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).

Mr. S.P. Muttiah,
Paul Tradings,
No. 27,
Clifford Place,
Colombo 04.

Appellant

Case No. CA/TAX/46/2019
Tax Appeals Commission
No. TAC/IT/058/2016

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	:	Dr. Shivaji Felix for Appellant
		Chaya Sri Nammuni, S.S.C. for Respondent
Argued on	:	21.02.2021, 22.02.2021, 08.03.2021 & 31.03.2021
Written Submissions filed on	:	10.08.2020 & 28.04.2021 (by the Appellant)

06.05.2021 (by the Respondent)

Decided on : 30.07.2021

Dr. Ruwan Fernando, J.

Introduction

[1] This is an Appeal by the Appellant by way of a Stated Case against the determination of the Tax Appeals Commission dated 24.09.2019 confirming the determination made by the Respondent dated 05.08.2016 and dismissing the Appeal of the Appellant. The period relates to the assessment years 2011/2012 & 2012/2013.

Factual Background

[2] The Appellant Mr. S.P. Muttiah is the sole proprietor of Paul Tradings bearing Business Registration No. W 7225 and having its Registered Office at No. 415, Sirimavo Bandaranayake Mawatha, Colombo 14. The Appellant received an income by leasing out his premises morefully described at page 37 of the brief and submitted his returns for the said years of assessment. The Appellant claimed the concessionary tax rate of 10% provided under and in terms of Item 31 of the Fifth Schedule to the Inland Revenue Act, No. 10 of 2006 as amended, and the concessionary rate of 10% under and in terms of Section 59B of the said Act as amended.

[3] The Deputy Commissioner by letter dated 05.06.2014 refused to accept the same and issued assessments for the following reasons:

1. As the main source of income of the Appellant is rental income, the Appellant is not entitled to deduct any expenses, except rates & taxes and 25% allowance for repairs and maintenance expenses from the gross rental income;

2. As the rental income received by any individual is not treated as a business income, the Appellant is not entitled to apply for concessionary tax rates introduced by Section 53 (16)-(31) (Amendments made to the 5th Schedule) of the Inland Revenue (Amendment) Act, No. 22 of 2011 as the Appellant is not an undertaking.

[4] The Appellant appealed to the Respondent against the said assessments and the Respondent by its determination dated 05.08.2016 revised the said assessments 2011/2012 and 2012/2013 (Vide- pages 1-3 of the TAC brief). The

reasons for the said determination are contained in the TAC brief (Vide- pages 14-19).

Appeal to the Tax Appeals Commission & the Court of Appeal

[5] Being dissatisfied with the said determination of the Respondent, the Appellant appealed to the Tax Appeals Commission and the Tax Appeals Commission by its determination dated 24.09.2019 confirmed the determination of the Respondent and dismissed the Appeal. Being dissatisfied with the said determination of the Tax Appeals Commission, the Appellant appealed to the Court of Appeal and formulated the following Five Questions of Law in the Case Stated for the opinion of the Court of Appeal.

1. Is the determination of the Tax Appeals Commission time barred?
2. Is the assessment, as confirmed by the determination of the Tax Appeals Commission excessive and without lawful justification?
3. In view of the fact that the rate of tax applicable to a person carrying out an undertaking providing storage facilities is 10%, under and in terms of Item 31 of the Fifth Schedule to the Inland Revenue Act, No. 10 of 2006 (as amended), is the Appellant entitled to the benefit of this concessionary tax rate?
4. In the alternative, is the Appellant entitled to be taxed at a concessionary rate under and in terms of Section 59B of the Inland Revenue Act, No. 10 of 2006 (as amended)?
5. In view of the facts and circumstances of the case, did the Tax Appeals Commission err in law in coming to the conclusion that it did?

[6] At the hearing of the appeal, Dr. Shivaji Felix, the learned Counsel for the Appellant, and Mrs. Chaya Sri Nammuni, the learned Senior State Counsel, made extensive oral submissions on the Five Questions of Law submitted to the opinion of Court. I shall now proceed to consider the said Five Questions of Law and express my opinion on each such Question of Law separately.

Question of Law No. 1

1.Whether the determination made by the Tax Appeals Commission is time barred

Statutory Provisions for Determination of Appeals by the Tax Appeals Commission

[7] The time limit for the determination of appeals by the Tax Appeals Commission was originally contained in Section 10 of the Tax Appeals Commission Act, No. 23 of 2011, which stipulated that the Tax Appeals Commission shall make the

determination within a period of **one hundred and eighty days** from the date of the commencement of the hearing of the appeal. It reads as follows:

> *"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".*

[8] Section 10 of the Tax Appeals Commission Act was amended by Section 7 of the Tax Appeals Commission (Amendment) Act, No. 4 of 2012, which stipulated that the determination of the Commission shall be made within **two hundred and seventy days**. In terms of Section 13 of the said Act, the amendment was to have retrospective effect and was deemed to have come into force from the date of the Principal Act (i.e. 31.01.2011).

[9] Section 10 of the Tax Appeals Commission Act was further amended by Section 7 of the Tax Appeals Commission (Amendment) Act, No. 20 of 2013, which stipulates that the determination of the Commission shall be made within **two hundred and seventy days from the date of the commencement of its sittings for the hearing of each such appeal**. In terms of the Tax Appeals Commission (Amendment) Act, No. 4 of 2012 (S. 13) and the Tax Appeals Commission (Amendment) Act, No. 20 of 2013 (S. 14), the amendments made to the provision of Section 10 were given retrospective effect.

[10] Section 15 of the Tax Appeals Commission (Amendment) Act, No. 20 of 2013 further provides an avoidance of doubt clause as follows:

> *"For the avoidance of doubts, it is hereby declared, that the Commission shall have the power in accordance with the provisions of the principal enactment as amended by this Act, to hear and determine any appeal that was deemed transferred to the Commission under section 10 of the principal enactment, notwithstanding the expiry of the twelve months granted for its determination by that section prior to its amendment by this Act."*

[11] Accordingly, Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 as last amended by the Tax Appeals Commission (Amendment) Act, No. 20 of 2013 now provides as follows:

> *"The Commission shall hear all appeals received by it and make its determination 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**:*
>
> *Provided that, all appeals pending before the respective Board or Boards of Review in terms of the provisions of the respective enactments specified in Column I of Schedule I, or Schedule II to this Act, notwithstanding the fact that such provisions are applicable to different taxable periods as specified therein shall with effect from the date of coming into operation of the provision of this*

Act be deemed to stand transferred to the Commission, and the Commission shall notwithstanding anything contained in any other written law make its determination in respect thereof, within twenty four months from the date on which the Commission shall commence its sittings for the hearing of each such appeal".

[12] At the hearing, Dr. Shivaji Felix submitted that Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 as last amended by the Tax Appeals Commission (Amendment) Act, No. 20 of 2013, stipulates that the Tax Appeals Commission shall make its determination within two hundred and seventy days from the date of the Commission commencing its sittings for the hearing of each appeal. He submitted that the amendment of Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 with retrospective effect on two occasions and having an avoidance of doubt clause in Section 15 of the Tax Appeals Commission (Amendment) Act, No. 20 of 2013 makes it very clear that the intention of Parliament is that Section 10 as amended, is a mandatory provision of law which requires strict compliance.

[13] He further submitted that though the first date of hearing of the appeal as per the Tax Appeals Commission proceedings was 24.05.2018, the determination of the Tax Appeals Commission was made on 24.09.2019 and thus, the determination has been made more than one year and 4 months after the date of the first hearing. His contention was that the determination made by the Tax Appeals Commission is time barred by operation of law and thus, it must be deemed to have been allowed on the basis that the Tax Appeals Commission had no jurisdiction to hear the appeal after the time limit specified in Section 10 lapsed.

[14] He drew our attention to the following statement made by His Lordship Gooneratne J. in *Mohideen v. Commissioner -General of Inland Revenue* (CA 2/2007 (20-15) Vol. XXI. BASL Law Journal, page 171 decided on 16.01.2014, referring to the statutory time bar applicable to the Board of Review in making its determination under the Inland Revenue (Amendment) Act, No. 37 of 2003 at p. 176:

"If specific time limits are to be laid down, the legislature need to say so in very clear and 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 two years from the date of oral hearing. If that be so, it is time barred."*** *[emphasis added]*

[15] Dr. Shivaji Felix submitted that the judgments of the Court of Appeal in *A.H. Mohideen v. Commissioner -General of Inland Revenue* (supra) is a binding precedent as the statement of Gooneratne J. was part of the ratio of the judgment and to consider it by His Lordship Janak de Silva J. as constituting an obiter dicta

statement by the subsequent judgments of this Court *in Stafford Motor Company Limited v. The Commissioner General of Inland Revenue*, CA /Tax/17/2017, decided on 15.03.2019, *Kegalle Plantations PLC v. Commissioner General of Inland Revenue*, CA/Tax 09/2017 decided on 04.09.2014 and *CIC Agri Business (private) Limited v. Commissioner General of Inland Revenue*, CA/Tax 42/2014 decided on 29.05.2021 was demonstrably wrong. Dr. Shivaji Felix further submitted that His Lordship Janak Silva J. has failed to consider in the said judgments the rationale for amending the time bar provision in Section 10 with retrospective effect on two occasions and having an avoidance clause in Section 15 of the Tax Appeals Commission Act No. 20 of 2013. He invited us to depart from the said three judgments of His Lordship Janak de Silva J. as they constitute judgments delivered per incuriam as far as the time bar is concerned.

[16] On the other hand, the learned Senior State Counsel submitted that the Court of Appeal in *Mohideen v. Commissioner-General of Inland Revenue* (supra), considered the question of the actual date of hearing intended by Parliament in the second proviso to Section 140 (10) of the Inland Revenue (Amendment) Act, No. 37 of 2003, for the purpose of the time limit of the appeal decided by the Board of Review and the Court held that the hearing means the date of the actual oral hearing, which constitutes ratio decidendi. She submitted that His Lordship Gooneratne J. having considered the date of the commencement of the oral hearing and the date of the determination made by the Board of Review, concluded that the Board made its determination within 2 years and thus, it is not time barred. Referring to the statement made by His Lordship Gooneratne J. that "It would be different or invalid if the time period exceeded two years from the date of oral hearing. If that be so, it is time barred", she submitted that the said statement was only a passing observation (obiter dicta) and not on points it decided (ratio decidendi).

[17 His Lordship Janak de Silva J., referring to *Mohideen v. Commissioner-General of Inland Revenue* (supra), held in *Stafford Motor Company Limited v. The Commissioner General of Inland Revenue* (supra) that the statement made by His Lordship Gooneratne J. was an obiter dicta statement at p. 6 as follows:

> *"We are of the view that the statement in Mohideen's case* (supra) *that the determination of the Board of Review is invalid if not made within the statutory time period is obiter dicta. Accordingly, we are of the view that the determination of the TAC in the instant case is not time barred. In Kegalle Plantations PLC v. Commissioner-General of Inland Revenue [CA (TAX) 09/2017, C.A.M. 04.09.2018] we arrived at a similar conclusion".*

[18] In *Kegalle Plantations PLC v. The Commissioner-General of Inland Revenue* (supra) and *CIC Agri Business (Private) Limited v. The Commissioner-General of Inland Revenue* (*supra*), His Lordship Janak de Silva J. arrived at a similar conclusion.

[19] So, the first point as far as the time bar of the appeal made by the Tax Appeals Commission is concerned is this:

> Is the statement made by His Lordship Gooneratne J. referring to the time bar applicable to the Board of Review under the second proviso to Section 140 (10) of the Inland Revenue (Amendment) Act, No. 37 of 2003, in the case of *Mohideen v. The Commissioner-General of Inland Revenue* (supra) constitutes a ratio decidendi to be followed as a binding precedent, and if so, whether this Court is duly bound to deviate from all subsequent judgments in question decided by His Lordship Janak de Silva J. on the basis that they constitute judgments delivered per se per incuriam as far as the time bar is concerned?

[20] As both Counsel addressed us at length on the doctrine of stare decisis- "let the earlier decision stand"- referring to the several judicial pronouncements made both here and abroad, I think it is necessary to carefully consider the doctrine of stare decisis in relation to the construction of Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 as amended, which is the fundamental issue between the parties.

The doctrine of precedent (stare decisis)

[21] The importance of the rule of stare decisis in relation to the Court of Appeal's own decisions can be hardly overstated as we now sit in several divisions with two Tax Courts in place and in the absence of such a rule, the law would become wholly uncertain. Black's Laws Dictionary defines stare decisis asunder

> *"1. Under doctrine a deliberate or solemn decision of court made after argument of question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent in the same court or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy. Doctrine is one of the policy, grounded on theory that security and certainty require that accepted and established legal principle, under which rights may accrue, be recognized and followed, though later found to be not legally sound, but whether previous holding of court shall be adhered to, modified, or overruled is within court's discretion under circumstances of case before it. When point of law has been settled by decision, it forms a precedent which is not afterwards to be departed from, and, while it should ordinarily be strictly adhered to, there are occasions when departure is rendered necessary to vindicate plain, obvious principles of law and remedy continued injustice. The doctrine is not ordinarily departed from where the decision is of long-standing and rights have been acquired under it, unless considerations of public policy demand it. The doctrine is limited to actual determinations in respect to litigated and necessarily decided questions and is not applicable to dicta or obiter dicta".*

[22] The principle of Stare decisis has been considered in several cases by this Court as well as the Supreme Court as the doctrine of precedent is motivated by the need for certainty and is based on the principle that like cases should be decided alike (*Customs and Excise Commissioners v. Le Rififi Ltd* (1995) STC 103). The doctrine of stare decisis only involves this, that when a case has been decided in a court, it is only the legal principle or principles upon which that court has so decided that bind courts of concurrent or lower jurisdictions and require them to follow and adopt them when they are relevant to the decision in later cases before those courts (*Ashvlle Investments Ltd v. Elmer Contractors Ltd* (1989) 1 Q.B. 488, 494).

[23] In Sri Lanka, Basnayake C.J. in *Bandahamy v. Senanayake* (62 NLR 313), fully discussed the rule of precedent or stare decisis and held that (i) the doctrine of precedent is not a rigid doctrine and that practices vary from country to country; and (ii) the attitude of judges to the doctrine is not uniform and varies according to the class of case which comes for consideration (p. 344). Having said that, Basnayake J. expressed the applicable principles at pp. 344-345 as follows:

> *"We have in this country over the years developed a cursus curia of our own which may be summarised thus-*
>
> *(a) One Judge sitting alone as a rule follows a decision of another sitting alone. Where a Judge sitting alone finds himself unable to follow the decision of another sitting alone, the practice is to reverse the matter for the decision of more than one Judge (ss. 38 & 48);*
>
> *(b) A Judge sitting alone regards herself is bound by the decision of two or more Judges.;*
>
> *(c) Two Judges sitting together also as a rule follow the decisions of two Judges. Where two Judges sitting together find themselves unable to follow a decision of two Judges, the practice in such cases is also to reserve the case for the decision of a fuller bench, although the Courts Ordinance does not make express provision in that behalf as in case of a single Judge;*
>
> *(d) Two Judges sitting together regard themselves as bound by a decision of three or more Judges;*
>
> *(e) Three Judges as a rule follow a unanimous decision of three Judges, but if three Judges sitting together find themselves unable to follow a unanimous decision of three Judges, a fuller bench would be constituted for the purpose of deciding the question involved;*
>
> *(f) Four Judges when unanimous are regarded as binding on all benches consisting of less than four. In other words, a bench numerically inferior regards itself as bound by the unanimous decision of a bench numerically superior;*
>
> *(g) ..*

(h) ...
(i) ..
(j) ..
(k) ..

[24] After having endorsed the tests adopted by Basnayake J. in *Bandahamy v. Senanayake* (supra), Thamotheram, J. in *Walker Sons & Co. (U.K.) Ltd. v. Gunatilake* (1978-79-80) 1 Sri L.R. 231, stated that the binding effect of the decisions of the highest Court or the Court of last resort on Courts exercising subordinate jurisdiction has been recognized and accepted long enough by our Courts even to acquire the force of custom (p. 261).

[25] In the present case, Dr. Shivaji Felix is inviting us to regard the above statement made by Gooneratne J. in *Mohideen v. The Commissioner-General of Inland Revenue* (supra) as ratio, which, he argued, is the essence of the doctrine of stare decisis and thus, it is a binding precedent of this Court, as it was decided prior to all three judgments delivered by His Lordship Janak de Silva J. In ascertaining the ratio decidendi in *Mohideen v. The Commissioner-General of Inland Revenue* (supra), as far as time bar is concerned, we have to distinguish ratio decidendi from the obiter dicta having regard to the facts of the case decided by His Lordship Gooneratne J. and then, identify the principle upon which the decision was made by His Lordship Gooneratne J. in *Mohideen v. The Commissioner-General of Inland Revenue* (supra).

Mandatory vs. directory

[26] Dr. Shivaji Felix submitted that Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 as amended, stipulates that the Commission **shall** make its determination within two hundred and seventy days from the date of the commencement of its sittings for the hearing of the appeal and therefore, the time bar indicated in the Tax Appeals Commission Act was clearly intended to be a **mandatory** provision of law and required strict compliance. He submitted that the acceptance of that legal requirement by His Lordship Gooneratne J. in *Mohideen v. The Commissioner-General of Inland Revenue* (supra), operates as ratio decidendi to be followed by this Court as a binding precedent.

[27] Section 10 of the Tax Appeals Act stipulates that the Tax Appeals Commission shall make its determination within 270 days from the date of the commencement of its sittings for the hearing of the appeal. Superficially, the effects of non-compliance of a provision are dealt with in terms of the mandatory-directory classification. Generally, in case of a mandatory provision, the act done in breach thereof is void, whereas, in case of a directory provision, the act does not become void, although some other consequences may follow (P.M. Bakshi, Interpretation of Statutes, First Ed, 2008422).

[28] Although one of the arguments advanced by Dr. Shivaji Felix was that the word "shall" used in Section 10 is normally to be interpreted as connoting a mandatory provision, meaning that what is thereby enjoined is not merely desired (directory) to be done but must be done (mandatory) and the effect of such breach of a mandatory provision, which has the consequence of the determination of the Tax Appeals Commission rendering invalid. But, the use of the word "shall" does not always mean that the provision is obligatory or mandatory as it depends upon the context in which the word "shall" occurs and the other circumstances as echoed by the Indian Supreme Court case of The Collector of *Monghyr v. Keshan Prasad Goenka,* AIR 1962 SC 1694 at p. 1701) in the following words:

> *"It is needless to add that the employment of the auxiliary verb " shall" is inconclusive and similarly the mere absence of the imperative is not conclusive either. The question whether any requirement is mandatory or directory has to be decided not merely on the basis of any specific provision which, for instance, sets out the consequence of the omission to observe the requirement, but on the purpose for which the requirement has been enacted, particularly in the context of the (1) [1958] S.C.R. 533, other provisions of the Act and the general scheme thereof. It would, inter alia, depend on whether the requirement is insisted on as a protection for the safeguarding of the right of liberty of a person or of property which the action might involve".*

[29] It is thus well-established that an enactment in form mandatory might in substance be directory and that the use of the word "shall" does not conclude the matter (*Hari Vishnu Kamath v Ahmad Ishaque* AIR 1955 SC 233 referring to *Julius v. Bishop of Oxford* (1880) 5 A.C. 214 HL. Section 10 of the Tax Appeals Commission Act does not say what will happen if the Tax Appeals Commission fails to make the determination within the time limit specified in Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 as amended. Dr. Shivaji Felix referring to in the five-judge decision of *D.M.S. Fernando and another v. A.M. Ismail* (1982) IV Reports of Sri Lanka Tax Cases 184, 193 submitted that penal consequences need not be laid down in order for a provision to be held mandatory and that in such case, the Court has to consider the natural consequences that would follow where Parliament had not prescribed a sanction for breach of a mandatory provision.

[30] He referred to the proposition of law that was lucidly explained by Samarakoon C.J, at pp.184, 190 wherein His Lordship stated as follows:

> *"The statute itself contains no sanction for a failure to communicate reasons. If it had the matter would be easy of decision. But the matter does not rest there. One has to make a further inquiry. "If it appears that Parliament intended disobedience to render the Act invalid, the provision in question is described as "mandatory", "imperative" or "obligatory"; if on the other hand compliance was not intended to govern the validity of what is done, the provision is said to be "directory" (Halsbury's Laws of England, Ed 3 Vol. 36-page 434 S. 650).*

Absolute provisions must be obeyed absolutely whereas directory provisions may be fulfilled substantially (Vide- Woodward vs Sarson (1875) (L.R.10 cp 733 at 746). No universal rule can be laid down for determining whether a provision is mandatory or directory. "It is the duty of Courts of Justice to try to get at the intention of the legislature by carefully attending to the whole scope of the Statute to be construed per Lord Campbell in Liverpool Borough Bank vs Turner (1860) (2 De CF. & J 502 at 508) Vita Food Products vs. Unus Shipping Co. (1939 A.C. 377 at 393). Each Statute must be considered separately and in determining whether a particular provision of it is mandatory or directory one must have regard "to the general scheme to the other sections of the Statute". The Queen vs. Justices of the County of London County Council (1893) 2 Q.B. 476 at 479). It is also stated that considerations of convenience and justice must be considered. Pope vs. Clarke (1953) (2 A.E.R. 704 at 705). 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. (Maxwell on Interpretation of Statutes, Edition 12 page 160). These are all guidelines for determining whether Parliament intended that the failure to observe any provision of a Statute would render an act in question null and void. They are by no means easy of application and opinions are bound to differ. Indeed, some cases there may be where the dividing line between mandatory and directory is very thin. But the decision has to be made. I will therefore examine the Statute bearing in mind these guidelines".

[31] I agree with Dr. Shivaji Felix that the absence of any provision does not necessarily follow that the statutory provision is intended by the legislature to be disregarded or ignored. Where the sanction for not obeying them in every particular statute is not prescribed, the court must judicially determine them to ascertain whether the legislature intended that the failure to observe any provision of a Statute would render an act null and void or leave it intact (see also, N.S. Bindra's Interpretation of Statute, 10th Ed. p. 1013).

Legislative Intent

[32] The question as to whether a statute is mandatory or directory is a question which has to be adjudged in the light of the intention of the Legislature as disclosed by the object, purpose and scope of the statute. If the statute is mandatory, the act or thing done not in the manner or form prescribed can have no effect or validity and if it is directory, penalty may be incurred for non-compliance, but the act or thing done is regarded as good (P.M. Bakshi, Interpretation of Statutes, p. 430 & *Mohanlal Ganpatram v. Shri Sayaji Jubliee Cotton and Jute Mills Co. Ltd* AIR 1966 Guj. 96). *In State of U.P., v. Baburam Upadhya*, reported in AIR 1961 SC 751, the Supreme Court of India said that when a statute uses the word "shall", prima facie, it is mandatory, but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute.

[33] Crawford on “Statutory Construction” (Ed. 1940, Art. 261, p. 516) sets out the following passage from an American case approvingly as follows:

> *"The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other".*

[34] According to Sutherland, Statutory Construction, Third Ed. Vol. III, p. 77:

> *“The difference between mandatory and directory statutes is one of effect only. The question generally arises in a case involving a determination of rights as affected by the violation of, or omission to adhere to statutory directions. This determination involves a decision of whether or not the violation or omission is such as to render invalid Acts or proceedings to the statute, or rights, powers, privileges claimed thereunder. If the violation or omission is invalidating, the statute is mandatory, if not, it is directory”.*

[35] Then the question is this: What is the fundamental test that is to be applied in determining whether or not the failure to obey the time bar provision in Section 10 of the Tax Appeals Commission Act was intended by the legislature to be mandatory or directory? This question ultimately depends on the consideration of whether the consequences of the non-compliance were intended by the legislature to be mandatory or directory. This proposition was echoed by Lord Woolf MR (as he then was) in *R v. Secretary of State for the Home Department, Ex p Jeyeanthan [2000] 1 WLR 354* , who stated that it is "much more important to focus on the **consequences of the non-compliance**". He elaborated this proposition in the following words at p. 360:

> *“In the majority of cases, whether the requirement is categorised as directory or mandatory, the tribunal before whom the defect is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises”.*

[36] Here, it is also desirable to remember the words of Lord Hailsham of St. Marylebone L.C. in his speech in *London and Clydeside Estates Ltd. v. Aberdeen District Council* [1980] 1 W.L.R. *182* , 188–190. He stated at p. 36:

> *"The contention was that in the categorisation of statutory requirements into ‘mandatory’ and ‘directory,’ there was a subdivision of the category ‘directory’ into two classes composed (i) of those directory requirements ‘substantial compliance’ with which satisfied the requirement to the point at which a minor defect of trivial irregularity could be ignored by the court and (ii) those*

requirements so purely regulatory in character that failure to comply could in no circumstances affect the validity of what was done.

When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the ***legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events"****.*

[37] In *Howard and Others v. Bodington* (1877) 2 PD 203, the Court of Arches considered the question whether the consequences of a failure to comply with a statutory requirement are mandatory or directory. Lord Penzance stated at pp. 211-212:

"Now the distinction between matters that are directory and matters that are imperative is well known to us all in the common language of the courts at Westminster. I am not sure that it is the most fortunate language that could have been adopted to express the idea that it is intended to convey; but still, that is the recognised language, and I propose to adhere to it. ***The real question in all these cases is this: A thing has been ordered by the legislature to be done. What is the consequence if it is not done?*** *In the case of statutes that are said to be imperative, the Courts have decided that if it is not done the whole thing fails, and the proceedings that follow upon it are all voids. On the other hand, when the Courts hold a provision to be mandatory or directory, they say that, although such provision may not have been complied with, the subsequent proceedings do not fail. Still, whatever the language, the idea is a perfectly distinct one. There may be many provisions in Acts of Parliament which, although they are not strictly obeyed, yet do not appear to the Court to be of that material importance to the subject-matter to which they refer, as that the legislature could have intended that the non-observance of them should be followed by a total failure of the whole proceedings. On the other hand, there are some provisions in respect of which the Court would take an opposite view, and would feel that they are matters which must be strictly obeyed, otherwise the whole proceedings that subsequently follow must come to an end".*

[38] In the absence of any express provision, the intention of the legislature is to be ascertained by weighing the consequences of holding a statute to be directory or mandatory having regard to the importance of the provision in relation to the general object intended to be secured by the Act *(Caldow v. Pixcell* (1877) 1 CPD 52, 566) & *Dharendra Kriisna v. Nihar Ganguly* (AIR 1943 Cal. 266). As held in *Attorney General's Reference (No 3 of 1999),* the emphasis ought to be on the **consequences of non-compliance, and asking the question whether Parliament can fairly be taken to have intended total invalidity**.

[39] Now the question is, to which category does Section 10 in this case belong? The question as to whether Section 10 is mandatory or directory depends

on the intent of the legislature and not upon its language, irrespective of the fact that Section 10 is couched in language which refers to the word "shall". The intention of the legislature must be ascertained not only from the phraseology of Section 10, but also by considering its purpose, its design and more importantly, the consequences which would follow from construing it one way of another.

[40] Now the question is, what is the consequence of the failure to adhere to the time limit specified by Section 10 that has been intended by the legislature to be categorised as mandatory or directory. That is how I would approach this question, which is ultimately a question of statutory construction of Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 as amended. Accordingly, one has to identify the tests to be applied in deciding whether a provision that is disregarded is mandatory or directory, and then apply them to the statute which stipulates the determination shall be made within the time limit specified therein, but makes no reference to any penal consequences.

Consequence of non-compliance with a statutory provision

Purpose of the section in the context of the statute

[41] In considering a procedural requirement from this angle, a court is likely to construe it as mandatory if it seems to be of particular importance in the context of the enactment, or if it is one of a series of detailed steps, perhaps in legislation which has created a novel jurisdiction, (*Warwick v. White* (1722) Bunb. 106; 145 E.R. 612) or if non-compliance might have entailed penal consequences for one of the parties (*State of Jammu and Kashmir v. Abdul Ghani* (1979) Ker LJ 46). Where the disobedience of a provision is made penal, it can safely be said that such provision was intended by the legislature to be mandatory (*Seth Banarsi Das v. The Cane Commissioner* & Another, AIR 1955 All 86).

[42] As noted, the fact that no penal consequence is stated in a statute however, is only one factor to be considered towards a directory construction and there are other factors to be considered in determining whether a provision of a Statute is mandatory or not. One of the factors in determining whether the consequence of non-compliance provision was intended by the legislature to be mandatory or directory is to consider the broad purpose and object of the statute as Lord Penzance stated in *Howard v. Bodington* (supra) at 211 as follows:

> *"I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter: consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."*

[43] The legislature is a purposive act, and judges should construe statutes to execute that legislative purpose, intent and context (Robert A. Katzmann, Judging

Statutes 31 (2014) by focusing on the legislative process, taking into account the problem that the legislature was trying to solve (Henry M. Hart, Jr. & Albert M. Sacks, “The legal Process: Basic Problems in the Making and Application of Law” 1182 (William N. Eskridge, Jr. & Phillip P. Frickey Eds., (1994). We must thus, ascertain what the legislature was trying to achieve by amending the Tax Appeals Commission Act twice as far as the time bar is concerned.

[44] Dr. Shivaji Felix strenuously contended that, given the tax law context, a strict approach to construction of Section 10 of the TAC statute should be adopted as the amendment of the Tax Appeals Commission Act with retrospective operation twice would reflect the legislative intent that the compliance with Section 10 is mandatory. He argued that if the time bar stipulated in Section 10 was intended to be directory, the amendment of Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 with retrospective effect on two occasions and the avoidance of doubt clause found in Section 15 of the Tax Appeals Commission (Amendment) Act, No. 20 of 2013 would have been superfluous.

[45] Will the amendment of Section 10 with retrospective operation twice manifest the intention of the legislature that the failure of the Tax Appeals Commission to make its determination within the time limit specified in Section 10 is mandatory? From Section 15, it is manifest that the legislature intended Section 10 to operate retrospectively, so that the date of the commencement of Section 10 is earlier than the date of that amendment.

[46] A legislative intention to amend Section 10 with retrospective operation does not necessarily or conclusively mean that the failure to make the determination of the Tax Appeals Commission within the time limit specified in Section 10 is mandatory. If such drastic consequence was really intended by the legislature, it would have made appropriate provisions in express terms in Section 10 to the effect that “the appeal shall be deemed to have been allowed where the Tax Appeals Commission fails to adhere to the time limit specified in Section 10 of the TAC Act”.

[47] There are guidelines in tax statutes which stipulate that the failure to observe any time limit provision would render the appeal null and void or that the appeal shall be deemed to have been allowed. For example, Section 165 (14) of the Inland Revenue Act, No. 10 of 2006 as amended, provides that “an appeal preferred to the Commissioner-General 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...”. The same section specifically stipulates that “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”.

[48] An identical provision is contained in Section 34 (8) of the VAT Act, No. 14 of 2002 as well, which stipulates that "where such appeal is not agreed to or determined within such period, the appeal shall be deemed to have been allowed and the tax charged accordingly". Although the Tax Appeals Commission Act was amended by Parliament twice and increased the period within which the appeal is to be determined by the Commission from 180 days to 270 days with retrospective effect, the legislature in its wisdom did not specify any penal consequence or any other consequence of non-compliance of the time bar specified in Section 10 of the Tax Appeals Commission Act. Had the legislature intended that the non-compliance with Section 10 to be mandatory, it could have easily included a provision with negative words requiring that an act shall be done in no other manner or at no other time than that designated in the Section or a provision for a penal consequence or other consequence of non-compliance. This proposition was echoed by FOTH, C. J. in the Supreme Court of Kansas decision in *Paul v. The City of Manhattan*, 511 P.2d (1973) 212 Kan. 381, paragraph 17 as follows:

> *"The language of the enactment itself may provide some guidance. Thus we said in Shriver v. Board of County Commissioners, 189 Kan. 548, 370 P. 2d 124, "Generally speaking, statutory provisions directing the mode of proceeding by public officers and intended to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties cannot be injuriously affected, are not regarded as mandatory, unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated". (p. 556.Emphasis added). A critical feature of mandatory legislation is often a provision for the consequences of non-compliance. This element was noticed by early legal commentators, for in Bank v. Lyman, supra, we find this observation (p. 413)."*

[49] Bindra's Interpretation of Statutes, 10th Ed. referring to the decision of *Paul v. The City of Manhattan* (supra), states that factors which would indicate that the provisions of a Statute or Ordinance are mandatory are: (1) the presence of negative words requiring that an act shall be done in no other manner or at no other time than that designated; or (2) a provision for a penalty or other consequence of non-compliance (p. 433). The legislature in its wisdom has placed time limit for the speedy disposal of appeals filed before the Commissioner-General and the overall legislative intention sought to be attained by the Inland Revenue Act in Section 165 (14) was to ensure that an appeal before the Commissioner-General of Inland Revenue is disposed of within a period of 2 years from the date on which the Petition of Appeal is received. As the Commissioner-General is an interested party against another interested party (tax payer) in the tax collection, it shall determine the appeal within 2 years from the receipt of the Petition of Appeal and if not, the appeal shall be deemed to have been allowed and tax charged accordingly, so as to safeguard the rights of the taxpayer

[50] The object sought to be attained by Section 10 of the Tax Appeals Commission Act has been designed primarily to expedite the appeal process filed before the Tax Appeals Commission, which was established by an Act of Parliament comprising retired Judges of the Supreme Court or the Court of Appeal and those who have gained wide knowledge and eminence in the field of Taxation.

[51] It was the contention of Dr. Shivaji Felix that where the Tax Appeals Commission has failed to comply with the time limit specified in Section 10, the Court could declare that the appeal made to the Tax Appeals Commission is deemed to have been allowed to give effect to the mandatory nature of Section 10. I am unable to agree with the contention of Dr. Shivaji Felix. It is settled law that Courts cannot usurp legislative function under the disguise of interpretation and rewrite, recast, reframe and redesign the Tax Appeals Commission Act, because this is exclusively in the domain of the legislature.

[52] This proposition was lucidly explained by Lord Simonds in *Magor and St Mellons Rural District Council v. Newport Corporaion* [1951] 2 All ER 839, HL. Referring to the speech of Lord Denning MR, Lord Simonds said at page 841: "It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation", Lord Simonds further stated at 841:

> *"The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited. If a gap is disclosed, the remedy lies in an amending Act and not in a usurpation of the legislative function under the thin disguise of interpretation".*

[53] The same proposition was echoed by Arijit Pasayat, J. in the Indian Supreme Court case of *Padmasundara Rao and Ors. v. State of Tamil Nadu and Ors.* AIR (2002) SC 1334, at paragraph 14, as follows:

> *"14. While interpreting a provision the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary".*

[54] Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 granted time to the Tax Appeals Commission to hear all appeals within one hundred and eighty days from the date of the commencement of the hearing of the appeal. The Tax Appeals Commission (Amendment) Act, No. 4 of 2012 extended the said time period from one hundred and eighty days to two hundred and seventy days from the date of the commencement of the hearing of the appeal. The Tax Appeals Commission (Amendment) Act, No. 20 of 2013 however, reduced the time limit granted to the Tax Appeals Commission to conclude the appeal by enacting that the time specified in Section 10 shall commence from the date of the commencement of its sittings for hearing the appeal.

[55] The legislature has, from time to time, extended and reduced the time period within which the appeal shall be determined by the Tax Appeals Commission, but it intentionally and purposely refrained from imposing any consequence for the failure on the part of the Tax Appeals Commission to adhere to the time limit specified in Section 10.

[56] The legislature amended the Tax Appeals Commission Act twice with retrospective effect and provided time frames to conclude appeals quickly as possible within the time limit of 270 days from the date of the commencement of its sittings for the hearing of such appeal. It is true that the legislature has amended Section 10 with retrospective operation but if it intended to take away the jurisdiction of the Tax Appeals Commission and render its determination made outside the time limit specified in section 10 invalid, it could have easily made, with retrospective effect, appropriate provision in express terms that the appeal shall be deemed to have been allowed or other consequence of non-compliance.

[57] On the other hand, the proviso to Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 granted time to the Commission to make its determination in respect of appeal transferred to the Commission from the Board of Review within a period of one hundred and eighty days (180) from the date of such transfer, notwithstanding anything contained in any other written law. The Tax Appeals Commission (Amendment) Act, No. 4 of 2012 extended the said time period from one hundred and eighty days to twelve months of the date on which the Commission shall commence its sittings. (Vide-Section 7 of the Act, No. 4 of 2012). The Tax Appeals Commission (Amendment) Act, No. 20 of 2013 extended the said time period to twenty-four months from the date on which the Commission shall commence its sittings for the hearing of each such appeal.

[58] It is crystal clear that these procedural time limit rules in respect of appeals received by the Tax Appeals Commission or appeals transferred from the Board of Review to the Commission have been devised by the legislature to facilitate the appeal process by increasing and reducing the time period within which such appeals shall be concluded. The provision for the determination of an appeal by the Tax Appeals Commission within a period of 270 days from the commencement of its sittings for the hearing of an appeal has been designed with a view to regulating the duties of the Tax Appeals Commission by specifying a time limit for its performance as specified in Section 10 of the Act.

[59] So that the legislature, in its wisdom has made provision in Section 10 to the effect that the appeal shall be disposed of speedily within a period of 270 days from the date of the commencement of the sittings for the hearing of the appeal. But the legislature imposed no drastic and painful penal consequence or other consequence of non-compliance, including prohibitory or negative words in Section 10, rendering the determination of the appeal null and void for non-

compliance of the time limit specified in Section 10. In my view, they are not intended to make the parties suffer for the failure of the Commission to make the determination within the time limit specified in Section 10 of the Tax Appeals Commission Act.

[60] Any procedural retrospective operation of a provision, in my view, cannot take away the rights of parties who have no control over those entrusted with the duty of making determination within the time limit specified in Section 10. The retrospective operation of Section 10 without any penal or other consequence of non-compliance, by itself, cannot be treated as a factor in determining that the legislature intended that the failure to adhere to the time limit specified in Section 10 is mandatory.

Avoidance of doubt clause

[61] Dr. Shivaji Felix further relied on the avoidance of doubt clause in Section 15 of the Tax Appeals Commission Act to argue that Section 15 would be rendered nugatory if the provisions of Section 10 are considered to be directory. A perusal of Section 15 of the Tax Appeals Commission (Amendment) Act, No. 20 of 2013 reveals that it relates to appeals that have been transferred to the Commission from the Board of Review, and provides that the Tax Appeals Commission shall have the power to make a determination in respect thereof, beyond twelve months granted for its determination of appeals by the Inland Revenue (Amendment) Act No. 23 of 2011.

[62] It seems to me that the avoidance of doubt clause in Section 15 applies to appeals transferred from the Board of Review and not to new appeals directly filed before the Tax Appeals Commission. On the other hand, the intention of the legislature in Section 15 is to empower the Commission to hear an appeal transferred to it by the Board of Review under Section 10 of the Act, notwithstanding the expiry of the twelve months granted for its determination by the Tax Appeals (Amendment) Act, No. 4 of 2012. It seems to me that Section 15 manifests that the legislature never intended that the time period specified in the general scheme of the Tax Appeals Commission Act to be mandatory and holding otherwise, would not promote the main object of the legislature reflected in the Act.

Consequences of non-compliance of statute by those entrusted with public duty

[63] One of the important factors that is necessary for determining whether a provision is mandatory or directory is to find as to who breached the time limit specified in Section 10-whether it was breached by one of the parties to the action or by those entrusted with the performance of a public duty. Also coming under

this head are cases where the Court will take into account the practical inconveniences or impossibilities of holding a time limit requirement to be mandatory where the public duty is performed by a public body. If the statutory provision relates to the performance of a public duty, the Court is obliged to consider whether any consequence of such breach would work serious public inconvenience, or injustice to the parties who have no control over those entrusted with such public duty.

[64] Apart from the absence of reference to penal sanction and other consequences of non-compliance of Section 10, the impossibility of adhering to the time limit provision is also a factor in influencing the court to construe that the time limit provision is not mandatory, but is directory only. I shall now proceed to consider the submission made by the learned Senior State Counsel that the delay, if at all, was purely due to practical reasons in appointing members to the Commission after the term of the previous Commission lapsed and thus, a new panel had to be appointed to continue the proceedings. A perusal of the record reveals the following matters:

1. The Appellant being dissatisfied with the determination made by the Commissioner-General of Inland Revenue appealed to the Tax Appeals Commission on 18.10.2016 (p. 57). As the Secretary to the Commission has to fix a date, time and place for the hearing of the appeal, giving 42 days' notice thereof to the parties, the Secretary informed the Chairman of the Tax Appeals Commission, to fix a date, time and nominate panel members for hearing of the appeal after 05.12.2016 (p. 59);
2. Upon the nomination of the Panel being made by the Chairman of the Commission, the Secretary, by letter dated 30.11.2016 informed the Attorneys-at-Law of the Appellant and the parties to the appeal that the hearing of the appeal has been fixed for **17.08.2017** at 2.00 p.m. (p. 62, 64 & 65);
3. By letter dated 30.11.2016, (p. 63) the Secretary to the Commission further informed the Members of the Commission of the date and time of the hearing (i.e., 17.08.2017 at 2.00 p.m.);
4. By letter dated 10.08.2017, the Secretary to the Commission informed the parties that the hearing fixed for 17.08.2017 will not be taken up on that date and the new date will be notified in due course (pp. 67-68);
5. By letter dated 10.10.2017, the Secretary to the Commission informed the parties that the hearing of the appeal has been postponed **due to unavoidable circumstances** and the next date will be informed in due course (pp. 76-77);

6. By letter dated 01.05.2018, the Secretary to the Commission informed the parties that the appeal will be called on 24.05.2018 at 3.30 p.m. (pp. 78-79);

7. The appeal was heard on 24.05.2018 and the parties were directed to file written submissions on or before 20.08.2018 and the next hearing was fixed for 20.09.2018; (p. 81) (Vide-hearing sheet at page 81 of the record);

8. The Appellant filed written submissions on 03.07.2018 (p. 84) and the Respondent filed written submissions on 30.08.2018 (p. 91);

9. Although the next hearing was fixed for 20.09.2018 (p. 81/84), there is no record of another hearing held on 20.09.2018 as the one-year time period of the members of the Commission expired on 02.07.2018 (p. 93);

10. By letter dated 30.10.2018, the Secretary to the Commission informed the Appellant that as the one-year time period of the members of the Commission expired on **02.07.2018**, the next date of the hearing will be informed once the members are appointed (P. 93);

11. By letter dated 22.01.2019, the Secretary to the Commission informed the parties that the hearing of the appeal has been fixed for **05.02.2019** at 2.00 p.m. (p. 95/96) and thereafter, the hearing was held on **05.02.2019 (p. 112) and 19.03.2019** (pp. 112, 126 & 168);

12. The Commission on 19.03.2019 granted time to the Appellant to discuss with the Respondent and come to a settlement as indicated in the following minutes made by the Commission on 19.03.2019 (p. 126):

    *"Commission gives time to discuss with CGIR and come for a settlement. If both parties are unable to come for a settlement, commission will hear the case again. If both parties agreed to come for a settlement, Commission ordered to come with the terms of settlement. Next hearing will be on **28.05.2019** at 2.30 p.m."*

13. As per the letter of the Respondent dated 21.05.2019, the Appellant and the Respondent held a discussion on 29.04.2019 but no agreement was reached (p. 127) and thus, on 28.05.2019, the appeal was heard and concluded (p. 136) and thereafter, the determination was made on **24.09.2019** (p. 16)

[65] If the time limit is calculated from the date of the new commission commenced its hearing on 05.02.2019, the determination has been made within a period of 7 months and 19 days, which is less than 270 days. It was the assertion of the Appellant, however, that as the hearing commenced on **24.05.2018**, the

determination has been made after the expiry of 270 days specified in Section 10. It is not in dispute that every member of the Commission, including its Chairman is appointed by the Minister to whom the subject of Finance is assigned and such member shall hold office for a specific period of time (S. 2(4)).

[66] The proceedings before the Tax Appeals commission do not indicate that the Appellant disputed the Secretary's letter dated 30.10.2018, which states that the one-year period of the members expired on **02.07.2018** (p. 93) or that the Appellant raised any objection before the Commission that it had no jurisdiction to make the determination as time limit specified in section 10 has already expired. There is nothing to indicate in the brief as to the precise date of the appointment of the new members of the commission. However, it is undisputed that after the new members were appointed, by letter dated **22.01.2019**, the Secretary to the Commission fixed the appeal for hearing on **05.02.2010** and the hearing commenced on **05.02.2019**. There is nothing to indicate that the Tax Appeals Commission deliberately delayed or failed to fix the hearing of the appeal after the new members were appointed to the Commission.

[67] It is absolutely clear that though the hearing of the appeal commenced on 24.05.2018, the Tax Appeals Commission could not practically continue the hearing on **20.09.2018** as the one-year time period of the members of the Commission expired on 02.07.2018. Upon the appointment of the members, the new Commission commenced hearing on 05.02.2019 and made the determination on 24.09.2019. It was thus, practically impossible for the Commission to make the determination within a period of 270 days when the period of the members of the Commission expired on 02.07.2018 (p. 93) and thus, they had to suspend the hearing until new members are appointed to the Commission. I do not think under such circumstances that it is practically possible for the new Commission to conclude the hearing within 270 days from the date of the initial hearing commenced on 24.05.2018 under the previous Commission whose period expired on 02.07.2018.

[68] The Tax Appeals Commission Act has imposed a duty on the Tax Appeals Commission to make the determination within the time limit specified in Section 10 but the parties had no control over those entrusted with the task of making the determination within the time limit specified in Section 10. Should the parties who have no control over those entrusted with the task of making the determination be made to suffer for any failure or delay on the part of the Tax Appeals Commission in not making its determination within the time limit specified in Section 10? I do not think that the legislature intended that the time limit specified in Section 10 is mandatory where the parties had no control over those entrusted with the task of making the determination within the time limit specified in Section 10.

[69] Maxwell, Interpretation of Statute, 11th Ed. at page 369 referring to the ascertaining the intention of the legislature in relation to the interpretation of limitation provision states:

"On the other hand, where the prescriptions of a statute relate to the performance of a public duty and where the 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 without promoting 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, where 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". *[emphasis added]*

[70] Where the statute imposes a public duty on persons and to treat, as void, acts done without compliance with the statute would cause serious inconvenience to persons who have no control over those entrusted with this duty, then the practice is to hold the provision to be directory only so as not to affect the validity of such action taken in breach of such duty (*Montreal Street Rly. Co. v. Normandin* (1917) AC 170, 175). Lord Sir Arther Channell echoed this proposition in that case at p. 176 as follows:

"When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done. This principle has been applied to provisions for holding sessions at particular times and places (2 Hale, P. C., p. 50, Rex v. Leicester Justices (1827) 7 B & C. 6 and Parke B. in Gwynne v. Burnell (1835) 2 Bing. N.C. 7); to provisions as to rates (Reg. v. Inhabitants of Fordham (1839) 11 Ad. & E. 73 and Le Feuvre v. Miller (1857) 26 L.J. (M.C.) 175); to provisions of the Ballot Act (Woodward v. Sarsons (1875) L.R. 10 C.P. 733 and Phillips v. Goff (1886) 17 Q.B.D. 805); and two justices acting without having taken the prescribed oath, whose acts are not held invalid (Margate Pier Co. v. Hannam (1819) 3 B. & Al. 266)".

[71] This proposition is further confirmed by Sutherland's Statutory Construction, Third Ed. Vol. 3. at p. 102 as follows:

"A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered a limitation of the power of the Officer". At p. 107 it is pointed out that a statutory direction to private individuals should generally be considered as mandatory and that the rule is just the opposite to that which obtains with respect to public officers. Again, at p. 109, it is pointed out that often the question as to whether a mandatory may be directory construction should be given to a statutory provision may

be determined by an expression in the statute itself of the result that shall follow the non-compliance with the provision...."

[72] In the present case, the duty to make the determination within the time limit specified in Section 10 is statutorily entrusted to the members of the Tax Appeals Commission in terms of the provisions of the Tax Appeals Commission Act, No. 23 of 2011 as amended, and the parties had no control whatsoever, over the Tax Appeals Commission. As Lord Sir Arther Channell put it correctly, it would cause the greatest injustice to both parties who had no control over those entrusted with the duty of making the determination, if we hold that neglect to observe the time limit specified in Section 10 of the statute renders the determination made by the Commission *ipso facto* null and void.

[73] In my view, every limitation period within which an act must be done, is not necessarily a prescription of the period of limitation with painful and drastic consequences and the parties who have no control of those entrusted with a statutory duty and no fault of them should not be made to suffer and lose their rights for the failure to adhere to the time limitation specified in a provision.

[74] In *Visuvalingam v. Liyanage* [(1985) 1 Sri LR 203], the Supreme Court was called upon to consider the question whether the time limit of two months set out in Article 126 (5) of the Constitution is mandatory or directory. The Supreme Court by a majority decision held that the provisions of Article 126 (5) of the Constitution are merely directory and not mandatory. Samarakoon, C.J stated at page 226 that:

"An examination of the relevant provisions of the Constitution indicates that the provision is merely directory.....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. While I can read into the Constitution a duty of the Supreme Court to act in a particular way I cannot read into it any deprivation of a citizen's guaranteed right due to circumstances beyond his control"

[75] Dr. Shivaji Felix sought to distinguish the decision of Samarakoon, C.J in *Visuvalingam v. Liyanage* (supra) from the present case on the basis that *Visuvalingam v. Liyanage* was only a case of infringement of the fundamental rights of the citizen, whereas this case involves the deprivation of a right of the taxpayer. Although the case decided by Samarakoon C.J. in *Visuvalingam v. Liyanage* (supra) related to a violation of a fundamental right, in my view, the rationale of the statement of Samarakoon C.J. equally applies to the facts of the present case. If we are to hold that the proposition of law laid down by

Samarakoon C.J. cannot be applied to a case of this nature, we would be depriving a statutory right of a party who has no control over those entrusted with a duty to make the decision for reasons beyond his control and no fault of such party.

[76] The answer to this question is further provided by Sharvananda J. (as he then was) in *Nagalingam v. Lakshman de Mel* (78 NLR 231), which is not a fundamental right case. The question before His Lordship was whether the provisions of Section 2 (2) (c) of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 are mandatory or directory. His Lordship Sharvananda J. (as he then was) stated at page 237:

> *"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 refusal. 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".*

[77] If we interpret the legislative intent of Section 10 from its mere phraseology, without considering the nature, purpose, the design, the absence of consequences of non-compliance and practical impossibility, which would follow from construing it one way or the other, it will tend to defeat the overall object, design, the purpose and spirit of the Tax Appeals Commission Act. If we hold that the determination of the Commission is null and void, it will cause serious injustice to parties who have no control over those entrusted with the duty of discharging functions under the Tax Appeals Commission Act.

[78] For those reasons, I hold that having considered the facts and he circumstances and legal principles, the failure to adhere to the time limit specified in Section 10 was not intended by the legislature to be mandatory with painful and drastic consequences of rendering such determination null and void. The directory interpretation of Section 10 is consistent with the object, purpose and design of the Tax Appeals Commission Act, which is reflected in the intention of the legislature.

Distinction between a dicta and obiter

[79] I will now proceed to ascertain whether the statement in question made by His Lordship Gooneratne J. in *Mohideen v. Commissioner-General of Inland*

Revenue (supra), can be regarded as a ratio to be followed as a binding precedent in the present case. The distinction between a dicta and obiter is well known. A ratio decidendi is the rule of law on which a judicial decision is based and obiter is not part of the ratio decidendi, which is not necessary for arriving at a decision.

[80] The rule for determining ratio decidendi of a case has been stated by Prof. John Chipman Gray at page 261 in the "Nature and Sources of Law" (2nd Ed., 1921) and quoted at page 193 of Jurisprudence in Action asunder:

> *"It must be observed that at the common law, not every opinion expressed by a judge forms a judicial precedent. In order that an opinion may have the weight of a precedent, two things must concur; it must be, in the first place, an opinion given by a Judge, and in the second place, it must be an opinion, the formation of which is necessary for the decision of the particular case".*

[81] The Black's Law Dictionary, (9th Ed, 2009) defines the term "obiter dictum" as 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. Strictly speaking an 'obiter dictum' is a **remark made or opinion expressed by a judge, in his decision upon a cause, 'by the way' - that is, incidentally or collaterally, and not directly upon the question before the court; or it is any statement of law enunciated by the judge or court merely by way of illustration, argument, analogy, or suggestion**.... In the common speech of lawyers, all such extrajudicial expressions of legal opinion are referred to as 'dicta,' or 'obiter dicta', these two terms being used interchangeably". [emphasis added].

[82] The Wharton's Law Lexicon (14th Ed. 1993) defines term "obiter dictum" as an opinion, not necessary to a judgment; an observation as to the law made by a judge in the course of a case, but not necessary to its decision, and therefore of no binding effect; often called as obiter dictum, a remark by the way. The concept of "dicta" has been further discussed in Halsbury's Laws of England, Fourth Edition (Reissue), Vol. 26, para. 574 as thus:

> *"574. Dicta. Statements which are not necessary to the decision, which go beyond the occasion and lay down a rule that it is unnecessary for the purpose in hand are generally termed "dicta". They have no binding authority on another court, although they may have some persuasive efficacy. Mere passing remarks of a judge are known as "obiter dicta", whilst considered enunciations of the judge's opinion on a point not arising for decision, and so not part of the ratio decidendi, have been termed "judicial dicta". A third type of dictum may consist in a statement by a judge as to what has been done in other cases which have not been reported.*
>
> *... Practice notes, being directions given without argument, do not have binding judicial effect. Interlocutory observations by members of a court during*

argument, while of persuasive weight, are not judicial pronouncements and do not decide anything".

[83] The Supreme Court of India had occasion to consider the difference between obiter dicta and ratio decidendi in the case of The *State of Haryana v. Ranbir,* (2006) 5 SCC 167 wherein the Court observed as under in paragraph 12 and 13 the concept of the obiter dictum thus:

> *"A decision, it is well settled, is an authority for what it decides and not what can logically be deduced therefrom. The distinction between a dicta and obiter is well known. Obiter dicta is more or less presumably unnecessary to the decision. It may be an expression of a viewpoint or sentiments which has no binding effect. See ADM, Jabalpur v. Shivakant Shukla. It is also well settled that the statements which are not part of the ratio decidendi constitute obiter dicta and are not authoritative. (See Divisional Controller, KSRTC v. Mahadeva Shetty)".*

[84] The Supreme Court of India further considered the difference between obiter dicta and ratio decidendi in the case of *Divisional Controller, KSRTC v. Mahadeva Shetty and Another,* (2003) 7 SCC 197 paragraph-23 of which reads as under:

> *"23. .....The decision ordinarily is a decision on the case before the court, while the principle underlying the decision would be binding as a precedent in a case which comes up for decision subsequently. Therefore, while applying the decision to a later case, the court dealing with it should carefully try to ascertain the principle laid down by the previous decision. A decision often takes its colour from the question involved in the case in which it is rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. The only thing binding as an authority upon a subsequent Judge is the principle upon which the case was decided. Statements which are not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative. The task of finding the principle is fraught with difficulty as without an investigation into the facts, it cannot be assumed whether a similar direction must or ought to be made as a measure of social justice. Precedents sub silentio and without argument are of no moment. Mere casual expressions carry no weight at all, nor every passing expression of a Judge, however eminent, can be treated as an ex-cathedra statement having the weight of authority"* (Emphasis Supplied].

Techniques of distinguishing the facts and the law of a previous case

[85] Now, the question is how to distinguish factually, whether the statement of Gooneratne J. is ratio or obiter. It depends on the examination of the facts of the case, the point upon which the decision was made and the necessity of such statement to the decision and then, identify the principle upon which the decision was made. In *Ambica Quarry Works v. State of Gujarat* 1987 (1) SCC 213, the

Indian Supreme Court stated at paragraph 18 that "The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides and not what logically follows from it". Bindra in "Interpretation of Statutes, 10th Edition at page 869 states:

> *"In order to understand and appreciate the binding force of a decision, it is always necessary to see what were the facts of the case and what was the point which had to be decided...".*

[86] Bindra, referring to the techniques of distinguishing the facts of a previous decision from the facts, a case, a Judge is called upon to decide in order to treat a former decision as a binding judicial precedent quotes the following statement from Salmond, Jurisprudence, 11th Ed. pp 223-24, at page 869:

> *"A precedent is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritarian elements is often the ratio decidendi. The concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law as regards the world at large. 'The only use of authorities or decided cases', says Sir George Jessel 'is the establishment of some principle, which the judge can follow out in deciding the case before him'. 'The only thing', says the same distinguished judge in another case, 'in a judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided'. The only judicial principles which are authoritative are those which are thus relevant in their subject matter and limited in their scope. All others, at the best are distinguished from them, under the name of dicta or obiter dicta, things said by the way. The prerogative of judges is not to make law by formulating and declaring it-this pertains to the legislature-but to make law by applying it. Judicial declaration, unaccompanied by judicial application is not of binding authority"* [emphasis added].

[87] Bindra, referring to the judicial authorities that used techniques of distinguishing facts of a previous decision from the facts, a case, a Judge is called upon to decide further states at page 871:

> *"Any judgment of any court is considered to have been necessary to the decision of the actual issue between the litigants. It is for the court, of whatever degree, which is called upon to consider the precedent, to determine what the true ratio decidendi was. It is the reason and spirit of cases that make the law, not the letter of particular precedents. It may be laid down as a general rule that that part alone of a court of law is binding upon courts of co-ordinate jurisdiction and inferior court which the question before the court has really been determined. This underlying principle which forms the only authoritative element of a precedent is often termed the ratio decidendi".*

Ascertainment of ratio decidendi and obiter dictum in *Mohideen v. Commissioner-General of Inland Revenue*

[88] In the light of above-mentioned judicial pronouncements and the legal principles in distinguishing a ratio decidendi from an obiter dictum, our task now is to ascertain whether the statement of His Lordship Gooneratne J. constitutes a ratio decidendi or obiter dictum. It is to be noted that the relevant question of law No. 2 in respect of which the above statement was made by Gooneratne J. in *Mohideen v. Commissioner-General of Inland Revenue* (supra) reads as follows:

> *"Has the Board of Review erred in law by violating the "spirit and intentions" of the first proviso to section 140 (10) of the Inland Revenue Act, No. 38 of 2000 (as amended by Section 52 of Inland Revenue (Amendment) Act, No. 37 of 2003), which makes it imperative that the Board of Review arrives at its determination within two years of the commencement of the hearing of this appeal?"*

[89] Section 140 (10) of the Inland Revenue Act, No. 38 of 2000 as amended by Section 52 of the Inland Revenue (Amendment) Act, No. 37 of 2003 contains 2 provisos and the intention as regards time limit is reflected in the second proviso to section 140 (10), which reads as follows:

> *"Provided, however, the Board shall make its determination or express its opinion as the case may be,* ***within two years*** *from the date of commencement of the hearing of such appeal."*

[90] It is to be observed that unlike in the Inland Revenue (Amendment) Act, No. 37 of 2003, which had given a period of almost **2 years to the Board of Review** to conclude an appeal from the date of commencement of the hearing, the legislature in Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 as amended, has reduced the period within which determination shall be made by the Tax Appeals Commission viz. 270 days from the commencement of its sittings for the hearing of the appeal.

[91] The Appellant in *Mohideen v. Commissioner-General of Inland Revenue* (supra) has referred to the Budget speech made by the Minister in charge of the subject while presenting the Inland Revenue (Amendment) Act, No. 37 of 2003 in Parliament, wherein, a reference has been made that "The final settlement of questions of fact including the Board of Review will be within 04 years" (Vide- p. 176).

[92] Based on the Budget speech, the Appellant's main argument in *Mohideen v. Commissioner-General of Inland Revenue* (supra) as regards the time bar, has been reproduced by His Lordship Gooneratne J. referring to paragraphs 2 and 4 of the written submissions of the Appellant as follows:

> *"3. Therefore, the clear legislative intention was to ensure that an appeal against an assessment is disposed of within a total period of four years (i.e. two years for the appeal to be determined by the Commissioner-General of Inland Revenue and two further years for the appeal to be determined by the Board of review resulting in a total period of four years).;*

4.The instant appeal was taken up for an oral hearing only on 17.02.2006 which is almost 6 ½ years since it was filed. It is submitted that the definition of the word "hearing" as used in the second proviso to section 140 (10) must be interpreted having regard to the legislative intention of disposing of matters before the Board of Review speedily. It would be contrary to the legislative intention (and the Board of Review would be at liberty to make even twenty-five years before orally hearing as appeal) if the operation date for the commencement of the time bar was construed to be the date of the oral hearing...."

[93] Based on the said written submissions, His Lordship Gooneratne J. has identified and referred to the Appellant's main point for the determination of the Court at page 177 of the judgment as follows:

"The Appellant's view is that commencement of the time bar will operate from the date on which he submitted to the jurisdiction of the Board. That would be according to the Appellant on receipt of the Petition of Appeal by the Board and not from the date of the oral hearing. Emphasis on this point is by reference to 140 (10) of Act No. 38 of 2000. As such Appellant submits it is the intention of the legislature that all of it should be concluded in 2 years and in the instant case it took 6 ½ years since filing the petition." [emphasis added]

[94] It was the submission of the learned State Counsel before His Lordship Gooneratne J. as indicated at page 177 that "legislative intention by the use of the word "hearing" in section 140 (10) means an "oral hearing" and no more". His reply submissions as reproduced by His Lordship Gooneratne J. in summary is as follows:

"*Based on Section 140 of the Act, No. 38 of 2000, legislative intended the word 'hearing' to mean an oral hearing; .....*

Section 140 (10) provides that the Board shall confirm, reduce, increase or annul the assessment 'after the hearing' of the Appeal. It is therefore patently evident that the word "hearing" used consistently in Section 140 of Act No. 38 of 2000 means an "oral hearing" and no more".

[95] It is manifest that the main argument advanced by Dr. Shivaji Felix before Gooneratne J. was that as the legislative intention was to dispose of both appeals within **a total period of four years and** the time limit of 2 years will begin to operate from the date on which the **Petition of Appeal is received** by the Board of Review and **not from the date of the oral hearing**. It is crystal clear that the issue before His Lordship Gooneratne J. was whether the legislature intended that the hearing used in the second proviso to Section 140 (10) of the Inland Revenue Act, No. 38 of 2000 as amended, for the calculation of a two-year time period commences from the **date of the oral hearing** as contended by the State or **from the date of the Petition of Appeal** received by the Board of Review as contended by Dr. Shivaji Felix. His Lordship Gooneratne J. answered this question at pp. 176-177 as follows:

"It is very unfortunate that it took almost 6 ½ years or more to reach its conclusion from the date of filing the Petition of Appeal in the Board. But the oral hearing commenced on 21.06.2006. This of course is well within the time limit and I would go to the extent to state that the Board has been very conscious of early disposal of the appeal. Board cannot be faulted for getting the appeal fixed for hearing as stated above since it is the duty and function of the Secretary of the Board to fix a date and time for hearing and to notify the parties. If it was the intention of the legislature that hearing 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. I do agree with the view of the State Counsel. ***Hearing no doubt commences from the date of oral hearing. I would as such answer this question in favour of the Respondent and endorse the view of the Board of Review.*** *It is not time barred as the Board arrived at the determination within 2 years." [emphasis added]*

[96] It is crystal clear that His Lordship Gooneratne J. flatly rejected the argument of Dr. Shivaji Felix that the legislature intended that the hearing should be concluded within 2 years **from the date of filing the petition of appeal** or **that the time period of 2 years begins to run from the date of filing the petition of appeal**. His Lordship Gooneratne J. was not prepared to be guided by the Budget Speech made by the Minister in charge of the subject and hold with the Appellant that the legislative intention was that the hearing should be concluded within 2 years from the date of the filing of the petition of appeal.

[97] For those reasons, His Lordship Gooneratne J. having considered the question involved (Question No. 2) held with the Respondent on the basis that the hearing for the calculation of time limit of 2 years specified in section 140 (10) commences from the date of the oral hearing and not from the date of filing the petition of appeal. In my view the principle laid down by Gooneratne J. in *Mohideen v. Commissioner General Inland Revenue* (supra) was that the hearing for the purpose of time limit of 2 years specified in the second proviso to Section 140 (10) of the Inland Revenue (Amendment) Act, No. 37 of 2003 commences from the date of the oral hearing and no more.

[98] That was the principle upon which the case was decided by His Lordship Gooneratne J. which represents the reason and spirit of the decision and that part alone is the principle which forms the only authoritative element of a precedent in *Mohideen v. Commissioner General Inland Revenue* (supra). Having laid down the principle upon which the case shall be determined on the Question of Law No. 2, His Lordship Gooneratne J. proceeded further to consider the facts of the case and found that the hearing commenced on 17.02.2006 and the determination was made by the Board on 21.06.2006 and therefore, the determination was made within the time limit specified in the said proviso. Thus, His Lordship answered the question No. 2 in favour of the Respondent in the following manner:

"I would in answer to this question of law, hold that the Board has not erred by arriving at its determination the way it was done in this appeal" (p. 177).

[99] After having answered the Question of Law, No. 2 in favour of the Respondent and while fully endorsing the proposition of law that the hearing contemplated in the said time bar provision is nothing but oral hearing and thus, the time bar of 2 years ought to be calculated from the date of the oral hearing, His Lordship made some remarks with regard to the need of adopting a practical and meaningful interpretation to the day-to-day functions in a court of law and statutory bodies. His Lordship remarked that where specific time limits are to be laid down, the legislature has to say so in very clear, unambiguous terms instead of leaving it to be interpreted in various ways. Then, as a passing remark which was not the principle upon which the issue was answered in favour of the Respondent, Gooneratne J. says that *"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". The relevant passage at page 176 reads as follows:*

> *"As such in the context of this case and by perusing the applicable provision, it seems to me that the hearing contemplated is nothing but 'oral hearing'. One has to give a practical and meaningful interpretation to the usual day to day functions or steps in a court of law or a statutory body involved in quasi-judicial functions, duty or obligation. If specific time limits are to be 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."***

[100] Obviously, the last sentence of the passage was not the principle upon which the issue was finally decided in favour of the Respondent in *Mohidden v. Commissioner General Inland Revenue* (supra) that forms part of the reason and spirit of the decision as the authoritative element of the decision. The point in Question of Law No. 2 was decided against the Appellant who argued that the time limit of 2 years ought to be calculated from the date of the receipt of the Petition of Appeal by the Board and not from the date of oral hearing.

[101] That part of the statement enunciated by His Lordship Gooneratne J. that "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 bar" is a passing observation, in the form of an assumption or hypothesis unaccompanied by the principle upon which the case was decided in favour of the Respondent, is manifestly obiter and not the ratio having a binding authority.

[102] On the other hand, His Lordship Gooneratne J. was never called upon to go into the factors, whether or not the second proviso to Section 140 (10) of the Inland Revenue Act could be regarded as mandatory or directory, having regard to the nature, purpose and the design of the statute, the consequences that may flow from non-compliance, if the act is not done within that period. So, those factors were not considered by His Lordship Gooneratne J. in *Mohideen v. Commissioner-General of Inland Revenue* (supra). Also not called upon and not

considered are the factors such as whether or not the non-compliance is visited with some penalties, or the statute provides for a contingency of non-compliance of the time limit provision or any practical inconvenience and injustice to parties who have no control over those entrusted with a statutory duty and deprivation of their statutory rights at their no fault.

[103] In the light of the above discussion, I am of the opinion that, the portion of the statement of Gooneratne J. in question cannot have the character of a ratio decidendi but a mere casual statement or observation or remark which does not form the part of the legal principle upon which the case was decided and thus, it has no authoritative value.

[104] As regards the submission of Dr. Shivaji Felix that the three judgments referred to above and delivered by His Lordship Janak de Silva J. as regards the time bar was decided per incuriam, I desire to say that I cannot agree with Dr. Shivaji Felix that the said three cases were decided by His Lordship Janak de Silva J. in ignorance of the Tax Appeals Commission Act, No. 23 of 2011 or previous binding judicial decisions. Although His Lordship has not specifically referred to the retrospective effect of Section 10 and the avoidance of doubt clause in Section 15, for the reasons stated in this judgment, the non-consideration of these two matters are not the crucial factors in determining whether the legislature intended that the failure to adhere to the time limit specified in Section 10 is mandatory or directory.

[105] His Lordship has clearly considered the relevant part of the previous judgment of Gooneratne J. in *Mohideen v. Commissioner-General of Inland Revenue* (supra) and His Lordship was guided by previous judicial decisions such as *Nagalingam v. Lakshman de Mel* (*supra*), *Visuvalingam v. Liyanage* (*supra*) *Magor & St. Mellons v. Newport Corporation* (supra) and judicial principles found in Maxwell on Interpretation of Statutes.

[106] His Lordship Janak Silva J. decided that the part of the statement in question in Mohideen's case is obiter and for the reasons stated above, I have no reason to disagree with His Lordship's view. For those reasons, I am in agreement with the reasoning of His Lordship Janak de Silva J. in the said decisions that the statement of His Lordship Gooneratne J. in *Mohideen v. Commissioner General of Inland Revenue* (supra) that "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" is obiter dicta.

[107] For those reasons, I hold that the determination of the Tax Appeals Commission dated 24.09.2019 is not time barred.

Question of Law No. 2

Whether assessment was excessive and made without lawful justification

Question of Law No. 3

Whether the Appellant is entitled to the benefit of 10% concessionary tax rate under and in terms of Item 31 of the Fifth Schedule to the Inland Revenue Act, No. 10 of 2006

[108] At the hearing Dr. Shivaji Felix submitted that the Tax Appeals Commission has erred in relying on the erroneous ruling bearing No. Act/03/15/ Ref. No. IC 2014/62 made by the Committee for Interpretation of Tax Laws dated 29.05.2015. By the said Interpretation, the Committee, has ruled that (i) the undertaking referred to in Item 31 means a kind of business and the term "business" has been defined in Section 217 of the Inland Revenue Act, referring to a company; and (ii) the letting or leasing of premises is treated as a business for the purpose of Item 31, only if such activity is carried out by a company.

[109] He submitted that the concept of "undertaking" in Item 31 is wider than the concept of "business", referred to in Section 217, which encompasses a number of different activities including the rental income received by the Appellant from warehouses and Item 31 of the Fifth Schedule to the Act applies to both individuals and companies. He referred to the Sinhala version of Item 31 of the Inland Revenue Act and submitted that it refers to both profits and income of an undertaking and it makes reference to an "individual" and thus, the concessionary rate in Item 31 applies to both the business profits and income of such an undertaking who is either an individual or company. On this basis, Dr. Shivaji Felix contended that the concessionary tax rate referred to in Item 31 applies to an individual who is engaged in renting warehouses, and thus, the income received by the Appellant from renting warehouses qualifies for the preferential rate of tax, independent of whether rents received by such individual constitute business income or rental income.

[110] The learned Senior State Counsel while conceding that an undertaking can and does include "business" as held by this Court in *Polychrome Electrical Industries (Pvt) Ltd v. Commissioner General of Inland Revenue* (CA Tax/49/2019) decided on 26.03.2021, submitted that the rent and income from rent is treated differently in the Inland Revenue Act and in terms of the definition of the term "business" in Section 217, the letting or renting out of a warehouse becomes a business when it is done by a company. She submitted that accordingly, the business income of an individual cannot be treated as business income for the purpose of granting concession under Item 31 of the Fifth Schedule to the Inland Revenue Act.

[111] The Tax Appeals Commission, in its determination dated 21.09.2016 stated that the Appellant is not eligible for the concessionary rate of tax set out in Item 31 of the Fifth Schedule to the Inland Revenue Act for the following reasons:

1. The term “undertaking” means a kind of a business and the term “business” has been defined in Section 217 of the Inland Revenue Act, which restricts the letting or leasing of any premises to a company and not to an individual;

2. The letting or leasing out premises is treated as a business only, if such activities carried out by a company and in case of an individual, income from letting or leasing of properties falls under Section 3 (g) and liable to income tax under Section 6 of the Inland Revenue Act, where the rates and the 25% allowance for repairs and maintenance can be deducted;

3. The Appellant is not involved in the business of operating and maintaining facilities for storage within the meaning of Item 31 of the Inland Revenue Act, but only rents out his premises to persons to be used for storage facilities and office work as seen from the Business Registration Certificate and the lease agreements;

4. The Appellant’s activity of renting out his premises cannot be treated as an undertaking or as a business and that the Appellant’s activity of renting out premises falls within the scope of Section 3 (g) of the Inland Revenue Act.

[112] In view of the rival submissions made by both Counsel, this Court is invited to determine the following four issues:

1. Whether the concessionary tax rate of 10% under and in terms of Item 31 of the Fifth Schedule to the Inland Revenue Act applies only to the business income of a company in view of the definition of the term “business” in Section 217 of the Inland Revenue Act;

2. Even if Item 31 of the Fifth Schedule applies to an individual, whether the Appellant constitutes an undertaking carried on the business of operating and maintaining facilities for storage within the meaning of Item 31 of the Fifth Schedule to the Inland Revenue Act;

3. On the facts and circumstances of this case, whether the income received by the Appellant from leasing out his property is to be treated as business income or rental income from his property;

4. On the facts and circumstances of this case, whether the Appellant is entitled to a concessionary tax rate under Item 31 of the Fifth Schedule to the Inland Revenue Act.

Undertaking set out in Item 31 of the Fifth Schedule to the Inland Revenue Act, No. 10 of 2006, as amended

[113] Before proceeding to deal with the issues involved in the second and third Questions of Law, I shall refer to the relevant provisions of the Inland Revenue Act, No. 10 of 2006, as amended by the Inland Revenue (Amendment) Act, No. 22 of 2011. Item 31 of the Fifth Schedule makes provisions for the concessionary rate of income tax applicable to any undertaking carried on in Sri Lanka for operation and maintenance of facilities for storage, development of software or supply of labour. Item 31 of the Fifth Schedule to the Inland Revenue Act, No. 10 of 2006, as amended reads as follows:

31. The rate of income tax applicable to any undertaking carried on in Sri Lanka **for operation and maintenance of facilities for storage,** development of software or supply of labour.	As per the First Schedule, but subject to a maximum of **10 per centum for an individual**, and **10 per centum for a company.**

[114] One has to consider the object of granting tax concessions to an undertaking under Item 31 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 Item 31, we have to consider whether the concession afforded to an undertaking is confined to a company, and if it applies to an individual, whether the nature of the business activity of such individual qualifies for the tax concession under Item 31 of the Fifth Schedule to the Inland Revenue Act.

Meaning of the expression “undertaking”

[115] The term “undertaking” used in Item 31 of the Inland Revenue Act has not been defined in the Inland Revenue Act. 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" etc. According to Online Dictionary, Merriam Webster, “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”.

[116] The Kerala High Court had 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 acceptance 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)".

[117] 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".

[118] 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, 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).

[119] The ECJ in *Klaus Hofner and Fritz Elser v. Macrotron GmblH,* Case C-41/90 decided on 23.04.1991 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".

[120] In *Polychrome Electrical Industries (Pvt) Ltd v. Commissioner General of Inland Revenue* (supra), this Court held that (i) the undertaking can be broadly described as any entity in a business or trade activity taken as a whole, but does not include individual assets or liability or any combination thereof not constituting a business activity; (ii) 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. It held at paragraph 67 as follows:

> *"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".*

Is an individual entitled to a concessionary rate of tax referred to in Item 31 of the Inland Revenue Act?

[121] Applying the above legal principles, I desire to consider the next question, whether the concessionary rate of tax referred to in Item 31 applies only to a company as submitted by the learned Senior State Counsel. Construing this word "business", the Indian 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".

[122] The word "business" has been narrowly 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**".*

[123] The definition of "business" in Section 217 is inclusive and not exhaustive in nature and thus, it includes an agricultural undertaking, the racing of horses, the letting or leasing of any premises, including any land by a company and the forestry. As noted, the concept of "undertaking" is wider than the mere term "business" referred to in Section 217. It encompasses every entity engaged in an economic activity, and it must be defined in fiscal statutes broadly. It, thus, extends to any business or trading activity of any person, several persons (associated persons), natural or legal and separate activities within the entity (*Polychrome Electrical Industries (Pvt) Ltd v. Commissioner General of Inland Revenue* (supra). It is immaterial whether the undertaking that carries out such business or trading

activity is performed by any company or individual, or several persons, natural or legal persons within such entity, so long as such individual or company also fulfils the conditions set out in Item 31 of the Inland Revenue Act.

[124] It is to be noted that the First Schedule to the Inland Revenue Act sets out the rates of income tax applicable to individuals other than any receivers, trustees, executers or liquidators, and the Second Schedule sets out the rates of income tax applicable to companies. The Fifth Schedule sets out the rates of income tax applicable, notwithstanding the rates specified in the First, Second and Third Schedules. The Second Column of Item 31 of the Fifth Schedule to the Act refers both to a company and individual as follows:

> *''As per the First Schedule, but subject to a minimum of 10 per centum* ***for*** *an* ***individual*** *and 10 per centum* ***for a company****."*

[125] The Sinhala version of Item No. 31 also reads as follows

> පළමුවන උපලේඛනය ප්‍රකාරව, එහෙත් පුද්ගලයෙකු සම්බන්ධයෙන් සියයට 10 උපරිමයකට සහ සමාගමක් සම්බන්ධයෙන් සියයට 10...

[126] If the intention of the legislature was to limit the tax concession to a company as the Respondent argued, the reference to an "**individual"** in the Second Column of Item 31 of the Fifth Schedule to the Inland Revenue Act is meaningless. At the hearing, the learned Senior State Counsel conceded that the Sinhala version of Item 31 makes reference to an "**individual"** however, offered no explanation as to why the Second Column refers to an "**individual"** if the intention of the legislature was to limit the concession to a company. Further, Section 217 of the Inland Revenue Act, No. 10 of 2006 as amended, defines the term "person" as follows:

> *"Person" includes a company or body of persons or any government".*

[127] On the other hand, the Sinhala version of Item 31 of the Fifth Schedule to the Inland Revenue Act, as amended, refers to both profits and income of the undertaking and thus, Item 31 captures both profits and income. The Sinhala version reads as follows:

> ගබඩා කිරීමේ, මෘදුකාංග සංවර්ධනය කිරීමේ හෝ කම්කරුවන් සැපයීමේ පහසුකම් ක්‍රියාත්මක කිරීම සහ පවත්වාගෙන යෑම සඳහා ශ්‍රී ලංකාවේදි පවත්වාගෙන යනු ලබන යම් ආයතනයක් ලාබ සහ ආදායමට අදාළව ආදායම් බදු අනුප්‍රමාණය...

[128] The word "undertaking" therefore, should be understood to have been used in Item 31 in a wide sense, and must be understood as one taking in its fold all collective business or trading activities, a person or company may undertake as one economically independent and self-sustaining indivisible entity **subject to the purpose and activity** referred to in Item 31 of the Act.

[129] In my view, the concept of “undertaking” referred to in Item 31 is wider than the mere term “business” referred to in Section 217 of the Inland Revenue Act. It is not limited to the activities carried out by a company as incorrectly found by the Tax Appeals Commission. It applies both to an individual and a company and profits and income earned by an individual or company, as long as such individual or company in the nature of an undertaking carried on business or trading activities as a whole, from which profits and income arise **for the purpose and activity referred to in Item 31 of the Fifth Schedule** to the Inland Revenue Act.

Rental income vs. business income

[130] But, the determination of the Tax Appeals Commission did not rest there. The Tax Appeals Commission has proceeded to consider the next crucial question whether the Appellant is involved in the activity of operating and maintaining facilities for storage. On facts, the Tax Appeals Commission has decided that the Appellant is not engaged in operating and maintaining facilities for storage as required by Item 31, but the income received by the Appellant by leasing out his premises for storage constitutes only a rental income under Section 3 (g) and not a business income. For the said reasons, the Tax Appeals Commission disallowed the tax concession sought by the Appellant under Item 31 of the Fifth Schedule to the Inland Revenue Act. The last paragraph of the determination made by the Tax Appeals Commission at page 7 of the TAC brief confirms this position.

[131] The next question is whether the rental income received by the Appellant can be considered as a business income for the purpose of Item 31 of the Inland Revenue Act, irrespective of the fact that the concession in Item 31 applies to an individual or a company, and profits or income of an undertaking. The question whether the rental income falls into the category of business income within the meaning of Item 31 of the Fifth Schedule to the Inland Revenue Act, depends on the type of the activity that is carried on by an undertaking in Sri Lanka and the purpose referred to in Item 31 of the Act.

[132] At the hearing Dr. Shivaji Felix submitted that the Tax Appeals Commission was wrong in holding that the taxpayer must be engaged in the activity of operating and maintaining a facility for storage to be eligible for the concessionary tax rate of 10%. He submitted that the premises in question have been constructed for the purpose of warehouses and that they are used for the purpose of storage facility other than a small part of the premises, which is used as office space. His contention was that the warehouses in question are dedicated warehouses and therefore, the Appellant is engaged in providing almost 90% of warehouse facilities to others for which rent was charged.

[133] Dr. Shivaji Felix submitted that if the taxpayer is operating the warehouse facility, he has to use the storage facility for himself and thus, it would not be a source of profit or income to him, but a cost to the person using the facility. He further submitted that the Tax Appeals Commission has erred in fact and law when it came to the conclusion that the Appellant was engaged in renting premises for office use and not for the purpose of warehousing when only a small portion of the premises was rented for office use. His contention was that the said part that was rented for office space could be excluded while the eligible part of the rental income can be taxed at the concessionary tax rate prescribed by Item 31.

[134] The learned Senior State Counsel, however, submitted that in terms of Item 31, the concessionary rate of 10% can only be granted if the Appellant is operating and maintaining a facility for storage, but merely providing a storage facility to others and collecting a rent is insufficient for the eligibility under Item 31 of the Fifth Schedule. She referred to the lease agreements in question and disputed the position of the Appellant that the warehouses in question are dedicated warehouses as claimed by the Appellant.

[135] She submitted that at least three premises have been used for the office work and some lease agreements had imposed the liability of getting the respective premises and goods insured on the lessees and obtaining the fire insurance policies and installing the firefighting equipment at their own cost. She submitted that no evidence has been placed by the Appellant to establish that the Appellant was operating and maintaining a facility for storage and therefore, the Appellant is not entitled to 10% concessionary rate of tax as correctly determined by the Tax Appeals Commission.

[136] It would be important now to refer to the following findings of the Tax Appeals Commission that are indicated at pages 165-166 of the brief:

> *"From the material referred to above, it is clear that the income received by the Appellant is rent income which will fall under Section 3 (g), of the Inland Revenue Act. According to the Business Registration Certificate, there was no reference at all that, the Appellant was in the business of providing storage facilities. Further, it would appear that the Committee for interpretation of Tax Laws of the Inland Revenue Department has also considered the question, whether the Appellant was involved in providing storage facilities and has come to the conclusion that the Appellant was not involved in the business of operating and maintaining facilities for storage, but he only rents out his premises to persons to be used for storage facilities and office purposes. According to the lease agreement that the Appellant has entered into with the Company named Ashutosh Marine and Management Consultancy Services (Pvt.) Ltd., that was produced marked D3, by the Representative for the Respondent, clause 10 of the said agreement, the Appellant had rented out his premises to the said Company 'for the sole purpose of office work and not to be used for the storage of*

items'. This clearly shows that the Appellant's income was for renting out his premises and that he was not involved in operating and maintaining facilities for storage".

Whether the Appellant is operating and maintaining facilities for storage

[137] In order to earn the benefit under Item 31, the following conditions must be satisfied by the Appellant, namely,

(i) the Appellant is an undertaking carried on in Sri Lanka.

(ii) the Appellant being an undertaking, must have derived profits or income from storage facilities (warehouses); and

(iii) the Appellant being an undertaking, must have carried on in Sri Lanka **for operation and maintenance of facilities** for (a) storage, (b) development of software; or (c) supply of labour.

[138] It is significant to note that the words "rate of income tax applicable to any undertaking" occurring in Item 31 of the Act are qualified by the words "carried on in Sri Lanka for operation and maintenance of facilities for storage, development of software or supply of labour". In line with the meaning of the expression "undertaking" referred to in paragraph 123 of this judgment, the warehouses in question for the purpose of Item 31, should have been rented or let or leased out for activities, namely, the **operation and maintenance of facilities** and for purposes, namely, the **storage**, **development of software** or **supply of labour** in the course of business or trade of the Appellant. If the warehouses are used for any other activity or purpose, the benefit of a concession under Item 31 of the Act would not be available to the Appellant.

[139] Dr. Shivaji Felix's argument appears to be that the expression "for operation and maintenance of facilities for storage...." must not be understood in their strict dictionary sense, because that would defeat the very purpose of encouraging persons to build warehouses for the purpose of storage. His argument is that such a strict application would result in imposing an obligation on the Appellant to use the facility for himself-not rent it out to others as a source of profit or income to him, but only a cost. According to him, the tax concession for operating storage facility was given to facilitate trade and trade activities and the expression "for operation and maintenance for facilities for storage " must take colour from the purposes for which they are expected to be rented, one of them being facilitating the trade and if the concession is limited to an undertaking, which is engaged in operating and maintaining facilities for storage, it would be impossible for the taxpayer to earn profit or income from renting such storage.

[140] Applying the principles discussed earlier, the distinction between rental income and business income must be understood in the context of the scheme, object and principles of the concession afforded under Item 31 of the Inland Revenue Act. A business income can include income from any business or trade activity carried out by a taxpayer for profit or with a reasonable expectation of profit, which may include a profession, vocation, trade, manufacturing endeavour, an undertaking of any kind, as well as a venture or concern in the nature of trade.

Beneficial provision in a tax statute

[141] It has long been a well-established principle that strict application of taxing statutes applies only to taxing provisions such as charging provision or provision imposing penalty and not to those parts of a nature of a statute which contains a machinery provision (*Indian Explosives Ltd v. Kanpur Nagar Mahapalika* (1982) All LJ 11140 & *Commissioner of Agricultural Income Tax: Calcutta v. National Tag Traders* AIR 1980 SC 301).

[142] A beneficial provision that contains a concession in rates of tax is a type of incentive provided to a taxpayer to reduce his tax liability, either by exemption, deductions and exclusions and such concessions are provided with a view to encourage and promote activities such as industrial, manufacturing, agricultural activities and development of commercial activities. Where there is a beneficial provision in a tax statute, it should be liberally construed so long as such concession does not make violence to the plain meaning of such provision, impair the legislative requirement and the spirit of the provision.

[143] A construction of such a provision depends, *inter alia,* upon the purpose for which the concession is sought to be granted and upon the fulfilment of such conditions as may be specified therein. It is well-settled that in order to claim the benefit of a tax concession, a party who seeks such concession must comply with all the conditions of a provision and the benefit is not conferred, by stretching or adding words to the provision. In *State Level Committee v. Morgardshammar India Ltd* AIR 1966 SC 524, the Indian Supreme Court held that:

> *"..... It must be remembered that no unit has a right to claim exemption from tax as a matter of right. His right is only insofar as it is provided.... While providing for exemption, the Legislature has hedged it with certain conditions. It is not open to the Court to ignore these conditions and extend the exemption."*

[144] It will appear from the scheme used in the Inland Revenue Act that the legislature has granted tax concessions under Item 31, with a view to encouraging an undertaking carried on business in Sri Lanka for operation and

maintenance of facilities (activities) in respect of three main purposes namely, storage, development of software or supply of labour.

[145] The legislature advisedly used the words "for operation and maintenance of facilities for storage" because the intention of the legislature in granting concessionary tax rate was to encourage any undertaking to carry on business for operation and maintenance of facilities for storages or development of software or supply of labour as a source of income for such undertaking for meeting operating and maintaining costs of such warehouses.

[146] If it was the intention of the legislature to extend the benefit to profits and income derived by mere letting or renting or leasing out warehouses irrespective of whether, it was involved in operating and maintaining facilities for storage, it would not have used the words "the rate of income tax applicable to any undertaking carried on in Sri Lanka **for operation and maintenance of facilities for storage**….". It could have easily used the words "The rate of income tax applicable to any undertaking carried on in Sri Lanka for storage….".

[147] The key words are "for operation and maintenance of facilities for storage", which refer to the operation and maintenance of facilities for whole storage and not that the undertaking shall also use the storage individually by itself either to store goods or provide services therefrom. I do not think that the words "for operation and maintenance of facilities for storage" used in Item 31 prevent a taxpayer from renting or leasing out his warehouses to others and making an income or profit as submitted by Dr. Shivaji Felix. I am not impressed by the argument that it would not be possible for the Appellant to derive a profit or income by renting out his warehouses to others when the taxpayer is engaged in the business of operating and maintaining facilities for storage as referred to in Item 31 of the Inland Revenue Act.

[148] All what is intended by the legislature is that the undertaking must be engaged in the business or trading activity of operating and maintaining facilities for storage and Item 31 does not in any way, prevent such undertaking from deriving profits or income by letting or renting or leasing out warehouses to others while operating and maintaining facilities for storage.

[149] If the argument advanced by Dr. Shivaji Felix holds water, the words in Item 31 "**for operation and maintenance of facilities for storage**" will be meaningless. What will happen, if the benefit is extended to "mere provision of storage without fulfilling the condition of "operation and maintenance of facilities for storage", referred to in Item 31? If the words "operation and maintenance of facilities for storage", are not given their natural meaning, it will defeat the legislative intent and enlarge the legislative intent by disregarding a condition precedent to the operation of the concessionary tax rate in Item 31.

[150] In my view, the legislative intent was to encourage a taxpayer to carry on the business of operating and maintaining facilities for storage as an undertaking, and derive business income from such storage facilities in the

course of its business or trading activity while providing storage facilities to those who are otherwise unable to afford storage facilities for themselves.

Whether the income received from warehouses can be treated as business income

[151] The next question is to consider whether, the rental income derived by the Appellant from warehouses can be treated as a business income in the circumstances of the case. One should first determine whether the rents are income from a business of the Appellant as an undertaking and if so, whether the concession will be applicable under Item 31. A distinction has to be made between the income received by any individual from merely renting or letting or leasing out a warehousing facility and income received by any individual in the nature of an undertaking from operating and maintaining facilities for storage in the course of its business or trading activity. The former may involve the costs of constructions and other ancillary expenses while the latter involves not only costs of construction, but also operation and maintenance costs of storage facilities, such as cooling, lighting, water, cleaning, security, depreciation, repair, staircase, insurance, forklift trucks and staff and personnel costs and services.

[152] The general rule is that the income received from mere renting out of properties is a common type of rental income and not business income unless such income was received in the course of carrying on business of renting out such property where the acquisition, use, management or disposition of such property makes up an integral part of one's business operations.

[153] Dr. Shivaji Felix however, submitted that the rental income received by a company or individual is treated as business income by operation of law. Referring to two UK decisions, he submitted that prior to the statutory clarification, traditionally, the renting of premises was not considered to be a business income but it was considered as investment income (*Salisbury House Estate Ltd v. Fry* (1930) 15 TC 266*)* or a receipt arising from the ownership of property (*Griffiths v. Jakson* (1983) STC 184. (See also- consolidated written submissions at paragraphs 44-45). In *Griffiths v. Jakson* (supra), Vinelott J. quoted with approval the dictum of Lord McMillen in *Fry (Inspector of Taxes) v. Salisbury House Estate Ltd* (1930) AC 432 at 468 that "it is a cardinal principle of UK tax law that income derived from the exercise of property rights by the owner of land is not income derived from the carrying on of a trade".

[154] Dr. Shivaji Felix however, submitted that there was scope in certain contexts to treat rental income as business income and cited the following opinion of Lord Diplock in *American Leaf Blending Co. Sdn v. Director-General of Inland Revenue* (1978) STC 561, at p. 564 in support of his contention:

> *"So, it is clear that 'rents', despite the fact that they are referred to in para (d) of s. 4, may nevertheless constitute income from a source consisting of a*

business if they are receivable in the course of carrying on a business of pursuing the taxpayer's property to profitable use by letting it out for rent".

[155] A perusal of the said decision reveals that Lord Diplock by applying the decision in *Commissioner of Income Tax v. Hanover Agencies Ltd. [1967] 1 A.C. 681* P.C. has held that:

1. The five paragraphs in section 4 of the Income Tax Act 1967 specifying the five classes of income in respect of which tax was chargeable under the Act were not mutually exclusive, so that "rents", despite being referred to in paragraph (d), could constitute income from a business source under paragraph (a); that, where premises were let in the course of carrying on the business of putting them to a profitable use, section 43 (1) gave primacy to the classification of the rents receivable as income from a source consisting of a business notwithstanding that they might also be classified as "rents" (post, p. 683C-E);
2. Where a company had been incorporated for the purpose of making profits, any gainful use to which it put its assets prima facie amounted to the carrying on of a business; that, although the fact that the letting of its premises was included in the objects of the company was not conclusive in deciding that the company was carrying on a business, since the only conclusion of fact which any reasonable commissioners could have reached on the evidence was that the company was carrying on a business of letting its premises for rent, it was unnecessary to remit the case for further consideration and the order of the High Court should be restored (post, pp. 683E-H, 684C, F-H).

[156] Lord Diplock referring to an "individual" however, distinguished the criteria to be applicable to a "company" from an "individual" and stated:

> *"In the case of a private individual, it may well be that the mere receipt of rents from property that he owns raises no presumption that he is carrying on a business. In contrast, in their Lordships' view, in the case of a company incorporated for the purpose of making profits for its shareholders any gainful use to which it puts any of its assets prima facie amounts to the carrying on of a business. Where the gainful use to which a company's property is put is letting it out for rent, their Lordships do not find it easy to envisage circumstances that are likely to arise in practice which would displace the prima facie inference that in doing so it was carrying on a business".* (p. 684).

[157] Dr. Shivaji Felix concedes that the question as to whether any rental income received by the Appellant could be regarded as business income within the contemplation of Section 3 (a) of the Inland Revenue Act is a question of fact (Vide- paragraph 116 of the consolidated written submissions). On examination of the above-mentioned decision, I however find that the statement of Lord

Diplock referred to in paragraph 156 above, advances the case of the Respondent rather than furthering the case of the Appellant.

Factors used in distinguishing rental income from business income

[158] In order to determine whether, the taxpayer is carrying on a business or merely earning rental income by letting out premises, the dividing line is to identify the nature of the activity and its dealings with the property. Now, I proceed to consider the Indian case law that has addressed the distinction between the rental income and the business income from warehouse facilities provided to others by taxpayers.

[159] In the case of *CIT v. Calcutta National Bank Ltd.* (1959 AIR 928), the Indian Supreme Court held that the realisation of rental income by the assessee was in the course of its business in the prosecution of one of its objects in its memorandum and was liable to be included in its business profits and was assessable to tax as a business profit. In the Indian Supreme Court case of *Universal Plast Ltd. v. Commissioner of Income Tax,* decided on 23 March, 1999, it was decided that where the assessee is engaged in the business of giving cotton, stopped its business and let out godowns and also separated machinery and let out pressing factory to a metal pressing factory, rental income derived therefrom could not be assessed as business income.

[160] In *East India Housing and Land Development Trust Ltd v. Commissioner of Income Tax, West Bengal* (1961) 42 ITR 49, the question arose for consideration, whether the rental income that is received was to be treated as income from the house property or the income from the business. The Court took the view that the income derived by the company from shops and stalls is income received from the property and such income shall be treated as income from the house property and not income from a business (paragraph 3). The Court based its decision in the context of the main objective of the company and took the view that letting out of the property was not the object of the company at all. The Court was of the opinion that the character of that income which was from the house property had not altered because it was received by the company formed with the object of developing and setting up properties. J.C. Shah, J. stated at paragraph 6:

> *"6. The income received by the appellant from shops is indisputable income from property; so is the income from stalls from occupants. The character of the income is not altered merely because some stalls remain occupied by the same occupants and the remaining source of income from the stalls is occupation of the stalls, and it is a matter of little moment that the occupation which is the source of the income is temporary. The income-tax authorities were, in our judgment, right in holding that the income received by the appellant was assessable under section 9 of the Income Ttax Act".*

[161] In *Karanpura Development Co. Ltd. v. Commissioner of Income Tax, West Bengal,* 44 ITR 362 (SC), the Court took the view at paragraph 13 that "*the deciding factor is not the ownership of land or leases, but the nature of the activity of the assessee and the nature of the operations in relation to them. The objects of the company must also be kept in view to interpret the activity*" [emphasis added]. The position in law, ultimately, was summarised by M. Hidayatullah, J. in the following words:

> *"34. As has been already pointed out in connection with the other two cases where there is a letting out of premises and collection of rents the assessment on a property basis may be correct but not so, where the letting or sub-letting is part of a trading operation. The dividing line is difficult to find; but in the case of a company with its professed objects and the manner of its activities and the nature of its dealings with its property, it is possible to say on which side the operations fall and to what head the income is to be assigned.*
>
> *35. Ownership of property and leasing it out may be done as a part of business, or it may be done as landowner. Whether it is the one or the other must necessarily depend upon the object with which the Act is done. It is not that no company can own property and enjoy it as property, whether by itself or by giving the use of it to another on rent. Where this happens, the appropriate head to apply is "income from property" (section 9), even though the company may be doing extensive business otherwise. But a company formed with the specific object of acquiring properties not with the view to leasing them as property, but to selling them or turning them to account even by way of leasing them out as an integral part of its business cannot be said to treat them as landowner but as trader".*

[162] After applying the aforesaid principle to the facts, the Court found that (i) the sub-leases were granted, because the assessee company wanted, was a matter of business, to turn its rights to account by opening out, and developing the areas, and then granting these sub-leases with an eye to profit; (ii) the assessee company having secured a large tract of coal-bearing land parcel, developed it into a kind of stock-in-trade to be profitably dealt with, extended its business acquiring fresh fields. In the circumstances, the Court came to the conclusion that the nature of the business was trading within the objects of the company and not enjoyment of property as land owner and thus, that income had to be treated as income from business and not as income from house property.

[163] In *Atma Ram Properties (P) Ltd. v. CIT (2006)* 102 TTJ Delhi 345, the Indian Supreme Court held that rental income derived by the assessee company by letting out a property simplicitor, was chargeable to tax under the head "income from house property" and not as business income, irrespective of the fact that the assessee company was doing business of acquiring, developing and selling properties as the rental income was received by it because of

ownership of the property and not by exploitation of property by way of complex commercial activity. While holding that the rental income received by the assessee does not become income from trade or business, Jagtap, A.M. J. held:

> "*25*. ....., *the legal position which emerges can be summarised as follows. If in the given case, the assessee is found to be the owner property and rental ITA No. 273/D/2013 & 1134/D/2013 Asstt. Years: 2006-07 & 2005-06 income is earned by him by letting out predominantly the said property, such rental income will be assessable under the head "Income from house property" and not "Profits and gains of business or profession". What is let out should be predominantly the said property inasmuch as the rental income should be from the bare letting of the tenements or from letting accompanied by incidental services or facilities".*

[164] The Appellant has registered the Certificate of Business which sets out the type of business activities he was carrying on as part of the nature of his business activities. A bare perusal of the Business Registration Certificate produced by the Appellant marked "D1" (page 121) confirms that the Appellant has registered his business name, "Paul Tradings" on 22.01.2004 and the Appellant is engaged in several business activities, but there is nothing to indicate in the said Certificate that the Appellant is engaged in any activity similar to the providing of storage facility under his business "Paul Tradings" or that the income earned by letting out those properties is the predominate business objective of the Appellant.

[165] The said Certificate of Business reveals that the general nature of the business of the Appellant was, not to set up, operate and maintain facilities for storage and make a substantial investment by acquiring and installing plant and machinery so as to develop, operate and maintain facilities for storage. No material has been placed before the assessor or the Commissioner-General of Inland Revenue by the Appellant to prove that the Appellant has registered his individual business for the operation and maintenance of facilities for storage and received income from his predominant business activity of renting out his premises during the relevant assessment years.

[166] Dr. Shivaji Felix, however, submitted that the liability to pay income tax is not dependent upon having a business registration certificate and for the purpose of qualifying for the tax concession, what matters is whether the Appellant is engaged in providing warehouse facilities. The Indian Supreme Court in *Sultan Brothers (P) Ltd. v. CIT* (1964) 51 ITR 353 (SC)/ 1964 AIR 1389, 1964 SCR (5) 807, held that (i) merely an entry in the object clause showing a particular object would not be the determinative factor to arrive at conclusion whether the income is to be treated as income from business; and (ii) such a question would depend upon the circumstances of each case to decide whether the letting was the doing of a business or the exploitation of his property. Sarkar, J. held at paragraph 9:

"We think each case has to be looked at from a businessman's point of view to find out whether the letting was the doing of a business or the exploitation of his property by an owner. We do not further think that a thing can by its very nature be a commercial asset. A commercial asset is only an asset used in a business and nothing else, and business may be carried on with practically all things. Therefore, it is not possible to say that a particular activity is business because it is concerned with an asset with which trade is commonly carried on. We find nothing in the cases referred, to support the proposition that certain assets are commercial assets in their very nature".

[167] Dr. Shivaji Felix is correct in saying that the ownership of land or lease is not the sole criteria in deciding whether the rent received from warehouses is business income or rental income as observed by the Indian Supreme Court in *Karanpura Development Co. Ltd. v. Commissioner of Income Tax, West Bengal* (supra) *and Sultan Brothers (P) Ltd. v. CIT* (supra). But I am not inclined to agree with his view, as noted previously, that all that the Appellant has to satisfy is that he was merely engaged in providing warehouse facilities to be eligible for tax concession under Item 31 of the Inland Revenue Act. The absence of any reference in the business registration certificate to the renting out the Appellant's properties may not be the sole test, but it is one of the factors to be considered in identifying the nature of business activity of the Appellant and deciding whether the Appellant was carrying on a business or trade for the operation and maintenance of facilities for storage as an undertaking.

[168] While the objects of the business must be kept in mind in deciding the factors, the nature of the activity and the nature of the operations of the taxpayer in relation to them are the vital factors in deciding whether the income from warehouses could become a rental income or business income (*Karanpura Development Co. Ltd. v. Commissioner of Income Tax, West Bengal* (supra). The Indian judgments have given a demarcation line by providing a proposition that where the main object of the company is to acquire and hold properties and to let out those properties, then the rental income may be treated as income from business and not as income from house property. The question whether an income of an individual is to be treated as income from business or mere rental income **depends upon the particular circumstances of each case** as held in *Karanpura Development Co. Ltd. v. Commissioner of Income Tax, West Bengal'* (supra) and *Sultan Brothers (P) Ltd. v. CIT* (supra).

[169] In the light of above judicial pronouncements, it is significant to consider the facts and circumstances of the present case and examine first, whether the nature and the activity of the Appellant was such that he was carrying on 'business of operating and maintaining facilities for storage and second, if so, whether the income derived from leasing out his warehouses could be treated as business income of the Appellant in the course of his business of operating and maintaining facilities for storage.

[170] From the details furnished in the brief, it appeared that apart from constructing a building to be used as a warehouse facility and leasing them out to several companies subject to common terms and conditions set out in any lease agreement, no material has been placed by the Appellant to show that he has installed plant and machinery such as central air-conditioning, overhead cranes, material handling facilities, fire-fighting equipment and fire appliances and provided specific services in the premises leased out to his lessees.

[171] According to most of the lease agreements, the premises are to be used for storage facility by the lessees however, the lease agreement at page 119 reveals that the leased premises bearing assessment No. 415/4/1/1, First Floor containing 1350 SF has been leased out to Ashutosh Marine and Management Consultancy Services (Pvt) Limited **for the sole purpose of office work** (p. 119 (a). Clause 10 states as follows:

> **"**10. To use the said demised premises for the sole purpose of office work and not to be used for the storage of items".

[172] The Appellant in his letter dated 15.08.2014 addressed to the Secretary, Interpretation Committee (p. 38) has admitted that according to the agreements entered into with the users of the facility that, except three premises, other premises are used for storage facility (paragraph 5). According to the schedule of premises listed out for the purpose of the Interpretation Committee at page 37 of the brief, the same premises (415/4/1/1 and 415/4) are being used for storage and office by Excel Trading. The schedule clearly sets out that two more premises (No. 415/4/1-item No. 7) and No. 415/2/1-item No. 9) are also being used for office purposes. It is apparent that at least three premises had been used by the taxpayer during the year in question for the sole purpose of office work and not for storage facility as specified in Item 31 of the Act.

[173] A perusal of the most of the lease agreement at pages 113-119 indicates that there had been no central air conditioning provided to each store and the users are responsible for the installation of their own air conditioners and other electrical appliances, maintaining and repairs (clause 4), firefighting equipment, fire appliances and maintaining such equipment (clause 13), employment of day and night security services for the safety of their own goods at their premises (clause 21) and insuring their own goods on the premises in question (clause-30).

[174] Identical clauses such as the responsibility of the lessee to insure its own property (clause 29) and provide firefighting equipment, appliances and maintain such equipment (clause 13) and insure its own property (clause 29), are contained in Agreement No. 276 at page 34 of the brief. Identical clauses such as the responsibility of installation and maintenance of air conditioners, firefighting equipment, providing security services and insurance of the premises

(clauses 4, 13, 21, 30) are contained in the Lease Agreement No. 222 at page 29 of the brief.

[175] The rent charged by the Appellant includes a 10 % service charge being the aggregate lease rental for the entire term (see- lease agreements at pages 34 and 29 of the brief) and in case of lease agreement at page 119, the monthly rental of Rs. 35,000/- was charged plus 15% or other prevailing taxes (page 118). There is nothing to indicate what specific services are included in the 10% service charge and thus, it could only be regarded as a fee for providing ancillary services to the Appellant's lessees as part of his rental income. It is absolutely clear that apart from charging the 10% service fee for providing ancillary services, no reference is made in the lease agreements with regard to the provision of specific facilities and amenities for safe storage and handling of goods in an efficient manner within the warehouses.

[176] A warehouse operation may cover several important operations such as developing warehouse infrastructure, operating services and customer safety measures etc. A storage maintenance may also include the upkeeping and repairing services provided for storage facilities such as storage hardware, replacement of storage components, engineering and technical resources and services either through directly without third party or through third party maintenance contracts.

[177] Had these facilities been provided, the Appellant would have employed a considerable workforce, both skilled and semi-skilled staff to whom salaries are to be paid regularly. No material has been placed by the Appellant that he carried on an organised activity with a view to commercially exploiting the infrastructure developed at a substantial cost, so that it could be treated as an undertaking engaged in operating and maintaining facilities for storage as specified in Item 31. No proof has been placed by the Appellant to come to such a conclusion as clearly observed by the Tax Appeals Commission.

[178] The legislature has been careful enough to introduce in Item 31 itself, a clarification by using the words "for operation and maintenance of facilities for storages". If the letting out of a warehouse is only for storage purpose while not engaging in operation and maintenance of facilities for storage as an undertaking, the question of concession under Item 31 would not arise.

[179] These observations do support the contention of the learned Senior State Counsel that the expression "for operation and maintenance of facilities for storage" would suggest that in order to earn the benefit of tax concession under Item 31, the Appellant must show that he was engaged in the operation and maintenance of facilities for storage and that he derived income predominantly from leasing out his premises in the course of business or trading activities. It is only after the Appellant has succeeded in establishing those elements that he would be entitled to the concession provided in Item 31.

[180] In *Griffiths v. Jakson* (supra), Vinelott J. quoted with approval the following dictum of Lord Greene MR in *Croft (Inspector of Taxes) v. Sywell Airdrome Ltd* (1942) 1 K.B. 317 at 329 when drawing the distinction between income derived from the exploitation of property rights and income derived from the carrying on of a trade:

> *"…why and on what principle is a person who, for example, sets up a refreshment stall on his land and provides services for people admitted to his land, not exhaustively taxed under Schedule A or B (as the case may be) in respect of or occupation save in the sense and to the limited extent that he must own or occupy the land before he can erect and carry on the refreshment stall or perform the services. The profits earned in such a case are referable, not to the exercise of the rights of property or of occupation since the customers come on to the land for the purpose of obtaining refreshment or procuring the benefit of the services. If on the other hand, the owner of land having (let me suppose) a remarkable view or some historic monument merely allows the public to come on to the land in return for an admission fee, I cannot myself see why it should be said that his profits are not covered by the Schedule A assessment since all that he is doing is to exploit his right of property by grating licences to come upon the land. The fact that he keeps the paths in order or the monument in repair in order to make a visit more attractive to the public again appears to me to make no difference, any more than does the action of the landlord of a house in keeping it in repair."*

[181] Having considered the relevant authorities, Vinelott J. concluded as follows:

> *"When the income derived by the owner from letting furnished, whether for a short or a long term and whether in small or large units and whether in self -contained units or to tenants who share a bathroom or kitchen or the like, is not income derived from carrying on a trade but is still taxable under Sch. A or, in the case of para. 4, under Case VI of Sch. D. Of course, if the owner provides services and the services are separately charged or the receipts can be otherwise apportioned in part to the provision of the services any profit derived from the provision of the services will be taxable as the profits of a trade."*

[182] The Appellant has not placed any credible material to satisfy that the nature of the leasing out his premises is an integral part of the business or trading operation of the Appellant who is engaged in operating and maintaining facilities for storage and not enjoyment of property as the land owner by merely leasing out his premises to others. The mere fact that the Appellant has leased out his premises to his lessees and derived a rental income from warehouses cannot, for that sole reason be treated, as carrying on a trade or business as an undertaking referred to in Item 31. The facts and the circumstances clearly indicate that it is a case of a leasing out the property owned by the Appellant and deriving rental income from the subject premises simplicitor as indicated in

the lease agreements. It is not a case of exploitation of the property predominantly for carrying on a trade or business by an undertaking and deriving income from operating and maintaining facilities for storage.

[183] As such, considering all the facts and circumstances of the case and keeping in view the legal position emanating from various judicial pronouncements discussed hereinabove, I hold that the income received by the Appellant from leasing out his warehouses in the year under consideration cannot be treated as a business income but only as a rental income as correctly determined by the Tax Appeals Commission.

[184] For those reasons, the income received by the Appellant from leasing out his properties would fall under Section 3 (g) of the Inland Revenue Act as rental income and therefore, the Appellant is not entitled to the tax concession under Item 31 of the Fifth Schedule to the Inland Revenue Act as correctly determined by the Tax Appeals Commission.

Question of Law No. 4

Appellant's alternative claim for concessionary tax rate of 10% under section 59B of the Inland Revenue Act

[185] Dr. Shivaji Felix submitted that the Tax Appeals Commission has failed to correctly consider whether the Appellant was entitled to be taxed at a concessionary tax rate contemplated by Section 59B of the Inland Revenue Act. He submitted that the concessionary tax rate contemplated by Section 59B applies to both profit and income and therefore, it would cover both business profits as contemplated by Section 3 (a) and rental income as contemplated by Section 3 (g). He further submitted that the turnover in issue for the years of assessment 2011/2012 and 2012/2013 is less than rupees three hundred million and, therefore, the Appellant is entitled to be taxed at the concessionary tax rate of a maximum of 10% as set out in Item 33 (a) of the Fifth Schedule to the Inland Revenue Act.

[186] The learned Senior State Counsel, however, submitted that the service charge of 10% referred to in lease agreements is connected to the rental income of the Appellant and thus, the income received from renting out the premises cannot be separated from the service charge when calculating the service income of any undertaking under Section 59B. She further submitted that the Appellant had agreed to take 10% of the total service fee as profit for service section and that the Appellant has failed to produce any document to prove that he had received a separate service income from the warehouses in question.

[187] Section 59B (2) of the Inland Revenue Act reads as follows:

"For the purpose of this section "undertaking" in relation to any year of assessment means any undertaking-

(a) engaged in the manufacture of any article or in the provision of any service; and
(b) the turnover of such undertaking (other than from the sale of any capital asset) for that year of assessment-

(i) being any year of assessment commencing on or after April 1, 2001 but prior to April, 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".

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

(c) **Any undertaking** must be **engaged in the manufacture of any article** or **in the provision of any service**; **and**

(d) 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.

[189] Further, Item 33 (a) to the rate of income tax applicable to profits and income of any person from any undertaking referred to in Section 59B reads as follows:

33. The rate of income tax applicable to profits and income of any person from any **undertaking** referred to in Section 59B.

(a) for any year of assessment commencing prior to April 1, 2014	As per the First Schedule, but subject to a maximum of 10 per centum for an individual, and 10 per centum for a company

[190] The words "any undertaking engaged in the manufacture of any article or in the provision of any service" in section 59B (2) unmistakably demonstrate that the undertaking for the purpose of tax concession under section 59B must be one, which partakes of the character of a business or trade in relation to "manufacture of any article" or "provision of any service". 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 engaged in the business of manufacture of any article or in the **provision of service and** the total turnover of **such undertaking** does not exceed Rs. 300 million (prior to April 1, 2013).

[191] 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 *(Polycrome Electrical Industries (Pvt) Ltd v. Commissioner-General of Inland Revenue)* (supra)**.** The term "undertaking" has to be understood as an economically independent and self-sustaining entity taken as a whole and in the context in which it occurs and thus, it must be understood first, as any **undertaking** as a whole and then, such undertaking must be engaged in the manufacture of any article or provision of services (supra).

[192] This Court held in *Polycrome Electrical Industries (Pvt) Ltd v. Commissioner-General of Inland Revenue* (supra) that 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 or business/trade sense, keeping its object and context in mind.

[193] The Appellant is claiming the total rental income under Section 59B as expenses incurred in the provision of services when calculating the service income of the Appellant, despite the fact that Appellant had agreed to take the 10% of the total service fee, as a profit of service sector. The relevant parts of the reasons for the determination of the Appeal made by the Senior Commissioner at pages 16-17 of the TAC brief are as follows:

> *"The expenses incurred relevant to the particular ancillary services can be allowed as expenditure when calculating the service income. But other expenses which do not relevant to such service income cannot be allowed. Furthermore, at the interview held on 05.08.2016 before me, the Authorised Representative agreed to take 10% of total service fee received as a profit of service sector".*

[194] The question is, in addition to providing ancillary services referred to in the lease agreements, whether the Appellant is engaged in providing other specific services as an integral part of his business or trading activity in the nature of an undertaking referred to in Section 59B to be regarded as a separate service income, rather than mere activity of renting out his premises to tenants for storage.

[195] A closer reading of the lease agreement at page 119 of the brief reveals that apart from the consideration of Rs. 450,000/- and the aggregate lease rental of Rs. 840,000/- (for the entire term) and monthly rental of Rs. 35,000/- plus 15% VAT and any other prevailing taxes to be paid, no service charge is set out in the said Agreement. The service charge of 10% referred to in other lease agreements can only be regarded as ancillary services, which constitute an insignificant portion of the whole rental income. There is nothing to indicate that

the Appellant has maintained separate accounts for rental income and service income and thus, the ancillary service charge of 10% is directly connected to the Appellant's rental income as clearly seen on the lease agreements.

[196] As noted, in paragraph 193, the Appellant has agreed to take the said 10% of the total service fee received as a profit of service sector as expenses incurred in the provision of such ancillary services. It is crystal clear that the service fee referred to in the lease agreements relate to the ancillary services provided by the Appellant to his lessees. The Appellant has not produced any credible document to show that, in addition to the 10% service fee referred to in the lease agreements, he had generated any other service income from warehousing facilities.

[197] The ancillary services provided by the Appellant as referred to in the lease agreements are directly connected to his rental income, which cannot be interpreted as services provided by the Appellant as an undertaking in the course of his business or trading activity to be treated as a separate service income within the meaning of Section 59B of the Inland Revenue Act.

[198] In *Coman v. Governors of the Rotunda Hospital,* [1921] 1 A.C.1, the House of Lords drew a clear distinction between a landowner who leases or lets his land to tenants and derives a profit from the rents from lessees and the landowner who utilises his land while retaining possession of it by hiring it out to be used by persons who do not take any estate or interest in the land itself. In the *Rotunda* case, concert and ball rooms were hired out to persons desirous of utilising them for the purposes of musical or dancing entertainments and the owners had equipped the rooms so as to make them available for those purposes.

[199] The Court held that the services which the owners had rendered could not be regarded as mere incidents attached to the letting of the rooms themselves, but an "adventure or concern in the nature of trade". Lord Atkinson, at page 35, said, 'I do not think the services thus rendered can be regarded as "mere incidents attached to the letting of the rooms themselves. What is let, paid for and used is the room plus the services as "constituting one composite whole, for which money is paid, and "is obtained from the general public. In my opinion this letting "is an "adventure or concern in the nature of trade".

[200] As noted, there is nothing to indicate in the lease agreements in specific terms that the Appellant is providing separate services, in addition to ancillary services provided to his tenants to be regarded as a separate service income. The mere fact that the Appellant is providing storage facilities with ancillary services to his lessees and collecting a profit therefrom cannot be treated as a profit of any undertaking engaged in the provision of service in the nature of business or trade within the meaning of Section 59B of the Act.

[201] Having regard to the totality of the circumstances and to the true substance of the agreements, I hold that the Appellant is not entitled to the concessionary rate of 10% under and in terms of Section 59B of the Inland Revenue Act as determined by the Tax Appeals Commission.

Question of Law No. 5

Whether, on the facts and circumstances of the case, the Tax Appeals Commission erred in law in coming to the conclusion

[202] For the reasons stated in this judgment, and subject to our findings in paragraph 129 of this judgment, I find no reason to interfere with the final determination made by the Tax Appeals Commission.

Conclusion & Opinion of Court

[203] In these circumstances, I answer the Questions of Law arising in the Case Stated against the Appellant and in favour of the Respondent as follows:

1. No. The determination of the Tax Appeals Commissions is not time barred;
2. No
3. No
4. No
5. No

[204] For the reasons stated in this judgment and subject to our findings in paragraph 129 of this judgment, the final determination made by the Tax Appeals Commission dated 24.09.2019 is confirmed and the Appeal of the Appellant is dismissed.

[205] 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