IN THE COURT OF APPEAL OF

THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal by way of a Case Stated 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 by Act No.20 of 2013.

CARGILLS QUALITY DAIRIES

(Pvt) Ltd.,

No.40,

York Street,

Colombo 01.

APPELLANT

Case No. C.A. (Tax)29/2014

Tax Appeals Commission No. TAC/IT/040/2013

Vs

THE COMMISSIONER GENERAL OF INLAND REVENUE.

14th Floor,

Secretarial Branch,

Department of Inland Revenue,

Sir Chittampalam A .Gardiner Mawatha,

Colombo 02.

RESPONDENT

Before :	**D.N.Samarakoon, J.**
	B. Sasi Mahendran, J.
Counsel :	Romesh De Silva PC with N.R. Sivendran, AAL for the Appellant.
	N.Wigneshwaran, DSG for the Respondent
Written Submissions : Tendered on	Appellant on 21.01.2019 Respondent on 03.09.2020
Argued On :	16.11.2021
Decided On:	08.02.2022

B. Sasi Mahendran, J.

In terms of Section 11A (2) of the Tax Appeals Commission Act No. 23 of 2011 as amended (hereinafter referred to as TAC Act) the "Case stated" was transmitted to this Court by the Secretary to the Tax Appeals Commission by letter dated 12.10.2015.

It contained the following twenty-six questions of law:

1. Is the decision of the Secretary to the Tax Appeals Commission (hereinafter also referred as "the Secretary"), not fixing the appeal for hearing, erroneous, invalid and bad in law, particularly because, the only statutory function specified for the Secretary under Section 9(1) of the TAC Act, is to fix the appeal for hearing on receipt of such appeal by the Secretary?

2. Has the Secretary misunderstood, misconstrued and erred in law, by refusing to list the appeal for hearing, particularly as there is no provision in the TAC Act for the Secretary to refuse and not to accept an appeal made to the Commission?

3. Is the decision of the Secretary of not listing the appeal, erroneous, invalid and bad in law as the Secretary, when refusing to list the appeal for hearing has not stated the provision (Section) of the Statute under which the said refusal to list the appeal was exercised and thus, violated the established legal principle that the exercise of power should be referable to a valid jurisdiction?

4. Has the Secretary violated one of the principles of natural justice, the rule of "*Audi alteram partem"* (The right to a fair hearing – hear the other side), by not providing a hearing to the Company before the Commission before refusing to list the appeal?

5. Is the Secretary empowered by law to dispose an appeal without giving a hearing for the Appellant?

6. Has the Secretary misunderstood, misconstrued and erred in law, by refusing to list the appeal for hearing, particularly because CQD has complied with proviso to Section 7(1) of the TAC Act, as it has paid Rs.20,561,414/- (as confirmed by the Department of Inland Revenue by its letter dated 23rd August 2013) which is in excess of 25% of the sum assessed by the Commissioner General of Inland Revenue in the determination(*The sum assessed by the Commissioner General of Inland Revenue in the determination is Rs. 53,601,301/-*) and the said 20% is equivalent to Rs. 13,400,325/- (25% of Rs. 53,601,301/-) and thus, the refusal by the Secretary to the list the appeal for hearing by the Commission is, erroneous, invalid and bad in law?

7. Has the Secretary acted unfairly, unjustly and unreasonably, by refusing to list the appeal, after CQD gave a bank guarantee as suggested by the Secretary, irrespective of the fact that CQD had already complied with proviso to Section 7(1) of the TAC Act?

8. Has the Secretary misunderstood, misconstrued and erred in law, by advising the Company to settle any dispute, relating to the compliance of Section 7 of the TAC Act, with the Commissioner General of Inland Revenue, when there, is no such provision in the TAC Act for such reference to be made to the Commissioner General of Inland Revenue by the Secretary?

9. Has the Secretary acted unfairly, unjustly and unreasonably, by considering the letter dated 21st May 2014 written by the Commissioner General of Inland Revenue to the Commission, regarding the compliance by CQD with proviso to Section 7(1) of the TAC Act, particularly as the said letter dated 21st May 2014 was obtained from the Commissioner General of Inland Revenue on the advice given by the Secretary?

10. Is the decision of the Secretary, not listing the appeal for hearing erroneous, invalid and bad in law, as the Secretary has not given any reasons whatsoever as to the shortfall or inadequacy of the bank guarantee which was given by CQD in compliance with proviso to Section 7(1) of the TAC Act?

11. Has the Secretary misunderstood, misconstrued and erred in law, by seeking the direction of the TAC for not listing the appeal, when there is no provision in the TAC Act for the Secretary to seek such a direction from the Commission?

12. Is the decision of the Commission, by not allowing the Secretary to fix the appeal, erroneous, invalid and bad in law, particularly because, the only statutory function specified for the Secretary under Section 9(1) of the TAC Act, is to fix the appeal for hearing on receipt of such appeal by the Secretary?

13. Has the Commission misunderstood, misconstrued and erred in law, by refusing to list the appeal for hearing, particularly as there is no provision in the TAC Act for the Commission to refuse and not to accept made to the Commission?

14. Is the decision of the Commission of not listing the appeal, erroneous, invalid and bad in law, as the Commission, when refusing to the list the appeal for hearing has not stated the provision (Section) of the Statute under which the said refusal to list the appeal was exercised and thus, violated the established legal principle that the exercise of power should be referable to a valid jurisdiction?

15. Has the Commission violated one of the principles of natural justice, the rule "*Audi alteram partem*" The right to a fair hearing – hear the other side, by not providing a hearing to the Company before refusing to list the appeal made by the Company?

16. Is the Commission empowered by law to dispose an appeal without giving a hearing for the Appellant, particularly where in terms of Section 2 of the TAC Act, the Commission is charged with the responsibility of hearing all the appeals and in terms of Section 10 of the TAC Act, the Commission shall hear all the appeals received by it?

17. Has the Commission misunderstood, misconstrued and erred in law, by refusing to list the appeal for hearing, particularly because CQD has complied with proviso to Section 7(1) of the TAC Act, as it has paid Rs.20,561,414/- (as confirmed by the Department of Inland Revenue by its letter dated 23rd August 2013) which is in excess of 25% of the sum assessed by the Commissioner General of Inland Revenue in the determination (*The sum assessed by the Commissioner General of Inland Revenue in the determination is Rs. 53,601,301/-*) and the said 25% is equivalent to Rs. 13,400,325/- (25% of Rs. 53,601,301/-) and thus, the refusal by the Commission to the list the appeal for hearing by the Commission is, erroneous, invalid and bad in law?

18. Has the Commission acted unfairly, unjustly and unreasonably, by refusing to list the appeal, after CQD gave a bank guarantee as suggested by the Secretary, irrespective of the fact that CQD had already complied with proviso to Section 7(1) of the TAC Act?

19. Has the Commission acted unfairly, unjustly and unreasonably, by not considering the letter dated 21st May 2014 written by Commissioner General of Inland Revenue to the Commission, regarding the compliance by CQD with proviso to Section 7(1) of the TAC Act?

20. Is the decision of the Commission, of not listing the appeal for hearing erroneous, invalid and bad in law, as the Commission has not given any reasons whatsoever as to the shortfall or inadequacy of the bank guarantee which was given by CQD incompliance with proviso to Section 7(1) of the TAC Act?

21. Has the Commission misunderstood, misconstrued and erred in law, by directing the Secretary not to list the appeal, when there is no provision in the TAC Act to provide such a direction to the Secretary?

22. Has the Commission misunderstood, misconstrued and erred in law, by seeking the views of the Commissioner General of Inland Revenue in listing the appeal, when there is no provision in the TAC Act to seek the views of the Commissioner General of the Inland Revenue to list the appeal?

23. Has the Commission contravened the provisions of the TAC Act and also, violated one of the principles of natural justice (the rule of "*Audi Alteram Partem*" The right to a fair hearing – hear the other side) by seeking only the views of the Commissioner General of the Inland Revenue and not the views of the Company, in deciding not to allow the listing of appeal for hearing?

24. Has CQD complied with proviso to Section 7(1) of the TAC Act, as it has paid Rs. 20,561,414/- (as confirmed by the Department of Inland Revenue by its letter dated 23rd August 2013) which is in excess of 25% of the sum assessed by the Commissioner General of Inland Revenue in the determination (*sum assessed by the Commissioner General of Inland Revenue in the determination is Rs. 53,601,301/-*) which is equivalent to Rs. 13,400,325/- (25% of Rs. 53,601,301/-)?

25. Has the Commission and/ or the Secretary wrongfully, unlawfully, unfairly and unjustly denied the right of appeal of the Company by not listing the appeal for hearing?

26. Once the Appeal is lodged to the Commission, should not the validity or the legality or the maintainability of the said appeal be determined, only by the Commission at a hearing before the Commission?

The main grievance of the Appellant is that the Petition of Appeal which was filed to the Tax Appeals Commission was rejected by the Secretary to the Commission (not by the Commission) without giving a hearing to the Appellant.

The said rejection was informed by the Secretary to the Commission by letter dated 02.09.2013.

The contents of the letter read as follows;

"*Since you have not complied with the requirement of Section 7 of the Tax Appeals Commission Act No.23 of 2011 as amended, namely, the provision of a bank guarantee or cash deposit of the sum as assessed by the Commissioner General of Inland Revenue, we are not in a position to accept your papers relating to the appeal.*

If you have a dispute relating to the complying of Section 7 of the Tax Appeals Commission Act, you have to settle it with the Commissioner General of Inland Revenue."

The Respondent has in its written and oral submissions taken a preliminary objection as to the jurisdiction of this Court. It was submitted that where an appeal has not been entertained by the Commission, the "Case Stated" procedure cannot be availed of. The correct procedure in its opinion is to challenge by way of judicial review in terms of Article 140 of the Constitution.

I am unable to agree with the objection raised by the Respondent for the simple reason that according to the Section 11A (6) of the TAC Act this Court is cloaked with the jurisdiction when it is obliged to give an opinion on any question of law arising on the "Case Stated" remitted by the Commission.

This Court has to consider who has to take decisions with regard to the accepting or rejecting of the appeal as per the provision in Section 11A (2) of the TAC Act.

For the purpose of convenience Section 11A (2) of the TAC Act is reproduced below;

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.* [emphasis added]

I am unable to find any provision in the TAC Act which contemplates or makes provisions for the Secretary to take decisions with regard to an appeal. On the other hand, there is a provision in the said Act concerning the hearing and determination of an appeal tendered by an aggrieved party. That is Section 8(3) of the said Act. It is pertinent to observe that Section which reads as follows:

The manner and the form of submitting such appeal, the procedure to be followed by the Commission in the hearing and determining of such appeal and the fees if any in respect thereof shall be determined by the Commission by rules made, from time to time, in that behalf.

On the other hand, the only provision of the said Act which provides for the functions of the Secretary is Section 9 (1) of the said Act. According to that Section, the Secretary shall "….within thirty days of the receipt of an appeal…….. fix a date and time and place for the hearing of the appeal……". Hence there is no authority conferred on the Secretary by this Act to take decisions with regard to the acceptance or rejection of appeals.

At this juncture, this Court's attention is drawn to the statutory provision which provides the criteria for the appointment of the members of the Tax Appeals Commission.

Section 2 of the TAC Act states as follows:

(1) ……

(2) The Commission shall comprise not more than nine members three of whom shall be appointed from amongst retired Judges of the Supreme Court or the Court of Appeal and six other members from amongst persons who have wide knowledge of, and have gained eminence in the fields of Taxation, Finance and Law, by the Minister to whom the subject of Finance is assigned. One of the members shall be appointed as the Chairman of the Commission by the Minister.

(2A)The Chairman of the Commission shall constitute three panels comprising three members each, from among the members appointed under subsection one of whom shall be a Judge as specified in subsection (2) to hear and determine any matter before the Commission.

(3) ……

(4) ……

It is evident that Parliament has in its wisdom intended the members of the Commission to not only have acquired "wide knowledge" in the relevant fields but also to be of such calibre to have "gained eminence" in the said fields.

I wish to reproduce the observation made by the Hon. Mr Justice Popplewell in P v. Q [2017 EWCH 194 (Comm) at para 68]

"……..The danger may be greater with arbitrators who have no judicial training or background, than with judges who are used to reaching entirely independent adjudicatory decisions with the benefit of law clerks or other junior judicial assistants. However, the danger exists for all tribunals. Best practice is therefore to avoid involving a tribunal secretary in anything which could be

characterised as expressing a view on the substance of that which the tribunal is called upon to decide."

It is noteworthy to consider the judgment of His Lordship Justice Malalgoda in Anoma S.Polwatte v.Jayawickrama& Others [SC/Writ Application No. 1/2011 (Decided on 26.07.2018)] where his Lordship has considered the powers and functions of the Commission to Investigate Bribery and Corruption. According to Section 3 of Bribery Act, it is the Commission that directs the institution of proceedings. The question considered in this case was whether such a direction given by one of the members of the Commission is lawful.

His Lordship held;

"Thus it is clear that the members of the Commission can exercise ancillary powers on his own though the full complement of the Commission is not available at one given time. But as for the exercise of functions such as the direction to be given to the Director General, it is crystal clear that the Act has not provided for one member alone to give such direction."

Similar provision with regard to filing of an appeal is found in Section 755(5) of the Civil Procedure Code. In the said Section the proviso reads as follows.

Provided that when the Judge of the original court has expressed an opinion that there is no right of appeal against the judgment or decree appealed against, the Registrar shall submit the petition of appeal to the President of the Court of Appeal or any other Judge nominated by the President of the Court of Appeal who shall require the petition to be supported in open court by the petitioner or an attorney on his behalf on a day to be fixed by such Judge, and the court having heard the petitioner or his attorney, may, reject such petition or fix a date for the hearing of the petition, and order notice thereafter to be issued on the respondents;

In Dharmaratne v. Kumari[2005] 1 SLR 265 His Lordship Justice Wimalachandra held that "the District Judge has no power to reject a notice of appeal even though he may call upon the Appellant to rectify any defect in the notice of appeal. The District Judge's function is merely to forward the notice of appeal and the petition of appeal to the Court of Appeal."

This Court is of the opinion that the proviso to Section 7 (1) TAC Act, which requiring to furnish security, confers a discretion only on the Tax Appeals Commission.

Now this Court will consider the purpose of furnishing security under Section 7 (1) of the TAC Act.

Proviso to Section 7 (1) is reproduced as follows;

Provided that, every person who wishes to appeal to the Commission under paragraph (a) shall, at the time of making of such appeal, be required to pay into a special account which shall be opened and operated by the Commission for such purpose, an amount-

a) as is equivalent to ten per centum which is non- refundable; or

b) as is equivalent to twenty five per centum which is refundable subject to subsection (1A) of this Section or a bank guarantee for the equivalent amount which shall remain valid until the appeal is determined by the Commission.

There is no dispute when the Appellant lodged the appeal to the Tax Appeals Commission, the Appellant has informed that there was no need to make a fresh deposit as there was a tax credit which is more than 25 percent of the determination of the Commissioner General of Inland Revenue as required by the said section.

The object of requiring security is to avoid frivolous and vexatious appeals as well as to ensure that once an appeal is concluded those moneys are readily available to the Department of Inland Revenue. It should be noted that the said Section was introduced by Act No. 20 of 2013 to ensure the money can be recovered.

His Lordship Justice Mark Fernando in Sri Lanka General Workers Union v. Samaranayake [1996] 2 SLR 268 at 272 expressed a similar view. Referring to Section 31 D (6) of Industrial Disputes Act, as amended, His Lordship held,

"There can be doubt that the legislative intention was to ensure that at the conclusion of the appellate proceedings, however lengthy, there would be a fund available to satisfy the workman's entitlements; and, by providing for interest, to ensure that the lapse of time and inflation would not unduly erode those entitlements"

In Nanayakkara v. Warnakulasuriya. 1993 (2)SLR289 at 294 His Lordship Justice Kulatunga made the following observation.

"I wish to make an observation. Even though the District Court appears to have no power to reject a notice of appeal for failure to hypothecate security, it may perhaps call upon the appellant to rectify the defect where the non-compliance is observed at the stage when notice of appeal is given."

Therefore, the purpose of furnishing the said security is to ensure that the money is readily available to be recovered at the conclusion of the appeal.

Be that as it may, if Court presumes that the Commission directed the Secretary to inform the Appellant of the rejection of its appeal on the basis of non-compliance with Section 7 of the TAC Act the question arises whether the non -compliance of that Section is mandatory or directory? It should be noted

that the TAC Act does not specify any penal consequences for non-compliance of the provisions of Section 7.

Whether a provision is mandatory or directory was discussed in the following cases.

Justice G.P.A.Silva,J (as he then was) held in Rajen Philip v. Commissioner of Inland Revenue (CA No. 1174/81 Sri Lanka Tax Cases Vol.IV P. 211)

"What, then, is the test to determine whether a statutory provision is mandatory, and what is the test to determine whether disregard of such a provision has the effect of nullifying a decision taken in disregard of such statutory provisions? Under the heading "disregard of procedural and formal requirements" . S.A. de Smith suggests the following test:-

"When Parliament prescribes the manner or form in which a duty is to be performed, it seldom lays down what will be the legal consequences of failure to observe its prescriptions: The Courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as .directory, in which case disobedience will be treated as an irregularity not affecting the validity of what has been done. Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision to the appropriate category. The whole scope and purpose of the enactment must be considered, and one must assess 'the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act'. Judicial Review of Administrative Action (4th Ed) 142."

A similar view was expressed by His Lordship Justice U. De Z. Gunawardhana in Fernando v. Ceylon Brewerys Ltd [1998] (3) SLR 61 at 69. His Lordship held that:

"The question whether provision in a statute is mandatory or directory is not capable of generalisation but when the legislature has not said which is which, one of the basic tests for deciding whether a statutory direction is mandatory or directory is to consider whether violation thereof is penal or not. It has been the traditional view that where disobedience of a provision is expressly made penal it has to be concluded that the provision is mandatory whereas if no penalty is prescribed non-compliance with the provisions of a statute may held to be directory."

Further His Lordship at p.70 held,

"In a case referred to in Bindra on Interpretation page 669 it had been stated that: "a statute which requires certain things to be done or provides what result shall follow a failure to do them, is mandatory but if the statute does not declare what result shall follow a failure to do the required acts it is directory".

When we perused the Section in the light of the above judicial dictums there is no provision providing for penal consequences for failure to comply with the provision of the said Section. Therefore, we hold that the provision of this Section is directory. In fact, it was submitted in open court by the Counsel for the Appellant that the sum of money demanded by the Commission had been furnished subsequently.

Further, I wish to mention that Our Courts have adopted liberal attitudes with regard to the Tax laws.

In Nanayakkara v. University of Peradeniya [1991] (1) SLR 97, S.N. Silva,J, (as he then was)held that;

'The Stamp Duty Act imposes a pecuniary burden on the people. Therefore it is subject to the rule of strict construction. (Maxwell on interpretation of statutes., 12th Edition page 256). In the case of Cape Brandy Syndicate vs. I.R.C, Rowlatt J stated as follows:

"In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.'"

In Vallibel Lanka (Pvt.) Limited v. Director General of Customs and three others, [2008] 1 SLR 219 Sripavan J. (as he then was) held;

"It is the established rule in the interpretation of statutes that levy taxes and duties, not to extend the provisions of the statute by implication, beyond the clear import of the language used or to enlarge their operation in order to embrace matters not specifically pointed out. In case of doubt, the provisions are construed most strongly against the state and in favour of the citizen.

The court cannot give a wider interpretation to Section 16 [of the Customs Ordinance]……. *merely because some financial loss may in certain circumstances be caused to the state. Considerations of hardship, injustice or anomalies do not play any useful role in construing fiscal statutes*."

For the foregoing reasons, the opinion of this Court is that all questions of law raised in this case should be answered in favour of the Appellant.

Therefore, this Court directs the Registrar to send this case back to the Tax Appeals Commission for them to hear and determine this appeal, according to the provisions of law.

JUDGE OF THE COURT OF APPEAL

D.N.SAMARAKOON,J

I AGREE

JUDGE OF THE COURT OF APPEAL