

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

In the matter of an appeal of a case stated under
section 11A of the Tax Appeals Commission Act No.
23 of 2011 as amended by Act No. 20 of 2013

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

APPELLANT

Case No. CA(TAX)02/2017 Vs.

Case Stated No. TAC/IT/019/2014

Pigott Chapman and Company,
58/1, Ward Place,
Colombo 7.

RESPONDENT

Before: Janak De Silva J.

Achala Wengappuli J.

Counsel:

Anusha Samaranayake DSG for the Appellant

Lakshman Perera P.C. with Pulasthi Hewamanne and Anjali Amarasinghe for Chapman International (Pvt) Ltd.

Written Submissions tendered on:

Appellant on 23.11.2018

Chapman International (Pvt) Ltd. on 22.10.2018

Argued on: 18.09.2018

Decided on: 25.03.2018

Janak De Silva J.

The Respondent is a partnership which is claimed to have been dissolved on 01.01.2013 (X2). The partners were Chapman International (Pvt) Ltd. and Ayman Abdul Cader. When the Respondent submitted its return of income for the years of assessment 2009/2010 and 2010/2011, the assessor rejected them and made his own assessments.

The Respondent appealed to the Appellant against the assessments made by the assessor. However, the Appellant confirmed the assessments made by the assessor. Then the Respondent appealed to the Tax Appeals Commission (TAC) which annulled the two assessments made by the assessor. Hence the Appellant applied to the TAC to forward a case stated to this Court which was done by the TAC.

On 8th June 2018 Chapman International (Pvt) Ltd. filed a motion through its Attorney-at-Law stating that the Respondent is a partnership consisting of Chapman International (Pvt) Ltd., a company duly incorporated in Sri Lanka and Ayman Abdul Cader (R1) and that upon the death of Ayman Abdul Cader on 3.12.2013 the partnership was determined and ceased to exist. It was

further stated that the surviving party after the determination of the partnership agreement is Chapman International (Pvt) Ltd. and that the appeal has been instituted against the business name and not legal persons who were party to the now dissolved partnership and therefore the appeal must be dismissed in limine.

Court heard the Appellant and Chapman International (Pvt) Ltd. on the preliminary objection. They were also given the opportunity to file written submissions. This order is on the preliminary objection.

The preliminary objection can be dissected into the following points:

- (1) The present status of the Respondent
- (2) A case stated is deemed to be a civil appeal
- (3) Only a legal person who is a partner of a partnership can be named as a Respondent
- (4) Invalidity of the transmission of the case stated in view of section 77(2) of the Inland Revenue Act No. 10 of 2006 (2006 Act)
- (5) Necessary parties
- (6) Failure to name existing partners renders any decision on the merits of the case a nullity
- (7) Principles of Natural Justice

Present Status of the Respondent

There is no dispute that the Respondent was registered as a partnership. The question is whether it was determined due to the death of Ayman Abdul Cader on 03.12.2013 which was registered on 23.01.2014 (R2). The learned President's Counsel for Chapman International (Pvt) Ltd. submits that it was determined based on clause 20 of the Partnership Agreement dated 5th April 2004. The said clause states that the death of a partner shall determine the partnership.

However, the following facts show that even after the death of Ayman Abdul Cader on 03.12.2013, Pigott Chapman and Company, the Respondent, acted as if the partnership existed or was continued as a new partnership which took over the liabilities of the previous partnership:

- (1) In the appeal to the Appellant against the assessments of the assessor dated November 2014 (X2) the name & address of the Petitioner is given as Pigott Chapman and Company (a Partnership), 58/1 Ward Place, Colombo 7.
- (2) The TAC Determination (X3) shows Pigott Chapman and Company (a Partnership) as the Appellant before the TAC and that Mr. P.L.G. De Silva, Attorney-at-Law, authorized representative and Mr.K. Prabahar, Accountant, Pigott Chapman and Company appeared for Pigott Chapman and Company (a Partnership) when the hearing took place on 20.10.2016.
- (3) Pigoff Chapman & Company (sic) filed a return of income for the year of assessment 2015/2016 as a partnership on 15.11.2016(B). The particulars of the partners are given as Chapman International (Pvt) Ltd. and late Mr. A.A. Cader.
- (4) The Precedent Partner, Pigoff Chapman & Company (sic) filed a return of income for the year of assessment 2016/2017 as a partnership on (B). The particulars of the partners are given as Chapman International (Pvt) Ltd. and Mr. A.A. Cader.
- (5) Dayananda Samarawickrema & Co., Chartered Accountants have certified a statement of comprehensive income for the year ended 31st March 2017 for Pigott Chapman & Company showing a net profit/(loss) for the years 2016/2017 and 2015/2016 (B).
- (6) Dayananda Samarawickrema & Co., Chartered Accountants have certified a statement of comprehensive income for the year ended 31st March 2016 for Pigott Chapman & Company showing a net profit/(loss) for the years 2015/2016 and 2014/2015 (B).
- (7) A Statement of Financial Position of the Respondent filed for the year 2015/2016 shows that it is an ongoing concern with valuable assets including fixed deposits (C).

The above facts clearly show that the Respondent had, even after the death of Mr. A.A. Cader on 3.12.2013 acted and held out to third parties including the Appellant and the TAC that it existed as a partnership or was continued as a new partnership which took over the liabilities of the previous partnership. In fact, relief was obtained from the TAC on the basis that the partnership existed. Court is therefore of the view that the Respondent cannot now be heard to state that the partnership Pigott Chapman and Company was determined upon the death of Late A.A. Cader on 3.12.2013. The Respondent cannot be allowed to approbate and reprobate.

Scrutton, L.J. in *Verschures Creameries vs. Hull & Netherland Steamship Co. Ltd.* [(1921) 2 KB 608 at 612] held:

"A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn around and say it is void for the purpose of securing some other advantage. This is to approbate and reprobate the transaction."

This principle had been adopted by the Supreme Court. In *Samarakoon C.J. in Visuvalingam v. Liyanage* [(1983) 1 Sri L.R. 203 at 227] reiterated this principle in a different formulation by stating that one "cannot blow hot and cold."

In *Ranasinghe v. Premadharma and others* [(1985) 1 Sri.L.R. 63 at 70] Sharvananda C. J. held:

"In cases where the doctrine of approbation and reprobation applies, the person concerned has a choice of two rights, either of which he is at liberty to adopt, but not both. When the doctrine does apply, if the person to whom the choice belongs irrevocably and with full knowledge accepts the one, he cannot afterwards assert the other; he cannot affirm and disaffirm"

Whether a Case Stated is a Civil Appeal

The learned President's Counsel for Chapman International (Pvt) Ltd. submitted that a case stated is a civil appeal. He relied on section 11A (3) of the Tax Appeals Commission Act No. 23 of 2011 as amended (TAC Act) which reads:

"(3) For the purpose of the application of the provisions of the Stamp Duty Act, No. 43 of 1982 -

- (a) all proceedings before the Court of Appeal on any case stated under this section or incidental to the hearing, determination or disposal of any such case, shall be deemed to be civil proceedings before the Court of Appeal of the value of five thousand rupees or of such greater amount as is set out by the Commission in the stated case as the amount of the tax in dispute;
- (b) every such case stated shall, together with all books, documents and papers annexed thereto by the Commission, be deemed to be a single exhibit in civil proceedings before the Court of Appeal; and
- (c) the Commissioner-General, if he is the appellant, shall be deemed to be a Government officer suing, or if he is the respondent to the appeal, a Government officer being sued, in a suit *virtue officii.*" (emphasis added)

This is a deeming provision the effect of which has been described by Ranasinghe C.J. in *Edwin and another vs. Sugathadasa De Silva* [(1989) 1 Sri.L.R. 337 at 341] as follows:

"The term "deem" is a concept very familiar in modern legislation. What is intended to be achieved by the use of this term is to treat as a fact something that has not been established as a fact or even shown not to be a fact. It is not an impossible conception to deem that a thing happened even though it is known positively that it did not happen - *Marimuttu vs. Commissioner for Registration of Indian and Pakistani Residents H)* Where a person is deemed to be something, what it means is that though he is not in reality that something he is required to be treated as if he were that something: where a person or thing is to be deemed to be or to be treated as something which in reality it is not it

shall have to be treated as so during the entire course of the proceedings - Bindra: interpretation of Statutes (6th Ed) p. 912 -14. Sometimes the term is used to give a comprehensive description that includes what is obvious what is uncertain and what is, in the ordinary sense, impossible - *St. Aubyn vs. A. G.*, (2)." (emphasis added)

However, as correctly submitted by the learned DSG it is a deeming provision with limited scope in that the deeming of a case stated as a civil proceeding is only for the limited purpose of the application of the provisions of the Stamp Duty Act No. 43 of 1982. The deeming effect does not have any application beyond that. On the other hand, that the legislature sought to deem a case stated as a "civil proceeding" indicates that in the absence of such a deeming provision it is in fact not a "civil proceeding".

The learned President's Counsel for Chapman International (Pvt) Ltd. also relied on section 9(a), (b) and (c) of the TAC Act which reads:

"(9) For the purposes of enabling the Commissioner- General or any other party to appeal to the Supreme Court against any order of the Court of Appeal under subsection (6), and for the purpose of the application of the provisions of any written law relating to appeals to the Supreme Court from the decisions of the Court of Appeal -

- (a) an order made by the Court of Appeal under subsection (6) shall, together with any order of that Court under subsection (8), be deemed to be a final judgment of the Court of Appeal in a civil action between the Commissioner-General and such other party;
- (b) the value of the matter in dispute in such civil action shall be deemed to be five thousand rupees:

Provided that, where the Commission in the stated case, set out an amount higher than five thousand rupees as the amount of the tax in dispute, the value of the matter in dispute in such civil action shall be deemed to be that higher amount; and

(c) in respect of any such appeal, the Commissioner-General shall not be required to make any deposit or pay any fee or furnish any security prescribed by such written law." (emphasis added)

Here again the deeming effect has limited scope in that it is only for the purpose of enabling the Commissioner-General or any other party to appeal to the Supreme Court against any order of the Court of Appeal under subsection (6), and for the purpose of the application of the provisions of any written law relating to appeals to the Supreme Court from the decisions of the Court of Appeal.

Court is of the view that a case stated in terms of section 11A (1) of the TAC Act is in fact a step in the appeal made by the Respondent to the TAC. In terms of section 11A (1) of the TAC Act any party to the appeal has the right to apply to the TAC to state a case on a question of law for the opinion of this Court. Furthermore, section 11A (5) of the TAC Act allows this Court to send the case stated back to the TAC for amendment and the TAC shall then amend the case accordingly. Additionally, after a case stated is referred, this Court can act under section 11A (6) of the TAC Act and inter alia remit the case to the TAC with the opinion of the Court and where a case is so remitted by the Court, the TAC has to revise the assessment in accordance with the opinion of the Court. This Court can also confirm, reduce, increase or annul the assessment determined by the TAC. Furthermore, in view of section 11A (7) of the TAC Act Court may, pending the determination of the case stated, make an interim determination as regards the amount of tax recoverable in respect of the amount of tax in dispute.

In our view these provisions support the view that the case stated to this Court in terms of section 11A (1) of the TAC Act is in fact a step in the appeal made by the Respondent to the TAC.

Only a legal person who is a partner of a partnership can be named as a Respondent

The learned President's Counsel for Chapman International (Pvt) Ltd. submits that the surviving partners of Pigott Chapman and Company are Chapman International (Pvt) Ltd. and the Executrix of the estate of the late Ayman Carder (paragraph 21 of the written submissions). Accordingly, it is his contention that no appeal can lie against the partnership which is not a legal persona and that the normal requirement is that persons who are partners in a partnership has to be named

as plaintiffs or defendants if the case is in the District Court and appellant or respondent if the case is an appeal in the Court of Appeal. He relied on Weeramantry on Contracts, Vol. 1, page 542, H.W. Thambiah Q.C., Principles of Ceylon Law, page 546 and *Suppiah vs. Paliahpillai* (14 N.L.R. 393) which state that all partners of the partnership must be made defendants to an action where the partnership is sought to be sued or they should be made plaintiffs where the partnership is seeking to sue.

The above statement of law will not apply to the instant case as a case stated is not an action as explained above.

There is also indication that there is no such requirement that a party to a case stated must be a legal or natural person.

Section 165(1) of the Inland Revenue Act No. 10 of 2006 as amended (2006 Act) allows “any person” to appeal to the Commissioner General of Inland Revenue against an assessment or valuation. Section 217 of the 2006 Act defines a “person” to include a company or body of persons or any government. Body of persons here must be read to include any body of persons corporate or unincorporate since section 7(1) of the TAC Act allows any person aggrieved by the determination of the Commissioner General of Inland Revenue to appeal to the TAC. Although the TAC Act does not define who a “person” is the “person” here includes, in terms of section 2(s) of the Interpretation Ordinance, any body of persons corporate or unincorporate. Accordingly, it is clear that when it comes to appeals made to the Commissioner General of Inland Revenue under the 2006 Act and appeals made to the TAC under the TAC Act, there is no need for parties to be legal or natural persons. A body of persons can be a party.

Invalidity of the transmission of the case stated in view of section 77(2) of the 2006 Act

The learned President’s Counsel for Chapman International (Pvt) Ltd. submits that as the case stated has been filed naming the partnership without naming the partners, namely Chapman International (Pvt) Ltd. and the executrix of the estate of the late Ayman Abdul Cader and the failure of the Appellant to amend the caption after this being brought to its attention “invalidates the transmission of the case”.

Court has no hesitation in rejecting this submission. Firstly, the whole process began with an appeal to the TAC made by the partnership in its name (X2 page 1). At no point during the proceedings before the TAC did the partnership or any of its partners seek to inform the TAC of any mistake in the name of the appellant before the TAC. On the contrary, the legal counsel marked appearance for the partnership while persons marked appearance as employees of the partnership. Secondly, the executor of the late A.A. Cader by letter dated 16 November 2016 informed the representative of the Appellant that the “partnership is now been carried on by a limited liability company”. The Appellant cannot be penalized for inconsistent positions taken by the Respondent.

Necessary Parties

The learned President’s Counsel for Chapman International (Pvt) Ltd. submits that the Appellant had failed to name necessary parties to the case stated and relied on *Abeydeera vs. Dr. Stanely Wijesundera, Vice Chancellor University of Colombo* [(1983) 2 Sri.L.R. 267] and *Perera vs. NHDA*. Those are cases involving the writ jurisdiction and the question as to who are necessary parties to such applications. The instant case is a case stated and not a writ application.

Failure to name existing partners renders any decision on the merits of the case a nullity

The learned President’s Counsel for Chapman International (Pvt) Ltd. submits that as the case stated was filed against a non-existent party any judgment thereon is null and void. He relied on *Lazard Brothers & Company vs. BanqueIndistrielle de Moscou* [(1932) K.B. 617] and *Lazard Bros & Co. vs. Midland Bank Ltd.* [(1933) A.C. 289]. Court has set out above the reasons why the instant case stated is not null and void.

In any event, if that is held to be the correct position then the appeal made by the Respondent to the TAC is also flawed as it was made in the name of the partnership and not the partners (X2 page 1). Then applying the ratio of *Lazard Brothers & Company vs. BanqueIndistrielle de Moscou* (supra) and *Lazard Bros & Co. vs. Midland Bank Ltd.* (supra) which are relied on by the learned President’s Counsel for Chapman International (Pvt) Ltd., that appeal is also null and void.

Principles of Natural Justice

The learned President's Counsel for Chapman International (Pvt) Ltd. submits that as the partners of the partnership Pigott Chapman and Company. have not been made parties there is a violation of the rules of natural justice and relies on *Menchinahamy vs. Muniweera* (52 N.L.R. 409), *Amerajeewa vs. University of Colombo* [(1993) 2 Sri.L.R. 327] and *Atapattu vs. People's Bank* [(1997) 1 Sri.L.R. 208].

Court has already allowed the learned President's Counsel to appear on behalf of Chapman International (Pvt) Ltd.

For the foregoing reasons, court overrules the preliminary objection raised by learned President's Counsel for Chapman International (Pvt) Ltd.

This brings me to the question of costs. Laws delay is topical at legal and judicial fora due to its acute impact on the administration of justice. It has ancient antecedents as Shakespeare makes the law's delay one of the ills of life which led Hamlet to think of suicide. Such discourse is meaningless unless Courts employs all possible preventive measures at its disposal when an opportunity arises. In my view, the instant preliminary objection is a text book example of a frivolous and vexatious preliminary objection. In particular, given that it is the partnership that filed the appeal to the TAC in its name and now seeks to raise objections on a contrary basis.

In these circumstances, an order for high costs is more than justified and Court is fortified by the statement of Tilakawardane J. in *Leon Peris Kumarasinghe v. Samantha Weliweriya* [S.C. (Spl) L.A. No. 37/2012, S.C.M. 12.11.2013] where she held (at page 7):

"The Court notes that the time has come for the Supreme Court to affirmatively determine the utility of punitive costs with the primary view of deterrence. The decision to award punitive damages is consistent with similar decisions in foreign jurisdictions including [but not limited to] the Indian Case of *Reliance Mobile v Hari Chand Gupta* (2006) (CPJ 73 NC), where punitive damages were awarded, for the production of a false affidavit, with the intention of preventing such actions in the future and *Polye v Papaki and Another* [2001](1 LRC 170), where the Supreme Court of Papua New Guinea

determined that the jurisdiction of the Supreme Court was invoked without reasonable cause and amounted to a misconduct on the part of the Appellant which resulted in unnecessary expenditure by the Respondents and granted punitive damages accordingly.

This Court cannot over emphasize the need to appropriately deal with litigants who attempt to abuse the process of Court and thereby cause unnecessary delay and costs to other parties in order to ensure that, in the future, litigants will not be tempted to indulge in such ill-conceived practices."

Court dismisses the preliminary objection with costs fixed at Rs. 50,000/=.

The case stated will now be fixed for argument.

Judge of the Court of Appeal

Achala Wengappuli J.

I agree.

Judge of the Court of Appeal