



A must-read for all those who deal with tax matters

Published : 12:00 am November 19, 2012 | 1,290 views | No comments so far |  | [E-mail to friend](#) 

‘A commentary of the Tax Appeals Commission Act No. 23 of 2011’ by Cecil Aluthwela, Stamford Lake Publication, pp 70, 2012.

Review by Saman Kelegama

The establishment of the Tax Appeals Commission in early 2011 was a momentous step in the sphere of tax legislation in Sri Lanka. In importance, it is perhaps second only to the introduction of the Kaldor taxes in 1959. In this book, the author provides a detailed critique of this newly established Commission and in this review a closer examination of this critique is presented.

Why a Tax Appeal Commission instead of the Tribunal (Board of Review)?

Appeals by persons against tax assessments issued on them are dealt with under specific sections of the relevant legislative Acts where special provisions and procedures are incorporated for the hearing, determination and disposal of such appeals. Such provisions include Sections 165 to 170 of Chapter XXIII of the Inland Revenue Act No.10 of 2006, Sections 35- 36 of the Value Added Tax Act No. 14 of 2002, Section 8 of the Nation Building Tax Act No.9 of 2009, Section 11 of the Economic Service Charge Act No. 13 of 2006 and Section 11 of the Stamp Duty (Special Provisions) Act No. 12 of 2006.

In respect of income tax, where an appellant is dissatisfied with the determination of the Commissioner General to whom he/she first makes an appeal, has the right under Section 167 to appeal to the Board of Review constituted under Section 166 of the Act. The members of the Board are to be independent arbitrators and act as an administrative check in favour of the taxpayer and as an additional assurance that his/her liability is correctly ascertained. The essence of the function of the Board of Review is that it remains independent and impartial. The Board does not exercise judicial power but it is one of the instruments created for the administration of the Inland Revenue Act and as such, its work is administrative although judicial qualities are called for in its performance.

The Board of Review was one of the original instruments created with the introduction of income tax by H. J. Huxham as far back as 1932 and functioned ever since then till 2011, when it was superseded by the Tax Appeals Commission established under Act No. 23 of 2011.

However, though it functioned for almost 80 years without any major changes there were some criticisms in its functioning and its concept which, with changing circumstances in respect of taxation, judicial and administrative concepts and procedures, had sooner or later to change and adapt to modern conditions.

The author of the book Cecil Aluthwela was a former Deputy Commissioner (Appeals) of the

Inland Revenue Department and functioned at one time as the Clerk (subsequently designated Secretary) to the Board of Review and hence is in a unique position to evaluate the strengths and weaknesses of the functioning of the Board for a number of years. From his knowledge and experience of tax law and its administration, the author in this penetrating and critical analysis, contends that the appeal provisions pertaining to the Board of Review were weighted heavily in favour of the Tax Department. He points out, for instance, the restriction placed on the appellant in the matter of producing evidence while no corresponding restriction was placed on the Assessor.

Further, where the Board of Review did not reduce or annul the Determination of the Commissioner/ Commissioner General, the appellant was required to pay the costs to the Board. However, if the Board were to reduce or annul the determination of the Commissioner General, the appellant was not to be paid the cost incurred by him in respect of the appeal. Thus the author states that the Board of Review was not an independent Tribunal in the true sense of the word. It was essentially an instrument created for the administration of the Income Tax Act as expressed by Lord Donovan and quoted by the author “the Board of Review... is one of the instruments created for the administration of the Income Tax Ordinance”.

Thus both from the point of view of the actual functioning of the Board and its conception there was the need to bring it in line with modern legal and administrative developments. It was for this purpose that the Board of Review was abolished and replaced with the Tax Appeals Commission with effect from 1 April 2011. One would expect that with the experience of the pros and cons of the former Board, the replacement would be far superior position both judicially, procedurally and administratively than what it replaced. An examination of the provisions of the new Act No. 23 of 2011 and its amendment No. 4 of 2012 however, shows that while in some areas rectifications have been made, there are a number of areas which fall short and are subject to criticism.

Author’s critique

In this critical analysis of the provisions of the Appeal Commission, the author has brought to bear his analytical mind, his knowledge of tax law, appeal procedures and tax administration to analyse the Act clause by clause. For instance, in Section 2 (2) of the Act, he points out that the appointment of members of the Commission by the Minister of Finance (under whom the Taxation Departments come) offends one of the rules of natural justice – *nemo iudex in causa*. There could be no objection to the Minister appointing members to a Tribunal, if the State is not one of the parties to the appeal, for example, to a Rent Tribunal where the parties to the dispute are Landlord and Tenant.

The author also criticises Section 5 where it is mandatory that the members of the Commission and the Panel should meet every month. This is an outdated provision and there is no justification for monthly meetings. Section 9 (4) evokes his criticism in that it should be the Assessor who took part in the appeal proceedings who should appear before the Appeals Commission and not as stipulated, the Assessor who made the assessment.

Then again, Section 9(9) gives the Appeals Commission a licence to admit or reject any evidence without regard to the admissibility of evidence in terms of the Evidence Ordinance No. 14 of 1895. While there may have been some justification for this in the early days when recovery of taxes and speedy settlement of appeals was the primary objective of tax administration, the author contends that in today’s, context such a provision is contrary to “the judicial system of the land under the rule of law” and that “such a provision is contrary to the modern views on tribunal procedure.”

Under Section 11, the Commission is empowered where it does not reduce or annul the Determination of the Commissioner General to levy costs on the appellant up to Rs. 5,000. The author calls this a “lopsided and iniquitous” provision when there is no statutory provision to award costs to the appellant.

One of the most scathing criticisms is reserved for the proviso Section 7(1) of the Act which is described as a “draconian piece of legislation” which has no rationale whatsoever. According to the Proviso, an appellant at the time of making the appeal is requested to pay in to a Special Account an amount equivalent to 25% of the sum assessed and under appeal or a bank guarantee for the amount. This proviso has earned widespread opprobrium all round as it can operate in a manner financially burdensome to an appellant who is really praying for some relief.

The above are some of the main critical aspects pointed out by the author in respect of the provisions of the current Appeals Commission Act and its functioning. His main concern is that it is not in harmony with modern notions regarding Tribunals.

The author quotes a number of sources in support of his position such as Lord Denning as given in H. W. R. Wade’s work on ‘Administrative Law,’ Megarry J. in a U.K. Tax Case and Sir Ivor Jennings among others, and argues that its appointment by the Executive and the inquisitorial nature of its proceedings run counter to the modern views regarding Tribunals. The Act also contains some obnoxious provisions that governed the proceedings of the Board of Review, while the Commission will in its operation entail a fair amount of unnecessary financial expenditure. As a consequence of the analytical shortcomings of the newly constituted Appeals Commission, the author in his concluding observations has as a solution advocated the reconstitution of the former Board of Review with a number of revisions to rectify its shortcomings and modernise its concept, procedures and functions.

Reflections on the critique

However, the reviewer is of the view that the author has not given due and sufficient emphasis to the positive aspects of the Appeals Commission. A number of such aspects come to mind. First, the Appeals Commission, unlike the Board of Review which deals only with income tax appeals, has a broader scope and is charged under Section 2 of the Act with the responsibility of hearing “all appeals in respect of matters relating to imposition of any tax, levy or duty.” Thus, payers of Customs, Excise duties and other levies who did not have the facility of such appeal hearing before going to Courts, have now the necessary legal apparatus to get their grievances rectified in an independent and proper manner.

Second, while the members of the Board of Review appointed by the Minister were apparently independent members, these members did not have a reasonably good knowledge of tax law and accounts. Hence, in practice, a number of retired or former Inland Revenue Officers were appointed to the Board and heard appeals, thus vitiating the independent concept at least in appearance. In the Appeals Commission the members limited to three in number are appointed from among retired Judges of the Supreme Court and Court of Appeal. They also have to be persons with wide knowledge of and gained eminence in the fields of Taxation, Finance and Law. The Commission is also assisted by a Panel of Legal Advisors of not more than 10 persons who have gained eminence in the field of Law.

Third, the Secretary to the Commission is appointed by the Minister. In the Board of Review while legally this was also the case, in practice the post of Clerk (or later Secretary) came to be held by a member of the Inland Revenue Department. This is not so today in respect of the Appeals Commission.

Fourth, the Board of Review was situated within the Inland Revenue Department premises and

held its sittings there. The Appeals Commission on the other hand, has its own independent offices elsewhere and has little to do with the Department itself.

Fifth, some of the defects and omissions pointed by the author have been rectified by Amendment Act No. 4 of 2012 and procedures have been clarified by Rulings given by the Commission. Further revisions rectifying anomalies and defects are to be made soon as stated in the 2013 Budget Speech. “The scope of the Tax Appeals Commission which was set up by me last year will be further expanded.” (Budget Speech, 8 November 2012).

In respect of the contention in the book that the law permits the Commission to embark upon investigations and that its proceedings are of an “inquisitorial nature,” this appears to be rather controversial. It is based on the concept and functions of what exactly is a “Tribunal,” whether it is only a part of the machinery of justice and not also an administrative device for disposing of claims and arguments. The author himself has dealt with this issue in the book but the issue in legal and judicial parlance terminology is still not fully conclusive and hence conclusions that the Appeals Commission has investigative powers of its own cannot be conclusively decided on at this stage.

And finally, the author’s view that the solution to all this is to go back to a reconstituted Board of Review does not appear to be realistic. At this stage of the development of taxation and the tax appellate machinery, one cannot go backwards but has to go forward having learnt past lessons and modifying them to suit current conditions within the national context.

Nevertheless in spite of these omissions and some debatable conclusions, the book is an extremely valuable document which highlights the defects and deficiencies of the Appeals Commission and its composition and powers as it currently stands. The author’s in-depth knowledge and experience in taxation and tax administration has resulted in an important and valuable analysis of the main weaknesses and deficiencies of the Appeals Commission and would greatly assist in rectifying and remedying them in the future.

As stated by K. Sripavan, Judge of the Supreme Court, in his Foreword, the book should “receive the widest possible dissemination” among policy makers and administrators, lawyers, law students, consultants and tax practitioners and the taxpaying public alike. It is recommended that the book should be read by all those who deal with tax matters.

(The reviewer is the Executive Director of the Institute of Policy Studies of Sri Lanka and was a Member of the Presidential Taxation Commission of 2009/2010)