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

In the matter of a Case Stated under Section 122 of the Inland Revenue Act No. 28 of 1979 (as amended).

C.A Case No:
CA/TAX 06/2009

BRA 535
SCA-221

Ajitha Ravindra Madanayake
of No.71 A,
Horton Place, Colombo 07.

Appellant

-Vs-

Commissioner General of Inland Revenue,
Department of Inland Revenue,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 2.

Respondent

Before : **D.N. Samarakoon, J.**
B. Sasi Mahendran, J.

Counsel : K. Kanag-Isvaran PC with N.R. Sivendran for the Appellant
S. Barrie, DSG for the Respondent

Written Submissions : 18.01.2022(by the Appellant)
19.01.2022 (by the Respondent)

Argued On : 17.02.2022

Decided On : 30.05.2022

B. Sasi Mahendran, J.

In the instant case, the Appellant served as the General Manager, and was a shareholder, of Ceylon Pencil Company Limited, a company in which his father was the Chairman, and his mother and siblings were the other shareholders. On the Appellant's notice of voluntary resignation from his post of General Manager by letter dated 01st July 1999, to be effectivefrom 31St July 1999, the Board of Directors of CPCL resolved by resolution dated 20th July 1999 to pay a sum of Rupees Sixty One Million (Rs. 61,000,000/-) to the Appellant.

The dispute centers around the Appellant's income tax return for the year of assessment 1999/2000, in which the Appellant declared the said sum of money as a gift. Disagreeing with this contention the Assessor who made the initial assessment, the Commissioner General of Inland Revenue (on appeal - by determination dated 08th October 2001), and the Board of Review (on further appeal - by determination dated 13th May 2009) were all of the view that the said sum of money constitutes "Profits from Employment", which is taxable under Section 4(a) of the Inland Revenue Act No. 28 of 1979,the relevant statute applicable to the present dispute.

Originally the first three questions of law were submitted by the Board of Review for the determination of this Court on12th October 2009 by way of a Case Stated. Questions 4-15 were incorporated into the Case Stated by way of a motion dated 01St June 2010 on the insistence of the Appellant, who felt that the first three questions did not adequately cover all the matters raised by the Appellant. Thus, it was agreed to incorporate questions 4-15 into the Case Stated.

However, on a careful perusal of the record and submissions of both sides, we are of the view that the key points in dispute for us to determine, as was argued before us on 17th February 2022, and to which the written submissions have devoted much time and attention, primarily involve three matters, encapsulated in the first three questions. This Court will address these three matters and then set out its opinion in respect of all fifteen questions of law by answering them in the affirmative or negative based on its reasoning.

The Fifteen questions of law, reproduced verbatim for the sake of completion, are as follows;

1. Whether the Commissioner General gave reasons for rejecting the return and/or did he exceed his authority under the law for there to be a non-compliance under the Act and/or failure to give reasons as required under Section 115(3) of the Act?

2. Was the sum of Rs. 61 million received from the company by the Assessee and paid to him upon a Board Resolution for Assessee's long association with the company and his contribution to the development of the family business of the company constitutes income for it to be taxed or was such sum paid could be treated as a gift by the employer company for it to be tax exempt?

3. Was the Board of Review empowered to hear and determine the appeal consequent to the Amnesty Act No. 10 of 2003 and the subsequent enactment of the Inland Revenue (Regulation of Amnesty) Act No. 10 of 2004?

4. Is the Appellant entitled for protection under Section 3(1) of the Inland Revenue (Special Provisions) Act No. 10 of 2003 and under Section 3(1) of the Inland Revenue (Regulation of Amnesty) Act No. 10 of 2004?

5. Even if the tax assessed under the charge number 11/C2/01/8001 is payable, is the Department of Inland Revenue statutorily denied from taking any recovery action in view of Section 144A of the Inland Revenue Act No. 38 of 2000 and Section 162A of the Inland Revenue Act No. 38 of 2000?

6. a. Does the sum of Rs. 61 Million, received from Ceylon Pencil Company Limited by the Appellant as a gift in consequence of the family decision to distribute the family wealth among the family members, amount to an income from employment, arising from the services provided by the Appellant as the General Manager (employee of Ceylon Pencil Company Limited) for a period of ten years?

   b. Has the Department of Inland Revenue acted unfairly, unjustly, and unreasonably by treating Rs. 61 Million as the employment income of the Appellant, when Ceylon Pencil Company Limited has not treated the said Rs. 61 million as a payment in respect of employment and not deducted same, in arriving at its total statutory income for the purpose its income tax?

7. Has the Commissioner General of Inland Revenue who made the determination acted unfairly, unjustly, and unreasonably by determining Rs. 61Million as employment income of the Appellant, after satisfying himself by stating in his determination dated 8th October, 2001 that the Rs. 61 Million was paid because 'The controlling shareholder of the company may have actuated by personal motives to make the payment"?

8. a. Can the failure to comply with the following provisions with regard to or pertaining to the Notice of Assessment, be cured under Section 144 of the Inland Revenue Act No. 28 of 1979?

   i. Non-compliance of Section 143(1) of the Inland Revenue Act No. 28 of 1979 and/or
   ii. Non-compliance of Section 143 (5) of the Inland Revenue Act No. 28 of 1979 and /or
   iii. Provision of the statute under which an assessment was made not being mentioned in the Notice of Assessment; and/ or
   iv. Giving reasons for not accepting a Return, making the Assessment, and issuing the Notice of Assessment not being performed by one and the same Assessor.

b. If not are the Notice of Assessment issued on the Appellant and the decision of the Board of Review erroneous and invalid?

9. Is the decision of the Board of Review illegal and/or bad in law as it has no jurisdiction to hear the appeal since the two-year period within which the decision should have been made had lapsed?

10. Is the Notice of Assessment bad in law for non-compliance and/or non-observance with the following provisions of the Inland Revenue Act No. 28 of 1979, namely-

    a) Section 143(1), 143(5); and /or
    b) Section 115(1), 115 (3);
    c) Failure to comply with Section 4(1);

11. a. Did A.A. Wijepala, Deputy Commissioner have no authority or power to issue the letter dated 5thApril, 2001(on 5th April, 2001 there was no tax in default) under Section 131(1) of the Inland Revenue Act No. 28 of 1979 (recovery provision to recover tax in default) to the General Manager, HongKong and Shanghai Banking Corporation Limited, requiring him to freeze the fixed deposits held on account of the Appellant with the said Bank?

    b. Was the said letter issued before the Notice of assessment was issued?

    c. If so, is the Notice of Assessment issued bad in law and not in accordance with the assessment process as specified in the Inland Revenue Act No. 28 of 1979?

12. a. Has the Commissioner General of Inland Revenue not made his determination in accordance with the provisions of Section 117(11) of the Inland Revenue Act No. 28 of 1979, in as much as he has not quantified the tax payable in his determination?

    b. If so, is the determination of the Commissioner General erroneous and/or invalid and/or null and void?

13. Did the Board of Review fail to consider that if an employee, who has left his employment on his own volition after working for more than ten (10) years has no legal entitlement to receive more than two hundred and three (203) years' annual salary as employment income, it is not a clear demonstration that Rs. 61 million was not an employment income, but was a gift?

14. Has the Board of Review misread and misinterpreted Section 2(2) of the Inland Revenue (Regulation of Amnesty) Act No. 10 of 2004, especially, the proviso to the Section and thus, made an erroneous and invalid decision?

15. By not quantifying the tax payable in its decision, has the Board of Review failed to make its decision in accordance with Section 121(10) of the Inland Revenue Act No. 28 of 1979 and thus, is the decision of the Board of Review erroneous and invalid?

1. Non-Compliance with Section 115(3) of the Inland Revenue Act.

Section 115(3) of the Inland Revenue Act reads,

Where a person has furnished a return of income, wealth or gifts, the Assessor may in making an assessment on such person under subsection (1) or under subsection (2), either-

(a) accept the return made by that person; or

(b) if he does not accept the return made by that person, estimate the amount of the assessable income, taxable wealth or taxable gifts of such person and assess him accordingly:

Provided that where an Assessor does not accept a return made by any person for any year of assessment and makes an assessment or additional assessment on such person for that year of assessment, he shall communicate to such person in writing, his reasons for not accepting the return.

On 9th April 2001, the Appellant received the letter of intimation, by which it was informed that the assessment had been rejected and the basis of such rejection, signed by one Mr. K.K. Samarapala, Senior Assessor. Whereas the Notice of Assessment (bearing Charge No. 11/C2/01/8001), received on 11th April 2001, was issued on the Appellant by one Mrs. P.Rohini, Senior Assessor. This, the Appellant contends, is not in compliance with the

statutory scheme, and by reason of this non-compliance, the Notice of Assessment ought to be a nullity.

The Appellant relying on the case of D.M.S. Fernando v. A.M. Ismail Sri Lanka Tax Cases Vol IV 184, contends that the decision to not accept the return furnished by a taxpayer, including the giving of reasons for the rejection, the assessment of the amount of tax payable having rejected the return, and the issuing of the Notice of Assessment ought to be made and done by one and the same Assessor as part of one and the same exercise.

It is manifest that a statutory duty is imposed on an Assessor not only to give reasons for non-acceptance of a return but also to communicate them to the Assessee. The rationale was elucidated in the clearest of terms by his Lordship Samarakoon C.J. in the case of D.M.S. Fernando (supra).

"Under the law that existed at the time, the Assessor was not bound to disclose any reasons either on the file or by communication to the Assessee. The Assessee could only appeal against the quantum of assessment and the onus of proof lay on the Assessee. He could only speculate on the reasons for such assessment for the purposes of his appeal. The picture is now different….

The primary purpose of the amending legislation is to ensure that the Assessor will bring his mind to bear on the return and come to a definite determination whether or not to accept it. It was intended to prevent arbitrary and grossly unfair assessments which many Assessors had been making as " a protective measure". An unfortunate practice had developed where some Assessors, due to pressure of work and other reasons, tended to delay looking at a return till the last moment and then without a proper scrutiny of the return, made a grossly exaggerated assessment……. Under the amendment when an Assessor does not accept a return, it must mean that at the relevant point of time **he has brought his mind to bear on the return and has come to a decision on rejecting the return. Consequent to this rejection, the reasons must be communicated to the Assessee.**" [emphasis added]

In the instant case, communication of the reasons of the Assessor has taken place albeit the Notice of Assessment is not issued by the same Assessor who made the assessment and communicated his reasons for non-acceptance of the Appellant's return.

Nevertheless, when the purpose of this practice is borne in mind, it is clear that in the instant case, the Assessor, one Mr. K. K. Samarapala, has done what was required of him by giving his mind to the return and making a definite determination to not accept it. He has communicated his reasons for arriving at his decision to the Appellant. No prejudice could be said to have been caused to the Appellant.

An allied point that the Appellant sought to raise was the inadequacy of reasons to discharge the statutory duty to give reasons. In terms of Section 115(3) of the Inland Revenue Act, the Legislature has in its wisdom cast a duty on an Assessor when he rejects a return. He has to "communicate to such person in writing his reasons for not accepting the return". The legislative provision is silent as to the adequacy of reasons, presumably because it will depend on the circumstances of each case.

The adequacy of reasons to discharge this statutory burden then has to be judged in the circumstances of the case. A useful judgment in this regard is the case of E D Gunaratna v Jayawardane, Sri Lanka Tax Cases Vol. IV 246. In that case, informing the Assessee that his income from lorries has not been declared was held to be adequate and intelligible to enable him to formulate his grounds of appeal as "a clue is given to the Petitioner as to where he had gone wrong in his return".

One main reason for the insistence of reasons is therefore to enable the aggrieved party to mount an effective attack on the decision so that one's right of appeal would not be rendered nugatory. This view was echoed by his Lordship Sharvananda J. (as he then was) in D.M.S. Fernando (supra) "so as to enable him [the Assessee] to demonstrate the untenability of the said reasons at the hearing of any appeal that may be preferred by him against the assessment".

The Appellant contends that in terms of the D.M.S. Fernando's judgment in which his Lordship Samarakoon C.J. held that "the section requires these reasons to be stated and not the conclusion which he arrived at" the Assessor has only disclosed that the sum will be taxable as "profit from employment". However, in the same breath, his Lordship the Chief Justice held, "It is his [the Assessor's] thinking that has to be disclosed to the Assessee." We are of the view that the said letter of intimation cannot be treated as a conclusion since the thinking of the Assessor is evident on the face of it.

It is on this basis that we respectfully are of the view that the case of New Portman v. Jayawardane, Sri Lanka Tax Cases Vol IV 236, cited by the Appellant, will not be applicable to the facts of the instant case. In New Portman, the reason informed to the company, which was held to be only a conclusion and not a reason per se, was as follows:

"According to the information available with me the statements of accounts furnished by you in support of the return of income for the above year of assessment... in respect of the above company does not reveal the correct profit. I am therefore, rejecting the Return and an assessment on estimated assessable income of the company will be issued shortly".

The relevant portion of the letter of intimation, in the instant case, is as follows:

"The note attached to the income tax returns and the extract of the resolution passed by the Board of Directors of Ceylon Pencil Company were carefully considered, and it connotes that,

i) The sum referred by you as a retiring gratuity has not been paid in accordance with a scheme which is uniformly applicable to all employees of the company, and

ii) Sum received as voluntary resignation was not made out of a scheme which is uniformly applicable to all employees of the Company,

Therefore, the sum received as considered past services rendered by you is treated as profit from employment income and it is taxable at the normal progressive rates."

The Assessor has not merely stated that the "return does not involve a correct profit" as in the case of New Portman (supra). He has gone further to indicate that the sums of money (the Rs. 1.5 Million treated as retiring gratuity by the Appellant in his letter dated 9th April 2001 to the Assessor and the remainder of the Rs. 61 Million) were treated as profits from employment because they were not referable to a scheme uniformly applied by the Company to all its employees. The correctness of these reasons is beside the point. For the purpose of discharging the statutory duty to give reasons, we are of the view that the

reasons given by the Assessor, one Mr. K.K. Samarapala, Senior Assessor are intelligible enough for the Appellant to have mounted an effective attack on it, as he has done, and therefore is adequate to discharge the statutory duty to give reasons. It cannot be said that the Appellant had to "speculate" the reasons. Neither could it be said that he was taken aback when he received the Notice of Assessment.

2. Taxability of the sum of Rupees Sixty One Million

The key dispute involves the task of deciding upon which side of the line this case lies. That is whether the sum of Rs. 61 Million is to fall on the side of taxability (in terms of "profit from employment" under Section 4) or, as the Appellant contends, an exemption as a "parting testimonial" (a gift). It would be prudent therefore to first set out the applicable statutory provision and lay down the arguments forcefully contested by either side to support their respective stances, prior to this Court deciding on which side of the aisle it would stand.

Section 4 of the Inland Revenue Act sets forth the sources of profits and income from which assessable income is derivable. The relevant parts of Section 4 reads as follows:

(a) (i) any wages, salary, allowance, leave pay, fee, pension, commission, bonus, gratuity, perquisite or such other payment in money which an employee receives in the course of his employment;

(ii) …….

(iii)……

whether received or derived from the employer or others;

(b)

(c) (i) any retiring gratuity or any sum received in commutation of pension;

The resolution dated 20th July 1999 of the Board of Directors of CPCL is reproduced for the purpose of convenience as follows:

"The Board has considered the circumstances in which Mr. A.R. Madanayake after a long association with and fruitful contribution to the development of the family business of the Company has voluntarily decided to relinquish his duties with effect from the 31st July, 1999 as General Manager a position which he has held for over a decade. Much as the Board Regrets his decision to sever his connections with the Company, and since he has been amply remunerated for his services rendered, the Board with the consent of the family shareholders has unanimously resolved to pay him a parting testimonial in a sum of Rupees Sixty One Million (Rs.61,000,000/-) payable as follows:

a) Rupees Fifty One Million (Rs.51,000,000/-) less amounts owing to the Ceylon Pencil Company Limited by cheque.

b) The balance Rupees Ten Million (Rs. 10,000,000/-) in suitable instalments over a period of ten years i.e. 30th July, 1999 and 30th July, 2009."

The Appellant contends that this "parting testimonial" was a result of a family arrangement to distribute its wealth amongst its members. The Appellant lists other transactions in this regard that happened on or about the same time as the resolution to pay a "parting testimonial". These include gifts of property from the Appellant's parents, and a gift of a motor vehicle to the Appellant from Care Products (Private) Limited, a family company.

Further, the Appellant strongly contended that this sum of money cannot be treated as a profit from employment on a plain reading of the statute. As per Section 4(a)(i) of the Act the receipts mentioned must satisfy the qualifying limb of having to be received "**in the course of his employment**". On the face of it, this provision would not envisage payments made consequent to employment.

It would not also, as per the Appellant, fall under Section 4(c)(i) as a "retiring gratuity" as the Appellant did not retire, but voluntarily resigned.

The case of K. Kanagasabapathy v. Commissioner General of Inland Revenue SL Tax Cases Vol IV 140, was relied on as authority for the proposition that the receipt must be derived by reason of a person's employment. In the same judgment, his Lordship

Wanasundera J. cited the English judgment of Hochstrasser v. Mayes 1959 (3) AER 817, in which Lord Radcliffe made the following observation,

"…. while it is not sufficient to render a payment assessable that an employee would not have received it unless he had been an employee, it is assessable if it has been paid to him in return for acting as or being an employee".

Lord Reid adopted a complementary approach in Laidler v. Perry [1960] A.C. 16:

"There is a wealth of authority on this matter and various glosses on or paraphrases of the words in the Act appear in judicial opinions, including speeches in this House. No doubt they were helpful in the circumstances of the cases in which they were used, but in the end **we must always return to the words in the statute and answer the question — did this profit arise from the employment? The answer will be 'no' if it arose from something else**." [emphasis added]

On these authorities, the Appellant contends that the parting testimonial was not paid in return for acting as or being an employee. It was paid because of "something else" i.e., the family relationship of the Appellant to the Company. As per the Appellant, there did not even exist a formal contract of employment between the Appellant and the Company.

The Commissioner General, affirming the decision of the Assessor, treated this sum as an ex-gratia payment or a gift covered by the term "gratuity" falling under profits from employment paid to the Appellant by the Company in consideration of his long association and fruitful contribution to the development of the business. The Board of Review too determined that the payment was made in appreciation of the Appellant's services to the Company.

In the letter dated 09th April 2001 it is seen that it is the Appellant himself who has indicated to the Assessee to consider a sum of Rupees 1.5 million as gratuity and the remainder as a gift. Neither at that stage nor in the appeal before the Commissioner General was the proposition of a family arrangement to distribute wealth put forward. The

Board of Review has observed this wavering in the Appellant's stance in its determination as well.

Further, there is no evidence forthcoming as to how other members of the Board of Directors or the family members of the Appellant benefitted from this distribution of wealth. It raises a doubt then whether this point of family wealth distribution was offered as a mere afterthought to escape having to pay taxes. If it was a family wealth distribution then there was no necessity for the resolution to be made while the Appellant was still in employment.

The Appellant also cited the case of Craib v. CIT Sri Lanka Tax Cases Vol 1 162. In the case of Craib, his Lordship Moseley J. held that "This payment I prefer to regard in the light of a personal gift the motive for which, no doubt, but not the consideration, was the long service rendered to the company by the appellant." The motive prompting the expression of gratitude, it was argued may have been the Appellant's good service, but it was nevertheless a personal gift on personal grounds to provide for a holiday and to enable the Appellant to recuperate his health.

However, we cannot follow this as it is not relevant to the instant case. The motive for making this generous payment and the consideration for the same is the yeoman services rendered by the Appellant.

Instead, we are guided by the words of Rowlatt J. in Davis v. Harrison [1927] All ER Rep 743 which was referred to in the case of Craib. Rowlatt J. held,

"In Seymour v. Reed…. in the opinion of Lord Phillimore there is one sentence which has to be considered carefully in this connection, because the learned Lord says that a gift of money handed by the employer to his employee during the course of the employment, and even in respect of loyal and meritorious services may still be a gift. I apprehend that the question is always under that word "may," whether it is given, because some further remuneration is thought proper to pay, or whether it is a gift which springs directly from goodwill only, although that goodwill, of course, has been generated by long association with the servant during which he has rendered loyal and meritorious service. If there were no loyal and meritorious service the goodwill would not arise, but I think that it must always be a question of fact how the particular payment is to be regarded."

A view echoed by Viscount Simonds in Hochstrasser(supra) quoting with approval the statement made by Upjohn J., the judge at the first instance in the same case.

"The authorities show this, that it is a question to be answered in the light of the particular facts of every case whether or not a particular payment is or is not a profit arising from the employment."

A pertinent observation is made by E. Gooneratne in his, 'Income Tax in Sri Lanka' (at p.103).

"A reward for past services does not acquire the character of a gift because it was granted without a legal obligation. A voluntary benefit given to an employee on retirement will be profits from employment if the consideration for the benefit is past service…. The occasion or time a payment is made is not conclusive of the nature of the payment. There is in every gift a close relationship between the donor and donee. The parties maybe master and servant. The employer-employee relationship maybe evidence that a benefit given by the employer was remuneration for service and equally it may be evidence that it was a gift……. A donor selects the objects of his bounty and if he elects in favour of an employee the relationship does not change the nature of the transaction. If the transaction is one that could have been entered into between parties who are not master and servant the existence of a contract of service is not by itself sufficient to make the benefit a profit from employment. When the benefit given by the employer is restricted to persons in his service the benefit comes to the employee because of the position held by him. The position held by the employee qualifies him to receive the benefit but does not determine the nature of the benefit as profits or income."

One factor, although not decisive or conclusive but merely influential, from which support may be gleaned is the wording of the Resolution. Indeed, in Craib's case (as was affirmed in Sutherland v. Commissioner of Income Tax, Sri Lanka Tax Cases Vol IV 446) it was held that the choice of words found in a document, which may be deliberate or accidental, cannot penalize the Assessee. However, in the light of the attending circumstances, the language of the document (the Resolution of the Board of Directors in the instant case) cannot be ignored altogether.

The wording in the Resolution especially, "**long association**", and "**fruitful contribution to the development**" in addition to the phrase "**resolved to pay**", instead of terming it as resolved to gift, grant or donate, on a literal interpretation lends support to the view that money was given as payment for consideration of yeoman services rendered by the Appellant.

Be that as it may, the Appellant, in his own words, by letter dated 09th April 2001, to the Assessor, has proposed to treat a sum of Rs. 1.5 million out of the larger sum as gratuity. A question arises on what basis, whether arbitrarily or otherwise, the line is drawn at Rs. 1.5 million to be treated as gratuity and the remainder as a gift?

This Court will now determine whether it is only the sum of Rs. 1.5 Million that should be treated as gratuity or the entire sum of Rs. 61 Million?

At this stage, since the term gratuity has not been statutorily defined, the word will be defined by reference to its ordinary meaning.

"A gift or present (usually of money), often in return for favours or services, the amount depending on the inclination of the giver" (The Oxford English Dictionary, Second Edition)

"Gratuity or retired pay is "income" (Re Ward [1897] 1 Q.B. 266)" (Stroud's Judicial Dictionary of Words and Phrases, Third Edition)

"Gratuities" – Gifts received as a reward for services rendered are subject to income tax (Jowitt's Dictionary of English Law, Second Edition)

We are also guided by a judgment from the Supreme Court of India in the case of Delhi Cloth & General Mill Co. v. Workmen 1970 AIR 919, in which it was held,

"Gratuity in its etymological sense means a gift especially for services rendered or return for favours received. For some time in the early stages in the adjudication of industrial disputes, gratuity was treated as a gift made by the employer at his pleasure and the workmen had no right to claim it. But since then there has been a long line of precedents in which it has been ruled that a claim for gratuity is a legitimate claim which the workmen may make and which in appropriate cases may give rise to an industrial dispute…… Gratuity paid to workmen is intended to help them after retirement on

superannuation, death, retirement, physical incapacity, disability or otherwise. **The object of providing a gratuity scheme is to provide a retiring benefit to workmen who have rendered long and unblemished service to the employer and thereby contributed to the prosperity of the employer**.....It is not paid to an employee gratuitously or merely as a matter of boon; it is paid to him for **long and meritorious service rendered by him** to the employer." [emphasis added]

This passage was cited with approval by his Lordship Samerawickrame J. in the National Union of Workers v. The Scottish Ceylon Tea Company 78 NLR 133.

Therefore, we hold that considering that the resolution was made during the period of his employment with the company and in consideration of his meritorious services the sum of Rs. 61 Million will fall on the side of taxability in terms of Section 4 (a) of the Act.

3. Applicability of the Amnesty Laws

Section 2(1) of the Inland Revenue (Special Provisions) Act No.10 of 2003 reads,

Any person whether in Sri Lanka or abroad, who, though required under any law for the time being in force, which is specified in the Schedule hereto, relating to the imposition of tax, had not in relation to any period prior to March 31, 2002, declared to the Commissioner-General or to the relevant authority, as the case may be, all or any portion of this liability to such tax, or of the sources of his income and assets, may make a declaration of the sources of his income and assets, may make a declaration of the sources of his income or assets as at April 1, 2002, to the Commissioner-General on or before June 30,2003:

Provided however that any person who had made the required declarations to the Commissioner-General or to the relevant authority in respect of all relevant periods prior to March 31, 2002, may make a declaration under Section 2 in order to ascertain the correctness of his position and the Commissioner-General or the other relevant authority shall extend the immunity referred to in Section 3, to such person.

The Appellant contends that as he has made a declaration under Section 2(1) of the Act, he is entitled to full immunity from liability to pay tax or from investigation or prosecution for any offence specified in the Schedule as provided for in Section 3(1) of the same.

Notwithstanding its repeal, the Appellant made another declaration in terms of the Inland Revenue (Regulation of Amnesty) Act No. 10 of 2004. Section 3(1) of the Inland Revenue (Regulation of Amnesty) Act No. 10 of 2004provides that if any taxpayer is required to pay income tax by law and had not, prior to 31st March 2002, declared his liability to the Commissioner-General to pay tax or declared his sources of income, had made a declaration to the Commissioner-General, prior to 31st August 2003, disclosing his liability and sources of income is entitled to amnesty. The proviso reads as follows,

Provided that in granting the amnesty as set out above the Commissioner-General shall verify the correctness of the declarations received by him and grant the amnesty only in respect of such part of the declaration which discloses information in relation to ***undeclared income, undeclared assets and undeclared sources of income*** *or additional income, assets and sources of income*. [emphasis added]

However, this Court is unable to agree with the contention that the Appellant is entitled to the benefit of the Amnesty Laws. In the instant case, the Appellant has in fact declared the said sum of money in his return of income. It is beside the point that the payment of Rs. 61 Million is listed in an Annexure to item 17(iii) of the return. The Amnesty Acts envisage situations in which there has been no disclosure, whether in the body of the return or even a Schedule or attachment to the return.

Further, at the time of enactment of the Amnesty Acts, the matter was already pending before the Board of Review. The Board of Review cannot take cognizance of the Amnesty Acts and determine whether it is applicable to the Appellant's case because the ambit of the Board of Review is strictly circumscribed by law in terms of Section 121(10) of the Inland Revenue Act. It can only "confirm, reduce, increase or annul the assessment as determined by the Commissioner-General on appeal".

In the light of the foregoing observations concerning the matters that were central to this dispute, we answer the questions of law as follows;

1. Whether the Commissioner General gave reasons for rejecting the return and/or did he exceed his authority under the law for there to be a non-compliance under the Act and/or failure to give reasons as required under section 115(3) of the Act?

We are of the view that the Assessor at the initial assessment gave sufficient reasons for rejecting the return and acted in compliance with Section 115(3) of the Act.

2. Was the sum of Rs. 61 million received from the company by the Assessee and paid to him upon a Board Resolution for Assessee's long association with the company and his contribution to the development of the family business of the company constitutes income for it to be taxed or was such sum paid could be treated as a gift by the employer company for it to be tax exempt?

   As has been dealt with above, we hold that the sum of Rs. 61 Million is taxable in terms of Section 4(a) of the Act. It is not tax exempt.

3. Was the Board of Review empowered to hear and determine the appeal consequent to the Amnesty Act No. 10 of 2003 and the subsequent enactment of the Inland Revenue (Regulation of Amnesty) Act No. 10 of 2004?

   No. The Board of Review was not empowered to take cognizance of the Amnesty Acts.

4. Is the Appellant entitled for protection under Section 3(1) of the Inland Revenue (Special Provisions) Act No. 10 of 2003 and under Section 3(1) of the Inland Revenue (Regulation of Amnesty) Act No. 10 of 2004?

   No, for the aforementioned reasons.

5. Even if the tax assessed under the charge number 11/C2/01/8001 is payable, is the Department of Inland Revenue statutorily denied from taking any recovery action in view of Section 144A of the Inland Revenue Act No. 38 of 2000 and Section 162A of the Inland Revenue Act No. 38 of 2000?

The Department of Inland Revenue can recover the said sum of money.

6. a. Does the sum of Rs. 61 Million, received from Ceylon Pencil Company Limited by the Appellant as a gift in consequence of the family decision to distribute the family wealth among the family members, amount to an income from employment, arising from the services provided by the Appellant as the General Manager (employee of Ceylon Pencil Company Limited) for a period of ten years?

For the aforementioned reasons, it is not a gift. The sum is taxable as a profit from employment.

b. Has the Department of Inland Revenue acted unfairly, unjustly, and unreasonably by treating Rs. 61 Million as the employment income of the Appellant, when Ceylon Pencil Company has not treated the said 61 million as a payment in respect of employment and not deducted same, in arriving at its total statutory income for the purpose its income tax?

No, the Department of Inland Revenue has not acted unfairly, unjustly, and unreasonably by treating the sum of Rs. 61 Million as employment income.

7. Has the Commissioner General of Inland Revenue who made the determination acted unfairly, unjustly, and unreasonably by determining Rs. 61 Million as employment income of the Appellant, after satisfying himself by stating in his determination dated 8th October, 2001 that the Rs. 61 Million was paid because 'The controlling shareholder of the company may have actuated by personal motives to make the payment"?

For the aforesaid reasons, this question must be answered in the negative.

8. a. Can the failure to comply with the following provisions with regard to or pertaining to the Notice of Assessment, be cured under Section 144 of the Inland Revenue Act No. 28 of 1979?

   v. Non-compliance of Section 143 (1) of the Inland Revenue Act No. 28 of 1979 and/or
   vi. Non-compliance of Section 143 (5) of the Inland Revenue Act No. 28 of 1979 and /or
   vii. Provision of the statute under which an assessment was made not being mentioned in the Notice of Assessment; and/ or
   viii. Giving reasons for not accepting a Return, making the Assessment, and issuing the Notice of Assessment not being performed by one and the same Assessor.

   We hold that it is curable. In this regard, I would like to quote a passage from the judgment of A.M. Ismail v. Commissioner of Inland Revenue, Sri Lanka Tax Cases Vol IV 156. His Lordship Victor Perera J. held,

   "On an examination of this Section, it is clear that the 'want of a form' or 'mistake' or 'defect' or 'omission' in the assessment itself or a notice will not affect the validity of the assessment if the assessment or notice is in substance and effect in conformity with or according to the intent and meaning of this law."

   b. If not are the Notice of Assessment issued on the Appellant and the decision of the Board of Review erroneous and invalid?

   No.

9. Is the decision of the Board of Review illegal and/or bad in law as it has no jurisdiction to hear the appeal since the two-year period within which the decision should have been made had lapsed?

In terms of Section 140(10) of Act No. 38 of 2000, as amended, the Board of Review ought to make its determination within two years of commencement of the hearing of the appeal to it. Hearing has been interpreted by our courts to mean oral hearing.

In Mohideen v. Commissioner General of Inland Revenue C.A. 02/2007, decided on 16.01.2014, his Lordship Gooneratne J. held,

"One has to give a practical and a meaningful interpretation to the usual day to day functions or steps taken in a court of law or statutory body involved in quasi-judicial functions, duty or obligation. If specific time limits are to be laid down the legislature need to say so in very clear unambiguous terms instead of leaving it to be interpreted in various ways. To give a restricted interpretation would be to impose unnecessary sanctions on the Board of Review…… If it was the intention of the legislature that hearing should be concluded within 2 years from the date of filing the petition or that the time period of 2 years begins to run from the date of filing petition, there could not have been a difficulty to make express provision, in that regard…... Hearing no doubt commence from the date of oral hearing."

In terms of determinations made by the statutory successor of the Board of Review i.e., the Tax Appeals Commission it has been established by a series of decisions of this Court that the time limit spelled out in Section 10 of the Tax Appeals Commission Act No. 23 of 2011, as amended, is not a mandatory provision. (CIC Agri Business (Private) Limited v. The Commissioner General of Inland Revenue, CA Tax 42/2014 decided on 29.05.2020, Kegalle Plantations PLC v. Commissioner General of Inland Revenue, CA Tax 09/2017 decided on 04.09.2018, Amadeus Lanka v. Commissioner General of Inland Revenue CA TAX 04/2019 decided on 30.07.2021) The rationale underlying these determinations would be equally applicable to the Board of Review.

The determination dated 13th May 2009 is not time barred since the oral hearings commenced on 01st December 2008.

10. Is the Notice of Assessment bad in law for non-compliance and/or non-observance with the following provisions of the Inland Revenue Act No. 28 of 1979, namely-

d) Section 143(1), 143(5); and /or

e) Section 115(1), 115 (3);

f) Failure to comply with Section 4(1);

No. The Notice of Assessment is not bad in law.

11. a. Did A.A. Wijepala, Deputy Commissioner have no authority or power to issue the letter dated 5thApril, 2001(on 5th April, 2001 there was no tax in default) under Section 131(1) of the Inland Revenue Act No. 28 of 1979 (recovery provision to recover tax in default) to the General Manager, HongKong and Shanghai Banking Corporation Limited, requiring him to freeze the fixed deposits held on account of the Appellant with the said Bank?

b. Was the said letter issued before the Notice of assessment was issued?

c. If so, is the Notice of Assessment issued bad in law and not in accordance with the assessment process as specified in the Inland Revenue Act No. 28 of 1979?

We hold that this is not a recovery. It is an internal communication between the bank and Assessor for official purposes. Unless a Court order is given the Department cannot seize the property. We hold there is no abuse of power. Without the permission of the court under Section 130 of Inland Revenue Act, the Commissioner has no authority to seize. There is only an indication. The purpose is to ensure that funds are available for recovery in the event of default.

12. a. Has the Commissioner General of Inland Revenue not made his determination in accordance with the provisions of Section 117(11) of the Inland Revenue Act No. 28 of 1979, in as much as he has not quantified the tax payable in his determination?

The Commissioner General has made a correct determination.

b. If so, is the determination of the Commissioner General erroneous and/or invalid and/or null and void?

No.

13. Did the Board of Review fail to consider that if an employee, who has left his employment on his own volition after working for more than ten (10) years has no legal entitlement to receive more than two hundred and three (203) years' annual salary as employment income, it is not a clear demonstration that Rs. 61 Million was not an employment income, but was a gift?

No. The Board of Review has construed it correctly as a profit from employment.

14. Has the Board of Review misread and misinterpreted Section 2(2) of the Inland Revenue (Regulation of Amnesty) Act No. 10 of 2004, especially, the proviso to the Section and thus, made an erroneous and invalid decision?

The Act is not applicable to the Appellant.

15. By not quantifying the tax payable in its decision, has the Board of Review failed to make its decision in accordance with Section 121(10) of the Inland Revenue Act No. 28 of 1979 and thus, is the decision of the Board of Review erroneous and invalid?

No.

It is regrettable to note that some issues framed were repetitive and unrelated causing delays in the disposal of this case.

For the foregoing reasons, this Court confirms the determination of the Board of Review. The Registrar is directed to, since the Board of Review is no longer in existence, send a copy of this judgment to the Tax Appeals Commission.

JUDGE OF THE COURT OF APPEAL

D.N. Samarakoon, J.
I AGREE

JUDGE OF THE COURT OF APPEAL

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