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

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

Illukkumbura Industrial Automation (Private) Limited,
No. 49/1, Fife Road,
Colombo 05.

APPELLANT

CA No. CA/TAX/0005/2016
Tax Appeals Commission
No. TAC/IT/045/2013

v.

Commissioner General of Inland Revenue,
14th Floor, Secretarial Branch
Department of Inland Revenue,
Sir Chittampalam A, Gardiner Mawatha,
Colombo 2.

RESPONDENT

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

COUNSEL : N. R. Sivendran with Renuka Udumulla for the Appellant.

Amasara Gajadeera, SC for the Respondent.

WRITTEN SUBMISSIONS	:	14.06.2018 (by the Appellant) 07.06.2018 (by the Respondent)
ARGUED ON	:	06.04.2022
DECIDED ON	:	29.09.2022

M. Sampath K. B. Wijeratne J.

Introduction

The Appellant is a limited liability company incorporated in Sri Lanka. The principal activity of the Appellant is to carry out electrical installation work including electrical wiring, fabricating, assembling, installing and commissioning electrical panels and providing electrical and mechanical services.

The Appellant submitted its return of income for the year of assessment 2009/2010, claiming a concessionary rate of 15% for the *'undertaking for construction work'* under Section 46 of the Inland Revenue Act No. 10 of 2006, as amended (hereinafter referred to as the 'IR Act'). The Assessor rejected the returns submitted by the Appellant and communicated his reasons for not accepting the return by letter dated 28th November 2011 as the electrical installation service does not fall under the definition, *'undertaking for construction work'* in Section 45 of the IR Act. Thereafter, the Notice of Assessment dated 30th March 2012 was issued to the Appellant.

The Appellant appealed to the Commissioner General of Inland Revenue (hereinafter referred to as 'the CGIR') against the Notice of Assessment issued to the Appellant. The CGIR, by his determination dated 23rd October 2013, confirmed the assessment made by Assessor. The Appellant appealed the CGIR's determination to the Tax Appeals Commission (hereinafter referred to as 'TAC'). The TAC, by its determination dated 30th December 2015, confirmed the determination made by the Respondent, CGIR. The aggrieved Appellant moved the TAC to state a case to this Court and the TAC stated a case on nine questions of law. The Appellant then moved to add an additional question of law and this Court, after hearing both parties, delivered the order on the 30th November 2020 allowing the tenth question of law.

Accordingly, the ten questions of law to be answered by this Court are as follows;

1. ***Did the Tax Appeals Commission err in law when it failed to appreciate that no assessment or additional assessment had been issued by the Department of Inland Revenue until the purported Assessment No. ITA1203190088 V1 was sent which is admittedly after a two (2) years period within the meaning of section 165 (3) of the Inland Revenue Act No. 10 of 2006 and therefore out of time and thus a nullity?***

2. ***Did the Tax Appeal Commission err in law when it failed to appreciate that the letter dated 28th November, 2011 is not and cannot be accepted as an Assessment in as much as –***

    a) ***no assessment has been made on 28th November, 2011;***

    b) ***the letter dated 28th November, 2011 clearly and categorically states that "Assessment will be issued in due course";***

    c) ***the letter of 28th November, 2011 specifically states that it is an intimation under Section 163(3) of the Inland Revenue Act No. 10 of 2006 and not an Assessment;***

    d) ***the Department of Inland Revenue has decided and contemplated of issuing an assessment on a future date;***

    e) ***the Assessment which was issued on a future date is the Assessment dated 30th March, 2012 bearing No. ITA12031900088V1;***

    f) ***the said Assessment bearing No. ITA 12031900088V1 issued belatedly on 31st March, 2012, was in fact posted to the Appellant long after that date on 8th May 2012;***

    g) ***the said Assessment bearing No. ITA 12031900088V1 issued belatedly on 31st march, 2012 is time barred in terms of section 163(5)(a) of the Inland Revenue Act No. 10 of 2006, as amended.***

3. ***Was the Appellant not given a proper hearing and/or has there been a breach of the principles of audi alteram partem and/or was the Appellant not given complete opportunity of putting forward its case before the Tax Appeals Commission and thereby, is the Order of the TAX appeals Commission bad in law and void?***

4. ***Did the Tax appeals Commission err in law when it failed to determine what constitutes an Assessment?***

5. ***Did the Tax appeals Commission err in law when it took in to account irrelevant matters in determining the express statutory provision set out regarding time imitation?***

6. ***Did the Tax appeals Commission err in law when it failed to appreciate that in terms of section 163(3) of the Inland Revenue act No. 10 of 2006 the Assessor who does not accept the returns furnished by the Assessee and the Assessor who communicates the reasons for not accepting the said Returns and the Assessor who makes the assessment on the Assessee should be one and the same.***

7. ***Did the Tax appeals Commission err in law when it failed to appreciate that the Assessment dated 30th March, 2012 bearing Assessment No. ITA12031900088V1 is bad on law and a nullity in as much as the said Assessor, L.J.G. Chandrasena has not given his reasons in writing for not accepting the Returns furnished by the Assessee and therefore, there has been a failure to comply with section 163 (3) of the Inland Revenue Act No. 10 of 2006 and therefore, all steps taken thereafter are a nullity and illegal?***

8. ***Did the Tax appeals Commission err in law when it failed to appreciate that the Commissioner General of Inland Revenue is not making his determination on the substantive matters of the ~~a~~ Appellants; appeal is deemed to have allowed such appeal of Appellant in terms of Section 165 (14) of the Inland Revenue Act No. 10 of 2006?***

9. ***Did the Tax appeals Commission err in law when it failed to appreciate that ~~the~~ an undertaking carried on for civil engineering work on electrical installation (planning the electrical layout,***

conduiting, earthing, cable laying, panel installation, transformer installation etc.) as a part of the subcontracted work relating to the main building construction contract falls within the meaning of "undertaking for construction work" as found in section 45 (2) of the Inland Revenue Act?

10. ***Did the Respondent violate the provisions of section 165 (7) of the Inland Revenue Act, No. 10 of 2006 in appointing M.M.R.R. Mellawa to hold further inquiries in terms of section 165 (7) of the Inland Revenue Act, No. 10 of 2006, when the said assessor was part of the decision-making process in rejecting and issuing the assessment?***

Analysis

The first, second, fourth and fifth questions of law pertain to the fact that no assessment was issued to the Appellant until the Notice of Assessment dated 30th March 2012 is issued and the assessment issued to the Appellant is time barred.

The sixth and seventh questions of law are formulated on the premise that in terms of Section 163 (3) of the IR Act, the Assessor who rejects the return furnished by the Appellant and the Assessor who communicates the reasons for the rejection and the Assessor who makes the assessment should be the same individual.

Since the first, second, fourth, fifth, sixth and seventh questions of law are interconnected, it would not be possible to create separate sections of this judgment for each question of law without causing unnecessary repetition and I will therefore consider them simultaneously.

Should the Assessor who makes the assessment, who gives the reasons why he does not accept a return and who issues a Notice of Assessment, be one assessor?

The Appellant has made submissions on the sixth and seventh questions of law under the subheading 3 of Appellant's written submission filed on the 14th June 2018, which reads; '*the Assessor who makes the assessment, giving reasons for not accepting a return and issuing a Notice of Assessment should be one and the same Assessor' (sic).* Hence, it is

apparent that the Appellant made its written submissions acknowledging the distinction between an assessment and the Notice of Assessment.
According to the Appellant, the letter dated 28th November 2011 issued under Section 163 (3) of the IR Act is signed by two persons namely Mr. M.M.R.R. Mellawa, Assessor and Ms. Manjula Gunathunga, Deputy Commissioner. The Deputy Commissioner Ms. Manjula Gunathunga has put her signature on the same date 28th November 2011, on the first page and the Assessor Mr. M.M.R.R. Mellawa has put his signature on the second page, at the place where the author of the letter has to sign. Hence, although it is not specifically stated as such, it appears to me that the Deputy Commissioner Ms. Manjula Gunathunga, being the senior officer, would have put her signature in the front page authorizing the act of her subordinate officer Mr. M.M.R.R. Mellawa, an Assessor.

On the above premise the Appellant submitted that the two persons who had examined the tax return and refused to accept the tax return are Ms. Manjula Gunathunga, Deputy Commissioner and Mr. M.M.R.R. Mellawa, Assessor. I do concede that the return would have been examined by the above two officers. Yet, in my view the author of the letter is the Assessor, Mr. M.M.R.R. Mellawa. Admittedly, the Notice of Assessment dated 30th March 2012[1] which was issued to the Appellant is signed by the Assessor Mr. M.L.J.G. Chandrasiri. The Appellant argued that the person making the assessment and giving reasons for not accepting the return should be one and the same person. The Appellant made the above submission on the basis that the assessment process is not completed until the Notice of Assessment is sent to the Assessee. The Appellant relied on the judgment of the divisional bench of the Supreme Court in the case of *D.M.S. Fernando and another v. A.M. Ismail*[2] wherein His Lordship Chief Justice Neville Samarakoon having considered Section 93 (2) of Inland Revenue Act No. 4 of 1963, as amended by Amendment Act No. 17 of 1972 and 30 of 1978 held as follows[3];

'*It empowers the Assessor to do one of two things. He may accept the return in which event he makes the assessment accordingly. Or else he* ***may not accept the return****. In such an event* ***he*** *is obliged to do two things:*

[1] At page 96 of the appeal brief.
[2] Sri Lanka Tax cases, Vol IV p. 184.
[3] At page 189.

1. *Estimate the assessable income, taxable income or taxable gifts and **assess him** accordingly (the underlining is mine); and*

2. ***He** must **communicate to the Assessee in writing** the reasons for not accepting the return.*

***To my mind these are all part of one exercise.** There is nothing in the provision which indicates that the estimation of assessable income, wealth and gifts must be postponed for some time long after the non-acceptance. Even if one transposes the words "and communicate to such persons in writing the reasons for not accepting the return" to the first line of the section after the word "return" and before the word "estimate" it will not make it a condition precedent. One has still to read more words into it to have the effect of postponing the rest of the exercise to sometime later. This would be doing violence to the section. **The section imposes a duty but does not impose a time limit within which it should be done.** To my mind the section merely states that if the Assessor does not accept a return he may assess on an estimate. **His exercise is not complete till he has also communicated his reasons for not accepting the return**. In effect he also justifies his act of assessing on an estimate. The plain meaning of the section is clear*.' (Emphasis added)

The Section 93 (2) of the repealed Inland Revenue Act No. 4 of 1963, as amended, is almost identical to Section 163 (3) of the IR Act which reads thus;

> '*93. (2) where a person has furnished a return of income, wealth or gift, the Assessor may-*
>
> *(a) either accept the return and make an assessment accordingly; or*
>
> *(b) **if he does not accept the return,** estimate the amount of the assessable income, taxable wealth or taxable gifts of such person and **assess him** accordingly and communicate to such person in writing the reasons for not accepting the return.'*

The Appellant submitted that making of an assessment consists of three components. They are;

a) Not accepting a return furnished by the tax payer and giving reasons in writing for not accepting.
b) Assessing the amount of tax payable by the tax payer in the judgment of the Assessor.
c) Issuing the Notice of Assessment requiring payment.

The Appellant argued that the above are three inseparable parts which should be done simultaneously by one and the same officer. It was submitted that it is legally prohibited for these parts to be done by different officers. The Appellant also cited the following observations made by His Lordship Chief Justice Neville Samarakoon regarding the amendments made to the existing statute as at that time.

'The picture is now different. A duty is now imposed on the Assessor not only to give reasons for non-acceptance of a return but also to communicate them to the assessee.

The primary purpose of the amending legislation is to ensure that the Assessor will bring his mind to bear on the return and come to a definite determination whether or not to accept it. It was intended to prevent arbitrary and grossly unfair assessments which many Assessors had been making as "a protective measure". An unfortunate practice had developed where some Assessors, due to pressure of work and other reasons, tended to delay looking at a "return till" the last moment and then without a proper scrutiny of the return, made a grossly exaggerated assessment. The law, I think, enabled the department to make recoveries pending any appeal on such assessments. The overall effect of this unhappy practice was to pressurise the tax payer to such an extent that he was placed virtually at the mercy of the tax authorities. The new law was a measure intended to do away with this practice. Under the amendment when an Assessor does not accept a return, it must mean that at the relevant point of time he has brought his mind to bear on the return and has come to a decision rejecting the return. Consequent to this rejection, the reasons must be communicated to the assessee. The provisions for the giving of reasons and the written communication of the reasons, contained in the amendment is to ensure that in fact the new procedure would be followed. 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 give him 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 later communication would defeat the remedial action intended by the amendment*[4]*.'* (Emphasis added)

Accordingly, the Appellant argued that in light of the aforementioned observations made by His Lordship Chief Justice Neville Samarakoon, if a return is rejected, the same Assessor must give the reasons for the rejection, communicate them to the Assessee, make the assessment and issue the Notice of Assessment. Consequently, the Appellant submitted that in the case at hand the assessment has been rejected by the Assessor, Mr. M.M.R.R. Mellawa and the Deputy Commissioner, Ms. Manjula Gunathunga, and the Notice of Assessment has been issued by Assessor Mr. M.L.J.G. Chandrasiri and all actions taken after the Notice of Assessment has been issued are null and void in law and should therefore be rescinded.

The Appellant's argument above is based on the fact that the Assessor who signed the intimation letter is not the Assessor who signed the Notice of Assessment. The Appellant's argument was founded on the words, '*(...) where an* ***Assessor*** *(...) does not accept a return (...) and makes an assessment (...),* ***he*** *shall communicate (...)* ***his*** *reasons for not accepting the return*', in the proviso of Section 163 (3) of the IR Act. However, Section 163 (3) does not specify that the *Notice of Assessment* should be issued by the *same* Assessor who made the assessment. All that is set out in the proviso of Section 163 (3) is that the Assessor who makes the assessment should communicate the tax payer in writing his reasons for not accepting the return.

The requirement of issuing a Notice of Assessment is specified in Section 164 of the IR Act. However, Section 164 also does not require the Assessor who made the assessment and communicated the reasons for not accepting the return to issue the Notice of Assessment.

[4] *Supra* note 2, at pp. 193, 194.

Hence, it is clear that the IR Act does not require the same Assessor who made the assessment and communicated reasons for not accepting the return to issue the Notice of Assessment.

On reading words into a statute, N.S. Bindra states as follows[5];

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

Moreover, the duty of this Court is not to legislate, but to interpret legislation. Legislation is the prerogative of the Legislature. If the Legislature so desired, it would have passed it into law.

Above all, I see no need to interpret Sections 163 and/or 164 so strictly to introduce a condition that the same Assessor who made the assessment and communicated reasons for not accepting the return should give the Notice of Assessment. The interpretation of Sections, as suggested by the Appellant, would create an absurdity in situations such as the retirement or death of an Assessor after making an assessment and before the Notice of Assessment is signed and dispatched. While tax laws must be interpreted strictly, I do not believe that such strict interpretations are warranted where there is neither advantage nor disadvantage to either party. If such a strict interpretation is given, as suggested by the Appellant, the Appellant would not be able to state his case on the ten questions of law submitted to this Court. The reason being Section 11A of the Tax Appeals Commission Act, No. 23 of 2011, as amended, reads that either party may make an application requiring the Commission to state the case on ***a question of law*** for the opinion of the Court of Appeal. If the above Section is interpreted strictly, the Appellant could only be able to submit a case stated on a *single* question of law, and any case where more than one question of law is stated could be dismissed. However, this is not the practice of this Court. I therefore, hold that the assessment is not invalid merely because two different Assessors have issued the letter of intimation and the Notice of Assessment.

[5] N.S. Bindra, *Interpretation of Statutes*, Eighth Edition, 1997. At p. 452.

Accordingly, it is my considered view that there is no statutory requirement under the IR Act for the Assessor who made the assessment and rejected the return to issue the Notice of Assessment.

Whether the assessment is time barred.

The principal argument advanced by the Appellant is that the assessment made in the instant case is time barred. The Appellant's contention is that no assessment had been made on/by the 28th November 2011[6]. According to the Appellant, an assessment can be made only on the Notice of Assessment[7]. However, the Appellant has taken conflicting positions on the aforementioned issue in his written submissions, in order to support different arguments. In order to substantiate the argument that the Respondent, CGIR, violated Section 165 (7) of the IR Act by appointing the same Assessor who made the assessment to cause further inquiry into the appeal; quite contrary to the position that an assessment can be made only on the Notice of Assessment, the Appellant expressly acknowledged[8] that it is the Assessor, Mr. M.M.R.R. Mellawa who issued the *assessment* contained in the letter dated 28th November 2011, communicating the reasons for not accepting the return (commonly called as the letter of intimation). There again, the Appellant contradicted the above position subsequently by saying that the letter dated 28th November 2011 is neither a communication of reasons for non-acceptance of the return of income nor an assessment[9].

The Respondent also took a different position from that presented to this Court regarding the date of the assessment in his determination. The Responded determined that the assessment was made on the 30th November 2011 on the document marked 'A 2', attached to the determination. 'A 2', appears to be an internal document maintained by the Inland Revenue Department which contains some tax figures. But it is important to note that it does not contain the most important tax calculation, the tax payable. Therefore, in all cases 'A 2' cannot be accepted as the assessment.

[6] Paragraph 4.2 (b) of the Appellant's Written Submission filed on the 14th June 2018.
[7] Ibid paragraph 5.2.
[8] Ibid paragraph 6.7.
[9] Ibid paragraph 7.7.

The provisions regarding making of an assessment and communicating reasons for not accepting a return are set out in Section 163 of the IR Act. I will reproduce relevant parts of Section 163 herein below.

> ***163.*** *(1) - (2) (...)*
>
> *(3) Where a person has furnished a return of income, the Assessor or Assistant Commissioner may in* ***making an assessment*** *on such person under subsection (1) or under subsection (2), either-*
>
> *a) accept the return made by such person; or*
>
> *b) if he* ***does not accept the return*** *made by that person,* ***estimate the amount of the assessable income*** *of such person and* ***assess*** *him accordingly:*
>
> *Provided that where an Assessor or Assistant Commissioner* ***does not accept a return*** *made by any person for any year of assessment* ***and makes an assessment*** *or additional assessment on such person for that year of assessment, he* ***shall communicate*** *to such person in writing his* ***reasons for not accepting*** *the return.*
>
> *(4) - (...)*
>
> *(5) Subject to the provisions of section 72,* ***no assessment of the income tax payable*** *under this Act by any person or partnership –*
>
> *(a) who or which has made a return of his or its income on or before the thirtieth day of November of the year of assessment immediately succeeding that year of assessment,* ***shall be made after the expiry of a period of two years from the end of that year of assessment****; and*
>
> *(b) (...)*
>
> *(5) - (10) (...)*
>
> (Emphasis added)

As such, the Assessor has to estimate the amount of '*assessable income*' in his judgment and then assess the person accordingly. It is obvious that in making the assessment, the Assessor must determine the taxable income and calculate the quantum of income tax payable. No doubt can exist that the word '*assess*' in Section 163 (3) (b) means the assessment of tax payable.

The term *'assessable income'* is defined in the interpretation Section of the IR Act, Section 217, to mean; '*the residue of the total statutory income of any person, after deducting the aggregate amount of the deduction to which such person is entitled under Section 32'*. The term '*taxable income'* is defined to mean; '*the residue of assessable income of a person after deducting the aggregate amount of allowances to which such person is entitled under Section 33'*.

According to the Oxford English Dictionary[10] '*estimate*' means '*to form an approximate notion of (the amount, number, magnitude, or position of anything) without actual enumeration or measurement; to fix by estimate'.* Thus, the taxable income estimated by the Assessor which is the basis of the assessment could be more or less the actual income.

Accordingly, under Section 163 (3), the stages of making an assessment are (i) estimate the amount of assessable income (ii) calculate the taxable income and assess the person (iii) communicate reasons in writing for not accepting the return. The Notice of Assessment under section 164 of the IR Act stating the amount of income assessed and the amount of tax charged must be sent only thereafter.

Consequently, where a person has furnished a return of income, if the Assessor does not accept the return, the Assessor should estimate the amount of assessable income and assess him accordingly. Further, where such an assessment is made, the Assessor should communicate his reasons for not accepting the return to the Assessee.

As such, it is clear that the Assessor is required to send the letter of intimation to the Assessee pursuant to the proviso of Section 163 (3) of the IR Act, only after making an assessment in his judgment.

Appellant has also stated that the letter issued on the 28th November 2011 has to be treated as an intimation issued under Section 163 (3) of the IR

[10] The Oxford English Dictionary- *A New English Dictionary on Historical Principles*, Vol III.

Act[11]. I do agree with the Appellant. Indeed, it is a letter issued under Section 163 (3) of the IR Act. The proviso of Section 163 (3) provides that where an Assessor does not accept the return and makes an assessment, he shall communicate his reasons in writing for not accepting the return, to the Assessee. Accordingly, the language of Section 163 (3) does not suggest that the letter of intimation should be treated as an assessment. The phrase ***'in making an assessment'*** in the opening paragraph of Section 163 (3) and the phrases *'if he (the Assessor) does not accept the return made by that person (the Assessee),* ***estimate the amount of the assessable income*** *of such person and* ***assess*** *him accordingly'* of Section 163 (3) (b) and phrase in the proviso *'(...) where an Assessor (...) does not accept a return (...) and makes an assessment (...), he shall communicate (...) in writing his reasons for not accepting the return'* demonstrate that the assessment should precede the letter of intimation. The intimation letter contains an estimated amount of the assessable income together with a calculation of the tax liability. It is true that the letter of intimation states that the *'assessment will be* ***issued*** *in due course'*. Yet, there is a clear distinction between *making* and *issuing* an assessment. An assessment already *made* can be *issued* at a later stage. Therefore, in my view the letter of intimation satisfies that an assessment had been made by the Assessor in terms of Section 163 of the IR Act. I wish to emphasise that I do not concede that the assessment had been made or communicated to the Assessee by the letter of intimation. The making of an assessment is a matter for the Assessor in his own judgment. The notification of the assessment to the Assesee has to be done by giving the Notice of Assessment under Section 164 of the IR Act. Of course, needless to say that an Assessor should not be allowed to say that he made the assessment and kept it in his drawer. He should communicate it to the taxpayer. Incorporating the assessment into the intimation letter certainly establishes the authenticity of the assessment.

Section 163 (1) provides that the Assessor who assess the amount which in the judgment of the Assessor ought to have been paid by the Assessee, shall by notice in writing require such person to pay forthwith. According to the proviso of Section 193 (2) the notice referred to in Section 163 (1) is the same Notice of Assessment and not an ordinary notice. Consequently, one

[11] Ibid Subheading two of paragraph 7.

may argue that the Notice of Assessment also should be sent *forthwith*, along with the letter of intimation. At a glance it appears that there is some merit in the said argument. Yet, on a careful consideration, it is clear that all that should be done is to require such person to ***pay forthwith***. The Sinhala text in the official version of the IR Act also reads that 'නොපමාව ගෙවන ලෙස'. On the other hand, the language in Section 163 or 164 does not provide that an assessment is made once the Notice of assessment is issued. All that is provided is that a Notice of Assessment should be given to the Assessee.

When addressing the question of time bar, it could be seen that the time bar provided in Section 163 (5) applies to the making of an assessment. The word '*made*' in Section 163 (5) (a) (i) and (ii) (b) clearly manifest this position. It is important to note that no time bar for the issuing of the Notice of Assessment is set out either in Section 164 or 163 (1). If the intention of the Legislature was to set up a time bar for the issuing of the Notice of Assessment, the legislature had no difficult in enacting that '*no Notice of Assessment should be given*' after the expiry of the prescribed time limit, instead of enacting that '*no assessment shall be made*' after the expiry of the prescribed time limit.

In the case of *Mohideen v. The Commissioner General of Inland Revenue*, (C.A.)[12] His Lordship Gooneratne J. considering the intention of the Legislature regarding the time limit available for the Board of Review to reach its determination made the following observation:

'*If it was the intention of the legislature that hearing should be concluded within 2 years (...),* ***there could not have been a difficulty to make express provision, in that regard*** (emphasis added).'

In the case of *K. Nagalingam v. Lakshman de Mel*,[13] Sharvananda J. (as His Lordship then was) made a similar observation regarding the time limits enacted in the Termination of Employment Act: ***'had it been the intention of Parliament (…), nothing would have been simpler than to have so stipulated*** (emphasis added).'

In terms of Section 165 (1) of the IR Act, an Assessee has to appeal against an assessment within a period of thirty days after the date of the Notice of

[12] 2015 [B.L.R] Vol. XXI p. 171, decided on 16.01.2014, at p.177.

[13] 78 N.L.R. 231, at p. 237.

Assessment. Hence, it is clear that the service of the Notice of Assessment is an administrative act subsequent to the making of the assessment.

The decision of the Supreme Court in the case of *D.M.S. Fernando and another v. A.M. Ismail*[14] arises out of the appeal to the Supreme Court against the judgment of the Court of Appeal in the case of *A.M. Ismail v. Commissioner of Inland Revenue* (C.A.)[15]. The main question for the decision of the Supreme Court was whether it is mandatory to communicate to the taxpayer the reasons for rejecting a return of income tax. The Supreme Court by the majority decision of three judges to two judges upheld the decision of the Court of Appeal on the above point.

In the aforementioned case of *D.M.S. Fernando and another v. A.M. Ismail*[16] all that His Lordship Chief Justice Neville Samarakoon held was that the Assessor who rejects a return should state his reasons and communicate them to the tax payer. Further, the reasons must be communicated at or about the time the Assessor sends his assessment on an estimated income. Although the Appellant submitted that His Lordship has clearly stated the Notice of Assessment should also be sent at or about the time the reasons for the rejection is sent, His Lordship has not stated as such in the judgment. The requirement of giving a Notice of Assessment had been there even in the Inland Revenue Act No. 4 of 1963, as amended[17], of which relevant provisions were subject to scrutiny by His Lordship Chief Justice Neville Samarakoon in the above-mentioned case. However, it is important to note that His Lordship Chief Justice Neville Samarakoon did not hold that the *'reasons must be communicated at or about the time he sends the* ***Notice of Assessment****'*. All His Lordship held was that *'reasons must be communicated* ***at or about the time*** *he sends his* ***assessment on an estimated income****'.* On the other hand, in my humble opinion, this is a time limit with latitude where it is impossible to draw a precise line.

The letter of intimation dated 28th November 2011 contains an assessment on an estimated income and therefore, the letter of intimation satisfies both the requirements, the reasons for rejecting the return and the assessment on an estimated income. Hence, the assessment had been *made* before, or at least on the 28th November 2011.

[14] *Supra* note 2.
[15] (1981)2 SLR 78.
[16] *Supra* note 2.
[17] Section 95 (1).

Therefore, in my opinion, it is apparent from the intimation letter that the Assessor acted in accordance with Section 163 (3) (b) of the IR Act; estimated the amount of assessable income and assessed the taxpayer accordingly.

In the case of *Stafford Motor Company (Private) Limited v. Commissioner General of Inland Revenue*[18] (hereinafter referred to as the *'Stafford Motor Company'* case) His Lordship Janak De Silva J., (Achala Wengappuli J., agreeing) concluded that the assessment must precede the Notice of Assessment. Their Lordships observed that;[19]

'*Sections 163(1) and (2) of the 2006 Act provide for making of assessments of Sections any person while section 164 therein requires a notice of assessment to be given to a person who has been so assessed*. ***Therefore, Court rejects the submission made by the learned counsel for the Appellant that no lawfully valid assessment can be made without first serving a valid notice of assessment.*** *There is no requirement to give notice of assessment before making an assessment. Practically it cannot be done as the assessment must first be made followed by a notice of assessment.*' (Emphasis added)

At this stage it is pertinent to consider the judgement of D.N. Samarakoon J., (with whom Sasi Mahendran J., agreed), in the case of *ACL Cables PLC v. Commissioner General of Inland Revenue*[20], wherein, quite contrary to the decision made by this Court in the *Stafford Motor Company*[21] case, it was held that an '*assessment*' becomes a valid assessment only when '*Notice of Assessment*' is given[22]. It was observed that;

'There was no "assessment" because there was no notice, a demand, a charge, within the limited period. ***This shows that an "assessment" becomes a valid "assessment" only when notice of assessment is given.*** *For the application of the time limit what must be there is a valid assessment. Such an assessment cannot come into being without there being notice of assessment.'* (Emphasis added)

[18] CA Tax 17/2017, (CA minutes dated 15.03.2019).
[19] At page 8 of the judgment.
[20] CA Tax 0007/2013 (CA minutes dated 16.03.2022).
[21] *Supra* note 18.
[22] At page 30.

The Court arrived at the above conclusion on the footing that the duty to assess is coupled with the duty to serve notice in writing and if not, the Assessor will be able to make an assessment even after the stipulated period and send the Notice of Assessment to the Assessee. Further, if the Assessee takes the position that the assessment was not made within the prescribed time, the Assessor will be free to produce a document made after the prescribed time but, incorrectly bears a date within the prescribed time, as evidence of making the assessment[23]. However, in the instant case the facts are different. The Assessor having made the assessment has communicated it to the Appellant in the letter of intimation dated 28th November 2011. The identical figures of taxable income and the total tax payable appearing in the letter of intimation[24] are there in the Notice of Assessment[25] as well.

Therefore, in anyway the Assessor in the present case has no opportunity to introduce a pre-dated assessment subsequently. Therefore, expressing a fear of introducing a false assessment in the case in hand would only be a surmise.

The finding of this Court that the Assessor, under Section 163 (3) (b), is entitled to make an assessment in his judgement and to postpone making of the *'final assessment'* later should never be an opportunity given to the Assessor to make an arbitrary assessment. The Assessor, though acts in his own judgement, is expected to exercise his judgement according to the principles of justice.

In the case of *A. M. Ismail v. Commissioner of Inland Revenue*[26] His Lordship Victor Perera J., dealing with the intention of the Legislature regarding the requirement of communicating reasons for the rejection of a return, introduced to the Inland Revenue Act No. 4 of 1963 by Inland Revenue (amendment) law No. 30 of 1978 stated as follows;

'*The amending law clearly contemplated that the notice communicating the reasons for not accepting of a return should be an exercise before the* ***actual assessment*** *of income, wealth or gifts is made for the purpose of sending the statutory Notice of Assessment referred to in Section 95.'*

It was also started that;

[23] *Supra* note 20, at p. 9.
[24] At page 10 of the appeal brief.
[25] At page 96 of the appeal brief.
[26] *Supra* note 15.

'*The purpose of communicating the reasons for the rejection of a return could only be for the purpose of giving the tax payer an opportunity before he receives the statutory notice of assessment under section 95, to put the assessee in possession of full particulars of the case he is expected to meet, in order that he could assist the Assessor if he does not accept the return to reconsider his rejection if satisfactory reasons are urged by the assessee before the* ***final assessment*** *is made.* '

Accordingly, His Lordship was of the view that the letter of intimation should contain a full particular of the case the tax payer is expected to meet and once the tax payer receives the reasons for not accepting the return, he would get an opportunity to convince the Assessor to reconsider the rejection by showing satisfactory reasons before the **final assessment** is made.

The dictum of His Lordship Victor Perera J., supports the view that the letter of intimation should contain an estimate of assessable income along with an assessment of income tax payable. The final assessment is completed and the Notice of Assessment is issued subsequent to the letter of intimation.

However, in the aforementioned case of *ACL Cables PLC v. Commissioner General of Inland Revenue* (C.A.)[27] D.N. Samarakoon J., observed that the view expressed by Victor Perera J., in His Lordship's judgement of *A.M. Ismail v. Commissioner of Inland Revenue* (C.A.)[28] that the notice of giving reasons for the rejection of the return should precede the Notice of Assessment was revised by the Supreme Court in appeal, in the judgement of Neville Samarakoon C.J., in *D.M.S. Fernando and another v. A.M. Ismail*[29]. His Lordship Neville Samarakoon C.J., stated that '***it appears to me*** *therefore, the duty to communicate reasons can be discharged by sending the reasons simultaneously with the Notice of Assessment'.* The word *'appear'* connotes the meaning something become visible or noticeable, especially, without apparent cause. This obviously cannot connote a great degree of certainty in the mind of a Judge. Chinua Asuzu in his work titled '*Judicial writing, A Benchmark for the Bench'*[30]stated that a conclusion in a judgement should state the disposition with maximum clarity and maximum freedom from ambiguity. Accordingly, it

[27] *Supra* note 20, at p.21.
[28] *Supra* note 15.
[29] *Supra* note 2.
[30] Partidge publishing, at p.199.

is my humble view that His Lordship has not arrived at a definite finding on the above matter.

As it was observed by His Lordship Janak de Silva J., in the case of *Stafford Motor Company*[31], the question of whether the time bar for making an assessment applies to the making of assessment or the Notice of Assessment did not arise for determination either in the Court of Appeal or in the appeal to the Supreme Court in the Judgements of *A. M. Ismail v. Commissioner of Inland Revenue*[32] and *D.M.S. Fernando and another v. A.M. Ismail*[33] respectively.

In the case of *Walker Sons & Co. (U.K.) Ltd. v. Gunathilake and Others*,[34] Thamotheram J., having considered the Judgement by Basnakyake C.J. in the case of *Bandahamy v. Senanayake*,[35] observed that as a rule, two judges sitting together follow the decision of two judges and where two judges sitting together are unable to follow a decision of two judges, the practice is to reserve the case for the decision of a fuller bench.

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

Accordingly, I am inclined to follow the view expressed by His Lordship Janak De Silva J., in the *Stafford Motor Company*[36] case. I agree with the view that the above judgment of the Supreme Court does not set out a binding precedent on this Court on the issue that reasons for not accepting the return and the Notice of Assessment should be sent simultaneously.

While I recognize that there is no need to refer to the opinions expressed by the courts of other jurisdictions in deciding this issue, I will do so for the purpose of completeness.

[31] *Supra* note 18, at p. 9.
[32] (1981)2 SLR 78.
[33] *Supra* note 2.
[34] [1978-79-80] 1 Sri.L.R. 231.
[35] 62 N.L.R. 313.
[36] *Supra* note 18.

In the English case of *Honig and others (Administrators of Emanuel Honig) v. Sarsfield* (Inspector of Taxes)[37], Fox L.J. dealing with the issue as to whether an assessment is not effectively made until notice of it has been given to the tax payer, observed that there is a difference between the notice and the assessment. Further, the words **'*the person assessed*'** in the phrase '*Notice of any assessment to tax shall be served on* ***the person assessed****'* in Section 29 (1) of the Taxes Management Act, 1970 implies that there has been an assessment already made. In addition, it was held that it is clear that an assessment is different from and will be followed by the Notice of Assessment and that its validity in no way depends on the latter and they are two wholly different things. Fox L.J. expressed the above view in the following manner;[38]

'*That Section again draws a clear distinction between the assessment and the notice of assessment, and shows that they are different, the assessment being in no way dependent upon the service of the notice.*

In my view the result of these provisions is that the Court is not concerned here with the question of the date when the notices of assessment were served. The Court is concerned with a totally different question, namely: When were the assessments made? The giving of notice has nothing to do with the making of a valid and effective assessment. The statute clearly distinguishes between the assessment and notice of it and contains no provisions which makes the validity of the assessment in any way conditions upon the notice.'

Similarly, as mentioned above in this judgment, in our IR Act as well, the wording in Sections 163 and 164 makes a clear distinction between assessment and Notice of Assessment. Furthermore, aforementioned sections make it clear that the assessment precedes the Notice of Assessment.

In the case of *Burford v. Durkin (HMIT)*[39] it was held that the process of making an assessment consist of (i) the decision to made the assessment, and (ii) the calculation of the amount. The assessment was '*made*' when the Assessor exercised his discretion to make it and calculated the amount.

[37] (1986) ETC 205.
[38] At page 349 and 350.
[39] [1991] BTC 9, England and Wales, Chancery Division.

In the case of *C & E Commissioners v. Ley Rififi Ltd*[40] it was held that the assessment of the amount due and the notification of it to the taxpayer are distinct operations and this is important if an assessment is received after the expiry of the time limit for assessment. To determine if an assessment has been '*made*' within the relevant time limit, should establish the date when it was assessed and not when the assessment was notified. It was also observed that to establish when an assessment was made, the internal records must be inspected. I do concede that that the procedure in England was different, where the assessment is '*made*' when the Inspector of Taxes authorized to make the assessment sign the certificate in the assessment book. That is because under the Taxes Management Act, 1970 the Inspector of Taxes was obliged to maintain an assessment book. However, there is no such requirement under the IR Act No.10 of 2006. Yet, as I have already analysed above, even under the IR Act No. 10 of 2006, the time bar is on '*making the assessment*' and not on sending the '*Notice of Assessment*'. Hence, it is important for the Respondent to satisfy the Court that an assessment has been made prior to the deadline. To ascertain the above fact, the Court to may have to refer to internal records or any other available documents which manifest in uncertain terms that an assessment had been made. In my view, the letter communicating the reasons for not accepting the return (letter of intimation) satisfies that the assessment had been made on or before the 28th November 2011.

One may argue that if the time bar does not apply to the Notice of Assessment and applies only to making of an assessment, the Assessor will be entitled to issue the Notice of Assessment at any time as desires. However, it is the duty of the Inland Revenue Department to collect taxes quickly and it is up to the Legislature to fill the gaps in the IR Act that hinder the course of events. It is not the duty of this Court to read words into the statute and facilitate such a course.

In view of the above analysis, I hold that the assessment made in the instant case is not made out time and therefore not a nullity. Accordingly, I hold that the TAC correctly determined that the assessment issued to the Appellant is not time barred and therefore I answer the first, second, fourth and fifth questions of law in the negative, in favour of the Respondent.

[40] [1995] BBC 55.

The Appellant also made submissions as to whether the deadline for making the assessment should be 31st March 2012 or 30th November 2012[41]. It was also submitted that the Appellant has a vested right to have his assessment made by 31st March 2012[42]. The above flows from the question of whether the amendment made by Amendment Act No. 22 of 2011 to the time limit prescribed in Section 163(5) of the IR Act applies to the year of assessment 2009/2010. The Respondent, relying on the judgement of this Court in the case of *Seylan Bank v. Commissioner General of Inland Revenue*[43], argued that the Amendment Act No. 22 of 2011 should apply to the instant case. However, as at present, the aforementioned judgement had been overruled on appeal by the Supreme Court, in *Seylan Bank PLC v. The Commissioner General of Inland Revenue*[44]. Moreover, since this Court has already held that the assessment had been *made* on or before the 28th November 2011, consideration of the two above issues will not arise in the instant case.

Has the Assessor given adequate and intelligible reasons for the rejection of the return?

The next argument of the Appellant is that the letter of intimation does not contain reasons for not accepting the return. The Appellant's submissions were that the letter contain only the conclusion of the Assessor that the service of electrical construction work does not come under the purview of *'undertaking for construction work'* under Section 45 of the IR Act.

The Appellant relied on the judgement of Justice Tambiah in the case of *New Portman Ltd v. Jayawardena*[45] wherein His Lordship held that the reasons for rejection of the return given by the Assessor to the Assessee should be adequate and intelligible and the general reasons are inadequate. However, *A. D. Gunerathne v. Jayawardene*[46] was a case where the Assessee did not declare his income from the lorries. The Assessor informed the Assessee that his 'income from the lorries has not been declared'. In appeal, His Lordship Tambiah J. held that if a clue is given to the tax payer as to where he had gone wrong in his return, it is adequate

[41] Paragraphs 4.19 to 4.47 of the Appellant's Written Submission filed on the 14th June 2018.
[42] Ibid paragraphs 4.28 to 4.30.
[43] CA/TAC/23/2013 decided on 25.05.2015.
[44] SC Appeal No. 46/2016 decided on 16.12.2021.
[45] 1989 1 SLR 307.
[46] Sri Lanka Tax Cases, Vol. IV, P. 246.

and intelligible to enable him to formulate his grounds in order to appeal. In the case at hand the Assessor has made it clear that in his opinion the service of electrical construction is not an undertaking for construction work in terms of Section 45 of the IR Act. The validity of his reasoning is a matter to be determined by a higher authority. Yet, in my view the said reason is sufficient for the tax payer to canvas the decision of the Assessor in a higher forum.

Therefore, I reject the argument of the Appellant on the above point.

Does the appellant qualify for the concessionary income tax rate?

The substantive issue in this appeal is that the TAC erred in law when it failed to appreciate that an undertaking carried on for civil engineering work on electrical installation (planning the electrical lay out, conduiting, earthing, cable laying, panel installation, transformer installation, etc.) as a part of the subcontractor work relating to the main building construction contract falls within the meaning of '*undertaking for construction work*' as found in Section 45 (2) of the IR Act and therefore, entitled to a concessionary income tax rate. The Appellant argued that even the services of a sub-contractor is not excluded from the definition in Section 45 (2) (c) of the IR Act, and therefore, a sub-contractor in par with the main contractor is entitled for the concessionary tax rate of 15 % on its part of profits.

The ninth question of law is formulated on the above basis.

For clarity, I will reproduce Section 45 and 46 of the IR Act.

> '***45***. *(1) Where the taxable income of any person other than a company for any year of assessment includes any profits and income within the meaning of paragraph (a) of section 3 from any–*
>
> *(a)(…)*
>
> *(aa) (….)*
>
> *(b) undertaking for the promotion of tourism; or*
>
> *(c) undertaking for construction work.*
>
> *(2) (a) (i) (…)*

(ii) (...)

(b) (i) (...)

(ii) (...)

(c) "undertaking for construction work" means an undertaking carried on by a resident person for the construction of any-

(i) building;

(ii) roads or bridges;

(iii) water supply, drainage or sewerage system; or

(iv) harbour, airport or any infrastructure project in telecommunication or electricity;

(d) (i) – (v) (...)'

*'**46**. (1) Where the taxable income of any company for any years of assessment includes any profits and income within the Meaning of paragraph (a) of section 3 from any-*

a) agricultural undertaking;

aa) undertaking for the manufacture of animal feed;

b) undertaking for the promotion of tourism; or

c) undertaking for construction work,

such part of such taxable income as consists of such profits and income shall, notwithstanding anything to the contrary in other provisions, but subject to the provisions of section 16 of this Act, be chargeable with income tax at the appropriate rate specified in the Fifth Schedule to this Act.

(2) For the purposes of subsection (1) the expressions "agricultural undertaking", "undertaking for the promotion of tourism", the "profits and income from any agricultural undertaking" and "undertaking for construction work", shall have the respective meanings assigned to them in section 45 or this Act'

The Appellant contended that the Appellant is engaged in the business of electrical installation work within the purview of *undertaking for construction work* defined in Section 45 (2) (c) of the IR Act. The Appellant submitted that the construction of a building is a multitasking process and is usually a collective effort of different groups of professionals and consists with the building or assembling of infrastructure.

The Appellant cited Black's Law Dictionary[47] which defines the word '*Construct*' as follows;

'***Construct.*** *To Build; erect; put together;* ***make ready for use****. To adjust and join materials, or parts of, so as to form a permanent whole. To put together constituent parts of something in their proper place and order. "Construct" is distinguishable from "maintain," which means to keep up, to keep from change, to preserve. See also Construction'*

*'****Construction*** *(…)* ***The process to bringing together and correlating a number of independent entities, so as to form a definite entity****.'*

'The creation of something new, as distinguished from the repair or improvement of something already existing. The act of fitting an object for use or occupation in the usual way, and for some distinct purpose. See construct.'

The Appellant also cited from Stroud's Judicial Dictionary[48] which defines '*construction*' as follows;

'*Semble, decoration of a building is part of its construction (Wardroper v. Tawse, 7 W.C. Cas. 67'*

More precisely, citing *Huge v. McGroff and Vickers*[49] 'the installation of electrical lighting in building' is also brought under the definition of '*construction*'[50]

The Appellant drew the attention of Court to the preamble and to the Section 67 of the Construction Industry Development Act No. 33 of 2014 and argued that 'construction work' should mean operation of installation in any building or structure of fittings forming part of the land including lighting and power supply etc. Accordingly, it was argued that undertaking

[47] *Black's Law Dictionary*, Sixth Edition, at p. 312.
[48] *Stroud's Judicial Dictionary of words and Phrases*, Sixth Edition, at p.500.
[49] 1955 [1 WLR] 416.
[50] *Supra* note 48.

for construction work for the construction of any building will include electrical system installation which is an integral part of the construction.

Attention was also drawn to the Health and Safety, the Construction Design and Management Regulations, 2015 of the United Kingdom wherein construction work is interpreted to include the installation, commissioning services such as electrical etc., or similar services which are normally fixed within to a structure. Accordingly, it was submitted that the Appellant's business of electrical installation work falls within the definitions of construction work and therefore, entitled to the exemption in terms of Section 46 of the IR Act.

N.S. Bindra stated the following regarding the definitions given in other statutes[51];

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

N.S. Bindra, referring to several Indian authorities, states as follows on recourse to extrinsic aid in interpreting a statute;

'Recourse to extrinsic aid in interpreting a statutory provision would be justified only within well-recognised limits; primarily the effect of the statutory provision must be judged on a fair and reasonable construction of the words used by the statute itself. If the words of the statutes are explicit and unambiguous there can be no resort to external aid for their

[51] N.S. Bindra, *Interpretation of Statutes*, Twelfth Edition, at page 277.

construction. Language which is plain and easily understood should be looked at without extensive aid for the meaning intended.'

As I have already stated above in this judgement, the term '*undertaking for construction work*' for the purpose of the IR Act has been defined in Section 45 (2) (c).

Therefore, in my view it is unnecessary to rely on any interpretation outside the IR Act.

Further, the Appellant also submitted that the Appellant is registered with ICTAD (Institution for Construction, Training and Development) and therefore, the services provided by the Appellant in electrical installation and such other activities falls within the definition of '*undertaking for construction work*' referred to in setion45 (2) (c) of the IR Act.

It was also submitted that the Appellant pays Construction Industry Guarantee Fund Levy imposed through the Finance Act on construction contractors and the Department of Inland Revenue being the administrative authority to collect the said levy has already identified that the Appellant is engaged in the business of construction work as defined in Section 45 of the IR Act.

However, in my view, the registration with the ICTAD and the payment of Construction Industry Guarantee Fund Levy only establish that the Appellant is a construction contractor or that the Appellant is engaged in construction work. Yet, the matter in issue in the instant appeal is whether the Appellant is entitled to the concessionary income tax rate specified under the IR Act. Therefore, in my view, as I have already stated above in this judgment, this matter has to be decided within the IR Act and not in conjunction with other statutes or similar matters.

The Appellant submitted that the Inland Revenue Department has given an interpretation including the electrical installation within the meaning of construction of building in the list of interpretation issued by the committee of interpretation of tax laws of the Department of Inland Revenue.[52] However, the documents at pages 155 to 171 is not a document issued by the committee of interpretation of Tax Laws of the Department of Inland Revenue and it is a document issued by the Health and Safety Authority.

[52] At paragraph 8.27 to 8.30 of the Appellant's Written Submission.

Therefore, the interpretation in the aforesaid document cannot be accepted as an interpretation issued by the Inland Revenue Department.

The Appellant's contention was that the Appellant's business of electrical installation work comes within the purview of '*undertaking for construction work*' as defined in Section 46 (1) (c) of the IR Act. The Respondent rejected the contention of the Appellant and submitted that the Appellant's principal business activity of electrical installation does not come under the purview of '*undertaking for construction work*' in terms of Section 45 of the IR Act.

The phrase '*undertaking for construction work*' is defined in Section 45 (2) (c) which is reproduced above to mean an undertaking carried on for the construction of any building, roads or bridges, water supply, drainage or sewerage system or harbour, airport or any infrastructure project in telecommunication or electricity.

The Appellant contended construction of the building is a multitasking process and most usually a collective effort of different groups of professionals and it consists with the building or assembling of infrastructure. It integrate the services of surveyors, architects, interior designers, civil engineers, mechanical engineers, electrical engineers, higher protection engineers and constructors throughout design and construction life cycle of the building in order to ensure a positive outcome with safe, comfortable and environmentally friendly operation of a building (sic).[53] I do concede that construction of a building is a multitasking process, usually a collective effort of different types of assembling infrastructure. It includes building the structure, electrical installations, water supply, drainage, or sewerage system etc. Admittedly, the principal activity of the Appellant company is carrying out the business of electrical installation work. It is true that the definition '*undertaking for construction work'* has an extensive meaning and the construction of a building is a multitasking process which involves collective effort of different groups. Yet, the exemption under the IR Act is granted for the profits and income of the company's '*undertaking for construction work'*. The term '*undertaking for construction work'* is defined to include the construction of any building. Admittedly, the *undertaking for the construction of the* ***building*** is not *carried on* by the Appellant. The Appellant only carries out the electrical installation work of the said

[53] At paragraph 8.10 of the Appellant's Written Submission.

building for and on behalf of the person who construct the building. Upon a careful consideration of Section 45 of the IR Act, it is my considered view that the intention of the Legislature is to give the benefit to the person who construct the building and not to any other person who does any work relating to the construction of the building, on behalf of the builder. If such a wide interpretation is given to Section 45 of the IR Act, other than the person who construct a road or a bridge, persons who supply rubble, sand etc. will also get the benefit of the exemption.

N.S. Bindra's *'Interpretation of Statutes'* states the following regarding the object of an exemption from taxation:

'*It is no doubt the object of an exemption is to narrow the effect of general taxing words. But where the taxing words are not general, but special, where they select a special class of goods for taxation, the Court will be disinclined to hold, unless forced by plain words to that conclusion, that the Legislature has in the exemption freed from duty the greater proportion of the class of goods which it has specially made liable to duty in the taxing item. When exemption from taxation or deduction is claimed, they should not be extended beyond the express requirements of the language of the provision.'*[54]

'Taxation laws are not in the nature of penal laws; they are substantially remedial in their character and are intended to prevent fraud, suppress public wrong and promote the public good. They should be, therefore, construed in such a way as to accomplish those objects.[55]*'*

'It is advantageous to quote from Union of India v. (M/s.) Wood Papers Ltd[56] *the exposition of principle of interpretation about exemption from tax the passage runs thus: 'Literally exemption is freedom from Liability, tax or duty. Fiscally it may assume varying shapes, especially in a growing economy. For instance, tax holding to new units, concessional rate of tax to goods or persons for limited period or with specific objective etc. That is why its construction, unlike charging provision, is like an exception and on normal principle of construction or interpretation of statutes, it is construed strictly either because of legislative intention or on economic*

[54] N.S. Bindra '*Interpretation of Statutes'* Eighth edition, 1997, at p. 693.
[55] Ibid.
[56] AIR 1991 SC 2049: 1991 (1) JT 151: (1990) 4 SCC 256.

justification of inequitable burden or progressive approach of fiscal provisions intended to augment State revenue.'[57]

Further, it is stated that;

'The principle that in case of ambiguity a taxing statute should be construed in favour of the tax-payer does not apply to a provision giving a tax-payer relief on certain cases from a section clearly imposing a liability. In construing an Act which imposes a burden, doubts should not be resolved in favour of the tax- payer but this general rule cannot be applied either when the taxing provision is clear and explicit or when a doubt arises in regard to a provision granting a deduction of an exemption from payment of tax. '[58]

N.S. Bindra[59], cited following extract from Sutherland[60];

'*As a general rule grants of tax exemptions are given a rigid interpretation against the assertion of the tax-payer and in favour of the taxing power. The basis for the rule here is the same as that supporting a rule of a strict construction of positive Revenue laws-that the burdens of taxation should be distributed equally and fairly among the members of society.'*

It was also cited the following extract from Crawford[61];

'Provision providing for an exemption may be properly construed strictly against the person who makes the claim of an exemption. In other words, before an exemption can be recognised, the person or property claimed to be exempt must come clearly within the language apparently granting the exemption… Moreover, exemption laws are in derogation of equal rights, and this is an equally important reason for construing them strictly…'

From the above analysis, it is my considered view that the Appellant is not entitled to the concessionary tax rate provided in Section 46 (2) (c) of the IR Act.

Accordingly, I hold that the TAC did not err in deciding that the Appellant's undertaking does not come under Section 45 (2) of the IR Act

[57] *Supra* note 54.
[58] N.S. Bindra *'Interpretation of Statutes',* Eighth edition, 1997, at p. 690.
[59] N.S. Bindra *'Interpretation of Statutes',* Twelfth edition, 2017, at p. 878.
[60] Southerland, *Statutory Construction*, Vol. 3, Third edition, p. 296.
[61] Crawford, *Statutory Construction*, pp. 506-508.

and answer the nineth question of law in the negative, in favour of the Respondent.

Did the CGIR violate Section 165 (7) of the IR Act by appointing the same Assessor who made the assessment to advance the appeal?

Another argument advanced by the Appellant is that the Respondent, CGIR, violated Section 165 (7) of the IR Act by appointing the Assessor Mr. M.M.R.R. Mellawa who made the assessment to cause further inquiry into the appeal made by the Appellant to the CGIR against the assessment. Accordingly, on the above ground the Appellant moved this Court to set aside all process pertaining this appeal[62]. The Appellant made the above submission based on the acknowledgement of appeal dated 29th May 2012, made under Section 165 (1) of the IR Act [63]. According to Section 165 (6) of the IR Act, every appeal has to be acknowledged within thirty days of its receipt. In the case at hand the appeal had been acknowledged by the Assessor, Mr. M.M.R.R. Mellawa. Mr. M.R.R. Mellawa is the assessor who also issued the letter of intimation dated 28th November 2011. In the letter of acknowledgement, it is stated that he had been directed by the CGIR in terms of Section 165 (7) of the IR Act, to make further inquiry into the appeal. However, according to the appeal report dated 18th April 2013, filed on record[64] the Assessor who caused further inquiry into the appeal was Mr. R.D.K.S. Senake and not Mr. M.M.R.R. Mellawa. The said Assessor Mr. R.D.K.S. Senake forwarded the appeal for the hearing by CGIR since the parties could not reach an agreement in terms of Section 165 (7) of the IR Act and the said decision of the Assessor was endorsed to by the Deputy Commissioner Mr. Darmadasa Rangalle.

Accordingly, the submission made by the Appellant that it is the same Assessor Mr. M.M.R.R. Mellawa who made the Assessment caused further inquiry into the appeal violating Section 165 (7) of the IR Act is devoid of merit.

Accordingly, I answer the tenth question of law in the negative, in favour of the Respondent.

[62] Paragraph 6.9 of the Appellant's Written Submission filed on the 14th June 2018.
[63] At page 94 of the appeal brief.
[64] At page 93 of the appeal brief.

Whether the Respondent failed to determine the nature of Appellant's undertaking.

Another argument advanced by the Appellant was that Respondent, CGIR has not given any determination on the question as to whether the nature of Appellant's undertaking is within the meaning of Section 45 (2) (c) of the IR Act. The eighth question of law flows from above. The basis of Appellant's argument is that the statement made by the CGIR at page 6 of his determination[65] to the effect that *'the Appellant has accepted the fact that the business activity of the Appellant company does not fall within the meaning of undertaking for construction of building as defined in Section 45 (2) (c) of the IR Act by keeping silence in respect of the second ground of the petition of appeal' (sic)* is factually incorrect. The above matter had been raised by the Appellant in its appeal to the TAC[66]. The TAC has considered the above issue and determined that the electrical installation work of the Appellant does not fall within the meaning of Section 45 of the IR Act. Therefore, the question to be determined by this Court is not whether the above statement of the CGIR is factually correct or incorrect. It is important to note that the Appellant has not raised the question before the TAC that the CGIR has failed to make a determination on the above issue. The task of this Court is to see whether the TAC erred in making its determination. Be that as it may, the Appellant's argument is that in terms of Section 165 (14) of the IR Act, every petition of appeal referred under the Section should be agreed to or determined by the CGIR. It is true that in this instance parties have not reached at an agreement. Yet, may be on an erroneous footing, the CGIR has determined that the Appellant, by keeping silent in respect of the second ground of appeal, has accepted the fact that the business activity of the Appellant company does not fall within the meaning of undertaking for construction of buildings as defined in Section 45 (2) (c) of the IR Act.

Therefore, I am of the view that it cannot be held that the appeal on the above point shall be deemed to have been allowed in terms Section 165 (14) of the IR Act, upon the failure of the CGIR to arrive at a determination.

Did the TAC violate the rule '*audi alteram partem*'?

The Appellant raised the third question of law on the fact that the TAC failed to give a proper hearing and a complete opportunity for the Appellant

[65] At page 11 of the appeal brief.
[66] Appellant's appeal to the TAC at page 48 of the appeal brief. (At page 7 of the petition of appeal.)

to put forward its case, and thus violated the rule of *audi alteram partem*. Accordingly, for the purposes of this case, I will answer the third question of law dealing solely with the facts relevant to this case. In the case of *Commissioner General of Inland Revenue v. Classic Travels (Pvt) Ltd*[67] this Court expressed the following view regarding an Appellant's right to be heard in an appeal*: 'the word "appeal" refers to itself a right, in particular, for* ***the Appellant to be heard.*** *This intern means that the Appellant must be afforded an opportunity to present a reasoned argument to persuade the authority concern to re considered his case. One must be able to filed a close link between such hearing and the eventual decision if the authority concerned has genuinely afforded such an opportunity to the Appellant*'.

According to the TAC determination[68], the appeal was heard on the 28th July 2015 and the Appellant had been represented by its principal officers including the Chairman, General Manager and the Managing Director. According to the first written submission filed by the Appellant in the TAC, there had been a hearing on the 5th June 2014 as well[69]. Moreover, the Appellant had been given the opportunity to file two written submissions on the 4th of July 2014 and 28th August 2015[70].

Hence, I am satisfied that the TAC has given sufficient opportunity to the Appellant to present its case and the decision had been given after a proper hearing.

Accordingly, I answer the third question of law in the negative, in favour of the Respondent.

Conclusion

Thus, having considered all arguments presented to this Court, I hold that the TAC has not erred in arriving at its determination.

Therefore, I answer all ten questions of law in the negative in favour of the Respondent.

1. ***No.***
2. ***No.***

[67] CA Tax Appeal No. 07/2015, decided on 06.04.2017.
[68] At p. 231 of the appeal brief.
[69] At page 128 of the appeal brief.
[70] At pp. 128 and 203.

3. ***No.***
4. ***No. The TAC rejected the Appellant's position that the Notice of Assessment constitutes the assessment.***
5. ***No. The TAC has not taken irrelevant matters into consideration in arriving at its conclusion.***
6. ***No.***
7. ***No.***
8. ***No.***
9. ***No.***
10. ***No.***

In light of the answers given to the above ten questions of law, acting under Section 11 A (6) of the TAC Act, I affirm the determination made by the TAC and dismiss this appeal.

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

JUDGE OF THE COURT OF APPEAL

Dr. Ruwan Fernando J.

I Agree.

JUDGE OF THE COURT OF APPEAL