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

In the matter of an appeal on a question of law in terms of the Inland Revenue Act No. 10 of 2006 read together with Section 11A of the Tax Appeals Commission Act No. 23 of 2011 (as amended)

Reckitt Benckiser (Lanka) Limited,
No.41, Laurie's Road,
Colombo 04.

Presently at,
25, Shrubbery Gardens,
Colombo 04.

Appellant

Case No: CA/TAX/14/2020
Tax Appeals Commission No:
TAC/VAT /007/2016

Vs.

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

Respondent

Before: Hon. D.N. Samarakoon, J.

Hon. K. K. A. V. Swarnadhipathy J.

Counsel: Dr. Shivaji Felix P.C., with Mr. Shanaka Amarasinghe and Mr. NivanthaSatharasinghe instructed by Julius and Creasy for the Appellant.

Mrs. Chaya Sri Nammuni, D.S.G., for the Respondent.

Argued on: 22.01.2024

Written submission tendered on: 21.11.2023 by the Appellant.
09.06.2022by the Respondent.

Decided on:12.02.2024

D.N. Samarakoon, J

The appellant Reckitt Benckiser (Lanka) Limited has made the Tax Appeals Commission sending to this Court a case stated on the following questions of law,

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

(02) Is the determination made by the Commissioner General of Inland Revenue time barred?

(03) Did the Tax Appeals Commission err in law in coming to the conclusion that the appellant was a manufacturer within the contemplation of the Value Added Tax Act No. 14 of 2002 (as amended)?

(04) Is the determination of the Tax Appeals Commission against the weight of evidence?

(05) Is the amount of Value Added Tax and penalty payable, as confirmed by the Tax Appeals Commission excessive arbitrary and unreasonable?

(06) In view of the facts and circumstances of the case did the Tax Appeals Commission err in law when it arrived at the conclusion that it did?

The above questions of law will be examined in turn.

Question No. 01:

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

According to the appellant, the first hearing before the Tax Appeals Commission was on 08th January 2019.

The determination of the Tax Appeals Commission is dated 17th June 2020.

The number of days within those two dates are 526.

The position of the appellant is, that, whereas the statutory time limit is 270 days, the determination was made one year and six months after the first date of hearing, which is 08thJanuary 2019.

The date of the determination being 17thJune 2020, it was 526 dates.

Section 10 of the Tax Appeals Commission Act as it originally stood said,

> "The Commission shall hear all appeals received by it and make its decision in respect thereof, within one hundred and eighty days from the date of the commencement of the hearing of the appeal:..."

Section 10 of the Tax Appeals Commission's Act No. 23 of 2011 was amended by two subsequent Amendment Acts. They are,

(i) Section 07 of Tax Appeals Commission (Amendment) Act No. 04 of 2012 and

(ii) Section 07 of Tax Appeals Commission (Amendment) Act No. 20 of 2013

Section 7(2) of (Amendment) Act No. 04 of 2012 provided, that,

> "by the substitution for the words "within one hundred and eighty days from", of the words "within two hundred and seventy days of"; and..."

Section 13 of the (Amendment) Act further provided, that,

"13.

> The amendments made to the principal enactment by the provisions of section 10 of this Act, shall be deemed for all purposes have come into effect on March 31, 2011".

The "side note" of this section says "Retrospective effect."

The Tax Appeals Commission Act No. 23 of 2011 was also certified on 31st March 2011.

Hence the first amendment to section 10 of Tax Appeals Commission also dates back to the date of the commencement of the Tax Appeals Commission Act No. 23 of 2011.

Then, section 07 of (Amendment) Act No. 20 of 2013 provided, that,

"7.

Section 10 of the principal enactment as last amended by the Tax Appeals Commission (Amendment) Act, No.4 of 2012 is hereby amended by the substitution for all the words commencing from "two hundred and seventy days" to the end of that section, of the following:-

"two hundred and seventy days **from the date of the commencement of its sittings for the hearing of each such appeal:..."**

Section 14(1) of the (Amendment) Act further, provided, that,

"14.

(1) The amendments made to the principal enactment [other than the amendments made to section 2, the proviso to subsection (1) of section 7 and the amendments made in relation to the appeals under the Customs Ordinance
(Chapter 235)] by the provisions of this Act shall be deemed for all purposes to have come into force on April 1, 2011".

The "side note" of this section says "Retrospective effect."

The Tax Appeals Commission Act No. 23 of 2011 was certified on 31st March 2011.

Hence the second amendment to section 10 of Tax Appeals Commission **dates back to the immediate date that follows the date of the commencement** of the Tax Appeals Commission Act No. 23 of 2011.

Section 13 of the first amendment and section 14 of the second amendment both relates to the “Retrospective effect”.

But, it is not a “mere” retrospective effect. It is a retrospective effect with a specific date.

The period of only one day, from 31.03.2011 to 01.04.2011 is also meticulously covered by section 14(2) of (Amendment) Act, which says,

> “(2) The amendment made to section 2 of the principal enactment by the Tax Appeals Commission Act, No.4 of 2012 shall be deemed for all purposes to have come into force on March 31, 2011 and any act or decision made by the Commission during the period commencing on March 31, 2011 up to the date of coming into operation of this Act shall be deemed to have for all purposes to have been validly made”.

It may be noted, that, what was originally 180 days, which was then extended for 270 days, by the initial amendment was later amended to say 270 days “**from the date of the commencement of its sittings for the hearing of each such appeal:...”**

This is a substantial increase of time for the Tax Appeals Commission. The period of 270 days, after the later amendment, does not commence to run until the Tax Appeals Commission commences the hearing of the appeal.

It may be noted, that, the time limit was twice amended and on both occasions with retrospective effect. If this time limit has no force in law why should the legislature take such fervent and meticulous care is a question that should be answered.

The position raised for the respondent is that, the 270 days is directory.

In its written submissions dated 09thJune 2022, the respondent refer this Court to **Kegalle Plantations PLC vs. Commissioner General of Inland Revenue C. A. Tax 09 2017 dated 04th September 2018** and **Stafford Motor Company (Private) Limited vs. Commissioner General of Inland Revenue C. A. Tax 17/2017** decided on 15th March 2019, both judgments written by Justice Janak de Silva.

It appears that, in respect of the case of Stafford Motor Company (Private) Ltd., vs. Commissioner General of Inland Revenue, C. A. Tax 17/2017 decided on 15th March 2019 the Supreme Court has granted special leave to appeal in SC SPL LA 138/2019 on 15th November 2021. In that case the Court of Appeal considered whether the limit of 270 days is mandatory or directory and it was said,

> The TAC Act does not spell out any sanction for the failure on the part of the TAC to comply with the time limit set out in section 10 of the TAC Act. If the Appellant is correct in submitting that the time bar on the TAC is mandatory, it will result in the validity of the impugned determination made by the Commissioner General of Inland Revenue been maintained for no fault of the aggrieved party where the TAC fails to adhere to the time limit. Such deprivation of rights of the aggrieved party cannot be implied in the absence of clear and unambiguous statutory provisions.
>
> On the other hand, if the failure on the part of the TAC to adhere to the time limit should result in the aggrieved party obtaining the relief claimed, the legislature would have specifically stated so. For example, the second proviso to section 34(8) of the VAT Act specifically provides that "the appeal shall be deemed to have been allowed and the tax charged accordingly" where the appeal to the Commissioner-General against an assessment made by the Assessor is not determined within the stipulated time of two years.

The learned counsel for the Appellant upon Court pointing this out responded by submitting that Court should then declare that the appeal made to the TAC is deemed to be allowed where the TAC fails to adhere to the time limit specified ins section 10 of the TAC Act. We do not agree as that would be in the words of Lord Simonds in *Magor & St. Mellons vs. Newport Corporation* [(1951) 2 All.E.R. 839 at 841] "a naked usurpation of the legislative function under the thin guise of interpretation...If a gap is disclosed, the remedy lies in an amending Act."

The question is therefore whether section 10, twice amended in successive years of 2012 and 2013, in regard to its time limit, not "spelling out" a consequence of not adhering to the said time limit makes it directory and not mandatory.

Another facet of this question could be posed as follows:

Will section 10 (as amended) not "spelling out" consequences of non adherence to its stipulated time limit, be a bar to interpret that the outcome is a position in favour of the tax payer?

The Court in C. A. Tax 17/2017, as quoted above, said, that, the second proviso to section 34(8) of the VAT Act specifically provided, that, "the appeal shall be deemed to have been allowed and the tax charged accordingly" when the appeal to the Commissioner General is not determined within two years. The Court was of the view that if that was intended for Income Tax too, the legislature will specifically state so. According to the judgment when this was pointed out to the learned counsel for the Appellant his response was that if the appeal was not determined within the stipulated time limit then the Court should declare that the appeal is deemed to have been allowed. The Court then said according to what Viscount Simonds said in **Magor & St. Mellons vs. Newport Corporation [(1951) 2 All E. R. 839 at 841]** this is "a naked usurpation of the legislative function under the thin guise of interpretation…If a gap is disclosed, the remedy lies in an amending Act".

It may be noted, that, in **Vallibel Lanka (Private) Limited vs. Director General of Customs, S. C. Appeal 26/2008 [2008] 1 SLR 219** in which Kanagasabapathy J. Sripavan J., (later Hon. Chief Justice) (with Sarath Nanda Silva C. J. and Gamini Amaratunge J., agreeing) said,

> "…The court cannot give a wider interpretation to section 16 as claimed by the learned Deputy Solicitor General merely because some financial loss may in certain circumstances be caused to the state. Considerations of hardship, injustice or anomalies do not play any useful role in construing fiscal statutes. One must have regard to the strict letter of the law and cannot import provisions in the Customs Ordinance so as to apply and assume deficiency".

More will be said about this case when it is considered in respect of the substantive question of this case. For the time being it appears to this Court, that, in as much as in that case the Supreme Court did not allow to import provisions from the Customs Ordinance, in this case with regard to the question of the construction of the time limit in section 10 of the Tax Appeals Commission Act a comparison cannot be made with the VAT Act. Doing so will violate the principle "**One must have regard to the strict letter of the law…**" As the appellant submits in the above Written Submission at paragraph 113 the judgment of the Supreme Court in the above case is consistent with a large number of judgments in England on the same issue. This will be examined morefully under the Question No. 04 below.

It appears to this Court, that, here the Court in C. A. Tax 17/2017 had considered two different questions at once.

The question whether section 10 (as amended) is directory or mandatory is one question. The question as to what will happen if it is held to be mandatory, **for if it is held to be directory the tribunal will have unlimited time of determining the appeal,** is another. There is no doubt that there is a close

connection with the two questions. But answer to one question must affect the answer to the other only when the rules of interpretation so permits in the view of this Court.

The respondent often relies upon **N. S. Bindra** on Interpretation of Statutes.

Narotam Singh Bindra's book, having reference to the Golden Rule and other rules of interpretation and several Indian, as well as, other cases had its 12th Edition in 2017.

He commences the 03rd Chapter in his 08th Edition as follows,

> "1. Golden Rule Warburton's case; Becke v. Smith —Burton, J., in Warburton v. Loveland, (1928) 1 Hudson and B. Irish cases 623,648, observed 'I apprehend it is a rule in the construction of statutes, that, in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with any expressed intention, or declared purpose of the statute, or if it would involve any absurdity, repugnance, or inconsistency, the grammatical sense must then be modified, extended, or abridged so far as to avoid such inconvenience, but no further. The elementary rule is that words used in a section must be given their plain grammatical meaning."

The grammatical sense of section 10 is that the Tax Appeals Commission must give its determination on the appeal within 270 days from the commencement of its sittings in respect of that particular appeal. That section or any other section does not say about the consequences of non compliance. **On the other hand that section or any other section also does not confer power to extend the time**. Now will the interpretation of this section to be mandatory result in any absurdity, repugnance or inconsistency?

There are other provisions too in this Act which provide for time limits.

For example section 7(2) says,

> "(2) A person to whom a right to appeal has accrued in terms of the provisions of the enactments specified in paragraphs (a) and (b) of subsection (1) of section 7, **shall notify the Commission within thirty days of the determination being communicated to him** under the respective laws, of the fact that he intends to prefer an appeal to the Commission against such determination. He shall state all relevant details of the determination in such notification including the name and address of his authorized representative, if any."

No one argues, that, this is not mandatory. It is on the basis that in respect of a citizen a time limit is mandatory and in respect of the state it is directory.

The basis here, not to follow the basic precept "What is good for the goose is good for the gander" does not find its foundation just because one is a citizen and the other is the state. Its footing, as it would appear, is based on much firmer grounds.

This basis was considered by the learned Chief Justice who headed the 09 Judge Bench in **Visuvalingam vs. Liyanage [(1985) 1 SLR 203]** N. D. M. Samarakoon Q. C. and in fact, the Court in C. A. Tax 17/2017 referred to this decision.

The quotation, which the Court referred to in C. A. Tax 17/2017 is from a paragraph at page 226 of that judgment in which the learned Chief Justice considered the question whether the time limit in Article 126(5) of the Constitution, that,

> "(5) The Supreme Court shall hear and finally dispose of any petition or reference under this Article within two months of the filing of such petition or the making of such reference",

is mandatory or directory.

The Bench consisting of SAMARAKOON, Q.C., C.J., SARVANANDA, J., WANASUNDERA, J., WIMALARATNE, J., RATWATTE, J., SOZA, J., RANANSINGHE, J., ABDUL CADER J., AND RODRIGO, J., were however not constituted to consider that question under Article 126(5) alone. There was a much more important question to be decided by that Bench. It was,

> "whether the judges of the Supreme Court and the Court of Appeal ceased to hold office in terms of the sixth amendment to the Constitution?"

The 06th Amendment which came into force on 08th August 1983 required that the Judges must take the relevant oath before the President. As it appears in the judgment of the learned Chief Justice,

> "This application was taken up for hearing by a Bench of Five judges of this Court on 8th September, 1983. The argument was not concluded on that day and was resumed on the next day. **Counsel for the Petitioners was making his submissions when one of my brother judges who was reading a copy of the Act which had reached us two days earlier brought it to my notice that the provisions of section 157A of the Act contained a requirement that the judges of the Supreme Court and the court of Appeal should take their oaths in terms of the Seventh Schedule before the President which in fact had not been done by any of the judges.** The judges of both courts therefore considered this matter and wrote to the President, inter alia that in their opinion the period of one month expired at midnight on the same day (i.e. the 9th September) and that they were thus prepared to take their oaths. There was no reply from the President. However, I was informed by the Minister of justice that he had contacted the president on this matter and he had been told that the President had been advised by the Attorney-General that the period of one month had expired on the 7th. In

the result no oath could be administered. **On Monday the 12th I was informed that the Courts of the supreme Court and Court of Appeal and the Chambers of all judges had been locked and barred and armed police guards had been placed on the premises to prevent access to them.** The judges had been effectively locked out."

On Monday the 12th September 1983 in a conversation with the Chief Justice the Minister of Justice deprecated the act stating that he has not given such instructions and by Tuesday the guards were withdrawn. Later in the course of the argument in this case the learned Deputy Solicitor General Mr. Shibly Aziz described it as an act of a "**blundering enthusiastic bureaucrat**". He apologized on behalf of the official and unofficial Bar. But on the last day of hearing he withdrew the apology and substituted it instead with an expression of regret. On the 15th the Judges of the Supreme Court and the Court of Appeal received fresh letters of appointments commencing from that day. When the Bench of Five Judges who heard this matter recommenced the hearing on 19th from where it stopped on 09th the question that arose was whether the judges ceased to hold office from 09th to 15th and S. Nadesan Q. C., who appeared for the petitioner vehemently objected to proceedings de novo. This matter was referred to a Bench of 09 Judges, as referred to above, which had to consider whether it was mandatory for the judges to have taken their oath before the President of the Republic.

The Scholar Dr. A. R. B. Amerasinghe, former Judge of the Supreme Court, in his book "**The Supreme Court of Sri Lanka – The First 185 Years**" describes this incident, saying,

> "Two other major crises – one involving the whole Supreme Court and the Court of Appeal and the other involving the Chief Justice – had to be weathered before the first 185 years were completed.

The first was described by Chief Justice Samarakoon in **Karthigesu Vishvalingam and others vs. Don John Francis Liyanage and others, S. C. Application No. 47 of 1983**, as

> "a classic example of the uncertainties of litigation and the vicissitudes of human affairs. **The annals of the Supreme Court do not record such a unique event and I venture to hope there never will be such an event in the years to come**." (page 97 – 98)

Dr. Amerasinghe added,

> "Why Deputy Solicitor General Shibley Aziz had to apologize on behalf of the Bar when he had blamed an official is not clear. He was certainly a better informed man when he decided to express regret rather than apologize. He then knew that no member of the "bureaucracy" had called in the Police, let alone having any intention of "preventing the judges from asserting their rights" It was a timorous official of the Supreme Court who had asked for Police protection." (page 101)

Whereas one who is interested in the details of this episode, **which was, with profound respect to the learned Chief Justice, not unprecedented in the annals of the Supreme Court** may read Dr. Amersainghe's aforesaid work; for the information of the new generation of Judges and Lawyers, who perhaps do not know about it, I venture to record here, that, when our first Chief Justice **Sir Codrington Edmund Carrington** presided with one other Judge in the court of equity, which became the Supreme Court of British Ceylon, **Edmund Henry Lushington**, due to a dispute arose between the Court and the Army due to the use of "parade grounds" in Fort, **Major General David Douglas Wemyss**, the lieutenant governor of Ceylon ordered the closure of "every entrance into the Fort" from 8 o'clock in the morning till 12 noon or 1 p.m., ostensibly on security reasons, which disrupted the Court and Wemyss, who

ranked in the protocol next to the Governor was summoned before the Court, examined for eight hours and released on a recognizance of a hundred thousand Rix dollars to keep the peace and to be in good behaviour for one year. It was as a result of this incident, that, the Judges had to come to Hulftsdorp from Fort. Incidentally, that too happened in the month of September in the year 1804 on 24th. It is recorded, that, on 03rd October, when Wemyss, the Commander of the Forces and Lieutenant Governor of Ceylon appeared, in Court, surrounded by the officers of the Garrison and armed and the ground around the Court and the Parade Ground were filled with soldiers who were talking aloud, the Chief Justice having inquired of Wemyss what was meant by so unusual an assemblage, added that if it was intended to intimidate the Judges, not all the guns at the Garrison levelled at their Lordships would have that effect. The Commander disclaimed such intentions and orders were given forthwith to the soldiers to disperse and keep the peace. The Crier of the Court was directed to proclaim the order that no one was to remain in the Court premises with their swords or bayonets, on which order there was compliance by all including the General and his suite[1]. (Dr. Amerasinghe at page 459)

Although C. A. Tax 27/2017 referred to the decision of the learned Chief Justice in regard to the effect of Article 126(5) of the Constitution, this Court is of the view now that the 09 Bench judgment of **Visuvalingam and others vs. Liyanage** and others was referred to in C. A. Tax 17/2017 and as the learned

[1] I know that one might question the relevance of this passage. But having quoted Chief Justice Samarakoon in Visuvalingam vs. Liyanage, 1983, that it was the first time such an incident took place I only thought it is appropriate to relate this story from the time of Ceylon's First Chief Justice and the profundity and splendor of that incident, as I think, if included in a "foot note" will be an insult to the great foundations on which the Supreme Court of this country is built. Dr. Amersinghe describes this incident in his above book from page 446 onwards as "Coming to Hulftsdorp". I myself had alluded to this episode in my Article "Legend, Legacy and Lucence of Hulftsdorp" published in the Judge's Journal in September 2017 and also used as the introduction to the "self running" PowerPoint presentation I prepared under the title "Judiciary's Decade of Resurgence 1999 – 2009", which was shown to a gathering of Judges and other distinguished guests at function held to commemorate the services rendered by the then incumbent Chief Justice in a renowned Hotel in the Fort of Colombo on the evening of 16th May 2009. The Original source of this episode is "The Ceylon Law Review."

Chief Justice who wrote the lead judgment of the majority of the Judges said at page 214 that "**The principle of interpretation that govern ordinary law are equally applicable to the provisions of a Constitution**", it is pertinent to also consider the basis of the decision of the majority of the Judges, as envisaged from the judgment of the learned Chief Justice as to how it was interpreted that the requirement of taking the oath before the President himself was not mandatory.

It must also be noted, that, according to the judgment of the learned Chief Justice the Judges of the Supreme Court and the Court of Appeal have taken their oath before another Judge of the same Court well before the deadline.

As the judgment said,

> "Each of the Judges of the Supreme Court took the oath set out in the Seventh Schedule to the Bill before another Judge of the Supreme Court. Similarly each of the Judges of the Court of Appeal took the said oath before another Judge of the same Court. At this juncture I might mention that the Judges of the Supreme Court and Court of Appeal are ex officio J. Ps. in terms of section 45 of the Judicature Act. The oaths of the Judges of the Court of Appeal were taken on dates prior to the 4th September, 1983, and the oaths of the Judges of the Supreme Court were taken before- 31st August, 1983. They were all well within the time limit of one month stipulated in the Bill and the Act." (page 209)

To appreciate the full effect of this judgment one must also know about Articles 107(4), 157A, 165(1) and 169(12) of the Constitution.

Article 107(4) provided that a person appointed as a Judge of the Supreme Court or a Judge of the 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 required oath or the affirmation.

Article 157A was the one prohibiting "support, espouse, promote, finance, encourage or advocate the establishment of a separate State". Its sub Article (07) imposed the requirement of taking the oath prescribed in the 07th Schedule and that included those who were required to take an oath or affirmation under Article 107 too. Article 157A at the end of sub Article (07) said,

> "The provisions of Article 165 and Article 169(12) shall **mutatis mutandis,** apply to, and in relation to, any person or officer who fails to take and subscribe, or make and subscribe an oath or affirmation as required by this paragraph".

It was Article 165(1) that provided, among other things, that,

> "…**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."***

Therefore in considering the question, whether the failure of the Judges to take and subscribe their oath or affirmation before the President attracts the sanction set out in Article 165 and thereby they ceased to hold office, (page 214) **since the learned Deputy Solicitor General contended that it was mandatory to do so,** the learned Chief Justice considered the meaning and the application of the term "mutatis mutandis".

As stated at page 216, the learned Deputy Solicitor General,

> "…submitted that the mutation must be done in this manner delete all the words in Article 165(1) except the words "failing to take and subscribe such oath or make and subscribe such affirmation" and the

words "shall cease to be in service or hold office" and for those words that have been deleted substitute the words "Any such person or officer". So that the mutation results in the following article

"Any such person or officer failing to take and subscribe such oath or make and subscribe such affirmation shall cease to be in service or hold office."

[In the reproduction of the part of Article 165(1) above in bold print these words are *italicized*]

The learned Chief Justice said, (at page 216)

> **"I cannot agree. This is not a mutation but a mutilation of Article 165. The major part of Article 165(1) is thereby abandoned.** Mutatis mutandis means "with necessary alterations in point of detail" (Wharton's Law Lexicon)…"

On this basis, the learned Chief Justice concluded (at page 220) that, the "mutanda" from Article 165 to Article 157A are,

(01) The oath,
(02) The time limit and
(03) The sanction, i.e., the loss of office.

His Lordship added,

> "There is nothing else that could be considered. The person before whom the oath is to be taken finds no place in the provisions of Article 165(l). It is found only in Article 157A…."

With profound respect, it appears that the reference to the "President" was in Article 107(4). In any event it is not in Article 165(1) which was applicable "mutatis mutandis".

So that was the basis on which the majority view in **Visuvalingam vs. Liyanage** decided that it was not mandatory to take the oath before the President. The term "mutanda" was used by Justice Parinda Ranasinghe at page 265 where His Lordship said that he gathered the case Tourial vs. Minister of Internal Affairs Southern Rhodesia (1946) S. A. L. R. (A. D.) 535,544, in which the phrase "mutatis mutandis" was considered from the judgment of the learned Chief Justice (at page 216). Justice Ranasinghe dissented with the majority view in his judgment of erudition.

It is true that Articles 157A and 165(1) spelled out sanctions of not following their provisions. There was no question before the Supreme Court about the mandatory nature of those Articles. The question was whether the oath must be taken before the President and no other. The majority of the Court decided it was not so on the basis of the phrase "mutatis mutandis" used in sub Article (07) of Article 175A.

Therefore what this Court wants to emphasize is that the basis of the majority decision of the Supreme Court that the requirement to take the oath before the President was not mandatory was not to validate the proceedings of the Supreme Court in the case Visuvalingam vs. Liyanage taken before the court on 08th and 09th September 1983, on a purported principle that when a Court, tribunal or any public authority had to follow a direction in a statute (here there was a time limit to take the oath as well as a manner of doing it) it is directory but not mandatory, but on the construction of Articles 165(1) and 157A in terms of the phrase "mutatis mutandis".

It must be also noted, that, the learned Chief Justice based His Lordship's decision on the phrase "mutatis mutandis" upon the Indian case of **Motilal vs. Commissioner of Income Tax, A. I. R. 1951 Nagpur 224,** which His Lordship considered at length and in detail from page 217 to 220.

In that case the Court was called upon to apply certain Rules of the Income Tax Appellate Tribunal of Bombay mutatis mutandis to the provisions of section 66 of the Income Tax Act of 1922.

The said section, which is also quoted, in part, in the judgment of Visuvalingam vs. Liyanage at page 218, is as follows, in full,

> "**66. Statement of case by Appellate Tribunal to High Court.**—[(1) Within sixty days of the date upon which he is served with notice of an order under sub-section (4) of section 33 **the assessee or the Commissioner may**, by application in the prescribed form, accompanied where application is made by the assessee by a fee of one hundred rupees, require the Appellate Tribunal to refer to the High Court any question of law arising out of such order, and the Appellate Tribunal shall within ninety days of the receipt of such application draw up a statement of the case and refer it to the High Court:..."

As it could be observed, the time limit of 60 days applied to the assessee as well as to the Commissioner and notwithstanding the application of Rules 07 and 08 mutatis and mutandis, the Court upheld the plea in bar when the application requiring the Tribunal to refer to the matter to the High Court was received on the 63rd day.

Motilal Hiralal vs. Commissioner of Income Tax Central Province and Berar, Nagpur A. I. R. (38) 1951 Nagpur 224, was decided by Hidayatullah J. and Kaushalendra J. and the judgment was authored by the former. Mohammad Hidayatullah[2] was later the Chief Justice of India, vice president of India and also the President of India. He was appointed as Additional Judge of the High Court at Nagpur in 1946.

The learned Judge decided,

> "The section speaks of sixty days, and the starting point is certain and there can be no dispute. Since the application under section 66(1) is to "require" the Tribunal to refer a case the obvious construction is that the "requiring" must be within 60 days. Now a person is "required" to do something only when he knows of it and not while the letter is lying in a post office unknown to him. The Tribunal is "required" to refer the questions when the application reaches the Tribunal and not before. The sub section nowhere uses the phrase "require by an application made within 60 days", which has been expounded in the Orissa High Court. The sub section read grammatically means only that the Tribunal must be "required" within 60 days to refer the questions, and then the Tribunal must within 90 days make the reference. There is really no hiatus [a pause] between terminus ad quem [the point at which

[2]**Mohammad Hidayatullah** OBE (pronunciation; 17 December 1905 – 18 September 1992) was the 11th Chief Justice of India serving from 25 February 1968 to 16 December 1970, and the sixth vice president of India, serving from 31 August 1979 to 30 August 1984. He had also served as the acting president of India from 20 July 1969 to 24 August 1969 and from 6 October 1982 to 31 October 1982 and from 25 July 1983 to 25 July 1983 and from 25 July 1984 to 25 July 1984.[1] He is regarded as an eminent jurist, scholar, educationist, author and linguist.[2][3]

On 12 December 1942, he was appointed Government Pleader in the High Court at Nagpur. On 2 August 1943, he became the Advocate General of Central Provinces and Berar (now Madhya Pradesh) and continued to hold the said post till he was appointed as an Additional Judge of that High Court in 1946. He had the distinction of being the youngest Advocate General of an Indian state, Madhya Pradesh.[2][9]
Mohammad Hidayatullah - Wikipedia

something ends] of the limitation for applications and the terminus a quo [starting point] of the 90 days in which the reference has to be made. For this second period the terminus a quo [starting point] is also the receipt of the application. The section, in my opinion, is quite clear and does not admit of any other construction." (page 225 – 226)

The learned Judge Mohammad Hidayatullah concluded his judgment saying,

"…In my opinion even the Tribunal cannot by rules extend the period and the remedy is only with the legislature as was pointed out by Chagla C. J., in the Bombay case referred to above. I agree with the Bombay Chief Justice that some amendment is absolutely necessary, but till that is done Courts must give effect to the law as it stands".

"Beneficial construction has its own limitations. An argument um ab inconvenients [the Latin phrase "argumentum ab inconvenienti" refers to an argument that draws its force from the inconvenience or other undesirable consequences of the available alternatives] is only to be resorted to when the law is ambiguous. Otherwise as was stated by Bohde J., in this Court in Gulabsinghe vs. Nathu Ram, I. L. R. (1944) Nagpur 419 at page 421 : (A. I. R. (31) 1944 Nagpur 145) :

> "Courts have not been given power to devise their own technique for saving claims from the bar which the statute of limitation create".

"This also follows from the observations of their Lordships of the Privy Council in General Accident Fire and Life Assurance Corporation Ltd., vs. Janmahomed, I. L. R. (1941) Bombay 203 at page 208: (A. I. R. (28) 1941 P. C. 06) and Maqbul Ahmad vs. Onkar Pratap Narain Singh, 57 Allahabad 242 at page 250 : (A. I. R. (22) 1950 P. C. 85)".

The learned Judge Mohammad Hidayatullah making the above statements in a tax case and also in respect of something the Tribunal was required to do makes His Lordship's interpretation more significant.

According to the judgment in **Visuvalingam vs. Liyanage** the above decision was approved and repeated in **K. M. Works vs. Income Tax Commissioner, A. I. R. 1953 Punjab 300.**

Before considering the impact of the majority view in **Visuvalingama vs. Liyanage** on the nature of Article 126(5) of the Constitution, which the Court of Appeal in C. A. Tax 17/2017 applied in respect of section 10 of the Tax Appeals Commission in full force, so to say, it is pertinent to refer to the decision of the Supreme Court in the Special Determination pertaining to the Amendment to the Tax Appeals Commission Act in 2013.

In that Special Determination made by the incumbent Chief Justice and two other Justices of the Supreme Court, under the Sub Heading "**The Bill seeks to fill in lacunae**," the Supreme Court said,

> "The Tax Appeals Commission was created under the Tax Appeals Commission Act No. 23 of 2011. Appeals that were pending under the Inland Revenue Act No. 10 of 2006, the Value Added Tax Act No. 14 of 2002, Nation Building Tax Act No. 09 of 2009 and the Economic Service Charge Act No. 13 of 2006 stood removed by operation of law to the newly created Tax Appeals Commission".
>
> "However, the Inland Revenue Act No. 28 of 1979 and the Inland Revenue Act No. 38 of 2000 had not been included. This left a lacunae in the law because, there were indeed tax appeals arising out of these two statutes which ought to have stood removed to the Tax Appeals Commission which was now the exclusive body created for the hearing of tax appeals. As the respondent submitted, Clause 07 amends section 10 of the principal enactment and provides for the lacunae in the law in

relation to appeals from the Inland Revenue Act No. 28 of 1979 and Inland Revenue Act No. 38 of 2000".

"Clause 07 seeks to clarify the period of time given to the Commission to determine the appeal by stating as follows:-

> "Two hundred and seventy days from the date of the commencement of the sittings for the hearing of such appeal."

"Clause 07 also inserts a proviso which provides that all appeals pending before the respective Board or Boards of review in terms of the provisions of the respective enactments shall with effect from the date of operation of this Act, be deemed to stand transferred to the Commission and the Commission shall notwithstanding any provision contained in any other written law, make its determination within twenty four months of the date on which the Commission shall commence its sittings for the hearing of each such appeal".

According to what the Supreme Court said the Tax Appeals Commission was established in respect of appeals under four Acts, viz., 10 of 2006, 14 of 2002, 09 of 2009 and 13 of 2006 dealing with taxes. The two later additions referred to in the Special Determination are also two former Acts of Inland Revenue, viz., 28 of 1979 and 38 of 2000. The above are all in respect of determinations made by the Commissioner General of Inland Revenue.

However it is also seen, that, whereas under section 7(1)(a) of the Tax Appeals Commission Act a person aggrieved by the decision of the Commissioner General of Inland Revenue can appeal; under section 7(1)(b) a person aggrieved by the decision of the Director General of Customs under section 10 (1A) of the Customs Ordinance also can appeal. This matter was also raised in the above Special Determination.

It was said,

> "The learned President's Counsel for the petitioner contended that Clause 04 of the Bill is discriminatory and thus offends Article 12 of the Constitution in that appellants who are aggrieved by a determination under the newly created section 10(1A) of the Customs Ordinance of the Director General of Customs and an appellant aggrieved by a determination of the Commissioner General of Inland Revenue are treated differently".

The grouse of the learned President's Counsel was that whereas an appellant appealing against a decision of the Commissioner General of Inland Revenue must deposit either 10% of the tax determined as payable which is non refundable or an equivalent of 25% Bank guarantee which shall remain valid until the appeal is determined by the Commission, there was no such requirement in respect of an appellant appealing against a decision of the Director General of Customs. It was argued that this is a violation of Article 12(1) and 12(2) of the Constitution.

The argument of the respondent was that differential treatment is indeed required in law because the persons [*aggrieved by a decision of the Commissioner General of Inland Revenue and aggrieved by a decision of the Director General of Customs*] are not similarly or identically placed.

The Supreme Court said,

> "The Court would emphasize the inherent principle of classification which is germane to Article 12 of the Constitution and this Court has time and again adverted to it – Perera vs. Building Materials Corporation (2007) BLR 59 and Dayawathie and others vs. Dr. M. Fernando and others (1988) 1 SLR 371".
>
> "It is ingrained in Article 12(1) of the Constitution that the state is allowed to classify persons or things for legitimate purposes".

However as referred to earlier, the Court decided that the time limit of "Two Hundred and Seventy Days from the date of commencement of sittings for the hearing of such appeal" can apply to both sets of appellants without discrimination and, as referred to above, it said,

> "This only clarifies the terminal dates of the time limit and it is crystal clear that such provisions cannot be violative of any of the provisions of the Constitution."

In this backdrop it is pertinent to consider the second question considered in **Visuvalingam vs. Liyanage** whether the requirement under Article 126(5) of the Constitution is mandatory or directory.

In C. A. Tax 17/2017 the Court of Appeal reproduced only a part of the passage in which the learned Chief Justice considered this question commencing from page 226 of the judgment of **Visuvalingam vs. Liyanage.**

But the learned Chief Justice started to consider this question at page 225 and to quote it in full it said,

> "Before I deal with the preliminary issues I desire to deal with the issue raised on the time limit of two months set out in Article 126(5) which states that the Supreme Court "Shall hear and finally dispose of any petition or reference within two months of the filling of such petition or the making of such reference". **The Deputy Solicitor General submitted that this provision was mandatory so that even a fault of the Court is no excuse.** An examination of the relevant provisions of the Constitution indicates that this provision is merely directory. **Fundamental Rights are an attribute of the Sovereignty of the People.** The constitution commands that they "Shall be respected, secured and advanced by all the organs of Government and shall not be abridged, restricted or denied save in the manner and to the extent (thereinafter) provided" (Article 4(d)). It is one of the inalienable rights of

Sovereignty (Article 3). **By Article 17 every person is given the right to apply to the Supreme Court to enforce such right against the executive provided the complains to Court within one month of the infringement or threatened infringement** (Article 126). **These provisions confer a right on the citizen and a duty on the Court.** If that right was intended to be lost because the Court fails in its duty the constitution would so have provided. It has provided no sanction of any kind in case of such failure. To my mind it was only an injunction to be respected and obeyed but fell short of punishment if disobeyed. I am of opinion that the provisions of Article 126(5) are directory and not mandatory. **Any other construction would deprive a citizen of his fundamental right for no fault of his.** While I can read into the constitution a duty on the Supreme Court to act in a particular way I cannot read into it any deprivation of a citizen's guaranteed right due to circumstances beyond his control".

The above passage says, at least, 05 things and they are,

(i) that **Fundamental Rights are an attribute of the Sovereignty of the People,**

(ii) that **By Article 17 every person is given the right to apply to the Supreme Court to enforce such right against the executive,**

(iii) that **These provisions confer a right on the citizen and a duty on the Court,**

(iv) that If that right was intended to be lost because the Court fails in its duty the constitution would so have provided,

(v) that **Any other construction would deprive a citizen of his fundamental right for no fault of his.**

In applying the above passage to the time limit in section 10 of the Tax Appeals Commission Act, in full force, so to say, the Court of Appeal in C. A. Tax 17/2017 said, that,

> "Although the above case was one involving of a fundamental right, the logic of the reasoning of Samarakoon C. J., is compelling and applicable to the present case as well. In terms of section 8(1) of the Tax Appeals Commission Act, it is only a person who is aggrieved by the determination of the Commissioner General of Inland Revenue in relation to the imposition of any tax, levy, charge, duty or penalty or the Director General of Customs under subsection (1B) of section 10 of the Customs Ordinance who can prefer an appeal to the Tax Appeals Commission. Section 9(10) of the Tax Appeals Commission Act allows the Tax Appeals Commission on appeal to confirm, reduce, increase or annul, as the case may be, the assessment determined by the Commissioner General of Inland Revenue or to remit the case to the Director General of Customs".
>
> "The Tax Appeals Commission Act does not spell out any sanction for the failure on the part of the Tax Appeals Commission to comply with the time limit set out in section 10 of the Tax Appeals Commission Act. If the appellant is correct in submitting that the time bar on the Tax Appeals Commission is mandatory, it will result in the validity of the impugned determination made by the Commissioner General of Inland Revenue been maintained for no fault of the aggrieved party where the Tax Appeals Commission fails to adhere to the time limit. Such deprivation of rights of the aggrieved party cannot be implied in the absence of clear and unambigouous statutory provisions."

Therefore the Court of Appeal commenced applying the passage from the judgment in **Visuvalingam vs. Liyanage** saying, "Although the above case was one involving of a fundamental right,..." the Court, it appears, took for granted,

that, both situations are similar or identical. It is the position of this Court that it is not so due to following reasons.

If a citizen whose fundamental right has been violated does not do anything he cannot assert that right and obtain a remedy for the infringement. It needs adjudication for it to come in to existence as a right. If he makes an application the Supreme Court has to adjudicate it and if the time limit obstructs the Supreme Court from doing it, the citizen is deprived of his right to get his fundamental right adjudicated.

On the other hand, under the system of self assessment of income tax by a citizen prevalent under the law on Income Tax, a citizen has been conferred with a right to pay the amount of tax he assesses, unless and until he is deprived of doing so by the assessor rejecting his self assessment. But it does not stop at the assessor under the law. From there it goes to the Commissioner General and to the Tax Appeals Commission. This is the end of it as far as the disputing (or not disputing) of the self assessment is concerned. Can anyone dispute this simple argument? The answer is no, because from the Tax Appeals Commission onwards there lies no appeal either by the citizen (taxpayer) or the Commissioner General on the factual dispute on the self assessment. What goes up from the Tax Appeals Commission up to this Court is only a Case Stated on Questions of Law. What goes up from there to the Supreme Court is only an appeal which assesses the correctness or otherwise of the answers given by this Court to those Questions of Law.

In fact, unlike in the Fundamental Rights case, there is no adjudication at any stage either by a Court or a Tribunal or any other body, in whatever name it may be called, in the sense of an exercise of judicial power under Articles 4(c)

and 105 of the Constitution[3] on the factual dispute. Of course, the Court of Appeal in resolving the Questions of Law exercises the judicial power under the above articles. But this Court does not adjudicate the factual dispute. The institutions below this Court, although **decide** on the factual dispute, do not exercise judicial power. Although all exercise of judicial power decides a question, all decisions in respect of questions does not involve the exercise of judicial power.

In this regard, this Court would wish to consider what was said in the Privy Council on 09th March 1967 in THE UNITED ENGINEERING WORKERS UNION, Appellants,and K. W. DEVANAYAGAM (President, Eastern ProvinceAgricultural Co-operative Union Ltd.), Respondent. The Privy council consisted of Viscount Dilhorne, Lord Guest, Lord Devlin,Lord Upjohnand Lord Pearson. The same way as the Supreme Court of Ceylon, the Privy Council too was divided 03 to 02. The majority judgment delivered by Viscount Dilhorne, with the concurrence of Lord Upjohn and Lord Pearson decided, that, the President of a Labour Tribunal does not hold judicial office within the meaning of section 55(5) of the Ceylon (Constitution) Order in Council of 1946. The minority judgment of Lord Guest and Lord Devlin held, that, the orders of a Labour Tribunal are judgments and not administrative orders.

Both the opinions accepted the view of Griffith C. J., in Huddart vs. Moorhead, (1908) 8 C. L. R. 330 at 357.

The majority opinion said at page 293,

> "**There is no single test that can be applied to determine whether a particular office is a judicial one**. In Labour Relations Board of Saskatchewan v. John East Iron Works 2[(1949) A. C. 134.] the question was whether that Labour Relations Board exercised judicial power and, if

[3] Neither the Assessor, Commissioner General or the members of the Tax Appeals Commission are appointed by the Judicial Service Commission or the Head of the State. The Assessor and the Commissioner General are not uninterested independent bodies too.

so, whether in that exercise it was a tribunal analogous to a superior, district or county court. Lord Simonds, delivering the judgment of the Board, stated that their Lordships without attempting to give a comprehensive definition of judicial power, accepted the view that its broad features were accurately stated by Griffiths C. J. in Huddart, Parker & Co. Proprietary Ltd. v. Moorhead 3[(1908) 8 C. L. R. 330, 357.], which was approved by the Privy Council in Shell Co. of Australia Ltd. v. Federal Commissioner of Taxation 4[(1931) A. C. 275.]. Lord Simonds went on to say at. page 149 :

> " Nor do they doubt, as was pointed out in the latter case, that there are many positive features which are essential to the existence of judicial power, yet by themselves are not conclusive of it, or that any combination of such features will fail to establish a judicial power if, as is a common characteristic of so-called administrative tribunals, the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also."

The minority opinion said at page 306,

> "The accepted definition of judicial power is that given by Griffiths C.J. in Huddart v. Moorhead 1[(1908) 8 C. L. R. 330 at 357.]. **It is the power "which every Sovereign Authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty, or property**. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action. " The power of the Labour Tribunal clearly falls within these general terms, but it is worth noting some particular aspects of it.

There must be a controversy about rights or, as it is sometimes put, a Rs. Part IV A covers controversies between a workman and his employer about the rights arising out of that relationship. The power of the Tribunal is that of giving a binding and authoritative decision. In this respect the procedure is to be distinguished from the conciliation procedures provided under the Act.

The power proceeds from the Sovereign, i.e., it is the judicial power of the State. In this respect it is to be distinguished from the power of an arbitrator whose authority is derived from the consent of the parties themselves. This factor-that it is the judicial power of the State-carries with it another consequence. Justice can be done in an individual case without creating any principle applicable to other cases of the same sort. But the judicial power of the State is concerned with justice for all and that is not attained if there are inexplicable differentiations between decisions in the same type of case. The judicial power of the State must therefore be exercised in conformity with principle. In Moses v. Parker 1[(1896) A. C. 245.] there was vested in the Supreme Court of Tasmania jurisdiction to deal with disputes regarding claims to grants of land. Such disputes had previously been dealt with by the Governor on the report of Commissioners, the Governor being "in equity and good conscience" entitled to make a grant. The statute which gave jurisdiction to the Supreme Court provided that it should not be " bound by the strict rules of law or equity in any case, or by any technicalities or legal forms whatever". The Board held that a decision of the Supreme Court given under the statute was not "a judicial decision admitting of appeal". Explaining this case in the later case of C. P. R. Co. v. Corporation of City of Toronto 2[(1911) A. C. 461.] the Board said at 471 that "as the tribunal from which it was desired to appeal was expressly exonerated from all rules of law or practice, and certain affairs were placed in the

hands of the judges as the persons from whom the best opinions might be obtained, and not as a court administering justice between the litigants, such functions do not attract the prerogative of the Crown to grant appeals".

As "History" judges after 57 years from 1967[4], it appears, that, the minority opinion, notwithstanding the fact that it had one judge less than that of the majority, is sounder an opinion. After this case in 1967, the Presidents of Labour Tribunals were come to be appointed by the Judicial Service Commission.

The minority, also at page 309 went on to quote the following from the dicta of Isaacs and Rich JJ., in Waterside Workers' Federation of Australia vs. Alexander (J. W.) Ltd., (1918) 25 C. L. R. 434 at 463, that,

> "**The essential difference is that the judicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted**; whereas the function of the arbitral power in relation to industrial disputes is to ascertain and declare, but not enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other."

At the same page, the dissenting lordships of the Privy Council said,

> "**Another and essential characteristic of judicial power is that it should be exercised judicially. Put another way, judicial power is power limited by the obligation to act judicially**. Administrative or executive power is not limited in that way. **Judicial action requires as a minimum the observance of some rules of natural justice**. Exactly

[4] John F. Kennedy said in his inaugural speech, "History, the final judge…"

what these are will vary with the circumstances of the case as Tucker L.J. said in Russell v. Duke of Norfolk 3[(1949) 1 A. E. R. 109 at 118.] in a passage which has several times been approved. Whatever standard is adopted, Tucker L.J. said, one essential is that the person concerned should have a reasonable opportunity of presenting his case. Lord Hodson in Ridge v. Baldwin 4[(1964) A. C. 40 at 132.], after quoting Tucker L.J'.s dictum, added :-"**No one, I think, disputes that three features of natural justice stand out(1) the right to be heard by an unbiased tribunal; (2) the right to have notice of charges of misconduct; (3) the right to be heard in answer to those charges**. "These are not necessarily features of administrative decisions. The administrator is not required to be unbiased and his decision may often affect those who have no opportunity of presenting their views.**Under s. 31C (2) the Labour Tribunal is empowered, subject to regulations which have not yet been made, itself to lay down the procedure to be observed by it. We think it is clear from the authorities, indeed, the contrary was not suggested-that the nature of its enquiry is such that it must act in conformity with natural justice**. A recent example of the applicability of the rules in this type of case is R. v. Deputy Industrial Injuries Commissioner ex parte Moore 1[(1964) A. C. 40 at 132. (1965) 1 Q. B. 456 at 476.]. **It is arguable that the rules of natural justice are not applicable at all unless there is an obligation to act judicially and that if such a limitation is imposed on the power, it must be a judicial power**. Parker C.J. said recently in re. Habib Khan that it may be that where there is no duty to act judicially or quasi-judicially there is no power in the Court to interfere. But the point was not explored in argument before the Board and we shall not therefore say more than that to hold that the Labour Tribunal is bound by the rules of natural justice is going a long way towards holding that it is a judicial tribunal.

The minority opinion quoted from page 309 and especially the highlighted parts show, that, Labour Tribunals exercise judicial power. It is a recognition of this, that, the Presidents, Labour Tribunals come to be appointed by the Judicial Service Commission.

Neither the assessor nor the Commissioner General of Inland Revenue are acting judicially. A minimum requirement of the exercise of judicial power, as Lord Hodson identified in Ridge vs. Baldwin (1964) A. C. 40, "the right to be heard by an unbiased tribunal", is not available with the assessor or the Commissioner General. They are officers appointed to collect revenue and not uninterested institutions exercising judicial power. Their decisions are either purely administrative or at the very least (even though there could be a semblance of acting judicially) "tainted" with administrative considerations of policy. An exercise of judicial power cannot be so influenced. Under section 2(2) of the Tax Appeals Commission Act although a kind of judicial flavour is added to the Tax Appeals Commission by the appointment of retired judges of the Supreme Court or the Court of Appeal not only that the Commission comprises of "persons who have wide knowledge of, and have gained eminence in the fields of Taxation, Finance and Law,…." but also since they are appointed not by the Judicial Service Commission or the Head of the State but by the minister of finance, the Commission is not a court or tribunal that exercises judicial power. In the above case of THE UNITED ENGINEERING WORKERS UNION, Appellants, and K. W. DEVANAYAGAM there was no doubt in the opinions of the majority or the minority of judges, that, a tribunal appointed by a minister would not exercise judicial power.

But in a Fundamental Right application the alleged infringement of a fundamental right or the language right is adjudicated under Article 126 by the highest court of the land under Article 105(1)(a) the Supreme Court of the Republic of Sri Lanka. The learned Chief Justice in **Visuvalingam vs. Liyanage** said,

"While I can read into the constitution a duty on the Supreme Court to act in a particular way I cannot read into it any deprivation of a citizen's guaranteed right due to circumstances beyond his control".

So, 09 Judges of the Supreme Court, on the strength of Article 126(5) of the Constitution, which was added to the Constitution by the legislature in the exercise of a part of sovereignty, but not otherwise, decided, that, they can "read into the constitution a duty on the Supreme Court to act in a particular way". But the Supreme Court said, that, it will not do so to deprive "a citizen's guaranteed right due to circumstances beyond his control." **Because, the citizen's guaranteed right required adjudication, the Court did not hold that the time limit was mandatory. But here, the citizen has been conferred a right to pay on his self assessment unless and until it is validly disputed.** If it needed adjudication under the Constitution it could have been done only in terms of Article 4(c) and 105. Adjudication cannot be done otherwise since the Preamble to the Constitution enunciates INDEPENDENCE OF THE JUDICIARY as an intangible heritage that guarantees the dignity and well being of succeeding generations of the People of Sri Lanka which includes tax payers. His Lordship Kanagasabapathy J. Sripavan, Chief Justice in the course of His Lordship's determination on the 19th Amendment to the Constitution said that the Preamble is a part of the Constitution. It is a long standing principle too. In *The London County Council vs. The Bermondsey Bioscope Company Limited, 08th and 09th December 1910, [1911] 1 K. B. 445,* C. A. Russell K. C. for the cinema argued, that, "**The title of the Act is part of the Act: Fielding vs. Morley Corporation [1899] 1 Ch. 1".**

Section 163(3) of Inland Revenue Act No. 10 of 2006 comes under Chapter XXII on "Assessments". That section says,

"(3) Where a person has furnished a return of income, the Assessor or Assistant Commissioner may in making an assessment on such person under subsection (1) or under subsection (2), either–

(a) **accept the return made by such person; or**

(b) if he does not accept the return made by that person, **estimate the amount of the assessable income** of such person and assess him accordingly:..."

It may be noted, that, the term used in section 163(3)(b) is not "rejection" but "does not accept". It is because under section 163(3)(a) there is a "right" accrued to the citizen to pay according to his self assessment, unless he is deprived of that "right". **If the self assessment is accepted under section 163(3)(a) that is the end of the matter and no other process commences.** The "process" of the deprivation of this "right" commences at section 163(3)(b) where the Assessor or the Assistant Commissioner must "estimate the amount of the assessable income" of the citizen.

The Assessor or the Assistant Commissioner under section 163(3)(b) is not an independent body such as a Court or a Tribunal or other institution under Article 4(c) and Article 105. He is the one who started the dispute of disputing the tax payer's self assessment. It could be that a particular tax payer on receiving an intimation of non acceptance of the self assessment may make representations to the Assessor or to the Assistant Commissioner and the latter accepts the position of the tax payer. This position which was succinctly explained by **Justice Victor Perera** in **Ismail vs. Commissioner of Inland Revenue (1981) 2 SLR 78** was considered by me in **ACL Polymers (Pvt) Limited vs. Commissioner General of Inland Revenue, C. A. Tax 09/2023 decided on 09.12.2022.** In the same judgment the case of **D. M. S. Fernando vs. Mohideen Ismail**, the appeal of the above case to the Supreme Court was also considered. From the decision of the Assessor or the Assistant

Commissioner the tax payer appeals to the Commissioner General, who is the superior of the former. The contest is between the self assessment and the estimate prepared by his subordinate officer. Before the Tax Appeals Commission too, the only appellant is the taxpayer as the Commissioner General was the decision maker. The Commissioners, although they include retired Judges of the Superior Courts because the legislature in establishing the Tax Appeals Commission in 2011 wanted it to consist of non tax officers as well, are neither appointed by the Head of the State or the Judicial Service Commission, as done in Courts, Tribunals and other institutions under Articles 4(c) and 105 of the Constitution.

This is the reason why the citizen's right to pay on the self assessment gets only suspended but not vitiated when disputed by the assessor and the Commissioner General. That process of disputing the citizen's self assessment culminates at the Tax Appeals Commission. From Tax Appeals Commission upwards what is considered are only questions of law but not facts. So if the process of disputing the self assessment cannot be completed according to law and as required by the law, should not the right of self assessment prevail?

It appears to this Court, that, to decide otherwise is the "**naked usurpation of the legislative function under the thin disguise of interpretation**." Why not "if a gap is disclosed, the remedy lies in an amending Act," as Viscount Simonds said when he castigated Denning L. J.?

Taxes are required for the maintenance of a welfare government. But the days that considered that all time limits are for the citizen and not for the official, unfortunately for some, are at an end. The officialdom and bureaucracy, which are remnants of feudalism are taking their due place on the face of Sovereign People in other parts of the world too. Despite the "citizen" under the Constitutional Monarchy in Great Britain is called a "subject" in **Sadiq Ahmed**

vs. The Commissioners for Her Majesty's Revenue and Customs [2020] UKFTT (United Kingdom First tier Tribunal) 337 (TC) allowed the taxpayer's appeal against a penalty for failing to comply with an information notice because the penalty notice was not issued within 12 months of the taxpayer becoming liable to a penalty and HMRC could not refresh the time period by issuing a subsequent information notice. **Judge Anne Redston** decided,

> "I considered whether HMRC had the power to extend that twelve month time limit by the simple device of issuing a new notice which repeated the text of the out of time notice. It is clear that the answer to that question must be no. It would entirely defeat the purpose of the statutory provision."

It was stated above as to why Chief Justice N. D. M. Samarakoon Q. C.'s decision regarding a Fundamental Rights application cannot apply here. If the Court extends time, without the statute giving power to do so, it will be a clear violation of the law.

The article "**Managing Income Tax compliance through Self Assessment**," by **Andrew Okello** dated 11th March 2014 published in **IMF eLibrary**[5] says, among other things, the following,

> **"**B. Self-assessment Implementation
>
> 12. **The self-assessment system accepts the reality that no tax administration has, or ever will have, sufficient resources to determine the correct liability of every taxpayer.** It also recognizes that taxpayers themselves—with appropriate assistance from the tax department—are in the best position to determine their tax liabilities, given that they have first-hand knowledge of their business affairs and financial transactions, and have ready access to underlying accounting records.

[5] Managing Income Tax Compliance through Self-Assessment in: IMF Working Papers Volume 2014 Issue 041 (2014)

13. **Self-assessment is based on the idea of voluntary compliance.** In a self-assessment system, taxpayers calculate and pay their own taxes without the intervention of a tax official. If this is not done appropriately and within the prescribed timeframes, the tax administration detects this failure and takes appropriate enforcement action, including applying the penalties provided for in the law. Tax administrations generally accept tax returns at face value (i.e. not subjected to technical scrutiny) at the time of filing, at which time the tax due is paid. Some simple checks may be performed; however, the focus is to ensure arithmetical accuracy and that the taxpayer has completed the appropriate items on the tax return form.

.....

17. **Internationally, there has been a steady movement towards self-assessment and away from administrative assessment practices.** Self-assessment for tax purposes is not a new phenomenon. Canada and the United States first implemented self-assessment in the 1910s, followed by Japan in 1947 (Loo et al., 2005). In the last 30 years, however, the spread of self-assessment for income tax has been a common phenomenon—Sri Lanka (1972), Pakistan (1979), Bangladesh (1981), Indonesia (1984), Australia (1986-87), Ireland (1988), New Zealand (1988) and the United Kingdom (UK) in 1996-97 (Noor et al., 2013). Presently, around half (18) of revenue bodies in the OECD, for example, apply self-assessment principles for the PIT while 22 apply self-assessment for CIT (OECD, 2013)".

This position is further explained by what was debated in the parliament at the second and third readings of the Tax Appeals Commission Act No. 23 of 2011, which is referred to below.

(a) The extent of the authority of the judgment of Lord Simonds in the case of Magor and St. Mellons Rural District Council vs. Newport Corporation:-

The court in C. A. Tax 17/2017 also said,

"

> The learned counsel for the Appellant upon Court pointing this out responded by submitting that Court should then declare that the appeal made to the TAC is deemed to be allowed where the TAC fails to adhere to the time limit specified ins section 10 of the TAC Act. We do not agree as that would be in the words of Lord Simonds in *Magor & St. Mellons vs. Newport Corporation* [(1951) 2 All.E.R. 839 at 841] "a naked usurpation of the legislative function under the thin guise of interpretation…If a gap is disclosed, the remedy lies in an amending Act."

The next passage of the judgment of that case considers the question of what is a ratio decidendi, another matter. Hence it appears that Lord Simond's dictum has been used as a concluding remark in the reasoning of the court with regard to the question of mandatory or directory nature of the provision.

In the speech, " STARE DECISIS By Honorable Edward D. Re Chief Judge, United States Customs Court[6]", it was said,

> "Of course, the issues raised in a case stem from the facts presented. **The facts of the case, therefore, are of the utmost importance.** The Latin maxim, **ex facto oritur jus**, tells us that **the law arises out of the facts**. Of particular relevance are the following observations by Professor Brumbaugh[7]:
>
> > Decisions are not primarily made that they may serve the future in the form of precedents, but rather to settle issues between litigants. Their use in after cases is an incidental aftermath. A

[6] Presented at a Seminar for Federal Appellate Judges Sponsored by the Federal Judicial Center May 13-16, 1975.
[7] Brumbaugh, Legal Reasoning and Briefing 172 (1917).

decision, therefore, draws its peculiar quality of justice, soundness and profoundness from the particular facts and conditions of the case which it has presumed to adjudicate. In order, therefore, that this quality may be rendered with **the highest measure of accuracy**, it sometimes becomes necessary to **expressly limit its application to the peculiar set of circumstances out of which it springs**.

Hence, the authority of the precedent depends upon, and is limited to, "the particular facts and conditions of the case" that the prior case "presumed to adjudicate." Precedents, therefore, are not to be applied blindly. The precedent must be analyzed carefully to determine whether there exists a similarity of facts and issues, and to ascertain the actual holding of the court in the prior case".

Therefore the words of Lord Simonds,

"It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation,"

must be traced to its origin, in that, to ascertain what were the factual circumstances that made Lord Simonds say that in 1951.

The case **Magor and St. Mellons Rural District Council vs. Newport Corporation** is reported in respect of its Court of Appeal decision in 1950 and in respect of the House of Lords decision in 1951.

In the Court of Appeal decision at **1950 2 All E. R 1226** Denning L. J., (before His Lordship became the Master of Rolls in 1962) dissented with Somervell and Cohen JJ. The majority of the House of Lords, except Lord Radcliff, confirmed the majority judgment of the Court of Appeal. Lord Simonds made a speech only as a criticism of Denning L. J.'s dissenting judgment in the lower court.

The facts of the dispute with regard to which both courts had dissenting judgments are not very complicated. Although they are referred to in passing in several of the speeches and judgments, Denning L. J., specifically said at page 1235 "**I confess that I find it difficult to deal with these questions of interpretation in the abstract. I like to see their practical application and for that reason I propose to set out hypothetical sets of facts which, I suppose, are probably the true facts although they are not stated in the Case**." They are as follows,

The borough of Newport, Monmouthshire was rich and it brought more money into the rates than it cost the rural district councils to look after them. By an Act of Parliament in 1934 the boundaries of Newport were extended to new rich grounds, out of the rural districts. If nothing was done about it, the rates in the rural districts would have gone up. To remedy this the Parliament enacted, that, Newport should pay compensation to the rural district councils. If the amount could not be agreed the matter was referred to arbitration. By an order of the Minister of Health in 1935, two rural districts, shorn as each was of its rich grounds were amalgamated. They were previously Magor and St. Mellons rural district councils separately. Now they were Magor and St. Mellons rural district council together.

The arbitrator referred four questions in a Case stated. The first and second questions are sufficient to appreciate the problem. They are (i) Whether the rural council as successor of the former rural district councils or otherwise is entitled to claim as against the borough council a financial adjustment under section 58(1) of the Act of 1934 and the applied provisions of the Act of 1933 in respect of the alteration of boundaries effected by Act of 1934? (ii) If the first question is answered affirmatively, whether a claim for any increase of burden within the meaning of section 152 of the Act of 1933 can lawfully be made by the rural council?

Parker J., in the Divisional Court answered (i) in affirmative and (ii) in negative. Cohen L. J., in the Court of Appeal at page 1231 said that Parker J., decided so because he thought he was bound by the decision of Godstone Rural District Council vs. Croydon Corporation (1932) 102 L. J. K. B. 34, "to hold that he must have regard only to the increase in burden during the period of the continued existence of the old councils after the transfer of the added areas to the borough council". That period was but a moment in time.

Later, in House of Lords at **1951 2 All E R 839 at 845** Lord Morton of Henryton would say, "In such a case, if the wealthier portion of the area is lost, there is an increase of burden on the ratepayers in the area which remains and section 151 and section 152 are directed to meeting such a case, **The present case is one in which each of two local authorities loses a wealthy portion of its area and is abolished immediately after the loss occurs.** It may well be that, if the legislature had contemplated such a state of affairs, some special provisions would have been inserted in the Act of 1933. What these provisions would have been can only be a matter of guesswork."

Despite the majority in the House of Lords and the Court of Appeal thinking, that, the amalgamation of "Magor" and "St. Mellons" would extinguish their rights independently of each other they had to claim compensation and what Parliament would have provided could only be a matter of guesswork [Lord Simonds said at page 841, "If a gap is disclosed, the remedy lies in an amending Act"] Denning L. J., was not deceived by "labels", "Magor", "St. Mellons" and now "Magor and St. Mellons". He said,

> "I cannot think that the judge is right about this. The Minister's order expressly provided that the property of the two rural district councils should be transferred to and vest in the combined council. **The right of the two councils to compensation was clearly "Property" which**

vested in the combined council and the judge so held, but he thought that the right was worth nothing because the two councils only lived for a moment of time after they had been shorn off their rich grounds. Much as I respect his opinions, I cannot agree with him about this. The effect of the Minister's order was, if I may use a metaphor, not the death of the two councils, but their marriage. The burdens which each set of ratepayers had previously borne separately became a combined burden to be borne by them all together. So, also, the rights to which the two councils would have been entitled for each set of ratepayers separately became a combined right to which the combined council was entitled for them all together. This was so obviously the intention of the Minister's order that I have no patience with an ultra legalistic interpretation which would deprive them of their rights altogether. **I would repeat what I said in Seaford Court Estates Ltd., vs. Asher [1949] 2 All E. R. 155. We do not sit here to pull the language of Parliament and Ministers to pieces and make nonsense of it. That is an easy thing to do and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis."** (page 1235,1236)

Section 151(1) of the Local Government Act of 1933, which was material said,

"151.—(1) Any public bodies affected by any alteration of areas or authorities made by an order under this Part of" this Act may from time to time make agreements for the purpose of adjusting any property, income, debts, liabilities and expenses (so far as affected by the alteration) of, and any financial relations between, the partis to the agreement".

In the simple, less legalistic and exalted way with unalloyed justice was to consider the amalgamation as marriage, but not death[8].

On that basis, one may consider the applicability and validity of what Lord Simonds said, which is reproduced here in full.

> "My Lords, I have had the advantage of reading the opinion which my noble and learned friend, Lord Morton of Henryton, is about to deliver and I fully concur in his reasons and conclusion, as I do in those of Parker J. and the majority of the Court of Appeal. Nor should I have thought it necessary to add any observations of my own were it not that the dissenting opinion of Denning L. J., appears to invite some comment.
>
> My Lords, the criticism which I venture to make of the judgment of the learned lord justice is not directed at the conclusion that he reached. It is after all a trite saying that on questions of construction different minds may come to different conclusions and I am content to say that I agree with my noble and learned friend. But it is on the approach of the lord justice to what is a question of construction and nothing else that I think is desirable to make some comment, for at a time when so large a proportion of the cases that are brought before the courts depend on the construction of modern statutes it would not be right for this House to pass unnoticed the propositions which the learned lord justice lays down for the guidance of himself and, presumably, of others. He said: ([1950] 2 All E. R. 1236):
>
> > "We sit here to find out the intention of Parliament and of Ministers and carry it out and we do this better by filling in the

[8] Despite both marriage and death introduce significant changes and discontinuities in people's lives. In marriage, individuals transition from being single to being part of a couple, while in death, the transition is from life to whatever lies beyond. Both involve coming to terms with loss and adjusting to new realities. But Denning L. J., in his above statement used the **conventional** contrast between the concepts of "marriage" and "death."

gaps and making sense of the enactment **than by opening it up to destructive analysis."**

The first part of this passage appears to be an echo of what was said in Heydon's case (1584) 3 Co. Rep. 7a; 76 E. R. 637; 42 Digest 614, 143, three hundred years ago and, so regarded, is not objectionable. But in a way in which the learned lord justice summarises**the broad rules laid down by SIR EDWARD COKE in that case**[9] may well induce grave misconception of the function of the court. The part which in the judicial interpretation of a statute by reference to the circumstances of its passing is too well known to need re statement. It is sufficient to say that the general proposition that it is the duty of the court to find out the intention of Parliament – and not only of Parliament but of Ministers also – cannot by any means be supported. The duty of the court is to interpret the words that the legislature has used. Those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited: see, for instance, Assam Railways & Trading Co., Ltd. vs. Inland Revenue Commissioners [1935] A. C. 445 and particularly, the observations of LORD WRIGHT [1935] A. C. 458.

The second part of the passage that I have cited from the judgment of the learned lord justice is, no doubt, the logical sequel of the first. The court, having discovered the intention of Parliament and Ministers too, must proceed to fill in the gaps. What the legislature has not written, the court must write. This proposition which re states in a new form the view expressed by the lord justice in the earlier case of Seaford Court Estates Ltd., vs. Asher [1949] 2 All E. R. 155, (to which the lord justice himself refers) cannot be supported. **It appears to me to be a naked usurpation**

[9] Sir Edward Coke did not write the judgment in Heydon's case (1584). He became a Judge for the first time in 1585, the next year, when he was 33 years old. Hence Viscount Simond's argument is wrong on this aspect too.

of the legislative function under the thin disguise of interpretation and it is the less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed, the remedy lies in an amending Act. For the reasons to be given by my noble and learned friend I am of opinion that this appeal should be dismissed with costs."

In his self proclaimed criticism, Lord Simonds dividing into two parts what Denning L. J., said in the Court of Appeal in the same case, sees its first part, "We sit here to find out the intention of Parliament and of Ministers and carry it out", as an echo of what Sir Edward Coke said in Heydon's case, decided in 1584. It is from Heydon's case the rule in interpretation known as the "mischief rule" is extracted. That rule applies in four parts, **[Beginning of the Quotation]**

"For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered:

- (1st). What was the common law before the making of the Act?
- (2nd). What was the mischief and defect for which the common law did not provide.
- (3rd). What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And,
- (4th). The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privatocommodo*, **and to add force and life to the cure and remedy**,

according to the true intent of the makers of the Act, *pro bono publico*[10]." [Emphasis added in this judgment]

[End of the Quotation]

Under the above rules, not only the court has to ascertain the "remedy the parliament has devised," the court must also discover the mischief or the defect that was there. This covers the part of Denning L. J.'s dictum that the court must gather the intention of the Parliament or the Minister. That is especially rules 02 and 03 above. But that is not all what the rules say. Rule 04 says, "the office of all the judges is always to make such construction as shall suppress the mischief" not only that, but "**to add force and life to the cure and remedy".** So the court must not only ascertain the intention of the Parliament but also add force and life to the cure. This is, in other words, to add force and life to the words in the statute. This was what Denning L. J., said in the second part of his dictum as per Lord Simonds, as "and we do this better by filling in the gaps and making sense of the enactment." **Hence, it appears to this court, that, the rules laid down in Heydon's case includes, not only the first part which Denning L. J., said but also his second part, despite Lord Simonds trying to confine the first part only to Heydon's test (which he says is not objectionable) and to isolate and attack to the second part in his criticism.Therefore Denning L. J., said nothing new except what was laid down in Heydon's case in 1584. <u>But people tend, not to see this simple truth and to discard the echoing of Denning L. J., which was the reverberation of Heydon's rules and to cling on to the criticism of Lord Simonds since it is a statement from the House of Lords</u>.** This is what happens when the phrase, "a naked usurpation of the legislative function under the thin guise of interpretation" alone is taken out of the context and used.

[10]Quoted by The Law Commission and the Scottish Law Commission in The Interpretation of Statutes, page 14, published 9 June 1969, accessed 17 December 2022

If, the facts of Heydon's case about 440 years ago is stated in a very simple form, the religious college Ottery College leased a manor also called Ottery to Ware the father and Ware the son for their lives. But it later leased the same parcel to Heydon for eighty years. Suppression of Religious Houses Act of 1535 brought by Henry[11] VIII dissolved many religious houses including the Ottery College. The college lost its lands to the king. But a provision in the Act kept alive any grant made more than an year before the enactment of the statute, for a term of life. The Court of Exchequer found that the grant to the Wares is valid whereas the grant to Heydon was not.

This judgment is available. Although the above rules were laid down in that judgment, it cannot be a judgment of Sir Edward Coke, as claimed by Lord Simonds and the popular belief because in 1584 Coke was not a Judge. Coke's first judicial postings came under Elizabeth; in 1585, he was made Recorder of Coventry, in 1587 Norwich, and in 1592 Recorder of London, a position he resigned upon his appointment as Solicitor General. [*Johnson, Cuthbert William (1845). The Life of Sir Edward Coke. Vol. 1 (2nd ed.). Henry Colburn.]*
Born on 01st February 1552, Coke was 32 years old in 1584. He was in his 33rd year in 1585 when he became a Judge. The judgment says that the said rules were the exposition of "**Sir Roger Manwood, Chief Baron, and the other Barons of the Exchequer.**" The judgment says,

1. "And the great doubt which was often debated at the Bar and Bench, on this verdict, was, whether the copyhold estate of Ware and Ware for their lives, at the will of the Lords, according to the custom of the said manor, should, in judgment of law be called an estate and interest for lives, within the said general words and meaning of the said Act. And after all the Barons openly argued in Court in the same term, *scil.* Pasch. 26 Eliz. and it was unanimously resolved by Sir Roger Manwood, Chief Baron,

[11]was King of England from 22 April 1509 until his death in 1547

and the other Barons of the Exchequer, that the said lease made to Heydon of the said parcels, whereof Ware and Ware were seised for life by copy of court-roll, was void; for it was agreed by them, that the said copyhold estate was an estate for life, within the words and meaning of the said Act. And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered:

1st. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.

And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privatocommodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*. **And it was said, that in this case the common law was, that religious and ecclesiastical persons might have made leases for as many years as they pleased, the mischief was that when they perceived their houses would be dissolved, they made long and unreasonable leases:** now the stat of 31 H. 8. doth provide the remedy, and principally for such religious and ecclesiastical houses which should be dissolved after the Act (as the said college in our case was) that all leases of any land, whereof any estate or interest for life or years was then in being, should be void; and their

reason was, that it was not necessary for them to make a new lease so long as a former had continuance; and therefore the intent of the Act was to avoid doubling of estates, and to have but one single estate in being at a time: for doubling of estates implies in itself deceit, and private respect, to prevent the intention of the Parliament. And if the copyhold estate for two lives, and the lease for eighty years shall stand together, here will be doubling of estates *simul &semel* which will be against the true meaning of Parliament[12]."

"The Law Commission and the Scottish Law Commission" report on "The Interpretation of Statutes" says,

23. The classic statement of the mischief rule is that given by the Barons of the Court of Exchequer in *Heydon's Case*:[45]

In **Seaford Court Estates Ld. Vs. Asher [1949] K. B. 481**, which was the earlier case in which Dennig L. J., made a similar statement, an apartment was let from 1935 to 1939 [*before the commencement of the Second World War*] at 175l. a year. The landlords were not under an obligation to provide hot water, but they nevertheless did so. The apartment was vacant from 1939 to 1943. In 1943 it was let at 250l., a year but the landlords were bound to provide hot water. The cost of fuel and labour had greatly increased between 1939 and 1943. The tenant now says that the increase from 175l., to 250l., is invalid. He says the rent should be 175l. and that he should get hot water free. The material section was section 2 sub section 3 of Increase of Rent and Mortgage Interest (Restrictions) Act of 1920.

Section 2 was dealing with "Permitted increases in rent". Its sub section 3 said,

"(03) **Any transfer to a tenant of any burden or liability previously borne by the landlord** shall, for the purpose of this Act be treated as an

[12] Heydon's Case [1584] EWHC Exch J36 (01 January 1584) (bailii.org)

alteration of rent and where, as the result of such a transfer, the terms on which a dwelling house is held are on the whole less favourable to the tenant than the previous terms, **the rent shall be deemed to be increased,** whether or not the sum periodically payable by way of rent is increased and any increase of rent in respect of any transfer to a landlord of any burden or liability previously borne by the tenant where, as the result of such transfer, the terms on which any dwelling house is held are on the whole not less favourable to the tenant than the previous terms, shall be deemed not to be an increase of rent for the purpose of this Act: Provided that, for the purposes of this section, the rent shall not be deemed to be increased where the liability for rates is transferred from the landlord to the tenant, if a corresponding reduction is made in the rent".

The court had to interpret the **employment** of the word "burden" in the section. Denning L. J., said at page 498,

"Was the tenant previously under any "burden" which now falls on the landlords? It is said that during the previous tenancy the landlords did in fact provide the hot water and that therefore the tenant was under no burden. This is where the rub comes I confess that according to the ordinary meaning of the word "burden" the tenant was under no burden previously to provide hot water. But neither were the landlords. There was no legal obligation on the landlords to provide hot water and if they for any reason, good or bad, decided to cut it off, the tenant would have no legal ground of complaint. When the price of the fuel rose the landlords would both legally and morally have been justified in saying that they would not provide hot water unless they were paid a contribution towards the increase in cost. **The tenant was therefore under the contingent burden, as a matter of practice, of providing the hot water himself, or paying a contribution towards the**

increased cost, or going without. Under the changed terms all that burden falls on the landlords. No matter how much the price of fuel rises, no matter how difficult it is to obtain, the landlords can no longer cut off the hot water or ask the tenant for a contribution towards the increase in cost. The change of terms does therefore put on the landlords a burden which previously fell contingently on the tenant."

He continued,

"**The question for decision in this case is whether we are at liberty to extend the ordinary meaning of "burden" so as to include a contingent burden of the kind I have described.** Now this court has already held that this sub section is to be liberally construed so as to give effect to the governing principles embodied in the legislation (Winchester Court Ltd., vs. Miller [1944] K. B. 734): and I think we should do the same. Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise and even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of

the mischief which was passed to remedy and then he must supplement the written words so as to give "force and life" to the intention of the legislature. **That was clearly laid down by the resolution of the judges in Heydon's case** [Denning says "judges," in plural. Coke, however much his greatness still counts as one] and it is the safest guide today. Good practical advice on the subject was given about the same time by Plowden in his second volume Eyston vs. Studd (1574) 2 Plowden 465. **Put into homely metaphor it is this: A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases"** (page 498, 499)

Lord Simonds, it appears with respect, was not only incorrect in dividing Denning L. J.'s statement into two and purporting to apply the rules in Haydon's case only to the first part, but also wrong in saying that Sir Edward Coke[13] decided that case. **It is ironical, that, people who are averse to "filling in the gaps and making sense of the enactment" readily accept "ironing out the creases" without knowing that it all comes in one.**

However, it may be specifically noted, that, this is not to say, that, any "filling in the gaps" is required to make the above time limit for the Tax Appeals Commissiever since. ever since. on mandatory. Such a "filling in the gaps" is not required. The statute simply does not give power to the court to extend time. As it will be referred to in due course, Rowlatt J., in 1921 said as to how a tax statute must be applied, which has been followed ever since.

[13] 1584 was the reign of Elizabeth. Coke was knighted by her successor James I who came to the throne in 1603

In the article "**ON ASSESSING THE ROLE OF COURTS IN SOCIETY**," by Dr. Shimon Shitreet[14], published in Volume 10, 1980 of the Manitoba Law Journal it is said,

> "The judiciary, they say, has been timid, unimaginative, not active, not creative, orthodox, conventional, or conservative in its law-making functions and that it has over-practised judicial self-restraint. Sometimes they go further and bestow upon a judge the title of "socially reactionary ' or "the high priest of rigid stare decisis and the limited role for the judiciary," both titles conferred on Viscount Simonds."

After I have incorporated the above passage from Denning L. J., in **Seaford Court Estates Ld. Vs. Asher [1949] K. B. 481, at page 498,499,** which was done in this case[15] but before that in another case[16], where the draft was prepared about four months ago[17], it was found that Mahinda Samayawardhena J., in the Supreme Court 07 Judge Bench case **S. C. Appeal 11 2021** delivered on 14th November 2023 has also cited with approval the same passage from Seaford Court Estates Ltd., giving a "purposive interpretation" to Act No. 04 of 1990[18].

The above was said to show that Viscount Symmond's criticism of Dening L. J., in Magor and St. Mellons Rural District Council vs. Newport Corporation, 1951 was unwarranted.

Charles Stephens in his book "**The Jurisprudence of Lord Denning A Study in Legal History Volume III Freedom under the Law: Lord Denning as Master of the Rolls, 1962-1982**", Cambridge Scholars Publishing, 2009 in its

[14] LL.B., LL.M. (Jerusalem); M.C.L., D.C.L. (Chicago); of the Faculty of Law, Hebrew University of Jerusalem; Visiting Professor, Faculty of Law, University of Manitoba (1977-1978).
[1515] And in Tax 27 2021 dated 15.12.2023
[16] C. A. Tax 17 2015.
[17] Which has not been delivered up to now.
[18] Recovery of Loans by Banks Act No. 04 of 1990.

INTRODUCTION THE OBITUARIES OF LORD DENNING in Notes under No. 01 says,

> "Lord Denning was first appointed to the Court of Appeal in 1948. He was promoted to the House of Lords by Harold Macmillan on 24th April 1957. **In his Romanes lecture of 1959, delivered in the University of Oxford, Lord Denning seemed to go so far as to claim that the House of Lords, in its judicial capacity, should appropriate legislative powers to itself enabling it to change the law when it needed changing, rather than having to wait on the more leisurely process of Parliamentary law making.** Although the Practice Statement of 1966 was a move in this direction, in 1959 such radicalism was anathema to the senior Law Lord, Lord Simonds. Although Lord Denning often dissented from the majority decision in the Lords, his dissent could make little or no impact. Frequently he was at odds with Lord Simonds in particular who once memorably expressed his distaste for Lord Denning's preference for 'filling in the gaps' left by poor or confusing drafting as 'a naked usurpation of the legislative function under the thin disguise of interpretation.' **According to the Sunday Times obituary, it was the frustration which resulted from conflict with Lord Simonds that led Lord Denning to accept the apparent demotion from the House of Lords consequent on his acceptance of the office of Master of the Rolls in April 1962.** In the Court of Appeal, Lord Denning's judgments, even the dissenting ones, could have much more impact on the shaping of the law than was possible in the House of Lords. It is also worth noting that Lord Denning's appointment to the Court of Appeal on 19th April 1962 was made by Harold Macmillan. Macmillan was an unorthodox Conservative who was the author of a number of relatively radical initiatives between 1957 and 1962 ranging from the creation of Life Peerages, the setting up of the National Economic Development Council,

the establishment of new Universities and, most radically of all, the application, in 1961 of the United Kingdom to join the European Economic Community[19].

One single factor to be rectified in the above passage is that it might imply, that, "'filling in the gaps' disagreement took place when both Lord Simonds and Lord Denning were in the House of Lords. It was not so, as referred to earlier in this judgment, Denning L. J.'s dissenting judgment in **Magor and St. Mellons Rural District Council vs. Newport Corporation** in the Court of Appeal in which he stated the above, referring to his earlier judgment in **Seaford Court Estates Ltd., vs. Asher [1949] 2 All E. R. 155** is reported in **1950 2 All E. R 1226** whereas Lord Simond's decision in the House of Lords in **Magor and St. Mellons Rural District Council vs. Newport Corporation** is reported at **1951 2 All E R 839 at 845.**

[19] [**The rest of the Note is reproduced here in footnote**] Macmillan's appointment of Lord Denning to the Court of Appeal, as Master of the Rolls, in April 1962 could be seen in this context as an unorthodox, but inherently conservative, attempt to modernise the institution of the law along similar lines to those which Macmillan adopted with regard to other institutions during the period of his premiership. Lord Denning's appointment came between the Orpington by-election, in the seat next door to that of the Prime Minister, which the Conservatives lost to the Liberals, and the so called 'night of the long knives' on 13th July 1962 when Macmillan sacked seven Cabinet ministers, including the Lord Chancellor. It was a time ofdecided instability in the fortunes of the Conservative government. In this context, Macmillan's appointment of Lord Denning to conduct the inquiry into the circumstances surrounding the resignation of John Profumo in June 1963 should be considered an astute manouevre; the deployment of a conservative, but unorthodox, judge of Lord Denning's calibre was perhaps the only way in which the gravest crisis of his premiership could have been resolved satisfactorily. In the febrile atmosphere of the summer of 1963, a judge of the stamp of Lord Simonds would not have been able to construct a report which would been credible, let alone have saved the government. Lord Denning did not disappoint; his Report saved Macmillan, perhaps even the Establishment itself. Despite his modest criticism of his conduct as Prime Minster during the affair, Lord Denning retained a substantial amount of respect for Harold Macmillan. He concluded his account of the whole business in Landmarks in the Law by quoting from the letter which Harold Macmillan wrote to him on his retirement on 28th July 1982 in which he praised him for his 'commonsense, fair play and justice' and concluded 'as Lord Mansfield and Lord Camden, so Lord Denning'. Lord Denning then commented that 'Macmillan was a very great man'. Landmarks in the Law [London 1984 p. 365].

The **Hon. Justice M.D. Kirby, C.M.G.,** President of the Court of Appeal, Supreme Court, Sydney, formerly Chairman, Australian Law Reform Commission and Judge of the Federal Court of Australia, in his book, "**Lord Denning: An Antipodean Appreciation,**" says,

> "The original genius of the common law of England lay in its capacity to adapt its rules to meet different social conditions. The advent of the representative Parliament has tended to make judges, including appeal judges, reticent about inventing new principles of law or overturning decisions that have stood the test of time. "Heresy is not the more attractive because it is dignified by the name of reform" declared Viscount Simonds, one of Lord Denning's critics. "It is even possible that we are not wiser than our ancestors. It is for the legislature, which does not rest under that disability[20], to determine whether there should be a change in that law and what the change should be."

Justice Micheal Kirby also says,

> "Needless to say Lord Denning's view of his role frequently drove him into dissent from other more conventional judges. Even where, in the Court of Appeal, he carried the day, he was sometimes reversed in the House of Lords in chilling language. One of his abiding concerns was to reform the law of contract. **He waged a battle over a quarter of a century against the unfair exclusion of claims by written terms, sometimes found obscurely on the back of a ticket or form.** But to his 1951 plea for the law to look at the reality of contract relationships, the Lords answered coldly. "Phrases occur", said Viscount Simon[21] "which give us some concern." (British Movietone News Ltd. v. London and District Cinemas Ltd. [1952] A.C. 166, 181-182.) Lord Simonds

[20] It is not that the legislature does not have that disability, but what it legislates subject to that infirmity also goes as law.
[21] This is not Viscount Simonds but another Law Lord.

added, "It is no doubt essential to the life of the common law that its principles should be adapted to meet fresh circumstances and needs. But I respectfully demur to saying that there has been or need be any change in the well-known principles of construction of contracts."

(b) No interpretation, let alone "purposive interpretation" is necessary in this case:-

But as far as this case and section 10 of the Tax Appeals Commission Act are concerned, no mischief rule or a "purposive interpretation" is required. In fact no interpretation at all is required but the application of the provision. Sir Roger Manwood, Chief Baron in Heydon's case said, "<u>that for the sure and true interpretation of all statutes in general</u>." Narotam Singhe Bindra says, as it would be seen, in Chapter 07 page 297, that "...General and comprehensive words should receive their full and natural meaning unless they are clearly restrictive in their <u>intendment</u>..." (State of Bombay vs. Ali Gulshan AIR 1955 SC 810) Also, as it would be seen and as Rowlatt J., said in Cape Brandy Syndicate vs. Inland Revenue Commissioners (1921) 12 TC 358 at page 366, "In taxation you have to look simply at what is clearly said. <u>There is no room for any intendment</u>;..."

As it was explained above the reason why Denning L. J., had to apply what His Lordship said in 1949 in **Seaford Court Estates Ltd., vs. Asher** was the wrong decision of the arbitrator that the amalgamation of the Magor and St. Mellons Rural District Councils amounts to their "death". But Denning L. J., said it was their "Marriage." In **Seaford Court Estates Limited vs. Asher** it was a question of extending the ordinary meaning of the word "burden", which the context required.

Sometime ago, this judgment referred to the Golden Rule of interpretation in Chapter 03 of the book of **Narotam Singh Bindra.** He says at Chapter 07 page

297, "…General and comprehensive words should receive their full and natural meaning unless they are clearly restrictive in their intendment…" (State of Bombay vs. Ali Gulshan AIR 1955 SC 810) He discusses in Chapter 11 the situation when the language is plain. He says,

> "In Curtis v. Stovin, 22 Q.B.D. 513, 519 Fry, L.J., said: "If the Legislature have given a plain indication of this intention, it is our plain duty to endeavour to give effect to it, though, of course, if the word which they have used will not admit of such an interpretation, their intention must fail." And then further on his Lordship, after explaining one possible construction, said : 'The only alternative construction offered to us would lead to this result, that the plain intention of the Legislature has entirely failed by reason of a slight inexactitude in the language of the section. If we were to adopt that construction, we would he construing the Act in order to defeat its object rather than with a view to carry its object into effect." (page 441)

He also says,

> "Courts not to modify language so as to bring it into accord with its own views of expediency, justice and reasonableness. —In Abel v. Lee (1871) L. R. 06 C. P. 365, 371, Willes, J., said :"**I utterly repudiate the notion that it is competent to a Judge to modify the language of an Act of Parliament in order to bring it into accordance with his views as to what is right and reasonable".** (page 452)

In Chapter 15 page 521 he quotes Pollock B. as follows,

> "**It must also be remembered that the rule of strict construction of penal statutes as modified in the modern times is not so rigid or unbending as it was in times gone by when the cutting down of a cherry tree in an orchard or the begging or wandering without a pass by a soldier or sailor was punishable in the United Kingdom with**

death. During the present times the rules mean very little more than that such statutes are to be fairly construed like all others according to the legislative intent as expressed by the statute itself or arising out of it by necessary implication. (Emperor vs. Noor Mohamed AIR 1928 Sind. 1,7 (FB)). What that 'little more' is, has been stated by Pollock, B., in Parry v. Croydon Commercial Gas Co., ((1863) 15 CB (NS) 568) in the following passage

> "It appears to me that in construing a penal statute of any kind, we are bound to take care that the party is brought strictly within it, and to give no effect to it beyond what it is clear that the Legislature intended. If there be any fair and legitimate doubt, the subject is not to be burthened. Though no doubt in modern times, the old distinction between penal and other statutes has, in this respect, been discountenanced, **still I take it to be a clear rule of construction at the present day that in the imposition of a tax or a duty; and still more of a penalty if there be any fair and reasonable doubt, we are so to construe the statute as to give the party sought to he charged the benefit of the doubt.**"

Furthermore, Narotom Singh Bindra in the 12th Edition of his book at page 317 says,

> "The first and primary rule of construction is that the intention of the legislature must be found in the words used by the legislature itself, **if the words used are capable of one construction only, then it would not be open to the courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act.** The legislature must be deemed to have intended what it has said. It is no part of the duty of the court to presume that the legislature meant

something other than what is said. **If the words of the section are plain and unambiguous, then there is no question of interpretation or construction.** The duty of the court then is to implement those provisions with no hesitation."

In Chapter 21 page 652 he says,

> "When a rule of law lays down the conditions under which an order or judgment shall not be invalid, it by necessary implication must be deemed to lay down the further rule that the order will be invalid if those conditions are net fulfilled." (Qaboot vs. Chajju AIR 1948 All 411)

Therefore when jurisdiction to make the determination is limited by time, as in section 10 of the Tax Appeals Commission Act and when the condition of the time limit is violated, it is an order or determination made without jurisdiction by necessary implication.

Despite the present case being under Inland Revenue Act No. 10 of 2006 and Tax Appeals Commission Act No. 23 of 2011, it is pertinent to note, what His Lordship K. J. Sripavan said in the Special Determination pertaining to the Bill after amendments became the Inland Revenue Act No. 24 of 2017. This is at page 122 to 124 of "The Supreme Court decisions on Parliamentary Bills".

It says,

> "Court assembled for hearings at 10.00 a.m. on 13.07.2017, 18.07.2017, 20.07.2017, 21.07.2017, 24.07.2017 and 25.07.2017. Determination : A Bill entitled 'Inland Revenue' was published in the Government Gazette on 19.06.2017 and placed on the Order Paper of the Parliament on 05.07.2017.

.....

> Clause 200

This Clause refers to the interpretation of the provisions of the Act. This applies also to Court of law in interpreting the provisions of the Act. This refers to the manner of interpreting the Act and its provisions and the material to be considered for the purpose of interpreting the Act. Interpretation of status is a part of the Judicial power. The Learned President Counsel for the Petitioner in SC/SD/9/2017 strenuously argued that Clause 200 encroach upon the judicial power and it violates Article 3 and 4 of the Constitution. Clause 200 is reproduced below:

Interpretation and avoidance of doubts

200. (1) In interpreting a provision of this Act, a construction that would promote the purpose or object underling the provision or the law (whether that purpose or object is expressly stated in the law or not), shall be preferred to a construction that would not promote that purpose or object.

(2) Subject to subsection (5), in interpreting a provision of this Act, if any material that does not form part of the law is capable of assisting in ascertaining the meaning of the provision, consideration may be given to that material.

(a) to confirm that, meaning of the provisions is the ordinary meaning conveyed by the text of the provision, taking into account its context in this Act and the purpose or object underlying this Act; or

(b) to determine the meaning of the provision when;

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text and taking into account its context in this Act and the purpose or object

underlying this Act, leads to a result that is manifestly absurd or its unreasonable.

(3) Without limiting the generality of subsection (2), material that may be considered in interpreting a provision of this Act shall include:

(a) all maters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Department of Government Printing;

(b) any treaty or other international agreement or international assistance agreement that is referred to in the Act;

(c) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the Members of Parliament, by a Minister, before the time when the provision was enacted;

(d) the speech made to Parliament by a Minister on the occasion of a motion related to the Bill containing the provision; and

(e) any relevant material in any official record of proceedings of debates in Parliament or debates of any Parliamentary committee that considered the related Bill.

It is well settled law that interpreting statutes is power vested in Courts and considered as part of the judicial power. When interpreting statutes Courts will follow the well established rules of interpretations. **If the language is clear and unambiguous there is no need for interpretation and it is a matter of applying the Law.** When Court interpreting statutes it will consider the purpose and object of the Act as disclosed in the preamble, long title or in the body of the Act. Therefore

any Act requiring Court to follow a particular method of interpretation or consider material not forming part of the Act amounts to encroaching upon powers of the Judiciary and repugnant to the doctrine of separation of powers recognized in the Article 3 and 4 of the Constitution.

The Learned President's Counsel for the Petitioner in SC/SD/ 09/2017 referred to several cases where it was held that interpreting law is a matter for the Courts. He had cited the case of Queen v. Liyanage 64 NLR 314, Tuckers Ltd. Vs. Ceylon Mercantile Union 73 NLR 31. CWC vs. Superintended, Beragala Estate 76 NLR 1.

According to Clause 200 (a), (b) and (c) matters not forming part of the Act such as documents, explanatory memorandum, speech made by the Minister by when introducing the Bill and official records could be considered in interpreting the Act. According to the law as set out in J.B. Textiles Industries Ltd. Vs. Minister of Finance (1981) 1 SLR 156. De Silva vs. Jeyaraj Fernandopulle (1996) 1 SLR 22 the Hansard could be used under limited circumstances. This Clause permits the extraneous matters and other material not forming part of the Act, to be considered in interpreting the provisions of the Act. We are of the view this Clause violates Articles 3 and 4 of the Constitution".

Therefore interpretation is within the province of the judiciary. But the Golden Rule or the application of the statute as it is applies unless the provision is ambiguous which is not the case in this case.

It is also noted, that, in C. A. Tax 17 of 2021, the Commissioner General of Inland Revenue, the respondent, has filed a written submission dated 25th January 2023 in which at paragraph 31 reference has been made to the case Mr. S. P. Muttiah vs. The Commissioner General of Inland Revenue, C. A. Tax 46/2019 decided on 30th July 2021. It is submitted, that, in that case the

Court based on Caldow vs. Pixcell (1877) 1 CPD 52 566 and Dharendra Krisna vs. Nihar Ganguly AIR 1943 Calcutta 266 stated that,

> "In the absence of any express provision the intention of the legislature is to be ascertained by weighing the consequences of holding a statute to be directory or mandatory having regard to the importance of the provision in relation to the general object intended to be secured by the Act."

The case of Caldow vs. Pixcell (1877) is from the Common Pleas Division in the Court of Appeal in England. In that case the question was whether the provision in Ecclesiastical Dilapidations Act of 1871 section 29 the words "within three calendar months after the avoidance of any benefice…the bishop shall direct the surveyor who shall inspect the buildings of such benefice and report to the bishop what sum, if any, is required to make good the dilapidation to which the late incumbent or his estate is liable", is mandatory or directory as to the time limit.

For the plaintiff it was argued, that, the effect of holding the period of three months to be imperative is to cast upon the plaintiff the cost of all repairs and that the primary object of the legislature was that the buildings of a benefice should be kept in repair, which object will be defeated if section 29 is construed to be imperative.

It was argued for the defendant, that, when a statute enacts that an act may be done for the benefit of an individual within a limited time, the act must be done within that specified time; and that principle applies here, for the main object of the Ecclesiastical Dilapidations Act 1871 was to provide for the benefit of a new incumbent.

Denman J., said

> "I will now return to section 29 and I may say that the rules for ascertaining whether the provisions of a statute are directory or imperative are very well stated in Maxwell on the Interpretation of Statutes: thus, at pages 330, 331 it is laid down that the scope and object of a statute are the only guides in determining whether its provisions are directory or imperative and the judgment of Lord Campbell in Liverpool Borough Bank vs. Turner 2 De G. F. & J. 502; 30 L. J. (Ch) 379 is cited in support of this proposition; at pages 333, 337 the distinction between statutes creating public duties and those conferring private rights is pointed out and it is stated that in general the provisions of the former are directory but of the latter imperative; and at page 340 it is laid down that in the absence of an express provision the intention of the legislature is to be ascertained by weighing the consequences of holding a statute to be directory or imperative. Upon applying the principles here set forth I come to the conclusion that section 29 is to be construed as directory and not as imperative". (page 566)

However, Denman J., said at page 567, that,

> "Howard vs. Bodington 2 P. D. 203, appears to be most in favour of the defendant, but it is clearly distinguishable; there the suit was of a criminal nature and as the defendant did not appear it was necessary to shew that he had received a copy of the representation against him within the limited time; it was held that as the limited time had been exceeded the suit failed".

The above very clearly shows that the principle that was generally followed, as said in the earlier quotation from the judgment of Denman J., that, "the distinction between statutes creating public duties and those conferring private rights" does not apply if the statute is penal or criminal in nature.

Now what is a tax statute?

As it was quoted above in Pollock, B., in Parry v. Croydon Commercial Gas Co.,, Pollock B., said,

> "…**still I take it to be a clear rule of construction at the present day that in the imposition of a tax or a duty; and still more of a penalty if there be any fair and reasonable doubt, we are so to construe the statute as to give the party sought to be charged the benefit of the doubt.**"

Therefore a tax statute has been considered on par with a penal statute and what was said in Howard vs. Bodington should apply.

Also if the Court in Mr. S. P. Muttiah vs. The Commissioner of Inland Revenue, 2021 reproduced the paragraph 42 of Dharendra Krisna vs. Nihar Ganguly AIR 1943 Calcutta 266 it would have been shown that what the Indian Court said was,

> ""42. The scope and object of a statute are the only guides in determining whether its pro-visions are directory or imperative. In the absence of an express provision, the intention of the Legislature is to be ascertained by weighing the consequences of holding a statute to be directory or imperative. No universal rule can be laid down for the construction of statutes as to whether any en-actment shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of the Court to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed: Liverpool Borough Bank v. Turner (1860) 2 De. F. & J. 502 at p. 507, per Lord Campbell L.C. In each case the subject-matter is to be looked to and the importance of the provision in question in relation to the general object intended to be secured by the Act, is to be

taken into consideration in order to see whether the matter is compulsive or merely directory. In the particular case before us, the statute secures to zemin-dars the extraordinary power of realising what they claim as balance due before the claim is established in any Court of justice. In securing this extraordinary power the statute lays down certain formalities to be observed by the zemindars and expressly makes them solely responsible for the observance thereof. Where powers, rights or im. munities are granted with a direction that certain regulations, formalities or conditions shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred and it is therefore probable that such was the intention of the Legislature (Maxwell on the Interpretation of Statutes, Edn. 7, p. 316.)".

Therefore what is cited in Mr. S. P. Muttiah's case is not the complete version and even in that case the Court has held that "it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to the acquisition of the right or authority conferred".

The appellant in this case in its Written Submissions dated 21stNovemberr 2023 at paragraph 29 cites the following,

"F. A. R. Bennion in Bennion on Statutory Interpretation [London: LexisNexis, 5th edition, 2008]at page 48 citing Millet L. J., in Petch vs. Gurney (Inspector of Taxes) [1994] 3 All E R 731 at page 738 states as follows,

"Where a statute requires an act to be done in a particular manner, it may be possible to regard the requirement that the act to be done as mandatory, but the requirement that it be done in a particular manner as merely directory. In such a case the statutory requirement can be

treated as substantially complied with if the act is done in a manner which is not less satisfactory having regard to the purpose of the legislature in imposing the requirement. But that is not the case with a stipulation as to time. If the only time limit which is prescribed is not obligatory, there is no time limit at all. Doing an act late is not the equivalent of doing it in time."

The appellant has cited another passage from Millet L. J., in Petch vs. Gurney (Inspector of Taxes) [1994] 3 All E R 731 at page 738 in paragraph 33 of the written submission, which says,

"Unless the court is given a power to extend the time, or some other and final mandatory time limit can be spelled out of the statute, a time limit cannot be relaxed without being dispensed with altogether and it cannot be dispensed with altogether unless the substantive requirement itself can be dispensed with."

Mr. S. P. Muttiah vs. The Commissioner General of Inland Revenue, C. A. Tax 46/2019 decided on 30th July 2021 was decided by another division of this Court. Page 10 paragraph 29 of that judgment says,

"It is thus well-established that an enactment in form mandatory might in substance be directory and that the use of the word "shall" does not conclude the matter (Hari Vishnu Kamath v Ahmad Ishaque AIR 1955 SC 233 referring to Julius v. Bishop of Oxford (1880) 5 A.C. 214 HL. Section 10 of the Tax Appeals Commission Act does not say what will happen if the Tax Appeals Commission fails to make the determination within the time limit specified in Section 10 of the Tax Appeals Commission Act, No. 23 of 2011 as amended. Dr. Shivaji Felix referring to in the five-judge decision of D.M.S. Fernando and another v. A.M. Ismail (1982) IV Reports of Sri Lanka Tax Cases 184, 193 submitted that penal

consequences need not be laid down in order for a provision to be held mandatory and that in such case, the Court has to consider the natural consequences that would follow where Parliament had not prescribed a sanction for breach of a mandatory provision".

It is pertinent to note what was said in Julius vs. Bishop of Oxford (1880) 5 A. C. 214 H. L. It could be a case on the question of mandatory or directory, but it was not on a time limit. The case of Julius vs. Bishop of Oxford was referred to by the House of Lords in the celebrated case of *Padfield and others vs. The Minister of Agriculture, Fisheries and Food, [1968] A. C. 997.*

In short, the dispute was in respect of the request of South Eastern dairy farmers that the existing "differential" was too low. What that is will be explained in due course. They complained to the Milk Marketing Board and as they could not persuade that, to the minister. The latter refused to refer the complaint to the committee. This was the grievance of the dairy farmers when they came to the Divisional Court of the Queen's Bench Division, which held with them. The minister appealed. In the Court of Appeal the dairy farmers lost. They had only the support of Lord Denning M. R. in a minority. The dairy farmers appealed. They won in the House of Lords.

As Lord Denning, M. R. said in the Court of Appeal the dairy farmers of England and Wales sold their milk to the Milk Marketing Board. The Board paid a higher price to dairy farmers in the South Eastern region than those in the Far Western region. The reason was because the South Eastern are much nearer to London and if they were free, they would sell their milk in London and would have to bear their own costs of transport. The cost of Sussex farmers in transporting their milk to London will be much less than that of Cornish farmers. The Board recognized this and paid a "differential" to the South Eastern farmers. They complained that this, which was fixed long ago by the Minister during the war, was too low.

Lord Reid referring to each party's arguments said,

> "…The respondent contends that his only duty is to consider a complaint fairly and that he is given an unfettered discretion with regard to every complaint either to refer it or not to refer it to the committee as he may think fit. The appellants contend that it is his duty to refer every genuine and substantial complaint, or alternatively that his discretion is not unfettered and that in this case he failed to exercise his discretion according to law because his refusal was caused or influenced by his having misdirected himself in law or by his having taken into account extraneous or irrelevant considerations". (page 1029)

The extraneous consideration was that the Minister did not want to displease the voters in the Far Western region.

In regard to the contention of the Minister, for such a contention was raised, that he "is not bound to give any reasons for refusing to refer a complaint to the committee" Lord Reid having examined the case of Julius vs. Bishop of Oxford [1880] 5 App. Case, 214, H. L. (E)[22] said,

> **"…So there is ample authority for going behind the words which confer the power to the general scope and objects of the Act in order to find what was intended". (page 1033)**

The words material in Julius' s case were,

[22] This case is about a complaint made by Dr. Frederick Guilder Julius against the Rev. Thomas Thellusson Carter, rector of the parish, in respect of unauthorized deviations from the ritual of the Church in the Communion Service, and the use of unauthorized vestments. Dr. Julius preferred a complaint to the Bishop of Oxford and required the Bishop to issue a commission under the Church Discipline Act third and 4th Victoria chapter 86, to inquire into this charge. The Bishop, in the exercise of his discretion, declined to issue this commission. The Court of Queen's Bench directed a writ of mandamus to issue commanding the Bishop either to issue the commission which Dr. Julius had applied for or to send the case by letters of request to the Court of Appeal of the province under the Statute. The Court of Appeal reversed this decision[1].
The House of Lords heard this case on Tuesday 23rd March 1880 and had to decide whether or not the Court of Queen's Bench was right in awarding this mandamus[1]. Lord Chancellor Cairns observed that the words "it shall be lawful" in section 3 of the Church Discipline Act conferred a faculty or power, and they did not of themselves do more than confer a faculty or power[2].

"…It "shall be lawful" for the Bishop of the diocese "on the application of any party complaining thereof" to issue a commission for inquiry". (page 1033)

"…It was held that the words "it shall be lawful" merely conferred a power.

"But there may be something in the **nature** of the thing empowered to be done, something in the **conditions** under which it is to be done, something in the **title of the person or persons for whose benefit the power is to be exercised**, which may couple the power with a duty and make it the duty of the person on whom the power is reposed, to exercise that power when called upon to do so" (per Lord Cairns L. C. 222 – 223)

Hence the "**nature of the thing**", "**the object**", "**the conditions**" and "**the title of the person or persons whose benefit the power is to be exercised**", creates a duty. On the strength of that decision made in 1880, more than 140 years ago, it could be assumed that those four things, "**nature**", "**object"**, "**conditions**" and "**the title of whose benefit the power is conferred**", which need not be an exhaustive list, confers a duty, upon the holder of the power. It is because of this and this alone, as this Court sees, the power cannot confer an unfettered discretion.

Therefore**Hari Vishnu Kamath vs. Ahmad Ishaque AIR 1955 Supreme Court 233** referring to **Julius vs. Bishop of Oxford** shows that even though the words "**it shall be lawful**" confer a power, that power has to be exercised subject to a duty regulated at least by four things, "nature", "object", "conditions" and "the title of whose benefit the power is conferred". **Whereas this is not, as it was already said, regarding a time limit, if that principle is applied to a time limit it would only mean, that, a power conferred subject to a time limit must be exercised within that time limit and not outside it.It is because and only because, (i) the "nature" as far as this**

case is concerned is "income tax", (ii) the "object" for which the institutions of the "Assessor", "Assistant Commissioner", "the Commissioner General" and the "Tax Appeals Commission" are created is "to dispute the self assessment of the tax payer", (iii) the "condition" when the matter comes to the "Tax Appeals Commission" is that it must be determined "within 270 days of the commencement of sittings in respect of that particular appeal" and (iv) "the title of whose benefit the power is conferred" is "the title (right) of the tax payer to pay income tax on the self assessment, unless it is validly disputed".

The judgment of Mr. S. P. Muttiah vs. The Commissioner General of Inland Revenue, C. A. Tax 46/2019 also says at page 10 – 11 paragraph 30,

> "[30] He referred to the proposition of law that was lucidly explained by Samarakoon C.J, at pp.184, 190 wherein His Lordship stated as follows:
>
> > "The statute itself contains no sanction for a failure to communicate reasons. If it had the matter would be easy of decision. But the matter does not rest there. One has to make a further inquiry. "If it appears that Parliament intended disobedience to render the Act invalid, the provision in question is described as "mandatory", "imperative" or "obligatory"; if on the other hand compliance was not intended to govern the validity of what is done, the provision is said to be "directory" (Halsbury's Laws of England, Ed 3 Vol. 36-page 434 S. 650). Absolute provisions must be obeyed absolutely whereas directory provisions may be fulfilled substantially (Vide- Woodward vs Sarson (1875) (L.R.10 cp 733 at 746). No universal rule can be laid down for determining whether a provision is mandatory or directory. "**It is the duty of Courts of Justice to try to get at the intention of the legislature by carefully attending to the whole scope of the**

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

It should be noted, that, the case **Liverpool Borough Bank vs Turner, 1860** was one of the main authorities relied upon by Parinda Ranasinghe J., in the case of **Visuvalingam vs. Liyanage**, referred to above, to say, that, it was essential for the Judges of the Supreme Court and the Court of Appeal to take the oath referred to before the President and that the time limit in Article 126(5) is mandatory.

Justice Parinda Ranasinghe in **Visuvalingam vs. Liyanage** said,

"Where a power or authority is conferred with a direction that certain regulation or formality shall be complied with, **it seems neither unjust nor incorrect to exact a rigorous observance of it as essential to the acquisition of the right or authority. Lord Campbell, L.C., formulated the test to be adopted in regard to this question, in the case of The Liverpool Borough Bank vs. Turner, (1860) 30 LJ Ch. 379.,** as : "..... in each case you must look to the subject matter, consider the importance of the provision that has been disregarded and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect, decide whether the matter is what is called imperative or only directory." (page 269)

In the 163 year old case of **Liverpool Borough Bank vs. Turner**, on 21st of July Vice Chancellor Sir W. Page Wood said, among other things, that,

"An analogous difficulty presents itself here in the question whether the Merchant Shipping Act 1854 having omitted the prohibitory words "otherwise such transfer shall not be valid or effectual for any purpose whatever, either in law or in equity", is to be considered as mandatory or merely directory with respect to the mode which it prescribes for carrying contracts into effect; **because, if the Legislature enacts that a transaction must be carried out in a particular way, the words that otherwise it shall be invalid at law and in equity are mere surplusage[23]**". (page 707)

For the reasons mentioned, discussed and analysed above, the Question No. 01 must be answered, "Yes".

Question No. 02:

[23] **excessive or nonessential matter**

Is the determination made by the Commissioner General of Inland Revenue time barred?

(i) The position of the appellant:

In this regard what is submitted by the appellant is as follows in summary,

- The Appellant argues that the Commissioner General of Inland Revenue is not authorized to delegate the acknowledgment of an appeal to an Assessor, and that only statutorily empowered individuals can perform this function.

- The Appellant contends that the acknowledgment of the appeal by an Assessor does not constitute a legally valid acknowledgment, and therefore the appeal should be considered as received on the date it was handed over to the Department of Inland Revenue.

- The determination by the Commissioner General of Inland Revenue was received by the Appellant after the statutory time bar had expired, leading the Appellant to argue that the appeal must be deemed to have been allowed by a certain date.

- The appellant discusses the statutory provisions related to the acknowledgment of appeals and the powers of the Commissioner General of Inland Revenue in relation to appeals under the Value Added Tax Act.

- It is emphasized that the power to acknowledge an appeal can only be delegated to individuals who are lawfully empowered to exercise the powers, duties, and functions of the Commissioner General of Inland Revenue.

(ii) The relevant provisions of the law:

Chapter VI of the Value Added Tax Act No. 14 of 2002 governs the procedure in appeals from the decision of an Assessor to the Commissioner General. Its salient features are as follows,

"- Registered persons can appeal against assessments, additional assessments, or penalties to the Commissioner-General within thirty days of receiving notice. (section 34(1)).

– If an agreement is reached during the appeal process, necessary adjustments to the assessment will be made. (section 34(6)).

– If no agreement is reached, the Commissioner-General will schedule a hearing for the appeal. (section 34(7)).

- Appellants are required to attend the hearing, either in person or through an authorized representative, and failure to do so may result in dismissal of the appeal. (section 34(8)).

– **Any appeal must be agreed to or determined by the Commissioner-General within two years from the date of receipt, and if not, the appeal is deemed to have been allowed and the tax charged accordingly**."(section 34(8) second proviso).

(iii)The material dates:

The appeal was handed over on 23rd April 2014. The official rubber stamp is dated 24th April 2014.

The purported notice signed by Mr. R. D. M. S. Muhandiram, Assessor, Large Taxpayers' Appeal Unit extends the date of the receipt of the appeal to 15th May 2014 [incorrectly stated as 2026]

The determination of the Commissioner General is dated 10th May 2016.

It was received by the appellant on 12th May 2016.

In terms of the provisions of section 34(8) second proviso, the determination is valid only if it is made within two years of the date on which the appeal is received by the Commissioner General.

Hence, if the date of receipt is 24th April 2014, the determination must be on or before 23rd April 2016.

If the date of receipt is 15th May 2014, the determination must be made on or before 14th May 2016.

If the former is correct, the determination is not valid.

If the latter is correct, the determination is valid.

If the determination is not valid, "the appeal shall he deemed to have been allowed and the tax charged accordingly…" (section 34(8) second proviso).

(iv)The argument of the appellant:

(a) The acknowledgment of the appeal by an Assessor is not valid; the Commissioner General cannot delegate his authority to an assessor; hence the effective date of the appeal is 24th April 2014

(b) The determination dated 10th May 2016 is not valid; the appeal must be allowed; tax to be paid accordingly

(v)The argument of the respondent:

It appears, that, the respondent relies upon the judgment in Lanka Ashok Leyland PLC vs. Commissioner General of Inland Revenue C. A. Tax 14/2017 dated 14th December 2018 written by Justice Janak de Silva in which it has been said, that,

> "Court is of the view that there is no merit in the submission of the Appellant that the acknowledgment must be signed by the Respondent. The functions of the Inland Revenue Department are so multifarious that no Commissioner General of Inland Revenue could ever personally attend to all of them. In particular, Court will be slow to impose such requirements unless there is unequivocal language in the IR Act. It is true that the appeal has to be submitted to the Respondent. However, that does not mean that the acknowledgement must be by the Respondent. There is nothing in the IR Act which requires the acknowledgment

to be made by the Respondent. Similar approach has been taken by our Courts in applying the Carltona principle in relation to administrative functions to be performed by Ministers [M.S. Perera v. Forest Department and another [(1982) 1 Sri.L.R. 187] and Kuruppu v. Keerthi Rajapakse, Conservator of Forests [(1982) 1 Sri.L.R. 163]".

(vi) The position of the Tax Appeals Commission:

The Tax Appeals Commission in its orders at page 03 and 04 relies upon the phrases "On receipt of a valid petition of appeal the Commissioner-General may cause further inquiry to be made by an Assessor, other than the Assessor who made such assessment against which the appeal is preferred…" (section 34(6)) and "the receipt of every appeal shall be acknowledged within thirty days of its receipt…"

Thus the Tax Appeal Commission said that the Commissioner at (least at) one instance is expected to delegate his authority (in respect of a limited matter) to an Assessor, other than the Assessor who made the assessment and there is no specific provision as to who shall acknowledge the receipt of the appeal.

(vii) The decision of this Court:

The Appellant says at paragraph 56 of its written submissions as follows,

> "56. Any given power, duty or function set out in an enactment may be exercised in one of three possible ways: (i) the person vested with the power, duty or function may exercise it him/herself; (ii) where the enactment enables it, a power, duty or function may be delegated pursuant to an instrument of delegation and exercised in the name of a delegate; (iii) where the enactment does not include a delegation provision, and the power, duty or function is of an administrative nature, the person in whom it is vested may authorize, expressly or impliedly, another person to exercise it in the name of the person vested with it,

that is, as an agent. In order to determine the appropriate person to exercise a power, duty or function it is necessary to consider its nature. It is also of course necessary to consider whether there is a provision for delegation in the enactment. As a general rule, where the nature of the power, duty or function requires the person vested with it to come to an opinion, belief or state of mind as to if or how it should be exercised, it should only be exercised by the person vested with the power, duty or function him/herself, or by a properly appointed delegate through an instrument of delegation".

The book that **Sir William Wade** wrote (or what remains from it) **Wade and Forsyth's Administrative Law**. Twelfth Edition, C. F. Forsyth & I. J. Ghosh, Oxford, 2023 says at page 256,

> "The maxim **delegatus non potestdelegare** is sometimes invoked as if it embodied somegeneral principle that made it legally impossible for statutory authority to be delegated (*This paragraph was referred to with approval by the Irish Supreme Court in I. X. vs. The Chief International Protection Officer & another [2020] IESC 44, paragraphs 37-38*) In reality there is no such principle; the maxim plays no real part in the decision of casesthough it is sometimes used as a convenient label. In the case of statutory powers,**the important question is whether, on a true construction of the Act, it is intended that a power conferred upon A may be exercised on A's authority by B**. The maxim merely indicates that this is not normally allowable. (*Re S. (a barrister) [1970] 1 Q. B. 160*) **For this purpose no distinction need be drawn between delegation and agency**. Whichever term is employed, the question of the true intent of the Act remains. **It is true that the court will more readily approve the employment of another person to act as a mere agent than the wholesale delegation of the power itself**. But this is due not to any technical difference between agency and delegation butto the different

degrees of devolution which either term can cover. **The vital question in most cases is whether the statutory discretion remains in the hands of the proper authority, or whether some other person purports to exercise it**. Thus, where the Act said thatan inspector of nuisances 'may procure any sample' of goods for analysis, it was held thatthe inspector might validly send their assistant to buy a sample of coffee. (*Horder vs. Scott (1880) 5 QBD 552*) This mightbe described as mere agency as opposed to delegation. But that would obscure the trueground, which was that the inspector had in no way authorised their assistant to exercisethe discretion legally reposed in themselves. For similar reasons there can be no objectionto the Commission for Racial Equality using its officers to collect information in its investigations. (*Regina vs. Commission for Racial Equality ex. P. Cottrell &Rothon [1980] 1 W. L. R. 1580*) Another example, which must be close to the boundary, is where a 'selectionpanel' makes a recommendation of a single candidate for: appointment to the appointing body. Since the appointing body could reject the recommendation, unlawful delegation to the selection panel was not found (*R (Reckless) vs. Kent Police Authority [2010] EWCA Civ 1277)*

The following are characteristic cases where action was held ultra vires because the effectivedecision was taken by a person or body to whom the power did not properly belong:

(a) Under wartime legislation local committees were empowered to direct farmersgrow specified crops on specified fields. A committee decided to order eight acres of sugar beet to be grown by a farmer, but left it to their executive officer todecide on which field it should be grown. The farmer, prosecuted for disobedience,successfully pleaded that the direction was void, since the executive officer hadno power to decide as to the field. (*Alingham vs. Minister of*

Agriculture and Fisheries [1948] 1 All E R 780) The right procedure would have been for thecommittee to have obtained the officer's recommendation and to have decided thewhole matter itself.

(b) Registered dock workers were suspended from their employment after a strike.The power to suspend dockers under the statutory dock labour scheme was vestedin the local Dock Labour Board. **The suspensions were made by the port manager,to whom the Board had purported to delegate its disciplinary powers**. The dockersobtained declarations that their suspension was invalid since the Board had nopower to delegate its functions and should have made the decision itself.(*Bernard vs. National Dock Labour Board [1953] 2 Q. B. 18*)

(c) A local board had power to give permission for the laying of drains. They empowered their surveyor to approve straightforward applications, merely reporting thenumber of such cases to the Board. It was held that the Board itself must decideeach application, and that delegation to the surveyor was unlawful. (*High vs. Billings (1903) 89 L. T. 550*) **The result was the same where a local education committee left it to its chairman to fix the date of closure of a school** (*Regina vs. Secretary of State for Education and Science ex. P. Birmingham CC (1984) 83 LGR 79*) and where the Monopolies Commission allowed its chairman to decide that a company's takeover proposal had been abandoned (*Regina vs. Monopolies and Mergers Commission ex. P. Argyll Group PLC [1986] 1 W. L. R. 763*)

(d) A local authority, having a statutory duty to provide housing for homeless persons set up a company which purchased houses, financed by a loan from a bank which the council guaranteed. This was held to be impermissible delegation sinceit transferred the

council's functions to the company, over which the council hadonly limited control. (*Credit Suisse vs. Waltham Forest LBC [1997] Q. B. 362*)

From these typical cases it might be supposed that the question was primarily one of form. Convenience and necessity often demand that a public authority should workcommittees, executive officers and other such agencies. The law makes little difficulty over this provided that the subordinate agencies merely recommend, leaving the legal act of decision to the body specifically empowered. (*Hall vs. Manchester Corporation (1915) 79 JP 385*) **It seems that in many situations the real discretion is being exercised by the body or person that recommends. But the valid exercise of a discretion always requires a genuine application of the mind and a conscious choice by the correct authority**."

Hence what is apparent from the above discussion, relevant to this case, is that if (i) the acknowledgment of the receipt of the appeal is something to be done as "a matter of course" even an Assessor may do it (ii) but if it involves discretion, then the correct authority on whom the power is vested must do it.

Then it is said at page 258,

"Delegation should be distinguished from agency. Although there are plainly similarities between the two concepts, the differences should be noted. **An unauthorised act of anagent may generally be ratified by the principal but the unauthorised act of the delegate in the absence of statutory authority, cannot be ratified by the delegator**. Thus the Court of Appeal summarily dismissed the National Dock Labour Board's claim to have ratified the suspension ofdock workers who had been invalidly suspended by the port manager, sincethis was a serious

disciplinary action which only the Board itself was competent to take. (*Bernard vs. National Dock Labour Board [1953] 2 Q. B. 18*)

It dismissed no less firmly a minister's claim to have ratified the irregular requisitioningofa house by a local authority under powers validly delegated by the minister. (*Blackpool Corporation vs. Locker [1948] 1 K. B. 349*). **Onthe other hand, public authorities are generally allowed to ratify the acts of their agents retrospectively, both under the ordinary rules of agency and under liberal interpretationa statute**. (*Warwick RDC vs. Miller – Mead [1962] Ch 441*)Occasionally the court may even invoke the rules of agency to justify aquestionable delegation. (*Rex vs. Champman ex p. Arlidge [1918] 2 Q. B. 298*) Normally a stricter rule prevails, so that where the Act allows proceedings to be instituted by an officer authorised by resolution, a later resolution cannot validly ratify action already taken. (*Bowyer Philpott & Payne Ltd., vs. Mather [1919] 1 K. B. 419*) **It must be emphasised that all these cases turnon the implications of various statutory provisions: there is no rigid rule.**

Another difference between agency and delegation is that in appointing an agent a principal does not divest themselves of their powers in the same matter, but whether thepublic authority that delegates its powers retains the power to act concurrently with itsdelegate is a matter of controversy discussed later.

A public authority is naturally at liberty to employ agents in the execution of its powers, as for example by employing solicitors in litigation, surveyors in land transactions,and contractors in road-building. The essential thing is that it should take its decisions ofpolicy itself, and observe any statutory requirements scrupulously.**But in**

general the Court is likely to be stricter where the issue is one of substance as opposed to formality.

In one doubtful decision it was held in effect that delegation of its powers by a local planning authority was justified by a general practice, though the practice had no legal basis. **In another case Denning LJ said: "While an administrative function can often be delegated, a judicial function rarely can be. No judicial tribunal can delegate its functionsunless it is enabled to do so expressly or by necessary implication"**. (*Bernard vs. National Dock Labour Board (above)*). **The decisions in fact show that the courts do not normally allow the delegation even of administrative functions if they involve the exercise of discretion**. ***There is no general principle that administrative functions are delegable***. **The principle is rather that, where any sort of decision has to be made, it must be made by the authority designated by Parliament and by no one else**. On this groundthe Director of Public Prosecutions acted unlawfully in delegating legal work to non legal staff (*Regina vs. Director of Public Prosecutions ex p Association of First Division Civil Servants (1988) 138 NLJ Rep. 158*)".

The book that **Dr. Stanley de Smith**wrote in 1950s as a doctoral thesis (or what remains of it) **De Smith's Judicial Review**, Seventh Edition by Harry Woolf, Jeffrey Jowell, Andrew Le Sueur, Catherine Donnelly and Ivan Hare, South Asian Edition, Sweet & Maxwell, 2015 says at page 326,

"In this context, sharp differences of opinion have been expressed on therelationship between the concepts of delegation and agency. They have sometimes been treated as being virtually indistinguishable (*Huth vs. Clarke (1890) 25 Q. B. D. 391*) but in many cases adistinction has been drawn between them, particularly where the court is actingon the assumption that an authority can validlydelegate its powers.

The correct view seems to be that the distinctions drawn between delegationand agency are frequently misconceived in so far as they are based on the erroneous assumption that there is never an implied power to delegate. Howeversome relationships that are properly included within the concept of delegation aresubstantially different from those which typify the relationship of principal andagent. There are three main characteristics of agency. First, the agent acts onbehalf of his principal, he does so in his nameand the acts done by the agent are broadly applicable to delegation in administrative lawand it would generalbe held to be unlawful for an authority to invest a delegate with powersexercisable in his own name. But where legislative powers are delegated byParliament, or validly sub-delegated by Parliament's delegate, the delegate or sub-delegate exercises his powers in his own name. And in the schemes of administrative delegation drawn up in local government law, the relationships between the local authorities concerned have often been far removed fromthose connoted by the relationship of principal and agent. (*inter delegation between local authorities was considerably diminished by the Local Government Act 1972; but see now Localism Act 2011 Pt. 1*)

Secondly, the agent can be - given detailed directions by his principal anddoes not usually have a wide area of discretion. On the other hand one to whomstatutory discretionary powers are delegated often has a substantial measure of freedom from control in exercising them. But the degree of freedom from control with which he is vested may be a decisive factor in determining the validity ofthe delegation made to him.

The more significant are the effective powers of control retained by thedelegating authority, the more readily will the courts uphold the validity ofthe delegation; and they may choose to uphold its validity by

denying that there has been vested by statute continues to address its own mind to the exercise of the powers (*As in Devlin vs. Barnett [1958] N. Z. L. R. 828*)".

The book says at page 332,

"**Comparative perspectives on delegation**:

In Australia it has been held that delegation to an office holder does not requirerenewal each time there is a change in the holder of that office: it has also heldthat revocation of a delegation does not affect the validity of the delegate's acts until the moment of revocation. (*Fyfe vs. Bordoni [1998] SACS 6860*). In addition, the delegation by an office holder does not require renewal each time there is a change in the holder of that office(*Johnson vs. Veteran's Review Board (2002) 71 A. L. D. 16)*.

Canadian courts have in the past taken a restrictive view of the competence oflocal authorities to confer a free discretion on their members or officials todispense with prohibitions embodied in byelaws. Thus, Montreal could not makea byelaw providing that nobody was to run a business in the city without anofficial permit; this was analysed as an invalid sub-delegation. (*Vic Restaurant Inc vs. Montreal [1959] S. C. R. 58*). And in anothercase, (*Brant Dairy Co. Ltd., vs. Milk Commission of Ontario (1976) 58 D. L. R. (3rd) 484 at 502 – 504*) a marketing board (itself a sub-delegate) was empowered to make regulations on certain matters; the regulations that it made were held invalid onthe ground that they contained no standards, but reserved to the board the power to exercise its discretion case by case. The board was said not to have exercised the legislative function delegated to it but to havesub-delegated to itself anadministrative function(*This reasoning reflects to a limited degree the argument advanced in K.C. Davis, Discretionary Justice: a Preliminary Inquiry (1969), pp.57-59, that bodies and officials in whom discretion is*

vested should be under an obligation to confine and structure it by the promulgation of decisional criteria so as to strike the best balance in the context between rules and discretion. This is a variation of the non delegation doctrine at one time used by the Supreme Court of the United States to render invalid statutes that delegated legislative power without setting sufficiently precise limits upon its exercise, e.g. Field vs. Clark 143 U.S. 649 (1892). See Jaffe, "An Essay on Delegation of Legislative Power" (1947) 47 Colum. L. Rev. 359, 561. It later reappeared in other contexts, e.g. Shuttlesworth vBrimmingham 394 U. S. 147 (1969) (byelaw requiring that permit be obtained before holding public demonstration, invalid because of the broad discretion entrusted to an official); Furman v Georgia 408 U. S. 238 (1972); Profitt v Florida 428 U.S. 242(1976), where the constitutionality of capital punishment was attacked in part because of the broad discretion "delegated" to the judge and jury in imposing it. Cf. Francis vs. Chief of Police [1973] A.C. 761 at 773, where the PC held that a statutory requirement that the permission of the Chief of Police be obtained before "noisy instruments" could lawfully be used at public meetings did not delegate so much discretion as to infringe the freedom of speech and assembly provisions of a constitution of St Christopher, Nevis and Anguilla).

The New Zealand decisions are conflicting; sometimes such provisions havebeen construed as valid conditional prohibitions, and sometimes as subdelegations the validity of which may be dependent on the prescription of standards governing the exercise of the dispensing power. (*Mackay vs. Adams [1926] N. Z. L. R. 518*). Issues such as thesehave seldom arisen in the English courts. (*Francis vs. Chief of Police [1993] A. C. 761*). If an absolute prohibition would bevalid, then prima facie a conditional prohibition should be upheld; (*Williams vs. Western super Mare UDC (1907) 98 L. T. 537 at 540*) but it may be relevant in some

cases to consider the context, the persons to whom the dispensing of regulatory power are delegated and the scope of the authority “delegated" to them.

In India the principle of non-delegation has also been upheld, (*Sahni Silk Mills (P) Ltd., vs. ESI Corp [1994] 5 S. C. C. 346 at 352*) however due to the enormous rise in the nature of activities to be handled by statutory authorities, the maxim delegates non potestdelegare is not being applied specially when there is a question of exercise of administrative discretionary power. (*Sahni Silk Mills (P) Ltd., vs. ESI Corp [1994] 5 S. C. C. 346 at 350*).

In South Africa the principle of non-delegation is more strictly applied,although "it is not every delegation of delegated powers that is [prohibited], but only such delegations as are not, either expressly or by necessary implication,athorised by the delegated powers". (*Attorney General, OFS vs. Cyril Anderson Investments (Pty) Ltd., 1965 (4) SA 628, A at 639D*).

The important case of *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council (2007 (1) S. a. 343, CC*illustrates degrees ofwillingness to find implied authority for sub-delegation. In her dissentingjudgment O'Regan J. readily accepted that even in the absence of expressauthority it would be practically necessary for the Minister to sub-delegate hisregulatory power to the Council. (paragraph 135). In another dissenting opinion Langa C.J. wasmore cautious, suggesting that "courts should be slow to infer the delegation ofpower to bodies that cannot be held directly accountable through ordinarypolitical processes.” (*paragraph 88. The majority held that owing to the limited scope of the challenge, the sub delegation had to be accepted as lawful (paragraphs 47 – 48*)”.

Stanley de Smith, at page 334 onwards refer to the Carltona Principle. As Justice Janak de Silva had also referred to this in the above case of Lanka Ashok Leyland PLC vs. Commissioner General of Inland Revenue C. A. Tax 14/2017 dated 14th December 2018, this will be also examined.

"**The Carltona principle**

Special considerations arise where a statutory power vested in a minister or adepartment of state is exercised by a departmental official. The official is notusually spoken of as a delegate, but rather as the alter ego of the minister or thedepartment: (Lewisham Borough vs. Roberts [1949] 2 K. B. 608, 629) power is devolved rather than delegated. (Regina vs. Secretary of State ex. P. Oladehinde [1991] 1 A. C. 254 at 283 – 284, C. A.)(A different analysismust, of course, be adopted where powers are explicitly conferred upon ordelegated to an official by a law-making instrument. (As where power to decide certain classes of planning appeals have been vested in inspectors by legislation. And see Somerville vs. Scottish Ministers [2007] UKHL 44; [2007] 1 W. L. R. 2734). Under the "Carltona"principle the courts have recognised that "the duties imposed on ministers and thepowers given to ministers are normally exercised under the authority of theministers by responsible officials of the department. Public business could not becarried on if that were not the case" (Carltona Ltd., vs. Commissioners of Works [1943] 2 All E R 560 at 563). In general, therefore, a minister is notobliged to bring his own mind to bear upon a matter entrusted to him by statutebut may act through a duly authorised officer (cf. Customs and Excise Commissioners vs. Cure & Deeley Ltd., [1962] 1 Q. B. 340 – manner of authorization prescribed by statute held, not complied with) of his department. (West Riding [1941] 2 Al E R 827). The officer's authority need not be conferred upon him by the minister personally,(Lewisham [1949] 2 K. B. 608) it may be conveyed generally and informally by the

officer's hierarchicalsuperiors in accordance with departmental practice. (Lewisham [1949] 2 K. B. 608). Whether it is necessary forthe authorised officer explicitly to profess to act on behalf of the minister is notcertain, but it is suggested that this will not usually be required. (cf. Woollett [1955] 1 Q. B. 103 at 120 – 121, 132,134 – Denning and Morris L. JJ.).

In R. (on the application of National Association of Health Stores) vDepartment of Health, the Court of Appeal considered whether the knowledgewithin the department should in law be imputed to the minister (who made thedecision to prohibit the use of a herbal remedy in foodstuffs in ignorance of thespecial expertise of a particular adviser). Sedley L.J. held that to impute theknowledge would be "antithetical to good government", ([2005] EWCA Civ 154 at [26]) and result in asituation where the person with knowledge decides nothing and the personwithout knowledge decides everything". Modern departmental government, hefelt, required ministers to be properly briefed about the decisions they must take.He was not willing to accept that the collective knowledge of the civil servants inhis department or their collective expertise would necessarily be treated as theminister's own knowledge and expertise. (Thus distinguishing Lord Diplock's assertion to the contrary in Bushell v Secretary of State for the1811AC. 75 at 95. It was held that the considerations of which the minister had no knowledge were not "relevant". See also M.Freedland, "The Rule Against Delegation and theDoctrine in an Agency Context" [1996] P.L. 19 (who argues that in conferring apower on a minister, the parliamentary draftsmen are in effect employing a formula that the discretion is conferred upon the government department). Sedley L.J. considered that such aproposition would have the effect that “ministers need to know nothing before reaching a decision so long as those advising them know the facts" at [37] -which he called the “law according to Sir Humphrey Appleby” (**an**

illusion to the permanent secretary in the television comedy "Yes Minister"); I. Steele, "Note on R. (National Association of Health Stores) vs. Department of Health" [2005] J. R. 232)

It may be that there are, however, some matters of such importance that theminister is legally required to address himself to them personally, (In re Golden Chemical Products Ltd., [1976] Ch. 300 the judge denied that such a category existed. But see Ramawad vs. Minister of Manpower and Immigration [1978] 2 S. C. R. 375 and R (on the application of Tamil Information Centre) vs. Secretary of State for the Home Department [2002] EWHC 2155; (2002) 99 L. S. G. 32 where it was held that ministerial authorization was an impermissible delegation as the statute required the minister personally to exercise his judgment) despite the fact that many dicta that appear to support the existence of such an obligation are at best equivocal (In re Golden Chemical Products Ltd., [1976] Ch. 300 at 309 – 310, Brightman J. concluded that the dicta in Liversidge vs. (Sir John) Anderson [1942] A. C. 206 should be understood as referring to political expediency and to the minister's personal responsibility to Parliament, rather than to his legal obligation) It is, however, possible that orders drastically affecting theliberty of the persona - e.g. deportation orders, (Rex vs. Chiswick Police Station Superintendent ex. P. Sacksteder [1918] 1 K. B. 578 at 585 – 586, 591 – 592 (dicta)) detention orders made underwartime security regulations (Liversidge vs. (Sir John) Anderson [1942] A. C. 206 at 223 – 224, 265,281) and perhaps discretionary orders for the renditionof fugitive offenders (Regina vs. Brixton Prison Governor e. P. Enahoro [1963] 2 Q. B. 455 at 466) require the personal attention of the minister. (Had he believed that such a category existed,the judge in Re Golden Chemicals might well have included in it the power to present a petition for the compulsory winding up of a company (Companies Act 1967 s.10). See D.

Lanham, "Delegation and the Alter Ego Principle" (1984) 100LQR 587, 592-594 (who argues that where life or personal liberty are at stake, the alter ego principle may not apply).

On the other hand, the minister was not required personally to approvebreath-testing equipment, despite its importance to the liberty of motoristssuspected of driving after consuming alcohol, (Regina vs. Skinner [1968] 2 Q. B. 701) and a decision on the question ofa life sentence prisoner's tariff period may be taken on behalf of the HomeSecretary by a Minister of State at the Home Office. (Doody vs. Secretary of State for the Home Department [1994] 1 A. C. 531). Objection to theproduction of documentary evidence in legal proceedings on the ground that itsproduction would be injurious to the public interest must be taken by the ministeror the permanent head of the department, certifying that personal considerationhas been given to the documents in question. (Duncan vs. Cammell, Laird & Co [1942] A. C. 624, 638). Statutory instruments are signedby senior officials acting under a general grant of authority from the minister (E. C. Page vs., Governing by Numbers: Delegated Legislation and Everyday Policy Making (2001)).

Similarly, it is uncertain whether the courts will examine the suitability of theofficial who performs the work. The Carltona case emphasised thatParliament,not the courts, was the forum for scrutiny of the minister's decision, (Regina vs. Secretary of State for the Home Department ex. P. Oladehinde [1991] 1 A. C. 254 at 281 – 282. C. A.) but morerecently it has been accepted that the courts may also examine the devolvementof authority, by way of judicial review. (Regina vs. Secretary of State for the Home Department ex. P. Oladehinde [1991] 1 A. C. 254, QBD at 206: C. A. at 282. Although it did not arise for decision in the case. in DPPvs. Haw (2007] EWHC 1931 (Admin); [2008] 1 W.L.R. 379

Lord Phillips C.J. suggested (at [29]) that there was scope for furtherrefinement of the Carltona principle, and devolution of a minister's powers should be subject to a requirement that the seniority of the official exercising: a power should be of an appropriate levelhaving regard to the nature of the power in question).

At the very least, it would seem that theofficial must satisfy the test of Wednesbury unreasonableness: he must not be sojunior that no reasonable minister would allow him to exercise the power.(Regina vs. Secretary of State for the Home Department ex. P. Oladehinde [1991] 1 A. C. 254 at 304). There may be some tasks which by their nature ought not to allow of delegationor devolution, such as some disciplinary powers. (Regina vs. North Thames Regional Health Authority and Chelsea and Westminster NHS Trust Ex. P. L (1996) 7 Med L. R. 385) And different tasks conferredon a decision-maker may be delegable to different levels within the organisation(For example the application task and the consultation task in Chief Constable of the West Midlands Police [2002] EWHC 1087; [2003] Crim. L. R. 37).

The Carltona principle may be expressly excluded by legislation, (See e.g., Immigration Act 1971) butwhether it may in addition be excluded by statutory implication remainsuncertain. Two situations should be distinguished. Where a power of delegation isexpressly conferred by Parliament on a minister, it may compel the inference thatParliament intended to restrict devolution of power to the statutory method, thusimpliedly excluding the Carltona principle. (Customs and Excise Commissioners vs. Cure and Deeley Ltd., [1962] 1 Q. B. 340). Commonwealth authority, however, suggests that such an implication will not readily be drawn. (O' Reilly vs. Commissioner of State Bank of Victoria (1982) 44 A. L. R. 27). It has alsobeen suggested that the principle may be impliedly excluded where it appearsinconsistent with

the intention of Parliament as evinced by a statutory frameworkof powers and responsibilities, (Ramawad vs. Minister of Manpower and Immigration (1978) 81 D. L. R. (3rd) 687). However, where the Immigration Act 1971apparently clearly divided responsibilities between immigration officers and theSecretary of State, the Court of Appeal and House of Lords held that the Carltonaprinciple enabled powers of the Secretary of State to be exercised by immigrationofficers. In the Court of Appeal it was said that the Carltona principle was notmerely an implication which would be read into a statute in the absence of anyclear contrary indication, but was a common law constitutional principle, whichcould not be excluded by implication unless "a challenge could be mounted onthe possibly broader basis that the decision to devolve authority was Wednesburyunreasonable" (Regina vs. Secretary of State for the Home Department Ex. P. Oladehinde C. A. 282). The House of Lords allowed the devolution of power on the narrower ground that the implication to exclude could not be drawn; thedevolution did not conflict with or embarrass [the officers] in the discharge oftheir specific statutory duties under the Act" (Regina vs. Secretary of State for the Home Department e. P. Oladehinde). Although their statutory analysismay be questioned, (Weight was placed on several explicit limitations of the minister's powers toexcluding further implicit limitations; yet it was surely consistent of Parliament to intend somepowers to be exercised by the minister personally, some to be exercised by the minister or his civilservants in the department, and others to be exercised by immigration officers as the statutory schemeappeared to require) the approach of the House of Lords accorded greaterweight than the Court of Appeal to Parliament's intent.

Does the Carltona principle apply to public authorities or officers besidesministers (See e.g. Lanham 604 et seq.). Powers of the Queen or

Governor in Council may be exercised by aminister or official in his department, although any formal decision necessarilywill be made by the Queen in Council. (FAI Insurance Ltd., vs. Winneke (1982) 151 C. L. R. 342). **Powers conferred on seniordepartmental officers may be devolved to more junior officials in the department**. (Commissioners of Customs and Excise vs. Cure and Deeley [1962] 1 Q. B. 340). In Nelms v Roe ([1970] 1 W. L. R. 4 at 8 – Lord Parker C. J.) **the Divisional Court upheld a decision of apolice inspector acting on behalf of the Metropolitan Police Commissioner, onwhom the power had been conferred. However, Lord Parker did not think that theinspector could be considered the alter ego of the Commissioner and preferred tobase the case on implied delegated authority**.

However, the Court of Appeal has held that the Carltona principle istransferable to non-ministerial bodies and that applications for antisocialbehaviour orders (ASBOS) could be made by junior police officers despite thefact that the power was conferred upon a local council or chief officer of police.Sedley L.J. stressed that Carltona was based not only on convenience (the alterego aspect) but also upon the fact that the minister continued to be responsible forthe decision taken by the official in his department. Provided that (a) the power isdelegable, and (b) is not required to be performed by a particularly qualifiedindividual (such as a medical officer of health or a statutory inspector), it may beexercised at different levels. The delegation or devolution of powers was, in thosecircumstances, for the Chief Constable to decide, and the court could notsecond-guess him unless his choice was irrational or beyond his powers. (Regina (on the application of Chief Constable of the west Midlands) vs. Birmingham Magistrate's Court [2002] EWHC 1087 (Admin))

Section 34(6) says,

> "(6) **On receipt of a valid petition of appeal the Commissioner-General may cause further inquiry to be made by an Assessor and** if in the course of such inquiry an agreement is reached as to the matters specified in the petition of appeal the necessary adjustment of the assessment shall be made".

Hence the Act has specifically provided for the delegation of that power, which is, to "cause further inquiry to be made by an Assessor". But the entirety of this section or any other provision does not provide for the Commissioner General to acknowledge the appeal having delegated that authority to an Assessor. Furthermore, the specific provision above, which makes it for the Commissioner General to cause inquiries to be made by an Assessor shows by application of the maxim Generaliaspecialibus non derogant and even otherwise, that, a specific power of delegation in regard to the matter under section 34(6) was expressed, because, it is not possible generally to delegate the powers of the Commissioner General.

Section 34(1) says,

> "(1) **Any registered person may** if he is dissatisfied with any assessment or additional assessment made in respect of him by an Assessor, or a penalty imposed under this Act, **appeal** against such assessment, additional assessment or penalty, as the case may be, **to the Commissioner-General**…"

Hence the appeal has to be made to the Commissioner General. Then it must be acknowledged by him unless there is a provision which specifically says he can delegate it. It could have been accepted by an Assistant Commissioner too. There is no requirement that the very person who for the time being holding the position of the Commissioner General must acknowledge it. It is because an Assistant Commissioner is his agent. But an Assessor is not. This is what this Court gathers from the discussion pertaining to delegation referred to

above. Hence 16th May 2014 has no validity. The acknowledgment is dated 24th April 2014. Hence the determination made by the Commissioner General is time barred.

Question No. 03:

Did the Tax Appeals Commission err in law in coming to the conclusion that the appellant was a manufacturer within the contemplation of the Value Added Tax Act No. 14 of 2002 (as amended)?

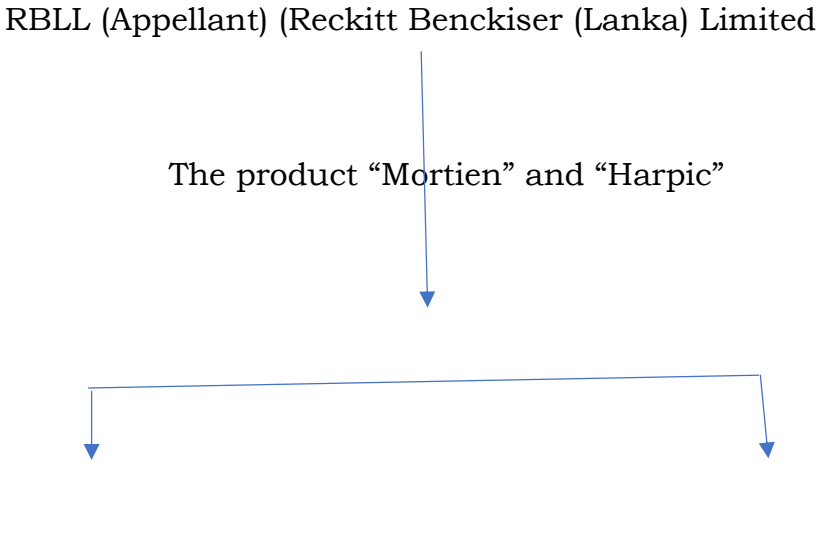
The appellant under Question of Law No. 03 says at paragraph 81 of written submissions that,

> "A bank robber who asks the bank clerk to handover money is making an order backed by a threat. The bank clerk is obliged to follow the order of the bank robber even though the order is not legal. When the tax collector demands a tax payment the tax payer is under an obligation to make the payment because the order is one which has the force of Law. It is this distinction between being "obliged" to do something and being under an "obligation" to do so that was alluded by H. L. A. Hart in his work The Concept of Law [Oxford: OUP 3rd Edition 2012]. A person may be obliged to do an unlawful act (like the bank clerk handing over money to the bank robber) but a person is under an obligation to perform only lawful acts (such as a taxpayer handing over a payment to the tax collector)".

Hence it is submitted, that, the right to demand a tax must have the authority of law. Otherwise, it is submitted, that the distinction between the bank robber and the tax collector is obliterated.

On the premise it is argued that as the fiscal statute, in this case the Value Added Tax Act No. 14 of 2002 imposes a tax liability on a manufacturer of goods, the above principle applies.

The crux of the matter is, whether Reckitt Benckiser (Lanka) Limited is the manufacturer of "Mortien" and "Harpic." It says no. The products are manufactured, according to the appellant as shown in the following diagram,



Reckitt Benckiser (Lanka) Limited contends, that, it provides only the brand name. Mortien is manufactured by MOS Lanka. Harpic is produced by Lalan. Both of them sell their products to Reckitt Benckiser (Lanka) Limited.

The following is what was contended before the Tax Appeals Commission, as per its order,

The Respondent (Commissioner General) contended that MOS Lanka and Lalan manufacture respective products for and on behalf of the appellant. The appellant is the manufacturer. Hence it must pay VAT.

Appellant contended that MOS Lanka and Lalan are not mere service providers. They are "contract manufacturers" for the relevant products.

This is in line with the global practice in the manufacture of branded goods by third parties ordinarily alluded as "contract manufacture." It involves the production of goods by one company under the brand or label of another company.

"Contract manufacture" in not defined in the VAT Act.

The appellant further contended that it has purchased goods manufactured by MOS Lanka and Lalan and it has paid VAT on the supplies made by those contract manufacturers. That it has not claimed input credit in respect of purchases and not charged VAT from sales as it is engaged in buying goods from contract manufacturers. It is only engaged in the wholesale and retail sale of "Mortien" and "Harpic" and does not manufacture and sell these goods.

The appellant has said that it retains the right to reject the manufactured product sent to it by MOS Lanka.

It said that if "Harpic" products manufactured by Lalan is not in the required quality the products are to be destroyed by Lalan at Lalan's cost.

Why is it so important, not to be the manufacturer?

Because of the operation of sections 02 and 03 in the Value Added Tax Act No. 14 of 2002.

They are as follows,

CHAPTER I

IMPOSITION OF VALUE ADDED TAX

Imposition of Value Added Tax

2. (1) **Subject to the provisions of this Act, a tax, to**

be known as the Value Added Tax(hereinafter referred to as "the tax") **shall be charged**

(a)at the time of supply, **on every taxable supply of goods or services**, made in a taxable period, by a registered person in the course of the carrying on or carrying out, **of a taxableactivity** by such person in Sri Lanka ,

(b)on the importation of goods into Sri Lanka, by any person.

Tax not be charged**3**.**Notwithstanding the provisions of section 2**, the tax on wholesale orshall not be charged on the wholesale or retail supply of retail supply ofgoods, **other than on the wholesale or retail supply of goods. goodsby**-

(a)**a manufacturer of such goods** ; or

(b)an importer of such goods ; or

(c) a supplier who is unable to satisfy the Commissioner-General, as to the source from which the goods supplied by him, were acquired:

So section 02 charges VAT on supply of goods. Section 03 grants an exception to wholesale or retail supply of goods. Then there is a further exception, to the

exception. If that wholesale or retail supply is by a manufacturer of the goods, he must pay VAT.

The appellant submits about the alleged contradictory positions in the following two judgments in this regard,

(i) Unilever Sri Lanka Limited vs. Commissioner General of Inland Revenue C. A. Tax 04/2013 dated 04th November 2022 written by Dr. Ruwan Fernando J., with the concurrence of Sampath K. B. Wijeratne J.

(ii) Unilever Sri Lanka Limited vs. Commissioner General of Inland Revenue C. A. Tax 23/2029 written by Sampath K. B. Wijeratne J., with the concurrence of Dr. Ruwan Fernando J.

However, as it appears, both learned Justices have decided, that, R M Chemical Ceylon (Pvt) Limited (RMCC) or Polypak Secco Limited (PSL) are not the manufacturer but the Unilever and hence it is liable to pay VAT.

Justice Fernando said, that, RMCC and PSL are not selling the goods as the exclusive owner, not transferring exclusive ownership to the appellant and the question of passing ownership does not arise.

Justice Wijeratne said, that, supply of goods means the passing of exclusive ownership of goods to another, there is no passing of exclusive ownership of goods here and RMCC and PSL are engaged in a supply of services.

Justice Fernando also said, that, a transfer of possession of goods without the transfer of exclusive ownership is only a supply of services.

Justice Fernando concluded, that, the appellant must be regarded as the manufacturer of the products within the meaning of section 3(1)(a) of the Value Added Tax Act.

Justice Wijeratne concluded, that, the appellant cannot claim the exemption under section 03 of the Value Added Tax Act.

Hence there is no stark contradiction as claimed by the appellant.

According to the appellant the Supreme Court has granted leave to appeal in five connected matters having as one of the questions, whether the Court of Appeal misdirected itself in construing the meaning of the word “manufacture” in section 83.

Now under section 02 VAT must be charged,

(i) On taxable supply of goods
(ii) At the time of supply
(iii) In the course of carrying in or carrying out of a taxable activity

Under section 03,

(iv) VAT is not charged,
(v) On the wholesale or retail supply of goods
(vi) By a manufacturer of such goods

Section 83 defines “taxable supply” of goods.

> “taxable supply" means any supply of goods or services made or deemed to be made in Sri Lanka which is chargeable with tax under this Act and includes a supply charged at the rate of zero percent other than an exempt supply.”

It defines “supply of goods”

> “supply of goods" means the passing of exclusive ownership of goods to another as the owner of such goods or under the authority of any written law and includes the sale of goods by public auction, the transfer of goods under a hire purchase agreement, the sale of goods in satisfaction of a debt and transfer of goods from a taxable activity to a non-taxable activity.”

It defines “supply of services”

"supply of services" means any supply which is not a supply of goods which includes any loss incurred in taxable activity for which an indemnity is due."

Now how does section 83 define the word "manufacture"?

""manufacture" means the making of an article, the assembling or joining of an article by whatever process, adapting for sale any article packaging bottling, putting into boxes, cutting, cleaning polishing wrapping labeling or in any other way preparing an article for sale other than in a wholesale or retail activity;..."

As it was said above both the justices Fernando and Wijeratne said that supply of goods is passing of exclusive ownership in the goods and if not it is a supply of services.

What is said in the above paragraph must be understood <u>in a structured manner</u> so to speak due to several definitions given in section 83.

The primary definition of the term "supply of goods" under that section is asking of exclusive ownership.

"Supply of services" mean all supplies other than supply of goods.

The Tax Appeal Commission in this case decided this question having considered section 02 of the Sale of Goods Ordinance No. 11 of 1896.

The Tax Appeal Commission says,

"the sale of goods take place where the seller transfers the **exclusive** ownership, i.e., the title and possessions for goods to the buyer". (at page 09 of the order of the Tax Appeals Commission)

The Sale of Goods Ordinance nowhere uses the term "exclusive".

Its section 02 is as follows,

> "2(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called "the prize". There may be a contract of sale between one part owner and another."

If this is simplified it reads,

> "2(1) A contract of sale of goods is a contract whereby the seller transfers…the property in goods to the buyer for a money consideration, called "the prize". There may be a contract of sale between one part owner and another."

Supply of goods as defined in the Act requires passing of exclusive ownership. The definition of the supply of goods in the Act includes the sale of goods by public auction. But the Sale of Goods Ordinance never refers in section 2(1) to **exclusive** ownership.

The appellant here argues that MOS Lanka and Lalan manufacture the goods. Why should, if it is so, the transfer of goods by MOS Lanka and or Lalan to the appellant should be a supply of goods under the Act where exclusive ownership is passed?

We saw, that, under section 02 of the Value Added Tax Act VAT must be charged

(I) on taxable supply of goods

(II) at the time of supply and

(III) in the course of carrying in or carrying out of a taxable activity

But this is, with respect, not a question of imposing VAT on the supply of goods. This is the question who is the manufacturer. So when the alleged manufacturer transfers the good to the alleged brand name owner who according to him has given a contract for the contract manufacturer, must the

transfer of goods by the contract manufacturer to the one who appointed him on that contract a supply of goods which requires the passing of the exclusive ownership of the goods? I do not think so. Unless someone reads into the Value Added Tax Act.

Hence the position of the appellant that it has purchased the goods manufactured by MOS Lanka and Lalan could be accepted.

Furthermore, as the Tax Appeals Commission said, why should MOS Lanka and Lalan be the owners of the product? Cannot a person manufacture a product of which he is not the owner? The farmers in ancient Egypt produced (something similar to manufacturing) barley and wheat from the days of Pharos. Were they the owners?

Justice Wijeratne says at page 30 that RMCC has set up a plant exclusively for the making of Vim scourer bars for an on behalf of the appellant. Will that make, if the assembling and joining etc., is done by RMCC, not the manufacturer? No. **Because the definition of "manufacture" never say that it should not be on behalf of another, it must be free from the control of another in regard to quality and quantity or if some of the ingredients are supplied by the person who grants the contract manufacture agreement then it is not the product of the person who took the contract agreeing to manufacture**.

This is a conflation of the concept of manufacturing with that of ownership which conflation is not required warranted or allowed by any law including sections 02 and 03 of the Value Added Tax Act: Sale of Goods Ordinance or the definition of the term "manufacture" in section 83 of the former Act.

Justice Wijeratne says that in the Indian case of **Commissioner of Sales Tax U. O. Vs. Dr. Sukh Deo 1969 AIR 499** the Supreme Court of India defined a

manufacturer as “a person by whom or under whose direction and control the articles or materials are made”.

The Tax Appeals Commission in this case at page 10 says that when making a deep analysis of the case, it becomes clear that the role played by these two companies has to be of a service provider. Just how deep?

When the law in this country provides how deep the decision maker should go, can he go beyond that? The consideration of the Indian definition of a manufacturer is unwarranted and not permitted when the very Act under consideration defines what manufacture is. At times courts unnecessarily fetter their jurisdiction on what they think as legal barriers which are self imposed non existing barriers. They tend to take decisions that defeat rules of interpretation natural justice and the rule of law thinking that in doing so they execute what the state (which is understood as synonymous to law) wants. The state is a creature of law. The law is a creature of the constitution. The constitution is a creature of the rights of the People (P for People in capital in its Preamble). **Section 83 says “manufacture” means (not includes), its meaning for the purpose of this Act is restricted, it means the making of an article, the assembling or joining of an article by whatever process (this includes mechanical or chemical or any other process) adapting for sale any article packaging bottling putting into boxes cutting cleaning polishing wrapping labeling or in any other way preparing an article for sale other than in a wholesale or retail activity**. It does not say that the manufacturer must be the exclusive owner, that he must do it in his own free will not subject to anyone else’s quality control or the ingredients also must belong to the manufacturer.

When a contract manufacturer is obligated to uphold quality requirements, it does not necessarily limit them to being solely a service provider.

Contract Manufacturer (CM):

A contract manufacturer is an entity that produces goods or components on behalf of another company (the contract giver).

CMs are often engaged in manufacturing processes, assembly, and production.

They play a crucial role in the supply chain by producing items based on specifications provided by the contract giver.

Quality Requirements:

Quality requirements encompass standards, specifications, and regulations that ensure the products meet predefined quality levels.

These requirements cover aspects such as safety, efficacy, consistency, and compliance with Good Manufacturing Practices (GMPs).

Quality Agreements:

Quality agreements are formal documents that outline the responsibilities and expectations between the contract giver and the contract acceptor (CM).

These agreements define roles, quality parameters, and regulatory compliance.

They ensure that both parties understand their obligations regarding quality control, testing, documentation, and other critical aspects.

Quality agreements are essential for maintaining product quality and safety.

CM as a Service Provider:

While CMs provide manufacturing services, their role extends beyond mere service provision.

By adhering to quality requirements, CMs contribute significantly to the overall quality of the final product.

They collaborate closely with the contract giver to ensure that the manufactured items meet the desired standards.

CMs are accountable for maintaining GMPs (Good Manufacturing Practices), handling raw materials, conducting quality checks, and ensuring consistent production.

Conclusion:

Being under a duty to maintain quality requirements does not diminish the CM's significance.

Instead, it underscores their critical role in delivering high-quality products.

CMs are more than service providers; they are essential partners in the production process, safeguarding quality and patient safety.

In summary, while quality requirements are a duty for contract manufacturers, they remain integral contributors to the entire product lifecycle, transcending the label of a mere service provider.

It is said, that, contract manufacturing is a type of outsourcing that involves hiring a manufacturer to create products or components for another company[24]. The hiring company specifies the design, performance, and quantity of the products, which may be under their own label or brand[25]. Contract manufacturing allows the hiring company to save on startup and production costs[26].

It is said,

> "Contract manufacturing is not a recent phenomenon. Its origins can be traced back to the early days of industrialization. However, the advent of globalization and technology has accelerated its evolution, transforming it into a vital component of the modern manufacturing landscape.

[24] Contract Manufacturing: A Helpful Guide (2023) (contractscounsel.com)
[25] What Is Contract Manufacturing? | American Micro Industries (americanmicroinc.com)
[26] What Is Contract Manufacturing? | American Micro Industries (americanmicroinc.com)

> The advent of globalization in the 20th century allowed companies to outsource production to regions with lower labor costs, thereby expanding contract manufacturing beyond national boundaries. This trend was further enhanced by 21st-century technological advancements like automation and digitalization. Together, these shifts have transformed contract manufacturing from a cost-saving strategy to a value-adding partnership, now integral to navigating the complexities of the modern manufacturing landscape[27]."

In regard to the advantageous of contract manufacturing, it is said,

> "Contract manufacturing provides numerous advantages that significantly contribute to a company's growth and profitability. By leveraging external resources, businesses can create more efficient, high-quality production processes, providing them with an edge in the competitive marketplace. The key advantages can be categorized as follows:
>
> Cost-Efficiency: Contract manufacturing allows businesses to outsource production, significantly reducing overhead costs including machinery, maintenance, and labor. Lower costs can translate into higher profit margins.
>
> Resource Allocation: Savings from manufacturing can be redirected to vital areas like research and development or marketing, allowing for a more effective utilization of resources.
>
> Expertise and Technology: Contract manufacturers bring a wealth of experience and advanced technologies. By leveraging these assets, businesses can enhance product quality and speed up time-to-market.

[27] What Is Contract Manufacturing? Role and Benefits | Komaspec

Competitive Advantage: Higher product quality and faster production times, achieved through contract manufacturing, give companies a distinct competitive edge over their rivals[28]."

The headquarters of Mercedez Benz is in Stuttgart, Germany. It became a global name in the 19th century. Karl Benz was the first person to own a driver's license. His patent for the "Benz Patent Motorwagen" in 1886 is widely considered to be the first automobile. Later that same year, Gottlieb Daimler, along with engineer Wilhelm Maybach, also converted a stagecoach by adding a petrol engine, effectively eliminating the need for horse-powered transportation. These pioneering efforts by Carl Benz and Gottlieb Daimler laid the foundation for the iconic Mercedes-Benz brand we know today. **Although the main factory is still at Stuttgart, Germany Benz is today manufactured in 22 countries including United States (Tuscaloosa) Austria (Eugendorf) Canada (Burnaby) Brazil (São Bernardo do Campo) Mexico (Several facilities) China (Beijing) Romania (Sebes and Cugir) and France (Hambach)**.

Even if it is assumed, that, theSale of Goods Ordinance says that the sale takes place when the seller transfers the **exclusive** ownership, under an agreement of contract manufacture the manufacturing party does not have to sell what it manufactures to the person on whose behalf it was done. The Brand name owner has outsourced the function of manufacturing to a manufacturer. This manufacturer's work comes thoroughly and squarely within the definition of "manufacture" under section 83 of the Act. Why, then, is it necessary to impose the mantel of manufacturing on the Brand name owner?

Is not doing so "a naked usurpation of the legislative function under the thin guise of interpretation[29]"? As this Court sees, it is. Like in that Indian case referred to above, the purported definition "a person by whom or under whose

[28] What Is Contract Manufacturing? Role and Benefits | Komaspec

[29] Refer to page 46 of this judgment as well as page 48 of this judgment, on both pages to the "highlighted" parts, Lord Simmonds in that case was not justified in saying so. But as a matter of law, principle and policy, a court cannot and must not "legislate" by way of interpreting or applying a statute.

direction and control the articles or materials are made" cannot be understood to influence the court's decision without reading into the statute, without usurping the legislative function.

The respondent says in its written submissions that contract manufacture is done to avoid tax. A fiscal statute is a penal statute. It was already said in regard to the Question No. 01 above. It will be referred to in due course in regard to a decision of the Supreme Court of Sri Lanka too. But the operation of a taxing statute is different to the operation of the penal code. If a person can without doing what is illegal under the law circumvent a taxing provision he is entitled to it. That is the meaning of article 148 of the constitution and what the learned Chief Justice K. Sripavan quoted from another case in the Special Determination before the Supreme Court dated 21.07.2016 in the matter none other than an amendment to the Value Added Tax, which is reproduced.

Article 148 of the constitution 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[30]."

Chief Justice Sripavan said,

> "Learned President's Counsel reminded us the observations made in S.C.F.R. Application 169/2016 - (S. C. Minutes of 22.06.2016) in the following manner:
>
> > "It is a cardinal principal of interpretation that words in Article 148 must be understood in their natural, ordinary and proper sense. The golden rule is that the words must prima facie given their

[30] No taxation without Representation was the slogan on which "Boston Tea Party" was staged and the basis on which America "waged war" against the British Crown to gain its independence as the United States of America.

ordinary meaning. It is another rule of construction that when the words of the Constitution are clear, plain and unambiguous then the Court is bound to give effect to that meaning irrespective of the consequences. The Court can't brush aside the words used in Article 148 as being inappropriate or surplus. **Thus, the Court reiterates that the Constitutional provisions must be interpreted having regard to the Constitutional objectives and goals and not in the light of how the Government may be acting at a given point of time**. The Court has to uphold the principle of [the] rule of law which is vital for the real establishment of democracy and the maintenance of the rule of law. **Therefore far from interfering with good governance of the State, the Court helps the good governance by reminding the Executive and its officers that they should act within the four corners of the Constitution and not contravene any of its provisions**."

Hence it is decided, that, MOS Lanka and Lalan are the manufacturers of Mortien and Harpic respectively and not the appellant. Question No. 03 is answered in favour of the appellant as "Yes".

Question of Law Nos. 04, 05 and 06:

On the basis of the answer given by this Court to the substantive Question of Question No. 03, these questions must be answered in favour of the appellant. Hence in regard to the points of the order of the Tax Appeals Commission being against the weight of the evidence; the amount of VAT and penalty imposed being arbitrary and unreasonable and that it erred in law, this Court answers all those three questions as "Yes".

Hence the Questions of Law are answered as follows:-

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

"Yes"

(02) Is the determination made by the Commissioner General of Inland Revenue time barred?

"Yes"

(03) Did the Tax Appeals Commission err in law in coming to the conclusion that the appellant was a manufacturer within the contemplation of the Value Added Tax Act No. 14 of 2002 (as amended)?

"Yes"

(04) Is the determination of the Tax Appeals Commission against the weight of evidence?

"Yes"

(05) Is the amount of Value Added Tax and penalty payable, as confirmed by the Tax Appeals Commission excessive arbitrary and unreasonable?

"Yes"

(06) In view of the facts and circumstances of the case did the Tax Appeals Commission err in law when it arrived at the conclusion that it did?

"Yes"

Therefore the appeal in the form of a Case Stated is allowed.

Judge of the Court of Appeal.

Hon. K. K. A. V. Swarnadhipathi J.,

I Agree

Judge of the Court of Appeal.