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. 41/2014

Tax Appeals Commission Appeal No. TAC/IT/050/2023

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: 07.09.2018 and 22.09.2022 by the Appellant.

07.09.2018 and 08.12.2022 by the Respondent.

Decided on: 28.02.2023

D.N. Samarakoon, J

The strongest point in this appeal, for the Appellant, that under section 7(1)(a) Proviso, of the Tax Appeals Commission Act, No. 23 of 2011, the 25% of the tax payable was wrongly calculated by the Commissioner General of Inland Revenue, the respondent, is not explicitly argued, 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 08.12.2022, 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.

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 07th September 2018, at page 17, paragraphs 93 and 94,

> "93. In the absence of a decision of the Commission, there can be no case stated and therefore the Case Stated sent by the TAC cannot be entertained as it is contrary to the provisions of section 11A of the TAC Act.
>
> 94. This view has further been upheld in the case of the **Commissioner of Inland Revenue vs. Koggala Garments (Pvt) Ltd.**, decided on 05.04.2017 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 this limited extent, the Koggala Garments case is quoted by this Respondent to state that Your Lordships' Court has held that even an interim order by the Commission has to be challenged by way of writ". [the emphasis in the said Written Submissions]

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.

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 07th February 2014, the appellant submitted its petition of appeal to the Tax Appeals Commission.

On 07th February itself, the appellant provided a Letter of Guarantee from the Commercial Bank of Ceylon to the value of Rs. 8,766,848/- being 25% of the total tax payable as per the determination.

On 10th February 2014, the Secretary to the Tax Appeals Commission has informed the appellant, that, the Commission is not in a position to accept the papers relating to the appeal, since appellant has not complied with 25% requirement. It further stated that if there is any dispute regarding the compliance of section 07 of the Tax Appeals Commission Act, it must be settled with the Commissioner General of Inland Revenue.

Can the secretary of her own, or with the concurrence of the Commission do so?

The appellant at page 13, paragraph 6.1 in the final written submissions, addressing the obligation of the secretary, refers to section 9.(1) of the Tax Appeals Commission Act, which is as follows,

> "9(1) Withing thirty days of the receipt of an appeal, the secretary to the Commission shall fix a date and time and place for the hearing of the appeal and shall give forty two days notice thereof, both to the appellant and to the Commissioner General or the Director General, as the case may be".

This is where the respondent referred to, in page 18 paragraph 75 of its written submissions dated 08th 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.

It may be noted, that, on 05th March 2014 [that is, after the letter of the Secretary dated 10th February 2014], GAJMA & Co., (authorized representative of the Appellant) has written to the Secretary, enclosing (i) a copy of the relevant page of the reasons for the determination [of Ms J. A. R. Perera, Deputy Commissioner] [because the Appellant has to deposit a sum of 25 per centum of the tax assessed] (ii) a copy of the Bank Guarantee for Rs. 8,766,848/- dated 07th February 2014 and (iii) the Bank Guarantee for Rs. 9,295,577/- dated 04th March 2014 requesting to list the appeal. This was done to supply the Bank Guarantee, which the Secretary was of the view that it has not been supplied, at the time of tendering the petition of appeal on 07th February 2014.

With regard to the said additional supply of Bank Guarantee, the Respondent submits at page 22, paragraph 94 of the Written Submissions dated 08th 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 Secretary could be able to reverse the rejection 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 Rs. 35,067,390/-

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.

Twenty five per centum of Rs. 35,067,390/- is Rs. 8,766, 847.50. On 07th February 2014, when the Appellant submitted the appeal, it provided a Letter of Guarantee from the Commercial Bank of Ceylon PLC for Rs. 8,766,848/-, which is twenty five per centum of the sum assessed by the Commissioner General as tax.

Then, why was the appeal rejected?

The reason is that, the sum assessed by the Commissioner General of Inland Revenue was inaccurately stated at the last page of the Reasons for Determination at page 18 of the brief, to be, Rs. 49,712,201 + 22,537,499 (penalty) the total of which is Rs. 72,249,700/- of which 25% is Rs. 18,062,425/- .

Rs. 18,062,425/- was the amount which was stated by the Commissioner General of Inland Revenue as 25% referred to in section 7(1) Proviso (b) of the Tax Appeals Commission Act.

It is stated at the end of the determination of Ms J. A. R. Perera, Deputy Commissioner, that,

> "For the reasons mentioned above, I determine that the appellant company is not eligible for exemption under section 16 or 17 of the Inland Revenue Act. Accordingly 25% of the tax payable is Rs. 18,062,425/-.
>
> Tax Rs. {(49,712,201 + Penalty Rs. 22,537,499) x 25%}".

The Respondent argues, that this, is the amount to be deposited by the tax payer if he wishes to proceed with the appeal, <u>even if that is wrong</u>.

[See page 20, paragraph 78, page 21, paragraph 83 and page 21, paragraph 84 of the written submissions of the respondent dated 08th December 2022]

In fact, the said paragraphs 83 and 84 reads,

> "83. This amount is NOT OPEN TO INTERPRETATION".
>
> "84. Even if the CGIR is wrong this amount has to be deposited".
>
> [Emphasis added in respondent's said written submissions]

There is no need for the words, "Even if" in paragraph 84 above, because the Commissioner General of Inland Revenue was, in fact, wrong.

Page 22, paragraph 97 of the said written submissions of the respondent says, as follows,

> "97. However, the tax payer appellant is relying on a letter sent by the CGIR dated 9.2.204 [which should be 9.4.2014, see page 23, paragraph 99] 2 months after the dismissal of the appeal, which has been sent amending the 25% deposit to Rs. 8,766,484/-. (page 127) However, this was NOT the tax assessed by the CGIR at the time the appeal was to be filed in fulfilment of the condition precedent of the provisions of section 7(1) of the Act. However, by this time the appeal was dismissed. There is no power to reopen an appeal".

Rs. 8,766,484/- therefore is the correct amount to be deposited, as per the Commissioner. The appellant on 07th February 2014 when presenting the petition of appeal has provided a Bank Guarantee for Rs. 8,766,848/.

But, what the respondent now argues is that, although this is the correct amount, the appellant should have deposited the wrong amount given by the Commissioner, because section 7(1) Proviso (b) says 25% as assessed by the Commissioner. The respondent, further, argues, that by this time the appeal was dismissed and there was no power to reopen an appeal. This is contrary to respondent's own argument at paragraph 75 of the said written submissions, referring to the judgment of Arjuna Obeysekera J.

This argument, that whatever be the amount, even if [and in this case, in fact] wrongly assessed by the Commissioner General, must be deposited by a tax payer, if he wants to succeed in getting his appeal listed before the Tax Appeal Commission, reminds this Court of the 1616 A. D. case of "In Commendum" decided by Sir Edward Coke, Chief Justice of the King's Bench[1].

[1] The *in commendam* writ was a method of transferring ecclesiastical property, which James used in this case to allow Richard Neile to hold his bishopric and associated revenues without actually performing the duties. On 25 April 1616 the courts, at Coke's bidding, held that this action was illegal, writing to the king that "in case any letters come unto us contrary to law, we do nothing by

When the wrong assessment of 25% was in force too, that was, prior to 09.04.2014, the appellant has attempted to furnish the purported deficiency by providing an additional bank guarantee for Rs. 9,295,577/- on 04th March 2014. It is because what was deposited on 07th February 2014, Rs. 8,766,848/- and Rs. 9,295,577/- is Rs. 18,062,425/-, which is the amount wrongly assessed by the Commissioner as 25% deposit, see page 20, paragraphs 78 and 81, page 21, paragraph 85, page 22, paragraph 91 and page 23, paragraph 99 of the said written submissions of the respondent.

At paragraph 85, the respondent says,

> "The 25% payable amount as assessed/calculated by the CGIR in the reasons at page 18, **rightly or wrongly**, is Rs. 18,062,425..." [Emphasis added in this judgment]

At paragraph 99, respondent states,

> "The appellant places much reliance on the letter dated 9.4.2014 at page 127 of the brief by the CGIR to the TAC correcting the amount of 25% payable by bank guarantee. The correction states that the amount should be only 25% of the tax as determined and should not include the penalty".

The penalty was included, in calculation of the amount of 25% deposit, by the Commissioner. The appellant on 07th February 2014 deposited the correct amount. But the appeal was rejected on 10th February 2014. The Commissioner corrected his error by letter dated 09.04.2014. The argument now is that the appeal has already been rejected. It is interesting to note the letters issued by the Secretary of the Tax Appeals Commission.

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such letters, but certify your Majesty thereof, and go forth to do the law notwithstanding the same".[122] James called the judges before him and, furious, ripped up the letter, telling them that "I well know the true and ancient common law to be the most favourable to Kings of any law in the world, to which law I do advise you my Judges to apply your studies". While all the other judges "succumbed to royal pressure and, throwing themselves on their knees, prayed for pardon", Coke defended the letter and stated that "When the case happens I shall do that which shall be fit for a judge to do".[i] Edward Coke - Wikipedia

The letter dated 10th February 2014 addressed to the appellant says,

> "Since you have not complied with the requirement of section 7 of the Tax Appeals Commission Act No. 23 of 2011 as amended, namely, the provision of a bank guarantee or cash deposit of the sum as assessed by the Commissioner General of Inland Revenue, we are not in a position to accept your papers relating to the appeal.
>
> If you have a dispute relating to the complying of section 7 of the Tax Appeals Commission Act, you have to settle it with the Commissioner General of Inland Revenue".

When the appellant provided the additional bank guarantee for Rs. 9,295,577/- by 04th March 2014, the Secretary, Tax Appeals Commission has written a letter dated 14th March 2014, which says,

> "As I have already informed you by my letter dated 10.02.2014, you have not forwarded a required bank guarantee or made a cash payment for a sum as payable in terms of section 07 of the Tax Appeals Commission Act No. 23 of 2011, as amended by Act No. 4 of 2021 and 20 of 2013...
>
> You have not complied with the above mentioned requirements within the stipulated period of thirty days from the date of the receipt of reasons for the determination from the Commissioner General of Inland Revenue, as required in terms of section 07 of the Tax Appeals Commission Act No. 23 of 2011, as amended. Therefore I am directed by the Commission to inform that your appeal has not been accepted by the Tax Appeals Commission".

Then the Secretary to the Tax Appeals Commission has written a letter dated 07th May 2014, to GAJMA & Company, the authorized representative of the appellant, which says,

> "...This refers to your letter dated 29th April 2014, requesting the Tax Appeals Commission to hear this case in terms of section 9(1) of the Tax Appeals Commission Act No. 23 of 2011.

On the directions of the Tax Appeals Commission, by my letters dated 10.02.2014 and 14.03.2014 I have informed the appellant that the above appeal has not been accepted by the Tax Appeals Commission for the reasons set out in the said letters.

In the circumstances, the Tax Appeals Commission has directed me to inform you that the Commission is unable to fix this case for hearing for the following reasons,

(i) Initial appeal has been made without sufficient bank guarantee and therefore, not accepted by the Tax Appeals Commission,
(ii) In any event, the appeal thereafter was out of time,
(iii) According to the records maintained by the Commission this appeal has been placed in the rejected list of appeals and the Secretary to the Treasury has been informed that, it was a rejected appeal in the progress report furnished by the Tax Appeals Commission".

By the time of the issuance of this last said letter, the Commissioner has informed the Tax Appeals Commission by letter dated 9.4.2014, that the correct amount of 25% deposit is same as the amount for which a bank guarantee has been provided by the appellant. This is what in the last said letter is referred to as "initial appeal has been made without sufficient bank guarantee".

It has not occurred to neither the Secretary nor to the Tax Appeals Commission, that the said statement is contradicting what the Commissioner informed by letter dated 9.4.2014, or perhaps, that is why the letter says, "in any event, the appeal thereafter was out of time".

The last letter in the brief, dated 25th July 2014 is also on the same tenor.

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.

The decision to reject your application was made by the previous Commission. Therefore, I am instructed to inform you to make an appropriate application to the Court of Appeal".

In the purported study, the Tax Appeals Commission has asked the person who initially miscalculated the 25% amount, whose error caused the rejection of the appellant's appeal, whether the said appeal should be re listed or not and as per the said letter, the person who miscalculated the said amount has said there is no need to do so.

The Secretary and the Tax Appeals Commission, on whose directions he has written, in all the letters except the initial letter dated 10th February 2014, has adduced, "being out of time", inclusion in the progress report to the Treasury Secretary as a "rejected appeal" and finally the previous Commission which rejected the appeal "not being in existence", in addition to the alleged opinion of the Commissioner, who mistakenly calculated an amount as 25% of deposit, to reject and not to re list the appeal.

It appears to this Court, that the maxim, actus curie neminem gravabit, [an act of the court shall prejudice no man] must apply to the act of the Secretary to the Tax Appeals Commission too.

In the article, "**Common Sense and Law**", the writer F. K. H. Maher said, "Even fourty years ago Lord Atkin caused no surprise when he finished his great speech in **Donoghue vs. Stevenson, [1932] A. C. 562, 599**, with words expressing satisfaction that '**the law in this matter, as in most others, is in accordance with sound common sense**".

On 07th February 2014, at the time of the filing of the petition of appeal, the appellant has tendered a bank guarantee for Rs. 8,766,848/-.

On 09th April 2014, Ms. J. A. R. Perera, Deputy Commissioner has confirmed Tax Appeals Commission, that the correct amount to be deposited is Rs. 8,766,848/-.

In the meantime, the Secretary to the Tax Appeals Commission, has even without receiving any instructions from the Tax Appeals Commission, written to the appellant on 10th February 2014, that its appeal cannot be accepted and further written on 14th March 2014, upon the appellant supplying the purported deficiency, on the instructions of the Tax Appeals Commission that the appeal has not been accepted.

On 07th May 2014, the Secretary to the Tax Appeals Commission writes to the Authorized Representative of the appellant that, the appeal cannot be accepted. The first two reasons given are, (i) initial appeal being filed without sufficient bank guarantee and (ii) thereafter the appeal being out of time.

The Secretary to the Tax Appeals Commission was made to think (i) above due to the wrong calculation by the Deputy Commissioner. Hence, the rejection of the appeal was wrong. The effect of the letter of the Deputy Commissioner to the Tax Appeals Commission dated 09th April 2014 was to make that initial deposit correct. But, the Secretary to the Tax Appeals Commission and the Tax Appeals Commission clings to what is now confirmed as wrong and hence a nullity, to make the appeal unacceptable and based on that wrong decision not to accept the appeal, makes it out of time. The appeal being included in a 'progress' report to the Treasury Secretary as a rejected appeal and the former Tax Appeal Commission not in existence, the former which also stems from the wrong decision to reject the appeal and the former and latter both which are also beyond the control of the appellant, are added in the course to buttress the initial wrong action.

This situation reminds this Court of the case of **Choptiany et al vs. The King, 2022 TCC 112**[2], decided in October 2022[3] in the Dominion of Canada.

It must be said, however, at the outset that the facts in that case where the three tax payers, who have been deceived by certain Tax Consultancy firms, but nevertheless, Judge Patrick Boyle, due to the conduct of the Canada Revenue Agency, which the Judge described as "outrageously misleading and inappropriate, took the extraordinary measure of allowing the appeals without having a trial on the merits of the case, although not similar to the present case in toto, what was said by Jeff Pniowsky, the lawyer who represented the three appellants, that Boyle's decision reminded him of a line from the film "Spiderman", "**With great power comes great responsibility**", also applies to this case.

The tax payer appeals from the decision of the assessor to the Commissioner, who will be his opponent, if he appeals from the decision of the Commissioner and in this case, the Tax Appeals Commission, asks for the views of the Commissioner as the letter dated 25th July 2014 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" and whereas Commissioner's letter dated 09th April 2014 clearly showed that the initial deposit was the correct amount, yet rejected the appeal, in the process jeopardizing, nay even violating the basic procedural rights of the appellant.

There is another thing which prejudiced the tax payer. After the appellant appealed to the Commissioner General, the determination of the Deputy Commissioner was dated 04th November 2013. This gives the computation of the tax liability and says Total Payable is Rs. 35,067,390/-. Twenty five per

[2] **By courtesy of Nalaka Weerasinghe Esqr., in Toronto, Dominion of Canada**

[3] Choptiany Et. Al. v The King, 2022 TCC 112: The Tax Court Of Canada Issues Scathing Rebuke Of CRA's "Outrageously Misleading And Inappropriate" Litigation Tactics In Tax Dispute Involving Gross-Negligence Penalties - Tax Authorities - Canada (mondaq.com)

centum of this is Rs. 8,766,847.50. This is what the appellant deposited at the time of preferring its appeal to the Tax Appeals Commission. It is after the appellant indicating its intention to appeal to the Tax Appeals Commission that the Deputy Commissioner sends her reasons for the determination. It was on 25th November 2013 that the appellant indicated to the Secretary to the Tax Appeals Commission, its intention to appeal. The respondent has stated at page 19, paragraph 77 of its written submissions dated 08th December 2022, that, "the reasons are sent once a tax payer communicates to the TAC that he is aggrieved by the decision of the CGIR and upon the TAC requesting the CGIR to send reasons".

The reasons sent are dated 02nd January 2014, nearly 2 months after the determination. It was in the reasons that the Deputy Commissioner has stated, that, **"...Accordingly 25% of the tax payable is Rs. 18,062,425/-**.

This is not to question the procedure of Deputy Commissioner acting on behalf of the Commissioner sending reasons for determination only if the tax payer expresses its intention to appeal. It is true that the appeal has to be made within 30 days after receiving the reasons for the determination. But a determination being provided without reasons and reasons coming only at the time of preferring an appeal to the Tax Appeals Commission is more the reason that the Secretary to the Tax Appeals Commission grants an opportunity to rectify any error [although the error, in this case, was not on the part of the appellant] without rejecting the appeal the appellant not being heard. This is why it was said, "With great power comes great responsibility".

A Court does not have the power to give reasons, only if the litigant aggrieved appeals. But the statutory creature of the Commissioner of Inland Revenue may do so.

The writer, **Rose M.B. Antoine**[4] 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.

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)

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

Thus, giving reasons later too, affects basic procedural rights and in the present case, it is very likely, it contributed to the situation raised in this appeal.

The respondent has taken up an objection at paragraphs 125 to 134 of written submissions dated 08th December 2022, that the appeal has not been made within time.

The argument is that as the Tax Appeals Commission has received reasons of the Commissioner General on 09th January 2014, the appellant tries to contend that they were posted on 10th January 2014 and the appellant received them on 11th January 2014 [incorrectly stated as 11th February at paragraph 131 of the said written submission] the only evidence in the possession of the appellant being "an envelop of a letter posted by the CGIR", [as stated in paragraph 131 of the said written submissions] the appeal is not within time, which is as respondent argues, within 30 days of the receiving of reasons.

The argument is that, there is nothing to prove that the said envelop contained reasons for determination. It cannot be reasonably expected, as this Court sees, a remark be made on the face or the back of an envelop as to what it contains. In any event, the respondent too admits, at paragraph 127 of the said written submissions that reasons were received by the Tax Appeals Commission on 09th January 2014. Hence, it is probable, that, it was posted on the following day and received on the next day. The argument in paragraph 130 of the said written submission, that, it is unrealistic that the appeal was filed on 07th February 2014 since the bank guarantee too is on the same date cannot be accepted. Furthermore, by 10th February [since 08th and 09th were the weekend] the secretary to the Tax Appeals Commission has rejected the appeal. Hence, too it must have

been received by the Tax Appeals Commission on 07th February 2014. Therefore, the said objection of the respondent cannot be accepted.

The appellant, in page 18, paragraph 10.10 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 10th February 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; <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 <u>should hear the party before they inflict upon him such a heavy loss.</u> … 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 10th February 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 29th May 2014 and a reminder dated 22nd 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 the requirement in section 7(1) proviso (b) of Tax Appeals Commission Act in respect of providing a bank guarantee for 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 10th February 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 10th February 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.