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/0043/2014
Tax Appeals Commission
No. TAC/OLD/IT/001

v.

John Keells Holding PLC,
No. 117, Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

RESPONDENT

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

COUNSEL : M. Goonathilake, P.C., ASG, with H. Opatha, SC, for the Appellant.

Maithrie Wickramasinghe, P.C. with Rakitha Jayatunga for the Respondent.

WRITTEN SUBMISSIONS	:	15.12.2022 (by the Appellant) 01.12.2022 (by the Respondent)
ARGUED ON	:	09.05.2022 & 19.07.2022
DECIDED ON	:	25.05.2023

M. Sampath K. B. Wijeratne J.

Introduction

When the Respondent's appeal was taken up for hearing, the TAC, on its own accord considered the issue as to whether the TAC could make a determination on an appeal in the absence of a determination made by the CGIR. It is apparent from the written submissions filed by the Respondent Company in the TAC[1] that the Respondent Company has not raised the question of jurisdiction before the TAC. Nevertheless, the TAC on its own held that it has no jurisdiction.

Be that as it may, when this matter was taken up before this Court on the 26th July 2021, the learned President's Counsel for the Respondent invited Court to hear the parties with regard to the jurisdiction of this Court to make a determination on a case stated in the absence of a determination made by the TAC on the quantum of the assessment or on the assessment and moved to tender written submissions on the above question. Thereafter, on the 9th of May 2022 and 19th of July 2022 both Counsel made oral submissions on the preliminary objection raised by the Appellant. Consequently, both parties filed their written submissions on the question of jurisdiction.

The taxable periods on appeal to the Commissioner General of Inland Revenue (hereinafter referred to as the 'CGIR') were in respect of years of assessment 1995/1996 and 1996/1997. The CGIR did not hear the appeal but, forwarded the same directly to the Board of Review (hereinafter referred to as the 'BOR') in terms of Section 139 of the Inland Revenue Act No. 38 of 2000. The TAC, the successor of the BOR dismissed the appeal on the ground that the TAC can exercise its jurisdiction under Section 9 (10) of the Tax Appeals Commission Act No. 23 of 2011, as

[1] At pp. 178,197 & 219 of the appeal brief.

amended (hereinafter referred to as the 'TAC Act') only when there is a determination made by the CGIR on the assessment.

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 Section 9 (10) and proviso of Section 10 of the TAC Act.

The Respondent submitted that there was no decision on the assessment by the TAC and the questions of law do not relate to the quantum of the assessment or indeed to the assessment at all. It was argued that this Court does not have jurisdiction to hear and determine the above matter on the premise that the TAC has not determined an assessment regarding the above taxable periods. The Respondent's contention is that the TAC ruled on a jurisdictional issue and has not considered or proceeded to confirm, reduce, increase, or annul the assessment determined by the CGIR. As such, there is no assessment determined by the TAC in respect of the above taxable periods. Accordingly, it was argued that CGIR cannot invoke the provisions of the 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. 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.

Another argument advanced by the Respondent is that the last segment of Section 11 A (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 Commission with the opinion of Court, there should be an assessment determined by the Commission for the Commission to revise.

The counter-argument of the Appellant 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*'. The Black's Law Dictionary, 10th Edition, defines the word revision 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 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 directs the TAC to hear and determine the appeal on its merits, 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 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 consider those questions on its own, examine the assessment and decide. Therefore, it is obvious that the revision is not always an arithmetic alteration of the figures in an assessment.

Furthermore, the Appellant argued 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[2].'

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[3]. 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. However, as I have analysed elsewhere in this judgment in respect of Section 11 A (6), the necessity of revising the assessment may or may not arise in this instance as well.

As I have already stated in this Order, the TAC has determined that, as no determination has been made by the CGIR, the TAC cannot exercise its jurisdiction on appeal. The Respondent's appeal in this case was transferred to the BOR by the CGIR without a hearing before the CGIR. Section 139 of the IR Act No. 38 of 2000 provide for this course. However, there is no

[2] N. S. Bindra *Interpretation of Statutes*, Eighth Edition, 1997. p. 258.
[3] Section 138 (3) of Inland Revenue Act No. 38 of 2000 also does not place any restriction on the grounds of appeal in an appeal to the Board of Review.

provision as such in the TAC Act under which the CGIR could refer an appeal to the TAC without making a determination.

Under Section 10 of the TAC Act, ordinarily, the TAC has to make its determination on an appeal within two hundred and seventy days from the commencement of its sitting for the hearing. However, in an appeal transferred to the TAC from the BOR, the TAC is given twenty-four months from the date of commencement of its sittings for the hearing to make its determination. The additional time given to the TAC to hear and determine an appeal transferred from the BOR suggests that it is for the TAC to hear evidence and arrive at its conclusion in an appeal transmitted under Section 168. Under Sections 9 (7) and 9 (8) TAC has the power to summon witnesses and to allow adducing new evidence as well as evidence already been recorded at the hearing before the Commissioner General.

The TAC, in its determination, observed that the phrase '*after hearing the evidence, the Commission shall on appeal either confirm, reduce, increase or annul as the case may be, the assessment as determined by the Commissioner General'* and Section 9(4), 9(5) and 9 (8) supports the position that there should be a determination made by the CGIR before the TAC could exercise its jurisdiction. However, this finding is against the option given to the CGIR by the legislature under Section 139 of the Inland Revenue Act No. 38 of 2000 and the powers granted to the TAC under the proviso of Section 10 of the TAC Act.

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 Legislature 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*[4].'

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

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

application requiring the Commission to state a case on ***a question of law*** *for the opinion of the Court of Appeal* (…)'

In the case of *M. P. Silva v. Commissioner of Income Tax*[5] Canekaratne J, having considered Section 74 (5) of the Income Tax Ordinance No. 2 of 1972 stated that '*all questions that could be raised on the whole case was intended to be kept open*'.

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 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.

[5] Reports of Ceylon Tax Cases Vol. I, p.336 at p.338.

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 [C.A.]*[8] His Lordship S. N. Silva J., (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 165 (1) of the Inland Revenue Act No. 10 of 2006 reads thus; *'Any person aggrieved by* ***the amount of the assessment*** *made under this Act 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 a jurisdictional issue before the CGIR as well as 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]. Furthermore, Wade and Forsyth[11] state that where a jurisdictional question is disputed before a tribunal, the tribunal must necessarily decide it.

In the case of *Commissioner General of Inland Revenue v. Koggala Garments (Pvt) Ltd*[12] (hereinafter referred to as '*Koggala Garments'*) this 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***

[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] Administrative Law, H.W.R.Wade and C.F.Forsyth,11th edition, Oxford University Press, at p. 210.
[12] CA Application No. Tax/01/2008.

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*[13] (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 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 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 revisions*.'

The Respondent submitted that in the case of *Koggala Garments*[14], the Supreme Court refused to grant leave to appeal[15] in the appeal filed by the CGIR, and such refusal amounts to an affirmation of the judgment of the Court of Appeal by the Supreme Court. Accordingly, the Respondent contended that this Court is bound to follow the decision of *Koggala Garments*[16].

However, in the case of *W. R. Kulatunga Bandara, Assistant Commissioner of Labour v. W. Balasuriya, Sports of Kings*[17] *[C.A.]* Salam J., (with

[13] CA Tax 14/2013.
[14] *Supra* note 12.
[15] SC Spl LA Application No. 114/2017.
[16] *Supra* note 12.
[17] CA (PHC) APN 97/2010, Court of Appeal Minutes Dated 17.07.2013.

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, it cannot be considered as creating a precedent.

In the case of *Mrs.Sirimavo Bandaranaike v Times of Ceylon Limited*[18] *[S.C]* His Lordship M.D.H.Fernando J., (Dheeraratne J., and Ramanathan J., agreeing) held that by restoring the *ex-parte* judgement 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 other jurisdictions also have expressed the same view with regard to the above matter. In the case of *Kunhayammed & ors v. State of Kerala & Anr*[19] 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 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*[20] 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.'*

[18] [1995] 1 S.L.R 22 at p 28
[19] SE (India) Minutes of 19.07.2000.
[20] Civil Appeal 9533-9537 of 2019.

Thus, it is my humble view, the refusal of the Supreme Court to exercise its jurisdiction on appeal, without giving reasons, does not constitute an affirmation of the judgment of the lower Court as opposed to confirming the judgment on appeal having given reasons. The refusal to exercise appellate jurisdiction may occur for many 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.

The Respondent also relied on the observations made by His Lordship Samarakoon C.J., in the case of *D.M.S. Fernando v. Mohideen Ismail*[21] and argued that, in light of the Supreme Court's decision, the appropriate remedy should be 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.'*

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

[21] (1982) 1 SLR 222 at p. 234.

that the proper remedy is to invoke writ jurisdiction and not that it was the only remedy.

Another matter that arises is the effect of the judgment of the Supreme Court in the case of *Janashakthi Insurance PLC v. Commissioner General of Inland Revenue [S.C.]*[22] (hereinafter referred to as the *'Janashakthi Insurance [S.C.]*'), upon this case.

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[23]. 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 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

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

part where the Court of Appeal could confirm, reduce, increase or annul the assessment determined by the TAC.

Therefore, although one may argue that in the aforementioned case of *Janashakthi Insurance [S.C.]*[24] 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 validity of the Notice of Assessment[25].

In light of the above analysis, with all due respect to Their Lordships who delivered the judgement in the above case, I hold that the judgement in the case of *Janashakthi Insurance [S.C.]*[26] is not binding on the issue at hand in the instant case.

In the case of *R. M. Fernando v, Commissioner of Income Tax*[27] 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.

In *M. P. Silva v. Commissioner of Income Tax*[28] 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*[29] 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

[24] *Supra* note 22.
[25] At p.10 of the judgement.
[26] *Supra* note 22.
[27] Reports of Ceylon Tax Cases, Vol. I p. 571 at p.577.
[28] Reports of Ceylon Tax Cases, Vol. I, p.336 at p.338.
[29] CA Tax 03/2017, at pp.5, 6, & 7.

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*[30], 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.

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.]*[31], and arrived at His Lordship's 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*[32] 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 Court re-affirmed the above position in the case of *Commissioner General of Inland Revenue v. M/S Lanka Marine Services*[33].

Even in the judgment of the case of *Koggala Garments*[34], 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*'[35].

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;

[30] 76 NLR 169.
[31] *Supra* note 22.
[32] CA Tax 41/2014, Court of Appeal Minutes dated 28.02.2023.
[33] CA Tax 30/2014, Court of Appeal Minutes dated 31.03.2023.
[34] *Supra* note 12.
[35] pp.3, 9 & 11 of the judgement.

'*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 pertains 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 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.]*[36] *Cargills Agrifoods Limited v. Commissioner General of Inland Revenue*[37] and *Commissioner General of Inland Revenue v. M/S Lanka Marine Services*[38], it is my considered view that this Court could make a determination on a case stated in the absence of a determination made by the TAC on the quantum of the assessment or on the assessment 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*[39], this Court is unable to agree with the reasoning that a jurisdictional issue 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*,[40] Thamotheram J., having considered the Judgement by Basnakyake C.J. in the case of *Bandahamy v. Senanayake*,[41] 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

[36] *Supra* note 13.
[37] *Supra* note 32.
[38] *Supra* note 33.
[39] *Supra* note 12.
[40] [1978-79-80] 1 Sri.L.R. 231.
[41] 62 N.L.R. 313.

of Appeal and one judgment against. Hence, another numerically equal bench of this Court is at liberty to follow any of those four decisions.

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.)*[42].

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 view of the above analysis, I hold that this Court has jurisdiction to make a determination on a case stated even in the absence of a determination made by the TAC on the quantum of the assessment or on the assessment.

This matter is fixed for argument for the determination of the questions of law stated to this Court.

JUDGE OF THE COURT OF APPEAL

Dr. Ruwan Fernando J.

I Agree.

JUDGE OF THE COURT OF APPEAL

[42] *Supra* note 13.