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

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

Mclarens Lubricants Limited,
No.284,
Vauxhall Street,
Colombo 02.

APPELLANT

CA No. CA/TAX/0038/2014
Tax Appeals Commission
No. TAC/IT /036/2013

v.

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

RESPONDENT

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

COUNSEL : F. N. Gunawardena for the Appellant.

F. Jameel, SASG, P.C. with M. Jayasinghe, SSC & M. Sri Meththa S.C. for the Respondent.

WRITTEN SUBMISSIONS : 18.10.2019 & (by the Appellant)

30.10.2019 & 20.05.2020 (by the Respondent)

ARGUED ON : 14.12.2021

DECIDED ON : 31.03.2022

M. Sampath K. B. Wijeratne J.

Introduction

The Appellant, McLarens Lubricants Limited, is a limited liability company incorporated in Sri Lanka, engaged in the business of importation, manufacture and distribution of lubricants.

The Appellant submitted its return of income for the year of assessment 2008/2009 claiming a tax exemption under Section 42 and 51 of the Inland Revenue Act No. 10 of 2006, as amended. (hereinafter referred to as 'the Inland Revenue Act' and 'the Act')[1]

The Assessor, by letter dated 4th March 2011 rejected the return on the ground that the Appellant's profit and income from supplying lubricants to foreign ships within the Sri Lankan territorial waters cannot be treated as income derived from qualified export. Accordingly, the Assessor, by the same letter communicated his reasons for not accepting the return, in terms of Section 163 (3) of the Inland Revenue Act, which also contained an estimated amount of taxable income and the tax payable for the year of assessment 2008/2009.[2]

Thereafter, the Assessment dated 29th March 2011 was issued to the Appellant[3].

[1] vide page 28 of the appeal brief
[2] At page 25 of the appeal brief
[3] Vide page 28 of the appeal brief

The company appealed to the Commissioner General of Inland Revenue (hereinafter referred to as 'the CGIR') against the said assessment, in terms of Section 155 of the Inland Revenue Act.

The CGIR heard the appeal and made his determination confirming the assessment[4].

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

The TAC by determination dated 12th September 2014 confirmed the determination of the Respondent, CGIR, and dismissed the appeal of the Appellant.

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

1. **Whether the profits made by the Appellant from the sale of lubricants to non-resident ships out of bonded warehouse amount to qualified export profits and income within the meaning of Section 51 of the Inland Revenue Act No.10 of 2006?**

2. **Whether in addition to or in the alternative to (1) above, the profits made by the Appellant from the sale of lubricants to non-resident ships amount to profits and income from the export of petroleum products within the meaning of Section 42(1) of the Inland Revenue Act No. 10 of 2006?**

The fact that the lubricants are sold by the Appellant to non-resident ships out of bonded ware houses is not in issue. The matter in issue is whether those supplies constitute an export in terms of Sections 42 (1) and/or Section 52 of the Inland Revenue Act No. 10 of 2006, as amended.

The Law

Before adverting to the matter in issue, for clarity, I will re-produce the relevant Sections herein below.

Section 42 (1) of the Inland Revenue Act No. 10 of 2006 reads as follows:

[4] vide page 49 of the appeal brief

"42 (1) The profits and income, for the year of assessment commencing on April 1, 2006, arising in Sri Lanka to a consignor or consignee, from the export of –

(a) (...);

(b) Any petroleum, gas or petroleum products; or

(c) (...),

being goods brought to Sri Lanka on a consignments basis, and re-exported without subjecting such goods to any process of manufacture, shall be liable to income tax at the appropriate rate specified in the Fifth Schedule to this Act"

Section 51 of the Inland Revenue Act No. 10 of 2006 reads as follows:

"51. where any company commences on or after November 10, 1993, to carry on any specified undertaking and the taxable income of that company for any year of assessment commencing prior to April 1, 2014 includes any qualified export profits and income, such part of the taxable income of that company for that year of assessment as consists of such quailed export profits and income shall, notwithstanding anything to the contrary in this Act, be chargeable with income tax at the appropriate rate specified in the Fifth Schedule to this Act"

The term "*qualified exports profits and income*" and "*specified under taking*" are defined in Section 60 (b) and Section 60 (c) of the Inland Revenue Act, which reads thus;

"60 (a) (...)

(b) "qualified export profits and income" in relation to any person, means the sum which bears to the profits and income within the meaning of paragraph (a) of section 3, after excluding therefrom any profits and income from the sale of gems and jewellery and any profits and income from the sale of capital assets, for that year of assessment from any specified

undertaking carried on by such person, ascertained in accordance with the provisions of this Act, the same proportion as the export turnover of that undertaking for that year of assessment bears to the total turnover of that undertaking for that year of assessment;

(c) "specified undertaking" means any undertaking which is engaged in –

i. the export of non-traditional goods manufactured produced or purchased by such undertaking; or

ii. the performance of any service of ship repair, ship breaking repair and refurbishment of marine cargo containers, provision of computer software, computer programmes, computer systems or recording computer data, or such other services as may be specified by the Minister by Notice published in the Gazette, for payment in foreign currency; and"

The fifth schedule specifies the rates of income tax applicable Section 42 and 51 of the Inland Revenue Act.

Analysis

The Appellant imports petroleum products from overseas, stores them in bonded warehouses, and then supplies to ships, without subjecting it to any process or manufacture are matters not in issue in the instant case. The issue to be determined is whether the supply constitutes an 'export' in terms of the Inland Revenue Act.

However, the word 'export' is not defined in the Inland Revenue Act.

Therefore, the Appellant as well as the Respondent referred to other sources to support their respective arguments.

The Appellant cited the definitions of the words '*exportation*' and '*exported*' in The Judicial Dictionary by F. Stroud which reads thus:

*"**Exportation** – The words "Shipped for Exportation" are not, necessarily, restricted to an exportation to foreign*

countries, but may mean Exportation in its evident sense, i.e. a carrying out of Port, and thus include carrying commodities from one port to another within the Kingdom (Stockton Ry v. Barrett 11 C1. &F. 590: Vth Dwar. 648, 691)."

*"**Exported**- "Exported" means, "carried out"; therefore, dues on "coals exported" from a Port are payable on coal to be consumed on board (Muller v. Baldwin, L. R. 9 Q. B. 457 L. J. Q. B. 164)."*

The above Dictionary was published in 1903, based on a case decided at the time the United Kingdom, comprised of England, Wales, Scotland and particularly Ireland. Therefore, the phrase 'within the Kingdom' could even mean taking overseas. Hence, in my view the said definition cannot be safely relied upon to interpret the word export.

The Respondent cited from Black's Law Dictionary which defines the word 'export' in the following manner:

"To carry or send abroad; to transport merchandise or goods from one country to another, products manufactured in one country and then shipped and sold in another."

The Responded also cited Cambridge Advanced Learner's Dictionary where the word 'export' is defined as "*to send goods to another country for sale*".

Chambers English Dictionary defines 'export' as "*to carry or send out of a country*".

The Oxford Advanced Learner's Dictionary of current English defines 'export' as "*the selling and transporting of goods to another country*". The New Shorter Oxford English Dictionary on Historical Principles also defines 'export' in the same manner.

In the Oxford English Dictionary, the word 'export' in verb form means to "*send (goods or services) to another country for sale*".

The word book titled, "Words and Phrases Judicially Defined" cited by the Appellant, explains the term 'exported' as

"*there is nothing in the language of the Act [the Tyne Coal Dues Act, 1872] to shew that the word "exported" was used in any other than its ordinary sense, namely, 'carried out of*

> *the port.' ... we feel bound to hold that coals carried away from the port, not on a temporary excursion, as in a tug or pleasure boat, which intends to return with more or less of the coals on board, and which may be regarded as always constructively within the port, but taken away for the purpose of being wholly consumed beyond the limits of the port, are coals 'exported' within the meaning of the Act." Muller v. Baldwin (1874) L. R. 9 Q. B. 457, per cur., at p. 461."*

This definition supports the view that the ship should take away the fuel beyond the limit of the port, for the purpose of consumption. However, this definition is also based on the Tyne Coal Dues Act, 1872 of the United Kingdom.

Therefore, in my view this could not be safely used in deciding the case in hand.

Upon a consideration of the above dictionary meanings and other definitions it appears that different dictionaries have given different definitions to the word "export". Therefore, in my view, it is unsafe to rely on those dictionary meanings to decide the matter in hand.

The Appellant relied on Section 16 of the Customs Ordinance to spell out at what time an export occurs. The relevant portion of Section 16 reads thus;

> *"If upon the first (...) repealing of any duty, or upon the first permitting (...) of any (...) exportation whether inwards, outwards, or coastwise in Sri Lanka, it shall become necessary to determine the precise time at which* ***an (…) exportation of any goods made and completed*** *shall be deemed to have had effect, such time (...), in respect of exportation, shall be deemed to be the time at which the goods had been shipped on board the ship* ***in which they had been exported****; and if such question shall arise upon the arrival or departure of any ship, in respect of any charge or allowance upon such ship, exclusive of any cargo, the time of such arrival shall be deemed to be the time at which the report of such ship shall have been or ought to have been made; and the time of such departure shall be deemed to be the time of the last clearance of such ship with the Director-General for the voyage upon which she had departed."* (emphasis added and import provisions omitted)

There are two important segments to Section 16. The first segment implies that the export of goods has to have been *made and completed* (at the point of consideration of the 'time of export'). It therefore follows that the effective time of export can only be considered in accordance with Section 16, where an exportation of any goods has already been *made and completed*. Therefore, in my view, the 'time of export' definition in the Customs Ordinance is *not* a definition for an 'export' itself.

The second segment implies that the act of exportation is separate from the act of loading something on board the ship. This is because the relevant clause reads: *(...) the goods had been shipped on board the ship in which they had been exported (...)*. That clause therefore has two very distinct acts; one of loading on board the ship, and the other of exporting.

Moreover, Section 16 is a deeming provision.

N.S. Bindra has stated the following on deeming provisions in a Statute[5]:

> *"Where the legislature says that 'something should be deemed to have been done' which in truth has not been done, it creates a legal fiction and in that case, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion."*

It is further stated, citing *Gajraj Singh v. State Transport Appellate Tribunal*[6]:

> *" (...) that legal fiction is one which is not an actual reality but which the law recognizes and the court accepts as a reality. Therefore, in case of legal fiction the court believes something to exist which in reality does not exist. It is nothing but the presumption of the existence of the state of affairs which in actuality is non-existent. The effect of such a legal fiction is that a position which otherwise would not obtain is deemed to obtain under the circumstances."*

In the Indian Supreme Court case of *Burmah Shell, Oil Storage & Distributing Co. Ltd v. The Commercial Tax officer and others*[7], Hidayathulla J., observed that the customs barrier is a barrier for customs purposes and it has nothing to do with the sale of aviation spirit.

[5] N.S. Bindra, *Interpretation of Statutes*, Twelfth Edition, at page 268
[6] (1997)1 SCC 650
[7] AIR 1961 SC 315

Hence, in my view, Section 16 of the Customs Ordinance does not support the Appellant's contention that as soon as the goods have been put on the ship, they are deemed to have been exported, notwithstanding that the ship is still within Sri Lankan territorial waters.

The Respondent relied on the interpretation given to the word 'export' in Section 22 of the Imports and Exports (Control) Act No. 1 of 1969, as amended, and argued that 'export' shall mean the carrying and taking of the goods out of Sri Lanka.

The Respondent proposed three tests in deciding whether the supply of marine bunker fuel is an export or not.

The first test is 'Taking out of Sri Lanka'

The Appellant argued that under the definitions of the term 'export' in Section 22 of the Import and Export (Control) Act and Section 16 of the Customs Ordinance, there is no requirement to indicate the place of destination for a supply to be classified as an export.

The Respondent cited the case of *Perera and Silva Ltd v. Commissioner General of Inland Revenue*[8] in support of their argument. The above is a case where the Appellant, a manufacturer of wooden boxes, had sold those to others who used those boxes to pack goods and export them. The Appellant claimed that his business came under the expression 'articles manufactured in Ceylon and exported', and that his business was therefore exempt from tax. However, the Supreme Court held that the turnover from articles sold by the Appellant and exported by others is not exempted from tax.

Accordingly, the Respondent argued that in the instant case, the Appellant sells bunker fuel to the master of the ship, a third party, who receives the goods and takes them out of Sri Lanka.

However, the interpretation of the word 'export' in the Import and Export (Control) Act, relied on by the Respondent himself, recognises that any good caused to be carried or taken out of Sri Lanka by sea constitutes an export. Therefore, it appears that the Appellant causing a third party to carry or take the goods out of Sri Lanka by sea is sufficient to constitute an export. It may be the case that the above interpretation given in the Imports and Exports (Control) Act was not considered in the case of *Perera and Silva Ltd v. Commissioner General of Inland Revenue.*

Hence, the above argument of the Respondent has little merit.

[8] S.C.3/76

The second and third tests are that;

ii. The goods must have a specific recipient and goods must reach a final destination out of Sri Lanka.
iii. The transaction must involve an export from one country and import to another country.

The Respondent relied on the Gazette (Extraordinary) No. 1053/11 dated 11th November 1998, issued under Section 22A (1) and (2) of the Customs Ordinance where the word *'export'* is defined to read as *"the supply of processed, assembled or manufactured goods to a destination outside Sri Lanka"* and contended that to constitute an export, goods shall have to be supplied to a foreign destination.

N.S. Bindra has stated as follows regarding the definitions given in other statutes[9];

> *"It is always unsatisfactory and generally unsafe to seek the meaning of words used in an Act of Parliament in the definition clause of other statutes dealing with matters more or less cognate, even when enacted by the same legislature. Even otherwise, the definition of an expression contained in one enactment cannot furnish any safe guideline for determining the scope and contents of the same expression used in different context in a separate enactment. (...) Where a definition is given in an Act, it should be confined as a general rule to interpret the word defined for that Act only and not explain the meaning of the word in another statute, particularly when the two statutes are not in pari materia. The definition given in a statute is for effectuating the provisions of that statute and not for effectuating the provisions of another statute. A definition given in an Act cannot be used for purposes of another Act. The material language of the section has to be always borne in mind, for if a court is prone to indulge in exposition and attempted definition, it will be substituting the language chosen by Parliament with some other form of words and in an attempt at wide survey, some essential factor will be omitted or some inessential factor be substituted or added."*

Hence, I am of the view that it is unsafe to rely on the interpretations given in other statutes to the word 'export', especially in interpreting a fiscal

[9] N.S. Bindra, *Interpretation of Statutes*, Twelfth Edition, at page 277

statute enacted for fiscal purposes. Therefore, on the available material, I will proceed to decide within the words of the Inland Revenue Act itself.

The Legislature itself has recognized petroleum gas or petroleum products as a product exported from Sri Lanka. Being a country, which does not have petroleum resources, it is obvious that the export of petroleum products referred to in Section 42 (1) (b) has to be petroleum products imported and re-exported. However, it is a known factor that Sri Lanka does not re-export petroleum products to other countries. Therefore, invariably, the export meant by section 42 (1) (b) has to be the supplies made to ships and/or air crafts etc.

Further, it is easily perceived that the ships arriving in Sri Lankan ports for fuel do not take fuel on board for export, but for their own consumption. The marine bunker fuel pumped into a ship will be consumed by that ship during its journey, and it may sometimes be the case that if that ship stays within the territorial waters of Sri Lanka for a long time, it will consume that fuel within the territory itself, before reaching its final destination or even before entering international waters. In the above circumstances, I am of the view that having a specific recipient and/or importer to receive the goods abroad is not an appropriate test in deciding whether the supply of marine bunker fuel is an export or not.

In the written submissions filed in the conjoined appeal No. CA Tax 0021/17, the Appellant contended that the *destination* need not be another country but could be any place outside Sri Lanka including international waters. However, I am unable to agree with the learned Counsel since a ship could not stay at sea forever without reaching a port to take on supplies such as fuel etc.

The learned Counsel for the Appellant advanced an argument that the Appellant's possessing of a licence issued under Section 5B of the Ceylon Petroleum Corporation Act itself establishes the fact that the Appellant is an exporter of petroleum products sold to ships. However, along with the word 'export', the words 'sell', 'supply' and 'distribute' are also present in that Section as alternatives. Therefore, the licence issued to the Appellant cannot conclusively be considered to be a licence that permits export. Hence, I am of the view that unless the Appellant establishes on other evidence that the Appellant exports bunker fuel on that particular licence, the existence of the licence itself is insufficient to establish the said fact.

It is a known fact that there are ships that provide services within the Sri Lankan territory. These ships could be resident or non-resident.

In the written submissions filed in the conjoined appeal No. CA Tax 0021/17, the Appellant stated that there are ships operating within the territorial waters of Sri Lanka. The Appellant has explained how sales are made to local vessels and to foreign vessels. Accordingly, as required by the Sri Lanka Customs, the Appellant passes an *ex-bond* entry by paying the relevant taxes and levies prior to executing the delivery to a local vessel, and the CUSDEC is under the Customs Procedure Code 4072 to "Entry for home use". The invoice is also raised in Sri Lankan Rupees. If the sale is made to a foreign going vessel, the Appellant has to firstly obtain approval from the Customs to re-bond products from the Jaya Container Terminal to the barges. The products are delivered to the vessel thereafter, and an *ex-bond* entry is passed at the Sri Lanka Customs by the Appellant. There, the CUSDEC will be under Customs Procedure Code 3072 to 'Re-export' from Private Bond. The invoice is raised in US dollars.

In the above set of scenarios, the importance of having the necessary documents to decide whether the sale made by the Appellant is an export or not is clearly manifested.

In the written submissions filed in the conjoined appeal No. CA Tax 0021/17, the Appellant, citing Simone Schnitzer's, *Understanding International Trade Law*, contended that an export sale can be affected under various International Commercial Terms. Those are:

> Terms (e) - the seller minimises his risk by making the goods available only at his premises.
>
> Terms (f) – the seller arranges and pays for any pre-carriage in the country of export and completes all customs and export formalities. The main carriage is to be arranged by the buyer. Risk and property pass once the seller has delivered the goods at the agreed price.
>
> Terms (c) – the seller arranges and pays for the main carriage but risk passes when the goods are loaded, or given into custody of the first carrier; property passes once the bill of lading/ transport documents are tendered. Export formalities must be cleared by the seller; import formalities are the buyer's duty.
>
> Terms (d) – the seller must make the goods available upon arrival at the agreed destination, therefore, his cost and risk is maximised, under delivered duty paid (DDP), even covering the

import clearance. Apart from the DDP, the duty to complete all import formalities is with the buyer.

The aforementioned International Commercial terms relevant to the International Sale of Goods itself demonstrate the importance of having the necessary documents in deciding the nature of the sale *viz* whether the exporter is the Appellant or not.

Therefore, anyone who claims a tax exemption on the ground of export of petroleum products should establish that those products were provided to a ship outbound from Sri Lanka. Otherwise, income from the supply of marine bunker fuel to a ship travelling from one port to another within the Sri Lankan territory will also be eligible for the exemption.

The Respondent relied on the judgement of the Indian Supreme Court *Burmah Shell Oil Storage & Distributing Co. Ltd v. The Commercial Tax officer and others*[10] to buttress the argument that in a supply of aviation spirit (almost similar to the supply of marine bunker fuel), taking out of the territory of India alone, would not constitute a sale occasioned in the course of export.

The material statutory provision taken into consideration by the Indian Supreme Court in the above case was article 286 (1) (b) of the Indian constitution which provides "*No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place* - ***in the course of the*** *import of the goods into, or* ***export of goods out of****, the territory of India"* (emphasis added).

The other provisions considered by the Indian Supreme Court are also different from the Sri Lankan provisions.

The relevance of statutory provisions outside the Inland Revenue Act is also dealt with separately, in this judgment.

Be that as it may, the following observations made by the Indian Supreme Court in the above judgement (reproduced below), are relevant to the matter in issue:

Regarding the definition of the word 'export';

> "*The word export may conceivably be used in more senses than one. In one sense, 'export' may mean sending or taking*

[10] *Supra* Note 5

out of the country, but in another sense, it may mean sending goods from one country to another. Often, the latter involves a commercial transaction but not necessarily. The country to which the goods are thus sent is said to import them, and the words 'export' and 'import' in this sense are complimentary"

In order to explain the above difference, Hidayathulla J., used an illustration where goods ordered by the health authorities to be destroyed by dumping them in the sea, and for that purpose are taken out of the territories, cannot be said to have been exported. On the contrary, if the goods put on board a ship bound for a foreign country but, for some reason dumped in the sea, they can still be said to have been exported, even though they do not reach their destination. Therefore, it appears that in both the instances, though goods have been taken out of the territory, the first example does not constitute an export whereas the second example does.

Hidayathulla J., explained the difference between the two scenarios in the following manner.

"The difference lies in the fact that whereas the goods, in the first example, had no foreign destination, the goods, in the second example, had. It means therefore, that while all exports involve a taking out of the country, all goods taken out of the country cannot be said to be exported. The test is that the goods must have a foreign destination where they ***can be said*** *to be imported."* (emphasis added)

However, as I have already stated in this judgement, marine bunker fuel which is consumed by the ship on its journey may not reach a foreign destination. Yet, in my view, for marine bunker fuel to be treated as having been exported, it should be supplied to a ship which is outbound from Sri Lanka to a foreign destination. It is obvious that a ship which leaves the territory of Sri Lanka will not stay in high seas indefinitely. It should reach a foreign port. If the same ship returns to a Sri Lankan port due to some unforeseen or catastrophic event, the supply could still be treated as an export, but not otherwise.

The Appellant cited the judgment of this Court in the case of *Nanayakkara v. University of Peradeniya*[11] wherein S. N. Silva J., (as he then was) held

[11] (1991)1 Sri. LR 97

as follows regarding the manner in which a tax exemption must be interpreted:

> *"A necessary corollary of applying the rule of strict construction to determine liability under a taxing statute, is that any provision granting an exemption from such liability is to be given its full effect. Exemptions are provided for by the Legislature for the purpose of giving a measure of relief to a person who would otherwise be liable to tax under the general rule. Therefore, no restriction should be placed on such provisions by way of interpretation so as to defeat the purpose of granting such exemption."*

The view expressed by our Courts in the above case and in a line of authorities was that tax exemptions also should be strictly interpreted as of other provisions of a taxing statute.

However, the Appellant, citing the following extract from the more recent decision of the Indian Supreme Court in the case of *Government of Kerala v. Mother Superior Adoration Convent*[12], argued that exemptions claimed by taxpayers are 'beneficial and promotional exemptions' and therefore, have to be liberally interpreted:

> *"[…] the rule regarding exemptions is that exemption should generally be strictly interpreted but beneficial exemptions having their purpose as encouragement or promotion of certain activities should be liberally interpreted. This composite rule is not stated in any particular judgment in so many words. In fact, majority of the judgements emphasise that exemptions are to be strictly interpreted while some of them insist that exemptions in fiscal statues are to be liberally interpreted giving an apparent impression that they are contradictory to each other. But this is only apparent. A close scrutiny will reveal that there is no real contradiction amongst the judgements at all. The synthesis of the views is quite clearly that the general rule is strict interpretation while special rule in the case of beneficial and promotional exemption is liberal interpretation. The two go very well with each other because they related to two different sets of circumstances."*

[12] AIR (2021) SC 1271

The Indian Supreme Court has also observed in the case of *Novopan India Ltd v. Collector of Central Excise and Customs*[13], that:

> *"(…) that a person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he was covered by the said provision. In case of doubt or ambiguity, benefit of it must go to the State."*

In *Commissioner of Central Excise v. Hari Chand Shri Gopal*[14], it was observed that:

> *"A person who claims exemption or concession has to establish that he is entitled to that exemption or concession… A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the Statute and the object and purpose to be achieved."*

In *Bank of Commerce v. Tennessee*[15], the United States Supreme Court observed:

> *"Taxes being the sole means by which sovereignties can maintain their existence, any claim on the part of anyone to be exempt from the full payment of his share of taxes on any portion of his property must on that account be clearly defined and found on plain language. There must be no doubt or ambiguity used upon which the claim to the exemption is founded. It has been said that a well-founded doubt is fatal to the claim; no implications will be indulged in for the purpose of construing the language used as giving the claim for the exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power.*

At a glance, it appears that there is a conflict of opinions expressed by the Indian Courts. However, on a careful consideration, I agree that there is no real contradiction. The opinion expressed in the case of *Government of Kerala v. Mother Superior Adoration Convent*[16] is on the standard to be applied in interpreting beneficial exemptions; and the dicta in the other cases are on who should establish the entitlement for the exemption, and

[13] 1994 SUPPL. (3) SCR 549
[14] Civil Appeal Nos. 1878-1880 of 2004
[15] 161 U.S. 134 (1896)
[16] *Supra* Note 10

in whose favour the Court should hold when there is a doubt or an ambiguity.

Therefore, before reaching the juncture where the standard upon which the exemption is established is decided, the Appellant first has to establish his entitlement, which is an endeavour the Appellant has failed in.

Conclusion and opinion of Court

On the above analysis, it is my considered view that for a supply of bunker fuel to be an export, it should be made to a ship leaving the territory of Sri Lanka to a foreign destination. Official documents such as the Customs Declaration Form (CUSDEC), the Marine Delivery Note, and the Commercial Invoice etc., where the place of destination is stated, are relevant in determining whether the ship is going out of Sri Lanka to a foreign destination or not. In fact, the Respondent has raised this issue in their written submission filed in this Court by stating that the contracts entered into by the Appellant do not provide for a terminus outside the territorial waters of Sri Lanka[17]. The ship/vessel being a non-resident ship/vessel should not be the test in determining this fact, since, there may be non-resident ships, registered in a foreign country, providing services within the Sri Lankan territory. However, it is unfortunate that in the case in hand, none of these documents were produced. It appears that even the Respondent, the CGIR, has not taken any step under Section 215 of the Inland Revenue Act to search for these documents. Nevertheless, since the Appellant is claiming a tax exemption in this case, the burden lies on the Appellant to establish its eligibility for the exemption.

The issue as to whether the Appellant satisfies the requirements imposed by to Section 42 (1) and/or Section 51 will not arise since this Court has already determined that the Appellant has failed to establish that the supply of marine bunker fuel by the Appellant to the ships constitutes an export.

However, I wish to emphasise that this decision is limited to this case, and in a case where the taxpayer establishes that bunker fuel has indeed been exported, by producing the necessary documents where the destination of the ship is indicated, the Appellant may be entitled to claim the exemption under the relevant Section or Sections.

Furthermore, it is my considered opinion that the export of marine bunker fuel, which would be consumed by a ship during its journey, is different from the traditional export of cargo where the goods are exported to a specified recipient in an overseas destination.

[17] Paragraph 3 (f) (ii)

The Appellant contended that the intention of the Legislature in introducing the legislative provisions relevant to this case is not fiscal, but economic, and was to increase foreign reserves by encouraging export, which in return brings in foreign exchange. Therefore, it was submitted that the Appellant's sale of marine bunker fuel, a transaction in foreign currency, constitutes an export.

However, in my view this may be one of several criteria which could be taken into consideration in deciding whether a transaction is an export or not but, not the decisive factor. There may be many more local transactions done in foreign currency which would not constitute an export.

The TAC arrived at the conclusion that the Appellant's sale of marine bunker fuel to foreign vessels cannot be treated as an export and therefore, the Appellant is not entitled to the concessionary tax rates under Sections 42 and 51 of the Inland Revenue Act, as amended, on the ground that the goods need to have a foreign destination necessitating an importer; export and import need to go in pairs.

However, this Court is of a different opinion on the above issue and as stated above in this judgment the test is whether the marine bunker fuel is supplied to the ships leaving the Sri Lankan territory to a foreign destination.

Nevertheless, the final conclusion of the TAC as well as of this Court is that the Appellant is not entitled to the concessionary tax rates. Therefore, no prejudice to the substantial rights of the Appellant or a failure of justice has occurred due to the difference of opinion of the TAC and this Court.

Therefore, I affirm the determination of the TAC and acting under Section 11 A of the Tax Appeals Commission Act No. 23 of 2011 (as amended) confirm the assessment determined by the TAC. Accordingly the appeal is dismissed.

I therefore, for the purpose of this case, answer the two questions of law in the negative, in favour of the Respondent.

1. ***No***
2. ***No***

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

JUDGE OF THE COURT OF APPEAL

Dr. Ruwan Fernando J.

I Agree.

JUDGE OF THE COURT OF APPEAL