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

In the matter of a Case Stated under Reference No. TAC/IT/065/2016 by the Tax Appeals Commission under Section 170 of the Inland Revenue Act No. 10 of 2006, as amended read together with Section 11A of the Tax Appeals Commission Act No. 23 of 2011 (as amended).

Polycrome Electrical Industries (Pvt) Ltd,
No. 333/9, Old Kesbewa Road,
Rattanapitiya,
Boralesgamuwa.

Appellant

Case No. CA/TAX/0049/2019
Tax Appeals Commission No. TAC/IT/065/2016

Vs

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

Respondent

Before **:** Dr. Ruwan Fernando J. &
M. Sampath K.B. Wijeratne J.

Counsel : F.N.Goonewardena for Appellant
Chaya Sri Nammuni, S.S.C. for Respondent

Argued on	:	02.02.2021
Written Submissions filed on	:	01.02.2021 &15.02.2021 (by the Appellant) 23.02.2021 (by the Respondent)
Decided on	:	26.03.2021

Dr. Ruwan Fernando, J.

Introduction

[1] This is an appeal from the decision of the Tax Appeals Commission dated 24.09.2019 confirming the determination of the Respondent made on 02.09.2016 and dismissing the appeal of the Appellant.

Business activities of the Appellant

[2] Briefly stated, the Appellant, is a Company registered under the Companies Act No. 07 of 2007 and the principal office of the Company is located at Boralasgamuwa. The Appellant is engaged in the business of manufacturing electrical accessories in its own factories and import and sale of electrical accessories. The total turnover of the Appellant for the year of assessment 2011/2012 is Rs. 342,256,515/- which comprises the turnover from the manufacturing activity of Rs. 237,347,049/- and turnover from import and sale activity of Rs. 104,909,466/-. The appeal relates to the assessment year 2011-2012.

Appellant's claim

[3] The Appellant submitted its returns for the year of assessment 2011/2012 and claimed a concessionary rate of 10% on the turnover from the manufacturing activity on the ground that the profits and income from such manufacturing undertaking shall be taxable at the said rate of 10% specified in the fifth schedule in terms of section 59B of the Inland Revenue Act, No. 10 of 2006 as amended by the Inland Revenue (Amendment) Act No. 22 of 2011 (hereinafter referred to as the Inland Revenue Act). The Appellant's position was that the word "undertaking" in section 59B (2) means any undertaking engaged in the manufacture of any article or in the provision of any service and thus, the manufacturing business is an "undertaking" within the meaning of section 59B (2) of the Inland Revenue Act. The Appellant has claimed that the turnover of the Appellant's manufacturing undertaking did not exceed Rs. 300 Million and therefore, the Appellant was qualified for the said concessionary rate of 10% specified in the fifth schedule in terms of section 59B of the Inland Revenue Act.

Rejection of the Appellant's Claim

[4] The Assessor denied 10% concessionary tax rate claimed by the Appellant on the grounds that (a) the undertaking may have more than one business activity, but still it is only one undertaking; (ii) there is no provision in section 59B of the Inland revenue Act to separate out each business activity and treat as separate undertakings for each such activity; (iii) the turnover limit of Rs. 300 Million is the total turnover of one undertaking that is engaged in all the business activities; (iv) the two business activities of the Appellant, namely, manufacturing and import and sales activities, are carried out in one undertaking; (v) the turnover of all the business activities of the Appellant as one undertaking exceeds the threshold limit of Rs. 300 Million referred to in section 59B (2) (a) and accordingly, the concessionary rate of 10% as specified in the fifth schedule in terms of section 59B of the Inland Revenue Act is not applicable to the profit and income from the manufacturing activity.

Appeal to the Respondent and the Tax Appeal Commission

[5] The Appellant appealed to the Respondent against the said assessment and the Respondent by its determination dated 02.09.2016 confirmed the assessment issued by the Assessor. Being dissatisfied with the said determination of the Respondent, the Appellant appealed to the Tax Appeals Commission and the Tax Appeals Commission by determination dated 24.09.2019 dismissed the appeal.

Questions of law formulated by the Appellant for the opinion of Court

[6] The questions of law formulated in the case stated and submitted to Court are as follows:

1. Should the appeal which had been filed by the Appellant to the Commissioner-General of Inland Revenue against the assessment numbered ITA 14070800116 VI be deemed to have been allowed in terms of Section 165 (14) of the Inland Revenue Act, No. 10 of 2006?

2. Is the profit included in the taxable income of the Appellant from the manufacture of articles of Rs. 21,135,956 for the Year of Assessment 2011/2012 liable to be taxed at the rate of 10% in terms of Section 59B of the Inland Revenue Act No. 10 of 2006?

Questions of law 1 formulated by the Appellant

Validity of the Acknowledgement of Appeal under Section 165 (6) and Time-Bar of the Appeal under Section 165 (14) of the Inland Revenue Act

Contentions of the parties on question of law No. 1

[7] At the hearing, Mr. F.N.Goonewardena, while relying on the position of the Appellant that the acknowledgement of the appeal was not received by the Appellant conceded that the copy of the acknowledgement dated 18.09.2014 was subsequently produced by the Respondent at the hearing before the Tax Appeals Commission (Vide- file copy of the acknowledgement at pages 198 and 109 of the brief). He submitted, however, that there is no due acknowledgement of the receipt of the appeal filed by the Appellant against assessment under section 165 (6) of the Inland Revenue Act as the acknowledgement dated 18.09.2014 has been signed by the assessor without any authority to acknowledge the appeal.

[8] Mr. Goonewardena's contention was that section 165 (1) of the Inland Revenue Act read with section 165 (2) provides that any person who is aggrieved by an assessment should appeal to the Commissioner-General and such appeal shall be preferred by a petition in writing addressing to the Commissioner-General. He strenuously contended that the assessor was not competent to acknowledge the appeal and the acknowledgement shall be signed by the Commissioner-General himself unless the authorisation of delegation was granted by the Commissioner-General to the assessor to sign the acknowledgement or it was signed by someone expressly acting for and on behalf of the Commissioner-General.

[9] Profusely referring to section 165 (1), (2), (6) and (7), as a whole, it was urged by Mr. Goonewardena that the legislative intent reflected in these combined provisions is that once an appeal is made to the Commissioner-General, every action in relation to such appeal shall be taken by the Commissioner-General himself unless the authorisation to make such acknowledgement is specifically delegated by the Commissioner-General to the assessor. His contention was that as the appeal was not properly acknowledged under section 165 (6), it shall be deemed to have been received by the Commissioner-General on 12.09.2014 and as the appeal has been determined by the Respondent on 14.09.2006, the determination of the Appeal was time barred under section 165 (14) of the Inland Revenue Act.

[10] Mrs. C. Nammuni, the learned Senior State Counsel for the Respondent submitted that it is not envisaged in 165 (6) of the Inland Revenue Act that the Commissioner-General himself should sign the acknowledgement of the appeal and as the issuance of the letter of acknowledgement is an administrative task, it can be delegated to any officer competent to do so. She submitted that in the present case, the letter of acknowledgement dated 18.09.2014 itself provides that the acknowledgement is sent on the instructions of the Commissioner-General and further that the Senior Commissioner has approved the acknowledgement of the

appeal and therefore, the assessor had the authority to issue the acknowledgement of the appeal dated 18.09.2014. She strongly relied on the decision of this Court in *Lanka Ashok Leyland PLC v. The Commissioner of Inland Revenue*, CA Tax 14/2017 decided on 14.12.2018 in support of her contention that the Inland Revenue Act does not indicate expressly that the Commissioner-General himself should sign the acknowledgement of the appeal.

[11] The rival submissions stir up two major issues pertaining to the acknowledgement of the appeal made to the Commissioner-General, in the face of section 165 (6) of the Inland Revenue Act, in particular read with the other cognate subsections of section 165. Now on these provisions, the following issues arise for consideration under the first question of law:

(a) Firstly, whether the Commissioner-General himself should sign the acknowledgment of the receipt of the appeal under section 165 (6) of the Inland Revenue Act and if so, whether the acknowledgement of the appeal signed by the assessor is valid in law; and

(b) Secondly, even if the Commissioner-General himself need not sign the acknowledgement, whether the authority needs to be specifically delegated by the Commisssioner-General to the assessor for such acknowledgement to be valid in law and if so, whether such authority has been delegated by the Commissioner-General to the assessor.

Statutory Provisions on Acknowledgement of Appeal

[12] Section 165 (1) confers on the assessee a right of appeal against the assessment or the amount of any valuation made under the Inland Revenue Act to the Commissioner-General of Inland Revenue and such appeal may be filed within 30 days after the date of the notice of assessment or valuation. The relevant provisions of section 165 relating to the Appeals to the Commissioner-General are reproduced for clarity as follows:

> *"(1) Any person who is aggrieved by the amount of an assessment made under this Act or by the amount of any valuation for the purposes of this Act may, **within a period of thirty days** after the date of the notice of assessment, appeal to the Commissioner-General against such assessment or valuation:*
>
> *Provided that the Commissioner-General, upon being satisfied that owing to absence from Sri Lanka, sickness or other reasonable cause, the appellant was prevented from appealing within such period, shall grant an extension of time for preferring the appeal.*

(2) Every appeal shall be preferred by a petition in writing addressed to the Commissioner-General and shall state precisely the grounds of such appeal.

(6) The receipt of every appeal ***shall be acknowledged within thirty days of its receipt*** *and where so acknowledged, the date of the letter of acknowledgement shall for the purpose of this section, be deemed to be the date of receipt of such appeal.* ***Where however the receipt of any appeal is not so acknowledged, such appeal shall be deemed to have been received by the Commissioner-General on the day on which it is delivered to the Commissioner-General.***

(7) On receipt of a valid petition of appeal, the Commissioner-General may cause further inquiry to be made by an Assessor or Assistant Commissioner, other than the Assessor or Assistant Commissioner who made such assessment against which the appeal is preferred, and if in the course of such inquiry an agreement is reached as to the matters specified in the petition of appeal, the necessary adjustment of the assessment shall be made".

[13] In terms of section 165 (6) of the Inland Revenue Act, the date of receipt of appeal by the Commissioner-General shall be regarded as follows:

(a) If the receipt of the appeal is acknowledged within 30 days of its receipt, the date of acknowledgement of the appeal shall be the date of receipt of appeal;
(b) If the receipt of the appeal is not so acknowledged, the appeal shall be deemed to have been received by the Commissioner-General on the date on which the appeal is delivered to the Commissioner-General.

Date of Acknowledgement of Appeal

[14] There is no dispute that the Appellant has delivered the appeal to the Commissioner-General on 12.09.2014 under section 165 (1) of the Inland Revenue Act. The Appellant has claimed that no acknowledgement was received by him in terms of section 165 (6) of the Inland Revenue Act and therefore, the appeal shall be deemed to have been received by the Commissioner-General on 12.09.2014. The Respondent has, however, produced the office copy of the letter of acknowledgement dated **18.09.2014** issued by the assessor (Vide- pages 198 & 109 of the brief). The said letter of acknowledgement has been signed by the assessor and addressed to the Managing Director of the Appellant.

[15] Although the Appellant has stated that as per the records of the Appellant, no letter of acknowledgement was received by the Appellant, the Appellant has admitted in its written submissions filed before the Tax Appeals Commission on 20.07.2018 that during the hearing of the appeal before the Commissioner-General

of Inland Revenue held on 06.06.2018, the Respondent produced a copy of the acknowledgement (vide- page 176 of the brief). On the other hand, Mr. Goonewardena's main argument during the hearing was that the acknowledgement letter should have been signed by the Commissioner-General himself unless the Commissioner-General has delegated his powers to the assessor and that such acknowledgement has not been made 'for and on behalf of the Commissioner-General of Inland Revenue'.

[16] A perusal of the said letter of acknowledgement of the appeal dated 18.09.2014 (Vide- pages 198 and page109 of the brief) reveals that it has been signed by the assessor and addressed to the Appellant. It reads *inter alia*, as follows:

> *"I hereby acknowledge the receipt of your appeal made by the letter of 12.09.2014 against the income tax assessment issued for the year of assessment ended on 2011/2012. Kindly note that that under Section 165 (6) of the Inland Revenue Act No. 10 of 2006, the date of receipt of your appeal shall be the date of this letter of acknowledgement which is 18.09.2014 and the period of 2 years within which your appeal shall be determined will end on 17.09.2016. I have been directed by the Commissioner-General of Inland Revenue in terms of section 165 (7) of the said Inland Revenue Act to make further inquiry into your appeal".*

[17] At the hearing, Mrs. Nammuni heavily relied on the decision of this Court in the case of *Lanka Asok Leyland PLC v. The Commissioner-General of Inland Revenue* (CA Tax No. 14/2017) in buttressal of her contention that the Commissioner-General needs not himself sign the acknowledgement, which is only an administrative task. In *Lanka Asok Leyland PLC v. The Commissioner-General of Inland Revenue* (Supra), the identical issue arose whether the acknowledgement of the appeal should have been signed by the Commissioner-General of Inland Revenue himself and if the appeal is not so acknowledged, whether the appeal shall be deemed to have been received by the Commissioner-General on the day on which it is delivered to the Commissioner-General. The Court of Appeal held that although the appeal has to be submitted to the commissioner-General, there is no requirement that the acknowledgement must be made by the Commissioner-General himself. His Lordship Janak de Silva, J. stated at page 6:

> *"Court is of the view that there is no merit in the submission of the Appellant that the acknowledgement must be signed by the Respondent. The functions of the Inland Revenue Department are so multifarious that no Commissioner-General of Inland Revenue could ever personally attend to all of them. In particular, Court will be slow to impose such requirements unless there is unequivocal language in the IR Act. It is true that the appeal has to be submitted to the respondent. However, that does not mean that the*

acknowledgement to be made by the respondent. Similar approach has been taken by our Courts in applying the Carltona principle in relation to administrative functions to be performed by Ministers (M.S.Perera v. Forest Department and another [(1982) 1 Sri. L.R. 187] amd Kuruppu v. Keerthir Rajapakse, Conservator of Forests [(1982) 1 Sri. L.R. 163]".

[18] The question of acknowledgement falls entirely within the purview of section 165 (6) of the Inland Revenue Act, which stipulates the period within which the receipt of the appeal shall be acknowledged and where so acknowledged or not acknowledged, as the case may be, the consequences thereof. On a careful reading of section 165 (6), it is patently clear that it does not state in unequivocal language that the Commissioner-General himself should sign the acknowledgement and if it is not so acknowledged, the date of the letter of acknowledgement shall for the purpose of section 165 (6), be deemed to be the date of the receipt of such appeal.

[19] In this modern-day administration, with expansion of powers and multifarious functions exercised by public officers, the Commissioner-General cannot be expected, as the head of the Inland Revenue Department to attend to all and perform each and every function himself. As there may be thousands of taxpayers in Sri Lanka, it cannot be expected that the Commissioner-General shall perform each and every task himself, unless the Inland Revenue Act itself has specifically empowered to him to exercise such function personally I do not see any such intention reflected in the language, scope or object of section 165 (6) of the Act. I do not think that the Parliament intended such a result.

[20] It was urged by Mr. Goonewardena however, that even if it is assumed that the Commissioner-General need not himself sign the acknowledgement, having regard to the scheme of section 165 of the Act as reflected in the legislative intent, it is necessarily implied that the Commissioner-General shall sign the acknowledgement unless his authority as the Commissioner-General has been delegated to the assessor or at least, an indication that the assessor was signing '*for and on behalf of the Commissioner-General'*. In view of this argument, the question arises for consideration whether there needs to be an explicit power to delegate or whether an implied power to delegate exists.

Delegation of Power

[21] The intention of the legislature in a taxation statute is to be gathered from the words or language used in the provision and accordingly, it is not possible to assume any intention or governing purpose of the statute, more than what is stated in the plain language (P. M. Bakshi, Interpretation of Statutes, 1st Ed. 2011, p. 512). The question of delegation of authority, however, arises where the

Commissioner-General entrusts or delegates another with authority by empowering such other person to act or do things which otherwise, he himself would have to do. In *Sidhartha Sarawagi v. Board of Trustees for the Port of Kolkata and others* [(2014) 16 SCC 248], the Indian Supreme Court, while dealing with the issue of delegation of authority, has observed:

> *"2-Delegation is the act of making or commissioning a delegate. It generally means of powers by the person who grants the delegation and conferring of an authority to do things which otherwise that person would have to do himself. Delegation is defined in Blacks Law Dictionary as the act of entrusting another with authority by empowering another to act as an agent or representative. …Delegation generally means parting of powers by the person who grants the delegation, but it also means conferring of an authority to do things which otherwise that person would have to do himself."*

[22] Mathew J. in *Gwalior Rayon Silk Manufacturing (Wvg.) Co. Ltd. v. The Assistant Commissioner of Sales Tax and others*, 1974 AIR 1660, has succinctly discussed the concept of delegation at paragraph 37:

> *"37-Delegation may be defined as the entrusting, by a person to another person or body of persons, of the exercise of a power residing in that person or body of persons, to another person or body of persons, with complete power of revocation or amendment remaining in the grantor or delegator. ……It is important to grasp the implications of this, for, much confusion of thought has unfortunately resulted from assuming that delegation involves or may involve, the complete abdication or abrogation of a power. This is precluded by the definition.* ***Delegation often involves the granting of discretionary authority to another, but such authority is purely derivative****. The ultimate power always remains in the delegator and is never renounced"* [Emphasis added]..

[23] A Statute will generally provide the answer as to whether a power must be performed personally by those to whom they have been given or whether such power can be delegated to another. As noted, there is no express provision in the Inland Revenue Act that authorises the Commissioner-General to sign the acknowledgement of the appeal personally or delegate his power to another officer of the department authorizing him to sign the acknowledgement. The question is whether a delegation of power can be implied from the scheme and objects of the Act and the character of the power to be delegated and the circumstances when the power is able to be exercised. The nature of the duty to be exercised here is merely to acknowledge the appeal and the character of the person involved is the Commissioner-General who is the head of the Department.

[24] As there may be thousands of taxpayers in Sri Lanka, the head of the Department of Income tax cannot be expected to discharge personally all the duties of administrative nature which can be performed by the officials of the Department in in exercise of statutory powers referred to in section 165 (6). I do not think that the acknowledgement signed by the officials of the Department acting under authorization of their superior officers in the exercise of the statutory duty conferred by section 165 (6) are invalid where no express or implied delegation of authority authorizing the officials to sign the acknowledgement is reflected in the scheme of the Inland Revenue Act. I do not think that the Parliament intended such a result.

[25] Mr. Goonewardena however, drew our attention to a case reported in *Carltona Ltd. v. Commissioners of Works*, (1943) 2 All E R 560 and submitted that even if the Commissioner-General need not sign the acknowledgement personally, his implied power to delegate exists unless the assessor signed "*for and on behalf of the Commissioner-General'*. He referred to the following statement made by Lord Green, M.R. in the said case and sought to distinguish the principle established in *Carltona Ltd. v. Commissioner of Works* (supra) from the facts of the present case.

> *"The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials...Constitutionally, the decision of such officials is, of course, the decision of the Minister".*

[26] He contended that the official in *Carltona Ltd. v. Commissioner of Works* (supra) signed *"for and on behalf of the Commissioner of Works*" and therefore, the actions of the official are the actions of the Commissioner of Works himself. He drew our attention to the present case and submitted that the assessor has signed on his own behalf when exercising the authority of the Commissioner-General of Inland Revenue and therefore, he could have only signed *'for and on behalf of the Commissioner-General'*. It seems that he is inviting our attention to the Latin maxim "*Qui facit per alium facit per se"* which means "He who acts through another does the act himself".

[27] Greene, M.R. in *Carltona Ltd. v. Commissioners of Works,* (supra) explained broadly the principle at page 560 as follows:

> *"In the administration of government in this country, the functions which are given to ministers (and constitutionally properly given to ministers, because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To make the example of the present case, no doubt there have been thousands of requisitions in this*

country by individual ministries. It cannot be supposed that this regulation meant that in each case, the minister in person should direct his mind to the matter. ***The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case.*** *Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them".*[Emphasis added].

[28] It is to be noticed that in *Carltona Ltd. v. Commr. of Works,* the question arose with reference to the validity of an order passed by the Assistant Secretary to the Commissioner for Works requisitioning some premises, under the Defence Regulations, which authorised the requisition "if it appears to the competent authority to be necessary so to do" for certain specified purposes. The Carltona doctrine thus, applies where a statute has conferred a power on a Minister, and it is practically impossible for the Minister to exercise such power personally, he may, in general, act through a duly authorised officer of his department without having a formal delegation to do so. It recognises the principle that the functions of a Minister are so multifarious that the business of government could not be carried on if he were required to exercise all his powers personally. Thus, the official is treated as the minister's alter ego, and to that extent, his decision is regarded as those of the Minister.

[29] The same principle was applied in *Kuruppu v. Keerthir Rajapakse, Conservator of Forests* (supra). The question arose *inter alia*, as to whether it was competent for the Conservator of Forests to specify the area within into or out of which no timber of any species could be transported without a permit from an authorised officer. Rodrigo, J. who quoted the following passage from De Smith's Judicial Review of Admistrative Action, 2nd Ed. Pp. 290 & 291 at pages 168 and 169:

"Special considerations arise where a statutory power vested in a Minister or a department of State is exercised by a departmental official. The official is the alter ego of the Minister or the Department and since he is subject of as to the fullest control by his superior he is not usually spoken of as a delegate…..The Courts have recognized that duties imposed on Ministers and the powers given

to Ministers are normally exercised under the authority of the Ministers by responsible officials of the department……..In general, therefore, a Minister is not obliged to bring his own mind to bear upon a matter entrusted to him by statutes, but may act through a duly authorized officer of his department".

[30] Mr. Gooewardena relied on the Australian decision in the case of *LS v. Director-General of FACS* (1989) 18 N.S.W.L.R. 481 at 488-89 where the issue was again the Minister's authority of making an intellectually handicapped person a ward of the state that had been exercised by someone who had not been properly constituted a delegate. It was a case wherein a departmental officer had exercised the power in his capacity as a **delegate** rather than as the minister's "alter ego" and accordingly, the Carltona principle had no application. Having held that the Minister thereupon fell back on *Carltona Ltd. v. Commissioner of Works,* Young J. stated at p. 489:

"[I]t is hard to see how the "alter ego" doctrine can apply in a case where the statute makes specific provision for ministers to delegate their functions and the person who exercises the function does not do so in the name of the minister but expressly as the delegate of the minister".

[31] It is to be noted that the Carltona principle does not confine to Ministers and it has been judicially recognised in *Commissioners of Customs and Excise v. Cure & Deeley Ltd.* (1962) 1 QB 340 at p 371 that the Commissioners of Customs and Excise were in a position parallel to that of Ministers:

"The Commissioners are in a position parallel to that of the Ministers referred to in the judgment of Lord Greene in the Carltona case [1943] 2 All ER 560 at 563, in that their functions are so multifarious that they could never personally attend to them all, and the powers given to them are normally exercised under their authority by responsible officials of the department.[45]".

[32] In *Re University of Sydney* [1963] S.R. N.S.W. 723, at p 733, the Senate of a University was regarded as being in a similar situation.The Carltona principle may, in my view apply in appropriate circumstances where the Government officials or bodies are authorised by their superior officers to carry out certain administrative or routine tasks without having a formal delegation to do so. Because, it is almost impossible for the head of a department in the Public Service to discharge personally all the duties which are conferred by a Statute otherwise than his officers responsible to him unless it is stated in the Act in unequivocal language that such duties shall be exercised by the head of the department personally.

As Mason, J. referring to the Carltona principle observed in *Minister for Aboriginal Affairs v. Peko-Wallsend (1986) 162 CLR 24* at paragraph 12:

> *"The cases in which the principle has been applied are cases in which the nature, scope and purpose of the function vested in the repository made it unlikely that Parliament intended that it was to be exercised by the repository personally because administrative necessity indicated that it was impractical for him to act otherwise than through his officers or officers responsible to him".*

[33] *In Re Golden Chemical Products Ltd*. (1976) Ch. 300 at p. 20, it was observed:

> *"Yet I find the logic of the principle equally persuasive in its application to the head of any large government department, and, a fortiori, to a Deputy Commissioner of Taxation responsible within a State for the implementation of the Commonwealth's laws with respect to taxation. No permanent head of a department in the Public Service is expected to discharge personally all the duties which are performed in his name and for which he is accountable to the responsible Minister".*

[34] Those authorities established that when a Minister is entrusted with administrative functions he may, in general, act through a duly authorised officer of his department. The same principle applies to the Commissioner-General of Inland Revenue, who as the head of a department is not expected to discharge personally all the duties otherwise through his responsible officers where the relevant power, duty or function is of an administrative nature or routine.

Acting under authorisation of the Superior Officers

[35] The next question is whether the assessor was acting under authorisation of his superior officers in the discharge of his duty of sending the acknowledgement letter on 18.09.2014. Mr. Goonewardena contended that although it is stated on the Senior Commissioner's Recommendations for appeal hearing that the appeal was acknowledged on 18.09.2014, the Senior Commissioner has approved the acknowledgement on 22.09.2014 and in the circumstances, no approval has been granted to acknowledge the appeal on 18.09.2014. A perusal of the Senior Commissioner's Recommendation for Appeal Hearing at page 108 of the brief reveals that the Commissioner, Large Taxpayer's Unit has confirmed on **18.09.2014** that the appeal has been acknowledged on **18.09.2014** and the date of time bar is **17.09.2016** (Vide- item No. 6 and 7). The Commissioner's comments "This appeal could be inquired at the Unit" and his signature placed **on 18.09.2014** clearly confirm that the date of acknowledgement of appeal was **18.09.2014** and thus, the

assessor has signed the acknowledgement on the basis of the administrative approval granted by his Senior Officers in charge of the Large Taxpayer's Appeal Unit.

[36] On the other hand, the Commissioner, LT Appeal Unit for the purpose of section 165 (7) has made recommendations on **18.09.2014** for further inquiry at the LT Appeal Unit and sought approval of the Senior Commissioner, Appeal who has granted approval for further inquiry to be made and thereafter, the Assistant Commissioner has been nominated to further inquire into the appeal as required by section 165 (7) of the Inland Revenue Act.

[37] The definition of the Commissioner-General in section 217 of the Inland Revenue Act means the Commissioner-General of the Inland Revenue Department appointed or deemed to be appointed under the Inland Revenue Act and includes, in relation to any provision of the Act, the Senior Deputy Commissioner-General, a Deputy Commissioner-General, **a Senior Commissioner** and Commissioner who is specifically authorized by the Commissioner-General either generally or for some specific purpose, to act on behalf of the commissioner-General.

[38] It is to be noted that section 165 (7) of the Inland Revenue Act grants a discretion to the Commissioner-General to cause further inquiry to be made by an Assessor or Assistant Commissioner, as the case may be. As noted, the definition of the "Commissioner-General" *inter alia*, includes in relation to any provision of the Act, the Senior Deputy Commissioner-General, a Deputy Commissioner-General, a **Senior Commissioner**. In the present case, the Senior Commissioner, LT Appeal Unit has granted approval under section 165 (7) of the Act to cause a further inquiry.

[39] On the face of the Senior Commissioner's Recommendations for Appeal Hearing (Vide-page 108 of the brief), the date of acknowledgement is **18.09.2014** and the date of the time bar is 17.09.2014 (vide-item 6 and 7). The Commissioner-LT Appeal Unit has confirmed the date of acknowledgement as 18.09.2014 and the Senior Commissioner has approved the recommendations made by the Commissioner on 18.09.2014. In the circumstances, the date of the approval granted by the Senior Commissioner on 22.09.2014 for further inquiry into the appeal to be made under section 165 (7) will not invalidate the acknowledgement of the appeal signed by the assessor on 18.09.2014, acting under authorisation of the his Superior Officers.

[40] It is patently clear that the assessor who is also an Assistant Commissioner has only performed an administrative function conferred by section 165 (6) of the Act

and signed the acknowledgement letter, acting under the authorisation of his Superior Officers rather than performing any discretionary power in terms of the provisions of the Inland Revenue Act. In the result, the absence of any reference in the acknowledgement letter that the assessor signed the acknowledgement "*for and on behalf of the Commissioner-General"* will not make the acknowledgement of the appeal invalid.

[41] I am of the view that the appeal has been validly acknowledged within 30 days of its receipt as required by section 165 (6) of the Inland Revenue Act and accordingly, the date of the acknowledgement viz. 18.09.2014 shall, for the purpose of section 165 (6) of the Inland Revenue Act, be deemed to be the date of the receipt of the appeal made to the Commissioner-General.

Time-bar objection

[42] The next question raised by Mr. Goonewardena was that as the petition of appeal was submitted on 12.09.2014 and the appeal was determined on 14.09.2016, the appeal had been determined after the expiration of the time bar in section 165 (14) of the Act. Section 165 (14) of the Inland Revenue Act reads as follows:

> *"Every petition of appeal preferred under this section, shall be agreed to or determined by the Commissioner- General,* ***within a period of two years from the date on which such petition of appeal is received by the Commissioner-General,*** *unless the agreement or determination or such appeal depends on—*
>
> *(a) the decision of a competent court on any matter relating to or connected with or arising from such appeal and referred to it by the Commissioner- General or the appellant; or*
>
> *(b) the furnishing of any document or the taking of any action–*
>
> *(i) by the appellant, upon being required to do so by an Assessor or Assistant Commissioner or the Commissioner-General by notice given in writing to such appellant (such notice being given not later than six months prior to the expiry of two years from the date on which the petition of appeal is received by the Commissioner-General); or*
>
> *(ii) by any other person, other than the Commissioner-General or an Assessor or Assistant Commissioner.*
>
> *Where such appeal is not agreed to or determined within such period,* ***the appeal shall be deemed to have been allowed and tax charged accordingly****.*

[43] As noted, the appeal has been made on 12.09.2014 and it has been acknowledged on 18.09.2014 and thus, the date of the time bar as stated in the acknowledgement is 17.09.2016. A perusal of the determination made by the Respondent at pages 68/164 of the brief reveals that it has been made on **02.09.2016** and the said determination has been communicated to the Appellant on **14.09.2016** (vide-page 69 of the brief). On the face of the record, it is patently clear that the determination has been made within a period of 2 years from the date on which the petition of appeal was received by the Commissioner-General.

[44] The contention of Mr. Goonewardena was, however, that the date of the determination should have been taken as **14.09.2016**. His argument is based on the premise that the determination is not completed or made until it is communicated to the person to be affected by the determination. I am not inclined to agree with Mr. Goonewardena's contention. All what is required under section 165 (14) is that the determination of the Commissioner-General shall be made within a period of 2 years from the date on which such petition of appeal is received by the Commissioner-General. It is not envisaged in section 165 (14) that the determination shall also be communicated to the Appellant within a period of 2 years from the date on which such petition of appeal is received If it was the legislative intent, it shall be stated in unequivocal language in section 165 (14).

[45] There is a clear distinction between a determination of the appeal and communication of appeal and they are two different things or steps at different stages. The former is the determination of the confirmation, reduction, increase or annulment of the assessment made by the Respondent and the latter is the formal intimation to the Appellant of the fact that such a determination has been made.

[46] I am of the view that the date of the determination could not be taken as the date of the communication as communication presupposes determination of a thing to be communicated to the Appellant. This Court in *Stafford Motor Company (Pvt) Limited v. Commissioner-General of Inland Revenue*, CA Tax 17/17 decided on 15.03.2018 considered a similar point. In that case, the Court considered whether a lawfully valid assessment can be made without serving a valid notice of assessment or whether there is a requirement to give notice of assessment before making an assessment. The Court held that there is no requirement to give notice of assessment before making an assessment as practically it cannot be done as the assessment must first be made followed by a notice of assessment. His Lordship Janak de Silva, J at page 8 stated:

> *"Section 163(1) and (2) of the 2006 Act provide for making of assessment of any person while section 164 requires a notice of assessment to be given to a*

person who has been so assessed. Therefore, Court rejects the submission made by the learned counsel for the Appellant that no lawfully valid assessment can be made without first serving a valid notice of assessment. There is no requirement to give notice of assessment before making an assessment. Practically, it cannot be done as the assessment must first be made followed by a notice of assessment...

The time bar to making of an assessment is set out in section 163(5) of the 2006 Act. The section clearly states that "no assessment" shall be made after the time specified therein. Given that the 2006 Act recognizes a distinction between an "assessment" and a "notice of assessment", it would have been convenient for the legislature to refer to the notice of assessment" rather than "assessment" in section 163(5) of the 2006 Act. On the contrary, it has been made effective for the posting of the "notice of assessment" is the relevant date for the purpose of determining the time bar making an assessment. Court determines that the date of making the assessment is the relevant date for the purpose of determining the time bar."

[47] It is true that the Appellant's statutory obligation to file an appeal to the Tax Appeals Commission against the determination cannot be set in motion until the determination is communicated to him and hence, the determination has to be communicated to the Appellant who is affected by such determination. In my view, this does mean that, until a determination is communicated, a valid determination under section 165 (14) is not made at all. An order to be communicated, must presuppose the existence of a determination and the existence of a determination is only possible when the Respondent has made the determination.

[48] The Respondent has discharged the statutory function of making the determination within a period of 2 years from the date on which the petition of appeal was received by the Commissioner-General on 12.09.2014. The Inland Revenue Act does not say that the determination must also be communicated to the Appellant within 2 years from the date on which such petition of appeal was received by the Commissioner-General. I, therefore, cannot accept the contention of Mr. Goonewardena that the date of communication of the determination is the date of the determination for the purpose of section 165 (14) of the Inland Revenue Act.

[49] In the present case, the appeal was made on 12.09.2014 and it was acknowledged within 30 days of its receipt viz. 18.09.2014. The appeal has been determined within a period of 2 years from the date on which the petition of appeal was received by the Commissioner-General viz. 02.09.2016, as required by section 165 (14) of the Act. For the reasons stated above, the answer to the question of law No. 1 should be made in the negative and against the Appellant.

Question of Law-2

Appellant's Eligibility to Concessioney Tax Rate of 10% as specified in the Fifth Schedule in terms of Section 59B of the Inland Revenue Act

[50] The question of law No. 2 is whether the profit included in the taxable income of the Appellant from the manufacture of articles of Rs. 21,135,956 for the Year of Assessment 2011/2012 liable to be taxed at the rate of 10% in terms of Section 59B of the Inland Revenue Act No. 10 of 2006.

Contentions of the parties on question of law No. 2

[51] It was the contention of Mr. Goonewardena that although there can be many different undertakings, the word "undertaking" in section 59B does not refer to the entire business and in the present case, the word "undertaking" for the purpose of section 59B only means the turnover from a single undertaking engaged in the manufacture of articles or in the provision of any service.

[52] Mr. Goonewardena submitted that the undertaking need not necessarily be confined to business and it can also include a company or person or a specific undertaking and accordingly, the term undertaking shall be narrowly defined to limit the scope of the concession, with the underlying rationale being to provide the concessionary rate only in respect of that specific income. His submission was that section 59B (2) only applies to manufacturing activities and the word "undertaking" is used only in the context of concessionary income tax from any manufacturing activity and accordingly, the assessor, the Respondent and the Tax Appeals Commissioner were wrong in widening the scope of the term "undertaking" in section 59B of the Inland Revenue Act by including all business activities of the Appellant.

[53] His main thrust of the argument was that as the Appellant was only seeking a concessionary rate of 10% in respect of the profits and income from the business of manufacture of goods and the turnover of such business (Rs. 237,347,049) is below the threshold amount of Rs. 300 Million specified in section 59B (b) (2) and thus, the profits and income of the Appellant conform to the definition of "undertaking" in section 59B (2) (b) of the Inland Revenue Act. Accordingly, he submitted that the assessor has wrongly segregated the turnover of the business to fall over Rs. 300 Million and denied the 10% concessionary rate in respect of manufacturing activity on the ground that the total turnover of the undertaking of the Appellant from all business activities is more than Rs. 300 Million.

[54] On the other hand, Mrs. Nammuni vehemently relying on section 59B of the Inland Revenue Act contended that the assessee is very much engaged in several business activities, namely, manufacturing, sale and import of goods and the word "undertaking" in section 59B is a collective reference to all the business activities of a company or person. Mrs. Nammuni contended that the word "undertaking" used in section 59B refers to "business" and since the Appellant's business consists of several business activities and the entire turnover of undertaking from all of the business activities exceed Rs. 300 Million, the Appellant is not eligible for a concessionary rate of 10% and accordingly, the concession under Section 59B was rightly denied by the assessor.

[55] Now the first question is whether the term "undertaking" used in section 59B of the Inland Revenue Act No. 10 of 2006 as amended by the Inland Revenue (Amendment) Act No. 22 of 2011, for the purpose of tax concession means any particular business activity (a single business activity of a company or person) or whether the expression is a collective reference to all the business activities of a company or person as an independent business entity of which the turnover does not exceed Rs. 300 Million for that year of assessment.

[56] The following matters are not in dispute:

1. The Appellant has two sources of income, namely, (i) income from the manufacture of electrical accessories and (ii) income from the import and sale of electrical accessories;

2. The turnover arising from undertaking of manufacturing operation amounts to Rs. 237,347,049 and the turnover arising from the sale of imported goods amounting to Rs. 104,909,466 for the year of assessment 2011/2012.

Statutory Provisions

[57] Before proceeding to deal with the issues involved in the second question of law, I shall refer to the relevant provisions of the Inland Revenue Act No. 10 of 2006 as amended by Inland Revenue (Amendment) Act, No. 22 of 2011. Section 59B makes provisions for the concessionary rate of income tax applicable to the profits and income of any person from any undertaking with annual income not exceeding certain amount. Section 59B reads as follows:

(1) The profits and income of any person (not being a holiday company, a subsidiary company, or an associate company of a group of companies) for any year of assessment commencing on or after April 1, 2011, ***from any***

undertaking referred to in subsection (2), *shall, notwithstanding anything to the contrary in any other provisions of this Act, but subject to provisions of section 59F be chargeable with income tax at the appropriate rate specified in the Fifth Schedule to this Act-*

(2) ***for the purpose of this section*** *the turnover of this section* ***"undertaking****" in relation to any year of assessment means undertaking-*

(a) engaged in the ***manufacture of any article or in the provision of any service,*** *and*

(a) the ***turnover of such undertaking*** *(other than from the sale of any capital asset) for that year of assessment does not exceed three hundred million rupees."*

(i) being any year of assessment commencing on or after April 1, 2011 but prior to April 1, 2013, does not exceed three hundred million rupees;

(ii) being any year of assessment commencing on or after April 1, 2013, does not exceed five hundred million rupees.

Object and context of section 59B of the Inland Revenue Act No. 10 of 2006

[58] I shall proceed to consider the question as to whether a company engaged in the composite business of manufacture, import and sale is entitled to the benefit of the tax concession set out in the fifth schedule in terms of section 59B in the light of the object and context of the beneficial provision contained in section 59B of the Inland Revenue Act. One has to consider the object of granting tax concessions to an undertaking under section 59B and thus, the said expression "undertaking" will have to be construed liberally in a broader commercial sense, keeping its object and context in mind. In the process of construing the object and context of section 59B, we have to consider whether one business activity of the company would be treated as an "undertaking" for the purpose of section 59B of the Inland Revenue Act.

Meaning of the expression "undertaking"

[59] The Tax Appeals Commission has taken the view that the term "undertaking" referred to in section 59B of the Inland Revenue Act has only one indivisible business for the purpose of the Inland Revenue Act and thus, it implies not only the manufacturing activity, but would also include the entire business activities carried on by the Appellant as a single undertaking. The word "undertaking" is not defined in the Inland Revenue Act and thus, there is no statutory definition to the word "undertaking" for the purpose of determining whether it implies one business activity or composite business activities constituting one single business entity. Although the expression "undertaking" is used in various provisions of the Inland

Revenue Act, while conferring the benefits under different schemes, the principles and attributes of what constitutes an "undertaking" for the purpose of tax concession or benefits are not settled. It has thus, become necessary to construe the scope of the expression "undertaking" for the purpose of section 59B of the Inland Revenue Act by resorting to its meaning in common parlance as understood by common persons or its natural and grammatical manner.

[60] The expression "undertaking" has different shades of meaning and is the most elastic and broad in nature. "**Undertaking"** in common parlance means an "enterprise", "business", "venture" or "engagement". According to Online Dictionary,MerriamWebster, "undertaking" means "Anything undertaken, any business, work, or project which one engages in, or attempts, an enterprise or venture or engagement in the context in which it occurs." The Kerala High Court had an occasion to expound this term "undertaking" and "industrial undertaking" in the Indian Income Tax Act, 1961 in the case of *P. Alikunju M.A. Nazeer Cashew Industries v. CIT*, 166 ITR 804. The High Court stated in paragraphs 5 and 6:

> *"5. What then is an "industrial undertaking"? The Income-tax Act does not define what is "an undertaking" or what is an "industrial undertaking". It has, therefore, become necessary to construe these words. Words used in a statute dealing with matters relating to the general public are presumed to have been used in their popular rather than their narrow, legal or technical sense. Loquitur ut vulgus, that is, according to the common understanding and acceptation of the terms, is the doctrine that should be applied in construing the words used in statutes dealing with matters relating to the public in general. In short, if an "Act is directed to dealings with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language." (Vide- Unwin v. Hanson [1891] 2 QB 115 , per Lord Esher M. R. at page 119).*

[61] Lord Easter in *Unwin v. Hanson (supra)* has further explained the manner in which the words used in statutes dealing with matters relating to the public in general are construed at page 119 as follows:

> *"If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words".*

[62] In *Secretary, Madras Gymkhana Club Employees' Union v. Management of the Gymkhana Club* (1968 SCR (1) 742), the Indian Supreme Court held that

though "undertaking" is a word of large import, and it means anything undertaken or any project or enterprise, in the context in which it occurs, it must be read as meaning an undertaking analogous to trade or business or as part of trade or business or as an undertaking analogous to trade or business (Para 37).

[63] The ECJ in *Klaus Hofner and Fritz Elser v Macrotron GmblH*, Case C-41/90 decided on 23.04.1991 has sought to maximise the application of competition law by taking a broad definition of "undertakings". The traditional definition in *Klaus Hofner and Fritz Elser v. Macrotron GmblH (supra)* at paragraph 21 was that the concept of undertaking "encompasses **every entity** engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and secondly, that employment procurement is an economic activity". At paragraph 24, it was observed that "an entity such as a public employment agency engaged in the business of employment may be classified as an undertaking for the purpose of applying the Community Competition rules..".

[64] The undertaking can be broadly described as any entity in a business or trade activity taken as a whole, but does not include individual assests or liability or any combination thereof not constituting a business activity. The word "business" has been defined in section 217 of the Inland Revenue Act of 2006. It reads as follows:

> "Business" includes an agricultural undertaking, the racing of horses, the letting or leasing of any premises, including any land by a company and the forestry".

[65] Construing this word "business", the Supreme Court in *Narain Swadeshi Weaving Mills v. Commissioner of Excess Profits Tax* [1954] 26 ITR 765 (SC) has observed that "the word "business" connotes some real, substantial and systematic or organised course of activity or conduct with a set purpose." Endorsing this construction, the Supreme Court in a later decision in *Mazagaon Dock Ltd. v. Commissioner of Income Tax* (1958) 34 ITR 368 has observed at page 376: "The word 'business' is, as has often been said, one of wide import and in fiscal statutes, it must be construed in a broader rather than a restricted sense".

[66] The term trade on the other hand has also been defined in section 217 to include "every trade and manufacture and every adventure and concern in the nature of trade". Although the word "business" is synonymous with trade, the word business has a more extensive significance and meaning than "trade" (Per Willes J. in *Harris v. Amery* (1866-66) P 148, 154). It comprises all those activities which are necessarily done to make the trade flourish and bring profits (Per Samarakoon C.J. in *Kanagaratna v Rajasunderam* (1981) 1 Sri LR, 432, at 495). His Lordship having regard to the facts of the said case held that hiring of labour

and staff, their disciplinary control, their conduct in and of the business, are all matters that are part and parcel of running the business and therefore touch the business....". The term 'business' can thus be understood as having a broad meaning and the scope of the term extends to a trade, profession, vocation, or any such arrangement having the characteristics of a business transaction.

[67] The Court's general approach to whether a given entity is an undertaking within the meaning of the tax rules focuses on the types of composite business or trade activities engaged in by such entity as a whole from which profits and income arise rather than individual business or trading activity or the characteristics of the actors who perform it. Thus, the concept of undertaking refers to the collective reference to a number of business or trading activities as a whole, undertaken by an economically independent and self-sustaining one indivisible business entity rather than a single business activity under one undertaking.

[68] The word "undertaking" therefore, should be understood to have been used in Section 54B in a wide sense and must be understood as one taking in its fold all collective business or trading activities a person may undertake as one economically independent and self-sustaining indivisible business entity. As long as this test is satisfied, it is immaterial whether the undertaking carries out the same business or different business or trading activities and even if in law that business entity consists of several persons, natural or legal and separate activity within such entity.

[69] Applying the above legal principles, I desire to state that the expression "undertaking" is of wide import and is capable of covering not only the activity of manufacture, but also activity of sale of imported items undertaken by a person or company earning profits and income from such business or trading activities as a whole so long as it is an economically independent and self-sustaining one indivisible business entity.

Is the business activity of manufacture an "undertaking" for the purpose of section 54B (2) of the Inland Revenue Act?

[70] Mr. Goonewardena took a great pain, defining the term "undertaking" which, goes to show that the manufacture of electrical items by the Appellant can be considered as one separate undertaking for the purpose of tax benefits under section 59B of the Act. The contention of Mr. Goonewardena was that every single business activity constitutes a single "undertaking" and thus, the term undertaking shall be treated separately as the business activity engaged in the manufacture of

goods within the meaning of section 59B. His contention was that the concessionary tax rate is available separately for the manufacturing business activity of the Appellant. Now the question is whether this view is within the legislative intent reflected in section 59B (2) of the Act..

[71] For the eligibility for tax concession under section 59B, the following two limbs in section 59B (2) must be satisfied:

1. Any undertaking must be engaged in the manufacture of any article or in the provisions of any service; **and**

2. the turnover of such undertaking (other than from the sale of any capital asset) for that year of assessment commencing on or after April, 1, 2001 but prior to April, 2013, does not exceed Rs. 300/- Million.

[72] I wish to reproduce hereunder the following observations made by the Kerala High Court in the Indian Case of *P. Alikunju M.A. Nazeer Cashew Industries v. CIT* (supra). While interpreting the conditions to be fulfilled to avail exemption benefit under section 54D of the Income Tax Act and the terms "undertaking" and "industrial undertaking" the Kerala High Court stated in paragraphs 6:

> *"An undertaking mentioned in Section 54D must be one maintained by a person for the purpose of carrying on his business. "Undertaking" for the purpose of this section, however, must be an "industrial undertaking". The demonstrative adjective "industrial" qualifying the word "undertaking" unmistakably and with precision shows that the undertaking must be one which partakes of the character of a business. That that is the meaning that is intended by Parliament is clear from the context in which these words have been used in the section".*

[73] We have to bear in mind that the expression "undertaking" is to be construed in the context of Section 54B (2) of the Act and the qualifying category of undertaking that is intended by Parliament in section 54B(2). A reference in this connection to the following words in section 59B (2) is of utmost significance:

"For the purpose of this section "undertaking".... means any undertaking-

(a) engaged in the manufacture of any article or in the provision of any service"

[74] The adjective "manufacture" qualifying the word "undertaking" unmistakably demonstrates that the undertaking for the purpose of tax concession under section 54B must be one which partakes of the character of a business in relation to

"manufacture". It must be understood first, as any **undertaking** as a whole and then, **such undertaking is engaged in the manufacture or provision of services.** If the Appellant's argument holds water, any person or company engaged in the manufacture of goods may be treated as a separate undertaking, whether or not such person or company is also engaged in several other business or trading activities under one economically independent and self-sustaining economic entity.

[75] Section 59B of the Inland Revenue Act provides concessionary tax rate of 10% to an "**undertaking engaged in the manufacture of any article or in the provision of any service"**. Had the expression "**undertaking"** meant any single business activity instead of the whole business activities of an economically independent and self-sustaining entity as claimed by the Appellant, there would have been no need for the legislature to include the words **"an undertaking engaged in the manufacture of any article or in the provision of any service"** in section 59B (2). The legislature could have simply used the words "manufacturing undertaking" in section 59B similar to the words "agricultural undertaking" used in section 45 (2) of the Act.. But that is not the case. The context in which the said reference is made in section 59B (2) (a) appears to be the meaning that is intended by Parliament. The concession specified in section 59B in relation to any undertaking engaged in the manufacture of any article or in the provision of any service has to be understood in the context in which the term **"undertaking"** is to be understood as an economically independent and self-sustaining entity taken as a whole and in the context in which it occurs

Turnover of such undertaking does not exceed Rs 300 Million-Turnover threshold

[76] The Tax Appeals Commission has stated that the Appellant has carried on two business activities under one undertaking and in an undertaking, the total turnover means all business activities excluding the sale of capital assets The benefit to be granted under section 59B is subject however to certain conditions so far as the type of undertaking engaged (manufacturing of articles or in the provision of any service), the minimum threshold of an undertaking (threshold turnover limit of Rs. 300 Million) and the limitation period (for that year of assessment). However, an **undertaking** engaged in the manufacture of articles or in the provision of services, for the purpose of section 59B (2) depends on the total turnover of such undertaking (other than from the sale of any capital assest) for that year of assessment, which does not exceed 300 Million Rupees.

[77] The contention of Mr. Goonewardena was that the turnover threshold of Rs. 300 Million for the purpose of section 59B (2) (b) has to be determined on the basis

of the turnover from the "manufacturing activity" without considering the total turnover from the two business activities and therefore, the turnover from the sale of imported goods (Rs. 104,909,466/) shall not be aggregrated in determining the turnover threshold of Rs. 300 Million. He submitted that as the total turnover received from the manufacturing of electrical accessories was Rs. 237,347,049/-, the Appellant falls within the meaning of "undertaking" referred to in section 59B (2) (b). Now coming to the question as to whether the turnover of an undertaking can be formed by separating each business activity of the whole undertaking, one has to consider how the legislative intent is reflected in section 59B (2) of the Act.

[78] Before considering the legislative intent reflected in section 59B (2), I desire to consider the principles that apply to the construction of tax statutes. Lord Cairns in *Partington v. Attorney-General*, (1869) LR 4 HL 100 at 122 stated:

> *"As I understand the principle of our fiscal legislation, it is this: if the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown is seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however, apparently within the spirit of the law the case might otherwise appear to be".*

[79] Again, Lord Chancellor Viscount Haldane has put it in *Lumsden v. Commissioner of Inland Revenue* [1914] 2 S.L.T. 188, at p. 193) "the duty of judges in construing statutes is to adhere to the literal construction unless the context renders it plain that such construction cannot be put on the words. This rule is especially important in cases of statutes which impose taxation". Lord Halsbury put the principle more succinctly in *Lord Advocate v. Fleming* 4 [1897] A.C. 145 at p. 151:

> *"It appears to me that in this case there is a plain interpretation to be put upon plain words. I am only reiterating what has been said over and over again in dealing with taxing Acts, when I say that we have no governing principle of the Act to look at; we have simply to go on the Act itself to see whether the duty claimed under it is that which the Legislature has enacted."*

[80] Lord Russell of Killowen in *Attorney- General v. Carleton Bank* [1899] 2 Q.B.158 at p. 164 again stated that there is no equitable construction of a taxing statute or considerations of hardship or the like play no part in construing Tax Acts as the duty of the Court is to give effect to the intention of the Legislature, which is to be gathered from the language employed having regard to the context:

> *"The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely to give*

effect to the intention of the Legislature as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed. The Court must no doubt ascertain the subject matter to which the particular tax is by the statute intended to be applied, but when once that is ascertained, it is not open to the Court to narrow or whittle down the operation of the Act by seeming considerations of hardship or of business convenience or the like. Courts have to give effect to what the Legislature has said ".

[81] In short, taxes are imposed by the letter of the law and not the spirit and the Court's duty is to give effect to the intention of the Legislature as that intention is to be gathered from the language employed having regard to the context in which it is applied. On a plain reading, it transpires that under section 59B (2), an assessee becomes entitled to 10% tax concession of the profits and income where the **"undertaking"** is mainly engaged in the business of manufacture of goods or in the provision of service **and** where the total turnover of **such undertaking** does not exceed Rs. 300 Million. In my view, the emphasis is on the **turnover of the undertaking** consisting of all business or trading activities as an economically independent and self-sustaining one indivisible business or trading entity.

[82] Let me now turn to the decision of the Supreme Court in *Rodrigo v. Commisssioner-General of Inland Revenue* (2002) 1 Sri LR 384, which was relied on by Mrs. Nammuni in support of the contention that the manufacturing activity cannot be treated as one undertaking. The asseseee in that case was an accounting firm and earned profits in local and foreign currency by carrying out professional services as a single indivisible business organisation under the control of the partners. The income earned in foreign currency were exempted from the income tax. Her Ladyship Bandaranayake J. (as she then was) held that although the Appellant provided services to both local and foreign clients, and earned income in foreign currency, the Appellant's firm was only one business and not two businesses as it carried on the professional practice as a single indivisible business organisation under the control of the partners. Bandaranayake J. stated at page 388:

"The partnership to which the appellant's belonged to carried on or exercised a professional practice in Sri Lanka dealing with local as well as foreign clients. From its inception, the appellant's firm carried on or exercised the said professional practice as a single indivisible business organisation under the control of the partners. A core staff of the specialists supported the firm in rendering the relevant professional service. The partners as well as the staff and the physical assets of the organization were not divided to serve local clients and foreign clients separately. Accordingly, the firm has only one indivisible business, the common exercise of it being providing services to

local and foreign clients using the professional skills of the partners and the staff."

[83] Bandaranayake J. dealing with the question whether it is feasible to distinguish the expenses incurred in the process of carrying out professional services from the perspective of whether the earnings are local or foreign currency, stated at page 392:

"The usage of office space, equipment, personal and the payments of bills would have been on a common basis for both local and foreign clients. In such a situation, it would not be possible to indicate the actual costs that were incurred in earning income in local and foreign currency."

[84] The concept of single entity or one indivisible business entity concept is intended to identify the nature of the undertaking and the presence and scope of an undertaking however depend on judicially established conditions and limits. As noted, in the 1991 Höfner judgment (supra), the European Court of Justice (ECJ) at para 123 set forth a single definition of an undertaking: "the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed". This definition, comprises two components: entity and economic activity.

[85] The basic elements of the (single) entity component have been interpreted in the Case T-11/89, *Shell International Chemical Company Ltd v. Commission of the European Communities* [1992] ECR II-757 (hereafter referred to as Shell). The General Court stated at para 311 that a single entity is an "economic unit which consists of a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision". The assessment of single economic unit status in determining the single entity concept in the EU crucially depends first on the corporate control, which is a functional test rather than a personhood test and second, on the integrated market conduct factor to determine a **single entity or one indivisible business entity** (Case 107/82, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v. Commission of the European Communities* [1983] ECR 3151, para. 50-52).

[86] In the case of *Rodrigo v. The Commissioner-General of Inland Revenue* (supra), the Supreme Court observed that although the Appellant provided services to local and foreign clients, the Appellant carried on the professional practice as a single indivisible business organisation under the control of the partners. The Court also observed that the partners and the staff, including the specialists who

rendered services and provided facilities of the organisation were not divided to serve the local and the foreign clients separately.

[87] The legislative intent is clearly reflected in the section 59B (2) (b) in using the words "the turnover of such undertaking" and thus, it is easily discernible, that the legislature wanted to add the total turnover received by the whole undertaking. Section 59B (2) cannot be formed by splitting up of the turnover of each business activity of an undertaking when the words used in the section refers to the turnover of "**undertaking"** and not the turnover of **"any single business activity**" to fall within the term "undertaking". The primary legislative intent as reflected in section 59B appears to be to provide tax concessions specified in the fifth schedule in terms of section 59B to Small and Medium Enterprises (SMEs) and encourage their economic activities, whose total turnover from any undertaking as a whole consisting of all business activities within one indivisible business or trading entity does not exceed Rs. 300 Million.

The requirement of separate statements of accounts

[88] Mr. Goonewardena however, referred to the decision of this Court in *ICICI Bank v. The Commissioner General of Inland Revenue* (CA/Tax 28/2013) decided on 16.07.2015 and submitted that the facts in that case are different from the present case as the issue there was whether the borrowing costs of the investment in Sri Lanka Development Bonds are a specific expense incurred in earning a non-taxable profit whereas the issue here is about the turnover of the manufacturing undertaking whose turnover does not exceed Rs. 300 Million.

[89] He further submitted that in any event, the Appellant has prepared a statement of account which has clearly separated its two business activities viz. Manufacturing activity and sale of imported goods and delivered the same to the assessor along with the Return of Income complying with section 106 (11) of the Inland Revenue Act. The contention of Mrs. Nammuni was, however, that separate accounts had not been kept by the Appellant in keeping with section 106 (11) of the Act as the debtors and creditors of the two business activities could not be identified separately and that the turnover of two business activities cannot be spitted in determining the total turnover of one undertaking as the Appellant had carried out two business activities under one undertaking,.

[90] Tax Appeals Commission has stated that the Appellant has issued the same sales invoices for both imported items as well as for manufactured items and the Appellant has not kept separate accounts and carried on two business activities under one undertaking. In *ICICI Bank v. The Commissioner-General of Inland*

Revenue (supra), in addition to its primary banking business, the Appellant Bank also invested money in Sri Lanka Development Bonds. The Appellant in that case argued that all its business activities including the investment fall within one banking business. The Court found that the Appellant carried on more than one business, including one trade, business, profession or vocation in terms of section 106 (11) of the Inland Revenue Act and thus, the Appellant was engaged, within the scope of banking businesses, in multiple businesses at the same time earning income from separate sources.

[91] The Court took the view that (i) as section 106 (11) of the Inland Revenue Act recognises that one entity can have several businesses and investment in Sri Lanka Development Bonds is exempted from income, the Appellant shall maintain and keep a separate statement of accounts in a manner that the profits and income from each activities to be separately identified; and (ii) unless the Appellant keeps a separate account, he will not be able to obtain the tax benefit as the tax benefit is granted only to the accrued interest in the investment of Sri Lanka Development Bonds.

[92] Section 106 (11) of the Inland Revenue Act provides as follows:

> *"Where any person or partnership carries on or exercises any trade, business, profession or vocation in several units or undertaking as one trade, business, profession or vacation, as the case may be, or where such person or partnership carries on or exercises more than one trade, business, profession or vocation and the profits and income from any such unit or undertaking or from such trade, business, profession or vocation is exempted from or chargeable with income tax at different rates, such person or partnership shall maintain and prepare statements of account in a manner that the profits and income from each such unit or undertaking or such trade, business, profession or vocation as the case may be, may be separately identified".*

[93] Section 106 (11) thus recognises that one person or partnership can carry on any business activity under several undertakings either as one such activity or more than one such activity and where the profits and income from such unit or undertaking or from such activity is exempted from income tax, such person or partnership shall maintain and prepare statements of accounts in a manner that profits and income from each such undertaking or such activity may be separately identified.

[94] The Appellant's position is that it has prepared a separate set of accounts identifying profits from each operation i.e. local (manufacturing operation) and imported (sale of imported goods) as reflected in the audited financial statements

for the year ended March 31, 2012 (Annexure 'J') in compliance with section 106 (11) of the Act and that the assessor has admitted that the Appellant has given separate accounts for manufacturing activity and import and sale activities (Annexure 'K'). Although the concessionary rate is applicable only to any **undertaking engaged in the manufacture of articles** or in the provisions of services, for the eligibility under section 59B (2)(b), the turnover threshold of Rs. 300 Million relates to the "**turnover of such undertaking**", which means the turnover of the whole undertaking consisting of all the business or trading activities under one economically independent and self sustaining indivisible entity of which the total turnover does not exceed Rs. 300 Million.

[95] In *ICIC Bank Limited v. The Commissioner-General of Inland Revenue* (supra), the Court held that separate accounts shall be maintained and kept in a manner that the profits and income from each such activity may be separately identified. In the absence of separate accounts, including any information, books and accounts, paying-in slips, auditors's reports or other documents which as is in the opinion of the assessor or assistant commissioner, necessary for the assessment of the income tax, payable by the assesee, as is referred to in subsections (12) and (13) of section 106, the computation of the turnover whether under one undertaking or separate undertakings may be difficult.

[96] The assesee has to satisfy that the activity of manufacture and the imported sale are two separate and distinct undertakings so as to be able to identify them separately. The assessor has noted that the Appellant has not provided the separate accounts under section 106 (11) which was called by him in order to ascertain whether the assessee maintained accounts separately for the previous year as indicating different undertakings as claimed by the assessee. (Vide- pages 120-122 of the brief). The Appellant's Authorised Representative while admitting that the Appellant did not maintain accounts separately for the previous year, has stated that separate accounts are indicated only for the current year (Vide-page121).

[97] The assessor has noted that he called for the assessee's representative to produce its ledger accounts for the manufacturing part and import and sale part to ascertain whether the assessee has maintained separate accounts for the manufacturing as a separate undertaking, but there is nothing to indicate that the assessee has produced a ledger accounts for the manufacturing activity and imported sale activity (pages 120-122). The assessor has further noted that although the expenses were separated on a proportionate basis in the audited accounts, the Appellant has not produced previous separate ledger accounts to indicate that the Appellant had maintained two separate accounts for each business

activity in a manner that the profits and income from each such undertaking could be separately identified.

[98] The Commissioner-General has also noted in Note dated 23.11.2015 that although the two activities have been separately on a proportionate basis in the financial report, as the detailed accounts requested under section 106 (11) have not been produced by the assessee, the debtors and creditors of the two activities could not be identified separately and most of the time items which the assessee sells under two activities goes under one invoice (Vide- page 123). In the present case, although the expenses have been indicated separately in the audited accounts, the accuracy of such matters have not been substantiated by producing the ledger accounts which is the basis for the preparation of the final accounts as requested by the assessor under subsections (12) and (13) of section 165 the Inland Revenue Act.

[99] As it is not every single business activity that can be separated in the calculation of the turnover of one undertaking, the turnover of an undertaking cannot be determined by splitting up of the business activities by the Assessee against the legislative intent that is reflected in section 59B (2) of the Act. In the absence of the fuller and further information required by the assessor for the identification of the business activities separately, including separate ledger accounts that were maintained, it is not possible to distinguish the two business activities as two separate undertakings and ascertain the income and expenditure separately. In the absence of such information that the Appellant carried on business of manufacturing activity as a single indivisible entity from its inception, it is not possible to divide the turnover from the manufacturing activity and the imported sales activity and calculate the total turnover only from the income earned from the manufacturing activity under section 59B (2) (b).

[100] As noted, the turnover of the undertaking referred to in section 59B (2) (b) shall be understood to mean the total turnover of the undertaking consisting of all the business activities under one undertaking which is an economically independent and self-sustaining one indivisible entity of which business activities cannot be run separately. For those reasons, I desire to hold that the turnover of one undertaking cannot be separated for the application of section 59B(2) (b) where the total turnover is regarded as the turnover of all business activities under one undertaking.

[101] In the present case, the Appellant carries on two business activities under one undertaking and the aggregate income of the Appellant from the manufacturing activity and the sale of imported goods exceeds Rs. 300 Million. In

the result the Appellant is not entitled to claim the concessionary rate of 10% as set out in the fifth schedule in terms of section 59B of the Inland Revenue Act.

Conclusion & Opinion of Court

[102] In these circumstances, I answer Questions of Law formulated above against the Appellant and in favour of the Respondent as follows:

Opinion of Court regarding question of law No. 01

1. No. The Respondent has complied with section 165 (14) of the Inland Revenue Act and determined the Appeal within the stipulated period of 2 years.

Opinion of Court regarding question of law No. 02

2. No. The total turnover of the undertaking consisting of the two activities (manufacturing activity and sales of imported goods) for the application of section 59B of the Inland Revenue Act exceeds Rs. 300 Million.

[103] In the result, this Court confirms the determination of the Tax Appeals Commission and the Appeal is dismissed. I make no order as to costs.

The Registrar is directed to send a certified copy of this judgment to the Tax Appeals Commission.

JUDGE OF THE COURT OF APPEAL

M. Sampath K.B. Wijeratne, J.

I agree.

JUDGE OF THE COURT OF APPEAL