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).

ITQ Lanka (Private) Limited,
4-09, Majestic City,
10, Station Road,
Colombo 4.

APPELLANT

CA No. CA/TAX/0001/2019
Tax Appeals Commission
No. TAC/VAT/009/2014

v.

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

RESPONDENT

BEFORE : Dr. Ruwan Fernando J. &
M. Sampath K. B. Wijeratne J.

COUNSEL : Dr. Shivaji Felix with Nivantha Satharasinghe for the Appellant.

Chaya Sri Nammuni, DSG for the Respondent.

WRITTEN SUBMISSIONS	:	10.06.2022, 31.01.2020 & 01.11.2019 (by the Appellant) 15.06.2022 & 16.12.2019 (by the Respondent)
ARGUED ON	:	17.12.2021 & 16.03.2022
DECIDED ON	:	28.07.2022

M. Sampath K. B. Wijeratne J.

Introduction

The Appellant, ITQ Lanka (Pvt) Ltd (hereinafter referred to as 'ITQLPL') is a limited liability company incorporated in Sri Lanka. According to the Appellant, its principal activity is providing the service of facilitating the processing of travel reservation related data and its transmission services to Travelport Global Distribution Systems BV, Netherlands (hereinafter referred to as 'Travelport') which owns and operates Galileo Computer Reservation System (Galileo CRS). CRS is a computerised system used to store and retrieve information and conduct transactions related to air travel, hotels, car rental or other related activities. The Respondent challenges the Appellant's position that the Appellant provides its services to Travelport Global Distribution Systems BV, Netherlands, an entity located abroad and contends that the services are being provided to Sri Lankan travel agents.

The Appellant submitted its Value Added Tax (hereinafter referred to as 'VAT') returns for the quarterly periods from 1st April 2010 to 30th September 2011 and the Assessor did not accept the same on the ground that the supplies made by the Appellant could not be considered as zero-rated supplies under Section 7 (c) of the Value Added Tax Act No. 14 of 2002 (hereinafter referred to as 'the VAT Act'), as amended. Accordingly, an assessment was issued to the Appellant company.

The Appellant appealed to the Commissioner General of Inland Revenue (hereinafter referred to as 'the CGIR') against the said assessment and the CGIR by his determination dated 21st April 2014 confirmed the Assessor's assessment.

Being aggrieved by the said determination, the Appellant appealed to the Tax Appeals Commission (hereinafter referred to as 'the TAC') on the 25th June 2014, in accordance with Section 7 of the TAC Act No. 23 of 2011 (hereinafter referred to as 'the TAC Act'), as amended.

The TAC, on the 26th June 2018, determined that the supply made by the Appellant is not zero rated either in terms of either Section 7 (1) (b) (vi) or Section 7 (1) (c) of the VAT Act, and confirmed the determination made by the Respondent, the CGIR.

The Appellant then 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. *Is the determination of the Tax Appeals Commission time barred?*

2. *Are the assessments of Value Added Tax and penalty, as confirmed by the Tax Appeals Commission, excessive, arbitrary and unreasonable?*

3. *Are the supplies made by the Appellant which constitute the subject matter of this appeal, zero rated supplies within the contemplation of section 7 (1) (c) of the Value Added Tax Act No. 14 of 2002 (as amended)?*

4. *In the alternative, are the supplies made by the Appellant, which constitute the subject matter of this appeal, zero rated supplies within the contemplation of section 7 (1) (b) ~~(iv)~~[1] (vi) of the Value Added Tax Act, No. 14 of 2002 (as amended)?*

[1] Corrected as (vi)

5. *In view of the facts and circumstances of the case, did the Tax Appeals Commission err in law when it arrived at the conclusion that it did?*

Analysis

1. Is the determination of the Tax Appeals Commission time barred?

The Appellant argued that the determination of the TAC is time barred and therefore not enforceable in law.

In my view the above issue is twofold; whether the TAC has made its determination within the stipulated time frame and whether the time frame is mandatory. On the face of the TAC determination, the first hearing was held on the 11th August 2016 and the determination was made on the 26th June 2018, well after two hundred and seventy days. Thus, it is apparent that the TAC has indeed overrun the prescribed time limit. The learned Deputy Solicitor General did not dispute that position, and the Court is satisfied that the TAC in fact exceeded the prescribed deadline. This allows me to proceed directly to the issue of whether compliance with the time frame is mandatory, or merely directory.

For clarity I will now reproduce the relevant part of Section 10 of the TAC Act (as it stood before the amendments), excluding the proviso, which reads thus:

> *10. The Commission shall hear all appeals received by it and make its decision in respect thereof,* ***within one hundred and eighty days from the date of the commencement of the hearing of the appeal*** (emphasis added).
>
> *(...)*

Accordingly, the Legislature intended the TAC to conclude an appeal within one hundred and eighty days from the date of the commencement of the hearing of the appeal.

Section 10 has subsequently been amended by Amendment Act No. 4 of 2012 to reads as follows:

> *10. The Commission shall hear all appeals received by it and make its **determination** in respect thereof, **within two hundred and seventy days of** the date of the commencement of the hearing of the appeal* (emphasis added).
>
> *(…)*

By this amendment, the Legislature extended the time granted to the TAC to conclude an appeal by ninety days.

Section 10 has been further amended by Amendment Act No. 20 of 2013 which reads thus:

> *10. The Commission shall hear all appeals received by it and make its decision in respect thereof, within **two hundred and seventy days from the date of the commencement of its sittings for the hearing of each such appeal*** (emphasis added).
>
> *(…)*

By this amendment, the Legislature reduced the time limit granted to the TAC to conclude an appeal by enacting that the time should commence not from the commencement of hearing, but from the commencement of its sittings for hearing the appeal.

The learned Counsel for the Appellant argued that the Legislature, by amending the above provision, not only once but twice, clearly manifested its intention of enacting the time frame provided for the conclusion of an appeal to be mandatory[2].

However, I am not in favour of the argument advanced by the learned Counsel for the Appellant. The Legislature, at first having extended the one-hundred-and-eighty-day period from the **commencement of the hearing** up to two hundred and seventy days, later reduced the said period by enacting that the time should take effect from the **commencement of sittings for the hearing**, which would precede the hearing itself.

[2] Paragraph 14 of the Appellant's consolidated written submission.

In the case of *D.M.S. Fernando and Another v. Mohideen Ismail*,[3] Samarakoon C.J., citing *Maxwell on the Interpretation of Statutes (12th Edn.)*, presented a three-limbed test that could assist in determining the intention of the Legislature:

"*Then again it is said that to discover the intention of the Legislature it is necessary to consider - (1) The Law as it stood before the Statute was passed. (2) The mischief if any under the old law which the Statute sought to remedy and (3) The remedy itself.*"

In applying this test to the present case, it apparent that the law as it existed prior to the amendments was modified by extension and reduction, as the Legislature deemed appropriate, the timeframe within which the TAC should make a decision. There appears to be no obvious mischief that the amendments were intended to remedy, and the remedy itself appears to be nothing other than a change in the time allotted to the TAC to adjudicate an appeal. Even if the mischief sought to be remedied was a delay in the appellate process, there is little support to the contention that the Legislature intended the said time limit to be mandatory, since it was first extended, and then reduced.

Accordingly, I am of the opinion that the intention of the Legislature in amending the aforementioned provision was simply to redefine time available to the TAC to determine an appeal.

It is also important to note that although the Legislature amended the relevant provision twice, it did not specifically make the deadline mandatory. If the intention of the Legislature was to entitle the Appellant to the relief sought in a situation where the TAC fails to meet the time limit, then the Legislature could have specifically enacted it.

The learned Counsel for the Appellant cited F.A.R. Bennion in *Bennion on Statutory Interpretation*[4] wherein it is stated that the requirement of an act to be done in a particular manner is merely directory but, that is not the case with a stipulation as to time. If the only time limit which is prescribed

[3] [1982] 1 Sri.L.R. 222, at p.229.

[4] London: LexisNexis, 5th edn., 2008, at p. 48, (citing Millet LJ in *Petch v. Gurney (Inspector of Taxes)*, [1994] 3 AII ER 731, at p. 738).

is not obligatory, there is no time limit at all. Doing an act late is not the equivalent of doing it in time.

It was also cited *Petch v. Gurney (Inspector of Taxes)*[5], wherein Millet LJ states that '*Unless the court is given a power to extend the time, or some other and final mandatory time limit can be spelled out of the statute, a time limit cannot be relaxed without being dispensed with altogether, and it cannot be dispensed with altogether unless the substantive requirement itself can be dispensed with.*'

In reply, the learned Deputy Solicitor General cited *Bindra*[6], where it is stated that '*where prescription relates to performance of a public duty, and to invalidate acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, such prescription is generally understood as mere instruction for the guidance of those upon whom the duty is imposed'.* Further, *Bindra*[7] analyses the mandatory and directory statutory provisions as follows; '*so a mandatory statute according to Crawford, may be defined as one whose provisions or requirements, if not complied with, will render proceedings to which it relates illegal and void, while a directory statute is one where non-compliance will not invalidate the proceedings to which it relates*'. It is further stated that *'on the other hand, where the conditions are imposed merely for administrative purpose and no specific penalty is imposed for breach or violation of such conditions, agreements in breach of them are valid. It is clear law that an act, forbidden in public interest, cannot be made lawful by paying penalty on violation, whereas as act which is lawful in itself cannot become unlawful merely because some collateral requirement, imposed for reasons of administrative convenience, has not been fulfilled.'*

The above authorities show that courts in different jurisdictions have adopted different views and that internationally recognized authors have expressed different views on the issue at hand.

As such, I believe it is prudent to be guided by the opinions expressed by our own Courts.

The learned Counsel for the Appellant contended that this Court is bound by the principle of statutory interpretation set out in *Sampanthan v.*

[5] [1994] 3 AII ER 731, at p. 738.
[6] *Interpretation of Statutes*, London: Lexis Nexis, 10th Edition, at p. 983.
[7] Ibid at p. 988.

Attorney General[8], wherein His Lordship H.N.J. Perera CJ delivering the majority judgment of a seven-judge bench of the Supreme Court, expressed his views regarding the role of court when interpreting a statute in the following terms; '*Next, it is to be kept in mind that the task of interpreting a statute must be done within the framework and wording of the statute and in keeping with the meaning and intent of the provisions in the statute. A Court is not entitled to twist or stretch or obfuscate the plain and clear meaning and effect of the words in a statute to arrive at a conclusion which attracts the Court*.'

However, this is not about twisting, stretching or obscuring the time limit set out in Section 10 of the TAC Act but, to determine whether it is mandatory or not. To this end, I will consider a decision that specifically addresses the statutory time limits for an act to be enforced by a public body or public officers.

In the case of *K. Nagalingam v. Lakshman de Mel*,[9] Sharvananda J. (as His Lordship then was) cited the following two excerpts from scholarly authorities, in determining whether a prescribed period for the performance of a public duty was mandatory:

"*The whole scope and purpose of the enactment must be considered, and one must of that provision* ***to the general object intended to be secured by the Act****' – Smith Judicial Review of Administrative Action (2nd Ed. at page 126)* (emphasis added)."

"*Where the prescriptions of a statute relate to the performance of a public duty, and where invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty yet not promote the essential aims of the Legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal, indeed, but it does not affect the validity of the act done in disregard of them. It has often been held, for instance,* ***when an Act ordered a thing to be done by a public body or public officers and pointed out the specific time when it was to be done, then the Act was directory only and might***

[8] SC FR 351/2018 at p. 65, decided on the 13th December 2018.
[9] 78 N.L.R. 231, at pp.236-237.

be complied with after the prescribed time. *(Maxwell-11th Ed. at page 369)* (emphasis added)."

Having considered the above scholarly authorities, His Lordship concluded on the time limits enacted in the Termination of Employment Act, as follows:[10]

"*The object of the provision relating to time limit in section 2 (2) (c) is to discourage bureaucratic delay. That provision is an injunction on the Commissioner to give his decision within the 3 months and not to keep parties in suspense. Both the employer and the employee should, without undue delay, know the fate of the application made by the employer. But the delay should not render null and void the proceedings and prejudicially affect the parties, as the parties have no control over the proceedings. It could not have been intended that the delay should cause a loss of the jurisdiction that the Commissioner had, to give an effective order of approval or refuse. In my view, a failure to comply literally with the aforesaid provision does not affect the efficacy or finality of the Commissioner's order made thereunder.* ***Had it been the intention of Parliament to avoid such orders, nothing would have been simpler than to have so stipulated*** (emphasis added)."

His Lordship affirmed this decision in the subsequent case of *Ramalingam v. Thangarajah*,[11] when deciding that the time limits laid down in the Primary Courts Procedure Act were to be construed as directory, and not mandatory.

It cannot be assumed that there was some form of oversight on the part of the Legislature when amending Section 10 of the TAC Act, not specifying the consequences that follow when the TAC does not strictly comply with the statutory time limit. This is particularly so since, as the learned Counsel for the Appellant himself argued, the relevant section has been amended twice. This means that the Legislature twice had the opportunity to specify any consequences that follow non-compliance, though it saw fit not to do so.

[10] *Ibid.* at p.237.

[11] [1982] 2 Sri.L.R. 693, at p.703.

In the case of *Mohideen v. The Commissioner General of Inland Revenue*,[12] a similar observation was made by His Lordship Gooneratne J. (sitting in the Court of Appeal) when examining the intention of the Legislature concerning the time limit set for the Board of Review (which was the body that was replaced by the TAC) to reach its determination:

"*If it was the intention of the legislature that hearing* (sic) *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 the petition,* ***there could not have been a difficulty to make express provision, in that regard*** (emphasis added)."

Based on a review of some tax legislation enacted by our Parliament, I observe that the Legislature, in its wisdom, specifically enacted in Section 165 (6) of the Inland Revenue Act No. 10 of 2006, as amended, that the failure to acknowledge an appeal within thirty days of its receipt should result in the appeal being deemed to have been received on the day on which it is delivered to the CGIR. Further, Section 165 (14) of the same Act stated that the failure to determine an appeal within two years from the date of its receipt should result in the appeal being allowed and tax charged accordingly. Similarly, Section 34 (8) of the VAT Act also provided that the failure to determine an appeal within the stipulated period should result in the appeal being allowed and tax charged accordingly.

Inland Revenue Act No. 24 of 2017, which is in force as at now, also provides for an Administrative Review of an assessment by the CGIR. However, unlike in the previous Inland Revenue Act No. 10 of 2006, no time frame has been specified in Section 139, for the CGIR to deliver his decision. Nevertheless, Section 140 provides that within thirty days from the date of the decision or upon lapse of ninety days from the request being made for an administrative review, the tax payer is entitled to make an appeal to the TAC. Hence, it becomes clear that while the breach of certain time limits is accompanied by remedies or sanctions, the breach of others is not. It is important to emphasize that, Section 144 of the 2017 Act provides that if the TAC fails either to determine or to respond to an appeal

[12] CA (BRA) 02/2007, decided on 16.01.2014, at p.18, [2015] Vol XXI BALJ 171.

filed by a person within ninety days from the appeal request, the Appellant is entitled to appeal to the Court of Appeal.

On the foregoing analysis, it is clear that in the new Inland Revenue Act No. 24 of 2017, the Legislature has taken out the penal consequences previously imposed on the CGIR for failure to comply with the statutory time limit. Nevertheless, upon such failure, the Appellant has been granted a remedy through a direct right of appeal to the TAC. It is important to note that in a situation where the TAC fails to respond to such a request for appeal within the specified time limit, the Appellant is granted a direct right of appeal to the Court of Appeal. Therefore, one can see that even though the Legislature has in the case of the Inland Revenue Act No. 24 of 2017, introduced a remedy where the TAC fails to respond within the specified time limit, in the case of the TAC Act, although the Legislature has twice availed itself of the opportunity to amend the Act, it has not provided a remedy for non-compliance.

I am not unmindful of the fact that this particular question of law is on the TAC Act. Yet, I am of the view that consideration of the above provisions in the Inland Revenue Act are relevant, since those provisions manifest the intention of the Legislature regarding the time limits imposed on the TAC.

In light of the above, it is my considered view that the Legislature, although it has amended Section 10 of the TAC Act twice, intentionally refrained from introducing a penal consequence and/or a remedy for the failure of the TAC to comply with the specified time limit. Therefore, I am not in favour of the argument forwarded by the learned Counsel for the Appellant, that the fact that the Legislature has amended Section 10 twice means that it intended the time limit contained therein to be mandatory.

The learned Counsel for the Appellant also argued that the Legislature, by amending Section 10 with retrospective effect, has clearly manifested its intention of strict compliance with the time limit provided therein. However, I am not in favour of the said argument in view of the facts stated herein below.

By Tax Appeals Commission (Amendment) Act No. 20 of 2013, the proviso to Section 10 of the TAC Act was amended by extending the time limit granted to the Commission to determine an appeal transferred from

the Board of Review, up to twenty-four months; twice the time limit which existed previously.

In the same amendment, by the introduction of Section 15, the Legislature enacted that the Commission has power to hear and determine any pending appeal that was deemed to have been transferred to the TAC from the Board of Review under Section 10 of the principal Act, notwithstanding the expiry of twelve months granted for its determination.

Since the amendment to Section 10 was brought in with retrospective effect, in any event, the twenty-four-month period will apply to all appeals transferred from the Board of Review. Therefore, the introduction of Section 15 by the amendment will serve no meaningful purpose and seems redundant. Nevertheless, in my view, introducing Section 15 under the Amendment Act No. 20 of 2013 manifests that the intention of the Legislature is not to make the timeline mandatory.

On the other hand, one may argue that the application of Section 15 of the amendment is limited to the proviso in Section 10 and that therefore, the Legislature has manifested its intention that the time frame in the proviso to be merely directory, but that which is in the main part to be mandatory. Yet, this cannot be a valid argument since in the circumstances, the Legislature has extended the time frame in the proviso and reduced it in the main part, by the same Amendment. When the time limit is lowered, the question of exceeding the existing time limit will not arise, and therefore, a necessity to enact as above will also not arise.

Therefore, I am not prepared to accept the contention of the learned Counsel for the Appellant, that the fact that the Legislature has given retrospective effect to the amended provisions means that it intended the time limit contained in Section 10 to be mandatory.

Having argued extensively, as above, that the time limit specified for the TAC is mandatory, the learned Counsel for the Appellant submitted that when the two-hundred-and-seventy-day time limit is exceeded, the self-assessment submitted by the Appellant shall take effect, thus nullifying both the Assessor's assessment and the CGIR's confirmation of the said assessment[13].

[13] Paragraph 45 of the Appellant's consolidated written submissions

In my view, this submission of the learned Counsel for the Appellant that if this Court were to hold that the TAC is *functus officio* in determining an appeal after the two-hundred-and-seventy-day period has lapsed, the assessment should be rendered void and the self-assessment submitted by the Appellant should take effect, is untenable. Should the State, and at large the citizens of this country, lose revenue or the taxpayers themselves lose the opportunity to be allowed the relief sought due to the TAC's fault?

Samarakoon C.J.'s judgement in the case of *K. Visvalingam and Others v. Don John Francis Liyanage*,[14] addresses the above problem, in the context of the time limit applicable to a Fundamental Rights petition before the Supreme Court of Sri Lanka:

"*These provisions confer a right on the citizen and a duty on the Court. If that right was intended to be lost because the Court fails in its duty, the Constitution would have so provided. It has provided no sanction of any kind in case of such failure. To my mind, it was only an injunction to be respected and obeyed, but fell short of punishment if disobeyed. I am of the opinion that the provisions of Article 126 (5) are directory and not mandatory.* ***Any other construction would deprive a citizen of his fundamental right for no fault of his*** (emphasis added)."

Sharvananda J. (as His Lordship then was) made a similar observation in the previously cited case of *K. Nagalingam v. Lakshman de Mel*,[15] regarding an order made by the Commissioner of Labour after the expiry of a statutory time limit:

"To hold that non-compliance with the time limit stipulated by section 2 (2) (c) renders the Commissioner's order of approval - or refusal void will cause grave hardship to innocent parties. ***Parties who have done all that the statute requires of them should not lose the benefit of the order*** *because it was made after the final hour had struck with the passage of the 3 months* (emphasis added)*."*

I find that the comments of Their Lordships are relevant to the present case, in illustrating the injustice that each party may suffer if the TAC was to be deemed *functus officio* upon expiry of the time limit in question. Moreover,

[14] Decisions on Fundamental Rights Cases, 452, at p.468

[15] *Supra note* 9, at p.237

when an appeal was filed before the TAC, it necessarily follows that the Appellant would have done so with meaningful confidence in a positive outcome. If that be so, there would be no need for the Appellant, upon the expiry of the time limit to demand that the determination of the TAC be time barred, since there would still be every chance of their appeal being successful and no fundamental right would be violated owing to the delay. Even if some other significant rights were to be infringed upon, it would not weigh so heavily as to vitiate the right of either party to receive a considered determination from the TAC.

It is therefore the opinion of this Court that there is no statutory construction whereby either the self-assessment of the Appellant or the assessment of the Assessor (as confirmed by the CGIR) is reinstated, where the TAC has overrun its statutory time frame. It is therefore best left to the Legislature to specify in no uncertain terms what the effect, if any, of a time bar would be, in order to avoid any inequitable outcomes as illustrated above.

The learned Counsel for the Appellant invited the attention of this Court to the two conflicting decisions on time bar by numerically equal benches, namely two judges each of this Court. This makes it necessary to consider the doctrine of *stare decisis*.

In the case of *Walker Sons & Co. (U.K.) Ltd. v. Gunathilake and Others*,[16] Thamotheram J., having considered the Judgement by Basnakyake C.J. in the case of *Bandahamy v. Senanayake*,[17] observed that as a rule, two judges sitting together follow the decision of two judges and where two judges sitting together are unable to follow a decision of two judges, the practice is to reserve the case for the decision of a fuller bench.

However, in circumstances where there are two conflicting decisions taken by numerically equal benches, another numerically equal bench of this Court is free to follow either of those two decisions, provided that they hold the same precedential value. In the previously cited case of *Mohideen v. The Commissioner General of Inland Revenue* (hereinafter referred to as '*Mohideen*'),[18] it was stated that the time limit prescribed for the

[16] [1978-79-80] 1 Sri.L.R. 231.

[17] 62 N.L.R. 313.

[18] *Supra* note 12

determination of an appeal by the Board of Review would be mandatory, if counted from the date of commencement of the oral hearing. Gooneratne J. formulated the particular paragraph under consideration as follows:[19]

"*I find that an area is left uncertain for interested parties to give different interpretation on time bar. Hearing need* (sic) *to be in camera and Section 140 subsection 7, 8 & 9 provide for adducing evidence. As such in the context of this case and by perusing the applicable provision, it seems to be that the hearing contemplated is nothing but 'oral hearing'. 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 a 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.* ***It would be different or invalid if the time period exceeded 2 years from the date of oral hearing. If that be so it is time barred*** (emphasis added)."

However, in the subsequent cases of *Kegalle Plantations PLC v. The Commissioner General of Inland Revenue (hereinafter referred to as 'Kegalle Plantations case')*[20] and *Stafford Motor Company (Private) Limited v. The Commissioner General of Inland Revenue* (hereinafter referred to as '*Stafford Motors*'),[21] Their Lordships declined to follow the reasoning in *Mohideen* on the ground that it is *obiter dicta*[22].

Black's Law Dictionary provides the following definition for *obiter dictum*:[23]

'*[Latin "something said in passing"] A judicial comment made while delivering a judicial opinion, but one that is* ***unnecessary to the decision in the case*** *and therefore not precedential (although it may be considered*

[19] *Ibid.* at p.15

[20] CA (TAX) 09/2017, decided on 04.09.2018.

[21] CA (TAX) 17/2017, decided on 15.03.2019.

[22] This stance was further affirmed following *Stafford Motors*, in the case of *CIC Agri Businesses (Private) Limited v. The Commissioner General of Inland Revenue* [CA (TAX) 42/2014, decided on 29.05.2020]

[23] B. A. Garner and H. C. Black, *Black's Law Dictionary*, Ninth Edition, 2009. at p.1177

persuasive). Often shortened to dictum or, less commonly, obiter (emphasis added).'

The learned Counsel for the Appellant argued that even if the aforementioned ruling in *Mohideen* constitutes an *obiter dicta* statement it cannot be disregarded since it sheds relevant light on the matter in issue.

The learned Deputy Solicitor General for the Respondent submitted that the doctrine of *stare decisis* demands that this Court must follow the judgement in *Stafford Motors* and *Kegalle Plantations* so that the certainty established by the said cases is not disturbed.

However, it was observed by His Lordship Justice Soza (sitting in the Court of Appeal) in the case of *Ramanathan Chettiar v. Wickramarachchi and Others* that:[24]

"*The doctrine of stare decisis is no doubt an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs as well as a basis for orderly development of legal rules. Certainty in the law is no doubt very desirable because there is always the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into. Further there is also the especial need for certainty as to the criminal law. While the greatest weight must be given to these considerations, certainty must not be achieved by perpetuating error or by insulating the law against the currents of social change*."

I therefore find that it is reasonable for this Court to consider whether or not the statement at issue in *Mohideen* is part of the *ratio decidendi* of the judgment and thus *obiter dictum*. If indeed this Court were to find that the said statement in *Mohideen* is *obiter*, then it would not set a binding precedent on the matter in issue in this case, under this particular question of law.

While I observe that Their Lordships in *Mohideen* had observed as above while answering a specific question of law raised by the Appellant, closer scrutiny of the final two sentences of that paragraph reveal that they are not essential to the finding of the Court. The finding of the Court was that the

[24] [1978-79] 2 Sri.L.R. 395, at p.410

Board of Review had not erred in law as regards the time available for it to arrive at its determination. The matter in issue in deciding that particular question of law was whether or not the two-year time limit applicable to the Board of Review was to be counted from the date of receipt of the petition of appeal by the Board, or whether it was to be counted from the date of commencement of the hearing of the appeal. That matter was decided in favour of the Respondent, with the Court holding the latter to be the case.

The learned Deputy Solicitor General cited *N. S. Bindra*[25], in analysing the dynamic process of the Court, and asserts that, if a Court, in arriving at a decision states that, "*It would be different or invalid if the time period exceeded two years from the date of oral hearing. If that is so it is time barred*" is clearly obiter.

In the above context, the final two sentences, "*It would be different or invalid if the time period exceeded 2 years from the date of oral hearing. If that be so it is time barred*.", constitute a conditional observation by Their Lordships. Its nature is hypothetical, and does not reflect the facts of the case, as the time period did not exceed two years from the date of oral hearing. In other words, if these two sentences were taken out of the judgement, there would be no change whatsoever either to the line of reasoning in *Mohideen*, or to the outcome. Therefore, though it was argued by the learned Counsel for the Appellant that these two sentences are plainly relevant in deciding the instant case, they do not form part of the *ratio* in *Mohideen*.

I therefore consider that the hypothetical conclusion arrived at by Their Lordships in *Mohideen* is indeed "unnecessary to the decision in the case". Therefore, in keeping with the definition I have provided above, and in agreement with Their Lordships who have pronounced the decision in *Kegalle Plantations* and *Stafford Motors*, it is my view that the particular statement in *Mohideen* (as reproduced and emphasised on above) is indeed *obiter dictum*.

The learned Deputy Solicitor General also commented in the written submissions on the issue that the judgments in the cases of *Kegalle Plantations* and *Stafford Motors* are not *per incuriam*, assuming that the

[25] *Supra note* 6, at page 886.

Appellant claimed as such. However, I find that this is not an issue raised by the appellant before this Court and therefore does not require consideration by the Court.

The same issue regarding the time frame contained in Section 10 of the TAC Act has been determined by both of us in the cases of *Amadeus Lanka (Private) Limited v. Commissioner General of Inland Revenue*[26], *Muttiah v. Commissioner General of Inland Revenue*[27], *Lanka Marine Services (Private) Limited v. Commissioner General of Inland Revenue*[28] *and CEI Plastics Limited, v. The Commissioner General of Inland Revenue*[29] holding that the time limit is merely directory and not mandatory.

The learned Deputy Solicitor General submitted that despite the fact that the matter was conclusively decided in several cases, the Appellant continued to agitate the matter again in this Court. She contended that a decision of the same Court may only be re-agitated before the same Court, in a subsequent case with identical facts, only on the basis that the previous decision is *per incuriam.* It was further submitted that the judgment in *Kegalle Plantations* is not even on appeal.

Thus, for the reasons enunciated above in this judgement, I would prefer to follow the judgement in the case of *Kegalle Plantations* and the line of subsequent judgments of this Court, and I hold that the time limit prescribed in Section 10 of the TAC Act is merely directory.

In closing my reasoning on the first question of law, I am indeed conscious of the fact that the two-hundred-and-seventy-day time frame cannot be meaningless. I recognize that significant non-compliance with this deadline can be detrimental to the taxpayer, particularly when the deadline is many years past. In the case of *Wickremaratne v. Samarawickrema and Others*,[30] Silva J. (as His Lordship then was) stated that:

"*In statutory interpretation there is a presumption that the Legislature did not intend what is inconvenient or unreasonable. The rule is that the construction most agreeable to justice and reason should be given.*"

[26] CA (TAX) 04/2019, Decided on 30.07.2021
[27] CA (TAX) 46/2019, Decided on 30. 07.2021.
[28] CA (TAX) 013/2015 and CA (TAX) 0012/2017, CA (TAX) 21/2017, Decided on 31.03.2022.
[29]CA (TAX) 0010/2017, Decided on 17.05.2022.
[30] [1995] 2 Sri.L.R. 212, at p.218.

In my view, a determination that the time limit in Section 10 of the TAC Act is mandatory would be inconvenient to the TAC, as delays can occur due to various reasons. Furthermore, to declare that the TAC is *functus officio* upon expiry of the time frame would be unreasonable to both parties for the reasons enunciated above. However, that is not to say that this Court endorses significant delays on the part of the TAC, rather, merely acknowledges that the construction most agreeable to justice and reason is interpreting that the time frame prescribed in Section 10 of the TAC Act to be merely directory. The duty of this Court is not to legislate, but to interpret legislation. Legislation is the prerogative of the Legislature. It is therefore the duty of the Legislature to specify what penal consequence or remedy, if any, must follow a lack of substantial compliance by the TAC with the time frame specified in Section 10 of the TAC Act, so that the parties are not inconvenienced.

Accordingly, having given due consideration to all of the learned Counsel's submissions on this question of law, I hold that the determination of the TAC is not time barred.

3. ***Are the supplies made by the Appellant, which constitute the subject matter of this appeal, zero rated supplies within the contemplation of section 7 (1) (c) of the Value Added Tax Act No. 14 of 2002 (as amended)?***

4. ***In the alternative, are the supplies made by the Appellant, which constitute the subject matter of this appeal, zero rated supplies within the contemplation of section 7 (1) (b) (vi) of the Value Added Tax Act, No. 14 of 2002 (as amended)?***

Since the third and fourth questions of law as above are interconnected, I will now deal with these two questions together, leaving aside consideration of the second question of law towards the end of this judgment.

The substantive question in this matter is whether the supply of services made by the Appellant is zero rated, either in terms of 7 (1) (b) (vi) or Section 7 (1) (c) of the VAT Act, as amended.

In the interest of clarity, I will re-produce the above two sections below:

> ***7.*** *(1) A supply of –*
>
> > *(b) services shall be zero rated where the supply of such services are directly connected with –*
> >
> > > *(vi) client support services provided, on or after April 1, 2001 over the internet or the telephone by an enterprise set up exclusively for the provision of such services to one or more identified clients outside Sri Lanka, for which payment is received in foreign currency, through a bank;*
> >
> > *(c) any other service, being a service not referred to in paragraph (b), provided by any person in Sri Lanka to another person outside Sri Lanka to be consumed or utilized outside Sri Lanka shall be zero rated provided that payment for such service in full has been received in foreign currency from outside Sri Lanka through a bank in Sri Lanka.*

In terms of Section 7 (1) (c), for a supply of services to be zero rated, it should be;

(i) **a service not referred to in Section 7 (1) (b)**,

(ii) provided by a person in Sri Lanka **to another person outside Sri Lanka**,

(iii) **consumed or utilised outside Sri Lanka**, and

(iv) paid for in full through foreign currency, received from outside Sri Lanka, through a bank in Sri Lanka.

In terms of Section 7 (1) (b) (vi), for a supply of services to be zero rated, such supply should be **directly connected with client support services** provided;

(i) on or after April 1, 2001,

(ii) over the internet or telephone,

(iii) by **an enterprise set up exclusively for the provision of such services**,

(iv) to one or more **identified clients outside Sri Lanka**, and

(v) for which payment is received in foreign currency, through a bank.

It is obvious that the case cannot come under both limbs at once since Section 7 (1) (c) applies to services not covered by paragraph 7 (1) (b). Nevertheless, the learned Counsel for the Appellant argued that his case should come under Section 7 (1) (c) or in the alternative, under 7 (1) (b) (vi). I will return to this point towards the end of this part of the judgement.

I will now focus on the facts of this matter to the extent that they are relevant to the instant appeal.

Travelport owns and operates Galileo Computerised Reservation System (Galileo CRS), a computerised system for the use of airlines, travel agencies and other entities in the travel and tourism industries. According to the Appellant, ITQLPL is engaged in providing the service of facilitating the processing of travel reservation related data and its transmission services to Travelport. Travelport was desirous of appointing an operator to provide with the services in respect of Galileo system in Sri Lanka and consequently, entered into the Operator Agreement dated 20th January 2009 (at page 222 of the appeal brief) with Interglobe Technology Quotient Private Limited, a company incorporated in India (in the agreement Travelport is termed as 'Galileo' and Interglobe Technology Quotient Private Limited is termed as 'the Operator'). Later, Interglobe Technology Quotient Private Limited (the Original Operator) by Deed of Novation dated 1st March 2009 (at page 150 of the appeal brief) novated the agreement to the new operator ITQLPL, the Appellant, and assigned all of its rights, benefits and interests in the agreement to the Appellant. Thus, for the purposes of the agreement, the Appellant put itself in the position of the original operator, Interglobe Technology Quotient Private Limited. Therefore, the observation of the TAC in its determination that there is no distinct agreement between Travelport and ITQLPL but, ITQLPL has just signed the agreement between Travelport and Interglobe Technology Quotient Private Limited is irrational.

At the argument, parties were not at variance that ITQLPL receives payments from outside Sri Lanka, in foreign currency, through a bank, which are requirements under both Sections 7 (1) (b) (vi) and 7 (1) (c), for a service to be zero rated.

There are only two issues raised by the Appellant to be addressed in order for the third and fourth questions of law to be answered. Firstly, criterion (ii) of Section 7 (1) (c) and criterion (iv) of Section 7 (1) (b) (vi) (as detailed above in this judgement) both address the need for the service to be supplied to a client/person outside Sri Lanka. Secondly, criterion (iii) of Section 7 (1) (c) requires the service to be consumed or utilised outside Sri Lanka.

Issue 1: Is the service provided to a client/person outside Sri Lanka?

Issue 2: Is the service consumed or utilised outside Sri Lanka?

The main issue parties are at variance under both the Sections 7 (1) (c) and 7 (1) (b) (vi) is whether the Appellant's services are provided to a client/person outside Sri Lanka. The issue whether the Appellant's services are consumed or utilised outside Sri Lanka falls specifically under Section 7 (1) (c). These two issues will now be considered together.

According to the Appellant's written submissions[31], the Appellant provides services by facilitating the processing of travel reservations related and its transmission services to Travelport, a foreign entity. Travelport pays the ITQLPL for their services.

In my view, the decision on the above two issues considerably depend on the terms and conditions of the Operator Agreement (read along with the Deed of Novation) between Travelport and ITQLPL and also, upon the available Subscriber Agreement between ITQLPL and one of its subscribers, BOC Travels Private Limited. (at page 130 of the appeal brief). The terms and conditions between Hemas Travels (Pvt) Ltd and ITQPL, attached to the ITQPL's letter dated 30th March 2010 (at page 133 and 134 of the appeal brief) also sheds light on this.

I now turn to the terms and conditions of the Operator Agreement and the Subscriber Agreement.

It is trite law that the consideration of whether the available facts are sufficient to arrive at a conclusion, constitutes a question of law.[32]

[31] Paragraph 77 of the Appellant's consolidated written submission
[32] *D. S. Mahawithana v. Commissioner of Inland Revenue*, 64 N.L.R. 217

In the volume titled *Income Tax In Sri Lanka*, Gooneratne states that:[33]

'The principle is well established that where a tribunal arrives at a finding which is not supported by evidence the finding though stated in the form of a finding of fact is a finding which involves a question of law. The question of law is whether there was evidence to support the finding, apart from the adequacy of the evidence. The Court will interfere if the finding has been reached without any evidence or upon a view of facts which could not be reasonably entertained. ***The evidence can be examined to see whether the Board*** **[being the Board of Review; the predecessor of the TAC]** ***being properly appraised of what they had to do could reasonably have arrived at the conclusion they did****.'* (emphasis added).

Therefore, if someone asserts that the Court cannot consider the facts available in a case in order to arrive at its decision on a stated case, it would be a misconception.

According to Article 36.1 of the Operator Agreement, the relationship between Travelport and ITQLPL is that of independent contractors. An independent contractor is a person who enters into a contract *for* services.

In this case, the Respondent disputes the Appellant's position that ITQLPL supplies its services to Travelport. The TAC upheld the Respondent's position. In the circumstances, this Court has an obligation to carefully examine the articles of the Operator Agreement to determine whether the TAC erred in determining to whom ITQLPL provides its services.

On a careful consideration of the Articles in the Operator Agreement, especially Articles 7 to 21, it is apparent that the parties to the agreement have mutual obligations; in particular Travelport has to supply certain goods/services to ITQLPL[34] as opposed to ITQLPL providing services to Travelport. It is important to note that no prominent service to be provided by ITQLPL to Travelport contrast with the services provided by ITQLPL to the subscribers. This may be the reason why the contracting parties describe their capacities as *'independent contractors'* instead of ITQLPL

[33] M. Weerasooriya and E. Gooneratne, *Income Tax In Sri Lanka*, Second Edition, 2009. at p.452 [citing *Stanley v. Gramophone & Typewriter Co. Ltd.* 5 TC 358; *CIR v. Samson* 8 TC 20; *Cape Brandy Syndicate v. CIR* 12 TC 358; *Mills v. John* 14 TC 769; *Cooper v. Stubbs* 10 TC 29; *J. G. Ingram and Son Ltd. v. Callaghan* 45 TC 151]

[34] Article 20.1 to 20.5 Operator Agreement.

being described as an independent contractor, providing Travelport with services.

Travelport has appointed and granted a licence to ITQLPL to provide the services in the territory, Sri Lanka[35].

Further, Travelport has authorized ITQLPL to use the word 'Galileo' in its corporate name and to use the Trade Marks, advertising material, instruction manuals and training manuals. In addition, agreed to provide the facilities set out in Article 20.

Travelport has also imposed certain restrictions on ITQLPL, such as being the agent of any competitor and the development of a competitive system[36].

According to Article 7.1.5 and 7.1.6, ITQLPL has to provide customer training services to the subscribers and customer support service for the benefit of the subscribers in the territory. Article 17.2 requires the Operator, ITQLPL, to provide customers with competitive market support. Customer Support Service is defined as services to be provided to the subscribers by the Operator. Market Support Services is defined as financial incentives paid by the Operator to the local subscribers in accordance with the subscriber agreement, for the commissionable bookings made or ticketing. In addition, clause 10.2 provides that services should not be provided until that party has entered into a subscriber agreement.

Under Article 13.2, the Operator must send its employees, at its own expense, to the training provided by Galileo.

It is important to note that Article 15.1 and 15.2 provides that ITQLPL shall comply with all applicable laws in relation to the implementation of the Agreement; obtain all required licenses, consents, permits and approvals at its own expense. This Article itself establishes that ITQLPL has provided its services to the subscribers on their own, under the authority granted by Travelport.

More importantly Article 4.1 specifies that Galileo, through the Operator Agreement, appoints the *Operator to provide services within the territory*, Sri Lanka. This Article categorically contradicts the Appellant's position

[35] Article 4 and 6 of the Operator Agreement.
[36] Article 23.3 and 23.4 of the Operator Agreement.

that the services are provided outside of Sri Lanka, leading to the denial of zero rating under Sections 7(1)(b)(vi) and 7(1)(c).

Next, I will consider the Articles in the Subscriber Agreement between BOC Travels Private Limited, a subscriber, and ITQLPL[37]. As per Article 2.1 a. ITQPL has pledged the subscriber to provide access to the Galileo System. In addition, it was agreed to provide equipment such as computers, routers etc. to use the Galileo system. Article 2. 1. a. of the Subscription Agreement provides that BOC Travels Private Limited has no recourse pursuant to the Subscription Agreement against Galileo Netherland B.V. This also demonstrates that the contract is between BOC Travels Private Limited and ITQLPL, the Appellant alone. In terms of Article 3. a., it is ITQLPL who has agreed to pay productive incentives to BOC Travels Private Limited. By Article 3. c. ITQPL has agreed to pay the subscriber productivity incentives based on the number of segments transacted and upon failure of BOC Travels Private Limited to generate the target segments in two consecutive quarters, ITQPL has the right to, *inter alia*, recover the cost of investment[38].

The learned Counsel for the Appellant contended that the TAC had failed to understand the essence of the agreements when the TAC held that the Appellant had a profit-sharing agreement with Travelport and the payments received by ITQLPL from Travelport's payment arm constituted the sharing of profits, which he contended is not supported by evidence.

Under Article 8.1 of the Operator Agreement, Galileo agreed to pay the Operator a commission calculated at the end of each month. Galileo is not liable to pay any commission to the Operator in respect of a booking where Galileo has not received the relevant booking fee.[39]The term *'booking fee'* is defined as the fees *received by* a Galileo Group Company *from* vendors, for bookings in accordance with any agreement between Galileo and the vendors. The term vendor is defined as a vendor of travel related products or services of any sort that participate in the Galileo system including an airline, hotel, rail operator, tour company, car rental company or cruise operator. BOC Travels Private Limited is a travel agent who has entered into a subscriber agreement with ITQLPL to make their bookings

[37] At page 130 of the appeal brief
[38] Article 3. e. of the Subscriber Agreement
[39] Article 8.3 and 8.4.

exclusively through Galileo CRS provided by ITQLPL. Thus, BOC Travels Private Limited becomes a vendor of Galileo Group of Companies.

Accordingly, it is clear that Travelport receives booking fees from the vendors of travel-related products or services, participating in the Galileo system. That would include a travel agent as well. A *'travel agent'*[40], is *'one who owns or works for a travel agency, a firm which makes arrangements for the transport, accommodation, etc.* As I have stated earlier in this judgment, ITQLPL facilitates the use of the Galileo system by local travel agents. For the use of the Galileo system, Travelport charges a reservation fee and a commission is paid to the ITQLPL. The Commission is paid in USD[41].

In these circumstances although the Tac has not addressed the matter in detail, the conclusion of the TAC that the transactions between Travelport and ITQLPL amount to a profit-sharing arrangement has significant merit.

The Appellant's learned Counsel took great pains to highlight the fact that ITQPL only receives payments from Travelport and not from its own subscribers, and that this should lead to the conclusion that ITQPL's services are delivered to Travelport[42]. This raises the pertinent question as to why ITQPL receives payments from Travelport, if the services are provided to the subscribers in Sri Lanka and utilised in Sri Lanka.

In my view, the contention that its Travelport and not the subscriber makes payments to ITQLPL simply cannot be the determining factor in deciding whether ITQLPL delivers its services to Travelport or to the subscriber in Sri Lanka. In any case, it is not a requirement of either Section 7 (1) (b) (vi) or 7 (1) (c) that the payment has to be made by the person who receives the service. It is also not the case that the reverse, i.e. that if a person has made the sole payment, they then become the only person to whom a service has been provided, necessarily holds true.

It was also submitted that the Appellant, ITQLPL, did not issue any invoices to the travel agents in respect of any purported supply to the travel agents. However, Article 3.4 (under the heading 'Charges') of Section 'C' ('Standard Terms and Conditions') attached to the Operator Agreement

[40] The Oxford English Dictionary, Second Edition, Vol. XVIII, Clarendon Press. Oxford.
[41] Article 8.1.0 of the Operator Agreement.
[42] Paragraphs 51,52, 53,94, 110 and 122 of the consolidated written submission of the Appellant.

and signed by the parties, specify that the Operator has to invoice the subscribers for the charges. In addition, Article 3.1 requires the subscriber to pay the charges to the Operator for services and products supplied by the Operator and/or any Galileo Group Company under or in connection with the agreement. According to Article 10.5, the Operator has the sole discretion in determining its own charges to *local subscribers* and shall be *entitled to retain all fees* it receives from local subscribers. Accordingly, the aforementioned submissions by the learned Counsel for the Appellant are without merit.

In light of the above analysis, it is clear that at least part of the Appellant's services are provided to its local subscribers. Furthermore, the Appellant has not presented this Court with a breakdown of what its separate services to the subscribers and to Travelport are, and claims that its entire taxable service is provided to Travelport. I am unable to accept that it is the intention of the Legislature that a taxpayer should be able to decide which of its services can be charged for and which of its services are to be zero rated on all its income.

I am willing to acknowledge that *some* of the Appellant's services are supplied to Travelport, which is an entity outside Sri Lanka, and that *some*, but not all of those services are consumed or utilised outside Sri Lanka. For instance, Operator is obliged to convert the users of any other CRS to the Galileo system, promote the Galileo system within the territory and increase the number of bookings through Galileo CRS[43].

In the case of *ICICI Bank Limited v. The Commissioner General of Inland Revenue*[44] His Lordship Dehideniya J., (Chithrasiri J., agreeing) emphasized the necessity to keep separate accounts for separate sources of income in order to claim tax relief for one or more of these sources, which the Appellant failed to do.

On the evidence available before this Court, it is my considered view that though the services supplied by the Appellant satisfy some criteria of both Sections 7 (1) (c) and 7 (1) (b) (vi), the said supplies do not *fully* satisfy either subsection.

[43] Articles 17.1.1, 17.1.2 and 17.1.4 of the Subscriber Agreement
[44] CA (Tax) 28/2013, Decided on 16.07.2015

N.S. Bindra's *Interpretation of Statutes* states the following regarding statutes to prevent fraud upon revenue:[45]

'*Statutes to prevent fraud upon the revenue are considered as enacted for the public good and to surpass a public wrong, and, therefore, although they impose penalties or forfeiture, not to be construed, like penal laws generally, strictly in favour of the assessee, but they are to be reasonably and fairly construed, so as to carry out the intention of the Legislature.*'

The learned Counsel for the Appellant relied upon Indian judgements[46] to strengthen his argument. The corresponding Section under the Indian law is section 65 of the Service Tax Act (Chapter V of the Indian Finance Act, 1994.)

According to Section 65 (105) (zzb). **'***any service provided or to be provided to a client, by any person in relation to business auxiliary service is a "taxable service"'* and the term "service provider" shall be construed accordingly.

Pursuant to Section 65 (19) "**business auxiliary service**" means any service in relation to –

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or
(ii) promotion or marketing of service provided by the client; or
(iii) any customer care service provided on behalf of the client; or
(iv) procurement of goods or services, which are inputs for the client; or

Explanation. – For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client.

(v) production or processing of goods for, or on behalf of, the client; or
(vi) provision of service on behalf of the client; or
(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and

[45] N. S. Bindra, *Interpretation of Statutes*, Eighth Edition, 1997. at p.701

[46] *Amadeus India Pvt. Ltd*., bearing No.ST/A.52354-52357/2014-CU [DB], *In M/s Microsoft Corporation (I) (P) Ltd v. CST. New Delhi, 2014 (10) TMI 200 – CESTAT New Delhi (LB)*

remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision,

and includes services as a commission agent, but does not include any ***information technology service***[47] *and any activity that amounts to "manufacture" within the meaning of clause (f) of section 2 of the Central Excise Act, 1944 (1 of 1944). Explanation. – For the removal of doubts, it is hereby declared that for the purposes of this clause, –*

(a) "commission agent" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person –

(i) deals with goods or services or documents of title to such goods or services; or
(ii) collects payment of sale price of such goods or services; or
(iii) guarantees for collection or payment for such goods or services; or
(iv) undertakes any activities relating to such sale or purchase of such goods or services;

(b) ***"information technology service"*** *means any service in relation to designing or developing of computer software or system networking, or any other service primarily in relation to operation of computer systems.'* (emphasis added)

According to Section 65(19), business auxiliary service does not include Information Technology Services, and thus not a taxable service.

In *Acquire Services Pvt Ltd v. Commissioner of Service Tax, Delhi*[48], the Court cited *Paul Merchants Ltd v CCE, Chandigarh, GAP International Sourcing (India) Pvt Ltd v CST and Alpine Moduler Interior Pvt Limited v*

[47] It was noted that by later amendments to the Act, "any information technology service" from section 65(19)(vii) had been removed.
[48] *Acquire Services Pvt Ltd v. Commissioner of Service Tax, Delhi* case was mentioned in *Abacus Distribution Systems (India) (Pvt) Ltd vs. Commissioner of service tax*.

CST (Adjudication Delhi), and stated where the recipient is located outside India; and the taxable service is delivered and used outside India; and payment of such service provided outside India is received by the Indian service provider in convertible foreign exchange, the service falls within the ambit of the 2005 Rules and admissible to benefits thereunder. Consequently, there is no liability to service tax.

Even though wordings in Section 65 (19) of Finance Act 1994 and Section 7 (1) (c) of VAT Act per se not similar yet the abstract of both the sections implies the same. The Section 65 (19) together read with Section 65(105) (zzb) defines what is a taxable service and what does not fall under it to be a taxable service. Likewise, Section 7 (1) (b) (vi) and 7 (1) (c) of the VAT Act defines what conditions to be fulfilled for a service to be zero rated. Yet, it is important to note that the two statutory provisions are not identical.

Therefore, the question whether the services provided by ITQLPL is *'zero rated'* has to be answered from analysing the facts of the instant case in relation to Sections 7 (1) (c) and 7 (1) (b) (vi) of the VAT Act. If ITQLPL provides a service to a client outside Sri Lanka where the service is consumed outside Sri Lanka, and payment of such service is paid in full through foreign currency, received from outside Sri Lanka, through a bank in Sri Lanka, then only such a supply of service can be zero rated.

Another important issue that arises is whether the Appellant's supplies are directly linked to client support services. This is a requirement under Section 7 (1) (b) (vi) of the VAT Act for the Appellant's supplies to be zero-rated. The learned Counsel for the Appellant submitted that the Appellant supplied its service of data processing and export thereof to the Appellant's client Travelport, using internet.[49] Accordingly, the Appellant claimed zero rating in terms of Section 7 (1) (b) (vi), on account of providing client support service over the internet.[50]

The VAT Act itself does not define the term '*client support services.'* Further, a definition for the said term is not readily available in case law or in legal dictionaries. Therefore, in determining the intention of the legislature, it is justified for this Court to formulate the definition within the VAT Act, considering the natural and ordinary meaning of the phrase.

[49] Paragraph 103 and 104 of the Appellant's consolidated written submissions.
[50] Paragraph 125 of the Appellant's consolidated written submissions.

As I have already analysed above in this judgement ITQLPL is obliged to promote the use of Galileo System, use its endeavours to convert the users of any other CRS of a competitor to use the Galileo System and to increase the number of bookings through Galileo System. In my view, these obligations are clearly a sales promotion, quite contrary to a client support service.

Accordingly, I do not find that ITQLPL provides a client support service within the contemplation of Section 7 (1) (b) (vi) to Travelport. I find that ITQLPL may well provide client support service to its subscribers, but a necessity of analysing this would not arise since the subscribers are located in Sri Lanka.

Another important requirement under Section 7 (1) (b) (vi) is whether ITQLPL is an enterprise set up exclusively for the provision of client support services. As I have already stated above, other than providing access to the Galileo CRS to its subscribers, ITQLPL is obliged to carry out all other necessary acts and to use its best endeavours to promote the Galileo products within the territory.

Hence, in my view ITQLPL is not an enterprise set up exclusively for providing client support service, and therefore, does not meet another requirement under Section 7 (1) (b) (vi).

The learned Counsel for the Appellant also submitted that the ruling in favour of the taxpayer in the decision of this Court in the case of *The Commissioner General of Inland Revenue v. Aitken Spence Travels Limited* (hereinafter referred to as '*Aitken Spence*')[51] should be followed in the instant case. However, the Counsel's claim cannot be upheld for the following reasons. *Aitken Spence* involved three parties, namely a Foreign Tour Operator outside Sri Lanka (analogous to Travelport in the instant case), foreign tourists (analogous to the subscribers in the instant case), and the resident company Aitken Spence Travels Limited (analogous to ITQLPL).

The statutory provision of which applicability was in issue in *Aitken Spence* was Section 13 (dddd) of the Inland Revenue Act No. 10 of 2006 (as

[51] CA (TAX) 04/2016, decided on 13.11.2018

amended, and in operation at the time). I reproduce Section 13 (dddd) below:

> ***13.*** *(dddd) notwithstanding the provisions of paragraph (ddd) of this section, the profits and income for the period commencing from April 1, 2009 and ending on March 31, 2011, earned in foreign currency by any resident company, any resident individual or any partnership in Sri Lanka, from any service rendered in or outside Sri Lanka to any person or partnership outside Sri Lanka, if such profits and income (less such amount, if any, expended outside Sri Lanka as is considered by the Commissioner-General to be reasonable expenses) are remitted to Sri Lanka, through a bank;*

It is immediately apparent that the above provision differs significantly from the two subsections that are in issue in the third and fourth questions of law in the instant appeal. Firstly, in contrast to Section 7 (1) (c) of the VAT Act, there is no requirement in Section 13 (dddd) above for the service to be consumed or utilised outside Sri Lanka. Secondly, in contrast to Section 7 (1) (b) (vi) of the VAT Act, there is no requirement in Section 13 (dddd) above for the service provider to be a company set up exclusively for the provision of client support services, which means that companies exempt under Section 13 (dddd) may provide a wide variety of services to both local and foreign clients, and have *only those services it provides to foreign clients and which fulfils the other criteria set out in the above section* be exempted from the applicable tax. This is clearly not the case with Section 7(1) (b) (vi) of the VAT Act, of which definition is much narrower. It has already been established that ITQLPL provides some, if not all, of its services to local subscribers.

For the above reasons and after having considered the facts of the two cases, I hold that the decision of this Court in *Aitken Spence* is not sufficiently analogous to the instant appeal, and distinguish the said decision from the instant appeal.

Therefore, in considering the Appellant's third and fourth questions of law, I conclude that some, if not most, of the Appellant's services are not provided to a person outside Sri Lanka, and that the majority of the Appellant's services are not utilised outside Sri Lanka. For these reasons, I hold that the supplies made by the Appellant are not zero-rated supplies

within the contemplation of Section 7 (1) (b) (vi) and/or 7 (1) (c) of the VAT Act.

2. Are the assessment of Value Added Tax and penalty, as confirmed by the Tax Appeals Commission, excessive, arbitrary and unreasonable?

As I have already stated above in this judgment, ITQLPL supplies a range of services to both Travelport and to its local subscribers, despite its contention to the contrary.

In support of question of law No. 2, the Appellant's learned Counsel relied on some of the grounds that I have already analysed in answering the third and fourth questions of law. The said grounds are that the travel agents are not making any payments to the Appellant, ITQLPL, the Appellant is not issuing invoices to the travel agents and the CGIR has not determined the value of the supply. In answering question of law No. 2, I rely on the same reasons stated earlier in this judgment.

Accordingly, I am of the view that the Appellant has not set out sufficient material in support of the second question of law. On the available evidence I am unable to find that the assessment of the Value Added Tax and penalty, as confirmed by the TAC, are excessive, arbitrary and unreasonable.

5. In view of the facts and circumstances of the case, did the Tax Appeals Commission err in law when it arrived at the conclusion that it did?

For the reasons set out above, and having considered the preceding four questions of law, I hold that the TAC did not err in law when it arrived at the conclusion that it did.

Conclusion

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

1. ***No***

2. ***No***

3. ***No***

4. ***No***

5. ***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.

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