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

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).

Stafford Motor Company (Private) Limited,
718/7, Maradana Road,
Colombo 10.

Appellant

Case No. CA/TAX/0021/2018
Tax Appeals Commission
No. TAC/IT/028/2016

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.

: Dr. Shivaji Felix with Shanaka Amarasinghe and Nivantha Satharasinghefor the Appellant

Susantha Balapatabendhi, Additional Solicitor General with Dr. Charuka Ekanayake for the Respondent.

Argued on : 07.07.2021, 04.08.2021, 26.11.2021, 09.12.2021 & 24.03.2022

Written Submissions filed on

: 07.02.2022 & 13.11.2019 (by the Appellant)

15.02.2022 & 14.11.2019 (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 12.06.2018 confirming the determination made by the Respondent on 16.12.2015, and dismissing the Appeal of the Appellant. The taxable period related to the appeal is the year of assessment 2010/2011.

Factual Background

[2] The Appellant is a limited liability company incorporated under the provisions of the Companies Act, No. 17 of 1982 and domiciled in Sri Lanka. The principal activity of the Appellant is importing and distributing of "Honda" and "Hero Honda" branded products. The Appellant submitted its return of income for the year of assessment 2010/2011 on 30.11.2011, but the assessor by letter dated 09.09.2013 rejected the return of income for the year of assessment 2010/2011 for the following reasons:

(i) The Appellant being an importer of motor vehicles and motor spare parts is liable to pay Mation Building Tax (hereinafter referred to as the "NBT") at the appropriate rate in respect of the liable turnover arising from the importation of such vehicles under Section 3 (1) of the Nation Building Tax Act, No. 9 of 2009;

(ii) In accordance with the Regulations made by the Gazette Notification No. 1606/31 dated 19.06.2009, the two thirds of the NBT charged by the NBT Ac, No. 9 of 2009 and payable for the relevant period, shall be a prescribed levy as provided for in Section 26 (1) (l) (iii) of the Inland Revenue Act, No. 10 of 2006;

(iii) Such prescribed levy is not an allowable deduction in ascertaining the profits and income of any person under Section 26 (1) (l) (iii) of the Inland Revenue Act, No. 10 of 2006;

(iv) In the Y/A 2010/2011, the Appellant was chargeable with Nation Building Tax of Rs. 143,830,690 and was liable to pay such sum at the point of importation of motor vehicles and motor spare parts;

(v) The Appellant had not made adjustments in ascertaining the profits and income.

[3] Accordingly, the assessment was made on the basis of the computation of tax for the year of assessment 2010/2011 as follows (pp. 23-24 of the TAC brief):

Y/A 2010/2011	
Adjusted trade profit	416,604,572
Add	
2/3 of the NBT paid at the point of customs not allowed (143,830,690 X 2/3)	95,887,127
Trade profit after the NBT adjustment	512,491,699

[4] The notice of assessment was issued on 29.11.2013 in respect of the year of assessment 2010/2011 (p. 14 of the docket). The Appellant appealed to the Commissioner-General of Inland Revenue (hereinafter referred to as the "Respondent") against the said assessment, and the Respondent by its determination dated 16.12.2015 confirmed the assessment and dismissed the appeal (pp. 31-32 of the Tax Appeals Commission brief).

Appeal to the Tax Appeals Commission

[5] 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 dated 12.06.2018 confirmed the determination made by the Respondent and dismissed the appeal.

Questions of Law for the Opinion of the Court of Appeal

[6] Being dissatisfied with the said determination of the Tax Appeals Commission (hereinafter referred to as the "TAC"), the Appellant requested the TAC to state a

case, and the TAC formulated the following questions of law in the Case Stated for the opinion of the Court of Appeal.

(1) Is the determination of the Tax Appeals Commission time barred?

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

(3) Did the Tax Appeals Commission err in law when it came to the conclusion that the determination of the Commissioner General of Inland Revenue was not time barred?

(4) Did the Tax Appeals Commission err in law when it came to the conclusion that the Nation Building Tax paid at the point of importation of articles to Sri Lanka is a disallowable expense under Section 26(1)(l)(iii) of the Inland Revenue Act, No. 10 of 2006?

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

[7] At the hearing of the appeal, we heard Dr. Shivaji Felix, the learned Counsel for the Appellant and Mr. Susantha Balapatabendi, P.C., A.S.G. for the Respondent, who made extensive oral submissions on the five questions of law submitted for the opinion of the Court. Subsequently, we directed both Counsel to make legal submissions on the applicability of the recent judgment of the Supreme Court in *Seylan Bank v. The Commissioner of Inland Revenue*, SC Appeal, No. 46/2016, decided on 16.12.2021, which was referred to in the written submissions filed by both Counsel in relation to the time bar of the assessment. We heard both Counsel on the applicability of the said Supreme Court judgment in the present case, and several other connected cases and fixed the matter for judgment.

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 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, stipulates that the TAC shall make its determination within two hundred and seventy days from the date of the

Commission commencing its sittings for the hearing of each appeal. He submitted that the amendment of section 10 of the Tax Appeals Commission Act, No. 23 of 2011 with retrospective effect on two occasions, and having an avoidance of doubt clause in section 15 of the Tax Appeals Commission (Amendment) Act, No. 20 of 2013, makes it very clear that the intention of Parliament is that section 10 (as amended), is a mandatory provision of law which requires strict compliance.

[9] He further submitted that the first oral hearing of the appeal by the TAC was held on 23.03.2017, the determination of the TAC was made on 25.06.2019 and thus, the determination has been made more than 270 days from the date of the first oral hearing, which is outside the period specified in section 10 for the determination of the appeal. His contention was that the determination of the TAC is time barred by operation of law, and therefore, the TAC no longer possesses jurisdiction to proceed to hear the appeal.

[10] 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, and the directory provision would not have required an amendment with retrospective effect. He further submitted that the avoidance of doubt provision found in section 15 of the Tax Appeals Commission Act, No. 23 of 2011, would also not have required, if the time bar stipulated in section 10 of the Tax Appeals Commission Act, as amended, was intended to be directory.

[11] 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]*

[12] Dr. Felix submitted that the statement made by Janak de Silva, J. in *Stafford Motor Company Limited v. The Commissioner General of Inland Revenue*, CA /Tax/17/2017, decided on 15.03.2019, *Kegalle Plantations PLC v. Commissioner*

General of Inland Revenue, CA/Tax 09/2017 decided on 04.09.2014, that the statement of Gooneratne, J. is an obiter dicta statement is erroneous. Dr. Felix submitted that even if the statement made by Gooneratne J. constituted an obiter dicta statement, it cannot be disregarded since it sheds relevant light on the matter in issue as the statement is one which contains relevant judicial dicta on the issue. He relied on several authorities including the decisions in *D.M.S. Fernando v. A.M. Ismail* (1982) IV Reports of Sri Lanka Tax Cases 184 and *Sampanthan v. Attorney General* SC FR 351/2018 decided on 13.12.2018, in particular, in support of his submissions.

[13] On the other hand, Mr. Susantha Balapatabendi, 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. He 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. His 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.

[14] Mr. Mr. Balapatabendi, *inter alia*, relied on the decisions in *Stafford Motor Company Limited v. The Commissioner General of Inland Revenue* (supra), *Kegalle Plantations PLC v. Commissioner General of Inland Revenue* (supra), *Visuvalingam and Others v. Liyanage and others* (1983) 1 Sri LR 203, *Nagalingam v. Lakshman de Mel* 78 NLR 231 in support of his submissions.

[15] His Lordship Janak de Silva J., referring to *Mohideen v. Commissioner-General of Inland Revenue* (supra), held in *Stafford Motor Company Limited v. The Commissioner General of Inland Revenue* (supra) that the statement made by His Lordship Gooneratne J. was an obiter dicta statement at p. 6 as follows:

> *"We are of the view that the statement in Mohideen's case* (supra) *that the determination of the Board of Review is invalid if not made within the statutory time period is obiter dicta. Accordingly, we are of the view that the determination of the TAC in the instant case is not time barred. In Kegalle Plantations PLC v. Commissioner-General of Inland Revenue [CA (TAX) 09/2017, C.A.M. 04.09.2018] we arrived at a similar conclusion".*

[16] In *Kegalle Plantations PLC v. The Commissioner-General of Inland Revenue* (supra) and *CIC Agri Business (Private) Limited v. The Commissioner-General of Inland Revenue* (CA/Tax 42/2014 decided on 29.05.2021), His Lordship Janak de Silva J. arrived at a similar conclusion.

Statutory Provisions

[17] 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".*

[18] 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.

[19] 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."*

[20] 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".*

[21] In view of the submission made by Dr. Felix that even if the statement made by Gooneratne J. constituted an obiter dicta statement, it cannot be simply disregarded as it contains relevant judicial dicta on the issue, the relevance of the statement must be considered in the context of the facts and the circumstances of the case, and the relevant legal provisions that existed at that time.

Mandatory vs. Directory

[22] I shall now proceed to consider the submission of Dr. Felix, referring to the word "shall" in section 10 that the time bar in section 10 of the Tax Appeals Commission Act is a mandatory provision of law which requires strict compliance. Section 10 of the Tax Appeals Act stipulates that the TAC shall make its determination within 270 days from the date of the commencement of its sittings for the hearing of the appeal. Superficially, the effect of non-compliance of a provision is dealt with in terms of the mandatory-directory classification. Generally, in case of a mandatory provision, the act done in breach thereof is void, whereas, in case of a directory provision, the act does not become void, although some other consequences may follow (P.M. Bakshi, Interpretation of Statutes, First Ed, 2008422).

[23] In my view, 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 as echoed by the Indian Supreme Court case of *The Collector of Monghyr v. Keshan Prasad Goenka,* AIR 1962 SC 1694 at p. 1701) in the following words:

> *"It is needless to add that the employment of the auxiliary verb " shall" is inconclusive and similarly the mere absence of the imperative is not conclusive either. The question whether any requirement is mandatory or directory has to be decided not merely on the basis of any specific provision which, for instance, sets out the consequence of the omission to observe the requirement, but on the purpose for which the requirement has been enacted, particularly in the context of the (1) [1958] S.C.R. 533, other provisions of the Act and the general scheme thereof. It would, inter alia, depend on whether the requirement is insisted on as a protection for the safeguarding of the right of liberty of a person or of property which the action might involve".*

[24] It is well-established that an enactment in form mandatory, might in substance be directory and that the use of the word "shall" does not conclude the matter (*Hari Vishnu Kamath v Ahmad Ishaque* AIR 1955 SC 233 referring to *Julius v. Bishop of Oxford* (1880) 5 A.C. 214 HL). Section 10 of the Tax Appeals Commission Act does not say what will happen if the Commission 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). Dr. Felix, referring to the five-judge decision of *D.M.S. Fernando and another v. A.M. Ismail* (1982) IV Reports of Sri Lanka Tax Cases 184, 193 submitted that the penal consequences need not be laid down in order for a provision to be held mandatory and that in such case, the Court has to consider the natural consequences that would follow where Parliament had not prescribed a sanction for breach of a mandatory provision. He referred to the proposition of law that was lucidly explained by Samarakoon C.J, at pp.184, 190 wherein His Lordship stated as follows:

> *"The statute itself contains no sanction for a failure to communicate reasons. If it had the matter would be easy of decision. But the matter does not rest there. One has to make a further inquiry. "If it appears that Parliament intended disobedience to render the Act invalid, the provision in question is described as "mandatory", "imperative" or "obligatory"; if on the other hand, compliance was not intended to govern the validity of what is done, the provision is said to be "directory" (Halsbury's Laws of England, Ed 3 Vol. 36-page 434 S. 650). Absolute provisions must be obeyed absolutely whereas directory provisions may be fulfilled substantially (Vide- Woodward vs Sarson (1875) (L.R.10 cp 733 at 746). No universal rule can be laid down for*

determining whether a provision is mandatory or directory. "It is the duty of Courts of Justice to try to get at the intention of the legislature by carefully attending to the whole scope of the Statute to be construed per Lord Campbell in Liverpool Borough Bank vs Turner (1860) (2 De CF. & J 502 at 508) Vita Food Products vs. Unus Shipping Co. (1939 A.C. 377 at 393). Each Statute must be considered separately and in determining whether a particular provision of it is mandatory or directory one must have regard "to the general scheme to the other sections of the Statute". The Queen vs. Justices of the County of London County Council (1893) 2 Q.B. 476 at 479). It is also stated that considerations of convenience and justice must be considered. Pope vs. Clarke (1953) (2 A.E.R. 704 at 705). Then again, it is said that to discover the intention of the Legislature it is necessary to consider-(1) The Law as it stood before the Statute was passed. (2) The mischief if any, under the old law which the Statute sought to remedy and (3) the remedy itself. (Maxwell on Interpretation of Statutes, Edition 12 page 160). These are all guidelines for determining whether Parliament intended that the failure to observe any provision of a Statute would render an act in question null and void. They are by no means easy of application and opinions are bound to differ. Indeed, some cases there may be where the dividing line between mandatory and directory is very thin. But the decision has to be made. I will therefore examine the Statute bearing in mind these guidelines".

[25] I agree with Dr. Felix 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 them to ascertain 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).

Legislative Intent

[26] 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 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 Sayaji Jubliee Cotton and Jute Mills Co. Ltd* AIR 1966 Guj. 96). In *State of U.P., v. Baburam Upadhya*, AIR 1961 SC 751, the Supreme Court of India stated 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. Crawford on "Statutory Construction" (Ed. 1940, Art. 261, p. 516) sets out the following passage from an American case approvingly as follows:

> *"The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other".*

[27] According to Sutherland, Statutory Construction, Third Ed. Vol. III, p. 77:

> *"The difference between mandatory and directory statutes is one of effect only. The question generally arises in a case involving a determination of rights as affected by the violation of, or omission to adhere to statutory directions. This determination involves a decision of whether or not the violation or omission is such as to render invalid Acts or proceedings to the statute, or rights, powers, privileges claimed thereunder. If the violation or omission is invalidating, the statute is mandatory, if not, it is directory".*

[28] Then, the question is this: What is the fundamental test that is to be applied in determining whether or not the failure to obey the time bar provision in section 10 of the Tax Appeals Commission Act was intended by the legislature to be mandatory or directory? This question ultimately depends on the consideration of whether the consequences of the non-compliance were intended by the legislature to be mandatory or directory. This proposition was echoed by Lord Woolf MR (as he then was) in *R v. Secretary of State for the Home Department, Ex p Jeyeanthan* [2000] 1 WLR 354, who stated that it is "much more important to focus on the **consequences of the non-compliance**". He elaborated this proposition in the following words at p. 360:

> *"In the majority of cases, whether the requirement is categorised as directory or mandatory, the tribunal before whom the defect is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises".*

[29] Here, it is also desirable to remember the words of Lord Hailsham of St. Marylebone L.C. in his speech in *London and Clydeside Estates Ltd. v. Aberdeen District Council* [1980] 1 W.L.R. *182* , 188–190. He stated at p. 36:

> *"The contention was that in the categorisation of statutory requirements into 'mandatory' and 'directory,' there was a subdivision of the category 'directory' into two classes composed (i) of those directory requirements 'substantial compliance' with which satisfied the requirement to the point at which a minor defect of trivial irregularity could be ignored by the court and (ii) those requirements so purely regulatory in character that failure to comply could in no circumstances affect the validity of what was done.*
>
> *When Parliament lays down a statutory requirement for the exercise of legal authority, it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the* ***legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events"****.*

[30] In *Howard and Others v. Bodington* (1877) 2 PD 203, the Court of Arches considered the question whether the consequences of a failure to comply with a statutory requirement are mandatory or directory. Lord Penzance stated at pp. 211-212:

> *"Now the distinction between matters that are directory and matters that are imperative is well known to us all in the common language of the courts at Westminster. I am not sure that it is the most fortunate language that could have been adopted to express the idea that it is intended to convey; but still, that is the recognised language, and I propose to adhere to it.* ***The real question in all these cases is this: A thing has been ordered by the legislature to be done. What is the consequence if it is not done?*** *In the case of statutes that are said to be imperative, the Courts have decided that if it is not done the whole thing fails, and the proceedings that follow upon it are all voids. On the other hand, when the Courts hold a provision to be mandatory or directory, they say that, although such provision may not have been complied with, the subsequent proceedings do not fail. Still, whatever the language, the idea is a perfectly distinct one. There may be many provisions in Acts of Parliament which, although they are not strictly obeyed, yet do not appear to the Court to be of that material importance to the subject-matter to which they refer, as that the legislature could have intended that the non-observance of them should be followed by a total failure of the whole proceedings. On the other hand, there are some provisions in respect of which the Court would take an opposite view, and would feel that they are matters*

which must be strictly obeyed, otherwise the whole proceedings that subsequently follow must come to an end".

[31] 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.

[32] Now the question is, to which category, does section 10 in this case belong? The question as to whether section 10 is mandatory or directory depends on the intent of the legislature, and not upon its language, irrespective of the fact that section 10 is couched in language which refers to the word "shall". The intention of the legislature must be ascertained not only from the phraseology of section 10, but also by considering its purpose, its design and more importantly, the consequences which would follow from construing it one way or another. It is necessary to ask the question: What is the consequence of the failure to adhere to the time limit specified by section 10 that has been intended by the legislature to be categorised as mandatory or directory? That is how I would approach this question, which is ultimately a question of statutory construction of section 10 of the Tax Appeals Commission Act. Accordingly, one has to identify the tests to be applied in deciding whether a provision is to be regarded is mandatory or directory, and then apply them to the statute which stipulates the determination shall be made within the time limit specified therein, but makes no reference to any penal consequences.

Consequence of non-compliance with a statutory provision

[33] In considering a procedural requirement from this angle, a Court is likely to construe it as mandatory if it seems to be of particular importance in the context of the enactment, or if it is one of a series of detailed steps, perhaps in legislation which has created a novel jurisdiction (*Warwick v. White* (1722) Bunb. 106; 145 E.R. 612) or if non-compliance might have entailed penal consequences for one of the parties (*State of Jammu and Kashmir v. Abdul Ghani* (1979) Ker LJ 46). Where the disobedience of a provision is made penal, it can safely be said that such provision was intended by the legislature to be mandatory (*Seth Banarsi Das v. The Cane Commissioner* & Another, AIR 1955 All 86). As noted, the fact that no

penal consequence is stated in a statute, however, is only one factor to be considered towards a directory construction, and there are other factors to be considered in determining whether a provision of a statute is mandatory or not. One of the factors in determining whether the consequence of non-compliance provision was intended by the legislature to be mandatory or directory is to consider the broad purpose and object of the statute as Lord Penzance stated in *Howard v. Bodington* (supra) at 211 as follows:

> *"I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter: consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."*

Purpose of the section in the context of the statute

[34] The legislature is a purposive act, and judges should construe statutes to execute that legislative purpose, intent and context (Robert A. Katzmann, Judging Statutes 31 (2014) by focusing on the legislative process, taking into account the problem that the legislature was trying to solve (Henry M. Hart, Jr. & Albert M. Sacks, "The legal Process: Basic Problems in the Making and Application of Law" 1182 (William N. Eskridge, Jr. & Phillip P. Frickey Eds., (1994). We must thus, ascertain what the legislature was trying to achieve by amending the Tax Appeals Commission Act twice as far as the time bar is concerned. Dr. Felix contended that, given the tax law context, a strict approach to the construction of section 10 of the Tax Appeals Commission Act should be adopted as the amendment of the Tax Appeals Commission Act with retrospective operation twice, would reflect the legislative intent that the compliance with section 10 is mandatory. He argued that if the time bar stipulated in section 10 was intended to be directory, the amendment of section 10 of the Tax Appeals Commission Act with retrospective effect on two occasions, and the avoidance of doubt clause found in section 15 of the Tax Appeals Commission (Amendment) Act, No. 20 of 2013 would have been superfluous.

[35] Will the amendment of section 10 with retrospective operation twice manifest the intention of the legislature that the failure of the TAC to make its determination within the time limit specified in section 10 is mandatory? From section 15, it is manifest that the legislature intended section 10 to operate retrospectively, so that the date of the commencement of section 10 is earlier

than the date of that amendment. A legislative intention to amend section 10 with retrospective operation does not necessarily or conclusively mean that the failure to make the determination of the TAC within the time limit specified in section 10 is mandatory. If such drastic consequence was really intended by the legislature, it would have made appropriate provisions in express terms in section 10 to the effect that "the appeal shall be deemed to have been allowed where the Tax Appeals Commission fails to adhere to the time limit specified in section 10 of the Tax Appeals Commission Act.

[36] There are guidelines in tax statutes, which stipulate that the failure to observe any time limit provision would render the appeal null and void or that the appeal shall be deemed to have been allowed. For example, section 165 (14) of the Inland Revenue Act, No. 10 of 2006 (as amended), provides that "an appeal preferred to the Commissioner-General 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...". The same section specifically stipulates that "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".

[37] An identical provision is contained in section 34 (8) of the VAT Act, No. 14 of 2002 as well, which stipulates that "where such appeal is not agreed to, or determined within such period, the appeal shall be deemed to have been allowed and the tax charged accordingly". Although the Tax Appeals Commission Act was amended by Parliament twice and increased the period within which the appeal is to be determined by the Commission from 180 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. This proposition was echoed by FOTH, C. J. in the Supreme Court of Kansas decision in *Paul v. The City of Manhattan*, 511 P.2d (1973) 212 Kan. 381, paragraph 17 as follows:

> *"The language of the enactment itself may provide some guidance. Thus, we said in Shriver v. Board of County Commissioners, 189 Kan. 548, 370 P. 2d 124, "Generally speaking, statutory provisions directing the mode of*

proceeding by public officers and intended to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties cannot be injuriously affected, are not regarded as mandatory, unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated". (p. 556. Emphasis added). A critical feature of mandatory legislation is often a provision for the consequences of non-compliance. This element was noticed by early legal commentators, for in Bank v. Lyman, supra, we find this observation (p. 413)."

[38] Bindra's Interpretation of Statutes, 10th Ed., referring to the decision of *Paul v. The City of Manhattan* (supra), states that factors which would indicate that the provisions of a Statute or Ordinance are mandatory are: (1) the presence of negative words requiring that an act shall be done in no other manner or at no other time than that designated; or (2) a provision for a penalty or other consequence of non-compliance (p. 433). The legislature in its wisdom has placed time limit for the speedy disposal of appeals filed before the Commissioner-General and the overall legislative intention sought to be attained by the Inland Revenue Act in section 165 (14) was to ensure that an appeal before the Commissioner-General of Inland Revenue is disposed of within a period of 2 years from the date on which the Petition of Appeal is received. As the Commissioner-General is an interested party against another interested party (tax payer) in the tax collection, it shall determine the appeal within 2 years from the receipt of the Petition of Appeal, and if not, the appeal shall be deemed to have been allowed and tax charged accordingly, so as to safeguard the rights of the taxpayer.

[39] Dr. Felix referred to the following statement made by H.N.J. Perera CJ in the majority judgment of seven judge bench of the Supreme Court in *Sampanthan v. Attorney General* (supra). Wherein the Supreme Court stated:

"Next, it is to be kept in mind that the task of interpreting a statute must be done within the framework and the wording of the statute and in keeping with the meaning and intent of the provisions in the statute. A Court is not entitled to twist or stretch or obfuscate the plan and clear meaning and effect of the words in a statute to arrive at a conclusion which attracts the Court".

[40] In identifying the legislative intention, it is necessary to consider the amendments made to the Tax Appeals Commission Act, to ascertain whether the provision of section 10 was intended to be mandatory by the legislature for the

purpose of the application of the proposition of law made in *Sampanthan v. Attorney General* (supra). 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 TAC, which was established by an Act of Parliament, and the Commsission 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.

[41] Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 granted time to the TAC to hear all appeals within one hundred and eighty days from the date of the commencement of the hearing of the appeal. The Tax Appeals Commission (Amendment) Act, No. 4 of 2012 extended the said time period from one hundred and eighty days to two hundred and seventy days from the date of the commencement of the hearing of the appeal. The Tax Appeals Commission (Amendment) Act, No. 20 of 2013 however, reduced the time limit granted to the TAC to conclude the appeal by enacting that the time specified in section 10 shall commence from the date of the commencement of its sittings for hearing the appeal. The legislature has, from time to time, extended and reduced the time period within which the appeal shall be determined by the TAC, but it intentionally and purposely refrained from imposing any consequence for the failure on the part of the TAC to adhere to the time limit specified in section 10.

[42] The legislature amended the Tax Appeals Commission Act twice with retrospective effect, and provided time frames to conclude appeals quickly as possible within the time limit of 270 days from the date of the commencement of its sittings for the hearing of such appeal. It is true that the legislature has amended section 10 with retrospective operation but if it intended to take away the jurisdiction of the TAC, and render its determination made outside the time limit specified in section 10 invalid, it could have easily made, with retrospective effect, appropriate provision in express terms that the appeal shall be deemed to have been allowed or other consequence of non-compliance.

[43] It is settled law that the Courts cannot usurp legislative function under the disguise of interpretation and rewrite, recast, reframe and redesign the Tax Appeals Commission 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 Corporaion* [1951] 2 All ER 839, HL. Referring to the speech of Lord Denning MR, Lord Simonds said at page 841: "It

appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation", Lord Simonds further stated at 841:

> *"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 duty of the court to travel outside them on a voyage of discovery are strictly limited. If a gap is disclosed, the remedy lies in an amending Act and not in a usurpation of the legislative function under the thin disguise of interpretation".*

[44] 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".*

[45] On the other hand, the proviso to Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 granted time for the Commission to make its determination in respect of appeal transferred to the Commission from the Board of Review within a period of one hundred and eighty days (180) from the date of such transfer, notwithstanding anything contained in any other written law. The Tax Appeals Commission (Amendment) Act, No. 4 of 2012 extended the said time period from one hundred and eighty days to twelve months of the date on which the Commission shall commence its sittings. (Vide-Section 7 of the Act, No. 4 of 2012). The Tax Appeals Commission (Amendment) Act, No. 20 of 2013 extended the said time period to twenty-four months from the date on which the Commission shall commence its sittings for the hearing of each such appeal.

[46] It is crystal clear that these procedural time limit rules in respect of appeals received by the Tax Appeals Commission or appeals transferred from the Board of Review to the Commission 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 has been designed with a view to regulating the duties of the TAC by specifying a time limit for its performance as specified in section 10 of the Act. So that the legislature, in its wisdom has made provision in section

10 to the effect that the appeal shall be disposed of speedily within a period of 270 days from the date of the commencement of the sittings for the hearing of the appeal. But the legislature imposed no drastic and painful penal consequence or other consequence of non-compliance, including prohibitory or negative words in section 10, rendering the determination of the appeal null and void for non-compliance with the time limit specified in section 10. In my view, they are not intended to make the parties suffer from the failure of the Commission to make the determination within the time limit specified in section 10 of the Tax Appeals Commission Act.

[47] Any procedural retrospective operation of a provision, in my view, cannot take away the rights of parties who have no control over those entrusted with the duty of making determination within the time limit specified in section 10. The retrospective operation of section 10 without any penal or other consequence of non-compliance, by itself, cannot be treated as a factor in determining that the legislature intended that the failure to adhere to the time limit specified in section 10 is mandatory.

Avoidance of doubt clause

[48] Dr. Felix, further relied on the avoidance of doubt clause in Section 15 of the Tax Appeals Commission Act to argue that section 15 would be rendered nugatory if the provisions of section 10 are considered to be directory. A perusal of section 15 of the Tax Appeals Commission (Amendment) Act, No. 20 of 2013 reveals that it relates to appeals that have been transferred to the Commission from the Board of Review, and provides that the TAC shall have the power to make a determination in respect thereof, beyond twelve months granted for its determination of appeals by the Inland Revenue (Amendment) Act No. 23 of 2011.

[49] It seems to me that the avoidance of doubt clause in section 15 applies to appeals transferred from the Board of Review and not to new appeals directly filed before the TAC. On the other hand, the intention of the legislature in section 15 is to empower the Commission to hear an appeal transferred to it by the Board of Review under section 10 of the Act, notwithstanding the expiry of the twelve months granted for its determination by the Tax Appeals (Amendment) Act, No. 4 of 2012. It seems to me that section 15 manifests that the legislature never intended that the time period specified in the general scheme of the Tax Appeals

Commission Act to be mandatory, and holding otherwise, would not promote the main object of the legislature reflected in the Act.

Consequences of non-compliance with a statute by those entrusted with public duty

[50] In deciding whether a provision is mandatory or directory, the other important factor is to find as to who breached the time limit specified in section 10-whether it was breached by one of the parties to the action, or by those entrusted with the performance of a public duty. Also coming under this head are the practical inconveniences or impossibilities of holding a time limit requirement to be mandatory when the public duty is performed by a public body. If the statutory provision relates to the performance of a public duty, the Court is obliged to consider whether any consequence of such breach would work serious public inconvenience, or injustice to the parties who have no control over those entrusted with such public duty.

[51] The Tax Appeals Commission Act has imposed a duty on the TAC to make the determination within the time limit specified in section 10. However, it is relevant to note that the parties had no control over those entrusted with the task of making the determination within the time limit specified in section 10. Should the parties who have no control over those entrusted with the task of making the determination be made to suffer for any failure or delay on the part of the TAC in not making its determination within the time limit specified in section 10? I do not think that the legislature intended that the time limit specified in section 10 is mandatory where the parties had no control over those entrusted with the task of making the determination within the time limit specified in section 10.

[52] Maxwell, Interpretation of Statute, 11th Ed. at page 369 referring to the ascertaining of the intention of the legislature in relation to the interpretation of limitation provision states:

> *"On the other hand, where the prescriptions of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the Legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal, indeed, but it does not affect the validity of the act done in disregard of them. <u>It has often been held,</u>*

for instance, where an Act ordered a thing to be done by a public body or public officers and pointed out the specific time when it was to be done, then the Act was directory only and might be complied with after the prescribed time". [Emphasis added]

[53] Where the statute imposes a public duty on persons and to treat, as void, acts done without compliance with the statute would cause serious inconvenience to persons who have no control over those entrusted with this duty, then the practice is to hold the provision to be directory only so as not to affect the validity of such action taken in breach of such duty (*Montreal Street Rly. Co. v. Normandin* (1917) AC 170, 175). Lord Sir Arther Channell echoed this proposition in that case at p. 176 as follows:

"When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done. This principle has been applied to provisions for holding sessions at particular times and places (2 Hale, P. C., p. 50, Rex v. Leicester Justices (1827) 7 B & C. 6 and Parke B. in Gwynne v. Burnell (1835) 2 Bing. N.C. 7); to provisions as to rates (Reg. v. Inhabitants of Fordham (1839) 11 Ad. & E. 73 and Le Feuvre v. Miller (1857) 26 L.J. (M.C.) 175); to provisions of the Ballot Act (Woodward v. Sarsons (1875) L.R. 10 C.P. 733-and Phillips v. Goff (1886) 17 Q.B.D. 805); and two justices acting without having taken the prescribed oath, whose acts are not held invalid (Margate Pier Co. v. Hannam (1819) 3 B. & Al. 266)".

[54] This proposition is further confirmed by Sutherland's Statutory Construction, Third Ed. Vol. 3. at p. 102 as follows:

"A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered a limitation of the power of the Officer". At p. 107 it is pointed out that a statutory direction to private individuals should generally be considered as mandatory and that the rule is just the opposite to that which obtains with respect to public officers. Again, at p. 109, it is pointed out that often the question as to whether a mandatory may be directory construction should be given to a statutory provision may be determined by an expression in the statute itself of the result that shall follow the non-compliance with the provision...."

[55] In the present case, the duty to make the determination within the time limit specified in Section 10 is statutorily entrusted to the members of the TAC in terms of the provisions of the Tax Appeals Commission Act, No. 23 of 2011 (as amended), and the parties had no control whatsoever, over the TAC. As Lord Sir Arther Channell put it correctly, it would cause the greatest injustice to both parties who had no control over those entrusted with the duty of making the determination, if we hold that the neglect to observe the time limit specified in section 10 of the statute renders the determination made by the Commission *ipso facto* null and void.

[56] In my view, every limitation period within which an act must be done, is not necessarily a prescription of the period of limitation with painful and drastic consequences and the parties who have no control of those entrusted with a statutory duty and no fault of them, should not be made to suffer and lose their rights for the failure to adhere to the time limitation specified in a provision.

[57] In *Visuvalingam v. Liyanage* [(1985) 1 Sri LR 203], the Supreme Court was called upon to consider the question whether the time limit of two months set out in Article 126 (5) of the Constitution is mandatory or directory. The Supreme Court by a majority decision held that the provisions of Article 126 (5) of the Constitution are merely directory and not mandatory. Samarakoon, C.J stated at page 226 that:

> *"An examination of the relevant provisions of the Constitution indicates that the provision is merely directory.....These provisions confer a right on the citizen and a duty on the Court. If that right was intended to be lost because the Court fails in its duty, the Constitution would have so provided. It has provided no sanction of any kind in case of such failure. To my mind it was only an injunction to be respected and obeyed, but fell short of punishment if disobeyed. I am of the opinion that the provisions of Article 126 (5) are directory and not mandatory. Any other construction would deprive a citizen of his fundamental right for no fault of his. While I can read into the Constitution a duty of the Supreme Court to act in a particular way, I cannot read into it any deprivation of a citizen's guaranteed right due to circumstances beyond his control"*

[58] Although the decision in *Visuvalingam v. Liyanage* (supra) was a case of infringement of the fundamental rights of a citizen, in my view, the rationale of the statement of Samarakoon C.J. equally applies to the facts of the present case. The decision in *Visuvalingam v. Liyanage* (supra) is further confirmed by Sharvananda J. (as he then was) in *Nagalingam v. Lakshman de Mel* (78 NLR 231),

which is not a fundamental right case. The question before His Lordship was whether the provisions of section 2 (2) (c) of the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971 are mandatory or directory. His Lordship Sharvananda J. (as he then was) stated at page 237:

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

[59] 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. If we hold that the determination of the Commission is null and void, it will cause serious injustice to parties who have no control over those entrusted with the duty of discharging functions under the Tax Appeals Commission Act.

[60] For those reasons, I hold that having considered the facts and he circumstances and legal principles, the failure to adhere to the time limit specified in section 10 was not intended by the legislature to be mandatory with painful and drastic consequences of rendering such determination null and void. The directory interpretation of section 10 is consistent with the object, purpose and design of the Tax Appeals Commission Act, which is reflected in the intention of the legislature.

[61] With regard to the relevance of the judicial dicta referred to by Dr. Felix in *Mohideen v. Commissioner-General of Inland Revenue* (supra), it is to be noted that the relevant question of law No. 2 in respect of which the above statement was made by Gooneratne J. in *Mohideen v. Commissioner-General of Inland Revenue* (supra) reads as follows:

"Has the Board of Review erred in law by violating the "spirit and intentions" of the first proviso to section 140 (10) of the Inland Revenue Act, No. 38 of 2000 (as amended by Section 52 of Inland Revenue (Amendment) Act, No. 37 of 2003), which makes it imperative that the Board of Review arrives at its determination within two years of the commencement of the hearing of this appeal?"

[62] 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 contains 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."*

[63] It is to be noted that unlike in the Inland Revenue (Amendment) Act, No. 37 of 2003, which had given a period of almost **2 years to the Board of Review** to conclude an appeal from the date of commencement of the hearing, the legislature in section 10 of the Tax Appeals Commission Act, No. 23 of 2011 (as amended), has reduced the period within which determination shall be made by the Tax Appeals Commission viz. 270 days from the commencement of its sittings for the hearing of the appeal.

[64] The Appellant in *Mohideen v. Commissioner-General of Inland Revenue* (supra) has referred to the Budget speech made by the Minister in charge of the subject while presenting the Inland Revenue (Amendment) Act, No. 37 of 2003 in Parliament, wherein, a reference has been made that "The final settlement of questions of fact, including the Board of Review will be within 04 years" (Vide- p. 176). Based on the Budget speech, the Appellant's main argument in *Mohideen v. Commissioner-General of Inland Revenue* (supra) as regards the time bar, has been reproduced by His Lordship Gooneratne J., referring to paragraphs 2 and 4 of the written submissions of the Appellant as follows:

"3. Therefore, the clear legislative intention was to ensure that an appeal against an assessment is disposed of within a total period of four years (i.e. two years for the appeal to be determined by the Commissioner-General of Inland Revenue and two further years for the appeal to be determined by the Board of review resulting in a total period of four years).;

4.The instant appeal was taken up for an oral hearing only on 17.02.2006 which is almost 6 ½ years since it was filed. It is submitted that the definition of the word "hearing" as used in the second proviso to section 140 (10) must

be interpreted having regard to the legislative intention of disposing of matters before the Board of Review speedily. It would be contrary to the legislative intention (and the Board of Review would be at liberty to make even twenty-five years before orally hearing an appeal) if the operation date for the commencement of the time bar was construed to be the date of the oral hearing....".

[65] Based on the said written submissions, His Lordship Gooneratne J. identified and referred to the Appellant's main point for the determination of the Court at page 177 of the judgment as follows:

"The Appellant's view is that the commencement of the time bar will operate from the date on which he submitted to the jurisdiction of the Board. That would be according to the Appellant on receipt of the Petition of Appeal by the Board and not from the date of the oral hearing. Emphasis on this point is by reference to 140 (10) of Act No. 38 of 2000. As such Appellant submits it is the intention of the legislature that all of it should be concluded in 2 years and in the instant case it took 6 ½ years since filing the petition." [Emphasis added]

[66] Referring to section 140 (10), His Lordship Gooneratne J. states as follows:

"*Based on Section 140 of the Act, No. 38 of 2000, the legislature intended the word 'hearing' to mean an oral hearing; .....*

Section 140 (10) provides that the Board shall confirm, reduce, increase or annul the assessment 'after the hearing' of the Appeal. It is therefore patently evident that the word "hearing" used consistently in Section 140 of Act No. 38 of 2000 means an "oral hearing" and no more".

[67] It is manifest that the main argument advanced by Dr. Shivaji Felix before Gooneratne J. was that as 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**. It is crystal clear that the issue before His Lordship Gooneratne J. was whether the legislature intended that the hearing used in the second proviso to section 140 (10) of the Inland Revenue Act, No. 38 of 2000 (as amended), for the calculation of a two-year time period commences from the **date of the oral hearing** as contended by the State or **from the date of the Petition of Appeal** received by the Board of Review as contended by Dr. Shivaji Felix. 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. 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 difficulty 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]*

[68] It is crystal clear that His Lordship Gooneratne J. flatly rejected the argument of Dr. Shivaji Felix that the legislature intended that the hearing should be concluded within 2 years **from the date of filing the petition of appeal** or **that the time period of 2 years begins to run from the date of filing the petition of appeal**. His Lordship Gooneratne J. was not prepared to be guided by the Budget Speech made by the Minister in charge of the subject and hold with the Appellant that the legislative intention was that the hearing should be concluded within 2 years from the date of the filing of the petition of appeal.

[69] 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 the petition of appeal. In my view, the principle laid down by Gooneratne J. in *Mohideen v. Commissioner General Inland Revenue* (supra) was that the hearing for the purpose of time limits of 2 years specified in the second proviso to Section 140 (10) of the Inland Revenue (Amendment) Act, No. 37 of 2003 commences from the date of the oral hearing and no more.

[70] That was the principle upon which the case was decided by His Lordship Gooneratne J. which represents the reason and spirit of the decision and that part alone is the principle which forms the only authoritative element of a precedent in *Mohideen v. Commissioner General Inland Revenue* (supra). Having laid down the principle upon which the case shall be determined on the Question of Law

No. 2, His Lordship Gooneratne J. proceeded further to consider the facts of the case and found that the hearing commenced on 17.02.2006 and the determination was made by the Board on 21.06.2006 and therefore, the determination was made within the time limit specified in the said proviso. Thus, His Lordship answered the question No. 2 in favour of the Respondent in the following manner:

> *"I would in answer to this question of law, hold that the Board has not erred by arriving at its determination the way it was done in this appeal" (p. 177).*

[71] After having answered the Question of Law, No. 2 in favour of the Respondent and while fully endorsing the proposition of law that the hearing contemplated in the said time bar provision is nothing but oral hearing and thus, the time bar of 2 years ought to be calculated from the date of the oral hearing, His Lordship made some remarks with regard to the need of adopting a practical and meaningful interpretation to the day-to-day functions in a court of law and statutory bodies. His Lordship remarked that where specific time limits are to be laid down, the legislature has to say so in very clear, unambiguous terms instead of leaving it to be interpreted in various ways. Then, as a passing remark which was not the principle upon which the issue was answered in favour of the Respondent, Gooneratne J. says that *"It would be different or invalid if the time period exceeded 2 years from the date of oral hearing. If that be so, it is time barred". The relevant passage at page 176 reads as follows:*

> *"As such in the context of this case and by perusing the applicable provision, it seems to me that the hearing contemplated is nothing but 'oral hearing'. One has to give a practical and meaningful interpretation to the usual day to day functions or steps in a court of law or a statutory body involved in quasi-judicial functions, duty or obligation. If specific time limits are to be laid down, the legislature needs to say so in very clear, unambiguous terms instead of leaving it to be interpreted in various ways. To give a restricted interpretation would be to impose unnecessary sanctions on the Board of Review.* ***It would be different or invalid if the time period exceeded 2 years from the date of oral hearing. If that be so, it is time barred."***

[72] Obviously, the last sentence of the passage was not the principle upon which the issue was finally decided in favour of the Respondent in *Mohidden v. Commissioner General Inland Revenue* (supra) that forms part of the reason and spirit of the decision as the authoritative element of the decision. The point in Question of Law No. 2 was decided against the Appellant who argued that the

time limit of 2 years ought to be calculated from the date of the receipt of the Petition of Appeal by the Board and not from the date of oral hearing.

[73] That part of the statement enunciated by His Lordship Gooneratne J. that "it would be different or invalid if the time period exceeded 2 years from the date of oral hearing. If that be so, it is time barred" is a passing observation, in the form of an assumption or hypothesis unaccompanied by the principle upon which the case was decided in favour of the Respondent, is manifestly an obiter and not the ratio having a binding authority.

[74] On the other hand, His Lordship Gooneratne J. was never called upon to go into the factors, whether or not the second proviso to section 140 (10) of the Inland Revenue Act could be regarded as mandatory or directory, having regard to the nature, purpose and the design of the statute, the consequences that may flow from non-compliance, if the act is not done within that period. So, those factors were not considered by His Lordship Gooneratne J. in *Mohideen v. Commissioner-General of Inland Revenue* (supra). Also not called upon and not considered are the factors such as whether or not the non-compliance is visited with some penalties, or the statute provides for a contingency of non-compliance of the time limit provision or any practical inconvenience and injustice to parties who have no control over those entrusted with a statutory duty and deprivation of their statutory rights at their no fault.

[75] In the light of the above discussion, I am of the opinion that, the portion of the statement of Gooneratne J. in question cannot have the character of a ratio decidendi but a mere casual statement or observation or remark which does not form the part of the legal principle upon which the case was decided and thus, it has no authoritative value.

[76] For those reasons, I have no reasons to disagree with the decisions of Janak de Silva, J. in *Stafford Motor Company Limited v. The Commissioner General of Inland Revenue* (supra) and *Kegalle Plantations PLC v. Commissioner General of Inland Revenue* (supra). For those reasons, I am in agreement with the reasoning of His Lordship Janak de Silva J. in the above-mentioned decisions that the statement of His Lordship Gooneratne J. in *Mohideen v. Commissioner General of Inland Revenue* (supra) is an obiter dicta statement and the time limit specified in section 10 is not intended to be mandatory.

[77] 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 (supra)*, we further held that:

> *"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"* (pp77-78).

[78] 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. 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 -Time Bar of the Assessment

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

1. There cannot be a valid assessment unless notice of assessment has been served on the taxpayer and the assessment was in fact made on 29.11.2013 and received by the Appellant on 03.12.2013. The so-called letter dated 10.09.2013 is only the source document which is referred to in the notice of assessment under DLN 12329404101 (Document Location Number) which does not contain a charge number and thus, it is not the assessment. The computerized notice of assessment dated 29.11.2013 is the assessment which had been served on the taxpayer after the expiry of the time bar for making the assessment in contravention of section 163(5) of the Inland Revenue Act.

2. Assuming without conceding that the assessment was made on 10.09.2013, as asserted by the Respondent, the appeal would nevertheless be time barred for the year of assessment 2010/2011 for the failure to make the assessment on or before 31.03.2013 since the assessment was made only on 29.11.2013

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 31.03.2013 on the basis of the Inland Revenue (Amenment) Act) No. 22 of 2011, which applied to the year of assessment 2011/2012.

[80] During the 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. During the course of further argument, 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.

[81] 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.

[82] The questions to be considered are:

1. Whether, on the facts and in the circumstances of this case, the assessment for the assessment year 2010-2011 was made on 09.09.2013 or 10.09.2013,

and if not, whether the service of the notice of assessment dated 29.11.2013 on the Appellant constituted a valid assessment;

2. Even if the assessment was made on 09.09.2013 or 10.09.2013, whether, on the facts and in the circumstances of this case, the assessment for the assessment year 2010-2011 was time barred in terms of section 163(5) of the Inland Revenue Act (as amended).

Whether the notice of assessment dated 29.11.2013 constitutes a valid assessment for the purpose of the time bar

[83] I shall consider the first argument of the Appellant, whether the service of the notice of assessment dated 29.11.2013 constitutes a valid assessment in terms of the provisions of the Inland Revenue Act (as amended).

Best judgment of the assessment-section 163

[84] 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".

[85] 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).

[86] 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".

[87] 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****".*

[88] 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".*

[89] 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).

[90] The Appellant relied on the decision of the Court of Appeal in *A. M. Ismal 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 Commssioner 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. ".*

[91] 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.**

[92] 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".

[93] 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".*

[94] 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".*

[95] 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".*

[96] 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.

[97] In the present case, however, the letter of the assessor dated 09.09.2013 states "**I hereby inform you that the said return of income has not been accepted for the reasons given below"** (See -letter of the assessor dated 09.09.2013 at page 3 of the Document File). There there was no complaint whatsoever that the reasons for not accepting the return were not communicated to the Appellant by the assessor, and in fact, the letter dated **09.09.2013** with reasons for not accepting the return has been sent to the Appellant before the notice of assessment dated **29.11.2013** was sent to the Appellant. 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.

[98] 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.

[99] 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)*

[100] 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 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.

[101] 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).*

[102] 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.

[103] 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 09.09.2013 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".*

[104] 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.

[105] The Appellant argued that the date of the notice of assessment i.e., 29.11.2013 should be regarded as the date for the making of the assessment completely ignoring the letter of communication dated 09.09.2013 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 under section 163(3) or an additional assessment under section 163(2).

[106] 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.

[107] 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.

[108] 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".

[109] 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].***

[110] 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 assesment has to be done within the time bar period. His Lordship stated at p. 32:

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

[111] 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 done within the prescribed time".*

[112] 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.

[113] 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).

[114] 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.

[115]*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.

[116] 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.."

[117] 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].

[118] 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.

[119] 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.

[120] 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.

[121] 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.

[122] 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.

[123] 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.."*

[124] 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".*

[125] 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".*

[126] 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".*

[127]. 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".*

[128] 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".*

[129] 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.

[130] 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.

[131] 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"..

[132] 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).

[133] 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. I am also of the view that the absence of any separate charge number in the letter of the assessor dated 09.09.2013 does not make the assessment invalid. 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.

[134] I reject the contention of the Appellant that the assessment was in fact made on 29.11.2013 and that the letter dated 09.09.2013 is only a source document which is referred to in the notice of assessment. In the present case, the letter of intimation dated 09.09.2013 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 09.09.2013, 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

[135] The next crucial question is to consider, even if the assessment was made on 09.09.2013, whether the assessment should have been made on or before 31.03.2013 and if so, whether the assessment made on 09.09.2013 is nevertheless time barred under section 163(5) of the Inland Revenue Act (as amended).

[136] Dr. Felix submitted that even if the assessment was made on 09.09.2013, as asserted by the Respondent, the applicable law for the year of assessment 2010/2011 commended **on 01.04.2010 and ended on 31.03.2011** 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 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**. On that basis, he argued that the amendment made to section 163(5) of the Act, No. 22 of 2011 had no retrospective effect in terms of section 56 of the said Act.

[137] 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 09.09.2013, it was time barred within two years from the end of the relevant year of assessment 2010/2011 (i.e., by 31.03.2013) 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* SC Appeal No. 46/2016 decided on 16.12.2021 in support of his contention.

[138] On the other hand, Mr. Balapatabendi 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 01.04.20111, 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 08.11.2011 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 2013; (v) the assessment was made on 09.09.2013 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.

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

1. If the assessment was made on 09.09.2013, whether the Inland Revenue (Amendment) Act, No. 19 of 2009 applied to the year of assessment 2010/2011;

2. If the Inland Revenue (Amendment) Act, No. 19 of 2009 applied to the year of assessment 2010/2011, whether the assessment should have been made on or before 31.03.2013, and if so, whether the assessment that was made on 09.09.2013 is time barred;

3. If the Inland Revenue (Amendment) Act, No. 22 of 2011 applied to the year of assessment 2010/2011, with retrospective effect, whether the period given to the assessor to make the assessment for the year of assessment 2010/2011 had been extended from 31.03.2013 to **30.11.2013**, in terms of the Inland Revenue (Amendment) Act, No. 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 **30.11.2013**, and if so, whether the assessment made on 09.09.2013 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

[140] 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

[141] 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

[142] 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.*

[143] 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

[144] 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.

[145] 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).

[146] In the present case, the assessment related to the year of assessment 2010/2011, which commenced on 01.04.2010 and ended on 31.03.2011. 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".

[147] The Inland Revenue (Amendment) Act, No. 19 of 2009 came into effect on **01.04.2009** and thus, *prima facie*, the law for the year of assessment 2010/2011 is 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 (2010/2011), which means by **31.03.2013.** 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 **30.11.2011** and the assessee filed its return on 08.11.2011. The assessor was required to make the assessment on or before **31.03.2013** for the year of assessment 2011/2011 under the Inland Revenue (Amendment) Act, No. 19 of 2009. The time bar that will be triggered in the year of assessment 2010/2011 under the Inland Revenue Act, No. 19 of 2009 is as follows:

Return to be filed for the year of assessment 2010/2011	-	08.11.2011
End of the year for 2010/2011	-	31.03.2011
Assessment must be made on or before	-	31.03.2013
Assessment was made on	-	09.09.2013

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

[148] While the said time period given to the assessee to file returns, and to the assessor to make his assessment for the year of assessment 2010/2011 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 and the said amendment was certified by the Speaker on 31.03.2011. The Inland Revenue (Amendment) Act, No. 22 of 2011 however, came **into operation on 01.04.2011**

[149] 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 **by two months**, viz. from March 31st 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. until 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 **2010/2011** on or before **31.03.2013** but the assessor made the assessment for the year of assessment **2010/2011** on **09.09.2013** 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 2010/2011 from **31.03.2013 to 30.11.2013**.

[150] The question before us is to decide whether the assessment issued for the year of assessment 2010/2011 on 09.09.2013, was time barred for the failure to make the assessment on or before 31.03.2013 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 **31.03.2013 to 30.11.2013** with retrospective effect to make the assessment for the year of assessment **2010/2011**

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

[151] 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 Constotution, 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

[152] 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

[153] 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).

[154] 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).

[155] 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 l**egislature 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

[156] 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."*

[157] 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).

[158] 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."

[159] 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

[160] 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.

[161] 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 31.03.2013 to 30.11.2013. 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**.

[162] 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.

[163] Dr. Felix strongly relied on the decision of the Supreme Court in *Seylan Bank PLC v. The Commisssioner 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 31.03.2013 for the year of assessment 2010/2011 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.

[164] In the case of *Seylan Bank PLC v. The Commisssioner 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

the amendment made to section 163 (5) of the principal enactment came into force on 01.04.2009 (see-section 27(6)). 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 **30.03.2011).** 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

[165] 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.***

[166] 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 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 succeding 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 restrospective 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 the year 2007/2008 and issued against the assessee is not time barred (p.6).

[167] 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 Commisssioner 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**.

[168] 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 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 into 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].*

[169] 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 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)".*

[170] 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. In the present case, however, the assessee filed its return after the Amending Act came into force and the time period to make the assessment had not expired by the time the amending Act came into force;

2. 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;

3. 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.

4. The Supreme Court has 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);

5. 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;

6. 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;

[171] 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.

[172] 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) therefore, the amending Act operates with prospective effect from 01.04.2009 and not to the year of assessment 2007/2008. 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.**

[173] With regard to the second part of the decision, it is not in dispute that the return had not filed and the time period for making the assessment had not expired by the time the amendments were made to section 163(5) **by the Inland Revenue (Amendment) Act, No. 22 of 2011.** The only distinction is that in Seylan Bank case, the assessee had already filed its return by the time the amendments were made, which deprived the assessee to benefit from the extended period given to file the return. So, that factor was an additional ground 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.

[174] 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.

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

[176] Accordingly, it is not possible to take into account only that second part of the judgment and disregard the first part which is the ratio, which lays down the principle 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 amendments to made to section 163(5) by the Act, No. 19 of 2011 does not apply to the year of assessment 2007/2008.

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

[177] 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.

[178) Now, 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 in the present case for the year of

assessment 2010/2011 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).

[179] 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.]

[180] 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**.

[181] 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****."*

[182] 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.****]"*

[183] 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.*

[184] 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 in as much as the period of four years had to be computed **from the end of 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.**

[185] 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

[186] 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".*

[187] 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 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. ..... "***

[188] 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 effect 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

[189] 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 the principal enact by the Act, No. 22 of 2011 has been rebutted by any express provision in that Act itself.

[190] 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. 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 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

[191] 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.** 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

[192] 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 31.03.2013 to 30.11.2013 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.

[193] 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 2010/2011 from 31.03.2013 to 30.11.2013.

[194] 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 09.09.2013 and the notice of assessment is dated 29.11.2013. 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 <u>any year of assessment on or after 1 April 2011 and not to the year of assessment 2010/2011 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.

[195] For those reasons, I hold that the amendments made to section 163(5) of the principal enactment 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 2010/2011. The assessor does not get an extended lease of life to make the assessment for the year of assessment 2010/2011 after the time period for making the assessment expired on 31.03.2013 in terms of section 56 of the Inland Revenue (Amendment) Act, No. 22 of 2111.

[196] 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 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 from 31.03.2013 to 30.11.2013 to make the assessment for the year of assessment 2010/2011, after the time bar period expired on 31.03.2013.

[197] For those reasons, I hold that although the assessment was made on 09.09.2013, the assessment for the year of assessment 2010/2011 was time barred when it was not made on or before 31.03.2013 in terms of section 163(5) of the Inland Revenue Act (as amended). For those reasons, the question of law No. 2 is answered in favour of the Appellant.

Question of Law No. 3

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

[198] 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 27.12.2013, but the Appellant did not receive the purported acknowledgement of appeal dated 09.01.2014. The Appellant came to know about the purported acknowledgement only when it was found in the bundle of documents tendered to the TAC by the Respondent;

2. The purported acknowledgement has been signed by Mr. S. Jayasinghe, Senior Assessor, Large Taxpayer Appeal Unit, who is not statutorily authorized to acknowledge an Appeal under section 208 of the Inland Revenue Act, and therefore, the acknowledgement cannot be considered as a legally valid acknowledgement under section 156(6) of the Inland Revenue Act.

3. The determination of the appeal was received by the Appellant on 07.01.2016 and thus, that date should be considered as the date of the determination.

Therefore, the determination of the Commissioner General is time barred under section 165(14) of the Inland Revenue Act.

[199] On the other hand, Mr. Balapatabendi submitted that the appeal was received on 27.12.2013 and the determination was made by the CGIR on 16.12.2015, and the determination was forwarded to the Appellant by letter dated 05.01.2016. For those reasons, he submitted that the determination of the appeal is not time barred in terms of section 165 (14) of the Inland Revenue Act.

[200] The TAC in rejecting the argument of the Appellant stated:

"It is to be noted that the date of the determination in this case was 16.12.2015 and the date of the handing over of the appeal to the IRD was on 27.12.2013. As there was no acknowledgement, determination period of two years should be calculated, based on the date of handing over of the Appeal, which is 27.12.2013 and therefore, the determination should be made on or before 26.12.2015. Since the determination was made on 16.12.2015, it is evident that it has been made within the stipulated period of two years……

Section 165(14) of the Act states that……

Accordingly, the intention of the law is to determine the Appeal within two years and it does not make any reference to the receipt of the determination. Since the Appeal has been determined within the stipulated period of two years and few days delay in receiving the determination by the Appellant has not caused any prejudice to him. We are unable to agree with the contention of the Appellant and we are of the view that the determination in this case is not time barred".

[201] The Appellant relies on section 208 of the Inland Revenue Act and argues that the Senior 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 Commssioner."

[202] 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.

[203] It is patently clear that the senior assessor who is also an assessor has only performed an administrative function conferred by section 165 (6) of the Act and signed the acknowledgement letter, acting under the authorisation of his Superior Officers rather than performing any discretionary power in terms of the provisions of the Inland Revenue Act. In the result, the fact that a senior assessor signed the acknowledgement letter, or that there is no reference in that letter that the assessor/senior assessor signed the acknowledgement "*for and on behalf of the Commissioner-General"* will not make the acknowledgement of the appeal invalid.

[204] The Appellant has further claimed that no acknowledgement was received by him 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 27.12.2013 under section 165 (1) of the Inland Revenue Act. There is no dispute that the appeal made by the Appellant to the Commissioner-General was received on 27.12.2013. The TAC brief (p 28) contains an acknowledgement of the appeal dated 09.01.2014, which states that the appeal was received on

27.12.2013. However, no proof of the posting of that acknowledgement has been produced by the Respondent. 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.***

[205] 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.

[206] 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. 27.12.2013). In the present case, the appeal shall be deemed to have been received by the Commissioner General on 27.12.2013. Section 165(14) of the Inland Revenue Act provides that the appeal shall be determined by the Commissioner-General within a period of two years from the date on which such appeal is received by the Commissioner General. Section 165(14) of the Inland Revenue Act states:

> *"Every petition of appeal preferred under this section, shall be agreed to or determined by the Commissiioner-General, within a period of two years from the date on which such petition is received by the Commissioner General, unless the agreement or determination or such appeal depends on-*
>
> *(a)...*
>
> *(b)...*

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

[207] Accordingly, the appeal shall be determined by the Commissioner General within a period of 2 years from the date of the receipt of such appeal. The appeal was received by the Commissioner General on **27.12.2013** and the appeal was determined by the Commissioner General on **16.12.2015** (Vide- page 21 of the TAC brief). The said determination was forwarded to the Appellant by letter dated 05.01.2016 (Vide-pp. 21-22 of the TAC brief). It is absolutely clear that the appeal has been determined by the Commissioner General within a period of 2 years from the date on which the appeal was received in terms of section 165(14) of the Inland Revenue Act. Accordingly, the determination of the Commissioner General of Inland Revenue is not time barred.

[208] The Appellant has further stated that the determination of the appeal was received by the Appellant on **07.01.2016** and therefore, the date of the determination should be considered as the date of the determination. It is not in dispute that the appeal was determined on 16.12.2015 and the determination was communicated to the Appellant by letter dated 05.01.2006 (pp 21-22 of the TAC brief). There is nothing to indicate in section 165(14) that the determination of the appeal shall be sent to the Appellant within a period of 2 years from the date on which such appeal is received by the Commissioner General. It only requires the Commissioner General to determine the appeal within a period of 2 years from the date on which such appeal is received.

[209] Accordingly, there is no substance in the argument that the determination of the appeal is time barred since the determination was not served on the Appellant within the statutorily prescribed time period of 2 years from the date of the determination of the appeal in terms of section 165(14) of the Inland Revenue Act. For those reasons, I am of the view that the question of law, No. 3 should be answered in favour of the Respondent.

Question of Law No. 4

Deductibility of NBD paid at the point of importation of motor vehicles and motor spare parts under Section 26(1)(l)(iii) of the Inland Revenue Act

[210] At the hearing, Dr. Felix submitted that the Appellant is a person referred to in Section 2 (1)(a) of the Nations Building Tax Act (hereinafter referred to as the NBT Act) and paid the Nation Building Tax (hereinafter referred to as the NBT) at the point of importation under Section 3(1)(i) read with section 5 of the NBT Act. He submitted that the Regulations made by the Minister of Finance under section 212 of the Act and published in Gazette Extraordinary No. 1606/31 dated 19.06.2009 by which the two thirds of NBT charged by the NBT Act was regarded as a prescribed levy as provided by section 26(1)(l) (iii) of the Inland Revenue Act, No. 10 of 2006, does not apply to the Appellant.

[211] His contention was that once the NBT was paid by the Appellant at the point of importation and collected by the Director-General of Customs, the Appellant does not fall within the said Regulation which only refers to a person referred to in paragraphs (b)-(d) of subsection 1 of section 2, and chargeable with tax in respect of the liable turnover of such person for such relevant quarter as the use of the word "quarter" in the Regulation reflects that the relevant Gazette was applicable only to those paying NBT on a quarterly basis.

[212] He further submitted that the Appellant being an importer who paid NBT at the point of importation does not fall within the "prescribed levy" as provided in section 26 (1)(l) (iii) of the Inland Revenue Act read with the said Regulation. He argued that the NBT paid at the point of importation does not come within the scope of the restriction on deductibility imposed by the said Regulation as a prescribed levy. On this basis, he submitted that the payment made by the Appellant at the point of importation is deductible as an outgoing or expense incurred by the Appellant for the production of income under Section 26 (1) of the Inland Revenue Act, No. 10 of 2006.

[213] On the other hand, Mr. Balapatabedi submitted that the prohibition on deduction in terms of section 26 (1) (l) (iii) applies to all four persons referred to in paragraphs (a)-(d) of subsection 1 of section 2, whether they are importers, manufactures, wholesale and retail salers or service providers. He submitted that, therefore, the Appellant being an importer within the meaning of section 2 (1) (a) of the NBT Act is not entitled to claim deduction of NBT paid on its imports under section 26 (1)(l)(iii) of the Inland Revenue Act. His contention was that the Regulation was published for the purpose of specifying what a prescribed levy should be in relation to two-third of NBT. He further submitted that the contention of the Appellant that the importers are entitled to deduct

the NBT paid while other persons referred to in paragraphs (b)-(d) of subsection 1 of section 2 are prohibited from deducting the same, will create a disparity between the liability to NBT of importers as opposed to the other classes of persons referred to in paragraphs (b)-(d) of subsection 1 of section 2, which is inconsistent with section 2 of the NBT Act.

[214] The TAC held that the Regulations made by the Minister of Finance under section 212 of the Act and published in Gazette Extraordinary No. 1606/31 dated 19.06.2009 apply to the Appellant, and the NBT paid at the point of importation would be a prescribed levy within the contemplation of the said Regulation. The findings of the TAC at pp 23-24 of the TAC brief are as follows:

"Thus, the contention of the Appellant Company that the Regulations do not apply to the Appellant is not tenable. The NBT paid at the point of importation would be a prescribed levy within the contemplation of the said Regulations. It is unlikely that the Regulations would have been promulgated so as to apply only in respect of some of the persons and not all of them, who are liable under the NBT Act, No. 9 of 2009 that sets out the Regulations made by the Minister under section 212 of the Inland Revenue Act, No. 10 of 2006, should be applied to the importer too, like any other taxpayer who is liable for NBT under the NBT Act. We are of the view that two thirds of the Nation Building Tax charged by the Nation Building Tax Act, No. 9 of 2009, whether collected by the Inland Revenue or Customs or by any other agent, shall be considered as a prescribed levy and recovery of such amount be made in calculating the annual income tax of the tax payer.

According to section 26(1)(l) (iii) of the Inland Revenue Act, No. 10 of 2006, for the purposes of ascertaining the profits and income of any person from any source, no deduction shall be allowed in respect of any prescribed tax or levy. As such, in our view, the Appellant Company cannot claim the NBT paid at the point of importation as a permissible deduction on the basis that it is an outgoing or expense incurred for the production of profits or income, since it falls under prescribed levy and is thus expressly disallowed under section 26(1)(l)(iii) of the Inland Revenue Act, No. 10 of 2006".

Questions for determination

[215] In view of the above-mentioned submissions of the parties, the questions for determination are:

1. Whether the regulations made by the Minister of Finance under Section 212 of the NBT Act and published in Gazette Extraordinary No. 1606/31

dated 19.06.2009 would only apply to a person who paid the relevant tax quarterly, and not to a person who paid the NBT at the point of importation under section 3(1)(i) of the NBT Act, No. 9 of 2009;

2. If so, whether the NBT paid by a person referred to in section 2(1)(a) and paid at the point of importation under section 3(1)(i) read with section 5 falls within the scope of the Regulation is a "prescribed levy" envisaged in subsection (iii)(1) l) of section 26 of the Inland Revenue Act, No. 10 of 2006 as a non-deductible outgoing or expense incurred for the production of income under section 26(1) of the Act.

3. If so, whether the payment of NBT at the point of the importation by the Appellant being an importer of such Honda and Hero Honda branded products becomes a 'prescribed levy' within the meaning of section 26(1)(l)(iii) of the Inland Revenue Act, and falls outside the prohibition of deduction provided in section 26 (1)(l) (iii) of the Inland Revenue Act.

Nation Building Tax (NBT)

[216] The Nation Building Tax (NBT) is imposed by the Nation Building Tax Act, No. 9 of 2009 as amended by subsequent Nation Building Tax (Amendment) Acts. The Act was introduced to impose and collect the NBT tax on the liable turnover of every person to whom the Act applies. It came into operation on February 1, 2009.

Person liable for NBT

[217] Section 2 (1) of the Nation Building Tax Act, No. 9 of 2009 as amended by Nation Building Tax (Amendment) Act, No. 10 of 2011 provides that the provisions of the Act apply to every person who-

a. ***imports of any article****, other than any article comprised in the personal baggage of the passenger,* ***into Sri Lanka,*** *["baggage" shall have the same meaning as in section 107A of the Customs Ordinance (Chapter 235)]; or*

b. ***carries on the business of manufacture of any article****; or*

c. ***carries on the business of providing a service*** *of any description: or*

d. ***carries on the business of wholesale or retail sale of any article*** *other than such sale by the manufacturer of that article being a manufacturer to whom the provisions of paragraph (b) applies."*

[218] Accordingly, NBT is payable by every **person** (individual, Company, body of persons) or partnership that carries out any of the following business activities in Sri Lanka:

1. importing (s. 2 (1)(a)
2. manufacturing (s. 2 (1)(b);
3. service providers (s. 2 (1)(c);
4. wholesale and retail sales (s. 2 (1)(d)

[219] In the present case, there is no dispute that the Appellant is engaged in the business of importing and distributing of "Honda" and "Hero Honda" branded products into Sri Lanka and the Appellant is a NBT registered company. Accordingly, the Appellant falls within the scope of section 2(1) (a) of the Act as a person to whom the NBT Act applies.

Imposition of a Nation Building Tax

[220] Section 3 (1) of the Nation Building Tax Act, No. 9 of 2009 as amended by the Nation Building Tax (Amendment) Act, No. 32 of 2009, and the Nation Building Tax (Amendment) Act, No 10 of 2011 relates to the Imposition of a Nation Building Tax. It reads as follows:

"3 (1) A tax to be called the "Nation Building Tax" (hereinafter referred to as "the Tax") shall, subject to the provisions of this Act, be charged from every person to whom this Act applies calculated at the appropriate rate specified in the Second Schedule to this Act, in the following manner:

(i) in the case of a person referred to in paragraph (a) of subsection (1) of section 2, who imports any article into Sri Lanka on or after January 1, 2009 the tax shall be chargeable in respect of the liable turnover of such person arising from the importation into Sri Lanka of such article;

(ii) in the case of a person referred to in paragraph (b) (c) or (d) of subsection (1) of section 2, for every quarter commencing on or after January1, 2009 (hereinafter referred to as "relevant quarter", the tax shall be chargeable in respect of the liable turnover of such person for such relevant quarter....."

Liable turnover in the case of an importer

[221] Section 3 (2) provides that the "liable turnover"

(i) with reference to any person referred to in paragraph (a) of subsection (1) of section 2 (importer) arising from the importation of any article, means the value of that article ascertained for the purpose of Value Added Tax under section 6 of the Value Added Tax Act, No. 14 of 2002, but does not include the value of any excepted article referred to in the First Schedule to this Act;

(ii) with reference to any person and to any relevant quarter referred to in paragraph (b) of subsection (1) of section 2, means the sum receivable whether received or not from ther sale in Sri Lanka, in that quarter, of every article manufactured by such person, other than any excepted article referred to in the First Schdule to this Act;

(iii) with reference to any person and to any relevant quarter referred to in paragraph (c) of subsection (1) of section 2 and to any relevant quarter means the sum receivable, whether received or not, from the provision in Sri Lanka of any service referred to in that paragraph other than any excepted service referred to in the First Schedule to this Act;

(iv) with reference to any person referred to in paragraph (d) of subsection (1) of section 2 and to any relevant quarter means the sum receivable whether received or not from the sale in that quarter, of any article , other than-
...."

Deductions allowed in ascertaining profits and income-General Deduction Rule-Section 25 (1)

[222] The NBT shall, subject to the provisions of the Act, be charged from every person to whom the Act applies and calculated at the rate in the aforesaid manner set out in section 3 (1). The assessor has determined that the two thirds of the NBT which was chargeable on the Appellant, and was payable by the Appellant falls with the prescribed levy which is not an allowable deduction in ascertaining the profits and income of any person from any source under section 26 (1)(l) (iii) of the Inland Revenue Act. Dr. Felix's submission was that the NBT incurred by any person would be allowed as a permissible deduction as an outgoing or expense incurred in the production of profits or income unless expressly disallowed by section 26 of the Inland Revenue Act. His submission appears to be that the NBT collected by the Director General of Customs from an importer would constitute part of the cost of the imported

article and therefore, it would be deductible as an expenses when computing the taxable profits, and the provisions of section 3(1)(i) and section 4 of the NBT Act and the Regulation made by the Minister of Finance are intended to exclude importers from the scope of the prescribed levy envisaged in section 26(1)(l)(iii) of the Inland Revenue Act.

[223] As it was the position of the Appellant that the prohibition of deduction contained in section 26 (1) (l)(iii) of the Inland Revenue Act does not apply to the Appellant, who falls within the ambit of a person under section 2(1)(a) of the Act, it is significant, first, to refer to section 26 (1) of the Inland Revenue Act. Although Section 26 of the Inland Revenue Act does not specifically refer to the NBD Act, or that NBD paid by an importer at the time of importation is non-deductible, section 8(c) of the NBT Act provides that every reference to assessable income or taxable income in any provision of the Inland Revenue Act, shall be deemed to be a reference to the relevant quarter or liable turnover or tax charged and levied in the provisions of the NBT Act.

[224] Income chargeable with income tax is, however, arrived at after taking into account the various exemptions and deductions allowed under the Act and thus, the profits and income or profit or income on which income tax is payable may be either exempted or deducted by the provisions of the Act. It was the contention of the Appellant that the NBT paid by the Appellant at the point of importation is fully deductible when computing its profits and income in terms of section 25 (1) of the Inland Revenue Act, and it will not be considered to be a prohibited deduction in the form of a prescribed levy for the purpose of section 26 (1)(l) (iii) of the Act.

Deductions not allowed in ascertaining profits and income-General Prohibition of Deduction Rule-S.26

[225] As Section 25 (1) of the Inland Revenue Act provides that all outgoings and expenses can generally be deducted in terms of the general rule of deduction which contains, what is known as a general rule of deduction that allows the deduction of "all outgoings and expenses" incurred in the production of profits or income of any person. While Section 25 (1) refers to general deductions allowed in ascertaining profits or income, Section 26 of the Inland Revenue Act deals with deductions not allowed in ascertaining profits, and income (general prohibition of deduction).

[226] In essence, section 26 of the Inland Revenue Act prescribes a negative test of deductibility and prohibits deductions in respect of all outgoings or expenses specified in section 26 of the Act. This means that even if they fall within section 25 (1), it may be excluded under section 26 for the purpose of the general deductibility or general limitations on deductibility. While section 25 (1) refers to general deductions allowed in ascertaining profits or income, section 26 deals with deductions not allowed in ascertaining profits, and income (general prohibition of deduction). In essence, section 26 of the Act prescribes a negative test of deductibility and prohibits deductions in respect of all outgoings or expenses specified in section 26 of the Act. This means that even if they fall within section 25 (1), we will still need to consider whether they would be excluded under section 26 for the purpose of the general deductibility or general limitations on deductibility.

[227] Section 26(1)(l)(iii) of the Inland Revenue Act provides that for the purpose of ascertaining profits or income of any person from any sources, no deduction shall be allowed in respect of "any prescribed levy". It reads as follows:

> "For the purpose of ascertaining the profits or income of any person from any source, no deduction shall be allowed in respect of-
>
> (l)
>
> *(iii) any prescribed tax or levy;or…"*

[228] Accordingly, any prescribed levy has been expressly disallowed as deductions, and it is not an allowable deduction in ascertaining the profits and income of any person from any source under section 26 (1)(l) (iii) of the Inland Revenue Act. This means that any NBT paid by a person would fall within the scope of the prescribed levy where such NBT is charged from a person referred to in section 2(1) and payable on a quarterly basis. The resulting position is that the NBT incurred by a person may be permitted as a permissible deduction as an outgoing or expense incurred in the production of profits or income, unless expressly disallowed by section 26 (1)(l) (iii) of the Inland Revenue Act, No. 10 of 2006 (as amended).

[229] Dr. Felix strongly argued that the NBT tax payments do not come within the contemplation of a prescribed levy envisaged by section 26 (1)(l)(iii) of the Inland Revenue Act. Dr. Felix referred to the Sinhala version of the Regulation

and submitted that it is clearly stated that the two third NBT tax applies to every person who paid NBT on a quarterly basis and it did not relate to chargeability alone and thus, the prescribed levy is limited to the persons specifically identified rather than encompassing to persons who pay NBT. The point that was argued by Dr. Felix was that the words "quarterly payments" referred to in the Regulations are intended by the Regulation to be limited to the prescribed levy of two thirds of the NBT payable by persons referred to in section 2(1)(b)-(d), and not importers who paid the NBT at the point of importation. Dr. Felix based his argument on the reference to quarter in the Regulation and submitted that the Appellant being an importer has paid NBT under section 3 (1)(a) at the point of importation and not quarterly and therefore, such payment of NBT is not a prescribed levy.

[230] In view of the argument of the Appellant that the two thirds of NBT charged by the NBT Act, which was regarded as a prescribed levy as provided by section 26(1)(l)(iii) of the Inland Revenue Act, No. 10 of 2006, applies only for the persons **who pay NBT quarterly,** and not to persons who pays NBD at the point of importation, it is important to refer to the said Regulation, No. 1606/31 dated 19.06.2009. The Regulations made by the Minister under section 212 of the Inland Revenue Act, read with section 26 and published in the Gazette Notification No. 1606 dated 19.06.2006 provides as follows:

> *"Two third of the Nation Building Tax charged by the Nation Building Tax Act, No. 9 of 2009 payable for the period commencing on May 1, 2009 and ending on une 30, 2009, and* ***for every quarter*** *commencing on or after July,1, 2009 shall for the purposes of Sub-paragraph (iii) of Paragraph (1) of Section 26 of the Inland Revenue Act, 10 of 2006 be a prescribed levy".*

[230] The Sinhala version of the Regulation reads as follows:

> **"2009 මැයි මස 01 වැනි දිනෙන් ආරම්භවන 2009 ජූනි මස 30 වැනි දිනෙන් අවසන් වන කාල පරිච්ඡේදය සඳහා සහ 2009 ජූලි මස 01 වැනි දින හෝ ඉන්පසු ආරම්භ වන්නා වූ සෑම කාර්තුවක් වෙනුවෙන් ම ගෙවිය යුතු 2009 අංක 09 දරන ජාතිය ගොඩනැගීමේ බදු පනත මගින් අය කරනු ලබන ජාතිය ගොඩනැගීමේ බද්දෙන් තුනෙන් දෙකක කොටස, 2006 අංක 10 දරන දේශීය ආදායම් පනතේ 26 වැනි වගන්තියේ (i) වැනි උපවගන්තියෙහි (ඕ) ඡේදයෙහි (iii) උපඡේදයේ කාර්යයන් සඳහා නිශ්චිත බද්දක් විය යුතු ය."**

[231] It is obvious that there is no any contradiction between the Sinhala version and the English version of the Regulation, and in terms of the said Regulation, two-third of the NBT charged under the NBT Act and payable for every quarter commencing from 1 May 2009 and ending on 30 June 2009 and for every quarter commencing on or after 1 July 2009, but prior to January 1, 2011 shall for the purpose of subsection (iii) of paragraph (l) of section 26 of the Inland Revenue Act, be a prescribed levy. He further relies on section 4 of the NBT Act and argues that the NBT disallowed under section 26 (1)(l) (iii) is the NBT payable under section 4 of the NBT Act, which refers to NBT paid by persons referred to in section 2(1)(b)(d) and the prohibition imposed by section 26(1)(l) (iii). Section 4 of the NBT Act reads as follows:

> *(4) Notwithstanding the provisions of subsection (1), the tax shall be chargeable from any person referred to in paragraph (b), paragraph (c) or paragraph (d) of subsection (1) of section 2, for any* ***relevant quarter*** *if-*
>
> *i. such quarter is a relevant quarter, which commenced prior to January 1, 2011 and the liable turnover of such person for that relevant quarter does not exceed the sum of six hundred and forty thousand rupees;*
> *ii. such person has paid for that relevant quarter which commenced prior to January 1, 2011 optional Value Added Tax Chapter III of the Value Added Tax Act, No. 14 of 2002;*
> *iii. liable turnover of such person for from the supply of any goods or services other than services referred to in paragraph (iv) and which does not exceed;....*
> *iv. such quarter is a quarter commencing on or after January 1, 2011 and the liable turnover of such person from.....*

Payment on a quarterly basis

[232] It is not in dispute that the NBT Act applies to any person referred to in section 2(1)(a) who imports any article, other than any article referred therein, and such person should pay NBT at the time of importation and such NBT shall be collected by the Director-General of Customs in terms of section 5 of the Act. Any such amount collected by the Director-General shall be deemed to be the tax chargeable in respect of the liable turnover arising from the importation of such article. The Appellant contends that the use of the word "**every quarter"** in the Regulation reflects that the relevant gazette was applicable only to those paying NBT on a quarterly basis and not to any importer referred to in

paragraph (a) of subsection 1 of section 2. Referring to the Regulation, Dr. Felix submitted that the Regulation refers to the NBT charged and payable on a quarterly basis but does not refer to all NBT charged an payable by any importer at the point of importation whether such importer is NBT registered.

[233] Dr. Felix, referring to the judgment of this Court in *Stafford Motor Company (Private) Limited v. Commissioner General of Inland Revenue*, CA Tax 17/2017 decided on 15.05.2019 submitted that the Court of Appeal erred in law by expanding the scope of the Regulation by assuming that where the charging section is engaged, any NBT that comes within the scope of the charge is covered by the Regulation so as to encompass all persons subject to the charge to NBT. Janak de Silva J. referring to the prescribed levy envisaged in section 26(1)(l)(iii) of the Inland Revenue Act, and the reliance of the identical submission made on behalf of the Appellant, stated in that case at page 15:

> *"The Respondent has based its argument on the reference to quarter in the Regulation and submits that as an importer it does not pay NBT quarterly but only in respect of the liable turnover of such person arising from the importation into Sri Lanka of such article and as such the NBT it pays on every import is not a prescribed levy.*
>
> *"Court is unable to accept the submission. The Regulation covers both the charging section as well as the calculation part referred to above. That is why the Regulation reads "two third of the Nation Building Tax charged by the Nation Building Tax Act, No. 9 of 2009 payable for the period commencing on May 1, 2009 and ending on June 30, 2009, and for every quarter commencing on or after July 1, 2009...." If one to accept the submission of the Appellant, it would amount to excluding part of the Regulation in its interpretation.*
>
> *Further if the Minister actually intended to exclude importers from the application of the Regulation, he could easily have done so by referring to only the categories of enterprises referred to in paragraphs (b) , (c) and (d) of Section 2 (1) of NBT Act"*

[234] Dr. Felix's argument is that the prescribed levy referred to in the Regulation only refers to the quarterly payment of NBT and not NBT charged by the NBT Act is not reflected in Section 3 of the NBT Act which refers to the imposition of a NBT tax on any person including an importer referred to in section 2(1)(a) to whom the NBT Act applies, and deals with two distinct elements, namely, the charging section and the manner of calculation.

Charging section & Machinery section

[235] The rule of construction of a charging section is that before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section. A charging section or a provision imposing a penalty has to be construed strictly. If a person has not been brought within the ambit of the charging section by clear words, he cannot be taxed at all. (*Indian Banks' Association, Bombay v. M/s. Devikala Consultancy Services*, AIR 2004 SC 2015). On the other hand, a machinery provision deals with calculation and collection of tax and the said provision is independent of the charging provision.

[236] Section 3 (1) of the Act deals with the following two distinct elements for the purpose of imposition of the NBT, namely:

1. The first element relates to the charging section by which the NBT is charged from every person who is liable to NBT in terms of Section 2 (1) of the Act; (charging section)

2. The second element deals with the calculation of the NBT at the appropriate rate specified in the second schedule to the Act, and the NBT is calculated in the following manner (machinery section):

   (i) in the case of importers of any articles referred to in paragraph (a) of subsection (1) of section 2, at the appropriate rate, in respect of the **liable turnover arising from the importation of such articles into Sri Lanka;**

   (ii) in the case of any other person referred to in paragraphs (b), (c) or (d) of subsection (1) of section 2, section 2(1) (b), (c) and (d), at the appropriate rate, **in respect of the liable turnover of such person for such relevant quarter.**

[237] In terms of the first element of section 3 (1), which refers to the charging section, charging the NBT from every person to whom the NBT Act applies, whether an importer or manufacturer or a service provider or wholesale or retail seller. The Legislature has deliberately included in the charging section an importer as a person to whom the NBT Act applies, and the word "person" referred to in paragraph (a) of subsection 1 of section 2 in the charging section cannot exclude such an importer who had been deliberately included in the

charging section. The charging section which fixes the liability is strictly construed, but that rule of strict construction is not extended to the machinery provisions which are construed like any other statute. The machinery provisions must, no doubt, be so construed as would effectuate the object and purpose of the statute, and not defeat the same. (See *Whitney v. Commissioner of Inland Revenue* (1926) AC 37, *Commissioner of Income-tax v. Mahaliram Ramjidas* (1940) 8-ITR-442 (PC), *India United Mills Ltd. v. Commissioner of Excess Profits Tax, Bombay* (1955) 27-ITR-20 (SC); and *Gursahai Saigal v. Commissioner of Income-tax, Punjab* (1963) 48-ITR-1 (SC).

[238] The charge for the levy of the NBT that is payable by any person referred to in section 2(1)(a)-(d) is laid by the charging section [(the first element of section 3(1)], which provides that NBT shall be charged from every person to whom the NBT Act applies. The fact that the tax is calculated at the appropriate rate specified in the Second Schedule to the Act and in the manner provided in the second part of section 3 (1), namely subparagraphs (i) and (ii) of subsection (1) of section 3, and collected at an earlier stage at the point of importation will not in any way alter the nature or character of the NBT that is charged from every person to whom the Act applies. The reason is obvious. The NBT is charged from every person referred to in paragraphs (a)-(d) of section 2, which is completely in the realm of legislative wisdom.

[239] The object in enacting section 3 (1) of the NBT Act was to charge the NBT from every person to whom the NBT Act applies, and enable (i) the Director-General of Customs to collect on behalf of the Commissioner General of Inland Revenue, in case of a person referred to in paragraph (a) of subsection 1 of section 2; or (ii) the Commissioner-General of Inland Revenue, in case of other persons referred to in paragraphs (b)-(d), the legitimate NBT dues of the State. The measure to collect the tax by the Director-General of Customs on behalf of the CGIR from the persons to whom the NBT Act applies was enacted to facilitate the collection of NBT at the point of importation itself, or at an anterior stage rather than waiting for the collection at a later stage to avoid a substantial revenue due to the State from the NBT.

[240] Considered in the light of the convenient method of locating the persons easily and collecting the tax due in certain trades such as imports into Sri Lanka, the Legislature in its wisdom thought that it will facilitate the collection of the tax due from such importers at the point of importation at the appropriate rate specified in the Second Schedule to the Act, which also refers to tax rate of NBT

payable by any person to whom the NBT Act applies. It is not in dispute that the said Regulation was made under section 212 of the Inland Revenue Act for the purpose of specifying what a prescribed levy should be under subparagraph (iii) paragraph (l) subsection (1) of section 26 of the Inland Revenue Act. Neither the NBT Act nor the Inland Revenue Act authorizes the deduction of NBT paid by any importer at the point of importation. Under such circumstances, if the Minister actually intended to exclude importers from the application of the Regulation, he could easily have done so by referring only to the categories of enterprises referred to, exclusing part of the Regulation in its interpretation as stated by Janak de Silva, J. in *Stafford Motor Company (Private) Limited v. The Commissioner General of Inland Revenue* (supra, p. 15).

[241] In any event, the Regulation has to be read subject to the substantive provision of the principal Act, namely, the NBT Act and the Inland Revenue Act in dealing with the imposition of the NBT on persons to whom the NBT Act applies, and what a prescribed levy should be, as envisaged in Section 26 (1)(l)(iii) of the Inland Revenue Act. In the present case, the validity of Regulation in question is not challenged in the case stated, and therefore, the point raised by the Appellant should accordingly be decided on the basis that the said Regulation is valid. The question whether the Regulation which is interpreted in a particular manner would be inconsistent with NBT Act or the Inland Revenue Act does not arise in this case. The said Regulation cannot have an elevated position than that of the principal statute, and it must subverse and supplement the principal statute. The said regulation cannot supplement or supersede the charging section or have an elevated position than that of the principal statute, and it must subverse and supplement the principal statute. The Regulation must be consistent with the provisions of the Act and any provision mentioned in the Regulation which is inconsistent with the principal Act is required to be discarded.

[242] Dr. Felix submits that any NBT paid by a person would come within the contemplation of a prescribed levy in circumstances where such a tax is charged from a person and is payable by such a person on a quarterly basis. If this argument of the Appellant is acceptable, there exists a disparity between the categories of persons that become liable to NBT under Section 3 (1) of the NBT Act. There is nothing in the NBT Act which makes provisions that any person referred to in paragraph (a) of subsection 1 of section 2 is a special category of a person as opposed to other categories of persons specified in section 2 of the NBT Act. The Appellant invites this Court to hold that the Regulation applies

to such other categories of persons, which is an interpretation that is inconsistent with section 2(1) and section in section 3 (1) of the NBT Act.

[243] In any event, language of Regulation which must be read is clear and unambiguous and is not capable of reading in any manner to mean that the Regulation only applies to persons paying NBT on a quarterly basis when the NBT Act does not differentiate between categories of persons that become liable for NBT under Section 3(1) of the NBT Act. The Regulation made by the Minister under section 212 of the Inland Revenue Act for the purpose of specifying what a prescribed levy under section 26(1)(l)(iii) of the Inland Revenue Act, must be read subject to charging provision of the NBT Act as the Regulation cannot override the substantive provision of Section 3 (1) of the NBT Act.

[244] The absurdity of the Appellant's argument is that the NBT Act allows importers to deduct the sums paid as NBT as an outgoing or expense under section 26 (1) while prohibiting local manufacturers, service providers and wholesale and retail salers from such deductions on the basis their payments amount to a prescribed levy. The Regulation which cannot enlarge the meaning of the parent NBD Act refers to the (i) **two thirds of the Nation Building Tax charged by the Nation Building Tax Act, No. 9 of 2009** (ii) payable **for the period commencing on May 1, 2009 and ending on June 30, 2009,** and **for every quarter commencing on or after July 1, 2009** ... covers both the charging part and the manner of calculating the NBT tax set out in section 3 (1) of the NBT Act.

[245] The charging section in the NBT Act, which charges a person to whom the Act applies is unambiguous in the statutory language and thus, to resort to any interpretative process to unfold the legislative intent or whittle down the statutory language becomes impermissible and is contrary to the manifest intention of the Legislature. In view of the said perspective, it is idle to contend that the statutory provisions of the NBT Act (s. 3) read with the Inland Revenue Act (s. 26 (1)(l)(iii) lack legislative competence to prohibit the deduction of payment made by a person to whom the NBT Act applies, and liable to pay the NBT at the point of importation as a prescribed levy under Section 26 (1)(l) (iii) of the Inland Revenue Act.

[246] In the year of assessment 2010/2011, the Appellant being an importer to whom the NBT Act applies was chargeable with the NBT of Rs. 143,830,690 and was liable to pay such sum at the point of importation of motor vehicles and motor spare parts. The two third of such sum of NBT which was chargeable on

the Appellant and payable by the Appellant falls within the prescribed levy. The said prescribed levy, namely two thirds of NBT chargeable and payable at the customs fall within the non-deductible portion in ascertaining the profits and income of the Appellant in terms of section 26 (1)(l) (iii) of the Inland Revenue Act.

[247] For those reasons, I hold that the Tax Appeals Commission has correctly held that the Appellant cannot claim the NBT paid at the point of importation as a permissible deduction on the basis that it is an outgoing or expense incurred for the production of profits or income as it falls under the prescribed levy which is expressly disallowed under the 26(1)(l)(iii) of the Inland Revenue Act, No. 10 of 2006. For those reasons, the question of law No. 4 should be answered in favour of the Respondent.

Conclusion

[248] In these circumstances, I answer questions of law, Nos, 1, 3 and 4 arising in the case stated in favour of the Respondent and the question of law No. 2 is answered in favour of the Appellant. The question of Law, No. 5 is answered accordingly. Those answers are as follows:

1. No

2. Yes. Although the assessment was made on 09.09.2013, the assessment for the year of assessment 2010/2011 was time barred when it was not made on or before 31.03.2013 in terms of section 163(5) of the Inland Revenue Act (as amended).

3. No

4. No.

5. The Tax Appeals Commission did not err in law when it came to the conclusion with regard to the questions of law Nos. 1, 3 and 4 but the Tax Appeals Commission erred in law with regard to the question of law No. 2 as described in this judgment.

[249] In view of the answer given to the question of law No. 2 in favour of the Appellant, I annul the determination made by the Tax Appeals Commission dated 12.06.2018, and the Registrar is directed to send a certified copy of this judgment to the Tax Appeals Commission.

JUDGE OF THE COURT OF APPEAL

M. Sampath K.B. Wijeratne, J.

I agree.

JUDGE OF THE COURT OF APPEAL