IN THE COURT OF APPEAL OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for a case stated for the opinion of the Court of Appeal under and in terms of section 36 of the Value Added Tax Act, No. 14 of 2002 (as amended), read with section 141 of the Inland Revenue Act, No. 38 of 2000 (as amended) and the provisions of the Tax Appeals Commission Act, No. 23 of 2011 (as amended).

Unilever Sri Lanka Limited,
258, M. Vincent Perera Mawatha,
Colombo 14.

Appellant

Case No. CA/TAX/0004/2013
Tax Appeals Commission
No. TAC/VAT/007/2011

Vs.

Commissioner General of Inland Revenue,
Department of Inland Revenue,
Sir ChittampalamA.Gardiner Mawatha,
Colombo 02.

Respondent

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

M. Sampath K.B. Wijeratne J.

Counsel **:** Dr. K. Kanag-Isvaran, P.C. with Dr. Shivaji Felix with Shivaan Kanag-Isvaran for the Appellant

Farzana Jameel, P.C., S.A.S.G. with
Suranga Wimalasena, D.S.G. and
Shiloma David, S.C. for the Respondent

Argued on	:	21.03.2022
Written Submissions filed on	:	02.06.2022, 23.07.2018, 17.09.2018 & 30.09.2019 (by the Appellant) 07.06.2022, 30.09.2019 & 26.07.2018 (by the Respondent)
Decided on	:	04.11. 2022

Dr. Ruwan Fernando, J.

Introduction

[1] This is an appeal by way of a case stated against the determination of the Tax Appeals Commission dated 14.12.2012 confirming the determination made by the Commissioner General of Inland Revenue on 13.09.2011 and dismissing the Appeal of the Appellant.

Factual Background

[2] The Appellant, Unilever Sri Lanka Ltd is a limited liability company duly incorporated and domiciled in Sri Lanka and carries on the business of manufacturing, producing, marketing and distributing a variety of household items. The Appellant's household items include soap, soap powder, detergents and toilet requisites, and cosmetics under the brand names/trademarks owned by Unilever PLC of the United Kingdom.

[3] The said Unilever PLC, which was incorporated in England and the owner of internationally well-known trademarks on a variety of goods, entered into a Trademark Licence Agreement with the Appellant on 18.09.2002 in respect of all those products listed in Schedule 'B' of the said Agreement under the trade marks specified in the agreement. In terms of the said agreement, the Appellant became the sole and only licensee to use the trademarks on a non-transferable basis in direct connection with the manufacture, packaging, advertising and sale of the products in the territory of Maldives under the trade marks specified in the said agreement.

[4] The Appellant entered into an agreement with R. M. Chemicals Ceylon (Pvt.) Limited (hereinafter referred to as the RMCC) on 14.05.2009 for a period of five years commencing from 01.01.2008 to 31.12.2012. In terms of the agreement between the Appellant and RMCC, RMCC shall manufacture vim dish wash bars bearing the Appellant's trademarks and supply the same to the Appellant subject to the terms and conditions of the agreement.

[5] The Appellant entered into an agreement with Polypak Secco Limited (hereinafter referred to as the PSL) on 30.08.2005, and in terms of the said agreement, PSL shall manufacture toothbrushes bearing the Appellant's trademarks and supply the same to the Appellant subject to the terms and conditions of the agreement.

[6] The Appellant claimed that in terms of the said agreements, the Appellant is not the manufacturer of the said products, but the RMCC and PSL are the manufacturers and suppliers of the said products and that the Appellant is only the buyer and seller of the products in question.

[7] The Appellant submitted its VAT returns for the monthly taxable periods of 24 months from January 2006 to December 2007 on the sale of its trademarked products (Vim dish bars and Signal toothbrushes) and claimed that it is not liable to pay VAT on the value of supply of the said products. The dispute related to the question of whether the Appellant is liable to pay Value Added Tax (VAT) for the monthly taxable periods of 24 months from January 2006 to December 2007, on the sale of its trademarked toothbrushes and vim scourer bars made by RMCC and PSL under the aforesaid agreements. The VAT in dispute amounted to Rs. 350,931,959/.

[8] The Assessor by letters dated 15.06.2009 refused the accept the VAT returns for the relevant 24-month period from January 2006 to December 2007. The Assessor decided that for the following reasons, the Appellant is liable to pay VAT on the value of supplies of Signal toothbrushes and vim dish wash bars as the manufacturer for the purposes of the VAT Act:

1. Taxable supplies derived from the supply of toothbrushes and vim scourer bars (dish wash bars) have not been included in the VAT returns as the value of taxable supplies, and the value of taxable supplies so undeclared during the year 2006 is amounting to Rs. 1,138,042,029 for the taxable periods from

01.01.2006 (06031) to 31.12.2006 (06123) and Rs. 1,400,000,000 for the taxable periods from 01.01.2007 (07031) to 31.12.2007 (07123) as follows:

Year	ToothBrush and Vim Dish Bars
2006	1,138,042,029

Year	ToothBrush and Vim Dish Wash bars
2007	1,400,000,000

2. In terms of the Trade Mark License Agreement, the ownership of the trademarks and the trade names of VIM scourer bars (vim dish wash bars) and Signal toothbrushes belong to Unilever PLC in England, and other than the Appellant (USL), is not permitted to use the aforesaid trademarks and trade names in Sri Lanka. Hence, the exclusive owner of these trademarks and trade names in Sri Lanka is Unilever Sri Lanka Ltd;

3. The Appellant is the sole authorized person in Sri Lanka to manufacture and sell the products bearing the trademarks owned by Unilever, U.K. In terms of the agreements:

(a) Vim scourer bars are manufactured by RMCC and Signal toothbrushes are manufactured by PSL, exclusively on behalf of the Appellant bearing its trademarks and brand names, and RMCC and the PSL have no authority to manufacture or sell the products without the permission of the Appellant;

(b) Vim scourer bars and Signal toothbrushes are manufactured RMCC and PSL respectively, on behalf of the Appellant bearing its trademarks and brand names in accordance with the formulae, specifications, moulding tools and other instructions provided by the Appellant;

(c) RMCC or the PSL cannot claim any right or ownership, or goodwill in any of the trademarks, labels, wrappers, pouches, bags or packages, which they use or apply on the products and packaged materials or finished products used by them and sold to the Appellant as per the agreements;

(d) The Appellant is the exclusive owner of those products and the RMCC or PSL has no right to sell those products owned by the Appellant, therefore, the manufactured goods become the property of the Appellant.

[9] Accordingly, the notices of assessment dated 17.08.2009 were issued by the Assessor, and being dissatisfied with the said assessments, the Appellant appealed to the Commissioner General of Inland Revenue (hereinafter referred to as the

Respondent). The Respondent by its determination dated 13.09.2011 decided that, as per section 83 of the VAT Act, the Appellant has become the manufacturer, and as the exclusive owner of the said products, the Appellant is liable to pay VAT on the supply of goods. Accordingly, the Respondent decided that the supply made by the Appellant on Vim wash bars and Signal toothbrushes should be treated as taxable supplies for the period from January to December 2006 and from January to December 2007.

[10] The Respondent further determined that the assessments made in respect of eight taxable periods i.e. from January, 2006 to August, 2006 were time-barred and accordingly, the Respondentconfirmed the assessments (Vide- reasons for the determination at pp. 128-153 of the TAC brief).

Appeal to the Tax Appeals Commission & the Court of Appeal

[11] Being dissatisfied with the said determination of the Respondent, the Appellant appealed to the Tax Appeals Commission (hereinafter referred to as the TAC). The two issues that arose for the determination before the TAC were whether (a) the supply of Vim dish wash bars and Signal toothbrushes during the twenty-four taxable periods i.e. from January, 2006 to December, 2007, amounting to Rs. 2,538,042,029 was taxable supplies for the purpose of the VAT Act, No. 14 of 2002; and (b) the assessments made in respect of eight taxable periods i.e. from January, 2006 to August, 2006 were statutorily time barred. The TAC in its determination dated 14.12.2012 stated:

> *"Therefore, in view of the substance of the contents of the three agreements referred to and matters clarified in the foregoing discussion, it is determined that the arguments put forward by the Representative for the Appellant cannot be maintained. Accordingly, it is determined that Unilever Sri Lanka Limited, the Appellant company, is the manufacturer in respect of both products, namely, Vim dish wash bars and toothbrushes, for the purpose of the Value Added Tax Act,No. 14 of 2002… [p.109].*
>
> *Accordingly, the supply of Vim dish wash bars and Signal tooth brushes made during the twenty four taxable periods from January, 2006 to December, 2007 for a value amounting to Rs. 2,538,042,029/- are to be determined as taxable supplies for the purposes of the Value Added Act, No. 14 of 2002 [p.109].*
>
> *…in the context of the aforementioned determination made by us relating to the first issue raised by the Appellant, namely, that the Unilever Sri Lanka Limited is not the manufacturer of the two products, it could be determined that the Assessor*

had reasonable grounds to make an opinion that the taxpayer (Appellant Company) has willfully failed to make a full and true disclosure of all the material facts necessary to decide the correct amount of tax payable by the taxpayer. Therefore, it would be necessary for him to make full use of the extended time period provided for in section 33(2) of the VAT Act to enable him to arrive at a considered decision relating to the correct amount of tax payable by the Appellant, …Accordingly, we hold that the five assessments made for the taxable periods from January, 2006 (o6031) to May, 2006 (06062), are not time-barred in terms of section 33(2) of the Value Added Tax Act, No. 14 of 2002" [p. 114].

[12] Accordingly, the TAC concluded that:

(a) The Appellant is the manufacturer in respect of both products, namely, 'Vim dish wash bars' and 'Signal toothbrushes' for the purposes of the VAT Act;

(b) The five assessments made for the taxable periods from January, 2006 (06031) to May, 2006 (06062), were not time barred in terms of section 33 of the VAT Act, and dismissed the appeal.

[13] For those reasons, the TAC confirmed the determination made by the Respondent and dismissed the appeal.

Questions of Law

[14] Being dissatisfied with the determination of the TAC, the Appellant appealed to the Court of Appeal by way of a case stated, and the TAC formulated the following questions of law in the case stated for the opinion of the Court of Appeal:

1. Is the determination of the Tax Appeals Commission time barred by operation of law?

2. Did the Tax Appeals Commission err in law when it came to the conclusion that the assessments for the period January 2006 to July 2006 were not time barred?

3. Did the Tax Appeals Commission err in law when it came to the conclusion that the Appellant was a manufacturer for the purpose of the assessments?

4. Is the determination of the Tax Appeals Commission against the weight of the evidence?

5. In view of the facts and circumstances of the case, did the Tax Appeals Commission err in law when it came to the conclusion that it did?

[15] We heard Dr. Kanag-Iswaran, P.C. and Dr. Shivaji Felix for the Appellant and Mrs. Farzana. Jameel, Senior Additional Solicitor General for the Respondent on all the questions of law.

Analysis

Question of Law No. 1-Time bar of the TAC determination

[16] The learned Counsel for the Appellant submitted that (i) the first date of the hearing commenced on 22.03.2012 before the TAC and the determination was made on 14.12.2012; (ii) In view of the fact that the Tax Appeals Commission (Amendment) Act, No. 4 of 2012) has a retrospective operation, it is deemed to have come into operation on 31.03.2011, the appeal would have been time-barred prior to 17.12.2012.

[17] The learned Counsel for the Appellant further submitted that the operative date for the commencement of the time bar is the date on which it submitted itself to the jurisdiction of the TAC and the term "hearing" as used in section 10 of the Tax Appeals Commission Act, No. 23 of 2011 (as amended prior to 2013), does not refer to an oral hearing. The contention of the learned Counsel for the Appellant was that the word "hearing" in that context has the same meaning as "to hear and determine" referring to Stroud's Dictionary (London, Sweet & Maxwell, 7thedn. Vol. 2) and therefore, the "hearing" does not commence with the oral hearing, but at a point anterior to it when a party submits to the jurisdiction of a tribunal. The Appellant's argument is that the hearing in the case commenced prior to the date of the oral hearing on 22.03.2012 and therefore, the Appellant's appeal before the TAC was time barred by operation of law at the time that the determination was made.

[18] The learned Senior Additional Solicitor General however, countered the submission of the Appellant and submitted that the word "hearing" in section 10 of the Tax Appeals Commission Act, No. 23 of 2011 is clearly an 'oral hearing' as determined by the Court of Appeal in *Mohideen v. Commissioner General of Inland Revenue* (2015) XXI BASL Law Journal p. 171). She submitted that the first oral hearing was on 22.03.2012 and the determination was made on 14.12.2012 and accordingly, the determination of the TAC has been made within a period of 270 days as required by the Tax Appeals Commission Act, No. 23 of 2011 as amended.

[19] The learned Senior Additional Solicitor General further submitted that the time limit specified in Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 is

not mandatory, but rather directory, and the failure to adhere to the time limit specified in the Tax Appeals Commission Act, No. 23 of 2011 cannot render the TAC *functus officio* to hear and determine the appeal. She relied on the decisions of this Court in *Stafford Motor Company Limited v. The Commissioner General of Inland Revenue* (CA /Tax/17/2017, decided on 15.03.2019).

[20] The time limit for the determination of appeals by the Tax Appeals Commission was originally contained in Section 10 of the Tax Appeals Commission Act, No. 23 of 2011, which stipulated that the Tax Appeals Commission shall make the determination within a period of **one hundred and eighty days** from the date of the commencement of the hearing of the appeal. It reads as follows:

> *"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".*

[21] Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 was amended by Section 7 of the Tax Appeals Commission (Amendment) Act, No. 4 of 2012, which stipulated that the determination of the Commission shall be made within **two hundred and seventy days**. In terms of Section 13 of the said Act, the amendment was to have retrospective effect and was deemed to have come into force from the date of the Principal Act (i.e. 31.01.2011). Accordingly, Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 as amended by the Tax Appeals Commission (Amendment) Act, No. 04 of 2002 read as follows:

> *"The Commission shall hear all appeals received by it and make its determination in respect thereof, within **two hundred and seventy days from the date of the commencement of the hearing of the appeal".***
>
> *Provided that, all appeals pending before the respective Board or Boards of Review in terms of the provisions of the respective enactments specified in the Schedule to this Act, shall with effect from the date of coming into operation of this Act be deemed to stand transferred to the Commission, and the Commission and the Commission shall make its determination in respect of thereof, within twelve months of the date on which the Commission shall commence its sittings notwithstanding anything contained in any other written law."*

[22] However, the amended Act, No. 4 of 2012 only amended the period for the determination of the appeal from 180 days to 270 days from the date of the hearing. Accordingly, the fact that the Tax Appeals Commission (Amendment) Act, No. 4 of 2012 was retrospective operation, and deemed to have come into

operation from 31.03.2011, will make no difference since the amended Act did not take away the word "hearing", which is nothing but "oral hearing" as held by Gooneratne, J. in *Mohideen v. Commissioner-General of Inland Revenue* (supra),

[23] The question that arose for decision in *Mohideen v. Commissioner-General of Inland Revenue* (supra), was whether the commencement of the time bar as contemplated in section 140 (10) of the Inland Revenue Act, No. 38 of 2000 will operate from the date on which the Appellant submitted to the jurisdiction of the Board of Review according to the Appellant, on receipt of the Petition of Appeal by the Board or from the date of the oral hearing. Section 140 (10) of the Inland Revenue Act, No. 38 of 2000 as amended by Section 52 of the Inland Revenue (Amendment) Act, No. 37 of 2003 contained 2 provisos, and the intention as regards time limit is reflected in the second proviso to section 140 (10), which reads as follows:

> *"Provided, however, the Board shall make its determination or express its opinion as the case may be,* ***within two years*** *from the date of commencement of the hearing of such appeal."*

[24] The submission of the Appellant in that case was that the legislative intention was to dispose of both appeals within **a total period of four years and** the time limit of 2 years will begin to operate from the date on which the **Petition of Appeal is received** by the Board of Review, and **not from the date of the oral hearing**. The State argued however that the legislative intention by the use of the word "hearing" in section 140(10) of the Inland Revenue Act, No. 38 of 2000 means an "oral hearing" and no more". His Lordship Gooneratne J. answered this question at pp. 176-177 as follows:

> *"It is very unfortunate that it took almost 6 ½ years or more to reach its conclusion from the date of filing the Petition of Appeal in the Board. But the oral hearing commenced on 21.06.2006. This of course is well within the time limit and I would go to the extent to state that the Board has been very conscious of early disposal of the appeal. The Board cannot be faulted for getting the appeal fixed for hearing as stated above, since it is the duty and function of the Secretary of the Board to fix a date and time for hearing and to notify the parties. If it was the intention of the legislature that hearing 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 difficult to make express provision, in that regard. I do agree with the view of the State Counsel.* ***Hearing no doubt commences from the date of oral hearing. I would as such answer this question in favour of the Respondent and endorse the view of the Board of Review.*** *It is not time barred as the Board arrived at the determination within 2 years." [Emphasis added]*

[25] For those reasons, His Lordship Gooneratne J. having considered the question involved (Question No. 2), held with the Respondent on the basis that the hearing for the calculation of time limit of 2 years specified in section 140 (10) commences 'from the date of the oral hearing' and 'not from the date of filing of the petition of appeal'. I have no reason to deviate from the view taken by Gooneratne, J. in *Mohideen v. Commissioner-General of Inland Revenue* (supra). I hold that when the legislation provides that when the Commission shall hear all appeals received by it and make its determination, **within two hundred and seventy days of the time of the commencement of the hearing of the appeal** [(prior to the Tax Appeal Commission (Amendment) Act, No. 20 of 2013)], the hearing commences ***from the date of oral hearing.*** The oral hearing in the present case commenced on 22.03.2012 and the determination was made by the TAC on 14.12.2012 and therefore, the determination of the appeal by the TAC is not time barred in terms of section 10 of the Tax Appeals Commission Act, No. 23 of 2011 as amended by the Tax Appeals Commission (Amendment) Act, No. 04 of 2012.

[26] I will now turn to the submission made by the learned Additional Solicitor General that the word "shall" used in section 10 is normally to be interpreted as connoting a (directory) and not mandatory provision. She submitted that the effect of any breach does not render the determination invalid in the absence of any consequences being specified in the legislation. Her submission was that the Tax Appeals Commission Act does not spell out any sanction for the failure on the part of the Tax Appeals commission to comply with the time limit set out in section 10 of the Tax Appeals Commission Act. She invited us to hold that the time limit set out in section 10 of the Tax Appeals Commission Act is only directory, and not mandatory.

Mandatory-directory classification

[27] Section 10 of the Tax Appeals Act stipulates that the Tax Appeals Commission **shall** make its determination within 270 days of the commencement of the hearing of the appeal. Superficially, the effects of non-compliance of a provision are dealt with in terms of the mandatory-directory classification. Generally, in case of a mandatory provision, the act done in breach thereof is void, whereas, in case of a directory provision, the act does not become void, although some other consequences may follow (P.M. Bakshi, Interpretation of Statutes, First Ed, 2008422). But, the use of the word "shall" does not always mean that the provision is obligatory or mandatory, as it depends upon the context in which the word "shall" occurs and the other circumstances (Vide-Indian Supreme Court case of *The Collector* of *Monghyr v. Keshan Prasad Goenka,* AIR 1962 SC 1694 at p. 1701).

[28] Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 (as amended) does not say what will happen if the TAC fails to make the determination within the time limit specified in Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 (as amended). It is true that the absence of any provision does not necessarily follow that the statutory provision is intended by the legislature to be disregarded or ignored. Where the sanction for not obeying them in every particular statute is not prescribed, the court must judicially determine whether the legislature intended that the failure to observe any provision of a Statute would render an act null and void or leave it intact (see also, N.S. Bindra's Interpretation of Statute, 10th Ed. p. 1013).

[29] The question as to whether a statute is mandatory or directory is a question which has to be adjudged in the light of the intention of the Legislature as disclosed by the object, purpose and scope of the statute. If the statute is mandatory, the act or thing done, not in the manner or form prescribed can have no effect or validity, and if it is a directory, a penalty may be incurred for non-compliance, but the act or thing done is regarded as good (P.M. Bakshi, Interpretation of Statutes, p. 430 &*Mohanlal Ganpatram v. Shri SayajiJubliee Cotton and Jute Mills Co. Ltd* AIR 1966 Guj. 96). *In State of U.P., v. Baburam Upadhya*, reported in AIR 1961 SC 751, the Supreme Court of India said that when a statute uses the word "shall", prima facie, it is mandatory, but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute.

[30] In the absence of any express provision, the intention of the legislature is to be ascertained by weighing the consequences of holding a statute to be directory or mandatory, having regard to the importance of the provision in relation to the general object intended to be secured by the Act [*(Caldow v. Pixcell* (1877) 1 CPD 52, 566) & *Dharendra Kriisna v. Nihar Ganguly* (AIR 1943 Cal. 266)]. As held in *Attorney General's Reference (No 3 of 1999),* the emphasis ought to be on the **consequences of non-compliance, and asking the question whether Parliament can fairly be taken to have intended total invalidity**.

[31] Although the Tax Appeals Commission Act, No. 23 of 2011 (as amended) was amended by Parliament twice and increased the period within which the appeal is to be determined by the Commission from 200 days to 270 days with retrospective effect, the legislature in its wisdom did not specify any penal consequence or any other consequence of non-compliance of the time bar specified in Section 10 of the Tax Appeals Commission Act. Had the legislature intended that the non-compliance with Section 10 to be mandatory, it could have easily included a

provision with negative words requiring that an act shall be done in no other manner or at no other time than that designated in the Section or a provision for a penal consequence or other consequence of non-compliance.

[32] The legislature in its wisdom has placed time limit for the speedy disposal of appeals filed before the Commissioner-General, and the overall legislative intention sought to be attained by the Inland Revenue Act in Section 165 (14) was to ensure that an appeal before the Commissioner-General of Inland Revenue is disposed of within a period of 2 years from the date on which the Petition of Appeal is received. As the Commissioner-General is an interested party against another interested party (tax payer) in the tax collection, it shall determine the appeal within 2 years from the receipt of the Petition of Appeal and if not, the appeal shall be deemed to have been allowed and tax charged accordingly, so as to safeguard the rights of the taxpayer

[33] The object sought to be attained by Section 10 of the Tax Appeals Commission Act has been designed primarily to expedite the appeal process filed before the Tax Appeals Commission, which was established by an Act of Parliament, comprising retired Judges of the Supreme Court or the Court of Appeal, and those who have gained wide knowledge and eminence in the field of Taxation.

[34] The legislature has, from time to time, extended and reduced the time period within which the appeal shall be determined by the Tax Appeals Commission, but it intentionally and purposely refrained from imposing any consequence for the failure on the part of the Tax Appeals Commission to adhere to the time limit specified in Section 10. It is crystal clear that these procedural time limit rules have been devised by the legislature to facilitate the appeal process by increasing and reducing the time period within which such appeals shall be concluded. The provision for the determination of an appeal by the Tax Appeals Commission within a period of 270 days from the commencement of its sittings for the hearing of an appeal. It has been designed to regulate the duties of the Tax Appeals Commission by specifying a time limit for its performance as specified in Section 10 of the Act.

Impossibility to adhere to the time limit

[35] Apart from the absence of reference to penal sanction and other consequences of non-compliance of Section 10, the impossibility of adhering to the time limit provision is also a factor in influencing the court to construe the time limit provision is not mandatory, but as directory only. I shall now proceed to consider the submission made by the learned Senior Additional Solicitor General that the delay,

if at all, was purely due to practical reasons in appointing members to the Commission.

[36] The appeal was made to the TAC on 01.11.2011. The TAC in the case stated has explained that since the three members appointed to the TAC did not conform to the composition provided in section 2(2) of the Tax Appeals Commission Act, the commission was not properly constituted to hear the appeal. Paragraph 2 of the case stated reads as follows:

> *"As the three members appointed to the Tax Appeals Commission did not conform to the composition provided in section 2 (2) of the TAC Act, No. 23 of 2011, the Tax Appeals Commission was not properly constituted and as a result, it lacked the jurisdiction to hear appeals in respect of matters relating to imposition of any tax, levy or duty. Therefore, it became necessary to amend the law to make the three members appointed to function as a legally and properly constituted body having the jurisdiction to hear tax appeals. Accordingly, the Tax Appeals Commission (Amendment) Act, No. 4 of 2012 was passed, making certain amendments to the TAC Act, No. 23 of 2011. Therefore, the properly constituted Tax Appeals Commission came into being and thereafter commenced its sittings for the first time on 08.03.2012".*

[37] It seems to me that it was practically impossible for the Commission to hear the appeal within the time limit specified in section 10, as the Commission was not properly constituted in terms of the provisions of the Tax Appeals Commission Act, No. 23 of 2011. When the Tax Appeals Commission (Amendment) Act, No. 04 of 2012 was passed making relevant amendments, the Commission was properly constituted, and it commenced the hearing on 22.03.2012, and made the determination on 14.12.2012. I do not think that the legislature intended that the time limit specified in Section 10 is mandatory where it is impossible for the Commission to make its determination within such period due to practical reasons. The legislature could not have intended that the time limit specified in section 10 is mandatory when the parties had no control over those entrusted with the task of making the determination under section 10 of the Tax Appeals Commission Act.

[38] In *Stafford Motor Company Limited v. The Commissioner General of Inland Revenue (supra),* Janak de Silva, J. held that the Tax Appeals Commission Act, No. 23 of 2011 (as amended) does not spell out any sanction for the failure on the part of the Tax Appeals commission to comply with the time limit set out in Section 10 of the Tax Appeals Commission Act.

[39] We took the same view in our judgments in *Mr. S.P. Muttiah v. The Commissioner General of Inland Revenue,* CA/TAX/46/2019, decided on 26.06.2021

and *Amadeus Lanka (Pvt) Ltd v. CGIR* (C. A Tax 4/19 decided on 30.07.2021.In *Mr. S.P. Muttiah v. The Commissioner General of Inland Revenue*, we further held that the directory interpretation of Section 10 is consistent with the object, purpose and design of the Tax Appeals Commission Act, which is reflected in the intention of the legislature. We held that if a gap is disclosed in the Legislature, the remedy lies is an amending Act and not in a usurpation of the legislative function under the thin disguise of interpretation.

[40] In *S.P. Muttiah v. Commissioner General of Inland Revenue* (supra), this Court held at page 77 and 78;

> *"If we interpret the legislative intent of Section 10 from its mere phraseology, without considering the nature, purpose, the design, the absence of consequences of non-compliance and practical impossibility, which would follow from construing it one way or the other, it will tend to defeat the overall object, design, the purpose and spirit of the Tax Appeals Commission Act"*.

[41] For those reasons, I hold that having considered the facts and he circumstances and legal principles, the failure to adhere to the time limit specified in Section 10 was not intended by the legislature to be mandatory with painful and drastic consequences of rendering such determination null and void. The directory interpretation of Section 10 is consistent with the object, purpose and design of the Tax Appeals Commission Act, which is reflected in the intention of the legislature. In the result, I hold that the determination of the Tax Appeals Commission in the present case is not time barred and thus, I answer the Question of Law No. 1 in favour of the Respondent.

Question of Law, No. 3

Is the Appellant the manufacturer as contemplated by section 3(1)(a) of the VAT Act?

[42] The next question is to decide, whether from the facts and circumstances of the case, the Appellant can be treated as the manufacturer of the products in question within the meaning of section 3(1)(a) of the VAT Act, No. 14 of 2002. At the hearing Dr. Kanag-Isvaran submitted that in terms of section 3 of the VAT Act, the wholesale and retail supply of goods is exempted from the VAT unless the said wholesale or retail supply of goods is carried out by a manufacturer or importer of such goods sold by the retailer or wholesale supplier. Dr. Kanag-Isvaran further submitted that section 83 of the VAT Act defines the term "manufacture", and in terms of the definition, it must be established by the Respondent that the Appellant

is engaged in the manufacturing activity of making of an article. His contention was such activity shall relate to the assembling or joining of an article by whatever process adapting for sale any article, packaging, bottling, putting into boxes, cutting, cleaning, polishing, labelling or in any other way preparing an article for sale other than in a wholesale or retail activity.

[43] Dr. Kanag-Isvaran submitted that no part of the agreement entered into between RMCC/PSL with the Appellant indicates that the Appellant is undertaking a manufacturing function, and the manufacturing function is undertaken by RMCC and PSL. His submission was that the Appellant has not in any way participated or engaged in any of the activities referred to, under the definition "manufacture" in section 83 of the VAT Act. He submitted that RMCC and PSL who run their own business in their own facilities and purchase their raw material and manufactured the products in question with their own labor and own expertise. He contended that in the present case, RMCC and PSL are physically engaged in contract manufacturing activities, and manufactured products on their own and the Appellant has merely purchased goods manufactured by contract manufacturers.

[44] Dr. Kanag-Isvaran's submission was that the Appellant only provided specifications, moulds and colours or ingredients to be added on, in order to differentiate the shape of the products which are the usual practices in any field of business. Dr. Kanag-Isvaran however, argued that such practices cannot be construed to classify the Appellant as the manufacturer. He further submitted that RMCC and PSL are contract manufacturers, and a contract manufacturer is in law regarded as the manufacturer. His contention was that in the absence of any statutory provision, the concept of a deemed manufacturer cannot be applied in respect of the supply of goods.

[45] His second argument was that the Appellant has paid VAT on the supplies made by the contract manufacturers but the Appellant did not claim an input credit in respect of such purchases or charged VAT for persons to whom it had sold these goods since it is only engaged in the activity of buying from the contract manufacturers. He contended that the Appellant has not claimed input tax credit in respect of such purchases and thus, it has not charged VAT for persons to whom it has sold goods. He further submitted that RMCC and PSL are registered with the Inland Revenue Department as manufacturers for VAT purposes, and issued VAT invoices in respect of the present transaction indicating that they have made supplies of goods. His third argument was that the Appellant is only engaged in buying and selling products manufactured by the RMCC and PSL, and therefore,

the Appellant does not fall within the statutory definition of a "manufacturer" for the purposes of the VAT Act.

[46] On the other hand, the learned Senior Additional Solicitor General submitted that the wholesale and retail supply of goods is carried out by a manufacturer or importer are subject to VAT. She submitted, however, that the different acts which are covered under the definition of "manufacture" do not necessarily coincide with the person who is deemed to be the manufacturer for the purposes of the VAT Act.

[47] Her submission was that the Appellant is engaged in the exploitation of intangible property as a sole and only licensee of Unilever, in terms of Article 3 of the Trade Mark Agreement in connection with the manufacture, packing, advertising and sale of Unilever products. She further submitted that the exploitation of intangible property is a taxable activity as defined in section 83 of the VAT Act. Her contention was that in terms of section 3 of the Trade Mark Agreement, the Appellant cannot sub license the trademarks, but can only exploit intangible property, exclusively and therefore, the supplies made by the Appellant are taxable supplies within the meaning of section 83 of the VAT Act.

[48] She further submitted that despite the fact that the Appellant was not physically engaged in the manufacture of the products, and the manufacturing takes place in the premises of RMCC and PSL using their raw materials, the degree of control vested in the Appellant throughout the manufacturing process, unequivocally established that it is the manufacturer. Her contention was that the RMCC and PSL are only providing contract services to the Appellant and the manufacturing of goods had been done by RMCC and PSL subject to full control and supervision of the Appellant.

[49] She specifically drew our attention to the articles of the agreements which deal with the involvement of the Appellant in connection with the product manufacturing activities done by RMCC and PSL and submitted that they were under direct supervision, direction and control of the Appellant. Accordingly, she argued that the Appellant who carried out manufacturing activities is directing involved in the manufacturing activities defined in section 83 and therefore, the Appellant is the actual manufacturer of goods bearing the Appellant's trademarks.

Statutory provisions

[50] Before embarking upon the rival contentions of the parties, I may proceed to consider the relevant statutory provisions which have a bearing on the issue. The

scope for the imposition of VAT is provided for in section 2 of the VAT Act. Section 2 of the VAT Act provides that, subject to the provisions of the VAT Act, the Value Added Tax (VAT) shall be charged-

*(a) at the time of supply, on every **taxable supply** of goods or services made in a taxable period, by a registered person in the course of the carrying on, or, or carrying out, of a **taxable activity** by such person in Sri Lanka;*

(b) on the importation of goods into Sri Lanka, by any person,

and on the value of such goods or services supplied or the goods imported, as the case may be subject to the provision of section 2A, at the rates more fully specified in the said section.

[51] In terms of section 2 of the VAT Act, in order to render the relevant supply of goods and services liable to VAT, the said supply has to be a taxable supply of goods or services made by a registered person and made in the course of carrying out a taxable activity. The terms "supply of goods", "taxable supply" and "taxable supply", "taxable activity" are defined in section 83 of the VAT Act.

"Supply of goods" means the passing of exclusive ownership of goods to another as the owner of such goods or under the authority of any written law and includes the sale of goods by public auction, the transfer of goods under a hire purchase agreement, the sale of goods in satisfaction of a debt and the transfer of goods from a taxable activity to a non-taxable activity".

"Supply of services" means any supply which a supply of goods, but includes any loss incurred in a taxable activity for which an indemnity is due".

"Taxable supply" means any supply of goods or services made or deemed to be made in Sri Lanka which is chargeable with tax under this Act and includes a supply charged at the rate of zero percent other than an exempt supply".

"Taxable activity" means-

(a) Any activity carried on as a business, trade, profession or vocation other than in the course of employment or every adventure or concern in the nature of a trade;

(b) The provisions of facilities to its members or others for a consideration and the payment of subscription in the case of a club, association or organization;

(c) Anything done in connection with the commencement or cessation of any activity or provision or facilities referred to in (a) or (b);

(d) The hiring or leasing of any movable property or the administration of any property;

(e) The exploitation of any intangible property such as patents, copyrights or other similar assests where such asset is registered in Sri Lanka or the owner of such asset is domiciled in Sri Lanka".

Exemption of wholesale and retail supply of goods

[52] The imposition of VAT is, arrived at after taking into account the various exemptions and deductions allowed under the provisions of the VAT Act. In terms of section 3 of the VAT Act. Section 3 of the VAT Act sets out the exceptions to the imposition of VAT specified in section 2 and provides that the wholesale and retail supply of goods are exempted from the VAT unless the said wholesale or retail supply of goods is carried out by a manufacturer or importer of such goods. Section 3 reads *inter alia*, as follows:

"Notwithstanding the provisions of section 2, the tax shall not be charged on the wholesale or retail supply of goods, other than on the wholesale or retail supply of goods, by

(a) a manufacturer of such goods; or

(b) .....

[53] It is clear that the intention of the legislature is to provide the benefit to a person who is engaged in the wholesale or retail supply of goods, and not to a manufacturer who is engaged in the wholesale and retail supply of goods. The main reason for which the Assessor disallowed the exemption sought by the Appellant was that the Appellant was, in terms of the articles of the agreements, is the manufacturer of the products in question.

[54] Now the question of whether the supply of Vim dish wash bars and Signal toothbrushes is a taxable supply made in the course of the carrying out, of a taxable activity by the Appellant depends on the answer to the question whether or not the Appellant is the "manufacturer" within the meaning of section 3(1)(a) of the VAT Act.

[55] The Appellant's case is that the Appellant is not the manufacturer of the goods in question as it is not engaged in or participated in the manufacturing activities detailed in the definition of "manufacture" in section 83. Thus, the Appellant's

contention is that though it is in the business of wholesale/retail supply of goods as a non-manufacturer, and purchased the goods, the real manufacturer is RMCC and PSL who manufactured the products using their raw materials, labor and facilities.

[56] The VAT Act defines the term "manufacture" in section 83 of the VAT Act as follows:

> *"Making of any article, the assembling or joining of an article by whatever process, adapting for sale any article, packaging, bottling, putting into boxes, cutting, cleaning, polishing, wrapping, labelling or in any other way preparing an article* ***for sale*** *other than in a wholesale or retail activity"*.

[57] The Appellant strongly relies on the word "means" used in the definition of "manufacture" and argues that it is an exhaustive definition and therefore, it is restricted to the activities detailed in the definition of "manufacture" in section 83 of the VAT Act. In summary, the Appellant's argument is that where the word "means" is used, the meaning of the word has been restricted to the activities detailed in the definition and therefore, no other meaning can be assigned to the expression than is put down.

[58] It is my opinion, that a mere process or activity using labour, facility and substance (i.e. raw material) will not tantamount to manufacture as defined in section 83, unless there is a transformation of numerous processes defined in section 83, into a new substance (finished product) **for sale** with certain identifiable characteristics. The definition of "manufacture" in section 83 makes it very clear that it is used to mean any such manufacturing process or activity which transforms the substance into a new substance (finished product) **for sale** with certain identifiable characteristics known to the market. The Indian Supreme Court in *Union of India v. New Delhi Cloth & General Mills Co. Ltd.* AIR (1963) SC 791, held in paragraph 11 that:

> *"The word "manufacture" used as a verb is generally understood to mean as "bringing into existence a new substance" and does not mean merely "to produce some change in a substance", however minor in consequence the change may be. This distinction is well brought about in a passage thus quoted in Permanent Edition of Words and Phrases, Vol. 26, from an American judgment. The passage runs thus: -*
>
> *'Manufacture' implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But*

something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use."

[59] From the wording of section 83, it is clear that a manufacture is a process of transforming or turning any substance (i.e., raw material) or part thereof into a new substance (finished product) **for sale** having a distinctive character, name, and quality through the activities defined in section 83. The VAT Act, however, does not define the term "manufacturer". The Appellant, however, argues that based on the definition of the term "manufacture" in section 83, a manufacturer should be considered as a person who is engaged in the manufacturing activities defined in section 83 and no other meaning can be assigned to a manufacturer.

[60] The argument of the learned Senior Additional Solicitor General is, however, that the VAT Act does not describe what physical acts would amount to "manufacture". She argued that the definition of "taxable activity" in section 83 sets out five different activities and the Appellant's activities are captured within the scope of the definition "taxable activity".

[61] Now the first question is whether the manufacturer, for the purposes of the VAT Act can only be a person who is himself engaged in physical activities defined in section 83 of the VAT Act. The second question is whether a person who engages a third party to manufacture goods for and on his behalf, through the activities detailed in section 83, could be regarded as the manufacturer for the purposes of the VAT Act. The answer to this question depends on the substance of the agreement, the nature of the relationship, obligations and involvement of the parties in carrying out the activities defined in section 83 of the VAT Act.

[62] The Appellant strongly rely on the following articles of the agreements (Vide-paragraphs 5-6 of the written submissions dated 23.07.2018) to support its contention that it has not undertaken any functions defined in section 83 of the VAT Act to be regarded as the manufacturer. The Appellant's stand is that it is only engaged in the business of buying and selling, and nothing more.

[63] The relevant parts of the two agreements relied on by the Appellant are as follows:

Agreement between the Appellant and the RMCC

"3.1 RMCC shall manufacture VIM Bar, and other products at the aforesaid premises solely for and as per specification communicated by USK to them from time to time and shall supply the same to USL as per the terms and conditions of this Agreement;

4.3. In accordance with the specifications and quantities communicated by USL, RMCC will on its own arrange to purchase all raw materials, packing material, bags, wrappers, pouches, labels and other inputs for the manufacture of the aforesaid finished products.

4.4. It is specifically clarified that as regards packaging material and the use of aforesaid trademarks, it would be the responsibility of RMCC to arrange to procure wrappers, pouches, bags and other packing material in full conformity with the specifications and approved suppliers of UCL for such design, artworks, etc. Before finalizing and using the said packing material for packaging finished products manufactured and sold by them to USL, as per the terms of the agreement.

8.3. RMCC expressly declares and agrees that they shall not claim any right or ownership, or goodwill in any of the trademarks, labels, wrappers, pouches, bags or packages which they use or apply on the products and/or packaged material used by them in the manufacture of finished products and sold to USL as per this Agreement.

Agreement between the Appellant and PSL

1. *PSL will manufacture, sell and supply Toothbrushes (hereinafter referred to as the product) to USL bearing their brand names as specified and made to their quality specifications and in quantities and as per delivery schedules indicated to PSL from time to time on Purchase Orders issued by USL…*

   The products to be manufactured and supplied by PSL and the technical /quality specifications thereof will be as set in Appendix 2 to this contract, and may be modified/extended as necessary with the mutual consent of the parties.

2. The Responsibilities of PSL

   2.1 To manufacture and pack the product as per specifications and quality standards set by USL and communicated in writing and updated as necessary from time to time.

   2.2 To carry out optimum production planning and resource allocation.

   2.3 The accurate transfer of finished goods from PSL's premises to USL Distribution Centre or designated Third Party warehouse, at a minimum daily frequency or as directed by USL".

[64] On the basis of those articles, the Appellant invites us to hold that RMCC and PSL, being contract manufacturers must be held to be the "manufacturer" for the purposes of the VAT Act and that the Appellant is only engaged in the business of the buying and selling of goods manufactured by RMCC and PSL. As the parties

sought to interpret the term "manufacturer" used in the agreements in a different manner, the Court must first find out the true meaning and the substance of the transaction, and the way in which the Appellant carried on business with RMCC and PSL.

Interpretation of written contracts

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

General Rule- Textualism

[66] It is settled law that in the true construction of a written agreement between the parties, the general rule is to ascertain what were the mutual intentions of the parties as set out in the contractual words of the agreement. Lord Diplock in *Pioneer Shipping Ltd. and Others Respondents v B.T.P. Tioxide Ltd.*(1982) A.C. H.L, at p. 736 stated:

> *"The object sought to be achieved in construing any commercial contract is to ascertain what were the mutual intentions of the parties as to the legal obligations each assumed by the contractual words in which they (or brokers acting on their behalf) chose to express them; or, perhaps more accurately, what each would have led the other reasonably to assume were the acts that he was promising to do or to refrain from doing by the words in which the promises on his part were expressed".*

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

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

From text to Context - contextualism

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

> *"(i) Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation;*
>
> *(ii) Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement;*
>
> *(iii) The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements;*
>
> *(iv) Some agreements may be successfully interpreted principally by textual analysis, for example, because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals;*
>
> *(v) The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example, because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement.*

Real Intention of the parties preferred to grammatical sense

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

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

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

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

as the present, when identifying the true nature and substance of the agreement in the following passage:

> *"The construction of a document is not a game with words. It is an attempt to discover what a reasonable person would have understood the parties to mean. And this involves having regard not merely to the individual words they have used, but to the agreement as a whole, the factual and legal background against which it was concluded and the practical objects which it was intended to achieve. Quite often this exercise will lead to the conclusion that although there is no reasonable doubt about what the parties meant, they have not expressed themselves very well. Their language may sometimes be careless and they may have said things which, if taken literally, mean something different from what they obviously intended..."*

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

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

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

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

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

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

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

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

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

"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v. Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101 , para 14. And it does so by focusing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions".

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

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

[79] In P.*T. Weerasinghe v Commissioner General of Inland Revenue,* CA/TAX/0002/2013 decided on 29.07. 2022, the Court of Appeal held:

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

[80] In the context, it is the substance of the contract document as a whole has to be taken into consideration, and not merely the form in which a word is used, as there may be different types of contracts that may closely resemble the commercial contracts such as in the present case.

Different types of manufacturing arrangements

[81] Apart from the dispute at hand, the question which arises for our consideration is whether in substance, the said contract was a contract for buying and selling or a contract for a supply of goods or services, or a contract for manufacture and supply, or a contract for mere work and labour.

[82] As major manufacturing companies carry out the manufacturing activity or processs, partly or in their own, or partly by outsourcing various activities on job work or by way of licensing or contract manufacturing etc. to save money or labour costs and ovoid setting up and maintain manufacturing facilities. There could be various manufacturing arrangements in the manufacturing industry where manufacturing is performed by a full-fledged manufacturer or a licenced manufacturer or a contract manufacturer or a toll manufacturer or other manufacturing service providers. They are involved in multiple manufacturing, packaging, testing steps at sites, procuring and providing raw materials, semi-finished and intermediate product or finished product, and different types of services including supply of goods ancillary to services in the supply chain.

[83] As various outsourcing activities in the manufacturing industry can take different forms, we have to give a meaningful expression to the term "manufacturer" that falls within the meaning of section 3(1)(a) of the VAT Act having regard to the obligations and activities intended by the parties to be performed in a commercial agreement.

[84] The Appellant submits that the substance of the agreements with RMCC and PSL is one of contract manufacturing in which the contract manufacturer is

performing the manufacturing function and thus, the contractual manufacturer is regarded in law as the manufacturer unless there is a statutory deeming provision in law that the party who engages a contract manufacturer is also a manufacturer by operation of law.

Contract Manufacturing Services

[85] A contract manufacturing service is an outsourced arrangement by large companies who hire a contract manufacturer or a manufacturing service provider; (i) to produce goods or provide services for and on their behalf; (ii) increase production capacity or efficient services and get higher profitability and save production/service costs or labour related matters. These outsourcing services are used by large companies who do not have manufacturing facilities on their own or whose facilities to inadequate for large scale production and avoid production or service costs, large facilities and labour matters.

[86] A contractual manufacturer is hired by a large manufacturing company to manufacture goods for and on its behalf, but the principal manufacturer directly bears demand and final customer pricing risk, provided the products made by the contract manufacturer comply with the principal's product and quality specifications and supervision (TP in the manufacturing sector:Transformation and new challenges, Kaoru Dahm, Richard Sciacca, Juan Sebastian Lleras & Daisuke Hagiwara,

(https://www.internationaltaxreview.com/article/2a699o5qjycho4pib708w/tp-in-the-manufacturing-sector-transformation-and-new-challenges).

[87] The contract manufacturer owns plant and equipment and labour and procures raw materials, according to the standards agreed with the principal manufacturer, and in many instances performs some activities that are ancillary to its licensed or full-fledged manufacturing activities (supra).

[88] In other manufacturing arrangements involve, manufacturing services provided by manufacturing service providers who typically manufacture products for other companies using component parts or raw materials, machinery following their design or previously agreed upon specifications (Identifying Factoryless Goods Producers in the U.S. Statistical System, Jennifer Edgar, Jim Esposito, Brandon Kopp, William Mockovak, Erica Yu. 1 Office of Survey Methods Research, U.S. Bureau of Labor Statistics, p.2). These manufacturing services are common in fields of pharmaceuticals, manufacturing, aerospace, packaging, cosmetics, foods, computers, and so on.

[89] In view of the position taken by the Respondent, that the substance of the agreement's points to the taxable supply of goods by the Appellant and the provision of manufacturing services by RMCC and PSL for and on behalf of the Appellant, it is necessary to consider the substance of the agreements and the activities performed by the parties in the entire manufacturing process.

[90] The VAT Act provides that "supply of services" means any supply which is not a supply of goods, but includes any loss incurred in a taxable activity for which an indemnity is due. In *Robinson v. Graves* (1935) 1 KB 579), in distinguishing a contract for service (work and labour) from a sale of goods, Acton J. stated that where the substance of the contract was that skill and labour should be exercised upon the production of the portrait, and it was only ancillary to that contract that there would pass from the artist to his customer some materials. As those materials were the paint and the canvas, the contract was considered to be one of service (work and labour).

[91] It is apt to reproduce the following statement made by Action J. in *Robinson v. Graves* (supra) at p. 588:

> *"I treat that judgment as indicating that in the view of Blackburn J. one has to look to the substance of the contract. If you find, as they did in Lee v. Griffin,1 B. & S. 272; 30 L. J. (Q. B.) 252 that the substance of the contract was the production of something to be sold by the dentist to the dentist's customer, then that is a sale of goods. But if the substance of the contract, on the other hand, is that skill and labour have to be exercised for the production of the article and that it is only ancillary to that that there will pass from the artist to his client or customer some materials in addition to the skill involved in the production of the portrait, that does not make any difference to the result, because the substance of the contract is the skill and experience of the artist in producing the picture".*

[92] On the basis of this test, a contract with a professional person such as a lawyer or an accountant is a contract for services even though documents may be prepared and passed to the client so as to become his property (see- P.S. Atiyak, John N. Adams & Hector Marcqueen, The Sale of Goods, 11th Ed. P. 27). As illustrated by Acton j. in *Robinson v Graves*(supra), the test for deciding whether a contract falls into the one category or another is to ask what is the 'substance' of the contract. (*Robinson v. Graves* (1935) 1 KB 579).

[93] Section 2(1) of the Sale of Goods Ordinance, (Chapter 84) defines a contract of sale of goods as:

"A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called "the price". There may be a contract of sale between one part-owner and another".

[94] Section (2) and (3) give different names to two transactions:

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale, the property in the goods is transferred from the seller to the buyer, the contract is called "a sale", but where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called "an agreement to sell".

[95] Accordingly, a contract for the sale of goods may be distinguished from a number of transactions that may not fall within the ambit of the sale of goods. If the real substance of the contract is the ultimate result- the goods to be provided for sale to the buyer for a consideration, the contract is one of sale of goods (P.S. Atiyah, John Adams & Hector MacQueen, The Sale of Goods, 11th Ed. P.27).

[96] If the substance of the contract is that skill and labour of the supplier have to be exercised for the production of the article and the passing of goods is only ancillary, it is a contract for the supply of services. In such case, the substance of the contract is the skill and labour in producing the articles in question.

[97] Addison on Contracts, 11th ed., p. 867, states that "In the case of works of art, the work and skill of the workman constitute, in general, the essence of the contract, the materials being merely accessorial; and, whenever the skill and labour are of the highest description, and the materials of small comparative value, the contract is a contract for work, labour and materials, and not a contract of sale." If work and labour constitute the essence of the contract that is decisive, then the contract is not one for the sale of goods but a contract for work and labour (service).

[98] If the substance of the contract involves the supply of goods and the supply of services by several persons in the execution of the contractual obligations, it is necessary to identify the predominant and the ancillary elements of supplies, and determine who is engaged in the supply of goods and the supply of services forming part of a taxable activity. The answer to this question will determine as to who can be considered as the manufacturer, or who can be considered as the service provider to the manufacturing activities defined in section 83 of the VAT Act.

[99] The Appellant submits that the concept of deemed manufacturer is not statutorily recognised in the VAT Act and therefore, the Appellant cannot be regarded as a deemed manufacturer unless there is a statutory deeming provision in law that provides that the party who engages a contract manufacturer is the manufacturer by operation of law. The concept of deemed manufacture arises where the activity which is not a "manufacture" in law but has deliberately included in the definition of manufacture in any statute. The concept applies where a person who has never undertaken any manufacturing activity by himself or through others and never involved in any activity of manufacture of any finished goods, but is treated as a deemed manufacturer as per a special definition of a statute.

[100] In the present case, the term "manufacture" is defined in section 83 of the VAT Act, which covers the process of manufacture of products in question and therefore, the question for decision is not whether the Appellant is a "deemed manufacturer" but is the real manufacturer of the goods through the effective involvement of any manufacturing activities defined in section 83 of the VAT Act.

[101] In such event, the question as to who can be regarded as the real manufacturer for the purposes of section 3(1)(a) of the VAT Act, must be decided on the examination of the substance of the contract, the rights and obligations set out therein, and the intentions of the parties who entered into the agreements rather than merely going by the words such as "manufacture", "sale", "supply" or "delivery" used in the contract.

[102] I shall now consider the conditions and activities and obligations of the Appellant and RMCC/PSL when they entered into the agreements in question for the court to determine the real manufacturer of the products in question within the meaning of section 3(1)(a) of the VAT Act.

Trademark license Agreement entered into between Unilever PLC, UK and Unilever Ceylin Ltd (Appellant)

[103] Unilever PLC, UK is the owner of internationally well-known trade marks on a variety of goods, which are manufactured and marketed worldwide (vide- Schedule "A" to the Trademark License Agreement dated 18.09.2003). In terms of the said Trademark Licence Agreement, the Appellant had been licensed to manufacture, sell and export products of Unilever PLC, listed in schedule "B" under the trademarks of Unilever PLC specified in the agreement. The preamble to the Agreement states as follows:

*"Licensee wishes to **manufacture and/or sell the products in Sri Lanka and export the products to the Maldives** (hereinafter referred to as "Territory") in respect of all those products listed in schedule B hereto, hereinafter referred to as "the products" under the Trade marks specified in this agreement"*.

[104] In terms of the agreement, the Appellant as the **sole and only licensee has rights to use the Unilever trademarks and manufacture, package, advertise and sell the products using its trademarks** on **an industrial scale** and report to Unilever in the annual report such manufacturing, packaging, advertising and selling activities. The scope of the agreement is stated in Article 2 of the agreement as follows:

*"2.1 Subject to the Terms and Conditions contained herein, Licensor hereby appoints Licensee as the sole and only Licensee to use Trade marks on a non-transferable basis in direct connection with the **manufacture,** packaging, advertising and sale of the products in the Territory;*

2.2. Licensee agrees to use the Trade Marks on an industrial scale and to furnish Licensor with an annual report relating thereto. The Licensee shall not export the products, other than to an affiliate of the Licensor".

[105] In terms of Article 3 of the agreement, the Appellant as the licensee cannot sub-license or sub-contract the trade marks. It reads as follows:

"3.1 Licensee may not sublicense the trademarks".

[106] Article 4 of the agreement sets out the manner in which the products shall be **manufactured** by the Appellant using the Unilever formulae, specifications and other instructions provided by Unilever PLC, UK as follows:

*1.1 **The products shall be manufactured in accordance with the formulae, specifications and other instructions provided by Licensor**;*

1.2 Licensee shall at all times permit Licensor or its authorized representations to enter the premises of Licensee to inspect the products and physical manufacturing and storage facilities used by the Licensee or under its directions in order to ascertain whether the products meet the specifications, nature and quality laid down by Licensor of the products and the packaging covered by the Trade Marks. The Licensee shall follow the instructions to this effect received from Licensor and shall from time to time at the request of the Licensor provide Licensor with samples of every batch of products manufactured. The licensee shall, however, remain solely responsible for the quality of the products;

1.3 Licensee warrants that the products, including the packaging will always be in accordance with the specifications and other guidelines and instructions laid down by Licensor from time to time and further warrants that all relevant statutory regulations and other legal and contractual requirements relating to production, packaging, manufacturing and sale will be complied with at all times.

[107] Article 5 of the agreement has laid down conditions for the use of Unilever trademarks by the Appellant and provides that the trademarks can only be used except as it is allowed under Article 2.2. It further provides that the trademarks shall not be used in any way which might challenge or damage the validity of trademarks or use them wrongfully causing injury to the Licensor's business or reputation and goodwill.

[108] Article 12.1 of the agreement provides that all right, title and interest in or to the trademarks and related goods shall remain the **exclusive property of Licensor**. It reads as follows:

"12.1 Nothing in this agreement shall be construed as an assignment or grant to Licensee of any proprietary right, title or interest in or to the Trademarks and its related goodwill and it is specifically understood and acknowledged by Licensee that all right, title and interest in or to the Trade Marks and related goodwill are reserved by and are shall at all times remain the exclusive property of Licensor".

[109] From the aforesaid agreement, the Appellant as the sole and exclusive license to manufacture, package, advertise and sell Unilever Products using its trademarks, and export to Maldives to the exclusion of all subject to the terms and conditions stipulated in the said agreement. It is manifest that in terms of the Trade Marks License Agreement, it is only the Appellant who has the right to use the trademarks of Unilever (Signal and VIM and manufacture, toothbrushes under the name of Signal and manufacture Vim dish wash bars under the name of VIM and sell the said products bearing the Unilever trademarks.

[110] No other person could have claimed to be the manufacturer of such products and claim title, right, and interest to such products using the trademarks of Unilever. It is further manifest that in terms of the said Trade Marks License Agreement, all right, title and interest in the trademarks shall remain the exclusive property of Unilever and the Appellant can only manufacture, package, advertise and sell and export such products using the trademarks subject to the terms and conditions and in accordance with the formulae, specifications and other instructions provided by Unilever PLC, UK.

[111] It is now necessary to consider the obligations and activities of the Appellant and RMCC/PSL as specified in the agreements between the Appellant and RMCC/PSL, to determine whether it is the Appellant who is effectively and deeply involved in the manufacturing activities defined in section 83 of the VAT Act, or whether the discretion of the manufacturing activities defined in section 83 of the VAT Act was entirely left with RMCC and PSL to exercise their skill and judgment to produce the completed products for sale.

Agreement between the Appellant and RMCC in respect of the manufacture of Vim Scourer Bars bearing the Unilever's VIM trade mark

[112] I shall now proceed to consider the agreements between the Appellant and RMCC. The scope of the agreement between the Appellant and RMCC is set out in Article 3, which provides that RMCC shall manufacture Vim scourer bars and other products at its premises solely for and as per the specifications provided by the Appellant and supply such products **exclusively t**o the Appellant. Article 3 reads as follows:

> *3.1 RMCC shall manufacture VIM Bar and other products at the aforesaid premises solely for and as per specifications by USL to them from time to time and shall supply the same to USL as per the terms and conditions of this Agreement.*

[113] The Appellant has permitted RMCC to use the Unilever trademarks in connection with the VIM bar products and other articles manufactured by RMCC, However, RMCC cannot enter into any agreement with any party and supply the same to any other party. Article 3 reads as follows:

> *"3.2 USL on its part has represented and confirmed that the said brand name VIM belongs to UNILEVER SRI LANKA USL has accordingly, permitted RMCC to use on or in connection with VIM Bar to be manufactured by them in pursuance to this Agreement and/or on all cartons, wrappers, pouches and other packing materials used or to be used for packing finished product so manufactured by RMCC*
>
> *3.3. RMCC shall not enter into agreements with other parties/for the supply of product out of the aforesaid premises and plant without the consent of USL".*

Involvement of the Appellant over the manufacturing activities & control over the manufacturing process/activities

[114] In terms of the agreement, RMCC however, cannot manufacture products using the Appellant's trademarks, exercising its sole and exclusive judgment and control as it was obliged to manufacture the products strictly in accordance with

formulations and specifications, examinations, inspections and instructions provided by the Appellant. It was the Appellant who laid down specifications, decided the raw materials and the quantity, quality, and carried out the examinations, inspections and quality control tests of products according its instructions, rules and regulations laid down by Unilever PLC, UK.

[115] As set out in Article 5, the Appellant is effectively and deeply involved in the manufacturing activities of RMCC by controlling, inspecting, examining and supervising the entire manufacturing activities. It further includes the selection of raw materials, managing the quality control system and rejecting any finished product which is not in conformity with its specifications. Article 5 reads as follows:

"5.1. It will be the responsibility of RMCC to manufacture and produce the said products strictly in accordance with formulations and specifications communicated by USL. USL, on its part, will be entitled to carry out examination, inspection and quality control tests of products so produced and manufactured by RMCC in order to test their compliance with quality specifications of the USL;

5.2.USL will be entitled to reject such finished products, which are not in conformity with quality specifications of the USL and the USL's word shall be final and binding in this respect;

5.3.RMCC however, will be free to reprocess the rejected finished products at its own cost and take steps, if possible, to bring them to total conformity with quality specifications and thereafter, they may be accepted by USL and sold as per this Agreement. For the aforesaid purpose, RMCC will permit USL representative to be present at the said premises and provide all necessary equipment and facilitate quality checks, etc.;

5.4 RMCC will continuously co-operate with USL to upgrade, improve and enhance its quality control procedures. Any increase in cost to be mutually agreed upon;

5.5.RMCC shall keep records of its quality control and the date shall be readily accessible to the USL;

5.6Quality assurance of finished goods will be done by USL personnel at site and transferred daily to Warehouse;

5.7. RMCC will implement all reasonable regulations resulting from quality and audits conducted by USL".

[116] As set out in Articles 8.3 and 8.4 of the Agreement, RMCC has no claim whatsoever to any **right or ownership, or goodwill in any of the trademarks, labels, wrappers, pouches, bags or packages which RMCC apply to the products** and sold to the Appellant. Article 8.3 reads as follows:

"8.3. RMCC expressly declares and agrees that they shall not claim any right or ownership in any of the trademarks, labels, wrappers, pouches, bags or packages which they use or apply on the products and/or packaged material used by them in the manufacture of finished products and sales to USL;

8.4. RMCC further undertake that they shall not infringe, copy or imitate or otherwise interfere with the brand name, trade and merchandise marks or devices or licenses or copyright as they may be authorized to use by these presents or otherwise alter, deface or interfere with the same or describe them as that of USL or as having been manufactured for USL or any of its associate companies. It is further clarified that RMCC shall have no authority to permit, use or cause to be used the aforesaid trademarks, labels, wrappers, pouches, bags or packing material by any other person or by themselves or in relation to products not manufactured or produced for USL".

Agreement between the Appellant and PSL in respect of manufacture of toothbrushes bearing the brand name of "Signal"

[117] The scope of the agreement between the Appellant and PSL is set out in Article 1. It provides that PSL will manufacture, sell and supply toothbrushes to the Appellant bearing licensed Unilever brand names as specified and subject the quality specifications and in quantities and as per delivery schedules indicated to PSL from time to time on purchase orders issued by USL. It reads:

1. PSL will manufacture, sell and supply Toothbrushes (hereinafter referred to as the product) to USL bearing their brand names as specified and made to their quality specifications and quantities and as per delivery schedules indicated to PSL from time to time on Purchase Orders issued by USL;

Involvement of the Appellant over the manufacturing activities & Control of the manufacturing process/activities

[118] PSL however, cannot manufacture products using the Appellant's trademarks exercising its sole and exclusive judgment and full control as it was obliged to manufacture the products strictly in accordance with formulations, specifications, examinations and instructions provided by the Appellant. It was the Appellant who carried out the examinations, inspections and quality control tests of products according to its own instructions.

[119] As set out in the following Articles of the agreement, the Appellant is effectively and deeply involved in the manufacturing activities of PSL. The Appellant's activities involve the control, inspection, examination and supervision of the entire manufacturing activities, managing the quality control system and

rejecting any finished product which is not in conformity with its specifications. Article 3 reads:

3.1 ***USL will provide written specifications, quality acceptance criteria and inspection methodology to PSL in respect of each product under this agreement;***

3.2 ***USL will provide all plastics moulding tools necessary, at its own cost and these tools will remain USL's exclusive property. However, PSL will assist in sourcing these moulding tools from its preferred sources as necessary;***

3.3. ***Insurance cover for the moulding tools will be taken by USL;***

3.4 USL will provide a three months forward forecast of its requirement of each product for PSL to plan material procurement and production. USL will also provide an annual forecast for PSL to review capacity needs.

4.Quality Control

The products manufactured and packed will be the quality specifications as laid down by USL in Appendix 3;

4.1 *Quality Assurance of finished product is the responsibility of PSL and will conform to USL's specifications, quality criteria and inspection methodology stipulated in Annexes 3*

4.2. PSL will continuously co-operate with USL to upgrade, improve and enhance its quality control procedures

4.3. PSL shall keep records of its quality control and the data shall be readily accessible to USL;

5.4 Quality auditing of finished goods as deemed necessary will be done by USL designated personnel at site, and due access should be provided to USL personnel for this purpose;

5.5 PSL shall implement all reasonable regulatory/remedial measures as necessary arising out of quality audits conducted by USL;

5.6 All products will be manufactured to meet the quality safety criteria specified in relevant contract elements;

5.7 USL shall do quality checks on products delivered to it and is not liable for products not meeting quality norms;

5.8 Any products not meeting standards will be destroyed by PSL at their cost.

7.Termination

7.3 PSL shall at the termination or sooner determination of the agreement will hand over the following to USL:
-All plastics moulding tools owned by USL
-Any finished e work in progress at the time of termination

9.3. *PSL warrants that the product/products manufactured by it will conform to the specifications and quality standards provided by USL…..*

9.8. *PSL shall pack the products on the format and type as approved by USL. The "PRODUCT" shall be sold or promoted by USL under trademark/brand name specified….*

PSL will give a guarantee to USL that during the course of the Agreement or thereafter that he will not use identical specifications given by USL from time to time for the manufacture of toothbrushes under any brand name".

[120] As set out in Article 8 and 9, PSL expressly declared and agreed that it has no claim whatsoever to any right or ownership or goodwill in any of the trademarks owned by the Appellant. The PSL has further agreed that it shall not claim any right or ownership in any of the trademarks/brand names **in** the products labels, wrappers, pouches, bags or packages which they use or apply on the products sold to the Appellant. It reads:

"8.3. Any intellectual property rights in and to the information, generated and provided by the disclosing party to the receiving party, shall remain owned by the disclosing party and any intellectual property rights in and to developments generated by a party as a result of an action following from the exchange of the information shall be owned by the said party who shall be entitled to protect said developments by any form of intellectual property subject to the provisions of this Agreement.

9.7. PSL shall use his best efforts to preserve and enhance the goodwill of the product and the trademark owned by USL;

9.8. ***PSL shall have no rights under this Agreement to the use of this trade mark/brand name in the product and shall not during the terms of this Agreement or thereafter*** *represent that BPL is the PSL is the owner of the Trade mark/brand name whether or not such Trade Mark/brand name is registered nor shall PSL dispute the validity of the Trade Mark/Brand name……..*

PSL shall not at any time manufacture and supply the product for sale either by himself or by any third party during the term of this Agreement. *PSL shall not at any time register or cause to be registered in its name or in the name of another who is so employed during or after the term of this Agreement, any of the Trademarks or Trade Mark names or designs resembling or similar to any of the Trade Marks of USL. PSL agrees that upon the termination of this Agreement, it will discontinue forthwith all use of such Trademarks and Trade Names and shall not thereafter directly or indirectly manufacture and pack any products bearing the Trade Mark names confusingly similar to the Trade Mark of USL".*

[121] From the obligations and activities set out in both agreements, it is manifest that the Appellant being the licensed manufacturer and trademark licensee had outsourced the manufacturing process to RMCC and PSL and engaged both RMCC and PSL to manufacture goods exclusively for and on its behalf, using its trademarks, and supply such branded goods to the Appellant. Accordingly, the taxable activity will be treated as a supply of goods for VAT purposes.

[122] Now the question as to whether the Appellant could be considered as the manufacturer, would depend on the question whether the Appellant was engaged in supplying goods in the course of taxable activity for the purposes of the VAT Act. The answer to this question depends on the consideration of activities performed by the Appellant in the manufacturing process, and its effective and deep involvement and control in the manufacturing process for making a finished product.

[123] The Indian Supreme Court in *Chillies Exports House Limited v. Commissioner of Income Tax*, 225 ITR 814 held in paragraph 8 that the question whether the assessee was carrying on process of goods has to be looked at by taking into consideration the different activities carried out by the assessee and their cumulative effect on the value of the manufacturing or processing of goods.

[124] The learned Senior Additional Solicitor General submitted that the goods were manufactured by RMCC and PSL under the Appellant's sole control and supervision using the moulds provided by the Appellant, formulations and specifications and accordingly, the TAC was justified in holding that the Appellant is engaged in the manufacturing activity as the manufacturer.

Effective Control test

[125] A survey of various judicial authorities indicates that the question as to whether the assessee is the manufacturer, has to be determined in the context of

the control exercised by the assessee over the manufacturing activities and his effective and deep involvement in the manufacturing activities.

[126] The Supreme Court of India held in *Commissioner of Sales Tax, U.P v Dr. Sukh Deo* (1969) 23 STC 385 (SC)/ 1969 AIR 499 that a manufacturer is a person by whom or under whose direction or control the goods are manufactured. In the High Court of Madras case of *Commissioner of Income Tax v. Elgi Ultra Industries Limited* (TS-658-HC-2012 (MAD) -01, even though the process of assembling of raw materials was done through two job workers, the manufacturing activity starting from planning, development of the model, procuring of raw materials, inspections and testing, quality control activities were done by the assessee. The High Court applied the control test and held that the question as to whether the assessee is engaged in the manufacturing process or not, has to be seen in the context of the control exercised by the assessee, even in the case of assembling was done by a third party. The High Court stated at paragraph 8:

> *"The order of the authorities below shows that the assessee exercised supervision and control in the manufacturing of the parts done by the job workers on the materials supplied by the assessee in accordance with the specification in the dyes supplied by the assessee. They were subject to quality control too. Thus, even though the assessee had not employed its own employees, yet, the fact is that at every stage the assessee had extracted control over the* job work as though they were employees of the assessee…"

[127] The Kerala High Court in *Commissioner of Income-Tax v. Rajmohan Cashews* (P.) Ltd. [1990]185, ITR472(Ker) held that when the assessee company was engaged in processing raw cashew nuts and the major operation of processing work was done by outside agencies on behalf of the assessee and charges, therefor, were paid by the assessee. It was held that the assessee was engaged in manufacture and processing of the goods. The Court held that the processing was not done in the factory of the assessee would not necessarily mean that the assessee is not mainly engaged in the processing of the goods. The Court held that this applies where there is material to show that the processing was done by the outside agency for and on behalf of the assessee, and the charges incurred therefore were paid by the assessee directly.

[128] The High Court of Allahabad in *Bulbu Prasad Amarnath v. Commissioner Of Sales Tax,* (1964) 15 STC 46, it was held that it is not merely the person who manufactures, but even the person who had the goods manufactured who would be a manufacturer. It stated:

"5. In order that a person is a manufacturer of linseed oil it is not essential that he should himself produce oil from oilseeds or should produce it with his own machinery or should produce it in his own premises. He can be a manufacturer if what he gets done through others is deemed to be his act and the act amounts to manufacturing……

9. This makes it clear that the assessee is the manufacturer though it only caused oil to be produced instead of producing it itself. In determining whether or not a person is a manufacturer the Court first ascertains what his business consists in and then whether or not that business is manufactured. And everyone who manufactures is not a manufacturer; the manufacture may be merely incidental to another business; thus a farmer who makes articles from his produce undoubtedly manufactures them, but is not a manufacturer because his business is to produce the raw material and the manufacture is not in his case a business by itself but only an incident to his farming".

[129] In the Bombay High Court in *Commissioner of Income-Tax v. Penwalt India Ltd,* [TS-5495-HC-1991 (Bombay)-OJ, the manufacturing process was carried out under the direct supervision of the assessee, and one Turner Hoare manufactured machinery as per the instructions of the assessee. The Revenue, admitted that (i) it was not necessary for a person to be engaged in a manufacturing activity, that he should undertake all manufacturing activities by himself; (ii) it would be enough if he engages himself in part in the manufacturing activity and gets the rest of it done through the agency of others. The Revenue however, contended that no part of the manufacturing activity was done by the assessee as everything concerning was done by Turner Hoare.

[130] The High Court rejected the argument of the Revenue and held that the expression "engaged in manufacture" does not indicate that the assessee should be directly involved in the manufacturing process and that it will include cases where he gets the goods manufactured totally by an outside agency. The High Court found that, out of many activities, except for one activity, namely getting the machinery manufactured through Turner Hoare, all other activities are admittedly undertaken by the assessee and therefore, the assessee is engaged in the business of manufacture (paragraph 7).

[131] The High refereed to 33, Hulsbury's Laws of England, third edition, "Revenue", paragraph 407, wherein it was said that "*a person is deemed to make goods or to apply a process if the goods are made, or the process is applied, by another person to his order under any form of contract other than a purchase*". The Court held that at paragraph 6 that:

"..an assessee would be said to be engaged in manufacturing activity if he is doing a part if the manufacturing activity by himself and, for the rest of it, engage the services of somebody else on a contract other than a contract of purchase".

[132] This decision was followed by another Division Bench of the Calcutta High Court in *Griffon Laboratories (P) Ltd v. CIT* (1979) 119 ITR (Cal.) TC 24R. 222, wherein it has been held that a manufacturer may hire a plant or machinery and hired labour to manufacture the goods. But to earn the benefit of the of the concessional rate of tax as an industrial company, the company must mainly engage itself in the manufacture or processing of goods as specified in section 2 (7) of the Finance Act, 1996, either by itself or by someone under its supervisory control or direction.

[133] Although some Indian cases were decided under the Finance Act, 1996, IT Act, 1961 of India and the Sales Act, the fundamental issue that arose in all those cases was whether activity carried out by the assessee was engaged in the manufacturing process or carrying on a manufacturing activity, which resulted in making the goods. The Courts held that the question as to whether the assessee is engaged in the manufacturing process, or not has to be seen in the context of the control exercised by the assessee.

[134] The mere use of the word "manufacturer" in any of the manufacturing contract, whether it is licensed manufacturing, or contract manufacturing or toll manufacturing or manufacturing service provider is not the criterion to determine the question of manufacturer who is entitled to the benefit of the exemption under section 3(1)(a) of the VAT Act.

[135] The test for deciding whether the taxpayer is the "manufacturer" for the purposes of section 3(1)(a) of the VAT Act is to ask whether the taxpayer is effectively and deeply involved in the process of manufacture defined in section 83, and exercised direct control and supervision over the manufacturing process to produce the completed new product having a distinctive character, quality, name and use for sale.

[136] From the facts detailed above, it is obvious that the Appellant obtained the license from Unilever U.K as the sole licensee for manufacturing, selling, supplying and exporting Signal toothbrushes and Vim sourer bar using trademarks on non-transferable basis and paying royalty to Unilever U.K. No other person except the Appellant is entitled to manufacture, advertise, market, distribute and sell the

Unilever products bearing its trademarks and brand names both for local and export market without the written permission of Unilever PLC, UK.

[137] Apart from procurement of components of raw materials and the assembly of raw materials was done through PSL using its facilities, the agreement between the Appellant and PSL manifestly indicate that the Appellant's effective and deep involvement in the manufacturing activities. These activities consist of:

(i) supply of the Appellant's moulds exclusively to manufacture the product at its own cost and the moulds remain the Appellant's exclusive property;
(ii) Undertaking all major repairs for moulds used in the production and bearing responsibility for insurance cover for moulding tools;
(iii) manufacturing the products to be carried out strictly in accordance with the Appellant's formulations, specifications, quantity, supervision and instruction;
(iv) the managing and conducting the quality control tests at all levels;
(v) quality auditing of finished goods to be done at the site by assigned employees of the Appellant;
(vi) supply of products to be done as per the delivery schedule advised by the Appellant;
(vii) upgrading, improving and enhancing of quality control for product development and efficiency; and
(viii) rejection of finished products which are not in conformity of the quality specifications; and
(ix) accessibility to records of the quality control and data.

[138] Apart from procurement of components of raw materials and the assembly of raw materials was done through labour contractors of RMCC using its facilities, the agreement between the Appellant and RMCC manifestly indicate that the Appellant's effective and deep involvement in the manufacturing activities. These activities consist of:

(i) manufacturing the products to be done strictly in accordance with the Appellant's formulations, specifications, examinations, quantity, supervision, instructions;
(ii) determining the quantity and supply schedules of the products and selecting the suppliers for design, artworks etc. before finalizing and using the material for packaging finished products;
(iii) the managing and conducting the quality control tests of the products at all levels;

(iv) quality auditing of finished goods to be dome at the site by assigned employees of the Appellant;
(v) supply of products to be done as per the delivery schedules advised by the Appellant; and
(vi) rejection of finished products which are not in conformity of the quality specifications;
(vii) upgrading, improving and enhancing of quality control procedures; and
(viii) accessibility to records of the quality control and data.

[139] The daily quality control tests were carried out by the Appellant's staff at the site and supply of the finished articles was done according to the formulations, formulations and quality employed by the Appellant. In case any product is found below such specifications and formulations, the Appellant has every right to reject such finished products, not in conformity with quality specifications and such decisions cannot be challenged by RMCC and PSL. In support of its position that the Appellant is not a manufacturer as defined in section 83 of the VAT Act, the Appellant relied on the following statement made by Walpita J. in *Commissioner General of Inland Revenue v Reckitt and Colman of Ceylon Limited* Sri Lanka Tax Cases Vol. IV 362-370L

> *"Counsel for the State also submitted that the change of name from "Seagull Blue" to "Robin Blue", the registered trade name of the assessee, amounted to an adaptation for sale of ultramarine blue imported as "Sea-gull Blue". I am unable to accept this submission, as a mere change of name by itself does not make a product which was originally sold under a different name amount to an "adaptation" for sale within the meaning of the Section and it cannot be so considered in the circumstances of this case.*
>
> *For these reasons, I am of the view that ultramarine blue packaged and sold as "Robin Blue" is not an article "manufactured" by the assessee within the meaning of the term "manufacture" in section 159(1) of Finance Act, No. 11 of 1963".*

[140] In *Revenue v. Reckitt and Colman of Ceylon Limited* (supra), the issue related to the meaning of the term "manufacturer" as defined in section 159(1) of the Finance Act, No. 11 of 1963. The assessee in that case imported Ultramarine Blue in packets of 58 pounds under the name "Seagull Blue". This was packeted by mechanical and manual process by the assessee into smaller packets under the name "Robin Blue" and sold wholesale. There was no change in the process of packeting. The chemical composition and physical properties were not altered in the process of repacking.

[141] Under such circumstances, the Court held that the assessee is not a manufacturer, nor is there an adaptation of the article as there is no treatment which changes the quality of the product, or makes an unfinished product a finished one. Mere change of name by itself does not amount to adaptation for sale.

[142] It is clear that the assessee who imported finished goods under one name, packeted by mechanical and manual process into smaller packets and sold them under a different name without any change in its composition, quality or character of the finished product. . There was no transformation of the products imported into a different product having a character, quality or composition, and therefore the Court was justified in holding that it was not an article manufactured by the assessee within the meaning of the term "manufacture" in section 159(1) of the Finance Act, No. 11 of 1963. As discussed, the facts of the present case are completely different and therefore, the decision in *Revenue v Reckitt and Colman of Ceylon Limited* (supra), will not help the Appellant.

[143] Although the plant and machinery employed and raw materials were provided by RMCC and PSL and services of certain employees were also utilized in the manufacturing process, they were manufactured by RMCC and PSL strictly as per the quality, formulations, specifications, quantity prescribed by the Appellant. It is not necessary that the Appellant himself should be personally engaged in the manufacturing of goods by its own plant and machinery at its own factory or pay the wages of the workers, if it is deeply involved in the manufacturing activities defined in section 83 where the Appellant engages a third party for getting the goods manufactured by it under its own effective control and supervision.

[144] In *Griffon Laboratories (P) Ltd v. Commissioner of Income Tax* (supra), the Tribunal held that the assessee was not a manufacturer of goods as it did not own or process any plant or machinery and caused those goods to be manufactured by a third party company. The High Court held (at paragraph 13) that the "Tribunal erred in holding that the assessee must own or process the manufacturing plant or machinery before it can be said to be a manufacturer of goods". The Court further said that the "Tribunal has not gone into the question as to whether the assessee caused those goods to be manufactured under its actual supervisory control or direction": The ratio of the decision was that the overall control and management of the products manufactured by the third party company was in the

hands of the assessee and accordingly, assessee ought to be held to be the manufacturer of the goods.

[145] In my view, the Appellant need not own or possess the manufacturing plant or machinery or raw materials, or physically involve in the manufacturing process, before it could be said to be a manufacturer of goods provided that he is a person by whom or under whose direction, supervision, control and deep and effective involvement in the manufacturing activity, the goods are made. In the Bombay High Court case of *CIT v. Neo Pharma (P) Ltd. (1982) 28 CTR (B0m.) 223,* it was held that it is not necessary that the manufacturing company must manufacture the goods by its own plant and machinery as its own factory, if, in substance, the manufacturing company has employed another company for getting the goods manufactured by it under its own supervision and control.

[146] In the present case, although the plant and machinery employed for the purpose of manufacture belonged to RMCC and PSL and services of employees were also utilized in that process, all obligations of RMCC and PSL under the agreements were performed under the supervision, control, direction and effective and deep involvement of the Appellant. The manufacturing activity was really that of the Appellant and the Appellant as the licensee to manufacture trademarked goods can be considered as a company engaged in manufacturing of goods for exclusive sale in the local and export market.

[147] The products manufactured were exclusively for the Appellant and RMC and PSL were not left with discretion to sell them to any other person and the manufacturing activities were done under the direct control and supervision of the Appellant, which in my view tantamounted to a manufacturing activity defined in section 83 under the definition of "manufacture".

[148] There is no nothing to indicate that the discretion was left with RMCC and PSL to exercise their independent skill and judgment in the manufacturing of products without direction, control and supervision and involvement of the Appellant (see the criterion used by Wright J. in *Cammell Laird & Co. Ltd v. The Manganese Bronze and Brass Co. Ltd*, (1934) A.C. 402 at. 420-421). In my view, the mere making of products by assembling raw materials and using machines, labour and facility by RMCC does not tantamount to manufacture as defined in section 83 of the VAT Act.

[149] I am of the view that a manufacturer is a person by whom or under whose direction or control or management the goods are manufactured for sale, either

by himself or through a third party for its behalf by deeply involved in a manufacturing activity or process defined in section 83 of the VAT Act.

Concept of buying and selling

[150] Now, I will turn to the Appellant's argument that it was only engaged in the business of buying and selling to earn a profit and that the transaction was purely a trading in nature. Buying and selling is an agreement between the buyer and the seller whereby the seller has the duty to transfer the ownership of property to the buyer and the buyer pays the price of the property to the seller. But it cannot be said that every purchase made during the course of a business is a business of buying and selling.

Supply of goods, first sale and time of supply

[151] The Appellant contended that RMCC and PSL invoiced goods to the Appellant on a VAT invoice that sets out sales made by RMCC and PSL to the Appellant. The Appellant argued that the ownership passed at the point of sale when the invoices were issued by RMCC and PSL to the Appellant within the meaning of section 4(1) of the VAT Act. The Appellant has produced two invoices said to have been issued by RMCC and PSL to the Appellant with the consolidated written submissions and argued that the said invoices set out the goods manufactured and sold to the Appellant by RMCC and PSL.

[152] It seems that the Appellant relies on section 4(1) of the VAT Act and claims that the supply of goods took place at the point when the invoices were issued by RMCC and PSL to the Appellant, and therefore, the Appellant is not liable to VAT. VAT is charged on taxable supplies. It is the liability of the person making the supply and becomes due at the time of supply. The VAT is charged and collected by the registered person at the time of supply of taxable goods or services (Balaratnam, VALUE ADDED TAX in Sri Lanka, 2nd Ed. 329). The VAT Act prescribes rules to determine the time at which a supply of goods or services is deemed to take place to ensure that output tax is charged to a customer at the appropriate time and for the registered person to account for the tax in the correct prescribed period (supra).

[153] The role of the time of supply rules in section 4 of the VAT Act is intended to determine the time when the supply of goods or services are to be treated as taking place for the purpose of the charge of tax, which arises at the time of supply in respect of which a taxable supply made by a taxable person and impose the liability to pay the tax under section 2(1) of the VAT Act (Balaratnam, supra, p. 330).

[154] Section 4 (1) of the VAT Act provides that the **supply of goods** shall be deemed to have taken place at the time of the occurance of any of the following whichever occurs:

(a) The issue of an invoice by the supplier in respect of the goods;or
(b) A payment for the goods including any advance payment received by the supplier;or
(c) A payment for the goods is due to the supplier in respect of such supply;or
(d) The delivery for the goods have been effected.

[155] A VAT is not charged on any supply of goods or services made by a person who is not a taxable person, unless there is a taxable supply of goods or services made in a taxable period by a taxable person in the course of a taxable activity. The first question is to identify whether or not a taxable supply of goods was made by RMCC and PSL to the Appellant, and if so, whether such supply of goods had taken place at the time of the occurance of any event specified in section 4(1) of the VAT Act. Section 83 of the VAT Act defines the term "goods" broadly as follows:

> "goods" means all kinds of movable or immovable property but does not include-
>
> *(e) Money;*
> *(f) Computer software made to customers, special requirements either as unique programme or adaptation for standard programme, intercompany information data, and accounts, enhancement and update of existing specific programmes, enhancement and updating of existing normalized programmes supplied under contractual obligations to customers who have bought the original programme or where the value of contents separately identifiable in a software such sale of contents".*

[156] In terms of section 83 of the VAT Act, "**supply of goods**" means-

> *"The passing of exclusive ownership of goods to another as the **owner of such goods** and under the authority of any written law and includes the sale of goods by public auction, the transfer of goods under a hire purchase agreement, the sale of goods public auction, the transfer of goods under a fire purchase agreement, the sale of goods in satisfaction of a debt and the transfer of goods from a taxable activity to a non-taxable activity".*

[157] A supply of goods takes place when the exclusive ownership of the goods is passed to the buyer and where the seller had no exclusive ownership of the branded goods manufactured for and on behalf of the brand owner using its trademarks under its direction, supervision and control. In terms of the agreements, the Appellant as the registered user of trademarks for manufacture,

advertising, sale of branded goods got RMCC RMCC and PSL to manufacture under its trademarks and RMCC and PSL have to manufacture the goods under such trademarks and under its direction, specifications and control.

[158] It is settled law that mere passing of property in article or commodity during course of performance of transaction in question does not render transaction to be transaction of sale of these materials. This is clear from the judgment of the High Court of Gauhati in *Hindustan Aeronautics Ltd. v. State of Karantaka*, decided on 05.09.2001, paragraph 7:

> *"Mere passing of property in an article or commodity during the course of performance of the transaction in question does not render the transaction to be transaction of sale. Even in a contract purely of works or service, it is possible that articles may have to be used by the person executing the work, and property in such articles or materials may pass to the other party. That would not necessarily convert the contract into one of sale of those materials. In every case, the Court would have to find out what was the primary object of the transaction and the intention of the parties while entering into it".*

[159] RMCC and PSL had no exclusive selling rights, either as the proprietor or holder of trademarks, or registered user or licensee of the trademarks or otherwise. RMCC and PSL are only permissive users for sole purpose of affixing the trademarks to the products made for and on behalf of the Appellant. RMCC and PSL had no authority, right or interest whatsoever, to manufacture or sell the finished products using the Appellant's trademarks without permission of the Appellant.

[160] The claimed supplies/sales made by RMCC and PSL are not sales to the exclusive marketing agent or wholesaler or other dealer or any other person as the exclusive owner of such products. They are not exclusive sales to the Appellant but merely supply of manufactured branded goods to the registered trademark licensee for a fee.

[161] In this regard it is significant to refer to the judgment of the Supreme Court in *Whirlpool of India Ltd, Bangalore v. The Deputy Commissioner of Commercial Taxes, Bangapore* decided on 22.11.2006). The Appellant was the licensee and the registered user of the trademark "Whirlpool" and the Appellant entered into an agreement with M/s. Applicomp India Ltd. Under the agreement, Applicomp agreed to manufacture and supply electronic products and electrical appliances to the Appellant on original equipment basis, as per the specifications of the Appellant.

[162] In terms of the agreement, Applicomp is neither a registered user nor a licensee in respect of the trademark "Whirlpool" and the agreement enabled Applicomp to manufacture products and affix the trade mark of the Appellant to the products which are manufactured by Applicomp to the specifications of the Appellant. The agreement required Applicomp to exclusively supply to the products to the Appellant and not to affix the trademark any other product of Applicomp.

[163] The issue *inter alia*, was whether the brand owner who is an exclusive purchaser of goods manufactured, using its brand name, by a manufacturer who is exempted under the Sales Tax Act of Karnataka is entitled to claim set off on the deemed tax paid on the purchases made from such manufacturer. The Supreme Court stated that in terms of the contract, Applicomp is neither a registered user nor a licensee of the trademark and thus, it is not selling the goods either as a trademark holder, or as one having any rights as the proprietor of the trademark or otherwise. The Supreme Court held at paragraph 10:

> *"In the present case, the appellant is the owner of the brand bane "Whirlpool" registered under the Trade and Merchandide Act, 1958. Under the agreement between the parties, the refrigerators and other consumer goods are got manufactured by M/s. Applicomp India Ltd, and as per the agreement M/s. Applicomp have to manufacture the products under the brand name "Whirlpool" and sell them exclusively to the appellant. M.s. Applicomp is not the registered user of the brand name "Whirlpool". Moreover, the sales made by M/s. Applicomp to the appellant, are not sales to the exclusive marketing agent or distributor or wholesale or any other dealer but are only sales of manufactured branded goods to the brand owner……".*

[164] In the present case too, the Appellant is the sole and exclusive licensee of the trademarks, and the branded products are manufactured by RMCC and PSL under its trademarks for and on behalf of the brand owner (the Appellant) under its control, direction, supervision. The sales made by RMCC and PSL to the Appellant without passing of exclusive ownership of goods as the owner of such goods, cannot be regarded as a supply of goods within the meaning of section 83 of the VAT Act. It is not the first sale to the Appellant whereas the sale made by the Appellant or by any other person on his account is the first sale. The use of the words "sale" or "sell" in the agreements will not make any difference as it is not the form of the contract but the substance that mattes.

[165] The exclusive ownership of the branded goods could not have passed from RMCC and PSL for the mere issuance of invoices to the Appellant when the claimed

sales made by RMCC and PSL could not constitute a "supply of goods", within the meaning of section 83 of the VAT Act. In my view, RMCC and PSL cannot be treated as sellers or supplies of the products in question in terms of the agreements.

[166] In the circumstances, the supply of goods cannot be deemed to have taken place at the time of the issuance of invoices when there cannot be a supply of goods by RMCC and PSL within the meaning of section 83 of the VAT Act. In my opinion, the facts and circumstances brought on record clearly demonstrate that this transaction is not a buying and selling of goods for a profit sharing basis. No such buying and selling transaction can be found within the substance of the agreements in question. In my view the Appellant's stand that it was engaged in the buying and selling business fails.

Exploitation of intangible property

[167] There is one other matter which I would comment upon is about the relevancy of IP rights to the present case. The Respondent has submitted that in terms of the Trade Mark License Agreement between the Appellant and Unilever PLC, UK, the Appellant's activity is captured in paragraph (e) of the definition of taxable activity. The Respondent's argument is that the Appellant being a registered owner of the trademarks in Sri Lanka was exploiting the same and paying royalties to Unilever PLC, UK. The Respondent argued that therefore, the Appellant is engaged in a taxable activity within the meaning of the VAT Act by virtue of exploiting its intangible property.

[168] The Respondent submitted that the Appellant is engaged in supply of manufactured goods under its trademarks in the course of carrying or carrying out of a taxable activity within the meaning of section 2 of the VAT Act. In terms of the Trade Mark License Agreement, as the licensee of the trademarks of "Unilever", the Appellant is entitled to exploit the registered trademarks, to manufacture, packaging, advertising and sale of the products on an industrial scale under the licensed trademarks.

[169] The Appellant contends that a person who is making taxable supplies by the exploitation of intangible property cannot be engaged in the "supply of goods" because goods by their very nature are tangible. The submission was that intangible character should not be regarded as 'goods' for the purpose of levying VAT. The term "goods" in section 83 of the VAT Act means-

"all kinds of movable or immovable property but does not include-

(a) money;

(b) computer software made to customers special requirements either as unique programme or adaptation for standard programme, intercompany information data and accounts, enhancement and update of existing specific programmes, enhancement and update of existing normalized programmes supplied under contractual obligation to customers who have bought the original programme or where the value of contents separately identifiable in a software such value of contents".

[170] Dr. Kanag-Iswaran submitted that the term "goods" in Section 83 only includes tangible movable property and that the exploitation of trademark is not tangible movable property. The definition of the term "goods" in section 83 of the VAT Act means all kinds of moveable property except those specified, namely, money and computer software and related programmes.

[171] The term "goods" meant all kinds of "movable property" and includes "all materials, articles and commodities", which are all movable property. The nature of intangible property is trademarks owned by Unilever PLC, UK, and the Appellant as its licensee is using Unilever trademarks on a non-transferable basis to manufacture, package, advertise and sell products using trademarks.

[172] In the present case, the intellectual property is not being used in its status but in connection with products which are transformed to a marketable branded products using trademarks for marketing and sale, closely linked with the manufactured finished products, which are movable at the time of the identification for sale. In *Advent Systems Ltd. v. Unisys Corporation* 1925 F 2d 670, it was held that while a computer software program in its status is intangible and remains intangible, when it is transferred to a physical medium, it is a "good":

*"Computer programs are the product of an intellectual process, but once implanted in a medium they are widely distributed to computer owners. An analogy can be drawn to a compact-disc recording of an orchestral rendition. The music is produced by the artistry of musicians and in itself is not a 'good', **but when transferred to a laser-readable disc it becomes a readily merchantable commodity**. Similarly, when a professor **delivers a lecture, it is not a good, but, when transcribed as a book, it becomes a good**....."*

[173] There is no dispute that the taxable activity includes both tangible and intangible property within the meaning of the expression "taxable activity" in section 83 of the VAT Act. The question is whether it relates to a supply of goods or supply of service. The exploitation of any intangible property where such property is registered in Sri Lanka constitutes a separate taxable activity, and earning from such activity constitutes a supply of service. It is not in dispute that

intellectual properties are intangible properties. They are not goods, and therefore, they fall outside the purview of 'goods' in section 83 of the VAT Act But, once such intangibles are captured and transferred to a physical media, such as books, video cassette, manufactured produces, they are capable of being abstracted, consumed, transferred, delivered, stored, possessed. Under such circumstance, they may become "goods" in movable form (*Tata Consultancy Services v. State of Andhra Pradesh* (05.11.2004 - SC), paragraph 28).

[174] In the present case, the Appellant is manufacturing its own goods affixing its own trademarks on its own finished products, and such manufactured products are capable of being physically moved from one location to another, delivered, stored, possessed and sold to another. They become "goods" in physical form within the definition of "goods" in section 83 of the VAT Act.

[175] The issue in the present case is whether the Appellant is a manufacturer of **goods** within the meaning of section 3(1)(a) of the VAT Act and therefore, it became necessary to consider whether the Appellant is engaged in the supply of goods made in the course of a taxable activity. It relates to the **supply of goods** and not a **supply of service**. If the taxable activity relates to the exploitation of intangible property (i.e. licensing or assignment), it is a supply of service rather than a supply of goods. Because intangible property in its status of intangible form cannot be "goods".

[176] The taxable activity carried out by the Appellant relates to the business of manufacturing goods and the Court has decided that the Appellant is engaged in the supply of goods in the course of the taxable activity referred to in paragraph (a) of the definition of "taxable activity" in section 83 of the VAT Act. In my view, the relevant taxable activity of supply of goods by the Appellant is captured in paragraph (a) of the definition of "taxable activity" in section 83 of the VAT Act. It is not captured in paragraph (e) of the definition of "taxable activity" in section 83 of the VAT Act.

Supply of services

[177] In terms of section 83, "supply of services" means any supply which is not a supply of goods, but includes any loss incurred in a taxable activity for which an indemnity is due. Thus, the concept of supply of service is any thing which is not a supply of goods. As noted, it is the Appellant who is engaged in a supply of goods by getting RMCC and PSL to manufacture branded goods to the Appellant under its direction, supervision and effective control.

[178] Although the manufacturing of goods was the final result of a single manufacturing agreement, the predominant part of the activity under the agreement was the supply of goods carried out by the Appellant in the course of a taxable activity under its direction, supervision and control. Where one of more elements in a single contract are to be regarded as constituting the principal activity whilst one or more elements are to be regarded, as ancillary services, such services must be regarded as ancillary to a principal activity. If the element of supply of goods dominates the other elements, the dominant element is the supply of goods while the ancillary element is the supply of service.

[179] The work done by RMCC and PSL in making products by assembling raw materials and delivering goods to the Appellant could not have materially altered or transformed into different finished product for sale having distinctive character, name, quality and use without the "effective control" and deep involvement of the Appellant. The Appellant is effectively and directly involved in the entire manufacturing process, and the work is done by RMCC and PSL under the Appellant's direction, supervision, control. RMCC and PS are not selling the goods as the exclusive owner, and not transferring the exclusive ownership to the Appellant. Their sales cannot constitute first sale as the exclusive owner of goods and thus, the question of passing ownership from RMCC and PSL to the Appellant will not arise.

[180] In the present case, the work of RMCC and PSL to whom the price was paid by the Appellant is not for the supply of goods, which does not involve a transfer of exclusive ownership of goods to the Appellant, but a price to make and supply of branded goods to the registered brand manufacturer under the manufacturer's effect control and deep involvement. It is not a supply of goods or a sale of goods. A transfer of possession in the goods without transfer of exclusive ownership is only a supply of service in the execution of the agreement between the Appellant and RMCC/PSL.

[181] In the circumstances, the work done by RMCC and PSL as manufacturing service providers under the two agreements can only be considered as a supply of service to the Appellant who is the manufacturer. The Appellant is engaged in the supply of goods as the real manufacturer within the meaning of section 3(1)(a) of the VAT Act.

[182] For those reasons, I am of the view that the Appellant must be regarded as the manufacturer of the products in question within the meaning of section 3(1)(a)

of the VAT Act, and the supply of manufactured goods shall be treated as a taxable activity within the meaning of the VAT Act.

[183] I hold that the TAC was correct in confirming the determination made by the Respondent, that the Appellant is engaged in the taxable supply of goods made in the course of the carrying on a taxable activity within the meaning of section 2 of the VAT Act.

Question of law No. 3

Time bar of the assessment issued for the periods January to July 2006

[184] At the hearing, the learned Counsel for the Appellant submitted that the assessments issued for the periods January 2006 to July 2006 are time barred for the following reasons:

1. The time bar to issue an assessment in respect of the taxable periods January 2006-August 2006 lapsed in August 2009 i.e., prior to the receipt of the letter of intimation and the notice of assessment. Each of the assessments made for the periods, January to July 2006 have been made after the expiry of the relevant statutory period for making an assessment in terms of section 33 (1) of the VAT Act and accordingly, such assessment is of no force or avail in law. The Appellant relied on section 33 (1) of the VAT, which provides that the assessment or additional assessment shall be made within 3 years from the end of the taxable period in respect of which the return is furnished or the assessment was made as the case may be.
2. No valid assessment can be made in compliance with section 33 of the VAT Act without serving the notice of assessment on the taxpayer and therefore, an unserved notice of to the taxpayer within the time bar period for making of an assessment is not valid;
3. Though the notice of assessment must be served on the taxpayer prior to the expiry of the statutory time bar period for making the assessment, in the present case, each of the assessments has been served on the Appellant after the expiry of the time bar period i.e.,11.09.2009. Accordingly, such assessment is also of no force or avail in law. The Appellant referring to the notice of assessment has taken up the position that the notice of assessment dated 17.08.2009 was received by the Appellant on 11.09.2009.

[185] The Respondent, however, contended that the assessment was made on 15.06.2009 and the same was communicated to the Appellant by letter dated 15.06.2009. The Respondent concedes that the notice of assessment was sent on 17.08.2009. The Respondent's argument is, however, that due to the willful failure of the Appellant to make a full and true disclosure of all material facts, the Assessor extended the time period for a valid assessment to be made at any time within a period of 5 years in terms of section 33(2) of the VAT Act. On this basis, the Respondent argued that no time bar operates on the notice of assessment, in the instant case.

[186] It is not in dispute that the Assessor by letters dated **15.06.2009** intimated to the Appellant that its returns were not accepted for the reasons stated therein and the same was received by the Appellant. The Appellant, however, claims that the letter of intimation was received on 07.08.2009 (p. 453 of the TAC brief). It is also not in dispute that the date of the notice of assessment is **17.08.2009** and the same was received by the Appellant. The Appellant, however, claims that it was received only on 11.09.2009.

Time bar of assessment-section 33(1)

[187] Section 33 (1) of the VAT Act provides the general rule that the assessment or additional assessment shall be made within 3 years from the end of the taxable period in respect of which the return is furnished or the assessment was made as the case may be. The three-year time bar is applicable in respect of assessment and additional assessments unless the exception under Section 33 (2) applies. Section 33 (1) reads as follows:

> *"33 (1). Where any registered person has furnished a return under subsection (1) of section 21, in respect of a taxable period or has been assessed for tax in respect of any period, it shall not be lawful for the Assessor where an assessment,*
>
> *(a) has not been made, to make an assessment; or*
> *(b) has been made, to make an additional assessment, after the expiration of three years from the end of the taxable period in respect of which the return is furnished or the assessment was made as the case may be."*

Exception-section 33(2)

[188] While the general rule is that the assessment shall be made within three years from the end of the taxable period, where the assessee has willfully or

fraudulently failed to make a full and true disclosure of all the material facts necessary to determine the amount of tax payable by him for any taxable period, an assessment or additional assessment can be made within the extended period of 5 years. Section 33 (2) reads as follows:

"(2) Notwithstanding the provisions of subsection (1) where the Assessor is of opinion that a person has willfully or fraudulently failed to make a full and true disclosure of all the material facts necessary to determine the amount of tax payable by him for any taxable period, it shall be lawful for the Assessor where an assessment-

(a) has not been made, to make an assessment; or
(b) has been made, to make an additional assessment,

at any time within a period of five years from the end of the taxable period to which the assessment relates*".*

Argument of the Appellant-no valid assessment can be made unless the notice of assessment is served on the taxpayer within the period for the making of the assessment in section 33(1)

[189] The Appellant further argues that no valid assessment has been made in terms of section 33(1), as the notice of assessment has been served on the taxpayer after the expiry of the taxable periods for the making of an assessment.

[190] According to the Appellant, the relevant time bar periods for the making of an assessment and the date of assessment are as follows:

For the period ending on	Time bar for making assessment ended on	Date of assessment	Date of receipt of notice of assessment
31.01.2006	30.01.2009	17.08.2009	11.o9.2009
28.02.2006	27.02.2009	17.08.2009	11.09.2009
31.03.2006	30.-03.2009	17.08.2009	11.09.2009
30.04.2009	29.04.2009	17.08.2009	11.09.2009
31.05.2006	30.05.2009	17.08.2009	11.09.2009
30.06.2006	29.06.2009	17.08.2009	11.09.2009
31.07.2006	30.07.2009	17.08.2009	11.09.2009
31.08.2006	30.08.2009	17.08.2009	11.09.2009

[191] As the above-mentioned table illustrates, the Appellant submits that the date of the assessment shall be regarded as the date on which the notice of assessment

is sent to the Appellant, i.e., 17.08.2009. The Appellant's argument is that where the Assessor does not accept a return furnished by any person under section 21, for any taxable period, in terms of section 33(1) of the VAT Act, the Assessor shall make an assessment or additional assessment on such person, and making of an assessment consists of the following components:

1. Assessing the amount of tax, which such person ought to have paid for that taxable period; in the best judgment of the Assessor; and
2. Issuing the Notice of Assessment in writing requiring such person to pay such amount forthwith.

[192] In short, the Appellant's argument is that a valid assessment is made only upon the notice of assessment served on the Appellant on 17.08.2009, and therefore, each and every assessment, including the assessment for the periods from January 2006 to June 2006 is time barred in terms of section 33(1) of the VAT Act.

[193] The Appellant strongly relied on the judgment of the Court of Appeal in *John Keels Holdings PLC v. Commissioner General of Inland Revenue* (CA Tax 26/2013 decided on 16.03.2022 and *ACL Cables v. Commissioner General of Inland Revenue* (CA Tac 07/2013 decided on 16.03.2022 in support of its position that whilst making an assessment and sending a notice of assessment are two different things, a valid assessment cannot be made in time unless the notice of assessment is served in the tax payer.

[194] The learned Senior Additional Solicitor General however, strenuously contended that there is a clear difference between the making of the assessment and the notice of assessment, and the time bar relates to the making of the assessment, and not the service of the notice of assessment. She argued that there can be no notice without an actual and valid assessment, which precedes the notice and the assessment, and therefore, it is in no way dependent on the notice or the service thereafter. She relied on the decisions in *Honig &Others (Administrators of Emmanuel Honig) v Sarsfield (H. M. Inspector of Taxes)* Ch. Div. (1985) STR 31 (CA) /(CA) (1986) STC 246), *Commissioner of Income Tax v. Chettinand Corporation,* 55 NLR 556 and *Stafford Motors v Commissioner General of Inland Revenue* CA Tax 17/2017 decided on 15.03.2019, which held that the making of assessment and serving of the notice of assessment are two different acts.

Best judgment of the assessment-section 28(1)

[195] Section 28(1) of the VAT Act relates to the power of the Assessor to make an assessment (i) using the best judgment rule by performing the duties honestly and above board; (ii) considering fairly all material put before it; (iii) considering the material that is in possession reasonably and not arbitrarily; and (iv) without being required to do the work of the taxpayer (See- *Van Boeckel v C&E QB* [1981] STC 290; VAEC1420). Section 28(1) reads as follows:

"28 (1) Where

(a) Any registered person who in the opinion of the Assessor is chargeable with tax, fails to furnish a return for any taxable period;or
(b) Any registered person, who is chargeable to tax, furnishes a return in respect of any taxable period, but to pay the tax for that taxable period; or
(c) Any person request the commissioner-General in writing to make any alteration or addition to any return furnished by such person for any taxable period,

*The Assessor **shall assess the amount of the tax**, which such person, in the judgment of the Assessor, ought to have paid for that taxable period **and shall, by notice in writing require such person to pay such amount forthwith.** The amount so assessed in respect of any person for a taxable period, shall be deemed to be the amount of the tax payable by him for that taxable period".*

[196] It is manifest that section 28 imposes the following duties on the Asssessor:

1. First to make an assessment (amount of tax which such person in the judgment of the Assessor, ought to have paid for that taxable period (making the assessment); and
2. Send the notice in writing requiring the taxpayer to pay such amount forthwith (sending the notice).

[197] On the other hand, section 31 (1) applies to an additional assessment to be made by an Asssesor where the Assessor is of the opinion that a person chargeable with tax has paid as tax, an amount less than the proper amount of the tax payable by him or chargeable from him for that taxable period. In such case, the Assessor may make an additional assessment and give such person notice of the assessment. It reads as follows:

"31 (1) .Where it appears to an Assessor that a person chargeable with tax has for any taxable period paid as tax an amount less than the proper amount of the

tax payable by him for that taxable period, or chargeable from him for that taxable period, the Assessor may, at any time, assess such person at the additional amount at which, according to the judgment of such Assessor, tax ought to have been paid by such person. The Assessor shall give such person notice of the assessment".

[198] Section 33(1) imposes a duty on the Assessor to make the assessment under section 28 or the additional assessment under section 31, before the expiry of three years from the end of the taxable period in respect of which the return is furnished. The making of the assessment is, however, different from sending the notice of assessment as there can be no notice without an assessment which precedes the notice. Accordingly, the assessment is not dependent on the notice of assessment and the notice of assessment arises only upon the making of the assessment (See-further the decision of Wijeratne, J. in *Illukkumbura v. Commissioner General of Inland Revenue*, CA/Tax 0005/2016 decided on 29.09.2022).

[199] The Appellant relied on a part of the passage from the judgment of Samarakoon C.J in *D.M.S. Fernando and another v. A.M. Ismail (1982)* Sri Lanka Tax cases, Vol IV 156, p. 184, in support of its argument that the notice must be sent to the taxpayer prior to the expiry of the time bar. The quoted passage reads as follows:

"It was therefore essential that an Assessor who rejects a return should state his reasons and communicate them. His reasons must be communicated at or about the time he sends his assessment on an estimated income".

[200] His Lordship the Chief Justice Samarakoon in *D.M.S. Fernando and another v. A.M. Ismail* (supra) considered the duty imposed on an Assessor under section 93 (2) of Inland Revenue Act, No. 4 of 1963, as amended by the Inland Revenue (Amendment) Acts, No. 17 of 1972 and 30 of 1978, in case the Assessor rejects a return. Section 93(2) of the amended Act reads as follows:

"93(2) Where a person has furnished a return of income, wealth, or gifts, the Assessor may-

(a) either accept the return and make as assessment accordingly;or

(b) if he does not accept the return, estimate the amount of the assessable income, taxable wealth or taxable gifts of such person and assess him accordingly and communicate to such person in writing the reasons for not accepting the return".

[201] His Lordship the Chief Justice having considered section 93(2) of the amended Act, held that where the Assessor rejects the return, he should state his reasons and communicate them to the taxpayer at or about the he sends his assessment on an estimated income. His Lordship referring to section 115(3) of the Inland Revenue Act, No. 4 of 1963 as amended by Act No. 17 of 1972 and Act, No. 30 of 1978 in relation to the duty of the Assessor in not accepting the return held at p. 194:

> *"Section 115(3) is an empowering section. It empowers the Assessor to do one of two things. He may accept the return, in which event he makes the assessment accordingly. Or else he* ***may not accept the return****. In such an event* ***he*** *is obliged to do two things:*
>
> 1. *Estimate the assessable income, taxable income or taxable gifts and* ***assess him*** *accordingly (the underlining is mine); and*
> 2. ***He*** *must* ***communicate to the Assessee in writing*** *the reasons for not accepting the return.*
>
> *To my mind these are all part of one exercise. There is nothing in the provision which indicates that the estimation of assessable income, wealth and gifts must be postponed for some time long after the non-acceptance. Even if one transposes the words "and communicate to such persons in writing the reasons for not accepting the return" to the first line of the section after the word "return" and before the word "estimate" it will not make it a condition precedent. One has still to read more words into it to have the effect of postponing the rest of the exercise to sometime later. This would be doing violence to the section.* ***The section imposes a duty, but does not impose a time limit within which it should be done.*** *To my mind the section merely states that if the Assessor does not accept a return, he may assess on an estimate.* ***His exercise is not complete till he has also communicated his reasons for not accepting the return****. In effect he also justifies his act of assessing on an estimate. The plain meaning of the section is clear. ' (Emphasis added)*

[202] The words clearly imply that all what the Assessor has to do, where he does not accept the return, is (i) to estimate the assessable income, taxable income...; (ii) assess him accordingly; and (iii) state reasons and communicate such reasons to the taxpayer. The words of 29 of the VAT Act are, however, different from the words in section 163(3) or section 93(2) of the repealed Inland Revenue (Amendment) Acts, No. 17 of 1972 and 30 of 1978. The words in section 29 of the VAT Act are, however, identical to the proviso to section 163(3) of the Inland Revenue Act. The proviso to section 163(3) reads as follows:

"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".

[203] Section 29 of the VAT Act reads:

"Where the Assessor does not accept a return furnished by any person under section 21 for any taxable period and makes an assessment or an additional assessment on such person for such taxable period under section 28 or under section 31, as the case may be, the Assessor shall communicate to such person by registered letter sent through the post why he is not accepting the return".

[204] It only imposes a duty on the Assessor who made the assessment either under section 28 or additional assessment made under section 31 to communicate the reasons to the taxpayer through a registered post for not accepting the return. Unless, section 33(2) applies, the assessment or additional assessment shall be made before the expiry of three years from the end of the taxable period in respect of which the return is furnished as required by section 33(1) of the VAT Act.

[205] The Appellant's argument is that the making of assessment and serving the notice of assessment are inseparable parts of the assessment which shall be made simultaneously before the expiration of the period for the making of the assessment relying on the part of the following statement made by Samarakoon C.J. in *D.M.S. Fernado v. A.M. Ismail* (supra) as reproduced in paragraph 159 of this judgment. It is apt to reproduce the entirety of the statement made by Samarakoon C.J. in *D.M.S. Fernado v. A.M. Ismail (*supra) at pp. 193-194:

"A duty is now imposed on the Assessor not only to give reasons for non-acceptance of a return, but also to communicate them to the assessor.
The primary purpose of the amending legislation is to ensure that the Assessor will bring his mind to bear on the return and come to a definite determination whether or not to accept it. It was intended to prevent arbitrary and grossly unfair assessments which many Assessors had been making as "a protective measure". An unfortunate practice had developed where some Assessors, due to pressure of work and other reasons, tended to delay looking at a "return till" the last moment and then without a proper scrutiny of the return, made a grossly exaggerated assessment. The law, I think, enabled the department to make recoveries pending any appeal on such assessments. The overall effect of this unhappy practice was to pressurize the taxpayer to such an extent that he was placed virtually at the mercy of the tax authorities. The new law was a measure intended to do away with this practice. Under the amendment when an Assessor does not accept a

return, it must mean that at the relevant point of time he has brought his mind to bear on the return and has come to a decision rejecting the return. Consequent to this rejection, the reasons must be communicated to the assessee. The provisions for the giving of reasons and the written communication of the reasons, contained in the amendment is to ensure that in fact the new procedure would be followed. More particularly the communication of the reason at the relevant time is the indication of its compliance. The new procedure would also have the effect of fixing the Assessor to a definite position and not give him the latitude to chop and change thereafter. ***It was therefore essential that an Assessor who rejects a return should state his reasons and communicate them h. His reasons must be communicated at or about the time he sends his assessment on an estimated income.*** *Any later communication would defeat the remedial action intended by the amendment" (emphasis added).*

[206] The Appellant's argument is that the substance of the statement made by Samarakoon C.J. is that a duty is now imposed on the Assessor who rejects the return and makes an assessment to state reasons for such rejection, communicate the same to the taxpayer, issue and serve the notice of assessment before the expiration of the period for the making of the assessment.

[207] In my view, all what His Lordship Samarakoon CJ said in *D.M.S. Fernando and another v. A.M. Ismail* was that the Assessor who rejected a return should state his reasons and communicate them at or about the time he sends his assessment on an estimated income to the taxpayer. I am afraid, there is nothing to indicate or gather from His Lordship Samarakoon C. J's statement that His Lordship held that the notice of assessment shall also be sent to the taxpayer at or about the time he sends his assessment or that the notice of assessment shall be sent to the taxpayer before the expiration of three years for the making of the assessment.

[208] All what section 29 requires the Assessor who rejected the return and made the assessment under section 28 or additional assessment under section 31 is to communicate to the tax payer by registered letter sent through the post, why he is not accepting the return, his reasons for not accepting the return. Having made the assessment, the Assessor by letter dated 15.06.2009 communicated to the taxpayer the **assessment** and the **reasons** in writing for not accepting the returns for the 24 taxable periods as required by section 29. At the end of the letter, Assessor states:

"Please treat this letter has been issued in terms of section 29 of the Value Added Tax Act, No. 14 of 2002".

[209] It is manifest that the Assessor could have communicated the reasons for not accepting the return only after making the assessment and therefore, the time bar applies to the assessment made under section 28 or additional assessment made under section 31 of the VAT Act, and not to the notice of assessment which is not dependent on the making of the assessment.

[210] On the other hand, section 28 (1) of the VAT Act imposes a duty on the Assessor who made the assessment to send a notice in writing requiring the person who was assessed to pay such amount forthwith. Section 28(3) also imposes a duty on the Assessor who assessed any person who failed to furnish a return, by notice in writing requiring him to pay on or before a date the amount specified in that notice. Furthermore, section 31 imposes a duty on the Assessor who made an additional assessment to serve the notice of assessment on the taxpayer. It is manifest that a duty is imposed on the Assessor who made the assessment under section 28 or additional assessment under section 31 to serve the notice of assessment on the taxpayer. Both sections do not specify a time limit within which the notice of assessment shall be served on the Assessor.

[211] The Appellant argued that the date of the notice of assessment i.e., 17.08.2009 should be regarded as the date for the making of the assessment completely ignoring the letter of communication dated 15.06.2009 issued by the Assessor to the Appellant in terms of section 29 of the VAT Act, which contains an assessment and reasons for not accepting the returns. I am not inclined to agree with this interpretation of the Appellant. The words "where the Assessor does not accept a return furnished by any person under section 21 .....and **makes an assessment or an additional assessment** under section 28 or under section 31, the Assessor shall communicate to such person…. why he is not accepting the return" clearly indicate that the assessment or additional assessment should precede the letter of intimation provided in section 29. It is obvious that the communication of the reasons for not accepting of the return cannot be issued unless the Assessor had in fact made the assessment under section 28 or an additional assessment under section 31.

[212] One cannot fathom from the language of section 29 that the notice of assessment should also be sent together with the communication of the reasons for the non-acceptance of the return. On the other hand, the requirement of sending the notice of assessment is set out in section 28 and 31 of the VAT Act. Once the assessment or additional assessment had been made, the Assessor is fixed to a definite assessment, a position which cannot be changed thereafter. Accordingly, what is communicated to the taxpayer under section 29 is the definite assessment made by the Assessor with reasons signed by the Assessor. In the

circumstance, the communication of such assessment or additional assessment with reasons is the clear proof that the **assessment had been made on a definite position** and therefore, the notice of assessment will follow.

[213] In the absence of any statutory obligation imposed on the Assessor, I am not inclined to accept the argument that the notice of assessment shall also be sent to the taxpayer before the expiration of three years for the making of the assessment. In order to buttress the argument that though the making of assessment and sending of notice of assessment are two different things, a valid assessment cannot be made in time unless notice of assessment is served on the taxpayer prior to the expiry of the statutory time bar for making an assessment, the Appellant relied on the decision of the Court of Appeal in *ACL Cables v. CGIR* (supra) and *John keels Holdings v. CGIR* (supra).

[214] It is relevant to note that *ACL Cables v. CGIR* and *John keels Holdings v. CGIR* (supra) were decided under the provisions of the Inland Revenue Act, No. 10 of 2006. The issue in both cases was whether the assessment in question was made within the meaning of section 163(3) of the Inland Revenue Act, No. 10 of 2006. The argument in both cases in both cases, related to the question whether the effective date for the commencement of the time bar is the date of making the assessment or the date of sending the notice of assessment to the taxpayer.

[215] Having considered the views expressed by Perera J. In *A. M. Ismail v. Commissioner General of Inland Revenue* (supra) and the views expressed by His Lordship Samarakoon C.J in *D. M. S. Fernando v. A. M. Ismail,* Sri Lanka Tax Cases Vol. IV, p. 184, Samarakoon J., in *ACL Cables PLC v. Commissioner General of Inland Revenue* (supra) held that the "making of the assessment" is same as "giving of assessment" and therefore, no lawfully valid assessment can be made without first serving a notice of assessment. Samarakoon J., stated at pp. 24-25 as follows:

> ***"Therefore, both Justice Victor Perera and the learned Chief Justice have based their judgments in the premise that "making the assessment" is same as "giving notice of assessment""*** *This was why it had been argued in CA Tax 17/2017 that no lawfully valid assessment can be made without first serving a valid notice of assessment. The Division of this Court in C.A. Tax 17/2017 though that this is a practical impossibility. A letter cannot be sent without being written. But what was meant is not this. The argument of the appellant is that an "assessment" becomes valid only when the "notice" is given. This position was the basis of Ismail despite those two cases were concurred with the duty to give reasons. The position of the appellant is that an "assessment" is no "assessment" until "notice of assessment" is given. The position could have been otherwise, viz. an "assessment" could have been a valid assessment, as soon*

as an estimate is made. If like in Honig (administrators of Emmanuel Honig) v Sarasfield (H.M. Inspector of Taxes) the Commissioners Inland Revenue also maintained a register in which an assessment is entered. In the absence of such procedure in this country. It cannot be accepted that the making of an assessment without giving notice of assessment is a valid assessment. Hence, notice of assessment must be given to make the assessment validly made for the purpose of the stipulated time period".

[216] The Court in *ACL Cables PLC v. Commissioner General of Inland Revenue* (supra) *further* stated that there cannot be a valid assessment made without there being a notice of assessment at pp 30-31 as follows:

"The lucidity in the aforequoted passage is characteristic of the age in which it was written. The taxpayer could have instituted a suit and recovered the tax paid because there was no "assessment". There was no "assessment" because there is no notice, a demand, a charge within the limited period. ***This shows that "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)***

[217] In *John Keels Holdings PLC v. Commissioner General of Inland Revenue* (supra) Samarakoon J. held that the time bar commences with the sending of the notice of assessment, and not with the making of the assessment unless a book or a register is maintained to indicate the evidence of the date of making of the assessment and therefore, the sending of the notice of assesment has to be done within the time bar period. His Lordship stated at p. 32:

"Hence, the argument of the Tax Appeals Commission in the present case that the effective date for the commencement of the time bar is the date of "making "the assessment not the date of sending the notice could have been accepted if there was a book or a register maintained by the Commissioner of Inland Revenue which will be evidence of the date of making of assessment".

[218] His Lordship Samarakoon, J., Father took the view that section 163(1) is subject to the provisions of subsection (3) and (5) and section 163(5) is also subject to time limits. Hence, sending of notice must be made within the prescribed time. His Lordship stated at page 30 as follows:

"But section 163(1) refers to "asses the amount...and shall by notice in writing require such person to pay forthwith. ....Section 163(1) also says subject to the provisions of subsection (3) and (5). It is section 165(5) which has the time limit. hence, sending of notice must be done within the prescribed time".

[219] In both cases, Samarakoon, J. held that no valid assessment can be made until notice of assessment is sent to the taxpayer or no lawfully valid assessment can be made without first serving a notice of assessment on the taxpayer unless the Assessor could have maintained a book or register in which an assessment is entered. Accordingly, in the absence of such a practice in Sri Lanka, making of an assessment without giving notice of assessment within the time bar period is not valid.

[220] The question that arose in *Ismail v. Commissioner of Inland Revenue* (supra) and in *D.M.S. Fernando and another v. Ismail* (supra) was whether the duty is imposed on the Assessor who rejects a return in terms of section 93(5) of the Inland Revenue Act No. 4 of 1963 (as amended) to state reasons, and if so, whether the communication of reasons in writing is mandatory and requires compliance.

[221] The question of whether the time bar applies to the making of the assessment or the notice of assessment was considered in *Stafford Motor Company (Pvt) Limited v. Commissioner General of Inland Revenue (CA Tax 17 of 2017 decided on 15.03.2019). Janak de Silva J., stated in Stafford Motor Company (Pvt) Limited v. Commissioner General of Inland Revenue (supra) that the* question of whether the time bar applies to the making of assessment or the notice of assessment did no arise for determination either in the Court of Appeal case, or in the Supreme Court case, and therefore, there is no binding precedent established in the said two cases on the said issue (Vide-page 9 of the judgment).

[222] It is relevant to note that the Court of Appeal in *Cables v. CGIR (supra) and John keels Holdings v CGIR* (supra) refused to follow the decision of the Court of Appeal in *Commissioner General Tax v. Chettinand Corporation* 55 NLR 556, Honig & Others (*Administrator of Emmanuel (Honig) v. Sarsfield (H. M. Inspector of Taxes)* Ch. Div. (1985) STRC 31 (CA) / (CA) (1986 STC 246 and Stafford Motors v CGIR (supra).

[223] The decisions in all these cases were based on the well established proposition that the making of the assessment and serving of notice of assessment are two different acts. *In Honig & Others (Administrators of Emmanuel (Honig) v. Sarsfield (H. M. Inspector of Taxes)* (supra), some weeks before the time limit in section 40 of the Taxes Management Act, 1970, the Inspector of Taxes on 16.03.1970 raised assessments against the administrators of Emanuel Honig by signing certificates to that effect where he entered into the assessment book stating that he had made assessments on the administrators. The notices of assessment were issued on 16.03.1970 but did not reach the administrators until after 07.04.1970. The time bar for the making of the assessment was 06.04.1970 under sections 34(1) and 40 of the Taxes Management Act, 1970.

[224] The Special Commissioners held that (i) the assessments were made on 16.03.1970 when the duly authorised Inspector signed the certificate and that they were not out of time. The Chancery Division, dismissing the appeal held that the making of an assessment was not dependent on the service of the notice of assessment, as the assessment was made on 16.03.1970 and so, it was within the time limit prescribed by section 34 and 40(1) of the Act.

[225] The Court of Appeal in dismissing the appeal held that the assessments were made on 16.03.1970 when the Inspector of Taxes signed the certificate in the assessment book. The fundamental question that arose for decision before the Court of Appeal was this: Is an assessment effectively made until notice of it has been given to the taxpayer? Section 29(1) of the Act provided as follows: "Except as otherwise provided, all assessments for tax shall be made by the Inspector. Section 29(5) provided that notice of any assessment of tax shall be served on the person assessed, and shall state the time within which any appeal against the assessment may be made. Section 29(6) provided that "After the notice of assessment has been served on the person assessed, the assessment shall not be altered except in accordance with the express provisions of the Taxes Acts.."

[226] The Court of Appeal in Honig answered the question whether an assessment effectively made until notice of it has been given to the taxpayer and held at paragraph F:

> *"It seems to me that the words in s. 29(5) "notice of any assessment to tax..." necessarily imply that there is a difference between the notice of assessment and the assessment.* ***One cannot have a notice of an assessment until there has been an actual and valid assessment****. In subs (6) one finds the words* ***"After the notice of assessment has been served on the person assessed...". The reference there to "the person assessed" implies to my mind that there has been an assessment. It is clear that that subsection contemplates 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. They are two wholly different things****. .....*
>
> ***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" [emphasis added].***

[227] The ratio of the decision was that the assessment is different from the notice of assessment and it is in no way dependent on the service of the notice of assessment. When the Inspector of Taxes signed a certificate in the assessment book stating that he had made an assessment, is good evidence that an assessment had been made under the Taxes Management Act because it has the

effect of fixing the Inspector of Taxes to a definite position, and not give him latitude to chop and change thereafter, echoing the quoted words used by Samarakoon C.J. in *D.M.S. Fernando v A.M. Ismail* (p. 194).

[228] But, the fact that the assessment is made when the certificate recording its entry in the assessment book is signed by the Inspector of Taxes cannot be taken into account in displacing the distinction between the making of the assessment and the sending the notice of assessment under the VAT Act.

[229] The VAT Act of Sri Lanka goes a step forward and imposes a mandatory statutory obligation on the Assessor who made the assessment to communicate his reasons in writing to the taxpayer why his return was not accepted. The Assessor who makes the assessment in Sri Lanka need not produce any assessment register to establish that an assessment was made when he communicated the assessment and his reasons in writing to the taxpayer with his signature, why he is not accepting the return.

[230] In England, the certificate made by the Inspector of Taxes in the assessment book may fix the Inspector of Taxes to a definite position that an assessment has been made under the provisions of the Taxes Management Act. In Sri Lanka, once the assessment made by the Assessor is communicated to the taxpayer in writing (by registered letter dated 15.06.2009) signed by the Assessor with reasons for not accepting the returns under section 29 of the VAT Act, the Assessor is fixed to a definite position that an assessment had been made by the Assessor, which cannot be changed or chopped thereafter. When that happens, there is no way for the taxpayer to argue that no assessment has been made until the notice of assessment is received.

[231] For those reasons, the fact that the Inspector of Taxes signed the certificate in the assessment book stating that an assessment was made under the Taxes Management Act, cannot be applied in displacing its ratio of Honig that the making of the assessment was not dependent on the service of the notice of assessment, which are two different things. Accordingly, there is no reason whatsoever, to regard the signing of the assessment register to be the reason as to distinguish the decision in Honig and uphold the Appellant's argument that unless the notice of assessment is served, there is no valid assessment.

[232] The Appellant argued that unless the notice of assessment is served on the Assessor within the period for the making of the assessment, the Assessor who made the assessment within the stipulated period can indefinitely delay the sending of the notice of assessment, and issue the same at any time as he wishes. If that is the intention of Parliament, the legislature should have specifically stated

so in the VAT Act that the letter of communication as required by section 29 of the VAT Act shall be accompanied by the notice of assessment or the notice of assessment and shall be served within the period for the making of the assessment.

[233] In this context, the question whether the notice of assessment should also be sent before the expiration of the time period for the making of the assessment is the exclusive province of the Parliament. It is settled law that courts cannot usurp legislative function under the disguise of interpretation and rewrite, recast, reframe and redesign the VAT Act, because this is exclusively in the domain of the legislature. This proposition was lucidly explained by Lord Simonds in *Magor and St Mellons Rural District Council v. Newport Corporation* [1952] AC 189, HL. Referring to the speech of Lord Denning MR, Lord Simonds said at page 191: "

> *"The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and the duty of the court to travel outside them on a voyage of discovery are strictly limited.."*

[234] MR, Lord Simonds further said at page 192:

> *"It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation and it is the less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed, the remedy lies in an amending Act".*

[235] The same proposition was echoed by Arijit Pasayat, J. in the Indian Supreme Court case of *Padmasundara Rao and Ors. v. State of Tamil Nadu and Ors.* AIR (2002) SC 1334, at paragraph 14 as follows:

> *"14. While interpreting a provision the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary".*

[236] In *Commissioner of Income Tax v. Chettinand Corporation* 55 NLR 553, the Court considered the distinction between the assessment and the notice of assessment under the provisions of the Income Tax Ordinance No. 2 of 1932 (as amended).Gratien J., at 556 stated:

> *"The distinction' between an " assessment " and a " notice of assessment " is thus made clear: the former is the departmental computation of the amount of tax with which a particular assessee is considered to be chargeable, and the latter is the formal intimation to him of the fact that such an assessment has been made".*

[237] Although the distinction was considered under the provisions of the Income tax Ordinance, the distinction between the assessment and the notice of assessment is clearly found in the wording in sections 28,29, 31 and 33 of the VAT Act as well. In *Stafford Motors Company (Pvt) Ltd v Commissioner General of Inland Revenue* (supra), the Court of Appeal considered the question whether the serving a notice of assessment is a necessary precondition that must be satisfied to confer validity on the assessment and the notice of assessement must be served on the taxpayer prior to the expiry of the time bar. Janak de Silva J. stated at page 8:

> "*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*".
>
> *The time bar to making of an assessment is set out in section 163(5) of the 2006 Act. The section clearly states that "no assessment" shall be made after the time specified therein. Given that the 2006 Act recognizes a distinction between an "assessment" and "a "notice of assessment" , it would have been convenient for the legislature to refer to the "notice of Assessment" rather than "assessment" in section 163(5) of the 2006 Act. On the contrary, it has been made effective for the making of an "assessment". Therefore, Court rejects the submission that the date of the posting of the "notice of assessment" is the relevant date for the purpose of determining the time bar for making an assessment. Court determines that the date of making the assessment is the relevant date for the purpose of determining the time bar*".

[238] In *Illukkumbura Industrial Automation (Private) Limited v Commissioner General of Inland Revenue* CA Tax 5/2016) decided on 29.09.2022, the issue *inter alia*, before the Court of Appeal was whether the intimation letter dated 28.11.2011 issued by the Assessor with reasons for not accepting the return under section 163(3) of the Inland Revenue Act, No. 10 of 2006 can be treated as evidence of making an assessment, or whether no valid assessment can be made until after the notice of assessment is issued to the assessee. Rejecting the argument of the Appellant that no valid assessment can be made until after the notice of assessment is issued to the assessee, Wijeratne J., stated at page 16:

> *"The letter of intimation dated 28.11.2011 contains an assessment on an estimated income and therefore, the letter of intimation satisfies both the requirements, the reasons for rejecting the return and the assessment on an*

estimated income. Hence, the assessment had been made before, or at least on the 28th November 2011".

[239] The identical situation applies to the VAT Act. The words in sections 28 (1) and (3) of the VAT Act "the Assessor shall **assess the amount** of the tax" and the words in section 31 "Assessor may, at any time, **assess such person** at the additional amount.." refer to the making of an assessment. Those words necessarily imply that first, there has to be an assessment made by the Assessor.

[240] On the other hand, he words in section 28 (1) and (3) "and. Shall, **by notice in writing**, require such person to pay such amount.." necessarily refer to the notice of assessment and that after making the assessment, the notice of assessment in writing has to be served on such person assessed. There cannot have a notice of assessment until there has been an actual and valid assessment made by the Assessor and it is that assessment that has to be communicated to the taxpayer in writing with reasons as required by section 29.

[241] The Appellant's argument that the relevant date for the determination of the assessment is the date of sending the notice is further displaced by the wording in section 33 of the VAT Act. The time bar for making an assessment is set out in section 33 of the VAT Act. Section 33 clearly provides that no assessment shall be made after the expiration of three years from the end of the taxable period in respect of which the return is furnished or the assessment was made.

[242] If it was the intention of the legislature that the relevant date for the validity if the assessment is the date of posting of the notice of assessment, the legislature could have referred to the "notice of assessment" in section 33, rather than the "assessment". Section 33 of the VAT Act has clearly recognised the distinction between the "assessment" and the "notice of assessment" in section 33.

[243] It is crystal clear that the VAT Act contemplates a distinction between the making of the assessment and the serving of the notice of assessment and the validity of the assessment in no way depends on the notice of assessment. It is the making of an assessment that determines the time bar of the assessment and not the serving of the notice of assessment. I am inclined to follow the decisions in *Honig & Others (Administrators of Emmanuel (Honig) v. Sarsfield (H. M. Inspector of Taxes)* (supra), *Commissioner of Income Tax v. Chettinand Corporation* (supra), *Stafford Motors Company (Pvt) Ltd v. Commissioner General of Inland Revenue* (supra) and *Illukkumbura Industrial Automation (Private) Limited v. Commissioner General of Inland Revenue* (supra).

[244] For those reasons, I hold that the time bar of the assessment in section 33 of the VAT Act applies to the making of the assessment and not to the serving of the notice of assessment and the serving a notice of assessment is not a precondition for the validity of the assessment. In the present case, the letter of intimation dated 15.06.2009 which contains an assessment made by the Assessor and reasons in detail for not accepting the returns has been communicated to the Appellant by the Assessor as required by section 29 of the VAT Act. In circumstance, the assessments shall be deemed to have been made by the Assessor on 15.06.2009, and such date shall be regarded as the relevant date to determine the time bar of the assessment under section 33 (1) of the VAT Act.

Time bar of the assessments for the period January 2006 to July 2006

[245] Having concluded that the date of making of the assessment is the relevant date to determine the time bar under section 33 (1) of the VAT Act, I shall now proceed to consider the question whether the assessments for the periods January 2006-July 2006 are time barred.

[246] The contention of the Appellant was that the Assessor had taken more than three years for making the assessment and hence, the assessments are statutorily time barred in terms of section 33(1) of the VAT Act. The learned Counsel for the Appellant submitted that the intimation letters dated 15.06.2009 and the notices of assessment dated 17.08.2009 had been issued on 17.08.2009 and therefore, each and all of the assessments had been made after the expiry of three years from the end of each taxable period in terms of section 33 of the VAT Act.

[247] As the date of making the assessment is the relevant date for the purpose of determining the time bar and the assessments had been made on 15.03.2009, the relevant time bar periods for the making of an assessment and the date of assessment are as follows:

For the period ending on	Time bar for making assessment ended on	Date of assessment	Date of receipt of notice of assessment
31.01.2006	30.01.2009	15.06.2009	11-o9.2009
28.02.2006	27.02.2009	17.06.2009	11.09.2009
31.03.2006	30.-03.2009	17.06.2009	11.09.2009
30.04.2009	29.04.2009	17.06.2009	11.09.2009
31.05.2006	30.05.2009	17.06.2009	11.09.2009
30.06.2006	**29.06.2009**	**17.06.2009**	11.09.2009
31.07.2006	**30.07.2009**	**17.06.2009**	11.09.2009

31.08.2006	**30.08.2009**	**17.06.2009**	11.09.2009

[248] The TAC has taken the view that the assessments for the taxable periods from June, 2006 to December, 2007 have been made within the stipulated time period of three years since those assessments have been made on **15.06.2009**. The TAC has thus, proceeded to consider the question whether the five assessments from January, 2006 to May, 2006 are time barred in terms of section 33 of the VAT Act and held that those five assessments are not time barred in terms of section 33 (2) of the VAT Act. The relevant findings are as follows:

> *"Accordingly, it is to be accepted that the 19 assessments for the taxable periods from June, 2006 to December, 2007 are deemed to have been made by the Assessor on 15th June, 2009 and accordingly, in terms of section 33 of the VAT Act, those nineteen assessments for the taxable periods from June, 2006 t December, 2007 have been made within the stipulated time period of three years. It is further stated by the Respondent in its written submissions dated 19.04.2009, only five assessments for the taxable periods from January, 2006 to May, 2006 have been made outside the time period of three years as stipulated in section 33(1) of the VAT Act…(p. 111)..*
>
> *Accordingly, we hold that the five assessments made for the taxable periods from January (06031) to May, 2006 (06062) are not time bared in terms of section 33 of the Value Added Tax Act, No. 14 of 2002" (p. 114).*

Exception to the general rule

[249] It is manifest that the three year cap in Section 33 (1) is paramount, and the assessment for the relevant periods must fall within the statutory time bar period specified in Section 33 (1). The exception applies where there is a willful or fraudulent failure to make a full and true disclosure of all the material facts necessary to determine the amount of tax payable by the taxpayer as set out in Section 33 (2). In such case, an assessment or additional assessment can be made within a period of 5 years. Section 33 (2) reads as follows:

> *"(2) Notwithstanding the provisions of subsection (1) where the Assessor is of opinion that a person has willfully or fraudulently failed to make a full and true disclosure of all the material facts necessary to determine the amount of tax payable by him for any taxable period, it shall be lawful for the Assessor where an assessment-*
>
> *(a) has not been made, to make an assessment; or*
> *(b) has been made, to make an additional assessment,*

at any time within a period of five years from the end of the taxable period to which the assessment relates".

Willful or fraudulent failure to make a full and true disclosure of all the material facts necessary to determine the amount of tax

[250] The Appellant argued that there is no basis in fact or in law to establish fraud or willful evasion when there is no allusion to fraud or willful evasion in the communication from the Assessor dated 15.06.2009, or to establish fraud or evasion **beyond reasonable doubt**. The Appellant relied on the decisions in *Piyasena v. Vaz* (1945) 1 CTC 338 at p. 242, *Chellappah v. Commissioner of Income Tax* (1961) 1 CTC 434 in support of the position.

[251] The Appellant has taken the stand that the Assessor has not come to a finding of a willful evasion or fraud in his intimation letter and therefore, there is no truth in the Respondent's argument that there was a willful or fraud on the part of the Appellant in not disclosing material facts. The contention of the Appellant is that the Assessor has not formed an opinion that the Appellant has willfully or fraudulently failed to disclose fully and truly all material facts which were necessary for the assessment but not otherwise. Section 33(2) refers to the Assessor to form an opinion that the taxpayer has willfully or fraudulently failed to make a full and true disclosure of all material facts necessary to determine the amount of tax.

[252] The learned Senior Additional Solicitor General submitted that the Appellant had deliberately failed to make a full and true disclosure of all the material facts necessary to determine the amount of tax payable by not including in the VAT returns the sales/supplies of toothbrushes and vim sourcer bars. She submitted that the logical consequence of the non-disclosure and non-inclusion of sales/supplies of toothbrushes and vim sourer bars in the returns on time, was the delay in making the assessments as VAT, unlike income tax, is collected by the Appellant from the consumers in respect of each monthly taxable period. She submitted that the non-inclusion of monthly sales/supplies deliberately by the Appellant prevented the Assessor to make the assessment for each monthly taxable period within the time period for making the assessment under section 33(1) of the VAT Act.

[253] Now the question is whether the Assessor is empowered to act and make an assessment under section 33(2) due to the willful failure of the Appellant to make a full and true disclosure of all the material facts necessary to determine the

amount of tax payable by him for the relevant taxable periods. In other words, the Court must determine the following questions:

a. Whether the taxpayer who fails to disclose and include the sales/supplies of toothbrushes and vim sourer bars fully and truly in the VAT returns in time;

b. If so, whether the Assessor was justified in forming an opinion that the taxpayer has willfully **or** fraudulently failed to make full and true disclosure of material facts necessary to determine the amount of tax payable by him for any taxable period;

c. If so, whether such a person is entitled to seek the benefit of the statutory time bar in Section 33 (1) of the VAT Act.

[254] The Appellant heavily relies on the following statements made by Basnayake C.J. in *Chellappah v. Commissioner of Income Tax* (1951) 1 CTC 434, 438, at p. 429 to buttress its argument that the omission of any income from the return does not constitute **an offence** unless it is done deliberately and with the **evil intention** of defeating the object of the statute:

> *"The mere omission of any income from the return does not constitute the offence. The omission may be due to an oversight or it may even be deliberate, but not willfully with intent to evade tax. A taxpayer is entitled to construe the taxing statute and make his return in accordance with the understanding of it. An omission based on a mistaken view of the law or facts does not attract punishment. The taxing authorities are not bound by the taxpayer's views of the law or by his methods of accounting. They are free to reject his interpretation and assess him on what they think is the correct basis.... to attract punishment, the omission must be done deliberately and with the evil intention of defeating unlawfully the object of the statute by knowingly presenting a false picture of the income of the person making the return by omitting therefrom material which the tax payer knowns should be properly be there.....*
>
> *The false statement or entry must be deliberately made with the knowledge that it is false and with the evil intention of thereby misleading the taxing officer. The object of the false statement or entry should be to defeat the purpose of the statute, to deny to the revenue its legitimate dues.* ***A statement of entry which is in fact false if made inadvertently or honestly in the belief that it is true does not attract punishment, even if the taxpayer stood by the statement or entry if passed undetected"*** *(emphasis added)*

[255] The learned Additional Solicitor General submitted that for the purpose of non-penal section 33(2), all what is required is to show that the failure of the

Appellant to make a full and true disclosure of all the material facts necessary to determine the amount of tax payable, and such failure was deliberate. She submitted that as Basnayake C.J himself stated, "willfully" means deliberately or purposely without reference to bona fides. Basnayake J., referred to the penal provision in section 87 of the Income Tax Ordinance, which provides:

> "*87 (1) Any person who willfully **with intent** to evade or to assist any other person to evade tax:*
>
> *(g) Omits from a return under this Ordinance any income which should be included; or*
> *(h) Make any false statement or entry in any return made under this Ordinance; or*
> *(i) Makes a false statement in connection with a claim for a deduction or allowance under Chapter V or Chapter VI; or*
> *(j) Signs any statement or return furnished under this Ordinance without reasonable grounds for believing the same to be true.*
>
> *Shall be guilty of an offence, and shall for each offence be liable on summary trial and conviction by a Magistrate to a fine exceeding the total of five thousand rupees and treble the amount of tax for which he, or as the case may be the other person so assisted, is liable under this Ordinance for the year of assessment in respect of or during which the offence was committed or to imprisonment of either description for any term not exceeding six months, or to both such fine and imprisonment".*

[256] It is manifest that section 87 requires the prosecution in a criminal case to prove both elements of "willfulness" and "intention to evade tax" **beyond the reasonable doubt** and thus, unless the willfulness and intention to evade tax are both proved beyond reasonable doubt, the offence is not committed under section 87, attracting an imprisonment or fine and a penalty.

[257] The Appellant relies on the decision in *Chellappah v. Commissioner of Income Tax* (supra) and *Piyadasa v. Vaz* (1945) 1 CTC 339, at p. 242 makes a feeble attempt to convince us that where fraud or willful evasion is alleged, the onus is on the Assessor to establish such fraudulent or willful intention to commit fraud or willful evasion **beyond reasonable doubt**. Similar to *Chellappah v. Commissioner of Income Tax* (supra), *Piyadasa v. Vaz* (supra), is also a criminal case where it was held that in a prosecution under section 87(1) (b) and (d) of the Income Tax Ordinance for making a false and willful statement intended to evade tax, the onus is on the prosecution to establish **beyond reasonable doubt** that the accused

intended to evade tax. It was further held that for an accused to be guilty, it must be proved by the prosecution **beyond reasonable doubt** that the real intention is to evade tax as opposed to a constructive one.

[258] The learned Senior Additional Solicitor General however, argued that the Respondent is not required by section 33(2) to prove that the Appellant's failure to make a full and true disclosure of all the material facts necessary to determine the amount of tax payable by him was done with the evil intention of misleading the Assessor. She argued that where it can be shown that there were reasonable grounds for the Assessor to form an opinion from the available materials that the Appellant has failed to make a full and true disclosure of all the material facts necessary to determine the amount of tax payable by him, the Appellant cannot be freed from its tax liability under the VAT Act.

[259] Section 33(2) is not a penal provision that imposes a punishment for committing a criminal offence willfully with intent to evade or assist any other person to evade tax, like in *Chellappah v. Commissioner of Income Tax* (supra) or *Piyadasa v. Vaz* (supra). In my view, section 33(2) of the VAT Act only empowers the Assessor to assess the taxpayer beyond the three year period for the making of the assessment where he is of the opinion that the taxpayer has willfully or fraudulently failed to make a full and true disclosure of all the material facts necessary to determine the amount of tax. There is no additional burden on the Assessor to prove intentional tax fraud or intentional tax evasion before making an assessment in the extended time period specified in section 33(2).

[260] It is relevant to note that section 33(2) refers to the elements of either "willfully" **or** "fraudulently;" and not "willfully **and** fraudulently" and thus, there is no need for the Assessor to prove fraud in all situations, and it is sufficient for the Assessor to form an opinion that the taxpayer has willfully failed to make a full and true disclosure of all the **material facts** necessary to determine the amount of tax payable by him.

[261] In *HSBS Electronic Data Processing Lanka (Pvt) Ltd v. The Commissioner General of Inland Revenue* (supra), Janak Silva J., relying on the interpretation given by Basnayaka J. (as he was then) held that the VAT Act, being a fiscal rather than a penal statute, the word "willfully" in section 33 (2) means deliberately or purposely without reference to bona fides. In this context, we have to look at the applicability of Section 33 (2) of the VAT Act. I must emphasize that Section 33 (2) requires the assessor to form an opinion that the taxpayer has willfully or

fraudulently failed to make a full and true disclosure of all the material facts necessary to determine the amount of tax.

[262] The word "willfully" has not been defined under the VAT Act. In *Reg v. Senior* (1899) 1 QB 283, Lord Russell, explains "willfully'" to mean:

> *"that the acts if done deliberately and intentionally not by accident or inadvertence, but so that the mind of the person who does the acts goes with it"*.

[263] In *In re YOUNG AND HARS-TON'S CONTRACT*' (1886) 31 Ch D 168, Bowen, L.J., explained the word "wilfully" which has been accepted and applied in subsequent cases, as follows:

> *"It (i.e., the word 'wilfully') generally, as used In Courts of law, implies nothing blamable, but merely that the person of whose action or default the expression, it used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing and intends to do what he is doing, and is a free agent"*.

[264] In the Indian case of *E.I. Rly. Co. v. Ahmed Ali Mohammad AIR* (14) 1921 Nag 34, the question was whether a railway company was guilty of willful neglect. The learned Judge said.

> *"that the term willful neglect implies an intentional and purposeful omission to do a certain act and, it is an even more extreme term than gross and culpable negligence"*.

[265] In *Re: T.N.K. Govindarajulu v. Unknown*, 1951 1952 CriLJ1063, Subba Rao, J. held at paragraph 10 in the context of tax evasion:

> *"In my view, this construction which leads to startling results should not be accepted unless the words in the statute are clear and unambiguous. Not only I do not see any such words but to my mind the word willful used in the section was intended only to hit at intentional omissions of an assessee with full knowledge that the item omitted is a taxable one"*.

[266] The Supreme Court of the United States held in *United States v. Bishop,* 412 U.S. 246 (1973) and *United States v. Pomponio* 429 U.S. 10 (1976), that willfulness is the "voluntary, intentional violation of a known legal duty." The word "willfully" in section 33 (2) in this sense means, done deliberately or voluntarily or purposely without reference to bona fides, in violation of a known legal duty.

[267] The only question is whether the Assessor could form an opinion that "there had been willful failure on the part of the Appellant to disclose fully and truly all material facts necessary for the assessment" for any of these years in consequence of which the under-assessment took place. There is nothing, however, in section 33 (2) to indicate that the assessor shall indicate his opinion in specific language and in a specific manner in writing. The formation of the assessor's opinion can be gathered from the language used in any notice or any intimation letter sent by him to the taxpayer supported by the contents of the record maintained by the Respondent.

[268] In *HSBC Entronic Data Processing Lanka (Pvt) Ltd, v. The Commissioner General of Inland Revenue,* CA/Tax/17/2013, decided on 12.05.2021, it was held that the 3 year cap will not apply where there has been a failure to provide necessary information. The Court of Appeal further held that the letter of intimation dated 21.02.2007 explains that the Appellant has failed to provide information on the time of supplies and thus, it was justifiable on the part of the assessor to invoke the amended Section 33 (2) of the VAT Act and make a singular assessment for the entire calendar year 2004. In *People's Leasing and Finance PLC. v. The Commissioner General of Inland Revenue* (supra), we took a similar view in paragraph 94:

> *"[94] There is nothing in section 33 (2) to indicate that the assessor shall indicate his opinion in specific language and in a specific manner in writing. The formation of assessor's opinion can be gathered from the language used in any notice or any intimation letter sent by him to the taxpayer supported by the contents of the record maintained by the Respondent".*

Failure to make a full and true disclosure of material facts

[269] The Assessor has stated in his letters dated 15.06.2009 that the Appellant being the manufacturer of toothbrushes and vim scourer bars (dish wash bars) has failed to disclose the following **material facts** relevant to determine the assessment by not including in the VAT returns as value of supplies of toothbrushes and vim dish wash bars. According to the Assessor, the **value of undeclared during the year 2006 and 2007 amounts to Rs.1, 138,042,029 and Rs. 1,400,000,000,** respectively.

> *"The taxable supplies derived from the supply of toothbrushes and vim scourer bars (dish wash bars) have not been included in the VAT returns as value of*

supplies-value of the supplies so undeclared during the year 2006 and 2007 as follows:

Year	toothbrush and vim dish wash bars
2006	**1,138,042,029**

Year	toothbrush and vim dish wash bars
2007	**1,400,000,000**

[270] The Appellant has, however, claimed that it had disclosed in each return in column E, the quantum of the supplies which the Appellant believed were excluded supplies (See- written submission of the Appellant dated 30.09.2019, paragraph 4). A perusal of few returns available in the brief reveals that superficially, the Appellant had declared values of supplies as excluded supplies in the returns. The Assessor has found, however, that the **total value of supplies has not been declared** by the Appellant and the values of supplies so **undeclared** amounts to Rs. 1**,138,042,029 and Rs. 1,400,000,000**. The following tables prepared by the Assessor in his assessments dated 15.06.2009 illustrate the value of supplies declared in the VAT returns and the value of the supplies (VIM and toothbrushes) undeclared and unassessed by the Appellant in the returns for the taxable years from January, 2006 to December 2007:

2006

Year/ Month	Value of Supplies of Vim & Tooth Brush (15%)	Value of Supplies Declared in VAT return (15%)	Total Value of Supplies (15%)	Value of Supplies Declar d in VAT Return (15%)	Tax Rate15%	Tax Rate 20%	VAT payable
2006 January	**107,875,179**	1,114,301,124	1,222,176,303		183,326,445		183,326,445
February	**90,814,450**	973,898,858	1,064,713,308		159,706,996		159,706,996
March	**83,907,668**	1,117,446,051	1,201,353,719	5,056,469	180,203,058	1,011,294	181,214,352
April	**104,362,255**	1,149,055,292	1,253,417,547	1,431,960	188,012,632	286,392	188,299,024
May	**80,583,723**	947,876,631	1,028,460,354		154,269,053		154,269,053
June	**91,848,512**	1,041,193,351	1,133,041,863		169,956,279		169,956,279
July	**100,768,739**	1,103,307,499	1,204,076,238	44,015	180,611,436	8,803	180,620,239

August	**84,123,910**	931,652,134	1,015,776,044	6,735,950	152,366,407	1,347,190	153,713,597
September	**94,373,361**	942,923,011	1,037,296,372		155,594,456		155,594,456
October	**121,673,337**	1,231,125,594	1,352,798,931		202,919,840		202,919,840
Novermber	**101,121,091**	1,058,557,706	1,159,678,797		173,951,820		173,951,820
December	**76,589,804**	753,190,121	829,779,925		124,466,989		124,466,989
Total	**1,138,042,029**	12,364,527,372	13,502,569,401	13,268,394	2,025,385,410	2,653,679	2,028,039,089

2007

Year/ Month	**Value of Supplies o Vim & Tooth Brush (15%)**	**Value of Supplies Declared in VAT return (15%)**	**Total Value of Supplies (15%)**	**Value of Supplies Declared in VAT Return (15%)**	**Tax Rate 15%**	**Tax Rate 20%**	**VAT payable**
2007 January	**116,666,667**	1,206,948,751	1,323,615,418		198,542,313		198,542,313
February	**116,666,667**	1,078,189,293	1,194,855,960		179,228,394		179,228,394
March	**116,666,667**	1,391,456,130	1,508,122,797		226,218,420		226,218,420
April	**116,666,667**	1,018,258,686	1,134,925,353	4,232,334	170,238,803	846,467	171,085,270
May	**116,666,667**	1,138,458,197	1,255,124,864		188,268,730		188,268,730
June	**116,666,667**	1,223,633,892	1,340,300,559		201,045,084		201,045,084
July	**116,666,667**	1,107,643,455	1,224,310,122		183,646,518		183,646,518
August	**116,666,667**	1,209,541,948	1,326,208,615		198,931,292		198,931,292
September	**116,666,667**	1,290,399,360	1,407,066,027		211,059,904		211,059,904
October	**116,666,667**	1,124,535,778	1,241,202,445	4,208,333	186,180,367	841,667	86,180,367
November	**116,666,667**	1,139,409,282	1,256,075,949		188,411,392		189,253,059
December	**116,666,663**	974,058,180	1,090,724,843		163,608,726		163,608,726
Total	**1,400,000,000**	13,902,532,952	15,302,532,952	8,440,667	2,295,379,943	1,688,133	2,297,068,077

[271] The column 2 in both tables illustrates the value of supplies declared and column 1 illustrates the value of undeclared supplies of vim and toothbrushes. The value of undeclared supplies of VIM and toothbrushes is a staggering amount of Rs. 1,138,042,029 and Rs. 1,400,000,000.

[272] Now, it is the duty of the assessee to disclose all the material facts necessary to determine the amount of tax payable by him and that duty lies on the Appellant by making available to the Assessor all the material facts either with the returns or during the assessment process which have a bearing on the assessment to be made by the Assessor. To establish this the Appellant could have relied on the statements of accounts, invoices and other documents furnished to the Assessor either with the returns or during the assessment process. The Appellant must make a clean breast of all the material facts and disclose all supplies made during each taxable period to enable the Assessor to make an assessment. He cannot hide any supplies in the returns and claim that he declared the quantum of the supplies which he believed were excluded supplies, but presents no evidence to the effect that the Assessor's finding that there has been an under-assessment is false.

[273] In *Calcutta Discount Company Limited v. Income Tax Officer, Companies District, I and Ors*. (01.11.1960 - SC), the Supreme Court of India explained what is meant by the words "*failure to disclose fully and truly all material facts necessary for his assessment*", and stated:

> "*9. Before we proceed to consider the materials on record to see whether the appellant has succeeded in showing that the Income-tax Officer could have no reason, on the materials before him, to believe that there had been any omission to disclose materials facts, as mentioned in the section, it is necessary to examine the precise scope of disclosure which the section demands. The words used are "omission or failure to disclose fully and truly all material facts necessary for his assessment for that year.*" ***It postulates a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material, and necessary for assessment will differ from case to case. In every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assesses, require to know all the facts which help him in coming to the correct conclusion. From the primary facts in his possession, whether on disclosure by the assesses, or discovered by him on the basis of the facts disclosed, or otherwise - the assessing authority has to draw inferences as regards certain other facts; and ultimately,***

from the primary facts and the further facts inferred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment, the proper tax leviable.*[Emphasis added].*

10. ***There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assesses.*** *To meet the possible contention that when some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income-tax Officer might have discovered,*

15. The position therefore is that if there were in fact, some reasonable grounds for thinking that there had been any non-disclosure as regards any primary fact, which could have a material bearing on the question of "under-assessment" that would be sufficient to give jurisdiction to the Income-tax Officer to issue the notices under section 34. Whether these grounds were adequate or not for arriving at the conclusion that there was a non-disclosure of material facts would not be open for the court's investigation. In other words, all that is necessary to give this special jurisdiction is that the Income-tax Officer had when he assumed jurisdiction some prima facie grounds for thinking that there had been some non-disclosure of material facts"

[274] What is the explanation of the Appellant? The Appellant did not make submission that the value of supplies amounting to Rs. 1,138,042,029 and Rs. 1,400,000,000 mentioned by the Assessor in his letters had been disclosed either in the returns, or subsequently during the assessment process and therefore, the Assessor could not have formed an opinion that there was a willful non-disclosure of material facts by the Appellant. No reasonable and acceptable explanation was offered.

[275] No submission was made that the undeclared value amounting to Rs. 1,138,042,029 and Rs. 1,400,000,000 mentioned by the Assessor in his letters dated 15.06.2009 are not supported by the evidence presented by the Appellant before the Assessor. Accordingly, the Appellant could not have said that there were materials before the Assessor to determine the amount of the tax payable by the Appellant. No submission was made on behalf of the Appellant that all the material facts necessary for the assessment were fully and truly disclosed in the course of the assessment for the years in question, but the Assessor did not consider them and erroneously stated that the supplies were not declared and the under-assessment amounted to Rs. Rs. 1,138,042,029 and Rs. 1,400,000,000.

[276] Can the Appellant point to any audited accounts or invoices or other documents furnished to the Assessor and contend that the correct values of all supplies were disclosed in those documents but the Assessor wrongly and incorrectly acted and incorrectly assessed on the basis that there was an under-assessment. Can the Appellant now contend that the failure to declare supplies amounting to Rs. 138,042,029 and Rs. 11,400,000,000 spoken to by the Assessor is a mere omission or oversight or a bona fide mistake or accidental slip. Can the Appellant argue that the omission to declare the full value of supplies was made inadvertently or in the belief that it does not attract a VAT liability because the Appellant is not a manufacturer?

[277] The Appellant seems to believe that it was not a manufacturer within the meaning of section 3 of the VAT Act and therefore, it only declared the quantum of supplies which it believed were excluded supplies. The Appellant's belief that he was not the manufacturer and therefore, he cannot be held to have willfully failed to disclose material facts that apply to the manufacturer, is immaterial to the Assessor. The Assessor is not bound by the taxpayer's view of the law or his method of calculation. He cannot expect the Assessor to perform his duty of disclosing all material facts and hide all relevant information from the Assessor, which will have a material bearing on the assessment and the amount of the tax payable by him

[278] It is relevant to note that VAT is not personal to the taxpayer who is only the registered supplier and the personal liability to pay is the consumer. Therefore, in any event, the Appellant is not personally liable to pay VAT like income tax. There was no explanation as to why the Appellant failed to declare the full supplies amounting to Rs. 138,042,029 and Rs. 1,400,000,000 when the Appellant is only collecting VAT which is borne by the consumer of the goods or services supplied by the supplier.

[279] Can the Appellant now complain that he provided all the information, including the supplies in compliance with his statutory obligation imposed by Section 21 (1) of the VAT Act, but the Assessor having had all such information delayed in making the assessment, which is wholly unreasonable or perverse? As noted, the manufacturing process was conducted under the full control and supervision of the Appellant who being the manufacturer had all the details relating to the supplies of goods, but the Appellant deliberately failed to make a full and true disclosure of all supplies necessary for the assessment.

[280] It is absolutely clear that the material documents including the activity wise breakups for VAT declared, representing liable and exempt activities for the determination of the VAT liability were in the custody of the Appellant but the record does not indicate that they were not disclosed to the Assessor. It is clear from the record that the Assessor had no evidence of facts sufficient to make an early assessment as all the necessary information and all relevant documents had not been disclosed to the Assessor in time to make the assessment in time.

[281] In my view that Assessor had reason to form an opinion first that the full supplies had not been truly declared and been under-assessed by the Appellant in its returns. The second is that the Assessor had reason to form an opinion that such under-assessment has occurred by reason of the willful (deliberate, voluntary and purposeful) failure on the part of the Appellant to disclose fully and truly all material facts (supplies) necessary to determine the amount of the tax payable by the Appellant. Both these conditions had been satisfied and therefore, the Assessor was entitled to make the assessments beyond the period of three years, but within the period of five years from the end of the taxable periods in respect of which the return is furnished.

[282] In my view, the taxpayer cannot invoke the time bar objection against his own willful, deliberate and voluntary act of failing to submit all the material facts, i.e. all supplies in time, necessary to determine the amount of tax payable by him, in violation of his statutory obligation imposed by the VAT Act. In the result, the assessor was justified in invoking Section 33 (2) of the VAT Act in making an assessment for the relevant periods. For those reasons, I hold that the assessments made for the periods from January 2006 to July 2006 are not time-barred.

Questions of law Nos: 4 & 5

Is the determination of the TAC against the weight of evidence?

In view of the facts and circumstances of the case, did the TAC err in law when it came to the conclusion it did?

[283] For those reasons, In my view, the TAC has properly examined and evaluated the relevant evidence, applied the relevant legal principles and come to the correct conclusion in confirming the determination made by the Respondent.

Conclusion & Opinion of Court

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

1. No
2. No
3. No
4. No
5. No

[285] For those reasons, I confirm the determination made by the Tax Appeals Commission dated 14.12.2012 and the Registrar is directed to send a certified copy of this judgment to the Tax Appeals Commission.

JUDGE OF THE COURT OF APPEAL

M. Sampath K.B. Wijeratne, J.

I agree.

JUDGE OF THE COURT OF APPEAL