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 section 11A of the Tax Appeals Commission Act, No. 23 of 2011 as amended by Act, No. 20 of 2013.

Access International (Private) Limited,
No. 278, Union Place,
Colombo 02.

Appellant

Case No. CA/TAX/0017/2018
Tax Appeals Commission
No. TAC/IT/001/2016

Vs.

The Commissioner General of Inland Revenue,
Department of Inland Revenue,
Sir ChittampalamA.GardinerMawatha,
Colombo 02.

Respondent

Before **:** Dr. Ruwan Fernando J. &

M. Sampath K.B. Wijeratne J.

: Romesh de Silva, P.C. with Harsha Amarasekera, P.C. and KanchanaPeiris for the Appellant

S.Balapatabandi, A.S.G. for the Respondent

Argued on : 14.03.2022

Written Submissions filed on

: 03.06.2019 &20.11.2019 (by the Appellant)

11.09.2019 &01.09.2019
(bytheRespondent)

Decided on : 05.08. 2022

Dr. Ruwan Fernando, J.

Introduction

[1] This is an appeal by way of a case statedagainst the determination of the Tax Appeals Commission dated 26.04.2018 confirming the determination made by the Commissioner General of Inland Revenue on 17.11.2015 and dismissing the Appeal of the Appellant. The period relates to the year of assessment 2010/2011.

Factual Background

[2] The Appellant, Access International (Pvt.) Limited is a limited liability Company incorporated and domiciled in Sri Lanka. As per the Audit Report, the Appellant is engaged in the business of importing, exporting, clearing and forwarding, wholesale and retail trading, merchandising and also deal as commission agents, construction contractors, manufacturers, representatives and distributors of manufactured goods.

[3] The Ministry of Highways and Road Development Authority of Sri Lanka entered into aContract with Mabey & Johnson Ltd, a Company duly incorporated in England (hereinafter referred to as Mabey & Johnson Ltd. UK) and having its registered office at Floral Mile, Twylord, Reading, Berkshire, RG109SQ, England, fordesign, manufacture and supply of Compact Bridging Components and associated goods and services for the Regional Bridge Project using the British Government Financial Assistance.

[4] The Appellant, with Access Engineering Limited, entered into a Remuneration Agreement with the said Mabey & Johnson Limited, UK, wherebythe Appellant agreed to represent the said Mabey & Johnson Limited, UK in Sri Lanka for the said Regional Bridge Project. The said Mabey& Johnson Ltd, UK, agreed to pay a commission payment to the Appellant at a rate of 6% of the contract value in terms of paragraph 1 of the said Contract.

[5] The Appellant further entered into an Agency Contract with the said Mabey & Johnson Ltd, UK and in terms of the said Agency Contract, the Appellant was appointed by the said Mabey & Johnson Ltd UK as its agent to promote its ranger of bridging products in Sri Lanka (pp. 64-69 of the TAC brief). In terms of the said Agency Contract, the Appellant was entitled to a

commission depending on the sale value, on all sales of the products that were made during the life of the Agency Contract to customers established in Sri Lanka.

[6] The Appellant furnished its return of income and the financial statement of accounts for the year of assessment 2010/2011 and declared that out of the total statutory income of Rs. 398,302,868, a sum of Rs. 144,570,401 was received from the said Mabey & Johnson Ltd, UK and several foreign companies (pp.13-15 of the TAC brief). The Appellant claimed that it rendered services tothe saidcompanies outside Sri Lanka and claimed a sum of Rs. 143,983,371 under section 13 (dddd) of the Inland Revenue Act, No. 10 of 2006 (as amended).

Basis of the Assessment

[7] The Assessor by its letter dated 19.11.2013 refused to accept the return of income submitted by the Appellant and refused to grant the exemption claimed by the Appellant under section 13 (dddd) of the Inland Revenue Act, No. 10 of 2006 (as amended) (hereinafter referred to as the Inland Revenue Act) for the commission income of Rs. 143,983,371/- for the following reasons:

1. The “person or partnership outside Sri Lanka” in section 13 (dddd) of the Inland Revenue Actmeans that the person or partnership should be completelyout of Sri Lanka, and the service rendered to suchperson or partnership should be consumed and utilized outside Sri Lanka. In the present case, the Appellant has rendered services to a person or partnership in Sri Lanka and not outside Sri Lanka;
2. In terms of the provisions of the VAT Act, No. 14 of 2002, the VAT is charged in the course of carrying on or carrying out of a taxable activity by any person in Sri Lanka and the Appellant has paid VAT on the commission income received. Therefore, the Appellant has not provided any service to any person or partnership outside Sri Lanka;

[8] Accordingly, the Assessor decided that the exemption claimed in terms of section 13 (dddd) is not applicable to the Appellant and calculated the taxable income of the Appellant as follows:

Profit from trade or business as per return	Rs. 242,788,140	
Interest Income as per Return	Rs. 11,621,357	
	Rs. 254,409,497	
Add Back		
Commission received claimed as exempt under section 13 (dddd)		Rs. 143,983,371
Adjusted statutory income		Rs. 398,392,868
Deduction from total statutory income		-

Adjusted assessable income	Rs. 398,392,868

[9] Accordingly, the notice of assessment was issued for the above year of assessment and the Appellant appealed to the Commissioner-General of Inland Revenue (hereinafter referred to as the Respondent) against the said assessment. The Respondent by its determination dated 17.11.2015 confirmed the assessment and dismissed the appeal (pp. 7-10 of the Tax Appeals Commission brief).

Appeal to the Tax Appeals Commission & the Court of Appeal

[10] Being dissatisfied with the said determination of the Respondent, the Appellant appealed to the Tax Appeals Commission (hereinafter referred to as the TAC) and the TAC by its determination dated 26.04.2018 confirmed the determination of the Respondent and dismissed the Appeal.

Questions of Law

[11] Being dissatisfied with the said determination of the TAC, the Appellant appealed to the Court of Appeal and the TAC submitted the following questions of law for the opinion of the Court of Appeal in terms of section 11A (2) of the TAX Appeals Commission Act, No. 23 of 2011 (as amended):

1. (a) Does the exemption set out in section 13 (dddd) of the Inland Revenue Act, No. 10 of 2006 as amended by Act, No. 19 of 2009 apply to the income of a local company providing services as an agent for an overseas company?

   (b) Does the fact that such overseas company has a place of business in Sri Lanka in terms of Part XVIII of the companies Act, No. 7 of 2007 not disentitle such local company of the benefit of such exemption?

   (c) Did the Commission err in law in arriving at the erroneous conclusion that the fact that the overseas company to which the Appellant provided services had a registered address in Sri Lanka disentitle the Appellant to the exemption in terms of section 13 (dddd) of the Inland Revenue Act, No. 10 of 2006 as amended by Act, No. 19 of 2009?

2. Did the Commission err in law in arriving at the erroneous conclusion that the Appellant had not rendered any service to the overseas company?

3. Is Mabey & Johnson Limitedto any person outside Sri Lanka within the meaning of section 13 (dddd) of the Inland Revenue Act, No. 10 of 2006 as amended by the Act, No. 19 of 2009?

4. Did the Commission err in failing to take cognizance of the fact that the income of the Appellant upon which the determination of the Commissioner General of Inland Revenue was based and upon which tax and penalties were computed was derived from several sources in addition to Mabey & Johnson Limited?

5. Did the Commission err in failing to take cognizance of the fact that the income of the Appellant upon which the determination of the Commissioner General of Inland Revenue was based and upon which tax and penalties were computed included interest income which is exempted?

6. Did the collective actions/acts take by the Appellant over the relevant period of time constitute a "service" within the meaning of the Inland Revenue Act, No. 10 of 2006 as amended by Act No. 19 of 2009?

7. In any event, is "indenting" a "service" within the meaning of the Inland Revenue Act, No. 10 of 2006 and in particular section 13 (dddd) of the Inland Revenue Act, No. 10 of 2006 as amended by Act, No. 19 of 2009?

8. Did the Commission err in law in arriving at the erroneous conclusion that the fact that an agency commission is calculated based on the value of sales means that no services are provided by the agent?

9. Did the Commission err in law by basing its decision on the manner in which the Appellant's compensation for service rendered by it to an overseas company were calculated?

10. Did the Commission err in law in arriving at the erroneous conclusion that an indenting agent is not entitled to avail itself of the exemption in terms of section 13 (dddd) of the Inland Revenue Act, No. 10 of 2006 as amended by Act, No. 19 of 2009?

11. Does section 13 (dddd) of the Inland Revenue Act, No. 10 of 2006 as amended by the Act, No. 19 of 2009 not require the service to be provided outside of Sri Lanka?

12. Did the Commission err in law in arriving at the erroneous conclusion that:

    (a) Section 106(11) of the Inland Revenue Act required the Appellant to maintain separate accounts for business activity for which income was exempted;

    (b) There was, for that reason, no merit in the Appellant's position that the Appellant's total commission was from 8 different companies and that such income must be considered separately.

13. Did the Commission err in law in arriving at the erroneous conclusion that:
    (a) The overseas company to which the Appellant provided services had a permanent establishment in Sri Lanka?

    (b) The existence of a permanent establishment in Sri Lanka disentitled in law to the exemption set out in section 13 (dddd) of the Inland Revenue Act, No. 10 of 2006 as amended by Act, No. 19 of 2009?

14. Is the Appellant entitled in law to the exemption set out in section 13 (dddd) of the Inland Revenue Act, No. 10 of 2006 as amended by Act, No. 19 of 2009?

15. Did the Commission fail to properly examine and/or appreciate the facts relevant to this matter?

Summary of the Submissions

[12] At the hearing, Mr. Romesh de Silva, the learned President's Counsel for the Appellant submitted that the determination of the TAC is erroneous for the following reasons:

1. The Appellant entered into a Remuneration Agreement with Mabey & Johnson Ltd, UK, a company outside Sri Lanka and agreed to represent Mabey & Johnson Ltd, UK. There is nothing to show that the Appellant agreed to represent the local branch office;

2. Mabey & Johnson Ltd, UK as the principal and the Appellant as the Agent entered into an Agency Contract and the Appellant agreed to provide services to the said Mabey & Johnson Ltd, UK. There is nothing to show that the Appellant agreed or provided any service to the local branch office of the said Company;

3. The very existence of a branch office in Sri Lanka cannot *ipso facto* constitute a permanent establishment and disentitle the Appellant to the tax exemption unless the services were provided to the local branch office. In the present case, there is nothing to show that the Appellant provided any service to the local branch office;

4. The TAC wrongly disallowed the exemption on the basis that Mabey & Johnson Ltd, is a not a person completely outside Sri Lanka and read into section 13 (dddd) words which were not there. The TAC failed to conclude that the said Company was not a person outside Sri Lanka, instead, it came to the conclusion that it was not completely outside Sri Lanka;

5. The Appellant's documentary evidence, including the contracts, invoices and the documents produced during the assessment process clearly established that the Appellant provided services to Mabey & Johnson Ltd, UK and other foreign companies outside Sri Lanka, and received a commission income in foreign currency, which was remitted to Sri Lanka through a bank.

[13] Mr. de Silva referred to the decision of the Court of Appeal in *The Commissioner-General of Inland Revenue v. Aitken Spence Travels Limited* CA Tax/04/2016 decided on 13.11.2018 in support of contention that the phrase "person outside Sri Lanka" means a person who is physically outside Sri Lanka. Mr. de Silva submitted therefore, that the Appellant who provided services to Mabey & Johnson Ltd, UK and other companies outside Sri Lanka is entitled to the tax exemption in section 13 (dddd) of the Inland Revenue Act.

[14] On the other hand, Mr. S. Balapatabendhi, the learned Additional Solicitor General who appeared for the Respondent submitted that the TAC was correct in holding that the Appellant is not entitled to the tax exemption in section 13 (dddd) of the Inland Revenue Actfor the following reasons:

1. Mabey & Johnson Ltd is incorporated in the UK and has a registered place of business within Sri Lanka as it is apparent from the form 35 issued under section 491 of the Companies Act, No. 07 of 2007 and therefore, being an overseas company in Sri Lanka, it has a permanent establishment in Sri Lanka;

2. Mabey & Johnson Ltd having a physical presence in Sri Lanka cannot qualify as a person outside Sri Lanka in terms of section 13 (dddd) of the Inland Revenue Act;

3. Even if the Appellant is held to be entitled to claim the tax exemption under section 13 (dddd), it is disentitled to claim the exemption as a result of the failure to comply with section 106 (11) of the Inland Revenue Act;

4. The Appellant is carrying on several business activities as set out at in the financial statement of the Appellant (pp 14-51 of the TAC brief) but the Appellant failed to maintain and prepare statements of accounts in a manner that the profits and income from each such activity could be separately identified.

[15] He relied on the decisions of the Court of Appeal in *The Commissioner-General of Inland Revenue v. Aitken Spence Travels Limited*, (supra) and *ICCI Bank Limited v. The Commissioner General of Inland Revenue* CA Tax 28/2013 decided on 16.07.2015 in support of his submissions.

[16] In view of the submissions made by Mr. de Silva and the learned Additional Solicitor General, and the determination made by the TAC, this Court, in answering the questions of law submitted for the opinion of the Court, has to consider the following main matters:

1. On the facts and in the circumstances of this case, whether or not, Mabey & Johnson Co. Ltd., UKhad a permanent establishment (PE) in Sri Lanka, and if so:

   (a) whether or not, the Appellant provided services to any person in Sri Lanka; and

   (b) if so, whether the Appellant is not entitled to claim the tax exemption in section 13 (dddd) of the Inland Revenue Act;

2. On the facts and in the circumstances of this case, whether or not, the Appellant provided services to any person or partnership outside Sri Lanka, and if so, whether the Appellant is entitled to claim the tax exemption in section 13 (dddd) of the Inland Revenue Act;
3. On the facts and in the circumstances of this case, whether or not the Appellant is an indenting agent; and if so, whether the Appellant is not entitled to claim tax exemption in section 13 (dddd) of the Inland Revenue Act;
4. In any event, on the facts and in the circumstances of this case, whether the Appellant has failed to comply with section 106(11) of the Inland Revenue Act, and if so, whether the Appellant is disentitled to claim a tax exemption under section 13 (dddd) of the Inland Revenue Act.

Analysis

[17] In the present case, the Appellant claims that it is entitled to the exemption from income tax in terms of section 13 (dddd) of the Inland Revenue Act, in respect of the commission income received in a sum of Rs. 143,983,371/- for the services rendered to Mabey & Johnson Ltd, UK and other foreign companies.

Exemption under Section 13 () of the Act

[18] Section 13 (dddd) of the Inland Revenue Act reads as follows:

"13. There shall be exempt from income tax-

(dddd) notwithstanding the provisions of paragraph (ddd) of this section, the profits and income for the period commencing from April 1, 2009 and ending on March 31, 2011, earned in foreign currency by any resident company, any resident individual or any partnership in Sri Lanka, from any service rendered in or outside Sri Lanka to any person or partnership outside Sri Lanka, if such profits and income (less such amount, if any,

expended outside Sri Lanka as is considered by the Commissioner-General to be reasonable expenses) are remitted to Sri Lanka, through a bank".

[19] In order to be entitled to the exemption in terms of section 13 (dddd) of the Inland Revenue Act, the following elements must be satisfied by the Appellant:

1. The Appellant must be a resident person or a partnership in Sri Lanka;
2. The Appellant rendered a service in or outside Sri Lanka;
3. The Appellant rendered a service to any person or partnership outside Sri Lanka;
4. The Appellant earned any profits and income for the period commencing from 01.04.2009 to 31.03.2011;
5. Such profits and income must be earned in foreign currency and remitted through a Bank.

[20] Now, I shall consider whether or not the five requirements set out in Section 13 (dddd) have been fulfilled by the Appellant. The following matters are not in dispute in the present case:

1. The Appellant is a company incorporated in Sri Lanka and has its registered or principal office in Sri Lanka and therefore, the Appellant is a resident person in Sri Lanka within the meaning of section 79 of the Inland Revenue Act;
2. The Appellant earned a commission income in foreign currency and such income was remitted to Sri Lanka through a Bank.
3. Such profits or income was earned for the period 01.04.2010 to 31.03.2011.

[21] According to the Appellant's document titled "detailed analysis on commission income" received by the Appellant during the relevant period, which appears on page 86 of the TAC brief, the Appellant having rendered its services to eight companies outside Sri Lanka received profits and income in foreign currency equivalent to Rs. 161,918,849.03, paid Rs. 17,348,448.09 as VAT and the net total earning was Rs. 144,570,400.94. As per the said detailed analysis of commission income, the Appellant received a sum of Rs. 134,883,192.26 from Mabey & Johnson Ltd and a total sum of Rs. 27,035,656.77 (161,918,849.03-134,883,192.26) from the other foreign companies (A15). The said "detailed analysis of commission income" at page 86 of the TAC brief reads as follows:

Customer Name	**Nature of the Commission**	**Amount Received to the Bank**	**VAT paid Amount**	**Net Amount**
DERCO	Indent	864,240.90	92,597.24	771,643.66

AEROSPACE INC,	Commission			
Mabey & Johnson Ltd	Agency service against shipment	134,883,192.26	14.451,770.58	120,431,421.68
Yaskawa Electric (Singapore) Ltd	Indent commission	1,687,117.02	180,762.54	1,506,354.48
Saloon Engineering BHD	Consultancy Services Design	16,575,360.00	1,775,931.43	14,799,428.57
Furukawa Rock Drill Co. Ltd	Indent commission	3,442,640.35	368,854.32	3,073,786.03
Messier Services (Pte) Ltd	Indent commission	3,611,288.70	386,923.79	3,224,364.91
Allen Vanguard Limited	Indent commission	491,296.68	52,638.93	438,657.75
IHC Parts Services B.V.	Indent commission	363,713.12	38,969.26	324,743,86
Total		**161,918,849.03**	**17,348,448.09**	**144,570,400.94**

[22] The total commission income received from Mabey & Johnson Ltd, UK has been separately calculated by the Appellant and submitted to the Assessor, which appears on page 82 of the TAC brief (A11) as follows:

S. No	Invoice No	Invoice Date	Customer Name	Description	Net Amount Rs.	VAT Amount Rs.	Total Amount Rs.
1	90170	30.08.2010	Mabey & Johnson Ltd	Payment for Agency Services	21,085,584.83	2,530,270.18	23,615,855.01
2	90171	30.08.2010	Mabey & Johnson Ltd	Payment for Agency Services	16,042,080.78	1,925,049.69	17,967,130.47
3	90172	30.08.2010	Mabey & Johnson Ltd	Payment for Agency Services	532,319.62	63,878.35	596,197.97
4	90173	30.08.2010	Mabey & Johnson Ltd	Payment for Agency Services	5,301,398.62	636,167.83	5,937,566.45
5	90174	30.08.2010	Mabey & Johnson	Payment for	3,449,789.59	413,974.75	3,863,764.34

			Ltd	Agency Services			
6	90175	30.08.2010	Mabey & Johnson Ltd	Payment for Agency Services	12,051,977.48	1,446,237.30	13,498,214.78
7	90187	31.08.2010	Mabey & Johnson Ltd	Payment for Agency Services	33,941,156.09	4,072,938.73	38,014,094.82
8	90272	23.09.2010	Mabey & Johnson Ltd	Payment for Agency Services	2,229,477.62	267,537.31	2,497,014.93
9	90316	07.10.2010	Mabey & Johnson Ltd	Payment for Agency Services	19,217,973.44	2,306,156.81	21,524,130.25
10	90360	19.10.2010	Mabey & Johnson Ltd	Payment for Agency Services	6,579,663.61	789,559.63	7,369,223.24
					120,431,421.68	**14,451,770.58**	**134,883,192.26**

[23] The Appellant has separately identified the commission income in a sum of Rs. 143,983,371/- received in foreign currency and stated in the Appellant's financial statements on page 15 as follows:

(IX) Commission income

Commission received in foreign currency	Rs. 144,570,401
Less	
Direct expenses	Rs. 587,030
	Rs. 143,983,371
Local	Rs. 934,997
	Rs. 144,918,368

[24] Now, the crucial question is whether or not the Appellant has rendered a service to the said Mabey & Johnson Ltd, UK and the other seven companies outside Sri Lanka within the scope and ambit of section 13 (dddd) of the Inland Revenue Act. A perusal of the determination made by the TAC reveals that the TAC disallowed the exemption in terms of section 13 (dddd) of the Inland Revenue Actfor the following reasons:

1. Mabey & Johnson Co. Ltd had a permanent establishment (PE) in Sri Lanka and therefore, the Mabey & Johnson Ltd, UK 0is not a person or partnership “completely outside Sri Lanka”; and

2. (i) The Appellant has not rendered any service to Mabey & Johnson Ltd, UK and the service rendered by the Appellant has been consumed and utilized in Sri Lanka.

   (a) the Appellant acted as an indenting agent for Mabey & Johnson Ltd, (local branch)and also as an intermediator between Mabey & Johnson Ltd and the Ministry of Highways and Road Development Authority;

   (ii) The Appellant received the commission income only as a result of the goods purchased by the Ministry of Highway

Permanent Establishment (PE)

[25] The TAC strongly relied on the concept of the PE and held that the Mabey & Johnson Ltd had a PE in Sri Lanka and therefore, the existence of a business connection or a PE in Sri Lanka would be an indication to show that the said Mabey & Johnson Ltd is not a person outside Sri Lanka. The TAC at pp. 4-5 of the determination finds that Mabey & Johnson Co. Ltd, UKhad a permanent establishment (PE) in Sri Lanka for the following reasons:

1. According to the letter sent by the Director, Road development Authority dated 27.12.2011 (R7), the permanent address of Mabey & Johnson Ltd in Sri Lanka is at No. 85/2, Main Street, Jayapurawatte, Battaramulla;

2. Mabey & Johnson had a permanent establishment in Sri Lanka as indicated in clause 10.3 of the Contract between Mabey & Johnson Ltd, UK and the Ministry of Highways & the Road Development Authority (RDA);

3. Mabey & Johnson Ltd, UK had a permanent establishment in Sri Lanka through a branch office as indicated in the form 35 issued under section 491 of the Companies Act, by which the said Mabey & Johnson Ltd changed its address in Sri Lanka from Level 08, East Tower, World Trade Centre, Colombo 01 to No. 85/2, Main Street, Jayapurawatte, Battaramulla.

[26] Accordingly, the TAC concluded at page 5 of the determination:

> *“It reveals that the supplier, Mabey & Johnson Ltd is not a person or partnership* ***completely outside Sri Lanka****. When examining the evidence submitted by the Respondent, it is very clear that Mabey & Johnson Ltd had a permanent establishment (PE) in Sri Lanka”.*

[27] The first point that arises is whether Mabey & Johnson Ltd, UK had a permanent establishment (PE) in Sri Lanka and if so, whether it had derived profits in Sri Lanka through a "permanent establishment" (PE) which can be taxed in Sri Lanka by virtue of the application of Article 5 of the Double Taxation Treaty (DTAA) between the United Kingdom and Sri Lanka.It was the submission of Mr. Balapatabendi that Mabey & Johnson was incorporated in the UK and has a registered place of business within Sri Lanka in terms of section 491 of the Companies Act, No. 7 of 2007 since it had altered the address of the principal place of business of the Company within Sri Lanka. His submission was that Mabey & Johnson Ltd, UK has a physical presence in Sri Lanka as a PE in Sri Lanka and therefore, Mabey & Johnson Ltd., which has a PE in Sri Lanka is not a person completely outside Sri Lanka.

Overseas company

[28] An overseas company is defined in Section 488 of the Companies Act No. 07 of 2007, to mean any company or body corporate incorporated outside Sri Lanka which- (a) after the appointed date (viz: 3rdMay 2007) establishes a place of business within Sri Lanka; or (b) had, before the said appointed date, established a place of business within Sri Lanka and continues to have an established place of business within Sri Lanka on the appointed date. “Registered Overseas Company” is defined to mean an overseas company which has delivered or is deemed to have delivered to the Registrar the documents and particulars required under Section 489.

[29] The Companies Act, No. 07 of 2007 obliges every overseas company to apply for registration in Sri Lanka within one month from the date of establishment of the place of business in terms of the provisions of the Companies Act with documents and particular to be delivered to Registrar by such company as set out in S. 489 (1) of the Companies Act. The certificate of registration is, however, not available in the TAC brief to prove that the local branch of Mabey & Johnson Co. Ltd has been registered as an overseas Company under Section 489 (1) of the Companies Act.

[30] Section 491 of the Companies Act, No. 07 of 2007 under Part XVIII- Overseas Companies, however, provides that any a registered overseas company shall, within the prescribed time, deliver to the Registrar for registration, a return containing *inter alia*, the prescribed particulars of the alteration made in address of the registered principal office of the company or the principal place of business in Sri Lanka. It reads as follows:

> *“491. Where in the case of a registered overseas company, any alteration is made in—*
>
> *(a) the charter, statutes, or memorandum and articles of the company or any other instrument constituting or defining the constitution of the company;*

(b) the directors of the company or the particulars contained in the list of the directors;

(c) the names and addresses of the persons authorised to accept service on behalf of the company; or

(d) the address of —

(ii)the registered or principal office of the company; or

(ii) the principal place of business of the company within Sri Lanka, the company shall, within the prescribed time, deliver to the Registrar for registration, a return containing the prescribed particulars of the alteration".

[31] The Respondent, referring to the form 35 issued under section 35 of the Companies Act, No. 7 of 2007 argues that the registration of the branch office of Mabey & Johnson Co. Ltd in Sri Lanka under and in terms of Section 489 of the Companies Act, No. 07 of 2007 is conclusive evidence that Mabey & Johnson Co. Ltd, UK has a PE in Sri Lanka. Clauae10.3 of the Supply Contract between Mabey & Johnson Co. Ltd, UK and the Ministry of Highways/ RDA provides that Mabey & Johnson Co. Ltd, UK has a branch office in Sri Lanka. Clause 10.3 of the said Contract reads as follows:

"If, notwithstanding the preceding clause the Supplier or its Sri Lankan branch is compelled to pay any such taxes, duties or fees, then in that event, the Government of Sri Lanka will immediately reimburse the Supplier or its ***Sri Lankan branch*** *for any and all taxes, duties or fees assessed and collected against them in connection with the services rendered under the Contract".*

[32] The letter addressed to the Respondent by the Director, RDA indicates that the Permanent official address of Mabey & Johnson Ltd (Sri Lanka Office) is at No. 85/2, Main Street, Jayapurawatte, Battaramulla, Telephone 011 2882218 fax: 011 2882221…." The form 35 issued under section 491 of the Companies Act, No. 07 of 2007 indicatesa change of the address of the local branch of Mabey & Johnson Ltd, UK in Sri Lanka from Level 08, East Tower, World Trade Centre, Colombo 01 to No. 85/2, Main Street, Jayapurawatte, Battaramulla.

[33] A perusal of the form No. 35 issued under the Companies Act, No. 07 of 2007 reveals that Mabey & Johnson Ltd, UK has changed its principal place of business in Sri Lanka to No. 85/2, Main Street, Battaramulla (branch office). Based on the contents of the form 35, it could be assumed that Mabey & Johnson Co. Ltd, UK has a branch office in Sri Lanka. Now the question is whether or not, the mere existence of a registered branch office of Mabey & Johnson Ltd, UK in Sri Lanka is sufficient to establish that Mabey & Johnson Co. Ltd had a permanent establishment in Sri Lanka for the purpose of tax law.

Double Taxation Treaty between Sri Lanka and the United Kingdom

[34] The Government of Sri Lanka entered into a Double Taxation Avoidance Agreement (DTAA) with the Government of the United Kingdom of Great Britain and Northern Ireland on 21.06.1979 for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital (Vide- the document marked "X" in the Docket). The DTAA applies to taxes on income, corporation and capital imposed on behalf of each Contracting State andArticle 2 (2) of the Double Taxation Avoidance Agreement (DTAA) between Sri Lanka and United Kingdom states:

> *"This Convention shall also apply to any identical or substantially similar taxes which are imposed after the date of signature of this Convention in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of any important changes which have been made in their respective taxation laws".*

Relief from Income Tax under the DTAA

[35] The DTAA is a contract between two Sovereign Governments of the United Kingdom and Sri Lankawith full knowledge, understanding and free consent of both the governments. Relief by way of an exemption shall be considered in case of a DTAA in terms of Section 97 of the Inland Revenue Act, No. 10 of 2006. Section 97 reads as follows:

> *"97 (1) (a) Where Parliament by resolution approves any agreement entered into between the Government of Sri Lanka and the Government of any other territory or any agreement by the Government of Sri Lanka with the Governments of any other territories, for the purpose of affording relief from double taxation in relation to income tax under Sri Lanka law and any taxes of a similar character imposed by the laws of that territory, the agreement shall, notwithstanding anything in any other written law, have the force of law in Sri Lanka, in so far as it provides for–*
>
> *(i) relief from income tax;*
> *(ii) determining the profits or income, to be attributed in Sri Lanka to persons not resident in Sri Lanka, or determining the profits or income, to be attributed to such persons and their agencies, branches or establishments in Sri Lanka;*
> *(iii) determining the profits or income, to be attributed to person's resident in Sri Lanka who have special relationships with persons not so resident*
> *(iv) exchange of information; or*
> *(v) assistance in the recovery of tax payable.*

[36] There are two situations under which the relief can be achieved in Sri Lanka under the DTAA between the UK and Sri Lanka:

(a) Where income tax has been paid under the provisions of the Inland Revenue Act of Sri Lanka and the corresponding UK Income Tax Act or income tax remains taxable in both countries (whether at a full or reduced rate), as the country of residence, Sri Lanka will give a tax credit for the purpose of Sri Lankan taxation; or

(b) Where exemption from taxation exists, Sri Lanka may grant the exemption from income tax in respect of the agreed source of income under the DTAA subject to conditions laid down in the domestic law or the DTAA.

[37] As per the Inland Revenue Act (S. 97), where the government has entered into a DTAA, then in relation to the assessee to whom such Agreement applies, the provisions of the DTAA, with respect to cases to which they would apply, would operate even if inconsistent with the provisions of the Inland Revenue Act. As a consequence, if a tax liability is imposed by the provisions of the Inland Revenue Act, the DTAA may be referred to, and relief may be granted either by deducting or reducing the tax liability. Thus, the Treaty provisions would prevail, and are liable to be enforced in Sri Lanka and the UK.

Concept of Permanent Establishment (PE)

[38] The word "permanent establishment" is a concept created by the DTAA for tax purposes and it can be described as a taxable entitywhich is commonly used in all international Double Taxation Avoidance Agreements based on standard O.E.C.D or UN Model and their commentaries. Article 5 (1) of the DTAA between UK and Sri Lanka defines the term “permanent establishment” as a “fixed place of business in which the business of the enterprise is wholly or partly carried on”. It reads as follows:

“1. For the purposes of this Convention, the term “permanent establishment” means a fixed place of business in which the business of the enterprise is wholly or partly carried on”.

[39] Article 5 (2) describes what permanent establishment includes. It reads as follows:

“2. The term “permanent establishment” shall include especially:

(a) a place of management;

(b) a branch;

(c) an office;

(d) a factory;

(e) a workshop;

(f) a mine, an oil or well, a quarry or any other place of extraction of natural resources;

(g) an installation or structure used for the exploitation of natural resources;

(h) a building site or construction or assembly project which exists for more than 183 days;

(i) an agricultural or farming estate or plantation.

[40] Now the question is whether the mere registration of a branch office of Mabey & Johnson Ltd, UK in Sri Lanka can *ipso facto* constitute a PE in Sri Lanka within the meaning of Article 5 of the DTAA between the UK and Sri Lanka. As noted, a PE is defined in Article 5 (1) of the DTAA between UK and Sri Lanka and in terms of the definition, the term"permanent establishment"means a fixed place of businessthrough which the **business of the enterprise is wholly or partly carried on**. As noted, there are three distinct ways in which a permanent establishment (PE) can be established in terms of Article 5 of the DTAA between UK and Sri Lanka.

1. Fixed place PE;
2. Consultancy PE;
3. Agency PE

Fixed place-positive list-Article 5 (2)

[41] It is to be noted that the second and third elements of a PE are not relevant to this case. In the case of fixed place PE, there must be a fixed place of business, **through which business is carried on by the enterprise wholly or partly.** The profits of any non-resident foreign company that is registered in Sri Lanka as an overseas company in terms of the provisions of the Companies Act, 07 0f 2007, are taxable only where the said company **carries on its business through a permanent establishment in Sri Lanka.** It is crystal clear that the mere existence of a fixed place and registration of a branch office in Sri Lanka is not sufficient for the establishment of a PE unless the branch also carries on business in Sri Lanka.

[42] It is relevant to note that Article 7 (1) of the DTAA between the UK and Sri Lanka clearly provides that an enterprise that carried on business through a PE in Sri Lanka is only liable for taxation in Sri Lanka in respect of business carried on therein. Article 7 (1) reads as follows:

"7(1) The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment".

[43] In other words, profits of any non-resident foreign company that is registered in Sri Lanka as an overseas company in terms of the provisions of the Companies Act, 07 0f 2007, are taxable only where the said company carries on its business through a permanent establishment in Sri Lanka. Thus, unless a branch office has carried on business, for example, from a fixed place of business in Sri Lanka, there cannot constitute a PE in Sri Lanka.

Negative list-Article 5(3)

[44] Now I will turn to the negative list. The DTAA between UK and Sri Lanka also provides a negative list–i.e., certain activities of a preparatory or auxiliary character will not constitute a PE as set out in Article 5(3). Article 5 (3) describes what permanent establishment does not include. It reads as follows:

> *"3. Notwithstanding the preceding provisions of this article, the term "**permanent establishment" shall be deemed not to include:***
>
> *(a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;*
>
> *(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;*
>
> *(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;*
>
> *(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise; and*
>
> *(e) the maintenance of a fixed place of business solely for the purpose of advertising for the supply of information or for scientific research, being activities solely of a preparatory or auxiliary character in the trade or business of the enterprise.*
>
> *4. A person acting in a Contracting State on behalf of an enterprise of the other Contracting State - other than an agent of an independent status to whom paragraph (5) of this article apply - shall be deemed to be a permanent establishment in the first-mentioned State if he has, and habitually exercises in that State, an authority to conclude contracts in the name of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise.*
>
> *5. An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that Sate through a broker, general commission agent or any other agent of an independent status, where such persons are acting in the ordinary course of their business;*

6. The fact that a company which isa resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise) shall not of itself constitute either company a permanent establishment of the other.

[45] An enterprise cannot be deemed to have created a permanent establishment in Sri Lanka in terms of Article 5(3) of the DTTA between UK and Sri Lanka, merely because it has a fixed place of business or it maintains such a fixed place, unless, it carried on its business through a PE in Sri Lanka. The mere registration or existence or maintenance of a fixed place of business, including the mere preparation or auxiliary character in the business or acceptance of documents,would be insufficient to create a PE in Sri Lanka unless it can be shown that branch office also carries on business in Sri Lanka from that fixed place of business.

[46] In my view, Mabey & Johnson Co. Ltd, UK cannot be deemed to have a PE in Sri Lanka merely because of the existence of a branch office in Sri Lanka under the provisions of the Companies Act, No. 07 of 2007, unless it can be shown that the local branch office carried on business in Sri Lanka.

[47] In the present case, apart from the fact that Mabey & Johnson Co. Ltd, has a branch office in Sri Lanka and it has changed its address of the principal place of business under section 491 of the Companies Act, No. 07 of 2007, there is absolutely no evidence such as bank statements and financial statements **to** show that the branch office **carried on any business in Sri Lanka** either from its previous address, at Level 8, East Tower, World Trade Centre, Colombo 01 or at the new address at No. 85/2, Main Street, Battaramulla.

[48] The TAC has taken the erroneous view that the mere presence of a branch office in Sri Lanka, based on the clause 10.3 of the Contract, the form issued under section 491 of the Companies Act and the letter of the Director, RDA*, ipso facto* established that Mabey & Johnson Co. Ltd had a PE in Sri Lanka. The TAC clearly expanded the scope of section 13 (dddd) by adding the words **"completely outside Sri Lanka",** which arenotused by the Legislature. Such hypothetical construction, in my view is inconsistent with the object and the policy of the Inland Revenue Act.

[49] The TAC,in my view totally failed to consider that there is no documentary evidence whatsoever, to show that the local branch carried on its business in Sri Lanka and unless, it carried on business in Sri Lanka, it cannot constitute a permanent establishment in Sri Lanka within the meaning of the definition of "permanent establishment" in Article 5 (1) of the DTTA between the United Kingdom and Sri Lanka.

Provision of services to a company outside Sri Lanka

[50] I shall turn to the next question. The question is whether or not, the Appellant rendered services to a company outside Sri Lanka or the services were rendered to a local branch office of the said Company in Sri Lanka. The Assessor took the view that the exemption is not applicable for commission income due to the fact that the services have been consumed or utilized in Sri Lanka and therefore, the services have not been rendered to a person or partnership outside Sri Lanka (p 93 of the TAC brief).

[51] The TAC too held that the Appellant has not provided any service outside Sri Lanka on the basis that the service has been consumed and utilized by the Ministry of Highways and the Road Development Authority in Sri Lanka. The following findings of the TAC (pp. 506 of the determination) clearly demonstrate that the TAC required the Appellant to establish that the service has been consumed and utilized outside Sri Lanka to be eligible for the tax exemption under section 13 (dddd) of the Inland Revenue Act:

> *"Another issue to be answered in this appeal is whether the service has been consumed and utilized outside Sri Lanka. According to the submissions made by the Representatives of the Appellant and the Respondent, the Mabey & Johnson paid 6% of the commission based on the value of bridge products imported by the Ministry of Highways and the Road Development Authority. The Appellant has received a commission as the agent of the contractor in introducing its business and promoting the project between the contractor and the Ministry of Highways and the Road Development Authority from the Mabey & Johnson Ltd, UK. In this regard, we further draw our attention to the interview notes dated 07.12.2012. According to above notes which were submitted by the Respondent as R8, the Appellant had acted as an indenting agent for Mabey & Johnson Ltd. The Appellant has not rendered any service to the Mabey & Johnson Ltd, UK and the Appellant has acted as an intermediator between the contractor, Mabey & Johnson Ltd and the Ministry of Highways and Road Development Authority. The Appellant Company received the commission only as a result of the goods purchased by the Government Ministry. The Appellant's work cannot be considered as a service. Therefore, the Appellant is not entitled to claim a tax concession in terms of section 13 (dddd)".*

[52] Now the question is whether there is any requirement in section 13 (dddd) of the Inland Revenue Act for the Appellant to satisfy that the services rendered by the Appellant were consumed and utilized by Mabey & Johnson Co. Ltd outside Sri Lanka. Under and in terms of section 13 (dddd) of the Inland Revenue Act, the profits and income earned by any resident company in foreign currency by providing any service in or outside Sri Lanka to a person or partnership outside Sri Lanka has been exempted from income tax. As the Appellant is a resident company and earned commission income from services rendered in Sri Lanka, all what the Appellant has to prove under

section 13 (dddd) is that the service was rendered to a person or partnership outside Sri Lanka. There is no further requirement in section 13 (dddd) for the Appellant to prove that the services rendered to Mabey & Johnson Co. Ltd, UK were **consumed or utilized** outside Sri Lanka.

[53] It is a well settled law of interpretation that when the words of the statute are clear, plain or unambiguous, i.e., they are reasonably susceptible to only one meaning, the Courts are bound to give effect to that meaning irrespective of consequences. *(Nelson Motis v. Union of India*, AIR 1992 SC 1981). In the Indian Supreme Court case of *Kanai Lal Sur v. ParamnidhiSadhukhan*,AIR 1957 SC 907, Justice P.B. Gajendragadkar, J. stated at paragraph 7:

> *"It must always be borne in mind that the first and primary rule of construction is that the intention of the Legislature must be found in the words used by the Legislature itself. If the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and the policy of the Act"*

[54] In *Coltness Iron Company v. Black*, [1881] 1 TC 287, Blackburn observed at page 330:

> "*No tax can be imposed on the **subject** without words in an Act of Parliament clearly showing an intention to lay a burden on him."*

[55] In *Russell v. Scott*, I9481. A.C. 422. 58, Lord Simonds observed on page 433:

> *"My Lords, there is a maxim of income-tax law which, though it may sometimes be overstressed, yet ought not to be forgotten. It is that the **subject** is not to be taxed unless the words of the taxing statute unambiguously impose that tax upon him. It is necessary that this maxim should on occasion be reasserted and this is such an occasion."*

[56] Now, it is a safe rule of construction that one must look at the words of the enactment to ascertain the legislative intent and if, in so construing the statute, the language is unambiguous and that the words "consumed or utilized outside Sri Lanka" are not there, the Assessor cannot twist and add words, as no tax can *be* imposed *on a* subject *by an* Act *of* Parliament without words which clearly show *an* intention *to* lay *the* burden*.*

[57] The Assessor and the TAC were wrong in holding that the Appellant did not provide any service to Mabey & Johnson Ltd, UK outside Sri Lanka as the Appellant failed to prove that the service rendered by it to Mabey & Johnson Co. Ltd was not consumed or utilized outside Sri Lanka when all what is required under section 13 (dddd) is to prove that the Appellant provided a service to Mabey & Johnson Co. Ltd **outside Sri Lanka**. The TAC further held that the Appellant has not rendered a service to Mabey & Johnson Co. Ltd,

UK and the work of the Appellant cannot be considered as a service as contemplated by section 13 (dddd) for the following reasons:

1. The Appellantacted as an indenting agent for Mabey & Johnson Ltd, (the Sri Lankan branch of the Mabey & Johnson Co. Ltd, UK);
2. The Appellant acted as an intermediator between the contractor, Mabey & Johnson Ltd and the Ministry of Highways and RDA;
3. The Appellant received a commission income only as a result of the goods purchased by the Ministry of Highways.

[58] In this context, it is important to consider whether the Appellant acted with Mabey & Johnson Co. Ltd, UK and rendered services to Mabey & Johnson Co. Ltd, UK,and if not, whether Appellant's services could be deemed to have been rendered to the local branch of the said Company. It is not in dispute that Mabey & Johnson, Ltd, UK and the other seven companies set out in the detailed analysis on commission marked A15 (p. 86 of the TAC brief) are physically outside Sri Lanka. According to the detailed analysis of commission income received by the Appellant (A15), the Appellant had received commission income from eight foreign companies including Mabey & Johnson Ltd. UK in foreign currency equivalent to SLR 161,918,849.03 and paid Rs, 17,348,448.09 as VAT and after deducting the VAT, the net total income earned was Rs. 144,570,400.94. The total commission income received by the Appellant from Mabey & Johnson Ltd, UK in a sum of Rs. 134,883,192.26 is separately identified by the Appellant and stated in the document at page 82 of the TAC brief (A1). After deducting the VAT (Rs. 14,451,770.58), the net amount of the commission income received from Mabey & Johnson Ltd, UK was Rs. 134,883,192.26. After deducting the direct expenses, the Appellant claimed the tax exemption under section 13 (dddd) in a sum of Rs. 143,983,371 in respect of the total commission income received in foreign currency as indicated in the financial statement (p. 15 of the TAC brief).

[59] It is relevant to note that the following matters are not in dispute in the present case:

1. Mabey & Johnson Ltd, UK is a company duly incorporated in England and having its registered office at Floral Mile, Twyford, Reading, Berkshire, RG10 9SQ, England;
2. On 20.09.2007, Mabey & Johnson Ltd, UK (the supplier)entered into aContract with the Ministry of Highways and Road Development of Sri Lanka (the purchaser) for the supply of Compact Steel Bridges in Sri Lanka for the Regional Bridge Project using the British Government Financial Assistance;
3. On 02.01.2008, Mabey & Johnson Ltd, UK, entered into a Remuneration Agreement with the Appellant (Access International

(Private) Limited and Access Engineering Limited, a company incorporated in Sri Lanka (p. 71 of the TAC brief);

4. On 31.12.2007, Mabey & Johnson Ltd, Floral Mile, Twyford, Reading, Berkshire, RG10 9SQ, England, as the principal and the Appellant as its Agent, entered into an Agency Contract (pp. 64-69 of the TAC brief);

5. TheAppellant received a commission incomein a sum of Rs. 144,570,409.94 (A15) and p. 15 of the TAC brief), which was remitted to Sri Lanka through a bank.

[60] At the hearing, both Counsel relied on the decision of the Court of Appeal in *Commissioner General of Inland Revenue v. Aitken Spence Travels (Pvt) Ltd* C.A. Tax 04/2016, decided on 13.11.2018, in which the Court of Appeal proceeded to define the phrase "a person or partnership outside Sri Lanka" within the meaning of section 13 (dddd) of the Inland Revenue Act, No. 10 of 2006. In that case, the Aitken Spence Travels (Pvt) Ltd provided travel related services to foreign tour operators who organised tours to tourists visiting Sri Lanka, and foreign tourists in Sri Lanka, and claimed a tax exemption under section 13 (dddd) of the Inland Revenue Act. The tax exemption was rejected by the Assessor and the Commissioner General of Inland Revenue on the basis that the services were provided to foreign tourists who are physically present in Sri Lanka. On appeal, the TAC allowed the appeal and held that that the services were rendered to foreign tour operators who are outside Sri Lanka within the meaning of the exemption in section 13 (dddd) of the Inland Revenue Act.

[61] The Court of Appeal confirmed the determination made by the TAC and held that:

1. The "place where the service is supplied is not determinative of the application of the exemption therein, and the decisive question is to whom the service is supplied;
2. The exemption will apply where the service was rendered to any person or partnership outside Sri Lanka;
3. Aitken Spence Travels (Pvt) Ltd provided two different types of services, firstly, to the foreign tour operators outside Sri Lanka and secondly, to foreign tourists in Sri Lanka;
4. The Inland Revenue Act does not define who "a person or partnership outside Sri Lanka, and therefore, both these services fall within the scope and ambit of the exemption in section 13 (dddd) of the Act (p.7).

[62] The term "service" is not defined in the Inland Revenue Act. The Black's Law Dictionary (11th Edition) defines "service" which includes the following:

"Service, (1) The status or condition of a servant……;

2.Labour performed in the interest or under the direction of others, specify., the performance of some useful act or series of acts for the benefit of another, usu. For a fee <goods or services>. In this sense, service denotes an intangible commodity in the form of human effort, such as labour, skill or advice;

3.The official work or duty that one is required to perform….

4.Any institution or organization instituted for the accomplishment of such duty <military service>

5. A person or agency that accomplishes some constantly recurring work or fills some perpetual demand <cleaning service>;

6.Hist. Whatever service a feudal tenant was bound to render to his lord for the use and occupancy of the land: any render made for the enjoyment of land..."

[63] According to Merriam-Webster online dictionary, a service includes: 1. The occupation or function of serving, employment as a servant; 2. The work performed by one that serves, help, use, benefit, contributing to the welfare of others, disposal for use; 3. A form followed in worship or in a religious ceremony, a meeting for worship; 4. The act of serving such as a helpful act or useful labour that does not produce a tangible commodity such as charge of professional services etc.

[64] The definition of "service" is so wide to encompass a number of acts or works performed by a person using its human effort, such as labour, skill or advice or charging a professional fee. Accordingly, the term "service" cannot be narrowly interpreted so as to exclude any service performed by any person to another using its effort, such as labour, skill or advice or charging a professional fee.

[65] From the Remuneration Agreement with Mabey & Johnson Limited, UK,it is clear that Mabey & Johnson Limited is physically present in the UK, (Floral Mile, Twyford, Reading, Berkshire, RG10 9SQ, England), which is outside Sri Lanka. From the very first clause of the Remuneration Agreement with Mabey& Johnson Limited Ltd, UK, it is clear that the Appellant had agreed to provide services by representing Mabey and Johnson, UK in Sri Lanka for the Regional Bridge Project entered into between Mabey & Johnson, UK and the Ministry of Highways and the RDA, in Sri Lanka. Clause 1 of the said Contract reads as follows:

1. ***Access International (Pvt) Limited agrees to represent Mabey and Johnson in Sri Lanka for the Regional Bridge Project.****The supply contract for the project was signed between Mabey and Johnson and the Ministry of Highways and Road Development on 20.09.2007. The supply contract is likely to become effective by the end of December 2007;*

2. *Commission shall be paid at a rate of 6% of the contract value denominated in yen on all items set out in the contract in paragraph 1 above;*

3. *Commission shall be paid in sterling using the exchange rate between yen and sterling defined by clause 19.03. of the supply contract. This rate will be obtained from Central Bank, Colombo, Sri Lanka. Commission payments will be initiated within 14 days of income under the contract being received by Mabey and Johnson.*

[66] Clauses 7 and 12 of the Remuneration Agreement provide:

> 7.*All items paid to Access International or Access Engineering under paragraphs 4,5 and 6 above shall be subject to audit procedures under the Mabey and Johnson Business Ethics and Conduct Policy Manual. Mabey and Johnson shall receive a copy of every month of all monthly bank statements which shall show all the monthly deposits from Mabey and Johnson and any withdrawals made. A monthly review of the figures based on the statements shall be made by Mabey and Johnson's internal compliance officer. A sixmonthly full summary shall be undertaken to balance all deposits and withdrawals and to vouch every withdrawal made to appropriate supporting documentation.*
>
> 12.*This Agreement shall be governed and construed by and in accordancewith the laws of England and Wales.*

[67] It is crystal clear that the Appellant had agreed **to represent Mabey & Johnson Co. Ltd, UK** in Sri Lanka and provided services to Mabey & Johnson Ltd, UK for the regional Bridge Project with the Ministry of Highways and RDA. There was no agreement whatsoever with the local branch office of Mabey & Johnson Ltd., UK. It is further proved that the 6% commission payments will be paid to the Appellant by Mabey & Johnson, UK after having received monthly bank statements from the Appellant. Accordingly, it is crystal clear that the Appellant entered into the Remuneration Agreement and agreed to represent the said Mabey & Johnson Co. Ltd, UK by rendering services in Sri Lanka for the regional Bridge Project with the Ministry of Highways and RDA.

Agency Agreement

[68] In addition to the Remuneration Agreement, the said Mabey & Johnson Ltd, U.K as the principal and the Appellant as its Agent entered into an Agency Contract marked A8 (pp. of the TAC brief). It is relevant to note that the local branch office (Mabey & Johnson Ltd) had nothing to do with this Agency Agreement. In terms of the said Agency Agreement:

1. Mabey & Johnson Ltd, UK appointed the Appellant as its commercial agent to promote the sale of Mabey & Johnson Ltd.'s products in Sri Lanka;

2. The Appellant was entitled to a commission, which covers any expenses incurred by the Appellant as the agent in fulfilling its obligations under the Agent Contract;

3. The calculation of the commission shall be made in the contract sum agreed by the principal and separate commission agreements shall be agreed and signed for each contract accepted by the principal;

4. The Agent shall acquire the right to commission after receipt of full payment from the customer of the principal of the invoiced price;

5. The Agreement is governed by the laws of England.

[69] The TAC has further denied the exemption on the basis that commission fees received by the Appellant were computed on the value of the products supplied by Mabey & Johnson and purchased by the Ministry of Highways. The Agency Contract (A8) clearly sets out the following services to be performed by the Appellant to Mabey & Johnson Ltd, UK:

1. Promotion of the sale of Mabey & Johnson Ltd. UK 's products in Sri Lanka (clause 1 & 3 (a);

2. Solicitation of orders from customers for the principal (Mabey & Johnson, Ltd, UK) (clause 3 (c).

[70] The Agency Agreement provides that (a) the remuneration of the Appellant's commission is computed on the basis of the sale value on all sales of the products that are made during the term of the contract to customers in Sri Lanka (clause 8 (a); (ii) the commission covers any expenses incurred by the Agent in fulfilling his obligations under the contract (such as telephone, telex, office, travel expenses, etc. (clause 8(d). Clause 8 relates to the manner in which the commission is computed and paid to the Agent by the Principal. However, it is clause 3 of the Agency Contract that sets out the services rendered to Mabey & Johnson Ltd, UK, which is outside Sri Lanka.

[71] The services referred to in clause 8 are rendered to Mabey & Johnson Ltd, UK and thus, unless contracts are procured for the foreign principal by the Appellant and services are rendered to the foreign principal (Mabey & Johnson Ltd UK), the question of computation of commission fees will not arise. The manner in which the fees are computed and paid is different from the service that is rendered to any person outside Sri Lanka. Therefore, the manner of computation of the commission fees cannot establish that the service is not rendered to Mabey & Johnson Ltd, UK when there is strong documentary evidence to show that the Appellant provided services to any person (Mabey & Johnson Ltd, UK) outside Sri Lanka.

[72] Accordingly, the exemption under section 13 (dddd) cannot be denied merely for the reason that in terms of the supply contract between Mabey

&Johnson Ltd, UK and the Ministry of Highways and RDA, the calculation of commission fees will be paid on the basis of value of the goods that are made during the term of the contract unless there is credible material that the services were provided by the Appellant to the local branch office only.

[73] In fact, all tax invoices had been specifically addressed directly to a foreign Company, namely, Mabey & Johnson Ltd, U.K. by the Appellant, which refer to payment for agency services due from Mabey & Johnson Ltd, United Kingdom (pp. 72-81 of the TAC brief). The TAC has accepted in its determination that that the commission income was received and remitted to Sri Lanka through a bank (p. 4 of the TAC determination).

[74] As clause 12 indicated, the Agreement was governed and construed in terms of the laws of England and Wales and thus, it was never intended by the parties that the Agreement was to be governed by the laws of Sri Lanka. This clause further confirmsthe position of the Appellant that the local branch of the Company has no involvement with the remuneration Agreement or the Agency Contract between the Appellant and Mabey & Johnson Co. Ltd, UK.

[75] In the case of other companies, the services have been provided by the Appellant as an indent agent or consultancy agent and there is no dispute that the Appellant received an indent commission and commission on consultancy services (A15). The Assessor or the CGIR or the TAC has not disputed the services provided to the other companies by the Appellant or the commission income was received by the Appellant from them in foreign currency.

[76] An indenting agent is a party that collects commission on sale though it may not buy or resale a product and the value added to the supply chain can be distribution, technical support, import export documentation services etc. (What is the definition of an indenting agent? -Answers (http//www.answers.com/Q/What_is_the_definition_of_an_indentingagent)
Indent commission has been claimed as part of a commission income received in foreign currency for providing services to six companies outside Sri Lanka as set out in the document presented to the Assessor by the Appellant (A15). I hold that “indenting” is a service provided by any indenting agent to any supplier in return for a commission and therefore, the indenting agent is entitled to avail itself of the exemption in terms of section 13 (dddd) of the Inland Revenue Act.

[77] The TAC approached this question on the basis that the determinative factor is the place where the service is consumed and utilized. On that basis, the TAC held that the Appellant received commission income only as a result of the goods purchased by the Ministry of Highways and the RDA to be used in Sri Lanka, and therefore, no service was provided outside Sri Lanka. In the present case, there is absolutely nothing to show that the Appellant had rendered any service to the local branch office or had any dealing or

transaction with the local branch office that gave rise to the payment for services rendered in Sri Lanka.

[78] The total commission income received from all eight companies in foreign currency, including from Mabey & Johnson Ltd, UK as per A15 is Rs. 144,570,400.94, which is clearly stated in the financial statement of the Appellant (p. 15). After deducting a sum of Rs. 587,030 as direct expenses, the Appellant claimed a sum of Rs. 143,983,371 as commission income under section 13 (dddd) of the Act (p. 15 of the TAC brief and the return of income). The Assessor has not disputed the detailed information provided by the Appellant in respect of the agency commission received from Mabey & Johnson Ltd, UK or the indent/consultancy commission received from seven other companies in foreign currency as set out in A15.

[79] During the course of the argument, the learned Additional Solicitor General submitted that the Appellant had paid VAT out of the commission income received by the Appellant and therefore, the Appellantis not entitled to claim the tax exemption under section 13 (dddd). This seems to be the identical stand taken by the Commissioner, referring to section 7 (1)(C) of the VAT Act, No. 14 of 2002 in its determination at pp. 7-8 of the TAC brief. The view of the Commissioner was that the payment of VAT proves that the service has been consumed and utilized in Sri Lanka and therefore, the person to whom the service was rendered was a person in Sri Lanka.

[80] It is relevant to note that the question in the present case is whether or not the Appellant provided any service to Mabey & Johnson Ltd, UK and other companies within the meaning of section 13 (dddd) of the Inland Revenue Act. Section 7(1)(c) of the VAT Act relied on by the Commissioner reads as follows:

> *"Any other service, being a service not referred to in paragraph (b), provided by any person in Sri Lanka to another person outside Sri Lanka* ***to be consumed or utilized outside Sri Lanka*** *shall be zero rated provided that payment for such service in full has been received in foreign currency from outside Sri Lanka through a bank in Sri Lanka"*

[81] In terms of section 7(1)(c) of the VAT Act, any supply to be treated as zero rated supply, has to be consumed or utilized outside Sri Lanka and the receipts should be remitted to Sri Lanka. Whereas, there is no requirement under section 13 (dddd), either to consume or utilize the service outside Sri Lanka as the words "to be consumed or utilized outside Sri Lanka" are not found in section 13 (dddd) of the Inland Revenue Act. Significantly, section 13 (dddd) only provides "the profits and income earned in foreign currency by any resident company, any resident individual or any partnership in Sri Lanka from any service rendered in or outside Sri Lanka, **to any person or partnership outside Sri Lanka**…". Where it is proved that the Appellant

rendered any service to any person or partnership outside Sri Lanka, and not to any local branch office, the Appellant cannot be disentitled to the tax exemption in section 13 (dddd) of the Inland Revenue Act on the basis of conditions for the VAT liability under section 7(1)(c) of the VAT Act are not satisfied by the Appellant.

[82] The Assessor, the CGIR and the TAC have erroneously decided that the Appellant has not provided any service to Mabey & Johnson Ltd, UK and other companies despite clear documentary evidence, including the Agreements and the invoices having been submitted to the Assessor by the Appellant during the assessment process. In my view the Appellant has satisfied that it rendered services to Mabey & Johnson Ltd, UK and **seven other** companies outside Sri Lanka and received commission income in foreign currency through a bank. Accordingly, I am of the view that the profits and income earned by the Appellant from the provision of the services to Mabey & Johnson Ltd, UK and seven other foreign companies fall within the scope and ambit of the tax exemption in section 13 (dddd) of the Inland Revenue Act.

Failure to comply with section 106 (11) of the Inland Revenue Act

[83] The learned Additional Solicitor General however, submitted at the hearing, without prejudice to his submissions that even if the Appellant is held to be entitled to claim a tax exemption under section 13 (dddd) of the Act, the Appellant is not entitled to the said exemption, as a result of its failure to comply with section 106 (11) of the Act.

[84] He concedes, however, that the non-compliance with section 106 (11) was not raised as a specific question of law by the Respondent, but since, the matter was raised by the Appellant in its written submissions, he invited us to deny the exemption for non-compliance with section 106 (11) of the Inland Revenue Act. His submission is that the Appellant has several businesses as detailed in the schedules to the financial statement (p. 14-18) but the Appellant has failed to maintain and prepare separate accounts in a manner that the profits and income from each such activity could be separately identified.

[85] He relied on the decision of the Court of Appeal in *ICCI Bank Limited v. The Commissioner General of Inland Revenue,* CA, Tax, Np. 28 /2013 decided on 16.07.2015 in support of his submission. Section 106 (11) of the Inland Revenue Act, No. 10 of 2006, which applies in the relevant period reads as follows:

> *"Where any person carries on or exercises more than one trade, business, profession or vocation and the profits and income from such trade, business, profession or vocation are exempted and exempted from or changeable with tax at different rates, such person shall maintain and*

prepare statements of amounts in a manner that the profits and income from each such activity may be separately identified".

[86] This section only requires for the Appellant to show, where it carries on or exercises more than one, trade, profession or vocation, and claim an exemption, to maintain and prepare a statement of account, in a manner that the income in respect of which it claims exemption can be separately identified. In *ICCI Bank Limited v. The Commissioner General of Inland Revenue (supra),* the Appellant was carrying on several businesses and out of those businesses, the Appellant's sources of income were from:

1. *Interest income from money deposits;*
2. *Interest or dividend income from investment;*
3. *Interest from loans and advances;*
4. *Interest from any other operations, etc.*

[87] In*ICCI Bank Limited v. The Commissioner General of Inland Revenue (supra),* the Court of Appeal referring to section 106 (11) stated that:

> *"Section 106(11) of IRA imposes a duty upon the Respondent to maintain separate accounts, when it became necessary. Even though the Appellant has not produced any document or a separate account in this case, the Appellant stated in the inquiry that they are keeping all the data in their computers. Still, they failed to submit them at the inquiry. Without conducting the business as required by law, the Appellant cannot be heard to say that the system adopted by the commissioner is arbitrary, and the opinion of this Court is that it is not bad in law".*

[88] A perusal of the financial statement of the Appellant reveals that the Appellant is carrying on several businesses and it is deriving income from several sources such as trading, construction, commission, service maintenance and hiring and number plate project (pp 14-19 of the TAC brief). The Appellant has clearly shown in the financial statement of accounts the total income received from several sources of income separately (Vide-**Schedules (1) to XII)** of the financial statement of accounts.

[89] Although the financial statement does not include the commission income received from each eight company separately, it clearly mentions the total commission income received in foreign currency in a sum of Rs. 143,983,371 claimed by the Appellant under section 13 (dddd) of the Act as follows:

"(IX) Commission Income

Commission received in foreign currency	*4,144,570,401*
Less	
Direct expenses	*587,030*
	143,983,371

[90] During the assessment process, the Appellant produced the information in respect of the commission income received from each and every foreign company and produced the detailed analysis of commission income received from the eight companies referred to in the detailed analysis of commission income (A 15-p. 86 of the TAC brief).It is absolutely clear that the Assessor never disputed the said separate commission income received by the Appellant from the said eight companies in foreign currency and remitted through a bank. The Appellant has not claimed the exemption from several different sources of income like in the case of *ICCI Bank Limited v. The Commissioner General of Inland Revenue (supra)*. Accordingly, the facts of this case can be distinguished from the decision of the Court of Appeal in *ICCI Bank Limited v The Commissioner General of Inland Revenue (supra)*

[91] Accordingly, there is no dispute that the Appellanthas received a total sum of Rs. 144,570,400.94 from eight separate companies as set out in the said document (A15)andafter deducting the direct expenses, the Appellant claimed a sum of Rs. 143,983,371 under section 13 (dddd) of the Act.

[92] For those reasons, I am of the view that the information stated in the financial statement of accounts and the document setting out the detailed commission income received from eight foreign companies (A15 and A11) and made available to the Assessor during the assessment process was sufficient to identify the commission income claimed by the Appellant separately from the income received by the Appellant from different other sources of income. On the above facts and circumstances, I am of the view that there is no basis for a finding that the Appellant has not complied with section 106 (11) of the Inland Revenue Act.

Conclusion & Opinion of Court

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

1. (a) Yes

   (b) The mere existence of a place of business of an overseas company in terms of Part XVIII of the Companies Act, No. 07 of 2007 did not disentitle the Appellant as a resident company of the benefit of the exemption unless it could be proved that the Appellant provided services to the local branch office that carried on business in Sri Lanka.

   (c) Yes (the above answer in (b) apples.

2. Yes
3. Mabey & Johnson Limited, UK is a person outside Sri Lanka within the meaning of section 13 (dddd) of the Inland Revenue Act;

4. The TAC has failed to take cognizance of the fact that the commission income of the Appellant upon which the determination of the Commissioner General of Inland Revenue was based and upon which tax and penalties were computed was derived from eight companies, including Mabey & Johnson Ltd, UK, asset out in the detailed analysis on commission at pages 82, &86 of the TAC brief.
5. Yes
6. Yes
7. Yes
8. Yes
9. Yes
10. Yes
11. Section 13 (dddd) of the Inland Revenue Act requires the service to be provided to any person or partnership outside Sri Lanka;
12. (a) Section 106 (11) of the Inland Revenue Act imposed a duty on the Appellant who carried on more than one business activity and claim an exemption from tax at different rates, to maintain and prepare separate accounts in a manner that the profits and income from each such activity may be separately identified.

    (b)The Appellant's total commission income received from eight different companies could be identified separately from the income received from other sources of income as indicated in the documents presented to the Assessor by the Appellant.
13. (a) The TAC has failed to consider that there is no material placed before the Assessor to show that the local branch office of Mabey & Johnson Ltd carried on business in Sri Lanka or that the Appellant provided any service to the said local branch office of the said company

    (b)The TAC erred in holding that the mere existence of a local branch office constituted a permanent establishment in Sri Lanka.
14. Yes
15. Yes

[94] For those reasons, I annul the determination made by the Tax Appeals Commission dated 26.04.2018 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