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

In the matter of an Appeal by way of a 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).

Lanka Marine Services (Private) Limited,
130, Glennie Street,
Colombo 02.

Appellant

Case No. CA/TAX/0020/2013
Tax Appeals Commission
No. TAC/IT/014/2011

Vs.

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

Respondent

Before : Dr. Ruwan Fernando J. &

M. Sampath K.B. Wijeratne J.

: Romesh de Silva, P.C. with Harsha

		Amarasekara, P.C. and Dr. Shivaji Felix for the Appellant
		F. Jammel, A.S.G., P.C. with N. Wigneswaran, D.S.G for the Respondent.
Argued on	**:**	02.12.2021 & 14.12.2021
Written Submissions filed on		
	:	18.10.2018 & (by the Appellant)
		30.10.2019 & 20.05.2020 (by the Respondent)
Decided on	:	31.03.2022

<u>Dr. Ruwan Fernando, J.</u>

Introduction

[1] This is an appeal by the Appellant by way of a Case Stated against the determination of the Tax Appeals Commission dated 28.05.2013 confirming the determination made by the Respondent on 14.10.2011 and dismissing the Appeal of the Appellant. The taxable period related to the appeal is the year of assessment 2007/2008.

Factual Background

[2] The Appellant is a limited liability company incorporated under the provisions of the Companies Act, No. 17 of 1982 and the principal activity of the Appellant is supply of marine fuel and lubricants to local and foreign vessels. The Appellant submitted its return of income for the year of assessment 2008/2009 claiming that the supply of bunker fuel to foreign vessels could be treated as an export, and applied for the concessionary tax rate on the profits of the business in terms of Sections 52 and 42 of the Inland Revenue Act, No. 10 of 2006 (as amended), as follows:

(i) On qualified export profits-section 52 - Rs. 1,106,953,724 at 15%

(ii) On qualified export profits-section 42 - Rs. 32,478,172 at 10%

[3] The Assessor by by letter dated 24.09.2009 rejected the same for the following reasons:

1. Trade profit and income of the company is liable to income tax as the agreement entered into between the Board of Investment and the Company is declared null and void;

2. Sale of bunker fuel to foreign ships cannot be treated as exports and the applicable income tax rate on this profit is 35%;

3. The capital allowances which are due by virtue of the aforesaid judgment, but claimed as the tax computation already furnished are not allowed as the Company is not the owner of the assets

[4] Accordingly, the Assessor adjusted tax computation for the above mentioned year of assessment as follows:

Tax Computation	Rs.
Profit declared as per return	1,247,574,879
<u>Add</u>	
Capital allowances disallowed	1,147,885
Total statutory/Assessable/Taxable Income	1,248,722,764
Tax Payable	437,052,967
Dividend Tax	91,350,000
SRL Payable	5,284,030

[5] Notice of assessment was issued in terms of Section 163 (3) of the Inland Revenue Act, No. 10 of 2006 (as amended) in respect of the year of assessment 2007/2008 (pp. 84-85 of the Tax Appeals Commission brief).

[6] The Appellant appealed to the Commissioner-General of Inland Revenue (hereinafter referred to as the "Respondent") against the said assessment and the Respondent by its determination dated 14.10.2011 confirmed the assessment and dismissed the appeal (pp. 14-28 of the Tax Appeals Commission brief). The Respondent held that the sale of bunker fuel/lubricants to foreign vessels cannot be treated as "exports" or

"consignment exports" and therefore, the concessionary tax rates under Sections 52 or 42 of the Inland Revenue Act, No. 10 of 2006 (as amended) do not apply.

Appeal to the Tax Appeals Commission

[7] Being dissatisfied with the said determination of the Respondent, the Appellant appealed to the Tax Appeals Commission and the Tax Appeals Commission by its determination made on 28.05.2013 confirmed the determination made by the Respondent and dismissed the appeal. The Tax Appeals Commission, after hearing the parties to the appeal by its determination was pleased to reject all the contentions urged by the Appellant and held that:

1. The word "export" including the meaning given in Dictionaries, shall mean the sending of goods from one country to another country and therefore, there has to be a destination point outside Sri Lanka to constitute an export. The destination point referred to in the relevant documents submitted by the Appellant state that the destination point is Sri Lanka;

2. Although the decisions of the Indian cases are not binding in Sri Lanka, they have a persuasive value and the test that has been applied in the Indian Supreme Court decision in *Burmah Shell Oil Storage & Distributing Company of India Ltd v. The Commercial Tax Officer and Others* AIR 1961 SC 315 is that the goods must have a foreign destination where they can be said to be imported, and so long as it does not satisfy this test, it cannot be said that the sale was in the course of export;

3. Sale of bunker fuel/lubricants by the Appellant to foreign vessels cannot be treated as exports and therefore, the Appellant is not entitled to the concessionary tax rates under Sections 52 or 42 of the Inland Revenue Act, No. 10 of 2006.

Questions of Law for the Opinion of the Court of Appeal

[8] Being dissatisfied with the said determination of the Tax Appeals Commission, the Appellant appealed to the Court of Appeal and formulated

the following questions of law in the Case Stated for the opinion of the Court of Appeal.

(1) Did the Tax Appeals Commission err in law when it came to the conclusion that the Appellant was not entitled to the concessionary tax rate conferred by Section 42 of the Inland Revenue Act, No. 10 of 2006 (as amended)?

(2) In the alternative, did the Tax Appeals Commission err in law when it came to the conclusion that the Appellant was not entitled to the concessionary tax rate conferred by Section 52 of the Inland Revenue Act , No. 10 of 2006 (as amended)?

(3) In view of the facts and circumstances of the case, did the Tax Appeals Commission err in law when it came to the conclusion that it did?

Analysis

Question of Law Nos. 1 and 2

Is the Appellant entitled to the Concessionary Tax Rate conferred by Sections 42 and 52 of the Inland Revenue Act, No. 10 of 2006

[9] It is not in dispute that the principal activity of the Appellant is the supply of marine fuel and lubricants to local and foreign vessels. At the hearing of the Appeal, Mr. Romesh de Silva, P.C. submitted that the Appellant being a supplier of bunker fuel to ships is engaged in exporting bunker fuel to a buyer abroad within the contemplation of Section 42 of the Inland Revenue Act, No. 10 of 2006 (as amended) and therefore, it is entitled to the concessionary rate of 10% specified in the Fifth Schedule to the Act or in the alternative, to the concessionary rate of 15% specified in the Fifth Schedule to the Inland Revenue Act. He further submitted that although the term “export” is not defined in the Inland Revenue Act, No. 10 of 2006 (as amended), the question of whether the Appellant qualifies for the concessionary tax rates under Sections 42 of 52 of the Inland Reveue Act would have to be decided by resorting to other definitions of “export” in other statutes.

[10] Mr. de Silva further submitted that the supply of bunker fuel qualifies as an "export" when Appellant satisfies the test of "act of taking out of Sri Lanka" as specified in Section 22 of the Imports and Exports (Control) Act, No. 1 of 1969, which is further confirmed by Section 16 of the Customs Ordinance. He referred to the definition of the term "export" set out in several Dictionaries and judicial authorities and submitted that the Appellant has established that the bunker fuel had been taken out of the Sri Lankan territorial waters, and the moment the bunker fuel is taken out of Sri Lanka, the act of exportation is complete and thus, the Appellant must be deemed to be an "exporter".

[11] Mr. de Silva strenuously argued that the real test is whether ot not the goods were taken out of Sri Lanka and once the act of taking out of Sri Lanka is established, the final destination of the goods, and the intent of the person to dispose or leave such goods in a particular destination becomes irrelevant. On the basis, Mr. de Silva, submitted that the supply of bunker fuel to a foreign going ship constitutes an "export" and therefore, the Appellant is eligible for the concessionary tax rates under Sections 42 and 52 of the Inland Revenue Act, No. 10 of 2006 (as amended).

[12] On the other hand, the learned Additional Solicitor General submitted that the Appellant's transactions do not constitute "exports" under any of the four legal standards or tests that are recognized as characteristics of an export such as (i) there should be an act of taking out of Sri Lanka; (ii) the goods must reach a final destination outside Sri Lanka; (iii) the transaction must involve an export from one country, and an import into another country; and (iv) the transaction should possess the characteristics of an international sale of goods transaction

[13] She submitted that the Appellant neither took the goods outside Sri Lanka, nor caused the foreign vessel to take the goods outside Sri Lanka with a final destination outside Sri Lanka as the contracts entered by the Appellant do not provide for a terminus outside the territorial waters of Sri Lanka. She submitted that as far as the Appellant was concerned, the terminus was within Sri Lanka, and the transaction between the Appellant and the vessel owners/charterers was a local transaction that took place within the territorial waters of Sri Lanka and thus, the final destination was not outside Sri Lanka. She further submitted that in any event, the

Appellant had no control over the ships' journeys; and thus, it is manifest that the goods have remained within the territorial waters of Sri Lanka, indefinitely.

[14] Referring to the test of international sale of goods transaction, she argued that the Appellant has failed to produce a single document such as a Bill of Lading, Marine Insurance, invoices and letters of credit, and that the Appellant's documents do not support that its transaction could be chaterertised as international sale of goods transaction. She argued, therefore, that the supply of bunker fuel was no export within the meaning of Section 42 or qualified export within the meaning of Section 52 of the Inland Revenue Act.

[15] The Tax Appeals Commission in holding that the bunker fuel supplied by the Appellant to ships travelling from Sri Lanka cannot constitute an export in the absence of a foreign destination, relied on the test adopted by Hidayatullah J. in the Indian Supreme Court case in *Burmah-Shell Oil Storage & Distribution Company Ltd v. Commercial Taxing Office and Othes* [1961]1SCR 902. That was a case relating to the sale and delivery of aviation spirits to Aircrafts proceeding abroad and belonging to several companies. The question arose was whether the sale and delivery of aviation spirits to Aircrafts constitutes an export.

[16] In *Burmah-Shell Oil Storage & Distribution Company Ltd v. Commercial Taxing Office and Othes* (supa), the Indian Supreme Court held that in the context and setting in which the expression "export out of the territory of India" occurs in Part XII of the Constitution, it was not sufficient that goods were merely moved out of the territory of India, but that it was further necessary that the goods should be intended to be transported to a destination beyond India, so that aviation spirit sold to an aircraft for enabling it to fly out of the country was not "exported" out of the country. Referring to the word "export", Hidayatullah J., further stated that (i) the test is that the goods must have a foreign destination where they can be said to be imported; (ii) the crucial fact is the sending of the goods to a foreign destination where they would be received as imports; and (iii) the two notions of export and import, thus, go in pairs.... and as long as it does not satisfy this test, it cannot be said that the sale was in the course of export. .." Under such circumstances, Hidayatulla J. stated at paragraph 37:

"Applying these several tests to the cases on hand, it is quite plaint that aviation sprit loaded on board an aircraft for consumption, though taken out of the country, is not exported since it has no destination where it can be said to be imported, and so long as it does not satisfy this test, it cannot be said that the sale was in the course of export. Further, as has already been pointed out, the sales can hardly be said to "occasion" the export. The seller sells aviation sprit for the use of the aircraft, and the sale is not integrally connected with the taking out of aviation sprit. The sale is not even for the purpose of export, as explained above. It does not come within the course of export, which requires an even deeper relation. The sales, thus, do not come within Article 286 (1)(b)".

[17] It was the contention of the learned Counsel for the Appellant that the concept of export in India as reflected in the Indian authorities is based on different principles such as the existence of two termini and the intention of their being landed in a different port. He submitted that the real test is whether or not the bunker fuel was taken out of the Sri Lankan territorial waters and therefore, the Indian authorities are irrelevant for the purpose of deciding the concessionary tax rate under Sections 42 and 52 of the Inland Revenue Act, No. 10 of 2006 (as amended).

[18] It is true that the decision in *Burmah-Shell Oil Storage & Distribution Company Ltd v. Commercial Taxing Office and Othes* (supra) is based on constitutional provisions of the Indian Constitution, [Article 286 (1) (b)] and Section 5 of the CENTRAL SALES TAX ACT to define the word "export" and such principles are not binding on the Courts of Sri Lanka. Hence, this Court is called upon to decide the question of whether the supply of bunker fuel to ships constitutes an "export" under Sections 42 or 52 of the Inland Revenue Act, No. 10 of 2006, independent of the Indian authorities in particular, the case of *Burmah-Shell Oil Storage & Distribution Company Ltd v Commercial Taxing Office and Othes* (supra).

Statutory Provisions

[19] Before embarking upon the rival contentions of the parties, I may proceed to notice the relevant statutory provisions which have a bearing on the issue. Section 42 of the Inland Revenue Act, No. 10 of 2006 (as amended), which sets out the rate of income tax on profits and income

arising in Sri Lanka to the consignor or consignee from certain exports. It provides as follows:

> *"42 (1) The profits and income, for the year of assessment on April 1, 2006, arising in Sri Lanka to a consignor or consignee,* ***from the export of–***
>
> *(a) any precious stones or metals not mined in Sri Lanka;*
>
> *(b) any petroleum, gas or petroleum products; or*
>
> *(c) such other products as may be approved by the Minister for the purposes of this paragraph, having regard to the foreign exchange benefits that are likely to accrue to the country from the export of such products, being goods brought to Sri Lanka on a consignment 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.*
>
> *(2) The profits and income for any year of assessment commencing on or after April 1, 2007, but prior to April 1, 2011 arising in Sri Lanka to any* ***consignor or consignee from the export of any goods brought to Sri Lanka on a consignment 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".*

[20] Section 52 of the of the Inland Revenue Act, No. 10 of 2006 as amended, which sets out the rate of income tax on **qualified export** profits and income of a company which carries on any specified undertaking as follows:

> *52-Where any company commenced prior to November 10, 1993, to carry on any specified undertaking and the taxable income of that company for any year of assessment* ***includes any qualified export profits and income from such specified undertaking,*** *such part of such taxable income as consists of such qualified 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.*
>
> *Exporting and importing are two sides of the same coin; both supply customers with products manufactured outside the country.*

[21] Section 60 of the Inland Revenue Act, No. 10 of 2006 interprets the terms "export turnover", "qualified export profits and income" and "specified undertaking" for the purpose Chapter IX as follows:

"60. *For the purposes of this Chapter—*

(a)"export turnover" in relation to any specified undertaking means the total amount receivable, whether, received or not, by that undertaking from the export of goods or commodities or from the provision of any service referred to sub-paragraph (ii) of paragraph (c), but does not include—

(i) any amount receivable, whether received or not, from the export of gems or jewellery or from the sale of any capital assets;

(ii) any amount receivable, whether received or not-from the export of black tea not in packet or package form and each packet or package weighing not more than one kilogram, crepe rubber, and, sheet rubber, scrap rubber, latex or fresh coconuts; or

(iii) any profits and income not being profits and income within the meaning of paragraph (a) of section 3;

(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 there from 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

(d) "total turnover" in relation to any specified undertaking means the total amount receivable, whether received or not, by that undertaking from any trade or business carried on by that undertaking, but does not include any amount receivable, whether

received or not, from the sale of capital assets, gems or jewellery or any profits and income not being profits and income within the meaning of paragraph (a) of section 3.

For the purposes of this section the expression "non- traditional goods" means goods other than black tea not in packet or package form and each packet or package weighing not more than one kilogram, crepe rubber, sheet rubber, scrap rubber, latex or fresh coconuts or any other produce referred to in section 16, but include organic tea in bulk".

Rates specified in the Fifth Schedule

[22] The Fifth Schedule specifies the rates for the application of Sections 42 and 52 as follows:

"Fifth Schedule

The following rates shall be applicable notwithstanding the rates specified in the First, Second and Third Schedules.

6. The rate of income tax on profits and income arising before April 1, 2011, to any consignor or consignee from entrepot trade involving precious stones, metals not mined in Sri Lanka or any petroleum , gas or petroleum products or such other approved products (section 42)
10 per centum

18. The rate of income tax on qualified export profits and income of a company, which commenced to carry on any specified undertaking prior to April 1, 2015, for-

(a) any year of assessment commencing prior to April 1, 2011 15 per centum

(b) any year of assessment commencing on or after April 1, 2011 (Section 52)

12 per centum

[23] To be eligible for the concessionary tax rate under Section 42 of the Inland Revenue Act, as specified in the Fifth Schedule to the Inland Revenue Act, No. 10 of 2006, the Appellant must satisfy that:

I. it has brought goods into Sri Lanka on a consignment basis; and

II. it is re-exporting such goods without subjecting it to any process of manufacture;

[24] The term “re-export” is the process of exporting goods that were previously imported into a country in the same state as previously imported (Cambridge English Dictionary). At the hearing, both Counsel made submissions on the question as to whether the activity of the Appellant constitutes an ‘export” within the meaning of Sections 42 or “qualified export” within the meaning of Section 52 of the Inland Revenue Act. The fundamental question that arises for consideration is whether or not, the supply of bunker fuel to ship by the Appellant constitutes an “export” within the meaning of Sections 42 of the Inland Revenue Act, No. 10 of 2006.

[25] On the other hand, the Appellant contends that it being a specified undertaking earned a qualified export profits and income from such undertaking and therefore, the Appellant being an qualified exporter falls within the meaning of Section 52 of the Inland Revenue Act, No. 10 of 2006 (as amended). The fundamental question that arises for consideration is whether or not, the profits and income of the Appellant being a specified undertaking were derived from the export of bunker fuel to be treated as a “qualified export profits and income” within the meaning of Section 52 of the Inland Revenue Act, No. 10 of 2006 (as amended).

Issue

[26] Accordingly, this case stated raises an interesting, but intricate the fundamental question whether or not the supply of bunker fuel to vessels constitutes an “export” within the meaning of Section 42 or 52 of the Inland Revenue Act, No. 10 of 2006 (as amended) to be eligible for the concessionary rate of tax specified in the Fifth Schedule to the Inland Revenue Act, No. 10 of 2006 (as amended).

Definition of the term”export”

[27] As the Inland Revenue Act does not provide a statutory definition to the term “export”, this Court has to decide what is envisaged by the term “export” for the purpose of Sections 42 and 52 of the Inland Revenue Act, No. 10 of 2006. It has now become necessary to construe the scope of the term “export” by using its ordinary or literal meanings in common parlance as understood in its natural and grammatic manner in the context in which it occurs for the application of Sections 42 and 52 of the Inland Revenue Act, No 10 of 2006 as amended.

[28] Maxwell on Interpretation of Statutes (12th Edition, page 28), deals with the concept of literal construction in the following words:

> *"The first and most elementary rule of construction is that is it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and otherwise in their ordinary meaning, and the second is that the phrases and sentences are to be construed according to the rules of grammar. 'The length and detail of modern legislation, wrote Lord Evershed M.R., 'has undoubtedly reinforced the claim of literal construction as the only safe rule.' If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences. The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases".*

[29] In Craies on Statute Law (7th Edition, page 65), it is stated that:

> *"Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature".*

[30] In *M.N. Dastur and Co. Ltd. and Ors. vs. Union of India (UOI) and Ors.* (28.02.2005 - CALHC), it was stated that

> *"Words used in a statute dealing with matters relating to the general public are presumed to have been used in their popular rather than narrow, legal or technical sense. The doctrine of Loquitur ut vulgus, i.e., according to the common understanding and acceptance of the terms, is to be applied in construing the words used in statute dealing with matters relating to the public in general. If an Act is directed to dealings with matters affecting everybody generally, the words used, have the meaning attached to them in the common and ordinary use of language".*

[31] Lord Easter, in *Unwin v. Hanson (1891) 2 QB 115 (CA)* has further explained the manner in which the words used in statutes dealing with matters relating to the public in general are construed at page 119 as follows:

"Now when we have to consider the construction of words such as this occurring in Acts of Parliament, we must treat the question thus: If the

Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words".

[32] In the Black's Law Dictionary, Revised Edition, the term "export" is defined in the following manner:

"EXPORT, v. To carry or to send abroad. Tennessee Oil Co. v. McCanless, 178 Tenn: 683, 157 S.W. 2d 267, 271, 272. To send, take, or carry an article of trade or commerce out of the country. To transport merchandise from one country to another in the course of trade. To carry out or convey goods by sea. State v. Turner, 5 Har., Del., 501....

"Export," in its primary sense, means to carry or send out of a place, and in secondary sense means to carry from one state or country. McKesson & Robbins v. Collins, 18 Cal.App.2d 648, 64 P.2d 469, 470".

[33] The definition of "*export*" from the Oxford Advanced American Dictionary is "the selling and transporting of goods to another country". In Cambridge Advance Learners' Dictionary defines the term *"exportation"* as *"the process of sending goods to another country for sale".* In the Merriam-Webster Online Dictionary, the term export means "to carry or send (something, such as a commodity) to some other place (such as another country). Accordingly, the Dictionary meaning of the word "export" of goods as normally understood is "sending goods" from one country to another country for sale.

[34] However, the meaning of a word in a statute may also be affected by its context, which may consist of surrounding sections, the whole Act or the scheme or purpose of the legislation and the exceptions or deduction granted thereunder. Thus, one has to construe the scope of the term "export" in the context in which it occurs in Sections 42 and 52 of the Inland Revenue Act, having regard to the nature of the goods that are to be exported, namely, the bunker fuel being a petroleum product which is not manufactured in Sri Lanka but, used for the navigation of vessels,

and the purpose for which such exports are qualified for concessionary tax rates under the Inland Revenue Act.

Imports & Exports (Control) Act

[35] The Appellant, however argues that as the Inland Revenue Act does not define the term "export", nor does it specify the criteria that must be affirmatively satisfied in order that a supply may be classified as an export, recourse must be had to the general principles of law applicable for the purposes of determining what constitutes an export. This Court is now required to find out what is meant by the phrase " export" for the purpose of the Section 42 and 52 of the Inland Revenue Act, and whether the mere supply of bunker fuel to a ship constitutes an export under Sections 42 or 52 of the Inland Reveue Act, No. 10 of 2006.

[36] The Appellant relies on the definition of the term "exportation given in the Stroud Judicial Dictionary, Vo. II 1903 referring to the decision in *A.G. v Pougett* 2 Price, 381) and *Stockton Ry v. Barrett*, 11 Cl. & F. 590) in support of his contention that the word "export" for the purpose of the Inland Revenue Act, is not restricted to an exportation to foreign countries, but may mean a carrying out of the Port The Stroud Judicial Dictionary, Vo. II 1903 defines the term "exportation" referring to the decision in *A.G. v Pougett 2 Price, 381*, as follows:

> *"unless a vessel has proceeded out of the limits of the Port with her cargo, it is not such an Exportation of the goods as will protect the cargo from duties subsequently imposed on the Exportation of goods of the same nature;although the vessel is not only freighted and afoat but has gone through all the formalities of Clearance, & at the Custom House and has paid the Exportation Dues".*

[37] In *A.G. v Pougett* (supra), the question was whether the goods laden on board the ship, having broken ground in the Themes, and not having left the port of London may be said to have been exported. It was held that the goods shipped could not be considered as exported until the ship had cleared the limits of the ports as follows:

> *"It is significant to know that this action was decided under the Tyne Coal Dues Act 1872 and the Court held that "There is nothing in the language of the Act (the Tyne Coal Dues Act 1872) to show 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 this limits of the port, are coals 'exported' within the meaning of the Act." (Muller v Baldwin (1874) L.R. 9 O.B 457, per cur., at p. 461)".

[38] It is significant to note that *A.G. v Pougett* (supra) was not an income tax or custom case, but a decision under the Tyne Coals Act which has now been abolished. There was clear evidence in that case that the coals had been taken away for the purpose of being wholly consumed beyond the limits of the port and thus, the coals were held to be exported

[39] In *Stockton Ry v. Barrett, 8 E.R. 1225 (House of Lords),* the action was for money had and received, originally brought in the Court of Common Pleas, to recover three sums of money, which the plaintiff there, Charles Barrett, alleged had been unlawfully received by the defendants as tolls on the carriage of certain coals carried on the line of the Stockton and Darlington Railway, of which they were the proprietors.

[40] It was held that 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"* and that the words *"the port of Stockton-upon-Tees aforesaid,"* meant the whole port of that name, and was not restricted to the port of the town of Stockton-upon-Tees;

[41] That action was, however, decided under the Railway Act, which empowered the proprietors to levy on all coals carried along any part of their line, such sum as they should direct, " not exceeding the sum of 4d. per ton per mile." It then went on thus: " And for all coal, which shall be shipped on board any vessel, etc. in the port of Stockton-upon-Tees aforesaid, for the purpose of exportation, such sum as the said proprietors shall appoint, not exceeding the sum of one-halfpenny per ton per mile: "

[42] As noted, the cases relied on by the Appellant relate to the statutory interpretation given to the term "exportation" in different statutes, which

are unrelated to tax statutes, and such decisions cannot, in my view, be used to determine the question as to whether the supply of bunker fuel to a ship for its navigation or use during its voyage constitutes an "export" for the purpose of the concessionary tax rates in the Inland Revenue Act, No. 10 of 2006.

[43] The Appellant, however, relied on the Imports and Exports (Control) Act, No. 1 of 1969, and the Customs Ordinance in support of its position that the supply of bunker fuel constitutes an "export" having regard to the definition of the term "export" in the Imports and Exports (Control) Act, No. 1 of 1969. For this aspect of the case, it is appropriate to take note of Section 22 of the Imports and Exports (Control) Act, no. 1 of 1969, which provides for levy of tax. The term "export" is defined in Section 22 of the Imporst & Exports (Control) Act, 1969 as follows:

> *"export" with its grammatical variations and cognate expressions when used in relation to any goods, means the carrying and **taking out of Sri Lanka, or causing to be carried or taken out of Sri Lanka**, whether by sea or by air of such goods"*

[44] Accordingly, the statutory definition of the term "export" refers to the actual carrying and taking out of Sri Lanka or causing to be carried out of Sri Lanka of the goods in question by sea or by air of such goods. The learned counsel for the Appellant relied heavily on the definition of "export" in Section 22 of the Imports and Exports (Control) Act and it was argued that since the definition does not refer to the requirement of 'destination', the same applies to the concessionary tax rate under the Inland Revenue Act. On this basis the Appellant argues that the Imports and Exports (Contriol) Act, No. 1 of 1969 would indicate the statutory criteria applicable for determining whether or not a person is an exporter for the purpose of the Sections 42 or 52 of the Inland Revenue Act, No. 10 of 2006.

[45] The question that arises for determination is whether the definition of the term "export" in the Imports and Exports (Control) Act, is the determinative factor in deciding that the bunker fuel had been exported within the meaning of Sections 42 or Section 52 of the Inland Revenue Act, No. 10 of 2006.

Customs Ordinance

[46] The Appellant further argues that the concept of "export" defined in Section 22 of the Imports and Exports (Control) Act is further confirmed by Section 16 of the Customs Ordinance, which indicates the point of time when an export is deemed to have taken place and an exportation of any goods is made and completed shall be deemed to have had effect when the goods had been shipped on board the ship in which they had been exported. Section 16 of the Customs Ordinance provides s follows:

> *"If upon the first levying or repealing of any duty, or upon the first* ***permitting or prohibiting of any importation or exportation*** *whether inwards, outwards, or coastwise in Sri Lanka, it shall - become necessary to determine the precise time at which* ***an importation or exportation of any goods made and completed*** *shall be deemed to have had effect, such time, in respect of importation, shall be deemed to be the time at which the ship importing such goods had actually come within the limits of the port at which such ship shall in due course be reported and such goods be discharged; and* ***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".*

[47] That means that an "importation" starts from one point and ends at another. It starts when the goods cross the customs barrier in a foreign country (exporting country) and ends when they cross the limits of the port in Sri Lanka (importing Country). In the case of "exportation", the time of exportation under section 16 shall be deemed to be the time at which the goods had been shipped on board the ship, in which the goods had been exported, and it starts when the goods cross the customs' limits of the port of one country (exporting country) and delivered to the ship on board in which such goods are exported to another country (importing country).

[48] In terms of this Section, the precise time at which exportation of any goods shall be deemed to be the time at which the goods had been shipped on board the ship in which they had been exported. Accordingly, the Appellant argues that the statutory criteria applicable for determining

whether or not a person is an exporter, the destination is not a requirement to be fulfilled under the law of Sri Lanka.

[49] The argument of the Appellant is that Section 22 of the Imports and Exports (Control) Act read with Section 16 of the Customs Ordinance refer to goods being taken out of the country rather than the goods necessarily being delivered to another country. Accordingly, it was argued on behalf of the Appellant referring to Section 16 of the Customs Ordinance that as the time of the export of goods occurs when the goods have been put on the ship, which constitutes an export notwithsndaning the fact that the ship is within Sri Lankan territorial waters at the time of the delivery of the bunker fuel. He further argued that the consumption, utilization or sale of the bunker fuel occurs once the vessel leaves the Colombo Port into the international waters and thus, the goods are taken out of the country.

[50] On the other hand, Section 16 of the Customs Ordinance applies to the definition of time of importation or exportation of prohibited or restricted goods and goods illegally imported for the purpose of levying or repealing of any duty under the Customs Ordinance. This Section has to be read with Section 3 of the Protection of Government Revenue (Special provisions) Act, No. 1 of 2006, according to which the date of importation or exportation ...shall be the date of delivery to the Director General of Customs of the bill of entry. Section 3 of the Protection of Government Revenue (Special provisions) Act reads as follows:

> *"3. Notwithstanding anything to the contrary contained in any of the laws specified in Part II of the Schedule hereto, for the purpose of levying or charging any tax, duty, surcharge, levy or other charge on the importation or exportation of goods into or from Sri Lanka, the date of importation or exportation, as the case may be, shall be the date of delivery to the Director-General of Customs, of the bill of entry relating to the goods on which such tax, duty, surcharge, levy or other charge is levied or charged".*

[51] The Schedule includes, *inter alia,* the Customs Ordinance (Cap. 235), as last amended by Act, No. 2 of 2003. For the purpose of levying or charging any tax, duty, surcharge, levy or other charge on the importation or exportation of goods into or from Sri Lanka, the date of importation or exportation, as the case may be, under the Protection of Government

Revenue (Special provisions) Act shall be the date of delivery to the Director-General of Customs, of the bill of entry relating to the goods on which such tax, duty, surcharge, levy or other charge is levied or charged.

[52] As noted, for the purpose of the protection of government revenue and prevention of any loss of revenue to the Government, the date of importation or exportation of goods, the date of delivery is relevant to the levying or charging any tax, duty, surcharge, levy or other charge under the Customs Ordinance. Those principles are, however, not applicable to the interpretation of the term "export" under Sections 42 or 52 of the Inland Revenue Act, No. 10 of 2006.

[53] Accordingly, for the purpose of levying or repealing of any customs duty upon the first permitting or prohibiting of any importation or exportation of prohibited/restricted goods and goods illegally imported, the time of importation shall be the time at which the ship importing such goods had actually come within the limits of the port at which such ship shall be reported and such goods be discharged. In case of exportation of prohibited/restricted goods and goods illegally exported, the time of exportation shall be the time at which the goods had been shipped on board the ship.

[54] To constitute an export under Section 22 of the Imports and Exports (Control) Act, the goods must be either taken out of the territory of Sri Lanka or caused to be taken out of Sri Lanka, by sea or air of such goods. This means that the mere delivery of the bunker fuel into the tanks of the ship is insufficient to constitute an export unless such fuel had been either actually taken out of Sri Lanka or caused to be taken out of Sri Lanka on a ship bound for a place out of Sri Lanka.

[55] The Imports and Exports (Control) Act is intended to provide for the control of the importation and exportation of goods and regulation of the standards of exportable goods. The provisions of the Imports and Exports (Control) Act shall be, however, read and construed with the Customs Ordinance as set out in Section 21 of the Imports and Exports (Control) Act. In terms of Section 21 of the Imports and Exports (Control) Act, the provisions of the Act "shall be construed with the Customs Ordinance and for the purpose of the application of the Customs Ordinance-

(a). goods the importation of which is prohibited by this Act or by regulation made under this Act shall be deemed to be goods the importation of which is prohibited by that Ordinance;

(b) goods the exportation of which is prohibited by this Act or by regulation made under this Act shall be deemed to be goods the exportation of which is prohibited by that Ordinance;

(c) goods the importation of which is restricted by this Act or by regulation made under this Act shall be deemed to be goods the importation of which is restricted by that Ordinance;

(d) goods the exportation of which is restricted by this Act or by regulation made under this Act shall be deemed to be goods the exportation of which is restricted by that Ordinance".

[56] As noted, Section 16 of the Customs Ordinance, which applies to the definition of time of importation or exportation for prohibited or restricted goods and goods illegally imported for the purpose of levying or repealing of any duty under the Customs Ordinance and thus, it cannot be strictly applied for the purpose of interpreting the term "export" and levying income tax under the Inland Revenue Act, No. 10 of 2006 (as amended).

[57] The provisions of the Imports and Exports (Control) Act shall be read and construed with the Customs Ordinance and thus, the goods either prohibited or restricted by the provisions of the Imports and Exports (Control) Act shall be deemed to be the goods prohibited or restricted by the Customs Ordinance. In the result, the definition of export in section 22 of the Imports and Exports (Control) Act cannot be strictly applied to the interpretation of the term "export" for the concessuoanry tax rate under Sections 42 and 52 of the Inland Revenue Act, No. 10 of 2006 (as amended).

Customs Clearance

[58] The learned Counsel for the Appellant submitted that the Appellant has a special customs entry (bill of entry) passed when it issued marine bunker fuel to foreign ships which are paid in foreign currency and such custom clearance and payment made in foreign currency shall be regarded as evidence that the supply of bunker fuel was an export transaction outside Sri Lanka in terms of the provisions of the Protection of Government Revenue (Special Provisions) Act No. 1 of 2006. The Appellant also relies on the Indian decision in *CIT v .Silver and Arts Palace* (2003) 259

ITR 684 to argue that the customs clearance is evidence that characterises the transaction as an export. It is the position of the Appellant that once the goods are kept in the customs clearance station, then, the goods shall be deemed to have been in the export stream.

[59] The said case related to the refusal of the deduction claimed by the assessee under Section 80HHC of The Income- Tax Act, 1995 placing reliance on Explanation (aa) to Section 80HHC(4A) of the Act. The said Section provides that "'export out of India' shall not include any transaction by way of sale or otherwise, in a shop, emporium or any other establishment situate in India, not involving clearance at any customs station as defined in the Customs Act, 1962 (52 of 1962)." There was no dispute in that case that transactions of counter sales effected by the respondent involved customs clearance within the meaning of Explanation (aa) to Section 80HHC (4A) of the Act, and further that the sales were in convertible foreign exchange.

[60] If the above interpretation applies to the export in question as projected by Dr. Felix in the written submissions filed on behalf of the Appellant, then, it would mean that irrespective of the condition in Sections 42 or 52 of the Inland Revenue Act, the delivery of goods shall be after customs clearance, i.e., after goods have cleared all local customs and all other legal formalities and are kept ready for delivery to the ship's tanks, the Appellant would qualify for the concessionary tax rates specified in the Fifth Schedule to the Inland Revenue Act.

[61] In my opinion, the concept sought to put in service in *CIT v. Silver and Arts Palace* (supra) cannot be applied to the facts of this case and therefore, the submission of customs clearance (bill of entry) per se does not constitute an Appellant an exporter of the bunker fuel under Sections 42 of 52 of the Inland Revenue Act, No. 10 of 2006 (as amended).

Use of Foreign Currency

[62] The learned Counsel for the Appellant citing the Exchange Control Act, No. 24 of 1953, as amended, submitted that the fact that the Appellant is permitted by the Central Bank to accept foreign currency payments for supplies of marine bunker fuel to ships travelling in international waters supports the position of the Appellant that the sales undertaken by the Appellant are not local sales but are in fact exports. He submitted that it is

an offence to accept foreign currency for a local sale and therefore, this transaction should be construed to be an export.

[63] On the other hand, the Central Bank has powers to permit any person under Section 7 of the Exchange Control Act, to make any payment to, or for the credit of a person resident outside Sri Lanka or make any payment to or for the credit of a person resident in Sri Lanka. In my view the mere fact that the sale of bunker fuel was paid for in foreign currency does not necessarily render it an export within the meaning of Sections 42 or 52 of the Inland Revenue Act.

Licence under the Ceylon Petroleum Corporation Act, No. 28 of 1961

[64] The Appellant argues that the Appellant possesses a licence under Section 5B of the Ceylon Petroleum Corporation Act, No. 28 of 1961 to import, export, sell, supply or distribute marine gas, oil and furnace oil (Vide- paragraph 43 of the written submissions tendered on behalf of the Appellant on 18.10.2019). In my view, the licence granted by the Ceylon Petroleum Corporation under Section 5B of the Ceylon Petroleum Corporation Act, No. 28 of 1961 does not necessarily mean that the supply of bunker fuel shall be treated as an export within the meaning of Sections Sections 42 or 52 of the Inland Revenue Act.

Central Bank Annual Reports

[65] The Appellant relies heavily on the Annual Reports of the Central Bank for the year 2011 in table 3.4 at page 63, which, the Appellant claims distinguishes between exports and local sales and table 3.4 which lists the Appellant as a source for both imports and export data. The Appellant submits that the Report supports his contention that the supply of bunker fuel has been recognised as an export by the Central Bank. In my view, the table 3.4 does not support the contention that the it distinguishes between exports and local sales or that the Central Bank has recognised the Appellant as an exporter within the meaning of any statute as claimed by the Appellant.

[66] The document (R1) issued by the Central Bank stated that for statistical compilation and economic analysis, bunker fuel and marine fuel selling to foreign ships and aircraft is an export following internationally accepted practices for economic data compilation. It, however, states that this

classification is not used for any other purpose as the classification is not made in terms of any law or for the purpose of any law. Accordingly, this document does not help the Appellant.

[67] The Appellant relies on the New Zeeland Court of Appeal case in *Commissioner of Inland Revenue v. International Importing Limited* (1972) NZLR 1095 in support its position that the word "export" is complete when (i) taking the goods out of the country and (ii) sending them or causing them to be sent out. The question in the said case was whether, for the purposes of Section 129B of the Land and Income Tax Act *1954*, the goods sold by a "duty free shop" operated by respondent company, to travellers departing overseas, and the subsequent carriage of those goods beyond New Zealand by the purchasers, constituted the "export" of those goods by the company, entitling it to the deduction given for income tax purposes by s 129B. Section129B of the said Act reads as follows:

> *"Export goods" means goods exported from New Zealand by a taxpayer, being goods—*
> *(a) Which were sold or disposed of by the taxpayer; and*
> *(b) Of which the taxpayer was the owner at the time of the sale or disposal—*
> *but does not include—*
>
> *(c) Goods exported by way of gift:*
> *(d) Goods taken or sent out of New Zealand with the intention that they will at some later time be brought or sent back to New Zealand:*
> *(e) Goods imported into New Zealand and subsequently exported from New Zealand after being processed, packed, graded, or sorted in New Zealand or incorporated with another product in New Zealand, if the consideration receivable for the sale or disposal of the goods so exported is less than fifteen percent greater than the cost of all imported goods included in the goods so exported, such cost being the landed cost of those imported goods (exclusive of New Zealand customs duty) at the time when they were imported into New Zealand:*
> *(f) Goods imported into New Zealand and subsequently exported from New Zealand in the same form without processing, packing, grading, or sorting thereof in New Zealand:*
> *(g) Goods exported to the Cook Islands (including Niue) or to the Tokelau Islands:*

(h) Animals, animal products and by-products (including dairy produce, meat, meat products, wool, and their respective by-products), newsprint, and minerals:
Provided that the Governor-General may from time to time, by Order in Council, exclude any such goods or any specified class or classes of such goods from the operation of this paragraph:
(i) Any other goods specified by the Governor-General from time to time by Order in Council:"

[68] The vital question in that case was whether goods which were sold by the respondent (and of which it was admittedly the owner at the time of such sales) were exported from New Zealand by the respondent within the opening words of the foregoing definition. The finding of the Commissioner was challenged on one question only, namely his finding that the goods sold to departing travellers in the respondent's duty free shops were exported by the respondent.

[69] The transactions were sales of goods of which respondent was the owner at the time of sale. The goods were taken out of the country as a direct result of the sale, and as one intended by both vendor and purchaser. And these were sales and the immediate result of which was an increase in foreign currency reserves, and (1) taking the goods out of the country, and (2) sending them or causing them to be sent out—the choice between them depends on the answer to the question: What operation is it that the Section is obviously designed to subsidise? Turner J, at pp 1097 stated:

> *"The section contains no definition of "export" nor can it be contended that this word is a term of art. It must therefore be given its ordinary meaning, or perhaps I should say one of its ordinary meanings, to be selected according to context. Clearly, if it is given one of its ordinary meanings the travellers may be said to have "exported" the goods themselves, for they carried them (if small enough) on to the plane personally, keeping them in their possession while the plane flew out of New Zealand. And no different result follows in the case of the larger packages which were put into the plane's hold, of which the passenger-purchasers doubtless must be deemed to have had possession at the time when they were taken out of the country. But should the word "export" so be read, as referring to what these people did, if proper regard is had to the context in which that word is found in s 129B, and if the*

acknowledged purpose of that section is remembered? The legislation is plainly addressed to those persons, and to those alone, who increase the foreign exchange reserves of New Zealand, by sending goods abroad, or causing them to be sent abroad, receiving in return foreign exchange for which they are bound to account, and do account, to the Reserve Bank. It is clear that even if the travellers may be regarded as themselves "exporting" the goods, the word "export" where used in the section must also clearly be applicable to those, such as respondent company, who send the goods abroad, or cause them to be sent, with this result. Surely a dairy company "exports" butter, and a fruit cannery "exports" its manufactures, whether it ships the goods to its own order in another country, or sells here f.o.b. to a foreign person or corporation, provided simply that the transaction is one in which it causes goods to be sent abroad in exchange for foreign currency which it receives and for which it accounts. t is to be observed however that s 129B is solely concerned with the actions of vendors. In our opinion a vendor may export either by taking or by sending. There will be many cases where it can be said that the buyer exports by taking, as for example in the case of an ordinary contract".

[70] Thus, Turner J., stated that the question whether the respondent or the passengers, who is to be regarded, for the purposes of s 129B, as having "exported" the goods which it sold to the travellers. Referring to the meanings of the word— (1) taking the goods out of the country, and (2) sending them or causing them to be sent out—the choice between them depends on the answer to the question: What operation was it that the section is obviously designed to subsidise? On this approach to the matter, it seemed clear to to Turner J. that it is respondent's operation which was meant to receive the reward offered by the statute.

[71] The facts of the New Zeeland judgment and the legal principles discussed under Section 129B of the Land and Income Tax Act 1954 are completely different in the present case for the following reasons:

1. The Respondent in that case owned and operated a duty free shop at the "Christchurch International Duty Free Shops" and the passengers were allowed to purchase goods from a duty free shop situated in the departure lounge of the airport to be taken out of New Zeeland. The question that was decided was whether or not it was the respondent or the passengers who is to be regarded, for the purposes of s 129B,

as having "exported" the goods which it sold to the travellers. In the present case, the issue was whether or not the supplier of bunker fuel to a ship constitutes an export for the purpose of the concessionary tax rates under Sections 42 or 52 of the Inland Revenue Act.

2. The New Zeeland Act provides that to constitute an export goods, the goods exported by a taxpayer from New Zeeland shall be goods exported which were sold or disposed of by the taxpayer; and of which the taxpayer was the owner at the time of the sale or disposal. Section 129B of the New Zeeland Act is not so worded as to require the taxpayer to be the owner of the goods at the time of export. The Section only requires that he should be the owner of the goods at the time of sale. There is no similar requirement in the Inland Revenue Act of Sri Lanka.

3. The New Zeeland decision is also based on the operation mode of the taxpayer as the owner of the goods. In order to purchase the goods from the duty free shop, the customer has to produce his boarding pass to the aircraft and his flight number of the duty free shop owned by the respondent The goods, in the open bags were handed to the passenger at the call to board the aircraft by the employees of the respondent on production of their copy of the sales docket in the "clear area" at the airport and in the presence of Customs Officers. There is no such conditions to be fulfilled for the charging of income tax under the Inland Revenue Act.

4. As a matter of fact and degree, the whole nature of the respondent's specialised business and the circumstances under which it is conducted, taken together with the actual part played by the respondent in bringing about the removal from New Zealand of goods sold by it to departing passengers, proved that the respondent exported the goods in question by sending them out of New Zealand. There the duty free sale occurred inside the departure lounge of the airport after the passengers were cleared for immigration and already stamped as having left the country by the customs officer that was strong evidence to establish that the passengers had already left the country. In the circumstances, the Court treated the goods to be export goods within the meaning of section 129B of the New Zeeland Act.

[72] Under such circumstances, the Court came to the conclusion that the whole nature of the respondent's specialised business and the circumstances under which it is conducted, taken together with the actual part played by the respondent in bringing about the removal from New Zealand of goods sold by it to departing passengers, justify the view that the respondent exported the goods by sending them out of New Zeeland. In my view the New Zealand case will not support the stand taken by the Appellant in the instant case and it cannot be regarded as a precedent for the case in hand.

[73] The Canadian case of *R v.Wuulf* (1970) 1 CCC (2d) 281 relied on by the Appellant is a criminal case for attempting to export out of Canada to the USA silver coins of Canada without a permit and the issue arose about the definition of the word "export" under the statute. It was held that the word "export' was simply 'take outside of Canada". The definition of the term "export" for the purpose of criminal liability of attempting to export goods under a criminal statute cannot be used to define the term "export" for the purpose of defining the term "export" under Sections 42 or 52 of the Inland Revenue Act.

[74] In *R. v. Smith (Donald)* (1973) Q.B. 924, the defendant was charged with being knowingly concerned in the fraudulent evasion of the prohibition against the importation of cannabis imposed by the Dangerous Drugs Act 1965 , contrary to Section 304 (b) of the Customs and Excise Act 1952, and with being knowingly concerned in the fraudulent evasion of the prohibition against the exportation of cannabis imposed by the Act of 1965, contrary to Section 56 (2) of the Act of 1952.

[75] In that case, packets containing cannabis addressed to a person in Bermuda were put on board an aircraft in Kenya, which was bound for Heathrow Airport in the United Kingdom. At Heathrow, the packets were unloaded and without leaving the customs area were put on board a second aircraft bound for Bermuda. The cannabis were discovered when the packets arrived in Bermuda. The question was whether the prohibited goods retained within the customs area were imported into the United Kingdom. It was held that although the cannabis had merely been transferred from one aircraft to another, the cannabis had been imported into the country when the aircraft from Kenya landed at Heathrow and had

been exported when placed on board the aircraft bound for Bermuda (post, p. 935G-H).

[76] In *A.G. v. Kumarasinghe* (1995) 2 Sri LR. 1, the accused, a Sri Lankan passport holder was indicted for having imported into Sri Lanka, 40 pieces of Gold valued at Rs. 2 million without a valid permit issued by the Central Bank. After arriving in Sri Lanka on an Air Lanka flight, he had been at the Transit Lounge with the pieces of gold to proceed to Male. The High Court of Negombo acquitted the accused. Referring to *R. Smith* (supra), it was held that (i) Importation is not defined in the Exchange Control Act, but recourse could be had to Section 22 of the Imports and Exports (Control) Act 1 of 1969; and (ii) the moment the accused-respondent landed in Sri Lankan soil with gold, the act of importation was complete, if he failed to produce the requisite permit for possession of that gold. Accordingly, it was held that he has contravened the provisions of Section 21(1).

[77] In all three criminal cases, the accused was considered to be an exporter on the basis that he was himself involved physically importing prohibited goods into a foreign country without a permit in violation of a criminal statute either under the Customs Act or Imports and Exports Act. Here, the issue is whether or not the supply of the bunker fuel to a ship that visits a port of Sri Lanka can constitute an export for the purpose of concessionary tax rates under Sections 42 or 52 of the Inland Revenue Act.

[78] The other argument of the Appellant was that as the consumption of bunker fuel occurs mid-voyage in international waters of another country, the question of Bill of Lading or Insurance Contract does not arise and thus, the mere fact that the goods do not arise at a foreign port does not preclude the goods from being considered an export. The argument of the Appellant was that the mere supply of bunker fuel to a foreign ship and utilization of such bunker fuel in the international waters constitutes an export within the meaning of Sections 42 or 52 of the Inland Revenue Act. Although the argument is attractive, I am afraid that I do not find any merit in the same.

[79] The charging provision in Section 3 is the prime purpose of the Inland Revenue Act and it shall control the profits and income that are chargeable with income tax subject to the provisions of the said Act. As noted, the charging Section is not controlled by the measure of tax levied under the

provisions of the Imports and Exports (Contriol) Act or the Customs Ordinance. The relevant statutory provisions with regard to levy of customs duties are found in the Customs Ordinance and the relevant statutory provisions with regard to the imposition of income tax are found in the Inland Revenue Act.

[80] The principles of charging the income tax and the principles of charging the customs duty are distinct, different and independent of each other. The income tax is charged on profits or income of a person which falls within the scope of Section 2 of the Inland Revenue Act and the rate of income tax varies subject to the provisions of the Inland Revenue Act. Customs Duty is a tax imposed on imports and exports of goods under the Customs Ordinance when they are transported across international borders and the rate of Customs duty varies subject to the provisions of the Customs Ordinance.

[81] When the provisions of the Imports and Exports (Control) Act are read and construed with the Customs Ordinance, the goods either prohibited or restricted by the provisions of the Imports and Exports (Control) Act shall be deemed to be the goods prohibited or restricted by the Customs Ordinance. The Customs Ordinance takes care of levy of import of goods or export of goods and thus, the taxable event for levy of custom duty and entry tax are different and distinct. The "pith and substance" and "aspect" of custom levy, as regards both imports and exports in terms of restrictions, prohibition and permissibility are different and distinct from the charging of income tax under the Inland Reveue Act.

[82] The learned counsel for the Appellant submits that the definition of "export" as defined in Section 22 of the Imports and Exports (Control) Act does not include "place of destination" but only "Taking out of Sri Lanka or causing to be carried or taken out of Sri Lanka" and, therefore, the concept of destination on the supply of bunker fuel to a ship is clearly beyond the ambit of Inland Revenue Act. In my view, Section 22 of the Imports and Exports (Control) Act or the Customs Ordinance has no overriding effect over the provisions of the Inland Revenue Act and the imposition of income tax under the provisions of the said Acts are based on different principles and the fulfilment of different conditions.

[83] If the Legislature intended to apply the same term "export" for the purpose of Sections 42 or 52 of the Inland Revenue Act, the Legislature could have easily used the same meaning as defined in Section 22 of the Imports and Exports (Control) Act, No. 1 of 1969. Thus, the argument of the Appellant that since the place of destination is not specifically mentioned in the definition of "export" in Section 22 of the Imports and Exports (Control) Act, it will give rise to the inference that Legislature intended not make the concept of destination as a requirement of export for the purposes of Sections 42 or 52 of the Inland Revenue Act is without substance.

[84] This case is not concerned about the imposition of levy under the Imports and Exports (Control) Act or the Customs Ordinance, and we are dealing with the imposition of income tax and the concessionary tax rates specified in the Fifth Schedule to the said Act. This Court is not inclined to apply the principles of the imposition of levy under the Imports and Exports (Control) Act or the Customs Ordinance to a case of export under Sections 42 or 52 of the Inland Revenue Acts

[85] It is only from the language of the statute that the intention of the Legislature must be gathered, for the Legislature means no more and no less than what it says. It is not permissible for the court to speculate as to what the Legislature must have intended and then to twist or bend the language of a different statute (the Customs Ordinance and the Imports and Exports (Control) Act to make it accord with the presumed intention of the Legislature (see-*Polestar Electronic (Pvt.) Ltd. v. Additional Commissioner, Sales Tax,* 1978] 41 STC 409 (SC).

[86] Of course, equitable construction may be admissible in relation to other statutes, but such an interpretation is not permitted to a charging or taxing provision of a statute (see-*Murarilal Mahabir Prasad v. B.R. Vad* [1976] 37 STC 77 (SC), which has laid down the tax is altogether different from the recovery of the tax/duty under the Imports and Exports (Control) Act and the Customs Ordinance

UN Report

[87] The Appellant relied on the United National Department of Economic and Social Affairs-International Mercandise Trade Statistics:Concept and

Definitions (IMTS 2010) to susbstantiate its position that that the supply of bunker fuel to ships travelling in international waters constitutes an export. Paragraph 1.32 at page 18 of the Report on Bunkers, stores, ballast and damage reads as follows:

" *1.32. Bunkers, stores, ballast and damage that are supplied:*

1. *to **foreign vessels** or aircraft in the economic territory of the compiling country;or*
2. *by **national vessels** or aircraft to foreign vessels or aircraft outside the economic territory of the compiling country; or*
3. *are **landed in foreign ports from national vessels** or aircraft;*
   are in the scope of IMTS 2010 for exports".

[88] Paragraph 1.42 which relates to goods recommended for exclusion reads:

*"1.42. Goods simply being transported include goods under "in transit" or "in transshipment" customs procedures but are not limited to them. ... Irrespective of the customary procedure applied when goods cross the compiling country's border, **if it is known that their destination is a third country, the goods should be treated as simply being transported through the country and excluded**. However, goods that are not under "in transit or "transshipment" customs procedure and change ownership after entering the economic territory of a country should be recoded as imports and re-exports if they leave the country in the state as imported...".*

[89] Firstly, the publication contains guidelines or recommendations and therefore, Sri Lanka is not obliged to adhere to them. Secondly, these guidelines or recommendations cannot change the principles of income tax specified in the Inland Revenue Act of Sri Lanka. Thirdly, the guidelines first classify the bunker fuel supplied to foreign vessels within the economic territory as exports. They also classify the bunker fuel supplied by national vessels to foreign vessels outside the economic territory as exports. Thirdly, they classify the bunker fuel supplied to vessels that are landed in foreign ports.

[90] It is my view, that the classification is based on the nationality of the vessel which is not the basis on which the concept of export is decided in the Inland Revenue Act of Sri Lanka. Fourthly, paragraph 1.42 states that

when goods are taken out of the territory of a country, the goods should be treated as simply being transported to a third country where the destination of a foreign country is known. It seems that the guidelines themselves, recognize that where the destination is known, the goods may be said to have been transported to a foreign country. For those reasons, I am of the view that the UN Report will not support the contention of the Appellant in the present case.

[91] In my view the mere supply or stores of bunker fuel in the ships tanks for consumption on board a ship cannot possibly be a deemed export, and such consumption by a foreign going ship cannot ever be considered as a supply occasioning the export of bunker fuel unless there is documentary evidence that manifest an indication that the ship that is consuming bunker fuel for navigation on the high seas is intended to a foreign destination point. Such documentary evidence in my view would exclude the possibility that such goods are not meant for supply of local consumption, which does not signify an "export" within the meaning of Sections 42 or 52 of the Inland Revenue Act.

Destination Principle.

[92] If the present transaction of the Appellant involves goods being moved **from one jurisdiction to another,** the destination principle applies and under the destination principle, the element of export is satisfied when the foreign destination point is intended and indicated in the relevant documents submitted by the Appellant.

[93] The mere delivery of the bunker fuel outside the customs barrier to the vessel cannot be regarded as having taken place out of the territory of Sri Lanka to constitute an export unless goods are taken out of Sri Lanka to another foreign point and the element of taking out of the territory of Sri Lanka to a destination point of another country become an integral part of the transaction, to constitute an export under Sections 42 or 52 of the Inland Revenue Act. A following illustrations given by Hidayatullah., J. In *Burmah Shell Oil Storage and Distributing Company* case (supra) will explain this proposition vividly. Goods cannot be said to be exported if they are ordered by the health authorities to be destroyed by dumping them in the sea, and for that purpose are taken out of the territories of India and beyond the

territorial wastes and dumped in the open sea (paragraph 36). Another illustration is where goods put on board a streamer bound for a foreign country, but jettisoned can still be said to have been “exported”, even though they do not reach their destination (supra).

[94] The objective of granting the concessionary tax rates under Sections 42 or 52 of the Inland Revenue Act as regards the supply of bunker fuel to foreign going ships for navigation is to attract foreign going ships to Sri Lankan ports and promote bunkering industry. So that the foreign going ships will visit the Ports of Sri Lanka and receive bunker fuel for navigation on the high seas in the course of its journey to the next foreign destination Port and the suppliers will be benefited from the concessionary tax rates under Section 42 or 52 of the Inland Revenue Act.

[95] The term 'export' in Sections 42 or 52 of the Inland Revenue Act signifies etymologically 'to take out of Sri Lanka into the territory of another country, and therefore, means to take out of Sri Lanka, goods to a territory of another country. Now the term "export " for the purpose the taking bunker fuel out of Sri Lanka means “taking out of Sri Lanka to any place (destination point) in the high seas outside the territorial waters of Sri Lanka. In this sense, any "place" beyond the territorial waters of Sri Lanka would be a place outside the country. The test is that the sending of the bunker fuel out of the country is satisfied when the bunker fuel, which is directly delivered to the operator /owner of the foreign going vessel for navigation on the high seas has a foreign destination point. The resulting position is that the ownership of the bunker fuel will be transferred to the owner/operator of the vessel by the supplier from a taxable activity and the vessel will use those bunker fuels for navigation on the high seas intended for a foreign destination point out of the Sri Lankan territorial waters (the next foreign port). In short, to earn the exemption or concessionary tax rate, the goods must have a foreign destination point where they can be said to be taken out of Sri Lanka to constitute an export under Sections 42 or 52 of the Inland Revenue Act.

[96] At the hearing, the learned Additional Solicitor-General submitted that in order for a transaction to qualify as export, there should be a recipient for such goods in another jurisdiction as an importer and as there was no corresponding importer in another country to physically receive the goods, the transition in the present case does not constitute an export. Bunker fuel

supplied to a foreign going vessel for navigation occasions an export and eligible for the concessionary tax rates under Sections 42 or 52 of the Inland Revenue Act if it is delivered by the supplier directly to a foreign going vessel and received by its owner/operator for navigation on the high seas out of Sri Lanka, with evidence of a foreign destination point.

[97] I do not think that given the nature of the goods being the bunker fuel, which is supplied to the operator/owner of the ship for navigation on the high seas for the next foreign destination point, the requirement in traditional export of cargo where the goods are exported to a specified recipient in another foreign jurisdiction is necessary to constitute an export under Sections 42 or 52 of the Inland Revenue Act. The above-mentioned second illustration that goods put on board a streamer bound for a foreign country, but jettisoned can still be said to have been "exported", even though they do not reach their destination vividly explains this proposition in case of bunker fuel which is supplied for navigation. Another illustration is where goods shipped from Colombo intended for delivery in Bombay proceeded on a voyage, leaving the Sri Lankan territorial waters, but developed engine trouble and returned and ran aground in the Sri Lankan territorial waters at Hambantota Port. In this illustration, the ship intended to deliver the goods at Bombay Port (destination point) and moved out of the Sri Lankan territorial waters and the export was complete when the goods were taken beyond the territorial waters of Sri Lanka with the intention of delivering at Bombay Port. The fact that the ship was brought back to Sri Lanka did not affect as the goods sold were intended to be taken to that foreign destination point, namely, the Bombay Port.

[98] I hold that the concessionary tax rates under Sections 42 or 52 of the Inland Revenue Act in the present case applies to the bunker fuel directly supplied to the operator or owner of the foreign going vessel to be used for navigation on the high seas (out of the territorial waters of Sri Lanka) and intended to a destination point of another country. This finding is limited to this case and it shall not in any way be construed as an application to other goods in respect of which concessionary tax rates are claimed under Sections 42 or 52 of the Inland Revenue Act.

[99] How can the Appellant satisfy that that the ship carrying bunker fuel for navigation was taken out of the Sri Lankan territorial waters? It must be

shown that the supply of bunker fuel was delivered to the foreign going ship's tanks by the Appellant to be used for navigation on the high seas with a foreign destination point of another country.

[100] To benefit from the concessionary tax rates under Section 42 or 52 of the Inland Revenue Act, as regards the supply of bunker fuel, the Appellant is required to satisfy the following documents:

1. Purchase orders for the receiver (customer) of the bunker fuel indicating the name of the vessel, date of departure and next destination from Sri Lanka;
2. Purchase order indicating written instructions for the receiver (customer) to deliver the bunker fuel to the vessel;
3. Sales invoice to the receiver of bunker fuel;
4. Bunker delivery note endorsed by the Master/Chief Engineer/ such responsible officer of the vessel; and
5. Evidence of payment from the receiver (customer).

[101] In the instant case, there is nothing to indicate that the bunker fuel supplied by the Appellant to a ship was bound to a foreign destination point out of Sri Lanka as there is no evidence whatsoever, indicating that the destination of the ship was any foreign place outside Sri Lanka. A perusal of the Bunker Delivey Note No. 12880 in the TAC brief reveals that although the bunker delivery note requireed that the destination port to be indicated in column 1 of the Bunker Delivery Note, the destination port is not indicated either by the Vessel Representative (Engineer) of the ship "MAERSK SERANGOON " or the Bunkering Supplier. Column 1 of the Bunker Delivery Note at page A7(2) reads as follows:

Customer	**Bunkers**	**Nomination No.**	**0212006952**
Vessel	**MAERSK SERANGOON**	**Date of Delivery**	**31.01.09/2012**
IMO No.	**9315214**	**Destination Port/Position**	
Delivery Port	**Colombo /IN**	**Vessel:Alongside**	**2135 31/08**

[102] Column 1 of the Bunker Delivery Note No. 13303 in the TAC brief reads as follows:

Customer	CHINA HARBOUR CORP.	Nomination No.	6877
Vessel	JUN HAI 2	Date of Delivery	07.08.2012
IMO No.		Destination Port/Position	
Delivery Port	IN	Vessel:Alongside	1040

[103] The Bunker Nomination A8(i) in respect of the vessel "**JUN HAI 2**" states that the Bunker Fuel is required for use:

WITHIN THE TERRITORIAL WATERS OF SRI LANKA

[104] Accordingly, the bunker delivery notes do not indicate that the bunker fuel that was supplied by the Appellant to ships will be taken out of the Sri Lankan territorial waters and used for navigation on the high seas when travelling to a foreign destination point of another port. Such a destination is conspicuously absent in the present case. On the contrary, the destination point indicated is Sri Lanka. The argument of the Appellant that the moment the bunker fuel was taken out of the Sri Lankan territory, the export was complete cannot be presumed and accepted in the absence of documentary evidence indicating the next foreign destination.

[105] For those reasons enumerated in this judgment, I hold that the supply of bunker fuel by the Appellant in the present case, does not constitute an export within the meaning of Sections 42 or 52 of the Inland Revenue Act and therefore, the Appellant is not entitled to claim the concessionary tax rate under Sections 42 or 52 of the Inland Revenue Act, No. 10 of 2006 (as amended).

Conclusion & Opinion of Court

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

1. No.
2. No
3. No

[105] For those reasons, subject to our observations in paragraphs 96 97 and 98 of this judgment, the determination made by the Tax Appeals Commission dated 28.05.2013 is affirmed and the Registrar is directed to send a certified copy of this judgment to the Tax Appeals Commission.

JUDGE OF THE COURT OF APPEAL

M. Sampath K.B. Wijeratne, J.

I agree.

JUDGE OF THE COURT OF APPEAL