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

In the matter of an appeal by way of a Case Stated 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).

Malwatte Valley Plantations PLC,

No. 280, Dam Street,
Colombo 12.

APPELLANT

CA No. CA/TAX/06/2017
Tax Appeals Commission
No. TAC/VAT/011/2014

v.

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. K. Kanag-Isvaran, PC with N. R. Sivendran and Renuka Udumulla for the Appellant.

Chaya Sri Nammuni, SSC for the

		Respondent.
WRITTEN SUBMISSIONS	:	27.08.2018 and 06.12.2021 (by the Appellant) 27.08.2018 (by the Respondent)
ARGUED ON	:	26.10.2021 and 29.10.2021
DECIDED ON	:	17.12.2021

M. Sampath K. B. Wijeratne J.

Introduction

The Appellant, Malwatte Valley Plantations PLC is a limited liability company incorporated in Sri Lanka. The principal activity of the Appellant is the cultivation of tea, rubber, coconut and other crops, and the manufacture of tea.

The Appellant tendered its Value Added Tax (hereinafter referred to as 'VAT') returns for the taxable periods from 1st January 2008 to 31st December 2010. Upon a VAT audit conducted by the Assessor Mr. J. M. U. M. B. Jayamaha, it was revealed that the company had not disclosed the value of trees sold by tender as a supply subject to VAT.

The Appellant claimed that the sale of trees was a supply of an *unprocessed agricultural product produced in Sri Lanka*, which is VAT exempted under item (xxiii) of paragraph (b) of Part II of the First Schedule to the Value Added Tax Act No. 14 of 2002, as amended (hereinafter referred to as 'the VAT Act').

The Assessor rejected the claim of the company and issued a letter of intimation dated 30th December 2011 (at page 64 of the brief) in terms of Section 29 of the VAT Act, communicating the reasons for not accepting the returns.

Thereafter, the Senior Assessor Mrs. S. M. Wickramarachchi issued several notices of assessment dated 12th March 2012 (*vide* page 61 of the appeal brief).

The company appealed to the Commissioner General of Inland Revenue (hereinafter referred to as 'the CGIR') against the said assessment in terms of Section 34 of the VAT Act (*vide* the petition of appeal at page 60 of the appeal brief).

The CGIR heard the appeal and made his determination on 19th May 2014, holding that the assessments issued for the taxable periods from January 2008 to November 2008 (Assessment Nos. 6765380 to 6765390) were invalid and confirming the other assessments (Assessment Nos. 6765391 to 6765414). Accordingly, the assessments for the period from January 2008 to November 2008 stand cancelled.

The Appellant appealed to the Tax Appeals Commission (hereinafter referred to as 'the TAC') in terms Section 7 of the TAC Act No. 23 of 2011, as amended (hereinafter referred to as 'the TAC Act'). The CGIR communicated the reasons for his determination to the TAC and to the Appellant, in terms of Section 7 (3) of the TAC Act.

The TAC, by its determination dated 30th December 2016, affirmed the determination of the CGIR and confirmed the assessment.

The Appellant then moved the TAC to state a case on the following questions of law for the opinion of this Court in accordance with Section 11A of the TAC Act:

1. *Did the Tax Appeals Commission err in law when it failed to appreciate that no assessment or additional assessment had been issued by the Department of Inland Revenue until the purported assessments were issued which is time barred thus nullity?*
2. *Did the Tax Appeals Commission err in law when it failed to appreciate that the letter dated 30th December 2011 is not and cannot be accepted as an Assessment inasmuch as: -*
    a) *no assessment has been made on 30th December 2011;*
    b) *the letter dated 30th December 2011 clearly and categorically states that "Assessment will be issued in due course";*

c) *the letter dated 30th December 2011 is an intimation letter which is statutorily required to be sent and which cannot be construed as an assessment or additional assessment?*

3. *Did the Tax Appeals Commission err in law when they* (sic) *failed to appreciate and take into account that an assessor has no power or authority or jurisdiction to issue an assessment or an additional assessment after the statutorily prescribed period?*
4. *Is the entire assessment process and the procedure adopted before the Commissioner General of Inland Revenue flawed and a nullity for the reasons that the assessor who wrote the intimation letter has not made the assessment?*
5. *Did the Tax Appeals Commission err in law when they* (sic) *failed to appreciate that* (sic) *assessor is obliged to assess for each taxable period the VAT liability which the assessor has failed to do in this instance?*
6. *Is an assessor authorized to collectively value VAT supply without individually assessing the supply for each taxable period?*
7. *Did the Tax Appeals Commission err in law when they* (sic) *failed to appreciate that* (sic) *assessor was not entitled to lump together and assess together for twelve months and thereafter apportion?*
8. *Whether the live trees supplied which is* (sic) *cut, uprooted and removed by the buyer is* (sic) *unprocessed agricultural produce.*
9. *Did the Tax Appeals Commission err in law when they* (sic) *failed to appreciate that what was sold by the appellant were standing trees which are "unprocessed agricultural produce"?*
10. *Did the Tax Appeals Commission err in law when they* (sic) *failed to appreciate the terms and conditions of the agreement to sell rubber trees cannot be construed to be an agreement for the performance of any services for the uprooting and removal of old rubber trees by a third party?*
11. *Has the Tax Appeals Commission misdirect* (sic) *itself in law refusing to construe that standing rubber trees are unprocessed agricultural produce?*

12. *Is the sale of trees is* (sic) *supply of goods are* (sic) *not services by the seller?*

13. *Did the Tax Appeals Commission err in law when they* (sic) *failed to appreciate that under the sale agreement the Appellant did not perform any services to change the nature of supply into a "supply of a service"?*

14. *Did the sale agreement not cast any obligation or liability on the part of the Appellant to perform any service in order to fulfil the conditions of the said sale Agreement?*

15. *Whether the purported cost of the performance of obligations under the sale agreement performed by the buyer can be added to the value of the supply in order to arrive at the "value of supply" for VAT charging purposes*.

16. *Whether the price agreed on the sale of trees under an Agreement entered into after tender being called for can be arbitrarily increased by an assessor for VAT charging purposes.*

17. *Whether the increase of the alleged price by the assessor by 40%* (sic) *arbitrary, unreasonable and unwarranted and not authorized by law.*

The Appellant requested in its oral submissions that the above questions of law be subsumed under four main questions of law, which would see the first to fourth questions, fifth to seventh questions, eighth to fourteenth questions, and fifteenth to seventeenth questions respectively, answered together.

However, I do not see the need to separate the first seven questions of law as they all address procedural elements of the case stated. I accept that the eighth to fourteenth questions of law can be addressed together as they concern the material elements of the case stated. I accept that the final three questions of law can also be addressed together as they concern the calculation of the amount of tax payable. This judgement is organised accordingly, into three main sections.

The procedural elements (Questions 1-7)

Section 31 (1) of the VAT Act empowers an Assessor to assess a person who has paid less than the proper amount of tax payable by him or chargeable from him for any taxable period.

The Assessor, according to his judgment, could assess the additional amount payable by the taxpayer, at *any time*. The above section also requires the Assessor to give *notice of the assessment* to the tax payer.

However, Section 33 (1) provides that where a registered person has furnished a return in respect of a taxable period in terms of Section 21 (1), it is not lawful for the Assessor to make an assessment or an additional assessment after three years from the end of the relevant taxable period. Admittedly, the Appellant in this case has submitted its returns in time and the matter in issue is the alleged non-payment of VAT for the value of trees which were sold.

Therefore, the three-year time limit provided in Section 33 (1) should apply to the assessments made in this case.

The "Assessment Notice" (at page 61 of the brief),[1] the first such notice for the period relevant to the instant case, had been issued on the 12th March 2012 which is a date later than three years from the end of the taxable period, namely 31st January 2009. The other assessment notices referred to in the CGIR's determination have not been included in the brief. However, the Appellant has tendered copies of assessment notices pertaining to assessment numbers 6765392 to 6765414 for the months from February 2009 to December 2010, which were later admitted by the learned Senior State Counsel to be part and parcel of the record (*vide* proceedings dated 26th March 2021).

All the above assessment notices had been issued on the same date, namely 12th March 2012, and the assessment notices pertaining to assessment numbers 6765393 to 6765414 for the months from March 2009 to December 2010 have been issued within three years from the end of the relevant taxable period whereas numbers 6765391 and 6765392 have not. Furthermore, the CGIR has determined assessment numbers 6765380 to 6765390 for the taxable periods from January 2008 to November 2008 to

[1] This is the title under which all twenty-four notices appear. The top-right hand corner of each document bears "Form No. VAT-24", which suggests that this is a form issued under Section 74 of the VAT Act. For the purposes of this judgement, these notices will be referred to as "assessment notices".

be invalid and confirmed assessment numbers 6765391 to 6765414, on the basis that the date of assessment should be the date of the letter of intimation, i.e. 30th December 2011. It appears that no assessment notice has been issued for the month of December 2008.

The learned Counsel for the Appellant argued with utmost confidence that the date on which the assessment notice was issued has to be taken as the date on which the assessment was made. His argument is that the assessment is not complete until the assessment notice is sent. If the said position is accepted, assessment numbers 6765391 and 6765392 would also be time barred.

I am not in favour of the argument advanced by the learned Counsel. The requirement under Section 33 (1) is only to *make* an assessment or an additional assessment within the time limit. The requirement to give notice of the said assessment under Section 31 (1) has no such time limitation. To read such a requirement into the relevant sections would be tantamount to modifying the language of the VAT Act.

On reading words into a statute, Bindra states that:[2]

'*It is not open to add to the words of the statute or to read more in the words than is meant, for that would be legislating and not interpreting a legislation. If the language of a statutory provision is plain, the Court is not entitled to read something in it which is not there, or to add any word or to subtract anything from it.*'

The Assessor's aforementioned letter of intimation contains a table which sets out the additional value of supply assessed, the VAT on it, the VAT rate and the description of the supply. Hence, it appears to me that although the Assessor is bound only to inform the reasons in writing for non-acceptance of the returns under Section 29, he has also communicated the additional amount of VAT payable, by his letter of intimation. Unlike under Section 163 (1) of the Inland Revenue Act No. 10 of 2006 (as amended) there is no requirement in the VAT Act for the Assessor to demand payment in the intimation letter.

It appears to me that the additional assessment under Section 31 (1) had already taken place by the time the intimation letter was sent on the 30th

[2] N. S. Bindra, *Interpretation of Statutes*, Eighth Edition, 1997. at p.452

December 2011. In fact, the values of supply assessed for the years 2009 (39,444,276/-) and 2010 (62,263,600/-) as mentioned in the intimation letter, have been used in the initial written submissions of the Appellant (para. 16.12 at page 32) in order to argue for the computation of an arbitrary value of supply. The total value of supply and the amount of tax charged as mentioned in the letter of intimation is the same as the total value of all the assessment notices added together, as regards the sale of trees.

The Appellant argued that although the letter of intimation sent on the 30th December 2011 contained a table setting out the additional VAT payable, it is not an assessment and the assessment notice issued on the 12th March 2012 is the valid assessment. Under Section 21 (4) an Assessor has the power to call for further information, if necessary. Nevertheless, as mentioned above, the computed value of supply does not appear to have changed between the 30th December 2011 and the 12th March 2012.

Though Section 29 of the VAT Act requires the Assessor to inform the tax payer the reasons for not accepting the return, the Assessor is not bound to inform the ground or basis for his assessment. In the dissenting judgment in the case of *D. M. S. Fernando and Another v. Mohideen Ismail*,[3] Sharvananda J. made a similar observation regarding Section 93 of the Inland Revenue Act No. 4 of 1963, as amended by Inland Revenue (Amendment) Law No. 30 of 1978:

"*Under the original section 93(2), the Assessor was not obliged to give his reasons for not accepting the return made by the taxpayer. By the amendment effected by the Amendment Law, No. 30 of 1978, the Assessor was required, if he did not accept the return of the taxpayer, to estimate the amount of his assessable income, etc. and assess him accordingly and communicate to such person in writing the reasons for not accepting his return. An obligation has now been cast on the Assessor to communicate to the taxpayer in writing the reasons for not accepting the return made by him. The object of this Amendment appears to be to make a taxpayer who has, according to him, made a correct return and is therefore reasonably entitled to expect his return to be accepted, aware, if the Assessor does not accept his return, of the reasons for the non-acceptance of his return so as to enable him to demonstrate the untenability of the said reasons at the*

[3] [1982] 1 Sri.L.R. 222, at p.242

hearing of any appeal that may be preferred by him against the assessment. The return referred to is the return required by section 82 of the Inland Revenue Act. ***Under the Amendment, what the taxpayer should be informed of are only the reasons in writing for non-acceptance of his return, but not the ground or basis of the estimate of the assessable income made by the Assessor.*** *If the Assessor accepts the return made by the taxpayer, the Assessor has no alternative but to make the assessment accordingly. But if he does not accept the return, or where the taxpayer has not furnished a return, then it is competent for the Assessor to estimate the amount of the assessable income, etc. of the taxpayer and assess him accordingly* (emphasis added)."

Hence, it appears to me that the additional assessment is a matter entirely within the purview of the Assessor under Section 31 of the VAT Act. He has to address his mind to the relevant facts and arrive at his own judgement.

> ***29.*** *Where the Assessor does not accept a return furnished by any person under section 21 for any taxable period* ***and*** *makes an assessment or an additional assessment on such person for such taxable period under section 28 or under section 31, as the case may be, the Assessor shall communicate to such person by registered letter sent through the post why he is not accepting the return* (emphasis added).

> ***31.*** *(1) Where it appears to an Assessor that a person chargeable with tax has for any taxable period paid as tax an amount less than the proper amount of the tax payable by him for that taxable period, or chargeable from him for that taxable period, the Assessor may, at any time, assess such person at the additional amount at which, according to the judgement of such Assessor, tax ought to have been paid by such person. The Assessor shall give such person* ***notice of the assessment*** (emphasis added).

Although Section 31, the section under which the Assessor makes an additional assessment, is placed after Section 29 in the VAT Act, in my

view, the making of an assessment or an additional assessment has to be done before the reasons for not accepting the return are communicated to the tax payer. The language used by the Legislature in the two sections itself demonstrates the above fact. Under Section 31 (1) the Assessor has to form the opinion that '*a person chargeable with tax has paid as tax an amount less than the proper amount payable by him…*'. Thereafter, he should assess an additional amount and give notice of the assessment to the tax payer.

There is a further requirement introduced by Section 29 for the Assessor to communicate reasons for not accepting the return whenever an assessment or an additional assessment has been made under either Section 28 or 31 (the relevant Section for this case is Section 31). The word 'and' as highlighted in Section 29 above lends further support to this opinion, such that the phrasing of '*Where the Assessor does not accept a return furnished by any person under section 21 for any taxable period* ***and*** *makes…an additional assessment…the Assessor shall communicate to such person…why he is not accepting the return.'* clearly implies that the letter of intimation is to be sent only after the additional assessment has been made. Therefore, it should be apparent that Section 29 is meant to follow not only Section 28, but also Section 31 temporally.

In the aforementioned case of *D. M. S. Fernando and Another v. Mohideen Ismail*,[4] Samarakoon C.J. dealing with the Income Tax Act No. 4 of 1963, as amended, observed that 1) the non-acceptance of a return by the Assessor, 2) the estimation of the assessable income, and 3) the communication of the reason(s) for not accepting the return, are all part of one exercise. However, since the above decision is on an income tax statute which is different from the present VAT Act, in my view those observations are not directly relevant to the instant case.

Be that as it may, even if they are all part of one exercise and the precedent holds for a case under the VAT Act, it is apparent that the assessment should precede both the intimation letter and the notice of the assessment. The reason being the phrasing of Section 29, which as reasoned above, connotes that the Assessor has to first reject the return and then make the

[4] [1982] 1 Sri.L.R. 222, at p.227

assessment and only thereafter, send the intimation letter and the notice of the assessment.

Of course, I am mindful that an Assessor should not be allowed to say that he made the assessment and kept it in his drawer. He should communicate it to the taxpayer. Incorporating the assessment in the intimation letter will certainly establish his *bona fides*.

Furthermore, on the contrary to the Inland Revenue Act No. 10 of 2006 (as amended), the VAT Act doesn't have a specific provision under which a *Notice of Assessment* should be issued. Section 164 of the Inland Revenue Act No. 10 of 2006 specifically provides that the Assessor should give notice of assessment to the taxpayer, whereas Section 31 (1) of the VAT Act reads that the Assessor should give the taxpayer notice of *the* assessment which implies that the Assessor should only inform the taxpayer that an assessment has been made. In my view, *notice of the assessment* in the VAT Act is different from the *notice of assessment* referred to in Section 164 of the Inland Revenue Act.

Accordingly, even if Samarakoon C.J.'s ratio is to be followed and all of the above steps are indeed part of one exercise, it is not improper for the *notice of the assessment* to be sent in the letter of intimation itself. There is no provision in the VAT Act that these two communications, i.e. the reasons for not accepting the return under Section 29 and the notice of the assessment under Section 31 (1), must be separate.[5] However, as the Appellant has correctly pointed out, the assessment notices issued on 12th March 2012 should not have contained a declaration that they should be treated as '*an intimation under Section 29 of* (sic) *VAT Act*'. This is plainly incorrect since the letter of intimation had already been sent, and since the reasons for not accepting the return of the taxpayer have not been mentioned in these notices. Such errors are not only embarrassing to behold, but bring unnecessary litigation before the Courts. Nevertheless, I cannot hold that the said error acts to invalidate the assessment notices altogether. In any event, it has no bearing on this Court's position that the additional assessment had taken place by the date of the letter of intimation, i.e. the 30th December 2011.

[5] Though of course, the fact that it *could* be done, does not imply that it *must* be done. The reasons for not accepting the return, and the notice of the assessment may be communicated separately.

Another fact towards which the attention of this Court was drawn involves the sentence: "*Assessments **will be** issued in due course as per section 31 (1) and 33 (2) of the VAT Act No. 14 of 2002* (emphasis added)." found in the letter of intimation. The Appellant has submitted that the construction of this sentence should be interpreted to mean that the assessments had not yet been made at the time of sending the intimation letter. I do not agree with this submission, as the assessments had clearly been made already as reasoned above. If anything, the choice of tense for the above sentence merely demonstrates a lack of knowledge on the provisions of the VAT Act, which is also exhibited elsewhere in the letter. In any case, assessments are *made*, not *issued* under Chapter V of the VAT Act. Only notices may be *issued*. The Assessor has therefore clearly meant that the assessment notices will be issued in due course.

Having considered all of the above, I am satisfied that the Assessor had made his assessment on or before 30th December 2011, and that it is manifested in the letter of intimation.

The Appellant has further submitted that as per the intimation letter, "*Assessments will be issued in due course as per Section 31 (1) **and 33 (2)** of the VAT Act No. 14 of 2002* (emphasis added)." It was submitted that, since the Appellant had not intentionally committed any wilful or fraudulent representation in furnishing the VAT returns, the assessment was made on an incorrect basis and therefore, is not valid.

As I have already held above, the assessments in this case are issued under Section 31 (1) of the VAT Act. Furthermore, the CGIR, in his determination, has determined that there was no wilful evasion or fraud committed by the Appellant Company (*vide* page 6 of the determination at page 164 of the brief). Hence, the question of the assessments being issued under Section 33 (2) does not arise at this stage of the case.

Another argument advanced by the Appellant was that the Assessor has violated Section 28 by failing to make assessments in respect of each taxable period and by equally distributing the value of supply among all taxable periods for the purpose of issuing assessments.

The section relevant to this appeal is Section 31 of the VAT Act, and not Section 28. However, even Section 31 provides that an Assessor could assess the additional amount payable by the taxpayer in respect of the

particular taxable period. Section 31 (2) also refers to a particular taxable period. However, as has been correctly observed by the TAC, calculating the additional amounts of tax payable by the Appellant for individual taxable periods, adding them up to arrive at the total amount payable across all taxable periods, and dividing it equally among the taxable periods, will not make any difference to the total amount of tax payable.

Section 61 of the VAT Act, regarding want of form, or the inclusion of a mistake, defect or omission with respect to an assessment, reads as follows:

> ***61.*** *(1)* ***No*** *notice,* ***assessment****, certificate or other proceeding purporting to be in accordance with the provisions of this Act* ***shall be quashed, or deemed to be void or voidable****,* ***for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with, or according to, the intent and meaning of this Act****, and if the person assessed or intended to be assessed or affected thereby is designated therein according to common intent and understanding* (emphasis added).

Hence, it's clear that what is important is not the form, but the substance. Furthermore, Section 33 of the VAT Act provides that for the purpose of Chapter V of the VAT Act (which includes Sections 28 to 33), any notice of assessment may refer to one or more taxable period.

Above all, although the Assessor has stated in his letter of intimation that the value of supply will equally be distributed among all taxable periods for the purpose of issuing assessments, the assessments issued by him vary in the stated value of supply for the separate taxable periods. It must be noted that only one of these assessment notices was available to the TAC at the time of making its determination. However, as I have already stated above in this judgement, the Appellant itself has submitted to Court the remaining twenty-three assessment notices along with a motion. Therefore, the question of adding up and then apportioning does not arise on the facts before this Court.

The Appellant then argued that the Assessor, Mr. A. M. Nafeel had carried out a detailed VAT audit for the entire years of 2008 and 2009 and thereafter, the Appellant had agreed with and paid an amount totalling Rs.

2,998,047/= on settlement of the VAT covering the entire years of 2008 and 2009. The Appellant relied on Section 37 of the VAT Act and submitted that the Assessor, in terms of the law, cannot reopen a concluded matter.

It is common ground that the Appellant has not preferred an appeal against the assessment made by the Assessor, Mr. A. M. Nafeel. Hence, it appears the assessment should be final and conclusive for all purposes in terms of Section 37 of the Act. However, the proviso to the same section provides that nothing in Section 37 shall prevent an Assessor from making an assessment or additional assessment for any taxable period if it does not involve reopening any matter which has been *determined on appeal* for that taxable period. The assessment made by the Assessor, Mr. A. M. Nafeel has not been determined on appeal. Therefore, on a plain reading of Section 37 itself, it is clear that the Assessor, Mr. J. M. U. N. B. Jayamaha is entitled to make the additional assessment relevant to this case, even for the taxable period of January 2009.

Finally, and perhaps most importantly, it appears to me that the assessment of the Assessor, Mr. A. M. Nafeel is not on the sale of trees, but on other supplies (such as rent and the sale of vehicles) made by the Appellant.

The penultimate argument submitted by the Appellant on the procedural elements of this case, is that the assessments must be set aside since the Assessor who has written the intimation letter is not the same Assessor who has made the assessment. In fact, what the Appellant means is that the Assessor who has written the intimation letter is not the same Assessor who has *signed the assessment notices*. There is no evidence before this Court to show that the Assessor, Mr. J. M. U. N. B. Jayamaha (who signed the intimation letter) did not make the assessment himself, as the assessment had already been made by the time the intimation letter was sent. What the Appellant relies on is the fact that the Senior Assessor, Mrs. S. M. Wickramarachchi has signed the assessment notices issued on 12th March 2012. The latter fact does not prove that Mr. Jayamaha did not make the assessment.

Nevertheless, I shall consider this point of law. Section 31 (1) reads:

> ***31.*** *(1) Where it appears to* ***an Assessor*** *that a person chargeable with tax has for any taxable period paid as tax*

an amount less than the proper amount of the tax payable by him for that taxable period, or chargeable from him for that taxable period, ***the Assessor*** *may, at any time, assess such person at the additional amount at which, according to the judgement of* ***such Assessor****, tax ought to have been paid by such person.* ***The Assessor*** *shall give such person notice of the assessment* (emphasis added).

Even though the Appellant's argument is on Section 28, the above section has been phrased similarly. What the Appellant is relying on is the final sentence of the provision: 'The Assessor shall give such person notice of the assessment'. It cannot escape this Court's notice that in the immediately previous sentence, the legislature has seen fit to use the word '*such*' to determine *the same* assessor, whereas it has not done so for the final sentence, even though it has used '*such*' to specify the assessee therein. In my view, the Assessor giving the notice of the assessment does not necessarily have to be the same Assessor who made the assessment. Similarly, in perusing the Sinhala text of the VAT Act, it is apparent that though the assessee has been specified, the Assessor has not.

I do not see the need to interpret the above section so strictly. There is no disparity between the value of supplies in the intimation letter and the collective values of supplies in the assessment notices. To interpret the section as the Appellant wishes would cause an absurdity in situations such as when an Assessor retires after making an assessment and before the notices have been signed and sent. Though fiscal statutes are to be interpreted strictly, I do not believe such strict interpretations are warranted where there is neither a benefit nor a disadvantage to either party. For example, Section 11A (1) of the TAC Act reads:

11A. *(1) Either the person who preferred an appeal to the Commission under paragraph (a) of subsection (1) of section 7 of this Act (hereinafter in this Act referred to as the "appellant") or the Commissioner-General may make an application requiring the Commission to state a case on* ***a question of law*** *for the opinion of the Court of Appeal. Such application shall not be entertained unless it is made in writing and delivered to the secretary to the Commission, together with a fee of one thousand and five*

> *hundred rupees, within one month from the date on which the decision of the Commission was notified in writing to the Commissioner-General or the appellant, as the case may be* (emphasis added).

If this is interpreted strictly, an Appellant would only be able to submit a case stated on a *single* question of law, and any cases where more than one question of law is stated could be set aside. However, this is not the case in practice. I therefore hold that the assessments are not invalidated merely because two different Assessors have issued the letter of intimation and the notices of assessment. In any case, I am not prepared to hold that the assessor who issued the letter of intimation in this case is not the same assessor who made the assessment.

The final argument submitted by the Appellant on the procedural aspects of the case is that the assessment notices issued on the 12th March 2012 are invalid as they have not been *signed* by the Assessor issuing them. Section 60, which deals with these miscellaneous matters, reads:

> ***60.*** *(1)* ***Every notice*** *to be given by the Commissioner-General, a Deputy Commissioner or an Assessor under this Act* ***shall bear the name of the*** *Commissioner-General or Deputy Commissioner or* ***Assessor****, as the case may be,* ***and every such notice shall be valid if the name of the*** *Commissioner-General, Deputy Commissioner or* ***Assessor is duly printed or signed thereon*** (emphasis added).

It appears from Section 60 (1) that the name of the relevant official needs to be either printed or signed on the assessment notices for them to be valid. Upon perusing the assessment notices, it is apparent that the Senior Assessor, Mrs. S. M. Wickramarachchi has placed her seal on all the notices. It is sufficient for the purposes of Section 60 (1) above that the name of the official be either *printed or signed* on the notices.

The *Oxford Dictionary of English* defines the verb *print* as follows:[6]

[6] Angus Stevenson, *Oxford Dictionary of English*, Third Edition, 2010.

1 **produce (books, newspapers, etc.), especially in large quantities, by a mechanical process involving the transfer of text or designs to paper**: *a thousand copies of the book were printed*.

• produce (text or a picture) by a printing process: *the words had been printed in dark type*.

• (of a newspaper or magazine) publish (a piece of writing) within its pages: *the article was printed in the first edition*.

• (of a publisher or printer) arrange for (a book, manuscript, etc.) to be reproduced in large quantities: *in 1923 he printed Yeats' 'Biographical Fragments'*.

• produce a paper copy of (information stored on a computer): *the results of a search can be printed out*. • produce (a photographic print) from a negative: *any make of film can be developed and printed*.

2 write (text) clearly without joining the letters together: *print your name and address on the back of the cheque*.

3 mark (a surface, typically a fabric or garment) with a coloured design or pattern: *a delicate fabric printed with roses*.

• transfer (a design or pattern) to a surface: *patterns of birds and trees were printed on the cotton*.

• make (a mark or indentation) by pressing something on a surface or in a soft substance: *a beetle scurried by, printing tracks in the sand with its busy feet*.

• mark (the surface of a soft substance): *we printed the butter with carved wooden butter moulds*.

• fix (something) firmly or indelibly in someone's mind: *his face was printed on her memory*.

The three definitions emphasised in bold fit the placement of a seal on a printed paper, and I therefore hold that the Senior Assessor has satisfied the requirement in Section 60 (1) by *printing* her name on the notices.

For all of the foregoing reasons, I hold that the assessments numbered 6765391 to 6765414 are valid.

The material elements (Questions 8-14)

There are three agreements available in the brief, entered into between the Appellant and three individual purchasers pertaining to rubber trees (at pages 32/349, 205/243 and 198 of the brief). These agreements state that they concern the sale of rubber trees. The location of the trees, the number of trees to be sold and the price at which a tree was to be sold had also been agreed upon. The trees which were to be uprooted had to be marked by the Appellant and had to be uprooted in the numbered order. In the aforementioned agreements, the other party who entered into the agreements with the Appellant is termed as the "Purchaser".[7] Further, the agreements read thus:

> *"…the purchaser submitted an offer for the purchase of the said … (number of trees) trees which offer was accepted by the company…"*
>
> *"…that in pursuance of the said offer the company hereby agrees to sell and the purchaser hereby agrees to purchase the … (number of trees) trees demarcated as aforesaid at or for the purchase price mentioned hereinafter and subject to the following terms and conditions to be observed and performed by the parties hereto."*

As per the agreement, the purchase price had to be paid according to the payment schedule in the agreement and upon payment, the purchaser was entitled to uproot and remove the trees according to the cutting schedule.

There are also certain conditions set out in the agreement for the purchaser to have followed when the trees were uprooted. The trees had to be uprooted by exposing the tap root and the lateral roots and also the root stumps. The field had to be completely cleared of all trees, timber, logs, roots and other debris. The purchaser was obliged to make a refundable deposit which was liable to be forfeited upon failure to fulfil the terms and conditions. In my opinion, the refundable deposit was only a security to ensure due performance of the obligations.

[7] For the purposes of this judgement, these other parties will be referred to as "purchasers", and not as "contractors".

It was argued by the learned Senior State Counsel for the Respondent that the contracts between the Appellant and the purchasers were to perform a service by the purchasers and not for the supply of goods by the Appellant.

At this juncture it is important to scrutinize the provisions in the agreements and the relevant provisions of the law to ascertain the true nature of the agreements between the Appellant and the purchasers.

In deciding whether a contract is one of sale of goods or one for services, the Courts have used the substance test. In the academic work titled *The Sale of Goods*, it is stated that:[8]

'*…the distinction between goods and services will often remain of some importance in the law, and it will still occasionally be necessary to distinguish between contract of sale of goods and a contract for the supply of services. The test for deciding whether a contract falls into a one category or the other is to ask what is 'the substance' of a contract. If the substance of the contract is the skill and labour of the supplier, then the contract is one for services, whereas if the real substance of the contract is the ultimate result - the goods to be provided – then the contract is one of sale of goods.*'

Under the VAT Act, a supply can be one of goods or services. It can also be a single or composite supply. In his book titled *Value Added Tax in Sri Lanka*,[9] S. Balaratnam has cited *British Airways Plc v. Customs and Excise Commissioners*,[10] to state the following:

'*The charging Section of the Value Added Tax does not enable one to determine whether a transaction involving a single payment to the supplier and requiring for its performance both the supplies of goods and the performance of services is to be treated as a single supply of goods or services or as two supplies, one of goods and other of services. The question whether a supply containing different elements should be treated as one or more than one supply is likely in practice to arise when there is a financial advantage either to the taxpayer or the revenue depending on how the supply is to be categorised for the purpose of VAT. How it is to be*

[8] P. S. Atiyah, John N. Adams & Hector MacQueen, *The Sale of Goods*, Eleventh Edition, 2005. at p.27
[9] S. Balaratnam, *Value Added Tax in Sri Lanka*, First Edition, 2002. at p.163
[10] (1990) STC 643

categorised whether as a single supply of goods or of services or as separate supply of goods and services is a question of law.'

He further states that:[11]

'*Where multiple supplies properly fall to be treated as single supply for fiscal purposes, there is always a single or unitary dominant supply to which all other supplies in question are then regarded as ancillary.*'

Whether a supply is ancillary or incidental to the principal is discussed as follows:[12]

"The issue was not whether one element of a complex commercial transaction is ancillary or incidental to, or even a necessary or integral part of the whole, but whether one element of the transaction is merely ancillary or incidental to, or a necessary or integral part of, any other element of the transaction. The reason why the former is the wrong question is that it leaves the real issue unresolved; whether there is a single or a multiple supply. The proper inquiry is whether one element of the transaction is so dominated by another element as to lose any separate identity as a supply for fiscal purposes, leaving the latter, the dominant element of the transaction, as the only supply. If the elements of the transaction were not in this relationship with each other, each remains as a supply in its own right with its own separate fiscal consequences. In determining whether what would otherwise be two supplies should be regarded as a single supply the court has to ask itself whether one element is an "integral part" of the other, or is "ancillary" or "incidental" to the other; or whether the two elements are "physically and economically dissociable". This, however, merely replaces one question with the other. In order to answer this further question, the court must consider "what is the true and substantial nature of the consideration given for the payment". There are, however, limits to this process. Where supplies are made by different suppliers, they cannot be fused together to make a single; and it is probably only in relatively simple transactions that the reductions of multiple to single supplies is appropriate".

[11] S. Balaratnam, *Value Added Tax in Sri Lanka*, First Edition, 2002. at p.168

[12] S. Balaratnam, *Value Added Tax in Sri Lanka*, First Edition, 2002. at p.168 [citing Millet J. in Customs & Excise Commissioners v. Wellington Private Hospital Ltd. (1997) STC 445]

It is further stated that:[13]

'*In any single commercial relationship, individual supplies of goods and services in the course of that relationship can vary widely both in nature and in taxability or potential taxability. In such a situation it is essential to analyse the individual supplies of goods and services by reference to specific taxing and relieving provisions as a preliminary to deciding whether any of them are no more than ancillary or incidental to another or others and to determine whether and if so how consideration received should appropriately and fairly apportioned between them.*

In deciding whether a supply constitutes a single supply or separate supplies the questions to be answered are said to be one of law, yet it has been said that the answer is to be obtained by the application of common sense to the substance and reality of the matter and the answer may well be a matter of impression. Scott [1978] STC 191: it may well be mixed questions of law and of fact: British Railways Board [1977] STC 221'

"The questions to be asked, as derived from decided cases are-

The relevant question is-

- *What did the taxable person supply in return for the single sum paid by the other party to the transaction?*

  or

- *What was the consideration for the payment he received?*

  or

- *Was it a supply of goods, to which supply of service was ancillary (or incidental)?*

  or

- *Was it supply of services, to which the supply of goods was ancillary or incidental?*

  or

- *Did he make two supplies?*

[13] S. Balaratnam, *Value Added Tax in Sri Lanka*, First Edition, 2002. at pp.165,166

The questions must be answered objectively without regard to the motive of either party. Each case must be considered on its own facts."[14]

On the difference between a mixed supply and a composite supply, Balaratnam states that:[15]

A supply, which is not a supply of goods, is a supply of services: S.80 (sic). *A transaction involving a single payment may compose of supplies of goods and or services the taxable value of which may have different fiscal consequences. Whether or not a supply is a mixed supply or a composite supply of goods and or services will be of importance in determining the output tax payable.*

On ancillary services, Balaratnam states that:[16]

There is a difference between what is 'ancillary' and what is 'integral'. Several supplies may be integral to one another with none of them predominating over others enabling the supplies be separately distinguished.

"*I consider that a service is ancillary if, first, it contributes to the proper performance of the principal service and, second, it takes up a marginal proportion of the package price compared to the principal service. It does not constitute an object for customers or a service sought for its own sake, but a means of better enjoying the principal service*".[17]

Upon a careful consideration of the aforementioned terms of the contracts, it is my view that the essence of those agreements is the sale of rubber trees and the obligations to be performed by the purchaser are ancillary to the main object. It is obvious that the purchaser of rubber trees had to uproot them to take them out of the estate. It is understood that the purchasers had to perform the removal of trees in a manner which would not interrupt the natural use of the land by the Appellant.

[14] S. Balaratnam, *Value Added Tax in Sri Lanka*, First Edition, 2002. at p.166 [citing McCullough J. in Customs & Excise Commissioners v. Leightons Ltd. (1995) STC 458]

[15] S. Balaratnam, *Value Added Tax in Sri Lanka*, First Edition, 2002. at p.166

[16] S. Balaratnam, *Value Added Tax in Sri Lanka*, First Edition, 2002. at p.168

[17] S. Balaratnam, *Value Added Tax in Sri Lanka*, First Edition, 2002. at p.168 [citing from Card Protection Plan v. Customs & Excise Commissioners: (1998) STC 1189]

According to Section 2 (1) of the Sale of Goods Ordinance,[18] a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called "the price".

According to Section 2 (3) of the above Ordinance, where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called "a sale", and where the transfer of the property in the goods is to take place at a future time, the contract is called "an agreement to sell".

In the instant case, since the goods, the trees, have to be uprooted for the property in goods to be transferred to the buyer, the agreements between the Appellant and the purchasers have to be considered as "agreements to sell" under ordinary circumstances.

Section 59, the interpretation section of the Sale of Goods Ordinance, defines "goods" as follows:

> *include all movables except moneys. The term includes growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale*

Section 83 of the VAT Act defines the term "goods" as follows:

> *"goods" means all kinds of movable or immovable property but does not include -*
>
> *a) money;*
>
> *b) computer software made to customers special requirements either as unique programme or adaptation for standard programme, intercompany information data and accounts, enhancement and update of existing specific programmes, enhancement and update of existing normalized programmes supplied under contractual obligation to customers who have bought the original programme or where the value of contents separately identifiable in a software such vale of contents;*'

[18] No. 11 of 1896

Therefore, it is clear that the definition of "goods" within the VAT Act itself includes all form of trees, whether live or dead.

Hence, it is clear that the sale of live trees under a contract of sale is a sale well within the VAT Act as well as the Sale of Goods Ordinance.

Section 18 of the Sale of Goods Ordinance provides that where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred and the intention should be ascertained from the terms of the contract, and the conduct of the parties.

Although Section 19 specifies rules for ascertaining the intention, in my view the contracts in issue do not fall under any of those rules.

On the above analysis, it is my considered view that the agreements are for the *sale of trees* by the Appellant, and not for the performance of a service by the purchasers.

The next matter for consideration is the time of supply.

In terms of Section 4 (1) of the VAT Act, the supply of goods shall be *deemed to have taken place* at the time of occurrence of any one of the following, whichever occurs first: -

a) *The issue of an invoice by the supplier in respect of the goods or*
b) *A payment for the goods including any advance payment received by the supplier; or*
c) *A payment for the goods is due to the supplier in respect of such supply; or*
d) *The delivery of the goods have been effected.*

In terms of the agreements,[19] the purchase price had to be paid before the trees were uprooted.

In terms of Section 83 of the VAT Act, "supply of goods" means the passing of exclusive ownership of goods to another as the owner of such goods and in the instant case, the exclusive ownership would not have passed until the goods were specific and/or ascertained.

[19] Clauses 1.1 and 1.3

In the case in hand, the agreement clearly states the number of trees to be uprooted and the location, with the division of the field of the estate. Further, the trees which were to be uprooted had to be numbered by the Appellant. Therefore, it is abundantly clear that the goods sold were specific and precisely ascertained.

Therefore, in the case in hand, the supply of goods shall be deemed to have taken place at the time the rubber trees were in live form and accordingly, VAT has to be paid in terms of Section 2 (1).

The learned Senior State Counsel cited at the argument two previous decisions of this Court in the cases of *Kegalle Plantations PLC v. The Commissioner General of Inland Revenue*,[20] and *Lalan Rubber (Pvt) Ltd. v. The Commissioner General of Inland Revenue*,[21] and contended that this Court is bound by these two judicial precedents.

However, I observe that there are significant differences between the material facts of those two cases and the facts of the case in hand. In the said cases, public tenders had been called for "uprooting old rubber trees" but in the case in hand the tender notice is not available in the brief for our perusal. However, there is a material difference between the agreements referred to in the above two cases and those in the instant case.

There, the agreements had been entered into for the "uprooting and removal of trees" whereas in the case in hand it is for the "selling of … (the number of trees) rubber trees".

Furthermore, in those two cases, in the financial statements/audited statements of accounts, the transaction had been identified as the profits from sale of "fire wood, logs and chips"/ "sale of rubber logs". However, in the case in hand, income had been identified in the financial statements as an income from sale of trees under the heading of other income (*vide* pages 190, 191 and 192 of the appeal brief).

Moreover, in the said two cases, some of the agreements had even specified the dimensions of the pieces to which the tree must be cut. Hence, it is obvious that the Appellants had sold the trees in the form of logs/timber. However, there is no such condition in the agreements relevant to the instant case. Another important difference is that in those

[20] CA (TAX) 09/2017, decided on 04.09.2018

[21] CA (TAX) 05/2017, decided on 04.09.2018

two cases, although the agreement referred to the number of trees, the contractor was required to take over the trees that were identified by the field officer. Hence, it is clear that the goods remained unascertained as at the date of payment, and the passing of "exclusive ownership of goods" had not taken place for the purposes of the Sale of Goods Ordinance. However, in the case in hand the goods had been identified by the number of trees and their situation in the field, and the trees were to be marked with *consecutive numbers* only for the purpose of carrying out the uprooting in the numbered order.[22]

One may argue that although the goods were specific, they were not in a deliverable state for the property in the goods to pass to the buyer when the contract was made. Yet, a specific agreement on the transfer of risk is considered as an indication that the property had passed when the contract was made.[23] In the instant case, clauses 3.7, 3.8 and 3.13 of the agreements clearly indicate that the risk factor had been passed to the purchaser.

Be that as it may, the agreement for the sale of rubber trees contains a payment schedule setting out the amount to be paid in instalments, along with the date of payment. Therefore, it is clear that the agreements provide for periodical payments. Hence, under Section 4 (5) (a) of the VAT Act, the time of supply is when the payment is due or when the payment is received, whichever is earlier. Hence, it is unnecessary to refer to the Sale of Goods Ordinance or any other statute or to look for external interpretation in deciding the fact of the *time of supply*.

Under the above premise, the argument of the learned Senior State Counsel (paragraph 21 to 23 of the written submissions filed on the 27th August 2018) that the agreement was for the future supply of timber, the felled rubber trees, and not for the sale of live trees cannot be sustained.

It was argued by the Appellant that the sale of trees falls outside the scope of the VAT Act for the following reasons;

i. The trees were in existence even prior to the commencement of the lease of the lands by the Appellant from the Government of Sri Lanka.

[22] Clause 3.1 of an agreement

[23] P. S. Atiyah, John N. Adams & Hector MacQueen, *The Sale of Goods*, Eleventh Edition, 2005. at p.326

ii. The trees were not at all used by the Appellant in its business and not related to the business "*carried on*" or "*carried out*" by the Appellant.

iii. The Assessor has not given any reasons in his letter of intimation for taxing the sale of valuable trees.

It may be true that the trees had been in existence even prior to the commencement of the lease between the Appellant and the Government of Sri Lanka. Yet, the scope of VAT is at the time of supply of goods or services. Admittedly, a supply of trees was done by the Appellant.

According to Section 2 (1) (a) of the VAT Act, VAT could be imposed on a registered person;

i. in the course of;
ii. the carrying on, or carrying out of;
iii. a taxable activity

The words '*carrying on*' and '*carrying out*' are not defined in the Act. Therefore, those words have to be given their ordinary grammatical meaning. In terms of Article 23 (1) of the Constitution, all laws in Sri Lanka are enacted and published in the Sinhala and Tamil languages, together with an English translation. If there is an inconsistency between the Sinhala and Tamil texts, the Sinhala text shall prevail. Hence, it would be important to examine the Sinhala text for the aforementioned words '*carrying on*' and '*carrying out*'. The Sinhala text reads 'කරගෙන යාමේදී' (carrying on) and 'කිරීමේදී' (carrying out). Upon a careful consideration of the above terms, it appears to me that even a single taxable activity is captured under the term 'කිරීමේදී' (carrying out).

Another argument advanced by the Appellant is that the sale of trees has not been done *in the course of* the carrying on or carrying out a of a taxable activity in terms of Section 2 (1) (a).

In the case of *Customs & Excise Commissioners v Morrison's Academy Boarding Houses Association*,[24] the words '*in the course of*' have been interpreted as follows:

"*The use of words in the course of suggests that the supply must be not merely in sporadic or isolated transaction but continued over an*

[24] [1978] STC 1, at p.8

appreciable tract of time and with such frequency as to amount to a recognizable and indefinable activity of the particular person on whom the liability is to fall."

However, I am of the view that the removal of rubber trees from the estate is not a sporadic or isolated act, though it may appear to be so. It is common knowledge that rubber crops are removed from the land at regular intervals and are replanted. When the Appellant took the land on lease from the Government of Sri Lanka, it would have been well aware of this procedure. This is a practice that would come around every time a rubber crop reaches the age by which it no longer yields latex, and must be replanted.

The three agreements (at pages 198, 205/243, 349) entered into between the Appellant and three individuals between 2008 and 2010, for the sale of rubber trees in different divisions in different estates itself shows that it is a regular rooting act done by the Appellant and not a sporadic or isolated act.

In the above circumstances, I am not inclined to accept the rubber trees as a capital asset.

The next issue is whether the sale of rubber trees is a '*taxable activity*'. The word '*taxable activity*' found in Section 2 (1) (a) has been defined in Section 83 of the VAT Act, which reads thus;

> *"taxable activity" means –*
>
> *a) any* ***activity carried on as a business, trade****, profession or vocation other than in the course of employment* ***or every adventure or concern in the nature of a trade*** (emphasis added)*;*
>
> *b) ...*
>
> *c)* ***anything done in connection with the*** *commencement or* ***cessation of any activity*** *or provision of facilities* ***referred to in (a)*** *or (b)* (emphasis added)*;*

It is important to note that the definition of a taxable activity in the VAT Act includes not only any activity carried on as a business or trade but also *every adventure or concern in the nature of a trade*. Hence, it need not be a trade alone, as any act in the nature of a trade is also captured under the

definition. This gives the term 'taxable activity' a very broad definition; one under which the sale of trees by the Appellant falls quite comfortably.

Incidentally, I observe that the definition of 'taxable activity' according to Section 83 includes anything done in cessation of any activity. Therefore, even if it is assumed that the disposal of rubber trees which no longer produce latex is not a supply of goods, it is an act done in connection with the cessation of the taxable activity; supply of latex. Therefore, even if the argument of the Appellant that the sale of rubber trees is not an activity carried on as a trade is entertained, the sale is in any way caught up under item (c) of the interpretation of taxable activity.

On the above analysis I am of the view that the sale of rubber trees by the Appellant is a supply of goods by a registered person in the course of the carrying out of a taxable activity, which is liable for VAT under Section 2 (1) (a) of the VAT Act.

The next important matter to be determined is whether the live trees sold by the Appellant, which constitute the subject matter of this appeal, can be held to be '*unprocessed agricultural products*' within the meaning of item (b) (xxiii) of Part II of the First Schedule of the VAT Act. This Court does not deem it necessary to scrutinise whether live trees are 'unprocessed', as this is apparent given the ordinary meaning of the term.

Scrutiny must be placed on the word 'agricultural'. Regarding the meaning of the same words in the same statute, Bindra states that:[25]

'*It is an ordinary canon of interpretation that a word keeps the same meaning at least throughout in any Act,*[26] *and, as far as possible, the same meaning ought to be given to that expression.*[27] *It is well established that in order to interpret a term in a particular legislation its use in the same legislation in another provision is the best clue for interpretation.*'

It appears to me that the word 'agricultural' has been used in a wide sense in the VAT Act. The word *agricultural* has even been used as an adjective

[25] N. S. Bindra, *Interpretation of Statutes*, Eighth Edition, 1997. at pp.266, 267

[26] Bindra, citing [*In re* Acting Advocate-General, AIR 1932 Bom 71, 77 (FB); Kekra v. Sadhu, 23 IC 238; Emperor v. Makunda, 8 Cr LJ 18: 4 N.L.R. 78; Ajit Kumar Mukherjia v. Chief Operating Superintendent, EIR, Calcutta, AIR 1953 Pat 92; Balakrishna Murthy v. Somhyya, AIR 1959 Andh Pra 186, 192 (Ranganadham Chetty, J.), Shabuddin Sheik v. J. S. Thekor, AIR 1969 Guj 1 (FB)]

[27] Bindra, citing [Lal Chand v. Radha Kishan, 1977 Cur LJ (Civil) (SC) 57. W. B. Headmasters' Association v. Union of India, AIR 1983 Cal 448.]

to describe tractors (road tractors are separate) and machinery (other machinery is separate) used for agriculture (*vide* items (xxxv) and (xxxvi) of Part I and item (b) (viii) and (x) of Part II of the First Schedule). Further, seeds and plants are also separately described as agricultural seeds and plants (item (a) (xi) of Part II of the First Schedule).

The word 'agricultural' as an adjective means 'relating to agriculture'. *The Oxford Dictionary of English* defines *agriculture* as:[28]

> *the science or practice of farming, **including cultivation of the soil for the growing of crops** and the rearing of animals **to provide** food, wool, and **other products*** (emphasis added).

Unlike ordinary trees, rubber trees are grown as a commercial crop to produce latex which is used for manufacturing rubber products. Therefore, no doubt can exist as to the fact that rubber is an agricultural crop.

The analysis must then move to the word 'product'. The VAT guide issued by the Department of Inland Revenue deems unprocessed agricultural *produce* to include "live trees". Accordingly, any type of live tree has to be considered as agricultural produce. In my view, it is an absurd definition for the simple reason that any tree grown in Sri Lanka; even a "bo tree" (*Ficus religiosa*) or any other tree which has no value as timber or otherwise will also be included into the category of unprocessed agricultural produce. Another important factor is that the definition in the VAT guide is with reference to agricultural *produce* and the provision in the VAT Act is on agricultural *products.* In my view *products* and *produce* have two different and distinct meanings.

It is important to observe that VAT guide was first published in the year 2002 (first printing 2003) and refers to item (i) (a) of Part I of the First Schedule of the VAT Act, which existed before the amendment and was only applicable to the taxable period commencing on or after 1st August 2002 and ending prior to 1st January 2004. Item (b) (xxiii) of Part II of the first schedule of VAT Act, which is applicable to the taxable period commencing on or after 1st January 2004 has been introduced by VAT (Amendment) Act No. 15 of 2008. Therefore, the VAT Guide cannot be valid for the amended item (b) (xxiii) of Part II of the First Schedule.

[28] Angus Stevenson, *Oxford Dictionary of English*, Third Edition, 2010.

Yet, the phrase *unprocessed agricultural products* had been there even before the amendment (in the aforesaid item (i) (a) of Part I of the First Schedule). Therefore, one may argue that the VAT Guide is still valid in interpreting this term. Be that as it may, this Court is not bound to follow the guidelines issued by the Department of Inland Revenue unless those are given statutory force through a specific provision in the VAT Act.

In *D. M. S. Fernando and Another v. Mohideen Ismail,*[29] Samarakoon C.J., citing Maxwell on Interpretation of Statutes (12th Edition p.160) stated that:

"*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.*"

In his book *Interpretation of Statutes,*[30] Bindra states that:

'*The same words used in different statutes on the same subject are interpreted to have the same meaning. Indeed, it has been said that if a statutory meaning is attached to certain words in a prior Act, there is a presumption of some force that the legislature intended that they should have the same signification when used in a subsequent Act in relation to the same subject-matter.*[31]'

Even though item (i) (a) of Part I of the First Schedule and item (b) (xxiii) of Part II of the First Schedule are part of the *same* Act, it seems prudent to consider the provision which existed prior to the introduction of item (b) (xxiii) of Part II of the First Schedule.

Before the amendment, item (i) (a) of Part I of the First Schedule read as follows:

> *The supply or import of-*
>
> *i. (a) unprocessed agricultural products other than potatoes, onions, chillies, all other grains (other than rice and paddy) and planting material;*

[29] [1982] 1 Sri.L.R. 222, at p.229

[30] N. S. Bindra, *Interpretation of Statutes*, Eighth Edition, 1997. at p.266

[31] Bindra, citing [National Planners v. Contributors, AIR 1958 Punj. 230, 232 (FB); Jagat Ram v. Shanti Sarup, AIR 1965 Punj. 175]

It appears to me that the Legislature, having enacted the words *agricultural products*, has excluded some such products. Those are mainly a few agricultural products as well as planting material such as seeds used in agriculture. Upon a careful consideration of the above provisions before amendment, I am of the view that the legislature never intended to include the waste products of agriculture, such as old rubber trees, to be agricultural '*products*'. Even if old rubber trees and other live trees were not waste products, they simply cannot come under the provision of agricultural 'products', as a crop is cultivated *in order to* produce some product such as food or industrial products/raw materials such as rubber latex. The tree itself cannot be construed to be the 'product' of the crop, other than perhaps trees grown specifically to be used as timber, which the Appellant strongly insists its sale should not be classified under.

In the aforementioned item (i) of Part I of the First Schedule, unprocessed agricultural, horticultural and fishing products are categorized under different provisions, along with three other categories of products (items (i) (a), (b), (d) and (i) (c), (e), (f) respectively). However, in item (b) (xxiii) of Part II of the First Schedule which is applicable to the case in hand, the unprocessed agricultural, horticultural and fishing products are put together under one item.

Interestingly, unprocessed (or raw) prawns are separated as *unprocessed prawns produced in Sri Lanka* (item (b) (xxiv)). It appears to me that prawns also could have been included under the same item ((b) (xxiii)). However, by separating unprocessed prawns *produced* in Sri Lanka from fishing *products produced* in Sri Lanka, the Legislature has clearly allowed the tax exemption granted under Section 8 for the prawns produced in Sri Lanka and limited it to the fishing *products* produced in Sri Lanka, not allowing it to *all* fish produced in Sri Lanka. Hence, it clear that the intention of the Legislature in using the word products is not necessarily in respect of raw products.

This position is further strengthened by the legislature granting VAT exemptions to *locally produced dairy products* out of *locally produced fresh milk* and *locally produced rice products* containing *rice produced* in Sri Lanka, under item (xxvi).

For the reasons discussed above, it is my view that the sale of live trees by the Appellant is not a sale that can be exempted under item (b) (xxiii) of

Part II of the First Schedule of the VAT Act. I therefore hold that the supply of live trees by the Appellant is liable to VAT.

Calculation of the amount of tax payable (Questions 15-17)

The learned Counsel for the Appellant submitted that the Assessor had arbitrarily assessed the sale of live trees at a value that is 40% higher than the actual value of supply. Upon perusing the financial statements of the Appellant as well as the letter of intimation dated 30th December 2011, this submission of the learned Counsel appears to be true. Furthermore, even though the Assessor has set out the equation he used to arrive at a *higher* value than the value stated by the Appellant, there is no basis for why the said higher value was to equate to a 40% increase over the actual value.

While it is true that Section 30 of the VAT Act empowers an Assessor to determine the open market value, and it is also true that all an Assessor is required to do where an additional assessment is made is to state the reasons for rejecting the return under Section 29, and to issue notice of the assessment under Section 31 (1), the Assessor must be able to demonstrate how he arrived at the value he did. In this regard, the Section 83 definition of *open market value* is instructive:

> ***"open market value"*** *in relation to the value of a supply of goods or services at any date means, the consideration in money less any tax charged under this Act, which a similar supply would generally fetch if supplied in similar circumstances at that date in Sri Lanka, being a supply freely offered and made between persons who are not associated persons;*

It is clear from this definition that the *open market value* contemplates a comparison between two similar supplies, the one which is being assessed, and the other which provides an accurate picture of a representative supply on the open market. The learned Senior State Counsel was not able to demonstrate in argument why the latter supply was worth exactly or at least approximately 40% more than the supply in question.

Under these circumstances, I hold that the increase of the value of supply by 40% in the assessments is arbitrary. Having held elsewhere in this judgement that there is no hidden supply of services in the agreements

between the Appellant and the purchasers, the question of whether the value of such a supply of services can be added on top of the actual value of supply in order to compute the open market value of the supply does not arise.

After having carefully considered all of the submissions by both parties as above, I answer the questions of law stated for the opinion of this Court as follows:

1. *Did the Tax Appeals Commission err in law when it failed to appreciate that no assessment or additional assessment had been issued by the Department of Inland Revenue until the purported assessments were issued which is time barred thus nullity?* ***No***

2. *Did the Tax Appeals Commission err in law when it failed to appreciate that the letter dated 30th December 2011 is not and cannot be accepted as an assessment inasmuch as: -*

    a) *no assessment has been made on 30th December 2011;*

    b) *the letter dated 30th December 2011 clearly and categorically states that "Assessment will be issued in due course";*

    c) *the letter dated 30th December 2011 is an intimation letter which is statutorily required to be sent and which cannot be construed as an assessment or additional assessment?* ***No***

3. *Did the Tax Appeals Commission err in law when it failed to appreciate and take into account that an assessor has no power or authority or jurisdiction to issue an assessment or an additional assessment after the statutorily prescribed period?* ***No***

4. *Is the entire assessment process and the procedure adopted before the Commissioner General of Inland Revenue flawed and a nullity for the reasons that the assessor who wrote the intimation letter has not made the assessment?* ***No***

5. *Did the Tax Appeals Commission err in law when it failed to appreciate that an assessor is obliged to assess for each taxable period the VAT liability which the assessor has failed to do in this instance?* ***No***

6. *Is an assessor authorized to collectively value VAT supply without individually assessing the supply for each taxable period?* ***Does not arise***

7. *Did the Tax Appeals Commission err in law when it failed to appreciate that the assessor was not entitled to lump together and assess together for twelve months and thereafter apportion?* ***No***

8. *Whether the live trees supplied which are cut, uprooted and removed by the buyer are unprocessed agricultural produce.* ***No***

9. *Did the Tax Appeals Commission err in law when it failed to appreciate that what was sold by the appellant were standing trees which are "unprocessed agricultural produce"?* ***Though the TAC failed to appreciate that what was sold were live trees, the said trees still do not fall under "unprocessed agricultural products". Therefore, though the TAC erred in fact, it did not err in law in determining the eligibility for the exemption.***

10. *Did the Tax Appeals Commission err in law when it failed to appreciate the terms and conditions of the agreement to sell rubber trees cannot be construed to be an agreement for the performance of any services for the uprooting and removal of old rubber trees by a third party?* ***Yes***

11. *Has the Tax Appeals Commission misdirected itself in law in refusing to construe that standing rubber trees are unprocessed agricultural produce?* ***No***

12. *Is the sale of trees a supply of goods and not services by the seller?* ***Yes***

13. *Did the Tax Appeals Commission err in law when it failed to appreciate that under the sale agreement the Appellant did not perform any services to change the nature of supply into a "supply of a service"?* ***Yes***

14. *Did the sale agreement not cast any obligation or liability on the part of the Appellant to perform any service in order to fulfil the conditions of the said sale Agreement?* ***Yes, it did cast some obligations on the Appellant.***

15. *Whether the purported cost of the performance of obligations under the sale agreement performed by the buyer can be added to the value of the supply in order to arrive at the "value of supply" for VAT charging purposes.* ***Does not arise since this Court has held that the performance of obligations is incidental to the supply of goods*** *(vide text pages 19-24)*

16. *Whether the price agreed on the sale of trees under an Agreement entered into after tender being called for can be arbitrarily increased by an assessor for VAT charging purposes.* ***No***

17. *Whether the increase of the alleged price by the assessor by 40% is arbitrary, unreasonable and unwarranted and not authorized by law.* ***Yes***

In light of the answers given to the above questions of law, acting under Section 11 A (6) of the TAC Act, I remit the case to the TAC with the opinion of this Court that the assessment numbers 6765391 to 6765414 as determined by the CGIR be revised. The taxable value of supply as regards the sale of live trees should be the actual value of supply reflected in the records available to the Department of Inland Revenue. The taxable value of supply should not be 40% higher than the actual value of supply above. Any penalties arising therefrom may also be revised accordingly.

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

JUDGE OF THE COURT OF APPEAL

Dr. Ruwan Fernando J.

I Agree.

JUDGE OF THE COURT OF APPEAL