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

ACL Cables PLC., No. 60,
Rodney Street, Colombo 08.

Appellant

CA Case No.: TAX/0007/2013

Tax Appeals Commission Case No.: TAC/OLD/LT/022

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. Nihal Fernando PC., with Mr. Johan Corera for the Appellant.

Mr. Milinda Gunatilake, ASG., for the Respondent.

Argued on: 16.02.2021 & 22.11.2021

Written submission tendered on: 10.12.2021 final written submissions by the Appellant.

30.11.2021 further written submissions by the Respondent.

Decided on: 16.03.2022

D.N. Samarakoon, J

The appellant ACL Cables PLC who is aggrieved by the order of the Tax Appeals Commission has suggested the questions of law stated below for the opinion of this court.

(1) Whether the aforementioned determination of the Tax Appeals Commission on the relevant appeals, which were deemed to be transferred to the Tax Appeals Commission under Section 10 of the Tax Appeals Commission Act No. 23 of 2011 is out of time?

(2) Whether the assessments in question were made within the time provided under section 163(5) of the Inland Revenue Act No. 10 of 2006?

(3) Whether the phrase 'industrial and machine tool manufacturing' appearing in section 17 of the Inland Revenue Act No.10 of 2006 can be interpreted as 'industrial manufacturing' and 'machine tool manufacturing' ?

(4) Can the interpretation of 'industrial manufacturing' as determined by the Tax Appeals Commission be rejected on the ground that "it has a very wide connotation"?

The appellant submitted that he is not pursuing the first question of law and therefore the scope of argument is limited to second to fourth questions of law.

Section 163 (1) of the Inland Revenue Act No.10 of 2006 is as reproduced below.

> "where any person who in the opinion of the Assessor is liable to any income tax for any 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."

Section 163(5) reads as reproduced below,

"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; and

(b) ……."

The two years of assessment relevant to this appeal are year of assessment 2006/2007 and year of assessment 2007/2008

Hence the first relevant year of assessment begins on 01.04.2006 and ends on 31.03.2007. The period of 18 months stipulated in section 163(5) of the Act has to be calculated from 31.03.2007 and hence ends on 30.09.2008.

The position of the appellant is that the Notice of Assessment for 2006/2007 which was received by the appellant on 06.10.2018 is out of time. It is not disputed by the respondent that the said Notice of Assessment was received as above. The Tax Appeals Commission also has accepted the said position in its determination.

There is an amendment Act No.19 of 2009 which amended section 163(5) (a) which substituted "eighteen months" by 'two years".

The Inland Revenue (amendment) Act No. 19 of 2009 was endorsed by the Speaker on 31st March 2009. The 18-month period for the first year of assessment relevant to this case ended before that on 30.09.2008.

The year of assessment 2007/2008 begins on 01.04.2007 and ends on 31.03.2008. The period of 18 months given in section 163(5) prior to its amendment is calculated from 31.03.2008 and therefore ends on 30.09.2009.

The position of the appellant is that the Notice of Assessment for 2007/2008 which was received by him on 14.10.2009 is out of time.

As Inland Revenue (amendment) Act No.19 of 2009 was endorsed by the Speaker on 31.03.2009, it has come into operation within the second year of assessment relevant to this case.

In CA (TAX) 23/2013[1] decided by another division of this court on 25.05.2015. the respondent, the Commissioner General of Inland Revenue (who is also the respondent in this appeal) had taken a two fold argument. It is said at page 3 of the said case. "one argument is that the amendment came into force within the eighteen month period where the assessor was entitled to send the assessment against the assessee and therefore the extension of time period is applicable. The other argument is that it is a procedural law and any change in the procedural law can be considered as an amendment with retrospective effect."

The first argument aforesaid, if correct, will apply to the second year of assessment in this appeal because the first 18 month period ended anyway before the commencement of the amendment by Act No.19 of 2009. In the said case CA (TAX) 23/2013 it was decided at page 5.

[1] Seylan Bank PLC vs. Commissioner of Inland Revenue

> "As I have pointed out earlier, the Speaker has endorsed the bill on 31st March 2009. As per section 27(6) of the Amendment Act, section 163 of the principal enactment is amended from 1st of April 2009. The amended section does not apply retrospect. It operates only from the date specified in it. The law of the country has changed from that date. Therefore, from that date onwards, the new law shall apply."

However the court in that case accepted the second argument of the respondent in that case on procedural law and held in page 5 itself,

> "The section 163(5) of the Inland Revenue Act is a procedural law. It regulates the procedure of sending an assessment against the assessee by an assessor in the event that the tax return sent by the assessee is not accepted by the assessor. Even if the amendment has a retrospective effect, it applies, if the amendment is only on procedural law. No party can have vested right on procedure."

The appellant has submitted at paragraph 64 of his final written submission because of CA (TAX) 23/2013 it is possible that the respondent may submit that the amendment to section 163 (5) (a) by Act No.19 of 2009 has amended the time period to two years. It was submitted in the course of oral submissions made by learned President's Counsel for the respondent that "court has to rely on Dehideniya J's judgment". This is the judgment in CA (TAX) 23/2013.

The appellant contends that the amendment by Act No.19 of 2009 does not apply to any year of assessment relevant to this appeal because of the title of the Inland Revenue Act No.10 of 2006 which says,

> "AN ACT TO PROVIDE FOR THE **IMPOSITION OF INCOME TAX FOR ANY YEAR OF ASSESSMENT** COMMENCING ON OR AFTER APRIL 1, 2006." (emphasis is in the final written submission of the appellant)

Hence it is submitted at paragraph 66 of the said final written submission that **the applicability of the Act is year on year.** (emphasis is in the final written submission of the appellant)

Hence it is further submitted that since the amendment Act 19 of 2009 was certified on 31.03.2009, the amendment to section 163(5) (a) was brought into force prospectively with effect from 01st April 2009 which is the date on which the year of assessment 2009/2010 begins.

This is an acceptable argument because the title to the Inland Revenue Act No.10 of 2006 says "FOR THE **IMPOSITION OF INCOME TAX FOR ANY YEAR OF ASSESSMENT** COMMENCING ON OR AFTER APRIL 1,2006."

Hence it appears that the operations of Act "is year on year". The intention of the legislature appears to be to enact the law on the basis of separate years of assessment.

Hence this court cannot accept the argument on procedural law which was accepted in CA TAX 23/2013. In fact, in that case itself at page 6 it is stated,

Maxwell on "The Interpretation of Statutes", 12th edition page 222 says;

> "The presumption against retrospective construction has no application to enactments which affect only the procedure and practice of courts. No person has a vested right in any course of procedure, but only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which he sues, and if an Act of Parliament alters that mode of procedure, he can only proceed according to the altered mode. Alterations in the form of procedure are always retrospective, **unless there is some good reason or other why they should not be".** (emphasis added in this judgment)

In that case the court also has said at page 6 itself,

"Bindra at page 1469 refers to Grander v. Lucas [1878] 3 AC 582 p. 603 and cites;

> It is perfectly settled that if the legislature intended to frame a new procedure that instead of proceeding in this form or that, you should proceed in another and a different way, clearly then bygone transactions are to be sued and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, **unless there is some good reason or other why they should not be**". (emphasis added in this judgment)

It is further stated in that page, "Then he goes to explain the citation;

> **In other words, if a statute deals merely with the procedure in an action, and does not affect the rights**, the new procedure will prima facie apply to all such proceedings as well as future. No party has a vested right to a particular procedure or to a particular forum. All procedural laws are retrospective, unless the legislature expressly says that they are not. Hence, when a suit of or proceeding comes on for hearing or disposal, the procedural law in force at that time must be applied. (emphasis added in this judgment)

The Inland Revenue Act No.10 of 2006 operating "year on year" is a good reason as to why an amendment which was certified on 31.03.2009 would operate from 01st April 2009 to the year of assessment 2009/2010 and not to the former years of assessment. Furthermore, due to this "year on year" operation of the Act it cannot be said that it "deals merely with the procedure" because within the year of operation it vests rights.

In appeal to the Supreme Court in respect of C.A. (TAX) 23/2013, the Supreme Court in the judgment of S.C. Appeal No. 46/2016 dated 16.12.2021 has said at page 17,

> "As stated above, the purpose of the amendment made to section 163(5)(a) read with section 106(1) of the principal Act was not only to grant additional time for an assessor to consider the return of income filed by the taxpayer and make an assessment (if necessary), but also to grant additional time for a taxpayer to prepare a return of income in compliance with the said Act....
>
> If the amendments made to section 163(5)(a) read with section 106(1) of the principal Act are interpreted to apply to the year of assessment 2007/2008 with retrospective effect, the taxpayers are deprived of filing income tax returns for such year of assessment within the extended time period, as such extended time period has passed by the time the said amendments came into operation. Thus such an interpretation defeats the purpose of the aforesaid amendment.
>
> Accordingly it is necessary to give prospective effect to both of the aforesaid amendments in order to give effect to the purpose of legislation".

The Supreme Court has therefore set aside the judgment of the Court of Appeal in C. A. (TAX) 23/2013.

The extension given to the assessor by an amendment not being afforded to the assessee, will not arise, if it is decided that the application of the Act is "year on year".

In the present case the respondent has taken another argument which it appears had not been taken in CA (TAX) 23/2013. That is that the question of law focuses on the date of <u>making</u> the assessment and not <u>sending</u> the

assessment. It is stated in the final written submission of the respondent that the Act provides separate provisions for making of assessments and sending of Notice of Assessments and whereas the legislature has intentionally provided a time frame for making the assessment it has intentionally not provided a time frame for sending the Notice of assessment.

If this argument 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 as it was seen 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)**.

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.

The appellant in paragraph 55 and 56 of the final written submission refer to section 194 (2) proviso and section 194 (3). Those provisions are as reproduced below.

> 194 …… (2) Every notice given by virtue of this Act may be served on a person either personally or by being delivered at, or sent by post to, his

last known place of abode or any place at which he is, or was during the year to which the notice relates, carrying on business:

Provided that a notice of assessment under section 163 shall be served personally or by registered letter sent through the post to any such place as aforesaid.

(3) any notice sent by post shall be deemed to have been served on the day succeeding the day on which it would have been received in the ordinary course by post.

Hence the appellant argues that the provisions demonstrate the timing when the Notice of Assessment is deemed to be served and it is so because the time of service is material. The appellant questions that if it were otherwise why would the legislature make such specific provisions relating to the deemed time of serving Notice of Assessment. If it were not intended to be adhered to and if the assessment was not to be made and served simultaneously there is no reason for the existence of such provisions.

This shows that the contention of respondent that "once" the assessment is made Notice of Assessment can be served at any time later is not valid.

Furthermore, at paragraph 57 of the final written submission the appellant cites E.Goonaratne, "INCOME TAX IN SRI LANKA", first edition at page 393, where he says **"Making an assessment culminates in the notice on the person assessed. An assessment is made when the assessment is sent."**

The appellant also cites **C.I.T. Bombay vs. Khemchand Ramdas (1938) 6 ITR 414,423 (PRIVY Council)** which is cited in Law and Practice of Income Tax by Dinesh Vyas, 9th edition, Volume II at page 1741 where it says,

" The method prescribed by the Act for making an assessment to tax- using the word assessment in its most comprehensive sense as including the whole procedure for imposing liability upon the taxpayer-

consists of the following steps. In the first place, the taxable income of the assessee has to be computed. In the next place, the sum payable by him on the basis of such computation has to be determined. Finally, a notice of demand in the prescribed form specifying the sum so payable has to be served on the assessee".

The parties have also referred to case No. C. A. (TAX) 17/2017[2] decided by another division of this court on 15.03.2019. In that case the appellant had filed his return for the year of assessment 2009/2010 by 30th November 2010. It appears that the said division of this court had two questions to be determined in regard to the question of time bar pertaining to the making of the assessment. One is whether the applicable date for time bar is the "date of making the assessment" or the "date of notice of assessment". The other is whether the two year period [unlike in the present case where the period of time bar is eighteen months, in that case it was two years since the Amending Act No. 19 of 2009 had come into force] end in counting two periods of 365 days or on two calendar years.

In regard to the first question the court decided that the applicable date for the time bar is the "date of making the assessment". It said at page 08 of the judgment,

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

[2] Stafford Motor Company (Private) Limited vs. Commissioner General of Inland Revenue

of determining the time bar for making an assessment. Court determines that the date of making the assessment is the relevant date for the purpose of determining the time bar".

The court cited **Commissioner of Income Tax vs. Chettinad Corporation Ltd., 55 NLR 553 at 556**, where Gratiaen J., said,

> "The distinction between an "assessment" and a "notice of assessment" is thus made clear: the former is the departmental computation of the amount of tax with which a particular assessee is considered to be chargeable and the latter is the formal intimation to him of the fact that such an assessment has been made".

Perusal of that judgment of Gratiaen J., shows that the aforesaid passage merely refer to an "assessment" and a "notice of assessment" whereas it is clear even without citing the said passage that there are two distinct words as "assessment" and a "notice of assessment". In other words, to say that "assessment" is different from "notice of assessment" the aforesaid passage is not required. But whether an "assessment" to be a valid one it should actually accompany with a "notice of assessment" is a deeper question.

As the court said in C. A. (TAX) 17/2017 aforesaid, it found Chettinad Corporation judgment, from reference made to it in **Ismail vs. Commissioner of Inland Revenue (1981) 2 SLR 78**, cited in that case by the appellant. That is a case decided by the Court of Appeal on a writ application where the main question for decision was whether reasons must be mandatorily given for the rejection of a return of income tax. The appellant in that case had also cited the appeal of **Ismail vs. Commissioner of Inland Revenue 1981** to the Supreme Court which is **D.M.S. Fernando and another vs. Ismail 1982 1 SRL 222**. The Supreme Court by a majority of 03 to 02 held that such reasons are mandatory upholding the decision of the Court of Appeal, on that point.

The division of this court in C. A. (TAX) 17/2017 then cited Cross on Precedents and another authority on ratio decidendi and obiter dictum and decided that neither the Court of Appeal in **Ismail vs. The Commissioner of Inland Revenue 1981**, nor the Supreme Court in **D.M.S. Fernando vs. Ismail 1982** have decided any question that came for decision in C. A. (TAX) 17/2017 and hence those cases are not binding authorities. This is correct on a perfunctory analysis. **But those two cases decided in early 1980s are important since in those cases the superior courts of this country examined in detail the procedures followed by the Inland Revenue Department in estimating, assessing, sending notice of assessment and giving reasons for non acceptance of the return.**

The division of this court in coming to the aforementioned decision in C. A. (TAX) 17/2017 that the effective date for the commencement of the time bar is the "date of assessment" has based its decision on the English case of **Honig and others vs. Sarsfield (Inspector of Taxes) (1986) BTC 205**.

The division of this court observed, having referred to that case, that 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. The division of this court said, "He (Fox L. J.) held that giving of the notice is independent of the making of a valid and independent assessment".

As already said in the present judgment, the passage quoted from the Chettinad case having shed no additional light to the decision contained in C. A. (TAX) 17/2017, it appears that the entire decision to base the effective date for the commencement of time bar on the "date of assessment" has been based on **Honig and others vs. Sarsfield (Inspector of Taxes) (1986) BTC 205**.

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 respondent 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.

It is said at page 09 of C. A. (TAX) 17/2017 that,

"The question that arose for determination in Ismail vs. Commissioner of Inland Revenue and D.M.S. Fernando and another vs. Ismail is whether the duty imposed on the assessor in terms of section 93(2) of the Inland Revenue Act No. 04 of 1963 as amended is mandatory and whether that duty has been complied with. The relevant provision is similar to section 163(3) of the 2006 Act which requires an assessor to

give reasons in writing to a person whose return has not been accepted by him. Both courts held that it was mandatory. The Supreme Court (by majority) held that the reasons must be communicated at or about the time the assessor sends his assessment on the estimated income….The question of whether the time bar for making an assessment applies to the making of assessment or the notice of assessment did not arise for determination in those cases".

"Section 93(2)[3] provided that where a person has furnished a return of income, wealth or gifts, the assessor may….if he does not accept the return estimate the amount of assessable income, taxable wealth or taxable gifts of such person and assess him accordingly". (page 166 of Ismail vs. Commissioner of Inland Revenue 1981)

But as the passage quoted from C. A. (TAX) 17/2017 said, section 163(3) of the 2006 Act requires the assessor, if the return of income tax was not accepted, to give reasons in writing. Section 93(2) of Act No. 04 of 1963, as it originally stood, did not require the assessor to give reasons. It was by an amendment brought by Law No. 30 of 1978 that sections 93(2)(b) and 96(c)(3) were amended thus including a requirement of giving reasons when the assessor decides to reject a return of income tax.

It was said that in C. A. (TAX) 17/2017 the division of this court decided that **Ismail vs. Commissioner of Inland Revenue 1981** has not decided the question of time bar. But that case has analysed the procedure to be followed when an assessor decides not to accept a particular return.

Justice Victor Perera in **Ismail vs. Commissioner of Inland Revenue 1981** said,

"Before I deal with the changes brought about by the amendment of the Revenue Law, No. 30 of 1978, I would refer to the bounds within which

[3] Of Act No. 04 of 1963

an Assessor could have rejected and substituted his own assessment under section 93 and section 94 of the Inland Revenue Law prior to 1978. The courts have considered the far reaching arbitrary powers granted to an Assessor under the existing law in several cases and have from time to time commented on the improper approach made by assessors in exercising those powers. **The areas of dispute between an assessor and assessee would necessarily revolve around the reasons of the Assessor for, and the basis of his making the arbitrary assessment of income or wealth.** But the assessee was completely in the dark in regard to the reasons or basis for not accepting the return even when the notice of assessment was served on him under section 95. An assessee, when he filed his appeal could therefore not formulate his grounds of appeal except in general terms. However, under the provisions dealing with the appeal in section 97 (2) he was obliged to set out the precise grounds of such appeal and necessarily he had to confine himself to such grounds when the appeal was considered by the Commissioner". (page 94-95 of the judgment[4])

Although Justice Victor Perera's reasoning, that reasons for not accepting the return should precede sending of the notice of assessment was refuted by the learned Chief Justice in appeal, in **D.M.S. Fernando vs. Mohideen Ismail**, the learned Chief Justice expressed similar views as to the purpose of giving reasons, which was introduced by amendment of revenue law effected by law No. 30 of 1978. His Lordship said,

"The primary purpose of the amending legislation is to ensure that the Assessor will bring his mind to bear on the return and come to a definite determination whether or not to accept it. It was intended to prevent arbitrary and grossly unfair assessments which many Assessors had been making as " a protective measure". An unfortunate practice had

[4] Copy available in Lawnet website

developed where some Assessors, due to pressure of work and other reasons, tended to delay looking at a return till the last moment and then without a proper scrutiny of the return, made a grossly exaggerated assessment. The law, I think, enabled the department to make recoveries pending any appeal on such assessments. The overall effect of this unhappy practice was to pressurise the tax payer to such an extent that he was placed virtually at the mercy of the tax authorities. The new law was a measure intended to do away with this practice. Under the amendment when an Assessor does not accept a return, it must mean that at the relevant point of time he has brought his mind to bear on the return and has come to a decision rejecting the return. Consequent to this rejection, the reasons must be communicated to the Assessee. The provision for the giving of reasons and the written communication of the reasons, contained in the amendment, is to ensure that in fact the new procedure would be followed. More particularly the communication of the reasons at the relevant time is the indication of its compliance. The new procedure would also have the effect of fixing the Assessor to a definite position and not give him latitude: to chop and change thereafter. It was therefore essential that an Assessor who rejects a return should state his reasons and communicate them. His reasons must be communicated at or about the time *he sends his assessment on an estimated income*. **Any later communication would defeat the remedial action intended by the amendment**".

It may be noted that when the learned Chief Justice said, "His reasons must be communicated at or about the time he sends his assessment on an estimated income", His Lordship referred as "sends his assessment" to the "sending of the notice of assessment", since the assessment without the notice, [the document in the possession of the assessor] which is just the "estimate" itself is not sent.

Justice Victor Perera in the Court of Appeal said,

"Up to 1978, therefore, the position was that an Assessor could under the law act arbitrarily though he was expected to act according to the principles of justice and fair play, honestly to come to a conclusion on the basis of existing material and to exercise his judgment with responsibility. **When the Assessor did form such a judgment, the burden is shifted on the assessee to displace the assessment he had decided to make, according to his judgment.** But still as the law stood, the taxpayer was given no opportunity to know beforehand the reasons for not accepting a return or the basis of an estimate made against him nor had he an opportunity of setting out the grounds of an appeal precisely, if he decided to lodge an appeal". (page 97[5])

Hence when there was no obligation to give reasons also, once the assessor forms his judgment, the burden shifted on the assessee.

The learned Chief Justice also said,

"Furthermore one has to consider this amendment in the light of the law as it then existed. The Assessor was then not bound to disclose any reasons either on the file or by communication to the Assessee. All was left to the good sense of the Assessor and his sense of justice and fairness. The Assessee could only appeal against the quantum of assessment **and the onus of proof lay on the Assessee.** He could only speculate on the reasons for such assessment for the purposes of his appeal. The picture is now different. A duty is now imposed on the Assessor not only to give reasons for non-acceptance of a return but also to communicate them to the Assessee".

[5] Copy available in Lawnet website

Justice Victor Perera further said,

> "The amended section 93, sub-section (2) imposed a duty on the Assessor who rejected a return furnished by any person to communicate to such person in writing the reasons for not accepting the return. This section clearly dealt with the assessment of income, wealth and gifts, the rejection of a return and a communication had to be done **before** the notice of assessment stating the amount of the assessment of income, wealth and gifts and the amount of the tax charged is sent under section 95. (page 99)

The learned Chief Justice said,

> "At this stage it would be convenient to deal with the opinion of Perera J. that "the amending law clearly contemplated that the notice communicating the reasons for not accepting of a return should be an exercise before the actual assessment of income, wealth or gifts is made for the purpose of sending the Statutory Notice of Assessment referred to in Section 95." I have quoted him verbatim because it appears to me that he considered this communication to be a condition precedent to making an estimate of assessable income. Perera J. was of the view that the intent of the provision was to give the Assessee an opportunity to meet the Assessor-so as to convince him, if possible, that his non-acceptance was erroneous".

Justice Victor Perera continued,

> "**The amending law clearly contemplated that the *notice* communicating the reasons for not accepting of a return should be an exercise before the actual assessment of income, wealth or gifts is made for the purpose of sending the statutory notice of assessment referred to in section 95. No useful purpose would be served if the *notices* communicating the reasons for non-acceptance**

of a return are sent simultaneously *or* *at any time after the notice of assessment is issued under section 95*. **The purpose of communicating the reasons for the rejection of a return could only be for the purpose of giving the taxpayer an opportunity** before he receives the statutory notice of assessment under section 95**, to put the assessee in possession of full particulars of the case he is expected to meet, in order that he could assist the Assessor if he does not accept the return to reconsider his rejection if satisfactory reasons are urged by the assessee before the final assessment is made**". (page 99-100[6])

It is to be noted that Justice Victor Perera uses the term "notice" interchangeably to mean "notice communicating the reasons" and the "notice of assessment" sent under section 95, which he sometimes referred to as "statutory notice of assessment". Whenever he referred to the notice of assessment, in the aforequoted passage it is reproduced in plain (not bold) letters. The ***notice*** in bold italics has referred to the notice of giving reasons. Why Victor Perera J., has opined that ***notice*** of giving reasons must be before the notice of assessment was to give an opportunity for the tax payer to fully enlighten the assessor, prior to the **charge** sent in the statutory notice of assessment. It is correct that this position of having to send ***notice*** of giving reasons prior to the statutory notice of the assessment [***which appears to be based on very sound logic***] was changed in the Supreme Court. But even the decision of the majority in the Supreme Court, where the lead judgment was written by the learned Chief Justice shows that the Supreme Court also appreciated the difference between the ***notice*** of giving reasons and the statutory notice of the assessment, without which there is only an "estimate" and not a valid "assessment".

The learned Chief Justice also said,

[6] Copy available in Lawnet website

> "Even if one transposes the words "and communicate to such persons in writing the reasons for not accepting the return" to the first, line of the section after the word "return" and before the word "estimate" it will not make it a condition precedent". (page 227)

His Lordship continued,

> "The section imposes a duty but does not impose a time limit within which it should be done. To my mind the section merely states that if the Assessor does not accept a return *he may assess on an estimate*".

In the aforequoted two passages one can see the learned Chief Justice did not accept the proposition of Justice Victor Perera that the ***notice*** of giving reasons should precede the statutory notice of assessment. But what is significant is to note that the learned Chief Justice said, "To my mind the section merely states that if the Assessor does not accept a return **he may assess on an estimate**". What is an "estimate" was defined by the judgment of Justice Victor Perera. It is given below. It was not altered by the majority judgment of the Supreme Court.

Justice Victor Perera defined the term "estimate" as,

> "According to the Shorter Oxford Dictionary 'estimate' means an 'approximate calculation based on probabilities' and therefore the 'estimate' becomes the basis of the assessment of the taxable income. This was the definition adopted by Canakaratne, J. in the case of Silva v. Commissioner of Income Tax, ! 1) at page 340".

Thus, if the assessor does not accept a return he may assess on an "estimate", means he may make an "*approximate calculation based on probabilities*". It can become the basis of the assessment of the taxable income, as the passage of Justice Victor Perera further said. But it can never become an assessment [***in***

the sense of a valid assessment] without it being sent with the statutory notice of assessment.

Hence it appears that although the learned Chief Justice did not agree with Justice Victor Perera, that giving reasons must be prior to the sending of notice of assessment, both justices agreed on several salient points, such as,

(a) An assessor could arrive at an arbitrary decision since he was not bound to disclose any reasons,
(b) The assessee was kept in the dark and hence was in a position of disadvantage when he has to appeal against a notice of assessment,
(c) Once the assessor forms his judgment, the burden shifts on to the assessee,
(d) The purpose of the amendment brought by law No. 30 of 1978 was to remedy the aforesaid position,
(e) Both Judges considered that the "making of an assessment" is synonymous with "the giving of statutory notice (not the reasons) of assessment". [Eg. **the actual assessment of income, wealth or gifts is made for the purpose of sending the statutory notice of assessment referred to in section 95]**
(f) In any event, the giving of reasons cannot be after the sending of notice of assessment,
(g) If giving reasons is after the sending of notice the purpose of the amendment by law No. 30 of 1978 will be defeated

Hence whereas Justice Victor Perera said giving reasons should precede sending notice of assessment, the learned Chief Justice said "His reasons must be communicated at or about the time he sends his assessment oiT'an-estimated income[7]". He further said, "**Any later communication would defeat the remedial action intended by the amendment**". Hence whereas the Court of Appeal said giving reasons must precede notice of assessment and the

[7] Statutory Notice

Supreme Court said reasons can be given at the time of the notice of assessment, both courts agreed that giving reasons cannot be after the sending of the **notice of assessment, which both courts considered as synonymous with making the assessment**.

Hence although it is correct to say that both the aforesaid cases [Ismail vs. Commissioner of Income Tax, as well as D.M.S. Fernando vs. Ismail] were not on the point whether "making the assessment" as well as "giving notice of assessment", must be within the stipulated time period, they both took it for granted, in their analysis of the procedure, that "*making the assessment*" is same as "*giving notice of assessment*". Whereas Justice Victor Perera said that giving reasons for non acceptance of the return should precede the notice of assessment, the learned Chief Justice said that reasons should be sent at or about the time of giving notice of assessment and any later communication would defeat the remedial action intended by the amendment.

Therefore both Justice Victor Perera and the learned Chief Justice have based their judgments on the premise that "making the assessment" is same as "giving notice of assessment". This was why it had been argued in C.A. (Tax) 17/2017 that no lawfully valid assessment can be made without first serving a valid notice of assessment. The Division of this court in C.A. (Tax) 17/2017 thought that this is a practical impossibility. A letter cannot be sent without it being written. But what was meant is not this. The argument of the appellant is that an "assessment" becomes valid only when the "notice" is given. This position was the basis of **Ismail vs. Commissioner of Income Tax** as well as **D.M.S. Fernando vs. Ismail**, despite those two cases were concerned with the duty to give "reasons". The position of the appellant is that an "assessment" is no assessment until "notice of assessment" is given. The position could have been otherwise, viz., an "assessment" could have been a valid assessment, as soon as an estimate is made, if like in **Honig (administrators of Emmanuel Honig) vs. Sarsfield (H.M. Inspector of**

Taxes) the Commissioner of Inland Revenue also maintained a register in which an assessment is entered. In the absence of such a procedure in this country, it cannot be accepted that the "making of an assessment" without "giving notice of assessment" is a valid assessment. Hence notice of assessment must be given to make the assessment validly made for the purpose of the stipulated time period.

The case of **Philip Upali Wijewardene (Appellant) vs. C. Kathiragamer and another (Respondent)** decided in 1992, although not cited by any of the parties, also has to be considered. 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".

Purportedly 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,

> (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.

The early case of **COMMISSIONER OF INCOME TAX v. SAVERIMUTTU CHETTY (1937) 39 NLR 01**, offers ***evidence of how the process of assessment worked in practice***, at a time when Income Tax Ordinance No. 02 of 1932 was only four years old and also at an age where there was no duty to give reasons for non acceptance of the return. The judgment of Abrahams C. J. said,

> "This is a case stated by the Board of Review under section 74 of the Income Tax Ordinance, No. 2 of 1932. The facts, so far as they are material to the consideration of the point of law on which the case has been stated, are as follows:- M. Saverimuttu Chetty, who may be called for convenience the assessee, was originally assessed for Income Tax for the year of assessment 1934-1935 on the basis that his assessable income was Rs. 9,413, and his taxable income was Rs. 4,913. Upon his taxable income he was called upon to pay Rs. 245.65 as income tax. His taxable income was reached by deducting certain allowances amounting to Rs. 4,500. The assessee appealed against this assessment of the Commissioner of Income Tax under the provisions of section 69 (1) of the Ordinance, which enable any person aggrieved by an assessment made under this Ordinance to appeal to the Commissioner within twenty one days from the date of the notice of such assessment. This must be done by what the section calls a "notice of objection". The Commissioner, acting under section 69 (2) of the Ordinance, directed the assessor to make further inquiry. By virtue of the provisions of this sub-section an agreement may be reached as to amount at which the assessee is liable to be assessed, and this in fact happened, and, as a result, the assessable income was assessed at Rs. 8,745, the taxable income at Rs. 2,496, and the income tax payable was reduced to Rs. 124.80 This revision was effected by an allowance to the assessee of the sum of Rs. 1,749 as earned income allowance under the provisions of section 16 (1) (b) of the Ordinance".

The judgment further said,

> "Section 69 of the Ordinance contemplates the following procedure whereby an assessee who has been wrongly assessed in any respect can obtain a redress of his grievance. He can file an objection in writing to the assessment. This done, the Commissioner may direct an assessor to make further inquiry and the assessor and the assessee may between themselves settle the matter or, in the language of sub-section (2) to section 69, make the "necessary adjustment" as a result of their agreement. If no agreement is reached, the Commissioner hears the appeal and decides accordingly. There is therefore a contrast drawn in the body of section 75 between an agreement as to the amount of the assessable income and the determination of the assessable income on appeal".

Therefore, it appears that there was a practice of the Commissioner of Income Tax directing the assessor to reconsider and the assessee can make representations to the assessor. If they can arrive at an adjustment that will expedite the process of recovering the tax. As per Justice Victor Perera's judgment too, if reasons are given before sending the "notice of assessment", the tax payer has an opportunity of fully enlightening the assessor. However as the learned Chief Justice refuted this position, as at today there is no compulsory requirement to send reasons prior to the "notice of assessment". However the question in the present case is not as to when reasons has to be given, but as to whether an assessment becomes a valid one only when "notice of assessment" is given. Hence what was said in this passage was said in orbiter.

Hence it is clear that giving reasons (letters of intimation as they are sometimes referred to in arguments) is ***ideally*** before making an assessment. Hence further there is no "assessment" at the time of giving reasons, unless, as

opined by the learned Chief Justice, reasons accompany the statutory notice. As per section 163(5) the time bar has to be counted from the "assessment". This is a valid "assessment", not an "estimate". Therefore it cannot be the letter giving reasons or a letter of intimation, because there cannot exist an "assessment" at the stage of the said letter. The "assessment" comes later after the taxpayer, is given the statutory notice of assessment.

The same principal adopted in **Ismail vs. Commissioner of Income Tax** and **D.M.S. Fernando vs. Mohideen Ismail**, that "assessment" becomes valid only when statutory "notice of assessment" is given, was followed in the Indian Case of **The Secretary of State for India in Council vs. Seth Khemchand Thaoomal and others, 1923** decided in the Court of the Judicial Commissioner, Sind, Reports of Income Tax cases, Vol. I (1886-1925) printed at the Madras Law Journal press, Maylapore, Madras, 1926. (A copy of the said judgment is attached to the present judgment)

The summary of the case said,

> "Where the notice of demand in respect of an assessment to super tax for the year 1918-1919 was served on the assessee in May 1919 after the expiry of the year charged for and the assessee instituted a suit to recover the tax collected from him on the ground that the assessment was illegal:
>
> Held, that there was no charge, recovery or payment of super tax within the year of assessment as laid down by section 03 of the Super tax Act and consequently there being no assessment under the Act, section 39 of the Income Tax Act was no bar to the suit". (page 26)

Except for the name "super tax" in the said kind of tax involved, there is no difference in the principal applicable.

The court said,

"The main point for consideration is whether the assessment of super tax was an assessment under the Act, for it is only in that event the jurisdiction of the civil court is barred".....(page 27)

"As observed in Maxwell on the Interpretation of Statutes, 04th Edition page 429 : Statutes which impose pecuniary burden are subject to the rule of strict construction. It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties".....(page 27)

"Section 06 of Act VIII of 1917 provided that when in the collectors opinion a person is chargeable with super tax a notice shall be served upon him calling upon him to pay the amount specified therein or to apply to have the assessment reduced or cancelled. **The only way that an assessee could be said to be charged is by a demand notice issued by the income tax officials, for till then it cannot be argued that he has been charged with the payment of any tax.** But the respondents admittedly received notice of demand only in May 1919, that is after the year 1918-1919 was over and even if he was chargeable with super tax he ceased to be so after the expiry of the year. The demand notice, therefore, having been issued after the year was over, there was neither payment nor recovery of the super tax within the year 1918-1919". (page 27)

The lucidity in the aforequoted passage is characteristic of the age in which it was written. The tax payer could have instituted a suit and recovered the tax paid because there was no "assessment". There was no "assessment" because there was no notice, a demand, a charge, within the limited period. This shows that an "assessment" becomes a valid "assessment" only when notice of assessment is given. For the application of the time limit what must be there is

a valid assessment. Such an assessment cannot come into being without there being notice of assessment.

The court further said,

> "Mr. Elphinston [who appeared for the state] attempted to invoke the aid of a confidential note dated the 23rd March 1919 wherein the Mukhtiarkar had made the calculation of the assessment and as this was done before the expiry of the year, he argued that the tax was charged within the year. This argument has no substance in it. **It is unarguable that the contents of a confidential document were communicated to the assessee, nor is it even alleged that the latter was aware before the end of the year that he was chargeable with any super tax**". (page 27)

Similarly, the argument for the respondent in the present case that when the assessment is made it is an "assessment" for the purposes of the time limit and there is no time period within which notice of assessment must be given, cannot succeed.

The court also said,

> "Mr. Elphinston pressed upon us the serious prejudice to the Crown, if section 03 were interpreted literally but in a fiscal statute we must look to the letter of the law and cannot introduce equitable considerations". (page 27)
>
> "There is a patent error of law in the assessment of the super tax and therefore, the assessment was not one under the Act ; the suit therefore is not barred". (page 27)

Hence the court considered the failure to give notice of assessment as a patent error in the assessment which makes the assessment invalid.

It further shows that when notice of assessment is not given within the time limit, the tax payer obtains a vested right not to be taxed, the reason why in that case he was able to successfully sue for tax illegally paid.

The position therefore is that in the present case there is no tax validly imposed for both the years of assessment in question. Hence question of law No. 02 has to be answered in favour of the appellant.

Question of law No. 03 is,

> "Whether the phrase 'industrial and machine tool manufacturing' appearing in section 17 of the Inland Revenue Act No.10 of 2006 can be interpreted as 'industrial manufacturing' and 'machine tool manufacturing' ?"

In regard to this question, the learned President's Counsel for the Appellant has argued in oral submissions that, an "**industrial tool**" does not mean only a screwdriver or a wrench, etc., but it includes cables. Certain notes from the internet have been produced to show that cables and wires are also classified as "tools".

The learned President's Counsel who appeared for the respondent has argued in his oral submissions that the aforesaid position of the appellant regarding an "**industrial tool**", is not what is in the case stated.

This appears to be correct because question of law No. 03 attempts to interpret the phrase "industrial and machine tool manufacturing" as "industrial manufacturing" and "machine tool manufacturing".

The plain reading of the phrase shows that it means, "industrial tool manufacturing" and "machine tool manufacturing".

Section 17 of the Inland Revenue Act No. 10 of 2006 reads thus,

> "17(1) The profits and income within the meaning of paragraph (1) of section 3 (other than any profits and income from the sale of capital assets) of any company from any specified undertaking referred to in subsection (2) and carried on by such company after 01st April 2002, shall be exempt from income tax for a period of five years reckoned from the commencement of the year of assessment in which the undertaking commences to make profits or any year of assessment not later than two years reckoned from the date on which the undertaking commences to carry on commercial operations whichever is earlier.
>
> (2) For the purpose of sub section (1) "specified undertaking" means –
>
> (a) An undertaking carried on by a company-
>
> (i)incorporated before 01st April 2002, with a minimum investment of rupees fifty million invested in such undertaking; or
> (ii) incorporated with a minimum investment of rupees ten million invested in such undertaking,
>
> and which is engaged in agriculture, agro processing, **industrial and machine tool manufacturing**, machinery manufacturing, electronics, export of non traditional products, or information technology and allied services".

Even the Tax Appeal Commission has decided this question in the same way. It says at page 09 of its determination,

> "It is to be noted that in section 17(2)(a)(ii) even though some terms such as "agriculture", "agro processing", "non traditional products" and "deemed export" are defined, the phrase "industrial and machine tool manufacturing" is not defined. Therefore it is necessary to look for a meaning to be attributed to this phrase "industrial and machine tool manufacturing". It would appear that in the phrase "industrial and machine tool manufacturing" the main item referred to is the term "tool" and the words "tool manufacturing" is qualified by the words industrial and machine. Therefore in this phrase "industrial and machine tool manufacturing" the term "tool" can be understood to mean either an "**industrial tool**" or a "machine tool"".

But having correctly understood the question, the Tax Appeal Commission erred in looking at the meaning of the term "tool" in dictionaries whereas it should have considered the meaning of the phrase "industrial tool manufacturing".

It considered the meaning of the term "tool" in the Oxford Dictionary, which it gave as "an instrument such as a hammer, screw driver, saw, etc., that you hold in your hand and use for making things, repairing things, etc. garden tools, cutting tools or power tools (using electricity)".

Hence it concluded at page 10 of its determination,

> "However, "fire guard cable" is only a wire with an improved capability used in the construction of buildings, houses, for the purpose of transmitting electrical current or used for telecommunication

signals…..The important difference is that the "fire guard cables" once used in buildings or houses it remains embedded in the building or in the house permanently".

But this would not have happened had the Tax Appeal Commission considered the meaning of the phrase "industrial tool manufacturing", which shows that "fire guard cables" are such tools. All tools, especially "industrial tools" need not be hand held tools in the popular meaning, as the Tax Appeal Commission said.

The Tax Appeal Commission said, "In this regard, it is a very useful rule in the interpretation of a statute, to adhere to the ordinary meaning of the word used and to the grammatical construction, unless that is at variance with the intention of the legislature, to be derived from the statute itself".

Here using the word in its ordinary meaning was in variance with the intention of the legislature, which was to be derived from the statute itself, because the term used was not "tool" as the Tax Appeal Commission thought but "industrial tool manufacturing".

The use of the prefix "industrial" before the term "tool manufacturing" alters its ordinary meaning.

Therefore it is clear that the appellant is entitled to the exemption from tax because it is engaged in "industrial tool manufacturing" which is a "specified undertaking".

However, the question of law No. 03 is not correctly formulated, in the sense, it should have referred not to "industrial manufacturing", but to "industrial tool manufacturing". Hence while the said question of law has to be answered in

the negative, the answer must accompany with an explanation that the term "industrial and machine tool manufacturing" can be interpreted as "industrial tool manufacturing" and "machine tool manufacturing", in which the appellant's product comes within the former.

The question of law No. 04 is,

> "Can the interpretation of 'industrial manufacturing' as determined by the Tax Appeals Commission be rejected on the ground that "it has a very wide connotation"?

But it would appear that now this question will not arise because the answer to question of law No. 03 is not that it is "industrial manufacturing" but "industrial tool manufacturing".

Hence this question has to be answered as "Does not arise, in view of the answer given to question of law No. 03".

Hence questions of law are answered as below,

(1) Whether the aforementioned determination of the Tax Appeals Commission on the relevant appeals, which were deemed to be transferred to the Tax Appeals Commission under Section 10 of the Tax Appeals Commission Act No. 23 of 2011 is out of time?

No. The appellant did not pursue on this question.

(2) Whether the assessments in question were made within the time provided under section 163(5) of the Inland Revenue Act No. 10 of 2006?

No. The assessments are time barred.

(3) Whether the phrase 'industrial and machine tool manufacturing' appearing in section 17 of the Inland Revenue Act No.10 of 2006 can be interpreted as 'industrial manufacturing' and 'machine tool manufacturing' ?

No. It has to be interpreted as "industrial tool manufacturing" and "machine tool manufacturing". The appellant's product comes within the former.

(4) Can the interpretation of 'industrial manufacturing' as determined by the Tax Appeals Commission be rejected on the ground that "it has a very wide connotation"?

This question does not arise in view of the answer given to question of law No. 03.

If the reasons given in this judgment are summarized they would appear as given below,

(1) The applicability of the Inland Revenue Act No. 10 of 2006 is "year on year". Therefore amendment Act No. 19 of 2009 certified on 31st March 2009 will apply only from 01st April 2009. Hence the time limit in Act No. 19 of 2009 is not applicable to years of assessment in question in this case which are 2006/2007 and 2007/2008.

(2) The Inland Revenue Act No. 10 of 2006 operating "year on year" is a good reason as to why Act No. 19 of 2009 will not apply retrospectively. Therefore the judgment in CA (TAX) 23/2013 dated 25.05.2015 is distinguished.

(3) The Supreme Court by its decision dated 16.12.2021 in S.C. 46/2016 has set aside the judgment of the Court of Appeal in CA (TAX) 23/2013.

(4) Section 163(1) of the Inland Revenue Act refers to assessing the amount and shall by notice in writing requiring the tax payer to pay forthwith, in the same section. Furthermore section 163(1) is subject to sub sections (3) and (5). Subsection (5) is the time bar and hence giving notice of assessment too has to be done within the time bar.

(5) The Court of Appeal in C.A. (TAX) 17/2017 dated 15.03.2019 referred to the judgment in Commissioner of Income Tax vs. Chettinad Corporation Ltd., 55 NLR 553 to say that there is a distinction between an "assessment" and a "notice of assessment". While the passage from that case quoted has superficially distinguished an "assessment" from a "notice of assessment", whether an "assessment" to be a valid one should accompany with a "notice of assessment" is a deeper question.

(6) In **Ismail vs. The Commissioner of Inland Revenue (1981) 02 SLR 78** and in **D.M.S. Fernando vs. Ismail 1982 01 SLR 222**, although C.A. (TAX) 17/2017 said they are not relevant, the superior courts of this country have examined the procedure followed in the Inland Revenue Department in estimating, assessing, sending notice of assessment and giving reasons for non acceptance of the return.

(7) The decision in C.A. (TAX) 17/2017 is based on the English case of **Honig and others vs. Sarsfield (inspector of Taxes) (1986) BTC 205**.

(8) As it is clear from the perusal of the judgment in **Honig and others (administrators of Emmanuel Honig) vs. Sarsfield (H.M. Inspector of Taxes) reported (Ch.D) [1985] STC 31; (CA) [1986] STC 246**, the

procedure in England was different because the assessment was "made" when the Inspector of Taxes signs the certificate in the assessment book. There is no such register maintained under the Inland Revenue Act No. 10 of 2006.

(9) The argument of the respondent in the present case that the effective date for the time bar is the date of "making" the assessment but not the date of "sending" the notice of assessment could have been accepted if there was a book or a register maintained as aforesaid.

(10) The judgment in **Ismail vs. Commissioner of Inland Revenue 1981** has although not decided the question of time bar in respect of an assessment, it has analysed the procedure to be followed when an assessor decides not to accept a return.

(11) It said, "**The areas of dispute between an assessor and assessee would necessarily revolve around the reasons of the assessor for and the basis of his making the arbitrary assessment of income or wealth**".

(12) Although the reasoning of Justice Victor Perera, that reasons for not accepting the return should precede sending of the notice of assessment was refuted by the learned Chief Justice in **D.M.S. Fernando vs. Mohideen Ismail 1982**, the learned Chief Justice expressed similar views as to the purpose of giving reasons, which was introduced by amendment of revenue law effected by law No. 30 of 1978.

(13) The learned Chief Justice said, "His reasons must be communicated at or about the time *he sends his assessment on an*

estimated income. Any later communication would defeat the remedial action intended by the amendment".

(14) Justice Victor Perera said, "When the assessor did form such a judgment, the burden is shifted on the assessee to displace the assessment he had decided to make, according to his judgment".

(15) The learned Chief Justice said, "....**and the onus of proof lay on the Assessee**".

(16) Justice Victor Perera as well as the learned Chief Justice appreciated the difference between the ***notice*** of giving reasons and the statutory notice of the assessment, without which there is only an "estimate" and not a valid "assessment".

(17) The learned Chief Justice said, "To my mind the section merely states that if the assessor does not accept a return **he may assess on an estimate**".

(18) Justice Victor Perera followed the definition of "estimate" given in the Shorter Oxford Dictionary which is an "approximate calculation based on probabilities". He said, "the "estimate" becomes the basis of assessment of the taxable income".

(19) Both courts agreed that giving reasons cannot be after the sending of the **notice of assessment, which both courts appear to have considered as synonymous with making the assessment**.

(20) Hence both Justice Victor Perera and the learned Chief Justice have based their judgments on the premise that "making the

assessment" is same as "giving notice of assessment". This was why it has been argued by learned Counsel in C.A. (TAX) 17/2017 that no lawfully valid assessment can be made without first serving a notice of assessment. The court in C.A. (TAX) 17/2017 considered that this is a practical impossibility such as a letter cannot be sent until it is written. But what was meant is not that. An "assessment" becomes valid only when the "notice of assessment" is given.

(21) The early case of **Commissioner of Income Tax vs. Saverimuttu Chetty** decided by Abrahams C.J., when the first Tax Ordinance No. 02 of 1932 was only 04 years old, shows that there was a procedure under section 69(2) where the Commissioner can direct the assessor to make further inquiry and there can be an adjustment between the assessor and the assessee. This procedure would expedite the recovery of tax by the state, without having to wait on the uncertain outcome of a lengthy litigation. This is what Justice Victor Perera meant when His Lordship said reasons for not accepting the return should precede the statutory notice of assessment under section 95, so that the assessee can make representations to the assessor.

(22) Hence it is clear that giving reasons (a letter of intimation) is ***ideally*** before making an assessment. Hence further there is no "assessment" at the time of giving reasons, unless, as decided by the learned Chief Justice, reasons accompany the statutory notice of assessment.

(23) The said principle that an "assessment" becomes valid only when statutory "notice of assessment" is given, was followed in the Indian case of **The Secretary of State for India in Council vs. Seth**

Khemchand Thaoomal and others, 1923 decided in the Court of the Judicial Commissioner, Sind.

(24) The court in that case said, "**The only way that an assessee could be said to be charged is by a demand notice issued by the income tax officials, for till then it cannot be argued that he has been charged with the payment of any tax**".

(25) In that case, the tax payer could have instituted a suit and recovered the tax paid because there was no "assessment". There was no "assessment" because there was no notice, a demand, a charge within the limited period. This shows that an "assessment" becomes a valid "assessment" only when "notice of assessment" is given.

(26) The court held that an attempt made by the state to invoke the aid of a confidential note, within the stipulated time, cannot be tax charged within the year and that the said argument has no substance in it. Similarly, the argument of the respondent in the present case that the "assessment" [which is actually an "estimate" in the legal sense] made without sending notice of assessment can be the assessment fails.

(27) The court considered the absence of notice of assessment as a patent error of law in the assessment.

(28) The plain reading of the term in question in section 17(2) of the Inland Revenue Act which is "industrial and machine tool manufacturing" shows that it means "industrial tool manufacturing" and "machine tool manufacturing".

(29) Having correctly understood the aforementioned position, the Tax Appeal Commission erred when it looked at the dictionary meaning of the term “tool”, whereas it should have considered the meaning of the phrase “industrial tool manufacturing”.

(30) Here using the word in its ordinary meaning was at variance with the intention of the legislature, which was to be derived from the statute itself, because the term used was not “tool” as the Tax Appeal Commission thought but “industrial tool manufacturing”.

(31) While the product of the appellant comes within the definition of “industrial tool manufacturing”, the question of law No. 04 will not arise.

In the circumstances, the appeal in the form of a stated case is allowed.

Judge of the Court of Appeal.

Hon. Sasi Mahendran,

I agree.

Judge of the Court of Appeal.

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levied are not those covered by the Act. But the grievance of the plaintiff is practically that the Assessing Officer ought to have satisfied himself that as a matter of fact the plaintiff did not get the necessary income for the levy of the assessment, but nevertheless assessed him. But it is cases of this character which have been ousted from the jurisdiction of civil courts. No doubt the ground on which the Assessing Officer (Tahsildar) has refused to reconsider the assessment is, as the plaintiff's vakil puts it, not intelligible. But that is no ground for interfering with his order under the Act. And in the circumstances there is no ground to disturb the decree of the lower Court and the appeal accordingly fails and is dismissed with costs."

S. Panchapakesa Sastri, for the appellant.

Government Pleader (*C. V. Anantakrishna Iyer*) for the respondent.

JUDGMENT.

The Subordinate Judge is right. Section 39 of Act II of 1886 is clearly a bar to this suit. The second appeal is dismissed with costs.

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[12] IN THE COURT OF THE JUDICIAL COMMISSIONER, SIND.

Before Mr. S. Raymond A. J. C. and Mr. B. C. Kennedy A. J. C.

[29th January 1924.]

The Secretary of State for India in Council .. *Appellant* * (*Defendant*)

v.

Seth Khemchand Thaoomal and others .. *Respondents* (*Plaintiffs*).

Income-tax Act (II of 1886) S. 39—Super-tax Act (VIII of 1917) S. 3—Super-tax—Notice of demand after expiry of year—Suit for refund of tax collected—Civil Courts' Jurisdiction.

Where the notice of demand in respect of an assessment to super-tax for the year 1918—1919 was served on the assessee in May 1919 after the expiry of the year charged for and the assessee instituted a suit to recover the tax collected from him on the ground that the assessment was illegal:

Held, that there was no charge, recovery or payment of super-tax within the year of assessment as laid down by S. 3 of the Super-tax Act and consequently there being no assessment under the Act, Sec. 39 of the Income-tax Act was no bar to the suit.

Appeal No. 16 of 1923 against the decree of the District Judge, Sukkur, dated the 4th December 1922.

Government Pleader (*T. G. Elphinston*) for the appellant.

Srikishendas H. Lulla, for the respondents.

JUDGMENT.

This appeal relates to an assessment of super-tax under Act VIII of 1917.

Plaintiff-respondent filed a suit against the Secretary of State for India, defendant-appellant, for a declaration that the assessment of super-tax of Rs. 2,500 for the year 1918-19 (from 1st April 1918 to 31st March 1919) was illegal and as made without jurisdiction and prayed for a decree for the refund of this amount with interest and costs.

The District Judge, Sukkur, granted the plaintiff a decree for the recovery of Rs. 2,500. The Secretary of State for India appeals against this judgment.

The first point taken on appeal is that the lower Court was in error in not holding the suit barred under section 39 of the Income-tax Act II of 1886 read with section 8 of the Super-tax Act VIII of 1917.

Section 39 of Act II of 1886 is as follows:—"No suit shall lie in any court to set aside or modify any assessment made under this Act," and section 8 of Act VIII

* (1924) 18 S. L. R. 9; 78 Ind. Cas. 438: (1925) A. I. R. (Sind.) 67.

of 1917 applies the provisions of section 39 *inter alia* in the case of super-tax as if that tax were income-tax chargeable under Act II of 1886.

The main point for consideration is whether the assessment of the super-tax was an assessment under the Act, for it is only in that event the jurisdiction of the Civil Court is barred. Now section 3 of Act VIII of 1917 enacts that in addition to the tax imposed by the principal Act (Act II of 1886) there shall be "charged, recovered and paid in the year" a super-tax upon a taxable income of a person or company computed at the rate specified in the schedule. Respondents contend that their assessment to payment of super-tax in the sum of Rs. 2,500 was neither charged, paid or recovered in the year 1918-19; therefore, the assessment is not under the Act.

As, observed in Maxwell on the Interpretation of Statutes, 4th Ed., page 429: "Statutes which impose pecuniary burden are subject to the rule of strict construction. It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties." There appears to us no ambiguity whatever in section 3, for the words are clear and specific, "there shall be charged, recovered and paid in the year beginning with the 1st day of April". The legislature has apparently detected the anomalous situation created by the words "in the year", for in Act XI of 1922 which consolidates and amends the law relating to both income-tax and super-tax the words now are "for any year."

We have, however, to consider the interpretation to be placed on section 3 of Act VIII of 1917 and it seems to us abundantly clear that the provisions were not complied with in the assessment of the respondents to super-tax. Between the period of the 1st April 1918 and 31st March 1919 he was neither charged any super-tax nor did he pay it nor was it recovered from him.

Section 6 of Act VIII of 1917 provided that when in the Collector's opinion a person is chargeable with super-tax a notice shall be served upon him calling upon him to pay the amount specified therein or to apply to have the assessment reduced or cancelled. The only way that an assessee could be said to be charged is by a demand notice issued by the Income-tax officials, for till then it cannot be argued that he has been charged with the payment of any tax. But the respondents admittedly received notice of demand only in May 1919, that is, after the year 1918-19 was over and even if he was chargeable with super-tax he ceased to be so after the expiry of the year. The demand notice, therefore, having been issued after the year was over there was neither payment nor recovery of the super-tax within the year 1918-19.

The Income-tax Collector had himself realised that super-tax is to be recovered within the year to which it relates, for in a memo marked urgent addressed to the *Mukhtiarkar* with reference to the super-tax for 1919-20 and dated the 23rd March 1920, he gave him strict injunctions to recover it promptly before the close of the "present month" and to adopt coercive measures if necessary. He interpreted the section 3 as it stood in the only manner that it could be interpreted, that the tax should be charged, paid and recovered within the year to which it relates.

Mr. Elphinston attempted to invoke the aid of a confidential note dated the 23rd March 1919 wherein the *Mukhtiarkar* had made a calculation of the assessment and as this was done before the expiry of the year, he argued that the tax was charged within the year. This argument has no substance in it. It is unarguable that the contents of a confidential document were communicated to the assessee, nor is it even alleged that the latter was aware before the end of the year that he was chargeable with any super-tax.

Mr. Elphinston pressed upon us the serious prejudice to the Crown, if section 3 were interpreted literally, but in a fiscal statute we must look to the letter of the law and cannot introduce equitable considerations.

There is a patent error of law in the assessment of the super-tax and, therefore, the assessment was not one under the Act; the suit therefore is not barred.

The second point taken on appeal is with regard to estoppel, but this needs the exposition of a few facts to consider its applicability.

On the 27th June 1919 the respondent appealed against the super-tax assessment to the Income-tax Collector. The order on it is dated the 28th March 1920 dismissing the appeal " in view of the settlement arrived at to-day with regard to the income-tax and super-tax for the years 1919-20. Respondent withdraws his appeal."

On the 5th February 1920 respondent appealed against his super-tax for the year 1919-20 but he was informed on the 15th March that this appeal could not be entertained as it was not duly stamped and was time barred. On the 18th March the respondent addressed the Income-tax Collector pointing out that his appeal was within time and enclosing the requisite stamps. The Collector was further informed that the appeal against the income-tax was still pending. On the 25th March the Collector directed the respondents to appear before him on the 28th March with regard to his super-tax and income-tax appeals. On this day a settlement was arrived at whereby the respondents agreed to pay the super-tax of Rs. 2,500 as also the income-tax for the years 1918-19 and 1919-20, based on an agreed income. By his order dated the 28th March 1920 the Collector says that "in view of the settlement arrived at to-day by which the assessee agrees to pay even the super-tax for 1918-19 amounting to Rs. 2,500 " though not legally due " the question of the super-tax to be levied upon him for the year 1919-20 is re-opened."

Mr. Elphinston contends that as the respondents paid the sum of Rs. 2,500 in terms of the settlement arrived at and the Collector in consideration of this payment reduced considerably the income-tax payable for the year 1919-20 the respondents cannot now be permitted to recover the sum of Rs. 2,500. Apart from the question of the probability of the respondent agreeing to pay the super-tax in order that his appeal against the income-tax may be reopened it is difficult to understand how the estoppel operates. The opening words of the written terms of the settlement are " To avoid trouble and litigation I agree ". Whilst paying the super-tax the respondent had protested that it was not legally due. It is not alleged that the respondent by his declaration, act or conduct intentionally caused the Income-tax Collector to believe a thing to be true and to act upon such belief. He promised to pay Rs. 2,500 and he paid it. It is obvious that the respondent never admitted that the imposition of the super-tax was just and legal as just shown above, nor did he ever agree not to question its legality. It may have been inferred by the Collector that the respondent would not go to law about it, but his doing so does not operate as an estoppel.

The third point raised in appeal is that the lower Court was in error in holding that the accounts which were settled for a lump sum could be reopened by the respondents and if the respondents are permitted to do so, the appellant should equally be permitted to assess the respondents afresh. But this is not a case of an account stated nor could it really be described as a settlement of account, for the most that can be said is that because the respondents agreed to pay the super-tax of Rs. 2,500 the Collector of Income-tax reduced the income-tax and super-tax for the years 1919—20. The contention that there was an implied agreement by the respondents not to resort to legal proceedings for the recovery of the Rs. 2,500 super-tax that he had paid is unsupportable, for this would be a void promise. Mr. Elphinston pointed out to us that the Collector of Income-tax is empowered to enter into composition with assessees subject to certain conditions and there being a valid compromise in this case, it ought not to be disturbed. It must be, however, observed that in the written statement of the appellant in the lower Court, though the plea of estoppel had been taken there was no reference to this compromise ; all that was urged was that the respondents had agreed to pay the super-tax of Rs. 2,500 before the 31st March 1920. Nor does the question of compromise find any place in the issues framed by the lower Court.

Issue 2 in the lower Court was, "Is the amount of the tax fixed on the plaintiff's own admission; if so, is he not estopped from contesting its legality and validity" and issue 3 "has the payment been voluntary, if so, can it be recovered from defendants." Even in the grounds of appeal in this Court, there is no reference to the compromise, but what is urged is that the respondent was barred from opening an account that had been settled. We cannot, therefore, permit the question as to a compromise being raised at this stage, for it is a mixed question of law and fact.

It was lastly urged that as the payment was voluntary it cannot be recovered. Under what circumstances was this payment made? Respondent never admitted that it was a just and legal payment for, as the order of the Collector itself shows, he protested as to its being legally due. It further seems fairly clear that his principal object in making the payment of Rs. 2,500-0-0 was to secure the hearing of his appeals against his income-tax and super-tax for the year 1919-20 and, lastly, there can be little doubt that the Collector was eager to receive payment of the Rs.2,500-0-0 which otherwise under the law he was aware that he could not recover. We are of opinion that the respondent is entitled to recover a payment made under these circumstances.

The appeal is dismissed with costs.

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[13] IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Sir Dawson Miller Kt. Chief Justice, Mr. Justice Atkinson and Mr. Justice Adami.

[11th and 14th August 1919.]

In the matter of The Bhikanpur Sugar Concern in the District of Mozuffarpur .. *Assessee.**

Income-tax Act (VII of 1918), Secs. 2 (1) (b) (ii) and 4—Sugar factory, if cultivator within Sec. 2 (1) (ii)—Agricultural income—Profits from sugarcane grown on factory's own lands liable to assessment.

Held, that the Bhikanpur Sugar Concern is liable to pay income-tax in respect of the portion of its profits derived from the sale of sugar manufactured from sugarcane grown by its own servants on its own land, as such income is not "agricultural income" exempt from taxation under Sec. 4 of the Income-tax Act.

In so far as they carry on the business of sugar manufacturers producing refined sugar in a factory equipped with modern machinery, the processes used by them for the purpose are not those ordinarily employed by cultivators for the purpose of rendering the produce fit to be taken to market, within the meaning of cl. (1) (b) of Sec. 2 of the Income-tax Act.

Per Atkinson J.—Sec. 4 read with Sec. 2 of the Income-tax Act is designed to protect the producer by giving him exemption from liability to income-tax, as a *bona fide* agriculturist carrying on the business of a farmer in the ordinary course of good husbandry. The sugar factory as such is not a cultivator within the meaning of Sec. (1) 2 (b) (ii) of the Act.

This was a reference [Miscellaneous Judicial Case No. 74 of 1919] by H. McPherson, Esq., Officiating Member of the Board of Revenue under Sec. 51 of the Income-tax Act, dated the 5th July 1919.

The facts which culminated in this reference were as follows :—

The Bhikanpur Concern is owned by a private company and is managed by one Mr. Richardson, who possesses a six annas share in the business. The Company owns a sugar factory equipped with up-to-date machinery in which sugar is manufactured on a large scale. In the year of assessment 7,44,398 maunds of cane passed through the factory, of which 4,21,206 maunds were grown by the concern, while 3,23,292 maunds were purchased from raiyats and others in the neighbourhood. The output of the factory consisted of 43,470 maunds of sugar valued at Rs. 5,90,498 (Rs. 13-9-11 per maund) and 26,002 maunds of molasses valued at Rs. 44,466

* (1919) Pat, 377 ; 53 Ind. Cas. 301.