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

In the matter of an appeal by way of Stated Case on a question of law for the opinion of the Court of Appeal under and in terms of Section 11A of the Tax Appeals Commission Act, No. 23 of 2011 (as amended).

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

APPELLANT

CA No. CA/TAX/0012/2019
Tax Appeals Commission
No. TAC/IT/023/2015

v.

TVS Lanka (Pvt) Limited,
No. 38, Old Negombo Road,
Wattala.

RESPONDENT

BEFORE : Dr. Ruwan Fernando J. &
M. Sampath K. B. Wijeratne J.

COUNSEL : Chaya Sri Nammuni, D.S.G. for the Appellant.

		Johann Corera, AAL instructed by Sivanantham & Associates for the Respondent.
WRITTEN SUBMISSIONS	:	16.05.2023 (by the Appellant) 24.02.2023 (by the Respondent)
ARGUED ON	:	30.02.2022. 15.06.2022, 18.07.2022 & 14.11.2022
DECIDED ON	:	25.05.2023

M. Sampath K. B. Wijeratne J.

Introduction

When this matter was taken up for argument on the 23rd February 2022, the learned Counsel for the Respondent raised the following two preliminary objections on the maintainability of this appeal.

1) *This Court has no jurisdiction to hear and determine this matter in view of the fact that the Appellant now cannot canvass the assessment before the Court of Appeal by way of a case stated in view of Section 11A of the Tax Appeals Commission Act; and*

2) *The Court of Appeal has no jurisdiction to hear the assessment which has not been determined by the Tax Appeals Commission.*

Both parties made oral submissions on the preliminary objection and the Respondent filed a written submission as well, and the matter was fixed for the order of Court.

The Respondent crystalised the preliminary objection in the written submissions in the following manner.

a) Does the Court of Appeal lack jurisdiction to hear and determine this application under Section 11A (6) of the Tax Appeals Commission Act (as amended) when there is no assessment determined by the Tax Appeals Commission – as the Tax appeals Commission did not make a determination of the assessment but determined that the assessment is invalid?
b) Can the Commissioner General of Inland Revenue invoke the Case Stated to challenge the preliminary determination of the Tax Appeals Commission holding that the assessment is invalid due to

time bar particularly when the Tax Appeals Commission did not make a determination of the assessment?

The Respondent submitted that the Court must consider the jurisdictional issue raised as a preliminary objection before considering the question of law in the stated case[1].

The essence of the argument is whether the Court of Appeal has jurisdiction to rule on a case stated in the absence of a determination by the TAC on the assessment determined by the Commissioner General. This argument is based upon the interpretation provided to Section 11A (6) of the TAC Act, in the case of *Commissioner General of Inland Revenue v. Koggala Garments (Pvt) Ltd*[2] (hereinafter referred to as '*Koggala Garments'*). As the same argument has been raised in several other cases, the Court decided to hear all counsel on this issue and reach a conclusion.

In the instant case, the taxable period on appeal to the Tax Appeals Commission (hereinafter referred to as the 'TAC') was 2009/2010. The TAC annulled the assessment determined by the Commissioner General of Inland Revenue (hereinafter referred to as the 'CGIR') on the ground that the Notice of Assessment issued to the Appellant is time-barred.

Being aggrieved by the aforesaid determination of the TAC, the CGIR moved the TAC to state a case to this Court on the question of whether the TAC erred in interpreting the provisions of Section 163 and 164 of the Inland Revenue Act No. 10 of 2006, by concluding that the assessment was time-barred.

Analysis

The Respondent argued that this Court does not have jurisdiction to hear and determine the above matter on the ground that the TAC has not determined an assessment regarding the above taxable period. The Respondent's contention is that the TAC ruled on a jurisdictional issue of time bar. The TAC held that since the Notice of Assessment is bad in law as it is time bared, it is unnecessary to consider the substantive issues.

The Appellant submitted that in this instance the TAC, having ruled on the preliminary objection, has proceeded to annul the assessment determined by the CGIR, acting under Section 11A (6).

[1] Paragraph 25 of the Respondent's written submission.
[2] CA Application No. Tax/01/2008.

The Respondent argued that once the assessment is annulled, there is no assessment determined by the TAC for this Court to determine in a case stated.

Accordingly, it was argued that CGIR cannot invoke the provisions of case stated to canvas the determination of the TAC and the available remedy is judicial review.

The Respondent's argument is substantially based on the interpretation of Section 11A (6) of the TAC Act. Section 11A (6) of the TAC Act provides that;

> **'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.*' (emphasis added)

According to the Respondent, the five alternatives available to the Court of Appeal under Section 11A (6) are to;

i. confirm
ii. reduce
iii. increase *or*
iv. annul

the assessment determined by the Commission ***or***

v. to remit the case to the Commission with the opinion of the Court, thereon.

As it is clearly set out, the first to fourth available alternatives are in respect of the assessment determined by the Commission.

The Respondent's argument is that the fifth alternative is also in respect of the assessment determined by the Commission. The Respondent argued that under the second segment of the first part of Section 11A (6), a case is remitted to the TAC to do the same thing, confirm, reduce, increase, or annul the assessment determined by the CGIR in

accordance with the opinion of the Court[3]. It appears that the Respondent's argument is based on the word '*thereon'* in the fifth alternative action. However, if the legislature intended to be so, the legislature had no difficulty enacting the words *'assessment determined by the Commission'* instead of the word '*thereon'*.

The Appellant's contention is that the word '*thereon'* refers to the question of law stated to the Court of Appeal.

The Sinhala text of Section 11A of the TAC Act is clear in this regard and supports the contention of the Appellant.

The Sinhala text reads as follows;

> '11 (අ) (6). ඉදිරිපත් කරන ලද **කරුණු සැලකිරීමෙන් පැන නගින *යම් නීතිමය ප්‍රශ්නයක්*** අභියාචනාධිකරණයේ විනිශ්චයකාරවරුන් දෙදෙනෙකු හෝ ඊට වැඩි ප්‍රමාණයක් විසින් විභාග කොට නිශ්චය කළ යුතු අතර, එම නීතිමය ප්‍රශ්නය පිළිබඳ අධිකරණයේ තීරණයට අනුව කොමිෂන් සභාව විසින් තීරණය කර තිබූ තක්සේරුව අභියාචනාධිකරණය විසින් ස්ථිර කිරීම, අඩු කිරීම, වැඩි කිරීම හෝ අවලංගු කිරීම සිදු කළ හැකිය. නැතහොත් ***එම කරුණු* පිළිබඳ** අධිකරණයේ මතය සහිතව **අදාළ කරුණු සැලකිරීම** කොමිෂන් සභාව වෙත ආපසු එවිය හැකිය. අධිකරණය විසින් අදාළ කරුණු සැලකිරීමෙන් එසේ ආපසු යවනු ලැබූ අවස්ථාවකදී කොමිෂන් සභාව විසින් අධිකරණයේ මතය අනුව තක්සේරුව ප්‍රතිශෝධනය කරනු ලැබිය යුතුය.'

The laws are enacted in Sinhala and the English text is a translation thereof. Therefore, the Sinhalese text should prevail over the English translation, even if it is assumed that the English text is ambiguous.

In my view, in both the Sinhala and English texts the fifth alternative available to the Court of Appeal is clearly separated from the first to fourth alternatives and the word *thereon* refers to the assessment. This finding will be analysed in more detail below in this judgment.

One other issue came up was that the last segment of Section 11A (6) which reads; '*where a case is so remitted by the Court, the Commission shall revise the assessment in accordance with the opinion of the Court'* establishes the fact that when the Court of Appeal remit a case to the

[3] Paragraph 29 of the written submission filed by the Respondent.

Commission with the opinion of Court, there should be an assessment determined by the Commission for the Commission to revise.

The counter-argument is that the word '*revise*' is not limited to arithmetic revisions. The Concise Oxford Dictionary defines the word '*revise*' to mean '*examine or re-examine and improve or amend*'. In Black's Law Dictionary, 10th Edition, the word revision is defined as '*A re-examination or careful review for correction or improvement'*. Collins Online Dictionary defines the word '*revise'* to mean to read over carefully and correct, improve, or update *where necessary*. It is therefore clear that the term revision does not necessarily imply an arithmetical alteration of the figures of an assessment and also only arises where corrections improvements and updates are necessary.

In the event, this Court affirms the decision of the TAC that the assessment is time-barred and dismisses the appeal of the CGIR, the question of revising the assessment will not arise. However, if this Court reverses the decision of the TAC and holds that the assessment is not time-barred, this Court has to remit the case to the TAC with the said opinion of the Court. Then the TAC has to decide on the other substantive questions of law on the assessment. However, the question of arithmetic alteration of the figures in the assessment in accordance with the opinion of this Court will not arise. The TAC will examine the assessment and decide the issues on its own. Therefore, it is obvious that the revision is not always an arithmetic alteration of the figures in an assessment.

It was argued by the Appellant that the term *assessment* in the last segment of Section 11A (6) is not the assessment determined by the Commission and it is the assessment made by the Assessor. In fact, if it was the assessment determined by the Commission the legislature could have easily enacted the same word as it was enacted in the previous part of the Section; '*the assessment determined by the Commission*' in the last segment as well.

It is trite law that in interpreting a statute, a provision should not be considered in isolation but, the whole statute has to be taken into consideration. On this matter, N.S. Bindra states:

'it is a fundamental principle in the construction of statutes that the whole and every part of the statute must be considered in the determination of the meaning of any of its parts. In construing a statute as a whole the Courts seek to achieve two principal results to clear up obscurities and ambiguities in the law and to make the whole of the law and every part of

it harmonious and effective. It is presumed that the Legislature intended that the whole of the statute should be significant and effective. Different sections, amendments and provisions relating to the same subject must be construed together and read in the light of each other[4].'

Section 9 (10) of the TAC Act, under which the powers of the TAC after hearing an appeal are set out has almost similar words. There also the first part of the Section refers to the assessment determined by the Commissioner General and the second part just refers to the assessment.

However, there is a material difference also; Section 11A (6) empowers the Court of Appeal to hear and determine *any question of law* whereas no such power is given to the TAC under Section 9 (10). Nevertheless, Section 7 (1) (a) and 8 (1) (a), grants a right of appeal to the aggrieved party to the TAC in respect of ***any matter*** *relating to* the imposition of any tax, levy, charge, duty, or penalty if the taxpayer is dissatisfied with the ***reasons*** stated by the Commissioner General. Hence, it is clear that an appeal to the TAC from the decision of the CGIR is not limited to the amount of tax. It could be in respect of any matter relating to the imposition of tax where the taxpayer is dissatisfied with the reasons stated by the CGIR. However, the last segment of Section 9 (10) specifically states that the revision of the assessment by the Commissioner General in conformity with the decision of the TAC should be in respect of the ***amount***. Thus, unlike Section 11A (6), it is categorically stated that the review should relate to the amount of tax. Nevertheless, the Respondent raised the objection on the time bar before the TAC and got the determination under Section 9 (10) of the TAC Act in its favour. However, when the CGIR, through the TAC, stated a case to this Court against the said determination, the Respondent took up a contrary position that the Court of Appeal cannot rule on the time bar in a case stated, in the absence of a determination on the assessment by the CGIR. If this argument is upheld, there would be two different remedies available to the taxpayer and the CGIR. When the taxpayer raises the objection before the CGIR and the CGIR overrules it, the taxpayer has a right of appeal to the TAC. In an appeal, when the TAC rules in favour of the taxpayer on the same matter, the CGIR cannot exercise the statutory right of appeal, the case stated but, has to resort to judicial review, a discretionary remedy. It is clearly a double standard; approbating and reprobating; blowing hot and cold on the part of the respondent and is contrary to public policy.

[4] N. S. Bindra *Interpretation of Statutes*, Eighth Edition, 1997. p. 258.

On another point, upon carefully reviewing Section 11A (6) of the TAC Act, I observe that Section 11A (6) set out the pronouncements that the Court of Appeal could make in determining an appeal. However, the last segment of the Section does not concern the powers of the Court of Appeal. It is simply a measure that the TAC could take once the case is remitted to the TAC by the Court of Appeal.

N. S. Bindra stated the following regarding surplus clauses in a statute;

'*In interpreting Acts of Legislatures although it is necessary, if possible, to give every word of a particular clause some meaning, it is not always possible to do so. Acts of Legislature are no more exempt than any other documents from looseness of language or inaccuracy of expression, and it is sometimes impossible, doing the best one can, to give full and accurate meaning to every word.*

The general rule of interpretation, no doubt, is that a meaning must be given, if possible, to every word of a statute, for a statute is never supposed to use words without a meaning. All the words used must be taken into consideration, and no word should be considered as redundant, and it is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage. The words used in an Act of Parliament must be construed in such a manner as to give them a sensible meaning, and it is improper to hold that the language of a statute is not strictly accurate. Courts will, however, when necessary, take cognizance of the fact the Legislature does sometimes repeat itself, and does not always convey its meaning in the style of literary perfection. ***It may not always be possible to give a meaning to every word used in an Act of Parliament and many instances may be found of provisions put into statutes merely by way of precaution.*** *Thus, it is not uncommon in an Act of Parliament to find special exemptions, which are already covered by a general exemption, introduced ex majori cautela. Nor is surplusage, or even tautology wholly unknown in the language of the Legislature.* ***"A Statute", said Lord Brougham, in Auchterarder of Presbytery v. Lord Kinnoull, "is always allowed the privilege of using words not absolutely necessary".*** *In every case, the construction of every Act depends upon its language as applied to the subject-matter, after giving full weight to every legitimate aid to interpretation*[5].'

Therefore, in my view, in determining the powers of the Court of Appeal under Section 11A (6), the first segment must be interpreted quite

[5] N. S. Bindra *Interpretation of Statutes*, Eighth Edition, 1997. pp. 199 & 200.

independently from the last segment of the Section. I am of the view, that the last segment merely explains the duty of the TAC where the decision of the Court of Appeal concerns the assessment. The necessity to revise the assessment may or may not arise depending on the order made by the Court of Appeal. In my view, this is the interpretation that is most agreeable to justice and reason.

Although the Respondent argued on a restrictive interpretation provided to Section 11A (6) of the TAC Act, Section 11 A (1) itself makes it clear that a case could be stated to the Court of Appeal on any question of law. There is no restriction on the types of questions that can be raised. Further, there is no requirement for the question to be on the amount of the assessment or on the assessment.

Section 11A (1) provides thus;

> '**11A (1).** *Either the person who preferred an appeal to the Commission* (…) *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* (…)'

Further, even Section 11A (6) has not placed any limitation on the Court of Appeal in respect of questions of law the Court could determine. The relevant part of the Section reads thus; '*Any two or more judges of the court of appeal may hear and determine* ***any question of law*** *arising on the stated case (…)*'

It is a rule of interpretation that, in interpreting a statute, no word is considered superfluous, redundant, or surplus. Therefore, a construction that makes any provision superfluous must be avoided. In this instance, the aforementioned provisions specifically deal with the nature of a case stated and the powers of the Court of Appeal in determining a case stated. It is apparent from the first part of the Section that the Court of Appeal has the power to hear and determine any question of law. A question of law is not restricted to the assessment. It could be any question of law arising on the stated case. Therefore, in the circumstances Legislature has granted the power to the Court of Appeal to hear and determine *any question of law arising on the stated case,* it would not be possible to place any restrictions by way of judicial interpretation.

Above all, Article 139 (1) of the Constitution provides that;

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.*

Although the first segment of the Article 139 (1) provides that the power of the Court of Appeal under Article 139 (1) is subject to any other law, the second segment does not have the phrase *according to law*. Therefore, acting under this segment the Court of Appeal can remit a case to the TAC with any appropriate direction.

As it was observed in the case of *Atapattu v. Peoples Bank*[6], constitutional provisions being the higher norm must prevail over the ordinary statutory provisions. This principle was reiterated in the subsequent case of *B. Sirisena Cooray v. Tissa Bandaranayake and two others*[7].

In addition, the law requires that the interpretation of Section 11 A (6) be consistent with Article 139 (1) of the Constitution. In the case of *Ismalebbe v. Jayawardena*[8] His Lordship S. N. Silva J., sitting in Court of Appeal (as His Lordship then was) cited the following extract from N. S. Bindra[9];

'It is well settled that of certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the Court would lean in favour of the former construction.'

Another matter which needs the attention of this Court is the appeal process. The process of appeal starts with an appeal to the CGIR against an assessment. Section 136 (1) of the Inland Revenue Act No. 38 of 2000 reads thus; *'Any person aggrieved by* ***the amount of the assessment*** *made under this Act or (...) may (...)* ***appeal*** *to the Commissioner General (...)'.*

Therefore, one may possibly argue that any appeal from its inception is limited to the amount of tax, and therefore even the Respondent was not entitled to raise time bar before the CGIR and also before the TAC. Yet, this cannot be a valid argument since it is settled law that any Court or tribunal has a right to decide on its own jurisdiction[10].

In the case of *Commissioner General of Inland Revenue v. Koggala Garments (Pvt) Ltd*[11] (hereinafter referred to as '*Koggala Garments'*) this

[6] (1997) 1 SLR 208.
[7] (1999) 1 SLR 1.
[8] (1990) 2 SLR 199 at p. 205.
[9] (1987) Seventh Edition, at p. 161.
[10] *M. Sivanathan v. Vanderpooten* 58 N.L.R. 553 at p. 556.
[11] CA Application No. Tax/01/2008.

Court interpreted Section 122(6) of the Inland Revenue Act No. 28 of 1979 which is identical to Section 11A (6) of the TAC Act. The Court observed that '*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 122 (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 conjunction "and" connotes that the words any question of law have to be read conjunctively with the requirement to confirm, reduce, increase or annul the assessment upon such question of law. This shows that the question of law has to pertain to the assessment.'*

'*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, confirms, reduces, increases or annuls the assessment determined by the Board, or remits the case to the Board with the opinion of the Court thereon.*'

However, in the subsequent case of the *Commissioner General of Inland Revenue v. Janashakthi General Insurance Co. Ltd*[12] (hereinafter referred to as *'Janashakthi Insurance [C.A. case]'*) this Court in delivering an order pertaining to the question of amending the questions of law in the case stated, expressed a contrary view on the same issue. The Court observed '*Thirdly, even if it 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 is directly connected to the assessment. If this Court so decides and remits 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 "revise the assessment" in Section 11A (6) of the TAC Act. There is no basis to say that the phrase "revise the assessment" is limited to arithmetic revision.*'

On appeal to the Supreme Court by the CGIR in the case of *Koggala Garments*[13], the Supreme Court refused to grant leave to appeal[14] and the pertinent question arises as to whether such refusal amounts to an affirmation of the judgment of the Court of Appeal by the Supreme Court.

[12] CA Tax 14/2013.
[13] *Supra* note 02
[14] SC Spl LA Application No. 114/2017.

Consequently, it may be argued that this Court is bound to follow the decision of *Koggala Garments.*

However, in the case of *W. R. Kulatunga Bandara, Assistant Commissioner of Labour v. W. Balasuriya, Sports of Kings*[15] *[C.A.]* Salam J., (with Rajapakse J., agreeing) held that it is a misconception to come to the conclusion that the refusal of leave by the Supreme Court constitutes the affirmation of the judgment of the lower Court and cannot be considered as creating a precedent.

In the case of *Mrs.Sirimavo Bandaranaike v Times of Ceylon Limited*[16] *[S.C]* His Lordship M.D.H.Fernando J., (Dheeraratne J., and Ramanathan J., agreeing) held that by restoring the *ex-parte* judgment of the District Court in that case, the Supreme Court did not expressly affirm or approve that judgment; the reason being not considering the legality or propriety of the judgment on its merits.

Moreover, I observe that even other jurisdictions have expressed the same view with regard to the above matter.

In the case of *Kunhayammed & ors v. State of Kerala & Anr*[17] the Supreme Court of India held that '*while hearing a petition for special leave to appeal, the Court is called upon to see whether the petitioner should be granted such leave or not, while hearing such petition, the Court is not exercising its appellate jurisdiction; it is merely exercising its discretionary jurisdiction to grant or not to grant leave to appeal Kunhayammed & ors v. State of Kerala & Anr*[18] the Supreme Court of India held that '*while hearing the petition for special leave to appeal, the Court is called upon to see whether the petitioner should be granted such leave or not. While hearing such petition, the Court is not exercising its appellate jurisdiction; it is merely exercising its discretionary jurisdiction to grant or not to grant leave to appeal.'*

'Dismissal at the stage of special leave-without reasons- no res judicata, no merger.'

it was held further that;

'a non-speaking order of dismissal where no reasons were given does not constitute res judicata. All that can be said to have been decided by the

[15] CA (PHC) APN 97/2010, Court of Appeal Minutes Dated 17.07.2013.
[16] [1995] 1 S.L.R 22 at p 28.
[17] SE (India) Minutes of 19.07.2000.
[18] SE (India) Minutes of 19.07.2000.

Court is that it was not a fit case where special leave should be granted. That maybe for various reasons.'

Further, the Indian Supreme Court observed in the case of *P. Singaravelan & ors v. The District Collector, Tiruppur and DT & Ors*[19] that *'it is evident that all the above orders were non-speaking orders, in as much as they were confined to a mere refusal to the grant of special leave to appeal to the petitioners therein. At this juncture, it is useful to recall that it is well settled that the dismissal of an SLP against an order or judgement of a lower forum is not an affirmation of the same. If such order of this Court is non-speaking, it does not constitute a declaration of law under Article 141 of the Constitution, or attract the doctrine of merger.'*

Thus, it is my humble view that the refusal of the Supreme Court to exercise appellate Jurisdiction, without giving any reasons, does not amount to an affirmation of the judgment of the lower Court as opposed to confirming the judgment in appeal having given reasons. The refusal to exercise appellate jurisdiction may occur due to numerous reasons including technical errors.

Accordingly, I am of the view that refusal to grant leave to appeal by the Supreme Court does not set out a binding precedent on this Court on the issue at hand.

In the case of *D.M.S. Fernando v. Mohideen Ismail*[20] His Lordship Samarakoon C.J., stated that the provisions of the Inland Revenue Act confine the taxpayer to an appeal against the quantum of the assessment and that the appropriate remedy in this case should be a writ. His Lordship observed that; *'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 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.'*

[19] Civil Appeal 9533-9537 of 2019.
[20] (1982) 1 SLR 222 at p. 234.

This was a case where the taxpayer applied to the Court of Appeal for 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 and the CGIR appealed to the Supreme Court. This was not a case where the taxpayer exercised his right of appeal to the CGIR and raised the objection of time bar and thereafter, appealed to the TAC and the CGIR appealed to the Court of Appeal therefrom. As such, there are material differences between the facts of the said case and the case at hand. The principal issue, in that case, was the duty of the Assessor to give reasons. The Supreme Court has not considered any specific provision such as Section 11 A of the TAC Act. It was just a passing remark made in response to a submission made in the case. Moreover, the Supreme Court only stated that the proper remedy is to invoke writ jurisdiction and not that it was the only remedy.

In the case of *Janashakthi Insurance PLC v. Commissioner General of Inland Revenue [S.C.]*[21] (hereinafter referred to as the *'Janashakthi Insurance [S.C.]*') the main grievance of the Appellant before the Supreme Court was a non-consideration of all the questions of law raised in the case stated. The Court of Appeal answered only three questions out of the seven questions of law. The other four questions were answered as '*it depends on the facts of each case'.* The Supreme Court was of the view that the Court of Appeal has failed to consider those four questions in the circumstances of the case at hand and to answer them accordingly[22]. The Supreme Court granted special leave to appeal on four questions of law, (a) to (d), formulated before the Supreme Court.

Question of law (a), the principal issue, before the Supreme Court was whether the Court of Appeal erred in law by failing to answer the case stated to the Court of Appeal. Question of law (b) was whether the Court of Appeal erred in law by applying the provisions of the Electronic Transactions Act No. 19 of 2006. Question of law (c), which is relevant to the case at hand, is whether the Court of Appeal erred in law by not deciding the case and *sending it to the Tax Appeals Commission with its opinion.* Question of law (d) was if one or more questions of law are answered in the affirmative, should the case be sent back to the Court of Appeal to answer the questions referred to in the case stated.

In delivering the order of the Supreme Court, Their Lordships of the Supreme Court refrained from answering the questions of law (c) above

[21] SC Appeal No. 114/2019, Supreme Court Minutes dated 26.06.2020.
[22] Ibid P. 12.

which was on the question of whether the Court of Appeal should have sent the case back to the TAC with the opinion of the Court of Appeal. The reason given was that answering the same will not arise in the circumstances Court has answered the other three questions in the affirmative. In the above circumstances, although the Supreme Court considered Section 11A (6) of the TAC Act, did not consider the fifth alternative available to the Court of Appeal, *remitting a case to the TAC with the opinion of the Court*. The Supreme Court considered only the first part where the Court of Appeal could confirm, reduce, increase, or annul the assessment determined by the TAC.

Therefore, although it was argued by the Respondent that in the aforementioned case of *Janashakthi Insurance [S.C.]*[23] the Supreme Court held that the Court of Appeal could consider a question of law in the case stated only if the question or questions may result in confirming, reducing, increasing or annulling the assessment determined by the TAC and the said decision of the Supreme Court is binding on this Court, it was not the *ratio decidendi* of the decision. The Supreme Court did not consider the second part where the Court of Appeal '*may remit the case to the Commission with the opinion of the Court, thereon.'* The Supreme Court decided a specific issue confining the decision to the facts of the case in appeal. Their Lordships went on to state in the order that the main grievance of the Appellant is non-consideration of majority of the questions of law raised in the case stated by the Court of Appeal and the validity of the Notice of Assessment[24].

In light of the above analysis, with all due respect to Their Lordships who delivered the judgment in the above case, I hold that the judgment in the case of *Janashakthi Insurance [S.C.]*[25] is not binding on the issue in the instant case.

In the case of *R. M. Fernando v, Commissioner of Income Tax*[26] Basnayake C.J., interpreted the word '*hear and determine any question of law arising on the stated case'* in Section 74 (5) of the Income Tax Ordinance No. 02 of 1932 to mean that the Court should hear and determine *any questions of law* arising on the stated case.

[23] *Supra* note 21.
[24] At p.10 of the judgement.
[25] *Supra* note 21.
[26] Reports of Ceylon Tax Cases, Vol. I p.571 at p.577.

In *M. P. Silva v. Commissioner of Income Tax*[27] Canekeratne J, having considered the same Section above held that *'all questions that could be raised on the whole case was intended to be left open.'*

In the case of *Commissioner General of Inland Revenue v. Dr. S. S. L. Perera*[28] Janak De Silva J., sitting in Court of Appeal (as His Lordship then was) (Wengappuli J., agreeing) considered the aforementioned two judgments in His Lordship's judgment and held that it is open for this Court to consider *any question of law*, provided that those may result in confirming, reducing, increasing or annulling the assessment determined by the Commission **or *requires remitting of the case to the TAC with the opinion of the Court.***

His Lordship Janak De Silva J., citing *Nilamdeen v. Nanayakkara*[29] observed that it is a well-known rule of construction that where that Legislature uses in an Act a legal term which has received judicial interpretation, it must be assumed that the term is used in the sense in which it has been judicially interpreted. There is also another rule of construction that where the words of an old statute are made part of a new statute, the legal interpretation which has been put upon the former by Courts of law is applicable to those same words in the new statute.

Accordingly, His Lordship Janak De Silva J., has considered the fifth alternative available to the Court of Appeal under Section 11A (6) of the TAC Act, which the Supreme Court did not consider in the case of *Janashakthi Insurance [S.C.]*[30] case and arrived at His Lordship conclusion that the Court of Appeal could consider any question of law provided that answer to the questions may result in not only confirming, reducing, increasing or annulling the assessment determined by the Commission but, also requires remitting the case to the TAC with the opinion of the court of Appeal.

In the recent case of *Cargills Agrifoods Limited v. Commissioner General of Inland Revenue*[31] D. N. Samarakoon J., (Sasi Mahendran J., agreeing) held that there can be a case stated on a question of law other than the determination of the TAC on the assessment. The same division of this

[27] Reports of Ceylon Tax Cases, Vol. I, p.336 at p.338.
[28] CA Tax 03/2017, at pp.5, 6, & 7.
[29] 76 NLR 169.
[30] *Supra* note 21.
[31] CA Tax 41/2014, Court of Appeal Minutes dated 28.02.2023.

Court re-affirmed the above position in the case of *Commissioner General of Inland Revenue v. M/S Lanka Marine Services*[32].

Even in the judgment of the case of *Koggala Garments*[33], Their Lordships were mindful of the option available to the Court of Appeal under Section 122 (6) of the Inland Revenue Act No. 28 of 1979 to '*remit the case to the Board with the opinion of the Court, thereon*'[34].

However, in arriving at the conclusion, with all due respect to Their Lordships, Their Lordships have not considered the aforementioned option available to the Court of Appeal. In the judgment, the conclusion is stated as follows;

'*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 12 (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 conjunction **"and"** connotes that the words any question of law have to be read conjunctively with the requirement to confirm, reduce, increase, or annul the assessment upon 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 question of law pertain only to a decision on jurisdiction which is susceptible to a challenge by way of judicial review.'*

Accordingly, the conclusion was that it is not any question of law but only a question of law impacting the assessment that this Court can hear and determine on a case stated. However, I am not in favour of the above interpretation.

As I have already stated above in this judgment, the intention of the Legislature has to be gathered from the language of the statute. In light of the analysis made above in this judgment and particularly in view of Sections 11 A (6) and 11 A (1) of the TAC Act, it is clear that the intention of the Legislature is to grant power to the TAC to try *any question of law* which result in confirming, reducing, increasing or annulling the

[32] CA Tax 30/2014, Court of Appeal Minutes dated 31.03.2023.
[33] *Supra* note 02.
[34] pp. 3, 9 & 11 of the judgement.

assessment determined by the Commission or requires remitting of the case to the TAC with the opinion of the Court.

The first segment of 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 determined by the commission'* is clearly separated from the immediate next segment *'may remit the case to the Commission with the opinion of the Court, thereon (...)'* with the word **'or'.** In my view, the word **'or'** is used to separate the first four alternatives where this Court could confirm, reduce, increase, or annul the assessment determined by the TAC from the fifth alternative where this Court could remit the case to the TAC with the opinion of the Court on the stated case. Therefore, having taken into consideration the above analysis with respect to the intention of the Legislature as well, it is my considered view that the first four alternatives and the fifth are disjunctive and mutually exclusive. If the intention of the Legislature was to make it conjunctive, it could have easily enacted the word *'and'* in place of the word *'or'*.

On the above analysis, it is my considered view that under Section 11 A (6), the question of confirming, reducing, increasing, or annulling arises when the Court of Appeal decides on the assessment determined by the Commission and the remittance of the case to the Commission with the opinion of the Court of Appeal arises when the Court of Appeal decides to remit the case back to the TAC with its opinion on the questions of law.

In light of the analysis made above in this judgment and keeping in line with the decisions of this Court in the cases of *Janashakthi Insurance [C.A.]*[35]*, Cargills Agrifoods Limited v. Commissioner General of Inland Revenue*[36] and *Commissioner General of Inland Revenue v. M/S Lanka Marine Services*[37] it is my considered view that the question of time bar can be determined by this Court and remit the case to the TAC with the opinion of the Court of Appeal under the second segment of the first part of Section 11A (6) of the TAC Act.

Therefore, with the greatest respect towards Their Lordships who delivered the judgment in *Koggala Garments*[38], this Court is unable to agree with the

[35] *Supra* note 12.
[36] *Supra* note 31.
[37] *Supra* note 32.
[38] *Supra* note 02.

reasoning that the question on time bar cannot be determined in a case stated and the only available remedy is judicial review.

In the case of *Walker Sons & Co. (U.K.) Ltd. v. Gunathilake and others*,[39] Thamotheram J., having considered the Judgement by Basnakyake C.J. in the case of *Bandahamy v. Senanayake*,[40] observed that as a rule, two judges sitting together follow the decision of two judges and where two judges sitting together are unable to follow a decision of two judges, the practice is to reserve the case for the decision of a fuller bench.

Focusing on the issue at hand, it appears to me that there are conflicting decisions on the question of whether a case could be stated to the Court of Appeal without a determination made by the TAC/BOR on the assessment, by numerically equal benches, namely two judges each of this Court. Three judgments in favour of the argument that a case could be stated to the Court of Appeal and one judgment against. Hence, another numerically equal bench of this Court is at liberty to follow any of those four decisions, provided that they hold the same precedential value.

Accordingly, in light of the preceding analysis made on the arguments presented to this Court. I am inclined to follow the views expressed by His Lordship Janak De Silva J., in the case of *Commissioner General of Inland Revenue v. Janashakthi General Insurance Co. Ltd (C.A.)*[41].

In my view, once a tax dispute enters the *appeal* process provided in the TAC Act, it should end up in the same process unless there is a rational reason for the deviation. Section 2 (1) of the TAC Act provides that the TAC shall be charged with the responsibility of hearing **all appeals** *in respect of* **matters relating to *imposition of any tax***, levy, charge, duty, or penalty.

Conclusion

In light of the above analysis, I hold that the Court of Appeal has jurisdiction to hear and determine this application under Section 11A (6) of the TAC Act even in the absence of a determination of an assessment by the TAC since the determination of this Court would result in confirming, reducing, increasing, or annulling the assessment determined

[39] [1978-79-80] 1 Sri.L.R. 231.
[40] 62 N.L.R. 313.
[41] *Supra* note 12.

by the Commission or requires remitting of the case to the TAC with the opinion of the Court.

Furthermore, I hold that the CGIR can invoke the case stated to challenge the determination of the TAC holding that the Notice of Assessment is time bared and therefore invalid and bad in law.

This matter is fixed for argument for the determination of the questions of law stated to this Court and to determine whether the TAC is correct in annulling the assessment.

JUDGE OF THE COURT OF APPEAL

Dr. Ruwan Fernando J.

I Agree.

JUDGE OF THE COURT OF APPEAL