Solicitor General. This is because Section 20 (6) (a) contains the qualification: '*An invoice issued under this subsection shall not be considered as a tax invoice for the purposes of this Act.*' Section 25 is applicable only to 'tax invoices'. Therefore, this point is abundantly clear upon reading the two sections of the Act together.

Para. 53 (at page 19) and para. 85 (at page 26) of the Respondent's written submissions appear to present a contradictory impression of whether or not it seeks to adjust input tax for commercial credit notes through the Section 25 process. While the latter instance, appears to vehemently deny this, the former instance is more ambiguous. It must be made plain that Section 25 does not allow the adjustment of *commercial invoices*, and that no input tax can be deducted for same.

In distinguishing the aforementioned decision in *Oriflame* on this point, it must be pointed out that the customers in *Oriflame* were not VAT registered persons, and therefore any adjustment that was allowed by the Court was not allowed through the use of Section 25 of the VAT Act. Furthermore, as mentioned previously in this judgement, the invoices in *Oriflame* reflected the correct value of the supply, as they were issued once all applicable discounts were allowed. Therefore, the Respondent cannot claim adjustments to its commercial invoices using Section 25, as *Oriflame* does not set a precedent on this point.

The process of issuing invoices and the procedure for their subsequent adjustment are distinctly different for those customers of the Respondent who are VAT registered persons, and for those who are not registered persons. However, the principle of neutrality applies to both sets of customers, and the process of post-sale adjustment for discounts must be allowed for both, so that the finding of this Court that the practices of the Respondent do not violate the open market value, is not affected. The wording of the third question of law, and the fact that there were no arguments by either party specifically on the adjustment procedure to be followed in the case of issuing credit notes for non-registered persons, mean that this Court need not address how the said procedure ought to be conducted.

Yet, before I depart from the line of reasoning which I have concluded above, I shall express my considered opinion on how post-sale adjustments should be allowed for persons who are not registered for VAT purposes. Section 20 (2) (f) specifies that a tax invoice shall set out the value of the supply, the tax charged and the consideration for the supply, with the first two elements adding up to equate to the third. Section 20 (6) (a), which specifies the contents of a commercial invoice, mandates the mention of only the total consideration, including the tax charged. Furthermore, Section 25 (2) (b) uses the conditional clause "*…if such a person is a registered person…*" to imply that the adjustment process for commercial invoices cannot involve the alteration of input or output tax.

Upon considering the above provisions, it appears that the adjustment of tax in the context of commercial invoices is a matter that should not require the involvement of the IRD. However, this poses the problem of how to ensure the principle of neutrality is honoured, where the IRD has already received an excess amount of tax, as illustrated previously in this judgement. It is suggested that where a supplier considers the employment of a post-sale quantity discount, it should utilise the procedure employed by the taxpayer in *Oriflame*, so that the invoice is issued after all applicable discounts have been applied. Thus, it appears that there is no barrier to the adjustment of the taxable value of supply, even where commercial invoices are concerned, without having recourse to Section 25.

The Appellant also contended that since the Respondent has not corrected each individual invoice as required by Section 25 of the Act, the Assessor is justified in rejecting the returns and issuing an assessment. The learned Deputy Solicitor General elaborated on this point by arguing that since the Respondent has granted the quantity discount at the end of the month, based on the total value of purchases made by a dealer and accounted for it without reference to a singular invoice, the Respondent's claim does not come under Section 25 of the Act.

Even though the learned Deputy Solicitor General's argument has some merit on a literal reading of Section 25, there is enough doubt as to the intention of the Legislature to consider the Respondent's argument. The Counsel for the Respondent argues that the Manual of Value Added Tax (2007) issued by the IRD (at page 23) allows the listing of more than one tax invoice in a given tax credit note. I am prepared to accept this argument

of the learned Counsel for the Respondent. The only necessary conditions for what can be included in a tax credit note in terms of Section 25 appear to be the six-month time limit specified in the proviso, and the fact that only those invoices belonging to a single taxable period must be included.

On the interpretation of fiscal statutes, Bindra states that:[11]

"*It is a well-known principle of interpretation that when construing a fiscal statute, the court has to lean in its interpretation in favour of the subject, rather than in favour of the State.*"

In keeping with the above principle, and for the reasons set out above, it is my view that the Respondent's returns should not have been rejected for the sole reason that it did not issue an individual tax credit note per tax invoice.

Thus, having considered all arguments under this question of law, I hold that the TAC has not erred in interpreting the 'adjustment of tax by credit or debit notes' as stipulated for under Section 25 of the VAT Act.

I therefore answer all three questions of law in the negative, and in favour of the Respondent.

1. Whether the TAC has erred in interpreting the 'value of supply of goods or services' pursuant to Section 5 (1) of the Value Added Tax Act No. 14 of 2002. ***No***

2. Whether the TAC has erred in interpreting the 'open market value' pursuant to Section 83 of the Value Added Tax Act No. 14 of 2002. ***No***

3. Whether the TAC has erred in interpreting the 'adjustment of tax by credit or debit notes' as stipulated in Section 25 of the Value Added Tax Act No. 14 of 2002. (vide 'X4'). ***No***

Acting under Section 11 A (6) of the Tax Appeals Commission Act No. 23 of 2011 (as amended), I affirm the determination made by the TAC and dismiss this appeal.

[11] *Supra* note 10, at p.672

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

JUDGE OF THE COURT OF APPEAL

Dr. Ruwan Fernando J.

I Agree.

JUDGE OF THE COURT OF APPEAL