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

In the matter of an appeal on Questions of Law in terms of the Inland Revenue Act No. 10 of 2006 read together with the Tax Appeals Commission Act No. 23 of 2011.

ACL Cables Limited., No. 60, Rodney Street, Colombo 08.

Appellant

CA Case No.: TAX/0028/2019

Tax Appeals Commission Case No.: TAC/IT/072/2016

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

Respondent

Before: Hon. D.N. Samarakoon, J.

Hon. Sasi Mahendran, J.

Counsel: Mr. Nihal Fernando PC., with Mr. Johan Corera instructed by Sivanantham Associates for the Appellant.

Mrs. Chaya Sri Nammuni, D. S. G., for the Respondent.

Argued on: Connected Matters on 16.02.2021 & 22.11.2021, 13.07.2021, 24.01.2022, 14.02.2022 & 21.02.2022

Written submission tendered on: 17.01.2023 by the Appellant.

18.01.2023 by the Respondent.

Decided on: 31.03.2023

This case came up for argument with case Nos. Tax 07/2013, Tax 09/2013 and Tax 33/2014.

This case and Tax 22/2014 were not argued. The judgment in Tax 07/2013 was given by this Court on 16.03.2022. The judgment in Tax 09/2013 was given by this Court on 09.12.2022.

The Questions of Law raised in this case are,

(1) Is the determination of the Tax Appeals Commission time barred in terms of section 10 of the Tax Appeals Commission Act No. 23 of 2011 as it was made after 270 days from the date of commencement of its sittings for the hearing of appeal?

(2) (a) Whether the phrase "industrial and machine tool manufacturing" appearing in section 17 of the Inland Revenue Act No. 10 of 2006 can be interpreted to the effect "industrial manufacturing" and "machine tool manufacturing"?

(2)(b) Whether the Tax Appeals Commission has erred in law in interpreting section 17(2) of the Inland Revenue Act No. 10 of 2006?

(3) Can the interpretation of "industrial manufacturing" as determined by the Tax Appeals Commission be rejected on the ground that "the phrase industrial manufacturing" has a very wide connotation?

(4) Whether the determination of the Tax Appeals Commission is erroneous as they misunderstood the main question, i.e., instead of the question "whether the activity of the company falls within the meaning of "industrial manufacturing", the Tax Appeals Commission determined the question "whether the product viz., "Fire Guard Table" falls within the meaning of "tool"?

(5) Whether the failure to determine the question by the Commissioner General of Inland Revenue and by the Tax Appeals Commission that the Assessor has communicated his conclusion instead of the reason required under section 163(3) of the Inland Revenue Act No. 10 of 2006 tantamount to the Commissioner General of Inland Revenue and the Tax Appeals Commission accepting the appeal?

In Tax 07/2013 the appellant was ACL Cables PLC. In Tax 09/2013 the appellant was ACL Polymers (Pvt) Limited. In this case the appellant is ACL Cables PLC. Oral submissions referred to in this judgment are those that were made in relation to case Nos. Tax 07/2013 and Tax 09/2013.

In respect of Question No. 01, the Tax Appeals Commission is required to determine an appeal within 270 days from the commencement of sittings for hearing of such appeal. The Commission has commenced its sittings in respect of this case on 26.06.2018. The determination is dated 11.06.2019. However the appellant is not pursuing on this question.

Section 17 of Inland Revenue Act No. 10 of 2006 reads, as follows,

Question of law No. 02 (a) is,

> "Whether the phrase 'industrial and machine tool manufacturing' appearing in section 17 of the Inland Revenue Act No.10 of 2006 can be interpreted as 'industrial manufacturing' and 'machine tool manufacturing' ?"

In regard to this question, the learned President's Counsel for the Appellant has argued in oral submissions that, an "**industrial tool**" does not mean only a screwdriver or a wrench, etc., but it includes cables. Certain notes from the internet have been produced to show that cables and wires are also classified as "tools".

The learned President's Counsel who appeared for the respondent has argued in his oral submissions that the aforesaid position of the appellant regarding an "**industrial tool**", is not what is in the case stated.

This appears to be correct because question of law No. 02 (a) attempts to interpret the phrase "industrial and machine tool manufacturing" as "industrial manufacturing" and "machine tool manufacturing".

The plain reading of the phrase shows that it means, "industrial tool manufacturing" and "machine tool manufacturing".

Section 17 of the Inland Revenue Act No. 10 of 2006 reads thus,

> "17(1) The profits and income within the meaning of paragraph (1) of section 3 (other than any profits and income from the sale of capital assets) of any company from any specified undertaking referred to in subsection (2) and carried on by such company after 01st April 2002, shall be exempt from income tax for a period of five years reckoned from the commencement of the year of assessment in which the undertaking commences to make profits or any year of assessment not later than two years reckoned from the date on which the undertaking commences to carry on commercial operations whichever is earlier.
>
> (2) For the purpose of sub section (1) "specified undertaking" means –

(a) An undertaking carried on by a company-

(i)incorporated before 01st April 2002, with a minimum investment of rupees fifty million invested in such undertaking; or

(ii) incorporated with a minimum investment of rupees ten million invested in such undertaking,

and which is engaged in agriculture, agro processing, **industrial and machine tool manufacturing**, machinery manufacturing, electronics, export of non traditional products, or information technology and allied services".

Even the Tax Appeal Commission has decided this question in the same way. It says in its determination,

"It is to be noted that in section 17(2)(a)(ii) even though some terms such as "agriculture", "agro processing", "non traditional products" and "deemed export" are defined, the phrase "industrial and machine tool manufacturing" is not defined. Therefore it is necessary to look for a meaning to be attributed to this phrase "industrial and machine tool manufacturing". It would appear that in the phrase "industrial and machine tool manufacturing" the main item referred to is the term "tool" and the words "tool manufacturing" is qualified by the words industrial and machine. Therefore in this phrase "industrial and machine tool manufacturing" the term "tool" can be understood to mean either an "**industrial tool**" or a "machine tool"".

But having correctly understood the question, the Tax Appeal Commission erred in looking at the meaning of the term "tool" in dictionaries whereas it should have considered the meaning of the phrase "industrial tool manufacturing".

It considered the meaning of the term "tool" in the Oxford Dictionary, which it gave as "an instrument such as a hammer, screw driver, saw, etc., that you hold in your hand and use for making things, repairing things, etc. garden tools, cutting tools or power tools (using electricity)".

Hence it concluded at page 10 of its determination,

> "However, "fire guard cable" is only a wire with an improved capability used in the construction of buildings, houses, for the purpose of transmitting electrical current or used for telecommunication signals.....The important difference is that the "fire guard cables" once used in buildings or houses it remains embedded in the building or in the house permanently".

But this would not have happened had the Tax Appeal Commission considered the meaning of the phrase "**industrial tool manufacturing**", which shows that "fire guard cables" are such tools. All tools, especially "industrial tools" need not be hand held tools in the popular meaning, as the Tax Appeal Commission said.

The Tax Appeal Commission said, "In this regard, it is a very useful rule in the interpretation of a statute, to adhere to the ordinary meaning of the word used and to the grammatical construction, unless that is at variance with the intention of the legislature, to be derived from the statute itself".

Here using the word in its ordinary meaning was in variance with the intention of the legislature, which was to be derived from the statute itself, because the

term used was not “tool” as the Tax Appeal Commission thought but “industrial tool manufacturing”.

The use of the prefix “industrial” before the term “tool manufacturing” alters its ordinary meaning.

Therefore it is clear that the appellant is entitled to the exemption from tax because it is engaged in “industrial tool manufacturing” which is a “specified undertaking”.

However, the question of law No. 03 is not correctly formulated, in the sense, it should have referred not to “industrial manufacturing”, but to “industrial tool manufacturing”. Hence while the said question of law has to be answered in the negative, the answer must accompany with an explanation that the term “industrial and machine tool manufacturing” can be interpreted as “industrial tool manufacturing” and “machine tool manufacturing”, in which the appellant’s product comes within the former.

The question of law No. 03 is,

> “Can the interpretation of ‘industrial manufacturing’ as determined by the Tax Appeals Commission be rejected on the ground that “it has a very wide connotation”?

But it would appear that now this question will not arise because the answer to question of law No. 02 (a) is not that it is “industrial manufacturing” but “industrial tool manufacturing”.

Hence this question has to be answered as “Does not arise, in view of the answer given to question of law No. 02 (a)”.

Questions of Law Nos. 02 (b) and (4) are similar in import. They question whether the Tax Appeals Commission erred, that instead of the question "whether the activity of the appellant falls within the meaning of "industrial manufacturing", the Tax Appeals Commission determined the question "whether the product viz., Fire Guard Cables" falls within the meaning of "tool". This has been decided in the present case as well as in Case No. Tax 07/2013 and Case No. Tax 09/2013.

In respect of Question No. 05, that the assessor has communicated his conclusion instead of reasons required under section 163(3) of Inland Revenue Act No. 10 of 2006, this Court wishes to observe the following.

The same principal adopted in **Ismail vs. Commissioner of Income Tax** and **D.M.S. Fernando vs. Mohideen Ismail**, that "assessment" becomes valid only when statutory "notice of assessment" is given, was followed in the Indian Case of **The Secretary of State for India in Council vs. Seth Khemchand Thaoomal and others, 1923** decided in the Court of the Judicial Commissioner, Sind, Reports of Income Tax cases, Vol. I (1886-1925) printed at the Madras Law Journal press, Maylapore, Madras, 1926. (A copy of the said judgment is attached to the present judgment)

The summary of the case said,

> "Where the notice of demand in respect of an assessment to super tax for the year 1918-1919 was served on the assessee in May 1919 after the expiry of the year charged for and the assessee instituted a suit to recover the tax collected from him on the ground that the assessment was illegal:
>
> Held, that there was no charge, recovery or payment of super tax within the year of assessment as laid down by section 03 of the Super tax Act and consequently there being no assessment under the Act, section 39 of the Income Tax Act was no bar to the suit". (page 26)

Except for the name "super tax" in the said kind of tax involved, there is no difference in the principal applicable.

The court said,

> "The main point for consideration is whether the assessment of super tax was an assessment under the Act, for it is only in that event the jurisdiction of the civil court is barred".....(page 27)
>
> "As observed in Maxwell on the Interpretation of Statutes, 04th Edition page 429 : Statutes which impose pecuniary burden are subject to the rule of strict construction. It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties".....(page 27)
>
> "Section 06 of Act VIII of 1917 provided that when in the collectors opinion a person is chargeable with super tax a notice shall be served upon him calling upon him to pay the amount specified therein or to apply to have the assessment reduced or cancelled. **The only way that an assessee could be said to be charged is by a demand notice issued by the income tax officials, for till then it cannot be argued that he has been charged with the payment of any tax.** But the respondents admittedly received notice of demand only in May 1919, that is after the year 1918-1919 was over and even if he was chargeable with super tax he ceased to be so after the expiry of the year. The demand notice, therefore, having been issued after the year was over, there was neither payment nor recovery of the super tax within the year 1918-1919". (page 27)

The lucidity in the aforequoted passage is characteristic of the age in which it was written. The tax payer could have instituted a suit and recovered the tax paid because there was no "assessment". There was no "assessment" because there was no notice, a demand, a charge, within the limited period. This shows that an "assessment" becomes a valid "assessment" only when notice of assessment is given. For the application of the time limit what must be there is a valid assessment. Such an assessment cannot come into being without there being notice of assessment.

The court further said,

> "Mr. Elphinston [who appeared for the state] attempted to invoke the aid of a confidential note dated the 23rd March 1919 wherein the Mukhtiarkar had made the calculation of the assessment and as this was done before the expiry of the year, he argued that the tax was charged within the year. This argument has no substance in it. **It is unarguable that the contents of a confidential document were communicated to the assessee, nor is it even alleged that the latter was aware before the end of the year that he was chargeable with any super tax**". (page 27)

Similarly, the argument for the respondent in the present case that when the assessment is made it is an "assessment" for the purposes of the time limit and there is no time period within which notice of assessment must be given, cannot succeed.

The court also said,

> "Mr. Elphinston pressed upon us the serious prejudice to the Crown, if section 03 were interpreted literally but in a fiscal statute we must look to the letter of the law and cannot introduce equitable considerations". (page 27)
>
> "There is a patent error of law in the assessment of the super tax and therefore, the assessment was not one under the Act ; the suit therefore is not barred". (page 27)

Hence the court considered the failure to give notice of assessment as a patent error in the assessment which makes the assessment invalid.

It further shows that when notice of assessment is not given within the time limit, the tax payer obtains a vested right not to be taxed, the reason why in that case he was able to successfully sue for tax illegally paid.

The position therefore is that in the present case this tantamount to the Commissioner General of Inland Revenue and the Tax Appeals Commission accepting the appeal for both the years of assessment in question. Hence question of law No. 05 has to be answered in favour of the appellant.

Hence Questions of Law are answered as follows,

(1) Is the determination of the Tax Appeals Commission time barred in terms of section 10 of the Tax Appeals Commission Act No. 23 of 2011 as it was made after 270 days from the date of commencement of its sittings for the hearing of appeal?

Not pursued.

(2) (a) Whether the phrase "industrial and machine tool manufacturing" appearing in section 17 of the Inland Revenue Act No. 10 of 2006 can be interpreted to the effect "industrial manufacturing" and "machine tool manufacturing"?

No. It has to be interpreted as "industrial tool manufacturing" and "machine tool manufacturing". The appellant's product comes within the former.

(2)(b) Whether the Tax Appeals Commission has erred in law in interpreting section 17(2) of the Inland Revenue Act No. 10 of 2006?

Yes.

(3) Can the interpretation of "industrial manufacturing" as determined by the Tax Appeals Commission be rejected on the ground that "the phrase industrial manufacturing" has a very wide connotation?

This question does not arise in view of the answer given to question of law No. 02 (a).

(4) Whether the determination of the Tax Appeals Commission is erroneous as they misunderstood the main question, i.e., instead of the question "whether the

activity of the company falls within the meaning of “industrial manufacturing”, the Tax Appeals Commission determined the question “whether the product viz., “Fire Guard Table” falls within the meaning of “tool”?

Yes.

(5) Whether the failure to determine the question by the Commissioner General of Inland Revenue and by the Tax Appeals Commission that the Assessor has communicated his conclusion instead of the reason required under section 163(3) of the Inland Revenue Act No. 10 of 2006 tantamount to the Commissioner General of Inland Revenue and the Tax Appeals Commission accepting the appeal?

Yes.

Hence the appeal in the form of a “Case Stated” is allowed.

There is no order on costs.

Judge of the Court of Appeal.

Hon. Sasi Mahendran J.,

I agree.

Judge of the Court of Appeal