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

In the matter of a Case Stated under Reference No. TAC/VAT/016/2014 by the Tax Appeals Commission under Section 36 of the Value Added Tax Act No. 14 of 2002 as amended

Kegalle Plantations PLC

310 High Level Road,

Nawinna, Maharagama.

APPELLANT

Case No. CA/TAX/09/2017

Vs.

Tax Appeals Commission Case No.

TAC/VAT/016/2014

The Commissioner General of Inland Revenue,

Department of Inland Revenue,

Sir Chittampalam A. Gardiner Mawatha,

Colombo 02.

RESPONDENT

Before: Janak De Silva J.

Achala Wengappuli J.

Counsel:

F.N. Goonewardena for the Appellant

Susantha Balapatabendi Senior D.S.G. for the Respondent

Written Submissions tendered on:

Appellant on 10.05.2018

Argued on: 19.07.2018

Decided on: 04.09.2018

Janak De Silva J.

This is a Case Stated submitted for the opinion of this Court by the Tax Appeals Commission (TAC) under section 36 of the Value Added Tax Act No. 14 of 2002 as amended (VAT Act). Although neither party raised this issue, we note that the VAT Act was amended by the Tax Appeals Commission Act No. 23 of 2011 as amended (TAC Act) by the repeal of section 36 therein. Hence the TAC has made a reference to this Court under a repealed provision.

However, it is well-settled that an exercise of power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle has been applied even to cases where a Statute which confers no power has been quoted as authority for a particular act, and there was in force another Statute which conferred that power. [*Pieris v. The Commissioner General of Inland Revenue* (65 N.L.R. 457), *Kumaratunga v. Samarasinghe, Additional Secretary, Ministry of Defence and Others* (1983) 2 Sri.L.R. 63]. Section 11A of the TAC Act enables the TAC to refer for the opinion of this Court a Case Stated. Accordingly, we are of the opinion there is a valid reference and make our determination accordingly.

The questions of law raised by the Appellant for consideration by Court are as follows:

1. Was the Tax Appeals Commission *"functus officio"* to make the decision in view of Section 10 of the TAC Act?
2. Are any of the assessments that form the subject matter of this appeal invalid and bad in law by reason of the Inland Revenue Department failing to comply with the provisions of section 29 of the VAT Act with regard to the disallowance of the input tax claimed by the Appellant?

3. Without prejudice to (2) above, are the Assessment Nos. 6895482, 6895483, 6895484, 6895485, 6895486, 6895487 time barred in terms of section 33(1) of the VAT Act?
4. Has the TAC erred in concluding that the agreements entered into by the Appellant with the contractors titled "Agreement for Uprooting Old Rubber Trees and clearing the Land" were in fact contracts for the supply of rubber logs?
5. Would the supply of Rubber trees in terms of the aforesaid agreements be an exempt supply in terms of the VAT Act by reasons of it being:
    a. "Unprocessed agricultural products produced in Sri Lanka" within the meaning of item (b) (xxiii) of Part II of the First Schedule of the VAT Act;

       or
    b. "Agricultural plants" in terms of item (a)(xi) of Part II of the First Schedule of the VAT Act?

The first three questions relate to preliminary issues while the other three questions deal with substantive issues.

Time Bar in making Determination by the Tax Appeals Commission

The Appellant contends that in view of section 10 of the TAC Act the appeal before the TAC is time barred. Section 10 of the TAC Act reads:

> "The Commission shall hear all appeals received by it and make its decision in respect thereof, within two hundred and seventy days from the date of the commencement of its sittings for the hearing of each such appeal"

The Appellant submits that it was notified by letter dated 20th March 2015 that the appeal preferred to the TAC by the Appellant was fixed for hearing on 14th May 2015 in terms of section 9(1) of the TAC Act. It was submitted that due to numerous postponements of the appeal subsequent to 14th May 2015, the determination of the TAC was given only on 6th December 2016 which is almost a ten-month delay from the statutory requirement. The Appellant relies on the judgment of this Court in *Mohideen v. Commissioner General of Inland Revenue* [C.A. 02/2007; C.A.M. 16.01.2014].

The learned Senior Deputy Solicitor General submitted that the TAC Act does not spell out the consequences arising from the failure of the TAC to adhere to the time limit and relied on the decisions in *Jayanetti v. Land Reform Commission and others* [(1984) 2 Sri.L.R. 172] and *Ramalingam v. Thangarajah* [(1982) 2 Sri.L.R. 693] as well as an extract from *Bindra on Interpretation of Statutes* [12th Ed., page 314].

In addressing this question, the fundamental issue to be determined is whether the time limit given in section 10 of the TAC Act is directory or mandatory. The question whether provision in a statute is mandatory or directory is not capable of generalization but when the legislature has not said which is which, one of the basic tests for deciding whether a statutory direction is mandatory or directory is to consider whether violation thereof is penal or not. It has been the traditional view that where disobedience of a provision is expressly made penal it has to be concluded that the provision is mandatory whereas if no penalty is prescribed non-compliance with the provisions, of a statute may held to be directory.

Where the prescription of a statute related to performance of a public duty and where invalidation of acts done, in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty yet not promote the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. Neglect of them may be penal, indeed, but it does not affect the validity of the acts done in disregard of them. It has often-been held, for instance, ***when an Act ordered a thing to be done by a public body or public officers and pointed out the specific time when it was to be done, then the Act is directory only and might be complied with after the prescribed time.*** (Emphasis added) [*Maxwell on Interpretation of Statutes*, 11th Edition, at page 369].

In *Nagalingam vs. Lakshman de Mel* (78 NLR 231, 237) in respect of a similar situation where the Commissioner of Labour had not made his order within the time prescribed under the Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971 Sharvananda J. (as he was then) held:

> "The delay should not render null and void the proceedings and affect the parties, as the parties have no control over the proceedings. It could not have been intended that the delay should cause a loss of jurisdiction, that the Commission had to give an effective order of approval or refusal. In my view, a failure to comply literally with the aforesaid provisions does not affect the efficacy or finality of the Commissioner's order made thereon. **Had it been the intention of the Parliament to avoid such order nothing would be simpler than to have so stipulated.** " (Emphasis added)

In *Visuvalingam v. Liyanage* [(1985) 1 Sri LR 203] a Bench of nine Judges of the Supreme Court considered whether Article 126 (5) of the Constitution is mandatory or directory. Article 126 (5) of the Constitution provides that when an application to the Supreme Court for relief against violation of fundamental rights guaranteed by the Constitution has been made "the Supreme Court shall hear and finally dispose of any petition or reference under this Article within two months of the filing of such petition. . .". The Supreme Court by majority judgment held that the provisions of Article 126 (5) of the Constitution are directory and not mandatory. Dealing with the argument that Article 126 (5) is mandatory and that even a fault of the court is no excuse, Samarakoon, C.J. said (at page 226) that:

> "If that right was intended to be lost because the court fails in its duty the Constitution would have so provided. It has provided no sanction of any kind in case of such failure. To my mind it was only an injunction to be respected and obeyed but fell short of punishment if disobeyed. I am of opinion that the provisions of Article 126 (5) are directory and not mandatory. Any other construction would deprive a citizen of his fundamental right for no fault of his. While I can read into the Constitution a duty on the Supreme Court to act

in a particular way I cannot read into it any deprivation of a citizen's guaranteed right due to circumstances beyond his control".

In terms of section 8(1) of the TAC Act, it is only a person who is aggrieved by the determination of the Commissioner General of Inland Revenue in relation to the imposition of any tax, levy, charge, duty or penalty or the Director General of Customs under subsection (1B) of section 10 of the Customs Ordinance who can prefer an appeal to the TAC. Section 9(10) of the TAC Act allows the TAC to on appeal confirm, reduce, increase or annul, as the case may be, the assessment determined by the Commissioner General of Inland Revenue or to remit the case to the Director General of Customs.

The TAC Act does not spell out any penal consequences for the failure on the part of the TAC to comply with the time limit set out in section 10 of the TAC Act. If the Appellant is correct in submitting that the time bar on the TAC is mandatory, it will result in the validity of the impugned determinations made by the Commissioner General of Inland Revenue and the Director General of Customs been maintained for no fault of the aggrieved party where the TAC fails to adhere to the time limit. Such deprivation of rights of the aggrieved party cannot be implied in the absence of clear and unambiguous statutory provisions. On the other hand, if the failure on the part of the TAC to adhere to the time limit should result in the aggrieved party obtaining the relief claimed, the legislature would have specifically stated so. For example, the second proviso to section 34(8) of the VAT Act specifically provides that "the appeal shall be deemed to have been allowed and the tax charged accordingly" where the appeal to the Commissioner-General against an assessment made by the Assessor is not determined within the stipulated time of two years.

In *Mohideen's* case (supra), this Court concluded that the determination of the Board of Review was not time barred in terms of section 140(10) of Act No. 38 of 2000 as amended by section 52 of Act No. 37 of 2003. However, Court went on to state that "It would be different or invalid if the time period exceeded 2 years from the date of the oral hearing. If that be so it is time barred."

Rupert Cross in *Precedents in the English Law* (3rd Ed., 1977) offers the following formulations for *ratio decidendi* and *obiter dictum*:

> "The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury" (page 76)
>
> "*Obiter dictum* is a proposition of law which does not form part of the ratio decidendi" (page 79)

Thamotheram J. in *Walker Sons and Co. (UK) Ltd. v. Gunatilake* [(1978-79-80) 1 Sri. L. R. 231 at 232] explicitly held that the ratio decidendi of a Superior Court is binding for all inferior Courts:

> "The ratio decidendi of cases decided by the Court becomes a rule for the future binding all courts which the courts of last resort are not whether it be under the same system or under a different system."

We are of the view that the statement in *Mohideen's* case (supra) that the determination of the Board of Review is invalid if not made within the statutory time period is *obiter dicta*. Accordingly, we are of the view that the Tax Appeals Commission was not *"functus officio"* to make the decision in view of Section 10 of the TAC Act.

Disallowance of the Input Tax

The learned counsel for the Appellant informed Court during the argument that the Appellant is not pursuing this question of law.

Taxable Supply of Goods

We will consider Question 3 after considering Questions 4 and 5 as they have a bearing on Question 3.

In terms of section 2(1) of the VAT Act, one condition for the imposition of Value Added Tax (VAT) is that there must be a "taxable supply of goods and services". The Appellant contends that this condition is not met in the circumstances of the instant case.

The Appellant is a public quoted company engaged in the cultivation, manufacture and sale of tea, rubber, coconut and other agricultural products. The Appellant called for public tenders for "Uprooting Old Rubber Trees". The Appellant entered into several contracts with contractors for the uprooting and removal of rubber trees. The agreement states that it is for the "uprooting and removal of trees". It requires the contractor to uproot and clear old rubber trees.

The contention of the learned counsel for the Appellant is that the contracts are in effect contracts for the sale of rubber trees *in situ* (i.e. live rubber trees in the natural form) and the successful bidder has paid the full sale consideration when the trees are in live form and live trees are "unprocessed agricultural product", which is an exempt supply within the contemplation of item (b)(xxiii) of Part II of the First Schedule to the VAT Act. In the alternative the Appellant contends that it sold agricultural plants which is an exempt supply within the contemplation of item (a)(xi) of Part II of the First Schedule to the VAT Act.

In this context it is important to determine the true nature of the contracts entered into by the Appellant. The substance test has been used by courts to determine whether a contract is a contract for the sale of goods or contract for the supply of services [per Greer L.J. in *Robinson v. Graves* [(1935) 1 KB 579 at 587; Atiyah, Adams and Macqueen, *The Sale of Goods* (11th Ed.; page 27)]. We are of the view that the same test is appropriate in determining the true nature of a contract.

The true nature of the contracts entered into by the Appellant can be discerned only after scrutinizing its terms and conditions. The contractor has to pay the Appellant a particular sum for each tree which in some cases was Rs. 1500/= and 1340/= per tree in other cases. Furthermore, the contractor is required to deposit a sum of Rs. 75/= per tree in some cases and Rs. 50/= per tree in other cases as a security deposit to ensure the due uprooting and removal of the tree. Where the contractor fails to duly clean the land, the security deposit is forfeited. Some of the agreements even specify the dimensions of the pieces to which the tree must be cut. More importantly, in the audited statements of accounts, the transaction forming the subject matter of this Case Stated was identified as "Sale of Rubber Logs" (Refer Note 32 of the audited financial statements 2007/2008 and 2008/2009). This, although not decisive, is important in understanding the true nature of the contracts under consideration as the intention of the parties is paramount in a contract. The intention as well as the understanding of the Appellant is quite clear when it describes the profits of the contracts as "Sale of Rubber Logs".

However, the learned counsel for the Appellant submitted that in terms of section 2(1)(a) of the VAT Act, VAT is chargeable **at the time of supply** and that in terms of section 4(1) of the VAT Act the time of supply is deemed to be the earlier of payment or delivery.

The learned counsel for the Appellant then referred to clauses 2 and 3 of one agreement and contended that they evidence that (i) at the time of signing the agreement the contractor is required to make a deposit of Rs. 50/= per tree which is to prevent him from defaulting on the agreement; and the contractor is required to pay the full sum payable in respect of the number of trees he intends to remove, and he would only be entitled to remove the trees after he has paid for the full value of the trees. Accordingly, he contended that the supply for the purpose of the VAT Act in the instant case was complete whilst the tree was *in situ* and therefore the contract must be construed as being one for the supply of live trees in their natural form which is an exempt supply.

We are of the view that this proposition is not tenable in law. The Appellant called for tenders to uproot and remove **non-harvesting rubber trees**. Hence, the trees sold have ceased to be productive in their natural form. Furthermore, section 4(1) of the VAT Act reads:

> "The supply of goods shall be deemed to have taken place at the time of occurrence of any of the following whichever, occurs earlier; (a) the issue of an invoice by the supplier in respect of the goods; or (b) a payment for the goods including any advance payment received by the supplier; or (c) a payment for the goods is due to the supplier in respect of such supply; or (d) the delivery of the goods have been effected."

The meaning of the word "deemed" was considered and explained by Ranasinghe, J. (as he then was) in *Jinawathie v. Emalin Perera* [(1986) 2 Sri.L.R. 121 at 130,131] in the following words:

> "In statutes, the expression deemed is commonly used for the purpose of creating a statutory function so that a meaning of a term is extended to a subject-matter which it properly does not designate. . . Thus, where a person is deemed to be something it only means that whereas he is not in reality that something, the Act of Parliament requires him to be treated as if he were".

Section 4(1) of the VAT Act is a deeming provision to determine the time of supply for the purposes of section 2(1) of the VAT Act. VAT is charged at the time of supply and as such it is important to clearly identify the time at which the taxable supply of goods or services takes place. Section 4(1) of the VAT Act seeks to facilitate the identification of this point of time. The deeming effect is in our view restricted to ascertaining the time of supply for the purpose of charging VAT.

It cannot be used to establish that the supply of goods did in fact take place at that point of time. In terms of section 83 of the VAT Act "supply of goods" means the passing of exclusive ownership of goods to another as the owner of such goods. Hence for there to be a "supply of goods" there must be a passing of "exclusive ownership of goods". That in our view must be ascertained upon a consideration of the provisions in the Sale of Goods Ordinance dealing with the passing of property.

The learned counsel for the Appellant concedes this point in submitting that the Sale of Goods Ordinance applies to the relevant contracts in relation to when the property or title to the underlying goods passes. However, he contends that the goods forming the subject matter of the contracts are specific or ascertained goods and that in terms of section 18 of the Sale of Goods Ordinance, the property is transferred to the buyer at such time the parties to the contract intend it to be transferred.

We are of the view that the goods forming the subject matter of the contracts between the Appellant and his contractors are not specific or ascertained goods but unascertained goods. The contracts do not identify the particular trees to be cut. It refers only to the number of trees. The contracts require the contractor to take over the trees that are identified by the field officer. Hence the goods remain unascertained as at the date of payment and passing of "exclusive ownership of goods" did not for the purposes of the Sale of Goods Ordinance take place at the date of payment as submitted by the learned counsel for the Appellant.

Section 19 of the Sale of Goods Ordinance sets out different rules for ascertaining the intention of the parties as to the time at which the property in the goods pass to the buyer unless a different intention appears from the terms of the contract, conduct of the parties and the circumstances of the case. Rule 5 thereunder specifies that where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. In *Kursell v. Timber Operators & Contractors Ltd.* [(1927) 1 K.B. 298] the plaintiff sold to the defendants all the trees in a Latvian forest which conformed to certain measurements on a particular date, the buyer to have 15 years in which to cut and remove the timber. The English Court of Appeal held that the property in the trees had not passed to the defendants as the goods were not sufficiently identified, since not all the trees were to pass but only those conforming to the stipulated measurements.

In the instant case, exclusive ownership of the trees is not passed when the payment was made by the contractor as the goods remain unascertained. The property in the trees can be passed if at all only after the trees are ascertained by the field officer as stated above.

However, as long as the trees are *in situ* on land owned by the State property in them cannot be transferred to the contractor. The property in them can be transferred only after uprooting them. In those circumstances, the true nature of the contracts in substance is that they are for the uprooting and removal of trees for the supply of rubber logs. The consideration for these contracts was the timber value of the trees uprooted, removed and taken into the possession of the contractor.

Accordingly, we reject the argument made by the learned counsel for the Appellant that the contracts are in effect contracts for the sale of rubber trees *in situ*.

We conclude that there has been a "taxable supply of goods" by the Appellant in terms of the VAT Act in relation to rubber trees under the aforesaid agreements,.

Unprocessed Agricultural Product/Agricultural Plant

The learned counsel for the Appellant submitted that even if the Respondents argument was to be accepted that the supply could only take place after the trees were uprooted and cut, whether the mere uprooting and cutting of the tree for removal from the estate could be considered to be "processing" which would disentitle the Appellant to the exemptions referred to in section 7 of the VAT Act which are available for an "unprocessed agricultural product" or "agricultural plant".

In addressing this contention Court is called upon to interpret the provisions of the VAT Act to ascertain whether the activity of the Appellant under consideration is subject to VAT. In *Perera & Silva ltd., v. Commissioner General of Inland Revenue* [79(II) N.L.R. 164 at 167] Thamotheram J. quoted with approval the following statement in C. N. Beatie- Elements of the Law of Income and Capital Gains Taxation at page 2;

> "It has frequently been said that, there is no equity in a taxing statute. This means that tax being the creature of statute, liability cannot be implied under any principle of equity

but must be found in the express language of some statutory provision. The ordinary canons of construction apply in ascertaining the meaning of a taxing statute: "the only safe rule is to look at the words of the enactments and see what is the intention expressed by these words." **If in so construing the statute the language is found to be so ambiguous that it is in doubt whether tax is attracted or not, the doubt must be resolved in favour of the taxpayer, because it is not possible to fall back on any principle of common law or equity to fill a gap in a taxing statute.** " The subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him ". However, this does not prevent the court from construing a taxing statute against the subject, where that appears to be the correct interpretation of a provision the meaning of which it may be difficult to understand. **Difficulty does not absolve the court from the duty of construing a statute; it is only when ambiguity remains after the statute has been properly construed that the court is entitled to decide in favour of the taxpayer**". (Emphasis added)

The Appellant contends that the mere act of cutting or felling trees would not amount to "processing". The learned counsel for the Appellant contended that the term "processed" connotes the performance of a series of mechanical or chemical operations on an object in order to change or preserve its original form and the mere act of cutting the tree would not change or modify the essential character of the tree and therefore cannot be construed as "processing". Reliance was placed on the term "unprocessed agricultural product" and the opposing term "processed agricultural product" used in Title 7 of the U.S. Code, European Union Regulation No. 510/2014 and United Kingdom Consumer Protection Act of 1978 and it was submitted that in all such contexts the envisaged processing would not cover the mere act of cutting down or felling an agricultural product such as a live tree.

We note that even these legislative instruments do not support the proposition advanced by the Appellant and do not have a common meaning attributed to the word "unprocessed agricultural products". While in Title 7 of the U.S. Code "processing" appears to imply doing an act which makes the product retail ready, the European Union Regulation No. 510/2014 appears to require steps such as adding chemicals or breaking down or otherwise changing the character of the agricultural product.

Hence the legal meaning of a word changes from jurisdiction to jurisdiction depending on its context and the intention of the legislature. We are of the view that it is unsafe to define a word used in the domestic legislation merely by reference to the same word and its meaning in different foreign legislative instruments.

The learned counsel for the Appellant referred to the Guide to the Value Added Tax in Sri Lanka and submitted that the directions issued by the Respondent defines "unprocessed agricultural produce" to include live trees, and other plants, roots, branches, leaves, flowers, tubes, seeds, fruits and nuts of trees and other plants in natural form not otherwise processed. He contended that manifestly live trees are caught up within the definition of unprocessed agricultural produce and that the Respondent is estopped from taking up a contrary position.

In terms of Article 23(1) of the Constitution, all laws are enacted and published in the Sinhala and Tamil, together with a translation thereof in English. Any interpretation of the VAT Act must be therefore be done by reference to the Sinhala Act as section 84 therein states that the Sinhala text shall prevail where there is any inconsistency between the Sinhala and Tamil texts and as the English text is only a translation.

The term used in the Sinhala text for "unprocessed" is "සැකසුම් නොකළ". We are of the view that the term "සැකසුම් නොකළ" is not a term of art as used in the VAT Act and must be given a literal meaning. In ගුණසේන මහා සිංහල ශබ්දකෝෂය compiled by Harischandra Wijetunge (2005, 1st Ed.) the word "සැකසීම්" is defined as නාප්‍ර සකසනවා යන්නෙහි භා නා පිළියෙල කිරීම, විශේෂ ක්‍රමයකට පිළියෙල කිරීම, සුදුසු සේ ගලපා සකස් කිරීම, සැකැස්ම.

The subject matter of the contracts between the Appellant and his contractors are not in our view live trees. The true nature of the contracts in substance is that they are for the uprooting and removal of trees for the supply of rubber logs. The consideration for these contracts was the timber value of the trees uprooted, removed and taken into the possession of the contractor. The exemption from VAT given to "unprocessed agricultural product" does not cover the instant case where non-harvesting rubber trees are uprooted and removed. That involves a process which changes the subject from a rubber tree to firewood, logs and chips. The Appellant in the Notes to the Financial Statements for the year ended 31st March 2008 identify the profits of these

transactions as "Sales of firewood, logs and chips". Accordingly, the subject matter of the contracts between the Appellant and its contractors are not live trees within the meaning of the Guide to the Value Added Tax in Sri Lanka. It is also not "unprocessed agricultural product" within the meaning of item (b) (xxiii) of Part II of the First Schedule of the VAT Act.

The remaining question is whether the subject matter of the contracts between the Appellant and the contractors are "Agricultural plants" in terms of item (a)(xi) of Part II of the First Schedule of the VAT Act.

In the Sinhala text of the VAT Act, the word used in item (a)(xi) of Part II of the First Schedule is "කෘෂිකාර්මික පැල". In ගුණසේන මහා සිංහල ශබ්දකෝෂය compiled by Harischandra Wijetunge (2005, 1st Ed.) the word "පැල" is defined to mean "පැළ නාප්‍රග 1 කුඩා ශාකය , ළපටි ගස, ළදරු ගස 2 බස්නාහිර දිසාව 3 පිටි පස්ස 4 පීඩාව, පෙළීම. වි. ළපටි, ළදරු". Non-harvesting rubber trees of around 25 feet which according to the Appellant were sold and profits derived as "Sales of firewood, logs and chips" are not in our view "කෘෂිකාර්මික පැල" within the meaning item (a)(xi) of Part II of the First Schedule of the VAT Act.

Time Bar of Assessments

Although the Appellant initially contended that six (6) assessments, namely Assessment Nos. 6895482, 6895483, 6895484, 6895485, 6895486, 6895487 are time barred in terms of section 33(1) of the VAT Act, during the argument the learned counsel for the Appellant submitted that this position is pursued only in relation to four assessments, namely Assessment Nos. 6895484, 6895485, 6895486, 6895487 for period June, 2009, July 2009, August 2009 and September 2009.

There is no dispute that the Appellant is a registered person under the VAT Act. Section 21(1)(a) of the VAT Act requires every registered person to furnish a return not later than the 20th day of the month after the expiry of the taxable period.

Section 33(1) of the VAT Act imposes a limitation of time for making an Assessment. It must be done within three years from the end of the taxable period. Hence the time bar period for Assessment Nos. 6895484, 6895485, 6895486, 6895487 are respectively 29.06.2012, 30.07.2012, 30.08.2012 and 29.09.2012 respectively whereas the dates of the relevant assessments are 02.10.2012.

The learned Senior Deputy Solicitor General for the Respondent submitted that it is section 33(2) of the VAT Act that is applicable to the instant case and not section 33(1) therein. Section 33(2) of the VAT Act reads:

> "(2) Notwithstanding the provisions of subsection (1) where the Assessor is of opinion that a person has wilfully or fraudulently failed to make a full and true disclosure of all the material facts necessary to determine the amount of tax payable by him for any taxable period, it shall be lawful for the Assessor where an assessment -
>
> (a)has not been made, to make an assessment, or
>
> (b)has been made to make an additional assessment,
>
> within a period of live years from the end of the taxable period to which the assessment relates. For the purposes of this Chapter any notice of assessment may refer to one or more taxable periods."

He submitted that the Assessor had found that there was undeclared value of VAT liable supplies by the Appellant which was detected only after an audit which amounted to a willful or fraudulent failure to make a full and true disclosure of all the material facts necessary to determine the amount of tax payable by him for any taxable period. The learned counsel for the Appellant contended that there was no willful non-disclosure.

In *Chellappah v. Commissioner of Income Tax* (52 N.L.R. 416 at 418) Basnayake J. (as he was then) held that ordinarily the word " wilfully " means deliberately or purposely without reference to bona fides but that in penal statutes it is used in a sense denoting deliberately or purposely and with an evil intention. The VAT Act been a fiscal rather than a penal statute, the word "willfully" in section 33(2) therein means deliberately or purposely without reference to bona fides.

The Appellant did not declare the value of VAT liable supplies by the Appellant in relation to the subject matter of the instant case. After examining the VAT returns submitted by the Appellant, the Assessor called for additional information and decided to conduct an audit. It is only after the Appellant submitted the VAT return did the Assessor call for and obtain the other information including the audited annual financial statements of the Appellant. In the audited statements of accounts, the transaction forming the subject matter of this Case Stated was identified as "Sale of Rubber Logs" (Refer Note 32 of the audited financial statements 2007/2008 and 2008/2009). Clearly, there was no doubt in the mind of the Appellant as to the true nature of the said transaction. On that characterization, VAT was payable which the Appellant did not declare in the return. This in our view amounts to "wilfully or fraudulently failing to make a full and true disclosure of all the material facts necessary to determine the amount of tax payable by him for any taxable period". Accordingly, we are of the view that Section 33(2) of the VAT Act applies in the instant case and the impugned assessments are not time barred.

Accordingly, we answer the questions of law arising in the Case Stated as follows:

1. Was the Tax Appeals Commission *"functus officio"* to make the decision in view of Section 10 of the TAC Act? **No.**
2. Are any of the assessments that form the subject matter of this appeal invalid and bad in law by reason of the Inland Revenue Department failing to comply with the provisions of section 29 of the VAT Act with regard to the disallowance of the input tax claimed by the Appellant? **No.**
3. Without prejudice to (2) above, are the Assessment Nos. 6895482, 6895483, 6895484, 6895485, 6895486, 6895487 time barred in terms of section 33(1) of the VAT Act? **No. During the argument the learned counsel for the Appellant submitted that this position is pursued only in relation to four assessments, namely Assessment Nos. 6895484, 6895485, 6895486, 6895487 for period June, 2009, July 2009, August 2009 and September 2009.**
4. Has the TAC erred in concluding that the agreements entered into by the Appellant with the contractors titled "Agreement for Uprooting Old Rubber Trees and clearing the Land" were in fact contracts for the supply of rubber logs? **No.**

5. Would the supply of Rubber trees in terms of the aforesaid agreements be an exempt supply in terms of the VAT Act by reasons of it being:

   a. "Unprocessed agricultural products produced in Sri Lanka" within the meaning of item (b) (xxiii) of Part II of the First Schedule of the VAT Act? **No.**

      or

   b. "Agricultural plants" in terms of item (a)(xi) of Part II of the First Schedule of the VAT Act? **No.**

Accordingly, acting in terms of section 11A (6) of the VAT Act, we confirm the assessment determined by the TAC and dismiss this appeal with costs.

Judge of the Court of Appeal

Achala Wengappuli J.

I agree.

Judge of the Court of Appeal