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

John Keells Holdings PLC.,
Cinnamon Lakeside
Commercial Centre, 117,
Sir Chittampalam A. Gardiner
Mw., Colombo 02.

Appellant

CA Case No.: TAX/0026/2013

Tax Appeals Commission Case No.: TAC/OLD/IT/017

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

Respondent

Before: Hon. D.N. Samarakoon, J.

Hon. Sasi Mahendran, J.

Counsel: Mr. Faiz Musthapha PC., with Dr. Shivaji Felix & Ms. Thushani Machado for the Appellant.

Mr. Saheeda Barrie, DSG., for the Respondent.

Argued on: 16.07.2021

Written submission tendered on: 30.08.2021 (final consolidated written submissions of the Appellant.)

31.08.2021 by the Respondent.

Decided on: 16.03.2022

D.N. Samarakoon, J

The case stated contain the questions of law as below.

1. Did the Tax appeals Commission err in law in its application of section 63 of the Inland Revenue Act No. 10 of 2006 (as amended) insofar as it applies to the Appellant?
2. Did the Tax Appeals Commission err in law when it came to the conclusion that section 10 of the Inland Revenue Act No. 10 of 2006 (as amended) had no application to the Appellant?
3. Did the Tax Appeals Commission err in law when it came to the conclusion that its determination was not time barred?
4. Did the tax appeals Commission err in law when it came to the conclusion that the initial assessment was not time barred?
5. Did the Tax Appeals Commission ignore the fact that the delegate of the Commissioner General of Inland Revenue has gone beyond his statutory remit by treating dividend income received by the Appellant as constituting part of its statutory income?
6. In view of the facts and circumstances of the case did the Tax Appeals Commission err in law when it came to the conclusion that it did?

Question of Law No. 01.

The term "dividend" is defined in section 217 of the Inland Revenue Act No. 10 of 2006 (as amended)

"dividend" includes –

(a) any distribution of profit by a company to its shareholders, in the form of - ....

(b) the amount of any capital returned or distributed....

The same section defines the term "statutory income". It includes income under section 3(a) which is business income and income under section 3(e) which is dividend income.

It is true that all income whether business or dividend income is income liable for income tax as the State argues.

But section 63 exempts a dividend received from a resident company if such dividend has been **either tax paid, tax exempt or tax excluded** from the statutory income of the receiving company.

The question in the phrase in the aforesaid passage which is in **bold** letters does not arise for decision of this court as it is not mentioned in the Case Stated that came up in terms of section 11A of the Tax Appeal Commission Act No. 23 of 2011 (as amended), as the jurisdiction exercised by this court in relation to a Stated Case is a jurisdiction conferred by the Tax Appeal Commission Act No.23 of 2011 (as amended), within the contemplation of Article 138 of the Constitution, because the jurisdiction is limited to express the opinion on a question of law. It may also be noted that the assessor was of the view that the appellant was entitled to the benefit of section 63 of the Inland Revenue Act No.10 of 2006 and what he disputed was the deductibility of certain expenses, whereas the respondent has taken a different view that section 63 does not apply to the appellant.

As per the learned President's Counsel for the Appellant this a policy that has commenced with the Open Economic policies in 1979.

It has commenced by section 35 of the Inland Revenue Act No. 28 of 1979 which read -

"35. Where a dividend is paid by any resident company to any resident or non resident company and either –

(a) a deduction has been made under section 38 in respect of that dividend by the first mentioned resident company; or

(b) that dividend is exempt from income tax under section 11; or

(c) that dividend consists of any part of the amount of a dividend received by the first mentioned resident company from another resident company; or

(d) that dividend is a dividend declared by a quoted public company on or after April 01st 1980 but before April 01st 1984; or

(e) that dividend is a dividend declared by a quoted public company on or after April 01st 1991

that dividend shall notwithstanding anything to the contrary in any other provision of this Act be deemed not to form part of assessable income of the second mentioned company".

It was repeated in section 58 of Inland Revenue Act No. 38 of 2000 which read -

" Where a dividend is paid by any resident company to any resident or non resident company and either –

(a) a deduction has been made under section 61 in respect of that dividend by the first mentioned resident company; or

(b) that dividend is exempt from income tax under section 11; or

(c) such dividend consists of any part of the amount of dividend received by the first mentioned resident company from another resident company; or

(d) such dividend is a dividend declared by a quoted public company,

such dividend shall notwithstanding anything to the contrary in any other provision of this Act be deemed not to form part of the assessable income of the second mentioned company".

Then it came to section 63 of Inland Revenue Act No. 10 of 2006 which reads -

"Where a dividend is paid by any resident company to any resident or non resident company and either –

(a) a deduction has been made under section 65 in respect of that dividend by the first mentioned resident company;

(b) that dividend is exempt from income tax under section 10; or

(c) such dividend consists of any part of the amount of a dividend received by the first mentioned resident company from another resident company; or

(d) such dividend is a dividend declared by a quoted public company,

such dividend shall notwithstanding anything to the contrary in any other provision of this Act be deemed not to form part of the total statutory income of the second mentioned company".

Section 63 was amended twice in 2014 and 2015.

The words "such dividend shall" in section 63 of Inland Revenue Act No. 10 of 2006 were replaced by words "profits and income of such dividends shall" by section 27 of Inland Revenue (Amendment) Act No. 08 of 2014 which amended section 63 aforesaid.

A further clause to this section was added by section 23 of Inland Revenue (Amendment) Act No. 09 of 2015 which read –
"For the purpose of this section the profits and income from such dividends which form part of the profits under section 3(a) of this Act means profits and income after deducting expenses in ascertaining the profits from such business of receiving dividends".

It may be noted, that this amendment in 2015 is referred to not because it applies to the years of assessment in question in this case, but because it shows the intention of the legislature to apply section 63 even if the dividend income is classified under section 3(1)(a).

Hence it appears that the amendments in 2014 and 2015 has a further purifying effect on the principle embodied in section 63 of the Act.

It has been stated in paragraph 29 of the complete written submissions of the Appellant that –

"The amendment made in 2015 would have no sense if section 63 of the Inland Revenue Act No. 10 of 2006 had no application to the dividends received that formed part of business income within the contemplation of section 3(a) of the Act".

Section 63 is only applicable when the dividend paid by a resident

company is received by another resident or non resident company and not by an individual.

The Appellant's complete written submissions from paragraphs 42 to 50 cites authorities with regard to the interpretation of taxing statutes.

It is stated that **Maxwell on The Interpretation of Statutes** [London: Sweet and Maxwell 1969] P St J Langan Edition at page 29 states,

"Where the language is plain and admits but one meaning the task of interpretation can hardly be said to arise....The desirability or undesirability of one conclusion as compared with another cannot furnish a guide in reaching a decision".

In the same book it is stated at page 256,

"....the subject is not to be taxed unless the language of the statute clearly imposes the obligation and language must not be constrained in order to tax a transaction which had the legislature thought of it would have been covered by appropriate words...."

In **Cape Brandy Syndicate vs. Inland Revenue Commissioners (1921) 12 TC** 358 at page 366 Rowlatt J. said,

"*In taxation you have to look simply at what is clearly said. There is no room for any intendment; there is no equity about a tax; there is no presumption as to a tax; you read nothing in; you imply nothing but you look fairly at what is said and at what is said clearly and that is the tax".*

It was said in **Inland Revenue Commissioners vs. Ross and Coulter [1948] 1 All E R 616 at page 625** by Lord Thankerton that,

"On the other hand if the provision is reasonably capable of two alternative meanings the courts will prefer the meaning more favorable to the subject".

This last mentioned dictum agrees with the position that there is no presumption as to a tax.

In **Partington vs. Attorney General (1969) LR 04 HL 100 at page 122** Lord Cairns said,

"If the person sought to be taxed comes within the letter of the law he must be taxed however great the hardship may appear to the Judicial mind to be. On the other hand if the Crown seeking to recover the tax cannot bring the subject within the letter of the law the subject is free however apparently within the spirit of the law the case might otherwise appear to be. In other words if there be admissible in any statute what is called an equitable consideration certainly such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute".

Hence as it was said, there is no equity in a tax.

It was said in **W T Ramsay vs. CIR [1981] 1 All E R 865** by Lord Wilberforce that,
"A subject is only to be taxed upon clear words not upon "intendment" or upon the "equity" of an act".

Although it was not a tax case, it was decided by H N J Perera C J while delivering the judgment of the Seven Judge Bench in the Supreme Court in **Sampanthan vs. Attorney General SC FR 350/2018**,

"....A court is not entitled to twist or stretch or obfuscate the plain and clear meaning and effect of the words in a statute to arrive at a conclusion which attracts the court".

The Tax Appeals Commission in its judgment said about the applicability of section 63,

"On a careful examination of sections 03,25,26,30 and 32 of the Inland Revenue Act it is quite clear that section 63 of the Inland Revenue Act applies where the source is treated as a separate source of income other than the main source of income of the business. Sections 63 does not have a bearing where the dividend income is earned as part of statutory income falling under section 3(a) of the Inland Revenue Act No. 10 of 2006".

It is stated in the complete written submissions of the Appellant that the Tax Appeals Commission has erred in law by merely repeating an incorrect assertion made by the delegate of the Commissioner General of Inland Revenue in his reasons for the determination which said,

"A careful examination of the whole of section 03 section 25,26,30,31,32 and 63 it is quite clear that section 63 only is applied for the source of dividend on which it is treated as separate source of income. Section 63 does not give any effect for the dividend is represented as part of the trade income". Whether the judgment of the Tax Appeals Commission is a mere repetition of this assertion without any deliberation or not there was no basis for the Tax Appeals Commission to say that "Sections 63 does not have a bearing where the dividend income is earned as part of statutory income falling under section 3(a) of the Inland Revenue Act No. 10 of 2006", since that is what section 63 has stated in plain language. When the dividend is paid by a resident company to a resident or non resident company and when it is a dividend either tax paid, tax exempted or tax excluded it does not form a part of the statutory income of the receiving company whether the said statutory income was under section 3(a) which is business income or under section 3(e) which is dividend income.

As the Appellant has stated if the legislature was of the view that section 63

applied only to dividend income that came within the contemplation of section 3(e) there would have been no necessity to amend section 63 because no expenses are deductible when determining dividend income under section 3(e)

The respondent in his written submissions before this court filed on 26th July 2016 states as reproduced below,

"13. Thus the "trade and business" of the company was primarily in the sphere of investment.

.....

17. The dividend income contemplated in section 3(e), is where the dividend is not derived from the investment in the ordinary course of business of a company but earned from a distinct and separate source.

18. This position is supported by the decision in the case of Financial Investment Ltd. vs. Commissioner of Income Tax (Ceylon Tax Cases, Vol.I page 235). In that case Howard C. J. concluded that the company in question was a holding company. He went on to hold as follows: "I am therefore of the opinion that the income derived by the appellant company from dividends and interest fall within the words "profits from any business" under section 6(1)(a)".

19. Further in the case of Commissioner of Income Tax vs. Arunachalam Chettiar 37 NLR 135 it was held that if a subject's income fell under either "profit of business" or "income arising from interest", the crown has a choice of levying the charge under either of the two heads".

Thus the case decided by a Five Judge Bench headed by Howard C. J. was cited for the respondent in the present case.

The case is **Ceylon Financial Investment Limited vs. Commissioner of Income Tax** decided under Income Tax Ordinance No. 02 of 1932.

The question in **Ceylon Financial Investments Limited vs. Commissioner of Income Tax** was since the company was only a holding company, whose income is derived from dividends declared by companies in which it owns shares and interest on money lent out by it, whether the declaration of an expense of Rs. 1270/- as management expenses which includes the Directors' Fees, Secretaries' Fees and Auditors' Fees, which if not exempted that incurred Rs. 153.96 of income tax, is liable to be taxed.

Hence the Assessee or the Appellant wanted to argue that what it does is "business". This is contrary to the position of the Appellant in the present appeal.

However it must be said that in the present case, the learned President's Counsel for the Appellant does not say for a moment that the dividends the Appellant receives do not form part of profits under section 3(1)(a) of the Inland Revenue Act No. 10 of 2006. His position is that even if it falls under that section, section 63 of the said Act would make him not liable for income tax.

But if not for this alleged effect of section 63, the Appellant would have been in a better position if the dividend income of the Appellant falls within section 3(1)(e)

But in the **Ceylon Finance Investment Ltd. vs. Commissioner of Income Tax**, the Assessee or the Appellant wanted to be treated under section 6(1)(e) [which in substance is similar to present section 3(1)(e) which includes dividends] because it wanted to argue that it is doing "business" in order to qualify to deduct management expenses out of "profits".

Interestingly the Assessor and the Commissioner of Income Tax argued in Ceylon Financial Investment Limited vs. Commissioner of Income Tax that the

Appellant in that case, which is a holding company is coming under section 06(1)(e) which is "dividends, interest or discounts;" which is same as section 3(1)(e) of the Inland Revenue Act No. 10 of 2006.

It is to be noted that the provisions in sections 3(1)(a) and 3(1)(e) of the present Act is similar in verbatim to the provisions in the corresponding sections of section 06 in Income Tax Ordinance No. 02 of 1932 (as amended) on which the **Ceylon Financial Investment Limited vs. Commissioner of Income Tax** is based.

It is also interesting to see that certain portions of the order of the Tax Appeals Commission has been directly taken from the ARGUMENTS ON BEHALF OF ASSESSEE, APPELLANT in Ceylon Financial Investments Limited case. For example, page 237 of the Law Report of the said case in summarizing the arguments in that case of Mr. H.V. Perera K.C. with E.F.N. Gratiaen for appellant states,

"There is a difference between investments of a private individual and investments by a company carrying on the business of making investments. In the former case each investment is an isolated source of income; whereas when a company exists for the purpose of making investments, the source of income is the business and the receipts of the business must be taken as a whole. National Bank of India V. Commissioner of Income Tax."

The Tax Appeal Commission in its order (page 138 of the brief) says,

"There is a difference between investments of a private individual and investments by a company carrying on the business of making investments. In the former case each investment is an isolated source of income, whereas when a company exists for the purpose making investments, the main source of income emanates from that business and therefore, the receipts of the business must be taken as a whole."

It may be noted that except for a minor change towards the end (which is underlined) most of the passage is same as the argument of the appellant in the Ceylon Financial Investment Limited case.

It may be recalled that the learned President Counsel for the appellant in the present case also drew the attention of the court to certain portions of Tax Appeals Commission's order which has been taken from the order of the Commissioner General of Inland Revenue.

Furthermore, the Commissioner General of Inland Revenue in his order cites the cases of

i. Commissioner Inland Revenue Vs. Korean Syndicate Limited (12TC 181)
ii. The Commissioner of Inland Revenue Vs. The Tire Investment Trust Limited (12TC 646)
iii. The Commissioners of Inland Revenue Vs. The South Bihar Railway Company Limited (12TC 657)
iv. The Commissioner of Inland Revenue Vs. Dale Steamship Company (12TC 712)
v. The Glamorgan Coal Company Limited Vs. The Commissioners of Inland Revenue (12TC 1027)
vi. Henry Briggs Son and Company Limited Vs. Commissioner of Inland Revenue (39TC 410),

all of which except the last case has been cited by Mr. H.V. Perera K.C. in the above case for the appellant.

In the Ceylon Financial Investments Limited Case, the judgment was in favor of the appellant since it was decided that the company is doing "business" it earns "profits" and it can deduct "management expenses" from the "profits".

The position of the Commissioner of the Income Tax or the respondent in that case was that "The English cases cited on behalf of the appellant were based on the Excess Profits Duty Act and the Corporation Profits Tax Act. The term "business" in those Acts has a much more extended meaning than in our Income Tax Ordinance." (Page 238 of the Law Report)

It was also the position of the Commissioner of Income Tax in that case that "With regard to section 6 the arrangement in our Ordinance is not the same as in the English Acts where the schedules are more or less exclusive. The contention that the present case falls exclusively under section 6 (1) (a) is untenable." (Page 238 of the Law Report)

The Commissioner of Income Tax further argued "The dividends and interest in this case fall exclusively under section 6 (1) (e)" and "The appellant company does nothing to "produce" the dividends." (Page 239 of The Law Report)

Not stopping there, it was further argued for the Commissioner of Income Tax "Even if the income falls under section 6(1) (a), the taxing authority has the right of option to elect between section 6 (1) (A) and section 6 (1) (E) when the two heads are equally applicable."

Ceylon Financial Investments Limited vs. Commissioner of Income Tax was initially heard by the Chief Justice and Keuneman J. but was later referred to a bench of five judges.

Howard CJ writing his Lordship's Judgment said "that on the facts it is evident that the Company's activities, so far as they are material, during the year of assessment, were limited to receiving dividends and interest and accounting for them." (Page 240 of The Law Report)

His Lordship also said " in order to meet the contention of the Crown that the appellant Company should be assessed under section 6 (1) (e) and not as a

"business" under section 6 (1) (a) Counsel for the appellant has referred us to numerous English authorities to establish the proposition that, although the income of the Company was derived solely from dividends declared by other companies in which it owned shares and interest on moneys lent out by it and its operations included no other trading enterprise, it was carrying on business." (Page 242 of The Law Report)

It was said following the judgment in Eccentric Club Ltd. at pages 688 and 689 by Pollock M. R., that " its business may be quiescent and to a large extent, a matter of routine. Its receipts may be derive, if not wholly, at least almost entirely from the annual payments made to it by the Secretary of State; but it remains a company alive and still requiring if only in smaller details, the direction of its directors and the duties carried out by its secretary. It is still concerned in the business of disposing of and diving the profits which it has become entitled to by reason of its greater activity in the past and that activity as well as possibly others may be awakened and quickened in the future. For these reasons I am of opinion that the appeal must be allowed, with costs here and below". (Page 243 of The Law Report)

Referring to the argument of the Crown the Chief Justice said " The Acting Solicitor – General has contended that the interpretation given by the English Courts in the cases I have cited as to what activities constituted carrying on "business" turned on the special meaning of this term in the Acts imposing duties on excess profits and can have no application to the term as employed in the Ceylon Income Tax Ordinance I am unable to accept this contention." (Page 243 of The Law Report)

It was further said "Moreover the Chairman of the Board of Review in his judgement states that on the facts it is evident that the company's activities, so far as they are material, during the year of assessment, were limited to receiving dividends and interest and accounting for them. I am of opinion that

so far as this aspect of the case is concerned the Commissioner and the Board have regarded the matter from the wrong angle." (Pages 244, 245 of The Law Report)

Having considered several other judgments cited, the learned Chief Justice towards the end of his Lordship's judgment said "for the enumeration of sources we must turn to section 6 (1). Can it be said that these sources like the Schedules in England are mutually exclusive? The wording of sources (a), (b) and (c) shows that these sources are mutually exclusive. (d) excludes (a), (b) and (c), and (h) excludes all previous sources. But there are no words in (e) to show that this source does not apply to dividends, interest or discounts arising from a trade or business. **If the business of a company consists in the receipt of dividends, interest or discounts alone** or if such a business can be clearly separated from the rest of the trade or business, **then any special provisions applicable to dividends, interest or discounts must be applied"**

Therefor His Lordship said "I agree, therefore, with Keuneman J. that the Commissioner was empowered to charge the appellant Company under section 6 (1) (e) in respect of the dividends and interest received from undertakings in which its capital was invested."

In any event, His Lordship finally said "The only remaining question for consideration is whether there are any provisions permitting the deduction of management expenses in arriving at the net income of a Company when such income is derived from source (e). This involves the interpretation of sections 09 and 10. Subject to subsections (2) and (3), section 09(1) permits the deduction of all outgoings and expenses incurred by a person in the production of income and applies to profits and income from any source and would therefore prima facie apply to all sources in section 06(1)(a) to (h). Section 09(3) provides that income from "interest" shall be the full amount without any deductions for outgoins or expenses. Section 10(b) provides that no deduction

shall be allowed for any disbursements or expenses not being money expended for the purpose of producing the income. Can it be said that the management expenses were disbursements expended for producing the dividends received by the appellant Company from investments in other Companies? I do not think it can be. In England by virtue of section 33 of the Income Tax Act, 1918, the management expense of any Company whose business consists mainly in the marking of investments are deductible. No such provision exists in the Ceylon Ordinance and having regard to its absence I am unable to say that management expenses can be deducted in order to ascertain the assessable income."

Hence as per Howard C. J., business expenses could not be deducted.

In **Ceylon Financial Investments Limited vs. Commissioner of Income Tax** Soertsz J., said,

"In regard to the next contention of the Acting Solicitor General that even if the appellant company was carrying on a business and for that reason, came under section 06(1)(a) and was entitled to claim deductions on account of the management expenses of that business, under section 09(1) yet as the gain derived by it from "dividends and interest" falls within the words "dividends, interest or discounts" of section 06(1)(e) as well, the crown is entitled to elect under which of these heads 06(1)(a) or 06(1)(e) it will make its assessment, I greatly regret that I cannot assent to the view taken by My Lord the Chief Justice in upholding that contention. On that point while I agree with my brother Keuneman that the crown has no such option and that "it was the intention of the Ordinance to regard dividends, interest or discounts as a separate source". I venture to differ when he says that,

> *"If then the business of an individual or a company consist in the receipt of dividends, interest or discounts alone, or if the business receiving dividends, interest or discounts can be clearly separated from the rest of*

the trade or business, then any provision applicable to dividends, interest or discount must be applied", in so far as that statement, as I understand it, implies that section 09(3) will uniformly apply if the "interest" part of the gains of such business is separate or separable from the "dividends" part of it.

Hence Soertsz J., while disagreed with the Chief Justice that crown has an option to assess under section 06(1)(a) or 06(1)(e), as it pleases, agreed with Keuneman J., that the crown has no such option. Soertsz J., also disagreed (as it appears with both the Chief Justice and Keuneman J.) that if the business consist of the receipt of dividends, etc., or if that can be clearly separated from the rest of the business, then any special provision applicable to dividends, etc., must be applied.

Keuneman J., in regard to cases cited for the Appellant by Mr. H. V. Perera K.C. said,

"As regards the first matter argued, a number of cases were cited to us. In the case of The Commissioner of Inland Revenue vs. The Korean Syndicate Ltd., 12 Reports of Tax Cases 181, a syndicate was registered in 1905 as a company for the purpose, inter alia, of acquiring and working concessions and turning them to account and of investing and dealing with any moneys not immediately required. In 1905 the syndicate acquired a right to concession in Korea, but in 1908 it assigned its rights to a development company under an agreement. During the years material to the case, the syndicate activities were confined to receiving the bank interest and royalties, its only income, distributing the amount among its shareholders and paying premiums on a sinking fund policy. It was held, that the syndicate was carrying on the business for which it was incorporated of acquiring concessions and turning them into account and that the profits derived therefrom were liable to Excess Profits Duty".

His lordship further said,

"The remarks of Atkin L. J. also are in point, "I myself have no difficulty at all in coming to the conclusion that this company is in fact carrying on business and it carried on a business of receiving the profits from the concession, in which it still retains an interest. It is true that it may be called, if you please, a passive carrying on of business as opposed to an active carrying on of business....Personally, if any emphasis is attached to the word "active", I think it would narrow the meaning of the word; for I see nothing to prevent a holding company, which is a very well known method of carrying on business in these days, from carrying on business".

Referring to another case cited, His lordship said,

"Further in The Commissioners of Inland Revenue vs. The South Behar Railway Co., 12 Reports of Tax Cases 657, decided in the House of Lords, Viscount Cave L. C. said: "It is true the company carries on no trade or manufacture and that its principal and only function at the present moment is to receive and distribute the fruits of its undertaking; but that is a part and a material part of the purpose for which it came into existence. It was not intended to be a trading but a financial company;....The company can no longer be called upon to fulfil its first purpose, namely, to make advances for a construction of the line, because all the necessary funds have already been advanced; but it is still fulfilling its second purpose, which was to receive an income for its shareholders....and to distribute it among them, ...I think, therefore, that the company still carries on a business or similar undertaking within the meaning of section 52 of the Finance Act 1920".

Refuting the argument of the Commissioner of Income Tax, that, in those cited cases, the word, "business" was given an especial meaning, His lordship said,

"It has however been contended for the Commissioner that the interpretation of the word "business" in these cases has particular relation to the meaning of that word in its special context. I do not think this is correct".

Analysing various items in section 06(1) of Ordinance No. 02 of 1932 His lordship said,

"If we examine section 06(1) of our Ordinance we see that source (a) deals with the profits from any trade, business, profession or vocation. Source (b) deals with a very distinct matter, viz., the profits from any employment. Source (c) deals with the net annual value of land occupied by or on behalf of the owner, in so far as it is not occupied for the purpose of a trade, business, profession or vocation. There is a clear differentiation between source (c) and source (a) and I think the language shows that it is distinct from source (b) also. Source (d) deals with the net annual value of land used rent free by an occupier, etc., in so far as it is not included in sources (a), (b) and (c). So far I think those sources are mutually exclusive".

"The difficulty arises with regard to sources (e), (f) and (g). In these cases there are no words employed to show that the earlier sources are excluded. For example take source (e), viz., "dividends, interest or discount". There are no words to show that this source does not apply to dividends, interest or discounts arising from a trade or business".

His lordship at the end decided,

"How then are we to treat income which comes under source (e) but can also be regarded as coming under source (a)? In my opinion it was the intention of the Ordinance to regard dividends, interest or discounts as a separate source. If then the business of an individual or a company consists in the receipt of dividends, interest or discounts alone, or if the business of receiving dividends, interest or discounts can be clearly separated from the rest of the trade or business, then any special provision applicable to dividends, interest or discounts must be applied. I do not think any question of option arises".

Hence with regard to the applicability of special provisions applicable to dividends, etc., when they come both under source (e) and source (a),

Keuneman J., agreed with Howard C. J. (although it was not said expressly, because as it would be recalled the Chief Justice also came to the same conclusion on the said point) although Soertsz J., has not agreed on that point. But De Kretser J., (who did not write a separate judgment) and Wijeyewardene J., (who gave his lordship's conclusions in point form) have agreed with Keuneman J. Hence 04 judges out of 05 have agreed on that point, which is hence the decision in that case.

That is that, if dividends, etc., comes under source (e) as well as source (a), if the business of the company consists in the receipt of dividends, etc., alone, or if the business of receiving dividends, etc., can be clearly separated from the rest of the trade or business, then any special provisions applicable to the dividends, etc., must be applied without there been any question of an option.

Thus the case of Ceylon Financial Investments Limited vs. Commissioner of Income Tax although cited for the respondent, to show that the company receiving dividends, etc., only was decided to be coming under section 06(1)(a) of the Ordinance, in its ratio decidendi has assisted the appellant in the present case.

It may be noted that Keuneman J., further said, '

"It is no doubt true that the divisions into "sources" under section 06(1) does not appear to be scientific and it is difficult to see on what grounds the division is made. But we must take the Ordinance as we find it".

Thus the majority of the 05 judge Bench classified the appellant in that case under source (e) as well as source (a) and also decided that any special provision applicable to dividends, etc., must apply.

Hence the question of law No. 01 must be decided in favour of the appellant.

Question of Law No. 02.

Question of law No. 02 is the applicability of section 10(1) of the Inland Revenue Act No. 10 of 2006. The said section reads –

"There shall be exempt from the income tax - [it continues from sub paragraph (a) to (j) and also continues in sub section 02(a) and (b)]

This becomes relevant under section 63(b) of the Inland Revenue Act No. 10 of 2006.

The Tax Appeals Commission in its judgment states that,

"Even though the representative of the Appellant referred to section 10 of the Inland Revenue Act he failed to show how Section 10 is applied to the Appellant's case. Further a close examination of the provisions in section 10 of the Inland Revenue Act shows that section 10 has no application to the Appellant's case".

However, any dividend received by the Appellant coming within the scope of section 10 of the Inland Revenue Act would enjoy an exemption from income tax, one reason being that any such dividend received by the appellant would not constitute part of its statutory income in view of the express provisions to this effect in section 63(b) of the Inland Revenue Act. The tax exemption conferred by section 10 is not dependent upon the application of section 63.

Hence question of law No. 02 must be decided in favour of the appellant.

Question of Law No. 03.

Question of law No. 03 is did the Tax Appeals Commission err in law when it came to the conclusion that its determination was not time barred.

Section 10 of the Tax Appeals Commission Act No. 23 of 2011 provided that an appeal must be heard and concluded within 180 days of the commencement of the hearing.

But with regard to the appeals transferred from the respective Board or Boards of Review it was provided that such an appeal must be heard and concluded within 180 days of the transfer.

The Tax Appeals Commission Act was certified on 31.03.2011. Hence that is the date on which an appeal before the Board of Review will stand transferred to the Tax Appeals Commission. In this manner the appeal will be prescribed by 180 days or by 27.09.2011.

The appeal of the Appellant from the decision of the delegate of the Commissioner General of Inland Revenue was made in this appeal to the Board of Review. Hence the particular appeal gets transferred to the Tax Appeals Commission on 31.03.2011. Hence it would be prescribed by 27.09.2011.

This would have been the situation if not for the Tax Appeals Commission (Amendment) Act No. 04 of 2012. The said Amendment Act changed the time limits by its section 07 and the amendment to section 10 by the said Amendment Act was made retrospectively applicable from 31.03.2011 by its section 13.

It was said that 31.03.2011 was the commencement of the principal Act and hence the date of the transfer of appeals pending before the Board of Review. Therefore the effect of this amendment in 2012 was to keep such an appeal alive for a longer period. The amendment extended the time period for the hearing and conclusion of a newly filed appeal for 270 days and in respect of transferred cases it was stipulated that such appeals must be heard and concluded within 12 months from the date of the commencement of the sittings of the Tax Appeals Commission.

Although the Tax Appeal Commission Act was enacted on 31.03.2011 the Tax Appeals Commission as per a notice published by the Ministry of Finance in its

website commenced sittings on 08.03.2012. It is submitted for the Appellant that the reference date is the date on which the Commission commenced sittings qua Commission and not the date on which the Commission commenced hearing a particular appeal. This position is correct. Hence it would appear that for all appeals transferred to the Commission from the Board of Review the transfer date is 31.03.2011 and for the purpose of the amendment the date on which prescription commence to run in respect of all such appeals is 08.03.2012. This would show that under the said Amendment the Appellant's appeal will be prescribed by 07.03.2013.

But the Tax Appeals Commission Amendment Act No. 20 of 2013 effected a further amendment. By this amendment the time period for appeals was changed to 270 days from the commencement of hearing of each such appeal. In respect of transferred appeals it was stated that they must be heard and concluded within 24 months of the date of the commencement of hearing of each such appeal.

This amendment came into effect from 01.04.2011.

The said Amendment Act brought another section 15 for the avoidance of doubts which read –

"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 twelve months granted for the determination by that section prior to its amendment by this Act".

If there were no section 15 what would have been the position?

After the second amendment the provisions of section 10 of the Tax Appeals Commission Act read –

"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 commencement of its sittings for the hearing of each such appeal.

Provided that all appeals pending before the respective Boards 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 the coming into operation of the provisions of this Act be deemed to stand transferred to the Commission and the Commission shall notwithstanding anything contained in any 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".

Since this amendment was retrospectively effective from 01.04.2011 the effect was to consider the appeals having been transferred on 31.03.2011 were alive until the Commission commences its hearing in respect of each such appeal and then continue to be alive for two years.

In such a situation any appeal that stood transferred on 31.03.2011 would have been alive in view of the said last amendment until the commencement of hearing of the particular appeal and for two years from that date.

There is no doubt that the said "avoidance of doubts" Clause was enacted to further make this position clear.

But the wording of the "avoidance of doubts" clause as it appears to this court brings a further complication. The reason appears to be that the "avoidance of doubts" clause referring not to the principal enactment as it stood on 31.03.2011 but to its amended version after the first amendment because it

says "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 in that section prior to its amendment by this Act".

Had it simply referred to the original enactment it would have been one hundred and eighty days and not twelve months.

This is referred to by the Appellant stating in the complete written submissions as "The avoidance of doubts clause applies for the interpretation of section 10 as amended with effect from the date of the amendment and not from the date of enactment of the principal enactment".

It is stated in the very next paragraph,

"Section 15 of the Tax Appeals Commission (Amendment) Act No. 20 of 2013 does not have the effect of resurrecting appeals that have already been determined by operation of law. The 2013 amendment substituted a new Schedule I to the principal enactment which resulted in a number of new transferred appeals. The avoidance of doubts provision would apply to such transferred appeals and not to those appeals that have already been determined. If the appeals that are time barred by operation of law are to be resurrected and resumed there would be a need for clear language as in the case of the Inland Revenue (Regulation of Amnesty) Act No. 10 of 2004 where vested rights were expressly disturbed".

But the appeal in this case as it was seen was kept alive until 07.03.2013 by the second amendment to section 10 of the Tax Appeals Commission Act. It was to be heard and concluded within twelve months. The "avoidance of doubts" Clause states 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".

The appeal of the Appellant to the Board of Review was an "appeal that was deemed transferred to the Commission under section 10 of the principal enactment". If so the phrase "notwithstanding the expiry of twelve months" applies.

Hence the authorities referred to by the Appellant in paragraphs 89, 92, 94 and 95 of the complete written submissions will have no applicability since the very provision of the second amendment to section 10 togetherwith the provisions of section 15 is to give the Commission jurisdiction to hear an appeal notwithstanding the twelve month period. There cannot be any other appeal to which such words refer except for an appeal prescribed due to the expiry of twelve months or determined by the operation of the law as the Appellant has termed.

The Appellant has also referred to Stafford Motor Company (Private) Limited vs. Commissioner General of Inland Revenue CA Tax 17/2017 decided by a learned previous Bench of this court on 15.03.2019 and Kegalle Plantations PLC vs. Commissioner General of Inland Revenue CA Tax 09 of 2017 decided by the same learned Justices of this court on 04.09.2018. The Appellant invites this court to depart from the judgments in those appeals.

But Stafford Motor Company (Private) Limited vs. Commissioner General of Inland Revenue CA Tax 17/2017 was in respect of an appeal made directly to the Tax Appeals Commission and not an appeal that was preferred to the Board of Review and then deemed to have been transferred as in this case and hence the provisions with regard to the time limits referred to in that case were

different. Section 15 in the second amendment applies only to "any appeal that was deemed transferred to the Commission" and hence in that case the appeal to the Tax Appeals Commission was not governed by that section. Hence for the purpose of the argument in this case the distinguishing of the decision in Stafford Motor Company (Private) Limited vs. Commissioner General of Inland Revenue CA Tax 17/2017 is not necessary.

Basically the question in Stafford Motor Company (Private) Limited vs. Commissioner General of Inland Revenue CA Tax 17/2017 was whether the time limits stipulated in section 10 are mandatory or directory. That question does not arise for determination in this appeal.

Kegalle Plantations PLC vs. Commissioner General of Inland Revenue CA Tax 09 of 2017 also dealt with an appeal directly made to the Tax Appeals Commission. Hence the question that arose in that appeal too was whether the time limits are mandatory or directory which as aforesaid does not arise for determination in this case.

Hence even if the Appellant had a vested right on the appeal being determined by 07.03.2013 as it argues it is vitiated by the revival, if not resurrection, of the appeal by the provisions of section 15 of the second amendment.

Hence the Tax Appeals Commission has not erred in deciding that its determination is not time barred as per the provisions applicable in this appeal.

Hence the question of law No. 03 must be answered in favour of the respondent.

Question of Law No. 04.

Question of Law No. 04 is “Did the tax appeals Commission err in law when it came to the conclusion that the initial assessment was not time barred?”

With regard to the aforesaid, the Tax Appeals Commission in its order said,

"The time bar period imposed by section 163(5) of the Inland Revenue Act relates to the time within which the assessment is required to be made by an assessor. However the requirement to send the notice of assessment in terms of section 164 of the Act, does not impose a time limit within which such notice is required to be sent. Even the amending Act No. 19 of 2009 did not make any change to this position. It would appear that section 164 of the Inland Revenue Act does not contemplate any specific time within which the notice of assessment is required to be sent, unlike in the case of making an assessment. However it does not mean that an inordinate delay in sending the notice of assessment is permitted by section 164 of the Inland Revenue Act. The delay of few days, as has happened in this case, cannot be considered as a serious violation of section 164 of the Inland Revenue Act so as to make the assessment invalid. Moreover section 165(1) of the Inland Revenue Act which provides for the making of an appeal, against any assessment made under the Act provides that an appeal could be made to the respondent (Commissioner General of Inland Revenue) "within a period of thirty days after the date of notice of assessment". Hence it would appear that the appellant's right to appeal has not been denied due to the said delay and therefore no prejudice has been caused to the appellant. Even in the case cited by the representative of the appellant, D.M.S. Fernando vs. Ismail Sri Lanka Tax Cases Vol. 184, the Supreme Court in dealing with the Inland Revenue Amendment Law No. 30 of 1978 which, inter alia, required the assessor to communicate his reasons for not accepting the return held that the communication of those reasons was mandatory and that this should be done "at or about the time he sends his assessment on an estimated income" (page 194). In the case of Upali Wijewardena vs. Kathiragamer and another, Sri Lanka Tax Cases Vol. iv page 313, the Court of Appeal held that, if the assessment is made within the stipulated time and is sent to the assessee "at or about the time" such assessment is made,

there is substantial compliance with the requirement of the law. Further in the English case of Honig vs. Sarsfield 59 Tax Cases page 337 at pages 349 350 the Court of Appeal drew a distinction in making of an assessment and the notice of assessment and said that they were different, the assessment being in no way dependent upon the serving of notice. The court was of the view that the issuing of the notice was independent of the making of valid and effective assessment. Therefore in the present case the assessment has been made within the stipulated time. However the notice of assessment has been sent to the appellant after few days delay. Therefore it would appear that, there has been substantial compliance with the requirement of section 163(5) of the Inland Revenue Act. Besides as stated above, no prejudice has been caused to the appellant, as the appellant had the opportunity to appeal".

If this argument of the Tax Appeal Commission is accepted, it means that the assessor only has to make the assessment within the stipulated time but he can indefinitely delay the sending of the Notice of Assessment.

But section 163(1) refers to "assess the amount …… and shall by notice in writing **require such person to pay forthwith** …….". section 163(1) also says **subject to the provisions of subsection (3) and (5)**. It is section 163(5) which has the time limit. Hence sending of notice also has to be done within the prescribed time.

This shows that the duty to "assess" is not only coupled with the duty to serve "notice in writing" but both are subject to the provisions of subsection (3) and (5) of section 163 of the Act.

If not the assessor will be able to make an assessment even after the stipulated period and send Notice of Assessment to the assessee. If the assessee takes the position that the assessment was not made within the prescribed time the assessor will be free to produce a document made after the prescribed time but

incorrectly bears a date within the prescribed time as evidence of making the assessment.

Furthermore, E.Goonaratne, says in "INCOME TAX IN SRI LANKA", first edition at page 393, **"Making an assessment culminates in the notice on the person assessed. An assessment is made when the assessment is sent."**

Honig and others vs. Sarsfield (Inspector of Taxes) (1986) BTC 205, the case cited by the Tax Appeal Commission was decided in the United Kingdom.

In that case Fox L.J., drew a distinction in making of an assessment and the notice of assessment and held them to be different, the assessment being no way dependent on the service of notice.

In the law report of **Honig and Others (administrators of Emmanuel Honig) vs. Sarsfield (H. M. Inspector of Taxes) Reported (Ch.D) [1985] STC 31; (CA) [1986] STC 246** it is said,

"....A back duty enquiry was instituted in 1970 and, on 16th March 1970, an Inspector of Taxes signed a certificate in volume 1 of his District Assessment books stating that he had made assessments on the administrators for the years 1960-61 to 1966-67 inclusive. The notices of assessment were issued on 16th March 1970, but did not reach the administrators until after 07th April 1970. It was common ground that the assessments would be out of time unless made before 06th April 1970 by reason of the provisions of section 34 and section 40(1) of the Taxes Management Act of 1970. The administrators appealed.

The Special Commissioners held that (1) the assessments were "made" on 16th March 1970, when a duly authorized Inspector signed the certificate in volume 1. They were therefore not out of time; (2) the increases to the assessments contended for by the Inspector were supportable. They did not accept the oral evidence of the son, M. Honig, one of the administrators, that the increases in

capital disclosed by the statements were attributable to rental income arising to the son, not the deceased.

The Chancery Division, dismissing the appeal, held that on the first point, it was clear on a proper construction of sections 29 and 114 of the Taxes Management Act of 1970, that the making of the assessment was not dependent on the service of the notice of assessment. The Special Commissioners were plainly right to hold that the assessments were made on 16th March 1970 and so within the time limit prescribed by sections 34 and 40 (1) of that Act. On the second point, there was no possible ground on which the court could hold that the Special Commissioners conclusion was perverse; there was ample evidence before them on which to make their findings of fact.

The administrators appealed to the Court of Appeal on the first point only, namely the date when the assessments were made.

Held, in the Court of Appeal, dismissing the appeal, that the assessments were made on 16th March 1970 when the Inspector of Taxes signed the certificate in volume 1 of the assessment book".

Thus it is clear that the procedure in England was different. The assessment was "made" when the Inspector of Taxes authorized to make such assessment signs the certificate in the assessment book. It is because under the Taxes Management Act of 1970 the Inspector of Taxes was obliged to maintain an assessment book. In this country the Inland Revenue Act No. 10 of 2006 does not require the assessor or the Commissioner of Inland Revenue to maintain such a register.

Hence the argument of the Tax Appeal Commission in the present case that the effective date for the commencement of the time bar is the date of "making" the assessment and not the date of "sending" the notice could have been accepted if there was a book or a register maintained by the Commissioner of Inland Revenue which will be evidence of the date of making of assessment.

The Tax Appeal Commission has also cited **Philip Upali Wijewardene (Appellant) vs. C. Kathiragamer and another (Respondent)** decided in 1992. The facts and the decision in that case is summarized as given below.

"Assessment for the years of assessment 1972/73, 1973/74, 1974/75, 1975/76 were dated 29.03.1979 and received by the assessee on 04.04.1979. Section 96 (c) of the Inland Revenue Act as amended by Act 30 of 1978 states that no assessment of income tax or wealth tax or gift tax for the Y/A 01st April 1972 01st April 1973 and 01st April 1974 shall be made after 31st March 1979. The aforesaid assessments were dated 29.03.1979. Therefore they were made within the stipulated time".

Following the Supreme Court case of D.M.S. Fernando vs. Ismail 1982 (1) SLR 272, W.N.D. Perera J., said,

"Communication of reasons for rejecting a return is mandatory and has to be done "at or about the time", an assessment is made on an estimated income. In the instant case the assessments have been sent to the assessee "at or about the time", the assessments were made. There is therefore substantial compliance with the requirement of the law".

The said judgment cannot be accepted for two reasons, one is intrinsic whereas the other is extrinsic. D.M.S. Fernando vs. Mohideen Ismail 1982 and the Court of Appeal decision on which it was based, Ismail vs. Commissioner of Income Tax 1981, dealt with the question whether giving reasons for not accepting a return is mandatory. Both courts decided that it was mandatory. The Court of Appeal decided that reasons must be given before sending the notice of assessment. The Supreme Court decided that the reasons can be given "at or about the time" when the notice of assessment is sent. It is from that decision the court in Philp Upali Wijewardene (appellant) vs. C. Kathiragamer and another in 1992 has taken the phrase "at or about the time". The Supreme Court in D.M.S. Fernando vs. Mohideen Ismail 1982 did not say

that "notice" or the "assessment" can be sent "at or about the time". This intrinsic defect is even seen in the last quoted passage from Justice W.N.D. Perera's judgment. In the aforequoted passage the first sentence refers to "reasons" while the second sentence refers to the "assessment". This is, with respect, the inherent defect in that decision. The extrinsic reason for the inability of this court to apply that decision lies in the difference between the relevant revenue legislations then and now. The case of Philp Upali Wijewardene (appellant) vs. C. Kathiragamer and another (respondent) 1992 was decided on Inland Revenue Act No. 04 of 1963 as amended by Inland Revenue (amendment) Law No. 30 of 1978. The said amendment dealt with the duty to give reasons for not accepting the return which was not a requirement in the law as existed prior to the said amendment. Giving of the notice was referred to in section 95(1) of the Act which said,

"*95.*

(1) An Assessor shall give notice of assessment to each person who has been assessed stating the amount of income, wealth or gifts assessed and the amount of tax charged".

Hence a separate provision dealt with the duty to give notice of assessment. But in the present Inland Revenue Act No. 10 of 2006, the same provision deals with the making of the assessment and giving notice of assessment while both requirements operate subject to the provision that stipulate the time limit. Hence it is provided,

"

Assessments and additional assessments.	**163.** (1) Where any person who in the opinion of an Assessor is liable to any income tax for any year of assessment, has not paid such tax or has paid an amount less than the proper amount which he ought to have paid as such tax for such year of assessment, **an Assessor may, subject to the provisions of subsection (3) and (5)** and after the fifteenth day of November immediately succeeding that year of assessment, **assess the amount which in the judgment of**

the Assessor ought to have been paid by such person, and shall by notice in writing require such person to pay forthwith –

(a) the amount of tax so assessed, if such person has not paid any tax for that year of assessment; or

(b) the difference between the amount of tax so assessed and the amount of tax paid by such person for that year of assessment, if such person has paid any amount as tax for that year of assessment:

……

(5) Subject to the provisions of section 72, **no assessment of the income tax payable under this Act by any person or partnership –**

(a) who or which has made a return of his or its income on or before the thirtieth day of September of the year of assessment immediately succeeding that year of assessment, **shall be made after the expiry of eighteen months from the end of that year of assessment;**

Therefore the notice of assessment must be given subject to section 163(5) which deals with the time limit. As already said the Tax Appeal Commission has accepted that the notice of assessment given in the present case was given after the stipulated time. It says "a few days delay" will not make the assessment invalid. But its decision is in violation of the provisions in section 163(1) read with section 163(5) of the Inland Revenue Act No. 10 of 2006.

Hence question of law No. 04 must be answered in favour of the appellant.

Question of Law No. 05.

Question of Law No. 05 is did the Tax Appeals Commission ignore the fact that the delegate of the Commissioner General of Inland Revenue has gone beyond his statutory remit by treating dividend income received by the Appellant as constituting part of its statutory income?

It appears that the delegate of the Commissioner General of Inland Revenue has varied the contours of the assessment with effect making a fresh

assessment by deciding to tax income which the Assessor himself had excluded from the Appellant's total statutory income. The delegate of the Commissioner General of Inland Revenue has treated the dividend income of the Appellant as part of its trading receipts and included it as constituting part of the Appellant's statutory income contrary to the position adopted by the Assessor who has observed the relevant statutory provision.

The Tax Appeals Commission has erred in law when it took the view that the Respondent was entitled to widen the scope of the assessment when arriving at its determination.

Hence question of law No. 05 must be answered in favour of the appellant.

Question of Law No. 06.

Question of Law No. 06 is whether in view of the facts and circumstances of the case did the Tax Appeals Commission err in law when it came to the conclusion that it did.

The questions of law No. 01,02,04 and 05 being answered in favour of the appellant and only question of law No. 03 answered in favour of the respondent, question of law No. 06 must be answered in favour of the appellant.

In the circumstances discussed as aforesaid, this court answers the questions of law as below.

1. Yes.
2. Yes.
3. No.
4. No.
5. Yes.
6. Yes.

If what was said in the present judgment is summarized it will appear as below,

1. It is true that all income whether business or dividend income is income liable for income tax, as the State argues.
2. But section 63 of the Inland Revenue Act No. 10 of 2006 exempts a dividend received from a residential or non residential company, if such dividend has been either tax paid, tax exempt or tax excluded from the statutory income of the receiving company.
3. A further clause to this section was added by section 23 of Inland Revenue (Amendment) Act No. 09 of 2015 which read,

   "For the purpose of this section the profits and income from such dividends which form part of the profits under section 3(a) of this Act means profits and income after deducting expenses in ascertaining the profits from such business of receiving dividends".
4. The amendment made in 2015 will have no sense if section 63 had no application to the dividends received that formed part of business income within the contemplation of section 3(a) of the Act.
5. The Tax Appeal Commission in its determination said that "Section 63 does not have a bearing where the dividend income is earned as part of statutory income falling under section 3(a) of the Inland Revenue Act No. 10 of 2006".
6. There was no basis for the Tax Appeal Commission to say what was stated in 05, since that is what section 63 said in plain language.
7. If the legislature was of the view that section 63 applied only to dividend income under section 3(e), there will be no necessity to amend section 63 because no expenses are deductible when determining dividend income under section 3(e).
8. The respondent cited the case of Ceylon Financial Investment Limited vs. Commissioner of Income Tax as the learned Chief Justice decided in that

case, “I am therefore of the opinion that the income derived by the appellant company from dividends and interest fall within the words “profits from any business” under section 6(1)(a)”.

9. The question in that case was, that since the company was only a holding company, management expenses on which income tax has been charged could be deducted, the deduction being possible only if the dividend income could be classified under section 6(1)(a).
10. Hence the assessee or the appellant wanted to argue that what it does is “business”.
11. It must be said that in the present case the learned President’s Counsel for the appellant does not argue that what the appellant receives does not form part of profits under section 3(1)(a). His position is that even if it falls under that section, section 63 will make him not liable for income tax.
12. The assessor and the Commissioner of Income Tax argued in that case that the appellant came under section 6(1)(e) which is “dividends, interest or discounts which is same as section 3(1)(e) of the present Act.
13. The provisions in section 3(1)(a) and 3(1)(e) of the present Act are ipsisima verba (similar in verbatim) to the corresponding provisions in section 6 of Ordinance No. 02 of 1932 under which that case was decided.
14. In that case the decision was in favour of the appellant since it was decided that the appellant is doing “business” it earns “profits” and it can deduct “management expenses” from the “profits”.
15. The learned Chief Justice said, “If the business of a company consists in the receipt of dividends, interest or discounts alone or if such a business can be clearly separated from the rest of the trade or business, then any special provisions applicable to dividends, interest or discounts must be applied”.

16. Soertsz J., while disagreeing with the learned Chief Justice that the Crown had the option to assess either under section 6(1)(a) or 6(1)(e), also disagreed with Keuneman J., that if the business consist of the receipt of dividends, etc., or if that can be clearly separated from the rest of the business, then any special provision applicable to dividends, etc., must apply.
17. Keuneman J., said, "The difficulty arises with regard to sources (e), (f) and (g). In these cases there are no words employed to show that the earlier sources are excluded. For example take source (e), viz., "dividends, interest or discounts". There are no words to show that this source does not apply to dividends, interest or discounts arising from a trade or business".
18. Keuneman J., at the end decided, "How then are we to treat income which comes under source (e) but can also be regarded as coming under source (a)? In my opinion it was the intention of the Ordinance to regard dividends, interest or discounts as a separate source. If then the business of an individual or a company consists in the receipt of dividends, interest or discounts alone, or if the business of receiving dividends, interest or discounts can be clearly separated from the rest of the trade or business, then any special provision applicable to dividends, interest or discounts must be applied. I do not think any question of option arises".
19. Hence with regard to the applicability of especial provisions applicable to dividends, etc., (such as section 63) Keuneman J., agreed with the learned Chief Justice (since the latter as said in 15 decided the same thing). Although Soertsz J., differed on this point, De Kretser J. and Wijeyewardene J., agreed with Keuneman J. Hence 04 Judges out of 05 agreed on that point which becomes its decision.
20. Thus the case of Ceylon Financial Investments Limited vs. Commissioner of Income Tax, although cited for the respondent in the present case to show that the appellant receiving dividends, etc., only was decided to be

doing "business" under section 6(1)(a), in its ratio decidendi it assists the appellant in this case, because the appellant relies on the applicability of a special provision regarding dividends, etc.

21. Any dividend received by the appellant under section 10 of the Inland Revenue Act No. 10 of 2006 would enjoy an exemption from income tax, one reason being that any such dividend received by the appellant would not constitute part of its statutory income in view of the express provisions to this effect in section 63(b) of the Inland Revenue Act.

22. The determination of the Tax Appeal Commission would have been time barred if not for the Tax Appeal Commission (Amendment) Act No. 04 of 2012.

23. Since the Tax Appeal Commission commenced its sittings on 08.03.2012, under the said Amendment the appellant's appeal will be prescribed by 07.03.2013.

24. But Tax Appeal Commission Amendment Act No. 20 of 2013 effected a further amendment. By this amendment the time period for appeals was changed to 270 days from the commencement of hearing of each such appeal.

25. The said Amendment Act brought a section 15 for the avoidance of doubts, which read, "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 twelve months granted for the determination by that section prior to its amendment by this Act".

26. The appeal of the appellant to the Board of Review was an "appeal that was deemed transferred to the Commission under section 10 of the principal enactment". If so the phrase "notwithstanding the expiry of twelve months" applies.

27. Although the appellant invited the court to distinguish the judgment in Stafford Motor Company (Private) Limited vs. Commissioner General of Inland Revenue CA (TAX) 17/2017, that case was in respect of an appeal directly made to the Tax Appeal Commission and the provisions with regard to time limits in that case are different. Hence distinguishing the judgment in that case, which basically decided the question whether the time limits are directory or mandatory does not arise.
28. The same reason applies to Kegalle Plantations PLC vs. Commissioner General of Inland Revenue CA (TAX) 09/2017 too.
29. Hence even if the appellant had a vested right on the appeal being determined by 07.03.2013 as it argues, it is vitiated by the revival, if not resurrection, of the appeal by the provisions of section 15 of the second amendment.
30. If the argument of the Tax Appeal Commission that a "few days delay" in sending notice of assessment is immaterial is accepted, the assessor only has to make the assessment within the stipulated time but he can indefinitely delay the sending of the notice of assessment.
31. But section 163(1) refers to "assess the amount....and shall by notice in writing require such person to pay forthwith...." Section 163(1) also says subject to the provisions of subsection (3) and (5). It is section 163(5) which has the time limit. Hence sending of notice also has to be done within the prescribed time.
32. Furthermore, E. Goonaratne says in "Income Tax in Sri Lanka", first edition at page 393, "Making an assessment culminates in the notice on the person assessed. An assessment is made when the assessment is sent".
33. Honig and others (administrators of Emmanuel Honig) vs. Sarsfield (H. M. Inspector of Taxes) cited by the Tax Appeal Commission has to be distinguished because in England there was a book or a register to enter the assessment, which is not the case in this country.

34. Philip Upali Wijewardene vs. C. Kathiragamer and another cannot be accepted for two reasons, one is intrinsic whereas the other is intrinsic. The intrinsic reason is that in that case the court referred to the "reasons" and "assessment", interchangeably due to confounding what was said in D.M.S. Fernando vs. Mohideen Ismail regarding "at or about the time", which is a case specifically dealt with the duty to send reasons and not the duty to send notices within the time limit. The extrinsic reason is that unlike section 163(1) in the present Act where the making of the assessment and sending of notices are included in one and the same provision, which is also subject to the time limit, in that case under the law No. 30 of 1978, which was the relevant legislation there was a separate section 95 dealing with notice.

35. Hence the decision of the Tax Appeal Commission that a "few days delay" will not make the assessment invalid, is in violation of the provisions of section 163(1) read with section 163(5).

36. The delegate of the Commissioner General of Inland Revenue has varied the contours of the assessment with effect making a fresh assessment by deciding to tax income which the assessor himself has excluded from the appellant's total statutory income. The delegate has treated the dividend income as part of appellant's trading receipts and included it as constituting part of appellant's statutory income without observing the relevant statutory provisions.

Hence the case stated in the form of an appeal is allowed.

Judge of the Court of Appeal

Hon. Sasi Mahendran

I agree

Judge of the Court of Appeal