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. Tax 36/2014

Tax Appeals Commission Appeal No. TAC/IT/037/2013

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: 31.10.2018, 09.12.2019 and 22.09.2022 by the Appellant.

29.10.2018 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.
>
> 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.

Unlike in the appeals Nos. Tax 41/2014 and Tax 40/2014, the earlier set of written submissions of the respondent, dated 29th October 2018 has not taken up the position that a case stated will not lie, since there is no determination by the Tax Appeals Commission on the substantial question. Hence, actually, the aforesaid page 07 paragraphs 10,11 and 12 of the written submissions dated 15th December 2022 are superfluous and appears to be so included as written

submissions in all cases were prepared together. The respondent in this appeal has not taken up, on an earlier occasion, like in the aforesaid cases, the objection based on the **Commissioner of Inland Revenue vs. Koggala Garments (Pvt) Ltd.**, decided on 05.04.2017 in Tax 1/2008.

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 decision of the Commission** and the amount of the tax in dispute where such amount exceeds five thousand rupees and the party requiring the Commission to state such case shall transmit 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 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) confirm, reduce, increase or annul **the assessment determined by the Commission,**

(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.

It was on 12th July 2013, the appellant submitted its petition of appeal to the Tax Appeals Commission.

On 12th July itself, the appellant provided a Letter of Guarantee from the Commercial Bank of Ceylon PLC to the value of Rs. 3,263,666/- [wrongly stated at page 9 of the final written submissions of the appellant as Rs. 3,263,6666/-].

On 18th July 2013 the Secretary to the Tax Appeals Commission has written to its Chairman stating that the appellant has preferred an appeal as required under section 7(1) of the Tax Appeals Commission Act and requesting to fix a date for hearing.

On 30th July 2013 the Secretary to the Tax Appeals Commission has written to the appellant informing that the hearing has been fixed for 21st January 2014. The said date is after 06 months from 18th July 2013.

But the Secretary to the Tax Appeals Commission has written on 17th January 2014, to the appellant that the Tax Appeals Commission will not take up the appeal for hearing on 21st January 2014, since the appellant had not complied with the requirement of section 7 of the Tax Appeals Commissions Act and to settle it with the Commissioner General of Inland Revenue.

In Tax 41/2014 and Tax 40/2014, the Secretary to the Tax Appeals Commission wrote letters on 10th February 2014, which was 02 days after the submission of the petition of appeal [because, those 02 days were the weekend, so almost "by return of post", as it is said] because at that time the matter with regard to the deposit of 25% has been known.

On 22nd January 2014, GAJMA & Co., the authorized agent of the appellant has written to the Tax Appeals Commission stating that as per the Reasons for the Determination received by letter dated 13th July 2013 by the Commissioner General, the gross tax payable is Rs. 20,933,885/- which is an incorrect and erroneous amount.

It was further stated that even as per the said wrong amount, the 25% is Rs. 5,233,472/- and as confirmed by the Commissioner General, the appellant has total credit available for Rs. 1,969,805/- and thus the appellant has complied with the requirement.

Notwithstanding that, the appellant on 03rd March 2014 has supplied an additional bank guarantee for Rs. 1,477,354/-.

On 14th March 2014, the Secretary to the Tax Appeals Commission has informed the appellant that the Tax Appeals Commission cannot accept the appeal.

The appellant, having narrated the facts with regard to the correspondence with the Secretary to the Tax Appeals Commission, states at page 26, paragraph 14 of the final written submissions that, "In any event, Secretary to the Tax Appeals Commission/Tax Appeals Commission cannot refuse to accept the appeal".

A similar paragraph 6.1 came relatively earlier in about page 14 in Tax 41/2014 and Tax 40/2014, because, as aforesaid, the appeals in those cases were rejected in limine by the Secretary herself.

This is where the respondent referred to, in page 18 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.

However, the statement in page 18, paragraph 75 of the said written submissions in this case that, "Thus, the power to not list is also implicitly given in the power to list an appeal", [which is in accord with the facts in Tax 41/2014 and Tax 40/2014] is not relevant in this case, in which, the appeal was in fact listed but just 04 days prior to the hearing it was informed that it will not be heard.

Anyway, 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.

Anyway, as aforesaid, in this appeal [unlike in Tax 41/2014 and Tax 40/2014] the appeal was, in fact, listed for hearing.

On 03rd March 2014 the appellant has provided an additional bank guarantee for Rs. 1,477,354/-.

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 23rd April 2013.

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. This is the Amendment by which the furnishing of the bank guarantee for 25% of the sum assessed was introduced by the Proviso to section 7(1) of the Act.

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.

As per the determination the total amount payable was Rs. 20,933,885/-.

It is not disputed that the total tax credit in the hands of the respondent for the benefit of the appellant is Rs. 1,969,805/-.

Hence the position of the appellant is that, when the respondent has to pay to the appellant Rs. 1,969,805/- and when the appellant has provided a bank guarantee for the balance amount, there is no requirement for the appellant to make a further payment. Hence, the appellant at the time of preferring the appeal has provided a bank guarantee for Rs. 3,263,666/-.

The appellant argues that the Commissioner General, in his determination has stated that there was income tax paid in a sum of Rs. 1,969,805/-. Hence it is also argued, that, the order of the Secretary to the Tax Appeals Commission is wrong.

Apart from a few minor differences between paragraphs 1,2 and 3 of the written submissions of the respondent in Tax 41/2014 dated 08th December 2022 and the written submissions dated 15th December 2022 in this case, the rest of the paragraphs up to paragraph 77 are identical. Paragraph 78 in the written submissions of Tax 41/2014 reads as follows,

> "78. Upon a careful perusal of the last page of the Reasons for Determination 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. 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".

Hence, despite a promising difference in the opening few words in the secondly reproduced paragraph 18, it has come to the same as the first even in figures. The figures are not the only difference between the facts in Tax 41/2014 and this case.

But there is a difference in paragraphs 81 and 82 in this case, which read as follows,

> "81. In this instant case, the tax payer has unilaterally taken a decision that the amount that is set out by the CGIR is incorrect or is not payable since there are tax credits due. The amount of 25% of the sum assessed HAS TO BE PAID IRRESPECTIVE OF ANY TAX CREDITS OR OTHER MONEY TO BE REFUNDED OR RETURNED OR CREDITED BY THE STATE. First the 25% deposit should be made and then, tax credits should be discussed".
>
> "82. It is clear that the amount of tax credits also varies and therefore, this CANNOT be a substitute for the mandatory pre condition of paying the 25% deposit".

Paragraph 83 also is different. It says,

> "83. The sum assessed is Rs. 20,933,885/-, whereas the sum of the 25% deposit payable as assessed/stated is Rs. 5,233,471/-".

Paragraph 83 of the former [Tax 41/2014] corresponds to paragraph 84 of the latter [this case] and this goes on until paragraph 86 [former] and paragraph 87 [latter]. Paragraph 87 of the former speaks about the providing of a bank guarantee for Rs. 27,959,666/-. Paragraph 88 of the latter speaks about a providing of a bank guarantee for Rs. 1,969,805/-. This has happened due to an insertion of a wrong figure, because the position of the appellant is that it never provided a bank guarantee for Rs. 1,969,805/-, but it has tax credit for that amount.

The paragraph corresponding to 88 in the former is omitted in latter. Hence, paragraphs in former and latter again tallies from 89 onwards, having the same contents except for minor differences. These differences are regarding figures, etc. This continues until paragraph 91, except that the said paragraph refers to tax credit.

What should correspond to paragraph 92 in the former is omitted. In its place is the following paragraph 92 in the latter.

> "92. However, the deposit of the bank guarantee was done AFTER the appeal was not allowed".

Now in paragraph 91, [this case] the only bank guarantee the respondent has spoken about is the bank guarantee of Rs. 3,253,666/- [which should correctly be Rs. 3,263,666/-]. This bank guarantee was provided at the time of filing the appeal and not after it was disallowed.

The argument of the appellant is the bank guarantee for Rs. 3,263,666/- + tax credit it has as per the determination of the Commissioner General himself, which is Rs. 1,969,805/-, both available at the time of filing the appeal, the aggregate of which is Rs. 5,233,471/-, which is the amount to be deposited according to the respondent.

This factual inaccuracy in paragraph 92 of the written submissions in this case has occurred by following paragraph 93 of the former written submission [Tax 41/2014] to draft paragraph 92 of the written submissions of this case.

Hence, paragraph 94 of the former corresponds to paragraph 93 of the latter. This is to say that there is no procedure to accept a bank guarantee after the appeal was disallowed. The bank guarantee provided by the appellant in this case is not that for Rs. 3,263,666/-, but for Rs. 1,477,354/- on 03rd March 2014. Even if this is not accepted, or cannot be accepted, as the respondent argues, Rs. 3,263,666/- (initial deposit) + Rs. 1,969,805/- (tax credit) amounts to Rs. 5,233,471/- (the amount to be deposited as per the respondent). Furthermore, if one

accepts the argument of the respondent in paragraph 75 of the said submission the power to disallow comes with the power to allow.

Thereafter paragraph 95 of the former corresponds to paragraph 94 of the latter and paragraph 96 of the former corresponds to paragraph 95 of the latter.

There is no paragraph in written submissions of this case corresponding to paragraphs 97 to 103, in the former [Tax 41/2014] because those paragraphs related to a letter sent by the Commissioner General dated 9.4.2014 by which he confirmed a certain amount as 25% deposit, which was the same amount the appellant has deposited at the time of the filing of the appeal in that case. There is no such letter sent by the Commissioner in this case.

Again, the respondent commences following paragraph 103 of the former for paragraph 96 of the latter, onwards. Thus, 104 to 97, 105 to 98, 106 to 99, 107 to 100, 108 to 101, 109 to 102, 110 to 103 and 111 to 104.

Paragraph 108 of the former refers to a letter dated 10th February 2014, by which the Secretary to the Tax Appeals Commission initially rejected the appeal in Tax 41/2014. The tenor of these paragraphs is that the appellant without challenging that letter challenges a letter dated 25th July 2014 because, it is beneficial for the appellant to challenge that letter, as the Commissioner General's letter in between, dated 9.4.2014 is to confirm that the initial deposit of the appellant is correct.

The letter referred to in paragraph 108 of the former is dated 10th February 2014. In the corresponding paragraph 101, in this case, it is stated that the actual refusal of appeal was by an earlier letter, without giving the date. The date is dated 17th January 2014. But the difference in the former case [Tax 41/2014] and the present case is that in between 17th January 2014 and 25th July 2014 [although in this case too there is a letter by the Secretary to the Tax Appeals Commission dated 25th July 2014] that there is no letter by the Commissioner General similar to the letter dated 9.4.2014 in the former case. Hence, as submitted in paragraph 111 of the

former and the corresponding paragraph 104 in the latter, [although there could have been in former] there is no additional benefit gained by the appellant challenging letter dated 25th July 2014. Hence, the appellant in this case does not challenge letter dated 25th July 2014 alone but challenges the procedure that started by the letter of the Secretary to Tax Appeals Commission dated 17th January 2014 onwards.

Instead of paragraph 112 of the former, which should have corresponded with paragraph 105 of the latter, paragraph 114 of the former corresponds paragraph 105 of the latter, which is because paragraphs 112 and 113 of the former, which are mainly on the correction made by the Commissioner General are omitted.

This is what paragraph 105 of the written submissions of this case says,

> "105. Even though it is not specifically stated, the ancillary powers to ensure that the mandatory requirements are met and if not, to take the necessary consequential action reposes with the person on whom the powers are vested by statute. Wade in "Administrative Law" 9th edition at page 213 states that "A statutory power will be construed as impliedly authorizing everything which can fairly be regarded as incidental or consequential to the power itself". Therefore, since the mandatory condition of notice was not sent by the appellant, the prerequisites set out in section 7(2) had not been met and therefore, the Secretary has the power to refuse to list the appeal".

Since, this paragraph was taken from paragraph 114 of written submissions of Tax 41/2014 there are defects. In this case, the Secretary to the Tax Appeals Commission did not refuse to list the appeal for hearing. It was listed and a few days before the hearing on 17th January 2014 it was informed that it will not be heard. In any event, with regard to the passage from Professor Wade, what has to be said is that, more than the ancillary power of not listing what is material in this case was the argument of the appellant that as a result of the initial bank

guarantee and available tax credit the appellant has fulfilled condition under section 7(1) Proviso (b) of the Tax Appeals Commission.

Thereafter, paragraph 115 of the former corresponds with paragraph 106 of the latter, 116 to 107, 117 to 108, 118 to 109 and since 119 and 120 of the former are omitted, 121 corresponds to 110. Then 122 corresponds to 111, 123 to 112 and 124 with some differences to 113.

It may be noted, that the "heading" on paragraph 124 of the former, as well as, 113 of the latter 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 113 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. 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 25th July 2014 [which is a similarity with cases Tax 41/2014 and Tax 40/2014] 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.

Paragraphs 125 to 134 in the former, which were under the "heading" "The appeal has not been filed on time", have been omitted.

Paragraph 135 of the former under the "heading" "The decision challenged is erroneous", corresponds to paragraph 114 of the latter and paragraph 136 of the former to paragraph 115 of the latter. However, in paragraph 115 in the latter the date of not allowing the appeal is given as 10th February 2014 which is not a material date in this case.

Paragraph 137 of the former is omitted. Paragraph 138 of former corresponds paragraph 116 of latter repeating the mistaken date 10th February 2014. Paragraph 139 of the former, about alleged misleading and misrepresenting, corresponds to paragraph 117 of the latter.

Paragraphs 140 to 151 in the former refer to distinguishing the judgment in Tax 29/2014. So are paragraphs 118 to 129 of the latter. 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 20 paragraph 10 of the final written submissions, that, in letters of the Secretary to the Tax Appeals Commission dated 17th January 2014, 14th March 2014 and 25th July 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, which was introduced by the amendment which came into effect on 24th April 2013 by Tax Appeals

Commission (Amendment) Act No. 20 of 2013 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.'

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.

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It can no longer be viewed as a mere privilege but rather a legitimate expectation of citizens, affected by the far-reaching decisions of administrative 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 respondent dated 29th October 2018, an objection has been taken that the appeal has not been submitted within 30 days of the receipt of the reasons for determination. But the envelop shows that they have been posted on 14th June 2013. The petition of appeal has been submitted on 12th July 2013. Hence the said objection cannot succeed.

The appellant, in page 33, paragraph 15.10 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 17th January 2014. 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; I imagine that it is intended to suggest justice that is simple or elementary, as distinct from justice that is complex, sophisticated and technical**.

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 hear the appeal of the appellant by letter dated 17th January 2014 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 22nd January 2014 and on 24th July 2014, 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 the providing a deposit 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 17th January 2014 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 17th January 2014.

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.