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

In the matter of an appeal by way of a 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).

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

Appellant

Case No. CA/TAX/0006/2019
Tax Appeals Commission
No. TAC/VAT/006/2014

Vs.

Perfetti Van Melle Lanka (Private) Limited,
No. 785/1, Negombo Road,
Liyanagemulla,
Seeduwa

Respondent

Before	**:**	Dr. Ruwan Fernando J. &
		M. Sampath K.B. Wijeratne J.
Counsel	:	Chaya Sri Nammuni, D.S.G for the Appellant
		Dr. Shivaji Felix with Nivantha Satharasinghe for the Respondent
Argued on	:	21.02.2021 & 23.05.2022
Written Submissions filed on	:	06.06.2022 (by the Appellant)
		26.04.2022 (by the Respondent)

Decided on : 05.08.2022

Dr. Ruwan Fernando, J.

Introduction

[1] A Case Stated under section 11A of the Tax Appeals Commission Act, No. 23 of 2011 (as amended) was transmitted to this Court by the Tax Appeals Commission by letter dated 06.03.2019. It contained the following three questions of law for the opinion of the Court of Appeal:

i. Whether the Tax Appeals Commission has erred in law in interpreting the section 21 (1) (b) of the Value Added Tax Act, No. 14 of 2002 (as amended) where the statutory requirements laid down with regard to furnishing VAT returns;

ii. Whether the Tax Appeals Commission has erred in law in interpreting the section 33 (2) of the Value Added Tax Act, No. 14 of 2002 (as amended) where the assessor is of the opinion that as willfully or fraudulently failed to make a full and true disclosure of the material facts to determine the amount of tax payable;

iii. Whether the Tax Appeals Commission has erred in law in interpreting the section 25 (1) of the Value Added Tax Act, No. 14 of 2002 (as amended) where this section is to correct an amount of overcharge or undercharge due to an error that has taken place at the point of issuing a particular tax invoice.

[2] In addition to the aforesaid three questions of law, the Appellant by motion dated 30.08.2019 sought to add the following three additional questions of law for the opinion of this Court:

iv. Whether the Tax Appeals Commission has erred in law in not considering the liability of the Respondent pertaining to the Taxable periods 090033, 09062, 09063, 09092, 09093, 09121, 09122 and 09123?

v. Whether the Tax Appeals Commission has erred in law in failing to include the aforesaid taxable periods in the Case Stated preferred as tax in dispute?

vi. Whether the Tax Appeals Commission has erred in law in not determining that the Respondent is liable to pay taxes under and in terms of the Value Added Tax Act, No. 14 of 2002 (as amended) for the taxable periods 090033, 09062, 09063, 09092, 09093, 09121, 09122 and 09123?

[3] In addition to the aforesaid six additional questions of law, the Appellant by the subsequent motion 26.04.2021 sought to add the following four additional questions of law for the opinion of this Court:

vii. Whether the Tax Appeals Commission has erred in law in not considering the input credit claimed by the Respondent without producing valid tax invoices in support thereof, pertaining to the Taxable Periods 090033, 09062, 09063, 09092, 09093, 09121, 09122 and 09123;

viii. Whether the Tax Appeals Commission has erred in law in not considering whether the value of product trials and free issues to the value of Rs. 79, 937, Rs. 147,510 and Rs. 3,959,534 have not been disclosed as taxable supply for the taxable periods of 01.01.2007 to 31.12.2007, 01.01.2008 to 31.12.2008 and 01.01.2009 to 31.12.2009;

ix. Whether the Respondent has agreed with the liability for the aforesaid free issues and product trials and the additional assessment thereof, and whether the Tax Appeals Commission has not considered the same in assessing the liability of the Respondent;

x. Whether the Tax Appeals Commission has erred in law in not considering that the undisclosed taxable supply amounting to Rs. 1,709,609 has to be declared even though it may be zero rated as it is considered a taxable supply since input credit is allowable when computing the VAT liability for zero rated supplies.

[4] It is seen that the Appellant sought to add three questions of law by the initial motion dated 30.08.2019 on the basis that the Tax Appeals Commission (hereinafter referred to as the "TAC") has failed to consider the assessments made by the Assessor for the years of assessment 090033, 09062, 09063, 09092, 09093, 09121, 09122 and 09123 which were under appeal before the TAC.

[5] It is further seen that the Appellant sought to add four more questions of law by the subsequent motion 26.04.2021 on the basis that the TAC has failed to consider the input credit disallowed for the above taxable periods, namely, 090033, 09062, 09063, 09092, 09093, 09121, 09122 and 09123, the free issues and product trial for the above periods and the undisclosed supply of Rs. 1,709,609/.

Submissions of the Parties

[6] At the inquiry held on 21.02.2022 and 23.05.2022, the learned Deputy Solicitor General for the Appellant, submitted that the TAC has omitted to consider the assessments for the taxable periods 090033, 09062, 09063, 09092, 09093, 09121 and 09123, and therefore, the seven questions of law

proposed by the Appellant ought to be added by this Court under section 11A (6) of the Tax Appeals Commission Act, No. 23 of 2011 (as amended) (hereinafter referred to as the TAC Act). She submitted, however, that alternatively, the TAC can be directed to amend the case stated to include all 13 assessments which related to the issues under Appeal before the TAC. In support of her contention, she made the following further submissions:

1. The Respondent appealed to the Commissioner of Inland Revenue (hereinafter referred to as the CGIR) in respect of all 13 assessments and disputed only 5 assessments for the taxable periods 07091, 07092, 07093, 07121 and 07122 on time bar, and the CGIR while confirming the assessments held that the assessments for the taxable periods, 07091, 07092, 07121 and 07122 are not time barred, but no reference was made to the assessment for the taxable period 07093;

2. The Respondent appealed to the TAC in respect of all 13 assessments including the assessments for the taxable periods 09033, 09062, 09063, 09092, 09093, 09121, 09122 and 09123, and disputed 5 assessments for the taxable periods, 07091, 07092, 07093, 07121 and 07122 on the basis of the time bar. The TAC decided that the 2 issues to be answered in the appeal are (i) the time bar of the assessment for the taxable periods, 07091, 07092, 07093, 07121, 07122; and (ii) the input credit based on credit notes;

3. The TAC, however, decided that out of 5 assessments, only 4 assessments for the taxable periods, namely, 07091, 07092, 07121, 07122 are time barred, but (a) the time bar of the assessment for the taxable period, 07093, and (b) the other 8 assessments for the taxable periods, 09033, 09062, 09063, 09092, 09093, 09121, 09122 and 09123 have not been determined;

4. Although the TAC at the end of its determination stated that “the appeal is allowed”, there is no determination made in respect of the assessments for the taxable periods, 090033, 09062, 09063, 09092, 09093, 09121, 09122 and 90123;

5. The TAC has failed to consider the input credit disallowed for the taxable periods, namely, 090033, 09062, 09063, 09092, 09093, 09121, 09122 and 90123, the free issues and product trial for the above periods and the undisclosed supply of Rs. 1,709,609/-;

6. Although the TAC does not specifically refer to all 12 assessments and the issue of the input credit based on credit notes, those issues have been admitted by the Respondent but the TAC dealt with only 4 assessments for the taxable periods 07091, 07092, 07121, 07122;

7. The stated case before the TAC includes all 12 assessments and the questions of law as indicated in the annexed determination of the TAC (X3) are all arising from the stated case and thus, the questions of law proposed by the Appellant ought to be added as new questions of law for the opinion of the Court of Appeal under section 11A (6) of the TAC Act;

8. The proposed questions of law do not widen the scope of the appeal as they are all arising from the facts and the issues referred to in the determination made by the TAC;

9. When the Appellant has made an application in writing to the TAC on time and with the required payment under section 11A (1) of the TAC Act, requiring the TAC to state a case on a question of law, it is the responsibility of the TAC to frame questions of law and set out the amount of tax in dispute. The duty of the TAC is not confined to the questions of law proposed by the Appellant.

[7] On the other hand, Dr. Shivaji Felix, the learned Senior Counsel for the Respondent objected to the new questions of law proposed by the Appellant and submitted that all new questions of law proposed by the Appellant ought to be disallowed for the following reasons:

1. The appeal before the TAC related to all 13 assessments and the TAC allowed the appeal in respect of all the assessments despite the paucity of reasons relating to the assessments in respect of which no time bar was engaged;

2. The Appellant has chosen to appeal against only five taxable periods under appeal, i.e., 07091, 07092, 07093, 07121 and 07122 and these five periods are clearly set out in the application made to the TAC by the Appellant on 04.01.2019 (X4);

3. The TAC specifically sought the Appellant's confirmation regarding the tax in dispute arising from all assessments under appeal and the Appellant by letter dated 14.08.2017 (p. 150 of the TAC brief) indicated that there was a tax in dispute only in respect of 12 assessments;

4. The stated case is based on the application made by the Appellant, which specifically refers to five identified assessments, namely, taxable periods 07091, 07092, 07093, 07121, 07122 bearing the respective charge numbers, 6778739, 6778740, 6778741, 6778742, 6778743 (X4). The total amount of the tax in dispute, as set out in the said application amounts to Rs. 71,991.00, which only relates to the assessments intended by the Appellant to appeal against;

5. The questions of law must relate to the assessment under appeal, whether such questions are framed by the Appellant or the Court of

Appeal, and the proposed questions are not related to the assessment under appeal as the Appellant appealed only against 5 assessments out of 12. Therefore, the Appellant cannot widen the scope of the appeal by way of raising additional questions of law that have been omitted or that do not relate to assessments subject to appeal;

6. The Appellant having elected to appeal only against five assessments out of a total number of thirteen assessments and opted out the remaining assessments, is not entitled to widen the scope of an appeal by adding questions of law that relate to assessments that are not part of the appeal and the stated case, in terms of the provisions of the TAC Act.

[8] In order to appreciate the rival contentions raised on behalf of the Appellant and the Respondent, and to determine the question whether or not the questions of law proposed by the Appellant should be added to the stated case, this Court is now invited to consider the following three issues:

1. Were the assessments for the relevant taxable periods from 01.01.2007 to 31.12.2009 under appeal before the TAC considered and determined by the TAC?

2. Did the TAC comply with the requirements in section 11A (2) of the TAC Act, by setting out the questions of law arising on the stated case in relation to the assessments for the taxable periods considered and determined by the TAC, and the correct amount of the tax in dispute?

3. Did the Appellant who preferred an appeal to the TAC, make a valid application requiring the TAC to state a case on a question of law as required by the provisions of section 11A (1) of the TAC Act?

4. Did the Appellant limit the scope of its appeal by proposing questions of law and the amount of the tax in dispute to the assessments for the taxable periods 07091, 07092, 07093, 07121 and 07122 and if so, whether the Appellant's application to add new questions of law ought to be dismissed?

[9] Section 11A (6) of the TAC Act provides as follows:

> *"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 the 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".*

[10] It is relevant to note that the TAC Act has granted two opportunities to the Court of Appeal to reconsider the questions of law submitted by the TAC, either referring the case stated to the TAC for necessary amendments under section 11A (5), or formulate additional questions of law in the case stated under section 11A (6) of the TAC Act. Section 11A (5) of the TAC Act reads as follows:

> *"11 A (5). Any two or more Judges of the Court of Appeal may cause a stated case to be sent back to the commission for amendment, and the Commission shall amend the case accordingly".*

[11] The effect of Section 11A (5) is that once the case stated, is received by the Court of Appeal, upon an application made by either party or on its own, the Court of Appeal can consider the case stated submitted by the TAC once again and where it is found that the case stated requires an amendment, it can send it back to the TAC for necessary amendment.

Assessments and the Issues under Appeal before the TAC

[12] The initial addition of three questions of law is sought by motion dated 30.04.2019 on the basis that the assessments made for the taxable periods 090033, 09062, 09063, 09092, 09093, 09121, 09122 and 09123 have not been considered and determined by the TAC. The first argument pressed strongly and clearly by the learned Deputy Solicitor General was that there were 12 assessments before the TAC but the TAC only dealt with 5 on the time bar issue, and out of 5, one assessment was omitted but, there is no indication of what happened to the other seven assessments.

[13] It is not in dispute that the Appellant furnished its VAT returns for the thirteen (13) taxable periods, 07091, 07092, 07093, 07121, 07122, 09033, 09062, 09063, 09092, 09093, 09121, 09122 and 09123. The Assessor by his letter dated 22.12.2011 rejected the above returns and issued assessments in respect of all thirteen (13) taxable periods. It is relevant to note that the particulars relating to specific assessments for the thirteen taxable periods from 01.01.2007 to 31.12.2009 (see- the Assessor's letter dated 22.12.2011, appeal to the TAC (X2) and the notices of assessments CGIR brief) are as follows:

Assessment No.	Taxable Period
6778739	07091
6778740	07092
6778741	07093
6778742	07121
6778743	07122
6782568	09033
6778748	09062

6778749	09063
6778751	09092
6778752	09093
6778753	09121
6778754	09122
6778755	09123

Assessments in dispute before the CGIR

[14] The Respondent who was dissatisfied with the said assessments appealed to the Commissioner General of Inland Revenue (hereinafter referred to as the CGIR) in respect of the all thirteen (13) assessments (p. 60 of the TAC brief). The matters in dispute before the CGIR were:

1. Whether or not the additional assessments issued for the taxable periods 07091, 07092, 07093, 07121 and 07122 were time barred; and
2. Whether or not the input credit claimed by credit note is allowable.

[15] The CGIR made the determination and held that the assessments for the taxable periods 07091, 07092, 07121 and 07122 are not time barred for which the Respondent raised the time bar objection, but omitted to refer to the taxable period 07093 in the reasons for the determination. The CGIR however, confirmed the determination dated 04.03.2013 (p. 9 of the TAC brief). The determination of the CGIR at page 34 of the TAC brief refers to all thirteen (13) assessments in respect of all thirteen taxable periods. By the said determination, the CGIR confirmed the tax charged by the Assessor and the confirmation of the assessments relates to all 13 assessments. The assessments and the taxable periods mentioned in the determination of the CGIR (p. 34) of the CGIR are as follows:

Taxable period	:	07091, 07092, 07093**,** 07121, 07122, 09033, 09062, 09063, 09092, 09093, 09121, 09122, 09123
Assessment No	:	6778739, 6778740, 6778741, 6778742, 6778743, 6782568, 6778748, 6778749, 6778751, 6778752, 6778753, 6778754, 6778755

Assessments in dispute before the TAC

[16] The Respondent who was dissatisfied with the determination made by the CGIR, appealed to the TAC in respect of all thirteen assessments for the above thirteen taxable periods, including the assessment for the taxable period 07093 (X2).

[17] The TAC stated in paragraph 1 of the case stated that the appeal was filed against the assessments in respect of all 13 taxable periods, namely,

07091, 07092, 07093, 07121, 07122, 09033, 09062, 09063, 09092, 09093, 09121, 09122 and 09123. It is not in dispute that the appeal before the TAC related to all thirteen assessments. The TAC determination reveals that initially, the following two questions were the matters in issues before the TAC:

1. *Whether the assessments issued by the Assessor for the taxable periods 07091, 07092, 07093, 07121, 07122 are time barred?*
2. *Whether the input tax credit claimed by credit note is allowable or not?".*

[18] It is crystal clear that the appeal before the TAC related to all 13 assessments, but the time bar was raised only in respect of the following five assessments, namely:

Assessments	**Taxable period**
6778739	07091
6778740	07092
6778741	07093
6778742	07121
6778743	07122

Preliminary objection raised on time bar

[19] When the appeal was taken up for the hearing before the TAC, the Respondent (the Appellant in the TAC case) however, raised a preliminary objection on the ground that the assessments are time barred for the relevant taxable periods. The TAC decided to determine the said preliminary objection in relation to the time bar of all thirteen assessments before going into the substantive issue of the allow ability of the input tax credit claimed by the Respondent. The following statement of the TAC at page 2 of the TAC determination amply confirms this position:

> *"When this appeal was taken up for the argument, the preliminary issue raised by the Appellant was that the assessment issued for the* ***relevant taxable periods*** *are time barred in terms of section 33 (1) of the VAT Act, No. 14 of 2002……"*

[20] A perusal of the determination made by the TAC reveals that the preliminary objection had been made by the taxpayer (the Respondent in the present appeal) before the TAC on the basis that the "statutory time bar period for making the assessment has been exceeded, in respect of assessments issued by the Assessor for relevant taxable periods in violation of section 33 (1) of the VAT Act, No. 14 of 2002 (hereinafter referred to as the VAT Act).

[21] The position of the present Appellant (CGIR) before the TAC was that the taxpayer has wilfully or fraudulently failed to make a full and true disclosure of all the material facts necessary to determine the amount of tax payable for

the relevant periods. The Appellant therefore, submitted before the TAC that all assessments related to the above taxable periods had been issued within the period of **five years** under section 33 (2) of the VAT Act) (p. 7 of the determination).

[22] It is crystal clear that both the Appellant and the Respondent made submissions before the TAC in respect of the preliminary objection that related to the time bar of all thirteen assessments. The TAC first held that the assessments issued for the taxable periods 07091, 07092, 070121, 071022 (the correct taxable period is 07122) are time barred. A specific reference has not been, however, made in respect of the taxable period 07093. The TAC having considered the material placed before the TAC stated (pp. 4-5 of the TAC determination):

> *"On a perusal of the documents produced by the Representatives of the Appellant and the Representatives of the Respondent, we note that the Respondent has failed to submit sufficient evidence to prove that the Respondent has wilfully or fraudulently failed to make full and true disclosure of all the material facts. In terms of section 33(1) of the VAT Act, No. 14 of 2002 as amended, the Assessor has to make an assessment within three years. The time bar period of three years is already lapsed for the above taxable period. Therefore, the Assessor is not entitled to issuance of an additional assessment within five years in terms of section 31 (2) of the VAT Act, No. 14 of 2002 as amended…."*

[23] Having stated so, the TAC proceeded to answer the first issue initially raised, namely, whether the assessments issued by the Assessor for the taxable periods 07091, 07092, 07093, 07121 and 07122 are time barred and concluded at p. 8:

> *"We are of the view that the assessments issued for the taxable period 07091, 07092, 070121, 071022 are time barred and not valid in law"*

[24] Having answered the said issue, the TAC proceeded to accept the material placed before the TAC by the Appellant (taxpayer) and allowed the appeal on the basis that the "assessment made by the Assessor is time barred ". The findings of the TAC at page 8 of the determination read as follows:

> *"After analysing the submissions made by the Representative of the Appellant, the Representative of the Respondent and the relevant authorities, we accept the material placed before the Tax Appeals Commission by the Appellant.* ***It is the view of the Tax Appeals Commission that the assessment made by the Assessor is time barred. For the above reason, we allow the appeal of the Appellant Company."***

[25] Although there is no specific reference to the time bar of the assessments for the taxable periods, 09033, 09062, 09063, 09092, 09093, 09121, 09122, and 09123, it is evident from the last paragraph quoted above, that the TAC was upholding the preliminary objection raised by the Respondent (taxpayer)

on the basis that all thirteen (13) assessments, including the taxable periods, 07091, 07092, 07093, 070121, 07122 were time barred.

[26] This is further evident from paragraphs 1, 7 and 9 of the case stated submitted by the TAC, that **the appeal before the TAC related to all 13 assessments,** and that the TAC allowed the appeal on the basis that the assessments issued for all thirteen taxable periods were time barred in terms of section 31 (2) of the VAT Act. The relevant paragraphs of the case stated read as follows:

> *"1. This appeal was against the assessment made for the taxable periods of 07091, 07092, 07093, 07121, 07122, 09033, 09062, 09063, 09092, 09093, 09121, 09122 and 09123 which was heard by the Tax Appeals Commission on 26.05.2015 and 09.06.2016.*
>
> *7.The Tax Appeals Commission after considering the submissions made on behalf of the Appellant and the Respondent Company, allowed the appeal of the Respondent Company by its determination dated 13.12.2018. A copy of the aforesaid determination is annexed hereto marked X3;*
>
> *9.In this Appeal, the Tax Appeals Commission made its determination against the Appellant on the basis that the* ***assessment issued for the said taxable periods were time barred in terms of section 31 (2) of the VAT Act, No. 14 of 2002 as amended"****.*

[27] Accordingly, I am not inclined to agree with the submission made by the learned Deputy Solicitor General that the determination made by the TAC did not apply to the assessments in respect of the taxable periods 09033, 09062, 09063, 09092, 09093, 09121, 09122 and 09123. For those reasons, I hold that there is no merit in the argument of the Appellant that the TAC failed to consider and determine the time bar of the assessments in respect of the taxable periods 09033, 09062, 09063, 09092, 09093, 09121, 09122 and 09123.

Whether the case stated relates to all assessments in respect of the relevant taxable periods

[28] The second set of additional questions of law is sought to be added on the basis that the (i) TAC has not considered the input tax credit disallowed for the taxable periods, 09033, 09062, 09063, 09092, 09093, 09121, 09122 and 09123, the free issues and product trial for the above periods and the undisclosed supply of Rs. 1,709,609; and (ii) TAC has not included those issues that arise on the stated case as questions of law in the case stated.

[29] Section 11A (6) of the TAC Act, No. 23 of 2011 (as amended) provides as follows:

"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 the 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".

[30] In this context, 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 Appeal 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 been determined by the Court of Appeal;
2. The provisions introduced by the TAC Act give the opportunity to the TAC 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 Commission or the remitting the case to the TAC 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, increasing 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.

Appeal on a question of law to the Court of Appeal

[31] As noted, section 11A (1) of the TAC Act provides that either party who preferred an appeal to the TAC or the CGIR, may make an application requiring the TAC to state a case on a question of law for the opinion of the Court of Appeal. The TAC Act, sets out the following requisites of a valid application to be made to the TAC, requiring the TAC to state a case, and

unless such requisites are satisfied, the application may not be entertained by the TAC:

1. It shall be made in writing;
2. It must be delivered to the secretary to the Commission;
3. It should be accompanied by a fee of one thousand and five hundred rupees;
4. It must be made within one month from the date on which the decision of the TAC was notified in writing to the CGIR or the Appellant.

[32] An appeal to the Court of Appeal from the decision of the TAC is on a question of law and it is the duty of the TAC to formulate a question of law for the opinion of the Court of Appeal. As noted, the TAC has considered all 13 assessments in respect of the relevant taxable periods and allowed the appeal on the basis that all 13 assessments were time barred in terms of section 31 (2) of the VAT Act, No. 14 of 2002.

Proposed three additional questions of law sought by the Appellant by motion dated 30.04.2019

[33] The Appellant seeks to add three additional questions of law filed by motion dated 30.04.2019 on the basis that the questions of law Nos. (i) and (ii) formulated by the TAC in the case stated do not include the assessments in respect of taxable periods, 09033, 09062, 09063, 09092, 09093, 09121, 09122 and 09123. It is evident from the first and second questions of law formulated by the TAC, there is nothing to show that the TAC has limited the scope of the questions of law Nos. (i) and (ii) to the taxable periods 07091, 07092, 07093, 07122 and 07122, and omitted the remaining taxable periods, 09033, 09062, 09063, 09092, 09093, 09121, 09122 and 09123. As noted, the preliminary objection and the determination related to all 13 assessments, including the taxable periods 07091, 07092, 07093, 07121 and 07122 and therefore, the appeal was allowed on the basis that all thirteen assessments issued for all thirteen taxable periods were time barred in terms of section 31 (2) of the VAT Act.

[34] The questions of law Nos. (i) and (ii) formulated by the TAC in the case stated referred to the proper interpretation of statutory provisions in section 21 (1)(b) and 33(2) of the VAT Act, which apply to all thirteen assessments in respect of which the preliminary objection was raised on the time bar of all thirteen assessments. It is obvious that the Appellant is disputing in the questions of law Nos. (i) and (ii) formulated in the case stated, the validity of the reasons given by the TAC in interpreting section 21 (1)(b) and 33 (2) of the VAT Act.

[35] In the circumstances, no specific reference is required to be made to each and every taxable period in the questions of law Nos. (i) and (ii) formulated in

the case stated when the consequence that flows from the determination of the TAC is that the appeal was allowed on the basis that the assessments in respect of all 13 taxable periods were time barred in terms of section 31 (2) of the VAT Act.

[36] I hold that the questions of law Nos. (i) and (ii) formulated by the TAC related to all assessments in respect of all thirteen taxable periods, including the taxable periods 09033, 09062, 09063, 09092, 09093, 09121, 09122 and 09123. I hold that there is no merit in the argument of the Appellant that the questions of law Nos. (i) and (ii) formulated in the case stated do not include the taxable periods 09033, 09062, 09063, 09092, 09093, 09121, 09122 and 09123. For those reasons, I hold that the addition of the proposed three questions of law sought by the Appellant by motion dated 30.08.2019 are not necessary as separate questions of law and they will not constitute questions of law in this case stated.

Proposed first additional question of law sought by the Appellant by motion dated 26.04.2021

[37] The Appellant now seeks to add further four additional questions of law on the basis that the TAC has not included in the case stated questions relating to (i) input credit disallowed for the above periods, 09033, 09062, 09063, 09092, 09093, 09121, 09122 and 09123; (ii) the free issues and the product trial for the above periods; (iii) the undisclosed supply of Rs. 1,709,609.

Input related issues

[38] The Assessor disallowed the input tax credit on the ground that the input tax credit has been claimed without supporting valid tax invoices in respect of all thirteen taxable periods. The Respondent appealed to the CGIR on the basis that as input tax credit has been claimed on credit notes, input credit claimed ought to be allowed (pp. 1-2 of the CGIR determination). The CGIR, in addition to the time bar of the taxable periods, 07971, 07092, 07093, 07121 and 07122, proceeded to consider the question whether or not, the input tax claimed by credit note is allowable.

[39] The TAC also initially stated in the determination that the second issue to be answered is the question whether or not the input tax credit claimed by credit note is allowable (p. 2 of the determination). Since, no determination was made by the TAC on the input tax credit issue, the Appellant proposed to the TAC to formulate a question of law on the input tax credit issue, and the TAC in the case stated formulated a question of law on the allowability of input tax credit as follows:

> *(iii) Whether the Tax Appeals Commission has erred in law in interpreting the section 25 (1) of the Value Added Tax Act, No. 14 of 2002 where this*

section is to correct an amount of overcharge or undercharge due to an error that has taken place at the point of issuing a particular tax invoice.

[40] Section 25 (1) is the relevant section with regard to the tax credit notes and tax adjustment by credit or debit notes, and therefore, the intention of this section is to correct such amount of overcharged or undercharged due to an error that has taken place at the point of issuing a particular tax invoice. It reads as follows:

> *(1) Where a registered person, has issued a tax invoice and accounted for an incorrect amount of tax by undercharging or overcharging tax on a supply made to another person, he shall be entitled to issue to such other person a tax debit note or a tax credit note, as the case may be, for the purpose of adjusting the amount of tax so undercharged or overcharged. Adjustment of tax by credit or debit notes. Provided however, the adjustment in respect of input tax under claimed on an original tax invoice shall be made in respect of a tax debit note or a tax credit note issued not later than six months after the issue of the original tax invoice, to which the tax debit note or the tax credit note relates.*

[41] The Respondent claimed before the CGIR that that it had issued credit notes to distributors at the time of supplying goods and claimed input tax credit under section 25 (2) of the VAT Act (Vide- CGIR determination). The Appellant's position was that the tax credit note issued by the Respondent cannot be traced back or related to any tax invoice which accounted for an incorrect amount of tax by overcharging or undercharging the tax on a supply already made (CGIR determination). Accordingly, the dispute before the CGIR and the TAC was whether or not the input credit claimed by the Respondent was allowable under section 25 of the VAT Act.

[42] It is evident from the facts in dispute before the TAC that the question of law No. (iii) formulated by the TAC related to the allow ability of the input tax credit claimed by the credit not under section 25 (1) of the VAT Act. As the TAC did not determine the input tax credit issue, the TAC upon the application made by the Appellant formulated the question of law No. (iii). I am of the view that the question of law No. (iii) already formulated by the TAC related to the input tax credit issue in respect of all thirteen taxable periods and thus, it is already set out on the stated case. For those reasons, I hold that the first question of law sought to be added by motion dated 29.04.2021 will not arise as a separate question of law, and will not constitute a new question of law in this case stated.

Second and fourth additional questions of law sought by motion dated 21.04.2021

Output related issues

[43] The Appellant further submits that the TAC has not considered the free issues, the product trial for the above period and the undisclosed supply of Rs. 1,709,609, and sought to add the second and fourth additional questions of law by motion dated 29.04.2021. The Assessor further rejected the returns on the basis that the detailed verification of the audited financial statements with the VAT returns for the taxable periods furnished by the taxpayer revealed that the taxpayer has **willfully failed to declare the following supplies as a taxable supply for VAT purpose:**

a. Rs. 79,937/ Rs. 147,510, and Rs. 3,959,534/- worth of **free goods and product trials are not declared** as taxable supply for the taxable periods 01.01.2007-31.12.2007, 01.01.2008-31.12.2008 and 01.01.2009-31.12.2009 respectively.

b. **Difference of Rs. 1,709,609/- in the supply declared in audited financial statement and the VAT returns is treated as a taxable supply due to the export being not reconciled** with custom's records and also **undeclared in the VAT returns**. This was applied for the taxable periods from 01.07.2007-31.12.2007 equality.

[44] It is manifest that the matters raised in the Appellant's additional questions of law by motion dated 29.04.2021 (second and fourth question of law) relate to the factual matters for the proof of the limitation to time bar of the assessment on willful and fraudulent non-disclosure of the material facts by the taxpayer in terms of section 33 (2) of the VAT Act. The question of law, No. 2 formulated by the TAC relates to the validity of the TAC decision on time bar of the assessment when the Assessor is entitled to make the assessment within a period of 5 years in terms of section 33(2) of the VAT Act. Those factual matters set out in the second and fourth additional questions of law by motion dated 21.04.2021 are related to the proof of the willful and fraudulent non-disclosure of material facts set out in the question of law No. (ii) formulated by the TAC. Those factual matters that are required for the proof of the question of law No. (ii) formulated by the TAC do not, in my view constitute a new question of law in this case stated.

Third additional questions of law sought by motion dated 21.04.2021

[45] The Appellant sought to add the third additional question of law by motion dated 21.04.2021 on the basis that the TAC failed to consider that the Appellant agreed to the liability of the free issues and product trials and the additional assessment. In my view the agreement of the Respondent set out in the said proposed additional question of law is a pure question of fact and therefore, it cannot constitute a question of law in this case stated.

[46] For those reasons, I hold that all the questions of law sought to be added by motion dated 21.04.2021 are not necessary as separate questions of law and thus, they will not constitute questions of law in this case stated.

Election to appeal against only five assessments

[47] Dr. Felix, however, submitted at the inquiry that the Appellant has elected to appeal against only five assessments out of a total number of 13 assessments and therefore, the Appellant cannot now seek to expand the scope of the appeal by way of an amendment of questions of law under section 11A (6) of the TAC Act. In support of his contention, he relied on the following matters contained in the application made by the Appellant to the TAC under section 11A (1) of the Tac Act:

1. The Appellant has in the application made to the TAC confined the appeal to 5 assessments for the taxable periods, 07091, 07092, 07093, 07121 and 07122;

2. The Appellant has restricted the amount of tax in dispute to a total sum of Rs. 71,991/- which relates to the taxable periods, 07091, 07092, 07093, 07121 and 07122.

[48] The application made by the Appellant to the TAC requiring the TAC to state a question of law for the opinion of the Court of Appeal under section 11A (1) reads as follows:

> The Secretary,
> Tax Appeals Commission,
> 6th Floor, Rotunda Tower,
> No. 109, Allen Road,
> Colombo 03.
>
> Perfetti Van Melle Lanka (Pvt) Ltd
> Taxable Periods: 07091, 07092, 07093, 07121, 07122
>
> I refer to the determination dated 13.12.2018 made by the Tax Appeals Commission against the appeal made by the above company, which you have referred to the CGIR on the same date.
>
> I hereby appeal that the Tax Appeals Commission be pleased to state a case for the opinion of the Court of Appeal on the following questions of law in terms of section 11A of the Tax Appeals Commission Act (as amended) by Act No. 20 of 2013, No. 23 of 2011.
>
> 1. *Whether the Tax Appeals Commission has erred in law in interpreting section 21 (1) (b) of the Value Added Tax Act No 14 of 2002 (as amended) where the statutory requirements laid down with regard to furnishing Vat returns.*
> 2. *Whether the Tax Appeals Commission has erred in law in interpreting section 33 (2) of the Value Added Tax Act No 14 of 2002 (as amended) where the assessor is of the opinion that as willfully or fraudulently failed to make a full and true disclosure of the material facts to determine the amount of tax payable.*

3. *Whether the Tax Appeals Commission has erred in law in interpreting section 25 (1) of the Value Added Tax Act No 14 of 2002 (as amended) where this section is to correct an amount of overcharge or undercharge due to an error that has taken place at the point of issuing a particular tax invoice.*

Taxes in dispute are as follows:

Taxable Period	Charge No.	Tax	Penalty	Total
07091	6778739	6,411.00	11,939.00	18,350.00
07092	6778740	6,410,00	6,401.00	12,811.00
07093	6778741	7,605.00	7,600.00	15,205.00
07121	6778742	6,412.00	6,401.00	12,813.00
07122	6778743	6,411.00	6,401.00	12.812.00
		33,249.00	38,742.00	71,991.00

Appeal by way of a case stated

[49] In the light of the submission of Dr. Felix, it is significant to consider the role of the TAC in stating a case on a question of law for the opinion of the Court of Appeal, and the scope of the application made by any person who preferred an appeal to the TAC. Subsections (1) and (2) of section 11A of the TAC Act provide for the procedure to be followed by the TAC where an application is made by any person who preferred an appeal to the TAC requiring the TAC to state a case on a question of law for the opinion of the Court of Appeal. Section 11 A (1) reads as follows:

> *(1) Either the person who preferred an appeal to the Commission under paragraph (a) of subsection (1) of section 7 of this Act (hereinafter in this Act referred to as the "appellant") or the Commissioner-General may make an application requiring the Commission to state a case on a question of law for the opinion of the Court of Appeal. Such application shall not be entertained unless it is made in writing and delivered to the secretary to the Commission, together with a fee of one thousand and five hundred rupees, within one month from the date on which the decision of the Commission was notified in writing to the Commissioner-General or the appellant, as the case may be;*

[50] An appeal by way of a case stated, is a procedure set out in the TAC Act by which, upon an application of a party to the TAC, the TAC is required to state a case on a question of law for the opinion of the Court of Appeal. Section 11A (2) of the TAC Act reads as follows:

> *"(2) The case stated by the Commission shall set out the facts, the decision of the Commission and the amount of the tax in dispute where such amount exceeds five thousand rupees and the party requiring the Commission to*

state such case shall transmit the case when stated and signed to the Court of Appeal, within fourteen days after receiving the same".

Application to the TAC under section 11A (1) of the TAC Act

[51] The TAC Act, however, sets out the following requisites of a valid application to the TAC to state a case, and unless such requisites are satisfied, the application may not be entertained by the TAC:

1. It shall be made in writing;
2. It must be delivered to the secretary to the Commission;
3. It should be accompanied by a fee of one thousand and five hundred rupees;
4. It must be made within one month from the date on which the decision of the TAC was notified in writing to the CGIR or the Appellant.

[52] An appeal by way of case stated under the TAC Act constitutes a distinct route of appeal and must be distinguished from any ordinary appeal filed in the original civil courts by filing a notice of appeal or a petition of appeal under the provisions of the Civil Procedure Code. The TAC Act only imposes a person or the CGIR who preferred an appeal, to make an application in writing and deliver it to the secretary to the TAC together with a fee of Rs. 1500/-. The said application shall be made within 1 month from the date on which the decision of the TAC was communicated in writing to the Appellant or the CGIR. The Appellant has complied with those requirements and thus, there is a valid appeal made to the TAC by the Appellant under section 11A (1) of the TAC Act.

[53] There is no requirement whatsoever, under section 11A (1) of the TAC Act, for any person or the CGIR who preferred an appeal to the TAC to present to the TAC a petition of appeal setting out the circumstances out of which the appeal arises and containing particulars such as (i) a concise statement of the grounds of objection to the determination referring to each assessment and each taxable period; (ii) a demand in the form of relief claimed; and (iii) the amount of the tax in dispute.

[54] Once the requirements set out in section 11A (1) are satisfied by a person or the CGIR who preferred the appeal to the TAC, the question of whether the Appellant has set out the grounds of appeal, the circumstance's out of which the appeal arises including the number of assessments for each taxable period does not arise. In such case, the responsibility lies on the TAC to comply with the requirements set out in section 11A (2), and transmit the case stated to the Court of Appeal as required by section 11A (2) of the TAC Act.

Contents of the Case Stated

[55] The case stated, is a statement setting out the facts found by the TAC and the decision of the TAC- the findings of facts and law in issue raised by the parties, the amount of the tax in dispute together with the question of law upon which the opinion of the Court of Appeal is sought. But the pure factual matters or evidence that relates to the proof of a particular question of law cannot be included in the question of law for the opinion of the Court of Appeal. Accordingly, the TAC in the case stated must set out the following particulars:

1. Facts of the case (statement of facts);
2. Decision of the TAC (findings of facts and law on the issues raised by the parties);
3. Question/s of law for the opinion of the Court of Appeal;
4. The amount of the tax in dispute.

The amount of the tax in dispute

[56] It is significant to note that there is no dispute between the parties with regard to the amount of the tax in dispute in respect of all thirteen taxable periods as both parties admitted that the amount of the tax in dispute is Rs. 4,929,932/-. The CGIR admitted in the reasons for the determination (page 22 of the TAC brief) that the amount of the tax in dispute is Rs. 4,929,932/-. The Respondent too admitted in paragraph 3 of the notice of appeal submitted to the TAC that the amount of the tax in dispute, including the penalty in respect of all thirteen taxable periods is Rs. 4,929,932/-(pp. 13-14 of the TAC brief). It is relevant to note that the amount of the tax in dispute (Rs. 4,929,932/-) is further set out in the attached Schedule to the Appeal Report of the CGIR referring to all 13 taxable periods.

[57] It is evident from the following table in the case stated that the amount of the tax in dispute set out therein has been indiscriminately taken by the TAC from the tax in dispute stated in the application made by the Appellant to the TAC:

Taxes in dispute are as follows:

Taxable Period	***Charge No.***	***Tax***	***Penalty***	***Total***
07091	*6778739*	*6,411.00*	*11,939.00*	*18,350.00*
07092	*6778740*	*6,410,00*	*6,401.00*	*12,811.00*
07093	*6778741*	*7,605.00*	*7,600.00*	*15,205.00*
07121	*6778742*	*6,412.00*	*6,401.00*	*12,813.00*
07122	*6778743*	*6,411.00*	*6,401.00*	*12.812.00*
		33,249.00	*38,742.00*	*71,991.00*

[58] The TAC having set out in the case stated that the **time bar of the assessments related to all thirteen assessments and that the appeal was allowed on the basis that the thirteen assessments were time barred** (paragraphs 1 and 9 of the case stated), mechanically and indiscriminately incorporated the amount of tax in dispute stated in the application made by the Appellant.

[59] It is possible for any party who preferred an appeal against the determination made by the TAC to propose in the application certain questions of law or the amount of tax in dispute for consideration by the TAC. The TAC, however, cannot blindly adopt those proposed questions of law and the amount of tax in dispute, as the responsibility to state a case is vested solely in the TAC by the provisions of the TAC Act (*Commissioner General of Inland Revenue v. Janashakthi Insurance Company Limited* (supra). The statutory duty to state a case on a question of law for the opinion of the Court of Appeal cannot be delegated to the party who made an application to the TAC under section 11A (1) of the TAC Act. In *R.M. Fernando v. Commissioner of Income Tax* (Reports of Ceylon Tax Case's Vol l page 571, Basnayake C.J. explained the role of the Board of Review at pp. 318-319 as follows:

> *"The function of the Board under the statute is to state as fully as can be done in the document entitled "Case Stated" in serially numbered paragraphs in ordered sequence the facts on which arise the questions of law this Court has to decide. It is wrong to submit to this Court a whole bundle of documents, as has been done in this case, and expect it to wade through them and ascertain the facts which have found acceptance with the Board. The present practice of indiscriminating incorporating by reference every document that has been placed before the Board should be discontinued. There should be incorporated in the stated case all the relevant facts contained in each document quoting verbatim extracts only when it is necessary to do so.*
>
> *….It is not for the appellant to state the questions of law arising on a case stated. Apart from that the course adopted by the Board in repeating those questions without discrimination shows that the Board did not exert itself even to consider whether they were such as may be appropriately reproduced in the case stated….."*

[60] At page 319, His Lordship Basnayake C.J. further stated:

> *"The responsibility for stating a case is vested by the statute in the Board of Review and although the statue provides for the appointment of a clerk and legal adviser to the Board it cannot delegate its function to either of them. Though in the performance of its statutory duty it may make use of its ministerial officers, the ultimate responsibility of the due and proper performance of its duty rests with the Board and the Board alone. If it is the practice to leave the preparation of the case entirely to one of his ministerial officers and for the Board merely sign the case as stated by*

such officer that practice is not warranted by law and must cease forthwith".

[61] It is settled law that in terms of Section 11A (2) of the TAC Act, it is the duty of the TAC to state a case on a question of law for the opinion of the Court of Appeal and it is not for any party aggrieved by the determination made by the TAC to state a case on a question of law arising on stated case, even though such party may propose a question of law (*R.M. Fernando v Commissioner of Income Tax* (supra), *Commissioner General of Inland Revenue v. Janashakthi Insurance Company Limited* (supra) and *The Commissioner General of Inland Revenue v. Dr. S.S.L. Perera*, CA Tax /03/2017 decided on 11.01.2019).

[62] It is not the responsibility of the Appellant to propose the questions of law arising on the stated case or identify the amount of tax in dispute as the Appellant is not obliged to indicate the questions of law or the amount of the tax in dispute in its application made to the TAC in terms of section 11A (1) of the TAC Act. The TAC cannot blindly adopt the contents of an application made to the TAC by the Appellant and limit the amount of the tax in dispute to a mere sum of Rs. 71,991/- on the purported basis that the amount of the tax in dispute set out in the application is limited to five assessments. The TAC must identify the amount of the tax in dispute based on the assessments determined by the TAC and its own findings, and set out the correct tax in dispute without adopting blindly the amount of the tax in dispute proposed by the Appellant.

[63] It is evident from the application made by the Appellant to the TAC that the Appellant has not made any statement to the effect that the Appellant was restricting its appeal to five taxable periods leaving out the remaining taxable periods. As noted, there is nothing to show in the questions of law proposed by the Appellant in the application made to the TAC that the questions of law are confined to five assessments in respect of taxable periods, 07091, 07092, 07093, 07121 and 07122. In my view, the TAC cannot presume that the Appellant has restricted the appeal to five assessments and restrict the amount of the tax in dispute to five assessments, based on the reference to five taxable periods on the caption of the application and the proposed amount of the tax in dispute stated therein.

[64] In my view, there is no legal basis for the TAC to limit the amount of the tax in dispute to five assessments (Rs. 71,991/) solely relying on the caption of the application and the taxes in dispute stated therein unless, the Appellant has clearly and precisely made a statement in the application that it was restricting the appeal to five taxable periods or that the proposed questions of law in the application made to the TAC specifically related to five taxable periods.

[65] For those reasons, I am unable to agree with the contention of Dr. Felix that the caption of the application and the taxes in dispute stated therein clearly demonstrated that the Appellant has elected to appeal against only five out of

thirteen assessments. The practice adopted by the TAC in blindly incorporating the amount of the tax in dispute in the stated case, based on the caption of the application to the TAC and the taxes in dispute stated therein, without making its own independent decision in respect of all thirteen taxable periods is not warranted by the provisions of section 11A (2) of the TAC Act. The TAC must comply with the statutory provisions of section 11A (2) of the TAC Act and set out the correct amount of the tax in dispute as required by the provisions of the TAC Act.

Conclusion

[66] For those reasons, I make the following orders:

1. The amendment of the questions of law in the case stated by adding the additional questions of law proposed by the Appellant by motions dated 30.04.2019 and 29.04.2021 is not necessary, and thus, they will not constitute the questions of law in this case stated.

2. The three questions of law formulated by the Tax Appeals Commission in the case stated and submitted to this Court by letter dated 06.03.2019 of the Commissioner General of Inland Revenue, will constitute the questions of law in this case stated.

3. The Tax Appeals Commission is directed to amend the case stated by setting out the correct amount of the tax in dispute in respect of all thirteen taxable periods as contemplated by section 11A (2) of the tax Appeals Commission Act.

4. The attention of the Tax Appeals Commission is drawn to (a) paragraphs 1, 7 and 9 of the case stated; (b) the amount of the tax in dispute set out in the reasons for the determination made by the CGIR (X1); (c) the amount of the tax in dispute set out in the notice of appeal addressed to the TAC by the Respondent (X2); and (d) the Schedule attached to the Appeal Report of the CGIR dated 27.03.2013 (Vide- the CGIR brief).

5. The Registrar is directed to forward a copy of this order together with a copy of the case stated and the annexed documents marked X1 to X4, the TAC brief and the CGIR brief to the TAX Appeals Commission.

JUDGE OF THE COURT OF APPEAL

M. Sampath K.B. Wijeratne, J.

I agree

JUDGE OF THE COURT OF APPEAL