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

In the matter of a case stated under Section 170 of the Inland Revenue Act, No. 10 of 2006 (as amended).

P.T. Weerasinghe,
Lanka Sportreizen,
No. 29 B,
S. De.S. Jayasinghe Mawatha,
Dehiwala.

Appellant

Case No. CA/TAX/0002/2013
Tax Appeals Commission
No. TAC/IT/023/2011

Vs.

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.

: Uditha Egalahewa, P.C. with Riad Ameen for the Appellant

Nirmalan Wigneswaran, Deputy Solicitor General for the Respondent

Argued on : 10.03.2022

Written Submissions filed on

: 07.09.2018 & 09.05.2022 (by the Appellant)

18.05.2020 & 05.05.2022 (by the Respondent)

Decided on : 29.07. 2022

Dr. Ruwan Fernando, J.

Introduction

[1] This is an appeal by way of a case stated against the determination of the Tax Appeals Commission dated 07.02.2013 confirming the determination made by the Respondent on 19.12.2011 and dismissing the Appeal of the Appellant. The period relates to the year of assessment 2006/2007.

Factual Background

[2] The Appellant is carrying on a business of a Travel Agency and destination/management in Sri Lanka under the name and style of "Lanka Sportreizen" (hereinafter referred to as "LSR"). In addition, the Appellant has been appointed by the Sri Lankan Airlines Limited as the authorised handling agent to service the Airline passengers arriving in Sri Lanka on its SriLankan Layover Programme subject to the terms and conditions set out therein.

[3] The Appellant submitted the return of income for the year of assessment 2006/2007 and claimed the concessionary tax rate of 15% in section 45 (2) (d) of the Inland Revenue Act, No. 10 of 2006 (hereinafter referred to as the IRA 2006). The Appellant claimed the said concessionary rate of 15% with its business with Sri Lankan Airlines Ltd as a travel agent. The Senior Assessor by letter dated 27.11.2009 (p. 66 of the TAC brief) separated the turnover of the Appellant from (i) business with Sri Lankan Airlines Ltd (Rs. 224,107,698); and (ii) business of tour operation (Rs. 91,220,569) and disallowed the concessionary rate of 15% for the Appellant's business for the following reasons:

> *"The business activity operated by your business under an agreement reached with the Sri Lankan Airlines Ltd, is related* ***entirely with the transit passengers who travel via airports in Sri Lanka.*** *Merely being the transit air passengers travelling via airports in Sri Lanka,* ***they cannot be treated as tourists in Sri Lanka.*** *Therefore, such a business is not an undertaking for the promotion of tourism as mentioned under section 45 (1) (b) of the Inland Revenue Act, No. 10 of 2006. Hence, the profits and income from such undertaking is liable to income tax under Part I of the First Schedule to the Inland Revenue Act, No. 10 of 2006".*

[4] Accordingly, the Assessor adjusted profit/assessable income for the year of assessment 2006/2007 by applying the normal rate of tax as follows:

Turnover from business of tour operation	91,220,569
Turnover from business activities with Sri Lankan Air Lines	224,107,698
Total Turnover	315,328,267

Declared profit	23,660,998
Dedicated Losses	8,281,349
Assessable Income	15,379,649

The profit from each business is calculated based on proportionate turnover as follows:

Profit from tour operation $\frac{15,379,649}{315,328,267} \times 91,220,569 = 4,449,142$

Profit from the business with Sri Lankan Air Lines

$\frac{15,379,649}{315,328,267} \times 224,107,698 = 10,930,507$

Tax Calculation

	Income		Tax
Assessable Income	15,379,649		
Allowance	300,000		
Taxable Income	15,079,649		
	1,600,000	-	305,000
	13,479,649		
	4,449,142	15%	667,371
	9,130,507	35%	3,195,677
Total Tax			4,168,048

[5] Accordingly, the notice of assessment was issued by the Assessor and being dissatisfied with the said assessment, the Appellant appealed to the Respondent. The Respondent by its determination dated 19.12.2011 confirmed the assessment and dismissed the appeal (Vide- reasons for the determination marked X1 of the TAC brief).

Appeal to the Tax Appeals Commission & the Court of Appeal

[6] Being dissatisfied with the said determination of the Respondent, the Appellant appealed to the Tax Appeals Commission and the Tax Appeals Commission by its determination dated 07.02.2013 confirmed the determination of the Respondent and dismissed the appeal.

Questions of Law

[7] Being dissatisfied with the said determination of the Tax Appeals Commission, the Appellant appealed to the Court of Appeal by way of a Case Stated and formulated one question of law in the Case Stated for the opinion of

the Court of Appeal. Prior to the commencement of the hearing on 10.03.2022, Counsel for both the Appellant and the Respondent agreed that for the purpose of clarity, the questions of law in this case stated should be replaced by the following two simplified questions of law:

1. Is the Appellant engaged in the business of travel agent within the meaning of section 45 (2) (d) of the Inland Revenue Act, No. 10 of 2006?
2. Is the Appellant engaged in the business of transporting tourists within the meaning of section 45 (2) (d) of the Inland Revenue Act, No. 10 of 2006?

[8] Both Counsel further agreed that the above questions of law will apply to both CA/Tax/2/2013 and CA/Tax/27/2013. At the hearing of the appeal, the learned President's Counsel for the Appellant, Mr. Uditha Egalahewa and the learned Deputy Solicitor General, Mr. Nirmalan Wigneswaran, made extensive oral submissions on the two questions of law submitted for the opinion of the Court on 10.03.2022 and filed further written submissions.

Analysis

Question of Law, No. 1

Is the Appellant engaged in the business of travel agent within the meaning of section 45 (2) (d) of the Inland Revenue Act, No. 10 of 2006?

An undertaking engaged in the business of a travel agent

[9] The first question of law is whether on the facts and circumstances of the case, the Appellant is engaged in the business of a travel agent within the meaning of section 45 (2) (d) of the Inland Revenue Act, No. 10 of 2006. The Tax Appeals Commission confirmed the determination made by the Respondent and dismissed the appeal for the following reasons:

1. The Agreement between the Appellant and Sri Lankan Airlines Ltd does not refer to tourists and the nature of the services provided by the Appellant under the Agreement is in relation to transit passengers of Sri Lankan Airlines Ltd and not tourists;
2. The Appellant is providing services under the Agreement only with Sri Lankan Airlines Ltd in the capacity of a handling agent and not as a travel agent;
3. The Appellant to be entitled to the concessionary tax rate of 15% under section 45 (2) (d) of the IRA 2006, it must provide services on his own, independently of an Agreement with a third party and in the present

case, the Appellant did not have any contract with passengers or tourists, but only with Sri Lankan Airlines Ltd.

[10] The findings of the Tax Appeals Commission (hereinafter referred to as the "TAC") AC at pp. 5-6 the TAC brief are as follows:

"It may be noted that according to the agreement, the Appellant is the authorised handling agent, who is to service passengers arising in Sri Lankan on its Sri Lankan Layover Programme. Nowhere in the agreement, such passengers are referred to or described as tourists. The definition given to the Sri Lankan Layover Programme in the agreement reads as follows: "Sri Lankam Layover Programme includes: all passenger programmes of Sri Lankan Airlines for their transit passengers, travelling in Sri Lanka". Further the nature of the services performed by the Appellant under the agreement with the Sri Lankan Airlines Ltd. is in relation to such transit passengers. Whatever assistance the Appellant has given in respect of such passengers is the service that is necessary to be performed in respect of these passengers under the agreement. Therefore, under these circumstances such passengers who are not tourists but transit passengers as far as Sri Lankan Airlines Ltd. is concerned, cannot become tourists for the Appellant, no sooner the Appellant takes charge of them, to provide the necessary services under the agreement".

Arguments of the Parties

[11] At the hearing, Mr. Egalahewa submitted that although the Appellant is labelled as providing services in the capacity of a "handling agent" in the Agreement between the Appellant and Sri Lankan Airlines Ltd, the label "handling agent" is not conclusive evidence that the Appellant was operating as a "handling agent" for Sri Lanka Airlines Ltd. He submitted that when the Agreement is taken as a whole together with the surrounding circumstances, and the true substance of the transaction, the passengers who arrived in Sri Lanka on SriLankan Airlines Layover Programme are either tourist passengers who stay in Sri Lanka for a period up to 14 days or transit passengers who leave the Airport for accommodation at a hotel. He submitted therefore, that passengers who arrived in Sri Lanka on SriLankan Airlines Layover Programme as tourist passengers and stay in Sri Lanka for a period up to 14 days cannot be limited to transit passengers in terms of the Agreement.

[12] His argument was that the Sri Lanka Airlines Ltd engaged the Appellant under the Agreement since the Appellant is a reputed Travel Agent in Sri Lanka and therefore, the Appellant acted as a travel agent for the Airline and provided services to its tourist passengers including transit passengers who leave the airport for accommodation at a hotel on its Layover Programme. Mr. Egalahewa contended that the Tax Appeals Commission (hereinafter referred

to as the “TAC”) erred in holding that in terms of the Agreement with Sri Lankan Airlines, the Appellant has to serve only ‘transit passengers” arriving in Sri Lanka on its Layyover Program and NOT tourists who are also passengers of the Airline. Mr. Egalahewa then contended that the TAC erred in holding that the Appellant is not a “travel agent” since, the Appellant is engaged in the business with SriLankan Airlines Ltd by providing services to Sri Lankan Airlines in the capacity of a “handling agent”.

[13] Mr. Egalahewa further contended that the TAC erred in holding that the Appellant did not have a contract with the tourists for the purpose of carrying on independent business activity as a travel agent and therefore, the Appellant’s business was only with Sri Lankan Airlines by executing its directions under the Agreement as its handling agent and not as a travel agent.

[14] On the other hand, Mr. Wigneswaran while conceding that the parties cannot claim a benefit by labelling themselves something that they are not, the Appellant cannot lightly ignore the fact that the label employed by the parties in the Agreement is not applicable, and that the Appellant in the present case is estopped from claiming that he is not a handling agent but a travel agent for the following reasons:

1. the Appellant’s business relationship under the Agreement is only with Sri Lankan Airlines Ltd as a handling agent for the Airlines, even if the Appellant provided services to passengers or tourists, and therefore, the Appellant was not carrying on an independent business as a travel agent or transporting tourists as an independent entity within the meaning of section 45 (2) (d) of the IRA 2006;
2. There is a clear distinction between a travel agent and a handling agent and the Appellant being a handling agent performs certain functions outsourced by the Sri Lankan Airlines but that did not make the Appellant a travel agent as the Appellant failed to demonstrate that he is a travel agent;
3. The Appellant had no contractual relationship with passengers or tourists, which forms the basis of the business under section 45 (2) (d) and received payment only from the Sri Lanka Airlines, and the Sri Lanka Airlines reimbursed the Appellant’s cost of transfers, tours and hotel accommodation strictly in conformity with the relevant Sri Lankan Airline Layover Voucher or written authorisation of Sri Lankan Airlines. Accordingly, the Appellant does not fall within the meaning of section 45 (2) (d) of the IRA 2006;
4. The Appellant belatedly claimed that he was involved in a different business and a different source of income from providing transport services for the first time before the TAC but the Appellant has failed to maintain and prepare a statement of accounts in a manner that the profits and income

from each such activity may be separately identified (*ICICI Bank Limited v. CGIR* CA/Tac/28/2013 decided on 16.07.2015);

5. The Appellant failed to demonstrate that he provided transportation to tourists and passengers and therefore, the Appellant does not fall within the meaning of section 45 (2)(d)(iv) of the IRA, 2006.

Legal Provisions

[15] The Appellant is claiming the concessionary tax rate of 15% set out in the 5th Schedule to the IRA 2006 within the meaning of section 45 (2) (d) of the IRA 2006, being profits derived from an undertaking for the promotion of tourism. In fact, the concessionary tax rate of 15% set out in the 5th Schedule of the IRA 2006 is applicable for an undertaking for the promotion of tourism. Section 45 (1) of the IRA 2006 reads as follows:

"(1) When the taxable income of any person other than a company for any year of assessment includes any profits and income within the meaning of paragraph (a) of section 3 from any-

(a)
(aa)
(b)
(c) ***undertaking for the promotion of tourism; or***
(d)

hereinafter in this section referred to as "specified profits", such specified profits shall, subject to the other provisions of this Act, be chargeable with tax at the appropriate rate specified in the Fifth Schedule to this Act".

[16] The phrase "undertaking" for the promotion of tourism" is defined in section 45 (2) (d) to mean an undertaking for the operation of *inter alia*-

(i) any hotel or guest house approved by the Ceylon Tourist Board;

(ii) any restaurant graded by the Ceylon Tourist Board as being in "Class A" or "Class B";

(iii) ***any business of travel agent;***

(iv) any business of transporting tourists;

(v) any business approved by the Ceylon Tourist Board for providing facilities for recreation or sports.

[17] According to the 5th Schedule, the rate of income tax on profits from and undertaking carried on by a person other than a company:

"(a) *engaged in agriculture,* ***promotion of tourism*** *or construction work as defined in section 45 or section 217, being profits for any year of*

assessment commencing prior to April 1, 2011 is subject to a maximum of 15 per centum."

Interpretation of the Agreement between the Appellant and the Sri Lankan Airlines Ltd

[18] It is an admitted fact that the Appellant is carrying on a business of a travel agent and destination/management company in Sri Lanka under the name and style of "Lanka Sportreizen" having its registered office in Sri Lanka (Vide-paragraph 2 of page 1 of the Agreement). According to the Licence issued by the Competent Authority for the Sri Lanka Tourist Board dated 11.02.2007 under the Travel Agents Code, 1973, the Appellant is a **registered travel agent** and therefore, the Appellant is entitled to carry on business as a "**Travel Agent".** According to the letter dated 18,02.2011 issued by the Director General of Sri Lanka Tourism Development Board ("SLTDA"), the Appellant being a **travel agent** has made a substantial contribution to the Tourism Industry (p. 25 of the New Brief). It reads as follows:

" This is to certify that Lanka Sportreizen is a Travel Agency registered with the Sri Lanka Tourism Development Authority. SriLankan Airlines and the Mihin Air being Sri Lanka's National Carriers have entrusted Lanka Sportreizen with the responsibility of handling their tourist passengers from all over the world who come to Sri Lanka for short stays which forms an integral part of their tourism related business and makes a major contribution to Sri Lanks's Tourism Industry".

[19] It is common ground that the SriLankan Airlines Ltd entered into an agreement on 04.11.2005 for the appointment of an authorised handling agent of the SriLankan Layover programme of the Sri Lankan Airlines Ltd. The Appellant is described in the said Agreement as the "sole handling agent" to serve the Airline passengers arriving on its SriLankan Layover Programme subject to the conditions set out therein. The Agreement between the Appellant and SriLankan Airlines states that the SriLankan Airlines appointed the Appellant as a handling agent having been satisfied with the following requirements of the Appellant:

1. The Appellant is carrying on a business of a travel agent who is able to service passengers arriving in Sri Lanka on its SriLankan Layover Programm;
2. The Appellant is a destination management company which is capable of servicing passengers who arrive in Sri Lanka on the Airline's Sri Lankan Layover Programme (vide- page 2).

Is the business activity of the Appellant totally connected with transit passengers?

[20] It is not in dispute that the Agreement between the Appellant and the SriLankan Airlines Ltd. refers to “passengers” and the Appellant has to service passengers arriving in Sri Lanka on its **SriLankan Layover Programme.** The SriLankan Layover Programme **includes “All passenger Programme”** of SriLankan Airlines for its Transit passengers, travelling via Sri Lanka. The Agreement includes the Recitals, Schedules and Appendices. The definition clause of the Agreement defines various terms such as “Airport Representative, Hotels, MARS, Passenger, Reservations Equipment, RoomsNet, SriLankan Airlines Layover Voucher and SriLankan Layover Programme, The definition clause defines “SriLankan Layover Programme” as follows:

> *“Sri Lankan Layover Programme **includes:** All passenger Programmes of Sri Lankan Airlines for their Transit Passengers, travelling via Sri Lanka”*

[21] The Assessor and the TAC came to the conclusion that the nature of the business and the services performed by the Appellant under the Agreement with the SriLankan Airlines **are totally connected with transit passengers** and therefore, the Agreement applies only to transit passengers, and not to tourists who arrived in Sri Lanka on SriLankan Airline flights. The TAC appears to have come to this conclusion on the erroneous interpretation of the definition of the phrase “Sri Lankan Layover Programme” that it only covers “transit passengers”.

[22] It is relevant to note, however, that the definition section of the Agreement indicates that those definitions apply except where the context otherwise required. It reads as follows:

> *“In this Agreement, including the Recitals, Schedules and Appendices hereto, except where the context otherwise requires to-”*

[23] The word "in this Agreement, ...except where the context otherwise requires to" would indicate that the definitions, which are indicated to be conclusive may not be treated to be conclusive if it was otherwise required by the context. The TAC took a very restrictive approach to the word **“include**” used in the definition “SriLankan Layover Programme” to mean that it is restricted to transit passengers travelling via Sri Lanka. The word "includes" has, however, different meanings in different contexts. For example, Standard dictionaries assign more than one meaning to the word "include". Webster's Dictionary defines the word "include" as synonymous with "comprise" or "contain". According to Black’s Law Dictionary, Revised ed. p. 905, the word “including” may, according to context, is express an enlargement and have the meaning of and, or in addition to, or merely specify a particular thing already included within general words therefore used.

[24] It is well-settled that when the interpretation clause used an inclusive definition, it would be generally expansive in nature and thus, it seeks to enlarge the meaning of the words or phrases used in an interpretation clause, unless it manifests a contrary intention very clearly (P. M. Bakshi, Interpretation of Statutes, First Edition, 2008, pp. 242-243). In such case, the word "include" must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include (*Commissioner of Inland Tax v. Banddarawathie Fernando Charitable Trusts* (63 N.L.R 409). It is true that generally, when the word "include" is used in a definition clause, it is used as a word of enlargement, that is to make the definition extensive and not restrictive. It is now relevant to consider the word "include" used in this definition in the context in which it is used in the Agreement having regard to the Agreement as a whole, the real intention of the parties and the surrounding circumstances.

[25] Now the question is whether the passengers who arrived in Sri Lanka on the SriLankan Layover Programme to which the Agreement applies are only transit passengers, and not tourists as determined by the TAC. It is significant to note that a passenger is defined in the Agreement to mean **"any person holding a Sri Lankan Airlines through ticket, for air travel via Sri Lanka & who is entitled to the Layover benefits under the Sri Lankan Layover Programme**".

Tourist Passenger

[26] A tourist is a person who is visiting a place for pleasure and interest, especially when they are on holiday (Collings Distionary) and one who makes a tour; one who travels from place to place for pleasure or culture (BLACK'S LAW DICTIONARY Revised 4th Edition). Accordingly, the two requirements to be fulfilled for a person to be regarded as a tourist, are that (i) a person must travel and (ii) a person who travels for pleasure.

Transit Passenger

[27] A "transit passenger" or a "tourist" is, however, not defined in the Agreement, and therefore, the question is whether or not a transit passenger could be treated as a tourist of the Sri Lankan Layover Programme under the Agreement. In aviation, transit passengers are generally defined as passengers who use other airports for less than 24 hours to get to their destination to complete their journey (Pegasus Transit Grossary (https://www.flypgs.com/en/travel-glossary/transit- passenger#:~:text=In%20aviation%2C). Transit travels can be of four different types: (i) domestic to domestic, (ii) domestic to

international lines, (iii) international lines to domestic, and (iv) international lines to international lines (supra).

[28] In terms of the practical application of the local and international airline transportation, there can be two categories of transit passengers. The first category of a transit passenger who arrived in Sri Lanka remains at the airport for the next flight, and the question of leaving the airport or accommodation at a hotel or transportation will not arise in this category of transit passengers. The second category of a transit passenger who arrived in Sri Lanka will be a passenger who leaves the airport for accommodation at a hotel due to flight cancellation or delay or other unforeseen emergency situations beyond the control of a transit passenger.

[29] It is relevant to consider what type of transit passenger is contemplated in the Agreement. In order to determine whether or not the Appellant's business is totally connected with transit passengers, it is relevant to examine the activities to be carried out by the Appellant in terms of the Agreement. It is evident from the clauses of the Agreement, that the Appellant is obliged to service the Airline's all passengers who arrived in Sri Lankan under the Layover Programme and provide passengers services as such transportation to and from BIA to Hotel and vice versa, Hotel accommodation, meals and refreshments and logistical support and other services at the rates laid down in the brochure (para 3.1). In discharging its obligations, the Appellant *inter alia,* shall perform the following duties:

1. Reservations

(a) Handle MARS (the Marcator Airline Reservation System) on behalf of the Airline including the receiving, reservations and bookings on MARS for all passengers on the Layover Programme as per the requests of the passengers and the Airline, re-confirm the bookings to the Airlines;

(b) Handle RoomsNet (the Interactive Hotel Reservation System) on behalf of the Airline to make the Hotel Bookings on RoomsNet as per the request of passengers and the Airline and confirm the reservations;

(c) Open and maintain an Officer at which the Reservation Equipment capable of hosting MARS and RoomsNet ;

(d) Ensure that a minimum number of 25 rooms are allotted per Hotel per day al the Hotel's stipulated in Annex 1 to the Airline (except in the Colombo Hotels where the minimum number of rooms shall be 5 per day);

(e) Make available additional rooms at Hotels as and when requested by the Airline at the rates set out in Annex 1;

(f) Pay the Airline a service charge of 2.25% on all utilized room bookings made over RoomsNet;

(g) Take care and proper case of the Airline's Reservations Equipment installed on its premises.

2. Airport Handling

(a) Establish and maintain a dedicated counter at the BIA Arrival Lounge to handle the Airline's Layover Passengers on a 24 hour service basis and provide a minimum of 10 Airport Representatives located at BIA to coordinate handling of Passengers arriving on SriLankan Airlines on the Layover Programme;

(b) Provide handling services to passengers on the Layover Programme including transfers between airport and the hotels and vice versa, and the Hotel accommodation and the facilitation of the Airline's Layover passengers.

3. Transport

(a) Provide a minimum fleet of 5 well maintained, air-conditioned vehicles on a 24 basis an ensure the quality transportation services between the Airport and Hotels and vice versa;

(b) provide transportation for passengers on the Sri Lankan Layover programme on optional and/or city tours in accordance with the requirements of the Airline on its Sri Lankan Layover Programme";

(c) Ensure that passengers departing from Sri Lanka reach BIA on scheduled time and the vehicles used to transport the passengers are well maintained and air-conditioned with acceptable standard and the drivers are properly licensed, conversant in the English language and comply with the applicable laws and regulations.

4. Hotel Accomodation

(a) Hotel accommodation *inter alia*, includes the provision of an adequate number of rooms at Hotels agreed between the parties and ensure that facilities and services provided to passengers shall be strictly in conformity with the SriLankan Airlines Hotel Voucher presented by the passenger;

5. Logistics and Co-ordination

6. Excurtions & Tours

[30] The Appellant is obliged to provide services to all passengers, including those who arrive in Sri Lanka on the Sri Lankan Layover Programme in the capacity of tourists and select optional tours such as one-day, two-day, three-day, five-day, six-day, seven-day, eight-day, nine- day, and 14- day tour in various parts of Sri Lanka. Annex 1 sets out 21 Types of "STOPOVER TOURTS" and the rates for them which include:

1. One day Excursions from Colombo, which includes 5 cities (Colombo Fort, Gangarama Temple, Independence Square, Town Hall), Bentota, Kandy, Galle and Ratnapura;
2. Two day Tours (Kandy, Nuwara Eliya, Sigiriya/Habarana, Beruwala;
3. Three day Tour (Sigiriya/Kandy/Bentota/Nuwara Eliya);
4. Five Day Tour (Habarana/Kandy/Nuwara Eliya/Bentota);
5. Six Day Tour (Anuradhapura/Polomnaruwa/Kandy/Nuwara Eliya/Bentota);
6. Seven Day Tour (Anuradhapura/Sigiriya/Kandy);
7. Eight Day Tour (Ratnapura /Yala national Park/Hambantota);
8. Nine Day Tour (Negombo/Mount Lavinia/Kalutara/Beruwala/Bentota or Koggala);
9. 14 Day Tour (Sigiriya/Habarana/Kandy/Nuwara Eliya/Mount Lavinia).

[31] It is relevant to note that the Appellant is entitled to be paid under the Agreement when it submits invoices to the Airline for **all SriLankan Layover Programme** Vouchers serviced by the Appellant and for other services provided to passengers upon the Airline's written authorization during thr previous month at the rates set out in Annex 1. Annex 1 specifies the rates for Hotel accommodation, meals, transport, excursions and other tours (Vide-clause 9.1).

[32] On the other hand, the Hotel accommodation to be arranged by the Appellant with the approval of the SriLankan Airliens indicates that all Hotels in Annex 1 are leading tourist Hotels in Sri Lanka, such Browns Beach Hotel Ltd, Negombo, Yala Village, Yala, The Cinnamon Grand, Colombo, Trans Asia Hotel, Colombo, Kandalama Hotel, Kandalama, Sigiriya Village, Sigiriya, Mahaweli beach, Kandy, Yala safari, Neptune Hotel, Mt. Lavinia Hotel, Taj Samudra Hotel (Vide- page 50 of the TAC brief). Those Hotels which are located outside the Airport area are unlikely to be occupied by "transit passengers" who will be temporarily provided with accommodation due to any flight cancellation, delay or other emergency situations.

[33] The Layover Programme may **include** all passengers who arrived in Sri Lanka on SriLankan Layover Programme and leave the airport for accommodation at a hotel either (i) as a transit passenger due to flight cancellation or delays or other emergency situations; or (ii) as a tourist

passenger who stays in Sri Lanka for a period up to 14 days as per Annex1 of the Agreement.

[34] For those reasons, I hold that it is not possible to give the word “includes” in the definition clause of the “SriLankan Layover Programme” a restrictive meaning in the context in which it is used in the Agreement and limit the business activity of the Appellant to transit passengers of the SriLankan Airlines. The TAC clearly erred in not considering the fact that the passengers who arrived in Sri Lanka on the SriLankan Layover Programme, may also leave the airport for accommodation in Hotels and undertake tours up to a period of 1-14 days as per Annex 1, and such passengers are in fact tourists. The TAC completely disregarded the fact that those optional 1-14 day tours selected by the foreign passengers who arrive in Sri Lanka fall within the purview of the “Sri Lankan Layover Programme” set out in the Agreement. In my view the TAC wrongly held that the Agreement applied only to transit passengers who remained at the Airport for the next flight.

Is the Appellant a “Travel Agent” under the agreement?

[35] The next question is to decide whether or not the Appellant acted as a travel agent or a handling agent in terms of the Agreement entered into between the Appellant and the SriLankan Airlines Ltd. As the parties sought to interpret the term “handling agent” used in the Agreement in different manner, the Court must first find out the true meaning and the substance of the transaction and the way in which the Appellant carried on business in terms of the Agreement.

[36] When determining the true nature and substance of the relationship between the parties and the characterisation of the relationship, it is necessary to consider the proper approach to be adopted in interpreting the true meaning of the Agreement. It is relevant to note that certain rules of interpretation have been formulated with a view to guide the Court in interpreting the true meaning and the substance of the Agreement in any commercial Agreement such as the one we are concerned.

General Rule- Textualism

[37] The general rule in interpreting any written agreement or a text is to understand and give full weight to the language used in its grammatical and ordinary sense, so as to give the written agreement or a text a commercial certainty and sensible meaning to the language used in its ordinary and grammatical sense. This ordinarily means that the words must prima facie be taken to have been used in their ordinary and grammatical sense. The general rule in construing wills, statutes and written instruments is that the grammatical and ordinary sense of the words is to be adhered to, unless the words would lead to some absurdity, or some repugnance or inconsistency

with the rest of the instrument. In such case, the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency, but no further" [*Grey v. Pearson* (1857) 6 H.L. Cas. 61 at 1060]. Thus, where the words used are free of ambiguity and devoid of commercial absurdity, their natural and ordinary meaning will apply unless the relevant surrounding circumstances demonstrate otherwise [*Bank of Credit and Commerce International SA v. Ali* (2002) 1 AC 251, para 20].

From text to Context - contextualism

[38] There has been a clear development over the last two or three decades, however, in both statutory and contractual interpretation from a literal approach to a purposive approach viz, from text to context (see- J. U Spigelman "From Text to Context: Contemporary Contractual Interpretation" (2007) 81 Australian Law Journal 322 www.lawlink.nsw.gov.su/sc under sppeches). The case law developed in the English Courts and modified more recently, in *Wood v. Capita Insurance Services Limited* [(2017) UKSC 24] demonstrates that in relation to the interpretation of commercial contracts, textualism and contextualism are not conflicting paradigms and the extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement. Para 13 states:

(i) Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation;

(ii) Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement;

(iii) The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements;

(iv) Some agreements may be successfully interpreted principally by textual analysis, for example, because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals;

(v) The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example, because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement.

Real Intention of the parties preferred to grammatical sense

[39] The general rule that the grammatical words are presumed to have been used in ordinary sense has been modified in commercial contracts that must be given a business like interpretation in which the real intention of the parties is to be ascertained with regard to the meaning of particular words used in a written contract. The shift from text to context in commercial contracts having given a business line interpretation is clearly reflected in the following statement made by Lord Hoffmann, who reformulated the principles of contractual interpretation in *Investors Compensation Scehme Ltd v. West Bromwich Building Society* (1998) 1 W.L.R. 896, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past:

> *"The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars, the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason have used the wrong words or syntax: see Mannai Investments Co. Ltd v. Eagle Star Life Assurance Co. Ltd (1997) A.C. 749)".*

[40] If the words used are free of ambiguity and devoid of commercial absurdity, their natural and ordinary meaning will apply unless the relevant surrounding circumstances demonstrate otherwise [*Marble Holdings Ltd v. Yatin Development Ltd* (2008) 11 HKCFAR 222, para 19]. To ascertain the intention of the parties, the Court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship, all the relevant facts surrounding the transaction so far as known to the parties [*Bank of Credit and Commerce International SA v. Ali* (2002) 1 A.C. 251, para 8].

[41] In discovering what a reasonable person would have understood the parties to have meant, and whether the labeling of the words are inconsistent with the overall terms of the contract, it is necessary to consider not only the individual words used in the text, but also the agreement as a whole, the object of the contract, factual and legal background against which the agreement was concluded. Lord Hoffmann in *Jumbo King Ltd v. Faithful Properties Ltd* (1999) 2 HKCFAR 279, 296 identified the proper approach to be adopted in a case such as the present, when identifying the true nature and substance of the agreement in the following passage:

> *"The construction of a document is not a game with words. It is an attempt to discover what a reasonable person would have understood the parties to mean. And this involves having regard not merely to the individual words*

they have used, but to the agreement as a whole, the factual and legal background against which it was concluded and the practical objects which it was intended to achieve. Quite often this exercise will lead to the conclusion that although there is no reasonable doubt about what the parties meant, they have not expressed themselves very well. Their language may sometimes be careless and they may have said things which, if taken literally, mean something different from what they obviously intended..."

[42] This legal position was further confirmed recently in the judgment of Lord Numberger of the Supreme Court of the United Kingdom in *The Commissioners for Her Majesty's Revenue and Customs (Respondent) v. Secret Hotels2 Limited (formerly Med Hotels Limited)* [2014] UKSC 16. The Supreme Court considered the question whether a written contract which appears on its face to be intended to govern the relationship between them necessarily falls within a particular legal description or labelling or categorisation of a relationship governed by the said written contract.

[43] The Supreme Court held that (i) when deciding on the categorisation of a relationship governed by a written agreement, the label or labels which the parties have used to describe their relationship cannot be conclusive, and may often be of little weight; (ii) where parties have entered into a written agreement which appears on its face to be intended to govern the relationship between them, it is necessary to interpret the agreement in order to identify the parties' respective rights and obligations in relation to its legal and commercial nature of the relationship unless it is established that it constitutes a sham. Lord Numberger stated in paragraph 32 as follows:

"32. When interpreting an agreement, the court must have regard to the words used, to the provisions of the agreement as whole, to the surrounding circumstances in so far as they were known to both parties, and to commercial common sense. When deciding on the categorisation of a relationship governed by a written agreement, the label or labels which the parties have used to describe their relationship cannot be conclusive, and may often be of little weight. As Lewison J. said in A1 Lofts Ltd v. Revenue and Customs Commissioners [2010] STC 214, para 40, in a passage cited by Morgan J:

"The court is often called upon to decide whether a written contract falls within a particular legal description. In so doing, the court will identify the rights and obligations of the parties as a matter of construction of the written agreement; but it will then go on to consider whether those obligations fall within the relevant legal description. Thus the question may be whether those rights and obligations are properly characterised as a licence or tenancy (as in Street v. Mountford [1985] AC 809); or as a fixed or floating charge (as in Agnew v. IRC [2001] 2 AC 710), or as a consumer hire agreement (as in TRM Copy Centres (UK) Ltd v. Lanwall Services Ltd [2009] 1 WLR 1375). In all these cases the starting point is to identify the legal rights and obligations of the parties as a matter of contract before going on to classify them."

[44] Prof. C.G. Weeramantry in his Treatise "Law of Contracts, Vol. II, referring to the local cases states at para 618:

> *"A court of justice in construing a document should have less regard to its letter than to its general sense and intention. This rule constitutes an important modification of the rule discussed in the preceding section. Thus the court will not consider the mere name given to a transaction, but will rather see what the transaction really is in truth and in fact upon a consideration of all the facts relating to it. The rule that the real intention is to be preferred to the ordinary meaning of words where such intention is clear is the first rule of interpretation laid down by Pothier. Where the intention is clear neither grammar nor punctuation will prevail against it, for the language of Blacktone, neither false English nor bad Latin will destroy a deed. Thus, the courts will not attach overmuch importance to the use in a document of such words as "agent' 'mortgage' or pledge' 'guarantee', ' kaikili' or 'stridanum' or 'koratuwa', but will examine the transaction in order to determine its true nature. The real intention of the parties has similarly prevailed where the property sold was erroneously described, but its identity was clear, and where a transaction was described by the parties as an exchange but was in reality two sales".*

[45] It is significant to note that the entire agreement must be looked at, which in turn must be construed against the surrounding factual matrix at the time of its making. In discovering the true intention of the parties what they in fact intended by a particular word used, particular regard must be given to the parties' **underlying commercial aims, importance, objectives, rights and obligations** in entering into the contract, their legal and factual background like a business like interpretation. The High Court of Australia in *Toll (FGCR) Pty Ltd v. Alphapharm Pty Ltd* (2004) 129 CLR 165 at 179 reaffirmed the same principle in the following words:

> *"The meaning of the terms of a contractual document is to be determined by a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction".*

[46] These principles were most recently restated by the UK Supreme Court in *Arnold v. Britton* [2015] AC 1619, following the previous guidance it had given in *Rainy Sky SA and others v. Kookmin Bank, (2011) UKSC 50).* In *Arnold v. Britton* (supra), the UK Supreme Court considered the correct approach to be adopted for the interpretation, or construction, of contracts and stated at para 15:

> *"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in* Chartbrook Ltd v. *Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101 , para 14.*

And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. ***That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions".*** [emphasis added]

[47] In *Wood v. Capita Insurance Services Limited* (supra), which reaffirmed the approach to contractual interpretation adopted in *Arnold v. Britton* (supra), and revisited the balance to be struck between the language used and the commercial context in which a clause was drafted when deciding between competing meanings of a clause. The Supreme Court held, at para 10 that:

"The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause, but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.

[48] Accordingly, the apparent contractual arrangement will not represent the true relationship between the parties if the evidence is wholly inconsistent with the apparent contractual arrangement, or if the parties have failed to operate the contractual arrangements, or contractual arrangements are a sham, or if the evidence is wholly inconsistent with the apparent contractual arrangement. In short, what is required is to consider whether or not the contractual terms constitute a purely artificial arrangement which does not correspond with the commercial and economic reality of the transaction.

[49] In interpreting the categorisation of a relationship between the parties, it is necessary, first to identify, the parties' respective rights and obligations- the activities to be carried out by the parties in terms of the Agreement, and the real intention and the surrounding circumstances rather than to conclusively rely on the labels which the parties have used to describe their relationship in the Agreement. It must then decide, having regard to those rights and obligations and the surrounding circumstances as a whole, whether the Appellant, can be properly characterised as a "travel agent" or a mere "handling agent".

Travel Agent

[50] It is relevant at this stage to identify as to who is a “travel agent” as the term “travel agent” is not defined in the IRA 2006. According to the Airlines Reporting Corporation (ARC), a travel agency is defined as "A business that performs the following functions: quotes fares, rates, make reservations, arrange travel tickets and accommodation, arrange travel insurance, foreign currency, documents and accepts payments (https://.www2arccorp.com). A travel agent is a person who has full knowledge of tourist product–destinations, modes of travel, climate, accommodation, and other areas of the service sector and **acts on behalf of product providers/principles and in return gets a commission** https://tourismnotes.com/travel-agency). It is relevant to note that products in the tourism industry include reservation, accommodation, transportation, air transportation by airlines, guided tours, dining facilities etc.

[51] Travel agencies are broadly divided into two basic categories: (1) wholesale travel agency; and (2) retail travel agency as per the distribution of sale of tourism related services. In addition to the above mentioned classification, travel agency can also be classified as implant agent, conference and meeting planners, trade fair organiser, destination management company (DMC), online travel agency, home based travel agent etc. (DR. BABASAHEB AMBEDKAR, BAOU Education, Travel Agency & Tour Operation, p. 14 https://C:/Users/hp/Desktop/10/Travel%20Agent.pdf).

[52] A wholesale travel agency is one which initiates the process of designing organised package tours or sells the individual travel components directly or indirectly through franchise, sub agents and retail agents (supra). Examples include, a wholesale agent of an airline or Hotel chain is authorised to sell the airline tickets or hotel rooms on behalf of the principal service vendors (supra). On the other hand, a retail travel agency is one which sells its services directly to tourists or travellers at various small locations (supra).

Functions and Services of Travel Agency

[53] According to DR. BABASAHEB AMBEDKAR (supra), main functions and responsibilities of a large-scale travel agency can be categorized as follows:

1. It sells package tours on behalf of a wholesaler and functions as a retailer with a commission;
2. It provides package tours, ticketing reservations, travel related services, sightseeing tours in terms of the agreement;
3. It acts as the intermediary between tour operators, wholesale travel agents, and travellers;

4. It creates tour itineraries and offers travellers with useful destination information;
5. It transfers visitors/tourists to their destinations according to the itinerary;
6. **It serves as a ground handling agency, confirming and reconfirming services reserved by tour wholesalers such as return plane tickets, hotel booking, etc.;**
7. It handles problems for travellers in accordance with tour operators' instructions;
8. It entails dealing with main suppliers to negotiate commission terms and conditions;
9. It frequently hires trained and semi–skilled workers as per the load of business;
10. It provides potential and current clients with travel–related information and knowledge

Tour Operator

[54] In addition to a travel agent, a tour operator in the industry is performing different types of activities from a travel agent. Holloway (1992) state that tour operations undertake a distinct function in the tourism industry, they purchase separate elements of tourism products/services and combine them into a package tour which they sell directly or indirectly to the tourists. (https://tourismnotes.com/tour-operators/). A tour operator is providing services for tourists such as planning, arranging and making a tour package, making reservations and transportation, promotion, and sales and marketing. Tour operators are basically categorized into four types on the basis of their nature of the business and operations, They include:

1. Inbound tour operators who receive guests, clients/tourists, and handle arrangements in the host country;
2. outbound tour operators who promote tours for foreign destinations;
3. domestic Tour Operators who assemble, combine tourist components into inclusive tours and sell them to the domestic travelers and provide domestic travel services within the tourist's native country; and offer package tour to the travelers;
4. ground operators/destination management companies who organize and handle tour arrangements for incoming tourists on behalf of overseas operators who do not have a prominent tourist place in the visiting country. Ground operators who function on behalf of foreign operators can also be called **handling agencies at the destinations for providing personalized travel services to the tourists.**

[55] According to DR. BABASAHEB AMBEDKAR (supra), the main roles of tour operators can be categorised as follows:

1. Tour Packages creation and selling;
2. Make travel arrangements in advance;
3. Tour operations & budgeting;
4. Providing a relaxed and safe arrangements and tours.

Handling Agent

[56] The term “handling agent” is not defined in the Agreement. A handling agent means any person, agency, firm or company appointed by an operator to perform any of the ground handling services or functions or as an operator including receiving, loading, unloading, transferring or other processing of passengers or cargo. (https://www.lawinsider.com/dictionary/handling-agent). As stated in paragraph 53, a travel agent may also function as a handling agent confirming and reconfirming services reserved by tour wholesalers such as return plane tickets, hotel booking, etc. But it does not make a travel agent a handling agent when interpreting the agreement as a whole where the rights and obligations of the parties and the surrounding circumstances demonstrate that the relationship falls within the scope of a travel agent. On the other hand, a tour operator who acts as a ground operatior/destination company can also act as a handling agent for providing personalized travel services to tourist as referred to in paragraph 53.

[57] According to DR. BABASAHEB AMBEDKAR (supra), both a travel agent and a tour operator provide common services such as :

1. Transfers to and from the airport and hotels;
2. Making preparations for a traditional greeting at the points of arrival;
3. Organising luggage transportation at the airport and train stations;
4. Organising sightseeing trips with guided guides;
5. Creating options and selections for itineraries to various locations across the world;
6. Organising trade show and factory tours for visitors and activities for travellers;
7. Booking of airline tickets as well as making travel documentation such as passports, visas, health certificates, and permits for restricted areas;
8. Tourists' foreign exchange and travel insurance;
9. Managing a team of skilled and competent tour guides, escorts, interpreters, and tour managers at the destination, as well as providing customised services;
10. In–house travel counsellor with Computerised Reservation System and managing implant operations.

[58] Irrespective of certain similarities between a travel agent and a tour operator/ground handling agent, there is a difference between a travel agent and a tour operator as to their roles, functions and nature in their transactions. According to Tourism Notes COM, (https://tourismnotes.com/tour-operators/), the two main differences between a travel agent and tour operator are as follows:

1. A travel agent is a person who has full knowledge of tourist product– destinations, modes of travel, climate, accommodation, and other areas of the service sector. A travel agent **acts on behalf of the product providers and in return receive a commission**;

2. The tour operator is an organisation, firm, or company that **buys services (individual travel components, separately) from their suppliers (hotels, restaurants, cafes, etc.) and combines them into a single package tour, which is sold with their own packages to the public directly and independently or through middlemen**;

[59] Before, I consider the question whether the Appellant's relationship with SriLankan Airlines Ltd falls within the scope of a travel agent or a mere handling agent, it is important to consider the argument advanced by the learned Deputy Solicitor General that, as the Appellant's business relationship was only with SriLankan Airlines, the Appellant's services cannot be equated with the carrying on of a business unless the Appellant contracted with tourists. His argument was that SriLankan Airlines is neither a passenger nor a tourist, but the Appellant is a party to a contractual relationship with the SriLankan Airlines Ltd. His contention was that the concessionary tax rate is provided for the entity that is carrying on the business of a travel agent or transporting tourists, and not to any person who is having a contractual relationship with the Airline.

[60] He relied on the following factors in support of his submission that the Appellant's business was only with SriLankan Airlines and not with tourists or passengers and therefore, the Appellant is not an entity that is carrying on business of a travel agent or transporting tourists.

1. The Agreement is silent in respect of the services that the Appellant performed towards SriLankan Airlines;
2. The Appellant does not contract with the passengers or tourists, but the Appellant contracted with SriLankan Airlines;
3. The passengers or tourists do not pay the Appellant for its services and the payment to the Appellant is made by the SriLankan Airlines;
4. The passengers can only be SriLankan Airline passengers on the Layover Programme and thus, the passengers pay according to the rates set by SriLankan Airlines;

5. The Appellant uses the platform provided by the Sri Lankan Airlines to carry out his work and the platforms are installed and handled on behalf of the SriLankan Airlines and the services are strictly within the ambit of the SriLankan Airline Vouchers;
6. The Appellant has an exclusive arrangement with Sri Lankan Airlines.

[61] In the present case, the Appellant is admittedly carrying on a business of a travel agency and also destination/management in Sri Lanka, and the SriLankan Airlines Ltd entered into the Agreement in question due to this dual capacity of the Appellant. The TAC has categorised the Appellant only as a handling agent merely on the basis that the Agreement has labelled the Appellant as a handling agent without properly examining whether or not the activities carried out by the Appellant under the Agreement can be properly characterised as a travel agent or a mere handling agent.

[62] In the present case, the SriLankan Airlines Ltd displayed various Tours and Excursions in Annex 1, which include one day excursions from Colombo, Two day Tour, Three day tour, Tour day tour, Five day Tour, Six day Tour, Seven Day Tour, Eight day Tour, Nine day Tour, and 14 day Tour. The SriLankan Airlines Ltd however, does not handle any of these tours or act as a travel agent. The SriLankan Airlines Ltd however, engaged the Appellant to provide a number of services not only to the passengers of the Airline, but also to the Airline itself as set out in the Agreement. In terms of the Agreement, the Appellant must make the following arrangements on behalf of the SriLankan Airlines in respect of tourists arriving in Sri Lanka on the SriLankan Airline's Layover Programme:

1. The Appellant has to handle reservations and bookings on MARS (Mercator Airline Reservation Software System) on behalf of the Airline for receiving, handling and processing the incoming SriLankan Airline's Layover reservations and bookings for all passengers of the Airline, who arrived in Sri Lankan on its Layover Programme;

2. The Appellant has to handle the Airline's RoomsNet (Interactive Hotel Reservation Software System) on behalf of the Airline as per the requests of the passengers and the Airline, and re-confirm the bookings to the Airline's officers within 24 hours of the request appearing in the MARS system;

3. The Appellant has to maintain MARS and RoomsNet Software systems installed by the Airline and reserve Hotel rooms stipulated by the Airline and also as required per the booking as appearing in the MARS system;

5. The Appellant must handle all Airport handling at BIA Arrival Lounge on SriLankan Layover Programme;

6. The Appellant must provide the transportation to passengers on optional and city tours and between the Airport and the Hotels;

7. The Appellant must arrange Hotel accommodation to all the passengers who use the Layover Programme at rates specified in Annex 1, and handle all logistics and coordination of passengers on Airline's Layover Programme;

8. The Appellant must provide Hotel Accommodation and transportation for such passengers strictly in conformity with the Sri Lankan Airlines Hotel Voucher presented by the passenger;;

9. The Appellant must handle the Airline's Layover Programme on an exclusive basis for the Airline and shall not service nor handle any similar Programme for any other Airline operating into Sri Lanka.

[63] The Appellant's sole business with the Airline is to act as its travel agent in relation to all obligations set out in the Agreement because the Airline is not capable of handling those obligations, and thus, the Airline engaged the Appellant to provide those services. Clause 9 provides that the Appellant shall invoice the Airline for all Sri Lankan Layover Programme Vouchers serviced by the Appellant and for other services provided to passengers upon the Airline's written authorisation during the previous month at the rates set out in Annex 1. Accordingly, the Appellant provided services to the passengers of the Airline on Layover Programme on behalf of the Airline and received payment from the SriLankan Airline as the agent of the Airline performing almost all major functions of a travel agent referred to in the Agreement. This is the same position where the services are provided to any other Airline or tourists through a foreign travel agent .

[64] In terms of the Agreement, the Appellant is handling the MARS and RoomsNet softwares installed by the Airline for providing services to both the passengers and the Airline through the MARS and RoomsNet and the Appellant received a payment/commission from the Airline at the rate specified in Annex 1. As described, a mere tour operator or a handling agent will buy services from their suppliers such as hotels, restaurants, cafes, saloons and airlines and sells its own single tour packages directly to passengers etc.

[65] The Appellant in the present case does not buy packages from the Sri Lankan Airlines or offer independent tour packages to tourists. The Appellant acts on the behalf of the Sri Lankan Airlines as its travel agent and receive a payment/commission as per the rates specified in Annex 1 and as per the accepted standard determined by the Airline. On the other hand, the Appellant is operating and handling the Airline's MARS and RoomsNet

Reservation and Hotel Booking Systems on behalf of the Airline and providing services both to the Airline and its passengers.

[66] The Agreement does not define the phrase "handling agent". The Agreement, however, defines the functions and obligations to be performed by the Appellant on behalf of the SriLankan Airlines, which also include a function to be handled by the Appellant such as the ground handling work of the SriLankan Airlines Ltd. Clause 3.2 (k), (i) and (m) of the Agreement reads as follows:

(k) Establish and maintain a dedicated counter at the BIA Arrival Lounge at its own cost, to handle the Airline's Layover Passengers, on a 24 hour service basis, manned by a minimum of 3 desk staff;

(l) Provide a minimum of 10 Airport Representatives located at BIA to coordinate handling of passengers arriving on SriLankan Airlines on the SriLankan Programme;

(m) Provide **handling services** to passengers on the Airlines Layover Programme, which shall include: transfers between the airport and the Hotels and vice versa, and the Hotel accommodation and facilitation of the Airline's Layover passengers.

[67] Accordingly, the handling services at the BIA include ground handling services such as (a) transfers between the Airport and the Hotel; (b) hotel accommodation; and (c) handling and coordinating passengers at the BIA. I am of the view that the SriLankan Airlines Ltd engaged the Appellant as a travel agent on behalf of the Airline and the Appellant carried on the business of a travel agency and acted as the travel agent of the Sri Lankan Airlines Ltd. As noted, a travel agent is also entitled to act as a handling agent, and in the present case, the Appellant in fact handled passengers arriving in Sri Lanka at the BIA in terms of the Agreement. The mere phrase "handling agent" used in the Agreement is not inconsistent with the role played by the Appellant as a travel agent on behalf of SriLankan Airlines Ltd.

[68] It is now relevant to consider the two cases relied on by the learned Deputy Solicitor General in support of his submissions. He relied on the decision of the Supreme Court in *Perera and Silva Ltd v. CGIR,* Sri Lanka Tax Cases Vol. IV, 371 and the Indian High Court decision in *Industrial Catering Services v. The Commercial Tax Officer*, 2003, 132 STC 35 Mad. He submitted that the business carried out by the Appellant with SriLankan Airlines does not fall within the category of a business with tourists as specified in Section 45 (2) (d) unless the Appellant's business is directly connected with tourists of the Airlines.

[69] In *Perera and Silva Ltd v. CGIR* (supra), the question was whether the wooden boxes and shocks manufactured by the assessee and sold to his customers who subsequently used them to pack goods for export of other products should be excluded from turnover in assessment made on him. The assessee argued that the boxes and shocks manufactured by him and

exported by his customers should be excluded from his turnover in assessments made by him. The Supreme Court rejected the contention of the assessee and held that (i) the business carried on by the assessee was one of manufacture only: (ii) it is only when the business in question includes both manufacture and export that the exemption to liability can arise; (iii) the turnover tax is in respect of the turnover made by the assessee from that business of manufacture of wooden boxes, but the exception applies when that business includes both manufacture and export.

[70] The business of the assessee in that case was manufacturing wooden boxes and the tax was in respect of the turnover made by the assessee from the business of the manufacture carried on by the assessee from the making of wooden boxes. The Supreme Court correctly rejected the assessee's contention as the tax liability of a transaction cannot be determined by the ultimate use of the article traded after changing hands several times and after several years of using them for export.

[71] I may now examine the decision In *Industrial Catering Services v. The Commercial Tax Officer*, (supra). The question was whether the turnover in relation to the sales effected by an independent contractor to factories or other establishments, and ran a canteen in those establishments, is exempt from sales tax. The exemption granted was for the sale by all canteens run "by an employer or by the employees on co-operative basis on behalf of the employer". The Court held that (i) the benefit of the exemption cannot be extended unless the plain language employed in the exemption reasonably required its application to the situation which is brought before the Court; (ii) but the running of the canteen by an independent contractor, even though can be regarded as running of the canteen on behalf of the employer cannot be exempted from sales tax.

[72] In my view the scope of the exemption in that case was limited to the employer or employee running the canteen on a co-operative basis as the possibility of the canteen being run by without a profit motion would be real when the employer does not normally seek to make a profit of his own employees who run a canteen on co-operative basis for the benefit of their members.

[73] The facts of the two cases relied on by the learned Deputy Solicitor General are distinct from the facts of the present case, and thus, those cases cannot be applied to the present case. The concessionary tax rate is granted to an undertaking engaged in the business of a travel agent or transportation of tourists for the purpose of promoting tourism and where the assessee falls within the category of such an undertaking, he will be entitled to the benefit of the concessionary tax rate specified in section 45 (2) (d).

[74] The learned Deputy Solicitor General further submitted that the Appellant did not have a contract with tourists, but only with the Sri Lankan

Airlines, and therefore, the Appellant has no business with tourists or passengers. It is relevant to note that the Appellant performed all services for the Airline and its passengers on its Layover Programme on behalf of the SriLankan Airlines Ltd, and received payment/commission from the Airline. But the SriLankan Airlines Ltd was not carrying on the business of a travel agent, and it is only the Appellant who was carrying on the business of a travel agent. Thus, the SriLankan Airlines Ltd could not have claimed the concessionary tax rate of 15% specified in section 45 (2) (d) (iii) of the IRA 2006. In my view, there is no need whatsoever for the Appellant to enter into a separate agreement with passengers or tourists in order to claim the concessionary tax rate of 15% specified in section 45 (2) (d) (iii) of the IRA 2006.

[75] The word "business" is defined in Section 217 of the Inland Revenue Act of 2006. It reads as follows:

> *"Business"* ***includes*** *an agricultural undertaking, the racing of horses, the letting or leasing of any premises,* ***including*** *any land by* ***a company and the forestry****".*

[76] The definition of "business" in Section 217 is inclusive and not exhaustive in nature and thus, it includes an agricultural undertaking, the racing of horses, the letting or leasing of any premises, including any land by a company and the forestry. The concept of "undertaking" is wider than the mere term "business" referred to in Section 217. It encompasses every entity engaged in an economic activity, including the business activity of a travel agent, and it must be defined in fiscal statutes broadly. It extends to any business or trading activity of any person, several persons (associated persons), natural or legal and separate activities within the entity (*Polychrome Electrical Industries (Pvt) Ltd v. Commissioner General of Inland Revenue* (C.A.Tax No. 0049/2019 decided on 26.03.2021). It is immaterial whether the undertaking that carries out such business or trading activity is performed by any company or individual, or several persons, natural or legal persons within such entity, so long as such individual or company also fulfils the conditions set out in section 45 (2) (d) (iii) of the IRA 2006.

[77] On the question whether the Appellant is carrying on a business within the meaning of Section 45 (2) (d) (iii), the learned Counsel for the Appellant referred to the decision of the Supreme Court in *Law Society v. Commissioner of Income Tax Commissioners of Inland Revenue,* 56 N.L.R. 97 at p. 99. The Supreme Court cited Rowlatt J. who considered the meaning to be attached to the word " business " in *Commissioner of Inland*

Revenue v. Marine Stream Turbine Co. [(1929) 1 K.B. 193 at p. 203] and stated:

> *"the word ' business ', however, is also used in another and a very different sense, as meaning an active occupation or profession continuously carried on, and it is in this sense that the word is used in the Act with which we are here concerned".*

[78] As to the meaning of the term "business", the case of *Rolls v. Miller* (1814) 27 Chancery Division 71 is also helpful. In that case, Lindley L.J. considered the question whether a payment taken by a charitable institution called a " Home for Working Girls ", that provided the inmates with board and lodging, was a " business ". At page 88 Lindley L.J. stated:

> *"...When we look into the dictionaries as to the meaning of the word ' business ', I do not think they throw much light upon it. The word means* ***almost anything which is an occupation, as distinguished from a pleasure—anything which is an occupation or a duty which requires attention is a business****—I do not think we can get much aid from the dictionary"*

[79] If the Respondent's interpretation that, since the Appellant only contracted with the Airlines, the Appellant cannot claim the concessionary tax rate, is carried to its logical conclusion, only the Sri Lankan Airlines Ltd could have claimed the concessionary tax rate specified in section 45 (2) (d) (iii) of the IRA 2006. It is illogical as the SriLankan Airlines is neither a travel agent nor claimed any concessionary tax rate for carrying on the business of transporting tourists.

[80] When the nature and substance of the Agreement, true intention of the parties together with surrounding circumstances and the commercial business realities are taken as a whole, support the notion that nature of the intended relationship of the Appellant with the SriLankan Airlines Ltd was to be the Airline's travel agent, which also includes the functions of a handling agent. The mere label "handling agent" which the parties used to describe their relationship in the Agreement could not be conclusive evidence, and it did not alter the true nature of the relationship and the true intention of the parties when entered into the Agreement in question.

[81] Applying that test, it would seem to be difficult to come to any other conclusion but that the Appellant is an undertaking engaged in a business of a travel agent within the meaning of section 45 (2)(d) (iii) of the IRA 2006. The TAC erroneously concluded that the Appellant was not entitled to the concessionary rate specified in section 45 (2) (d) because the Agreement labelled the Appellant as a "handling agent" instead of labelling the Appellant as a "travel agent". It follows that, in the instant case, the Appellant was engaged in the business of a travel agent for the purpose of Section 45 (2) (d) (iii) of the IRA 2006 and therefore, the Appellant was entitled to the

concessionary tax rate of 15% in section 45 (2) (d) (iii) of the IRA 2006. For those reasons, I hold that the question of law No. 1 should be answered in favour of the Appellant

Question of Law No. 2

Is the Appellant engaged in the business of transporting tourists within the meaning of section 45 (2) (d) of the Inland Revenue Act, No. 10 of 2006?

Business of transportation of tourists-S. 45 (2)(d)(iv)

[82] The concessionary tax rate also applies to the transportation of tourists, whether or not an undertaking is operating as a travel agent under section 45 (2)(d)(iii). The Agreement in question clearly provides that the Appellant must **transport passengers/tourists from the BIA to the Hotel and vice versa, and other tours and excursions** (clause 3.1). Accordingly, the Appellant is also obliged under the Agreement to transport tourists. The Assessor has, divided the business activities of the Appellant with SriLankan Airlines Ltd and applied the normal tax rate in calculating the assessable income as follows:

1.	Business of tour operation	91,220,569
2.	Business activities with SriLankan Airlines	224,107,698
	Total Turnover	315,328,267

[83] However, the Appellant has not identified the transportation of tourists/tour operation as a separate business of the Appellant and claimed a separate amount for transportation of tourists/tour operation as a separate business of the Appellant. For those reasons, the question of law No. 2 does not arise for further consideration and in the result, it is answered in the negative.

Conclusion & Opinion of Court

[84] In these circumstances, I answer the questions of law No. 1 arising in the case stated in favour of the Appellant and the question of law No. 2 in the negative as follows:

1. Yes.
2. No (As the Appellant has not claimed the business of transporting tourists as a separate business).

[85] For those reasons, in view of the answer to the question of law No. 1 in favour of the Appellant, I annul the determination made by the Tax Appeals Commission dated 07.02.2013 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