

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

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

The Commissioner General of Inland Revenue,

Department of Inland Revenue,

Sir Chittampalam A. Gardiner Mawatha,

Colombo 02.

APPELLANT

Case No. CA/TAX/24/2017

Vs.

Tax Appeals Commission Case No.

TAC/IT/005/2015

Fonterra Brands Lanka (Pvt) Ltd.,

No. 100 Delgoda Road,

Biyagama.

RESPONDENT

Before: Janak De Silva J.

Achala Wengappuli J.

Counsel:

Maithree Amerasinghe SC for the Appellant

K. Kanag-Ishvaran P.C. with Manoj Bandara for the Respondent

Argued on: 25.09.2018 and 26.11.2018

Written Submissions tendered on:

Appellant on 21.09.2018 and 08.01.2019

Respondent on 17.09.2018 and 07.01.2019

Decided on: 13.05.2020

Janak De Silva J.

The Respondent is a limited liability company incorporated in Sri Lanka engaged in importing, manufacturing and distribution of dairy products. The largest shareholder of the Respondent is Fonterra Brands (Asia holdings) Pvt. Ltd. which is in turn a wholly owned subsidiary of Fonterra Co-operative Group Ltd. of New Zealand.

The Respondent entered into a licensee agreement with the New Zealand Milk Brands Ltd. for ten years with effect from 01.06.2006 as licensor granting a non-exclusive right to the Respondent to use the "technical Know-How and Communication Package" in connection with the manufacture, packaging, marketing, distribution and sale of products in Sri Lanka. The Agreement also provided for the payment of royalty.

The Appellant claimed and deducted Rs. 866,588,254/= as royalty payment for the year of assessment 2009/2010 which had been paid to an associate company in the group of companies called New Zealand Milk Brands Ltd., which is closely connected to the Appellant.

The Assessor disallowed the royalty payments and issued an assessment against which the Respondent appealed to the Appellant who confirmed the assessment. The Respondent appealed to the Tax Appeals Commission (TAC) which annulled the assessment.

At the request of the Appellant the TAC has forwarded this Case Stated containing the following questions of law:

- (1) Whether the TAC erred in law, in coming to the conclusion that there has been a failure on the part of the CGIR, to grant a fair hearing though the CGIR has heard the appeal on 27.11.2014, and allowed to the Representative of the Appellant to make the oral submissions?
- (2) Whether the TAC erred in law in stating that CGIR cannot determine the appeal on new ground in the exercise of the appellate jurisdiction?
- (3) Whether the following facts are not the rationale behind the determination of the CGIR
 - I. The payment of Rs. 866,588,254/= as royalty deducted from the profit of the Company?
 - II. The payment has been made to the associate company which shows the arrangements for the purpose of reducing tax?

Fair Hearing

The TAC determined that the Respondent was denied a fair hearing by the Appellant in the appeal and as such the determination is ultra vires.

In this context, I must state that although the TAC is an appellate body and the question is whether the decision is right or wrong as opposed to judicial review where the question is whether the decision is lawful or not, it has the jurisdiction to consider grounds such as the breach of the rules of natural justice or an issue relating to the jurisdiction of the decision maker which traditionally forms a ground for the invocation of the power of judicial review.

Breach of the common law principles of natural justice can be dealt with by the appellate system in the tax field [*R. v. Brentford General Commissioners Ex. p. Chan* (1986) S.T.C. 65; *R. v. Commissioner for the Special Purposes of the Income Tax Acts Ex. p. Napier* (1988) 3 All E.R. 166; *Banin v. Mackinlay (Inspector of Taxes)* (1985) 1 All E.R. 842].

A multitude of judicial authority supports the proposition that jurisdictional questions can be raised by way of appeal.

In *R. v. Inland Revenue Commissioners Ex. p. Preston* [(1985) A.C. 835 at 862] Lord Templeman expressly held that on appeal the High Court can correct all kinds of errors of law including errors which might otherwise be subject to judicial review. Similar approach was taken in *R. v. Minister of Housing and Local Government Ex. p. Finchly Borough Council* [(1955) 1 W.L.R. 29 at 35], *Re. Purkiss' Application* [(1962) 1 W.L.R. 902 at 914], *Essex CC v. Essex Incorporated Church Union* [(1963) A.C. 808], *Shell v. Unity Finance Co. Ltd.*, [(1964) 2 Q.B. 203], *Arsenal Football Club v. Ende* [(1977) Q.B. 100 at 116].

The rules of natural justice are not engraved in stone. The exact scope of the requirements of fairness depends on the circumstances of each case such as the character of the decision-making body, the types of decisions to be made and the statutory framework which guides the decision-making body.

As Tucker L.J. expounded in *Russell v. Duke of Norfolk* [(1949) 1 All E.R. 109 at 117]:

"There are, in my view, no words which are of universal application to every kind of inquiry and kind of domestic tribunal. the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity to present his case."

The issue of a fair hearing arises in the context of documents submitted by the Respondent on 10.12.2014 to the Appellant. It appears that these documents were documents substantiating the payment of royalties which was requested by the Appellant by letter dated 27.11.2014 which is in fact the date on which the hearing into the appeal was held.

The documents so requested by the Appellant were provided by the Respondent on 10.12.2014. However, the Appellant did not consider them and went on to issue the determination on 09.12.2014 and state that those would have to be "sorted out in the appeal before the Tax Appeals Commission". Supposedly the determination was rushed as the time bar would have operated from 07.01.2015.

The Appellant acknowledged the appeal made to him by the Respondent on 07.01.2013 and had two years until 07.01.2015 to determine it. Having given a hearing on 27.11.2014 and called for further documents from the Respondent to substantiate its position, the Appellant violated the rules of justice and denied the Respondent a fair hearing by not considering the documents submitted in response to the Appellants request. Courts have leaned strongly against allowing a tribunal to decide a matter without giving a person an opportunity to have his case considered [*R. v. Housing Appeal Tribunal* [(1920) 3 K.B. 334; *Re. Wilson* (1985) A.C. 750; *R. v. Birmingham JJ Ex. p. Lamb* (1983) 1 W.L.R. 339; *R. v. Central Criminal Court Ex. p. Boulding* (1984) Q.B. 813].

Hence the determination made by the Appellant on the appeal made by the Respondent against the assessment of the assessor is void and the TAC was correct in its conclusion on this issue.

New Ground

The TAC held that the Appellant cannot in terms of section 165(13) of the Inland Revenue Act No. 10 of 2006 as amended (IR Act), determine an appeal on new grounds in the exercise of the appellate jurisdiction.

The issue revolves on whether the Appellant could have considered the application of sections 32 of the IR Act.

The Learned President's Counsel for the Respondent submitted that the assessor did not challenge or in any manner whatsoever deny to the Respondent its right to make the royalty payments under the License Agreement and/or deny the Respondent's right to claim any benefit under section 32 of the IR Act and that he disallowed the royalty payment only on the ground that such payment did not make the Respondent profitable for that year of assessment 2009/10.

It is observed that the application of section 32 of the IR Act was in fact raised by the Respondent in the letter of appeal dated 28th December 2012. The Respondent states therein:

"The appellant reiterates the position taken in the return of income submitted and emphasizes that the payment in question clearly bear the character of royalty and are thus deductible in terms of section 32 of the Act in the determination of its assessable income for the year of assessment 2009/10."

Thus the application of section 32 of the IR Act was raised by the Respondent and it was obligatory on the Appellant to consider it. In these circumstances, I see no error in the Appellant having done so as part of the determination.

Accordingly, the TAC erred in concluding that the Appellant had considered a new ground without jurisdiction.

Rationale for Determination

A Case Stated can be forwarded to Court only on a question of law. As a corollary this Court has the power to refrain from answering any question included in the Case Stated if it is not a question of law.

Question No. 3 formulated in the Case Stated in my view is not a question of law. As the learned President's Counsel for the Respondent correctly submitted, the Appellant is seeking to argue that the points made in Question No. 3 are in fact the rationale for the determination of the Appellant.

For all the foregoing reasons, I answer the questions of law in the Case Stated as follows:

- (1) Whether the TAC erred in law, coming to the conclusion that there has been a failure on the part of the CGIR, to grant a fair hearing though the CGIR has heard the appeal on 27.11.2014, and allowed to the Representative of the Appellant to make the oral submissions? **No.**
- (2) Whether the TAC erred in law stating that CGIR cannot determine the appeal on new ground in the exercise of the appellate jurisdiction? **Yes.**
- (3) Whether the following facts are not the rationale behind the determination of the CGIR
 - I. The payment of Rs. 866,588,254/= as royalty deducted from the profit of the Company? **Does not arise as it is not a question of law.**
 - II. The payment has been made to the associate company which shows the arrangements for the purpose of reducing tax? **Does not arise as it is not a question of law.**

Accordingly, acting in terms of section 11A (6) of the Tax Appeals Commission Act No. 23 of 2011 as amended, we confirm the assessment determined by the TAC.

The Registrar is directed to send a certified copy of this determination to the Secretary of the TAC.

Judge of the Court of Appeal

Achala Wengappuli J.

I agree.

Judge of the Court of Appeal