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).

CF Insurance Brokers (Private) Limited,
No. 270, Vauxhall Street,
Colombo 2.

APPELLANT

CA No. CA/TAX/0040/2019
Tax Appeals Commission No. TAC/NBT/003/2016

v.

Commissioner General of Inland Revenue,
Department of Inland Revenue,
Sir Chittampalam A, Gardiner Mawatha,
Colombo 2.

RESPONDENT

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

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

Chaya Sri Nammuni, DSG for the Respondent.

WRITTEN SUBMISSIONS	:	18.06.2020 & 20.10.2022 (by the Appellant) 25.06.2020 & 10.10.2022 (by the Respondent)
ARGUED ON	:	15.07.2021, 27.07.2021, 21.02.2022, 28.03.2022 & 20.07.2022
DECIDED ON	:	04.11.2022

M. Sampath K. B. Wijeratne J.

Introduction

The Appellant is a limited liability company incorporated in Sri Lanka, engaged in the business of insurance brokerage services. The Appellant submitted its Nation Building Tax (hereinafter referred to as 'NBT') returns for the taxable quarters ending on 30.06.2010 (1006), 30.09.2010 (1009), 31.12.2010 (1012), 31.03.2011 (1103), 30.06.2011 (1106), 30.09.2011 (1109), 31.12.2011 (1112), 31.03.2012 (1203), 30.06.2012 (1206), 30.09.2012 (1209), 31.12.2012 (1212), 31.03.2013 (1303) and 30.06.2013 (1306) claiming that the turnover of the company is not liable to NBT. The Assessor rejected the claim of the Appellant and made assessments for the aforementioned thirteen taxable quarters. Consequently, the reasons in writing for not accepting the return were communicated to the Appellant company[1] *viz.* only insurance brokerage received in respect of local produces is exempt from NBT and the rest of the Appellant's turnover through insurance brokerage services is liable to NBT. Thereafter, the Appellant was issued with Notices of Assessment. The Appellant confronted the above position of the CGIR and claimed that the entire brokerage income earned by an insurance broker is exempt from NBT.

The Appellant appealed to the Commissioner General of Inland Revenue (hereinafter referred to as 'the CGIR') the Notices of Assessment issued to the Appellant. The CGIR by his determination dated 5th April 2016

[1] At p. 59 of the appeal brief.

confirmed the assessments issued for the taxable quarters ending on 30.06.2011 (1106), 31.12.2011 (1112) and 31.03.2012 (1203).

The Appellant then appealed the CGIR's determination to the Tax Appeals Commission (hereinafter referred to as the 'TAC'). The TAC, by its determination dated 31st July 2019 determined that the assessment No.7123212 for the taxable quarter ending on 30.06 2011 (1106) is time barred and therefore, should be excluded. The TAC confirmed the other two assessments determined by the CGIR. Accordingly, the appeal was dismissed subject to the aforementioned qualification.

The aggrieved Appellant moved the TAC to state a case to this Court and the TAC stated a case on the following six questions of law.

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

2. ***Did the Tax Appeals Commission err in law when it concluded that the Appellant was liable to pay the Nation Building Tax as assessed?***

3. ***Did the Tax Appeals Commission err in law when it concluded that the assessment bearing No.7123214 was not time barred?***

4. ***Did the Tax Appeals Commission err in law when it concluded that the determination of the Commissioner General of Inland Revenue relating to the several assessments that comprises the subject matter of this appeal was not time barred?***

5. ***Did the Tax Appeals Commission err in law when it concluded that insurance brokerage income does not come within the scope of the exemption set out in item (xiii) of Part II of Schedule 1 to the Nation Building Tax Act, No. 09 of 2009 (as amended)?***

6. ***In view of the facts and circumstance of the case did the Tax Appeals Commission err in law when it came to the conclusion that it did?***

Analysis

Is the determination of the Tax Appeals Commission time barred?

The learned Counsel for the Appellant submitted that the TAC had made its determination exceeding the statutorily prescribed time limit and therefore, by operation of law, the appeal to the TAC must be deemed to have been allowed in view of the fact that it stands abated[2]. That gives rise to the first question of law.

In my view, the above question has two components: whether the TAC made its determination within the prescribed timeframe and whether the timeframe is mandatory. It seems unnecessary to restate the chronology of events to determine whether the TAC made its determination within the prescribed time limit. The learned Deputy Solicitor General did not contest this allegation and the Court is satisfied that the TAC did exceed the statutory time limit. The Respondent argued that the time period specified for the determination to be made by the TAC is merely directory.

This allows me to move directly to the question of whether compliance with the timeframe is mandatory, or merely directory.

To be clear, I will now reproduce the relevant part of section 10 of the TAC Act (as it existed prior to the amendments), excluding the proviso, which reads as follows:

> *10. The Commission shall hear all appeals received by it and make its decision in respect thereof,* ***within one hundred and eighty days from the date of the commencement of the hearing of the appeal*** (Emphasis added).

Accordingly, the Legislature intended the TAC to conclude an appeal within one hundred and eighty days from the date of the commencement of the hearing of the appeal.

Section 10 was subsequently been amended by Amendment Act No. 4 of 2012 to the following:

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

[2] At paragraph 13 of the Appellant's Consolidated Written Submission filed on the 20th October 2022.

With this amendment, the Legislature extended the time granted to the TAC to conclude an appeal by ninety days.

Section 10 has been further amended by Amendment Act No. 20 of 2013 which reads thus:

> *10. The Commission shall hear all appeals received by it and make its decision in respect thereof, within **two hundred and seventy days from the date of the commencement of its sittings for the hearing of each such appeal*** (Emphasis added).

With this change, the legislature reduced the time for the TAC to conclude an appeal by declaring that the time should begin not from the commencement of the hearing, but from the commencement of its sittings to hear the appeal.

The learned Counsel for the Appellant argued that the Legislature, by amending the above provision, not only once but twice, clearly manifested its intention of enacting the timeframe provided for the conclusion of an appeal to be mandatory[3].

However, I am not inclined to accept the argument advanced by the learned Counsel for the Appellant. The Legislature, at first having extended the one-hundred-and-eighty-day period from the **commencement of the hearing,** up to two hundred and seventy days, later reduced the said period by enacting that the time should take effect from the **commencement of sittings for the hearing**, which would precede the hearing itself.

In the case of *D.M.S. Fernando and Another v. Mohideen Ismail*,[4] Neville Samarakoon C.J., citing *Maxwell on the Interpretation of Statutes*[5], introduced a three-limbed test that may assist in determining the intention of the Legislature:

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

[3] At paragraph 22, 40 and 43 of the Appellant's Consolidated Written Submission filed on the 20th October 2022.

[4] [1982] 1 Sri.L.R. 222, at p.229.

[5] Twelfth edition.

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

In applying this test to the present case, it appears that the law as it existed prior to the amendments was modified by extension and reduction, as the Legislature has deemed appropriate, the timeframe within which the TAC should make a decision. There does not seem to be any clear mischief that the amendments were meant to correct, and the remedy itself does not appear to be anything other than a modification of the time granted to the TAC to decide an appeal. Even if the mischief sought to be corrected was a delay in the appeal process, there is little support for the claim that the Legislature intended the said time limit to be mandatory, since it was initially extended, and then reduced.

Accordingly, I am of the view that the intention of the Legislature in amending the aforementioned clause was merely to redefine the time available to the TAC to determine an appeal.

It is also important to note that while the Legislature has amended the relevant provision twice, it has not specifically made the deadline mandatory. If the intention of the legislature was that the failure of the TAC to meet the time limit should give the Appellant the right to the relief sought, the Legislature could have specifically enacted it.

In the case of *K. Nagalingam v. Lakshman de Mel*,[6] Sharvananda J. (as His Lordship then was) cited the following two excerpts from academic literature, in determining whether a statutory time limit for the discharge of a duty was mandatory:

"*The whole scope and purpose of the enactment must be considered, and one must of that provision* ***to the general object intended to be secured by the Act****' – Smith Judicial Review of Administrative Action (2nd Ed. at page 126)* (Emphasis added)."

"*Where the prescriptions of a statute relate to the performance of a public duty, and where invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty yet not promote the essential aims of the Legislature, such prescriptions seem to be generally understood as mere*

[6] 78 N.L.R. 231, at pp.236-237.

instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal, indeed, but it does not affect the validity of the act done in disregard of them. It has often been held, for instance, ***when an Act ordered a thing to be done by a public body or public officers and pointed out the specific time when it was to be done, then the Act was directory only and might be complied with after the prescribed time****. (Maxwell-11th Ed. at page 369)* (Emphasis added)."

Having scrutinized the above scholarly authorities, His Lordship concluded on the time limits enacted in the Termination of Employment Act, as follows:[7]

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

His Lordship upheld this decision in the subsequent case of *Ramalingam v. Thangarajah*,[8] when deciding that the time limits laid down in the Primary Courts Procedure Act were to be interpreted as directory, and not mandatory.

It cannot be presumed that there was some form of oversight by the Legislature in drafting and amending Section 10 of the TAC Act, in that it did not specify the consequences that result when the TAC does not strictly comply with the statutory deadline. This is especially so since, as submitted

[7] *Ibid.* at p.237.

[8] [1982] 2 Sri.L.R. 693, at p.703.

by counsel for the Appellant himself, the relevant section was amended twice. This means that the Legislature has twice had the opportunity to specify the consequences of non-compliance, although it has seen fit not to do so.

In the case of *Mohideen v. The Commissioner General of Inland Revenue*,[9] (hereinafter referred to as '*Mohideen*') His Lordship Gooneratne J. (sitting in the Court of Appeal) made a similar observation when considering the intention of the Legislature regarding the time limit available for the Board of Review (which was the body that was replaced by the TAC) to reach its determination:

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

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

Inland Revenue Act No. 24 of 2017, which is in force as at now, also provides for an Administrative Review of an assessment by the CGIR. However, unlike in the previous Inland Revenue Act No. 10 of 2006, no timeframe has been specified in Section 139 for the CGIR to deliver his decision. Nevertheless, Section 140 provides that within thirty days from the date of the decision or upon lapse of ninety days from the request being made for an administrative review, the tax payer is entitled to make an

[9] CA 02/2007, decided on 16.01.2014, at p.18; 2015 [B.L.R] Vol. XXI p. 171.

appeal to the TAC. Hence, it becomes clear that while the breach of certain time limits is accompanied by remedies or sanctions, the breach of others is not. It is important to note that, Section 144 of the 2017 Act provides that if the TAC fails either to determine or to respond to an appeal filed by a person within ninety days from the appeal request, the Appellant is entitled to appeal to the Court of Appeal.

From the foregoing analysis, it is clear that in the new Inland Revenue Act No. 24 of 2017, the Legislature has taken out the penal consequences previously imposed on the CGIR for failure to comply with the statutory time limit. Nevertheless, upon such failure, the Appellant has been granted a remedy through a direct right of appeal to the TAC, and upon the failure of the TAC to respond to such an appeal request within the specified time limit, the Appellant has been granted a direct right of appeal to the Court of Appeal. Therefore, it can be seen that though the Legislature has in the case of the Inland Revenue Act No. 24 of 2017, introduced a remedy where the TAC fails to respond within the specified time limit, in the case of the TAC Act itself, despite twice availing itself of the opportunity to amend the law, the Legislature has not specified a remedy in case of non-compliance.

I am not unmindful of the fact that this particular question of law is on the TAC Act. Yet, I am of the view that consideration of the above provisions in the Inland Revenue Act are relevant, since those provisions manifest the intention of the Legislature regarding the time limits imposed on the TAC.

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

Respondent argued that since there is no penalty set out for the failure of the TAC to make a determination within two-hundred-and-seventy days, the time limit specified for the determination to be made by the TAC is merely directory[10].

[10] At paragraph 15 of the Respondent's Written Submission filed on the 10th October 2022.

The learned Counsel for the Appellant also argued that the Legislature, by amending Section 10 with retrospective effect, has clearly manifested its intention of strict compliance with the time limit provided therein. However, I am not in favour of the said argument in view of the facts stated herein below.

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

In the same amendment, by the introduction of Section 15, the Legislature enacted that the TAC has power to hear and determine any pending appeal that was deemed to have been transferred to the Commission from the Board of Review under Section 10 of the principal Act, notwithstanding the expiry of twelve months granted for its determination.

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

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

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

Having argued extensively, as above, that the time limit specified for the TAC is mandatory, the learned Counsel for the Appellant submitted that when the two-hundred-and-seventy-day time limit is exceeded, TAC no longer possesses jurisdiction to proceed to hear the appeal and therefore, the appeal stands abated. The Appellant further argued that this would result in a situation where the tax is no longer recoverable since an appeal before the TAC stands abated and the Commission is no longer possessed of jurisdiction to hear and determine the appeal. The practical consequence would be that the appeal is as good as allowed and the benefit of this will accrue to the taxpayer[11]. It was also submitted by the Appellant that if the time bar applicable for the determination of an appeal by the TAC is upheld by this Court, it does not restore the original assessment that was confirmed by the CGIR. That assessment will only be restored if the assessment is confirmed by the TAC. If the TAC is prevented from hearing the appeal because it is time barred it would result in the appeal before the Commission being regarded as abated. This would have the practical effect of being as good as the appeal being allowed[12].

In my view, the submission of the learned Counsel for the Appellant that if this Court were to hold that the TAC is *functus officio* in determining an appeal after the two-hundred-and-seventy-day period has lapsed, the appeal should stand allowed is untenable. Should the State, and in general the people of this country, lose revenue or the taxpayers themselves lose the opportunity of getting the relief because of the fault of the TAC?

Samarakoon C.J.'s judgement in the case of *K. Visvalingam and Others v. Don John Francis Liyanage*,[13] addresses the above problem, in the context of the time limit applicable to a Fundamental Rights petition before the Supreme Court of Sri Lanka:

'*These provisions confer a right on the citizen and a duty on the Court. If that right was intended to be lost because the Court fails in its duty, the Constitution would have so provided. It has provided no sanction of any kind in case of such failure. To my mind, it was only an injunction to be respected and obeyed, but fell short of punishment if disobeyed. I am of the*

[11] At paragraph 13 & 44 of the Appellant's Consolidated Written Submission filed on the 20th October 2022.
[12] *Ibid* at paragraph 27..
[13] Decisions on Fundamental Rights Cases, 452, at p.468.

opinion that the provisions of Article 126 (5) are directory and not mandatory. ***Any other construction would deprive a citizen of his fundamental right for no fault of his*** (Emphasis added).'

Sharvananda J. (as His Lordship then was) made a similar observation in the previously cited case of *K. Nagalingam v. Lakshman de Mel*,[14] regarding an order made by the Commissioner of Labour after the expiry of a statutory time limit:

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

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

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

[14] *Supra* note 6, at p.237.

In the previously cited case of *Mohideen*,[15] it was stated that the time limit prescribed for the determination of an appeal by the Board of Review would be mandatory, if counted from the date of commencement of the oral hearing. Gooneratne J. formulated the particular paragraph under consideration as follows:[16]

'*I find that an area is left uncertain for interested parties to give different interpretation on time bar. Hearing need* (sic) *to be in camera and Section 140 subsection 7, 8 & 9 provide for adducing evidence. As such in the context of this case and by perusing the applicable provision, it seems to be that the hearing contemplated is nothing but 'oral hearing'. One has to give a practical and a meaningful interpretation to the usual day to day functions or steps taken in a court of law or a statutory body involved in quasi-judicial functions, duty or obligation. If specific time limits are to be laid down the legislature need to say so in very clear unambiguous terms instead of leaving it to be interpreted in various ways. To give a restricted interpretation would be to impose unnecessary sanctions on the Board of Review.* ***It would be different or invalid if the time period exceeded 2 years from the date of oral hearing. If that be so it is time barred.'*** (Emphasis added)

However, in the subsequent case of *Stafford Motor Company (Private) Limited v. The Commissioner General of Inland Revenue* (hereinafter referred to as '*Stafford Motors*'),[17] Their Lordships declined to follow the reasoning in *Mohideen* on the ground that it is *obiter dicta*.

Black's Law Dictionary provides the following definition for *obiter dictum*:[18]

'*[Latin "something said in passing"] A judicial comment made while delivering a judicial opinion, but one that is* ***unnecessary to the decision in the case*** *and therefore not precedential (although it may be considered*

[15] *Supra* note 9.

[16] *Ibid.* at p.15.

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

[18] B. A. Garner and H. C. Black, *Black's Law Dictionary*, Ninth Edition, 2009. at p.1177.

persuasive). Often shortened to dictum or, less commonly, obiter (Emphasis added).'

The learned Counsel for the Appellant invited the Court to depart from the ruling in *Kegalle Plantations PLC v. The Commissioner General of Inland Revenue*[19] and alleged *obiter dicta* statement in *Stafford Motors*[20]. It was also argued that even though statement of Gooneratne J., regarding applicability of the time bar would not constitute part of the *ratio decidendi* for the decision it nevertheless constitutes relevant judicial dicta which sheds light on this issue[21].

However, as it was observed by His Lordship Justice Soza (sitting in the Court of Appeal) in the case of *Ramanathan Chettiar v. Wickramarachchi and others*:[22]

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

Accordingly, if this Court were to find that the said statement in *Mohideen* is *obiter*, then it would not set a binding precedent on the matter in issue in this case, under this particular question of law.

While I note that Their Lordships in *Mohideen* had observed as above while answering a specific question of law raised by the Appellant, closer scrutiny of the final two sentences of that paragraph reveal that they are not essential to the finding of the Court. The finding of the Court was that the Board of Review had not erred in law as regards the time available for it to

[19] CA (TAX) 09/2017, decided on 04.09.2018.
[20] At paragraph 25 of the Appellant's Consolidated Written Submissions filed on the 20th October 2022.
[21] *Ibid* at paragraph 29.

[22] [1978-79] 2 Sri.L.R. 395, at p.410.

arrive at its determination. The matter in issue in deciding that particular question of law was whether or not the two-year time limit applicable to the Board of Review was to be counted from the date of receipt of the Petition of Appeal by the Board, or whether it was to be counted from the date of commencement of the hearing of the appeal. That matter was decided in favour of the Respondent, with the Court holding the latter to be the case.

In the above context, the final two sentences, '*It would be different or invalid if the time period exceeded 2 years from the date of oral hearing. If that be so it is time barred*,' constitute a conditional observation by Their Lordships. Its nature is hypothetical, and does not reflect the facts of the case, as the time period did not exceed two years from the date of oral hearing. In other words, if these two sentences were taken out of the judgement, there would be no change whatsoever either to the line of reasoning in *Mohideen*, or to the outcome. I therefore consider that the hypothetical conclusion arrived at by Their Lordships in *Mohideen* is indeed 'unnecessary to the decision in the case'. I am of the view that the aforementioned final two sentences do not form part of the *ratio* in *Mohideen*. Therefore, in keeping with the definition I have provided above, and following the dicta in *Stafford Motors*, it is my view that the particular statement in *Mohideen* (as reproduced and emphasised on above) is indeed *obiter dictum*.

The doctrine of stare decisis also requires the court to follow the judgment in *Stafford Motors* and the line of cases it is part of,[23] to avoid disturbing the certainty established by such cases.

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

In concluding my reasoning on the first question of law, I am indeed mindful of the contention by the learned Counsel for the Appellant that the two-hundred-and-seventy-day timeframe cannot be devoid of meaning. I am aware that a lack of substantial compliance with the said timeframe may inconvenience the taxpayer, especially where the timeframe is overrun

[23] *Supra* note 17.

by many years. In the case of *Wickremaratne v. Samarawickrema and others*,[24] Silva J. (as His Lordship then was) stated that:

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

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

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

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

Whether the assessment bearing No. 7123214 is time barred?

The Appellant contended that the above numbered assessment is time barred despite the fact that the TAC determined it was not. The third question of law is set out on the basis of the foregoing. The taxable period covered by the above numbered assessment is the quarter ending on the 31st December 2011 (1112). The chronology of events relevant to the above question of law is as follows. The Appellant submitted its return for the

[24] [1995] 2 Sri.L.R. 212, at p.218.

aforementioned taxable quarter on the 20th January 2012[25]. The Assessor rejected the same and the written reasons for not accepting the return were communicated to the Appellant on 11th July 2013[26]. Admittedly, the date of the Notice of Assessment for the taxable quarter mentioned above is 30th December 2013[27]. According to the Appellant, the time bar for making an assessment is 20th January 2014, two years from the date of filing of the return[28]. Yet, the Appellant contended that no legitimate assessment can be made without serving a valid Notice of Assessment and therefore, the taxpayer must be served with the Notice of Assessment prior to the expiry of the deadline. Accordingly, it was argued that service of the Notice of Assessment is a necessary prerequisite for the validity of an assessment[29]. According to the Appellant, the Notice of Assessment was received on the 7th February 2014, well after the timeframe[30]. The Respondent did not challenge the above fact but, contended that the relevant date for the time bar is the date on which the assessment is *made*. Nevertheless, the Appellant's contention is that the aforesaid position is untenable in law and unsupported by judicial precedents[31]. In support of the above contention of the Appellant relied on the two decisions of another division of this Court in the cases of *ACL Cables PLC v. Commissioner General of Inland Revenue*[32] (hereinafter referred to as '*ACL Cables'*) and *John Keells Holdings PLC v. Commissioner General of Inland Revenue*[33] (hereinafter referred to as '*John Keells'*) the cases that would be considered hereunder in this judgment.

I will start the analysis by reproducing relevant statutory provisions pertaining to the above issue. Section 8 of the NBT Act No. 09 of 2009, as amended by amendment Act No. 32 of 2009 (hereinafter referred to as 'the NBT Act') reads as follows;

> '***8.*** *The provisions in sections 106, 107, 108 and 112 of Chapter XII relating to Returns etc.,* ***Chapter XXII relating to Assessments****, Chapter XXIII relating to Appeals, Chapter XXIV relating to Finality of Assessments and Penalty for Incorrect*

[25] At p. 48 of the appeal brief.
[26] *Ibid* at p. 59.
[27] *Ibid* at p. 21.
[28] Paragraph 55 of the Appellant's Consolidated Written Submission filed on the 20th October 2022.
[29] *Ibid* paragraph 74.
[30] *Ibid* paragraph 55.
[31] *Ibid* paragraph 57.
[32] CA TAX 0007/2013 (C.A. minutes dated 16.03.2022).
[33] CA TAX 0026/2013 (C.A. minutes dated 16.03.2022).

Returns, Chapter XXV relating to Tax in Default and Sums Added Thereto, Chapter XXVI relating to Recovery of Tax, Chapter XXVII relating to Miscellaneous, Chapter XXIX relating to Penalties and Offences, Section 209 of Chapter XXX relating to Administration and Chapter XXXI on General matters, of the Inland Revenue Act, shall mutatis mutandis apply to the furnishing of returns, assessments, appeal against assessments, finality of assessments and penalty for incorrect returns, tax in default and sums added thereto, recovery of tax, miscellaneous, penalties and offences, administration and general matters under this Act subject to the following modifications:-

a. *every reference to the year of assessment in any such provision of the Inland Revenue Act, shall be deemed to be a reference to the "relevant quarter" in this Act;*

b. *every reference to assessable income or taxable income in any such provision of the Inland Revenue Act, shall be deemed to be a reference to the "liable turnover" in this Act; and*

c. *every reference to income tax in any such provision of the Inland Revenue Act, shall be deemed to be a reference to the tax charged and levied in terms of the provisions of this Act.*

d. *return for any relevant quarter under this Act shall be furnished on or before the twentieth day of the month commencing immediately after the expiry of such quarter.'*

Accordingly, the NBT Act incorporates the specified provisions of the IR Act No 10 of 2006, as amended, which was in force on the date of enactment, subject to the modifications set forth therein.

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[34] '*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 assessable income and accordingly 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.

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 to the Assessee in writing (commonly known as the letter of intimation) for not accepting the return. 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***

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

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, the learned Counsel for the Appellant argued that the statutory power to make an assessment is coupled with the statutory duty to send the Notice of Assessment and therefore, the Notice of Assessment also should be sent *forthwith*, at or around the time the assessment is made. The learned Counsel for the Appellant contended that a demand for payment forthwith cannot be made with a delayed Notice of Assessment. 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***, upon receipt of the Notice of Assessment. 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 difficulty 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.)[35] 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,*[36] 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 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*[37] 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.*

[35] *Supra* note 9, at p.177.

[36] *Supra* note 6, at p. 237.

[37] *Supra* note 4.

Commissioner of Inland Revenue (C.A.)[38]. 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, Wanasundara J. and Weeraratne J. agreeing with Neville Samarakoon C.J., made no variation to 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*[39] 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[40], 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, '***at or about the time'*** is a time limit with latitude where it is impossible to draw a precise line.

In addition, the appellant contended that in the case of *Wijewardene v. Kathirgamar and another*[41] as well it was concluded that the Notice of Assessment must be sent at or about the time the assessments were made. It is important to note, however, that the Court did not conclude as such and all that was held is that the assessment must be sent around the time it was made.

The letter of intimation dated 7th November 2013 contains an estimated value of services provided by the Appellant and therefore, the letter of

[38] (1981) 2 Sri. L. R. 78.
[39] *Supra* note 4.
[40] Section 95 (1).
[41] Sri Lanka Tax Cases, Vol. IV, at p. 313.

intimation satisfies both the requirements, the reasons for rejecting the return and an assessment on the liable turnover. In addition, the rate at which tax is assessed and the amount of tax payable. Hence, it is clear that the assessment had been *made* before, or at least on the 7th November 2013.

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 liable turnover and assessed the taxpayer accordingly.

In the case of *Stafford Motors*[42] His Lordship Janak De Silva J., (Achala Wengappuli J., agreeing) concluded that the assessment must precede the Notice of Assessment. Their Lordships observed that;[43]

'*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 judgements of D.N. Samarakoon J., (with whom Sasi Mahendran J., agreed) in the cases of *ACL Cables*[44] wherein, quite contrary to the decision made by this Court in the *Stafford Motors*[45] case, it was held that an '*assessment*' becomes a valid assessment only when '*Notice of Assessment*' is given[46]. 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)

[42] *Supra* note 17.
[43] At page 8 of the judgment.
[44] *Supra* note 31.
[45] *Supra* note 17.
[46] At page 30.

Consequently, the assessments were found to be out of time. 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[47]. 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 7th November 2013.

Therefore, in all cases, it is not possible for the Assessor in the present case to subsequently introduce a pre-dated assessment. Therefore, expressing the fear of introducing a false assessment in the case at hand would only be an assumption.

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*[48] 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;

'*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*

[47] *Supra* note 31, at p. 9 and *Supra* note 32, at page 30.
[48] *Supra* note 37.

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* (C.A.)[49] 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.)[50] 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*[51]. 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'*[52]stated that a conclusion in a judgement should state the disposition with maximum clarity and maximum freedom from ambiguity. Accordingly, it is my humble view that His Lordship has not arrived at a definite finding on the above matter.

[49] *Supra* note 31, at p.21.
[50] *Supra* note 37.
[51] *Supra* note 4.
[52] Partidge publishing, at p.199.

As it was observed by His Lordship Janak De Silva J., in the case of *Stafford Motors*[53], 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*[54] and *D.M.S. Fernando and another v. A.M. Ismail*[55] respectively.

In the case of *Walker Sons & Co. (U.K.) Ltd. v. Gunathilake and Others*,[56] Thamotheram J., having considered the Judgement by Basnakyake C.J. in the case of *Bandahamy v. Senanayake*,[57] 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*[58] 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.

The Appellant submitted that the English precedents in this regard do not have any bearing since the applicable laws are different. While I recognize that the laws are not identical and these authorities are not binding on our Courts, I will still refer to those in order to demonstrate that even other jurisdictions have recognized the distinction between making an assessment and issuing a Notice of Assessment.

[53] *Supra* note 17, at p. 9.
[54] *Supra* note 37.
[55] *Supra* note 4.
[56] [1978-79-80] 1 Sri.L.R. 231.
[57] 62 N.L.R. 313.
[58] *Supra* note 17.

In the English case of *Honig and others (Administrators of Emanuel Honig) v. Sarsfield* (*Inspector of Taxes*)[59], 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;[60]

'*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)*[61] it was held that the process of making an assessment consist of (i) the decision to make 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.

[59] (1986) ETC 205.
[60] *Ibid*, at page 349 and 350.
[61] [1991] BTC 9, England and Wales, Chancery Division.

In the case of *C & E Commissioners v. Ley Rififi Ltd*[62] 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 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 7th November 2013, well within two years even from the date of filing the return.

In the aforementioned case of *John Keells*[63], D. N. Samarakoon J., having analysed the facts of the case *Honig and others (Administrators of Emanuel Honig) v. Sarsfield* (*Inspector of Taxes*)[64] expressed the view that the procedure in Engand was different and that the assessment had been '*made*' when the Inspector of Taxes signs the certificate in the assessment book. It was further observed that this was because under the Taxes Management Act of 1970, the Inspector of Taxes was obliged to maintain an assessment book and in this country the IR Act No. 10 of 2006 does not require the Assessor to maintain such a register[65]. However, the assessment book being a document in the custody of the Inspector of Taxes, in my view, an assessee may not have access it. Consequently, as observed by D. N. Samarakoon J., in the cases of *ACL Cables* and *John Keels*[66], there is room

[62] [1995] BBC 55.
[63] *Supra* note 32.
[64] *Supra* note 58.
[65] *Supra* note 32, at p.32.
[66] *Supra* note 46.

for an Assessor to falsify the date of making the assessment. Nevertheless, in Sri Lanka once the reasons for not accepting the return are communicated to the assessee along with the estimated amount of assessable income and the amount of tax payable, the Assessor would not be able to falsify the date of making the assessment subsequently, as D. N. Samarakoon J., was concerned. Therefore, in my view, the Sri Lankan legislation is a step forward from the English legislation on transparency.

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.

The Appellant's argument that the assessment No. 7123214 is time barred is based on the assertion that the Notice of Assessment was received by the Appellant by post after the expiry of the deadline. It was also submitted that even the date of posting is after the expiration of the time bar. However, since this Court has already held that the assessment had been *made* on or before the 7th November 2013, consideration of the above matter will not arise in the instant case.

The Appellant, relying on the assessing instructions issued by the CGIR[67], contended that the CGIR himself has conceded that the Notice of Assessment must be sent within ten working days from the date of the Notice of Assessment. Nevertheless, this Court is not bound by the guidelines issued by the Department of Inland Revenue, unless they are given statutory force through a specific provision in the IR Act. However, Assessors and the other officers are required to follow these guidelines at the departmental level. The issue at hand is whether the assessment had been made within the timeframe and this Court has already decided that making the assessment is independent of the issuance of the Notice of Assessment. Therefore, in all cases, it does not matter when the Notice of Assessment is sent.

In view of the above analysis, I hold that the assessment made in the instant case is not made out of time and therefore, not a nullity. Accordingly, I

[67] At paragraph 88 of the Appellant's Consolidated Written Submissions filed on the 20th October 2022.

hold that the TAC correctly determined that the assessment issued to the Appellant is not time barred and therefore I answer the third question of law in the negative, in favour of the Respondent.

Whether the acknowledgement of appeal by an Assessor bad in law?

The Appellant's contention is that since there was no proper acknowledgement of the appeal, the appeal should be deemed to have been received by the CGIR on the 18th February 2013, the day it was delivered to the CGIR, according to the Appellant. The learned Counsel for the Appellant argued that the Assessor who acknowledged the appeal was not statutorily authorized to acknowledge the appeal made to the CGIR[68]. Based on the above premise, the Appellant argued that the several assessments that are the subject matter of this appeal are time barred. Although the Appellant referred to several assessments, the appeal to the TAC was limited to the three assessments bearing No. 7123212 (1106), 7123214 (1112) and 7123215 (1203)[69] out of which the TAC allowed the appeal in respect of assessment No. 7123212 (1106). Therefore, only two assessments remain for the determination under this question including assessment No. 7123214 (1112) which is also considered in relation to the third question of law.

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

> *'165. (1)-(5)(…).*
>
> *(6) The receipt of every appeal shall be acknowledged within thirty days of its receipt and where so acknowledged, the date of the letter of acknowledgement shall for the purpose of this section, be deemed to be the date of receipt of such appeal. Where however the receipt of any appeal is not so acknowledged, such appeal shall be deemed to have been received by the Commissioner General on the day of which it is delivered to the Commissioner-General."*
>
> *(7)-(3)(…).*
>
> *(14) Every petition of appeal preferred under this section, shall be agreed to or determined by the Commissioner-General, within*

[68] At paragraph 111 of the Appellant's Consolidated Written Submission filed on the 20th October 2022.
[69] At p. 29 of the appeal brief.

a period of two years from the date on which such petition of appeal is received by the Commissioner-General unless the agreement or determination or such appeal depends on-

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

or

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

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

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

Where such appeal is not agreed to or determined within such period, the appeal shall be deemed to have been allowed and tax charged accordingly.'

(15) (...).

First, I will advert to the question whether the acknowledgement of the appeal by E.K.N. Edirisinghe, Assessor, Large Taxpayer's Appeal Unit of the Inland Revenue Department is bad in law.

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

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

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

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

Accordingly, it was argued that in view of the scheme of IR Act, a Commissioner General could specially authorize only a Senior Deputy Commissioner General, a Deputy Commissioner General, Senior Commissioner and a Deputy Commissioner and not an Assessor. The learned Counsel for the Appellant also cited relevant parts of Section 208 which reads thus;

‘208.(1) (…).

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

(3) (…).

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

a) Act under Section 163; or

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

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

(5) (…).

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

One may argue that the deeming provision in section 208 (2) does not permit an Assessor to act on behalf of the Commissioner General.

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

The learned Counsel for the Appellant, profusely referring to Sections 165 (6), 208 and 217 argued that the combined effect of those Sections is that the CGIR himself should acknowledge the appeal. It was submitted that the famous doctrine known as *Carltona* principle, which is a principle of English Constitutional Law is not applicable to the case at hand where there is a statutory power of delegation. The learned Counsel cited the following extract from Lord Woolf, sir Jeffrey Jowell, Catherine Donnelly and Ivan Hare (eds), in *De Smith's Judicial Review*[70] which reads thus;

'*The Carltona principle may be expressly excluded by legislation, but whether it may in addition be excluded by statutory implication remains uncertain. Two situations should be distinguished. Where a power of delegation is expressly conferred by Parliament on a minister, it may compel the inference that Parliament intended to restrict the devolution of power to the statutory method, thus impliedly excluding the Carltona*

[70] [London: Sweet & Maxwell, 8th edn., 2018], at p. 336.

principle. Commonwealth authority, however, suggests that such an implication will not readily be drawn. It has also been suggested that the principle may be impliedly excluded where it appears inconsistent with the intention of Parliament as evinced by a statutory framework of power and responsibilities.

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

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

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

This principle was applied in the case of *Kuruppu v. Keerthir Rajapakse, Conservator of Forests*,[71] wherein Rodrigo, J. quoted the following passage from De Smith's Judicial Review of Administrative Action[72].

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

In the recent past Courts have further extended the doctrine '*Carltona principle'*. In the case of *R. (Chief Constable of West Midlands Police) v. Birmingham Justices.*[73] Sedley LJ. held that;

'There was a distinction to be drawn between 'those offices which are the apex of an organisation itself composed of office-holders or otherwise hierarchically structured, and those offices designated by Parliament because of the personal qualifications of the individual holder'[74]*. In the former case the subordinate officers could act on behalf of their superior to whom Parliament had granted the power and who would take legal responsibility for its exercise. In the latter only the officer actually empowered could act.'*

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

[71] (1982) 1 Sri. L. R. p. 163 at pp.168 and 169.
[72] 2nd Edition, at pp. 290 and 291.
[73] [2002] E. W. H. C. 1087 (Admin); H. W. R. Wade and C. F. Forsyth 11th Edition at p. 268.
[74] Sedley LJ in R (Chief Constable of West Midlands Police) v. Birmingham Justices.

In the case of *Director of Public Prosecutions v. Haw* [75] the concern was whether in the absence of express statutory authorisation the power could be delegated by a superior officer to a subordinate officer. Lord Phillips C. J., held;

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

Dr. Sunil F. A. Coorey, in his scholarly work titled *Administrative Law in Sri Lanka*[76] made the following observations.

'There can be cases where statute requires that the exercise of power by one officer or authority be authenticated certified or communicated by some particular official, and such authentication, certification or communication has been in fact done by a different official. Here, the situation is that actual exercise of power has been by the proper person., but the wrong person has authenticated, certified or communicated such exercise of power. In this type of situation, the law seems to be that as the proper person has in fact exercised the power in question, its authentication, certification or communication by the wrong person does not, for that reason alone, affect the validity of such exercise of power.'

The Assessor E. K N. Edirisinghe, in the acknowledgment signed by him[77] has stated that he has been directed by the CGIR in terms of Section 165 (7) at the Inland Revenue Act to make further inquiry into the appeal. Therefore, in my view the Assessor E. K N. Edirisinghe has signed the acknowledgment on the authority granted by the CGIR.

[75] [2007] E. W. H. C. 1931; H. W. R. Wade and C. F. Forsyth 11th Edition at p. 268.
[76] 4th Edition Vol. I at p. 643.
[77] At pp. 97 & 98 of the appeal brief.

Be that as it may, at this stage it is pertinent to examine whether the acknowledgement of an appeal is a statutory obligation cast upon the CGIR himself.

In the case of *Lanka Ashok Leyland PLC v. The Commissioner General of Inland Revenue*[78] the identical issue of acknowledgment of an appeal had been decided and it was held by the numerically equal bench of this Court that although the statute provides that the appeal has to be submitted to the CGIR, there is no requirement that the acknowledgement also should be made by the CGIR himself. His Lordship Janak De Siva, J. stated at page 6 as follows;

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

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

[78] CA (TAX) 14/2017, decided on 14.12.2018.

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

On reading words into a statute, Bindra states that:[79]

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

On the above issue in our own judgment in *Polycrome Electrical Industries (Pvt) Ltd v. The Commissioner General of Inland Revenue*[80] Dr. Ruwan Fernando J. dealing with delegation of authority cited the following extract from the Indian Supreme Court decision in the case of *Sidhartha Sarawagi v. Board of trustees for the Port of Kolkata and others*[81]

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

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

In view of the above analysis, it is my considered view that the acknowledgment of an appeal is not an act the CGIR himself have to do, and he can delegate his power to another officer authorising him to sign the acknowledgment on his behalf. There may be thousands of taxpayers in Sri Lanka and the acknowledgement of appeals submitted to the CGIR

[79] N. S. Bindra, *Interpretation of Statutes*, Eighth Edition, 1997. at p.452
[80] CA. TAX 0049/2019, decided on 26.03.2021.
[81] [2014] 16 SCC 248.

personally would be an impossible exercise. In my view that the acknowledgment of an appeal is a step within the process of *making further inquiries into the appeal* submitted by the taxpayer. Therefore, I am of the view, the Assessor, acknowledging an appeal acting on the directions given by the CGIR under Section 165 (7) of the Inland Revenue Act is valid in law. The nature of an acknowledgment of an appeal is merely an administrative act. Therefore, the only reasonable inference this Court could draw is that the Assessor has acknowledged the appeal on the implied delegation of authority by the CGIR.

Accordingly, the argument of the Appellant's learned Counsel that the name of the CGIR should have been printed in the letter of acknowledgement pursuant to Section 194 (1) and 194 (5) of the IR Act and whoever acknowledges the appeal, should do so in the name of the CGIR also has no merit.

In terms of Section 165 (14) of the Act every appeal has to be determined by the CGIR within a period of two years from the date of its receipt. On the above analysis I hold the appeal has been duly acknowledged by the Assessor's letters dated 12th March 2014. The CGIR has made his determination on the 1st March 2016, within the stipulated two-year period. Accordingly, the question as to whether the appeal is deemed to be allowed will not arise.

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

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

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

Another submission included in the Appellant's written submission is that the person makes the assessment, gives reasons for not accepting the return and sends the Notice of Assessment should be one and the same person[82]. However, other than the underlying statement in the written submissions, the Appellant did not add any weight to the argument in supporting the

[82] Paragraph 61 of the Appellant's Consolidated Written Submission filed on the 20th October 2022.

argument. Moreover, the Notice of Assessment is not available in the brief to determine by whom the Notice of Assessment was sent.

Above all, in the case of *Illukkumbura Industrial Automation (Private) Limited v. Commissioner General of Inland Revenue*[83], I have already determined (Dr. Ruwan Fernando J. agreeing) 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.

In light of the above analysis, I answer the fourth question of law in the negative, in favour of the Respondent.

Does the income of an insurance broker fall within the scope of the exemption under item (xiii) of Part II of the First Schedule to the NBT Act?

The basic argument advanced by the Appellant is that the brokerage income of an insurance broker is exempt from NBT pursuant to item (xiii) of Part II of the First Schedule to the NBT Act No. 9 of 2009. The Respondent contended that only the turnover from the services of an auctioneer, broker, insurance agent or commission agent in respect of local produce is exempt from NBT and not the entire income.

The Appellant argued that there is no legal basis to read in such a requirement into the above statutory exemption and it was submitted that the exemption is not restricted to services related to local produce.

For clarity, I will reproduce item (xiii) of Part II of the First Schedule to the NBT Act which reads as follows;

> *'**(xiii).** The services of an auctioneer, broker, insurance agent or commission agent of any local produce'*

The Sinhala text, in the official version of the above reads that;

> *'(xiii) යම් දේශීය නිශ්පාදන ද්‍රව්‍යයක වෙන්දේසිකරුවකු, තැරැව්කරුවකු, රක්ෂණ නියෝජිතයකු හෝ කොමිස් නියෝජිතයකු විසින් සලසනු ලබන සේවා'*

The Appellant quoted *Maxwell on The Interpretation of Statutes*[84] and submitted that when construing a taxing statute, one has to look at what is

[83] CA TAX 0005/2016. CA minutes dated 29.09.2022.
[84] [London: Sweet & Maxwell, 1969], P St J Langan (ed), at page 29.

clearly stated; nothing is to be read in and nothing is to be implied. One can only look fairly at the language used.

I agree that where the language is clear, the matter of interpretation would not arise. If the language of a statutory provision is plain, the Court is not entitled to add any word or to subtract anything from it.

At argument, the learned Counsel for the Appellant submitted that there are no brokers or insurance agents for local produce only. Accordingly, the words, *local produce* should only apply to commission agents. The learned Counsel for the Respondent submitted that just as there may not be brokers and insurance agents solely for local produce, there may not be auctioneers solely for local produce. I am in favour of the aforementioned argument of the learned Counsel for the Respondent. It is true that there will be no brokers, insurance agents, auctioneers or commission agents for local products alone. However, it is common knowledge that insurance companies have different types of insurance schemes in their insurance activities. Some companies have coverage for crops that may include a special coverage for local produce. Similarly, an auctioneer, broker or commission agent, among many other services they provide, may also deal with local produce. In such a case, the turnover of the services supplied for any local product would be exempt from the NBT.

The Appellant's argument is that the words *local produce* applies only to the commission agents to whom those words are attached. If the interpretation of the learned Counsel for the Appellant is accepted, the entire turnover of an auctioneer, broker and insurance agent will be exempt from NBT and only the turnover of a commission agent from local produce would be exempted. I see no valid reason for the Legislature to grant such an exemption for the specified categories, other than to promote transactions relating to local products. Furthermore, according to the English text, a commission agent will be entitled to the exemption and, according to the Sinhalese text, an auctioneer will be entitled to the exemption. In my view, such an absurd interpretation would never have been the intention of the Legislature. It is therefore my opinion that the aforementioned argument is unfounded.

I will now refer to N.S. Bindra's *Interpretation of Statutes* on this point. N. S. Bindra has stated as follows;[85]

'(...) In a fiscal or a taxing Act one has to look merely at what is clearly said for there is no room for any intendment nor for any equity nor for any presumption. The only criterion is whether or not the words of the Act have reached the alleged subject of taxation. There is no question of equity.'

N. S. Bindra citing several Indian judgements states as follows regarding interpretating a taxing statute[86];

'*The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any assumed deficiency. There is no equity about a tax and there is no presumption as to tax. Nothing is to be read in and nothing is to be implied. While equitable considerations are of no avail in the construction of taxing statutes, a proper balance must be struck between the essential needs for Revenue of a modern welfare state on the one hand and the desirability that the citizen must know his liability clearly before he can be called upon to contribute to the Revenue on the other.'*

Regarding exemptions from taxation N. S. Bindra cites from Sutherland, *Statutory Construction*, Vol 3, Third Edition, p. 281; which reads as follows[87];

'*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. However, exemption claimed by the state or its sub-divisions are usually liberally construed and the same rule had frequently been applied to exemption made in favour of charitable organisation'*

Further cites Crawford, *Statutory Construction*, p. 506-08;

[85] N. S. Bindra, *Interpretation of Statutes*, Eighth Edition, 1997. At p. 676 quoting *Maxwell on the Interpretation of Statutes*, Twelfth Edition, at p. 256 and three other Indian judgments.
[86] N. S. Bindra, *Interpretation of Statutes*, Twelfth Edition, 2017. at p.871.
[87] *Ibid* at p.878.

'*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.'*

N.S. Bindra further states as follows[88];

'*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.'*

'It is advantageous to quote from Union of India v. (M/s.) Wood Papers Ltd 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 justification of inequitable burden or progressive approach of fiscal provisions intended to augment State revenue.'

Accordingly, I hold that the TAC did not err in law when it concluded that insurance brokerage income does not come within the scope of the exemption under item (xiii) of Part II of the First Schedule to the NBT Act, and therefore, answer the fifth question of law in the negative, in favour of the Respondent.

Did the TAC err in law when it came to the conclusion that it did?

[88] N. S. Bindra, *Interpretation of Statutes*, Eighth Edition, at p.693.

For the reasons set out above, and considering the preceding five questions of law, I hold that the TAC did not err in law when it arrived at the conclusion that the Appellant was liable to pay NBT as assessed.

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

Conclusion

I therefore answer all six questions of law in the negative, in favour of the Respondent.

(1) ***No.***

(2) ***No.***

(3) ***No.***

(4) ***No.***

(5) ***No.***

(6) ***No.***

In light of the answers given to the above six questions of law, acting under Section 11 A (6) of the TAC Act No. 23 of 2011, as amended, I affirm the determination made by the TAC and dismiss this appeal.

The Registrar is directed to send a certify 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