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

In the matter of a Case Stated under the provisions of Section 11A of the Tax Appeals Commission Act No. 23 of 2011 as amended by Act No. 20 of 2013.

Hatton National Bank PLC,
No. 479, T.B. Jayah Mawatha,
Colombo 10.

Appellant

Case No. CA/TAX/0001/2010
Tax Appeals Commission
No. BRA/VAT/06

Vs.

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

Respondent

Before : Dr. Ruwan Fernando J. &

M. Sampath K.B. Wijeratne J.

Counsel : Romesh de Silva, P.C. with N.R. Sivendran for the Appellant

Chaya Sri Nammuni, S.S.C. for the Respondent

Written Submission Filed on

: 26.05.2020 & 20.05.2022 (by the Appellant)

06.04.2022 (by the Respondent)

Decided on : 03.06.2022

Dr. Ruwan Fernando, J.

Introduction

[01] The Board of Review in the case stated transmitted to this Court has submitted the following questions of law, as set out in paragraph 8 of the case stated, for the opinion of the Court of Appeal:

(i) Whether the Board of Review should have annulled the assessment for the following reasons:

a. The name of the Assessor had not been published in the Gazette in order to judicially notice in terms of section 60(5) of the VAT Act;
b. In the notice of assessment, the section under which the assessment was issued was not stated;
c. The taxable periods that fall within the year were not stated separately;
d. Reasons for not accepting the returns for each taxable period are not separately stated.

(ii) Did the non-compliance with the procedural provisions of section 29 and 34 nullify the assessment?

(iii) Is the Appellant liable to VAT on the following:

a. Interest received in respect of non-performing loans in the suspense account as at 31.12.2002 received during the taxable periods from 01.01.2003-31.12.2003;

b. Share of profit received by the Appellant from Lloyds Bank;

c. Profits earned from the sale of Treasury bills or the Bonds

(iv) Are the following expenses deductible in computation of net profit for the purpose of ascertaining the value of supply of financial services:

a. Provision for taxation;

b. Economic Depreciation on leased assets acquired;

(v) Is the Appellant entitled to the tax credits claimed on account of VAT paid on goods and services supplied by other registered persons from the VAT on financial services.

[02] The Appellant by motion dated 02.09.2013 raised the following 21 additional questions of law for the opinion of this Court:

01. In view of assessments not being made for each of the taxable periods (calendar month) in the calendar year 2003 and in view of a calendar year not being a taxable period under the Value Added Tax Act No. 14 of 2002 (as amended) and particularly in view of the remarks and observations made by the Board of Review in its Order dated 5th May 2008 on the preliminary objections, has the Board of Review misdirected itself and erred in law in not canceling the purported Notice of Assessment which was made for the calendar year 2003?

02. Is the decision made by the Board of Review erroneous, invalid and bad in law as the Board of Review failed to address and make its decision on the issues and questions of law stated in paragraphs 1.1, 1.2, 1.3, 1.4, 11, 13 and 15 of the Written Submissions of the Appellant dated 11th August 2008 (at page 344 of the Brief) which were raised before the Board of Review? and are as follows:-

(a) The terms “capital gains”, “dividend income” and “provision for taxation” are not found anywhere in the Letter of Intimation dated 12th August 2004 and thus, the assessment is erroneous, invalid and bad in law.

(b) The determination of the Commissioner General of Inland Revenue is erroneous, invalid and bad in law, as he has not made his

determination and not given reasons for such determination separately for each of the taxable periods (calendar month) for the calendar year 2003.

(c) In view of the following reasons the determination of the Commissioner General of Inland Revenue is erroneous, invalid and bad in law, as he has not conducted the appeal proceedings in accordance with the provision of the Value Added Tax Act No. 14 of 2002 (as amended):-

(i) Although required under Section 34 (11) of the Value Added Tax Act No. 14 of 2002, the Commissioner General of Inland Revenue who made the determination has not kept Minutes of the hearing held on 6th June 2006.

(ii) Although required under Section 35 of the Value Added Tax Act No. 14 of 2002 read together with Section 140 (2) of the Inland Revenue Act, No. 38 of 2000, the Commissioner General of Inland Revenue has not transmitted to the Board of Review a copy of the record maintained for the hearing of appeal held on 24th April 2006 and 6th June 2006.

(iii) The Commissioner General of Inland Revenue who made the determination has not kept proper Minutes of the hearing held on 24th April 2006 and has not recorded the vital evidence adduced at the said hearing.

(d) The determination of the Commissioner General of Inland Revenue is erroneous, invalid and bad in law, since Mr. J.P.D.R. Jayasekara, Senior Assessor who was specifically directed by the Commissioner General of Inland Revenue to look into the possibility whether an agreement could be reached under Section 34 (6) of the Value Added Tax Act No. 14 of 2002, did not conduct any proceedings under Section 34 (6) of the Value Added Tax Act No. 14 of 2002 (as amended) as directed by the Commissioner General of Inland Revenue.

(e) In computing the value addition for the purposes of VAT on financial services, provision for taxation should be allowed as a deduction in arriving at the net profit before payment of income tax.

(f) Under Section 25 C (1) of the Value Added Tax Act No. 14 of 2002 (as amended), for the purposes of computing VAT on financial services, VAT on financial services can be deducted in arriving at the net profit before payment of income tax.

(g) Under Section 25C (1) of the Value Added Tax Act No. 14 of 2002 (as amended), economic depreciation on assets owned by the Appellant and used in its business of leasing should be deducted in computing the value addition for the purposes of VAT on financial services.

03. Is the determination of the Board of Review bad in law inasmuch as the Board of Review misdirected itself and erred by not making its decision on the following questions of law which were identified by the Board of Review in its decision dated 16th June 2009?

(A) Was the interest in suspense account on non-performing loans as at 31.12.2002, received during the year – ended 31.12.2003 liable to Financial Vat for the year ended 31.12.2003.

(B) Whether the income received from monies remitted to Lloyds Bank, a Bank Outside Sri Lanka, liable to Financial VAT"

04. (a) As the final hearing of the appeal fixed by the Board of Review for 11th March 2009 was not held; does it amount to a violation of one of the principles of natural justice "*audi alteram partem"?*

(b) Thus, is the decision of the Board of Review, erroneous, invalid and bad in law?

05. Has the Board of Review misdirected itself by not determining that the Notice of Assessment was invalid as the name of Mr. J.P.D.R. Jayasekara who issued the purported Notice of Assessment was not judicially noticed as mandatorily required in terms of Section 60(5) of the Value Added Tax Act No. 14 of 2002, and thereby failed to cancel the Notice of Assessment?

06. Is the purported Notice of Assessment dated 12th August, 2004 bearing charge No. VAT/FS/06/0312/06 erroneous, invalid and bad in law in that –

(a) as it is one (a single) Notice of Assessment issued for the whole of the calendar year 2003 and as a separate assessment has not been made and a separate Notice of Assessment has not been issued for each of the taxable periods (taxable period is a calendar month as specified in Section 25B of the Value Added Tax Act No. 14 of 2002 as amended), in the calendar year 2003, as required in terms of Section 28 and Section 31 of the Value Added Tax Act No. 14 of 2002 (as amended)? and/or

(b) as the reasons have not been given separately for each of the taxable periods for not accepting the Returns furnished for each of the taxable periods (taxable period is a calendar month as specified in Section 25B of the Value Added Tax Act No. 14 of 2002 (as amended) in the year 2003, and thus contravenes the mandatory requirement of Section 29 of the Value Added Tax Act No. 14 of 2002 (as amended)? and/or

(c) as the purported Letter of Intimation dated 12th August 2004 does not satisfy the mandatory requirement as found in Section 29 of the Value Added Tax Act No. 14 of 2002 (as amended) which mandates the Assessor to give reasons for not accepting a Return furnished? and/or

(d) for the contravention of the mandatory provision of Section 29 of the Value Added Tax Act No. 14 of 2002 (as amended) as no reasons whatsoever have been given in the purported Letter of Intimation dated 12th August 2004 for imposing VAT on purported financial services on capital gains, dividend income and provision for taxation? and/or

(e) as the Commissioner General of Inland Revenue has not given his determination and the reasons for his determination separately for each of the taxable periods in the calendar year 2003?

07. Is the purported Notice of Assessment dated 12th August, 2004 bearing charge No. VAT/FS/06/0312/06 erroneous, invalid and bad in law –

(a) for non-compliance with the provision of Section 60 (5) of the Value Added Tax Act No. 14 of 2002 as there is no evidence that the name of Mr. J.P.D.R. Jayasekara who issued the Notice of Assessment had been judicially noticed? and/or

(b) as the provision of the statute under which the Notice of Assessment was purportedly issued has not been stated in the purported Notice of Assessment?

08. Is the determination of the Commissioner General of Inland Revenue erroneous, invalid and bad in law?, in that –

(a) as Mr. J.P.D.R. Jayasekara, Senior Assessor who was specifically directed by the Commissioner General of Inland Revenue to look into the possibility whether an agreement could be reached as provided in Section 34 (6) of the Value Added Tax Act No. 14 of 2002 (as amended), had not conducted any proceedings under Section 34(6) of the Value Added Tax Act No. 14 of 2002 (as amended) as directed by the Commissioner General of Inland Revenue? and/or

(b) as the term "Commissioner" has not been defined under the Inland Revenue Act, No. 38 of 2000, can a Commissioner be a Commissioner General of Inland Revenue and perform the functions of the Commissioner General of Inland Revenue and determine an appeal under Section 34 of the Value Added Tax Act No. 14 of 2002 (as amended)? and/or

(c) if a Commissioner cannot be and is not a Commissioner General of Inland Revenue, then, is the determination made by Mr. H.B.A. Seneviratne who is a Commissioner, erroneous, invalid and bad in law?

09. Is the determination of the Commissioner General of Inland Revenue erroneous, invalid and bad in law as the Commissioner General of Inland Revenue who made the determination has conducted the appeal proceedings as follows: -

(a) The Commissioner General of Inland Revenue who made the determination has not kept Minutes of the hearing held on 6th June 2006 as required under Section 34(11) of the Value Added Tax Act No. 14 of 2002 (as amended)? and/or

(b) The Commissioner General of Inland Revenue has not transmitted to the Board of Review a copy of the record maintained for the hearings held on 24th April 2006 and 6th June 2006 and/or as required under Section 35 of the Value Added Tax Act No. 14 of

2002 read with Section 140(2) of the Inland Revenue Act, No. 38 of 2000? and/or

(c) The Commissioner General of Inland Revenue has not kept proper Minutes of the hearing held on 24th April 2006 and has not recorded the following vital evidence adduced at the said hearing:-

(i) On 24th April 2006, the officials representing the Department of Inland Revenue accepted that the profits of a branch outside Sri Lanka of a Bank in Sri Lanka have to be removed from the accounting profits in computing liable value addition under Section 25C(1) of the Value Added Tax Act No. 14 of 2002 (as amended), since the profits of a branch outside Sri Lanka of a Bank in Sri Lanka is not chargeable to VAT on financial services. The Commissioner General of Inland Revenue who made the determination too has endorsed this position.

(ii) At the hearing held on 24th April 2006, the officials of the Department of Inland Revenue expressed the view that no adjustment could be made to the accounting profit when computing the value addition under Section 25C(1) of the Value Added Tax Act No. 14 of 2002 (as amended). The authorized representatives of the Appellant inquired from the Commissioner General of Inland Revenue who made the determination, as to how the officials of the Department of Inland Revenue can state that other supplies not chargeable for VAT on financial services could not be removed in computing the value addition under Section 25C(1) of the Value Added Tax Act No. 14 of 2002 (as amended), when they have already accepted that the profits of a branch outside Sri Lanka of a Bank in Sri Lanka is not chargeable for VAT on financial services. It was accepted that the adjustments to the accounting profits could be made in computing the value addition, under Section 25C(1) of the Value Added Tax Act No. 14 of 2002 (as amended).

10. Has the Board of Review erred in law when it failed to give reasons for not considering the grounds urged in the Petition of Appeal and at the hearings before it?

11. In accordance with Section 25A(1) of the Value Added Tax Act No. 14 of 2002 (as amended), is the overdue interest in respect of supply of financial services made prior to 1st January 2003 (in respect of non-performing loans as at 31st December 2002), which was received during the financial year ended 31st December 2003, liable to VAT on financial services imposed on or after 1st January 2003?

12. Is the profit arising from the sale of a Treasury Bill or a Treasury Bond, a capital gain or a trading profit (the industry norm treats such profit as capital gain)?

13. In view of the following finding of the Board of Review –

"We find that the financial VAT contemplated has to be computed on the value addition on account of activities defined in the Section 25 (F) of VAT Act No. 14 OF 2002." (Page 9 of the determination of the Board of Review at page 11 of the Brief)

(a) Is capital gain, arising from the sale of a Treasury Bill or a Treasury Bond, a supply of financial service as defined in Section 25F of the Value Added Tax Act No. 14 of 2002 (as amended) and thus; is it liable to VAT on financial services?

(b) Is trading profit, arising from the sale of a Treasury Bill or a Treasury Bond, a supply of financial service as defined in Section 25F of the Value Added Tax Act No. 14 of 2002 (as amended) and thus; is it liable to VAT on financial services?

(c) Is dividend income a supply of financial service as defined in Section 25F of the Value Added Tax Act No. 14 of 2002 (as amended) and thus, is it liable to VAT on financial services?

14. (a) Is the share of profit received by the Appellant from Lloyds Bank (a Bank outside Sri Lanka carrying on business outside Sri Lanka) out of profits earned by Lloyds Bank (outside Sri Lanka) by managing (outside Sri Lanka) the monies of the Appellant, a supply made outside Sri Lanka? And

(b) Thus, is it liable to VAT on financial services in accordance with Section 25A (1) of the Value Added Tax Act No. 14 of 2002 (as amended)?

15. (a) Is the share of profit received by the Appellant from Lloyds Bank (a Bank outside Sri Lanka carrying on business outside Sri Lanka) out of profits earned by Lloyds Bank (outside Sri Lanka) by managing (outside Sri Lanka) the monies of the Appellant, a supply of financial service as defined in Section 25F of the 'Value Added Tax Act No. 14 of 2002 (as amended)? And

(b) Thus, is it liable to VAT on financial services?

16. (a) When computing the value addition for the purposes of VAT on financial services in accordance with Section 25C(1) of the Value Added Tax Act No. 14 of 2002 (as amended), can provision for taxation be deducted in computing the net profit before payment of income tax? and/or

(b) Under Section 25C (1) of the Value Added Tax Act No. 14 of 2002 (as amended) for the purposes of computing VAT on financial services, can VAT on financial services be deducted in arriving at the net profit before payment of income tax? and/or

(c) Can economic depreciation on assets owned by the Appellant and used by it in its business of leasing, be deducted in computing the value addition under Section 25C(1) of the Value Added Tax Act No. 14 of 2002 (as amended) for the purposes of computing VAT on financial services?

17. In accordance with Section 25D of the Value Added Tax Act No. 14 of 2002 (as amended), is the Appellant entitled to a tax credit of Rs. 70,694,797/- (being the aggregate of Rs. 9,787,967/-, Rs. 10,735,414/-, Rs. 8,809,951/-, Rs. 9,698,153/-, Rs. 10,077,266/-, Rs. 11,002,549/- and Rs. 10,583,497/- claimed as a tax credit in the Returns of VAT on financial services filed for the months of January 2003, February 2003, March 2003, April 2003, May 2003, June 2003 and December 2003 respectively)?

18. Is the Appellant entitled to a tax credit of Rs. 226,813,998/- (Rs. 149,140,485/- for the period January 2003 to June 2003 and Rs.

77,673,513/- for the period July 2003 to December 2003) in view of following reasons:-

(i) As per Section 25D of the Value Added Tax Act No. 14 of 2002 (as amended) read together with the proviso to Section 25D of the Value Added Tax Act No. 14 of 2002 (as amended), the Appellant will be entitled to a tax credit of -

(a) on the entire (100%) normal VAT paid (output tax) on the taxable supplies of leasing which were chargeable to the normal VAT at the rate of 10% and

(b) 50% of the normal VAT paid (output tax) on the taxable supplies which were chargeable to the normal VAT at the standard rate of 20% and the said tax credit (as stated in (a) and (b) above) aggregates to Rs. 149,140,485/- for the period January 2003 to June 2003.

(ii) As per Section 22 (e) of the Value Added Tax (Amendment) Act, No.13 of 2004, the amendment made to Section 25D of the Value Added Tax Act No. 14 of 2002 as found in Section 10 of the Value Added Tax (Amendment) Act, No. 13 of 2004 was effective only from 1st July 2003. Thereby, the Appellant will be entitled to a tax credit of –

(a) 25% of the normal VAT paid (output tax) on the taxable supplies of leasing which were chargeable to the normal VAT at the rate of 10%; and

(b) 50% of the normal VAT paid (output tax) on the taxable supplies which were chargeable to the normal VAT at the standard rate of 20%,

and the said tax credit (as stated in (a) and (b) above) aggregates to Rs. 77,673,513/- for the period July 2003 to December 2003.

19. In accordance with Section 25D of the Value Added Tax Act No. 14 of 2002, is the Appellant entitled to a tax credit of Rs. 10,526,092/- which was paid by cheque to the Department of Inland Revenue (Rs. 10,526,092/-, being the excess of output tax over input tax in respect of normal VAT for the month of November 2003)?

20. Is the determination of the Board of Review bad in law and a nullity inasmuch as –

    (a) the documents set out at Nos. 7, 10 to 23 and 25 to 31 of the Motion of the Appellant dated 24th May, 2012 filed of record in Your Lordships' Court have not been placed before the Board of Review and/or have not been considered by the Board of Review?
    (b) thus, has the Board of Review made its determination without having obtained and ascertained the complete facts of the matter?

21. Is the determination of the Board of Review bad in law and a nullity inasmuch as –

    (a) the Board of Review has failed to consider there is no record of the hearing required to be maintained by the Commissioner-General in terms of Section 34(11) of the Value Added Tax Act No. 14 of 2002 (as amended)?
    (b) the Board of Review has failed to consider that the Commissioner-General has not complied with the appeal procedure in Section 34(11) of the Value Added Tax Act No. 14 of 2002?
    (c) the Board of Review has made its determination without having ascertained and obtained the complete facts of the matter inasmuch no record has been transmitted in terms of Section 35 of the Value Added Tax Act No. 14 of 2002 (as amended) read with Section 140(2) of the Inland Revenue Act, No. 38 of 2000 to the Board of Review?

[03] The Respondent whilst conceding that the Court has jurisdiction to formulate additional questions of law, objected to the nature of the additional questions suggested by the Appellant. At the inquiry, both parties agreed to file written submissions on the acceptance of the additional questions of law. This order relates to the question whether or not this Court should accept the additional questions of law suggested by the Appellant as set out in its motion dated 02.09.2013.

[04] Section 36 (1) of the Value Added Tax Act, No. 14 of 2002 as amended by the Value Added Tax (Amendment) Act, No. 09 of 2011 that was in force at the time in question (now repealed by the Tax Appeals Commission Act, No. 23 of 2011) reads as follows:

"36(1) The decision of the Board of Review or any Commission, which may be constituted by any written law for the purpose of hearing appeals in terms of this Act shall be final:

Provided that either the appellant or the Commissioner-General may make an application requiring the Board of Review or any Commission, which may be constituted by any written law for the purpose of hearing appeals in terms of this Act to issue a case on a question of law for the opinion of the Court of Appeal".

Appeal on a question of law to the Court of Appeal under the Inland Revenue Act, No. 38 of 2000

[05] Section 141(2) of the Inland Revenue Act, no. 38 of 2000 (as amended) provides that the Board of Review, shall, in the case stated set out the facts, the decision and the amount of tax in dispute where such amount exceeds five thousand rupees. It reads as follows:

"(2) The case stated by the Board shall set out the facts the decision of the Board and the amount of the tax in dispute where such amount exceeds five thousand rupees and the party requiring the Board to state such case shall transmit the case when stated and signed to the Court of Appeal, within fourteen days after receiving the same"

[06] In the present case, the Appellant being dissatisfied with the decision dated 16.06.2009 made by the Board of Review made an application on 14.07.2009 under section 36 (1) of the Value Added Tax Act, No. 14 of 2002 (hereinafter referred to as the VAT Act) read with section 141(1) of the Inland Revenue Act, No. 38 of 2000 (hereinafter referred to as the "IRA, 2000"), requiring the Board to state a case for the opinion of the Court of Appeal on 35 questions of law (Vide- X4).

[07] The Board of Review however, in the case stated dated 03.03.2010 formulated 5 questions of law [(8(i) (a) -(d), 8(ii), 8(iii), 8(iv) and 8(v)] arising in the case stated for the opinion of the Court of Appeal (Vide- paragraph 1). The Appellant while incorporating and crystallizing almost all the questions of law set out in the case stated, suggested additional questions of law as well, not stated in the case stated. The Appellant submits that the Court of Appeal is entitled to consider questions of law other than what is set out in the case stated and accordingly, the Court of Appeal should hear

and determine the said additional questions of law arising in the stated case other than what is set out in the case stated.

[08] Section 141 (6) of the IRA 2000 provides that the Court of Appeal is entitled to hear and determine any question of law arising in the stated case and confirm, reduce, increase or annual the assessment determined by the Board, or may remit the case to the Board with the opinion of the Court thereon. It reads as follows:

> *(6) Any two or more Judges of the Court of Appeal may hear and determine* ***any question of law arising on the stated ease*** *and may, in accordance with the decision of the Court upon such question, confirm, reduce, increase or annual the assessment determined by the Board, or may remit the case to the Board with the opinion of the Court thereon".*

[09] The words "**any question of law arising on the stated ease"** in section 141 (6) clearly signify that it is open to the Court of Appeal to consider any question of law that results either in the confirmation, reduction, increasing, or annulment of the assessment determined by the Board of Review on a case stated, or the remitting the case to the Board of Review with the opinion of the Court. The identical provision is found in section 11A (6) of the Tax Appeals Commission Act, No. 23 of 2011 (as amended) and therefore, the same test applies to the admission of a new question of law, and its determination by the Court of Appeal under section 11A of the Tax Appeals Commission Act, No. 23 of 2011 (as amended).

[10] It is now settled law that where a new question of law will result either in the confirmation, reduction, increasing, or annulment of the assessment determined by the Board of Review or the Tax Appeals Commission on a case stated or the remitting the case to the Board of Review with the opinion of the Court, a new question of law may be permitted to be raised by the Court of Appeal (*The Commissioner General of Inland Revenue v. Dr. S.S.L. Perera* CA/Tax/No. 3/2017 decided on 11.01.2019, *Royal Ceramics Lanka PLC v. The Commissioner General of Inland Revenue* CA Tax No. 5/2008 decided on 12.05.2020), Commissioner General of Inland Revenue v Koggala Garments (Pvt) Ltd CA. Tax 01/2008 decided on 05.04.2017, and *Commissioner General of Inland Revenue, v. Janashankthi Insurance Company Limited* SC. Appeasl No. 114/2019 decided on 26.06.2020).

[11] It is apt to consider the principles of law enunciated by the Supreme Court in *Commissioner General of Inland Revenue, v. Janashankthi Insurance Company Limited* (supra), when the Court of Appel is invited to consider the admission of a new question of law for the opinion of the Court of Appeal. In *Commissioner General of Inland Revenue, v. Janashankthi Insurance Company Limited* (supra), the Supreme Court held that:

1. The legislature had expected the Court of Appeal to consider the case stated once the case stated is remitted to the Court of Appeal, and prior to it being determined by the Court of Appeal;

2. The provisions introduced by the Tax Appeals Commission Act give the opportunity to the Tax Appeals Commission and the Court of Appeal to carefully consider the questions of law that are to be contained in the case stated before it being taken up for hearing before the Court of Appeal;

3. The power of the Court of Appeal to consider an additional question of law is not restricted to the questions identified in the case stated, but the Court is permitted to consider a new question of law agreed upon by the Court, if the Court is of the view that the answer to a new question of law may result in the confirmation, reduction, increasing or annulling the assessment determined by the Commssion or the remitting the case to the Tax Appeals Commission with the opinion of the Court;

4. Similarly, the Court of Appeal is free to decline to answer any of the question or questions, that is included in the case stated, if the court is of the view that it may not result in the confirmation, reduction, incresing or annulling the assessment determined by the Commission, but in any other instance, the Court of Appeal is required to answer all the questions before them.

[12] At the inquiry, the learned Senior State Counsel only objected to the nature of the suggested questions of law, and therefore, I shall now proceed to consider whether or not such additional questions of law suggested by the Appellant should be permitted to be raised on the basis

of the tests identified, and settled in the said cases decided by the Court of Appeal and the Supreme Court.

Additional question of Law No. 1

[13] The learned Senior State Counsel has objected to the first additional question of law on the ground that it is identical to the question of law No. 8 (1)(c) in the case stated. The first additional question of law suggested by the Appellant in its motion dated 02.09.2013 is identical to the question of law No. 8 (1) (c) in the case stated, and the additional question of law No. 6 (a) set out in the said motion. The additional question of law No. 6 (a) in the motion dated 02.09.2013 has been, however, formulated with specific reference to the relevant provision of the VAT Act. Therefore, this Court will accept the additional questions of law No. 1 and No. 6 (a) and consolidate them in the questions of law to be determined by this Court subject to amendment, where necessary.

Additional question of Law 2

[14] The learned Senior State Counsel has objected to the additional question of law No. 2 on the ground that it is identical to the question of law No. 8 (1) (d) in the case stated. While the additional question of law No. 2 (b) is identical to the question of law No. 8 (1) (d), it questions the validity of the letter of intimation, and the determination made by the Commissioner-General for not giving reasons separately for each of the taxable periods. I am of the view that this additional question of law arises on the assessment and thus, falls within the scope of the test applied in the aforesaid cases. The additional question of law No. 2 (a) and 2 (b) should be permitted to be raised subject to amendment, where necessary.

[15] The additional suggested questions of law No. 2 (c) (i) -(iii) relate to the procedural irregularities of not keeping the minutes and recorded evidence for the hearing on 24.04.2006 and 06.06.2006, and for not transmitting the copy of the recorded proceedings of the hearing held on 24.04.2006 and 06.06.2006 to the Board of Review. These are, however, matters relating to question of facts that had not been determined by the Board of Review. The Commissioner General of Inland Revenue by letter addressed to the Registrar of the Court of Appeal dated 16.05.2014 has attached documents mentioned in the motion dated 24.05.2012 including the notes of the

appeal hearing held on 24.04.2006 (X11). Though the proceedings dated 06.06.2006 are not available, the Appellant has admitted that on 06.06.2006, a settlement was finally discussed based on its suggestion to compute the liability on VAT in financial services by excluding capital gains and dividend income (Vide- page 13 of the written submissions of the Appellant dated 01.08.2007).

[16] It is not in dispute that the discussed settlement was not reached and therefore, the Commissioner-General made the determination on 19.07.2006, and the reasons were submitted to the Appellant on 18.08.2006 (Vide-last pages of the brief). Under such circumstances, I am of the view that the additional questions of law No. 2 (c) (i) -(iii) will not result in an adjustment of the assessment determined by the Board of Review. For those reasons, I am of the view that the additional questions of law No. 2 C (i) -(iii) should not be permitted to be raised.

[17] The additional question of law No. 2 (d) is identical to the additional question of law No. 8 (a) which related to the failure of Mr. J.P.D.R. Jayasekara, Senior Assessor who was specifically directed by the Commissioner General to conduct an inquiry for the purpose of reaching an agreement under section 34 (6) of the VAT Act (as amended). Section 34 (6) of the VAT Act authorizes the Commissioner General to cause a further inquiry to be made by an Assessor for the purpose of reaching an agreement as to the matters specified in the petition of appeal, and where an agreement is reached in the course of the inquiry, the necessary adjustment of the assessment shall be made.

[18] The question of law No. 8 (ii) in the case stated relates to the nullification of the assessment for non-compliance with section 29 and 34 of the VAT Act (as amended). It reads as follows:

> *"8 (ii). Did the non compliance of the procedural provision of section 29 and 34 nullify the assessment?*

[19] Section 34 (6) mandates an Assessor who is specifically appointed by the Commissioner General to hold an inquiry, and it is primarily aimed at a settlement. The question whether or not the answer to this question will result in an adjustment of the assessment cannot be answered at this state and the same has to be answered at the conclusion of the argument. But,

in my view this question of law No. 2 (d) has been formulated in line with the question of law No. 8 (ii) in the case stated, Accordingly, I am of the view that the question of law No. 2 (d) should be permitted to be raised.

[20] The additional questions of law No. 2 (e) –(g) are identical to the question of law already formulated in the case stated, and primarily, they relate to the assessment determined by the Board of Review. Accordingly, those questions of law should be permitted to be raised.

Additional question of Law 3

[21] The question of law No. 3 suggested by the Appellant is consistent with the question of law 8 (iii)(a) in the case stated, and 8 (iii) (b) but has been formulated in detail and therefore, this question of law should be permitted to be raised.

Additional question of Law 4

[22] The additional question of law No. 4 states that the Board of Review did not conduct any hearing on 11.03.2009 but the the case stated generally refers to 11.03.2009 as a date on which the hearing was held. However, the proceedings dated 02.02.2009 state that the Board decided to meet on 11.03.2009 at 10.00 a.m. for deliberation, but there is no reference to a hearing. I find that the letter of the Commissioner General dated 16.05.2014 states that no meeting of the Board of Review was held on 11.03.2009.

[23] A perusal of the proceedings of the Board of Review dated 19.06.2007 reveals that the Appellant has identified eight issues to reject the assessment as follows:

1. *The Asessor should be a gazetteed officer to issue an assessment like in other departments. But in this particular assessment, that process has not taken place and as such the assessment is rejected;*

2. *Every notice of assessment should state under what secton of the VAT Act the notice is issued. This has not been mentioned. Hence, it is not valid;*

3. *Every notice of assessment should be issued for a year of assessment/taxable period that is a calandar month. Mr. Jayasekera has taken the liberty to issue the assessment for whole year from 1st Jabuary*

to 31st December where as company is in difficulty to compute the amounts for 12 months. He reads out section 28 for reference and pointed out that section 31 also is same as section 28;

4. *Tax payers file returns. The Assessors have the right to accept or not and give reasons for each taxable period. The Assessor concerned has not complied with section 29 of the VAT Act;*

5. *Notice of assessment should be duly assessed under the law. In this assessment, it has been addressed as No. 79, T.B. Jaya Mawatha. There is a H.N.B. Bank at No. 79. It should be at No. 479. The Board questioned as to how the assessment was received. The answer was as it was mentioned as Hatton National Bank, it was received;*

6. *Letter intimating the figures are not printed before payment of tax is as per audited accounts. There is no such figure. There is a figure after the net profit. What is different from ..before net profit. Due care has not been exercised when assessing the assessment. There is a different figure in the audited statement of accounts. There is no amount of Rs. 1,009,585.*

[24] A persual of the proceedings dated 08.01.2009 further reveals that the authorized representative of the Appellant submitted and presented before the Board of Review a brief summary of the substantive issues dated 08.01.2009 to be determined by the Board of Review. The relevant proceedings read as follows:

"Brief summary of the substantive issues

We wish to place before the Board a brief summary of the substantive issues:

1. *VAT on financial services cannot be imposed on the following:*

   -Capital gains arising from buying and selling shares;
   -Capital gains on buying and selling shares
   -Dividend income
   -Share of profit from monies given to Lloyds Bank outside Sri Lanka
   -Interest income accrued up to 31st December 2002 on non-performing loans reflected as interest in suspense (overdue interest) in the balance sheet as at 31st December 2002.

2. *The following should be deducted in calculating the net profit under section 25C of the VAT Act:*

   -Provision for taxation
   -VAT on financial services

3. *Economic depreciation (including the economic depreciation on leased assets) should be deducted in computing the value addition under section 25C of the VAT Act.*

4. *Output tax paid by HNB under normal VAT should be allowed as a tax credit under section 25D of the VAT Act;*

5. *In any event, about Rs. 10 million paid by HNB in November 2003 (being the excess of output tax over the input tax) under normal VAT should be allowed as a tax credit under section 25D of the VAT Act.*

[25] The proceedings before the Board of Review dated 08.01.2009 reads as follows:

> *"The authorized representative of the appellant submitted further set of written submissions dated 07th of January and 8th January 2009.* ***He further clarified the matters that are in issue.*** *The Board directed the department to submit computation of tax payable for each of the taxable period for the year 2003 giving the details of the Output tax, input tax and credits available and the balance of tax for the said periods....."*

[26] The parties identified the issues to be decided by the Board of Review and filed several written submissions and therefore, I am of the view that the additional question of law No. 4 has no potential to result in an adjustment of the assessment and therefore, the additional question of law No. 4 should not be permitted to be raised.

Additional question of Law 5

[27] The additional question of law No. 5 and the additional question of law No. 7 (a) are identical and they are reflected in question of law No. 8 (1)(a) in the case stated. It should be allowed and consolidated as a single question of law dealing with the validity of the notice of assessment dated 12.08.2004.

Additional question of Law 6

[28] The additional question of law No. 6 is arising on the case stated and therefore, it should be allowed subject to amendment, where necessary.

Additional question of Law 7

[29] The additional question of law No. 7 (a) is identical to the additional question of law No. 5 and is arising on the case stated. It may result in an adjustment of the assessment, if the Court answers that questions of law in the affirmative. In my view, the the question of law 7 should be allowed to be raised as a single question of law.

Additional question oflLaw 8

[30] The additional question of law No. 8 (a) is identical to the additional question of law No. 2 (d). As stated, additional questions of law 8(b) and 8 (c) are question of law that relate to the question of law No. 8 (a) and therefore, should be allowed.

Additional question of law 9

[31] The additional question of law No. 9 is identical to the additional question of law No. 2 (c) and therefore, the same anaylsis in respect of the additional question of law No. 2 (c) applies. In my view they are primarily questions of fact that have no potential to result in an adjustment of the assessment. In my view the additional question of law No. 9 should not be permitted to be raised.

Additional question of law 10

[32] The additional question of law No. 10 relates to the failure to give reasons for not considering the grounds urged in the petition of appeal. It is very vague and relates almost to all the matters referred to in the petition of appeal without identifying the question of law in respect of which reasons have not been given. I am of the view that this question of law will not result in an adjustment of the assessment and therefore, it should not be permitted to be raised.

Additional question of law 11

[33] The additional question of law No. 11 and 3 (a) are identical to the question of law No. 8 (iii)(a) in the case stated, but they have been formulated with specicial reference to the provision in the VAT Act. I am of the view that a single question of law on the basis of the matters contained in the said questions of law should be permitted to be raised.

Additional question of law Nos. 12 & 13 (a)-(c)

[34] The additional question of law No. 12 is reflected in the question of law No. 8 (iii)(c) in the case stated, and is identical to the additional question of law No. 13 (a)-(b). This question of law has been formulated in detail with specicial reference to the provision of law in the VAT Act (as amended) and as such, they should be permitted to be raised and consolidated. The additional question of law No. 13 (c) is arising on the case stated and it is a question of law that impacts on the assessment determined by the Board of Review. Accordingly, the additional question of law No. 13 (c) should be permitted to be raised.

Additional questions of law Nos. 14 & 15

[35] The additional questions of law No. 14 and 15 are similar questions of law that arise on the case stated, and therefore, they should be allowed and consolidated.

Additional questions of law Nos. 16

[36] The additional questions of law No. 16 (a) is similar to the additional questions of law No. 2 (e), the additional question of law No. 16 (b) is similar to the additional question of law No. 2 (f) and the additional question of law No. 16(c) is similar to the additional question of law No. 2 (g). Those questions of law impact on the assessment determined by the Board of Review and therefore, they must be permitted to be raised and consolidated.

Additional questions of law Nos. 17, 18, 19

[37] The additional questions of law Nos. 17-19 relate to tax credits.The learned Senior State Counsel has observed that the quantum of credit claimed is unclear. The question of law No. 8 (iv) in the case stated refers to the entitlement of the Appellant to tax credits claimed on account of VAT

paid on goods and services supplied by other registered persons from the VAT on financial services. The additional questions of law 17-19 that have been formulated in detail contain the amount of the tax credit claimed in the returns of VAT on financial services filed with figures for the relevant months of 2003 separately. The question of law No. 17 refers the entitlement of the Appellant to the tax credit in a sum of Rs. 70,694,797/- under section 25D of the VAT Act, and is based on the figures mentitoned in the written submissions of the Appellant dated 19.11.2008 (Vide-paragraph 1.8).

[38] The The question of law No. 18 refers the entitlement of the Appellant to the tax credit in a sum of Rs. 226,813,998/- (Rs. 149,140,485/-for the period January 2003 to June 2003 under section 25D of the VAT Act and Rs. 77,673,513/- for the period July 2003-December 2003 as per section 22(e) of the VAT (Amendment) Act, No. 13 of 2004, the amendment made to the VAT Act, No. 14 of 2002 as found in section 10 of the VAT (Amendment) Act, No. 13 of 2004. These figures are based on the matters contained in paragraphs 18.2.2-18.3.4 of the same wriiten submissions of the Appellant.

[39] The question of law No. 19 refers the entitlement of the Appellant to the tax credit in a sum of Rs. 10,526,092/- under section 25D of the VAT Act, and paid by cheque to the Department of Inland Revenue being the excess of output tax over input tax in respect of normal VAT for the month of November 2003. These figures are reflected in paragraph 1.9 of the written submssions of the Appellant filed on 18.11.2008.

[40] In my view that these three questions of law arise on the case stated and may result in an adjustment of the assessment determined by the Board of Review if the Court answers that questions of law in the affirmative. Therefore, I am of the view that these three questions of law should be allowed to be raised subject to amendment, where necessary.

Additional questions of law Nos. 20-21

[41] The question of law No. 20 relates to the failure to produce the documents set out at Nos. 7, 10-23 and 25-31 of the Motion of the Appellant dated 24.05.2012 filed of record and the determination made by the Board without obtaining the said documents. The additional question of law No. 21 relates to the failure of the Commissioner General to maintain

a record under section 34 (11) and the failure of the Board of Review to make the determination without obtaining the complete record transmitted by the Commissioner General to the Board.

[42] In my view the mere failure to place before the Board of Review the documents referred to in the motion will not result in an adjustment of the assessment determined by the Board of Review without first identifying the legal consequences emanating from the non-production or non-consideration of the said documents. A perusal of the said Motion reveals that the majority of the items set out therein are documents that are either in the possession or control of the Appellant and therefore, if those documents are relevant, at least those documents which were in the possession or control of the Appellant could have been produced before the Board of Review during the course of the proceedings.

[43] The Appellant complains that the record has not been maintained by the Commissioner-General and the Board of Review has failed to obtain the record before making the determination. If the relevant documents were not made available for the hearing of the appeal, before the Board, that matter should have been first brought to the notice of the Board of Review, and an appropriate direction should have been sought from the Board by the Appellant. The proceedings before the Board of Review do not indicate that the Appellant has made any such complaint to the Board and sought any order directing the Commissioner General to submit the said documents.

[44] I further find that the Commissioner General has now submitted documents (except item No. 1- the minute and items No. 2-4) mentioned in the motion dated 24.05.2022 to this Court. The Commssioner-General has, however, stated that the minutes in item No. 1 has not been prepared by the Board of Review and the Board meetings referred to in items No. 2-4 were not held. The Appellant has not identified any legal consequence and the prejudice that have resulted in the non-availability of the documents in question. I am of the view under such circumstances, that the non-availability of those documents will not result in an adjustment of the assessment determined by the Board of Review.

[45] I am of the view that the additional questions of law Nos. 20 and 21 should not be permitted to be raised by this Court as questions of law for the opinion of this Court.

Conclusion

1. I accept the additional questions of law Nos. 1, 2 (a) -(b), 2 (d) -(g), 3 (A)-(B), 5, 6, 7, 8, 11, 12, 13, 14, 15, 16, 17, 18 and 19 subject to amendment and consolidation. where necessary.

2. I disallow the additional questions of law Nos. 2 (c), 4, 9, 10, 20 and 21.

3. Accordingly, the questions of law to be determined by this Court in this case stated are:

    1. Is the decision of the Board of Review erroneous, invalid and bad in law as the Board of Review failed to address and make its decision on the following questions of law?

        (a) the Commissioner General of Inland Revenue in his determination has not given reasons for such determination separately for each of the taxable periods for the calendar year 2003;

        (b) (i) the determination of the Commissioner General of Inland Revenue is erroneous, invalid and bad in law, since Mr. J.P.D.R. Jayasekera, Senior Assessor who was specifically directed by the Commissioner General of Inland Revenue to look into the possibility whether an agreement could be reached under section 34(6) of the Value Added Tax Act, No. 14 of 2002, did not conduct any proceedings under section 34 (6) of the Value Added Tax Act, No. 14 of 2002 (as amended) as directed by the Commissioner General of Inland Revenue;

        (ii) as the term "Commssioner" has not been defined under the Inland Revenue Act, No. 38 of 2000, can the Commissioner be a Commissioner General of Inland Revenue and perform the functions of the Commissioner General of Inland Revenue and determine an appeal under section 34 of the Value Added Tax Act, No. 14 of 2002 (as amended)/and/or

(iii) If a Commssioner cannot be and is not a Commssioner General of Inland Revenue, then, is the determination made by Mr. H.B.A. Seneviratne who is a Commssioner, erroneous, invalid and bad in law?

2. (a) In computing the value addition for the purposes of VAT on financial services, in accordance with section 25C(1) of the Value Added Tax Act, No. 14 of 2002 (as amended), can provision for taxation de deducted in arriving at the net profit before payment of income tax?;

(b) Under section 25C(1) of the Value Added Tax Act No. 14 of 2002 (as amended), for the purposes of computing VAT on financial services, can VAT on financial services be deducted in arriving at the net profit before payment of income tax?;

(c) Under section 25C(1) of the Value Added Tax Act, No. 14 of 2002 (as amended), can economic depreciation on assets owned by the Appellant and used in its business of leasing be deducted in computing the value addition for the purposes of VAT on financial services?;

3. Is the determination of the Board of Review bad in law inasmuch as the Board of Review misdirected itself and erred by not making its determination on the following questions of law which were identified by the Board of Review in its decision dated 16.06.2009?

(a) was the interest in suspense account in respect of supply of financial services made prior to 1st January 2003 in respect of non-performing loans as at 31.12.2002, which was received during the financial year ended 31.12.2003, liable to VAT on financial services for the year ended 31.12.2003 ?;

(b) Is capital gain, arising from the sale of a Treasury Bill or a Treasury Bond, a supply of financial service as defined in section 25F of the Value Added Tax Act, No. 14 of 2002 (as amended) and thus, is liable to VAT on financial services?

(c) Is trading profit, arising from sale of a Treasury Bill or a Treasury Bond, a supply of financial service as defined in section 25F of the Value Added Tax Act, No. 14 of 2002 (as amended) and thus, is it liable to VAT on financial services?

(d) Is dividend income a supply of financial service as defined in section 25F of the Value Added Tax Act, No. 14 of 2002 (as amended) and thus, is it liable to VAT on financial services?

(e) (i) Is the share of profit received by the Appellant from Lloyds Bank (a Bank outside Sri Lanka carrying on business outside Sri Lanka) out of profits earned by Lloyds Bank (outside Sri Lanka) by managing (outside Sri Lanka) the monies of the Appellant, a supply made outside Sri Lanka?;

(ii) Is it liable to VAT on financial services in accordance with section 25A (1) of the Value Added Tax Act, No. 14 of 2002 (as amended)?

4. Has the Board of Review failed to consider that the notice of assessment dated 12.08.2004 being charge No. VAT/FS/06/0312/06 is erroneous, invalid and bad in law in that:

(a) as the name of Mr. J.P.D.R.Jayasekara who issued the notice of assessment was not judicially noticed as mandatorily required in terms of section 60(5) of the Value Added Tax Act, No. 14 of 2002, and thereby failed to cancel the notice of assessment;

(b) as it is one (a single) notice of assessment issued for the whole of the calendar year 2003 and as a separate assessment has not been made for each taxable periods in the calander year 2003 and a separate notice of assessment has not been issued for each of the taxable periods (taxable period is a calendar month as specified in section 25B of the Value Added Tax Act, No. 14 of 2002 (as amended), in the calandar year 2003, as required in terms of section 28 and section 31 of the Value Added Tax Act, No. 14 of 2002 (as amended) and/or

(c) as the reasons have not been given separately for each of the taxable periods for not accepting the Returns furnished for each

of the taxable periods (taxable period is a calander month as specified in section 25B of the Value Added Tax Act, No. 14 of 2002 (as amended), in the year 2003, and thus, contravenes the mandatory requirement of section 29 of the Value Added Tax Act, No. 14 of 2002 (as amended); and/or;

(d) as the letter of intimation dated 12.08.2004 does not satisfy the mandatory requirement as found in section 29 of the Value Added Tax Act, No. 14 of 2002 (as amended), which mandates the Assessor to give reasons for not accepting a Return furnished;and/or

(e) as the provision of the statute under which the notice of assessment was issued has not been stated in the notice of assessment;

5. Is the decision of the Board of Review erroneous, invalid and bad in law as the Board of Review has failed to make a decision on the following questions of law raised before the Board of Review?

   (a) the terms "capital gains", "dividend income" and "provision for taxation" are not found anywhere in the letter of intimation dated 12.08.2004:

   (b) for the contravention of the mandatory provision of section 29 of the Value Added Tax Act, No. 14 of 2002 (as amended), as no reasons whatsoever have been given in the letter of intimation dated 12th August 2004 for imposing VAT on financial services on capital gains, dividend income and provision of taxation; and/or

6. In accordance with section 25D of the Value Added Tax Act, No. 14 of 2002 (as amended), is the Appellant entitled to a tax credit of Rs. 70,694,797/- claimed as a tax credit in the Returns of VAT on financial services filed for the months of January 2003, February 2003, March 2003, April 2003, May 2003, June 2003 and December 2003 respectively?

7. Is the Appellant entitled to a tax credit of Rs. 226,813,998/- (Rs. 149,140,485/- for the period January 2003 to June 2003 as per section 25D of the Value Added Tax Act, No. 14 of 2002 (as amended), read

together with the proviso to section 25D of the Value Added Tax Act, No. 14 of 2002 (as amended) and Rs. 77,673,513/- for the period July 2003 to December 2003 as per section 22(e) of the Value Added Tax (Amendment) Act, No. 13 of 2004, the amendment made to section 25D of the Value Added Tax Act, No. 14 of 2002 (as amended), as found in section 10 of the Value Added Tax (Amendment) Act, No. 13 of 2004?

8. In accordance with section 25D of the Value Added Tax Act, No. 14 of 2002 (as amended), is the Appellant entitled to a tax credit of Rs. 10,526,092/- which was paid by cheque to the Department of Inland Revenue(Rs. 10,526,092/-, being the excess of output tax over input tax in respect of normal VAT for the month of November 2003?

JUDGE OF THE COURT OF APPEAL

M. Sampath K.B. Wijeratne, J.

I agree.

JUDGE OF THE COURT OF APPEAL