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

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

**Mclarens Lubricants (Pvt) Ltd,**
No.193, Dr. Danister De Silva Mawatha,
Colombo 08.

**APPELLANT**

**CA No. CA/TAX/0026/2019**
**Tax Appeals Commission**
**No. TAC/IT /013/2016**

v.

**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.

**COUNSEL** : Neomal Gunawardena AAL., instructed by Nalin Samarakoon for the Appellant.

F. Jameel, SASG, P.C. with N. Wigneshwara DSG & Dr. Charuka Ekanayake for the Respondent.

**WRITTEN SUBMISSIONS** : 27.01.2022 (by the Appellant)

23.02.2022 (by the Respondent)

**ARGUED ON** : 02.12.2021

**DECIDED ON** : 19.05.2023

**M. Sampath K. B. Wijeratne J.**

## Introduction

The Appellant, Lanka Marine Services (Pvt) Ltd, is a limited liability company incorporated in Sri Lanka, engaged in the business of importing, manufacturing, and distributing lubricants.

The Appellant submitted its return of income for the year of assessment 2010/2011 claiming a tax exemption under Section 42 of the Inland Revenue Act No. 10 of 2006, as amended by Inland Revenue (Amendment) Act No. 19 of 2009, (hereinafter referred to as the 'IR Act')[1].

The Assessor, by letter dated 27th November 2013 rejected the return on the ground that the Appellant's sales made to marine companies cannot be identified as exports in terms of Section 42 of the Act. The Assessor was of the view the term *export* signifies '*goods transferred from one country to another*'. Accordingly, by the same letter, the Assessor communicated his reasons for not accepting the return, in terms of Section 163 (3) of the Inland Revenue Act, which also contained an estimated amount of assessable income and the tax payable for the year of assessment 2010/2011[2].

[1] At p. 94 & 96 of the appeal brief, Paragraphs 24 to 27 of the Appellant's written submissions dated 27th January 2022.
[2] At p. 92 o the appeal brief.

Thereafter, the Notice of Assessment dated 29th November 2013 was issued to the Appellant[3].

The company appealed to the Commissioner General of Inland Revenue (hereinafter referred to as 'the CGIR') against the said assessment, in terms of Section 165 of the Inland Revenue Act.

The CGIR heard the appeal and made his determination confirming the assessment and the reasons for the determination were communicated to the Appellant company by letter dated 15th December 2015.[4]

Being aggrieved by the said determination, the Appellant appealed to the Tax Appeals Commission (hereinafter referred to as 'the TAC') in terms of Section 7 of the Tax Appeals Commission Act No. 23 of 2011, as amended. (hereinafter referred to as 'the TAC Act')

The TAC by determination dated 25th June 2019 confirmed the determination of the Respondent, CGIR, and dismissed the appeal of the Appellant.

The Appellant then moved the TAC to state a case on the following questions of law for the opinion of this Court in accordance with Section 11 A of the TAC Act.

1. ***Whether the Assessment No. ITA 13291100321 VI which has purportedly been issued on 29th November 2013 but only posted to the Appellant by the CGIR on the 11th of December 2013 is time-barred in terms of Section 163 (5) (a) of the Inland Revenue Act, No.*** *10* ***of 2006 (as amended)?***

2. ***Whether the sale of lubricants to non- resident ships out of bonded warehouses by the Appellant can be considered as qualified exports within the meaning of Section 51 and/ or 42 of the Inland Revenue Act, No. 10 of 2006 (as amended)?***

[3] At p. 36 of the appeal brief.
[4] At p. 32 of the appeal brief.

## Analysis

1. ***Whether the Assessment No. ITA 13291100321 VI which has purportedly been issued on 29th November 2013 but only posted to the Appellant by the CGIR on the 11th of December 2013 is time-barred in terms of Section 163(5) (a) of the Inland Revenue Act, No. of 2006 (as amended)?***

In the case at hand, the relevant taxable period is 2010/2011, from 1st April 2010 to 31st March 2011. The Appellant Company tendered its income tax returns under Section 106 (1) of the IR Act No. 10 of 2006, as amended by Inland Revenue (Amendment) Act No. 19 of 2009, on the 30th November 2011[5]. The Assessor intimated to the Appellant his reasons for rejecting the return furnished by the Appellant by letter dated 27th November 2013[6].

As I have already stated above in this judgment, said letter contains the total amount of tax payable with the calculation thereof. The Assessor's assessment is thus set out in that letter. As provided in Section 163 (5) of the Act, the act to be conducted by the Assessor within the prescribed time is to *make* an assessment and not to send or serve the Notice of Assessment. Above all, the Appellant Company on its own admitted that the date of assessment is 27th November 2013, the date of the letter of intimation[7]. As a result, this Court does not have to rule on this matter on the basis of the Notice of Assessment, etc.

The argument advanced by the Appellant was that in view of the judgment of the Supreme Court in the case of *Seylan Bank PLC v. The Commissioner General of Inland Revenue*[8] (hereinafter referred to as the *'Seylan Bank case'*), the amendment made to Section 163 (5) (a) by Amendment Act No. 22 of 2011 will not apply to the instant case and, therefore, in terms of Section 163 (5) (a), as amended by (Amendment) Act No. 19 of 2009, the assessment is time-barred by the 31st of March 2013.

[5] *Supra* note 1.
[6] *Supra* note 2.
[7] *Vide* paragraph 19 of Appellant's Written Submission dated 27th January 2022.
[8] S.C. Appeal No. 46/2016.

The Respondent submitted that, according to the general rules of interpretation, the substantive provisions apply prospectively and the procedural provisions apply retrospectively. It was submitted that all the provisions mentioned in Section 56 (a) and (b) of the Amendment Act No. 22 of 2011 are substantive provisions and the Legislature enacted as such to give retrospective effect to these substantive provisions. The Respondent's contention was that under the general rule of interpretation, all procedural provisions including Section 106 (1) and 163 (5) (a) should operate retrospectively.

Adverting to the above issue, for clarity, I will reproduce the relevant parts of Sections 163 (5) (a) as amended by Inland Revenue (Amendment) Act No. 19 of 2009 and thereafter, the amendments made to the Section by (Amendment) Act No. 22 of 2011.

Section 163 (5) of the IR Act No. 10 of 2006, as amended by (Amendment) Act No. 19 of 2009 sets out the deadlines for making assessments. The relevant part of Section 163 (5) reads as follows;

> ***163 (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) (...)*

Accordingly, an assessment must be completed not later than two years from the 31st March of that year of assessment.

Section 163 (5) of the IR Act was amended again by (Amendment) Act No. 22 of 2011. The relevant part of Section 163 (5), after the amendment, reads as follows;

> *163 (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 thirtieth day of November of the immediately succeeding year of assessment: and*

*(b) (...)*

Accordingly, an assessment must be completed not later than two years from the 30th November of that year of assessment.

The Appellant stated that in both of these instances, in Section 27 of the (Amendment) Act No.19 of 2009 and in Section 56 of the (Amendment) Act No. 22 of 2011, the Sections that should be operated retrospectively are expressly referred to but, subsection 163 (5) is not, and therefore the amendment to subsection 163(5) cannot be made retrospective.

Accordingly, the Appellant relied upon Section 6 (3) of the Interpretation Ordinance No. 21 of 1901 and argued that since the Appellant filed his income tax return on the 30th November 2011, before the amendment Act No. 22 of 2011 came into operation on the 31st March 2011, the Appellant has a vested right to a time bar to make the assessment on or before the 31st March 2012. However, it is settled law that no party can have a vested right to the procedure.

The Respondent argued that the amendment made to Section 163 (5) of the IR Act by (Amendment) Act No. 22 of 2011 was brought into operation on the 31st of March 2011, prior to the expiry of the current time bar applicable to the case at hand, namely 31st March 2012 and therefore, the Assessor may make his assessment no later than 30th day of November 2012, in accordance with Section 163 (5) as amended by (Amendment) Act No. 22 of 2011.

A similar question concerning the year of assessment 2007/2008 was addressed by the Court of Appeal in the case of *Seylan Bank PLC v.*

*Commissioner General of Inland Revenue [C.A.]*[9]. The facts of the case are set out below. Under Section 106 (1) of the Inland Revenue Act No. 10 of 2006, the taxpayer was required to file the return of income on or before the 30th day of September immediately succeeding the end of that year of assessment. Accordingly, if the Assessor does not accept the return and proceeds to make an assessment, the Assessor has to make the assessment on or before the 30th of September 2009, after the expiry of eighteen months from the end of the year of assessment. Accordingly, the taxpayer filed the return within the prescribed time frame. In this instance before the 30th September 2008. Subsequently, by Inland Revenue (Amendment) Act No. 19 of 2009, the Legislature extended the period for a taxpayer to file a return by two months, until 30th November 2008, and the time period for the Assessor to make an assessment by six months, until 31st of March 2010. By the time the taxpayer has already submitted his return before the 30th day of September, under Section 106 (1) of the Inland Revenue Act No. 10 of 2006, the principal Act. However, the Assessor made his assessment on the 26th March 2010, pursuant to Section 163 (5) of the Inland Revenue Act No. 10 of 2006, as amended by amendment Act No. 19 of 2009 which was brought into operation with effect from 31st March 2009. As regards Section 27 of Amendment Act No 19 of 2009, certain Sections have retrospective effect as of the dates set out therein, but Section 163 (5) is not included. The Court of Appeal held that Section 163 (5) being a procedural law the amendment to the said Section has a retrospective effect and the taxpayer does not have a vested right in having his assessment made under the law on which he filed his return and therefore, the assessment is not time-barred.

On appeal, the Supreme Court considered the matter in detail and held otherwise.

Under Article 75 of the constitution, the legislature has the power to make laws, including laws having retrospective effect.

As a general rule, amendments to the procedural laws are deemed to have retrospective effect. The amendments made to substantive provisions are always with prospective effect unless specifically made retrospective. His

[9] CA Tax 23/2013, CA minutes dated 25.05.2015.

Lordship Justice Priyantha Jayawardena, P.C. in his judgment cited the judgment of the Indian Supreme Court in the case of *Hitendra Vishnu Thakur & others v. State of Maharashtra & others*[10] wherein it was held;

> *(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 rights 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; and*
>
> *(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.*

Further, His Lordship cited from *Maxwell on Interpretation of Statutes*[11] which states;

'*It is perfectly settled law that if the legislature intended to frame a new procedure that, instead of proceeding in this form or that, you should proceed in another and a different way, clearly then bygone transactions are to be sued*

[10] (1994) 4 SCC 602.
[11] 12th edition, at 222.

*for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective* ***unless there is some good reason or other why they should not be****.*'

Although the amendment Act was certified on the 31st March 2009, the dates on which the amendments made by the said amending Act should come into force are expressly set out in Section 27 of the amendment Act No. 19 of 2009. Accordingly, His Lordship scrutinized Section 27 and held that only the Sections referred to in Section 27 (1) to (5) of the amending Act would operate with retrospective effect from the specified dates, and the Sections that are not referred to would operate with prospective effect from the 1st of April 2009, in terms of Section 27 (6) of the amending Act wherein it is enacted that other than the amendments specifically referred to in Section 27 (1), (2), (3), (4) and (5), shall come into force on 1st April 2009. Consequently, His Lordship held that the amendments made to Sections 106 (1) and 163 (5) (a) by amendment Act No. 19 of 2009 have no application to the *year of assessment* 2007/2008. Therefore, the opinion expressed by the Supreme Court was based on the fact that the acts to be performed under these sections are linked to the *year of assessment*. These findings are further supported by the title of Act No. 10 of 2006 which reads thus; '*An Act To Provide For The Imposition Of Income Tax For Any* ***Year of Assessment*** *(...)'.* As such it is clearly manifested that the purpose of the Act is to tax income on a year-by-year basis.

The phraseology of Section 56 of Amendment Act No. 22 of 2011 is almost identical to Section 27 of Amendment Act No. 19 of 2009 which was subject to scrutiny by the Supreme Court. The provisions which should have the retrospective operation are specifically set out whereas the other provisions should have the prospective operation, from 1st April 2011.

Consequently, in terms of the judgment of the Supreme Court in the case of *Seylan Bank PLC v. Commissioner General of Inland Revenue [S.C.]*[12] the amendment made to Section 163 (5) by Amendment Act No.22 of 2011 which came into operation with effect from 1st April 2011 should not apply to the case at hand where the *year of assessment* is 2010/2011.

Accordingly, the Assessor should have made his assessment on or before the 31st March 2013. The Assessor sent his letter communicating reasons for not

[12] SC appeal No. 46/2016.

accepting the return only on the 27th November 2013 with a calculation of the total tax payable. As I have already stated above in this judgment, it is common ground that the assessment was made on the 27th November 2013.

The learned Senior Additional Solicitor General for the Respondent argued that the essence of the judgment of the Supreme Court in the case of *Seylan Bank v. Commissioner General of Inland Revenue [S.C.]*[13] is that since the taxpayer could not make use of the benefit of the additional two months granted to submit the return by the amendment, the Respondent also is not entitled to make use of the additional six months granted to make the assessment. She relied on the following observations made by the Supreme Court '*...the law should not be interpreted to give an advantage to an assessor and deprive a taxpayer. Article 12 (1) of the Constitution states that 'all persons are equal before the law and are entitled to the equal protection of the law'. Hence, the amendments made to section 163 (5) (a) read with section 106 (1) of the principal Act should be interpreted to secure the rights of both taxpayers and assessors of the Department of Inland Revenue'.* However, in my view, this is only a passing remark in the judgment and therefore, an *obiter dictum.* The *ratio decidendi* is on the interpretation of Section 27 of the Amending Act. As such, the learned Senior Additional Solicitor General's argument is not well-founded.

In light of the aforementioned facts, it is clear that the Assessor failed to make the assessment on or before the 31st of March 2013. Hence, I hold that the assessment is time-barred.

Accordingly, I answer the first question of law in the affirmative, in favour of the Appellant.

2. ***Whether the sale of lubricants to non-resident ships out of bonded warehouses by the Appellant can be considered as qualified exports within the meaning of Section 51 and/ or 42 of the Inland Revenue Act, No. 10 of 2006 (as amended)?***

The fact that the lubricants are sold by the Appellant to non-resident ships out of bonded warehouses is not at issue. The matter in issue is whether those

[13] *Supra* note 36.

supplies constitute an export in terms of Sections 42[14] and/or Section 51[15] of the Inland Revenue Act No. 10 of 2006, as amended. (hereinafter referred to as the 'Inland Revenue Act')

Before adverting to the matter in issue, for clarity, I will re-produce the relevant Sections herein below.

Section 42 (1) of the Inland Revenue Act No. 10 of 2006 reads as follows:

> *'42 (1) The profits and income, for the year of assessment commencing on April 1, 2006, arising in Sri Lanka to a consignor or consignee, from the export of –*
>
> *(a) (...);*
>
> *(b) Any petroleum, gas or petroleum products; or*
>
> *(c) (...),*
>
> *being goods brought to Sri Lanka on a consignments basis, and re-exported without subjecting such goods to any process of manufacture, shall be liable to income tax at the appropriate rate specified in the Fifth Schedule to this Act.'*

Section 51 of the Inland Revenue Act No. 10 of 2006 reads as follows:

> *'51. where any company commences on or after November 10, 1993, to carry on any specified undertaking and the taxable income of that company for any year of assessment commencing prior to April 1, 2014 includes any qualified export profits and income, such part of the taxable income of that company for that year of assessment as consists of such quailed export profits and income shall, notwithstanding anything to the contrary in this Act, be chargeable with income tax at the appropriate rate specified in the Fifth Schedule to this Act.'*

[14] At paragraph 27, 45 & 46 of the Appellant's written submission filed on the 27th January 2022.
[15] At paragraph 27, 28, 29 & 44 of the Appellant's written submission filed on the 27th January 2022.

The term '*qualified exports profits and income*' and '*specified undertaking*' are defined in Section 60 (b) and Section 60 (c) of the Inland Revenue Act, which reads thus;

*'60 (a) (...)*

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

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

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

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

*(d) (...)"*

The fifth schedule specifies the rates of income tax applicable to Sections 42 and 51 of the Inland Revenue Act.

The Appellant imports petroleum products from overseas, store them in bonded warehouses, and then supplies them to the ships, without subjecting them to any process or manufacture are matters not in issue in the instant case[16]. The issue to be determined is whether the supply constitutes an 'export' in terms of the Inland Revenue Act.

However, the word 'export' is not defined in the Inland Revenue Act.

Black's Law Dictionary defines 'export' in the following manner:

> *'To carry or send abroad; to transport merchandise or goods from one country to another, products manufactured in one country and then shipped and sold in another.'*

The Cambridge Advanced Learner's Dictionary defines 'export' as '*to send goods to another country for sale*.'

Chambers English Dictionary defines 'export' as '*to carry or send out of a country*.'

The Oxford Advanced Learner's Dictionary of Current English defines 'export' as "*the selling and transporting of goods to another country*". The New Shorter Oxford English Dictionary on Historical Principles also defines 'export' in the same manner.

In the Oxford English Dictionary, the word 'export' in verb form means to "*send (goods or services) to another country for sale*".

The book titled, '*Words and Phrases Judicially Defined*' explains the term 'exported' as

> "*there is nothing in the language of the Act [the Tyne Coal Dues Act, 1872] to shew that the word "exported" was used in any other than its ordinary sense, namely, 'carried out of the port.' ... we feel bound to hold that coals carried away from the port,*

[16] Paragraphs 4 (i), (iv) & 5 of the appeal submitted by the Appellant company to the CGIR, at p. 100 of the appeal brief.

*not on a temporary excursion, as in a tug or pleasure boat, which intends to return with more or less of the coals on board, and which may be regarded as always constructively within the port, but taken away for the purpose of being wholly consumed beyond the limits of the port, are coals 'exported' within the meaning of the Act." Muller v. Baldwin (1874) L. R. 9 Q. B. 457, per cur., at p. 461."*

This definition supports the view that the ship should take away the fuel beyond the limits of the port, for the purpose of consumption. However, this definition is also based on the Tyne Coal Dues Act, 1872 of the United Kingdom.

Upon consideration of the above dictionary meanings and other definitions, it appears that different dictionaries have given different definitions to the word 'export'. Therefore, in my view, it is unsafe to rely on those dictionary meanings to decide the matter at hand.

At this stage, it is appropriate to consider Section 16 of the Customs Ordinance which specifies when an export takes place. The relevant portion of Section 16 reads thus;

*'If upon the first (...) repealing of any duty, or upon the first permitting (...) of any (...) exportation whether inwards, outwards, or coastwise in Sri Lanka, it shall become necessary to determine the precise time at which* ***an (…) exportation of any goods made and completed*** *shall be deemed to have had effect, such time (...), in respect of exportation, shall be deemed to be the time at which the goods had been shipped on board the ship* ***in which they had been exported****; and if such question shall arise upon the arrival or departure of any ship, in respect of any charge or allowance upon such ship, exclusive of any cargo, the time of such arrival shall be deemed to be the time at which the report of such ship shall have been or ought to have been made; and the time of such departure shall be deemed to be the time of the last clearance of such ship with the Director-General for the voyage upon which she had departed."* (emphasis added and import provisions omitted)

There are two important segments to Section 16. The first segment implies that the export of goods has to have been *made and completed* (at the point of consideration of the 'time of export'). It, therefore, follows that the effective time of export can only be considered in accordance with Section 16, where the exportation of any goods has already been *made and completed*. Therefore, in my view, the 'time of export' definition in the Customs Ordinance is *not* a definition of an 'export' itself.

The second segment implies that the act of exportation is separate from the act of loading something on board the ship. This is because the relevant clause reads: *(...) the goods had been shipped on board the ship in which they had been exported (...)*. That clause, therefore, has two very distinct acts; one of loading on board the ship, and the other of exporting.

However, Section 16 is a deeming provision.

N.S. Bindra has stated the following on deeming provisions in a Statute[17]:

> *'Where the legislature says that 'something should be deemed to have been done' which in truth has not been done, it creates a legal fiction and, in that case, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion.'*

It is further stated, citing *Gajraj Singh v. State Transport Appellate Tribunal*[18]:

> *' (...) that legal fiction is one which is not an actual reality but which the law recognizes and the court accepts as a reality. Therefore, in case of legal fiction the court believes something to exist which in reality does not exist. It is nothing but the presumption of the existence of the state of affairs which in actuality is non-existent. The effect of such a legal fiction is that a position which otherwise would not obtain is deemed to obtain under the circumstances.'*

[17] N.S. Bindra, *Interpretation of Statutes*, Twelfth Edition, at page 268.
[18] (1997)1 SCC 650.

In the Indian Supreme Court case of *Burmah Shell, Oil Storage & Distributing Co. Ltd v. The Commercial Tax officer and others*[19], Hidayathulla J., observed that the customs barrier is a barrier for customs purposes and it has nothing to do with the sale of aviation spirit.

Therefore, in my view, Section 16 of the Customs Ordinance does not facilitate the interpretation of the term 'export' for the purposes of this case.

Section 22 of the Imports and Exports (Control) Act No. 1 of 1969, as amended, is another statute where the term 'export' is defined to mean the *carrying and taking of goods out of Sri Lanka*.

In the Gazette (Extraordinary) No. 1053/11 dated 11th November 1998, issued under Section 22A (1) and (2) of the Customs Ordinance, the word *'export'* is defined to read as *'the supply of processed, assembled or manufactured goods to a destination outside Sri Lanka';* that to constitute an export, goods shall have to be supplied to a foreign destination.

Thus, in the same way as in the dictionaries, different statutes give different definitions of the term export.

N.S. Bindra has stated as follows regarding the definitions given in other statutes[20];

> *'It is always unsatisfactory and generally unsafe to seek the meaning of words used in an Act of Parliament in the definition clause of other statutes dealing with matters more or less cognate, even when enacted by the same legislature. Even otherwise, the definition of an expression contained in one enactment cannot furnish any safe guideline for determining the scope and contents of the same expression used in different context in a separate enactment. (…) Where a definition is given in an Act, it should be confined as a general rule to interpret the word defined for that Act only and not explain the meaning of the word in another statute, particularly when the two statutes are not in pari materia. The definition given in a statute is for effectuating the provisions of that statute and not for effectuating the provisions of another statute. A definition given in an Act cannot be used for purposes of another Act. The material*

[19] AIR 1961 SC 315.
[20] N.S. Bindra, *Interpretation of Statutes*, Twelfth Edition, at page 277.

> *language of the section has to be always borne in mind, for if a court is prone to indulge in exposition and attempted definition, it will be substituting the language chosen by Parliament with some other form of words and in an attempt at wide survey, some essential factor will be omitted or some inessential factor be substituted or added.*

Hence, I am of the view that it is unsafe to rely on the interpretations given in other statutes to the word 'export', especially in interpreting a fiscal statute enacted for fiscal purposes. Therefore, on the available material, I will proceed to decide within the words of the Inland Revenue Act itself.

The Appellant advanced a further argument citing the judgement of the Indian Supreme Court *State of Travancore-Cochin and Others v. Shanmugha Vilas Cashew Nut Factory and Others*[21] and a judgment of the United State Supreme Court *Empresa Siderurgica, S. A. v. Country of Merced*[22] that the above two judgments affirm the position that goods which have entered the stream of export are in fact exports. Accordingly, it was contended that lubricants that enter the bonded warehouses have entered the export stream and must not be denied tax exemptions given to the exports under the Inland Revenue Act.

However, as I have already stated elsewhere in this judgment, petroleum products are imported to Sri Lanka and kept in bonded warehouses until supplied to the ships. Any other product exported from Sri Lanka will enter the bonded warehouses once those are ready to be exported. Accordingly, like any other product, lubricants kept in the bonded warehouses cannot be considered to have entered the stream of export.

The Legislature itself has recognized petroleum gas or petroleum products as a product exported from Sri Lanka[23]. Being a country, which does not have petroleum resources, it is obvious that the export of petroleum products referred to in Section 42 (1) (b) has to be petroleum products imported and re-exported. However, it is a known factor that Sri Lanka does not re-export petroleum products to other countries. Therefore, invariably, the export meant by section 42 (1) (b) has to be the supplies made to ships and/or air crafts etc.

[21] 1953 AIR 333.
[22] 337 U.S. 154 (1949).
[23] Section 42 (1) (b) of the Inland Revenue Act No. 10 of 2006.

Further, it is easily perceived that the ships arriving in Sri Lankan ports for fuel do not take fuel on board for export, but for their own consumption. The bunker fuel pumped into a ship will be consumed by that ship during its journey, and it may sometimes be the case that if that ship stays within the territorial waters of Sri Lanka for a long time, it will consume that fuel within the territory itself, before reaching its final destination or even before entering international waters. In the above circumstances, I am of the view that having a specific recipient and/or importer receives the goods abroad is not an appropriate test in deciding whether the supply of marine bunker fuel is an export or not.

It is a known fact that there are ships providing services within the Sri Lankan territory. These ships could be resident and/or non-resident. Therefore, anyone who claims a tax exemption on the ground of the export of petroleum should establish that those were provided to a ship outbound from Sri Lanka. Otherwise, income from the supply of bunker fuel to a ship travelling from one port to another within the Sri Lankan territory will also be eligible for exemption on the ground that as soon as the fuel has been put on the ship, they are deemed to have been exported, notwithstanding the fact that the ship is still within the Sri Lankan territorial waters.

Therefore, anyone who claims a tax exemption on the ground of export of petroleum products should establish that those products were provided to a ship outbound from Sri Lanka.

In the above set of scenarios, it is important to have the documents such as Customs Declaration Form (CUSDEC), Marine Delivery Notes, and Commercial Invoices etc. where the destination of the ship is mentioned, in order to decide whether the sale made by the Appellant is an export or not.

The Respondent relied on the judgment of the Indian Supreme Court *Burmah Shell Oil Storage & Distributing Co. Ltd v. The Commercial Tax officer and others*[24] to buttress the argument that in a supply of aviation spirit (almost similar to the supply of marine bunker fuel), taking out of the territory of India alone, would not constitute a sale occasioned in the course of export.

The material statutory provision taken into consideration by the Indian Supreme Court in the above case was Article 286 (1) (b) of the Indian constitution which provides '*No law of a State shall impose, or authorize the*

[24] *Supra* note 5

*imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place* - ***in the course of*** *the import of the goods into, or* ***export of goods out of****,* ***the territory of India****'* (emphasis added).
The other provisions considered by the Indian Supreme Court are also different from the Sri Lankan provisions.

The relevance of statutory provisions outside the Inland Revenue Act is also dealt with separately, elsewhere in this judgment.

Be that as it may, the following observations made by the Indian Supreme Court in the above judgment regarding the definition of the word 'export' (reproduced below), are relevant to the matter in issue;

'*The word export may conceivably be used in more senses than one. In one sense, 'export' may mean sending or taking out of the country, but in another sense, it may mean sending goods from one country to another. Often, the latter involves a commercial transaction but not necessarily. The country to which the goods are thus sent is said to import them, and the words 'export' and 'import' in this sense are complimentary.'*

In order to explain the above difference, Hidayathulla J., used an illustration where goods ordered by the health authorities to be destroyed by dumping them in the sea, and for that purpose are taken out of the territories, cannot be said to have been exported. On the contrary, if the goods are put on board a ship bound for a foreign country but, for some reason dumped in the sea, they can still be said to have been exported, even though they do not reach their destination. Therefore, it appears that in both instances, though goods have been taken out of the territory, the first example does not constitute an export whereas the second example does.

Hidayathulla J., explained the difference between the two scenarios in the following manner.

*'The difference lies in the fact that whereas the goods, in the first example, had no foreign destination, the goods, in the second example, had. It means therefore, that while all exports involve a taking out of the country, all goods taken out of the country cannot be said to be exported.* ***The test is that the goods must have a foreign destination where they can be said to be imported.****'* (emphasis added)

However, as I have already stated in this judgment, marine bunker fuel which is consumed by the ship on its journey may not reach a foreign destination. Yet, in my view, for marine bunker fuel to be treated as having been exported, it should be supplied to a ship that is outbound from Sri Lanka. It is obvious that a ship that leaves the territory of Sri Lanka will not stay in high seas indefinitely. It should reach a foreign port. If the same ship returns to a Sri Lankan port due to some unforeseen or catastrophic event, the supply could still be treated as an export, but not otherwise.

The Appellant cited the judgment of this Court in the case of *Nanayakkara v. University of Peradeniya*[25] wherein S. N. Silva J., (as he then was) held as follows regarding the manner in which tax exemptions must be interpreted:

*'A necessary corollary of applying the rule of strict construction to determine liability under a taxing statute, is that any provision granting an exemption from such liability is to be given its full effect. Exemptions are provided for by the Legislature for the purpose of giving a measure of relief to a person who would otherwise be liable to tax under the general rule. Therefore, no restriction should be placed on such provisions by way of interpretation so as to defeat the purpose of granting such exemption.'*

The view expressed by our Courts in the above case and in a line of authorities was that tax exemptions also should be strictly interpreted as other provisions of a taxing statute.

However, the Appellant, citing the following extract from the more recent decision of the Indian Supreme Court in the case of *Government of Kerala v. Mother Superior Adoration Convent*[26], argued that exemptions claimed by taxpayers are 'beneficial and promotional exemptions' and therefore, have to be liberally interpreted:

*"[…] the rule regarding exemptions is that exemption should generally be strictly interpreted but beneficial exemptions having their purpose as encouragement or promotion of certain activities should be liberally interpreted. This composite rule is not stated in any particular judgment in so many words. In fact, majority of the judgements emphasise that exemptions are to be strictly interpreted while some of them insist that exemptions in fiscal statues are to be liberally interpreted giving an apparent impression that they are contradictory to each other. But this is only apparent. A close scrutiny*

[25] (1991)1 Sri. LR 97.
[26] AIR (2021) SC 1271.

*will reveal that there is no real contradiction amongst the judgements at all. The synthesis of the views is quite clearly that the general rule is strict interpretation while special rule in the case of beneficial and promotional exemption is liberal interpretation. The two go very well with each other because they related to two different sets of circumstances."*

The Indian Supreme Court has also observed in the case of *Novopan India Ltd v. Collector of Central Excise and Customs*[27], that:

*"(…) that a person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he was covered by the said provision. In case of doubt or ambiguity, benefit of it must go to the State."*

In *Commissioner of Central Excise v. Hari Chand Shri Gopal*[28], it was observed that:

*'A person who claims exemption or concession has to establish that he is entitled to that exemption or concession… A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the Statute and the object and purpose to be achieved.'*

In *Bank of Commerce v. Tennessee*[29], the United States Supreme Court observed:

> *'Taxes being the sole means by which sovereignties can maintain their existence, any claim on the part of anyone to be exempt from the full payment of his share of taxes on any portion of his property must on that account be clearly defined and found on plain language. There must be no doubt or ambiguity used upon which the claim to the exemption is founded. It has been said that a well-founded doubt is fatal to the claim; no implications will be indulged in for the purpose of construing the language used as giving the claim for the exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power.'*

[27] 1994 SUPPL. (3) SCR 549.
[28] Civil Appeal Nos. 1878-1880 of 2004.
[29] 161 U.S. 134 (1896).

At a glance, it appears that there is a conflict of opinions expressed by the Indian Courts. However, on careful consideration, I agree that there is no real contradiction. The opinion expressed in the case of *Government of Kerala v. Mother Superior Adoration Convent*[30] is on the standard to be applied in interpreting beneficial exemptions, and the dicta in the other cases are on who should establish the entitlement for the exemption, and in whose favour the Court should hold when there is a doubt or an ambiguity.

Therefore, before reaching the juncture where the standard upon which the exemption is established is decided, the Appellant first has to establish his entitlement, which is an endeavour the Appellant has failed in.

**Conclusion and Opinion of the Court**

On the above analysis, it is my considered view that for a supply of bunker fuel to be an export, it should be made to a ship leaving the territory of Sri Lanka. Official documents such as the Customs Declaration Form (CUSDEC), Marine Delivery Notes, and Commercial Invoices etc., where the place of destination is stated, are relevant in determining whether the ship is going out of Sri Lanka to a foreign destination or not. The ship/vessel being a non-resident ship/vessel should not be the test in determining this fact, since, there may be non-resident ships, registered in a foreign country, providing services within the Sri Lankan territory. However, it is unfortunate that in the case at hand, none of these documents were produced. It appears that even the Respondent, the CGIR, has not taken any step under Section 215 of the Inland Revenue Act to search for these documents. Nevertheless, since the Appellant is claiming a tax exemption in this case, the burden lies on the Appellant to establish its eligibility for the exemption.

The issue as to whether the Appellant satisfies the requirement imposed by Section 42 (1) and/or Section 51 will not arise since this Court has already determined that the Appellant has failed to establish that the supply of marine bunker fuel by the Appellant to the ships constitutes an export.

However, I wish to emphasize that this decision is limited to this case, and in a case where the taxpayer establishes that marine bunker fuel has indeed been exported, by producing the necessary documents where the destination of the ship is indicated, the Appellant may be entitled to claim the exemption under the relevant Section or Sections.

[30] *Supra* note 10.

Furthermore, it is my considered opinion that the export of bunker fuel, which would be consumed by a ship during its journey, is different from the traditional export of cargo where the goods are exported to a specified recipient in an overseas destination.

Another perspective argument is that the intention of the Legislature in introducing the legislative provisions relevant to this case is not fiscal, but economic, and was to increase foreign reserves by encouraging export, which in return brings in foreign exchange. Therefore, the Appellant's sale of marine bunker fuel, a transaction in foreign currency, constitutes an export.

However, in my view, this may be one of several criteria which could be taken into consideration in deciding whether a transaction is an export or not but, not the decisive factor. There may be many more local transactions done in foreign currency that would not constitute an export.

The TAC arrived at the conclusion that the Appellant's sale of marine bunker fuel to foreign vessels cannot be treated as an export and therefore, the Appellant is not entitled to the concessionary tax rates under Sections 42 and 51 of the Inland Revenue Act, as amended, on the ground that the goods need to have a foreign destination necessitating an importer; export and import need to go in pairs.

However, this Court is of a different opinion on the above issue, and as stated above in this judgment the test is whether the marine bunker fuel is supplied to ships leaving the Sri Lankan territory to a foreign destination.

Nevertheless, the final conclusion of the TAC as well as of this Court is that the Appellant is not entitled to the concessionary tax rates. Therefore, no prejudice to the substantial rights of the Appellant or a failure of justice has occurred due to the difference of opinion of the TAC and this Court on the above issue.

I therefore answer the second questions of law in the negative, in favour of the Respondent, for the purpose of this case.

Thus, having considered all the arguments presented to this Court and in view of the above analysis I answer the two questions of law in the following manner.

1. ***Yes.***

2. ***No.***

In light of the answer given to the first question of law, I allow the appeal. Acting under Section 11 A of the Tax Appeals Commission Act No. 23 of 2011 (as amended), I annul the assessment determined by the TAC.

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

**JUDGE OF THE COURT OF APPEAL**

**Dr. Ruwan Fernando J.**

I Agree.

**JUDGE OF THE COURT OF APPEAL**