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).

Orient Finance PLC (Formerly Known as Bartleet Finance PLC)
No. 61, Dharmapala Mawatha,
Colombo 07.

APPELLANT

CA No. CA/TAX/0008/2019
Tax Appeals Commission
No. TAC/VAT /013/2014

v.

Commissioner General of Inland Revenue,
14th Floor, Secretarial Branch,
Department of Inland Revenue,
Sir Chittampalam A, Gardiner Mawatha,
Colombo 02.

RESPONDENT

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

COUNSEL : Nihal Fernando, P.C., with Johann Corera for the Appellant.

M. Jayasinghe, D.S.G. with A. Gajadeera, S.C., for the Respondent.

WRITTEN SUBMISSIONS	:	31.03.2022 (by the Appellant)
		29.03.2022 (by the Respondent)
SUPPORTED ON	:	23.08.2021 & 02.11.2021
DECIDED ON	:	16.06.2022

M. Sampath K. B. Wijeratne J.

Order

This order deals with the issue of whether the additional questions of law No. 11, 12 and 13 which the Appellant seeks to formulate before this Court should be allowed or rejected.

The Tax Appeals Commission (hereinafter referred to as 'TAC') in the case stated submitted ten questions of law for the opinion of this Court. The TAC appears to have forwarded the ten identical questions suggested by the Appellant in its letter to the TAC dated 20th July 2018[1]. The case stated was received by this Court on the 21st March 2019, through the Attorney at Law for the Appellant. After the case was mentioned for steps over several days, it was fixed for argument on the 22nd January 2021. However, the case was not taken up for argument and was postponed from time to time for the reasons stated in the journal entries. On the 30th July 2021 Appellant's registered Attorney filed a motion and moved to add three new questions of law No. 11, 12 and 13. When the said application was supported on the 2nd November 2021, the learned Senior State Counsel for the Respondent objected to the three additional questions. Thereafter, the parties were allowed to file written submissions on the issue and accordingly, both parties filed their respective written submissions.

The ten questions of law in the case stated are as follows:

1. **Whether the reasons communicated by the assessor under section 29 of the VAT Act in making the assessment is correct as the assessor dis regarded the changing provisions of section 25 (A) (1) read together with section 25 (f) of the Value Added Tax Act No. 14 of 2002 as amended (Vat Act) and relies only on section 25 C (5)?**

[1] At pp. 210 to 212 of the appeal brief

2. **Whether the computation section *viz* section 25 C (5) of the Vat Act can supersede the charging section for VAT on supply of financial services *viz* section 25 A (1) of the VAT Act?**

3. **Whether an item of income tax that does not fall within the supply of financial services found under section 25 (f) of the VAT Act, is chargeable with VAT on "supply of financial services" under VAT on "supply of financial services"**

4. **Whether the Tax Appeals Commission has erred in law by determining that the income items that do not fall within the ambit of the definition of "supply of financial services" found under section 25 F of the VAT Act, as being liable for VAT on "supply of financial services"?**

5. **Whether the sale of shares falls within the ambit of the definition of "supply of financial services" found under section 25 F of the VAT Act?**

6. **Whether the receiving dividend income falls within the ambit of the definition of "supply of financial services" found under section 25 F of the VAT Act?**

7. **Whether investing in bank deposits and earning interests therefrom falls within the ambit of the definition of "supply of financial services" found under section 25 F of the VAT Act?**

8. **Whether the investing government securities and earning interest therefrom falls within the ambit of the definition of "supply of financial services" found under section 25 F of the VAT Act?**

9. **Has the Tax Appeals Commission erred in failing to consider that there is no "supply of financial services" and/or taxable supply carried out by the Appellant in the sale of shares, receipt of dividend income, investment in bank deposits and earning interest, and investment in government securities and receipt interest?**

10. **Whether the Tax Appeals Commission erred in determining the value addition as computed based on liable and non-liable turnover as correct on the basis segmental accounts are not provided when in fact the company has already provided actual value addition from liable supplies in segmental form along with the annual adjustment?**

The Appellant sort to add the following three new questions of law.

11. **Is the determination of the Tax Appeals Commission time barred under and in terms of Section 10 of the Tax Appeals Commission Act No.23 of 2011 (as amended) as the Commission commenced hearing of the appeal on 07.07.2015 and the determination of the Commission is dated 19.06.2018 after the lapse of more than 270 days since the commencement of hearing of the appeal?**

12. **Is the assessment dated 26.06.2012 relating to the taxable periods April 2009 and May 2009 time barred in terms of Section 33 (1) of the VAT Act No. 14 of 2002 as the assessment has been made after the lapse of three** years **since the end of the said taxable period?**

13. **Has the Tax Appeals Commission failed to determine the ground of appeal that reimbursement of director's fees of Rs. 16, 698,857/- to the holding company and payment of block contribution of Rs. 1, 976,988/- to medical insurance cannot be considered as emoluments?**

I will start with considering the sequence of events behind the proposed three questions of law.

Question No. 11

> **11. Is the determination of the Tax Appeals Commission time barred under and in terms of Section 10 of the Tax Appeals Commission Act No.23 of 2011 (as amended) as the Commission commenced hearing of the appeal on 07.07.2015 and the determination of the Commission is dated 19.06.2018 after the lapse of more than 270 days since the commencement of hearing of the appeal?**

This question of law is whether the determination of the TAC is time barred. The Appellant stated that the TAC commenced hearing of the appeal on the 7th July 2015 and the determination was made on the 19th June 2018, after the expiry of more than 270 days since the commencement of appeal hearing.

The Appellant moved the TAC to state a case to the Court of Appeal against the determination of the TAC. The Appellant did not raise the issue of time bar of the TAC determination in the questions of law suggested to

the TAC[2]. Accordingly, this was not one of the questions of law stated to this Court by the TAC.

Question No. 12

12. Is the assessment dated 26.06.2012 relating to the taxable periods April 2009 and May 2009 time barred in terms of Section 33 (1) of the VAT Act No. 14 of 2002 as the assessment has been made after the lapse of three years **since the end of the said taxable period?**

The question is whether the period from April 2009 to May 2009, which is part of the 2009/2010 taxable period, is time bared in terms of Section 33 (1) of the VAT Act. According to the Appellant, the assessment is dated June 26, 2012 and is therefore being made after three years since April 30, 2009 and May 31, 2009 respectively.

However, when the Appellant appealed to the Commissioner General of Inland Revenue (hereinafter referred to as the 'CGIR'). against the assessment[3], that was not one of the grounds for the appeal. The Appellant did not raise this matter even in the written submissions tendered to the CGIR[4]. Therefore, there is no determination in this regard by the CGIR[5].

The Appellant subsequently appealed to the TAC against the CGIR's determination. Even in the petition of appeal to the TAC, the Appellant did not raise this objection[6]. The appellant did not raise this issue in the written submissions filed on 9th December 2014 or in the written submissions filed on the 29th July 2016. As a result, the TAC did not make a decision on that either.

On being aggrieved by the determination of the TAC, the Appellant moved the TAC to state a case to the Court of Appeal. The Appellant did not raise the issue of time bar of the assessment even in the questions of law suggested to the TAC[7]. Accordingly, this was not one of the questions of law stated to this Court by the TAC.

[2] At pp. 210 t0 212 of the appeal brief.
[3] At pp. 64 to 69 of the appeal brief.
[4] At pp. 42 to 45 of the appeal brief.
[5] At pp. 75 to 80 of the appeal brief.
[6] At pp. 84 to 95 of the appeal brief.
[7] At pp. 210 t0 212 of the appeal brief.

The Appellant first brought the above matter before this Court by motion dated 31st March 2020.

Question No. 13

13. Has the Tax Appeals Commission failed to determine the ground of appeal that reimbursement of director's fees of Rs. 16, 698,857/- to the holding company and payment of block contribution of Rs. 1, 976,988/- to medical insurance cannot be considered as emoluments?

The above question concerns the consideration of medical expenses of Rs.1, 976, 988/- and emoluments of the Director's aggregating to Rs. 16,698, 857/- for VAT purposes. In the appeal to the CGIR, the appellant raised the two issues of whether the Director's emoluments constitute an allocation of costs and whether medical expenses constitute payment of a contribution. The Appellant argued that those two are not emoluments, for the purpose of Income tax.[8] The Appellant made submissions on those two issues in the written submissions made to the CGIR[9]. The CGIR considered the submissions made on behalf of the Appellant and arrived at the conclusion that the staff medical expenses and Director's emoluments should be considered as emoluments payable to employees, for the purpose of calculation of VAT[10].

Thereafter, the Appellant appealed to the TAC against the determination of the CGIR. In the said petition of appeal, the Appellant raised the aforementioned two issues on medical expenses and Director's emoluments[11].

However, for the reasons best known to the Appellant, in both the written submissions filed by the Appellant before the TAC, the Appellant did not pursue the above two issues[12]. In the above premise the TAC did not address the two issues of medical expenses and Director's emoluments, in its determination. Thereafter, the Appellant moved the TAC to state a case

[8] At pp. 64 to 69 of the appeal brief.
[9] At pp. 42 to 45 of the appeal brief.
[10] At pp. 75 to 80 of the appeal brief.
[11] At pp. 84 to 95 of the appeal brief.
[12] Written submissions dated 9th December 2014 at pp. 118 to 125 and written submissions dated 29th July 2016 at pp. 165 to 169 of the appeal brief.

to the Court of Appeal. The Appellant did not raise this issue even in the letter requesting to state a case to the Court of Appeal[13]

The TAC submitted to this Court the identical questions suggested by the Appellant, which did not include a question of law with respect to medical expenses and Director's emoluments. It is true that the case stated to the Court of Appeal is a matter for the TAC[14]. Yet, the TAC also did not include a question of law on those two issues.

Subsequently, the appellant sought to include a question of law on these two issues for the first time before this Court.

On a careful consideration of the aforementioned facts, it appears to me that the Appellant has waived his right to proceed with the issues pertaining to questions of law No. 12 and 13. Thereafter, on a second thought, decided to raise the said two questions to this Court, after a long delay.

Be that as it may, having analysed the factual background and nature of the three questions of law which were raised for the first time before this court, I will now advert to the applicable law relating to the matter in issue.

Section 11A (6) of the Tax Appeals Commission Act, No. 23 of 2011, as amended, (hereinafter referred to as the 'TAC Act') reads:

> ***'11A (6)*** *any two or more Judges of the Court of Appeal may* ***hear and determine any question of law arising on the stated case*** *and may in accordance with the decision of Court upon such question, confirm, reduce, increase or annul the assessment determined by the Commission, or may remit the case to the Commission with opinion of the Court, thereon. Where a case is so remitted by the Court, the Commission shall revise the assessment in accordance with the opinion of the Court.'* (emphasis added)

The identical words '*hear and determine any questions of law arising on the stated case*' were in Section 74 (5) of the repealed Income Tax

[13] At pp. 210 t0 212 of the appeal brief.

[14] *R.M. Fernando v. Commissioner of Income Tax* (Reports of Ceylon Tax Cases, Vol. I, p.571 at p. 577), *Commissioner General of Inland Revenue v. Dr. R.S.L. Perera* (C.A. Tax 03/2017, C.A.M. 11.01.2019).

Ordinance No. 2 of 1932 as well and those words were interpreted by Basnayake C.J., in the case of *R. M. Fernando v. Commissioner of Income Tax*[15] to mean that *'it requires the Court to hear and determine any questions of law arising on the stated case and not any question or questions formulated by the board.'*

In the case of *M.P. Silva v. Commissioner of Income Tax*[16] Canekeratne J., following the dicta in the case of *Ushers Wiltshire Brewer v. Bruce*[17] and having considered Section 74 (5) of the Income Tax Ordinance No. 2 of 1932, held that '*all questions that could be raised on the whole case was intended to be left open*'.

In *Nilamdeen v. Nanayakkara*[18] the statement made by Lord Coleridge C.J., in the case of *Jay v. Jonhnston*[19] was cited wherein it was observed that *'it is a well-known rule of construction that where the Legislature uses in an Act a legal term which was received Judicial Interpretation it must be assumed that the term is used in the sense in which it has been Judicially Interpreted'.*

Accordingly, the interpretation given to the words *'hear and determine any questions of law arising on the stated case'* which appeared in Section 74 (5) of the repealed Income Tax Ordinance No. 2 of 1932 are still valid since the identical words are in Section 11A (6) as well.

N.S.Bindra, in his book *'Interpretation of Statutes'* stated[20]:

'The legislature must be presumed to know the course of the legislation, as well as the course of judicial decisions in the country, a fortiori of the superior courts of the country. It is a well-settled rule of construction that when a statute is repealed and re-enacted, and words in the repealed statute are reproduced in the new statute, they should be interpreted in the sense which had been judicially put on them in the repealed Act, because the legislature is presumed to be acquainted with the construction which the courts have put upon the words, and when they repeat the same words, they must be taken to have accepted the interpretation put on them by the court as correctly reflecting the legislative mind. It is equally presumed

[15] Ceylon Tax Cases, Vol. I, p. 571 at p. 577.
[16] Ceylon Tax Cases, Vol I, p.336 at p.338.
[17] (1915) A.C. 433 at pp. 465, 466.
[18] 76 N.L.R. 169.
[19] (1893) 1 Q.B.D. at 28.
[20] Twelfth Edition, at p. 217.

that the legislature is aware of the general principles of law and did not intent to overthrow a fundamental legal principle, in the absence of a contrary intention expressed in unmistakable terms.'

In the case of *The Commissioner General of Inland Revenue v. Dr. S.S.L. Perera*[21] His Lordship Janak De Silva J., sitting in Court of Appeal (as His Lordship was then) having considered an application to submit additional questions of law to the Court of Appeal observed that *'it is open for this Court to consider questions of law other than what is set out in the case stated. However, I wish to state that such a course of action is permissible only if the answers to the new questions of law may result in the confirmation, reduction, increasing or annulling the assessment determined by the Commission, or requires the remitting of the case to the TAC with the opinion of the Court. Questions of law which are purely of academic interest cannot be raised'.*

In *The Commissioner General of Inland Revenue v. Janashakthi General Insurance Col. Ltd*[22] His Lordship Janak De Silva J., made a similar observation.

Illukkumbura Industrial Automation (Private) Limited v. Commissioner General of Inland Revenue[23] is a case where His Lordship A.H.M.D. Nawaz J., (P/CA) sitting in the Court of Appeal (as His Lordship was then) dealt with the question of law sought to be raised in the Court of Appeal and held that *'additional question of law that surfaces to the fore and alleged failure to comply with a statutory requirement of the Inland revenue Act No. 10 of 2006 must be permitted to be raised, as this question of law impacts or impinges on the assessment made in this case'.*

In the case of *Commissioner of Income Tax v. Saverimuttu Retty*[24] Abraham C.J., made the following observation. *'incidentally there was no reference to us on this point by the Board of Review, since that point was not put to the Board when they were called upon to adjudicate in appeal but we are not, of course, precluded from considering any point upon which the actual decision of the Board might be up held, no matter but might have been their reasons for arriving at that decision'.*

[21] CA Tax 03/2107 decided on the 11th January 2019.
[22] CA Tax 14/2013 decided on the 20th May 2020.
[23] CA Tax 05/2016 decided on the 30th November 2020.
[24] Ceylon Tax Cases Vol I p.103 at p. 109.

In the light of the aforementioned series of authorities. it is my considered view that the aforementioned questions of law No.11, 12 and 13 arises on the case stated and the answers to those three questions of law will result either in confirmation, reduction, increasing or annulling the assessment determine by the TAC or requires to the remitting of the case to the TAC with the opinion of this Court, provided that this Court answers those questions in the affirmative, in favour of the Appellant.

Therefore, I allow the questions No. 11, 12 and 13 to be added.

JUDGE OF THE COURT OF APPEAL

Dr. Ruwan Fernando J.

I Agree.

JUDGE OF THE COURT OF APPEAL