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

In the matter of an Appeal by way of *a* Case Stated on a question of law for the opinion of the Court of Appeal under and in terms of Section 141 (1) of the Inland Revenue Act, No. 38 of 2000 (as amended).

Lanka Marine Services (Private) Limited,
No. 117, Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

Appellant

C.A Case No. CA/TAX/0013/2015
Tax Appeals Commission
No. TAC/OLD/VAT/005

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

: 18.10.2019 (by the Appellant)

30.10.2019 & 20.05.2020 (by the Respondent)

Decided on : 31.03.2022

Dr. Ruwan Fernando, J.

Introduction

[1] This is an appeal by the Appellant by way of a Case Stated against the determination of the Tax Appeals Commission dated 30.10.2014 confirming the determination made by the Respondent on 30.11.2009 and dismissing the Appeal of the Appellant. The appeal relates to the Value Added Tax Assessments for the taxable periods from 01.08.2003 to 31.05.2007.

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 the supply of marine fuel and lubricants to local and foreign vessels. The Appellant treated the supply of bunker fuel as an "export" and claimed the zero-rated supply in its Value Added Tax (hereinafter referred to as the "VAT") returns under Section 7 (1) a) of the VAT Act, No. 14 of 2002. On that basis, the Appellant claimed the input tax

credit on local purchases against output tax and refunds claimed in its VAT returns.

[3] The Senior Assessor by letter dated 30.08.2007 rejected the same on the following grounds:

1. The supply of fuel to vessels cannot be treated as an export since the supplier himself has not exported such goods. Under the VAT Act, a foreigner buying goods in Sri Lanka and taking them to his country is not treated as an export even if the payment is received in foreign currency;

2. An export cusdec is not conclusive evidence of an export for the purpose of VAT. It cannot be treated as a zero-rated supply;

3. The supply of bunker fuel is exempt from VAT in terms of Item (viii) of the First Schedule to the VAT Act, No. 14 of 2002 and therefore, the input tax credit on such supply is not claimable;

[4] Accordingly, the notices of assessment were issued by the Senior Assessor on 13.11.2007 for the taxable periods from 01.08.2003 to 31.05.2007. The Appellant appealed to the Commissioner-General of Inland Revenue (hereinafter referred to as the "Respondent") against the said assessments and the Respondent by its determination dated 30.11.2009 confirmed the assessments and dismissed the appeal (pp. 49-45 of the Tax Appeals Commission brief).

[5] While confirming the assessments, the Respondent held that (1) the supply of bunker fuel to foreign ships does not fall within the meaning of "export" in Section 7 (1) (a) of the VAT Act, and (ii) the time bar provision does not apply to the issue of assessment since Section 22 (8) overrides the Section 33 of the VAT Act, when there is an excess amount of refund due and claimed by the Appellant.

Appeal to the Board of Review

[6] Being dissatisfied with the said determination of the Respondent, the Appellant appealed to the Board of Review but thereafter, by operation of law, the appeal was transferred to the Tax Appeals Commission under the provisions of the Tax Appeals Commission Act, No. 23 of 2011(as amended).

[7] The Tax Appeals Commission by its determination dated 30.10.2014 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 appeal to the Tax Appeals Commission is not time barred by operation of law;

2. When a foreign buyer purchases the fuel for his own use in the journey, it cannot be said that the goods have a final destination where the goods can be said to have been "imported" and therefore, the Appellant is only a supplier of bunker fuel to foreign ships through sales made in Sri Lanka and not an 'exporter";

3. Notwithstanding provision of Section 33 of the VAT Act, Section 22 (8) of the VAT Act applies and thus, the time bar for making an assessment does not apply when a refund has been made in excess of the amount due, where an excess amount of input tax has been claimed under the VAT Act.

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) Is the determination of the Tax Appeals Commission time barred?

(2) Are the assessments for the taxable periods ending prior to November 2004 time barred?

(3) Do marine bunker fuel supplies made by the Appellant to ships travelling outside Sri Lanka qualify for zero rated status, on the basis that they constitute exports, under and in terms of Section 7 (1) (a) of the Value Added Tax Act, No. 14 of 2002 (as amended)?

(4) 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, No. 1

Is the determination made by the Tax Appeals Commission time barred?

[9] It is the contention of the Appellant that in terms of Section 10 of the Tax Appeals Commission Act, No. 23 of 2011, all appeals pending before the Board of Review were deemed to stand transferred to the Tax Appeals Commission, and the Tax Appeals Commission was required to decide such appeals within a period of 180 days from the date of such transfer. The Appellant's position is that Tax Appeals Commission Act, No. 23 of 2011 was certified on 31.03.2011 and the period of 180 days ended on 30.09.2011, and although the Tax Appeals Commission (Amendment) Act No. 4 of 2012 was certified on 15.02.2012, the period of 180 days had already lapsed by the time the said Amending Act was passed. Accordingly, the Appellant's position is that the provisions of the Amending Act did not have the effect of reviving an appeal that had already been time-barred as the said Amending Act did not have the retrospective effect.

[10] Dr. Shivaji Felix, who filed written submissions on behalf of the Appellant has submitted has submitted that Section 10 of the Tax Appeals Commission Act, No. 23 of 2011, as last amended by the Tax Appeals Commission (Amendment) Act, No. 20 of 2013, stipulates that the Tax Appeals Commission shall make its determination within two hundred and seventy days from the date of the Tax Appeals Commission commencing its sittings for the hearing of each appeal. He has submitted that the amendment of Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 with retrospective effect on two occasions and having an avoidance of doubt clause in Section 15 of the Tax Appeals Commission (Amendment) Act, No. 20 of 2013 makes it very clear that the intention of Parliament is that Section 10 (as amended), is a mandatory provision of law which requires strict compliance.

[11] He has further submitted that the determination of the Tax Appeals Commission was made on 30.10.2014, after a period of 2 years from the statutorily prescribed date of the first hearing, and therefore, the determination of the appeal was time barred by operation of law on 30.09.2011.

[12] On the other hand, the learned Additional Solicitor General relied on the statement made by Janak de Silva, J. in the Court of Appeal case of *Stafford Motor Company Limited v. The Commissioner General of Inland Revenue* (CA /Tax/17/2017, decided on 15.03.2019), which held that the time limits granted to the Tax Appeals Commission to make a determination is not mandatory as the Tax Appeals Commission Act, No. 23 of 2011 (as amended) does not spell out any sanction for the failure on the part of the Tax Appeals commission to comply with the time limit set out in Section 10 of the Tax Appeals Commission Act.

[13] In the same case, Janak de Silva, J. having specifically considered the implication of the Court of Appeal decision in *Mohideen v. Commissioner-General of Inland Revenue* ((CA 2/2007 (20-15) Vol. XXI. BASL Law Journal, page 170), held at page 6 that the statement made by His Lordship Gooneratne J. referring to the statutory time bar applicable to the Board of Review in making its determination under the Inland Revenue Act, No. 38 of 2000 to the effect that "*If specific time limits are to be laid down, the legislature need to say so in very clear and unambiguous terms instead of leaving it to be interpreted in various ways. To give a restricted interpretation would be to impose unnecessary sanctions on the Board of Review. <u>It would be different or invalid if the time period exceeded two years from the date of oral hearing. If that be so, it is time barred.</u>" was an obiter dicta statement (*emphasis added).

[14] The provisions relating to the Tax Appeals Commission were originally contained in Section 10 of the Tax Appeals Commission Act, No. 23 of 2011, which stipulated that the Tax Appeals Commission shall make the determination within a period of **one hundred and eighty days** from the date of the commencement of the hearing of the appeal. It reads as follows:

> *"The Commission shall hear all appeals received by it and make its decision in respect thereof, within **one hundred and eighty days** from the date of the commencement of the hearing of the appeal".*

[15] The proviso to Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 reads as follows:

> *"Provided that. All appeals pending before the respective Board or Boards of Review in terms of the provisions of the respective enactments specified in the schedule to this Act, shall with effect from the date of coming into operation of the provision of this Act be deemed to stand transferred to the Commission and the Commission shall make its decision in respect thereof, within hundred and eighty days from the date of such transfer notwithstanding anything contained in any other written law".*

[16] Section 10 of the Tax Appeals Commission Act was amended by Section 7 of the Tax Appeals Commission (Amendment) Act, No. 4 of 2012, which stipulated that the determination of the Commission shall be made within **two hundred and seventy days**. Section 10 of the Tax Appeals Commission Act was further amended by Section 7 of the Tax Appeals Commission (Amendment) Act, No. 4 of 2012 by the substitution of the words "within hundred and eighty days from the date of such transfer" of the words "within twelve months of the date on which the Commission shall commence its sittings". This Amendment came into effect on 15.02.2012 and pending appeals were transferred to the Tax Appeals Commission from the Board of Review. In terms of Section 13 of the said Act, the amendment was to have retrospective effect and was deemed to have come into force from the date of the Principal Act (i.e. **31.01.2011**).

[17] Section 10 of the Tax Appeals Commission Act, no 23 of 2011 was further amended by Section 7 of the Tax Appeals Commission (Amendment) Act, No. 20 of 2013 by in terms the substitution for all the words commencing from "two hundred and seventy days" to the end of that Section, of the following: -

> ***"Two hundred and seventy days from the date of the commencement of its sittings for the hearing of each such appeal***
>
> *Provided that, all appeals pending before the respective Board or Boards of Review in terms of the provisions of the respective enactments specified in Column I of Schedule I, or Schedule II to this Act, notwithstanding the fact that such provisions are applicable to different taxable periods as specified therein shall with effect from the date of coming into operation of the provision of this Act be deemed to stand transferred to the*

Commission, and the Commission shall, notwithstanding anything contained in any other written law make its determination in respect thereof, within twenty four months from the date on which the Commission shall commence its sittings for the hearing of each such appeal.".

[18] In terms of Section 14 of the Tax Appeals Commission (Amendment) Act, No. 20 of 2013, the amendment was to have retrospective effect and was deemed to have come into force with effect from **01.04.2011**. Section 15 of the Tax Appeals Commission (Amendment) Act, No. 20 of 2013 further provides an avoidance of doubt clause as follows:

"For the avoidance of doubts, it is hereby declared, that the Commission shall have the power in accordance with the provisions of the principal enactment as amended by this Act, to hear and determine any appeal that was deemed transferred to the Commission under section 10 of the principal enactment, ***notwithstanding the expiry of the twelve months granted for its determination by that section prior to its amendment by this Act."***

[19] Accordingly, Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 as last amended by the Tax Appeals Commission (Amendment) Act, No. 20 of 2013 now provides as follows:

"The Commission ***shall*** *hear all appeals received by it and make its determination in respect thereof, within* ***two hundred and seventy days from the date of the commencement of its sittings for the hearing of each such appeal****:*

Provided that, all appeals pending before the respective Board or Boards of Review in terms of the provisions of the respective enactments specified in Column I of Schedule I, or Schedule II to this Act, notwithstanding the fact that such provisions are applicable to different taxable periods as specified therein shall with effect from the date of coming into operation of the provision of this Act be deemed to stand transferred to the Commission, and the Commission shall notwithstanding anything contained in any other written law make its determination in respect thereof, within twenty four months from the date on which the Commission shall commence its sittings for the hearing of each such appeal".

Mandatory vs. Directory

[20] Section 10 of the Tax Appeals Commission Act stipulates that the Tax Appeals Commission shall make its determination within 270 days from the date of the commencement of its sittings for the hearing of the appeal. Superficially, the effects of non-compliance of a provision are dealt with in terms of the mandatory-directory classification. Generally, in case of a mandatory provision, the act done in breach thereof is void, whereas, in case of a directory provision, the act does not become void, although some other consequences may follow (P.M. Bakshi, Interpretation of Statutes, First Ed, 2008422).

[21] The argument advanced by Dr. Shivaji Felix in the written submissions filed on behalf of the Appellant was that the word "shall" used in Section 10 is normally to be interpreted as connoting a mandatory provision, meaning that what is thereby enjoined is not merely desired (directory) to be done but must be done (mandatory). Thus, he has submitted that the effect of such breach of a mandatory provision, which has the consequence of the determination of the Tax Appeals Commission rendering invalid. But, the use of the word "shall" does not always mean that the provision is obligatory or mandatory as it depends upon the context in which the word "shall" occurs, and the other circumstances as echoed by the Indian Supreme Court case of The Collector of *Monghyr v. Keshan Prasad Goenka,* AIR 1962 SC 1694 at p. 1701) in the following words:

> *"It is needless to add that the employment of the auxiliary verb " shall" is inconclusive and similarly the mere absence of the imperative is not conclusive either. The question whether any requirement is mandatory or directory has to be decided, not merely on the basis of any specific provision which, for instance, sets out the consequence of the omission to observe the requirement, but on the purpose for which the requirement has been enacted, particularly in the context of the (1) [1958] S.C.R. 533, other provisions of the Act and the general scheme thereof. It would, inter alia, depend on whether the requirement is insisted on as a protection for the safeguarding of the right of liberty of a person or of property which the action might involve".*

[22] Thus, an enactment in form is mandatory might, in substance be directory and that the use of the word "shall" does not conclude the matter (*Hari Vishnu Kamath v. Ahmad Ishaque* AIR 1955 SC 233). It is not in dispute that Section 10 of the Tax Appeals Commission Act does not say what will

happen if the Tax Appeals Commission fails to make the determination within the time limit specified in Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 as amended.

Legislative Intent

[23] The question as to whether a statute is mandatory or directory is a question which has to be adjudged in the light of the intention of the Legislature as disclosed by the object, purpose and scope of the statute. If the statute is mandatory, the act or thing done not in the manner or form prescribed can have no effect or validity and if it is a directory, a penalty may be incurred for non-compliance, but the act or thing done is regarded as good (P.M. Bakshi, Interpretation of Statutes, p. 430 & *Mohanlal Ganpatram v. Shri Sayaji Jubliee Cotton and Jute Mills Co. Ltd* AIR 1966 Guj. 96). *In State of U.P., v. Baburam Upadhya*, reported in AIR 1961 SC 751, the Supreme Court of India said that when a statute uses the word "shall", prima facie, it is mandatory, but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute.

[24] Crawford on "Statutory Construction" (Ed. 1940, Art. 261, p. 516) sets out the following passage from an American case approvingly as follows:

> *"The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other".*

[25] According to Sutherland, Statutory Construction, Third Ed. Vol. III, p. 77:

> *"The difference between mandatory and directory statutes is one of effect only. The question generally arises in a case involving a determination of rights as affected by the violation of, or omission to adhere to statutory directions. This determination involves a decision of whether or not the violation or omission is such as to render invalid Acts or proceedings to the statute, or the rights, powers, privileges claimed thereunder. If the*

violation or omission is invalidating, the statute is mandatory, if not, it is directory".

[26] Then the question is this: What is the fundamental test that is to be applied in determining whether or not the failure to obey the time bar provision in Section 10 of the Tax Appeals Commission Act was intended by the legislature to be mandatory or directory? The question whether the non-compliance with a statutory provision can be classified as mandatory rendering the proceedings invalid or directory leaving it intact depends, on the consideration of whether the consequences of the non-compliance were intended by the legislature to be mandatory or directory. This proposition was echoed by Lord Woolf MR (as he then was) in *R v. Secretary of State for the Home Department, Ex p Jeyeanthan [2000] 1 WLR 354*, who stated that it is "much more important to focus on the **consequences of the non-compliance**". He elaborated this proposition in the following words at p. 360:

"In the majority of cases, whether the requirement is categorized as directory or mandatory, the tribunal before whom the defect is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises".

[27] Here, it is also desirable to remember the words of Lord Hailsham of St. Marylebone L.C. in his speech in *London and Clydeside Estates Ltd. v. Aberdeen District Council* [1980] 1 W.L.R. *182* , 188–190. He stated at p. 36:

"The contention was that in the categorization of statutory requirements into 'mandatory' and 'directory,' there was a subdivision of the category 'directory' into two classes composed (I) of those directory requirements 'substantial compliance' with which satisfied the requirement to the point at which a minor defect of trivial irregularity could be ignored by the court and (ii) those requirements so purely regulatory in character that failure to comply could in no circumstances affect the validity of what was done. When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events".

[28] In *Howard and Others v. Bodington* (1877) 2 PD 203, the Court of Arches considered the question whether the consequences of a failure to comply with a statutory requirement are mandatory or directory. Lord Penzance stated at pp. 211-212:

> *"Now the distinction between matters that are directory and matters that are imperative is well known to us all in the common language of the courts at Westminster. I am not sure that it is the most fortunate language that could have been adopted to express the idea that it is intended to convey; but still, that is the recognized language, and I propose to adhere to it.* ***The real question in all these cases is this: A thing has been ordered by the legislature to be done. What is the consequence if it is not done?*** *In the case of statutes that are said to be imperative, the Courts have decided that if it is not done the whole thing fails, and the proceedings that follow upon it are all voids. On the other hand, when the Courts hold a provision to be mandatory or directory, they say that, although such provision may not have been complied with, the subsequent proceedings do not fail. Still, whatever the language, the idea is a perfectly distinct one. There may be many provisions in Acts of Parliament which, although they are not strictly obeyed, yet do not appear to the Court to be of that material importance to the subject-matter to which they refer, as that the legislature could have intended that the non-observance of them should be followed by a total failure of the whole proceedings. On the other hand, there are some provisions in respect of which the Court would take an opposite view, and would feel that they are matters which must be strictly obeyed, otherwise the whole proceedings that subsequently follow must come to an end".*

[29] In the absence of any express provision, the intention of the legislature must be ascertained by weighing the consequences of holding a statute to be directory or mandatory and having regard to the importance of the provision in relation to the general object intended to be secured by the Act *(Caldow v. Pixcell* (1877) 1 CPD 52, 566) & *Dharendra Kriisna v. Nihar Ganguly* (AIR 1943 Cal. 266). As held in *Attorney General's Reference (No 3 of 1999),* the emphasis ought to be on the consequences of non-compliance, and asking the question whether Parliament can fairly be taken to have intended total invalidity.

[30] Now the question is, to which category does Section 10 in this case belong? The question as to whether Section 10 is mandatory or directory depends on the intent of the legislature, and not upon its language,

irrespective of the fact that Section 10 is couched in language which refers to the word "shall". The intention of the legislature must be ascertained not only from the phraseology of Section 10, but also by considering its purpose, its design and more importantly, the consequences which would follow from construing it one way of another.

[31] Again, the question is, what is the consequence of the failure to adhere to the time limit specified in Section 10 that has been intended by the legislature to be categorized as mandatory or directory. Accordingly, one has to identify the tests to be applied in deciding whether a provision that has been disregarded as mandatory or directory, and then applies them to the statute which stipulates the determination shall be made within the time limit specified therein, but makes no reference to any penal consequences.

Consequence of non-compliance with a statutory provision

Purpose of the Section in the context of the Statute

[32] In considering a procedural requirement from this angle, a court is likely to construe it as mandatory if it seems to be of particular importance in the context of the enactment, or if it is one of a series of detailed steps, perhaps in legislation which has created a novel jurisdiction, (*Warwick v. White* (1722) Bunb. 106; 145 E.R. 612) or if non-compliance might have entailed penal consequences for one of the parties (*State of Jammu and Kashmir v. Abdul Ghani* (1979) Ker LJ 46). Where the disobedience of a provision is made penal, it can safely be said that such provision was intended by the legislature to be mandatory (*Seth Banarsi Das v. The Cane Commissioner* & Another, AIR 1955 All 86).

[33] As noted, the fact that no penal consequence is stated in a statute, however, is only one factor to be considered towards a directory construction, and there are other factors to be considered in determining whether a provision of a Statute is mandatory or not. As noted, one of the factors in determining whether the consequence of non-compliance provision was intended by the legislature to be mandatory or directory is to consider the broad purpose and object of the statute as Lord Penzance stated in *Howard v. Bodington* (*supra*) at 211 as follows:

"I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look into the subject-matter: consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."

[34] The legislature is a purposive act, and judges should construe statutes to execute that legislative purpose, intent and context (Robert A. Katzmann, Judging Statutes 31 (2014) by focusing on the legislative process, taking into account the problem that the legislature was trying to solve (Henry M. Hart, Jr. & Albert M. Sacks, "The legal Process: Basic Problems in the Making and Application of Law" 1182 (William N. Eskridge, Jr. & Phillip P. Frickey Eds., (1994). We must thus, ascertain what the legislature was trying to achieve by amending the Tax Appeals Commission Act, twice as far as the time bar is concerned.

[35] Dr. Shivaji Felix has submitted that, given the tax law context, a strict approach to construction of Section 10 of the Tax Appeals Commission statute should be adopted as the amendment of the Tax Appeals Commission Act with retrospective operation twice would reflect the legislative intent that the compliance with Section 10 is mandatory. He has argued that if the time bar stipulated in Section 10 was intended to be a directory, the amendment of Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 with retrospective effect on two occasions and the avoidance of doubt clause found in Section 15 of the Tax Appeals Commission (Amendment) Act, No. 20 of 2013 would have been superfluous.

[36] Will the amendment of Section 10 with retrospective operation twice manifest the intention of the legislature that the failure of the Tax Appeals Commission to make its determination within the time limit specified in Section 10 is mandatory? From Section 15, it is manifest that the legislature intended Section 10 to operate retrospectively, so that the date of the commencement of Section 10 is earlier than the date of that amendment.

[37] A legislative intention to amend Section 10 with retrospective operation does not necessarily or conclusively mean that the failure to

make the determination of the Tax Appeals Commission within the time limit specified in Section 10 is mandatory. If such drastic consequence was really intended by the legislature, it would have made appropriate provisions in express terms in Section 10 to the effect that "the appeal shall be deemed to have been allowed where the Tax Appeals Commission fails to adhere to the time limit specified in Section 10 of the Tax Appeals Commission Act".

[38] There are guidelines in tax statutes which stipulate that the failure to observe any time limit provision would render the appeal null and void or that the appeal shall be deemed to have been allowed. For example, Section 165 (14) of the Inland Revenue Act, No. 10 of 2006 as amended, provides that "an appeal preferred to the Commissioner-General shall be agreed to or determined by the Commissioner-General within a period of two years from the date on which such petition of appeal is received...". The same section specifically stipulates that "where such appeal is not agreed to or determined within such period, the appeal shall be deemed to have been allowed and tax charged accordingly".

[39] The legislature in its wisdom has placed time limit for the speedy disposal of appeals filed before the Commissioner-General and the overall legislative intention sought to be attained by the Inland Revenue Act in Section 165 (14) was to ensure that an appeal before the Commissioner-General of Inland Revenue is disposed of within a period of 2 years from the date on which the Petition of Appeal is received. As the Commissioner-General is an interested party against another interested party (tax payer) in the tax collection, it shall determine the appeal within 2 years from the receipt of the Petition of Appeal and if not, the appeal shall be deemed to have been allowed, and tax charged accordingly, so as to safeguard the rights of the taxpayer

[40] Although the Tax Appeals Commission Act was amended by Parliament twice and increased the period within which the appeal is to be determined by the Commission from 200 days to 270 days with retrospective effect, the legislature in its wisdom did not specify any penal consequence or any other consequence of non-compliance of the time bar specified in Section 10 of the Tax Appeals Commission Act. Had the legislature intended that the non-compliance with Section 10 to be

mandatory, it could have easily included a provision with negative words requiring that an act shall be done in no other manner or at no other time than that designated in the Section or a provision for a penal consequence or other consequence of non-compliance. This proposition was echoed by FOTH, C. J. in *Paul v. The city of Manhattan* (1973) 212 Kan 381 as follows:

> *"The language of the enactment itself may provide some guidance. Thus we said in Shriver v. Board of County Commissioners, 189 Kan. 548, 370 P. 2d 124, "Generally speaking, statutory provisions directing the mode of proceeding by public officers and intended to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties cannot be injuriously affected, are not regarded as mandatory, unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated". (p. 556. Emphasis added). A critical feature of mandatory legislation is often a provision for the consequences of non-compliance. This element was noticed by early legal commentators, for in Bank v. Lyman, supra, we find this observation (p. 413)."*

[41] Bindra's Interpretation of Statutes, 10th Ed. referring to the decision of *Paul v. The city of Manhattan* (supra), states that factors which would indicate that the provisions of a Statute or Ordinance are mandatory are: (1) the presence of negative words requiring that an act shall be done in no other manner or at no other time than that designated; or (2) a provision for a penalty or other consequence of non-compliance (p. 433).

[42] The object sought to be attained by Section 10 of the Tax Appeals Commission Act has been designed primarily to expedite the appeal process filed before the Tax Appeals Commission, which was established by an Act of Parliament comprising retired Judges of the Supreme Court or the Court of Appeal and those who have gained wide knowledge and eminence in the field of Taxation.

[43] It is settled law that the Courts cannot usurp legislative function under the disguise of interpretation and rewrite, recast, reframe and redesign the Tax Appeals Commission Act, because this is exclusively in the domain of the legislature. This proposition was lucidly explained by Lord Simonds in *Magor and St Mellons Rural District Council v. Newport Corporation* [1951] 2 All ER 839, HL. Referring to the speech of Lord Denning MR, Lord Simonds said at page 841: "It appears to me to be a naked usurpation of the

legislative function under the thin disguise of interpretation", Lord Simonds further stated at 841:

> *"The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and the duty of the court to travel outside them on a voyage of discovery are strictly limited. If a gap is disclosed, the remedy lies in an amending Act and not in a usurpation of the legislative function under the thin disguise of interpretation".*

[44] The same proposition was echoed by Arijit Pasayat, J. in the Indian Supreme Court case of *Padmasundara Rao and Ors. v. State of Tamil Nadu and Ors.* AIR (2002) SC 1334, at paragraph 14, as follows:

> *"14. While interpreting a provision the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary".*

[45] Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 granted time to the Tax Appeals Commission to hear all appeals within one hundred and eighty days from the date of the commencement of the hearing of the appeal. The Tax Appeals Commission (Amendment) Act, No. 4 of 2012 extended the said time period from one hundred and eighty days to two hundred and seventy days from the date of the commencement of the hearing of the appeal. The Tax Appeals Commission (Amendment) Act, No. 20 of 2013 however, reduced the time limit granted to the Tax Appeals Commission to conclude the appeal by enacting that the time specified in Section 10 shall commence from the date of the commencement of its sittings for hearing the appeal.

[46] The legislature has, from time to time, extended and reduced the time period within which the appeal shall be determined by the Tax Appeals Commission, but it intentionally and purposely refrained from imposing any consequence for the failure on the part of the Tax Appeals Commission to adhere to the time limit specified in Section 10.

[47] "Retrospective" according to the Shorter Oxford English Dictionary, 3rd Edition, in relation to Statues etc. means "operative with regard to first time". The legislature amended the Tax Appeals Commission Act, twice

with retrospective effect and provided time frames to conclude appeals quickly as possible within the time limit of 270 days from the date of the commencement of its sittings for the hearing of such appeal. It is true that the legislature has amended Section 10 with retrospective operation but if it intended to take away the jurisdiction of the Tax Appeals Commission and render its determination made outside the time limit specified in section 10 invalid, it could have easily made, with retrospective effect, appropriate provision in express terms that the appeal shall be deemed to have been allowed or other consequence of non-compliance.

[48] On the other hand, the proviso to Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 granted time for the Commission to make its determination in respect of appeal transferred to the Commission from the Board of Review within a period of hundred and eighty days (180) from the date of such transfer, notwithstanding anything contained in any other written law. The Tax Appeals Commission (Amendment) Act, No. 4 of 2012 extended the said time period from hundred and eighty days to twelve months of the date on which the Commission shall commence its sittings. (Vide-Section 7 of the Act, No. 4 of 2012). The Tax Appeals Commission (Amendment) Act, No. 20 of 2013 extended the said time period to twenty-four months from the date on which the Commission shall commence its sittings for the hearing of each such appeal.

[49] It is crystal clear that these procedural time limit rules in respect of appeals received by the Tax Appeals Commission or appeals transferred from the Board of Review to the Commission have been devised by the legislature to facilitate the appeal process by increasing and reducing the time period within which such appeals shall be concluded. The provision for the determination of an appeal by the Tax Appeals Commission within a period of 270 days from the commencement of its sittings for the hearing of an appeal has been designed with a view to regulating the duties of the Tax Appeals Commission by specifying a time limit for its performance as specified in Section 10 of the Act.

[50] So that the legislature, in its wisdom has made provision in Section 10 to the effect that the appeal shall be disposed of speedily within a period of 270 days from the date of the commencement of the sittings for the hearing of the appeal. But the legislature imposed no drastic and painful

penal consequence or other consequence of non-compliance, including prohibitory or negative words in Section 10, rendering the determination of the appeal null and void for non-compliance of the time limit specified in Section 10. In my view, they are not intended to make the parties suffer from the failure of the Commission to make the determination within the time limit specified in Section 10 of the Tax Appeals Commission Act.

[51] Any procedural retrospective operation of a provision, in my view, cannot take away the rights of parties who have no control over those entrusted with the duty of making determination within the time limit specified in Section 10. The retrospective operation of Section 10 without any penal or other consequence of non-compliance, by itself, cannot be treated as a factor in determining that the legislature intended that the failure to adhere to the time limit specified in Section 10 is mandatory.

Consequences of non-compliance of a statute by those entrusted with public duty

[52] One of the important factors that is necessary for determining whether a provision is mandatory or directory is to find as to who breached the time limit specified in Section 10-whether it was breached by one of the parties to the action or by those entrusted with the performance of a public duty. Also coming under this head are cases where the Court will take into account the practical inconveniences or impossibilities of holding a time limit requirement to be mandatory where the public duty is performed by a public body. If the statutory provision relates to the performance of a public duty, the Court is obliged to consider whether any consequence of such breach would work serious public inconvenience, or injustice to the parties who have no control over those entrusted with such public duty.

[53] Apart from the absence of reference to penal sanction and other consequences of non-compliance of Section 10, the impossibility of adhering to the time limit provision is also a factor in influencing the court to construe the time limit provision is not mandatory, but as directory only. As noted, the pending appeals were transferred to the properly constituted Tax Appeals Commission after the amendment to Section 2 was enacted by the Tax Appeals Commission (Amendment) Act, No. **4 of**

2012 which came into effect on 15.02.2012. A perusal of the record reveals that the appeal was first fixed for hearing on 31.07.2012 (p. 58) and the first hearing was conducted on 31.07.2012 (p. 61). The Commission consisted of Justice H. Yapa (Chairman), Mr. M.Somasundara, (Member) and Mr. P.A. Pematilaka (Member) (p. 79). The next hearings were conducted on 29.11.2012 (p. 119), 17.01.2013 (p. 121) and 05.02.2013 before the same Members of the Commission and the Commission reserved the determination (p. 146).

[54] No determination was made and in the meantime, the Tax Appeals Commission was reconstituted on 09.05.2014 and the new members did not have the benefit of hearing the parties in appeals where no determination had been made by the previous Commission (p. 210). The new commission consisting of Justice N. Udalagama (Chairman), Mr. M.N. Junaid (Member) and Mr. S. Swarnajothi (Member). The new commission heard the parties and made the determination on 30.10.2014. It is manifest that although the previous commission commenced its sittings on 31.07.2012 and 29.11.2012 and reserved the determination, it could not practically make the determination due to the expiry of the term of the commission and the reconstitution of the commission

[55] It is true that The Tax Appeals Commission Act has imposed a duty on the Tax Appeals Commission to make the determination within the time limit specified in Section 10 but the parties had no control over those entrusted with the task of making the determination within the time limit specified in Section 10. Should the parties who have no control over those entrusted with the task of making the determination be made to suffer for any failure or delay on the part of the Tax Appeals Commission in not making its determination within the time limit specified in Section 10? I do not think that the legislature intended that the time limit specified in Section 10 is mandatory where it is impossible for the Commission to make its determination within such period due to practical reasons or where the parties had no control over those entrusted with the task of making the determination within the time limit specified in Section 10.

[56] Maxwell, Interpretation of Statute, 11th Ed. at page 369 referring to the ascertaining the intention of the legislature in relation to the interpretation of limitation provision states:

"On the other hand, where the prescriptions of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the Legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal, indeed, but it does not affect the validity of the act done in disregard of them. It has often been held, for instance, where an Act ordered a thing to be done by a public body or public officers and pointed out the specific time when it was to be done, then the Act was directory only and might be complied with after the prescribed time" [emphasis added.]

[57] Where the statute imposes a public duty on persons and to treat, as void, acts done without compliance with the statute would cause serious inconvenience to persons who have no control over those entrusted with this duty, then the practice is to hold the provision to be directory only so as not to affect the validity of such action taken in breach of such duty (*Montreal Street Rly. Co. v. Normandin* (1917) AC 170, 175). Lord Sir Arthur Channell echoed this proposition in that case at p. 176 as follows:

"When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done. This principle has been applied to provisions for holding sessions at particular times and places (2 Hale, P. C., p. 50, Rex v. Leicester Justices (1827) 7 B & C. 6 and Parke B. in Gwynne v. Burnell (1835) 2 Bing. N.C. 7); to provisions as to rates (Reg. v. Inhabitants of Fordham (1839) 11 Ad. & E. 73 and Le Feuvre v. Miller (1857) 26 L.J. (M.C.) 175); to provisions of the Ballot Act (Woodward v. Sarsons (1875) L.R. 10 C.P. 733 and Phillips v. Goff (1886) 17 Q.B.D. 805); and two justices acting without having taken the prescribed oath, whose acts are not held invalid (Margate Pier Co. v. Hannam (1819) 3 B. & Al. 266)".

[58] This proposition is further confirmed by Sutherland's Statutory Construction, Third Ed. Vol. 3. at p. 102 as follows:

"A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered a limitation of the power of the Officer". At p. 107 it is pointed out that a statutory direction to private individuals should generally be considered as mandatory and that the rule is just the opposite to that which obtains with respect to public officers. Again, at p. 109, it is pointed out that often the question as to whether a mandatory may be directory construction should be given to a statutory provision may be determined by an expression in the statute itself of the result that shall follow the non-compliance with the provision…."

[59] If we hold that the literal compliance with the time limit specified in Section 10 is mandatory, disregarding the fact that neglect was performed by those who are entrusted with the duty, we will be disregarding the practical impossibility of the Commission and inconvenience of holding proceedings and making a determination strictly within the time limit specified in Section 10. In the present case, the duty to make the determination within the time limit specified in Section 10 is statutorily entrusted to the members of the Tax Appeals Commission in terms of the provisions of the Tax Appeals Commission Act, No. 23 of 2011 as amended, and the parties had no control whatsoever, over the Tax Appeals Commission.

[60] As Lord Sir Arthur Channell put it correctly, it would cause the greatest injustice to both parties who had no control over those entrusted with the duty of making the determination, if we hold that neglect to observe the time limit specified in Section 10 of the statute renders the determination made by the Commission *ipso facto* null and void. In my view, every limitation period within which an act must be done, is not necessarily a prescription of the period of limitation with painful and drastic consequences and the parties who have no control of those entrusted with a statutory duty and no fault of them should not be made to suffer and lose their rights for the failure to adhere to the time limitation specified in a provision.

[61] If we interpret the legislative intent of Section 10 from its mere phraseology, without considering the nature, purpose, the design, the absence of consequences of non-compliance and practical impossibility,

which would follow from construing it one way or the other, it will tend to defeat the overall object, design, the purpose and spirit of the Tax Appeals Commission Act. If we hold that the determination of the Commission is null and void, it will cause serious injustice to parties who have no control over those entrusted with the duty of discharging functions under the Tax Appeals Commission Act.

[62] The principle laid down by Gooneratne J. in *Mohideen v. Commissioner General Inland Revenue* (supra) was that the hearing for the purpose of time limit of 2 years specified in the second proviso to Section 140 (10) of the Inland Revenue (Amendment) Act, No. 37 of 2003 commences from the date of the oral hearing and no more. That was the principle upon which the case was decided by His Lordship Gooneratne J. which represents the reason and spirit of the decision, and that part alone is the principle which forms the only authoritative element of a precedent in *Mohideen v. Commissioner General Inland Revenue* (supra).

[63] In *Mohideen v. Commissioner General Inland Revenue* (supra), after having fully endorsed the proposition of law that the hearing contemplated in the said time bar provision is nothing but oral hearing, His Lordship as a passing remark stated "It would be different or invalid if the time period exceeded 2 years from the date of oral hearing. If that be so, it is time barred" (p. 176). That part of the statement enunciated by His Lordship Gooneratne J. is manifestly an obiter and not the ratio having a binding authority. Justice Jank de Silva, in *Staford Motors v. Commissioner-General of Inland Revenue (supra)*, *Kegalle Plantations PLC v. The Commissioner-General of Inland Revenue* (CA/Tax 09/2017 decided on 04.09.2014) and *CIC Agri Business (Private) Limited v. The Commissioner-General of Inland Revenue* (CA/Tax 42/2014 decided on 29.05.2021), arrived at a similar conclusion.

[64] We took the same view in our judgments in *Mr. S.P. Muttiah v. The Commissioner General of Inland Revenue,*CA/TAX/46/2019,decided on 26.06.2021 and Amadeus Lanka (Pvt) Ltd v. CGIR (C.A Tax 4/19 decided on 30.07.2021. In *Mr. S.P. Muttiah v. The Commissioner General of Inland Revenue*, we further held that the directory interpretation of Section 10 is consistent with the object, purpose and design of the Tax Appeals Commission Act, which is reflected in the intention of the legislature and

that if a gap is disclosed in the Legislature, the remedy lies is an amending Act and not in a usurpation of the legislative function under the thin disguise of interpretation.

[65] I hold that having considered the facts and he circumstances and legal principles, the failure to adhere to the time limit specified in Section 10 was not intended by the legislature to be mandatory with painful and drastic consequences of rendering such determination null and void. For those reasons, I hold that the determination of the Tax Appeals Commission in the present case is not time barred and thus, I answer the Question of Law No. 1 in favour of the Respondent.

Question of Law No. 3

Zeo-rated supply conferred by section 7 (1) (a) of the Value Added Act (VAT Act), No. 14 of 2002.

[66] 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 and the Appellant has been granted a license under Section 5B of the Ceylon Petroleum Corporation Act, No. 28 of 1961 (as amended), to import, export, sell, supply or distribute marine gas, oil and finance oil for the sole purpose of providing fuel marine shops (p. 123).

[67] At the hearing, the learned President's Counsel for the Appellant, Mr. Romesh de Silva submitted that the Appellant being a supplier of bunker fuel to ships, is engaged in exporting bunker fuel to ships travelling outside Sri Lanka and therefore, the Appellant qualifies for zero rated status on the basis of that the supply of bunker fuel to vessels constitutes an "export" under Section 7 (1) (a) of the VAT Act, No 14 of 2002. Mr. de Silva further submitted that although the term "export" is not defined in the VAT Act, No. 14 of 2002, the question whether the Appellant qualifies for the zero-rated status under Section 7 (1) (a) of the VAT Act would have to be decided by resorting to other definitions of "export" in other statutes.

[68] 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".

[69] Mr. de Silva strenuously argued that the real test is whether or 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 zero rated status under Section 7 (1) (a) of the VAT Act.

[70] 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

[71] 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. She submitted accordingly, that 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.

[72] 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 characterized as international sale of goods transaction. She argued, therefore, that the supply of bunker fuel was no export within the meaning of Section 7 (1) (a) of the VAT Act, No. 14 of 2002.

[73] 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.

[74] In *Burmah-Shell Oil Storage & Distribution Company Ltd v. Commercial Taxing Office and Othes* [supra), 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)".

[75] It was the contention of Mr. de Silva 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 zero rated status under Sections 7 (1) (a) of the VAT Act, No. 14 of 2002.

[76] It is true that the decision in *Burmah-Shell Oil Storage & Distribution Company Ltd v. Commercial Taxing Office and Others* (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 Section 7 (1) (a) of the VAT Act, No. 14 of 2002, independent of the Indian authorities in particular, case of *Burmah-Shell Oil Storage & Distribution Company Ltd v. Commercial Taxing Office and Others* (supra).

Statutory Provisions

[77] Before embarking upon the rival contentions of the parties, we may proceed to notice the relevant statutory provisions which have a bearing on the issue. Under Section 2 of the VAT Act, which is the charging section, subject to the provisions of the VAT Act, VAT shall be charged-

(a) at the time of supply, on every taxable supply of goods or services made in a taxable period, by a registered person in the course of the carrying on, or, or carrying out, of a taxable activity by such person in Sri Lanka;

(b) on the importation of goods into Sri Lanka, by any person,

and on the value of such goods or services supplied or the goods imported, as the case may be subject to the provision of section 2A, at the rates more fully specified in the said section.

[78] The imposition of VAT is, arrived at after taking into account the various exemptions and deductions allowed under the provisions of the VAT Act. Under Section 8 of the VAT Act, no tax shall be charged on an exempt supply. It reads as follows:

> *"8. No tax shall be charged on the supply of goods or services and the importation of goods specified in the First Schedule to this Act as such supplies and imports are not taxable unless zero rated under section 7."*

[79] Under Part I of the First Schedule to the VAT Act No. 14 of 2002, the supply of bunker fuel is an exempt supply for the period commencing on or after 1, August 2002 and ending 1, January 2004. It provides, *inter alia*, as follows:

> *"(Viii) The supply or import of kerosene, bunker fuel and aviation fuel".*

[80] Under Part II of the First Schedule of the VAT Act, No. 14 of 2002, supply of crude petroleum oil, kerosene, Liquid Petroleum, Gas and aviation fuel, etc. are an exempt supply for the period commencing on or after 1, January 2004 It provides, *inter alia*, as follows:

> *(vi) crude petroleum oil, kerosene, Liquid Petroleum, Gas and aviation fuel (effective from 5/8/2005) diesel and aviation fuel (effective from 1/8/2005) oil for ships or fuel oil specified under Harmonized by Commodity Description Number 2710.19.60;*

[81] The VAT Act exempts supplies of bunker fuel to local vessels and such supplies constitute exempt supplies. The Appellant relies on the zero-rated status specified in Section 7 (1) (a) of the VAT Act, and argues that the supply of bunker fuel constitutes an "export" within the meaning of Section 7 (1) (a) of the VAT Act, No. 14 of 2002. Section 7 (1) (a) of the VAT Act reads as follows:

> *"7 (1) A supply of-*
>
> *(a) goods shall be zero rated where the supplier of such goods has exported such goods;"*

[82] Section 7 (2) of the VAT Act reads as follows:

> "*Where a registered person supplies any goods or services which is zero rated-*
>
> *(a) no tax shall be charged in respect of such supply;*
> *(b) the supply shall in all other respects be treated as a taxable supply and accordingly, the rate at which tax is charged on the supply shall be zero".*

[83] The "supply of goods" means the passing of exclusive ownership of goods to another as the owner of such goods or under the authority of any written law and includes the sale of goods by public auction, the transfer of goods under a hire purchase agreement, the sale of goods in satisfaction of a debt and the transfer of goods from a taxable activity to a non-taxable activity (See- the definition in Section 83 of the VAT Act.

[84] Accordingly, if a supplier has exported such goods or services, no tax shall be charged and the rate at which the tax is charged on the supply of such goods or services shall be zero rated. That means that the output tax will be zero and under section 22 (5) (c), the input tax can be claimable.

Issue

[85] 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 7 (1) (a) of the VAT Act, No. 14 of 2002 (as amended).

Definition of the term "export"

[86] As the VAT 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 Section 7 (1) (a) of the VAT Act, No. 14 of 2002. 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 Section 7 (1) (a) of the VAT Act, No. 14 of 2002 (as amended).

[87] 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 if 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".

[88] 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".

[89] 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".

[90] 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".

[91] 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".

[92] 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.

[93] 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 Section 7 (1) (a) of the VAT 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 zero rated status under Section 7 (1)(a) of the VAT Act, No. 14 of 2002.

Imports & Exports (Control) Act

[94] 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 7 (1) (a) of the VAT Act, and whether the mere supply of bunker fuel to a ship constitutes an export under Section 7 (1) (a) of the VAT Act, No. 14 of 2002.

[95] 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 afloat but has gone through all the formalities of Clearance, & at the Custom House and has paid the Exportation Dues".*

[96] 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)".

[97] It is significant to note that *A.G. v. Pougett* (supra) was not an income tax or a 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

[98] 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.

[99] 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 the 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;

[100] 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: "

[101] 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 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 zero-rated status under Section 7 (1) (a) of the VAT Act, No. 14 of 2002.

[102] 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 Imports & 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"*

[103] 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 zero-rated status under the Inland Revenue Act. On this basis the Appellant argues that the Imports and Exports (Control) 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 Section 7 (1) (a) of the VAT Act, No. 14 of 2002.

[104] 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 Section 7 (1) (a) of the VAT Act, No. 14 of 2002.

Customs Ordinance

[105] 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 as 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".*

[106] 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).

[107] 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.

[108] 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 notwithstanding the fact that the ship is within Sri Lankan territorial waters at the time of the delivery of the bunker fuel. Mr. de Silva 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.

[109] 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".*

[110] 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.

[111] 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 the VAT Act, No. 14 of 2002.

[112] 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.

[113] To constitute an export under Section 22 of the Import and Export (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.

[114] 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".

[115] 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 charging VAT under the VAT Act, No. 14 of 2002.

[116] 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 zero rated status under Section 7 (1) (a) of the VAT Act, No. 14 of 2002.

Customs clearance

[117] 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 characterizes 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.

[118] The said case related to the refusal of the deduction claimed by the assessed 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.

[119] 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 conditions set out in the VAT Act, the delivery of goods shall be after customs clearance, i.e., after the 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 zero rated status under the VAT Act.

[120] 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 per se does not constitute an Appellant an exporter of the bunker fuel under Section 7 (1) (a) of the VAT Act, No. 14 of 2002.

Use of Foreign Currency

[121] 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.

[122] 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 Section 7 (1) (a) of the VAT Act, No. 14 of 2002.

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

[123] The Appellant argues that the Appellant possesses a license 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 license 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 Section 7 (1) (a) of the VAT Act, No. 14 of 2002.

Central Bank Annual Reports

[124] 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 recognized 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 recognized the Appellant as an exporter within the meaning of any statute as claimed by the Appellant.

[125] 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 travelers 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:"

[126] 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 travelers in the respondent's duty-free shops were exported by the respondent.

[127] 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 subsidize? 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 travelers may be said to have "exported" the goods themselves, for they carried them (if small enough) onto 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 travelers 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.* it 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".

[128] 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 travelers. 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 subsidize? On this approach to the matter, it seemed clear to subsidize Turner J. that it is respondent's operation which was meant to receive the reward offered by the statute.

[129] 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 travelers. 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 zero-rated status under Section 7 (1)(a) of the VAT 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 VAT 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 to 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 are no such conditions to be fulfilled for the charging of income tax under the VAT Act;

4. As a matter of fact, and degree, the whole nature of the respondent's specialized 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.

[130] Under such circumstances, the Court came to the conclusion that the whole nature of the respondent's specialized 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.

[131] 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" under Section 7 (1) (a) of the VAT Act, No. 14 of 2002.

[132] 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.

[133] 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 was 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).

[134] 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).

[135] 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 zero rated status under Section 7 (1) (a) of the VAT Act, No. 14 of 2002.

[136] 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 Section 7 (1) (a) of the VAT Act, No. 14 of 2002.

[137] The charging provision in Section 2 is the prime purpose of the VAT 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 (Control) 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 charging of VAT are found in the VAT Act.

[138] The principles of charging VAT and the principles of charging customs duty are distinct, different and independent of each other. The VAT is charged on the fulfilment of the conditions specified in Section 2 of the VAT Act, subject to the provisions of the VAT Act and the VAT rates vary subject to the provisions of the VAT 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.

[139] 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 VAT under the VAT Act.

[140] 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 the VAT 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 VAT Act and the imposition of taxes under the provisions of the said Acts are based on different principles and the fulfilment of different conditions.

[141] If the Legislature intended to apply the same term "export" for the purpose of Section 7 of the VAT 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 Ordinance has 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 Section 7 of the VAT Act, is without substance.

[142] 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 VAT under the VAT 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 Section 7 (1) (a) of the VAT Act.

[143] 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 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).

[144] 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

[145] The Appellant relied on the United Nations Department of Economic and Social Affairs-International Merchandise Trade Statistics: Concept and Definitions (IMTS 2010) to substantiate its position that that the supply of bunker fuel to ships travelling in international waters constitutes an export. Paragraph 1.32 of the Report (p. 18) 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".

[146] 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 custom 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…".*

[147] 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.

[148] 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.

Destination Principle

[149] VAT is generally applied on a transaction-by-transaction basis and the supply of goods is in principle subject to VAT in the jurisdiction where the goods are located at the time of the transaction and, and when a transaction involves goods being moved **from one jurisdiction to another,** the destination principle applies. Under the destination principle, exports are not subject to VAT, and suppliers are allowed a refund of input VAT. The exported goods are free of VAT in the supplier's jurisdiction as specified in Section 7 (1) (a) of the VAT Act. 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.

[150] 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 the VAT 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).

[151] The objective of granting zero rated status under Section 7 (1) (a) of the VAT 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 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 such supplies will receive the zero-rated status under Section 7 (1) (a) of the VAT Act.

[152] The term 'export' in Section 7 (1) (a) of the VAT 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 zero-rated status, 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 Section 7 (1)(a) of the VAT Act.

[153] 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 zero-rated status under Section 7 (1) (a) of the VAT 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. Once these requirements are fully satisfied with the supplier,

[154] 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 Section 7 (1) (a) of the VAT 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.

[155] I hold that the zero-rated status under Section 7 (1) (a) of the VAT 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 zero rated supply is claimed under the provisions of the VAT Act, No. 14 of 2002.

[156] 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.

[157] To support the zero rating of the supply of bunker fuel to foreign going vessels under Section 7 (1) (a) of the VAT Act, 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).

[158] In this case, there is nothing to indicate that the bunker fuel supplied by the Appellant to a ship was bound for a foreign destination point out of Sri Lanka (a place outside Sri Lanka) as there is no evidence whatsoever, indicating that the destination of the ship was any place outside Sri Lanka. A perusal of the Bunker Delivery Note (p. 128 of the TAC brief) reveals that although the bunker delivery note required 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 "MELODY-9 or the Bunkering Supplier. Accordingly, the bunker delivery note does not indicate whatsoever, 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 foreign destination point is conspicuously absent in the present case.

[159] 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 and therefore, the Appellant is not entitled to claim the zero-rated status, under Section 7 (1) (a) of the VAT Act, No. 14 of 2002 (as amended).

Question of Law No. 2

Are the Assessments for the taxable periods ending prior to November 2004 time barred?

[160] The Appellant has claimed the input tax credits on the basis that the Appellant is entitled to zero rated status and therefore, the Appellant is entitled to rely on the statutory protection conferred by Section 33 (1) of the VAT Act. Section 33 of the VAT Act, No. 14 of 2002 (as amended), provides that the assessment must be made within a period of 3 years from the end of the taxable period. It reads as follows:

> *"33.(1) Where any registered person has furnished a return under sub-section (1) of section 21 in respect of a taxable period or has been assessed for tax in respect of any period, it shall not be lawful for the Assessor where an assessment-*
>
> *(a) has been made, to make an assessment;or*
> *(b) has been made, to make an additional assessment,*
>
> *after the expiration of three years from the end of the taxable period in respect of which the return is furnished or the assessment was made as the case may be.*
>
> *(1) Notwithstanding the provisions of subsection (1) where the Assessor is of opinion that a person has willfully or fraudulently failed to make a full and true disclosure of all the material facts necessary to determine* the amount *of tax payable by him for any taxable period, it shall be lawful for the Assessor where an assessment-*

(a) has not been made, to make an assessment, or
(b) has been made, to make an additional assessment, at any time.

For the purposes of this Chapter any notice of assessment may refer to one or more taxable periods".

[161] It was the contention of the Appellant that for the taxable periods ending prior to November 2004, three years from the end of the taxable period will expire on or before 31.10.2007. The Appellant's position is that since the notice of assessment has been issued on 13.11.2007, and served on the taxpayer subsequent to that date, the assessment is time barred under Section 33 of the VAT Act.

[162] Section 22 (8) of the VAT Act provides as follows:

"22 (8) Notwithstanding the provisions of section 33, any refund in excess of the amount due, or any excess amount of input tax claimed under this Act or the Goods and Services Tax Act, No. 34 of 1996 shall be assessed by an Assessor on the registered person to whom the refund has been made or making such claim, as the case may be, and such amount shall be deemed to be a tax in default on the first day of the taxable period in which the excess of input tax first arose resulting in such refund or claim in excess as the case may be.

[163] Section 22 (8) provides that the time bar for making assessment does not apply when a refund has been made in excess of the amount due, or where an excess amount of input tax has been claimed under the VAT Act. In the present case, the Appellant is not entitled to claim zero rated supply under Section 7 (1) (a) of the VAT Act and accordingly, the time bar is not applicable in making the assessment in the following situations:

1. Any refund in excess of the amount due; or
2. Any excess amount of input tax claimed.

[164] The question arises whether a refund has been made in excess of the amount due, or any excess amount of input tax has been claimed under this Act. The excess amount for the input tax claimed is defined in the section 22(8) of the VAT Act as follows:

"For the purposes of this subsection, input tax claimed in a return by any person-

(a) who has not commenced any commercial operation within or on completion of the project implementation period referred to in item (xxvii) or item (xxviii) of the Schedule to the Goods and Services Tax Act, No. 34 of 1996 or item (xix) or (xx) of the First Schedule to this Act, as the case may be;

(b) who has obtained approval under subsection (7) or subsection (6) of section 22 of the Goods and Services Tax Act, No. 34 of 1996 and has not commenced business of making taxable supplies as stated in the undertaking given, by such person prior to the obtaining of such approval,

shall be deemed to be an excess amount of input tax claimed by such person. The Assessor determined that the supply of bunker fuel does not constitute an export and therefore, the it cannot be treated as zero rated supply".

[165] The argument of the Appellant was that Section 22 (8) cannot be engaged when the excess input credit claim is collateral to the basis of the assessment which in the present case is predicated on the classification of the supply. The underlined principle is that the meaning and intention of the statute must be collected from the plain and unambiguous expression used therein rather than from any notions which may be entertained by the court as to what is meant by the provision. A perusal of Section 22 (8) of the VAT Act reveals that the power of the Assessor to extend the completion of the assessment beyond the period specified in Section 33 is a special power "notwithstanding the provision of Section 33".

[166] Section 22 (8) provides that the time bar for making an assessment does not apply when a refund has been made in excess of the amount due, where an excess amount of input tax has been claimed under the VAT Act. This special power given to assess any person under Section 22 (8) applies "notwithstanding the time bar provision in Section 33" where "any refund in excess of the amount due or any excess amount of input tax claimed. There is nothing in Section 22 (8) that suggests that the special power of the Assessor to extend the completion of the assessment does not apply where the excess input credit claim is collateral to the basis of the assessment as contended by the Appellant.

[167] The Appellant has claimed the input credit refund in excess of the amount due under the VAT Act and the disallowance of input credit by the Assessor was the result of the determination made by him that the supply of bunker fuel was a local supply, and not a zero-rated supply, and thus, the Assessor has treated the supply of bunker as an exempt supply on which input tax is not claimable.

[168] The Assessor is entitled to make an assessment under Section 22 (8) of the VAT Act notwithstanding the provisions of Section 33, in respect of any refund in excess of the amount due, or any excess amount of input tax claimed by the Appellant under the VAT Act. The Assessor in the present case has exercised such a special power given to him under section 22 (8) of the VAT Act. In the result, the Appellant's contention that Section 22 (8) of the VAT Act does not apply where the excess input credit claim is collateral to the basis of the assessment is untenable. I hold that the assessments made for the periods ending prior to November 2004 are not time-barred under the provisions of the VAT Act.

[169] The Appellant has further raised the issue of non-service of the notice of assessment prior to the expiry of the statutory time bar for making an assessment. The Senior Assessor by letter dated 30.08.2007 has given reasons for not accepting the returns and the notices of assessment had been sent to the Appellant on 13.11.2007. As the assessments have been issued under Section 22 (8) of the VAT Act, the time bar referred to in Section 33 of the VAT Act is not applicable in making the assessment in the present case.

Conclusion & Opinion of Court

[170] 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 (not in the present case)
4. No

[171] For those reasons, subject to our observations in paragraphs 153, 154 and 155 of this judgment, the determination made by the Tax Appeals Commission dated 30.10.2014 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