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

In the matter of a case stated for the opinion of the Court of Appeal under section 11A of the Tax Appeals Commission Act No. 23 of 2011 as last amended by Act No. 20 of 2013. Tax Appeals Commission Appeal

**C. A. Tax 30/2014** **THE COMMISSIONER GENERAL OF INLAND**

**TAC/OLD/IT/032** **REVENUE,** 14th Floor, Secretarial Branch, Department of Inland Revenue, Sir Chitthampalam A. Gardiner Mawatha, Colombo 02. **APPELLANT**

Vs.

**M/S Lanka Marine Services.,** No. 4, Leyden Bastian Road, Colombo 1 **RESPONDENT**

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

Hon. Sasi Mahendran J.

**Counsel:** Mr. Nirmalan Wigneswaran, Deputy Solicitor General, for the Appellant.

Dr. Sivaji Felix, with Niwantha Satharasinghe, for the Respondent.

**Argued on:** On 04.05.2022 both Counsel informed the Court that this matter can be disposed by way of written submissions.

**Written submission tendered on:** 13.08.2018, 17.09.2019 and 24.06. 2022 by

the Appellant.

13.08.2018, 17.09.2019 and 15.06.2022 by the Respondent.

Decided on: 31st March 2023

1. **Prologue**

In **VASUDEVA NANAYAKKARA v CHOKSY AND OTHERS (JOHN KEELLS CASE),** the incumbent Chief Justice, with two other judges of the Supreme Court said,

> "That the impugned transaction and the granting of benefits to John Keells Holdings Ltd.; has been an arbitrary exercise of executive power primarily on the part of the 8th respondent P.B. Jayasundera who functioned at the relevant time as the Chairman of the Public Enterprise Reform Commission.
>
> The defence of time bar pleaded by the respondent must necessarily fail since the impugned transfer was not conducted according to obtain material documents from sources that were not accessible to him. This is borne out by the fact that material documents P31 and P37 on which significant findings have been made were obtained from the Board of Investments after the applications was filed.
>
> Accordingly, I overrule the objections based on locus standi and time bar and grant to the petitioner the relief sought in prayer (b) of the petition that there has been an infringement of the fundamental right guaranteed by Article 12(1) of the Constitution by executive or administrative action.
>
> Ordinarily, the grant of a declaration that executive or administrative action is an infringement of the fundamental right guaranteed by Article 12(1) would result in a restoration of the status quo ante. However, since the jurisdiction vested in this Court in terms of Article 126(4) of the

Constitution is to grant relief or to make directions as it may seem just and equitable, it is open to the Court to ascertain whether the implications of the impugned executive action are severable. On a careful survey of the findings I am of the view, that the Presidential Grant of the land 8 Acres 2 Roods 21.44 Perches which is within the declared limits of the Port of Colombo; the grant of investment relief by the Board of Investments to Lanka Marine Services Ltd., resulting inter alia in relief from the payment of taxes that are due and, the entering into of the Common Users Facility Agreement with the Sri Lanka Ports Authority are severable from the sale of shares. Accordingly, I allow the relief prayed for in prayer (g), (h) and (i) of the prayer to the petition and declare the Presidential Grant marked P31 as null and void. The 18th, 19th, 20th and 21 st respondents will vacate the land within one month from today and restore possession to Sri Lanka Ports Authority. The Common User Facility Agreement dated 20.08.2002 (P19(a)) is declared null and void and the Sri Lanka Ports Authority may enter into fresh Agreements for the use of facilities within the Port on equal terms with all parties licensed to supply bunkers.

**All agreements entered into between the Board of Investment and Lanka Marine Services Ltd., are declared null and void and the Commissioner General of Inland Revenue is directed to recover all taxes due on the basis that such Agreements have not been in force.**

In view of the foregoing orders I do not consider it necessary or just and equitable to make an order as regards the sale of shares per se.

The findings in the judgment demonstrate that the action of P.B. Jayasundera, 8th respondent has not only been arbitrary and ultra vires but also biased in favour of John Keells Holdings Ltd., The allegation of the petitioner that he worked in collusion with S. Ratnayake of John Keells to secure illegal advantages to the latter, adverse to the public interest is

established. Accordingly I direct the 8th respondent pay a sum of Rs. 500,000/- as compensation to the State.

The 18th to 21st respondents will pay the petitioner a sum of Rs. 250,000/- as costs.

The Registrar is directed to send a copy of this judgment to the Commissioner General of Inland Revenue who is not a party to these proceedings to take action as directed above.

All parties to the proceedings will take necessary action on the basis of the findings stated above.

The application is allowed".

The above judgment was dated 21.07.2008.

On 08.10.2008, the court ordered the 08th Respondent Jayasundera to file an affidavit stating that he will not hold any office in any governmental institution either directly or indirectly or purport to exercise in any manner executive or administrative function.

An affidavit in this respect was filed in court on 16.10.2008.

After the retirement of the said Chief Justice in June 2009, Jayasundera filed S. C. (F. R.) 209/2007, a further Application in the same case No. 209/2007, which was titled **Vasudeva Nanayakkara vs. Choksy and others And Now between Dr. P. B. Jayasundera vs. The Attorney General (John Keels case No. 2),** which was heard by 07 judges of the Supreme Court presided by the succeeding Chief Justice in which the judgment was delivered on 13.10.2009.

J.A.N. de Silva, C. J. and Balapatabendi J., held, among other things,

"(1) An order to file an affidavit, the contents of which are the dictates of Court amounts to an order made in excess of jurisdiction and as such the

validity of the document becomes an issue. Accordingly, the Petitioner is not bound by its contents".

Dr. Shirani Bandaranayake J., held, among other things,

"(1) A citizen of the Republic of Sri Lanka has a fundamental right to engage in a lawful occupation and such right is guaranteed in terms of Article 14 (1) of the Constitution. Any restriction would only be based on the disciplinary procedure in terms of his employment".

Saleem Marsoof J., held, among other things,

"(1) The most important characteristic of an affidavit is its voluntary nature, and there can be no doubt that no Court will act on an affidavit that has been extracted with coercion. The onus would he on the person asserting duress or coercion to show that the threat of harm was so immediate and proximate that it deprived the affidavit of its voluntary character".

Sripavan J., held, among other things,

"(1) It is a fundamental principle that no Bench is empowered to enlarge the ambit and scope of the judgment or punishment imposed by a previous Bench, [nothing is to be implied and no inferences could be drawn from the judgment. One has to look fairly at the language used in the final judgment, or otherwise the door will be opened for unfettered conclusions being reached.]"

Ratnayake J., held, among other things,

"(1) In the absence of the explicit order in the journal entry of 8 th October 2008 to the effect that the 8 th Respondent - Petitioner was ordered by the Supreme Court not to hold "any office in any Government institution either directly or indirectly or purport to exercise in any manner executive or administrative function" as described by the 8 th Respondent - Petitioner

in paragraph "a" of the amended petition, the necessity to vacate such an order dated 8 th October 2008 does not arise. Indeed all that the journal entry dated 8 th October 2008 stated was that the Respondent - Petitioner "may consider" filing an affidavit in which he may make a statement to the effect that he would not hold any office in any Governmental institution either directly or indirectly. . . . The use of the words "may consider" in the said journal entry makes it unambiguously clear that the making of such statement in the affidavit was optional on the part of the 8"'Respondent – Petitioner".

Shiranee Thilakawardene J., (dissenting) held, among other things,

An affidavit cannot he retracted from the record once it is filed in Court. Any retraction on the evidence given by affidavit will entail similar consequences a s going back on ora"(1) The Supreme Court's divisions are a product of administrative expediency and nothing more, and in the light of Section 114 (d) presumption under the Evidence Ordinance - which presumes that judicial acts have been regularly performed - the suggestion that a change in composition of a particular Bench itself somehow extinguishes jurisdiction, is proved to be patently incorrect.

(2) The prayer to vacate an Order is a re-visitation of a judgment by the Supreme Court, and in this case by a Bench differing in composition than the one which issued the Order. Therefore, we are precluded from being able to take such action.

(3) In the light of the judgment in "Jeyaraj Femandopulle v. Prernachandra Silva and Others" when the Supreme Court has decided a matter, that matter is at an end, and there is no occasion for other Judges to be called upon to review or revise a matter. To grant relief of the type that reverses a prior judgment of the Supreme Court is untenable and has no basis in Law.

(4) An affidavit is a solemn declaration of the truth of the facts stated therein made by a person from his personal knowledge and is evidence given on oath for the purpose of being relied on and acted upon and therefore it cannot withdrawn.

l evidence. The consequence of any person who willfully and dishonestly swears or affirms falsely, to facts contained in an affidavit, would be guilty of making a false statement of Court, which attracts penal consequences".

By a majority decision of 6 to 1, the Supreme Court granted relief sought under paragraph (c) of the petition.

The above is the effect of John Keels Case No. 1 and John Keels Case No. 2.

**2. Steps Taken Thereafter**

It is stated in paragraphs 1 to 3 of **written submissions of the Appellant**, Commissioner General of Inland Revenue, dated 13.08.2018, as follows,

"1. The primary question of law for the opinion of Your Lordship's Court in this Case Stated is whether the Tax Appeals Commission erred in interpreting the Supreme Court judgments in **Vasudeva Nanayakkara vs. K. N. Choksey and 30 others, S.C. F. R., 209/2007** dated 21 July 2008 and 13 October 2009.

2. In brief, the Commissioner General of Inland Revenue (the Appellant) took steps against the respondent, Lanka Marine Services, pursuant to a direction of the Supreme Court in its judgment dated 21st July 2008 ("original judgment"). As the original judgment had directed the appellant to take the necessary steps to recover taxes after disregarding the agreement the respondent had entered into with the Board of Investment, the appellant proceeded to do so. The time bar was disregarded in view of the express direction of the Supreme Court.

3. The Tax Appeals Commission ("TAC"), however, appears to have held that the Supreme Court decision in the subsequent order issued pursuant to Dr. P. B. Jayasundera's application delivered on 13th October 2009 ("subsequent order") had "set aside all findings" of the original judgment. As the subsequent order does no such thing, it would appear that the TAC has mistakenly relied upon some other unknown order. The TAC allowed the appeal on the preliminary issue of time bar, based on such erroneous premise".

Without saying, perhaps in jest, that, the "TAC has mistakenly relied upon some other unknown order", it could have been said that the interpretation of the order dated 13th October 2009 by the TAC was erroneous, in that, the said subsequent order did not set aside the findings of the judgment dated 21st July 2008. What it set aside was not the judgment dated 21st October 2008, but the subsequent order in respect of Jayasundera holding government office dated 10th October 2008.

Hence the original order or actually the judgment's directions that tax should be recovered from the Lanka Marine Services Limited, as if the prohibition in the Board of Investment agreement did not operate, is in force.

What took place after the delivery of the judgment dated 21st July 2008, is stated in paragraphs 12 to 21 of the above **written submissions of the Appellant**, as follows,

"12. Upon receipt of the direction contained in the original judgment, the appellant wrote to the respondent by letter dated 01st August 2008 requesting early submission of the relevant tax computations and payment schemes.

13. The appellant also sought the opinion of the Attorney General by letter dated 22nd August 2008, as to whether an assessment could be maintained in respect of taxable periods 2002/03, 2003/04 and 2004/05

as the time for assessment for those periods had already lapsed in terms of section 134(5) of the Inland Revenue Act No. 38 of 2000.

[This is incorrect, because on 31st March 2005, the second proviso to section 134(5) was amended to say "**at any time after the end of that year of assessment"**.

14. By letter dated 05th December 2008, the Attorney General having considered the original judgment and the relevant law, informed the appellant that there is no legal bar against the recovery of taxes from the respondent for the taxable period 2002/03, 2003/04 and 2004/05.

15. By three separate letters dated 10th December 2008, the respondent was informed that it had failed to furnish the tax computation requested and that the returns submitted by it for the taxable periods 2002/03, 2003/04 and 2004/05 respectively were rejected. Accordingly, Notices of Assessment dated 07th January 2009 were issued for the said periods.

16. The respondent appealed against the said Notices of Assessment by its letters dated 26th January 2009. The objections included a time bar objection and other substantive objections.

17. After considering the representations made by the respondent, the appellant decided to recover Rs. 129 million immediately and hold over the balance tax assessed pending settlement of the appeals. This decision was intimated to the respondent by letter dated 24th April 2009.

18. By written submissions dated 14th June 2010 and 05th July 2010, the respondent raised a preliminary objection on the basis that the assessments were time barred. The respondent subsequently filed written submissions dated 09th August 2010 on the substantive issues as well. The principle substantive issue involved the question of whether the supply of bunker fuel could be considered an export and as such exempt

in terms of section 15 or subject to the special rate of tax under section 47 of the Inland Revenue Act No. 38 of 2000.

19. By decision dated 03rd December 2010, the appellant confirmed the assessments. The reasons for the determination were issued on 10th December 2010. The taxes for the respective years of assessment were determined as follows:-

| Year of Assessment | Assessable Income (Rs.) | Tax (Rs.) |
|---|---|---|
| 2002/2003 | 495,941,863 | 85,837,219 |
| 2003/2004 | 365,710,433 | 118,855,891 |
| 2004/2005 | 698,212,965 | 226,919,214 |

20. The respondent appealed to the Board of Review under section 138(3) of the Inland Revenue Act No. 38 of 2000 on 04th January 2011 against the decision of the appellant. The respondent filed written submissions dated 17th December 2013 and the appellant filed written submissions dated 05th December 2013.

21. The TAC after hearing the parties made its decision on 05th August 2014, allowing the appeal on the preliminary matter of time bar on the basis that the original judgment of the Supreme Court "**was completely reversed by the subsequent appointment of a fuller Bench of seven Supreme Court Judges presided over by the succeeding Chief Justice Dr. Shirani Bandaranayake, which Court was required to consider the earlier judgment and the fuller Bench in fact set aside all findings of the earlier court**".

This was a completely wrong interpretation of the subsequent order dated 13th October 2009. The seven Judge Bench was not presided by Dr. Shirani Bandaranayake and she was not the Chief Justice. This shows that the TAC has not read the subsequent order. The said order did not reverse the judgment dated

21st July 2008 except for the direction [*which too was not in the judgment but on the subsequent order dated 08th October 2008 in a journal entry*] in respect of Jayasundera holding a government post.

The appellant wanted a case stated to be referred to this Court. It contained two questions of law, which are,

(1) Has the TAC erred in interpreting the Supreme Court judgment dated 21st July 2008, in a Fundamental Rights application filed in the same court bearing No. S. C. F. R. 209/2007?
(2) Has the TAC misread some other judgment in interpreting Supreme Court judgment No. S. C. (F. R.) 209/2007 and dated 21st July 2008?

### 3. Preliminary jurisdictional objection

In **written submissions dated 13th August 2018 filed by the respondent**, a preliminary objection has been taken up in respect of the jurisdiction of this Court.

It basically contains in paragraphs 6 to 18 of the said written submissions which are as follows,

> "6. It is the respondent's position that Your Lordships' Court does not possess the jurisdiction to answer the above questions of law since these questions of law do not impinge upon the assessment. **Assuming, without conceding, that the above two questions of law are answered in the appellant's favour it would still have no impact on the amount assessed which relates to the income tax liability of the respondent.** The primary purpose of the appellant's appeal in this instance has been to challenge the legality of the determination of the Tax Appeals Commission. The appellant does not invoke the jurisdiction of Your Lordship's Court with the intention of annulling the assessment. In the event that the appellant sought to annul the assessment or sought any other relief

contemplated by section 11A (6) of the Tax Appeals Commission Act, No. 23 of 2011 (as amended), it could invoke the jurisdiction of Your Lordship's Court by way of a Stated Case.

7. It is submitted that Your Lordships' Court does not have the jurisdiction to quash the determination of the Tax Appeals Commission on an appeal on a question of law in a Stated Case. The jurisdiction in such cases is limited to giving effect to the Court's opinion on questions of law that impact upon the amount assessed. The proper remedy in the circumstances, available to the appellant, would have been to come by way of judicial review so as to invoke the constitutional writ jurisdiction of Your Lordships' Court for the purpose of quashing the decision of the Tax Appeals Commission.

8. In any event, it is the respondent's respectful submission that the above questions of law are not fit and proper questions to be determined by Your Lordship's Court by way of a Stated Case appeal.

9. The Tax Appeals Commission has made a determination based on the preliminary objection raised by the taxpayer and the appellant in the appeal before the Tax Appeals Commission (i.e., the Respondent in the instant appeal)

10. It is trite law that a jurisdictional issue can be raised before a statutory tribunal.

11. H. W. R. Wade and C. F. Forsyth, in their well known work, Administrative Law [Oxford:- Oxford University Press, 11th edition, 2014], explain that a statutory tribunal is lawfully entitled to examine a jurisdictional issue that has been raised before it. They state, at page 210, as follows,

> "Where a jurisdictional question is disputed before a tribunal, the tribunal must necessarily decide it. If it refuses to do so, it is

wrongfully declining jurisdiction and the court will order it to act properly. Otherwise the tribunal or other authority would be able to weild an absolute despotic power, which the legislature never intended that it should exercise. It follows that the question is within the tribunal's own jurisdiction, but with this difference, that the tribunal's decision about it cannot be conclusive".

12. Wade and Forsyth clearly supports the proposition that a tribunal is fully entitled to decide a jurisdictional question that has been raised before it. However if the tribunal has got its answer to the jurisdictional question wrong this matter could be canvassed in an application for judicial review or by way of appeal. This position has now been accepted by the Court of Appeal in Commissioner General of Inland Revenue vs. Koggala Garments (Pvt.) Ltd., C.A. Tax 1/2008 and affirmed by the Supreme Court.

13. In the **Commissioner General of Inland Revenue vs. Koggala Garments (Pvt) Limited, C. A. Tax 1/2008,** Nawaz J., explains the applicable law, at page 8 – 9 of his judgment in the following terms:-

"The argument is that the Board of Review could not have considered the jurisdictional objection…

I hasten to point out that the law is to the contrary. H. W. R. Wade and C. F. Forsyth in their well known tome, Administrative Law [Oxford:- Oxford University Press, 11th Edition 2014] explain that a statutory tribunal is lawfully entitled to examine a jurisdictional issue that has been raised before it. They state at page 210, as follows,

> "Where a jurisdictional question is disputed before a tribunal, the tribunal must necessarily decide it. If it refuses to do so, it is wrongfully declining jurisdiction and the court will order it to act properly. Otherwise the tribunal or other authority would be able to weild an absolute despotic power, which the legislature never

intended that it should exercise. It follows that the question is within the tribunal's own jurisdiction, but with this difference, that the tribunal's decision about it cannot be conclusive".

Wade and Forsyth clearly support the proposition that a tribunal is fully entitled to decide a jurisdictional question that has been raised before it. However, if the tribunal has got its answer to the jurisdictional question wrong, it is open to the aggrieved party to canvass the wrong answer on jurisdiction by way of judicial review".

It may be noted, that, Wade does not say that judicial review is the only way of canvassing the order. This question will be examined in due course. The respondent's written submissions continued,

"14. The judgment of the Court of Appeal was affirmed by the Supreme Court on 04th May 2018 in Commissioner General of Inland Revenue vs. Koggala Garments (Private) Limited, C. A. Application S. C. Spl L. A. 114/2017, when the Supreme Court refused the petitioner, Commissioner General of Inland Revenue, Special Leave to Appeal against the judgment of the Court of Appeal.

15. In Commissioner General of Inland Revenue vs. Koggala Garments (Private) Limited., C. A. Tax 01/2008, decided by the Court of Appeal on 05th April 2017, Your Lordships' Court held that, "if the question of law stated to this court does not arise on the assessments, this court is denuded of jurisdiction to hear and determine that question of law". (per Nawaz J., with Malalgoda P/CA agreeing, at page 10 of the judgment)".

The question arises, that, if the Court of Appeal being a superior court of record has no jurisdiction to hear and determine the preliminary objection, in respect of its jurisdiction, how could the TAC being an inferior tribunal could have heard and determined the same. The tribunal of the Tax Appeals Commission doing this was supported by citing Wade in paragraph 13 above that it is a

must and if the tribunal refuses to do so the court will order to act properly. Will not the same logic apply to the Court of Appeal, when the Court of Appeal is confronted with the same preliminary objection? If not, it will be an anomaly of law, to say the least.

The said written submission continued,

> "16. Assuming that the appellant, Commissioner General of Inland Revenue succeeds in his appeal by having the questions of law answered in his favour, this would not result in the amount of tax assessed being confirmed since the substantive issues raised in the taxpayer's appeal have not been considered by the Tax Appeals Commission.
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> 17. It is the respondent's position that the questions of law raised by the appellant have no logical nexus or connection with the assessment. It is further submitted that even if both the questions of law are answered in favour of the appellant, it would have absolutely no bearing on the assessment.
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> 18. Article 138 of the Constitution provides as follows:-
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> "138(1) The Court of Appeal shall have and exercise subject to the provisions of the constitution or any other law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any Court of First Instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things of which such Court of First Instance, tribunal or other institution may have taken cognizance:-
>
> Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not 1prejudiced the substantial rights of the parties or occasioned a failure of justice.

(2)The Court of Appeal shall also have and exercise all such powers and jurisdiction, appellate and original, as Parliament may by law vest and ordain".

Then it is cited the case of **Martin vs. Wijewardane, [1989] 2 SLR 409**, decided under the Agrarian Services Act to say that Article 138(1) will not grant a right of appeal.

**4. Commissioner General of Inland Revenue vs. Koggala Garments Limited**

At this stage, it is pertinent to examine as to what the Koggala Garments Limited case says.

It said, "The determination of the Board of Review does not deal with the assessments that were before the Board and it was fairly and squarely a decision on time bar".

> ..... "Koggala Garments (Private) Limited, the Appellant before the Board of Review raised the following objections in limine when its appeal was taken up.....
>
> (li) The first proviso to Section 140(10) of the Inland Revenue Act, No 38 of 2000 (as amended by Section 52 of Inland Revenue (Amendment) Act, No 37 of 2003), makes it imperative that the Board of Review arrives at its determination within two years from the commencement of the hearing of the appeal. Consequently, since this two year period has lapsed the appeal must be deemed to have been allowed and the Board of Review is functus officio as far as the appeal made by this Appellant is concerned".
>
> ..... " The Board of Review upheld the second preliminary objection and allowed the taxpayer's appeal".
>
> ..... "In fact the argument is to the effect that the Board cannot even consider the question of time bar and rule on its jurisdiction. If one

looks at the question of law (h), it suggests that questions of law cannot be gone into at all by the Board of Review. The words in the question of law (h) " ..... it cannot assume jurisdiction it does not possess to decide on questions of law .. " are also supplemented by the written submissions of the Appellant dated 20.02.2017 wherein it is stated in paragraph 21 that "it is respectfully submitted that the jurisdiction of the Board of Review is limited to confirming, reducing, increasing or annulling the assessment as determined by the Commissioner-General on appeal or else, to remit it to the Commissioner General for the revision of the assessment. It is therefore respectfully submitted that the Board of Review does not have the power to entertain and/or deal with questions of law challenging the jurisdiction of the Board of Review itself on the basis of a time bar which the Appellant alleges denudes the jurisdiction of the Board."

Hence, in Koggala Garments Limited, itself, in 2017, the argument was raised, that even the Board of Review cannot consider the question of time bar.

5. **Jurisdiction of the Board of Review, Tax Appeals Commission and the Court of Appeal**

**The Board of Review, as it appears to this court, had the same limitations as the respondent now argues, that, this court has.** Both the Board of Review and this court, under relevant sections could confirm, reduce, increase or annul the assessment or else remit the case to the Commissioner General of Inland Revenue for the revision of the assessment. Hence the argument of this court is that if the Board of Review [the tribunal] could have considered a question of time bar, notwithstanding the above section, this court too can hear the said jurisdictional objection in a stated case under section 11(A) (6) of the Tax Appeals Commission Act, which is similar in import.

What is the jurisdiction of the Board of Review in an appeal that comes from the Commissioner General of Inland Revenue?

The Board of Review was established by section 98 of the Inland Revenue Act No. 4 of 1963.

Section 99 said,

> *"99. Any appellant, or the authorized representative of any appellant, who is dissatisfied with the determination of an appeal under section 97, may, by petition in writing addressed to the Board, appeal from that determination within one month from the date of the notice of the determination.".*

Section 97 was appeals to the Commissioner. Hence from an appeal to the Commissioner of Inland Revenue, the taxpayer could appeal to the Board of Review.

What could the Board of Review do with such an appeal?

Section 101(9) said,

> *"(9) After hearing the appeal, the Board shall* ***confirm, reduce, increase, or annul the assessment*** *as determined by the Commissioner on appeal, or as referred by him under section 100, as the case may be,* ***or may remit the case to the Commissioner with the opinion of the Board thereon.*** *Where a case is so remitted by the Board, the Commissioner shall revise the assessment as the opinion of the Board may require".*

The Board of Review was replaced by the Tax Appeals Commission Act No. 23 of 2011. Section 7 provides for an appeal to the TAC from the determination of the Commissioner General of Inland Revenue.

What can the TAC do with such an appeal?

In section 9(10) of the TAC Act it is provided,

> "After hearing the evidence, the Commission shall on appeal **confirm, reduce, increase or annul, as the case may be, the assessment** as determined by the Commissioner General **or may remit the case to the Commissioner General with the decision of the Commission on such appeal**. Where a case is so remitted by the Commission, the Commissioner General shall revise the assessment in order that it is in conformity with such amount as stated in the decision of the Commission".

This is the same thing the Court of Appeal is empowered to do when it hears a case stated on questions of law. Section 11(A) (6) of the Tax Appeals Commission Act says,

> "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 the Court upon such question, **confirm, reduce, increase and 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".

So, on an appeal, the Board of Review, the Tax Appeals Commission and the Court of Appeal have been asked to do the same thing.

The respondent to support its contention that the Board of Review can, nay that it must, hear the jurisdictional question of time bar, the court in Koggala Garments Limited cited Wade, quoted under paragraph 13 of the said written submissions quoted above. The argument of this court is that if Wade in that paragraph is applicable to an inferior tribunal why not it apply, with the same, or even more force to this court? "What is good for the Goose is good for the Gander".

## 6. The characteristics of a "Case Stated"

This court is aware of the fact that what comes from the Commissioner General to the Board of Review [or Tax Appeals Commission] is an appeal whereas what comes to this court is a case stated. But the side note of section 7 of Tax Appeals Commission Act says "Right to appeal to the Commission…"The side note in section 11(A) is "Appeals on a question of law to the Court of Appeal".

In deciding upon the question, what is a case stated, it is pertinent to refer to the following material, which includes decided cases from this country as well as other jurisdictions.

First we shall consider a case from New Zealand. The case is **IN THE MATTER OF An appeal by way of case stated from the determination of the Social Security Appeal Authority at Wellington, DAVID OWEN CREQUER Appellant vs. THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Respondent,** decided on 09th July 2015.

The High Court of New Zealand at Christchurch said, under the topic "**The case stated regime"**,

> "The law is always guided by context. It is therefore useful to contextualise the concept of cases stated. I think it valuable to first traverse the genesis of cases stated. In this respect, Gordon's article provides an invaluable starting point.10 In introducing the topic, Gordon provides the following resume of the procedure's history:11
>
> > *Judges have been given to asserting that a stated case, i.e one stated by a magistrate or magistrates, is a purely statutory remedy. That statement seems to be seriously misleading. It is true that the type of stated case now invariably used is of statutory origin. But the assertion as usually made implies that stated cases were unknown to the common law, which is decidedly wrong. …*

In the past, not only did justices state cases for several centuries at common law, but for a short time after statutory stated cases were created by the Summary Jurisdiction Act 1857, both statutory and common law cases were in use at the same time. The common law stated case was in no sense an appeal; it operated through the machinery of certiorari proceedings to quash. A case stated under the Act of 1857 began to take on the properties of an appeal, since the Act dispensed with the need for a certiorari to bring the case before the superior court.

As to these common law species of cases stated, Gordon divides them into two categories. Helpfully, the latter bears resemblance to the procedure currently before the Court:12

> *It should be mentioned that two types of cases were stated by justices at common law.* ***Justices stated one type of case during the course of a hearing before them; they set out the facts that raised a legal problem, and that statement was sent before the Assize judges for solution.*** *The judges' opinion was returned to the justices, who then completed their hearing and adjudicated in the light of that opinion.*
>
> ***The other type of stated case was stated after the justices had made their conviction or order.*** *If a legal problem had arisen on which they had felt difficulty, they could state the facts and the problem in the form of an appendix to their conviction or order, and it was then brought up as part of the record by a certiorari. Then the Queen's Bench quashed or affirmed the adjudication brought up, according as they agreed or disagreed with the justices' legal rulings.*

As to the purpose of such a mechanism, it is quite straight forward. It stems from a desire to ensure that the legal interpretation of inferior Courts and tribunals is correct. As Beck remarks:13

> *Sometimes a point of law arises in proceedings not before the High Court where it would be wasteful to go through the whole process of appeal of review. Part 21 HCR makes provision for the court to be consulted on a point of law where this is authorised by a statute. The empowering statute governs the nature and purpose of cases that may be stated for the court's opinion; the rules determine the procedure to be adopted.*

Informed by this history, I think today it is safe to say that the case stated procedure is simply a species of appeal that is narrow in compass. However, it has been said that:14

In theory, a case stated appeal is not an appeal in the ordinary sense of the word but a form of consultation by a tribunal with the Court in order to obtain an answer on a point of law.

Ordinarily the ability to state a case will be confined to questions of law. That is not a panoptic statement, of course; as with many facets of our law, there are exceptions. But, the general position is accurately captured in Conroy v Patterson, where Henry J stated:15

> *On an appeal by way of case stated on a point of law only the Court is concerned with the relevant facts as found and the grounds for determining the particular question of law, which question itself must be properly stated. The Supreme Court is not further or otherwise concerned with the evidence or the other findings which were made. In my respectful opinion, the position is correctly stated by Paull J. in McGee v George (1964) 108 S.J. 119, where the learned Judge says that the object of appeal by way of case stated is that the Court should look only at the case as stated and the facts as found".*

Hence, although the New Zealand High Court said it is a "species of appeal that is narrow in compass", it asserted that it is a form of "consultation", not only at

the end of the determination by the lower tribunal, but also "during the course of a hearing before them". Since the Tax Appeals Commission has not, in the present case, decided on the assessment, but only on a preliminary point, it can be considered as "during the course of a hearing before them". The dicta of the New Zealand case therefore shows, that, there is no jurisprudential objection for a "Case Stated" to come to this Court on such a question of law.

Vijith K. Malalgoda J., [*with Justices Murdu N. B. Fernando and E. A. G. R. Amerasekera agreeing*] also had the occasion to pronounce upon a "Case Stated" in **Commissioner General of Inland Revenue vs. Janashakthi Insurance Company Limited, SC. Appeal No. 114/2019, C.A (Tax) Appeal No. 10/2013.**

His Lordship said at page 09 and 10 of the judgment,

> "In addition to the statutory provisions found in the TAC Act, our Appellate Courts too have considered the process before the Court of Appeal in a case stated and opined that the Court of Appeal's power in considering the questions of law **is not restricted to the questions identified in the case stated**, but the Court is permitted to consider new questions of law agreed upon by the court, if the answers to new questions of law may result in the confirmation, reduction, increasing or annulling the assessment determined by the Commission.
>
> In this regard I am mindful of the dicta of Abrahams C.J., in **Commissioner of Income Tax Vs. Sarverimuttu Ratty (Report of Ceylon Tax Case, Vol 1 page 103 at 109** to the effect,
>
> > "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 cause precluded from considering any point upon which the actual decision of the Board might be upheld, no matter what might have been their reasons for arriving at that decision**"

Although Justice Malalgoda has referred to the "confirmation, reduction, increasing or annulling the assessment", the authority His Lordship refers to, of **Sir Sydney Abrahams, the Chief Justice** proves the wider scope of a "Case Stated", which the learned Chief Justice made, in respect of a "Case Stated" from the Board of Review similar to in this case. Hence this Court has power to consider about the question of time bar, considered by the Board of Review or the Tax Appeals Commission, in this "Case Stated".

In The Commissioner General of Inland Revenue vs. Dr. S.S.L. Perera CA/TAX/03/2017 Justice Janak de Silva referring to the question of a "Case Stated" said at page 05 and 06,

> "Section 11A (6) of the TAC Act reads:
>
> "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." (emphasis added).
>
> The words "hear and determine any question of law arising on the stated case" appeared in section 74(5} of the Income Tax Ordinance No 2 of 1932 and was interpreted by Basnayake e.J. in R.M. Fernando v. Commissioner of Income Tax (Supra. at 577) 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. Previously in M.P. Silva v. Commissioner of Income Tax (Reports of Ceylon Tax Cases, Vol. I, page 336 at 338) Canekeratne J. 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". The learned Judge chose to follow the dicta in Ushers Wiltshire Brewery v. Bruce [(1915) A.C. 433 at 465,466]".

Since his lordship said at page 07,

> "Accordingly, I hold 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",

it shows that if the considering of the question results in remitting of the case to the Tax Appeals Commission too, the question can be considered.

As the New Zealand High Court decision of 2015 clearly shows that in a "Case Stated" the superior court can consider interim questions, such as time bar questions and also final determinations on facts, which is akin to a "consultation", if this Court cannot decide the jurisdictional issue on a "Case Stated" it is like consulting a higher court and say, "**you may only speak about this and no other**". In that way, it is not the "Case Stated" but the writ, which is limited.

In deciding this question, in respect of the self same Koggala Garments Limited case, in **The Commissioner General of Inland Revenue vs. Janashakthi General Insurance Co. Ltd., C. A. Tax 14/2013 decided on 20th May 2020**, Justice Janak de Silva, [Justice N. Bandula Karunarathne agreeing] said at page 09, that,

> "Furthermore, given that the established position is that a tribunal exceeds its jurisdiction if it makes any error of law [Anisminic Ltd v. Foreign Compensation Commission (1969) 2 A.C. 147], statutory appeal procedure will be made redundant in the event it is held that jurisdictional questions cannot be raised in such appeal procedure".

The Court of Appeal said at page 10,

> "Let me give an example. A case before the TAC raises the question of whether the assessment is time barred in addition to substantive issues. The TAC decides to take up the time bar issue as a preliminary objection as raised by the taxpayer. If the TAC overrules [This should be "upholds"] the preliminary objection then we are told, by the second part quoted from Koggala Garment case (supra), that the taxpayer must resort to judicial review as the TAC has not looked at the substantive issues. Yet if the taxpayer [This should be "Commissioner General of Inland Revenue"] succeeds in its challenge on time bar of assessment, then it is in relation to a matter arising on the assessment and, we are told by the first part of the quotation in Koggala Garment case (supra), the Commissioner General of Inland Revenue can move for a Case Stated to be referred to this Court".

Dr. Sivaji Felix at the oral argument said that the above passage is contradictory. But it gives meaning, when the confusion between "overrules the preliminary objection" is corrected as "upholding the preliminary objection" and "if the taxpayer succeeds is corrected as "if the Commissioner General of Inland Revenue" succeeds.

The Court of Appeal also said at page 11,

> "As explained above, applying the ratio in Koggala Garment case (supra) creates situations where if a preliminary issue is answered in favour of one party, the aggrieved party must resort to judicial review, which is discretionary, whereas if it is answered in favour of the other party, the aggrieved party may submit a Case Stated which is available as of right. Secondly, such a situation is in any event contrary to public policy since it results in two different procedures for two types of parties arising from the same decision".

Hence, with the greatest of the respect, this court is unable to agree with the reasoning of the Koggala Garments Limited case, that, the appropriate procedure

for a party aggrieved by a decision of the Board of Review or Tax Appeals Commission on a time bar question, is to prefer an application on judicial review.

It was also decided in **The Commissioner General of Inland Revenue vs. Janashakthi General Insurance Col. Ltd C.A. Tax 14/2013** that,

> "The learned counsel for the Respondent submitted that the judgment of this Court in Koggala Garment case (supra) was affirmed by the Supreme Court on 04.05.2018 in Commissioner General of Inland Revenue v. Koggala Garments (Private) Limited [S.C. Spl. L.A. Application No. 114/2017] when the Supreme Court refused special leave to appeal. However, in B.M. Karunadasa, Asst. Commissioner of Labour v. W. Balasuriya, Sports of Kings [CA (PHC) APN 97/2010, C.A.M. 17.07.2013] Salam J. (with Rajapakse J. agreeing) held that it is a misconception to come to the conclusion that the refusal of leave by the Supreme Court constitutes the affirmation of the judgment of the lower court and cannot be considered as creating a precedent".

This Court while agreeing with the above view, respectfully submits, that the Supreme Court refusing leave is a refusal to exercise appellate jurisdiction and jurisprudentially it is different to the Supreme Court confirming the judgment appealed having given reasons.

In paragraph 22 of the above written submissions, the respondent, has analysed section 11A (6) which grants jurisdiction to the Court of Appeal, which will be considered later.

In the case of **R. M. Fernando vs. Commissioner of Income Tax (1959) Reports of Ceylon Tax cases (1960 edition) 652 at 660,** which is cited in paragraph 24 of the said written submissions, Basnayake C. J., has said that the Board of Review should not state abstract or hypothetical questions. But the question of time bar arises in this case is neither.

The case cited at paragraph 26 of the said written submissions is **Navaratnam vs. Commissioner of Income Tax (1949) Reports of Ceylon Tax cases (1960 edition) 431,** in which, it was said that where there is no tax in dispute the question of law was one of pure academic interest and there is no right of appeal. But in the present case, the questions of law raised by the appellant decide the question whether the Board of Review has come to the correct decision with regard to the judgment dated 27.07.2008 and subsequent order dated 13.10.2009 in the John Keels Case Nos. 1 and 2, which is not academic.

What the respondent cites at paragraph 29, **Thomas vs. Ingram (Inspector of Taxes) [1979] STC 1,** says, among other things,

> "It would in my view be quite impossible for me to resolve any such questions as the taxpayer has now raised as to the propriety of the conduct of the proceedings before the commissioners without full evidence as to what transpired. The leading of evidence of that sort is plainly not appropriate to the procedure by way of case stated: it is a matter for prerogative order".

The question of time bar which was considered by the Board of Review is not a question that requires the leading of evidence and the above case does not apply.

Therefore and even otherwise, as paragraph 31 of the said written submissions say, there is no need of tendering an affidavit.

**7. Alleged Time Bar**

The Final Consolidated written submissions of the respondent is dated 15th June 2022.

Without prejudice to the preliminary objection, the respondent submits that the assessments are time barred.

The following table shows the dates on which the particular assessments become time barred, as per the respondent.

| **Year of Assessment** | **Number** | **Notice of Assessment issued on** | **Date of Time Bar** |
|---|---|---|---|
| 2002/2003 | 8780826 | 07th January 2009 | 31st March 2006 |
| 2003/2004 | 8780830 | 07th January 2009 | 31st March 2007 |
| 2004/2005 | 8780832 | 07th January 2009 | 31st March 2008 |

Paragraph 96 of the said written submission quotes from John Keels Case No. 1 and says,

> "On a careful survey of the findings I am of the view, that the Presidential Grant of the land 8 Acres 2 Roods 21.44 Perches which is within the declared limits of the Port of Colombo; the grant of investment relief by the Board of Investments to Lanka Marine Services Ltd., resulting inter alia in relief from the payment of taxes that are due and, the entering into of the Common Users Facility Agreement with the Sri Lanka Ports Authority are severable from the sale of shares. Accordingly, I allow the relief prayed for in prayer (g), (h) and (i) of the prayer to the petition and declare the Presidential Grant marked P31 as null and void. The 18th, 19th, 20th and 21 st respondents will vacate the land within one month from today and restore possession to Sri Lanka Ports Authority. The Common User Facility Agreement dated 20.08.2002 (P19(a)) is declared null and void and the Sri Lanka Ports Authority may enter into fresh Agreements for the use of facilities within the Port on equal terms with all parties licensed to supply bunkers.
>
> All agreements entered into between the Board of Investment and Lanka Marine Services Ltd., are declared null and void **and the Commissioner**

**General of Inland Revenue is directed to recover all taxes due on the basis that such Agreements have not been in force**". [Emphasis added in the said written submissions]

It is said at paragraph 97 that the Chief Justice cannot be understood to have meant that taxes should be recovered contrary to law.

The said judgment at page 156 in "bold" print stated,

> **"The date of the BOI letter granting tax exemption being 11.07.2002 may have some significance since on the very next day - 12.07.2002, Jayasundera rushed a letter to Ratnayake that the JKH bid was accepted and that " it is proposed to conclude the transaction" . Ratnayake replied on the same day 12.07.2002 stating that they are willing to conclude the transaction. There is indeed, amazing speed, in concluding a transaction as to the sale of a public asset which also included 8 Acres of land in the Port of Colombo. All this was done when the proposed process of sale had not been even considered by the Cabinet. The Cabinet considered the process, a month later on 14.08.2002".**

It said at page 159,

> *"Whereas, if in effect the monopoly was going to continue for a limited period of time the bidders may have had a basis to enhance their bids. Hence Jayasundera's action was adverse to the interests of the State in securing a better price. He failed to take into account the specific decision of the Cabinet that the monopoly would at the least would continue to the Port of Colombo for one year".*

It said at page 161,

> *"JKH knew fully well that this was not a mere sale, but a sale of shares owned by a Public Corporation in an extremely lucrative venture. That, transparency and action being taken according to law should necessarily*

*underpin the validity of the transaction. The declared basis at the Pre Bid Conference attended by Ratnayake representing JKH was that there will be no monopoly after the sale and that other suppliers of bunkers would be issued licenses. This premise would necessarily have inhibited bidders from quoting a higher price. In any event the object of the Cabinet was not to secure a higher price by preserving the monopoly. It was, as noted above is to enhance competition, to lower bunker prices, improve facilities and thereby increase the revenue yield to the State. Having come in on this openly declared premise, no sooner the bid was accepted by Jayasundera, Ratnayake moved quickly to get the former committed to an inclusion of clause 8.2. The obvious purpose of getting clause 8.2 included was to drive away competitors as manifested by the subsequent conduct of JKH of procuring the SLPA to take action against the 32nd respondent and thereafter by directly instituting legal proceedings against the latter. Hence I cannot agree with the submission of bona fides".*

The judgment said at page 170,

*"JKH/LMSL pursued their "rights" under the Agreement P27 and the Government was compelled to seek extensions of the period of 1 year granted to "ensure" the transfer of the land. There were accordingly 4 amendments to the Agreement. Finally the then President made a Grant under the Public Seal of the Republic in respect of the land to LMSL under the State Lands Ordinance. The Grant P30 states that it is made in consideration of Rs. 1,199,362,500/= paid to the Republic by LMSL. It is common ground that this statement is incorrect. In fact no money was paid by LMSL to the Government. The amount is the sum as that paid on 06.09.2002 by JKH to CPC for the purchase of shares of LMSL. Hence the grant is bad in law solely on the ground of the misstatement as to consideration. Any Grant made by the Head of State under the Public Seal of the Republic should have the sanctity of truth in its contents. In normal*

*circumstances a false statement as to a payment to the Government could not be made since, it has to be verified by the Treasury. But regrettably, that check is not there since by now the same Jayasundera who was responsible for the creation of the fiction in favour of the JKH that there would be no additional payment in respect of the land, is now ensconced as the Secretary to the Treasury".*

It said at page 176,

*"When looking at the two letters bearing the same date one gets the impression that Jayasundera and Ratnayake sat across the table and exchanged them. Counsel for JKH submitted that they were exchanged by FAX. Jayasundera's FAX letter bears time 4.45 p.m. and Ratnayake's Fax the time 5.30. The documents have not been produced by JKH and I have noted the times based only on submissions. Whatever be the travails of other bidders, the timing fitted well to Ratnayake's affairs since according to document P37 (subsequently obtained by the petitioner from the BOI) by letter dated 11.07.2002 the BOI informed JKH that the application for tax relief in this regard has been allowed I have already under the heading "E" dealt with the false and illegal manner in which JKH secured the tax relief".*

Then it said at page 180,

*"On the basis of the aforesaid findings I hold that the entire process of the sale of shares of Lanka Marine Services Ltd., to John Keells Holdings has been done without lawful authority. P.B. Jayasundera being the 8th respondent and the then Chairman of the Public Enterprise Reform Commission, from the very commencement of the process, has acted outside the authority, of the applicable law being the Public Enterprise Reform Commission Act No. 1 of 1996 and the functions mandated to be done by the Commission as contained in the decision of the Cabinet of Ministers. He had not only acted contrary to the law but purported to arrogate to himself*

*the authority of the Executive Government. His action is not only illegal and in excess of lawful authority but also biased in favour of JKH.*

*From the perspective of JKH I hold that the company has secured advantages and benefits through the illegal process and in specific instances by misrepresentations that have been made".*

It was thereafter, at page 182, that His Lordship the Chief Justice came to the conclusion, quoted at paragraph 96 of the above written submissions of the respondent, saying,

*"The defence of time bar pleaded by the respondent must necessarily fail since the impugned transfer was not conducted according to obtain material documents from sources that were not accessible to him. This is borne out by the fact that material documents P31 and P37 on which significant findings have been made were obtained from the Board of Investments after the applications was filed. Accordingly, I overrule the objections based on locus standi and time bar and grant to the petitioner the relief sought in prayer (b) of the petition that there has been an infringement of the fundamental right guaranteed by Article 12(1) of the Constitution by executive or administrative action.*

*Ordinarily, the grant of a declaration that executive or administrative action is an infringement of the fundamental right guaranteed by Article 12(1) would result in a restoration of the status quo ante. However, since the jurisdiction vested in this Court in terms of Article 126(4) of the Constitution is to grant relief or to make directions as it may seem just and equitable, it is open to the Court to ascertain whether the implications of the impugned executive action are severable. On a careful survey of the findings I am of the view, that the Presidential Grant of the land 8 Acres 2 Roods 21.44 Perches which is within the declared limits of the Port of Colombo; the grant of investment relief by the Board of Investments to Lanka Marine Services Ltd., resulting inter alia in relief from the payment of taxes that are due and,*

*the entering into of the Common Users Facility Agreement with the Sri Lanka Ports Authority are severable from the sale of shares. Accordingly, I allow the relief prayed for in prayer (g), (h) and (i) of the prayer to the petition and declare the Presidential Grant marked P31 as null and void. The 18th, 19th, 20th and 21 st respondents will vacate the land within one month from today and restore possession to Sri Lanka Ports Authority. The Common User Facility Agreement dated 20.08.2002 (P19(a)) is declared null and void and the Sri Lanka Ports Authority may enter into fresh Agreements for the use of facilities within the Port on equal terms with all parties licensed to supply bunkers.*

*All agreements entered into between the Board of Investment and Lanka Marine Services Ltd., are declared null and void and the Commissioner General of Inland Revenue is directed to recover all taxes due on the basis that such Agreements have not been in force".*

**The above reasoning, with its strong emphasis on fraud, does not show an inclination to stop at an objection of time bar.**

Hence it is the decision of this court that the particular findings and decisions of the Supreme Court in the above case makes that time bar provision has no avail.

**8. Statutory provisions re. assessments pertaining to fraud**

**Furthermore, what is the law pertaining to imposing such tax, when there is fraud?**

The respondent in paragraph 39 of written submissions dated 13th August 2018 has quoted section 134(5) of Inland Revenue Act No. 38 of 2000. Section 134 is the first section in Chapter XVIII on "Assessments". As quoted by the respondent, the said section says,

"

(5) Subject to the provisions of section 67. no assessment shall be made, of the income tax payable under this Act. for any year of assessment by any person who has made a return of his income,

(a) on or before the thirtieth day of November of the year of assessment immediately succeeding that year of assessment, after the expiry of three years from the end of that year of assessment:

(b) after the thirtieth days of November but on or before the thirty first day of March, after the expiry of six years from the end of that year of assessment:

Provided, that nothing in this subsection shall apply to the assessment of income tax payable by any person in respect of any year of assessment, consequent to the receipt by such person, of any arrears relating to the profits from employment of that person for that year of assessment :

**Provided further that, where in the opinion of the Assessor, any fraud, evasion or willful default has been committed by or on behalf of, any person,** in relation to any income tax, payable by such person for any year of assessment, it shall be lawful for the Assessor to make an assessment or an additional assessment on such person **not later than five years after the end of that year of assessment".** [Emphasis added in this judgment]

This second proviso appeared in the **original Act No. 38 of 2000** as follows,

"Provided further that. where in the opinion of the Assessor. any fraud, evasion or willful default has been committed by, or on behalf of, any person, in relation to any income tax, payable by such person for any year

of assessment, it shall be lawful for the Assessor to make an assessment or an additional assessment on such person **at any time after the end of that year of assessment"**.

The provision in the original second proviso was amended by **Inland Revenue (Amendment) Act No. 37 of 2003,** which came into operation on 14th November 2003. The amendment said,

"50. Section 134 of the principal enactment is hereby amended in subsection (5) of that section as follows,....

(2)in the second proviso to that subsection, by the substitution for the words "at any time after the end of that year of assessment", of the words "**not later than five years after the end of that year of assessment**".

The said second proviso was again amened by **Act No. 08 of 2005**, which came into operation on 31st March 2005. It said,

"38. Section 134 of the principle enactment as last amended by Act No. 12 of 2004 [that did not concern the second proviso] is hereby further amended in subsection (5) of that section as follows,....

(2)in the second proviso to that subsection by the substitution for the words "not later than five years from the end of that year of assessment", of the words "**at any time after the end of that year of assessment".**

Hence this last said provision was the one in force when notices of assessment in this case were sent on 07th January 2009.

Hence the section says, "Provided further that, where in the opinion of the Assessor any fraud, evasion or willful default has been committed by, or on behalf of, any person, in relation to any income tax, payable by such person for any year of assessment, it shall be lawful for the assessor to make an assessment

or an additional assessment on such person **at any time after the end of that year of assessment"**.

As per the above judgment of the Supreme Court, the Assessor is bound to make such an opinion. Therefore tax can be validly assessed at any time after the end of that year of assessment.

**9. Reasoning on section 11(A) (6) of TAC Act**

**The argument in respect of the analysis of jurisdiction of this court under section 11(A) (6) of Tax Appeals Commission Act was already decided by this court in Cargills Agrifoods Limited vs. The Commissioner General of Inland Revenue, C. A. Tax 41/2014 decided on 28th February 2023[1].**

In that case, the respondent Commissioner General of Inland Revenue, took up a jurisdictional objection based on Koggala Garment Limited case, in 2018. But later in December 2022, the respondent relinquished that argument in favour of jurisdiction of this court. But in that case, this court, considered the said objection to jurisdiction in respect of section 11(A) (6), on the basis that parties cannot by agreement cloth the court with jurisdiction. This court said in that case,

> *"This was the position of the Respondent in September 2018. By December 2022, the Respondent has abandoned this argument in favour of the jurisdiction of this Court in a Case Stated in a matter which there is no determination by the Tax Appeals Commission on the substantial question.*
>
> *Perhaps, from 2018 to 2022 a number of Respondents apart from the Commissioner General of Inland Revenue, taking up the above objection based on the Koggala Garments case, must have changed the mind of the present Respondent.*

[1] Justice Sasi Mahendran and myself.

*But, it is a basic rule of law that if a tribunal or a Court has no jurisdiction, the parties cannot by consent cloth it with jurisdiction.*

*……*

*What shall the Court of Appeal do when it receives such a case stated? Section 11A.(6) says,*

*"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 the 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".*

*Hence, any two or more Judges of the Court of Appeal may,*

*(i) determine any question of law arising on the stated case, It does not say may determine the "determination" of the Commission.*

*(ii) (ii) confirm, reduce, increase or annul the assessment determined by the Commission,*

*(iii) (iii) or may remit the case to the Commission with the opinion of the Court, thereon.*

*This may or may not be on the "determination" of the Commission, because the term "thereon" refers to "any question of law arising on the stated case".*

*What does the next sentence mean?*

> *"Where a case is so remitted by the Court, the Commission shall revise the assessment in accordance with the opinion of the Court".*

*If the question of law arose was not with regard to the "assessment determined by the Commission", how shall the Commission "revise the assessment"?*

*The answer is, that, the "assessment", referred to in the last sentence is, the "assessment" made by the assessor.*

*This is why, the previous sentence refers to the "assessment determined by the Commission" but the last sentence just say "assessment".*

*The legislature will not waste words as well as it will not use words without a meaning.*

*Hence it is clear that,*

*(a) there can be a case stated on a question of law other than the determination of the Commission on tax,*

*(b) the Court has power to remit the case to the Commission, with its opinion on the question of law so arose and*

*(c) the Commission shall, on receiving such an opinion of the Court, revise the assessment of the assessor.*

*Hence, this Court has jurisdiction to go into the questions in the present case stated".*

That is the answer of this court to the question raised on the language of section 11(A) (6).

**Hence, the preliminary jurisdictional objection is overruled and this Court decides that it has jurisdiction to decide the Questions of Law in the "Case Stated".**

## 10. Conclusion

As already said, the Tax Appeals Commission has misdirected itself in respect of the operation of the subsequent order in case John Keels Case No. 2 dated 13th

October 2009, in that, it decided that the said order completely reversed the position of the judgment in John Keels Case No. 1 dated 27th July 2008. The way it misread the subsequent order is clear that it even said that the Supreme Court in the subsequent case was presided by Chief Justice Dr. Shirani Bandaranayake, whereas by that date she has not yet become the Chief Justice.

The subsequent order only dealt with restrictions imposed upon Jayasundera not by the judgment dated 27th July 2008 but by a subsequent order dated 10th August 2008. The subsequent order did not change anything in the earlier judgment. Hence the tax liability created by the judgment remains and the Commissioner General of Inland Revenue is bound to issue notice on such assessment and take subsequent steps.

Therefore the two questions of law are answered as follows,

1. Has the Tax Appeals Commission erred in interpreting the Supreme Court judgment dated 21.07.2008, in a Fundamental Rights Application filed in the same court bearing No. S.C. (F.R.) 209/2007?

   Yes.

2. Has the Tax Appeals Commission misread some other judgment in interpreting Supreme Court judgment No. S. C. (F. R.) 209/2007 dated 21.07.2008?

   The Tax Appeals Commission was under the wrong impression that the said judgment dated 21st July 2008 was completely reversed, whereas, it was not reversed, completely or otherwise.

Hence this case is remitted to the Tax Appeals Commission, with the above opinion of this court, for the Tax Appeals Commission to take further steps according to the said opinion. There is no order on costs.

Judge of the Court of Appeal.

Hon. Sasi Mahendran J.,

I agree.

Judge of the Court of Appeal