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

In the matter of a Case Stated for the Opinion of the Court of Appeal under and in terms of section 122 (1) of the Inland Revenue Act, No. 28 of 1979 (as amended).

Prima Ceylon (Private) Limited,
No. 50, Sri Jayawardenapura Mawatha,
Rajagiriya.

Appellant

Case No. CA/TAX/0009/2009
Board of Review Case No.
No. BRA-529/SCA-224

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.
	:	Dr. Shivaji Felix with Nivantha Satharasinghe for the Appellant
		Nirmalan Wigneswaran, Deputy Solicitor General for the Respondent
Argued on	**:**	21.01.2022 & 28.02.2022
Written Submissions filed on	:	24.03.2014, 21.05.2018, 29.10.2019, & 20.04.2022 (by the Appellant)

19.11.2015, 29.10.2019 & 20.04.2022 (by the Respondent)

Decided on : 29.07.2022

Dr. Ruwan Fernando, J.

Introduction

[1] This is an appeal by the Appellant by way of a Case Stated against the determination of the Board of Review dated 29.06.2009 confirming the determination made by the Respondent on 21.04.2008 and dismissing the Appeal of the Appellant. The period relates to the year of assessment 1998/1999.

Factual Background

[2] The Appellant, Prima Ceylon (Private) Limited, previously known as Prima Ceylon Limited, is a limited liability company incorporated under the laws of Sri Lanka. The Appellant transferred a land at Rajagiriya to a property developer, named Keangnam Ceylon (Pvt) Limited in 1994 for a sum of Rs. 82 Million. On 01.07.1994, Keangnam Ceylon (Pvt) Limited (hereinafter referred to as "Keangnam") settled the purchase consideration of Rs. 82 Million by the issue of 8,200,000 cumulative preference shares of Rs. 10/- each in the capital of the said company, credited as fully paid up carrying a dividend rate of 28 percent for a period of three years.

[3] The Appellant further entered into an agreement in July 1994 with Keangnam, whereby keangnam agreed that after the completion of the construction of a High Rise Apartment Complex, it shall redeem the said 8,200,000 28% redeemable cumulative preference shares of Rs. 10/- and in lieu of the redemption proceeds of the said preference shares and the cumulative dividends thereon, totaling Rs. 150,000,000/-, to transfer to the Appellant, 28 residential units. In terms of clause 13 of the agreement, the parties agreed that in the event that it is not legally permissible for Keangnam to declare and pay the cumulative dividends on the 8,200,000 redeemable preference shares of Rs. 10/- each, and or redeem the preference shares and or transfer the said 28 residential units to the Appellant in lieu of redemption proceeds, the Appellant shall be entitled to demand payment of the guaranteed amount or be entitled to all other remedies available at law including specific performance. The Appellant took possession of the said residential units in the year 1998/1999 in lieu of the redemption of the preference shares in terms of the said agreement but the transfer of deeds was executed subsequently.

[4] The Appellant submitted its Returns of Income and the Assessor by its letter dated 06.12.2000 rejected the Return of Income furnished by the Appellant on

the ground that a capital gain amounting to Rs. 503,000,000/- arising on the redemption of shares had not been declared as income and the taxes thereon had not been paid (A1). Accordingly, the notice of assessment (A2) was issued by the Assessor and the Appellant appealed against the said assessment to the Respondent. Whilst the hearing was in progress, the Inland Revenue (Special Provisions) Act, No. 10 of 2003 came into force, and in terms of section 4 (3) of the said Act, the Respondent accepted the Return of Income for the year of assessment 98/99 and therefore, the assessment was discharged (A4).

[5] Subsequently, the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2014 came into force and in terms of the provisions of the said Act, any proceedings, investigation or inquiry which had been stopped, suspended or withdrawn in terms of the provisions of the Inland Revenue (Special Provisions) Act, No. 10 of 2003, shall be revived or restored and continued with, as if such proceedings, investigation or inquiry had not been stopped, suspended or withdrawn. Accordingly, the Senior Assessor by letter dated 29.12.2005 informed the Appellant that the assessment which had been discharged under the provisions of the Inland Revenue (Special Provisions) Act, No. 10 of 2003 will be reissued (A6). Accordingly, the notice of assessment dated 26.03.2006 was issued by the Assessor (A7). The Appellant appealed against the said assessment to the Respondent, and the Respondent by determination dated 21.04.2008 confirmed the assessment and dismissed the appeal.

Appeal to the Board of Review & the Court of Appeal

[6] Being dissatisfied with the said determination of the Respondent, the Appellant appealed to the Board of Review and the Board of Review by its determination dated 29.06.2009 confirmed the determination of the Respondent and dismissed the appeal.

Questions of Law

[7] Being dissatisfied with the said determination of the Board of Review, the Appellant appealed to the Court of Appeal by way of a Case Stated and formulated 23 questions of law in the Case Stated for the opinion of the Court of Appeal. On 21.01.2022, the parties agreed that the questions of law to be answered by this Court are questions of law Nos. 4, 11, 12, 13, 14, 15, 16, 17, 22 and 23 and other questions of law need not be answered (Vide- journal entry dated 21.01.2022). Accordingly, the questions of law to be answered by this Court are:

04. Has the Board of Review erred in law by basing its decision on the assessment bearing No. 9523168 when the appeal does not relate to that assessment, but to assessment bearing No. 8206103?

11. Has the Board of Review erred in law by not coming to the conclusion that the Assessor has acted contrary to law by issuing a fresh assessment when he/she is not legally empowered to do so in terms of the applicable law which the Assessor relied on in the communication to the taxpayer?

12. Has the Board of Review erred in law by coming to the conclusion that the Assessor is legally empowered to raise a fresh assessment under and in terms of section 4 (4) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004?

13. Has the Board of Review erred in law by not coming to the conclusion that if the hearing before the Commissioner General of Inland Revenue was revived by operation of law, it would also be time barred by operation of law?

14. Has the Board of Review erred in law by not coming to the conclusion that the assessment is time barred under section 115 (5) of the Inland Revenue Act, No. 28 of 1979?

15. Has the Board of Review erred in law by not coming to the conclusion that the assessment is bad in law because the Assessor has not provided any reasons for his decision to raise a fresh assessment which is a mandatory requirement under and in terms of section 115 (3) of the Inland Revenue Act, No. 28 of 1979?

16. Has the Board of Review erred in law by coming to the conclusion that the Appellant was liable to capital gains tax despite the fact that the imperative requirements for the imposition of capital gains tax as required by law had not been fulfilled?

17. Has the Board of Review erred in law by coming to the conclusion that the redemption of preference shares had in fact taken place despite the failure to satisfy the statutory criteria in respect of the same?

22. Has the Board of Review erred in law by coming to the conclusion that the Commissioner General of Inland Revenue has adduced grounds for the assessment in his determination that were not relied upon by the Assessor in any communication to the taxpayer?

23. Has the Board of Review erred in law by coming to the conclusion that there were grounds for the imposition of a penalty for the late payment of taxes when in terms of the then applicable agreement between the Government of Sri Lanka and Prima Ceylon Limited, payments of income tax have been made on or before due dates by the Ministry of Plan Implementation out of a budgetary allocation for the purpose?

[8] At the hearing, Dr. Shivaji Felix, the Senior Counsel for the Appellant and Mr. Nirmalan Wigneswaran, the Deputy Solicitor General, Counsel for the Respondent made oral submissions on the said questions of law Nos. 4, 11, 12, 13, 14, 15, 16, 17, 22 and 23.

Analysis

Question of Law, No. 4

4-Has the Board of Review erred in law by basing its decision on the assessment being No. 9523168 when the appeal does not relate to that assessment, but to the assessment being No. 8206103?

[9] At the hearing, Dr. Shivaji Felix submitted that the Board of Review (hereinafter referred to as the BOR) erred in law by basing its determination on assessment bearing No. 9523168 dated 07.03.2001 (A2) where the tax in dispute was Rs. 125,000,000/- when the appeal does not relate to that assessment, but to the assessment bearing No. 8206103 dated 26.03.2006 (A7). He submitted that the assessment bearing No. 9523168 (A2) had already been discharged by the Respondent by letter dated 30.06.2003 (A4) and the assessment under appeal bears the assessment No. 8206103 dated 26.03.2006 (A7). He submitted that the assessment No. 8206103 (A7) refers to the amount of tax in dispute as Rs. 47,188,400/- and the assessment, as determined by the BOR is in relation to an incorrect assessment and is, therefore, bad in law and must be annulled.

[10] On the other hand,Mr. Wigneswaran while conceding that the amount of tax in dispute mentioned in the BOR determination (Rs. 125,750,000) is incorrect, submitted that the Appellant is estopped from taking up this position for the following reasons:

1. The Appellant sought to appeal against assessment No. 8206103 (A7) and the Appellant submitted an application for a case stated which also refers to the correct assessment No. 8206103 (A7). Accordingly, the Appellant had no doubt that the correct assessment under appeal is the second assessment No. 8206103 (A7);
2. The BOR in its determination refers to the tax in dispute as Rs. 125,750,000, but the BOR determination does not state that the assessment that was confirmed was the assessment No. 9523168 since the BOR also refers to the fresh assessment being issued by the Assessor;
3. The BOR specifically refers to the raising of a fresh assessment under and in terms of the provisions of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 and accordingly, the reference to the incorrect tax in dispute (Rs. 125,750,000) is an omission;
4. The omission to refer to the correct tax in dispute does not make the determination of the BOR bad in law or result in the annulment of the assessment, and such an omission can be cured by section 144 of the Inland Revenue Act, No. 28 of 1979 (as amended).

[11] Now the question that arises for determination is whether the reference to the incorrect amount of tax in dispute (Rs. 125,750,000/-) in the determination made by the BOR instead of the tax in dispute as Rs. 47,188,400/- (A7) is fatal to the assessment, or is a ground to annul the assessment bearing No. 8206103 (A7). It is not in dispute that by letter dated 13.12.2000 (A1), the Assessor rejected the Return of Income furnished by the Appellant on the ground that a capital gain amounting to Rs. 503,000,000/- arising on the redemption of shares had not been declared as income, and the taxes thereon had not been paid by the Appellant (A1). The said letter dated 13.12.2000 (A1) reads as follows:

> " 1. Capital gain amounting to Rs. 503,000,000/- arising on the redemption of shares has not been declared as income and taxes have not been paid
>
> Capital gain of Rs. 503,000,000 was computed as follows:
>
> | | |
> |---|---|
> | Redeemed value of preference shares | Rs. 585,000,000 |
> | Less: Cost of acquisition of 8,200,000/-. Cumulative Preference shares of Rs. 10/- each | Rs. 82,000,000 |
> | Capital gain | Rs. 503,000,000. |
>
> According to Notes 2 & 3, to the financial statement of accounts for the year ended 31.12.98, it appears that the shares held by Prima Ceylon (Pvt) Ltd. in Keangnam Company (Pvt) Ltd. have been redeemed by Keangnam Ceylon (Pvt) Limited at a value of Rs. 82 Million by way of giving 28 residential apartments (Units). Prima Ceylon Limited has obtained possession of the said 28 residential units during the Year of Assessment 1998/99.
>
> According to the Note 3 to the financial accounts, it further appeared, that the Company has incurred Rs. 44,104,349/- for the other improvements to the said residential apartment after obtaining the possession of the said properties.
>
> The Period of ownership of the shares held in Keangnam Ceylon Limited by Prima Ceylon Limited is 4 years.
>
> An assessment will be issued for the Year of Assessment 1998/99 as follows:
>
> | | |
> |---|---|
> | Trade profit as per tax computation | Rs. 1,007,051,610 |
> | Interest Income | Rs. 85,864,729 |
> | Capital Gain | Rs. 503,000,000 |
> | Statutory incomes/assessable Income Tax | Rs. 1,595,916,339 |

[12] Accordingly, the notice of assessment bearing No. 9523168 dated 07.03.2001 (A2) was issued by the Assessor. The following matters are not in dispute in the present case:

1. The notice of assessment bearing No. 9523168 (A2) was issued by the Assessor and the Appellant appealed against the said assessment to the Respondent;

2. Whilst the hearing was in progress, the Inland Revenue (Special Provisions) Act, No. 10 of 2003 came into force, and the in terms of section 4 (3) of the said Act, the Respondent accepted the Return of Income for the year of assessment 98/99 and the assessment was discharged (A4);

3. The Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 came into force on 20.10.2004 and the Assessor by letter dated 29.12.2005 (A5) informed the Appellant that the assessment which was discharged under section 4 (3) of the Inland Revenue (Special Provisions) Act, No. 10 of 2003 will be reissued;

4. The notice of assessment bearing No. 8206103 dated 26.03.2006 (A7) was issued by the Assessor under the provisions of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 and the Appellant appealed against the said assessment to the Respondent (A8);

5. The notice of assessment No.9523168 (A2) and the notice of assessment bearing No. 8206103 (A7) bears the same TIN number (10404536);

6. The notice of assessment No. 9523168 (A2) and the notice of assessment No. 8206103 (A7) refer to the same name of the Appellant and the same year of assessment (1998/1999).

[13] A comparison of the notice of assessment No. 9523168 (A2) and the notice of assessment bearing No. 8206103 (A7) issued by the Assessor reveals that the Assessor has provided the following details in both notices of assessment and demanded payment accordingly.

	Notice of assessment No. 9523168 (A2)	**Notice of assessment No. 8206103 (A7)**	**Difference**
Item	**Amount**	**Amount**	
Profit from Trade	1,007,051,610	1,007,051,610	
Interest Income	85,864,729	85,864,729	
Capital Gains	503,000,000	503,000,000	
Total	1,595,916,339	1,595,916,339	
Qualifying Payments	1,830,566	1,830,566	

Taxable Income	1,594,085,773	1,594,085,773	
Tax	507,630,021	507,630,021	
Tax on Dividends	193,371,000	114,809,400	78,561,600
Total Tax Payable	701,001,021	622,439,040	78,561,600
Amount Paid	65,557,981	65,557,981	
Amount paid late	509,693,040	509,693,040	
Under Payment	125,750,000	47,188,400	78,561,600
Penalty	215,003,864	175,723,064	39,280,800
Amount Due	340,753,864	222,911,464	117,842,400

[14] The above table clearly reveals that the following details in both notices of assessment are identical except few differences:

1. Profit from trade;
2. Interest income;
3. Capital gains;
4. Total amount;
5. Qualifying payment;
6. Taxable income;
7. Tax;
8. Amount paid;
9. Amount paid late.

[15] The differences only relate to the following items:

1. Tax on Dividend;
2. Total Tax Payable;
3. Under Payment;
4. Penalty

[16] The main difference between the two assessments relates to the reduction in the tax on dividends whereby the tax on dividends has been reduced from 193,371,000 to Rs. 114,809,400. The difference is only Rs. 78,561,600. Due to the reduction of the dividend tax outstanding at the relevant period, the under-payment of taxes has also been reduced from Rs. 125,750,000 to Rs. 47,188,400, and the penalty, from Rs. 215,003,864 to Rs. 175,723,064. It is relevant to note that the Appellant has challenged the imposition of penalty on the ground that any delay in the payment of any penalty accruing in respect of delay must be paid by the Government of Sri Lanka (question of law No. 23). However, the method of calculation has not been challenged by the Appellant.

[17] It is seen that the reduction of the tax on dividends, underpayment and the penalty depended on the reduction of the tax on dividends, which has been

calculated at the rates applicable in the relevant period. Except for the reduction of the amount referred to above, the details, including the profit from trade, interest income, capital gains, qualifying payments, taxable income and the amount of tax between the two assessments A2 and A7 are almost identical.

[18] The Appellant appealed against the assessment No. 8206103 (A7) to the Respondent and the acknowledgment letter dated 27.04.2006 (A8) refers to the correct assessment No. 8206103 (A7). The reasons for the determination of the Respondent dated 15.05.2008 (Vide- BOR file pp. 1-10) and the determination dated 21.04.2008 refers to the correct TIN Number (104048536) and the correct charge number/assessment Number (8206103) (Vide- letter of the Respondent dated 21.05.2008). Though the Reasons for the determination dated 15.05.2008 refer to the under-payment amount of Rs. 125,750,000/- as tax in dispute, it clearly provides the following details of the appeal:

TIN No. 104048536
Appellant: Prima Ceylon Ltd
Y/A 98/99-Income Tax
Charge No. 8206103
Date of Notice of Assessment:26.04.2006

[19] A perusal of the appeal filed by the Appellant to the BOR against the determination made by the Respondent reveals (X2) that the Appellant has clearly mentioned the assessment No. 8206103 (X2). The Appellant has admitted in paragraph 9 of the said appeal dated 09.06.2008 that

> *"By notice of assessment dated 26.03.2006 issued by J. M. Jayawardena, Senior Assessor, LTU Audit-Unit 8, received by the Company on 17.04.2006, Prima Ceylon Limited was served with an assessment bearing No. 8206103".*

[20] By the same appeal, the Appellant moved to allow the appeal and discharge the assessment bearing No. 8206103 (p.6). It is absolutely clear that the assessment under appeal related to No. 8206103, and the BOR by determination dated 29.06.2009 dismissed the said appeal filed by the Appellant.

[21] The Appellant strongly relies on the reference to the first assessment and the under-payment of tax (Rs. **125,750,000**) on page 1 of the determination made by the BOR. The BOR considered the four preliminary objections raised by the Appellant, namely, that (i) the Assessor had acted contrary to law; (ii) the Assessor was not legally empowered to raise a fresh assessment under and in terms of section 4 (4) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004; (iii) the reasons for the assessment were not provided and; (iv) the assessment is time barred under section 115 (5) of the Inland Revenue Act, No. 28 of 1979. The BOR decided that those preliminary issues could not be raised before the BOR in view of the decision of the Court of Appeal in *A. M.*

Ismail v. Commissioner of Inland Revenue (Sri Lanka Tax Case Vol. IV, p. 156) which held that the legality or validity of the acts complained of by the Appellant in the preliminary issues relate to administrative acts which cannot be challenged by way of appeal to the BOR. The Court of Appeal stated at pp. 3 & 4:

> *"The Revenue's contention on the preliminary issues was that the Appellant could not raise such issues before the Board in view of the pronouncements of the Appellate Court in the case of A. M. Ismail v. Commissioner of Inland Revenue (Sri Lanka Tax Case Vol. IV, p. 156) does not support the Appellant as far as the powers and authority to be exercised under the law by the Board of Review, particularly to rule on the preliminary issues" (p. 3)*
>
> "*Be that as it may, we have taken note of the aforesaid directions of their Lordships (A.M. Ismail vs. Commissioner of Inland Revenue). We are cautioned to leave such matters of law and procedure for proper adjudication by a Court of Law.*
>
> *The enactment of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 has empowered the Assessor to raise assessment and the Board to determine the Appeal. We find no merit in this objection by the appellant, particularly as section 2 (2) of the Inland Revenue (Regulation of Amnesty) Act. No. 10 of 2004 expressly provides the continuation of the liability irrespective of any right acquired under the Amnesty Act.*
>
> *As such, the Board overrules the preliminary issues and proceeds to determine the appeal on the substantive issues based on the submissions of the parties".*

[22] It is clearly seen that even though the BOR has not specifically referred to the assessment bearing No. 8206103 (A7) in its determination, it has overruled the preliminary objection raised by the Appellant that the Assessor is not legally empowered to raise a fresh assessment under and in terms of section 4 (4) of the Inland Revenue (Regulation of Amnesty) Act. No. 10 of 2004. The only fresh assessment referred to by the BOR in its determination relates to the assessment bearing No. 8206103 (A7) in respect of which the appeal was filed by the Appellant to the BOR.

[23] The BOR then proceeded to consider the substantive issue raised by the Appellant in respect of the assessment No. 8206103 (A7) and dismissed the appeal filed in respect of the assessment bearing No. 8206103 (A7). It is relevant to note that the substantive issue that was decided by the Respondent and the BOR related to the liability of the Appellant to pay capital gains tax in a sum of Rs. 503,000,000/- under section 7 (1) (d) of the Inland Revenue Act, No. 28 of 1979 (as amended).

[24] There is nothing in the determination made by the BOR to indicate that the BOR considered the appeal purely on the basis of the assessment bearing No. 9523168 (A2) when the determination clearly refers to the fresh assessment

issued by the Assessor under and in terms of section 4 (4) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004. It is manifest that even though the BOR refers to an incorrect under-payment figure of Rs. 125,750,000, which relates to the assessment bearing No. 9523168, the appeal to the BOR was filed against the determination of the Respondent dated 21.04.2008, which clearly confirms the assessment bearing No. 8206103 and NOT the assessment No. 9523168.

[25] In my view, the reference to an incorrect under-payment of Rs. 125,750,000 does not become the determination bad in law or null and void when the BOR having overruled the preliminary objection raised in relation to the legality of the assessment made by the Assessor to raise a fresh assessment, dismissed the appeal filed in relation to the assessment bearing No. No. 8206103 (A7). I hold that the appeal relates to the assessment bearing No. 8206103 (A7) and the BOR's determination in dismissing the appeal is also based on the said assessment bearing No. 8206103 (A7). For those reasons, there is no merit in the submission that the BOR erred in basing its decision on the assessment bearing No. 9523168 (A2) as claimed by the Appellant. Accordingly, the question of law No. 4 shall be answered in favour of the Respondent.

Question of Law No. 11

11-Has the Board of Review erred in law by not coming to the conclusion that the Assessor has acted contrary to law by issuing a fresh assessment when he/she is not legally empowered to do so in terms of the applicable law which the Assessor relied on in the communication to the taxpayer?

[26] The Appellant argues that the Senior Assessor is not empowered to make an assessment under section 4 (2) (b) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004, and only the Commissioner General is empowered to do so. The Appellant contends that the term "Commissioner General" in section 163 of the Inland Revenue Act, No. 28 of 1979 does not include an Assessor.

[27] It is not in dispute that whilst the appeal filed against the assessment bearing No. 9523168 was in progress, the Inland Revenue (Special Provisions) Act, No. 10 of 2003 came into force. By virtue of section 4 (3) of the said Act, the Income Tax Department was obliged to accept the return furnished by the Appellant, and discharge the assessment No. 9523168 (A2). Section 4 (3) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2003 reads as follows:

> *(3) Where there is any tax in dispute under any of the laws specified in the Schedule hereto, pertaining to tax, in respect of any period ending on or before March 31, 2000, in relation to a person who has not made a declaration in terms of section 2, then the tax specified by such person, as being the amount of tax payable by him shall be accepted by the relevant*

authority, charged with the administration of the laws specified in the Schedule hereto, as being correct and reflecting the final tax liability of that person in respect of such period:

Provided that no tax in dispute, which has been settled with the agreement of the person who has not made the declaration in terms of section 2, shall be re-opened.

[28] Accordingly, the Commissioner-General by letter dated 30.06.2003 (A4) informed the Appellant that in terms of section 4 (3) of the Inland Revenue (Special Provisions) Act, No. 10 of 2003, return for the year of assessment (98/99) will be accepted and the assessment will be discharged. The Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 came into force on 20.10.2004 which, *inter alia,* repealed the Inland Revenue (Special Provisions) Act, No. 10 of 2003, and section 4 (2) (b) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 Act empowered the Commissioner-General or any other Authority administering the collection and recovery of any tax, levy or penalty, to issue assessments or any other orders for any year of assessment or taxable period ending on or before March 31, 2002, where any tax, levy or penalty, (including any penalty in respect of any offence) forfeiture or fine has been discharged or refunded in terms of any law referred to in the Schedule to the Inland Revenue (Special Provisions) Act, No. 10 of 2003, notwithstanding the fact that the period for the making of the same has elapsed.

[29] Section 4 (2) (b) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 states as follows:

"2. It shall be lawful for the ***Commissioner-General or any other Authority administering the collection and recovery of any tax,*** *levy or penalty, (including any penalty in respect of any offence) forfeiture or fine in terms of any law referred to in the Schedule of the Inland Revenue (Special Provisions) Act, No. 10 of 2003,—*

(a)..
(b) ***to issue assessments*** *or any other orders as the case may be, for any year of assessment or taxable period ending on or before March 31, 2002, where any tax, levy or penalty, (including any penalty in respect of any offence) forfeiture or fine* ***has been discharged*** *or refunded in terms of any law referred to in the Schedule to the aforesaid Act* ***notwithstanding the fact that the period for the making of the same has elapsed****.*

[30] On a careful reading of section 4 (2) (b), it is patently clear that it does not state in unequivocal language that the Commissioner-General himself should make the assessment, and if it is not so issued, the assessment shall, for the purpose of section 4 (2) (b), be deemed to be invalid. In this modern-day administration, with the expansion of powers and multifarious functions exercised by public officers, the Commissioner-General cannot be expected,

as the head of the Inland Revenue Department to attend to all and perform each and every function himself (*Polycrome Electrical Industries (Pvt) Ltd, v. The Commissioner General of Inland Revenue*, paragraph 19, CA/TAX/0049/2019, decided on 26.03.2021).

[31] As there may be thousands of taxpayers in Sri Lanka, it cannot be expected that the Commissioner-General shall perform each and every task himself, unless the Inland Revenue Act has specifically empowered to him to exercise such function **personally.** It is for that reason, that the powers given to the Commissioner-General are normally exercised under his authority by responsible officials of the department. I do not see any intention reflected in the language, scope or object of section 4 (2) (b) of the Inland Revenue (Special Provisions) Act, No. 10 of 2003, that the Commissioner General should himself exercise such function personally. I do not think that the Parliament intended such a result.

[32] In my view, a distinction must be drawn between those acts which only a Commissioner General can do personally, and those which can be done by an officer or other designated persons such as an Assessor who is statutorily empowered by the Inland Revenue Act, No. 28 of 1979 to make an assessment. It is relevant to note that the Schedule to the Inland Revenue (Special Provisions) Act, No. 10 of 2003 includes the Inland Revenue Act, No. 28 of 1979. Sections 115 of the Inland Revenue Act, No. 28 of 1979 empowers the Assessor to make assessments and additional assessments, and section 116 relates to the issue notice of assessments. Section 115 (1) of the Act reads as follows;

> *"Where any person, who in the opinion of an Assessor is liable to any income tax, wealth tax or gifts tax for any year of assessment has not paid such tax or has paid an amount less than the proper amount which he ought to have paid as such tax for such year of assessment, the Assessor may, subject to the provisions of subsections (3) and (5) and after the fifteenth day of November immediately succeeding that year of assessment, assess the amount which in the judgment of the Assessor ought to have been paid by such person and shall by notice in writing require such person to pay forthwith-……."*

[33] Section 116 of the Act reads as follows:

> *"An Assessor shall give notice of assessment to each person who has been assessed stating the amount of income, wealth or gifts assessed and the amount of tax charged:….."*

[34] Accordingly, the Assessor is statutorily obliged to issue the assessment in terms of sections 115 and 116 of the Inland Revenue Act, No. 28 of 1979,. The Senior Assessor in the present case has lawfully exercised his statutory powers and re-issued the assessment bearing No. 8206103 (A7). On the other hand,

the Commissioner of Inland Revenue in his determination dated 15.05.2008 has stated that the Commissioner General had given instructions to the Deputy Commissioners, Senior Assessors and Assessors to take action and to issue fresh notice of assessments in respect of any tax that has been so discharged (vide- page 4 of the determination dated 15.05.2008).

[35] For those reasons, I hold that the Senior Assessor has lawfully re-issued the assessment No. 8206103 (A7) in terms of the provisions of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2003. Accordingly, I am of the view, the question of law No. 11 must be answered in favour of the Respondent.

Question of Law No. 12

12-Has the Board of Review erred in law by not coming to the conclusion that the Assessor is legally empowered to raise a fresh assessment under and in terms of section 4 (4) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004?

[36] The Appellant argues that when the Assessor informed the Appellant that the assessment that was discharged under and in terms of section 4 (3) of the Inland Revenue (Special Provisions) Act, No. 10 of 2003 will be issued as provided by section 4 (4) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004, the Respondent cannot contend that the reference to section 4 (4) made by the Assessor was an error or that the Assessor in fact exercised his statutory power under section 4 (2) (b) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2003.

[37] The Senior Assessor by letter dated 29.12.2005 (A5), however, incorrectly referred to **section 4 (4) instead of section 4 (2)(b)** of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004, and informed the Appellant that the assessment No. 9523168 which has been discharged under section 4 (3) of the Inland Revenue (Special Provision) Act, No. 10 of 2003, **will be reissued.** The said letter of the Senior Assessor dated 29.12.2015 (A5) reads as follows:

TIN: 104048536

The General Manager,
Prima Ceylon Ltd,
, Sri Jayawardenapura Mawatha,
Rajagiriya,
Dear Sir,

Prima Ceylon Ltd
Income Tax – Y/A/ 1998/1999
Assessment No. 9523168

I refer to the assessment issued under the above assessment number for the Y/A 1998/1999.

The above assessment has been discharged in terms of the Section 4 (3) of the Inland Revenue (Special Provision) Act No. 10 of 2003.

But subsequently, the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 came into force and under Section 4 (4) of the Act, any proceedings, investigation or inquiry which was being conducted by the Commissioner General, administrating the collection and recovery of any tax, levy or penalty, which has been stopped, suspended or withdrawn in terms of the Inland Revenue (Special Provision) Act, No. 10 of 2003, shall be revived or restored and continued with, as if such proceedings, investigation or inquiry had not been stopped, suspended or withdrawn.

Therefore, the above mentioned assessment which has been discharged under Section 4 (3) of the Inland Revenue (Special Provision) Act, No. 10 of 2003, will be reissued.

The copy of the Section 4 (4) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 is attached herewith for your reference.

Yours faithfully,

P.G.K. Samaratunge,
Senior Assessor – Unit 08

[38] The Appellant further contends that the effect of section 4 (3) of the Inland Revenue (Special Provisions) Act, No. 10 of 2003 has been negated or nullified by section 4 (4) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004. It was the contention of Dr. Felix that the assessments contemplated by section 4 (2)(b) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 are those assessments where there has been no appeal and have been withdrawn due to the enactment of the Inland Revenue (Special Provisions) Act, No. 10 of 2003.

[39] Section 4 (3) of the Inland Revenue (Special Provisions) Act, No. 10 of 2003 applies where there is any **tax in dispute** under any of the laws specified in the Schedule thereto (here, the Inland Revenue Act, No. 28 of 1979) pertaining to income tax, in relation to a person **who has not made any declaration** in terms of section 2 of the said Act, (such as the Appellant) and such tax specified by such person (such as the Appellant) shall be accepted by the relevant authority (the Department of Income Tax as per definition in section 13), as being correct and reflecting the final tax liability of that person. The term “tax in section 13 of the Inland Revenue (Special Provisions) Act, No. 10 of 2003 shall include any tax, levy, penalty (including any penalty in respect of any offence), forfeiture or fine, payable or levied under any of the laws referred to in the Schedule thereto. The phrase “tax in dispute” shall include any tax assessed under any of the laws referred to in the Schedule to the said Act, **which has not been accepted by the Commissioner-General**, the relevant authority or the person concerned.

[40] The assessment No. 9523168 relates to the tax in dispute which has been assessed by the Assessor in terms of the provisions of the Inland Revenue Act, No. 28 of 1979 and the Appellant appealed against the said assessment to the Respondent. Prior to any determination to be made by the Respondent, the Inland Revenue (Special Provisions) Act, No. 10 of 2003 came into force on 17.03.2003. By virtue of section 4 (3) of the Inland Revenue (Special provisions) Act, No. 10 of 2003, the Assessor was obliged to accept the tax specified by the Appellant in the return as being correct and reflecting the final tax liability of that person in respect of such period, 98/99.

[41] There is nothing to indicate in the Inland Revenue (Special Provisions) Act, No. 10 of 2003 that the scope of section 4 (3) is limited to, assessments where there is no appeal filed or have been withdrawn by any Appellant due to the Inland Revenue (Special Provisions) Act, No. 10 of 2003. As it was noted, the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 clearly empowered the Commissioner General or any other Authority to issue assessments where any tax, levy or penalty, (including any penalty in respect of any offence) forfeiture or fine has been discharged in terms of the Inland Revenue (Special Provisions) Act, No. 10 of 2003, when its schedule includes the Inland Revenue Act, No. 28 of 1979. For those reasons, I hold that there is no merit in the argument that the assessments contemplated by section 4 (2) (b) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 are those assessments where there has been no appeal filed or the appeal filed has been withdrawn as claimed by the Appellant.

[42] Accordingly, I hold that the Senior Assessor representing the Commissioner General is entitled to issue the assessment bearing No. 8206103 (A7) in terms of section 4 (2) (b) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 when any tax, levy or penalty included in the assessment No. 9523168 (A2), had been discharged in terms of section 4 (3) of the Inland Revenue (Special Provisions) Act, No. 10 of 2003.

[43] The Appellant further contended that Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 cannot apply to the Appellant as the Appellant did not make any application seeking amnesty under the Inland Revenue (Special Provisions) Act, No. 10 of 2003 in respect of non-payment or non-disclosure of liability by making a statutory declaration for the purpose. The Appellant relies on section 6(3) of the Interpretation Ordinance, No. 21 of 1901 (as amended) and argues that it was able to acquire a right within the contemplation of section 6 (3) as the Appellant did not seek an amnesty by making a declaration under section 2 of the Inland Revenue (Special Provisions) Act, No. 10 of 2003. Section 6 (3) Interpretation Ordinance provides:

"Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected-

(a) The post operation of or anything duly done or suffered under the repealed written law;
(b) Any offence committed, any right, liberty or penalty acquired or incurred under the repealed written law;
(c) Any action, proceeding, or thing pending or incompleted when the repealing written law comes into operation, but every such action, proceeding, or thing may be carried on and completed as if there had been no such repeal".

[44] It is relevant to note that the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 was designed to regulate the tax amnesty in respect of the non-payment or non-disclosure of liability under the provisions of the Inland Revenue (Special Provisions) Act, No. 10 of 2003, and repeal of the Inland Revenue (Special Provisions) Act, No. 10 of 2003. The title of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 reads as follows:

"An act to provide for the regulation of the grant of an amnesty in respect of the non-payment or non-disclosure of liability to pay income tax in respect of declarations made on or before August 31, 2003 in terms of the repealed Inland Revenue ((Special Provisions)) Act, No. 7 of 2002 and the Inland Revenue ((Special Provisions)) Act, No. 10 of 2003; to provide for the repeal of the Inland Revenue ((Special Provisions)) Act, No. 10 of 2003; and for matters connected therewith or incidental thereto".

[45] The Inland Revenue (Special Provisions) Act, No. 10 of 2003 first, applies to any person **who has made a declaration** to the Commissioner General before June 30, 2003 under section 2, and such persons may be entitled to immunity from liability to pay tax or from any investigation or prosecution for any offence under any law specified in the Schedule thereto (Vide- section 2 and 3) . On the other hand, the same Act also applies to any person who **has not made a declaration in terms of section 2,** but there is any tax in dispute under any of the laws specified in the Schedule thereto, pertaining to tax, in respect of any period ending on or before March 31, 2000 (Vide- section 4 (3). Then, the tax specified by such person, as being the amount of tax payable by him shall be accepted by the relevant authority, charged with the administration of the laws specified in the Schedule thereto, as being correct and reflecting the final tax liability of that person in respect of such period (supra).

[46] Though the Appellant has not made an application seeking an amnesty under the Inland Revenue (Special Provisions) Act, No. 10 of 2003, the Commissioner General was obliged to comply with the provisions of the said Act and discharge the assessment under section 4 (3) of the said Act, whether

or not a declaration seeking an amnesty was made by the Appellant in terms of section 2 of the said Act, No. 10 of 2003. It is relevant to note that section 4 (4) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 relates to any revival or restoration and continuation of any proceedings, investigation or inquiry which had been stopped, suspended or withdrawn by the Commissioner General or any Authority administering the collection and recovery of any tax, levy or penalty, forfeiture or fine by virtue of the provisions of the Inland Revenue (Special Provisions) Act, No. 10 of 2003. Section 4 (4) reads as follows:

> *(4) Any proceedings, investigation or inquiry which was being conducted by the Commissioner-General or any Authority administering the collection and recovery of any tax, levy or penalty, (including any penalty in respect of any offence) forfeiture or fine in terms of any law referred to in the Schedule of the Inland Revenue (Special Provisions) Act, No. 10 of 2003, and which has been, stopped, suspended or withdrawn in terms of the aforesaid Act, shall from the date of the coming into operation of this Act, be revived or restored and continued with, as if such proceedings, investigation or inquiry had not been so stopped, suspended or withdrawn".*

[47] As it was noted, section 4 (2) (b) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004, empowered the Commissioner General or any other Authority to issue assessments where any tax, levy or penalty , forfeiture or fine **has been discharged under the provisions of the Inland Revenue (Special Provisions) Act, No. 10 of 2003.** Section 4 (4) does not, however, empower the Commissioner-General or any Authority to re-issue an assessment which has been discharged in terms of the provisions of the Inland Revenue (Special Provisions) Act, No. 10 of 2003. It only empowers the Commissioner-General or any Authority to revive or restore and continue any proceedings, investigation or inquiry which had been stopped, suspended or withdrawn by the Commissioner General or any Authority in terms of the provisions of the Inland Revenue (Special Provisions) Act, No. 10 of 2003.

[48] It is section 4 (2) (b) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 that has empowered the Commissioner-General or any Authority to reissue an assessment which has been discharged in terms of section 4 (3) of the Inland Revenue (Special Provisions) Act, No. 10 of 2003. It is, thus, obvious that the Senior Assessor has made a mistake in stating the wrong section, as 4 (4) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 instead of section 4 (2) (b) under which the assessment could be re-issued by the Assessor. It is relevant to note that section 144 of the Inland Revenue Act, No. 28 of 1979 relates to the validity of notices, assessments & etc. and provides:

> *"(1) No notice, assessment, certificate, or other proceeding purporting to be in accordance with the provisions of this Act shall be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a*

mistake, defect, or omission therein, if the same is in substance and effect in conformity with, or according to, the intent and meaning of this Act, and if the person assessed or intended to be assessed or affected thereby is designated therein according to common intent and understanding".

[49] I am of the view the incorrect reference of the wrong section as 4 (4) instead of section 4 (2) (b) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 is not fatal to the validity of the assessment bearing No. 8206103 when section 4 (2)(b) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 expressly empowers the Commissioner General or any Authority, such as the Senior Assessor, to reissue the assessment No. 8206103 notwithstanding the fact that the assessment has been discharged in terms of section 4 (3) of the Inland Revenue (Special Provisions) Act, No. 10 of 2003. For those reasons, I am of the view, that the question of law No. 12 must be answered in favour of the Respondent.

Questions of Law No. 13 & 14

13. Has the Board of Review erred in law by not coming to the conclusion that if the hearing before the Commissioner-General of Inland Revenue was revived by operation of law it would also be time barred by operation of law?

14- Has the Board of Review erred in law by not coming to the conclusion that the assessment is time barred under section 115 (5) of the Inland Revenue Act, No. 28 of 1979?

[50] The Appellant relies on the reference to section 4 (4) made by the Assessor in the letter dated 29.12.2005 (A5) and section 115 (5) of the Inland Revenue Act, No. 28 of 1979 and argues that the assessment No. 8206103 which was re-issued by letter dated 26.03.2006 (A7) is time barred by operation of law. The Appellant argues that in terms of section 4 (4) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004, the appeal shall be deemed to have been revived or restored and continued with, from the date of the coming into operation of the said Act. On this basis, the Appellant argues that:

1. When the appeal was revived by operation of law, it would have been revived only for the remaining period of the time bar for the determination of the appeal and therefore, the original appeal shall be determined within a period of 3 years from 11.04.2001, and the time bar would have been engaged on 11.04.2004 (V3);

2. The appeal was allowed by the letter dated 30.06.2003 (A4) after a period of 2 years, 2 months and 19 days had passed from the statutory period of 2 years given to hear and determine the appeal;

3. If the appeal had revived and restored, the Respondent had a further period of 1 year and 24 days from the enactment of the Inland Revenue (Regulation of Amnesty) Act. No. 10 of 2004, and thus, the assessment

should have been made within 1 year and 24 days from the date of the said Act came into force;

4. As the Inland Revenue (Regulation of Amnesty) Act. No. 10 of 2004 was certified on 20.10.2004 and there was an extension of the time bar, the remainder of the period for the application of the time bar for hearing the appeal would be 9 months and 11 days;

5. As the letter regarding the re-issue of the assessment is dated 29.12.2005, and it was received long after that date, the assessment should have been made within the remainder of the period for the application of the time bar for hearing the appeal, and therefore, assessment bearing No. 8206103 (A7) is time barred by operation of law.

[51] Section 115 (5) of the Inland Revenue Act, No. 28 of 1979 reds as follows:

"(5) Subject to the provisions of section 62, no assessment shall be made-

(a) …….

(b) of the income tax, or wealth tax, as the case may be, payable under this Act for any year of assessment commencing, on or after April 1, 1986 by any person who has made a return of his income or wealth, as the case may be, on or before the thirteen of November next succeeding the end of that year of assessment,

after the expiry of three years from the end of that year of assessment, and

(c) ……

Provided that nothing in this subsection shall apply to the assessment of income tax payable by any person in respect of any year of assessment, consequent to the receipt by such person, of any arrears to the profits from employment of that person for that year of assessment:

Provided further that, where in the opinion of the Assessor, any fraud, evasion or wilful default has been committed by, or on behalf of any person, in relation to any income tax, wealth tax or gift tax payable by such person for any year of assessment, it shall be lawful for the Assessor to make an assessment or an additional assessment on such person at any time after the end of that year of assessment".

[52] As it was noted, the assessment No. 9523168 (A2) was discharged by operation of law, viz, section 4 (3) of the Inland Revenue (Special Provisions) Act, No. 10 of 2003, and the said assessment which was discharged was re-issued by operation of law, viz, section 4 (2) (b) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004. It is none other than section 4 (2) (b) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004, that authorized the Commissioner-General or any other Authority to issue assessments or any other orders as the case may be, **for any year of assessment or taxable period** ending on or before March 31, 2002, which

had been discharged by section 4 (3) of the Inland Revenue (Special Provisions) Act, No. 10 of 2003, **notwithstanding the fact that the period for the making of the same has elapsed**.

[53] As it was noted, it is manifest that the assessment was re-issued in terms of section 4 (2) (b) in conformity with the scheme, purpose, intent and meaning of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 and therefore, the mere reference to a wrong section is not fatal to the validity of the assessment (A7). The Appellant has completely disregarded the fact that section 4 (2) (b) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 expressly empowered the Commissioner General or any other Authority to issue assessments ***notwithstanding the fact that the period for the making of the same has elapsed"*** .

[54] It is relevant to note that the assessment No. 8206103 was issued on 26.03.2006 (A7) and the appeal dated 25.04.2006 was acknowledged on 27.04.2006 by letter dated on 27.04.2006 (A8). Section 136 (13) of the Inland Revenue Act, No. 38 of 2000 as amended by the Inland Revenue (Amendment) Act, No. 37 of 2003 provides that "…an appeal received by the Commissioner General on or after April 1, 2003 shall be determined by the Commissioner-General within two years from the date of receipt of such appeal".

[55] Accordingly, the appeal had to be determined by the Respondent on or before 28.04.2008. The Respondent determined the appeal on 21.04.2008 as indicated in the letter dated 21.04.2008, and the said determination was communicated to the Appellant by letter dated 22.04.2008 (Vide- BOR file). For those reasons, I hold that the appeal filed against the assessment bearing No. 8206103 (A7) is not time barred by operation of law and therefore, questions of law No.s 13 and 14 should be answered in favour of the Respondent.

Question of Law No. 15

15. Has the Board of Review erred in law by not coming to the conclusion that the Assessor has not provided any reasons for his decision to raise a fresh assessment which is a mandatory requirement under and in terms of section 115 (3) of the Inland Revenue Act, No. 28 of 1979?

[56] The Appellant contends that the Assessor's communications dated 29.12.2005 (A5) and dated 07.03.2000 (A6) do not indicate the reasons for making the fresh assessment and therefore, the assessment is invalid and is of no force or avail in law. The Appellant relies on section 115 (3) of the of the Inland Revenue Act, No. 28 of 1979, and the decision in *Fernando v. Ismail* (supra), in support of its contention. Section 115 (3) of the Inland Revenue Act, No. 28 of 1979 reads as follows:

> *"(3) Where a person has furnished a return of income, wealth or gifts, the Assessor may in making an assessment on such person under subsection (1) or under subsection (2), either-*

(a) accept the return made by that person; or

(b) if he does not accept the return made by that person, estimate the amount of the assessable income, tax- able wealth or taxable gifts of such person and assess him accordingly":

Provided that where an Assessor does not accept a return made by any person for any year of assessment and makes an assessment, or additional assessment, he shall communicate to such person for that year of assessment, he shall communicate to such person in writing, his reasons for not accepting the return".

[57] In *Fernando v. Ismail* (supra), it was held that the duty to give reasons is a mandatory requirement and the failure to do so would result in the assessment being devoid of legal effect. Samarakoon, C.J. at p. 234 stated:

"More particularly, the communication of the reason at the relevant time is the indication of its compliance. The new procedure would also have the effect of fixing the Assessor to a definite position and not to give him the latitude to chop and change thereafter. It was therefore essential that an Assessor who rejects a return should state his reasons and communicate them. His reasons must be communicated at or about the time he sends his assessment on an estimated income. Any late communication would defeat the remedial action intended by the amendment".

[58] It is settled law that where the Assessor does not accept the return made by the assessee and makes an assessment, he shall state his reasons and communicate his reasons to the assessee, and the failure to comply with this mandatory requirement will result in the assessment being devoid of any legal effect. As it was noted, the Appellant furnished its return of income for the year of assessment 1998/1999 and that the return of income in respect of capital gain was rejected by the Assessor by letter dated 06.12.2000 (A1). By the said letter marked A1, the Assessor explicitly stated the following reasons for the rejection of return of income furnished by the Appellant in respect of the capital gain for the year of assessment 1998/1999, and communicated those reasons to the Appellant:

1. Capital gain amounting to Rs. 503,000,000/- arisen on redemption of shares has not been declared and income and taxes have not been paid;
2. Shares held by the Appellant in Keangnam have been redeemed by Keangnam at a value of Rs. 28 Million by way of giving 28 residential apartments (Units) and the Appellant has obtained possession of the said 28 residential units during the year of assessment 1998/1999;
3. The Appellant has incurred Rs. 44,104,349/- for the other improvements to the said residential apartments after obtaining the possession of the said properties.

[59] The capital gain of Rs. 503,000,000/- was calculated by the Assessor as follows:

Redeemed value of preference shares	Rs. 585,000,000
Less: cost of acquisition of 8,200,000. Cumulative Preference shares of Rs. 10/ each	Rs. 82,000,000
	Rs. 503,000,000

[60] The Appellant argues that the details of the notice of assessment No. 9523168 dated 07.03.2001 (A2) are materially different from the details of the notice of assessment No. 8206103 dated 26.03.2006 (A7). The Appellant argues that the former shows the total tax payable as amounting to a sum of Rs. 701,001,021/- while the latter refers to a figure of Rs. 622,439,421/-, and the former (A2) indicates a tax in dispute as Rs. 125,750,000/- while the latter indicates the tax in dispute as Rs. 47,188,400/-. As it was noted in the table (paragraph 13), the details such as Profit from trade, interest income, capital gains, total amount, qualifying payment, taxable income, tax, amount paid and amount paid late stated in both notices of assessment are identical except few differences such as tax on dividends, total tax payable, underpayment and the penalty.

[61] It is manifest that the total tax payable as amounting to a sum of Rs. 701,001,021/- set out in the original notice of assessment (A2) has been reduced to a sum of Rs. 622,439,421/- in the notice of assessment No. 8206103 (A7) due to the reduction of the tax on dividends from Rs. 193,371,000/- to Rs. 114,809,400/- resulting in a difference of Rs. 78,561,600/-. It is clearly seen from the said table that due to the reduction of the tax on dividends subsequently, the amount stated in the original notice of assessment in respect of the underpayment and the penalty was also reduced in the assessment No. 8206103, which ultimately resulted in the total tax payable reducing from Rs. 701,001,021/- to Rs. 622,439,421/-.

[62] On the face of the notice of assessment (A2), under payment has been calculated as follows:

> Total tax payable Rs. 701,001,021 – Tax paid with late payment (Rs. 65,557,981 + 509,693,040) = Rs. 125,750,000.

[63] On the face of the notice of assessment (A7), the underpayment has been calculated as follows:

> Total tax payable Rs. 622,439,421 – Tax paid with late payment (Rs. 65,557,981 + 509,693,040) = Rs. 47,188,400.

[64] The penalty has been calculated on the basis of the guidelines set out in section 125 of the Inland Revenue Act, No. 28 of 1979 (Vide- page 2 of the notices of assessment marked A2 and A7). Section 125 of the said Act relates to the payment of late payment of tax (penalty) and the method of calculation of the penalty in default according to the rate which is initially based on the rate 5%, and then, with an additional percentage during the amount was

outstanding. The notice of assessment (A2) refers to the penalty of Rs. 215,003,864 while the notice of assessment (A7) refers to a penalty of Rs. 175,723,064.

[65] The Appellant challenged the imposition of penalty for the late payment of taxes on the basis that in terms of the agreement with the Government of Sri Lanka, the obligation to pay taxes and the penalty must be paid by the Government of Sri Lanka (Vide- question of law No. 23). The Appellant did not, however, challenge the method of calculation of penalty referred to in the notice of assessment in question.

[66] It is relevant to note that the assessment No. 8206103 (A7) in respect of the capital gain made by the Appellant had been reissued under section 4 (2) (b) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 on the basis of the same reasons that had been stated and communicated by the Assessor to the Appellant in his assessment No. 9523168 (A2). The communications marked A5 and A6 clearly referred to (i) the same TIN number (10408536); (ii) the **assessment No. 9523168** (A2) issued for the year of assessment 1998/1999; (iii) the fact that the said assessment No. 9523168 was discharged in terms of section 4 (3) of the Inland Revenue (Special Provisions) Act, No. 10 of 2003; and (iv) the fact that the said discharged assessment will be **reissued** in terms of the provisions of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004.

[67] As it was noted, the details of the two assessments A2 and A7 are almost identical except the differences between the two assessments due to the reduction in the tax on dividends which ultimately reduced the tax payable by the Appellant. It is clear that the Assessor's reasons given for the assessment No. 9523168 (A2) in respect of capital gain made by the Appellant for the year of assessment 1998/1999, are the same reasons that applied to the reissued assessment No. 8206103 made by the Assessor for the same year of assessment 1998/1999 in terms of the provisions of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004.

[68] For those reasons, I hold that the reasons stated and communicated to the Appellant by letter dated 06.12.2006 for rejecting the return of income of the Appellant in respect of the capital gain made by the Appellant for the year of assessment 1998/1999 continue to be operative, and apply to the reissued assessment made by operation of law in respect of the same capital gain and the same year of assessment. For those reasons, the decision in *Fernando v Ismail* (supra) can be distinguished from the facts of the present case as the reasons for rejecting the return of income have been clearly provided by the Assessor, and communicated in writing to the Appellant as required by law. For those reasons, I hold that the question of law No.15 must be answered in favour of the Respondent.

Questions of Law No. 16 and 17

16. Has the Board of Review erred in law by coming to the conclusion that the Appellant was liable to capital gains tax despite the fact that the imperative requirements for the imposition of capital gains tax as required by law had not been fulfilled?

17. Has the Board of Review erred in law by coming to the conclusion that the redemption of preference shares had in fact taken place despite the failure to satisfy the statutory criteria in respect of the same?

[69] It was urged on behalf of the Appellant that the Appellant had not made any capital gain by the redemption of shares or any obligation made by Keagnam within the meaning of section 7 (9) (d) of the Inland Revenue Act, No. 28 of 1979 as Keangnam had not redeemed the 8.2 Million preference shares, for the following reasons:

1. The capital gain arises by virtue of the redemption of cumulative preference shares, where the capital had been returned as contemplated by section 7 (3) (h) (ii) of the Inland Revenue Act, No. 28 of 1979';
2. There is no evidence whatsoever, that such preference shares had been redeemed during the year 1998/99 or that the Assessor had regarded that such shares as having been redeemed by reference to any specific provision of the Inland Revenue Act, No. 28 of 1979;
3. The Inland Revenue Act, No. 28 of 1979 does not have any provision that presumes that a redemption of shares can take place other than in the manner envisaged in section 57(1) of the Companies Act, No. 17 of 1982.
4. The manner in which shares can be redeemed is set out in the Companies Act and the Inland Revenue Act, No. 28 of 1979 does not override its provisions in relation to redemption of shares;
5. In terms of the Companies Act, No 17 of 1982, the redemption of shares results in its cancellation and the Appellant held 8.2 Million 28% preference shares in Keangnam as at 31.12.1998 as shown in the Annual Report of Keangnam submitted to the Registrar of Companies. Therefore, no redemption of shares took place during the year 1998/1999 in the manner provided in section 57(1) of the Companies Act, No. 17 of 1982;
6. The Appellant was shown as a shareholder by Keangnam in the balance sheet of Keangnam as at 31.12.1998 as Keangnam was not in a position to comply with the requirement of the Companies Act, No. 17 of 1982 for the redemption of shares;
7. The cancellation of shares took place in the subsequent year and therefore, no redemption of shares took place in the year 1998/1999 resulting in the

cancellation of shares in terms of section 57 (1) of the Companies Act, No. 17 of 1982.

8. The the redemption of preference shares cannot take place by merely providing free accommodation of premises until the shares are formally cancelled under the provisions of the Companies Act, No. 17 of 1982, and a legally valid deed of transfer is executed;
9. The contention that once the Appellant obtained rent free possession of the residential premises that all the obligations relating to the redemption of preference shares are complete and that a capital gain in respect of the same has arisen is misconceived.

[70] On this basis, the Appellant argues that the mere transfer of 28 residential premises on a rent-free basis to the Appellant cannot be regarded as a redemption of preference shares as contemplated by the Inland Revenue Act, No. 28 of 1979 unless the redemption of shares resulting in the cancellation of shares takes place in the manner provided in section 57 of the Companies Act, No. 17 of 1982.

[71] On the other hand, it was urged on behalf of the Respondent that the contention of the Appellant that there was no redemption of shares as contemplated by the Companies Act, No. 17 of 1982 is flawed for the following reasons:

1. The term “redemption” used in section 7(1) (d) of the Inland Revenue Act, No. 28 of 1979 is broader than the term “redemption” used in section 52 (1) of the Companies Act;
2. The failure to follow legal formalities laid down in the Companies Act by the Appellant is not an excuse for the Appellant to profit from its own wrongdoing and avoid tax in respect of capital gain;
3. In tax matters, what matters is the actual transaction and not the legal formalities, and the Court must examine the intention of the parties and the commercial justification of the transaction;
4. The Appellant and Keangnam agreed to redeem shares, and in lieu of the redemption of shares and the cumulative dividends, transferred 28 residential units which extinguished any further claim the Appellant will have in respect of the shares and dividends;
5. The transfer of shares and taking over possession by the Appellant including making improvements at a cost of 44 million satisfies not only the terms of the agreement, but also the requirement of the “redemption” as it was an instance of reclaiming or regaining possession by the Appellant by the agreed conditions between the parties;

[72] In the present case the question that arises for consideration is whether, on the facts and in the circumstances of the case, the preference shares of 28 Million held by the Appellant in Keangnam were redeemed by the said Keangnam and if so, whether the Appellant was liable to pay tax in respect of capital gain made by the Appellant within the meaning of section 7 (1) (d) of the Inland Revenue Act, No. 28 of 1979 (as amended). In order to answer this question, this Court is called upon to decide the following issues:

1. Whether or not the transfer of 28 residential units to the Appellant only satisfied the conditions stipulated in the Agreement between the Appellant and Keangnam;

2. Whether, in addition to the terms of the agreement, the transfer of 28 residential units to the Appellant further satisfied that "redemption of shares" took place in the year of assessment 1998/1999 as contemplated by section 7 (1) (d) of the Inland Revenue Act, No. 28 of 1979 (as amended) unless such redemption of shares took place in the manner provided in section 52 (1) of the Companies Act, No. 17 of 1982.

Meaning of Redemption

[73] Our attention was drawn to the term of "redemption", and it was contended by the learned Deputy Solicitor General that the meaning of "redemption" is so broad for tax purposes than the term "redemption" used in the Companies Act, as it covers debentures or other obligations. It is in this context, that the meaning of "redemption" has to be examined for the purpose of section 7(1) (d) of the Inland Revenue Act, No. 28 of 1979 (as amended).

[74] Before dealing with the merits of the arguments, and the case law, I shall examine the meaning of "redemption" to ascertain how far the argument advanced by Dr. Felix and Mr. Wigneswaran is sustainable in law. Section 7 (1) (d) of the Inland Revenue Act, No. 28 of 1979 (as amended) refers to the "redemption of shares, debentures or other obligations" and thus, the term "redemption" is not confined to shares, but extends to debentures or other obligations. Section 7 (1) of the Inland Revenue Act, No. 28 of 1979, defines what is meant by capital gain. Section 7 (1) of the Act reads as follows:

(1) "Capital gain" means *the profits or income, not being profits or income within the meaning of paragraphs (a), (g) or (i) of section 3 arising from-*

(a) the change of ownership of any property occurring in any manner whatsoever ;
(b) the surrender or relinquishment of any right in any property ;
(c) the transfer of some of the rights in any property ;
(d) ***the redemption of any shares, debentures or other obligations;***
(e) the formation of a company;
(f) the dissolution of a business or the liquidation of a company;
(g) the amalgamation or merger of two or more businesses or companies; or

(h) any transaction in connection with the promotion of which any person who is not a party to such trans- action receives a commission or reward.

(2) For the purposes of subsection (1) and in relation to the capital gain of any person, the profits and income arising from-

(a)

(b)

(c) the redemption of any shares, debentures or other obligations, means, subject to the provisions of subsection (4), the **value of all property received by him in consequence of such redemption less the value of that which is redeemed** at the time when it was acquired by him or where that which is redeemed is any property referred to in paragraph (e) or paragraph (f) or paragraph (g) or paragraph (h) of subsection (3), less such value of that property as is specified in that paragraph.

[75] The term "redemption" means an act or an instance of reclaim or regaining possession of something by paying a specific price (Black's Law Dictionary, 7th Ed). In relation to a share of a company, it generally means the re-acquisition or buy-back of a share by the issuer (Company Law, K.Kanag-Isvaran & Dilshani Wijeyawardena, p. 197). Section 57 of the Companies Act, provides:

"(1) ***A company limited by shares may, if so authorized by its articles, issue preference shares which are, or at the option of the company are to be liable, to be redeemed:***
Provided that-

(a) No such shares shall be redeemed except out of profits of the company which would otherwise be available for dividend or out of the proceeds of fresh issue of shares made for the purposes of the redemption;

(b) No such shares shall be redeemed unless they are fully paid;

(c) The premium. If any, payable on redemption, must have been provided for out of the profits of the company or out of the company's share premium account before the shares are redeemed; and

(d) Where any such shares are redeemed otherwise than out of the proceeds of a fresh issue, there shall out of the profits which ……..

(2) The redemption of preference shares under the provisions of this section may be effected subject to such terms and in such manner as may be provided by the articles of the company.

(3) The redemption of preference shares under the provisions of this section by a company shall not be taken as reducing the amount of the company's authorized share capital

(4) Where in pursuance of the provisions of this section a company has redeemed or is about to redeem any preference shares, it shall have power

to issue shares up to the nominal amount of the shares redeemed or to be redeemed, as the case may be, as if those shares had never been issued, and accordingly the share capital of the company shall not for the purposes of any enactments relating to stamp duty be deemed to be increased by the issue of shares in pursuance of the provisions of this subsection:

(5) The Capital Redemption Reserve Fund may, notwithstanding anything in this section, be applied by the company in paying up unissued shares of the company to be issued to members of the company as fully-paid bonus shares".

[76] In short, the argument of the Appellant is that the redemption shall take place only in the manner provided in the Companies Act, No. 17 of 1982, and thus, a redemption of preference shares could only be effected:

a. Out of profits;and/or
b. By way of the proceeds of a new share issue made for the purpose.

[77] The Appellant argues that Keangnam did not make a profit, but it carried forward losses, resulting in it being unable to redeem its preference shares as stipulated in section 57(1) of the Companies Act, No. 17 of 1982. The Appellant relies on the audited accounts for 1999 of keangnam and argues that it had made a loss after payment of taxes in a sum of Rs. 216,951,550/- and had a brought forward loss of Rs. 220,419,405/-. On this basis, the Appellant argues that it was legally impossible for Keangnam to redeem the preference shares in view of the imperative requirements of section 57(1) (a) of the Companies Act, No. 17 of 1982.

[78] The Appellant's argument is that the Assessor erred in making the assessment on the footing that (i) the moment the Appellant received possession of the apartments, its cumulative preference shares were deemed to have been redeemed and (ii) the consideration received by the Appellant was equal to the market value of the apartments as if they had been transferred to the Appellant by a duly executed deed of transfer.

[79] Now the question is whether the failure to comply with the legal formalities set out in the Companies Act, No. 17 of 1982 will affect or supersede the charging section, and the computation provisions set out in the Inland Revenue Act, No. 28 of 1979 in respect of the capital gain tax. In order to determine this question, it is necessary to ascertain the intention of the parties stated in the agreements in question and the conduct of the parties in enforcing those agreements.

[80] 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]. 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 case of *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".*

[81] It is not in dispute that in terms of the Agreement entered into by the Appellant and Keangnam in 1994, the Appellant transferred a land it owned in Rajagiriya to Keangnam. The consideration of Rs. 82 Million was made by Keangnam by the issue of 8.2 cumulative preference shares of Rs. 10/- each in the capital of the said Company, as fully paid up carrying a dividend rate of 28 percent per annum for a period of three years. The Appellant further entered into an agreement No. 1075 with Keangnam on 01.07.1994 and in terms of the said agreement, Keangnam agreed that, on completion of the apartment complex in June 1997, it shall transfer to the Appellant, 28 residential units in lieu of the redemption proceeds of the aforesaid preference shares and the dividend accumulated thereon. Clause 11 of the Agreement dated 01.07.1994 reads as follows:

> *"After the conclusion of the said High Rish Apartment Complex shall have been fully completed at the expiration of the said period of thirty six (36) months in accordance with the stipulations and conditions herein contained, the* ***Company shall redeem*** *the eight million two hundred thousand (8,200,000) 28% Redeemable Cumulative Preference Shares of Rs. 10/- each in the Capital of the Company* ***and in lieu of the redemption proceeds of the said preference shares and the accumulated dividends*** *thereon totalling Rupees One hundred and fifty million (Rs. 150,000,000),* ***transfer to PCL the said twenty eight (28) Residential Units*** *facing the Golf Course and… in accordance with the Third Schedule hereto and* ***PCL shall have no further claims against the Company either in respect of the said preference shares or the dividends accumulated thereon or on any other grounds whatsoever****".*

[82] It is absolutely clear that the Appellant and Keangnam intended and expressly provided in the agreement that the shares would be redeemed by Keangnam, and in lieu of redemption proceeds of the said preference shares and accumulated dividends thereon, 28 residential units would be transferred by Keangnam to the Appellant. In terms of the said agreement, the Appellant

took over the possession of 28 residential units in the year 1998/1999 and improved them at a cost of Rs. 44 million.

[83] The Commissioner of Inland Revenue referring to the statement of accounts by the auditors of the Appellant for the year 1998/99, which relates to the transfer of 28 residential units to the Appellant, states at page 9 of the determination:

> *"…the deed of transfer had not been executed as at date. However, Prima Ceylon Ltd. obtained possession of the said 28 residential units. The market value of the 28 residential units is estimated at US $ 8,563,753 (approximately Rs. 585 million). Further, it was indicated that the company had spent Rs. 44,104,349/- on taking possession and improvement carried out on the 28 units…"*

[84] It is relevant to note that the Appellant and keangnam were aware of legal obstacles that may arise in the execution of the agreement in the event of any difference in the preference shares and accumulated dividends. Keangnam thus, agreed in clause 13:

1. to furnish to the Appellant an irrevocable Banker's Guarantee in form and substance acceptable to the Appellant in the sum of USD 3,000,000; and

2. to issue to the Appellant an irrevocable Corporate Guarantee in form and substance acceptable to the Appellant in the sum of USD 3,000,000/-.

3. to secure the due performance and observance of its obligations and duties under the agreement and the redemption of shares and reserved the right of specific performance to the Appellant;

4. In the event that it is not legally permissible for Keangnam to declare and pay the cumulative dividends on 8,200,000 redeemable preference of each 10/-and or redeem the preference shares and or transfer the said 28 residential units to the Appellant, in lieu of redemption proceeds and accumulative dividends, or failure to redeem the said 8.2 million redeemable preference shares or completion of the apartment complex, or transfer the said 28 units to the Appellant:

   (a) the Appellant shall be entitled to demand payment of the guaranteed amount; or

   (b) if the guarantees are unenforceable, or in the event it being not legally permissible for the Company to redeem the preference shares or transfer the said 28 residential units, the Appellant shall be entitled to demand payment of the guaranteed amount or be entitled to all other remedies, including specific performance.

[85] If the transfer of 28 residential units to the Appellant by Keangnam and taking over possession of possession of 28 residential units was only a mere acquisition of rent free possession without any legal obligations emanating therefrom as claimed by the Appellant, there was no need for the parties to agree in clause 12 of the agreement to the effect that "**consideration for the transfer of 28 residential units to be satisfied by the redemption of the proceeds of the sale of preference shares and accumulated dividends** thereto.

[86] The Appellant and Keangnam expressly agreed that upon the transfer of the said 28 residential units by Keangnam, Keangham shall thereafter, have no further claims against the Appellant. Clause 12 states as follows:

> *"It is agreed between the parties hereto that the consideration for the transfer of 28 residential units to be satisfied by the redemption proceeds of the share preference shares and accumulated dividends and in the event of the redemption proceeds of the said preference shares and the accumulated dividends thereon being less than Rupees One Hundred and Fifty Million (Rs. 150,000,000/), the Company shall, notwithstanding such difference/shortfall transfer the said 28 units to the PCL and the Company shall thereafter have no further claims whatsoever, against PCL in respect of the said transfer".*

[87] On the other hand, if the intention of the parties was merely to keep possession of rent-free 28 residential units without any obligation to redeem shares, and in lieu of redemption, to transfer such units, there was no reason whatsoever, for the Appellant to carry out improvements to such units at a cost of Rs. 44,104,349/-. I am unable to agree with the contention that the Appellant that the Appellant simply agreed to occupy 28 residential units owned by someone on a rent-free basis when the Appellant had carried out improvements to such units at a cost of Rs. 44,104.349/-.

[88] As it was noted, in terms of clause 11 of the agreement, the Appellant and Keangnam agreed that with the transfer of such 28 residential units, the Appellant shall have **no further claims against the Keangnam either in respect of the said preference shares or the dividends accumulated thereon or on any other grounds whatsoever**. In clause 13 of the agreement, the parties further agreed that in the event that it is not legally permissible for the company to redeem the preference shares or transfer 28 residential units, the Appellant shall be entitled to all other remedies, including specific performance. The Appellant did not seek any remedy referred to in clause 13 of the agreement, but took over possession of 28 residential units in the year 1998/99 and carried out improvements to the said units at a cost of Rs. 44,104,349/-. All what keangnam had to do was to execute deeds of transfer and enter the redemption of shares formally in their books and inform the Register of Companies accordingly.

[89] Dr. Felix strenuously argued that this is not a case where the extinguishment of any right in the preference shares had taken place in the year

1998/1999. It is crystal clear that in terms of the agreement, the transfer of 28 residential units in the year 1998/1999 in lieu of redemption of shares extinguished any further claim to be made by the Appellant against Keangnam in respect of the said preference shares or dividends accumulated thereon. Accordingly, the intention between the parties was that Keangnam will redeem cumulative preference shares and in lieu of redemption of preference shares, Keangnam will transfer the 28 residential units to the Appellant and upon the said transfer, the right of the Appellant to any claim against Keangnam will be extinguished.

[90] The transfer of 28 residential units took place in the year 1998/1999. The Appellant carried out improvements to the same and the market value of the said units was estimated at US$ 585 Million when the units were handed over to the Appellant by keangnam in terms of the agreement. The capital gain made by the Appellant as per the Assessor's assessment (A2) in terms of the Inland Revenue Act, No. 28 of 1979 was Rs. 503 Million (Rs. 585,000,000-Rs. 82,000,000).

[91] It is manifest that the parties to the agreement intended to carry out the transaction irrespective of whether there are legal obstacles set out clause 12 of the agreement, and expressly agreed that the consideration for the transfer of 28 residential units shall be satisfied by the redemption proceeds of the said preference shares and accumulated dividends. The Appellant who took over possession of 28 residential units in the year 1998/1999, carried out improvements, relinquished all further claims set out in the agreement and awaited deeds of transfer at a later date. Having acted in terms of the agreement and made a capital gain of Rs. 503 Million in relation of the said residential units, the Appellant now relies on non-fulfillment of formalities stipulated in section 52 (1) of the Companies Act, No. 17 of 1982 by Keagnnam to avoid tax liability in respect of capital gain made by the Appellant under the provisions of the Inland Revenue, Act, No. 28 of 1979.

[92] Even if it is assumed that keangnam failed to formally cancelled the shares upon transferring 28 residential units to the Appellant as claimed by the Appellant, or that Keangnam did not make a profit at that point, the Appellant who made a capital gain of 503 Million in the year 1998/1999 cannot be permitted to benefit from any breach of the provisions of the Companies Act, No. 17 of 1982 by Keangnam. In my view, the charging section and the computation provisions of a tax statute are inextricably connected and the charging section of a tax statute constitutes an integrated part of the Income Tax Statute. The provisions of the Inland Revenue Act, No. 28 of 1979 in my view cannot be superseded by the provisions of the Companies Act, No. 17 of 1982.

[93] In the case of *Commissioner of Income Tax, Bangalore v. B.C. Srinivasa Setty* (19.02.1981- SC), 19.02.1981 (1981) 128 ITR 294/5 Taxman 1), the Indian Supreme Court held that the charging section and the computation

provisions together constitute an integrated code. R.S. Pathak, J. In paragraph 10 stated:

> *"For the purpose of imposing the charge, Parliament has enacted detailed provisions in order to compute the profits or gains under that head. No existing principle or provision at variance with them can be applied in determining the chargeable profits and gains. All transactions encompassed by Section 45 must fall under the governance of its computation provisions. A transaction to which those provisions cannot be applied must be regarded as never intended by Section 45 to be the subject of the charge. This inference flows from the general arrangement of the provisions in the Income-tax Act, where under each head of income the charging provision is accompanied by a set of provisions for computing the income subject to that charge. The character of the computation provisions in each case bears a relationship to the nature of the charge.* ***Thus the charging section and the computation provisions together constitute an integrated code.*** *When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section. Otherwise, one would be driven to conclude that while a certain income seems to fall within the charging section there is no scheme of computation for quantifying it. The legislative pattern discernible in the Act is against such a conclusion. It must be borne in mind that the legislative intent is presumed to run uniformly through the entire conspectus of provisions pertaining to each head of income. No doubt there is a qualitative difference between the charging provision and a computation provision. And ordinarily the operation of the charging provision cannot be affected by the construction of a particular computation provision. But the question here is whether it is possible to apply the computation provision at all if a certain interpretation is pressed on the charging provision. That pertains to the fundamental integrality of the statutory scheme provided for each head".*

[94] It is also relevant to consider the decision in *Kishinchand Chellaram and others v. Commissioner of Income Tax, (Central) Bombay*, 1963 AIR 390 SC) which considered the question *inter alia*, whether any violation of any prohibition relating to a payment of dividend in the Indian Companies Act will alter the liability to pay tax on the dividend. The Supreme Court of India stated at page 6 that that the liability to pay income tax cannot be avoided by the violation of any requirement contained in the Companies Act:

> *"By virtue of s. 16(2), the liability to pay tax attaches as soon as dividend is paid, credited or distributed or deemed to have been paid, credited or distributed to the shareholder and the income tax Act contains no provision for altering the incidence of liability to pay tax on the dividend merely because it is found that in declaring dividend and paying it the company violated a prohibition (1) (1925) I.L.R. 47 All 669) relating to payment of dividend in the Indian Companies Act.*

[95] In the present case, the true intention of the parties and conduct are manifested by the agreement between the parties under which the

consideration for the transfer of 28 residential units was satisfied by the redemption of proceeds of the said preference shares and the accumulated dividends and thus, the parties intended the redemption to take place by the transfer of 28 residential units to the Appellant by keangnam. In my view, the preference share itself stood extinguished by redemption when the consideration for the transfer of 28 residential units was satisfied from the redemption proceeds of the share preference and the accumulated dividends, where the Appellant relinquished all its right to any further claim against Keangnam.

[96] I am of the view that the BOR has come to a right a decision in this case. The transfer of 28 residential units, acquisition of possession and improvements made by the Appellant at a cost of 44,104,349 million and the agreement not to claim any further claim against the Company will squarely constitute a redemption of preference shares by keangnam within the meaning of section 7 (1) (d) of the Inland Revenue Act, No. 28 of 1979 (as amended).

[97] With regard to the year of chargeability under the provisions of the Inland Revenue Act, No. 28 of 1979, it is the year of effective transfer of 28 residential units to the Appellant with the right to improve such units that is relevant. Capital gains are assessable as income of the year in which the redemption took place by the transfer of 28 residential units to the Appellant, even though the shares were formerly cancelled under the provisions of the Companies Act, No. 17 of 1982 in the subsequent year.

[98] To attract the liability to tax under Section 7(1)(d), it is sufficient if, in the accounting year (1998/99), capital gain was made by the Appellant when the Appellant who had a right to take over possession of 28 residential shares, in lieu of redemption of shares in terms of the agreement and made improvements in the year 1998/1999 and relinquished all its rights against Keangnam on the understanding that the cancellation of shares and the formal execution of deeds will be made in the subsequent years.

[99] In other words, the Appellant had a right to take over 28 residential units, carry out improvement in the relevant accounting year (1998/1999) in lieu of redemption of preference shares, and in my view that would be sufficient to attract tax liability on capital gains under Section 7(1)(d) of the Inland Revenue Act, No. 28 of 1979, irrespective whether the formal cancellation of shares was effected by Keangnam, the formal transfer of deeds was executed and book entries were made in the subsequent accounting year.

[100] The question whether or not, the other party to the agreement, Keangham violated section 52 (1) of the Companies Act, No. 17 of 1982 relating to the redemption of shares by not making the cancellation of shares in the same year of assessment and notification of the same to the Registrar of Companies, cannot be raised as an excuse to avoid tax liability of the Appellant in respect of capital gain made by the Appellant in the year 1998/1999 under section 7(1)(d) of the Inland Revenue Act, No. 28 of 1979.

[101] Under such circumstances, viewed from any angle, there is no escape from the conclusion that Section 7 (1) (d) was attracted and that the capital gain made by the Appellant in the said transaction was liable to be taxed under the head "Capital gains" in section section 7 (1)(d) of the Inland Revenue Act, No. 28 of 1979. For those reasons, I hold that the questions of law Nos. 16 and 17 must be answered in favour of the Respondent.

Question of Law No. 22

22-Has the Board of Review erred in law by not coming to the conclusion that the Commissioner General of Inland Revenue has adduced grounds for the assessment in his determination which were not relied upon by the Assessor in any communication to the taxpayer?

[102] The Appellant's question of law No. 22 is that the Respondent has adduced grounds for the assessment in his determination which were not relied upon by the Assessor in any communication to the taxpayer. The Appellant in his written submissions, however, refers to section 115 (3) of the Inland Revenue Act, No. 28 of 1979, and submits that the Assessor has failed to provide no justification for the assessment in terms of the reasons set out in the statement of reasons, and therefore, it is contrary to law for the Assessor to adduce new grounds for the assessments.

[103] The Assessor in his reasons for not accepting of the return of income stated that the capital gain amounting to Rs. 503,000,000/- arising on the redemption of shares had not been declared as income and taxes have not been paid. The Assessor further stated that the shares held by the Appellant in Keangnam have been redeemed by Keangnam at value of Rs. 28 million by way of giving 28 residential apartment units and the Appellant had obtained possession of the said units (A1). It is manifest that the Assessor had not given new grounds for the rejection of the return of income.

[104] The Commissioner in his determination affirmed the assessment and stated that the assessment A2 which was discharged under section 4 (3) of the Inland Revenue (Special Provisions) Act, No. 10 of 2003 was reissued under section 4 (2) (b) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 0f 2004. He further stated that though the Assessor had indicated in the latter (A1) that the assessment will be issued under section 4(4), it was a mistake in quoting the appropriate section, but in fact, the assessment was issued under section 4 (2)(b) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 0f 2004.

[105] As it was noted earlier, the assessment was reissued under section 4 (2) (b) of the Inland Revenue (Regulation of Amnesty) Act, No. 10 of 2004 and not under section 4 (4), which is not fatal to the validity of assessment. Therefore, the argument of the Appellant is devoid of merits. For those reasons, I hold that the question of law No. 22 must be answered in favour of the Respondent.

Question of Law No. 23

23-Has the Board of Review erred in law by coming to the conclusion that there were grounds for the imposition of a penalty for the late payment of taxes when in terms of the then applicable agreement between the Government of Sri Lanka and Prima Ceylon Limited, payments of income tax have been made on or before due dates by the Ministry of Plan Implementation out of a budgetary allocation for the purpose?

[106] The Appellant's argument is that the obligation to pay income tax on its operations was on the Government of Sri Lanka in terms of the agreement with the Government of Sri Lanka and thus, taxes were to be paid by the Ministry of Plan Implementation and a budgetary allocation was made for that purpose. On that basis, the Appellant argues that if there was a delay in the payment of taxes, any penalty must be paid by the Government of Sri Lanka and not the Appellant.

[107] In the present case, what is relevant is the capital gain made by the Appellant arising on the redemption of shares in terms of the agreement between the Appellant and keangnam to which the Government of Sri Lanka is not a party. As it was noted, the Appellant is liable to pay capital gains tax and thus, any penalty for the delay in payment of capital gains tax shall be borne by the Appellant. Therefore, the argument of the Appellant is devoid of merits.

Conclusion & Opinion of Court

[108] In these circumstances, I answer the questions of law arising in the case stated in favour of the Respondent and against the Appellant as follows:

4. No
11. No
12. No
13. No
14. No
15. No
16. No
17. N0
22. No
23. No

[109] For those reasons, I confirm the determination made by the Board of Review dated 29.06.2009 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