

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

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

Lanka Marine Services (Private) Limited,
4, Leyden Bastian Road,
Colombo 10.

And also, of

No.117, Sir Chittampalam A. Gardiner
Mawatha,
Colombo 02.

APPELLANT

CA No. CA/TAX/0021/2017
Tax Appeals Commission
No. TAC/IT /046/2013

v.

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

RESPONDENT

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

COUNSEL : Dr. Shivaji Felix with Nivantha
Satharasinghe for the Appellant.

Farzana Jameel, SASG, P.C. with
Nirmalan Wigneswaran DSG for the
Respondent.

WRITTEN SUBMISSIONS : 10.09.2018 & 12.05.2020 (by the
Appellant)

18.11.2019 & 22.02.2022 (by the
Respondent)

ARGUED ON : 14.12.2021

DECIDED ON : 07.04.2022

M. Sampath K. B. Wijeratne J.

Introduction

The Appellant, Lanka Marine Services (Pvt) Ltd, is a limited liability company incorporated in Sri Lanka, engaged in the business of importation and supply of marine lubricants and fuel.

The Appellant submitted its return of income for the year of assessment 2011/2012 claiming a tax exemption under Section 9 (g) and 13 (b) (iii) of the Inland Revenue Act No. 10 of 2006, as amended. (hereinafter referred to as ‘the Inland Revenue Act’ and ‘the Act’)¹

The Assessor, by letter dated 2nd August 2013 rejected the return on the ground that the Appellant is not an exporter and/or a consignor/consignee in terms of Section 13 (b) (iii) and 42 of the Act. Accordingly, the Assessor, by

¹ At pages 56-59 of the appeal brief

the same letter communicated his reasons for not accepting the return, in terms of Section 163 (3) of the Inland Revenue Act, which also contained an estimated amount of assessable income and the tax payable for the year of assessment 2011/2012².

Thereafter, the Notice of Assessment dated 18th November 2013 was issued to the Appellant³.

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

Admittedly, the petition of appeal had been handed over to the CGIR on the 13th December 2013⁴. Thereafter, the Assessor, S. A. C. Geethani has sent the acknowledgement of the appeal dated 24th December 2013, made under Section 165 (1) of the Inland Revenue Act, to the Managing Director of the Appellant company⁵.

The CGIR heard the appeal and made his determination confirming the assessment and the reasons for the determination were communicated to the Appellant company by letter dated 23rd November 2015.⁶

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

The TAC by determination dated 17th August 2017 confirmed the determination of the Respondent, CGIR, and dismissed the appeal of the Appellant⁷.

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

² At pages 47 to 51 of the appeal brief

³ At page 54 of the appeal brief

⁴ At pages 57 and 59 of the appeal brief

⁵ At page 55 of the appeal brief

⁶ At pages 92-99

⁷ At pages 174 to 190 of the appeal brief

1. *Is the determination of the Tax Appeals Commission time barred?*
2. *Did the Tax Appeals Commission err in law when it came to the conclusion that the determination made by the Commissioner General of Inland Revenue was not time barred under and in terms of Section 165 (14) of the Inland Revenue Act, No. 10 of 2006 (as amended)?*
3. *Did the Tax Appeals Commission err in law when it came to the conclusion that the Appellant was not entitled to the tax concession conferred by Section 13 (b) (iii) of the Inland Revenue Act, No. 10 of 2006 (as amended)?*
4. *In the alternative, if Section 13 (b) (iii) of the Inland Revenue Act, No. 10 of 2006 (as amended), is inapplicable, did the Tax Appeals Commission err in law when it came to the conclusion that the Appellant was not entitled to the concessionary tax rate conferred by Section 52 of the Inland Revenue Act, No. 10 of 2006 (as amended)?*
5. *In view of the facts, circumstances of the case did the Tax Appeals Commission err in law when it came to the conclusion that it did?*

1. *Is the determination of the Tax Appeals Commission time barred?*

In *Amadeus Lanka (Private) Limited v. Commissioner General of Inland Revenue*⁸, we have already made a decision on the same issue. Therefore, I will adopt the same line of reasoning to this case as well, wherever those are relevant.

The learned Counsel for the Appellant contended that the determination of the TAC is time barred by operation of law and therefore, the appeal must be deemed to have been allowed.

⁸ CA/TAX/04/2019 decided on the 30th July 2021

Section 10 of the TAC Act, as amended, provides that the TAC shall hear and determine all appeals within 270 days from the date of the commencement of sittings for the hearing of the appeal.

The learned Counsel for the Appellant submitted that the time bar starts to run not from the commencement of sittings for the first oral hearing, but from the day the Commission sat for deciding the preliminary matters even though it is not an *inter-parte* hearing.⁹ His contention was that such a sitting constitutes commencement of sittings for hearing the case and is a trigger for time bar. Be that as it may, the learned Counsel has failed to establish that there had been such a sitting in the instant case. Hence, the question as to whether date of commencement of sittings should start from the date the Commission sat for deciding preliminary matters is not a matter which arises for determination in the instant case. This allows me to proceed on the basis that the first date of oral hearing was on the date stated in the determination.

In the case in hand, the determination of the TAC itself states that the date of first hearing was 13th October 2016 and the determination had been made on the 17th August 2017. Hence, it is apparent that the decision has taken more than 270 days.

The learned Senior State Counsel did not contest this position and the Court is convinced that the TAC indeed over run the statutory time frame.

Next, I will proceed to the issue as to whether compliance with the aforesaid time frame is mandatory, or merely directory.

On a plain reading of Section 10 it appears that the Legislature has used the word “shall”, in enacting the provision of time bar.

However, as the law stands, mere presence of the word “shall” itself does not make any matter mandatory.

N.S. Bindra, in his work titled *Interpretation of Statutes*, has stated as follows;¹⁰

“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

⁹ At paragraph 36 and 37 of the 2nd written submission filed by the Appellant on the 12th May 2020

¹⁰ N. S. Bindra, *Interpretation of Statutes*, Eighth Edition, 1997. at p.1030

attending to the whole scope of the statute. For ascertaining the real intention of the Legislature, the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered.

If the imperative meaning were to defeat the purpose of the provision, then the word 'shall' must be considered as not mandatory.

Hence, it is obvious that mere presence of the word “shall” does not make a provision mandatory and the object of the legislation has to be considered.

The learned Counsel for the Appellant strenuously contended that the fact the Legislature amended the time frame provided in Section 10 not only once, but twice, especially with retrospective effect, manifest that the intention of the Legislature was to make the time bar to be regarded as mandatory.

Adverting to the argument on amendments made to the Section 10 of the Act, with retrospective effect, I will first reproduce the relevant part of Section 10 of the TAC Act (as it was before the amendment), excluding the proviso.

*10. 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** (emphasis added).*

Thereby the Legislature has intended the TAC to conclude an appeal within hundred and eighty days from the date of the commencement of the hearing of the appeal.

Subsequently, Section 10 has been amended by amendment Act No. 4 of 2012 to read as follows:

*10. The Commission shall hear all appeals received by it and make its **determination** in respect thereof, **within two hundred and seventy days of the date of the commencement of the hearing of the appeal** (emphasis added).*

By this amendment the Legislature extended the time granted to the TAC to determine an appeal by 90 days.

Section 10 has been subject to a further amendment by amendment Act No. 20 of 2013 which read thus:

*10. The Commission shall hear all appeals received by it and make its decision 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** (emphasis added).*

By this amendment, the Legislature has reduced the time limit granted to the TAC to determine an appeal by enacting that the time should commence not from the commencement of hearing the appeal, but from the commencement of its sitting for hearing the appeal.

On a careful consideration of the above amendment, I am not inclined to accept the argument of the learned Counsel for the Appellant. The Legislature, at first having extended the 180-day period from the **commencement of the hearing** up to 270 days, later reduced the said period by enacting that the time should take effect from the **commencement of sittings for the hearing**, which would proceed the hearing itself.

In the case of *D.M.S. Fernando and Another v. Mohideen Ismail*¹¹, Samarakoon C.J., citing *Maxwell on the Interpretation of Statutes (12th Edi.)*, presented a three-limbed test that could be made use of in determining the intention of the Legislature:

“Then again, it is said that to discover the intention of the Legislature it is necessary to consider - (1) The Law as it stood before the Statute was passed.

¹¹ [1982] 1 Sri. L.R. 222, at p. 229

(2) *The mischief if any, under the old law which the Statute sought to remedy* and (3) *The remedy itself.*”

Applying the above test to the case at hand, it appears that the Legislature has altered the time frames existed by extending and reducing as it saw fit within which the TAC is expected to arrive at a determination. Therefore, does not appear to me that it had been done to remedy any obvious mischief which existed, other than an alteration of the time granted to the TAC to decide an appeal. On the other hand, one cannot argue that the mischief sought to be remedied was the delay in the appeal process since the 180-day time frame had been extended up to 270 days at first and thereafter, it had been reduced again to run from the commencement of sittings for the hearing. Hence, it is my considered view that the intention of the Legislature in amending the above provisions twice was merely to redefine the time granted to the TAC to determine an appeal.

Furthermore, it is important to note that although the Legislature has amended the relevant provision twice Legislature, in its wisdom has not made the time limit mandatory. If the intention of the Legislature was that the failure of the TAC to adhere to the time limit should result the appeal being abated and the tax is no longer recoverable, as it was submitted by the learned Counsel for the Appellant¹², the Legislature could have specifically enacted it to be so.

In the case of *K. Nagalingam v. Lakshman de Mel*,¹³ Sharvananda J. (as His Lordship then was) cited the following extract from the scholarly authority, *Smith, Judicial Review of Administrative Action (2nd Ed. at page 126)*, in determining whether a statutory time limit for the discharge of a duty was mandatory:

“The whole scope and purpose of the enactment must be considered, and one must of that provision to the general object intended to be secured by the Act (emphasis added).”

His Lordship also cited the following excerpt from *Maxwell-11th Ed. at page 369*:

¹² At paragraphs 24 of the written submissions filed on 10th September 2018

¹³ 78 N.L.R. 231, at pp.236-237

*“Where the prescriptions of a statute relate to the performance of a public duty, and where 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, yet not promote 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, **when 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).”*

Having scrutinized the above scholarly authorities, His Lordship concluded on the time limits enacted in the Termination of Employment Act, as follows:¹⁴

*“The object of the provision relating to the time limit in section 2 (2) (c) is to discourage bureaucratic delay. That provision is an injunction on the Commissioner to give his decision within the 3 months and not to keep parties in suspense. Both the employer and the employee should, without undue delay, know the fate of the application made by the employer. But the delay should not render null and void the proceedings and prejudicially affect the parties, as the parties have no control over the proceedings. It could not have been intended that the delay should cause a loss of the jurisdiction that the Commissioner had, to give an effective order of approval or refuse. In my view, a failure to comply literally with the aforesaid provision does not affect the efficacy or finality of the Commissioner’s order made thereunder. **Had it been the intention of Parliament to avoid such orders, nothing would have been simpler than to have so stipulated** (emphasis added).”*

His Lordship affirmed the above decision in the subsequent case of *Ramalingam v. Thangarajah*,¹⁵ when deciding that the time limits laid down

¹⁴ *Ibid.* at p.237

¹⁵ [1982] 2 Sri.L.R. 693, at p.703

in the Primary Courts Procedure Act were to be construed as directory, and not mandatory.

I am unable to assume that there was an oversight on the part of the Legislature, in drafting and amending Section 10 of the TAC Act, not specifying the consequences to follow when the TAC does not strictly comply with the statutory time limit. This is particularly so since, as the learned Counsel for the Appellant himself submitted that, the relevant section has been amended twice. Hence, it is apparent that the Legislature having had two opportunities to specify the consequences to follow non-compliance, saw fit not to do so.

In the case of *Mohideen v. The Commissioner General of Inland Revenue*, (C.A.)¹⁶ His Lordship Gooneratne J. made a similar observation when considering the intention of the Legislature regarding the time limit available for the Board of Review (which was the body that was replaced by the TAC) to reach its determination:

*“If it was the intention of the legislature that hearing (sic) should be concluded within 2 years from the date of filing the petition or that the time period of 2 years begins to run from the date of filing the petition, **there could not have been a difficulty to make express provision, in that regard** (emphasis added).”*

Another argument advanced by the learned Counsel for the Appellant was that the avoidance of doubts clause found in Section 15 of the TAC (Amendment) Act becomes superfluous if the time frame was intended to be directory.

However, I disagree with this argument in light of the facts set out below.

By Amendment Act No. 20 of 2013, the proviso to Section 10 of the TAC Act was amended by extending the time limit granted to the Commission to determine an appeal transferred from the Board of Review, up to twenty-four months; twice the time limit which existed previously.

In the same amendment, by the introduction of Section 15, the Legislature enacted that the TAC has power to hear and determine any pending appeal

¹⁶ 2015 [B.L.R] Vol. XXI p. 171, decided on 16.01.2014, at p.18

that was deemed to have been transferred to the Commission from the Board of Review under Section 10 of the principal Act, notwithstanding the expiry of twelve months granted for its determination.

Since the amendment to Section 10 was brought in with retrospective effect, in any event, the twenty-four-month period will apply to all appeals transferred from the Board of Review. Therefore, the introduction of Section 15 of the amendment will not serve any meaningful purpose and appears to be redundant. Nevertheless, in my view, Section 15 manifests that the intention of the Legislature, by introducing Amendment Act No. 20 of 2013, is not to make the deadlines mandatory.

On the other hand, one may argue that the application of Section 15 of the amendment is limited to the proviso in Section 10 and that therefore, the Legislature has manifested its intention that the time frame in the proviso to be merely directory, but that which is in the main part to be mandatory. Yet, this cannot be a valid argument since in the circumstances, the Legislature has extended the time frame in the proviso and reduced it in the main part, by the same Amendment. When the time frame is brought down, the question of overrunning the existing time frame will not arise, and therefore, a necessity to enact as above will also not arise.

Therefore, I am not prepared to accept the contention of the learned Counsel for the Appellant, that the fact that the Legislature has given retrospective effect to the amended provisions means that it intended the time limit contained in Section 10 to be mandatory.

Although fiscal statutes generally require strict interpretation, N. S. Bindra has stated that:¹⁷

‘The principle that fiscal statutes should be strictly construed does not rule out the application of the principles of reasonable construction to give effect to the purposes or intention of any particular provision as apparent from the scheme of the Act, with the assistance of such external aids as are permissible under the law.’

¹⁷ N. S. Bindra, *Interpretation of Statutes*, Eighth Edition, 1997. at p.674-675

'We must also, of course, have regard to the subject-matter with which the Legislature is dealing and the first thing to be done is, having regard to that subject-matter, to find out what the Legislature has said as a matter of English, that is, to discover the grammatical construction of the words used, of course giving to words of art their technical meaning.'

Upon a consideration of some other fiscal statutes enacted by our Parliament, I observe that the Legislature, in its wisdom, had specifically enacted in Section 165 (6) of the Inland Revenue Act No. 10 of 2006, as amended, (hereinafter referred to as the 'Inland Revenue Act') that the failure to acknowledge an appeal within thirty days of its receipt should result in the appeal being deemed to have been received on the day on which it is delivered to the CGIR. Further, Section 165 (14) of the same Act stated that the failure to determine an appeal within two years from the date of its receipt should result in the appeal being allowed and tax charged accordingly. Similarly, Section 34 (8) of the VAT Act also provided that the failure to determine an appeal within the stipulated period should result in the appeal being allowed and tax charged accordingly.

Inland Revenue Act No. 24 of 2017, which is in force as at now, also provides for an Administrative Review of an assessment by the CGIR. However, unlike in the previous Inland Revenue Act No. 10 of 2006, no time frame has been specified in Section 139, for the CGIR to deliver his decision. Nevertheless, Section 140 provides that within thirty days from the date of the decision or upon lapse of ninety days from the request being made for an administrative review, the tax payer is entitled to make an appeal to the TAC. Hence, it becomes clear that while the breach of certain time limits is accompanied by remedies or sanctions, the breach of others is not. It is important to note that, Section 144 of the 2017 Act provides that if the TAC fails either to determine or to respond to an appeal filed by a person within ninety days from the appeal request, the Appellant is entitled to appeal to the Court of Appeal.

On the above analysis, it is clear that in the new Inland Revenue Act (No. 24 of 2017), the Legislature has taken out the previously existed penal consequences on the CGIR for failure to comply with the statutory time limit. Nevertheless, upon such failure, the Appellant has been granted a remedy

through a direct right of appeal to the TAC, and upon the failure of the TAC to respond to such an appeal request within the specified time limit, the Appellant has been granted a direct right of appeal to the Court of Appeal. Therefore, it can be seen that though the Legislature has in the case of the Inland Revenue Act No. 24 of 2017, introduced a remedy where the TAC fails to respond within the specified time limit. However, in the case of the TAC Act, despite twice availing itself of the opportunity to amend the law, the Legislature has not specified a remedy in case of non-compliance.

In light of the above, it is my considered view that the Legislature, although it has amended Section 10 of the TAC Act twice, intentionally refrained from introducing a penal consequence and/or a remedy for the failure of the TAC to comply with the specified time limit. Therefore, I am not in favour of the argument forwarded by the learned Counsel for the Appellant, that the fact that the Legislature has amended Section 10 twice means that it intended the time limit contained therein to be mandatory.

Having argued extensively, as above, that the time limit specified for the TAC is mandatory, the learned Counsel for the Appellant submitted that when the two hundred and seventy day time limit is exceeded, the returns submitted by the Appellant shall take effect, thus nullifying both the Assessor's assessment and the CGIR's confirmation of the said assessment.

In my view, this submission of the learned Counsel for the Appellant that if this Court were to hold that the TAC is *functus officio* in determining an appeal after the two hundred and seventy day period has lapsed, the assessment should be rendered void and the return submitted by the Appellant should take effect, is untenable. Should the State, and at large the citizens of this country, lose revenue or the taxpayers themselves lose the opportunity to be allowed the relief sought due to the fault of the TAC?

The judgment of Samarakoon C.J. in the case of *K. Visvalingam and Others v. Don John Francis Liyanage*,¹⁸ addresses the above problem, in the context

¹⁸ Decisions on Fundamental Rights Cases, 452, at p.468

of the time limit applicable to a Fundamental Rights petition before the Supreme Court of Sri Lanka:

*“These provisions confer a right on the citizen and a duty on the Court. If that right was intended to be lost because the Court fails in its duty, the Constitution would have so provided. It has provided no sanction of any kind in case of such failure. To my mind, it was only an injunction to be respected and obeyed, but fell short of punishment if disobeyed. I am of the opinion that the provisions of Article 126 (5) are directory and not mandatory. **Any other construction would deprive a citizen of his fundamental right for no fault of his** (emphasis added).”*

Sharvananda J. (as His Lordship was then) made a similar observation in the previously cited case of *K. Nagalingam v. Lakshman de Mel*,¹⁹ regarding an order made by the Commissioner of Labour after the expiry of a statutory time limit:

*“To hold that non-compliance with the time limit stipulated by section 2 (2) (c) renders the Commissioner's order of approval - or refusal void will cause grave hardship to innocent parties. **Parties who have done all that the statute requires of them should not lose the benefit of the order** because it was made after the final hour had struck with the passage of the 3 months (emphasis added).”*

I find that Their Lordships’ comments are relevant to the instant case, in illustrating the injustice that either party could suffer if the TAC were to be deemed *functus officio* upon expiry of the time limit in question. Furthermore, when an appeal has been lodged before the TAC, it necessarily follows that the appellant would only have done so with significant confidence in a positive outcome. If that be so, there would be no need for the appellant, upon the expiry of the time limit, to demand that the determination of the TAC be time barred, since there would still be every chance of their appeal being successful and no fundamental right would be violated owing to the delay. Even if some other significant right were to be infringed upon, it would not

¹⁹ *Supra* note 13, at p.237

weigh so heavily as to vitiate the right of either party to receive a considered determination from the TAC.

It is therefore the opinion of this Court that there is no statutory construction whereby either the tax return of the appellant or the assessment of the Assessor (as confirmed by the CGIR) is reinstated, where the TAC has overrun its statutory time frame. It is therefore best left to the Legislature to specify in no uncertain terms what the effect, if any, of a time bar would be, in order to avoid any inequitable outcomes as illustrated above.

The next important issue raised by the learned Counsel for the Appellant is on the doctrine of *stare decisis*.

In the case of *Walker Sons & Co. (U.K.) Ltd. v. Gunathilake and Others*,²⁰ Thamotheram J., having considered the Judgement by Basnakyake C.J. in the case of *Bandahamy v. Senanayake*,²¹ observed that as a rule, two judges sitting together follow the decision of two judges and where two judges sitting together are unable to follow a decision of two judges, the practice is to reserve the case for the decision of a fuller bench.

Focusing on the issue at hand, there are two conflicting decisions on time bar by numerically equal benches, namely two judges each of this Court. Hence, another numerically equal bench of this Court is at liberty to follow either of those two decisions, provided that they hold the same precedential value.

The Learned Counsel for the Appellant invited this Court to depart from the judgement of this court *Kegalle Plantations PLC v. Commissioner General of Inland Revenue*²² and *Stafford Motor Company Private Limited v. Commissioner General of Inland Revenue*²³ follow the decision in the case of *Mohideen*, out of the two conflicting decisions of numerically equal benches of this Court, regarding whether the time bar on TAC is mandatory or directory²⁴.

²⁰ [1978-79-80] 1 Sri.L.R. 231

²¹ 62 N.L.R. 313

²² CA Tax 09/2017

²³ CA Tax 10/2017

²⁴ At paragraph 19 and 26 of the 2nd written submission filed by the Appellant on the 12th May 2020

In the previously cited case of *Mohideen v. The Commissioner General of Inland Revenue* (hereinafter referred to as ‘*Mohideen*’),²⁵ it was stated that the time limit prescribed for the determination of an appeal by the Board of Review would be mandatory, if counted from the date of commencement of the oral hearing. Gooneratne J. formulated the particular paragraph under consideration as follows:²⁶

*“I find that an area is left uncertain for interested parties to give different interpretation on time bar. Hearing need (sic) to be in camera and Section 140 subsection 7, 8 & 9 provide for adducing evidence. As such in the context of this case and by perusing the applicable provision, it seems to be that the hearing contemplated is nothing but 'oral hearing'. One has to give a practical and a meaningful interpretation to the usual day to day functions or steps taken in a court of law or a statutory body involved in quasi judicial functions, duty or obligation. If specific time limits are to be laid down the legislature need to say so in very clear 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. **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** (emphasis added).”*

However, in the subsequent case of *Stafford Motor Company (Private) Limited v. The Commissioner General of Inland Revenue* (hereinafter referred to as ‘*Stafford Motors*’),²⁷ Their Lordships declined to follow the reasoning in *Mohideen* on the ground that it is *obiter dicta*.

Black’s Law Dictionary provides the following definition for *obiter dictum*.²⁸

²⁵ *Supra* note 23

²⁶ *Ibid.* at p.15

²⁷ CA (TAX) 17/2017, decided on 15.03.2019. Prior to *Stafford Motors*, this Court initially reached the same conclusion regarding *Mohideen* in the case of *Kegalle Plantations PLC v. The Commissioner General of Inland Revenue* [CA (TAX) 09/2017, decided on 04.09.2018]. This stance was further affirmed following *Stafford Motors*, in the case of *CIC Agri Businesses (Private) Limited v. The Commissioner General of Inland Revenue* [CA (TAX) 42/2014, decided on 29.05.2020]

²⁸ B. A. Garner and H. C. Black, *Black’s Law Dictionary*, Ninth Edition, 2009. at p.1177

‘[Latin “something said in passing”] A judicial comment made while delivering a judicial opinion, but one that is **unnecessary to the decision in the case** and therefore not precedential (although it may be considered persuasive). Often shortened to dictum or, less commonly, obiter (emphasis added).’

The learned Counsel for the Appellant submitted that even if the aforementioned ruling in *Stafford Motors* and that the relevant opinion in *Mohideen* (as reproduced with emphasis on the final two sentences) is obiter dicta, it cannot be disregarded since it constitutes relevant judicial dicta which sheds light on the matter in issue. (*vide* paragraph 23 and 26 of the 2nd written submission filed by the Appellant on the 12th May 2020)

The learned Senior State Counsel invited this Court to follow the judgement in *Stafford Motors*²⁹ so that the certainty established by the said case on the doctrine of *stare decisis* is not disturbed.

However, it was observed by His Lordship Justice Soza (sitting in the Court of Appeal) in the case of *Ramanathan Chettiar v. Wickramarachchi and Others* that:³⁰

“The doctrine of *stare decisis* is no doubt an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs as well as a basis for orderly development of legal rules. Certainty in the law is no doubt very desirable because there is always the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into. Further there is also the especial need for certainty as to the criminal law. While the greatest weight must be given to these considerations, certainty must not be achieved by perpetuating error or by insulating the law against the currents of social change.”

I therefore find that it is pertinent to consider whether or not Their Lordships in *Stafford Motors* had been correct in holding that the statement under

²⁹ *Supra* note 23

³⁰ [1978-79] 2 Sri.L.R. 395, at p.410

consideration in *Mohideen* does not form part of the *ratio decidendi* of the judgement in that case, and that it is therefore *obiter dictum*. If indeed this Court were to find that the said statement in *Mohideen* is *obiter*, then it would not set a binding precedent on the matter in issue in this case, under this particular question of law.

While I agree with the Appellant's observation that Their Lordships in *Mohideen* had observed as above while answering a specific question of law raised by the Appellant, closer scrutiny of the final two sentences of that paragraph reveal that they are not essential to the finding of the Court. The finding of the Court was that the Board of Review had not erred in law as regards the time available for it to arrive at its determination. The matter in issue in deciding that particular question of law was whether or not the two-year time limit applicable to the Board of Review was to be counted from the date of receipt of the Petition of Appeal by the Board, or whether it was to be counted from the date of commencement of the hearing of the appeal. That matter was decided in favour of the Respondent, with the Court holding the latter to be the case.

In the above context, the final two sentences, "*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.*", constitute a conditional observation by Their Lordships. Its nature is hypothetical, and does not reflect the facts of the case, as the time period did not exceed two years from the date of oral hearing. In other words, if these two sentences were taken out of the judgement, there would be no change whatsoever either to the line of reasoning in *Mohideen*, or to the outcome. Therefore, though it was argued by the learned Counsel for the Appellant that these two sentences are plainly relevant in deciding the instant case, they do not form part of the *ratio* in *Mohideen*.

I therefore consider that the hypothetical conclusion arrived at by Their Lordships in *Mohideen* is indeed "unnecessary to the decision in the case". Therefore, in keeping with the definition I have provided above, and in agreement with Their Lordships who have pronounced the decision in *Stafford Motors*, it is my view that the particular statement in *Mohideen* (as reproduced and emphasised on above) is indeed *obiter dictum*.

Thus, for the reasons enunciated above in this judgement, I would prefer to follow the judgement in the case of *Stafford Motors*, and I hold that the time limit prescribed in Section 10 of the TAC Act is merely directory.

In concluding my reasoning on the first question of law, I am indeed mindful of the contention by the learned Counsel for the Appellant that the two hundred and seventy day time frame cannot be devoid of meaning. I am aware that a lack of substantial compliance with the said time frame may inconvenience the taxpayer, especially where the time frame is overrun by many years. In the case of *Wickremaratne v. Samarawickrema And Others*,³¹ Silva J. (as His Lordship then was) stated that:

“In statutory interpretation there is a presumption that the Legislature did not intend what is inconvenient or unreasonable. The rule is that the construction most agreeable to justice and reason should be given.”

I am of the opinion that a ruling to the effect that the time frame contained in Section 10 of the TAC Act is mandatory, would be inconvenient to the TAC, since delays must be countenanced owing to a variety of circumstances. Furthermore, to declare that the TAC is *functus officio* upon expiry of the time frame would be unreasonable to both parties for the reasons enunciated above. However, that is not to say that this Court endorses significant delays on the part of the TAC, rather, it is merely acknowledging that the construction most agreeable to justice and reason is that the time frame prescribed in Section 10 of the TAC Act it is merely directory. The duty of this Court is not to legislate, but to interpret legislation. Legislation is the prerogative of the Legislature. It is therefore the duty of the Legislature to specify what penal consequence or remedy, if any, must follow a lack of substantial compliance by the TAC with the time frame specified in Section 10 of the TAC Act, so that the parties are not inconvenienced.

Accordingly, having given due consideration to all of the learned Counsel’s submissions on this question of law, I hold that the determination of the TAC is not time barred.

³¹ [1995] 2 Sri.L.R. 212, at p.218.

2. Did the Tax Appeals Commission err in law when it came to the conclusion that the determination made by the Commissioner General of Inland Revenue was not time barred under and in terms of Section 165 (14) of the Inland Revenue Act, No. 10 of 2006 (as amended)?

The parties are not at variance that the appeal had been handed over to the CGIR on 13th December 2013. Thereafter, the Assessor S. A. C. Geethani has acknowledged the appeal by letter dated 24th December 2013.

The CGIR made his determination on the 23rd November 2015, which was forwarded to the Appellant by letter dated 15th December 2015. According to the Appellant, it was received by the Appellant on the 17th December 2015.

The learned Counsel for the Appellant contended that the Assessor who acknowledged the appeal was not statutorily authorized to acknowledge the appeal made to the CGIR and therefore, the acknowledgment is not valid. Accordingly, it should deem to have been received by the CGIR on the day on which it was delivered to the CGIR.

It was submitted that in terms of Section 165 (14) of the Act every appeal has to be determined by the CGIR within a period of two years from the date of its receipt.

Further, the learned Counsel for the Appellant contended that the relevant date for the computation of the statutory time bar of the determination is the date on which the determination was received by the Appellant.

Before I get into the matter in issue, for clarity, I will repeat the relevant sections of the Inland Revenue Act.

165(1)-(5)(...).

(6) The receipt of every appeal shall be acknowledged within thirty days of its receipt and where so acknowledged, the date of the letter of acknowledgement shall for the purpose of this section, be deemed to be the date of receipt of such appeal. Where however the receipt of any appeal is not so

acknowledged, such appeal shall be deemed to have been received by the Commissioner General on the day of which it is delivered to the Commissioner-General.”

(7)-(3)(...).

(14) Every petition of appeal preferred under this section, 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 by the Commissioner-General unless the agreement or determination or such appeal depends on-

a) The decision of a competent court on any matter relating to or connected with or arising from such appeal and referred to it by the Commissioner- General or the appellant;

or

b) The furnishing of any document or the taking of any action-

i. By the appellant, upon being required to do so by an assessor or Assistant Commissioner-General by notice given in writing to such appellant (such notice being given not later than six months prior to the expiry of two years from the date on which the petition of appeal is received by the Commissioner-General); or

ii. By any other person, other than the Commissioner-General or an Assessor or assistant Commissioner.

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.”

(15) (...).

First, I will advert to the question whether the acknowledgement of the appeal by the Assessor S. A. C Geethani is bad in law.

The learned Counsel cited the definition given to the term “*Commissioner General*” in Section 217, the interpretation Section, of the Inland Revenue Act which reads thus;

“217. “Commissioner- General” means the Commissioner-General of Inland Revenue appointed or deemed to be appointed under this Act, and:-

a) In relation to any provision of this Act, includes the Senior Deputy Commissioner-General, a Deputy Commissioner General, Senior Commissioner, a Senior Commissioner and Commissioner who is specially authorized by the Commissioner- General either generally or for some specific purpose, to act on behalf of the Commissioner-General;

b) In relation to Chapter XXIII, includes an adjudicator appointed by the Minister and authorized by the Commissioner-General under that Chapter;”

Accordingly, it was argued that in terms of the Act, a Commissioner General could specially authorize only a Senior Deputy Commissioner General, a Deputy Commissioner General, Senior Commissioner and a Deputy Commissioner. The learned Counsel for the Appellant also cited relevant parts of Section 208 which reads thus;

208(1) (...).

(2) A Senior Deputy Commissioner-General or a Deputy Commissioner-General or a Senior Commissioner or Commissioner exercising or performing or discharging any power, duty or function conferred or imposed on or assigned to the Commissioner-General by any provision of this Act, shall be deemed for all purposes to be authorized to exercise, perform or discharge that power, duty of function until the contrary is proved.

(3) (...).

(4) Notwithstanding anything to the contrary in any other provisions of this Act, a Senior Assessor or Assistant Commissioner of Inland Revenue or an Assessor or Assistant Commissioner of Inland Revenue shall not-

a) Act under Section 163; or

b) Reach any agreement or make any adjustment to any assessment made under subsection (7) of Section 165.

Except with the written approval of the Commissioner-General or any Commissioner.

(5) (...).

It is apparent from Section 208 (4) that the acknowledgement of an appeal under Section 165 (6) is not an act which requires written approval of the CGIR or any Commissioner.

However, the leaned Counsel for the Appellant argued that the deeming provision in section 208 (2) does not permit an Assessor to act on behalf of the Commissioner General.

It is important to note that Section 165(7) itself provides that upon receipt of a valid petition of appeal the CGIR may cause further inquiry to be made by an Assessor or Assistant Commissioner, other than the Assessor or Assistant Commissioner who made the assessment in appeal. Hence, it is clear that the intention of the Legislature in enacting aforementioned provisions in Section 208 and 217 are not to curtail the authority of the CGIR causing an Assessor to do any act which is to be done under the Inland Revenue Act.

The learned Counsel for the Appellant, profusely referring to Sections 165 (6), 208 and 217 argued that the combined effect of those Sections is that the CGIR himself should acknowledge the appeal.

At this stage it is pertinent to examine whether the acknowledgement of an appeal is a statutory obligation cast upon the CGIR himself.

Carltona Ltd. v. Commissioner of works is the case where the famous doctrine known as ‘*Carltona Principle*’ on delegation of authority was set out. Lord Green, M. R. delivering the judgment explained the principle as follows;

*“In the administration of government in this country, the functions which are given to ministers (and constitutionally properly given to ministers, because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To make the example of the present case, no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that in each case, the minister in person should direct his mind to the matter. **The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view***

that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them". [emphasis added]."

The "*Carltona doctrine*" applies where a statute has conferred a power on a Minister and it is practically impossible for the Minister to exercise such power personally, he may in general act through a duly authorised officer, without having a formal delegation of power to do so. Here the official is treated as the Minister's "*alter ego*" and the officer's decision is regarded as the Minister's own decision.

This principle was applied in the case of *Kuruppu v. Keerthir Rajapakse, Conservator of Forests*,³² wherein Rodrigo, J. quoted the following passage from De Smith's *Judicial Review of Administrative Action*³³.

"Special considerations arise where a statutory power vested in a Minister or a department of State is exercised by a department official. The official is the alter ego of the Minister or the Department and since he is subject of as to the fullest control by his superior he is not usually spoken of as a delegate... The Courts have recognized that duties imposed on Ministers and the powers given to Ministers are normally exercised under the authority of the Ministers by responsible officials of the department..... In general, therefore, a Minister is not obliged to bring his own mind to bear upon a matter entrusted to him by statutes, but act through a duly authorized officer of his department."

In the recent past Courts have further extended the doctrine '*Carltona principle*'. In the case of *R. (Chief Constable of West Midlands Police) v. Birmingham Justices*.³⁴ Sedley LJ. held that;

"There was a distinction to be drawn between 'those offices which are the apex of an organisation itself composed of office-holders or otherwise hierarchically structured, and those offices designated by Parliament because of the personal qualifications of the individual holder'³⁵. In the former case

³² (1982) 1 Sri. L.R. p. 163 at pp.168 and 169

³³ 2nd Edition, at pp. 290 and 291

³⁴ [2002] E. W. H. C. 1087 (Admin); H. W. R. Wade and C. F. Forsyth 11th Edition at p. 268

³⁵ Sedley LJ in *R (Chief Constable of West Midlands Police) v. Birmingham Justices*.

the subordinate officers could act on behalf of their superior to whom Parliament had granted the power and who would take legal responsibility for its exercise. In the latter only the officer actually empowered could act.”

The CGIR’s appointment is on the hierarchy structure created by the statute and not on his personal qualifications. Upon a careful consideration of the numerous important functions assign to the CGIR by the statute, it appears to me that a delegation of minor functions such as acknowledgement of appeals is inevitable. Further, acknowledgement of the appeal is not an act which needs any special knowledge on the subject and/or exercise of discretion is involved but, merely an administrative task.

In the case of *Director of Public Prosecutions v. Haw* ³⁶ the concern was whether in the absence of express statutory authorisation the power could be delegated by a superior officer to a subordinate officer. Lord Phillips C. J., held;

“Where a statutory power is conferred on an officer who is himself the creature of statute, whether that officer has the power to delegate must depend upon the interpretation of the relevant statute or statutes. Whether the responsibilities of the office created by statute are such that delegation is inevitable, there will be an implied power to delegate. In such circumstances there will be a presumption, where additional statutory powers and duties are conferred, that there is a power to delegate unless the statute conferring them, expressly or by implication, provides to the contrary.”

Dr. Sunil F. A. Coorey, in his scholarly work titled *Administrative Law in Sri Lanka*³⁷ made the following observations.

“There can be cases where statute requires that the exercise of power by one officer or authority be authenticated certified or communicated by some particular official, and such authentication, certification or communication has been in fact done by a different official. Here, the situation is that actual exercise of power has been by the proper person., but the wrong person has authenticated, certified or communicated such exercise of power. In this type

³⁶ [2007] E. W. H. C. 1931; H. W. R. Wade and C. F. Forsyth 11th Edition at p. 268

³⁷ 4th Edition Vol. I at p. 643

of situation the law seems to be that as the proper person has in fact exercised the power in question, its authentication, certification or communication by the wrong person does not, for that reason alone, affect the validity of such exercise of power.”

In the case of *Lanka Ashok Leyland PLC v. The Commissioner General of Inland Revenue*³⁸ the identical issue of acknowledgment of an appeal had been decided and it was held by the numerically equal bench of this Court that although the statute provides that the appeal has to be submitted to the CGIR, there is no requirement that the acknowledgement also should be made by the CGIR himself. His Lordship Janak De Siva, J. stated at page 6 as follows;

“Court is of the view that there is no merit in the submission of the Appellant that the acknowledgement must be signed by the Respondent. The functions of the Inland Revenue Department are so multifarious that no Commissioner-General of Inland Revenue could ever personally attend to all of them. In particular, Court will be slow to impose such requirements unless there is unequivocal language in the IR Act. It is true that the appeal has to be submitted to the respondent. However, that does not mean that the acknowledgement to be made by the respondent. Similar approach has been taken by our Courts in applying the Carltona principle in relation to administrative functions to be performed by Ministers (M.S.Perera v. Forest Department and another [(1982) 1 Sri. L.R. 187] and Kuruppu v. Keerthir Rajapakse, Conservator of Forests [(1982) 1 Sri. L.R. 163]”.

The question of acknowledgement of an appeal arises out of Section 165 (6) of the Act. The Section stipulates the period within which an appeal should be acknowledged and also provides that where it was not so acknowledged the consequence would be that the appeal deem to have been acknowledged on the day it was delivered to the CGIR. However, it is important to observe that nowhere in Section 165 (6) it is stated that the acknowledgement should be done by the CGIR himself, whereas proviso to Section 165 (1), 165 (4) and Sections 165 (7), 165 (8), 165 (9), 165 (10), 165 (11), 165 (12), 165 (13), 165 (14) and 165 (15) specifically enacts the function of the CGIR.

³⁸ CA TAX 14/2017

It is trite law that a Court cannot read words into a statute. As I have already stated above in this judgement, the function of the Courts is to interpret the law and not to legislate. It is the prerogative of the legislature.

On reading words into a statute, Bindra states that:³⁹

‘It is not open to add to the words of the statute or to read more in the words than is meant, for that would be legislating and not interpreting a legislation. If the language of a statutory provision is plain, the Court is not entitled to read something in it which is not there, or to add any word or to subtract anything from it.’

The Assessor S.A.C. Geethani, in the acknowledgment signed by her⁴⁰ has stated that she has been directed by the CGIR in terms of Section 165 (7) at the Inland Revenue Act to make further inquiry into the appeal. Therefore, in my view the Assessor S.A.C. Geethani has signed the acknowledgment on the authority granted by the CGIR.

On the above issue in our own judgment in *Polycrome Electrical Industries (Pvt) Ltd v. The Commissioner General of Inland Revenue*⁴¹ Dr. Ruwan Fernando J. dealing with delegation of authority cited the following extract from the Indian Supreme Court decision in the case of *Sidhartha Sarawagi v. Board of trustees for the Port of Kolkata and others*⁴²

“Delegation is the act of making or commissioning a delegate. It generally means of powers by the person who grants the delegation and conferring of an authority to do things which otherwise that person would have to do himself. Delegation is defined in Blacks Law Dictionary as the act of entrusting another with authority by empowering another to act as an agent or representative. ...Delegation generally means parting of powers by the person who grants the delegation, but it also means conferring of an authority to do things which otherwise that person would have to do himself.”

³⁹ N. S. Bindra, *Interpretation of Statutes*, Eighth Edition, 1997. at p.452

⁴⁰ At page 55 of the appeal brief

⁴¹ CA. TAX 0049/2019

⁴² [2014] 16 SCC 248

It is true that Section 165 deals with appeals to the CGIR. Yet, the issue is whether CGIR himself should acknowledge or cause to acknowledge such appeals. Upon a careful of consideration of Section 165 of the Inland Revenue Act, I am of the view that Section 165 (6) does not envisage that the CGIR himself should acknowledge the appeal.

In the above analysis it is my considered view that the acknowledgment of an appeal is not an act the CGIR himself should have to do or should delegate his power to another officer authorising him to sign the acknowledgment on his behalf. There may be thousands of taxpayers in Sri Lanka and the acknowledgement of appeals submitted to the CGIR personally would be an impossible exercise. In my view that the acknowledgment of an appeal is a step within the process of *making further inquiries into the appeal* submitted by the taxpayer. Therefore, I am of the view, the Assessor, acknowledging an appeal acting on the directions given by the CGIR under Section 165 (7) of the Inland Revenue Act is valid in law. The nature of an acknowledgment of an appeal is merely an administrative act. Therefore, the only reasonable inference this Court could draw is that the Assessor has acknowledged the appeal on the implied delegation of authority by the CGIR.

The Appellant's contention is that since there was no proper acknowledgement of the appeal, the appeal should be deemed to have been received by the CGIR on the, 13th December 2013, the day it was delivered to the CGIR.

On the above analysis I hold the appeal has been duly acknowledged by the Assessor's letter dated 24th December 2013. The CGIR has made his determination on the 23rd November 2015, within the stipulated two-year period.

Section 165 (6) provides that if an appeal is acknowledged within thirty days of its receipt, the date of the letter of acknowledgment shall be deemed to be the date of receipt of such appeal. Therefore, the day on which the Appellant received the acknowledgment is immaterial.

Therefore, I hold that the determination of the CGIR is not time barred under in terms of Section 165 (14) of the Inland Revenue Act.

Therefore, I answer the question number 2 in the negative.

3. *Did the Tax Appeals Commission err in law when it came to the conclusion that the Appellant was not entitled to the tax concession conferred by Section 13 (b) (iii) of the Inland Revenue Act, No. 10 of 2006 (as amended)?*
4. *In the alternative, if Section 13 (b) (iii) of the Inland Revenue Act, No. 10 of 2006 (as amended), is inapplicable, did the Tax Appeals Commission err in law when it came to the conclusion that the Appellant was not entitled to the concessionary tax rate conferred by Section 52 of the Inland Revenue Act, No. 10 of 2006 (as amended)?*

The fact that the lubricants are sold by the Appellant to non-resident ships out of bonded warehouses is not at issue. The matter in issue is whether those supplies constitute an export in terms of Sections 13(b) (iii) and/or Section 52 of the Inland Revenue Act.

Before, proceeding to the analysis, I will begin by reproducing the relevant Sections below:

Section 13 (b) (iii) of the Inland Revenue Act No. 10 of 2006 reads as follows:

“13. There shall be exempt from income tax-

(a) (...)

(b) the profits and income earned in foreign currency by a resident company or partnership carrying on or exercising any trade, business or vocation, in any year of assessment-

(i) (...)

(ii) (...)

(iii) in respect of any business of exporting any goods, being goods brought to Sri Lanka on a consignment basis, and re-exported without

subjecting such goods to any process of manufacture, other than repacking or labeling of such goods in the preparation to the market.

In the course of carrying on or exercising such trade, business or vocation, if such profits and income (less any such amount expended by that company or partnership outside Sri Lanka as is considered by the Commissioner General to be reasonable expenses) are remitted to Sri Lanka through a bank;”

Section 52 of the Inland Revenue Act No. 10 of 2006 reads as follows:

“52. Where any company commenced prior to November 10, 1993, to carry on any specified undertaking and the taxable income of that company for any year of assessment commencing prior to April 1, 2015 includes any qualified export profits and income from such specified undertaking, such part of such taxable income as consists of such qualified export profits and income, shall, notwithstanding anything to the contrary in this Act, be chargeable with income tax at the appropriate rate specified in the Fifth Schedule to this Act.”

The term “*qualified export profits and income*” and “*specified undertaking*” are defined in Section 60 (b) and Section 60 (c) of the Inland Revenue Act, which reads thus;

“60 (a) (...)

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

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

(c) “specified undertaking” means any undertaking which is engaged in-

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

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

(d) (...)

The fifth schedule sets out the income tax rates applicable to section 52 of the Inland Revenue Act.

The Appellant’s importation of petroleum products from overseas, storage of those products in bonded warehouses, and their subsequent supply to ships without subjecting said products to any process or manufacture; are matters not in issue in the instant case.

However, the term ‘export’ has not been defined in the Inland Revenue Act.

Accordingly, the Appellant and Respondent relied on other sources to support their respective arguments.

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

“Exportation – The words “Shipped for Exportation” are not, necessarily, restricted to an exportation to foreign countries, but may mean Exportation in its evident sense, i.e. a carrying out of Port, and thus include carrying commodities from one port to another within the Kingdom (Stockton Ry v. Barrett 11 Cl. &F. 590: Vth Dwar. 648, 691).”

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

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

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

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

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

The Chambers English Dictionary defines ‘export’ as *“to carry or send out of a country”*.

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

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

The word book titled, “Words and Phrases Judicially Defined” cited by the Appellant, explains the term ‘exported’ as

“there is nothing in the language of the Act [the Tyne Coal Dues Act, 1872] to shew that the word “exported” was used in any other than its ordinary sense, namely, ‘carried out of the port.’ ... we feel bound to hold that coals carried away from the port, not on a temporary excursion, as in a tug or pleasure boat, which intends to return with more or less of the coals on board, and which may be regarded as always constructively within the port, but taken away for the purpose of being wholly consumed beyond the limits of the port, are coals ‘exported’ within the meaning of the Act.” Muller v. Baldwin (1874) L. R. 9 Q. B. 457, per cur., at p. 461.”

This definition supports the view that the ship should carry the fuel beyond the limit of the port, for the purpose of consumption. However, this definition is also based on the Tyne Coal Dues Act, 1872 in the United Kingdom. Therefore, in my view this definition could not be applied in a general sense in deciding the case in hand.

After examining the definitions in the above dictionaries and other definitions, it appears that different dictionaries have given different definitions of the word "export". Therefore, in my view, it is unsafe to rely on any one of those dictionary definitions to decide the issue at hand.

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

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

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

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

Moreover, Section 16 is but a deeming provision.

N.S. Bindra has stated the following on deeming provisions in a Statute⁴³:

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

It is further stated, citing *Gajraj Singh v. State Transport Appellate Tribunal*⁴⁴:

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

In the Indian Supreme Court case of *Burmah Shell, Oil Storage & Distributing Co. Ltd v. The Commercial Tax officer and others*⁴⁵,

⁴³ N.S. Bindra, *Interpretation of Statutes*, Twelfth Edition, at page 268

⁴⁴ (1997)1 SCC 650

⁴⁵ AIR 1961 SC 315

Hidayathulla J., observed that the customs barrier is a barrier for customs purposes and it has nothing to do with the sale of aviation spirit.

Hence, it is my view that Section 16 of the Customs Ordinance does not support the Appellant's contention that an export is deemed to have been completed as soon as the goods have been loaded on board the ship, notwithstanding that the ship is still within Sri Lankan territorial waters.

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

The Respondent proposed three tests to determine whether the marine bunker fuel supply is an export or not.

The first test is 'Taking out of Sri Lanka'

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

The Respondent cited the case of *Perera and Silva Ltd v. Commissioner General of Inland Revenue*⁴⁶ in support of their argument. This is a case in which the appellant, a manufacturer of wooden boxes, sold them to others who then used these boxes to package the goods and export them. However, the Supreme Court held that the turnover from articles sold by the Appellant and exported by others is not exempted from tax.

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

However, the interpretation of the word 'export' in the Import and Export (Control) Act, relied on by the Respondent itself, recognises that any good caused to be carried or taken out of Sri Lanka by sea constitutes an export. Therefore, it appears that the Appellant's causing of a third party to take the goods from Sri Lanka by sea, which constitutes an export. It may be the case that the above interpretation given in the Imports and Exports Control Act was

⁴⁶ S.C.3/76

not considered in the case of *Perera and Silva Ltd v. Commissioner General of Inland Revenue*.

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

The second and third tests are that;

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

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

N.S. Bindra has stated the following regarding the definitions given in other statutes⁴⁷;

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

⁴⁷ N.S. Bindra, *Interpretation of Statutes*, Twelfth Edition, at page 277

Hence, I am of the view that it is unsafe to rely on the interpretations given in other statutes to the word 'export', especially in interpreting a fiscal statute enacted for fiscal purposes. Therefore, on the available material, I will proceed to decide this matter within the words of the Inland Revenue Act itself.

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

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

In the written submissions filed in this case the Appellant contended that the *destination* need not be another country, but could be any place outside Sri Lanka including international waters. However, I am unable to agree with the learned Counsel since a ship could not stay at sea forever without reaching a port to take on supplies such as fuel etc.

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

bunker fuel on that particular licence, the existence of the licence itself is insufficient to establish the said fact.

It is a known fact that there are ships provide services within the territorial waters of Sri Lanka. These ships could be resident or non-resident.

In the written submissions filed in this case the Appellant stated that there are ships operating within the territorial waters of Sri Lanka. The Appellant explained as to how sales are made to local vessels and to foreign vessels. Accordingly, as required by the Sri Lanka Customs, the Appellant passes an *ex-bond* entry by paying the relevant taxes and levies prior to executing the delivery to a local vessel, and the CUSDEC is under the Customs Procedure Code 4072 to “Entry for home use”. The invoice is also raised in Sri Lankan Rupees. If the sale is made to a foreign going vessel, the Appellant has to firstly obtain approval from the Customs to re-bond products from the Jaya Container Terminal to the barges. The products are delivered to the vessel thereafter, and an *ex-bond* entry is passed at the Sri Lanka Customs by the Appellant. There, the CUSDEC will be under Customs Procedure Code 3072 to ‘Re-export’ from Private Bond. The invoice is raised in US dollars.

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

In the written submissions filed in this case the Appellant, citing Simone Schnitzer’s, *Understanding International Trade Law*, contended that an export sale can be affected under various International Commercial Terms. Those are:

Terms (e) - the seller minimises his risk by making the goods available only at his premises.

Terms (f) – the seller arranges and pays for any pre-carriage in the country of export and completes all customs and export formalities. The main carriage is to be arranged by the buyer. Risk and property pass once the seller has delivered the goods at the agreed price.

Terms (c) – the seller arranges and pays for the main carriage but risk passes when the goods are loaded, or given into custody of the first carrier; property passes once the bill of lading/ transport

documents are tendered. Export formalities must be cleared by the seller; import formalities are the buyer's duty.

Terms (d) – the seller must make the goods available upon arrival at the agreed destination, therefore, his cost and risk is maximised, under delivered duty paid (DDP), even covering the import clearance. Apart from the DDP, the duty to complete all import formalities is with the buyer.

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

Therefore, anyone claiming a tax exemption for the export of petroleum products would have to prove that they were supplied to a ship outbound from Sri Lanka. Otherwise, income from the supply of bunker fuel to a ship traveling from one port to another in Sri Lanka will also be eligible for the exemption.

The Respondent relied on the judgement of the Indian Supreme Court *Burmah Shell Oil Storage & Distributing Co. Ltd v. The Commercial Tax officer and others*⁴⁸ to buttress the argument that in a supply of aviation spirit (almost similar to the supply of marine bunker fuel), taking out of the territory of India alone, would not constitute a sale occasioned in the course of export.

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

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

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

⁴⁸ *Supra* Note 44

Nevertheless, the following observations made by the Supreme Court of India in the aforementioned judgment (reproduced below) are relevant to the issue at hand:

Regarding the definition of the word ‘export’;

“The word export may conceivably be used in more senses than one. In one sense, ‘export’ may mean sending or taking out of the country, but in another sense, it may mean sending goods from one country to another. Often, the latter involves a commercial transaction but not necessarily. The country to which the goods are thus sent is said to import them, and the words ‘export’ and ‘import’ in this sense are complimentary”

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

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

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

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

The Appellant cited the judgment of this Court in the case of *Nanayakkara v. University of Peradeniya*⁴⁹ wherein S. N. Silva J., (as he was then) held as follows regarding the manner in which a tax exemption must be interpreted:

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

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

However, the Appellant, citing the following extract from the more recent decision of the Indian Supreme Court in the case of *The Government of Kerala v. Mother Superior Adoration Convent*⁵⁰, argued that exemptions claimed by taxpayers are ‘beneficial and promotional exemptions’ and therefore, have to be liberally interpreted:

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

⁴⁹ (1991)1 Sri. LR 97

⁵⁰ AIR (2021) SC 1271

The Indian Supreme Court has also observed in the case of *Novopan India Ltd v. Collector of Central Excise and Customs*⁵¹, that:

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

In *Commissioner of Central Excise v. Hari Chand Shri Gopal*⁵², it was observed that:

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

In *Bank of Commerce v. Tennessee*⁵³, the United States Supreme Court observed:

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

At first, it appears that there is a conflict of opinions expressed by the Indian Courts. However, on closer scrutiny, I agree that there is no real contradiction. The opinion expressed in the case of *The Government of Kerala v. Mother Superior Adoration Convent*⁵⁴ is on the standard to be applied in interpreting beneficial exemptions; and the dicta in the other cases are on who should

⁵¹ 1994 SUPPL. (3) SCR 549

⁵² Civil Appeal Nos. 1878-1880 of 2004

⁵³ 161 U.S. 134 (1896)

⁵⁴ *Supra* Note 10

establish the entitlement to the exemption, and in whose favour the Court should hold when there is a doubt or an ambiguity.

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

Conclusion

In the above analysis, it is my considered view that for a supply of bunker fuel to be an export, it should be made to a ship leaving the territory of Sri Lanka. Official documents such as the Customs Declaration Form (CUSDEC), the Marine Delivery Note, and the Commercial Invoice etc., where the place of destination is stated, are relevant in determining whether the ship is going out of Sri Lanka or not. In fact, the Respondent has raised this issue in their written submission filed in this Court by stating that the contracts entered into by the Appellant do not provide for a terminus outside the territorial waters of Sri Lanka⁵⁵. The ship/vessel being a non-resident ship/vessel should not be the test in determining this fact, since, there may be non-resident ships, registered in a foreign country, providing services within the Sri Lankan territory. However, it is unfortunate that in the case in hand, none of these documents were produced. It appears that even the Respondent, the CGIR, has not taken any step under Section 215 of the Inland Revenue Act to search for these documents. Nevertheless, since the Appellant is claiming a tax exemption in this case, the burden lies on the Appellant to establish its eligibility for the said exemption.

The issue as to whether the Appellant satisfies the requirement imposed by Sections 13 (b) (iii) and/or Section 52 will not arise since this Court has already determined that the Appellant has failed to establish that the supply of bunker fuel by the Appellant to the ships constitutes an export.

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

⁵⁵ Paragraph 3 (f) (ii)

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

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

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

The TAC arrived at the conclusion that the bunker fuel supplied or loaded by the Appellant to ships travelling from Sri Lanka in international waters cannot be considered as an export and therefore, the Appellant is not entitled to the concessionary tax rates under Sections 13 (b) (iii), 42 or 52 of the Inland Revenue Act, as amended, on the ground that the goods need to have a foreign destination where it can be said to be imported.

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

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

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

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

In view of the answers given to the first four questions of law, I answer the fifth question of law also, in the negative.

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

Accordingly, for the purpose of this case, I answer all five questions of law in the negative, in favour of the Respondent.

1. *No*
2. *No*
3. *No*
4. *No*
5. *No*

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

JUDGE OF THE COURT OF APPEAL

Dr. Ruwan Fernando J.

I Agree.

JUDGE OF THE COURT OF APPEAL