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.

Case No. 06/2015

Tax Appeals Commission Appeal No. TAC/IT/020/2011

CARGILLS AGRIFOODS LTD.,
(formerly known as "CPC Agrifoods Limited"), No. 40, York Street, Colombo 1

APPELLANT

Vs.

THE COMMISSIONER GENERAL OF INLAND REVENUE, 14th Floor, Secretarial Branch, Department of Inland Revenue, Sir Chitthampalam A. Gardiner Mawatha, Colombo 02.

RESPONDENT

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

Hon. Sasi Mahendran J.

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

Mr. Milinda Gunethilake, P.C., Additional Solicitor General with Mrs. Chaya Sri Nammuni, Deputy Solicitor General for the Respondent.

Argued on: 01.08.2022 both Counsel informed the Court that this matter can be disposed by way of written submissions.

Written submission tendered on: 02.11.2018 and 22.09.2022 by the Appellant.

02.11.2018 and 15.12.2022 by the Respondent.

Decided on: 28.02.2023

D.N. Samarakoon, J

Whereas, perhaps the weakest point in appellant's case, that whether "an appeal", in the form of "a stated case", under section 11A. (1) may arise only upon a determination of the Tax Appeals Commission, has been conceded by it's opponent, in page 07, paragraphs, 10,11 and 12 of the Written Submissions [of the respondent] dated 15.12.2022, which reads,

> "10. Whilst any action of the Secretary are administrative in nature, those of the TAC are not. In [the] circumstances where administrative decisions are challenged, the legal remedy usually lies by way of writ. However, in this case stated as noted above, the majority of the questions of law relate to the actions/decisions of the TAC and no writ will lie in relation to decisions/actions of the TAC.
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> 11. In any event, it is submitted that the section 11A(1) requires the TAC to "state a case on a question of law for the opinion of the Court of Appeal". It is submitted that the words "Question of law" and the powers

of the Court of Appeal to answer the same are sufficiently broad to cover questions of Law arising from actions of the TAC as well as it's Secretary.

12. In the circumstances, in this matter the Respondent will not pursue the objection that the remedy with regard to the matters alluded to in the 11 questions of law relating to the Secretary should be challenged by way of writ".

The strongest point in this appeal, for the Respondent, being section 8(3) of the said Tax Appeals Commission Act, which provides that,

> "the manner and the form of submitting such appeal, the procedure to be followed by the Commission in hearing and determining such appeal and the fees if any in respect thereof shall be determined by the Commission by the rules made, **from time to time**, in that behalf"

and the case of **Green Up International (Private) Limited vs. Director General of Customs,** Writ 335/2014 decided on 29.06.2020, where His Lordship Justice Arjuna Obeysekera refers to section 18 of the Interpretation Ordinance where any authority is conferred power to make any order, such order can be revoked by the same authority in the same manner it was made, (Thus, the Respondent in this case argues, that, the power to not list the appeal, is also given in the power to list an appeal), whereas,

the weakest point is, that, the existence of such a rule, which empowers the Secretary of the Tax Appeals Commission not to list an appeal is not explicitly shown.

Although the Respondent has presently conceded not only that there need not be a writ application instituted to question the conduct of the Secretary, but also that this Court has jurisdiction under section 11A. (1) to express an opinion about a question of law, the Respondent argued as follows, in the previous set of Written Submissions tendered dated 02nd November 2018, at page 11,

paragraphs 57 and 58, as well as page 12, paragraph 66 has argued that this Court has no jurisdiction.

The said paragraphs are as follows,

> "57. Arguably, in the circumstances, without making any concession on this point, a decision that has been made ultra vires or an irrational decision may be subject to judicial review in terms of Article 140 of the Constitution. In the present case the respondent states that the decision of the secretary is neither arbitrary nor irrational.
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> 58. The right of appeal created by the TAC Act in section 7 gives the Commission the power to "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" as stated in section 9(1) of the TAC Act. This power is clearly exercised on a final decision made by the CGIR on the substantive issue…
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> 66. This view has been further upheld in the case of **Commissioner of Inland Revenue vs. Koggala Garments (Pvt) Ltd., decided on 5.4.2017 in Tax 1/2008** holds that "the appropriate time for stating a case on a point of law is after the conclusion of the substantive hearing. Where a tribunal has made an interim ruling which is challenged it is inappropriate for a case to be stated and the aggrieved party should seek permission to obtain judicial review". To <u>this limited extent</u>, the Koggala Garments case is quoted by this respondent to state that Your Lordship's Court has held that even an interim order by the Commission has to be challenged by way of writ".

This was the position of the Respondent in November 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.

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.

Hence, it is required to examine the provisions of section 11A. (1) of the Tax Appeals Commission Act, which gives jurisdiction to this Court. It says,

> "11A. (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". [Emphasis added in this order]

Hence, upon the Commission being requested to state a case, the Commission shall entertain such application, provided, that, it is done "within one month from the date on which the decision of the Commission".

Hence, further, there must be a "decision" of the Commission.

What is the duty of the Commission, upon receiving an appeal from the tax payer [assessee]?

Section 7(1) of the Tax Appeals Commission Act reads, thus,

"7 (1) A person who is aggrieved by the determination –

(a) of the Commissioner General of Inland Revenue appointed in terms of the Inland Revenue Act, (hereinafter referred to as the "Commissioner General") given in respect of any matter relating to imposition of any tax, levy, charge, duty or penalty under the provisions of the enactments specified in Column I of Schedule I, or Schedule II of this Act; or… [paragraph (b) omitted]

may appeal to the Commission in accordance with the provisions hereinafter set out:

Provided that, every person who wishes to appeal to the Commission under paragraph (a) shall, at the time of making such appeal, be required to pay into a special account which shall be opened and operated by the Commission for such purpose, an amount –

……… [paragraph (a) omitted]

(b) as is equivalent to twenty five per centum which is refundable subject to subsection (1A) of this section or a bank guarantee for the equivalent amount **which shall remain valid until the appeal is <u>determined</u> by the Commission**,

of the sum as assessed by the Commissioner General as being payable by such person as tax, levy, charge, duty or penalty under any of the said enactments and which assessment is the subject of the appeal.

(1A) (a) The amount referred to in paragraph ….. (b) of the Proviso to subsection (1), as the case may be, **shall be transferred to the Commissioner General upon the determination of the respective appeal** to which such amount is applicable and which shall be set off

against the sum as assessed by the Commissioner General as being payable by such person as tax, levy, charge, duty or penalty under any of the said enactments and which assessment is the subject of the appeal.

(b)Any excess of the amount referred to in paragraph (b) of the Proviso to subsection (1), may be set off against the taxes due and which are administered by the Commissioner General. Where any balance if any of such amount shall be refunded to the appellant on request made in that behalf in writing to the Commissioner General".

One must not think, although the question of the refundable deposit of twenty five per centum is central to the arguments in this appeal, that, the Court is deciding the substantive matter, because, at this stage, what is considered only is whether this Court has jurisdiction to hear the Stated Case.

The section 7(1) in two places, speaks about the "**determination**" of the appeal. Hence, an appeal has to be "**determined**" by the Tax Appeals Commission, which means the determination of the substantial question, with regard to the tax, etc.

However, section 11A.(1) does not provide that a stated case must be preferred only after a "**determination**". It says, "within one month from the date on which the **decision** of the Commission was notified". Therefore, a "**decision"** as against a "determination" is sufficient to make a valid request for a case stated.

This is with regard to the making a request or for preferring an appeal in the form of a Stated Case. The section 11A.(2) then speaks about transmitting the case stated to this Court. It says,

"11A. (2) The case stated by the Commission shall set out the facts, **the <u>decision</u> 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 such case, when stated and signed to the Court of Appeal, within fourteen days after receiving the same".

Here too, what is referred to is the "decision" as against the "determination" of the Commission.

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 <u>any question of law arising on the stated case</u> and may in accordance with the decision of the Court upon such question, confirm, reduce, increase or annul the <u>assessment determined by the Commission</u>, **or may <u>remit</u> the case to the Commission <u>with the opinion of the Court, thereon</u>**. Where a case is **<u>so remitted</u>** by the Court, **<u>the Commission shall revise the assessment</u>** 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) confirm, reduce, increase or annul **the assessment determined by the Commission,**

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

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.

It was on 09th January 2012, the appellant submitted its petition of appeal to the Tax Appeals Commission.

On 16th January 2012, GAJMA & Co., the authorized agent for the appellant wrote to the Deputy Commissioner of the Tax Appeals Commission requesting to confirm that the total credit available to the appellant for the year of assessment 2007/2008 is Rs. 10,356,404/-.

On 18th January 2012, the Secretary to the Tax Appeals Commission has written to the appellant asking the appellant to submit bank guarantee or pay in cash 25% of the sum assessed.

GAJMA & Co., has written on 20th January 2012 explaining in detail about the availability of tax credit for the above sum.

On 26th January 2012 the Assessor of the Department of Inland Revenue has confirmed to the appellant the availability of Rs. 7,155,494/- tax credit.

GAJMA & Co., has written to the Secretary to the Tax Appeals Commission on 27th January 2012 that the appellant has complied with the requirement under section 7(1) of the Tax Appeals Commission Act.

On 14th May 2012, the Deputy Commissioner of Inland Revenue has confirmed to the Secretary to the Tax Appeals Commission of the availability of Rs. 6,323,247/- as tax credit to the appellant.

But on 23rd July 2012, the Secretary to the Tax Appeals Commission has written to the appellant that the Tax Appeals Commission is not in a position to list the appeal for hearing since the appellant is not agreeing with the tax payable amount determined by the Commissioner General.

There are letters dated 12th April 2013 by the Deputy Commissioner of the Tax Appeals Commission to its Secretary asking her to confirm whether the appeal is listed and a reply letter dated 02nd May 2013 that no valid appeal has been listed as no bank guarantee is provided.

On 05th March 2014, GAJMA & Co., wrote to the Secretary to the Tax Appeals Commission explaining that on 04th March 2014 a bank guarantee for Rs. 1,637,037/- is provided being 25% of Rs. 6,548,146/- the assessment of tax.

On 10th October 2014, GAJMA & Co., has written to the Secretary to the Tax Appeals Commission, informing that adequate value has been provided and either to list the appeal or to fix a meeting.

On 30th December 2014, Secretary to the Tax Appeals Commission has informed GAJMA & Co., that a subsequent study of the application for re listing, the Commission having sought the views of the Respondent had decided not to allow the application for re listing.

The appellant, having narrated the facts with regard to the correspondence with the Secretary to the Tax Appeals Commission, states at page 17, paragraph 5.13 of the final written submissions that, "the Secretary has no power or right or status to determine on the validity or the correctness of the appeal".

This is where the respondent referred to, in page 17 paragraph 75 of its written submissions dated 15th December 2022, to **Green Up International (private) Limited vs. Director General of Customs, Writ 335/2014** decided on 29.06.2020 by His Lordship Justice Arjuna Obeysekera.

What His Lordship said in that judgment was,

> "Although the Act provides for the amendment of an Order made under Section 2(1), the Act does not provide for the cancellation of an Order. The power to cancel an order is clearly provided for in Section 18 of the Interpretation Ordinance, which reads as follows:
>
> "Where any enactment, whether passed before or after the commencement of this Ordinance, confers power on any authority to issue any proclamation, or make any order or notification, any proclamation, order, or notification so issued or made may be at any time amended, varied, rescinded, or revoked by the same authority and in the same manner, and

> subject to the like consent and conditions, if any, by or in which or subject to which such proclamation, order, or notification may be issued or made."

Therefore, an Order made under Section 2(1) can be cancelled at any time and a fresh Order made in lieu thereof, in the absence of any restriction or prohibition in the Act relating to cancellation".

What section 18 of the Interpretation Ordinance says is, "confers power on any authority to issue any proclamation, or make any order or notification, any proclamation, order, or notification so issued or made may be at any time amended, varied, rescinded, or revoked…"

Following this case, the respondent tries to argue that, "the power to not list is also implicitly given in the power to list an appeal".

There is a contradiction in itself, in this form of argument, because making a proclamation, order or notification and amend, vary, rescind or revoke it does not mean that an officer whose task is to list the appeal may also not list it.

On 05th March 2014 the appellant has provided a bank guarantee for Rs. 1,637,037/-.

With regard to the said additional supply of Bank Guarantee, the Respondent submits at page 21, paragraph 93 of the Written Submissions dated 15th December 2022, that,

> "There is no procedure to accept a bank guarantee after an appeal has been disallowed since section 7(1) claims that the deposit has to be made with the appeal".

This argument of the Respondent is contradictory to what it submitted at paragraph 75 above, referring to section 18 of the Interpretation Ordinance, because [not in terms of the said section 18, but the purported argument of the Respondent that the power not to list comes with the power to list] the Tax Appeals Commission could be

able to reverse the disallowance of the appeal. Hence, the argument at paragraph 75 above, has no basis.

It is appropriate, at this stage, to examine as to what really happened.

The sum assessed by the Commissioner General of Inland Revenue as tax was made on 04th November 2011.

Although not specifically submitted by the appellant, the Tax Appeals Commission Amendment Act No. 20 of 2013 was certified by the Speaker on 24th April 2013 and published in Gazette dated 26th April 2013.

The relevant section is section 7(1) Proviso (b) which reads as follows,

> Provided that, every person who wishes to appeal to the Commission under paragraph (a) shall, at the time of making of such appeal, be required to pay into a special account which shall be opened and operated by the Commission for such purpose, an amount –
>
> (a)...
>
> (b) **As is equivalent to twenty five *per centum*** which is refundable subject to subsection (1A) of this section **or a bank guarantee for the equivalent amount** which shall remain valid until the appeal is determined by the Commission.

of the sum as assessed by the Commissioner – General as being payable by such person as tax, levy, charge, duty or penalty under any of the said enactments and which assessment is the subject of the appeal.

After deducting the tax credit, the total tax liability as per the determination the total amount payable was Rs. 6,548,146/-.

It has been confirmed that the total tax credit in the hands of the respondent for the benefit of the appellant is Rs. 10,356,404/-.

Hence the position of the appellant is that, when the respondent has to pay to the appellant Rs. 10,356,404/-, there is no requirement for the appellant to make a further payment.

Apart from a few minor differences between the written submissions of the respondent in Tax 36/2014 dated 15th December 2022 and the written submissions in this case dated 15th December 2022 in this case, the paragraphs up to paragraph 77 are identical. Paragraph 78 in the written submissions of Tax 36/2014 reads as follows,

"78. The sum assessed by the CGIR at page 18 of the brief, it is clear that the CGIR states that "accordingly 25% of the tax is Rs. 18,062,425/-". Therefore, the tax assessed by the CGIR is Rs. 18,062,425/-. This is then the amount to be deposited by the tax payer if he wishes to proceed with the appeal, in fulfilling the pre condition of submitting a valid appeal".

Paragraph 78 of the written submissions of the respondent in this case reads as follows,

> "78. It is clear that 25% of the tax is Rs. 3,217,848/-. Therefore, the tax assessed by the CGIR is Rs. 12,871,393/-. This is then the amount to be deposited by the tax payer if he wishes to proceed with the appeal, in fulfilling the pre condition of submitting a valid appeal".

The figures are not the only difference between the facts in Tax 36/2014 and this case.

There is also no difference between paragraphs 79 to 82 between the two sets of written submissions.

It is stated at paragraph 83,

> "83. There, the tax payer misleads Your Lordship's Court by stating that the sum assessed is Rs. 12,871,393/-, whereas the sum of 25% deposit payable as assessed/stated is Rs. 3,217,848/-.

While paragraphs 84 and 85 are same, the latter says even if the Commissioner General is wrong that amount has to be deposited.

Paragraph 86 is as follows,

> "86. The 25% payable amount as assessed/calculated by the CGIR in determination, rightly or wrongly, with or without considering tax credits, is Rs. 3,217,848/-. The appellant has not appealed against this imposition and therefore this remains valid until determined by the Commission and is tax and penalty as assessed by the CGIR".

While paragraph 87 in both cases is same, it is stated in paragraph 88 as follows,

> "88. However, admittedly, the appellant HAS LATER submitted the bank guarantee for Rs. 1,637,037/- as evidenced by the bank guarantee at page 185 of the brief, WHICH IS MUCH LATER THAN THE APPEAL SUBMITTED AND THEREFORE NOT IN COMPLIENCE WITH THE PRE CONDITION OF A DEPOSIT ALONG WITH THE SUBMISSION OF THE APPEAL".

Paragraph 89 in Tax 36/2014 and in this case are similar. Paragraph 90 states as follows,

> "90. Since the amount is admittedly less, by letter dated 23.12.2012, at page 182 of the brief, the CGIR REJECTS the appeal of the appellant. The specific reason is cited as the appellant not having submitted sufficient bank guarantee".

Except for the "letter dated 23.12.2012" and page "182", this is same as the corresponding paragraph in Tax 36/2014.

There is no "letter dated 23.12.2012". The letter of rejection is letter dated 23rd July 2012. It is not by the Commissioner General. It was the Secretary to the Tax Appeals Commission informed that the Tax Appeals Commission is "not in a position to list the appeal for hearing since the appellant is not agreeing with

the tax payable amount determined by the Commissioner General of Inland Revenue".

If the tax payer agrees with the "tax payable amount determined by the Commissioner General of Inland Revenue", there is no need to appeal, in the first place. It is because the tax payer does not agree with the said amount it wants to appeal.

Paragraphs 91 to 95 in Tax 36/2014 and in this case are similar, subject to minor differences.

Paragraph 96 is as follows,

> "96. IT SHOULD BE NOTED THAT BY THE TIME THE BANK GUARANTEE IS SUBMITTED, A LESSER AMOUNT AT THAT, THE APPEAL HAD ALREADY BEEN DISMISSED BY LETTER DATED **10.02.2014** AT PAGE 118 AND THE BANK GUARANTEE RETURNED BY LETTER DATED 22.04.2014 AT PAGE 125". [Emphasis added in this judgment]

Something similar to the dismissal of an appeal was done by a letter dated 10th February 2014 in Tax 41/2014 and in Tax 40/2014 but not in this case.

Paragraphs 97 to 100 in the present case are similar to paragraphs 96 to 99 in Tax 36/2014. Paragraphs 101 to 114 under the "heading" "Request for case stated not on the dismissal but on refusal to re list", are similar to paragraphs 100 to 112 under the same "heading" in case No. Tax 36/2014.

It may be noted, that the "heading" on paragraph 115 of the present case, as well as, 113 of Tax 36/2014 is "A hearing was not given to the CGIR on this matter".

The allegation of the appellant is not that a hearing was not given to the Commissioner General, but a hearing was not given to the appellant and the hearing given to the Commissioner General, among other things, violated the rule audi alteram partem. What does paragraph 115 say,

> "113. The tax payer appellant states that there is a violation of the principles of natural justice since the CGIR was heard on this matter. But what actually the letter dated 30.12.2014 which is challenged, reflects is that over 5 months after the letter rejecting the appeal was sent to the appellant. The TAC has sought the views of the CGIR and THE CGIR HAS CATEGORICALLY STATED THEREIN THAT IT IS NOT PROPER TO GIVE THEIR VIEWS ON RELISTING. Therefore, it is clear that there is no violation of the principles of natural justice and in fact, the CGIR has acted honourably and refused to comment".

But, this is not what the letter of the Secretary to the Tax Appeals Commission dated 30th December 2014 says.

It says,

> "I am directed by the Tax Appeals Commission to inform you that subsequent to a study of your application for re listing, the Tax Appeals Commission after seeking the views of the Commissioner General of Inland Revenue had decided not to allow your application for re list".

It does not say that the Commissioner declined to comment. The meaning it conveys is that in addition to the Tax Appeals Commission and its Secretary, the Commissioner General is also of the view that the appeal should not be heard.

If the Commissioner General declined to comment, as claimed by the respondent, it shows, that, even the Commissioner General, the opponent of the appellant has appreciated and understood that what was proposed by the Tax Appeals Commission is unethical, to say the least.

Paragraphs 116 to 119 under the "heading" "The decision challenged is erroneous", are similar to paragraphs 114 to 117 under the same "heading" in Tax 36/2014.

Paragraphs 118 to 129 in the former [Tax 36/2014] refer to distinguishing the judgment in Tax 29/2014. So are paragraphs 120 to 131 of the latter [present case].

What is submitted is that this matter is unique and different. It is on that basis that this case is decided.

The appellant has submitted, at page 36 paragraph 12 of the final written submissions, that, in letters of the Secretary to the Tax Appeals Commission dated 18th January 2012, 23rd July 2012 and 14th March 2014 it is not set out what is the shortfall, which the appellant has allegedly not provided.

The respondent may say to counter this argument, that, there is no purpose in so informing because 25% has to be deposited at the time of the filing of the appeal and not thereafter. However, the section 7(1) proviso (b) or any other provision does not spell out the consequences of a non furnishing of 25% deposit at the time of the filing of the appeal.

The object of 25% deposit of assessed amount of tax, is to prevent frivolous appeals. The objective being this, there cannot be any reason which prevents the Secretary or the Tax Appeals Commission from accepting any deficiency, if any, before the hearing of the appeal.

U. de Z. Gunewardane J., in **Fernando vs. Ceylon Brewerys Ltd., [1998] (3) SLR 61** observed,

> "The question whether provision in a statute is mandatory or directory is not capable of generalization but when the legislature has not said which is which, one of the basic tests for deciding whether a statutory direction is mandatory or directory is to consider whether violation thereof is penal or not. It has been the traditional view that where disobedience of a provision is expressly made penal it has to be concluded that the provision is mandatory whereas if no penalty is prescribed non compliance with the provisions of a statute may held to be directory".

In appeal, in **The Ceylon Brewery Limited vs. Jax Fernando, Proprietor, Maradana Wine Stores 2001 (1) S. L. R. 270,** the Supreme Court has set aside the above judgment, only on the point that an application to purge default in an

action in the district court under section 86(2) of the Civil Procedure Court has to be made within 14 days of the notice of the decree.

The Supreme Court said,

"I therefore set aside the judgm ent of the Court of Appeal on that point".

Hence, the point that if no penal consequences are included, the provision is directory, was not set aside.

Therefore, it appears to this Court that the Secretary to the Tax Appeals Commission or the Tax Appeals Commission could have accepted any deficiency, if any, later before the hearing of the appeal and therefore, if there was a shortfall as the Tax Appeals Commission thought, it should have been informed. The appellant should have been told, the reason as to why its appeal was not listed or not heard.

The writer, **Rose M.B. Antoine**[1] criticizes the decision, in ***Regina v Secretary of State for Trade and Industry, Ex parte Lonrho PLC The Times, 18 January, 1989*** the failure of the House of Lords to direct the Secretary of State to reveal the reasons for his decision. The writer says,

> 'Thus, the Justice All Souls Review Report found that "the absence of a general duty to give reasons is a serious gap in the law."2 This report reiterated the posi- tion of an earlier committee stating that "no single factor has inhibited the development of English administrative law as seriously as the absence of any general obligation upon public authorities to give reasons for their deci- sions."3 Similar sentiments have also been expressed in Australia4 and in Canada.'

[1] Lecturer in the Faculty of Law, University of the West-Indies, Cave-Hill Campus, Barba- dos, W.I., attorney-at-law and legal consultant. LL.B., University of the West-Indies; LL.M., University of Cambridge. Published in 'Law liberty and pursuing justice' of American Bar Association.

Antoine says,

> '**Lonrho demonstrates clearly that it is perilous to sit back and rely on judges if we are serious about the giving of reasons in administrative decisions. The Justice All Souls Review question whether judges are to be trusted to carry out clearly needed reform must surely now be answered with a resounding "No!"48** Clearly, too many opportunities have now been missed by the common law and the need for a clear statutory duty to give reasons in all administrative decisions is even more imperative. Reasons can now be viewed as a * "third principle of natural justice.
>
> **It can no longer be viewed as a mere privilege but rather a legitimate expectation of citizens, affected by the far-reaching decisions of adminis- trative officials, to know why such officials have acted as they have.' (Emphasis added in this writing)**

Therefore Antoine even go as far as suggesting that the 'duty to give reasons' should be the third principle of natural justice.

In written submissions of the appellant dated 02nd November 2018, at page 10, it is stated, that "Not required to give a hearing before dismissal of an appeal filed contrary to mandatory provisions of the TAC".

The appellant, in page 21, paragraph 9.11 of its Final Written Submissions has referred to the case of **Ganeshananthem vs. Goonewardene and other, 1984(1) SLR 319**, to quote from the dicta of Ranasinghe J., (as he then was) to highlight the importance of the rule audi alteram partem.

The position of the appellant is that it should have been heard prior to the rejection of its appeal on 23rd July 2012. However, Ranasinghe J., was in the minority in that judgment.

Mrs. Vivionne Gunawardena vs. Hector Perera, Officer in Charge, Police Station, Kollupitiya and others S.C. Application 20/1983 was an application filed in respect of an alleged violation of a fundamental right, where Mrs. Vivionne Gunawardena alleged, among other things, that she was unlawfully arrested by the OIC of Kollupiya Police Station. The IGP, the 02nd respondent filed an affidavit from one Vinayagam Ganeshananthem, Sub Inspector, to the effect that he and not the 01st respondent who arrested Mrs. Vivionne Gunawardena because she had no "permit" to go in a procession. Although Mrs. Vivionne Gunawardane countered this position, the Supreme Court consisting of a three Judge bench did not believe her, but believed the affidavit of Vinayagam Ganeshananthem and decided that the petitioner's fundamental rights have been violated as Vinayagam Ganeshananthem is "guilty" of unlawfully arresting her.

Vinayagam Ganeshananthem then petitioned to the Supreme Court requesting to set aside the said decision of the Supreme Court itself, as he was only a witness (on affidavit) and he was not informed before finding him "guilty" and therefore the rule audi alteram partem is violated. This second case was decided by a Seven Judge bench of the Supreme Court, including the incumbent learned Chief Justice. The decision was divided 05 to 02 and the majority decided against Vinayagam Ganeshananthem.

The appellant cites a better case, **Cooper vs. Wandsworth Board of Works (1863) 143 ER 414** at page 20, paragraph 10.14 of the said written submissions, but as this Court recollects, the oft quoted example of the God and Adam was not uttered in that case [as the said written submission claims] but, the ancient case in which it was uttered in 1723 was mentioned in the unreported case of **Fountaine v. Chesterton,** by Megarry J. In John vs. Rees and others, 1969, Chancery Division. Meggary J., referring to the above judgment said as follows,

> ""....**Accordingly, I must consider what are the principles of natural justice which prima facie are applicable, and whether or not there is anything to oust their application.** In doing this, it is convenient to refer

to a case concerning an avowed expulsion from a political party which came before me some three weeks after the conclusion of the argument in this case, namely, **Fountaine v. Chesterton.** It may be that there is other authority on the point that I have in mind: but none was cited to me in that case or in this. The decision was briefly reported in "The Times" on August 20, 1968, and 112 S.J. 690: but I gather from the asterisk attached to the latter report that no full report is likely to appear, at any rate in the Weekly Law Reports. Accordingly, it may be convenient if I set out as best I can from my notes the passage in that judgment which I have in mind".

Then His Lordship further referring to what was said in Fountaine vs. Chesterton, said,

"**The expression 'the principles of natural justice' is, I think, now a technical term. As Maugham J. pointed out in Maclean v. Workers' Union [1929] 1 Ch. 602, 624, among most savages there is no such thing as justice in the modern sense. In a state of nature, self-interest prevails over any type of justice known to civilisation; the law of the jungle is power, not justice. Nor am I clear what the word 'natural' adds to the word 'justice.' It cannot be intended to indicate the antithesis of 'unnatural justice,' which would indeed be an odd concept; <u>I imagine that it is intended to suggest justice that is simple or elementary, as distinct from justice that is complex, sophisticated and technical</u>**.

And also,

"When a member of a university was deprived of his degrees without being given an opportunity to defend himself, Fortescue J. said: 'The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. Adam (says God)

> where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also': Rex v. Cambridge University (1723) 1 Stra. 557, 567".

What was said in **Cooper vs. Wandsworth Board of Works (1863)**, which was decided in the Court of Common Please by Earl C. J., was,

> ""I cannot conceive any harm that could happen to the district board from hearing the party before they subjected him to a loss so serious as the demolition of his house; but I can conceive a great many advantages which might arise in the way of public order, in the way of doing substantial justice, and in the way of fulfilling the purposes of the statute, by the restriction which we put upon them, [189] that they should hear the party before they inflict upon him such a heavy loss. … this board was not justified under the statute, because they have not qualified themselves for the exercise of their power by hearing the party to be affected by their decision": p. 417-418

The great object, behind the rules of natural justice is to arrive at the correct decision. Audi alteram partem, or hear the other side, means to gather all relevant information. But such gathering of information will not, often, make a correct decision if the deciding authority is not impartial. Hence, arises the rule nemo judex in causa re sua, no one be the judge of his own cause.

Thus, the 'judicial process' requires the allowing of **the free inflow of all facts and circumstances the presence of which is necessary to arrive at the right decision** and **an unfettered ability to discern good from evil or the ability to take independent and unbiased decisions.** It was also said that the **ability to discern good from evil is not what anybody and everybody think good and evil, because it is so connected with the rationality of human mind** for **it is that which arises by cause following effect, reason.**

In refusing to list the appeal of the appellant on 23rd July 2012 and in persistently refusing to re list the same, neither the Secretary to the Tax Appeals Commission, nor the Tax Appeals Commission, if in fact it directed the Secretary as claimed, have acted as above.

Furthermore, the Secretary to the Tax Appeals Commission and or as the Secretary has claimed, the Tax Appeals Commission, has sought only the views of the Commissioner General, with regard to re listing and apart from receiving the letter of the appellant dated 20th January 2012 and 27th January 2012, has not considered the views of the appellant, which is also a violation of the basic procedural rights of the appellant.

In the circumstances, the Questions of Law are answered in favour of the appellant. This Court is of the opinion that the appellant has complied with section 7(1) proviso (b) of Tax Appeals Commission Act, in respect of providing the value of 25% of the tax assessed by the Commissioner General.

Hence, this Court holds that the decision of the Secretary to the Tax Appeals Commission dated 23rd July 2012 is bad in law, a nullity and without jurisdiction and hence set aside.

Hence, further this Court sets aside all steps taken by the said Secretary after the sending of the letter dated 23rd July 2012.

The case is remitted to the Tax Appeals Commission, with the above opinion of this Court to hear and determine the same according to law.

Judge of the Court of Appeal.

Hon. Sasi Mahendran J.,

I agree.

Judge of the Court of Appeal.