**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, Mandamus and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**Case No. CA/ Writ/ 73/ 2023**

1. Pethiyagoda John Ranasinghe Arachchige Sudantha Sagara Ranasinghe,
   President – Association of Judicial Officer of Labour Tribunal,
   President/ Additional Magistrate,
   Labour Tribunal No. 13,
   Colombo 08.

**2.** Bertram Charles Justus Nesiah,
Secretary - Association of Judicial Officer of Labour Tribunal,
President/ Additional Magistrate,
Labour Tribunal No. 08,
Colombo 08. **Petitioners**

**Vs.**

1. A.S.M. Jayasingha,
   Chief Accountant,
   Ministry of Justice,
   No, 19, Sangaraja Mawatha,
   Colombo 10.

2. Wasantha Perera,
   Secretary,
   Ministry of Justice,
   No, 19, Sangaraja Mawatha
   Colombo 10.

3. D.R.S. Hapuarachchi,
   Commissioner General of Inland Revenue,
   Department of Inland Revenue,
   Sir Chittampalam A. Gardiner Mawatha,
   Colombo 02.

4. Hon. Attorney General
   Attorney General's Department,
   Colombo 12.

**Respondents**

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

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| **Counsel**: | Dr. Romesh de Silva, PC with Sugath Caldera AAL, and Niran Anketell for the Petitioners in Writ/0035/2023 and Writ/0036/2023. |
| | Shammil J. Perera PC, with Primal Ratwatte AAL, Chamath Fernando AAL and Duthika Perera AAL for the Petitioners in Writ/0073/2023 |
| | Nirmalan Wigneswaran, DSG, with M. Jayasinghe, DSG and Shiloma David, SC for all the Respondents. |
| **Written Submissions:** | By the petitioners – Not filed |
| | By the Respondent – Not filed |
| **Supported on :** | 12.05.2023, 05.06.2023 and 04.07.2023 |
| **Decided on :** | 25.07.2023 |

**N. Bandula Karunarathna J. P/CA**

The petitioners are citizens of Sri Lanka and are at present serving as High Court Judges, District Judges, Additional District Judges, Magistrates, Additional Magistrates, 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. Writ/35/2023 and Writ/36/2023 were supported by learned Senior President's Counsel Mr. Romesh De Silva and Writ/73/2023 was supported by learned President's Counsel Mr. Shamil Perera. All 3 matters were defended by learned DSG Mr. Nirmalan Wigneswaran who appeared on behalf of all the respondents.

All parties agreed that all 3 matters to be taken up together and deliver one order regarding the notices as well as interim relief.

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

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

The petitioners in Writ/73/2023 are holding the posts of being the duly elected President and Secretary respectively in the Association of judicial officers of Labour Tribunal President/ Additional Magistrate.

The Executive Committee of those 3 associations, unanimously passed a resolution to make this instant 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 in 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 as more fully set out hereinafter. The petitioners state that they have a sufficient genuine interest in order to make this application and beg the leave of this Court to plead this petition in the interests of 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 in 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 provides 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 in accordance with Article 4 (c) of the Constitution the sovereignty of the people shall be exercised and enjoyed *inter alia* 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 President's 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. The petitioners state that as observed by the Supreme Court the three branches of the government of the Legislative, the Executive and the Judiciary, are composed of different powers and functions as three separate organs of government, and that those three organs are constitutionally of equal status and also independent from one another.

Article 170 of the Constitution sets out the interpretation of a "Judicial Officer", [other than in Article 111M], 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.

The petitioners state that in this context that 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 that 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, 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", that the Judges are not employees, and that 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 a "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 petitioners state further that judicial officers shall be entitled to an official residence, official vehicle, driver's allowance and other allowances which shall 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 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 been provided to judicial officers in this Country.

The petitioners state furthermore 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 that 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 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 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.

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 the 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 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.

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 & issue the following interim orders as a matter of urgency and pressing necessity;

i. directing the above-named respondents or any one 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 any one 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 petitioners pray as follows;

(a) issue notice of this application on 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 any one 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 any one 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 any one 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 any one 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 any one 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 seem meet.

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

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

The learned counsel for the respondents 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 for, have been subject to the payment of APIT, even prior to the enactment of the Inland Revenue (Amendment) Act, No. 45 of 2022. The respondents further 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".

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 submit that "vehicle allowance" and "housing allowance" are subject to tax in terms of the Inland Revenue Act and the direction and guidelines issued by Commissioner General of Inland Revenue.

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 state 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 I am advised to state further that the petitioners are estopped from doing so.

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."
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> "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 substance amounts to a power over his will".
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> "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 the 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 revenues 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.

Learned counsel for the respondents' states that the order procured by the petitioners from this Court, *ex parte*, reduces government revenue, during the most adverse economic situation experienced in this country, imperils the public confidence in the Judiciary, and is contrary to public interest. In these circumstances, a real and pressing need has arisen to seek the indulgence of this Court to set aside the order dated 25.01.2023, issued *ex parte* and refuse the issuance of notice.

The petitioners have intentionally failed to give adequate and sufficient notice of the instant application prior to supporting the same and have intentionally and wilfully obtained the order by misdirecting this Court on material particulars. The Inland Revenue (Amendment) Act, No. 45 of 2022 was certified on 18.12.2022, and the purported 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 notice, the relief prayed for in the petition and the interim relief sought therein. Learned counsel for the respondents, moves to dismiss the petitioners' application *in limine*.

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 in to 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 of the application it can be refused.

When it is crystal clear that the decision of the administrative body or the decision of the respondents are *ultra vires,* the Court should not refuse the petitioners writ application *in limine*. If the court does not here the application of the petitioner and refused the petition considering only technical grounds, it can be considered as violation of the rules of natural justice.

Keeping that in my mind now I will look into the present issue in this case. Judges indeed hold a unique position within society due to their role and responsibilities. They play a crucial role in upholding the law, interpreting it, and ensuring justice is served. Their decisions can have significant impacts on individuals and communities, making their job 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.

However, 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. They face challenges, make personal sacrifices, and contribute to society in their own way, just like any other profession. 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 Court of Appeal cannot be reduced 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.

It is my view that 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.

The decision in Senadhira vs. The Bribery Commissioner 63 NLR 313 at page 317 where it was 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.

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 Court of Appeal, why not it applies to the other judicial officers in the Judiciary. I am of the view that it

should be seriously considered by this Court with the other basic legal arguments raised by both parties.

Indeed, 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, Magistrates Court, President of the Labour Tribunals and all other judicial officers within the meaning of Article 111 M of the Constitution is 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).

Heard both learned President's Counsel appearing for the petitioners, and the learned DSG for the respondents in support of their respective cases for issuing of notice and the interim orders prayed for.

Having heard all parties, I am of the view that petitioners have satisfied this court that there is a serious matter to be looked into inter alia on the questions of ultra vires and the reasonableness of the impugned amendments to the Inland Revenue Act. Accordingly, I am inclined to issue notice to all the respondents.

Having issued notice, now I have to consider the application by the petitioners for the extension of the interim orders prayed for. In this regard I am of the view that unless the interim orders prayed for by the petitioners are not extended the final relief sought by the petitioners would be rendered nugatory.

Therefore, even on a consideration of the balance of convenience I am of the view that the balance of convenience lies in favour of the petitioners as the damage that would be caused to the petitioners would be greater than that to the respondents. Therefore, I am of the view that this is a fit case to extend the interim order prayed for in prayer (f) to the petition dated 23.01.2023 until the final determination of the petitioners' application.

Respondents can file their objections on or before 31.08.2023.

Counter objections can be filed on or before 07.09.2023.

Arguments on 22.09.2023 and 26.09.2023 at 1.30 p.m.

This court, strongly of the view that the final judgement should be delivered within 3 months from today.

**President of the Court of Appeal**

**Sobhitha Rajakaruna J.**

On an overall consideration of the submissions made on behalf of both parties, I take the view that the questions of law raised in the instant Application should be assayed and evaluated at a final hearing and accordingly, I also agree that formal notice of the instant Application should be issued on the Respondents. In regard to the interim order that the Petitioners have prayed for, I am of the view that the Court should be guided by the principles on balance of convenience. In the event the Petitioners are unsuccessful in the instant Application, there is a greater possibility of issuing stringent directions by relevant authorities against the Petitioners in order to recover the tax which was not paid during the pendency of a possible stay order. Hence, based on an overall conspectus of this case, I cannot agree to issue a stay order as prayed for in the prayer of the Petition of the Petitioners.

**Judge of the Court of Appeal**

**Menaka Wijesundara J.**

I agree for the issuance of notice but disagree for interim relief being extended for the reasons considered by Justice Iddawala.

**Judge of the Court of Appeal**

**D.N. Samarakoon J.**

It is said, that, "The famous American scientist and politician Benjamin Franklin once remarked, 'in this world nothing can be said to be certain, except death and taxes".

I also recently found in a very philosophical and jurisprudential Written Submission filed by the State in a Tax Case saying, "While the regular citizen pays a substantial part of his earnings as income tax, a certain class of people is relieved of the obligation to pay tax. Ironically, tax exemptions are afforded to wealthy entrepreneurs while the struggling middle class continue to be burdened with taxes. Thus, it is important to understand and appreciate the justification underlying tax exemptions. It is only then can this Court properly interpret the scope of tax exemption".

The Written Submission then explains how the Free-Market Economies are driven by the initiative of entrepreneurs, who are prepared to risk significant capital to accumulate personal wealth but, in the process, creating employment opportunities, effectively relieving the State from the burden of providing the same. Hence such enterprises are given a tax holiday.

In considering the above, in the backdrop of the quotation cited from S.K. Dutta, Income-Tax Officer & Others Vs. Lawrence Singh Ingty, in the judgment of My Lord the President, it is clear that this Court has to understand and appreciate the responsibility of Judges performing the unique task of administering justice, vis a viz, the liability of a Judge as a citizen to pay taxes for the welfare of the state, giving that question a consideration of utmost maturity.

Therefore, I agree with My Lord the President to issue notices and also to extend the Interim Relief, until the final determination of this application.

**Judge of the Court of Appeal**

**Iddawala- J**

I concur with the findings of His Lordship the President of the Court of Appeal concerning the issuance of notice to the respondents. However, I am not convinced to extend the Stay Order or grant an Interim Relief until the final determination of this case. Therefore, I am respectfully compelled to provide the reasons behind my decision.

Three writ applications were filed by the petitioners against the imposition of Advance Personal Income Tax (APIT) on the salary of Judicial Officers. Initially two applications were filed under CA - WRIT 35-23 by High Court Judges' Association and CA - WRIT 36-23 by the Judicial Service Association and later the third application was filed under CA- WRIT 73-23 by the Association of

Judicial Officers of Labour Tribunal. All three applications are now supported together seeking the issue of formal notice and interim relief.

On 12th May 2023, 05th June 2023 and on 04th July 2023 Dr. Romesh De Silva President's Counsel appearing for the petitioners of the first two cases and President's Counsel Shamil Perera for the third application supported the matter and learned Deputy Solicitor-General strongly objected to issuing formal notices on the respondents.

- ***Judges are not Employee's***

The learned President's Counsel appearing for the petitioners Dr. Romesh de Silva argued the case on several grounds, *inter alia* he stressed on concerns such as Judges are not being subject to taxations. The main reason the counsel aimed to establish was the fact that Judges do not fall within the Inland Revenue Act's (IRA) interpretation of 'Employee' and thus should be exempted from tax.

For the purpose of matter, **Section 195** of IRA interprets:

- 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 individual 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…."*

When inquisitively considering the abovementioned subsection (iii), it can be argued that for the purpose of the Act any individual who is entitled to a fixed or ascertainable remuneration with respect to the service they provide, is considered to be involved in an employment. Thereby, the learned Deputy Solicitor General argued that, it can be said that judicial officers/judges provide

judicial services, and they are entitled to a scheme of remuneration for the service they provide to the state. Thus, it can be said that the judicial officers in the country too, are considered to be employed in an employment as per the interpretation of the IRA.

Nevertheless, the learned President's Counsel Dr. de Silva argued that firstly, judges are not employees as they are not engaged in any kind of employment and emphasized that they perform constitutional functions designated to judicial officers and thus cannot be considered as providing a service. Secondly, the learned President's Counsel also reiterated that judicial officers cannot be considered within the ambit of employee as they have no employer. In elaborating this stance, the learned President's Counsel emphasized that judicial officers perform the judicial/ constitutional power of the people granted through Article 3 & 4 of the 1978 Constitution, and thus there is no employer. Further, the learned President's Counsel stated that it would be constitutionally inconsistent to state that the judicial officers are bound by an employer as it would thereby indicate that the judges are controlled by an authority. This would thereby lead to impact the notion of the independence of the judiciary. With regards to the impact on independence of judiciary the learned President's Counsel stated that in order to determine the relationship between employer and employee, the most significant test used is the control test. This test looks as to who is the party in control over the other party and whose instructions and guidance does the party seek in matters of employment. It was stated that from the outset of the test itself it focuses on who is in control? Since the constitution promotes the notion of independence of the judiciary there cannot be any authority that controls or interferes with the judiciary, which includes all judicial officers. Thus, the learned President's Counsel stated that there cannot be any authoritative figure acting as the employer of the judges.

Upon the consideration of these facts President's Counsel Dr. De Silva states that judicial officials are not employees of any employer thus Advanced Personal Income Tax (APIT) cannot be deducted from the remuneration of the judicial officers. This is mainly based on the principle that as per Section 83A of IRA only an employer can deduct APIT from any payment made to the employee. Thereby, learned President's Counsel emphasized that judges are not employees and thus no tax can be deducted.

Furthermore, the President's Counsel also stated that the relationship between an employee and an employer is statutorily acceptable when there is a contract of employment. The counsel states

that judicial officers are not bound by a contract of employment. Further he cited **Article 107 (4)** together with **Article 165 (1)** of the constitution which state:

> **Article 107 (4)** - *"Every person appointed to be or to act as Chief Justice, President of the Court of Appeal or a Judge of the Supreme Court or Court of Appeal shall not enter upon the duties of his office until he takes and subscribes or makes and subscribes before the President, the oath or the affirmation set out in the Fourth Schedule."*
>
> **Article 165 (1)** – *"Every public officer, judicial officer and every other person as is required by the Constitution to take an oath or make an affirmation on entering upon the duties of his office, every holder of an office required under the existing law to take an official oath and every person in the service of every local authority and of every Public Corporation shall take and subscribe the oath or make and subscribe the affirmation set out in the Fourth Schedule. Any such public officer, judicial officer, person or holder of an office failing to take and subscribe such oath or make and subscribe such affirmation after the commencement of the Constitution on or before such date as may be prescribed by the Prime Minister by Order published in the Gazette shall cease to be in service or hold office."*

The learned President's Counsel in reference to the above Articles claimed to state that judges of Supreme Court, Court of Appeal and even the Chief Justice are appointed by the President and thereby have no contract of employment and emphasized on the fact that consent of these officials are not attained prior to appointment in comparison to regular workman/employees. And the only way of acceptance to the appointed position would be the instance where the judicial officers take oaths or make affirmations upon entering the assigned duties. Thereby he strongly sustains that judicial officers cannot be considered within the ambit of employees.

Further buttressing the above contention President's Counsel Mr. Shamil Perera submitted an Indian authority- **All *India Judges Association v. Union of India (1993) 4 SCC 288*** where it was held that judicial service is not a service in the sense of 'employment' and judges are not employees though it goes on to say that they (judges) are holding a 'public office'.

- ***Impact on Separation of Powers and Independence of Judiciary***

Dr. de Silva during his argument reiterated on the notions of Separation of Power (SOP) and Independence of Judiciary. The learned President's Counsel argued that the constitution emphasizes both these notions. The principle of SOP aims to proclaim that the government

consists of three branches namely, Executive, Legislative & Judiciary and these three branches are vested with powers and duties which are inalienable. The principle of SOP also aims to ensure that each branch should perform their assigned duties without interference from the other branches. This also leads to the notion of independence of judiciary as it aims to highlight that the duties, powers and assigned roles should not be interfered with nor influenced by any other authority in power. Article 3 & 4 backs up these notions. **Article 3** of the constitution states that sovereignty of people is vested within the people of the country. Sovereignty includes power of the government, fundamental rights and the franchise. **Article 4** of the constitution indicates how the branches of the government should exercise and enjoy the sovereign power given by the people. The concept of SOP is accepted and apparent in our Constitution and reiterates that one branch should not interfere with the other branch unless provided by law.

The learned President's Counsel also stressed on Independence of the Judiciary stating that the judiciary should be independent from the other branches of the government. Thus claims no influence or interference of control over the judiciary can be placed. The learned President's Counsel also mentioned that according to the **Article 111, all** High Court Judges are appointed by the President and remove by President. Subject to provisions of **111 (2) b** even resignation should address to the President. But it doesn't show that the President has a direct control over these High Court Judges. Nevertheless, the learned President's Counsel drew attention over the concern whether the imposition of tax on judicial officers' earnings amount to an interference of Judicial Independence.

- ***Time lapse between imposition of APIT and filing the Action***

Dr. Romesh de Silva in his arguments correctly emphasized and conceded the fact that APIT was introduced by the Inland Revenue (Amended) Act (IRA), No 10 of 2021 which came into the operation with effect from 1st April 2020.

- As **S 83A (1) of IRA No 10 of 2021** "*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." (Emphasis added)*

Nevertheless, **IRA No 45 of 2022 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." (Emphasis added)*

Thus, it is quite clear that APIT has been in force since the amendment of Act No 10 of 2021 and thus is not a newly introduced tax imposition through the amendment in the later Act No 45 of 2022. And further, even prior to the imposition of APIT, the PAYE tax (Pay As You Earn) had been enforced over 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. Thus, the concern arises as to why judicial officers are objecting to the imposition of tax only after the amendment Act No 45 of 2022. Nevertheless, it can be thereby said that the reasoning to the objection is to challenge the increase of percentage of the imposed tax. The document marked P-9 in the Case of WRT-36 /23 is evident of this factor.

- ***Judges are a special group***

Furthermore, the learned President's Counsel claimed that judges are a special and secluded group in society and thus should not be burdened by imposition of tax. He also cited **Article 108** of the constitution and stated that salaries of the Judges of the Supreme Court and of the Court of Appeal shall be determined by the Parliament and shall be charged on the Consolidated Fund and further that it shall not be reduced after his appointment. Thus, the President's Counsel claimed that after the appointment of the judicial officers their salaries cannot be reduced. Thereby, he stated that if APIT is imposed on judicial officers it will impact and reduce their salary.

However, it can be said that if the above notion is taken to consideration it should impact to many other public officers governed by the constitution and are remunerated through the consolidated

fund. Few of such officers are President -Article 36(3) and President's staff -Article 41(2), salary of Secretary-General of Parliament – Article 65(2) and members of the staff - Article 65(4), the Chairman, and members of the Commission – Article 155(A)7, salary of Auditor General – Article 153(2).

- ***Application of the SC Determination***

Learned President's Counsel stated that the question of whether the judges must pay tax, does not come within the purview of the determination of the Supreme Court. He further claimed that the SC determination on the IRA Bill **(S.C.S.D. Nos, 64 - 71/2022)** did not answer the concerns of the instant petition.

It can be pointed out that the purpose of the application of the SC determination bill is to perceive whether it is consistent with the Constitution. In order to perceive that it is necessary to assess whether there is an acceptable *ratio decidendi* and *obiter dicta* set out in the SC determination. Nevertheless, the level of how far the determination is binding needs to be assessed.

The learned President's Counsel appearing for the Judicial Service Association when supporting the matter, further emphasized on the importance and significant impact it would make on the notions of SOP and independence of judicial officers' salaries. The counsel stated that independence of the judiciary seeks to ensure that the judicial officers are free to perform their assigned duties and responsibilities without interference from any authority. He also cited **Article 111C (1)** of the Constitution which states: *"Every judge, presiding officer, public officer or other person entrusted by law with judicial powers or functions or with functions under this Chapter or with similar functions under any law enacted by Parliament shall exercise and perform such powers and functions without being subject to any direction or other interference proceeding from any other person except a superior court, tribunal, institution or other person entitled under law to direct or supervise such judge, presiding officer, public officer or such other person in the exercise or performance of such powers or functions."* It was stated that unless prescribed or ordered by law the judiciary cannot be subjected to influence or interference. The learned President's Counsel further stressed the fact that the constitution shields the tenure and salary of all judicial officers as it clearly states that after the appointment of judicial officers their salary cannot be amended.

The learned President's Counsel Mr. Shamil Perera appearing for the Association of Judicial Officers of Labour Tribunal highlighted the fact that even the Labour Tribunal Presidents' salary is being taxed, apart from the salary they are granted with allowances such as housing, vehicle

etc. The counsel stated that if the salary and other allowances of the judicial officers are taxed their take-home salary will be too trivial.

- ***Issuing an interim order***

This matter of concern has many important issues to be decided. Nevertheless, I believe it is justifiable to issue formal notice on respondents. Yet, in order to grant interim relief, it is essential to consider factors governing to issue an interim relief.

It is no doubt that a stay/interim order can be issued against collecting taxes under certain circumstances. When petitioners believe that they are being subjected to unjust or unlawful tax collection practices, they are free to seek legal recourse by filing a petition or an application for a stay/interim order in the appropriate court. When such an application is filed before the court, it is the duty of the court to consider various aspects before issuing a stay order, particularly against the tax collection of the State. The following factors may be considered namely:

- *Prima facie case*: The petitioners need to demonstrate that they have a reasonable chance of success in challenging the tax assessment or collection. They should present a valid legal argument or evidence indicating that the tax collection is unlawful or unjust.

- *Irreparable damage*: The court should assess whether allowing tax collection to proceed would cause irreparable damage to the petitioners. This damage should be substantial and difficult to compensate for, if the petitioners ultimately succeed in their arguments.

- *Balance of convenience*: The court should also consider the balance of convenience between the petitioners and the respondents (tax authority). It will weigh the potential harm to the petitioners if tax collection proceeds against any harm that may be caused to the tax authority if the stay order is granted.

- *Public interest*: Courts may also consider the public interest in maintaining an effective tax collection system. The Court should evaluate whether granting the stay order would harm the public interest or disrupt the functioning of essential government services.

- *Probability of success*: While not always a decisive factor, the court may assess the probability of the petitioners succeeding in their challenge against the tax deduction. If the court believes the petitioners' case has a high likelihood of success, it may be more inclined to grant the stay order.

As I mentioned above, the specific considerations and requirements for obtaining a stay/interim order against tax deduction may vary depending on the circumstances of each case.

I find it prudent to decline the issuance of an interim order against the respondents. This decision is based on several reasons. In the event that the court decides to grant an interim order at present and subsequently, upon completion of comprehensive arguments and determines to dismiss the application put forth by the petitioners, the petitioners shall be obliged to refund the said amount to the tax authority. This cumulative sum is expected to be of significant magnitude. Under such circumstances, the petitioners may be exposed to substantial detriment, surpassing the potential damages that could arise from the issuance of an interim order at this juncture.

The above stance is supported by the following judgements.

In the case ***R (on the application of Prudential plc and another) v Special Commissioner of Income Tax (2013) UKSC 1*** the Supreme Court of the United Kingdom considered the circumstances in which a stay of tax assessments could be granted pending an appeal. The court held that a stay order could be issued if there was a real prospect of success in the appeal and the taxpayer would suffer irreparable harm if the stay order was not granted. The court emphasized the importance of balancing the interests of the taxpayer and the tax authority.

Similarly, in the case of ***R (on the application of Haworth) v Her Majesty's Revenue and Customs (2021) UKSC 25*** the Supreme Court of the United Kingdom considered the criteria for granting a stay of tax collection pending the determination of a judicial review. The court held that the taxpayer must show a good arguable case and a real possibility of substantial injustice if the stay was not granted. The Court also emphasized the need to consider the public interest and the balance of convenience.

These judgements provide insight into the factors that English courts consider when determining the issuance of a stay order against tax collection.

In a recent judgment, ***CA/WRIT/354/2022*** decided on 14.10.2022 Sobhitha Rajakaruna J. stated "The Judges exercising the jurisdiction in judicial review have enlarged the scope of granting

interim orders by following stringent principles and also sometimes taking lenient approach to issue or not issue interim reliefs. In many instances the review Judge has refused to issue interim orders even after being satisfied that the Petitioner has submitted a prima facie case.

In ***Assistant Collector, C.E., Chandan Nagar vs. Dunlop India Ltd., AIR 985 SC 330,*** the Supreme Court of India has observed;

*'…where matters public revenue are concerned, it is of utmost importance to realize that interim orders ought not to be granted merely because a prima facie case has been shown. More is required. The balance of convenience must be clearly in favour of making an interim order and there should not be the slightest indication of a likelihood of prejudice to the public interest.'"*

Justice Amerasinghe in the case ***Amerasekere v Mitsui and Company Ltd and others (1993) 1 SLR 22*** referred to the observation of Lord Denning, MR, in ***Hubbard v Vosper (1972) 2 Q.B. 84*** approved by Sachs, LJ in ***Evans Marshall & Co v Bertola S.A (1973) 1 WLR 394***: *"In considering whether to grant an interlocutory injunction, the right course for the judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide the best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint upon the defendant but to leave him free to go ahead.....The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules".*

Furthermore, it is crucial to note that the deduction of taxes, in form of "PAYE" or "APIT", has been a longstanding practice for more than a decade. The only modification that has occurred by Act No 44 of 2022 is an increase in the tax percentage. Given this historical context and continuity, I believe it is not necessary to grant interim relief at this stage. However, it is essential to issue a formal notice to the respondents, acknowledging the gravity of the matter and allowing them an opportunity to respond accordingly. Hence, I cannot see any irreparable damage is caused to the petitioners or the balance of convenience is rested with them.

In conclusion, the learned Deputy Solicitor General presented a compelling and well-founded argument, supported by substantial materials and reasoning. Simultaneously, the two learned President's Counsel appearing for the petitioners also put forward a formidable case, highlighting their strong points effectively. After careful consideration of the submissions made by both sides,

it is evident that there are sound arguments to be taken into account. This process can also be regarded as an academic exercise, weighing the merits of each side's position. Thus, I have reached the decision to issue a formal notice on the respondents, based on the strength of the arguments presented.

***Notice issued. Refuse to extend the interim relief.***

**Judge of the Court of Appeal**