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. 69, Walls Lane,
Colombo 15.

Appellant

Case No. CA/TAX/0008/2007
BRA/ VAT/ 01

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 Board of Review dated 17.07.2007 confirming the determination made by the Respondent on 27.06.2005 and dismissing the Appeal of the Appellant. The appeal relates to the Value Added Tax Assessments for the taxable periods ended 31.10.2002, 30.11.2002, 31.12.2002, 31.01.2003 and 31.03.2003.

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 input tax credit on local purchases against output tax and VAT refunds in respect of exports.

[3] The Senior Assessor by letter dated 15.07.2003 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 cus-dec 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;

6. Part of the supplies made to costal vessels have been declared as an exempt supply and such supplies are liable at standard rate of 20%;

7. The taxpayer has a business of local buying and selling of fuel and it can be treated as an excluded supply and therefore, the input credit for such supplies cannot be claimed;

8. As the refund obtained by the taxpayer is a refund in excess of the amount due, an assessment was issued in terms of Section 22 (8) of the VAT Act, as follows:

Taxable Period	Amount Refunded (Rs.)	Amount Assessed (Rs.
02.12.1	307,170	307,170
02.12.2	1,665,221	1,665,221
02 12 3	43,020,528	43,020,528
03 03 1	1,344,747	1,344,747
03 03 2	1,352,696	1,352,696
03 03 3	10,099,709	10,099,709

9. In addition to the above, the following refund will not be refunded on the above grounds:

Period	Amount of Refund Claimed (Rs.
02092	126,144
02093	150,842
03061	40,883,675

[4] Accordingly, the notices of assessment were issued by the Senior Assessor for the above-mentioned taxable periods. Being dissatisfied with the above-mentioned assessments, the Appellant appealed to the Commissioner-General of Inland Revenue (hereinafter referred to as the "Respondent") and the Respondent by its determination dated 27.06.2005 confirmed the assessments and dismissed the appeal.

[5] While confirming the assessments, the Respondent held that (i) 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; (ii) according to the Dictionary meaning of the term "export", the word "export" as normally understood is "sending goods to another country" and the Appellant is not taking the bunker fuel out of Sri Lanka as it is the Master of the ship or ship owner who is taking the bunker fuel out of Sri Lanka; (iii) the mere handing over the goods to the ship's captain will not complete the export, and the goods should be carried to a given destination to be eligible for zero rated supply; (iv) No evidence was produced by the Appellant to show that the goods had a foreign destination; iv) as the Appellant is not entitled to zero rated supply, the Appellant is not entitled to refunds of input tax credit on local purchases against the output tax.

Appeal to the Board of Review

[6] Being dissatisfied with the said determination of the Respondent, the Appellant appealed to the Board of Review and the Board of Review by its determination dated 17.07.2007 confirmed the determination made by the Respondent and dismissed the appeal. The Board of Review, 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 supply of bunker fuel to foreign ships cannot be treated as exports under Section 7 (1) (a) of the VAT Act, unless the goods had a foreign destination where they would be received as an import;
2. As the supply of bunker fuel is not zero rated and is exempted from VAT in terms of Item (iii) of the First Schedule of the VAT Act, the input credit on such supply is not claimable;

3. The Assessor by letter dated 15.07.2013 has given reasons for not accepting the returns as required under Section 29 of the VAT Act.

Questions of Law for the Opinion of the Court of Appeal

[7] Being dissatisfied with the said determination of the Board of Review, the Appellant appealed to the Court of Appeal by way of Case Stated and formulated the following questions of law for the opinion of the Court of Appeal.

(1) Did the Assessor comply with Section 29 of the VAT Act relating to the communicating of reasons for the taxable period?

(2) Whether the supply of bunker fuel to vessels within Sri Lanka constitutes an "export" under Section 7 of the VAT Act.

Analysis

Question of Law, No. 2

Does the supply of bunker fuel to vessels constitute an "export" under Section 7 of the VAT Act?

[8] 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 licence 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 furnace oil for the sole purpose of providing fuel for marine ships (A10).

[9] At the hearing, the learned Presidnet'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.

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

[11] Mr. de Silva strenuously argued that the real test is whether 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.

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

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

not outside Sri Lanka. She further submitted that in any event, the Appellant had no control over the ships' journeys; and thus, it is manifest that the goods have remained within the territorial waters of Sri Lanka, indefinitely.

[14] Referring to the test of international sale of goods transaction, she argued that the Appellant has failed to produce a single document such as a Bill of Lading, Marine Insurance, invoices and letters of credit, and that the Appellant's documents do not support that its transaction could be chaterertised as international sale of goods transaction. She argued, therefore, that the supply of bunker fuel was no export within the meaning of Section 7 (1) (a) of the VAT Act, No. 14 of 2002.

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

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

[17] 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.

[18] It is true that the decision in *Burmah-Shell Oil Storage & Distribution Company Ltd v. Commercial Taxing Office and Othes* (supra) is based on constitutional provisions of the Indian Constitution, [Article 286 (1) (b)] and Section 5 of the CENTRAL SALES TAX ACT to define the word "export" and such principles are not binding on the Courts of Sri Lanka. Hence, this Court is called upon to decide the question of whether the supply of bunker fuel to ships constitutes an "export" under Section 7 (1) (a) of the VAT Act, No. 14 of 2002, independent of the Indian authorities in particular, the case of *Burmah-Shell Oil Storage & Distribution Company Ltd v Commercial Taxing Office and Othes* (supra).

Statutory Provisions

[19] Before embarking upon the rival contentions of the parties, 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 morefully specified in the said section.

[20] 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."*

[21] 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".*

[22] 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;*

[23] 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;…."

[24] 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".

[25] 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 Section83 of the VAT Act.

[26] 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

[27] 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"

[28] 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).

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

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

[30] 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".*

[31] 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".*

[32] 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".

[33] 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".

[34] 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.

[35] 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

[36] 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.

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

[38] 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)".

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

[40] 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.

[41] It was held that the words *"shipped for Exportation" are not, necessarily, restricted to an exportation to foreign countries, but may mean Exportation in its evident sense, i.e. a carrying out of Port, and thus, include carrying commodities from one port to another, within the Kingdom"* and that the words *"the port of Stockton-upon-Tees aforesaid,"* meant the whole port of that name, and was not restricted to the port of the town of Stockton-upon-Tees;

[42] 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: "

[43] As noted, the cases relied on by the Appellant relate to the statutory interpretation given to the term "exportation" in different statutes, which are unrelated to tax statutes, and such decisions cannot in my view, be used to determine the question as to whether the supply of bunker fuel to a ship for its navigation or use during its voyage constitutes an "export" for the

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

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

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

[45] 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 VAT Act. On this basis the Appellant argues that the Imports and Exports (Contriol) Act, No. 1 of 1969 would indicate the statutory criteria applicable for determining whether or not a person is an exporter for the purpose of the Section 7 (1) (a) of the VAT Act, No. 14 of 2002.

[46] 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

[47] The Appellant further argues that the concept of "export" defined in Section 22 of the Imports and Exports (Control) Act is further confirmed by Section 16 of the Customs Ordinance, which indicates the point of time when an export is deemed to have taken place and an exportation of any

goods is made and completed shall be deemed to have had effect when the goods had been shipped on board the ship in which they had been exported. Section 16 of the Customs Ordinance provides s follows:

> *"If upon the first levying or repealing of any duty, or upon the first* ***permitting or prohibiting of any importation or exportation*** *whether inwards, outwards, or coastwise in Sri Lanka, it shall - become necessary to determine the precise time at which* ***an importation or exportation of any goods made and completed*** *shall be deemed to have had effect, such time, in respect of importation, shall be deemed to be the time at which the ship importing such goods had actually come within the limits of the port at which such ship shall in due course be reported and such goods be discharged; and* ***such time, in respect of exportation, shall be deemed to be the time at which the goods had been shipped on board the ship in which they had been exported;*** *and if such question shall arise upon the arrival or departure of any ship, in respect of any charge or allowance upon such ship, exclusive' of any cargo, the time of such arrival shall be deemed to be the time at which the report of such ship shall have been or ought to have been made; and the time of such departure shall be deemed to be the time of the last clearance of such ship with the Director-General for the voyage upon which she had departed".*

[48] 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).

[49] 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.

[50] 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 at the time of the export of goods occurs when the goods have been put on the ship, which constitutes an export notwithsndaning the fact that the ship is within Sri Lankan territorial waters at the time of the delivery of the bunker fuel. 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.

[51] 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".*

[52] 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.

[53] 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.

[54] 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.

[55] 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.

[56] 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".

[57] 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.

[58] 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

[59] The learned Counsel for the Appellant submitted that the Appellant has a special customs entry (bill of entry) passed when it issued marine bunker fuel to foreign ships which are paid in foreign currency and such custom clearance and payment made in foreign currency shall be regarded as evidence that the supply of bunker fuel was an export transaction outside Sri Lanka in terms of the provisions of the Protection of Government Revenue (Special Provisions) Act No. 1 of 2006. The Appellant also relies on the Indian decision in *CIT v .Silver and Arts Palace* (2003) 259 ITR 684 to argue that the customs clearance is evidence that characterises the transaction as an export. It is the position of the Appellant that once the goods are kept in the customs clearance station, then, the goods shall be deemed to have been in the export stream.

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

[61] 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.

[62] 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

[63] 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.

[64] 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.

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

[65] The Appellant argues that the Appellant possesses a licence under Section 5B of the Ceylon Petroleum Corporation Act, No. 28 of 1961 to import, export, sell, supply or distribute marine gas, oil and furnace oil (Vide- paragraph 43 of the written submissions tendered on behalf of the Appellant on 18.10.2019). In my view, the licence granted by the Ceylon Petroleum Corporation under Section 5B of the Ceylon Petroleum Corporation Act, No. 28 of 1961 does not necessarily mean that the supply of bunker fuel shall be treated as an export within the meaning of Section 7 (1) (a) of the VAT Act, No. 14 of 2002.

Central Bank Annual Reports

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

[67] The document (R1) issued by the Central Bank stated that for statistical compilation and economic analysis, bunker fuel and marine fuel selling to foreign ships and aircraft is an export following internationally accepted practices for economic data compilation. It, however, states that this classification is not used for any other purpose as the classification is not made in terms of any law or for the purpose of any law. Accordingly, this document does not help the Appellant.

[68] The Appellant relies on the New Zeeland Court of Appeal case in *Commissioner of Inland Revenue v. International Importing Limited* (1972) NZLR 1095 in support its position that the word “export” is complete when

(i) taking the goods out of the country and (ii) sending them or causing them to be sent out. The question in the said case was whether, for the purposes of Section 129B of the Land and Income Tax Act *1954*, the goods sold by a "duty free shop" operated by respondent company, to travellers departing overseas, and the subsequent carriage of those goods beyond New Zealand by the purchasers, constituted the "export" of those goods by the company, entitling it to the deduction given for income tax purposes by s 129B. Section129B of the said Act reads as follows:

"Export goods" means goods exported from New Zealand by a taxpayer, being goods—

(a) Which were sold or disposed of by the taxpayer; and

(b) Of which the taxpayer was the owner at the time of the sale or disposal—

but does not include—

(c) Goods exported by way of gift:

(d) Goods taken or sent out of New Zealand with the intention that they will at some later time be brought or sent back to New Zealand:

(e) Goods imported into New Zealand and subsequently exported from New Zealand after being processed, packed, graded, or sorted in New Zealand or incorporated with another product in New Zealand, if the consideration receivable for the sale or disposal of the goods so exported is less than fifteen percent greater than the cost of all imported goods included in the goods so exported, such cost being the landed cost of those imported goods (exclusive of New Zealand customs duty) at the time when they were imported into New Zealand:

(f) Goods imported into New Zealand and subsequently exported from New Zealand in the same form without processing, packing, grading, or sorting thereof in New Zealand:

(g) Goods exported to the Cook Islands (including Niue) or to the Tokelau Islands:

(h) Animals, animal products and by-products (including dairy produce, meat, meat products, wool, and their respective by-products), newsprint, and minerals:

Provided that the Governor-General may from time to time, by Order in Council, exclude any such goods or any specified class or classes of such goods from the operation of this paragraph:

(i) Any other goods specified by the Governor-General from time to time by Order in Council:"

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

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

> *"The section contains no definition of "export" nor can it be contended that this word is a term of art. It must therefore be given its ordinary meaning, or perhaps I should say one of its ordinary meanings, to be selected according to context. Clearly, if it is given one of its ordinary meanings the travellers may be said to have "exported" the goods themselves, for they carried them (if small enough) 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 are remembered The legislation is plainly addressed to those persons, and to those alone, who increase the foreign exchange reserves of New Zealand, by sending goods abroad, or causing them to be sent abroad, receiving in return foreign exchange for which they are bound to account, and do account, to the Reserve Bank. It is clear that even if the travellers may be regarded as themselves "exporting" the goods, the word "export" where used in the section must also clearly be applicable to those, such as respondent company, who send the goods abroad, or cause them to be sent, with this result. Surely a dairy company "exports" butter, and a fruit cannery "exports" its manufactures, whether it*

ships the goods to its own order in another country, or sells here f.o.b. to a foreign person or corporation, provided simply that the transaction is one in which it causes goods to be sent abroad in exchange for foreign currency which it receives and for which it accounts. This 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".

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

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

1. The Respondent in that case owned and operated a duty free shop at the "Christchurch International Duty Free Shops" and the passengers were allowed to purchase goods from a duty free shop situated in the departure lounge of the airport to be taken out of New Zeeland. The question that was decided was whether or not it was the respondent or the passengers who is to be regarded, for the purposes of s 129B, as having "exported" the goods which it sold to the travellers. In the present case, the issue was whether or not the supplier of bunker fuel to a ship constitutes an export for the purpose of the 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 of the duty free shop owned by the respondent The goods, in the open bags were handed to the passenger at the call to board the aircraft by the employees of the respondent on production of their copy of the sales docket in the "clear area" at the airport and in the presence of Customs Officers. There is no such conditions to be fulfilled for the charging of income tax under the VAT Act;

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

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

[74] 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.

[75] 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.

[76] 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).

[77] 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 in 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).

[78] 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.

[79] 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.

[80] 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 (Contriol) Act or the Customs Ordinance. The relevant statutory provisions with regard to levy of customs duties are found in the Customs Ordinance and the relevant statutory provisions with regard to the charging of VAT are found in the VAT Act.

[81] 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.

[82] 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.

[83] 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.

[84] 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 Inports 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.

[85] 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.

[86] 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).

[87] 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

[88] 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 on page 18 of the Report on Bunkers, stores, ballast and damage reads as follows:

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

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

[89] 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 customs 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…".*

[90] 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.

[91] 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.

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

for local consumption, which does not signify an "export" within the meaning of Section 7 (1 (a) of the VAT Act.

Destination Principle

[93] 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.

[94] 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).

[95] 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.

[96] 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.

[97] At the hearing, the learned Additional Soliciter-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,

[98] 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.

[99] 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.

[100] 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.

[101] 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).

[102] In the instant case, there is nothing to indicate that the bunker fuel supplied by the Appellant to a ship was bound to a foreign destination point out of Sri Lanka as there is no evidence whatsoever, indicating that the destination of the ship was any foreign place outside Sri Lanka. A perusal of the Bunker Delivey Note 1485 (A&) reveals that although the bunker delivery note requires 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) on the ship or the Bunkering Supplier. Column 1 of the Bunker Delivery Note reads as follows:

Customer		Nomination	
Vessel		Date of Delivery	
IMO No.		Destination Port/Position	
Delivery Port		Vessel Alongside	

[103] 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 destination is conspicuously absent in the present case. The argument of the Appellant that the moment the bunker fuel was taken out of the Sri Lankan territory, the export was complete cannot be presumed and

accepted in the absence of documentary evidence indicating the next foreign destination.

[104] 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. 1

Did the Assessor comply with Section 29 of the VAT Act relating to the communicating of reasons for the taxable period?

[105] The Appellant in its written submissions has contended that the VAT assessments for the periods under appeal are void *ab initio* since the said assessments have been made contrary to the principles of natural justice and in breach of the express statutory requirements imposed by Section 29 of the VAT Act as amended.

[106] The Appellant's position is that the Assessor had not provided reasons for rejecting the return furnished by the Appellant for the taxable periods under appeal"at or about the time the assessment was made". The Appellant relied on the decision in *Wijewardene v. Kathiragamar* (1991) IV Reports of Sri Lanka Tax Cases 313, *New Portman Limited v. Jayawardena* (1984) IV Reports of Sri Lanka Tax Cases 236 and the decision of the Supreme Court in *Fernando v. Ismail* (1982) IV Reports of Sri Lanka Tax Cases in support its position.

[107] Section 29 of the VAT Act (as amended) requires the Assessor to provide reasons for rejecting a return submitted by a taxpayer. It provides as follows:

> *"Where the assessor does not accept a return furnished by any person under Section 21 for any period and makes an assessment or an additional assessment on such person for such taxable period under Section 28 or under Section 31, as the case may be, the Assessor shall communicate to such person by registered letter sent through the post why he is not accepting the return".*

[108] It is settled law that the communication of reasons for rejecting a return is mandatory and has to be done "at or about the time' an assessment

is made to an estimated income (*Wijewardene v. Kathiragamar* (1991) IV Reports of Sri Lanka Tax Cases 313, *New Portman Limited v. Jayawardena* (1984) IV Reports of Sri Lanka Tax Cases 236 and the decision of the Supreme Court in *Fernando v. Ismail* (1982) IV Reports of Sri Lanka Tax Cases).

[109] The Assessor has issued the assessment under Section 22 (8) of the VAT Act. 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. It reads 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".*

[110] The Assessor is entitled to make an assessment under Section 22 (8) notwithstanding the provisions of Section 33, to make an assessment 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 and made the assessments under the said Section.

[111] The Assessor's letter dated 15.07.2003 (A2) states that it had been posted to the Appellant's registered address by Registered Post and the Appellant has referred to the said letter in its letter addressed to the Respondent on 01.09.2003 (A4c). The Appellant has stated in its letter dated 01.09.2003 as follows:

> ***"In this regard, we refer to the Assessor's letter dated 15.07.2003 and the subsequent assessments served on our client dated 02.08.2003***.
>
> 1. *The Assessor by his letter dated 15.07.2003 presumably served under section 29 of the Value Added Act has come to the wrongful conclusion that the supply of fuel to foreign vessels is not an export of goods as contemplated by the Value Added Tax Act, No. 14 of 2002. As such he*

has wrongfully assessed additional VAT by disallowing the input VAT claimed by our client;

2. *The Assessor' s letter requesting the Returns filed by our client was received on the 08th August although the letter has been dated 15.07.2007. The Assessments are dated 02.08.2003, thus, leaving no time for our client to explain the basis adopted to pay value added tax, which action by the Assessor undermines the whole basis if Section 29 of the Act".*

[112] A perusal of the said letter reveals that the Appellant has not denied the receipt of the Assessor's letter dated 15.08.2007 but the complaint of the Appellant was that assessments have been made without giving reasons and thus, it was not an intimation under Section 29 of the VAT Act. A perusal of the letter dated dated 01.09.2003 (A4 (e) of the Appellant further reveals that the Appellant's complaint was that the reasons given for rejecting the returns did not comply with the mandatory provisions of section 29 of the VAT Act.

[113] In the present case, the Assessor by letter dated 15.07.2003 rejected the returns submitted by the Appellant and provided reasons for not accepting the returns (A2). A perusal of the said letter clearly reveals that the Assessor had given reasons for rejecting the returns submitted by the Appellant and held that for the said reasons, the supply of the bunker fuel cannot constitute an export (Vide- paragraph 3 of the judgment for the reasons given by the Assessor).

[114] The Appellant has claimed the input credit on the basis that the Appellant is entitled to zero rated status, but the Assessor for the reasons, given in his communication dated 15.07.2003 has clearly stated that the supply of bunker fuel cannot constitute an export and therefore, the Appellant is not entitled to the zero rated status under Section 7 (1) (a) of the VAT Act. The Assessor has further that for those reasons, the refund in excess of the amount due, cannot be claimed.

[115] In the result, I hold that the Assessor has communicated his reasons for the rejection of the relevant assessments as required by Section 29 of the VAT Act and therefore, the question of law No. 1 is answered in the favour of the Respondent.

Conclusion & Opinion of Court

1. Yes

2. No, for the reasons morefully enumerated in this judgment, the supply of bunker fuel to vessels in the present case does not constitute an export under Section 7 (1) (a) of the VAT Act, No. 14 of 2002 (as amended. The Appellant has failed to satisfy the requirements necessary to support a claim for zero rated supply under Section 7 (1) (a) of the VAT Act, No. 14 of 2002.

[117] For those reasons, subject to our observations in paragraphs 97, 98 and 99 of this judgment, the determination made by the Board of Review 17.07.2007 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