
COMMISSIONER GENERAL OF INLAND REVENUE

Vs.

FIRST MEDIA SOLUTION (PVT) LTD

COURT OF APPEAL
WICKRAMASINGHE, J.
SAMAYAWARDHENA, J.
CA/TAX/6/2016
TACNAT/019/2014

Tax Appeals Commission Act, No. 23 of 2011, sections 7, 11A—Case stated—Value Added Tax Act, No. 14 of 2002, sections 60(1), 61— Electronic Transactions Act, No. 19 of 2006

The respondent taxpayer preferred an appeal to the Tax Appeals Commission (TAC) against the determination of the Commissioner General of Inland Revenue. The TAC, without going into the merits of the matter, allowed the appeal on the basis that the Notice of Assessment is not in compliance with the mandatory provisions of section 60(1) of the Value Added Tax (VAT) Act, No. 14 of 2002, as amended, inasmuch as the said Notice of Assessment does not bear the name or signature of

the officer who issued it, and that the said omission is incurable. At the instance of the Commissioner General, the TAC referred a case stated for the opinion of the Court of Appeal.

Held:

1. Although the Notice of Assessment does not bear the name or signature of the officer who issued it, there was no room for the respondent taxpayer to be misled about the item of tax in dispute and the name of the assessor who made the assessment. No prejudice has been caused to the respondent taxpayer by failure to mention the name of the assessor.
2. The Tax Appeals Commission has taken the view that the use of the word “shall” in section 60(1) makes compliance mandatory, and there is no valid assessment without a name or signature. The use of the expression “may” or “shall” in a statute is not decisive, and other relevant provisions need to be looked into to find out whether the character of the provision is mandatory or directory. When section 60 is read with section 61, it is clear that the word “shall” used in section 60(1) is not mandatory.
3. The defect is curable in terms of section 61 (1) of the VAT Act.

Cases referred to:

1. Elgitread Lanka (Pvt) Ltd v. Sino Tyres (Pvt) Ltd [2011] SLR 130 at 136
2. Ramalingam v. Thangarajah [1982] 2 Sri LR 693 at 702
3. Kamkaru Sevana v. Kingsly Perera (SC/HC/LN86/12, SCM of 17. 05. 2013)
4. Somawathi de Zoysa v. Jayasena Fernando [2005] 1 Sri LR 10 at 14
5. Ismail v. Commissioner of Inland Revenue [1981] 2 Sri LR 78 at 111
6. Ranaweera v. Ramachandran (1969) Vol III Sri Lanka Tax Cases 395

APPLICATION for an Opinion on a Case Stated by the Tax Appeals Commission.

Suranga Wimalasena, S. S. C., for the Appellant.

Johann Corera for the Respondent.

cur. adv. vult.

December 5, 2019

SAMAYAWARDHENA, J.

This is a case stated for the opinion of this Court under section 11A of the TaxAppeals Commission Act, No. 23 of 2011, as amended.

In terms of section 7 of the TaxAppeals Commission Act, the respondent taxpayer preferred an appeal to the Tax Appeals Commission against the determination of the Commissioner General of Inland Revenue dated 10. 11. 2014.

The Tax Appeals Commission, by determination dated 13. 11. 2015, without going into the merits of the matter, allowed the appeal on the basis that the Notice of Assessment relevant to this matter is not in compliance with the mandatory provisions of section 60(1) of the Value Added Tax Act, No. 14 of 2002, as amended, inasmuch as the said Notice of Assessment “*does not bear the name of the Commissioner General, Deputy Commissioner or Assessor issuing it nor any name duly printed or signed thereon.*” The Tax Appeals Commission has also taken the view that “the omission is not a defect curable under section 61 of the VAT Act.”

There is no dispute that the Notice of Assessment does not bear the name of the Commissioner General nor any name duly printed or signed thereon.

It is the submission of the learned Senior State Counsel for the Commissioner General of Inland Revenue that as the Notice of Assessment is a computer-generated document, under the Electronic Transactions Act, No. 19 of 2006, as amended, neither the name nor the signature is required.

Secondly, the learned Senior State Counsel submits that even if the Notice of Assessment is not considered a computer-generated document, the failure to place the name or signature of the Assessor who issued the Notice is an omission curable under section 61 (1) of the Value Added Tax Act.

I will first consider the alternative submission of the learned Senior State Counsel.

By looking at, *inter alia*, page (ii) of the Petition of Appeal of the respondent taxpayer, it is clear that the respondent taxpayer knew very well that the Assessor responsible for this Assessment is Mrs. S. H. C. S. Perera of Unit 5 of the Department of Inland Revenue. The respondent taxpayer

has given details of the inquiry/interview had with the said Assessor and the documents exchanged in that regard prior to receipt of the Notice of Assessment.

It is noteworthy that in all the correspondence (including the documents exchanged before receipt of the Notice of Assessment and in the Notice of Assessment in issue), the following details are included:

Tax Identification No./File No. 114470058 Assessment No. 6976840 Taxable Period 09090

According to page 1 of the “Reasons for the Determination of Appeal” given by the Commissioner General of Inland Revenue dated 10. 11. 2014, during the hearing of the appeal before the Commissioner General of Inland Revenue, the said Assessor, Mrs. S. H. C. S. Perera, also participated.

Hence, there was no room for the respondent taxpayer to be misled about the item of tax in dispute and the name of the Assessor who made the Assessment.

There is no dispute that the respondent taxpayer received the Notice of Assessment.

Section 60(1) of the Value Added Tax Act (as amended by Act No. 7 of 2014) reads as follows:

Every notice to be given by the Commissioner General, a Commissioner or an Assessor or Assistant Commissioner under this Act shall bear the name of the Commissioner General or Commissioner or Assessor or Assistant Commissioner as the case may be and every such notice shall be valid if the name of the Commissioner General, Commissioner or Assessor or Assistant Commissioner is duly printed or signed thereon.

The Tax Appeals Commission has taken the view that the use of the word “shall” in section 60(1) makes compliance mandatory, and there is no valid assessment without the name or signature.

The learned counsel for the respondent taxpayer, in his written submission, whilst emphasising the use of the word “shall” twice in section 60(1) and the use of the word “*if in the said section, argues that “a notice is valid only if it bears the name either printed or signed thereon.”*”

In *Elgitread Lanka (Pvt) Ltd v. Bina Tyres (Pvt) Ltd*,¹Marsoof J. stated:

The “may” and “shall” dichotomy has oft confounded courts in the process of statutory interpretation, and as N. S. Bindra’s Interpretation of Statutes (10th Edition, Butterworths, 2007) explains at page 999-

“The use of the expression “may” or “shall” in a statute is not decisive, and other relevant provisions that can throw light have to be looked into in order to find out whether the character of the provision is mandatory or directory. In such a case legislative intent has to be determined. The words “may”, “shall”, “must” and the like, as employed in statutes, will in cases of doubt, require examination in their particular context in order to ascertain their real meaning.”

In ascertaining the legislative intent, it is permissible to look at the purpose of the legislation in which the particular provision sought to be interpreted occurs.

As Sharvananda J. (later C. J.) stated in *Ramalingam v. Thangarajah*:²

Prima facie the word ‘shall’ suggests that it is mandatory, but that word has often been rightly construed as directory. Everything turns on the context in which it is used; and the purpose and effect of the section in which it appears.

In the Supreme Court case of *Kamkaru Sevana v. Kingsly Perera*³ Sripavan J. (later C. J.) stated:

It is no doubt true that the rule of interpretation permits the interpretation of the word “may” in certain context as “shall” and vice versa, namely, permit the interpretation of “shall” as “may”.

In my view, when section 60 is read with section 61, it is clear that the word “shall” used in section 60(1) is not mandatory.

Let me reproduce section 60 in its entirety.

60(1) Every notice to be given by the Commissioner General a Commissioner or an Assessor or Assistant Commissioner under this Act shall bear the name of the Commissioner General or Commissioner or Assessor or Assistant Commissioner as the case may be and every such notice shall be valid if the name of the

Commissioner General, Commissioner or Assessor or Assistant Commissioner is duly printed or signed thereon.

(2) Every notice given by virtue of this Act may be served on a person either personally or by being delivered at or sent by post to his last known place of abode or any place at which he is, or during the period to which the notice relates, was carrying on or carrying out a taxable activity.

(3) Any notice sent by post shall be deemed to have been served on the day on which it could have been received in the ordinary course of post.

(4) In proving service by post it shall be sufficient to prove that the letter containing the notice was duly addressed and posted.

(5) Every name printed or signed on any notice or signed on any certificate given or issued for the purposes of this Act, which purports to be the name the person authorised to give or issue the same, shall be judicially noticed.

When section 60 is read as a whole, it is clear that the intention of the legislature is to interpret the Notice in favour of the Commissioner General of Inland Revenue (and not in favour of the taxpayer).

When section 60(1) is taken separately, the said intention of the legislature is clearer.

Section 60(1) has two parts. The first part states that the Notice of Assessment shall bear the name of the Commissioner or the Assessor. The second part states that even in the absence of the name, the Notice of Assessment would still be valid if the name is printed or the Notice is signed.

The argument of the learned counsel for the respondent taxpayer that *“The word ‘if’ is immediately preceded by the words ‘shall be valid’. This demonstrates that a notice would be valid if it bears the name either printed or signed”*, is misplaced.

The second part containing the word “if” is not favourable to the taxpayer. It is against the taxpayer. This second part has been introduced not to reject Notices but to accept Notices. The underlying rule employed therein is not exclusionary but inclusionary.

Against that background, let me now quote section 61 in full.

61(1) No notice, assessment, certificate or other proceeding purporting to be in accordance with the provisions of this Act shall be quashed, or deemed to be void or voidable, for want of form, or be effected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with, or according to, the intent and meaning of this Act, and if the person assessed or intended to be assessed or affected thereby is designated therein according to common intent and understanding.

(2) Without prejudice to the generality of subsection (1) an assessment shall not be affected or impugned by reason of

(a) a mistake therein as to the name or surname of person chargeable, the amount of the value of taxable supplies or the amount of tax charged; or

(b) any variance between the assessment and the notice therefor if notice of such assessment is duly served on the person intended to be charged and contains in substance and effect the particulars set out in paragraph (a) of this subsection.

It is manifest that the legislature has employed the inclusionary rule as opposed to the exclusionary rule in introducing this section as well. According to this section, even if the Notice of Assessment is lacking in form or is effected by reason of mistake, defect or omission, if it is, in substance, in conformity with the intent and meaning of the Act, the Notice shall not be invalidated. Such defects are curable.

There cannot be any dispute that, if not for the failure to mention the name of the Assessor, the Notice of Assessment in question is in conformity with the Act in form.

Having regard to the attended circumstances of this matter mentioned above, in that no prejudice has been caused to the respondent taxpayer by failure to mention the name of the Assessor, it is my considered view that the said failure on the part of the Assessor shall not make the Notice of Assessment invalid in view of section 61 (1) of the Act. The said defect is a curable defect.

The argument of the learned counsel for the respondent taxpayer that *“For the provisions of section 61(1) to apply, the notice or assessment*

ought to first comply with the provisions of [section 60(1) of] this Act” is again misplaced. If section 60(1) has been fully complied with, there is no reason to seek shelter under section 61 (1).

Another argument of the learned counsel for the respondent taxpayer is that the Court of Appeal lacks jurisdiction to hear and determine the questions of law contained in the case stated since the impugned determination of the Tax Appeals Commission does not relate to an “assessment” of the quantum of tax imposed.

The learned counsel refers to section 11 A(6) of the Tax Appeals Commission Act in that regard. This section runs as follows:

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.

It is the contention of the learned counsel that the Court of Appeal is vested with jurisdiction to hear and determine questions pertaining to “the assessment determined by the Commission”, and, in this case, the Tax Appeals Commission did not make any determination relating to the “assessment” but invalidated the Notice of Assessment on a technical ground.

In the Supreme Court case of *Somawathi de Zoysa v. Jayasena Fernando*,⁴ Weerasuriya J remarked:

The provisions of a statute must be construed with reference to their context and with due regard to the object to be achieved and the mischief to be prevented. Where two views are possible an interpretation which would advance the remedy and suppress the mischief it contemplates is to be preferred.

The very argument of the learned counsel for the respondent taxpayer is counterproductive. It opens the door for a constructive dialogue about whether the Tax Appeals Commission has the authority to declare as void Notices sent by the Commissioner General of Inland Revenue

purely on technical grounds, or whether it can only annul an Assessment determined by the Commissioner General of Inland Revenue on merits. The dicta in cases such as *Ismail v. Commissioner of Inland Revenue*,⁵*Ranaweera v. Ramachandran*⁶ seem to me to be lending support to the latter view. However, I will leave that broader question open for decision in a future case, and, for the purposes of this case, decide that the Tax Appeals Commission had jurisdiction to do what it did.

It will be a travesty of justice if this Court is to hold that if the Commissioner's assessment is reduced by the Tax Appeals Commission, the Commissioner can appeal to the Court of Appeal, but if the Commissioner's assessment is quashed by the Tax Appeals Commission, the Commissioner cannot appeal against such order.

I reject that argument unhesitatingly.

In terms of section 11 A(6) of the Tax Appeals Commission Act, the Court of Appeal can "determine any question of law arising on the stated case" and can "remit the case to the Commission with the opinion of the Court thereon".

For the aforesaid reasons, I hold that, in the facts and circumstances of this case, the Tax Appeals Commission erred in law when it decided to allow the appeal of the respondent taxpayer, on the ground that the Notice of Assessment is invalid as it bears neither the name nor the signature of the Assessor, as mandated by section 60(1) of the Value Added Tax Act.

In view of the said conclusion, there is no necessity to address the other questions of law in the case stated.

I direct the Tax Appeals Commission to accept the Notice of Assessment and decide the appeal on merits.

The appellant is entitled to the costs of this appeal.

WICKREMASINGHE, J. - *I agree.*

Determination of the Tax Appeal Commission set aside.

Judgment by: Mahinda Samayawardhena, J.

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