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

In the matter of an appeal by way of Stated Case on a question of law for the opinion of the Court of Appeal under and in terms of Section 11A of the Tax Appeals Commission Act, No. 23 of 2011 (as amended).

Amadeus Lanka (Private) Limited,
1st Floor,
Galadari Hotel,
64, Lotus Road,
Colombo 1.

APPELLANT

CA No. CA/TAX/04/2019
Tax Appeals Commission
No. TAC/VAT/010/2014

v.

Commissioner General of Inland Revenue,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 2.

RESPONDENT

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

COUNSEL : Dr.Shivaji Felix with Shanaka Amarasinghe, instructed by Julius & Creasy for the Appellant.

Manohara Jayasinghe, SSC for the Respondent.

WRITTEN SUBMISSIONS	:	04.11.2019, 29.07.2020 & 22.06.2021 (by the Appellant) 31.10.2019, 01.06.2020 & 22.06.2021 (by the Respondent)
ARGUED ON	:	22.02.2021, 05.03.2021, 19.03.2021, 26.03.2021 & 30.03.2021
DECIDED ON	:	30.07.2021

M. Sampath K. B. Wijeratne J.

Introduction

The Appellant is a limited liability company incorporated in Sri Lanka. According to the Appellant, its principal activity is providing the service of facilitating export of travel reservation data from Sri Lanka to the Amadeus Global Distribution System. Parties are at variance as to whether such services are provided to Amadeus India (Private) Limited, an entity located overseas, or to travel agents in Sri Lanka.

The Appellant submitted its Value Added Tax (hereinafter referred to as 'VAT') returns for the quarterly periods from June 2010 to September 2011 and the Assessor did not accept the same on the ground that the supplies made by the Appellant could not be considered as zero rated supplies under Section 7 of the VAT Act No. 14 of 2002 (hereinafter referred to as 'the VAT Act'), as amended. Accordingly, an assessment was issued to the Appellant company.

The Appellant appealed to the Commissioner General of Inland Revenue (hereinafter referred to as 'the CGIR') against the said assessment and the CGIR by his determination dated 7th April 2014 confirmed the assessment.

Being aggrieved by the said determination, the Appellant appealed to the Tax Appeals Commission (hereinafter referred to as 'the TAC') on the 23rd June 2014, in accordance with Section 7 of the TAC Act No. 23 of 2011 (hereinafter referred to as 'the TAC Act'), as amended.

The TAC, on the 26 June 2018, determined that the supply made by the Appellant is not zero rated either in terms of either Section 7 (1) (b) (vi) or Section 7 (1) (c) of the VAT Act, and confirmed the determination made by the Respondent, the CGIR.

The Appellant then moved the TAC to state a case on the following questions of law for the opinion of this Court, in accordance with Section 7 of the TAC Act.

1. *Is the determination of the Tax Appeals Commission time barred?*

2. *Are the assessment of Value Added Tax and penalty, as confirmed by the Tax Appeals Commission, excessive, arbitrary and unreasonable?*

3. *Are the supplies made by the Appellant which constitute the subject matter of this appeal, zero rated supplies within the contemplation of section 7 (1) (c) of the Value Added Tax Act No. 14 of 2002 (as amended)?*

4. *In the alternative, are the supplies made by the Appellant, which constitute the subject matter of this appeal, zero rated supplies within the contemplation of section 7 (1) (b) (vi) of the Value Added Tax Act, No. 14 of 2002 (as amended)?*

5. *In view of the facts and circumstances of the case, did the Tax Appeals Commission err in law when it arrived at the conclusion that it did?*

1. Is the determination of the Tax Appeals Commission time barred?

The learned Counsel for the Appellant argued with utmost confidence that the determination of the TAC is time barred and therefore, has no force or avail in law.

In my view the above issue is twofold; whether the TAC has made its determination within the stipulated time frame and whether the time frame is mandatory. It does not appear to be necessary to restate the timeline of

events, in order to determine whether or not the TAC has made its determination within the stipulated time frame. The learned Senior State Counsel did not contest this claim, and the Court is satisfied that the TAC did indeed overrun the statutory time frame. This allows me to proceed directly to the issue of whether compliance with the time frame is mandatory, or merely directory.

For clarity I will now reproduce the relevant part of Section 10 of the TAC Act (as it stood before the amendments), excluding the proviso, which reads thus:

> *10. The Commission shall hear all appeals received by it and make its decision in respect thereof,* ***within one hundred and eighty days from the date of the commencement of the hearing of the appeal*** (emphasis added).

Accordingly, the Legislature intended the TAC to conclude an appeal within one hundred and eighty days from the date of the commencement of the hearing of the appeal.

Section 10 has subsequently been amended by Amendment Act No. 4 of 2012 to reads as follows:

> *10. The Commission shall hear all appeals received by it and make its* ***determination*** *in respect thereof,* ***within two hundred and seventy days of*** *the date of the commencement of the hearing of the appeal* (emphasis added).

By this amendment, the Legislature extended the time granted to the TAC to conclude an appeal by ninety days.

Section 10 has been further amended by Amendment Act No. 20 of 2013 which reads thus:

> *10. 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*** (emphasis added).

By this amendment, the Legislature reduced the time limit granted to the TAC to conclude an appeal by enacting that the time should commence not from the commencement of hearing, but from the commencement of its sittings for hearing the appeal.

The learned Counsel for the Appellant argued that the Legislature, by amending the above provision, not only once but twice, clearly manifested its intention of enacting the time frame provided for the conclusion of an appeal to be mandatory.

However, I am not in favour of the argument advanced by the learned Counsel for the Appellant. The Legislature, at first having extended the one hundred and eighty day period from the **commencement of the hearing** up to two hundred and seventy days, later reduced the said period by enacting that the time should take effect from the **commencement of sittings for the hearing**, which would precede the hearing itself.

In the case of *D.M.S. Fernando and Another v. Mohideen Ismail,*[1] Samarakoon C.J., citing *Maxwell on the Interpretation of Statutes (12th Edn.),* presented a three-limbed test that could assist in determining the intention of the Legislature:

"*Then again it is said that to discover the intention of the Legislature it is necessary to consider - (1) The Law as it stood before the Statute was passed. (2) The mischief if any under the old law which the Statute sought to remedy and (3) The remedy itself.*"

Applying this test to the instant case, it appears that the law as it stood before the amendments has been altered by extending and reducing, as the Legislature saw fit, the time frame within which the TAC is expected to reach a decision. There does not appear to be any obvious mischief that the amendments sought to remedy, and the remedy itself appears nothing more than an alteration of the time granted to the TAC to decide an appeal. Even if the mischief sought to be remedied was a delay in the appellate process, there is little support to the contention that the Legislature intended the said time limit to be mandatory, since it was first extended, and then reduced.

[1] [1982] 1 Sri.L.R. 222, at p.229

Hence, I am of the view that the intention of the Legislature in amending the above provision was merely to redefine the time available to the TAC to determine an appeal.

Furthermore, it is important to note that although the Legislature has amended the relevant provision twice, it has not specifically made the time limit mandatory. If the intention of the Legislature was that the failure of the TAC to adhere to the time limit should result in the Appellant being entitled to the relief claimed, the Legislature could specifically have enacted it to be so.

In the case of *K. Nagalingam v. Lakshman de Mel*,[2] Sharvananda J. (as His Lordship then was) cited the following two excerpts from scholarly authorities, in determining whether a statutory time limit for the discharge of a duty was mandatory:

"*The whole scope and purpose of the enactment must be considered, and one must of that provision* ***to the general object intended to be secured by the Act****' – Smith Judicial Review of Administrative Action (2nd Ed. at page 126)* (emphasis added)."

"*Where the prescriptions of a statute relate to the 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. The neglect of them may be penal, indeed, but it does not affect the validity of the act 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 was directory only and might be complied with after the prescribed time****. (Maxwell-11th Ed. at page 369)* (emphasis added)."

[2] 78 N.L.R. 231, at pp.236-237

Having considered the above scholarly authorities, His Lordship concluded on the time limits enacted in the Termination of Employment Act, as follows:[3]

"*The object of the provision relating to time limit in section 2 (2) (c) is to discourage bureaucratic delay. That provision is an injunction on the Commissioner to give his decision within the 3 months and not to keep parties in suspense. Both the employer and the employee should, without undue delay, know the fate of the application made by the employer. But the delay should not render null and void the proceedings and prejudicially 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 the jurisdiction that the Commissioner had, to give an effective order of approval or refuse. In my view, a failure to comply literally with the aforesaid provision does not affect the efficacy or finality of the Commissioner's order made thereunder.* ***Had it been the intention of Parliament to avoid such orders, nothing would have been simpler than to have so stipulated*** (emphasis added)."

His Lordship affirmed this decision in the subsequent case of *Ramalingam v. Thangarajah*,[4] when deciding that the time limits laid down in the Primary Courts Procedure Act were to be construed as directory, and not mandatory.

It cannot be assumed that there was some form of oversight on the part of the Legislature, when drafting and amending Section 10 of the TAC Act, in that it has not specified the consequences that follow when the TAC does not strictly comply with the statutory time limit. This is particularly so since, as the learned Counsel for the Appellant himself argued, the relevant section has been amended twice. This means that the Legislature twice had the opportunity to specify any consequences that follow non-compliance, though it saw fit not to do so.

In the case of *Mohideen v. The Commissioner General of Inland Revenue*,[5] His Lordship Gooneratne J. (sitting in the Court of Appeal) made a similar observation when considering the intention of the Legislature regarding the

[3] *Ibid.* at p.237

[4] [1982] 2 Sri.L.R. 693, at p.703

[5] CA (BRA) 02/2007, decided on 16.01.2014, at p.18

time limit available for the Board of Review (which was the body that was replaced by the TAC) to reach its determination:

"*If it was the intention of the legislature that hearing* (sic) *should be concluded within 2 years from the date of filing the petition or that the time period of 2 years begins to run from the date of filing the petition,* ***there could not have been a difficulty to make express provision, in that regard*** (emphasis added)."

Upon a consideration of some fiscal statutes enacted by our Parliament, I observe that the Legislature, in its wisdom, had specifically enacted in Section 165 (6) of the Inland Revenue Act No. 10 of 2006, as amended, that the failure to acknowledge an appeal within thirty days of its receipt should result in the appeal being deemed to have been received on the day on which it is delivered to the CGIR. Further, Section 165 (14) of the same Act stated that the failure to determine an appeal within two years from the date of its receipt should result in the appeal being allowed and tax charged accordingly. Similarly, Section 34 (8) of the VAT Act also provided that the failure to determine an appeal within the stipulated period should result in the appeal being allowed and tax charged accordingly.

Inland Revenue Act No. 17 of 2017, which is in force as at now, also provides for an Administrative Review of an assessment by the CGIR. However, unlike in the previous Inland Revenue Act No. 10 of 2006, no time frame has been specified in Section 139, for the CGIR to deliver his decision. Nevertheless, Section 140 provides that within thirty days from the date of the decision or upon lapse of ninety days from the request being made for an administrative review, the tax payer is entitled to make an appeal to the TAC. Hence, it becomes clear that while the breach of certain time limits is accompanied by remedies or sanctions, the breach of others is not. It is important to note that, Section 144 of the 2017 Act provides that if the TAC fails either to determine or to respond to an appeal filed by a person within ninety days from the appeal request, the Appellant is entitled to appeal to the Court of Appeal.

On the above analysis, it is clear that in the new Inland Revenue Act (No. 17 of 2017), the Legislature has taken out the penal consequences previously imposed on the CGIR for failure to comply with the statutory time limit. Nevertheless, upon such failure, the Appellant has been granted a remedy through a direct right of appeal to the TAC, and upon the failure

of the TAC to respond to such an appeal request within the specified time limit, the Appellant has been granted a direct right of appeal to the Court of Appeal. Therefore, it can be seen that though the Legislature has in the case of the Inland Revenue Act No. 17 of 2017, introduced a remedy where the TAC fails to respond within the specified time limit, in the case of the TAC Act itself, despite twice availing itself of the opportunity to amend the law, the Legislature has not specified a remedy in case of non-compliance.

I am not unmindful of the fact that this particular question of law is on the TAC Act. Yet, I am of the view that consideration of the above provisions in the Inland Revenue Act are relevant, since those provisions manifest the intention of the Legislature regarding the time limits imposed on the TAC.

In light of the above, it is my considered view that the Legislature, although it has amended Section 10 of the TAC Act twice, intentionally refrained from introducing a penal consequence and/or a remedy for the failure of the TAC to comply with the specified time limit. Therefore, I am not in favour of the argument forwarded by the learned Counsel for the Appellant, that the fact that the Legislature has amended Section 10 twice means that it intended the time limit contained therein to be mandatory.

The learned Counsel for the Appellant also argued that the Legislature, by amending Section 10 with retrospective effect, has clearly manifested its intention of strict compliance with the time limit provided therein. However, I am not in favour of the said argument in view of the facts stated herein below.

By Amendment Act No. 20 of 2013, the proviso to Section 10 of the TAC Act was amended by extending the time limit granted to the Commission to determine an appeal transferred from the Board of Review, up to twenty-four months; twice the time limit which existed previously.

In the same amendment, by the introduction of Section 15, the Legislature enacted that the TAC has power to hear and determine any pending appeal that was deemed to have been transferred to the Commission from the Board of Review under Section 10 of the principal Act, notwithstanding the expiry of twelve months granted for its determination.

Since the amendment to Section 10 was brought in with retrospective effect, in any case, the twenty-four-month period will apply to all appeals

transferred from the Board of Review. Therefore, the introduction of Section 15 of the amendment will not serve any meaningful purpose and appears to be redundant. Nevertheless, in my view, Section 15 manifests that the intention of the Legislature, by introducing Amendment Act No. 20 of 2013, is not to make the time frames mandatory.

On the other hand, one may argue that the application of Section 15 of the amendment is limited to the proviso in Section 10 and that therefore, the Legislature has manifested its intention that the time frame in the proviso to be merely directory, but that which is in the main part to be mandatory. Yet, this cannot be a valid argument since in the circumstances, the Legislature has extended the time frame in the proviso and reduced it in the main part, by the same Amendment. When the time frame is brought down, the question of overrunning the existing time frame will not arise, and therefore, a necessity to enact as above will also not arise.

Therefore, I am not prepared to accept the contention of the learned Counsel for the Appellant, that the fact that the Legislature has given retrospective effect to the amended provisions means that it intended the time limit contained in Section 10 to be mandatory.

Having argued extensively, as above, that the time limit specified for the TAC is mandatory, the learned Counsel for the Appellant submitted that when the two hundred and seventy day time limit is exceeded, the returns submitted by the Appellant shall take effect, thus nullifying both the Assessor's assessment and the CGIR's confirmation of the said assessment.

In my view, this submission of the learned Counsel for the Appellant that if this Court were to hold that the TAC is *functus officio* in determining an appeal after the two hundred and seventy day period has lapsed, the assessment should be rendered void and the return submitted by the Appellant should take effect, is untenable. Should the State, and at large the citizens of this country, lose revenue or the taxpayers themselves lose the opportunity to be allowed the relief sought due to the fault of the TAC?

Samarakoon C.J.'s judgement in the case of *K. Visvalingam and Others v. Don John Francis Liyanage*,[6] addresses the above problem, in the context

[6] Decisions on Fundamental Rights Cases, 452, at p.468

of the time limit applicable to a Fundamental Rights petition before the Supreme Court of Sri Lanka:

"*These provisions confer a right on the citizen and a duty on the Court. 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 the 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*** (emphasis added)."

Sharvananda J. (as His Lordship then was) made a similar observation in the previously cited case of *K. Nagalingam v. Lakshman de Mel*,[7] regarding an order made by the Commissioner of Labour after the expiry of a statutory time limit:

"To hold that non-compliance with the time limit stipulated by section 2 (2) (c) renders the Commissioner's order of approval - or refusal void will cause grave hardship to innocent parties. ***Parties who have done all that the statute requires of them should not lose the benefit of the order*** *because it was made after the final hour had struck with the passage of the 3 months* (emphasis added)*."*

I find that Their Lordships' comments are relevant to the instant case, in illustrating the injustice that either party could suffer if the TAC were to be deemed *functus officio* upon expiry of the time limit in question. Furthermore, where an appeal has been lodged before the TAC, it necessarily follows that the appellant would only have done so with significant confidence in a positive outcome. If that be so, there would be no need for the appellant, upon the expiry of the time limit, to demand that the determination of the TAC be time barred, since there would still be every chance of their appeal being successful and no fundamental right would be violated owing to the delay. Even if some other significant right were to be infringed upon, it would not weigh so heavily as to vitiate the right of either party to receive a considered determination from the TAC.

It is therefore the opinion of this Court that there is no statutory construction whereby either the tax return of the appellant or the

[7] *Supra* note 2, at p.237

assessment of the Assessor (as confirmed by the CGIR) is reinstated, where the TAC has overrun its statutory time frame. It is therefore best left to the Legislature to specify in no uncertain terms what the effect, if any, of a time bar would be, in order to avoid any inequitable outcomes as illustrated above.

The next important issue raised by the learned Counsel for the Appellant is on the doctrine of *stare decisis.*

In the case of *Walker Sons & Co. (U.K.) Ltd. v. Gunathilake and Others*,[8] Thamotheram J., having considered the Judgement by Basnakyake C.J. in the case of *Bandahamy v. Senanayake*,[9] observed that as a rule, two judges sitting together follow the decision of two judges and where two judges sitting together are unable to follow a decision of two judges, the practice is to reserve the case for the decision of a fuller bench.

Focusing on the issue at hand, there are two conflicting decisions on time bar by numerically equal benches, namely two judges each of this Court. Hence, another numerically equal bench of this Court is at liberty to follow either of those two decisions, provided that they hold the same precedential value. In the previously cited case of *Mohideen v. The Commissioner General of Inland Revenue* (hereinafter referred to as '*Mohideen*'),[10] it was stated that the time limit prescribed for the determination of an appeal by the Board of Review would be mandatory, if counted from the date of commencement of the oral hearing. Gooneratne J. formulated the particular paragraph under consideration as follows:[11]

"*I find that an area is left uncertain for interested parties to give different interpretation on time bar. Hearing need* (sic) *to be in camera and Section 140 subsection 7, 8 & 9 provide for adducing evidence. As such in the context of this case and by perusing the applicable provision, it seems to be that the hearing contemplated is nothing but 'oral hearing'. One has to give a practical and a meaningful interpretation to the usual day to day functions or steps taken in a court of law or a statutory body involved in quasi judicial functions, duty or obligation. If specific time limits are to be*

[8] [1978-79-80] 1 Sri.L.R. 231

[9] 62 N.L.R. 313

[10] *Supra* note 5

[11] *Ibid.* at p.15

laid down the legislature need to say so in very clear unambiguous terms instead of leaving it to be interpreted in various ways. To give a restricted interpretation would be to impose unnecessary sanctions on the Board of Review. ***It would be different or invalid if the time period exceeded 2 years from the date of oral hearing. If that be so it is time barred*** (emphasis added)."

However, in the subsequent case of *Stafford Motor Company (Private) Limited v. The Commissioner General of Inland Revenue* (hereinafter referred to as '*Stafford Motors*'),[12] Their Lordships declined to follow the reasoning in *Mohideen* on the ground that it is *obiter dicta*.

Black's Law Dictionary provides the following definition for *obiter dictum*:[13]

'*[Latin "something said in passing"] A judicial comment made while delivering a judicial opinion, but one that is* ***unnecessary to the decision in the case*** *and therefore not precedential (although it may be considered persuasive). Often shortened to dictum or, less commonly, obiter* (emphasis added).'

The learned Counsel for the Appellant argued with utmost confidence that the aforementioned ruling in *Stafford Motors* is incorrect, and that the relevant opinion in *Mohideen* (as reproduced with emphasis on the final two sentences) is part of the *ratio decidendi* of the judgement in that case.

The learned Senior State Counsel submitted that the doctrine of *stare decisis* demands that this Court must follow the judgement in *Stafford Motors* and the line of cases it is part of,[14] so that the certainty established by the said cases is not disturbed.

[12] CA (TAX) 17/2017, decided on 15.03.2019. Prior to *Stafford Motors*, this Court initially reached the same conclusion regarding *Mohideen* in the case of *Kegalle Plantations PLC v. The Commissioner General of Inland Revenue* [CA (TAX) 09/2017, decided on 04.09.2018]. This stance was further affirmed following *Stafford Motors*, in the case of *CIC Agri Businesses (Private) Limited v. The Commissioner General of Inland Revenue* [CA (TAX) 42/2014, decided on 29.05.2020]

[13] B. A. Garner and H. C. Black, *Black's Law Dictionary*, Ninth Edition, 2009. at p.1177

[14] *Supra* note 12

However, it was observed by His Lordship Justice Soza (sitting in the Court of Appeal) in the case of *Ramanathan Chettiar v. Wickramarachchi and Others* that:[15]

"*The doctrine of stare decisis is no doubt an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs as well as a basis for orderly development of legal rules. Certainty in the law is no doubt very desirable because there is always the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into. Further there is also the especial need for certainty as to the criminal law. While the greatest weight must be given to these considerations, certainty must not be achieved by perpetuating error or by insulating the law against the currents of social change*."

I therefore find that it is reasonable for this Court to accept the Appellant's invitation to decide whether or not Their Lordships in *Stafford Motors* had been correct in holding that the statement under consideration in *Mohideen* does not form part of the *ratio decidendi* of the judgement in that case, and that it is therefore *obiter dictum*. If indeed this Court were to find that the said statement in *Mohideen* is *obiter*, then it would not set a binding precedent on the matter in issue in this case, under this particular question of law.

While I agree with the Appellant's observation that Their Lordships in *Mohideen* had observed as above while answering a specific question of law raised by the Appellant, closer scrutiny of the final two sentences of that paragraph reveal that they are not essential to the finding of the Court. The finding of the Court was that the Board of Review had not erred in law as regards the time available for it to arrive at its determination. The matter in issue in deciding that particular question of law was whether or not the two-year time limit applicable to the Board of Review was to be counted from the date of receipt of the Petition of Appeal by the Board, or whether it was to be counted from the date of commencement of the hearing of the appeal. That matter was decided in favour of the Respondent, with the Court holding the latter to be the case.

[15] [1978-79] 2 Sri.L.R. 395, at p.410

In the above context, the final two sentences, "*It would be different or invalid if the time period exceeded 2 years from the date of oral hearing. If that be so it is time barred*.", constitute a conditional observation by Their Lordships. Its nature is hypothetical, and does not reflect the facts of the case, as the time period did not exceed two years from the date of oral hearing. In other words, if these two sentences were taken out of the judgement, there would be no change whatsoever either to the line of reasoning in *Mohideen*, or to the outcome. Therefore, though it was argued by the learned Counsel for the Appellant that these two sentences are plainly relevant in deciding the instant case, they do not form part of the *ratio* in *Mohideen*.

I therefore consider that the hypothetical conclusion arrived at by Their Lordships in *Mohideen* is indeed "unnecessary to the decision in the case". Therefore, in keeping with the definition I have provided above, and in agreement with Their Lordships who have pronounced the decision in *Stafford Motors*, it is my view that the particular statement in *Mohideen* (as reproduced and emphasised on above) is indeed *obiter dictum*.

Another argument advanced by the learned Counsel for the Appellant is that the decision in *Stafford Motors* is *per-incuriam*, as it was based on the erroneous conclusions that, a) the decision in *Mohideen* is *obiter*, and b) that the time limits presented in Section 10 of the TAC Act are not mandatory. Accordingly, he contended that the decision in *Stafford Motors* is not binding.

Before adverting to the issue as to whether the decision is *per-incuriam* or not, I will briefly consider the definition and the legal application of the rule of *per-incuriam*.

L.B. Curzon's *A Dictionary of Law* defines the concept of *per-incuriam* as follows:[16]

'*Through want of care. A mistaken decision of a Court. (…) Application of the doctrine should be made only in the case of "**decisions given in ignorance or forgetfulness of** some inconsistent statutory provision or of some authority binding on the court concerned" (…)* (emphasis added).'

[16] L. B. Curzon, *A Dictionary of Law*, Second Edition, 1983. at p.273

Halsbury's Laws of England describes the rule of *per-incuriam* as follows:[17]

'*A decision is given per-incuriam when the Court has* ***acted in ignorance of*** *a previous decision of its own or of a Court of co-ordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has* ***acted in ignorance of*** *a House of Lords decision, in which case it must follow that decision; or when the decision is* ***given in ignorance of*** *the terms of a statute or rule having statutory force* (emphasis added).'

The following definition has been given by His Lordship Justice Basnayake (as His Lordship then was) to the term *per-incuriam*, in the case of *Alasupillai v. Yavetpillai*:[18]

"*A decision per-incuriam is one given when a case or statute has not been brought to the attention of the Court and it has given the decision* ***in ignorance or forgetfulness of the existence of that case or that statute*** (emphasis added)."

Further, His Lordship Justice Soza, in the above-mentioned case of *Ramanathan Chettiar v. Wickramarachchi and Others*, re-produced the following paragraph from the treatise *Precedent in English Law* by Prof. Rupert Cross,[19] which explains the rule of *per-incuriam* thus:

"*The principle appears to be that a decision can only be said to have been given per-incuriam if it is possible to point to a step in the reasoning and show that it was faulty because of* ***a failure to mention*** *a statute, a rule having statutory effect or an authoritative case which might have made the decision different from what it was* (emphasis added)."

I now advert to the issue as to whether the decision in the case of *Stafford Motors* is *per-incuriam.*

Whilst applying the above legal principals, I find that Their Lordships in *Stafford Motors* have considered the earlier decision in the case of *Mohideen*. Of course, Their Lordships have declined to follow the latter

[17] Lord Mackay of Clashfern, *Halsbury's Laws of England*, Fourth Edition, Vol. 26, 1999. at pp.297-298

[18] [1949] 39 C.L.W. 107, at p.108

[19] *Supra* note 15, at pp.407-408.

decision for the reasons given therein. However, regardless of the merits of the said reasoning, which have been dealt with above, it cannot be said that the Court has been ignorant or forgetful of the previous decision.

For the reasons considered above, despite the learned Counsel's contention that Their Lordships in *Stafford Motors* had failed to consider the double amendment with retrospective effect of Section 10 of the TAC Act, it is my considered view that the decision in *Stafford Motors* is not *per-incuriam*, since there does not appear to be any ignorance or forgetfulness by Their Lordships of the scope and effect of Section 10.

Thus, for the reasons enunciated above in this judgement, I would prefer to follow the judgement in the case of *Stafford Motors*, and I hold that the time limit prescribed in Section 10 of the TAC Act is merely directory.

In concluding my reasoning on the first question of law, I am indeed mindful of the contention by the learned Counsel for the Appellant that the two hundred and seventy day time frame cannot be devoid of meaning. I am aware that a lack of substantial compliance with the said time frame may inconvenience the taxpayer, especially where the time frame is overrun by many years. In the case of *Wickremaratne v. Samarawickrema And Others*,[20] Silva J. (as His Lordship then was) stated that:

"*In statutory interpretation there is a presumption that the Legislature did not intend what is inconvenient or unreasonable. The rule is that the construction most agreeable to justice and reason should be given.*"

I am of the opinion that a ruling to the effect that the time frame contained in Section 10 of the TAC Act is mandatory, would be inconvenient to the TAC, since delays must be countenanced owing to a variety of circumstances. Furthermore, to declare that the TAC is *functus officio* upon expiry of the time frame would be unreasonable to both parties for the reasons enunciated above. However, that is not to say that this Court endorses significant delays on the part of the TAC, rather, it is merely acknowledging that the construction most agreeable to justice and reason is that the time frame prescribed in Section 10 of the TAC Act it is merely directory. The duty of this Court is not to legislate, but to interpret legislation. Legislation is the prerogative of the Legislature. It is therefore the duty of the Legislature to specify what penal consequence or remedy,

[20] [1995] 2 Sri.L.R. 212, at p.218.

if any, must follow a lack of substantial compliance by the TAC with the time frame specified in Section 10 of the TAC Act, so that the parties are not inconvenienced.

Accordingly, having given due consideration to all of the learned Counsel's submissions on this question of law, I hold that the determination of the TAC is not time barred.

3. ***Are the supplies made by the Appellant, which constitute the subject matter of this appeal, zero rated supplies within the contemplation of section 7 (1) (c) of the Value Added Tax Act No. 14 of 2002 (as amended)?***

4. ***In the alternative, are the supplies made by the Appellant, which constitute the subject matter of this appeal, zero rated supplies within the contemplation of section 7 (1) (b) (vi) of the Value Added Tax Act, No. 14 of 2002 (as amended)?***

Since the third and fourth questions of law as above are interconnected, I will now consider these two questions together, leaving aside consideration of the second question of law towards the end of this judgment.

The substantive issue in this case is whether the supply of services made by the Appellant is zero rated, either in terms of Section 7 (1) (c) or 7 (1) (b) (vi) of the VAT Act, as amended.

For clarity, I will re-produce the aforementioned two sections herein below:

> ***7.*** *(1) A supply of –*
>
> > *(b) services shall be zero rated where the supply of such services are directly connected with –*
> >
> > > *(vi) client support services provided, on or after April 1, 2001 over the internet or the telephone by an enterprise set up exclusively for the provision of such services to one or more identified clients outside Sri Lanka, for which payment is received in foreign currency, through a bank;*

(c) any other service, being a service not referred to in paragraph (b), provided by any person in Sri Lanka to another person outside Sri Lanka to be consumed or utilized outside Sri Lanka shall be zero rated provided that payment for such service in full has been received in foreign currency from outside Sri Lanka through a bank in Sri Lanka.

In terms of Section 7 (1) (c), for a supply of services to be zero rated, it should be;

(i) **a service not referred to in Section 7 (1) (b)**,

(ii) provided by a person in Sri Lanka **to another person outside Sri Lanka**,

(iii) **consumed or utilised outside Sri Lanka**, and

(iv) paid for in full through foreign currency, received from outside Sri Lanka, through a bank in Sri Lanka.

In terms of Section 7 (1) (b) (vi), for a supply of services to be zero rated, such supply should be **directly connected with client support services** provided;

(i) on or after April 1, 2001,

(ii) over the internet or telephone,

(iii) by **an enterprise set up exclusively for the provision of such services**,

(iv) to one or more **identified clients outside Sri Lanka**, and

(v) for which payment is received in foreign currency, through a bank.

The learned Counsel for the Appellant presented his case with an uncertainty as to whether his case falls under Section 7 (1) (c) or 7 (1) (b) (vi). It is obvious that the case cannot come under both limbs at one and the same time since Section 7 (1) (c) applies to services not referred to in paragraph 7 (1) (b). Nevertheless, the learned Counsel for the Appellant argued with utmost confidence that his case should come under Section 7 (1) (c) or in the alternative, under 7 (1) (b) (vi). I will return to this point towards the end of this judgement.

I will now advert to the facts of this case in so far as they are material to the instant appeal.

The Appellant Amadeus Lanka (Private) Limited (hereinafter referred to as 'ALANKA') is a company incorporated in Sri Lanka. Amadeus India (Private) Limited (hereinafter referred to as 'AIPL') is a company incorporated in India, engaged in software and information technology enabled services. AIPL provides software connectivity to the AMADEUS Global Travel Distribution Systems, a fully automated system, in India and in neighbouring countries. AIPL was desirous of distributing AMADEUS products and services to subscribers in Sri Lanka and consequently, entered into a Distribution Agreement with ALANKA (at page 303 of the brief).

At the argument, parties were not at variance that ALANKA receives payments from outside Sri Lanka, in foreign currency, through a bank, which are requirements under both Sections 7 (1) (c) and 7 (1) (b) (vi), for a service to be zero rated.

Although the learned Senior State Counsel, referring to Section 7 (1) (b) (vi) contended that the Appellant's services were not provided over the internet, from the facts of this case it is apparent that the services are provided through the internet. On the other hand, the learned Senior State Counsel has failed to disclose any other means through which the Appellant has supplied the services, upon which the Respondent has imposed VAT.

In my view, there are four issues to be addressed in order for the third and fourth questions of law to be answered. Firstly, criterion (ii) of Section 7 (1) (c) and criterion (iv) of Section 7 (1) (b) (vi) (as detailed above in this judgement) both address the need for the service to be supplied to a client/person outside Sri Lanka. Secondly, criterion (iii) of Section 7 (1) (c) requires the service to be consumed or utilised outside Sri Lanka. Thirdly, criterion (i) of Section 7 (1) (c) and the entire Section 7 (1) (b) (vi) taken together require this Court to determine whether the Appellant supplies a client support service. Finally, criterion (iii) of Section 7 (1) (b) (vi) requires that the Appellant company be an enterprise set up exclusively for the provision of client support services.

Issue 1: Is the service provided to a client/person outside Sri Lanka?

Issue 2: Is the service consumed or utilised outside Sri Lanka?

The main issue parties are at variance under both the Sections 7 (1) (b) (vi) and 7 (1) (c) is whether the Appellant's services are provided to a

client/person outside Sri Lanka. Falling specifically under Section 7 (1) (c) is the issue of whether the Appellant's services are consumed or utilised outside Sri Lanka. These two issues will now be addressed together.

According to the Appellant's written submissions, the Appellant facilitates the service of exporting travel reservation data from Sri Lanka to Amadeus Global Distribution System. These services are provided to AIPL, an entity located overseas.

In my view, the decision on the above two issues considerably depends on the terms and conditions of the Distribution Agreement between AIPL and ALANKA and also, upon the Subscriber Agreement between ALANKA and one of its subscribers, namely Global Holidays (Pvt) Ltd. (at page 183 of the brief).

The learned Counsel for the Appellant contended that the TAC had failed to understand the essence of the agreements when it held that ALANKA is an agent of AIPL and the payments received by ALANKA from AIPL constituted the sharing of profits, which he contended is not supported by evidence.

The learned Senior State Counsel contented that ALANKA is a subsidiary of AIPL, or in the alternative, an agent.

Black's Law Dictionary defines 'subsidiary' as:[21]

'*subordinate; under another's control.*'

For ALANKA to be a subsidiary of AIPL, the former would have to be under the control of the latter. Other than the fact that the Distribution Agreement has been signed on behalf of ALANKA and AIPL by two directors having the same surname, which raises some curiosity as to whether both companies are controlled by one family, no other evidence is available to support the contention of the learned Senior State Counsel that ALANKA is a subsidiary of AIPL.

Nevertheless, according to *Black's Law Dictionary*,[22] an 'agent' is:

'*one who is authorized to act for or in place of another; a representative.*'

[21] *Supra* note 13, at p.1565

[22] *Supra* note 13, at p.72

Therefore, I will have to scrutinize the facts of this case to ascertain whether ALANKA is an agent of AIPL and whether the TAC erred in holding it to be so.

According to clause 19.03 of the Distribution Agreement, the relationship between AIPL and ALANKA is that of independent contractors. An independent contractor is a person who enters into a contract *for* services.

In the instant case, the Respondent disputes the fact that ALANKA provides its services to AIPL. In the circumstances, this court is obliged to consider the clauses in the Distribution Agreement carefully, in order to ascertain the true relationship between AIPL and ALANKA and to whom ALANKA provides its services, notwithstanding the description given in the agreement.

Article IX of the Distribution Agreement sets out the obligations of AIPL towards ALANKA and Article X sets out the obligations of ALANKA towards AIPL. Clause 9.05 of Article IX sets out the continuing *services* to be provided by AIPL to ALANKA.[23] On a careful consideration of the aforesaid clauses, it is apparent that the parties to the agreement have mutual obligations; in particular AIPL has to provide certain services to ALANKA as opposed to ALANKA providing services to AIPL. It is important to note that no services to be provided by ALANKA to AIPL are mentioned in the agreement. This may be the reason for the contracting parties describing their capacities as 'independent contractors' as opposed to ALANKA being described as an independent contractor, providing services to AIPL.

As I have already stated above in this judgment, AIPL has authorized ALANKA to carry out the necessary tasks in order to provide software connectivity for subscribers to access AMADEUS products and services. Clause 2.01 specifically states that AIPL *authorizes* ALANKA to carry out the necessary tasks.

Clauses 7.01 and 7.02 provide that ALANKA is responsible for contracting *independently* with subscribers in its territory, in conformity with the

[23] There appears to be a typographical error in the numbering of the clauses under Article IX of the Distribution Agreement. The clauses are numbered (in order) as 9.01, 9.02, 9.03, 9.04, 9.05, 9.05, and 9.04. Consequently, there are two clauses numbered as "9.05". The clause I have referred to herein is the second of the two such clauses, or in other words, the sixth clause (out of a total of seven clauses) under Article IX.

applicable laws, rules and regulations governing the operation of a distribution system and that '*AIPL in no manner will be associated with or responsible for any contracts entered into by ALANKA with the subscribers'*.

Further, AIPL has authorized ALANKA to use AMADEUS proprietary marks and agreed to provide the facilities described in clause 8.01 and Article IX.

Moreover, AIPL has imposed certain restrictions on ALANKA such as withholding permission to use or sub-license the AMADEUS software and AIPL software etc.

According to clause 10.02 and 10.04, ALANKA has to set up demonstration and customer training facilities, customer service/help desk facilities for the benefit of the subscribers in the territory, at its own costs.

It is important to note that clause 10.05 provides that ALANKA shall conduct *its business* in accordance with all applicable local laws and regulations; obtain all required permits, certificates and licenses at its own expense. This clause itself establishes that ALANKA has provided its services to the subscribers as their own business, under the authority granted by AIPL.

Next, I will consider the clauses in the Subscriber Agreement between Global Holidays (Pvt) Ltd, a subscriber, and ALANKA. (at page 183 of the brief) According to clause 2.2 ALANKA has pledged to provide appropriate software access to AMADEUS GDS. Further, in clause 5.4 ALANKA has agreed to provide necessary equipment for hardware/software connectivity etc. By clause 6.2 ALANKA has agreed to pay the subscriber loyalty incentives for their bookings and in return, the subscriber has agreed to pay liquidated damages upon their failure to meet the agreed commitment (*vide* clause 9 of the Subscriber Agreement).

On a careful consideration of the aforementioned clauses, I am of the view that ALANKA, with the authority granted by AIPL, provides its services directly to the subscribers in Sri Lanka, and the services are utilised within Sri Lanka. On the above analysis of facts, it is my considered view that the TAC has correctly held that ALANKA is an agent of AIPL.

In concluding the issues of whether the services supplied by the Appellant are provided to persons/clients outside Sri Lanka and are utilised outside

Sri Lanka, I now distinguish the decision of this Court in the case of *The Commissioner General of Inland Revenue v. Aitken Spence Travels Limited* (hereinafter referred to as '*Aitken Spence*').[24] The learned Counsel for the Appellant submitted that the circumstances in the two cases are *almost identical*, and that the ruling in favour of the taxpayer in *Aitken Spence* should apply *mutatis mutandis* to the instant case. The Counsel's argument has some merit, though it is ultimately flawed. *Aitken Spence* involved three parties, namely a Foreign Tour Operator outside Sri Lanka (analogous to AIPL in the instant case), foreign tourists (who the Appellant submits are analogous to the subscribers in the instant case), and the resident company Aitken Spence Travels Limited (which is analogous to ALANKA).

The statutory provision whose applicability was in issue in *Aitken Spence* was Section 13 (dddd) of the Inland Revenue Act No. 10 of 2006 (as amended, and in operation at the time). I shall reproduce Section 13 (dddd) below:

> ***13.*** *(dddd) notwithstanding the provisions of paragraph (ddd) of this section, the profits and income for the period commencing from April 1, 2009 and ending on March 31, 2011, earned in foreign currency by any resident company, any resident individual or any partnership in Sri Lanka, from any service rendered in or outside Sri Lanka to any person or partnership outside Sri Lanka, if such profits and income (less such amount, if any, expended outside Sri Lanka as is considered by the Commissioner-General to be reasonable expenses) are remitted to Sri Lanka, through a bank;*

It becomes immediately apparent that the above provision has some crucial differences when contrasted with the two subsections that are in issue in the third and fourth questions of law in the instant appeal. Firstly, in contrast to Section 7 (1) (c) of the VAT Act, there is no requirement in Section 13 (dddd) above for the service to be consumed or utilised outside Sri Lanka. Secondly, in contrast to Section 7 (1) (b) (vi) of the VAT Act, there is no requirement in Section 13 (dddd) above for the service provider to be a company set up exclusively for the provision of client support services, which means that companies exempt under Section 13 (dddd)

[24] CA (TAX) 04/2016, decided on 13.11.2018.

may provide a wide variety of services, to both local and foreign clients, and have *only those services it provides to foreign clients and which fulfil the other criteria set out in the above section* be exempted from the applicable tax. This is plainly not the case for Section 7 (1) (b) (vi) of the VAT Act, which is much more narrowly defined. Finally, it has already been established that ALANKA provides some, if not all, of its services to local subscribers.

For the above reasons and after having considered the facts of the two cases, I hold that the decision of this Court in *Aitken Spence* is not sufficiently analogous to the instant appeal, and distinguish the said decision from the instant appeal.

The learned Counsel for the Appellant went to great lengths to stress the fact that ALANKA only receives payments from AIPL and not from any of its own subscribers, and that this should lead to the inference that it is AIPL to whom ALANKA provides its services. Then the pertinent question arises as to why ALANKA receives payments from AIPL, if the services are provided to the subscribers in Sri Lanka and utilised in Sri Lanka.

As clause 7.2 of the Subscriber Agreement reads, subscribers make their reservations for fares. Hence, it is obvious that subscribers will have to pay for those fares through AMADEUS GDS, either at the time of reservation or as a subscription. Therefore, it is incontrovertible that the payment for the services provided by ALANKA has to be reimbursed by its principal AIPL.

Hence, it is my considered view that the mere fact that it is AIPL, and not the subscriber, that makes payments to ALANKA, cannot be the determinative criterion in deciding whether ALANKA provides its services to AIPL or to the subscriber in Sri Lanka. In any case, it is not a requirement of either Section 7 (1) (b) (vi) or 7 (1) (c) that the payment has to be made by the person who receives the service. It is also not the case that the reverse, i.e. that if a person has made the sole payment, they then become the sole person to whom a service has been provided, necessarily holds true.

It is also important to note that the Appellant's submissions contain the following clause (at page 13 of the Appellant's consolidated written submissions):

'…*because they* [the subscribers] *are only provided with connectivity for which they* [the subscribers] *are not charged by the Appellant.*'

This means that at least a part of the Appellant's services is provided to its subscribers. Furthermore, the Appellant has not presented this Court with a breakdown of what its separate services to the subscribers and to AIPL are, and claims that its entire taxable service is provided to AIPL. Moreover, by the Appellant's own admission, the only source of income for ALANKA is the payments made by AIPL, for which '…*billing is for the service of exporting processed data/software for a period.*' (at page 44 of the Appellant's consolidated written submissions). I cannot accept that it is the intention of the Legislature that a taxpayer should be able to decide which of its services can be charged for and which of its services are to be supplied free of charge, so as to conveniently claim a zero rating for its entire income. I shall return to this matter at a later stage of the judgement.

In the circumstances, notwithstanding the fact that it has been accompanied by insufficient reasoning, the finding of the TAC that the transactions between AIPL and ALANKA amount to a profit-sharing arrangement has significant merit.

Issue 3: Is the Appellant's supply directly connected with client support services?

The next matter in issue is whether the Appellant's supplies are directly connected with client support services. This is a requirement in order for the Appellant's supplies to be zero rated under Section 7 (1) (b) (vi) of the VAT Act.

The VAT Act itself does not provide a definition for "client support services". Furthermore, such a definition does not appear to be readily available through either case-law or in legal dictionaries. It is therefore up to this Court to formulate a definition, taking into account the Act as a whole, and considering the ordinary meaning of the phrase, in order to determine the intention of the Legislature.

The learned Counsel for the Appellant submitted several Indian authorities, that had established a legal precedent in the context of "business auxiliary services" as defined in Section 65 (19) of the Indian Finance Act 1994 (as amended). I have reproduced this particular statutory provision below:

65. *In this Chapter, unless the context otherwise requires,*

*(19) "**business auxiliary service**" means any service in relation to, —*

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or

***Explanation.** — For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;*

(v) production or processing of goods for, or on behalf of the client; or

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent, but does not include any activity that amounts to "manufacture" of excisable goods.

***Explanation.** — For the removal of doubts, it is hereby declared that for the purposes of this clause, —*

(a) "commission agent" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person —

(i) deals with goods or services or documents of title to such goods or services; or

(ii) collects payment of sale price of such goods or services; or

(iii) guarantees for collection or payment for such goods or services; or

(iv) undertakes any activities relating to such sale or purchase of such goods or services;

(b) "excisable goods" has the meaning assigned to it in clause (d) of section 2 of the Central Excise Act, 1944(1 of 1944);

(c) "manufacture" has the meaning assigned to it in clause (f) of section 2 of the Central Excise Act, 1944(1 of 1944)]

It is apparent that a "business auxiliary service" within the contemplation of the above Act is very broadly defined. I am not prepared to accept that Section 7 (1) (b) (vi) of the VAT Act is meant to include such a broad range of supplies, particularly since "client support services" are zero rated as part of a closed list of supplies, with the broader scope having been provided through Section 7 (1) (c). Therefore, I cannot define Section 7 (1) (b) (vi) in such broad terms as the provision in the above Indian Act is defined.

Section 83 of the VAT Act provides the following definition for a 'supply of services':

83. *In this Act, unless the context otherwise requires –*

*"**supply of services**" means any supply which is not a supply of goods but includes any loss incurred in a taxable activity for which an indemnity is due.*

Furthermore, *Black's Law Dictionary* provides the following definition for 'client':[25]

[25] *Supra* note 13, at p.289

'*A person or entity that employs a professional for advice or help in that professional's line of work.*'

The learned Senior State Counsel submitted that the intention of the Legislature was to mean "call centres", when it referred to "client support services" in Section 7 (1) (b) (vi). The *Oxford Advanced Learner's Dictionary of Current English* defines a 'call centre' as follows:[26]

'*an office in which a large number of people work using telephones, for example arranging insurance for people, or taking customers' orders and answering questions.*'

I find that there is some merit in the Counsel's submission. The relevant subsection specifically mandates that such client support be provided over the internet or telephone, and that the enterprise be set up exclusively for the provision of such services to one or more identified clients outside Sri Lanka.

I am therefore of the view that the Legislature intended the zero rating under Section 7 (1) (b) (vi) to apply to supplies made by an organisation that offers support services, via a customer hotline or an online customer interface, to identified clients outside Sri Lanka. This provision was likely intended by the Legislature to provide a means of encouraging the setting up of businesses in Sri Lanka that cater to foreign clients, through the outsourcing of the latter's support services to support staff employed by the business in Sri Lanka. This would allow for the foreign client to cater to its customers at a lower cost, for the Sri Lankan business concerned to be set up, thus creating employment opportunities, and most importantly of all, for the Sri Lankan Government to receive revenue owing to the receipt of foreign currency through a bank.

Having reasoned as above, I do not find that ALANKA provides a client support service within the contemplation of Section 7 (1) (b) (vi) to AIPL. I find that ALANKA may well provide a client support service to its subscribers, but an analysis of this is unnecessary, since the subscribers are located in Sri Lanka. Perhaps the situation would be different if ALANKA provided the services it currently provides local subscribers, exclusively to Maldivian subscribers.

[26] A. S. Hornby, *Oxford Advanced Learner's Dictionary of Current English*, Eighth Edition, 2010. at p.209

Therefore, I cannot hold that the service of exporting processed data/software for a period, which is what ALANKA bills AIPL for, is directly connected with client support service as provided for in Section 7 (1) (b) (vi) of the VAT Act.

Issue 4: Is the Appellant company an enterprise set up exclusively for the provision of client support services?

Another important requirement under Section 7 (1) (b) (vi) is whether ALANKA is an enterprise setup exclusively for the provision of client support services. According to clause 10.01 of the Distribution Agreement, other than providing software connectivity, ALANKA is obliged to carry out all necessary acts and use its reasonable efforts to promote and distribute the AMADEUS products widely within the territory. In my view, this obligation is a clear sales promotion, quite apart from providing client support services. Furthermore, the Appellant has stated (at pages 40 and 41 of the Appellant's consolidated written submissions) that:

'*In fact, it is the Appellant's role to increase the number of subscribers in order that listings on Amadeus are available to more travellers via the subscribing travel agents.*'

I do not see how the above role of the Appellant falls within a "client support service" as reasoned above in this judgement, and as it does not fall within the said definition, then the Appellant cannot claim that it is an enterprise set up exclusively for the provision of such services.

Hence, in my view ALANKA is not an enterprise set up exclusively for providing client support services and therefore, fails in satisfying another necessary requirement under Section 7 (1) (b) (vi).

Following the scrutiny afforded to all four issues above, I am willing to acknowledge that *some* of the Appellant's services are supplied to AIPL, which is an entity outside Sri Lanka, and that *some*, but not all of those services are consumed or utilised outside Sri Lanka, and that *some* of the services supplied by the Appellant may well be client support services, but that *none* of those client support services, if any, are provided to AIPL. Perhaps this goes some way towards explaining why the leaned Counsel for the Appellant has submitted two subsections under which the Appellant company may be eligible for a zero rating. On the evidence available before this Court, it appears that though the services supplied by the Appellant

satisfy some criteria of both Sections 7 (1) (c) and 7 (1) (b) (vi), the said supplies do not *fully* satisfy either subsection.

N.S. Bindra's *Interpretation of Statutes* states the following regarding statutes to prevent fraud upon revenue:[27]

'*Statutes to prevent fraud upon the revenue are considered as enacted for the public good and to surpass a public wrong, and, therefore, although they impose penalties or forfeiture, not to be construed, like penal laws generally, strictly in favour of the assessee, but they are to be reasonably and fairly construed, so as to carry out the intention of the Legislature.*'

I am indeed mindful of the fact that in the presence of doubt, fiscal statutes are to be construed in favour of the assessee. However, there is no doubt whatsoever as to the ineligibility of the Appellant for a zero rating on the facts of this case. It has not escaped the scrutiny of this Court that the Appellant may have been attempting to bypass the system of taxation applicable to it. This is borne out by such considerations as its attempts to bring all of its activities within either Section 7 (1) (b) (vi) or Section 7 (1) (c), by claiming that services rendered to entities within Sri Lanka, such as the provision of connectivity to its subscribers and the promotion of Amadeus products in order to increase the number of subscribers, are offered free of charge. Furthermore, in its consolidated written submissions (at page 47), the Appellant has skilfully submitted that it provides its services "*exclusively to its client*", thereby implying that the exclusivity criterion in Section 7 (1) (b) (vi) is meant to apply to the recipient of the services, and not to the nature of the services supplied.

Therefore, in considering the Appellant's third question of law, I conclude that some, if not most, of the Appellant's services are not provided to a person outside Sri Lanka, and that the majority of the Appellant's services are not utilised outside Sri Lanka. For these reasons, I hold that the supplies made by the Appellant are not zero rated supplies within the contemplation of Section 7 (1) (c) of the VAT Act.

Finally, in considering the Appellant's fourth question of law, I conclude that not all of the supplies provided by the Appellant to either its subscribers or AIPL are directly connected with client support services, that the Appellant company is not an enterprise set up exclusively for the

[27] N. S. Bindra, *Interpretation of Statutes*, Eighth Edition, 1997. at p.701

provision of such services, and that none of the aforesaid client support services are provided to AIPL, and in the absence of evidence that such services are provided to clients in the Maldives, that ALANKA provides its client support services only to clients within Sri Lanka. For these reasons, I hold that the supplies made by the Appellant are not zero rated supplies within the contemplation of Section 7 (1) (b) (vi) of the VAT Act.

2. Are the assessment of Value Added Tax and penalty, as confirmed by the Tax Appeals Commission, excessive, arbitrary and unreasonable?

As I have already stated above in this judgment, ALANKA supplies a range of services to both AIPL and to its subscribers, despite its contention to the contrary. The learned Counsel for the Appellant submitted in oral argument that if the VAT did not apply to its supply of services, it should be taxed under the Inland Revenue Act. However, Counsel did not elaborate on this argument and no separate account statements or any other such evidence in support of its claim was tendered.

Upon perusing the Appellant's written submissions, it appears that it has not set out sufficient material in support of the second question of law. Under these circumstances, I cannot find that the assessment of the Value Added Tax and penalty, as confirmed by the TAC, are excessive, arbitrary and unreasonable.

5. In view of the facts and circumstances of the case, did the Tax Appeals Commission err in law when it arrived at the conclusion that it did?

For the reasons set out above, and having considered the preceding four questions of law, I hold that the TAC did not err in law when it arrived at the conclusion that it did.

I therefore answer all five questions of law in the negative, and in favour of the Respondent.

1. *Is the determination of the Tax Appeals Commission time barred?* ***No***
2. *Are the assessment of Value Added Tax and penalty, as confirmed by the Tax Appeals Commission, excessive, arbitrary and unreasonable?* ***No***
3. *Are the supplies made by the Appellant which constitute the subject matter of this appeal, zero rated supplies within the contemplation*

of section 7 (1) (c) of the Value Added Tax Act No. 14 of 2002 (as amended)? ***No***

4. *In the alternative, are the supplies made by the Appellant, which constitute the subject matter of this appeal, zero rated supplies within the contemplation of section 7 (1) (b) (vi) of the Value Added Tax Act, No. 14 of 2002 (as amended)?* ***No***

5. *In view of the facts and circumstances of the case, did the Tax Appeals Commission err in law when it arrived at the conclusion that it did?* ***No***

Acting under Section 11 A (6) of the Tax Appeals Commission Act No. 23 of 2011 (as amended), I affirm the determination made by the TAC and dismiss this appeal.

The Registrar is directed to send a certified copy of this judgment to the Secretary of the TAC.

JUDGE OF THE COURT OF APPEAL

Dr. Ruwan Fernando J.

I Agree.

JUDGE OF THE COURT OF APPEAL