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

In the matter of a case stated for the opinion of the Court of Appeal under section 11A of the Tax Appeals Commission Act, No. 23 of 2011, as amended by Act No. 20 of 2013.

C.A. TAX 05/2016

TAC/IT/045/2013

**Ilukkumbura Industrial Automation (Private) Limited**

No. 49/1,

Fife Road,

Colombo 05.

APPELLANT

-Vs-

**Commissioner General of Inland Revenue**

14th Floor, Secretarial Branch,

Department of Inland Revenue,

Sir Chittampalam A. Gardiner Mawatha,

Colombo 02.

RESPONDENT

BEFORE : A.H.M.D. Nawaz, J. (P/CA)

&

Sobhitha Rajakaruna, J.

COUNSEL : N.R. Sivendran with Upendra Kalahewatte, Pavithra Ragavan and Renuka Udumulla for the Appellant.

Suren Gananaraj SSC for the Respondent.

Argued on : 25.09.2020

Decided on : 30.11.2020

A.H.M.D. Nawaz, J. (P/CA)

The Appellant seeks to raise a new question of law in addition to the nine questions of law that the Tax Appeals Commission (TAC) has submitted to this court for determination, by its case stated.

The new question of law sought to be formulated before this court goes as follows:-

> *Did the Respondent violate the provisions of section 165 (7) of the Inland Revenue Act, No. 10 of 2006 in appointing M.M.R.R. Mellawa to hold further inquiries in terms of section 165 (7) of the Inland Revenue Act, No. 10 of 2006, when the said assessor was part of the decision making process in rejecting and issuing the assessment?*

Foremost in the substance of this question of law is the assertion that M.M.R.R Mellawa was engaged in rejecting the return of the Appellant and issuing the assessment served on the Appellant subsequently.

The Appellant relies on a case decided by another division of this court in ***Commissioner General of Inland Revenue v. Dr. S.S.L. Perera*** (CA Tax No. 3 of 2017, CA minutes of 11.01.2019) in order to buttress his argument for admitting this new question of law into the case stated. Justice Janak de Silva held as follows in the above judgment :-

> *"Accordingly, I hold that it is open for this Court to consider questions of law other than what is set out in the case stated. However, I wish to state that such a course of action is permissible only if the answers to the new questions of law may result in the confirmation, reduction, increasing or annulling the assessment determined by the Commission, or requires the remitting of the case to the TAC with the opinion of the Court. Questions of law*

*which are purely of academic interest cannot be raised [Navaratnam v. Commissioner of Income Tax (Reports of Ceylon Tax Cases, Vol. I, page 378 at 381). The same test applies to the questions of law to be formulated by the TAC for reference to this Court."*

I have to pause at this stage and observe that long before ***Commissioner General of Inland Revenue v. Dr. S.S.L. Perera,*** I had an opportunity to articulate the same principle (with Vijith K. Malalgoda, PC. J, the then President of the Court of Appeal, agreeing) in ***Commissioner General of Inland Revenue v. Koggala Garments (Pvt.) Ltd.*** [CA Application Tax 01/2008 (C.A. Minutes of 05.04.2017); reported in (2017) Galle LJ 04 at 507] that the question that is formulated in a case stated must result in one of the following :-

a) Confirming, reducing, increasing or annulling the assessment determined by the Commissioner; or,
b) Remittance of the case to the TAC with the opinion of the court.

In a nutshell, I had occasion to interpret the words "any question of law" arising on the stated case in section 122 (6) of the Inland Revenue Act, No. 28 of 1979 as amended and held that the stated question of law must arise or impinge on the assessment. It is not any question of law that can be raised in a case stated. It is only a question of law impacting on the assessment that renders itself amenable to a determination on a case stated. I came to take this view because the conjunction "and" in section 122 (6) of the Inland Revenue Act, No. 28 of 1979 signifies that the words "any question of law" have to be used conjunctively with the requirement to confirm, reduce, increase or annul the assessment upon such question of law. So the passage quoted of Justice Janak de Silva's reasoning in ***Commissioner General of Inland Revenue v. Dr. S.S.L. Perera*** (supra), is an affirmation of what I had held in ***Commissioner General of Inland Revenue v. Koggala Garments (Pvt.) Ltd.*** (supra) and in a nutshell, the ratio of the ***Koggala Garments*** case is as follows:

*The question of law in a case stated, whether stated by the TAC or sought to be raised before the Court of Appeal, must result in one of the alternatives in section 122 (6) of the Inland Revenue Act or the identical options specified in section 11A (6) of the Tax Appeals Commission Act as amended.*

I must also advert to another fact before I proceed to consider the question whether the particular question of law sought to be raised could be admitted into the case stated. Having implicitly agreed thus with the reasoning in the ***Koggala Garments Case***, I find Justice Janak de Silva contradicting himself in another case, namely, ***The Commissioner General of Inland Revenue v. Janashakthi General Insurance Co. Ltd.*** (CA Tax No. 14 of 2013 , CA minutes of 20.05.2020)

A recent decision of the Supreme Court in ***Janashakthi General Insurance PLC. V. Commissioner General of Inland Revenue*** (SC Appeal No. 114/2019, SC minutes of 26.06.2020) has now impliedly endorsed the correctness of the ***Koggala Garments Case.*** Justice Vijith K. Malalgoda, PC. (with Justice Murdu N.B. Fernando, PC. and Justice E.A.G.R. Amarasekara agreeing) has quite poignantly observed at page 13 of the Supreme Court judgment thus:-

*"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 conformation reduction increasing or annulling the assessment determined by the Commission."*

So the reasoning of the ***Koggala Garments Case*** stands validated and even the objections raised by the learned Senior State Counsel as to the new question of law confirms the validity and correctness of the ***Koggala Garments Case.***

The pith and substance of the objection of Mr. Suren Gnanaraj, the learned Senior State Counsel is that the admission of the new question of law and its determination would not result in the nullification of the assessment made by the Commissioner General of Inland Revenue. His argument is teleological. He assumes

that the answer that this court would give in response to the new question of law will not result in an adjustment of the assessment and therefore the question of law should not be permitted to be raised. Fundamentally his objection is not so much as to the substance of the question as to a definitive answer he assumes would be given to this question by this court.

On a careful consideration of the question of law and the facts and circumstances, the answer could very well be within the criteria suggested by ***Koggala Garments*** (supra). In other words I would not and could not venture into an answer to the question of law but the question of law would have to be allowed if it has the potential to result in an adjustment of the assessment. This calls for the discussion of the facts immanent in the case so that the admissibility or otherwise of the question of law becomes capable of resolution.

The question sought to be formulated as I alluded to it before, goes as follows :-

> *Did the Respondent violate the provisions of section 165 (7) of the Inland Revenue Act, No. 10 of 2006 in appointing M.M.R.R. Mellawa to hold further inquiries in terms of section 165 (7) of the Inland Revenue Act, No. 10 of 2006, when the said assessor was part of the decision making process in rejecting and issuing the assessment?*

This question of law implies that Mr. M.M.R.R. Mellawa, the assessor, took part in the inquiry to reach a compromise or adjustment of the assessment after the petition of appeal was received by the Commissioner General of Inland Revenue. It goes without saying that after a notice of assessment notifying the assessment of the amount of tax to be paid by the assessee, prior to his appeal being heard and disposed of, section 165 (7) of the Inland Revenue Act, No, 10 of 2006 mandates a condition precedent of an inquiry to arrive at an adjustment. The relevant provisions state as follows:-

Section 165 (7)

> *"On receipt of a valid petition of appeal, the Commissioner-General may cause further inquiry to be made by an Assessor, other than the Assessor who made such assessment against which the appeal is preferred, and if in the course of such inquiry an agreement is reached as to the matters specified in the petition of appeal, the necessary adjustment of the assessment shall be made."*

Section 165 (8)

> *"Where no agreement is reached between the appellant and the Assessor in the manner provided in subsection (7), the Commissioner-General shall, subject to the provisions of section 168, fix a time and place for the hearing of the appeal."*

Thus Section 165 (7) is quite explicit in that it precludes the assessor who made the assessment from participating at this inquiry that is primarily aimed at a settlement. It is the contention of the Appellant that section 165 (7) of the Inland Revenue Act has been infringed, as Mr. Mellawa who was the assessor and who had rejected the return took part in the inquiry leading finally to a non-settlement of the matter. The rationale for section 165 (7) appears to be the principle that the impartiality and the independence of the settlement would be best achieved only by employing someone who did not make the assessment on the assessee.

Upon a search for legislative history and provenance of section 165 (7) of the Inland Revenue Act, No. 10 of 2006, there was no restriction initially that an assessor who made the assessment could not look into the possibility of a settlement. Under the current law as it stands, the assessor who inquires as to a settlement has to be someone other than the assessor who made the assessment. This restriction did not exist in Inland Revenue Act, No. 28 of 1979 nor was it found in the Inland Revenue Act, No. 38 of 2000 as it was originally enacted. This requirement found its way into

the Inland Revenue Act, No. 38 of 2000 by way of an amendment introduced by Amendment Act, No. 37 of 2003 (section 136 (6) of the Amendment Act) and since then this imperative has existed in the fiscal law within its continuance in the Inland Revenue Act, No. 10 of 2006.

In the circumstances I take the view that the additional question of law that surfaces to the fore an alleged failure to comply with a statutory requirement of the Inland Revenue Act, No. 10 of 2006 must be permitted to be raised, as this question of law impacts or impinges on the assessment made in this case within the parameters of the criteria laid down in the case of *Commissioner General of Inland Revenue v. Koggala Garments (Pvt.) Ltd* (supra).

PRESIDENT OF THE COURT OF APPEAL

Sobhitha Rajakaruna, J.

I agree.

JUDGE OF THE COURT OF APPEAL