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

In the matter of an application for mandates in the nature of writs of Certiorari, Prohibition and Mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA/WRIT/35/2023

(together with CA/Writ/36/2023 & CA/Writ/73/2023)

1. Dr. Nayake Bandaralage Dileepa Namal Bandara Balalle
   President – High Court Judges Association
   High Court Judge
   High Court Judge's Chambers,
   Colombo 12.
2. Wagoda Pathirage Sujeewa Nishshanka,
   Secretary – High Court Judges Association
   High Court Judge
   High Court Judge's Chambers,
   Colombo 12.

PETITIONERS

Vs.

1. Chief Accountant
   Ministry of Justice
   No.19, Sangaraja Mawatha,
   Colombo 10.
2. Secretary

Ministry of Justice
No.19, Sangaraja Mawatha,
Colombo 10.

3. Commissioner General of Inland Revenue
Sir Chittammpalam A. Gardiner Mawatha,
Colombo 02.

RESPONDENTS

Before : N. Bandula Karunarathna J. (P/CA)
Sobhitha Rajakaruna J.
Menaka Wijesundera J.
D.N. Samarakoon J.
Neil Iddawala J.

Counsel : Dr. Romesh de Silva, PC with Sugath Caldera, and Niran Anketell for the Petitioners in CA/Writ/35/2023 and CA/Writ/36/2023
Shammil J. Perera, PC with Primal Ratwatte AAL, Chamath Fernando and Duthika Perera for the Petitioners in CA/Writ/73/2023
Nirmalan Wigneswaran, DSG with Manohara Jayasinghe, DSG and Shiloma David, SC for the Respondents in CA/Writ/35/2023, CA/Writ/36/2023 and CA/Writ/73/2023.

Argued on: 22.09.2023

Written submissions: Petitioners - 20.10.2023
Respondents - 17.10.2023

Decided on: 02.11.2023

N. Bandula Karunarathna J. P/CA

This writ application was filed along with Writ/36/2023 on 23.01.2023. Writ application Writ/73/2023 was filed on 08.02.2023. The petitioners in all 3 matters are Judicial Officers

of Sri Lanka. They are representing High Court judges, District judges, Additional District judges, Magistrates, Additional Magistrates and Presidents of the Labour Tribunal.

Three associations of the above-mentioned judicial officers filed 3 separate writ applications namely Writ/35/2023, Writ/36/2023 and Writ/73/2023 requesting this Court to grant and issue a mandate in the nature of a writ of certiorari, a writ of prohibition and a writ of mandamus. Writ/35/2023 and Writ/36/2023 were supported by learned Senior President's Counsel Dr. Romesh De Silva and Writ/73/2023 was supported by learned President's Counsel Mr. Shamil Perera. All 3 matters were defended by learned Deputy Solicitor General Mr. Nirmalan Wigneswaran who appeared on behalf of all the respondents.

All parties agreed that all 3 matters to be taken up together and delivered one judgment.

The petitioners in Writ/35/2023 are holding the posts of duly elected President and Secretary respectively in the High Court Judges Association.

The petitioners in Writ/36/2023 are holding the posts of duly elected President and Secretary respectively in the Judicial Service Association which comprises District judges, Additional District judges, Magistrates and Additional Magistrates.

The petitioners in Writ/73/2023 are holding the posts of duly elected President and Secretary respectively in the Association of Judicial Officers of Labour Tribunal.

The Executive Committee of those 3 associations, unanimously passed a resolution to make this application under and in terms of Article 140 of the Constitution and contest the Advanced Personal Income Tax (APIT) liabilities imposed under and in terms of the Inland Revenue Act No. 24 of 2017 as amended by Act No. 45 of 2022. Such resolution had been passed by the members of the Executive Committee of the Association of Judicial Officers and the instant application has been made before this Court reluctantly due to the fact that there had been no other alternative available to them in order to uphold and preserve the rights of the judicial officers and safeguard the doctrine of the separation of powers, the independence and impartiality of the Judiciary.

The petitioners state that they have a sufficient genuine interest in order to make this application and beg from this Court to plead in the interests of all judicial officers and also in

the wider context of the interests of all constitutionally recognized judicial officers in this country, and the public interest.

The petitioners state that;

i. The 1st respondent is the Chief Accountant and the 2nd respondent is the Secretary, respectively in the Ministry of Justice which is the body that is responsible for implementing constitutional reforms giving prominence to the sovereignty of the people, and creating the legal background and providing physical facilities to protect the rule of law and act in full fairness to all who approach the law or seek protection of the law;

ii. The 3rd respondent is the Commissioner General of Inland Revenue in the Department of Inland Revenue. Its functions constitute the administration of all enactments which fall under the purview of the Commissioner General, collection of government tax revenue and providing feedback on the implementation of fiscal policies;

iii. The 4th respondent in Writ/73/2023 is the Attorney General of the Republic and has been made a party to this application in terms of Article 134 of the Constitution and the rules of this Court.

The petitioners state that as observed by the Supreme Court, the three branches of the government namely, the Legislative, the Executive and the Judiciary, are composed of different powers and functions as three separate organs. Those three organs are constitutionally of equal status and also independent from one another. The petitioners further state that in accordance with Article 4 (c) of the Constitution the sovereignty of the people shall be exercised and enjoyed *inter alia,* and the judicial power of the people shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized by the Constitution, or created and established by law. In these circumstances, it is settled law that judges in the above courts and the presidents of the Labour Tribunal exercise the judicial power of the State within the meaning of the said Article 4 (c) of the Constitution when it exercises its powers.

Article 170 of the Constitution sets out the interpretation of a "judicial officer"; [other than in Article 111M], which means any person who holds office as;

(a) a judge of the Supreme Court or a judge of the Court of Appeal;
(b) any judge of the High Court or any judge, presiding officer or member of any other Court of First Instance, tribunal or institution created and established for the administration of Justice or for the adjudication of any labour or other dispute but does not include a person who performs arbitral functions or a public officer whose principal duty or duties is or are not the performance of functions of a judicial nature.

It was argued by the petitioners that in this context, all judicial officers shall not fall within the category of "employment" and neither do such judicial officers receive any "employment income" as interpreted and contemplated under and in terms of the Inland Revenue Act No. 24 of 2017 as amended by the Inland Revenue (Amendment) Act No. 45 of 2022. In these circumstances, subsequent to the imposition of the provisions of the said Inland Revenue (Amendment) Act No. 45 of 2022, the judicial officers are at present considered as falling into the category of "employment" and the salaries of such judicial officers are considered as "employment income" by the respondents in this instant application, which amounts to being irrational, unreasonable and ultra vires.

The petitioners state that such an ultra vires application of the Inland Revenue (Amendment) Act No. 45 of 2022 shall also clearly impose a direct threat against the rule of law, the doctrine of the separation of powers, and the independence and impartiality of the judicial officers. It is established law that the judicial service is not a service in the sense of "employment", and that the judges are not employees. As members of the Judiciary, they exercise the sovereign judicial power of the State. The petitioner argued that it has also been established that judges, at whatever level they may be, represent the State and its authority unlike the administrative executive or the members of the other services. Accordingly, it has been held therefore that members of the other services cannot be placed on par with the members of the Judiciary, either constitutionally or functionally.

The petitioners state that moreover the 1st and 2nd respondents shall not even be deemed to be the employer of the judicial officers. The petitioners state that in lieu of the services rendered by judicial officers, they receive their appropriate amounts of due allowances and salaries which shall not be liable to be subject to taxation. In those circumstances, the Inland Revenue

Department has issued the "Guideline for Employers on deducting Advance Personal Income Tax (APIT) from Employment Income" dated 22nd December 2022. The petitioners further state that the 1st and 2nd respondents shall not be permitted in law to make any such deductions of any Advance Personal Income Tax (APIT) pertaining to the judicial officers of Labour Tribunals and proceed to remit the same to the 3rd respondent.

The highly escalated increase in the level of taxation applied to the income received by the judicial officers under and in terms of the Inland Revenue Act No. 24 of 2017 as amended by the Inland Revenue (Amendment) Act No. 45 of 2022 would amount to the said judicial officers having to pay an approximate sum of Rs. 1,500,000/- annually in the form of Income tax. This would clearly result in amounting to low and inadequate remuneration being provided to judicial officers in this country.

The petitioners state further that judicial officers shall be entitled to an official residence, official vehicle, driver's allowance and other allowances which should not be subjected to taxation. The respondents by taking the steps to deduct the aforementioned Advance Personal Income Tax (APIT) from the said income of judicial officers are acting arbitrarily, irrationally, unreasonably and ultra vires. Accordingly, the petitioners state that therefore the 3rd respondent shall be placed on a public duty to duly return any such Advance Personal Income Tax (APIT) monies which are baselessly deducted from the income of judicial officers under and in terms of the Inland Revenue Act No. 24 of 2017 as amended by the Inland Revenue (Amendment) Act No. 45 of 2022.

The petitioners state furthermore, on the other hand, that the rights of the petitioners shall be affected due to the said irrational conduct of the respondents, of deducting the aforementioned Advance Personal Income Tax (APIT) from the income of judicial officers affected by the respondents under and in terms of the Inland Revenue Act No. 24 of 2017 as amended by the Inland Revenue (Amendment) Act No. 45 of 2022.

The petitioners state that Principle 11 of the 'United Nations Basic Principles on the Independence of the Judiciary', sets out clearly that the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law. In these circumstances, the deduction of the

aforementioned Advance Personal Income Tax (APIT) from the income of judicial officers, effected by the respondents under and in terms of the Inland Revenue Act No. 24 of 2017 as amended by the Inland Revenue (Amendment) Act No. 45 of 2022 shall in these circumstances directly pose a threat of grossly violating the said Principle 11 of the 'United Nations Basic Principles on the Independence of the Judiciary'.

The aforementioned deduction of the Advance Personal Income Tax (APIT) from the income of judicial officers effected by the respondents under and in terms of the Inland Revenue Act No. 24 of 2017 as amended by the Inland Revenue (Amendment) Act No. 45 of 2022 shall be illegal, null and void and are of no force or avail in law, in as much as *inter alia* they are;

i. illegal and *ultra vires* the powers of the above-named respondents;
ii. irrational, unreasonable and capricious;
iii. amounts to a breach of the legitimate expectations;
iv. contrary to the doctrine of the separation of powers;
v. imposes a direct threat on the independence of the Judiciary;
vi. breaches the principles of natural justice and proportionality;
vii. contrary to the rule of law;
viii. amounts to a gross violation of Principle 11 of the 'United Nations Basic Principles on the Independence of the Judiciary';
ix. the rights of the petitioners shall be affected due to the said irrational conduct of the respondents of deducting the aforementioned Advance Personal Income Tax (APIT) from the income of judicial officers affected by the respondents under and in terms of the Inland Revenue Act No. 24 of 2017 as amended by the Inland Revenue (Amendment) Act No. 45 of 2022.

Therefore, the petitioners state that in these circumstances, grave, irremediable and irreparable loss, detriment and prejudice will be caused to them and to all judicial officers and also in the wider context of the interests of all of the other constitutionally recognized judicial officers in this country and this application would be rendered infructuous and nugatory, unless this Court be pleased to grant and issue the following orders as a matter of urgency and pressing necessity:

i. Directing the above-named respondents or anyone and/or more of them to immediately return any Advance Personal Income Tax (APIT) monies which are deducted from the income and/or any part of the said income of judicial officers under and in terms of the Inland Revenue Act No. 24 of 2017 as amended by the Inland Revenue (Amendment) Act No. 45 of 2022, if any subsequent to the filing of this application, until the final determination of this application.

ii. Restraining the above-named respondents or anyone and/or more of them from deducting Advance Personal Income Tax (APIT) monies from the income and/or any part of the said income of judicial officers under and in terms of the Inland Revenue Act No. 24 of 2017 as amended by the Inland Revenue (Amendment) Act No. 45 of 2022, until the final determination of this application.

The petitioners state therefore that a cause of action has accrued against the respondents above named in their favour to seek all legal reliefs in order to safeguard the constitutional guarantees available to judicial officers and all of the other constitutionally recognized judicial officers in this country who do not fall into the category of "employment", and the salaries of such judicial officers of Labour Tribunals cannot be considered as "employment income" as contemplated under and in terms of the Inland Revenue Act No. 24 of 2017 as amended by Act No. 45 of 2022.

The main argument of the petitioners focuses on, no payments purporting to be APIT can be deducted from the judges' salary. The present law in this matter is found in section 83A as amended by the Inland Revenue [Amendment] Act no. 45 of 2022.

The said section reads as follows;

(1) An employer shall deduct an Advance Personal Income Tax with effect from 01.04.2020, but prior to 01.01.2023 on any payment which falls under section 5 made to his employee if such employee;

a. is a non-resident or non-citizen of Sri Lanka; or
b. is a resident and citizen of Sri Lanka who gives his consent, as specified by the Commissioner-General.

(1A) An employer shall deduct the Advance Personal Income Tax with effect from 01.01.2023 on any payment which falls under section 5 made to his employee, as specified by the Commissioner-General.

(2) The obligation of an employer to withhold tax under subsection (1) or subsection (1A) shall not be reduced or extinguished when;

a. the employer has a right or is under an obligation to deduct and withhold any other amount from the payment; or

b. any other law provides that an employee's income from employment shall not be reduced or subject to attachment.

(3) The provisions applicable to the withholding tax under this Act shall, *mutatis mutandis*, apply to the Advance Personal Income Tax and every reference to the term "withholding", "withholding tax" or "tax payable by withholding" in any such provisions of this Act shall, subject to such modification, be deemed to be a reference to the "Advance Personal Income Tax.

It is only an employer who can deduct the Advance Personal Income Tax [APIT] from the salary of "his employee". Thus, there has to be an Employer-Employee relationship. It is important to note that a similar provision was included in the amendment Act No. 10 of 2021. It is an anathema to the doctrine of separation of powers and in particular to Article 4 of the Constitution if there is a finding that a judge has an employer.

A judge has no employer. Thus, APIT cannot be deducted from a judge's salary in that; only the judge's employer can deduct APIT;

a the judge has no employer.

In classical terms, it is the control test that is primarily used to determine whether a person is in employment or not. If one person has no control over the manner in which a person performs his duties, that person is not an employer. A judge is not in employment within this sense.

However, the Inland Revenue Act defines some relevant words.

The definition reads *inter alia* as follows;
"employer" means;

- the person who engages,
- remunerates an employee in employment;
- pays a pension,
- other remuneration to a former employee;
- any other person for the past services of such former employee, and includes...

The rest of the definition after the word "and includes" is only descriptive of the terms 'engages or remunerates'. The word in the definition after "employer" is 'means' and not 'includes'. It is an exclusive definition. If no person engages or remunerates, there is no employer.

No person engages a judge. The President appoints a judge in terms of Article 111(2)(a) of the Constitution; the judge's consent is not a legal necessity for the appointment to take place. What is merely required is a warrant by the President. The President appoints the judge, and with effect from the date of appointment, the person appointed holds judicial office as a judge.

A judge cannot enter the functions of his office or perform duties as a judge before he takes an oath, but there is no question that he holds judicial office upon appointment. Thereafter, the person remains a judge unless he ceases to be a judge by resignation, death etc. There is no contract or meeting of the minds as far as the legal process of appointment is concerned. The President can never be said to engage a judge.

Stroud's Judicial Dictionary begins to define the word "engage" thus; to "engage" to do anything "has the same force as the word 'covenant'. The rest of the entry on "engage" in Stroud's builds on the idea of "engage" being a word synonymous with a contract and with employment.

The entry in Black's Legal Dictionary (Edition 2) also carries the same basic meaning.

In French law, a contract means the obligation arising from a quasi-contract. The terms "obligation" and "engagement" are said to be synonymous. The code seems especially to apply

the term "engagement" to those obligations which the law imposes on a man without the intervention of any contract, either on the part of the obligor or the obligee, an engagement to do or omit to do something amounts to a promise. Thus, the essential feature of the word 'engage' is a contract between two individuals.

It is anathema to Article 4 of the Constitution if the conclusion is reached that the President is the employer of the judge. The President does not contract with a judge. There is no meeting of the minds between the President and the appointee. The President does not engage the judge. It is important to note that the President appoints the judge and the President's role ceases thereafter.

The discipline of the judge is in the President "on the recommendation of the Judicial Services Commission". The President himself has no real powers of disciplinary control and he must always act on the recommendation of the Judicial Services Commission (JSC). Neither the President nor the JSC have any power to discipline a judge when he is acting as qua judge.

Neither the President nor JSC may exercise disciplinary control over judgments, orders or directions however wrong or perverse. It is only a higher court that can set aside or amend a judgment or order of the High Court judge. It is only in the process of appeal or revisions that a superior court can comment on a judgment or order. In these circumstances, neither the President nor the JSC can be considered the 'employer' of the judge. In the aforesaid, no person engages a judge, and thus, relative to the word 'engaged', there is no employer.

In terms of Section 7 of the Judicature Act, the remuneration of a High Court judge is charged to the Consolidated Fund. The judge's salary is received from the said fund. No person remunerates a judge. The procedure is as follows:

a The money is released from the Consolidated Fund by warrant of the Minister of Finance; this is a ministerial function as the Parliament by law has already prescribed the salary.
b The money is then credited to an account.

c There are two signatories to the judge's cheque: one is an accountant of the Ministry of Justice; the other is the relevant Registrar of the High Court.

d The cheque may be delivered to the judge physically by the peon of the High Court, or credited to the judge's personal bank account through some clerical functions.

It doesn't mean that the official of the bank who credits the account is the person remunerating the judge.

No one person remunerates the judge. Not one person exercises discretion whether or not to pay the judge and the amount that should be paid other than the Parliament which fixes the salary.

The funds are sourced from the Consolidated Fund via the conduit pipe consisting *inter alia* of:

a an officer of Parliament,

b the accountant of the Ministry of Justice, the Registrar of the relevant High Court and,

c the officer who credits the account.

Thus, it can never be suggested that;

i. the officer of Parliament remunerates the judge or

ii. the register of the High Court remunerates the judge or

iii. the accountant of the Ministry of Justice remunerates the judge or

iv. the clerical officer remunerates the judge.

The judge's remuneration is charged to the Consolidated Fund and it is received by the judge via administrative procedures wherein no one person exercises any discretion or makes any decision.

In these circumstances, it is crystal clear that no person remunerates the judge.

The respondents contend that the judge is remunerated by the Secretary, of the Ministry of Justice. This concept is totally incorrect. The Secretary of, the Ministry of Justice does not even sign the cheque.

The Secretary has no power or authority to decide the quantum of the remuneration paid to the judge and she doesn't have any discretion in the matter and in fact, has nothing to do with the remuneration.

The remuneration emanates from the Consolidated Fund and is paid to the judge by a cheque signed by two accountants. One signature from the Ministry of Justice and the other from the Registrar of the High Court. In these circumstances, there is no person who remunerates the judge.

Considering the above-mentioned procedure and for the reasons set out above:

a. There is no person who engages the judge.
b. There are no persons who remunerate the judge.

It is my considered view that there is no employer of the judge within the meaning of the Inland Revenue Act.

The learned DSG who is appearing on behalf of the respondent states that the Secretary, of the Ministry of Justice, deducts APIT. The Secretary cannot deduct APIT in that *inter alia* she is not an employer of the petitioners.

According to the definitions of employer in the Inland Revenue Act, if there is no person who engages or remunerates, there is no employment. As set out earlier the rest of the section only elaborates on "engages" and "remunerates".

The judges do not come within any of the 5 categories set out in column 1 of the definition of employer within the meaning of the Inland Revenue Act. The respondents argued that the judges come under the term 'government institution'. Considering the above circumstances, it is not correct. This is a fundamental error made by the respondents.

It is true that judges are independent and exercise the judicial power of the people as set out in Article 4.

Although there is no strict definition of the word "government" in the Constitution, it is crystal clear in constitutional terms that the word "government" refers to the Executive and in limited situations, those members of Parliament supporting the Executive. In common usage, the main parties in Parliament are referred to as the "government" and the "opposition".

Article 43(1) of the Constitution specifically states that,

'There shall be a Cabinet of Ministers charged with the direction and control of the Government of the Republic.'

Article 30 states specifically that the President is "Head of State" but also Head of Government. There shall be a President of the Republic of Sri Lanka, who is the Head of the

State, the Head of the Executive and of the Government, and the Commander-in-Chief of the Armed Forces.
Article 33(a) empowers the President to *inter alia* "make the Statement of Government Policy in Parliament".

Article 41(a) in referring to the composition of the Constitutional Council includes one seat for "one Member of Parliament nominated by agreement of the majority of the Members of Parliament representing the Government". In these circumstances, the argument raised by the learned DSG was confusing. It would be perverse to class judges, as being part of a 'government institution'. The implications of such a statement are grave. If so, judges would be subject to the direction and control of the Cabinet. The head of the Judiciary would be the President and he would *inter alia* be entrusted with making a statement of policy on behalf of the Judiciary as well. This could never be the case and judges can never be said to be part of a 'government institution'. Thus, in any event, there is no employer of the judges and the APIT cannot be deducted.
The Secretary of the Ministry of Justice has no power to deduct APIT, within the meaning of the Inland Revenue Act and as the petitioners succeed in establishing this point, on this point alone, relief should be granted.

On the other hand, if there is an employer, the definition of employment has no relevance. As set out above, it is the employer who deducts APIT. Thus, if there is no employer the definition of employment has no relevance. The judges do not come within the definition of employment.
Within the meaning of the Inland Revenue Act, the words used are "employment means"...
As set out earlier when the word 'means' is used, it is an exclusive meaning. The judges do not fall within any of the limbs (i) to (vi) of (a).
The State sought to submit that the judges fall within (a)(iv). It is incorrect. The judges do not hold public office.
This is clear in that:

i. Article 111 L and Article 111 J draw a clear distinction between judicial office and scheduled public officer; judges do not come within the rubric of "public office".

ii. Judges are not under the Public Service Commission.
iii. Article 170 of the Constitution where "judicial officer" is defined separately from "public officer".
iv. A public officer is also defined and specifically mentioned that a public officer is not a judicial officer.

In these circumstances, it is very clear that the judges are not holders of public office. The argument of the learned DSG that judicial officers are holders of public office is dangerous in the extreme and would leave the door wide open for government functionaries to exert varying types of control over the judiciary on the basis that judges hold public office. This is exacerbated by the State's spurious contention that judges are employed within a 'government institution'.

As an alternative to a(iv) and a fallback position, the learned DSG sought to rely on (a)(iii). However, (iii) has no application in that the judges do not perform a service in the sense set out in (a)(iii). Instead, judges exercise the judicial power of the people as set out in Article 4(c).

Thus, 195 (1) (a)(iii) of the Inland Revenue Act has no application.

In any event the Sinhala text 195(1) (a)(iii) reads as follows:

(iii) "ඉටු කරනු ලබන සේවාවන් සම්බන්ධයෙන් යම් ස්ථාවර හෝ නිශ්චය කරනු ලැබිය හැකි පරිශ්‍රමික සඳහා හිමිකම ලබාදෙන යම් පුද්ගලයෙකුගේ තත්ත්වය."

This relates clearly to the salary received from employment.

In these circumstances, there is no doubt that the judges do not come within 'employment'.

However, as set out above,

a. what is relevant is not the definition of 'employer';
b. the definition of employment has no relevance.

In these circumstances, there is no employer for judges.

As set out above, in terms of section 83 A as amended by Act No. 45 of 2022, there is no employer who can deduct APIT from the judicial officers. Therefore, APIT cannot be deducted from judges. It is evident that the Secretary, of the Ministry of Justice deducts or makes the decision to deduct APIT. This was stated in the affidavits filed by the respondents. The Secretary of, the Ministry of Justice has no power to deduct APIT. The Secretary is not

the employer of the judges. It is ludicrous if it is contended that the Secretary of, the Ministry of Justice is the employer of the judges.

The Secretary, of the Ministry of Justice is neither the person who engages the judge nor remunerates the judge.

In the circumstances, The Secretary has no power or authority to deduct APIT and any such past, present or future action, is and would be ultra vires.

It is important to note, that the prayer (h) of the petition reads as follows:

(h) Grant a writ of prohibition, prohibiting the 2nd respondent, his servants, agents and all those holding under and through him from taxing any income of a High Court Judge received qua judges and/or retaining as tax any sum on such income

This prayer as set out earlier is separate distinct and different to prayers (c) and (d) of the petition.

Sections 3 and 4 of the Inland Revenue Act are as follows:

Division I: Taxable Income

1. Subject to subsection (2), the taxable income of a person for a year of assessment shall be equal to the total of the person's assessable income for the year from each employment, business, investment and other sources.

2. In arriving at taxable income of a year of assessment qualifying payments and reliefs for that year under section 52 shall be deducted.

3. The taxable income of each person and the assessable income from each source shall be determined separately.

The learned DSG contends that the judges are obliged to pay tax in that they receive assessable income from employment. If the judges are not employees and they are not in employment, then they are not liable to pay tax. Thus, the judges do not receive any income from employment under the provisions of the Inland Revenue Amendment Act. Therefore, the judges are not liable to pay tax.

The petitioners pray as follows:

(a) Issue notice of this application to the respondents in the first instance.

(b) Call for and inspect the record.

(c) Grant and issue mandates in the nature of;

i. a writ of certiorari quashing the decision of the above-named respondents or anyone and/or more of them to deduct Advance Personal Income Tax (APIT) monies from the income and/or any part of the said income of judicial officers under and in terms of the Inland Revenue Act No. 24 of 2017 as amended by the Inland Revenue (Amendment) Act No. 45 of 2022;

ii. a writ of prohibition refraining the above-named respondents or anyone and/or more of them from deducting Advance Personal Income Tax (APIT) monies from the income and/or any part of the said income of judicial officers under and in terms of the Inland Revenue Act No. 24 of 2017 as amended by the Inland Revenue (Amendment) Act No. 45 of 2022;

iii. a writ of mandamus directing the 3rd respondent and/or the above-named respondents or anyone and/or more of them to return all Advance Personal Income Tax (APIT) monies which are deducted from the income and/or any part of the said income of judicial officers under and in terms of the Inland Revenue Act No. 24 of 2017 as amended by the Inland Revenue (Amendment) Act No. 45 of 2022;

(d) grant and issue the following interim orders;

i. directing the above-named respondents or anyone and/or more of them to immediately return any Advance Personal Income Tax (APIT) monies which are deducted from the income and/or any part of the said income of judicial officers under and in terms of the Inland Revenue Act No. 24 of 2017 as amended by the Inland Revenue (Amendment) Act No. 45 of 2022, if any subsequent to the filing of this application, until the final determination of this application;

ii. restraining the above-named respondents or anyone and/or more of them from deducting Advance Personal Income Tax (APIT) monies from the

income and/or any part of the said income of judicial officers under and in terms of the Inland Revenue Act No. 24 of 2017 as amended by the Inland Revenue (Amendment) Act No. 45 of 2022, until the final determination of this application.

(e) grant costs; and

(f) grant such other and further relief as this Court shall deem meet.

The learned counsel for the respondent vehemently objected to the issuing of notices and the extension of the interim order. The 2nd respondent filed an affidavit on behalf of the respondents for the limited purpose of placing before this Court certain important facts and documents which would be relevant in considering whether the petitioners are entitled to the issuance of notice and to vacate the interim order issued by this Court on 25.01.2023 (hereinafter referred to as the "order") stating, "1st and 2nd respondents and their officers, servants, agents are directed not to deduct Advance Personal Income Tax from the income of the judges of the High Court received qua judges, and/or part of the said income until the next date of this case".

The respondents raised 3 preliminary objections. They are as follows:

a. the petitioners are guilty of laches;
b. the petitioners failed to give adequate notice of this application prior to supporting the matter *ex parte* and thus and otherwise abused the process of the court;
c. the petitioners have suppressed and/or misrepresented material facts.

Therefore, the respondents pray that the petition should be dismissed *in limine*.

The respondents submit that the petitioners are guilty of laches, in as much as they have failed to challenge the deduction of APIT for over a year. The petitioners have misdirected this Court in seeking to obtain an order to maintain the status quo, on the basis that the income of the judges does not constitute "taxable income". The learned counsel for the respondents further says that the petitioners have misrepresented material facts to this Court that the judges have been subject to the payment of Advance Payment Income Tax (hereinafter referred to

as "APIT") in an unlawful manner consequent to the amendment to the Inland Revenue (Amendment) Act, No. 45 of 2022.

The process of deduction of APIT has been the same from its inception, except that residents and citizens of Sri Lanka no longer need to give their consent for the deduction. All judges on whose behalf the petitioners have filed these applications have been subjected to the payment of APIT, even prior to the enactment of the Inland Revenue (Amendment) Act, No. 45 of 2022. Learned counsel for the respondent argued that the judges are engaged in "employment" and are "employees" in terms of the Inland Revenue Act, No. 24 of 2017, as amended. The process of deducting APIT is carried out by the corresponding "employer" of an "employee" in terms of the said Act. The respondents further submitted that "vehicle allowance" and "housing allowance" are subject to tax in terms of the Inland Revenue Act and the direction and guidelines issued by the Commissioner General of Inland Revenue.

The learned counsel for the respondents denied that persons who receive the benefit of housing and vehicles (as opposed to a "housing allowance" and "vehicle allowance") are not subject to tax, and stated that averments to the contrary in the petition are gross misrepresentation. All such benefits, known as "non-cash benefits" have been and are taxed in accordance with the direction and guidelines issued by the Commissioner General of Inland Revenue in accordance with the Inland Revenue Act. It is said, that, the decisions and guidelines issued by the Commissioner General of Inland Revenue have not been assailed in the instant application and the petitioners are estopped from doing so.

The learned DSG argued on behalf of the respondents that the petitioners have failed to bring to the specific attention of this Court that the Supreme Court in considering the Inland Revenue (Amendment) Bill in SC (SD) No. 64-71/2022, had specifically considered the issue of whether the salary of a judge is taxable and would impact the independence of the Judiciary, and concluded as follows:

"The question before us is whether judges should be required to pay taxes when all citizens, obviously above a minimum threshold, are required to pay taxes. In a welfare state, public finances must sustain free public services such as education and health and other subsidized services. We are of the view that there is no logical reason as to why judges should not be

called upon to contribute on a non-discriminatory basis, directly or indirectly, to the State coffers along with other members of the public despite the differences identified above."

"In addressing these points, it is apposite to refer to the dissenting judgment of Justice Holmes, with whom Justice Brandeis concurred, in Evans v. Gore (Supra. at page 265) where he held: "The exemption of salaries from diminution is intended to secure the independence of judges, on the ground as it was put by Hamiltion in the Federalist, (No. 79) that "a power over a man's subsistence amounts to a power over his will".

"That is a very good reason preventing attempts to deal with a judge's salary as such, but seems to me no reason for exonerating him from the ordinary duties of a citizen, which he shares will all others**.** To require a man to pay the taxes that all other men have to pay cannot be possibly made an instrument to attack independence as a judge. I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institution upon which their well-being if not their life depends. We are of the view that the reasoning in the above cases is logical and instructive on the issue of taxes on the salaries of judges. When a tax is applied across the board, as in this case, without directly or indirectly targeting the judges, it cannot be said to be an intrusion into the independence of the Judiciary. Taxes are one of the main revenue-generating measures to enhance public finance. Facilities are open to all citizenry including judges of the superior courts and judicial officers within the meaning of Article 111M of the Constitution."

Learned counsel for the respondents further says that there is no logical reason to exempt judges from making their contribution to the public coffers along with the other members of the community. To that extent, the classification is permissible. Judges should have the same obligations as other citizens on taxing matters. The Inland Revenue (Amendment) Act, No. 45 of 2022 was certified on 18.12.2022, and the resolution marked as P1 was made on 28.12.2022, while the application was filed only on 23.01.2023 just prior to the payment of salaries in the government sector. The notice of the application was handed over only on 23.01.2023, which is inadequate notice for a matter of this nature. In all of the aforesaid circumstances, the respondents state that the petitioners are not entitled to the relief prayed for in the petition. Learned counsel for the respondents, moves to dismiss the petitioners' application.

Whenever a writ application is filed by a petitioner the one who has some grievance against the respondents has to pursue the said application. It is the duty and the responsibility of this Court to see whether there is a *prima facia* case against the respondents. Also, it is important to look into the matter and see whether there is an important issue or any important question to be decided against the respondents. If the Court is of the opinion that there is an issue which has to be looked into by this Court then the Court can issue notices against the respondents and after the notice returnable date, the respondents are permitted to file objections and give them a chance to defend themselves. Thereafter, this Court can issue a writ or otherwise; if there is no merit in the application, it can be dismissed.

When it is crystal clear that the decision of the administrative body or the decision of the respondents is *ultra vires,* the Court should not refuse the petitioner's writ application. If this Court does not hear the application of the petitioner and refuses the petition considering only technical grounds, it can be considered a violation of the rules of natural justice. Keeping that in mind, I will look into the present issue in this case. Judges indeed hold a unique position within society due to their roles and responsibilities. They play a crucial role in upholding the law, interpreting it, and ensuring that justice is served. Their decisions can have significant impacts on individuals and communities, making their jobs distinct and often challenging.

Some reasons why judges are considered distinct from the rest of the population include:

Impartiality : Judges are expected to be impartial and unbiased in their decision-making. They must set aside personal beliefs and emotions to ensure fair and just outcomes.

Legal Knowledge and Expertise : Judges require specialized legal knowledge and experience to interpret and apply the law effectively. This sets them apart from the general population.

Public Scrutiny : Judges' decisions are subject to public scrutiny, which can put them under a unique kind of pressure.

Responsibility : Judges hold the responsibility of safeguarding the rule of law and protecting individual rights, making their role crucial in maintaining a just and orderly society.

Lifestyle and Social Circles : Judges often maintain a distinct lifestyle, sometimes interacting more within legal circles and being mindful of their public image.

Judicial officers face challenges, make personal sacrifices, and contribute to society in their own way, just like any other profession. It is essential to remember that judges are still human beings with personal lives, emotions, and experiences. While they may have a unique role, they are part of the society as well. The perception of judges as distinct and separate can vary across different cultures and legal systems. Ultimately, their distinctness lies in their professional duties and ethical obligations, but they remain integral members of the broader community they serve.

Learned President's Counsel who appeared on behalf of the petitioners argued that the independence of the Judiciary is guaranteed through security of tenure, income security and non-interference. As a result, it was argued that judges' salaries cannot be reduced by an act of the Executive or Legislature. In particular, it was submitted that Article 108(2) of the Constitution which specifically provides that the salaries of the judges of the Supreme Court and the Court of Appeal cannot be reduced and must be read as a limitation on Parliament in determining the salaries of superior court judges and not as an exclusion of the minor judiciary from the general principle that judges' salaries must not be reduced.

The decision in Senadhira vs. The Bribery Commissioner 63 NLR 313 on page 317 held that "full salaries are absolutely secured to them during the continuance of their commissions". Clause 31 of the Beijing Principles, August 1995 states that the remuneration and conditions of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the judges of a relevant court, or a majority of them, have agreed.

There is a general principle that the salaries of the judges shall not be reduced during their term of office which is recognized by judicial precedent and in several international declarations and guidelines. In the 'UN Basic Principles on the Independence of the Judiciary', it is provided in clause 11 that the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and age of retirement shall be adequately secured by law. The "Latimer House Guidelines" for the Commonwealth, 11.2.

states that as a matter of principle, judicial salaries and benefits should be set by an independent commission and should be maintained.

I am of the view that Article 108(2) of the Constitution applies only to the salaries of the judges of the Supreme Court and Court of Appeal which cannot be reduced. Nonetheless, I agree with the argument that it should not be interpreted as an exclusion of the minor judiciary from the general principle that judicial salaries should not be reduced. If it applies to the judges of the Supreme Court and the Court of Appeal, why not it applies to the other judicial officers in the Judiciary? It should be seriously considered by this Court with the other basic legal arguments raised by both parties.

There is a general principle that the judge's salaries cannot be reduced during their tenure of office. This general principle now forms part of the constitutional guarantees for the establishment of judicial independence. The judges of the High Court, District Court, Magistrate's Court, Presidents of the Labour Tribunal and all other judicial officers within the meaning of Article 111 M of the Constitution are entitled to this protection. The reason for the recognition of such a general principle can be garnered from the eloquently penned statement of Alexander Hamilton in Federalist Paper No. 79 which reads as follows:

"Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. The remark made in relation to the President is equally applicable here. In the general course of human nature, a power over a man's subsistence amounts to a power over his will and we can never hope to see realized in practice, the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter."

Also, it was said in S.K. Dutta, Income-Tax Officer & Others Vs. Lawrence Singh Ingty [1967] INSC 250 (7 November 1967) 1967, that,

"It is well settled that a State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably."

The power to issue writs vested by Article 140 of the Constitution is a supervisory power and not an appellate jurisdiction (vide: The Board of Trustees of the Tamil University Movement vs. F.N. de Silva 1981 (1) SLR 350).

In exercising the writ jurisdiction, this Court will not consider whether the decision is right or wrong in the context of the greater benefit of the society or otherwise, but whether the decision is lawful or unlawful in the eyes of the law. (Vide Public Interest Law Foundation vs. Central Environment Authority 2001 (3) SLR 330 & CA/WRIT/173/2015, C.A. Minutes dated 03.07.2018).

Undoubtedly, judges could be considered as a unique category under the Constitution. It was decided in the case of Chathurika de Silva vs. Secretary, Ministry of Education, SC/FR 222/2018, SC Minutes 18.06.2020, Justice Priyantha Jayawardena PC held as follows in a case involving the admission of judges' children to schools:

"Judges are an essential part of the administration of justice. They are required to maintain the honour and dignity of their profession, at all times. It is the responsibility of the judge to adjudicate a dispute honestly and impartially on the basis of the judge's assessment of the facts and in accordance with the conscientious understanding of the law."

"Conflicts of interest occur where there is a conflict between the public duty and the private interest of a judge, in which the judge's private interest could improperly influence the performance of their official duties. This needs to be avoided, at all times. In the circumstances, a judge is required to maintain a form of life and conduct more severe and restricted than that of other people. "

"The Constitution of Sri Lanka has provided the necessary framework for the Judiciary to maintain the aforementioned standards and to protect the independence of the Judiciary."

This position was held in Jathika Sevaka Samgamaya v Sri Lanka Handabima Authority (SC Appeal No. 15/ 2013 SC Minutes 16th December 2015) where it was held;

"Article 111C of the Constitution is a manifest intention to ensure the Judiciary is free from interferences whatsoever. Thus, there is a clear demarcation of powers between the Judiciary and the other two organs of the government, namely, the Executive and the Legislature."

This principle has been laid down in High Court Judges Association and seven others vs. Lionel Fernando, Co-Chairmen National Salaries and Cadre Commission and Twenty Others SC Application No. 66/2008 as far back in 2009 by Chief Justice S.N. Silva where he said *inter alia,*

"If there is a national wages policy, the Judiciary should be clarified separately. In this instance, we are of the view that it is reasonable to clarify the High Court Judges as being similarly circumstanced to that of a judge of the Court of Appeal."

Therefore, judges are a unique and distinct class, and no interference with their functions, livelihood and status can be tolerated.

Justice Dr. A. R. B Amarasinghe in his monumental treatise 'Judicial Conduct: Ethics and Responsibilities' cites a debate in the House of Commons on judges' salaries where Prime Minister Winston Churchill is quoted as saying of superior court judges:

"There is nothing like them at all on our Island. They are appointed for life. They cannot be dismissed by the executive government. They cannot be dismissed by the crown either by the prerogative or by the advice of ministers. They are distinguishable from the great officers of states and other servants of the executive high or low"

Chief Justice Samarakoon in Fernandopulle vs. Minister of Lands and Agriculture 79 NLR 115 on page 120 dealt with the role of the court and very clearly articulated the role of the court on page 122 he stated as follows:

"Are the courts obliged to turn a deaf year merely because some statutory officer is able to proclaim 'I alone decide' when I open my mouth and let no dog bark? If that be the position when the rights of a subject are involved then the courts would have abdicated its powers necessary to safeguard the rights of the individual. I do not think that this is the test"

This same quote was repeated by Justice Sripavan in Joseph Fernando v Minister of Land Development and Others 2003 (2) SLR 294 at 298.

'In the circumstances, the judges have a different part to play. They have to, when necessary, supervise and regulate the Executive.'

Justice A.R.B Amerasinghe, in 'Judicial Conduct' on page 11 states as follows:

'By reason of the great responsibilities vested in them, judges occupy a special place in the community.'

He starts this treatise by saying, 'For a very long time judges have been compared with priests and the courts in which they officiate described as temples. It is in that context that the phrase 'temple of justice' has arisen.'

These principles have been accepted in *inter alia*;

- UN Basic Principles on the independence of the judiciary;
- Latimer house guidelines for the Commonwealth;
- Beijing Principles of the Independence of the Judiciary;
- The Bangalore Drafts.

In the case of Queen vs Liyanage 64 NLR 313 at 318, it was held that the nomination of the judges by the Minister also destroys the oneness and identity of the Supreme Court.

The respondents' arguments which seek to lump the Judiciary with public servants characterizing judges as employees subject to employment by a Ministry Secretary and holders of public office must fail, considering the abovementioned authorities.

All the comparative jurisprudence from other Commonwealth countries emphatically declares that judges are not employees, and judges and are distinct or different to government servants.

In All India Judges' Association vs. Union of India and Others, AIR 1993 SC 2493, the Indian Supreme Court held that;

"It is not necessary to repeat here what has been stated in the judgment under review while dealing with the same contentions raised there. We cannot, however, help observing that the failure to realize the distinction between the judicial service and the other services is at the bottom of the hostility displayed by the review petitioners to the directions given in the judgment. The judicial service is not service in the sense of 'employment'. The judges are not: employees. As members of the Judiciary, they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as the members of the council of ministers and the members of the Legislature."

Even though the judges are referred to as the holders of "public offices", in Sri Lanka, there is a clear distinction between "judicial office" and "public office".

In S and Others vs Van Rooyen and Others (General Council of the Bar of South Africa Intervening) (2002 (8) BCLR 810, the South African Constitutional Court held;

"Judicial officers ought not to be put in a position of having to do this or to engage in negotiations with the Executive over their salaries. They are judicial officers, not employees, and cannot and should not resort to industrial action to advance their interests in their conditions of service. That makes them vulnerable to having less attention paid to their legitimate concerns in relation to such matters, than others who can advance their interest through normal bargaining processes open to them."

In Gilham (Appellant) vs Ministry of Justice (Respondent) [2019] UKSC 44, the Supreme Court of the United Kingdom held:

"For the reasons given earlier, it is impossible to regard the Judiciary as employed under or for the purposes of the Ministry of Justice. They are not civil servants or the equivalent of civil servants. They do not work for the ministry."

The Australian High Court held in "Re Australian Education Union & Australian Nursing Federation; Ex Parte Victoria ("AEU case") (1995) 69 ALJR 451 (7 April 1995)

"In our view, also critical to a State's capacity to function as a government is its ability, not only to determine the number and identity of those whom it wishes to engage at the higher levels of government but also to determine the terms and conditions on which those persons shall be engaged. Hence, Ministers, ministerial assistants and advisers, heads of departments and high-level statutory office holders, parliamentary officers and judges would clearly fall within this group. The implied limitation would protect the States from the exercise by the commission of power to fix minimum wages and working conditions in respect of such persons and possibly others as well. And, **in any event, ministers and judges are not employees of a State**."

In the present case, neither the petitioners nor the Judges' Association concerned have been consulted or been given an opportunity to present their views. It reflects a clear violation of the rules of natural justice. It is axiomatic that aggrieved persons are entitled to be heard.

Justice A. R. B. Amersinghe held in the case of Sarath Amunugama vs Karu Jayasuriya, Chairman UNP and others 2000 (1) SLR 172 at 188 cited R vs. Chancellor University of Cambridge to say the following;

"As far as the law is concerned, we have in Sri Lanka in this area closely followed the common law which, from very early times, recognized the right to a fair hearing. In R. v. Chancellor of the University of Cambridge, (16), support for the right to a hearing was based by Fortescue J. on the events in the Garden of Eden;"

"I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam', says God, 'where art thou'? 'Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat?' And the same question was put to Eve also".

The learned President's Counsel submits on behalf of the petitioners that judges have a legitimate expectation that their salary will not in any way be reduced during their tenure as judges. The Executive cannot interfere with the salaries of judges already determined by Parliament. In the present case, the salary of the judges determined by Parliament has been reduced by the Secretary, Ministry of Justice. The judges have fashioned their lives in the expectation that their actual salaries and remuneration will not be reduced during their tenure of office. The charging of APIT is in breach of the legitimate expectations of the judges. It is unreasonable that the remuneration of a judge be reduced during his tenure of office.

The argument raised by the respondents regarding laches cannot be taken up at this stage of the case. The respondents raised the same preliminary objection at the support stage, and this Court issued notices. Thus, the said preliminary objection cannot be taken at this stage. It is trite law that laches does not prevent a court from judicially reviewing a nullity.

In Biso Menike vs Cyril de Alwis 1982 (1) SLR 368 on page 379, Justice Sharvananda held that laches would not disentitle the petitioner to relief where the decision impugned is manifestly erroneous or without jurisdiction.

"When the Court has examined the record and is satisfied the order complained of, is manifestly erroneous or without jurisdiction the Court would be loathed to allow the mischief of the order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection. Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction. In any such event, the explanation of the delay should be considered sympathetically."

This case was followed in Private Tea Factory Owners' Association vs Tea Commissioner SC Appeal 47/20211 where it was held on page 15;

"The Court may therefore in its discretion entertain an application in spite of the fact that a petitioner comes to Court late, especially where the order challenged is a nullity. The conduct of the petitioner cannot be branded as unreasonable to disentitle it to a writ especially when the decisions contained in the letters marked P 12 and P 13 are *ultra vires,* the powers of the Tea Commissioner. "

"There has undoubtedly been great delay in challenging the validity or legality of the said circulars. However, the rule of laches or delay is not a rigid rule which can be cast in a straight-jacket formula, for there may be cases where despite delay and creation of third-party rights, the Court may still in the exercise of its discretion interfere and grant relief to the petitioner."

In Pathirana vs. Victor Perera (DIG Personal Training Police) 2006 (2) SLR 281, it was held as follows;

"Laches could be excused if the order is nullity. As the circular is a nullity there are no laches."

This same line of thinking has been followed in multiple cases. Thus, laches do not prevent a court exercising powers of judicial review from quashing a nullity. In this case, there is actually no question of laches. The petitioners have sought *inter alia* a writ of prohibition to prevent the deduction of APIT, and a writ of prohibition to prevent the Inland Revenue Department from taxing High Court Judges and retaining any part of their income. Thus, these two reliefs at least are directed towards future conduct and thus, laches does not apply.

The conduct of the respondents impugned is to deduct the salary of High Court Judges every month. The Petitioners are not challenging one solitary decision made in the past. Instead, the petitioners are impugning a series of continuing decisions that are made every month and which the respondents have stated would continue into the future unless prevented by this Court. In a seminal judgment on the concept of continuing infringements in the context of the fundamental rights jurisdiction, and after examining several authorities, the late Justice Prasanna Jayawardene PC explained in Demuni Sriyani de Soyza and others vs. Chairman, Public Service Commission, SC FR 206/2008, SC Minutes 09.09.2016 as follows;

"An infringement can be constituted by a single, distinct and 'one-off' act, decision, refusal or omission. However, some other infringements can be constituted by a series of acts, decisions, refusals or omissions which continue over a period of time. It is only the second type of infringement which can be correctly identified as a 'continuing infringement".

"It seems to me that, the essential characteristic of a 'continuing infringement' which is constituted by an act or decision is that, such act or decision or similar acts or decisions are committed or are taken several times throughout the period the infringement continues. There is a series of acts or decisions, each of which infringes the petitioner's Fundamental Rights, which occur throughout the period of the infringement. The result is a 'continuing infringement' in relation to which the time period of one month starts on the day the last such act is done or decision is taken."

What is critical is that where a series of acts or decisions continue over a period of time, the starting time begins to run only on the date of the last such decision. The petitioners filed this application on 23.01.2023. The last act in a series of acts to deduct APIT from the judges' salaries would therefore have been taken in December 2022. Thus, there are no laches whatsoever.

Without any hesitation, I have to say that,

- judges do not have an employer;
- judges are not employees;
- judges are not in employment;

Thus, APIT cannot be deducted from judges' salaries. Further, judges are not liable to pay tax in terms of the Inland Revenue Act. The arguments by the respondents are fraught with danger. If the respondents' position is accepted,

- judges would be considered employees of the Secretary, Ministry of Justice;
- the Secretary, of the Ministry of Justice would be considered as an employer of judges;
- judges would be considered to be part of a government institution;
- there would be no distinction between public officers and judicial officers, and between public office and judicial office.

It would be obvious that the path suggested on behalf of the respondents is one in which the distinctiveness of the Judiciary, the separation of powers and the independence of the Judiciary would be sacrificed in the name of placing judges on the same footing as all public servants. Neither the Inland Revenue Act nor the Constitution would permit the same.

In my considered view that the judges are not liable to pay taxes to maintain the independence of the Judiciary is not accurate. In most countries, judges are required to pay taxes just like any other citizens. The independence of the Judiciary is maintained through other means, such as lifetime appointments, legal protections against removal without just cause, and the principle of judicial review, which allows judges to interpret laws independently.

Allowing judges to be exempt from taxes could create issues related to fairness and equality among citizens. It is important for a society to have a tax system that applies uniformly to all individuals, regardless of their profession or position, to ensure equal treatment under the law. While judges do enjoy certain legal protections to maintain their independence and impartiality, these protections do not extend to exemptions from taxes. judges, like all citizens, are expected to contribute to the funding of public services and government operations through taxation.

I wish to reiterate that such an ultra vires application of the Inland Revenue (Amendment) Act No. 45 of 2022 shall clearly impose a direct threat against the rule of law, the doctrine of the separation of powers, and the independence and impartiality of the judicial officers.

In interpreting the provisions of the Inland Revenue (amended) Act No. 45 of 2022, I emphasize that the relevant clauses have not been interpreted in such a way that judicial

officers are subject to the payment of APIT tax. My view is that there is a legal bar to levy APIT from judicial officers under the said Inland Revenue (amended) Act. The interpretation clauses of the Act appear to be deficient or defective. Taking into consideration all the legal arguments mentioned above, I should say that the provisions of the said amended Act do not provide an opportunity to subject the judicial officers to APIT tax. Therefore, considering all the reasons mentioned above, I decided that the attempt of the respondent to collect APIT tax from the judicial officers using the Inland Revenue (amended) Act No. 45 of 2022 is illegal and *ultra vires*. Therefore, all the reliefs prayed by the petitioners should be granted.

President of the Court of Appeal

Sobhitha Rajakaruna J.

I have had the opportunity of reading, in draft, the judgment of His Lordship Justice Bandula Karunarathne J. (P/CA). The view I take in regard to the principal questions of this case is different and thus, I have set out my reasons in this Judgement.

The cogent argument of the Petitioners is that the judges cannot be considered as employees of any employer and judges are not liable to pay tax on remuneration received qua judges. Thus, the Petitioners argue that the Advanced Personal Income Tax ('APIT') introduced under section 83A of the Inland Revenue Act No.24 of 2017 as amended by Inland Revenue (Amendment) Act No.10 of 2021 cannot be deducted from the salaries of the judges. Section 83A reads:

> *(1) An employer shall deduct an Advance Personal Income Tax with effect from April 1, 2020 on any payment which falls under section 5, made to his employee, if such employee -*
>
> *(a) is a non-resident or non-citizen of Sri Lanka; or*
>
> *(b) is a resident and citizen of Sri Lanka who gives his consent,*

as specified by the Commissioner-General.

(2) The obligation of an employer to withhold tax under subsection (1) shall not be reduced or extinguished when –

(a) the employer has a right or is under an obligation to deduct and withhold any other amount from the payment; or

(b) any other law provides that an employee's income from employment shall not be reduced or subject to attachment.

(3) The provisions applicable to the withholding tax under this Act shall, mutatis mutandis, be applicable to the Advance Personal Income Tax and every reference to the term "withholding", "withholding tax" or "tax payable by withholding" in any such provisions of this Act shall, subject to such modification, be deemed to be a reference to the "Advance Personal Income Tax.".

The Petitioners' contention is that in terms of the said section 83A(1), only an employer shall deduct APIT from his employee and thus the Secretary to the Ministry of Justice has no power or authority to deduct APIT from the judges. The Petitioners state that such deduction is ultra vires; unreasonable; etc.

The other facet of the Petitioners' argument is that it is a control test, in the classical terms which is primarily used to determine whether a person is in employment or not. It is further submitted that if one person has no control over how a person performs his duties, that person is not an employer and within these parameters, judges are not in employment. In this sense, the Petitioners referring to the definition given to the word "employer" in the Inland Revenue Act No.24 of 2017 contend that, if there is no person who engages or remunerates then there is no employer; and similarly, there is no person who engages a judge. In addition to the above, the Petitioners assert that no person remunerates a judge since the salaries of the judges of the High Court in terms of section 7 of the Judicature Act shall be charged on the consolidated fund. In summary, the Petitioners' contention is that no one employs a judge nor does anyone remunerate a judge and, in such circumstances, there is no employer for a judge within the meaning of the said Inland Revenue Act.

The Respondents complain that the Petitioners have raised several matters that are completely outside the scope of the instant Application and such claims tend to cloud the real issue in this case. The Respondents heavily placed reliance on several paragraphs of the Special Determination of the Supreme Court (No. S.C.S.D/64 to 71/2022) in which the jurisdiction of the Supreme Court to determine the constitutionality of the Bill titled "Inland Revenue (Amendment)" has been invoked in terms of Article 121 (1) of the Constitution. The Inland Revenue (Amendment) Act No. 10 of 2021 was enacted by the Parliament after the Supreme Court ruled that the preceding Bill and its provisions are not inconsistent with the Constitution. The attention of this Court has been drawn by the Respondents to the following paragraphs of the said Determination:

> *"We are of the view that there is no logical reason as to why judges should not be called upon to contribute on a non-discriminatory basis, directly or indirectly, to the State coffers along with other members of the public despite the differences identified above. These differences do not have a rational relationship to the purpose of taxation, which is to increase government revenues. The public services provided through public funds are available to all judicial officers. In fact, in The Judges v. The Attorney-General for the Province of Saskatchewan [Privy Council Appeal No. 118 of 1936] the Privy Council held that neither the independence nor any other attribute of the judiciary can be affected by a general income tax which charges their official incomes on the same footing as the incomes of other citizens."* ***(at p.40)***
>
> *"In addressing these points, it is apposite to refer to the dissenting judgment of Justice Holmes, with whom Justice Brandeis concurred, in Evans v. Gore (Supra. at page 265) where he held:*
>
> > *"The exemption of salaries from diminution is intended to secure the independence of the judges, on the ground, as it was put by Hamilton in the Federalist, (No. 79,) that "a power over a man's subsistence amounts to a power over his will." That is a very good reason for preventing attempts to deal with a judge's salary as such, but seems to me no reason for exonerating him from the ordinary duties of a citizen, which he shares with all others. To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge. I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class,*

free from bearing their share of the cost of the institutions upon which their well-being if not their life depends."

(at pp.44-45)

"A similar approach was adopted in 1954 by the Supreme Court of Ireland in Majorie O'Byrne v. The Minister for Finance and the Attorney-General [Irish Reports 1954 No. 453 P.] when it held that to require a judge to pay taxes on his income on the same basis as other citizens and thus contribute to the expense of Government could not be said to be an attack upon his independence." ***(at p.45)***

"In 2001, the US Supreme Court in United States vs. Hatter, Judge, United States District Court for the Central District of California, et al, (Supra.) expressly overruled Evans v. Gore (Supra.). Breyer J held as follows:

> *……There is no good reason why a judge should not share the tax burdens borne by all citizens….. In practice, the likelihood that a nondiscriminatory tax represents a disguised legislative effort to influence the judicial will is virtually nonexistent. Hence, the potential threats to judicial independence…..cannot justify a special judicial exemption from a commonly shared tax…*

Thus, insofar as the principle that judges are liable to be taxed is concerned the judgement is unanimous."

(at pp.45-46)

"When a tax is applied across the board, as in this case, without directly or indirectly targeting the judges, it cannot be said to be an intrusion into the independence of the judiciary. Taxes are one of the main revenues generating measures to enhance public finance. Public services such as free health and free education in this country are run with public finance. They are open to all citizenry including judges of the superior courts and Judicial Officers within the meaning of Article 111M of the Constitution. In fact, the decision of this Court in Chathurika Silva is premised on the legitimate expectation that judges have of admitting their children to State schools. Hence there is no logical reason to exempt judges from making their contribution to the public coffers along with the other members of the community. To that extent, the classification

is permissible. Judges should have the same obligations as other citizens on taxing matters" ***(at pp.46-47)***

In the meantime, relying on the following paragraphs of the respective judgments, the Petitioners submit that all the comparative jurisprudence from other commonwealth countries emphatically declares that judges are not employees and judges are distinct/different from Government servants.

(i) All India Judges' Association vs Union Of India And Others AIR 1993 SC 2493

"It is not necessary to repeat here what has been stated in the judgment under review while dealing with the same contentions raised there. We cannot however, help observing that the failure to realize the distinction between the judicial service and the other services is at the bottom of the hostility displayed by the review petitioners to the directions given in the judgment. The judicial service is not service in the sense of 'employment'. The judges are not: employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as the members of the council of ministers and the members of the legislature."

(ii) Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening) 2002 (8) BCLR 810 (CC) :

"Judicial officers ought not to be put in a position of having to do this, or to engage in negotiations with the executive over their salaries. They are judicial officers, not employees, and cannot and should not resort to industrial action to advance their interests in their conditions of service. That makes them vulnerable to having less attention paid to their legitimate concerns in relation to such matters, than others who can advance their interest through normal bargaining processes open to them"

(iii) Gilham v Ministry of Justice [2019] UKSC 44 :

"For the reasons given earlier, it is impossible to regard the judiciary as employed under or for the purposes of the Ministry of Justice. They are not civil servants or the equivalent of civil servants. They do not work for the ministry."

(iv) Re Australian Education Union & Australian Nursing Federation; ex parte Victoria (1995) 69 ALJR 451; [1995] HCA 71; 184 CLR 188; 128 ALR 610:

> *"In our view, also critical to a State's capacity to function as a government is its ability, not only to determine the number and identity of those whom it wishes to engage at the higher levels of government, but also to determine the terms and conditions on which those persons shall be engaged. Hence, Ministers, ministerial assistants and advisers, heads of departments and high level statutory office holders, parliamentary officers and judges would clearly fall within this group. The implied limitation would protect the States from the exercise by the Commission of power to fix minimum wages and working conditions in respect of such persons and possibly others as well. And, in any event, Ministers and judges are not employees of a State."* (para 58).

Having considered the above judgments and the submissions made on behalf of the Petitioners, I need to assess whether a judge in general perception falls within the category of employee or whether the judge, in the same context, is employed by an employer. I must now draw my attention to the conceptual point of view adopted both nationally as well as worldwide that underpin the significance of the role of a judge and judicial independence.

The current Constitution of Sri Lanka provides institutional safeguards to strengthen the independence of the judiciary in its Articles, inter alia, 107, 108, 109, 110, 111, 111A, 111B & 111C. In order to secure the independence of the judges of the lower courts, a Judicial Service Commission has been created in terms of Article 111D of the Constitution. In view of such provisions of the Constitution, judges are vested with a degree of immunity from suit for acts performed in their judicial capacity and it makes an interference with the judiciary a punishable offense. All such constitutional safeguards are to enable judges to act fearlessly in deciding cases justly.

In July 2006, the United Nations Economic and Social Council (ECOSOC) adopted a resolution recognizing the Bangalore Principles as representing a further development of, and as being complementary to, the 1985 United Nations Basic Principles on the Independence of the Judiciary. ECOSOC invited States to encourage their judiciaries to take into consideration such Principles when reviewing or developing rules concerning judicial conduct as well. The following paragraph on the Bangalore Principles of Judicial Conduct 2002 which

is highlighted in the "***The Bangalore Principles of Judicial Conduct" by The United Nations Office on Drugs and Crimes (UNODC) , Vienna (2018) states:***

> *"A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason. "*

The UNODC Commentary on the Bangalore Principles of Judicial Conduct (drafted by the Judicial Integrity Group in 2007) provides the following definition of constitutionalism in the context of judicial conduct:

> *"The idea of constitutionalism involves the proposition that the exercise of governmental power shall be bounded by rules, rules prescribing the procedure according to which legislative and executive acts are to be performed and delimiting their permissible content. Constitutionalism becomes a living reality to the extent that these rules curb the arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty."* [1]

Referring to the above definition, Prof. G. Mohan Gopal (***"Eliminating the Subjectivity in Judging: Reflections on the Occasion of the Centenary Year of Cardozo's - The Nature of the Judicial Process"*** in the ***Judges Journal Vol.VII, December 2021, published by the Sri Lanka Judges' Institute***) indicates that Constitutionalism requires the judiciary to maintain zones of liberty into which State authority cannot enter.

It is noteworthy that Judge C. G. Weeramantry wrote the preface to the above-mentioned UNODC Commentary as the Chairman of the Judicial Integrity Group at the time and in his preface, it is stated as follows:

[1] S. A. de Smith, The New Commonwealth and its Constitutions (London, Stevens, 1964).

"A judiciary of undisputed integrity is the bedrock of democracy and the rule of law. Even when all other protections fail, the judiciary provides a bulwark to the public against any encroachments on rights and freedoms under the law.

These observations apply both domestically—in the context of each nation State—and globally, for the global judiciary is seen as one great bastion of the rule of law throughout the world. Ensuring the integrity of the global judiciary is thus a task to which much energy, skill and experience must be devoted."

When examining the issues relating to this area of law, it is important to take into consideration the basic values of a democratic judicial system such as i.) justice, ii.) democracy, iii.) constitutionalism, iv.) rule of law v.) reasoning. These elements are referred to by the said Prof. Gopal in the above article published in the ***Judges Journal Vol.VII, December 2021.*** Judicial independence is the cornerstone of the Rule of Law. Regardless of the extrinsic, the judiciary must strive always to maintain its intrinsic independence. This requires the judiciary to be unafraid in its pursuit of justice[2].

In light of my above findings and also based on my extensive reading on the basic values of a democratic judicial system I am of the opinion that the judges of this country, in general perception, cannot be considered as employees per se or that they are employed by an employer. However, I have not arrived at the above conclusion based on the 'control test', upon which the Petitioner has placed reliance to differentiate the judges from usual employees. The said control test and even the integration test and economic reality test are employed by Courts to assess the realities of the contracts of employment which do not expressly provide the precise relationship of the employer and the employee. It cannot be assumed that the judges of the Superior Courts and the High Courts are exercising their duties under a written contract of employment. As specifically provided in the Constitution His Excellency the President grants the aforesaid judges a warrant and not a letter of appointment.

Nevertheless, the question that arises at this point is whether it is reasonable to interpret the words "employee" and "employer" embodied in section 83A of the said Inland Revenue Act

[2] Also see: *'Judicial Independence as the Cornerstone of the Rule of Law'* in the National Law Conference Publication 2022, Bar Association of Sri Lanka p.1 (This is an article written by me)

in the backdrop of my above conclusion. Now I must consider the reasonability of interpreting the said words in light of the conception that the judges are not employees as contended by the Petitioners.

Their Lordships in the Supreme Court, have already decided in the said Special Determination that taxes are one of the main revenue-generating measures to enhance public finance and the tax is open to all citizenry including judges of the superior courts and judicial officers within the meaning of Article 111M of the Constitution. The focal point of the Supreme Court is that there is no logical reason to exempt judges from making their contribution to the public coffers along with the other members of the community and the judges should have the same obligations as other citizens on taxing matters.

In the meantime, the Respondents argue that taxation and remuneration are two distinct elements and that taxation is a universally accepted method of enhancing Government revenue. It is apparent, as pointed out by the Respondents that this is not the 1st time the judges of this country are going to pay income tax and they have been liable to pay taxes including PAYE tax[3] under the Inland Revenue Act parallel to the public servants of the Country. Referring to section 195 of the said Inland Revenue Act which provides a comprehensive definition of the term 'employer', the Respondents assert that judges are well within the category of the 'Government institution' elaborated in Column II of the table attached to the said definition.

In terms of the said section 195, the "employer" means:

> 'the person who engages or remunerates an employee in employment or pays a pension or other remuneration to a former employee or to any other person for the past services of such former employee, and includes in the case of an entity specified in Column I hereunder, the person specified in the corresponding entry in Column II.'

Column I	*Column II*
A Government Institution	Accountant or Director of Finance or

[3] 'Pay As You Earn' tax

	Administrative Officer or Head of the Department or Institution, or Secretary to the Ministry or Chairman of Commission or Committee or any other person who pays remuneration

The Respondents contend that the corresponding entry in Column II in reference to the phrase "A Government Institution" in Column I includes any person who pays remuneration and thus unambiguously, judges fall within the said category of 'other persons' (as opposed to the individuals listed in the said Column II) who pay remuneration.

The reliefs sought in the instant Application by the Petitioners are for orders in the nature of writs of Certiorari, Prohibition and Mandamus. Undoubtedly, a review application of this nature may be, based on circumstances, different from a Special Determination matter or a Fundamental Rights application upon which the Supreme Court has exclusive jurisdiction. The question in the instant review Application at this stage, to my mind, is whether it is rational to borrow my above conclusion, that the judges are not employees, using it as a mold to interpret the words "employer" and "employee" in the said section 83A.

On a careful perusal of the above definition given in the said section 195, including the phrases embodied in the above corresponding entries in Columns I and II, I am convinced that, prima facie, judges fall under the said category of "any other person who pays remuneration". However, with my earlier findings, I observe a conflict exists with the presence of the word "employer" in the same definition for which I cannot provide an adequate justification. The views of the judges at every time cannot be stretched to authorize them to interpret the law in such a manner that would amount to new legislation which goes against the intention of the legislature.

The court should be extremely careful when interpreting the law formulated to generate revenue which is for the benefit of every member of the society. The learned President's Counsel for the Petitioners in his submissions stated that not only the Judges but even the Secretary General of Parliament, His Excellency the President, Members of Parliament, the Ombudsman, Attorney General acting quo are not employees. This may cause an additional burden not only to this Court but also to the authorities who govern the public sector and to

the society at large when choosing where to draw the line to ascertain the group of persons who should be exempted from APIT or any other taxes.

In this regard, I simply cannot keep a blind eye on the Respondents' submissions based on the pronouncements of the Supreme Court in the relevant Special Determination as described above. When exercising the discretionary jurisdiction the courts ought to be guided by justifiability, appreciating the public policy to a greater extent than demeaning such policies for a mere benefit towards a smaller group of the society regardless of the high rank assigned to such smaller group in the table of precedence in the country. Therefore, I need to convert my examination to the key issues in this case focusing on the sociology of law.

'The sociology of law refers to the sociological study of law and law-related phenomena, whereby law is typically conceived as the whole of legal norms in society as well as the practices and institutions that are associated with those norms' (Vide - Mathieu Deflem; "Sociology of Law", Oxford Bibliography[4]). 'Law and sociology show similarities but also important contrasts in the way they are constituted as intellectual fields and in their strengths and weaknesses as such. Law's particular weaknesses have allowed sociological ideas to invade legal thought in certain contexts and conditions' (Vide - Roger Cotterrell, "Law's Community: Legal Theory in Sociological Perspective" [1997], published by the Oxford University Press; at chap.3 pp.41–72.).

Upon an independent study I have done on the above aspects of law, I must concentrate at this juncture, on the judicial discipline which is a significant facet of the administration of justice. An ethical question arises as to whether it is incumbent upon this Court to assume the role of interpreting the respective law relating to APIT. It is obvious that this case primarily revolves around issues related to the intricacies of remuneration and benefits provided to members of the judiciary including me, my sister and my brothers on this panel of judges. One may even raise the issue of nondisclosure of such interest of the judges who are hearing this Application. If this Court were to rule that judges are not obligated to pay taxes without a statute clearly expressing the legislative intent, it could potentially lead to a loss of public

[4]<https://www.oxfordbibliographies.com/display/document/obo-9780199756384/obo-9780199756384-0056.xml> accessed on 26.10.2023

confidence in the court, especially among the general public who are legally required to pay taxes. Further, if I were to offer the interpretation that was previously stated in this judgment, it would inevitably give rise to a situation analogous to 'self-serving' which is in my opinion fundamentally inappropriate and dilutes the quality of judicial discipline.

Given this context, I take the view that the current case is not an appropriate venue for debating whether a judge falls within the purview of an employee under section 83A of the aforementioned Inland Revenue Act and therefore obliged to pay APIT. Hence, I should refrain from overstepping the boundaries of judicial discipline by interpreting the said section 83A solely for the benefit of judges at a time when the Government of Sri Lanka has taken a policy decision to enhance their revenue through APIT.

However, this doesn't in any way compromise the inherent powers of this Court and it is only a matter of assaying whether the inherent powers of this Court should be exercised to interpret the said section 83A here on the footing that judges are not the employees of anybody. This is not a fit case to use the inherent powers of this Court to interpret section 83A based on the arguments formulated by the Petitioners. Anyhow it must be stressed that this Court will not hesitate at any time to give an interpretation lawfully to section 83A if there is a clear threat to the independence of the judiciary.

It is not only the judges who should uphold the independence of the judiciary but arguably it is also the bounded duty of the remaining two limbs of the Government, namely the Executive and the Legislature to facilitate the enshrinement of the independence of the judiciary. When the judges refrain from interpreting the provisions of the legislation, such as what is spelled out in section 83A, merely to maintain judicial discipline, as in this case, in my view, it is at the discretion of the other two limbs of the Government to take the lead in resolving the grievances relating to the remuneration of the judges. The learned President's Counsel for the Petitioners ardently and delicately placed before this Court the grievances faced by the judges due to APIT. As such, I am of the view that the Executive and the Legislature may take cognizance of such grievances, to avoid erosion of the independence of the judiciary while balancing the constraints in the country's economy. The economic distress faced by the judge

contributes to the judicial stress which would eventually erupt the thin tissues of judicial independence.

Upon wide reading on the essence of the sociology of law relating to the question of this case, it is important to draw attention to the following thoughts of Justice P.H.K.Kulatilaka[5] (former judge of the Court of Appeal) upon judges, reflected in his article '***Judicial Stress - Reality Exposed'*** found in the ***JSA Law Journal Volume I (2013) published by the Judicial Service Association of Sri Lanka'.***

> *"Nevertheless recent studies have revealed that they are most likely and very much prone to stress….. They have to perform daily, and in the full glare of public gaze what most of the Public officers dare not to do, that is making decisions."*
>
> *"to expect them to work in a tiring environment without having proper housing, sufficient officers etc. would add up to their stress hormones. In rural areas people don't build houses to rent out. About two years back I had the misfortune of seeing a sad and pathetic sight where a Magistrate was occupying the upstairs section of a dilapidated house with a ladder to go up and an old bucket to carry water for his toilet and washing purposes. This was an untold sad tale or plight of a judge, the giver of justice who strives hard to keep the streams of justice pure and clear…….. No doubt such humiliating experience would be a source of stress. The high ups and authorities are aware of this plight but they have more important things to focus upon. They know that judges would hear cases even under the shade of a tree and impart justice."*
>
> *"Now times have changed. It was only the other day that Hon. Mr. Sarath Ambepitiya the High Court Judge of Colombo was gunned down at close range in broad daylight by a drug baron. It was during the same time that a District Judge in an outstation court was assaulted while in Chambers in front of the C.O. There had been few other instances where the accused had tried to embarrass the Judicial Officers.*

[5] In this article he says :-
"After 40 years of experience in different fields in the legal profession i.e. as legal assistant to the Supreme Court Judges, State Counsel and Senior State Counsel, High Court Judge, Judge of the Court of Appeal, Deputy Director and Co-Director of the Sri Lanka Judges Institute, I feel I am competent to speak on this subject."

Judges are individuals entrusted with a specific and exclusive authority to exercise their jurisdiction in the pursuit of justice. Therefore, in order to carry out their crucial responsibilities, judges should be regarded as a distinct group that necessitates special safeguards to maintain the integrity and dignity. Based on the rationale I've presented earlier and out of respect for the principle of judicial discipline, I am unable to provide the remedies sought by the Petitioners at this point in time. I believe that the judicial creativity which enhanced the grounds of review from the time of Lord Diplock's exposition of the principles of Judicial Review in ***Council of Civil Service Unions v Minister for the Civil Service (1985) AC 374*** is highly essential, in a case of this nature, even to refuse reliefs sought by the Claimant of a review application.

On a careful consideration of the whole matter, I have come to the conclusion that by reason of the special circumstances of this case, this Court should exercise its discretion to dismiss the instant Application of the Petitioners.

Judge of the Court of Appeal

Menaka Wijesundera J.

I have had the advantage of reading, in draft, the Judgement of His Lordship Justice Bandula Karunarathna (P/CA) and His Lordship Justice Sobhitha Rajakaruna. I agree with the final conclusion together with the reasoning given by His Lordship Justice Rajakaruna and while agreeing with him I should briefly clarify my position on some of the matters urged before us.

The main grouse of the Petitioners are that they have been compelled to pay APIT by the amendment to the Inland Revenue Act No. 45 of 2022. The Petitioners have further stated that when the Respondents deduct the APIT from the salaries of the Petitioners, the independence of the judiciary is disturbed. The purpose of taxation is to improve public revenue to maintain public services enjoyed by all members of the society. The judiciary is also part of the society, and taxes are enforced in order to earn revenue to the country to

maintain public services such as education, transport, medical services and the transport system. Members of the judiciary also enjoy these facilities, hence the judicial officers as responsible members of the society must contribute, to the revenue of the country.

The latest amendment to the Inland Revenue Act has imposed the tax amendments to be effective to the entirety of the society on the basis of their income earned, hence there is no exceptionality to any party hence it cannot hamper the judicial independence at all because it is imposed on a nondiscriminatory basis. As such the members of the judiciary also has the same obligations towards the society as other members of the society. It has nothing to do with the independence of the judiciary but only being civic minded for the goodness and the welfare of the entire society.

The Respondents has quoted some interesting case law in this regard which says that **"Hence there is no logical reason to exempt judges from making their contribution to the public coffers along with the other members of the community. To that extent, the classification is permissible. Judges should have the same obligations as other citizens on taxing matters."** (Chathurika Silva Vs Sunil Hettiarachchi, Secretary, Ministry of Education and Others, SCFR/222/2018, SCM 18 June 2020).

Therefore although Judges perform a unique duty, the Judges are also liable to pay taxes.

The deduction of the taxes for the salaries of Judges has been in existence for sometimes and the Petitioners had not complained before but as the quantum of payment has been amended by Act No.45 of 2022, the instant applications had been filled. But the delay in complaining has not been explained by the Petitioners. In this regard to the Respondents have cited a suitable case law CA/WRIT/419 of 2019 in which it has been held that **"The Petitioners have not mentioned anything in their pleadings with regard to the delay or acquiescence. Counsel's explanations from the Bar Table cannot be countenanced. The pleadings remain silent and Your Lordship will not condone the same".**

Hence as the taxation is national policy and national policy has been implemented by Parliament which is supreme to all. The Judiciary has been empowered to go into the constitutionality of any policy which is passed by Parliament and in the instant matter the

Supreme Court has held that the instant amendment to the Inland Revenue Act which has enacted APIT is Constitutional.

As such although the judiciary is unique and is exercising the judicial power of the people the Parliament by enacting national policies is exercising the legislative powers of the people which is applicable to all members of the society and the members of the judiciary are also part of that.

As such if any party is to be exempted from being liable for tax, then the specific law passed by the public policy must say so. But in the instant case the relevant act has not said so, hence the judiciary also like any other member of society to whom public policy applies comes within the provisions of the act.

As such I am of the view that as stated by His Lordship Justice Rajakaruna the instant application should be dismissed.

Judge of the Court of Appeal

Dushmanta N. Samarakoon J.,

(A) Preliminary Factors:

Alexander Hamilton, in Federalist No. 78 said,

"The executive not only dispenses the honors, but holds the sword of the community. The Legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment…"

This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three

> departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks."

He added, in Federalist No. 79,

> "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support…In the general course of human nature, a power over a man's subsistence amounts to a power over his will…"

The Federalist Papers is a collection of 85 articles and essays written by Alexander Hamilton, James Madison, and John Jay under the collective pseudonym & "Publius" to promote the ratification of the Constitution of the United States. The first seventy-seven of these essays were published serially in the Independent Journal, the New York Packet, and The Daily Advertiser between October 1787 and April 1788. The last eight papers (Nos. 78–85) were republished in the New York newspapers between June 14 and August 16, 1788.

The above extracts from the Federalist papers were quoted, morefully, by Justice Van Devanter in Judge Walter Evans vs. Gore, Acting Collector of Internal Revenue, 1919, 250 U. S. 550, in the Supreme Court of the United States.

Article 27(3) of the 1978 constitution provides, that,

> "The State shall safeguard the independence, **sovereignty,** unity and the territorial integrity of Sri Lanka."

Therefore, the State is under a duty to safeguard sovereignty.

Article 03 says, "In the Republic of Sri Lanka sovereignty is in the People and is inalienable…"

The petitioners in their written submissions dated 20th October 2023 in C. A. Writ 35 2023 says at paragraph 10, that, there is no other constitution in which there is a declaration that sovereignty is in the people and is inalienable, as far as their research goes.

Article 04 of the said constitution says, that, the judicial power of the People, which was included in the powers of government and hence in sovereignty as per Article 03,

"…shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized by the constitution, or created and established by law…"

The position of the petitioners is, that, section 83A as amended by Inland Revenue (Amendment) Act No. 45 of 2022, requires, the "employer" to deduct the Advance Personal Income Tax from the salary of his "employee" and, that,

(a) a Judge has no employer and it is an anathema to the doctrine of separation of powers and to Article 04 of the constitution if there is a finding that a Judge has an employer,

(b) as the definition of "employer" in the Inland Revenue Act provides that "employer" means the person who engages or remunerates an employee, but no one "engages" a Judge, for Stroud's Judicial Dictionary says "engage" to do anything "has the same force as the word "covenant," which refers to a contract and it is anathema to Article 04 if the conclusion is that the President of the Republic [in the case of High Court Judges] does contract with a Judge,

(c) neither the President, not the Judicial Service Commission have any power to discipline a judge when he is acting qua judge,

(d) as judges' salaries are received from the Consolidated Fund, there is no person who remunerates a judge and that judges are not remunerated by the Secretary, Ministry of Justice, who has no power or authority to decide the quantum of the remuneration paid to the judge,

(e) judges are independent and exercise the judicial power of the people as set out in Article 04,

(f) judges are not part of a "government institution,"

(g) since Article 111L and Article 111J draw a clear distinction between "judicial office" and "scheduled public office" judges do not come within the rubric of "public office", Article 170 defines "judicial officer" separately from "public office", judges do

not come under the Public Service Commission and hence they do not hold "public office",

(h) judges are not liable to be taxed,

(i) the statutory determination did not say that judges are liable to pay tax in terms of the Inland Revenue Act No. 24 of 2017, and therefore this court can grant relief prayed for by the petitioners.

The petitioners cite several cases from other countries,

(i) All India Judges' Association vs. Union of India and others, AIR 1993 SC 2493, where the Indian Supreme Court said, "The judges are not: employees",

(ii) S and Others vs. Van Rooyen and Others (General Council of the Bar of South Africa Intervening) 2002 (08) BCLR 810, where the South African Constitutional Court said, "They are judicial officers, not employees",

(iii) Gilham vs. Ministry of Justice [2019] UKSC 44, where the Supreme Court of the United Kingdom says, **"it is impossible to regard the judiciary as employed under or for the purposes of the Ministry of Justice"**,

(iv) Re Australian Education Union & Australian Nursing Federation; Ex parte Victoria ("AEU case") (1995) 69 ALJR 451, where the Australian High Court said, "…in any event, Ministers and judges are not employees of a State".

It appears, therefore on a prima facie basis, that, judges,

(1) do not have an employer,

(2) are not employed,

(3) are not engaged by a contract and

(4) not liable to pay Advanced Payment Income Tax

on the basis of the above.

(B) Cursus curiae of the Supreme Court of United States of America:

In the United States of America, where Alexander Hamilton, who had so much to do with the promulgation of the Constitution of the Unites States said, what was quoted at the commencement of this judgment, Article I section 08 of the constitution confers the power to impose taxes on the Congress. Most of the cases, where the question of imposing tax on Judges' salaries arose, two of which, Judge Walter Evans vs. Gore, Acting Collector of Internal Revenue, 1919 and United States vs. Hatter, Judge, United States District Court for the Central District of California, et al, 2001 were referred to by the Supreme Court in the Special Determination pertaining to the Bill and in the written submissions of the respondents dated 17 th October 2023 at pages 06 and 07, dealt with the prohibition in Article III section 01 of the constitution, the relevant part of which says,

> "… The Judges, both of the supreme and inferior Courts, shall … at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Considering this "compensation clause," Justice Van Devanter in Evans vs. Gore said,

> "With what purpose does the constitution provide that the compensation of the judges "shall not be diminished during their continuance in office"? Is it primarily to benefit the judges, or rather to promote the public weal by giving them that independence which makes for an impartial and courageous discharge of the judicial function[6]?"

The Supreme Court of United States of America in Evans vs. Gore decided that the tax was imposed contrary to the constitutional prohibition. Walter Evans was appointed a Judge in 1899, before the Revenue Act was brought.

Miles vs. Graham, [decided in 1925] 268 U. S. 501, extended the application of Evans. Judge Samuel J. Graham was appointed on September 1, 1919, after the Act which came into force on February, 25 th 1919. So this case extended the protection of Article III, section 01 to judges appointed after the Act also.

[6] There is a reference to "public weal" under Article 27(2)(d) of the Constitution, that comes under, "DIRECTIVE PRINCIPLES OF STATE POLICY AND FUNDAMENTAL DUTIES".

In O'Malley vs. Woodrough et al., 1939, 305 U. S. 838, decided 14 years after Miles, the Supreme Court criticized Evans vs Gore and said regarding Miles, that "latter cannot survive". But Evans itself was not overruled.

United States vs. Hubert L. Will, 1980 449 U. S. 471, was a case in which the Supreme Court affirmed in part, reversed in part, the District Court's decision and remanded the case.

In United States vs. Hatter, 2001, the gist of the decision was, that, the Compensation clause prevents the Government from collecting Social Security taxes, but not Medicare taxes, from federal judges who held office before Congress extended those taxes to federal employees.

In Hatter, the court said,

> "We now overrule Evans **insofar as** it holds that the Compensation Clause forbids Congress to apply a generally applicable, nondiscriminatory tax to the salaries of federal judges, whether or not they were appointed before enactment of the tax." (page 567)

The Opinion of the Court was written by Justice Stephen Gerald Breyer[7], but there was a dissenting opinion by Justice Antonin Gregory Scalia[8], although he too agreed that Evans is liable to be overruled, albeit on a more purified argument. **I consider Justice Scalia's dissenting opinion, together with the court's decision, not only because The Talmud said**, "In addition, the time may come when the minority opinion becomes the majority opinion. According to Rabbi Yehuda, "An individual opinion is cited along with the majority opinion as it may be needed at some time in the future[9]," **but also, it is logical; and could be tested in more than one instance for its accuracy.** Therefore, I submit, that, not only the decision of the court in United States vs. Hatter, 2001, but Evans, 1920, Miles, 1925, O'Malley, 1939

[7] Who was generally associated with the liberal wing of the Court – Kersch, Ken (2006) Justice Breyer's Manderin Liberty.
[8] Who was described as the intellectual anchor for the originalist and textualist position in the U. S. Supreme Court's conservative wing.
[9] Introduction to the Book "Dissent and the Supreme Court – Its role in the court's history and the nation's constitutional dialogue, Melvin I. Urofsky, First Edition, 2015.

and Hubert L. Will, 1980 too, must be understood in the light of what Justice Scalia said twenty two years ago.

The Relevancy to Sri Lanka position:

Why should one consider those American decisions, not only because two of them have been referred to by the Supreme Court of this country and referred to in the written submissions of the respondents in this application at pages 06 and 07. Although we do not have a Compensation clause as in United States of America covering all judges, "of the supreme and inferior Courts" in one stroke, we have provisions not much dissimilar.

Article 108 (2) of 1978 constitution says,

> "The salary payable to and the pension entitlement of a Judge of the Supreme Court and a Judge of the Court of Appeal shall not be reduced after his appointment."

Although the above Article does not apply to High Court Judges, District Judges, Magistrates and the Presidents of Labour Tribunals, the said article coming within **Chapter XV "The Judiciary"** and the particular part **"Independence of the Judiciary"**, sets an example, because "The Judiciary" and its "Independence" is applicable to all judges.

In the Special Determination pertaining to the Bill that amended the Inland Revenue Act No. 24 of 2017, S. C. S. D. 64/2022, the Supreme Court said,

> "We are of the view that Article 108(2) of the Constitution applies only to the salaries of the Judges of the Supreme Court and Court of Appeal which cannot be reduced. Nonetheless, we agree with the argument that it should not be interpreted as an exclusion of the minor judiciary from the general principle that judicial salaries should not be reduced.
>
> Indeed, there is a general principle that the judges salaries cannot be reduced during their tenure of office". (page 42)

There is another similarity with the American position. That is the 16th Amendment to the American Constitution, which says,

> "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

The similarity is in Article 148 of the 1978 constitution, which says,

> "Parliament shall have full control over public finance. No tax, rate or any other levy shall be imposed by any local authority or any other public authority, except by or under the authority of a law passed by Parliament or of any existing law."

Although the American provision is positive and the Sri Lankan one is, at least from its second sentence negative, both say the same thing. Whereas the former expressly say, that, it can tax income from whatever source derived, the latter, by not referring to details, but merely saying that, the Parliament has the full control over public finance and no tax could be imposed without under the authority of a law passed by it, assumes the same power.

Coming back to the discussion of the cursus curiae of American cases, it is proposed to do it under 10 Sub headings, which are nothing other than the propositions I deduced from examining the above cases, because it would formulate the reasons that enabled the deductions under each Sub heading.

(1) **The first proposition:**

> We concede that this Court has held that the Legislature cannot directly reduce judicial salaries **even if it decides to reduce all Government salaries** (Hatter, 2001, page 571 and Hubert L. Will, 1980, 449 U. S. at 226)

The above was said at page 571 of United States vs. Hatter, Judge, United States District Court for the Central District of California, 2001, relied upon by the respondents at page 07 of their above written submissions.

Hence, it is accepted, that, the legislature cannot directly reduce judicial salaries, even if it decides to reduce all Government salaries.

The reference the court gave for that proposition, **449 U. S. at 226**, is United States vs. Hubert L. Will, 1980 above referred to. That case said at paragraph 226,

> "The Government contends that Congress could reduce compensation as long as it did not "discriminate" against judges, as such, during the process. That the "freeze" applied to various officials in the legislative and Executive Branches, as well as judges, does not save the statute, however. This is quite different from the situation in O'Malley vs. Woodrough, 307 U. S. 277, 59 S. Ct. 838, 83 L. Ed. 1289 (1939). There the Court held that the Compensation clause was not offended by an income tax levied on Article III judges as well as on all taxpayers; there was no discrimination against the plaintiff judge. Federal judges, like all citizens, must share "the material burden of the government…" Id., at 282, 59 S. Ct., at 840. The inclusion in the freeze of other officials who are not protected by the Compensation clause does not insulate a direct diminution in judges' salaries from the clear mandate of that clause; **the Constitution makes no exception for "nondiscriminatory" reductions.** Accordingly, we hold that the statute with respect to Year 1, as applied to compensation of members of the certified class, **violates** the Compensation clause of Article III". (page 486, paragraph 226)

Therefore, Hubert L. Will, 1980[10] did not accept the Government's contention of nondiscrimination.

(2) **The second proposition:**

> **The Constitution made no exception for "nondiscriminatory reductions"** (Hubert L. Will, 1980)

What Chief Justice Warran Earl Burger said in the above passage could be understood by referring to 449 U. S. 205, 206 (page 476) of the same judgment, which says,

> "In October 1976, GS salaries were increased by an average of 4.8% under the procedures of the Compatibility Act outlined earlier. On October 1,…the first day of the relevant pay period, the President signed the Legislative Branch Appropriation Act, 1977,…By virtue of the reference to the Salary Act, this statute applied to federal

[10] Also approved by the majority judgment in Hatter, 2001.

judges; its import, therefore, was to prohibit paying the 4.8% raise on October 1, 1976, under the Adjustment Act to federal judges, as well as Members of Congress and high level officials in the Executive Branch".

This explains, the statement of the Chief Justice Burger in the previously quoted passage [under 01 above] to the effect,

> "The inclusion in the freeze of other officials who are not protected by the Compensation clause does not insulate a direct diminution in judges' salaries from the clear mandate of that clause; **the Constitution makes no exception for "nondiscriminatory" reductions."**

Hence, the inclusion in the freeze of Members of the Congress and high level officials of the Executive Branch did not, as he said, "insulate" a direct diminution of judges' salaries, because, the Constitution made no exception for "nondiscriminatory" reductions.

(3) **The third proposition:**

Because it is a "Compensation clause" not a "Discrimination clause."

The Constitution made no exception for "nondiscriminatory" reductions was the point Justice Scalia's dissenting opinion made.

He said,

> "But we are dealing here with a "Compensation clause," not a "Discrimination clause." (Hatter, page 582) As we have said, [Chief Justice Warran Burger in Hubert L. Will] "the Constitution makes no exception for "nondiscriminatory" reductions in judicial compensation, Will, supra, at 226".

(4) **The fourth proposition:**

Hatter, 2001, not only did not overrule Hubert L. Will, 1980, but followed it.

Then, if Hubert L. Will was not overruled in Hatter; and in fact, it was followed, as referred to above, in Hatter, the decision in Hatter cannot be on nondiscrimination, although it may have said so.

So, it is not on nondiscrimination.

This was the basis of the dissent of Justice Scalia.

When Hatter accepted the validity of a nondiscriminatory tax, it means, that, the legislature can reduce judges' salaries with all other salaries. But as (01) above says, the majority opinion of Hatter accepted that it cannot be done (Hatter, page 571) This is why Hatter's majority opinion is contradictory and the cursus curiae must be appreciated in the light of Justice Scalia's dissent.

(5) **The fifth proposition:**

> **The Question in Evans, 1920, Miles, 1925 and O' Malley 1939 were inclusion of the salary in "gross income". Presently, this has to be considered as a reduction of the "value of" compensation, not a reduction in compensation itself, which is permissible.**
>
> **This is based on the premise, that, Hamilton accepted the power of the Congress to increase the salaries of judges due to inflation.**
>
> **Although, it is not perfectly clear, as to how, this is recognized as an empowerment to reduce the "value of" compensation, in a manner akin to inflation, etc., the methods by which the value of the money is reduced, without infringing the "compensation clause," it has become the upshot, the cursus curiae, of American cases. [Justice Scalia, in his dissenting opinion in Hatter too, used "italics" for the words "value of" thus signifying that there is an especial meaning attached to those words].**

What was the complaint of Judge Walter Evans in 1920?

The Act of February 24, 1919, Statute 1062, on his net income for the year 1918 included his compensation as District Judge in the computation. Had it been excluded he would not been called upon to pay any income tax for that year. 250 U. S. 246 (page 550) Mr. Justice Holmes in his dissenting opinion (at 264, page 557) said, that, the Act taxes the net income of e**very individual.**

In Miles, 1925, the question was whether Judge Samuel J. Graham's salary should be included in his gross income for the purpose of income tax.

The grievance in O'Malley vs. Woodrough et al., 1939 was that Judge Joseph W. Woodrough's annual salary of $12,500 having been included in the net income for the purpose of income tax. It was done under section 22 of the Revenue Act of 1932. The said section said,

> "SEC. 22.
>
> GROSS INCOME.
>
> (a,) GENERAL DEFINITION. "Gross income"; includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. **In the case of Presidents of the United States and judges of courts of the United States taking office after the date of the enactment of this Act, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly."**

It was, hence, a provision determining the "Gross income" of any citizen who shall be liable to pay income tax.

Delivering the Opinion of the Court, Justice Felix Frankfurter said,

> "To subject them [Judges] to a general tax is merely to recognize that judges are also citizens and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." 305 U. S. 282 (page 840)

The effect of inflation on compensation, as envisaged by the Framers was considered at length by Chief Justice Warran Earl Burger in **United States vs. Hubert L. Will, 1980, 449 U. S. 471** at page 483. According to Madison's notes the tentative arrangement of the draftsmen was to provide that the Congress could neither increase nor decrease the compensation of judges. Gouverneur Morris raised the question of inflation and it was finally agreed, as Hamilton wrote,

> "…What might be extravagant today might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances; **yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse."** The Federalist No. 79, pages 491 – 492 (1818).

Repeating what Chief Justice Burger quoted in Hubert L. Will, Justice Scalia said (Hatter, page 584) that, "Since Hamilton thought that the Compensation clause "put it out of the power of [Congress] to change the condition of the individual [judge] for the worse".

There are factors other than tax, as Justice Scalia explained, [Hatter, page 583] that could affect the "value" of compensation although they are not elements of compensation itself. He cited as examples, inflation, rates charged by government owned utilities, or import duties that increase consumer prices. He said that, the Framers had this distinction well in mind and gave the example of Hamilton writing in The Federalist No. 79, page 473 (C. Rossiter ed. 1961)

(6) **The sixth proposition:**

> **Hence Government action affecting compensation should be discerned from Government action affecting the "value of" compensation.**

Justice Scalia said, at page 584 of Hatter,

> "I agree with the Court, therefore, because in Evans there was no discrimination, but because in Evans the universal application of the tax demonstrated that the Government was not reducing the compensation of its judges **but was acting as sovereign** rather than employer, imposing a general tax."

So he said Medicare tax too is unconstitutional. This was his dissent. The important point that should not be missed, as I think, is he saw it, not as a matter of nondiscrimination in reducing the compensation of judges, (as employer) but as acting as sovereign in imposing a general tax, which he classified with something similar to inflation.

The reader may refer to the fifth proposition.

(7) **The seventh proposition:**

> **The facts of Hatter [in regard to Medicare tax] shows that it was a reduction of compensation itself, it reduced a conferral of compensation.**
>
> In Hatter,
>
> (1) In 1982 Congress extended Medicare to federal employees,
>
> (2) In 1983 Congress required federal employees to participate in social security. It left about 96% of those who were currently employed free to choose not to participate in social security, thereby avoiding any increased financial obligation. It required the remaining 4% to participate in social security while freeing them of any added financial obligation. But it left those who could not participate in a contributory program without a choice. This last mentioned group consisted almost exclusively of federal judges.

Justice Scalia said, "I agree with the Court that extending the Social Security tax to sitting Article III judges in 1984 violated Article III's Compensation clause. **I part paths with the Court on the issue of extending the Medicare tax to federal judges in 1983, which I think was also unconstitutional".** (page 581)

Because, he saw, that what happened in Evans, Miles and O'Malley was not a reduction of compensation but a reduction of the "value of" compensation.

The question he formulated, at page 583 was, "when [does] an exemption from [a] tax constitutes compensation"?

If it is a general tax imposed on all citizens it is only a reduction of the "value of" the compensation, not a reduction of compensation itself.

Because in Hatter itself, the court's decision said,

> "We concede that this Court has held that the Legislature cannot directly reduce judicial salaries even as part of an equitable effort to reduce all Government salaries. See 449 U. S., at 226".

Hence, the opinion of Justice Scalia is that only an act of reducing the "value of" compensation, which could be likened to inflation, etc., that could validly reduce compensation, which would escape the effect of the word "directly" in the above proposition. He said that, it is something affecting the "value of" compensation, **but is not an element of compensation itself.** (page 583)

We must remember, that, the use of the word "directly" would not mean, that, its opposite "indirectly" would mean only one alternative.

For example, it is said, "Directly means in a straightforward or immediate way. It suggests a clear and unambiguous connection between two things[11]."

"Indirectly, on the other hand, means in an unclear, roundabout, or circuitous way. It suggests a less clear or less direct connection between two things[12]."

As a further example, one may imagine, a direct line between A to B, the variations are almost nil. What if one imagines an indirect line between A and B, there will be a multitude of variations.

So, indirectly is not a one "direct" opposite of directly.

Therefore, the use of the word "directly" in Hatter's court decision at page 571, even though was not the best word to be used there, leaves a number of ways of doing it **otherwise than direct**; and I think we must understand about a way similar or almost akin to inflation which affects the poor, but also the rich [*though the poor will suffer more in hardship*] which affects not a class but the whole and which affects not one but all.

[11] Directly vs Indirectly: Decoding Common Word Mix-Ups (thecontentauthority.com)

[12] Ibid.

(8) **The eighth proposition:**

> **Although in the statement in 01 above there is the word "directly", that is not to say that a nondiscriminatory tax is permitted.**
>
> **It is because the statement in 03 above.**
>
> **The decision of the court in Hatter was to allow such a reduction as the Medicare tax as permissible.**
>
> **But, as per Justice Scalia's dissenting opinion, which is based on Hatter's majority decision accepting Hubert L. Will, 1980, 449 U. S. at 226, (Hatter, page 571) the majority decision of Hatter then becomes contradictory.**
>
> **The reason is, because Hatter says salaries of judges cannot be reduced even if the legislature reduces all other salaries [by following Hubert L. Will] and it then says a nondiscriminatory tax is permissible.**

I accept the position of the petitioners, that, a judge is not an employee. But according to the cursus curiae of American cases, currently under discussion, [*which I am of the view applicable to the similar situation under the 1978 Constitution*] even if he is regarded as an employee, his salary cannot be reduced with the salaries of other employees, except by way of something akin to inflation, i.e., a general tax for all citizens, not all employees.

This is clear as per what Justice Scalia says at page 584 – 585, of Hatter. Although I do not wish to quote those two passages in full, what he meant was, that,

> (a) If there was a non extension to federal employees of a tax, such as the Medicare tax in that case, **it is a conferral of compensation** and
>
> (b) The extension of that tax to federal employees, therefore, **is a reduction of that compensation** and
>
> (c) It will not be constitutional unless Article III, section 01 is a Discrimination clause and not a Compensation clause

Hence, it appears, beyond any doubt, that, the majority decision of the court in Hatter, that the Medicare tax is not an infringement of the Compensation clause violates its own declaration that,

> "We concede that this Court has held that the Legislature cannot directly reduce judicial salaries even as part of an equitable effort to reduce all Government salaries. See 449 U. S., at 226".

The error it committed was, that, in the majority decision (at page 571) it was said, that,

> "But a tax law, unlike a law mandating a salary reduction, affects compensation indirectly, not directly."

As it was said earlier in this judgment, only an act reducing the "value of" compensation, [not reducing compensation itself] to explain further, something which is not an element of the compensation itself, can escape the effect of the word "directly."

Otherwise, it violates the first proposition above referred to, based on the Compensation clause.

This becomes clear from what Justice Scalia says at the end of page 585 and at the end of that section of his dissenting opinion as,

> "Had Congress simply imposed the Medicare tax on its own employees (including judges) at the time it introduced that tax for other **working people**, no benefit of federal employment would have been reduced, because, with respect to the newly introduced tax, none had ever existed. But an extension to federal employees of a tax from which they had previously been exempt *by reason of their employment status* seems to me a flat out reduction of federal employment compensation". [Emphasis in "bold" print added, but emphasis in "italics" is in the original]

The principle is, hence, if there was no conferral of compensation, there cannot be a reduction too. But a benefit that was available "by reason of their employment status," if reduced, will be a reduction of compensation.

(9) **The ninth proposition:**

> **In Evans, Miles and O'Malley, the Government was not reducing the compensation of its judges but was acting as sovereign rather than employer, imposing a general tax.**

Justice Scalia said, at page 584 of Hatter,

> "I agree with the Court, therefore, because in Evans there was no discrimination, but because in Evans the universal application of the tax demonstrated that the Government was not reducing the compensation of its judges **but was acting as sovereign** rather than employer, imposing a general tax."

The facts in Hatter, 2001, are different to Evans, Miles or O'Malley. The earlier cases were instances where the "gross income" of all citizens were assessed and in respect of the judges, the Act provided that their salary is to be included.

This is why Justice Scalia used the term "**rather than employer**."

That is why he said, at the passage cited under 08 "**working people**".

"Working people," indeed, is a term very much wider than "employees." As the petitioners also argue, all working people are not employees.

(10) **The tenth proposition:**

> **It is not a question of a general tax law affecting indirectly, but a question of there being no existing conferral of compensation that will be reduced.**
>
> **What can escape the term "directly" in the statement in 01 above is something that has the effect of reducing the "value of" compensation, but not compensation itself.**
>
> **In Evans, Miles and O'Malley, there was no reduction of an existing benefit available to judges "by reason of their position as judges" [which term is used in place of Justice Scalia's words "by reason of their employment status" at page 585]**

As it was said earlier in this judgment, only an act reducing the "value of" compensation, [not reducing compensation itself] to explain further, something which is not an element of the compensation itself, can escape the effect of the word "directly."

Otherwise, it violates the first proposition above referred to, based on the Compensation clause.

Thus, the principles emanating from the American cases are molded, to create the statue the raw material commands; and it is seen to be yet another statue of Liberty.

(C) **The position under Inland Revenue Act No. 24 of 2017 and its 2001 and 2022 amendments:**

The Inland Revenue Act No. 24 of 2017 starts with "The Imposition of Income Tax".

The following are the opening sections,

"2. (1) Income tax shall be payable for each year of assessment by

(a) a person who has taxable income for that year; or

(b) a person who receives a final withholding payment during that year.

Taxable income.

3. (1) Subject to subsection (2), the taxable income of a person for a year of assessment shall be equal to the total of the person's assessable income for the year from each employment, business, investment and other sources.

4. The assessable income of a person for a year of assessment from employment, business, investment or other source shall be equal to…

5. (1) An individual's income from an employment for a year of assessment shall be the individual's gains and profits from the employment for that year of assessment".

The above arrangement of sections could be likened to those in Evans, Miles or O'Malley, the imposition of general income tax.

But, a new section 83A was inserted by (Amendment) Act No. 10 of 2021. It read,

"83A. (1) An employer shall deduct an Advance Payment Income Tax with effect from April 1, 2020 on any payment which falls under section 5 made to his employee. If such employee –

(a) is a non resident or non citizen of Sri Lanka, or

(b) is a resident and citizen of Sri Lanka who gives his consent,

as specified by the Commissioner General.

(2)The **obligation** of an employer to withhold tax under subsection (1) shall not

be reduced or extinguished when…"

That section 83A was again amended by Act No. 45 of 2022 which provides,

15. Section 83A of the principal enactment is hereby amended as follows:

(1) in subsection (1) of that section, by the substitution for the words and figures "from April 1, 2020 on" of the words and figures "from April 1, 2020, but prior to January 1, 2023 on";

(2) **by the insertion immediately after subsection (1) of that section, of the following new subsection:**

"(1A) An employer shall deduct the Advance Personal Income Tax with effect from January 1, 2023 on any payment which falls under section 5 made to his employee, as specified by the Commissioner-General."; and

Therefore, it creates an obligation upon an employer to deduct Advanced Personal Income Tax from his employee.

The situation prior to that was, therefore, a **conferral of compensation.** The introduction of section 83A and its application to judges is a **reduction of that compensation.**

Furthermore, the general imposition of taxes under sections 1 to 5 et. Seq., is to assess the gross income and to compute the tax.

But section 83A is not that general tax.

The word "Advance…" itself signifies its difference.

It is not a tax by the sovereign rather than employer, but by an employer, as the power of the Inland Revenue Commissioner is "delegated" to the employer. I am mindful of Article 80(3) of the 1978 Constitution. It is not that I say that section 83A is unconstitutional, but I say that it cannot be applied to Judges. Because I am of the view that on the basis of the Constitutional arrangement discussed in relation to the cursus curiae of the United States cases, which is applicable to Sri Lanka, the decision of the respondents to deduct and or cause to be deducted the Advance Personal Income Tax from judges qua judges is irrational, because it defies the logic which is to be extracted from the said Constitutional arrangement (i) purporting to consider a Judge as an employee and (ii) purporting to impose upon him a tax other than that only reduces the value of compensation but not compensation itself and (iii) purporting to remove a conferral of compensation that existed; and that therefore the said decision is also in breach of the principles of proportionality and legitimate expectations. Hence I agree with My Lord the President to grant relief as His Lordship has directed.

Also as already said, whether judges are employees or not as according to the first proposition above, which was accepted in the majority opinion of Hatter as well as in Justice Scalia's dissenting opinion in that case that judges' salaries cannot be reduced even if salaries of all the other employees are reduced, the said legal provision, if applied to judges, infringes the rule that salaries of judges cannot be reduced which has been accepted by the Supreme Court.

In **Laker Airways Ltd., vs. Department of Trade, [1977] 2 All E. R. 182** Lord Denning M. R., in the Court of Appeal said, (at page 192) among other things, that,

> "The prerogative is a discretionary power exercisable by the executive government for the public good, in certain spheres of governmental activity for which the law has made no provision, such as the war prerogative (of requisitioning property for the defence of the realm), or the treaty prerogative (of making treaties with foreign powers). The law does not interfere with the proper exercise of the discretion by the executive in those situations: **but it can set limits by defining the bounds of the activity: and it can intervene if the discretion is exercised improperly or mistakenly.** That is a fundamental principle of our constitution."

In S. C. Application No. 66/2008 dated 04.05.2009, Chief Justice Sarath Nanda Silva determined, that, "If there is a national wages policy, the judiciary should be classified separately".

The determination further said, "This issue was left open for further consideration by the Executive since there was a reluctance to grant such a benefit to Judges of the High Court."

Although that case was not directly on a tax, but on an emolument, the principle above discussed, the limitations imposed by the Constitutional arrangement on reducing the compensation of judges makes the respondent's decision to deduct tax at the source, as submitted for the respondents at paragraph 32 page 12 of their written submissions, irrational and in breach of the principles of proportionality and the legitimate expectations of judges.

It was said in O'Malley vs. Woodrough, 1939, that, "And so their salaries are distinguished from income of others. The immunity extends only to compensation for their services. No question of comparison or reasonableness is involved." Therefore a tax in the form under section 83A is being paid by other categories of employees is not a ground not to treat the case of judges separately. O'Malley is a decision that said, that, a general tax is payable by judges too. But as per the above discussion in regard to the cursus curiae of the American cases together with the Constitutional arrangement under the 1978 Constitution, section 83A cannot be reasonably and rationally interpreted in a manner to make judges liable. In this judgment, reference has been made to "compensation" and "salaries." These words need to be interpreted to include the basic salary with increments and the allowances of the judges, because, if not the independence of the judiciary expected by the rule against deductions will be meaningless.

(D) **The basis of the Rule that Judges' Salaries must not be reduced:**

The petitioners themselves state, in their above written submissions, at paragraph 178, that Justice Dr. A. R. B. Amerasinghe commences his treatise on "Judicial Conduct Ethics and Responsibilities", by saying,

> "For a very long time judges have been compared with priests and the courts in which they officiate described as temples…"

I think no one said, better than Albert Camus, Algerian-French philosopher, author, dramatist, journalist, and political activist, about "religion," without which "priests" and "temples" in Dr. Amersainghe's statement will not exist. Camus said,

> "I would rather live my life as if there is a God and die to find out there isn't, than live as if there isn't and to die to find out that there is."

The basis of the said quote from Camus is nothing but faith and belief, sometimes blind, but that which runs the world.

The writings of Israeli Historian Yuval Noah Harari and Russian biologist and evolutionary scientist Peter Valentinovich Turchin agree, that, human social order could exceed the highly cooperative societies of wasps, bees, termites and ants, that consist of millions of inhabitants and form an "**ultrasoceity**" which consists of hundreds of millions of individuals, because of the power of faith and belief. Attributing the belief for this corporation to religion, Harari says, the Agricultural revolution, where he says, man did not domesticate wheat, but wheat domesticated man, who was a forager, arose for no other reason but to support thousands of people who gathered to build religious monuments, those in Gobekli Tepe in South Eastern Turkey built by hunter gatherers, long before pyramids, being evidence.

As Sri Anupam Gupta of Chandigarh, India, a senior lawyer, who said addressing a gathering of Sri Lankan Judges in Chandigarh Judicial Academy on 23rd April 2017, on the Topic "Sri Lankan Constitutions; A balance sheet",

> "The constitution is a political document and it has to be interpreted referring to the Preamble, which is a part of it. It cannot be interpreted in any other way than safeguarding the rights of the People, P in capital in "assuring to all Peoples FREEDOM, EQUALITY, JUSTICE, FUNDAMENTAL HUMAN RIGHTS and the INDEPENDENCE OF THE JUDICIARY as the intangible heritage that guarantees the dignity and well being of succeeding generations of the People" in the Preamble as well as in Article 04. It is a Public Trust, a perpetual trust, a trust that lives for eternity."

"Preamble" is a part of the constitution", so held by S. M. Sikri C. J., in **Kesavananda Bharati … vs State Of Kerala And Anr on 24 April, 1973** and **"The title of the Act is part of the**

Act:…" so said in **Fielding vs. Morley Corporation [1899] 1 Ch. 1.,** as cited by counsel in The London County Council vs. The Bermondsey Bioscope Company Limited, 08th and 09th December 1910, [1911] 1 K. B. 445.

This is the legal position, as I see it, unless and until Article 108(2) is abolished and the general arrangement in the constitution with regard to "The Independence of the Judiciary" and "Sovereignty" are altered.

But it was decided by the Supreme Court of India in the landmark ruling in **Golaknath v. State Of Punjab** (AIR 1967 SC 1643) that while Parliament has "wide" powers to amend the Constitution, it does not have the power to destroy the basic elements or fundamental features of the constitution. In other words, that, the Basic Structure of the Constitution cannot be changed.

The value of such an arrangement of provisions in a constitution was reiterated by Chief Justice Warran Earl Burger in United States vs. Hubert L. Will, 1980, 449 U. S. 471 at page 482 in the following words,

> "The relationship of judges' compensation to their independence was by no means a new idea initiated by the authors of the Constitution. The Act of Settlement in 1701, designed to correct abuses prevalent under the reign of Stuart Kings, includes a provision that, upon the accession of the successor to then Princess Anne,
>
> > "Judges Commissions be made Quamdiu se bene gesserint [during good behavior] and their Salaries ascertained and established…"

Chief Justice Burger then explained, that whereas the above is the earliest English statute of legislative acknowledgment that control over the tenure and compensation of judges is incompatible with a truly independent judiciary, later Parliament passed and the King assented to a statute implementing the Act of Settlement providing that a judge's salary would not be decreased "so long as the Patents and Commissions of them, or any of them respectively, shall continue and remain in force."

The learned Chief Justice continued,

> "Originally, these same protections applied to colonial judges as well. In 1761, however, the King converted the tenure of colonial judges to service at his pleasure. The interference this change brought to the administration of justice in the Colonies soon became one of the major objections voiced against the Crown…
>
> …Independence won, the colonists did not forget the reasons that caused them to separate from the Mother Country. Thus, when the Framers met in Philadelphia in 1787 to draft our organic law, they made certain that in the judicial articles both the tenure and the compensation of judges would be protected from one of the evils that had brought on the Revolution and separation".

Although Ceylon was also a colony its situation was much better.

In his first Chapter of the book, "**Emergency 58**", Tarzie Vittachchi states, that, "a High Commissioner for Ceylon in London once publicly boasted at a Guildhall banquet that Ceylon was a "little bit of England", The author adds, "And, superficially at any rate, it was from many points of view".

The Supreme Court, in the Special Determination pertaining to the Bill of the Act presently under consideration said, "Indeed, long before we became a Republic, the Soulbury Constitution constitutionally recognized the principle of judicial independence by creating the Judicial Service Commission. Although the 1972 Constitution made no provision for a Judicial Service Commission, its re introduction by the 1978 Constitution is evidence of the desire of the State to embed the independence of the judiciary as a functional and foundational constitutional principle". (page 41)

In fact, a distinguished academic had said, that, we were even better than England.

In his article, **"THE TWILIGHT OF JUDICIAL CONTROL OF EXECUTIVE ACTION IN SRI LANKA,"** December 1976, L. J. M. Coorey, having commenced his examination on the body of administrative law that prevailed in Ceylon, from colonial times, states,

> "There are numerous instances in which this relief has been claimed and granted. **They cannot be recapitulated in this context but it may be stated that the subject in Sri**

Lanka has been more fortunate than his counterpart in England. The subject in Sri Lanka could sue the state in contract (Queens Advocate v. Siman Appu (1884) 9 A.C. 571; C.G. Weeramantry, Law of Contracts (1967) pp. 494-95) as a right in a manner in no way different to that in which he could have sued any of his fellow citizens".

The Title of the Article of Dr. L. J. M. Coorey above referred to, written in 1976, indicates the dark clouds that came upon independence of the judiciary after the promulgation of the First Republican constitution in 1972. There was no article similar to Article 108(2) in the 1978 constitution.

It is the duty of the courts, therefore, to preserve this gladsome light thrown upon the Judiciary Department by the 1978 Constitution which has the term INDEPENDENCE OF THE JUDICIARY in capital letters in its Preamble and also specifically mentioned as a sub heading in the Chapter on Judiciary.

As Chief Justice John Marshall said, in the case of **William Marbury vs. James Madison, 1803**, which America celebrates as the commencement of the exercise of judicial review[13], "it is emphatically the province and duty of the judicial department to say what the law is".

Although it does not arise to be decided here the question might be raised what if the present law is altered and the law pertaining to income tax is brought in line with the statutes considered in Evans, Miles and O'Malley?

The answer is in paragraph 10 of the written submissions of the petitioners. There is no other constitution in which there is a declaration that sovereignty is in the people and is inalienable.

The Supreme Court in its above Special Determination referred to Industrial Disputes (Special Provisions) Bill [S. C. (S. D.) No. 30 2022] to say that Sovereignty in Article 03 of the Constitution must be interpreted to include the right to an independent judiciary.

If Sovereign people grants jurisdictions and appoint Judges as repositories of their judicial power on one hand; and tax the compensation of judges infringing the rule that their

[13] Although it has been done in State level much earlier than that.

compensation shall not be reduced, which is a result of the cause called Independence of the Judiciary on the other, there will be a clash which cannot be allowed in a democracy.

Judge of the Court of Appeal.

Neil Iddawala J.

In the present judicial proceedings, this Court is presented with three compelling applications, each filed by- members representing the learned High Court Judges, other Judicial Officers of the Court of First Instances, and Judicial Officers of the Labour Tribunals. Throughout the course of these proceedings, all parties involved, have eloquently presented comprehensive and complete submissions on multiple occasions. In the matter before this Court, I have had the privilege of reviewing the comprehensive draft judgment of His Lordship Justice Sobhitha Rajakaruna. I wish to express my concurrence with the ultimate conclusion reached by Justice Rajakaruna in this case. However, I am inclined to offer a separate and distinct perspective concerning the interpretation of the concepts surrounding employer-employee relationships and the broader notion of employment under the purview of the Inland Revenue Act, along with the other important arguments presented by the learned President's Counsel and the learned Deputy Solicitor General.

Nevertheless, I must respectfully dissent from the views expressed by His Lordship the President of the Court of Appeal and His Lordship Justice Samarakoon in this matter. While their opinions undoubtedly carry great weight, I find myself unable to concur in their interpretation of the relevant legal principles. Hence, this matter, of considerable significance and academic interest, warrants the issuance of a separate judgment to elucidate the nuances that have arisen during the course of the arguments.

Introduction

The petitioners have filed the instant application impugning the deduction of Advanced Personal Income Tax (*hereinafter* APIT) under the Inland Revenue (Amendment) Act No 24

of 2017 as amended by Acts No 10 of 2021 and No 45 of 2022 (*hereinafter* Inland Revenue Act (as amended)) from the income of High Court Judges in the Republic and prayed for, *inter alia*, notice to be issued on the respondents and interim orders pending final determination directing the respondents to prohibit the continuation of the measure and/or reimburse the respective judicial officers any monies deducted from their incomes after the institution of this action.

Initially, two applications were filed under CA-WRT-35-23 by High Court Judges' Association and CA-WRT-36-23 by the Judicial Service Association and later the third application was filed under CA-WRT-73-23 by the Association of Judicial Officers of Labour Tribunal.

Consequent to issuing formal notices, on 22/09/2023 the main arguments took place and all parties were heard. Nevertheless, since the learned counsel for all parties had already made lengthy and comprehensive submissions during the support stage, they relied on those submissions while making brief submissions on the argument date.

I hereby tender my input while considering submissions made during the support stage and the argument stage as a whole.

The primary contention of the petitioners asserts that the income of judicial officers received qua judicial officers does not constitute taxable income on which income tax could be lawfully charged within the meaning of the Inland Revenue Act (as amended). It was contended that the respondents have, by the increased taxation vis-à-vis Inland Revenue (Amendment) Act No 45 of 2022 and the deduction of APIT thereunder decreased the remuneration of judicial officers. The said measure was characterized as the respondents exerting control over the petitioners. As such, petitioners contend that the deduction of APIT from the income of High Court Judges constitutes an encroachment of the judicial power of the People as it infringes on the independence of the judiciary.

Implications of the S.C.S.D. Nos, 64 - 71/2022

At the outset, it must be highlighted that the Supreme Court in its **Special Determination of Bill titled Inland Revenue (Amendment) Bill S.C.S.D. Nos, 64 - 71/2022** (*hereinafter* S.C.S.D. Nos, 64 - 71/2022) have deemed the provisions of the present Inland Revenue

(Amendment) Act No 45 of 2022 to be consistent with the provisions of the Constitution. The Supreme Court has lengthily addressed the issue of whether a tax that is imposed on all citizenry without directly or indirectly targeting the judicial officers can be characterized as an affront to the independence of the judiciary. While reinforcing the independence of the protection afforded by Article 111M of the Constitution in terms of independence of the judiciary, the Supreme Court pronounced:

> *"Nevertheless, the question before us is whether judges should be required to pay taxes when all citizens, obviously above a minimum threshold, are required to pay taxes. ln a welfare state, public finances must sustain free public services such as education and health and other subsidized services. We are of the view that there is no logical reason as to why judges should not be called upon to contribute on a non-discriminatory basis, directly or indirectly, to the State coffers along with other members of the public despite the differences identified above. These differences do not have a rational relationship to the purpose of taxation, which is to increase government revenues. The public services provided through public funds are available to all judicial officers. ln fact, in The Judges v. The Attorney-General for the Province of Saskatchewan Privy Council Appeal No. 118 of 1936] the Privy Council held that neither the independence nor any other attribute of the judiciary can be affected by a general income tax which charges their official incomes on the same footing as the incomes of other citizens."* (at page 40)

On page 47 of the S.C.S.D. Nos, 64 - 71/2022, the Supreme Court pronounces that levying a tax from judicial officers would not, ipso facto, constitute an encroachment of the independence of the judiciary. The effect of it is contrasted with a constitutional amendment whereby the tenure of judges is changed and distinguishes the effects of both. While framing the issue before them as "The issue for determination is whether a tax that is imposed on all citizenry without directly or indirectly targeting the judicial officers runs counter to the general principle that the salaries of judges should not be diminished during the tenure of office" (at page 43), the Supreme Court conducted a comprehensive analysis on the matter by referring to case law from comparative jurisdictions to hold the following:

> "*We are of the view that the reasoning in the above cases is logical and instructive on the issue of taxes on the salaries of judges.* ***When a tax is applied across the board, as in this case, without directly or indirectly targeting the judges, it cannot be said to be an intrusion into the***

independence of the judiciary. *Taxes are one of the main revenues generating measures to enhance public finance. Public services such as free health and free education in this country are run with public finance. They are open to all citizenry including judges of the superior courts and Judicial Officers within the meaning of Article 111M of the Constitution. ln fact, the decision of this Court in Chathurika Silva is premised on the legitimate expectation that judges have of admitting their children to State schools. Hence* ***there is no logical reason to exempt judges from making their contribution to the public coffers along with the other members of the community***. *To that extent, the classification is permissible. Judges should have the same obligations as other citizens on taxing matters*." (Pages 46 – 47) (Emphasis added)

Furthermore, in commenting on the proposed Bill (which has now become law by Act No 45 of 2022), the Supreme Court highlighted the reasoning behind the tax policy changes which included revenue mobilization to address deteriorating economic conditions and ensure economic stability and acknowledged the detailed assessment of the economic conditions which showcases both external and internal factors and the fiscal consolidation policy measures that need to be made to address the "unprecedented economic crisis" (at page 12).

It is well established that the parliament shall have full control over public finance. No tax rate or any other levy shall be imposed by any local authority or any other public authority, except by or under the authority of a law passed by parliament or of any existing law. (See Article 148 of the Constitution). Article 152 of the Constitution further elaborates on the procedure of imposing any tax. The impugned Amendment Act No 45 of 2022 has followed this procedure laid down in the Constitution. Our Constitution does not permit post-enactment judicial review and only allows pre-enactment judicial review. As such, with the pronouncement of S.C.S.D. Nos, 64 - 71/2022, the pre-enactment judicial review in respect of Amendment Act No. 45 of 2022 has been exhausted. It is not up to the Court of Appeal to detract from the findings of the said determination of the Supreme Court. Hence, the Supreme Court has unequivocally held that the income of judicial officers qua judicial officers constitutes taxable income, and a lawful tax deduction therein would not constitute an encroachment of the independence of the judiciary. Therefore, in my view, the Supreme Court has sufficiently dealt with the eligibility of the judiciary to contribute to government revenue vis-à-vis lawful taxes.

On the other hand, paying taxes is a crucial element of being a responsible citizen. It helps ensure that everyone contributes towards the development and well-being of society. Regardless of one's profession or status, everyone benefits from the services and infrastructure that taxes fund, and thus, it is the responsibility of all citizens to pay their fair share, unless it is exempted by law.

The learned DSG during his submission at the argument stage reiterated his previous argument made during the support stage with regard to Section 8 of the Inland Revenue Act (as amended).

Section 8 reads as follows:

"(1) A person's income from other sources for a year of assessment shall be that person's gains and profits from any source whatsoever for the year, not including profits of a casual and non-recurring nature…."

The learned DSG in making this submission emphasized the fact that any person's income, irrespective of their profession or status could be subject to the deduction of income tax.

At this juncture, I would like to pause and address an argument preferred during the support stage by the learned President's Counsel Dr. Romesh De Silva, where a distinction was made between the *ratio* and *obiter* of the S.C.S.D. Nos, 64 - 71/2022. The learned President's Counsel has averred that the *ratio* entailing the Supreme Court's determination made in respect of the Inland Revenue (Amendment) Bill, under Article 123 (1) and Article 123 (2) of the Constitution, is the prevalence of any inconsistency of the Bill, either wholly or partly with the Constitution and as such the disputed issue in the instant petition has not been dealt by the Supreme Court. It seems that the learned President's Counsel is denying the relevance of the S.C.S.D. Nos, 64 - 71/2022 to the instant matter. This contention is rejected for the following reasons.

The *obiter dicta* of the S.C.S.D. Nos, 64 - 71/2022 extensively refers to the principle of the independence of the judiciary and how the same is not encroached upon by a lawful imposition of taxation in compliance with the law of the land. If the law on taxation is not prejudiced or biased on a certain category of people and is done so by an extension of the law and if it directly or indirectly includes the judiciary, such an act cannot be perceived as an act of encroaching upon the independence of the judiciary. Albeit, the *ratio* of the above case is

the constitutionality of the Bill, its *obiter dicta* are precisely relevant to the matter at hand, and by virtue of such relevance, I consider it as a persuasive authority, thus, the *obiter dicta* of the Supreme Court's determination shall be adopted by the case at hand and will be applied accordingly. Therefore, I am inclined to hold and follow the rationale and viewpoints conveyed within the *obiter dicta*, as they carry substantial weight and influence pertinent to the case at hand, which bears resemblances in terms of legal issues.

Legislative Discretion in Tax Matters

At the outset, the principle of separation of powers must be highlighted where the ensuing discussion will explore how the legislature is empowered, according to law, to undertake classifications or give concessions to a particular division of society, to generate revenue through taxation. This power cannot be usurped by the judiciary via the interpretation of the law so as to defeat the purpose and objective of the law promulgated by the legislature in its legislative capacity.

The Supreme Court and the former Constitutional Court have in several determinations recognised the legislature's freedom of 'classification' and granting 'concessions' to specific sectors in taxation matters. It was determined in respect of the Finance (Amendment) Act of 1978. The Constitutional Court observed as follows:

> "*In taxation matters, even more than other fields, it is well established that the Legislature has the greatest freedom in classification. In deciding whether a taxing law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting the persons or objects will tax and that a statute is not open to attack on the ground that it taxes some persons or objects and not others. It is only when within the range of its selection the law operates unequally that it cannot be justified on the basis of any valid classification". (The Constitutional Court of Sri Lanka-Vol VI -1978)*:

In **S.C./S. D-3/1980** the Supreme Court in relation to the Inland Revenue (Amendment) Bill, a similar observation was made as follows:

> *"This is however, fiscal legislation and it is a matter for the legislature to decide what consideration relating to the amelioration of hardship or to the interests of the economic progress of the people should be given effect to. Presumably, this provision is sought to be enacted on the*

basis of economic consideration in respect of which the decision must largely be left to the Legislature in view of the inherent complexity of fiscal adjustment of diverse elements that requires to be made".

Considering all these determinations of the Constitutional Court and the Supreme Court, in **S.C./S.D. No 27/2004** clearly stated as follows:

"It is clear from the observations made consistently by the Constitutional Court and this Court that in revenue matters in making classifications for the purpose of granting concessions or imposing liability there is a wide discretion. These measures are taken not only to raise resources necessary for the State but also to direct economic activity projected to the general welfare of the society. Such measures would be considered as inconsistent of the Article 12 of the Constitution only if they are manifestly unreasonable or discriminatory".

The Supreme Court of India, in the case of **S.K.Dutta, Income Tax Officer, Salary-Cum SIB Circle Assam and others -vs- Lawrence Singh Ingty, Treasury Officer, State of Nagaland,** (1968-Income Tax Reports Vol. 68,at p.272) referred to the principles that govern the approach of the court to a taxing statute. Here, the contours of 'classification' were lucidly set out by Hedge J. in the following terms.

"It is not in dispute that taxation laws must also pass the test of Article 14. That has been laid down by this court in Moopil Nair v State of Kerala (1961 3 SCR 77). But as observed by this court in East India Tobacco Co. v State of Andhra Pradesh (1963 1 SCR 404, 409), in deciding whether the taxation law is discriminatory or not it is necessary to bear in mind that the State has wide discretion in selecting persons or objects it will tax, and that a statute is not open to attack on the ground that it taxes some persons or objects and not others; it is only when within the range of its selection, the law operates unequally, and that cannot be justified on the basis of any valid classification, that it would be violative of Article 14. It is well settled that a State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably."

In, **Sri Lanka Dental Association Vs Attorney General** S. C. Special Determination 17/1997, considering the principles set out above held that the classification consistent with the Constitution is neither arbitrary nor unreasonable.

In light of the above authorities, it has consistently held that in revenue matters in making 'classifications' for granting 'concessions' and imposing liabilities, there is a wide discretion vested upon the legislature. These measures are taken not only to raise resources necessary for the State but also to direct economic activities properly for the general welfare of society.

It is important to note that in countries such as the United Kingdom, the United States, South Africa, Australia, and India, general tax policy is applied to judicial officers as other citizens. Except for judicial officers in India, all judges in the aforementioned countries are generally subject to income tax and are considered regular taxpayers. They must report their income and pay taxes per the prevailing tax laws and regulations (Including Pay As You Earn Tax - PAYE). In India, however, judicial officers such as judges enjoy certain income tax exemptions. Section 10(46) of the Income Tax Act, 1961, exempts judges of the Supreme Court, High Courts, and subordinate courts from income tax on their salaries, allowances, and perquisites. It is worthwhile to note that such an exemption is granted by an act of the legislature, which is permissible in the Sri Lankan context as well, as discussed under the concept of 'classification'.

As such, considering their unique service, the questions concerning the maintenance of expected life standards of judges and their secluded lifestyle, and their classification as being eligible for granting 'concessions' is a matter solely within the scope of legislative competence and is outside the ambit of the judiciary.

Petitioners through their written submissions quoted Justice A.R.B Amerasinghe in 'Judicial Conduct' on page 11 where it states *'By reason by the great responsibility vested in them, judges occupy a special place in the community'*.

The extent to which the judiciary is competent to engage with the said evaluation is limited to the pre-enactment judicial review of the intended legislative measures, which in the instant case has already been dispensed under S.C.S.D. Nos, 64 - 71/2022. The judiciary should not get into the shoes of the legislature and encroach on its boundaries. The Constitution cannot operate effectively if any branch of the government encroaches upon or abridges the rights of another. The framers of our Constitution, in their wisdom, wisely ensured the separation of powers and shielded each branch without reservation. All three branches must maintain their

independence and not be influenced or obstructed by the others. Any conflicts or confusion within or between the branches of government will harm the sovereignty of the people. Therefore, it is the responsibility of all three branches to protect the people from such situations and also maintain good relations among the Legislature, Executive, and Judiciary for the benefit of the people and to uphold the Constitution. However, it may be necessary for each pillar of the government to evolve a healthy convention that respects the domain of the others.

According to "The Spirit of Laws", the principal work of the French political philosopher Montesquieu there are three main branches of government, and the principle of separation of powers involves assigning specific functions and powers to each of these branches to prevent the concentration of power in a single authority. The three branches he identified are the Executive, Legislature and Judiciary

Montesquieu's theory of the separation of powers is intended to create a system of checks and balances, where each branch has its own sphere of authority and can limit the powers of the other branches. This system is designed to protect individual rights, prevent tyranny, and promote the rule of law within a democratic government. It has had a profound impact on the development of constitutional democracies around the world. Even in our Constitution by Articles 3 and 4, it clearly recognizes the theory of Separation of Powers. In such a context, the judiciary is also a part of the government.

The respondents during their submissions filed evidence to define the term 'government'. As per K.J. Aiyar's Judicial Dictionary 11th Edition the term *'Government' means "the State in a loose sense. In its popular sense, means the body of persons authorized to administer the affairs of or to govern a State…….. the term Government including the entire Government machinery of the State, embracing the Legislature, the Executive, the Judiciary, and indeed the entire field of Government or State*".

Similarly, according to Mitra's Legal and Commercial Dictionary 5th Edition the term Government is described as *"the exercise of certain powers and the performance of certain duties by public authorities or officers, together with certain private persons or corporations exercising public*

functions…….. Government generally connotes three estates, namely, the Legislature, the Executive, and the Judiciary".

Interpretation of "employer" & "employee"

The terms of statutes, when there is doubt or ambiguity about their meaning, are to be understood in the sense in which they best harmonise with the object and purpose of the enactment.

In our Constitution, the legislative power of the people is vested with the parliament, and it is the duty of the judiciary to interpret the laws thus promulgated by the legislature to the accepted judicial norms and the principle of separation of powers. It has been accepted as axiomatic that judges administer justice according to the prevailing law of the country. Justice Maartensz stated in Alice **Kotalawala-Vs- W.H.Perera and another** 1937 1CLJ 58 *" Justice must be done according to law. If hardship results from the law in force the remedy must be effected by the legislation. There would be chaos if a judge was entitled to create a procedure to meet the exigencies of every case in which he considers the law would work injustice".* A judge may not convince with a piece of legislation, since it may lead to what s/he regard as unjust, inappropriate or unreasonable results, but still a judge's duty is to interpret the statutes according to the law. Lord Denning stressed in **Gouriet Vs- Union Post Office Workers** (1977)2 WLR 310 that "*The law should be obeyed. Even the powerful. Even by the Trade Unions. We sit here to carry out the law. To see that the law is obeyed. And that we will do. A subject cannot disregard the law with impunity. To every subject in this land no matter how powerful, I would use Thomas Fuller's words over three hundred years ago 'Be you ever so high, the law is above you*". In such a context, I now turn to the submissions made by the petitioners.

During both the support stage and the argument stage of the instant applications the learned President's Counsel for the petitioners submitted that judicial officers are not 'employees' of any 'employer' as defined in the Interpretation Section of the Inland Revenue Act (as amended). It was asserted that such a characterisation between the respondent and the petitioners would mean that there is a degree of control exercised by the former over the latter and that such an outcome is an encroachment on the independence of the judiciary. The learned President's Counsel purported the argument that the respondents, namely the

Secretary and the Accountant of the Ministry of Justice cannot be considered as employers of the judges and as such cannot fall within the meaning of the Inland Revenue Act (as amended).

At this juncture, I would like to delve into several statutes that offer explicit definitions for the term's 'employer' and 'employee'. Now, I will proceed to scrutinize a selection of statutes that have interpreted and elucidated these aforementioned terms.

The Wages Boards Ordinance No.27 of 1941 objective is to regulate the wages and other payment rewards of persons employed in trade and employment. Section 64 *(Amended Ordinance No. 5 of 1953)* interprets 'Employer' and 'Worker' as:

> "*Employer* means any person who on his own behalf employs, or on whose behalf any other person employs, any worker in any trade, and includes any person who on behalf of any other person employs any worker in any trade" (emphasis added)
>
> "*Worker* means any person employed to perform any work in any trade.

The Employees' Provident Fund Act No.15 of 1958 aims to assure financial stability to the employee in the retirement stage of life and to reward employee for his/her role in the economic growth of the country. For the purpose of the act Section 47 of the act interprets 'Employer' and 'Employee' as below:

> "*Employer* means any person who employs or on whose behalf any other person employs any workman and includes a body of employers (whether such body is a firm, company, corporation or trade union), and any person who on behalf of any other person employs any workman, and includes the legal heir, successor in law, executor or administrator and liquidator of a company; and in the case of an incorporated body, the President or the Secretary of such body, and in the case of a partnership, the Managing Partner or Manager" (emphasis added)
>
> "*Employee* means any person who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed or implied, or oral or in writing and whether it is a contract of service or of apprenticeship or a contract personally to execute any work of labour, and includes any person ordinarily

employed under any such contract, whether such person is or is not in employment at any particular time." (emphasis added)

The Employees' Trust Fund Act No. 46 of 1980 Section 44 defines the terms 'Employer' and 'Employee' as below:

> *"Employer* means any person who employs or on whose behalf any other person employs any workman and includes a body of employers (whether such body is a firm, company, corporation, local authority or trade union), and any person who on behalf of any other person employs any workman, and includes a competent authority of a business undertaking vested in the Government under any written law, the legal heir, successor in law, executor or administrator and liquidator of a company, and in the case of an unincorporated body, the president or the secretary of such body, and in the case of a partnership, the managing partner or manager." *(As amended by Act No.18 of 1993)* (emphasis added)
>
> "*Employee* means any person who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed or implied, or oral or in writing, and whether it is a contract of service or of apprenticeship or a contract personally to execute any work of labour, and includes any person ordinarily employed under any such contract whether such person is, or is not in employment at any particular time." *(As amended by Act No.47 of 1988)* (emphasis added)

Upon careful examination of the aforementioned statutes, it becomes apparent that the definitions put forth by each statute exhibit variations that align with the specific "purpose and objectives" of the respective legislation. Thus, it is evident that a universally accepted definition of an 'employee' and an 'employer' does not exist. Therefore, when courts are tasked with interpreting these terms, they must consider the **'purpose and objectives'** of the relevant Statute at hand.

I now turn to the pertinent provisions of the Inland Revenue Act (*as amended*). For clarity, I wish to reproduce the relevant portion of Section 195 of the IRA as follows.

- *an 'Employee' as an individual engaged in employment,*

- *an 'Employer' as the person who engages or remunerates an employee in employment or pays a pension or other remuneration to a former employee or to any other person for the past services of such former employee, and includes in the case of an entity specified in Column I hereunder, the person specified in the corresponding entry in Column II…..*
- *an 'Employment' as*
  - *(i) a position of an individual in the employment of another person;*
  - *(ii) a position of an individual as manager of an entity;*
  - *(iii) a position of an individual entitling the individual to a fixed or ascertainable remuneration in respect of services performed;*
  - *(iv) a public office held by an individual;*
  - *(v) a position of an induvial to whom any payment is made or due by or from an employer or who receives any other benefit as an employee or in a similar capacity;*
  - *(vi) a position as a corporation or company director; and…."*

The term 'employer' (Section 195) means *"the person who engages or renumerates an employee in employment or pays pension or other remuneration to a former employee or any other person for the past services of such former employee and includes in the case of an entity specified in Column I hereunder, the person specified in the corresponding entry in Column II:*" As such, The Act specifies "A Government Institution" under Column I and describes the said entity in column II as *"*Accountant or Director of Finance or Administrative Officer or Head of the Department or Institution, or Secretary to the Ministry or Chairman of Commission or Committee or <u>any other person who pays remuneration</u>*" (emphasis added).* As established, judicial officers are liable for tax deductions from their incomes, it is submitted that for the purpose of such deductions, Section 195 of the Inland Revenue Act (as amended) characterises the respondents of the instant application as an 'employer' as they "engage in or remunerate employees in employment."

When scrutinizing the abovementioned subsection (iii), it can be argued that under the Inland Revenue Act (as amended), any individual who is entitled to a fixed or ascertainable remuneration concerning the service they provide is considered to be involved in employment. Thereby, the learned Deputy Solicitor General argued that judicial officers provide judicial services, and they are entitled to a scheme of remuneration for the service

they provide to the state. I accept this argument as it is clear that such a characterization is limited to the purpose of the Inland Revenue Act (as amended) and serves a functional purpose in the implementation of the statute. Therefore, it can be asserted that the petitioners are indeed recognized as being engaged in employment for the purpose of the Inland Revenue Act (as amended).

Hence, the respondents are the entity that 'remunerates the petitioners.' It must be asserted that the said characterisation of the relationship between the respondents and the petitioners is for the limited purpose of government revenue generation. Further, 1st respondent is the link between the executive and petitioners. Therefore, other than the payment of remuneration, the 1st respondent performs, inter alia, payment of allowances, maintenance of courthouse buildings & official bungalows, vehicles, stationary, furniture, & etc. The documents marked P7, P8, P10, P11, P12 in WRT-35-23, documents marked P7, P8, P9, P10, P11, P12 in WRT-36-23 and the documents marked P5 and P6 in WRT-73-23 further affirm the above contention. The relevant provisions of the Inland Revenue Act, (as amended) namely Sections 5, 83A and 195 are clear and do not create any doubt or ambiguity. The functional purpose such a relationship serves to implement a lawful tax policy encapsulated within the purpose and objective of the Inland Revenue Act (*as amended*), and thus does not constitute a degree of 'control' that amounts to encroachment of the independence of the judiciary.

Interpretation of "public officer" and "public office"

The learned President's Counsel for the petitioner also draws the attention of this Court to Article 170 (Interpretation Clause) of the Constitution. It was asserted that as Article 170 of the Constitution does not include a 'Judicial Officer/ Judge' as a 'public officer' and is therefore not engaging in 'employment'. If one were to agree with this argument, its logical extension would mean that all persons excluded from the list of persons mentioned in Article 170 Constitution are equally ineligible to contribute to revenue generation under the country's tax regime for not being 'employed'.

As conceded by the learned President's Counsel, the Constitutional interpretation of 'public officer' does not only exclude the category of Judicial Officers but also excludes many

categories such as President, Prime Minister, the Speaker, Ministers and Deputy Ministers, Members of Parliament, Members of the Parliamentary Council, Members of all Independent Commissions, Secretary – General of the Parliament and his Staff, Member of University Grants Commission, Commissioner-General of Elections, Auditor-General, Ombudsman & etc. Therefore, by the asserted interpretation of Article 170 of the Constitution, judicial officers alone are not excluded but all other parties therein mentioned will be excluded from APIT. It is my considered opinion that such an interpretation is unacceptable. Though the judicial officers are not a part of the executive or the legislature, the judiciary is one of the branches of the government. Therefore, the argument of only the members of the executive and legislative branches are being subjected to tax is not acceptable.

The learned Deputy Solicitor General has made a thorough distinction between a "public officer" and "public office" to discern whether a judicial officer can be characterised as a public officer and if not, does a judicial officer hold a public office. In determining this matter, the learned Deputy Solicitor General has referred to the case **Siriwardena v Fernando** 84 N.L.R 77 page 469, where His Lordship Justice Pathirana has quoted **Queen v Guardians of St. Martin's** (1851) 17 QB 154, in which it was held that:

> "*This case discusses what the office of a public nature is. Lord Campbell, C.J. said Then, is the office of a public nature? We must look to the functions, and compare them with those which were held to constitute such an office in Darley v. The Queen (12 Cl. & Fin. 520). The House of Lords laid down no criterion in that case; but they held that the office there in question was public within the rule they laid down; and I think the present office is not distinguishable. Whether the district for which it is exercised be a parish, or a hundred, or several parishes in a union, appears to me to form no ground of distinction, if it be an office in which the public have an interest"*

Furthermore, in the same case His Lordship Justice Patterson held that *"Then, is it a public office? He proceeded to answer the question as follows— "The question here is not whether the body for which the officer acts is public; it is whether his duties are of a public nature; and, as the exercise of them materially affects a great body of persons, I think they are so."*

Nonetheless, the petitioners through their written submissions submitted that all other commonwealth countries emphatically declare that judges are not employees and are different

from government servants. The petitioners cited the case; **All India Judges' Association vs Union of India and Others** AIR 1993 SC 2493, where the Indian Supreme Court held: *"It is not necessary to repeat here what has been stated in the judgement under review while dealing with the same contentions raised there. We cannot however, help observing that the failure to realize the distinction between the judicial service and the other services is at the bottom of the hostility displayed by the review petitioners to the direction given in the judgement.* ***The judicial service is not a service in the sense of 'employment'. The judges are not: employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public office in the same way as the members of the council of ministers and members of the legislation."*** (emphasis added)

According to the abovementioned case cited by the petitioners, it is emphasized that judges do not fall within the ambit of employee. Nevertheless, it further highlights that judges are holders of public office similar to members of the council of ministers and members of the legislation.

In line with the above observations, it can be noted that the Court System in Sri Lanka is established by the Constitution and the Judicature Act or any other Statute, on the pillar of the sovereignty of the people and therefore the mandate of such institutions is to exercise the judicial power of the people. This is further buttressed by the fact that judicial officers are renumerated from the Consolidated Fund which is established mainly by the money taxed on the general public.

Therefore, such a link infers the public character of the service performed by the judicial officers and as such it can be observed that the judicial officers, albeit not determined as public officers, do hold a public office. In the same light, the courthouses and the services therein performed are for the benefit of the general public at large by utilising public funds. Hence, the public nature of the services performed by the judicial officers can be brought to light to affirm that a judge does hold a public office and thus can be brought within the purview of 'employment' as interpreted under the Inland Revenue Act (as amended), thereby enabling the diminution of the remuneration under APIT.

Remuneration through the Consolidated Fund

Implication of Section 7 of the Judicature Act

During the submissions made by the learned President's Counsel Dr. Romesh De Silva, he emphasized Section7 of the Judicature Act. The section reads as follows:

"The salaries of the Judges of the High Court shall be charged on the Consolidated Fund."

The learned President's Counsel through these submissions aimed to highlight that similar to the salaries of the Judges of the Supreme Court and the Court of Appeal as per Article 108 of the Constitution, the Judicature Act indicates that the salaries of the High Court Judges are also charged on the Consolidated Fund.

However, it must be noted the Judicature Act does not mention with regard to whether the salaries of District Judges, Additional District Judges, Magistrates, Additional Magistrates and Presidents of the Labour Tribunal are charged on the Consolidated Fund.

Thereby, it could be said that Section 7 of the Judicature Act specifies that salaries of High Court Judges are charged on the Consolidated Fund similar to Article 108 of the Constitution which specifies salaries of Supreme Court and Court of Appeal Judges are charged on the Consolidated Fund. Yet it must be noted that Article 108 of the Constitution sets out a restriction on authorities specifying that, after the appointment of the Supreme Court and Court of Appeal Judges their salaries and pension entitlements cannot be diminished.

Implication of Article 108 of the Constitution

Delving into another point of contention, the application of Article 108 of the Constitution was mentioned in the petition and was stressed by the learned President's Counsel repeatedly during his submissions.

Article 108 of the Constitution can be reproduced in the following manner:

> *(1) The salaries of the Judges of the Supreme Court and of the Court of Appeal shall be determined by Parliament and shall be charged on the Consolidated Fund.*
>
> *(2) The salary payable to, and the pension entitlement of a Judge of the Supreme Court and a Judge of the Court of Appeal shall not be reduced after his appointment.* (Emphasis added)

Accordingly, the law clearly provides that the salary payable to and the pension entitlement of a Judge of the Supreme Court and the Court of Appeal is determined by the Parliament and that it is directly charged to the Consolidated Fund. Therefore, the supreme law of the land has specifically delineated the Judges of the Supreme Court and the Court of Appeal as directly entitled under Article 108 of the Constitution.

Moreover, the phrase "shall be charged on the Consolidated Fund" can be explicated in line with Article 150 of the Constitution which stipulates the following:

> *(1) Save as otherwise expressly provided in paragraphs (3) and (4) of this Article, no sum shall be withdrawn from the Consolidated Fund except under the authority of a warrant under the hand of the Minister in charge of the subject of Finance.*
>
> *(2) No such warrant shall be issued unless the sum has by resolution of Parliament or by any law been granted for specified public services for the financial year during which the withdrawal is to take place or* ***is otherwise lawfully, charged on the Consolidated Fund****.* (Emphasis added)

The above law promulgates that where a withdrawal is lawfully charged on the Consolidated Fund, there will be no requirement of a Resolution passed by the Parliament. Thus, Article 150 of the Constitution buttresses the observation that the salaries of the Judges of the Supreme Court and the Court of Appeal are charged on the Consolidated Fund and as such the salaries of these two superior courts cannot be reduced as provided by the Constitution. According to the S.C.S.D. Nos, 64 – 71/2022 (Supra), it is settled law that Article 108 can be interpreted as only applicable to the judges of the Supreme Court and the Court of Appeal.

Therefore, though the salaries of the High Court Judges are charged on the Consolidated Fund, neither the High Court nor any other judicial officers fall within the ambit of Article 108 of the Constitution apart from the Supreme Court and the Court of Appeal which is expressly provided for by the Constitution itself.

In the determination of the S.C.S.D. Nos, 64 – 71/2022 (Supra), it was their Lordships' view that Article 108 is solely correlated to the Supreme Court and the Court of Appeal in Sri Lanka, whereas it would not be applicable to the minor judiciary. The following was held by their Lordships:

*"We are of the view that Article 108 (2) of the Constitution **applies only** to the salaries of the Judges of the Supreme Court and Court of Appeal which cannot be reduced. Nonetheless we agree with the argument that it should not be interpreted as an exclusion of the minor judiciary from the general principle that judicial salaries should not be reduced."* (emphasis added)

(Vide-SC determination at p. 42)

In light of the above determination, the application of Article 108 of the Constitution was interpreted to hold that the salaries of the Judges of the Supreme Court and the Court of Appeal cannot be reduced as it is constitutionally guaranteed in Sri Lanka. However, it was stated that the aforementioned interpretation of Article 108 should not preclude the application of the "general principle" to the salaries of the High Court Judges, which is that the judicial salaries should not be reduced. Therefore, their Lordships contended that while they agree with the general principle that judicial salaries should not be reduced, Article 108 specifically applies only to the Supreme Court and the Court of Appeal. Thus, the Judges of High Courts, other Courts of First Instances and Tribunals do not fall within the ambit of Article 108. Hence, the Constitutional guarantee under Article 108 solely concerns the judicial salaries of the Supreme Court and the Court of Appeal and is inapplicable in the case before this Court.

In view of this contention, the determination of whether the salaries of the Judges of the Supreme Court and the Court of Appeal can be reduced by way of tax is vested within the Supreme Court of Sri Lanka, as this contention arises from a question of interpretation of the Constitution. As per Article 125 of the Constitution, the Supreme Court has the sole and exclusive jurisdiction to determine any matter related to the interpretation of the Constitution. The relevant law is quoted below:

*(1) The Supreme Court shall have **sole and exclusive jurisdiction** to hear and determine any question relating to the **interpretation of the Constitution** and accordingly, whenever any such question arises in the course of any proceedings in any other court or tribunal or other institution empowered by law to administer justice or to exercise judicial or quasi-judicial functions, such question shall forthwith be referred to the Supreme Court for determination.* (Emphasis added)

Therefore, as already determined by the Supreme Court in the determination of the Inland Revenue Amendment Bill, (Supra) Article 108 of the Constitution has no application for the salaries of the High Court Judges or any other judges of the minor judiciary.

Nevertheless, the above provision brings to light the exclusive jurisdiction of the Supreme Court to make determinations regarding matters related to the interpretation of the Constitutional provisions along with the provisions of the Inland Revenue Act (as amended), in respect of the reduction of the salaries of the Judges of the Supreme Court and the Court of Appeal.

Therefore, the determination of the reduction of the salaries of the said Judges along with the application of Section 83 A and Section 83 (2) of the Inland Revenue Act (as amended), shall be determined at the appropriate forum. It is important to note that , as elaborated above, the present applications are not related to the particular issue.

Implementation of PAYE/APIT

At this juncture, I would like to pause and note that the eligibility of judicial officers to contribute to tax revenue has manifested in the past and complied with as evinced by the judicial officer's contribution to Pay As You Earn Tax (PAYE Tax). Initially, the PAYE Tax was introduced through amendments made to the original Act No 10 of 2006 by Act Nos 22 of 2011 and 18 of 2013. Further, APIT (in replace of PAYE) is not a new introduction of the Amendment Act No 45 of 2022 but under Amendment Act No 10 of 2021. As the learned Deputy Solicitor General has correctly pointed out, the deduction of income tax from the remuneration of the judges either in the form of PAYE Tax or APIT is not a novel importation of the law but rather an application of the law which has undergone changes over the course of legislative amendments governing income tax in Sri Lanka. If all petitioners have consistently remitted their dues in the form of PAYE or APIT (taxes) since the inception thereof, and the amendment Act No 45 of 2022 merely augments the tax percentages, it follows that the prevailing state of affairs should encompass the continuance of tax payment in the manner it was initially established. Nothing less than the maintenance of this condition is warranted. In light of the aforementioned argument, I note that the practice of contributing to PAYE Tax bears considerable weight and significance in the present case.

Laches specified by the respondent

The learned DSG further reiterated another submission made by him during the support stage. The counsel for the respondent firmly stated that the petitioners were guilty of laches. The learned DSG highlighted that the petitioners have been subjected to the payment of income tax since the introduction of the PAYE tax.

PAYE tax was replaced by the introduction of APIT which was in operation since the amendment of Act No 10 of 2021. Therefore, it is quite clear that APIT is not a newly introduced tax imposition through the later amendment Act No 45 of 2022. Thus, it could be reiterated on the fact that even prior to the imposition of APIT, the PAYE tax had been enforced on all employees of the country both the public and private sectors.

Hence it could be accentuated on the fact that the deduction of tax from all employees has been practiced throughout the years and judicial officers too have been paying the relevant tax for over a decade without hesitation. The document marked P-9 in the case of WRT-36-23 is evidence of this factor. Thus, it is clear that the reasoning to the objection is to challenge the increase of percentage of the imposed tax.

At this point I would like to highlight the Document marked P-9 in the WRT-36-23petition. This is a letter dated 05/01/2023 addressed to the Secretary of Ministry of Justice (2nd Respondent) by the President and the Secretary of the Judicial Service Association of Sri Lanka.

The letter finally states the below:

> "**ඉහත සඳහන් කරුණු සියල්ල ඉදිරිපත් කර සිටීමෙන් විනිසුරුවරුන්ගෙන් ආදායම් බදු අය නොකරන ලෙසට කිසිදු ඉල්ලීමක් සිදු නොකරන බවට වැඩිදුරටත් දැන්වා සිටිමු**.
>
> **කෙසේ වුවත්, ඉහත සඳහන් පරිදි තම රාජකාරී කටයුතු නිසි පරිදි මහජනතාව වෙනුවෙන් පවත්වා ගෙන යාම සඳහා විනිසුරුවරුන් වෙත ලබා දී ඇති අයිතිවාසිකම් ආරක්ෂා වන පරිදි, ආදායම් බදු ලෙසට අය කර ගන්නා මුදලට සාපේක්ෂව සාධාරණ අයකින් දීමනාවන් වල අගය වැඩි කිරීම මගින්**

ඉහත සවිස්තරව දක්වා ඇති සාධාරණ තත්වයන් සහ අසමානතාවයන් අවම කිරීම සුදුසු බව ද යෝජනා කර සිටිමු.

ඉහත ආකාරයෙන් දීමනා ඉහල නැංවීමට 2018 **වර්ෂයේ එළඹෙන ලද අමාත්‍ය මණ්ඩලය තීරණය මගින් අධිකරණ අමාත්‍යාංශයේ ලේකම්වරයා වෙත බලය පවරා ඇති බවද වැඩිදුර දන්වා සිටිමු.**"

Through this quoted extraction, the legislative intention has been made explicit where it expressly admits the fact that judicial officers are subject to tax. However, a caveat has also been expressed where the relevant authorities are requested to consider that drastic changes are not made to the lifestyle of judicial officers as a result of taxation. Further, the fact that judicial officers are subjected to tax is buttressed by paragraphs 40 and 42 of the petition in the case WRIT-35-23 as highlighted by the learned DSG.

Concluding remarks

The Constitution is the supreme law of the land and as per Article 3 of the Constitution, sovereignty lies in the people and is inalienable. Sovereignty includes the government; thus, the power of the people is exercised through the three pillars of the government, namely the executive, legislature and the judiciary. Therefore, the judiciary is only one such pillar of the government which exercises the judicial power of the people.

The regulation of taxation by laws passed and implemented by the three pillars of government serves the best interest of society. However, the efficacy of fulfilling such a task lies in the principle of separation of powers enshrined within the Constitution. As the learned DSG states in his submission "*the legislature has the purse, the executive has its sword, and the judiciary has the public confidence*": though akin to a slogan, it aptly describes the separation of powers within a government system. Accordingly, the three branches of the government are to operate independently from one another, and there shall be no interference of one in the other. There shall only be checks and balances between these three branches. This principle, which is provided by the Constitution, safeguards the independence of the judiciary in a delicate balance.

In addressing the conundrum of whether High Court Judges (Judicial Officers) are to be treated as a special category, from among the general society/general public, the answer is in the affirmative as the service of all judges awards them a special category, although they are members of the Judiciary. The service of the judicial officers must be undoubtedly rewarding for their service comes with invaluable commitment. Nonetheless, justified and proper imposition of tax without directly or indirectly targeting such judicial officers specifically, in the interest of society, is not an act of interference with the independence of the judiciary if such imposition could be treated as a general fiscal measure applicable to all citizens.

It must be noted that imposing APIT on the salaries of judges could directly impact their expected standard of lifestyle. It is well recognised that judges are considered as a distinct category from the rest of the population, and it is further accepted that they live a very secluded and isolated lifestyle. Given such a context whilst being subjected to the APIT, alternative methods to balance out any dissonance created by the APIT in maintaining the said lifestyle should be considered. This is important as the service of the judiciary is distinct from any other sector of service and their service is awarded at the expense of certain liberties on the part of a judicial officer. As a judge is expected to maintain certain standards of living, to feasibly meet the expected commitment, I observe that allowances granted exclusively to a judicial officer to maintain such standards be exempted from taxation. It is worthwhile to accentuate that, on one stage the exclusive allowances such as Personal Allowance and Appeal Allowance of judicial officers were exempted by a Circular No. SEC/2013/07 dated 01/09/2013 issued by the 3rd respondent Inland Revenue Commissioner General.

Further, I wish to add the following observation. Contemporary society is constantly changing, with new social upheavals and challenges arising every day. To effectively solve these problems and guarantee positive change, those in power must be equipped with the necessary tools and authority to do so. This means that the legislative and executive power of the government must have adequate and far-reaching powers, free from unnecessary obstruction or interference. It is important to remember that these powers are given to them by the people, and with this trust comes the expectation that they will use their powers responsibly with a sense of justice and for the betterment of people.

Similarly, the independence of the judiciary should be preserved without any obstruction, hindrance or interference. The judiciary plays a vital role in ensuring that justice is served fairly and impartially, and any interference with their independence could compromise the integrity of the judicial system. A delicate balance ought to be struck between both these points for the adequate functioning of society.

While exercising their powers, all three branches of the government may experience a sense of satisfaction, but they must also remember that using their powers excessively or unjustly is not acceptable. The saying, "It is excellent to have a giant's strength; but it is tyrannous to use it like a giant" serves as a reminder that those in power must be mindful of the impact of their actions on society and use their powers for the greater good, rather than for personal gain or to oppress others.

Hence, it is the responsibility of both the legislature and the executive to impose taxes and determine their percentages. However, these decisions must be made in a manner that is fair and reasonable, without infringing upon the rights of individuals in a burdensome way. Furthermore, once revenue is collected, it should be used transparently for the betterment of society. The funds collected through taxation or other means must be utilized appropriately and for the greater good, rather than being misused or used for personal gain.

In a democratic society, taxes are collected to fund public services and infrastructure that benefit the entire community, such as healthcare, education, transportation, and public safety. When taxpayers pay their fair share of taxes, they expect their money to be used efficiently and effectively to support these important services.

Misuse of public funds, whether it be through corruption, embezzlement, or other forms of fraud, is a breach of the public trust and undermines the integrity of the system. It not only harms the individuals directly affected by the misuse of funds but also erodes public confidence in government institutions and makes it harder to sustain support for important public programs.

Therefore, governments need to have strong accountability measures in place to ensure that public funds are being used appropriately and for the intended purpose. This includes having

independent auditors, oversight committees, and transparent reporting mechanisms to monitor the use of public funds and prevent corruption and fraud.

In summary, the appropriate and effective use of public funds is essential for the functioning of a democratic society, and it is the responsibility of governments to ensure that these funds are used for the greater good and not for personal gain or to give benefits to the certain class of people or other dishonest purposes.

Conclusion

In conclusion, after careful consideration of the lengthy and exhaustive reasons provided in the foregoing discussion, I have determined that it is appropriate to dismiss the applications in all cases, namely WRT-35-23, 36-23 and 73-23, without imposing any costs.

Further, I wish to consider another critical aspect in this case, and I am compelled to issue a direction to the respondents with regard to the recovery of arrears of the APIT. It is essential to establish a suitable recovery procedure that will enable the affected parties to pay the arrears in a reasonable and manageable manner.

Judge of the Court of Appeal

By majority decision the Application is dismissed.