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

In the matter of an Application of a Case Stated under section 11A of the Tax Appeals Commission Act, No. 23 of 2011 as amended by Act, No. 20 of 2013.

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

Appellant

Case No. CA/TAX/0015/2015
Tax Appeals Commission
No. TAC/OLD/IT/026

Vs.

Cargills Food Services (Pvt) Ltd,
No. 40, York Street,
Colombo 01.

Respondent

Before : Dr. Ruwan Fernando J. &

M. Sampath K.B. Wijeratne J.

: Milinda Gunatilleke, P.C., ASG with Amasara Gajadeera, SC for the Appellant

Romesh de Silva, PC with N.R.Sivendran, Dushyanthi Jayasuriya and Fithama Hanifa for the Respondent.

Argued on : 09.12.2022

Written Submissions filed on : 13.03.2023 (by the Appellant)

27.02.2023 & 18.10.2018 (by the Respondent)

Decided on : 25.05.2023

Dr. Ruwan Fernando, J.

Introduction

[1] This is an appeal by way of a Case Stated against the determination of the Tax Appeals Commission dated 11.08.2015 annulling the assessment on the ground that the notice of assessment has not been issued in compliance with the statutory provisions of the Inland Revenue Act, No. 38 of 2000. The Appellant is the Commissioner General of Inland Revenue. The taxable period related to the appeal is the year of assessment 2006/2007. The assessor has however, referred to the year of assessment 2005/2006 as well in the letter of communication dated 02.09.2008 sent to the Respondent. A separate appeal was filed before the Tax Appeals Commission in respect of that year of assessment, and the connected appeal against that decision of the Tax Appeals Commission was taken up together with this in the Court of Appeal (Vide-CA Tax 0013/2016).

Factual Background

[2] The Respondent Cargils Food Services (Pvt) Ltd (hereinafter referred to as the Respondent) is a limited liability company incorporated under the provisions of the Companies Act, No. 17 of 1982, and is resident in Sri Lanka. It is a subsidiary of Cargills Food Procesessor (Pvt) Ltd. The Respondent submitted its return of income and claimed an exemption in terms of section 21G of the Inland Revenue Act, No. 38 of 2000 (as amended). The assessor by letter dated 21.08.2008 stated that the Appellant has failed to qualify for the exemption claimed under section 21G of the Inland Revenue Act (as mended) and assessed the Respondent accordingly. The assessor however, cancelled the said letter by letter dated 02.09.2008, and by the same letter dated 02.09.2008, the assessor communicated reasons for not accepting the return of income, but gave an opportunity to the Respondent to clarify the matters set out in the said letter stating that in the absence of a satisfactory response, the assessment will be made disallowing the exemptions claimed by the Respondent. The assessor received a reply from the

Respondent by letter dated 12.09.2008, but the assessor was not satisfied with such explanation and, referring to the letter dated 02.09.2008, and by letter dated 16.09.2008, the assessor confirmed the rejection of the return made by the previous letter dated 02.09.2008.

[3] The Respondent taxpayer appealed to the Commissioner-General of Inland Revenue against the said assessment, and the Commissioner-General of Inland Revenue by its determination confirmed the assessment and dismissed the appeal.

Appeal to the Tax Appeals Commission

[4] Being dissatisfied with the said determination of the Commissioner-General of Inland Revenue, the Appellant appealed to the Tax Appeals Commission. At the hearing of the appeal, the Respondent raised the following preliminary objection:

The notice of assessment is not valid in law for the following reasons:

a. No reasons were communicated to the Respondent by the assessor for not accepting the return;

b. The relevant section in the statute under which the notice of assessment was issued has not been mentioned in the notice of assessment.

[5] The Tax Appeals Commission (hereinafter referred to as the "TAC") by determination dated 11.08.2015 upheld the preliminary objections, and annulled the assessment for the following reasons:

1. The reasons were not communicated to the Appellant in writing for not accepting the return of income in terms of section 134(3) of the Inland Revenue Act, No. 38 of 2000, and as such, the notice of assessment is invalid and bad in law;
2. The assessor has failed to mention the relevant section or the provision under which such notice of assessment was issued. That is not a mistake that can be cured under section 164(1) of the Inland Revenue Act.

Questions of Law for the Opinion of the Court of Appeal

[6] Being dissatisfied with the said determination of the TAC, the Appellant appealed to the Court of Appeal and the TAC formulated the following questions of law in the Case Stated for the opinion of the Court of Appeal.

(1) Whether the Tax Appeals Commisssion which is the highest tax administrative body has jurisdiction to hear and determine the validity of an assessment. In the case of *A. M. Ismail v Commissioner of Inland Revenue* (Ceylon Tax Cases Column IV), Abdul Cader J. held the power to quash a notice or proceeding before the assessor is vested in court and therefore the court must be satisfied that the circumstance, justify the exercise of such jurisdiction.

(2) Has the TAC erred in concluding the notice of assessment issued as invalid and bad in law in view of mistakes in the notice of assessments. Regarding this it is to be told that in the case of *A. M. Ismail v Commissioner of Inland Revenue*, (Ceylon Tax Cases Volumn IV-page 179), Victor Perera J held "on an examination of this section, it is clear that the 'want of a form' or mistake' or 'defect' of 'omission' in the assessment itself or notice will not affect the validity of assessment if the assessment or notice is in substance and effect in conformity with or according to the intent and meaning of this law. Therefore, it necessarily follows that it is competent to a court to examine the validity of an assessment or notice and quash such assessment or notice on substantial ground where there has been no conformity with or where the same is not according to the intent and meaning of the law.

(3) Whether the Tax Appeals Commission was empowered to determine the appeal only on preliminary objections of the appeal preferred by the Appellant without giving due consideration to the main issues raised in the appeal.

[7] At the hearing, Mr. Milinda Gunatilleke, A.S.G. who appeared for the Appellant submitted that the determination made by the TAC is erroneous for the following reasons:

1. The TAC erred in fact and law that the assessor has failed to communicate reasons for rejecting the return filed by the Respondent. His submission was that the assessor rejected the return on the basis that the Respondent has not fulfilled the requirements of section 21G to be entitled to the exemption, and the assessor communicated his reasons to the Respondent

in a clear and comprehensive manner as to to why the Respondent was not qualified for the exemption under section 21G. He referred to the letter of the assessor dated 02.09.2008, and submitted that the assessor has set out reasons why the Respondent was not entitled to the exemption;

2. The TAC erred in its determination that the non-reference to the section renders the assessment invalid. His submission was that in terms of section 135 of the Inland revenue Act, No. 38 of 2000, the assessor has mentioned the amount of income and the amount of tax charged and therefore, the assessor has complied with the relevant requirements. He referred to section 164 of the Inland Revenue Act, No. 38 of 2000 and section 195(1) of the Inland Revenue Act, No. 10 of 2006 and submitted that notice of assessment will not be affected by reason of any failure to mention the section under which the notice of assessment was issued as it the substance and not the form that matters;

3. The TAC cannot annul an assessment purely on a procedural matter without going into the substantive questions of imposition of the tax payable.

[8] On the other hand, Mr. Romesh de Silva, PC, submitted that that the TAC determination cannot be set aside for the following reasons:

1. Even if all the questions of law are answered in favour of the Appellant, the determination of the TAC cannot be set aside since there was no question of law before this Court raised as to whether reasons should be given or reasons should not be given;

2. No reasons were given by the assessor in non-compliance with the mandatory provisions of the Inland Revenue Act, and therefore, the assessment cannot stand and it is bad in law.

3. The TAC had the jurisdiction and power to determine whether the reasons were or not given when the main matter of the assessment was not before the TAC, and it correctly did;

4. Even if the TAC did not have power, the Appellant's remedy should have been by way of writ and not a case stated, but the Appellant has chosen to come by way of case stated. The Appellant having followed the case stated method cannot now contend that there was no jurisdiction to the TAC..

Argument of the Respondent that there was no question of law before the Court of Appeal whether or not reasons were given by the assessor.

[9] An appeal by way of case stated is an appeal to a superior court to make a decision on the question of law arising in the stated case. It identifies the facts in issue, the relevant contentions of the parties, the findings of fact and ground for the determination, and, and the questions of law or jurisdiction on which the opinion of the Court of Appeal for resolution is sought. This type of appeal is known as an Appeal by way of case stated, meaning that an application is made by a party aggrieved by the decision to the same tribunal or court that made the decision, to state a case for the opinion of the Court of Appeal on a question of law. The appeal by way of case stated constitutes a distinct route of appeal and must be distinguished from any ordinary appeal or a judicial review.

[10] The legal scope of the appeal by way of case stated is set out in section 11A (1) of the TAC Act, which provides that either party who preferred an appeal to the TAC or the CGIR make an application requiring the TAC to state a case on a question of law for the opinion of the Court of Appeal. The marginal note of section 11A(1) clearly states "**Appeals on a question of law to the Court of Appeal**", referring to an appeal by way of case stated on a question of law to the Court of Appeal . Section 11A(1) of the TAC Act states:

> *(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;*

[11] This section has the following two limbs:

1. Any party who is preferred an appeal against the decision of the TAC may make an application requiring the TAC to state a case on a question of law for the opinion of the Court of Appeal (statutory right of appeal by way of case stated);

2. Such application shall be 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 (procedural conditions for the exercise of such statutory right).

Procedure to be followed by the TAC upon the receipt of the application

[12] Section 11A(2) lays down the procedure to be followed by the TAC upon the application is made by a party to state a case for the opinion of the Court of Appeal. Section 11A (2) of the TAC Act reads as follows:

> *"(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 the case when stated and signed to the Court of Appeal, within fourteen days after receiving the same".*

[13] Second, section 11A(6) provides that the Court of Appeal may hear and determine any question of law arising on the stated case, and may in accordance with the decision of Court upon on 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. It does not limit the scope of the section to a tax issue determined by the TAC in the assessment or where the tax issue is not decided by the TAC, it is not a question of law that can be gone into by the Court of Appeal under s 11A(6).

[14] Now it is the duty of this Court first to identify the questions of law in the Case Stated and to consider whether the questions of law proposed by the Appellant arise on the stated case, and if the any questions of law so arises on the stated case, the Court may either to add the new question of law or cause a Case Stated to be sent back to the Commission for necessary amendments. In the present case, it is not in dispute that the preliminary objection before the TAC was raised by the Respondent on the ground that the assessor had not given reasons and communicated the same to the Respondent and that the notice of assessment did not mention the section or provision under which the notice was issued. The TAC considered these two questions by way of a preliminary objection and held that the reasons were not given and not communicated to the Respondent in non- compliance with the requirements imposed by section 134(3)

of the Inland Revenue Act, No. 38 of 2000. So that, that those two questions that were considered and determined by the TAC in favour of the Respondent give rise to a question of law for the opinion of the Court of Appeal.

[15] The point that was raised by Mr. Romesh de Silva was that no question of law has been formulated in the case stated as to whether or not the TAC erred in holding that the reasons were not given by the assessor and therefore, the Court of Appeal cannot decide that matter and set aside the TAC determination. The questions that were raised and considered by the TAC by way of a preliminary objection raised by the Respondent related to-

(i) reasons not given and reasons not communicated;

(ii) notice of assessment does not mention the section under which it is issued.

[16] Those questions that were decided by the TAC, are the questions of law that must be considered by this Court in addition to the question of law, No. 3. Though it is not specifically stated in the questions of law transmitted to the Court of Appeal, that the "reasons were not communicated", it is obvious that the combined effect of the three questions of law is that the TAC erred in deciding the those two questions by way of a preliminary objection and annulling the assessment without considering the substantive matters of the assessment. At the hearing, Mr. Romesh de Silva and Mr. Gunathilleke referred us to those two questions decided by the TAC upon which the assessment was annulled by the TAC (other than the issue of the writ), and both Counsel addressed us on those two questions decided by the TAC, and the separate issue about the proper remedy available to the Appellant. We are now invited to express the opinion by Mr. Romesh de Silva on those two questions of law decided by the TAC, and the availability of the proper remedy, while taking the stand that the answer to all three questions cannot set aside the TAC decision. Though the words "reasons are not communicated "are not specifically stated in the questions of law, it is undisputed that the only questions that were raised before the TAC by way of a preliminary objection and decided by the TAC were the aforesaid two questions.

[17] In any event, any failure on the part of the TAC to include any specific question of law on whether the reasons were communicated or not, does not preclude the Court of Appeal from considering such question specifically raised and considered by the TAC. It is any question of law arising on the stated case

that may be heard and determined by the Court of Appeal, but the power of the Court of Appeal is not confined to the questions of law are not confined the questions identified in the Case Stated. I am fortified with my view by the judicial pronouncement made in the case of *R.M. Fernando v Commissioner of Income Tax* (Reports of Ceylon Tax Cases Vol 1 p. 571, at 577, where Basnayake, C.J. at p. 577 held:

> *"The statute does not require the Board to formulate in catechistic form the questions which this Court has to decide. Sub-sectio (5) of section 74 requires the Court to hear and determine any questions of law arising on the stated case and not any question or questions formulated by the Board. The function of the Board is to set forth the facts and the decision of the Board and not to formulate as it has done in this case specific questions to be answered by this Court. The present practice is likely to result in a party being stated out of Court",*

[18] In *Commissioner of Income Tax v. Saverimuttu Reddy* (Reports of Ceylon Tax Cases, Vol. 1, p. 103, Abrahams C.J. stated that although a fresh point was not included in the stated case by the Board of Review, it did not preclude the Court from considering any point upon which the actual decision of the Board might be upheld. His Lordship stated at p 109:

> *"Mr. Nadarajah, for the assessee, raises a fresh point on the meaning of section 65.............Incidently, there was no reference to us on this point by the Board of Review, since that point was not out to the Board when they were called upon to adjudicate in appeal,* ***but we are not, of course, precluded from considering any point upon which the actual decision of the Board might be upheld, no matter what might have been their reasons for arriving at that decision".***

[19] A similar view was taken by Janak de Silva, J. in CGIR v S.S.I. Perera CA/Tax/03/2017, referrting to the interpretation made by Basnayajake, C.J. in *R.M. Fernando v Commissioner of Income Tax (supra) at p. as follows:*

> *"The next question is whether this Court is bound to answer only the questions of law referred in the case stated by the TAC. Section 11A(6) of the TAC Act reads: "Any two or more Judges of the Court of Appeal may hear and determine any question of law arising on the stated case* ***and may,*** *in accordance with the decision of court upon such question, confirm, reduce, increase or annul the assessment determined by the commission, or may remit the case to the commission with the opinion of the Court, thereon." (emphasis added). The words £hear and determine any question*

of law arising on the stated case" appeared in section 74(5) of the Income Tax Ordinance, No. 2 of 1932 and was interpreted by Basnayake CJ, in R.M.Fernando v Commissioner of Income Tax (Supra, at 577) to mean that it requires the Court to hear and determine any questions of law arising on the stated case and not any question or questions formulated by the Board. Previously in M.P. Silva v Commissioner of Income Tax (Reports of Ceylon Tax Cases, Vol. 1, page 336 at 338) Canekeratne J. having considered section 74(5) of the Income Tax Ordinance, No. 2 of 1932 held that "all questions that could be raised on the whole case was intended to be left open". The learned Judge chose to follow the dicta in Ushers Wilshire Brewery v Bruce [(1915) A.C.. 433 at 465,466]. In Commissioner of Income Tax v. Saverinmuttu Retty {Reports of Ceylon Tax Cases, Vol. 1. Page 103 at 109) Abrahams CJ did make a similar statement by stating "Incidently there was no reference to us on the point by the Board of Review, since that point was not put to the Board when they were called upon to adjudicate in appeal, but we are not, of course precluded from considering any point upon which the actual decision of the Board might be upheld, no matter what might have been their reasons for arriving at that decision".

[20] In my view any finding of fact (and law) determined by the TAC is part of the case stated and any question of law can arise on such case stated and therefore, the Court of Appeal is entitled to "hear and determine the question or questions of law arising on such a case stated, whether any question is set out in the case stated transmitted to the Court of Appeal or any party failed to make an application to add such question where that question arises on the case stated and decided by the TAC. Accordingly, I am of the view that in the present case, the Court of Appeal is not precluded from considering, the question whether the TAC erred in law in holding that the reasons for not accepting the retun of income were not communicated, even if no specific question of law was not set out in the case stated transmitted to this Court by the TAC.

[21] For those reasons, I hold that the contention of the Respondent that the Court of Appeal cannot decide the question whether the TAC erred in holding that the reasons were not communicated to the Respondent is highly technical in nature and I reject that contention.

Failure to give reasons and communicate the reasons to the Appellant

[22] Now the question is whether the assessor, in rejecting the return has communicated the reasons in writing to the Respondent as required by the statutory provisions of the Inland Revenue Act. The TAC's view is that (i) the letter

dated 16.09,2008 is not an intimation letter sent under section 134(3) of the Inland Revenue Act; and (ii) the said letter doesn't give any reasons for not accepting the returns. The assessor first issued the intimation letter dated 21.08.2008 in respect of both years of assessment 2005/2006 and 2006/2007 under section 134(3) of the Inland Revenue Act, No. 38 of 2000 and section 163(3) of the Inland Revenue Act, No. 10 of 2006. Section 134(3) of the of the Inland Revenue Act, No. 38 of 2000 reads as follows:

"134(3). Where a person has furnished a return of income, the Assessor may in making an assessment on such person under subsection (1), or under subsection (2) either-

(a) accept the return made by such person;or

(b) if he does not accept the return made by that person, estimate the amunt of the assessable income of such person sn aseess him accordingly:

Provided that where an Assessor does not accept a return made by any person for any year of assessment and makes an assessment or additional assessment on such person for that year of assessment, he shall communicate to such person in writing his reasons for not accepting the return,"

[23] Section 163(1) of the Inland Revenue Act, No. 10 of 2006 provides:

"Where any person who in the opinion of an Assessor or Assistant Commissioner is liable to any income tax for any year of assessment, has not paid such tax or has paid an amount less than the proper amount which he ought to have paid as such tax for such year of assessment, an Assessor Assistant Commissioner may, subject to the provisions of subsection (3) and (5) and after the fifteenth day of November immediately succeeding that year of assessment, assess the amount which in the judgment of the Assessor Assistant Commissioner ought to have been paid by such person, and shall by notice in writing require such person to pay forthwith–

(a) the amount of tax so assessed, if such person has not paid any tax for that year of assessment; or

(b) the difference between the amount of tax so assessed and the amount of tax paid by such person for that year of assessment, if such person has paid any amount as tax for that year of assessment:

Provided that an Assessor or Assistant Commissioner may, subject to the provisions of subsections (3) and (5), assess any person for any year of assessment at any time prior to the fifteenth day of November immediately succeeding that year of assessment, if he is of opinion that such person is about to leave Sri Lanka or that it is expedient to do so for the protection of revenue, and require such person to pay such tax to the Commissioner-General earlier than as required under subsection (1) of section 113:

Provided further that any assessment in relation to the tax payable by a company under sub-paragraph (i) of paragraph (b) of subsection (1) of section 61 or paragraph (c) of subsection (1) of section 61 or paragraph (b) of subsection (1) of section 62 shall be made after the expiry of thirty days from the due date for payment of such tax".

[24] On the other hand, section 163(2) applies to an additional assessment to be made by an assessor where the assessor is of the opinion that a person chargeable with tax has paid as tax, an amount less than the proper amount of the tax payable by him or chargeable from him for that tax period. In such case, the assessor may make an additional assessment and give such person notice of the assessment. *Section 163 (2 reads as follows:*

"(2) Where it appears to an Assessor or Assistant Commissioner that any person liable to income tax for any year of assessment, has been assessed at less than the proper amount, the Assessor or Assistant Commissioner may, subject to the provisions of subsection (3) and subsection (5), assess such person at the additional amount at which according to his opinion such person ought to have been assessed, and the provisions of this Act as to notice of assessment, appeal and other proceedings shall apply to such additional assessment and to the tax charged there under".

[25] Section 163(3) deals with the duties of the assessor in making an assessment or additional assessment and steps to be taken where the return is either accepted or not accepted. *Section 163(3)* reads as follows:

"(3) Where a person has furnished a return of income, the Assessor or Assistant Commissioner, may in making an assessment on such person under subsection (1) or under subsection (2), either–

(a) accept the return made by such person; or

(b) if he does not accept the return made by that person, estimate the amount of the assessable income of such person and assess him accordingly:

*Provided that where an Assessor or Assistant Commissioner does not accept a return made by any person for any year of assessment and makes an assessment or additional assessment on such person for that year of assessment, **he shall communicate to such person in writing his reasons for not accepting the return".***

[26] It is manifest that section 134(3) of the Inland Revenue Act, No. 38 of 2000 and section 163(3) of the Inland Revenue Act, No. 10 of 2006 imposes the following duties on the assessor:

1. First, to make an assessment (amount of tax which such person in the judgment of the assessor, ought to have paid for that taxable period (making the assessment); and

2. Send the notice in writing requiring the taxpayer to pay such amount forthwith (sending the notice).

[27] All what section 134(3) or section 163(3) requires the assessor who rejects the return and made the assessment or additional assessment is to communicate to the tax payer by letter sent through the registered post, why he is not accepting the return, his reasons for not accepting the return. Having made the assessment, the assessor in the present case, by letter dated 09.09.2013 communicated to the taxpayer the **assessment** and the **reasons** in writing for not accepting the return as required by section 134(3) or 163(3).

[28] Section 163(3) requires the assessor who rejects the return and made the assessment or additional assessment to communicate to the taxpayer in writing his reasons why he is not accepting the return. The Respondent's claim was that it was entitled to the exemption from income tax in respect of the investment made during the relevant periods under section 21G of the Inland Revenue (Amendment0 Act, No. 19 of 2003. Having made the assessment, the assessor in the present case, by letter dated 21.08.2008 rejected the return and gave reasons for not accepting the return (p. 38 of the TAC brief) as follows:

> *".....Clearly mentioned in the section this exemption related to the expansion of undertaking engaged in the manufacture of production of traditional export of non exportable goods. In addition to this investment has to be done on or before March 31st of 2003. But this audited accounts which you have furnished for the above periods, I realished your investment has not qualified under section 21G, because your investment was less than Rs. 10 million (you have invested this period only Rs. 2,848,980/-)/*

Therefore, the income that you have shown as exempt income for the periods of Year of assessment 2005/2006-Rs. 38,737,262/- and 2006/2007-Rs. 57,395,698.00 cannot be considered as exempt income on the above mentioned reason. I will be going yo issue the assessment in due course.

Please treat this letter as an intimation under section 134(3) Inland Revenue Act, No. 38 of 2000 and section 163 (3) of the Inland Revenue Act, No. 10 of 2006"

[29] The assessor by letter dated 02.09.2008 cancelled the letter dated 21.08.2008 and by the same letter 09.09.2013 gave reasons in detail for not accepting the reason of income, but the assessor sought a clarification from the Respondent in respect of the matters stated in his letter and further stated that in the absence of any explanation, the assessment will be made disallowing the exceptions. The said letter dated 02.09.2008 reads as follows:

"I write with reference to the income tax returns and respective accounts of the company for the above years of assessment, declaring that the profits and income of the company are exempt from income tax under section 21G of the Inland Revenue Act No. 38 of 2000 as such profits are attributable to an expansion undertaken by the company.

Section 21G, introduced to the Inland Revenue Act by the Inland Revenue (Amendment) Act No. 19 of 2003, provides that profits and income attributable to the expansion of any undertaking of any company which is engaged in the manufacture or production of traditional exports or non-exportable goods and which undertakes the expansion of any undertaking for the production or manufacture of such traditional exports or non-exportable goods with an investment of not less than rupees ten million are exempt from income tax for a period of 2 years, if the full investment in relation to such expansion has been made on or before March 31. 2004.

Though the aforesaid amending Act 19 of 2003 was enacted on May 9, 2003, the provisions of said section 21G has been made for all purposes effective from April 1, 2003. It means that the retroactive operation of that provision has not been extended beyond April 1, 2003. To be entitled for the above tax exemption, the requirements stipulated therein must be satisfied.

The company has, apparently not satisfied certain requirements necessary to qualify for that exemption. According the returns of the company for the year of assessments 2005/06 and 2006/07 are not accepted as correct. The reasons are further described as follows.

(i) The company has not undertaken any expansion of any of its undertaking engaged in the production or manufacture of non-

traditional exports or non-exportable goods by investing not less than the required sum after the operating date of the provision, but not later than 31.03.2004. During the period 01.04.2003 to 31.03.2004, the total amount invested by the company in the business is only Rs. 2,848,980/=.

The section specifies that the exemption applies to "any company that undertakes expansion......." and it cannot be interpreted to cover any expansion already undertaken.

(ii) *As reveal from the returns and accounts furnished, the nature of business of the company up to and including the year of assessment 2005/2006 has been the **operating restaurants (KFC)**, and the nature of business in the Year of assessment 2006/2007 is **manufacture/produce/process and market of fresh milk based ice cream and other dairy products under Cargills magic brand.** To qualify for the aforesaid exemption, subject to satisfying the investment requirement, the company should have undertaken the expansion of an undertaking for the production or manufacture of goods that the company was engaged in the production or manufacture prior to such expansion.*

You have shown Rs. 38,737,262/= and Rs. 57,395,698/= as exempt profits, respectively for the years of assessment 2005/06 and 2006/07.

I wish to have received clarifications from you on these issues before September 13, 2008. If you fail to respond to this letter satisfactorily, as requested, assessments will be made disallowing the exemptions claimed for the said years of assessment."

[30] The Respondent provided an explanation by its letter dated 12.09.2008, but the assessor by letter dated 16.09.2008 stated that it is not in line with the respective provisions and confirmed the assessment, referring to the letter dated 02.09.2008. The said letter dated 16.09.2008 (p. 36 of the TAC brief) states:

"This refers to the letter dated 12.09.2008 sent by Gajima Company (Chartered Accountant) in reply to my letter to you dated 02.09.2008. As informed by me in that letter, the returns furnished in relation to the above company for the years of assessment 2006/06 and 2006/07 are not acceptable, as the explanations contained in the said letter are not in line with the respective provisions.

*Accordingly, you are hereby informed that action is taken to issue assessments **on basis already informed for the Y/A 2005/06 in terms of***

Section 134(3) of the Inland Revenue Act No. 38 of 2000 and 2006/07 in terms of Section 163(3) of the Inland Revenue Act No. 10 of 2006!.

[31] The The Respondent's complaint is that (i) when the Respondent provided an explanation by its letter dated 12.09.2008, the assessor did not explain the requirements that the Respondent needs to satisfy to qualify for the exemption; (ii) the assessor did not give reasons why the explanation cannot be accepted and therefore, the letter dated 12.09.2008, cannot be the reasons for issuing assessment. The Respondent further complains that the words "The company has apparently not satisfied certain requirement necessary to qualify for that exemption" in letter dated 02.09.2008 imply that the assessor was not certain with regard to what are the requirements that the Respondent needs to satisfy for the exemption. For those reasons, the Respondent argues that the assessor has not communicated the reasons for not accepting the return of under section 163(3) of the Inland Revenue Act.

[32] It is crystal clear that the assessor by letter dated 02.09.2008 has provided reasons as to why the investment does not qualify for the exemption under section 21G of the Inland Revenue Act (as amended). By the said letter dated 02.09.2008, the assessor has not confirmed the rejection but given an opportunity to the Respondent to give his clarification with regard to his findings before 13.09.2008, but stated that unless no satisfactory explanation is given before that date, the assessment will be issued disallowing the exemptions. (see-the paragraph before the last sentence). The Respondent by letter dated 12.09.2008 acknowledged the assessor's letter dated 02.08.2008 and clarified the issues raised by the assessor by stating it is entitled to the exemption under section 21G of the Inland Revenue Act (pp. 30-33 of the TAC brief). The assessor did not accept the Respondent's clarification stating that they are not in line with the respective provisions.

[33] The assessor thereafter, by letter dated 12.09.2008, informed the Respondent that the returns were not accepted as per the letter dated 02.09.2008, as the explanation contained in the letter of the Respopndent dated 12.09.2008 are not in line with the respective provisions. The said letter dated 16.09.2008 (p. 36 of the TAC brief).

[34] It is crystal clear that the assessor by letter dated 02.09.2008 gave reasons in detail for the rejection of the returns and by the second letter dated 16.09.2008 confirmed the rejection of the return of income referring to the letter dated 02.09.2008, which provided reasons in detail. The TAC in holding

that the reasons for not accepting the returns were not given to the Respondent states:

> *"Therefore from the material set out above, it is very clear that the Assessor has failed to comply with the mandatory requirement imposed by section 134(3) of the Inland Revenue Act, No. 38 of 2000 of communicating to the Appellant in writing the reasons for not accepting the return made by the Appellant. Even though the Representative for the Respondent tried to argue that the second letter dated 02.09.2008 has given reasons for not accepting the return, it must be stated that, it was not an intimation letter sent under section 134(3) of the Inland Revenue Act, No. 38 of 2000. Even the third letter dated 16.09.2008 had not stated that it was an intimation letter sent under section 134(3) of the Inland revenue Act, No. 38 of 2000. Besides, the said letter does not give any reasons for not accepting the returns. However, we have considered the two cases cited by the representative for the Respondent, namely Gunaratne v. Jayawardena and others Sri Lanka Tax Cases Vol. Iv page 246 and Ponniah v Commissioner General of Inland revenue 2002 (3) Sri Lanka LR p. 314)."*

[35] The Respondent heavily relies on the decision of the Court of Appeal in *A. M. Ismail v Commissioner General of Inland Revenue* (Ceylon Tax Cases, Vol. IV, p. 156) in support of the position that the reasons should be communicated to the assessee so as to know the reasons to formulate the appeal, and the failure to give reasons is fatal to the assessment. The Respondent relies on the following passages from the judgment of Victor Perera, J. In the case of *A. M. Ismail v Commissioner General of Inland Revenue (supra).*

> *"Before I deal with the changes brought about by the amendment of the Revenue Law, No. 30 of 1978, I would refer to the bounds within which an Assessor could have rejected and substituted his own assessment under section 93 and section 94 of the Inland Revenue Law prior to 1978. The courts have considered the far reaching arbitrary powers granted to an Assessor under the existing law in several cases and have from time to time commented on the improper approach made by assessors in exercising those powers. The areas of dispute between an assessor and assessee would necessarily revolve around the reasons of the Assessor for, and the basis of his making the arbitrary assessment of income or wealth. But the assessee was completely in the dark in regard to the reasons or basis for not accepting the return even when the notice of assessment was served on him under section 95. An assessee, when he filed his appeal could therefore not formulate his grounds of appeal except in general terms. However, under the provisions dealing with the,appeal in section 97 (2) he was obliged to set out the precise grounds of such appeal and*

necessarily he had to confine himself to such grounds when the appeal was considered by the Commissioner" (p. 170).

In case he proposes to use against the assessee the result of any private enquiries made by him, he must communicate to th e assessee the substance of the information so proposed to be utilized to such an extent as to put the assessee in possession of full particulars of the case he is expected to meet and should further give him ample opportunity to meet it, if possible (p. 171)

" Up to 1978, therefore, the position was that an Assessor could under the law act arbitrarily though he was expected to act according to the principles of justice and fair play, honestly to come to a conclusion on the basis of existing material and to exercise his judgment with responsibility. When the Assessor did form such a judgment, the burden is shifted on the assessee to displace the assessment he had decided to make, according to his judgment. Bui. still as the law stood, the tax payer was given no opportunity to know beforehand the reasons for not accepting a return or the basis of an estimate made against him rior had he an opportunity of setting out the grounds of an appeal precisely, if he decided to lodge an appeal" (p. 172)

"Clause 34: amends section 93 of the principal enactment and and the legal effect of this clause will be to impose a duty on an assessor who rejects a return furnished by any person to state his reasons for rejecting the return". (p 173)

"....The amended section 93, sub-section (2) imposed a duty on the Assessor who rejected return furnished by any person to communicate to such person in writing the reasons for not accepting the return..."............................(p. 174)

"This would necessarily mean that the assessment of income, wealth or gifts had to be done under section 94 prior to the assessment of the tax as contemplated by this proviso. The taxing process provided for, under this proviso before certain fixed dates, could not take place without a proper and valid assessment of income, wealth or gifts prior to taxing. For there to be a proper and valid assessment, this condition precedent referred to in proviso (c) had to have been observed................". (p. 175)

[36] In the light of these statements of Victor Perera J., it is necessary to understand the circumstances under which Victor Perera, J. made those statements. In M*. Ismail v. Commissioner General of Inland Revenue* (supra), the taxpayer submitted his return and in August, 1977 and had an interview with the

assessor. Thereafter, the taxpayer, by letter dated 10.08.1977, forwarded a statement disclosing an additional income and other information with a view to finalising his income tax matters with an explanation for non-disclosure of this additional income earlier. The taxpayer had another interview with the assessor in January 1978 and in October, 1978. The taxpayer made payments towards settling the liability arising from the additional income disclosed., but after the interview with the Deputy Commssioner in October, 1978, **the taxpayer received no further communication.**

[37] In 1979, the taxpayer received a notice of assessment dated 30.03.1979 showing a larger amount of assessable income and wealth than was returned or declared by him and the said notice of assessment was posted on 21.04.1979. Under such circumstances, the taxpayer sought a writ of certiorari and/for prohibition quashing this assessment. The Revenue (Respondents) relied on a copy of a letter dated 04.04.1979 allegedly sent by the assessor to the taxpayer stating "reasons for rejecting the returns and accounts have already been intimated to you..." The Respondents were however, unable to prove that such a letter was sent to the taxpayer, or to give evidence as to how and when the letter was sent. The Respondents also filed an affidavit which stated, *inter alia,* that "at these in his return and statement for the relevant year of assessment will not be accepted".

[38] Section 93(2) of the Inland Revenue Act, 04 of 1963 reads as follows:

> *"Where a person has furnished a return of income, wealth or gifts, the assessor may*
>
> *(a) either accept the return and make an assessment accordingly;*
>
> *(b) if he does not accept the return, estimate the amount of the assessable income, taxable wealth or taxable gifts of such person and assess him accordingly, and communicate to such person in writing the reasons for not accepting the return".*

[39] By the Inland Revenue (Amendment) Act, No. 30 of 1978, section 93(2) was amended, and it made it obligatory for the assessor "to communicate to the assessee in writing the reasons for not accepting the return. Section 93(C)(3) reads as follows:

"Where, in the opinion of the Assessor, any person chargeable with any tax....has paid as the quarterly instalment of that tax.....an amount less that the proper amount which he ought to have paid....the Assessor may assess the amount which in the judgment of the Assessor ought to have been paid by such person and shall by notice in writing require such person to pay forthwith the difference between the amount so assessed and the amount paid by that person".

[40] The proviso (d) to section 96(C)(3) reads as follows:

"Where an assessor does not accept a return made by any person for any year of assessment and makes an assessment on that person for that year of assessment, he shall communicate to such a [erson in writing his reasons for not accepting the return".

[41] It was absolutely clear that after the two interviews were held and the additional income and other information with an explanation for not disclosing them earlier, were sent to the assessor by the taxpayer, **the assessor did not communicate in writing with his reasons** for not accepting the return as required by section 93(2) of the Act. The Respondents (Revenue) were unable to to prove that a letter dated 04.04.79 was sent to the taxpayer with reasons for rejecting the returns, and accordingly, the notice of assessment dated 30.03.1979 was sent to the taxpayer **without communicating reasons for not accepting the return** in **total non-compliance with the provisions of section 93(2) and 93(C)(3)** of the Inland Revenue Act.

[42] In the present case, after the first letter of intimation dated 21.08.2008 was cancelled, the assessor by letter dated 02.09.2008 clearly provided reasons for not accepting the return of income and communicated those reasons to the Respondent. The Respondent acknowledged this letter by its letter dated 12.09.2008 (see- letter dated 12.09.2008, at p. 33 of the TAC brief). The assessor, by letter dated 16.09.2009 confirmed the reasons given by his letter dated 02.09.2008. Accordingly, the statements made by Victor Perera J. in *A.M.Ismail v Commissioner General of Inland Revenue (supra)* do not support the Respondent's arguments.

[43] It is apposite now to refer to the following statement made by Samarakoon C.J. in *D.M.S. Fernando and another v. A.M. Ismail* (Sri Lanka Tax Cases, Vol. IV, p. 184). His Lordship considered the duty imposed on an assessor under section 93 (2) of the Inland Revenue Act, No. 4 of 1963, as amended by the Inland Revenue (Amendment) Acts, No. 17 of 1972 and 30 of 1978, in case the assessor rejects a

return. His Lordship the Chief Justice, having considered section 93(2) of the amended Act, held that where the assessor rejects the return, **he should state his reasons and communicate them to the taxpayer** at or about the time he sends his assessment on an **estimated income**. His Lordship referring to section 115(3) of the Inland Revenue Act, No. 4 of 1963 as amended by Act No. 17 of 1972 and Act, No. 30 of 1978 in relation to the duty of the assessor in not accepting the return held at p. 194:

> *"Section 115(3) is an empowering section. It empowers the Assessor to do one of two things. He may accept the return, in which event he makes the assessment accordingly. Or else he **may not accept the return**. In such an event **he** is obliged to do two things:*
>
> 1. *Estimate the assessable income, taxable income or taxable gifts and **assess him** accordingly (the underlining is mine); and*
> 2. ***He** must **communicate to the Assessee in writing** the reasons for not accepting the return.*

[44] Samarakoon C.J. in *D.M.S. Fernado v. A.M. Ismail* (supra) made the following statement at pp. 193-194:

> *"A duty is now imposed on the Assessor not only to give reasons for non-acceptance of a return, but also to communicate them to the assessor. ......*
> *The new law was a measure intended to do away with this practice. Under the amendment when an Assessor does not accept a return, it must mean that at the relevant point of time he has brought his mind to bear on the return and has come to a decision rejecting the return. Consequent to this rejection, the reasons must be communicated to the assessee. The provisions for the giving of reasons and the written communication of the reasons, contained in the amendment is to ensure that in fact the new procedure would be followed. More particularly, the communication of the reason at the relevant time is the indication of its compliance. The new procedure would also have the effect of fixing the Assessor to a definite position and not give him the latitude to chop and change thereafter. **It was therefore essential that an Assessor who rejects a return should state his reasons and communicate them. His reasons must be communicated at or about the time he sends his assessment on an estimated income.** Any later communication would defeat the remedial action intended by the amendment" (emphasis added).' (Emphasis added).*

[45] Samarakoon C.J. held, at p. 242:

> *"Under the Amendment, what the taxpayer should be informed of are only the reasons in writing for non-acceptance of his return**, but not the ground or basis***

***of the estimate of the assessable income made by the Assessor**. If the Assessor accepts the return made by the taxpayer, the Assessor has no alternative but to make the assessment accordingly. But if he does not accept the return, or where the taxpayer has not furnished a return, then it is competent for the Assessor to estimate the amount of the assessable income, etc. of the taxpayer and assess him accordingly".*

[46] These words clearly imply that all what the assessor has to do, where he does not accept the return, is (i) to estimate the assessable income,...; (ii) assess him accordingly; and (iii) **state reasons, and communicate such reasons to the taxpayer in writing.** The words of section 163(3) of the Inland Revenue Act are, however, identical to section 93(2) and section 93(C)(3) of the repealed Inland Revenue (Amendment) Acts, No. 17 of 1972 and 30 of 1978. It only imposes a duty on the assessor who made the assessment or additional assessment to communicate the reasons to the taxpayer through a registered post for not accepting the return, but not the basis and the reasons may not necessarily be correct. If reasons are sufficiently given why the return was not accepted and communicated to the taxpayer in writing so as to enable him to formulate his appeal, the assessor has discharged his duty of communicating his reasons for not accepting the return of income.

[47] In the present case, the assessor by letter dated 02.09.2008 cancelled the previous letter and sent the letter dated 02.09.2008 (pp. 36-37) which also provided two reasons in detail for not accepting the return of income as follows:

1. *The company has not undertaken any expansion of any of its undertaking engaged in the production or manufacture of non-traditional exports or non-exportable goods by investing not less than the required sum after the operating date of the provision, but not later than 31.03.2004. During the period 01.04.2003 to 31.03.2004, the total amount invested by the company in the business is only Rs. 2,848,980/=.The section specifies that the exemption applies to "any company that undertakes expansion......." and it cannot be interpreted to cover any expansion already undertaken.*

2. *As reveal from the returns and accounts furnished, the nature of business of the company up to and including the year of assessment 2005/2006 has been the **operating restaurants (KFC)**, and the nature of business in the Year of assessment 2006/2007 is **manufacture/produce/process and market of fresh milk based ice cream and other dairy products under Cargills magic brand.** To qualify for the aforesaid exemption, subject to satisfying the investment requirement, the company should have undertaken the expansion of an*

undertaking for the production or manufacture of goods that the company was engaged in the production or manufacture prior to such expansion.

[48] Having given reasons, the assessor clearly stated that the return was rejected for the reasons provided in the letter dated 02.09.2008. The letter dated 02.09.2008 states at p. 2 :

"Accordingly, the returns of the company for the year of assessments 2005/2006 and 2006/2007 are not accepted as correct. The reasons are further described as follows:

(i).....

(ii)..."

[49] By the same letter dated 02.09.2008, the assessor called for a clarification from the Respondent, and by letter dated 16.09.2008, the assessor only confirmed the rejection of the return, referring to the reasons set out in his letter dated 02.09.2008. But reasons for not accepting the return had already been sent by letter dated 02.09.2008. The Respondent heavily relies on the letter dated 16.09.2008 and argues that the assessor has not given reasons for not accepting the explanation given by the asseesee. The assessor states in his letter dated 16.09.2008 that the explanation is not in line with the respective provisions referred to in his letter dated 02.09.2008 (section 21G of the principal and amendment Act). The assessor however, refers to his previous letter dated 02.09.2008 and states:

"As informed by me in that letter, the returns furnished in relation to the above company for the years of assessment 2005/2006 and 2006/2007 are not acceptable, as explanations contained in the said letter *(letter of the Respondent dated 12.09.2008)* ***are not in line with the respective provisions".***

[50] It is crystal clear that the assessor reiterates his position that the reasons are contained in the letter dated 02.09.2008 and therefore, there is no substance whatsoever, in the Respondent's contention that the reasons for not accepting the returns were not communicated to the Respondent by the assessor. In my view, once the reasons are communicated to the assessee in writing so as to enable him to understand and formulate any appeal, the absence of any further information in detail for not accepting the explanation is not a statutory requirement in terms of section 134(3)/163(5) of the Inland Revenue Act.

[51] It is crystal clear that the intimation letter was the letter dated 02.09.2008 issued by the assessor under section 134(3) of the Inland revenue Act, No. 38 of 2000 and under section 163(3) of the Inland Revenue Act, No. 10 of 2006 for the respective years of assessments. The intimation letter is clearly not the letter dated 16.09.2008. It is relevant to note that it is the substance of the document and not the form that matters. It is not in dispute that the assessee received all three letters. The absence of any reference to section 134(3) or section 163(3) in the letter dated 02.09.2008 does not change the character of the said letter. The fact that the assessor gave an opportunity to the Respondent to clarify the matters contained in his letter dated 02.09.2008 or absence of any reference to section 134(3) or section 163(3) does not alter the character of the said intimation letter dated 02.09.2008 where the assessor had given reasons and communicating those reasons in writing to the Respondent in accordance with the provisions of section 134(3) or 163(3) of the relevant statutes.

[52] For those reasons, I am of the view that the assessor, by letter dated 02.09.2008 has given reasons for not accepting the return of income and communicated the same to the Respondent in compliance with section 134(3) of the Inland Revenue Act, No. 38 of 2000 and section 163(3) of the Inland Revenue Act, No. 10 of 2006. The TAC erred in holding that the assessor failed to give and communicate the reasons to the Respondent as required by section 134(3) of the Inland Revenue Act, No. 38 of 2000 and section 163(3) of the Inland Revenue Act, No. 10 of 2006.

Failure to mention the section under which the notice of assessment was issued

[53] The next question is to consider whether the failure to mention the section under which the notice of assessment was issued is fatal to the notice as held by the TAC. The TAC has accepted the argument of the Respondent that the notice of assessment does not mention the section or provision under which such notice was issued, and therefore, the notice of assessment is bad in law. The TAC states:

> *"Therefor for the year of assessment 2005/2006, the notice of assessment should have been issued in terms of section 135 of the Inland Revenue Act, N o. 38 of 2000, mentioning the relevant section under which the assessment was being made. The failure to mention the relevant section under which the assessment was being made is a serious error on the part of the assessor who issued the notice of assessment which renders the notice of assessment invalid and bad in law".*

[54] Section 163 of the Inland Revenue Act, No. 38 of 2000 relates to the contents, signature and service of notice, and it reads as follows:

> *"(1) Every notice to be given by the Commissioner- General, a Deputy Commissioner, or an Assessor under this Act shall bear the name of the Commissioner-General or Deputy Commissioner or Assessor, as the ease may be, and every such notice shall be valid if the name of the Commissioner-General, Deputy Commissioner, or Assessor is duly printed or signed thereon.*
>
> *(2) Every notice given by virtue of this Act may be served on a person either personally or by being delivered at, or sent by post to, his last known place of abode or any place at which he is, or was during the year to which the notice relates, carrying on business ;*
>
> *(3) Any notice sent by post shall be deemed to have been served on the day succeeding the day on which it would have been received in the ordinary course by post.*
>
> *(4) In proving service by post it shall be sufficient to prove that the letter containing the notice was duly addressed and posted.*
>
> *(5) Every name printed or signed on any notice or signed on any certificate given or issued for the purposes of this Act, which purports to be the name of the person authorized to give or issue the same, shall be judicially noticed.*

[55] The TAC further states that the failure to mention the section is a fatal mistake that cannot be cured under section 164(1) of the Inland Revenue Act, No. 38 of 2000 which only cures mistakes or defects or omissions which are not substantial in nature. Section 164 reads:

> *"(1). No notice, assessment, certificate or other proceeding purporting to be in accordance with the provisions of this Act shall be quashed or deemed to be void or voidable for want of form or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with, or according to the intent and meaning of this Act, and if the person assessed or intended to be assessed or affected thereby, is designated therein according to common intent and understanding".*
>
> *(2)* ***Without prejudice to the generality of subsection (1), an assessment shall not be affected or impugned by reason of"***

*(a) **a mistake therein as to the name or surname of the person chargeable, the amount of income, assessed, or the amount of tax charged; or***

(b) any variance between the assessment and the notice thereof,

If the notice of such assessment is duly served on the person intended to be charged and contains in substance and effect of the particulars mentioned in paragraph (a) of this subsection"

[56] The legislature has clearly intended that no notice of assessment shall be quashed by reason of a mistake, defect or omission if the same is in conformity with the substance and effect, and not the form thereof. It is well settled that the document should be read as a whole, and it is not the form but the substance of a document that matters. It is trite law that the **wrong mentioning of a section** does not invalidate any action if the action can otherwise be sustained in law (*Arvind Kumar Agarwal v State of U.P. & Others* decided on 04.08.2017, Allahabad High Court). In *Peiris v Commissioner General of Inland Revenue* 65 NLR 457, the question was whether the certificate issued under section 80(1) of the Income Tax Ordinance is invalidated by the mistake which the Assistant Commissioner made, answered in the negative. Sansoni, J. stated:

"It is well settled that an exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle has been applied even to cases where a Statute which confers no power has been quoted as authority for a particular act and there was in force, another Statute which conferred that power".

[57] In *A. M. Ismail v Commissioner of Inland Revenue*, (supra), Victor Perera J. stated at p. 179;

"On an examination of this section, it is clear that the 'want of a form' or mistake' or 'defect' of 'omission' in the assessment itself or notice will not affect the validity of assessment if the assessment or notice is in substance and effect in conformity with or according to the intent and meaning of this law".

[58] A perusal of the notice of assessment (2005/2006 and 2006/2007) reveals that it is a computer generated document and the substance of the notice of assessment contains all relevant information as required by section 163 of the

Inland Revenue Act. It includes the name of the assessor printed on the notice of assessment (H.W.M;K. Thalaramba, Senior Assessor, Uniot 1 Department of Inland Revenue), the name of the assessee, assessment No, DLN Number, year of assessment, the date of issue and the amount of ta due. It is absolutely clear that the failure to mention the section under which it was issued is only a curable mistake that is not a ground to vitiate the notice of assessment. The substance of which contains all the relevant information as required by section 163 of the Inland Revenue Act. In my view, the TAC was wrong in holding that the absence of the section under which the notice was issued makes the notice of assessment bad in law. I hold that the TAC erred in upholding the preliminary objection and annulling the assessment on the ground that the reasons for not accepting the return were not communicated to the Respondent and that the section under which the notice of assessment was issued was not mentioned in the said notice of assessment. Under such circumstances, I am of the opinion that the TAC has wrongly annulled the assessment purely on a preliminary objection without going into the substantive matters of the assessment.

Question of law No. 3

[59] It is not in dispute that the TAC has got authority to rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the assessment, in addition to substantive matters of the assessment. If a jurisdictional question or the extent thereof is disputed before a tribunal, the tribunal must necessarily decide it unless the statute provides otherwise. (See Judicial Review of Administrative Law by H.W.R. Wade & C.F. Forsyth, page No. 260). In *Union of India and Anr. v. Paras Laminates (P) Ltd.* [1990]186ITR722(SC), it was held as follows:

> *"The powers of the Tribunal are no doubt limited. Its area of jurisdiction is clearly defined, but within the bounds of its jurisdiction, it has all the powers expressly and impliedly granted. The implied grant is, of course, limited by the express grant and, therefore, it can only be such powers as are truly incidental and ancillary for doing all such acts or employing all such means as are reasonably necessary to make the grant effective. As stated in Maxwell on Interpretation of Statutes (11th edn.) "where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution".*

[60] Only when a question of law or mixed question of fact and law are decided by the TAC, the Court of Appeal can exercise its power, either of appeal by way of case stated, or in an appropriate case, by way of judicial review. The TAC, having regard to the scheme of the TAC Act has jurisdiction to rule on facts and law, including whether reasons were given and communicated to the assessee or whether the assessment is time barred or not, unless the TAC Act provides otherwise.

[61] In the present, the TAC determined the preliminary objections and annulled the assessment in favour of the Respondent on erroneous grounds, without giving due consideration to the substantive matters of the assessment. In my view, in the present case, the TAC should have heard and determined all the questions raised before the TAC, including the substantive matters of the assessment, without confining itself to the preliminary matters raised by the Respondent.

Jurisdiction of the Court of Appeal to hear and determine this case

[62] The only remaining issue is to consider whether this Court has jursidcition to determine these questions of law based on the provisions in section 11A(6) of the TAC Act. This matter was not taken up as a preliminary issue at the outset of the case, and hence, I consider this issue at this statge of this judgment.

[63] The Respondent submits that the Court of Appeal has no jurisdiction whatsoever, to determine the questions of law based on the provisions of section 11A(6) of the Tax Appeals Commission Act, No. 23 of 2011 (as amended), since these questions of law do not arise or impinge on the substantive matters of the assessment determined by the TAC. The Respondent's contention is that it is only the questions of law that may result in the confirmation, reduction, increasing, or annulment of the assessment as determined by the TAC that can be the subject of an appeal by way of a case stated in terms of section 11A(6) of the TAC Act. The Respondent further submits that there is no nexus between the questions of law submitted to the Court of Appeal by the TAC and the assessment determined by the TAC, and therefore, the Court of Appeal has no jurisdiction to hear and determine this matter in terms of section 111A (6) of the TAC Act.

[64] The Respondent relies on the decision of this Court in *The Commissioner General of Inland Revenue v. Koggala Garments (Pvt) Ltd,* CA. Application No. Tax/01/2008, decided on 05.04.2017, and the refusal by the Supreme Court in

SC (SPL) LA No. 114/2017 decided on 04.05.2018, to grant special leave against the decision of the Court of Appeal in *The Commissioner General of Inland Revenue v. Koggala Garments (Pvt) Ltd* (supra).

[65] On the other hand, Mr. Milinda Gunetilleke, A.S.G., the learned President's Counsel for the Appellant submitted that (i) this Court is vested with jurisdiction in terms of section 11A(1) of the TAC Act, and the words "…may make an application requiring the Commission to state a case on a question of law for the opinion of the Court of Appeal", which define the scope of the jurisdiction of the Court of Appeal; (ii) section 11A(1) does not confine the case stated to be a question of law in relation to the substantive matters of the assessment determined by the TAC, and the only requirement is that such questions of law must have a nexus to the matters placed before the TAC; (iii) the words "Any two or more Judges of the Court of Appeal may hear and determine any question of law arising on the stated case.." comfirm the position in section 11A (1), that the Court of Appeal can answer "any question of law" in terms of section 11A(6) of the TAC Act; (iv) the use of the word "may" in section 11A(6), and the use of the word "and" referring to the second part of section 11(6), which is separated from the first part negates the argument of the Respondent that the jurisdiction of the Court of Appeal is restricted to the "confirmation, reduction, increasing or annulment of the assessment determined by the Commission"; (v) when the determination of the TAC is erroneous, the Court of Appeal has full power to remit the case back to the TAC, and the TAC is bound to act in accordance with such opinion, and consider the substantive matters in accordance with the opinion of the Court of Appeal.

Issues

[66] In view of the arguments advanced by the respective parties, this case raises the following interesting questions:

1. First, whether case stated is the appropriate remedy when the nullification of the assessment is made by the TAC without going into the substantive matters of the relevant assessment, namely, the imposition of the tax issue;
2. Second, if so, whether the Court of Appeal has jurisdiction to look into the correctness of such nullification of assessment made by the TAC, in terms of section 11A(1) of the TAC Act, and if not, whether the jurisdiction of the

Court of Appeal is governed by section 11A(6) of the TAC Act, and if so, whether the Court of Appeal can exercise its jurisdiction and look into the correctness of such nullification of assessment made by the TAC, in terms of section 11A(6) of the TAC Act;

3. Third, if the annulment of the assessment is found to be erroneous, whether the Court of Appeal has power to remit the case back to the TAC with its opinion thereon;
4. Finally, if so, what is the role to be played by the TAC, when the case is remitted back to the TAC with the opinion of the Court of Appeal, in terms of the TAC Act.

[67] An appeal by way of case stated is an appeal to a superior court to make a decision on the question of law arising on the stated case. It identifies the facts in issue, the relevant contentions of the parties, the findings of facts and ground for the determination, and, and questions of law which the opinion of the Court of Appeal for resolution is sought. This type of appeal is known as an Appeal by way of Case Stated, meaning that an application is made by a party aggrieved by the decision to the same tribunal or court that made the decision to state a case for the opinion of the Court of Appeal on a question of law. The appeal by way of case stated constitutes a distinct route of appeal and must be distinguished from any ordinary appeal or a judicial review.

What should be set out in the case stated?

[68] This is an appeal by way of case stated and the case stated is formulated by the TAC and not an Appellant. In what constitutes a case stated, LORD SUMNER in *Usher's Wiltshire Brewery, Limited Appellants v. Bruce Respondent* [1915] A.C. 433, at p. 466 stated:

> *"My Lords, the question which arises at the outset of this case is, What facts have the Commissioners found? The jurisdiction of the High Court, and on appeals from it, is by s. 59, sub-s. 2 (b), of the Taxes Management Act, 1880 , to "hear and determine the question or questions of law arising on a case transmitted under this Act." This involves the construction of the language of the case stated.* ***It must be interpreted in the light of common knowledge and by the common sense of the language used; but the findings of fact, as such, when ascertained are final…."***

[69] The Appellant who is aggrieved by the decision of the TAC can, however, make an application requiring the TAC to state a case on the question of law for the opinion of the Court of Appeal. The TAC must independently formulate the questions of law in the case stated and transmit to the Court of Appeal. As noted, a case stated made by the TAC on a question of law under section 11A(2) of the TAC Act shall specify:

(1) the facts of the case (but not usually the evidence);

(2) the decision of the TAC (the particular findings of facts and law);

(3) the questions of law upon which the opinion of the Court of Appeal is sought;

(4) the amount of the tax in dispute.

[70] It is crystal clear that any finding of fact with law made by the TAC, constitutes a case stated, and hence, it does not necessarily confine to the substantive matters of the assessment determined by the TAC.

What constitutes a question of law?

[71] The next question is what constitutes a question of law. An appeal on a question of law is intended to be a beneficial remedy, and therefore, it is necessary to ascertain, first what constitutes a question of law in relation to an appeal on a question law. The Supreme Court in *Collettes Ltd v. Bank of Ceylon*, (1982) 2 Sri LR, 514 considered the question: what constitutes a "question of law" within the meaning of the provisions of Article 128 (1) of the Constitution. In *Collettes Ltd v. Bank of Ceylon* (supra), their Lordships of the Supreme Court considered the following questions as "questions of law":

(a) The proper legal effect of a proved fact is necessarily a question of law;

(b) Inferences from the primary facts found are matters of law;

(c) The question whether the tribunal has misdirected itself on the law or the facts or misunderstood them or has taken into account irrelevant considerations or has failed to take into account relevant considerations or has reached a conclusion which no reasonable tribunal directing itself properly on law could have reached or that it has gone fundamentally wrong in certain other respects is a

question of law. Given the primary facts, the question whether the tribunal rightly exercised its discretion is a question of law;

(d) Whether the evidence is in the legal sense sufficient to-support a determination of fact is a question of law;

(e) If in order to arrive at a conclusion on the facts, it is necessary to construe a document of title or correspondence, then the construction of the document or correspondence becomes a question of law;

(f) Every question of legal interpretation which arises after the primary facts have been established is a question of law;

(g) Whether there is or is not evidence to support a finding, is a question of law;

(h) Whether the provisions of a statute apply to the facts; what is the proper interpretation of a statutory provision; what is the scope and effect, of such provision are all questions of law;

(i) Whether the evidence had been properly admitted or excluded or there is misdirection as to the burden of proof are all questions of law.

[72] The Court of Appeal in *Amarasinghe v. Acquiring Officer, Kegalle*, (2008) 1 Sri LR 120, applied the tests adopted by the Supreme Court in *Collettes Ltd v. Bank of Ceylon* (supra), to an appeal filed under section 28 of the Land Acquisition Act and observed that it would be sufficient for the question or questions of law to be stated in the averments in the Petition of Appeal which would be easily discernable and apparent on the face of the Petition.

[73] It is any question of law arising on the stated case that may be heard and determined by the Court of Appeal. But the power of the Court of Appeal is not confined to the questions identified in the case stated but the Court of Appeal is not precluded from considering any point upon which the actual decision of the TAC might be upheld, no matter what might have been their reasons for arriving at that decision (See- the first part of section 11A(6) & *Commissioner General of Income Tax v Saverimuttu Retty* (Reports of Ceylon Tax Cases, Vol. 1, p. 103 at p. 109).

Jurisdiction of the Court of Appeal to hear and determine an appeal by way of case stated

[74] In view of the argument advanced by Mr. Gunatilleke that section 11A(1) defines the jurisdiction of the Court of Appeal to hear and determine an appeal by way of case stated on a question of law, it is useful to consider the legal scope of the appeal by way of case stated as set out in section 11A(1) of the TAC Act. The legal scope of the appeal by way of case stated is set out in section 11A (1) of the TAC Act. The marginal note of section 11A(1) states "**Appeals on a question of law to the Court of Appeal**", clearly referring to an appeal by way of law on a question of law to the Court of Appeal. Section 11A(1) provides that either party who preferred an appeal to the TAC or the CGIR, may make an application requiring the TAC to state a case on a question of law for the opinion of the Court of Appeal. Section 11A(1) of the TAC Act states:

> *"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.."*

[75] This section has the following two limbs:

1. **Any party who preferred an appeal** against the decision of the TAC may make an application requiring the TAC to state a case on a question of law for the opinion of the Court of Appeal (substantive right of appeal by way of case stated);
2. Such application shall be 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. (procedural conditions for the exercise of such statutory right).

[76] The second part of section 11A(1) is a conditional one, that consists of a mandatory requirement of entertaining and making the application to the TAC, but that is a piece of procedural legislation, and it does not fall within

the realm of substantive law set out in the first part of section 11A(1). The TAC Act, in the second part of section 11A(1) sets out the following procedural requisites of a valid application to the TAC to state a case on a question of law, and unless such requisites are satisfied, the application may not be entertained by the TAC, and such application for a statutory right of appeal by way of case may not be transmitted to the Court of Appeal. The requisites are:

1. It shall be made in writing;
2. It must be delivered to the secretary to the Commission;
3. It should be accompanied by a fee of one thousand and five hundred rupees;
4. It must be made within one month from the date on which the decision of the TAC was notified in writing to the CGIR or the Appellant.

Procedure to be followed by the TAC upon the receipt of the application

[77] Section 11A(2) lays down the procedure to be followed by the TAC upon the application is made by a party to state a case for the opinion of the Court of Appeal. Section 11A (2) of the TAC Act reads as follows:

> *"(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 the case when stated and signed to the Court of Appeal, within fourteen days after receiving the same".*

Appeal by way of case stated is a statutory remedy

[78] In the instant case, there is no complaint whatsoever, about the procedural part of that section, and the issue is about the substantive part of section 11A(1). An appeal is a statutory right and must be expressly created and it confers jurisdiction to a court of tribunal to hear and determine appeals. It is section 11A(1) that has expressly granted a statutory right of appeal by case stated to the Appellant. Section 11A(1) clearly grants a substantive right of appeal by way of a case stated to any person who is aggrieved by the decision of the TAC to prefer an appeal and make an application requiring the TAC to state a case on a question of law for the opinion of the Court of Appeal. The words "**Either the person who preferred an appeal** to the Commission under paragraph (a) of subsection (1) of section 7 of this

Act……..of the Commissioner General **may make an application requiring the Commissiomn to state a case on the question of law for the opinion of the Court of Appeal**" clearly define the right of appeal of any Appellant to invoke the appellate jurisdiction of the Court of Appeal.

[79] There is nothing to indicate in section 11A(1) either expressly or impliedly that the remedy by way of case stated is limited to the determination made by the TAC on the tax issue. The Respondent has failed to convince us that the right of an Appellant to make an application requiring the Commission to state a case on a question of law for the opinion of this Court is limited to the substantive matters of the assessment.

[80] The Respondent's argument is, however, based only on section 11A(6) disregarding the statutory right of appeal given to an aggrieved party to invoke the appellate jurisdiction of the Court of Appeal by way of case stated specified in section 11A(1). The Respondent, however, argues that it is not necessary to state in the TAC Act, that section 11A(1) is subject to the provisions of section 11A(6), but the words that the nexus between the questions of law and the substantive matters of the assessment must be implied by this Court. The Respondent invites us to interpret the words that the legislature has not used in section 11A(1) and travel outside the statutory provisions on a voyage of discovery, to fill in the gap, which the legislature in its wisdom thought otherwise. If the legislature intended to confine the case stated to a question of law in relation to the substantive matters of the assessment, it could have stated so in express words.

[81] It is settled law that courts cannot usurp legislative function under the disguise of interpretation, and rewrite, recast, reframe and redesign a statutory provision, because this is exclusively in the domain of the legislature. This proposition was lucidly explained by Lord Simonds in *Magor and St Mellons Rural District Council v. Newport Corporation* [1952] AC 189, HL. Referring to the speech of Lord Denning MR, Lord Simonds said at page 191: "

> *"The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and the duty of the court to travel outside them on a voyage of discovery are strictly limited.."*

[82] MR, Lord Simonds further said at page 192:

"It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation and it is the less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed, the remedy lies in an amending Act".

[83] The same proposition was echoed by Arijit Pasayat, J. in the Indian Supreme Court case of *Padmasundara Rao and Ors. v. State of Tamil Nadu and Ors.* AIR (2002) SC 1334, at paragraph 14 as follows:

"14. While interpreting a provision the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary".

[84] The only requirement to make an application to state case on a question of law is that there must be a nexus between the question of law and the case stated (facts and law placed before the TAC). In other words, a question of law must arise on the case stated determined by the TAC, and a question of law is not restricted to substantive matters of an assessment. I am not inclined to take the view that the questions of law must relate to any question of facts and law decided by the TAC and therefore, it is not limited to the substantive matters determined by the TAC as submitted by the Respondent.

[85] The Court of Appeal in *The Commissioner General v. Koggala Garments (Pvt) Ltd* (supra), has heavily relied on section 112(6) of the Inland Revenue Act, No. 28 of 1979, which is identical to section 11A(6) of the TAC Act, in holding that unless the question of law impinges on an assessment, no case stated procedure under section 112(1) can be invoked by the Appellant. Section 112(1) of the Inland Revenue Act, No. 28 of 1979 states:

"The decision of the Board shall be final:

Provided that either the appellant or the Commissioner-General may make an application requiring the Board 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 Board,together with a fee of one thousand and five hundred rupees, within one month of the date in which the decision of the Board was notified in writing to the Commissioner General or the appellant, as the case may be."

[86] It seems to me that the attention of the Court of Appeal has not been adequately drawn to the scope of section 112(1) of the Inland Revenue Act, No. 28 of 1979, which is identical to section 11A(1) of the TAC Act. The Court of Appeal in *The Commissioner General v. Koggala Garments (Pvt) Ltd* (supra), has paid little attention to section 112(1), which allows any person aggrieved by the BOR decision to invoke the appellate jurisdiction of the Court of Appeal. I am of the view that it is section 11A(1) that has granted the Appellant to invoke the appellate jurisdiction of the Court of Appeal by way of case stated on a question of law unless that right is expressly taken away by a subsequent enactment or by the Constitution, that right exists .

[87] At this stage, it is relevant to note that the right of appeal by way of a case stated is a substantive right given to any person aggrieved by the decision of the TAC in terms of section 11A(1) of the TAC Act. When that right has already vested with the parties on the date the *lis* (proceedings) commenced in the TAC, that right cannot be denied to such party who seeks remedies to violated rights, unless that right has been taken away by a subsequent enactment, if it so provided expressly and not otherwise. The only condition is that the Appellant must fulfill the procedural requirements set out in the second part of section 11A(1).

[88] The meanings of substantive law and procedural law as stated in Black's Law Dictionary, 9th Edition, are as under:

> *"Substantive law (Seb-sten-tive) (18c). The part of the law that creates, defines and regulates the rights, duties and powers of parties. 'so far as the administration of justice is concerned with the application of remedies to violated rights, we may say that the substantive law defines the remedy and right, while the law of procedure defines the modes and conditions of the application of the one to the other. John Salmond, Jurisprudence 476 (Glanville L. Williams ed., 10th ed. 1947)"*
>
> *Procedural law: The rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves-Also termed adjective law.*
>
> *(b) The law of procedure or adjective law may be defined as that breach of the law, which governs the process of litigation. It is the law of actions-jus quod ad actionee pertinet-using the term action on a wide sense to include all legal proceedings, civil or criminal. All the residue is substantive law, and relates, not to the process of litigation, but to the purposes and subject matter. In other words, substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the*

means and instruments by which those ends are to be attained. The latter regulates the conduct and relation of courts and litigants in respect of the litigation itself; the formal determines their conduct and relations in respect of the matters litigated. What facts constitute a wrong is determined by the substantive law; what facts constitute proof of a wrong is a question of procedure. The first relates to the subject matter of the litigation, the second relates to the process merely".

[89] In the privy council in *Colonial Sugar Refining Company v. Irving* (1905) AC 369 (PC), the Privy Council considered a situation where the right to file an appeal from a Supreme Court of Australia to the Privy Council given by the Order in Council of 1860 was taken away and the only appeal therefrom was directed to lie to the High Court of Australia. In that case, it was held, to deprive a suitor in a pending action of an appeal to a Superior Tribunal, which belonged to him as of right, is a very different thing from regulating procedure. The Privy Council held that the right to file an appeal was a substantive right and not a mere matter of procedure such as the conditions accompanying the filing of an appeal, which is in the realm of procedure. An appeal by way of case stated is also a substantive right, but exercised in a different route. An appeal is a vested right in a party from the commencement of the action and such a right cannot be taken away except by an express provision in any subsequent statute.

[90] Let me turn to *Garikapati Veerayya*: v. N. *Subbiah Choudhry* , AIR 1957 SC 540, wherein a suit was instituted on April 22, 1949, and the right of appeal vested in the parties thereto on that date was to be governed by the law as it prevailed on that date. That is, on that date, the parties acquired the right, if unsuccessful, to go on in an appeal from the Special Court to the High Court and from the High Court to the Federal Court, provided the conditions thereof were satisfied in that case. It was held that **unless that right had been taken away only by a subsequent enactment**, if it so provided expressly or by necessary intendment, and not otherwise.

[91] In *Hoosein Kasam Dada (India) Ltd. v. The State of Madhya Pradesh and Others* ([1953] S.C.R. 987), it was held that (i) a right of appeal is a substantive right which vests in a litigant at the date of the filing of the suit, and cannot be taken away unless the legislature expressly or by necessary intendment says so; (ii) an appeal is a continuation of the suit, and it is not merely that a right of appeal cannot be taken away by a procedural enactment which is not made retrospective, but the right cannot be impaired or imperilled nor can new conditions be attached to the filing of the appeal; (iii) nor can a condition already

existing be made more onerous or more stringent so as to affect the right of appeal arising out of a suit instituted prior to the enactment. This is because the **right to file an appeal is crystallized on the institution of the application of the suit in the first instance**.

[92] From the decisions cited above, the following principles clearly emerge:

1. The legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding;
2. The right of appeal is not a mere matter of procedure but is a substantive right;
3. The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit;
4. The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced;
5. Such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal;
6. <u>This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise</u> (Emphasis added) (see-*Satya Nand Jha and Ors. v. Union of India and Ors*., the High Court of Jharkhand, decided on 05.07. 2016/

Scope of section 11A(6) of the TAC Act-Powers in Appeal by way of Case Stated

[93] The fundamental argument of the Respondent is that this Court does not have jurisdiction to set aside or quash the determination of the TAC on a question of law, which does not relate to the substantive matters of the assessment under section 11A(6) of the TAC Act. The Respondent in support of the argument, heavily rely on the statement of His Lordship Nawaz, J. referring to section 112(6) of the Inland Revenue Act, No. 28 of 1979 in *The Commissioner General of Inland Revenue v Koggala Garments (Pvt) Ltd* (supra), that the case stated jurisdiction of the Court of Appeal is provided by

the legislature in section 11A(6) of the TAC Act. Section 112(6) of the Inland Revenue Act, No. 28 of 1979 is identical to section 11A(6) of the TAC Act, reads as follows:

> *"122(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 court upon such question, confirm, reduce, increase or annul the assessment determined by the Board with the opinion of the Court thereon. Where a case is so remitted by the Court, the Board shall revise the assessment in accordance with the opinion of the court".*

[94] His Lordship Nawaz, J. referring to section 112(6) of the Inland Revenue Act, No. 28 of 1979 in *The Commissioner General of Inland Revenue v. Koggala Garments (Pvt) Ltd* (supra) at pp.10-12 stated:

> *"No nexus between the Questions of Law and the Assessments*
>
> *Upon a careful perusal of section 112(6) of the Inland Revenue Act, No. 28 of 1979, it becomes patently clear that if the question of law stated to this Court does not arise on the assessments, this Court is denuded of jurisdiction to hear and determine that question of law. The appellant power needs encapituation.*
>
> *"section 111(6).........*
>
> *The above provision makes it clear that upon the question of law stated to this Court, this Court is required to confirm, reduce, increase or annul the assessment determined by the Board, or remit the case to the Board with the opinion of the Court thereon.*
>
> *In other words, the Board of Review must have gone into the assessment in the first instance and thereafter the Board must state questions of law that arise or impinge on the assessment. The question of law must relate to the assessment. Thereafter this Court, in accordance with a decision of Court upon such question, confirm, reduces, increases, or annuls the assessment determined by the Board, or remits the case to the Board with the opinion of the Court thereon.*
>
> *In this case, it needs recalling that the Board never went into the assessments. It only considered a jurisdictional objection and made its decision. So none of the eight questions of law that have been stated to this Court impacts on the assessments. Section 112(6) of the Inland revenue Act, No. 28 of 1979 mandates a question of law arising on the assessment to be stated to this Court for an opinion. Only then this Court can finally*

confirm, reduce or annul the assessment determined by the Board, or remit the case to the Board with the opinion of the Court thereon.

It is not any question of law that this Court can go into in a case stated. It is only a question of law impacting on the assessment that this Court can hear and determine on a case stated. I am fortified in this interpretation by the words in section 112(6) "...........any question of law arising on the stated case and may in accordance with the decision of Court upon such question, confirm, reduce, increase or annul the assessment…". This conjunction "and" connotes that the words any questions of law have to be read conjunctively with the requirement to confirm, reduce, increase or annul the assessment upin such question of law. This shows that the question of law has to pertain to the assessment. In the case before us, none of the questions pertain to the assessments which went up in appeal before the Board of review. The questions of law pertain only to a decision on jurisdiction which is susceptible to a challenge by way of judicial review".

Powers of the Court of Appeal in an Appeal by way of Case Stated

[95] Section 11A(6) of the TAC Act sets out the powers of the Court of Appeal in relation to an appeal by way of case stated in the exercise of jurisdiction conferred on it by section 11A(1) of the TAC Act. Section 11A (6) of the TAC Act provides:

> *"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 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".*

[96] It is relevant to note that section 11A(6) defines the **powers of the Court of Appeal** in exercising jurisdiction under section 11A(1) when the questions of law arising on the stated case are submitted by the TAC in terms of section 11A(2) of the TAC Act.

Decision made by the TAC

[97] A perusal of the TAC determination reveals that the taxpayer (the Respondent in the present appeal) raised a preliminary objection stating that the notice of assessment is not valid in law for two reasons. First, the reasons for not accepting the retun of income were not communicated to

the Respondent, and the second, no mention had been made to the relevant section in the statute under which the notice of assessment was made.

[98] The Appellant Commissioner-General of Inland Revenue in this case contested the position taken by the taxpayer, but the TAC decided that the assessor failed to comply with the mandatory requirements imposed by section 134(3) of the Inland Revenue Act, No. 38 of 2000, and therefore, the notice of assessment is invalid and bad in law. In view of the said finding, the **TAC annulled the assessment** upholding the preliminary objection raised by the taxpayer.

Case Stated formulated by the TAC for the opinion of the Court of Appeal

[99] The issues argued before this Court are directly related to the validity of the notice of assessment and involves both facts and law determined by the TAC. Accordingly, the Appellant who was aggrieved by the TAC decision is entitled to invoke the appellate jurisdiction of the Court of Appeal under section 11A(1) of the TAC Act. The Court of Appeal has powers to hear and determine such appeal by way of case on a question of law arising from such decision in terms of section 11A(6) of the TAC Act.

[100] The Respondent's argument that the jurisdiction of the Court of Appeal is exclusively laid down in section 11A(6) is based on the words in section 11A(6) "….**any question of law arising on the stated case and may, in accordance with the decision of Court upon such question, confirm, reduce, increase, or annul the assessment…**". The Respondent argues that those words show that the question of law shall pertain to the substantive matters of the assessment. The Respondent's argument is that the words "confirm, reduce, increase or annul the assessment determined by the commission" necessarily restricts the jurisdiction of the Court of Appeal to the determination of substantive matters of the assessment. I am not inclined to agree with this argument of the Respondent.

[101] First, the words in the first part of section 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**",* is consistent with position in section 11A(1) that the questions of law arise on a **case stated,** and the Court of Appeal can answer any question of law arising on the case stated. If the jurisdiction of the Court of Appeal is restricted to the substantive matters of the assessment as contended by the Respondent, there was no need for the

legislature to use the words that the Court of Appeal "**may hear and determine any question of law** **<u>arising on the stated case</u>**", and it could have easily used the words "..''any question of law arising **<u>on the assessment determined by the Commission</u>**".

[102] Second, the Respondent contended that the use of the words ""and" in the second line of section 11A(6) restrict the meaning of the words "any question of law" and thus, "any question" in section 11A(6) is restricted to the words "confirm, reduce, increase or annul of the assessment determined by the commission", and nothing more. The Respondent fails to understand however, that section 11A(6) only refers to **<u>the appellate powers of the Court of Appeal</u>** to determine any question of law arsing **on the stated case,** and the use of the word "and" in the second line of section 11A(6), does not restrict the words "any question of law" to the determination of the substantive matters of the assessment.

[103] On the other hand, the word **"may"** after the word "and" in the second line and the word "or" in the fifth line, after the words "confirm, reduce, increase, or annul the assessment determined by the Commission" confirm the position that the legislature has intended to provide two distinct powers to the Court of Appeal in appeal by way of case stated in the determination of the questions of law.

[104] In my view, the second part of section 11A(6) is not restricted to the words "confirm, reduce, increase, or annul the assessment" unless the legislature has expressly provided that the right of any aggrieved party to invoke the appellate jurisdiction of this Court under section 11A(1) is restricted to the determination of the substantive matters of the assessment determined by the TAC. On the contrary, the legislature has granted a substantive right of appeal by way of case stated to the Appellant to invoke the appellate jurisdiction of this Court on any question of law arising on the case stated (facts and law determined by the TAC) for the opinion of the Court of Appeal. As noted, in the present case, the assessment was annulled on the ground that the notice of assessment is invalid because it was not in conformity with the mandatory requirements under section 194(1) of the Inland Revenue Act.

[105] Aggrieved by the said annulment of the assessment, the Appellant preferred an appeal by way of case stated and the questions of law

submitted to the Court of Appeal relate to the validity of the notice of assessment, which is a question of law that arises on the case stated under section 11A(1). That annulment of assessment is a decision that is part and parcel of the case stated [see- section 11A(2)] and thus, all the questions of law that pertain to that decision arise on the stated case for the opinion of this Court. In addition, the legislature has clearly provided in section 11A(6) that the Court of Appeal has powers to hear and determine "any question of law" arise on the stated case submitted to the Court for its opinion under section 11A(2), which includes almost all the questions of law submitted by the TAC for the opinion of this Court.

[106] In view of the aforesaid decisions referred to in paragraphs 89-91 of this judgment, the right of appeal is a vested right in the first instance, but, the legislature by express words can always change the nature of right to prefer an appeal. In the instant case, the right of appeal by way of a case stated, is a substantive right granted under Section 11A (1) of the TAC Act. That right is exercised by the Court of Appeal in terms of the powers conferred on this Court under section 11A(6) of the TAC Act.

[107] On the other hand, the judicial authorities support the view that the questions of law are not restricted to the stated case, or to the question formulated by the TAC and therefore, the Court of Appeal is not precluded from considering **any point upon** which the actual decision of the TAC might be upheld or annulled.

[108] I am fortified with my view by the judicial pronouncement made in the case of *R.M. Fernando v Commissioner of Income Tax* (Reports of Ceylon Tax Cases Vol 1 p. 571, at 577, where Basnayake, C.J. at p. 577 held:

> *"The statute does not require the Board to formulate in catechistic form the questions which this Court has to decide. Sub-section (5) of section 74 requires the Court to hear and determine any questions of law arising in the stated case and not any question or questions formulated by the Board. The function of the Board is to set forth the facts and the decision of the Board and not to formulate as it has done in this case specific questions to be answered by this Court. The present practice is likely to result in a party being stated out of Court",*

[109] As noted, Abrahams C.J. stated in *Commissioner of Income Tax v. Saverimuttu Reddy* (Reports of Ceylon Tax Cases, Vol. 1, p. 103, that although a fresh point was not included in the stated case by the Board of

Review, **it did not preclude the Court from considering any point upon which the actual decision of the Board might be upheld.** His Lordship stated at p 109: *"……..Incidentally, there was no reference to us on this point by the Board of Review, since that point was not out to the Board when they were called upon to adjudicate in appeal,* ***but we are not, of course, precluded from considering any point upon which the actual decision of the Board might be upheld, no matter what might have been their reasons for arriving at that decision".***

[110] Janak de Silva, J. in *CGIR v S.S.I. Perera* CA/Tax/03/2017, referring to the interpretation made by Basnayajake, C.J. in *R.M. Fernando v Commissioner of Income Tax (supra)* took a similar view at p. 5 (see-paragraph 20 of this judgment).

[111] In my view any finding of fact (and law) determined by the TAC constitutes a case stated and any question of law can arise on such case stated and, therefore, the Court of Appeal is entitled to "hear and determine the question or questions of law arising on such a case transmitted under this Act. On the other hand, the Court of Appeal can hear any question of law that is not set set out in the case stated, if the determination of such point will either confirm or annul the actual decision of the TAC, irrespective whether or not the whether reasons to arrive at such question were considered by the TAC, provided that it was a matter for consideration before the TAC.

[112] Accordingly, it is absolutely clear that the jurisdiction of the Court of Appeal is not limited only to a question of law that relates to the substantive matters determined by the TAC, but the jurisdiction extends to any question of law that arise on the case stated in respect of which the appellant has chosen to invoke the appellate jurisdiction of this Court of Appeal in terms of section 11A(1) of the TAC Act.

[113] In the light of the express statutory provisions in section 11A(1), that grants a right of appeal by way of case stated and in section 11A(6) that grants power to the Court of Appeal to hear and determine any question of law, the argument of the Respondent that, unless the questions of law relate to substantive matters of the assessment, the Court of Appeal is denuded of jurisdiction is fallacious, and is liable to be rejected.

Janashakthi Insurance v Commissioner General of Inland Revenue

[114] The Respondent relies on the decision of the Supreme Court *in Janashakthi Insurance v. Commissioner General of Inland Revenue,* SC Appeal No. 114/2019 decided on 26.06.2020, and argues that the said judgment supported the decision in Koggala Garments case. The Respondent relies on the following passage of the said judgment at p. 13 wherein the Supreme Court stated:

> *"The Court of Appeal is hereby directed to answer all the questions that have been raised in the case stated, if answering the said questions may result in confirmation, reduction, increasing or annulling the assessment determined by the commission"*

[115] It is to be noted that the Supreme Court determined in The SC Appeal No. 114/2019 relates to the Court of Appeal case of the *Commissioner-General of Inland revenue v. Janashkthi Insurance Co. Ltd* No. CA Tax No. 10/ 2013 decided on 08.06.2018, which related to the two preliminary objections raised before the TAC. The first preliminary objection was that the notice of assessment has not been signed or does not bear the name and the designation of the person making the assessment. The second preliminary objection related to the time bar of the assessment.. The TAC upheld the first preliminary objection and overruled the second preliminary objection. There were seven questions of law before the Court of Appeal, and the Court of Appeal did not answer the questions of law Nos. 1, 2, 4 and 5 on the ground that the opinion on such questions depends on the facts of each case. The Court of Appeal answered only the questions of law Nos. 3, 6, 7, The Court of Appeal accordingly, remitted the case back to the TAC. The questions of law before the Supreme Court were:

A. Did the Court of Appeal err in law by failing to answer the case stated?

B. Did the Court of Appeal err in law by applying the provisions of the Electronic Transactions Act, No. 19 of 2006?

C. Did the Court of Appeal err in law by not deciding the case and sending it to the Tax Appeals Commission with its opinion?

D. If one or more questions of law are answered in affirmative, should this appeal be sent back to the Court of Appeal to answer the questions referred to in the said case?

[116] The Supreme Court answered the 1st, 2nd and the 4th questions of law in the affirmative, but did not answer the 3rd question of law as it did not arise. On that basis, the judgment of the Court of Appeal was set aside and the Court of Appeal was directed to answer all the questions that have been raised in the case stated, if answering the said question may result in the confirmation, reduction, increasing or annulling the assessment determined by the Commission. The Supreme Court, referring to the ***Commissioner of Income Tax v. Saverimuttu Reddy*** (supra), **which held that the Court is not precluded from considering any point upon which the actual decision of the Board might be upheld,** (see- p. 10), held that the Court of Appeal has failed to answer all the questions of law raised in the case stated, and directed the Court of Appeal to answer all the questions of law, if answering the said question may result in the confirmation, reduction, increasing or annulling the assessment determined by the Commission.

[117] The Respondent relies on the above passage of the SC judgment referring to the passage "the Court of Appeal must answer all the questions of law, if answering the said questions may result in confirmation, reduction, increasing or annulling the assessment determined by the commission.". The Respondent, however, disregards the **Supreme Court's own reliance on the judgment in** *Commissioner of Income Tax v. Saverimuttu Reddy* (supra), which held **that the Court is not precluded from considering any point upon which the actual decision of the Board might be upheld**. It is a clear statement by the judges in *Commissioner of Income Tax v. Saverimuttu Reddy* (supra) that the Court of Appeal has jurisdiction to hear and determine any question of law, not even raised before the TAC, upon which the actual decision of the TAC might be either upheld, no matter what might have been their reasons for arriving aat that decision.

[118] It is crystal clear that the Supreme Court having relied on the decision in *Commissioner of Income Tax v. Saverimuttu Reddy* (supra) accepted the position that the powers of the Court of Appeal are not precluded from considering any point upon which the actual decision of the TAC might be upheld, no matter what might have been the reasons for arriving at that decision. In fact, the following questions of law raised before the Court of Appeal, in particular, clearly arise on the case stated (see- pp. 5-7) :

1. Whether the Tax Appeals Commission has the jurisdiction to annul an Assessment due to service of unsigned notice of assessment, even all other

mandatory requirements have been fulfilled in order to make the assessment.

2. Whether duly served notice of Assessment with the omission of signature affect the validity of assessment.
3. Whether duly served notice of Assessment, which was printed and issued by the computer, without signature of issuing officer, is an error covered by section 61 of the Value Added Tax Act, No 14 of 2002
4. Whether Assessee can challenge the validity of assessment at the hearing of Appeal at the Appeals Commission.
5. Whether Assessee can raise an issue as a preliminary objection at the hearing of Appeal at the Appeals Commission, which has not been raised at the time of Appeal.
6. Whether issuing a notice of assessment by an Assessor, which is generated through computer under the provision of section 28 of the Value Added Tax Act, No. 14 of 2002, is exercising of a discretionary power or ministerial act.
7. Whether the name of the Commissioner General, Deputy Commissioner or Assessor duly printed or signed on the assessment.

[119] It is seen that the identical issues have been submitted to the Court of Appal in this case and the decision of the Court of Appeal decision in Commissioner-General of Inland revenue v. Janashkthi Insurance Co. Ltd, except the fact that this is a case under the Inland revenue Act whereas that case related to the VAT Act. The Court of Appeal refused to answer the said questions (Nos. 1, 2, 4 & 5) but the Supreme Court directed the Court of Appeal to answer all the said questions, if answering the said questions may result in confirmation, reduction, increasing or annulling the assessment determined by the Commission.

[120] It is clear that the Supreme Court only considered the first part of section 11A(6) of the TAC Act but it did not consider either the second part of section 11A(6) or section11A(1), which grants the Appellant the right of appeal to invoke the appellate jurisdiction of the Court of Appeal. The reason is obvious. There was no issue raised with regard to the jurisdiction of the Court of Appeal to decide any question of law raised in the case stated, or the powers of the Court of Appeal to remit the case back to the TAC. The real issue here is whether

the Court of Appeal has jurisdiction to hear and determine the questions of law that arise on the case stated under section 11A(1) and if not, whether it is section 11A(6) which governs the jurisdiction. The Supreme Court case never determined the jurisdiction of the Court of Appeal under section 11A(1) or the powers of the Court of Appeal under section 11A(6). No determination was made by the Supreme Court on the jurisdiction of the Court of Appeal to hear and determine a question of law when the TAC fails to decide the substantive matters of the assessment.

[121] On the other hand, the Supreme Court answered the 1st, question of law and held that the Court of Appeal erred in law by failing to answer the questions that arise on the case stated (questions of law Nos. 1, 2, 4 and 5). It answered the 3rd question and held that the Court of Appeal erred in not deciding the those questions and sending the case back to the TAC with its opinion. The questions of law Nos. 1, 2, 3, 4, 6, and 7 in the Court of Appeal case, similar to the present case, clearly arise on the case stated, and the Supreme Court held that the Court of Appeal erred in not answering the questions of law which arise on the case stated. Thus, the Respondent's argument in the present case, that the Court of Appeal has no jurisdiction to decide the matters arise in the present case clearly contradicts the position of the Respondent in the present case, that Court of Appeal has no jurisdiction to hear and determine the questions of law since the questions of law do not relate to the substantive matters of the assessment determined by the TAC. In my view, the decision of the Supreme Court which clearly accepts the position in *Commissioner of Income Tax v. Saverimuttu Reddy* (supra) that the powers of the Court of Appeal are not precluded from considering any point upon which the actual decision of the TAC might be upheld, does not support the Respondent's own preliminary objection.

Distinct Powers of the Court of Appeal under section 11A(6)

[122] Significantly, section 11A(6) has two limbs, and the word "or" in the third line separates the first limb from the second limb of section 11A(6). In the exercise of the appellate jurisdiction of the Court of Appeal under section 11A(1), it has wide powers to act either under the first limb or the second limb of section 11A(6). After hearing and determining any question of law arising on the case stated, the Court of Appeal may, do one of the following things:

1. confirm, reduce, increase or annul the assessment determined by the Commission in respect of which the case was stated (first limb), or
2. remit the case case to the TAC for a decision only in accordance with the opinion on the question of law (second limb).

[123] The first limb may generally apply where the question of law on the stated case relates to the substantive matters of the assessment determined by the TAC, and the Court decides to confirm, reduce, increase or annul the assessment determined by the TAC. If the Court of Appeal decides to confirm or annul the assessment determined by the TAC, the case ends there subject to any appeal to the Supreme Court. The second limb is the alternative option to the first limb and if the Court decides to remit the case to the TAC, with its opinion in two different situations, it may send the case back to the TAC and the TAC is required to revise the assessment in accordance with the opinion of the Court.

Opinion of the Court of Appeal under two different situations

[124] The case can be sent back to the TAC with the opinion of the Court of Appeal under two different situations:

1. If the Court of Appeal is of the opinion that the amount of the assessment determined by the TAC must be either increased or reduced, the second limb may apply, and the case may be sent back to the TAC. The is required to revise the assessment made by the assessor in accordance with such opinion;
2. If the Court of Appeal is of the opinion that the annulment of the assessment made by the TAC on questions other than substantive matters of the assessment is erroneous, the case may be sent back to the TAC with its opinion. The TAC is required to revise the annulment of assessment in accordance with such opinion, and consider the substantive matters of the assessment.

[125] Either way, the assessment made by the assessor or the annulment of the assessment made by the TAC will be revised to give effect to the intention of the legislature.

[126] It was contended on behalf of the Respondent, that the question of revision does not arise where the TAC has already annulled the assessment

made by the assessor, and thus, there is nothing that the TAC or the Court of Appeal can do, in remitting the case back to the TAC. The Respondent is inviting us to abdicate our statutory powers conferred on us under the send part of section 11A(6) every time the TAC wrongly annulled an assessment without going into the substantive matters of the assessment. I do not think that the legislature in enacting the TAC Act intended to restrict the statutory powers conferred on us by section 11A(6) of the TAC Act where the TAC erroneously annulled the assessment without going into the merits of the assessment.

[127] Article 138(1) of the Constitution refers to the "jurisdiction of the Court of Appeal! In the marginal note and provides that the Court of Appeal shall have and exercise **subject to the provisions of the Constitution or of any law**, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any Court of First Instance, tribunal or other institution.
The powers of the Court of Appeal in appeal are set out in Article 139 of the Constitution and the Court of Appeal may exercise its jurisdiction **according to law.** Article 139(1) reads as follows:

> *"139. (1) The Court of Appeal may in the exercise of its jurisdiction, affirm, reverse, correct or modify any order, judgment, decree or sentence* ***according to law or it may give directions to such Court of First Instance, tribunal or other institution or order a new trial or further hearing upon such terms as the Court of Appeal shall think fit".***

[128] The jurisdiction of the Court of Appeal is subject to the provisions of the Constitution or any law, which means that it is subject to any specific law in order for the Court of Appeal to exercise its jurisdiction over any such matter specified in Article 138(1). The specific legislation in the present case obviously is the TAC Act, which confers the appellate jurisdiction on the Court of Appeal in respect of any appeal by way of case stated under section 11A(1). In terms of section 11A(6), the Court of Appeal has powers to hear and determine any question of law arising on the stated case. In addition to constitutional provisions, the TAC Act clearly provides that the Court of Appeal is entitled to send the case back to the TAC with its opinion, and the TAC shall act according to such opinion and revive the assessment (see-the second part of section 11A(6) and paragraph 71 of this judgment.

[129] In *Commissioner General of Inland Revenue v. Janashakthi General Insurance Company Limited* CA Tax 14/2013, Janak de Silva took the similar view and held:

> *"Thirdly, even if it is assumed that the decision of this Court has to be connected to an assessment, the reversal of an annulment done by the TAC as in this case directly connected to the assessment. If this Court so decides, and remains its opinion to the TAC, the TAC will have to reverse the annulment of the assessment it made and thereafter decide the substantive issue. Such a course of action is covered by the words "reverse the assessment" in section 11A(6) of the TAC Act. There is no basis to say that the phrase "reverse the assessment" is limited to arithmetic revisions".*

[130] The dictionary meaning of the word "revise" has many meanings: (1) (v) examine and alter; reconsider and change (an opinion), reread previous work in order to prepare for an examination; and (2) adapt, alter, change, correct, edit, amend, improve, modify, overhall, reconsider, rectify, redo,, rephrase, revamp, rework, rewrite, update (Compact Oxford Dictionary Thesaurus, Indian Ed. 2001, p. 770). Accordingly, the word "revise" is broad enough to cover the words "revise the assessment" specified in section 11A(6) of the TAC Act where the Court is of the opinion that the annulment of assessment is erroneous and thus, the TAC is required to revise its annulment of assessment and decide the substantive matters.

[131] The decision of *The Commissioner General of Inland Revenue* v. *Koggala Garments (Pvt) Ltd.* (supra) is based entirely on the analysis of section 11A(6) (dentical section 112(6) of the Inland Revenue Act, No. 28 of 1979). It that case, the Court of Appeal has not been invited to consider the scope of section 112(1) (identical to section11A(1) or the second limb of section 112(6) (identical to s. 11A(6) of the TAC Act. It has further not been invited to consider the question whether or not the Court of Appeal has powers to remit the case back to the TAC, with its opinion in situations, where the Board of Review erred in making the annulment of the assessment. On that ground as well, the decision of The *The Commissioner General of Inland Revenue* v. *Koggala Garments (Pvt) Ltd.* (supra) can be distinguished from the present case.

[132] The Respondent relied on the decision of the Supreme Court in refusing to grant special leave (SC Spl LA Application No. 114/2017, decided on 04.05.2018 against the decision of The *Commissioner General of Inland Revenue* v. *Koggala Garments (Pvt) Ltd.* (supra). The Respondent argued that the refusal to grant leave to appeal amounts to an affirmation of the judgment

of the Court of Appeal by the Supreme Court. On that basis the Respondent argued that this Court is bound to follow the decision of the Court of Appeal in *The Commissioner General of Inland Revenue* v. *Koggala Garments (Pvt) Ltd.* (supra).

[133] The Appellant relies on the decision in *W. R. Kulatunga Bandara, Assistant Commissioner of Labour v. W. Balasuriya, Sports of Kings* CA (PHC) APN 97/2010, Court of Appeal Minutes Dated 17.07.2013, wherein Salam J., (with Rajapakse J., agreeing) held that it is a misconception to come to the conclusion that the refusal of leave by the Supreme Court constitutes the affirmation of the judgment of the lower Court and that it cannot be considered as creating a precedent. However, this Court need not go into that matter in the present case, as the decision of the Court of Appeal in *The Commissioner General of Inland Revenue* v. *Koggala Garments (Pvt) Ltd.* (supra), can be clearly distinguished from the present case, for non-consideration of the crucial jurisdictional provision (section 11A(1) and powers of the Court of Appeal as specified in the second limb of section 11A(6) of the TAC Act.

[134] On the other, hand, that decision of *The Commissioner General of Inland Revenue* v. *Koggala Garments (Pvt) Ltd.* (supra), can also be distinguished from the nature of the questions of law submitted to the Court of Appeal by the Board of Review. The facts of the Koggala Garments case reveal that the majority of the questions of law before the Court of Appeal related to the-

> *"character or grounds on which judicial review is sought. For instance (h) is virtually a complaint that the Board acted ultra virus. The question (g) complains of illegality in that the question connotes the import that Board committed an illegality by interpreting the relevant law, thus harking back that the Board cannot even consider the question of time bar and rule on its jurisdiction (p. 7).*

[135] In the present case, all the questions in the case stated arise on the facts and the law decided by the TAC, and related to the annulment of the assessment made by the TAC. Accordingly, the Appellant has lawfully invoked the jurisdiction of the Court of Appeal under section 11A(1) of the TAC Act. On that ground as well, the decision of the Koggala Garments Ltd can be distinguished from this case. The determination of the Supreme Court in granting leave is based on the matters that are involved in that particular case, and when that case can be distinguishable from this case, I am of the view that

refusal to grant leave to appeal by the Supreme Court does not set out a binding precedent of this Court on the issue in the present case.

[136] On the other hand, there is another judicial decision on the question whether the Court of Appeal is denuded of jurisdiction when the TAC did not make a determination relating to the substantive matters of the assessment, but invalidated the notice of the assessment on technical grounds such as this case, without considering the substantive matters. In the Court of Appeal case of *The Commissioner General of Inland Revenue v. First Media Solutions (Pvt)* decided on 05.12.2019, the Respondent argued that the jurisdiction of the Court of Appeal is limited to the questions that pertain to the assessment determined by the commission, since the commission did not make any determination relating to the assessment, but invalidated the notices of assessment on a technical ground. Samayawardena J. Interpreted section 11A(6) and rejected the argument of the Respondent. His Lordship held at p. 11:

> *"It will be a travesty of justice if this Court is to hold that if the Commissioner's assessment is reduced by the Tax Appeals Commission, the Commissioner can appeal to the Court of Appeal, but if the Commissioner's assessment is quashed by the Tax Appeals Commission, the Commissioner cannot appeal against such order. I reject that argument unhesitatingly".*

[137] His Lordship further stated at p. 12:

> *"In terms of section 11A(6) of the tax Appeals Commission Act, the Court of Appeal can determine any question of law arising on the stated case and can remit the case to the Commission with the opinion of the Court thereon.*
>
> *For those reasons, I hold that, in the facts and circumstances of this case, the Tax Appeals Commission erred in law when it decided to allow the appeal of the respondent taxpayer, on the ground that the notice of assessment is invalid as it bears neither the name nor the signature of the Assessor, as mandated by section 60(1) of the Valie Added tax Act. In view of the said conclusion, there is no necessity to address the other questions of law in the case stated. I direct the tax Appeals Commission to accept the notice of assessment and decide the appeal on merits".*

[138] That case was appealed to the Supreme Court, and the Supreme Court in SC (Spl) L.A. No. 15/20, decided on 15.03.2023 refused to grant leave to appeal (Vide SC Minutes dated 15.93.2023).

[139] Recently, D. N. Samarakoon J., (Sasi Mahendran J., agreeing) held in *Cargills Agrifoods Limited v. Commissioner General of Inland Revenue* CA Tax 41/2014, decided on 28.02.2023, that there can be a case stated on a question of law other than the determination of the TAC on the assessment. The same position was taken by the Court of Appeal in *Commissioner General of Inland Revenue v. M/S Lanka Marine Services* CA Tax 30/2014, Court of Appeal Minutes dated 31.03.2023.

Remedy of Judicial Review

[140] The Respondent heavily argued that the proper remedy for the Appellant was to change the decision of the TAC by way of a writ, and not the case stated. The Respondent relied on the observations made by His Lordship Samarakoon C.J., in *D.M.S. Fernando v. Mohideen Ismail,* (1982) 1 SLR 222 and argued that the appropriate remedy should be to challenge the TAC decision by way of writ. The Respondent relies on the following statement made by His Lordship at p. 234:

> "*There was another matter that was raised incidentally. It was contended by the Deputy Solicitor-General that the Respondent was not entitled to maintain this application for Writ because an alternative remedy by way of appeal was available to him under the Inland Revenue Act. Those provisions confine him to an appeal against the quantum of assessment. The Commissioner has not been given power to order the Assessor to communicate reasons. He may, or may not, do so as an administrative act. The Assessor may, or may not, obey. The Assessee is powerless to enforce the execution of such administrative acts. The present objection goes to the very root of the matter and is independent of the quantum. It concerns the very exercise of power and is a fit matter for Writ jurisdiction. An application for Writ of Certiorari is the proper remedy.'*

[141] It is to be noted that that was a case where the taxpayer applied to the Court of Appeal by way of a writ to quash the assessment on the ground that the assessor did not give written reasons for rejecting the return. The Court of Appeal granted the writ of certiorari quashing the notice of assessment and the CGIR appealed to the Supreme Court. In that case, the taxpayer exercised his right of appeal to the CGIR and raised the time bar objection and thereafter the taxpayer appealed to the TAC. Thereafter, the CGIR appealed to the Court of Appeal therefrom. The principal issue, in that case, was the duty of the assessor to give reasons in terms of the mandatory provisions of the Inland revenue Act. The Supreme Court has only considered

the duty on the part of the assessor to communicate the reasons to the taxpayer and it did not consider (i) the jurisdiction of the Court of Appeal to hear and determine any question of law that was decided by the Board; and (ii) the validity of any annulment of the assessment without considering the substantive matters. Hence, the Supreme Court stated that "*An application for Writ of Certiorari is the proper remedy"* , but it did not say that it is the only remedy. Hence, it is not binding on us in the present case.

[142] It is not in dispute that the TAC has got authority to rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the assessment, in addition to substantive matters of the assessment. If a jurisdictional question or the extent thereof is disputed before a tribunal, the tribunal must necessarily decide it unless the statute provides otherwise. (See Judicial Review of Administrative Law by H.W.R. Wade & C.F. Forsyth, page No. 260). In *Union of India and Anr. v. Paras Laminates (P) Ltd.* [1990]186ITR722 (SC), it was held as follows:

> *"The powers of the Tribunal are no doubt limited. Its area of jurisdiction is clearly defined, but within the bounds of its jurisdiction, it has all the powers expressly and impliedly granted. The implied grant is, of course, limited by the express grant and, therefore, it can only be such powers as are truly incidental and ancillary for doing all such acts or employing all such means as are reasonably necessary to make the grant effective. As stated in Maxwell on Interpretation of Statutes (11th edn.) "Where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution".*

[143] Only when a question of law or mixed question of facts and law is decided by the TAC, the Court of Appeal can exercise its power, either of appeal by way of case stated, or in an appropriate case, by way of judicial review. The TAC, having regard to the scheme of the TAC Act, has jurisdiction to rule on the facts and law, including whether reasons were given and communicated to the assessee or whether the assessment is time barred or not, unless the TAC Act provides otherwise.

[144] In the present, the TAC determined the preliminary objections and annulled the assessment in favour of the Respondent on erroneous grounds, without giving due consideration to the substantive matters of the assessment. In my view, in the present case, the TAC should have heard and

determined all the questions raised before the TAC, including the substantive matters of the assessment, without confining itself to the preliminary matters raised by the Respondent.

[145] It is relevant to note that a party has no absolute right in a judicial remedy where an inferior tribunal exceeds its jurisdiction, and where the absence or excess of jurisdiction is not apparent on the face of the proceedings. It is only discretionary, and depends on various other circumstances, such as laches, or misconduct, misrepresentation or non-disclosure of facts and acquiescence etc. The grant of a writ is always discretionary and is never demandable of right like in a case stated in terms of section 11A(1).

[146] For purposes of this case it is sufficient to state that the remedy provided for in 141 of the Constitution is a discretionary remedy and the Court of Appeal has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. Of course, in appropriate cases, the prerogative writ under the Constitution may also exist, as an alternative remedy which the aggrieved party may, in his discretion resort to, in addition to the case stated under the TAC Act. H.W.R. Wade & C.F. Forsyth on Administrative Law, 9th Ed. At p. 949-950 dealing with the distinction between an appeal and review stated:

> *"Appeal and review are in principle two distinct proceedings, the appeal being concerned with merits and review being concerned with legality. But in practice an appellate will often wish to raise questions which strictly are questions of legality, such as violation of natural justice or some objection to the tribunal's jurisdiction. It is important that this should be freely allowed, since otherwise many cases could not be fully disposed of on appeal"*

.

[147] It is for the Legislature to determine what categories it would embrace within the scope of the legislation and use the word which reflects its intention, and though the canons of statutory interpretation vary on what factors should be considered, all approaches start with the language used by the legislature and structure of the statute itself. So that the Court would follow the principle that a statute be read as a harmonious whole whenever reasonable, to reflect the legislative intent with separate parts being interpreted within their broader statutory context.

No express provision in the TAC Act ousting the jurisdiction of the Court of Appeal

[148] I am not inclined to take the view that the mere annulment of the assessment without going into the substantive matters is sufficient to oust the jurisdiction of the Court of Appeal in the exercise of its jurisdiction under section 11A(1), and its powers under section 11A(6) of the TAC Act, unless an express provision is provided in the Act itself ousting the jurisdiction of the Court of Appeal.

[149] The unsatisfactory nature of this preliminary objection in practical terms is that when the TAC decides any question of law that does not relate to the substantive matters of the assessment against the taxpayer, the taxpayer can come by way of case stated. However, when the same question of law is decided by the TAC against the Revenue without going into the substantive matters, it is said that the Revenue must resort to the remedy by way of judicial review. Where a party appears before Court and complains that the TAC has wrongly annulled the assessment, and the Court of Appeal takes the view that the TAC was manifestly wrong, this Court would not helplessly watch and allow that wrong to remain intact, disregarding its statutory powers conferred on it by the TAC Act.

[150] In *Pooja Pal vs. Union of India (UOI)* and Others, decided on 22.01.2016, the Supreme Court of India stated at paragraph 94:

> *"A court of law, to reiterate has to be an involved participant in the quest for truth and justice and is not expected only to officiate a formal ritual in a proceeding farseeing an inevitable end signaling travesty of justice and mission justice so expectantly and reverently entrusted to the judiciary would then be reduced to a teasing illusion and a sovereign and premier constitutional institution would be rendered a suspect for its existence in public estimation. Considering the live purpose for which judiciary exists, this would indeed be a price which it cannot afford to bear under any circumstance".*

[151] It is a clear miscarriage of justice if the Court of Appeal is to abdicate its statutory powers conferred on it under the provisions of the TAC Act and simply pronounce that it cannot decide the correctness of the annulment of the assessment made by the TAC on the mere ground that the TAC did not go into the merits of the tax issue. I venture to think that the true measure and

scope of the exercise of this jurisdiction of the Court of Appeal is laid down in section 11A(1) of the TAC Act, which does not expressly oust the jurisdiction of the Court of Appeal to decide any question of law arising on the case stated, irrespective whether the substantive matters were not considered by the TAC. In my view, the power of the Court of Appeal, either to act under the first part or the second part of section 11A (6) in a case stated, is in no case taken away by the existence of any alternative remedy.

[152] Where an appeal can properly be pursued by way of case stated, like in this case, in my view, then, that is the route which should be followed. To hold that the judicial review is the only remedy where the annulment of the assessment is made without going into the substantive matters of the assessment would restrict the right of appeal of an appellant to invoke the appellate jurisdiction of the Court of Appeal under section 11A(1) of the Tac Act. On the other hand, to restrict the right of appeal for purely technical reasons would make unnecessary difficulties for appellants wishing to appeal both on the merits and on the question of jurisdiction, resulting in multiple litigations, in different divisions of the Court of Appeal. If this happens, the appeal by way of case stated provided by the TAC Act under section 11A(1) would be futile and unworkable.

[153] For those reasons, I am inclined to follow the decisions of this Court in *Commissioner General of Inland Revenue v. Janashakthi General Insurance Co. Ltd (C.A. (Tax) 14/2013), Commissioner General of Inland Revenue v. First Media Solutions (Pvt) Ltd, Cargills Agrifoods Limited v. Commissioner General of Inland Revenue, Commissioner General of Inland Revenue v. M/S Lanka Marine Services, Commissioner of Income Tax v. Saverimuttu Reddy* (supra), *R.M. Fernando v. Commissioner of Income Tax* (supra). With greatest respect, I am not inclined to follow the decision of *The Commissioner General of Inland Revenue* v. *Koggala Garments (Pvt) Ltd* (supra) in the present case.

[154] For those reasons, I am of the view that the Court of Appeal has jurisdiction to hear and determine the questions of law in the case stated, and decide the correctness of the annulment of the assessment made by the TAC, even if they do not relate to the substantive matters of the assessment. The objection to jurisdiction of the Court of Appeal raised by the Respondent is therefore, overruled.

Conclusion

[155] In these circumstances, I answer questions of law as follows:

1. Yes.

2. Yes

3. The TAC, in the present case, should have considered and determined both the procedural and substantive matters and answered all the questions raised by the Respondent before the TAC.

[156] The TAC erred in law when it decided that the reasons for not accepting the return of income were not communicated to the Respondent, and that the section under which the notice of assessment was issued was not mentioned in the notice of assessment. The TAC erred in law in deciding to annul the assessment without going into the substantive matters of the assessment, upholding the preliminary objection.

[157] This case is remitted to the Tax Appeals Commission with our opinion and the TAC is directed to decide the appeal on merits.

[158] The Registrar is directed to send a certified copy of this judgment to the Tax Appeals Commission.

JUDGE OF THE COURT OF APPEAL

<u>M. Sampath K.B. Wijeratne, J.</u>

I agree.

JUDGE OF THE COURT OF APPEAL