IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA 12.05.2023

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

Lanka Marine Services (Private) Limited,
130, Glennie Street,
Colombo 02.

Appellant

Case No. CA/TAX/0004/2018
Tax Appeals Commission
No. TAC/IT/008/2015

Vs.

The Commissioner General of Inland Revenue,
Department of Inland Revenue,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

Respondent

Before : Dr. Ruwan Fernando J. &

M. Sampath K.B. Wijeratne J.

: Romesh de Silva, P.C. with Harsha Amarasekara, P.C. and Dr. Shivaji Felix for the Appellant

F. Jammel, A.S.G., P.C. with N. Wigneswaran, D.S.G for the Respondent.

Argued on : 02.12.2021, 14.12.2021 & 24.03.2022

Written Submissions filed on : 18.10.2018 & (by the Appellant)

30.10.2019 & 20.05.2020 (by the Respondent)

Decided on : 19.05.2023

Dr. Ruwan Fernando, J.

Introduction

[1] This is an appeal by the Appellant by way of a Case Stated against the determination of the Tax Appeals Commission dated 28.08.2017 confirming the determination made by the Respondent on 15.09.2014 and dismissing the Appeal of the Appellant. The taxable period related to the appeal is the year of assessment 2009/2010.

Factual Background

[2] The Appellant is a limited liability company incorporated under the provisions of the Companies Act, No. 17 of 1982 and the principal activity of the Appellant is supply of marine fuel and lubricants to local and foreign vessels. The Appellant submitted its return of income for the year of assessment 2009/2010 claiming that the supply of bunker fuel to foreign vessels could be treated as an export, and applied for the concessionary tax rate on the profits of the business in terms of sections 42 of the Inland Revenue Act, No. 10 of 2006 (as amended).

[3] The assessor by letter dated 26.11.2012 rejected the same for the following reasons:

1. Section 42 apples to consignee or consignor who is engaged in the activities specified in section 42, and the examination of accounts and other related documents of the company indicate that the characterstics of consignment sale is not appeared in the transactions of Lanka Marime Services Pvt Ltd;

2. As far as the business of Lanka Marine Services is concerned (a) the ownership of the goods is transferred physically to the buyer within the water territory of Sri Lanka; (b) physical procession is vested with the buyer once the goods are transferred; (c) characterization of export has not been fulfilled;
3. Accordingly, section 42 is not applicable since (a) the company is not the consignor/consignee and the company has not engaged in export and therefore, the applicable income tax rate on the profits is the normal rate of 35%;

[4] Accordingly, the assessor made tax computation for the above mentioned year of assessment as follows:

Tax profit	22,275,642
Interest income	4,862,705
Total statutory income/assessablr/taxable income	27,138,347
Tax at 35%	9,498,421
Tax on distributable profit is	7,643.885
Total tax payable	17,142,306

[5] Notice of assessment was issued in terms of Section 163 (3) of the Inland Revenue Act, No. 10 of 2006 (as amended) in respect of the year of assessment 2009/2010. The Appellant appealed to the Commissioner-General of Inland Revenue (hereinafter referred to as the "Respondent") against the said assessment. The Respondent by its determination dated 15.09.2014 confirmed the assessment and dismissed the appeal (pp. 27, 15-24) of the Tax Appeals Commission brief). The Respondent held that the sale of bunker fuel/lubricants to foreign vessels cannot be treated as "exports" or "consignment exports" and therefore, the concessionary tax rates under sections 52 or 42 of the Inland Revenue Act, No. 10 of 2006 (as amended) do not apply.

Appeal to the Tax Appeals Commission

[6] Being dissatisfied with the said determination of the Respondent, the Appellant appealed to the Tax Appeals Commission and the Tax Appeals Commission by its determination made on 28.07.2017 confirmed the determination made by the Respondent and dismissed the appeal. The Tax Appeals Commission, after hearing the parties to the appeal by its determination was pleased to reject all the contentions urged by the Appellant, and held that:

1. The determination made by the Respondent on 15.09.2014 has been made within within the two year period in terms of section 165(14) of the Inland Revenue Act (as amended);

2. The assessment made by the assessor on 29.11.2012 for the year of asaeessment 2009/2010 is not time barred in terms of section 163(5) of the Inland Revenue Act (as amended);

3. The word "export" including the meaning given in dictionaries, shall mean the sending of goods from one country to another country and therefore, there has to be a destination point outside Sri Lanka to constitute an export. The destination point referred to in the relevant documents submitted by the Appellant state that the destination point is Sri Lanka;

4. Although the decisions of the Indian cases are not binding in Sri Lanka, they have a persuasive value, and the test that has been applied in the Indian Supreme Court decision in *Burmah Shell Oil Storage & Distributing Company of India Ltd v. The Commercial Tax Officer and Others* AIR 1961 SC 315 is that the goods must have a foreign destination where they can be said to be imported, and so long as it does not satisfy this test, it cannot be said that the sale was in the course of export;

5. Sale of bunker fuel/lubricants by the Appellant to foreign vessels cannot be treated as exports and therefore, the Appellant is not entitled to the concessionary tax rates under sections 52 or 42 of the Inland Revenue Act, No. 10 of 2006.

Questions of Law for the Opinion of the Court of Appeal

[7] Being dissatisfied with the said determination of the Tax Appeals Commission, the Appellant appealed to the Court of Appeal and 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?

(2) Did the Tax Appeals Commission err in law when it came to the conclusion that the determination made by the Commissioner General of Inland Revenue was not time barred under and in terms of section 165(14) of the Inland Revenue Act, No. 10 of 2006 (as amended)?

(3) Did the Tax Appeals Commission err in law when it came to the conclusion that the assessment was not time barred?

(4) Did the Tax Appeals Commission err in law when it came to the conclusion that the Appellant was not entitled to the tax concession conferred by section 42 of the Inland Revenue Act, No. 10 of 2006 (as amended)?

(5) In the alternative, if section 42 of the Inland Revenue Act, No. 10 of 2006 (as amended), is inapplicable, did the Tax Appeals Commission err in law when it came to the conclusion that the Appellant was not entitled to the concessionary tax rate conferred by section 52 of the Inland Revenue Act , No. 10 of 2006 (as amended)?

(6) 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?

Analysis

Question of Law, No. 1

Time bar of the determination made by the Tax Appeals Commission

[8] At the hearing, Dr. Shivaji Felix submitted that the appeal dated 09.04.2015 was tendered to the Tax Appeals Commission (hereinafter referred to as the TAC) on 21.04.2015, and the first date of the hearing was 14.02.2017. His submission was that the time bar for the determination of the appeal under section 10 of the Tax Appeals Commission Act, No. 23 of 2011 (as amended) should be calculated from the date on which the petition of appeal was tendered to the Respondent on 21.04.2015. He submitted that although the determination of the TAC was made on 28.08.2017, the TAC would have commenced its sittings for the hearing of the appeal prior to well before this date since the oral hearing had been held after more than one and one half years from the date of tendering of appeal to the TAC. His submission was that the determination has been made more than 270 days from the date of the TAC commencing its sittings for the hearing of the appeal, which occurred on 21.04.2015 and therefore, the appeal is time barred by operation of law under section 10 of the Tax Appeals Commission Act, No. 23 of 2011 (as amended).

[9] He further submitted that the Tax Appeals Commission Act, No. 23 of 2011 (as amended) was intended to be a mandatory provision of law and required strict compliance. He submitted that the directory provision would not have required an amendment with retrospective effect, and the avoidance of doubt provision found in section 15 of the Tax Appeals Commission Act, No. 23 of 2011 would not have required if the time bar stipulated in section 10 of the Tax Appeals Commission Act, was intended to be directory. Dr. Felix heavily relied on the following statement made by His Lordship Gooneratne J. in *Mohideen v. Commissioner -General of Inland Revenue* (CA 2/2007 (20-15) Vol. XXI. BASL Law Journal, page 171 decided on 16.01.2014, referring to the statutory time bar applicable to the Board of Review to make a determination under the Inland Revenue (Amendment) Act, No. 37 of 2003 at p. 176:

> *"If specific time limits are to be laid down, the legislature needs to say so in very clear and unambiguous terms instead of leaving it to be interpreted in various ways. To give a restricted interpretation would be to impose unnecessary sanctions on the Board of Review.* ***It would be different or invalid if the time period exceeded two years from the date of oral hearing. If that be so, it is time barred."*** *[Emphasis added]*

[10] On the other hand, Mrs. Jameel submitted that the Court of Appeal in *Mohideen v. Commissioner-General of Inland Revenue* (supra), held that the hearing means the date of the actual oral hearing, which constitutes ratio decidendi, and that the statement made by Gooneratne J. was only an obiter dicta, and not the ratio decidendi. She submitted that the determination has been made within a period of 270 days from the date of the commencement of the actual oral hearing and therefore, the TAC determination is not time barred. She further submitted that the Tax Appeals Commission Act does not spell out any sanction for the failure on the part of the TAC to comply with the time limit set out in section 10 of the Act. Her contention was that the word "shall" in section 10 does not necessarily mean that the provision is mandatory unless non-observance will result in the object of the provision being frustrated and the sanction is statutorily spelled out in the Tax Appeals Commission Act.

Statutory Provisions

[11] The time limit for the determination of the appeal by the TAC 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".*

[12] Section 10 of the Tax Appeals Commission Act 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). Section 10 of the Tax Appeals Commission Act was further amended by section 7 of the Tax Appeals Commission (Amendment) Act, No. 20 of 2013, which stipulated that the determination of the Commission shall be made within **two hundred and seventy days from the date of the commencement of its sittings for the hearing of each such appeal**. In terms of the Tax Appeals Commission (Amendment) Act, No. 4 of 2012 (s. 13) and the Tax Appeals Commission (Amendment) Act, No. 20 of 2013 (s. 14), the amendments made to the provision of section 10 were given retrospective effect.

[13] Section 15 of the Tax Appeals Commission (Amendment) Act, No. 20 of 2013 further provides an avoidance of doubt clause as follows:

> *"For the avoidance of doubts, it is hereby declared, that the Commission shall have the power in accordance with the provisions of the principal enactment as amended by this Act, to hear and determine any appeal that was deemed transferred to the Commission under section 10 of the principal enactment, notwithstanding the expiry of the twelve months granted for its determination by that section prior to its amendment by this Act."*

[14] Accordingly, section 10 of the Tax Appeals Commission Act, No. 23 of 2011 as last amended by the Tax Appeals Commission (Amendment) Act, No. 20 of 2013 now provides 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 its sittings for the hearing of each such 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 Column I of Schedule I, or Schedule II to this Act, notwithstanding the fact that such provisions are applicable to different taxable periods as specified therein shall with effect from the date of coming into operation of the provision of this Act be deemed to stand transferred to the Commission, and the Commission shall notwithstanding anything contained in any other written law make its determination in respect thereof, within twenty four months from the date on which the Commission shall commence its sittings for the hearing of each such appeal".

[15] 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."*

[16] 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].*

[17] 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.***

[18] The oral hearing in the present case commenced on 14.02.2017 and the determination was made by the TAC on 28.08.2017 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.

Mandatory-directory classification

[19] I will now turn to the submission made by Mrs. Jameel that, in any event, 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 TAC 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.

[20] Section 10 of the Tax Appeals Commission 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, 2008). 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).

[21] 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).

[22] 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.

[23] 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.

[24] 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.

[25] 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, and the Commission shall comprise 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.

[26] 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 TAC 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.

[27] 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. 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.

[28] 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.

[29] 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".*

[30] 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. For those reasons, 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. 2

Is the determination made by the Commissioner-General time barred in terms of section 165(14) of the Inland Revenue Act?

[31] At the hearing, Dr. Felix submitted that the determination made by the Commissioner General is time barred for the following reasons:

1. The petition of appeal to the Commissioner General was tendered on 24.12.2012 and the determination must be communicated to the taxpayer

prior to 23.12.2014. The determination was communicated to the Appellant by letter dated 02.01.2015 and it was received by the Appellant on 06.01.2015. Although the determination is dated 15.09.2014, there cannot be a valid acknowledgement without communicating same to the tax payer, which occurred only on 06.01.2015. The determination shall be deemed to have been validly made on 06.01.2015 and accordingly, the determination which was made on 06.01.2015 is time barred in terms of section 165(14) of the Inland Revenue Act (as amended);

2. The purported acknowledgement of the appeal dated 07.01.2013 has been signed by B.A.I.Wijesekara, assessor, Large Taxpayer's Appeal Unit, Department of Inland Revenue, who is not statutorily authorized to acknowledge the appeal made to the Commissioner General of Inland Revenue. The appeal must be acknowledged either by the Commissioner General of Inland Revenue himself, or by an officer who is lawfully delegated with the power to do so. The Commissioner General is not statutorily empowered to permit an assessor to acknowledge an appeal made to the Commissioner General since it is a statutory function which can only be delegated to a person who is statutorily empowered to act on behalf of the Commissioner General of Inland Revenue There is no valid acknowledgment under section 165(6) of the Inland Revenue Act;

3. The assessor has no power to acknowledge the appeal in terms of section 208 read with sections 213, 217 of the Inland Revenue Act and therefore, no acknowledgement has been made in terms of section 165 (6) of the Inland Revenue Act and, therefore, the appeal shall be deemed to have been received by the Commissioner-General on 24.12.2012;

4. As the determination has been served on the taxpayer on 06.01.2015, the appeal has been made after the expiry of the period of 2 years from the date on which the petition of appeal is received by the Commissioner General in violation of section 165(14) of the Inland Revenue Act (as amended).

[32] On the other hand, Mrs. Jameel submitted that:

1. The relevant date for the purpose of calculating the time bar under section 165(14) of the Inland revenue Act is the date on which the CGIR makes the determination and not the date of receipt by the Appellant of the determination;

2. The appeal was acknowledged on 07.01.2013 and the determination was made on 15.09.2014, which is well within the period of two years from 07.01.2013 in terms of section 165(14) of the Inland Revenue Act (as amended) and the determination was forwarded to the Appellant and admittedly, it was received by the Appellant;

3. The appeal was acknowledged by letter dated 07.01.2013 and the determination was made on 15.09.2014 and therefore, the determination has been made within a period of 2 years from the date of the acknowledgement of the appeal in terms of section 165(14) read with section165(5) of the Inland Revenue Act (as amended).

[33] Section 165 (6) of the Inland Revenue Act provides:

(6) The receipt of every appeal ***shall be acknowledged within thirty days of its receipt*** *and where so acknowledged, the date of the letter of acknowledgement shall for the purpose of this section, be deemed to be the date of receipt of such appeal.* ***Where however the receipt of any appeal is not so acknowledged, such appeal shall be deemed to have been received by the Commissioner-General on the day on which it is delivered to the Commissioner-General"***

[34] In terms of section 165 (6) of the Inland Revenue Act, the date of receipt of appeal by the Commissioner-General shall be regarded as follows:

(a) If the receipt of the appeal is acknowledged within 30 days of its receipt, the date of acknowledgement of the appeal shall be the date of receipt of appeal;
(b) If the receipt of the appeal is not so acknowledged, the appeal shall be deemed to have been received by the Commissioner-General on the date on which the appeal is delivered to the Commissioner-General.

[35] Where the receipt of the appeal is not shown to have been acknowledged within 30 days of its receipt, the effect is that the appeal shall be deemed to have been received by the Commissioner-General on the date on which the appeal is delivered to the Commissioner-General (i.e. 24.12.2012).

Date of Acknowledgement of Appeal

[36] There is no dispute that the Appellant has delivered the appeal to the Commissioner-General on 24.12.2012 under section 165 (1) of the Inland Revenue Act. The assessor B.A.L.I. Wijesekara (assessor, Unit 10) acknowledged the appeal by communication dated 07.01.2013, which states that the appeal made by letter dated 24.12.2002 is acknowledged by letter dated 07.01.2013 and therefore the period of 2 years within which the appeal shall be determined will end on 05.01.2015. Dr. Felix's argument during the hearing was that the acknowledgement letter should have been signed by the Commissioner-General himself or by an officer who is lawfully delegated with the power to do so, but the assessor has no power to acknowledge the appeal.

[37]] At the hearing, Mrs. Jameel heavily relied on the decision of this Court in *Lanka Asok Leyland PLC v. The Commissioner-General of Inland Revenue* (CA Tax No. 14/2017) in support of her contention that the Commissioner-General needs not himself sign the acknowledgement, which is only an administrative task. In *Lanka Asok Leyland PLC v. The Commissioner-General of Inland Revenue* (Supra), the identical issue arose whether the acknowledgement of the appeal should have been signed by the Commissioner-General of Inland Revenue himself and if the appeal is not so acknowledged, whether the appeal shall be deemed to have been received by the Commissioner-General on the day on which it is delivered to the Commissioner-General. The Court of Appeal held that although the appeal has to be submitted to the commissioner-General, there is no requirement that the acknowledgement must be made by the Commissioner-General himself. His Lordship Janak de Silva, J. stated at page 6:

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

[38] The question of acknowledgement falls entirely within the purview of section 165 (6) of the Inland Revenue Act, which stipulates the period within

which the receipt of the appeal shall be acknowledged, and where so acknowledged or not acknowledged, as the case may be, the consequences thereof. On a careful reading of section 165 (6), it is patently clear that it does not state in unequivocal language that the Commissioner-General himself should sign the acknowledgement, and if it is not so acknowledged, the date of the letter of acknowledgement shall for the purpose of section 165 (6), be deemed to be the date of the receipt of such appeal.

[39] In *Polycrome Electrical Industries (Pvt) Ltd, v The Commissioner General of Inland Revenue*, CA/TAX/0049/2019, decided on 26.03.2021, this Court held:

> *[19] In this modern-day administration, with expansion of powers and multifarious functions exercised by public officers, the Commissioner-General cannot be expected, as the head of the Inland Revenue Department to attend to all and perform each and every function himself. As there may be thousands of taxpayers in Sri Lanka, it cannot be expected that the Commissioner-General shall perform each and every task himself, unless the Inland Revenue Act itself has specifically empowered to him to exercise such function personally I do not see any such intention reflected in the language, scope or object of section 165 (6) of the Act. I do not think that the Parliament intended such a result".*

[40] The Appellant relies on section 208 of the Inland Revenue Act and argues that the assessor is not included in that section and, therefore, the senior Assessor cannot acknowledge the appeal. On that basis, the Appellant argues that the purported acknowledgement is not a valid acknowledgement. Section 208 (2) and 208(4) of the Inland Revenue Act provides:

> *"(2) A Senior Deputy Commissioner-General or a deputy Commissioner-general or a Senior Commissioner or Commissioner or a Deputy Commissioner exercising or performing or discharging any power, duty or function conferred or imposed on or assigned to the Commissioner-General by any provision of this Act, shall be deemed for all purposes to be authorized to exercise, perform or discharge that power, duty or function until the contrary is proved".*
>
> *(4) Notwithstanding anything to the contrary in any other provisions of this Act, a Senior Assessor or Assistant Commissioner of Inland revenue or an Assessor or Assistant Commissioner of Inland Revenue shall not-*
>
> *(a) act under setion 163;or*

(b) reach any agreement or make any adjustment to any assessment made under subsection (7) of section 165,

except with the written approval of the Commissioner-General or any Commissioner."

[41] The acknowledgement was issued by the Senior Assessor under section 165 (6), and not under section 163 or 165(7) of the Inland Revenue Act and the acknowledgement of the appeal under section 165(6) is not caught under section 208 of the Inland Revenue Act. The question of acknowledgement falls entirely within the purview of section 165 (6) of the Inland Revenue Act, which stipulates the period within which the receipt of the appeal shall be acknowledged and where so acknowledged or not acknowledged, as the case may be, the consequences thereof. Section 165(6) does not specify who should acknowledge the appeal, which is only an administrative act performed on behalf of the Commissioner-General.

Delegation of Power

[42] The intention of the legislature in a taxation statute is to be gathered from the words or language used in the provision and accordingly, it is not possible to assume any intention or governing purpose of the statute, more than what is stated in the plain language (P. M. Bakshi, Interpretation of Statutes, 1st Ed. 2011, p. 512). The question of delegation of authority, however, arises where the Commissioner-General entrusts or delegates another with authority by empowering such other person to act or do things which otherwise, he himself would have to do. In *Sidhartha Sarawagi v. Board of Trustees for the Port of Kolkata and others* [(2014) 16 SCC 248], the Indian Supreme Court, while dealing with the issue of delegation of authority, has observed:

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

[43] Mathew J. in *Gwalior Rayon Silk Manufacturing (Wvg.) Co. Ltd. v. The Assistant Commissioner of Sales Tax and others,* 1974 AIR 1660, has succinctly discussed the concept of delegation at paragraph 37:

> *"37-Delegation may be defined as the entrusting, by a person to another person or body of persons, of the exercise of a power residing in that person or body of persons, to another person or body of persons, with complete power of revocation or amendment remaining in the grantor or delegator. ....It is important to grasp the implications of this, for, much confusion of thought has unfortunately resulted from assuming that delegation involves or may involve, the complete abdication or abrogation of a power. This is precluded by the definition.* ***Delegation often involves the granting of discretionary authority to another, but such authority is purely derivative****. The ultimate power always remains in the delegator and is never renounced" [Emphasis added]..*

[44] A Statute will generally provide the answer as to whether a power must be performed personally by those to whom they have been given or whether such power can be delegated to another. As noted, there is no express provision in the Inland Revenue Act that authorises the Commissioner-General to sign the acknowledgement of the appeal personally or delegate his power to another officer of the department authorizing him to sign the acknowledgement. The question is whether a delegation of power can be implied from the scheme and objects of the Act and the character of the power to be delegated and the circumstances when the power is able to be exercised. The nature of the duty to be exercised here is merely to acknowledge the appeal and the character of the person involved is the Commissioner-General who is the head of the Department.

[45] In *Polycrome Electrical Industries (Pvt) Ltd, v The Commissioner General of Inland Revenue*, (supra), this Court held:

> *"[24] As there may be thousands of taxpayers in Sri Lanka, the head of the Department of Income tax cannot be expected to discharge personally all the duties of administrative nature which can be performed by the officials of the Department in in exercise of statutory powers referred to in section 165 (6). I do not think that the acknowledgement signed by the officials of the Department acting under authorization of their superior officers in the exercise of the statutory duty conferred by section 165 (6) are invalid where no express or implied delegation of authority authorizing the officials to sign the acknowledgement is reflected in the scheme of the Inland Revenue Act. I do not think that the Parliament intended such a result".*

[46] Greene, M.R. in *Carltona Ltd. v. Commissioners of Works,* (supra) explained broadly the principle at page 560, as follows:

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

[47] The Carltona doctrine thus, applies where a statute has conferred a power on a Minister, and it is practically impossible for the Minister to exercise such power personally, he may, in general, act through a duly authorised officer of his department without having a formal delegation to do so. It recognises the principle that the functions of a Minister are so multifarious that the business of government could not be carried on if he were required to exercise all his powers personally. Thus, the official is treated as the minister's alter ego, and to that extent, his decision is regarded as those of the Minister.

[48] It is to be noted that the Carltona principle does not confine to Ministers and it has been judicially recognised in the *Commissioners of Customs and Excise v. Cure & Deeley Ltd.* (1962) 1 QB 340 at p 371 that the Commissioners of Customs and Excise were in a position parallel to that of Ministers:

> *"The Commissioners are in a position parallel to that of the Ministers referred to in the judgment of Lord Greene in the Carltona case [1943] 2 All ER 560 at 563, in that their functions are so multifarious that they could never personally attend to them all, and the powers given to them are normally*

exercised under their authority by responsible officials of the department.[45]".

[49] *In Re Golden Chemical Products Ltd.* (1976) Ch. 300 at p. 20, it was observed:

> *"Yet I find the logic of the principle equally persuasive in its application to the head of any large government department, and, a fortiori, to a Deputy Commissioner of Taxation responsible within a State for the implementation of the Commonwealth's laws with respect to taxation. No permanent head of a department in the Public Service is expected to discharge personally all the duties which are performed in his name and for which he is accountable to the responsible Minister".*

[50] Those authorities established that when a Minister is entrusted with administrative functions he may, in general, act through a duly authorised officer of his department. The same principle applies to the Commissioner-General of Inland Revenue, who as the head of a department is not expected to discharge personally all the duties otherwise through his responsible officers where the relevant power, duty or function is of an administrative nature or routine.

[51] It is patently clear that the assessor has only performed an administrative function conferred by section 165 (6) of the Act and signed the acknowledgement letter, which is only an administrative act, acting under and on behalf of the Commissioner-General rather than performing any discretionary power in terms of the provisions of the Inland Revenue Act. In the result, the absence of any reference in the acknowledgement letter that the assessor signed the acknowledgement "*for and on behalf of the Commissioner-General" or that the assessor was specifically delegated by the Commissioner General to sign on his behalf* will not make the acknowledgement of the appeal invalid.

[52] I am of the view that the appeal has been validly acknowledged within 30 days of its receipt as required by section 165 (6) of the Inland Revenue Act and accordingly, the date of the acknowledgement viz. 07.01.2013 shall, for the purpose of section 165 (6) of the Inland Revenue Act, be deemed to be the date of the receipt of the appeal made to the Commissioner-General

[53] The next question raised by Dr. Felix was that as the petition of appeal was submitted on 24.12.2012 but the determination was communicated to the Appellant on 06.01.2015 and therefore, the appeal has been lawfully determined after the expiry of the period of 2 years from the receipt of the appeal tendered

to the CGIR on 24.12.2012. Section 165 (14) of the Inland Revenue Act reads as follows:

> *"Every petition of appeal preferred under this section, shall be agreed to or determined by the Commissioner- General,* ***within a period of two years from the date on which such petition of appeal is received by the Commissioner-General,*** *unless the agreement or determination or such appeal depends on—*
>
> *(a) the decision of a competent court on any matter relating to or connected with or arising from such appeal and referred to it by the Commissioner- General or the appellant; or*
>
> *(b) the furnishing of any document or the taking of any action–*
>
> *(i) by the appellant, upon being required to do so by an Assessor or Assistant Commissioner or the Commissioner-General by notice given in writing to such appellant (such notice being given not later than six months prior to the expiry of two years from the date on which the petition of appeal is received by the Commissioner-General); or*
>
> *(ii) by any other person, other than the Commissioner-General or an Assessor or Assistant Commissioner.*
>
> *Where such appeal is not agreed to or determined within such period,* ***the appeal shall be deemed to have been allowed and tax charged accordingly****.*

[54] Dr. Felix contended that the determination is not completed or made until it is communicated to the person to be affected by the determination and as it was communicated to the Appellant by letter dated 06.01.2015, the determination is time barred. I am not inclined to agree with Dr. Felix's contention. All what is required under section 165 (14) is that the determination of the Commissioner-General shall be made within a period of 2 years from the date on which such petition of appeal is received by the Commissioner-General. It is not envisaged in section 165 (14) that the determination shall also be communicated to the Appellant within a period of 2 years from the date on which such petition of appeal is received. If it was the legislative intent, it shall be stated in unequivocal language in section 165 (14).

[55] There is a clear distinction between a determination of the appeal and communication of appeal, and they are two different things or steps at different

stages. The former is the determination of the confirmation, reduction, increase or annulment of the assessment made by the Respondent and the latter is the formal intimation to the Appellant of the fact that such a determination has been made.

[56] I am of the view that the date of the determination could not be taken as the date of the communication as communication presupposes determination of a thing to be communicated to the Appellant. This Court in *Stafford Motor Company (Pvt) Limited v. Commissioner-General of Inland Revenue,* CA Tax 17/17 decided on 15.03.2018 considered a similar point. In that case, the Court considered whether a lawfully valid assessment can be made without serving a valid notice of assessment or whether there is a requirement to give notice of assessment before making an assessment. The Court held that there is no requirement to give notice of assessment before making an assessment as practically it cannot be done as the assessment must first be made followed by a notice of assessment. His Lordship Janak de Silva, J at page 8 stated:

> *"Section 163(1) and (2) of the 2006 Act provide for making of assessment of any person while section 164 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 posting of the "notice of assessment" is the relevant date for the purpose of determining the time bar making an assessment. Court determines that the date of making the assessment is the relevant date for the purpose of determining the time bar."*

[57] As noted, the appeal has been made on 24.12.2012 and it has been lawfully acknowledged on 07.01.2013 and thus, the date of the time bar as stated in the acknowledgement is 07.01.2013. The determination has been made on 15.09.2014 and the said determination has been communicated to the

Appellant on **15.09.2016** (vide-page 101). The Commissioner by letter dated 15.09.2014 communicated the said determination to the Appellant under Registered post (p. 101 of the TAC brief). It is patently clear that the determination has been made within a period of 2 years from the date on which the petition of appeal was acknowledged by the Commissioner-General under section 165(14) of the Inland revenue Act.

[58] For the reasons stated above, the question of law No. 2 should be answered in favour of the Respondent.

Question of Law No. 3

Time Bar of the Assessment

[59] At the hearing, Dr. Felix submitted that the assessment made by the assessor is time barred by operation of the law for the following reasons:

1. The intimation letter is dated 26.11.2012 and the notice of assessment is dated 30.11.2012, and the notice of assessment was received by the Appellant on 18.12.2012 (p. 49 of the TAC brief);

2. The assessment has been made on 30.11.2012 for the year of assessment 2009/2010 and the assessment (received on 06.12.2012) and the notice of assessment (received on18.12.2012) has been received by the Appellant after the expiry of the statutory period for making an assessment under section 163(5) of the Inland Revenue Act (as amended);

3. A lawfully valid assessment can only be made if it is served on the taxpayer prior to the expiry of the statutory time bar for making the assessment and the reasons for making the assessment must also be served on the taxpayer prior to the expiry of the time bar;

4. It is the notice of assessment which gives validity to the assessment and the failure to send a notice of appeal within the statutorily contemplated period would result in the assessment being devoid of legal effect.

5. Assuming without conceding that the assessment was made on 26.11.2012, as asserted by the Respondent, the appeal would nevertheless be time barred for the year of assessment 2009/2010 for the failure to make the assessment

on or before 31.03.2012 when the assessment was made on 26.11.2012 in contravention of section 163(5) of the Inland Revenue (Amendment) Act, No. 19 of 2019, which does not provide that the amendment made to section 163(5) had retrospective effect. Thus, the assessor could not have extended the time period for making the assessment beyond 31.03.2012 for the year of assessment 2009/2010 on the basis of the Inland Revenue (Amenment) Act) No. 22 of 2011, which applied to any year of assessment commencing from 01.04.2011.

[60] During the course of the further argument, Dr. Felix strongly relied on the judgment of the Court of Appeal in *A. M. Ismail v. Commissioner General of Inland Revenue* (1980) IV Sri Lanka Tax Cases 156, *D.M.S. Fernando and another v. A.M. Ismail (1982)* Sri Lanka Tax cases, Vol IV 156, p. 184, *Chettinad Corporation Ltd* (1954) 1 CTC 515 and *Wijewardene v. Kathiragamar* (1991) IV Sri Lanka Tax Cases 313, in particular, in support of his contention. He further relied on the decisions 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 Tax 07/2013 decided on 16.03.2022 which held 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 on the tax payer.

[61] 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 to the service of the notice of assessment. He 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. He 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.

[62] The questions to be considered are:

1. Whether, on the facts and in the circumstances of this case, the assessment for the assessment year 2009-2010 was made on 26.11.2012 or the service of the notice of assessment dated 29.11.2012 on the Appellant on 18.12.2012 constituted a valid assessment;
2. Even if the assessment was made on 26.11.2012, whether, on the facts and in the circumstances of this case, the assessment for the assessment year 2009-2010 was time barred in terms of section 163(5) of the Inland Revenue Act (as amended).

Whether the assessment has been validly made on or before 26.11.2012 or a lawfully valid assessment has only been made when the notice of assessment dated 30.11.2012 was served on the taxpayer

[63] I shall consider the first question, whether the assessment has been made on or before 26.11.2012 or the service of the notice of assessment dated 29.11.2013 on the taxpayer constitutes a valid assessment in terms of the provisions of the Inland Revenue Act (as amended).

Best judgment of the assessment-section 163

[64] Section 163 of the Inland Revenue Act, No 10 of 2006 (as amended) 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; VAEC 1420). Section 163(1) reads as follows:

> *"(1) Where any person who in the opinion of an Assessor or Assistant Commissioner is liable to any income tax for any year of assessment, has not paid such tax or has paid an amount less than the proper amount which he ought to have paid as such tax for such year of assessment, an Assessor Assistant Commissioner may, subject to the provisions of subsection (3) and (5) and after the fifteenth day of November immediately succeeding that year of assessment, assess the amount which in the judgment of the Assessor Assistant Commissioner ought to have been paid by such person, and shall by notice in writing require such person to pay forthwith–*
>
> *(a) the amount of tax so assessed, if such person has not paid any tax for that year of assessment; or*

(b) the difference between the amount of tax so assessed and the amount of tax paid by such person for that year of assessment, if such person has paid any amount as tax for that year of assessment:

Provided that an Assessor or Assistant Commissioner may, subject to the provisions of subsections (3) and (5), assess any person for any year of assessment at any time prior to the fifteenth day of November immediately succeeding that year of assessment, if he is of opinion that such person is about to leave Sri Lanka or that it is expedient to do so for the protection of revenue, and require such person to pay such tax to the Commissioner-General earlier than as required under subsection (1) of section 113:

Provided further that any assessment in relation to the tax payable by a company under sub-paragraph (i) of paragraph (b) of subsection (1) of section 61 or paragraph (c) of subsection (1) of section 61 or paragraph (b) of subsection (1) of section 62 shall be made after the expiry of thirty days from the due date for payment of such tax".

[65] It is manifest that section 163 (1) imposes the following duties on the assessor:

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).

[66] On the other hand, section 163(2) applies to an additional assessment to be made by an assessor 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:

"Where it appears to an Assessor or Assistant Commissioner that any person liable to income tax for any year of assessment, has been assessed at less than the proper amount, the Assessor or Assistant Commissioner may, subject to the provisions of subsection (3) and subsection (5), assess such person at the additional amount at which according to his opinion such person ought to have been assessed, and the provisions of this Act as to notice of assessment, appeal and other proceedings shall apply to such additional assessment and to the tax charged there under".

[67] Section 163(1) imposes a duty on the assessor to make the assessment and section 163(2) imposes an assessor to make an additional assessment. Section 163(3) deals with the duties of the assessor in making an assessment or additional assessment and steps to be taken where the return is either accepted or not accepted. It reads as follows:

> *"163(3). Where a person has furnished a return of income, the Assessor or Assistant Commissioner may in making an assessment on such person under subsection (1) or under subsection (2), either–*
>
> *(a) accept the return made by such person; or*
>
> *(b) if he does not accept the return made by that person, estimate the amount of the assessable income of such person and assess him accordingly:*
>
> > *Provided that where an Assessor or Assistant Commissioner does not accept a return made by any person for any year of assessment and makes an assessment or additional assessment on such person for that year of assessment,* ***he shall communicate to such person in writing his reasons for not accepting the return****".*

[68] Section 164 requires the assessor who **made the assessment** to give notice of assessment to each person and each partnership **who or which has been assessed,** stating the amount of income assessed and the amount of tax charged. It reads as follows:

> *"164. As Assessor or Assistant Commissioner shall give notice of assessment to each person and each partnership who or which has been assessed, stating the amount of income assessed and the amount of tax charged:*
>
> *Provided that where such notice is given to an employer under the provisions of Chapter XIV, it shall be sufficient to state therein the amount of tax charged".*

[69] The making of the assessment is, thus, 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 *Stafford Motor Company (Private) Limited v. Commissioner General of Inland Revenue* CA Tax 17/2017, decided on 15.03.1919, *Illukkumbura v. Commissioner General of Inland Revenue*, CA/Tax 0005/2016 decided on 29.09.2022 and *Unilever Sri Lanka Limited, v. Commissioner General of Inland Revenue,* CA/TAX/0004/2013 decided on 04.11. 2022).

[70] The Appellant relied on the decision of the Court of Appeal in *A. M. Ismail v. Commissioner General of Inland Revenue* (supra) and part of the passage from the judgment of Samarakoon C.J in *D.M.S. Fernando and another v. A.M. Ismail (supra),* in support of its argument that the notice must be sent to the taxpayer prior to the expiry of the time bar. In A.*M.Ismail v Commissioner General of Inland Revenue* (supra), Victor Perera J. stated at p. 182:

> *"It is necessary that the respondents should realise that the specific duties imposed on them as these provisions have been repeated in the Inland Revenue Act, No. 28 of 1979, which is the law now in operation in the year commencing 1st April, 1978, so that the Inland Revenue Department could recover the tax found to be due from taxpayers with expedition as provided in this law without jeopardising the rights of the State to collect the revenue due to it. The law given to an Assessor, a period of 3 years to examine and investigate a return while an assessee keeps on paying the tax installments on the specified dates.*
>
> ***In regard to the date of the notice of assessment, it was conceded that the relevant date is the date of posting as a notice sent by post shall be deemed to have been served on the day succeeding the day on which it would have been received*** *in the ordinary course of business. In this case, the notice was admittedly posted on 31st April, 1979, long after the effective date referred to in section 96 (C) (3), namely 31st March 1979 1979. In this case it cannot be considered a valid notice under section 96(C) (3) or even a valid notice under section 95 as there has been an absolute non-compliance with the mandatory provisions of section 93(2) even if the assessment was made on 30.03.1979. ".*

[71] Accordingly, the Court of Appeal issued a writ of certiorari quashing the assessment of tax. Now it is necessary to consider the facts and circumstances under which Victor Perera, J. stated that that notice of assessment was not a valid notice of assessment under section 93(2) of the Inland Revenue (Amendment) Act, No. 30 of 1978. In M.*Ismail v. Commissioner General of Inland Revenue* (supra), the taxpayer submitted his return and in August, 1977 and had an interview with the assessor. Thereafter, the taxpayer, by letter dated 10.08.1977, forwarded a statement disclosing an additional income and other information with a view to finalising his income tax matters with an explanation for non-disclosure of this additional income earlier. The taxpayer had another interview with the assessor in January 1978 and in October, 1978. The taxpayer made payments towards settling the liability arising from the additional income disclosed., but after the interview with the Deputy Commssioner in October, 1978, **the taxpayer received no further communication.**

[72] In 1979, the taxpayer received a notice of assessment dated 30.03.1979 showing a larger amount of assessable income and wealth than was returned or declared by him and the said notice of assessment was posted on 21.04.1979. Under such circumstances, the taxpayer sought a writ of certiorari and/for prohibition quashing this assessment. The Revenue (Respondents) relied on a copy of a letter dated 04.04.1979 allegedly sent by the assessor to the taxpayer stating "reasons for rejecting the returns and accounts have already been intimated to you…" The Respondents were however, unable to prove that such a letter was sent to the taxpayer, or to give evidence as to how and when the letter was sent. The Respondents also filed an affidavit which stated, *inter alia,* that "at these in his return and statement for the relevant year of assessment will not be accepted".

[73] Section 93(2) of the Inland Revenue Act, 04 of 1963 reads as follows:

> *"Where a person has furnished a return of income, wealth or gifts, the assessor may*
> *(a) either accept the return and make an assessment accordingly;*
>
> *(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".*

[74] By the Inland Revenue (Amendment) Act, No. 30 of 1978, section 93(2) was amended, and it made it obligatory for the assessor "to communicate to the assessee in writing the reasons for not accepting the return. Section 93(C)(3) reads as follows:

> *"Where, in the opinion of the Assessor, any person chargeable with any tax….has paid as the quarterly instalment of that tax…..an amount less that the proper amount which he ought to have paid….the Assessor may assess the amount which in the judgment of the Assessor ought to have been paid by such person and shall by notice in writing require such person to pay forthwith the difference between the amount so assessed and the amount paid by that person".*

[75] The proviso (d) to section 96(C)(3) reads as follows:

> *"Where an assessor does not accept a return made by any person for any year of assessment and makes an assessment on that persons for that year of*

assessment, he shall communicate to such a [erson in writing his reasons for not accepting the return".

[76] It was absolutely clear that after the two interviews were held and the additional income and other information with an explanation for not disclosing them earlier, were sent to the assessor by the taxpayer, **the assessor did not communicate in writing with his reasons** for not accepting the return as required by section 93(2) of the Act. The Respondents (Revenue) were unable to to prove that a letter dated 04.04.79 was sent to the taxpayer with reasons for rejecting the returns, and accordingly, the notice of assessment dated 30.03.1979 was sent to the taxpayer **without communicating reasons for not accepting the return** in **total non-compliance with the provisions of section 93(2) and 93(C)(3)** of the Inland Revenue Act.

[77] In the present case, however, the letter of the assessor dated 26.11.2012 states "**Please treat that this letter is issued in terms of section 163 of the Inland Revenue Act, No. 10 of 2006".** (See -letter of the assessor dated 26.11.2012 at p. 43 of the TAC file). There was no complaint whatsoever that the reasons for not accepting the return were not communicated to the Appellant by the assessor and the complaint was that it was received on 06.12.2012 (p. 49 of the TAC brief). In fact, the letter dated 26.11.2012 with reasons for not accepting the return has been sent to the Appellant before the notice of assessment dated 30.11.2012 was sent to the Appellant. The Appellant admits that the notice of assessment dated 30.11.2012 was received on 18.12.2012. Accordingly, I am of the view that the circumstances under which Victor Perera, J. made the above quoted statement is not applicable to the facts of the present case.

[78] It is to be noted that the assessor and the Commissioner General of Inland Revenue appealed to the Supreme Court against the said order of the Court of Appeal which issued a writ of certiorari quashing the assessment of tax (See- *D.M.S. Fernando and another v. A.M. Ismail* Sri Lanka Tax Cases, Vol. IV, p. 184). 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.

[79] 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 time 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)*

[80] These 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,...; (ii) assess him accordingly; and (iii) state reasons, and communicate such reasons to the taxpayer in writing. The words of section 163(3) of the Inland Revenue Act are, however, identical to section 93(2) and section 93(C)(3) of the repealed Inland Revenue (Amendment) Acts, No. 17 of 1972 and and the Act, No. 30 of 1978. It only imposes a duty on the assessor who made the assessment or additional assessment to communicate the reasons to the taxpayer through a registered post for not accepting the return.

[81] 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). 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).*

[82] 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**". In my view, all what His

Lordship Samarakoon CJ said in *D.M.S. Fernando and another v. A.M. Ismail (supra)* 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 has said 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.

[83] All what section 163(3) requires the assessor who rejects the return and made the assessment or additional assessment is to communicate to the tax payer by letter sent through the registered post, why he is not accepting the return, his reasons for not accepting the return. Having made the assessment, the assessor in the present case, by letter dated 26.11.2012 communicated to the taxpayer the **assessment** and the **reasons** in writing for not accepting the return as required by section 163(3). At the end of the letter, assessor states:

> *"Please treat this letter as an intimation made under section 163(3) of the Inland Revenue Act, No. 10 of 2006".*

[84] 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 making of the assessment or additional assessment, and not to the notice of assessment which is not dependent on the making of the assessment. On the other hand, section 164 of the Inland Revenue Act imposes a duty on the assessor who made the assessment to send a notice in writing requiring the person who was assessed stating the **amount of income assessed** and **the amount of tax charged.** Section 163 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, the amount of the tax so assessed, if such person has not paid any tax, or the difference between the amount of tax so assessed and the amount of the tax paid by such person. Furthermore, section 163 (2) imposes a duty on the assessor who made an additional assessment 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.

[85] The Appellant argued that the date on which the notice of assessment dated 30.11.2012 was served on the taxpayer should be regarded as the date for the making of the assessment, completely ignoring the letter of communication dated 26.11.2012 issued by the assessor to the Appellant in terms of section 163(3) of

the Inland Revenue Act. It contains **an assessment and reasons for not accepting the returns.** 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 by 26.11.2012 under section 163(3) or an additional assessment under section 163(2).

[86] One cannot fathom from the language of section 163 (3) that the notice of assessment should also be sent together with the communication of the reasons for non-acceptance of the return. 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 163(3) 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, under section 164 will only be sent to the taxpayer who has been assessed under section 163(3). 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 under section 163(3) before the time bar period expires to make the assessment.

[87] 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). The issue in both cases (*ACL Cables v. CGIR* and *John keels Holdings v. CGIR* (supra) 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, 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.

[88] 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, (supra)*, 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".*

[89] 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].***

[90] 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 the making of the assessment and therefore, the sending of the notice of assessment 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".

[91] His Lordship Samarakoon J., further 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 made within the prescribed time".

[92] 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, Samarakoon J. held that 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.

[93] 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. 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).

[94] 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). 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.

[95]*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.

[96] 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. 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.."

[97] 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].

[98] 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. The reason is obvious. It has the effect of fixing the Inspector of Taxes to a definite position, and not give him the 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). 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 of the notice of assessment under the Inland Revenue Act.

[99] The Inland Revenue 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, with his reasons in writing to the taxpayer under his signature, why he is not accepting the return.

[100] 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 09.09.2013) signed by the assessor with reasons for not accepting the return, the assessor is fixed to a definite position that an assessment had been made, 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.

[101] 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, it is not possible to distinguish the decision in Honig from the present case and accept the Appellant's argument that unless the notice of assessment is served, there is no valid assessment.

[102] The Appellant argued that unless the notice of assessment is served on the assessee within the period for the making of the assessment, the assessor could 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 Inland Revenue Act that the letter of communication as required by section 163(3) of the Inland Revenue Act shall be accompanied by the notice of assessment or that the notice of assessment shall be served within the period for the making of the assessment. 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.

[103] It is settled law that courts cannot usurp legislative function under the disguise of interpretation and rewrite, recast, reframe and redesign the Inland Revenue 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.."*

[104] 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".*

[105] 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".*

[106] 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".*

[107]. In *Stafford Motors Company (Pvt) Ltd v Commissioner General of Inland Revenue* (supra), the Court of Appeal considered the question whether (i) the serving a notice of assessment is a necessary precondition that must be satisfied to confer validity on the assessment; and (ii) the notice of assessment 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".

[108] In *Illukkumbura Industrial Automation (Private) Limited v Commissioner General of Inland Revenue* CA Tax 5/2016) decided on 29.09.2022, the issue before the Court of Appeal was, *inter alia,* 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".

[109] The words in section 163 (1) of the Inland Revenue Act state "Assesor, Assistant Commissioner may, subject to the provisions of subsection (3), and (5), ...assess the amount which in the judgment of the Assessor, Assistant Commissioner..". The words in sections 163(3) state "the Assessor of Assistant Commissioner ...... makes an assessment or additional assessment..." Those words necessarily imply that first, there has to be an assessment made by the assessor and such assessment shall be communicated to the taxpayer in writing with reasons for not accepting the return.

[110] On the other hand, the words in section 164, "An Assessor or Assistant Commissioner shall give notice of assessment to each person . stating the amount of income assessed and the amount of tax charged..." necessarily imply 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. It is that assessment that has to be communicated to the taxpayer in writing with reasons as required by section 163(3). Upon making the assessment, the notice of assessment must be given to the taxpayer as required by section 164 demanding to pay the **amount of income assessed** under section 163(3) and the amount of tax charged.

[111] If it was the intention of the legislature that the relevant date for the validity of the assessment is the date of posting of the notice of assessment, the legislature

could have referred to the "notice of assessment" in section 163(3) rather than the "assessment". Section 163 (3). In my view, section 163(3) and section 164 of the Inland Revenue Act Act clearly recognises the distinction between the "assessment" and the "notice of assessment"..

[112] It is crystal clear that the Inland Revenue 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 has to be considered to determine the question of time bar under section 163(5) 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), *Illukkumbura Industrial Automation (Private) Limited v. Commissioner General of Inland Revenue* (supra) and *Unilever Sri Lanka Limited, v Commissioner General of Inland Revenue,* (supra).

[113] For those reasons, I hold that the time bar of the assessment in section 163 (5) of the Inland Revenue 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, it is absolutely clear that the assessor who rejected the return estimated the amount of the assessable income of the taxpayer, and made the assessment accordingly and thereafter, the reasons for non accepting the return were communicated to the taxpayer by the same letter.

[114] I reject the contention of the Appellant that a valid assessment can only be made if the notice of assessment is served on the taxpayer and the letter dated 26.11.2012 is only a source document which is referred to in the notice of assessment. In the present case, the letter of intimation dated 26.11.2012 which contains the proof of assessment made by the assessor, and the reasons in detail for not accepting the returns. The assessor has communicated reasons for not accepting the return as required by section 163(3) of the Inland Revenue Act. In the circumstance, the assessments shall be deemed to have been made by the assessor on or before 26.11.2012, and such date shall be regarded as the relevant date to determine the time bar of the assessment under section 163(5).

Whether the assessment is nevertheless time barred in terms of section 163(5) of the Inland Revenue Act

[115] The next crucial question is to consider, even if the assessment was made on 26.11.2012, whether the assessment should have been made on or before 31.03.2012 and if so, whether the assessment made on 26.11.2012 is nevertheless time barred under section 163(5) of the Inland Revenue Act (as amended).

[116] During the course of the further argument on the applicability of the judgment of the Supreme Court in *Seylan Bank PLC v. Commissioner General of Inland Revenue* SC Appeal No. 46/2016 decided on 16.12.2021, Dr. Felix submitted that even if the assessment was made on 26.11.2012, as submitted by the Respondent, the applicable law for the year of assessment 2009/2010 commenced on 01.04.2010 and ended on 31.03.2010 and thus, the statutory amendment applied in respect of the said year of assessment was the Inland Revenue (Amendment) Act, No. 19 of 2009, which applied to any year of assessment **on or after 1, April 2009**. He further submitted that section 27 of the Inland Revenue (Amendment) Act, No. 19 of 2009, which changed the time bar relating to assessment, but it did not provide that the amendment made to section 163(5) of the principal enactment had retrospective effect. Dr. Felix strenuously argued that the Inland Revenue (Amendment) Act. No. 22 of 2011 came into effect on **01.04.2011,** which further changed the time bar relating to assessment, but it applied to any year of assessment on or after **01.04.2011** and the amendment made to section 163(5) of the principal enactment by the Act, No. 22 of 2011 had no retrospective effect in terms of section 56 of the said Act, No. 22 of 2011.

[117] He further submitted that the said amendment was prospective in nature, which has no effect on any year of assessment prior to 1, April 2011 and section 56 of the Inland Revenue (Amendment) Act, No. 22 of 2011 did not provide that the amendment made to section 163(5) of the principal enactment had retrospective effect. He submitted that even if the assessment was made on 26.11.2012, it was time barred within 2 years from the end of the relevant year of assessment 2009/2010 (i.e., by 31.03.2012) in terms of section 163(5) of the Inland Revenue (Amendment) Act, No. 10 of 2009. He relied on the decision of the Supreme Court in *Seylan Bank PLC v. Commissioner General of Inland Revenue* (supra) in support of his contention.

[118] On the other hand, Mr. Wigneswaran submitted that (i) the Inland Revenue Act, No. 10 of 2006 provided that no assessment shall be made after the expiry of 18 months from the end of the immediately succeeding year of assessment (i.e. until 30th September of the following year; (ii) this section was amended by the Act No. 19 of 2009 which provided that no assessment shall be made after the

expiry of a period of 2 years from the end of the immediately succeeding year of assessment (i.e. until 31st March of the second year following the year of assessment); (iii) a further amendment was made by the Act. No. 22 of 2011, which came into operation on 01.04.2011, which provided that no assessment shall be made after the expiry of a period of 2 years from the 30th day of November of the immediately succeeding year of assessment (i.e. until 30th November of the second year following the year of assessment); (iv) the return was submitted on **20.08.2010** and the Inland Revenue Act was amended by the Act, No. 22 of 2011 and thus, the legal regime applicable to the said return required the assessment to be made on or before 30th November 2012; (v) the assessment was made on 26.11.2012 and accordingly, the assessment is within the time stipulated in the Inland Revenue (Amendment) Act, No. 22 of 2011. He submitted that the decision of the Supreme Court in *Seylan Bank PLC v. Commissioner General of Inland Revenue* (supra) is inapplicable to the present case.

[119] In view of the rival submissions of the parties, the following questions arise for determination:

1. If the assessment was made on 26.11.2012, whether the Inland Revenue (Amendment) Act, No. 19 of 2009 applied to the year of assessment 2009/2010;

2. If the Inland Revenue (Amendment) Act, No. 19 of 2009 applied to the year of assessment 2009/2010, whether the assessment should have been made on or before 31.03.2012 and if so, whether the assessment that was made on 26.11.2012 is time barred;

3. If the Inland Revenue (Amendment) Act, No. 22 of 2011 applied to the year of assessment 2009/2010, with retrospective effect, whether the period given to the assessor to make the assessment for the year of assessment 2009/2010 had been extended from 31.03.2012 to **30.11.2012,** in terms of the Inland Revenue (Amendment) Act, 22 of 2011.

4. If so, whether the assessor was entitled to make the assessment during the extended period given to the assessor to make the assessment on or before 30.11.2012, and if so, whether the assessment made on 26.11.2012 is not time barred in terms of the Inland Revenue Act, (as amended).

Inland Revenue Act, No. 10 of 2006 before the amendment by Act, No. 19 of 2009

[120] At this stage, it may be pertinent to consider the relevant provisions of the Inland Revenue Act in relation to the period within which the assessment shall be made by the assessor. Under section 106 of the Inland Revenue Act, No. 10 of 2006, the assesee had to submit his return on or before the 30th of September of that assessment year. The Inland Revenue Act, No. 10 of 2006 in its original form reads as follows:

> *"106. (1) Every person who is chargeable with income tax under this Act for any year of assessment shall, on or before the* ***thirtieth day of September*** *immediately succeeding the end of that year of assessment, furnish to an Assessor, either in writing or by electronic means, a return in such from and containing such particulars as may be specified by the Commissioner-General, of his income, and if he has a child, the income of such child".*

Amendment to section 106 of the Inland Revenue Act, No. 10 of 2006 by the Inland Revenue Act, No. 19 of 2009

[121] Section 106 (1) of the Inland Revenue Act, No. 10 of 2006 was amended by the Inland Revenue Amendment Act No. 19 of 2009, which extended the time period given to the assessee to furnish a return from the 30th day of September to the 30th day of November immediately succeeding the end of that year of assessment. The Amended section 106 (1) of the The Inland Revenue Amendment Act No. 10 of 2009 reads as follows:

> *"Every person who is chargeable with income tax under this Act for any year of assessment shall, on or before the* ***thirtieth day of November*** *immediately succeeding the end of that year of assessment, furnish to an Assessor or Assistant Commissioner, either in writing or by electronic means, a return in such form and containing such particulars as may be specified by the Commissioner-General, of his income, and if he has a child, the income of such child:*
>
> *Provided however, the preceding provisions shall not apply to an individual whose income for any year of assessment comprises solely of one or a combination of the following:*
>
> *(a) Profits from employment as specified in section 4 and chargeable with income tax does not exceed rupees four hundred and twenty thousand, and income tax under Chapter XIV has been deducted by the employer on the gross amount of such profit and income;*

(b) Dividends chargeable with tax on which tax at ten per centum has been deducted under subsection (1) of section 65;

(c) Income tax from interest chargeable with tax on which tax at the rate of ten per centum has been deducted under section 133",

Time bar for Making the Assessment before the Amendments made to the Inland Revenue Act, No. 10 of 2006

[122] Section 163 (5) of the Inland Revenue Act, No. 10 of 2006, which deals with the time bar relating to assessments, provided as follows:

"(5) Subject to the provisions of section 72, no assessment of the income tax payable under this Act by any person or partnership-

(a)** who or which has made a return of his or its income **on or before the thirtieth day of September** of the year of assessment immediately succeeding that year of assessment, **shall be made after the expiry of eighteen months from the end of that year of assessment; and

(b) who has failed to make a return on or before such date as referred to in paragraph (a), shall be made after the expiry of a period of three years from the end of that year of assessment:.

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

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

[123] Accordingly, the original Inland Revenue Act enacted that no assessment shall be made after the expiry of **eighteen months from the end of the immediately succeeding year of assessment** (i.e. until 30th September of the following year.

Time bar for making the assessment after the amendments made to section 163(5) by the Inland Revenue (Amendment) Act, No. 19 of 2009

[124] Section 163 (5) of the Inland Revenue Act, No. 10 of 2006 was amended by the Inland Revenue (Amendment) Act, No. 19 of 2009, which changed the time bar relating to assessment, and enacted as follows:

> *"(5) Subject to the provisions of section 72, no assessment of the income tax payable under this Act by any person or partnership-*
>
> *(a) who or which has made a return of his or its income on or before the "**thirtieth day of November"** of the year of assessment immediately succeeding that year of assessment, shall be made **after the " expiry of a period of two years", from the end of that year of assessment;** and*
>
> *(b) who has failed to make a return on or before such date as referred to in paragraph (a), shall be made after the expiry of a period of* four years. *from the end of that year of assessment:.*
>
> *Provided, that nothing in this subsection shall apply to the assessment of income tax payable by any person in respect of any year of assessment, consequent to the receipt by such person of any arrears relating to the profits from employment of that person for that year of assessment:*
>
> *Provided further that, where in the opinion of the Assessor, any fraud, evasion or wilful default has been committed by or on behalf of, any person in relation to any income tax payable by such person for any year of assessment, it shall be lawful for the Assessor to make an assessment or an additional assessment on such person at any time after the end of that year of assessment.*

[125] The Inland Revenue (Amendment) Act, No. 19 of 2009 extended both the time periods given to a taxpayer to submit a return of his income for a given year of assessment **by two months,** and the assessor to make an assessment for such year of assessment **by six months** respectively. The Inland Revenue (Amendment) Act, No. 19 of 2009 however, provided that no assessment shall be made **after the expiry of a period of 2 years from the end of the immediately succeeding year of assessment** (i.e. until 31st March of the second year following the year of assessment).

[126] In the present case, the assessment related to the year of assessment **2009/2010**, which commenced on **01.04.2009** and ended on **31.03.2010**. In the present case, the assessment related to the year of assessment 2009/2010, which commenced on 01.04.2009 and ended on 31.03.2010. It is relevant to note that income tax is charged for every year of assessment commencing on or April 1, in respect of the profits and income of every person for that year of assessment (see- section 2(1) of the Inland Revenue Act, No. 10 of 2006). The return is filed by the taxpayer for every year of assessment and the assessment is made by the assessor for that relevant year of assessment (see- section 106(1) section 163(1) and section 163(5) of the Inland Revenue Act). In terms of section 217 of the Inland Revenue Act (as amended), "**year of assessment"** means "the period of twelve months commencing on the first day of April of any year and ending on the thirty-first day of March of any year and ending on the thirty-first day of March in the immediately succedding year".

[127] The Inland Revenue (Amendment) Act, No. 19 of 2009 came into effect on **01.04.2009** and *prima facie*, the law for the year of assessment 2009/2010 is the Inland Revenue (Amendment) Act, No. 19 of 2009. The assessee was required to file its return in terms of the extended period granted to file the return by the Inland Revenue (Amendment) Act, No. 19 of 2009 on or before **30.11.2010** and the assessee filed its return on **20.08.2010.** The assessor was required to make the assessment on or before **31.03.2012** for the year of assessment 2009/2010 under the Inland Revenue (Amendment) Act, No. 19 of 2009. In terms of the Inland Revenue (Amendment) Act, No. 19 of 2009, the assessment will be, *prima facie*, time barred within a period of 2 years from the end of the relevant year of assessment (2009/2010), which means by **31.03.2012.**. The assessment was made on 26.11.2012. The time bar that will be triggered in the year of assessment 2009/2010 under the Inland Revenue Act, No. 19 of 2009 is as follows:

Year of assessment	-	2009-2010
Return to be filed for the year of assessment 2010/2011	-	20.08.2010
End of the year for 2009/2010	-	31.03.2011
Assessment must be made on or before	-	31.03.2012
Assessment was made on	-	26.11.2012

Time bar for making the assessment after the amendments made to section 163(5) by the Inland Revenue (Amendment) Act, No. 22 of 2011

[128] After the taxpayer filed return of income on 20.08.2010, and while the said time period given to the assessor to make his assessment for the year of assessment 2009/2010 under the Inland Revenue (Amendment) Act, No. 19 of 2009 was in operation,the Inland Revenue (Amendment) Act, No. 22 of 2011 was enacted by Parliament. The said amendment was certified by the Speaker on 31.03.2011. By that time, the assessee had already filed its return on **20.08.2010**.

[129] By the Inland Revenue (Amendment) Act, No. 22 of 2011, section 163(5) of the Inland Revenue Act, No. 10 of 2006 was further amended by extending the time period given to the assessor to make his assessment for the year of assessment from March 31st March to 30th November immediately succeeding that year of assessment. The Inland Revenue (Amendment) Act, No. 22 of 2011 thus, provided that where a return is made on or before **30th November** of the year of assessment immediately succeeding that year of assessment, no assessment shall be made **after the expiry of a period of 2 years from the 30th of November of the immediately succeeding year of assessment** (i.e. 30th November). In terms of the Inland Revenue (Amendment) Act, No. 19 of 2009, the assessor was required to make the assessment for the year of assessment **2009/2010** on or before **31.03.2012** but the assessor made the assessment for the year of assessment **2009/2010** on **26.11.2012** on the basis that the amending Act (Inland Revenue (Amendment) Act, No. 22 of 2011) extended the time period given to the assessor to make the assessment for the year of assessment 2009/2010 from **31.03.2012 to 30.11.2012**.

[130] The question before us is to decide whether the assessment issued for the year of assessment 2009/2010 on 26.11.2012, was time barred for the failure to make the assessment on or before 31.03.2012 under the Inland Revenue (Amendment) act, No. 19 of 2009, or whether the amending Act (Inland Revenue (Amendment) Act, No. 22 of 2011) extended the time period from **31.03.2012 to 30.11.2012** with retrospective effect to make the assessment for the year of assessment **2009/2010**

Whether the Inland Revenue (Amendment) Act, No. 22 of 2011 has retrospective operation

[131] Section 80(1) of the Constitution provides that a Bill passed by Parliament shall become law when the certificate of the Speaker is endorsed thereon and thus, by operation of Article 80(1) of the Constototution, it should have come into force from that date as the Speaker certified the Bill on 31.03.2009. However, section 27(6) of the Act, No. 19 of 2009 provides that the amendments made to the principal enactment by the Act, No. 19 of 2009, other than the amendments specifically referred to in subsections (1)-(5) of section 27 shall come into force **on April 1, 2009.** The amendment made to section 163(5) of the principal enactment is not a section that is specifically referred to in subsections (1)-(5) of section 27. Accordingly, the amendment made to section 163(5) of the principal enactment came into force on **01.04.2009.** Section 75 of the Constitution confers power on the legislature to make laws, including laws having retrospective effect and repealing or amending any provision of the Constitution, or adding any provision to the Constitution.

Retrospective and prospective amendments

[132] It is relevant to note that a substantive law defines and provides for rights, duties and liabilities whereas the procedural law deals with the application of substantive law to particular cases (*Izhar Ahmed Khan v. Union of India* AIR 1962 1052) (e.g. law of evidence or practice of courts or limitation).

General Rule- Presumption against retrospective construction- prospective effect

[133] There is a presumption of retrospective construction and a presumption against retrospective construction. The cardinal principle of construction is that every statute is prima facie, prospective unless it is expressly or by necessary implication made to have a retrospective operation (*Keshvan v. State of Bombay* AIR 1951 SC). The general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective (TAXMANN'S Interpretation of Statutes, p. 860). The retrospective operation should not be given to a statute unless by express words or necessary implication, it appears that this was the intention of the legislature. (Supra, p. 840, 846).

[134] The general rule or presumption against retrospective operation of statutes applies where it deals with substantive rights, or existing rights or obligations or where the object of the statute is to affect vested rights or to impose new burdens or impair existing obligations (Justice G P Singh, Principles of Statutory Interpretation, 12th Ed, p. 524). Retrospective effect should not be

given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature (*ITO v T.S. Devinatha Nadar* (1938) 68 ITR 252 (SC). Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only (Justice G P Singh, Principles of Statutory Interpretation, 12th ed, p. 524). If the enactment is expressed in the language which is fairly capable of either interpretation, it is ought to be construed as prospective only (*In re Athlumney* (1898 2 QB 547):

[135] The real issue is to look at the scope of the particular enactment having regard to its language and the object discernible from the statute read as a whole. It is necessary to keep in mind that in order to decide whether an Act is retrospective or prospective, to consider the legislative intention in making the provisions of an Act, retrospective or prospective. The courts will consider the following two principles:

1. If is necessary implication from the language employed that the **legislature intended a particular section to have a retrospective operation,** the courts will give it such an operation because it is obviously competent for the legislature if it pleases in its wisdom to make the provisions of an Act retrospective;

2. If, on the other hand, the language employed by the legislature is ambiguous or not clear and explicit, the court must not give a construction which would take away vested rights, or in other words, should treat the Act as prospective (TAXMANN'S TAXMANN'S Interpretation of Statutes, p. 846).).

The presumption of retrospective operation-retrospective effect

[136] The presumption against retrospective construction applies only in respect of substantive law and not against the procedural law but the presumption of retrospective operation applies when the statute deals with the procedure or practice of the courts. In Maxwell on the Interpretation of Statutes, 12th Edn., the statement of law in this regard is stated thus:

> *"Perhaps no rule of construction is more firmly established than thus - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as*

prospective only.' The rule has, in fact, two aspects, for it, "involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary."

[137] If the new Act affects only matters of procedure, *prima facie*, it applies to all actions-pending, as well as future. The principle applies to-(a) the forms of procedure; (b) the admissibility of evidence; and (c) the effect which the courts give to evidence of a particular category (*Blyth v. Blyth* (No. 2) (1966) AC 643). Accordingly, the alterations in the form of procedure are always retrospective, **unless there are some good reasons or otherwise, they should not be such as it is expressly stated so.** (TAXMANN'S Interpretation of Statutes, supra). If the law deals with matters of **procedure only, it is deemed to be retrospective unless such inference is likely to lead to unjust results** (supra).

[138] In Francis Bennion's Statutory Interpretation, 2nd Edn, the statement of the law is stated as follows:

"...............The true principle is that lex prospicit non respicit (law looks forward not back). As Willes, J. said retrospective legislation is 'contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law."

[139] In *Hitendra Vishnu Thakur v. State Of Maharashtra* 994 AIR 2623, 1994 SCC (4) 602, DR ANAND, J. of the Supreme Court of India held:

"26......From the law settled by this Court in various cases, the illustrative though not exhaustive principles which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation may be culled out as follows:

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) *Every litigant has a vested right in substantive law, but no such right exists in procedural law.*

(iv) *A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.*

(v) ***A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication".***

Retrospectivity and Prospectivity in Amending Acts

[140] It is relevant to note that where a repeal of statutory provision dealing with substantive rights is followed by new legislation by enactment of an amending Act, such new legislation is prospective in operation. (Texmann, p. 863). Such an amendment will not affect the substantive or vested rights of parties unless it is made retrospective expressly or by necessary implication. (supra). Thus, an amendment of substantive law is not retrospective unless expressly laid down or by necessary implication inferred (*Bhagai Ram Sharma v. Union of India* AIR 1988 SC 740). An amending Act that deals with substantive rights is only retrospective if there is a clear indication in the legislative language to that effect.

[141] I would now proceed to examine whether section 163(5) of the amending Act (Act, No. 22 of 2011) is retrospective as urged by learned counsel for the Respondent, and thus, whether the assessor is given a new lease of life to extend the period given to make the assessment from 31.03.2012 to 30.11.2012. A perusal of the amendments made to the Inland Revenue (Amendment) Act, No. 22 of 2011 reveals that they deal with both procedural and substantive amendments. The amendments made to section 163(5) of the principal enactment are **prima facie**, presumed to have retrospective effect and the question is whether such presumption of retrospectivity applies to the present case, in view of section 56 of the Act, No. 22 of 2011.

[142] It was contended on behalf of the Respondent that the purpose of the Amending Act was designed to give more time to the assessor as the assessor had only 1 year and 4 months to make the assessment in terms of the previous Act, which was highly inadequate. It was also submitted that the new Act was passed for the purpose of supplying an omission in the previous act, and

therefore the new Act would relate back to the time when the prior Act was passed.

[143] Dr. Felix strongly relied on the decision of the Supreme Court in *Seylan Bank PLC v. The Commissioner General of Inland Revenue* (supra) in support of his contention that the amendment made to section 163(5) by the Inland Revenue (Amendment) Act, No. 22 of 2011 applied with prospective effect and applied to any year of assessment on or after 1 April 2011. He submitted that, therefore, the assessment that expired on 31.03.2012 for the year of assessment 2009/2010 cannot be extended under section 163(5) of the Amending Act, No. 22 of 2011, in view of the express provisions in section 56 of the Amending Act.

[144] In the case of *Seylan Bank PLC v. The Commissioner General of Inland Revenue* (supra), the assessor was required to make the assessment for the year of assessment 2007/2008 on or before 30.09.2009 in terms of section 163(5) (a) of the principal Inland Revenue Act, No. 10 of 2006. While the said period was still in operation, the Inland Revenue (Amendment) Act, No. 19 of 2009 was enacted by parliament and it was certified by the Speaker on 31.03.2009, but it came into force on 01.04.2009. By the amending Act, the time period given to the asseesee to file a return was extended by two months and the time period given to the assessor to make the assessment was extended by six months (till **31.03.2011).** The assessor made the assessment for the year of assessment 2007/2008 on **09.03.2010** and it was served on the assessee on **26.03.2010.** The assessor made the assessment on the basis that the amending Act extended the time period given to the assessor to make the assessment for the year of assessment 2007/2008 by another 6 months, i.e. from 30.09.2009 to 31.03.2010.

Dates on which the Inland Revenue (Amendment) Act, No. 19 of 2009 came into force

[145] Section 27 of the Inland Revenue (Amendment) Act, No. 19 of 2009 specifically sets out the dates on which the amendments made by the amending Act come into force. Section 27 of the amending Act provides:

> *"(1) The amendments made to paragraph (e) of subsection (2) of section 34, subsection (3) of section 78, subsection (4) of section 113, subsection (2) of section 153 and subsection (2) of section 173 of the principal enactment, by sections 10(2),section 15, section 17, section 19 and section 21, respectively, of this Act, shall be deemed for all purposes to have come into force on April 1, 2006.*

(2) The amendment made to the Second Schedule to the principal enactment by section 25 of this Act, shall be deemed for all purposes to have come into force on April 1, 2007.

(3) The amendment made to section 8, section 40A and section 57 of the principal enactment, by section 3(1) and (2), section 11 and section 13 respectively, of this Act, shall be deemed for all purposes to have come into force on April 1, 2008.

(4) The amendment made to section 13 of the principal enactment by section 5(2) of this Act, shall be deemed for all purposes to have come into force on October 21, 2008.

(5) The amendment made to section 13 by section 5(4) of this Act, shall be deemed for all purposes to have come into force, on February 1, 2009.

(6) The amendments made to the principal enactment by this Act, other than the amendments specifically referred to in subsections (1), (2), (3), (4) and (5) of this section, shall come into force on April 1, 2009.

[146] In terms of the Inland Revenue Act, No. 10 of 2006, the assessor was required to make the assessment for the year of assessment 2007/2008 on or before 30.09.2009. The issue arose before the Court of Appeal (CA/Tax/23/2013 decided on 25.05.2015) was whether the deadline for the assessor to make the assessment for the year of assessment 2007/2008 was extended with prospective effect from the 30.09.2009 to 31.03.2010 in terms of the amending Act, No. 19 of 2009. The Court of Appeal held that even though amendment made to section 163 of the principal enactment operated from **01.04.2010** in terms of section 27(6), the law of the country was changed from 01.04.2009 authorising the assessor to extend the time period to make the assessment by another 6 months and therefore, the assessment made for the year of assessment 2007/2008 on 26.03.2010 is not time barred. The Court of Appeal on an identical issue held:

1. As per section 27(6) of the Amendment Act, the amendment brought into the section 163 of the principal enactment is **in operation from 01st of April 2009.** Therefore, the law of the country from the 1st of April 2009 in relation to sending an assessment to the assessee by the assessor is the amended section 163 of the Inland Revenue Act (p.4);

2. Irrespective of whether the asssesee had to submit the tax return on or before the 30th September 2009 or 30th November 2009, the assessor can

send the assessment to the assessee within two years immediately succeeding that year of assessment (p.4);

3. As per section 27(6) of the Amending Act, section 163 of the principal enactment was amended from 1st April 2009 and the amending Act did not operate with retrospective effect but it operated from **01.04.2009**. The law of the country was, however, changed from that date (01.04.2009) and from that date, the new law applied (p.5);

4. In terms of the amending Act, the time period given to the assessor to make the assessment for the year of assessment 2007/2008 was extended from 30.09.2009 to 31.31.03.2010 (p. 4), and therefore, the assessment dated 26.03.2010 made for made for the year 2007/2008 and issued against the Assessee is not time barred (p.6).

[147] It was the submission of Dr. Felix that the Supreme Court rejected this proposition of law enunciated by the Court of Appeal in *Seylan Bank v. The The Commissioner General of Inland Revenue* (supra), which held that when the law was changed extending the period of assessment, the assessor was entitled to make the assessment within the extended period of limitation, irrespective of the fact that the amending law applied with prospective effect.

[148] The issue before the Supreme Court was, despite the fact that the amendments made to section 163(5) are presumed to have retrospective effect, whether such presumption of retrospective operation was applied to the amendments made to the section 165(3)(a) of the Inland Revenue (Amendment) Act, No. 19 of 2009, in view of the provision in section 27(6), and if so, whether the assessment dated 26.03.2010 for the for the year of assessment 2007/2008 was time barred under and in terms of section 163(5) of the Inland Revenue Act. The Supreme Court, having considered the effect of section 27(6) of the amending Act, and the absence of express provisions to the contrary held:

> *"Accordingly, the amendments referred to in section 27(1) to (5) of the amending Act are given a retrospective effect from the dated specified therein, in terms of Article 75 of the Constitution.*
>
> *On the other hand, the amendments that are not referred to in section 27(1) to (5) of the amending Act operate with prospective effect from the 1st April, 2009, in terms of section 27(6) of the amending Act.*
>
> *Further, although there is a general distinction between substantive law and procedural law, section 27(6) of the amending Act does not distinguish between the amendments made to the substantive law and procedural law of the principal Act (p. 15).*

Thus, in the absence of any reference to a segregation between the two branches of law in the said section, it is not possible to read the words in the said section by a judicial interpretation, and segregate the amendments made to the substantive law and the procedural law of the principal Act.

In the circumstances, I am of the view that section 27(6) of the amending Act was intended to give prospective effect to both the amendments made to the substantive and procedural law of the principal Act, other than those expressly referred to in section 27(1) to (5) of the amending Act;

***Therefore, although the amendments made to section 106(1) and 163(5) (a) of the principal Act are procedural in nature, the express provision in section 27(6) of the amending Act excludes the applicability of the general presumption that procedural laws be given retrospective effect** (pp 15-16) [Emphasis added).*

***Hence, the amendments made to both sections 106(1) and 163(5) (a) of the principal Act will operate with prospective effect from the 1st April, 2009, in terms of section 27(6) of the amending Act** (pp.15-16) [Emphasis added].*

[149] Having held that section 27(6) of the amending Act is intended to give prospective effect to both procedural and substantive provisions, and it excludes the applicability of the general presumption, and therefore, the amendment made to section 163(5) will operate with prospective effect from 01.04.2009, the Supreme Court further considered the second question. The second question was whether the assessor alone could benefit from the amendment while the assessee could not, in view of the principle enshrined in Article 12(1) of the Constitution. The Supreme Court held at p.19 that:

"Thus, since the appellant had furnished the return of income in accordance with section 163(5)(a) of the principal Act, prior to the said section being amended, a right had accrued to the appellant under the said section to have an assessment of income tax made (if any) within eighteen months from the end of that year of assessment…….

Thus, it is necessary to interpret both the said amendments to have prospective effect, to secure equality between the taxpayer and revenue officer in terms of Article 12(1) of the Constitution" (p. 20)".

[150] At the further hearing before us, the Respondent however, argued that the judgment of the Supreme Court is inapplicable in the present case and it should not be followed for the following reasons.

1. The Supreme Court held that the assessment was time barred on the basis that the return of income had already been submitted by the assessee when

the Act, No. 19 of 2009 came into operation, and thus, the assessee could not benefit from the amending Act while the assessor could benefit from the provisions that extended the time within which the assessment could be submitted;

2. In the present case, however, the assessment had not been done by the time the Act, No. 22 of 2011 came into force and therefore, the time within which an assessment is to be issued was extended by the amending Act, and thus, the assessor is entitled to issue an assessment within the time so extended provided that the amendment became operative prior to the lapse of the timeline under the earlier provision;

3. The time limit within which an act is required to be done, ought to be ascertained with reference to when that particular act was done (making of the assessment) and not by reference to the impact of the law would have on another act (tendering the return) as held in the Indian case of *Super Cast Alloy Foundries Ltd v. Commissioner of Income Tax* (2005) 275 IER 195).

4. The Supreme Court considered the combined effect of section 106(1) and section 163(5) of the Act and thus, the basis of the judgment related to the inability of the taxpayer to benefit from the extended period of time given to the taxpayer to file return while the assessor could benefit from the extended period given to make the assessment, since the taxpayer had already filed return by the time the Act. No. 19 of 2000 came into force;

5. The intention of the legislature by amending section 163(5) of the principal enactment by the Act No. 22 of 2011 was to grant a right only to the assessor, and thus, the assessor has a right to make the assessment within the extended period of time;

6. The Supreme Court failed to consider the principle enunciated in the Indian case of *Super Cast Alloy Foundries Ltd v. Commissioner of Income Tax* (2005) 275 IER 195);

[151] In view of these submissions, it is necessary to identify the ratio on which the Supreme held that the amendments made to section 163(5)(a) of the Act, No. 19 of 2009 have no application to the year of assessment 2007/2008, and the assessment made by the assessor is time barred. A careful reading of the Supreme Court judgement in *Seylan Bank PLC v. The Commissioner General of*

Inland Revenue (supra) reveals that the Supreme Court judgment has the following two parts.

1. Although the amendment made to section 163(5) of the Act, No. 19 of 2009 is presumed to have retrospective effect, such presumption of retrospective effect will not apply when the **express provision in section 27(6) of the amending Act excludes the applicability of the general presumption** (i.e. that procedural laws be given retrospective effect) and hence, the amendment made to section 163(5) **will operate with prospective effect from 01.04.2009 for the year of assessment 2007/2008 in terms of section 27(6) of the amending Act;**

2. The taxpayer had furnished the return prior to the amending Act came into force, and thus, a right had accrued to the taxpayer under section 163(5) (a) to have an assessment made within 18 months from the end of that year of assessment. If the year of assessment is extended with retrospective effect, it would only benefit the assessor but it deprived the taxpayer who is unable to file a return within the extended period under section 106(1), that infringes Article 12 (1) of the Constitutio that guarantees the equal protection of the law;

[152] It is crystal clear that it is only the first part of the Supreme Court decision that reprersents ratio decidendi of the decision-the reason and the spitit of the decision. Namely that (i) although the amendment made to section 163(5) is presumed to have retrospective effect, the express provision in section 27(6) of the amending Act excludes the applicability of the general presumption of retrospectivity, or the restrospective operation of that section was rebutted by the express exclusion in section 27(6); and (ii) the amending Act **operates with prospective effect from 01.04.2009.** The effect of this part of the decision is that the amendment made to section 163(5) of the principal enactment is only prospective and applicable for any year of assessment on or after 1 April 2009 and not before 01.04.2009 and hence, it has no application to the year of assessment 2007/2008.

[153] Section 106(1) of the Inland Revenue (Amendment) Act, No. 19 of 2009, extended the time period given to the taxpayer to furnish a return by two months from 30.09.2010 to 30.11.2010. In the present case, the assessee furnished its return on 20.08.2010 and the Act, No. 22 of 2011 came into force on 01.04.2011 and the assessment was made on 30.11.2012. Thus, by the time the Act, No. 22 of 2011 came into force, the taxpayer had already filed its return. With regard to the second part of the decision, it is not in dispute that the time period for

making the assessment had not expired by the time the amendments were made to section 163(5) of the principal enactment. The second part of the judgment related to the inability of the assessee to benefit from the extended period given to file the return under the Act, No. 19 of 2009 and therefore, the law should not be interpreted to give an advantage to an assessor and deprive an assessee in violation of Article 12 (1) of the Constitution as held by the Supreme Court in *Seylan Bank decision.* It is an additional factor in that individual case for the Supreme Court to hold that the law should not be interpreted to give an advantage to an assessor and deprive an assessee in violation of Article 12 (1) of the Constitution. The second part of the judgment related to the inability of the assessee to benefit from the extended period given to file the return under Act, No. 19 of 2009 and therefore, the assessee had a right to have the assessment passed within the 18 months from the end of that year. It is only an additional factor in that particulae case, in holding that the amendments made to section 163(5) have no application to the year of assessment 2007/2008.

[154] It was argued on behalf of the Respondent that (i) the purpose of the amendment made to section 163(5) of the principal enactment by the Act, No. 19 of 2009 was to extend the time period given to the taxpayer to furnish the return, and to the assessor to make the assessment; (ii) the purpose of the amendment made to section 163(5) of the principal enactment by the Act, No. 22 of 2011 was only to extend the time period given to the assessor to make the assessment from 31st March to 30th November. On that basis, the Respondent argued that the judgment of the Seylan Bank, which is based on the interpretation of the amendments made to both sections 106(1) and 163(5) of the principal enactment by the Act, No. 19 of 2009, would not apply to the present case and therefore, the assessor, in the present case, has a right to extend the period given to make the assessment from 31st March to 30th November in terms of the Act, No. 22 of 2011. The Respondent has however, failed to explan the legal effect of section 27(6) of the Act, No. 19 of 2009, which expressly excludes the retrospective operation of that amendment and provides that the effective date of the amendment shall be 01.04.2009.

[155] Although the Supreme Court considered the combined effect of section 106(1) and section 163(5) of that Act, No. 19 of 2009, the Supreme Court was clearly guided by the legislative intention in section 27(6) of the amending Act, No. 19 of 2009. As noted, the Supreme Court clearly held that section 27(6) expressly excludes the applicability of the general presumption that procedural laws be given retrospective effect and that the amendments made to the principal enactment, (which includes s. 163(5)), <u>other than the amendments</u>

specifically referred to in section 27, shall come into force on April 1, 2009. (see- pp 15-16 of the Supreme Court judgment).

[156] The Supreme Court clearly held in *Seylan Bank v. The The Commissioner General of Inland Revenue* (supra) that **although the amendment made to section 163(5)** is presumed to have retrospective effect**, the express provision in section 27(6) of the amending Act excludes the applicability of the general presumption** of retrospectivity, and therefore, the amendment made to section 163(5) of the principal enactment does not apply to the year of assessment 2007/2008, in terms of section 27(6) of the Act, No. 19 of 2009.

Decision of the High Court in Commissioner of Income Tax v. Super Cast Alloy Foundries Ltd. ,

[157] The Respondent strongly relied on the decision of the Gujarat High Court in *Commissioner of Income Tax v. Super Cast Alloy Foundries Ltd.* (2005) 194 CTR Guj 194, 2005 275 ITR 199 Guj decided on 02.02.2005) in support of the contention that as the assessment had not been made by the time the amending Act was enacted, the assessor gets an extended lease of life (extended period of time), and therefore, the assssessor had a right to make the assessment during the extended period of time until 30.11.2013.

[158) I desire, to consider the question whether the Indian High Court case in *Commissioner of Income Tax v. Super Cast Alloy Foundries Ltd.* (Supra), applies to decide the time bar of the assessment for the year of assessment 2009/2010 in the present case under the Inland Revenue Act of Sri Lanka. In *Commissioner of Income Tax v. Super Cast Alloy Foundries Ltd.* (Supra), the High Court was interpreting section 154 of Income Tax Act of India, 1961. The issue was whether on the facts and in the circumstances, the Appellate Tribunal was right in law in holding that rectification order dated.31.3.86 under Section 154 of the Income Tax Act of India 1961 in respect of the assessment order dated 25.3.82 was barred by time on the ground that un-amended provisions of Section 154(7).

[159] Section 154 - Rectification of mistake

> *"1a[(1) With a view to rectifying any mistake apparent from the record an income-tax authority referred to in section 116 may, -*
>
> *(a) amend any order passed by it under the provisions of this Act ;*
>
> *1[(b) amend any intimation or deemed intimation under sub-section (1) of section 143]].*
>
> *1aa[(bb) the Inspecting Assistant Commissioner may amend any order passed by him in any proceeding under]*

4[(c) amend any intimation under sub-section (1) of section 200A.]

9[(d) amend any intimation under sub-section (1) of section 206CB.]

1aa[(1A) Where any matter has been considered and decided in any proceeding by way of appeal or revision relating to an order referred to in sub-section (1), the authority passing such order may, notwithstanding anything contained in any law for the time being in force, amend the order under that sub-section in relation to any matter other than the matter which has been so considered and decided.]

(2) Subject to the other provisions of this section, the authority concerned-
(a) may make an amendment under sub-section (1) of its own motion, and
(b) shall make such amendment for rectifying any such mistake which has been brought to its notice 5[by the assessee or by the deduct or [or by the collector],], and where the authority concerned is [the Joint Commissioner (Appeals) or the Commissioner (Appeals)], by the 2b[Assessing Officer] also.
[Proviso omitted by the Finance Act, 1994, with effect from 1st June, 1994.];

(3) An amendment, which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of [the assessee or the deduct or [or the collector]], shall not be made under this section unless the authority concerned has given notice to 6[the assessee or the deduct or 9[or by the collector]] of its intention so to do and has allowed [the assessee or the deduct or 9[or by the collector]] a reasonable opportunity of being heard.
(4) Where an amendment is made under this section, an order shall be passed in writing by the income-tax authority concerned.

(5) Where any such amendment has the effect of reducing the assessment or otherwise reducing the liability of the assessee or the deduct or 9[or the collector], the Assessing Officer shall make any refund which may be due to such assessee or the deduct or [or the collector].]

(6) Where any such amendment has the effect of enhancing the assessment or reducing a refund [already made or otherwise increasing the liability of the assessee or the deduct or [or the collector], the Assessing Officer shall serve on the assessee or the deduct or [or the collector], as the case may be] a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be issued under section 156 and the provisions of this Act shall apply accordingly.

(7) Save as otherwise provided in section 155 or sub-section (4) of section 186 no amendment under this section shall be made after the expiry of four years 3a[from the end of the financial year in which the order sought to be amended was passed].

(8) Without prejudice to the provisions of sub-section (7), where an application for amendment under this section is made 5[by the assessee or by the deduct or 9[or by the collector]] on or after the 1st day of June, 2001 to an income-tax authority referred to in sub-section (1), the authority shall pass an order, within a period of six months from the end of the month in which the application is received by it, -

(a) making the amendment ; or
(b) refusing to allow the claim.]

[160] The Assessment Year was 1979-80 and the relevant accounting period was 31st December, 1978. The assessment order was made under Section 143(3) of the Act on **25th March, 1982.** The Assessing Officer passed an order under Section 154 of the Act for the purposes of reworking the depreciation allowance to which the assessee was entitled and the said order was made on **31st March, 1986**.

[161] The case of the assessee was that the period of limitation for passing an order of rectification is prescribed under Section 154(7) of the Act and that provision was amended by Taxation Laws (Amendment) Act, 1984 w.e.f. 1st October, 1984, but the time limit of four years from the date of assessment order had to be taken into consideration and not the **amended provision**. On the other hand, the Revenue, argued that once the provision was amended, the **extended period of limitation would apply** and if the said amended provision was applied to the facts of the case, the order of rectification under Section 154 of the Act was within the period of limitation. The question, therefore, was whether the rectification order made on 31.03.1986 was time barred in terms of section 155(4) by virtue of the amended Act, which came into effect from 1st October.The relevant provision before the amendment reads as under :

*"(7) Save as otherwise provided in Section 155 or sub-section (4) of Section 186 no amendment under this section shall be made after the expiry of four years **from the date of the order sought to be amended**."*

[162] The relevant provision after the amendment reads as under :

*"(7) Save as otherwise provided in Section 155 or sub-section (4) of Section 186 no amendment under this section shall be made after the expiry of four years **[from the end of the financial year in which the order sought to be amended was passed.]**"*

[163] Section 155 (4) of the INCOME-TAX ACT, 1961 reads as follows:

(4) Where as a result of proceedings initiated under section 147, a loss or depreciation has been recomputed and in consequence thereof it is necessary to recompute the total income of the assessee for the succeeding year or years to which the loss or depreciation allowance has been carried forward and set-off under the provisions of sub-section (1) of section 72, or sub-section (2) of section 73, or 1e[sub-section (1) or sub-section (3) of section 74,] 1f[or subsection (3) of section 74A,] the 1g[Assessing Officer] may proceed to recompute the total income in respect of such year or years and make the necessary amendment ; and the provisions of section 154 shall, so far as may be, apply thereto, ***the period of four years specified in sub-section (7) of that section being reckoned 1b[from the end of the financial year in which the order was passed]*** *under section 147.*

[164] The assessment order was dated **25th March, 1982**. The Assessor under the provision before the amendment was permitted to amend an order within the period of four years from the date of the order sought to be amended. The original period of limitation under the unamended provision would have expired on 24th March, 1986. The amendment of Section 154(7) of the Act which came into effect from **1st October, 1984.** By virtue of the amended provision, the period of limitation within which an order could be rectified stood extended by as much as the period of four years had to be computed **from the end of the financial year in which the order sought to be amended was passed.** By virtue of the amendment, the said period stood extended to **31st March, 1986** and the **rectification order has admittedly been made on 31st March, 1986.**

[165] The assessment order was dated 25th March, 1982. The original period of limitation under the unamended provision would have expired on 24th March, 1986. However, by virtue of the amendment carried out by the Taxation Laws (Amendment) Act the said period stood extended to 31st March, 1986 and the rectification order has admittedly been made on 31st March, 1986. Under such circumstances, the High Court held that (i) the original period of limitation under the unamended provision that would have expired on 24th March, 1986, stood extended to 31st March, 1986 under the Taxation Laws (Amendment) Act; (ii) therefore, the order of the Tribunal holding that the rectification order was barred by limitation is not correct as **there is no indication in the context of the Amendment Act, nor is there any express provision which would prohibit the assessing authority from passing an order of rectification within the extended period of limitation.** The High Court in fact looked for rebuttal evidence in the Act itself, either to prohibit the assessor from passing an order within the

extended period of limitation or allow the assessor to pass an order in the absence of such express provision.

Existence or absence of any express provision and rebuttal of presumption of retrospectivity

[166] Significantly, the High Court considered whether the limitation provision in section Section 154(7) of the Income Tax Act, 1961 has been rebutted **by any express provision in the Amendment Act itself** or where there is any express provision in the Amending Act, which would prohibit the assessing authority from passing an order of rectification within the extended period of limitation. The High Court held that there is no any express provision which would prohibit the assessing authority from passing an order of rectification within the extended period of limitation. The High Court stated at paragraph 10:

> *"10. In light of the aforesaid settled position of law, the impugned order of the Tribunal holding that the rectification order was barred by limitation is not correct. There is no indication in the context of the Amendment Act, nor is there any express provision which would prohibit the assessing authority from passing an order of rectification within the extended period of limitation".*

[167] The same question was considered in the Indian case of *Commissioner of Income Tax v. Royal Motor Car Co.* [1977]107ITR753(Guj), and while holding that when the legislature makes changes to the procedural limitation period in pending proceedings, the new section would apply after the Amendment where the entire old section was substituted by the new section, **unless there is something in the context or by express words the legislature has expressed it**. In *Commissioner of Income Tax v. Royal Motor Car Co. (supra), it was stated:*

> *"..... It is well-settled law that as regards matters of procedure, the legislature can make changes and those changes would apply so far as the limitation is concerned to pending proceedings unless a vested right has accrued to any party by reason of the old period of limitation having expired. ..... "*
>
> *"At least so far as the question of limitation is concerned, it is obvious that the old section cannot apply after the Amendment Act since the entire old section was substituted by the new section and what we are concerned with in the present case is the application of the well-settled rule of law that limitation is a matter of procedure and* ***unless there is something in the context or by express words the legislature has expressed it, new period of limitation would always apply to pending proceedings as well. .....*** *"*

[168] In my view, an amending Act which only affects procedure is presumed to be retrospective unless the Act provides otherwise-meaning, the Court should at the question whether its retrospective operation has been rebutted by any express provision in the same Act (*Shyam Sunder v. Raj Kumar* (2001) 8 SCC 24). In *Shyam Sunder v. Raj Kumar* (supra), it was stated:

> *"From the aforesaid decisions the legal position that emerges is that when a repeal of an enactment is followed by a fresh legislation such legislation does not effect the substantive rights of the parties on the date of suit or adjudication of suit unless such a legislation is retrospective and a court of appeal cannot take into consideration a new law brought into existence after the judgment appealed from has been rendered because the rights of the parties in an appeal are determined under the law in force on the date of suit. However, the position in law would be different in the matters which relate to procedural law but so far as substantive rights of parties are concerned they remain unaffected by the amendment in the enactment. We are, therefore, of the view that where a repeal of provisions of an enactment is followed by fresh legislation by an amending Act, such legislation is prospective in operation and does not affect substantive or vested rights of the parties unless made retrospective either expressly or by necessary intendment.* ***We are further of the view that there is a presumption against the retrospective operation of a statute and further a statute is not to be construed to have a greater retrospective operation than its language renders necessary, but an amending Act which affects the procedure is presumed to be retrospective, unless amending Act provides otherwise" (emphasis added).***

Rebuttal of Presumption of Retrospectivity

[169] This raises the question whether the presumption of retrospective operation of any procedural enactment made by Act, No. 22 of 2011 has been rebutted by any express provision of the same Act. There is no dispute that the period of limitation for making the assessment had not expired when the amendment was made to the Inland Revenue Act by the Inland Revenue (Amendment) Act, No. 22 of 2011. Even if it is assumed that the period of limitation for making the assessment had not expired when the amendment was made to the principal enactment by the Act, No. 22 of 2011, the crucial question is whether the legislature has expressed something **by express words that would prohibit the assesser from using such amendment and making an assessment within such extended period of limitation**. In short, the question is whether the presumption of retrospectivity in relation to procedural limitation made to the principal

enactment by the Act, No. 22 Act, No. 22 of 2011 has been rebutted by any express provision in that Act itself.

[170] In regard to the rebuttal of the presumption, it is relevant to note that any amending Act may provide either by any express provision or by implication affecting the procedure that is presumed to be retrospective effect. It is true that where a statute is passed for the purpose of supplying an obvious omission in a former statute, the subsequent statute would generally relate back to the time when the prior Act was passed **unless the provides otherwise** indicating the legislative intention against retrospective operation. Although an Amending Act affecting procedure is presumed to be retrospective, **the presumption could be rebutted when the Amending Act in section 56 expressly or by implication, indicates in the legislative language** to the effect that the amendment made to the principal enactment by the provisions of the Act, No. 22 of 2011 [(including section 163(5)], shall be deemed for all purposes to have come into force on April 1, 2011. Now the question is whether the presumption of retrospective operation of the limitation period has been rebutted by any express provision in the Inland Revenie (Amendment) Act, No. 22 of 2011 itself.

Exclusivity of Retrospective operation by section 56 of the Act No. 22 of 2011

Dates on which the amendments made to section 163(5) came into force

[171] Similar to section 27 of the Inland Revenue (Amendment) Act, No. 19 of 2009, section 56 of the Act, No 22 of 2011 specifically sets out the dates on which the amendments made to the Inland Revenue Act, shall come into force. Section 56 of the Amending Act provides that certain amendments are procedural in nature while amendments made to sections 7, 21, 21, and 21A of the principal enactment by the Amending Act are of substantive in nature. Section 56 of the amending Act provides:

> ***"56. The amendments made to the principal enactment by the provisions of this Act, shall be deemed for all purposes to have come into force on April 1, 2011.***
>
> *Provided that-*
>
> *(a) the amendments made to section 7 of the principal enactment by subsection (2) of section 3 of this Act, shall be deemed for all purposes to have come into force on April 1. 2008;*

(b) *the amendments made to sections 20, 21 and 21a of the principal enactment by section 10, section 11 and section 12 respectively of this Act, shall be deemed for all purposes to have come into force on April 1, 2009".*

Effect of section 56 of the Inland Revenue (Amendment) Act, No. 22 of 2011

[172] Section 56 of the Act, No. 22 of 2011 clearly provides that the amendments made to the principal enactment by the Inland Revenue (Amendment) Act, No. 22 of 2011**, other than the amendments specifically referred to in the proviso to section 56** of the said Act, **shall come into force on April 1, 2011.** The legislative intention is to ensure that the amendments that are specifically referred to in the proviso to section 56 of the Inland Revenue (Amendment) Act, No. 22 of 2011, operate with retrospective effect from the dates specified therein while all other amendments made to the principal enactment, including the amendments made to section 163(5) operate with prospective effect from April, 1, 2011. If the legislative intention was to extend the period given to the assessor from 31.03.2012 to 30.11.2012 for **any year of assessment** prior to 01.04.2009, there was no reason for the legislature to provide in express terms that "the amendments made to the principal enactment including section 163(5) by the provisions of the Act No, 22 of 2011, other than the amendments referred to in section 56, shall be deemed for all purposes to have come into force on April 1, 2011. 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 and read words into the section which are not there, by a judicial interpretation and to defeat the intention of the legislature.

[173] Although the amendment made to section 163(5) of the principal enactment is of a procedural nature, and is presumed to have retrospective effect, the presumption of retrospectivity has been excluded or rebutted by the express provision in section 56 of the same Act. Section 56 expresslly provides that the amendment made to section 163(5) applies with prospective effect (w.e.f. 01.04.2011) and thus, it is not possible for the assessor to extend the time period for making the assessment for the year of assessment 2009/2010 from 31.03.2012 to 30.11.2012.

[174] A perusal of the decision in *Commissioner of Income Tax v. Super Cast Alloy Foundries Ltd.* and the relevant provisions of section 154 or 155 of the Income Tax Act of India reveal that the is nothing to indicate that the limitation provisions of the Income Tax Act of India restrict the effective date of the limitation

provisions similar to section 56 of the Inland Revenue (Amendment) Act, No. 22 of 2011. In the present case, the assessment was made on 26.11.2012 and the notice of assessment is dated 30.11.2012. The amendments made to section 163(5) of the principal enactment by the Act, No. 22 of 2011 operates with prospective effect from 01.04.2011, which means that the amendments made to section 163(5) of the principal enactment by the Act, No. 22 of 2011 is applicable for any year of assessment on or after 1 April 2011 and not to the year of assessment 2009/2010 <u>in terms of section 56 of the Act, No. 22 of 2011</u>. Accordingly, it is not possible to disregard the first part of the decision of the Supreme Court in *Seylan Bank v. The Commissioner General of Inland Revenue* (supra), and apply only the second part of the decision as against the express statutory provision in section 56 of the Act, No. 22 of 2011 in the present case.

[175] For those reasons, I hold that the amendments made to section 163(5) by the Inland Revenue (Amendment) Act, No. 22 of 2011 operates with prospective effect from 01.04.2011 in terms of section 56 of the said amending Act. Accordingly, the amendments made to section 163(5) of the principal enactment by the Inland Revenue (Amendment) Act, No. 22 of 2011 has no effect relating to the year of assessment 2009/2010. The assessor does not get an extended lease of life to make the assessment for the year of assessment 2009/2010 after the time period for making the assessment expired on 31.03.2012.

[176] Before I part with this judgment, I must place on record that for the reasons stated in this judgment, this Court is bound by the judgment of the Supreme Court in *Seylan Bank PLC v. The Commissioner General of Inland Revenue* (Supra). This Court is not bound by the judgment of the Gujarat High Court in *Commissioner of Income Tax v. Super Cast Alloy Foundries Ltd.* (supra), when there is a statutory provision in the Act, No. 22 of 2011, which expressly provides that the amendment made to section 163(5) of the principal enactment, shall for all purposes, come into force from 01.04.2011. In any event, the said Indian decision applied unless there is any express provision in the Amendment Act itself which prohibits the assessor from passing an order of rectification within the extended period of limitation. For those, reasons, I am not inclined to agree with the Respondent's argument that the amending Act, No. 22 of 2011 extended the time period given to the assessor to make the assessment for the year of assessment 2009/2010 from 31.03.2012 to 30.11.2012, after the time bar period expired on 31.03.2012.

[177] For those reasons, I hold that although the assessment was made on 26.11.2012, the assessment for the year of assessment 2009/2010 was time barred

when it was not made on or before 31.03.2012 in terms of section 163(5) of the Inland Revenue Act (as amended). For those reasons, the question of law No. 3 is answered in favour of the Appellant.

Question of Law Nos.4 & 5

Is the Appellant entitled to the Concessionary Tax Rate conferred by Sections 42 and 52 of the Inland Revenue Act, No. 10 of 2006

[178] It is not in dispute that the principal activity of the Appellant is the supply of marine fuel and lubricants to local and foreign vessels. At the hearing of the Appeal, Mr. Romesh de Silva, P.C. submitted that the Appellant being a supplier of bunker fuel to ships is engaged in exporting bunker fuel to a buyer abroad within the contemplation of Section 42 of the Inland Revenue Act, No. 10 of 2006 (as amended) and therefore, it is entitled to the concessionary rate of 10% specified in the Fifth Schedule to the Act or in the alternative, to the concessionary rate of 15% specified in the Fifth Schedule to the Inland Revenue Act. He further submitted that although the term “export” is not defined in the Inland Revenue Act, No. 10 of 2006 (as amended), the question of whether the Appellant qualifies for the concessionary tax rates under Sections 42 or 52 of the Inland Reveue Act would have to be decided by resorting to other definitions of “export” in other statutes.

[179] Mr. de Silva further submitted that the supply of bunker fuel qualifies as an “export” when Appellant satisfies the test of “act of taking out of Sri Lanka” as specified in Section 22 of the Imports and Exports (Control) Act, No. 1 of 1969, which is further confirmed by Section 16 of the Customs Ordinance. He referred to the definition of the term “export” set out in several Dictionaries and judicial authorities and submitted that the Appellant has established that the bunker fuel had been taken out of the Sri Lankan territorial waters, and the moment the bunker fuel is taken out of Sri Lanka, the act of exportation is complete and thus, the Appellant must be deemed to be an “exporter”.

[180] Mr. de Silva strenuously argued that the real test is whether ot not the goods were taken out of Sri Lanka and once the act of taking out of Sri Lanka is established, the final destination of the goods, and the intent of the person to dispose or leave such goods in a particular destination becomes irrelevant. On the basis, Mr. de Silva, submitted that the supply of bunker fuel to a foreign going ship constitutes an “export” and therefore, the Appellant is eligible for the

concessionary tax rates under Sections 42 and 52 of the Inland Revenue Act, No. 10 of 2006 (as amended).

[181] On the other hand, the learned Additional Solicitor General submitted that the Appellant's transactions do not constitute "exports" under any of the four legal standards or tests that are recognized as characteristics of an export such as (i) there should be an act of taking out of Sri Lanka; (ii) the goods must reach a final destination outside Sri Lanka; (iii) the transaction must involve an export from one country, and an import into another country; and (iv) the transaction should possess the characteristics of an international sale of goods transaction

[182] She submitted that the Appellant neither took the goods outside Sri Lanka, nor caused the foreign vessel to take the goods outside Sri Lanka with a final destination outside Sri Lanka as the contracts entered by the Appellant do not provide for a terminus outside the territorial waters of Sri Lanka. She submitted that as far as the Appellant was concerned, the terminus was within Sri Lanka, and the transaction between the Appellant and the vessel owners/charterers was a local transaction that took place within the territorial waters of Sri Lanka and thus, the final destination was not outside Sri Lanka. She further submitted that in any event, the Appellant had no control over the ships' journeys; and thus, it is manifest that the goods have remained within the territorial waters of Sri Lanka, indefinitely.

[183] Referring to the test of international sale of goods transaction, she argued that the Appellant has failed to produce a single document such as a Bill of Lading, Marine Insurance, invoices and letters of credit, and that the Appellant's documents do not support that its transaction could be chaterertised as international sale of goods transaction. She argued, therefore, that the supply of bunker fuel was no export within the meaning of Section 42 or qualified export within the meaning of Section 52 of the Inland Revenue Act.

[184] The Tax Appeals Commission in holding that the bunker fuel supplied by the Appellant to ships travelling from Sri Lanka cannot constitute an export in the absence of a foreign destination, relied on the test adopted by Hidayatullah J. in the Indian Supreme Court case in *Burmah-Shell Oil Storage & Distribution Company Ltd v. Commercial Taxing Office and Othes* [1961]1SCR 902. That was a case relating to the sale and delivery of aviation spirits to Aircrafts proceeding abroad and belonging to several companies. The question arose was whether the sale and delivery of aviation spirits to Aircrafts constitutes an export.

[185] In *Burmah-Shell Oil Storage & Distribution Company Ltd v. Commercial Taxing Office and Othes* (supra), the Indian Supreme Court held that in the context and setting in which the expression "export out of the territory of India" occurs in Part XII of the Constitution, it was not sufficient that goods were merely moved out of the territory of India, but that it was further necessary that the goods should be intended to be transported to a destination beyond India, so that aviation spirit sold to an aircraft for enabling it to fly out of the country was not "exported" out of the country. Referring to the word "export", Hidayatullah J., further stated that (i) the test is that the goods must have a foreign destination where they can be said to be imported; (ii) the crucial fact is the sending of the goods to a foreign destination where they would be received as imports; and (iii) the two notions of export and import, thus, go in pairs.... and as long as it does not satisfy this test, it cannot be said that the sale was in the course of export. .." Under such circumstances, Hidayatulla J. stated at paragraph 37:

> *"Applying these several tests to the cases on hand, it is quite plaint that aviation sprit loaded on board an aircraft for consumption, though taken out of the country, is not exported since it has no destination where it can be said to be imported, and so long as it does not satisfy this test, it cannot be said that the sale was in the course of export. Further, as has already been pointed out, the sales can hardly be said to "occasion" the export. The seller sells aviation sprit for the use of the aircraft, and the sale is not integrally connected with the taking out of aviation sprit. The sale is not even for the purpose of export, as explained above. It does not come within the course of export, which requires an even deeper relation. The sales, thus, do not come within Article 286 (1)(b)".*

[186] It was the contention of Mr. de Silva that the concept of export in India as reflected in the Indian authorities is based on different principles such as the existence of two termini and the intention of their being landed in a different port. He submitted that the real test is whether or not the bunker fuel was taken out of the Sri Lankan territorial waters and therefore, the Indian authorities are irrelevant for the purpose of deciding the concessionary tax rate under Sections 42 and 52 of the Inland Revenue Act, No. 10 of 2006 (as amended).

[187] It is true that the decision in *Burmah-Shell Oil Storage & Distribution Company Ltd v. Commercial Taxing Office and Othes* (supra) is based on constitutional provisions of the Indian Constitution, [Article 286 (1) (b)] and Section 5 of the CENTRAL SALES TAX ACT to define the word "export" and such

principles are not binding on the Courts of Sri Lanka. Hence, this Court is called upon to decide the question of whether the supply of bunker fuel to ships constitutes an "export" under Sections 42 or 52 of the Inland Revenue Act, No. 10 of 2006, independent of the Indian authorities in particular, the case of *Burmah-Shell Oil Storage & Distribution Company Ltd v Commercial Taxing Office and Othes* (supra).

Statutory Provisions

[188] Before embarking upon the rival contentions of the parties, I may proceed to notice the relevant statutory provisions which have a bearing on the issue. Section 42 of the Inland Revenue Act, No. 10 of 2006 (as amended), which sets out the rate of income tax on profits and income arising in Sri Lanka to the consignor or consignee from certain exports. It provides as follows:

> *"42 (1) The profits and income, for the year of assessment on April 1, 2006, arising in Sri Lanka to a consignor or consignee,* ***from the export of–***
>
> *(a) any precious stones or metals not mined in Sri Lanka;*
>
> *(b) any petroleum, gas or petroleum products; or*
>
> *(c) such other products as may be approved by the Minister for the purposes of this paragraph, having regard to the foreign exchange benefits that are likely to accrue to the country from the export of such products, being goods brought to Sri Lanka on a consignment basis, and re-exported without subjecting such goods to any process of manufacture, shall be liable to income tax at the appropriate rate specified in the Fifth Schedule to this Act.*
>
> *(2) The profits and income for any year of assessment commencing on or after April 1, 2007, but prior to April 1, 2011 arising in Sri Lanka to any* ***consignor or consignee from the export of any goods brought to Sri Lanka on a consignment basis*** *and re-exported without subjecting such goods to any process of manufacture, shall be liable to income tax at the appropriate rate specified in the Fifth Schedule to this Act".*

[189] Section 52 of the of the Inland Revenue Act, No. 10 of 2006 as amended, which sets out the rate of income tax on **qualified export** profits and income of a company which carries on any specified undertaking as follows:

> *"52-Where any company commenced prior to November 10, 1993, to carry on any specified undertaking and the taxable income of that company for any year of assessment* ***includes any qualified export profits and income from such specified undertaking,*** *such part of such taxable income as consists of such qualified export profits and income, shall, notwithstanding anything to*

the contrary in this Act, be chargeable with income tax at the appropriate rate specified in the Fifth Schedule to this Act.

Exporting and importing are two sides of the same coin; both supply customers with products manufactured outside the country".

[190] Section 60 of the Inland Revenue Act, No. 10 of 2006 interprets the terms "export turnover", "qualified export profits and income" and "specified undertaking" for the purpose Chapter IX as follows:

"60. *For the purposes of this Chapter—*

(a)"export turnover" in relation to any specified undertaking means the total amount receivable, whether, received or not, by that undertaking from the export of goods or commodities or from the provision of any service referred to sub-paragraph (ii) of paragraph (c), but does not include—

(i) any amount receivable, whether received or not, from the export of gems or jewellery or from the sale of any capital assets;

(ii) any amount receivable, whether received or not-from the export of black tea not in packet or package form and each packet or package weighing not more than one kilogram, crepe rubber, and, sheet rubber, scrap rubber, latex or fresh coconuts; or

(iii) any profits and income not being profits and income within the meaning of paragraph (a) of section 3;

(b) "qualified export profits and income" in relation to any person, means the sum which bears to the profits and income within the meaning of paragraph (a) of section 3, after excluding there from any profits and income from the sale of gems and jewellery and any profits and income from the sale of capital assets, for that year of assessment from any specified undertaking carried on by such person, ascertained in accordance with the provisions of this Act, the same proportion as the export turnover of that undertaking for that year of assessment bears to the total turnover of that undertaking for that year of assessment;

(c) "specified undertaking" means any undertaking which is engaged in–

(i) the export of non-traditional goods manufactured, produced or ***purchased by such undertaking;*** *or*

(ii) the performance of any service of ship repair, ship breaking repair and refurbishment of marine cargo containers, provision of computer software, computer programmes, computer systems or recording computer data, or such other services as may be specified by the Minister by Notice published in the Gazette, for payment in foreign currency; and

(d) "total turnover" in relation to any specified undertaking means the total amount receivable, whether received or not, by that undertaking from any trade or business carried on by that undertaking, but does not include any amount receivable, whether received or not, from the sale of capital assets, gems or jewellery or any profits and income not being profits and income within the meaning of paragraph (a) of section 3.

For the purposes of this section the expression "non- traditional goods" means goods other than black tea not in packet or package form and each packet or package weighing not more than one kilogram, crepe rubber, sheet rubber, scrap rubber, latex or fresh coconuts or any other products referred to in section 16, but include organic tea in bulk".

Rates specified in the Fifth Schedule

[191] The Fifth Schedule specifies the rates for the application of Sections 42 and 52 as follows:

"Fifth Schedule

The following rates shall be applicable notwithstanding the rates specified in the First, Second and Third Schedules.

6. The rate of income tax on profits and income arising before April 1, 2011, to any consignor or consignee from entrepot trade involving precious stones, metals not mined in Sri Lanka or any petroleum , gas or petroleum products or such other approved products (section 42)
10 per centum

18. The rate of income tax on qualified export profits and income of a company, which commenced to carry on any specified undertaking prior to April 1, 2015, for-

(a) any year of assessment commencing prior to April 1, 2011 15 per centum

(b) any year of assessment commencing on or after April 1, 2011 (Section 52)

12 per centum

[192] To be eligible for the concessionary tax rate under Section 42 of the Inland Revenue Act, as specified in the Fifth Schedule to the Inland Revenue Act, No. 10 of 2006, the Appellant must satisfy that:

I. It has brought goods into Sri Lanka on a consignment basis; and

II. It is re-exporting such goods without subjecting it to any process of manufacture;

[193] The term "re-export" is the process of exporting goods that were previously imported into a country in the same state as previously imported (Cambridge English Dictionary). At the hearing, both Counsel made submissions on the question as to whether the activity of the Appellant constitutes an 'export" within the meaning of Sections 42 or "qualified export" within the meaning of Section 52 of the Inland Revenue Act. The fundamental question that arises for consideration is whether or not, the supply of bunker fuel to ship by the Appellant constitutes an "export" within the meaning of Sections 42 of the Inland Revenue Act, No. 10 of 2006.

[194] On the other hand, the Appellant contends that it being a specified undertaking earned a qualified export profits and income from such undertaking and therefore, the Appellant being an qualified exporter falls within the meaning of Section 52 of the Inland Revenue Act, No. 10 of 2006 (as amended). The fundamental question that arises for consideration is whether or not, the profits and income of the Appellant being a specified undertaking were derived from the export of bunker fuel to be treated as a "qualified export profits and income" within the meaning of Section 52 of the Inland Revenue Act, No. 10 of 2006 (as amended).

Issue

[195] Accordingly, this case stated raises an interesting, but intricate the fundamental question whether or not the supply of bunker fuel to vessels constitutes an "export" within the meaning of Section 42 or 52 of the Inland Revenue Act, No. 10 of 2006 (as amended) to be eligible for the concessionary rate of tax specified in the Fifth Schedule to the Inland Revenue Act, No. 10 of 2006 (as amended).

Definition of the term"export"

[196] As the Inland Revenue Act does not provide a statutory definition to the term "export", this Court has to decide what is envisaged by the term "export" for the purpose of Sections 42 and 52 of the Inland Revenue Act, No. 10 of 2006. It has now become necessary to construe the scope of the term "export" by using its ordinary or literal meanings in common parlance as understood in its natural and grammatic manner in the context in which it occurs for the application of Sections 42 and 52 of the Inland Revenue Act, No 10 of 2006 as amended.

[197] Maxwell on Interpretation of Statutes (12th Edition, page 28), deals with the concept of literal construction in the following words:

> *"The first and most elementary rule of construction is that is it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and otherwise in their ordinary meaning, and the second is that the phrases and sentences are to be construed according to the rules of grammar. 'The length and detail of modern legislation, wrote Lord Evershed M.R., 'has undoubtedly reinforced the claim of literal construction as the only safe rule.' If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences. The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases".*

[198] In Craies on Statute Law (7th Edition, page 65), it is stated that:

> *"Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature".*

[199] In *M.N. Dastur and Co. Ltd. and Ors. vs. Union of India (UOI) and Ors.* (28.02.2005 - CALHC), it was stated that

> *"Words used in a statute dealing with matters relating to the general public are presumed to have been used in their popular rather than narrow, legal or technical sense. The doctrine of Loquitur ut vulgus, i.e., according to the common understanding and acceptance of the terms, is to be applied in construing the words used in the statute dealing with matters relating to the public in general. If an Act is directed to dealings with matters affecting everybody generally, the words used, have the meaning attached to them in the common and ordinary use of language".*

[200] Lord Easter, in *Unwin v. Hanson (1891) 2 QB 115 (CA)* has further explained the manner in which the words used in statutes dealing with matters relating to the public in general are construed at page 119 as follows:

> *"Now when we have to consider the construction of words such as this occurring in Acts of Parliament, we must treat the question thus: If the*
>
> *Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and*

> *ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words".*

[201] In the Black's Law Dictionary, Revised Edition, the term "export" is defined in the following manner:

> *"EXPORT, v. To carry or to send abroad. Tennessee Oil Co. v. McCanless, 178 Tenn: 683, 157 S.W. 2d 267, 271, 272. To send, take, or carry an article of trade or commerce out of the country. To transport merchandise from one country to another in the course of trade. To carry out or convey goods by sea. State v. Turner, 5 Har., Del., 501....*
>
> *"Export," in its primary sense, means to carry or send out of a place, and in secondary sense means to carry from one state or country. McKesson & Robbins v. Collins, 18 Cal.App.2d 648, 64 P.2d 469, 470".*

[202] The definition of "*export***"** from the Oxford Advanced American Dictionary is "the selling and transporting of goods to another country". In Cambridge Advance Learners' Dictionary defines the term *"exportation"* as *"the process of sending goods to another country for sale".* In the Merriam-Webster Online Dictionary, the term export means "to carry or send (something, such as a commodity) to some other place (such as another country). Accordingly, the Dictionary meaning of the word "export" of goods as normally understood is "sending goods" from one country to another country for sale.

[203] However, the meaning of a word in a statute may also be affected by its context, which may consist of surrounding sections, the whole Act or the scheme or purpose of the legislation and the exceptions or deduction granted thereunder. Thus, one has to construe the scope of the term "export" in the context in which it occurs in Sections 42 and 52 of the Inland Revenue Act, having regard to the nature of the goods that are to be exported, namely, the bunker fuel being a petroleum product which is not manufactured in Sri Lanka but, used for the navigation of vessels, and the purpose for which such exports are qualified for concessionary tax rates under the Inland Revenue Act.

Imports & Exports (Control) Act

[204] The Appellant, however argues that as the Inland Revenue Act does not define the term "export", nor does it specify the criteria that must be affirmatively satisfied in order that a supply may be classified as an export, recourse must be had to the general principles of law applicable for the purposes of determining what constitutes an export. This Court is now required to find out what is meant by the phrase " export" for the purpose of the Section 42 and 52 of the Inland Revenue Act, and whether the mere supply of bunker fuel to a ship constitutes an export under Sections 42 or 52 of the Inland Reveue Act, No. 10 of 2006.

[205] The Appellant relies on the definition of the term "exportation given in the Stroud Judicial Dictionary, Vo. II 1903 referring to the decision in *A.G. v Pougett* 2 Price, 381) and *Stockton Ry v. Barrett*, 11 Cl. & F. 590) in support of his contention that the word "export" for the purpose of the Inland Revenue Act, is not restricted to an exportation to foreign countries, but may mean a carrying out of the Port The Stroud Judicial Dictionary, Vo. II 1903 defines the term "exportation" referring to the decision in *A.G. v Pougett 2 Price, 381*, as follows:

> *"unless a vessel has proceeded out of the limits of the Port with her cargo, it is not such an Exportation of the goods as will protect the cargo from duties subsequently imposed on the Exportation of goods of the same nature;although the vessel is not only freighted and afoat but has gone through all the formalities of Clearance, & at the Custom House and has paid the Exportation Dues".*

[206] In *A.G. v Pougett* (supra), the question was whether the goods laden on board the ship, having broken ground in the Themes, and not having left the port of London may be said to have been exported. It was held that the goods shipped could not be considered as exported until the ship had cleared the limits of the ports as follows:

> *"It is significant to know that this action was decided under the Tyne Coal Dues Act 1872 and the Court held that "There is nothing in the language of the Act (the Tyne Coal Dues Act 1872) to show that the word "exported" was used in any other than its ordinary sense, namely, 'carried out of the port' ..We feel bound to hold that coals carried away from the port, not on a temporary excursion, as in a tug or pleasure boat, which intends to return with more or less of the coals on board, and which may be regarded as always constructively within the port, but taken away for the purpose of being wholly consumed beyond this limits of the port,*

are coals 'exported' within the meaning of the Act." (Muller v Baldwin (1874) L.R. 9 O.B 457, per cur., at p. 461)".

[207] It is significant to note that *A.G. v Pougett* (supra) was not an income tax or custom case, but a decision under the Tyne Coals Act, which has now been abolished. There was clear evidence in that case that the coals had been taken away for the purpose of being wholly consumed beyond the limits of the port and thus, the coals were held to be exported

[208] In *Stockton Ry v. Barrett, 8 E.R. 1225 (House of Lords),* the action was for money had and received, originally brought in the Court of Common Pleas, to recover three sums of money, which the plaintiff there, Charles Barrett, alleged had been unlawfully received by the defendants as tolls on the carriage of certain coals carried on the line of the Stockton and Darlington Railway, of which they were the proprietors.

[209] It was held that the "*words "shipped for Exportation" are not, necessarily, restricted to an exportation to foreign countries, but may mean Exportation in its evident sense, i.e. a carrying out of Port, and thus, include carrying commodities from one port to another, within the Kingdom"* and that the words *"the port of Stockton-upon-Tees aforesaid,"* meant the whole port of that name, and was not restricted to the port of the town of Stockton-upon-Tees;

[210] That action was, however, decided under the Railway Act, which empowered the proprietors to levy on all coals carried along any part of their line, such sum as they should direct, " not exceeding the sum of 4d. per ton per mile." It then went on thus: " And for all coal, which shall be shipped on board any vessel, etc. in the port of Stockton-upon-Tees aforesaid, for the purpose of exportation, such sum as the said proprietors shall appoint, not exceeding the sum of one-halfpenny per ton per mile: "

[211] As noted, the cases relied on by the Appellant relate to the statutory interpretation given to the term "exportation" in different statutes, which are unrelated to tax statutes, and such decisions cannot, in my view, be used to determine the question as to whether the supply of bunker fuel to a ship for its navigation or use during its voyage constitutes an "export" for the purpose of the concessionary tax rates in the Inland Revenue Act, No. 10 of 2006.

[212] The Appellant, however, relied on the Imports and Exports (Control) Act, No. 1 of 1969, and the Customs Ordinance in support of its position that the supply of bunker fuel constitutes an "export" having regard to the definition of

the term "export" in the Imports and Exports (Control) Act, No. 1 of 1969. For this aspect of the case, it is appropriate to take note of Section 22 of the Imports and Exports (Control) Act, no. 1 of 1969, which provides for levy of tax. The term "export" is defined in Section 22 of the Imporst & Exports (Control) Act, 1969 as follows:

> *"export" with its grammatical variations and cognate expressions when used in relation to any goods, means the carrying and* ***taking out of Sri Lanka, or causing to be carried or taken out of Sri Lanka****, whether by sea or by air of such goods"*

[213] Accordingly, the statutory definition of the term "export" refers to the actual carrying and taking out of Sri Lanka or causing to be carried out of Sri Lanka of the goods in question by sea or by air of such goods. The learned counsel for the Appellant relied heavily on the definition of "export" in Section 22 of the Imports and Exports (Control) Act and it was argued that since the definition does not refer to the requirement of 'destination', the same applies to the concessionary tax rate under the Inland Revenue Act. On this basis the Appellant argues that the Imports and Exports (Contriol) Act, No. 1 of 1969 would indicate the statutory criteria applicable for determining whether or not a person is an exporter for the purpose of the Sections 42 or 52 of the Inland Revenue Act, No. 10 of 2006.

[214] The question that arises for determination is whether the definition of the term "export" in the Imports and Exports (Control) Act, is the determinative factor in deciding that the bunker fuel had been exported within the meaning of Sections 42 or Section 52 of the Inland Revenue Act, No. 10 of 2006.

Customs Ordinance

[215] The Appellant further argues that the concept of "export" defined in Section 22 of the Imports and Exports (Control) Act is further confirmed by Section 16 of the Customs Ordinance, which indicates the point of time when an export is deemed to have taken place and an exportation of any goods is made and completed shall be deemed to have had effect when the goods had been shipped on board the ship in which they had been exported. Section 16 of the Customs Ordinance provides s follows:

> *"If upon the first levying or repealing of any duty, or upon the first* ***permitting or prohibiting of any importation or exportation*** *whether inwards, outwards, or coastwise in Sri Lanka, it shall - become necessary to*

determine the precise time at which ***an importation or exportation of any goods made and completed*** *shall be deemed to have had effect, such time, in respect of importation, shall be deemed to be the time at which the ship importing such goods had actually come within the limits of the port at which such ship shall in due course be reported and such goods be discharged; and* ***such time, in respect of exportation, shall be deemed to be the time at which the goods had been shipped on board the ship in which they had been exported;*** *and if such question shall arise upon the arrival or departure of any ship, in respect of any charge or allowance upon such ship, exclusive' of any cargo, the time of such arrival shall be deemed to be the time at which the report of such ship shall have been or ought to have been made; and the time of such departure shall be deemed to be the time of the last clearance of such ship with the Director-General for the voyage upon which she had departed".*

[216] That means that an "importation" starts from one point and ends at another. It starts when the goods cross the customs barrier in a foreign country (exporting country) and ends when they cross the limits of the port in Sri Lanka (importing Country). In the case of "exportation", the time of exportation under section 16 shall be deemed to be the time at which the goods had been shipped on board the ship, in which the goods had been exported, and it starts when the goods cross the customs' limits of the port of one country (exporting country) and delivered to the ship on board in which such goods are exported to another country (importing country).

[217] In terms of this Section, the precise time at which exportation of any goods shall be deemed to be the time at which the goods had been shipped on board the ship in which they had been exported. Accordingly, the Appellant argues that the statutory criteria applicable for determining whether or not a person is an exporter, the destination is not a requirement to be fulfilled under the law of Sri Lanka.

[218] The argument of the Appellant is that Section 22 of the Imports and Exports (Control) Act read with Section 16 of the Customs Ordinance refers to goods being taken out of the country rather than the goods necessarily being delivered to another country. Accordingly, it was argued on behalf of the Appellant referring to Section 16 of the Customs Ordinance that as the time of the export of goods occurs when the goods have been put on the ship, which constitutes an export notwithsndaning the fact that the ship is within Sri Lankan territorial waters at the time of the delivery of the bunker fuel. He further argued that the consumption, utilization or sale of the bunker fuel occurs once the

vessel leaves the Colombo Port into the international waters and thus, the goods are taken out of the country.

[219] On the other hand, Section 16 of the Customs Ordinance applies to the definition of time of importation or exportation of prohibited or restricted goods and goods illegally imported for the purpose of levying or repealing of any duty under the Customs Ordinance. This Section has to be read with Section 3 of the Protection of Government Revenue (Special provisions) Act, No. 1 of 2006, according to which the date of importation or exportation ...shall be the date of delivery to the Director General of Customs of the bill of entry. Section 3 of the Protection of Government Revenue (Special provisions) Act reads as follows:

> *"3. Notwithstanding anything to the contrary contained in any of the laws specified in Part II of the Schedule hereto, for the purpose of levying or charging any tax, duty, surcharge, levy or other charge on the importation or exportation of goods into or from Sri Lanka, the date of importation or exportation, as the case may be, shall be the date of delivery to the Director-General of Customs, of the bill of entry relating to the goods on which such tax, duty, surcharge, levy or other charge is levied or charged".*

[220] The Schedule includes, *inter alia,* the Customs Ordinance (Cap. 235), as last amended by Act, No. 2 of 2003. For the purpose of levying or charging any tax, duty, surcharge, levy or other charge on the importation or exportation of goods into or from Sri Lanka, the date of importation or exportation, as the case may be, under the Protection of Government Revenue (Special provisions) Act shall be the date of delivery to the Director-General of Customs, of the bill of entry relating to the goods on which such tax, duty, surcharge, levy or other charge is levied or charged.

[221] As noted, for the purpose of the protection of government revenue and prevention of any loss of revenue to the Government, the date of importation or exportation of goods, the date of delivery is relevant to the levying or charging any tax, duty, surcharge, levy or other charge under the Customs Ordinance. Those principles are, however, not applicable to the interpretation of the term "export" under Sections 42 or 52 of the Inland Revenue Act, No. 10 of 2006.

[222] Accordingly, for the purpose of levying or repealing of any customs duty upon the first permitting or prohibiting of any importation or exportation of

prohibited/restricted goods and goods illegally imported, the time of importation shall be the time at which the ship importing such goods had actually come within the limits of the port at which such ship shall be reported and such goods be discharged. In case of exportation of prohibited/restricted goods and goods illegally exported, the time of exportation shall be the time at which the goods had been shipped on board the ship.

[223] To constitute an export under Section 22 of the Imports and Exports (Control) Act, the goods must be either taken out of the territory of Sri Lanka or caused to be taken out of Sri Lanka, by sea or air of such goods. This means that the mere delivery of the bunker fuel into the tanks of the ship is insufficient to constitute an export unless such fuel had been either actually taken out of Sri Lanka or caused to be taken out of Sri Lanka on a ship bound for a place out of Sri Lanka.

[224] The Imports and Exports (Control) Act is intended to provide for the control of the importation and exportation of goods and regulation of the standards of exportable goods. The provisions of the Imports and Exports (Control) Act shall be, however, read and construed with the Customs Ordinance as set out in Section 21 of the Imports and Exports (Control) Act. In terms of Section 21 of the Imports and Exports (Control) Act, the provisions of the Act "shall be construed with the Customs Ordinance and for the purpose of the application of the Customs Ordinance-

> *"(a). goods the importation of which is prohibited by this Act or by regulation made under this Act shall be deemed to be goods the importation of which is prohibited by that Ordinance;*
>
> *(b) goods the exportation of which is prohibited by this Act or by regulation made under this Act shall be deemed to be goods the exportation of which is prohibited by that Ordinance;*
>
> *(c) goods the importation of which is restricted by this Act or by regulation made under this Act shall be deemed to be goods the importation of which is restricted by that Ordinance;*
>
> *(d) goods the exportation of which is restricted by this Act or by regulation made under this Act shall be deemed to be goods the exportation of which is restricted by that Ordinance".*

[225] As noted, Section 16 of the Customs Ordinance, which applies to the definition of time of importation or exportation for prohibited or restricted

goods and goods illegally imported for the purpose of levying or repealing of any duty under the Customs Ordinance and thus, it cannot be strictly applied for the purpose of interpreting the term "export" and levying income tax under the Inland Revenue Act, No. 10 of 2006 (as amended).

[226] The provisions of the Imports and Exports (Control) Act shall be read and construed with the Customs Ordinance and thus, the goods either prohibited or restricted by the provisions of the Imports and Exports (Control) Act shall be deemed to be the goods prohibited or restricted by the Customs Ordinance. In the result, the definition of export in section 22 of the Imports and Exports (Control) Act cannot be strictly applied to the interpretation of the term "export" for the concessionary tax rate under Sections 42 and 52 of the Inland Revenue Act, No. 10 of 2006 (as amended).

Customs Clearance

[227] The learned Counsel for the Appellant submitted that the Appellant has a special customs entry (bill of entry) passed when it issued marine bunker fuel to foreign ships which are paid in foreign currency and such custom clearance and payment made in foreign currency shall be regarded as evidence that the supply of bunker fuel was an export transaction outside Sri Lanka in terms of the provisions of the Protection of Government Revenue (Special Provisions) Act No. 1 of 2006. The Appellant also relies on the Indian decision in *CIT v .Silver and Arts Palace* (2003) 259 ITR 684 to argue that the customs clearance is evidence that characterises the transaction as an export. It is the position of the Appellant that once the goods are kept in the customs clearance station, then, the goods shall be deemed to have been in the export stream.

[228] The said case related to the refusal of the deduction claimed by the assessee under Section 80HHC of The Income- Tax Act, 1995 placing reliance on Explanation (aa) to Section 80HHC(4A) of the Act. The said Section provides that "'export out of India' shall not include any transaction by way of sale or otherwise, in a shop, emporium or any other establishment situate in India, not involving clearance at any customs station as defined in the Customs Act, 1962 (52 of 1962)." There was no dispute in that case that transactions of counter sales effected by the respondent involved customs clearance within the meaning of Explanation (aa) to Section 80HHC (4A) of the Act, and further that the sales were in convertible foreign exchange.

[229] If the above interpretation applies to the export in question as projected by Dr. Felix in the written submissions filed on behalf of the Appellant, then, it would mean that irrespective of the condition in Sections 42 or 52 of the Inland

Revenue Act, the delivery of goods shall be after customs clearance, i.e., after the goods have cleared all local customs and all other legal formalities and are kept ready for delivery to the ship's tanks, the Appellant would qualify for the concessionary tax rates specified in the Fifth Schedule to the Inland Revenue Act.

[230] In my opinion, the concept sought to put in service in *CIT v. Silver and Arts Palace* (supra) cannot be applied to the facts of this case and therefore, the submission of customs clearance (bill of entry) per se does not constitute an Appellant an exporter of the bunker fuel under sections 42 of 52 of the Inland Revenue Act, No. 10 of 2006 (as amended).

Use of Foreign Currency

[231] The learned Counsel for the Appellant citing the Exchange Control Act, No. 24 of 1953, as amended, submitted that the fact that the Appellant is permitted by the Central Bank to accept foreign currency payments for supplies of marine bunker fuel to ships travelling in international waters supports the position of the Appellant that the sales undertaken by the Appellant are not local sales but are in fact exports. He submitted that it is an offence to accept foreign currency for a local sale and therefore, this transaction should be construed to be an export.

[232] On the other hand, the Central Bank has powers to permit any person under Section 7 of the Exchange Control Act, to make any payment to, or for the credit of a person resident outside Sri Lanka or make any payment to or for the credit of a person resident in Sri Lanka. In my view the mere fact that the sale of bunker fuel was paid for in foreign currency does not necessarily render it an export within the meaning of Sections 42 or 52 of the Inland Revenue Act.

Licence under the Ceylon Petroleum Corporation Act, No. 28 of 1961

[233] The Appellant argues that the Appellant possesses a licence under Section 5B of the Ceylon Petroleum Corporation Act, No. 28 of 1961 to import, export, sell, supply or distribute marine gas, oil and furnace oil (Vide- paragraph 43 of the written submissions tendered on behalf of the Appellant on 18.10.2019). In my view, the licence granted by the Ceylon Petroleum Corporation under Section 5B of the Ceylon Petroleum Corporation Act, No. 28 of 1961 does not necessarily mean that the supply of bunker fuel shall be treated as an export within the meaning of Sections Sections 42 or 52 of the Inland Revenue Act.

Central Bank Annual Reports

[234] The Appellant relies heavily on the Annual Reports of the Central Bank for the year 2011 in table 3.4 on page 63, which, the Appellant claims distinguishes between exports and local sales and table 3.4 which lists the Appellant as a source for both imports and export data. The Appellant submits that the Report supports his contention that the supply of bunker fuel has been recognised as an export by the Central Bank. In my view, the table 3.4 does not support the contention that the it distinguishes between exports and local sales or that the Central Bank has recognised the Appellant as an exporter within the meaning of any statute as claimed by the Appellant.

[235] The document (R1) issued by the Central Bank stated that for statistical compilation and economic analysis, bunker fuel and marine fuel selling to foreign ships and aircraft is an export following internationally accepted practices for economic data compilation. It, however, states that this classification is not used for any other purpose as the classification is not made in terms of any law or for the purpose of any law. Accordingly, this document does not help the Appellant.

[236] The Appellant relies on the New Zeeland Court of Appeal case in *Commissioner of Inland Revenue v. International Importing Limited* (1972) NZLR 1095 in support its position that the word "export" is complete when (i) taking the goods out of the country and (ii) sending them or causing them to be sent out. The question in the said case was whether, for the purposes of Section 129B of the Land and Income Tax Act *1954*, the goods sold by a "duty free shop" operated by respondent company, to travellers departing overseas, and the subsequent carriage of those goods beyond New Zealand by the purchasers, constituted the "export" of those goods by the company, entitling it to the deduction given for income tax purposes by s 129B. Section129B of the said Act reads as follows:

> *"Export goods" means goods exported from New Zealand by a taxpayer, being goods—*
> *(a) Which were sold or disposed of by the taxpayer; and*
> *(b) Of which the taxpayer was the owner at the time of the sale or disposal—but does not include—*
>
> *(c) Goods exported by way of gift:*
> *(d) Goods taken or sent out of New Zealand with the intention that they will at some later time be brought or sent back to New Zealand:*

(e) Goods imported into New Zealand and subsequently exported from New Zealand after being processed, packed, graded, or sorted in New Zealand or incorporated with another product in New Zealand, if the consideration receivable for the sale or disposal of the goods so exported is less than fifteen percent greater than the cost of all imported goods included in the goods so exported, such cost being the landed cost of those imported goods (exclusive of New Zealand customs duty) at the time when they were imported into New Zealand:
(f) Goods imported into New Zealand and subsequently exported from New Zealand in the same form without processing, packing, grading, or sorting thereof in New Zealand:
(g) Goods exported to the Cook Islands (including Niue) or to the Tokelau Islands:
(h) Animals, animal products and by-products (including dairy produce, meat, meat products, wool, and their respective by-products), newsprint, and minerals:
Provided that the Governor-General may from time to time, by Order in Council, exclude any such goods or any specified class or classes of such goods from the operation of this paragraph:
(i) Any other goods specified by the Governor-General from time to time by Order in Council:"

[237] The vital question in that case was whether goods which were sold by the respondent (and of which it was admittedly the owner at the time of such sales) were exported from New Zealand by the respondent within the opening words of the foregoing definition. The finding of the Commissioner was challenged on one question only, namely his finding that the goods sold to departing travellers in the respondent's duty free shops were exported by the respondent.

[238] The transactions were sales of goods of which respondent was the owner at the time of sale. The goods were taken out of the country as a direct result of the sale, and as one intended by both vendor and purchaser. And these were sales and the immediate result of which was an increase in foreign currency reserves, and (1) taking the goods out of the country, and (2) sending them or causing them to be sent out—the choice between them depends on the answer to the question: What operation is it that the Section is obviously designed to subsidise? Turner J, at pp 1097 stated:

"The section contains no definition of "export" nor can it be contended that this word is a term of art. It must therefore be given its ordinary meaning, or perhaps I should say one of its ordinary meanings, to be selected according to context. Clearly, if it is given one of its ordinary meanings the travellers may be said to have "exported" the goods themselves, for they carried them (if small enough) on to the plane personally, keeping them in their possession while the plane flew out of New Zealand. And no different result follows in the case of the larger packages which were put into the plane's hold, of which the passenger-purchasers doubtless must be deemed to have had possession at the time when they were taken out of the country. But should the word "export" so be read, as referring to what these people did, if proper regard is had to the context in which that word is found in s 129B, and if the acknowledged purpose of that section is remembered? The legislation is plainly addressed to those persons, and to those alone, who increase the foreign exchange reserves of New Zealand, by sending goods abroad, or causing them to be sent abroad, receiving in return foreign exchange for which they are bound to account, and do account, to the Reserve Bank. It is clear that even if the travellers may be regarded as themselves "exporting" the goods, the word "export" where used in the section must also clearly be applicable to those, such as respondent company, who send the goods abroad, or cause them to be sent, with this result. Surely a dairy company "exports" butter, and a fruit cannery "exports" its manufactures, whether it ships the goods to its own order in another country, or sells here f.o.b. to a foreign person or corporation, provided simply that the transaction is one in which it causes goods to be sent abroad in exchange for foreign currency which it receives and for which it accounts.
t is to be observed however that s 129B is solely concerned with the actions of vendors. In our opinion a vendor may export either by taking or by sending. There will be many cases where it can be said that the buyer exports by taking, as for example in the case of an ordinary contract".

[239] Thus, Turner J., stated that the question whether the respondent or the passengers, who is to be regarded, for the purposes of s 129B, as having "exported" the goods which it sold to the travellers. Referring to the meanings of the word— (1) taking the goods out of the country, and (2) sending them or causing them to be sent out—the choice between them depends on the answer to the question: What operation was it that the section is obviously designed to subsidise? On this approach to the matter, it seemed clear to to Turner J. that it is respondent's operation which was meant to receive the reward offered by the statute.

[240] The facts of the New Zeeland judgment and the legal principles discussed under Section 129B of the Land and Income Tax Act 1954 are completely different in the present case for the following reasons:

1. The Respondent in that case owned and operated a duty free shop at the "Christchurch International Duty Free Shops" and the passengers were allowed to purchase goods from a duty free shop situated in the departure lounge of the airport to be taken out of New Zeeland. The question that was decided was whether or not it was the respondent or the passengers who is to be regarded, for the purposes of s 129B, as having "exported" the goods which it sold to the travellers. In the present case, the issue was whether or not the supplier of bunker fuel to a ship constitutes an export for the purpose of the concessionary tax rates under Sections 42 or 52 of the Inland Revenue Act.

2. The New Zeeland Act provides that to constitute an export goods, the goods exported by a taxpayer from New Zeeland shall be goods exported which were sold or disposed of by the taxpayer; and of which the taxpayer was the owner at the time of the sale or disposal. Section 129B of the New Zeeland Act is not so worded as to require the taxpayer to be the owner of the goods at the time of export. The Section only requires that he should be the owner of the goods at the time of sale. There is no similar requirement in the Inland Revenue Act of Sri Lanka.

3. The New Zeeland decision is also based on the operation mode of the taxpayer as the owner of the goods. In order to purchase the goods from the duty free shop, the customer has to produce his boarding pass to the aircraft and his flight number of the duty free shop owned by the respondent The goods, in the open bags were handed to the passenger at the call to board the aircraft by the employees of the respondent on production of their copy of the sales docket in the "clear area" at the airport and in the presence of Customs Officers. There is no such conditions to be fulfilled for the charging of income tax under the Inland Revenue Act.

4. As a matter of fact and degree, the whole nature of the respondent's specialised business and the circumstances under which it is conducted, taken together with the actual part played by the respondent in bringing about the removal from New Zealand of goods sold by it to departing

passengers, proved that the respondent exported the goods in question by sending them out of New Zealand. There, the duty free sale occurred inside the departure lounge of the airport after the passengers were cleared for immigration and already stamped as having left the country by the customs officer that was strong evidence to establish that the passengers had already left the country. In the circumstances, the Court treated the goods to be export goods within the meaning of section 129B of the New Zeeland Act.

[241] Under such circumstances, the Court came to the conclusion that the whole nature of the respondent's specialised business and the circumstances under which it is conducted, taken together with the actual part played by the respondent in bringing about the removal from New Zealand of goods sold by it to departing passengers, justify the view that the respondent exported the goods by sending them out of New Zeeland. In my view the New Zealand case will not support the stand taken by the Appellant in the instant case, and it cannot be regarded as a precedent for the case in hand.

[242] The Canadian case of *R v.Wuulf* (1970) 1 CCC (2d) 281 relied on by the Appellant is a criminal case for attempting to export out of Canada to the USA silver coins of Canada without a permit and the issue arose about the definition of the word "export" under the statute. It was held that the word "export' was simply 'take outside of Canada". The definition of the term "export" for the purpose of criminal liability of attempting to export goods under a criminal statute cannot be used to define the term "export" for the purpose of defining the term "export" under Sections 42 or 52 of the Inland Revenue Act.

[243] In *R. v. Smith (Donald)* (1973) Q.B. 924, the defendant was charged with being knowingly concerned in the fraudulent evasion of the prohibition against the importation of cannabis imposed by the Dangerous Drugs Act 1965 , contrary to Section 304 (b) of the Customs and Excise Act 1952, and with being knowingly concerned in the fraudulent evasion of the prohibition against the exportation of cannabis imposed by the Act of 1965, contrary to Section 56 (2) of the Act of 1952.

[244] In that case, packets containing cannabis addressed to a person in Bermuda were put on board an aircraft in Kenya, which was bound for Heathrow Airport in the United Kingdom. At Heathrow, the packets were unloaded and without leaving the customs area were put on board a second aircraft bound for Bermuda. The cannabis was discovered when the packets arrived in

Bermuda. The question was whether the prohibited goods retained within the customs area were imported into the United Kingdom. It was held that although the cannabis had merely been transferred from one aircraft to another, the cannabis had been imported into the country when the aircraft from Kenya landed at Heathrow and had been exported when placed on board the aircraft bound for Bermuda (post, p. 935G-H).

[245] In *A.G. v. Kumarasinghe* (1995) 2 Sri LR. 1, the accused, a Sri Lankan passport holder was indicted for having imported into Sri Lanka, 40 pieces of Gold valued at Rs. 2 million without a valid permit issued by the Central Bank. After arriving in Sri Lanka on an Air Lanka flight, he had been in the Transit Lounge with the pieces of gold to proceed to Male. The High Court of Negombo acquitted the accused. Referring to *R. Smith* (supra), it was held that (i) Importation is not defined in the Exchange Control Act, but recourse could be had to Section 22 of the Imports and Exports (Control) Act 1 of 1969; and (ii) the moment the accused-respondent landed in Sri Lankan soil with gold, the act of importation was complete, if he failed to produce the requisite permit for possession of that gold. Accordingly, it was held that he has contravened the provisions of Section 21(1).

[246] In all three criminal cases, the accused was considered to be an exporter on the basis that he was himself involved physically importing prohibited goods into a foreign country without a permit in violation of a criminal statute either under the Customs Act or Imports and Exports Act. Here, the issue is whether or not the supply of the bunker fuel to a ship that visits a port of Sri Lanka can constitute an export for the purpose of concessionary tax rates under Sections 42 or 52 of the Inland Revenue Act.

[247] The other argument of the Appellant was that as the consumption of bunker fuel occurs mid-voyage in international waters of another country, the question of Bill of Lading or Insurance Contract does not arise and thus, the mere fact that the goods do not arise at a foreign port does not preclude the goods from being considered an export. The argument of the Appellant was that the mere supply of bunker fuel to a foreign ship and utilization of such bunker fuel in the international waters constitutes an export within the meaning of Sections 42 or 52 of the Inland Revenue Act. Although the argument is attractive, I am afraid that I do not find any merit in the same.

[248] The charging provision in Section 3 is the prime purpose of the Inland Revenue Act and it shall control the profits and income that are chargeable with

income tax subject to the provisions of the said Act. As noted, the charging Section is not controlled by the measure of tax levied under the provisions of the Imports and Exports (Contriol) Act or the Customs Ordinance. The relevant statutory provisions with regard to levy of customs duties are found in the Customs Ordinance and the relevant statutory provisions with regard to the imposition of income tax are found in the Inland Revenue Act.

[249] The principles of charging the income tax and the principles of charging the customs duty are distinct, different and independent of each other. The income tax is charged on profits or income of a person which falls within the scope of Section 2 of the Inland Revenue Act and the rate of income tax varies subject to the provisions of the Inland Revenue Act. Customs Duty is a tax imposed on imports and exports of goods under the Customs Ordinance when they are transported across international borders and the rate of Customs duty varies subject to the provisions of the Customs Ordinance.

[250] When the provisions of the Imports and Exports (Control) Act are read and construed with the Customs Ordinance, the goods either prohibited or restricted by the provisions of the Imports and Exports (Control) Act shall be deemed to be the goods prohibited or restricted by the Customs Ordinance. The Customs Ordinance takes care of levy of import of goods or export of goods and thus, the taxable event for levy of custom duty and entry tax are different and distinct. The "pith and substance" and "aspect" of customs levy, as regards both imports and exports in terms of restrictions, prohibition and permissibility are different and distinct from the charging of income tax under the Inland Reveue Act.

[251] Mr. De Silva submitted that the definition of "export" as defined in Section 22 of the Imports and Exports (Control) Act does not include "place of destination" but only "Taking out of Sri Lanka or causing to be carried or taken out of Sri Lanka" and, therefore, the concept of destination on the supply of bunker fuel to a ship is clearly beyond the ambit of Inland Revenue Act. In my view, Section 22 of the Imports and Exports (Control) Act or the Customs Ordinance has no overriding effect over the provisions of the Inland Revenue Act and the imposition of income tax under the provisions of the said Acts are based on different principles and the fulfilment of different conditions.

[252] If the Legislature intended to apply the same term "export" for the purpose of Sections 42 or 52 of the Inland Revenue Act, the Legislature could have easily used the same meaning as defined in Section 22 of the Imports and

Exports (Control) Act, No. 1 of 1969. Thus, the argument of the Appellant that since the place of destination is not specifically mentioned in the definition of "export" in Section 22 of the Imports and Exports (Control) Act, it will give rise to the inference that Legislature intended not make the concept of destination as a requirement of export for the purposes of Sections 42 or 52 of the Inland Revenue Act is without substance.

[253] This case is not concerned about the imposition of levy under the Imports and Exports (Control) Act or the Customs Ordinance, and we are dealing with the imposition of income tax and the concessionary tax rates specified in the Fifth Schedule to the said Act. This Court is not inclined to apply the principles of the imposition of levy under the Imports and Exports (Control) Act or the Customs Ordinance to a case of export under Sections 42 or 52 of the Inland Revenue Acts

[254] It is only from the language of the statute that the intention of the Legislature must be gathered, for the Legislature means no more and no less than what it says. It is not permissible for the court to speculate as to what the Legislature must have intended and then to twist or bend the language of a different statute (the Customs Ordinance and the Imports and Exports (Control) Act to make it accord with the presumed intention of the Legislature (see-*Polestar Electronic (Pvt.) Ltd. v. Additional Commissioner, Sales Tax,* 1978] 41 STC 409 (SC).

[255] Of course, equitable construction may be admissible in relation to other statutes, but such an interpretation is not permitted to a charging or taxing provision of a statute (see-*Murarilal Mahabir Prasad v. B.R. Vad* [1976] 37 STC 77 (SC), which has laid down the tax is altogether different from the recovery of the tax/duty under the Imports and Exports (Control) Act and the Customs Ordinance

UN Report

[256] The Appellant relied on the United Nations Department of Economic and Social Affairs-International Merchandise Trade Statistics: Concept and Definitions (IMTS 2010) to substantiate its position that that the supply of bunker fuel to ships travelling in international waters constitutes an export. Paragraph 1.32 on page 18 of the Report on Bunkers, stores, ballast and damage reads as follows:

" *1.32. Bunkers, stores, ballast and damage that are supplied:*

1. *to **foreign vessels** or aircraft in the economic territory of the compiling country;or*
2. *by **national vessels** or aircraft to foreign vessels or aircraft outside the economic territory of the compiling country; or*
3. *are **landed in foreign ports from national vessels** or aircraft; are in the scope of IMTS 2010 for exports".*

[257] Paragraph 1.42 which relates to goods recommended for exclusion reads:

> *"1.42. Goods simply being transported include goods under "in transit" or "in transshipment" customs procedures but are not limited to them. ... Irrespective of the customary procedure applied when goods cross the compiling country's border, **if it is known that their destination is a third country, the goods should be treated as simply being transported through the country and excluded**. However, goods that are not under "in transit or "transshipment" customs procedure and change ownership after entering the economic territory of a country should be recoded as imports and re-exports if they leave the country in the state as imported...".*

[258] Firstly, the publication contains guidelines or recommendations and therefore, Sri Lanka is not obliged to adhere to them. Secondly, these guidelines or recommendations cannot change the principles of income tax specified in the Inland Revenue Act of Sri Lanka. Thirdly, the guidelines first classify the bunker fuel supplied to foreign vessels within the economic territory as exports. They also classify the bunker fuel supplied by national vessels to foreign vessels outside the economic territory as exports. Thirdly, they classify the bunker fuel supplied to vessels that are landed in foreign ports.

[259] It is my view, that the classification is based on the nationality of the vessel which is not the basis on which the concept of export is decided in the Inland Revenue Act of Sri Lanka. Fourthly, paragraph 1.42 states that when goods are taken out of the territory of a country, the goods should be treated as simply being transported to a third country where the destination of a foreign country is known. It seems that the guidelines themselves, recognize that where the destination is known, the goods may be said to have been transported to a foreign country. For those reasons, I am of the view that the UN Report will not support the contention of the Appellant in the present case.

[260] In my view the mere supply or stores of bunker fuel in the ships tanks for consumption on board a ship cannot possibly be a deemed export, and such consumption by a foreign going ship cannot ever be considered as a supply

occasioning the export of bunker fuel unless there is documentary evidence that manifest an indication that the ship that is consuming bunker fuel for navigation on the high seas is intended to a foreign destination point. Such documentary evidence in my view would exclude the possibility that such goods are not meant for supply of local consumption, which does not signify an "export" within the meaning of Sections 42 or 52 of the Inland Revenue Act.

Destination Principle.

[261] If the present transaction of the Appellant involves goods being moved **from one jurisdiction to another,** the destination principle applies and under the destination principle, the element of export is satisfied when the foreign destination point is intended and indicated in the relevant documents submitted by the Appellant.

[262] The mere delivery of the bunker fuel outside the customs barrier to the vessel cannot be regarded as having taken place out of the territory of Sri Lanka to constitute an export unless goods are taken out of Sri Lanka to another foreign point and the element of taking out of the territory of Sri Lanka to a destination point of another country become an integral part of the transaction, to constitute an export under Sections 42 or 52 of the Inland Revenue Act. A following illustrations given by Hidayatullah., J. In *Burmah Shell Oil Storage and Distributing Company* case (supra) will explain this proposition vividly. Goods cannot be said to be exported if they are ordered by the health authorities to be destroyed by dumping them in the sea, and for that purpose are taken out of the territories of India and beyond the territorial wastes and dumped in the open sea (paragraph 36). Another illustration is where goods put on board a streamer bound for a foreign country, but jettisoned can still be said to have been "exported", even though they do not reach their destination (supra).

[263] The objective of granting the concessionary tax rates under sections 42 or 52 of the Inland Revenue Act as regards the supply of bunker fuel to foreign going ships for navigation is to attract foreign going ships to Sri Lankan ports and promote bunkering industry. So that the foreign going ships will visit the Ports of Sri Lanka and receive bunker fuel for navigation on the high seas in the course of its journey to the next foreign destination Port and the suppliers will be benefited from the concessionary tax rates under Section 42 or 52 of the Inland Revenue Act.

[264] The term 'export' in Sections 42 or 52 of the Inland Revenue Act signifies etymologically 'to take out of Sri Lanka into the territory of another country, and therefore, means to take out of Sri Lanka, goods to a territory of another country. Now the term "export " for the purpose the taking bunker fuel out of Sri Lanka means "taking out of Sri Lanka to any place (destination point) in the high seas outside the territorial waters of Sri Lanka. In this sense, any "place" beyond the territorial waters of Sri Lanka would be a place outside the country. The test is that the sending of the bunker fuel out of the country is satisfied when the bunker fuel, which is directly delivered to the operator /owner of the foreign going vessel for navigation on the high seas has a foreign destination point. The resulting position is that the ownership of the bunker fuel will be transferred to the owner/operator of the vessel by the supplier from a taxable activity and the vessel will use those bunker fuels for navigation on the high seas intended for a foreign destination point out of the Sri Lankan territorial waters (the next foreign port). In short, to earn the exemption or concessionary tax rate, the goods must have a foreign destination point where they can be said to be taken out of Sri Lanka to constitute an export under Sections 42 or 52 of the Inland Revenue Act.

[265] At the hearing, the learned Additional Solicitor-General submitted that in order for a transaction to qualify as export, there should be a recipient for such goods in another jurisdiction as an importer and as there was no corresponding importer in another country to physically receive the goods, the transition in the present case does not constitute an export. Bunker fuel supplied to a foreign going vessel for navigation occasions an export and eligible for the concessionary tax rates under Sections 42 or 52 of the Inland Revenue Act if it is delivered by the supplier directly to a foreign going vessel and received by its owner/operator for navigation on the high seas out of Sri Lanka, with evidence of a foreign destination point.

[266] I do not think that given the nature of the goods being the bunker fuel, which is supplied to the operator/owner of the ship for navigation on the high seas for the next foreign destination point, the requirement in traditional export of cargo where the goods are exported to a specified recipient in another foreign jurisdiction is necessary to constitute an export under Sections 42 or 52 of the Inland Revenue Act. The above-mentioned second illustration that goods put on board a streamer bound for a foreign country, but jettisoned can still be said to have been "exported", even though they do not reach their destination vividly explains this proposition in case of bunker fuel which is supplied for navigation.

Another illustration is where goods shipped from Colombo intended for delivery in Bombay proceeded on a voyage, leaving the Sri Lankan territorial waters, but developed engine trouble and returned and ran aground in the Sri Lankan territorial waters at Hambantota Port. In this illustration, the ship intended to deliver the goods at Bombay Port (destination point) and moved out of the Sri Lankan territorial waters and the export was complete when the goods were taken beyond the territorial waters of Sri Lanka with the intention of delivering at Bombay Port. The fact that the ship was brought back to Sri Lanka did not affect as the goods sold were intended to be taken to that foreign destination point, namely, the Bombay Port.

[267] I hold that the concessionary tax rates under Sections 42 or 52 of the Inland Revenue Act in the present case applies to the bunker fuel directly supplied to the operator or owner of the foreign going vessel to be used for navigation on the high seas (out of the territorial waters of Sri Lanka) and intended to a destination point of another country. This finding is limited to this case, and it shall not in any way be construed as an application to other goods in respect of which concessionary tax rates are claimed under Sections 42 or 52 of the Inland Revenue Act.

[268] How can the Appellant satisfy that that the ship carrying bunker fuel for navigation was taken out of the Sri Lankan territorial waters? It must be shown that the supply of bunker fuel was delivered to the foreign going ship's tanks by the Appellant to be used for navigation on the high seas with a foreign destination point of another country.

[269] To benefit from the concessionary tax rates under Section 42 or 52 of the Inland Revenue Act, as regards the supply of bunker fuel, the Appellant is required to satisfy the following documents:

1. Purchase orders for the receiver (customer) of the bunker fuel indicating the name of the vessel, date of departure and next destination from Sri Lanka;
2. Purchase order indicating written instructions for the receiver (customer) to deliver the bunker fuel to the vessel;
3. Sales invoice to the receiver of bunker fuel;
4. Bunker delivery note endorsed by the Master/Chief Engineer/ such responsible officer of the vessel; and
5. Evidence of payment from the receiver (customer).

[270] In the instant case, there is nothing to indicate that the bunker fuel supplied by the Appellant to a ship was bound to a foreign destination point out of Sri Lanka as there is no evidence whatsoever, indicating that the destination of the ship was any foreign place outside Sri Lanka. A perusal of the letter dated 31,10,2012 (p. 41 of the TAC briefs) issued by the senior assessor to the Managing Director of the Appellant reveals that the assessor wanted the Appellant to furnish the proof of the following documents to the assessor in relation to High surplus fuel oil, and marine gas and reasons for non recognition of sales:

1. Purchase order;

2.Purchase invoice;

3.Purchase accounting entries;

4.Goods receive note;

[271] The only document available in the TAC brief is one purchase order requesting the supplier (Pilot Stattions Pvt Ltd) to deliver goods to the Appellant with the payment details. The purchase order only refers to the date, contact persons, purchase order number, the names of the supplier and the person to whom the goods are delivered with payment details. No Bunker Delivey Note, Bunker Nomination purchase invoice, goods receive note are available in the TAC brief in respect of a foreign going vessel. No evidence is available with regard to the destination port or the name of the ship or the Vessel Representative (Engineer) of the ship or the Bunkering Supplier to a particular foreign going ship to indicate whether the bunker fuel is required for use outside the territorial waters of Sri Lanka. .

[272] Accordingly, there is no evidence whatsoever, that the bunker fuel was supplied by the Appellant for consumption to ships which will be taken out of the Sri Lankan territorial waters and used for navigation on the high seas when travelling to a foreign destination point of another port. Such a destination point is conspicuously absent in the present case. The argument of the Appellant that the moment the bunker fuel was taken out of the Sri Lankan territory, the export was complete cannot be presumed and accepted in the absence of documentary evidence indicating the next foreign destination.

[273] For those reasons enumerated in this judgment, I hold that the supply of bunker fuel by the Appellant in the present case, does not constitute an export within the meaning of Sections 42 or 52 of the Inland Revenue Act, and therefore,

the Appellant is not entitled to claim the concessionary tax rate under sections 42 or 52 of the Inland Revenue Act, No. 10 of 2006 (as amended). Accordingly, the questions of law, No. 4 and 5 will be answered in favour of the Respondent.

Question of Law No. 6

[274] In view of the opinion expressed by this Court on the questions of law. Nos. 1-5, the question of law, No. 6 will be answered.

Conclusion & Opinion of Court

[275] In these circumstances, I answer Questions of Law arising in the Case Stated as follows:

1. No.
2. No
3. Yes. Although the assessment was made on 26.11.2012, the assessment for the year of assessment 2009/2010 was time barred when it was not made on or before 31.03.2012 in terms of section 163(5) of the Inland Revenue Act (as amended).
4. No
5. No
6. The Tax Appeals Commission erred in law in relation to question of Law, No. 3, but it did not err in law in relation to questions of law, Nos. 1,2,4 and 5.

[276] In view of the answer given to the question of law No. 3 in favour of the Appellant, I annul the determination made by the Tax Appeals Commission dated 28.08.2017, and the Registrar is directed to send a certified copy of this judgment to the Tax Appeals Commission.

JUDGE OF THE COURT OF APPEAL

<u>M. Sampath K.B. Wijeratne, J.</u>

I agree.

JUDGE OF THE COURT OF APPEAL